ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION PETITIONER, ON HABEAS CORPUS.	No. S065575 (Related Appeal: *People* v. *Champion*, Crim. No. 22955.)

PETITION FOR WRIT OF HABEAS CORPUS

PETITION
VERIFICATION
PROOF OF SERVICE

(Volume 1 of 2 volumes)

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CODES

CALIFORNIA CODES

UNITED STATES CODES

CONSTITUTIONAL PROVISIONS

CALIFORNIA

OTHER

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PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

In this verified petition for a writ of habeas corpus, petitioner Steve Allen Champion, by and through his attorney of record, Karen Kelly, alleges that his convictions of first degree murder, robbery, and burglary, and sentence of death were obtained in violation of his state and federal constitutional rights as set forth below:

I.

STATEMENT OF UNLAWFUL CONFINEMENT

1. Petitioner, Steve Champion, is presently unlawfully confined on death row in San Quentin State Prison, as a result of a sentence of death imposed by the Honorable William B. Keene, on December 10, 1982, following jury trial in Los Angeles County Superior Court case number A365075.

II.

STATEMENT OF JURISDICTION

1. "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." (California Penal Code section 1473, subdivision (a).)[1] This Court by virtue of article VI, section 10 of the California Constitution has original jurisdiction in habeas corpus proceedings.

2. On September 12, 1986, during the pendency of petitioner's direct appeal, a single-issue habeas petition was filed on petitioner's behalf. The petition, which was filed in response to respondent's contention that an appellate issue concerning the voir dire process had been waived, alleged that if trial counsel had waived the issue, counsel, in so doing, had provided ineffective assistance of counsel. This Court, in its direct appeal opinion, assumed that the voir dire issue had been preserved and denied the claim on its merits, thereby rendering moot the single-issue habeas petition. (*People v. Champion* (1995) 9 Cal.4th 879, 907-908.)[2]

III.

PROCEDURAL HISTORY

1. Petitioner and co-defendant Craig Anthony Ross were charged by amended Information, filed September 13, 1982, with the December 12, 1980, murders of Bobby and Eric Hassan (section 187, two counts), burglary (section 459, one count), and robbery (section 211,

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[1] All further statutory references are to the California Penal Code unless otherwise specifically indicated.

[2] A formal order denying the petition was issued 5/31/95. (*In re Champion*, Crim. 25478.)

two counts). In connection with the murder counts, the Information alleged the special circumstances of multiple murder (two allegations), robbery (two allegations) and burglary (two allegations (sections 190.2, subd. (a)(3), subd. (a)(17)(i), and subd. (a)(17)(vii).) As to each crime, it was further alleged that the perpetrators were armed with a handgun. (Section 12022, subd. (a).)

2. In addition, the Information charged Mr. Ross with the December 27, 1980, murder of Michael Taylor, and burglary, robbery, and rape perpetrated in connection with Mr. Taylor's death. As to the Michael Taylor homicide, four special circumstances were alleged: burglary, robbery, rape and multiple murder. (CT 530-544.)

3. Petitioner was arrested on January 9, 1981. He was eighteen years old. (CT 39, 115.)

4. Trial began on September 28, 1982. In addition to evidence of the Hassan crimes charged against both defendants and the Taylor crimes charged against Mr. Ross, the prosecution introduced evidence of a third homicidal incident, the November 1982 murder of Teheran Jefferson. On October 19, 1982, petitioner was found guilty as charged of the Hassan offenses. (CT 725-735.) But for a single Taylor incident robbery count, the jury also found Mr. Ross guilty as charged of both the Hassan and Taylor offenses. (CT 742-763.) The arming and special circumstance allegations were each found to be true. (CT 725-763.)

5. The penalty phase was conducted before the same jury. The penalty phase began on October 21, 1982. (CT 781.) The jury returned verdict of deaths as to both Mr. Ross and petitioner on October 27, 1982. (CT 798.)

6. On December 10, 1982, Judge Keene sentenced petitioner and Mr. Ross to death. (RT 3807-3808.)

7. On April 6, 1995, this Court affirmed petitioner and Mr. Ross' convictions and sentences on automatic appeal. The duplicative multiple-murder special circumstance findings were ordered stricken. (*People* v. *Champion, supra*, 9 Cal.4th 879.)

8. On June 1, 1995, rehearing before this Court was denied. On January 8, 1996, the United States Supreme Court denied a petition for writ of certiori filed by petitioner.

9. On October 7, 1997, after the District Court's ruling on exhaustion of claims presented in a petition to that court on April 21, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. (*Champion v. Calderon* case number CV 96-2845.) Said petition contains only exhausted claims, i.e. claims based upon the appellate record and presented to this Court on petitioner's automatic appeal. That court ordered petitioner file any unexhausted claims, including extra record claims be presented to this Court by November 6, 1997.

IV.

THIS PETITION IS TIMELY

1. On May 23, 1983, R. Charles Johnson was appointed to represent Steve Champion on his direct appeal from the convictions described above and the judgment of death. (Exhibit 1 -- California Supreme Court Order Appointing R. Charles Johnson.)[3] At the time of Mr. Johnson's appointment, appellate counsel was under no obligation to investigate factual and legal grounds

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[3] The exhibits for this petition EXCLUSIVE OF THOSE EXHIBITS WHICH ARE REFERRED TO IN CLAIM XI. C. (Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial) are contained in Exhibit Volumes 1-4, numbered 1-84, entitled *Guilt Phase Claims and other Claims (excluding Penalty Phase Ineffective Assistance of Counsel Claims.*) The exhibits to Claim XI.C. are contained in Volumes 1-13, numbered 1-240 entitled *Exhibits to Claim of Ineffective of Counsel at Penalty Phase.*

for the filing of a petition for writ of habeas corpus and Mr. Johnson's understanding when he accepted the appointment was that he would be performing only appellate work. (Exhibit 2 — Declaration of R. Charles Johnson.)

2. In June, 1989, almost three years after the filing of petitioner's direct appeal reply brief, this Court promulgated capital habeas standards which, for the first time, imposed upon counsel representing appellants in capital cases an obligation to investigate possible bases for habeas relief.[4] On September 20, 1989, Mr. Johnson, explaining that he was not competent to conduct a habeas investigation or represent petitioner in habeas proceedings,[5] moved the Court for appointment of second counsel to investigate and pursue potential habeas corpus issues. (Exhibit 3 -- Confidential Motion for Appointment of Second Counsel.) On March 1, 1990, Mr. Johnson was informed by the Court that his request for second counsel had been tentatively granted. (Exhibit 2.) On August 20, 1992, when second counsel still had not been appointed, Mr. Johnson wrote the Court to again request appointment of such counsel. (Exhibit 4-- Letter from Mr. Johnson to Chief Justice of the California Supreme Court renewing request for appointment of second counsel.) On September 22, 1992, this Court granted the request and appointed James Merwin as associate counsel to represent petitioner on his automatic appeal, including any related habeas proceedings. (Exhibit 5 -- Order of the California Supreme Court appointing James

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[4]Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions (hereinafter "Habeas Standards"), standard 1-1; see also, *In re Clark* (1993) 5 Cal.4th 750, 783-785.

[5]Mr. Johnson had filed a single-issue habeas petition on petitioner's behalf on September 12, 1986, but, as indicated above, this petition was intended simply as a mechanism to insure the the reviewability of an appellate issue and required no extra-record investigation.

Merwin as second counsel.)

3. Mr. Merwin was associate counsel from September 22, 1992 through June 28, 1995. (See Exhibit 8 - California Supreme Court order relieving Mr. Merwin and appointing Karen Kelly for purposes of post-conviction proceedings.) During his involvement with the case, Mr. Merwin was able to identify in broad terms a number of potentially meritorious habeas claims and to request funding to pursue them; but because of serious personal problems, financial and health-related, he was ultimately unable to plan in any detail or complete any substantial portion of the necessary investigation or to pass on to successor counsel drafts of any potential claims or supporting declarations, or any other documentary support.

4. In beginning his exploration of potential habeas issues, Mr. Merwin was hampered by San Quentin's unwillingness to allow him to have confidential meetings with petitioner. (Exhibit 6 - Mr. Merwin's Motion for Leave to Withdraw as Counsel, p. 9.) Because very little investigation had been done by trial counsel, because the prosecution involved three separate homicidal incidents only one of which was formally charged against petitioner, because the crimes allegedly involved gang activity, and because essentially no penalty phase mitigation case had been presented, there were many sensitive factual issues which needed to be discussed in a confidential setting. On June 18, 1993, Mr. Merwin sought funding from this Court to litigate in the Marin County Superior Court a habeas petition challenging San Quentin's denial of confidential, contact visits with petitioner. On August 25 , 1993, the Court denied the funding application without prejudice to Mr. Merwin's filing a habeas petition directly in this Court challenging San Quentin's decision to deny petitioner contact visits with his counsel. (*Ibid.*) While Mr. Merwin was working on this confidential-attorney-client-visit petition, he learned that the same issue was being

litigated in the Marin County Superior Court in *Ayala v. Vasquez*, Case no. SC059289A, and, rather than duplicate the efforts of Mr. Ayala's counsel, Mr. Merwin decided to delay completion of his confidential-visit petition until the superior court ruled. *Ayala* remained pending during the remainder of Mr. Merwin's tenure as petitioner's habeas counsel.[6] (*Id.* at p.10.)

5. On February 15, 1994 Mr. Merwin applied to this Court for funding to investigate potential habeas issues relating to the guilt and penalty phase verdicts at petitioner's trial. On August 24, 1994, the Court granted the funding request in part, authorizing Mr. Merwin to incur expenses to investigate specified guilt and penalty phase issues.

6. Soon after the authorization order was issued, Mr. Merwin, because of personal financial difficulties, had to close down his private law practice and take a job with the Office of the Public Defender in Orange County, where he began working on October 11, 1994. He did not immediately move to be relieved as petitioner's habeas counsel because the Orange County Public Defender authorized Mr. Merwin to complete his remaining private practice cases on his own time (evenings and weekends) and Mr. Merwin hoped he would be able to find time to conduct the necessary investigation and prepare a petition on petitioner's behalf. However, shortly after Mr. Merwin assumed his position as a Deputy Public Defender, Orange County declared bankruptcy and threatened to lay off 25% of the Public Defender's staff. The Public Defender responded by undertaking to absorb additional case load responsibilities for his office, which resulted in a substantial increase in each deputy's already heavy case load. Further, beginning in October 1994, Mr. Merwin began to have recurrent instances of severe chest pain

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[6]The legal issues surrounding petitioner's right to confidential, contact visits with habeas counsel became moot when San Quentin, subsequent to Mr. Merwin's withdrawal from this case, opted to change petitioner's custody status and permit contact visits with counsel.

and both his personal physician and the physician at an Emergency Room to which he went during one of these episodes told him that he had to find some way to reduce the stress in his life. (Exhibit 6, pp.10-11.) Mr. Merwin did no work on petitioner's case after October, 1994.

7. On March 8, 1995, Mr. Merwin forwarded to the Court a motion for leave to withdraw as counsel, citing his change in employment status and personal health problems. (Exhibit 6.) On May 24, 1995, petitioner, with the assistance of R. Charles Johnson, filed a motion for replacement of associate counsel. (Exhibit 7 -- Request to Substitute Associate Counsel.) On June 28, 1995, the Court vacated Mr. Merwin's appointment, and appointed Karen Kelly as associate counsel "for purposes of appropriate post-conviction proceedings in this court." (Exhibit 8.)

8. Because Mr. Merwin had been unable to move forward with the investigation and had been able only to identify very broadly various categories of ineffective assistance of counsel claims (e.g., failure to seek court-appointed investigative, expert and other support; failure to conduct any investigation as to the Jefferson and Taylor homicides; failure to investigate mental defenses; failure to put on more than a token penalty phase defense), it remained for Ms. Kelly to develop the precise nature of these claims and to plan and carry out the investigation which trial counsel should have carried out prior to petitioner's trial, some 13 years before Ms. Kelly's appointment. Conducting such an investigation was essential to pleading prima facie claims of ineffective assistance of counsel, since such claims require a showing not only that trial counsel's performance was deficient, but also a showing of prejudice, i.e., that if counsel had conducted an adequate investigation, there is a reasonable likelihood that a verdict more favorable to petitioner would have been returned. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v.*

Williams (1988) 44 Cal.3d 883, 944-945.)

9. Further, as petitioner's habeas counsel, Ms. Kelly was obligated to ensure that the petition she filed on petitioner's behalf was as complete as was reasonably possible. As this Court has made clear, a habeas petitioner is expected to exercise due diligence in pursuing potential claims and if petitioner's counsel, at the time of filing an initial petition, had reason to suspect that an additional basis for habeas relief was available but did nothing to investigate those suspicions, petitioner may be barred from raising the uninvestigated claim in a successor petitioner. (*In re Clark, supra,* 5 Cal.4th at 775.) The rules governing federal habeas review are all the more hostile to successor petitions (see, *McClesky v. Zant* (1991) 499 U.S. 467; and 28 U.S.C. section 2244(b), as recently amended by the Antiterrorism and Effective Death Penalty Act of 1996), and since the federal courts generally require exhaustion of state remedies as to each claim presented (see *Rose v. Lundy* (1982) 455 U.S. 509; *Greenawalt v. Stewart* (9th Cir. 1997) 105 F.3d 1268), the omission of a potentially meritorious claim from the state petition Ms. Kelly filed might also preclude federal habeas review of the claim. Thus to unsure that all bases for relief available to petitioner would be reviewed on the merits by this Court, and if this Court were to deny relief, that all such bases would reviewable in a federal habeas proceeding, Ms. Kelly had to strive to make sure that no potentially meritorious claim suggested by the records or investigation reasonably available to her was overlooked.

10. To develop the precise nature of the potential habeas claims, to ensure that potential claims were not overlooked, and to plan and begin the necessary investigation, Ms. Kelly had to

review the transcripts and briefs on appeal,[7] review trial counsel's files[8], review district attorney files[9], review Jerome Evan Mallet's pretrial and trial transcripts[10], view trial exhibits[11], conduct multiple interviews with petitioner[12] and other persons, obtain signed releases and obtain, review, and analyze medical, educational, psychiatric, correctional, social service, military, and employment records of petitioner and his family members; and arrange for expert testing,

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[7]Review of the transcripts on appeal, appellate briefing, and trial counsel's files was essentially completed by August 1996.

[8]Neither trial counsel's files nor the district attorney files provided contained some essential items, such as copies of photographic and live-lineups, audio tapes of petitioner's statements used by the prosecution on direct and cross examination, or photographs of physical evidence and court exhibits. To date, counsel has not yet obtained copies of the three tape recorded statements of petitioner and has not located many essential witnesses.

[9]In February, 1996, after review of trial counsel's files and the transcripts provided in petitioner's case, Kelly requested an opportunity to view the Los Angeles County District Attorney files in the cases of petitioner, Craig Ross and the related case of Evan Mallet. The files provided were photocopied and sanitized versions of the Champion/Mr. Ross files. These files were provided in December 1996. The files provided have been sanitized to exclude all identifying information, such as addresses, telephone numbers, dates of birth, and social security and driver's license numbers. Also eliminated were all probation reports, rap sheets, attorney work-product notes and juvenile records. Essentially, what remained were sanitized police and autopsy reports most of which were contained in trial counsel's files. At no time were the original unsanitized district attorney files made available for review or for copying. The Mallet district Attorney files were provided in late August 1977.

[10] Prior to petitioner's trial, Mr. Mallet was convicted as one of the perpetrators of the Taylor homicide. The files of Mr. Mallet in the custody of trial counsel Charles Gessler's were obtained in December 1996. Following a visit with Mallet in 1997, his transcripts were forwarded to Ms. Kelly in February, 1997.

[11]In January, 1997, exhibits stored at the Los Angeles County Superior Court were viewed and photographed.

[12]At the time of Ms. Kelly's appointment, petitioner's classification prohibited confidential attorney-client visits. Confidential visits were not possible until September 1995.

11. In the course of conducting her review and preliminary planning and investigation, Ms. Kelly came to the conclusion that the sum of money authorized for habeas investigation in this Court's order of August 24, 1994 was inadequate to cover the cost of necessary pre-filing investigation. On November 8, 1996, Ms. Kelly applied to both this Court and the federal district court[13] for additional funds. On January 28, 1997, this Court denied the request for additional funds. Shortly thereafter, however, the federal district court authorized a portion of the requested investigative funding.

12. Believing that further investigative work was needed in order to set forth prima facie claims for relief and avoid summary denial in this Court,[14] and knowing that failure to file and fairly present claims in this Court might preclude their presentation during initial federal habeas proceedings and perhaps forever bar federal review should this Court not grant relief, counsel proceeded to further investigate potential claims using what was left of the funds authorized by this Court's August 24, 1994 order, the funds authorized by the federal district court, and volunteer assistance.

13. On August 6, 1997, Ms. Kelly filed with this Court her second request on petitioner's behalf for authorization to incur expenses for habeas investigation. This request was based on the results of continued investigative work following the Court's denial of the prior funding request and on Ms. Kelly's belief that she then had in hand more information to demonstrate the likely merit of a claim of ineffective assistance of counsel and hence make a more persuasive showing of

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[13]Ms. Kelly was appointed by the district court on July 31, 1996 to serve as one of petitioner's counsel for purposes of federal habeas proceedings.

[14] "Summary disposition of a petition which does not state a prima facie case for relief is the rule." (*In re Clark, supra*, 5 Cal.4th at 781.)

the appropriateness of funding further investigation. (See Habeas Standards, standard 2-4.2.) The August 6, 1997 request, which seeks funding for further investigation to confirm the reliability of the preliminary information gathered and, by obtaining appropriate declarations and other documentary support, to place the information in proper form before the Court (see *In re Duvall* (1995) 9 Cal.4th 464, 474), is still pending.

14. Since the filing of the August 6, 1997 funding request, Ms. Kelly, expending some of her personal resources, has continued to move forward with the investigation, obtaining declarations and other documentary support needed to show the prejudicial impact of trial counsel's investigative nonfeasance and to set forth a prima facie case for relief. As noted above, the federal district court has ordered petitioner to file his unexhausted claims with this Court by November 6, 1997. In order to ensure the availability of federal review should this Court decline to grant relief, petitioner must file now despite the pendency of the August 6, 1997 funding request. Petitioner does so with the hope that this will not prejudice this Court's consideration of that funding request. The proposed investigation will help petitioner demonstrate the prejudicial impact of counsel's failure to investigate, whether as part of petitioner's initial setting forth of a prima facie case for relief, or as part of petitioner's ultimate proof of prejudice at a hearing on the ineffective assistance of counsel claim.

15. As the foregoing facts make clear, this petition is timely because it has been filed without substantial delay, i.e., within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting the claims herein and (b) became aware, or should have become aware, of the legal bases for the claims (Habeas Standards, standard 1-1.2), and/or because there was good cause for any substantial delay. (Habeas Standards, standard 1-2.) The

petition has been filed as soon as practicable after petitioner and his counsel acquired facts sufficient to set forth prima facie claims for relief[15]-- which, given the nature of the claims and the need to make a showing of *Strickland* prejudice, required habeas counsel to conduct investigation that trial counsel failed to conduct. For example, claims alleging ineffective assistance in failing to investigate guilt phase mental health defenses and ineffective assistance in failing to investigate petitioner's socio-medical history and adduce available mitigation both depend in part on declarations of mental health experts, which in turn had to await compilation of at least a tentative life history of petitioner, which required numerous interviews and extensive record gathering and review, a process never even started by trial counsel. Petitioner's habeas counsel was unable to complete this process and obtain the expert declarations until October 1997. Similarly, the claim of ineffective assistance in failing to investigate the Taylor crimes rests in part on counsel's failure to make any effort to locate, interview and call Wayne Harris, a witness who, as police reports suggested, was in a position to confirm that petitioner could not have been involved in the Taylor crimes. Pleading the claim required that habeas counsel interview Mr. Harris, but it was not until October of 1997, that habeas counsel was able to locate, interview and obtain a declaration from Mr. Harris. Similarly, it was not until September of 1997 that habeas counsel was able to find, interview and obtain declarations from numerous other essential witnesses including, but not limited to Walter Winbush, Karl Owens, and Earl Boganx. Further, the importance of finding, interviewing and obtaining declarations of certain witnesses was not known until Ms. Kelly had

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[15]It is petitioner's awareness "of facts sufficient to state a prima facie case for habeas relief" which triggers an obligation to include the claim supported by those facts in a habeas petition. (*In re Clark, supra*, 5 Cal.4th at 781.) To plead a claim without facts to support a prima facie case for relief is to invite summary denial. (*Ibid.*)

obtained and reviewed the trial transcripts of Jerome Evan Mallet. Although Mr. Mallet was prosecuted for the Taylor crimes, many witnesses who testified at his proceedings did not testify at petitioner's.

16. If the Court determines that there was any substantial delay in conducting the necessary investigation and filing of the petition, there was good cause for such delay in that it resulted from the Court's unavoidable delay in providing petitioner with habeas counsel; the unavoidable difficulties encountered by initial habeas counsel which required his withdrawal from the case; and the magnitude and inherent difficulties of the task facing Ms. Kelly upon her July 1995 appointment, which required her to review a large mass of materials to make sure that no reasonably available claims were overlooked, and to plan and carry out an investigation that should have been conducted some 13 years earlier by trial counsel.

17. Even if the petition were deemed in any way untimely, consideration of the claims set forth herein would be required in order to avoid a fundamental miscarriage of justice. (*In re Clark, supra*, 5 Cal.4th at 797-798.) Had trial counsel provided effective guilt phase assistance and adduced available evidence to show that petitioner was not involved in the Taylor crimes and that the ring found in petitioner's possession was not victim Bobby Hassan's ring, the prosecutor would have been left with nothing but the contradiction-riddled identification testimony of Elizabeth Moncrief, and on that basis alone no reasonable judge or jury would have convicted petitioner of involvement in the Hassan killings.[16] Further, had counsel, as he should have, adduced evidence showing that petitioner was not involved in the Taylor crimes, no reasonable

[16]The prosecuting attorney conceded in closing argument that Moncrief's testimony, standing alone, was inadequate to support a conviction. RT 3172.

judge or jury would have accepted the prosecutor's speculative invitation to assume that petitioner was involved in the Jefferson homicide, a crime as to which the prosecutor had no direct evidence linking petitioner, co-defendant Ross or any person known to either of them. With no basis for linking petitioner to either the Taylor or the Jefferson crimes, and in light of evidence which counsel should have presented concerning neurological impairments which make it more difficult for petitioner than for most people to draw accurate inferences about what others around him are intending, no reasonable judge or jury would have been able to conclude beyond a reasonable doubt that petitioner, if he were one of the four men who entered the Hassan residence on the day of the homicides, understood that a homicide would occur or personally intended that anyone be killed.[17] Hence, but for counsel's ineffective assistance, no reasonable judge or jury could have found true the special circumstance allegations or convicted petitioner of capital murder. Moreover, as a result of trial counsel's ineffective assistance in failing to adequately investigate petitioner's life history and mental impairments and in failing to adequately challenge the prosecution's misleading claims concerning petitioner's alleged involvement in three homicidal incidents, "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark, supra*, 5 Cal.4th at 798). As shown below, there is a wealth of mitigating evidence that could have been presented.

18. Finally, and as an additional reason why the claims set forth in this petition should be considered on the merits even if the petition were deemed in any way untimely, it should be borne

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[17]The prosecuting attorney conceded in closing argument that the evidence did not permit a finding as to which of the four intruders fired the fatal shots. (RT 3192.)

in mind that any unjustified failure to file the petition sooner was the responsibility of habeas counsel and not petitioner. Petitioner is an indigent, incarcerated layman and suffers from mental impairments which make him even less able than most laymen to organize a habeas investigation or prepare a habeas petition. He was entirely dependent upon counsel to identify claims, to conduct appropriate investigation, to draft a petition, and to determine when it was to be filed. As this Court has noted, a petitioner who is represented by habeas counsel "has a right to assume that counsel is competent." (*In re Clark, supra*, 5 Cal.4th at 780.) If habeas counsel, whether Mr. Merwin or Ms. Kelly, has unjustifiably delayed some facet of the habeas investigation or unjustifiably delayed the filing of the petition, then counsel has "failed to afford [petitioner] adequate representation" within the meaning of *In re Clark* (*ibid.*), and accordingly, under *Clark*, any procedural bar should be excused. (*Ibid.*)."

V.

INTRODUCTION TO PETITIONER'S CLAIMS FOR RELIEF

1. Petitioner was found guilty of two murders and sentenced to die following a trial marred by numerous instances of ineffective assistance of counsel, including counsel's failure to investigate, discover and produce essential and readily available evidence, as well as counsel's failure to offer specific objections to inadmissible evidence. According to trial counsel, Mr. Skyers, petitioner's case has always bothered him. It "rings in [his] ears." While conceding the abundance of evidence against Mr. Ross, Mr. Skyers could only guess that ultimately,[A]t trial "Steve got caught up in [the evidence of Ross' guilt]." Mr. Skyers is confident that Mr. Champion is not guilty of the crimes of which he was convicted and concedes that his inexperience, failure to investigate, and failure to grasp complexity of the defense which he was required to present were, in great part, the reasons for the guilty verdicts and the sentence of death. (See Exhibit 47 -- Declaration of Ronald Skyers.)

2. Mr. Champion was also prejudiced by numerous instances of prosecutorial misconduct — all of which went unobjected to by trial counsel. The errors complained of were separately and cumulatively prejudicial.

3. Although petitioner was charged with only the December 12, 1980, murder of Bobby and Eric Hassan, the prosecution introduced a mass of prejudicial testimony regarding two other homicides -- one which occurred prior to the Hassan murders [Jefferson] and one which occurred after [Taylor]-- which the prosecution relied on to persuade the jury both of petitioner's involvement in the Hassan killings and of his having acted with the mens rea essential to capital murder.

