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

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

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PRELIMINARY STATEMENT

On November 17, 2004, this Court filed a Order to Show Cause (OSC) on why the relief prayed for should not be granted on grounds that trial counsel rendered ineffective assistance as alleged in subclaims A, B, H and I in Claim IV of the habeas corpus petition filed in this case on June 14, 2002. Prior to the OSC, respondent filed an informal response to the petition, and this Court affirmed the judgment of conviction and death penalty sentence in petitioner's appeal in case number S026872 (*People v. Valdez* (2004) 32 Cal.4th 73) (*Valdez*). On February 22, 2005, the United States Supreme Court denied petitioner's petition for writ of certiorari in case number No. 03-10453.

The petition does not contain a declaration from petitioner or trial counsel. Each subclaim at issue alleges that the facts supporting it require full investigation, discovery, access to this Court's subpoena power, funding, and an evidentiary hearing. Some subclaims are based on the record in S026872. Thus, when appropriate, respondent will respond to a subclaim by citing to the record in S026872. Otherwise, this return will demonstrate why there is no cause for this Court to grant the relief prayed for in subclaims A, B, H and I.

Respondent has acted with due diligence to obtain facts related to the above subclaims by contacting trial counsel. Trial counsel indicated he would provide information relating to the subclaims only if there was a Court Order

allowing him to do so. Respondent filed a motion in this Court for such an order, and on February 16, 2005, this Court denied the motion in an Order stating that it was "unnecessary to authorize trial counsel to so respond" with citation to *In re Scott* (2003) 29 Cal.4th 783, 814 (*Scott*). On February 18, 2005, counsel herein mailed this Court's above Order to trial counsel with a request for him to contact respondent to arrange receipt of trial counsel's declaration for filing with this return. Prior to filing the above motion, counsel herein drafted and sent to trial counsel a proposed declaration based on information exchanged between trial counsel and counsel herein in a telephone interview on December 13, 2004. Although trial counsel has yet to reply to the above request, on information and belief, respondent believes there is good reason to dispute facts alleged in the petition.

In sum, on information and belief, petitioner's 1991-1992 counsel:

(1) did not offer evidence about the blood on the pants as alleged in subclaim A of Claim IV of the petition because he:

(a) was reasonably skeptical of DNA results; indeed, it was six years after petitioner's 1992 trial that this Court held that DNA results had gained general acceptance in the relevant scientific community to meet the *Kelly*[1/] standard for admissibility;

(b) wanted to maintain credibility with the jury; that is, given his trial tactic to discredit DNA results as to the blood on the gun, he would have lost credibility if he had embraced DNA by offering results that the blood on the pants did not come from the victim; and

(c) was concerned about admission of unfavorable rebuttal evidence; that is, petitioner told him something that caused him to believe the blood on the pants came from another victim or petitioner; thus, he

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1. *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); see *People v. Soto* (1999) 21 Cal.4th 512, 541 (*Soto*).

reasonably believed evidence about the blood on the pants would result in unfavorable rebuttal evidence that the blood on the pants matched another victim or petitioner;

(2) did not make a "proper" third party culpability offer of proof as alleged in subclaims B and I of Claim IV of the petition because, as an officer of the court, he had a duty to refrain from knowingly proffering false trial evidence; that is, prior to trial, he was told by petitioner that petitioner was the shooter and had robbed the victim in this case;[2/] and

(3) reasonably investigated petitioner's social history, and presented reasonable mitigation evidence, i.e., alleged emotional and physical abuse suffered by petitioner was investigated by counsel, and he made a reasonable trial strategy contrary to subclaim H of Claim IV of the petition.

In sum, counsel's assistance was constitutionally adequate; thus, the petition must be denied with prejudice without an evidentiary hearing.

FACTS AND PROCEEDINGS RELATED TO THE CONVICTION

On April 28, 1989, 26-year-old Ernesto Macias (victim) cashed a federal income tax refund check for $1,203. The next day (Saturday), he left his home in Pomona, California, where he lived with his cousin Arturo Vasquez. The victim told Arturo that he was flying to Mexico that day, but around 9 p.m., the victim returned home. At that time, Arturo was there with Rigoberto Perez. They had been drinking beer at this residence for hours. Soon, the victim, Arturo, and Rigoberto were joined by petitioner, and then Gerardo Macias-

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2. However, (1) trial counsel tried to proffer third party culpability evidence through a back-door (*Valdez, supra,* 32 Cal.4th at pp. 106-109); and (2) petitioner's guilt phase jury was presented with evidence on third parties possibly being culpable as to the instant robbery-murder (*id.* at pp. 109-110).

Perez (cousin to Rigoberto and the victim).

When Gerardo arrived, the victim was lying under a blanket in a bed on the floor of the small house, and (according to Gerardo) a handgun was visible at the victim's side. The victim told the room-occupants that he was going to sleep, had $3,000, and was flying to Mexico in the morning. Soon, Gerardo drove Arturo and Rigoberto around the corner to someone's house. While leaving, Gerardo heard the victim tell petitioner in an angry voice to wait outside. Petitioner was inside with the victim when Gerardo, Arturo and Rigoberto left. They returned around 10 minutes later.

Upon returning home, Arturo turned the knob on his closed front door, then saw blood scattered in the house. He yelled, and was joined by Rigoberto. They ran to Gerardo's car, and told Gerardo what they had witnessed in the house. They feared that the victim had shot petitioner.

After driving around the dark area, Gerardo saw a "bloody" body lying on a curb several houses from the victim's house. Gerardo drove around the block, called "911" at a telephone booth, then went home with Rigoberto after taking Arturo to a friend's house. The body was that of the victim, who had died from multiple gunshot wounds to the head and upper body at close range. Evidence showed that the victim was shot in his house, and walked outside before collapsing.[3/]

About 24 hours later, petitioner was arrested nearby, outside a car

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3. In petitioner's automatic appeal, this Court explained as follows:

> At approximately 3:15 a.m. on Sunday, April 30, 1989, the body of Ernesto Macias was found lying on a curb a few houses from his home. He had been shot from close range multiple times in the head and upper body. One of the pockets of his pants was turned inside out, and bloodstains were discovered on the interior of that pocket. His jewelry was undisturbed and approximately $80 was found in his other pocket. Defendant was the last person seen with the victim.

(*Valdez, supra,* 32 Cal.4th at p. 81.)

containing a gun like the one near the victim 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 this gun. His palm print was made in "wet" blood, and the blood surrounding his print was consistent with the victim's blood-type.

Petitioner, who was unemployed and who had five California burglary convictions and a Texas robbery conviction before the instant robbery-murder, did not testify at trial. A police officer testified that during his post-arrest interview, petitioner said that he left the house after Gerardo, Arturo and Rigoberto, and did not rob or kill the victim. At the penalty phase, trial counsel presented the jury with live testimony from petitioner's father, mother, two sisters, an aunt, and three close family friends.

In 1992, a jury convicted petitioner of first degree robbery-murder and escape while in custody on the murder count. On January 6, 2004, this Court, in a four-to-three opinion, affirmed the conviction and sentence of death. On February 24, 2004, this Court denied rehearing as to the appeal.

RESPONDENT'S ADMISSIONS AND DENIALS

A. Claim IV, Subclaims A, B, H And I

Below are admissions or denials to factual averments in subclaims A, B, H and I of Claim IV of the petition filed in this case.

Before addressing each subclaim, counsel's guilt phase closing argument to the jury must be considered. He argued that he had 15 years experience as a criminal defense attorney, and this was a "reasonable doubt case." (RT 1388.) Also, trial counsel argued that there was insufficient circumstantial proof to convict petitioner. (RT 1375, 1388.) He argued that petitioner did not know that a gun was in the Monte Carlo (RT 1344), and the car was registered to someone else (RT 1372). Counsel argued that there was inconclusive proof that

the victim was the source of the blood on the gun found in the car (RT 1347), and that the gun in the Monte Carlo was identical to other guns stolen before the shooting (RT 1349-1350, 1386-1387) as well as a gun loaned to "Pato" (RT 1376-1377). Counsel argued that Pato was possibly involved in the crime. (RT 1375-1376.) Counsel argued that the age of the print on the gun from the Monte Carlo was unknown (RT 1377-1378), and ballistic tests were inconclusive as to whether the gun in the Monte Carlo was the murder weapon (RT 1352-1354). Counsel attacked the credibility of Rigoberto Perez and Gerardo Macias in that they left the scene after calling the police to report the discovery of a body on the street. (RT 1354-1355.) Counsel argued that there was no proof of a robbery (RT 1362, 1371, 1386), and that others could have been the shooter given the evidence (RT 1363-1364). Counsel argued that the footprints at the scene implied that someone else may have been the shooter, and that the police conducted a poor initial investigation as to the footprints. (RT 1365-1370.)

1. Subclaim A

In subclaim A of Claim IV, petitioner claims that he received ineffective assistance of trial counsel because counsel failed to present the 1992 guilt phase jury with DNA evidence that blood on the pants in the Monte Carlo did not belong to the victim. (Pet. at 54-55.) Respondent denies that petitioner received "ineffective assistance" here, and admits or denies specific factual assertions in subclaim A as follows.

1. Respondent admits that: (1) blood was found on pants seized from a car about 24 hours after the instant shooting which occurred on or about April 30, 1989; (2) the prosecution gave a sample of this blood to a laboratory

in Maryland for testing in June 1991 (RT 3-2);[4] (3) on August 19, 1991, the laboratory dated a letter to the Los Angeles County Sheriff's office stating that the DNA obtained from "material cuttings" labeled "blood stains from pants" did *not* originate from the victim, and this letter is marked exhibit F to the petition; and (4) around September 4, 1991, counsel received the above letter from the prosecutor (see RT 11).

On information and belief, respondent alleges that trial counsel reasonably decided not to independently test the above blood for tactical reasons because he reasonably believed that this blood would not be exculpatory because respondent believes petitioner may have told trial counsel that he was the victim's shooter. Thus, while counsel could have "easily called" a Maryland laboratory official to testify that the blood on the pants did not come from the victim, on information and belief, respondent denies that trial counsel, consistent with his ethical obligations, could have "argued that it was reasonable to assume that if the blood on the pants" did not come from the victim, then "the blood on the gun did not belong to him either." (See Pet. at 54.) Instead, trial counsel reasonably and properly suggested in his guilt phase closing argument that there was a reasonable doubt in the evidence as to whether the prosecution had conclusively proven that it was the victim's blood on the gun.[5]

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4. There is a page 3-1, 3-2, and 3-3 in the reporter's transcript.

5. Petitioner had about 24 hours to change his pants between the time of the shooting, and his arrest near the Monte Carlo. In his guilt phase closing argument, counsel essentially argued that there was a reasonable doubt that the victim was the source of the blood on the gun because: (1) the gun and pants were seized at the same time from the same car; (2) the bloodstained pants did not belong to petitioner because he was wearing pants when he was arrested; (3) the People offered no evidence about the blood on the pants; and (4) the People offered no analysis showing that the blood on the pants was consistent with the victim's blood "the way" that the blood on the gun was shown to be

2. Respondent admits: (1) trial counsel elicited guilt phase trial testimony (during a re-cross examination of a police officer) stating that blood was found on pants seized from the passenger compartment of the Monte Carlo during a search shortly after petitioner's arrest (see Pet. at 55; RT 1118-1119); and (2) trial counsel's closing argument urged the jury to "consider the fact that the blood on the pants had not been tested and an analysis provided by the prosecution to show that the blood on the pants was consistent with the blood on the gun" (see Pet. at 55). On information and belief, counsel tactically and reasonably did the above to encourage a jury finding of reasonable doubt as to petitioner's guilt, by suggesting that the prosecution had not conclusively established that the victim was the source of the blood on the gun seized from the car with the pants. Such tactic by trial counsel would favor the defense by getting the jury to find that while petitioner's palm print was made in wet blood found on the grip part of the gun, there was a reasonable doubt that this blood came from the victim as the prosecutor's expert witness opined to the jury. (See *Valdez, supra,* 32 Cal.4th at p. 84; footnote 5 at page 7, *ante*.)

In rebuttal, the prosecutor argued that trial counsel "very cleverly" saved "for argument" the bloodstained pants issue. (RT 1394.)[6/] In greater detail, the prosecutor argued to the guilt phase jury as follows:

> And what Mr. Robusto [trial counsel] very cleverly did was save a lot of this stuff for argument and not ask the experts these questions.
>
> Let me mention that to you. Now he mentioned these pants that had possible blood in the car the defendant was arrested in. Now if the

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consistent with the victim's blood. (See RT 1372-1374.)

6. Earlier, the prosecutor argued to the jury that trial counsel was "one of the finest defense lawyers" that she knew, and if she were guilty of killing her husband, as the prosecutor put it: "I definitely would want Mr. Robusto to represent me, because, as I said, he's an excellent attorney." (RT 1389.)

blood was consistent with that of the victim don't you think you would have known that? He didn't ask Detective Terrio anything about testing. He didn't ask Detective Terrio what was done. He didn't ask Detective Terrio what he thought, how it was analyzed, if it was done, if it wasn't done.

It's a little unfair then to get up in front of you and say where's the testing? Where's the blood? Where's the beef?

You know what I mean, Ladies and Gentlemen. If in fact this blood was so relevant defendant Valdez could have had it analyzed. He could have called his own experts. They could have taken the blood. They could have told you you know, yes, it was, no, it wasn't.

So, Ladies and Gentlemen, it really is unfair to ask these questions about why things weren't done when the question was not asked to the expert at the time that he was on the witness stand.

(RT 1394-1395; see Pet. at 55.)

Respondent thus denies that "counsel's representation fell below an objective standard of reasonableness" (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674]) (*Strickland*) "as of the time of counsel's conduct" (*id.* at p. 690), and denies that "there is a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different" (*id.* at 694).[7] In short, respondent denies that trial counsel gave petitioner ineffective assistance as alleged in subclaim A of Claim IV of the petition.

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7. In 1984, petitioner's trial counsel was appointed as "cocounsel" in a prior death penalty case. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1035 (*Stansbury*).) In *Stansbury*, petitioner's trial counsel was later labeled "advisory" counsel, and petitioner's trial counsel participated "several times" at the death penalty trial in *Stansbury*. (See *Id.* at p. 1036, fn. 2.) Thus, while preparing for petitioner's trial in 1992, counsel had death penalty investigation experience dating back to at least 1984. (See RT 1987-1988, 1993.)

2. Subclaim B

In subclaim B of Claim IV, petitioner claims that he received ineffective assistance of trial counsel because counsel failed to make a proper offer of proof as to third party culpability evidence at his 1992 guilt phase trial. (Pet. at 55-56.) Respondent denies that petitioner received "ineffective" assistance, and responds to subclaim A as follows.

On information and belief, respondent denies that trial counsel "wanted" to introduce evidence that Liberato Gutierrez may have killed the victim "or at least taken" the victim's "wallet" after the shooting. (See Pet. at 55.) On information and belief, trial counsel did not make a third party culpability offer of proof because, as an officer of the court, counsel had a duty to refrain from knowingly proffering false trial evidence. Specifically, on information and belief, respondent alleges that counsel did not want to introduce direct evidence that Liberato Gutierrez may have shot the victim "or at least taken his wallet" because petitioner may have told counsel prior to trial: (1) he was the victim's shooter; and (2) he robbed the victim after the shooting. To comply with both his duty as an officer of the court and his duty to zealously represent petitioner's interest, counsel tried to raise a reasonable doubt about petitioner's guilt, by suggesting that the police performed a poor investigation in this case in failing to eliminate other potential suspects such as Gutierrez. (See *Valdez, supra,* 32 Cal.4th at pp. 106-109.) Ultimately, the guilt phase jury was presented with evidence that third parties may have been culpable as to the robbery-murder in this case. (See *Id.* at pp. 109-110.)

The record supports respondent's belief that the reason counsel did not make a "proper" third party culpability offer of proof was because petitioner had confessed to him that he had committed the instant murder and robbery. Indeed, a report dated April 30, 1989, refers to four suspects, including

Gutierrez, being taken to a police station from the crime scene. The report states that Gutierrez appeared to have blood on his shirt and a shoe, his hands were shaking as if he was nervous as he spoke to Detective Guenther, and the above gave police "reasonable cause" to arrest Gutierrez on suspicion of murder. (CT "Supplemental One" 18, 22-23, 26-28, 30-31; see *Valdez, supra,* 32 Cal.4th at pp. 106-110.) This report was prepared by Detective Guenther, who counsel later cross-examined at the preliminary hearing in May 1991. Yet, later, in a 1992 factual statement in a motion prepared by counsel, counsel did not make the obvious claim that a third party was the shooter. (See CT 179-181.) The defense received a copy of the police report on April 4, 1991, i.e., before petitioner's preliminary hearing. (CT "Supplemental One" 76-78.) Thus, as early as February 1992, when the above motion was filed, counsel appeared to be *tactically* refusing to claim that a third party shot the victim in this case.[8/]

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8. In petitioner's presence on March 16, 1992, i.e., prior to trial and without petitioner's objection on the record, trial counsel made this record:

> I want to be real candid with the court as well as the prosecution, [a]nd I believe I have been so far.
>
> The whole tenor of Mr. Valdez' defense is not in the arena of *Kaurish* or *Hall* [see *People v. Kaurish* (1990) 52 Cal.3d 648, 684-686; *People v. Hall* (1986) 41 Cal.3d 826, 833; see also *Valdez, supra,* 32 Cal.4th at pp. 106-110]. I would indicate to the court that there will be *no offer of proof or any evidence that we believe a specific person other than Mr. Valdez committed the homicide*; that the tenor of the defense is in essence that the People have the – have not – do not have the right man. And it will be *based on the evidence* that we've presented during the course and scope of the trial.
>
> *I am not going to be calling witnesses that will direct a specific finger at a specific individual.* If I do end up getting into that position from the standpoint [sic] something might pop up during the course and scope of the trial, I will advise everybody involved and we can have a [sic] 352 or 402 motion at that point.

(RT 690, italics added.) On March 29, 1992, after the People rested its guilt

On information and belief, respondent denies that counsel "failed to request that the court at least admit the evidence at the penalty phase where relevant to lingering doubt." (See Pet. at 55.) Instead, based upon the guilt phase ruling and counsel's apparent receipt of a pre-trial confession by petitioner, counsel reasonably believed that he would not obtain a different ruling if he had made a "proper" third party culpability offer of proof at the penalty phase.

On information and belief, respondent denies the following:

> There was ample evidence, as set forth more fully in Claim I, B, and in police reports, to suggest that persons other than Gutierrez, such as El Pato, or Arturo had killed [the victim] and conspired to blame it on petitioner. The discovery provided as set forth in Claim 1,B [sic] and in police reports submitted as exhibits, strongly suggest that El Pato or Arturo killed [the victim] and conspired to blame it on petitioner. Counsel unreasonably failed to investigate or even attempt to introduce any of this evidence.

(Pet. at 55-56.) Respondent alleges that counsel did not want to introduce false evidence that a third party may have shot the victim in that respondent believes petitioner may have told counsel pre-trial that he was the victim's robber-shooter. As noted, on information and belief, counsel did not make a third party culpability offer of proof because, as an officer of the court, he had a duty to refrain from knowingly proffering false trial evidence.

It is clear from the record that counsel was aware of the third party

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phase case, counsel asked for discretion to question police officers about their alleged poor investigation of Gutierrez. (RT 1164-1171.) Among other things, since trial counsel said he was "not pointing a finger at Mr. Liberato Gutierrez and saying you're the killer, you're the one that took the money" (RT 1169), the trial court limited the scope of defense evidence as to persons found near the crime scene when the police arrived (RT 1170-1171; see *Valdez, supra,* 32 Cal.4th at pp. 106-110).

culpability issue. At the May 1991 preliminary hearing, he cross-examined Detectives Terrio and Holtberger about some of their findings at the crime scene on April 30, 1989. (CT 15, 22-30.) During direct examination at the preliminary hearing, Detective Terrio referred to crime scene photos, a property report, and fingerprinting evidence and analysis. (CT 16-22.) Also, counsel was at the preliminary hearing when Detective Guenther testified about his investigation of the victim, the victim's income tax checks, and the victim's planned trip to Mexico. (CT 99-102.) In other words, about 11 months before the trial in 1992, trial counsel was arguably aware of the police records offered by petitioner. (See Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ.) Under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], the People presumably gave trial counsel all police records from the crime's discovery on April 30, 1989, to the trial time in March 1992. (See RT 3-3, 7-8; CT 126, 143, 150-151; CT "Supplemental One" 15-16, 76-78.)

Thus, before trial, trial counsel was arguably aware of information in the police records in the petition. (See Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ.) For nearly a one-year period from appointment as counsel on April 19, 1991 (CT 125; see CT 144-145; CT "Supplemental One" 9; RT 1-2), to the trial in March 1992, trial counsel arguably knew of alleged third party suspects. Since the preliminary hearing was in May 1991, i.e., over one month after counsel's appointment, counsel arguably knew of alleged third party suspects by May 1991, i.e., nearly one year prior to trial.

In sum, respondent alleges that petitioner wanted trial counsel to represent in court that Gutierrez was the shooter, but counsel could not do so as an officer of the court because respondent believes that petitioner had told counsel that he (petitioner) was the shooter as to the instant killing. In a pre-trial handwritten *Marsden*[9/] brief to the trial court dated February 24, 1992,

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9. *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

petitioner wrote that he was contemplating a "diminished capacity" defense. (CT "Confidential" 204.) Thus, it seems petitioner had confided to counsel that he was the shooter. After the guilt phase and before the start of the penalty phase, petitioner wrote a note to the court that said: "I do believe that God has done justice." (*Id.* at p. 205.) The above suggests that petitioner was admitting his guilt for the robbery-killing in this case.

Respondent thus denies that counsel's representation fell below an objective standard of reasonableness as of the time of counsel's conduct, and denies that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. (See *Strickland, supra,* 466 U.S. at pp. 688, 690, 694.) In short, respondent denies that counsel gave petitioner ineffective assistance as alleged in subclaim B of Claim IV of the petition.

3. Subclaim H

In subclaim H of Claim IV, petitioner claims that he received ineffective assistance at the penalty phase of his 1992 trial because counsel failed to investigate, consult with experts and present mitigation evidence of "severe and unrelenting emotional and physical abuse" petitioner had "throughout his childhood" causing "mental state and serious resulting substance abuse" problems. (Pet. at 69-83.) Respondent denies that petitioner received "ineffective" assistance, and otherwise responds to subclaim H as follows.

As a staring point, respondent notes the following. At a pre-trial hearing in petitioner's presence, trial counsel properly said that a death penalty case is "the most serious case that a defense attorney can handle[.]" (RT 114.) Also, during his penalty phase closing argument, trial counsel noted that he had 15 years experience as a "criminal defense" attorney. (RT 1388.) During penalty phase rebuttal argument, the prosecutor told the jury that she would hire trial

counsel if she were charged with killing her husband because counsel is an "excellent attorney." (RT 1389.) Earlier, at a pre-trial hearing, the trial judge told petitioner that he had known trial counsel for a "long" time. (RT 74-75.) Later, during the defense case at the penalty phase trial, the trial judge told petitioner, "you have had one of the best defenses that this Court has seen[.]" (RT 1728.) While arguing "lingering doubt" during his penalty phase closing argument, trial counsel argued to the jurors that, given the state of the evidence, they made a mistake in finding petitioner guilty beyond a reasonable doubt. (RT 1994-1995.) As noted (see footnote 7 at page 9, *ante*), at the time of petitioner's 1992 trial, trial counsel had prior death penalty trial experience dating back to at least 1984. (See *Stansbury, supra*, 4 Cal.4th at pp. 1035-1036, fn. 2.) Also, counsel hired an investigator, the investigator traveled to Mexico and Texas to interview people that petitioner designated, counsel traveled to petitioner's house and interviewed petitioner's mother and family, and, at the penalty phase, counsel presented the jury with evidence about petitioner's social history through live testimony from his father, mother, two sisters, an aunt, and three friends. (See counsel's representations at RT 63-68, 109-118, 1720-1724, 1727; see also penalty phase testimony at RT 1771-1773 [mother's testimony], 1761-1770 [father's testimony], RT 1652-1670 [testimony of sister Victoria], 1671-1681 [testimony of sister Graciela], RT 1749-1760 [aunt's testimony], RT 1639-1651 [Reyna's testimony], RT 1626-1638 [Enedina's testimony], RT 1731-1740, 1746-1748 [Jose's testimony]; *Valdez, supra,* 32 Cal.4th at pp. 89-90.) Given the above, respondent denies that counsel withheld any penalty phase mitigation evidence about petitioner's social history, including his mental state and alleged child abuse and/or alleged drug problems.

Petitioner's penalty phase case began on March 25, 1992. That day, opening statement was waived, and the jury heard live testimony about his social history from his two sisters, Victoria Valdez (RT 1652-1670) and

Graciela Valdez (RT 1671-1681), and two close family friends, Enedina Garcia (RT 1626-1638) and Carolina Reyna (RT 1639-1651). This occurred on a Wednesday, and the court recessed until the following Friday, March 27, 1992. That day, in petitioner's presence and outside the jury's presence, trial counsel made the following statements in court:

> It's been communicated to me, Your Honor, that my client [petitioner] wishes to testify during the course and scope of the penalty phase. I indicated to him that I would make the following motion before the court.
>
> [Petitioner]'s asking that, if he takes the witness stand, that the questions – and I would indicate to the court that I will comply with his request from the standpoint that [petitioner] wants to testify with respect to the *penalty phase issues* and *nothing more*. [Petitioner] *does not want to testify about the guilt phase issues*, [petitioner] *doesn't want to testify about the homicide, the robbery, the gun, the blood print, all of those things*.
>
> As a result, I'm asking for the court to limit, if [petitioner] does testify, to *limit the questions propounded to [petitioner] that are applicable only to the penalty phase*.

(RT 1713-1714, italics added.) The court asked trial counsel if he had law to cite in support of the above. Trial counsel said, "I do not." (RT 1714.)

In reply, the prosecutor said, "I do." (RT 1714.) Citing three 1988 opinions from this Court, the prosecutor objected, and argued that a capital defendant has no right to testify at a penalty phase trial free from cross-examination, or subject to limited cross-examination by a prosecutor. (RT 1714-1715, citing *People v. Keenan* (1988) 46 Cal.3d 478, 511-513; *People v. Brown* (1988) 45 Cal.3d 1247, 1260-1261; *People v. Robbins* (1988) 45 Cal.3d 867, 888-890.) The trial court asked:

It's the People's position, them, that once the defendant testifies, cross-examination is permitted on all issues?

The prosecutor replied: "Yes." She then explained that under this Court's above precedents, once a defendant has been convicted at the guilt phase, he or she cannot "hide behind the self-incrimination doctrine" to bar cross-examination at the penalty phase trial. The prosecutor also properly noted that "once a witness hits the stand," said witness puts his or her "credibility in issue," and thus, as with "any other witness[,]" petitioner "cannot limit the People's ability to cross-examine him." (RT 1715.)

Trial counsel replied to the above as follows:

I don't know if I made myself real clear in my opening with respect the [sic] this particular issue, but I intend to do that right now.

I'm not going to open the door with respect to the guilt phase. I'm not going to do that. If I do that, then [the prosecutor] obviously is entitled to bang and to cross-examine and to have at it, if you will, for lack of a better term, with respect to those issues that I raised during my direct.

With respect to credibility issues, character issues, things of that nature, I believe that she's able to cross-examine, because that's what we're talking about.

My position to the court and to [petitioner] and for the purposes of this record is that [petitioner] *should not testify*, that *my recommendation* to [petitioner] is *that* [sic] and it's an *adamant recommendation*, it's *adamant advice*, and I believe sincerely that *it's in his best interest not to take that witness stand*.

[Petitioner] has indicated to me, if I'm not mistaken, that he has listened to *my advice*, he's listened to *my rational* [sic], and he's listened to *my logic* but [petitioner] still wants to take that witness stand. My

position is that he should not.

(RT 1716-1717, italics added.)

Immediately after the above, trial counsel asked petitioner: "Do you understand that, Mr. Valdez?" Petitioner replied: "I understand that. Yes, sir." Counsel asked: "Do you agree with everything I've indicated to you from the standpoint I've talked to you about testifying?" Petitioner replied: "Yes, I do." Counsel asked: "And have I indicated to you that my recommendation is that you not testify?" Petitioner replied: "Yes, that is." Counsel asked: "Is it still your wish to testify?" Petitioner said: "Yes, it is." (RT 1717.) Ultimately, petitioner did not testify. (See *Valdez, supra,* 32 Cal.4th at pp. 89-91.)

Also, respondent notes that petitioner's appellate record contains various *personally handwritten* statements and oral comments that he made or filed at his 1992 trial involving a *Marsden* or a *Faretta* motion.[10/] (CT "Confidential" 189-207 [handwritten motions]; RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992, hearing weeks before guilt phase opening statement], 1717-1728 [March 27, 1992, hearing during defense case at penalty phase]; *Valdez, supra,* 32 Cal.4th at pp. 91-103.)

As to petitioner's pre-trial *Marden* motions or attempted motions on February 10, 1992, and February 26, 1992, the appellate record shows as follows. (See *Valdez, supra,* 32 Cal.4th at pp. 91-93.)

As to the hearing on February 10, 1992,[11/] the following occurred. Judge Piatt, who later did not sit as the trial judge in this case, asked, "Mr. Valdez, what did you want to tell me, sir?" (RT 62.) Petitioner, without using a

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10. *Faretta v. California* (1975) 422 U.S. 806, 834 [95 S.Ct. 2525, 45 L.Ed. 562] (*Faretta*); *Marsden, supra,* 2 Cal.3d 118.

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

language interpreter, replied as follows:

> Um, in the matter of this, this case was filed on me back in 19– I mean last year, 1991. And some time in April. [¶] And ever since then I haven't had any time to confer with my counsel within that period of time. I've only seen him about two or three times and I've got numerous witnesses and people to talk to because I don't want to just go through everything – through the whole thing. [¶] I don't know the procedures of the law. Okay? I'm not competent to the law.

(RT 62.) Petitioner also explained as follows:

> No, I'm not knowledgeable to it. And I have – I never studied nothing. I only have a tenth grade degree. [¶] But concerning to that I've been looking up on my matter and there was motions to be filed that I've asked [trial counsel] to file for me and which he hasn't done. [¶] At this time we're almost into trial. It's something that I didn't even commit, a murder that they're trying to file on me which this D.A. is trying to send me to death row. You know, I don't have a criminal case or I mean a life history of criminal [sic]. [¶] I'm not going out there killing people or nothing. And yet she wants to kill me and nobody has done nothing about [sic] to question here why. Why did she want to kill me when there's guys doing life without [sic] that actually got caught doing killings and stuff, and they didn't get sent to death row chambers. [¶] Me. Concerning that I spend some time in Mexico in the penitentiary, I was involved in with the people there, it's, you know, life, it gets harder and harder because I don't have any papers of my own. [¶] But concerning this case, what I was trying to say is that the counsel here I feel that he didn't help me at all in nothing, okay, to this point. Okay. [¶] I understand that I'll be going into like you say they don't give us enough time you know, you know, you don't give me time to show the

people I got to show up [sic]. People I go to be talked to in Mexico [sic]. [¶] And where I'm from, Cuidaud Juarez, Mexico, Texas. There's people here over the United States. People, the families that I have that are willing to come and talk for me because, you know, I'm not a bad person. You know, I understand. I'm an artist myself, you know. [¶] And I'd just like to ask if I could have a *Marsden* hearing on this matter because there's nothing – there is nothing being done on my case.

