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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
7 **THE STATE OF NEVADA IN AND FOR THE**
8 **COUNTY OF WASHOE**

9 **CARLOS GUTIERREZ,**

10 **Petitioner,**

11 **v.**

Case No.: CR94-1795B

12 **THE STATE OF NEVADA,**

Dept. No.: 3

13 **Respondent.**
14 _____/

15 **ORDER POST EVIDENTIARY HEARING**

16 This Court denied without a hearing a successive petition for post-conviction
17 habeas relief, filed in 2003, because the court found it was procedurally barred. On
18 appeal, the Nevada Supreme Court remanded with the instructions to this court to
19 hold an evidentiary hearing regarding Petitioner's ability to overcome the procedural
20 bars to further consideration of his death sentence. The Court denoted several issues
21 of concern that needed further development on remand, specifically, whether
22 Gutierrez was actually prejudiced by translation errors at the penalty hearing or
23 prejudiced because he was not informed of his right to Mexican Consular assistance
24 in defending the capital murder charge he was facing. The Court heard the petition
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1 through 14 sessions and heard 27 witnesses. The Court concludes that the
2 interpreter issue did not prejudice Gutierrez but that the lack of notice to the
3 Mexican Consul did.

4 The Court does not have to restate the entire tragic history which caused the
5 hearings in this matter. Suffice it to say that a young 3½ year old girl, Mailin, was
6 brutally and violently abused by Gutierrez, her step-father, over time until she died
7 as a result. He then drove with his wife to California and threw her body into a
8 ravine near Fillmore covered by her blanket and with a rosary her mother put in her
9 hand. They initially lied to the police about it but her mother eventually related to
10 the police the actual events which led to the recovery of the body and the arrest and
11 prosecution of both mother and father. Both were charged with first degree murder
12 but the mother, Tara, negotiated a plea of felony child abuse and served a sentence of
13 15 years for her part in these acts.
14

15 Gutierrez entered an Alford plea in April, 1995 and a panel of three district
16 court judges sentenced him to death for his treatment and killing of the little girl. He
17 appealed and the judgment of conviction was affirmed in 1996. He then filed a post-
18 conviction petition in 1996 that was denied after a hearing and his appeal of that
19 denial was dismissed by the Supreme Court in June 2000. In 2003 Gutierrez filed a
20 second habeas petition which this Court dismissed as procedurally barred. He
21 appealed and it was remanded in 2012 for a hearing as mentioned above.
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23 Many of the arguments presented in the latest petition were presented in the
24 direct appeal and/or in the first habeas petition but this latest hearing covered the
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1 interpreter issue and the Vienna Convention along with ineffective assistance of
2 counsel issues in more detail, in Petitioner's effort to overcome the procedural bar.

3 I. The first question to be addressed and answered is the interpreter question -
4 whether Gutierrez was actually prejudiced by translation errors at the penalty
5 hearing.

6 The Court finds the following facts as to that question:

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8 A review of that penalty hearing transcript reveals that the prosecutor advised
9 the court at the beginning of the sentencing proceeding that they were providing two
10 interpreters: Carlos Miguel Gonzalez and Olivia Yniguez. The petitioner had his own
11 interpreter, Margarita Larkins. The prosecutor advised that Gonzalez would be the
12 primary interpreter and Ms. Yniguez would sit with the prosecutor and would listen to
13 what was being spoken and interpreted when Gonzalez was interpreting and if there
14 were any questions in her mind as to the literal interpretation or meaning of a phrase
15 of a witness or a party to the proceedings, she would bring the matter to the
16 prosecutor's attention immediately and he would bring it to the court's attention.
17 There was no objection by the defense at that time; in fact, Ms. Larkins participated
18 in that arrangement.
19

20 The purpose of the three interpreters was to ascertain as best as was possible,
21 a correct interpretation of the questions and answers provided during the hearing for
22 the petitioner's benefit.

23
24 Gonzalez interpreted for three of the state's witnesses: Virginia Martinez, Maria
25 Torres, and Alfredo Gutierrez. Virginia Martinez was the first of those witnesses: she
26 was asked 84 questions - 63 on direct examination, 19 on cross-examination and 2

1 on redirect examination. The entire questioning was interrupted 3 times: once by the
2 interpreter when he asked the court if he could restate a question saying that he
3 thought the witness misunderstood it. There was no comment by any of the other
4 interpreters at that time. The second time was for clarification because the
5 prosecutor had been talking about 'Tara' and then asked the witness using the
6 pronoun 'she' but intending to talk about the girl victim and that evidently confused
7 the witness and the matter had to be cleared up. It was. It was the prosecutor who
8 was not clear in his use of the English language. The third interruption was brought
9 to the court's attention by interpreter Larkins who said that Gonzalez misinterpreted
10 the word for 'spank' and used instead the word 'hit.' There was a discussion among
11 the interpreters and the court and it concluded ambiguously with Ms. Larkins saying
12 'spank' was the verb and Gonzalez saying 'hit' which included 'hit on the buttocks'
13 was the verb. Ms. Yniguez said Larkins's interpretation was more literal but that both
14 interpretations were correct. The questioning that brought about that interruption
15 and conversation among the interpreters was the witness said she left the room and
16 when she returned, the child was crying and she asked the petitioner 'did you hit her'
17 and he responded, as interpreted by Gonzalez, "Sometimes you have to *hit* kids in
18 order to correct them" whereas Ms. Larkin said what the witness said was
19 "Sometimes you have to *spank* kids in order to correct them." Ms. Yniguez said that
20 technically Ms. Larkin was correct however Gonzales was not incorrect because
21 spanking involves hitting, and then the hearing continued.

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25 Maria Torres was the second witness for whom Gonzalez interpreted. She was
26 asked 230 questions, 173 on direct examination, 34 on cross examination, 22 on re-

1 direct and 1 final one. During direct examination Gonzalez briefly used the 3rd
2 person then switched to the first person in an answer. An interruption came when
3 there was confusion about what Torres saw and what Tara had told her about the
4 bruises on the little victim. The prosecutor thought she said that she saw the bruises
5 but then denied having seen them. Ms. Yniguez cleared it up by saying that Torres
6 said she did not see the girl with the bruising reflected in the 'J' series of the exhibits.
7 Torres did say that she was told by the Social Service lady that the girl had been
8 beaten. The term used by Gonzales was 'beatings' while Ms, Yniguez used 'bruises.'
9 Tara told Torres the bruises were the result of a fall at the park.
10

11 There was another interruption when Gonzalez told the court that he was
12 getting confused by the way Torres was answering the questions in the narrative and
13 it was agreed by all that he should instruct her to respond in shorter sentences and
14 she did thereafter. There was no question at that time about any irregularities by
15 Gonzales and his interpretations.
16