4. Petitioner's codefendant, Craig Anthony Ross, was jointly charged with the Hassan killings. Trying petitioner in a consolidated trial with Mr. Ross was unconstitutionally prejudicial to petitioner. The evidence of Mr. Ross' participation in the Hassan crimes, which included fingerprint evidence, was stronger than the evidence offered against petitioner. Further, Mr. Ross was charged with one of the additional murders, that of Michael Taylor. Additional and inflammatory charges were brought against Mr. Ross in connection with the Taylor murder including the rape of Taylor's sister, the robbery of Taylor's mother, sister, and family friend, and the burglary of the Taylors' home. Neither petitioner nor Mr. Ross was charged with the murder of Teheran Jefferson.

5. The only evidence directly linking petitioner to the Hassan crimes was the eyewitness testimony of prosecution witness Elizabeth Moncrief and petitioner's possession of jewelry which had allegedly been worn by Bobby Hassan. Because Moncrief's identification of petitioner was so fatally flawed, the prosecutor was forced to admit to the jury that without more, the jury had insufficient evidence to render a finding of guilt. (RT 3172.)

6. In light of the thin evidence of petitioner's guilt, the prosecutor fabricated a conspiracy to which he claimed petitioner was a party. The prosecutor argued that in order to determine *who* committed the murders, it was necessary to understand *how* they were committed, i.e., it was necessary to understand the pattern which the prosecutor claimed emerged on comparison of the Hassan, Taylor and Jefferson murders. (RT 3152.)

7. According to the prosecutor, the similarities between the crimes indicated they were committed by the same group of people. "[I]t is clear that this murder is connected to this murder, that is, part of the same common plan, part of the same conspiracy, to rob and kill people

in their homes." (RT 3156.) "[A] conspiracy specifically to rob and kill a certain type of victim...to wit, a marijuana dealer." (RT 3156.) "It's obvious that [the crimes] were all committed by the same group of people, although the participants may have varied one or two of them from one crime to the next, such as Mallet, but they were all committed by the same group of coconspirators pursuant to a single common plan or common pattern, and part of the same conspiracy....we're talking about one continuous crime spree or one continuous crime." (RT 3159.)

8. In closing arguments, the prosecutor advised the jurors to reason backward. "[I]f the Michael Taylor murder is inextricably connected to the Bobby [and] Eric Hassan['s] murder, then it logically follows that any evidence connecting...either of the defendants to the Michael Taylor murder logically connects that same defendant to the Bobby Hassan and Eric Hassan murder." (RT 3161, 3168.) "[T]he evidence connecting Mr. Champion to Mr. Taylor connects him to Bobby and Eric Hassan." (RT 3171.) "[F]urthermore, any evidence connecting either of the defendants to any other of the known participants in these conspiracies logically tend to connect then to the crimes in question." (RT 3161.) Petitioner's connection to Mr. Ross and other alleged Crips allegedly further connected him to the Hassan crimes. (RT 3168-3169.) Thus, the prosecutor theorized that petitioner was guilty by his alleged association with the Raymond Street Crips, and specifically with Craig Ross.

9. Evidence of the Taylor crimes was central to the prosecution's theory of petitioner's guilt in the Hassan crimes. This was in spite of the fact that the Taylor killing occurred after the Hassan crimes. The prosecution relied on what it perceived to be the similarities between the two crimes, the common participation of Mr. Ross, petitioner's alleged association with Mr. Ross and

another known perpetrator, Evan Jerome Mallet, and a suspected perpetrator, Michael Player. The prosecutor argued Cora Taylor's in-court surprise identification of petitioner was credible and supported by Mary Taylor's inability to state emphatically that petitioner was not present at the scene. (RT 3170.)[18] Simply put, the prosecutor argued that if petitioner was guilty of the Taylor crimes he was necessarily guilty of the Hassan crimes, and by implication, of the Jefferson murder as well. Moreover, under this theory, the Jefferson and Taylor crimes provided sufficient evidence to find petitioner possessed the mental state necessary to prove the Hassan special circumstances. This was so because it was reasoned that knowledge of the Jefferson and Taylor crimes meant that the perpetrators of the Hassan crimes had entered the Hassan residence with the requisite criminal intent, i.e., an intent to kill or assist in the killing of a human being.[19]

10. Had trial counsel conducted a reasonable investigation he would have found abundant, reliable, and unimpeachable evidence was available to counter any assertion of petitioner's involvement in the Taylor crimes. Petitioner's alibi for these crimes is iron-clad. Further, it can be inferred that the prosecutor had actual knowledge of petitioner's noninvolvment in Taylor crimes; if not actual, the knowledge was certainly imputed to the prosecution because petitioner's innocence was known by law enforcement as early as the night of the murder.

11. Because the prosecution had no direct evidence of the conspiracy to which it claimed

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[18] Cora Taylor and Mary Taylor had previously failed to identify petitioner during numerous pretrial identification opportunities.

[19] The prosecutor conceded that he did not know who fired the shots that killed Bobby and Eric Hassan. Petitioner's murder convictions and the special circumstance findings necessarily rest on an accomplice theory. Accordingly, special circumstance liability required proof of intent to kill.

petitioner was a party, it relied on petitioner's alleged association *near the time of the crime* with Craig Ross, Jerome Evan Mallet, and with others, such as the Player brothers, who were not even charged with any of the crimes here. To support its theory that a conspiracy between these men to kill and rob existed, the prosecution offered pictures of petitioner with his friends and pictures of graffiti it claimed advertised the Taylor crimes and petitioner's involvement.

12. Steve Champion was not the author of the graffiti which the prosecution claimed advertised his involvement in the Taylor crimes. The author, Karl Owens, wrote petitioner and others' names on the wall as a show of loyalty. He never intended any reference to the Taylor or other crimes here. The graffiti was completely irrelevant and yet this Court noted that it according to the testimony with which it was offered, it inferred petitioner's involvement. Had trial counsel conducted a reasonable investigation he would have been able to present the author and meaning of the graffiti and other photographs, and other evidence which together would demonstrate Mr. Champion's lack of association with the Raymond Street Crips and specifically Craig Ross during the months preceding the crimes, and to disprove his involvement in the Taylor crimes. This would have left the prosecutor with nothing more than confused and conflicted testimony of Ms. Moncrief and the jewelry. As noted above, the prosecution conceded that Ms. Moncrief's testimony in and of itself was insufficient for a conviction. As explained below, credible evidence demonstrating that the jewelry petitioner wore was not Bobby Hassan's was available for trial counsel's use. The ring offered into evidence which Merci Hassan believed belonged to her husband was a mass-produced piece. Thousands were made. Petitioner testified that the ring was given to him by a friend, Raymond Winbush. That friend's father does recall the ring as belonging to his son. Finally, the ring in evidence is not the same size as Bobby Hassan's

ring. It is the same size as the size ring worn by Raymond Winbush.

13. Thus, improper conduct by the prosecution and ineffective assistance of petitioner's trial counsel combined to violate petitioner's rights to free speech and association, due process, a fair trial, equal protection, confrontation, and effective assistance of counsel, under the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 7, 15, 16, 17, and 24 of the California Constitution, and precluded the reliable guilt and penalty determinations required in a capital case by the Eighth and Fourteenth Amendments. The jury was encouraged and permitted to overlook the insufficiency of evidence against petitioner and find him guilty by association in violation of the First and Eighth Amendments.

VI.

INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS RELATING TO THE TAYLOR HOMICIDE

Petitioner's convictions and death sentence were unlawfully and unconstitutionally obtained in violation of petitioner's rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under article I, section 1, 7, 15, 16, 17, and 24 of the California Constitution and the statutory and decisional law of California, in that petitioner was denied effective assistance of counsel by various errors and omissions of his trial counsel relating to the Taylor homicide, and as a result of those errors and omissions, also denied his rights to due process of law, to freedom of association, to equal protection, to confrontation, and to a fair and reliable guilt and sentencing determination. But for counsel's errors and omissions, which were not the product of any reasonable tactical decision and would not have been committed by competent counsel, it is reasonably likely that the result of the proceedings would have been more favorable to petitioner.

As mentioned above, at petitioner's trial, the prosecutor introduced evidence to link petitioner to the commission of the Taylor crimes and relied upon that purported linkage to prove petitioner's guilt of the offenses charged against him. Trial counsel offered little defense in response to the evidence of petitioner's alleged involvement in the Taylor crimes. Trial counsel failed to discover and present readily available evidence that would have demonstrated petitioner was not involved. More specifically, trial counsel (1) failed to discover, present, and argue evidence that petitioner could not have been involved in the Taylor crimes as he was in the company of friends who were never considered viable suspects and were detained by Los Angeles

County Sheriff's Department deputies at the time the Taylor crimes were being committed, did not match the description of any suspect who law enforcement saw exiting the suspect vehicle, and had approached the officers from an area which would have made it very difficult, if not impossible for him to have been involved; (2) failed to identify the actual or likely perpetrators, as to whom the police had reliable, incriminating information; (3) failed to demonstrate that neither petitioner's physical description nor the clothing he was known to be wearing near the time of the crimes matched the victims' descriptions of any perpetrator; (4) failed to adequately demonstrate that no forensic evidence or other identification procedures resulted in a pretrial identification of, or linkage to petitioner; (5) failed to demonstrate that motives other than the prosecution's conspiracy theory accounted for Michael Taylor's killing; (6) failed to impeach the prosecutor's gang expert and his opinion that petitioner was linked to Michael Taylor's killing through (a) graffiti, (b) his membership in the Raymond Street Crips, and (c) his close association with Craig Ross; (7) failed to object to the prosecutor's efforts to link petitioner to the Taylor crime; and (8) failed to adequately impeach Cora Taylor's identification of petitioner.

The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

VI. A. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that petitioner could not have been involved in the Taylor crimes as he was in the company of friends who were never considered viable suspects and were detained by Los Angeles County Sheriff's Department deputies at the time the Taylor crimes were being committed, did not match the description of any suspect who law enforcement saw exiting the suspect vehicle, and approached the officers from an area which would have made it very difficult, if not impossible for him to have been involved.

1. On December 27, 1980, Michael Taylor, was killed in his mother's duplex in South Central Los Angeles. (RT 2122.) Mr. Taylor had been shot in the head at point blank range with a revolver. (RT 2340.) Mr. Taylor lived with his mother, Cora Taylor, and his sister, Mary Taylor. Cora Taylor, Mary Taylor, and a friend, William Birdsong, were in the duplex at the time of the killing. Only Mary Taylor and Cora Taylor testified at petitioner's trial. Insofar as all three surviving victims were locked inside the bathroom when Michael was killed, there were no eyewitnesses to the murder. (RT 2167-2170.)

2. According to police reports and the testimony of witnesses, shortly before midnight, [20] on December 27, 1980, three suspects entered the victims' apartment. Soon thereafter, at 12:10 a.m., on December 28, 1980, Los Angeles police received a radio call of the shooting at the Taylor residence. The ambulance responded at 12:12 a.m. (Exhibit 9.) The vehicle containing the perpetrators of the Taylor crimes was observed by sheriff's reserve officers Naimy and Koontz driving through Helen Keller Park at 12:10 a.m. (Exhibit 12-- Investigative Report Continuation Sheet.)

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[20] Officers DeWitt and Calagna report the incident occurred between 11:45 p.m. and 12:05 a.m. (Exhibit 9 -- Investigative Report of M. Calagna and G. DeWitt.) Cora Taylor testified at petitioner's trial that the incident occurred between 11:00 p.m. and midnight. (RT 2240.) Both Mary and Cora Taylor testified at Evan Mallet's trial that the incident occurred between 11:00 p.m. and midnight. (Exhibits 10 and 11 -- Mallet Jury Trial Reporter's Transcript.)

3. At trial, on cross-examination, petitioner was asked whether or not he had an alibi for when the Taylor crimes were committed. Petitioner explained that he did. (RT 3089-3098.) Although there was abundant corroborating evidence available to trial counsel that petitioner had testified truthfully to his alibi and was not involved in the Taylor crimes, Mr. Skyers offered none of the information discussed below.

4. At 11:50, while the Taylor crimes were in progress, several alleged members of the Raymond Street Crips gang, including Marcus Player, Earl Boganx, Willie Marshall, and Angulus Wilson were being detained, for reasons unrelated to the Taylor crimes. The men were detained at Helen Keller Park by Los Angeles Sheriff's Deputies Lambrecht and Tong. (Exhibit 13 -- Sheriff's Department Memorandum from Deputies T. Lambrecht and O. Tong to LAPD Homicide.)[21] At 12:05 a.m., Lambrecht and Tong observed deputies Naimy and Koontz activate their red lights in pursuit of the Taylor suspect vehicle. The deputies followed Naimy's vehicle to 127th and Budlong. Thus, this first detention of Marcus Player and others was in progress before and during the pursuit of the Taylor suspect vehicle. (Exhibit 15 -- January 10, 1981, telephonic interview with Deputy T. Lambrecht.) In other words the detainees were necessarily eliminated as possible perpetrators of the Taylor crimes. As demonstrated below, petitioner too was detained under circumstances that eliminated him as a plausible suspect in the Taylor crimes.

5. Following the homicide, a vehicle with four occupants inside was pursued by law enforcement. During the chase, the car failed to negotiate a turn and collided with a telephone or

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[21] Deputy Owen Tong has executed a declaration which states that the information in his report is true and accurate and had he been called to testify or questioned by trial counsel he would have done so consistent with the information in his report. (Exhibit 14 — Declaration of Owen Tong.)

light pole. After the suspect vehicle crashed, the occupants fled on foot. The pursuing and other officers set up a parameter in order to contain the suspects in a four city block area. A patrol vehicle was positioned at each corner and at least one other vehicle was assigned to travel around the containment area as a "rover." Officers Koontz and Naimy were positioned at 126th and Budlong. This position was called the "command post."[22] (Exhibit 16 at 80-81.) Deputies Smith and Martin were positioned at 127th and Budlong. (Exhibit 16 at 80.) Officers Lambrecht and Tong positioned themselves at 127th and Raymond. (Exhibit 13; Exhibit 16 at 80.) Officers Duran and Bragg were positioned at 126th and Raymond. (Exhibit 15, RT 80.)[23]

6. Hollins testified that on December 28, 1980, he participated in a "neighborhood search" in the area of 125th and Budlong. Hollins arrived at the scene at approximately 12:30 a.m. The area to be searched was bordered by Budlong on the east, Raymond on the west, 126th and 127th Streets. (Exhibit 16 at 76.)

7. Hollins proceeded to the command post, which had been set up at 126th and Budlong. The command post consisted of a patrol vehicle which was manned by Deputies Naimy and Koontz. Ultimately, Hollins and his partner, Dunn, were assigned as the roving car in the area. During the search for suspects, they drove around the block numerous times.

8. When Hollins initially arrived at the command post at 126th and Budlong at 12:30 a.m., the three men, including petitioner, Marcus Player, and Wayne Harris, were stopped as they walked southbound from 125th and Budlong into the containment area. This second detention of

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[22] They were briefly joined by Deputy Hollins when he escorted petitioner, Marcus Player, and Wayne Harris to the command post.

[23] Attached hereto is Exhibit 26 which is a map from trial counsel's file. It indicates some of the information above. Attached as Exhibit 27 is a map created by habeas counsel.

Marcus Player occurred within minutes of the Taylor suspect vehicle crash. At the suppression hearing on Evan Mallet's case,[24] held May 12, 1981, Sheriff's Deputy Hollins testified that the detention of three men -- *one of which was petitioner* — commenced at approximately 12:30 a.m. (Exhibit 16 at 75 et. seq; Exhibit 13; Exhibit 15.) The pedestrians were told to walk to the next post at 127th and Budlong, identify themselves then proceed around the block. (Exhibit 16 at 80-81.) Originally, there were three men in the party -- petitioner, Marcus Player and Wayne Harris. None of the original three were arrested, but as the group of three approached 127th and Budlong, the group of three was joined by Robert Simms. (Exhibit 16 at 81-83.)[25]

9. The four men proceeded to the corner of 127th and Raymond, where they were detained by Officers Lambrecht and Tong. The group now consisted of Marcus Player, Robert Simms — who gave the false name of James Taylor[26] — Wayne Harris, and Steve Champion. (Exhibit 13.) Officer Hollins' testimony at a pretrial proceeding in the Mallet case confirmed that Player, Harris, and petitioner -- the three men other than Simms detained at 127th and Raymond --

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[24] Evan Jerome Mallet was tried separately for the Taylor crimes in Los Angeles Superior Court case number A619834. Petitioner has attached hereto pages from the transcripts of that case when it is referred to.

[25] Sergeant Antony Hollins has executed a declaration which states that his testimony was true and accurate and had he been called to testify or questioned by trial counsel he would have done so consisted with the information in his report. (Exhibit 17 — Declaration of Anthony Hollins.)

[26]That report goes on to say that Simms/Taylor was taken into custody after a positive identification. All subsequent reports identify Taylor as Simms. (Exhibit 18 — Arrest report T. Naimy and S. Koontz; Exhibit 19 -- Police Log; Exhibit 20 -- Sheriff's Department Supplementary Report 12/28/80.) Thus, when Simms was detained by Lambrecht and Tong, he gave the false name of James Taylor. At the time of the incident though, James Taylor was an adult. (Exhibit 21 -- RAP sheet for James Taylor.) Simms was ultimately correctly identified when he was booked. (See Exhibit 18; Exhibit 22 -- Mallet Jury Trial Reporter's Transcript pp. 614-615)

were the same three men he had originally seen approaching the containment area from 125th and Budlong. (Exhibit 16 at 83.) A field identification card noting Mr. Champion's physical and clothing descriptions was prepared at or near 1:00 a.m. (Exhibit 32.)

10. Soon thereafter, Naimy and Koontz arrived at the location. They identified Simms as one of the suspects who had fled from the vehicle and placed him under arrest. The other three men, including petitioner, were released. (Exhibit 13, Exhibit 16 at 81-82.)

11. At no time was petitioner seriously suspected of being involved in the Taylor crimes.

12. Moreover, proof was available that petitioner could not have been involved in the Taylor crimes because he was in the park playing basketball before and during the time of Marcus Player's initial detention at 11:50 p.m.[27] (Exhibit 23 -- Declaration of Wayne Harris; Exhibit 24-- Declaration Earl Bogans.) At trial, petitioner testified that he was with Marcus Player and others playing basketball at the park during the pursuit of the suspect vehicle. (RT 3092-3094.) When Marcus Player was being detained at 11:50 p.m., petitioner had just gone inside of a store located at Helen Keller Park. (RT 3093.) When petitioner exited the store, he saw perhaps as many as seven young men on the ground. While getting up from the ground, Marcus told petitioner that sheriff's deputies had him on the ground asking him questions. (RT 3094-3095.) It was during this conversation between petitioner and Marcus Player that deputies Lambrecht and Tong left the detention scene to join the pursuit of the suspect vehicle. (RT 3095.) Wayne Harris and Earl Bogans confirm petitioner's account of events and would have been available to do so at the time of petitioner's trial had trial counsel contacted them. (Exhibits 23-24.)

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[27]The call of this juvenile disturbance/gang activity originally went out at 11:45 p.m. (Exhibit 13.)

13. Additionally, as shown by to the attached maps, the site and circumstances of petitioner's initial detention would have made it impossible for him to have come from the suspect vehicle. According to Hollins' testimony, Steve Champion, Marcus Player and Wayne Harris approached the containment area from 125th and Budlong in a southerly direction *after the suspect vehicle had already crashed and the containment area had been established.* In other words, they approached the corner of 126th and Budlong, where the vehicle had crashed, from north of both the vehicle and the containment area. Petitioner could not have been detained at 126th and Budlong without first passing through the containment area and the vehicles forming the perimeter. (Exhibit 26; Exhibit 27.)

14. Further, the suspect vehicle was seen proceeding southbound on Berendo then westbound on 126th. It crashed at 126th and Budlong while attempting a southbound turn onto Budlong. The suspects who were inside of the vehicle when it crashed were seen to immediately exit and run from the vehicle. Two headed south along Budlong and then west between two houses on Budlong; two headed west across the yard of the corner house on Budlong and 126th. (Exhibits 16, 18, 22, 28.)

15. Finally, the officers who observed the crash and saw the suspects leave the vehicle gave descriptions of the suspects which in no way fit that of petitioner. All of the officers observed dark clothing. The only further descriptions was that of a "white jacket" and a "plaid coat." As discussed below, petitioner wore yellow sweat clothing at the time he was detained and was told to walk the perimeter of the containment area. (Exhibit 32.)

16. Thus, at the time of the Taylor crimes, petitioner was in Helen Keller Park playing basketball with friends who could have testified to this fact. Petitioner's approach to the area

where the suspect vehicle had crashed meant that it was impossible for him to have fled from it. As he approached, he was detained and his clothing was noted in a field identification card. Petitioner's clothing in no way matched that of any of the four men in the car. Finally, petitioner's home is located within the containment area.[28] It would have been unlikely that if he had managed to flee into the containment area that he would have emerged only to be detained.

17. All of the above information was readily available to trial counsel and would have been found by counsel had he conducted a reasonable investigation and made reasonable preparation for trial. Counsel conducted no investigation concerning the Taylor homicide (other than reading the police reports and visiting the scene (Exhibit 47)), and did not find and/or utilize the foregoing information and had no reasonable tactical basis for failing to do so.

[28] Evan Mallet was arrested in petitioner's backyard. This was a point the prosecutor used to connect petitioner to the Taylor crimes when, in fact, it demonstrated his lack of involvement as he was seen outside of the perimeter and had he fled from the car as testified to by the officers would have likely gone to and inside of his own house in order to hide.

VI. B. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence which indicated police and the prosecutor had reliable information that four other persons were actually responsible for the Taylor crimes.

1. Four men were responsible for the Taylor crimes. Three of these men entered the residence. (RT 2201, 2242.) Evan Mallet was positively identified as the first man to enter. (RT 2126.) Mr. Ross was positively identified by both Mary and Cora Taylor as the third man to enter. (RT 2130.) He was also identified by Mary Taylor as the man who raped her. (RT 2154, 2160.) Additionally, Mr. Ross' fingerprints were recovered from the scene. (RT 2552-2553.) Prior to Mr. Ross' and Mr. Champion's joint trial, in separate proceedings, Mallet was convicted in the Taylor killing. Mr. Ross was convicted of that same crime at his joint trial with petitioner.

2. Following the Taylor homicide, a vehicle with four occupants inside was pursued by law enforcement. During the chase, the car failed to negotiate a turn and collided with a telephone or light pole. The individuals inside fled on foot. Although officers gave chase, they ultimately testified at petitioner's trial that they could not identify any of the occupants. (RT 2469, 2473, 2571.)

3. Although abundant and credible evidence was available for trial counsel's discovery and presentation to the jury regarding the true identities of the perpetrators of the Taylor crimes, trial counsel presented no evidence to demonstrate that four persons other than petitioner were responsible for those crimes.

4. As noted above, the evidence that Mr. Ross and Mr. Mallet were two of the perpetrators of the Taylor crimes is clear. The other two likely participants, Michael Player and Robert Aaron Simms, are identified in police reports and their identities and involvement were

testified to by police under oath in other court proceedings available to trial counsel.

Robert Simms was one of the four men who committed the Taylor crimes.

5. At the time the suspect vehicle crashed, Robert Simms was positively identified by two sheriff's deputies, Naimy and Koontz, as he fled the vehicle. Deputy Koontz testified at the Mallet preliminary examination. (Exhibit 28 -- Mallet PXTX 255 et seq.) The deputies first noticed the suspect vehicle traveling westbound on 125th approaching Berendo. The time was ten minutes passed midnight. (Exhibit 28 at 263.) When the vehicle turned to go southbound on Berendo, Koontz yelled out the window for the driver to pull over. The two cars actually passed within three or four feet of each other on Berendo. (Exhibit 28 at 257, 269.) Officer Koontz performed a U-turn and saw the suspect vehicle accelerate. Officer Koontz testified that he and his partner Officer Naimy gave chase. (Exhibit 28 at 256.) Three other sheriff's units joined the pursuit. (Exhibit 28 at 257.) Koontz saw the vehicle run up over a curb and into a sign. The time was approximately 12:12 a.m. (Exhibit 28 at 264.) The doors opened[29] and Officer Koontz saw four suspects exit the car. Two exited the right door and two exited the left. (Exhibit 28 at 269.) Two of the men were seen by Koontz to go between the corner house and the house next door to the south. The two others ran westbound through a yard on 126th. (Exhibit 28 at 284.)

6. Officer Koontz testified Mr. Mallet looked like one of the men who fled from the vehicle. (Exhibit 28 at 268, 274.)[30] He also recalled that at approximately 1:30 p.m. some

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[29]The car was a two-door. (Exhibit 28 at 269.)

[30]Mallet was not the driver of the vehicle. The driver was described as wearing a jacket or a shirt, and as having no mustache or goatee. The right passenger wore either a jacket or a shirt. Koontz could not tell whether he had facial hair. (Exhibit 28 at 270-273.) Officer Naimy recalled that one of the men who exited the right side, or passenger side of the vehicle wore a "plaidish dark jacket." (Exhibit 22 at 606.) Mallet was described by many of the witnesses as wearing a

civilians -- presumably Birdsong and Mary and Cora Taylor — were taken to a show up of Simms. At the time, Simms was already arrested and in custody. (Exhibit 28 at 276-279.) Koontz believed he saw Simms exit the left side of the vehicle. At the time he prepared his report, Officer Koontz stated that Mr. Simms exited the vehicle from the left side door[31] and ran south on Budlong. Mr. Simms ran along the sidewalk then disappeared between the corner house and the first house on Budlong (Exhibit 28 at 279-281; Exhibit 18), i.e., into the containment area. At the time he testified, Officer Koontz was aware that Mr. Simms was eventually let go, but did not personally rule him out as being one of the suspects who fled the vehicle. (Exhibit 28 at 279.)

7. Sheriff's deputy Naimy observed a man who he recognized as Simms exit the vehicle. Naimy gave chase and followed Simms as he disappeared between the houses and into the containment area. Due to the darkness of the area the foot chase became unsafe and Naimy ordered the area into which Simms fled cordoned off. (Exhibit 18.) Although Deputy Naimy was not "absolutely positive" that Simms fled the vehicle, he noted that Mr. Simms had similar clothing, height, weight, and age and "came from the cordoned area without reason for being there." (Exhibit 19.)

