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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

STEVE ALLEN CHAMPION,

On Habeas Corpus.

S065575

INFORMAL RESPONSE

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DEATH PENALTY

Table of Contents

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Authorities

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Constitutional Provisions

Statutes

Table of Authorities, cont'd

Court Rules

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **STEVE ALLEN CHAMPION,** On Habeas Corpus.	S065575

INTRODUCTION

Sixteen years ago, on October 19, 1982, following a jury trial, petitioner and his codefendant Craig Ross were convicted of the first degree murders of Bobby Hassan and his 14-year-old son Eric.[1/] The jury also convicted petitioner of two counts of robbery and one count of burglary. Allegations that a principle was armed with a firearm were found true. The jury also found true three special circumstances making petitioner death-eligible: (1) that there was a multiple murder; (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed during the commission of a burglary. (CT 780-782.) On October 27, 1982, following a penalty trial, the jury fixed petitioner's sentence at death. (CT 798.)

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1. Ross also was convicted of numerous offenses, which were committed on December 27, 1980, at the apartment of Michael Taylor, and for which he was sentenced to death. Petitioner was neither charged nor convicted of any of the crimes committed at the Taylor apartment. (See *People* v. *Champion* (1995) 9 Cal.4th 879, 900-901.) Ross does not have any action currently before this Court.

On or about January 27, 1986, petitioner filed his opening brief on automatic appeal. Thereafter, on September 10, 1986, petitioner filed a petition for writ of habeas corpus, wherein he argued only that he was denied effective assistance of counsel for his trial counsel's failure to secure a ruling on a pretrial motion regarding the death qualification of jury voir dire. In connection with his appeal, petitioner subsequently filed a supplemental opening brief, a reply brief, and a supplemental reply brief.[2/]

On April 6, 1995, this Court issued its opinion in the automatic appeal. (*People* v. *Champion, supra,* 9 Cal.4th at p. 879.) This Court ordered that one of petitioner's two multiple-murder special circumstances be stricken as duplicative. (*Id.*, at pp. 9435-936.) In all other respects, the judgment, including the death sentence, was affirmed. (*Id.*, at p. 952.) One month later, this Court denied petitioner's petition for writ of habeas corpus.

Two years later, on April 21, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court, Central District of California. The petition consisted of 139 pages raising 27 claims. Respondent filed a motion to dismiss the habeas petition. On September 8, 1997, the district court heard the motion to dismiss and found it could not entertain the petition because it contained unexhausted claims. On that basis, the district court issued an order holding the federal proceedings in abeyance while petitioner returned

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2. Petitioner also joined in the arguments raised by codefendant Ross on appeal. Respondent asks this Court to take judicial notice of its own records, including all documents petitioner, respondent, and Craig Ross filed in the course of the automatic appeal and previous habeas corpus proceeding. (Evid. Code, § 452; see *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

to state court to exhaust his remedies. Petitioner was ordered to file his state habeas petition within 60 days of the court's order.

On November 5, 1997, petitioner filed the instant petition for writ of habeas corpus. On November 7, 1997, this Court requested respondent to file an informal response to the petition, pursuant to rule 60 of the California Rules of Court.

ARGUMENT

I.
APPLICABLE PRINCIPLES OF LAW

In response to this Court's request for an informal response under rule 60 of the California Rules of Court, respondent initially sets forth the applicable principles of law so as to avoid unnecessary repetition of these principles when discussing the separate claims raised in the petition. It is respondent's position that nearly all of the petitioner's claims are subject to one or more of the procedural bars discussed below. Respondent further submits petitioner has failed to establish a prima facie case for relief in each and every one of his claims.

A. Unjustifiable Delay

Unjustified delay precludes consideration of a habeas petition on its merits. Delay may occur under two circumstances: (1) where there is substantial delay in presenting a claim regardless of the existence of any prior habeas attacks on the judgment (*In re Clark, supra,* 5 Cal.4th at pp. 782-787); and (2) where the petition amounts to a successive petition which raises additional claims that could have been presented in an earlier attack on the judgment (*id.*, at p. 769-770, citing *In re Horowitz* (1949) 33 Cal.2d 534, 546-547). "A successive petition presenting additional claims that could have been raised in an earlier attack on the judgment is, of necessity, a delayed petition." (*Id.*, at p. 770.)[3/]

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3. Recently, this Court has stated that it would not apply the

This Court has historically required a petitioner to justify substantial delay in presenting claims via habeas corpus petitions. (*In re Wells* (1967) 67 Cal.2d 873, 875; *In re Shipp* (1965) 62 Cal.2d 547, 553; *In re Swain* (1949) 34 Cal.2d 300, 304.) Indeed, in *In re Clark*, *supra*, this Court recognized the significance of its prior decisions in *In re Stankewitz* (1985) 40 Cal.3d 391, and *People* v. *Jackson* (1973) 10 Cal.3d 265, by noting:

> "Even before June 1989 [the date this Court issued policies governing timeliness of capital petitions], a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified." (*In re Clark*, *supra*, 5 Cal.4th at p. 782, citing *In re Stankewitz*, *supra*, 40 Cal.3d at p. 396, fn. 1 and *People* v. *Jackson*, *supra*, 10 Cal.3d at p. 268.)

In June, 1989, this Court published timeliness standards for habeas corpus petitions filed in capital cases. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3 [hereinafter "Policies"], stds. 1-1.1 to 1-3.) A petitioner's failure to comply with the timeliness policies permits this Court to deny the petition as untimely. (Policies, std. 1-3.)

The Policies impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus. (Policies, std. 1-1.)

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successive petition bar to cases where the prior habeas corpus petitions were filed prior to the decision in *In re Clark*. (*In re Robbins* (1998) 18 Cal.4th 770, 788, fn. 9.) Petitioner's prior habeas petition predates *Clark*, and respondent therefore will not assert a successive petition bar.

"This duty requires that counsel (i) conduct a follow-up investigation concerning specific triggering facts that come to counsel's attention in the course of, among other things, reviewing the reporter's and clerk's transcripts, reviewing trial counsel's existing files, preparing or reviewing the appellate briefs, and interviewing the client or trial counsel, and (ii) timely present to this court any resulting potentially meritorious habeas corpus claims. Counsel is not expected to conduct an unfocused investigation grounded on mere speculation or hunch, without any basis in triggering fact." (*In re Robbins, supra*, 18 Cal.4th at p. 781.)

The Policies also provide that a habeas petition filed in a capital case is presumptively timely if it is filed within 90 days of the final due date for the reply brief on the direct appeal. (Policies, std. 1-1.1.) A habeas petition filed more than 90 days after the reply brief is due, however, is not entitled to such a presumption. (*In re Robbins, supra,* 18 Cal.4th at p. 780.)

"In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.

"Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither

was known, nor reasonably should have been known at any earlier time.[4/] It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive postconviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of establishing, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay." (*People* v. *Robbins, supra,* 18 Cal.4th at p. 780.)

B. Justification For Delayed Petitions

If there exists substantial delay in presentation of a claim, or of part of a claim, it will nevertheless be considered on the merits if petitioner can demonstrate good cause for the delay. (*Id.*, at p. 780.)

"Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims, but good cause is not established by prior counsel's asserted uncertainty about

4. Such information should be "clearly present *in the petition.*" (*In re Robbins, supra,* 18 Cal.4th at p. 799, fn. 21, emphasis in original.) Moreover, petitioner should attach declarations to support the absence of substantial delay. (*Id.*, at p. 795, fn. 16.) The instant petition contains no declarations in support of the absence of substantial delay.

his or her duty to conduct a habeas corpus investigation and to file an appropriate habeas corpus petition." (*Ibid.*)

In assessing a petitioner's explanation and justification for delayed presentations of claims, the court also will consider whether the facts on which the claim is based, although recently discovered, could and should have been discovered earlier. (*In re Clark, supra,* 5 Cal.4th at p. 775.) In other words, a petitioner must explicitly

> "'show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.'" (*Id.*, at p. 779, quoting *People* v. *Shipman* (1965) 62 Cal.2d 226, 230.)

If the petitioner does not allege with specificity when he or she became aware of the factual and legal bases for his claims,

> "it is impossible to determine whether the claims are raised within a reasonable time after petitioner or counsel became aware of the factual and legal bases for his claims." (*Id.*, at p. 786.)

The burden to justify a delay is not met by an assertion of counsel that he or she did not represent the petitioner earlier. (*Id.*, at p. 765.)

> "Were the rule otherwise, the potential for abuse of the writ would be magnified as counsel withdrew or are substituted and each successor attorney claims that a petition was filed as soon as the successor attorney became aware of the new basis seeking relief." (*Id.*, at p. 765, fn. 6.)

In very limited circumstances, consideration may be given to a claim that prior habeas counsel did not competently represent

petitioner. (*Id.*, at p. 780; but see *In re Robbins, supra,*.18 Cal.4th at p. 809.)

> "However, if the petitioner is aware of facts that may be a basis for collateral attack, and of their potential significance, he may not fault counsel for failing to pursue that theory of relief if the petitioner failed to advise counsel of those facts." (*Ibid.*)

C. Exception To Procedural Bars Resulting From Delay

A claim that is substantially delayed without good cause nevertheless will be entertained on the merits if the petitioner demonstrates:

> "(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute." (*In re Robbins, supra,* 18 Cal.4th at pp. 780-781.)

In order for the claim to fall within exception (ii), the evidence must "'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" (*In re Clark, supra,* 5 Cal.4th at pp. 797-798, fns. 32 & 33, quoting *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1246.) Evidence that is relevant only to an issue already disputed at

trial, which does no more than conflict with trial evidence, does not constitute "new evidence" that fundamentally undermines the judgment. (*Id.*, at p. 798, fn. 33.)

With regard to the parameters of exception (ii),

> "the petitioner . . . bear[s] a heavy burden of satisfying the court that the evidence of innocence could not have been and presently cannot be refuted." (*Id.*, at p. 798, fn. 33.)

As to exception (iii),

> "a 'grossly misleading profile' is not one which simply fails to alert the jury to some potentially mitigating evidence. The picture of the defendant painted by the evidence at trial must differ so greatly from his or her actual characteristics that the court is satisfied that no reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*Id.*, at p. 798, fn. 34.)

D. The Procedural Bars of *Waltreus* and *Dixon*

Aside from the procedural bar against unjustifiably delayed petitions, there are other procedural bars generally applied to defective petitions for writ of habeas corpus. For example, the *Waltreus* rule provides that issues will not be reconsidered on habeas corpus once having been raised and rejected on direct appeal, in the absence of strong justification for the issue's renewal on habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 825, 829; *In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Courts must presume that a litigant received sufficient review of his or her legal claims, both

constitutional and otherwise, on direct appeal. (*In re Harris*, *supra*, 5 Cal.4th at p. 834.)

In re Harris identified the following exceptions to the *Waltreus* rule: (1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris*, *supra*, 5 Cal.4th at p. 834); (2) "A judgment rendered by a court wholly lacking jurisdiction may be challenged at any time" (*id.*, at p. 836); (3) "any error of sufficient magnitude that the trial court may be said to have acted *in excess of jurisdiction*," such as an illegal or unauthorized sentence, "provided a redetermination of the facts underlying the claim is unnecessary" (*id.*, at pp. 838-841, emphasis added); and (4) "when there has been a change in the law affecting the petitioner" (*id.*, at p. 841).

The *Dixon* rule commands that, in the absence of special circumstances excusing the failure to employ the appellate remedy,

> "the writ will not lie where the claimed errors *could have been, but were not*, raised upon a timely appeal from a judgment of conviction." (*In re Harris*, *supra*, 5 Cal.4th at p. 829, emphasis added; *In re Clark*, *supra*, 5 Cal.4th at p. 765; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Thus, absent strong justification, issues that could be raised on appeal must initially be so presented. (*In re Harris*, *supra*, 5 Cal.4th at p. 829.) This rule, of course, does not apply to issues that are based on matters outside the appellate record (*id.*, at p. 828, fn. 7) and appears to be subject to basically the same exceptions as the *Waltreus* rule. (*Id.*, at p. 825, fn. 3.)

E. Failure To Object

As to those claims which are appellate in nature, because they are based on matters solely within the appellate record, many may be precluded from review by this Court for the additional reason that the petitioner failed to object at trial. The Legislature intends the direct appeal to be the normal avenue of relief for criminal defendants unjustly incarcerated by events occurring on the record at trial. (*In re Harris, supra*, 5 Cal.4th at pp. 827-828, fn. 7.) The Legislature, as does this Court, also intends most errors occurring at trial to be brought to the immediate attention of the trial court so that they can be corrected or avoided. (Evid. Code, §§ 353, 354; Pen. Code, § 1259; *People* v. *Saunders* (1993) 5 Cal.4th 580, 589-590; *People* v. *Green* (1980) 27 Cal.3d 1, 27-34.) Allowing a criminal defendant to raise a claim of unpreserved trial error for the first time in a petition for writ of habeas corpus would have the unwanted effect of discouraging the defendant both from objecting at the appropriate time at trial and from using the appellate process. Such discouragement serves no legitimate criminal justice purpose. Thus, failure to object at trial bars relief.

F. Rules Governing The Merits Of The Habeas Corpus Petition

A "petitioner bears a heavy burden initially to plead sufficient grounds for relief, and later to prove them." (*People* v. *Duvall* (1995) 9 Cal.4th 464, 474.) To satisfy this initial burden of pleading adequate grounds for relief, the petition must "state fully and with particularity the facts on which relief is sought" *and* it should "include copies of reasonably available documentary evidence supporting the claim." (*Ibid.*)

Notice pleading is insufficient to establish grounds for issuance of the writ or an order to show cause.

> "'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing,'" since we must "presume the regularity of proceedings that resulted in a final judgment." (*Ibid.*, quoting *People* v. *Karis* (1988) 46 Cal.3d 612, 656.)

Likewise, the claims must be supported by something more than speculation. (*People* v. *Karis*, *supra*, 46 Cal.3d at p. 656.)

Thus, a reviewing court must ask "whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475.) "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 p. 781.) In contrast, an order to show cause may be issued when the reviewing court makes a preliminary determination that, if true, the petition's specific factual allegations state a prima facie case for relief. (See, e.g., *In re Visciotti* (1996) 14 Cal.4th 325, 334.)[5/]

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5. In addition to relying on the facts set forth in the petition, petitioner suggests as to many of his claims that there may be other facts yet to be developed in support of the claim. Regardless of the existence of such other facts, the petition is to be determined solely by what is actually before the Court. (*In re Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16.) A petitioner is not justified in "believing that the court will routinely delay action on a filed petition to permit amendment and supplementation of the petition." (*Id.*, at p. 781, fn. omitted.) This is because summary disposition of the habeas corpus petition is the rule when the petition does not state a prima facie case for relief. (*Ibid.*)

Thus, petitioner's repeated references to other facts which may be discovered do not constitute a reservation of a right to supplement or amend the petition. This Court determines the appropriate disposition of a petition based solely upon the allegations of the

G. Ineffective Assistance Of Counsel

With respect to ineffective assistance of counsel claims, the allegations must be supported by something more than speculation. (*Karis*, *supra*, 46 Cal.3d at p. 656.) This means the petition must address the issues of counsel's ineffectiveness by providing, or explaining the failure to provide, a declaration from trial counsel disclosing trial counsel's reasons for acting or failing to act in the manner complained of. (See *Duvall*, *supra*, 9 Cal.4th at p. 474; and see *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) A petitioner must establish trial counsel knew or should have known that further investigation was necessary, the nature and relevance of the evidence that counsel failed to present or discover, and prejudice as a "demonstrable reality." (*In re Clark*, *supra*, 5 Cal.4th at p. 766.) Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had counsel acted competently and if the incompetence resulted in a fundamentally unfair proceeding or an unreliable verdict. (*In re Visciotti*, *supra*, 14 Cal.4th at p. 352; *In re Clark*, *supra*, 5 Cal.4th at p. 766; see also *Lockhart* v. *Fretwell* (1993) 506 U.S. 364, 372.)

However, counsel is not required to investigate all prospective witnesses. (*People* v. *Jackson* (1980) 28 Cal.3d 264, 289, citing *People* v. *Floyd* (1970) 1 Cal.3d 694, 710.) Counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances,

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Thus, petitioner's repeated references to other facts which may be discovered do not constitute a reservation of a right to supplement or amend the petition. This Court determines the appropriate disposition of a petition based solely upon the allegations of the petition as originally filed along with any amended or supplemental petition for which leave to file has been granted. (*In re Clark*, *supra*, at p. 781, fn. 16.)

applying a heavy measure of deference to counsel's judgments. . . . " (*Strickland* v. *Washington* (1984) 466 U.S. 668, 691; see also *Babbitt* v. *Calderon* (9th Cir. 1998) 151 F.3d 1170, 1173-1174.)

> "In evaluating defendant's showing we accord great deference to the tactical decisions of trial counsel in order to avoid second guessing counsel's tactics and chilling vigorous advocacy by tempting counsel to defend himself against a claim of ineffective assistance after trial rather than to defend his client against criminal charges at trial . . . ." (*People* v. *Padilla* (1995) 11 Cal.4th 891, 936, overruled on other grounds by *People* v. *Hill* (1998) 17 Cal.4th 800, quoting *In re Fields* (1990) 51 Cal.3d 1063, 1069-1070; internal quotation marks omitted.)

II.

THE INSTANT PETITION SHOULD BE REJECTED ON TIMELINESS GROUNDS BECAUSE PETITIONER HAS FAILED TO SHOW THE ABSENCE OF SUBSTANTIAL DELAY REGARDING THE FILING OF THE INSTANT PETITION; MOREOVER, PETITIONER'S EFFORTS TO EXPLAIN AND JUSTIFY HIS DELAYED PRESENTATION OF THE INSTANT CLAIMS ARE INADEQUATE TO WARRANT CONSIDERATION OF THE CLAIMS ON THEIR MERITS

Petitioner devotes 13 pages of his 280-page petition to the issue of untimeliness. (Pet. 4-16.) His justification for delay is inadequate and he has not demonstrated the claims in the petition fall within the exceptions to the rule barring consideration of untimely habeas corpus petitions.

On August 15, 1986, petitioner filed his reply brief, and on September 10, 1986, petitioner filed a petition for writ of habeas corpus. In that petition, petitioner argued only that he was denied effective assistance of counsel for his trial counsel's failure to secure a ruling on a pretrial motion regarding the death qualification of jury voir dire. In connection with his appeal, petitioner subsequently filed a supplemental opening brief on May 18, 1994, and a supplemental reply brief on June 17, 1994.

On April 6, 1995, this Court issued its opinion in the automatic appeal from this judgment of death. (*People* v. *Champion, supra,* 9 Cal.4th at p. 879.) One month later, on May 31, 1995, this Court denied petitioner's petition for writ of habeas corpus.

A. The Petition Is Untimely Due To Unjustified Delay

It is first clear petitioner's instant petition is substantially delayed under the Policies adopted by this Court. The instant petition was filed on November 5, 1997 -- more than 11 years after the due date of the initial reply brief in Champion, and more than 3 years after the due date of the supplemental reply brief.[7/] These time frames far exceed the window-period of opportunity for which this Court deems the habeas corpus petition to be presumptively timely. (Policies 1-1.1.) This Court has expressly held that, for the most part, the Policies apply to all capital appeals, even those arising before the Policies were adopted. (*In re Clark, supra*, 5 Cal.4th at p. 785.) This Court will apply the Policies to all capital petitioners with the exception of Policies, standard 1-1 which places an "obligation [on counsel] to investigate possible claims" because this requirement was "created only by the Policies . . . ." (*Ibid.*) Thus, "claims that were discovered only as a result of investigation commenced promptly after June 6, 1989, the date on which the Policies became effective, will be deemed timely if presented promptly after counsel became aware of them." (*Ibid.*)

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7. Respondent acknowledges that petitioner did file a state habeas petition on September 10, 1986, 26 days after he filed his initial reply brief. However, since it only raised one very specific issue relating to the effectiveness of his trial counsel in light of counsel's failure to secure a ruling on a pretrial motion regarding the death qualification of jury voir dire, it is not material to the claims raised in the instant petition. It does, however, indicate counsel's awareness that a habeas petition be timely filed as to any meritorious claims.

1. Timeliness Presumption

As discussed in section I, *supra*, a habeas petition that is filed within 90 days of the final due date for the reply brief on direct appeal is presumptively timely. (Policies, std. 1-1.1.) The instant petition is not presumptively timely because it was not filed promptly after June 6, 1989,[8] nor was it filed 90 days after the final due date of the supplemental reply brief (June 17, 1994) filed in petitioner's direct appeal. It therefore becomes necessary to consider whether petitioner has demonstrated the absence of substantial delay, good cause for the delay, or that the claims fall within an exception to the timeliness bar. As will be discussed below, petitioner has not defeated the timeliness bar.

2. Absence Of Substantial Delay

Petitioner filed the instant petition over 3074 days after the effective date of the Policies. Petitioner has not alleged with specificity *when* he became aware of the factual and legal bases of the claims he now raises. (*In re Robbins, supra,* 18 Cal.4th at p. 780; *In re Clark, supra*, 5 Cal.4th at p. 786.) Nor has petitioner alleged with specificity that the information neither was known or reasonably should have been known, at any earlier time. (*Ibid.*) Petitioner makes no attempt to specify any dates when any information became "known" with three exceptions: (1) he alleges he could not "obtain the [mental health]

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8. Since 90-days from the filing of petitioner's reply brief would have predated the effective date of the Policies, petitioner was required to file his petition promptly after June 6, 1989, effective date. (*In re Robbins, supra,* 18 Cal.4th at p. 781.)

expert declarations until October 1997" (Petn. 13); (2) he could not "obtain a declaration from [Wayne] Harris" until October of 1997 (Petn. 17); and (3) he was unable to obtain declarations from Walter Winbush, Karl Owens, and Earl Bogans until September 1997 (Petn. 13). It is significant to note that the mental health experts' declarations only are pertinent to Claim VII, subclaim G, and to Claim IX, subclaim C. Likewise, Wayne Harris' and Earl Bogans' declarations only are arguably relevant to Claim VI, subclaim A. Walter Winbush's declaration is only arguably relevant to Claim VII, subclaim A, and Karl Owens' declaration is only arguably relevant to Claim VI, subclaim G.

As to every other claim and subclaim, petitioner makes absolutely no mention of any dates corresponding to the discovery of both the alleged factual and legal bases of his claims. Therefore, aside from the three exceptions discussed above, it is impossible to determine whether the claims are raised within a reasonable time after petitioner or counsel became aware of the factual and legal bases for his claims.

Furthermore, petitioner confuses the date upon which he knew, or reasonably should have known, of the facts and legal bases supporting the claims with the date that he in fact obtained declarations allegedly supporting his claims. This Court stated in *In re Clark*, and again made clear in *In re Robbins*, that counsel's duty to present claims in a habeas petition arises when counsel becomes "aware" of "triggering information" that would lead a reasonable attorney to initiate an investigation. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra*, 5 Cal.4th at pp. 799-800.) While counsel is not expected to conduct an unfocused investigation, counsel also is not allowed to stand by until he or she happens to discover facts confirming

a claim; rather, the standard requires counsel to act on "triggering information." (*Ibid.*)

Here, it is evident that, as to many of the claims, the triggering information was available long before petitioner filed the instant petition, and petitioner's counsel waited to develop and present facts confirming petitioner's claims based on the triggering facts .[9/] To the extent that petitioner asserts his trial counsel's alleged errors and omissions denied him effective assistance of counsel, his argument presupposes that the facts upon which petitioner now relies could, and should, have been known to him prior to, or at the time of trial. Likewise, petitioner made many evidentiary challenges in his direct appeal and only now claims that his counsel was ineffective for not objecting to such evidence. Certainly, the "triggering facts" giving rise to the ineffectiveness claims coincided with the evidentiary claims and should have been raised in petitioner's direct appeal, or in a habeas corpus petition filed shortly thereafter.[10/] The foregoing makes clear,

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9. For example, petitioner asserts that it was not until October 1997 when he was able to locate, interview, and obtain a declaration from 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." (Petn. 13.) However, it is clear that the "triggering fact" for this claim was not Harris' declaration, but the police reports suggesting Harris could confirm that petitioner was not involved in the Taylor crimes. Inasmuch as petitioner appears to concede that the report was turned over to trial counsel and, further, that trial counsel's file, including the police report, was in prior appellate and habeas counsel's possession, it appears that the "triggering fact" has been known to trial counsel and all prior appellate counsel before this Court.

10. Respondent recognizes that, subsequent to this Court's decision in *In re Robbins*, this Court will not apply the bars of *In re Waltreus, supra,* 62 Cal.2d at p. 225, and *In re Dixon, supra,* 41 Cal.2d at p. 759, to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely on the appellate record. (*In re*

petitioner has failed to establish the absence of substantial delay in filing the instant petition.

3. Good Cause For The Delay

Petitioner's justifications for the delay are equally unpersuasive. Petitioner first claims that any delay resulted from this "Court's unavoidable delay in providing petitioner with habeas counsel." (Petn. 14.) By couching this justification in terms of this Court's failure to appoint "habeas" counsel, petitioner really is arguing that current counsel is presenting the claims here at her earliest opportunity and that she is not responsible for previous counsel's omissions. This clearly is an inadequate justification. (*In re Clark, supra*, 5 Cal.4th at p. 765 & fn.6.)

Moreover, this Court did *not* "delay in providing petitioner with habeas counsel." Petitioner was provided with appellate counsel, R. Charles Johnson, who was free to file a habeas petition of petitioner's behalf, *and did so in August of 1986*. Additionally, after June 6, 1989, the Policies imposed a duty to investigate potentially meritorious claims. Counsel accepted that duty, but nonetheless moved this Court, in September of 1989, for appointment of *second* counsel to "investigate and pursue potential habeas corpus issues." (Petn. 5.) This Court tentatively granted that request for second counsel on March 1, 1990. (*Ibid.*) However, petitioner's counsel waited nearly two and a half years, until August 20, 1992, to write to this Court to again request appointment of such counsel. Such delay is more appropriately

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Robbins, supra, 18 Cal.4th at p. 814, fn. 34.) Nevertheless, respondent urges that such facts should still be considered in assessing the timeliness of the claims in general.

attributed to petitioner's counsel and not to this Court, and therefore does not establish good cause for the delay.

Petitioner next argues that when second counsel James Merwin was finally appointed on September 22, 1992, the exploration of potential habeas issues was hampered by San Quentin's unwillingness to allow counsel to have confidential meetings with petitioner.[11] (Petn. 6.) However, although petitioner may not have been allowed "contact visits" with his habeas counsel, petitioner was permitted to, and did, have non-contact visits with his former habeas attorney at San Quentin. (Vol.1 Guilt Exhibit 6 at p. 9.)

More to the point, however, the petition does not allege as to any claim that petitioner possessed "triggering information" that could only be obtained by his counsel through "contact visits." Petitioner has failed to demonstrate that he could not assist his prior habeas counsel in discovering the factual and legal bases for his habeas claims during his non-contact visits. Nor does petitioner assert that he was unable to communicate with his habeas attorney by telephone or by mail. Indeed, the petition does not even allege that petitioner possessed *any* "triggering information" whatsoever. In fact, the contrary is implied by the fact that petitioner does not even verify his own petition, much less submit a declaration on his own behalf.

Moreover, for more than two years, as of September 1995, petitioner was allowed to have confidential contact visits with his

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11. In James Merwin's declaration, he stated he was denied "contact visits" with petitioner because petitioner was classified as a "Grade B" inmate. According to Mr. Merwin, "Grade B" inmates are not allowed "contact visits" with anyone, including their attorney. (Vol.1 Guilt Exhibit 6 at p. 9.) According to petitioner's current habeas counsel, however, petitioner was allowed confidential visits as of September 1995. (Petn. 10, fn. 12.)

present attorney. (Petn. 10, fn. 12.) Thus, petitioner has failed to establish good cause for the substantial delay in filing the instant petition based on the visiting procedures at San Quentin.

Petitioner further claims his delay is justified because his former habeas counsel, James Merwin, had financial difficulties, had to close down his private law practice and take a job at the Office of the Public Defender in Orange County, and was suffering from "recurrent instances of severe chest pain." (Petn. 7-8.) Petitioner asserts that because Mr. Merwin was "unable to move forward with the investigation, and had been able only to identify very broadly various categories of ineffective assistance of counsel claims," it remained for present habeas counsel to "develop the precise nature of these claims and to plan and carry out the investigation . . . ." (Petn. 8.) Petitioner further states that due to Mr. Merwin's financial and health problems, he was

> "ultimately unable to plan in 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." (Petn. 6.)