17 The next interruption was by the prosecutor who pointed out to the court that
18 for the last 5 minutes there were no translations being conducted by Ms. Larkins to
19 the defendant, but Mr. Leslie explained that she was content to listen and would say
20 something if Gonzalez was not accurate in his interpretations. Evidently Gutierrez
21 was understanding the English without the aid of an interpreter during that time.
22

23 The next interruption came when Ms. Yniguez said there was a mistake:
24 Gonzalez said that Torres wanted to take Tatiana with her rather than giving her to
25 Tara and the petitioner because she felt that if she gave her to them she was going to
26 be guilty of giving the daughter to them. Ms. Yniguez said what the witness said was

1 she would be guilty if something happened to her. Gonzalez disagreed then asked the
2 question again, and it turned out that what the witness said was the little girl was
3 going to stay with her; she didn't want to give Tatiana to Tara because if something
4 were to happen to the little girl, she would feel guilty. Direct examination was
5 completed without further interruptions.

6 In cross-examination, Gonzales asked the defense lawyer to repeat a question.
7 The next interruption was when Ms. Yniguez corrected Gonzales saying that she heard
8 the word 'cemetery' used by the witness when she described what it felt like when she
9 entered the petitioner's Bravo street house. Gonzalez interpreted the witness saying
10 "here it's like...like there's fear here. Take the clothes and let's get out of here because
11 it's really ugly here." Ms. Yniguez said that he missed the word 'cemetery' and what
12 the witness said was "when she entered the house it felt like a cemetery, like there's
13 fear here. Take the clothes... etc." Ms. Larkins agreed with Ms. Yniguez. The court
14 remarked that the system (the 3 interpreters) is working very well. At another time
15 Gonzalez said the witness said the defendant would not eat chilies because they
16 '*sting*' his stomach; Ms Larkins said the witness said '*burned*' his stomach.

17 On redirect, the prosecutor asked Torres about her answer of feeling bad when
18 she saw the pictures of the girl victim and she said her husband grabbed her. Then
19 the prosecutor asked, 'did you collapse?' and she answered - 'my husband was able
20 to catch me,' and then the prosecutor asked, 'did you go unconscious?' She answered
21 that she felt bad about the pictures shown to her, then the prosecutor said that's not
22 my question. At that time, Ms. Larkins interrupted and was joined by Ms. Yniguez and
23 they suggested that Torres did not understand the word 'unconscious,' so the
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1 prosecutor changed the question to -'did you black out?' Torres responded that she
2 collapsed. The final interruption was when Gonzalez asked the court if he could
3 repeat a question to the witness.

4 Alfredo Gutierrez was the third witness translated by Gonzalez and he was
5 asked 172 questions: 129 on direct examination, 38 on cross-examination and 5 on
6 redirect.

7 During direct examination Gonzales interrupted and said he'd have to have the
8 witness repeat his answer because he did not understand him. There was no
9 comment by the other interpreters.

11 The second interruption had to do with a question about marks that the
12 witness supposedly saw on the little girl's hands - "And some of those marks were on
13 her hands?" The witness said 'No, not on her hands' and the prosecutor asked, do
14 you recall saying that to Miss Wyatt, the D.A.'s investigator? Ms. Larkins interrupted
15 saying the witness did not say 'hands'; he said 'marks.' Ms. Ynigez agreed with Ms.
16 Larkins and the court had the reporter read the questions back. Upon re-reading,
17 Gonzales was shown to be correct; the witness saw marks on the girl's hands and
18 Tara told him they were from falling at the park.

20 The next interruption came when Gonzales used a Spanish word for 'other' in
21 the question - 'And you saw other bruises other than on the hands, didn't you?' Ms.
22 Larkins objected to the use of the particular Spanish word Gonzales used, as it had
23 two distinct meanings: it could mean 'outside' the hands or 'aside from' the hands.
24 Ms. Ynigez agreed. Clarifying questions were asked and the witness said that he saw
25 marks here (motioning with his hands indicating scratches on the tops of his hand).
26

1 There was more discussion concerning the words 'bruises,' 'marks' or 'scratches,'
2 then the prosecutor asked the witness - are you saying under oath subject to the
3 penalty of perjury that you never told us about the bruises from her playing... at
4 which time Ms. Ynigez interrupted and said that 'Gonzalez said *'prejudice'* rather than
5 *'perjury'* but the Spanish words are close.' There was another instance when Gonzalez
6 asked if he could have the witness repeat his answer and no one commented on the
7 request.
8

9 Another interruption was when the prosecutor asked the witness about the
10 petitioner having told him that somebody did something to Gutierrez and the girl
11 about three years prior. The witness answered that another man told him that after
12 looking at a picture of Gutierrez, the man said that he could tell that something had
13 happened to the petitioner. Ms. Ynigez interrupted saying that the man said that by
14 looking at the picture, he cast a spell or hex or something through the picture. The
15 prosecutor re-asked the question and the witness said the people in the picture were
16 in some (Spanish word). It was not clarified on the record as to what that word was.
17

18 There was another interruption when Gonzales said that someone was blowing
19 in his ear when he went into the Bravo house and Ms. Larkins said he also said 'and
20 talking to him.' Ms. Ynigez heard it both ways and it was decided that there was a
21 blowing in his ears after the witness repeated the answer.
22

23 During cross-examination Gonzales asked Mr. Leslie if he could repeat a name
24 used in a question. Gonzales interrupted himself to say "again he used *'sting'* his
25 stomach' when Ms. Larkins would say *'burn'* his stomach' in regards to eating chilies,"
26 but no one objected. Those were all of the interruptions during his testimony.

1 Out of 486 questions and answers to and from those three witnesses, less than
2 5 corrections had any substance and none was major. They were all addressed to
3 everyone's satisfaction at the time.

4 This Court finds that based on the record of the sentencing hearing, Mr.
5 Gonzalez's interpretations did not adversely affect the petitioner's position during
6 that hearing. The Court is aware of the subsequent history of Mr. Gonzalez and his
7 deception of the courts in his role as official interpreter for several local courts and in
8 his position with the district attorney's office. Notwithstanding his conviction and
9 imprisonment for perjury and the district attorney's position at his prosecution, and
10 the fact that Ms. Yniguez admonished Ms. Larkin to not interrupt so much (she
11 interrupted 8 times), the record of Gutierrez's penalty hearing does not disclose any
12 substantive errors in Gonzalez's interpretations.
13

14 The system set up by Judge Agosti was a good one and as she exclaimed, it
15 worked. It would have been better had she ordered an audio recording of the
16 proceeding but the two interpreters were sort of wary of Mr. Gonzalez and they were
17 listening to every word he and the witnesses uttered. The defense lawyers were told
18 of the Public Defender's skepticism of Mr. Gonzalez's interpretations and it was
19 suggested to them to have his cases recorded, but they chose not to request that for
20 some reason.
21

22 The Court is also aware of the testimony of the language experts called by the
23 defense, but the Court finds that nothing presented by them affected Gonzalez's
24 interpretation during the penalty hearing. Even they had discussions as to what
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1 certain words meant during the hearing and which lexicon was the best for any
2 translation.

