SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

IN RE MICHAEL BRAMIT, JR.,

Petitioner,

On Habeas Corpus.

Case No.: RIC1821263

Criminal Case No.: CR57524

ORDER GRANTING RELIEF ON HABEAS CORPUS AND ORDER GRANTING NEW PENALTY PHASE TRIAL (Pen. Code, §§ 1475 & 1509; Cal. Rules of Court, Rules 4.574(c) & 4.575)

THIS COURT, having read and considered the return filed by respondent as represented by the District Attorney of Riverside County on July 7, 2021, and the traverse filed by petitioner on May 3, 2022, and taking judicial notice of its own records, including the record on appeal (Evid. Code, § 452, subd. (d)), finds there are no material factual issues in dispute, that the post-order to show cause pleadings admit the facts necessary for the court to decide the issues without the need for an evidentiary hearing, and indeed both pleadings request a decision without an evidentiary hearing. Applying the applicable law to the admitted facts, the court finds petitioner has proved by a preponderance of the evidence that he suffered ineffective assistance of counsel during jury selection and during the penalty phase and that he was prejudiced by the individual failures and by their cumulative impact. Accordingly, the court grants petitioner relief from the

judgment imposing death and issues this order to grant petitioner a new penalty phase trial (Pen. Code,[1] §§ 1475 & 1509). The court explains its reasoning in this order.

Order to Show Cause

On February 7, 2020, this court issued the following order to show cause with respect to the amended petition for writ of habeas corpus, which had been transferred to this court by the California Supreme Court on October 16, 2018: "The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause in the Superior Court of California, County of Riverside and file a return pursuant to Rules of Court, rule number 4.574 within 45 days of the issuance of this order, why the relief prayed for should not be granted on the grounds that (1) Petitioner suffered constitutionally ineffective assistance of counsel during jury selection due to counsel's inadequate voir dire of potential jurors and use of peremptory challenges as alleged in subclaims of Claim 3; (2) Petitioner suffered constitutionally ineffective assistance of counsel during the penalty phase due to counsel's inadequate investigation, preparation, and presentation of mitigating evidence and expert opinions involving Petitioner's personal, family, social, and psychological background as alleged in Claims 5 and 6; and (3) Petitioner suffered constitutionally ineffective assistance of counsel during the penalty phase due to the cumulative effect of the failings stated in (1) and (2)."

Generally Applicable Law Regarding Ineffective Assistance of Counsel

A defendant is entitled to effective assistance of trial counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Jones* (1994) 27 Cal.App.4th 1032, 1040.) A successful claim for ineffective assistance of trial counsel must establish: (1) that counsel's representation fell

[1] All further undesignated statutory references are to the Penal Code.

below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to the petitioner would have resulted. (*Strickland, supra,* 466 U.S. at p. 690; *In re Richardson* (2011) 196 Cal.App.4th 647, 657; *People v. Holt* (1997) 15 Cal.4th 619, 703, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Counsel is presumed to have "rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*Holt, supra,* 15 Cal.4th at p. 703; see also *Strickland, supra,* 466 U.S. at p. 690.) A reviewing court must give great deference to trial counsel's tactical decisions. (*Holt, supra,* 15 Cal.4th at p. 703.) This is because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." (*Harrington, supra, 562* U.S. at p. 105.) The question is not merely whether in hindsight it would have been more prudent for counsel to have done something else; it is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (*Id* at p. 105, quoting *Strickland, supra,* 466 U.S. at p. 690.)

To establish prejudice, a petitioner must show that "[c]ounsel's errors [were] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Harrington v. Richter* (2011) 562 U.S. 86, 104, quoting *Strickland, supra,* 466 U.S. at p. 687.) A petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 685.) With respect to a

verdict of death, "[p]rejudice is established when ' "there is a reasonable probability that, absent the errors [of counsel], the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." ' " (*In re Gay* (1998) 19 Cal.4th 771, 790, quoting *In re Marquez* (1992) 1 Cal.4th 584, 606.)

Post-OSC Proceedings

Applicable Law

"Issuance of an OSC signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) If the court issues an order to show cause, the respondent is required to file a return. (§§ 1480 & 1500; Cal. Rules of Court, rule 4.574(a).) The return must deny or controvert the facts and allegations made in the petition that are material to the claims for which the order to show cause issued. (Cal. Rules of Court, rule 4.574(a)(4).) To adequately deny material facts, the respondent must "allege *facts* tending to establish the legality of petitioner's detention." (*Duvall, supra*, 9 Cal.4th at p. 476, quoting *In re Sixto* (1989) 48 Cal.3d 1247, 1252, emphasis in original.) The factual allegations must respond to the specific allegations of the petition that form the basis for the claim for unlawful confinement. (*Id.* at p. 476.) The return should also include appropriate documentary evidence, affidavits, or other materials. (*Ibid.*) The return has been analogized to a complaint in a civil proceeding in asserting grounds of legality and as to the factual allegations it makes. (See *People v. Pacini* (1981) 120 Cal.App.3d 877, 884.) Facts and allegations not adequately denied or controverted in the return will be deemed admitted for purposes of the proceedings. (*Duvall, supra*, 9 Cal.4th at p. 479; Cal. Rules of Court, rule

4.574(a)(4).) If the respondent fails to dispute factual allegations made in the petition, they have been effectively admitted for purposes of the proceedings. (*Sixto, supra*, 48 Cal.3d at p. 1252.)

After the return is filed, the petitioner files a traverse, also called a denial. (§ 1484; Cal. Rules of Court, rule 4.574(b).) The traverse must deny or controvert material facts and allegations in the return or those facts and allegations will be deemed admitted for purposes of the proceedings. (*Duvall, supra*, 9 Cal.4th at p. 477; § 1484; Cal. Rules of Court, rule 4.574 (b)(4).) The traverse is essentially an answer to the return. (See *Pacini, supra*, 120 Cal.App.3d at p. 884.)

A discussion of the purpose and requirements of the return is prudent in this case. While "[h]istorically the required contents of the return were not very extensive[,] ... the function of habeas corpus has evolved[,]" and our Supreme Court "has required more of the return than mere compliance with the literal language of section 1480." (*Duvall, supra*, 9 Cal.4th at p. 476.) The court has "cautioned ... regarding the danger of relying on general denials in the[] return" (*Duvall, supra*, 9 Cal.4th at p. 479) and emphasized its "disapproval of the practice of setting out in a return to an order to show cause mere general denials of a habeas corpus petition's allegations. Because the issuance of an order to show cause reflects the issuing court's determination that the petition states facts which, if true, entitle the petitioner to relief [citations], the respondent should recite the facts upon which the denial of petitioner's allegations is based, and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed" (*In re Lewallen* (1979) 23 Cal.3d 274, 278, fn. 2). "The People need not *prove* the habeas corpus petitioner's factual allegations are wrong; if an evidentiary hearing is held, it is the petitioner who bears the burden

of proof. At this *pleading* stage, however, the general rule has been that respondent must either admit the factual allegations set forth in the habeas corpus petition, or *allege additional facts* that *contradict* those allegations. If a dispute arises regarding material facts, [the court will] determine the true facts at a hearing in which the petitioner will have the burden of proof. At this early stage, however, the People's burden is one of pleading, not proof." (*Duvall, supra*, 9 Cal.4th at p. 483, emphases in original.) The court emphasized the importance of the return, saying that once an order to show cause has issued, it " 'becomes the principal pleading' [citation][]" ... and is " 'an essential part of the scheme' by which relief is granted in a habeas corpus proceeding. [Citation.]" (*People v. Romero* (1994) 8 Cal.4th 728, 738-739.) The return is the document that provides the People with an opportunity to "participate in the court's decisionmaking process" and helps to "frame[] the issues the court must decide in order to resolve the case." (*In re Serrano* (1995) 10 Cal.4th 447, 455.) A return containing general denials "is deficient in two important ways[,]" specifically by failing to "narrow[] the facts and issues to those that are truly in dispute" and by "prevent[ing] a habeas corpus petitioner from controverting those facts in his or her traverse." (*Duvall, supra*, 9 Cal.4th at p. 480.) The court explained that "[a] return containing general denials indicates the People's 'willingness to rely on the record.' " (*Id.* at p. 479)

Our Supreme Court has acknowledged the rule that the return must deny or controvert facts alleged in the petition "results in the somewhat confounding situation of transforming a denial, albeit a general one, into an admission of sorts[,]" so the court in *Duvall* engaged in a significant discussion of the requirements for the return in a habeas proceeding. (*Duvall, supra*, 9 Cal.4th at pp. 479-486) The court "acknowledge[d] the possibility that a habeas corpus petition

could contain factual allegations that, under the circumstances of a particular case, would be difficult or impossible for the respondent to contradict with contrary factual allegations prior to an evidentiary hearing.... Nevertheless, respondent may harbor an honest and reasonable belief that a particular factual allegation is untrue." (*Id.* at p. 484.) In these cases, the party can meet his factual denial requirement by alleging: (1) he has acted with due diligence; (2) crucial information is not readily available; and (3) there is good reason to dispute certain alleged facts or question the credibility of certain documents or witnesses. (*Id.* at p. 485.) The party should explain: (1) why information is not readily available; (2) the steps the party took to try to obtain the information; and (3) why a party believes in good faith that certain alleged facts are untrue. (*Ibid.*) This will permit the respondent to "identify what facts he is disputing, thereby assisting the court in determining whether there are material facts in dispute to justify an evidentiary hearing. By pleading such facts, the return will fulfill its historical role of helping to narrow the contested issues for the court while holding respondent to his statutory burden of pleading." (*Id.* at p. 486, fn. omitted.)

If, after considering the return and the traverse, the court determines there are " 'no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing.' " (*Duvall, supra,* 9 Cal.4th at p. 478, quoting *People v. Karis* (1988) 46 Cal.3d 612, 656.) Within 60 days after the filing of the traverse, the court must either grant or deny the relief sought in the petition or set an evidentiary hearing. (Cal. Rules of Court, rule 4.574(c).) If there are no factual issues in dispute, the court may decide the merits of a petition without an evidentiary hearing. (*Duvall, supra,* 9 Cal.4th at pp. 478-479; Cal. Rules of Court, rule 4.574(c) & (d)(1).) "The petitioner 'must prove, by a

preponderance of the evidence, facts that establish a basis for relief on habeas corpus.' " (*In re Price* (2011) 51 Cal.4th 547, 559, quoting *In re Visciotti* (1996) 14 Cal.4th 325, 351.)

Discussion

The return here was filed on July 7, 2021. The return does not attempt or claim to deny any of the factual claims made in the petition, nor does respondent claim that he does not have reasonable access to the necessary facts in order to properly admit or deny the material facts alleged in the petition relevant to the issues for which this court issued an order to show cause, nor does the return contain any new documentary evidence. Instead, the return appears to argue that petitioner failed to make the necessary prima facie showing sufficient for the court to issue an order to show cause.[2] Insofar as the return may be considered a motion for reconsideration of the court's prior order, that is denied, and nothing in the return caused the court to question the

[2] For example, respondent complains that "the amended petition relies solely on items within the appellate record to contend the actions of counsel fell below the standard of care during jury selection but the appellate record fails to show either of Bramit's trial counsel did something no reasonable counsel would have done[,]" (Return, Points and Authorities Opposing Relief, pp. 8-9) and "the amended petition does not allege — let alone provide supporting documentation showing [that] an incompetent juror was seated." (*id.* at p. 9.) Respondent says, "the amended petition does not provide a basis for concluding either counsel was deficient in questioning potential jurors" (*id.* at p. 10), "the amended petition is insufficient to overcome the presumptive validity of the tactical choice of counsel to accept the panel" (*id.* at p. 12), and "the amended petition is conclusory as to what would have been uncovered if trial counsel had sought additional analysis at that time" (*id.* at p. 19). Respondent concludes, "the amended petition is conclusory as to whether the actions of counsel fell below the standard of care and does not show any prejudice. [¶] The amended petition is not supported by a declaration of either trial counsel admitting fault or explaining the reasoning underlying their actions in either jury selection or in preparing, investigating, and presenting the penalty phase. Thus, this Court is left only with the presumptive validity of their choices. As to the jury selection claims, the amended petition does not show trial counsel failed to uncover anything that would have disqualified any juror as it does not include any supporting documentation showing what additional questioning would have uncovered. The amended petition also does not explain how the lack of additional questioning, challenges for cause, or use of peremptories resulted in an ineligible juror sitting on the jury" (*id.* at p. 22), and "the amended petition does not permit the conclusion that either trial counsel's conduct was below professional norms or that some action below the standard of care resulted in prejudice to Bramit" (*id.* at p. 23). Respondent's arguments and conclusions go to whether the amended petition met the initial prima facie showing. The court has already determined that the petition met the initial pleading requirements. The issue at this point is narrowing the universe of factual disputes.

propriety of the order to show cause.[3] Respondent does not request an evidentiary hearing to resolve any factual disputes, but only argues that based on the facts, petitioner has not met any requisite burden. Respondent urges the court to deny the claims without an evidentiary hearing to resolve any factual disputes.[4] The traverse, filed on May 3, 2022, points out that the return has effectively admitted the facts alleged in the petition and argues the court should grant relief based on these undisputed facts. Respondent has not requested leave to amend the return.

The court agrees with petitioner that based on the undisputed facts, petitioner is entitled to relief from his sentence of death due to having suffered constitutionally ineffective assistance of counsel during jury selection and the penalty phase and due to the cumulative impact of counsel's errors.

Issue 1: Ineffective Assistance of Counsel During Jury Selection

The first claim the court issued an order to show cause for is whether petitioner suffered ineffective assistance of counsel during jury selection due to his counsel's inadequate voir dire on relevant issues and inadequate use of peremptory challenges. The court finds petitioner has proved this claim by a preponderance of the evidence.

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[3] The People have not raised this, but the court also notes that the court could not treat the informal response as a substitute for the formal return. (*Romero, supra*, 8 Cal.4th at pp. 741-742 ["Although the custodian or real party in interest may choose, after the order to show cause issues, to have the informal response serve as the formal return, the two documents (informal response and return) are formally distinct and are intended to serve different purposes."].)

[4] "[I]t appears the amended petition should be denied without an evidentiary hearing to resolve any dispute of fact because 'the petitioner has not alleged facts sufficient to warrant relief.' [Citation.]' (Return, Points and Authorities Opposing Relief, p. 1.) "Because there is no evidentiary dispute as to what occurred during voir dire, the claim may be denied without an evidentiary hearing." (*Id.* at p. 13.) "[T]he People respectfully request the petition be denied without an evidentiary hearing." (*Id.* at p. 23.)

Additional Applicable Law

The Sixth Amendment and the California Constitution guarantee the right to a jury trial, which requires that a criminal defendant be tried by a panel of impartial and indifferent jurors. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *People v. Williams* (1997) 16 Cal.4th 635, 666.) The United States Supreme Court has said a juror is biased when the juror "ha[s] such fixed opinions that [he or she] could not judge impartially the guilt of the defendant." (*Patton v. Yount* (1984) 467 U.S. 1025, 1035.) In a death penalty case, a juror is not impartial when that "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*People v. Bunyard* (2009) 45 Cal.4th 836, 845, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 423.) "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Morgan, supra*, 504 U.S. at p. 729.)

Voir dire of potential jurors during jury selection "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. U.S.* (1981) 451 U.S. 182, 188.) Voir dire is an art, not a science, and there is no single way to conduct voir dire during jury selection. (*People v. Taylor* (1992) 5 Cal.App.4th

1299, 1313.) However, "[w]ithout adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled[,]" and inadequate voir dire "impairs the defendant's right to exercise peremptory challenges." (*Rosales-Lopez, supra*, 451 U.S. at p. 188.) Review of juror voir dire is always difficult because judges and attorneys have the benefit of personally observing the jurors' demeanors and responses to questions, which are important factors in determining credibility and impartiality. (*Ibid.*) A reviewing court must be careful not to second-guess the conclusions of those who were able to actually hear and observe the potential jurors. (*Ibid.*) And, as always with claims of ineffective assistance of counsel, there is great deference given to the tactical decisions of counsel, and the presumption of adequate representation is not easy to overcome. (*Holt, supra*, 15 Cal.4th at p. 703.) "Hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predications of how the trial would proceed[,]" and every effort should be made to avoid the distortion of hindsight. (*Premo v. Moore* (2011) 562 U.S. 115, 132.)