While petitioner suggests that former habeas counsel did practically nothing, and passed on as much to successor counsel, this claim is belied by former habeas counsel's Motion for Leave to Withdraw as Counsel and attached declaration. (See Vol.1 Guilt Exhibit 6.) In his declaration, Mr. Merwin states that he

> "reviewed the file, interviewed the petitioner, interviewed petitioner's trial counsel, hired an investigator who has interviewed dozens of family members and friends of petitioner, located and interviewed experts in the fields of

> eyewitness identification, neuropsychology, 'gang' behavior and psychiatry (Post Traumatic Stress Disorder) . . . [and] continued my efforts to put together a life history of petitioner and develop penalty phase evidence that was readily available to petitioner's trial counsel but which he failed to develop and present." (*Id.*, at p. 5.)

Mr. Merwin's declaration further calls into doubt petitioner's claim that his former counsel could only "identify in broad terms" potential habeas claims. (Petn. 6.) In his declaration, former habeas counsel sets forth, in great detail, at least 11 ways in which trial counsel provided ineffective assistance. (See Vol.1 Guilt Exhibit 6 at pp. 5-7.) Mr. Merwin goes on to list, also in detail, at least nine prejudicial trial errors made by trial counsel. (*Id.*, at pp. 7-9.) Thus, petitioner's suggestion that little was done toward the preparation of his habeas petition during Mr. Merwin's tenure as habeas counsel is disingenuous, at best, and does not establish good cause for the delay.

Mr. Merwin's declaration also makes clear that triggering facts were available early on in his investigation, and certainly by February 1994, when he requested funds from this Court to investigate such claims. (Vol. 1, Guilt Exhibit 6.)

Finally, petitioner claims delay was justified because the sum of money authorized by this Court for habeas investigation was *inadequate* to cover the cost of "necessary pre-filing investigation." (Petn. 11-12.) This Court recently stated, with regard to the "substantial delay" prong of the timeliness inquiry, a petitioner may establish absence of substantial delay by showing that he was previously unaware of the factual basis for the claim because he timely requested but was *denied* funding to investigate the claim. (*In re Gallego* (1998)

18 Cal.4th 825, 828-829.) However, it does not alleviate petitioner of the burden of establishing when the information offered in support of the claim was obtained, and that the information was neither known, nor reasonably should have been known, at any earlier time. (*Ibid.*)

Here, this Court only *limited*, but did not outright *deny*, petitioner's funding requests. Yet, petitioner has utterly failed to specify which claims, if any, were affected by the limitation of investigative funds. It bears repeating, petitioner has not shown with specificity when the information in support of *any* claim in the petition was obtained. Thus, petitioner has failed to show the absence of substantial delay, let alone good cause for the substantial delay that exists in all of the claims presented in this petition.

4. Exceptions To The Timeliness Bar

Even though petitioner has not established either lack of substantial delay in the presentation of his claims or good cause, this Court will still consider his claims on the merits if petitioner can demonstrate that a fundamental miscarriage of justice occurred. As noted earlier, this can be established by showing:

> "(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which he was convicted; (3) that 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; or (4) that the petitioner was

convicted under an invalid statute." (*In re Clark, supra,* 5 Cal.4th at pp. 797-798.)

Attempting to fall within the first exception, above, petitioner summarily contends that had his counsel provided effective assistance in both guilt and penalty phases, no reasonable judge or jury would have found him guilty of the Hassan murders or sentenced him to death. (Petn. 14-15.) Petitioner adds, the petition should be deemed timely for the additional reason that he is an indigent, incarcerated layman, who suffers from mental impairments which makes him "less able than most laymen" to organize and prepare a habeas petition.[12/] (Petn. 15-16.)

However, as a detailed review of this petition will reveal later in this response, in *no* claim does petitioner ever specifically address the applicability of a *Clark* exception to the timeliness bar. Moreover, as this informal response will show, petitioner *cannot* make out a prima facie case for relief on any of his claims. Given petitioner's failure to meet the prima facie standard for relief, petitioner *necessarily* cannot

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12. In addressing the timeliness of the petition, petitioner also summarily alleges that if habeas counsel has unjustifiably delayed some facet of the habeas investigation or filing of the petition, then counsel failed to afford petitioner adequate representation within the meaning of *In re Clark.* (Petn. 16.) However, in order for such a claim to be cognizable, petitioner must demonstrate (1) counsel knew or should have known that further investigation was necessary as well as the nature and relevance of the evidence that counsel failed to present and discover; (2) prejudice to his case exists as a demonstrable reality rather than speculation as to the effect of the errors or omissions of counsel; (3) there is a reasonable probability the result of his case would have been different had the errors not occurred; and (4) the incompetence resulted in fundamentally unfair proceedings. (*In re Clark*, *supra*, 5 Cal.4th at p. 766.) Petitioner's one-sentence summary allegation of appellate counsels' incompetence does not satisfy these standards.

meet the much narrower and harsher standards applicable under the timeliness exceptions. Therefore, petitioner has clearly failed to meet his burden of establishing that the claims in this petition fall within an exception to the bar of untimeliness.[13] (*In re Robbins, supra,* 18 Cal.4th at pp. 787-788.)

Likewise, petitioner's summary allegations do not point to specific errors and establish how those errors undermined the entire prosecution case and point unerringly to innocence or reduced culpability. (See *In re Clark, supra,* 5 Cal.4th at p. 797, fn. 32, citing *People* v. *Gonzalez, supra,* 51 Cal.3d at p. 1246.) As explained in the following arguments, each and every one of the claims in the instant petition must be rejected since they do not fall within the "fundamental miscarriage of justice" exception to the procedural bar against unjustifiably delayed petitions. (See, e.g., *In re Clark*, *supra*, 5 Cal.4th at p. 799.) In addition, most of these claims are subject to other procedural bars, and all of the claims fail to provide sufficient factual allegations supporting a prima facie case for relief.

Accordingly, petitioner's unjustified delay in presenting his claims is not excused by the application of an exception.

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13. Notably, petitioner and/or present counsel clearly were aware of the instant claims prior to April 1997, when they filed a federal petition including similar claims. Petitioner and his present counsel's decision to file the petition first in federal court, knowing the claims were not exhausted in state court, unnecessarily delayed the resolution of the instant claims by this Court. Thus, respondent submits this tactical delay in the filing of the state petition is the type of abuse of the writ which raises serious questions about petitioner's good faith and veracity and should be penalized under the procedural bar against unjustifiably delayed petitions set forth in *In re Clark.* (*In re Clark, supra,* 5 Cal.4th at pp. 798-799.)

III.

PETITIONER'S CLAIM VI, THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR REASONS RELATING TO THE TAYLOR HOMICIDE, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

On December 27, 1980, at about 11 p.m., three men, including Evan Jerome Mallet[14/] and Craig Ross, entered the Taylor residence, which was located near the Hassan home. The men demanded money and drugs from Cora Taylor, her daughter Mary, Cora's son Michael (who sold marijuana), and a friend, William Birdsong. Mallet drew a gun and ordered Cora, Mary, Michael and Birdsong to lay face down on the bed while the men ransacked the premises. While the robbers were rummaging through the apartment, a fourth man (apparently a lookout) came to the door but did not enter.

While Mallet and the third robber searched the kitchen for money, Ross forced Mary into the bathroom, where he raped her. Ross left momentarily, returned, and raped her again. Thereafter, Mallet entered the bathroom and attempted to rape her. The three men then ordered Birdsong and Cora to join Mary in the bathroom. A short time later, they heard a muffled gunshot, waited a few minutes, and exited the bathroom to find Michael lying on the living room floor with his head in a pool of blood. Several items were missing from the apartment, including an eight-track player and a Christmas present - a photo album - which had been taken out of its wrapping.

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14. Throughout the transcripts, records and exhibits, Mr. Mallet is referred to variously as Evan, Jerome, Evan Jerome and Jerome Evan. For the sake of consistency, respondent will refer to him as Evan Mallet.

A short time later, deputy sheriffs patrolling the area spotted a brown Buick, containing four males, driving without its lights. The Buick was the same car as the one that had been seen parked in front of the Hassan residence on December 12, 1980. A car chase ensued, the Buick went out of control and struck a curb. Two occupants jumped out of the left side of the vehicle and ran south. The other two occupants got out of the right side of the car and ran west.

Several items were retrieved from the Buick, including the Taylor's eight-track tape player and the .357 caliber Ruger revolver that had been stolen two weeks earlier from the Hassan home. The photo album that had been taken from the Taylor residence also was found under the car. Police searched the neighborhood and found Mallet hiding in petitioner's backyard.

Natasha Wright, who lived next door to the Taylors, testified at trial and identified Ross as one of four men she saw arrive at the Taylor residence in a Buick earlier in the day on December 27, 1980. Wright stated that when Michael came to the door, one of the men grabbed him, and an argument ensued over money. The four men then got back into the car and left.

Also at trial, Cora Taylor unexpectedly identified petitioner as one of the robbers. Mary Taylor testified that petitioner was similar in appearance to one of the robbers.[15/]

Although petitioner was neither charged with nor convicted of any of the crimes committed at the Taylor apartment, he testified at trial that he had been home the night of the Taylor crimes and did not go out until 11 or 11:30 p.m., at which time he went to Helen Keller

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15. Petitioner had not been identified as a participant in the Taylor crimes at any time prior to trial.

Park and played basketball with some friends. According to petitioner, he then walked over to a store near the park and, when he walked back out of the store, he saw Marcus Player and others already being detained by Lennox Sheriff Deputies. The deputies then left. About five minutes later, Marcus Player and petitioner were again detained by sheriffs at the park.

In Claim VI,[16/] petitioner alleges his rights were violated 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," as well as his rights to due process, freedom of association, equal protection, confrontation, and to a fair and reliable guilt and sentencing determination as a result of various errors and omissions by his trial counsel relating to the Taylor homicide. (Petn. 23-71.) Specifically, petitioner claims trial counsel was ineffective because he:

> "(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

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16. In the petition, roman numerals I through V denote headings such as "Statement of Unlawful Confinement," "Statement of Jurisdiction," and "Procedural History." Petitioner's actual claims begin with roman numeral VI.

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." (Petn. 23-24.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner has failed to make a prima facie case for relief.[17/]

As discussed below, petitioner has failed to establish a prima facie case for relief in that he has not set forth, with respect to the two prongs of an ineffective assistance of counsel claim, that trial counsel had no valid, tactical reasons for the alleged errors and omissions, and

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17. The merits discussion also is relevant to establish that petitioner cannot meet any recognized exception to the timeliness bar.

that petitioner was deprived of a fair trial as a result of his trial counsel's errors and omission. (*In re Clark, supra,* 5 Cal.4th at p. 766; see also *Lockhart* v. *Fretwell, supra,* 506 U.S. at p. 372.)

A. 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

In Claim VIA, petitioner contends his counsel was ineffective for 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 had approached the officers from an area which would have made it very difficult, if not impossible for him to have been involved. (Petn. 25-31.)

First, petitioner has not presented reasonably available documentary evidence demonstrating his counsel's failure to discover, present and argue evidence that petitioner did not participate in the Taylor crimes was not a tactical decision. To the contrary, petitioner's counsel, Ronald Skyers, explained in his declaration that his investigation into the Taylor crimes was limited, and he did not present a defense to the crimes, because

> "[petitioner] was not charged with any of the crimes in connection with Mr. Taylor's death, [therefore Skyers] did not consider the contents therein as being crucial to the prosecution's contention that [petitioner] was guilty of the Hassan crimes." (Vol. 3, Guilt Exhibit 47, ¶ 6.)

Mr. Skyers further stated he believed the prosecutor had no proof of petitioner's involvement in the Taylor crimes, he did not believe even the knowledge of the Taylor crimes tended to implicate petitioner in the Hassan crimes, and he did not expect petitioner would be identified as one of the perpetrators of the Taylor crimes. (*Id.*, at ¶ 7.) Consequently, such a decision by trial counsel to limit investigation and presentation of a defense to the Taylor crimes clearly was tactical.

Certainly, it was a reasonable tactical decision to forgo presenting a defense to a crime to which petitioner *had not been charged*, and where there was no direct proof of his involvement. This is especially true since petitioner *had not been identified* by any of the Taylor victims prior to trial. For counsel to have presented a defense to the Taylor crimes, even after Cora Taylor's surprise identification of petitioner, would have drawn attention to the Taylor crimes and suggested petitioner's connection to them. Such a suggestion would have caused the jury to question whether petitioner was in fact involved in the Taylor crimes. The decision to minimize any connection between petitioner and the Taylor crimes clearly was reasonable and tactical.

With respect to the prejudice prong, petitioner has failed to show it is reasonably probable the jury would not have found him guilty of the Hassan murders had counsel presented to the jury a defense to the Taylor crimes including the factual allegations he now alleges. At the risk of stating the obvious, petitioner was neither charged nor

convicted of the Taylor crimes, despite Cora Taylor's surprise in court identification of petitioner as a participant.

Petitioner offers police reports and declarations of his fellow gang members Wayne Harris and Earl Bogans as corroboration that petitioner could not have participated in the Taylor crimes. However, such evidence does not negate petitioner's involvement in the Taylor crimes and completely contradicts evidence presented on petitioner's behalf at trial.

As stated above, petitioner testified in his own behalf that on the night of December 27th, 1980, he was at home between 10 and 11 p.m. (RT 3089.) Petitioner stated that he went out around 11 or 11:30 p.m. and played basketball at Helen Keller Park with his friends. According to petitioner, he then went into a store near the park, and, when he walked out of the store, *he saw* Marcus Player and *others already being detained* by Lennox Sheriffs deputies. The deputies then left. Five or ten minutes later, petitioner and Marcus Player again were detained by sheriffs at the park. (RT 3089-3094.)

Petitioner's mother, on the other hand, testified at trial that petitioner was home *all evening* on December 27th. (RT 2833, 2838.) Neither petitioner nor his mother ever testified at trial that petitioner was detained by sheriffs deputies between 10 and 11 p.m.

Petitioner has now changed his story and argues he could not have been involved in the Taylor crimes because he was in the company of his friends and *was being detained with them* at the time of the Taylor crimes. (Petn. 25.) In support of this new story, Wayne Harris states in his declaration that on December 27, 1980, he was "with [his] friends" at Helen Keller Park from 2 p.m. until late into the evening, and that petitioner, in contradiction of petitioner's trial testimony, was with

Harris when they were detained by police between 9:30 and 10 p.m. According to Harris, he and petitioner *were detained for* the next *four hours*, during which time they were moved between six different patrol vehicles and "never allowed to be out of the view of police officers for the entire period." (Vol. 1, Guilt Exhibit 23.) According to Harris, at the third police interrogation vehicle, Robert Simms, who Harris knew as "Lil Owl,"[18/] walked out of the bushes and mingled with the crowd as if he had been there all along. (*Ibid.*; Petn. 28.) Harris further stated that the police finally let them go at petitioner's house. (*Ibid.*)

A third version of petitioner's whereabouts at the time of the Taylor crimes is furnished by Earl Bogans. Bogans states in his declaration that he was playing basketball in the park with petitioner from 8 until 10:30 p.m. on December 27, 1980, at which time he, petitioner, and others were briefly detained by police. (Vol. 1, Guilt Exhibit 24.) According to Bogans, a brown car sped into the parking lot where he and petitioner were being detained. The officers then abruptly told him and the others to "get out of the way," and the officers jumped into the patrol car and began chasing the brown car, thereby ending Bogans' and petitioner's detention. Bogans then walked home. (*Ibid.*) Contrary to Harris' story, Bogans states that Simms "was not with [them] that night before or while [they] were being detained by police." (*Ibid.*)

The inconsistent declarations of Harris and Bogans do not assist petitioner because they both *contradict* petitioner's trial testimony,

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18. It appears clear from petitioner's petition and the police report that "Lil Owl" is James Taylor. Further, as petitioner explains, James Taylor and Robert Simms are one and the same person; Simms gave police the false name of James Taylor when he was taken into custody. (See Petn. 28, fn. 26.)

as well as each other. Trial defense attorneys have no duty to present evidence that would contradict their client's sworn testimony. In addition, the police report written by Officers Lambrecht and Tong specifically refers to two different detentions and makes no reference to petitioner during the first detention. (Vol. 1, Guilt Exhibit 13.) With regards to the first detention involving Earl Bogans, petitioner *was not* one of the four persons initially detained. (*Ibid.*) The only subjects participating in the first detention were Bogans, Marcus Player, Willie Marshall and Angulus Wilson. (*Ibid.*)

The deputies apparently released the four individuals when the officers left to follow Deputies Naimy and Koontz, who had activated their lights and siren. (*Ibid.*) A containment area was established and, thereafter, Deputies Lambrecht and Tong took up a position within that area. It was at that time that they were approached by, and detained, Marcus Player, Robert Simms, Wayne Harris and petitioner.[19] (*Ibid.*)

Notably, the containment area was set up only *after* the vehicle that officers had been chasing had crashed and the four occupants had fled on foot. (See Vol. 1, Guilt Exhibit 12.) And, according to the police reports, petitioner was involved only in the second detention, which also occurred *after* the crash of the vehicle that had been chased. In other words, petitioner could have been involved in the Taylor crimes because he was detained after the crash and after the containment area was established.

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19. The police report in fact indicates that James Taylor was one of the individuals detained, but, as discussed in fn. 11, *supra*, James Taylor was in fact Robert Simms.

Interesting to note is that petitioner claims he could not have committed the Taylor crimes because he was being detained at the time of their commission. (Petn. at 27.) He also states in Argument IIIB, *post*, that Robert Simms was one of the four perpetrators of the Taylor crimes. The police report indicates, however, that petitioner and Simms were detained at the same time. (Vol. 1, Guilt Exhibit 13.) Therefore, to the extent that Simms could have been involved in the Taylor crimes, so could petitioner.

Also of little assistance to petitioner is his claim that he could not have been involved in the Taylor crimes because his clothing did not match the description of any of the suspects. (Petn. 30.) Petitioner claims he was wearing "yellow sweat clothing" when all of the suspects were observed in "dark clothing." (*Ibid.*) However, according to the field identification card, petitioner was wearing a "yellow coat, grey shirt & pants." (See Vol. 2, Guilt Exhibit 32.) Without the yellow coat, petitioner's grey shirt and pants were consistent with the "dark clothing" description. Thus, petitioner could have been involved in the Taylor incident and then put the yellow coat on after the incident.

Moreover, even with the yellow coat, petitioner could have participated in the Taylor crimes. Deputy Sheriff Theodore Naimy testified at the Evan Mallet preliminary hearing that one of the suspects to exit the brown Buick was wearing a white or light colored jacket. (Vol. 1, Guilt Exhibit 22 at 606, 611, 612, 615.) Based on the time the car chase occurred, and the lighting or lack thereof, petitioner's yellow jacket may have appeared to be white or light colored.

The jury also would have given little weight to petitioner's present assertion that he could not have been involved in the Taylor

crimes because he approached the containment area heading south on Budlong from a northerly direction after the suspect vehicle had crashed and the containment area had been established. (Petn. 30.) Deputy Naimy testified at petitioner's trial that when the suspect vehicle crashed near the corner of 126th and Budlong, two suspects exited the car on the left and ran south on Budlong, and two suspects exited on the right side of the car and ran west on 126th. (RT 2567.) Deputy Naimy stated that the suspects who ran west on 126th then "went around the corner," at which point they disappeared from the view of the deputy. (RT 2567, 2569.) Based on this testimony, if petitioner was one of the two suspects who ran west on 126th, turned the corner and ran north on Raymond, he would only have had to continue around the block to end up heading south on Budlong, which is where petitioner was in fact stopped and detained. (See Vol. 2, Guilt Exhibit 27.)

Furthermore, even if petitioner's so-called defense to the Taylor crimes had been presented by counsel, it would not have affected the *admissibility* of the Taylor evidence. As this Court stated when it found that severance was properly denied, "the jury could properly consider the evidence that defendant Champion was involved in the murder of Michael Taylor in deciding whether he participated in the murders of Bobby and Eric Hassan because the killings shared various significant characteristics." (*People* v. *Champion, supra*, 9 Cal.4th at p. 905.) Therefore, at best, the evidence petitioner now presents might have affected the *weight* of the evidence, not its admissibility. And, as discussed above, since the evidence petitioner now presents is contradictory and does not demonstrate he was not involved in the Taylor crimes, the jury would have given it little weight,

if any. Thus, it is not reasonably probable that the evidence would have affected the verdict.

Finally, even assuming arguendo that the evidence petitioner now presents demonstrated petitioner was not involved in the Taylor crimes, it is of no consequence. It bears repeating, petitioner was neither charged nor convicted of the Taylor crimes. And, as to the Hassan murders alone, this Court stated:

> "The evidence against defendant Champion was far from weak: An eyewitness identified him as one of the four men that entered the Hassan residence, and when arrested he was wearing a ring and a charm that Mercie Hassan identified as belonging to her husband Bobby Hassan, one of the murder victims. The trial court could reasonably conclude that the jury would be unlikely to convict defendant Champion simply because of his association with defendant Ross." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.)

Consequently, respondent respectfully submits the instant claim of ineffective assistance must be rejected because it does not state a prima facie case for relief or establish a fundamental miscarriage of justice.

B. Evidence Which Indicated Police And The Prosecutor Had Reliable Information That Four Other Persons Were Actually Responsible For The Taylor Crimes

In Claim VIB, petitioner claims that his counsel was ineffective for failing to present to the jury available credible evidence regarding the true identities of the perpetrators of the Taylor crimes. (Petn. 32-38.) According to petitioner, the four perpetrators to the Taylor crimes

were Evan Mallet, codefendant Craig Ross, Michael Player, and Robert Aaron Simms. (*Ibid.*)

Again, petitioner has not presented reasonably available documentary evidence demonstrating his counsel's failure to present evidence of the alleged four actual perpetrators to the Taylor crimes was not a tactical decision. As discussed in Argument IIIA, *supra*, trial counsel made a reasonable tactical decision when he decided to forgo presenting a defense to a crime to which petitioner had not been charged, and where there was no direct proof of his involvement.

With respect to the prejudice prong, petitioner has failed to show it is reasonably probable the jury would not have found him guilty of the Hassan murders had counsel presented to the jury alleged evidence regarding the identity of the four "true" perpetrators to the Taylor crimes. As stated previously, petitioner was neither charged nor convicted of the Taylor crimes.

Additionally, the evidence petitioner now presents does not negate his involvement in the Taylor crimes. There appears to be no dispute that Evan Mallet and Craig Ross, two of the individuals convicted of the Taylor crimes, were two of the four individuals who in fact committed the Taylor crimes. However, there is no evidence that excluded petitioner as one of the remaining two participants who committed the Taylor crimes.

Petitioner claims Robert Aaron Simms was one of the remaining two Taylor suspects. However, the evidence advanced by petitioner does not clearly establish that fact. Although the police report written by Deputies Koontz and Naimy indicated that Simms was one of the individuals to exit the left side of the brown Buick (Vol. 1, Guilt Exhibit 18), Deputy Naimy clarified in a later police report that

he "was not absolutely positive that Simms [*sic*] came from [the] car" (Vol. 1, Guilt Exhibit 19). At the Mallet preliminary hearing, Deputy Naimy again clarified that Simms was taken into custody *only* because his clothes were consistent with those of the person he had seen run from the car. (Vol. 1, Guilt Exhibit 22 at p. 615.) Naimy described that person as one of the two tallest suspects, wearing a white or light colored jacket. (*Id.*, at pp. 606, 611, 612, 615.) At Mallet's trial, Deputy Koontz too agreed that any male Black of a youthful age and with an "afro" hairstyle would have resembled someone who fled from the car. (Vol. 2, Guilt Exhibit 28 at pp. 274, 280.) And, since Simms was later released and never charged for the Taylor crimes, it is reasonable to assume that he was not identified by any of the victims of the Taylor crimes. On the contrary, Cora Taylor identified petitioner as the tallest of the men who entered her residence on December 27th, 1980. (RT 2246.)

Despite petitioner's assertion that the fourth man involved in the Taylor crimes was Michael Player, there is no evidence that Michael Player was the driver of the car containing the four individuals. The fact that the car belonged to Michael's stepfather, and that Michael's brother Marcus was being detained at the time of the car chase, suggests that Michael Player might have been driving the car. However, a mere suggestion is insufficient to prove that Michael Player was in fact the driver of the vehicle. Nor is Evan Mallet's self-serving and ingratiating letter to the judge, in which he states that "Scrag"[20/] was the driver, constitute credible documentary evidence supporting

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20. Deputy Williams testified that Michael Player's moniker was "Scrag." (RT 2639.)

petitioner's claim that Michael Player was the fourth man involved in the Taylor crimes.

The Taylor crimes could have been committed by petitioner, Ross, Mallet, and Simms. Petitioner could have been driving the car. The fact that Frank Harris never knew petitioner to have driven Harris' car (Vol. 2, Guilt Exhibit 29), does not prove that petitioner never drove Harris' car.

A more likely scenario is that the Taylor crimes were committed by petitioner, Ross, Mallet, and Player. Indeed, petitioner was wearing a yellow jacket at the time of his arrest, which might well have fit the description of the light-colored jacket worn by the person who exited the vehicle on the left.

In any event, even assuming that four individuals other than petitioner had in fact committed the Taylor crimes, such evidence would not have affected the verdict. As stated in Argument IIIA, *supra*, there was substantial evidence that petitioner was guilty of the Hassan murders aside from any evidence relating to the Taylor crimes.

Consequently, respondent respectfully submits the instant claim of ineffective assistance must be rejected because it states neither a prima facie case for relief nor a fundamental miscarriage of justice.

C. Evidence That The Descriptions Offered By Witnesses Did Not Fit That Of Petitioner On The Night Of The Taylor Crimes

In Claim VIC, petitioner further claims that his counsel was ineffective for 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. (Petn. 39-42.)

Petitioner has not presented reasonably available documentary evidence demonstrating that his counsel's failure to present evidence that petitioner did not fit the physical and clothing descriptions of the alleged perpetrators to the Taylor crimes was not a tactical decision. As discussed previously in Arguments IIIA and IIIB, defense counsel made a reasonable tactical decision to minimize petitioner's connection to the crimes for which he was neither charged nor convicted. To the extent that petitioner argues his trial counsel should have conducted a more thorough or rigorous cross-examination of the Taylor witnesses to point out discrepancies in their testimony, "such matters are normally left to counsel's discretion and rarely implicate inadequacy of representation." (*People* v. *Williams* (1997) 16 Cal.4th 153, 216, quoting *People* v. *Cox* (1991) 53 Cal.3d 618, 662.)

Moreover, petitioner has failed to show it is reasonably probable the jury would not have found him guilty of the Hassan murders had counsel presented to the jury the alleged evidence regarding such descriptions. The evidence petitioner now presents does not suggest a contrary result.

Mary Taylor testified that Person Number Two, the suspect to whom petitioner resembled, was the tallest of the individuals to enter the Taylor residence. He had an earring in his left ear, short hair, big lips, a full face, was dark complected and had a little mustache. (RT 2129-2130, 2133, 2326.) Cora Taylor, too, testified that petitioner was the tallest of the men to enter her home. He had a slight mustache, his hair was in a short natural, he had a dark complexion, and was wearing a brown long-sleeved shirt with a gold earring in his left ear. (RT 2246, 2302-2303.) William Birdsong similarly testified at the Mallet trial that

Person Number Two was about five foot eleven inches tall and wearing an earring in his left ear.[21] (Vol. 2, Guilt Exhibit 34 at 805.)

Petitioner closely fit these descriptions. Deputy Naimy testified at the Mallet preliminary hearing that the two tallest individuals exited the left side of the brown Buick and that one of them was wearing a white or light-colored jacket. (Vol. 1, Guilt Exhibit 22 at 606, 611, 612, 615.) Petitioner's yellow jacket could have been characterized as "light-colored." And, the shirt petitioner was wearing at the time he was detained matched the description given by Mary Taylor of a dark long-sleeved shirt. The shade of grey may have been close to brown, which also would have matched the description given by Cora Taylor. But notably, petitioner had a mustache on the night of the Taylor crimes, and, when he was arrested, petitioner was wearing an earring in his left ear. (RT 1971.)

Certainly, it would have been tactically unwise for petitioner's counsel to even broach the subject of the identity of the Taylor suspects because to have done so would have opened the door to evidence showing the similarities between petitioner and the suspects. Had defense counsel pointed out the few dissimilarities between petitioner and the descriptions of the Taylor suspects, the district attorney would have responded, in turn, with the remarkable and specific similarities petitioner shared with the suspects. For this reason, it is of no consequence that Birdsong's description of the clothing worn by Person Number Two did not match petitioner's clothing.

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21. Petitioner asserts that Birdsong described Person Number Two as "five foot ten inches tall." (Petn. 40.) However, Birdsong in fact stated the person was "something like five eleven." (Vol. 2, Guilt Exhibit 34 at p. 805.) Birdsong himself was six feet tall and the person was "pretty close" to Birdsong's height. (*Ibid.*)

Furthermore, the unsigned, undated, handwritten page describing petitioner as having buck teeth is of no significance.[22/] (See Vol. 2, Guilt Exhibit 33.) There is no evidence that petitioner said much of anything when he was in the Taylor residence. Thus, if his mouth was closed, the victims could not have noticed the condition of petitioner's teeth. Additionally, the fact that the 3" by 5" field identification card did not list any other scar, injury, or that petitioner might have been wearing an earring when he was detained, is easily explained by lack of room to do so. (See Vol. 2, Guilt Exhibit 32.) The space provided on the field identification card is very limited, and, as discussed previously, there is no evidence that Vol. 2, Guilt Exhibit 33, the unsigned, undated, handwritten jotting, was in fact written by police.