3 The Court did not consider the facts of the other instances that were testified
4 about Gonzalez's honesty and conflict with the Public Defender's Office or his lying
5 about his credentials. As the Supreme Court pointed out, "The U.S. Constitution
6 does not require certified interpreters. But it does require reliable evidence."
7 (Citations omitted). Those extrinsic, collateral matters did not affect his in-court
8 interpretations as far as the record discloses. The rationale of NRS 48.045 applies to
9 that other activity that was presented by the petitioner: evidence of a person's
10 character or a trait of character is not admissible for the purpose of proving that the
11 person acted in conformity therewith on a particular occasion. Such evidence was
12 admitted, but the rationale is the same: just because he was bad at one time or other
13 times does not prove he was bad at the time in question – the penalty hearing.
14

15 The Court did not find any evidence of the "pretty hostile behavior" nor of any
16 "emotionally or verbally confrontation" in the record as testified to by Mr. Leslie.
17

18 As for Virginia Martinez, after 21 years, she says she had been misinterpreted
19 at the penalty hearing. Her testimony at the preliminary hearing, held on September
20 6, 1994 and less than three months after the death of Mailin, the young girl, and
21 interpreted by someone from Merit Court Reporting services, not Gonzalez, was that
22 she babysat for the Gutierrez's two girls from May to June 15, 1994; that Mailin had
23 bruises over her whole body and Mailin had shown them to her; that Mailin had been
24 sick, didn't eat and had been vomiting a few days before Martinez last saw her on
25 June 15th; that Mailin told her her father had hit her; that sometimes she would cry
26

1 when her father came to pick her up, saying she didn't want to go with him; that she
2 saw Gutierrez spank Mailin on the buttocks at her house one time and that Tara had
3 told her he had hit Mailin; that Mailin liked to sleep all the time; that she told the
4 police she saw the bruises on Mailin; that Tara acted 'lovely' with Mailin; that every
5 time Mailin came into her house, Mailin had bruises that she saw on her arms and
6 one on her face; that Mailin usually showed up with new bruises throughout the time
7 she babysat her; that Mailin told her her father had hit her when she asked Mailin
8 about the bruises; that Mailin would lift her clothes to show the bruises; that Tara
9 showed up once with a black eye and told her he had hit her; and that on the last
10 day Gutierrez told her Mailin was lost.
11

12 Mrs. Martinez testified again at the penalty hearing with the three interpreters
13 present – Gonzalez being the main one for the state, and she testified the same as she
14 had at the preliminary hearing. Twenty-one years later, she claims what she said
15 under oath three months after the events in question, and at the penalty hearing 14
16 months after, the events were misinterpreted and incorrect.
17

18 The Court finds Mrs. Martinez is not to be believed at this hearing.
19 The petitioner had the burden of establishing his claim against Gonzalez by a
20 preponderance of the evidence and this Court finds that he failed to do so as far as
21 any misinterpretations of Mrs. Martinez's penalty hearing testimony is concerned.
22 There was no testimony from the other two witnesses for whom Gonzalez testified at
23 the penalty hearing and there was a total of 14 witnesses for the State, only three of
24 which were interpreted by Gonzalez.
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1 II. The next issue is the Vienna Convention and the effect, if any, of its denial of
2 its benefits to Gutierrez in the proceedings. As the Court sees it, this is the critical
3 question, as it calls into review the ineffective assistance of counsel arguments at the
4 previous levels; the penalty hearing, the appeal and the prior habeas action and
5 appeal and it can remove the procedural bar if the court finds the petitioner has been
6 actually prejudiced by any attorney's ineffective assistance in light of the
7 Convention's provisions.
8

9 The Court recognizes that most of the IAC claims were argued and rejected by
10 the district court and the Supreme Court, but if the Vienna Convention deprivation
11 had a constitutional impact, those claims can be resurrected and a new penalty
12 hearing can be had. This Court recognizes that those earlier tribunals worked with
13 the presumption that defense counsel were effective and they presented their case
14 after a thorough investigation of the available facts surrounding the tragic event and
15 the involved actors and hindsight has no place in such a review per *Strickland*.
16

17 The Court concludes that as far as the finding of murder in the first degree,
18 that judgment will not be affected by any findings of this Court as to the potential
19 impact of the Vienna Convention. There is no question that Gutierrez, with his
20 abusive history with Mailin, was responsible for her death. His wife, Mailin's mother,
21 contributed to her death also, but the final and terminal blows were administered by
22 Gutierrez on June 15th, 1994 according to the evidence presented at the penalty
23 hearing.
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1 To establish his habeas case, Gutierrez called witnesses who this Court finds
2 would have been available had the Mexican Consulate been notified pursuant to the
3 Vienna Convention by the State of Nevada or for that matter, by the defense team.

4 His witnesses were:

- 5 1. Victor Manuel Uribe Avina, a member of the Mexican Ministry
6 of Foreign Affairs who explained the consulate's protection activities for
7 Mexican's seriously involved with the law in foreign countries.
- 8 2. Eduardo Martinez Curiel, currently a minister in the Mexican Foreign
9 Service who served in the Sacramento, CA office of the Mexican Consulate in
10 1994 and testified that a Mexican national charged with a capital offense would
11 be at the highest priority of concern for that office when they are advised of a
12 situation;
13
- 14 3. Carlos Giralt Cabrales, was a Deputy Consul General for the Mexico
15 serving in Sacramento CA at the time;
- 16 4. Carolina Zaragoza Flores, was a Deputy Consul General also in
17 Sacramento and explained what services that consulate would have provided in
18 1994;
19
- 20 5. Barbara Strickland;
- 21 6. Dr. Andres Lugo;
- 22 7. Alicia Vicars;
- 23 8. Patricia Fager;
- 24 9. David Gould;
- 25 10. Ramon Ascencio;
- 26

11. Rodrigo Segoviano Negrete;
12. Esther Guterriez;
13. Jose Segoviano;
14. Juan Ramon Ornelas;
15. Lourdes Guterriez;
16. Russell Stetler;
17. Tammy Smith;
18. Dr. Pablo Stewart;
19. Prof. Holly Mikkelson; and
20. Carlos Guterriez, the petitioner.