To succeed on a claim for ineffective assistance of counsel during the jury selection process, the petitioner must show the jury was actually biased, or that but for counsel's deficient performance, it is reasonably probable that a different jury would have been seated that was more favorably disposed to him. (*People v. Freeman* (1994) 8 Cal.4th 450, 487.)

Relevant ABA Guidelines at the Time of Trial

At the time of petitioner's trial, the American Bar Association (ABA) had published the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1989." The guidelines set standards for the preparation, investigation, and presentation of a trial where

the client was facing death, including standards for jury selection. These standards are relevant to determining the prevailing standards of professionalism at the time of petitioner's trial (*Padilla v. Kentucky* (2010) 559 U.S. 356, 366-367 ["We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ....' [Citations.] Although they are 'only guides,' [citation], and not 'inexorable commands,' [citation], these standards may be valuable measures of the prevailing professional norms of effective representation...."; *People v. Jones* (2010) 186 Cal.App.4th 216, 237-238 [citing *Padilla* and relying on ABA standards to evaluate counsel's duty to investigate]). The court also notes that the amended petition cited to these guidelines in support of the claim that petitioner's counsel was ineffective, and respondent has not disputed that these guidelines provide the standard of professionalism for capital counsel in effect at the time of petitioner's trial.

Pertinent to petitioner's case, the guidelines and commentary provided the following:

"Guideline 11.7.2 Voir Dire and Jury Selection

A. "Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

B. "Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding 'death qualification' concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques for rehabilitating potential jurors

whose initial indications of opposition to the death penalty make them possibly excludable.

"Commentary

"The important and complex nature of jury selection is demonstrated by the lengthy guideline drafted by NLADA concerning the process for all criminal cases. The intricacy of the process has led to the creation of specialists in the field. Determining what invisible but lethal currents of prejudice may exist in the jury pool and how to avoid letting the client be trapped therein may require sociological data, psychological expertise, skillful questioning and intuition. Since capital cases demand an even more expansive voir dire than general criminal cases, counsel should consider obtaining the assistance of such a specialist."

Admitted Facts

The court finds the following facts were alleged in the petition, they are supported by the record, they were not denied by respondent in the return, and they are thus are deemed admitted for the purpose of these proceedings:

Trial counsel's role during voir dire and jury selection is to meaningfully question the potential jurors to probe the jurors' views relevant to their abilities to be fair and impartial in the consideration of a defendant's guilt or innocence and to follow the law by considering all mitigating factors and evidence determined by law to be relevant to the determination of whether to impose a sentence of death or life at the penalty phase. (¶ 242)

Trial counsel failed to pose penetrating questions to the jurors that would have produced information about any potential juror bias, their attitudes toward the death penalty, and their attitudes toward various mitigating factors likely to be presented in the penalty phase. (¶ 246)

None of the twelve sitting jurors was asked by trial counsel any questions directly related to the sentence of death or life in prison without parole, or the consideration of background information in reaching a sentencing verdict. Four of the twelve jurors were not asked one single question by trial counsel during voir dire. (¶ 323)

Petitioner's jury was weighted heavily in favor of the death penalty. (¶ 328)

Trial counsel were provided 20 peremptory challenges, yet only 16 potential jurors were excused. (¶ 245)

Juror No. 1, C.B., indicated on the questionnaire that she did not believe a defendant's background was relevant to consideration of penalty. (7 CT 1890.) She rated herself a seven on a scale of one to ten in favor of the death penalty. (7 CT 1888.) She indicated her mother and her friend had been victims of robberies or home burglaries. (7 CT 1883.) Defense counsel asked her if she wanted to be a juror, if she was apprehensive, and if she felt like she would go along with the views of the other jurors. (3 RT 363-364.)

Juror No. 2, A.J., indicated he believed the death penalty should always be imposed for killing during a robbery. (11 CT 2817.) A.J. rated himself a nine on a scale of one to ten in favor of the death penalty, explaining, "If someone take another life with prove by evidence in a court of law then that person life should be taken." (11 CT 2812, errors in original.) He indicated he would refuse to consider whether extenuating circumstances existed when the crime was committed. (11 CT 2819.) He also indicated he would not consider family background in consideration of penalty (11 CT 2820), but said personal background would be relevant (11 CT 2814). Trial counsel did not ask A.J. any questions. (See 4 RT 436-450.)

Competent counsel would have challenged Juror A.J. (#2) for cause or used a peremptory challenge to keep him off of the jury. (¶ 319)

Juror No. 3, R.M., indicated he, a relative, or a close friend had an association with gangs on the questionnaire. (15 CT 4124.) He also indicated when he was 15 years old, his football teammate was killed in a "gang knifing." (15 CT 4126.) During questioning by the court, R.M. said gang members broke his father's window while he was present, and two of his nephews had been involved in separate drive-by shootings. (4 RT 500.) The court asked if he could put those incidents out of his mind and be fair, and R.M. responded that he could. (4 RT 500, 503-504.) On his questionnaire, R.M. indicated he would refuse to consider whether the defendant committed the offense under the influence of an extreme mental or emotional disturbance. (15 CT 4135.) He rated himself a six on the scale of one to ten in favor of the death penalty and explained he had "mix[ed] emotions" about it. (15 CT 4128.) Trial counsel did not ask any questions of R.M. (See 4 RT 509-516.)

Juror No. 4, L.L, indicated in his questionnaire that depending on the circumstances of the crime and the defendant's mental state, the death penalty should be imposed for murder during a robbery. (2 CT 409.) He rated himself a four on a scale of one to ten in favor of the death penalty and explained, "I'm Catholic, however I don't necessarily agree with the church on this issue." (2 CT 404.) He indicated the defendant's background is not relevant to the consideration of penalty. (2 CT 406.) L.L had been the victim of an armed robbery at his work and had been held at gunpoint. (2 CT 399-400; 2 RT 161-162.) Counsel did question L.L. about his experience being robbed, asking, "Anything about that experience that you think in this type of case you would be more inclined to do one thing or the other?" and L.L. responded that there

was not. (4 RT 205.) Counsel also asked L.L. if he would be open to hearing aggravating and mitigating evidence during a penalty phase, and L.L. responded he would and said he would be "real disappointed if we got to that point and we didn't have a lot of mitigating and aggravating type of evidence for us to make a decision on." (4 RT 205.)

Juror No. 5, D.B., who became the foreperson, stated in the questionnaire, "No background justifies the choice to take the life of another" and said he did not believe the defendant's background was relevant to consideration of penalty. (5 CT 1386, emphasis in original.) He stressed personal responsibility in his responses and said, "Responsibility lies with [the criminal] only." (5 CT 1390.) He rated himself as a seven in favor of the death penalty, which he described as "sometimes, regrettably, necessary." (5 CT 1384.) D.B. did not answer the question regarding whether the death penalty or life without parole would be worse for the defendant, saying, "What is better or worse for the defendant is irrelevant." (5 CT 1387.) He indicated he would refuse to consider the defendant's age in consideration of penalty. (5 CT 1392.) Defense counsel asked D.B. whether he considered himself a leader or a follower and if he had kept in touch with his former students. (3 RT 363.)

Juror No. 6, S.M., indicated in the questionnaire that she believed the death penalty made society feel better and safer (14 CT 3765), and she might vote for the death penalty "if the person is continuing to commit violent crimes" (14 CT 3766). She rated herself an eight in favor of the death penalty. (14 CT 3764.) She was a witness to a bank robbery, but said nobody was hurt. (14 CT 3760.) In responding to the question whether a close friend or relative had died from something other than natural causes, she said she knew "an ops officer" who was killed in

another bank robbery. (14 CT 3762.) Trial counsel did not ask S.M. any questions. (See 4 RT 509-516.)

Juror No. 7, D.O., lived in Banning at the time of the trial. (11 CT 2860.) In her questionnaire, she indicated she believed the death penalty was "a necessary evil" and "[an] eye for an eye." (11 CT 2868.) She rated herself an eight in favor of the death penalty and explained, "Too may repeat criminals ... can't be rehabilitated." (11 CT 2868.) She also said, "The only person responsible for you and what you do/are is yourself." (11 CT 2874.) She was not questioned by counsel. (See 4 RT 436-450.)

Juror No. 8, A.S., indicated in the questionnaire that he felt the death penalty was needed in some cases and rated himself a six in favor of the death penalty. (5 CT 1160.) He did not believe the defendant's background was relevant to consideration of penalty. (5 CT 1162.) He believed the death penalty should always be imposed for intentional killings (5 CT 1165) and gave inconsistent answers regarding imposing the death penalty for a killing during a robbery (5 CT 1164 [question 45], 1165 [question 51]). A.S. had been the victim of a robbery at gunpoint. (5 CT 1155.) Trial counsel only asked A.S. if he thought he would be a good juror and whether he had any nervousness or reluctance about the case. (3 RT 292.)

Juror No. 9, F.J., indicated in his questionnaire that he was robbed at gunpoint at his work less than a year before jury selection. (8 CT 1998.) He was also the victim of an assault during an attempted robbery at his work approximately five years before jury selection. (8 CT 1995.) He was a volunteer for the Los Angeles County Sheriff and Fire Department Emergency Communications (8 CT 1997), and his father was a police officer (8 CT 1994). He had previously served as a juror in a murder trial, and the jury reached a verdict. (8 CT 1997.) With

respect to the death penalty, F.J. rated himself a seven in favor of it and indicated "it is needed." (8 CT 2000.) In response to the question regarding whether he felt the death penalty should always be imposed under certain circumstances, F.J. checked every choice involving a killing, including during a robbery, and wrote "could apply" to the side of the question. (8 CT 2005.) F.J. also said, "We are responsible for ourselves no matter what the environment." (8 CT 2006.) Defense counsel asked F.J. if he believed he could be fair. (3 RT 368.)

Competent counsel would have at least asked Juror F.J. (#9) about his jury questionnaire response indicating that the death penalty should always be imposed in killings involving a robbery. (¶ 304) Further, competent counsel would have questioned F.J. about his ties to law enforcement and work with the Los Angeles County Sheriff's Department to determine whether a challenge for cause was necessary (¶ 310) Competent counsel would have challenged F.J. for cause or used a peremptory challenge to keep him off of the jury. (¶ 319)

Juror No. 10, C.P., stated in the questionnaire that she did not believe the defendant's background was relevant to consideration of penalty (9 CT 2394) and "too much blame [is placed] on parents [and] social setting" (9 CT 2398). She rated herself an eight in favor of the death penalty (9 CT 2392) and said "if [a defendant] did it before he could do it again" (9 CT 2394). She indicated at one point that the death penalty should always be imposed for an intentional killing. (9 CT 2397.) Defense counsel asked C.P. if she would listen to both sides and be willing to make a penalty decision. (2 RT 211-212.)

Juror No. 11, G.N., indicated in the questionnaire that he did not believe the defendant's background to be relevant to consideration of penalty (6 CT 1610) and rated himself a six in favor of the death penalty (6 CT 1608). He said people not taking enough responsibility for

themselves "is a problem with our society. You should take care of your own responsibility regardless who the [*sic*] blame, past or present." (6 CT 1614.) G.N. had previously served as a juror in a murder trial where the same judge, Judge McIntyre, was the trial judge, and the same prosecutor, Deputy District Attorney Allison Nelson, was the prosecuting attorney. (3 RT 328.) The jury found the defendant guilty in that case. (6 CT 1605.) Defense counsel asked G.N. if anything about the prior murder case caused him any concern about being a juror in another murder case. (3 RT 371.)[5] Counsel also asked G.N. if there was anything that caused him discomfort during the prior case, and G.N. responded, "Well, a little discomfort." (3 RT 371-372.) Counsel did not follow up. Counsel then asked if G.N. felt any nervousness at the prospect of deciding a death penalty case, and G.N. said he did not. (3 RT 372.)

Competent counsel would have questioned Juror G.N. (#11) further on his responses in the questionnaire and his prior jury service as Juror G.N.'s jury service involved a murder case in which the same prosecutor, DDA Nelson, was the prosecutor and petitioner's trial judge, Judge Robert McIntyre presided. (¶ 286)

Juror No. 12, J.L., indicated in the questionnaire that he did not believe a defendant's background was relevant to consideration of penalty (2 CT 434) and rated himself an eight in favor of the death penalty (2 CT 432). J.L. said he believed the death penalty was appropriate in cases where "the crime is bad enough" (2 CT 432) and that he had "heard of too much leniency in crimes involving murder while growing up" (2 CT 433). J.L. "agree[d] wholeheartedly" with the statement that people do not take enough responsibility for their own actions and blame their

[5] The Reporter's Transcript indicates this was Juror No. 12, however, this appears to be a mistake. Juror No. 12 indicated he had never previously served on a jury (3 RT 248-249; 2 CT 429). Additionally, the two jurors were part of different panels. (See 3 RT 311-386 [Juror No. 11 - Panel 3] & 3 RT 234-310 [Juror No. 12 - Panel 2].)

problems on others and said "we are all responsible ultimately for our own actions." (2 CT 438.) J.L. had been the victim of a robbery while at work during which a gun was put to his head. (2 CT 428.) During questioning, defense counsel asked J.L. whether he thought he would be a good juror and whether he could refrain from talking to people about the case. (3 RT 289-290.)

Reasonably competent counsel would have asked each and every juror questions about the sentence of death or life in prison without parole and about their willingness to consider petitioner's background as mitigation because many jurors' questionnaire answers on these difficult and sensitive subjects were unclear and could have been further developed upon oral questioning. Moreover, these questions and answers are critical to selecting a jury that is not death prone and thus, not prejudiced against petitioner. (¶ 324)

Trial counsel was deficient for accepting jurors who believed that the death penalty should always be imposed for a killing involving a robbery. Trial counsel had sufficient peremptory challenges to dismiss these jurors, specifically A.J. and F.J. In none of these cases could failure to have exercised a challenge been a reasonable tactical or strategic decision. (¶ 325)

Trial counsel's failure to make a sufficient inquiry on voir dire into the jurors' ability to give full consideration to mitigating evidence when reaching a sentencing verdict precluded them from identifying and challenging jurors who might be biased against petitioner. This inquiry would have weeded out nine jurors (Jurors C.B. [#1], A.J. [#2], R.M. [#3], D.B. [#5], D.O. [#7], A.S. [#8], C.P. [#10], G.N. [#11], and J.L. [#12]), who all indicated a lack of ability or unwillingness to consider relevant evidence in mitigation. (¶ 327)

Discussion

On these facts, the court finds petitioner has proved by a preponderance of the evidence that he suffered ineffective assistance of counsel during jury selection, which resulted in prejudice during the penalty phase. Specifically, counsel unreasonably failed to adequately question jurors regarding penalty phase issues and unreasonably failed to competently use peremptory challenges.

On the issue of questioning jurors, counsel's performance fell below the standard of professionalism. As the ABA Guidelines noted, counsel in a death penalty case must try to weed out the "invisible but lethal currents of prejudice [that] may exist in the jury pool." The answers that some jurors gave certainly necessitated further follow-up by defense counsel, but this was not done. Several jurors indicated they would not consider important mitigating factors, including age and personal and familial background. Petitioner's counsel did not ask any follow-up questions regarding the potential jurors' views to determine whether those views were fixed or whether those jurors would be able to follow the instructions and consider everything the law required, thereby failing to inquire into lethal prejudice, invisible or not. Indeed, based on a thorough review of the record, it is clear that counsel had no strategy in approaching jury selection. Counsel asked the same general, non-specific questions of the jurors he did question and failed to question many jurors at all. The questions that were asked were in no way tailored to the particular facts and circumstances of the case designed to evoke substantive answers to give counsel meaningful information to make an informed decision about how to exercise peremptory challenges and avoid a jury biased against petitioner. Unquestionably, counsel did

not conduct an expansive voir dire, something demanded in a capital case, and especially in a case with an 18-year-old client facing the ultimate punishment.

Two areas without follow-up are most troubling: jurors who said they did not believe consideration of a defendant's familial or personal background was important, specifically Jurors C.B. (#1), A.J. (#2), D.B. (#5), F.J. (#9) C.P. (#10), G.N. (#11), and J.L. (#12), and jurors who said they believed the death penalty should always be imposed for killing during a robbery, specifically Jurors A.J. (#2) and F.J. (#9). There is no conceivable rational tactical reason for failing to question these jurors further, and in the case of A.J., failing to question him at all. There is no conceivable rational tactic for failing adequately questioned the jurors given the facts of this case. Juror D.B. (#5) also indicated he did not believe age was an important consideration, something counsel should have explored given that petitioner was only 18 years old when he committed the murder. Failure to follow up on this was deficient performance.