8. Further, as noted in Naimy's report, Simms was arrested in the area cordoned off for the apprehension of the fleeing suspects. As discussed above, at or near 12:30 a.m., Steve Champion, Wayne Harris, and Marcus Player were detained as they approached the command

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plaid jacket. (Exhibit 18; Exhibit 28 at 265; Exhibit 34 at 821.)
Mallet is also described as one of the shorter of the four men. (Exhibit 22 at 607.)

[31]Because this was the driver's side, Simms was either the driver or the passenger seated behind the driver. (Exhibit 22 at 588-589.)

post at 126th and Budlong, coming from a point outside of and to the north and east of the containment area. The group walked from the command post to the check point at 127th and Budlong and then to the next check point at 127th and Raymond because the sheriff's deputies hoped to flush-out the suspects who fled from the vehicle. (Exhibit 16 at 78-83.) Simms was observed by Deputy T. Martin and Deputy M. Smith to emerge from between houses on the north side of 127th Street at about 12:29 a.m. and walk west bound in an apparent attempt to appear as if he were part of petitioner's group. (Exhibit 18.) Martin and Smith believed Simms did so as to establish an alibi for himself.[32] Deputy Hollins recalled that as the group of three approached 127th and Raymond, he observed a fourth man with the group. Hollins wondered where he had come from. Hollins recalled that ultimately this fourth individual was arrested when it was determined that he matched the description of one of the four men who had fled from the suspect vehicle. This man was Robert Simms. Mr. Simms was arrested after police officers positively recognized him as one of the four suspects to have fled the vehicle. (Exhibit 16 at 80-83; Exhibit 18.)

9. According to police reports, Mr. Simms is described as a 16 year old juvenile, 5'6 134 lbs, Simms was booked wearing Navy shoes, blue plaid shorts, white T-shirt, blue, short sleeve shirt, *white jacket*, blue Levis. (Exhibit 18.) Officer Naimy testified at Mr. Mallet's trial that Mr. Simms "clothing, body size, approximate weight and the general shape and configuration" matched one two tallest suspects Officer Naimy saw flee the vehicle. (Exhibit 22 at 615.) According to his testimony, one of the men who exited the driver's side wore "a white jacket."

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[32] Deputies Martin and Smith had received a call from the area that a prowler had been seen or heard. (Exhibit 18.)

The other had on dark colored clothing. (Exhibit 22 at 606, 612.)

The forth man involved in the Taylor crimes was Michael Player.

10. The suspect vehicle was registered to Frank Harris, Marcus Player and Michael Player's stepfather. Sheriff's deputy Ronnie Williams testified that he had seen both Marcus and Michael Player drive their stepfather's car. (RT 2642.) According to both Marcus Player and Evan Mallet, Michael Player was the driver of the vehicle on the night of the Taylor crimes. (Exhibits 13, 25.) According to Frank Harris, the registered owner of the vehicle, on the night of the Taylor killing, Michael Player took the car without his stepfather's permission. Frank Harris' wife informed the police of this fact. (Exhibit 29 — Declaration of Frank Harris.)

11. In closing argument at petitioner's trial, the prosecutor himself urged that one of the Player brothers must have been involved in the Taylor crimes, although, he claimed, he was not sure which one. He stated the "evidence does not show them guilty beyond a reasonable doubt, or if it does, it doesn't show which one of them is involved. But at any rate it clearly shows their car was involved and therefore, one of them had something to do with this." (RT 3160.) The prosecutor made this point to connect Mr. Ross and petitioner to the Taylor crimes, arguing in effect that since one of the Players was involved in the Taylor crimes, and Mr. Ross and petitioner were connected to the Players, Mr. Ross and petitioner were connected to the Taylor crimes. (RT 3159-3961, 3168.) At a pretrial hearing on the admissibility of alleged gang affiliation, the prosecutor argued that Marcus Player was a Raymond Avenue Crip and both his car and Mallet, another alleged Crip were connected to the Taylor crimes, because the Hassan crime was connected to the Taylor crimes, petitioner was necessarily connected to the Hassan crime because of his alleged membership in the Raymond Avenue Crips. (RT 1502-1503.) If the prosecutor,

however, had acknowledged, or if petitioner's counsel had adduced the evidence identifying Simms as one of the four Taylor perpetrators, it would not have mattered which of the Player brothers was involved because petitioner would have been eliminated as a perpetrator.

12. On the night of the crimes, Marcus Player was questioned by police. As explained above, Marcus was eliminated as a suspect because he was detained by sheriff's deputies while the crimes occurred. He informed the police that Michael Player was the last person to have possession of the car. (Exhibit 13.)

13. In a letter dated December 27, 1990 and addressed to the court, Evan Mallet explained that on the night of the Taylor crimes, a car driven by Michael Player[33] pulled up along side Mallet. As Mallet got in, someone in the backseat told him that they had "just pulled a move." The car pulled away from the curb just as the sheriff's vehicle came around the corner. Mallet's statement supports the recollection of the police. Every one in the car got quiet. When the police car turned around and put on the emergency lights, someone yelled "punch it." Michael Player "floored it." After driving for about a block and one half, Player crashed the car into a pole. Everyone, including Mallet got out of the car and ran. Mallet admitted to being inside of the car when it crashed. He also admitted to wearing a "lumber jacket." He admitted to leaving out the fact that he was in the car when he testified at his own trial. (Exhibit 25 -- Letter to Court by Jerome Evan Mallet.) After Mr. Mallet was arrested he admitted to sheriff's deputies that he was with someone who had committed a robbery and that he had run from the police. (Exhibit 30 -- Mallet Jury Trial Reporter's Transcript pp. 930-934.)

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[33]Mallet names the driver as "Scrag." According to Williams' testimony at petitioner's trial, Scrag was Michael Player's moniker. (RT 2639.)

14. Moreover, Steve Champion was never known to drive Frank Harris' car. This is confirmed by Mr. Harris. (Exhibit 29.) Notably, no person testified that petitioner drove that vehicle or any other. Recall that on the day of the Hassan crimes, when he went to pick up his paycheck, Steve had to be driven by his brother. (RT 2956-2957.)

15. Finally, petitioner has discovered sufficient independent information to support a prima facie case that Michael Player was involved in other murders. As described in the attached newspaper reports on October 10, 1986, Michael Player was found shot in a West Los Angeles motel room. It was ruled that Player had shot himself with a **.38-caliber** pistol -- same caliber weapon as the crimes here. The pistol found at the motel and other evidence, including a shoe matching a footprint found at a murder scene convinced homicide detectives that Michael Player murdered 10 men by shooting them **execution style** in the head -- same modus operandi as the crimes herein. Michael Player was described by then Los Angeles Police Chief Daryl Gates as "**a man whose occupation was 'robbery, grand theft, burglary, and murder**.'" (Exhibit 31 -- Los Angeles Times newspaper articles.)

16. Thus, the four participants to the Taylor crimes were identified in police reports provided to trial counsel prior to trial and in the testimony of police officers at proceedings in the Mallet prosecution which took place prior to petitioner's trial. Although this information was available to trial counsel prior to trial, he made no effort to demonstrate that petitioner was not one of the four men identified by police as fleeing the suspect vehicle after it crashed.

VI. C. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that the physical and clothing descriptions offered by witnesses did not fit that of petitioner on the night of the Taylor crimes.

1. Statements contained in police reports and the testimony of Cora and Mary Taylor, and William Birdsong consistently identify Jerome Evan Mallet as the first man to enter the Taylor home. Mr. Ross was identified as the third man. The fourth man, the one outside the door, was never seen by any person well enough to make an identification or give more of a description than that he was an African American male. The man Cora ultimately identified as petitioner was suspect number two, the "tallest" one. The physical descriptions of the "tallest" suspect do not sufficiently match petitioner. Neither do the witnesses' clothing descriptions for the "tallest" suspect match the clothing petitioner wore the night the Taylor crimes were committed.

2. At 1:00 a.m. on December 28, 1980, during the time of petitioner's detention, a field identification card was prepared in which petitioner's physical and clothing descriptions were noted. According to the card, which was found in both the district attorney files and trial counsel files, law enforcement noted that petitioner was **6'0 tall** and weighed **185 pounds**. It was further noted that petitioner was wearing a **yellow coat, grey shirt and pants and was wearing a mustache**. (Exhibit 32.) Finally, police noted that petitioner had "**buck teeth**." (Exhibit 33.)[34] No other scar or injury was noted by police at the time of petitioner's detention. On the night of Michael Taylor's death, it was not noted that he was wearing an earing of any sort. (Exhibit 32.)

3. At trial Mary Taylor testified that the suspect who "might have been" petitioner was

taller than Mallet[35] (RT 2129), in fact, he was the tallest of the three men inside. This man had an earring in his left ear and was clean cut except for a little mustache. The man had short hair (RT 2129), a full face, thick lips and was dark complected. (RT 2130). This tallest suspect was *5'7-5'8 and weighed 160-165 pounds.* Mary described him as kind of big. (RT 2316.) He was hit by Michael. (RT 2135.)[36] Mary said the suspect wore a *dark, long-sleeve shirt* and *blue jeans* and *had a small stud earring.* (RT 2327).

4. Cora Taylor testified that the man she believed to be petitioner wore an earring in left ear, was dark complected and wore a *brown long sleeve shirt.* (RT 2303.)

5. At Evan Mallet's trial, William Birdsong[37] gave a description of person number two. Number Two was generally described as *five foot ten* inches tall. The man wore an earring in his left ear. He was dressed in *blue jeans* and wore a *"lumber jacket" plaid coat.*[38] (Exhibit 36 -- at 805, 821.)

6. Thus, not only did none of the Taylor witnesses identify petitioner prior to trial, at trial none of their descriptions contained essential information about petitioner, particularly that he had "buck teeth." In this regard, at Mallet's trial, during cross-examination of Birdsong, Mr. Mallet's counsel asked whether or not any suspect had "any missing teeth, anything like that stood out" in

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[35]Note, Evan Mallet was approximately 5'0 tall. At 6'0 tall petitioner would have towered above Mallet, an observation one would expect to have been noted by the witnesses.

[36]Note, no injuries were noted by police or anyone else at the time of petitioner's detention.

[37]Birdsong did not testify at petitioner's trial.

[38]According to Mr. Birdsong both Mr. Mallet and suspect number two wore a plaid jacket. (Exhibit 34 at 821.) Deputy Koontz recalled that Mallet was wearing a "very heavy plaid jacket." (Exhibit 28 at 265.)

his mind. Mr. Birdsong replied, "No." (Exhibit 34 at 812.) It is apparent that had one of the suspects had missing, buck, or noticeably different teeth, Birdsong would have used this opportunity to say so.

7. Finally, petitioner was significantly taller than Mallet and Mr. Ross. As noted above, petitioner's height at the time of the crimes was between 6'0 and 6'1.[39] Both Mallet are Mr. Ross are significantly shorter.[40] (Exhibit 35.) This means that petitioner would have towered above the other two men by perhaps as much as 12 inches. Here, to the contrary, the height estimates of suspect number two are only a few inches taller than Mr. Mallet and Mr. Ross.

8. Thus, none of the witnesses' physical or clothing descriptions match petitioner. Most noticeably missing is any description of yellow or grey clothing and buck teeth and a man who literally towered above the other two suspects. Each of the conflicting previous descriptions and the description of petitioner at the time of the Taylor killings was available to trial counsel for impeachment purposes. As stated above, trial counsel had a copy of the field identification in his files. Yet, when Cora Taylor identified petitioner and Mary Taylor could not exclude him as a perpetrator, trial counsel did not compare their recollections of the suspects physical and clothing description to what petitioner was known to look like and known to be wearing at the time the crimes were committed, or introduce available evidence to show that the only other eyewitness,

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[39] Although William Birdsong and Cora Taylor describe a man similar to petitioner in height, Mr. Birdsong testified that he is 6'0 tall and that this suspect was shorter than he, thus eliminating 6'0 to 6'1 petitioner as a suspect. Mr. Birdsong also described this man as the tallest, thus if the tallest perpetrator was shorter than 6'0, petitioner is eliminated. (Exhibit 34 at 805-807.)

[40] Mr. Mallet is consistently described at 5' to 5' 1/2" tall. Mr. Ross is 5'5. (Exhibits 18, 35.)

William Birdsong had also provided descriptions of suspect number two inconsistent with petitioner's physical appearance and the clothing worn on the night of the Taylor crimes.

VI. D. Defense counsel provided constitutionally ineffective assistance by failing to object to the prosecution's attempts to have witnesses identify petitioner as one of the men who entered the Taylor residence, in spite of the fact that the prosecution had assured both the court and counsel that it had no evidence that petitioner was present inside the Taylor home.

1. Prior to trial, defense counsel objected to any reference to petitioner as having been involved in the Taylor crimes. Trial counsel argued that, "[t]he Taylor killing [was] not charged to Champion at all, and to make some reference or some hint that he might be involved in some way...would be highly prejudicial...." (RT 1519.) The prosecutor responded that he had no direct evidence that petitioner was inside the Taylor house, and that he had given defense counsel "evidence of one negative identification that was [not] contained in any written report." (RT 1519.) For clarification, the prosecutor stated that while he did not have any evidence that petitioner was inside the house, he did believe that petitioner was involved in the conspiracy that ultimately was the cause for Taylor's death. (RT 1520.)[41]

2. As discussed above and in the next claim, Mary and Cora Taylor had been given numerous opportunities to identify petitioner as one of the men who entered the Taylor home on the night of Michael's killing. None of the opportunities yielded positive results. Nevertheless, the prosecutor elicited in-trial identifications from both.

3. After Mary Taylor had identified Evan Mallet as the first man to enter the residence, the prosecutor asked Mary for descriptions of the other two men who entered.

Q And was one of these two guys taller than Malett (sic)?

A Yes.

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[41]The transcript is unclear as to whether the trial court ruled on defense counsel's objection. THE COURT: I have made no ruling. (RT 1529:13.)

Q And the other guy, was he taller, shorter, or the same size as Mallet?

A A little taller.

Q Are you saying that both guys were taller than Malett?

A Yes.

Q The guy who was the tallest, will you describe him please. (RT 2129.)

4. Here, the prosecutor was not asking for a description of Mr. Ross, but of the other, the "tallest" suspect. As it was not Mr. Ross, Mary's description of the "tallest" suspect was arguably irrelevant and more prejudicial than probative, but went unobjected to by defense counsel. In failing to object, defense counsel failed to derail the prosecutor's underhanded attempts to have Mary identify petitioner. After Mary described the tallest suspect the prosecutor asked her to say whether or not she saw the man she had described or anyone who looked like him in the courtroom. When Mary identified Mr. Ross instead of petitioner, the prosecutor went so far as to correct her identification and get her back on the track toward an identification of petitioner.

Q Would you point to that person, please?

A The young man sitting behind the lady in the gray.

MR. LENOIR: [counsel for Mr. Ross] Pointing to Craig Ross.

Q BY [the prosecutor]: You're talking about the smallest of the men?

A Short one.

Q And you were speaking a minute ago about somebody having his hair sort of back[42] a full face, thick lips and earring and a thin mustache. Do you recall that description?

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[42] A fact not in evidence.

A Yes.

Q Is that your description of Mr. Ross or is that your description of the other person who came in?

A It's the description of the other person.

Q What I was just trying to ask you a moment ago is with respect to that other person, who would be the tallest of the three, do you see him or anyone who looks like him in the court room at this time?

A I'm not sure.

Q And when you say not sure, do you see--does that mean you see someone who looks like him? (RT 2130-2133.)

5. After the witness indicated that she was looking specifically at petitioner, she concluded that she can not be sure whether or not petitioner was the tallest person that she had seen inside the house. (RT 2133-2134.)

6. Thus, in spite of his assurances that he had no evidence, the prosecutor raised the inference that petitioner was one of the men who entered the Taylor home. He was not satisfied to stop there. On conclusion of his direct examination of Mary, the prosecutor reinforced the possibility that petitioner was one of the men who terrorized the Taylor witnesses by asking Mary:

Q [H]ave you ever given Defendant Malett, Defendant Champion, or Defendant Mr. Ross permission at any time to come into your residence? (RT 2204.)

7. During cross-examination of Mary Taylor, trial counsel asked whether or not the witness identified anyone from the January 14, 1981, physical line-up of which petitioner was a part. Mary said no. Trial counsel did not inform the jury of the numerous other occasions Mary Taylor had observed but had not identified petitioner. (RT 2234-2235.)

8. The prosecutor continued his efforts to implicate petitioner in the perpetration of the

Taylor crimes when Cora Taylor was called to testify.[43]

9. When the prosecutor asked whether or not Cora Taylor saw any of the men who entered her home the night her son was murdered, Cora responded with an in-court identification of petitioner. (RT 2245.) The prosecutor reinforced this identification, and specifically referred to petitioner by name, coupling him with Mallet and Mr. Ross, as one of the perpetrators of the crimes, numerous times during his questioning of this witness. (RT 2246, 2248, 2250, 2255, 2263, 2302, 2304, 2305.)

10. Thus, in spite of the fact that he had absolutely no reason to believe petitioner was one of the three men who entered the Taylor residence, the prosecutor went on a fishing expedition which yielded an identification of petitioner as being one of the three men who entered and terrorized the Taylor family and Birdsong, then either killed or watched Michael Taylor as he was killed.

11. Further, despite the fact that the prosecutor had assured both defense counsel and the court that he had no evidence that petitioner was directly involved in the Taylor crimes and despite the obviously prejudicial impact at each trial phase of petitioner being "identified" as one of the Taylor perpetrators, trial counsel failed to obtain a ruling on his pretrial objection to any suggestion being made that petitioner was involved in the Taylor incident and failed to object and/or move for a mistrial when the prosecutor sought to elicit such an identification, and repeatedly asked questions assuming petitioner's involvement. Had counsel timely objected when the prosecutor initiated this improper questioning and/or moved for a mistrial when he elicited Cora Taylor's surprise in-court identification, it is reasonably probable that the objection would

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[43]Cora Taylor's testimony immediately followed Mary Taylor's testimony.

have been sustained and/or the mistrial motion granted, and that the result of the proceedings would have been more favorable to petitioner.

VI. E. Defense counsel failed to discover and present evidence that there was no physical or other evidence of petitioner's involvement in the Taylor crimes and that to the contrary, numerous pretrial identification attempts failed to identify petitioner as a suspect, fingerprint analysis did not implicate petitioner, and a secretly taped conversation between Evan Mallet and petitioner failed to yield any evidence that petitioner was involved in the Taylor crimes.

1. Mary Taylor, Cora Taylor and William Birdsong each had numerous pretrial opportunities to observe petitioner and identify him to police and yet failed to do so. None of these identification procedures yielded positive results.

2. According to William Birdsong's testimony at Evan Mallet's trial, after the police arrived at the Taylor home, Mr. Birdsong and Mary and Cora Taylor were taken to a "police station" where they were shown a number of photo albums and the three looked through a number of photographs. None of the victims recognized any suspect at this viewing. (Exhibit 34 at 771-772.)

3. The three witnesses were shown photographs at both a Los Angeles police station and the Sheriff's Department Lennox Station. (Exhibit 34 at 774-776.) At the Lennox station each witness was asked to view a wall of pictures of "different people in the area that been hanging out at the park" as well as additional folders of photographs. On this occasion, Mr. Birdsong identified Mr. Mallet. (Exhibit 34 at 776-778.) As the wall contained the pictures of alleged Raymond Street Crips, it is certain that petitioner's picture was among those on the wall.

4. Although Mary Taylor recognized some people, she did not recognize or identify petitioner as being present at her home. (Exhibit 34 at 776.) Additionally, these witnesses were shown a number of photographs of petitioner as contained in photographic arrays or as part of the Sheriff Department Gang Book. Each with a negative result. (Exhibit 36 — Mallet Evidence

Code § 402 hearing Reporter's Transcript 186.) Although they had seen petitioner in court on prior occasions, none of the witnesses identified petitioner on any of those occasions. In spite of numerous opportunities, no identification of petitioner was made before Cora Taylor identified him at trial.

5. Trial counsel failed to demonstrate to the jury, through evidence he had in hand that fingerprint and other evidence did not implicate Mr. Champion in the Taylor crimes. The person Mary Taylor identified as the "tallest" suspect asked for money and dope (RT 2137) and "snatched" Cora's purse (RT 2147), pulled open drawers, went through the closet and all over the house. (Exhibit 11 at 466.) Cora recalled that the men — other than Mallet — "picked up stuff" in the living room and ransacked the house. (RT 2263.) Mary said that Michael Taylor hit the taller guy (RT 2138), this man also hit Mary in the jaw (RT 2147), and yet there is no mention that petitioner had any injuries on his hand or other part of his person at the time of his detention. (Exhibit 32.) Petitioner's fingerprints were compared, with negative results, to latent prints recovered from the Taylor home and the suspect vehicle. According to Analyzed Evidence Reports contained in both trial counsel and the sanitized district attorney files, 51 latent fingerprints were lifted from the Taylor home. Additional prints were lifted from the suspect vehicle and the items found therein. Mr. Ross was made by fingerprints he left at the scene. Petitioner's fingerprints were run against all of the prints collected. No match was made. (Exhibit 37 Taylor Fingerprint Report; Exhibit 19.)

6. This is especially noteworthy because none of the perpetrators wore gloves and counsel could have adduced evidence to demonstrate this fact. Specifically, at Mallet's trial Mary Taylor was asked by the court whether or not any of the three men who entered her home were

wearing gloves. Mary replied that they were not. (Exhibit 11 at 565.)

7. In spite of the negative results of physical evidence examination and eyewitness identification efforts, in order to create some evidence of petitioner's involvement in the Taylor crimes , Deputy District Attorney Semow did his best to coax an admission from petitioner by secretly taping him not once, not twice, but on three separate occasions, once when he was transported with Mr. Ross and twice during a transportation with Mallet. (CT 400-408.) At no time did petitioner make incriminating comments regarding the Taylor or other crimes. This is all the more significant because, according to the prosecution's theory of the case, petitioner, Mr. Ross, and Mallet were all part of the inner circle of Crips who masterminded a conspiracy to kill dope dealers. By negative inference the very fact that these three never made mention of anything related to this conspiracy indicates none existed.

8. Neither before nor after Cora Taylor's eleventh hour in-court identification of petitioner did trial counsel present the fact that identification procedures, forensic testing and attempts to elicit an admission from petitioner's own mouth failed to connect petitioner with the Taylor crimes. Trial counsel's failure to present and argue any and all of the evidence to the jury was especially prejudicial in light of deputy district attorney Semow's examination of the witnesses.

9. Although there had been no in trial identification of petitioner, during his questioning of Mary Taylor the possibility of petitioner's involvement was raised and exploited by Semow. As discussed more fully above, looking specifically at petitioner, Mary concluded that she could not be sure whether or not petitioner was the tallest person that she had seen inside the house. (RT 2133-2134.) Trial counsel countered the possibility of petitioner's presence only by

establishing that Mary Taylor had failed to pick petitioner out of a January 14, 1981 physical line-up. (RT 2234.) Trial counsel failed to discuss the other numerous opportunities Mary had had to identify petitioner. He failed to establish that petitioner did not match the physical description given by Mary. He failed to establish that within the hour of the crimes, petitioner was wearing clothing that in no way matched that of any of the perpetrators. He failed to elicit evidence and argue that in spite of the fact that suspect number 2 touched numerous items in the duplex and no suspect wore gloves, none of the latent prints matched petitioner's. All of the above provided strong evidence of petitioner's lack of involvement in the Taylor crime.

VI. F. Defense counsel failed to object to or impeach Cora Taylor's identification of petitioner.

1. Although petitioner was not charged with any crime connected to the Taylor household, at trial, as discussed above, Cora Taylor identified petitioner as one of the suspects who entered the Taylor home. Thus, during the course of petitioner's trial for the Hassan killings only, the jurors heard highly prejudicial evidence which should have been excluded. In addition, following aggressive and objectionable questioning by the prosecutor, Mary Taylor could not say for certain that petitioner was not present during the crimes. Trial counsel did not object to the identification, move for a cautionary instruction, or move for a mistrial. This was in spite of the numerous failed attempts by the prosecution to have Cora Taylor identify petitioner from photographs and live-lineups, the fact that the witness clothing and physical descriptions did not match petitioner, in spite of the fact that petitioner had a solid alibi, that the four participant's were known to police and the prosecutor's assertion that it had no evidence that petitioner was inside the residence.

2. The credibility of Cora Taylor's surprise identification could easily have been called into question. As noted by the trial court presiding over Mallet's trial:

> THE COURT: Let me make this observation. [Cora Taylor] changed her testimony enough times on fairly sufficient points concerning identification that the tryer [sic] of fact would have to take her identification in court with a grain of salt. Mr. Marin, I really have serious doubts about her ability to make [an] identification. (Exhibit 38 -- Mallet Reporters Transcript at 318.) Just as an ID witness she leaves a lot to be desired. (Exhibit 38 at 325.)

3. The verdict in Evan Mallet's case was reached before petitioner's case went to trial. All of the information presented in those transcripts was available for trial counsel's use in impeaching witnesses and discrediting the theory of the prosecution's case against petitioner.

4. None of the witnesses' clothing or physical descriptions matched that of petitioner. Trial court was ineffective in failing to bring this information to the jury's attention after Cora Taylor rendered her devastating identification of petitioner.

5. Finally, trial counsel's failure to seek a limiting instruction, move for a mistrial and or object to the prosecution's argument constituted ineffective assistance of counsel. (See *People v. Coleman* (1985) 38 Cal.3d 69, 91-93; *People v. Williams* (1971) 22 Cal.App.3d 34, 50.)