The petitioner testified that had he known about his right to notify the Mexican Consular, he would have done so.

Based upon that testimony, the Court finds the following facts:

Eduardo Martinez Curiel was the Mexican consul. He was responsible for providing consular protection to Mexican nationals arrested in Washoe County in 1994-95. He would have advised the defense team that the consulate was prepared to provide expert assistance and to assist with a mitigation investigation in Mexico. Consular officers would have gone over the plea agreement with Mr. Gutierrez to make sure that he understood it and comprehended its ramifications. Consul Martinez Curiel would have personally conveyed his concerns to the Mexican Foreign Ministry and his recommendations for the replacement of counsel, if he had learned that Mr. Gutierrez had been advised to plead guilty by his lawyer for the ostensible reason that he could not get a fair trial because he was a Mexican national. He also

1 clarified that the Mexican Consulate in Sacramento had access to legal advisors and
2 that he would have asked those advisors to assist the consulate with its review of this
3 case. As part of that case review by its legal advisors, the consulate would have
4 requested the recordings of the police interrogations of Mr. Gutierrez and the other
5 Spanish-speaking witnesses. He would have personally attended the penalty hearing
6 and would have responded to any concerns about the accuracy or impartiality of the
7 interpretation by insisting on the recording of those proceedings. Hence the Gonzalez
8 issue would have been obviated.
9

10 Barbara Strickland testified that her role in such cases was to advise lawyers
11 about the Mexican Foreign Ministry resources that were available for capital cases,
12 such as psychologists, expert witnesses [and] resources in locating people in Mexico.
13 Ms. Strickland explained that she would have provided wide-ranging assistance to
14 trial counsel and to Mr. Gutierrez, including the gathering of mitigation evidence in
15 Mexico. This would include contacting relatives and getting statements from them,
16 arranging for their travel to the United States to testify at mitigation hearings,
17 arranging for witnesses' visas, and looking for documents in Mexico such as medical
18 records or school records that might indicate some mitigating situation that had
19 occurred in Mexico. She would then have assisted the defense team in presenting the
20 resulting mitigating evidence to the prosecutor, in an effort to resolve the case short
21 of trial. She would have provided translation and interpretation services along with
22 the consular visits, to ensure that Mr. Gutierrez fully comprehended the process. As
23 part of her duties, she would have agreed to review the video recordings of the police
24 interrogations of Mr. Gutierrez and the Spanish speaking witnesses, along with the
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1 written transcripts of those recordings. Once she had noticed any significant
2 discrepancies in the transcripts, she would have alerted defense counsel and
3 suggested that they prepare their own transcripts. She reviewed the translations and
4 transcriptions of the recorded interrogations, and made her own. The State did not
5 present any expert testimony or evidence to refute her translations and
6 transcriptions, leaving no reason for this Court to doubt their reliability.

7
8 Ramon Ascensio, the witness from Mexico called by the defense at the penalty
9 hearing was called by the petitioner but asked significantly different questions. Mr.
10 Ascensio stated that the only questions he was asked by Ms. Vicars, trial counsel's
11 investigator, had to do with local customs in San Francisco del Rincon as they
12 pertained to '*brujeria*' (witchcraft). Although the investigator knew that Mr. Ascensio
13 owned a shoe factory, she did not ask him any questions about working conditions in
14 the local shoe factories, nor was he asked to provide any testimony at the penalty
15 hearing on that issue.

16
17 At the evidentiary hearing, Mr. Ascensio revealed that he was familiar with the
18 conditions at the shoe factory where Carlos started working at the age of twelve. He
19 noted that "there was really no ventilation system." He described how workers
20 applied a variety of chemicals to the shoe components during assembly, including
21 Resistol 5000 glue and a strong-smelling solvent.

22
23 Mr. Ascensio testified that he met with trial counsel on two occasions prior to
24 the penalty hearing, but they did not ask him any questions about the use of toxic
25 chemicals in the shoe industry or about the conditions in the factories. He testified
26

1 that he would have testified about the working conditions prevailing in the town's
2 shoe industry, but instead all of the attorneys' questions were "related to witchcraft."

3 Mr. Ascensio's testimony demonstrates that the lack of consular assistance
4 during the background investigation was prejudicial in two respects. First, the
5 defense team's inability to identify and develop Gutierrez's history of child labor in
6 unhealthy conditions may well have resulted in the loss of crucial medical evidence.
7 This Court noted, "the deficit was [trial counsel] not having him examined to see if
8 there were any residual effects from the [working] environment." Had trial counsel
9 "gone. . . to the Consul, perhaps they would have been able to do this." Through
10 consular involvement the sentencing panel would at least have heard moving
11 mitigating evidence about the chronic exposure of the shoe factory workers to
12 harmful and addictive neurotoxins and Gutierrez's exposure to it for at least two
13 years. Second, through consular involvement, other witnesses who testified for the
14 first time at the evidentiary hearing confirmed that Gutierrez endured these horrific
15 conditions while he was still a child—and did so solely to help support his
16 impoverished family.
17

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19 The Court finds the value of this testimony portraying Gutierrez as a hard-
20 working child helping the family survive—despite the deplorable working conditions—
21 would have been obvious, both to trial counsel and to the sentencing judges.
22

23 At the hearings, Petitioner's counsel provided contemporaneous training
24 materials for Nevada capital defense attorneys for the years surrounding the trial that
25 emphasized that good character testimony is indispensable and powerfully
26 mitigating. When properly developed and presented, it permits counsel "to portray

1 the defendant as one who, despite his or her tragic or sad background, was able to
2 channel the negative into positive acts and deeds. . .”¹ Had the consulate right to
3 assist not been violated, it would have ensured that the sentencing judges possessed
4 the “fullest information possible concerning the defendant’s life and characteristics,”
5 which is “[h]ighly relevant—if not essential— [to the] selection of an appropriate
6 sentence . . .” *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (emphasis and alterations in
7 original). The Court finds Mr. Ascensio credible.