Moreover, as discussed previously, even assuming that such evidence had been presented, and that the jury believed that four individuals other than petitioner had in fact committed the Taylor crimes, such evidence would not have affected the verdict. As stated in Argument IIIA, *supra*, there was substantial evidence that petitioner was guilty of the Hassan murders aside from any evidence relating to the Taylor crimes.

Consequently, respondent respectfully submits the instant claim of ineffective assistance must be rejected because it does not state either a prima facie case for relief or a fundamental miscarriage of justice.

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22. Petitioner baldly claims this note was written by police. However, there is nothing evidencing this fact, and, even if true, there is no indication of the circumstances surrounding the note so as to understand its context.

D. Trial Counsel's Failure To Object To The Prosecution's Attempts To Have Witnesses Identify Petitioner As One Of The Men Who Entered The Taylor Residence

In Claim VID, petitioner claims his trial counsel was ineffective for failing to object to the prosecution's alleged attempts to have witnesses identify petitioner as one of the men who entered the Taylor residence.[23] (Petn. 43-47.)

Petitioner has failed to make a prima facie showing entitling him to relief on the basis of ineffective assistance of counsel. Petitioner has not presented reasonably available documentary evidence demonstrating that his trial counsel's failure to object to the prosecutor's questions, which ultimately led to petitioner's identification as one of the participants of the Taylor crimes, was not a tactical decision. To the contrary, petitioner's trial counsel states in his declaration that he did not expect petitioner to be identified as one of the participants of the Taylor crimes, but fully anticipated that the prosecutor would ask both Mary and Cora Taylor whether they saw anyone in the courtroom who resembled the perpetrators. (Vol. 3, Guilt Exhibit 47 at ¶ 7.) Trial counsel recognized that the procedure would necessarily include petitioner as he was sitting at counsel table when the question was asked. (*Ibid.*) Counsel explained that he

> "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 as [he] believed that in any case, a district attorney

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23. To the extent that petitioner also alleges the prosecutor's attempts at obtaining an identification were "underhanded," this claim is addressed more fully in Argument XC, below.

would be well within his rights to ask a witnesses [*sic*] whether any person, including a specific defendant, could be identified." (*Ibid.*)

Trial counsel further stated that did not attempt to impeach Cora Taylor's identification, because he did not have any information in hand or in mind that would cast doubt on her identification.[24] (*Id.*, at ¶ 9.)

Trial counsel now states he "had no tactical reason 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." (*Id.*, at ¶ 11.) However, he then adds, "I believed then, but not now that it was better to 'leave it alone' and that in that way perhaps it might be less harmful." (*Ibid.*)

What is clear from trial counsel's declaration is that he in fact made tactical decisions with regards to the questioning surrounding petitioner's surprise identification. Despite his gratuitous remarks to the contrary, trial counsel's choices not to object to the prosecutor's questions, or to move for a mistrial, but instead to just "leave it alone" were in fact tactical decisions. And, based on the fact that petitioner

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24. The fact that Cora Taylor apparently was generally not a good eyewitness at the Mallet trial is of no consequence, and testimony taken there is irrelevant. Indeed, Mallet testified in his defense that *the entire evening* of December 27, 1980, and into the early morning hours of December 28, 1980, he was with petitioner and Sue Winbush at petitioner's house drinking rum and coke and beer. According to Mallet, when he was arrested in the bushes behind petitioner's residence, he had just stepped outside to vomit. This version of the events of December 28th clearly contradicts petitioner's own testimony.

Petitioner has failed to cite any authority requiring his counsel to obtain and read the entirety of transcripts in a co-perpetrator's case. Certainly, the only testimony of Cora Taylor's that was relevant was her testimony at petitioner's trial.

was not charged with the Taylor crimes, that he had not previously been identified as one of the Taylor perpetrators, and that there was no other direct proof of his involvement in those crimes to indicate that an identification would be forthcoming, trial counsel's decision to just "leave it alone," when petitioner unexpectedly was identified was not only tactical but also reasonable. Indeed, Cora Taylor could just have easily have failed to identify petitioner.

Moreover, petitioner has not shown prejudice resulting from his trial counsel's failure to object and request a mistrial. Seldom does a mere failure to object to evidence or argument reflect that trial counsel was incompetent. (See *People* v. *Sheldon* (1989) 48 Cal.3d 935, 951; *People* v. *Jackson, supra,* 28 Cal.3d at pp. 291-292.) Furthermore, petitioner has failed to demonstrate how counsel's failure to object to the prosecutor's questions resulted in prejudice. It was stipulated that Mary Taylor viewed a lineup on January 14, 1981, which included petitioner. (RT 2234.) And, Mary Taylor testified that she was unable to make an identification at the lineup. (*Ibid.*) Cora Taylor, too, testified that she attended the January 14, 1981, lineup and was unable to identify anyone. (RT 2272, 2293.)[25/]

Trial counsel also brought to the jury's attention that the earring petitioner was wearing when arrested was different from the

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25. Petitioner claims counsel was ineffective for not informing the jury of the "numerous other occasions Mary Taylor had observed but had not identified petitioner." (Petn. 45.) However, the record indicates that the *only* occasion that Mary Taylor had to observe petitioner was at the January 14, 1981, lineup. (RT 2234.) Petitioner suggests that photographs shown to the Taylor witnesses at the Lennox Sheriff's station must have contained petitioner's picture because there were pictures of the Raymond Street Crips and individuals who hung out at Helen Keller Park. (Petn. 48.) However, this is just speculation.

earring Mary Taylor remembered the perpetrator wearing. (RT 2328.) During closing argument, trial counsel reminded the jury that petitioner was not charged with the Taylor or Jefferson murders. (RT 3245.) Counsel further informed the jury of a number of other cases wherein people were convicted based on eyewitness identifications and later it was found that someone else had committed the crime. (RT 3293-3295.) Counsel then reminded the jury that none of the Taylor witnesses identified petitioner at the county jail lineup. (RT 3300.) Consequently, petitioner was not prejudiced by Cora Taylor's surprise identification.

Prejudice must be set forth as a "demonstrable reality." (See *In re Clark*, *supra*, 5 Cal.4th at p. 766.) Petitioner has not done so, therefore, he is not entitled to relief. Nor has he demonstrated a fundamental miscarriage of justice.

E. Evidence That There Was No Physical Or Other Evidence Of Petitioner's Involvement In The Taylor Crimes

In Claim VIE, petitioner contends his counsel was ineffective for failing to present evidence that (1) 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; (2) fingerprint analysis did not implicate petitioner; and (3) a secretly taped conversation between Evan Mallet and petitioner failed to yield any evidence that petitioner was involved in the Taylor crimes. (Petn. 48-51.)

Petitioner has not presented reasonably available documentary evidence demonstrating that his trial counsel's failure to present evidence demonstrating petitioner was not involved in the Taylor crimes

was not a tactical decision. Trial counsel stated in his declaration that he was aware that the results of the forensic testing for blood and gunshot residue on the gloves taken from petitioner's bedroom were negative and did not present this information *because* the results were negative. (Vol. 3, Guilt Exhibit 47 at ¶ 22.) Certainly, as discussed below, this was a reasonable tactical decision in light of the defense presented.

Notably, trial counsel argued to the jury that the quality of the evidence was such that everything should be distrusted. (RT 3226.) Trial counsel further reminded the jury that petitioner was not charged with the Jefferson or Taylor murders and that the jury should base their decision *only* on the facts presented as to the *charged offenses*. (RT 3245.) In asking the jury to disregard the evidence as to the Taylor and Jefferson crimes, trial counsel added:

> "Everything presented outside of Mercie Hassan and Elizabeth Moncrief was meant to muddy [petitioner] to the point where you lose your sense of reason." (*Ibid.*)

It therefore would have been inconsistent for counsel to have asked the jury to rely on the very evidence trial counsel had asked them to ignore as a calculated distraction. It is not ineffective assistance for a trial counsel to refrain from presenting alternative or inconsistent theories, especially where they might draw prosecutorial comment. (*People* v. *Thomas* (1992) 2 Cal.4th 489, 531; see also *Correll* v. *Stewart* (1998) 137 F.3d 1404, 1411.) Consequently, trial counsel's decision not to address evidence relating to crimes for which petitioner was not charged was tactical and reasonable.

Furthermore, petitioner has failed to show how his counsel's alleged error prejudiced him. The jury here was instructed that

whether a defendant is to be found guilty depends on the facts and the law. The jury also was told the facts of the case were to be determined by the evidence received at trial and not from any other source. (CT 641.) Jurors are presumed to be able to understand and correlate instructions; they are further presumed to have followed the court's instructions. (*People* v. *Danielson* (1992) 3 Cal.4th 691, 722; see also *Richardson* v. *Marsh* (1987) 481 U.S. 200, 206-207, 211; *Francis* v. *Franklin* (1985) 471 U.S. 307, 324-325, fn. 9.) As there was no fingerprint or other forensic evidence presented connecting petitioner to the Taylor crimes, the jury was not permitted to speculate that such evidence existed. Consequently, trial counsel's failure to point out that no such evidence existed was not prejudicial.

Similarly, the taped-recorded conversation between Evan Mallet and petitioner was neither played to the jury, nor offered as evidence by the prosecutor. Therefore, the taped conversation was neither relevant nor admissible if offered by petitioner to try to prove a negative inference. As such, there was no reason for trial counsel to even attempt to bring it to the jury's attention.

Finally, as discussed previously, petitioner's assertion that there were numerous pretrial identification attempts which failed to identify petitioner as a suspect of the Taylor crimes is pure and utter speculation. Petitioner only surmises that photographs shown to the Taylor witnesses at the Lennox Sheriff's station ***must*** have contained petitioner's picture because apparently there were pictures of the Raymond Avenue Crips and individuals who hung out at Helen Keller Park.[26/] (Petn. 48.) To the contrary, the record indicates the only

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26. It is interesting to note that petitioner's defense at trial was that he was *not a* Raymond Crip at the time of the murders and had

occasion that Mary and Cora Taylor had to observe petitioner was at the January 12, 1981, lineup.[27/] (RT 2234. 2293.) Consequently, petitioner's conclusory and speculative allegations provide no basis for relief or relief from their untimely presentation. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th at p. 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

F. Defense Counsel Failed To Object To Or Impeach Cora Taylor's Identification Of Petitioner

In Claim VIF, petitioner repeats his previous argument that his trial counsel was ineffective for failing to object to Cora Taylor's identification of petitioner (Claim VID) and further claims that counsel should have impeached such testimony. (Petn. 52-53.) As discussed in Argument IIID, *supra*, trial counsel was not ineffective for failing to object to questions leading to Cora Taylor's surprise identification.

Additionally, petitioner's trial counsel was not ineffective for allegedly not impeaching Cora Taylor's identification. It bears repeating, trial counsel fully anticipated that the district attorney would ask both Mary and Cora Taylor whether anyone in the courtroom, including petitioner, resembled the perpetrators of the Taylor crimes.

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not been for years. (RT 3035.) Yet, he now is certain that his picture would have been included in the group of photographs of the Raymond Avenue Crips.

27. Although there appears to be a discrepancy in the date of the lineup -- in some places in the transcript it appears as January 12, 1981 (RT 1918, 2294), and in other places it appears as January 14, 1981 (RT 2234, 2293) -- it appears clear from the testimony, the photograph of the lineup (People's Exhibit 95), and the witness card from the lineup (Defense Exhibit J) that there was only one lineup which included petitioner.

(Vol. 3, Guilt Exhibit 47 at ¶ 7.) Trial counsel believed the deputy district attorney was well within his right to make such an inquiry. Therefore, trial counsel did not plan to object, and did not object, when such questions were asked of the Taylor women. (*Ibid.*) Rather, trial counsel decided that "the best way to deal with this was not to emphasize it." (*Id.*, at ¶ 10.) Trial counsel's decision not to object and to "leave it alone" (*Id.*, at ¶ 11), clearly was tactical. In light of her prior failure to identify petitioner, this was a reasonable decision.

In any event, petitioner has failed to show prejudice resulting from trial counsel's decisions. As stated in Argument IIID, *supra*, and despite petitioner's argument to the contrary, trial counsel plainly attempted to impeach Cora Taylor's identification during the cross-examination of Cora and Mary Taylor. Trial counsel elicited testimony from both women that they had viewed the January 14, 1981, lineup, which included petitioner, and both failed to identify petitioner as one of the perpetrators. (RT 2234, 2272, 2293.) Trial counsel also impeached Cora Taylor's identification by pointing out the discrepancies between the type of earring the Taylor perpetrator was wearing and the earring petitioner was wearing when arrested. (RT 2328.) During his closing argument, trial counsel further acquainted the jury with cases where individuals were wrongly convicted based on misidentifications. (RT 3293-3295.) And, trial counsel repeatedly reminded the jury that petitioner was not charged with any other crime but the Hassan crimes. (RT 3300.) Thus, despite petitioner's conclusory allegations to the contrary, his counsel <u>did</u> take steps to impeach Cora Taylor's surprise identification of petitioner once it was made. Any further steps would have been cumulative.

Finally, petitioner argues that his counsel should have been aware of the Mallet transcript wherein the trial judge questioned Cora Taylor's ability to make an identification. (Petn. 52.) However, petitioner has failed to show how Cora Taylor's testimony in the Mallet case would have affected the instant case. Petitioner has not shown with particularity where Cora's testimony in that case was contrary to her testimony in the instant case so as to have been impeaching. Certainly, the Mallet trial judge's opinion alone was irrelevant and inadmissible. Accordingly, petitioner's conclusory allegations are neither a basis for relief nor do they establish a fundamental miscarriage of justice. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

G. Evidence (1) That Graffiti Which Purportedly Implicated Petitioner In The Taylor Crimes Was Authored By Someone Other Than Petitioner And (2) That Deputy Williams' Opinion That Petitioner Was Associated With The Crime Was Based On False Information

At trial, evidence was presented which proved that petitioner and Craig Ross were still gang members at the time of the murders. Such evidence included the testimony of Deputy Sheriff Ronnie Williams regarding photographs of graffiti painted on a building located diagonally across from the home of Michael Taylor.[28/] During cross-

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28. Specifically, on the building was written "Trecherous," "Popeye," "Raymond Avenue Crips Cuzzins," and "do-re-me" and a dollar sign. According to Deputy Williams, "Trecherous" was petitioner's nickname, "Popeye" was the name of another member of the Raymond Avenue Crips, and the words "do-re-me" and a dollar sign referred to the obtaining of money in a robbery or burglary. (*People* v. *Champion, supra*, 9 Cal.4th at p. 920.)

examination of the gang expert, the defense presented evidence that petitioner no longer was a gang member and that he personally had not told Deputy Williams that his name was Trech or Treacherous.

In Claim VIG, petitioner contends his trial counsel was ineffective for failing to discover, present and argue evidence that graffiti which purportedly 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. (Petn. 54-64.) Petitioner further contends that Deputy Williams' opinion that petitioner was associated with the crime through his association with alleged Raymond Avenue Crips members, and particularly Craig Ross, was based on false information. (*Ibid.*) Petitioner's general claim regarding the graffiti essentially breaks down into four specific claims: (1) counsel was ineffective for failing to attempt to locate the actual authors of the graffiti and for failing to consult with a gang expert to determine the likely authorship and meaning of the graffiti in order to rebut the prosecution's contention that the graffiti advertised petitioner's involvement in the Taylor murder (Petn. 56-62); (2) counsel was ineffective for failing to object to Williams' qualifications as an expert (Petn. 62); (3) counsel was ineffective for failing to object to Williams' opinion as beyond the scope of his personal knowledge (Petn. 63); and (4) counsel was ineffective for failing to object to the graffiti on the grounds of hearsay (Petn. 63-64). As discussed below, as to each subclaim, petitioner has not established a prima facie case for relief.

1. Failure To Consult With A Gang Expert To Determine The Likely Authorship And Meaning Of The Graffiti

Petitioner claims that his trial counsel was ineffective for failing to consult a gang expert or attempt to locate the actual authors of the graffiti. (Petn. 54-64.) However, petitioner's trial counsel did present evidence that petitioner no longer was a gang member. Counsel also stated in his declaration that he "tried to focus on whether it was [petitioner's] graffiti." Trial counsel has the duty and authority to control the proceedings, and his decision to follow one game strategy over another clearly is a tactical one. (*People* v. *McKenzie* (1983) 34 Cal.3d 616, 631.) Indeed, if counsel convinced the jury that petitioner was not the author of the graffiti then it did not matter *who* wrote the graffiti[29] or *what* it said. Therefore, counsel had the authority to make the tactical decision not to focus on the actual author or to call an expert of his own.

Furthermore, counsel was not required to put on a defense gang expert if he could accomplish the same result through cross-examination. (See *Ainsworth* v. *Calderon* (9th Cir. 1998) 138 F.3d 787, 792.) Here, counsel established through cross-examination of Deputy Williams that it was two or three years prior to the crimes when petitioner had used the name Crazy 8, and that petitioner himself had not told the deputy he was using the name Trech or Treacherous. (RT 2665.) Counsel also established that there were other monikers painted

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29. The declaration from Karl Owens (Vol. 2, Guilt Exhibit 42), that he recognized the writing of "Lil Drac" as his own and *believes* he wrote the other words, is not a convincing statement to establish that he in fact authored the rest of the graffiti, effectively admitting to committing a robbery or burglary.

on the wall, and that it appeared that all of the writing was written by the same person. (RT 2676.) Counsel also elicited from Deputy Williams that sometimes gang members write the names of other gang members on walls, and that is not uncommon for Crip members to write names other than their own. (RT 2677, 2685.) Finally, counsel elicited testimony from the deputy that he had never seen petitioner write his gang moniker on a wall. (RT 2689.)

Such evidence permitted the jurors to believe, if they were so inclined, that petitioner was no longer a gang member and that he did not write the graffiti on the wall. Since trial counsel was able to put before the jury through cross-examination the same evidence that would have been presented through a defense gang expert, no expert was needed. Thus, the decision to forgo presenting a defense gang expert was reasonable and tactical.

Moreover, petitioner has failed to provide reasonably available documentary evidence indicating that there was an expert available at the time of trial who would have presented the same opinions regarding the graffiti as petitioner's after-the-fact expert Rouselle Shepard. Certainly, Mr. Shepard himself could not have testified as an expert at petitioner's trial because, at the time the crimes were committed, he only had been working for the Los Angeles Police Department for approximately four years, during which time he had had little or no gang experience.[30/] Consequently, unlike Deputy Williams' opinions,

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30. Following Mr. Shepard's own calculations, at the time the crimes in this case were committed, Shepard only had been a deputy for four and one-half to five years. Of those years in the department, Shepard spent the first year or so assigned to in-court duties, and, once assigned to patrol, he had a 6 to 18 month training period, followed by assignments in low level, non critical, non specialty duties. (Vol. 2, Guilt Exhibit 41 at ¶ 17.)

Shepard's opinions were not based on personal experience with the Raymond Avenue Crips between the critical years of 1976 and 1982. Rather, they were based on information and experience derived *after* the crimes and the trial in this case. Thus, petitioner has failed to demonstrate that there was any gang expert at the time of trial who shared the opinions of Mr. Shepard.

Petitioner further fails to show prejudice because even if a defense gang expert had been presented, the expert's testimony would not have affected the admissibility of Williams' testimony only the weight attributed to it. And, despite petitioner's suggestions, Mr. Shepard's opinions were not devastating impeachment evidence. Unlike Shepard's after-the-fact opinion that the graffiti said "do or die," Williams' opinion that the graffiti said "do-re-me" was an opinion derived from his extensive experience with members of the Raymond Avenue Crips and other gang members at the time of the murders in this case.

Williams' statement that he had spoken to petitioner in the spring or summer months of 1980 (RT 2668) also is not impeached by the Youth Authority case reports and High School transcripts provided by petitioner. (See Vol. 2, Guilt Exhibits 43-46.) To the contrary, the Youth Training School report indicates that on April 6, 1980, petitioner returned late from a furlough. (Vol. 2, Guilt Exhibit 44.) There is no indication of the length of the April furlough, but Deputy Williams certainly could have seen petitioner at that time or during another furlough.[31/]

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31. It appears the April 6, 1980, report was issued only as a result of petitioner's late return from his furlough. There is no telling how many other furloughs petitioner was granted, where petitioner returned on time and a report was not issued.

Moreover, Deputy Williams' opinion that each member of the inner circle of Original Gangsters would have knowledge of the crimes being committed by other members of the inner circle is supported by evidence presented that petitioner and Ross were usually together, and they usually were in the company of the Player brothers and Evan Mallet. (RT 2639, 2644, 2650, 2651.) Thus, at a minimum, the jury could reasonably infer that such a tight-knit group was apprised of the crimes being committed by each member of that group. As is clear from the foregoing, a defense gang expert would not have discounted the weight given to Deputy Williams' testimony.

Significantly, since the defense gang evidence petitioner now presents has no bearing as to petitioner's involvement in the Hassan murders, the jury would have given it little, if any, weight. Indeed, as this Court previously declared with regard to the graffiti evidence:

> "[A]ny error in admitting the graffiti testimony was harmless. Although it could be inferred from the graffiti that defendant Champion participated in the robbery and murder of Michael Taylor, defendant Champion was neither charged with nor convicted of those offenses. Any bearing the graffiti had on Champion's guilt of the crimes of which the jury eventually convicted him -- the robberies and murders of Bobby and Eric Hassan -- was tangential, and not likely to affect the outcome of the case." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 924.)

Thus, it is not reasonably probable that testimony from a defense gang expert would have affected the verdict. For these reasons, petitioner has failed to establish either a prima facie case for relief or a fundamental miscarriage of justice based on his trial counsel's failure to call a defense gang expert.

2. Failure To Object To Williams' Qualifications As An Expert

Petitioner next contends that his counsel was ineffective for failing to object to Deputy Williams' qualifications as a gang expert. (Petn. 62.) Trial counsel, however, has no duty to make his client happy by interposing useless motions, objections, or challenges. (*People* v. *Lewis* (1990) 50 Cal.3d 262, 289.) Most competent attorneys would prefer not to run the risk of magnifying the significance of such an inquiry by attacking it with a futile objection. (*People* v. *Milner* (1988) 45 Cal.3d 227, 242.)

Here, trial counsel obviously recognized that an attack on Deputy Williams' qualifications would have been futile. Trial counsel states in his declaration that he did not "object to Deputy Williams' opinions or alleged expertise after [Williams] gave his training and experience." (Vol. 3, Guilt Exhibit 47 at ¶ 13.) This statement demonstrates that counsel believed Williams was in fact qualified as an expert, and counsel's tactical decision not to object to the deputy's qualifications was reasonable.

Evidence Code section 720 states, in part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Despite petitioner's assertions to the contrary (Petn. 62), often police officer testimony has been upheld as properly admitted gang expert testimony. (See *People* v. *Gamez* (1991) 235 Cal.App.3d 957, 966; *People* v. *McDaniels* (1980) 107 Cal.App.3d 898, 904-905; *In re Darrell T.* (1979) 90 Cal.App.3d 325; see also *People* v. *Roberts* (1992) 2 Cal.4th 271, 297-298.)

Certainly, Deputy Williams' special knowledge, skill, experience, and training in the area of gangs qualified him as a gang expert. In fact, this very Court has characterized Deputy Williams as an expert witness, listing his qualifications as follows:

> "Deputy Williams was assigned to the 'street gang detail' at the Los Angeles County Sheriff's Lennox sub-station; for the previous four and one-half to five years his work had involved the investigation of street gangs in the Lennox area." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919.)

Indeed, the record makes clear that Deputy Williams had extensive personal experience with a number of gangs and with the Raymond Avenue Crips in particular. He was familiar with their primary hangout and their various factions and subsets. (RT 2636-2639.) The deputy also was familiar with the gang's customs such as their clothing, graffiti and hand signs. (RT 2645-2646, 2648, 2653.) In addition, he had been involved in hundreds of investigations involving crimes committed by gang members. (RT 2659.) Most importantly, Deputy Williams had personal contact with, and knew the nicknames or monikers of, many of the Raymond Avenue Crips members, including petitioner, Craig Ross, Evan Mallet and the Player brothers. (RT 2639-2640.) He also personally observed which gang members were frequently seen together. (RT 2649-2650.) Deputy Williams was familiar with the brown Buick, which was associated with both the Hassan and Taylor murders. The deputy knew that the car belonged to the Players' father and he had seen it driven by both Michael and Marcus Player in 1980. (RT 2642-2643.)

Given Deputy Williams' background and experience, any objection based on his lack of qualifications as a gang expert would

have been futile. (*People* v. *Milner, supra,* 45 Cal.3d at p. 242.) Since trial counsel was not ineffective for failing to object to Deputy Williams' qualifications as a gang expert, petitioner has neither stated a prima facie case for relief nor established a fundamental miscarriage of justice.

3. Failure To Object To Williams' Opinion As Beyond The Scope Of His Personal Knowledge

Petitioner next claims that his trial counsel was ineffective for failing to object to Williams' opinion as beyond the scope of his personal knowledge because petitioner did not personally tell the deputy that he was a gang member in 1980, and because the deputy's opinion was based on allegedly having seen petitioner in the company of other gang members in the middle of 1980, when those observations supposedly were not accurate. (Petn. 63.) Again, as discussed below, counsel's decision not to object was clearly tactical as any objection would have been futile.

Evidence Code section 801 sets forth the grounds for the admission of expert testimony and limits such testimony, inter alia, to an opinion based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the expert, or made known to him, at or before the hearing. (Evid. Code, § 801.) Despite petitioner's protestations to the contrary, Deputy Williams had personal knowledge which properly formed the basis for his opinion that petitioner was a gang member at the time the crimes were committed. The fact that petitioner himself did not tell Deputy Williams that he was a gang member in 1980 does not render the basis

for the deputy's opinion lacking. In *People* v. *Gamez*, *supra*, 235 Cal.App.3d at p. 966, the court found a "diverse and strong" foundation for a police officer's testimony had been shown because it included "personal observations of and discussions with gang members as well as information from other officers and the department's files."

Here, Deputy Williams' opinion that petitioner was a gang member at the time the crimes were committed was based on his personal observations of petitioner in the company of other Raymond Avenue Crip gang members in the spring or summer months of 1980.[32/] (RT 2668.) Additionally, in the middle of 1980, when the deputy was attempting to locate petitioner, several Raymond Avenue Crip gang members referred to petitioner as "Trech," which was a new and different gang moniker than petitioner previously had used. (RT 2666-2668.) Such information formed a proper basis for Deputy Williams' opinion that petitioner was a gang member in 1980 and at the time of the murders.

Since Deputy Williams' opinion was based on his personal knowledge and his personal experience with gang members, any objection that it was beyond the scope of his personal knowledge would have been futile. Since petitioner has failed to demonstrate his counsel was ineffective for failing to object, petitioner has neither stated a prima facie case for relief nor established a fundamental miscarriage of justice.

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32. As discussed previously, it is unclear exactly how many furloughs petitioner was granted in 1980, but, at the very least, he was given a furlough in the beginning of April 1980 and could have been observed by the deputy at that time.

4. Failure To Object To The Graffiti On The Grounds Of Hearsay

Petitioner finally claims that his counsel was ineffective for failing to object to the graffiti as hearsay. (Petn. 63-64.)

While it is true that petitioner's trial counsel may have "overlooked" the hearsay objection relating to the graffiti (Vol. 3, Guilt Exhibit 47 at ¶ 13), petitioner's assumption that such an omission constituted ineffective assistance of counsel is unfounded. It bears repeating that this Court found any error in admitting the graffiti testimony to be harmless. (*People* v. *Champion, supra,* 9 Cal.4th at p. 924.) This Court emphasized that petitioner was neither charged nor convicted of the Taylor crimes, and that any bearing the graffiti may have had on petitioner's guilt as to the Hassan crimes was tangential and not likely to affect the outcome of the case. (*Ibid.*)

Notably, in addressing petitioner's claims that Deputy Williams' testimony rendered the trial fundamentally unfair, violated his right to due process of law, and constituted violations of the First and Sixth Amendments, this Court concluded:

> "We find no constitutional violation. As we have discussed, the trial court properly admitted the vast majority of Deputy Williams' testimony. Those portions of Williams' testimony that the trial court should have excluded did not render [petitioner's] trial 'fundamentally unfair,' and did not violate [his] right to due process of law." (*People* v. *Champion, supra,* 9 Cal.4th at p. 925.)

Since petitioner suffered no prejudice from the admission of the graffiti evidence, petitioner has failed to show his counsel was

ineffective. A fortiori, petitioner has failed to establish either a prima facie case for relief or a fundamental miscarriage of justice.