VI. G. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue (1) evidence that the graffiti which proportedly implicated petitioner in the Taylor crimes was authored by someone other than petitioner and did not represent that petitioner had been or would soon be involved in the Taylor robbery or otherwise implicate him in that offense and (2) that Deputy Williams' opinion that petitioner was associated with the crime through his association with alleged Crips and particularly Craig Ross was based on false information

1. To bolster its conspiracy theory, the prosecution called Sheriff's Deputy Ronnie Williams as an "expert" witness. Williams was not an impartial expert unconnected with the investigation of the crimes charged. In fact, Deputy Williams was the deputy sheriff who showed mug shots and other pictures from the L.A. County Sheriff's Gang Book to the Taylor victims on the night of the crimes. (Exhibit 36 at 173-174.) No identification of petitioner was made through the identification procedures employed by Williams.

2. At the time of Williams' testimony, he had been a sheriff's deputy for 6 ½ years. (RT 2635-2636.) Williams claimed to have had experience with local Los Angeles gangs for 41/2 to 5 years. (RT 2636.) He numbered his acquaintances in the Raymond Avenue Crips street gang as approximately 30 members. (RT 2637.) Petitioner, Craig Ross, Marcus Player, Evan Mallet, Michael Player, and Bobby Hassan's son, Bobby Hassan, Jr., Emmanuel Mallet, and Lavell Player were all allegedly known to Williams to be Raymond Avenue Crips members. (RT 2639-2640.) He allegedly knew these men through their given names as well as their street names. Petitioner was known to Williams as "Crazy 8," "Trech," and "Treacherous." (RT 2640.)[44]

3. Officer Williams testified as to his interpretation of pictures of graffiti located at two

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[44] Sometime in the year 1977 or 1978, petitioner allegedly told Williams that his moniker was "Crazy 8." Other persons allegedly told Williams that petitioner's moniker was "Trech" or "Treacherous." (RT 2665.)

locations.[45] The photographs of the graffiti were taken by Williams two days before his testimony of October 6, 1982, or, in other words, nearly twenty-two months *after* the Taylor crimes. (RT 2616, 2653.)

4. In reference to graffiti in general, Officer Williams asserted that "[g]raffiti is a form of advertisement for the gang and for the person in the gang." (RT 2653.) With reference to the specific prosecution exhibits, Williams asserted that Exhibit 177 (Exhibit 39 -- two pictures of graffiti on one piece of paper), was taken from the wall of a liquor store located at El Segundo and Vermont Avenues. This exhibit contained the words "Mr. Crazy 8" and "O/R/C." Williams claimed this graffiti identified petitioner by his moniker and as an original member of the Raymond Avenue Crips. (RT 2655.)

5. People's Exhibit 178 (Exhibit 39), was taken from the same liquor store only from a different wall. It too, according to Officer Williams, identified petitioner as an original member of the Raymond Avenue Crips. (RT 2655-2656.)

6. People's Exhibit 179 (Exhibit 40 -- photograph of graffiti) was taken from the wall of an arcade in a shopping center located in the 11800 block of Vermont Avenue. (RT 2658.) The location of the arcade was at a 45 degree angle and across the street from Michael Taylor's residence. (RT 3658.)

7. Exhibit 179 was described by Officer Williams as containing the words "Trecherous," and identifying by moniker another Raymond Avenue Crip member "Popeye." The photograph also contained the words "Raymond Avenue Crips Cuzzins," "Lil Drac," some Roman numerals,

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[45]Pictures of the graffiti referred to by Officer Williams are attached here as Exhibits 39 and 40. They were marked at trial as People's Exhibits 177-179. (RT 2646.)

(which Williams misread as "DOO," a dollar sign, and what Williams *erroneously* read as "do-re-me." This misreading of the words "do-re-me" coupled with the dollar sign was interpreted by Williams to mean "to obtain money in a robbery or burglary." (RT 2657, 2675.)[46] [47] The basis for this interpretation was not explained or questioned by defense counsel.

8. Counsel did not carefully examine the photos of the graffiti, did not attempt to locate the actual authors of any part of the graffiti shown in trial exhibit 179, and did not consult with a gang expert to obtain assistance in determining the likely authorship and meaning of the graffiti shown in exhibit 179. Had he done so, he would have been able to refute the prosecution contention that the graffiti in the exhibit advertised petitioner's involvement in the Taylor robbery-murder.

9. Attached to this petition is the declaration of Rouselle Ray Shepard who previously was employed with the Los Angeles Police Department for 22 years. During his employment with that department Mr. Shepard worked various details including Southwest CRASH, or Community Resources Against Street Hoodlums, which was a gang detail, and South Bureau CRASH, also a gang detail. Mr. Shepard has significant gang related expertise including contact with gangs known as Van Ness Gangsters, Rollin' Sixties, Six Deuce Brims and Raymond Street Crips. He

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[46] Q: Now, have you ever seen graffiti with that dollar sign there before, or do-re-me?
A: Yes. With the dollar sign.
Q: And based upon your experience and your expert opinion, what does that dollar sign mean?
A: To obtain money in a robbery or burglary. (RT 2657.)

[47] In its opinion on direct appeal this Court noted that "According to Deputy Williams...the word do-re-me and a dollar sign referred to the obtaining of money in a robbery or burglary." This Court stated further that "it could be inferred from the graffiti that defendant Champion participated in the robbery and murder of Michael Taylor...." (*People v. Champion, supra.*)

has attended numerous seminars and lectured on the subject of gang awareness and has been qualified in superior and federal courts as a gang expert.

10. Mr. Shepard's lengthy and uninterrupted tenure as a CRASH patrol officer makes him one of the most experienced and longest working gang experts in the police department. He obtained his expertise from a variety of sources, including a predecessor and mentor who schooled Mr. Shepard in the knowledge he had acquired from many years of work in the area; interviewing and talking to gang members and others who lived in the neighborhoods where Mr. Shepard worked on a daily basis; talking to other sources, including other law enforcement personnel who too were knowledgeable of the neighborhood gangs; and field observations as he patrolled the neighborhoods on foot or by car. Mr. Shepard has trained many officers on gang-related issues.

11. As a patrol officer it was Mr. Shepard's duty to keep track of the known gang members in each of the neighborhoods he patrolled as well as adjacent gang neighborhoods so as to develop a network of people who would discuss the latest events in the neighborhoods. He did this and learned how to read and interpret gang writing — known as graffiti — so he would know when trouble was brewing or when new members, whose names appeared in the graffiti, became affiliated with the gangs he was monitoring. (Exhibit 41 — Declaration of Rouselle Ray Shepard.)

12. Williams' opinion that the graffiti contained the phrase "do-re-me" was wrong. Simple review of the photograph shows the writing not to be "do-re-me" but "do-or-die." Do-or- die is a phrase with many and varied meanings, for example, "Do-or-die" is the title of a novel written Leon Bing. (Bing, Leon, Do or Die 1992 HarperPerennial.) Do-or-Die -- the book -- describes the author's experience with Los Angeles street gangs from South Central Los Angeles, Compton and Watts beginning in 1986. The term do-or-die was a street term which obviously predated Bing's

use of it as the title of her book. Scottish Poet Robert Burns (1759-1796) used the phrase in "Robert Bruce's March to Bannockburn." *"Liberty in every blow! Let us do — or die!!!"* According to Rouselle Ray Shepard the term do-or-die is and was a term common to gang usage. It is considered "tough talk" and a catchy phrase evidencing strength. The term do-re-me is a gang term too, it generally designates the author as a scam artist, conman, or hustler. The term has no known connection to obtaining money in a robbery or burglary. (Exhibit 41.)

13. Williams testified that all of the graffiti in Exhibit 179 was written by the same person. (RT 2676.) This is not true, and even if it were, it was not authored by petitioner. As discussed in the attached declaration of Mr. Shepard, the writing on the arcade may have been authored by different people. The words "Trecherous" "Popeye" "Raymond Ave Crips," "Cuzzins" and "Li'l Drac" appear to be authored by the same person. According to the declaration of Karl Owens, the graffiti was written by him. Lil Drac's given name is Karl Owens. In fact, the arcade wall bears Lil Drac's signature above and to the right of the portion interpreted by Williams. According to Mr. Owens, in the early 1980's he was known by Drac. Mr. Owens recognized the writing of "Lil Drac" as his own. Mr. Owens believes that he also wrote the other words — "Trecherous," "Popeye," "Raymond Avenue Crips," Cuzzins," and "Do or Die" as well. Mr. Owens does not recall writing the dollar sign and has declared that the dollar sign does not look like his handwriting. None of what Mr. Owens wrote on the wall had any particular meaning. To him this writing on the wall was a demonstration of loyalty. There was no other message.
On being informed that at petitioner's trial that Officer Williams testified that the graffiti contained the phrase "Do-Re-Mi," he declared that this interpretation was wrong. The words are not "do-re-mi" but "do-or-die." Mr. Owens did not mean the words "do-or-die" to have any particular

significance. It was just a common phrase. (Exhibit 42 -- Declaration of Karl Owens.) Furthermore, a simple comparison of the letters "R" and "C" reveal that the words "Drac" and "Trecherous Popeye Raymond Ave Crips" were all written by the same person.

14. The dollar sign is a sign which typically indicated it author was a "player" i.e., a con man or scam artist and not a gang banger, as petitioner was alleged to be. The writing Williams believed to be "DOO" is actually Roman Numerals. Finally, as mentioned above the term "do-or-die" is considered tough talk with no specialized meaning. Thus, contrary to the prosecution assertion that the arcade graffiti identifies petitioner as a gang member and inferentially indicates his involvement in a robbery or burglary, the graffiti neither refers to a robbery nor to petitioner.[48]

15. Moreover, comparison of the handwriting between the "Crazy 8" graffiti and "Trecherous"[49] graffiti indicates that the two walls were authored by different persons. This is obvious even from lay person review. Finally, as stated above, there was no testimony that dates the graffiti on the arcade wall to a time near the time of the Taylor killing. Petitioner testified that the last time he put graffiti on the wall was sometime during 1975 or 1976. (RT 3031.)[50] This would have been when Steve was only 13 or 14 years old, a time that petitioner was not known as Trecherous. This statement of a youth putting graffiti on walls is consistent with Mr. Shepard's opinion that generally older members do not write on walls.

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[48] During his cross-examination, the prosecutor increased the prejudicial impact of this misreading of do-or-die to imply that petitioner had "jacked" somebody, thus implying the phrase do-re-mi with a dollar sign actually meant to rob. (RT 3069-3070.)

[49]Note that the word "treacherous" is misspelled. Petitioner testified that he spelled his moniker correctly i.e. T-r-e-a-c-h-e-r-o-u-s-, and not T-r-e-c-h-e-r-o-u-s. (RT 3032.)

[50]It appears as if petitioner is shown one of the exhibits containing the phrase "Crazy 8" which he consistently dates as having been written years before the time of trial. (RT 3032.)

16. Deputy Williams' opinions and conclusions were impeachable on other grounds. For example, Williams' testimony consisted in large part of his "knowledge" of various gang members association with the Raymond Avenue Crips and these young men's association with each other. At one time, Williams offered testimony that he had spoken to petitioner during the year 1980:

Q: Did you ever see Steve Champion during that year 1980?

A: Yes.

Q: In the middle of the year?

A: Middle of the year, summer months, somewhere around there.

Q: Where did you see him?

A: In and around the park. (RT 2668-2669.)

Later, Williams testified as follows:

Q: You mentioned in the latter part of 1980 that you had never seen Steve Champion, the latter part of 1980.

A: I said I saw him on occasion in the middle part of 1980. I believe that's what I said.

Q: Okay. And my question was whether or not you had an opinion that whether or not they were members of the Raymond Crips in the latter part of 1980 and you said your opinion was yes, that they were.

A: Yes.

Q: That opinion is based on having seen Steve Champion in the middle part of 1980?

A: Seeing him in the company of other Crips, that's what that opinion is based on. (RT 2690-2691.)

17. According to petitioner's juvenile custody records, petitioner was housed at the Youth

Training School during 1980. Petitioner was released on October 23, 1980. The attached exhibits demonstrate that petitioner was in custody during the period of time Williams claimed to have seen him at Helen Keller Park in the company of alleged members of the Raymond Avenue Crips, and in particular, Craig Ross. According to the exhibits attached as number 43 through 46, petitioner was in custody from April 1980 through his release in October 1980. [51] [52] Thus, Williams' testimony that he saw petitioner at and around the park during the middle or summer of 1980 was not true.

18. Further, Mr. Shepard disagrees with Deputy William's testimony and the prosecution's argument that if one member of the inner circle of the Raymond Street Crips, sometimes referred to as the O.G.'s, or original gangsters, had knowledge of a crime which had been committed by certain Crips, all of the O.G.'s would have that knowledge even if they had not actually participated in the crime. It is not true that the each member of the inner circle of the Raymond Street Crips had actual knowledge of the criminal activities of every other member of the inner circle of the gang. In the early 1980's many of the street gangs, including the Raymond Avenue

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[51] Exhibit 43 — Transcript of High School Record: Petitioner attended YTS from 1979 through 1980 1st semester.

Exhibit 44— Youth Authority Case Report dated 7/11/80: Petitioner continued in custody until November 1980. Reference to petitioner in custody but for furlough on April 6, 1980 when he received a Level B Behavior report.

Exhibit 45 — Re-entry Report August 22, 1980: Petitioner in custody

Exhibit 46 — Case Report dated 10/2/80: Petitioner in custody during August and September.

[52] Craig Ross's RAP sheet indicates that he was received at CDC on June 10, 1980 and not paroled to Los Angeles until September 20, 1980. (Exhibit 35.) Habeas counsel is informed and believes that additional documentation in the possession of Mr. Ross' habeas counsel adequately demonstrates that Mr. Ross was in custody during the entire summer of 1980. Because Steve Champion was not released from CYA between April 6, 1980 and October 23, 1980, Williams could not have seen the two together during those dates.

Crips were loosely organized groupings of young men who sometimes participated in street crimes and who sometimes came together for other non criminal purposes and motives, such as for protection and companionship. These men and boys were not part of the kind a sophisticated criminal enterprise we associate with street gangs today. If it were true that some members of the inner circle of Crips were involved in a criminal enterprise it does not necessarily follow that all members of the gang or the inner circle would have actual knowledge of those plans or activities. (Exhibit 41.)

19. Williams' qualifications were insufficient to qualify him as a gang expert under California Evidence Code section 720. Evidence Code section 720, subdivision (a), requires that the expert possess special knowledge, skill, experience, training or education in the subject to which his testimony relates. Repeated observations of an event without inquiry, analysis, or experiment does not turn the mere observer into an expert. (*People v. Hogan* (1982) 31 Cal.3d 815, 852-853.) Nor does a police officer's street experience transform him into a behavioral scientist who can predict individual or group behavior. (See *People v. Sergill* (1985) 138 Cal.App.3d 34.)

20. Here, although Williams was no more a gang expert than any of the men whose monikers he related to the jury, no objection on this ground was offered by trial counsel. At best, Williams participated in a number of arrests and had passing conversations and opportunities to observe alleged members of the Raymond Street Crips. As such, he was not qualified to testify as a gang expert. Admission of his testimony violated the due process and confrontation clauses of the federal constitution. Moreover, in violation of the Sixth Amendment, trial counsel was ineffective for failing to object Williams' lack of qualifications and ask for a limiting instruction

pursuant to *People v. Hogan, supra,* 31 Cal.3d 815.[53]

21. In addition to the lack of any scientific underpinnings, the factual basis for Williams' opinions regarding petitioner's alleged gang membership and moniker was similarly lacking. Williams admitted that he had no personal knowledge of petitioner's membership in the gang at the time the crimes were committed. His opinion that petitioner was a gang member in 1980 was based on allegedly having seen petitioner during the middle of 1980 in the company of others who Williams believed to be gang members, as described above, these alleged observations could not have been accurate. (RT 2644-2645, 2650-2651, 2665-2668).

22. California Evidence Code section 801, subdivision (a), limits expert opinion to subjects sufficiently beyond the range of common experience that the opinion of an expert is of assistance to the jury. Here, Williams' opinion that appellant was a gang member was purely gratuitous, being based on nothing more than unsupported speculation.

23. Additionally, trial counsel failed to object to the graffiti evidence on the grounds of hearsay. The graffiti allegedly advertising a robbery or burglary and identifying petitioner constituted inadmissible hearsay. As it was intended to demonstrate petitioner's connection and/or knowledge of the Taylor robbery-murder it was obviously offered for the truth of the matter. (Evidence Code section 1200.) Because Williams could not identify the author, it can not be argued that there is an exception to the rule of exclusion. (Evid. Code §§ 1220, 1223.)[54]

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[53] "Error must be found if 'the evidence shows that a witness clearly lacks qualification as an expert and the judge has held the witness to be qualified as an expert.'" *People v. Hogan, supra,* 31 Cal.3d at 852.

[54]Counsel failed to raise proper objection to this damaging testimony at trial based on the grounds that it violated petitioner's due process rights, the right of confrontation, the hearsay rules, was not probative, irrelevant, and the gang patois (see Claim VII. H.) played on the fears of

24. Here, the prosecution introduced the graffiti for the purpose of establishing petitioner's membership in a gang and further, as evidence of petitioner's involvement in the Taylor crimes. In trial counsel's own words, "a lot was made of the graffiti evidence." (Exhibit 47.) Trial counsel admittedly "overlooked" the hearsay objection and tried to focus on whether it was "Steve's graffiti." (Exhibit 47.) Trial counsel recalls that he looked at the pictures before they were offered into evidence but that he "missed Do-or-Die" and that he "never gave a thought" to objecting to Deputy Williams' opinions or alleged expertise. Trial counsel's failure to object as hearsay, to question Williams' basis for his opinions, to consult and call a gang expert on behalf of petitioner, to find and call the author of the graffiti, and to point out that when compared the writing on the two walls and that on the arcade wall appeared to be authored by different persons and most importantly, that Officer Williams had simply misread the graffiti constituted ineffective assistance of counsel.

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the jury such that it was unduly prejudicial. In its opinion this Court noted, "Because Deputy Williams was unable to testify that defendant Champion was the author of the graffiti, the graffiti was hearsay when admitted to show that defendant Champion had committed a robbery. Defense counsel never specifically objected that the graffiti was hearsay." (*People v. Champion, supra,* 9 Cal.4th at 924, n. 14.) "Defendants . . . contend that the deputy's testimony [as to gang patois] was irrelevant and that its primary purpose was to stress that defendants spoke a different language than the members of the jury, thereby playing on the jurors' fears of the unknown and of ethnic or social minorities. Because defendants did not object to Deputy Williams's testimony on this ground, they are barred from asserting it on appeal." (*Id.*, at 925.)

VI. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the motive for the Taylor killing was personal retribution, undercutting the prosecution theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers.

1. Evidence contained in police investigative reports and the testimony given at Evan Jerome Mallet's trial provided a credible basis upon which to show that Taylor's killing was not part of a conspiracy to kill neighborhood marijuana dealers, but that Taylor was killed for personal reasons.[55]

2. On the day of the shooting, witness Natasha Loy Wright saw four persons in the vicinity of the Taylor home. Wright lived in an apartment which faced the Taylor apartment and was situated approximately 20 feet away. (Exhibit 48-- Signed Statement of Natasha Wright.)

3. Exhibit 48 appears to be an investigative report dated 12/28/80 and authored by G. Dewitt. In it Wright apparently recalled that at about 3:30 or 3:45 on the afternoon of the Taylor crimes, Wright came home from her mother's house. As she was bringing boxes from her car, she noticed a grey '68 or '69 Buick Electra 225 drive up in the alley. Four black men were in the car. The two from the front seat got out and went to the Taylor apartment. Wright watched them as they "looked kind of suspicious." The men knocked on the Taylor door but no one answered. The shorter of the two men said, "When we catch Michael we're gonna kick his ass." Both men seemed very angry. (Exhibit 48.)

4. Wright also testified at petitioner's trial. (RT 2352 et. seq.) During her testimony Wright recalled the scene somewhat differently. Wright testified that at 3:30 on the afternoon of

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[55] Although Taylor sold marijuana he was not a large scale dealer as Hassan and Jefferson were reported to be. In fact the first time there it was reported that the Taylor suspects asked for dope was at petitioner's trial.

Michael Taylor's killing, four men arrived at Taylor's home. (RT 2352-2354.) All four men got out of the car. Two went to the door, one remained at the car and the other stood at the side of the apartment. (RT 2355.) Wright indicated that the Player vehicle was not the car she had seen at the home earlier that day. (RT 2354.) Wright was sure that Mr. Ross was one of the two men she had seen go to the door of the house. (RT 2354, 2356.)

5. After the two men knocked at the door, Cora answered and called for Michael. (RT 2355.) Michael came to the door and an argument followed. One of the men grabbed Michael; then the men left. Wright testified that the dispute was over some money. (RT 2356.)

6. Another investigative report, which also appears to have been written by Dewitt, indicates that Michael was involved in an altercation with Emmanuel Mallet, Evan Mallet's brother and a known informant. On December 25, 1980, two days before the killings, Cynthia Wilte saw Michael Taylor get into a fight with Emanuel Mallet. The fight was possibly about someone getting caught with marijuana. (Exhibit 49 -- Handwritten Report.)

7. Additionally, on 1/19/81 police received further information that someone named "Binkey" killed Michael. Binkey was described as wearing a black earing. He lived across from the park and had a brother named La Mar Davis. (Exhibit 50 -- Handwritten Report, Exhibit 19.)

8. Further, testimony at Mallet's trial concerning the Taylor crimes indicated that at least one of the perpetrators knew and disliked Michael Taylor. There is evidence of the personal nature of the Taylor crimes is the fact that Michael Taylor was known to at least one of his attackers. Apparently Taylor played basketball in the same park as some of the alleged Raymond Street Crips. During Mallet's trial Birdsong testified that Michael Taylor was known by at least one of the suspects from the park and was not liked: "They were saying, we don't like you

anyway, and said, 'You come down to the park,' and said, 'We don't like you anyway.'" (Exhibit 34 at 767-768.)[56] Birdsong testified further that he overheard Cora Taylor say that the men were going to kill Michael because one of them knew him. (Exhibit 34 at 767.)

9. Based on the foregoing a jury might reasonably conclude that the suspects entered the Taylor home to settle a personal debt. There was, therefore, ample evidence available for trial counsel to counter the prosecution theory that the crime was part of an ongoing conspiracy. Trial counsel presented none of the above mentioned information. Trial counsel did not question either the Taylor women or the police regarding the information that Binkey killed Michael Taylor. Cynthia Wilte was not called to testify and when Natashia Wright testified, Mr. Skyers had no questions for the witness. Had trial counsel demonstrated that a personal motive was the reason for Michael Taylor's killing, not only would there have been doubt cast on the prosecution's conspiracy theory, but, it would have made the prosecution's plea to use evidence of guilt in Taylor to prove guilt in Hassan would have been undercut. There would be no way to infer from the killing of Michael Taylor each of the four men who entered the Hassan residence knew or intended that anyone would be killed therein Left only with the unconnected evidence of the Jefferson killing to demonstrate identity, knowledge and specific intent, it is unlikely the jury would have heeded the prosecution's plea to convict petitioner and find that he possessed the necessary mental state.

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[56]Mr. Birdsong testified consistently at Mallet's preliminary hearing. (Exhibit 34 at 809-810; Exhibit 51 -- Mallet PXTX 215.)

Trial Counsel had not Tactical Reasons for the Acts and Omissions Complained of Above

10. Trial counsel had then and has now no tactical reason for his failure to investigate and prepare a defense as to petitioner's alleged involvement in the Taylor crimes he simply failed to recognize the significance of the Taylor crimes to the prosecution's case against petitioner. This was true for both the guilt and penalty trials. As seen in the attached declaration of Ronald Skyers, attached hereto as Exhibit 47, trial counsel offers no tactical reason for the acts and omissions complained of above and declares that had he realized the importance of the information already in his possession and the importance of the information obtained by habeas counsel through independent investigation, he would have presented it to the jury. This is so because as discussed above and here too, the jury's belief in petitioner's participation in and knowledge of the Taylor crimes was necessary to its finding of defendant's guilt in the Hassan murders as well as its finding that death was the appropriate punishment.

11. Counsel explains his failures and omissions as to the Taylor crimes as follows:

Counsel did no investigation into the Taylor crimes other than to read the police reports. He did not consider them in relation to the Hassan crimes. Counsel did not anticipate the prosecuting attorney would use evidence of the Taylor crimes to implicate petitioner in the Hassan crimes.[57] It was counsel's "sense" that petitioner had not been and would not be identified as one of the perpetrators of those crimes. But, counsel acknowledged that he fully anticipated that Deputy District Attorney Semow would ask both Mary Taylor and Cora Taylor whether or not

[57] In pretrial proceedings to join the defendants and to admit photographs and evidence of the Jefferson crimes, the prosecutor informed defense counsel of his conspiracy theory of the case and the connection between the three incidents and the Raymond Avenue Crips.

they saw anyone in the courtroom who resembled the perpetrators. Counsel recognized that this procedure would necessarily include petitioner as he would be seated at counsel table when the question was asked. Counsel had not planned to object to this procedure and in fact did not object when either Mary or Cora were asked whether petitioner resembled one of the men who had entered their home. Counsel stated that he felt that in any case, a district attorney would be well within his rights to ask a witnesses whether any person, including a specific defendant, could be identified. Counsel acknowledges that the possibility always exists that a witness will make an identification of a defendant when asked to do so by the prosecution. In spite of the fact that trial counsel knew that it was possible that either or both Mary and Cora would identify petitioner, counsel did not prepared to counter this eventuality.

12. Trial counsel admits that he undertook no investigation so as to impeach Cora Taylor's identification of petitioner. He had none of the information, in hand or in mind, which would cast doubt on this identification. Counsel did not perform any independent investigation into the customary areas of witness identification impeachment, such as personal bias, physical disabilities and infirmities — such as poor eyesight or lack of opportunity to observe — in order to determine whether or not Cora Taylor's identification could be impeached. Neither did trial counsel review Ms. Taylor's testimony at Evan Jerome Mallet's trial; thus he was unaware of the fact that the judge in that trial commented very strongly that Ms. Taylor did not make a good eyewitness. Trial counsel ultimately decided that the worst that could come of introduction of the Taylor crimes at petitioner's trail would be the jurors' tendency to take the association between petitioner and Craig Mr. Ross and draw an inference that because of that association, petitioner may have had some knowledge of the crime. Trial counsel explained that he decided that the best way to deal with this

was "not to deal with it." Trial counsel did not realize the significance of attributing knowledge of these crimes to petitioner so when Mr. Semow argued that the jury should "reason backward" from Taylor to Hassan to find petitioner guilty, he did not object then either.