(RT 62-63.) The court asked trial counsel to reply, and he did as follows:

Your Honor, from the time that I've started representing [petitioner] - the background I think for the purposes of the record is that this particular murder case is a 1989 case. [¶] From the time that he was arraigned on this particular case in municipal court until this point in time, there was another murder case filed against [petitioner], which in essence what took place, Your Honor, is that we have a 1989 murder case. [¶] You had another murder case that was filed which ended up being dismissed by Judge Yates. [¶] So from the time that he's been arraigned on this case in essence I've been working two murder cases until the dismissal of the other one. [¶] As far as being ready with respect to the issues that will be presented in this particular trial on this particular murder case, I'm ready to proceed. [¶] And the reason for that is very simple and *it is not a complex murder case*. [¶] *The reason that it's not complex* is that the allegations are that at this particular home where the victim resides, [petitioner] is seen at that particular location approximately fifteen minutes to a half hour prior to the alleged murder. There are other individuals there at this particular location. [¶] This location is known in the area as a home that deals narcotics, cocaine, marijuana, things of that nature. [¶] The victim is found in the street with one pocket turned inside out. The people that find him are his relatives

or his friends that are living in this particular home in the city of Pomona. Nobody calls the police. Nobody does anything. [¶] There's an anonymous phone call indicating something about a body. Subsequent [sic] they do an investigation. They contact these people. And they indicate, yes, we did see the body, but we were afraid. We didn't do anything. We left. [¶] Just prior to the homicide there's a carload or truckload of Jennings .22 weapons that is stolen from the manufacturer. And in essence they're being distributed throughout the city of Pomona. [¶] People are gathering these up from the standpoint of receiving stolen property. The murder weapon in this particular case is a .22. [Petitioner] is arrested in a car where a Jennings .22 is found underneath the driver's seat. He's a passenger in that car. [¶] They do a print examination of that particular weapon, and there's a print that matches [petitioner's] print. There's blood on that weapon which matches the sub level of – and it's in that blood typing business is called PGM [sic] – it matches the victim which sixteen percent of the population have. [¶] They don't have enough blood to do a total run. In essence what I'm indicating is that the case is in my opinion is very weak. [¶] And there's not a whole lot for me to get ready with from the standpoint of nobody is going to be able to say that he was the person that committed the murder. [¶] Nobody is going to be able to point the finger at him. It's totally from the standpoint of trying to hook him up to this .22 weapon which their belief is he's killed by a .22. [¶] However, the murder weapon that they – the alleged murder weapon that they find him with. The ballistics people are unable to say that's the murder weapon. [¶] There's another Jennings .22 found in the house. They're unable to say that was the murder weapon. [¶] There's another .22 Jennings that is not found but is confessed to by one of the witnesses

that says that he has one of those type of weapons. [¶] The issue that has been presented by [petitioner] I think stems from a potential 995 motion that is applicable to the special circ [sic] , i.e., the robbery from the standpoint whether or not the people should be allowed to go forward on that particular allegation. [¶] I indicated to [petitioner] that I felt that I would file [sic] 995 with respect to that allegation. I felt that it would not in my humble opinion be successful because I felt that there was sufficient evidence to bind him over to superior court on the special circ [sic]. [¶] The evidence behind that is that there's a check that is cashed after the murder that belongs to the victim. The pocket is turned inside out. And based on the burden of proof at the preliminary hearing, I didn't think it would fly. [¶] However, I would litigate it and I will argue it. [¶] [Petitioner's] asked me to suppress the guns in this particular case. And I indicated to [petitioner] that I felt that there was not a legal basis to suppress the weapons from the standpoint that he was found with a .22. His print was on the .22. The murder was committed by somebody with a .22. [¶] And I tried to explain to him that it's circumstantial. At the same time there's no way that I'm going to be able to eliminate the People's theory from the standpoint of suppressing the use of the weapon because there's no legal basis for me to do that. [¶] With respect to contacting people in the local community there's no difficulty with the with doing that. They're all local. In fact I specifically asked are these people local? Do they live here? Do we have phone numbers, addresses? Yes. [¶] *With respect to the issue of Mexico, now that's the problem*. That's why I came into court on Thursday last to address you with respect to that because *I felt that was something of importance*. [¶] And [petitioner] wants me or my staff or in my mind if I can *arrange it an investigator out of Texas to go into Juarez to contact these people,*

talk to these people for the purposes of a potential penalty phase. [¶] He's indicating to me that *there's relatives that live in Juarez that can be of assistance to him if and when a penalty phase* is reached. [¶] That caused me concern because of the *shortness of time to accomplish that.* I felt that [it] was in his best interest to address that issue with you. [¶] At the same time I asked [petitioner] if he had any problems with me doing that. He said, *no, I want you to do that.* [¶] We talked about waiving time because I said I am not going to be able to do that until you are prepared and accept the fact that you will waive time so I can accomplish it.

(RT 63-68, italics added.)

Replying to an inquiry, trial counsel said "[t]he other night" was when he first heard from petitioner about "people in Juarez[.]" (RT 68-69.) Petitioner disagreed, and explained to the trial court as follows:

When I met him I had addressed him of that and a long time ago I addressed him of all these things. [¶] I was bonded (sic) to superior from municipal which I noticed the judge in this Judge Jack P. Hunt, this man, my attorney, had an ex parte conversation with the D.A. prior to this date here – what was this date. May 29, 1991. [¶] And they agreed on bringing a case, a second case which is Penal Code 4532(b) and they put it in with this one to bond [sic] me over to superior with the 187. This other case was escape. That didn't have nothing to do with the murder. [¶] And all through this case and the other one were presented to the judge that bonded [sic] me over. It says right there he stated that that right there bonded me over this way too according to the escape. [¶] The escape happened because a person, another attorney came and told me that I was going to death row, that I was going to die –."

(RT 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 not. All right. [¶] Is there anything else either side wants to put on the record now?" (RT 70.) Trial counsel explained:

> The only thing I would like to put on the record with respect to the escape allegation, number one, I didn't have – [petitioner] has articulated I had an ex parte communication with [the prosecutor] with respect to putting those cases together. [¶] I don't do the filings. I don't put cases together. She indicated to me that is what she was going to do. I had no problems with it. She communicated that to me. [¶] With respect to the escape allegation I have every intention of addressing whoever is going to try this case that I believe that should be bifurcated from the 187 and I believe there's an appropriate motion in limine.

(RT 70.) Trial counsel assured the court that he could file all written "in limine" motions forthwith. (RT 70-71.)

The trial court expressed concern that the "people in Juarez"issue may present the prosecutor with a last-minute "discovery" issue given the upcoming trial date. (RT 71-72.) Petitioner stated again that he had asked counsel "way back" about obtaining information from people in Juarez. Petitioner then asked, "Can I have another attorney?" The court replied,

> No. No, your *Marsden* motion is denied. I've heard enough now to believe that you can be adequately and well represented by Mr. Robusto. [¶] Mr. Valdez, it is common if not an everyday thing, it's very common that people who are charged with criminal offenses do not like their lawyers. [¶] I am the one that has to –.

(RT 72.) Petitioner cut-off the court and stated, "It's not that I don't like him." (RT 72.) The court explained to petitioner:

> In my mind it's not a question of whether you like him or dislike him.

[¶] It's a question of whether of not based upon what I've seen in the case he's handling your affairs properly legally. And I believe that he is, even if you disagree with me. [¶] So your *Marsden* motion is denied.

(RT 72-73.) Petitioner replied: "If he hasn't filed any motions to now, I mean, because he asked me if you want [sic]. It's not if I want. That's the law. The procedures he has to do." The trial court replied:

[Trial counsel] is only required to file and do as the lawyer on the case what he thinks is appropriate to do. [¶] It's a different issue when I tell him that he has to file certain motions because I just want to make sure they're in writing rather than oral motions made before trial. [¶] I want to make sure that the trial judge in this case, whoever that is, has all these motions in writing and that he can deal with them and if he has to do his own research on those motions that he can. [¶] In terms of his decision as to whether or not he needs to file motions or not, I believe is that [sic] entirely up to the attorney. [¶] The *Marsden* motion is denied. . . .

(RT 73.)

Petitioner explained:

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. [¶] 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 [trial counsel].

(RT 74.)

After a brief colloquy with petitioner, the trial court explained to petitioner:

I'm sure your mother is a very nice lady. I just think she's mistaken. I

don't think [trial counsel] told her that. I've known him too long. [¶] She's a very nice woman. I think she's mistaken. I don't think [trial counsel] told her that you were released on this case.

(RT 74-75.) Petitioner replied:

He told her 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.

(RT 75.) The court replied: "I have a feeling, Mr. Valdez, that there's a lot more that's been done than you know about because you're in custody. That's my belief. . . ." (RT 75.)

The trial court explained to petitioner:

Now you're asking me to give you an answer to a question about your particular needs while you're in jail in terms of your relationship with your attorney and that's not my responsibility. [¶] My responsibility is to see that a case gets tried and that people have the resources of the court to try their lawsuit and that you have the resources of counsel and investigators and so forth. [¶] So I am not going to get into the issue of what he should or shouldn't tell you. I don't think that's appropriate.

(RT 76.)

On February 26, 1992, petitioner's second *Marsden* motion was heard by the trial court (Judge Nuss).[12/] (CT 161-162, 206 see *Valdez, supra,* 32 Cal.4th at pp. 92-93.) On February 24, 1992, petitioner had filed a 16-page handwritten motion in the trial court. Many of the alleged inadequacies of counsel discussed in petitioner's personally handwritten motion involved trial matters. (CT "Confidential" 189-204.) For example, besides claiming that "we haven't been getting along" (*id.* at p. 191), petitioner claimed: (1) counsel "had ex parte with D.A." and they "agreed to take certain action upon their hands" (*id.* at p. 191); (2) there were "numerous witnesses to be interrogated" (*id.* at p. 192); (3) petitioner did not see counsel "as often" as requested (*id.* at p. 192); (4) counsel asked petitioner to admit "untrue" evidence (*id.* at p. 192); (5) counsel made "false statements" to petitioner's relatives (*id.* at p. 192); (6) counsel had not filed "motions" urged by petitioner after having promised to do so (*id.* at p. 193); (7) counsel forced petitioner to "search and reed [sic] on what's going on to make certain that these matters will be handle [sic] the way a defendant must be represented" (*id.* at p. 193); (8) counsel had represented petitioner on "two other cases no motions has [sic] been declared" (*id.* at p. 194); (9) counsel's office did not take an "interest" in petitioner's "problem" (*id.* at p. 194); and (10) petitioner had not "seen" counsel's private investigator and that investigator had not "successfully tried to make any kind of contact" with petitioner (*id.* at p. 195).

Thus, on February 26, 1992, after the prosecutor left the court, the trial court said it had read petitioner's motion. The court asked petitioner if he had "any additional facts" (RT 104). Petitioner explained as follows:

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12. This occurred two weeks after the first *Marsden* denial by Judge Piatt, four days before jury selection began, and three weeks before the prosecutor's guilt phase opening statement.

> Yes, believe I do. [¶] I was thinking probably didn't put a few things in there, probably, I didn't want it to reflect because I understand that – that you're not supposed to know anything about the case, I believe. That's my understanding, that you're not suppose to. [¶] I read something about that, that the judge ain't supposed to know about the case, you know, actually what took place and all that, until it's brought up in front of the jury.

(RT 104-105.) After the court assured petitioner that he could speak freely, petitioner said:

> Okay. Because in Department A downstairs on the 3rd of February I was asked [sic] for a *Marsden* hearing, and the judge denied me of one [sic], and the reason for that was that [trial counsel] told him that this case wasn't a complex case and therefore he specifically told him in detail about the case, and I don't think that he was supposed to know anything about it. [¶] And he denied me and said on the grounds that I had no reasons without giving me – he cut me off without an explanation or anything. I still want to keep on telling him about it. [¶] I believe that the reason that [trial counsel] is now doing things such as going to my house last week, conferring with my mother about my case, or anywhere else that he has been during this last week, is because I've told him that I wanted to have a *Marsden* and that I wanted to make sure that this case is surrounded with all the facts. Before there was a lot of things that needed to be done in this case. [¶] I believe specific witnesses that back in 1989 heard shots, and no one spoke about them [sic]. The cops spoke about them and had their testimonies, and I don't know whether tapes, but I know I read something about it. And I haven't seen nothing about that or heard the investigator, whoever he is, come and spoke to me about that, he spoke to anybody about it [sic]. [¶] I called the office and

tried to get contact with his people here, because I been giving up a lot of rights on the basis that – for not a speedy trial, where for I haven't seen nothing, no paperwork. The same paperwork that I see is from back in 1989. [¶] No motions were filed. There was [sic] motions, I believe, that could have been filed to dismiss the special circumstances. I wanted to see if I could get a jury expert to – somebody to come, you know, to call – an I.D. something, I don't know what it's called. I want to get one of them. [¶] There was a guy – there was a guy. He's in jail in Susanville. He called him Pato. I believe his name is Andreas Gutierrez, and another guy by the name of Rigoberto Perez. I never seen him, his testimony in the municipal. Before entering – before entering last year – I believe it was in April. Before entering into municipal court, there was another case brought up with this case concerning – it was an escape that took place during them days, and them two cases were brought up in front of the judge, which I believe that's one of the reasons he bound me over to superior and because of the people he had there, they spoke about – you know, they spoke about my case. [¶] But it was said that – and my understanding was that my lawyer had an ex parte or a dispute with the district attorney concerning about that case before entering the court, and they agreed without my knowing it, and they bound me over to superior. And that is what the judge – that is – that is what I read on the municipal court transcripts, that the judge specific said that [sic]. [¶] Also I've been reviewing my case back in the back, everywhere, everything that I could do to it, and like I said, there's a lot of things that needed to be done, such as I believe there is witnesses to be talked to, there's fingerprints that came out of everywhere. The only fingerprint that I have here about [sic] in my whole case is mine. It's not even a fingerprint. [¶] And they caught a guy around the corner

with some blood on his shoes and blood on his pants. I never heard nothing about it being analyzed or anything being done about that either. These guys got arrested and got released the same day. [¶] So if somebody – I believe that somebody would have done something with the last 10 months that I have had this case, which is to wait till now to go to trial. We're in trial, we still got the same things. Only got two witnesses. The third witness never came up. Never spoke to him. I still don't know what he got to say. [¶] And I believe – you know, I believe that this is a complex case, because there ain't nothing indicating that this took – this was a murder/robbery or anything like that. Concerning the D.A., that's what she thinks it is. What's her requirements of – making it a special circumstances?

(RT 105-108.) After the court asked for anything further, petitioner stated:

No, nothing further. The only thing is I just need to confer with my attorney as often as possible to let him know things that I know, give him opinion on my behalf of – because I know that I'm not supposed to do his job and I know that I don't know nothing about the law, but I would look into it, if it requires for me and my case to be held the right way, have due representation.

(RT 108.)

After the court asked petitioner questions about some of the above alleged inadequacies, the court asked trial counsel respond. (RT 109.) Trial counsel gave the following lengthy reply to the foregoing:

Yes, Your Honor. I'm going to address the issues that have been raised by [petitioner]. [¶] [Petitioner] indicated that I stated to Judge Theodore Piatt that I felt that the matter was not a complex case. That took place during the course and scope of a *Marsden* hearing that was held by Judge Theodore Piatt. I did indicate to Judge Piatt that I did not feel that

it was a complex case. [¶] When I indicated that to Judge Piatt, as well as indicating it to Your Honor, as far as murder cases go and in my experience, I firmly believe that it is not a complex case. That is true. [¶] With respect to shots being fired, shots being heard in the neighborhood where the alleged homicide/murder took place, this is a 1989 case. The events took place on April 30th or April 29th, 1989. The matter was not in any type of court until April of 1991. Shots in this particular neighborhood where the alleged homicide took place are heard on a frequent basis, and we're talking about events that took place in 1989. [¶] The neighborhood has been talked to. The neighborhood – the people have been talked to. With respect to whether or not they remember shots in this particular incident, it's very difficult at best, Your Honor. [¶] [Petitioner] has indicated that he wanted myself to file a motion to dismiss the special circumstances. That has been done. It's in the 995 motion that has been filed with this Court, and it has been argued in that motion. [¶] That issue was addressed as well with Judge Theodore Piatt, whereby I indicated to Judge Piatt, as well at this point in time indicating to yourself, what the People's allegations are is that this particular victim was robbed. The evidence that they are presenting to the Court to establish, that is that the body was found in the street just east of the victim's home, that the body was laying on its back, there was no shirt on the victim, the victim was wearing a pair of pants, one pocket, the left pocket, was turned inside out. [¶] Two days prior to the alleged murder, the alleged victim was to receive a [sic] income tax refund check in the approximate amount of $1,300. At the preliminary hearing the check was presented, introduced into evidence. The check had been cashed on April 28th, 1989. There was no evidence presented as to who cashed the check. There is no evidence at the preliminary

hearing that the victim cashed a check, that the victim received the money, that monies were at the home or on the victim at the time of the murder. [¶] With respect to acquiring an I.D. expert, I am assuming that when [petitioner] is indicating that, he wants me to retain the services of an identification expert [sic]. That's the first I've heard of that request, and I find the request to be, without being demeaning to [petitioner], without any merit at all. [¶] And the reason I indicate that to the Court is two fold. Number one, the fact pattern as presented by the People, as well as being confirmed by my client, is that the alleged victim in this particular matter lived in Pomona, that the victim knew [petitioner], [petitioner] knew the victim, that [petitioner] was at the victim's home with the victim as well as a couple of other men, [petitioner] was in the company of these other men at the home. [¶] The other men left. The alleged victim asked [petitioner] to leave the home. *[Petitioner], in statements to me, has indicated that he in fact left the home.* [¶] The other men who were at the home, who left on or about the same time as [petitioner], went to other locations. They came back to the home approximately 10 to 20 minutes later. They found blood in the home. They were not able to find the alleged victim. They drove around the neighborhood, found the body, did not determine whether or not the body was dead. They were afraid. They called 911. They did not await the arrival of the Police Department. [¶] I see no issue with respect to identification from the standpoint [sic] [Petitioner] is known in the neighborhood, he knows these people, the people know him. In fact one of the other men in the home is a person that [petitioner] went to local schools with. [¶] So I fail to see that request having any merit. [¶] My own humble opinion, if it did have merit, is that identification experts have no credibility with juries, and the reason for that is because they

articulate common sense principles that everybody understands. I don't need an expert to articulate that. [¶] That's humble opinion. That's my tactic with respect to identification experts.

(RT 109-112, italics added.)

After the trial court inquired about "individuals in Susanville" (RT 112-113), trial counsel explained:

The individual in Susanville is a person by the name of Pato, P-A-T-O. He indicates – he's a witness. He's a witness that will be here. He's a witness that will be called by the People. That's pure and simple. And if he's not called by the People, which I believe he is in my conversations with [the prosecutor], then I have every intention of having him here. [¶] With respect to the severance, meaning that apparently [petitioner] believes that I had an ex parte conversation with [the prosecutor], I would indicate to the Court and I would indicate to [petitioner], which I have done on numerous occasions, I talk to [the prosecutor] on a regular basis about this case. I talk about the exchange of information, I talk about motions, I talk about things that I anticipate taking place. [¶] If he classifies that as ex parte, that I'm not suppose to do that, I would disagree with him. It's part and parcel of my job. [¶] The – I believe what he's indicating is that at the time of the preliminary hearing there was two separate cases. One was the murder alleging the special circumstances, as well as the escape allegation which is now in the information in count II. The escape allegation allegedly took place at the time that [petitioner] was to be arraigned on the murder case, that was April 8th, 1989 [sic], whereby he allegedly attempted to escape from the Pomona Municipal Court, was apprehended. [¶] The prelim [sic] that we did on this particular matter encompassed the escape case as well as the murder case. It was done for purposes of convenience, nothing

more. [¶] I would like to indicate to the Court, I do not under any circumstances, in any case, whether it's this case which I consider to be a very – well, it's the most serious case that a defense attorney can handle, I do not do things because *Marsden* hearings are brought. This case has been worked. I am prepared. This case is continually being worked. [¶] No case is crystallized two months before the trial. It's a constant, ongoing process. Information is always being gathered up until and during the course of any type of trial. It's an ongoing process. It will continue to proceed. The information will become more crystallized, and I believe I have been diligent in representing [petitioner]. [¶] If there is specific issues or points that the Court wants to address, I think I've covered what was articulated orally by [petitioner] as well as what was presented to the Court in writing. My opinion of the motion in writing to the Court by [petitioner] was that it was basically conclusory. There wasn't really anything that I can remember that was specific that I can address.

(RT 113-114.)

After hearing the above, petitioner replied:

Yes. He said that this case – he indicated that this case has been worked on. I believe that barely a week ago I gave him 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. [¶] So if this case was going within a jury trial, I understand that death penalty phase takes action right upon after (sic), and all these people, if they can't find them within this period of time from filing the case till now, you think it would take two weeks, three weeks to find all those people and question them and bring them in, if they could come all the way over here. [¶] There has to be arrangements for that. And I believe that it's

> barely – you know, I'm in the trial, pretrial already, and nothing was done before. When I tried to contact and ask, he said he would go talk to me up to the County Jail. I waited and waited. Never had nobody come up there. [¶] I came here. Every time I came here, he tells me he'll go up there to talk to me. I have a statement already of my – I have a statement ready of my life, and kept waiting. Nothing. He wouldn't show up.

(RT 114-115.)

The court asked trial counsel: "you want to address the issue in regard to family contact and people in Texas?" (RT 115.) Counsel replied:

> Approximately *two weeks ago* [petitioner] indicated to me he had people that he wanted me to talk to that resided in Juarez, Mexico. He indicated to me that he thought this would be helpful to me if there was a *penalty phase*. [¶] I asked Mr. Juarez – strike that. *I asked [petitioner] the names of these particular people. He was unable to articulate the names to me.* He indicated that they were aunts, uncles and cousins, that his mother had the names addresses and phone numbers of these particular persons. [¶] *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.* 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[.]

(RT 115-118, italics added.)

After listening to the above, the trial court ruled: "The Court has heard sufficient information. There's no reason to proceed any further. [¶] The [*Marsden*] motion is denied." (RT 118.) After petitioner asked "why[,]" the court replied: "Because there are no grounds that have been articulated to the Court. The Court has heard the evidence, heard your argument. The motion is denied." (RT 118; CT 187; see also RT 368.)

As to the hearing on March 9, 1992, i.e., 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 trial court:

> Yes. I'd like to address the Court if it's possible, because I have asked for a change of counsel and I understand that I can go pro per on this case. Because *I feel that I could do a much better job if I investigate* other things that I need to investigate. I feel that I have some investigating to take. And that's one of the reasons that *I'd like to go pro per* on this case.

(RT 365, italics added.) The court asked: "Would you prepared to proceed to trial today?" Petitioner replied: "No, sir. I doubt if I could." The court asked petitioner how many *Marsden* motions he had made. Petitioner said he had made "two[.]" The court asked petitioner how long trial counsel 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.* On the jailhouse case." The court asked: "How long have you been pro per on that case?" Petitioner: "I believe about a month and a half." (RT 365-366, italics added.)

After listening the above, the trial court ruled as follows:

> So *you're very familiar with the procedure to go pro per.* You're also

very familiar with the fact that this is a case that been pending now and you have been in custody on for almost 12 months. You knew that this case was proceeding to trial. The motion is certainly untimely. [¶] The matter has been here ready to proceed to trial. And any granting of your right to go pro per would require the Court to continue this case. [¶] And the Court finds that this request at this late hour is not done in good faith by the defendant, but merely for the purposes of obtaining a continuance. The request is denied.

(RT 366, italics added.)

Petitioner replied:

I do have the constitutional right to go pro per under *Faretta*. I understand what you said about being late, in coming late at this moment, but upon reading upon [sic] the cases and things that I wanted to be heard and people to come in the penalty phase, a death sentence, that there's more people to be talked to or bring up to the Court that admitted it takes place after the – after the murder case is alleged. [¶] And if – if it takes action right upon – right after – if I don't have people come in and talk good about me, that know me from the street, what good am I – am I to defend myself for anything, for any purpose?

(RT 366-367.) The trial court replied:

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 [trial counsel]. [¶] If in your discussions with [trial counsel] 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. [¶] You do have the right to proceed representing yourself and the Court at your request could

> relieve [trial counsel]. But the Court will not do so at this time because you are not prepared to proceed to trial. The Court has made the finding that your actions are not based upon any misconduct or any conflict between you and [trial counsel], but your request to go pro per is merely made to delay the proceedings and to continue the trial. [¶] If you wish to proceed to trial today in pro per, representing yourself, you have an absolute right and the Court will permit you to do so. I will have Mr. Robusto stand by as counsel, so that during the course of the trial if for some reason you realize how mistaken you are to do this, [trial counsel] would be able to take over on the defense. [¶] But we're not going to hold up the trial, Mr. Valdez. We're going to proceed with the trial. The Court has made a finding under the *Marsden* motion that you filed that the motion was not well taken and that motion was denied. We're now ready to proceed to trial.

(RT 367-368.)

Petitioner replied: "Well, in other words, what I got to do is give my rights." The court disagreed and said: "You don't have to give up any rights." Petitioner replied: "To get one right I have to give up a right. That's what you're making me do." The court replied: "That's the law, Mr. Valdez." (RT 368.)

Later, on March 27, 1992, i.e., during the defense case at the penalty phase and after counsel had presented the jury with four 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 trial counsel told the court that if petitioner took the stand it would be against counsel's advice. (RT 1717.) At the hearing, petitioner never identified the remedy he sought. He did not cite or refer to *Marsden* even after the court asked him if he wanted to "relieve" counsel. (See RT 1724-1725,

1727-1728.)

The above 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; CT 303; RT 1718.) In his letter, petitioner alleged that trial counsel did not do his "best." (CT "Confidential" 205.) In a "P.S." section, petitioner wrote to the court: "Can we have a meeting without the prosecutor !! being present?" (CT "Confidential" 207.)

In court, in front of the prosecutor, petitioner claimed that counsel 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. (RT 1718-1719.)

After the prosecutor left the courtroom (RT 1719), the court took a recess to allow trial counsel to read petitioner's letter for the first time. (RT 1719-1720.) Afterwards, trial counsel replied:

> With respect to the allegations that have been articulated in written form by [petitioner] in the exhibit, I discussed the Soledad incident, the Tracy incident and the L.A. County Jail shank stabbing incident with Mr. Robinson as well as the robbery of Mr. Banuelos with [petitioner]. [¶] [Petitioner] indicated to me with respect to the baseball bat incident at Soledad that *he, in fact, did grab a baseball bat, that he, in fact, did chase the individual, that he, in fact, did indicate to the sergeant, when interviewed, that he had every intention of killing the individual* if he could get a hold of him. [¶] What he indicated to me was the following: I'm in canteen, I'm in line for canteen; the individual that was pursued by [petitioner] approached him, told him either to give him some items or get some items. [Petitioner] indicated to that particular inmate that he would not do that, he's not going to do that. [¶] The next situation that took place was that [petitioner] was approached by this individual, as

well as other inmates, apparently that were associated with the other inmate, that he had the bat, he picked up the bat for protection, then he went after this other inmate. [¶] Now, I just don't know what I can do with that particular fact pattern that's being presented to me. [¶] With respect to the shank at L.A. County Jail, *[petitioner] indicated to me that he did have the shank*, he had the shank for protection, he has having [sic] problems with Mr. Robinson. He was on this particular module, which I believe was 2600 module, that was basically an all-black module except for himself, that *he did in fact strike the individual with the shank*. [¶] Again, he indicated to me that as a result of – for protection, he did that as a result of setting up his own perimeters. He indicated to me that, if you don't take care of yourself in custody, you will end up being somebody's woman or you will end up being hurt or killed. [¶] With respect to the Tracy incident, which is the knifing, the fact pattern is, the knifing, [petitioner] is in the yard, he's wearing a black bandana. He indicates to me that Mr. Copeland, the victim of the stabbing, is a friend of his, that he did not stab Mr. Copeland; that he, after the event took place, after Mr. Espinoza got his name, his number, that he was put in the hole for a couple of days, 72 hours, that there was no disciplinary action, that there was no charges brought against him. [¶] And, in essence, that's what's taken place during the course and scope of this particular trial, meaning the sergeant indicated, I don't believe any charges have been brought, I don't believe there was any discipline against [petitioner]. And *my discovery from the standpoint of being provided to me by the People* indicated that. [¶] With respect to the robbery of Mr. Banuelos, that a complaint – or information has been filed against [petitioner]. That has not been litigated as of this point in time. It's being used as a prior act of violence in this particular penalty

phase. [¶] *The conversation I had with [petitioner] was that [petitioner] took some tires* from his brother-in-law, that's Gracie's boyfriend at the time; that the brother-in-law had purchased these particular tires, which, during my investigation, was confirmed by Gracie, his sister; that the brother-in-law did not respect [petitioner]; that [petitioner] took the tires; that he, on this particular evening, he wanted to sell the tires. [¶] Banuelos has over at his house [sic]. He talked to Banuelos about the tires. [Petitioner] wanted $150.00 for the tries. Banuelos indicated he only had a hundred dollars. He was willing to give him a hundred dollars for the tires now and $50.00 later. That was acceptable to [petitioner]. [¶] [Petitioner] and Mr. Banuelos got into Mr. Banuelos' truck to go retrieve the tires at the garage that they were located at. On the drive from [petitioner]'s house to Mr. – the house where the tries were located, *[petitioner] indicated to me* that Mr. Banuelos was vacillating back and forth about the price, that he wanted to reduce the price to $80.00. When Mr. – [sic] [¶] The way [petitioner] articulated to me, *[petitioner] indicated to me* [sic] Banuelos thought he was some type of chump and thought he could get him down lower, and then, at the time they arrived at the location, Banuelos indicated he didn't want the tires, he was going to back out of it. That's when [petitioner] took the money. That's when he – [sic] [¶] *I've had two stories now from [petitioner]*. [¶] Initially, he indicated to me that he did use a knife, however he didn't put the knife to the guy's chest, he held the knife in his hand and took the money. Just recently, this morning or the other day, I'm not serious – I'm very serious, but I'm not certain if it was today, he – he's indicated to me that there was no knife utilized. [¶] He – *[petitioner]'s indicated to me* that there's a witness that was present during the time – and I don't have any information about that. If there

is any witness and if I can get the witness, I'll pull the witness in. [¶] But that's my position with respect to these events. I think it's – they may be explainable to the jury, but the point of the matter, in my humble opinion, is that the events basically took place in sum and substance. There may be a little bit – deviations from details. I can only do with facts what I can do with the facts.

(RT 1720-1724, italics added; see *Valdez, supra,* 32 Cal4th at pp. 88-89.)