H. Evidence That The Motive For The Taylor Killing Was Personal Retribution, Undercutting The Prosecution's Theory That The Killing Was Part Of, And Motivated By, An Ongoing Conspiracy To Rob And Kill Marijuana Dealers

As discussed previously, Natasha Wright testified at trial that she lived next door to the Taylors. In the afternoon of December 27, 1980, she saw four men arrive at the Taylor residence in a Buick. Wright identified Ross as one of four men. Wright stated that Michael Taylor came to the door, one of the men grabbed him, and an argument ensued over money. The four men then got back into the car and left. This testimony was consistent with what she told detectives on December 28, 1980. (See Vol. 3, Guilt Exhibit 48.)

Cynthia Wilte also spoke with detectives and told them that on December 25, 1980, two days before Michael Taylor was killed, she witnessed an altercation between Emmanuel Mallet (Evan Mallet's brother) and Michael Taylor. Wilte believed the fight might have been about someone getting caught with marijuana. (Vol. 3, Guilt Exhibit 49.)

In Claim VIH, petitioner argues his trial counsel was ineffective for failing to discover and present evidence that the true motive for the Taylor killing was personal retribution, undercutting the prosecution's theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers. (Petn. 65-67.) Specifically, petitioner asserts that the statements by Wright and Wilte, coupled with an unsigned, undated piece of paper with the scribble "Binkey," and the words "killed Mike" in parenthesis above it (see Vol.

3, Guilt Exhibit 50) would have shown this alternative motive. (Petn. 65-67.)

Petitioner has failed to provide reasonably available documentary evidence establishing that his trial counsel's decision not to question Natasha Wright, not to call Cynthia Wilte to testify, and not to question the Taylor women about alleged information that someone named "Binkey" killed Michael Taylor was not a tactical decision. There is no explanation from trial counsel in his declaration as to these alleged omissions. Hence, petitioner has failed to establish a prima facie case for relief based on a violation of his right to effective assistance of trial counsel. (*Duvall, supra,* 9 Cal.4th at p. 474.)

Notwithstanding the fact that counsel did not discuss in his declaration his failure to question Natasha Wright, counsel did discuss Wright in his closing argument to the jury. Counsel forcefully reminded the jury that Wright *did not identify petitioner* as one of the four persons she had seen at the Taylor residence on the afternoon of December 27, 1980. (RT 3301.) Clearly, it was a reasonable and tactical decision for counsel to forgo cross-examination of Wright and instead to focus during closing argument on Wright's failure to identify petitioner. Had counsel during cross-examination pursued Wright's lack of identification of petitioner, such cross-examination might have caused Wright to scrutinize petitioner more carefully. Counsel would have risked turning what had been "no identification" into what could have become a possible identification of petitioner as one of the four men she had seen. By leaving Wright's identification alone, counsel was free to argue with confidence that she did not identify petitioner. This was a reasonable and tactical decision.

As to any evidence that Cynthia Wilte may have seen Michael Taylor get into a fight with Evan Mallet's brother, Emmanuel, two days before Taylor's murder, and that the fight had something to do with marijuana, such evidence certainly would not have negated the prosecution's theory of a conspiracy directed at marijuana dealers. To the contrary, such evidence proved that Mallet knew Michael Taylor was a marijuana dealer, and simply added another dimension to the conspiracy theory. Such evidence relating to the Taylor murder did not assist petitioner and again would have emphasized the very evidence that trial counsel in closing argument asked the jury to ignore as a calculated distraction. (See RT 3300.) It was therefore a reasonable tactical decision to avoid it.

As to the alleged police report that someone named "Binkey" killed Michael Taylor, this "report" is an unsigned, undated, handwritten scribble that cannot be considered competent evidence that "Mike" refers to Michael Taylor or that petitioner was not one of the four men who entered the Taylor residence. Beyond the obvious authenticity problem with the document, such a document also would have been inadmissible to prove third party culpability. A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. (*People* v. *Sandoval* (1992) 4 Cal.4th 155, 176.)

> "This rule does 'not require that any evidence, however remote, must be admitted to show a third party's possible culpability. ... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the

third person to the actual perpetration of the crime.' (*People* v. *Hall* (1986) 41 Cal.3d 826, 833.)" (*Ibid.*)

Since there was no evidence linking "Binkey" to the perpetration of the murder of Michael Taylor, the document properly would have been excluded at trial. A fortiori, counsel was not ineffective for failing to seek its introduction into evidence.

Even assuming petitioner could have overcome authentication and admissibility problems, counsel still was not ineffective. At the risk of stating the obvious, it was a reasonable and tactical decision to avoid presenting a defense to a crime for which petitioner was not charged.

Finally, petitioner has not established prejudice. As has been repeated a number of times, petitioner was neither charged nor convicted of the Taylor crimes. In addition, as stated above, Natasha Wright did in fact testify. (RT 2352-2369.) Thus, the jury heard testimony of the "personal retribution" motive for the killing of Michael Taylor. Moreover, Wright did not identify petitioner as one of the four men she had seen during direct examination. Therefore, even assuming she would have confirmed the same during cross-examination, such testimony would have been cumulative.

Furthermore, since neither Cynthia Wilte's testimony, nor the scrap of paper identifying "Binkey" as "Mike's" killer, precluded petitioner from being considered as one of the four suspects to the Taylor crimes, there was no prejudice by their not being presented. Consequently, petitioner has failed to make a prima facie showing for relief or establish a fundamental miscarriage of justice.

IV.

PETITIONER'S CLAIM VII, THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR REASONS RELATING TO THE HASSAN HOMICIDE, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

On December 12, 1980, sometime around noon, Elizabeth Moncrief, a nurse who was working across the street from the Hassan residence, saw Bobby Hassan (who sold marijuana) and his 14-year-old handicapped son Eric return home. A half hour later, Moncrief saw what she thought was a gold or cream-colored Cadillac containing four Black males parked in front of the Hassan home. She went outside and took a close look at the car. About five minutes later, two of the men got out of the car and knocked on the door of the Hassan residence. After a struggle, the men entered the residence. The other two men then got out of the car and entered the residence.

Later, Moncrief saw all four men leave the Hassan house carrying bags or pillowcases. She paid particular attention to the last man out of the residence, who she was certain was petitioner, having seen him previously at Helen Keller Park, which was located across the street. Petitioner looked directly at Moncrief as he walked back toward the car.

When Merci Hassan returned home at about 3:30, she found her house ransacked and part of the lunch she had prepared for her husband and son on the floor, along with wrapping paper from the children's Christmas presents. Several presents were missing, as were some pillowcases and a .357 caliber Ruger revolver. The bodies of her husband and son were found in the bedroom, lying on the bed. Each had been shot once in the head and Bobby's hands were tied behind his

back. Three rings and a necklace[33/] that Bobby customarily wore were missing. When petitioner was arrested, he was wearing one of the rings and the necklace taken from Bobby Hassan.

Moncrief selected petitioner's picture from a photographic lineup, saying he could have been one of the four persons she had seen at the Hassan house. Three days later, she positively identified petitioner in a physical lineup. She also identified a brown Buick linked to the defendants as being the car she had seen in front of the Hassan home.

In Claim VII, petitioner alleges his rights were violated 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," as well as his rights to due process, freedom of association, equal protection, confrontation, and to a fair and reliable guilt and sentencing determination as a result of various errors and omissions by his trial counsel relating to the Hassan homicide. (Petn. 72-121.) Specifically, petitioner claims trial counsel was ineffective 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;

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33. The necklace taken had a gold chain that contained a charm bearing half of a king-of-hearts playing card.

(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 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 . . . ."[34/] (Petn. 72-73.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner has failed to make either a prima facie case for relief or to demonstrate a fundamental miscarriage of justice exception to the timeliness bar.

As discussed below, petitioner has failed to establish a prima facie case for relief in that he has not set forth, with respect to the two prongs of an ineffective assistance of counsel claim, that trial counsel had no valid, tactical reasons for the alleged errors and omissions, and

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34. Although in the introduction to the claim petitioner numbers his subclaims one through eight, in the text of the petition he changes their order and numbers them A through H. Respondent will address the subclaims in the order raised in the text of the petition.

that petitioner was deprived of a fair trial as a result of his trial counsel's errors and omission. (*In re Clark, supra,* 5 Cal.4th at p. 766; see also *Lockhart* v. *Fretwell, supra,* 506 U.S. at p. 372.)

A. Trial Counsel's Failure 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

In Claim VIIA, petitioner asserts his counsel was ineffective for failing to present evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to victim Bobby Hassan. (Petn. 75-79.) Notwithstanding the fact that when petitioner was arrested he was wearing *both* the ring and king-of-hearts charm that were taken from Bobby Hassan at the time of his murder, for this claim, petitioner focuses his attention on the ring. Specifically, petitioner claims his counsel should have presented additional evidence demonstrating that the ring petitioner was wearing at the time of his arrest belonged to Raymond Winbush and was given to petitioner by Winbush. (*Ibid.*)

Petitioner has failed to provide reasonably available documentary evidence establishing that his trial counsel's decision not to present additional evidence relating to the ownership of the ring was not a tactical one. Indeed, trial counsel states in his declaration that he "presented [petitioner's] mother and sister's testimony in support of [petitioner's] statement that he had gotten the jewelry from a friend, Raymond Winbush." (Vol. 3, Guilt Exhibit 47 at ¶ 17.) Counsel intentionally did not call Rose Winbush[35/] (Raymond's sister) as a defense witness at trial because she would have testified that her

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35. Trial counsel refers to Rose Winbush in his declaration as Sue Winbush and Rose Winbush. They are one and the same person.

brother, Raymond, had purchased the ring three years prior and given it to petitioner for his birthday in 1978. (Vol. 3, Guilt Exhibit 55.) This "gift version" concerned counsel because it conflicted with petitioner's account that, in 1980, Raymond had asked petitioner to hold the ring and locket for him while Raymond was in the California Youth Authority. (Vol. 3, Guilt Exhibit 47 at ¶ 17.) Such contradictory testimony would have impacted upon petitioner's credibility, which already was in question in light of his sister Rita's conflicting testimony that she was *certain* she had seen petitioner wearing the diamond ring around four years earlier. (RT 2947.) Consequently, counsel's decision to limit testimony on the subject was tactical and reasonable.

In any event, counsel's decision to limit such evidence was not prejudicial. To the contrary, the "new" evidence petitioner now proffers would have contradicted other evidence presented. As mentioned, Rose Winbush would have testified that her brother Raymond gave the ring to petitioner in 1978 as a birthday present. (Vol. 3, Guilt Exhibit 55.) Walter Winbush (Raymond's father), on the other hand, would now have testified that the ring was given to petitioner *after* Raymond *got out* of the Youth Authority in 1980. (Vol. 3, Guilt Exhibit 61.) However, both of these statements are contradicted by petitioner's own statement that he was given the ring in April of 1980 to hold for Raymond for two weeks *while* Raymond *was in* the California Youth Authority. (Vol. 3, Guilt Exhibit 47 at ¶ 17.) Thus, such inconsistent testimony would only have further damaged petitioner's own credibility.

Furthermore, any additional evidence would have been cumulative to the evidence presented at trial. Petitioner had already testified that Raymond Winbush gave him the ring and king-of-hearts charm. (RT 3027, 3037.) Petitioner's sister testified that petitioner had

gotten the jewelry from a friend. (RT 2943.) Trial counsel also had elicited testimony from jeweler Simon Tabello that the king-of-hearts charm was a very common and mass produced piece of jewelry. (RT 2877, 2880.) Tabello also stated that the ring was a cheaper kind of mass produced piece of jewelry that could be found at stores such as Best Products. (RT 2885-2886.) This testimony was supported by the receipt for the ring from Best Products, dated six months prior to the murder, that was admitted into evidence as People's Exhibit 40.[36/] (RT 1609, 2711.) Consequently, any further testimony regarding the ownership of the ring would have been cumulative.

Nevertheless, petitioner now attempts to argue that the ring in evidence is a size 11 1/2, and that Bobby Hassan's ring was a size 12 and therefore the ring in evidence could not possibly belong to Bobby Hassan. (Petn. 76-77.) However, such an argument is based on speculation and therefore must be rejected. (*People* v. *Karis, supra,* 46 Cal.3d at p. 656.)

The only suggestion that the ring in evidence is in fact a size 11 1/2 comes from petitioner's own counsel, who, along with his investigator, Eldridge Moore, went to the evidence room in the Los Angeles Superior Court and measured the ring. (Vol. 3, Guilt Exhibit 60.) Neither petitioner's counsel nor his investigator are jewelers. Thus, their opinion regarding the measurement of the ring is suspect.

Even assuming arguendo the ring was size 11 1/2, and that Bobby Hassan wore a size 12 ring, petitioner does not even attempt to address the fact that when he was arrested he was wearing not only the ring, but also the charm that was taken from Bobby Hassan at the time

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36. Petitioner also has attached a copy of the same receipt as Exhibit 56. (See Vol. 3, Guilt Exhibit 56.)

Hassan was brutally executed. Petitioner's theories and conclusions are without support. Such a mountain of speculation must fall. It does not present a proper basis for habeas relief. (*People* v. *Karis, supra*, 46 Cal.3d at p. 656.)

Since any additional reliable evidence with respect to the ring's ownership was either contradictory or cumulative, failure to present such evidence was not prejudicial. Accordingly, petitioner has failed to make either a prima facie showing of ineffective assistance of counsel or a fundamental miscarriage of justice.

B. Trial Counsel's Failure To Discover, Present, And Argue Evidence That At The Time Of The Hassan Crimes, Petitioner Was At Home Or Picking Up His Paycheck

At trial, petitioner presented testimony from three witnesses accounting for his whereabouts on December 12, 1980, during the times of the Hassan murders. Petitioner himself testified that on the day of the Hassan murders, he and his brothers Reginald and Lewis picked up their paychecks from Prompt Employment Service between 11:30 and noon. (RT 3029-3030.) Likewise, Reginald Champion testified that he and petitioner picked up their checks between 11:30 a.m. and noon and they were gone for about 20 minutes. (RT 2957.) By the time of trial, petitioner's mother had changed her story and also testified that petitioner was talking on the phone and then picked up his paycheck around noon.[37/] (RT 2792.)

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37. On July 7, 1981, when she was interviewed by the defense investigator, Mrs. Champion stated that petitioner did not get out of bed until around noon. He then talked on the telephone to Sue Winbush for two to three hours, took a shower, ate, and picked up his paycheck sometime in the afternoon. (See Vol. 3, Guilt Exhibit 53.)

In Claim VIIB, petitioner asserts his counsel was ineffective for failing to obtain telephone records and paycheck logs, which allegedly would corroborate his alibi that he was either at home, on the phone, or picking up his paycheck at the time of the Hassan murders. (Petn. 80-82.) Petitioner has not shown that his trial counsel was ineffective.

Petitioner's trial counsel states in his declaration that he did not obtain telephone records and paycheck logs which he now believes "could have provided documented evidence of the time when [petitioner] was on the phone and may have been helpful in determining when he left to pick up his paycheck." (Vol. 3, Guilt Exhibit 47 at ¶ 19.) However, trial counsel's new found belief does not demonstrate his performance was deficient at the time of trial. Counsel's actions and decisions must be considered in light of the information that was available to him at the time the decisions were made. (*Strickland, supra,* 466 U.S. at p. 690; *Babbitt, supra*, 151 F.3d at pp. 1173-1174.)

Initially, it is important to note that petitioner's allegations are supported by nothing more than speculation. (*Karis, supra*, 46 Cal.3d at p. 656.) He has failed to present reasonably available documentary evidence that such documents ever in fact existed, much less that they would have been helpful to him. Accordingly, he has failed to demonstrate his counsel was deficient.

Furthermore, it was not unreasonable for petitioner's counsel not to have attempted to obtain phone and paycheck records. As to the alleged phone records, Rose Winbush lived two blocks away from petitioner. (Compare Vol. 3, Guilt Exhibits 53 & 55.) Since the call would have been a local call, it is questionable whether there would have been a record of the call.

Significantly, even assuming for the sake of argument that there was a phone record, it would not have proved that petitioner was the person on the telephone. And, a record that corroborated Rose Winbush's statement that she talked with petitioner until 1:30 p.m (see Vol. 3, Guilt Exhibit 55) would have contradicted petitioner's own testimony.

Likewise, as to any alleged paycheck log, trial counsel *did* call as a defense witness Donnel Avery, who worked for Prompt Employment Service, and testified at trial that *there was no way of telling* when petitioner picked up his check. (RT 2875.) It is therefore reasonable to conclude that no list in fact ever existed and does not exist, despite petitioner's brother's recollection to the contrary. It must be remembered that petitioner must affirmatively demonstrate prejudice. He cannot rely on speculation. Petitioner alleges only that the supposed list would have contained petitioner's signature. Petitioner speculates that the list also would have contained the signatures of others who picked up their paychecks before or after petitioner so as to narrow down the exact time when petitioner in fact picked up his check. However, petitioner does not allege the actual existence of any fact that would contradict Mr. Avery's trial testimony. Therefore, there would have been *no way* of telling when petitioner actually picked up his paycheck.

Moreover, obtaining such records could have been detrimental to petitioner's defense. Indeed, petitioner already had three consistent versions of his whereabouts. The results of a records search might well have been inconsistent with those versions. Thus, such a search would have been tactically unwise. Consequently, taking into consideration what petitioner's counsel in fact knew at the time of trial, it was

reasonable for him not to have attempted to obtain the alleged records in question.

Finally, as stated above, petitioner has failed to allege that such records ever existed, much less that they contained information that would have exonerated him. Without such a showing, petitioner cannot show prejudice. Accordingly, petitioner has failed to make a prima facie showing that his counsel was ineffective or establish a fundamental miscarriage of justice.

C. Trial Counsel's Alleged 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

During the week following the Hassan killings, Detective Crews showed Elizabeth Moncrief a photographic lineup and a single photograph. Moncrief selected a photograph of Benjamin Brown from the lineup photographs as the person she thought was the fourth person to exit the Hassan residence on the day of the murders. However, she was uncertain of her identification because she was not able to tell from the photograph whether the man had a broken tooth. Moncrief selected a single photo of Clarence Reed, who Moncrief believed was the driver of the car. She also identified Brown and Reed's Chrysler as the one she had seen outside the Hassan residence.

Moncrief subsequently was shown a photo spread containing petitioner's photograph. Moncrief stated that she thought petitioner could have been one of the men she had seen at the Hassan residence but wanted to see him in person before making a positive identification.

Three days later, Moncrief attended a live lineup at County Jail where she positively identified petitioner. Moncrief also identified petitioner at trial as the fourth person she saw leaving the Hassan home. In addition, Moncrief identified a photograph of a brown Buick as the car she has seen in front of the Hassan home.

In Claim VIIC, petitioner argues his counsel was ineffective for "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." (Petn. 83-93.) Petitioner again has failed to demonstrate his counsel was ineffective.

Petitioner has not presented reasonably available documentary evidence that his counsel's decision to limit presentation of the inconsistencies in Moncrief's testimony was not a tactical decision. To the contrary, trial counsel explained in his declaration that in cross-examining Moncrief he intentionally limited Moncrief's impeachment to the inconsistencies in her earlier identifications of the suspects she saw entering and leaving the Hassan home. (Vol. 3, Guilt Exhibit 47 at ¶ 20.) Counsel then focused the jury on Moncrief's earlier identifications of Benjamin Brown and Clarence Reed as the perpetrators of the Hassan murders. (*Ibid.*) Indeed, had counsel pointed out each and every inconsistency in Moncrief's statements, he ran the risk that the jury would reject her earlier identifications of Brown and Reed. Petitioner needed the jury to believe that Brown and Reed, and not petitioner, were involved in the Hassan murders for there to be any hope of acquittal for petitioner. Trial counsel argued

as much in his closing. (RT 3250-3258.) Accordingly, counsel's decision to limit Moncrief's impeachment was tactical and reasonable.

In any event, petitioner was not prejudiced by his counsel's decision to limit the impeachment of Moncrief because the jury heard the bulk of the inconsistencies anyway, and any further inconsistencies merely would have been cumulative. It is interesting to note that, as petitioner lays out the inconsistencies in Moncrief's statements, he directs this Court to various citations in the record on appeal. (See Petn. 83-93.) The inconsistencies were placed before the jury through Moncrief's answers to the questions during her direct and redirect examination (RT 1708-1739, 1870-1878) and through her inconsistent answers on cross-examination and recross-examination to questions asked by petitioner's counsel. (RT 1739-1812, 1836-1870). Additionally, Moncrief's inconsistent statements were explored at length during the cross-examination of Detective Crews by trial counsel. (RT 1976-2011.) Further, trial counsel pointed out inconsistencies in Moncrief's testimony during his closing argument (RT 3246-3249), and the prosecutor himself conceded there were inconsistencies and problems with Moncrief's testimony (RT 3171). Thus, the inconsistencies in Moncrief's testimony were before the jury.

As to any further inconsistencies that can be found in the "undated handwritten notes," which petitioner claims were found in the district attorney's files (Vol. 3, Guilt Exhibits 62 & 64), they are exactly that -- unsigned and undated handwritten notes, which have neither been corroborated nor authenticated. Even assuming for the sake of argument that the notes were in the district attorney's file, petitioner has failed to allege that his own counsel knew of the notes or the

information contained within the notes. Without such knowledge, counsel had no obligation to present such evidence.

Petitioner also claims there were inconsistencies shown in Moncrief's December 16, 1980, signed statement (Vol. 3, Guilt Exhibit 63), and in her testimony at the preliminary hearing. (Petn. 86.) As to the December 16th statement, this statement was presented to the jury as Defense Exhibit F. (RT 1837.) Petitioner concedes as much and points out that his counsel in fact asked Moncrief to read her statement. (Petn. 93.) The fact that petitioner's counsel did not point out every single discrepancy to the jury does not negate the fact that the statement, in its entirety, was before the jury. As to the preliminary hearing transcript, trial counsel specifically referred to the transcript, and read from it, during cross-examination of Moncrief. (RT 1778-1780, 1793, 1803.) Thus, any discrepancy there also was before the jury.

Finally, as discussed above, the jury's belief in at least part of Moncrief's testimony, relating to her identification of Brown and Reed as participants in the Hassan murders, was critical to petitioner's acquittal. Thus, counsel's limitation on Moncrief's impeachment could only have benefited petitioner.

Because trial counsel's decision to limit impeachment was tactical and not prejudicial, petitioner has failed to make a prima facie showing entitling him to relief on the basis of ineffective assistance of counsel or relief from his timeliness default.

D. Trial Counsel's Alleged Failure To Introduce Readily Available And Significantly Exculpatory Forensic Evidence

In Claim VIID, petitioner alleges his trial counsel was ineffective for failing to bring to the jury's attention the fact that the

forensic testing of the gloves taken from petitioner's bedroom at the time of his arrest was negative for blood and gun-shot residue. (Petn. 94-96.) According to petitioner, "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." (Petn. 95, emphasis added.) Similarly, petitioner argues the fact that there was no gun-shot residue on the gloves proved petitioner could not have been the triggerman. (*Ibid.*) Yet again, petitioner has failed to make a prima facie showing that his counsel was ineffective.

As in his previous arguments, petitioner has not presented reasonably available documentary evidence that his counsel's decision not to present the forensic testing results was not a tactical decision. To the contrary, trial counsel stated in his declaration that he was aware that the results of the forensic testing for blood and gun-shot residue on the gloves taken from petitioner's bedroom were negative, and he intentionally did not present this information *because* the results were negative. (Vol. 3, Guilt Exhibit 47 at ¶ 22.) Clearly, this was a reasonable and tactical decision in light of the prosecutor's concession that he did not know who fired the shots that killed Eric and Bobby Hassan, and that the special circumstance findings necessarily rested on an accomplice theory. (See Vol. 3, Guilt Exhibit 47 at ¶ 21.) This is especially true since petitioner's ineffective assistance of counsel claim presupposes petitioner's presence at the scene of the crime (petn. 95), which is incriminating.

Moreover, petitioner's bald and conclusory allegation that he would have had to have blood on his gloves had he been at the Hassan crime scene is nothing more than absolute speculation. (*Karis*, *supra*, 46 Cal.3d at p. 656.) Certainly, petitioner has not presented any

particular allegations or evidence to support exoneration. Therefore it must be rejected. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.

In any event, petitioner has not set forth prejudice by his counsel's failure to present the lack of forensic evidence. Certainly the lack of forensic evidence did not prove that petitioner was not present during the Hassan murders. Despite petitioner's supposition, petitioner could have been present without getting blood on his gloves or he might have worn a different pair of dark gloves at the time of the Hassan murders; the Hassan murders occurred on December 12, 1980 (RT 1589), and petitioner was not arrested until January 9, 1981 (RT 1946). Petitioner had nearly a month to dispose of a pair of bloody gloves. Thus, the fact that the gloves taken at the time of his arrest proved negative, did not establish that petitioner was not at the Hassan crime scene.

Finally, as discussed in Argument IIIE, *supra*, The jury here was instructed that the verdict had to based on the facts and the law. The jury also was told the facts of the case were to be determined by the evidence received at trial and not from any other source. (CT 641.) Jurors are presumed to be able to understand and correlate instructions; they are further presumed to have followed the court's instructions. (*People* v. *Danielson, supra,* 3 Cal.4th at p. 722; see also *Richardson* v. *Marsh, supra*, 481 U.S. at pp. 206-207, 211.) As there was no forensic evidence presented showing blood or gun-shot residue on the gloves that were taken from petitioner's residence at the time of his arrest, the jury was not permitted to speculate that such evidence existed. Consequently, trial counsel's failure to point out that no such evidence existed was not prejudicial. Since petitioner has failed to

allege sufficient evidence as to his counsel's ineffectiveness, and has not demonstrated prejudice resulting from his counsel's alleged omissions, he has not established a prima facie case for relief or a fundamental miscarriage of justice to excuse his tardiness.

E. Trial Counsel's Failure 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

In Claim VIIE, petitioner asserts trial counsel was ineffective for failing 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. (Petn. 97-99.) Specifically, petitioner claims the trial court approved the appointment of a ballistics expert, eyewitness identification expert, probation consultant, a doctor to perform a psychiatric evaluation of petitioner, and an investigator to assist the defense. Yet, he asserts that none of the court's orders for assistance were "utilized" by trial counsel. (*Ibid.*) Petitioner has failed to demonstrate his counsel was ineffective.

At the outset, it should be clarified that, despite petitioner's misleading assertions, most of the experts identified above were in fact appointed and utilized by the defense. As to the eyewitness identification expert, the record shows that psychologist Robert Wm. Shomer was appointed to assist counsel on the issue of eyewitness identification. (CT 229-230.) Petitioner himself confirms that the doctor was hired and conducted an examination of petitioner. (See Petn. 121.)

As to the probation consultant, Clyde Longmire was appointed to assist petitioner's first counsel, Homer Mason, in preparing the

defense. (CT 382.) Mr. Mason stated in his request for attorneys fees that between March and August 1981, he discussed case strategy with the probation consultant. (CT 600.) Thus, the record reflects that such an expert was in fact hired and utilized by the defense.

Likewise, as to the defense investigator, the record indicates that such an expert was consulted by Mr. Mason. (CT 600.) Defense counsel Skyers, too, confirmed that investigator Charles Lawrence was appointed by the court, with costs paid by Los Angeles County. (Vol. 3, Guilt Exhibit 47 at ¶ 5.) Counsel Skyers added, "I used information gathered by that investigator." (*Ibid.*) Clearly, this is evidence that an investigator was hired and "utilized" by the defense.

Finally, the court appointed Seymour Pollack, M.D., of the U.S.C. Institute of Psychiatry & Law, to perform a psychiatric evaluation of petitioner. (CT 579-580.) According to trial counsel Skyers, an examination was performed, which did not reveal brain damage. (Vol. 3, Guilt Exhibit 47 at ¶ 26.) Again, despite petitioner's allegations to the contrary, a psychiatric expert was appointed and utilized.

It appears that the only individuals that may or may not have been hired by trial counsel to assist in the defense were a second counsel and a ballistics expert[38]. And, as to these individuals, petitioner has failed to present reasonably available documentary evidence that counsel's decision not to utilize these individuals was not a tactical decision. Indeed, as to counsel's decision to forgo second

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38. The record in fact includes an ex parte order, dated July 3, 1981, and signed by Judge Julius Leetham, appointing ballistics expert Ram Tec to aid former counsel Homer Mason in preparation of petitioner's defense. (CT 224-225.) Thus, it appears that a ballistics expert may in fact have been hired and utilized by the defense.

counsel, he states that "in 1981 second counsel was not as universally used as come [*sic*] to be in later years." (Vol. 3, Guilt Exhibit 47 at ¶ 5.) As such, counsel's decision not to retain the assistance of second counsel was both reasonable and tactical.