8
9 Ester Gutierrez, Petitioner’s sibling, testified about the family’s poverty and
10 the children’s repeated exposure to neurotoxins. She testified that her mother gave
11 her sister some kind of tea as medicine and home remedies for an obviously serious
12 and eventually fatal intestinal disorder. Those remedies included Azarcon, a lead
13 oxide compound that her mother also administered to all of her other children when
14 they had stomach aches. Petitioner’s experts testified that when lead poisoning has
15 been attributed to the use of Azarcon (also known as Greta) as a home remedy,
16 analysis of the substance “has yielded results of concentrations from 70% - 90% of
17 lead oxides,” making it “one of the most hazardous” sources for lead poisoning in
18 Hispanic children.² These lead-based remedies are often administered to children
19 “[m]ixed with hot tea,” causing lead poisoning which affects the children’s mental
20 development according to an expert, Dr. Lugo. Ester also testified that the family was
21 forced to move frequently and lived in a series of single-room houses, each about the
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24 ¹EX 274, Training for Defense Attorneys: “The Nevada Attorneys for Criminal Justice
25 Presents Defending Capital Cases,” July 26-27, 1990, at p. 1-39 (emphasizing that, following a full
26 background investigation, positive character evidence should be intertwined with “the evidence of
neglect, abuse, drugs, etc. to portray the defendant as one who, despite his or her tragic or sad
background, was able to channel the negative into positive acts and deeds. . .”).

²EX 215, *Lead Poisoning in Hispanic Children: The Great Need for Prevention Education*, at p.
54.

1 size of a hotel room, with dirt floors that the children slept on. Her two-year-old
2 sister was severely bitten by a rat while asleep in the dirt. The family diet consisted
3 of beans, along with tortillas cooked on the lids of barrels that had been used to store
4 diesel fuel or glue. The entire room would fill with smoke when her mother burned
5 off the chemical residue adhering to the barrel lids used for cooking the family's
6 meals. The family ate from clay pots and plates, because they "didn't have any
7 money to buy any other better kind." When the children got head lice, her mother
8 would soak their scalps in DDT, H24 insecticide or leaded gasoline, wrapping their
9 heads with a plastic bag until the lice died. Ester also recounted how Carlos had left
10 school at the age of twelve because "he decided it was better for him to work to help
11 my mother and father." Carlos worked in a shop making shoes for eleven to twelve
12 hours a day, came home with his hands and clothes covered in bad-smelling yellow
13 glue, and would "always say that he had headaches because of the fumes of the
14 shoes." She also testified that her mother punished Gutierrez by making him stand
15 up and put his hands out, then she would hit them with a wooden object.
16
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18 Fully presented at the penalty hearing, Ester's testimony and that of her sister
19 Maria would have supported a variety of productive mitigation themes such as their
20 brother's "unstable and deprived childhood," his "extraordinary exposure to
21 neurotoxics" and, despite the many deficits in his upbringing, his "positive
22 character traits." The Court finds Ester's testimony would have been "substantial
23 mitigating evidence" but that petitioner's "trial lawyers failed to investigate and
24 present" to the sentencing panel. [*Terry*] *Williams v. Taylor*, 529 U.S. 362, 390 (2000).
25
26

1 This Court finds that contrary to Judge Agosti's findings in the prior habeas
2 proceeding, providing, "In anticipation of the penalty phase, Mr. Kafchinski and Mr.
3 Leslie effectively investigated, marshaled and then, in the penalty phase, presented
4 all of the relevant and credible mitigating evidence available for the penalty phase,"
5 they did not.

6 Kafchinski testified they used the *Brujas* or witchcraft theory of defense
7 because that was all they had to work with. Counsel did not effectively act on the
8 findings of their first consultant, Dr. Leonard Campos, whose affidavit contradicted
9 Mr. Kafchinski's testimony at that prior habeas hearing that he did not choose to use
10 Dr. Campos because he concluded that Gutierrez was a sociopath and manipulative.
11 Dr. Campos's affidavit, Ex. 277, states that he was contacted by Kafchinski in 1994,
12 to evaluate Gutierrez for competency to stand trial and that he diagnosed Gutierrez
13 with a paranoid personality disorder with schizotypal features (DSM IV, 301.80), and
14 that he never told counsel that Gutierrez was a sociopath. He did say that he
15 thought Gutierrez lacked candor in the evaluation session which prevented Campos
16 from testing him. Trial counsel did not further pursue the competence issue.

17 Dr. John Wallace evaluated Gutierrez and was told of his visual and auditory
18 hallucinations but did not find any underlying brain conditions. He therefore
19 contributed those to Gutierrez's beliefs and superstitions. He evidently suggested or
20 affirmed the defense of cultural and religious influences on Gutierrez which could "be
21 crucial to make a distinction between maliciousness and superstition." The *Brujas* or
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1 witchcraft defense. Wallace found Gutierrez had a Full Scale IQ of 81.³ Neither
2 psychologist was consulted further nor were they called to testify at the penalty
3 hearing. More importantly, neither of them had the information about the facts of
4 Gutierrez's impoverished and toxic exposed childhood.

5 The reason for their not having access to that information was that such
6 information was never investigated. Although counsel sent an investigator to Mexico,
7 Alicia Vicars, they told her what to look for and that was "someone who could explain
8 those beliefs (*Brujas*) to show that Gutierrez acted not out of maliciousness but out of
9 superstition." She knew how to conduct a mitigation investigation but she was not
10 asked to do that. Trial counsel testified that they had budget constraints and they
11 could only afford to send Vicar to Mexico for 3 days of investigation, plus 2 travel
12 days.
13

14 The Mexican Consular witnesses testified they would have provided sufficient
15 funding for a proper and full investigation in Mexico and made arrangements for
16 travel to the US for all the witnesses.
17

18 That Ms. Vicars met and arranged for Ramon Ascensio to come and testify
19 and he did but he only testified about the cultural and religious beliefs and
20 superstitions of the village Gutierrez grew up in. It turned out he had a plethora of
21 knowledge about the conditions in that village that could have affected Gutierrez's
22 mental health but he was not asked about that topic. However he did explain such in
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25 ³ Counsel for petitioner talked about and Dr. Stewart testified about the "Flynn effect" and
26 explained that generally IQs drop annually so that in 2015 Gutierrez's IQ would have been around 78
or border line mentally retarded, but their Ex. 279, a report from Johathan Mack, Psy.D., stated that
the Flynn effect is the general increase in IQ over a period of time with .03 IQ point increase per year
which would be 85.2 although Mack came up with 76!

1 this habeas hearing: he testified about the toxicity of the work place, the water, and
2 the air. His testimony of the workplace, where young Gutierrez worked for 2 years,
3 was compelling and could have formed a basis for profound systemic and
4 psychological mitigating evidence.

5 The Court finds the testimony of Dr. Andres Lugo credible. He has impressive
6 credentials in the area of public health and toxicology. Dr. Andrés Lugo, a bilingual
7 medical doctor and toxicologist, was retained by the Mexican Foreign Ministry to
8 conduct an environmental hazard assessment of the Mexican town of San Francisco
9 del Rincón, where Gutierrez lived and worked as a child, including the health hazards
10 from the neurotoxins that he was repeatedly exposed to while living there. He
11 testified that the places where Gutierrez grew up were among shoe, hat, and chemical
12 factories, and in the middle of agricultural fields where neurotoxic pesticides were
13 used. Dr. Lugo visited several of Gutierrez's childhood homes and toured a number
14 of shoe factories in the neighborhood. He found that Gutierrez was raised in
15 extremely impoverished circumstances and that the conditions in the shoe factories
16 where he worked as a child were unsanitary, with very poor ventilation.