Counsel was also ineffective by failing to competently use peremptory challenges to remove Jurors A.J. (#2) and F.J. (#9) from the jury. The evidence established that A.J. and F.J. were actually biased against petitioner; they said the death penalty should be imposed in all cases of a killing during a robbery, and they did not consider background important in considering whether to impose the death penalty. These jurors were especially problematic in this case because the evidence that the killing took place during a robbery was clear and the arguments for mitigation during penalty phase were largely based on defendant's upbringing and background. Given what counsel knew about these two jurors, there is no conceivable rational tactical reason for having kept these jurors, especially since counsel had four remaining challenges. Even presuming counsel could not have made successful challenges for cause against A.J. and F.J.,

had counsel used two peremptory challenges to remove these jurors, counsel still would have had two challenges left, which could have been used to challenge remaining jurors who expressed staunch support for the death penalty and hesitance to consider mitigating factors that were going to be relevant in this case. Accordingly, petitioner has proved by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness.

Petitioner has also proved by a preponderance of the evidence that he was prejudiced due to his counsel's failures, and the evidence established "a probability sufficient to undermine confidence in the [penalty verdict]" (*Strickland*, *supra*, 466 U.S. at p. 685). With seated jurors actually biased against him and several others who were strongly in favor of death and who would refuse to consider relevant mitigating evidence, petitioner was not tried by an impartial jury, something contrary to constitutional demands. Had counsel performed competently during jury selection by adequately questioning jurors regarding pertinent issues, such as their views on the death penalty and their willingness to consider mitigating evidence, and competently challenged jurors for cause or used peremptory challenges to remove certain jurors, there is a reasonable probability that petitioner would have had a jury more favorably disposed to him.

Respondent argues that the court should deny this claim because (1) the amended petition did not include a declaration of either trial counsel discussing the reasons underlying their actions in jury selection, (2) the amended petition fails to include documentation to show what trial counsel would have uncovered that would have disqualified a juror, and (3) "the amended petition does not explain how the lack of additional questioning, challenges for cause, or use of peremptories resulted in an ineligible juror sitting on the jury."

Respondent emphasizes the presumption that counsel has acted competently and claims that without a declaration from counsel, petitioner is unable to overcome that presumption. Specifically, respondent says "the amended petition is not supported by a declaration of either trial counsel admitting fault or explaining the reasoning underlying their actions in ... jury selection" or "a declaration establishing some particular norm that Gunn, Cormicle, or both, failed to satisfy." Respondent urges denial of the claim, averring that "the absence of a declaration from trial counsel creates 'a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." [Citation]' [Citation.] Thus, the strong presumption that the actions of counsel were done with professional judgment 'has particular force.' [Citation.] Accordingly, because the amended petition does not provide a declaration from either trial counsel, both of whom remain professionally active and subject to a duty of loyalty to [petitioner], the amended petition is unable to overcome the presumption counsel acted within professional norms."

Respondent made the same argument regarding the lack of declaration by counsel several times in the informal response during the prima facie stage.[6] Despite this argument, the court issued an order to show cause. If a lack of a declaration from counsel were per se fatal to a claim for ineffective assistance of counsel, this court would have been wrong in issuing the order to

[6] "Bramit has failed to state a prima facie case for relief. First, he has not offered a declaration from either of his two trial attorneys to illuminate the reasons for their decisions on these issues." (Informal Response to Petition for Writ of Habeas Corpus, p. 20); "Bramit has not offered a declaration from his attorney" (*id* at p. 23); "Bramit has not offered a declaration of counsel to show that they did not exercise reasonable professional judgment in approving the jury questionnaire, nor has he explained his failure to offer such a declaration. Under these circumstances, Bramit has failed to overcome the strong presumption that counsel rendered adequate assistance." (*id.* at p. 32) "Bramit has not offered a declaration of counsel" (*id.* at p. 33); "Nor has Bramit offered. a declaration of his defense counsel to demonstrate that they did not exercise reasonable professional judgment" (*id.* at p. 34); "Bramit has not offered declarations from his trial attorneys to explain their trial decisions, nor explained his failure to do so." (*id.* at p. 38); "Bramit fails to offer declarations of his trial attorneys to shed light on the reasons for their decisions with respect to these issues" (*id.* at p. 53).

show cause. Respondent has not asked this court to reconsider the issuance of order to show cause and does not request the court discharge the order to show cause as improvidently granted. Instead, respondent argues that, substantively, the fact that there is no declaration in evidence requires this court to deny the claim. In support of this argument, respondent cites to *Yarborough v. Gentry* (2003) 540 U.S. 1, 8, and *Duvall, supra*, 9 Cal.4th at p. 474. This court disagrees that these cases support respondent's position regarding the necessity of a declaration.

First, *Yarborough* was at an entirely different procedural posture from our case as the United States Supreme Court was reviewing a state criminal conviction. A federal court reviewing a state conviction is limited to determining whether the state court's rejection of an ineffective assistance of counsel was an objectively unreasonable application of clearly established federal law (see *Yarborough, supra*, 540 U.S. at p. 5; 28 U.S.C. § 2254, subd. (d)(1)), while this court is the first state court to decide the issue. Further, *Yarborough* does not support the contention that a declaration is *required* to grant relief on habeas ineffective assistance of counsel claim, only that the presumption of competent performance is particularly strong when the reviewing court is relying solely on the record. Neither does *Duvall* support respondent's claim. In *Duvall*, the court was discussing the pre-OSC petition requirements, including that the petition should "include[] pertinent portions of trial transcripts and affidavits or declarations[,]" and the court said, "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*Duvall, supra*, 9 Cal.4th at p. 474.) These cases do not require a declaration of counsel to find ineffective assistance.

In our case, despite the lack of a declaration of counsel, this court previously determined that some claims in the petition related to ineffective assistance of counsel were not conclusory

and issued an order to show cause. The presumption, even when particularly strong, is not insurmountable and is no substitute for careful review, especially when it is clear from the record that counsel had no conceivable rational tactics when making their choices during jury selection. "[D]eferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; see also *People v. Dennis* (1998) 17 Cal.4th 468, 541 [to establish ineffective assistance of counsel, "a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions.")

While difficult, it is possible for a defendant to rebut the strong presumption of competent performance and make a showing of ineffective assistance of counsel based solely on review of the record. Importantly, in this habeas proceeding, the record does not consist solely of the trial transcript and record, but also includes the facts contained in the petition that respondent has not denied and effectively admitted. When relying on the record, a reviewing court will " ' "reverse convictions on the ground of inadequate counsel only if the record ... affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [Citation.]' " (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1130, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 980.) "[I]f the record does not shed light on why counsel acted or failed to act in the

challenged manner, we must reject the claim ... unless counsel was asked for and failed to provide a satisfactory explanation, *or there simply can be no satisfactory explanation.*" (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1129, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1212, emphasis added.) As explained above, given the facts of this particular case, "there simply can be no satisfactory explanation" for counsel's failure to adequately question jurors regarding issues pertinent to the case and failure to competently use peremptory challenges. This court is not engaging in any inappropriate second-guessing or imposing unreasonable scrutiny with the benefit and distorting effect of hindsight with respect to counsel's performance and decisions during jury selection. There is no reasonable explanation for counsel's performance, and indeed respondent offers no such explanation (see *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1524 ["The Attorney General suggests no tactical reason for defense counsel to withhold objection ..., and we cannot imagine one."]). Respondent merely makes the conclusory statement that counsel "could have reasonably determined general questions are more effective at eliciting bias or that additional questioning would have exposed a potential juror to a challenge even though they had indications of being favorable to the defense at either phase of trial[]" and "could have reasonably relied upon their observation of the potential jurors or concerns over who might replace a juror." Respondent does not point to any specific facts in support of these conclusory statements, and indeed makes no references to the facts in arguing this claim.

On the issue of prejudice, respondent argues that "the amended petition does not allege — let alone provide supporting documentation showing — an incompetent juror was seated ... [¶] ... [and] provides nothing to show what would have been uncovered from further questioning of any juror or to show that someone seated on the jury was actually biased such that they should

have been removed for cause. Thus, the claim that [petitioner] was prejudiced due to the failure to question or challenge any juror is based solely on unsubstantiated speculation." The court disagrees with this characterization of what the record shows with respect to actual bias. Juror A.J. unequivocally stated in the questionnaires that he believed the death penalty should always be imposed in cases of a murder during a robbery and he did not believe consideration of a defendant's personal background was relevant. The court remains mindful of the pronouncement of the United States Supreme Court that "a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror.... If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Morgan, supra*, 504 U.S. at p. 729.) Having expressed automatic support of the death penalty in all robbery felony murder cases and a belief that background was not an important consideration when deciding penalty, counsel should have challenged, at least, A.J. for cause, and by failing to do so, an actually biased jurors were seated on petitioner's jury, and the jury returned a sentence of death. As noted above, other jurors expressed actual bias, as well. A.J. is simply the most egregious and obvious and a single biased juror renders the death sentence unconstitutional. The record establishes by a preponderance of the evidence that due to his counsel's deficient performance, petitioner was not tried by an impartial jury, and this was prejudicial.

Issue 2: Ineffective Assistance of Counsel During the Penalty Phase

The second issue for which the court issued an order to show cause is whether petitioner suffered ineffective assistance of counsel during the penalty phase. Again, respondent does not deny the factual claims with respect to the claims of ineffective assistance of counsel, so the court will determine the issue as a matter of law.

Additional Applicable Law

Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." (*Strickland, supra*, 466 U.S. at p. 691.) A defendant "can ... reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations.] If counsel fails to make such a decision, his action—no matter how unobjectionable in the abstract—is professionally deficient." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; see also *In re Marquez* (1992) 1 Cal.4th 584, 602. ["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."]; *In re Jones* (1996) 13 Cal.4th 552, 564-565 ["the reasonableness of a tactical decision at trial invites scrutiny as to whether that decision was an informed one, that is, whether it was preceded by adequate investigation and preparation."].) The exercise of counsel's discretion in making decisions "must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation and preparation' " (*In re Hall* (1981) 40 Cal.3d 408, 426), and decisions regarding the investigation must be examined in light of counsel's actual strategy (*In re Lucas* (2004) 33 Cal.4th 682, 725). A " 'tactical decision' " that

"followed from 'ineptitude or lack of industry' " on the part of counsel "cannot shield him from the charge of incompetence." (*Id.* at p. 430.) When reviewing counsel's decision not to introduce evidence in mitigation, the "focus [is] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable.*' " (*Lucas*, *supra*, 33 Cal.4th at p. 725, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 523, emphasis in original.)

In *In re Lucas* (2004) 33 Cal.4th 682, our State Supreme Court reversed a judgment of death due to counsel's deficient investigation in preparation for the penalty phase. There, the defendant was convicted of brutally murdering an elderly couple during a burglary in 1986. (*Lucas*, *supra*, 33 Cal.4th at pp. 690-691.) Defense counsel did not present any evidence in mitigation. (*Id.* at p. 690.) The reference hearing established that a reasonable investigation would have uncovered evidence that the defendant's mother, an unwed teenager at the time of his birth, gave him up for adoption, and he spent about three years in five foster homes before she reclaimed him. (*Id.* at p. 698.) School records indicated the defendant was being abused, and at the age of seven, he was sent to live in a care facility for neglected and abused children. (*Ibid.*) Records from the care facility indicate that the staff believed the defendant had been subjected to severe abuse and was psychologically damaged as a result. (*Ibid.*) The defendant's family members and others testified that as a young child, the defendant "had been singled out for physical and emotional abuse, both by his parents and by his stepfather's mother, with whom he frequently resided. Between the ages of three and seven years, he was beaten regularly, given inadequate food, dressed in rags during Ohio winters, forced to sleep under the bed, disciplined by being burned with a cigarette and by the administration of chili peppers to his genitals, and

excoriated because of the circumstances of his birth. His sister was not subject to abuse; [the defendant] often was fed solely on her leftovers." (*Ibid.*) Trial counsel's investigation did not uncover this evidence; rather, the investigation was incomplete and inadequate, and counsel failed to follow-up with witnesses when counsel was on notice that further investigation would likely lead to mitigating evidence. (*Id.* at pp. 699-708.) Had counsel conducted an adequate investigation, significant mitigating evidence would have been uncovered, specifically information regarding the defendant's horribly abusive childhood. (*Id.* at pp. 708-718.)

In finding counsel was ineffective, the court explained, "Lead counsel's failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history[,] ... [and] defense counsel acted unreasonably in failing to conduct a thorough investigation of facts relating to [the defendant's] social history, considering the suggestive evidence in their possession[.]" (*Lucas*, *supra*, 33 Cal.4th at p. 725.) The court noted that counsel had a "confused" strategy for the penalty phase, and counsel indicated he had not rejected social history as an element of the case in mitigation, "a circumstance rendering even more inexplicable his failure to thoroughly investigate petitioner's social history." (*Id.* at p. 726.) The court pointed out that counsel's "tardiness and superficiality" in conducting the investigation prevented counsel from being "[]able to respond to the apparently unexpected failure of his penalty phase strategy." (*Ibid.*) The court also rejected the argument that counsel's decision was tactical because he feared presenting evidence in mitigation would open the door to more evidence in

aggravation, saying counsel did not have enough information to make this decision. (*Id.* at p. 730.)

On the issue of prejudice, the court explained that the unpresented "mitigating evidence was weighty—particularly the evidence of the rejection and extraordinary abuse [the defendant] suffered at the hands of his family when he was a young child. [Citations.] Such evidence may be the basis for a jury's determination that a defendant's relative moral culpability is less than would be suggested solely by reliance upon the crimes of which he stands convicted and the other aggravating evidence." (*Lucas, supra*, 33 Cal.4th at pp. 731-732.) The court said if the jury had heard such evidence, "they would not have been left to consider inexplicable acts of violence, but would have had some basis for understanding how it was that [the defendant] became the violent murderer he was shown to be at the guilt phase" and, given the strength of the evidence, it "naturally would have given rise to greater understanding, if not also to sympathy." (*Id.* at p. 732.) Even against a strong case in aggravation, the court said, "A significant potential exists that this evidence would produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision. The potential that the evidence would reduce [the defendant's] moral culpability in the eyes of members of the jury also is significant, even weighed against potential rebuttal evidence." (*Id.* at p. 735.) Accordingly, the court granted relief, finding that "trial counsel's failure to perform an adequate investigation of available evidence in mitigation for possible use at the penalty phase constitutes performance that falls below an objective standard of reasonableness. This failure was prejudicial." (*Id.* at p. 736.)

Relevant ABA Guidelines at the Time of Trial

Pertinent to petitioner's case, the ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1989" provided the following:

"Guideline 11.3: Determining that Death Penalty Is Being Sought

"Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

"Commentary

"If there is any possibility that the death penalty will be sought, counsel should proceed as if it will be sought. As is set out in Guideline 11.4, early investigation is a necessity, and should not be put off on some possibility that the death penalty will not be requested, or that the request will be dropped at a later point."

"Guideline 11.4.1: Investigation

"Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously."

"Guideline 11.8.3: Preparation for the Sentencing Phase

A. "As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in

mitigation or explanation of the offense and to rebut the prosecution's sentencing case."

[¶]...[¶]

F. "In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. "Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. "Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;"

[¶]...[¶]

4. "Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client."

"Guideline 11.8.6: The Defense Case at the Sentencing Phase

A. "Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

B. "Among the topics counsel should consider presenting are:

1. "Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);"

[¶]...[¶]

5. "Family, and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);"

[¶]...[¶]

8. "Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing."

"Commentary

"The evidence to be presented by the defense - indeed, the whole theory of proceeding - at the sentencing phase stands outside normal criminal trial practice. Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail. The assistance of one or more experts (e.g. social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome, as set out in Guideline 11.4.1(a) and 11.4.1(7). Unless a plea bargain has resulted in a

guarantee on the record that the death penalty will not he imposed, full preparation for a sentencing trial must be made in every case."

[¶]...[¶]

"Obviously, the uniqueness of every client makes guidelines as to the sentencing phase a starting point, not a checklist. However, counsel in every capital case should consider strategies offered by other attorneys, discussed in the literature or otherwise available for consideration. Counsel may not choose, without investigation and preparation, to sit back and do nothing at sentencing...[¶]...The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill."