Petitioner replied:

Yes. I think there's a great issue about all this. Because, first of all, I did indicate to my attorney that I didn't stab anybody in the County Jail. I indicated to him that there was riots going on in Wayside in the minimum facility and in the upper class, and this – by being – this was a transfer module, they were coming in and out, and I was the only trustee working there according to a Mexican, and that's suppose – they're supposed to basically put seven of each races, and there was nothing but Black trustees working there. [¶] There was a lot of stabbing and a lot of riots taking place in other places that would come to that particular module. And I did have a shank in my pocket for my protection because these guys – [sic].

(RT 1724.)

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?" (RT 1724-1725.) Petitioner did not answer the question. Instead, petitioner replied: "My thing here is that I didn't have witnesses." (RT 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 counsel to bring in "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. (RT 1725-1726.)[13/]

Trial counsel told the trial court:

> *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.

(RT 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. [¶]

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13. Petitioner's 2002 habeas clinical psychologist formed part of her present opinion about petitioner's alleged mental problem and childhood abuse based on her interview with inmate Copeland. (See Pet., Ex, AA at p. 1.) The psychologist's declaration suggests that her opinion did not include consideration of *any* of the following: (1) petitioner's 1992 probation report (CT 469-470 [1992 probation report]); (2) various handwritten statements by petitioner in 1992 involving his various *Marsden* and/or *Faretta* motions (CT "Confidential" 189-207); or (3) petitioner's courtroom testimony involving the above motions (RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992, hearing weeks before guilt phase opening statement], 1717-1728 [March 27, 1992, hearing during defense case at penalty phase]). (See Pet., Ex, AA at p. 1.)

> 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.

(RT 1727.)

The trial court asked: "What's your specific motion? What do you want the Court to do?" (RT 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.

(RT 1727-1728; see *Valdez, supra,* 32 Cal.4th at pp. 124-125.) The 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?

(RT 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." (RT 1728.) The 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.

(RT 1728, italics added.)

Thus, on information and belief, as to subclaim H of Claim IV, respondent denies that petitioner received ineffective assistance of counsel. On information and belief, respondent denies that petitioner's 1992 trial counsel

failed to investigate, consult with experts, and present mitigation proof of "severe and unrelenting emotional and physical abuse" petitioner allegedly had suffered "throughout his childhood" causing "mental state and serious resulting substance abuse" problems. (See Pet. at 69-83.) On information and belief, respondent denies that petitioner suffered severe and unrelenting emotional and physical abuse in his childhood allegedly caused by: (1) his father, allegedly beginning when petitioner was a toddler in Mexico in 1963; and (2) his brother's untimely accidental car accident death in 1981, i.e., when petitioner was 16 years old.

Here, as noted, petitioner was serving time in a California prison from 1983 to 1988, and, he has given numerous statements to probation officers stating that, at best, he was an occasional marijuana user leading up to the instant murder in 1989. (See CT 469-470 [1992 probation report].) Thus, on information and belief, respondent denies that petitioner has ever had a "substance abuse" problem, or that such alleged problem has seriously affected petitioner's "mental" state. The record discussed above, including petitioner's personal statements at hearings on February 10, and 26, 1992, and March 9, and 27, 1992, (see *Valdez, supra,* 32 Cal.4th at pp. 91-95, 98-102) overwhelmingly demonstrates that petitioner has no arguable mental problem that required counsel to investigate further than he did at the penalty phase, as trial counsel detailed for the trial court as discussed, *ante*.

In particular, as trial counsel told the trial court, he investigated petitioner's social history as best he could given the late information about people in Texas and Mexico that petitioner wanted investigated. Counsel hired a Spanish-speaking investigator, and this investigator traveled to Mexico and Texas, and he interviewed people that petitioner wanted interviewed.

At the penalty phase, trial counsel presented the jury with live testimony from petitioner's father, mother, two sisters, an aunt, and three close friends, all

of whom had ample opportunity to inform the jury about: (1) childhood abuse allegedly suffered by petitioner throughout his childhood caused by his father; (2) the impact of the untimely accidental car accident death of petitioner's brother in 1981, i.e., eight years before the instant murder; (3) substance abuse problems petitioner allegedly had at the time of the 1989 murder and 1992 penalty phase trial; (4) the significance of petitioner's alleged "art" work; (5) the significance of petitioner's alleged flight from Pomona, Arizona, Texas, Mexico, then back to Pomona, all supposedly occurring in 1981 when petitioner was 16 years old; and (5) symptoms of "Post Traumatic Stress Disorder (PSTD)" (Pet. at 77-78) that petitioner allegedly had at the time of the 1989 murder, at the time of the 1992 trial and sentencing, and at the time of the 2002 prison interview he had with his present habeas clinical psychologist (see Pet., Ex. AA). On information and belief, respondent denies that petitioner has, or has ever had, PSTD. Thus, respondent denies that counsel should have investigated PSTD as to petitioner in 1992, or had petitioner's brain scanned as alleged.

As to petitioner's present habeas clinical psychologist, respondent denies that this psychologist's 2002 opinion is credible. As previously noted, in forming her opinion, this psychologist's declaration suggests that her opinion did not take into consideration: (1) petitioner's 1992 probation report (CT 469-470 [1992 probation report]); (2) various 1992 handwritten statements by petitioner involving his various *Marsden* and/or *Faretta* motions (CT "Confidential" 189-207); or (3) petitioner's court testimony involving the above motions (RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992 hearing weeks before guilt phase opening statement], 1717-1728 [March 27, 1992 hearing during defense case at penalty phase]). (See Pet., Ex, AA at p. 1.) On information and belief, respondent denies that petitioner's 2002 psychologist's opinion would

have been credible at the time of the murder in 1989, at the time of the trial and sentencing in 1992, and presently in 2005.

On information and belief, respondent denies that the following is presently relevant, or was relevant at the time of either the crime in 1989, or the trial and sentencing in 1992: (1) petitioner's father's alleged sexual molestation of juvenile girls allegedly in the 1980s; (2) petitioner's father's post-trial sexual molestation criminal case in 1999 or 2001; (3) petitioner's father's alleged failure to be the main "bread" winner for his family; (4) petitioner's father's alleged beatings of persons other than petitioner, including petitioner's mother, who clearly could have easily testified to this at the penalty phase if the above were true or relevant; (5) petitioner's father's alleged failure to pay petitioner and his siblings for work the siblings performed in the family restaurant and/or janitorial service in the late 1970s leading up to the restaurant's closure around 1981, i.e., the time of the oldest sibling's untimely accidental car accident death; (6) the school grades of petitioner's two brothers while they were in high school; (7) the social security income statements involving petitioner's parents from the period of the 1950s to the 1990s (see Pet., Exs, NN, OO); and (8) a post-trial 1996 news article about overcrowding in prisons (see Pet., Ex. KK). On information and belief, respondent denies that trial counsel rendered ineffective assistance by allegedly failing to investigate and present the above to the 1992 jury.

At any rate, respondent makes the following specific admissions and/or denials to the factual assertions in subclaim H of Claim IV.

1. Respondent admits the facts in paragraph "1" of subclaim H of Claim IV concerning petitioner's birth, family members, the move from Mexico to Southern California by petitioner and his family when petitioner was "10 years old" (see *Valdez, supra,* 32 Cal.4th at p. 89), and the fact the family had "resided" in the Pomona area for about "20 years" at the time of petitioner's

March 1992 trial. (See Pet. at 69.) Also, petitioner was born in Mexico in January 1963; thus, he was 26 years old when he shot and robbed the victim in April 1989. (See *Valdez, supra,* 32 Cal.4th at p. 81.)

2. Respondent admits the following:

> Petitioner's parents and sisters, his Aunt Leticia [sic], as well as long term family friends, Enedina and Jose Luis Garcia and Carolin [sic] Reina [sic] testified at the penalty phase about petitioner's childhood, what it was like growing up in a poor immigrant family, his obedience to his parents, his devotion to his mother and sisters, his kindness to children and his embrace of Christianity.

(Pet. at 69; see *Valdez, supra,* 32 Cal.4th at pp. 89-90.)

Respondent denies that counsel was constitutionally required to ask "more questions" to elicit the alleged "facts" in the "post trial declarations of petitioner's sisters and family friends." (See Pet. at 69.)

On information and belief, respondent denies that the "portrait of petitioner as a poor but much loved child, growing up in a hard working ambitious family" that was given to the jury through live testimony from petitioner's father, mother, two sisters, aunt, and three close family friends was "grossly misleading." (See Pet. at 69.)

On information and belief, respondent denies that petitioner's father was "not the hard working family man he portrayed himself to be" at the penalty phase through his live testimony in petitioner's presence. (See *Valdez, supra,* 32 Cal.4th at pp. 89-90.)

At the penalty phase, petitioner's father (Antonio Sr.)[14/] told the jury the following. Petitioner was born in Ciudad Juarez, Mexico, and lived there with

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14. Respondent refers to petitioner's father as "Antonio Sr." to avoid confusion due to the fact that: (1) petitioner and his father have the same last name; and (2) petitioner's older (deceased) brother was also named Antonio.

his family until they moved to Pomona when petitioner was 10 years old. Antonio Sr. and petitioner's mother (Rosa)[15/] had five children: two daughters and three sons (including petitioner). One of petitioner's brothers (Antonio Jr.) died. The family worked after moving to Pomona. Antonio Sr. worked in janitorial service for a company called Gibson Brothers. Petitioner dropped out of school when he was 14 or 15 years old, then worked with his father in janitorial service. Petitioner was a good worker. He always followed direction. When Antonio Sr. owned a Pomona restaurant for one year, petitioner worked there as a cook. He was about 14 years old at that time. After Antonio Sr. sold the restaurant and started working for a maintenance company, petitioner worked there. When Antonio Sr. started a construction business, petitioner worked there. Since his children obeyed him, Antonio Sr. did not know why they "take the wrong path" (RT 1768). Petitioner was obedient at home. He was always respectful of his mother. Antonio Sr. did not believe it was "fair" to decide his son's fate. He opined that petitioner had "taken the wrong path" perhaps because life was "very hard in Pomona." Antonio Sr. said his wife was "ill" and "might die in a month or a year" due to an illness in her bones. Antonio Sr. opined, "If you sentence him to death or if he is sentenced to death I don't believe that my wife will live." Antonio Sr. opined that petitioner was always good to his family, friends and others. (RT 1761-1770.)

On information and belief, respondent denies the following:

> [Petitioner's father] was a vicious drunk, who made no effort to support his family, who beat his wife and children, especially petitioner for whom he had a special hatred, molested children [allegedly years after the instant trial] and ultimately impregnated his own thirteen year old

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15. Respondent refers to petitioner's mother by her first name to avoid confusion due to the fact that she had the same last name as her two daughters, who also testified at petitioner's penalty phase trial.

granddaughter [allegedly years after the instant trial].

(Pet. at 70.)

Respondent alleges that trial counsel conducted a reasonable social history investigation, and that any failure to discover or present the allegations of this paragraph did not render his representation of petitioner constitutionally inadequate. As will appear later in this brief, counsel's representation did not fall below an objective standard of reasonableness as of the time of counsel's conduct, and there is no reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. (See *Strickland, supra,* 466 U.S. at pp. 688, 690, 694.)

3. Respondent admits: (1) petitioner's father told the penalty phase jury that he was strict with his children even when they were small, they had to do what he told them to do, and petitioner was always obedient (see RT 1761-1770); and (2) Carolina Reyna told the penalty phase jury that petitioner's father was always yelling at petitioner, and Reyna had been a close friend of petitioner's mother since petitioner was 12 years old (see RT 1639-1651). (See Pet. at 70; *Valdez, supra,* 32 Cal.4th at pp. 89-90.)

Respondent denies that the penalty phase testimony on petitioner's father's strictness did "nothing to inform the jury about" the alleged "extreme, unrelenting physical and emotional abuse" his father allegedly "inflicted on petitioner from the time petitioner was about four years old, until he was adulthood [sic]." (See Pet. at 70.) On information and belief, respondent denies that petitioner's father inflicted "extreme, unrelenting physical and emotional abuse" on petitioner "from" petitioner being about "four years old" until his "adulthood." Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover such evidence, or, if he did, failing to present such evidence to the penalty phase jury in 1992. (See Pet. at 70.)

4. On information and belief, respondent denies that Carolina Reyna

"could have also testified" to petitioner's 1992 penalty phase jury "about how" petitioner's father allegedly "repeatedly molested" Reyna's "preschool daughter Sabrina" outside of Reyna's presence, and "how on many nights" petitioner and his siblings would seek "refuge" in Reyna's house due to petitioner's father's "drunken abuse" that allegedly occurred outside of Reyna's presence. (See Pet. at 71.)

On information and belief, respondent denies that Reyna could have "revealed" at trial that petitioner's father "pushed and hit" his wife Rosa and that Rosa "continually complained" to Reyna about petitioner's father's alleged "beating" of Rosa and her children. Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover this information, or, if he did, failing to present it at the penalty phase trial. (See Pet. at 71.)

On information and belief, respondent denies: (1) from the time that petitioner was a "toddler" he "witnessed" his father "beating" Rosa with "closed" fists; and (2) petitioner's father "beat" petitioner and his two brothers "Ricky and Antonio, Jr." with "closed" fists and "anything else he could get his hands on." (See Pet. at 71.) The petition does not include a declaration from petitioner. However, his brother Ricky's post-trial habeas declaration says Antonio Jr., who died in a car accident in 1981, "would protect us from our father" and he allegedly would "get beaten for sticking up for us[.]"[16/] Also, petitioner and Ricky would "hide together whenever" their father would allegedly come home "drunk." (Pet., Ex. U at p. 2.)

5. On information and belief, respondent denies that petitioner "began to experiment with drugs and alcohol including sniffing gasoline when he was only" 13 years old. (See Pet. at 71.) By comparison, Ricky, petitioner's younger brother, states that he (Ricky) managed to play varsity football and baseball in high school, and he got "good" grades, never missed a day of

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16. He did not say Antonio Jr. would "try" to do this. (See Pet. at 71.)

school, and stayed away from "cholos and from drugs" until 1981, i.e., when petitioner was 18 years old and their brother Antonio Jr. died in a car accident. (Pet., Ex. U at pp. 1-2.)

Given Ricky's claim that Antonio Jr. "would protect us from our father" and would allegedly "get beaten for sticking up for us," (Pet., Ex. U at p. 2), Antonio Jr.'s death arguably devastated petitioner. (See Pet. at 71.) However, given petitioner was 18 years old at the time of this death, and, in fact, petitioner was in jail for an unrelated crime at the time, the above death was of questionable weight as mitigating evidence as to the instant robbery-murder.

On information and belief, respondent denies that: (1) petitioner had a "drug" problem; and (2) "[b]y 1988 petitioner's drug problem was so serious that he always seemed to be under the influence." (See Pet. at 71.) During his interview with a probation officer in 1992 after the conviction in this case, petitioner stated that he was a occasional marijuana user. (CT 469.) After the above interview, the probation officer wrote this report:

> Defendant verbalizes the use of "hard" drugs began following defendant's release from prison during the year 1988, approximately. Such involved [sic] the use of cocaine by injection on a daily basis over a three-month period of time *until being returned to prison on a parole violation* during the year 1989. According to defendant [sic] who claims *no use of illegal drug substance since that time* because *"drugs are no good for you."* Defendant *denies ever using heroin, "speed," LSD, and other form of illegal substance.* Defendant claims alcohol problems, stating, "I will drink all day, every day, when drinking." In further discussion of problems with alcohol, defendant verbalized a tendency to be involved in fights when drunk, . . . especially when mixing the types of alcohol and when drinking in conjunction with marijuana use. When questioned further about marijuana, defendant

changed the story and claimed *occasional use of marijuana* to present time. Reportedly, defendant has *never been involved in drug/alcohol treatment programs*.

(CT 469-470. italics added.)[17]

In 1981, petitioner was convicted of burglary in Pomona, and sentenced to county jail for 180 days. Later that year, he was convicted of auto theft in Pomona, and sent to county jail for 30 days. Later in 1981, he was convicted of vandalism in East Los Angeles, and sent to county jail for three days. In 1982, he was convicted of possession of a dangerous weapon in Pomona, and sent to county jail for four days. Later that year, he was convicted of "aggravated robbery" in El Paso, Texas, and in 1983, he was deported out of this Country from Texas. Later in 1983, he was convicted of multiple counts of first degree burglary in Pomona. Due to the above, the California Department of Corrections took custody of petitioner on August 19, 1983, and he was paroled to San Bernardino County on February 20, 1988.[18] In 1988, he also was convicted of battery for striking a woman in Claremont, and sent to county jail for 17 days. In 1988, he was convicted of being under the influence

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17. Petitioner's 1992 probation report also states:

> The probation report dated July 6, 1984, reflects information from defendant indicating LSD use four to five time during the year 1982, approximately. Further, there is information of experimentation with barbiturates around the same period of time [when he was 19 years old]. Additionally, a probation report dated June 3, 1991, reflects defendant's claim of cocaine use "the past eight years" and, a probation report dated June 12, 1991, reflects defendant's *denial of any drug use*.

(CT 470, italics added.)

18. As the jury heard at the penalty phase trial, petitioner committed multiple crimes while in custody during 1983 to 1988, and he committed more crimes while in custody in 1991, including escaping from custody while this murder trial was pending. (See *Valdez, supra,* 32 Cal.4th at pp. 86-89.)

of a controlled substance in Pomona. In 1989, he was twice convicted of that same crime in Pomona. The first 1989 arrest occurred in January, i.e., about three months before the instant robbery-murder, and the second 1989 arrest occurred at the time of petitioner's arrest about 24 hours after the instant killing. (CT 464-465.) However, given petitioner's lengthy custody in prison from 1983 (age 20) to 1988 (age 25), plus his denials of prior drug use or admission of mere occasional drug use, respondent denies that: (1) petitioner had a "drug" problem; and (2) "[b]y 1988 petitioner's drug problem was so serious that he always seemed to be under the influence." (See Pet. at 71.)

On information and belief, indeed, given the foregoing record, respondent denies that petitioner's "sisters would find drug paraphernalia" in petitioner's "room" that was used by petitioner, or that the "sisters" noticed "puncture marks" on petitioner's "arms." (See Pet. at 71.)

On information and belief, respondent admits that trial counsel received pre-trial discovery about "petitioner's prior arrests" showing that "in the year prior to the months prior to the" instant killing, petitioner was "arrested in September 1988, November 1988, and January 1989 for being under the influence of" a controlled substance. (See Pet. at 71-72.) Given the above record, including petitioner's statements to probation officers at various times both before and after the trial in this case. on information and belief, respondent denies that petitioner has ever used "heroin and PCP[.]" (See *Ibid.*)

On information and belief, respondent denies that petitioner was "attempting to buy cocaine" from the victim when he killed and robbed the victim in this case. (See Pet. at p. 72.)

On information and belief, respondent denies that petitioner was "known as a heroin addict among drug suppliers[.]" (See Pet. at p. 72.) Respondent admits that petitioner was arrested for being under the "influence on May 1, 1989," i.e., about 24 hours after he killed and robbed the victim in this case.

(See *Ibid.*)

Respondent denies that counsel was constitutionally ineffective for allegedly: (1) failing to conduct further investigation of the "drug use" issue; and (2) failing to discover any evidence of drug use, or, if he did discover such evidence, failing to present it to the penalty phase jury.

6. On information and belief, respondent denies that petitioner's "family endured" abuse from his father, or that this alleged abuse "resumed as soon as" his father was "returned" after a jail term for "driving under the influence" in some undisclosed year. (See Pet. at 72.)

Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner's father "threatened to kill" his wife in some undisclosed year, or that petitioner's sister (Victoria) tried to kill her father around 1984, i.e., (1) when petitioner was about 21 years old and in prison; and (2) five years before the instant murder. (See Pet. at 72.)

Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner's parents were "separated" in 1984, i.e., (1) when petitioner was about 21 years old and in prison; and (2) five years before the murder in this case. (See Pet. at 72.)

Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner's sister Graciela did "better in life" than all four of her older siblings. (See Pet. at 72.) At the penalty phase, Victoria (petitioner's other sister), testified that she was a single parent and food service worker, and that petitioner helped to raise her 10-year-old and 4-year-old daughters. (See RT 1652-1670.) By comparison, at the penalty phase, Graciela testified that she was a single mother who worked as a food service worker and word processor. (See RT 1671-1681.)

On information and belief, respondent denies that around 1979, nine-year-old Graciela opened a "closed door" and saw her father "beating" 16-year-

old petitioner and 14-year-old Ricardo with a "two by four" board, and that on this occasion, petitioner was beaten "so badly" that he could not get "out of bed[.]" (See Pet. at p. 72.) As noted, Ricardo generally states that Antonio Jr. "would protect us from our father" and he would allegedly "get beaten for sticking up for us," (Pet., Ex. U at p. 2), and thus, in 1979, 18-year-old Antonio Jr. presumably protected his brothers. Petitioner does not claim that such "horrific" beatings, allegedly dating back to when petitioner was a toddler in 1963 in Mexico, was ever reported to law enforcement in Mexico, California, Texas, or elsewhere. (See Pet. at 72.)

Petitioner's mother declares that during the time of the alleged 1979 two-by-four beating, she took the children to school, and she took care of them after school and during vacation time. (See Pet., Ex. X at pp. 4-5.) Thus, if the beating evidence was true, she presumably would have: (1) reported her husband to law enforcement; or (2) had petitioner treated at a hospital. Indeed, she allegedly worked at a "hospital" in Pomona for "three to four years" coving the time of the alleged above two-by-four beating. (*Id.* at p. 5.)

As to the beating, petitioner's mother claims that after the alleged above 1979 beating, petitioner ran away, and was found by police officers in Arizona, who, after seeing petitioner's "swelling on his face" due to the alleged above beating, gave a 16-year-old illegal Mexican immigrant minor "directions to the freeway and just dropped him off." (Pet., Ex. X at p. 5.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial.

7. Respondent denies that petitioner's mother "testified at trial that due to the long hours she worked she did not have time to take care of the children." (See Pet. at 73.) Indeed, petitioner's mother reasonably told the penalty phase jury that "one" does not always "take good care" of one's children, and "one can't always" know "exactly everything" that one's children are doing. (RT

1772-1773.) Even now, petitioner's mother states that she took care of petitioner (and his siblings) after school and during vacation time. (Pet., Ex. X at p. 5.) Petitioner's sister Victoria states: "My mother was a good mother[.]" (Pet., Ex. W at p. 1.) As to his father's alleged abuse, petitioner's brother Ricardo states: "My Mom would wake us up and warn us that Dad was coming home. We would hide outside and wait for him to fall asleep." (Pet., Ex. U at P. 2.)

Thus, on information and belief, respondent denies that his father inflicted "extreme, unrelenting physical and emotional abuse" on petitioner "from" petitioner being about "four years old" until his "adulthood." (See Pet. at 70.) Also, on information and belief, respondent denies that: (1) petitioner's mother worked "harder" than otherwise because she was the "main bread winner"; and (2) petitioner's father "contributed very little and very infrequently." (See *Id.* at p. 73.) Further, on information and belief, respondent denies that "much of the early" alleged "abuse of petitioner" took place while his mother was "gone from the house." (See *Ibid.*)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial.

8. On information and belief, respondent denies that petitioner's father was "torturing his own children[,]" or that this occurred while his wife was "away from the house," or that "petitioner" continually "molested his deceased friend's pre school daughter, Sabrina Zueck[,]" over a "two year period[.]" (See Pet. at p. 73.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial.

9. Respondent admits that when petitioner's father testified at the 1992 penalty phase trial, he said that he: (1) worked for a janitorial service; and (2) delegated janitorial jobs to his wife and children, including petitioner. (See Pet.

at 73; RT 1761-1770; *Valdez, supra,* 32 Cal.4th at p. 90.) On information and belief, respondent denies that petitioner's father was "usually too drunk to work and would sleep on the floor while Rosa and the children worked." (See Pet. at 73.) Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner and his two brothers Ricardo and Antonio Jr. suffered a dramatic "decline in school grades during the period of 1977 to 1979[,]" i.e., a period ending ten years *before* the instant 1989 murder. Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner and his two brothers Ricardo and Antonio Jr. were "forced to work all night" from 1977 to 1979. (See *Id.* at pp. 73-74.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial.

10. Assuming, without conceding, that petitioner's father "apparently also enjoyed masturbating in front of the neighborhood children and was eventually arrested for this activity" around 1999 and/or 2001, i.e., over 10 years *after* petitioner killed the instant robbery-murder victim (see Pet. at 74), respondent denies that counsel's representation was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial. Counsel obviously could not have know about the foregoing at petitioner's 1992 penalty phase trial. Assuming, without conceding, relevance, on information and belief, respondent admits that petitioner's father was serving a twelve-year prison term as of the filing of petitioner's instant 2002 habeas corpus petition.

11. On information and belief, respondent admits that Doctor Nancy Kaser-Boyd "reviewed petitioner's social history, and declarations R through X" of petitioner's instant habeas corpus petition as well as the "defense and prosecution's penalty phase evidence, prior to interviewing and evaluating" petitioner in prison in January 2002, i.e., over 13 years after the murder and about 10 years after the trial. (Pet. at 74, Ex. AA.)

On information and belief, respondent denies that petitioner suffered "traumatic stress" or that such alleged stress was "compounded" by: (1) his brother's death in 1981, i.e., about eight years before the instant robbery-murder; and/or (2) the alleged "serious toxic effects" of the alleged "many substances" petitioner allegedly "ingested in an attempt to assuage the pain." (See Pet. at 74-75.)

On information and belief, respondent denies that petitioner "displays the clinical symptom of hypervigilence" as a result of his alleged "long history" of alleged child abuse. Indeed, on information and belief, respondent denies that petitioner had "hypervigilence" when he was 26 years old on April 30, 1989, i.e., around the time that he committed the instant robbery-murder, after having spent nearly five years in prison from 1983 to 1988. (See Pet. at 75.)

Assuming, without conceding, relevance, on information and belief, respondent denies that petitioner "learned to anticipate harm from his father" and others "and developed a fighting stance to protect himself from anticipated harm." (See Pet. at 75.)

If the above is true, it also seems true that 16-year-old petitioner would have defended himself from his father's alleged "horrific" two-by-four beating in 1979. (See Pet. at 72, 75; *Valdez, supra*, 32 Cal.4th at pp. 88-89 [penalty phase proof of petitioner's assaults on others in custody in 1984 an 1991].) Indeed, in 1991, petitioner intimidated a fellow inmate who was physically larger than petitioner. During the penalty phase, the inmate was brought into the courtroom so the jury could see how much smaller petitioner was compared to a fellow inmate that he intimidated. (RT 1454.) Later, during guilt phase closing argument, the prosecutor commented to the jury:

> [L]et's talk about the stabbing of William Robinson. You saw him. He didn't want to testify. You saw how big and buffed out he was. Alfredo Valdez is nowhere near his size, but he stabbed him twice and

[petitioner] was causing [Robinson] to back up in an intimidating fashion in front of deputies.

(RT 1977; see *Valdez, supra,* 32 Cal.4th at pp. 89, 135-136.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

12. On information and belief, respondent denies that petitioner had a "stress level" that was "already extreme" after 18 years of allegedly being "beaten by his father and watching the beating of his mother[.]" (See Pet. at 75.) On information and belief, respondent denies that the above alleged "stress level" was "no doubt exacerbated" due to petitioner's state prison incarceration for "the greater part of the" 1980s. (See *ibid.*) On information and belief, respondent denies that petitioner was in "fear for his life and personal safety in county jail and in state prison." (See *ibid.*; see also *Valdez, supra,* 32 Cal.4th at pp. 87-89, 135.)

On information and belief, respondent admits that prior to trial, trial counsel knew that petitioner had suffered multiple stab wounds around May 1988, i.e., nearly one year before he shot and robbed the instant victim in April 1989. (See Pet. at 75.) On information and belief, respondent denies that: (1) petitioner's 1988 stab wounds was an "additional factor" to petitioner's alleged "fear and stress"; and (2) trial counsel "unfortunately" did not proffer the 1988 stab wound and emergency surgery evidence to the 1992 penalty phase jury (see *ibid.*), but admits that counsel did not offer the evidence at trial.

Respondent denies that counsel was constitutionally ineffective for allegedly failing to offer the above evidence at the penalty phase trial.

13. On information and belief, respondent denies that petitioner's alleged "art work" contains "many of the themes of his life" and his alleged "addiction, entrapment, good and evil and fate." (See Pet. at 75.) On information and belief, respondent denies that petitioner's alleged "art" shows,

in "clinical" terms, a "dysphoric quality" that is "often seen" in people with "similar histories" to that experienced by petitioner in reality. (See *Id.* at 75-76.) On information and belief, respondent denies that petitioner "has a history of physical and mental abuse which was inflicted on him by his father throughout his formative years." (See *Id* at 76.) On information and belief, respondent denies that: (1) petitioner's father was a bad "role model for violent behavior and criminal conduct";[19/] (2) petitioner was "badly battered by his father"; (3) petitioner's father was "very harsh both physically and physically; (4) petitioner suffered the alleged specific "incidents" of alleged physical abuse; and (5) petitioner received "constant and intense abuse" at an "early age" that "affected his psychological development" and spawned a "plethora of socio-psychological problems which interfered with his social conditioning and mental development." (See Pet. at 76-77.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to investigate or develop the above evidence for the penalty phase, or for failing to present such evidence at trial.

14. Respondent intends to dispute that at the time of the penalty phase trial in April 1992, it was "recognized" in the relevant community that: (1) "mental development" is necessarily "affected by experiences during childhood;" (2) "developmental experiences determine the organizational and functional status of the mature brain;" and (3) the "effect of extreme adversity

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19. Petitioner's brother Ricardo states that his "life went down hill" about three months after his brother Antonio Jr. died in 1981. (See Pet., Ex. U at p. 3.) Up to then, Ricardo managed to play varsity football and baseball in high school, and he got "good" grades, never missed a day of school, and he stayed away from "cholos and from drugs." (*Id.* at p. 1.) Thus, petitioner's father was not a bad role model for his children. Instead, Antonio Jr.'s death caused a change in perspective at least in Ricardo's view. But, this was of questionable weight as a mitigating factor for the robbery-murder committed in this case about eight years after petitioner's brother's untimely accidental death.

on a child's psychological development" could "lead to the creation of psychiatric and behavior disturbances." (See Pet. at 77.) Respondent intends to dispute that: (1) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (2) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005.