13. Trial counsel called Cora Taylor's identification of petitioner as one of the three men who entered the residence "a shocker." Counsel had no tactical reasons for failing to object to the identification, failing to move for a mistrial, or failing to request a continuance so as to prepare a defense to the charge. Trial counsel felt that it was better to "leave it alone" and that in that way perhaps "it would go away." Trial counsel acknowledges that the police reports attached hereto and referred to in these claims were provided to him by the district attorney through normal discovery procedures.

14. Further, following the identification of petitioner by Cora Taylor, trial counsel did not perform any investigation or in anyway prepare petitioner for the possibility that he might be questioned about the Taylor crimes during cross-examination. When petitioner testified he was asked on cross-examination where he was on the night of December 27, 1980 through the morning of December 28, 1980. Petitioner recalled that he was out between 11:00 p.m. and midnight and that he had been detained by sheriff's deputies with Marcus Player at the corner of 126th and Budlong. (RT 3089-3090.) Petitioner was uncertain of the time of his detention and the prosecutor noted for the jury petitioner's failure to determine where he was when the suspect vehicle crashed and chastised him for failing to bring in witnesses to the fact that he was with Marcus Player at the time of Player's earliest detention i.e., when the Taylor crimes were being committed. (RT 3092-3096, 3098.) The prosecutor noted too that no law enforcement had contact with petitioner at that earlier time. (RT 3095.) Had trial counsel realized the significance

of these questions and been aware of deputy Hollins testimony, he could have supported petitioner's recollection and testimony. Had trial counsel been prepared, he could have demonstrated that petitioner was not a participant in the Taylor crimes. Lay and law enforcement witnesses as well as ample documentation were available at all times for trial counsel's use.[58] Instead, trial counsel only elicited from petitioner that petitioner had not run when confronted by police and was told to go home shortly after a Los Angeles Police Department vehicle flashed a light on him. (RT 3100-3101.) Counsel called no other witnesses and adduced no other evidence to support petitioner's testimony.

15. Trial counsel did not undertake investigation in order to determine who authored the graffiti. He did not date it and could not counter the prosecution's assertion that it implicated petitioner in a killing.

16. Finally, trial counsel had no tactical reason for failing to prepare a defense to the introduction of the Taylor crimes at the penalty phase. (Exhibit 47.)

[58] Mr. Semow concluded his examination of petitioner by implying he had not had an opportunity to "come up with" an alibi for the Jefferson crimes either. (RT 3099.)

VII.

INEFFECTIVE ASSISTANCE OF COUNSEL

CLAIMS RELATING TO THE HASSAN HOMICIDES

Petitioner's convictions and death sentence were unlawfully and unconstitutionally obtained in violation of petitioner's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under article I, section 1, 7, 15, 16, 17, and 24 of the California Constitution and the statutory and decisional law of California, in that petitioner was denied effective assistance of counsel by various errors and omissions of his trial counsel relating to the Hassan homicides, and as a result of those errors and omissions, also denied his rights to due process of law, to freedom of association, to equal protection, to confrontation, and to a fair and reliable guilt and sentencing determination. But for counsel's errors and omissions, which were not the product of any reasonable tactical decision and would not have been committed by competent counsel, it is reasonably likely that the result of the proceedings would have been more favorable to petitioner.

Specifically, defense counsel provided constitutionally ineffective assistance in (1) failing to discover, present and argue evidence that petitioner had an alibi for the Hassan crimes; (2) failing to discover, present and argue evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan; (3) failing to discover, present, and argue evidence that the statements by Elizabeth Moncrief were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief did not match petitioner; (4) failing to discover, present and introduce readily available and significantly exculpatory forensic evidence; (5) failing to request attorney, investigative, and expert support from the trial court, or utilize

those funds authorized by the trial court prior to Mr. Skyers becoming counsel for petitioner; (6) failing to object to the use of a secretly taped conversation between petitioner and Evan Jerome Mallet both pretrial and when used by the prosecution during its cross-examination of petitioner; (7) failing to properly object to the use of a secretly taped conversation between petitioner and Mr. Ross; and (8) failing to discover, present, and argue evidence that would have precluded the jury from finding beyond a reasonable doubt that petitioner, if he did enter the Hassan residence, did so understanding that anyone would be killed, i.e., evidence that petitioner suffers from longstanding mental impairments (pre-dating the Hassan offenses) which render him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misreading cues concerning the intentions of other persons.

The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

1. On December 12, 1980, Hassan, a marijuana dealer, and his son Eric, were killed in their South-Central Los Angeles home. Both had been shot. Bobby had a knife wound in the area of his neck. (RT 2077.) The Hassan home had been ransacked. Several Christmas gifts were unwrapped and/or missing. Also missing was a .357 caliber Ruger revolver and pieces of mass produced jewelry Bobby Hassan was known to have worn. (RT 1605-1606, 1611-1613, 2880.) Both petitioner and Mr. Ross were charged with these killings.

2. The Hassan residence was a regular depot for marijuana and cocaine sales. It had been so for "a year or longer" at the time of the crimes. (RT 1630, 1640, 1645, 1648.) Bobby Hassan traveled as far as Florida to make large purchases of drugs for resale. In fact Hassan had traveled

to Florida for a marijuana buy only the week before his murder. (Exhibit 52-- Handwritten note from trial counsel file.) According to police reports[59] Bobby Hassan dealt only to African American that he knew. He was the only one to answer the door. Merci and their children were not permitted to answer the door. (Exhibit 54.) Over 22 pounds of marijuana were found in the Hassan garage by police investigating the crime. (RT 1939.)

3. The only witness to the crime was Elizabeth Moncrief. At the time of the crime, Ms. Moncrief was employed as a nurse, or nurse's aide, at a home in the vicinity of the Hassan residence. (RT 1784.) Ms. Moncrief described her own testimony as "confused." (RT 1784, 1835.) The prosecutor agreed. (RT 3171-3172.)

[59]Exhibit 52 was found in trial counsel's file. As Mr. Skyers did not speak to Merci Hassan (Exhibit 47), the note was probably prepared by police and provided to trial counsel through discovery.

VII. A. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan.

1. The prosecutor argued that there was one single piece of evidence which, alone, would support a finding of guilt beyond a reasonable doubt. Here, the prosecutor pointed to petitioner's possession of two pieces of jewelry that he alleged belonged to Bobby Hassan. (RT 3178.)

2. The prosecutor conceded that the jewelry in evidence was not unique. (RT 3180.) He relied on the fact that petitioner had *two* pieces which were identified as Bobby Hassan's jewelry. He argued that petitioner's possession of two pieces of jewelry which were also possessed by another was a "possibility that [was] absolutely minuscule." (RT 3180.)[60]

3. Petitioner testified at trial that the ring and "king of hearts" charm in evidence were given to him by a deceased friend, Raymond Winbush. (RT 3026 et. seq.) Trial counsel offered no independent evidence to support petitioner's claim. [61] Abundant and readily accessible independent and corroborating proof that the jewelry in evidence *did not* belong to Bobby Hassan was available to trial counsel.

4. According to the Best Products Company receipt, Bobby Hassan ordered a ring of the same style as the one admitted into evidence on June 18, 1980, approximately six months before his death. The ring is described as a yellow gold 1/4 carat total weight ring. The receipt gives 581887E as the catalog number. (Exhibit 56 -- Copy of BEST receipt.)

5. Petitioner has obtained a Best catalog which depicts what the prosecution alleged was

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[60] As discussed below, Merci Hassan's recollection of the ring her husband wore and her identification of the ring in custody were not entirely certain.

[61] Trial counsel was in the possession of an investigative report in which Sue Rose Winbush confirmed that her brother had given petitioner the ring and the charm. (Exhibit 55.)

the stolen ring and has appended as an exhibit a copy of the page showing the ring in question. The ring ordered by and allegedly stolen from Bobby Hassan is depicted as item 11 on that catalogue page. (Exhibit 57 -- Best Catalog page.)[62] According to both the receipt for the ring Bobby's ring was a size 12. Careful review of the receipt indicates that initially, Bobby Hassan ordered a size 11 3/4 as this number is written near the bottom of the receipt. This initial sizing was changed and ultimately Bobby Hassan ordered a size 12. According to Mike Reese, a jeweler who has had experience with Best Catalog Stores, the receipt for Bobby Hassan's ring indicates the size ring ordered by Bobby Hassan. Bobby Hassan ordered a size 12. It is Mr. Reese's opinion that the initial size ordered was 11 3/4 and that size was changed to a size 12 because a size 11 3/4 was ultimately determined to be too small. (Exhibit 59 -- Declaration Mike Reese.)

6. The ring taken from petitioner at the time of his arrest, and ultimately entered into evidence is not a size 12. The ring in evidence is a size 111/2. This size is not only smaller than the ring purchased by Bobby Hassan, it is a size smaller than the 11 3/4 which was determined to be too small for Bobby Hassan.

7. Petitioner's investigator Eldridge Moore, in the company of federal co-counsel David Reed, examined the ring in evidence at the Los Angeles County Superior Court and, using a jeweler's measuring device, determined the size of the ring. The ring in evidence is a size 11 1/2. (Exhibit 60 -- Declaration of Elridge Moore.) Size 11 ½ is one half size smaller than the ring purchased by Bobby Hassan. This size difference is not an acceptable range of error in the jewelry

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[62]Exhibit 57 is a photocopy of a page 25 of a September 1979 — August 1980 BEST Products Buyer's Book. Habeas counsel has retained the full catalog for safekeeping but will make it available for the Court inspection, if so ordered.

community i.e., if one were to order a size 12, one would not expect to receive a size 11 ½ unless it were by accident. According to Mr. Reese if Bobby Hassan ordered a size 12 he would not receive or likely be able to wear a size 111/2. This would be especially true if it had been determined, as it was in this case that a size 11 3/4 was too small. (Exhibits 56, 59, 60.)

8. At the time of his arrest and at trial petitioner maintained that the ring seized from him had been given to him by a friend, Raymond Winbush. (RT 3027-3029.) Trial counsel, however, made no effort to find or adduce evidence to confirm that Raymond Winbush had given the ring to petitioner or that Raymond Winbush had ever owned such a ring. More specifically, counsel made no effort to identify, locate or interview Raymond Winbush's father, Walter Winbush, who would have been easily identified and located, and would have been able to corroborate petitioner's testimony. When recently shown a copy of the Best Catalogue page with a picture of the ring seized from petitioner and entered into evidence (Exhibit 57), Walter Winbush recognized the ring as one his son had owned and worn before his death and given to petitioner. (Exhibit 61 — Declaration of Walter Winbush.)

9. Walter Winbush recalls that his son Raymond was a personal friend of Steve Champion. Raymond Winbush owed a ring of the style identified by Merci Hassan as her husband's ring for 1 ½ to 2 years prior to his death on April 15, 1980. Walter Winbush recalls that his son gave the ring to Steve Champion and further corroborates the fact that the ring in evidence belonged to Mr. Champion by indicating that the size would have corresponded with Raymond's size. (Exhibit 61 — Declaration of Walter Winbush.)[63]

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[63] According to the declaration of investigator Elridge Moore, Mr. Winbush was shown a copy of the catalog page which is attached hereto as Exhibit 57. Without hesitation and without any prompting by Mr. Moore, Mr. Winbush pointed directly to the picture of the ring which,

10. Both petitioner's mother and sister Rita recognized the ring in evidence as having been worn by Steve before the Hassan killings. (RT 2800, 2930.) Rita recalled seeing petitioner wear both the ring and the charm together prior to December 1980. (RT 2949.) As noted above, Rose Winbush gave a statement to Homer Mason's investigator that the ring had been given to petitioner by Raymond Winbush. (Exhibit 47.)

11. According to Merci Hassan, her husband Bobby owned many diamond rings all with varying numbers of diamonds. While Ms. Hassan was certain Bobby was wearing a diamond ring the day he was killed, she was never certain how many diamonds the ring had. At one point, the prosecutor actually had Ms. Hassan count the number of diamonds in the ring in evidence. (RT 1603,1639,1642,1679,1680.) Ms. Hassan was also uncertain where or when the ring was purchased. (CT 10-11.) Ultimately, Ms. Hassan had to ask a jeweler who she thought the jewelry was purchased from to draw a picture of the jewelry because she was unable to do so her self. (RT 1669.)

12. While similar in style and of the same brand, the ring in custody is *not* Bobby Hassan's ring. Although Bobby Hassan owned a ring similar to the one in evidence, Ms. Hassan was unable to identify the ring in evidence as belonging to her husband with complete certainty. There was readily available, credible evidence that the ring Merci Hassan identified as similar to her husband's ring (1) had been given to petitioner by his friend Raymond Winbush, and (2) was not the same size as Bobby Hassan's ring. If presented by trial counsel this evidence would have undermined the prosecution's theory that the ring in evidence was a trophy taken by petitioner during the

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according to the BEST receipt, matches the description of the ring Bobby Hassan had ordered, as the ring which his son Raymond had given to Steve Champion. Mr. Winbush picked the ring from a photograph containing *twenty* different styles of rings. (Exhibit 60.)

killing of Bobby Hassan.

13. Trial counsel can offer no tactical reason for failing to support his client's testimony that the ring in his possession at the time of his arrest had been given to him by his friend. (Exhibit 47.)

VII. B. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that at the time of the Hassan crimes, petitioner was at home or picking up his paycheck.

1. When Mr. Skyers was substituted in as petitioner's counsel, he was given investigative reports from prior counsel Homer Mason. These reports were of interviews between Mr. Mason's investigator, and petitioner's mother, Azell Champion, brother Reginald Champion, and friend Sue Winbush. Each of these three individuals was asked about his or her recollection of petitioner's activities on the day of the Hassan killings. Although the reports were consistent in describing petitioner's activities, the times of various activities varied.

2. When Azell Champion was interviewed on July 7, 1981, she stated that petitioner arose "around noon" and spoke on the phone with Sue Winbush for two to three hours. Azell recalled that sometime in the afternoon, petitioner and his brother Louis (sic) went to pick up paycheck at Prompt Employment Services. When he returned, petitioner went to his room where he stayed for the remainder of the day. (Exhibit 53 -- Investigative report dated 7/7/81 — Azell Champion.)

3. In an interview with the same investigator Reginald recalled that they brothers had gone to get their paychecks sometime between 11:00 and 1:00 p.m. Reginald recalled that he and his brother had to sign a list in order to pick up their checks. (Exhibit 54 -- Investigative report of Reginald Champion.)

4. According to Sue Rose Winbush, a friend of petitioner's and the sister of Raymond Winbush, on the day of the Hassan murders, she and petitioner had a telephone conversation that began sometime prior to 1:00 p.m. The conversation ended sometime around 1:30 when petitioner said he was going to pick-up his paycheck. (Exhibit 55.)

5. Because of incomplete investigation trial counsel failed to present other evidence to

support the fact that petitioner had an alibi for the Hassan killings. This is so because trial counsel made no effort to obtain the list which would have contained petitioner's signature, and perhaps the signatures of others who too might recall the time they had gone to pick up their paychecks, and petitioner's telephone records so that the time at which each of petitioner's activities for the day had taken place could have been supported by documentation and thereby corroborate petitioner's testimony that he could not have committed the Hassan crimes because at the time of the Hassans' deaths he was either at home on the phone or going to get his paycheck.

6. The last class Eric Hassan attended ended at 12:01 p.m. (RT 1586.) The trip from his school to the Hassan home took approximately 10 minutes. (RT 3005.) Thus, the earliest the Hassan crimes could have begun was near 12:15 p.m.

7. Ultimately, Azell testified that on December 12, 1980, the day of the Hassan killings her son Steve went to get his paycheck at Prompt Service at approximately noon. Petitioner went to pick up his check with his brothers Reginald and Lewis. An employee of Prompt Service confirmed that the checks would have been available for pick up Friday, December 12, 1980. (RT 2792-2793, 2873.) Azell recalled the time because she was watching All My Children, a television program which she thought started at 12:00. (RT 2826.)

8. When he testified, petitioner's brother Reginald recalled the activities of December 12, 1980 similarly. He and petitioner went to pick up both of their checks on that day. Reginald and Steve were driven to Prompt Service by their brother Lewis. The three left the house between 11:30 and noon and returned within approximately 20 minutes. (RT 2957.) After returning, petitioner spent the rest of the day at home. (RT 2808, 2959.)

9. Trial counsel made a tactical decision not to call Sue Winbush as an alibi witness. Mr. Skyers explains that Ms. Winbush was not considered a witness who could testify that Steve was picking up his check at the time of the killing because she was not with him. (Exhibit 47.)

10. Because trial counsel failed to obtain telephone records and paycheck logs he was not able to support the testimony of the witnesses who were presented to corroborate petitioner's alibi. This failure of trial counsel left petitioner with only the somewhat conflicting and not particularly persuasive testimony of his mother and brother — witnesses who a jury might choose to give less credibility due to their relationship to petitioner and perceived bias of wanting him to be acquitted. Trial counsel has no explanation for failing to obtain the referred to records. (Exhibit 47.)

VII. C. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that Elizabeth Moncrief's statements concerning the events she witnessed, the physical appearance of the suspects, and her own actions were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief do not match petitioner.

1. Ms. Moncrief testified at a pretrial hearing held on February 27, 1981, that sometime shortly after noon on December 12, 1980, the day Bobby and Eric Hassan were killed, she saw a car in which the four alleged perpetrators arrived on the scene. She testified that at the time she was watching the Young and the Restless (CT 19), which began at 12:00 noon and ended at 1:00 p.m. At subsequent hearings Ms. Moncrief alternately described the car as a "shiny light yellow" Buick Electra 225 (RT 2056), and a "gold or cream" Cadillac. (RT 1716.) She previously had claimed the car was a Buick Riviera (RT 2067), and later was sure that it was a Chrysler. (RT 2067.) Ms. Moncrief could not credibly describe the color of the car. At various times she claimed the car was "brown," "white and yellow," "yellow," and "light goldish." (RT 1839.)

2. At trial, Ms. Moncrief testified that four African American men arrived in the car. Ms. Moncrief testified that she saw two men go into the house through the front door, after what she believed to be a struggle. The other two men, who had been seated in the front seat of the car, followed shortly thereafter. (RT 1721-1722.)

3. When questioned by police, prior to Steve Champion's arrest, Ms. Moncrief positively identified Benjamin Brown as the individual she later identified as petitioner. She further identified Clarence Reed as the driver of the car and identified Mr. Brown's car as the car she had seen at the Hassan residence on the day the Hassans were killed. (RT 1825.) Mr. Brown and Mr. Reed were two young African American men who, perhaps not so coincidentally, were involved in an armed robbery *the day after* the Hassan killings. Mr. Reed was killed during this incident. (RT 2061.)

Mr. Brown generally matched Ms. Moncrief's description of the Hassan perpetrators as he had chipped front teeth and was close in height to all of the individual described by Ms. Moncrief to police.[64] (RT 1991-1992, 2095-2096.) Mr. Brown was also identified by Hassan's wife, Merci Hassan, as an individual who had purchased marijuana from Hassan three weeks prior to the homicide. (RT 2058-2059.) The property report for Mr. Reed -- prepared in connection with Brown's arrest for the armed robbery, which too occurred in South Central Los Angeles -- included a gun fitting the description of the gun used in the Hassan killings, two gold chains, such as those claimed to have been taken from Hassan, and dark gloves such as Ms. Moncrief claimed to have seen petitioner wearing when he exited the Hassan residence. (RT 1726, 1803, 2405-2407, 2994-2995.) Ms. Moncrief and Mr. Brown resided on the same street. (RT 1797.)

4. The inconsistencies in Ms. Moncrief's trial testimony were so damaging to her credibility that if given her testimony only, the jury could not have returned a guilty verdict against petitioner. The prosecutor conceded this very fact to the jury: "There is no doubt that there are just too many problems with her testimony that you [could not convict petitioner] if she were standing alone and there were no other evidence or witnesses in the case." (RT 3172.) Nonetheless, the prosecutor did state that in his view "she is a credible witness" and that "she has to be correct." (RT 3172.) Unfortunately, Ms. Moncrief was never fully impeached by her numerous conflicting pretrial statements. Due to the ineffective cross-examination by trial counsel, the jury did not know the true extent of Ms. Moncrief's confusion.

5. According to undated handwritten notes contained in the district attorney files, (Exhibit

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[64]Benjamin Brown is believed to be 5'9, weighing 165 lbs. Clarence Reed was 5'4 and weighed 130 lbs.

62), Ms. Moncrief had been employed for 3 ½ weeks prior to Bobby Hassan's killing.[65] On the day of the killing, Ms. Moncrief last saw Bobby alive at 11:15 a.m. Ms. Moncrief and Hassan had a conversation outside at that time. When she returned from the store five minutes later, Ms. Moncrief saw Hassan's car in the driveway. She went into her employer's house and saw people at Bobby Hassan's house. Ms. Moncrief also saw a car parked in front of where she worked. There were two men in the car. The men were African American. Unlike her pretrial testimony, here, the car arrived before noon rather than after and the car was not seen by Ms. Moncrief as it arrived. Two rather than four men were inside of the car.

5.a. Thereafter, Ms. Moncrief went to get her patient lunch. By this time the car was empty. The next thing she saw was "four guys leaving -- one at a time -- from Bobby's front door." Two of the men were the two who she had seen in the car earlier. All four men were carrying something. One had a pink pillow case and the others had shopping bags. The fourth individual was wearing gloves and covered his face when a car drove by.

5.b. Ms. Moncrief described the four men as follows:

Number 1 -- 5'6-5'7 small, 145 lbs. 20-25 years old, processed, superfly hair style, dark complected, and wearing a plaid Pendelton-type coat, blue shirt, dark pants. Number 1 carried the pillow case and was the driver of the vehicle.[66] This man was seen by Ms. Moncrief at the location on the Monday or Tuesday preceding the crimes.

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[65]Further evidence of Ms. Moncrief's incredibly faulty memory is the fact that she testified that she was certain that she had been employed for "almost a year." (RT 1765.) This was in spite of the fact that her patients' daughter testified that Ms. Moncrief began her employment in November, 1980. (RT 2787.)

[66]Ms. Moncrief later describes this individual as the front seat passenger. (RT A-146.)

Number 2 -- smaller than the driver, approximately 5'5 and weighing 135 lb. This man wore a dark jacket, shirt, hat, dark pants and suspenders. He was dark complected, had hair protruding from under a hat and had a **scar on the upper bridge of his nose**.[67]

Number 3 -- 5'7 and weighing 135 to 140 pounds. He was 20 to 25 years old, light complected, wearing natural hair. This man was bowlegged. He wore a plaid shirt and dark pants and carried a paper sack.[68]

Number 4 -- wore gloves, a wool jacket, a beanie, and dark shoes. He was dark complected, had **long hair**, and **a long nose**. This man covered his face when a car passed and carried a paper sack. This man was also previously seen at the residence. (Exhibit 62 -- Undated Handwritten Report.)

6. In a December 16, 1980, statement taken by Officers Dorman and Crews, (Exhibit 63), Ms. Moncrief added to the above statement that **Number 1** had a jheri curl, and that **Number 4** was number 2 of a photographic spread.[69] **Number 4** was now described as "husky," with a "broken front tooth." Ms. Moncrief is consistent in that **the second guy out of Bobby's house had a scar on the bridge of his nose.** (Exhibit 63 -- 12/16/80 Statement of Elizabeth Moncrief.)

7. In a typed statement dated January 9, 1981, (Exhibit 64), Ms. Moncrief made some additional and significant changes to her initial identifications. Ms. Moncrief added that **Number 1** had a light mustache and big, open eyes. **Number 2** also wore a light mustache. In this version it was now **Number 3** who was described as having not only **a scar on the bridge of his nose** but

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[67] This man is described as a back seat passenger. (RT A-146.)

[68] This man is later described as the driver. (RT A-147.)

[69]Later identified as Benjamin Brown

also **a little bit of a scar running on to the left side of his face. Number 3** rather than number 4 had **chipped front upper teeth**. He was 5'5-5'7, 135-165, solidly built with long hair and thick lips. Ms. Moncrief now described **Number 4** as 5-5-5-7, 145, solidly built, 20-25 years old. **Number 4 rather than Number 3** was bowlegged with natural long hair coming from under his cap, side burns and light hair on his face. (Exhibit 64 -- Typed Statement re: Hassan Suspects.)

8. On January 9, 1981, petitioner was arrested. The investigator's report indicates the following description of petitioner at the time of his arrest. **6'1, 183 lbs,** and 18 years old. Petitioner had **a light scar on his cheek and lip,** thick lips, **protruding and irregular upper teeth**. Petitioner wore his hair in a **bushy afro**. His ears were described as small and close to the head. Petitioner had a left earring. He wore a **thin mustache and goatee**. Noteworthy is the fact that **the description "missing" teeth was circled and then crossed out** as if it was not applicable. (Exhibit 65 -- Police Report.)

9. On February 27, 1981, at petitioner's preliminary examination, Ms. Moncrief gave the following testimony. In this version it was **after** Ms. Moncrief returned from the store, rather than before she left, that she had a conversation with Bobby Hassan. (CT 16, 27.) As Ms. Moncrief was fixing her patient's lunch, she realized that she had forgotten something in her car. Here, Ms. Moncrief added that she went back downstairs and out to her car. (CT 16-17.)

9.a. It was after Ms. Moncrief returned to her car that she first noticed the suspect car. (Rather than when she was making or eating lunch.) The car was not there before she went to her own car. At preliminary hearing, Ms. Moncrief stated that she saw **four** men, rather than two men, in the car. The car was parked across the street from the Hassan residence, behind a tree near the house where she worked. (CT 17, 28.) In this version, Ms. Moncrief purposely walked past the

car so that she could see what the men were doing. (CT 33.)