Assuming for the sake of argument that a ballistics expert was not hired by the defense, counsel's decision to forgo a ballistics expert clearly was tactical. Trial counsel explained that he "did not think the ballistic issue was major, or failed to see it as a major issue." (*Ibid.*) This was a reasonable decision in light of the prosecutor's concession that he did not know the identity of the triggerman, and the special circumstance findings necessarily rested on an accomplice liability theory. (See *Id.*, at ¶ 21.) Consequently, trial counsel's decision to forgo the ballistics expert was both tactical and reasonable.

Moreover, aside from his conclusory and speculative allegations, petitioner has failed to show how he was prejudiced by counsel's failure to present the testimony of such experts. Unlike many of his other claims, petitioner does not even attempt to speculate on how the ballistics evidence would have changed had petitioner had his own expert. Moreover, as discussed above, any further testimony regarding ballistics would have been irrelevant in light of the prosecutor's choice to pursue an accomplice liability theory to prove the special circumstance allegations.

As to the testimony of any of the other experts, it is clear that they were in fact hired by the defense although their testimony was not presented at trial. This omission certainly gives rise to the inference that the experts did not have information that would have benefited petitioner's defense. (See e.g. *People* v. *Webster* (1991) 54 Cal.3d 411, 457; see also *People* v. *Williams* (1988) 44 Cal.3d 883, 933; *People* v.

Jackson, supra, 28 Cal.3d at pp. 288-289.) Indeed, petitioner does not now present any evidence showing such testimony would have altered the result in his case.[39/] Accordingly, petitioner has failed to present a prima facie case of ineffective assistance of counsel or establish a fundamental miscarriage of justice.

F. Trial Counsel's Failure To 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

In Claim VIIF, petitioner asserts his counsel was ineffective for failing to object to the use of a secretly taped conversation between petitioner and Evan Mallet.[40/] (Petn. 100-104.) Specifically, petitioner argues that had his counsel made timely and appropriate objections, it is likely that the taped conversations would have been excluded. Petitioner has failed to demonstrate he received ineffective representation.

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39. Petitioner states he is unable to set forth any such evidence because, inter alia, the court has not approved funding for the services of ballistic and eyewitness experts. (Petn. 99, fn. 75.) This statement is in error. Petitioner's previous habeas counsel, James Merwin, stated in his declaration that this Court had approved limited funding for his investigation, and that he had "located and interviewed experts in the fields of eyewitness identification, neuropsychology, "gang" behavior and psychiatry (Post-Traumatic Stress Disorder) . . . ." (Vol. 1, Guilt Exhibit 6 at p. 5.) Additionally, in July of 1981, Judge Leetham appointed ballistics experts Ram Tec to assist in the preparation of petitioner's defense. (CT 224.) Thus, petitioner had the funds and the opportunity to present such beneficial information here.

40. Pursuant to an order from the trial court, on August 4, 1981, petitioner and Mallet had been transported together to court in a van equipped to tape record their conversation. (See CT 400.)

As a preliminary matter, it should be made clear that the tape recorded conversation between petitioner and Evan Mallet was neither played for the jury to hear, nor admitted into evidence. In fact, the details of the conversation were never specifically mentioned by the prosecutor, nor was a transcript of the conversation ever put before the jury. The *only* reference to the conversation itself came during the cross-examination of petitioner, when the prosecutor asked petitioner if Evan Mallet had suggested to petitioner that Elizabeth Moncrief had confused petitioner with a Raymond Crip named "Nicky" because "Nicky" was now dead. (RT 3040.) And, even then, petitioner stated he had no recollection of that conversation with Mallet. (*Ibid.*)

That said, petitioner has failed to present reasonably available documentary evidence establishing his counsel's failure to object to the prosecutor's brief reference to the conversation was not a tactical decision. As trial counsel makes clear in his declaration, in June 1982, he filed a motion to suppress *all* of the tape recorded conversations, including the conversation between petitioner and Ross and any conversations between petitioner and Mallet. (Vol. 3, Guilt Exhibit 47 at ¶ 23; see also CT 232-235.) That motion was heard and denied.[41] (RT 2860.) Thereafter, on October 12, 1982, counsel again objected to the admissibility of the tape recorded conversations and specifically to the transcript of the conversation between petitioner and Ross.[42]

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41. During a hearing on October 12, 1982, trial counsel Skyers made reference to a 1538.5 hearing that "we have already had." (RT 2861.) The prosecutor, too, made reference to the same hearing stating, "I think what counsel is doing is simply resurrecting the 1538.5 motion." (RT 2864.) Trial counsel then clarified, "I filed a motion in this Court, your honor, and it was heard, though very quickly, and the court did deny the motion." (RT 2860.)

42. Petitioner asserts that because there is no specific reference

(RT 2861.) The trial court, having had the opportunity to hear the tape recordings, found, "the objection that the tape is not intelligible is not well founded. It is intelligible. It can be heard." (RT 2859.) After further objections by defense counsel, and rebuttal from the prosecutor, the trial court overruled petitioner's objections stating, "The tape will be played to the jury. . . . The jury will have use of the transcript." (RT 2870.)

As discussed in Argument IIIG, *supra*, trial counsel has no duty to make his client happy by interposing useless motions, objections, or challenges. (*People* v. *Lewis, supra,* 50 Cal.3d at p. 289.) Clearly, having unsuccessfully raised numerous objections to the admissibility of the tape recorded conversations, it would have been a futile effort for counsel to have again objected to the prosecutor's brief reference to the conversation between petitioner and Mallet.

That another objection would have been futile is further supported by this Court's finding that the taping procedure was proper.[43/] This Court concluded that the tape recording did not violate petitioner's rights to remain silent and to counsel because the investigatory technique used had "'no capability of leading the conversation into any particular subject or prompting any particular

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to the taped conversations between petitioner and Mallet, that his counsel failed to get a ruling on his motion to exclude those conversations. (Petn. 100-101.) Respondent disagrees. The motion to suppress included *both* taped conversations and trial counsel's declaration confirms this. (CT 232-235, Vol. 3, Guilt Exhibit 47 at ¶ 23.) Thus, the discussions regarding the tape recorded conversations, and objections to the legality of those conversations clearly encompasses *all* of the tape recorded conversations.

43. Petitioner suggests that the taping was improper as the "fruit of willful prosecutorial misconduct." (Petn. 101.) This allegation is addressed more specifically in Argument IXC(3), below.

replies.'" (*People* v. *Champion, supra,* 9 Cal.4th at p. 911, quoting *United States* v. *Henry* (1980) 447 U.S. 264, 271, fn.9.) Additionally, because the prosecution merely listened to the tape recorded conversations, but did not question the defendants, "[the prosecution] did not engage in 'secret interrogation' by any techniques that were 'the equivalent of direct police interrogation.'" (*Ibid.*, quoting *Kuhlmann* v. *Wilson* (1986) 477 U.S. 436, 459.) This Court further found that petitioner had no reasonable expectation of privacy while confined in the back of a police car. (*Id.*, at p. 912.) Finally, this Court found that the trial court's order permitting the prosecution to record petitioner's conversations lacked any aspect of compulsion:

> "Like a search warrant, the order merely permitted the prosecution to engage in evidence-gathering activities that were permissible at the time the court issued the order." (*Id.*, at p. 913.)

Since the tape recording procedure was proper, the resulting tape recorded conversations were admissible as admissions. When this fact is added to the fact that counsel already had repeatedly and unsuccessfully objected to the taped conversations, it becomes obvious that trial counsel's decision not to object to the prosecutor's brief questions during cross-examination was tactical and reasonable.[44/]

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44. Petitioner represents that Evan Mallet's attorney, Charles A. Gessler, "was successful, with little opposition from the prosecuting attorney, in keeping the tape out, although it contained an alleged admission by Mallet." (Petn. 103.) Petitioner is incorrect. According to the transcript of the Mallet hearing, the trial court in the Mallet case *denied* the motion to suppress, commenting, "I don't see anything that the court's process was abused. I just don't see any illegal search . . . or invasion of privacy." (Vol. 3, Guilt Exhibit 68 at p. 344.)

In any event, the prosecutor's fleeting reference to the conversation between petitioner and Mallet was not prejudicial. It bears repeating, the taped conversation was not played to the jury and the jury did not have a copy of the transcript of the tape. Indeed, all that the jury heard in relation to the conversation between petitioner and Mallet was the prosecutor's question of whether Mallet had suggested to petitioner that Moncrief may have mistaken petitioner for a Raymond Crip named "Nicky", to which petitioner answered "No." (RT 3040.) Petitioner has failed to explain how the prosecutor's question prejudiced him. To the contrary, the jury heard that petitioner may have been mistakenly identified by Moncrief and that someone else named Nicky may have been involved in the Hassan killings rather than petitioner. This statement could only have benefited petitioner.

Accordingly, since counsel's failure to object to the prosecutor's brief reference to the conversation between petitioner and Mallet was tactical, and since petitioner has not demonstrated prejudice from the prosecutor's question, he has failed to make either a prima facie showing entitling him to relief or a fundamental miscarriage of justice on the basis of ineffective assistance of counsel.

G. Trial Counsel's Failure To Object To The Use Of A Secretly Tape Recorded Conversation Between Petitioner And Craig Ross

On August 20, 1981, the prosecutor requested the trial court to issue an ex parte order that petitioner and Craig Ross be transported from jail to court together and that their conversations be tape recorded. The prosecutor asserted that if the two defendants were

transported together, they would likely discuss their mutual involvement in the crimes charged. After obtaining authorization from the court, the police tape recorded two conversations in the van transporting petitioner and Ross to and from court. At trial, over objection of both petitioner and Ross, the tapes were played for the jury.

In the two tape recorded conversations, petitioner and Ross fantasized about taking a "stroll" out of jail and about blowing up the driver of the transport van and escaping. The conversations contained numerous profanities and derogatory terms. The conversations included an interchange in which petitioner and Ross talked about Bobby Hassan, Jr., the son of victim Bobby Hassan and a "junior member" of petitioner's gang, the Raymond Avenue Crips. According to the prosecution, in the interchange, petitioner and Ross discussed whether Bobby Hassan, Jr. had told the police about the defendants' participation in the murder of his father and brother, and discussed whether the bed on which Bobby and Eric Hassan were lying when they were shot was a waterbed.

In Claim VIIG, petitioner argues that his trial counsel was ineffective for failing to object to the tape recorded conversations between petitioner and Ross. (Petn. 105-112.) Specifically, he argues that his counsel should have objected to the tape as a clear abuse of discretion pursuant to Evidence Code section 352, and on the basis that it violated his rights to due process and a fair trial. (*Ibid.*) Petitioner further argues that upon proper objection, the trial court would have excluded the tape in its entirety or, at the very least, portions of the conversations that petitioner believes were irrelevant and prejudicial, such as the portion relating to killing sheriffs, or petitioner's comments

about "strolling," and his references to the "waterbed" and "Bobby Jr." (Petn. 112.)

Again, petitioner has failed to present reasonably available documentary evidence establishing his counsel's failure to make further objections to the taped conversations was not a tactical decision. As discussed in subargument (F), *supra,* trial counsel filed a motion to suppress all of the tape recorded conversations (CT 232-235) and he argued to exclude the tape recordings at a hearing on the motion (RT 2860). He then argued again, at length, to keep the tape recorded conversations out of evidence as a violation of petitioner's Fourth, Fifth, and Sixth Amendment rights to counsel, as irrelevant, and as hearsay. (RT 2860-2870). Indeed, counsel explains in his declaration that he believed that such objections were sufficiently specific to preserve the issue for appeal. (Vol. 3, Guilt Exhibit 47 at ¶ 25.) Consequently, trial counsel's decision not to wage further objections was reasonable and tactical.

Additionally, counsel's failure to specifically object to the tape recorded conversations on Evidence Code section 352 and due process grounds is of no consequence because any further objection would have been futile. (*People* v. *Milner, supra,* 45 Cal.3d at p. 242.) As this Court found:

> "Even if defendant's had adequately challenged the admissibility of the conversations under Evidence Code section 352, we find no error. Evidence Code section 352 gives the trial court broad discretion when weighing the probative value and prejudicial effect of proffered evidence. Here, the portion of defendants' tape-recorded conversations in which they made reference to the waterbed was immediately preceded by a

> lengthy discussion of Bobby Hassan, Jr., the son of victim Bobby Hassan. Thus, the trial court could reasonably conclude that the waterbed the defendant's mentioned was in the Hassan home. Moreover, in that same discussion, defendant Ross asked defendant Champion: 'He [Bobby Hassan, Jr.] ain't never said nothing?' Defendant Champion responded: 'No, he's a punk ass.' The court could reasonably infer from this interchange that both defendants believed that Bobby Hassan, Jr., knew of their participation in the murders, that defendant Ross was asking whether Hassan had spoken to law enforcement authorities about the crimes, and that defendant Champion was explaining that Hassan had not done so. Finally, the trial court could reasonably determine that when they discussed the possibility of escape, the defendants showed a consciousness of guilt. The trial court did not abuse it's discretion in concluding that these portions of the tape recording were sufficiently probative to render the tape recording admissible." (*People* v. *Champion, supra,* 9 Cal.4th at pp. 913-914, fn. omitted.)

In light of trial counsel's repeated objections to the admissibility of the tape recorded conversations, and this Court's finding that the conversations were admissible and would not have been excluded in their entirety, trial counsel's failure to wage further objections does not demonstrate he was incompetent.

Finally, even assuming the jury heard some comments which arguably were irrelevant to the crimes at hand, such comments were few and clearly were not prejudicial. Indeed, as discussed above, the statements regarding "strolling" and escaping were highly relevant in

that they showed a consciousness of guilt. (*People* v. *Champion, supra,* 9 Cal.4th at p. 914.) The comments regarding the waterbed and Bobby Hassan, Jr., also were highly relevant in that they tied petitioner directly to the Hassan crimes. (*Id.*, at p. 911.) Petitioner's references to gang monikers also was relevant to support the prosecutor's theory that petitioner was still an active gang member and that the killings were perpetrated by members of the Raymond Avenue Crips.

The remainder of the tape recorded conversation included petitioner's fantasies about killing sheriffs, his obscenities, and general "tough talk." However, even a brief view of the record makes clear that petitioner was found guilty of the Hassan murders because of the overpowering evidence that tied him to the crimes, inter alia, his identification by an eyewitness, the fact that he was wearing the victim's jewelry at the time of the arrest, and his own statements connecting him to the crimes. If the jury found that petitioner had "bad character" it was because it found he killed Bobby Hassan and his 14-year-old handicapped son, and not because of petitioner's "tough-man lingo."

Accordingly, since counsel's decision not to wage further objections to the tape recorded conversations was tactical, and since petitioner has not demonstrated prejudice, he has failed to make a prima facie showing entitling him to relief or establish a fundamental miscarriage of justice on the basis of ineffective assistance of counsel.

H. Trial Counsel's Failure 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 Circumstances Liability

During closing argument, the prosecutor told the jury that in order to establish the special circumstance allegations as to petitioner, it had to be proven that petitioner shared the triggerman's intent that Bobby and Eric Hassan perish in the course of the burglary and robbery. (RT 3192.) Based on the "striking similarities" and "connections" between the Hassan and Jefferson crimes, the prosecutor argued it was abundantly clear that whichever group committed the Hassan crimes also committed the Jefferson crime. (RT 3193.) The prosecutor continued that whether or not petitioner and Ross were physically present at the Jefferson murder, they certainly were part of the conspiracy and therefore knew what had happened to Jefferson. (RT 3193-3194.) Taking it one step further, it was inconceivable that petitioner or Ross went into the Hassan residence without knowing the same thing was going to happen to Bobby and Eric Hassan. (RT 3194.)

At trial, petitioner's defense was that he was never there. Nevertheless, in Claim VIIH, petitioner now contends that, "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 than the prosecutor's argument suggested." (Petn. 114.) Thus, petitioner argues:

> "The prosecutor's weak mens rea case against petitioner . . . 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." (Petn. 115.)

Generally, a criminal defense attorney "has no blanket obligation to investigate possible 'mental' defenses, even in a capital case." (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1244; *People* v. *Williams, supra,* 44 Cal.3d at p. 937.) Instead, to establish that investigative omissions were constitutionally ineffective assistance, a petitioner must first show trial counsel knew or should have known further investigation was necessary, and he must establish the nature and relevance of the evidence counsel failed to discover and present.[44/] (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1244; *In re Sixto* (1989) 48 Cal.3d 1247, 1257.) Furthermore, counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

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44. As to a defense counsel's duty to investigate possible defenses, this Court has insightfully noted,

> "the range of constitutionally adequate assistance is broad, and a court must accord presumptive deference to counsel's choices and how to allocate available time and resources in his client's behalf. . . . Counsel may make reasonable and informed decisions about how far to pursue particular lines of investigation. Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive." (*Gonzalez, supra,* 51 Cal.3d at p. 1252.)

judgment's." (*Strickland, supra,* 466 U.S. at p. 691; *Babbitt, supra*, 151 F.3d at pp. 1173-1174.) It must be shown the omission was not attributed to a tactical decision which a reasonably competent, experienced criminal defense attorney would make. (*In re Sixto, supra,* 48 Cal.3d at p. 1257.)

> "The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but whether 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' ([*Strickland, supra*, 466 U.S. at p. 687.].) In other words, . . . 'the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.' (*Siripongs* v. *Calderon* [(9th Cir. 1998) 133 F.3d 732, 736.]" (*Babbitt, supra*, 151 F.3d at p.1173.)

At the outset, respondent submits petitioner has failed to establish a prima facie case for relief because he has not even attempted to allege what information counsel had obtained through investigative efforts, much less identify any evidence that would have given him reason to investigate further. Accordingly, there is no basis on which to find an *unreasonable* failure by trial counsel to pursue an investigation of mental defenses.

Although petitioner makes several arguments predicated upon showing what brain damage evidence defense counsel *could now present*, this is not the test. As discussed above, this Court must make a determination as to whether counsel's actions were reasonable. Yet, absent, at the very least, a declaration from counsel regarding the investigative efforts undertaken, the medical consultations which

occurred, and the results gleaned, petitioner's claim is hollow and speculative at best, and accordingly not worthy of consideration in this forum.[46/] (See *People* v. *Wash* (1993) 6 Cal.4th 215, 269.) Indeed, without such critical information, this Court is left to guess at the reasonableness of trial counsel's actions. (See *Strickland, supra*, 466 U.S. at p. 687; see also *Babbitt, supra*, 151 F.3d at pp. 1173-1174.) Without more, petitioner has failed to establish a prima facie case for relief.

Furthermore, petitioner has failed to present reasonably available documentary evidence that trial counsel's alleged failure to present evidence of petitioner's mental impairments was not attributable to a tactical reason. (See Petn. Exhs; see also *Duvall, supra*, 9 Cal.4th at p. 474.) The appellate record provides evidence that trial counsel made a reasonable tactical decision to present a reasonable doubt defense that *never conceded* petitioner's presence at the murder scene and therefore was absolutely incompatible with the mental defense now proposed. As his cross-examination of prosecution witnesses (RT 1670, 1739-1812, 1841, 1992, 2007, 2010, 2034, 2055, 2057, 2234, 2405) and closing argument at the guilt phase (RT 3237, 3246, 3252, 3256, 3274, 3293-3299, 3312) demonstrate, trial counsel attempted to raise a reasonable doubt as to whether petitioner was one of the four perpetrators of the Hassan or the Taylor crimes. (See e.g., *People* v.

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46. In this context, it should be noted that "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charges, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." (*United States* v. *Cronic* (1984) 466 U.S. 648, 656-657, fn. 19.) Thus, if the medical experts opined that no psychological issues were indicated, the presentation of evidence of petitioner's mental state would not have been warranted.

Horton (1995) 11 Cal.4th 1068, 1125; *People* v. *Mitcham* (1992) 1 Cal.4th 1027, 1059 [counsel could have reasonably determined not to present witnesses because "the defense's strongest argument was that the prosecution had failed to prove its case beyond a reasonable doubt"].) It is not ineffective assistance for a trial counsel to refrain from presenting inconsistent theories. (*People* v. *Thomas, supra,* 2 Cal.4th at p. 531; see also *Correll* v. *Stewart, supra,* 137 F.3d at p. 1411; *Butcher* v. *Marquez* (9th Cir. 1985) 758 F.2d 373, 376-377 [Counsel provided effective assistance in not pursuing diminished capacity or heat of passion defense where counsel believed case "was 'one of whether or not Mr. Butcher committed the act, not if he committed the act, why'"].)

Indeed, a reasonable doubt defense was not only a reasonable tactical alternative, but also *the only* alternative available in light of the fact that the psychological examination of petitioner that was done at the U.S.C. Institute of Psychiatry & Law prior to trial did not reveal any brain damage.[47] (Vol. 3, Guilt Exhibit 47 @ ¶ 26.)

Similarly, petitioner has not presented any evidence that trial counsel actually failed to investigate the possibility of a mental defense. Not only does the petition conspicuously fail to attach any declarations from former trial attorney Homer Mason, but also absent are any declarations from the investigators used by trial counsel. This omission

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47. Petitioner states that "[o]ther 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." (Petn. 121.) This statement is simply wrong. The record shows that a psychiatric evaluation by Dr. Seymour Pollack, of the U.S.C. Institute of Psychiatry & Law, was ordered prior to trial. (CT 579-580.) And, trial counsel's declaration confirms that such an evaluation was performed and that it did not reveal brain damage. (Vol. 3, Guilt Exhibit 47 @ ¶ 26.)

is significant and gives rise to the inference that a mental defense investigation was in fact performed but produced nothing to benefit petitioner's case. (See e.g. *People* v. *Webster, supra,* 54 Cal.3d at p. 457; see also *People* v. *Williams*, *supra*, 44 Cal.3d at p. 933; *People* v. *Jackson, supra,* 28 Cal.3d at pp. 288-289.)

While information regarding the extent of such investigations is absent from the present petition, the record on appeal sheds some light on the inquiry. Prior to trial, Superior Court Judge Everett Ricks granted petitioner's motion for appointment of psychologist Robert Wm. Shomer to examine all of the documentation in the case and to testify in court on behalf of petitioner. (CT 229-230.) As stated above, Judge Ricks also granted petitioner's motion for appointment of Seymour Pollack, M.D., of the U.S.C. Institute of Psychiatry & Law, to perform a psychiatric evaluation of petitioner. (CT 579-580.) Thus, there is no evidence that trial counsel failed to investigate a possible mental defense.

With respect to the performance prong, petitioner has not presented any evidence to establish his counsel knew or should have known further investigation might turn up materially favorable evidence of a mental disorder, which actually affected petitioner's capacity to form the necessary intents to rob and kill Bobby Hassan and his 14-year-old handicapped son Eric. To the contrary, trial counsel Skyers states in his declaration that he was "unaware" petitioner was so significantly impaired. (Vol. 3, Guilt Exhibit 47 at ¶¶ 26-27.) He further states 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. (*Id.*, at ¶ 26.) The psychological

examination performed by Dr. Pollack prior to trial also did not reveal brain damage. (*Ibid.*)

Moreover, none of the declarations and exhibits produced by petitioner indicate the possibility that convincing mental evidence should have been reasonably apparent to a competent attorney. (See, e.g. *People* v. *Payton* (1992) 3 Cal.4th 1050, 1079; *People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1244.) In other words, the evidence presented by petitioner by way of declarations and exhibits would have been irrelevant, and consequently inadmissible, because the evidence does not support petitioner's conclusory allegation that a mental disorder "caused" an inability to form the intent to kill.

In this context, petitioner includes reports, records, and declarations of family members and friends of petitioner, recalling anecdotes about petitioner's and their social histories, petitioner's upbringing, and about life in South Central Los Angeles and in the California Youth Authority. The psychological reports on petitioner during his time at the California Youth Authority, and close to the time of the crimes in this case, consistently indicate no mental or neurologic impairment. (See Vol. 7, Penalty Phase Exhibit 115.) For example, in a report dated January 4, 1979, social worker John Spurney found there was "no gross evidence of any mental, emotional, or personality disorders." (*Ibid.*) Mr. Spurney further opined, "I do not see Steve as being a hardened criminal-type of personality, nor do I see any gross signs of mood, thought, or personality disorders; nor signs of organicity." (*Ibid.*) In a psychological report, dated December 13, 1978, Audrey Prentiss, Ph.D. likewise states, "There is no neurological impairment . . . ." (*Ibid.*) In a report, dated December 15, 1978, Psychiatrist Daniel Minton characterizes petitioner as:

"a well-developed, well-nourished adolescent male who appeared to be his stated age. He was alert and oriented to time, place and person. His intelligence was in the average range. He conceptualized concretely. His memory was intact. His associations were tight throughout the interview. His affect was appropriate to the content of the interview." (*Ibid.*)

Petitioner's trial counsel cannot be deemed deficient for failing to present a mental defense if, after a reasonable investigation, nothing has put counsel on notice of the existence of that evidence. (*Strickland, supra,* 466 U.S. at p. 690.)

Indeed, "counsel is not required to pursue repetitive mental examinations until he finally obtains a favorable diagnosis." (*People* v. *Webster*, *supra*, 54 Cal.3d at p. 457; *People* v. *Williams*, *supra*, 44 Cal.3d at p. 945; see also *Hendricks* v. *Calderon* (9th Cir. 1995) 70 F.3d 1032, 1039.) Nevertheless, petitioner did obtain and attach to the petition declarations from Roderick W. Pettis, M.D. and Nell Riley Ph.D. According to Dr. Pettis,

"[Petitioner's] life was shaped by the catastrophes he survived as a child, his family's unsuccessful attempts to overcome its history of mental illness, addiction and domestic violence, and ever present threat of harm and death in his community. His ability to understand and to make sense out of the world in which he lived was compromised by brain damage, which dramatically impaired his ability to learn basic skills of life and increased his dependency on others. The etiology of his neurologic impairments is impossible to determine with certainty, but the severity and effect of the impairments are manifested in all aspects of his life, including academic

performance, peer relationships, social understanding, and cognitive functioning." (Vol. 1, Penalty Phase Exhibit 1 at p. 66.)

Pettis' 68-page declaration conspicuously omits any reference whatsoever to the instant murders and robberies, and petitioner's state of mind at the time of those crimes. The doctor also never mentions the effect any alleged mental disorder had on petitioner's capacity to form the requisite intent for his robbery and murder convictions. (See *ibid.*)

In October of 1997, 17 years after the crimes were committed in this case, Dr. Riley, consulted with Dr. Pettis and administered a battery of neuropsychological tests on petitioner. Those tests revealed that petitioner is of average intelligence. However, according to the doctor, the discrepancy in his verbal and performance IQ scores, and his scores on other tests suggested brain dysfunction. (Vol. 3, Guilt Exhibit 67 at ¶¶ 12, 15.) And, although petitioner was able to pronounce English words accurately, his ability to pronounce nonsense words such as "snirk" and "gusp" was strikingly impaired, apparently suggesting he has a developmental reading disorder or dyslexia. (*Id.*, at ¶ 19.) Despite the fact that petitioner scored in the average range on a battery of memory tests, Dr. Riley opined that petitioner manifested significant difficulties on measures of higher executive function, indicating brain dysfunction. (*Id.*, at ¶¶ 20-26.) Dr. Riley found several possible sources for petitioner's cognitive deficits and brain dysfunction, including in utero insults he may have suffered when his mother was beaten by her husband during pregnancy, the physical abuse he suffered during his childhood and early adolescence, and his abuse of drugs. (*Id.*, at ¶ 29.) Dr. Riley further suggested that

petitioner's environment offered no protection and made him more vulnerable to learning difficulties. (*Id.*, at ¶ 30.)

Again, conspicuously absent from Dr. Riley's report was any mention of the instant crimes or the effect petitioner's alleged mental dysfunction had on petitioner's actual capacity to form the requisite intent to commit the crimes for which he was convicted. At best, Dr. Riley concluded that petitioner's deficits "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." (*Id.*, at ¶ 32.)

In general, the value of a mental health expert's opinion lies, among other things, in the explanation of how the mental disease or disorder affected the state of mind of the defendant at the time of the incident. (*People* v. *Bassett* (1968) 69 Cal.2d 122, 144; *People* v. *Klvana* (1992) 11 Cal.App.4th 1679, 1713; see Pen. Code, § 28.) In the instant case, both doctors utterly fail to explain the link between petitioner's alleged brain dysfunction or any other mental disorder and petitioner's actual capacity to form the specific intent to rob, to burglarize, and to kill.[48/] (See, e.g., *People* v. *Coogler* (1969) 71 Cal.2d 153, 167, fn. 6; *Klvana*, *supra*, at p. 1713.) Nor does either doctor provide any evidence that the subject mental disorders generally negate petitioner's capacity

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48. Petitioner attempts to draw on Dr. Riley's language that petitioner was vulnerable to misreading cues concerning the intentions of other persons, in an attempt to tie in his alleged mental disorder with his state of mind at the time of the crimes. (Petn. 120.) However, *petitioner's* opinion as to his own mental state is irrelevant. What is pertinent is the *mental expert's* explanation of how petitioner's alleged mental infirmity affected his capacity to form the requisite intent at the time of the crimes. Such an opinion is markedly absent.

to form the requisite mental states. (See, e.g., *People* v. *Gonzalez, supra*, 51 Cal.3d at p. 1246; *People* v. *Rosenkrantz* (1988) 198 Cal.App.3d 1187, 1201.) Indeed, Dr. Riley does not even mention the facts of the crimes, much less rely on them, to demonstrate how the circumstances of the crimes were "ambiguous," nor has she opined how the words "snirk" and "gusp" might have come into play during the crimes so as to have negated petitioner's understanding that Bobby and Eric Hassan were to die a brutal death during the course of the burglary and robbery. Dr. Riley further has not explained how petitioner's alleged dyslexia prevented him from understanding that Bobby and Eric Hassan would be killed after they were robbed. Certainly, there is no evidence in the record that petitioner and his cohorts were communicating their intentions in writing as they carried out their brutal murders. Nor could Dr. Riley possibly be suggesting that dyslexia negates the intent to kill.