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

15. Respondent intends to dispute the allegations that: (1) the "human brain exists in its mature form as a byproduct of genetic potential and environmental history;" (2) "traumatic" experiences "may cause sensation or learning" and "determine the functional capacity of the fully developed brain;" (3) traumatic experiences in "childhood" will "increase the risk of developing a variety of neuropsychiatric symptoms in adolescence and adulthood;" (4) "Post Traumatic Stress Disorder (PSTD)" is among the "many effects of early childhood trauma in adults" and that this will result in "dissociation as a learned response patter;" (5) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (6) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 77-78.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

16. Respondent intends to dispute the allegations that: (1) the "development of Post Traumatic Stress Disorder" has been "formally recognized" by the relevant "medical community" since "1980;" (2) the

"development of PSTD in adults which have suffered from childhood trauma is a result of continued abuse;" (3) it is the "effect" that such abuse has on the "development of the brain" that "leads the traumatized child to develop certain response patterns to deal with the trauma being inflicted on him" or her; (4) such "response to the trauma becomes a learned response which is manifested whenever perceived threat is present;" (5) PSTD "becomes a type of defense mechanism which the child uses to compensate for his inability to cope with the perceived danger; (6) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (7) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 78.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

17. Respondent intends to dispute the allegations that: (1) the "human body and mind" have "deeply ingrained physical and mental responses to threat" such as the allegedly "most familiar" labeled "the 'fight or flight' reaction;" (2) the above "becomes" an "unfortunate problem in the case of abuse child" and that petitioner was in fact an "abused" child who was abused by a "caretaker;" (3) for many children, crying for help from potential trauma is doomed to fail, where the parent cases trauma; (4) the "only defense mechanism available to the child is actually used against him;" (5) research "indicates" that "family dynamics" are "significant factors in the formation of PTSD in children;" (6) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (7) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 78-

79.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

18. On information and belief, respondent denies: (1) petitioner's "family dynamics" were "at best, volatile;" (2) petitioner's and his siblings would "often leave their home in the late hours of the night and wait outdoors or in neighbors homes until their" allegedly drunken father fell asleep;[20/] (3) petitioner's father would "attack" his family members "at any given time without reason;" (4) petitioner and his brothers "would receive beatings for trivial things;" and (5) petitioner's "family dynamics" were "further disrupted" after the death of petitioner's brother in 1981, i.e., when petitioner was 16 years old. (See Pet. at 79.)

Respondent denies that counsel was constitutionally ineffective by failing to discover the above evidence, or, if he did discover it, by failing to present it at petitioner's 1992 penalty phase trial.

19. Respondent intends to dispute allegations that: (1) "[s]tudies have shown that as many as 90% of children who have been physically abused for greater than five years suffer" from "PTSD;" (2) from a "young age, petitioner developed symptoms of dissociation, which are associated with PTSD;" (3) dissociation is "described by experts as simply disengaging from stimuli in the external world and attending to an internal world;" (4) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; (5) petitioner "finds refuge in his art work" and this is a "common recourse of persons exhibiting dissociation;" (6) petitioner's alleged "art work" is a "'dysphoric quality which is often seen in individuals who have

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20. Petitioner's mother states that she took care of petitioner (and his siblings) after school and during vacation time. (Pet., Ex. X at p. 5.)

suffered similar'" abuse; and (7) the above claims about petitioner and his "art" were known and true at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 79-80.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to discover or present the above evidence at trial.

20. Respondent intends to dispute the allegations that: (1) petitioner has "in the past found common avenues of dissociation such as drug use and alcoholism;"[21/] (2) very "often" persons suffering from PTSD attempt to self medicate with drugs and alcohol; (3) research indicates that people with PSTD are "more likely than others with similar backgrounds to have alcohol use disorders;" (4) "individuals with PTSD and alcohol use problems often have additional mental or physical health problems;" (5) up to "fifty percent of adults with alcohol use disorders and PTSD also suffer from a variety of disorders" including "mood disorders, addictive disorders" such as "addiction to or abuse of street or prescription drugs" and "chronic illness" such as "diabetes, heat disease, or liver disease;" (6) a "feeling of futurelessness" is among "the listed symptoms characteristic of all who suffer from PTSD;" (7) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (8) petitioner fell into any of the above categories at the

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21. As noted, petitioner's 2002 habeas corpus clinical psychologist apparently did not review petitioner's 1992 probation report (CT 469-470 [1992 probation report]) or even the various handwritten statements and motions that petitioner drafted and filed in the trial court in 1992 in connection with his various *Marsden* and/or *Faretta* motions (CT "Confidential" 189-207) or petitioner's live comments in open court in connection with the above motions (see RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992, hearing weeks before guilt phase opening statement], 1717-1728 [March 27, 1992, hearing during defense case at penalty phase]; *Valdez, supra,* 32 Cal.4th at pp. 91-95, 98-102). (See Pet., Ex. AA at p. 1.)

time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 80-81.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

21. Respondent intends to dispute the allegations that: (1) "[s]tudies conducted in the 80's and early 90's" indicate that children who have "experienced physical abuse tend to show a heightened anxiety as evinced by among things, self destructive behavior and delinquency;" (2) the above "studies" further reveal that "persons suffering from PTSD exhibit feeling of always needing to be 'on guard' which often result in a tendency to misinterpret benign situations as threatening and result in perceived self-protective behavior;" (3) the above "increased baseline physiological arousal" can "then result in violent behavior" that is "out of proportion to the perceived threat;" (4) "the feeling of guilt commonly experienced" by "trauma survivors" can "sometimes" lead to the "commission of crimes" in which there is a "near certainty of either being apprehended and punished or seriously injured or killed;" (5) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (6) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 81.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to develop or present the above evidence at trial.

22. On information and belief, respondent denies that "further investigation" and research "needs to be done" in this case, and denies that: (1) petitioner was "beaten around the head;" (2) "children beaten around the head" are at a "high risk of neurological damage;" (3) had trial counsel "consulted" clinical psychologist Kaser-Boyd when counsel was appointed in April 1991

or at the time of the trial in March 1992, Kaser-Boyd "would have recommended" that petitioner "undergo thorough neuropsychological evaluation, including a brain scan"[22/] because his alleged "symptoms" are allegedly "consistent with organic impairment;" (4) the above was accepted or recognized by the relevant medical or legal community at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005; and (5) petitioner fell into any of the above categories at the time of the murder in April 1989, at the time of the trial and sentencing in 1992, and presently in 2005. (See Pet. at 81.)

Respondent denies that counsel was constitutionally ineffective for allegedly failing to conduct further investigation of the above issue at the time of petitioner's 1992 penalty phase trial, or for failing to present the above evidence at trial.

23. Respondent admits that at the penalty phase trial in 1992, over objections by the prosecutor (RT 1708-1713), trial counsel "presented testimony regarding security conditions for LWOP prisoners" (see Pet. at 81-83; RT 1826-1863; *Valdez, supra,* 32 Cal.4th at pp. 90-91). Thus, the penalty phase jury heard the following evidence offered by trial counsel.

James Park, a retired correctional officer with the California Department of Corrections who once served as an associate warden at San Quentin, explained to the penalty phase jury both prison classification and general housing conditions for inmates serving life without the possibility of parole (LWOP). Park opined that there were four levels of prison in this state. Level 1 was typically "forestry camp." Level 2 was "medium" confinement. Level

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22. Dr. Kaser-Boyd's present claims were made and based on acts in 2002, i.e., about 13 years *after* the murder, and about 10 years *after* the trial. (See Pet., Ex. AA at pp. 1, 6.) Around the time of trial counsel's appointment and the trial in 1991 and 1992, Dr. Kaser-Boyd apparently had been employed at her current job for two years, or less. (Pet., Ex. AA [page 2 of resume].)

3 was "closed" confinement. Level 4 was "maximum" prison or confinement. Park said an inmate sentenced to LWOP would "most certainly go to one of the now four maximum security level 4 prisons." Those prisons were Pelican Bay, New Folsom, New Tehachapi and Calipatria. Park opined that if appellant were sentenced to LWOP, he would serve his term in one of the above four prisons, which were "all brand new, state-of-the-art prisons." He opined that security at each prison was impregnable. (RT 1826-1833, 1854-1855.)

Park explained to the penalty phase jury that level 4 inmates can work, go to school and move about with some degree of freedom. Security measures are taken when level 4 inmates are out of their cell. Such inmates are routinely searched and inspected. Those needing discipline are placed in a security housing unit, where they spend up to 23 hours a day in a cell, which served as a "pretty good" deterrent to bad behavior by level 4 inmates. In addition, bad behavior could lead to loss of privileges such as not being allowed to exercise in the general population with other inmates. Park opined the violence rate had declined "fairly steadily" in state-of-the-art prisons. (RT 1833-1837, 1858-1863.)

Park told the penalty phase jury that he opposed the death penalty. He opposed it for several reasons. First, it was not a "useful thing" for a civilized society to do. He said it was "bizarre" to believe killing enough people would make the world better. He explained his belief that it was harmful for a society to believe its "serious problems" can be solved by killing people. Second, he opined that victim counseling was better than retribution by the death penalty. Third, he opined that the length of an LWOP term tended to cause such inmates to "settle down." Fourth, having "participated" in an execution, he saw first hand the irrevocability of the gas chamber when the gas began to generate. He stated that it was "pretty awesome" to stand and watch the gas chamber in use. (RT 1855-1857.)

On information and belief, respondent denies that trial counsel failed to investigate, or, if he did investigate, was required to inform the penalty phase jury that petitioner's alleged "capacity to focus on positive goals" indicates that petitioner "would be able to make progress in a therapy-based program." (See Pet. at 82.) At any rate, counsel cleverly used testimony from a retired correctional officer, who was once an "associate warden at San Quentin" prison (see *Valdez, supra,* 32 Cal.4th at pp. 90-91), to argue to the penalty phase jury that no one should ever receive the death penalty (see RT 1988-1990 [trial counsel's penalty phase closing argument]). Trial counsel argued to the jury that even a former San Quentin warden "still has the lust for life and the lust for human beings and he still considers those people that go to prison people" and "human beings." (RT 1990.)

24. On information and belief, respondent denies that trial counsel was "ineffective in failing to present the above mentioned evidence to the jury." (See Pet. at 82.) Respondent admits that "[p]etitioner bears the burden" to prove to prove the above. (*Ibid.*) On information and belief, respondent denies that counsel presented the penalty phase jury with an "unreasonable false portrayal of" petitioner's "family[.]" (See *ibid.*) On information and belief, respondent denies that counsel failed to "investigate and present extensive mitigating evidence about petitioner's background[.]" (See Pet. at 83.) On information and belief, respondent denies that counsel: (1) failed to consult with an expert; (2) was required to "develop and present expert testimony regarding" petitioner's alleged "mental health, drug addiction and possible brain damage[,]"; (3) rendered the "result" of the trial "unreliable and unfair" by the alleged failure to do the above' and (4) was "ineffective" by allegedly "failing to present such evidence to the court at the automatic motion to modify the verdict." (See *Ibid.*) After the guilty phase trial, petitioner personally wrote the following statement to the trial court: "I do believe that God has done justice."

(CT "Confidential" 205.)

Respondent alleges that counsel's 1992 performance at trial met constitutional standards for effective assistance notwithstanding any failure to investigate, discover, develop, or present specific mitigation evidence as alleged. Respondent thus denies that counsel's representation fell below an objective standard of reasonableness as of the time of counsel's conduct, and denies that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. (See *Strickland, supra,* 466 U.S. at pp. 688, 690, 694.) In short, respondent denies that counsel gave petitioner ineffective assistance as alleged in subclaim H of Claim IV of the petition.

4. Subclaim I

In subclaim I of Claim IV, petitioner claims that he received ineffective assistance of trial counsel because counsel failed to make a proper offer of proof as to third party culpability evidence at his penalty phase trial. (Pet. at 83-84.) Respondent denies the above general claim, and admits or denies specific factual assertions in subclaim I as follows.

Respondent admits that trial counsel "requested and received an instruction on lingering doubt and argued lingering doubt to the jury." (Pet. at 83; see *Valdez, supra,* 32 Cal.4th at pp. 128-129.) As this Court has already observed:

> Defense counsel, for example, argued to the jury during his guilt phase closing argument that other individuals could have killed or robbed the victim, arguing at one point: "In the back alley . . . are other people that are found, that are detained, that are talked to. Guenther knows they're back there. He talked to them. [¶] Were those people's shoes gathered up? Were those people's shoes taken? Were those people shoe's

analyzed? Were those people's shoes looked at for blood?"

(*Valdez, supra,* 32 Cal.4th at p. 129; see RT 1370.) During the penalty phase, trial counsel, in relevant part, argued to the jury:

> [Y]ou have received the law that has to do with lingering doubt, pure and simple. [¶] Well, when I stood up here during the course and scope of the guilt phase and I indicated to you Ladies and Gentlemen that I have been doing this for 15 years and I have argued cases before for 15 years and that this was a close case and that I believe that there was reasonable doubt, I believed it. And I believe it now.

(RT 1993.) Trial counsel also argued: "Mistakes cannot be corrected if you kill somebody." (*Ibid.*) Counsel further argued: "I respect your decision, I don't agree with it" and "I've lost cases that I should have won" and "in my humble opinion this is one of those cases." (RT 1994.) Counsel argued:

> [Y]ou have made your decision based on a couple of drunks who apparently you believe. You made your decision on blood being placed on a gun that you cannot say with any reasonable point of view that you know for certain that it's the blood of [the victim], cannot do it, not based on the testimony in this courtroom, cannot do it.

(RT 1994.) Counsel also argued: "Is it possible that the murder weapon that [petitioner's] prints was on is not the murder weapon? Yes." (*Ibid.*) Counsel argued: "Lingering doubt [sic]. Mistakes take place in this system, Ladies and Gentlemen." (RT 1994-1995.)

On information and belief, respondent denies that counsel "failed to seek the admission of his best lingering doubt evidence; Detective Guenther's testimony about the arrest of Liberato Gutierrez." (See Pet. at 83.) On information and belief, trial counsel did not make a third party culpability offer of proof at the penalty phase because, as an officer of the court, counsel had a duty to refrain from knowingly proffering false trial evidence. On information

and belief, counsel did not want to "point the finger" at Gutierrez (see *Valdez, supra,* 32 Cal.4th at pp. 107-108, 129) because respondent believes petitioner may have told counsel: (1) he was the victim's shooter; and (2) he robbed the victim after the shooting.

Respondent thus denies that counsel's representation fell below an objective standard of reasonableness as of the time of counsel's conduct, and denies that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. (See *Strickland, supra,* 466 U.S. at pp. 688, 690, 694.) In short, respondent denies that counsel gave petitioner ineffective assistance as alleged in subclaim I of Claim IV of the petition.

B. Summary Of Petitioner's Exhibits Cited In Subclaims A, B, H, I

The ineffective assistance of counsel issues in subclaims A, B, H, and I are (in whole or in part) based on the following ten categories of habeas corpus exhibits offered by petitioner: (1) pre-trial records from the Pomona Police Department as to the murder that were arguably provided to trial counsel during pre-trial discovery (Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ);[23/] (2) a pre-trial (August 1991) letter from employees at a laboratory in Maryland to a criminalist at the Los Angeles County Sheriff's office stating that a comparison was made between the victim's blood and bloodstains "from pants" and that the blood on the pants did not come from the victim (Pet., Ex. F); (3) a pre-trial

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23. Exhibit II is a record from the West Covina Police Department as to petitioner's arrest for driving under the influence of a controlled substance in November 1988, i.e., over five months before the murder. (Pet., Ex. II.) Exhibit JJ contains files involving petitioner's May 1989 conviction for being under the influence of a controlled substance as to his arrest on January 16, 1989, i.e., over three months before the murder. (Pet., Ex. JJ.) The murder occurred about 3 a.m. on April 30, 1989. (*Valdez, supra,* 32 Cal.4th at p. 81.)

(1985) record of petitioner's hearing to decide his prison placement (Pet., Ex. O); (4) seven (post-trial) declarations from relatives and others (Pet., Exs. R, S, T, U, V, W, X) four of whom testified at the penalty phase, i.e., petitioner's mother Rosa (Pet., Ex. X; RT 1771-1773) and his two sisters Graciela (Pet., Ex. R; RT 1671-1681) and Victoria (Pet., Ex. W; RT 1652-1670; see *Valdez, supra*, 32 Cal.4th at p. 90) and his friend Carolina Reyna (Pet., Ex. T; RT 1639-1651; *Valdez, supra,* 32 Cal.4th at p. 90);[24/] (5) court documents as to petitioner's father's conviction for continuous sexual abuse against a child under the age of 14 for the (post-murder trial) period of 1998 to 1999 (Pet., Ex. Y); (6) a declaration (dated 10 years after the trial) from a psychologist who has never interviewed or even met petitioner, but opines that petitioner "received an inadequate presentation of mitigating factors" (Pet., Ex. AA); (7) school records as to petitioner (Pet., Ex. BB), his brother Ricardo (Pet., Ex. CC), and his (deceased) brother Antonio (Pet., Ex. DD); (8) a pre-trial (1988) record from a doctor about surgery that he performed on petitioner to treat multiple stab wounds to petitioner's abdomen (Pet., Ex. GG); (9) a post-trial news story (apparently published seven years after the murder and four years after the trial) authored by a doctor about "trauma" suffered by "male prisoners" (Pet. Ex. KK); and (10) post-trial social security records as to both petitioner's father (Pet., Ex. NN) and his mother (Pet., Ex. OO).

Before individually addressing the merits of subclaims A, B, H, and I,

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24. Petitioner's brother Ricardo (Pet., Ex. U) did not testify at trial like their parents, sisters and an aunt. (See *Valdez, supra,* 32 Cal.4th at pp. 89-90.) Besides declarations from Ricardo and four people who testified at the penalty phase (petitioner's mother, two sisters, and Reyna), petitioner's instant seven declarations include declarations from: (1) Rose Solis, who is petitioner's niece and was about 10 years old at the time of the trial and less than 7 years old at the time of the murder (Pet., Ex. S); and (2) Sabrina Zueck, who is Reyna's daughter and was about 12 years old at the time of the murder and about 15 years old at the time of the trial (Pet., Ex. W).

as an aid to this Court, below is a summary of petitioner's habeas exhibits, along with factual assertions based on petitioner's appellate record in the context of his above ten categories of habeas corpus exhibits.

1. Petitioner's Police Records

Petitioner's habeas corpus exhibits categorized as police records (Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ) are as follows.

Petitioner's exhibit B is a nine-page police reported dated May 1, 1989, that was prepared by a Pomona Police detective (McLean). Therein, Detective McLean narrates the investigation from the time that he initially arrived at the crime scene and interviewed: (1) fellow police officers; (2) the victim's neighbors; (3) the victim's brother; and (4) one of the reporting witnesses, i.e., Arturo Vasquez, who testified at trial and last saw the victim alive in his small house with petitioner (see *Valdez, supra,* 32 Cal.4th at pp. 81-82 [discussing crime and discovery of body by Vasquez, Rigoberto Perez, and Gerardo Macias]).[25/] Simply put, there does not appear to be any new evidence in the above report.

Petitioner's exhibit C is an 11-page police report dated May 2, 1989, that was prepared by Detective McLean wherein he narrates his interviews with: (1) Liberato Gutierrez, Arturo Vasquez, Gerardo Macias, Rigoberto Perez, and Andres Gutierrez; and (2) Los Angeles County deputy coroner Dr. Susan Selser, who testified at trial (RT 818-834). In this report, Detective McLean reports that after his interview with Liberato Gutierrez, he released this person

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25. Detective McLean was the one who decided to arrest Liberato Gutierrez and others found in the alley by the victim's house, as alleged regarding the third party culpability issue in subclaims B and H of Claim IV. (See *Valdez, supra,* 32 Cal.4th at p. 109; RT 1171.) Gerardo Macias was cross-examined (RT 741-795) and re-cross-examined (RT 802-811) at trial by trial counsel.

from custody. Simply put, there does not appear to be any new evidence in the above report.

Petitioner's exhibit D is a six-page police report dated June 20, 1991, that was prepared by Pomona Police Detective Greg Guenther, who testified at petitioner's guilt phase trial as a defense witness. (RT 1185-1203.) In the report, Detective Guenther narrates his interview with Pato that was conducted at a state prison on June 18, 1991. (See *Valdez, supra,* 32 Cal.4th at pp. 106-110.) There was no pre-trial evidence that Pato was at the crime scene at the time of the shooting. Simply put, there does not appear to be any new evidence in the above report.

Petitioner's exhibit E is a one-page police report dated May 6, 1991, that was prepared by Detective Guenther. In this report, the detective narrates: (1) he gave a pair of pants to someone at the "crime lab" because the pants contained bloodstains; and (2) he found said pants in the car in which petitioner was arrested. Simply put, there does not appear to be any new evidence in the above report.

Petitioner's exhibit J is a three-page police report dated April 25, 1990, that was prepared by Pomona Police Officer Allen Maxwell, who testified at the guilt phase trial. (RT 994, 1000-1026; see *Valdez, supra,* 32 Cal.4th at p. 85.) In the report, Officer Maxwell narrates his interview with petitioner on April 19, 1990, that was held while petitioner was in prison. (See *Valdez, supra,* 32 Cal.4th at pp. 124-125 [rejecting prosecutor misconduct claim as to jury hearing about petitioner's prison status].) In short, there does not appear to be any new evidence in the above report.

Petitioner's exhibit K is an eight-page police report dated May 1, 1989, that was written by Pomona Police Joseph Pallermino, who testified at the preliminary hearing, and was cross-examined therein by trial counsel. (CT 40-47.) He testified at the guilt phase trial. (RT 865-884; see *Valdez, supra,* 32

Cal.4th at p. 84.) In the report, Officer Pallermino narrates: (1) events involving petitioner's arrest and the seizure of the Monte Carlo, including the gun found in the car; and (2) petitioner's statements pursuant to his arrest. There does not appear to be any new evidence in the report.

Petitioner's exhibit L is a three-page police report dated February 25, 1991, that was written by Detective Guenther wherein he narrates his interview with Pedro Morales on February 22, 1991. Morales was arrested with petitioner. Morales was the driver of the Monte Carlo when petitioner was arrested about 24 hours after the crime. (See *Valdez, supra,* 32 Cal.4th at p. 84, fn. 3.) There does not appear to be any new evidence in the report.

Petitioner's exhibit Z is a six-page police reported dated May 24, 1999, i.e., years after petitioner's trial ended, prepared by an Officer Bozarth. In this report, the officer narrates the events involving the arrest of petitioner's father for indecent exposure in May 1999, i.e., years after petitioner's trial ended. Petitioner's exhibit Z also contains other police documents involving the above crime.

Petitioner's exhibit II is a three-page police report (with page 2 missing from the exhibit package served on respondent) dated November 26, 1988, i.e., about five months before the shooting, that was prepared by an officer with the West Covina Police Department, i.e., a police agency different from the one that investigated the shooting. In the above report, the events about petitioner's intoxication in November 1988 are narrated.

Petitioner's exhibit JJ is a four-page police report and other police records from the Pomona Police Department involving petitioner's arrest for being under the influence of a controlled substance on January 16, 1989, i.e., over three months before the instant shooting.

2. 1991 Letter From Laboratory

At the preliminary hearing in May 1991, petitioner's trial counsel cross-examined two Pomona Police Department officers (Lieutenant Larry Todd and Officer Joseph Pallermino) about: (1) the arrest of petitioner; and (2) the seizure of the Monte Carlo at the 7-11 store about 24 hours after the instant robbery-shooting. (CT 36, 38-40, 45-47.) In other words, about 11 months before the March 1992 trial, trial counsel was arguably aware of all items seized from the Monte Carlo, including pants containing bloodstains. (See CT "Supplemental II" 45, 59.) News about blood on the above pants was revealed in a police report from Detective Terrio dated May 2, 1989. (*Id.* at p. 65.) The defense received the police reports on April 4, 1991, i.e., before the preliminary hearing (CT "Supplemental One" 76-78), and trial counsel cross-examined Detective Terrio at the preliminary hearing (CT 13, 22-25). In sum, by the preliminary hearing in May 1991, trial counsel was arguably aware of the blood on the pants in the Monte Carlo, and thus, by trial time about 10 months later in March 1992, it can be reasonably inferred that trial counsel made a tactical decision about how to deal with the blood on the pants in the Monte Carlo.

Indeed, at a March 6, 1992, hearing to suppress evidence of the gun found in the car, trial counsel represented that petitioner was: (1) not the owner of the Monte Carlo; and (2) merely a passenger. Petitioner was present when counsel made the above statements. At this hearing, nothing was said about: (1) the pants found in the Monte Carlo; (2) blood on said pants; or (3) that said blood was tested and resulted in a finding that the source of the blood was someone other than the victim. (See RT 333-335.) The above will be discussed below on the merits of subclaims A, B, and I.

At any rate, nearly three months after the preliminary hearing, a laboratory in Maryland dated a letter that is now designated as exhibit F of the petition. In the letter, addressed to a criminalist at the Los Angeles County

Sheriff's Department, laboratory officials stated: (1) on June 20, 1991, the victim's blood sample was received along with material cuttings inside an envelope labeled "blood stains from pants"; and (2) testing resulted in a finding that the victim was not the source of the blood on the pants. (Pet., Ex. F.)

The prosecutor presumably gave trial counsel a copy of the above letter in a timely manner prior to trial. At a pre-trial hearing on June 26, 1991, the prosecutor told the defense that "a pair of bloody pants" had been sent to "Sellmark [sic] Lab" (see Pet., Ex. F) for "D.N.A." testing. (RT 3-2.)[26] Thus, months before the trial, the defense knew that the blood on the pants was being

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26. At this hearing, attorney Charles Uhalley appeared in court for trial counsel (Robusto) because Robusto was engaged in another trial. At any rate, petitioner was present at the above hearing. (RT 3-2.) At the hearing, the prosecutor said "as soon as I get it, I hand everything over to Mr. Robusto, and I did hand Mr. Uhalley a supplemental report this morning." (RT 3-3.) In other words, it seems clear that the prosecutor gave trial counsel a copy of petitioner's instant letter (Pet., Ex. F) as soon as the prosecutor received it. At the preliminary hearing in May 1991, trial counsel cross-examined James Roberts, a criminalist at the Los Angeles County Sheriff's Department. (CT 31, 33.) While petitioner's August 1991 letter was addressed to supervising criminalist Ronald Linhart (Pet., Ex. F), it is reasonable to presume that upon receipt of the letter, Linhart, Roberts, or one of their colleagues gave petitioner's instant letter to the prosecutor for delivery to trial counsel. At a pre-trial hearing attended by petitioner and trial counsel on July 3, 1991, the prosecutor said that she would give the pants testing results to trial counsel. The prosecutor said: "I haven't gotten a preliminary result yet. As soon as I do, I will get that over to Mr. Robusto immediately." (RT 8.) Also, at the June 1991 hearing, attorney Uhalley said he had been having "extensive conversations" with trial counsel (Robusto) about this case, and trial counsel was near his completion of reviewing all discovery documents. (RT 3-3, 4-5.) At a pre-trial hearing attended by petitioner and counsel on September 4, 1991, trial counsel said: "I would indicate for the purposes of the record that all the discovery at this point has been complied with by the prosecution." (RT 11.) Thus, months before petitioner's March 1992, trial counsel apparently received all prosecution records, including petitioner's instant police records (see Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ) and his letter about the blood on the pants (see Pet., Ex. F; see also RT 12).

tested. Indeed, by trial time in March 1992, trial counsel had clearly made a tactical decision about the blood on the pants. At the June 1991 pre-trial hearing, the prosecutor told petitioner, defense counsel, and the court that she "spoke to [trial counsel] Robusto" about the fact that the results from the pants testing could take three months, and trial counsel "didn't appear to be too concerned about that." (RT 3-3.) The above will be further discussed below on the merits of subclaim A.

Also, earlier, at the preliminary hearing in May 1991, trial counsel cross-examined an expert about: (1) blood testing; and (2) the fact that petitioner's blood sample showed that he was not the source of blood found on the gun seized from the Monte Carlo. (See CT 94-98.) In other words, about 11 months before the trial in March 1992, trial counsel was aware of the potential for blood as to items seized from the car such as the pants at issue in subclaim A of Claim IV of the petition. (See CT "Supplemental One" 45-46.) Again, the foregoing will be further discussed below on the merits of subclaim A.

3. Prison Document

Petitioner's habeas corpus exhibit O is a pre-trial (1985) record of petitioner's hearing to decide his prison placement. (Pet., Ex. O.)

4. Seven Declarations

Petitioner's seven post-trial habeas corpus declarations are from relatives and others (see Pet., Exs. R, S, T, U, V, W, X), four of whom testified at his penalty phase trial, i.e., his mother (Pet., Ex. X; RT 1771-1773), sisters Graciela (Pet., Ex. R; RT 1671-1681) and Victoria (Pet., Ex. W; RT 1652-1670; see *Valdez, supra*, 32 Cal.4th at p. 90), and his friend Reyna (Pet., Ex. T; RT 1639-1651; *Valdez, supra,* 32 Cal.4th at p. 90).

At any rate, on August 14, 1991, the prosecutor filed a letter in the trial

court addressed to trial counsel that revealed the aggravating evidence that the People would seek to introduce against petitioner at a penalty phase trial. (CT 150-151.) Thus, nearly eight months prior to the trial in March 1992, trial counsel was aware that mitigating evidence would be needed to offset the voluminous aggravating evidence being proffered by the People. At a hearing attended by petitioner on March 9, 1992, trial counsel said that he would soon give the court a defense witness list. (RT 357-358.)

Also, the booking report incident to petitioner's arrest gave the names and telephone numbers for petitioner's sisters (Victoria and Graciela Valdez). (CT "Supplemental II" 40.) Thus, trial counsel arguably aware of petitioner's sisters soon after counsel was appointed. Both sisters, Victoria (RT 1652-1670) and Graciela (RT 1671-1681), testified for petitioner at the penalty phase, along with his father, Antonio Valdez (RT 1761-1770), his mother, Rosa Valdez (RT 1771-1773), his aunt, Laticia Belmar[27/] (RT 1749-1760), and three close family friends, i.e., Carolina Reyna (RT 1639-1651), Enedina Garcia (RT 1626-1638) and her husband Jose Garcia (RT 1746-1748). (See *Valdez, supra,* 32 Cal.4th at pp. 89-90.)

As to the details in petitioner's seven post-trial declarations (Pet., Exs. R, S, T, U, V, W, and X), respondent summarizes them as follows.

Petitioner's exhibit R is post-trial August 2000 declaration from his sister Graciela Davila Valdez, who testified at his penalty phase trial. There, she said that she was a single mother who worked as a food service worker and word processor. She told petitioner's 1992 jury that petitioner was good, respectful, non-violent, and that she loved him. She also said that petitioner loved his family members, and they loved him. She opined that petitioner should not receive the death penalty, and that he could help others if sentenced to life without the possibility of parole. She added that petitioner wrote to her

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27. Belmar was petitioner's mother's sister. (RT 1749-1750.)

children from prison. (RT 1671-1681; see *Valdez, supra,* 32 Cal.4th at p. 90.)

Besides repeating the above, Graciela now declares that petitioner "always seemed to be in trouble." (Pet., Ex. R at p. 1.) She says this even though she is "seven years younger than" petitioner, and she was "rarely at home when my father was there." (*Id.* at pp. 1-2.) Graciela now declares:

> My father has always been very strict and abusive. He has never believed in teaching. I have heard stories about my family's life in Mexico and the kids being forced to kneel outside in the heat. My father would spank, and hit us frequently, He had mood swings and when he drank he was extremely abusive toward the boys and towards my Mom. He would often come home drunk, chase us with a knife and kick us out of the house in the early morning hours. My mother would hide clothes outside so that we would have something to put on when we were forced to flee the house in the middle of the night.

(*Id.* at p. 1.) This allegedly is proof of "severe and unrelenting emotional and physical abuse" that petitioner had "throughout his childhood" causing "mental state and serious resulting substance abuse" that counsel failed to investigate or consult with experts on as urged in subclaim H of Claim IV. (See Pet. at 69-83) Respondent disagrees for reasons explained later.