9.b. Later, when Ms. Moncrief was fixing her patient's lunch, she saw two men walk across the street and go to the Hassan house. One of these men went to the front door and knocked. There was no struggle. Someone came to the door. Ms. Moncrief saw the door close. The men rushed around the house. Ten or fifteen minutes later, Ms. Moncrief saw "the curtain go back." (RT 18.) It was then that two other guys got out of the car. These men entered the home through the front door. (CT 18-19.) Allegedly, petitioner was one of the first two men to go into the house. (CT 22.) He and "a light guy" were the first to go inside. (CT 22.)

9.c. Ms. Moncrief saw the curtain go back again three times, then saw a man come out with a pillow case. Another came out with a bag a few seconds later. Another came out with a bag about two seconds later, then petitioner allegedly came out last and carrying a bag. (CT 19-20.) Ms. Moncrief put the time of this man's exit at 12:25 p.m. (CT 20.)[70]

9.d. When a green Mercedes came down the street, the man identified as petitioner put his hand over his face and turned toward the window Ms. Moncrief was looking out of. Ms. Moncrief saw a scar on his face and a "broken tooth." (CT 20.) This man wore brown gloves. (CT 21.) On cross-examination Ms. Moncrief added that petitioner had on a big jacket. (CT 25.) He was "wider" and "heavier" then the other men. Ms. Moncrief did not describe him a taller. (CT 25.)

10. Ms. Moncrief did not testify at Mr. Ross' preliminary examination. (CT 70.)

11. In August 1981, at the hearing on a pretrial motion Ms. Moncrief testified as follows:

11.a. On January 9, 1981, Ms. Moncrief was shown a series of six photographs. Ms.

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[70] Please recall that the trip from his school to the Hassan home took approximately 10 minutes and Eric's last class ended at 12:01. (RT 1586, 3005.)

Moncrief was unable to identify anyone. (RT A-109.) A few days later, Ms. Moncrief was presented with a live line-up at which she identified petitioner. (RT A-111.) Ms. Moncrief now stated that she had seen petitioner **several** times before the date of the incident. (RT A-112.) Ms. Moncrief gave the following descriptions:

11.b. She described the driver was a young black male, with light skin, long hair, and wearing a hunting jacket. (RT A-117.) The front passenger dark had long hair in a jheri curl of some kind, and was very rough looking. (RT A-117.)

11.c. She testified that the two in the back seat got out first. (RT A-118.) The man seated in the back seat behind the passenger was described as **5'5, 165 lb**, dark, beanie, dark clothes, very thick lips, **a scar across his face on the left side** and **a chipped tooth**. (RT A-116-A-117.) The other back seat passenger was identified as wearing **braids** and suspenders, 5'5-5'6, 160, and very rugged looking. (RT A-118.) Ms. Moncrief saw the men when she went down to retrieve something from her car. She went outside to see what they were doing *because they had been there for so long* she became concerned. (RT A-121.) At this juncture, Ms. Moncrief claimed to come outside *two, rather than one* additional times. The first time she went out all four were sitting in the car. When she went out the second time, there were only **two** men in the car. (RT A-122.)

11.d. Ms. Moncrief explained that she saw the car after she had gone out and had seen the four men in the car, then she went inside. As she was sitting and having (rather than preparing lunch) she watched them for awhile and saw two of the men get out of the car and walk up to the Hassan house, ring the doorbell, and rush around the side of the house. (RT A-123.) She assumed they were there on business *because they had been there before*. (RT A-124.) **She did not see**

these two go into the house. (RT A-128.)

11.e. Ms. Moncrief repeated that she had seen petitioner prior to the incident. **She stated that she knew petitioner and "automatically picked him out."** She was sure that petitioner had a **chipped tooth** and **not a gap**. (RT A-119-A-120, A-129, A-141.) Even if petitioner had not had a chipped tooth she would have been able to recognize him. (RT A-141.)

11.f. Ms. Moncrief recalled that the first person to come out of the house was the driver. The front seat passenger came out second. The "guy with the suspenders" came out third. The "guy with the beanie and the chipped tooth" was the last to come out. (RT A-128.)

12. At trial, Ms. Moncrief testified as follows:

12.a. After she returned from the store, she had a conversation with Bobby Hassan. Hassan left and Ms. Moncrief went inside. Thereafter, she went inside to make lunch for her patient. Ms. Moncrief looked out the window while making lunch and saw a car parked in front of the house.[71] It was a large car and there were four men seated inside of it. (RT 1714-1716.) The men remained in the car **until Bobby Hassan returned home**. (This conflicts with her earlier statement in which she recalled that Bobby Hassan had already returned prior to the car's arrival.) (RT 1716.)

12.b. Ms. Moncrief saw two of the men get out of the backseat and walk across the street. One of the two knocked on the door. **There was a struggle at the door** , then **the two went inside**. (RT 1720.) Immediately after seeing the curtains go back inside the house, the **other two men** got out of the car and **went around the side of the house**. (RT 1722.)

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[71]Ms. Moncrief also testified that she first noticed the car when she went outside. (RT 1719.)

12.c. Ms. Moncrief "went back to her business." (RT 1722.) When she saw the curtain go back again, she saw a man with a pillow case exit the front door. (RT 1723.) A second, third and fourth man each exited carrying a paper bag. (RT 1724-1725.)

12.d. Ms. Moncrief described the fourth man as tall, dark, with heavy lips. He had **a gap** or **a space** between his teeth, or **a broken tooth**, and **a scar across his nose toward the left side**. (RT 1726.) Ms. Moncrief noticed his teeth because he was talking and **he started to laugh**. (RT 1727, 1728.) Ms. Moncrief paid the most attention to this man. (RT 1726.) She had seen this man before. **Only once**. (RT 1727.)

13. Thus, at various times, Ms. Moncrief claimed that suspects numbered 2, 3, and 4 had a facial scar.[72] Initially, Ms. Moncrief did not recall anything unusual about suspect number 4's teeth. When she did, she initially described the abnormality as "chipped front upper teeth, " then definitely not a gap, then as a broken tooth, and finally as a gap or a space. Again, the police described petitioner's teeth as "buck teeth" or "protruding and irregular." Although given the opportunity to describe them as missing, the police specifically declined to do so. (Exhibit 65.)

14. At no time was Ms. Moncrief's description of petitioner's height or weight remotely close to petitioner's actual size. As noted by police, on January 9, 1981, when arrested petitioner's height was 6'1 and his weight as 185 pounds. The earlier, November 28, 1980 field identification card has his height as 6'0 and weight as 185 pounds. Ms. Moncrief consistently described the man she identified as petitioner as being between 5'5 and 5'7. Ms. Moncrief

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[72]1) undated report: Ms. Moncrief states the **Number 2** has a scar on the bridge of his nose

2) 12/16/80 report: **Number 3** has a scar on the bridge of his nose and a bit of a scar running on the left side of his face

3) Preliminary Exam: **Number 4** has a scar on his face

estimated this suspects weight at 165 pounds. He was husky, solidly built, or heavy. According to Ms. Moncrief, all of the men were essentially the same size with one of them being only slightly taller. (RT 1777.)[73]

15. On cross-examination at trial, Mr. Skyers attempted to impeach Ms. Moncrief's identification of petitioner and the Player car by pointing to the certainty of Ms. Moncrief's earlier identifications of Mr. Brown and Mr. Reed and the automobile associated with them. As he stated in his declaration, his focus was not to point out the inconsistences of all of her identifications and he instead chose to rely on her earlier identification of Brown and Reed to demonstrate that that one was correct or at least more accurate and that her second identification, that of petitioner, was erroneous. (Exhibit 47.) Unfortunately, Ms. Moncrief disputed the certainty of her earlier identifications and let the jury believe that those were only tentative and her identification of petitioner was the most solid. For example, when Mr. Skyers questioned Ms. Moncrief about her identification of the car associated with Benjamin Brown and Clarence Reed, Ms. Moncrief responded that she hadn't been entirely certain of her first identification. (RT 1739-1741.) Although Ms. Moncrief ultimately admitted that she changed her initial identifications of the passenger, the driver, and the car, Ms. Moncrief explained that she never told anyone that she had been positive, only that the Brown and Reed car resembled the car she had seen at the Ms. Moncrief residence and that Mr. Brown looked familiar and that she had seen him before. (RT 1742, 1751, 1757-1758.)

16. In only one instance on cross and three on re-cross was Ms. Moncrief actually

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[73]If Ms. Moncrief's height estimations of the other three men are correct as between 5'5 and 5'8, petitioner would have towered above them by as much as eight inches.

confronted with her earlier statements or testimony. Mr. Skyers impeached Ms. Moncrief with her testimony at the preliminary examination on three occasions. Twice having to do with Ms. Moncrief's prior description of the suspect's teeth as "chipped" rather than with a gap, and once on whether the first two men went around the house. (RR 1778-1780, 1793, 1803.) On re-cross examination, Mr. Skyers specifically referred to Ms. Moncrief's December 16, 1980 statement to police. That statement was marked as defendant's F and Ms. Moncrief was asked to read it. (RT 1837.) Although her discrepancies in the description of the car were noted by Skyers neglected to point out that in this version, Ms. Moncrief said the scar was on person number Two. (Exhibit 63; RT 1838-1848.)[74]

[74] Ms. Moncrief admitted that during the lunch break which was taken during her testimony, her prior statements and her testimony was discussed with her by Semow and Detective Crews. She was also shown photographs of petitioner. Ms. Moncrief accounted for some of the differences in her post lunch testimony as her having remembered what had happened after these lunch break discussions. (RT 1867-1870.)

VII. D. Trial Counsel provided ineffective assistance of counsel by failing to introduce readily available and significantly exculpatory forensic evidence

1. At trial, Elizabeth Ms. Moncrief testified that the person she ultimately identified as petitioner was wearing **dark gloves** (RT 1726, 1732.) Detective David Crews testified that he was the investigating homicide detective assigned to the Hassan murders. (RT 1899.) He reported to the crime scene on December 12, 1980, and immediately entered the Hassan home. Detective Cruz noticed that the entire residence had been ransacked and objects were strewn about. Christmas wrapping paper had been lying all over the bedroom floor, boxes had been ripped open and there was "total ransacking." (RT 1936-1937.) Two bodies were lying on or across the bed and large amounts of blood were present. (RT 1938.) Crime scene photos were introduced as trial exhibits 66, 67, and 76, and they depicted large amounts of blood.

2. According to the prosecution's own account of the murder, Bobby and Eric Hassan were killed with a high-powered .38 caliber revolver and the bullets from the gun entered the brains of the two victims with such force that they "pulped" the brain matter and shattered the skulls as the they exited from the heads. (RT 2075-2077.) A large amount of blood was splattered and present at the object-scattered crime scene. (RT 1938.)

3. Detective Cruz arrested petitioner at petitioner's residence on January 14, 1981. A search warrant was executed at that residence at that time. A pair of a dark gloves were seized from petitioner's bedroom. (RT 1959.) These gloves were sent to the crime lab for blood and gun-shot residue testing. Such large amounts of blood were present at the crime scene, and so many objects had been scattered throughout the bedroom area and Christmas gifts and wrappings been ripped open, that blood would naturally be splattered or smeared on gloves worn by the

killer or killers. Certainly had a gun been fired by petitioner while he wore them, gun-shot residue would be spread over the surface of the gloves. The results of the forensic testing for gun-shot residue on the gloves taken from petitioner was negative. Neither is there mention that the gloves were suspected to contain blood or did in fact contain blood stains. (Exhibit 66 — Analyzed Evidence Report.) Trial counsel had this forensic report prior to trial and did not make use of it.

4. Trial counsel failed to elicit this clearly exonerating evidence that Mr. Champion's gloves had no blood or gun-shot residue on them. Consequently, the jury did not know the extent of the forensic analysis on the gloves, the reasons for the analysis and the findings that no blood or gun-shot residue was on the gloves.

5. In final argument, the prosecutor was consequently free to suggest to the jury that there was a strong suspicion that petitioner was the triggerman:

> MR. SEMOW: I am going to admit to you right off the bat you may have a strong suspicion based on what you have heard them say on the tape, based upon the picture of the way Mr. Champion is holding the gun --- that either Mr. Champion or Mr. Mr. Ross, as opposed to one of the other two people, was the actual killer in the Hassan crime. (RT 3191.)

6. In a case where the prosecution had a highly confused eye witness identification of petitioner at the Hassan crime scene, trial counsel missed a critical exonerating point. Counsel should have emphasized that if petitioner was present at the Hassan crime scene wearing the gloves taken upon his arrest, those gloves certainly would have had blood on them. And if the jury were to conclude that he was present at the Hassan residence and for some reason blood did not splatter or get on the gloves, then certainly he could not have been the triggerman as no gun-shot residue was on the gloves. Therefore, there was no evidence of his intent to kill anyone and thus no proof

of the special circumstances. Accordingly, petitioner could not receive the death penalty. Trial counsel failed to drive this point home to the jury which could have saved petitioner's life.

7. Trial counsel had no rational, tactical reason for failing to present such evidence during his case in chief. (Exhibit 47.) The failure fell below an objective standard of reasonableness under prevailing professional norms and affected both the guilt and penalty phases of petitioner's trial. But for counsel's failure in this regard, a reasonable probability exists that the result of each phase of trial would have been more favorable to petitioner.

VII. E. Trial counsel Ronald Skyers, failed to request attorney, investigative, and expert support from the trial court, or utilize those funds authorized by the court prior to his becoming counsel for petitioner.

1. Penal Code section 987.9 reads in pertinent part, as follows:

In the trial of a capital case...the defendant, through defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation of the defense.

2. As will be discussed fully, despite this statute Mr. Skyers never sought or received any section 987.9 funding for investigators, counsel, and experts. Although the court had approved funding for an eyewitness expert, a probation expert, ballistic testing and an investigator, Mr. Skyers did not expend the sums authorized, consult with any experts, test the gun seized from Clarence Reed or employ an investigator. *Keenan* v. *Superior Court* (1982) 31 Cal.3d 424, authorizing appointment of second counsel in capital cases, was decided on February 8, 1982, more than seven months before petitioner's trial began.

3. In June, 1981, petitioner's counsel, Homer Mason, applied to the court for the appointment of a ballistics expert. The court approved $450.00 in expenses for the preparation of petitioner's defense. (CT 224-225.) At the same time, Mr. Mason applied for the appointment of an eyewitness identification expert and a probation consultant. The court appointed Dr. Robert Wm. Shomer, psychologist, to assist counsel and approved a sum of $400.00 for his use. (CT 224-231.) Petitioner's request for a probation expert was also granted and the sum of $250.00 was approved for this purpose. (CT 382.) In July, 1981, Mr. Mason applied for the appointment of a doctor to perform a psychiatric evaluation of petitioner. That request too, was approved. (CT 397-399.) In September, 1981, the court appointed an investigator to assist the defense. The investigatory costs were ordered paid by Los Angeles County. (CT 572.)

4. In December 1981, when Mr. Skyers was counsel, the court further granted an order for removal of the Brown/Reed gun and the bullet fragments from Bobby Hassan and Eric Hassan in order to perform comparison tests. (CT 410-411.)

5. Other than having a short psychiatric evaluation of petitioner performed, although available for his use, none of the above court orders for assistance were utilized by Mr. Skyers.

6. According to Mr. Skyers April 12, 1982 declaration, on file in the clerk's transcript on appeal, before Mr. Skyers had ballistics comparisons done, the gun was released. According to Mr. Skyers' declaration, the gun was released on February 2, 1982. There is no information in the file which explains why Mr. Skyers did not have the comparisons performed during the two months preceding the release of the gun and following the court's order. (CT 443-444.) Mr. Skyers states in his declaration that he did not think or failed to see the ballistics issue as a major issue. (Exhibit 47.)

7. Here, defense counsel was presented with a complex capital case in which the guilt phase alone involved four homicide victims, an unknown number of suspects, countless lay and law enforcement witnesses. The case involved eyewitness testimony, fingerprint, blood, and gun shot residue analysis, perhaps as many as three weapons were used. There were direct assertions of gang involvement and an alleged gang conspiracy to commit murder and robbery. The case took over two years from the Jefferson incident to the court's death sentence. Counsel had available resources in which to assist in the investigation and preparation of petitioner's trials — both guilt and penalty and yet, counsel can offer no reasonable tactical basis upon which his decision to proceed without attorney, expert, or investigative assistance. (Exhibit 47.)

8. As shown throughout the various claims set forth in this petition, had counsel sought

and utilized available resources and conducted adequate guilt and penalty phase investigations, with appropriate expert assistance, there was a host of exculpatory and mitigating evidence that could have been presented, [75] and verdicts more favorable to petitioner at each phase of trial would have been likely.

[75] Petitioner is now unable to set forth the evidence that would have been forthcoming had counsel acted in a timely fashion to obtain ballistics testing and consulted with an eyewitness identification expert, in part because one of the guns to be tested ceased to be available because of trial counsel's delay, and also becuase the court has not approved funding for the services of ballistic and eyewitness experts.

VII. F. Failure to properly object to the use of a secretly taped conversation between petitioner and Mallet both pretrial and when used by the prosecution during its cross-examination of petitioner.

1. On or about June 10, 1982, trial counsel Skyers filed a notice of motion to suppress evidence pursuant to Penal Code section 1538.5. The evidence sought to be suppressed was the taped statements between petitioner and codefendant Mr. Ross and the taped statements between petitioner and Evan Mallet. In his declaration attached thereto, Skyers stated that he received two tapes supplied through discovery and numbered respectively Copy No. 3 81-603CC and Copy no 4 81-709CC. According to the declaration tape number 3 contained the conversations between petitioner and Mallet, and tape number 4 contained the conversations between petitioner and Mr. Ross. (CT 232-234.)

2. Petitioner's motion to suppress was set for June 21, 1982. (CT 232.) On that date the trial court continued the hearing on the motion to suppress to "immediately preceding trial."

3. On September 28, 1982, during in limine discussions, Mr. Lenoir, Craig Ross' counsel, objected to the taped conversation between petitioner and Mr. Ross as unintelligible. The court ruled that it would take up the objection at the time the tape was offered into evidence. The prosecutor was ordered not to make any mention of the tape during his opening statement. (RT 1498-1499.) Thereafter on October 12, 1982, the trial court heard petitioner's motion to exclude evidence of the audio taped conversation between petitioner and Mr. Ross. (RT 2859 et. seq.) During the motion hearing, counsel makes reference to a Penal Code section 1538.5 motion *which has already been heard.*[76] (RT 2861.) Throughout the October 12, 1982 motion, trial counsel continually refers to only one tape. At no time does anyone specifically refer to the taped

[76] It is uncertain which hearing counsel refers to here.

conversation between petitioner and Mallet as having been obtained in violation of peitioner's state and federal constitutional rights to counsel, to due process, and to be free from unreasonable searches and seizures, and as the fruit of wilful prosecutorial misconduct. Trial counsel failed to get a ruling on his motion to exclude the taped conversation between petitioner and Mallet even though it was clearly inadmissible.

4. On July 30, 1981,[77] prosecuting deputy district attorney Semow moved the superior court for an order permitting him to secretly tape two conversations between petitioner and Jerome Evan Mallet. (CT 401-402.) In his declaration in support of his request, Semow justified his request on his information and belief that Mallet and petitioner's separate cases bore "close factual connections." (CT 403.) Semow requested that the taping take place on August 4, 1981, a time which he declared would be "the first and possibly the only time [Mallet and petitioner would] appear in court together. (CT 403.) The reason Mallet and petitioner would be in court together on August 4, 1981, was because Semow had scheduled a motion to consolidate the two men's cases for that date. (CT 383-387.) Semow's motion to consolidate was filed on July 24, 1981. (CT 383.)

5. Also on July 24, 1981, Mallet's attorney Charles A. Gessler, filed an opposition to Semow's motion to consolidate. In it, Gessler argued the controlling authority *People v. Ortiz* (1978) 22 Cal.3d 38, which made clear that defendants may not be joined unless they are named together in at least one count of the Information. (*Id.*)

6. Mr. Gessler raised his objection to Semow's deceptive acts on September 10, 1981,

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[77]Although the motion was not formally "filed" until August 20, 1981, the Order was signed by the court on July 30, 1981. The motion and supporting declaration of Mr. Semow are dated July 29, 1981. (CT 400-404.)

when the prosecutor in Mallet's case, Mr. Marin, moved to admit the conversation between petitioner and Mallet at Mallet's trial.

> MR. GESSLER: The stipulation is that that Jeff Semow is deemed called, duly sworn and testified that he is a deputy district attorney with the County of Los Angeles who is prosecuting the case of People versus Steve Champion in Central District in Judge Rick's court; that in good faith he moved to consolidate the case of People versus Champion with the present case of People versus Mallet and set it on the calendar for August 4th in Judge Rick's court.
>
> That sometime on July 23rd or shortly thereafter, he read points and authorities that defense counsel Charles Gessler filed in opposition to the motion for consolidation citing the case of People versus Ortiz, 22 Cal 3d 38.
>
> That at that time he thought the case of Ortiz looked pretty good but he was not sure at that point that it was controlling law.
>
> That on July 29th he then filed an affidavit and order to have Mr. Champion and Mr. Mallet transported to court together on August 4th in a van that was specially equipped to monitor their conversation and to record it and also place them in a cell in the Criminal Courts Building which was similarly monitored or wired and taped their conversations.
>
> That sometime before August 4th, Mr. Semow convinced (sic) that Ortiz was controlling law and the motion for consolidation was not well taken
>
> That at that point when he became convinced that Ortiz was controlling law, he had time to take the consolidation off calendar but did not do so, and the reason that he did not do so was his desire to get the tape of conversation between Mr. Champion and Mr. Mallet, and that he did not notify counsel for Mr. Mallet of the proposed tape recording.
>
> That on August 4th neither Mr. Champion nor Mr. Mallet was physically brought into the courtroom, but Mr. Semow appeared in Judge Ricks' court and conceded that the motion was not well taken.
>
> MR. MARIN: People would so stipulate. (Exhibit 68 -- Mallet RT 340-345 at 340-342.)

7. Mr. Gessler went on to argue for the suppression of the conversation at Mallet's trial. He pointed out that while Semow's motion was perhaps initially placed on the calender in good faith, by August 4, 1981, the motion's only purpose was to facilitate the tape recording of

petitioner and Mallet. In Mr. Gessler's words, "[I]t was known that the consolidation motion was not well taken, was going to be conceded, that it was a sham to leave on calendar. (Exhibit 68 at 343.)

8. On August 4, 1981, Mr. Semow's consolidation motion was in fact, conceded and denied. (CT 558.) Mallet and petitioner's conversations were recorded without notice to petitioner's counsel or counsel to Mr. Mallet. (CT 400.) Ultimately, Mr. Gessler was successful, with little opposition from the prosecuting attorney, in keeping the tape out, although it contained an alleged admission by Mallet. (Exhibit 68 at 342, 343, 344, 345.)

9. During his cross-examination of petitioner, the prosecutor makes reference to one of the taped conversations between petitioner and Mr. Mallet. During cross-examination, petitioner was asked by Semow whether or not he knew anyone named Nicardo Petit. When petitioner responded that he did not, Semow asked whether or not he knew someone named Nicky. Petitioner did. (RT 3039.)

Q: Nicky was a Raymond Crip, wasn't he?

A: Yes, at one time he was.

Q: And Nicky is dead too?

A: Yes, he is.

Q: Do you recall having a conversation with Evan Malett [sic] about Nicky?

A: We might have had a conversation about him.

Q: And do you recall talking to Evan Mallet about saying that Elizabeth Moncrief confused you with Nicky because he's dead now?

A: No.

Q: Do you recall Evan Malett [sic] suggesting that to you?

A: No, not at this time.

Q: Isn't it a fact you had that conversation with him again on a sheriff's van one week before you had the conversation that we played for the jury yesterday with you and Mr. Ross?

A: Not that I recall.

Q: Are you saying that you are not aware of the conversation or that you're not aware of that portion of it?

A: I am not aware of that portion.

Q: Are you saying that you may have had that conversation but cannot recall, or are you saying that you did not have any such conversation?

A: I am just saying I can't recall that conversation.

Q: So you may have actually discussed that with Evan Malett [sic], is that correct?

A: I just can't recall at this time. (RT 3041-3042.)

10. Trial counsel had no tactical reason for failing to object to the admission of the taped conversation between petitioner and Mr. Mallet. Furthermore, the prosecutor's questioning -- *without objection by counsel* -- regarding this conversation with a convicted murderer and alleged gang member allowed the jury to prejudicially infer petitioner's culpability in the crimes charged and the Taylor crimes.

11. Had counsel made timely and appropriate objections, it is likely, particularly in light of the prosecution's misuse of the court's motion calendar, that the taped conversations would have been excluded.

VII. G. Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Mr. Ross

1. On August 7, 1981, eight months after petitioner had been arrested, charged, and been provided appointed counsel, the prosecutor sought an *ex parte* order from the trial court to facilitate the following plan: petitioner was scheduled for a court appearance on August 10, 1981. Although Mr. Ross had no court appearance scheduled that day, and no reason to be transported from the jail to court, the prosecutor made special arrangements for Mr. Ross to be transported with petitioner to the courthouse. The prosecutor also made special arrangements to ensure that no one else--neither counsel nor other prisoners--would be present in the van carrying petitioner and Mr. Ross. In his *ex parte* application for the order authorizing the transportation and the taping of any resulting conversation, the prosecutor laid out the purpose of these arrangements, "I believe that if he [petitioner] and Mr. Ross are transported to court together, but apart from others, it is likely that they will discuss with each other their mutual involvement in the crimes charged herein." (CT 407-408.)

2. The motion was granted and the two men were transported to the courthouse together, but apart from all other inmates, and their conversations surreptitiously tape recorded. A transcript of the tape is set forth in a supplemental clerk's transcript dated February 29, 1984, at page 32 and here as Exhibit 76. It was stipulated at trial that neither petitioner's attorney nor Mr. Ross' attorney was advised in advance of the taping. (RT 2895.)