Subissue: Lay Testimony of Petitioner's Personal, Social, and Familial History

The first issue with respect to the claim of ineffective assistance of counsel relates to the investigation and presentation of lay evidence with respect to petitioner's personal, social, and familial history. On this issue, the court finds counsel was ineffective by failing to competently and adequately investigate petitioner's personal, social, and familial history and failing to uncover powerful evidence in mitigation in preparation for the penalty phase and by failing to competently present known evidence in mitigation. The court concludes that petitioner was prejudiced by his counsel's individual failures and their combined effect.

The court summarizes the relevant facts in support of this claim followed by a discussion. Because this claim is so fact specific, an extensive factual recitation is necessary. The following lists each witness who testified on behalf of petitioner during the penalty phase with a summary of their statements to defense investigators and a summary of their testimony at trial, followed by a list of individuals interviewed by defense but not presented at trial, and finally, a summary of

petitioner's life story. These summaries are based on the undisputed facts presented in the amended petition and not denied by the return.

Denise Carr

Statements to Investigators

Denise Carr is petitioner's mother. She was interviewed twice by the defense and once by the prosecution. (Callaway Investigation April 24, 1996 Memo re Interview With Denise Carr, Petitioner's Exhibit No. 13, Vol. III, 563-567; Denise Carr, April 13, 1997, Petitioner's Exhibit No. 66, Vol. VII, 1764-1766; November 12, 1996 District Attorney Interview of Denise Carr, Petitioner's Exhibit No. 47, Vol. VII, 1593-1596.) Denise[7] provided investigators with the names of her siblings and each one's father. She also provided some contact information.

In one interview, Denise told defense investigators that petitioner was the product of a one-night stand with Michael Bramit, Sr., whom she had met at a party, and petitioner never knew his father. In the later interview, she said she had a one-night stand with a man named James Hicks, and he was petitioner's father. In that interview, she said Michael Bramit, Sr. was a friend of hers. In November 1996, she told the district attorney investigators that petitioner's birth was normal with no issues. In April 1997, she told defense investigators that petitioner was only three pounds when he was born and had to stay in the hospital after his birth.

Denise said her boyfriend XL Cook was petitioner's father-figure, and he cared for the children very much. XL Cook eventually went to prison, at which point Denise said her "world was shattered." After that she turned to drugs, specifically crack, and partying. She asked Bonnie Jackson, whom Denise considered her mother-figure, to take care of the children when she was

[7] For the sake of clarity, the court will refer to some witnesses by their first names. No disrespect is intended.

gone and arranged for her welfare check to go to Jackson for that purpose. She said petitioner was happy with Jackson and was close to her son, Keshon Cooper.

Denise knew petitioner was angry about her "lack of motherly" duties, and she would talk to him about it. She said he was not mad at her, but rather "mad at things in general." She said petitioner would cry and tell her, "We'll be all back together someday." She described petitioner as the one who took on the role of the father to his two siblings. Denise said he was very close to them and loved them very much. He would spend time with them, talk to them, take them to school, and attend their events.

Petitioner began to "rebel" in his mid-teen years. Denise said he began to hang out with older kids, some with gang ties. Denise told investigators that petitioner was jumped into a gang at the age of 11 or 12. She said he was never involved in any hardcore gang activity, and she did not know him to carry a gun. The gang activity in their neighborhoods made it difficult for petitioner to go to school as he would get into verbal or physical altercations simply because of where he lived. She eventually sent petitioner to a boys' home to help with his issues.

She said that petitioner was shot in 1993. She described this as a "drastic turning point in his life." Petitioner was shot in front of his home, and his friend was also killed in the shooting. She said the shooting was committed by rival gang members. After the shooting, petitioner was angry and disturbed, and she described him as someone who had "shell shock." She said his personality changed and he became withdrawn. She believed he had mental problems as a result.

She claimed that despite "running wild," she regularly saw her children, and they appeared happy. She said she was never around her children while she was high. She said she moved around a lot, sometimes staying in one place for as little as a month. She admitted this

instability had a negative effect on the children and it was difficult for them to feel at home or make friends. Denise had relationships with women after XL Cook went to prison; she said her children were not bothered by her relationships with women, and she did not believe they had been harassed by their peers because of it.

Denise suggested the defense team interview a teacher and another person who worked at petitioner's middle school. She provided their names and the location of the school. She also suggested they interview a family friend who was an attorney and provided his phone number. None of these people was interviewed.

Trial Testimony[8]

Denise testified that petitioner was the result of a one-night stand, and they never had contact with his father after he was born. She claimed she did not use drugs or alcohol during her pregnancy, but began using drugs and alcohol when petitioner was 11 or 12 years old. She said petitioner did not have any male figures in the home until she began a relationship with XL Cook. She said this happened when petitioner was 11 or 12 years old. Her relationship with XL Cook ended when he was sent to prison. She had two children with XL Cook: Marvin and Lakeisha. Denise later had an eight-year relationship with a woman named Katherine Cole.

She testified that she and the children moved to several different homes and lived with many different people during petitioner's childhood. She testified when she was using drugs she would send the children to live with family members or with Bonnie Jackson. She said when she would leave, it would only be overnight or possibly for a week. She testified that at the time of

[8] Denise Carr's testimony and subsequent discussion of her testimony are located at 13 RT 2143-2167.

petitioner's trial, she had been clean for over a year and was the primary caretaker of petitioner's daughter.

Denise described petitioner as "very kindly, a little gentleman," and said he was a happy child who was involved in sports and did well in school. However, he was exposed to gangs and drugs around the age of 12 and became involved with both, as well. He was sent to a boys' home when he was 14 years old, as his counsel described in one of his questions, "because of the problems that he was creating." Denise said she did not visit him in the boys' home, but that they had "friendly" phone calls. Petitioner was expelled from school in eleventh grade for fighting.

Denise testified that she and petitioner had a "[m]other-son and sister and brother" type of relationship. She said petitioner got along with his brother and sister and said they were "close." Petitioner's counsel asked her how she would feel if petitioner were put to death. She answered, "Well, sort of—I don't know—I don't know. I have to stay strong to take care of my grand baby. I have to stay strong to be there for my daughter, to show her the mistakes[,] the things that I've done so she wouldn't follow my way and I just have to keep loving him knowing he's mine and I never stop loving him."

On cross-examination, Denise said she tried to be as good of a mother as she could. She said she tried to keep the children together, always tried to remember their birthdays and holidays, and made sure they had food and clothing. She said she taught petitioner right from wrong, encouraged him to go to school, and discouraged and tried to prevent him from associating with gangs.

During her cross-examination, petitioner abruptly "threw his chair backwards, knocked it over, and then ... exited the courtroom." The trial judge noted prior to that, petitioner had

"behaved like a gentleman throughout th[e] trial." After petitioner's outburst, Denise appeared to suffer an asthma attack. The prosecutor indicated she had no more questions for Denise, and defense counsel did not perform any redirect examination. Petitioner says his mother was high when she testified and trial counsel should have known this.

Clyde Stewart

Statement to Investigators

Stewart told investigators that he ran the home for boys where petitioner was placed. He described petitioner as having a lot of anger inside and said he would frequently cry. He described a difficult relationship between petitioner and Denise. He said it would upset petitioner when Denise would call. He also said Denise would tell petitioner she was coming to visit, but would never show. He said petitioner felt responsible for his brother and sister and had taken on the role of their guardian. (Clyde Stewart, April 22, 1997, Petitioner's Exhibit No. 66, Vol. VII, 1799-1800.)

Trial Testimony[9]

Stewart told the jury about the boys' home and that petitioner did well in the program, made progress, and was easy to get along with. He testified petitioner was at the program for approximately 14 months and had difficulty with a place to stay upon his release, which Stewart said made petitioner unhappy. He said that petitioner's mother never visited him at the home, but Bonnie Jackson did.

On cross-examination, the prosecutor asked if petitioner "was very resistant to dropping this gang sort of attitude and demeanor about himself" while in the program. Stewart responded

[9] Clyde Stewart's testimony is located at 13 RT 2175-2184.

that he would not say "resistant," but said "when they were by themselves or thought staff wasn't too much paying attention to what they were doing they would kind of revert and just kind of get into that mode of street life."

Vernita "Elaine" Lynch

Statement to Investigators

Vernita "Elaine" Lynch is petitioner's aunt. She described petitioner as a trustworthy, friendly, likeable person. She said he was never violent with her. She said he treated older people and children well, and she did not know him to use drugs or alcohol. She was unaware of any bizarre behavior or aberrant sexual behavior. She said she had seen petitioner lose control of his emotions before and described an incident involving an argument between her own sons that caused petitioner to become upset and cry.

She said petitioner was very helpful to her and would help her with money, which she said he usually had. She said he would take her kids out and buy them clothes or shoes, and sometimes give them money. She said he was helpful to everybody, unless someone upset him, and then he would not do anything for them. She said he was generally very friendly, but sometimes could get into moods when he was not.

She said petitioner "constantly" worried about his brother and sister. She described that petitioner was the one who raised his siblings and said he had missed out on a lot because he had to be a man when he was just a kid. She said petitioner liked to come to her home because it was stable, something he did not have in his own life because of the constant moving around. She said Denise would always take petitioner out of a stable environment, and he was never able to establish any roots, which especially caused him difficulty in school. She said petitioner would

always do what his mother wanted. She said he wanted to buy a home for his mother, brother, and sister so they would always have a place to stay. However, petitioner always felt rejected by his family and did not get the love he needed.

She told investigators that after he got shot, petitioner changed. She said he was wilder before he was shot and tamed down after. She said he never showed any anger, however. (Vernita Lynch, May 6, 1996, Petitioner's Exhibit No. 66, Vol. VII, 1795-1798.)

Trial Testimony[10]

Elaine told the jury that petitioner's mother began using drugs after XL Cook went to prison. She said Denise would "stay away" when she was on drugs. When defense counsel asked her whether Denise would stay away for long periods of time, she responded, "I couldn't say short, but I couldn't say how long." She testified petitioner was polite to his elders and did not mistreat children. She said petitioner was well-behaved around her and she trusted him. She said she loved him, and his death would have "[a] very bad impact" because he was part of her life, and "[a]nyone that is part of your life will bring an impact on you."

Beatrice McClain

Statement to Investigators

Beatrice McClain is petitioner's grandmother. She told investigators about Denise's drug use and said Denise would leave the children for days at a time without telling them where she was. She said petitioner knew his mother was using drugs and that that was the reason she would leave. Denise would leave petitioner in charge of his two siblings. Beatrice said petitioner was very concerned about his siblings, and all he wanted was his family to be together. She said it

[10] Vernita "Elaine" Lynch's testimony is found at 13 RT 2184-2191. Pages 2185 and 2187 are missing from the appellate record lodged with this court.

bothered petitioner that he was not able to provide more for his siblings. Petitioner worked jobs delivering newspapers and selling candy in order to earn money. He would use the money to buy shoes and clothes for his brother and sister.

She described petitioner as a good boy who never gave her many problems. She said he spent most of the time with his family or by himself. She said petitioner went to church with the family, and she tried to counsel the children about staying away from drugs and gangs. She said petitioner drank beer and smoked marijuana, and she was unaware if he was in a gang.

She said petitioner was greatly bothered by the fact that his mother was a lesbian. She said petitioner and his siblings had a hard time accepting that, and they were teased at school because of it. Beatrice was unaware if Denise used drugs or alcohol while she was pregnant with petitioner. (January 18, 1996 Justin Painter Interview of Beatrice McClain, Petitioner's Exhibit No. 74, Vol. X, 2609-2610.)

Trial Testimony[11]

Beatrice testified that petitioner and his siblings lived with her from 1987 until 1989. She said she took the children in because Denise had a drug problem and had gone to stay in San Francisco for six or seven months. Denise did not visit the children during this time. She said the children were taken care of by her or Bonnie Jackson when Denise would leave.

Beatrice testified that petitioner treated his siblings very well and was "most concerned" about them. She said petitioner was respectful when he lived with her. Counsel asked Beatrice if petitioner was ever "mean" to her and she responded, "sometimes" and explained it was difficult for petitioner to accept her telling him what to do when she was not his mother. He felt he had

[11] Beatrice McClain's testimony is located at 13 RT 2192-2195.

missed out on having his mother be there for him. She said after he moved out of her home, petitioner continued to visit her every day or every other day. When asked how petitioner's death would affect her, she said she would have to "turn it over to Jesus." Counsel asked if she would miss him, and she said, "Do I miss him? I miss him now."

Lakeshia Cook

Statement to Investigators

Lakeshia Cook is petitioner's younger sister. She told investigators that petitioner would go out of his way to help people, and he would break up fights between family members. She said he was smart, outgoing, and respectful of elders and nice to children. She said sometimes he was trustworthy. She described him as friendly sometimes, but said he could have an attitude. She did not know if he had ever threatened anyone or committed a crime. She said he was lazy, but he did not live off anybody, and he attended classes in school. She said he usually had money and even had a BMX bicycle and cars. She said when her mother was in jail for two years, she and her siblings lived with Bonnie Jackson. She said that petitioner was not bothered by their mother's sexuality. (Lakeshia Cook, April 22, 1996, Petitioner's Exhibit No. 66, Vol. VII, 1772-1774.)

The statement notably lacks any information about petitioner providing for his siblings or taking care of them in their mother's absence. This interview took place after investigators spoke to Bonnie Jackson and Beatrice McClain, who told them about Denise's drug use and neglect of her children and petitioner's role as their caretaker.

Trial Testimony[12]

Lakeshia's entire testimony was as follows:

Q: Thank you for coming Lakeshia. You know Michael as your brother, right?

A: (No audible response)

Q: Is that a yes?

A: Yes.

Q: Do you love your brother?

A: Yes.

Q: Why do you love your brother?

A: Because he always been there for me when I didn't have a daddy.

Q: How was he there for you?

A: We didn't – my mom was on drugs. He was there. I didn't have no dad or nothing. My brother had to steal for me and my brother so we could survive.

Q: Are you able to continue? What sort of impact or how it would affect you if Michael was to be killed?

A: Bad.

Bonnie Jackson

Statement to Investigators

Bonnie Jackson took care of petitioner and his siblings during periods when his mother left. She was interviewed along with her son, Vincent Jackson. She told investigators that Denise was a crack addict who ran with a bad crowd. She would frequently leave the home to use drugs

[12] Lakeisha Cook's testimony is located at 13 RT 2196-2197.

and would put petitioner in charge of his brother and sister. The children's aunts would sometimes have to pick the children up from the police station when Denise got arrested. When Denise left to go to San Francisco, she asked Jackson to take custody of the children, which she did.

Denise returned about five months later and took the children back. Jackson said she was still using drugs at that time and would continue to leave the children alone, with only petitioner to care for them. She said petitioner taught his brother and sister to avoid drugs, guns, and gangs. She said his brother and sister depended on him, and petitioner's priority was keeping them together and having money to provide for them.

Jackson described petitioner as a good kid. She said he was quiet and introverted and never violent. She said the neighborhood where they lived was rife with gang activity. Jackson and her son said petitioner hung out with gang members, but they did not think he was a member. Jackson said petitioner was different from other boys in the neighborhood because he had people who cared about him. Jackson said she believed XL Cook was petitioner's father. Jackson suggested the investigators speak to her other adult children who grew up around petitioner. (Bonnie Jackson, December 4, 1995, Petitioner's Exhibit No. 66, Vol. VII, 1788-1789.)

Trial Testimony[13]

Jackson considered petitioner her grandchild even though they were not blood related, and she had known him since birth. She testified briefly regarding petitioner's childhood and Denise's drug habit. She testified that petitioner's mother was nonfunctional when petitioner was

[13] Bonnie Jackson's testimony is located at 13 RT 2206-2211.

only two or three years old, and she took the family into her home. She also took in petitioner and his siblings a couple of times when their mother was in jail or when she just left. There was one period where Denise was gone for over a year. She said Denise loved the children and would call and sometimes visit.

Jackson described her neighborhood as rough and suffering gang activity. She had four sons living at home with her when petitioner was growing up and staying with her. Petitioner became friends with one of her sons, Keshan Cooper, and counsel elicited from Jackson that Keshan was convicted of murder and was sentenced to 19 years to life.

Jackson described petitioner as smart and always trying to make a good situation out of a bad one. She said he loved his brother and sister, and "he felt like he had to be the man to be a big brother for his siblings." Counsel did not ask follow up questions about this. When asked what impact it would have on her if petitioner were executed, she said she loved him very much and that death was unnecessary because he had the potential to be somebody.

The defense rested after Jackson's testimony.