Graciela declares that her father was on petitioner's "case" about "trivial things like not listening or not doing things the way he liked them done." Also, her father "always punished" petitioner and called him "the 'bad one.'" Graciela says petitioner was "always grounded and was almost never allowed to watch televison with the rest of us." Once, she opened a door and saw her father "beating" petitioner with a "2x4" so hard that he could not "get out of bed the next day." As to the above, Graciela says petitioner did not receive medical aid, and he "ran away when he was able to get out of bed." Graciela states that petitioner went to El Paso, Texas and Mexico. (Pet., Ex. R at pp. 1-

2.)

Graciela claims her father "rarely had a steady job, yet he behaved as if he were of a higher social class." He acted as if he was rich and often "misspend what little money" they had. But, her mother "always found full time employment[,]" and "the boys would help" their parents clean "different locations all night long and still attend school in the morning." (Pet., Ex. R at p. 2.) As her father told petitioner's penalty phase jury (RT 1763; see *Valdez, supra,* 32 Cal.4th at pp. 89-90), Graciela repeats that her father worked for a janitorial service called "Gibson Brothers." (Pet., Ex. R at p. 2.) Graciela says her father "never paid" petitioner. (*Id.* at p. 2.)[28/]

Graciela says her parents separated around 1984, when she was 14 years old and petitioner was about 21 years old. (Pet., Ex. R at p. 2.) Also, Graciela says her father once "threatened to kill" her sister Victoria,[29/] and her father once "slapped" her brother Tony, who died due to a car accident when Tony was 19 years old. (*Id.* at pp. 1-2.) Graciela says her father is in "denial about the abuse that he put the family through." (*Id.* at p. 2.) She adds that as of August 2000, her father was in custody awaiting trial for impregnating her oldest daughter Cynthia when Cynthia was 13 years old, and that her father had

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28. Petitioner's father told the 1992 penalty phase jury that before petitioner stopped attending school around 1977 when he was about 14 or 15, he worked part-time or on weekends at Gibson Brothers, where the father was "the assistant supervisor." (RT 1762-1763.) Also, after petitioner stopped attending school, he worked full-time, was a good worker, and followed instructions at Gibson Brothers. (RT 1764-1765.) Later, his father bought a restaurant in Pomona for $25,000, and petitioner worked at the restaurant for about one year when he was about 14 years old. (RT 1766-1767.) After that, petitioner worked at a "maintenance" company with his father. When his father formed his a construction company, petitioner worked there as well. (RT 1767-1768.)

29. Victoria testified at the 1992 penalty phase trial. (RT 1652-1670; see *Valdez, supra,* 32 Cal.4th at p. 90.)

been having "intercourse" with his granddaughter Cynthia "for three years before he was caught." (*Id.* at p. 3.)

Graciela says petitioner had "problems with drugs which altered his behavior." She does not indicate when the above occurred or what type of drugs were allegedly used, but she says petitioner "tried to quit but was never successful." (Pet., Ex. R at p. 2.) Graciela now opines as follows:

> Drugs changed [petitioner]. He began to have drastic mood swings. He would become angry when he did not have his drugs. During the time that he brought Tina Marie Sanchez to live at our home, Victoria and I would often find syringes and marijuana pipes in his room.

(*Id.* at pp. 2-3.)

Petitioner's exhibit W is a post-trial July 2000 declaration from his sister Victoria Perez, who testified at his penalty phase trial. There, she said she was a single parent and food service worker, and her family loves petitioner. Victoria also said that petitioner is a good person, she never saw him angry or violent, he lived with her when he was a young adult, and he helped to raise her 10-year-old and 4-year-old daughters. Victoria told the 1992 penalty phase jury that petitioner was very good to her daughters, they loved him, and she trusted petitioner with her daughters. Victoria added that petitioner dropped out of school when he was 15 years old, and worked for their father in the janitorial and construction business. (RT 1652-1670; see *Valdez, supra,* 32 Cal.4th at p. 90.)

Missing from Victoria's penalty phase testimony is the following, which she has now included in her declaration to this Court.

Victoria claims that in 1988, when petitioner was 25 years old, he and his girlfriend Tina Marie Sanchez lived with "us." Around this time, petitioner was always "out of touch[,]" "developed a serious drug problem" and "seemed to always be under the influence of drugs." Victoria says she "frequently saw

pipes and syringes" in petitioner's room, and saw "scabbed puncture wounds and bruises" on petitioner's "inner elbows, similar to the type of marks you get after you have blood drawn." Victoria says she once saw petitioner "snorting white powder in the bathroom." Victoria says that petitioner's "drug abuse" became "so bad" that "we no longer wanted him to live with us." (Pet., Ex. W at p. 3.) Victoria says if petitioner's trial counsel or investigator had "asked" her, she would have told the "the above information. She claims that petitioner's trial counsel "never interviewed" her, and that trial counsel "just put" her "on the stand." (*Id.* at p. 4.)

Victoria adds that petitioner was "always the target of my father's aggression" and her father was "terrible to us." She says her father "beat all the boys" and petitioner "the most." She says petitioner was badly beaten over a "minor thing like not listening." (Pet., Ex. W at p. 1.)

Born in 1964, i.e., one year after petitioner, Victoria claims that her father beat petitioner starting when petitioner was three year old, or "earlier." She says he father beat "the boys" with "belts, fists or anything he could get his hand on." Victoria claims that when petitioner was five years old, her father used to get mad and make petitioner stand in the sun holding "as many as three bricks in each hand." Also, when petitioner got older, her father beat petitioner with an extension cord that left bruises and welts "all over" petitioner's body. Further, "[n]eighbors" once called the police" due to a beating that her father inflicted on petitioner, but there was "no follow up." Victoria claims that when she was in "elementary" school, she attended "group counseling" to help her "cope with the abuse" that she and her siblings "suffered." (Pet., Ex. W at pp. 1-2.)

Victoria also claims her father often came home drunk while her mother was at work. She adds that on "weekends[,]" her father got drunk, "hit" the children, and locked them out of the house often between 2 a.m. and 5 a.m.;

thus, leaving her and her siblings "barefoot and cold." (Pet., Ex. W at p. 2.) Victoria says "[s]ometimes" she and her siblings would escape to the house of Carolina Reyna (*ibid.*), who testified at petitioner's penalty phase trial (RT 1639-1651; see *Valdez, supra,* 32 Cal.4th at p. 90) and provided petitioner here with a post-trial declaration (see Pet., Ex. T).

Victoria claims her father had a large knife with a 10-to-12 inch curved blade that he used to "chase" his children around the house when he was drunk or angry. She says whoever got caught got cut, and petitioner was "cut on the back on a couple of occasions." (Pet., Ex. W at p. 2.)

Victoria claims that when petitioner was 13 years old, he began to "experiment with drugs and alcohol, yet he remained friendly and loving." Around this time, petitioner would also "sniff gasoline" with Victoria, and he "continued" after Victoria stopped doing this. (Pet., Ex. W at p. 2.)

Victoria says when petitioner was 13 years old, he "left home for about two months[.]" Also, when petitioner was 16 years old around 1979, her father beat petitioner with a "two by four[.]" After petitioner managed to get out of bed, he "ran away" to Texas. Victoria claims when petitioner returned from Texas, her father had "real hate" for petitioner, and he "never allowed" petitioner to watch television and "always punished" petitioner. (Pet., Ex. W at pp. 2-3.)

Victoria also claims that years ago Sabrina Zueck said Victoria's father had "molested her." Victoria adds that she "recently" learned about her father's "history of molesting children[,]" including Teresa Belmar and Victoria's daughter Rose Mary Solis.[30/] (Pet., Ex. W at p. 4.)

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30. Petitioner has provided declarations from Zueck (Pet., Ex. V) and Solis (Pet., Ex. S). Victoria's cousin (Teresa Belmar) apparently is the daughter of Laticia Belmar, i.e., petitioner's aunt who testified at his penalty phase trial. (See *Valdez, supra,* 32 Cal.4th at p. 90.) There, Laticia (petitioner's mother's sister) testified that she had lived in petitioner's city of birth in Mexico for 38

Petitioner's exhibit S is post-trial October 1999 declaration from Victoria daughter (Solis), who was born in March 1982, and thus, was 10 years old at the time of petitioner's trial. Solis says petitioner "has always been kind and loving" to her and her siblings, but her grandfather began "sexually molesting" her around 1989, i.e., around the time of the murder (when petitioner was around 26 years old and Solis was about 7 years old). Solis says her grandfather was often "drunk" and yelled at "everyone" and seemed to be "complaining about something." But, Solis says she managed to become a "4.0" high school student in Pomona even though she "always believed" her grandfather was a "sick man" who had serious psychological "problems." (Pet., Ex. S at pp. 1-2.)

Petitioner's exhibit V is post-trial 1999 declaration from Sabrina Zueck, who is the daughter of Carolina Reyna.[31/] Zueck, who was born in 1977, and thus, was about 15 years old at the time of petitioner's 1992 trial, claims her mother (Reyna) remained "friends" with the Valdez family after Zueck's father died in 1978. Zueck says petitioner's father was violent and abusive towards his family, especially "the boys." Zueck was never close to petitioner's father, but petitioner's mother was like a grandmother to Zueck, and petitioner and his siblings were "aunts and uncles" to Zueck. Zueck lived next door to

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years, and had known petitioner since his birth. Laticia took care of petitioner as a child on a daily basis, and he was a well-behaved boy. As a boy, he took care of her three children. Laticia testified that petitioner attended church as a boy, he was a giving child, and he once gave the shirt off his back to another boy. Laticia told the penalty phase jury that petitioner once saved another boy from drowning, and gave gifts to Laticia's children. Laticia visited petitioner and his family in Pomona, and they often went up to Stockton to see her. Laticia testified that she had not seen much of petitioner since 1981, and her fond memories were based on petitioner as a boy in Mexico. (RT 1749-1760.)

31. As noted, Reyna testified at petitioner's 1992 penalty phase trial. (RT 1639-1651; see *Valdez, supra,* 32 Cal.4th at p. 90.)

petitioner's family, and Zueck says that "the boys" always fled to her house to get away from their father. Zueck claims "the boys" were always crying due to something their drunken father had done to them, and the boys often slept at her house to escape from their father. Zueck once saw petitioner "crying and pulling at his hair" in frustration over the fact that his father had hit him for no apparent reason.[32/] Zueck says when she was in preschool or kindergarten, petitioner's father began sexually molesting her for the next two years until Zueck told her mother. (Pet., Ex. V at pp. 1-2.)

Petitioner's exhibit T is post-trial October 1992 declaration from Reyna, who testified at the 1992 penalty phase trial. (RT 1639-1651; see *Valdez, supra,* 32 Cal.4th at p. 90.) At trial, Reyna said she met petitioner when she was 24 years old and he was 12 years old, and they were close friends. Reyna told petitioner's 1992 jury that she was a single mother of 14-year-old daughter and 7-year-old son, she worked for a Christian radio station in Pasadena, and she viewed petitioner as a brother. Reyna added that she loved and trusted petitioner, and petitioner helped raise her two children. Also, Reyna told the jury that petitioner loved to joke around, have fun, party, and go out dancing. Reyna added that petitioner had "a few problems with his father" because his father would always yell at him and his siblings. (RT 1642.) Reyna also told the jury that petitioner always obeyed his father, petitioner was never violent or hostile, and petitioner was not capable of killing another person. (See RT 1639-1651.)

Missing from Reyna's 1992 trial testimony is her present claim that petitioner's father "always seemed to be very harsh with" petitioner. Reyna says petitioner's father would often "mistreat" petitioner for "no real reason." Once, his father beat petitioner "so bad" that petitioner "did not come out for a whole week." Reyna says petitioner's father was "a very violent man[,]" he

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32. Petitioner was 14 years old when Zueck was born.

slapped and pushed his wife (Rosa), he became irate while under the influence of alcohol, and he often chased his children out of the house in the "early morning" hours. When his father became "too abusive," petitioner and his siblings would sleep at Reyna's house. Reyna adds that when her daughter (Zueck) was six years old, petitioner's father started sexually molesting Zueck, but Reyna "never filed formal charges[.]" (Pet., Ex. T at pp. 1-2.)

Petitioner's exhibit X is a post-trial declaration from petitioner's mother, Rosa Valdez. At the 1992 penalty phase trial, she testified that petitioner helped her a lot, he was a friend and meant everything to her, and he was always respectful of her. (RT 1771-1773; *Valdez, supra,* 32 Cal.4th at p. 90.) Post-trial, petitioner's mother makes the following 1999 claims to this Court.

Petitioner's mother says she met her husband in 1959, they began living together in 1960, and they got married in 1965 after she gave birth to four of their five children. Petitioner, her second child, was born in Mexico in 1963, and he attended Catholic school in Mexico like all of her children except her youngest child (Graciela). Petitioner was her only child that was not born at a hospital, and her oldest child died in a car accident in 1981 when he was 19 years old. (Pet., Ex. X at p. 1-2, 7.)

Petitioner's mother says her husband's parents divorced when her husband was seven years old, and her husband was raised by a mother who "spoiled" her husband. Also, her husband attended "prestigious schools" in Mexico, his father was a former "Mayor of Torreon" and was killed by a "political opposition" in 1969. Her husband's mother was a midwife who once owned a clinic, and she died of cancer in 1969. (Pet., Ex. X at p. 2.)

According to Petitioner's mother, when they lived in Mexico, her husband worked as a bartender and a waiter, and he stared drinking around 1960. When he drank, he was "terrible" and he started beating her in 1961, i.e., before petitioner's birth in 1963. When petitioner was a "toddler[,]" he saw his

father hit his mother with a closed fist. Also, petitioner's mother says that her husband hit her three sons, including petitioner, with his fists. Petitioner's mother adds that her husband "would only help out with money once or twice a month to buy food," and thus, she was the primary financial "provider" for their family. (Pet., Ex. X at pp. 1-3.)

According to petitioner's mother, when petitioner was four years old, she learned about the "beatings" that her husband had been inflicting on petitioner. For example, upon the discovery that petitioner had taken a jar of dimes, his father "burned" five-year-old petitioner's hands. Someone told petitioner's mother that her husband made three-year-old petitioner stand in the sun holding "concrete blocks" over his head as "punishment." Also, petitioner's father continued beating petitioner until he was 18 years old. His father talked "mean" to petitioner, was "very strict" and "treated" petitioner like he was in the "army." When petitioner was 11 years old, his father hit him on the knee with a stick, and this caused petitioner's knee to swell and caused petitioner pain for a long time. Petitioner was often kept from school due to marks on his body, and he never received medical aid because the family did not have insurance. When petitioner was 12 years old, he ran away from home for about two months. Upon returning home, petitioner's father treated petitioner even "worse[.]" (Pet., Ex. X at pp. 3-4.) But, as petitioner's mother says: "Despite all of this abuse, [petitioner] was a happy boy." Indeed, he "played a lot like a normal kid." (*Id.* at p. 4.)

From June 1972 to July 1973, petitioner's mother lived with her children in San Bernardino, i.e., away from their father. From July 1973 to September 1975, petitioner's mother and her children returned to Pomona to live with their father plus petitioner's mother's brother, and his wife. Around this time, petitioner's father worked at a Holiday Inn, at a factory in El Monte, and as a handyman. Meanwhile, petitioner's mother worked in a sewing factory, and

she worked for about four years as a housekeeper at a hospital in Pomona. Around this time, she took the children to school, and she took care of them after school and during vacation time. (Pet., Ex. X at pp. 4-6.)

According to petitioner's mother, the following occurred in 1979, i.e., when petitioner was 16 years old. First, his father beat him with a "two by four." After petitioner recovered, he ran away from home. After he was found by police officers in Arizona, the police released him even though they saw "beating" bruises on him. He then hitchhiked to El Paso Texas, where he lived for a few months with his maternal cousin and her husband. Later, he "crossed the border" to Mexico, where he lived in Cuidad Juarez with his mother's brother, and his wife. Later, he "crossed" back to El Paseo, Texas, where he was "picked up by a truck looking for field workers to work at a chile field in New Mexico." Petitioner was "taken in by a Lady who allowed him to stay with her in her field shack." Later, petitioner returned to Mexico to live again with his mother's brother. Eventually, around December 1979, petitioner's mother sent him a plane ticket, and he flew back to Los Angeles to live with his family. (Pet., Ex. X at pp. 5-6.)

According to petitioner's mother, while her husband "did not make enough to support the family[,]" she made enough money to support the family. In 1975, the family bought a house in Pomona, and they lived there until 1984, i.e., when petitioner was 21 years old. After petitioner's mother obtained a $25,000 loan, the family bought a restaurant in Pomona. The whole family worked at the Mexican restaurant wherein petitioner "washed dishes, and helped in the kitchen." (Pet., Ex. X at pp. 4-6.)

According to Petitioner's mother, her husband started "drinking" again and the children did not want to work at the restaurant because their father refused to pay them. Around this time in 1981, petitioner "started going to jail." Also, in 1981, i.e., when petitioner was about 18 years old, his mother

closed the restaurant after the car accident death of her son. At the time, petitioner was in jail, but he was released to attend the funeral of his oldest sibling. Petitioner was "very close" to his older brother, and the death was "hard" for petitioner to deal with. After the funeral, petitioner's mother separated from her husband for one year, but she lived in the family house with her two daughters (Victoria and Graciela) while petitioner and his younger brother Ricardo were in jail. Around 1982, their father moved back into the family house, in 1986 the family "lost the house" and then the family rented a house in Pomona. (Pet., Ex. X at pp. 6-7.)

Petitioner's exhibit U is a post-trial January 2002 declaration from his brother Ricardo, who was born in 1965, and thus, is two years younger that petitioner. Ricardo says his father was a "violent man" who beat "us" and "Mom" without reason. According to Ricardo, "Dad did not know how to talk to us, he would instead hit us when he wanted to get his point across." Ricardo says he, petitioner, and their deceased brother often hid their "marks and bruises" on their "legs and chests." Ricardo gave his recollection of petitioner's trips back and forth from Pomona, to Arizona, to Texas, to Mexico, then back home, around 1979, all caused by the "2 x 4" beating inflicted on petitioner by their father. Ricardo said that he and petitioner were "devastated" by the 1981 death of their brother because this oldest brother use to "protect" them from their father. Also, Ricardo says he managed to play varsity football and baseball in high school, and he got "good" grades, never missed a day of school, and he managed to stay away from "cholos and from drugs" until 1981, i.e., when petitioner was 18 years old.[33/] (Pet., Ex. U at pp. 1-2.)

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33. Later, after the death of his older brother in 1981, Ricardo says his life went "down hill" in that he began drinking, sniffing "paint" and smoking marijuana, and he started using "acid and PCP." In 1983, he was convicted of burglary, and served time in county jail. In 1984, he violated parole and was ordered to serve a four-year prison term. Three weeks after his release in 1987,

The above seven declarations offered by petitioner will be further discussed below on the merits of subclaim H.

5. Court Documents

Pre-trial dated records involving petitioner's arrest for aggravated robbery in Texas in 1982 state that petitioner was born in Juarez, Mexico. The records also reveal petitioner's address in Mexico. (CT "Supplemental II" 111-113.) Thus, prior to trial, trial counsel was apparently aware that his client (petitioner) may have had family or friends in Mexico. Also, a pre-trial dated (May 1991) record of petitioner's escape crime stated that petitioner was born in Texas. (CT 493.) Thus, prior to trial, trial counsel was apparently aware that petitioner may have had family or friends in Texas.[34/] This will be further discussed below on the merits of subclaim H.

Petitioner's court records involve his father's 2001 prosecution for continuous sexual abuse from June 1998 to May 1999, i.e., over six years after petitioner's trial. (Pet., Ex. Y.) Since petitioner's trial counsel would not have had access to these documents, they are irrelevant. At any rate, the above will be further discussed below on the merits of subclaim H.

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he was arrested for robbery. He took a three-year "deal" and was ordered to serve time in prison. There, he was "involved in a stabbing, and sentenced to an 11-year prison term. In 1998, he was deported to Mexico, but he came back to Pomona to care for his mother. Later, he was arrested for evading an officer, and he is currently in prison at Pelican Bay. (Pet., Ex. U at p. 3.)

34. At a pre-trial hearing attended by petitioner and trial counsel on July 3, 1991, the prosecutor said she would forward petitioner's Texas records to trial counsel as soon as she got them from her investigator in Texas. (RT 8.) Thus, prior to trial, trial counsel apparently knew that petitioner may have had family or friends in Texas and/or Mexico.

6. Psychologist's Declaration

Petitioner has a post-trial 2002 declaration from a clinical-forensic psychologist who interviewed him over 13 years after the murder and about 10 years after the trial, i.e., Doctor Nancy Kaser-Boyd. (Pet., Ex. AA.) Based on her two interviews with petitioner in prison in January 2002, plus her reading of declarations (some noted above) by petitioner's mother, his two sisters (Graciela and Victoria), his brother (Ricardo), his niece (Solis), his friend (Reyna), and prisoner inmate William Copeland, Dr. Kaser-Boyd opines as follows:[35/]

> At the time of the crimes, it is my opinion that [petitioner] received an inadequate presentation of mitigating factors related to his crimes. There are several mitigating factors. First, [petitioner] has a clear history of environmental stress by way of family circumstances and economic hardship. Second, [petitioner] experienced the specific traumatic stressor of severe child abuse, physical and psychological (multiple occasions) and developed Post Traumatic Stress Disorder, chronic from the repeated threats to his safety. When he was 18 years old, he experienced the traumatic loss of his closest brother, in an automobile accident, and this compounded the traumatic stress he had experienced since early childhood. Within the next several years, he developed a serious substance abuse problem, which clouded his judgment, changed his psychological functioning, and was likely related to aberrant behavior that led to criminal charges. All of these factors were present and intricately involved in his mental state at the time of

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35. The habeas psychologist also "reviewed summations of the penalty phase evidence by both Petitioner's counsel and counsel for Respondent, a Chronology prepared by Petitioner's counsel, and portions of [petitioner's father's] case." (Pet., Ex. AA at p. 1.)

the offenses[.]

(Pet., Ex. AA at pp. 1-2.) The doctor claims this 2002 opinion "would have been the substance" of her "expert testimony at the penalty phase" had she been called as a defense witness at petitioner's 1992 penalty phase trial. (*Id.* at p. 2.) The above will be further discussed below on the merits of subclaim H.

7. School Records

As to school records (Pet., Exs. BB, CC, DD), exhibit BB is a one-page record of his grades at Chaffey High School in Ontario, California in 1979, i.e., when petitioner was 16 years old. The file shows that petitioner received an "F" grade in every school course that year except art, wherein he received a "C" grade. Petitioner's exhibit CC is a file of the 1981-1982 high school grades for petitioner's brother (Ricardo). Finally, petitioner's exhibit DD is the 1978-1979 high school grades for petitioner's deceased brother (Antonio). The above will be further discussed below on the merits of subclaim H.

8. Petitioner's 1988 Medical Record

On May 1, 1989, petitioner told a booking officer that he was not taking any medication and had no special medical problem to report. This news was available to trial counsel in that it was written in the booking report incident to petitioner's arrest in this case. (See CT "Supplemental II" 40.) In other words, by May 1, 1989, petitioner was arguably in normal physical condition. In a pre-trial dated report from 1991, a probation officer stated that petitioner denied any drug use, and he denied any claim of significant physical, mental, or emotional health problems. (CT 485.) Since counsel apparently had the opportunity to review the above report prior to trial, trial counsel could have reasonably assumed that petitioner suffered no significant physical, mental, or emotional health problems.

As to petitioner's medical record, it is a one-page report from a doctor about a May 1988 operation that he performed on petitioner to treat a stab wound to petitioner's abdomen nearly one year before the murder. (Pet., Ex. GG.) The above will be further discussed below on the merits of subclaim H.

9. News Article

Petitioner offers a report entitled "Trauma And Its Sequelae In Male Prisoners: effects of confinement, overcrowding, and diminished services" by doctor Terry A. Kupers that was published in the American Journal of Orthopsychiatry in April 1996, i.e., four years after petitioner's trial. (Pet. Ex. KK.) In other words, trial counsel clearly would not have access to the above report in preparing for petitioner's 1992 trial. The above will be further discussed below on the merits of subclaim H.

10. Social Security Records

As to social security records, petitioner offers copies of his father's statement of earnings from January 1971 through December 1991 (Pet., Ex. NN) and his mother's statement of earnings from January 1953 until December 1991 (Pet., Ex. OO). The above will be further discussed below on the merits of subclaim H.

ARGUMENT

I.

STANDARD OF REVIEW FOR HABEAS CORPUS

A habeas corpus proceeding is a collateral attack upon a criminal judgment which is presumed to be valid because of societal interest in the finality of judgments. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (*Gonzalez*).) Petitioner bears "a heavy burden" to both plead and prove grounds for relief by a preponderance of the evidence. (*In re Visciotti* (1996) 14 Cal.4th 325, 351 (*Visciotti*); *In re Sasounian* (1995) 9 Cal.4th 535, 546-547; *Duvall, supra,* 9 Cal.4th at p. 474.) To satisfy his burden, petitioner must state fully and with particularity the facts supporting his claim, along with reasonably available documentary evidence, including affidavits or declarations. (*Duvall, supra,* 9 Cal.4th at p. 474.) Conclusory allegations are insufficient, particularly when a paid lawyer prepared the petition. (*Ibid.; People v. Karis* (1988) 46 Cal.3d 612, 656.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*Gonzalez, supra,* 51 Cal.3d at p. 1260, italics in original; accord *Duvall, supra,* 9 Cal.4th at p. 474.)

"The state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment." (*Gonzalez, supra,* 51 Cal.3d at p. 1260.) Habeas counsel has a duty to investigate factual and legal grounds before filing a petition. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 179; *In re Robbins* (1998) 18 Cal.4th 770, 793, fn. 15.) Indeed, "'[h]abeas corpus will not serve as a second appeal.'" (*In re Harris* (1993) 5 Cal.4th 813, 825, quoting *In re Foss* (1974) 10 Cal.3d 910, 930; see *Marks, supra,* 27 Cal.4th at p. 188.)

Petitioner does not provide trial counsel's declaration (see Pet. at pp. 54-56, 69-84), and claims the attorney-client privilege should not be waived to allow trial counsel to defend himself (see footnote 39 at page 110, *post*). There is no allegation in the petition that trial counsel refused to cooperate with habeas counsel in providing a declaration for the petition. Claim IV states that the facts supporting it require full investigation, discovery, access to this Court's subpoena power, adequate funding, and an evidentiary hearing. (Pet. at p. 53.) Also, the petition does not contain a declaration from the petitioner.

Respondent has been informed and believes that petitioner's habeas counsel has spoken with trial counsel about various issues relating to decisions that trial counsel made in representing petitioner at trial. If this is true, it is respondent's position that this Court should find that the petitioner has failed to sustain his burden of presenting a prima facie case for relief. Respondent recognizes that this Court's issuance of the OSC signals an initial determination by this Court that a prima facie case was pleaded by petitioner. But, respondent respectfully submits petitioner should be required to either provide a declaration from trial counsel as to the ineffective assistance of counsel claims in subclaims A, B, H, and I of Claim IV of the petition, or a declaration from habeas counsel stating that trial counsel has refused to provide a declaration to this Court.

II.

HABEAS RELIEF SHOULD BE DENIED BECAUSE TRIAL COUNSEL DID NOT RENDER "INEFFECTIVE ASSISTANCE" AS ALLEGED IN SUBCLAIMS A, B, H AND I OF CLAIM IV

In subclaims A, B, H and I of Claim IV, petitioner claims that he received ineffective assistance of counsel because trial counsel failed to (1) present DNA evidence that blood on the pants in the Monte Carlo did not belong to the victim (subclaim A) (Pet. at 54-55); (2) make a proper offer of proof as to third party culpability evidence (subclaim B) (Pet. at 55-56); (3) investigate, consult with experts and present mitigation evidence of "severe and unrelenting emotional and physical abuse" petitioner had suffered "throughout his childhood" causing "mental state and serious resulting substance abuse" problems (subclaim H) (Pet. at 69-83); and (4) offer third party culpability evidence at the penalty phase (subclaim I) (Pet. at 83-84). As will appear, there is no cause for this Court to grant the relief prayed for above.

A. Standard Of Review

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

> 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, citing *Strickland, supra,* 466 U.S. at p. 686; see *People v. Pope* (1979) 23 Cal.3d 412, 424-426.)

B. The Merits

As will appear, there is no cause for this Court to grant the relief prayed for in subclaims A, B, H and I of Claim IV of the instant petition.

1. Blood On Pants In Monte Carlo (Subclaim A)

Petitioner claims he had ineffective assistance because counsel failed to present the guilt phase jury with DNA evidence that blood on the pants found in the car about 24 hours after the murder did not belong to the victim (subclaim A). (Pet. at 54-55.) Counsel was reasonably skeptical of DNA results.

On cross-examination at the guilt phase trial, counsel attacked the prosecutor's use of DNA evidence to establish that the blood on the gun matched the victim's blood-type. (RT 934-935.) At the guilt phase, Richard Catalani, a serologist with the Los Angeles County Sheriff's Department, testified that he examined the blood on the grip of the gun found in the car and compared it to blood from the victim and petitioner. (RT 917-931.) Catalani testified that the blood on the gun could not have come from petitioner, but it matched the victim's blood-type in that the victim and the blood on the gun shared the same phosphoglucomutase (PGM) subtype. Catalani said that he could not opine that the blood on the gun came from the victim. (RT 927, 931-

932, 934.) Catalani said that 16.4 percent of the 9 million persons in Los Angeles County (1.3 million persons) in 1992 could have been the source of the blood on the gun. (RT 933, 935-936, 940-941, 945.) Catalani said that he could not determine the age of the blood or when it was put on the gun. Catalani said that fingerprints could be left in wet blood. (RT 944, 947-948.) On direct-examination at the guilt phase, the prosecutor asked Catalani, "in determining that the blood [on the gun] is consistent with that of [the victim], could you ever say that that blood is 100 percent from [the victim]?" Catalani replied, "Not with the testing we do, no." (RT 932.) In the jury's presence, the following exchange ensued:

> [Prosecutor] There is – is there any testing at all that can take it down to say this individual is the donor of that blood?
>
> [Expert] Not that I know of, no.
>
> [Prosecutor] Not even DNA?
>
> [Expert] Not even DNA.

(RT 932.) In other words, respondent believes that trial counsel reasonably took the position that DNA or blood-test results were not reliable at the time of petitioner's 1992 trial.

Also, given counsel's reasonable trial tactic to discredit such DNA results as to the blood found on the gun, counsel would have reasonably lost all credibility with the jury if he had used DNA results to establish that the blood on the pants did not come from the victim. As counsel said at closing argument, "I am not going to lose my credibility with 16 people arguing something that doesn't make any sense." (RT 1374.)