17 Dr. Lugo described the effects that childhood exposure to neurotoxins can
18 have, including mental and behavioral problems. He said that poor nutrition
19 worsens the effect of neurotoxin exposure. He also described the family's use of lead-
20 glazed pottery, ubiquitous in poor households in that area, which would cause lead
21 to leach into food, and the family practice of applying leaded gasoline on the
22 children's scalps to treat lice. Dr. Lugo also learned that Gutierrez and his siblings
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1 were treated with *greta* as a folk remedy for stomach problems, but noted that "this
2 chemical contains over 95 percent of lead oxide."

3 In response to this Court's question on whether neurotoxins can have
4 permanent effects on people, Dr. Lugo explained that the long-term consequences
5 can include mental problems such as "changes in behavior, changes in cognition,
6 becoming depressed, developing paranoia, schizophrenia." He described a range of
7 highly toxic pesticides that were banned or severely restricted in the United States
8 but were widely used in Mexico at the time when Gutierrez would have been living
9 and working in agricultural fields. When interviewed by Dr. Lugo, Gutierrez's father
10 specifically mentioned that his duties as a farm worker included spraying pesticides
11 such as methyl parathion ("Polvo de Avion") and DDT. These substances are highly
12 neurotoxic.
13

14 Dr. Lugo also described Resistol 5000, a very toxic glue that Gutierrez used in
15 his work in a shoe factory, where he glued soles onto shoes. Gutierrez worked full-
16 time from the age of 12 to 14 applying Resistol with his bare hands, breathing its
17 vapors "full time, working six days a week." Dr. Lugo explained that Resistol 5000
18 contains Toluene and Hexame. These chemicals are "potent aromatic hydrocarbon
19 neurotoxins capable of causing brain damage, behavioral problems and other health
20 problems." Gutierrez's sisters told Dr. Lugo that when their brother came home from
21 working in the shoe factory, "he had red eyes, was dizzy, 'like drunk', with headaches
22 and nausea." Exposure to these neurotoxic substances "may trigger behavioral
23 changes such as lack of attention and impulsivity, with increased levels of
24 externalizing behaviors, including irritability and aggression." In conclusion, Dr.
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1 Lugo rendered an expert opinion that Gutierrez was "chronically exposed, to a
2 number of neurotoxic and neuroendocrine substances."

3 None of this information was discovered nor presented to the sentencing panel
4 notwithstanding there were flags raised in many of the witness statements taken
5 early on by the local investigators. Gutierrez had headaches, dizzy spells, black outs,
6 hallucinations and possibly seizures, in that he was noticed to blankly stare until he
7 was brought out of it and he had 'visions'.
8

9 The Court finds this type of expert testimony has mitigating value in at least
10 three respects. First, Dr. Lugo's professional assessment of the degree and types of
11 childhood exposure to neurotoxins was an essential contribution to making an
12 accurate mental health diagnosis of Gutierrez, as Dr. Pablo Stewart, another witness
13 for petitioner, confirmed. Second, Dr. Lugo visited and reported on Gutierrez's home
14 town, his family members, his childhood homes and the factory where he worked,
15 providing credible first-hand descriptions of petitioner's deprived and toxic childhood
16 environment. Dr. Lugo's testimony established that Gutierrez's sisters reported a
17 history of miscarriages and spontaneous abortions, indicating that the toxic stew of
18 chemicals polluting the local environment was profoundly harmful. Lastly, as an
19 expert in the field of neurotoxins, Dr. Lugo provided context and relevance for much
20 of the lay testimony regarding Gutierrez's childhood living conditions. He observed
21 that it is one thing for the sentencer to hear that the defendant's family used clay
22 pottery for cooking and eating because they were poor, and quite another to learn
23 that the local pottery contained high quantities of soluble lead that the children
24 consumed every day. Dr. Lugo also explained the multiple and devastating effects of
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1 neurotoxins on brain development, knitting together the disparate strands of lay
2 testimony on pottery, home remedies, pesticide use and factory conditions into a
3 coherent narrative of repeated exposure to potent brain poisons. His testimony also
4 laid the foundation for Dr. Pablo Stewart's psychiatric opinion.

5 Dr. Pablo Stewart is a clinical and forensic psychiatrist and presently a clinical
6 professor of psychiatry at the UCSF School of Medicine, in the California university
7 system, who was retained to conduct a psychiatric assessment of Gutierrez, under
8 the auspices of the Mexican Foreign Ministry and the Mexican Capital Legal
9 Assistance Program. Dr. Stewart prepared a psychosocial history of Gutierrez, which
10 he testified would also have been standard psychiatric practice in 1994-95. In
11 preparing the psychosocial history, Dr. Stewart reviewed interview reports prepared
12 by the mitigation specialists in the case, along with the social history report and a
13 wide range of case documents. He also met with several Gutierrez family members as
14 well as other life-history witnesses, in addition to interviewing Gutierrez on three
15 separate occasions. Dr. Stewart testified that the amount of materials that he had
16 available to him in this matter far exceeded that which he would normally have
17 available to him during his usual clinical practice. This abundance of material and
18 sources provided him with additional confidence in arriving at his medical opinions.

19 Dr. Stewart testified that the harmful effects of childhood exposure to trauma
20 do not diminish over time and that the effects of multiple exposures to trauma are
21 additive over time. He found that Gutierrez suffered from multiple forms of trauma,
22 including abuse and neglect inflicted upon him directly, observing abuse inflicted
23 upon his mother and siblings, and surviving a catastrophic flood. Dr. Stewart
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1 concluded that Gutierrez suffered from a Trauma Related Disorder. Children who are
2 chronically exposed to trauma also suffer from cognitive impairments, the symptoms
3 of which include impaired executive functioning and over reactivity to stress.