Other Individuals Interviewed by Defense but not Called to Testify

In addition to the six witnesses who testified, the defense also interviewed: (1) Latrina Howard[14], girlfriend, (2) Juanita Dobbins, aunt, (3) Joyce Tripp Williams, aunt, (4) Ronnie Lynch, uncle, (5) Alice Trina Drew, cousin, (6) Rasheda Williams, cousin, (7) XL Cook, stepfather, (8) Keshon Cooper, Bonnie Jackson's son, (9) Katherine Cole, petitioner's mother's girlfriend, (10) Carolyn Cole, Katherine Cole's daughter, and (11) Evangelina Lozoya, victim

[14] Howard did testify in the penalty phase, but was called by the prosecution.

Juan Fierros' girlfriend. (See Witness Interviews, Petitioner's Exhibit No. 66, Vol. VII, 1767-1771, 1775-1787, 1790-1794, 1801-1804.)

These interviews generally described petitioner, including his personality and the fact that he cared for his brother and sister. Some interviews revealed Denise's drug use and the fact that she was generally neglectful of her children. Most specifically was the statement of Joyce Tripp Williams. The interview with Ronnie Lynch, petitioner's uncle, also discussed petitioner's care for his siblings and the neglect he suffered by his mother. This was a common theme throughout most of the statements.

Relevant Portions of the People's Closing Arguments[15]

"We heard testimony from his family members understandably grieving over the possibility that he may be executed. We heard testimony from them about Michael Bramit, the son, the godson, the grandchild and the brother.

"You and I, however, during the course of this case, have gotten to know a different person, and his name is not Michael, it is Wiz. And you, ladies and gentlemen of this jury, are in the unique position that you know more about the defendant than his own family does. You know things. he has done that they do not know. You have seen the witnesses come into this courtroom breaking down crying, shaking to the point that they can barely point at an exhibit. You know that. This trial is not about Michael. It is about Wiz.

"And so throughout my argument, I may have a tendency to call him by the name that I think you should think of him as when you are making this decision."

...[¶]...

[15] The quoted portion of the closing argument is located at 14 RT 2250-2277.

"Mitigation. Mitigation? What mitigation can we talk about in this case? First and foremost, I'm gonna go back to the article I read you in the beginning and tell you that what the defense in this case is saying to you is that the defendant is not responsible for any of these choices that he has made in his life because he had a poor childhood.

"The reason he had a poor childhood is because his mother abused crack cocaine. There is a bit of irony that that is the excuse. The defendant didn't seem to be too concerned about selling rock cocaine to Angie Simms, the mother of Spechel Austin. But, nonetheless, we are to believe that his mother's use of crack cocaine periodically throughout his life is a ticket for him to not be held accountable to society, you being the representatives of society, for this horrendous crime and others that he has committed. And, yet, let's ask ourselves, did he really have a horrible family and horrible childhood?

"You saw these people that came into this courtroom. Certainly, certainly, they do not want to see their relative executed, but these are people who raised their children, sent them to school, celebrated Christmases and birthdays just like the rest of us, took him into their home, grandmothers, godmothers, aunts, loving people who loved him very much. He was shown a different way, ladies and gentlemen. He was taught right from wrong.

"I couldn't have said it better than the lovely lady who testified yesterday who said he has potential. He's always had potential, ladies and gentlemen, from the time he was small. He was bright. He was articulate. He played with other children. He was a happy child and he had all this love and all these people in this extended family, understanding that it is not a substitute for a mother. But what did he choose to do with his potential? He chose to take his potential down the street and hang around with gang members and become a violent criminal.

"Let's not kid ourselves that that wasn't a choice that he made. And it's a shame because the pain that his family is feeling is genuine, and that pain has been inflicted upon them not by me, but by him because of the choices that he made to go out and do drive-by shootings. How long do you think his family has sat back and waited for that phone call saying that he's dead, he's been shot in a drug war or by a gang member or some Bloods driving by? How many times?

"He chose the path of his life and it has led to true sorrow on behalf of those who love him. And he chose to end the path of Mr. Fierros' life, as well. And so he, too, has inflicted that pain and that sorrow on the Fierros family."

...[¶]...

"Society took a couple shots at Mr. Bramit, that we heard testimony about by way of a defense witness. He was in the third placement by the County when he was in the home of the gentleman whose name I've forgotten. They made efforts to straighten him out. They didn't let him dress in gang clothing. They didn't let them behave like gang members when they we're being supervised. But what choices did he make while he was in the home being rehabilitated? He chose to continue, whenever possible, to associate with gang members and to act like a gang member.

"He has rejected the efforts of society and the members of his family to steer him down the path.

"But let us not get away with him saying that these were not his choices. These people taught him better. He chose to reject their love."

[¶] ... [¶]

"And so on behalf of society, I ask you to tell Wiz that society has been his victim long enough. Society, all of society, is done with your violence. We're putting an end to the crimes that you will commit upon innocent victims and we, as the responsible parties here, the jurors in the case, decide that justice demands your execution, Wiz."

Relevant Portions of the Defense Closing Argument[16]

"I have some fear in speaking to you today. I, obviously, during the voir-dire process, we learned a little bit about you. You, in your questionnaires, obviously disclosed some of your feelings concerning this phase should we have gotten to this phase and obviously we are here. Therefore, those comments that you've made have perhaps a little more meaning to me in my address to you. And my fear is that much of what I have presented, you, yourselves, have already had questions about whether or not this is legitimate, whether or not you would in any case consider some of the things that we have presented to you in the defense, such as the defendant's age, whether or not somebody showed remorse for the offense, the type of offense, you know, whether or not somebody was a gang member, whether or not somebody has led a criminal type of existence which Michael certainly has.

"I mean, this is something that's been going on for a long time in his life, and you have expressed reservations about what sort of weight you would give to such evidence. Some of you lean towards the death penalty in certain types of offenses, some of you lean towards it just in general as a general proposition. So my fear, obviously, in speaking to you was that, 'Well, so what, Mr. Cormicle, so what if Michael Bramit had this kind of environment, had this kind of life, had these kind of relatives, had this child, you know, so what?'

[16] The quoted portions of the closing argument are located at 14 RT 2280-2306.

[¶] ... [¶]

"I mean, we give value to people's lives in general. I mean, that could be – assume for the moment this is for purposes of illustration that you bring back a verdict imposing the death penalty and Michael, upon hearing the verdict collapses. Well, what would be done in that case? Would you let him die? Would everybody let him writhe and die in this courtroom or would things happen which suggest that we, as a society, value Michael's life even though we decide on the one hand that we're going to impose death? What would happen, the clerk would be on the phone calling for paramedics, the bailiff would be rushing over trying to take care of Michael, there would be concern over Michael's life.

"Now, why would we react in that fashion? I don't think anybody here would leave him there writhing on the floor, since we already imposed death penalty, walk out and we can go grab a bite to eat and, you know, that's the trial in its process. Well, you would not do that. You would be concerned. You would not want the paramedics to get into a car accident on their way to the courtroom. You would not scream out to the clerk and say, 'Don't make that phone call.' You would not scream out to the deputy and say, 'Forget about him.' You wouldn't do that in that case.

"So I want you to consider why you would not do that in that case in deciding whether or not you want to kill him in the jury room by writing on a piece of paper authorizing the execution to be carried out. You wouldn't do it, because you value human life. I know on your questionnaires that I mean you're all at least death-qualified, meaning you could impose death in, the appropriate case. But let's get down to the reality and how you carry out that perhaps political or philosophical position and deal with it in terms in which you would actually operate

under. And what I'm suggesting to you is that you value life in general including Michael's enough that death is not appropriate and should not be the penalty."

[¶] ... [¶]

"Now, again, we are not excusing the crime, the crime will keep Michael in prison for the rest of his life. But environment is a topic that I think you should discuss, because I can't imagine anybody on this jury having obviously the same type of existence as Michael as you would, not with anybody else in the jury, but you do have to put yourself somewhat in the role of child. Michael, we have at age two, you know, how can he be this individual that turns out to be a killer without something influencing him in his life?

"I mean, what are we born with? I think we are all born somewhat guilty somewhat innocent. We are responsible for some of our actions and perhaps not some others. Did Michael give himself birth? Did Michael make his own brain? Did Michael choose to be born and raised in Los Angeles in South Central? Did Michael choose to move in with particular family members? Did Michael choose to not have a father in his life? I mean, are these things that Michael was choosing?

"Well, we have, as kind of a side topic, somebody else could discuss what sort of advice and counseling Michael received throughout the course of his life. Who was telling him the difference between right and wrong? Who were the figures? Who were the role models that were molding Michael's life? Are we really surprised to learn that he's being told right and wrong from a crack addict? Or are we surprised that another significant relationship in Denise's life was Katherine Cole? Are we surprised that she was convicted for arson, robbery, sales of cocaine? She's in prison.

"Now, are we really surprised to learn that [XL] Cook is in prison, a relationship in Denise's life, that he's vanished from maybe 10 years, 12 years, he's never been out. I mean, are we really surprised that somebody in Bonnie Jackson's house, her own son is convicted of murder and is doing 19 years to life? I mean, she's again looking at people you can't believe. Well, why would certain people turn out certain ways? Bonnie Jackson seems like a good woman to be in her control and her custody. You would think that you could lead a decent life. Why are people going out and committing murders? Why are things happening? Why are people becoming statistics ending up in prison at a young age after killing people?

"I want you to discuss – perhaps somebody else could lead the discussion, well, what sort of things are in place in society that says, "Wait a second, if we see somebody going one way, if we see somebody that is obviously filled with anger and rage about something that's going on in their life, what is being done to correct, to somehow turn around that individual?"

"Now, it's been suggested by the prosecution this was done at – Michael had choices. He chose to go his own way and yes, as I've indicated before, a person does choose certain things and other things are chosen for him. So what is in place that can stop somebody from turning out like Michael did with his life? Well, we have gangs like magnets operating in all these communities. That is something everybody is familiar with. And whether or not you can control somebody of a younger age and let them come into your orbit, and that is your mindset from that point on, are you choosing them or are they choosing you to perpetuate the gang and the gang life-style and crime in which human life sometimes just takes a backseat and whether or not you are leading a life in which I can reflect upon what you're doing and choosing intelligently, emotionally correct, emotionally appropriate decisions, or whether certain things are affecting

you that you cannot put a finger on, but are affecting you none the less. I mean, do we have psychiatrists in place guiding an individual like Michael along the way and saying, 'Wait a second, we need therapy sessions.' "

[¶] ... [¶]

"But what I'm asking you to explore in the jury room is whether or not there are things in place that Michael is saying, 'Well, yeah, I had this opportunity, you know,' he's sitting back thinking one night, 'Well, that's – I'm going to make this choice, because I thought it out.' He's not thinking things, engaged in all sorts of antisocial behavior that people should be able to pick up on, but things are not being done to correct that.

"We have also a discussion that can center along Clyde Stewart's program, the man who's got prison background, he's got very professional in this particular area, but he obviously recognizes the limitations of such a program. It's something that would, you would hope would catch, stop, isolate, remove and correct antisocial behavior. It's obviously not that punishing. I mean, if you're in a group home in which Michael has interaction with Mr. Stewart, with family members, it's not your typical setting. It's a family setting and it's also a family, that Michael never knew when you think about the evidence.

"Well, is it important to have role models along the way? It is important to have father figures along the way? Maybe it isn't. Maybe, you know, we could get along and Michael should not have done anything wrong just because there wasn't a man controlling and disciplining him along the way. And whether or not he's reacting to the absence of that maybe there is no difference, but it's a topic that I think you should discuss, because I think these facts cry out for

some resolution in the jury room concerning whether or not that is significant, and I'm suggesting to you that it is significant.

"Clyde Stewart seems like a father figure. It seems like Michael operated and could function mostly decently in that setting. I mean Stewart – excuse me, Mr. Stewart likes Michael. I mean, he went to visit him as recent as a couple weeks ago. There's nothing there that would hurt him if Michael was to be killed. This is someone who has been dealing with criminals much of his professional life.

"And what kind of setting is actually the group home? It obviously has drawbacks. It has things that once you think about it it's fine that Clyde Stewart is operating it. He seems like a good man and a professional and that somehow he could turn Michael around. And he does function under him as a role model, but who else was in this group? I mean, it's not your model citizens that he's associating with. This is the last stop before CYA or state prison. These all are all people headed down the road to future criminality. And to get off that train or not is something that may or may not occur in Clyde Stewart's home. It's a stop-off point.

"And what happens after that? Well, Michael is associating not only with Clyde Stewart and his family and staff, but with other gang members and other criminals of somebody engaged in a serious nature as we learn from Clyde Stewart. What sort of success occurs, you know, from those people that participate in that experience? Well, okay. Numerous individuals, you know, in for murder, numerous individuals with future criminality.

"I mean – and again, I asked him – 'Well, why?' I mean, where do these people go after Clyde Stewart? Do they go to employment services? Do they go through future counseling? Do they get, you know, follow-up psychiatric care? Do they get follow-up some sort of professional

help? He doesn't do it and that was not in place. What happens is, and he described it to *you,* they're sent back to the same environment from which they came. The system is not going to work and whether or not it should, that's not your job. That's not your responsibility. But it's a discussion worth having in this case.

"And while the environment he went back to begin was Bonnie Jackson, again, good woman, lives in a violent neighborhood, a criminal neighborhood, her own sons for some reason, maybe it's a coincidence that all these people are in prison that are coming out of this area, that are coming out of relationships with the others, maybe it's just a coincidence, but I don't think it is. And I think it's a discussion worth having by somebody who chooses to lead that area.

"I think it's – you know, to say that environment doesn't have any effect or shouldn't have, you know, I would say that that's a pretty easy statement for me to make. I don't live in these neighborhoods. I don't live, you know, with crack dealing going on outside my front door. I mean my past is about as different from L.A. as well as my co-counsel, are both from Newton, Iowa. We don't have that life experience to bring to this discussion, to this decision. I mean to say that the environment doesn't have any affect or is an excuse I think misses the point. I think environment does affect you. It has to affect you, because certain – these people are not committing murder for no reason. They're committing murder, because certain things that are happening that you maybe are not able to identify, you can't put your finger on. And do you think Michael would be sitting here next to us, Mr. Gunn and myself, as a defendant if he was born in Newton, Iowa? I don't think he would be. No, there's something that is going on that – it's easy for us, even for me to say, "Well, it's not – it shouldn't affect him. I mean he's – at a

certain point you're making your own decisions, you should be responsible for your own actions.'

"This is a life that is out of control, basically, at the beginning when Denise Carr takes the dive and gets into drugs when [XL] goes off to prison whether or not that has any effect or should be, should have effect is a topic that you need to discuss, because it has to play some role. Whether or not any of this has any in choosing the penalty, it does – this is all something that can be considered as penalty or mitigation type of evidence that could – that you could use in imposing life without the possibility of parole, because you can consider things that extenuate the gravity of the crime, and you can also look at the individual's background which is what I'm asking you to do."

[¶] ... [¶]

"We also have, like we said before, the bee-bee gun incident. Again, I think that's a sign post of what laid ahead for Michael as far as how much significance and how much violence was, can be attributed to that. I don't think you can, there was simple possession that's being suggested, but as far as the fight in the school yard, how many fights in the school yard have there been since the beginning of time?

"Well, Michael gets expelled, but as far as the injuries we don't know whether or not who started it. Mr. Clock came in a little later and what's Mr. Clock have to add to this discussion that you should have in these other crimes' discussion? Well, Mr. – excuse me Michael, you know, if he was a person that deserves death, would he have apologized to Mr. Clock? Would he have realized it struck him at the time again this was in '91, so he's about 15 at the time as you know something he apologizes for, you know, why apologize if underneath all of this other stuff, you

know, is there somebody else? Is there another Michael? I mean the district attorney suggests there's a couple Michaels.

"I'm suggesting maybe another Michael in which underneath all of this he doesn't want to be acting out this way. He doesn't want to be in an aggression type of mode. He would not have apologized to Mr. Clock. There's no relationship there for knocking off the glasses. And Mr. Clock, you know, said, "Well, yeah, he was sincere." Actually this was not something that was false. This was something where Michael, you know, underneath all this other stuff, all his other life that he's leading where he's preteen, you know, selling drugs, you know what sort of – why is that occurring if appropriate controls and discipline is being vested upon Michael at an early age.

"Kids don't go out and do that unless somebody is suggesting that's appropriate course on how you conduct your life. Are those things really in place? Is he being told right from wrong? Is the guidance that is being told to him being told him by responsible people?