Also, respondent believes that counsel thought that further focus on the blood on the pants might lead to unfavorable rebuttal evidence, for example, further testing with results unfavorable to the defense. Here, respondent believes that prior to trial, petitioner told counsel something that caused counsel

to reasonably believe that the blood on the pants came from petitioner or another victim.[36/] Based upon these valid three tactical reasons, i.e., reasonable skepticism in DNA results, maintaining credibility with the jury, and reasonable potential admission of unfavorable rebuttal evidence, counsel did not render ineffective assistance; thus, subclaim A of Claim IV fails. Also, as will appear, even if counsel's tactic fell below an objective standard of reasonableness in 1992, there was no prejudice; thus, relief would be unwarranted as to subclaim A of Claim IV.

a. Legal Discussion

At the time of petitioner's trial, some types of DNA testing were not held to have met the standard of admissibility under *Kelly, supra,* 17 Cal.3d 24. Seven years *after* petitioner's 1992 trial, i.e., in 1999, this Court held:

> It is clear from the evidence in the record, the clear weight of judicial authority, and the published scientific commentary, that the unmodified product rule, as used in the DNA forensic analysis in this case, has gained general acceptance in the relevant scientific community and therefore meets the *Kelly* standard for admissibility.

(*Soto, supra,* 21 Cal.4th at p. 541.)

Also, counsel is justified in deciding to maintain credibility with his or her client's jury. (*People v. Memro* (1995) 11 Cal.4th 786, 858 (*Memro*) ["counsel were wise to maintain credibility with the jury by acknowledging the obvious"]; see *People v. Freeman* (1994) 8 Cal.4th 450, 499 (*Freeman*) [counsel could "fully attack the identity evidence without worrying about losing

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36. At a hearing on February 10, 1992, i.e., over one month before the prosecutor made her opening statement at the guilt phase, counsel said he was petitioner's counsel on a second murder case, and the second murder case was "dismissed[.]" (RT 64.)

his credibility"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1060 (*Mitcham*) ["The concession of intent as to the shooting of Williams was not unreasonable in light of the substantial weight of the evidence on this issue, and counsel's desire to focus on the defense of misidentification and thus maintain his credibility with the jury."]; *People v. Rich* (1988) 45 Cal.3d 1036, 1097 (*Rich*) ["The record shows trial counsel merely sought to maintain credibility with the jury."].)

Further, rebuttal evidence may be admissible when it is offered as impeachment to meet evidence on a point put in dispute. (See *People v. Fierro* (1991) 1 Cal.4th 173, 240 ["the prosecutor's questions were appropriate for purposes of impeachment and rebuttal"]; *People v. Williams* (1988) 44 Cal.3d 1127, 1153, fn. 13; *People v. Westek* (1948) 31 Cal.2d 469, 476-477; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1302.)

b. Factual Discussion

The victim was shot around 3 a.m. on Sunday, April 30, 1989. (*Valdez, supra*, 32 Cal.4th at p. 81.) About 24 hours later, i.e., at 1:40 a.m., Pomona Police Lieutenant Larry Todd saw petitioner and others standing by a 1974 two-door Monte Carlo (registered to Juan Veladore of Pomona) parked in a 7-11 store parking lot. As Todd drove to the rear of the Monte Carlo and shined his spotlight on it, the driver's door opened and a man exited. The man walked to the front of the Monte Carlo and opened the hood. As Todd approached the open driver's door of the Monte Carlo, his flashlight beamed on an object. He shined his light towards the object and saw the barrel of a gun sticking out from under the front seat. Petitioner was standing by the passenger's door, and Todd never saw petitioner in the Monte Carlo. Todd ordered petitioner to approach. He did, and soon met Officer Joseph Pallermino. Pallermino arrested petitioner and the driver (Morales). (See RT 856-864, 863-866, 868-869, 877-880, 884,

892-895; *Valdez, supra* 32 Cal.4th at pp. 83-84.)

At trial, defense counsel elicited guilt phase testimony (during a re-cross examination of Detective Terrio) that blood was discovered on pants in the Monte Carlo during a search after petitioner's arrest. (RT 1118-1119.) Counsel's argument urged the jury to consider the fact that there was no evidence presented about the blood on the pants being tested, and there was no analysis from the prosecutor to show that the blood on the pants was consistent with the blood on the gun. (RT 1372-1375; see footnote 5 at page 7, *ante*.) At the March 1992 trial, the jury did not hear that: (1) law enforcement gave a sample of blood from the pants to a laboratory for testing in June 1991; (2) in August 1991, the laboratory dated a letter stating that the DNA from material labeled "blood stains from pants" did not originate from the victim; and (3) on September 4, 1991, counsel received the above letter (see RT 11). Thus, before eliciting the above evidence and making the above closing argument, counsel had known for over six months that: (1) the blood on the pants had been tested as to the victim (as opposed to petitioner); (2) DNA results had been given to the defense; and (3) the results stated that the blood on the pants was not consistent with the blood on the gun in that the blood on the gun matched the victim's blood-type.[37/] Under the circumstances, the only reasonable inference to be drawn is that trial counsel knowingly chose not to present that evidence at petitioner's 1992 guilt phase trial.

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37. As the prosecutor argued to the jury in rebuttal, counsel "very cleverly" saved "for argument" the bloodstained pants issue. (RT 1394-1395.) Then, in March 1992, counsel had 15 years experience as a criminal defense attorney. (RT 1388.) On April 19, 1991, he was appointed as petitioner's counsel. (CT 125.) Over one year earlier, i.e., around September 19, 1989, law enforcement obtained a blood sample from petitioner. (RT 946.)

c. Analysis

Given counsel's reasonable trial tactic to discredit DNA results as to the blood on the gun (see RT 934-935), counsel would have lost credibility with the jury if he had offered DNA results to prove that the blood on the pants did not come from the victim. He had a duty to maintain his credibility (see *Memro, supra,* 11 Cal.4th at p. 858; *Freeman, supra,* 8 Cal.4th at p. 499; *Mitcham, supra,* 1 Cal.4th at p. 1060; *Rich, supra,* 45 Cal.3d at p. 1097), and he showed his understanding of this when he argued to the jury: "I am not going to lose my credibility with 16 people arguing something that doesn't make any sense." (RT 1374.) It would have made no sense if counsel had presented the jury with a theory that DNA results are trustworthy as to the defense, but untrustworthy as to the prosecution. Petitioner would not have benefitted from such hypocrisy. Thus, counsel's "performance" was not "deficient." (See *Strickland, supra,* 466 U.S. at p. 687; see also *Bell v. Cone* (2002) 535 U.S. 685, 695 [122 S.Ct. 1843, 152 L.Ed.2d 914] (*Cone*).) Since counsel's trial tactic did not fall below an objective standard for reasonableness in 1992, petitioner has not met, and cannot meet, his burden to show *Strickland*'s first prong. Thus, subclaim A of Claim IV lacks merit independent of the fact that, as will appear, petitioner also cannot show he suffered prejudice here.

Also, on information and belief, counsel was reasonably skeptical of DNA results;[38/] thus, he reasonably decided that such results about the blood on the pants was not worth presenting to the jury. At trial, the prosecutor's expert told the jury that DNA results did not have 100-percent certainty. (RT 932.) Thus, even the People proffered evidence that DNA results were not dispositive in 1992. Seven years *after* petitioner's 1992 trial, this Court held that the unmodified product rule used in DNA forensic analysis "has gained general

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38. As shown, respondent believes that in this 1992 case, counsel was clearly, reasonably, and understandably skeptical of DNA blood-test results.

acceptance in the relevant scientific community and therefore meets the *Kelly* standard for admissibility." (*Soto, supra,* 21 Cal.4th at p. 541.) Prior to *Soto*, as recently as 2000, defendants have argued that it is error to admit evidence of statistical probabilities calculated by means of the unmodified product rule. (See *People v. King* (2000) 82 Cal.App.4th 1363, 1368, fn. 1.)

Prior to petitioner's 1992 trial, i.e., in October 1991, *People v. Axell* (1991) 235 Cal.App.3d 836 (*Axell*), was filed, and this Court denied review on January 30, 1992. But, as noted in *Soto, supra,* 21 Cal.4th 512, *Axell* was criticized in *People v. Barney* (1992) 8 Cal.App.4th 798, which was filed several months after petitioner's trial. As this Court has put it, *Axell* was "the first California appellate decision to confirm the general scientific acceptance of RFLP DNA analysis within the meaning of *Kelly*[.]" (*Soto, supra,* 21 Cal.4th at pp. 535-536.) "In the months between the filing of the *Axel* and *Barney* decisions, two significant events occurred." (*Id.* at p. 536.)

On December 20, 1991, i.e., prior to petitioner's March 1992 trial, "a pair of articles" were published, and one "attacked the failure of DNA statistical calculation analysis to account for population substructuring." (*Soto, supra,* 21 Cal.4th at p. 536.) Also, in April 1992, i.e., after counsel finished his penalty phase closing argument on March 31, 1992, (RT 1941, 1987), the "NRC" published its "first report on DNA profiling[.]" (*Soto, supra,* 21 Cal.4th at p. 536.) The NRC is "a private, nonprofit society of distinguished scholars that is administered by the National Academy of Sciences, the National Academy of Engineering and the Institute of Medicine." (*Ibid.*, fn. 30.) "The NRC formed the Committee on DNA Technology Forensic Science to study the use of DNA analysis for forensic purposes, resulting in the issuance of the 1992 report." (*Ibid.*) At any rate, in the report, the Committee "acknowledged that the effect of population substructuring was controversial." (*Id.* at p. 536.)

As this Court has put it:

> These intervening publications, reasoned the *Barney* court, undermined *Axell's* conclusion that sufficient scientific consensus had been reached regarding the insignificance of the effects of population substructuring on calculations made with the unmodified product rule.

(*Soto, supra,* 21 Cal.4th at p. 537.)

The moral of the above story is this: as counsel prepared for trial, he could be reasonably skeptical of DNA results, i.e., he could reasonably have decided that DNA results about blood on the pants was not worth offering to the guilt phase jury at petitioner's 1992 trial. Indeed, since a December 1991 article had criticized *Axell, supra,* 235 Cal.App.3d 836 (*Soto, supra*, 21 Cal.4th at p. 536), counsel's tactical decision here did not fall below an objective standard for reasonableness in March 1992.

Also, respondent believes and alleges that: (1) prior to trial, petitioner told counsel something that caused counsel to reasonably believe that the blood on the pants came from petitioner or another victim; and (2) counsel reasonably believed that presenting defense evidence about DNA results as to the blood on the pants might result in the admission of unfavorable rebuttal evidence that the blood on the pants matched petitioner or another victim. For this third reason, counsel's above trial tactic was not ineffective assistance of counsel under *Strickland.*

At a pre-trial hearing on February 10, 1992, trial counsel stated that he was representing petitioner on a second murder case. (RT 64.) Thus, petitioner may have made pre-trial statements to counsel about the instant murder case, and a second murder case. At the above hearing, counsel said the second murder case was "dismissed[.]" (*Ibid.*) But, prior to dismissal, it is possible that petitioner made statements to counsel in 1991 and/or 1992 about two murder cases.

In June 1991, i.e., after counsel's trial appointment in April 1991, the

police sent to a laboratory a sample of: (1) the blood from the pants; and (2) the victim's blood. (CT 125; RT 3-2; Pet., Ex. F.) It is clear that this testing was strictly to investigate the instant murder. (See footnote 36 at page 102, *ante*.) Indeed, at a pre-trial hearing on June 26, 1991, the prosecutor told the defense that "a pair of bloody pants" was sent to "Sellmark [sic] Lab" for "D.N.A." testing in this case. (RT 3-2.)

Around September 19, 1989, i.e., over one year before petitioner's 1992 trial in this case, the police obtained petitioner's blood sample. (RT 926, 946.) Since the People gave counsel all discovery in this case by September 4, 1991 (RT 11), by then, it is reasonable to infer that counsel knew that: (1) petitioner was being investigated for two murder cases (see RT 64); (2) the police had a sample of petitioner's blood (see RT 926, 946); (3) the police had found blood on pants in a car about 24 hours after the instant murder (see RT 856, 1118-1119); and (4) DNA results as to the blood on the pants showed that the blood on the pants did not come from the victim in this murder case (see Pet., Ex. F).

To represent petitioner's best interest in the instant murder case and a possible second murder case (see RT 64), counsel reasonably could have decided that he did not want to do anything to trigger a re-testing of the blood on the pants to see if it matched another victim or petitioner. If re-testing had yielded a result that the blood on the pants matched another victim or petitioner, such evidence might have been admissible in: (1) the instant case in rebuttal to evidence that the blood on the pants did not come from the victim if re-testing showed that the blood was petitioner's blood; or (2) a second case involving murder or other crimes petitioner may have committed during the 24 hours between: (a) the instant murder; and (b) the discovery of the pants in the Monte Carlo. For this third reason, counsel's trial tactic was not "deficient." (See *Strickland, supra,* 466 U.S. at p. 687.)

For the above three tactical reasons, i.e., reasonable skepticism in DNA

results, maintaining credibility with the jury, and reasonable potential admission of unfavorable evidence in this case or possible evidence in other cases, counsel reasonably could have decided against presenting the jury with DNA results that the blood on the pants did not come from the victim.

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactic reasons rather than through sheer neglect." (*Yarborough v. Gentry* (2003) 540 U.S. 1, ___ [124 S.Ct. 1, 5, 157 L.Ed.2d 1] (*Gentry*).) For example, in a case decided by this Court, a capital defendant claimed he had ineffective assistance due to a failure to offer evidence of a lack of injuries to his penis six days after the sexual assault on the murder victim. This Court rejected the claim. (*People v. Earp* (1999) 20 Cal.4th 826, 875 (*Earp*).) Here, failure to offer evidence of a lack of blood-match as to the victim and blood found on pants in a car (away from the crime scene) about 24 hours after the crime was not ineffective assistance.

This Court has confirmed:

> [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[.]" (*Gentry, supra,* 540 U.S. at p. ___ [124 S.Ct. at p. 4].)

The *Strickland* test for ineffective assistance of counsel is "highly demanding" (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [106 S.Ct. 2574, 91 L.Ed.2d 305]), and judicial review must be "highly deferential"

(*Gentry, supra,* 540 U.S. at p. ___ [124 S.Ct. at p. 4]). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Gentry, supra,* 540 U.S. at p. ___ [124 S.Ct. at p. 6]; see *Cone, supra,* 535 U.S. at p. 702 ["We cautioned in *Strickland* that 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."]; *Scott, supra*, 29 Cal.4th at pp. 811-812.)[39/]

Indeed, petitioner "must overcome the presumption that, *under the circumstances*, the challenged action 'might be considered sound trial strategy.'" (*Strickland, supra,* 466 U.S. at p. 689, italics added; see *Cone, supra,* 535 U.S. at p. 698.) Petitioner must demonstrate that

> there "'could be no satisfactory explanation'" for the omission in question by defense counsel.

(*Earp, supra,* 20 Cal.4th at p. 875, citing *People v. Kipp* (1998) 18 Cal.4th 349, 367.) In *Strickland*, the high court stated:

> There are countless ways to provide effective assistance in any given

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39. Here, where petitioner claims counsel gave ineffective assistance, and claims the attorney-client privilege should not be waived to allow counsel to defend his assistance (see Petitioner's Reply To Motion To Authorize Trial Counsel To Respond Claim of Ineffective Assistance Of Counsel By Way Of Declaration), review should be even more *highly deferential* and *demanding*. As *Strickland* states, "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." (*Strickland, supra,* 466 U.S. at p. 691.) Also, "by claiming trial counsel provided ineffective assistance," petitioner waives "the attorney-client privilege to the extent relevant to the claim." (*Scott, supra,* 29 Cal.4th at p. 814.) Petitioner's effort to bar trial counsel from assisting respondent in preparing this return should be weighed against petitioner in determining if he has met his burden of alleging sufficient facts to establish that he received ineffective assistance of counsel at his 1992 trial. (See *Visciotti, supra,* 14 Cal.4th at p. 351-352 (petitioner has burden of proof on *Strickland* claim).)

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.) Here, 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.*)

Counsel's strategic choice was made with full knowledge of facts surrounding the blood on the pants. Thus, for the above reasons, subclaim A of Claim IV lacks merit; that is, petitioner has not met, and cannot met, his burden of proving that counsel's tactic as to the blood on the pants fell below an objective standard of reasonableness in 1992.

Also, even if counsel's tactic fell below an objective standard of reasonableness in 1992, there was no prejudice. Petitioner must show that there is a "reasonable probability" the jury would have reached a different "result" at the guilt phase if counsel had presented DNA evidence that the blood on the pants did not match the victim's blood. (*Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.) Petitioner has not met, and cannot meet, his burden here.

Indeed, the jury heard that the blood on the gun (found in the car with the pants) could have come from 16.4 percent of the 9 million persons in Los Angeles County (1.3 million persons) in 1992. (RT 933, 935-936, 940-941, 945; see *Soto, supra,* 21 Cal.4th at pp. 519-526, 535-541.) Given the jury knew that 1.3 million persons could have been the source of the blood on the gun found in the car with the pants, there is no "reasonable probability" the jury would reached a different result if counsel had offered DNA results that the blood on the pants did not match the victim's blood.

Also, about 24 hours elapsed between the murder, and discovery of the

pants in the car. The car was found at a different location from the murder, and the jury heard that the car did not belong to: (1) the victim; or (2) petitioner. The jury heard that when the police found the car, petitioner was merely standing near the passenger-door of the car, but was not in the car, and the passenger-door was closed. (RT 856, 858-861, 868-869, 894; *Valdez, supra,* 32 Cal.4th at pp. 83-84.) Thus, if counsel had presented DNA results that the blood on the pants did not match the victim's blood, the jury would have been free to speculate as various reasonable reasons why the blood on the pants (see RT 1118-1119) did not match the victim's blood, i.e., this blood could have: (1) been deposited during the nearly 24 hours after the instant murder (see RT 856-857); (2) been deposited at some indeterminate time prior to the instant murder; (3) come from the true owner of the car, i.e., Velador (see RT 894); (4) come from the driver of the car, i.e., Morales (see RT 878), who was found with petitioner outside the 7-11 store; (5) come from "a group of people around the front" of the car with petitioner and Morales (see RT 857); (6) come from a crime victim in another case; (7) come from petitioner; or (8) come from completely irrelevant sources. Given these viable alternatives, there is no "reasonable probability" that the jury would have reached a different "result" if counsel had presented DNA results that the blood on the pants did not match the victim's blood. (See *Strickland, supra,* 466 U.S. at 694.)

The jury heard claims that petitioner "did not know there was a gun" in the car, "did not know how his bloody print got on the gun" and he "never touched the gun." (*Valdez, supra,* 32 Cal.4th at p. 85.) Given the jury rejected these claims beyond a reasonable doubt, there is no reasonable probability the jury would reached a different result if counsel had offered DNA results that the blood on the pants did not match the victim's blood.

As this Court has observed:

When questioned further [by the police about one-year after the murder],

> [petitioner] gave contradictory answers as to how he and Morales obtained the car. [Petitioner] first said he went with Morales to the apartment of the owner of the Monte Carlo, and even though the owner did not like him, the owner lent them his car. [Petitioner] then said Morales went to the owner's apartment, borrowed the Monte Carlo, drove around the corner, picked up defendant, and the two of them drove around looking for drugs.

(*Valdez, supra,* 32 Cal.4th at p. 85.) Given the jury's knowledge of petitioner's inconsistent statements to police, there is no "reasonable probability" the jury would have reached a different "result" if counsel had offered DNA results that the blood on the pants did not match the victim's blood. (See *Strickland, supra,* 466 U.S. at 694.)

Finally, in his guilt phase closing argument, counsel reasonably argued that there was a reasonable doubt that the victim was the source of the blood on the gun because: (1) the gun and pants were found at the same time in the same car; (2) the bloodstained pants did not belong to petitioner because he was wearing pants when he was arrested; (3) the People offered no evidence about the blood on the pants; and (4) the People offered no analysis showing that the blood on the pants was consistent with the victim's blood "the way" that the blood on the gun was shown to be consistent with the victim's blood. (RT 1372-1374.) Counsel's argument that the victim was not the source of the blood on the gun was reasonable. In fact, the above is a further reason why counsel was not "deficient" here. (See *Strickland, supra,* 466 U.S. at p. 687.)

Simply put, counsel tactically did not offer DNA results about the blood on the pants so that he could encourage a jury finding that someone other than the victim could have been the source of the blood on the gun seized from the car with the pants. Such tactic would favor the defense by getting the jury to find that while petitioner's palm print was made in wet blood found on the grip

part of the gun, this blood might not have come from the victim as the prosecutor's expert witness opined to the jury. (See *Valdez, supra,* 32 Cal.4th at p. 84.)

As the prosecutor argued to the guilt phase jury in rebuttal, counsel "very cleverly" saved "for argument" the bloodstained pants issue. (RT 1394-1395.) She argued to the jury in rebuttal as follows:

> And what Mr. Robusto [trial counsel] very cleverly did was save a lot of this stuff for argument and not ask the experts these questions.
>
> Let me mention that to you. Now he mentioned these pants that had possible blood in the car the defendant was arrested in. Now if the blood was consistent with that of the victim don't you think you would have known that? He didn't ask Detective Terrio anything about testing. He didn't ask Detective Terrio what was done. He didn't ask Detective Terrio what he thought, how it was analyzed, if it was done, if it wasn't done.
>
> It's a little unfair then to get up in front of you and say where's the testing? Where's the blood? Where's the beef?
>
> You know what I mean, Ladies and Gentlemen. If in fact this blood was so relevant defendant Valdez could have had it analyzed. He could have called his own experts. They could have taken the blood. They could have told you you know, yes, it was, no, it wasn't.
>
> So, Ladies and Gentlemen, it really is unfair to ask these questions about why things weren't done when the question was not asked to the expert at the time that he was on the witness stand.

(RT 1394-1395.)

Given defense counsel's above reasonable tactic, there is no "reasonable probability" the jury would reached a different "result" if counsel had offered DNA results that the blood on the pants did not match the victim's blood. (See

Cone, supra, 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.)

Petitioner has not met, and cannot meet, his burden here. Indeed, for all of the above reasons, counsel's assistance was reasonable, there was no prejudice, and thus, subclaim A must be denied with prejudice without an evidentiary hearing.

2. Guilt Phase Third Party Culpability Evidence (Subclaim B)

Petitioner claims he received ineffective assistance of trial counsel because counsel failed to make a proper offer of proof as to third party culpability evidence at the 1992 guilt phase trial (subclaim B). (Pet. at 55-56.) Simply put, counsel was not ineffective because: (1) respondent believes and alleges that counsel may have been told by petitioner, prior to trial, that he had shot and robbed the victim; and (2) as an officer of the court, counsel could not knowingly participate in the presentation of perjury at trial. Counsel "need not elicit what he thinks will be" perjury. (*People v. Guzman* (1988) 45 Cal.3d 915, 943 (*Guzman*), overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13); thus, as will appear, the tactic used by counsel herein complied with both settled rules of professional conduct and the test for reasonable competence in *Strickland.* The record demonstrates the above, and the only missing evidence to confirm the above is a declaration from counsel. (See footnote 39 at page 110, *ante*; Petitioner's Reply To Motion To Authorize Trial Counsel To Respond Claim of Ineffective Assistance Of Counsel By Way Of Declaration.) Petitioner had effective assistance; thus, subclaim B fails. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1217-1218 (*Riel*) [no ineffective assistance where counsel refused to present jury with testimony they knew was based on a lie according to admission from the witness].)

a. Factual Discussion

At the May 1991 preliminary hearing, counsel cross-examined Detectives Terrio and Holtberger about their findings at the crime scene on April 30, 1989. (CT 15, 22-30.) On direct examination at the preliminary hearing, Detective Terrio referred to crime scene photos, a property report, and fingerprint evidence and analysis. (CT 16-22.) Counsel was at the above hearing when Detective Guenther testified about his investigation of the victim, the victim's income tax checks, and the victim's planned trip to Mexico. (CT 99-102.) In short, about 11 months before the trial in 1992, counsel was aware of the contents of police records now being offered by petitioner. (See Pet., Exs. B, C, D, E, J, K, L, Z, II, JJ; RT 3-3, 7-8; CT 126, 143, 150-151; CT "Supplemental One" 15-16, 76-78.)

On June 25, 1991, counsel filed a motion for a continuance that said he needed more "time to investigate[.]"[40/] On July 3, 1991, a hearing was held where the court granted counsel's continuance motion to trail this case to September 1991, and the court ordered counsel to file all pre-trial motions by September 4, 1991. On September 25, 1991, at counsel's request, this trial was trailed to November 25, 1991. (CT 146-147, 149, 155-156.)[41/] At a hearing in petitioner's presence on November 25, 1991, counsel said he was ready for trial in this case. Counsel said: "Judge, I'm basically ready. I mean obviously I just

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40. As noted (footnote 7 at page 9, *ante*), in 1984, counsel was "cocounsel" in a capital case. There, he was later labeled "advisory" counsel, and he participated "several times" in that case. (*Stansbury, supra,* 4 Cal.4th at pp. 1035-1036, fn. 2.) Thus, while investigating this case in 1991, counsel had death penalty investigation experience dating back to at least 1984. During his guilt phase closing argument to the jury in this case, counsel stated that he had 15 years experience as a criminal defense attorney. (RT 1388.)

41. On September 25, 1991, counsel filed a continuance motion herein that said he was engaged in another "capital murder case" for six to eight weeks. (CT 155; see RT 18-20.)

got done with a capital murder case, but I'm ready to proceed" in this case. (RT 23.) At counsel's request, petitioner's trial was trailed to February 3, 1992. (CT 157; see RT 26.)

On February 10, 1992, the court conducted an in-camera hearing outside the prosecutor's presence, and the hearing was ordered "sealed." (CT 159; see RT 53-60.) Several days later, on February 14, 1992, counsel was granted a continuance to trail this trial to March 2, 1992, in order to perform "defense preparation." (CT 160; see RT 78-86.) On February 19, 1992, the court ordered that all pre-trial motions be filed by February 25, 1992. (CT 161, 163-188; RT 87-94.) Several pre-trial sealed hearings under *Marsden, supra,* 2 Cal.3d 118, were held in February 1992 leading up to the March 1992 trial. (*Valdez, supra,* 32 Cal.4th at pp. 91-97; CT 161-162; see RT 94-96, 98, 100-101, 103.)

Thus, for nearly a one-year period from his appointment in April 1991 (CT 125), to the trial, counsel knew of alleged third party suspects. Since the preliminary hearing was in May 1991, i.e., over one month after his appointment, counsel knew of alleged third party suspects by May 1991, i.e., nearly one year prior to trial in March 1992.[42/]

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42. As noted, a report dated April 30, 1989, refers to four suspects taken to a police station from the crime scene. It states that Gutierrez seemed to have blood on his shirt and shoe, his hands were shaking as if he was nervous as he spoke to Detective Guenther, and the above gave police "reasonable cause" to arrest Gutierrez on suspicion of murder. (CT "Supplemental One" 18, 22-23, 26-28, 30-31; see *Valdez, supra,* 32 Cal.4th at pp. 106-110.) This report was prepared by Detective Guenther, who counsel later cross-examined at the preliminary hearing in May 1991. Yet, later, in a 1992 factual statement in a motion prepared by counsel, counsel did not state that a third party was the shooter. (See CT 179-181.) The defense received a copy of the police report on April 4, 1991, i.e., before petitioner's preliminary hearing. (CT "Supplemental One" 76-78.) Thus, as early as February 1992, when the above motion was filed, counsel appeared to be *tactically* refusing to claim that a third party shot the victim. After the guilt phase and before the start of the penalty

On Friday afternoon, March 13, 1992, after a jury was picked, the prosecutor noted in court that she had talked to counsel about whether he would make an opening statement based on a "third party culpability" defense. The prosecutor noted that she had "pulled cases" for counsel and the court to review over the "weekend" to decide if third party culpability evidence was admissible at petitioner's trial. Counsel said he appreciated the prosecutor's help, and that he would look at the cases. (RT 687-688.)

After the weekend ended, i.e., on Monday, March 16, 1992, in petitioner's presence, counsel said he wanted to be "real candid with the court" and the prosecutor, and that the defense in this case was not in the "arena" of *People v. Kaurish*, *supra*, 52 Cal.3d 648, or *People v. Hall*, *supra*, 41 Cal.3d 826. He said "there will be no offer of proof or any evidence that we believe a specific person other than [petitioner] committed the homicide[.]" Counsel added: "I am not going to be calling witnesses that will direct a specific finger at a specific individual." He said if "something" were to "pop up during the course and scope of the trial," he would "advise everybody" and a hearing could be held "at that point." (RT 690.)

After the above, the prosecutor gave an opening statement at the guilt phase, trial counsel reserved the right to give an opening statement, and the first guilt phase trial witness was called to the stand. (RT 707.) On March 29, 1992, after the People rested its guilt phase case, counsel waived the right to make an opening statement for petitioner. On the above date, counsel asked for discretion to question police officers about their alleged poor investigation of Liberato Gutierrez, who police found near the crime scene and was released after being arrested with blood on his clothing. (RT 1164-1171.) Among other

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phase, petitioner wrote a note to the court that said: "I do believe that God has done justice" (*id.* at p. 205), suggesting that petitioner was admitting his guilt to the trial court, as respondent believes petitioner may have revealed to his counsel prior to trial.

things, since counsel said he was "not pointing a finger at Mr. Liberato Gutierrez and saying you're the killer, you're the one that took the money" (RT 1169), the court limited the scope of defense evidence as to persons found near the crime when the police arrived (RT 1170-1171; see *Valdez, supra,* 32 Cal.4th at pp. 106-110).

During the defense case at the penalty phase, in petitioner's presence and outside the jury's presence, counsel told the court as follows:

> It's been communicated to me, Your Honor, that my client [petitioner] wishes to testify during the course and scope of the penalty phase. I indicated to him that I would make the following motion before the court.
>
> [Petitioner]'s asking that, if he takes the witness stand, that the questions – and I would indicate to the court that I will comply with his request from the standpoint that [petitioner] wants to testify with respect to the *penalty phase issues* and *nothing more*. [Petitioner] *does not want to testify about the guilt phase issues*, [petitioner] *doesn't want to testify about the homicide, the robbery, the gun, the blood print, all of those things*.
>
> As a result, I'm asking for the court to limit, if [petitioner] does testify, to *limit the questions propounded to [petitioner] that are applicable only to the penalty phase.*

(RT 1713-1714, italics added.) Later, counsel commented:

> I don't know if I made myself real clear in my opening with respect the [sic] this particular issue, but I intend to do that right now.
>
> I'm not going to open the door with respect to the guilt phase. I'm not going to do that. If I do that, then [the prosecutor] obviously is entitled to bang and to cross-examine and to have at it, if you will, for lack of a better term, with respect to those issues that I raised during my

direct.

With respect to credibility issues, character issues, things of that nature, I believe that she's able to cross-examine, because that's what we're talking about.

My position to the court and to [petitioner] and for the purposes of this record is that [petitioner] *should not testify*, that *my recommendation* to [petitioner] is *that* [sic] and it's an *adamant recommendation*, it's *adamant advice*, and I believe sincerely that *it's in his best interest not to take that witness stand.*

[Petitioner] has indicated to me, if I'm not mistaken, that he has listened to *my advice*, he's listened to *my rational* [sic], and he's listened to *my logic* but [petitioner] still wants to take that witness stand. My position is that he should not.