4 Dr. Stewart further testified that Gutierrez suffered from Unspecified
5 Schizophrenia Spectrum and other Psychotic Disorder, the symptoms of which
6 include delusional thinking and hallucinations. He described at length the many
7 forms of visual, tactile and auditory hallucinations that Mr. Gutierrez had
8 experienced, beginning in his childhood, along with instances of delusional thinking.
9 His opinion that Gutierrez suffers from an Unspecified Schizophrenia Spectrum
10 Disorder was informed and confirmed by Dr. Campos's evaluation and opinion.
11

12 Dr. Stewart agreed with Dr. Lugo's finding that Gutierrez suffered from chronic
13 environmental exposure to neurotoxic and neuroendocrine disrupting chemicals
14 capable of causing brain damage, neuropsychiatric and health problems. He further
15 agreed with Dr. Lugo that Gutierrez's exposure to pesticides, neurotoxic substances
16 used in shoe factories as well as tanneries and chemicals from the chemical
17 manufacturing plant at San Francisco del Rincon were aggravated due to poverty,
18 lack of appropriate housing and extremely deficient sanitary conditions. Dr. Stewart
19 noted that the types of neurotoxins (i.e. Resistol 5000, lead, pesticides as well as
20 water and air pollution from industrial chemicals) to which Gutierrez was exposed
21 are well established as causing neuro-cognitive disabilities. Dr. Stewart stated that
22 solvents such as toluene are "absolutely linked to neurological changes and even to
23 the progression to psychotic symptoms." Toluene exposure results in a lower IQ and
24 is "especially toxic in that it is documented to produce both visual and auditory
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1 hallucinations in people, in addition to neurologic impairments.” The toxic effects of
2 toluene, lead, pesticides and the other neurotoxins Gutierrez was exposed to were
3 known back in 1994-1995.

4 Dr. Stewart opined that exposure to these various neurotoxins from childhood
5 onward were risk factors contributing to Gutierrez suffering from an Unspecified
6 Neuro-Cognitive Disorder. The symptoms of this disorder include impaired executive
7 functioning, lowered IQ and impaired reaction to stress.
8

9 Dr. Stewart further testified that he reviewed the report that Dr. Campos
10 provided to trial counsel and also interviewed Dr. Campos. Contrary to the testimony
11 given by lead counsel at the first state evidentiary hearing, Dr. Stewart confirmed
12 that Dr. Campos did *not* diagnose Gutierrez as being a sociopath or state that he
13 suffered from an antisocial personality disorder. Dr. Stewart agreed that Gutierrez
14 does not meet the criteria for either of these conditions. Instead, Dr. Campos
15 diagnosed Gutierrez as suffering from a Paranoid Personality Disorder with
16 Schizotypal Features, which Dr. Stewart described as a pervasive pattern of distrust
17 and suspiciousness of others such that the afflicted individual ascribes malevolence
18 to their motives, to a degree that bordered on the psychotic. Dr. Stewart also
19 described Dr. Campos’s diagnosis of Gutierrez as reasonable, given the limited
20 information Dr. Campos had to work with, and stated that it was congruent with his
21 own diagnosis.
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24 In conclusion, Dr. Stewart offered his considered opinion that Gutierrez suffers
25 from a Trauma Related Disorder, and Unspecified Schizophrenia Spectrum and Other
26 Psychotic Disorder and an Unspecified Neuro-Cognitive Disorder.

1 The Court also received testimony and evidence indicating that Gutierrez
2 suffers from a cognitive impairment. Dr. Stewart testified that he had reviewed the
3 1995 neuropsychological evaluation of Gutierrez, in which Dr. John Wallace found
4 that Gutierrez had an I.Q. of 78 in the areas of his verbal and performance scores
5 and a Full-Scale I.Q. of 81. Dr. Stewart also reviewed Dr. Jonathan Mack's July
6 2015 report, and agreed with him that, assuming the Full Scale IQ score of 81 was
7 correct, it would decrease to 76.8 due to the phenomenon known as the Flynn effect.
8 An IQ score of 76.8 would place Gutierrez in the borderline impaired range.
9

10 None of this evidence was developed or presented at Gutierrez's sentencing. All
11 of it was available at that time, and all of it was eventually discovered through
12 Mexican consular assistance and would have been discovered in 1994 had the consul
13 been notified.
14

15 The Court finds that Gutierrez was deprived of that kind of investigation
16 because the State did not notify the Mexican Consulate. This Court cannot conclude
17 that such information would have changed the panel's findings, but certainly there
18 would have been provided an explanation of why he hallucinated and how he was
19 affected by his earlier childhood experiences which could have bought him
20 understanding if not sympathy from the panel. The Court can conclude that
21 Gutierrez suffered prejudice at the sentencing hearing because he was deprived of all
22 the mitigating information that the Mexican Consulate provided in preparation for
23 this habeas hearing.
24

25 With his low IQ, his problems with his attorney, the real possibility of brain
26 damage from all the neurotoxins he was exposed to, the translation problems, the

1 contradictory statements of not admitting but admitting – the decision to be
2 condemned to death ought to be scrutinized. In this case it has been, and the Court
3 is constrained to conclude that the petitioner has demonstrated by a preponderance
4 of the evidence that he was denied effective assistance of counsel at his penalty
5 hearing and his death sentence ought to be vacated and he be given a new penalty
6 hearing.

7
8 This conclusion is based upon, contrary to Judge Agosti's findings, that "In
9 anticipation of the penalty phase, Mr. Kafchinski and Mr. Leslie effectively
10 investigated, marshaled and then, in the penalty phase, presented all of the relevant
11 and credible mitigating evidence available for the penalty phase." They did not, even
12 though they had indicators that there might have been something amiss mentally
13 with their client. There existed criminal defense associations' training in the defense
14 of capital cases prior to 1994 in California. The annual Capital Case Defense
15 Seminar in Monterey CA put on by the California Attorneys for Criminal Justice and
16 the California Public Defender's Association since 1980. Also, the Death Penalty
17 College at Santa Clara Law School was extant annually since 1992. Nevada defense
18 attorneys provided articles on defending such cases and the emphasis was on
19 mitigation – how to save the defendant's life. It was recognized then as now that
20 defending the guilt phase of a capital case is no different from any other type of
21 crime, but where 'death is different' comes into play is with the preparation of the
22 penalty hearing, which begins at the acceptance of representation. There is a reason
23 for the second attorney for these cases: one to defend against the crime, the other to
24 defend against the death penalty in the event of a finding of guilt. Here, early on, the
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1 guilt result was known and a trial was waived without exploiting an empty chair
2 defense therefore the attorneys' energies ought to have shifted totally to the penalty
3 phase, but there was no effort to re-think their initial conclusion as to their course of
4 defense. *Strickland* requires a thorough investigation before making a strategic
5 decision. Gutierrez's history of hallucinations ought to have suggested a potential
6 problem with his mental health, notwithstanding the MRI and CAT results or the
7 inadmissible polygraph results. Dr. Campo's truncated examination ought to have
8 caused counsel to seek another examination from someone else. Judge Agosti rightly
9 stated that a lawyer does not have to go from expert to expert in order to find one
10 who helps his cause, but that does not mean that a lawyer should stop his
11 investigation when his client is not cooperative with a potential expert. Perhaps the
12 next one and the client could work together. But the red flag was there and ought to
13 have been investigated. The obvious starting point would have been Ms. Vicars who
14 traveled to Mexico; she should have been instructed to find out what she could about
15 Gutierrez's life and beliefs rather than just his beliefs. That was a conclusion based
16 upon incomplete foundation.