Moreover, whereas the evidence adduced at trial unquestionably supports the jury's finding that petitioner shared the intent to kill the Hassans when he entered their residence, Drs. Pettis and Riley have not even attempted to challenge or refute the inference drawn from the facts. (See, e.g. *People* v. *Bassett, supra*, 69 Cal.2d at p. 144.)

Accordingly, respondent respectfully submits petitioner has not established a prima facie case for relief because there is no showing trial counsel was incompetent. (See, e.g., *People* v. *Avena* (1996) 13 Cal.4th 394, 422; *Gonzalez, supra*, 51 Cal.3d at pp. 1244-1245.) Since there is no showing trial counsel was required to investigate the mental defense now proposed by petitioner, petitioner similarly has failed to show trial counsel was required to present the subject evidence.

(*Payton*, *supra*, 3 Cal.4th at p. 1079.) In addition, the mere fact trial counsel, had he chosen another path, might have obtained a more favorable result for petitioner, does not meet petitioner's burden herein. (*People* v. *Jennings* (1991) 53 Cal.3d 334, 379-380.)

Furthermore, petitioner has failed to establish prejudice[48] since the subject mental disorder evidence does not contradict, in any possible way, the jury's finding that petitioner acted with the requisite specific intent to rob and murder Bobby and Eric Hassan. (See, e.g., *Webster*, *supra*, 54 Cal.3d at p. 458; *Williams*, *supra*, 44 Cal.3d at pp. 946-949.) In other words, petitioner has failed to show it is reasonably probable the jury would not have found him guilty of first degree murder with special circumstances had the evidence of a mental disorder now suggested by petitioner been presented at trial. (See, e.g., *ibid.*; *People* v. *Mayfield* (1993) 5 Cal.4th 142, 208-209; *Payton*, *supra*, 3 Cal.4th at p. 1079; *People* v. *Robertson* (1982) 33 Cal.3d 21, 43-44.)

Also, as noted earlier, any mens rea defense based on organic brain damage would have conceded petitioner's presence at the scene of the murder. Petitioner specifically concedes this by "assuming that the Jefferson, Taylor and Hassan crimes were all committed by the same persons." (Petn. 114.) Once petitioner's presence was conceded, then all of the testimony and evidence that linked petitioner to those crimes both directly and circumstantially would have been corroborated.

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48. Since petitioner has failed to demonstrate with declarations from experts or other reasonably available documentary evidence that he actually lacked the requisite mental state due to mental illness or defect, his claim of prejudice is based on pure speculation and must be summarily denied. (See, e.g., *In re Avena* (1996) 12 Cal.4th 694, 738 ["[w]e cannot, and will not, predicate reversal of a judgment on mere speculation that some undisclosed testimony may have altered the result"; internal quotation marks omitted].)

Given the execution style manner of killings in all four murders, and given the absence of any details from petitioner describing his mental state during the crimes, the only reasonable inference is that petitioner engaged in knowing and purposeful conduct in committing the murders in the Jefferson, Taylor and Hassan cases.

Since petitioner has failed to proffer any evidence showing he actually lacked the requisite intent to commit the charged crimes against Bobby and Eric Hassan, the evidence presented at trial "was ample to support the convictions." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 927.) Thus, petitioner has failed to establish trial counsel's allegedly deficient performance in failing to investigate and present a mental defense rendered the result of the guilt phase unreliable or fundamentally unfair. (See, e.g., *In re Avena, supra,* 12 Cal.4th at pp. 722-726; *People* v. *Beeler* (1995) 9 Cal.4th 953, 1009-1010.)

Accordingly, respondent respectfully submits the instant claims of ineffective assistance of counsel relating to the Hassan murders must be rejected on timeliness grounds and they fail to establish either a prima facie showing entitling him to relief or a fundamental miscarriage of justice.

V.

PETITIONER'S CLAIM VIII, THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR REASONS RELATING TO THE JEFFERSON HOMICIDE, IS PROCEDURALLY BARRED AND FAIL TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

At trial, the prosecution introduced evidence of the murder of Teheran Jefferson, which occurred approximately a month prior to the Hassan murders. On the afternoon of November 15, 1980, police responded to the scene of a murder across the street from the Hassan residence. Victim, Teheran Jefferson, who was known to sell marijuana, was found with his upper torso on the bed, and his knees and feet on the floor. Jefferson's hands were tied behind his back, a pillow was over his head, and his mouth was gagged with a T-shirt. He had been shot in the back of the head. The prosecution introduced no evidence directly connecting either petitioner or Craig Ross with Jefferson's murder.

In Claim VIII, petitioner alleges his rights were violated 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," as well as his rights to due process, freedom of association, equal protection, confrontation, and to a fair and reliable guilt and sentencing determination as a result of various errors and omissions by his trial counsel relating to the Jefferson homicide. (Petn. 122-141.) Specifically, petitioner claims trial counsel was ineffective 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's 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 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." (Petn. 122-123.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner has failed to make a prima facie case for relief.

As discussed below, petitioner has failed to set forth a prima facie case for relief, with respect to the two prongs of an ineffective assistance of counsel claim, that trial counsel had no valid, tactical reasons for the alleged errors and omissions, and that petitioner was deprived of a fair trial as a result of his trial counsel's errors and omission. (*In re Clark, supra,* 5 Cal.4th at p. 766; see also *Lockhart* v. *Fretwell, supra,* 506 U.S. at p. 372.)

A. Trial Counsel's Failure To Discover And Produce Evidence That The Jefferson Case Was Not Similar To The Hassan Or Taylor Crimes

In Claim VIIA, petitioner alleges his counsel was ineffective for failing to discover and produce evidence of the dissimilarities between the Jefferson, Hassan, and Taylor murders, which he argues would have undercut the prosecution's theory that petitioner participated in, or had knowledge of, all three incidents, and therefore petitioner had the requisite mental intent for finding the special circumstances to be true. (Petn. 125-130.) Petitioner has not shown his counsel was ineffective.

Although trial counsel offers no tactical reason for his failure to highlight for the trial court and the jury the alleged dissimilarities between the crimes, it is clear that even if counsel had brought the alleged dissimilarities to their attention, it would not have barred admission of the Jefferson evidence because the similarities between all of the crimes were substantial. As between the Jefferson and Hassan crimes, both Jefferson and Hassan were marijuana dealers who were shot in the head, at close range, with a .38 or .357 caliber revolver. Jefferson and Hassan lived only three doors from each other and the murders were committed within a month of each other. Both victims lived in close proximity to Helen Keller Park. In both cases, there was a nonforcible entry, yet the interior of the residences were ransacked. Despite petitioner's misleading statements to the contrary (petn. 126), both Jefferson and Bobby Hassan were bound and placed on a bed in similar positions before being shot. In both cases, pillows were used to muzzle the sound of the shot so it would not be heard.

The Taylor murder, too, was similar to the Jefferson and Hassan murders such that it clearly was part of the same common plan. Taylor, like Jefferson and Bobby Hassan, was a marijuana dealer in the

same neighborhood. He, too, was shot once in the head at close range. Like the Hassan and Jefferson murders, the Taylor incident involved a nonforcible entry and a ransacking of the interior of the house. As in the prior murders, the single shot to the head that killed Taylor was muffled to avoid being heard by neighbors. The significant similarities between the Jefferson, Hassan and Taylor crimes make clear that any attempt by trial counsel at having the Jefferson evidence precluded would have been futile. (*People* v. *Milner, supra,* 45 Cal.3d at p. 242.)

In any event, petitioner could not have been prejudiced because many of the alleged "dissimilarities" are not dissimilar at all. For example, the fact that there is no evidence of what vehicle was used in the Jefferson murder is not a dissimilarity to the vehicle used in the Hassan murders, it is just a fact that is unknown. Likewise, the fact that Jefferson allegedly sold a greater quantity of marijuana than Bobby Hassan is a distinction without a difference. The fact of the matter is that Jefferson, Hassan, and Taylor all were marijuana dealers.

Petitioner's claim that the Jefferson crime was dissimilar because Jefferson had no relation to the Raymond Avenue Crips misses the point. The similarity actually proposed at trial by the prosecutor is that all of the crimes were committed by the Raymond Avenue Crips, not that there was any relation between the Crips and the victims.[50/]

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50. Petitioner further suggests that the "Bascue Memorandum" (see Vol. 3, Guilt Exhibit 73), sent from the deputy district attorney to his supervisor with recommendations that no charges be filed against petitioner or Ross for the Jefferson crime, evidences that the Jefferson murder was dissimilar to the Hassan and Taylor crimes and that petitioner was not involved. Petitioner is simply wrong. First, the memorandum merely states that there is no evidence *directly* linking petitioner and Ross to the Jefferson crime. The statement does not mean that there is *no evidence at all.* Certainly there is circumstantial evidence linking the two to the crime and the district attorney says as

Petitioner cannot show prejudice because it is not reasonably probable that the jury would have reached a more favorable result in the absence of evidence of the Jefferson murder. The evidence against petitioner was overwhelming. Elizabeth Moncrief positively identified petitioner as a participant in the Hassan murders. Her identification was supported by Bobby Hassan's jewelry that petitioner was wearing at the time of his arrest, the photograph depicting petitioner in possession of a Colt .357 or ".38 Special" revolver, which was consistent with the slugs removed from Bobby Hassan's head, petitioner's acknowledgement in the tape recording that there was a waterbed in the Hassan's bedroom, and the testimony of Officer Williams, linking petitioner to the Raymond Avenue Crips and to his fellow cohorts. Given this mountain of evidence against petitioner, there is no reasonable probability that he would have obtained a more favorable result had the jury not heard evidence of the Jefferson killing.

This Court already has agreed with respondent's position, finding any error in admitting the Jefferson evidence to be harmless:

> "As defendants themselves point out, the prosecution offered no evidence directly connecting defendants to Jefferson's death. Thus, it seems unlikely that the jury gave the evidence substantial weight. We conclude there is no reasonable

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much in the first paragraph of the memorandum.

Moreover, the fact that the district attorney decided not to prosecute petitioner and Ross for the Jefferson crime clearly was a tactical decision based on the fact that there was substantial direct evidence tying petitioner to the Hassan crimes, and Ross to both the Hassan and Taylor crimes. Additionally, the prosecutor intended to use the Jefferson crimes in the penalty phase of the trial to ensure petitioner received the commensurate penalty. Such a tactical decision certainly was the prerogative of the prosecutor and should not be construed as anything more.

probability that the outcome of the trial would have been different if the trial court had excluded the evidence of the Jefferson murder." (*People* v. *Champion, supra,* 9 Cal.4th at p. 919.)

Accordingly, since any attempt by counsel to preclude evidence of the Jefferson crime would have been futile, and since petitioner has not demonstrated prejudice, he has failed to make either a prima facie showing entitling him to relief or to establish a fundamental miscarriage of justice on the basis of ineffective assistance of counsel.

B. Trial Counsel's Failure To Object To The Jefferson Evidence On The Ground That It Violated Petitioner's Due Process Rights And Evidence Code Sections 352 and 1101

Prior to opening statements, petitioner's counsel made a general objection to any reference by the prosecutor during his opening argument of the uncharged Jefferson murder. (RT 1510.) The prosecutor responded that the Jefferson murder was relevant to show the guilt of both defendants by showing that the Hassan murder was not an isolated incident but part of an ongoing conspiracy to commit robbery and murder of dope dealers in the neighborhood. (RT 1511.) The prosecutor explained that the Jefferson murder was the first in a series of murders and that it was uniquely similar to the Hassan murder in that both Bobby Hassan and Jefferson were marijuana dealers, they lived three doors apart, they were killed within a month of each other, and neither residence was broken into but both were ransacked. (*Ibid.*) The prosecutor added that Jefferson and one of the Hassan victims' bodies were found in similar positions and that both Jefferson and one of the Hassan victims had a pillow covering their heads. (*Ibid.*) The

prosecutor emphasized that both victims were shot in the head with a .38 revolver with a six left twist. (RT 1512.)

The prosecutor further explained that the Jefferson murder was relevant to show intent because the jury reasonably could infer that since the Hassan murder was subsequent to the Jefferson murder, the persons involved in the Hassan murder went into the house knowing that a murder had been committed before and would be committed again. (*Ibid.*) The trial court overruled petitioner's objection. (RT 1514.)

In Claim VIIIB, petitioner complains his counsel was ineffective for failing to object to the Jefferson evidence on the grounds that it violated petitioner's due process rights and Evidence Code sections 352 and 1101. (Petn. 131-135.)

First, petitioner fails to establish a prima facie case for relief as he has not presented any reasonably available documentary evidence demonstrating his counsel's decision not to object on Evidence Code sections 1101 and 352 grounds was not tactical. While trial counsel states that there was no tactical reason for his failure to object to the Jefferson evidence on that basis, he further asserts that he believed at the time that his general objection to the introduction of evidence of the Jefferson crimes was sufficiently specific. (Vol. 3, Guilt Exhibit 47 at ¶ 17.) Therefore, trial counsel did have a tactical reason for not pursuing more specific objections.

Nevertheless, any further objection to the evidence as violative of due process and Evidence Code sections 1101 and 352 would have been fruitless because the evidence was properly admitted on that basis. As this Court recently stated in *People* v. *Kipp* (1998) 18 Cal.4th 349, 369:

"Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) . . .

"To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a '"pattern and characteristics . . . so unusual and distinctive as to be like a signature."' [Citations.] 'The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.'" (*People* v. *Kipp, supra,* 18 Cal.4th at pp. 369-370.)

As discussed in the previous subpart to this claim, the Jefferson, Hassan and Taylor crimes displayed common features that revealed a highly distinctive pattern. Jefferson, Taylor and Bobby Hassan all were marijuana dealers in the same neighborhood; Jefferson and Hassan lived only three doors from each other and they all lived near Helen Keller Park. The murders took place over the course of two months, with the Jefferson and Hassan crimes taking place within a month of one another. In all three cases, there was a nonforcible entry and yet the interiors of the residences were ransacked. In all three cases, the victims were shot once in the head, at close range, with

a .38 or .357 caliber revolver. Both Jefferson and Bobby Hassan were bound and placed on the bed in similar positions before being shot. In both cases, pillows were used to muzzle the sound of the shots. In the Taylor case, too, the shot was muffled to avoid being heard by the neighbors. Based on both the number and the distinctiveness of the shared characteristics, the jury could properly infer that the same persons, or group of persons, involved in the Jefferson murder were also involved in the Hassan and Taylor crimes.

A lesser degree of similarity is required to establish relevance on the issue of common design or plan, and the least degree of similarity is required to establish relevance on the issue of intent. (*People* v. *Kipp, supra,* 18 Cal.4th at p. 371; see also *People* v. *Ewoldt* (1994) 7 Cal.4th 380, 402.) Here, the common features noted above indicate that when petitioner committed the Hassan crimes, he was acting pursuant to a common plan or design to rob and murder marijuana dealers in his neighborhood. The shared characteristics of the crimes also support an inference that petitioner harbored the intent to kill when he entered the Hassan residence.

In order for the evidence of the Jefferson murder to be admissible, there is the added requirement that the probative value of the uncharged offense must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People* v. *Kipp, supra,* 18 Cal.4th at p. 371; *People* v. *Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) Here, as noted above, the Jefferson, Hassan, and Taylor crimes displayed the same highly distinctive features so that evidence of the Jefferson crimes had substantial probative value on the issues of identity, common plan or design, and intent in the Hassan

crimes. That probative value is further enhanced by the proximity of the incidents in place and time, and the fact that all of the incidents occurred in the territory of the Raymond Avenue Crips. Moreover, the crimes were separately investigated by different law enforcement officers, and proved by the testimony of different witnesses. (See *People* v. *Kipp, supra,* 18 Cal.4th at p. 371.) Finally, the evidence of the Jefferson crimes was probative to material and disputed factual issues so that it could not be excluded as merely cumulative. (*Id.*, at p. 372.)

Against this substantial probative value on material and contested issues must be weighed the danger of undue prejudice to petitioner, of confusing the issues, or of misleading the jury. (*Ibid.*) While evidence of the Jefferson murder posed a danger of prejudice to petitioner, such prejudice is inherent whenever other crimes evidence is admitted, and the risk of such prejudice is not unusually grave here. (*Ibid.;* see also *People* v. *Ewoldt, supra,* 7 Cal.4th at p. 404.) The Jefferson crime was not significantly more inflammatory than the Hassan crimes. Indeed, the Hassan crimes involved the murder of a 14-year-old handicapped child. Finally, the jury was properly instructed on the purposes for which it might consider the evidence of the Jefferson crime. Considering all of the relevant factors, the probative value of the Jefferson evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or misleading the jury. Accordingly, the evidence of the Jefferson crimes was properly admitted pursuant to Evidence Code sections 1101 and 352 and did not violate due process. As such, petitioner's counsel was not ineffective for failing to raise a meritless objection on those grounds.

In any event, as discussed in the previous subpart to this claim, any error in the admission of the Jefferson murder was harmless. (*People* v. *Champion, supra,* 9 Cal.4th at p. 919.) Since any objection to the Jefferson evidence on the basis of a violation of due process and Evidence Code sections 1101 and 352 would have been futile, and since there was no prejudice, petitioner has failed to establish a prima facie case entitling him to relief or a fundamental miscarriage of justice on the grounds of ineffective assistance of counsel.

C. Trial Counsel's Failure To Object To The Jefferson Evidence On The Ground That The Evidence Was Inconsistent With The Prosecutor's Offer Of Proof

In Claim VIIIC, petitioner argues his counsel was ineffective for failing to object to evidence of the Jefferson crime on the ground that the evidence was inconsistent with the prosecutor's offer of proof. (Petn. 136.) This argument must be rejected.

At the outset, petitioner's argument fails because he does not even attempt to demonstrate how the evidence presented at trial was inconsistent with the prosecutor's offer of proof, rendering such an objection appropriate. He merely makes a bald conclusory assertion that such was the case, and claims his counsel was ineffective for failing to object. Such unsupported conclusory allegations provide no basis for relief. (*Duvall, supra*, 9 Cal.4th at p. 474.)

Furthermore, any objection to the Jefferson evidence on the grounds that the prosecutor's offer of proof was inconsistent with the evidence presented at trial would have been futile because there in fact were no inconsistencies shown.[51/] (*People* v. *Milner, supra,* 45 Cal.3d

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51. The specific similarities between the prosecutor's offer of

at p. 242.) Indeed, this Court observed, "We have examined the offer of proof and find no inaccuracies." (*People* v. *Champion, supra,* 9 Cal.4th at p. 919.) Consequently, any objection on that basis would have been an idle act.

In any event, petitioner cannot show prejudice. As stated above, there was nothing improper about the prosecutor's offer of proof. And, even assuming arguendo that there was any error, this Court has already found that the admission of evidence of the Jefferson murder was harmless. (*Ibid.*)

In sum, trial counsel's decision not to wage a more specific objection was tactical. In addition, such an objection would have been a futile act, and, in any event, petitioner was not prejudiced. Accordingly, petitioner has failed to demonstrate a prima face case of trial counsel's incompetence entitling him to relief. Nor has he established a fundamental miscarriage of justice.

D. Trial Counsel's Failure To Object To The Prosecution's Conspiracy Evidence And Argument

In Claim VIIID, petitioner alleges his counsel was ineffective for failing to object to the prosecution's argument that the Jefferson, Hassan, and Taylor murders were similar and part of an ongoing conspiracy. (Petn. 137-141.) Such an argument, petitioner argues, constituted prosecutorial misconduct to which an objection by trial counsel was mandated.[52/] (*Ibid.*)

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proof and the evidence presented is discussed more fully in Argument XB, *post*, as it relates to petitioner's claim that the prosecutor committed misconduct based on his alleged misrepresentations included within the offer of proof.

52. To the extent that petitioner makes a separate claim that the

Petitioner fails to present any reasonably available documentary evidence in support of his contention. In particular, petitioner has not provided a declaration from defense counsel explaining why he did not object to the prosecutor's argument regarding a conspiracy, even though trial counsel clearly was available for such comment on the issue.[53/] Petitioner's conclusory and unsupported allegations are not a basis for relief. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

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prosecutor's argument constituted misconduct, he is procedurally barred under *Waltreus*. This claim already was raised and rejected by this Court. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 931.) As found by this Court, the claim also is waived since petitioner did not make a timely objection to the remarks at trial. (*People* v. *Cain* (1995) 10 Cal.4th 1, 48; *People* v. *Gionis* (1995) 9 Cal.4th 1196, 1215; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.)

53. Petitioner states in his petition:

> "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 [*sic*] for all purposes." (Petn. 138 at ¶ 7.)

Such comments by trial counsel, however, are not contained in his declaration.

To the extent that this Court might consider the unsupported allegations in the text of the petition, they clearly evidence a tactical reason for failing to object to the conspiracy evidence -- because a conspiracy was not charged, there was no concern that the prosecutor argued one might have existed. In light of his tactical reason, petitioner has not established his counsel was ineffective.

Nevertheless, any objection by trial counsel to the prosecutor's conspiracy argument would have been futile because such argument was proper. As this Court aptly stated in *People* v. *Belmontes* (1988) 45 Cal.3d 744:

> "It is long and firmly established that an uncharged conspiracy may properly be used to provide criminal liability for acts of a coconspirator. (*People* v. *Lopez* (1963) 60 Cal.2d 223, 250 . . . [uncharged conspiracy to commit burglaries admissible to prove identity of murderer]; *People* v. *Pike* (1962) 58 Cal.2d 70, 88 . . . [uncharged conspiracy to commit robberies admissible to prove armed robbery culminating in murder].) 'Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy. [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations].'" (*People* v. *Belmontes*, *supra*, 45 Cal.3d at p. 788, quoting *People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842.)

Indeed, conspiracy principles often are utilized in cases wherein the criminal conspiracy is not charged in the indictment or information. (*People* v. *Brigham* (1989) 216 Cal.App.3d 1039, 1049.)

> "In some cases, for example, resort is had to such principles in order to render admissible against one defendant the statements of another defendant. [Citations.] In others evidence of conspiracy is relevant to show identity through the existence of a common plan or design. [Citation.] In still others the prosecution properly seeks to show through the

existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense aided and abetted in its commission. [Citations.]" (*People* v. *Durham* (1969) 70 Cal.2d 171, 180-181, fn. 7.)

In such instances, the function of offering evidence of the uncharged conspiracy is simply evidentiary, as those facts tend to prove the crime charged.

In the instant case, there was ample evidence from which the jury could have inferred that petitioner and Ross, and other members of the Raymond Avenue Crips, conspired to rob and murder marijuana dealers in the area surrounding Helen Keller Park. The evidence of the conspiracy was relevant to the issue of identity in the Hassan case by showing a plan to commit a crime substantially similar in design to the Jefferson robbery and murder. The jury reasonably could have inferred from the evidence that petitioner was associated with the Raymond Avenue Crips, and Craig Ross in particular, as partners in crime during the months of November and December 1980. By establishing the active criminal partnership, it corroborated the identification evidence tending to establish that petitioner was one of the four perpetrators who robbed and killed Bobby Hassan and his 14-year-old handicapped son Eric.

The evidence of the conspiracy also was relevant because it tended to establish the intent of the perpetrators of the Hassan robbery and murders. Clearly, the jury could properly infer that petitioner was involved in the Jefferson murder, or knew about it through his fellow gang members. Therefore, he had to know that at least Bobby Hassan would be robbed and murdered when petitioner and his cohorts entered the Hassan residence. As evidence of the conspiracy was

relevant and proper, any objection by trial counsel would have been in vain.

Petitioner argues an objection to the conspiracy evidence and argument would have been sustained here because the court in the Evan Mallet case precluded any mention of gang activity. (Petn. 139-141.) Petitioner's argument is flawed. Evan Mallet was only charged with the Taylor crimes. As to those crimes, Mallet had been positively identified by Mary Taylor as one of the four perpetrators who entered her residence and killed her brother, and, more specifically, as the person who attempted to rape her. Thus, in sharp contrast to the instant case, in the Mallet case there was less an issue as to identity or intent.

In any event, as discussed in the previous subparts to this claim, any error in the admission of the Jefferson murder, which included the conspiracy evidence, was not prejudicial. (*People* v. *Champion, supra,* 9 Cal.4th at p. 919.) Since any objection to the conspiracy evidence and argument would have been futile, and since there was no prejudice, petitioner has failed to establish either a prima facie case entitling him to relief or a fundamental miscarriage of justice on the grounds of ineffective assistance of counsel.

VI.

PETITIONER'S CLAIM IX, THAT HIS TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim IX, petitioner alleges his rights were violated "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" as well as his rights to due process, freedom of association, equal protection, confrontation, and to a fair and reliable guilt and sentencing determination as a result of various errors and omissions by his trial counsel relating to the penalty phase of petitioner's trial. (Petn. 142-219.) Specifically, petitioner alleges his trial counsel provided ineffective assistance in:

> "(1) failing to object to the prosecutor's argument that petitioner would kill if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation; (2) failing to object to the prosection's argument that an alleged lack of a mitigating factor was, as to each factor, to be considered a factor in aggravation; and (3) failing to discover and produce substantial mitigating evidence at the penalty phase of the trial." (Petn. 142.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner has failed to make a prima facie case for relief.

As discussed below, petitioner has failed to set forth a prima facie case for relief with respect to the two prongs of an ineffective assistance of counsel claim, that trial counsel had no valid, tactical reasons for the alleged errors and omissions, and that petitioner was deprived of a fair trial as a result of his trial counsel's errors and/or omissions. (*In re Clark, supra,* 5 Cal.4th at p. 766; see also *Lockhart* v. *Fretwell, supra,* 506 U.S. at p. 372.)

A. Trial Counsel's Failure To Object To The Prosecutor's Argument That Petitioner Would Kill If Sentenced To Life Without The Possibility Of Parole And That His Demeanor Should Be Used As A Factor In Aggravation

At the conclusion of the guilt phase of the trial, when the jury returned the verdicts convicting both petitioner and Craig Ross of murder with special circumstances, the defendants stood up and petitioner uttered an obscenity. The trial court directed the defendants to sit down; they refused and began walking toward the lock-up area. Petitioner turned toward his mother, who was sitting in the audience, and stated that he was being "railroaded." At some point while this was going on, Craig Ross indicated to a plain clothes officer that he was willing to get into a fight with the officer if the officer moved any closer to Ross. The bailiff then escorted both defendants out of the courtroom and into the lock-up area. The whole incident took no more than 15 or 20 seconds before the defendants were taken out of the courtroom. (*People* v. *Champion, supra,* 9 Cal.4th at p. 941; see also Settled Statement of July 8, 1985, 70-74.)

Thereafter, in closing argument at the penalty phase, the prosecutor commented on the defendants in-court behavior on three occasions. First, the prosecutor argued that the defendants' behavior

showed they would be a danger to others if they were sentenced to life imprisonment without the possibility of parole. The prosecutor briefly referred to the incident again in pointing out the "mock indignation" that the defendants had displayed, and, at a later point, the prosecutor argued that the defendants' behavior demonstrated a lack of remorse for their crimes. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 941.)

Petitioner now alleges his counsel was ineffective for failing to object to the prosecutor's remarks. (Petn. 144-150.) Specifically, he complains that his counsel should have objected to the prosecutor's comments referencing petitioner's in-court demeanor, lack of remorse, and future dangerousness. (*Ibid.*) Petitioner further argues his counsel should have objected to the prosecutor's alleged urging of the jury to use anger and outrage in determining petitioner's penalty, and to the prosecutor's reference to non-statutory aggravating factors. (*Ibid.*) Petitioner has not shown that his trial counsel's performance was deficient nor that it subjected him to prejudice.

First of all, petitioner has failed to provide reasonably available documentary evidence establishing that his trial counsel's decision not to object to the prosecutor's penalty phase argument was not a tactical one. While trial counsel states he could offer no tactical reasons for failing to "object and/or raise specific objections to certain *evidence*" (Vol. 3, Guilt Exhibit 47 at ¶ 25, emphasis added), he offers no explanation as to his failure to object to the prosecutor's *closing argument*. Hence, petitioner has failed to establish a prima facie case for relief based on a violation of his right to effective assistance of trial counsel. (*Duvall, supra,* 9 Cal.4th at p. 474.)