(RT 1716-1717, italics added.) After the above, counsel asked petitioner: "Do you understand that, Mr. Valdez?" Petitioner said: "I understand that. Yes, sir." Counsel asked: "Do you agree with everything I've indicated to you from the standpoint I've talked to you about testifying?" Petitioner replied: "Yes, I do." Counsel asked: "And have I indicated to you that my recommendation is that you not testify?" Petitioner replied: "Yes, that is." Counsel asked: "Is it still your wish to testify?" Petitioner said: "Yes, it is." (RT 1717.) Ultimately, petitioner did not testify to the penalty phase jury, as advertised. (See *Valdez, supra,* 32 Cal.4th at pp. 89-91.)

b. Analysis

It seems clear from the above that petitioner had told trial counsel that he was the shooter and robber as to the instant victim. There is no other reasonable explanation for: (1) counsel not making a "proper" offer of proof as to third party culpability evidence; and (2) petitioner's desire to testify at the

penalty phase without being cross-examined as to the robbery-murder, considering petitioner's belief that "justice" was "done" after his conviction at the guilt phase (CT "Supplemental One" 205) and his interest in a "diminished capacity" defense (CT "Confidential" 204). In short: (1) respondent believes and alleges that counsel was told by petitioner, prior to trial, that he had shot and robbed the victim; and (2) as an officer of the court, trial counsel could not knowingly participate in the presentation of perjured testimony at trial. Also, the tactic used by counsel, to raise a reasonable doubt by focusing on the investigation of other suspects (see *Valdez, supra,* 32 Cal.4th at pp. 106-110), complied with settled rules of professional conduct as well as the test for reasonableness in *Strickland*. Counsel rendered effective assistance, i.e., his tactic did not fall below an objective standard of reasonableness in March 1992. (See *Strickland, supra,* 466 U.S. at pp. 688, 690.) Thus, petitioner had effective assistance of counsel, and his claim fails. (See *Riel, supra,* 22 Cal.4th at 1217-1218.)

While counsel has a "duty of loyalty" and an "'overarching duty to advocate the defendant's cause[,]'" such duty is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth." (*Nix v. Whiteside* (1986) 475 U.S. 157, 166 [106 S.Ct. 988, 89 L.Ed.2d 123]) (*Whiteside*). In *Whiteside*, the Supreme Court confirmed:

> Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.

(*Ibid.*) The above principle has "consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct" since 1908. (*Ibid.*; see *People v. Jennings* (1999) 70 Cal.App.4th 899, 907; *People v. Johnson* (1998) 62 Cal.App.4th 608, 619 (*Johnson*) ["Attorneys have long

been prohibited by the attorney rules of professional conduct from participating in the presentation of perjured testimony."]; *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1710 ["a defense counsel's refusal to participate in the presentation of perjurious testimony from the accused does not deny the client effective assistance of counsel"].)

This Court has explained a distinction in the law as follows:

> Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false. Criminal defense attorneys sometimes have to present evidence that is incredible and that, not being naive, they might personally disbelieve. Presenting incredible evidence may raise difficult tactical decisions–if counsel finds evidence incredible, the fact finder may also–but, 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.)

At any rate, as the high court has confirmed,

> the legal profession has accepted that an attorney's ethical duty to advocate the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.

(*Whiteside, supra,* 474 U.S. at p. 168, footnote omitted.) The above "special duty of an attorney to prevent" frauds upon the court "derives the recognition that perjury is a much a crime" as witness or jury tampering. (*Id.* at pp. 168-169.)

In at least one state (Iowa), a lawyer who "aids false testimony by questioning a witness when perjurious responses can be anticipated" risks "prosecution for subornation of perjury[.] (*Whiteside, supra,* 475 U.S. at 169.)

In California, this Court has confirmed that a lawyer's "ethical obligations as an officer of the court" mandate that he or she "refuse to suborn perjury[.]" (*Guzman, supra,* 45 Cal.3d at p. 943, noting *Whiteside, supra*; see *Riel, supra,* 22 Cal.4th at p. 1216.) Indeed, as one court stated:

> The California Rules of Professional Conduct require an attorney to "employ, for the purpose of maintaining the causes confided to the [attorney] such means only as are consistent with truth" and prohibits him from seeking "to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." (Rules Prof. Conduct, rule 5-200.) The Business and Professions Code echoes the California Rules of Professional Conduct, which are made binding on all members of the California State Bar. (Bus. & Prof. Code, § 6077.) Business and Professions Code section 6068, inter alia, provides: "It is the duty of an attorney . . . [¶] . . . [¶] [t]o employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

(*Johnson, supra,* 62 Cal.App.4th at p. 619.)

Also, since "[w]ithdrawal of counsel" gives rise to "many difficult questions including possible mistrial and claims of double jeopardy[,]" (*Whiteside, supra,* 475 U.S. at p. 170; see *Johnson, supra,* 62 Cal.App.4th at pp. 622-623), some jurisdictions, like California, permit trial counsel to zealously represent a criminal defendant without directly suborning perjury. In *Guzman*, for example, this Court held that a capital defendant was not denied effective assistance of counsel when he testified at trial in the "free narrative" because counsel refused to ask him questions as to his version of the facts. (*Guzman, supra,* 45 Cal.3d at pp. 942, 944-946.) Noting that "it appears that the high court does not look favorably" on the "free narrative" tactic, the

Guzman court said "[n]othing in *Whiteside* condemns the free narrative approach as amounting to ineffective assistance of counsel[.]" (*Id.* at p. 944; see *Johnson, supra,* 62 Cal.App.4th at pp. 624-630.)[43/]

Prior to issuing the above holding in *Guzman*, this Court cited and discussed rules of professional conduct that recognize that "counsel need not elicit what he thinks will be perjured testimony[.]" (*Guzman, supra,* 45 Cal.3d at p. 944; see *Johnson, supra,* 62 Cal.App.4th at p. 627.) Rule 3.3(c) of the American Bar Association's Model Rules of Professional Conduct states that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false[.]" (See *Johnson, supra,* 62 Cal.App.4th at pp. 619-620.) In other words:

> [T[he right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

(*Whiteside, supra,* 475 U.S. at p. 173.)[44/]

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43. As to the "narrative" approach, one court has explained:

> Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the defendant to testify in a free narrative manner. In closing arguments, the attorney does not rely on any of the defendant's false testimony.

(*Johnson, supra,* 62 Cal.App.4th at p. 624.) The above approach has been "criticized" on the basis that the attorney "participates in committing a fraud on the court" and communicates "to the jury that the defendant is committing perjury." (*Id.* at p. 625.)

44. As the high court explained in *Whiteside*:

> [T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for the truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

(*Whiteside, supra,* 474 U.S. at p. 174.)

In this case, the record all but confirms that counsel did not make a "proper" third party culpability offer of proof, as petitioner claims he should have, because, as an officer of the court, he could not present evidence he reasonably believed was perjurious; that is, prior to trial, respondent believes that petitioner had revealed to counsel that he was the shooter and robber as to the victim. The only missing evidence to confirm the above is a declaration from counsel (see footnote 39 at page 110, *ante*). But, as shown, there is overwhelming evidence in the appellate record from which it can reasonably be inferred that counsel: (1) was told by petitioner that he was the shooter-robber; and thus (2) could not, as an officer of the court, make a "proper" third party culpability offer of proof in this case.

In *Riel, supra,* 22 Cal.4th 1153, a capital defendant claimed that he received ineffective assistance due to counsel failing to offer testimony from a man named Osborne. At a motion for a new trial, this Court said:

> defense counsel explained enough to the court to get it to appoint new attorneys but, it appears, they were also *intentionally vague* about what Osborne *actually told them* so as not to harm their client's position affirmatively.

(*Id.* at p. 1217, italics added.) Noting that an attorney cannot present false trial testimony, this Court found since Osborne had told counsel "'he would be lying'" if he testified favorably for the defendant, "we have no basis to find that counsel acted other than as diligent advocates consistent with ethical constraints." (*Id.* at pp. 1217-1218.)

Here, the appellate record overwhelmingly confirms that counsel did not make a "proper" third party culpability offer of proof because, as an officer of the court, he could not present evidence he reasonably believed was perjurious; that is, prior to trial, petitioner had revealed that he was the shooter and a robber as to the victim. Thus, subclaim B lacks merit in that petitioner has not met, and

cannot meet, his burden of proving that trial counsel's tactic fell below an objective standard of reasonableness in 1992.

Also, even if counsel's tactic fell below an objective standard of reasonableness in 1992, there was no prejudice. Petitioner must show that there is a "reasonable probability" the jury would have reached a different "result" at the guilt phase if counsel had made a "proper" offer of proof as to third party culpability. (See *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.) Petitioner has not met, and cannot meet, his burden here.

Indeed, at trial, to avoid what appears to be a clear ethical constraint , counsel found another way to present the guilt phase jury with evidence on third parties possibly being culpable. (*Valdez, supra,* 32 Cal.4th at pp. 106-110.) Counsel tactically offered evidence to "challenge and undermine the police investigation of the murder, specifically the failure to investigate and pinpoint the source of the shoe prints discovered at the crime scene." (See *Id.* at pp. 108-109.) Here, as this Court has held:

> We note that the trial court expressly did not prohibit defense counsel from eliciting testimony from Detective Guenther regarding the group of individuals in the alley, of which Liberato Gutierrez was a part, ruling that Detective Guenther "can testify as to the arrest of other individuals in the alley by Detective McLean. He can testify as to what he observed, obviously. He may not testify as to the specifics of Mr. Gutierrez in particular, the fact that he was nervous, the drops of blood, what appeared to be blood on his shoes, and, of course, on his shirt." Subsequently, during counsel's direct examination of Detective Guenther, defense counsel asked the court to clarify its ruling; specifically, whether he could ask Detective Guenther whether he was informed about the group of individuals in the alley. The court

> responded in the affirmative and continued: "I think he can even say they were arrested. I don't have a problem with that. Just when we start getting into the specifics of the people, the blood, or apparent blood." In a general sense, *defendant was able to elicit testimony that others may have had the opportunity to rob or kill the victim.* As Detective Guenther testified, he walked through the side yard, on the west side of the house, and noted shoe prints that appeared to lead toward the alley. he stated that the individuals were in the alley, but explained they were discovered four residences east of the victim's house, not behind the house as defense counsel suggested.

(*Valdez, supra,* 32 Cal.4th at pp. 109-110, italics added; see RT 1170-1171, 1185-1203.)

Given the above, petitioner suffered no prejudice under *Strickland* due to the alleged failure to make a "proper" offer of proof on third party culpability. As this Court has already found:

> The jury thus heard evidence that other individuals were in the vicinity after the murder. The jury could have concluded, as defendant argues on appeal, that any of those individuals murdered or robbed the victim. Further, the trial court did not prevent defense counsel from posing additional questions concerning the detention and investigation of the group, such as whether shoe comparisons were made of the group or whether the individuals gave a reason for being in the alley so late at night Defense counsel chose not to do so.

(*Valdez, supra,* 32 Cal.4th at p. 110.) The latter was so because, as shown, as an officer of the court, counsel could not present evidence he reasonably believed was perjurious. At any rate, given the jury heard "evidence that other individuals were in the vicinity after murder" and the jury could have concluded that "any of those individuals murdered or robbed the victim" (*ibid.*),

there is no "reasonable probability" that a different "result" would have been reached if counsel had made a "proper" offer of proof even assuming that the trial court would have allowed such evidence and counsel was able to present it consistent with his ethical obligations (see *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694).

Also, if counsel had made a "proper" offer as to Gutierrez or other third party culpability, the prosecutor could have reasonably rebutted the offer by presenting to the jury the following:

> The prosecution also stated that Detective Guenther also would testify, inter alia, that two other individuals were arrested along with Liberato Gutierrez, Liberato Gutierrez was "quite inebriated [registering a .30 blood-alcohol level] when a breathalyzer was taken," and that everyone in the alley was taken into custody until everything was sorted out. The prosecutor further stated that she did not believe Liberato Gutierrez was ever considered a suspect and that his work boots, which were examined by Detective Terrio on more than one occasion, did not match any of the shoe prints left at the crime scene.

(*Valdez, supra,* 32 Cal.4th at p. 107, fn. 8; see RT 1165-1167.) Given the above rebuttal evidence available at the guilt (and penalty) phases if counsel had made a "proper" offer, there is no "reasonable probability" that a different "result" would have been reached if counsel had successfully made a "proper" offer of proof and presented third party culpability evidence. (See *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.)

Finally, the fact that petitioner stayed in the victim's house (see RT 728, 740, 746-747, 769-776, 798-800, 802) even after the victim had angrily told petitioner to leave or wait outside (RT 740, 769-772, 774-776, 798-800) was overwhelming evidence that petitioner decided to rob the victim before the others drove away to "party down" (RT 745) at Pato's house around the corner

(RT 728, 740, 745, 769-777, 780-784, 794-795, 798-800, 802). Petitioner, who was unemployed (*Valdez, supra,* 32 Cal.4th at p. 84), had $100 on him when he was arrested (RT 872). The jury could have reasonably found that he stole the $100 during the robbery-murder, and that he hid or spent the remaining cash during the nearly 24-hour time period leading up to his arrest. (RT 856-859, 865-866, 868.) Indeed, the shooting occurred "less than 10 minutes" (RT 728, 794-795) after Gerardo, Arturo and Rigoberto left petitioner alone in the small room with the victim (RT 728, 740, 746-747, 769-776, 798-800, 802). Simply put, since the evidence of guilty as to the shooting and the robbery were overwhelming, petitioner has not met, and cannot meet, his burden to demonstrate a "reasonable probability" that a different "result" would have been reached if counsel had made a "proper" offer of proof on third party culpability. (See *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.)

For all of the above reasons, counsel's assistance was reasonable, there was no prejudice, and thus, subclaim B must be denied with prejudice without an evidentiary hearing.

3. Failure To Present Mental And Abuse Evidence (Subclaim H)

Petitioner claims he received ineffective assistance of trial counsel because, as to the 1992 trial, counsel failed to investigate, consult with experts and present mitigation proof of "severe and unrelenting emotional and physical abuse" petitioner had suffered "throughout his childhood" causing "mental state and serious resulting substance abuse" problems (subclaim H). (Pet. at 69-83.) Respondent disagrees.[45/]

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45. Simply put, on information and belief, in 1991 and 1992, there was nothing in petitioner's social history that would have caused counsel (or other

As will appear, counsel did not: (1) fail to investigate petitioner's social or mental history (see *In re Marquez* (1992) 1 Cal.4th 584, 605-609 (*Marquez*) [counsel had undertaken no investigation of mitigating evidence] [death penalty reversed]); or (2) improperly limit the scope of investigation (see *Wiggins v. Smith* (2003) 539 U.S. 510, 521 [123 S.Ct. 2527, 156 L.Ed.2d 471] (*Wiggins*) [counsel limited "scope of their investigation into potential mitigating evidence" and tactically focused on retying factual case and death penalty reversed]; *In re Lucas* (2004) 33 Cal.4th 682, 689 (*Lucas*) ["limited investigation"], 721-725, 733-736 [death penalty reversed in reliance on *Wiggins, supra*]); or (3) fail to present mitigation evidence (see *Wiggins, supra,* 539 U.S. at p. 516 ["[a]t no point did [counsel] proffer any evidence of petitioner's life history or family background"]; *Lucas, supra,* 33 Cal.4th at pp. 690 ["Defense counsel did not present any evidence in mitigation at the penalty phase."], 723; *Marquez, supra,* 1 Cal.4th at p. 605 [counsel offered no mitigation evidence]); or (4) present very little mitigation evidence; or (5) present mitigation evidence that gave the jury little or no basis to reasonably find compassion.

Here, trial counsel presented the jury with compelling mitigation evidence that: (1) imposition of a death penalty is irrevocable; (2) petitioner would serve a life term in an impregnable prison; and (3) petitioner should live due to: (a) his social history; (b) his future contributions to his family and others; and (c) his religion, discovered while in prison. The above mitigation

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reasonable criminal defense counsel) to consult with experts and present mitigation proof of "severe and unrelenting emotional and physical abuse" petitioner allegedly had suffered "throughout his childhood," causing "mental state and serious resulting substance abuse" problems. On information and belief, and as will appear, there is no credible proof petitioner had severe and unrelenting emotional and physical abuse throughout his childhood that caused such problems. As will appear, counsel presented the 1992 penalty phase jury with strong mitigation evidence in order for the jury to reasonably find a basis, if any, for exercising compassion.

evidence came from petitioner's mother, father, two sisters, an aunt, three close family friends, and a retired correctional officer who also served as an associate warden at San Quentin. (*Valdez, supra,* 32 Cal.4th at pp. 89-91.) In other words, this is not a case where the defendant's relatives "easily could be traced" but were not. (See *Lucas, supra,* 33 Cal.4th at p. 698.) Here, not only were petitioner's relatives found, counsel interviewed them, and he presented the jury with testimony from them as well as other friends and supporters. (*Valdez, supra,* 32 Cal.4th at pp. 89-91.) Thus, if petitioner, in fact, had a "turbulent family background and childhood abuse" (see *Lucas, supra,* 33 Cal.4th at p. 735) as suggested, nothing prevented his family and friends from saying so to trial counsel prior to their testifying (see *Visciotti, supra,* 14 Cal.4th at p. 352 [counsel's "examination of the family members who testified at the penalty phase of the trial confirms that he learned from them before they testified some information regarding petitioner's acts of kindness and generosity and his artistic skill"]). If they did not do so, the credibility of their current declarations is suspect.

This is not a case where counsel decided "not to find out, and to offer nothing in mitigation[.]" (See *Marquez, supra,* 1 Cal.4th at p. 606.) This is not a case of "inattention" by counsel; instead, this is a case of "reasoned strategic judgment." (See *Wiggins, supra,* 539 U.S. at p. 526.) Counsel's pre-trial investigation and assistance at the penalty phase was reasonable, there was no prejudice, and thus, subclaim H must be denied with prejudice without an evidentiary hearing.

In *Wiggins*, the high court reversed a death penalty based on "the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent 'reasonable professional judgment supports the limitations on investigation.'" (*Wiggins, supra,* 539 U.S. at p. 533.) As will appear, there was no limited strategic investigation here; that

is, counsel's investigation of mitigation evidence as to petitioner was reasonably complete given the information available in 1991 and 1992. (See *Scott, supra,* 29 Cal.4th at p. 792 ["petitioner has failed to carry his burden of establishing ineffective assistance of counsel"], 811-812, 826-828 [order to show cause discharged]; *Visciotti, supra,* 14 Cal.4th at pp. 330, 352-357 [writ denied]; *In re Avena* (1996) 12 Cal.4th 694, 704, 731-738 (*Avena*) [denied]; *In re Ross* (1995) 10 Cal.4th 184, 188, 204-215 (*Ross*) [denied]; *Gonzalez, supra,* 51 Cal.3d at pp. 1239-1240, 1242-1255 [denied]; see also *In re Fields* (1990) 51 Cal.3d 1063, 1076-1081 (*Fields*) [denied].)

a. Factual Discussion

As noted, at a pre-trial hearing in petitioner's presence, counsel commented that a death penalty case is "the most serious case that a defense attorney can handle[.]" (RT 114.) During his penalty phase closing argument, counsel noted that he had 15 years experience as a "criminal defense" attorney. (RT 1388.)[46] As noted, at the time of petitioner's 1992 trial, counsel had prior death penalty trial experience dating back to at least 1984. In this case, counsel hired an investigator, the investigator traveled to Mexico and Texas to interview people that petitioner designated, counsel traveled to petitioner's house and interviewed petitioner's mother and family, and, at the penalty phase, trial

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46. During penalty phase argument, the prosecutor told the jury that she would hire trial counsel if she were charged with killing her "husband" because counsel is an "excellent attorney." (RT 1389.) Earlier, at a pre-trial hearing, the judge told petitioner that he had known counsel for a "long" time. (RT 74-75.) Later, during the defense case at the penalty phase, the judge told petitioner, "you have had one of the best defenses that this Court has seen[.]" (RT 1728.) While arguing "lingering doubt" at the penalty phase, counsel argued to the jurors that, given the evidence, they made a mistake in finding petitioner guilty beyond a reasonable doubt. (RT 1994-1995.)

counsel presented the jury[47] with evidence about petitioner's social history through live testimony from petitioner's father, mother, two sisters, an aunt, and three friends. (See counsel's statements at RT 63-68, 109-118, 1720-1724, 1727; see also penalty phase testimony at RT 1771-1773 [mother's testimony], 1761-1770 [father's testimony], RT 1652-1670 [testimony of sister Victoria], 1671-1681 [testimony of sister Graciela], RT 1749-1760 [aunt's testimony], RT 1639-1651 [Reyna's testimony], RT 1626-1638 [Enedina's testimony], RT 1731-1740, 1746-1748 [Jose's testimony]; *Valdez, supra,* 32 Cal.4th at pp. 89-90.)

Also, during the defense case at the penalty phase, in petitioner's presence and outside the jury's presence, counsel said petitioner wanted to testify to the jury, but petitioner did not want to be cross-examined on anything involving the charged robbery-murder. (See RT 1713-1714.)

Also, petitioner's appellate record contains various *personally handwritten* statements and oral comments that he made or filed at his 1992 trial involving motions under *Marsden, supra,* 2 Cal.3d 118 and/or *Faretta, supra,* 422 U.S. 806. (CT "Confidential" 189-207 [handwritten motions]; RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992, hearing weeks before guilt phase opening statement], 1717-1728 [March 27, 1992, hearing during defense case at penalty phase]; *Valdez, supra,* 32 Cal.4th at pp. 91-103.)

As to petitioner's pre-trial *Marden* motions or attempted motions on February 10, 1992, and February 26, 1992, the appellate record shows as follows. (See *Valdez, supra,* 32 Cal.4th at pp. 91-93.)

As to the hearing on February 10, 1992, the following ensued. The court asked, "Mr. Valdez, what did you want to tell me, sir?" (RT

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47. The defense case at the penalty phase began on March 25, 1992. (RT 1625.)

62.)[48/] Petitioner, without using a language interpreter, claimed to the court as follows: (1) he had only saw counsel "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) counsel 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. (RT 62-63.)

The court asked counsel to reply to the above allegations, and he did as follows. Counsel said: (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 was dismissed); (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* (RT 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." (RT 63-68.) Counsel said 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." (RT 68.) Counsel said he told petitioner that it was in his "best interest" for him to tell the court the above. Counsel said he asked petitioner if he had a "problem" with counsel conducting the above investigation, and petitioner told counsel that "I want you to do that." (*Ibid.*)

Counsel said "[t]he other night" was when he first heard from petitioner about "people in Juarez[.]" (RT 68-69.) Petitioner disagreed, and alleged that

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48. As noted, the prosecutor made her guilt phase opening statement over *one month later* on March 16, 1992. (RT 689, 697.)

he told counsel the foregoing when they "met" and that they discussed the above penalty phase witness issue "a long time ago[.]" (RT 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 not." (RT 70.) The court expressed concern that the "people in Juarez" issue may present the People with a last-minute "discovery" issue given the upcoming trial date. (RT 71-72.) Petitioner re-alleged that he had asked counsel "way back" about obtaining information from people in Juarez. Petitioner asked, "Can I have another attorney?" The court said, "No," and found that counsel could "adequately" represent petitioner at trial. (RT 72.) Petitioner cutoff the court and said, "It's not that I don't like him." (*Ibid.*) The court told petitioner that counsel was "handling" petitioner's "affairs" in a proper and legal manner. (RT 72-73.) Petitioner explained:

> 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. [¶] 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 [trial counsel].

(RT 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 [counsel] told her that. I've known him too long. [¶] She's a very nice woman. I think she's mistaken. I don't think [counsel] told her that you were released on this case.

(RT 74-75.) Petitioner replied:

> He told her 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.

(RT 75.) The court replied: "I have a feeling, Mr. Valdez, that there's a lot more that's been done than you know about because you're in custody. That's my belief. . . ." (RT 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." (RT 76.) Petitioner was represented by counsel at trial. (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).[49/] (CT 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.[50/] The

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49. As noted (footnote 12 at page 27, *ante*), this occurred two weeks after the first *Marsden* denial by Judge Piatt, four days before jury selection began, and three weeks before the prosecutor's guilt phase opening statement.

50. Many of the alleged inadequacies by counsel urged in petitioner's handwritten motion involved trial matters. (CT "Confidential" 189-204.) For example, besides claiming that "we haven't been getting along" (*id.* at p. 191), petitioner claimed: (1) counsel "had ex parte with D.A." and they "agreed to take certain action upon their hands" (*id.* at p. 191); (2) there were "numerous witnesses to be interrogated" (*id.* at p. 192); (3) petitioner did not see counsel

court asked petitioner if he had "any additional facts" (RT 104). Petitioner alleged that the "reason" counsel 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. (RT 105.) Petitioner further alleged: (1) he had not met the investigator hired by counsel; and (2) "I just need to confer with my attorney as often as possible to let him know things that I know[.]" (RT 106, 108.) Counsel, in relevant part, replied that: (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. (RT 113-114.)

After hearing the above, petitioner, in part, replied: "I believe that barely a week ago I gave him 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." (RT 114-115.) Counsel 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) counsel asked

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"as often" as requested (*id.* at p. 192); (4) counsel asked petitioner to admit "untrue" evidence (*id.* at p. 192); (5) counsel made "false statements" to petitioner's relatives (*id.* at p. 192); (6) counsel had not filed "motions" urged by petitioner after having promised to do so (*id.* at p. 193); (7) counsel forced petitioner to "search and reed [sic] on what's going on to make certain that these matters will be handle [sic] the way a defendant must be represented" (*id.* at p. 193); (8) counsel had represented petitioner on "two other cases no motions has [sic] been declared" (*id.* at p. 194); (9) counsel's office did not take an "interest" on petitioner's "problem" (*id.* at p. 194); and (10) petitioner had not "seen" counsel's private investigator and that investigator had not "successfully tried to make any kind of contact" with petitioner (*id.* at p. 195).

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." (RT 115-116.) Counsel further told the court as follows:

> 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 footnote 11, *ante*; RT 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[.]

(RT 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." (RT 118.)

As to the hearing on March 9, 1992, i.e., 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." (RT 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 counsel 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. (RT 365-366.) The court commented to petitioner as follows:

> 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 [counsel]. [¶] If in your discussions with [counsel] 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.

(RT 367.)

Later, on March 27, 1992, i.e., during the defense case at the penalty phase, after the People had presented its penalty phase case, and after trial counsel had presented the jury with four 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 counsel told the court that if petitioner took the stand it would be against counsel's advice. (RT 1717.) At the hearing, petitioner never identified the remedy he sought. He did not cite or refer to *Marsden* even after the court asked him if he wanted to "relieve" counsel. (See RT 1724-1725, 1727-1728.)

The above 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; CT 303; RT 1718.) In his letter, petitioner alleged that counsel did not do his "best." (CT "Confidential" 205.) In a "P.S." section, petitioner asked the court: "Can we have a meeting without the prosecutor !! being present?" (CT "Confidential" 207.) In court, in front of the prosecutor, petitioner claimed counsel 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. (RT 1718-1719.)

After the prosecutor left the courtroom (RT 1719), the court took a recess to allow trial counsel to read petitioner's letter for the first time. (RT 1719-1720.) Afterwards, counsel responded to the points raised in the letter in great detail, as set forth at pages 40 through 43, *ante*. (See RT 1720-1724.) Petitioner replied, as noted at page 43, *ante*. (See RT 1724.) 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?" (RT 1724-1725.) Petitioner did not answer the question. Instead, petitioner replied: "My thing here is that I didn't have witnesses." (RT 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 counsel to bring in "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. (RT 1725-1726.)

Trial counsel told the court:

> *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.

(RT 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.

(RT 1727.)

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

(RT 1727-1728; see *Valdez, supra,* 32 Cal.4th at pp. 124-125.) The 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?

(RT 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." (RT 1728.) The 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.

(RT 1728, italics added; see page 45, *ante*.)

b. Analysis

Trial counsel has a duty to conduct an adequate investigation in preparation for the penalty phase of a capital trial. (See *Wiggins, supra*, 539 U.S. at pp. 521-522; *Lucas, supra,* 33 Cal.4th at p. 689.) If there is "readily discoverable evidence" of severe emotional or physical abuse suffered by the defendant, counsel has a duty to adequately investigate such mitigation evidence and adequately present it to the penalty phase jury so that it has a basis for "exercising compassion." (See *Lucas, supra,* 33 Cal.4th at pp. 689-690.)[51] If counsel "lacked a sufficient basis upon which to make a reasoned strategic decision to forgo further investigation" or to "not present any" mitigation evidence at the penalty phase, then counsel's investigation may be deemed deficient performance. (See *Id.* at p. 689; see also *Cone, supra,* 535 U.S. at p. 695; *Strickland, supra,* 466 U.S. at p. 687.)

But, to vacate a sentence of death, a defendant must demonstrate that there was prejudice due to counsel's alleged inadequate investigation; that is, he or she must demonstrate that "there is a reasonable probability the jury would have reached a different verdict" if the jury been presented with the allegedly missing mitigation evidence. (*Lucas, supra*, 33 Cal.4th at p. 690; see

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51. This Court has observed the following:

> [T]he the United States Supreme Court has recognized that evidence of matters such as turbulent family background and childhood abuse is of particular relevance to a jury's consideration of whether to impose the death penalty.

(*Lucas, supra*, 33 Cal.4th at p. 735, citations omitted.)

Strickland, supra, 466 U.S. at pp. 687, 694.) In other words, to vacate a sentence of death, a defendant must demonstrate that "at least one juror would have struck a different balance." (*Wiggins, supra,* 539 U.S. at p. 537; see *Cone, supra,* 535 U.S. at pp. 695, 697-698.)[52/]

Thus, "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*Marquez, supra,* 1 Cal.4th at p. 602; see *Lucas, supra*, 33 Cal.4th at pp. 721-722.) This Court "must indulge a 'strong presumption' that counsel's conduct fell within the wide range of reasonable professional assistance[.]" (*Cone, supra,* 535 U.S. at p. 702; see *Lucas, supra*, 33 Cal.4th at p. 722.) But, "counsel's alleged tactical decisions must be subjected to 'meaningful scrutiny.'" (*Lucas, supra*, 33 Cal.4th at p. 722, citing *Avena, supra,* 12 Cal.4th at p. 722.) This Court has confirmed:

> Tactical decisions must be informed, so that before counsel acts, he or she "'will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.'"

(*Lucas, supra*, 33 Cal.4th at p. 722, quoting *Avena, supra,* 12 Cal.4th at p. 722.) This Court has also confirmed:

> In some cases, counsel may reasonably decide not to put on mitigation evidence, but to make that decisions counsel must understand what mitigating evidence is available and what aggravating evidence, if any, might be admissible in rebuttal.