3. The tape consists of two recordings. The first is a conversation on the way from the jail to the courthouse in which petitioner and Mr. Ross -- who were shackled in the van -- fantasized about "bailing" or "strolling." (RT 3030-3041, 3051.) This was interpreted by "gang

expert" Williams as escaping. (RT 2904, 2907.) The second is a conversation on the return trip. The latter recording included the following:

C: Man, shit. I saw that mother fucker Bobby Hassan.

R: Bobby Hassan what you mean?

C: His father - the one that got killed.

R: A picture?

C: No, I saw him. He's in the courtroom.

R: What you mean? He's dead.

C: No (inaudible) (laughs) the other (inaudible).

R: Oh, the Raymond Crip.

C: Yeah.

C: He always be at all the courts, Cuz.

R: Yeah?

C: (Laughs) Him and his mother . . . his other brother and shit. I look at him raw - the mother fucker (laughs).

R: He's in court (inaudible)?

C: Yeah, he be at all my courts. I look at him raw, the mother fucker. I was sleepy and just woke up. . .

R: He ain't never said nothing?

C: No, he's a punk ass.

R: They supposed to be witnesses?

C: No, they just come to see what's happening with me. (Laughs) see if I'm going to get convicted and shit.

R: (Inaudible)

C: (Inaudible)

R: Was that a waterbed in that room?

C: Uh-uh.

4. This brief excerpt, replete with inaudible exchanges, formed the basis of the prosecutor's argument that the entire conversation --covering seventeen pages of transcript should be admitted to prove that both defendants were present in the room when the Hassan killings took place, and that both petitioner and Mr. Ross knew Bobby Hassan, Jr. (RT 3400-3401.)

5. The recording contained vast amounts of prejudicial material including numerous obscenities, references to alleged gang monikers, use of alleged gang language, and general "tough" talk.

6. When petitioner took the stand he was interrogated extensively by the prosecutor, over numerous objections, regarding all of these irrelevant and highly charged and prejudicial aspects of the tape recording. (RT 3045, 3046, 3050-3058, 3070-3073, 3076-3077, 3079-3081, 3111-3114, 3120.) The prosecutor repeatedly stressed all of these matters during his guilt and penalty phase arguments. (RT 3166, 3182-3186, 3194, 3322-3323, 3393-3394, 3399-3401, 3404-3406, 3698-3699, 3711-3712, 3728.)

7. The tape's asserted relevance was that petitioner's alleged "contemplation of escape," demonstrated consciousness of guilt and that Mr. Ross' question as to whether there was a waterbed in that room coupled with the ambiguous response, "Uh-uh," allegedly demonstrated petitioner's and Mr. Ross' knowledge that there was a waterbed in the Hassan residence. This was not so even if "uh-uh" was an affirmative response, petitioner had been given discovery at the

beginning of the case which detailed that a waterbed was in the Hassan bedroom. Petitioner had heard detective David Crews testify at his preliminary hearing how a waterbed was in the Hassan bedroom. (CT 35.) Petitioner testified that he discussed the waterbed with his counsel.

8. Neither of these subjects was of more than marginal probative value. With regard to the "contemplation of escape," it is clear from the conversation itself that it was nothing more than two young men's fantasizing. As petitioner testified, it was "only an imaginary thing. We knew we could never get out because we were both shackled." (RT 3051.) With regard to the brief reference to a waterbed, petitioner's knowledge, if any, was as a result of obtaining discovery and being present at his preliminary hearing. Further, it is not clear from the record whether Petitioner's response was negative and, therefore, inconsistent with his having accurate information about the crime scene.

9. Consequently, the probative value of the portions of the tape pointed to by the prosecution was minimal. The prejudicial effect of the remainder, on the other hand, was very substantial. Petitioner submits that it was a clear abuse of discretion under Evidence Code section 352 to admit the tape into evidence.

10. Further, the prosecutor used the tape as evidence of petitioner's character:

> MR. SEMOW: For people like you [jurors], prison is a jungle for the weak and so for the civilized....but for men who live by the law of the jungle or who live by no laws at all, for street toughs and killers, prison can be a very tolerable place, it can even be an enjoyable and satisfying place to live in....And I will ask you to recall the tape recording of defendants Champion and Ross on that sheriff's van and what they spoke of at great length what they are hoping for, and again ask yourselves is life imprisonment without parole sufficient to protect society from them. (RT 3698 - 3699.)

11. The language used by petitioner and Mr. Ross in their taped conversation was also used to "prove" that they were evil gang members. (RT 3394, 3711, 3698, 3166, 3182-85, 3194).

The prosecutor even argued that since petitioner did not implore Mr. Ross on tape to exonerate him, the inference was raised that petitioner's alibi defense was false. (RT 3184-3185.) He also argued that petitioner was "cool" on the witness stand, but that the tape recording revealed his "real personality" which the jury should use as a factor to convict him (RT 3394). Even though it was not a statutory aggravating factor, the prosecutor even urged that petitioner's demeanor on the tape was a factor favoring imposition of death (RT 3698-3699.) He also argued that the contents of the tape showed that petitioner lacked remorse and should therefore be sentenced to death (RT 3728.) Trial counsel, however, failed to object to the introduction of the taped conversation on section 352 or due process grounds and further failed to request deletion of irrelevant, prejudicial portions of the tape.

12. The prejudicial effect was so substantial and inflammatory that the introduction of the largely irrelevant evidence violated Evidence Code section 352, as well as petitioner's right to due process and a fair trial under the California and federal constitutions.

13. With respect to trial counsel's failure to object to the entirety of the tape because its prejudicial effect outweighed its probative value and also request redactions, this Court held, "Defendants argued at trial that the tape-recorded conversations were irrelevant, but they never asked the court to weigh the conversations' probative value and prejudicial effect; thus they failed to preserve the issue for appeal." (*People v. Champion, supra,* 9 Cal.4th at 913.) "Defendants fault the trial court for not deleting from the tape recording those portions of defendants' conversation that were irrelevant and prejudicial. But defendants never asked the trial court to edit the tape recording, and never notified the court that, in their view, portions of the tape recording were particularly prejudicial. Accordingly, they have not preserved this issue for appeal." (*Id.*, at

914.)

14. The Court offered the following reasoning to justify the introduction of the portion of the tape about what petitioner meant when he called Bobby Jr. a "punk ass." The Court reasoned that petitioner called him a "punk ass" because Bobby Jr., being a Raymond Crip, presumably knew that petitioner killed his father and since Bobby "ain't never said nothing," [presumably to law enforcement,] he was called a "punk ass" by petitioner.[78] But, "Punk ass" is a derogatory term, not one of appreciation (for not turning over evidence) and, therefore, abrogates the Court's reasoning. Seemingly, the Court did not analyze the context of this section of the conversation, which involved petitioner looking at Bobby Jr. "raw" each time Bobby Jr. came to court. Because Bobby Jr. wouldn't "say anything" back to petitioner, petitioner thought him to be a "punk ass."

15. Notwithstanding the Court's analysis of this section of the tape, trial counsel ineffectively assisted petitioner by failing to properly object to the entire tape's probative value being far outweighed by its prejudicial effect, and to ask the court to edit out portions which had no relevancy to the case. As to the various irrelevant portions, counsel also unreasonably failed to object on the ground that the substance of petitioner's fantasies and offensive words expressed therein --- about violent, unrelated "bad criminal acts" and tough-man lingo --- were inadmissible pursuant to Evidence Code section 1101-1102. For example, the conversation about "shot-gunning" sheriffs, and "blowing them up," was not only pure fantasy, but not probative of a **viable**

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[78] In order to embark on this course of deductive reasoning, one must first presume that notice of every crime committed by any member of the Raymond Crips is automatically dispatched to all other members. There was no expert testimony that gang members are told about every crime all other gang members commit. Gang expert Rouselle Shepard disagrees with this theory (Exhibit 41.)

escape plan, and therefore could not be "consciousness of guilt" evidence.[79]

16. The fantasies of "blowing up" sheriffs involved unrelated bad character evidence which had no relevancy to the murders for which petitioner and Mr. Ross were on trial. As a result of the introduction of this inflammatory fantasy, the jury could only conclude that petitioner had earlier acted in conformity with his unrelated fantasies and thereby convict him not based on what he had done, but who they believed he was. The prosecutor not only argued that those fantasies or "hopes" of petitioner, as he called them, proved that petitioner was at the crime scene and had the intent to kill the Hassans. The prosecutor made numerous improper references to this portion of the tape, emphasizing it throughout his guilt and penalty phase arguments to demonize petitioner. The discussion about murdering sheriffs and blowing them up was prejudicial character evidence, in violation of Evidence Code sections 1101 and 1102.

17. The taped conversation was used by the prosecution to demonize petitioner and create terror in the minds of the jury. By failing to raise proper objections and arguments to the introduction of this evidence, trial counsel permitted the prosecution to commit character assassination of petitioner before the jury.

18. A reasonably competent counsel would have recognized that most of the taped

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[79] After languishing in jail for months, it is not "consciousness of guilt" to fantasize about breaking out of jail. Consciousness of guilt evidence involves some unbroken chain of inferences from the behavior to the defendant's guilt of the crime; for example, covering up of the crime, or flight just after the commission of the offense. Consciousness of guilt is not fantasizing about blowing up sheriffs during a shackled ride to court. This Court opined, "Finally, the trial court could reasonably determine that when they [Mr. Ross and Champion] discussed the possibility of escape, the defendants showed a consciousness of guilt. The court did not abuse its discretion in concluding that these portions of the tape recording were sufficiently probative to render the tape recording admissible." (*Id.*, at 915.) There was **no** "possibility of escape" and even had there been, this evidence is not "consciousness of guilt evidence" as an escape plot months after arrest is too attenuated from the original offense.

conversation, certainly the portions concerning unrelated fantasies of killing sheriffs, was not admissible at trial. Evidence of extra-judicial statements must show a sufficient connection to the case at bar. Particularly where the statements contain "bad character" evidence against a defendant, there is an extreme danger of unfair prejudice. As trial courts recognize, the jury may conclude that a defendant acted in conformity with other "bad acts" and thereby convict him not based on what he did but who they believed he was. Upon proper objection and argument by trial counsel, the court would have excluded the portion related to killing sheriffs, "strolling," and very likely excluded the evidence pertaining to the "waterbed" and "Bobby Jr. ain't said nothing" and the entirety of the tape. Trial counsel was incompetent in failing to properly object and argue the inadmissibility of such highly prejudicial and inflammatory evidence at trial. Mr. Skyers had no tactical reason for failing to object.

VII. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence of significant mental impairments from which petitioner was suffering as of the date of the Hassan crimes which would have precluded the jury from finding that petitioner, if present at the victims' residence, possessed the intent to kill required for special circumstance liability.

1. In order to establish the special circumstances, the prosecutor was required to prove either that petitioner was the actual killer or that petitioner "intentionally aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of the [Hassan] murder[s]." (CT 677-678; CALJIC 8.80), in other words, that petitioner had the actual intent to kill Bobby and Eric Hassan.

2. The prosecutor conceded that he could not prove that petitioner was the trigger man, and hence that he had to prove that petitioner shared the triggerman's intent that Bobby and Eric Hassan perish in the course of the charged burglary and robbery. (RT 3192.) Having no evidence concerning petitioner's conduct inside the Hassan residence, no evidence of any admissions of homicidal intent by petitioner, and no evidence of any express statements of homicidal intent or planning by any of the four perpetrators, the prosecutor was forced to rely upon circumstantial evidence as to what, in the prosecutor's view, each of the four men must have inferred and understood prior to entering the Hassan residence.

3. According to the prosecutor, evidence of the Jefferson and Taylor crimes provided the evidence to to prove that each of the Hassan perpetrators alleged, including petitioner, possessed the homicidal intent necessary to the Hassan special circumstances. The prosecutor asked the jury to, again, reason backwards. (RT 3192.) Based on the "striking similarities" and "connections" between the Hassan and Jefferson crimes, the prosecutor argued that it was inconceivable that petitioner or Mr. Ross went into the Hassan residence without knowing that Teheran Jefferson had

died as a result of a gunshot wound to the head in the course of a robbery. (RT 3193-3194.) This was in spite of the prosecutor's concession that there was no evidence whatsoever that either petitioner or Mr. Ross participated in the Jefferson crimes. (RT 3194.) Apparently, according to the prosecutor, even if petitioner (or any particular Hassan perpetrator) had not participated in the Jefferson crimes, it was reasonable to assume that he would have learned what had happened to Mr. Jefferson, either because someone explicitly told him what happened or because he would have put it together based on bits and pieces of information that would inevitably have come his way. And, according to the prosecutor, having learned what had happened to Mr. Jefferson, petitioner (or any Hassan perpetrator) must have understood that "the same thing was going to happen to Bobby Hassan and to Eric Hassan, if he was home"(RT 3193-94), either because he would have drawn this inference himself and/or because it would have been clear from cues provided by the other Hassan perpetrators.

4. The prosecutor's circumstantial evidence argument to support a finding that petitioner, if he entered the Hassan residence, did so with an understanding that Bobby and Eric Hassan would be killed was not overwhelmingly strong. Ignoring the lack of evidence connecting the Jefferson crime to petitioner or anyone known to petitioner, and even assuming that the Jefferson, Taylor, and Hassan crimes were all committed by persons involved with the Raymond Avenue Crips, the evidence concerning the intent of the perpetrators was far more ambiguous that the prosecutor's argument suggested. As to Mr. Jefferson, there was no evidence at trial that he was in any way connected with the Raymond Avenue Crips, nor that any non-perpetrator witness was

present at the time of the homicide.[80] As to Mr. Taylor, there was evidence that he knew and was known by one of the perpetrators, Evan Mallet (RT 2126), but there is again no evidence that he was in any way affiliated with the Raymond Avenue Crips. Three witnesses were present when Taylor was shot; none of them was killed. Certainly, looking to the facts of the Jefferson and Taylor crimes provides no basis for inferring that the Hassan perpetrators, prior to entering the Hassan residence must have understood that all witnesses would be killed, or that "Eric Hassan, if he was home," would be shot. Further, Bobby Hassan and Eric Hassan were respectively the father and brother of a member of the Raymond Street Crips, a fact which might affect how they would be treated by members of the Raymond Street Crips and which may have affected the understanding of one or more of the perpetrators as to what was going to happen.

4.a. The prosecutor's weak mens rea case against petitioner, based on inferences concerning what each of the perpetrators must have understood upon entering the Hassan residence, would have been undermined had trial counsel conducted a reasonable investigation of his client's personal history and discovered and presented available evidence that as of the date of the Hassan crimes, petitioner suffered from longstanding mental impairments of a severe and global nature which impaired his ability to discern or accurately read cues concerning the intentions of other persons, to draw his own inferences in ambiguous circumstances, or to engage in planning activity.

5. At habeas counsel's request, Dr. Nell Riley examined petitioner. Dr. Riley is a licensed psychologist specializing in clinical neuropsychology. She holds a Diplomate in Neuropsychology

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[80] There was in fact evidence, not presented at trial, that a "partner" of Mr. Jefferson's may have been present. See Claim VIII. A.

from the American Board of Clinical Neuropsychology (ABPP) and the American Board of Professional Neuropsychology. Dr. Riley is presently employed as a staff neuropsychologist at the Neurodiagnostics Service of the Department of Neurology at Stanford University Hospital. (Exhibit 67 -- Declaration of Nell Riley, Ph.D. ABPP.)

6. On February 12, and February 26, 1997, Dr. Riley conducted a neuropsychological examination of Mr. Champion. She interviewed, tested, and evaluated Mr. Champion at California State Prison at San Quentin. The evaluation consisted of a series of tests that took over 8 hours to administer. The purpose of the neuropsychological testing was to determine the existence, severity, and effect of brain damage and cognitive impairment and to analyze Mr. Champion's performance in light of inherited physical or psychiatric dysfunction, substance use or abuse, pre or perinatal trauma, acquired brain injury or psychiatric disorders. (*Ibid.*)

7. Prior to meeting with Mr. Champion, Dr. Riley was provided with background materials on Mr. Champion, including previous social service and juvenile records, correctional records, medical records, school records, and numerous other documents pertaining to him and numerous family members. She also consulted with Roderick Pettis, M.D. regarding his preliminary findings about Mr. Champion's social history.[81] (*Ibid.*)

8. Dr. Riley administered a number of standard neuropsychological tests designed to detect and assess the effects of neuropsychological deficits on cognitive functioning and behavior. On the Wechsler Adult Intelligence Scale-Revised, Mr. Champion earned a Verbal IQ of 92, a Performance IQ of 74 and a Full Scale IQ of 83, placing him in the low average range of overall

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[81] Dr. Pettis' declaration is attached hereto as Exhibit 1 of the Penalty Phase Ineffective Assistance of Counsel claims. (Exhibit 1, Vol. 1 of 13.) His findings are discussed below.

intellectual function. Of particular interest is the 18 point difference between his verbal and performance IQ scores. A verbal-performance discrepancy of this magnitude is unusual in the normal population and is thus suggestive of brain dysfunction. Because individual subtest scores on the WAIS-R revealed a broad range of variability, Dr. Riley carried out an additional analysis to group together those subtests measuring three separate dimensions of intellectual capacity. The results of this analysis indicated that Mr. Champion performed at the 39th percentile on verbally based WAIS-R subtests, at the 10th percentile on subtests most sensitive to attentional capacity, and at the 3rd percentile on subtests requiring spatial abilities and novel problem solving.

9. Mr. Champion's Halstead Impairment Index was 1.0 which indicates that his score fell in the range associated with brain damage on each one of the seven measures which make up the index. An Impairment Index of 1.0 is quite rare; when adjusted for Mr. Champion's age and educational level using the extensive normative base of Heaton, Grant and Matthews, the index score placed him in the 0.02 percentile of the normal population. In other words, of 10,000 men of his age and educational level, Mr. Champion would place second from the bottom. Performance at these levels clearly indicates significant brain dysfunction. (*Ibid.*)

10. A number of the tests administered to Mr. Champion revealed attention and concentration difficulties. Problems with attention were observed on the three WAIS-R subtests (Digit Span, Digit Symbol and Arithmetic) most sensitive to attentional difficulties. On these, Mr. Champion performed at the 10th percentile, suggesting that his cognitive functioning is vulnerable to distraction. He was also impaired on the Digit Vigilance Test, which requires more sustained attention, and on other tasks, such as the Trailmaking Test, which is dependent on higher order aspects of attentional control. (*Ibid.*)

11. On a complex measure requiring the integration of speed, eye-hand coordination and fine motor dexterity, he was impaired bilaterally. Performance was particularly poor (less than the 1st percentile) with his left hand, rasing the possibility of right hemispheric dysfunction. (*Ibid.*)

11. Because Mr. Champion's grade school records indicate developmental learning difficulties, the Woodcock Johnson Psycho-educational Battery-Revised was administered. Results of this test yielded a surprising and relatively rare pattern of academic competencies. Mr. Champion's ability to accurately pronounce familiar English words and to comprehend short written passages was average. However, his ability to pronounce nonsense words such as "snirk" or "gusp" was strikingly impaired, falling at the level of a beginning, third grade reader. This deficiency in what are termed "word attack" skills indicates problems in the neural processing of phonological codes and is regarded as the hallmark of developmental reading disorder or dyslexia. Mr. Champion's impaired performance on the Speech Sounds Perception Test (8th percentile) further confirms his weakness in matching language sounds with their written equivalent.

12. Mr. Champion's performance on a battery of memory tasks (Memory Assessment Scales) yielded a Global Memory Index at the 25th percentile, which is at the lowest end of the average range. (*Ibid.*)

13. A number of tests indicated that petitioner is particularly impaired in processing spatial information. As noted above, his performance on aspects of the WAIS-R reliant on spatial skills, such as assembling puzzles and replicating block designs, was a clear area of cognitive dysfunction. Another task which assess spatial abilities the Tactual Performance Test, a component of the Halstead Reitan Battery. On this task, the subject is required to fit blocks into a formboard while blindfolded, thus forcing him to solve a spatial problem by relying on tactile input. Each hand is

tested independently and then both hands are used together. Finally, the blindfold is removed and the subject is asked to draw a map representing the shape and location of the blocks. This multi-factorial test requires intact sensory ability, motoric speed, and problem solving ability. Additionally, the task taps the brain's ability to transfer information between sensory modalities and between the right and left cerebral hemispheres. (*Ibid.*)

14. On the TPT Mr. Champion performed slowly (14th percentile). However, deficits were particularly striking after the blindfold was removed and he was to draw a visual map of the blocks. He was quite deficient in recalling both the shapes (4th percentile) and locations (2nd percentile) of the individual blocks. (*Ibid.*)

15. Mr. Champion's impaired performance on the location and memory portions of the TPT was consistent with the spatial deficits he exhibited on the WAIS-R and Rey Osterrieth Complex Figure Test. The Rey Osterrieth requires the subject to first to copy, and later draw from memory, a complex design. Petitioner approached the copy phase of this task in a very disorganized and fragmented manner producing a reproduction which was extremely distorted (less than the 1st percentile). *Such an approach is consistent with deficits in the ability to plan and organize a behavioral strategy.* (*Ibid.*, emphasis added.)

16. Because of Mr. Champion's extemely impaired performance on the Rey Osterreith, Dr. Riley asked him to complete the Beery Test of Visuomotor Integration, a test which is typically administered to children. On this test, his ability was at the 3rd percentile of the adult population. Using developmental comparisons, his visuomotor integration skills were at the level of the average 9 year old child.

17. Mr. Champion manifested significant difficulties on measures of higher executive

function. These were most conspicuous on the Wisconsin Card Sorting Test. On the Wisconsin Card Sorting Test he had difficulty deriving the sorting principles. While most subject become more efficient in sorting strategies as the test progresses, Mr Champion did not. This impaired learning efficiency was reflected in his poor "learning to learn" index. Similarly, his high number of perseverative responses on the Wisconsin placed him at the 3rd percentile. Perseveration refers to the tendency to "get stuck in" behavioral patterns, repeating the same response or action when it is no longer appropriate. Perseveration is universally recognized as a marker of brain dysfunction. Executive and conceptual problem were also evident in Mr. Champion's high number of errors on the Halstead Category Test, on which he performed at the 5th percentile. (*Ibid.*)

18. Dr. Riley concluded that Mr. Champion's deficits, as revealed by the neuropsychological testing, in problem solving, nonverbal reasoning, attention and slowed information processing *render him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misreading cues concerning the intentions of other persons.* (*Ibid.*, emphasis added.)

19. Here, the prosecutor reasoned that knowledge of the Jefferson crimes meant that the perpetrators of the Hassan crimes had entered the Hassan residence with the requisite criminal intent, i.e., an intent to kill or assist in the killing of a human being. The prosecutor attributed petitioner's alleged knowledge of the Jefferson crime to his alleged membership in the Raymond Avenue Crips, his alleged association with the Evan Mallet, the Player brothers and Craig Ross. The prosecutor claimed petitioner had knowledge of an alleged conspiracy to rob and kill drug dealers. The prosecution offered no direct evidence of this conspiracy or any evidence whatsoever of petitioner's knowledge of or involvement in the Jefferson killing.

20. According to the findings of Dr. Riley, petitioner suffers from brain damage to such a degree as to be impaired in his ability to pick up cues and insinuations from others, to draw his own inferences in ambiguous circumstances, and to engage in planning activity. (*Ibid.*)

21. Other than the very cursory examination performed by Dr. Shomer, trial counsel did not conduct any investigation into the possibility that petitioner might suffer from brain damage. Trial counsel explains in his declaration that no one from petitioner's family told him that petitioner had been abused in utero or that petitioner had been involved in a serious car accident. Trial counsel admits that he neglected to ask whether petitioner had suffered any head injuries. Had trial counsel been aware of the significant injuries suffered by petitioner, he would have requested funding for further neuropsychological examination. Had findings consistent with Dr. Riley's been available at trial, Mr. Skyers would have presented them at both the guilt and penalty phases of the trial.

VIII.

INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS RELATING TO THE JEFFERSON HOMICIDE

Petitioner's convictions and death sentence were unlawfully and unconstitutionally obtained in violation of petitioner's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under article I, section 1, 7, 15, 16, 17, and 24 of the California Constitution and the statutory and decisional law of California, in that petitioner was denied effective assistance of counsel by various errors and omissions of his trial counsel relating to the Jefferson homicide, and as a result of those errors and omissions, also denied his rights to due process of law, to freedom of association, to equal protection, to confrontation, and to a fair and reliable guilt and sentencing determination. But for counsel's errors and omissions, which were not the product of any reasonable tactical decision and would not have been committed by competent counsel, it is reasonably likely that the result of the proceedings would have been more favorable to petitioner.

Specifically, defense counsel provided constitutionally ineffective assistance in (1) failing to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes undercutting the prosecution theory that petitioner was a participant in or at least had knowledge of all four homicides and its theory that petitioner's knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true; (2) failing to object to introduction of the Jefferson crimes on grounds that its introduction violated petitioner's due process rights, and Evidence Code §§ 352 and 1101; (3) failure to request a mistrial or to have the court strike testimony once the prosecution's offer of the proof of the

similarity of the Jefferson crimes did not conform with the evidence actually admitted at trial and (4) failing to object to the prosecution's conspiracy evidence and argument.

The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

1. On either November 14, or November 15, 1980, Teheran Jefferson was killed in his South-Central Los Angeles apartment.[82] Jefferson was a large-scale marijuana dealer who sold to "fifteen to twenty people" daily. (RT 1556, 1562-1563, 1566, 1568.) There was pathology testimony that Jefferson had been killed by a gun shot to the head, that his wrists had been bound with a necktie, and that he had a rag in his mouth. An investigating officer testified that the apartment had been ransacked. (RT 1546, 1557, 1577.) Numerous photographs of Jefferson and his apartment, as well as the bullet which allegedly caused Jefferson's death, were entered into evidence. (RT 1546; 1557-1563; People's 13-36.) The prosecution's forensic expert could not definitely identify the weapon from which the bullet had been fired. The expert opined that it was either a .32, .38 or .357 caliber weapon. (RT 1573, 2391.)