"You don't – when you look in the yellow pages on how to do right or wrong, you don't find Katherine Cole's and Denise Carr's names in that column of people that you call if you're looking for guidance from those individuals, which they obviously to a certain extent provide, but on the other hand maybe they don't have the tools themselves to provide. And that's not anything against them. That's – this is life. This is what has happened to them. And this is the result, but again, it's a discussion that is worth having in deciding this penalty."

[¶] ... [¶]

"If Michael was to look at a scrapbook over the course of his life, the one page that would be absent would be the fact that there is no father to reminisce about, to enjoy certain

activities that a father and son might enjoy. And the same with the mother. I mean, a mother, that's a mother that really was not there in a significant way, you know. Again, looking back at the scrapbook you could note at age 12 – 'Well, yeah, that was the year my mother turned to crack. You could say the same 13, 14, 15, 16, 17, she apparently was off for a period of time which she was able to get it together, but note that at the time that the killing took place in '94 that she had gotten back on crack. And whether this grew out of that incident or not, it still points in a couple different ways. One is that you are not really there as a parent, you know, if you have personal problems that you're dealing with. I mean, you can devote your attention only so far in one direction, something will be missed out on.

"And again, that is a discussion that I want you to engage in. I think these are valid questions to raise about how somebody turns out, how somebody acts, whether it's going to be criminal behavior, whether it's going to be civil, whether you show respect to one another. I mean, throughout the different defense witnesses, I mean there was 'Michael can act appropriately in certain instances.' I mean, there are certain things that obviously have triggered criminal reactions. But again, there's the other side of Michael as well in which you know people note that he is a loving brother, a loving cousin, a loving nephew, a loving grandson, that sort of behavior again is inconsistent with somebody society should kill, that you 12 should kill.

"And concerning not only the behavior that he's been able to exhibit in certain family context get-togethers, there was a point – not anybody putting any force or duress on Michael to make a statement, eventually, you know, at the conclusion, near the end, you know, he realizes what has occurred, that an innocent man – this is something he says to the police, an innocent man did die. He apologized to the family and he was sorry. This is again inconsistent with

somebody who is somebody who should be removed by killing him, because I think in some of the questionnaires remorse was something you looked at. It's not something that, you know, we're presenting at trial. It's something that at the time in a sense of from the witness stand it's something that was said to the police not in a context where you know a jury is considering whether he live or die. This is something that he had expressed to the police and again it's inconsistent with somebody who should be killed by you 12.

"You have the tools to make the appropriate decision in this case. You know whether or not Michael had appropriate emotional tools to handle his life. We've seen that he did not but, you know, that does not make it right and make it appropriate in this case for you to bring back anything other than a life without possibility of parole penalty. I ask you to tell me per justice, with mercy, and make that decision, and you can live with that. That's something that you can face anybody in the future and say, 'It was all right in this case. We did the right thing. We didn't kill anybody. It's not appropriate.' So please do your jobs.

"Thank you for your attention."

Petitioner's Life Story

The following is a summary of petitioner's life story. This is compiled from the undisputed facts alleged in the petition and declarations provided by petitioner. (Petition, 190-346; Declarations, Petitioner's Exhibit No. 1, Vol. I, 1-150; Declaration of Debbara J. Monroe, PhD, Petitioner's Exhibit No. 65, Vol. VII, 1682-1763.)

Petitioner had a heartbreaking childhood. There is evidence of multigenerational abuse, addiction, mental illness, a lack of a father, severe neglect by his mother and early parentification of petitioner, severe abuse and domestic violence within the family, and neighborhood gang

activity and violence. Petitioner responded to these circumstances by taking a parental role over his brother and sister and succumbed to the neighborhood by joining a gang and committing crimes as a child.

Petitioner's grandmother, Beatrice McClain, became pregnant with her first child at the age of 13. She went on to have 11 more children, all by different men. She abandoned four of her children to be raised by others. The remaining children suffered poverty, neglect, instability, and physical and sexual abuse. Beatrice would beat the children with a switch. Beatrice engaged in sex work and drug sales, and the children were frequently left to fend for themselves.

Petitioner's mother Denise was Beatrice's third youngest child. Denise gave birth to petitioner just before her 18th birthday. Petitioner never knew his father, and there are several claims as to who his father is. The most common claim is that Denise had a one-night stand with Michael Bramit, Sr. at a party and never saw him again. Her sister reported that Denise drank alcohol during her pregnancy, and Denise said petitioner was only three pounds at birth.

When petitioner was a few months old, his mother became involved with XL Cook and had two children by him, Marvin and Lakeisha. During this period, Denise frequently stayed with Bonnie Jackson. Denise left XL Cook after she discovered he was cheating on her. He was later convicted of child molestation and sent to prison. Leaving XL Cook was devastating to Denise, and she descended into a downward spiral. She would leave the family for days or weeks at a time to use drugs. She became addicted to crack, and it was her priority. She was unpredictable, and her disappearances were abrupt. She would then come back into the children's lives, only to leave them again and again. Even when Denise was present, she was not described as loving or affectionate with her children, but rather detached. She did not buy them

presents or show up for birthdays. Petitioner was frequently disappointed when Denise did not come to celebrations such as his birthday.

Petitioner's childhood was chaotic. He and his siblings went from home to home, often with only the clothes on their backs and nothing else. Bonnie Jackson reported that her children and petitioner's cousins would often give them basic necessities, such as toothbrushes and towels, and they would also share their toys because petitioner and his siblings had none. Denise did not ensure petitioner or his siblings went to school. In fact, their emergency contact was frequently another family member or friend. Petitioner's and his siblings' hospital and school records show they lived at many different addresses and attended many different schools during their childhood. Denise frequently did not have a place to stay. In one instance, Beatrice kicked Denise out of her house with the children, and they slept on the ground outside that night. In the morning, Denise took the children to the grocery store and had them eat food in the aisles.

After Denise left XL Cook, she began dating women. She had a relationship with a woman named Regina "Blackie" Prather and moved with her to San Francisco for a couple of years. Petitioner and his siblings stayed with Jackson during this time. The family rejected Denise's sexuality, causing her to become even more frequently absent from her family, and her crack addiction only worsened.

During the time when Denise was in San Francisco and petitioner stayed with Jackson, Petitioner became close with Jackson's son, Keshon Cooper. Keshon was a couple years older than petitioner and was a member of the Eight Trey Crips gang. The neighborhood they lived in was rough, and petitioner's middle school was located between the territories of rival gangs. At

the age of 10, petitioner was jumped into the Eight Trey Crips at Keshon's encouragement. Petitioner learned how to sell drugs shortly thereafter.

When petitioner was 10 or 11 years old, he and his siblings stayed with his uncle, Ronnie Lynch. Ronnie was the oldest male figure in the family and is described by other family members as incredibly violent and abusive to everyone. He would whip the boys with belts and force them to engage in sexual behaviors. For example, he once forced his sons to have sex with a woman he brought home when they were in elementary school. He forced his sons and nephews, including petitioner, to watch as he violently sexually assaulted his wife and other women. He once raped his son's girlfriend in front of the son and tried to rape one of petitioner's cousins and molested another.

In addition to the abuse inflicted by Ronnie, petitioner's cousins suffered severe physical and sexual abuse by their parents and other adults in the family. One of petitioner's cousins was raped by a family friend when she was in middle school. There were incidents in the family where child protective services was called and the children had to be removed from the home, at least temporarily. Children were struck, beaten, whipped, and denied food as punishments. The described punishments sometimes involved forcing the children to strip naked.

Petitioner suffered through the deaths or shootings of several family members and friends as a young child, and Denise allegedly attempted suicide when petitioner was 11 years old. In 1988, a family friend was killed by police during a raid at his home. In April 1989, petitioner's uncle Jerome, who was well-liked by petitioner and his cousins, was murdered by fellow gang members. In October 1989, Keshon Cooper, whom petitioner considered a mentor and friend,

was shot three times by rival gang members. In November 1989, Ronnie Lynch murdered his sister Elaine's boyfriend. In October 1991, one of petitioner's cousins was shot and killed.

When petitioner was approximately 11 or 12 years old, he and his siblings went to live with Beatrice in Riverside. Life was difficult with Beatrice, who was also housing many of petitioner's cousins, and there was little money for food or clothing. Petitioner took on odd jobs to make extra money. It was during this period that petitioner became involved in the juvenile system. In October 1988, petitioner and his cousin brought a stolen BB gun to school and put it in another student's locker. He was referred to Charter Youth Diversion Services as a result. In December 1990, petitioner and two others were arrested for stealing office supplies. Petitioner was ordered to do 10 to 20 days in a juvenile work program as a result.

Denise came back into petitioner's life after the theft incident when he was around 14 years old. By this time, she had a new relationship with Katherine Cole. She took petitioner and his siblings to live with them and Katherine's children. Denise and Katherine had a violent relationship, and they both continued to use drugs.

In May 1991, petitioner and a friend robbed a pizza deliveryman. The following month, petitioner was declared a ward of the court. He participated in a juvenile work program and a student work program at the Press-Enterprise. In August, the District Attorney filed robbery charges against petitioner. In September 1991, petitioner was arrested for possession of cocaine with intent to sell. On November 20, 1991, Denise was arrested and taken into custody. Beatrice was unwilling to take petitioner, so he was placed in a foster care facility.

On January 2, 1992, petitioner had a dispositional hearing and was placed under 24-hour supervision due to psychological stress. He was transferred to the developmental center of the

foster care facility and ordered to participate in group therapy. Petitioner had behavioral issues there and left without permission. Accordingly, a warrant issued, but petitioner turned himself in. He told his probation officer he did not want to live with his grandmother. During his time in juvenile detention, petitioner experienced episodes of isolation, outbursts, and argumentative behavior.

In March 1992, petitioner was placed at Clyde Stewart's Home for Boys in Rialto. He stayed there until November 1992 and was released to Denise. After he left the boys home, he eventually ended up with his grandmother. On April 1, 1993, he was arrested for possession of cocaine. On April 11, 1993, he was arrested for an assault on Denise. On August 5, 1993, petitioner and his friend were shot in front of his house. Petitioner was shot six times, suffering wounds to his back, leg, and hand. He required surgery and was hospitalized for four days. His friend died in that shooting. On August 9, 1993, just four days after he was shot, another of petitioner's friends was shot and killed. On February 13, 1994, petitioner's friend, James Zamura, was shot in a gang-related shooting. Petitioner was with Zamura at the time and tried to save his life. Zamura died in petitioner's arms. This occurred four months prior to petitioner's murder of Fierros.

Discussion

Petitioner has proved by a preponderance of the evidence that his counsel's mitigation investigation and interviews were deficient and fell below the standards of professionalism. The interviews were inadequate and many were done right before the trial was to begin, preventing counsel from doing necessary and adequate follow-up investigation and making it impossible to competently decide how to present the mitigating evidence. Petitioner has also proved by a

preponderance of the evidence that counsel was ineffective in presenting the known and available evidence during the case in mitigation. Petitioner has also proved by a preponderance of the evidence that he was prejudiced as a result of his counsel's deficient performance.

The timeline of counsel's investigation demonstrates deficient performance. The People provided their notice of intention to seek the death penalty on March 20, 1996. Up to that point, the defense had interviewed four witnesses: Bonnie Jackson, Juanita Dobbins, Joyce Tripp, and Beatrice McClain. Between the notice of intent to seek death and the start of Petitioner's trial on April 14, 1997, defense counsel interviewed seven more witnesses: XL Cook, Keshon Cooper, Lakeshia Cook, Denise Carr, Vernita "Elaine" Lynch, Evangelina Loyoza, and Latrina Howard, who was interviewed just four days before the start of the trial. Defense counsel re-interviewed Denise Carr the day before the trial began and obtained a list of her siblings and their fathers. It was during this interview that Denise told investigators that petitioner weighed only three pounds when he was born. After the trial commenced, defense interviewed six more witnesses: Rasheda Williams, Clyde Stewart, Alice Drew, Katherine Cole, Carolyn Cole, and Ronnie Lynch; the last two were interviewed the day the jury began deliberations in the guilt phase and just seven days before the penalty phase began. This chronology supports that petitioner's counsel did not expeditiously investigate and did not fully prepare for the penalty phase. This fails to comport with the guideline that the penalty phase "investigation[] should begin immediately upon counsel's entry into the case and should be pursued expeditiously."

The interviews were also superficial and short and were clearly based on standard questions that were not tailored to the facts or circumstances of this case or to elicit mitigating evidence about petitioner as a person. Interviewees were not asked questions based on

information obtained from other family members, and they were not asked for specific examples or to give good facts about petitioner's life, other than generalized opinions. Nor were interviewees asked adequate follow-up questions based on the information they provided. The interviews demonstrate a superficial investigation into petitioner's personal, social, and family background that absolutely failed to comply with the professional standards that require counsel in a capital case to "seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case[,]" and counsel failed to make "full preparation for [the] sentencing trial."

Given this timeline, the amount and type of information provided, and the lack of follow-up investigation by counsel, petitioner has proved by a preponderance of the evidence that his counsel's investigation and preparation for the penalty phase fell below the standard of professionalism. Counsel was on notice that more investigation should have been done into the neglect and trauma suffered by petitioner during his childhood if they wanted the jurors to see petitioner as someone they did not want to kill in light of the aggravating evidence. Denise told counsel that she used drugs during petitioner's childhood, though she minimized it. However, Denise also told counsel that petitioner was only three pounds when he was born, and this, combined with Denise's admission to drug use should have caused counsel to investigate further into the cause of petitioner's low birth weight, and this would have led to evidence regarding Denise's rampant drug use well before she admitted to. Denise also told the defense investigator that her children were taken care of by other family members, that she and the children moved around a lot, sometimes staying in a place for less than a month, and she knew petitioner was upset about her lack of mothering skills. Beatrice McClain and Bonnie Jackson told investigators

that Denise used drugs and would leave the children for days and months at a time. This put counsel on notice of the possibility that Denise was more neglectful than she had portrayed herself to be, and indeed much earlier in petitioner's childhood than was presented to the jury, and that petitioner suffered trauma from this neglect. Counsel should have further investigated by re-interviewing witnesses with tailored questions designed to probe into those specific issues and by interviewing other and additional family members. Denise also told the investigator that petitioner took on the role of a father-figure to his siblings, and other interviewees, including Clyde Stewart, Vernita "Elaine" Lynch, Beatrice McClain, and Bonnie Jackson, also described this to defense investigators. This put counsel on notice of the possibility of early parentification and also the possibility of a special relationship between petitioner and his siblings, and counsel should have investigated these issues further.

Had counsel performed an adequate investigation in preparation for the penalty phase, significant additional mitigating evidence would have been uncovered, and had counsel competently presented that mitigating evidence, there is a reasonable likelihood that at least one juror would have been moved to reject the death penalty. The picture of petitioner that was presented to the jury was someone who had a loving, caring family who rejected them to run with gangs and become "Wiz." His mother went through a short period where she struggled with drugs, but she always made sure her children were taken care of. The jury did not get a picture of a young boy essentially abandoned by his mother, left in the care of some good family members, but surrounded by sexuality and violence, who wanted a "normal" family and took on great responsibility to care for his younger siblings. In a case where the defendant had very little criminal history before the murder, where he was young, and where the murder itself was not

particularly gruesome or heinous compared to others, this information could certainly have changed some jurors' minds about the appropriate penalty.

Petitioner has also proved by a preponderance of the evidence that, even with the limited information defense counsel had available, counsel's performance in presenting that evidence in mitigation fell below the standard of professionalism, and he was prejudiced thereby. The defense team was aware of mitigating evidence that did not present risk of opening the door to harmful evidence, and there is no conceivable rational tactical reason not to have elicited further testimony about petitioner's childhood. Petitioner's mother's drug use, her neglect of the children, the early parentification of petitioner, and genuine concern for the wellbeing of his siblings were mitigating facts and were the type of facts that would have humanized petitioner in the eyes of the jurors. While the information counsel had was only a fraction of the true mitigating evidence that could have been uncovered through adequate investigation, counsel was still in possession of some potentially useful mitigating facts. This information, however, was barely presented to the jury and certainly not in an effective manner. The testimony of petitioner's sister Lakeisha Cook demonstrates this. She was asked no questions that would elicit meaningful responses about the character of petitioner and specifically his care and concern for his siblings. Lakeisha's pretrial statement to investigators did not contain much information about his childhood, but during her testimony counsel asked he why she loved petitioner, and she responded that he was always there for her when she "didn't have a daddy," and when asked how he was there for her, she said, "[M]y mom was on drugs. He was there. I didn't have no dad or nothing. My brother had to steal for me and my brother so we could survive." Despite opening the door to sympathetic testimony about how a young petitioner cared for his even younger,

vulnerable siblings and being presented with an opportunity to show the jury a caring boy rather than a murdering man, counsel moved on from the subject and asked what impact petitioner's death would have on her and ended on her one word answer of, "Bad." Competent counsel, even without the benefit of an extensive investigative interview, would have recognized this opportunity to elicit favorable testimony from a sympathetic witness and would have asked Lakeisha more probing questions about her childhood, the facts of which would certainly have evoked sympathy, and specifics about how petitioner cared for her and their brother, testimony which may have reasonably humanized petitioner in the eyes of at least one juror. Such evidence had a reasonable likelihood of "help[ing] the jury see [petitioner] as someone they do not want to kill."