(*Marquez, supra,* 1 Cal.4th at p. 606; *Lucas, supra*, 33 Cal.4th at p. 726; *Ross,*

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52. This Court has denied a claim that the failure to investigate and present "all reasonably available mitigating evidence" necessarily constitutes ineffective assistance of counsel "per se." (*Lucas, supra*, 33 Cal.4th at p. 729, fn. 6.) As this Court has noted, the United States Supreme Court "continues to call for a case-by-case analysis applying the *Strickland* test." (*Ibid.*, citing *Williams v. Taylor* (2000) 529 U.S. 362, 391, 395 [120 S.Ct. 1495, 146 L.Ed.2d 389].)

supra, 10 Cal.4th at pp. 205-209.)[53/]

Also, "no amount of preparation can make human witnesses impervious to effective cross-examination." (*People v. Williams* (1997) 16 Cal.4th 153, 263 (*Williams*); see *Cone, supra,* 535 U.S. at p. 700 ["putting [defendant's sister] on the stand would have allowed the prosecutor to question her about the fact that [defendant] called her from the Todds' house just after the killings"].) Thus, counsel must understand that trial answers from mitigation witnesses may not be "entirely favorable" to the defense. (*Williams, supra,* 16 Cal.4th at p. 263.) Counsel must be mindful of a risk that a witness may "say something damaging on cross-examination in order to obtain that witness's favorable testimony on direct." (*Ibid.*; see *Gonzalez, supra,* 51 Cal.3d at pp. 1249-1250 ["We are convinced that counsel's decision not to present character and background evidence through family members was tactically motivated by plausible concerns that such evidence might be outweighed by damaging rebuttal."].) "The possibility of damaging rebuttal is a necessary consideration in counsel's decision whether to present mitigating evidence about the defendant's character and background." (*Gonzalez, supra,* 51 Cal.3d at p. 1251.)

Also, as noted, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactic reasons rather than through sheer neglect." (*Gentry, supra,* 540 U.S. at p. ___ [124 S.Ct. at p. 5]; see *Cone, supra,* 535 U.S. at p. 700 ["In his trial preparations, counsel investigated the possibility of calling other witnesses" and "There was also the

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53. Here, "'the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf.'" (*Lucas, supra*, 33 Cal.4th at p. 733, citation omitted.) Also, "[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct." (*Ibid.*)

possibility of calling other witnesses from his childhood or days in the Army. But counsel feared that the prosecution might elicit information about respondent's criminal history."]; *Scott, supra,* 29 Cal.4th at pp. 826-828; *People v. Catlin* (2001) 26 Cal.4th 81, 176 ["counsel reasonably may have concluded that the evidence that was presented at the penalty phase, consisting of testimony concerning defendant's excellent adjustment to prison confinement and ability to provide assistance and comfort to persons outside of prison even during his incarceration, was likely to persuade the jury to spare his life, whereas assertions regarding his mother's conduct toward him when he was a child would not"]; *People v. Hart* (1999) 20 Cal.4th 546, 637 ["We further observe that, although trial counsel did not present the mental health defense that defendant now contends was necessary, counsel did present considerable evidence that sought to portray defendant as a victim of numerous unfortunate circumstances"]; *Williams, supra,* 16 Cal.4th at p. 263 ["[E]ach mitigation witness testified positively about defendant's character–specifically, that he was obedient and respectful. Counsel might have had the tactical aim of suggesting to the jury that defendant, being obedient and respectful, was a good candidate for successfully serving out a prison sentence"]; *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" and "Notwithstanding [counsel]'s multiple failings, however, this is not a case in which there was a total breakdown of the adversarial process"]; *Avena, supra,* 12 Cal.4th at pp. 731-738; *Ross, supra,* 10 Cal.4th at p. 210 ["This is certainly not much, but it presented a coherent case, and avoided the impeachment and rebuttal the new mitigating evidence would have elicited."].)

Strickland instructs:

A convicted defendant making a claim of ineffective assistance must

> identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

(*Strickland, supra,* 466 U.S. at p. 690.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" and "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation[.]" (*Id.* at pp. 690-691.) "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Id.* at p. 691.)

Further, counsel's role is to decide which witnesses will be called to testify for the defense (*People v. Williams* (1970) 2 Cal.3d 894, 905), and "an attorney owes no duty to offer on his client's behalf testimony which is untrue" (*In re Branch* (1969) 70 Cal.2d 200, 210; see *Gadson, supra,* 19 Cal.App.4th at p. 1712). "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense." (*People v. Welch* (1999) 20 Cal.4th 701, 728.) "When a defendant chooses to be represented by professional counsel, that counsel is `captain of the ship' and can make all but a few fundamental decisions for the defendant." (*People v.*

Carpenter (1997) 15 Cal.4th 312, 376; accord, *Welch, supra,* 20 Cal.4th at p. 729; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1096 ["defendant had no right to an attorney who would accede to all of his whims"].)

Here, on information and belief, in 1991 and 1992, there was nothing in petitioner's social history that would have caused counsel (or any other reasonable criminal defense lawyer) to consult with experts and present mitigation proof of "severe and unrelenting emotional and physical abuse" petitioner allegedly had suffered "throughout his childhood," causing "mental state and serious resulting substance abuse" problems. On information and belief, and as shown, there is no credible evidence petitioner had suffered such severe abuse. Counsel presented the penalty phase jury with strong mitigation evidence in order for the jury to reasonably find a basis, if it chose to do so, for exercising compassion. Counsel gave petitioner effective assistance at the penalty phase in 1992.

At a pre-trial hearing on February 10, 1992, i.e., prior to the penalty phase by over 30 days, petitioner mentioned witnesses in Texas and Mexico that he wanted counsel to investigate for a penalty phase. (See RT 62-63.) At that time, counsel told petitioner and the trial counsel that he planned to investigate these persons because this was "something of importance." (RT 67-68.) Counsel said the "other night" was when he first heard from petitioner about people in "Juarez[.]" (RT 68-69.) Petitioner disagreed, but he agreed that he wanted counsel to investigate these people despite the discrepancy as to when he told counsel about these people. (RT 69-70.) Most importantly, counsel assured the court *on the record* that he would investigate all of the people that petitioner wanted investigated for purposes of mitigation evidence at a potential penalty phase trial. (See RT 67-68, 70-76.)

In short, there is positively no factual basis for petitioner to claim that counsel failed to investigate petitioner's childhood in preparation for a potential

penalty phase trial. At the above pre-trial hearing over 30 days before the eventual penalty phase, petitioner admitted that counsel had: (1) interviewed petitioner's mother; and (2) a private investigator working on the investigation of penalty phase witnesses. (See RT 74-75.)

About 16 days later on February 26, 1992, i.e., about 30 days before the start of the defense case at the penalty phase on March 25, 1992, petitioner made a second *Marsden* motion, after filing a 16-page *personally handwritten* motion. (See CT 161-162; CT "Confidential" 189-204; *Valdez, supra,* 32 Cal.4th at pp. 92-93.) Petitioner again mentioned witnesses in Texas and Mexico that he wanted counsel to investigate for a penalty phase. (See RT 104-108.) In reply, as an officer of the court, counsel represented to the trial court that he was in fact investigating all of the people that petitioner wanted investigated for purposes of mitigation evidence at a penalty phase. (See RT 113-114.) As noted, counsel *properly* explained *on the record* as follows: (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. (RT 113-114.) Thus, there is no factual basis for petitioner to claim that counsel failed to investigate petitioner's childhood in preparation for a penalty phase trial. Indeed, at the above pre-trial hearing, counsel said "arrangements have been made" for his investigator (Eddie Sanchez) to go to Mexico and Texas to interview people that petitioner wanted investigated for purposes of a potential penalty phase trial. (See RT 115-118.)

At the above hearing, counsel said: (1) he had already interviewed

petitioner's mother; (2) he learned from petitioner's mother that petitioner was "struck" by his father when petitioner was 16 or 17 years old, and that petitioner ran away and stayed away (and was mostly in Mexico) for about one-year; (3) he thought the circumstances as to petitioner being struck by his father was "important information[,]" but not "really weighty" information; and (4) he learned from petitioner's mother that petitioner: (a) was born in Juarez, Mexico; (b) lived there with his family until he was about 8 years old; and (c) lived in Pomona (the city of the instant murder) with his family. (See RT 116.)

Thus, there is no factual basis for petitioner to claim that counsel failed to investigate petitioner's childhood in preparation for the penalty phase. If it was true that petitioner's had suffered severe and unrelenting emotional and physical abuse throughout his childhood causing "mental state and serious resulting substance abuse" problems, the record shows that counsel *in this case* would have investigated the above.

Several weeks before counsel made the above statements, petitioner said: "my mother, she knows me better than anybody in this world I suppose." (RT 74.) Thus, if it was true that petitioner had actually suffered severe and unrelenting emotional and physical abuse throughout his childhood causing "mental state and serious resulting substance abuse" problems, petitioner's mother obviously had ample pre-trial opportunities to convey such allegations to counsel when counsel interviewed her, as noted above.

Alternatively, assuming, without conceding, petitioner's mother told counsel that petitioner had suffered severe and unrelenting emotional and physical abuse throughout his childhood causing "mental state and serious resulting substance abuse" problems, the record shows that counsel necessarily was aware of such allegations; thus, there is no factual basis for petitioner to claim that counsel failed to investigate petitioner's childhood in preparation for a potential penalty phase trial.

Thus, on information and belief, respondent denies that petitioner received ineffective assistance of counsel. On information and belief, respondent denies that counsel failed to investigate "severe and unrelenting emotional and physical abuse" that petitioner allegedly had suffered "throughout his childhood," causing alleged "mental state and serious resulting substance abuse" problems. (See Pet. at 69-83.) Indeed, on information and belief, respondent denies that petitioner suffered severe and unrelenting emotional and physical abuse in his childhood allegedly caused by: (1) his father, allegedly beginning when petitioner was a toddler in Mexico in 1963; and (2) his brother's untimely accidental car accident death in 1981, i.e., when petitioner was 16 years old.

Here, as noted, petitioner was serving time in a California prison from 1983 to 1988, and, he has given numerous statements to probation officers stating that, at best, he was an occasional marijuana user leading up to the instant murder in 1989. (See CT 469-470 [1992 probation report].) Thus, on information and belief, respondent denies that petitioner has ever had a "substance abuse" problem, or that such alleged problem has seriously affected petitioner's "mental" state. The record discussed above, including petitioner's personal statements at hearings on February 10, and 26, 1992, and March 9, and 27, 1992, (see *Valdez, supra,* 32 Cal.4th at pp. 91-95, 98-102) overwhelmingly demonstrates that petitioner has not demonstrated any arguable mental problem that warranted that counsel investigate further than he did in preparation for a potential penalty phase trial.

In particular, as counsel told the court, he investigated petitioner's social history as best he could given the late information about people in Texas and Mexico that petitioner wanted investigated. Counsel hired a Spanish-speaking investigator, and this investigator traveled to Mexico and Texas, and he interviewed people that petitioner wanted interviewed.

At the penalty phase, counsel presented the jury with testimony from petitioner's father, mother, two sisters, an aunt, and three closest friends, all of whom could have informed counsel about the alleged: (1) childhood abuse allegedly suffered by petitioner throughout his childhood allegedly caused by his father; (2) the impact of the untimely accidental car accident death of petitioner's brother in 1981, i.e., eight years before the instant murder; (3) substance abuse problems petitioner allegedly had at the time of the 1989 murder and 1992 penalty phase trial; (4) the significance of petitioner's alleged "art" work; (5) the significance of petitioner's alleged flight from Pomona, Arizona, Texas, Mexico, then back to Pomona all allegedly in 1981 when petitioner was 16 years old; and (5) symptoms of "Post Traumatic Stress Disorder (PSTD" (Pet. at 77-78) that petitioner allegedly had at the time of the 1989 murder, at the time of the 1992 trial and sentencing, and at the time of the 2002 prison interview he had with his present habeas clinical psychologist (see Pet., Ex. AA). On information and belief, respondent denies that petitioner has, or has ever had, PSTD. Thus, respondent denies that counsel should have investigated PSTD as to petitioner in 1992, or had petitioner's brain scanned as alleged. In so far as these defense penalty phase witnesses did not inform counsel of the information now contained in their declarations, their credibility as to the new allegations is suspect.

As to petitioner's present habeas clinical psychologist, respondent denies that this psychologist's 2002 opinion is credible. Indeed, as noted, in forming her opinion, this psychologist did not even read: (1) petitioner's 1992 probation report (CT 469-470 [1992 probation report]); (2) various 1992 handwritten statements by petitioner involving his various *Marsden* and/or *Faretta* motions (CT "Confidential" 189-207); or (3) petitioner's court testimony involving the above motions (RT 62-76 [pre-trial hearing February 10, 1992], 104-118 [pre-trial hearing February 26, 1992], 365-368 [March 9, 1992, hearing weeks

before guilt phase opening statement], 1717-1728 [March 27, 1992, hearing during defense case at penalty phase]). (See Pet., Ex, AA at p. 1.) On information and belief, respondent denies that petitioner's 2002 psychologist's opinion would have been credible at the time of the murder in 1989 and/or at the time of the trial and sentencing in 1992.

At any rate, about 30 days before the defense case at the penalty phase, counsel said: (1) he learned from petitioner's mother that petitioner was "struck" by his father when petitioner was 16 or 17 years old, and that petitioner ran away and stayed away (and was mostly in Mexico) for about one-year; and (2) he thought the circumstances surrounding the above were "important information[,]" but not "really weighty" information. (RT 116.) Thus, this is not a case of "likely ignorance of the history" of petitioner's alleged "abuse" in 1992. (See *Wiggins, supra,* 539 U.S. at p. 533.) Also, counsel's decision that the "abuse" information was not "really weighty" was not unreasonable in light of information available to counsel in 1992 (see *Ross, supra,* 10 Cal.4th at p. 205 ["There was also no testimony that petitioner lived in a violent neighborhood, that his failure to be rehabilitated was partly the fault of institutional authorities, and that he expressed remorse for his earlier crimes."]; see e.g., *Lucas, supra,* 33 Cal.4th at pp. 689 [finding "weighty" evidence that "beginning at the age of seven years, petitioner was housed in an institution for abused and neglected children that was staffed by abusive, violent adults, and that subsequently he was placed in juvenile correctional facilities that were known for crowding, neglect, and abuse"], 731, 735;.) This is not a case where counsel failed to "investigate petitioner's early social history." (See *Lucas, supra,* 33 Cal.4th at p. 725.) In this case, there was no limited investigation due to "vague fear" of unfavorable rebuttal evidence. (See *Id.* at pp. 727, 732-733.) Here, counsel's investigation was not "superficial and tardy" in 1992. (See *Id.* at p. 729; see also *Gonzalez, supra,* 51 Cal.3d at pp.

1249-1250.)

Indeed, as the high court re-confirmed in *Wiggins*:

> *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.

(*Wiggins, supra,* 539 U.S. at p. 533.)

Also, this is not a case of "inattention" by counsel; instead, this is a case of "reasoned strategic judgment." (See *Wiggins, supra,* 539 U.S. at p. 526.) Given counsel's various pre-trial interviews with petitioner, his family and his friends, as well as counsel's other investigations, including review of petitioner's multiple probation reports in prior cases as well as having an investigator go to Mexico and Texas to interview people selected by petitioner, this is not a case where "known evidence would lead a reasonable attorney to investigate further" in 1992. (See *Wiggins, supra,* 539 U.S. at p. 527.) "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." (*Strickland, supra,* 466 U.S. at p. 691.) As *Strickland* states:

> 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.

(*Ibid.*; accord *Scott, supra,* 29 Cal.4th at p. 827; see *Gonzalez, supra,* 51 Cal.3d at p. 1245 ["Trial counsel cannot be faulted for failing to take steps that require cooperation his client declines to give."].) On information and belief and as the appellate record confirms, in this case, nothing petitioner supplied to counsel

in 1991 or 1992 "would lead a reasonable attorney to investigate further." (See *Wiggins, supra,* 539 U.S. at p. 527; *Scott, supra,* 29 Cal.4th at p. 826 [petitioner hindered the investigation by not wanting to involve his family, not cooperating with counsel, and not providing any useful information for penalty phase].) None of the exhibits offered by petitioner sufficiently show the possibility of convincing mental evidence that "should have been *reasonably apparent* to a competent attorney" in 1992. (See *Gonzalez, supra,* 51 Cal.3d at p. 1244, italics in original.)

Also, as noted, *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case." (*Wiggins, supra,* 539 U.S. at p. 533.) But, as to petitioner, the available record indicates that this is not a case where counsel: (1) failed to investigate defendant's background for a penalty phase; or (2) strategically limited the scope of the investigation of defendant's background for a penalty phase; or (3) failed to present any mitigation evidence at the penalty phase; or (4) presented very little mitigation evidence at the penalty phase; or (5) elected to present mitigation evidence that gave a jury little or no basis to reasonably find compassion, if any, as to a person facing the death penalty. Here, counsel presented the 1992 penalty phase jury with compelling mitigation evidence that: (1) imposition of a death penalty is irrevocable; (2) petitioner would serve a life term in an impregnable prison; and (3) petitioner should live due to: (a) his social history; (b) his future contributions to his family and others; and (c) his religion, discovered while in prison. (See *Valdez, supra,* 32 Cal.4th at pp. 89-91.)

On information and belief, respondent denies that the following is presently relevant, or was relevant at the time of either the crime in 1989, or the trial and sentencing in 1992: (1) petitioner's father's alleged sexual molestation of juvenile girls allegedly in the 1980s; (2) petitioner's father's post-trial sexual molestation criminal case in 1999 or 2001; (3) petitioner's father's alleged

failure to be the main "bread winner" for his family; (4) petitioner's father's alleged beatings of persons other than petitioner, including petitioner's mother, who could have been expected to testify to this at the penalty phase if the above were true; (5) petitioner's father's alleged failure to pay petitioner and his siblings for work the siblings performed in the family restaurant and/or janitorial service in the late 1970's leading up to the restaurant's closure around 1981, i.e., the time of the oldest sibling's untimely accidental car accident death; (6) the school grades of petitioner's two brothers while they were in high school; (7) the social security income statements involving petitioner's parents from the period of the 1950's to the 1990's (see Pet., Exs, NN, OO); and (8) a post-trial 1996 news article about overcrowding in prisons (see Pet., Ex. KK). On information and belief, respondent denies that counsel rendered ineffective assistance by allegedly failing to investigate and present the foregoing to the 1992 jury.

Thus, subclaim H lacks merit; that is, petitioner has not met, and cannot meet, his burden of proving that counsel's trial tactic fell below an objective standard of reasonableness in 1992. (See *Scott, supra,* 29 Cal.4th at p. 792 ["petitioner has failed to carry his burden of establishing ineffective assistance of counsel"]; see also *Visciotti, supra,* 14 Cal.4th at pp. 352-357 [writ denied]; *Avena, supra,* 12 Cal.4th at pp. 731-738; *Ross, supra,* 10 Cal.4th at pp. 204-215; *Gonzalez, supra,* 51 Cal.3d at pp. 1239-1240, 1242-1255; *Fields, supra,* 51 Cal.3d at pp. 1071-1081.)

Also, to vacate his sentence, petitioner must show that there is a "reasonable probability" the jury would have reached a different "result" if it had been presented with the allegedly missing mitigation evidence; that is, petitioner must demonstrate that "at least one juror would have struck a different balance." (*Wiggins, supra,* 539 U.S. at p. 537; see *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at pp. 687, 694.)

Petitioner has not met, and cannot meet, his burden of demonstrating that he suffered prejudice. (See *Scott, supra,* 29 Cal.4th at p. 827 ["As with the failure to investigate a possible mental defense, we find no prejudice even assuming counsel should have investigated further."]; *Visciotti, supra,* 14 Cal.4th at p. 330 ["assuming petitioner's trial counsel afforded inadequate representation in some respects, petitioner has not demonstrated that those failings were prejudicial"]; *Avena, supra,* 12 Cal.4th at p. 734 ["petitioner fails to allege sufficient facts to demonstrate prejudice"]; *Ross, supra,* 10 Cal.4th at p. 188 ["petitioner has not shown a reasonable probability that the result would have been different but for counsel's unprofessional errors"]; see also *Wiggins, supra,* 539 U.S. at p. 534 ["In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."].)

As to aggravating evidence, the prosecutor presented the jury with an overwhelming degree of aggravating circumstances. As this Court has confirmed, the jury heard that petitioner: (1) was convicted of aggravated robbery in Texas in January 1983; (2) was convicted of five counts of first degree residential burglary in California in August 1983; and (3) committed "four violent acts while in prison and jail." (*Valdez, supra,* 32 Cal.4th at pp. 87-88.) Specifically, in May 1984, while in custody at Deuel Vocational Institution, petitioner stabbed a fellow inmate with an "inmate manufactured stabbing" weapon while another inmate held the victim. Later that year, in September, while in Soledad Prison, petitioner chased a fellow inmate with a metal baseball bat, and ignored a correctional officer's order to stop during the chase. When petitioner finally dropped the bat, he told a correctional officer that he would have "beaten to death the other inmate had he caught him[.]" Nearly seven years later, in March 1991, i.e., after petitioner committed the 1989 murder-robbery in this case, while in jail in Los Angeles, petitioner approached a fellow inmate and robbed him of a bag containing $80. After

robbing the above victim, petitioner and his fellow inmates assaulted the inmate-victim. Several months later, in October, while in county jail, petitioner threatened a fellow inmate with a 10-inch "shank" weapon. Also, earlier that year (1991), petitioner: (1) escaped from court while in custody on a hearing in the instant case; and he kicked and struck a deputy sheriff while being apprehended in a bathroom; and (2) put a knife to the chest and demanded money from a man under the pretext of buying car tires. Later that day (January 18, 1991), petitioner led police on a chase after being seen in a truck stolen from the man petitioner had threatened with a knife, and, petitioner struggled with three police officers when apprehended after the chase. (*Valdez, supra,* 32 Cal.4th at pp. 87-88.)

As to mitigating circumstances, as shown, at the 1992 penalty phase, counsel presented the jury with evidence about petitioner's social history through live testimony from petitioner's father, mother, two sisters, an aunt, and three friends. (See penalty phase testimony at RT 1771-1773 [mother's testimony], 1761-1770 [father's testimony], RT 1652-1670 [testimony of sister Victoria], 1671-1681 [testimony of sister Graciela], RT 1749-1760 [aunt's testimony], RT 1639-1651 [Reyna's testimony], RT 1626-1638 [Enedina's testimony], RT 1731-1740, 1746-1748 [Jose's testimony]; *Valdez, supra,* 32 Cal.4th at pp. 89-90.) As noted, these witnesses offered strong mitigation evidence for the jury to reasonably find a basis, if any, for exercising compassion. Finally, as shown, nothing that petitioner, his mother, father, two sisters, and other family and friends supplied to counsel in 1991 and 1992 "would lead a reasonable attorney to investigate further." (See *Wiggins, supra,* 539 U.S. at p. 527.) In other words, the mitigation evidence that counsel allegedly failed to discover and present to the jury in 1992 was not "powerful." (See *Id.* at p. 534.)

For instance, in *Wiggins*, the defendant had experienced "severe

privation and abuse in the first six years of his life while in custody of his alcoholic, absentee mother" and suffered "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care" and had been "homeless" while suffering from "diminished mental capacities[.]" (*Wiggins, supra,* 539 U.S. at p. 535.) The alleged missing mitigation evidence cited by petitioner in his 2002 petition does not come close to the above mitigating circumstances. In other words, petitioner's alleged missing mitigation evidence is not "stronger" than in *Wiggins*. (See *Id.* at pp. 537-538.) Also, "beginning at the age of seven years, petitioner" was not "housed in an institution for abused and neglected children that was staffed by abusive, violent adults, and that subsequently he was placed in juvenile correctional facilities that were known for crowding, neglect, and abuse." (See *Lucas, supra,* 33 Cal.4th at p. 689; see also *Ross, supra,* 10 Cal.4th at p. 205.)

Also, in *Wiggins*, the defendant had "no prior convictions." (*Wiggins, supra,* 539 U.S. at p. 537.) Petitioner cannot say the same as to his social history. (*Valdez, supra,* 32 Cal.4th at pp. 87-89.) Indeed, the aggravating evidence in this case was not "weaker" than the aggravating evidence in *Wiggins*. (See *Wiggins, supra,* 539 U.S. at p. 538.) Here, the aggravating evidence was not "relatively spare." (See *Lucas, supra,* 33 Cal.4th at p. 735; *Marquez, supra,* 1 Cal.4th at p. 609; see also *Avena, supra,* 12 Cal.4th at pp. 736-738.) Here, the aggravating evidence was conservatively speaking "quite strong." (See *Avena, supra,* 12 Cal.4th at p. 738.) Here, the jury had a "fairly accurate picture of the case in mitigation" and the allegedly missing evidence "would not significantly have altered this picture" of petitioner. (See *Marquez, supra,* 1 Cal.4th at p. 607, discussing *Fields, supra,* 51 Cal.3d at pp. 1079-1081.) "[T]his is not a case in which there was a total breakdown of the adversarial process[.]" (See *Visciotti, supra,* 14 Cal.4th at p. 352.) Here, "petitioner must show how specific errors undermined the reliability of the

verdict." (*Id.* at p. 353.) Also, in this case, "there is no persuasive evidence that these crimes were a product of petitioner's [alleged] drug abuse." (See *Id.* at p. 356.) Further, this is not a case where "[c]ounsel called no witnesses at the penalty phase trial." (See *Fields, supra,* 51 Cal.3d at p. 1076; see also *id.* at pp. 1078-1081 [habeas corpus writ denied due to lack of prejudice under *Strickland*].)

Given the above, there is no a "reasonable probability" the jury would have reached a different "result" if it had been presented with the allegedly missing mitigation evidence. (See *Scott, supra,* 29 Cal.4th at pp. 811-812, 826-828; *Visciotti, supra,* 14 Cal.4th at pp. 352-357; *Avena, supra,* 12 Cal.4th 694, 731-738; *Ross, supra,* 10 Cal.4th 184, 204-215; *Gonzalez, supra,* 51 Cal.3d at pp. 1239-1240, 1242-1255; *Fields, supra,* 51 Cal.3d at pp. 1071-1081; see also *Lucas, supra*, 33 Cal.4th at pp. 731-736.) For the above reasons, counsel's assistance was reasonable, there was no prejudice, and thus, subclaim H must be denied with prejudice without an evidentiary hearing.

4. Penalty Phase Third Party Culpability Evidence (Subclaim I)

Petitioner claims he received ineffective assistance because counsel failed to seek admission of third party guilt evidence at the penalty phase trial (subclaim I). (Pet. at 83-84.) Respondent disagrees. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1157-1158 [no ineffective assistance in failing to proffer third party culpability evidence at penalty phase where jury had obviously rejected similar evidence at guilt phase].) Respondent incorporates here the above discussion of the similar issue as to subclaim B.

In particular, since the same jury adjudicated the penalty and guilt phases, and the guilt phase jury heard evidence about third parties possibly being culpable (see *Valdez, supra,* 32 Cal.4th at pp. 109-110), there is no

"reasonable probability" the jury would have reached a different "result" if counsel had made a "proper" offer of proof at the penalty phase. (See *Strickland, supra,* 466 U.S. at p. 694.) Indeed, as shown in the discussion addressing subclaim B, *ante*: counsel reasonably did not make a "proper" offer, as petitioner alleges he should have, because: (1) respondent believes and alleges that counsel may have been told by petitioner, prior to trial, that he had shot and robbed the victim; and (2) as an officer of the court, counsel could not knowingly participate in the presentation of perjury at trial. Thus, there was no "deficient" performance under *Strickland*. (See *Strickland, supra,* 466 U.S. at p. 687.)

Also, as shown in the argument to subclaim H, *ante*, the available record indicates that this is not a case where trial counsel: (1) failed to investigate defendant's background for a penalty phase; or (2) improperly limited the scope of the investigation of defendant's background for a penalty phase; or (3) failed to present any mitigation evidence at the penalty phase; or (4) presented very little mitigation evidence at the penalty phase; or (5) elected to present mitigation evidence that gave a jury little or no basis to reasonably find compassion, if any, as to a person facing the death penalty. Here, counsel presented the 1992 penalty phase jury with compelling mitigation evidence. Thus, there was no prejudice under *Strickland*; that is, there is no "reasonable probability" that the penalty phase jury would have reached a different "result" if counsel had made a "proper" offer of proof as to third party culpability evidence, as petitioner alleges he should have done. (See *Cone, supra,* 535 U.S. at pp. 695, 697-698; *Strickland, supra,* 466 U.S. at p. 694.)

Here, counsel "requested and received an instruction on lingering doubt and argued lingering doubt to the jury." (Pet. at 83; see *Valdez, supra,* 32 Cal.4th at pp. 128-129.) As this Court has already observed:

Defense counsel, for example, argued to the jury during his guilt phase

closing argument that other individuals could have killed or robbed the victim, arguing at one point: "In the back alley . . . are other people that are found, that are detained, that are talked to. Guenther knows they're back there. He talked to them [¶] Were those people's shoes gathered up? Were those people's shoes taken? Were those people shoe's analyzed? Were those people's shoes looked at for blood?"

(*Valdez, supra,* 32 Cal.4th at p. 129; see RT 1370.) During the penalty phase, counsel, in relevant part, argued to the jury:

> [Y]ou have received the law that has to do with lingering doubt, pure and simple. [¶] Well, when I stood up here during the course and scope of the guilt phase and I indicated to you Ladies and Gentlemen that I have been doing this for 15 years and I have argued cases before for 15 years and that this was a close case and that I believe that there was reasonable doubt, I believed it. And I believe now.

(RT 1993.) Counsel argued: "Mistakes cannot be corrected if you kill somebody." (*Ibid.*) Counsel argued: "I respect your decision, I don't agree with it" and "I've lost cases that I should have won" and "in my humble opinion this is one of those cases." (RT 1994.) Counsel argued:

> [Y]ou have made your decision based on a couple of drunks who apparently you believe. You made your decision on blood being placed on a gun that you cannot say with any reasonable point of view that you know for certain that it's the blood of [the victim], cannot do it, not based on the testimony in this courtroom, cannot do it.

(RT 1994.) Counsel argued: "Is it possible that the murder weapon that [petitioner's] prints was on is not the murder weapon? Yes." (*Ibid.*) Counsel argued: "Lingering doubt [sic]. Mistakes take place in this system, Ladies and Gentlemen." (RT 1994-1995.)

On information and belief, respondent denies that counsel "failed to seek

the admission of his best lingering doubt evidence; Detective Guenther's testimony about the arrest of Liberato Gutierrez." (See Pet. at 83.) Respondent believes and alleges that counsel did not make a "proper" offer as alleged by petitioner because, as an officer of the court, he had a duty to refrain from knowingly proffering false trial evidence. Thus, trial counsel did not want to "point the finger" at Gutierrez (see *Valdez, supra,* 32 Cal.4th at pp. 107-108, 129) because respondent believes that petitioner had confidentially revealed, prior to trial, that he was the shooter-robber. Counsel's assistance was reasonable, there was no prejudice, and thus, subclaim I must be denied with prejudice without an evidentiary hearing.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of habeas corpus be denied with prejudice.

Dated: March 9, 2005

Respectfully submitted,

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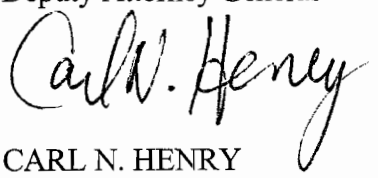

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/cnh
LA2002XH0003

CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13-point Times New Roman font and contains 53,440 words.

Dated: March 9, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

CARL N. HENRY
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

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 Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 MAR 0 9 2005, I placed two (2) copies of the attached

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 300 South Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Marilee Marshall
Attorney at Law
523 West Sixth Street, Suite 1109
Los Angeles, California 90014

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attn: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on MAR 0 9 2005, at Los Angeles, California.

K. Amioka

Signature

CNH:ksa
LA2002XH0003