2. In two letters dated November 17, 1981, prosecuting attorney Jeffrey Semow advised petitioner's trial counsel and the attorney for Mr. Ross that he thought petitioner and Ross were guilty of the crime.

After a review of the evidence summarized in the attached reports, I have concluded that

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[82] Although the prosecution asserted the date of death was November 15, 1980, the medical examiner could not determine the time of death with any reasonable certainty. (RT 1575.) According to police reports, Jefferson's death occurred sometime between 10:00 p.m. November 14, 1980, when he was last spoken to by his wife Almira Jefferson and 11:40 a.m. on November 15, 1980 when his body was discovered. (Exhibit 69 -- Jefferson Police Reports pp. 1-3, 10, 16.)

> Craig Anthony Mr. Ross [Steve Allen Champion] is responsible for the murder of Teheran Jefferson. My office has decided, however, to hold the filing of this charge in abeyance until the conclusion of the murder case pending trial December 7 (No. A 365075). In the meantime, evidence of the Jefferson murder will be presented as a factor in aggravation at the penalty phase in that trial. (Exhibit 70 -- Semow 11/17/81 letters.)

3. On June 2, 1982, Deputy District Attorney Semow informed trial counsel, by letter, that he intended to introduce evidence of the Jefferson homicide at both the guilt and penalty phases of petitioner's trial. (Exhibit 71 -- Semow letter 6/2/82.) Ultimately, evidence of Mr. Jefferson's killing, including several gruesome photographs were introduced at **both** the guilt and penalty phases of petitioner's trial. Trial counsel, by his own admission performed absolutely no investigation into the facts of the Jefferson killing and made no efforts to discover information which would exonerate petitioner of this crime. (Exhibit 47.)

VIII. A. Defense counsel provided constitutionally ineffective assistance by failing to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes which would have precluded admission of the Jefferson evidence and undercut the prosecution's theory that petitioner was a participant in or at least had knowledge of all three incidents and its theory that petitioner's alleged knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true.

1. Police and prosecution reports and other documentation concerning the Jefferson killing indicate the crimes were glaringly dissimilar in at least the following respects:

a. There was no evidence at all concerning the number of persons involved in the perpetration of the Jefferson homicide. Unlike the Taylor and Hassan crimes, each of which involved four perpetrators, the Jefferson homicide may have been committed by a single, unassisted perpetrator; (Exhibit 69.)

b. Mr. Jefferson was killed in his apartment some time between 10:00 p.m., November 14, 1980 and 11:40 a.m., November 15, 1980. [83] There was evidence that during this time span, from 10:00 p.m., on November 14 and continuing to some unknown hour, Mr. Jefferson was in his apartment "getting high" with "a partner" of his. (Exhibit 69 -- statement of Jefferson's wife.) While habeas counsel has not yet been able to identify Mr. Jefferson's partner there is no reason to suspect that Jefferson's partner was anyone connected in any with petitioner or Ross or to the Raymond Avenue Crips. Thus, there is evidence that during the time span when Jefferson was killed in his apartment, he was "getting high" in the apartment with someone having no apparent connection to petitioner or the Raymond Avenue Crips, and thus, as to the Jefferson crime, there

[83] It is likely that Mr. Jefferson died considerably before 11:40 a.m., when his body was discovered, since Ralph Richards, a Vietnam veteran who called the police and was one of the first to see the body, reported that when Mr. Jefferson was discovered his body was already stiff. (Exhibit 69.)

was either an alternative suspect with no apparent ties to the Crips (unlike the Taylor crimes) or a witness who was allowed to leave the scene of the crime (unlike the Hassan case).

c. There apparently was no fingerprint or other physical evidence obtained, tying the Crips to the Jefferson crime scene. (Exhibit 69.) Ross's fingerprints were found at both the Hassan and Taylor crime scenes.

d. Ballistic comparisons do not indicate the weapon used in the Jefferson homicide was the same weapon used as either the Taylor or Hassan homicides; (Exhibit 69.)

e. Mr. Jefferson had no known connections to the Raymond Street Crips as did Taylor (whose played basketball in Helen Keller Park and knew at least one of his assailants) and Hassan (who's son was a young Crip); (Exhibit 69.)

f. There is no description of a suspect vehicle which matches that of the vehicle at the Taylor and Hassan homes; (Exhibit 69.)

g. Unlike Michael Taylor, Teheran Jefferson was a large scale marijuana dealer and large quantities of the drug was found in his residence. (Exhibit 69.)

h. Although Mr. Jefferson was shot in the back of the head like the Taylor and Hassan victims, only Jefferson was gagged, as well as bound. A rag was forced into his mouth; (Exhibit 69.)

2. In spite of the prosecutor's assurances that petitioner and Mr. Ross would face charges for the Jefferson killing, they were never charged. A check with the Los Angeles Police Department Robbery/Homicide division revealed that the Jefferson case was "cleared other." Petitioner and Mr. Ross were listed as suspects. This occurred subsequent to petitioner and Mr. Ross' arrest. (Exhibit 72 -- Declaration Investigator Tom Lange) This practice generally occurs

when the district attorney believes that the suspects committed the crime -- because of a similar M.O. or circumstantial evidence — but the case did not meet certain filing criteria, such as sufficient evidence for prosecution or probability of conviction. This would seldom happen today and would probably be justified only where the suspects are deceased. (Exhibit 72.)

3. Prior to opening statements, defense counsel moved to exclude all evidence of the Jefferson killing. The prosecutor replied as follows:

> MR. SEMOW: The people's position is that it is relevant to show the guilt of both defendants and again particularly Champion's. That the Hassan murder was not an isolated incident but a part of a single ongoing conspiracy to commit robbery and murders of dope dealers in that neighborhood of which the Hassan murder was only one of the acts in furtherance thereof. This is particularly important because Mr. Champion is shown to have connections to this conspiracy beyond those connections tying him directly to the Hassan murders themselves. The initial act in this series is the Jefferson murder. (RT 1511.)

4. The prosecution went on to argue that the Jefferson murder was uniquely similar to the Hassan murders in the following respects: (1) there was no evidence of breaking and entering but the residences were ransacked; (2) Jefferson and one of the Hassan victims were found with their feet extended out away from the bed but their torsos were in a prone position on the bed; (3) both Jefferson and one of the Hassan victims had a pillow covering his head; (4) both were shot in the head; (5) both were shot with a .38 caliber revolver with a six left twist.[84] (RT 1511-1512.)

5. The prosecutor argued the importance of the Jefferson killing to his theory of knowledge. "I think the jury can fairly infer that if the Hassan murder is but one of a subsequent murder in a series that had already begun, that those persons involved in the Hassan murder, whether or not any of them were the actual trigger men, went into the house knowing that

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[84] As discussed above this is inaccurate or at least an overstatement of the evidence.

murders[85] had been committed pursuant to this plan before and would be committed again and therefore shared the requisite intent with the actual killer.... (RT 1512.) The prosecutor concluded that the Jefferson murder was necessary to establish the existence of the ongoing conspiracy as well as to establish the specific intent required for the special circumstance. (RT 1512.)

6. The prosecutor's conclusion above is an example of circuitous logic and the bootstrapping of inferences and circumstances which permeated petitioner's case. Here, no conspiracy was charged and there was no evidence tending to implicate either petitioner or Mr. Ross in the Jefferson murder. Thus, to justify the admission of evidence of the Jefferson killing, the prosecutor assumed the existence of the conspiracy in order to establish the Jefferson killing's relevance. The prosecutor then used the evidence of the Jefferson killing to prove the very conspiracy it assumed was in existence. Thus, evidence of the Jefferson killing was essential to the prosecution's case as there was no evidence of a conspiracy without it and no way to even arguably attribute the requisite homicidal intent to all four of the perpetrators of the Hassan burglary/robbery unless a related killing preceded the killing of Bobby and Eric Hassan.

7. Trial counsel failed to inform the trial court of the above-mentioned dissimilarities and to argue to the court that the prosecution had no evidence which tended to show participation by petitioner in the Jefferson murder.

8. To the extent that the prosecutor implied the existence of evidence which was relevant to show the guilt of petitioner, evidence which he knew he could not produce, his offer of proof

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[85] As only one murder allegedly tied to the purported conspiracy, i.e., the Jefferson murder, occurred prior to the Hassan killings the prosecutor either misspoke or intentionally misled the court as to the extent of murders this alleged conspiracy was party to.

was misleading at best, and, at worse, a blatant lie.[86] Trial counsel's failure to discover, produce evidence of, and argue the dissimilarities of the crimes and the lack of any tie between the Jefferson incident and petitioner was therefore ineffective assistance of counsel.

9. When asked trial counsel offered no tactical reason for failing to investigate the Jefferson crime. Trial counsel has no recollection of receiving the June 2, 1982 letter in which deputy district attorney Semow specifically informed Mr. Skyers that he intended to offer evidence of the Jefferson murder at both the guilt and penalty phases of the trial. (Exhibit 71.)[87] Trial counsel does admit that his handwriting is located on pages one and two of the letter. (Exhibit 47,

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[86] The prosecutor neglected to inform the trial court that there was no evidence connecting petitioner or Mr. Ross to the Jefferson murder. In a November 12, 1981 memorandum to his supervisors, Deputy District Attorney Semow recommended that no charges be filed against petitioner or Mr. Ross noting inter alia, that: "While proof that they murdered the Hassans logically proves that they murdered Jefferson as well, the reverse is not true *since there is no evidence connecting them directly to Jefferson.*" (Exhibit 73 — Bascue Memorandum, emphasis added.)

[87] In this letter Mr. Semow listed the Jefferson police reports as number 7. On page three of the letter he informed Mr. Skyers that this evidence would be admitted at both the guilt and penalty phases as follows:

> Please be advised that I intend to offer all relevant and admissible evidence at the guilt trial including ... item 7....At the penalty trial, I intend to offer... 7 as to both defendants.

71.)

10. Although trial counsel inexplicably did not realize that the Jefferson homicide was to be offered at the guilt phase, he was aware that the prosecutor intended to offer evidence of the crime as aggravation at the penalty phase. (Exhibit 71.) Even so, trial counsel did not investigate the crime at all. Trial counsel admits that he should have, at the very least, done some investigation of the Jefferson homicide between the guilt and penalty phases of the trial. He did none then or at any time before or during any phase of this case. (Exhibit 47.) Trial counsel has admitted that he did not do enough. (Exhibit 47.) Had trial counsel read and recalled the reports provided he would have seen two "Firearms and Explosive Analyzed Evidence" reports in which it was concluded that the coroner's bullets recovered from Bobby Hassan, Eric Hassan, and Teheran Jefferson "could have been fired from" the weapon recovered from Benjamin Brown a fact which, if presented to the jury, would have helped undermined the prosecutor's speculative efforts to connect petitioner to the Jefferson murder and to use the purported connection to show the requisite mens rea for capital murder, and further would have helped raise a reasonable doubt as to Mr. Champion's involvement in the Hassan crimes. (Exhibit 74 — Firearms and Explosive Analyzed Evidence reports.)

VIII. B Defense counsel provided constitutionally ineffective assistance in failing to object to introduction of the Jefferson crimes on grounds that the introduction of this other crimes evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101.

1. The prosecutor was allowed to introduce the Jefferson murder against petitioner to prove that petitioner was at the Hassan crime scene, harbored the necessary intent to kill the Hassans, was a man of bad character, and a man who had killed Jefferson.[88]

2. This Court held that "defendants never asserted at trial that admission of the evidence of Jefferson's killing violated Evidence Code sections 352 or 1101, or their right to due process of law, the grounds asserted on this appeal. We therefore will not consider these claims on appeal." (*People v. Champion, supra,* 9 Cal.4th at 918.) "Although counsel registered a timely objection to the admission of the exhibits relating to Jefferson's death, we question whether their objection to the testimony regarding his death was timely, because it was not made until long after the witnesses had testified." (*Id.* at 919.) "Defendants made no objection, after the jury heard the evidence relating to Jefferson's death, on the ground that the evidence was inconsistent with the prosecutor's offer of proof. They thus have not preserved the right to raise the issue on appeal." (*Ibid.*) Petitioner asserts that his counsel was ineffective. Had petitioner's counsel registered the above noted objections, the Jefferson murder would not have been introduced and the outcome of petitioner's case would have been different.

3. As discussed above, prior to opening statements, defense counsel moved to exclude all evidence of the Jefferson killing. The prosecutor replied that the Jefferson killing was relevant to

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[88] In his penalty phase closing argument, the prosecutor argued "If you found that defendants committed the Jefferson murder, or Champion committed the Taylor murder, obviously you must use that for what its worth and its worth a lot...." (RT 3706.)

show the guilt of both defendants, particularly petitioner.[89] The prosecutor also asserted that the Hassan murders was not an isolated incident, but part of an ongoing conspiracy to rob and murder of dope dealers. (RT 1511.)

4. The prosecution went on to argue that the Jefferson murder was uniquely similar to the Hassan murders. (RT 1511-1512.)

5. He also argued the importance of the Jefferson killing to his theory of knowledge. (RT 1512.)

6. Trial counsel failed to object to the introduction of the Jefferson crimes under Evidence Code section 1101, subdivision (b). Before evidence of an uncharged crime is admissible under subdivision (b) of California Evidence Code section 1101, certain foundational requirements must be met. First, the accused must be implicated in the charge under trial. Second, there must be proof that the accused was involved in the uncharged offense. Finally, there must be identity of person or crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, clearly connecting the accused, showing that the person who committed the one crime must have committed the other. (*People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Far more than superficial similarities must be present before uncharged crimes are admissible under this theory. (See generally, *People v. Rivera* (1985) 41 Cal.3d 388, 392.)

7. The introduction of crimes unconnected to any legitimate issue and relied upon to establish guilt by association and purported propensity deprives a defendant of a fair trial and due

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[89] The prosecutor must have been making reference to the relative weakness of his case against petitioner as compared to his case against Mr. Ross, as the duo's alleged participation in Jefferson would have been no more relevant to petitioner than to Ross.

process. (*Henry v. Estelle* (9th Cir. 1993) 993 F.2d 1423, 1427-1428.) Similarly, the admission of "other acts" evidence that is probative only of a murder defendant's alleged character deprives him of a fair trial in violation of the due process clause.(*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

8. Here, whatever superficial similarities there may have been between the crimes were far outnumbered by the dissimilarities between them -- as discussed fully in the claim above. Further, none of the similarities point to petitioner. Petitioner was not connected to the Jefferson killing by any evidence presented or any legitimate inference therefrom.

9. Trial counsel's failure to object on all available grounds was nonetheless prejudicial. The prosecutor relied on the Jefferson shooting to besmirch petitioner's character and to establish petitioner's guilt by association and alleged propensity. In his opening statement, the prosecutor argued that petitioner's case actually began one month before the date of any of the crimes charged, i.e., on November 15, 1980, the day Jefferson was killed. (RT 1522-1523.) At the penalty phase argument, the prosecutor claimed "If you found that the defendants committed the Jefferson murder...obviously you must use that for what it's worth and it's worth a lot." (RT 3706.) At guilt phase, "Now whether or not Mr. Ross or Mr. Champion were physically at the Teheran Jefferson murder, it is no doubt that they are part of the same criminal organization that committed this murder as well as the Hassan murders." (RT 3192.)

10. Moreover, the admission of evidence of the Jefferson murder increased the likelihood of confusing the issues which affected more than the guilt phase of the trial. Since the jury was instructed at penalty phase to consider "all of the evidence which has been received during any part of the trial in this case" (CT 793), it undoubtedly considered not only the evidence of the Jefferson

murder, but also the evidence of the Taylor murder with which only codefendant Mr. Ross was charged, in assessing whether petitioner should live or die, thus undermining petitioner's Eighth Amendment right to a reliable penalty verdict.

11. Trial counsel also failed to object to the admission of the Jefferson crimes on grounds that the evidence was more prejudicial than probative. Evidence Code section 352 provides for the exclusion of evidence on the ground that its probative value is outweighed by its prejudicial effect. Given that there was no direct or circumstantial evidence to connect petitioner or Ross — or anyone known to either of them — to the Jefferson killing, the evidence had no legitimate probative value. Nonetheless, given the inflammatory nature of the evidence and the prosecutor's apparent willingness to exploit it to show guilt by propensity and association, there was a clear danger that the evidence would improperly influence the jury's verdicts as to guilt, special circumstance liability, and penalty. Had a timely section 352 objection been made, the objection would have been meritorious and would likely have been granted.

12. There was no tactical reason for defense counsel not to have objected to the admission of the Jefferson killing under the specific grounds of violating Evidence Code section 352 or 1101, or petitioner's right to due process of law. Counsel has declared that he believed his blanket object to the introduction of evidence of the Jefferson crimes was sufficiently specific. Counsel's failure to object under specific grounds alleged above was therefore a violation of petitioner's Sixth Amendment right to effective assistance of counsel. This failure fell below an objective standard of reasonableness under prevailing professional norms, and had counsel appropriately objected, the evidence would have been excluded. The Jefferson evidence was used by the prosecution to prove that petitioner had murdered before and therefore murdered again, and to provide a key part

of the prosecution case that petitioner harbored the intent to murder the Hassans when he entered their home. Without this evidence, petitioner would not have been convicted of first degree murder with special circumstances. Accordingly the evidence infected both the guilt and penalty phases of petitioner's trial. But for trial counsel's failure in this regard, a reasonable probability exists that the result of the guilt and/or penalty phase would have been more favorable to petitioner.

VIII. C. Trial counsel was ineffective in failing to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof.

1. After the evidence of the Jefferson crime had been presented, trial counsel was ineffective for failing to ask the trial court to reconsider the admissibility of the Jefferson evidence on the ground that the evidence did not conform to the prosecutor's offer of proof.

2. This Court noted "Although counsel registered a timely objection to the admission of the exhibits relating to Jefferson's death, we question whether their objection to the testimony regarding his death was timely, because it was not made until long after the witnesses had testified....Defendants made no objection, after the jury heard the evidence relating to Jefferson's death, on the ground that the evidence was inconsistent with the prosecutor's offer of proof. They thus have not preserved the right to raise the issue on appeal." (*People v. Champion, supra,* 9 Cal.4th at 919.)

3. There was no tactical reason for defense counsel not to have objected to the admission of the Jefferson killing under the specific grounds of not conforming to offer of proof. As stated above, counsel believed his blanket object to the introduction of evidence of the Jefferson crimes was sufficiently specific. (Exhibit 47.) Counsel's failure to object under specific grounds alleged above was therefore a violation of petitioner's Sixth Amendment right to effective assistance of counsel. This failure fell below an objective standard of reasonableness under prevailing professional norms, and had counsel appropriately objected, the evidence would have been excluded. But for trial counsel's failure in this regard, a reasonable probability exists that the result of the guilt and/or penalty phase would have been more favorable to petitioner.

VIII. D. Trial counsel was ineffective in failing to object to the prosecution's conspiracy evidence and argument.

1. During the trial, the prosecutor repeatedly argued to the jury that the Jefferson murder and the Hassan murders were similar, and urged that they were part of an ongoing conspiracy. (RT 3152-3156; 3159-3161; 3193-3196.) Petitioner submits that the prosecution's unfounded conspiracy theory was so pervasive and prejudicial as to constitute plain error, particularly since the uncharged murders were used as the sole "proof" of petitioner's intent to kill the Hassans.

2. Improper prosecutorial argument of an uncharged offense is cognizable on habeas review. (*Hamilton v. Nix* (8th Cir. 1987) 809 F.2d 463, 469-470.) "[T]he petitioner must show that there is a reasonable possibility that the error complained of affected the outcome of the trial--i.e., that absent the alleged impropriety the verdict probably would have been different. (*Id.* at 470; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431.)

3. That it is improper to argue a conspiracy when none is in evidence is well established. A defendant should be tried for what he is charged with. (See *Kotteakos v. United States* (1946) 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557.) Further, where there is no evidence of conspiracy, an uncharged conspiracy may not be relied on even where there is some evidence to support it. (*Id.*)

4. Here, there was no evidence of a conspiracy. Nonetheless, the prosecutor argued as follows:

> Now whether or not Mr. Mr. Ross or Mr. Champion were actually physically present at the Teheran Jefferson murder, it is no doubt that they are part of the same criminal organization that committed this murder as well as the Hassan murders. (RT 3192.)

5. With respect to this issue, this Court opined, "Defendants . . . complain that the

prosecutor was guilty of misconduct because, throughout the trial, he asserted that the December 12, 1980, murders of Bobby and Eric Hassan and the December 15, 1980, murder of Teheran Jefferson were part of an ongoing conspiracy involving defendants and other members of the Raymond Avenue Crips gang . . . . [D]efendants have not preserved their right to raise the issue on appeal, because they failed to object to the prosecutor's comments at trial." (*People v. Champion, supra,* 9 Cal.4th at 931.)

6. Petitioner asserts that a reasonably competent trial counsel would have objected to this evidence and the prosecutor's arguments. Had trial counsel properly objected, the court would have sustained the objection. The result of counsel's deficiencies was to allow the state to unreliably prove and argue that petitioner participated in a conspiracy to kill drug dealers, which was the linchpin of their case to prove petitioner's participation and intent.

7. Trial counsel had no rational, tactical reason for failing to object to this conspiracy evidence and argument. When asked, trial counsel recalled that because a conspiracy was not charged he was not concerned that the prosecutor might argue one existed. It was not until the court permitted evidence of the Jefferson crime to be admitted that Mr. Skyers recalled being put on notice that a conspiracy theory was being relied on by the prosecutor. Even at that point, Mr. Skyers did not object and can offer no tactical reason for this omission other than his belief that his objection to introduction of the Jefferson crimes was sufficient object for all purposes.

8. Trial counsel should have been on notice that the prosecutor would attempt to implicate petitioner by asserting a conspiracy theory. As early as June 16, 1981, the prosecution informed the defense that it believed that there was a "strong factual connection" between the Hassan killings and the Taylor killing. At this hearing the prosecutor voiced his intention to move to

consolidate petitioner's case with that of Evan Jerome Mallet. In July, the court ruled, preliminarily, that evidence of gang membership and petitioner's affiliation with specific alleged Raymond Avenue Crips would be permitted so long as it was relevancy to the theory of the case. Petitioner's counsel at this time was Homer Mason. (RT 21a-22a; 29a, 37a-38a.) On August 4, 1981, the prosecutor' s motion to consolidate Mallet and petitioner's cases was denied. (RT 54a-56a.) On August 10, 1981, the prosecutor explained that the decision to seek the death penalty against petitioner was that the four murders — the two Hassan, the Taylor, and the Jefferson murder — were all connected. (RT 60a.) During a suppression motion there was extensive testimony that petitioner was involved with the Raymond Street Crips, and individually with Evan Mallet, Craig Mr. Ross, and Marcus Player. On August 21, 1980, Deputy Paul Bradley testified that he formed the opinion that petitioner was involved in the Taylor homicide because of his association with Mallet, Player, and Mr. Ross. (RT 63a, 90a-91a.) On February 16, 1982, petitioner's case was consolidated with that of Craig Ross. (RT 280a-283a.)

9. Trial counsel was on actual knowledge as of September 28, 1982, when the specifically argued that the case was "a series of crimes committed by the Raymond Crypts." (RT 1502.)

> MR. SEMOW: Mr. Champion was actually determined to be a suspect well before he was ever identified by Mrs. Ms. Moncrief by virtue of the fact that he is the only member of that same circle of Raymond Crypts who has both a scar on his nose and a deformity of the front teeth, and it is by deductive logic that he was determined to have been one of the killers....(RT 1502-1503.)[90]

10. Moreover, the transcripts in the Mallet case were available to trial counsel. As described above, Evan Mallet was tried separately with the Taylor crimes. The trial proceedings in

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[90] It was at this same hearing that the prosecutor uttered the word "conspiracy." (RT 1511.)

his case occurred generally from May, 1981 through October 1981. In September of 1981, Mallet's defense attorney Charles Gessler moved to preclude the prosecuting district attorney, Paul Marin, from offering any witness identification of Craig Mr. Ross as a perpetrator in the Taylor crimes. (Exhibit 75 -- Mallet RT 148-157.) The prosecutor argued that the relevance of witness testimony of Mr. Ross' participation in the crime was that an identification of Mr. Ross, coupled with his palm print at the scene, and his known association with Mallet, logically demonstrated the reliability of any identification of Mallet as a perpetrator. (Exhibit 75 at 152-153.) The prosecutor informed the court that he intended to bring in numerous witnesses who could testify as to the association between Mr. Ross and Mallet. (Exhibit 75 at 153.) The court found that this association would only be relevant if it shortly proceeded or followed the commission of the crimes. (Exhibit 75 at 154-155.)

11. Moreover, dealing specifically with the question of gang association, the trial court prohibited the prosecution from presenting any evidence of gang affiliation by Mallet. (Exhibit 75 at 207-208.)

12. At no time did the Mallet prosecuting attorney argue to the court that the Taylor crimes were part of an ongoing conspiracy to rob and kill drug dealers. No gang evidence was introduced against Mallet. No association with other Raymond Street Crips was put into evidence. In fact, no mention of either the Hassan or Jefferson crimes was made. The theory of the Taylor crimes was a simple robbery-murder.

13. As noted above/below, the prosecution theory of the Taylor murder in the Mallet trial was that it was merely a robbery-murder. The prosecution did not attempt to introduce evidence of a Raymond Street Crip plan to kill drug dealers. In fact no reference to gang involvement or

association was relied on to establish motive or intent.[91] [92]

14. Mr. Semow's representation to the trial court as to the motive of these crimes was, at best, disingenuous, and petitioner herein argues, actually fraudulent.

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[91]The Mallet prosecutor was permitted to show that Mallet and Mr. Ross were associates. (Mallet RT 923-927.)

[92] When the prosecution attempted to show Mallet and Mr. Ross had a common relationship to a gang, the trial court responded that gang membership was completely irrelevant, it had relationship to the case and that the prosecution's theory of the case was a simple robbery-murder not a gang killing. (Exhibit 75 at 1150- 1152.)