The necessity of presenting this mitigating evidence fully and adequately is made clear by the closing argument of both parties. During the penalty phase, the prosecutor to the jury that the trial was not about Michael, but about "Wiz," and consistently referred to petitioner by this gang moniker, in a deliberate and zealous attempt to get the jury to view petitioner as someone unworthy of sympathy and deserving of execution. On the other side, petitioner did not enjoy such zealous advocacy for his humanity and for the jury to see him as the boy Michael rather than the gang member Wiz. Counsel's argument lacked strategy, factual support, and zealous advocacy. For petitioner to have had a chance at a life sentence from the jury, counsel needed to have properly investigated petitioner's life to uncover mitigating evidence and needed to have adequately presented the evidence that did happen to be uncovered or elicited. Petitioner has proved by a preponderance of the evidence that he suffered ineffective assistance of counsel due to his counsel's deficient investigation into his personal, social, and familial history and in

presenting the available mitigating evidence at the penalty phase of his trial, and this requires reversal of the sentence of death.

Subissue: Expert Testimony Regarding Petitioner's Personal, Social, Familial, and Psychological History and Background

The court also issued an order to show cause regarding whether counsel was ineffective by failing to adequately investigate and consult with appropriate experts and present expert testimony regarding the impact of petitioner's personal, social, familial, and psychological history and background. The court finds petitioner has proved this claim by a preponderance of the evidence. The following is a summary of the undisputed facts relevant to this claim followed by the court's discussion of the claim.

Expert Consultation by Trial Counsel

Trial counsel did consult with one clinical psychologist, Dr. Craig Rath. Petitioner's counsel sought and obtained $5,000 for expert consultation, which would cover 40 hours of work by Dr. Rath. Dr. Rath sent two invoices to counsel, which total $1,150, reflecting just over nine hours of work on the case. (March 10, 1997 Dr. Craig Rath Invoice to Bruce Cormicle, Petitioner's Exhibit No. 60, Vol. VII, 1665; May 12, 1997 Dr. Craig Rath Invoice to Bruce Cormicle, Petitioner's Exhibit No. 52, Vol. VII, 1605.) Dr. Rath did not testify. Indeed, no expert testified on behalf of petitioner during the penalty phase.

Dr. Rath was hired in October 1995 to interview petitioner. Dr. Rath was provided with some school and medical records and police reports related to the murders. Dr. Rath was not provided with petitioner's complete school and medical records, his juvenile court and probation records, records pertaining to his family members, or any of the interviews that were conducted

with his family members. At the time trial counsel hired Dr. Rath, no defense interviews had been conducted.

Trial counsel did not have any communication with Dr. Rath from December 1995 until February 28, 1997, when trial counsel informed Dr. Rath that the state intended to seek the death penalty and requested that Dr. Rath provide a list of tests that remained to be conducted. It should be noted, the People filed their Notice of Intent to Seek the Death Penalty on March 20, 1996, approximately eleven months before trial counsel notified Dr. Rath of this and requested additional information. At the time contact was reestablished, Dr. Rath had not conducted any tests and had only interviewed petitioner. On March 20, 1997, Dr. Rath recommended conducting additional interviews, obtaining additional records, and administering an IQ test and a personality test. Those tests were administered and unfavorable results and opinions were provided to trial counsel *after* the trial had begun.

Dr. Rath did not follow proper guidelines in his evaluation. A 1994 article in the American Journal of Forensic Psychiatry outlines the standards of practice for mental health evaluations in death penalty cases. This article proposes five steps to be used in all capital cases: (1) the collection of accurate medical, developmental, psychological, and social history, gathered from multiple sources; (2) a thorough physical and neurological examination; (3) a complete psychiatric and mental status examination; (4) diagnostic studies, including psychometrically based approaches to personality assessment, neuropsychological testing, appropriate brain scans, and blood tests or genetic studies; (5) the use of other specific specialists and additional appropriate tests as indicated. Dr. Rath failed to follow these guidelines.

Dr. Rath did not obtain an accurate social and medical history and was not provided with any significant information by counsel. Dr. Rath also failed to obtain historical data from sources other than petitioner and the incomplete records. Dr. Rath did not review any of the interviews conducted by defense investigators. Dr. Rath administered diagnostic tests, specifically the WAIS and the MCMI-II (IQ and personality tests, respectively), without the benefit knowing petitioner's personal history. There was also significant criticism of the accuracy and validity of the MCMI-II test at the time Dr. Rath used it, according to a 1990 article in the Journal of Psychopathology and Behavioral Assessment, but he used it anyway as the only personality test administered to petitioner. Dr. Rath opined that his opinion would not be helpful to counsel as he had concluded that petitioner suffered from antisocial traits.

Dr. Dale G. Watson

Habeas counsel had petitioner examined by Dr. Dale G. Watson, who is a clinical and forensic psychologist with a specialty in neuropsychological assessments. (Declaration of Dr. Dale G. Watson, Ph.D., Petitioner's Exhibit No. 89, Vol. XI, 2905-2940.) Dr. Watson conducted a comprehensive neuropsychological evaluation of petitioner, which took a total of thirteen hours over three separate days. The purpose of the evaluation was to identify whether petitioner "evidenced any indicia of cognitive dysfunction, brain-related dysfunction, and/or neuropsychological deficits." Dr. Watson administered 31 tests to petitioner, reviewed declarations from members of petitioner's family, reviewed school, medical, and hospital records for petitioner and some family members, reviewed petitioner's juvenile, probation, court, and prison records, and reviewed petitioner's social history chronology.

Dr. Watson concluded that "[d]espite adequate functioning in many areas, [petitioner] was found to have particularly significant deficits in some aspects of executive functioning." This caused petitioner to "become stuck in 'mental ruts' when confronted with ambiguous problems solving tasks," to have "difficulty understanding and following new instructions," to have difficulty functioning and thinking things through before acting in situations that require concentration, and to suffer from an attention deficit. He also found "significant memory deficits within both verbal and non-verbal domains," and opined that petitioner likely needs more time to learn new material, is slow in gaining new skills, and has difficulty retrieving information to which he had been exposed. He said these issues "are likely to create problems in his daily functioning." Petitioner's performance on the tests administered by Dr. Watson was wide-ranging, sometimes falling within the average or even above-average range, but sometimes falling in the below-average or severely-impaired range. Dr. Watson described many of the outcomes as "unexpected."

Dr. Debbara J. Monroe

Dr. Debbara J. Monroe specializes in developmental disorders in childhood, attachment-bonding difficulties in high-risk parent-child relationships, and early detection and diagnosis of autism spectrum disorders. She was requested to complete a psychosocial history and psychodiagnostic assessment of petitioner. Dr. Monroe conducted multiple clinical interviews of petitioner, reviewed declarations of petitioner's family members, reviewed school, medical, and hospital records for petitioner and some family members, reviewed petitioner's juvenile, probation, court, and prison records, and reviewed petitioner's social history chronology.

Dr. Monroe characterizes petitioner's childhood as "psychologically devastating." She says petitioner's "chaotic, abusive[,] and traumatic childhood ... was so painful that he eventually shut down emotionally in order to cope and survive." She says in order "to avoid the emotional pain and exhaustion of his circumstances," petitioner "inhibited his compassionate nature." She points out multiple risk factors that petitioner suffered during his childhood, including multigenerational patterns of addiction, mental illness, learning difficulties, criminality, violence, and abuse, and care by a drug-addicted mother and other family members. The adults in petitioner's life consistently traumatized, abandoned, and neglected him. Such "unpredictability and ... constant upheaval" caused petitioner to isolate himself, and he was never able to establish psychologically healthy relationship, friendships, or bonds as he aged. As a result of the actions of the adults in petitioner's life, especially his mother, petitioner took on adult responsibilities and "was robbed of his childhood." She says the stressors of neglect or abandonment by a caregiver are associated with coping problems in adulthood especially among men. Dr. Monroe also points to the lack of a male role model while growing up as detrimental. Having a positive male role model is correlated with positive developmental outcomes for boys. Petitioner's very few "positive" male relationships became "dislocated" during petitioner's childhood, as the men were incarcerated or killed.

Dr. Monroe says, "In sum, numerous psychological, genetic, developmental, and environmental risk factors are crucial to an understanding of [petitioner's] psychological and social development and functioning. [Petitioner] is genetically predisposed to mood disorders and depression .... In fact, [petitioner] exhibited many red flags associated with these conditions throughout his childhood and adolescence that went unremediated. In addition to a genetic

predisposition, overwhelming psychosocial risk factors were present throughout [petitioner's] infancy, early childhood[,] and adolescence. From the time he was a young child, due to his mother's repeated abandonment, [petitioner] was parentified and left to care for his two younger siblings. While attempting to take on the pressing burden of protecting and providing for himself and his siblings, [petitioner] was faced with insurmountable negative environmental risk factors that eventually led to his downfall. These risk factors and lack of sufficient supports impaired his ability to regulate his behavior and emotions and debilitated his psychological and social functioning throughout his life. Over time, repeated exposure to one psychologically devastating blow after another created a state of learned helplessness that [petitioner] could not escape. He went on to experience multiple traumas and serial losses from which he suffered further devastating, unresolved grief and emotional pain that eventually contributed to a psychological downward spiral, increased gang involvement[,] and serious criminal behavior.

"[Petitioner] struggled from an early age with constant dis- and relocations, environmental chaos and violence, as well as abuse, trauma, loss[,] and poverty. Although [petitioner] attempted to create a better life for himself and his siblings he could not overcome the adverse circumstances of his life. Unfortunately, he did not have the psychological resources nor was he given the support he needed to face the chronic and unrelenting demands that were placed on him. Like many at-risk youth, the tragic story of [petitioner's] life was defined by the presence of an insurmountable number of both environmental and genetic risk factors and the lack of protective factors to buffer him from the unrelenting stressors he faced throughout his early childhood years, adolescence, and young adulthood."

Father Gregory Boyle

Father Gregory Boyle, is an expert in gangs in the Los Angeles area, who opines about the destructive effect of gangs on youth living in areas where they are active and explains why youth in those areas join gangs. (Declaration of Father Gregory Boyle, Petitioner's Exhibit No. 61, Vol. VII, 1666-1673.)

Discussion

Petitioner has proved by a preponderance of the evidence that his counsel's performance in investigating and presenting evidence in mitigation, specifically expert testimony regarding petitioner's personal, social, and psychological background, fell below the prevailing standards of professionalism at the time of his trial.

Counsel's performance was deficient in its investigation into petitioner's personal, social, and mental health and psychological history and consultation with appropriate experts. In addition to the article in the American Journal of Forensic Psychiatry cited by petitioner, the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in effect at the time of petitioner's trial required more than what petitioner's counsel did.

Trial counsel did not adequately investigate the need for an expert in petitioner's case. Trial counsel only consulted with one expert and that consultation was inadequate. Dr. Rath was hired in October 1995. On October 18, 1995, defense investigators provided Dr. Rath with some documentation from petitioner's case, including the complaint, the "CDP" interview, medical and school records, a statement summary, a crime scene sketch, police reports, a polygraph test, and the autopsy protocol. According to the letter sent to Dr. Rath, these reports were all the

reports the defense had obtained by that point. (October 19, 1995 Swafford Investigations Memo to David Gunn Re Package to Dr. Rath, Petitioner's Exhibit No. 49, Vol. VII, 1598-1599.)

On March 20, 1996, the People filed their notice indicating they would seek the death penalty against petitioner. Counsel then waited for nearly a year, and then, on February 28, 1997 and March 2, 1997, Counsel Cormicle sent faxes to Dr. Rath requesting a list of tests he would recommend in light of the fact that the People were seeking the death penalty. The lack of investigation in that year since counsel knew Petitioner was facing the death penalty did not comply with the standards requiring an "immediate" and "expeditious" investigation.

On March 10, 1997, Dr. Rath sent a letter to trial counsel recommending an interview with petitioner's grandmother,[17] obtaining records from the medical center where petitioner was treated after he was shot, Stewart's Home for Boys, and the jail, and administering psychological and intelligence tests. Dr. Rath indicated additional work would take ten to twelve hours. (March 10, 1997 Dr. Craig Rath 1st Letter to Bruce Cormicle, Petitioner's Exhibit No. 50, Vol. VII, 1600-1601.)

That same day, Dr. Rath sent a letter to trial counsel detailing the interview he originally conducted with petitioner in 1995. This letter indicates, "As you know from our telephone conversation[,] I reached the conclusion that because of the prejudicial nature of much of the information he provided to me it appeared unlikely that I would be called as a witness." Dr. Rath detailed the information petitioner provided him, including the fact that petitioner said he had committed dozens of robberies and kidnappings during his youth. During that interview, petitioner wanted to go to lunch and "was not interviewed thereafter by the present evaluator,

[17] Petitioner's grandmother had in fact been interviewed by defense investigators on January 18, 1996, more than a year prior.

because it appeared extremely unlikely that the present evaluator would ever serve as a witness given the defendant's confession to fifty or sixty kidnappings and thirty bank robberies." (March 10, 1997 Dr. Craig Rath 2nd Letter to Bruce Cormicle, Petitioner's Exhibit No. 51, Vol. VII, 1602-1604.) Accordingly, the *only* interview of petitioner by an expert prior to the start of his death penalty trial was cut short and not even completed.

Also on this date, Dr. Rath sent trial counsel an invoice. The invoice was for six hours of work, totaling $750. The professional services listed indicate, "Psychological Interview 1995," "Review of police reports 1997," and "Telephone conference and dictation of summary." (March 10, 1997 Dr. Rath Invoice to Bruce Cormicle, Petitioner's Exhibit No. 60, Vol. VII, 1665.)

Petitioner's trial began on April 14, 1997. Jury selection began on April 29, 1997. Opening statements and the first witness testimony occurred on May 6, 1997. On May 12, 1997, well into the guilt phase of the trial, Dr. Rath sent a letter to trial counsel summarizing his work. He indicated he performed psychological testing on petitioner on May 2, 1997, several days after jury selection began. Dr. Rath concluded petitioner had an I.Q. of 93 with above-average scores in social comprehension, meaning he "would understand what is going on very well in interpersonal relationship and can likely foresee the consequences of his actions." Based on the results of the personality testing, Dr. Rath concluded petitioner scored the highest on the antisocial personality scale and the narcissistic scale. He also had significantly elevated scores on the passive-aggressive and aggressive-sadistic scales. He scored high on the drug dependence scale, and had less significantly elevated scores on the anxiety and drug dependence scale. He said there was no indication of major mental illness.

Based on his findings, Dr. Rath opined his testimony would be "the opposite of mitigating." He said his findings and opinions would support the argument that petitioner was self-centered, lacked empathy, expressed anger inappropriately, derived satisfaction from anger, and understood social limits. Dr. Rath's invoice for this testing totaled $400, indicating 3.2 hours of work. The penalty phase of petitioner's trial began on May 27, 1997, just two weeks after Dr. Rath sent the letter detailing his results and opinions.

This chronology establishes that petitioner's counsel did not adequately investigate and prepare for expert testimony during his penalty phase. Dr. Rath was the only expert with whom trial counsel consulted. It is true that counsel is not required to seek expert after expert until they can find one who will provide a favorable opinion. Here, however, Dr. Rath's examination was based on inadequate information, as he had not reviewed any other statements nor had he reviewed all necessary records and he had conducted insufficient interviews and testing. Trial counsel knew or should have known this. Therefore, trial counsel's reliance on Dr. Rath's findings and opinions was not reasonable and fell below the standard of professionalism.