17
18
19 Russell Stetler was called by the petitioner. He is employed by the National
20 Coordinator for the Federal Death Penalty Projects which offers assistance to Federal
21 defenders and private counsel in capital cases. In 1994 – 1995 he was the Chief
22 Investigator for the California Appellate Project – a nonprofit resource project that
23 provides assistance to people handling death penalty cases in California, either at the
24 level of direct appeal or state or federal habeas corpus.
25

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1 He is on the faculty of the Monterey and Santa Clara programs and was on
2 over 350 training programs on death penalties since 1990. He began his involvement
3 with such programs in 1980. He taught on the standard of care in mitigation
4 investigation at Monterey in 1991 and in 1994. He was a consultant/contributor to
5 their Death Penalty Defense Manual which was first published in 1980 and he
6 published their then up-dated 4 volume manual in 1993, of which 1 volume was
7 devoted to mitigation evidence. That volume had sections dealing with mitigation
8 strategy where they first discussed the nuts and bolts of mitigation investigation. The
9 second dealt with neurological issues, organic brain damage and what leads to brain
10 damage, neurotoxins and so forth. The third dealt with psychological issues. The
11 fourth dealt with dysfunctional families and how somebody's family background
12 identified potential mitigating themes. The fifth dealt with addiction and substance
13 abuse, which are common problems in these cases and the sixth area dealt with
14 social and cultural issues, including foreign nationals. This volume was sort of a
15 workbook with pointers and contacts for lawyers with a capital case and a
16 bibliography for further research of all the topics. He identified the national standard
17 for preparing a mitigation defense which even at that time included the importance of
18 a multi-generational investigation, the development of a social history, a biography of
19 the client in the context of the world that shaped him. And that that involves multiple
20 in-person, face-to-face meetings with people who knew him in his developmental
21 years. If you have a client who was born in Mexico, it meant that you had to go to
22 Mexico to meet those people, to see the community that he came from, and, if you
23 would enlist the assistance of the Consulate, all kinds of things were possible that
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1 would otherwise be very difficult in foreign national cases without cooperation of the
2 government.

3 Trial counsel did none of this.

4 The next issue to be addressed is the prior petition for habeas relief which is
5 one of the causes of the procedural bar to this subsequent petition. Bruce Lindsay
6 represented Gutierrez for the petition and its appeal. Admittedly, he was 'aware' of
7 the Vienna Convention but did not investigate its implications nor did he understand
8 them. He was contacted by the Mexican Consul in Sacramento while he was
9 preparing his pleadings but did not even research the issue. The first contact was
10 around August 3, 1998 informing Lindsay about the notification to the US State
11 Department in July, 1998 that Gutierrez had not been provided with consular
12 contact when he was arrested in contravention of the Vienna Convention. Another
13 written contact between Lindsay and the consulate was in December 1998 and
14 Lindsay agreed that as it mentioned, he had prior conversations with a member of
15 that consulate concerning the Convention. He acknowledged that someone from the
16 consulate was in court watching the proceedings. Thereafter, contact between
17 Lindsay and the consulate was largely ignored by Lindsay until 2001 when the
18 Federal Public Defender's Office entered the case. The consulate provided Lindsay
19 with the names of attorneys he could contact for assistance on the Convention but
20 none was contacted by him. Lindsay was also told by Ms. Larkin about the
21 translation problems but he did no investigation about those either. His reasons for
22 not investigating the Vienna Convention material was that he was overwhelmed by
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1 the amount of work he was committed to at that time and there was no tactical
2 reason for ignoring it.

3 This Court finds the representation provided to Gutierrez on his prior petition
4 was ineffective representation to a constitutional degree. The record reflects that he
5 wrote and argued a brief before the district court and then wrote the appellate brief,
6 but what those tribunals did not know until now is the lack of investigation and
7 research that was ignored by Mr. Lindsay. Had what was presented at this hearing
8 been presented to Judge Agosti, it is reasonable to conclude that her findings would
9 have been quite the opposite.
10

11 The Court is aware that the Supreme Court is in the minority position with
12 regards to the Vienna Convention displacing the procedural bars to a successive
13 habeas petition. However, the case cited by it for this evidentiary hearing, *Torres v.*
14 *State*, 2004 WL 3711623 (Okla. Crim. App. 2004) is remarkably similar to this case
15 in its facts and the reasoning of that majority was fair to the defendant since these
16 are death penalty cases, notwithstanding the gruesome underlying facts. The Court
17 also recognizes the dissent's reasoning and concurs with most of it. This is a close
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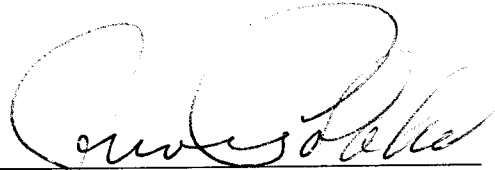
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1 difficult case. However in perusing the outside-the-record facts which led to the
2 decisions by the respective lawyers at the first levels, it cannot be argued that
3 Gutierrez was effectively represented at the penalty hearing and for his original
4 habeas petition.

5 In conclusion, had the State notified Petitioner of his consular rights, there is a
6 reasonable probability that the representation would have had a different ending.
7 This conclusion is made with the Court being aware of the *Collman* case which has
8 remarkably similar facts and where there were 6 mitigators introduced and still the
9 death penalty was meted out. At least, Collman was given the benefit of argument
10 that provided significant mitigators which was not the case with Gutierrez.
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12 THEREFORE this Court so finds and the death penalty is VACATED.

13 DATED this 21 day of August, 2017.

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17 JEROME M. POLAHA
18 DISTRICT JUDGE
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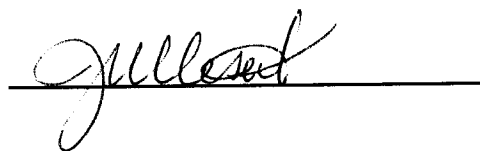
CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 21 day of August, 2017, the following persons were served via electronic filing:

JAMES SCOTT THOMSON, ESQ. for CARLOS GUTIERREZ

DAVID ANTHONY, ESQ. for CARLOS GUTIERREZ

JOSEPH R. PLATER, III, ESQ. for STATE OF NEVADA

A handwritten signature in cursive script, appearing to read "J. Thomson", is written over a horizontal line.