Notwithstanding trial counsel's failure to discuss his decision not to object to the prosecutor's closing remarks, such a decision clearly

was tactical. It was reasonable for counsel not to want to draw attention to the prosecutor's comments by raising a futile objection at a time when counsel was not in a position to address the comments fully. Instead, trial counsel addressed the prosecutor's remarks, in turn, during the defense closing argument in the penalty phase. During his own closing argument, trial counsel argued to the jury that it should not use protection of civilian persons or guards as a reason to give the death penalty. (RT 3753.) Trial counsel further explained petitioner's outburst in court and assured the jury that petitioner was not challenging anyone. (RT 3755.) Counsel's preference to deal with the prosecutor's remarks during his own closing was a reasonable and tactical decision.

Furthermore, as discussed below, the prosecutor's remarks were proper and therefore any objection by trial counsel would have been unavailing. (*People* v. *Lewis, supra,* 50 Cal.3d at p. 289.) And, even assuming any error, it was not prejudicial.

1. Reference To In-Court Demeanor

As discussed above, during closing argument, the prosecutor made a few brief references to "the display" put on by petitioner and Craig Ross at the time the verdicts were returned. (RT 3699-3700, 3712, 3728.) Petitioner asserts the remarks were impermissible argument and that his counsel was ineffective for failing to object to them. Respondent submits the remarks were entirely proper.

Although in criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom has been held improper, prosecutorial reference to the defendant's courtroom demeanor is not improper during the penalty phase of trial.

(*People* v. *Haskett* (1990) 52 Cal.3d 210, 247; *People* v. *Jackson* (1989) 49 Cal.3d 1170, 1206; *People* v. *Heishman* (1988) 45 Cal.3d 147, 197.)

> "[W]here a defendant has placed his own good character in issue as a mitigating factor, it is 'proper for the jury to draw inference on that issue from their observations of defendant in the courtroom and therefore proper for the prosecutor to base a closing argument on such observations.'" (*People* v. *Jackson*, *supra*, 49 Cal.3d at p. 1206.)

And, the fact that the defendant himself does not testify at the penalty phase is of no consequence. (*Ibid.*; *People* v. *Heishman*, *supra*, 45 Cal.3d at p. 197.)

Here, defense witnesses at the penalty phase spoke to petitioner's good character and positive attributes. Thomas Crawford, petitioner's parole agent, testified that petitioner was cooperative, maintained satisfactory conduct, and the agent did not have the occasion to violate petitioner's parole. (RT 3665-3679.) Azell Champion, petitioner's mother, also testified that petitioner was prepared to enter a tutoring program at Compers Junior High at the time he was arrested. (RT 3681-3682.) Since petitioner's good character was placed in issue by defense witnesses, it was proper for the jury to draw inferences on that issue from their observations of petitioner in the courtroom, and therefore proper for the prosecutor to base a closing argument on such observations.

Moreover, petitioner could not have been prejudiced by the prosecutor's remarks. Notably, the incident to which the prosecutor referred during his closing took place in full view of the jury at the time the guilt verdicts were returned.[54/] And, during argument, the

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54. Petitioner suggests that his "display" at the time the verdicts

prosecutor did not reconstruct the incident in great detail, but merely referred to "the display" put on by petitioner and Ross when the verdicts were read. Thus, the jurors were, in effect, left to their own individual recollections as to what they observed in the courtroom.

Furthermore, the reference to the incident itself was not of critical importance in the jury's determining what penalty to impose. The thrust of the prosecutor's argument as to why the penalty of death should be imposed centered on the circumstances of the cold-blooded execution type murders involved in the instant case, coupled with other penalty phase evidence such as the evidence of petitioner's past criminal conduct. Indeed, at the conclusion of the hearing to settle the record with regards to this incident, the trial judge concluded, "Quite frankly, gentlemen, I think we've got much to do about nothing . . . ." (Settled Statement of July 8, 1985 at p. 74.)

Finally, despite petitioner's protestations that he could only rebut such an argument at the cost of surrendering his right to remain silent (Petn. 147), his counsel availed himself of the opportunity during the defense closing argument to counter the comments by the prosecutor and to explain petitioner's actions in the courtroom. (RT 3755.) Ross' attorney, too, addressed the prosecutor's comment and explained the conduct he had seen and its significance, or lack thereof. (RT 3741.)

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were read was "probably only partially witnessed" by the jury. (Petn. 148.) This suggestion finds no support in the record. The entire jury was present and seated at the time the verdicts were read. (RT 3466.) After petitioner's initial outburst, the court indicated that it was going to send the jury back into the jury room, but then stated, "All right. It will not be necessary at this time." (RT 3482.) Thereafter, the clerk continued reading the verdicts, and the jury remained there until after the defendants had left the courtroom. (RT 3488-3489.)

Clearly, petitioner was not found guilty and given the death penalty because of the prosecutor's brief references in closing argument to petitioner's courtroom behavior. Rather, petitioner was sentenced to death because the evidence overwhelmingly demonstrated that with a cold heart, and at close range, petitioner and his cohorts executed Bobby Hassan and his helpless and handicapped 14-year-old son Eric.

Because the prosecutor's argument referring to petitioner's in-court demeanor was proper, any objection by trial counsel would have been futile. (*People* v. *Milner, supra,* 45 Cal.3d at p. 242.) And, even assuming error, any error was not prejudicial. As such, petitioner's counsel was not ineffective. Petitioner has therefore failed to make a prima facie case for relief or to establish a fundamental miscarriage of justice.

2. Reference To Lack Of Remorse

Petitioner next argues the prosecutor's remarks about petitioner's lack of remorse were improper, and his counsel's failure to object to them constituted ineffective assistance of counsel. (Petn. 147.)

It is well settled that a prosecutor is entitled to call the jury's attention to the lack of any evidence of remorse. (*People* v. *Hardy* (1992) 2 Cal.4th 86, 209-210.) As this Court previously explained:

> "'[L]ack of remorse, because it suggests the absence of a mitigating factor, is deemed a relevant factor in the jury's determination as to whether the factors in aggravation outweigh those in mitigation, and [is] thus an appropriate subject of comment by the prosecutor, so long as he or she does not argue that lack of remorse constitutes a factor in

aggravation.'" (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 943, quoting *People* v. *Crittenden* (1994) 9 Cal.4th 83, 150; see also *People* v. *Osband* (1996) 13 Cal.4th 622, 724; *People* v. *Proctor* (1992) 4 Cal.4th 499, 545.)

In addition, such comments by the prosecutor do not amount to comment on defendant's silence (*Griffin* error). (*People* v. *Roberts*, *supra*, 2 Cal.4th at p. 336; *People* v. *Keenan* (1988) 46 Cal.3d 478, 509.)

The prosecutor properly commented during closing argument on petitioner's conduct at the immediate scene of the crime which demonstrated petitioner's remorselessness.[54] (RT 3727-3728.) The prosecutor also referred to petitioner's lack of remorse as evidenced by his "mock display of indignation" at the reading of the verdicts. (RT 3728.) The prosecutor's remarks were proper in both instances because he did not urge the jury to use petitioner's lack of remorse as an aggravating factor. (RT 3724-3727.) Indeed, this Court found the prosecutor's argument "may reasonably be construed as urging the jury *not* to find remorse as a mitigating factor." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 943, emphasis added.) As the prosecutor's comments regarding petitioner's lack of remorse were proper, any objection to the remarks would have been futile. (*People* v. *Milner*, *supra*, 45 Cal.3d at p. 242.) As such, petitioner's trial counsel was not ineffective and petitioner has therefore failed to make a prima facie showing for relief on that basis.

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54. The prosecutor pointed out that the circumstances of the crime demonstrated the lack of remorse. For example, it was not enough to murder a "[14]-year-old handicapped child," but petitioner and his cohorts ripped the house apart afterwards, stealing the child's Christmas toys and leaving the child's shattered piggy bank next to his dead body. (RT 3727.)

3. Reference To Future Dangerousness

Petitioner also claims that the prosecutor's allegations of future dangerousness if petitioner were given life imprisonment without the possibility of parole were improper and that his counsel was ineffective for failing to object to the comments. (Petn. 148.) Counsel was not ineffective.

It is only expert predictions of the defendant's future dangerousness that generally have been condemned by this Court because of their inherent unreliability. (*People* v. *Payton, supra,* 3 Cal.4th at p. 1063.) Prosecution argument of future dangerousness based on the evidence has been consistently upheld. (*People* v. *Millwee* (1998) 18 Cal.4th 96, 153; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1064; *People* v. *Payton*, *supra*, 3 Cal.4th at pp. 1063-1064; *People* v. *Bell* (1989) 49 Cal.3d 502, 549; *People* v. *Davenport* (1985) 41 Cal.3d 247, 288.)

In the present case, the prosecutor's reference to future dangerousness was made at the very beginning of his penalty phase argument in response to an anticipated defense argument. (RT 3698-3699.) The prosecutor told the jury that one of the things defense attorneys like to argue at a death penalty trial is that life imprisonment without the possibility of parole is punishment for anybody and that prison is a terrible place. (RT 3698.) The prosecutor then acknowledged that prison would be a terrible place "for people like you and me." But, he pointed out that

> "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." (RT 3698.)

Thus, the prosecutor's clear implication, certainly supported by the evidence, was that petitioner and his codefendant were "street toughs," "killers," and the type of men who did not live by any laws. Describing appellants in those terms was certainly accurate and reasonable based on the evidence establishing the circumstances of the crimes of which appellants had just been convicted.

Anticipating a defense argument that life without possibility of parole would be sufficient to protect society from petitioner and Ross, and that "where there is life there is hope," the prosecutor referred the jury to the evidence of the tape recorded conversation between petitioner and Ross when they were in the sheriff's van. (RT 3698.) The prosecutor asked the jury to recall "what they're hoping for [escape]." (*Ibid.*) Finally, the prosecutor suggested the jurors ask themselves whether life imprisonment without possibility of parole would be sufficient to protect society from petitioner and Ross. (15 RT 3698-3699.) It was by these remarks that the prosecutor made references to petitioner's future dangerousness. He also argued to the jury that it was a fact society included people in prison as well as those outside prison and asked the jury to consider whether life without the possibility of parole would be sufficient to protect society from petitioner and Ross. (*Ibid.*)

In *People* v. *Payton*, *supra*, this Court held that the defendant's own statements demonstrating his attitude towards his victims was highly probative as evidence of future dangerousness. (*People* v. *Payton*, *supra*, 3 Cal.4th at p. 1063.) In the present case, petitioner and Ross' own statements regarding their confinement and their hopes of escape from custody showed their attitude which was certainly relevant evidence on the issue of future dangerousness. Respondent thus

submits that future dangerousness weighs significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed.

In any event, petitioner could not have been prejudiced by the remark because the prosecutor's reference to petitioner's future dangerousness was fleeting, consumed only a few sentences at the beginning of his lengthy penalty phase argument, and such argument regarding a defendant's future dangerousness is proper. Thus, there is no reasonable possibility that the prosecutor's reference to future dangerousness would have misled the jury, and thus, affected the penalty verdict. (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at 1231; *People* v. *Brown* (1988) 46 Cal.3d 432, 448.) As a result, trial counsel was not ineffective for failing to object to the comments.

4. Reference To Anger And Outrage

Petitioner briefly touches on what he characterizes as the prosecutor's improper "exhortations to the jury to base its penalty decision on their anger and outrage." (Petn. 148.) Petitioner again argues his trial counsel was ineffective for failing to object to such comments. (*Ibid.*) Respondent submits when these comments are read in context, it is clear the argument was proper, and petitioner has not made out a prima facie case for relief.

During argument the prosecutor stated:

"*And your duty here as sworn jurors to follow the law is clear.*

"And I hope I have said enough about that because I would like to talk about just for a moment not just what you must do but how you feel about doing what you have to do in this case.

"Some of you, and rightfully so, feel outrage and anger right now at what was done to these victims, at what was done to the father, to the son, to that little boy.

"And the defense may try to tell you it is barbaric to feel anger and that it is wrong to make your decision in anger.

"*It is wrong* only *to make your decision solely because of anger.*

"But don't be ashamed of your anger and do not try to stifle it because as Justice Stewart said, that anger is part of the reason that we have the death penalty.

"That *anger is human*. That anger is something that is only felt by civilized and decent and caring human beings who care about what happens to their own and others like them.

"It is only because of that that you feel anger, if you do.

"If the anger gives you the courage to do what the law requires you to do in this case, then use that anger for that very commendable purpose.

"Others of you may no longer feel that anger.

" . . . . . .

"*I am going to ask you, though, to do your duty and do what the law requires you to do in this case because under the evidence and under the guidelines given to you by the judge, your duty is very clear.*" (RT 3728-3731, emphasis added.)

When the prosecutor's comments are read in context, it is clear the prosecutor was not urging the jury to base its decision solely on passion, prejudice, anger or outrage. The comments make clear the jury was to do its "duty" and "follow the law" by deciding the case "under the evidence" and the "guidelines given you by the judge." The

prosecutor never told the jury to base its penalty decision on anger or outrage but to "follow the law" and that moral outrage was an appropriate response to what happened to the victims especially "to that little boy." Indeed, the prosecutor told the jurors it was wrong to base their penalty determination solely on the basis of anger. (Cf. *California* v. *Brown* (1987) 479 U.S. 538, 541 [instructing jury not to base its decision purely on sympathy proper].)

Moreover, the complained of argument was merely a comment to the jurors that if they felt anger for the crimes committed by petitioner and others they should not be ashamed of such anger because such feelings and emotions are proper in a case such as the instant one. It is clear the prosecutor was merely trying to explain to jurors that moral outrage was an appropriate response to "what was done to the victims." (See *Gregg* v. *Georgia* (1976) 428 U.S. 153, 183-184.) It is entirely proper for a prosecutor to ask a capital sentencing jury to consider in aggravation a murder victim's suffering. (*Payne* v. *Tennessee* (1991) 501 U.S. 808, 825.) Consequently, the prosecutor's comments were proper and, in any event, could not have misled the jury to base its penalty decision exclusively on anger and outrage. As such, trial counsel was not ineffective for failing to object to them.

5. Reference To Non-Statutory Aggravating Factors

Relying on *People* v. *Boyd* (1985) 38 Cal.3d 762, petitioner asserts that "[e]vidence of a defendant's background, character, or conduct which is not probative of any specific factor listed in Penal Code section 190.3 has no tendency to prove or disprove a fact of consequence to the determination of the penalty to be imposed, and is therefore irrelevant to aggravation." (Petn. 148.) Hence, petitioner

argues comments by the prosecutor relating to petitioner's in-court demeanor, lack of remorse, future dangerousness, and urging the jury to use anger to render a death verdict, clearly were improper appeals that the jury should reach beyond the factors enumerated under section 190.3. (*Ibid.*) Petitioner further asserts that such references constituted misconduct by the prosecutor, and that his counsel was ineffective for failing to object to them. (*Ibid.*)

In *People* v. *Boyd*, *supra*, this Court held that the prosecution's case-in-chief at the penalty phase must be limited to evidence which is relevant to any of the specified factors - exclusive of factor (k) - in Penal Code section 190.3.[56] *Boyd* thus prohibits a prosecutor from introducing in his case for aggravation *evidence* which is irrelevant to any of the other enumerated aggravating or mitigating factors listed in section 190.3. Although the prosecution cannot rely on factor (k) in it's own case for aggravation, it can rebut such evidence if presented by the defense. And, contrary to petitioner's assertions (Petn. 148), *Boyd* does *not* prohibit the prosecutor from *arguing* matters which are based on evidence properly introduced at the penalty phase of the trial. (See *People* v. *Millwee*, *supra*, 18 Cal.4th at p. 152; *People* v. *Hines* (1997) 15 Cal.4th 997, 1062; *People* v. *Avena, supra,* 13 Cal.4th at p. 439.)

As discussed in the preceding subsections 1 through 4, the prosecutor's comments referencing petitioner's in-court demeanor, lack of remorse, future dangerousness, and the anger and outrage

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56. Factor (k) provides "any other circumstance which extenuates the gravity of the crime even though it is not legal excuse for the crime." This factor has been construed to allow the jury to consider "any other circumstance which extenuates the gravity of the crime . . . and any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." (*People* v. *Easley* (1983) 34 Cal.3d 858, 878-879, fn. 10.)

experienced by the jury were proper because they were based on the evidence, or they rebutted evidence, introduced at the penalty phase of the trial. Since the prosecutor's comments were proper, they did not constitute misconduct and trial counsel was not ineffective for failing to object to them. Consequently, petitioner has failed to make a prima facie case for relief based on ineffective assistance of counsel. Nor has he established a fundamental miscarriage of justice.

B. Trial Counsel's Failure To Object To The Prosecution's Argument That An Alleged Lack Of A Mitigating Factor Was, As To Each Factor, To Be Considered A Factor In Aggravation

Petitioner next argues his counsel was ineffective for failing to object to the prosecution's argument that an alleged lack of a mitigating factor was, as to each factor, to be considered a factor in aggravation. (Petn. 151-154.) Even if the prosecutor's argument was improper under *People* v. *Davenport* (1985) 41 Cal.3d 247, petitioner has not demonstrated his counsel was incompetent.

Penal Code section 190.3 describes the factors in aggravation and mitigation that the jury may consider in deciding whether to impose the death penalty. In *People* v. *Davenport*, and subsequent cases, this Court held that a prosecutor may not argue that the absence of certain potentially mitigating factors transforms those factors into factors in aggravation. (*People* v. *Davenport*, *supra*, 41 Cal.3d at p. 289; see also *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 144.) At different times during his penalty phase closing argument, the prosecutor did just that. (See *People* v. *Champion*, *supra*, 9 Cal.4th at p. 939, fn. 27.) However, failure to object to such argument did not render petitioner's trial counsel ineffective.

As noted by this Court, "[t]his case was tried before [the] decision in *People* v. *Davenport* . . . ." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 939. "'[A]ccordingly, the trial court and the prosecutor[, as well as petitioner's counsel,] lacked the benefit of *Davenport's* teachings.'" (*People* v. *Clark* (1992) 3 Cal.4th 41, 169; *People* v. *McDowell* (1988) 46 Cal.3d 551, 574.) Indeed, trial counsel cannot be faulted for failing to anticipate subsequent Supreme Court decisions, prescience being no more required of competent counsel than omniscience. (*People* v. *Criscione* (1981) 125 Cal.App.3d 275, 295; *People* v. *Russell* (1980) 101 Cal.App.3d 665, 668; see also *In re Johnson* (1970) 3 Cal.3d 404, 420.) Consequently, petitioner's counsel was not ineffective for failing to object to the prosecutor's argument.

In any event, any error was harmless because the jury was well aware of the underlying facts of the crimes and was free to place whatever weight it wished upon those facts. (*People* v. *Clark*, *supra*, 3 Cal.4th at p. 169; *People* v. *McDowell*, *supra*, 46 Cal.3d at p. 574.) In argument, the prosecutor did not urge the jury to apply a mechanical counting approach in evaluating the aggravating circumstances. (RT 3697-3733.) Indeed, the prosecutor told the jury that "the test is whether or not the aggravating circumstances in this case *outweigh* or fail to *outweigh* the mitigating circumstances in this case." (RT 3722, emphasis added.) Again, as he concluded his argument, the prosecutor argued that he believed that it was clear that "the circumstances in aggravation in this case *outweigh* the circumstances in mitigation not slightly but overwhelmingly." (RT 3726, emphasis added.) Furthermore, both defense counsel referred to the jury's ability to apply whatever single factor it chose in attempting to mitigate the sentence ultimately to be imposed. (RT 3739, 3745.)

This Court recognized this to be the case and therefore found the prosecutor's argument to be harmless. (*People* v. *Champion*, *supra*, 9 Cal.4th at pp. 939-940.) This Court concluded,

> "The prosecutor's erroneous argument related to the circumstances surrounding the offense; the jury was not misled as to the nature of these circumstances, and was free to weigh them appropriately. In these circumstances, '"a reasonable jury would not assign substantial aggravating weight to the absence of unusual extenuating factors."' (Citations.)" (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 940.)

Petitioner disputes this Court's finding that any improper argument was harmless. Citing to *Sochor* v. *Florida* (1992) 504 U.S. 527, petitioner asserts that "Eighth Amendment error occurs when a sentencing jury considers even a single invalid aggravating factor" and that here the jury considered four invalid factors in addition to the duplicative special circumstances error in determining petitioner's sentence. (Petn. 153-154.) Petitioner's analysis is flawed.

First of all, not just any non-statutory aggravating factor constitutes an "invalid factor" triggering a violation of the Eighth Amendment. "An aggravating circumstance is invalid if 'it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected.' (Citation.)" (*Romano* v. *Oklahoma* (1994) 512 U.S. 1, 10-11.) Since the argument referencing the lack of a mitigating factor did not relate to such constitutionally protected conduct, it did not fit within the definition of a constitutionally "invalid factor." At worst, the error here was the failure to object to argument concerning a nonstatutory aggravating factor.

However, there is no constitutional defect in a death sentence based on both statutory and nonstatutory aggravating circumstances. (*Barclay* v. *Florida* (1983) 463 U.S. 939, 956.) In other words, while consideration by the jury of the lack of mitigating factors as aggravating factors may have been improper as a matter of state law under *Davenport*, there was no federal constitutional prohibition against such an argument. (*Ibid.*) Thus, while the prosecutor's argument may have been a violation of state law, it was not a violation of constitutional magnitude. Despite petitioner's suggestion that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors (Petn. 154), the United States Supreme Court has made clear that states are entitled to shape and structure the jury's discretion with regard to selecting the penalty so long as the jury is not precluded from considering any relevant mitigating evidence. (*Buchanan* v. *Angelone* (1998) __ U.S. __, __, 118 S.Ct. 757, 761, 139 L.Ed.2d 702; *Johnson* v. *Texas* (1993) 509 U.S. 350, 362.)

Finally, *Sochor* is irrelevant as it pertains to constitutionally vague aggravating circumstances used both to narrow the class of death eligible defendants and as a sentencing factor. Here, vagueness is not at issue. (See *Tuilaepa* v. *California* (1994) 512 U.S. 967, 974-975.) Accordingly, *Sochor* is inapplicable.

Since petitioner was not prejudiced by the prosecutor's argument, trial counsel can not be deemed ineffective. Thus, petitioner has failed to make a prima facie showing entitling him to relief on that basis or to establish a fundamental miscarriage of justice to overcome the untimeliness bar.

C. Defense Counsel's Failure To Discover And Produce Substantial Mitigating Evidence At The Penalty Phase Of The Trial

In Claim IXC, petitioner alleges his trial counsel was ineffective for failing to

> "recognize, adequately investigate, consult and prepare appropriate lay witnesses and experts, and present evidence of petitioner's full social history, including petitioner's severe brain damage, parental death, family mental illness and neurologic disease, divorce, poverty, and life threatening danger at home and in the community . . . ." (Petn. 155-219.)

As discussed in Argument IVH, *supra,* in general, a criminal defense attorney "has no blanket obligation to investigate possible 'mental' defenses, even in a capital case." (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1244; *People* v. *Williams, supra*, 44 Cal.3d at p. 937.) Instead, to establish investigative omissions were constitutionally ineffective assistance, a petitioner must first show trial counsel knew or should have known further investigation was necessary, and he must establish the nature and relevance of the evidence counsel failed to discover and present. (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1244; *In re Sixto, supra*, 48 Cal.3d at p. 1257.) And, as stated previously, counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland, supra,* 466 U.S. at p. 691; *Babbitt*, *supra,* 151 F.3d at pp. 1173-1174.)

As in his previous claims of ineffective assistance, petitioner has failed to establish a prima facie case for relief because he has not provided reasonably available documentary evidence concerning his

counsel's decisions and conduct during the penalty phase. Specifically, petitioner fails to present any evidence about the nature and scope of the penalty phase investigation conducted by trial counsel Skyers, former trial counsel Homer Mason and their investigators, about the nature and extent of information elicited during this investigation and about trial counsel's tactical decisions concerning which evidence to present at the penalty phase. Under these circumstances, petitioner has utterly failed to make a prima facie case of incompetent performance by trial counsel. Thus, there is no need to determine whether petitioner was prejudiced by the alleged incompetence. (See, e.g., *People* v. *Jackson*, *supra*, 28 Cal.3d at p. 296; *Harris* v. *Vasquez* (1990) 949 F.2d 1497, 1522-1525.)

Even without such information being supplied by petitioner, the record on appeal makes clear that an investigation into a possible mental defense, and social history, was performed. As to a possible mental defense, Judge Ricks granted petitioner's motion for appointment of psychologist Robert Wm. Shomer to examine all of the documentation in the case and to testify in court on behalf of petitioner. (CT 229-230.) Judge Ricks also granted petitioner's motion for appointment of Seymour Pollack, M.D., of the U.S.C. Institute of Psychiatry & Law, to perform a psychiatric evaluation of petitioner. (CT 579-580.)

Likewise, as to a social history, a probation consultant was appointed prior to trial "to assist counsel in gathering information relative to defendant's background in order to properly represent the defendant at trial and, should the defendant be convicted, at the penalty phase of the trial." (CT 227-228.) Between March 1981 and July 1981, petitioner's first counsel, Homer Mason, interviewed

petitioner several times, he had discussions with petitioner's mother and various family members, and he discussed case strategy with the defense investigator and probation consultant. (CT 597-601.) In his summary of the case, Mr. Mason stated, inter alia, that he investigated and researched various aspects of the defendant's case. (CT 601.) Trial counsel Skyers, too, spoke with family members and with petitioner's parole officer. (Vol. 3, Guilt Exhibit 47 at ¶¶ 26-27.) Thus, there is no evidence that trial counsel failed to investigate a possible mental defense or develop a social history.

While petitioner now relies heavily on his status as a poor Black man reared without any protection or intervention in South Central Los Angeles (Petn. 155-219), his trial counsel arguably made a strategic decision not to ask the jury to exempt petitioner from the death penalty because of his race and the socio-economic plight of Black men in America. Since petitioner's victims also were Black men and innocent children from the very same neighborhood, who undoubtedly suffered the same discrimination and socio-economic hardship during their lifetimes, counsel's tactical decision to forgo such a defense would not have been unreasonable.

Petitioner also has not presented any evidence to establish his counsel knew or should have known further investigation might turn up materially favorable evidence of a mental disorder or social history. As discussed in Argument IVH, *supra,* neither petitioner nor anyone in his family told trial counsel Skyers that petitioner was mentally impaired, that he had been abused while in utero, that he allegedly had been in a car accident, or that his social history was so devastating. (Vol. 3, Guilt Exhibit 47 at ¶¶ 26-27.) In addition, the psychological examination performed by Dr. Pollack did not reveal any brain damage.

(*Ibid.*) Moreover, petitioner's exhibits make clear that had trial counsel ordered petitioner's medical records from the California Youth Authority, he would have found the psychological reports on petitioner during his time there consistently indicated he had no mental or neurologic impairment. (See Vol. 7, Penalty Phase Exhibit 115.)

It bears repeating, petitioner's trial counsel cannot be deemed deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put counsel on notice of the existence of that evidence. (*Babbitt, supra,* 151 F.3d at p. 1174; *Matthews* v. *Evatt* (1997) 105 105 F.3d 920, 920.) Indeed, "counsel is not required to pursue repetitive mental examinations until he finally obtains a favorable diagnosis." (*People* v. *Webster*, *supra*, 54 Cal.3d at p. 457; *People* v. *Williams*, *supra*, 44 Cal.3d at p. 945; see also *Hendricks* v. *Calderon, supra*, 70 F.3d at p. 1039.) Accordingly, petitioner has failed to make a prima facie showing that his counsel's performance was ineffective.

Moreover, petitioner has failed to make a prima facie showing of prejudice due to counsel's failure to present the allegedly mitigating evidence set forth in the exhibits and declarations of Drs. Pettis and Dr. Riley, and those of family members and friends of petitioner. Indeed had such witnesses testified at the penalty phase, they would have been subject to cross-examination.

For example, had Dr. Pettis testified, the prosecutor would have been able to emphasize to the jury that petitioner had developed a strategy to protect himself from his older brother, Lewis III, and was able to "watch [Lewis'] posture and reactions" to see if he was angry. (Vol. 1, Penalty Phase Exhibit 1 at p. 41.) Such information certainly contradicts petitioner's present claim that he is unable to read cues concerning the intentions of others. (Petn. 121.) Likewise, had Dr.

Riley testified, the prosecutor would have been able to emphasize that petitioner was of average adult intelligence (Vol. 3, Guilt Exhibit 67 at ¶12), that petitioner performed adequately on a measure of motor speed (*Id.*, at ¶ 18), that petitioner's ability to pronounce familiar English words and to comprehend short written passages was average (*Id.*, at ¶ 19), and that petitioner fell within the average range on a battery of memory tests (*Id.*, at ¶ 20).