The ABA guidelines and professional standards at the time demanded that trial counsel conduct a full and thorough investigation into petitioner's personal, social, and familial history and consult with necessary experts. By failing to timely conduct investigation, failing to supervise and ensure the investigation was actually conducted, and failing to do any follow-up investigation based on information obtained, trial counsel was unable to consult with the appropriate experts and present evidence in mitigation on behalf of petitioner. Experts in the field of childhood development and the effects of growing up among gangs were the most obvious and necessary based on the facts of petitioner's case, yet no such experts were even

consulted let alone presented to the jury. Trial counsel was on notice of petitioner's difficult childhood and early parentification. Experts in the field of childhood psychology and development and gangs would have been helpful to petitioner and such inquiry by trial counsel was required by the prevailing standards of professionalism at the time of trial. Had counsel properly consulted with experts in relevant areas, the jury could have heard testimony of an expert such as Drs. Watson and Monroe, and learned about the effects of childhood abuse, trauma, neglect, and early parentification on petitioner and his psychological and intellectual development. This sort of testimony, especially in connection with accurate facts reflecting petitioner's childhood and upbringing, is the type that reasonably may have swayed at least one juror to vote for life instead of death due to the sympathetic nature of the evidence and tendency of such evidence to humanize the individual. The jury deliberated for two full days and two half days before arriving at their verdict. The case in mitigation that was presented was exceedingly weak and even misleading about petitioner's childhood. This was especially prejudicial to petitioner because the prosecution characterized petitioner as having grown up in a loving family who taught him right from wrong and attempted to dehumanize him by constantly referring to him by his gang moniker "Wiz." Evidence and testimony regarding his childhood and expert opinion regarding how his childhood affected him as an adult, especially given the fact that he was only 18 years old when he committed the murder, certainly could have changed at least one juror's opinion. Based on the stark contrast between the picture that was presented to the jury and the actual truth of petitioner's life, petitioner has established " 'a probability sufficient to undermine confidence in the [penalty]' " (*Porter, supra*, 558 U.S. at p. 44, quoting *Strickland, supra*, 466 U.S. at pp. 693-694).

On this issue, similar to the jury selection issue, respondent argues that the lack of a declaration from trial counsel is fatal to petitioner's claim. For the same reasons discussed above, the court disagrees with respondent's view of this requirement. There are no conceivable rational tactical reasons for the decisions counsel made with respect to the investigation and presentation of the evidence in mitigation.

Respondent does not meaningfully contest the facts, but argues that they fail to establish ineffective assistance of counsel. Respondent avers that petitioner's counsel had sufficient resources to conduct an investigation, that fifteen people were interviewed in anticipation of the case in mitigation, and that counsel received adequate evidence in mitigation from those interviews. Somewhat ironically, respondent seems to argue that counsel was not ineffective for failing to adequately present evidence of petitioner's background because "[t]he responses to the juror questionnaires showed only one juror was open to blaming wrongdoing on parenting or social setting[,] ... [and] [t]he one juror who was open to blaming wrongdoing on parenting or social setting thought the death penalty was used too seldomly." Accordingly, respondent concludes, "The opinions expressed by the jurors in their questionnaire responses provided a tactical basis for trial counsel focusing during the penalty phase on [petitioner's] positive qualities warranting sparing his life rather than providing additional details as to why his childhood and social setting should excuse his behavior as the jurors were not predisposed to viewing such a defense theory positively." First, this fact could not bear on counsel's deficient investigation, as counsel could not have foreseen that the jury would be so predisposed when determining how to conduct the investigation. And second, respondent does not even explain what "positive qualities" counsel focused on, and the court is unclear what respondent means.

The court does not agree with respondent's characterization that it was counsel's "strategy" to focus on petitioner's good qualities but not his background because of the predisposition of the jurors. The content of defense counsel's argument does not support this view. Counsel did attempt to rely on petitioner's background and childhood to garner the jurors' sympathy, but due to the deficient investigation and performance during the penalty phase, there was little evidence to support counsel's arguments.

In any case, counsel's arguments were weak and unmoving. Counsel argued this case was not "the worst of the worst," and compared it to much more heinous murders, and said it was not premediated, but "something that happened, ... just rage in general that has been building and building in Mr. Bramit's mind, and was not the product of planned premeditated act...." Concluding this argument, counsel said, "Well, then maybe the death penalty isn't appropriate in that kind of case." Counsel argued that life without parole was sufficient and petitioner did not need to be put to death, pointing out that if petitioner collapsed in the courtroom after the penalty was imposed, the jurors would want him to receive medical aid despite the intended ultimate punishment. In arguing that death was not appropriate, counsel pointed out petitioner's age, and suggested to the jury that petitioner did not choose a lot of negative things in his life, focusing on the fact that petitioner grew up without a father and pointing out that he grew up without proper role models to teach him right from wrong. Counsel went on for a couple of paragraphs asking the jurors if they were "surprised" that people in petitioner's life used drugs or were in jail, finally asking, rhetorically, "Why are people going out and committing murders? Why are things happening? Why are people becoming statistics ending up in prison at a young age after killing people?" Counsel then turned to petitioner's upbringing, saying that he grew up around gangs,

discussing his life in a disjointed fashion, and seeming to attempt to place blame on society for failing to recognize the signs that petitioner was going to become a criminal, saying, "He's not thinking things, engaged in all sorts of antisocial behavior that people should be able to pick up on, but things are not being done to correct that." This was certainly not a strategic and informed argument that focused on petitioner's good qualities in a zealous effort to prevent the jury from returning a sentence of execution for a young client.

Respondent also contends that trial counsel's consultation with Dr. Rath was sufficient and reliance on Dr. Rath's opinion to inform the decision to not further investigate was appropriate and was a rational tactical decision. For reasons discussed above, the court disagrees that this consultation was adequate under the circumstances. Respondent also claims that the defense case in mitigation was "successful[]" and "included emotional moments from [petitioner's] extended family members being confronted with the possibility of a death sentence."[18] Two minor moments in an otherwise deficient presentation based on a deficient investigation cannot make up for counsel's ineffectiveness.

Respondent also contends that counsel's decisions need to be analyzed based on what the standards were at the time of trial, not based on a present-day perspective, and faults the amended petition for failing to establish that the opinions of Drs. Watson and Monroe would have been the same or consistent with those that would have been rendered in 1997. The court disagrees. For example, respondent says, the amended petition "contends his trial counsel should have been aware that an article in a 1990 issue of the Journal of Psychopathology and Behavioral Assessment had raised questions about scale elevations and profile patterns matching DSM- III-

[18] In making this claim, the People point to the testimony of Lakeisha Cook and state, petitioner's "brother gets choked up." Lakeisha is actually petitioner's sister.

R diagnoses via structured interview. [Citation.] But the petition does not explain how it was a prevailing norm for trial counsel to be aware of this particular criticism of this test[.]" However, by failing to deny the facts in the petition or to state facts to controvert them, respondent has effectively admitted the facts alleged in the petition, including that trial counsel should have been aware of this article and it should have alerted them to the deficiencies in their investigation. If respondent wanted to challenge these facts, an evidentiary hearing would have been the proper venue to do so, but instead, respondent has decided to proceed by way of general denial and to request a decision without a fact-finding hearing. Respondent also claims that by introducing more evidence in mitigation, petitioner would have opened the door to aggravating evidence, such as petitioner's antisocial, narcissistic, and aggressive-sadistic traits. Respondent does not explain how evidence of petitioner's childhood neglect and trauma would open the door to more aggravating evidence, and counsel cannot decide to withhold mitigating evidence on the mistaken belief that it will open the door to other evidence (see e.g. *Dobbs v. Turpin* (11th Cir.1998) 142 F.3d 1383. 1388 ["lawyers [may] make strategic decisions limiting certain types of mitigating evidence. [Citations.] These strategic decisions, however, 'must flow from an informed decision.' [Citation]"]). Further, even if some of the additional evidence resulted in some unfavorable rebuttal evidence, "the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of [petitioner's] background." (*Williams v. Taylor* (2000) 529 U.S. 362, 396.)

Finally, respondent claims the evidence of aggravation was so overwhelming that there is no reasonable probability of a different outcome. The court disagrees with this assessment of the

aggravating factors, especially in light of the fact that petitioner was only 18 years old at the time of the murder, the murder was not premeditated, and petitioner had only minor juvenile offenses before the murder occurred.

Respondent claims that our case is similar to *Bobby v. Van Hook* (2009) 558 U.S. 4. In that case, the defendant, whose age is not indicated in the opinion, went to a gay bar for the express purpose of picking up a man to rob, something the defendant had done many times before. (*Bobby v. Van Hook* (2009) 558 U.S. 4, 5 & 13.) The defendant lured the victim to a secluded area, strangled him to the point of unconsciousness, and then killed him by stabbing him with a knife before mutilating his body and stealing his property. (*Id.* at p. 5.) The United States Supreme Court described trial counsel's pretrial investigation in anticipation of the penalty phase, saying, "Between Van Hook's indictment and his trial less than three months later, they contacted their lay witnesses early and often: They spoke nine times with his mother (beginning within a week after the indictment), once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime. [Citation]. As for their expert witnesses, they were in touch with one more than a month before trial, and they met with the other for two hours a week before the trial court reached its verdict. [Citation]. Moreover, after reviewing his military history, they met with a representative of the Veterans Administration seven weeks before trial and attempted to obtain his medical records. [Citation]. And they looked into enlisting a mitigation specialist when the trial was still five weeks away." (*Id.* at pp. 9-10.) During the penalty phase, the factfinder "learned, for instance, that Van Hook (whose parents were both 'heavy drinkers') started drinking as a toddler, began 'barhopping' with his father at

age 9, drank and used drugs regularly with his father from age 11 forward, and continued abusing drugs and alcohol into adulthood. [Citation.] The court also heard that Van Hook grew up in a ' "combat zone" ': He watched his father beat his mother weekly, saw him hold her at gun and knifepoint, 'observed episodes of 'sexual violence' while sleeping in his parents' bedroom, and was beaten himself at least once. [Citation.] It learned that Van Hook, who had 'fantasies about killing and war' from an early age, was deeply upset when his drug and alcohol abuse forced him out of the military, and attempted suicide five times (including a month before the murder), [citation]. And although the experts agreed that Van Hook did not suffer from a 'mental disease or defect,' the trial court learned that Van Hook's borderline personality disorder and his consumption of drugs and alcohol the day of the crime impaired 'his ability to refrain from the [crime],' [citation.], and that his 'explo[sion]' of 'senseless and bizarre brutality' may have resulted from what one expert termed a 'homosexual panic,' [citation.]." (*Id.* at pp. 10-11.)

The Court said the scope of the investigation was not unreasonable, and "given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents. This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, [citation], or would have been apparent from documents any reasonable attorney would have obtained[.]" (*Van Hook, supra*, 558 U.S. at p. 11.) The Court also explained that the record showed that the testimony of the new witnesses interviewed during the habeas investigation "would have added nothing of value" and would have been merely cumulative of evidence from closer family members. (*Id.* at p. 12.) The Court also noted the strength of the

aggravating evidence, which included the defendant's confession, the fact that he planned out the crime, the fact that he previously pursued the same robbery strategy and even continued to do so after committing the murder, and the fact that the defendant mutilated the victim's body, significantly reduced the possibility that the habeas evidence would have been impactful. (*Id.* at pp. 12-13.) Accordingly, the Court found that counsel's performance was not deficient and petitioner did not suffer any prejudice. (*Id.* at pp. 4-5.)

Our case is not "highly analogous" to *Van Hook*. There, counsel diligently pursued an investigation and met several times with the potential witnesses, including experts, in advance of trial, and adequately presented a case in mitigation that highlighted pertinent factors in an attempt to humanize the defendant. In our case, counsel clearly had no strategy with respect to the case in mitigation, and the mere fact that fifteen individuals were interviewed is immaterial when the interviews were superficial and counsel failed to delve into petitioner's background. Further, the aggravating case against *Van Hook* was much stronger than in our case. True, there were significant aggravating factors in our case, but the actual murder itself was significantly different from *Van Hook*, which included predation of the victim and unnecessary cruelty in committing the murder. In our case, petitioner fatally shot a man once during an attempted robbery. These are wildly different facts when it comes to deciding whether to impose death. *Van Hook* is also significantly different because Van Hook was a grown adult, and petitioner was just 18 years old. This fact cannot be overlooked and renders the prejudice analysis pointedly different from *Van Hook*.

Our case is much more similar to *Lucas*, *supra*, 33 Cal.4th 682, where counsel's "tard[y] and superficial[]" investigation resulted in counsel's inability to make informed decisions about

what mitigating evidence to present and how to present it. Like in *Lucas*, a thorough investigation would have uncovered weighty mitigating evidence about petitioner's childhood, and the evidence was of such a nature as to evoke sympathy or at least show the jury a version of petitioner that was less morally culpable than the coldblooded gang member that was presented at trial. True, the abuse suffered by the defendant in *Lucas* does appear to have been more severe than that suffered by petitioner, but the case in aggravation in *Lucas*, including the circumstances of the underlying murder, was much stronger than in our case, even considering that petitioner committed several armed bank robberies after the murder. Also, and this court believes incredibly importantly, petitioner was only 18 years old at the time of the murder and only a few years older at the time he faced the jury. This fact cannot be ignored when considering the impact of potentially mitigating evidence even in the face of aggravating evidence. Our case is very similar to *Lucas*, and supports that petitioner suffered ineffective assistance of counsel.

Given petitioner's young age at the time of the offense, the fact that the murder was not particularly gruesome or heinous compared to other capital murders, and petitioner's limited criminal history prior to the murder, petitioner has proved by a preponderance of the evidence that there is a reasonable likelihood of a different outcome had counsel adequately investigated and prepared the case in mitigation and the jury been presented with accurate and complete testimony regarding his personal, social, and familial history, and expert testimony about the effect the trauma had on him. Accordingly, petitioner has proved by a preponderance of the evidence that his counsel was ineffective by failing to consult with experts and present such expert opinions in mitigation during the penalty phase.

Issue 3: Cumulative Impact

The court finds that petitioner has proved by a preponderance of the evidence that the cumulative impact of counsels' failures in jury selection and in investigating and presenting the case in mitigation resulted in prejudice.

The cumulative error doctrine requires the reviewing court to "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349, disapproved of on other grounds in *People v. Whitmer* (2014) 59 Cal.4th 733.) If the cumulative effect of the errors deprived the defendant of a fair trial and due process, reversal is required. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Here, the cumulative impact of counsel's deficient performance in jury selection, leading to the empanelment of at least one biased juror and a jury predisposed to vote for death in this particular case, and of counsel's deficient performance in investigating and presenting mitigating evidence during the penalty phase, led to constitutionally intolerable prejudice against petitioner and "undermines [this court's] confidence in the outcome under the standard set forth in *Strickland* ..." (*Jones*, *supra*, 13 Cal.4th at p. 583). The combination of a jury heavily weighted in favor of death and biased against defendant and a severely lacking case in mitigation was fatal to petitioner's chance of avoiding the death penalty, and there is no conceivable rational tactic for conducting the limited investigation, then selecting the jury that counsel did, the way it which they did, and then presenting the evidence in mitigation the way it was presented. Counsel gave a jury with members who believed the death penalty should be imposed in any case of a killing during a robbery and who did not believe background was relevant to punishment very little with

which to view petitioner as someone they did not want to kill. Counsel's failures during jury selection and the penalty phase were individually prejudicial, and their combined effect even more so, severely undermining this court's confidence in the outcome of the sentence of death. As such, the court disagrees with respondent that there were no individual errors, and thus no cumulative prejudice as a result. The court finds petitioner has proved by a preponderance of the evidence that he suffered ineffective assistance of counsel due to the cumulative impact of his counsel's deficient performance in jury selection and in investigating and presenting the case in mitigation, and this requires reversal of the penalty imposing death.

Conclusion

For the foregoing reasons, the court grants relief as to the judgment imposing death. The sentence is vacated, and an order for a new penalty phase trial is granted. The criminal matter, case CR57524, is therefore set for a status conference on July 8, 2022 at 8:30 a.m. in Department B101 at the Banning Courthouse.

Due to the fact that the basis for reversal of the sentence is ineffective assistance of counsel, a copy of this opinion shall be sent to the State Bar of California and to trial counsel[19] (Bus. & Prof. Code, § 6068.7; Cal. Rules of Court, Rule 10.609).

IT IS SO ORDERED.

Dated: 6-30-22

Judge Stephen J. Gallon
Riverside County Superior Court

[19] Petitioner was represented at trial by the now-retired Honorable David Allen Gunn, inactive State Bar Number 100842, and Bruce Gurnea Cormicle, State Bar Number 114117.