As to testimony of family members, although many now describe a difficult childhood and family life, this would have been contradicted by petitioner's psychological reports from the California Youth Authority, and his probation reports, which indicate interviews with family members, but which are completely devoid of any mention of such a terrible life. (See Vol. 7, Penalty Phase Exhibit 115.) The instant declarations also are contradicted by previous statements. For example, petitioner's mother now claims that when petitioner returned from the Youth Authority he was "serious, quiet, and withdrawn" and did not smile. (Vol. 1, Penalty Phase Exhibit 15 at p. 23.) However, in 1979, she told social worker John Spurney, "I am very happy with Steve's attitude and behavior since returning from camp." (See Vol. 7, Penalty Phase Exhibit 115.)

More importantly, the jury already had concluded petitioner perpetrated the brutal and cold blooded execution-style murders of Bobby Hassan and his 14-year-old handicapped son Eric prior to the penalty phase. The jury then heard additional evidence at the penalty phase that on November 6, 1977, petitioner was one of eight young men who robbed three people at a Greyhound bus station in West Covina. (RT 3534-3542.) The jury also heard evidence that on September 27, 1978, a group of five males, including petitioner, robbed and assaulted

Jose Bustos at Vermont Park. According to the testimony of Bustos, petitioner kicked Bustos, cut his finger with a switchblade knife, and broke a bottle over the back of Bustos' head. (RT 3575-3628.) In light of the extremely aggravating circumstances of the charged murders and prior acts of violence, there is no reasonable probability the jury would have returned a sentence of life without the possibility of parole had the evidence proffered by petitioner to this Court been presented at the penalty phase. (See, e.g., *People* v. *Webster*, *supra*, 54 Cal.3d at pp. 458-459.) Consequently, the failure to present the allegedly mitigating evidence did not undermine the confidence in the penalty judgment.

VII.

PETITIONER'S CLAIM X, THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED DUE TO THE PROSECUTOR'S ALLEGED INFERENCES THAT PETITIONER HAD A CRIMINAL RECORD, AND THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim X, petitioner alleges his due process rights under the federal Constitution were violated because the trial court refused to grant a mistrial after the prosecutor introduced evidence allegedly implying petitioner had a criminal record.[57] (Petn. 220-221.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner is procedurally barred from raising this claim for other reasons, and has failed to set forth a prima facie case for relief.

This claim constitutes petitioner's second attempt to challenge the trial court's denial of petitioner's motion for a mistrial. On direct appeal, petitioner joined in the very same argument raised by codefendant Ross. (See Champion Opening Brief [hereinafter "Ch.OB"] 163; Ross Opening Brief [hereinafter "Ross OB"] 130-131.) This Court rejected petitioner's argument noting, "The trial court could

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57. At trial, over defense objection, Detective Crews testified that neither Benjamin Brown nor Clarence Reed -- two suspects initially identified by Elizabeth Moncrief -- had a criminal record. (RT 1901.) Petitioner subsequently moved for a mistrial on the ground that the detective's answer implied that petitioner did have a criminal record. (RT 1908.) The trial court denied the motion. (*Ibid.*)

reasonably conclude that the jury was unlikely to draw the highly speculative inference that defendants had a criminal record." (*People* v. *Champion, supra,* 9 Cal.4th at p. 926.) Since petitioner now raises the same claim that has been raised on direct appeal, unsupported by additional facts, his claim on habeas is procedurally barred, and should be rejected. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

To the extent that this Court views the issue presented on appeal different from the issue presented on habeas, because petitioner now claims a violation of his due process rights, the claim on habeas is procedurally barred under *Dixon*. Petitioner bases his claim on the testimony of investigating officer David Crews. Detective Crews testified during the guilt phase of petitioner's trial. (RT 1898-2041.) The *Dixon* default applies to claims which are based on the record. Since this is a record based claim, petitioner should have presented this issue on direct appeal, not habeas. This claim is now procedurally barred. Habeas corpus is not a substitute for direct appeal. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Also, petitioner has waived this claim by failing to object on that basis at trial. (*People* v. *Cain, supra,* 10 Cal.4th at p. 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.) Likewise, although petitioner's counsel joined in a motion for mistrial based on Detective Crew's response (RT 1908), he did not seek a curative admonition from the trial court. Therefore, he has waived this claim.[58] (See *People* v. *Mincey* (1992) 2 Cal.4th 408, 446;

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58. This Court noted that counsel's failure to seek such an admonition did not demonstrate inadequacy, as counsel could reasonably conclude that the best approach was to let the matter rest rather than to draw the jury's attention to the possibility that

People v. *Hardy, supra*, 2 Cal.4th at pp. 208-209; *People* v. *Price* (1991) 1 Cal.4th 324, 447; *People* v. *Sully* (1991) 53 Cal.3d 1195, 1248; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.)

Further, petitioner has failed to set forth a prima facie case for relief based on a violation of his due process rights because the trial court properly denied the motion for mistrial. A trial court's ruling denying a motion for mistrial is reviewed under the deferential abuse of discretion standard. (*People* v. *Price, supra*, 1 Cal.4th at p. 428; *People* v. *McLain* (1988) 46 Cal.3d 97, 113.) A mistrial should be granted only if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People* v. *Haskett* (1982) 30 Cal.3d 841, 854; see also *People* v. *Wharton* (1991) 53 Cal.3d 522, 565.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. (*People* v. *Haskett*, *supra*, 30 Cal.3d at p. 854; *People* v. *Stansbury* (1993) 4 Cal.4th 1017, 1060; see also *Illinois* v. *Somerville* (1973) 410 U.S. 458, 461-462.)

In the instant case, there was no basis for the mistrial motion because the question asked of Detective Crews regarding the prior criminal records of Benjamin Brown and Clarence Reed was proper to explain the actions by the police in the investigation. Additionally, a review of the record makes clear that Detective Crews never discussed petitioner's criminal background and therefore the detective's answer in no way implied that petitioner had a criminal record. Indeed, this Court found:

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defendants had criminal records. (*People* v. *Champion, supra,* 9 Cal.4th at p. 926, fn. 16.)

"The trial court could reasonably conclude that the jury was unlikely to draw the highly speculative inference that defendants had a criminal record. Any danger that the jury would do so could have been dealt with by a judicial admonition that the jury should not infer from the question and answer that defendants had a criminal record." (*People* v. *Champion, supra,* 9 Cal.4th at p. 926.)

As this Court concluded, there was no need for the trial court to have declared a mistrial. (*Ibid.*) Consequently, petitioner has failed to establish a prima facie case for relief resulting from any violation of his due process rights based on the trial court's refusal to grant a mistrial. Nor has he established a fundamental miscarriage of justice.

VIII.

PETITIONER'S CLAIM XI, THAT HIS TRIAL DEFENSE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST THAT AFFECTED HIS PERFORMANCE, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XI, petitioner alleges a violation of his "Sixth Amendment" rights under the federal Constitution due to an actual conflict of interest that affected his counsel's performance in that the $10,000.00 in legal fees paid to his counsel was insufficient "to compensate him for the time actually spent in preparation of or presentation of petitioner's case." (Petn. 222-223.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) Petitioner's substantial delay as to this claim in particular is evidenced by the fact that trial counsel states in his declaration that he initially was approached by petitioner's mother and paid a sum of $10,000 in legal fees in 1981. By the time the jury returned its verdict in 1982, and trial counsel's job was complete, petitioner should have known, or reasonably could have discovered, whether the fees paid to his attorney were sufficient to compensate him for the time spent on petitioner's case. Thus, this claim is substantially delayed without justification or exception.

Additionally, petitioner has failed to establish a prima facie case for relief based on his counsel's alleged conflict of interest. The state and federal constitutions guarantee defendants effective assistance of counsel. (U.S. Const., Sixth amend.; Cal. Const., art. I, § 15.) This guarantee includes the correlative right to representation free of

conflicts of interest. (*People* v. *Hardy, supra,* 2 Cal.4th at p. 135, citing *Wood* v. *Georgia* (1981) 450 U.S. 261, 271; *People* v. *Bonin* (1989) 47 Cal.3d 808, 833.) Under the Sixth Amendment, reversal is required if a defendant, over a timely objection, is forced to continue with conflicted counsel. In the absence of an objection, however, a defendant on appeal must demonstrate that an actual conflict of interest adversely affected counsel's performance. A factual showing, not just allegations, must be made that an actual conflict existed. (*Morris* v. *California* (9th Cir. 1992) 966 F.2d 448, 455.) The mere possibility of a conflict is not sufficient to compel reversal of a conviction. (*Cuyler* v. *Sullivan* (1980) 446 U.S. 335, 348; *Holloway* v. *Arkansas* (1978) 435 U.S. 475, 488; *People* v. *Easley* (1988) 46 Cal.3d 712, 724.)

Here, petitioner never objected and claimed any conflict with his counsel's representation. Nor is there any evidence in the record to suggest an actual conflict existed. To the contrary, it is clear on the record that petitioner's counsel had ample funds to prepare and present petitioner's case. In the declaration of petitioner's trial counsel, Ronald Skyers, he states he was paid $10,000.00 by petitioner's mother and that he utilized court funding of $450.00 in order to perform a limited psychological examination of petitioner. (Vol. 3, Guilt Exhibit 47, ¶ 5.) Although petitioner asserts his counsel did not request additional funds to hire an investigator, petitioner ignores that portion of Mr. Skyers' declaration where Mr. Skyers states that the court appointed an investigator to assist the defense and those investigatory costs were paid by Los Angeles County.

Nowhere does Mr. Skyers state that the funds were insufficient to conduct his investigation and prepare and present petitioner's

defense. Obviously, Skyers did not ask petitioner's family for more funds because they were not needed. Indeed, Skyers may or may not have utilized court funding that already had been secured for ballistics testing. In addition, a probation expert already had been hired and consulted by former counsel Homer Mason. Likewise, Mr. Mason utilized funds granted by the court to hire psychologist Robert Wm. Shomer to assist counsel on the issue of eyewitness identification. (CT 229-230; see also Petn. 121.) Finally, as previously discussed in earlier portions of this brief, trial counsel was not ineffective for failing to conduct further investigation. Consequently, petitioner has failed to establish a prima facie case for relief for any violation based on a direct conflict between petitioner and his trial counsel. Nor has he established a fundamental miscarriage of justice.

IX.

PETITIONER'S CLAIM XII, THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HIS CASE WAS JOINED WITH THAT OF CRAIG ROSS, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XII, petitioner contends the unconstitutional joinder of his case with that of Craig Ross, combined "with prosecutorial bad faith, ineffective assistance of counsel, and erroneous trial court rulings," denied petitioner due process of law and violated his 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." (Petn. 224-246.)

Petitioner contends he was not convicted on the basis of any direct evidence that he was the killer, but rather because he was associated with Craig Ross and other members of the Raymond Avenue Crips. (Petn. 226.) Specifically, he maintains:

> "This joinder claim will discuss the prosecutor's deceptive pretrial and trial maneuvers, the court's erroneous initial denial of severance, erroneous evidentiary rulings, failure to sever when the prosecutor breached his promise to the court and counsel re: 'other crimes' evidence, and the ineffectiveness of petitioner's counsel in failing to ensure due process for his client." (*Id.* at 225.)

As stated in Argument II, *supra*, the instant claims are precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner's claims of

unconstitutional joinder are subject to other procedural bars. Petitioner also has failed to make a prima facie case for relief.

Petitioner concedes that "some of the claims referenced herein appear as separate claims in the petition." (*Ibid.*) Therefore, so as to avoid unnecessary repetition of arguments, those claims which are raised separately will not be addressed except to the extent petitioner claims the error is cumulative. (See Petn. 246.)

A. Ineffective Assistance Of Trial Counsel

Petitioner sets forth the facts of the case against petitioner and points out how such facts would have been weakened had his trial counsel effectively brought out contradictory facts and evidence at trial. (Petn. 226-229.) Specifically, petitioner asserts: Elizabeth Moncrief's identification would have been shown to be inherently unreliable based on her conflicting identifications (Petn. 226, citing to Claim VII C); forensic testing on gloves seized from petitioner's bedroom would have shown that petitioner was not the triggerman (Petn. 227, citing to Claim VII D); petitioner had an alibi for the Hassan crimes in that he was on the telephone with Rose Winbush prior to picking up his paycheck (Petn. 227, citing Claim VII B); the ring bought by victim Bobby Hassan was not the same size as the ring worn by petitioner at the time of his arrest (Petn. 228, citing Claim VII A); and the secret tape recording of petitioner and Ross did not contain any probative references and would not have been before the jury had his trial counsel objected to the use of the tape recording (Petn. 228, citing Claim VII G).

All of the above claims of ineffective assistance of trial counsel previously have been addressed by respondent. (See Argument IV, *supra*.) As demonstrated in respondent's earlier argument, petitioner

has failed to make a prima facie case for relief as to each claim or to establish a fundamental miscarriage of justice. Thus, counsel's alleged incompetence did not effect the joinder in this case.

B. The Joinder of the Taylor Murder To Petitioner's Case

Petitioner further argues that the improper joinder turned a weak case into a strong case. (Petn. 229.) This claim has previously been raised by petitioner and rejected by this Court in petitioner's direct appeal.

In his opening brief on appeal, petitioner argued that joining his case with that of Ross would "subject Champion to a potential finding of 'guilt by association' denying him a fair trial on the merits of the charges brought against him." (Ch.OB 11-12.) Petitioner further argued on appeal that his case should have been severed because the evidence against him was "substantially weaker" than the evidence against Ross. (*Id.*, at p. 12.) In his supplemental opening brief, petitioner similarly argued:

> "[T]he evidence against Mr. Champion was relatively weak, and so the prosecutor continually inveigled the jury to view the evidence cumulatively so as to find Mr. Champion guilty." (Champion Supplemental Opening Brief [hereinafter "Ch.Supp.OB"] 6.)

In his reply brief, petitioner again characterized the evidence of his involvement in the Hassan murders as "extremely weak" and argued that his conviction was based on "guilt by association." (Champion Reply Brief [hereinafter Ch.RB] 7-16.) Since petitioner now raises the same claim that has been raised and rejected on direct appeal, unsupported by additional facts, his claim on habeas is procedurally

barred, and should be rejected. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

To the extent that this Court views the claim of unconstitutional joinder presented on appeal different from the issue presented on habeas, the claim on habeas is procedurally barred under *Dixon*. As discussed above, petitioner extensively argued on direct appeal that his case should have been severed from Ross'. Therefore, any variations of this claim could have, and should have, been raised on appeal. In light of petitioner's failure to justify his not raising this issue on direct appeal, petitioner has forfeited this claim. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Moreover, in addition to the timeliness arguments raised in Argument II, petitioner's untimeliness as to this subclaim is further evidenced by the fact that the gunshot residue test referred to by petitioner in support of his claim is dated June 1, 1982. (See Vol. 3 Guilt Exhibit 66.) Likewise, the report of the interview with Rose Winbush, which petitioner asserts now establishes an alibi for the time of the Hassan murders, is dated July 16, 1981. In addition, the alleged differences in the ring sizes could have been discovered at or near the time of trial. Thus, this subclaim is substantially delayed without justification or exception.

In any event, petitioner has failed to establish a prima facie case for relief based on the alleged unconstitutional joinder of the Taylor case. In its opinion, this Court stated:

> "The evidence against defendant Champion was far from weak: An eyewitness identified him as one of the four men that entered the Hassan residence, and when arrested he was wearing a ring and a charm that Mercie Hassan identified as

belonging to her husband Bobby Hassan, one of the murder victims. The trial court could reasonably conclude that the jury would be unlikely to convict defendant Champion simply because of his association with defendant Ross." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.)

And, as this Court pointed out, the prosecution's motion for joinder, and petitioner's motion for severance, were made *before* trial, at a time when no eyewitness had identified petitioner as one of Taylor's killers.

"Thus, at the time the trial court made its ruling, it could reasonably conclude that the evidence of Taylor's murder would not adversely affect Champion at trial." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.)

Moreover, petitioner was not prejudiced by the evidence of the Taylor crimes. As this Court found, the jury properly could consider the evidence that petitioner was involved in the Taylor murder in deciding whether he participated in the murders of Bobby and Eric Hassan because the killings shared various significant characteristics:

"The murders occurred in the same neighborhood, 15 days apart. Both involved four perpetrators and the same getaway car; when police seized the car on the night Michael Taylor was killed, they found in it items stolen from both the Hassan and Taylor homes. In both cases, the victims included drug dealers (Bobby Hassan and Michael Taylor) who were robbed in their homes, ordered to lie on their beds, and shot in the back of the head at close range. These common features of the two killings are sufficiently distinctive to support an inference that both crimes were committed by the same

persons. (Citation.)" (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.)

This Court further noted that on the night of the Taylor murder, police saw a brown Buick automobile driving without its headlights in the neighborhood where the slaying occurred. (*Id.*, at p. 906.) When the car crashed shortly thereafter, the police found, in addition to items stolen from both the Hassan and Taylor murders, the gun that had been stolen from the Hassan residence. This Court found the jury reasonably could infer that the four individuals who fled from the Buick also participated in the murders. Since evidence of the Taylor murder was admissible against petitioner, he was not prejudiced by the trial court's failure to sever the two cases. A fortiori, petitioner has not established a prima facie case for relief based on unconstitutional joinder. Nor has he established a fundamental miscarriage of justice.

C. The Bad Faith of the Prosecutor

Petitioner next claims that the prosecutor's acts of bad faith denied him due process. (Petn. 230-236.) Specifically, he claims the prosecutor executed six bad faith maneuvers to bolster a weak case.

1. The First Maneuver

The prosecutor's alleged "first maneuver" was to trick petitioner into making incriminating statements by arranging a secret tape recording of conversations between petitioner and Evan Mallet. As discussed more fully in Argument XA, below, petitioner is procedurally barred from raising this claim under *Dixon*, *supra*, and he has waived it

under *People* v. *Green, supra*. Additionally, petitioner can not establish a prima facie case for relief based on the bad faith of the prosecutor because the conduct of the prosecutor did not constitute misconduct.

2. The Second Maneuver

The prosecutor's alleged "second maneuver" was to try to prejudice petitioner's case by attempting to improperly join it with Evan Mallet's. (Petn. 232.) As discussed fully in Argument XA below, petitioner is procedurally barred from bringing this claim under *Dixon, supra*, and he has waived it under *People* v. *Green, supra*. Moreover, petitioner has failed to establish a prima facie case based on this "bad faith maneuver" because the prosecutor's conduct did not constitute misconduct. And, in any event, petitioner was not prejudiced because his case was not joined with Mallet's and his conversations with Mallet were not introduced at his trial.

3. The Fourth Maneuver[59/]

The prosecutor's alleged "fourth bad-faith maneuver" was to have petitioner and Ross transported together in a van which tape recorded their conversations. (Petn. 232-234.) This claim previously has been raised by petitioner and rejected by this Court in petitioner's direct appeal.

In his opening brief, petitioner claimed numerous violations based on the taping of his conversations with Ross in the police van,

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59. Petitioner does not specify the prosecutor's alleged "third maneuver" but skips directly to the "fourth bad-faith maneuver." (Petn. 232.)

including that the trial court's order amounted to unconstitutional prosecutorial discovery. (Ch.OB 59-71.) Petitioner's codefendant, too, claimed violations of numerous constitutional rights based on the taping of the conversations. (Ross OB 102-111.) Significantly, in Ross' supplemental opening brief, in which petitioner joined, he argued that the tape recording of petitioner and Ross' conversations constituted misconduct and violated petitioner's right to due process. (Ch.OB 163; Ch.Supp.OB 123; Ross Supplemental Opening Brief [hereinafter Ross Supp.OB] 101-102.) Since petitioner now raises the same claim that has been raised and rejected on direct appeal, unsupported by additional facts, his claim on habeas is procedurally barred, and should be rejected. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

To the extent that this Court views the claims of constitutional error arising from the tape recorded conversations presented on appeal different from the issue presented on habeas, the claim on habeas is procedurally barred under *Dixon*. As discussed above, on direct appeal, petitioner made numerous challenges to the admissibility of the tape recorded conversations. Thus, petitioner could have, and should have, raised the issue of misconduct or bad faith relating to the tape recorded conversations on direct appeal. In light of petitioner's failure to justify his not raising this issue on direct appeal, petitioner has forfeited this claim. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Furthermore, although petitioner challenged the admissibility of the tape recorded conversations at trial, he did not object to the taped conversations on the basis of prosecutorial misconduct or bad faith. Therefore, he has waived this claim by failing to object at trial.

(*People* v. *Cain, supra,* 10 Cal.4th at p. 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.)

Finally, petitioner has failed to set forth a prima facie case for relief based on the prosecutor's conduct in tape recording petitioner's conversations with Ross. Indeed, he has provided no reasonably available documentary evidence in support of his claim. He merely alleges in a conclusory fashion that the tape recording, which contained "offensive swear words," was prejudicial and admitted "to arouse the juror's terror of petitioner." (Petn. 233-234.) Such conclusory allegations are not the basis for habeas relief. (*People* v. *Duvall, supra,* 9 Cal.4th at p. 474.)

In addition, as discussed more fully in Argument XA, below, this Court found the tape recording procedure to be proper. This Court concluded that the tape recording did not violate petitioner's rights to remain silent and to counsel because the investigatory technique used had "'no capability of leading the conversation into any particular subject or prompting any particular replies.'" (*People* v. *Champion, supra,* 9 Cal.4th at p. 911, quoting *United States* v. *Henry, supra*, 447 U.S. at p. 271, fn.9.) Additionally, because the prosecution merely listened to the tape recorded conversations, but did not question the defendants, "[the prosecution] did not engage in 'secret interrogation' by any techniques that were 'the equivalent of direct police interrogation.'" (*Ibid.*, quoting *Kuhlmann* v. *Wilson, supra,* 477 U.S. at p. 459.) This Court further found that petitioner had no reasonable expectation of privacy while confined in the back of a police car. (*Id.*, at p. 912.) Finally, this Court found that the trial court's order permitting the prosecution to record petitioner's conversations lacked any aspect of compulsion.

> "Like a search warrant, the order merely permitted the prosecution to engage in evidence-gathering activities that were permissible at the time the court issued the order." (*Id.*, at p. 913.)

Consequently, the tape recording procedure was appropriate and did not constitute misconduct. As such, petitioner has failed to establish a prima facie case for relief based on the prosecutor's alleged fourth bad faith maneuver.

4. The Fifth Maneuver

Petitioner alleges the prosecutor's "fifth bad-faith maneuver" was to join petitioner's case with that of Ross on the improper legal theory that there was a "common element of substantial importance in the commission of the Hassan and Taylor crimes." (Petn. 234-235.) Petitioner is procedurally barred from bringing this claim and has failed to make a prima facie case for relief.

While petitioner did not specifically argue in his direct appeal that the case should not have been joined due to the prosecutor's bad faith maneuvers, he did argue at length that his case should not have been joined with that of Ross. Therefore, any variations of this claim could have, and should have, been raised on appeal. This is especially true in light of the fact that petitioner's sole support for this claim is citations to the clerk's transcript on direct appeal. Petitioner's argument thus demonstrates this issue is an appellate issue and should have been raised in his direct appeal. Because petitioner has failed to justify his not raising this issue on direct appeal, he has forfeited this claim. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Furthermore, although petitioner objected to the joinder of his case with that of Ross, he did not object to the joinder on the basis of prosecutorial misconduct or bad faith. Therefore, he has waived this claim by failing to object at trial. (*People* v. *Cain, supra,* 10 Cal.4th at p. 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.)

In any event, petitioner has failed to establish a prima facie case for relief based on an improper joinder theory. He provides no documentary support for his claim. He merely makes speculative and conclusory allegations, and repeats arguments against joinder that he made in his earlier appeal. Petitioner's conclusory and speculative allegations are not a basis for relief. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

Nevertheless, petitioner's claim that severance should have been granted where there existed a possibility that his conviction could result from "guilt by association" (Petn. 235), relies on the erroneous assumption that the evidence surrounding Michael Taylor's murder would not have been admissible against him. However, this Court found the contrary to be true. This Court determined evidence that petitioner was involved in the murder of Michael Taylor was properly considered by the jury in making a determination of whether petitioner was involved in the murders of Bobby and Eric Hassan because the killings "shared various significant characteristics." (*People* v. *Champion, supra*, 9 Cal.4th at p. 905.). As discussed previously, the murders occurred in the same neighborhood, and only 15 days apart. Both murders involved four perpetrators and the same getaway car. When that car was seized by police, they found in it items stolen from both

the Hassan and Taylor homes. Additionally, victims Bobby Hassan and Michael Taylor were both drug dealers, who were robbed in their homes, ordered to lie on their beds, and shot in the back of the head at close range. This Court found that these common features of the two killings are sufficiently distinctive to support an inference that both crimes were committed by the same persons. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.) This Court added that on the night of the Taylor murder, police saw a brown Buick automobile driving without its headlights in the neighborhood where the slaying occurred. (*Id.*, at p. 906.) When the car crashed shortly thereafter, the police found, in addition to items stolen from both the Hassan and Taylor murders, the gun that had been stolen from the Hassan residence. This Court found the jury reasonably could infer that the four individuals who fled from the Buick also participated in the murders. (*Ibid.*) Therefore, as the prosecutor properly argued, and as this Court found, joinder was proper. Consequently, petitioner has failed to make a prima facie showing warranting relief.

5. The Sixth Maneuver

Petitioner asserts that once joinder had been granted, the prosecutor's sixth bad-faith maneuver was to deceive the court and trial counsel into a false sense of security by stating that he would not seek to introduce evidence that petitioner was involved in the joined charges, even though the prosecutor in fact "fully intended to introduce evidence that petitioner was at the Taylor murder." (Petn. 235-236.) As discussed more fully in Argument XC, below, this claim is based entirely on the record on appeal and therefore is procedurally barred under *Dixon*. He also has failed to make a prima facie case for relief

or establish a fundamental miscarriage of justice. Just as in his later argument, he provides no documentary support for his claim. His bald and speculative accusations certainly are no basis for relief. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

D. The Unconstitutionality of Joinder And Resulting Prejudice

Petitioner argues that joinder violated both California and Federal constitutional law because the consequences of the joinder rendered the trial fundamentally unfair. (Petn. 236.) Specifically, petitioner points to four categories of evidence that he alleges would not have been introduced had petitioner been tried alone: (1) the entirety of the Taylor rape/robbery incident; (2) Cora Taylor's surprise in-court identification of petitioner as the third person who entered the Taylor residence; (3) the gang graffiti, including petitioner's moniker found across the street from the Taylor home "hurrahing" that he committed a robbery at that location and that he was an associate of the Raymond Avenue Crips; and (4) the entirety of the Jefferson murder. (Petn. 238-246.) Without citation to any documentary evidence outside the record on appeal, petitioner disputes this Court's findings that the common features of the Taylor and Hassan murders are sufficiently distinctive to support an inference that both crimes were committed by the same persons. (Petn. 236-237.) Petitioner then states that he was prejudiced by the evidence the jury heard that allegedly would not have been introduced if petitioner had been tried alone. (Petn. 238.) Petitioner is procedurally barred from raising this claim and has failed to make a prima facie showing for relief.

As discussed previously, this claim has been raised and rejected in petitioner's direct appeal. In his opening brief, petitioner alleged that he was prejudiced as a result of his being tried together with Ross because the jury heard testimony from a number of witnesses relating to charges only against Ross and not Champion. (Ch.OB 11-16.) In his supplemental opening brief, petitioner similarly argued the prejudice resulting from his joint trial with Ross, and the inflammatory evidence that allegedly would not have been cross-admissible. (Ch.Supp.OB 5-7.) In his reply brief, petitioner again argued that he was prejudiced by the evidence that came in at his joint trial that would not have come in had he been tried alone. (Ch.RB 7-16.) Petitioner reasserted the above arguments in his supplemental reply brief. (Champion Supplemental Reply Brief [hereinafter "Ch.Supp.RB"] 2-8.) Since petitioner now raises the same claim that has been raised and rejected on direct appeal, unsupported by additional facts, his claim on habeas is procedurally barred, and should be rejected. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

To the extent that this Court views the claims of constitutional error regarding severance as presented on appeal different from the issue presented on habeas, the claim on habeas is procedurally barred under *Dixon*. As discussed above, on direct appeal, petitioner made numerous challenges to the joinder of his case with Ross' and the trial court's failure to sever the cases. Thus, petitioner could have, and should have, raised the present issue on direct appeal. In light of petitioner's failure to justify his not raising this issue on direct appeal, petitioner has forfeited this claim. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Petitioner also has failed to establish a prima facie case for relief as to each of the four categories.

1. The Taylor Rape/Murder

Petitioner argues that had he been tried separately for the Hassan murder, evidence of the Taylor rape and murder would not have been admissible. (Petn. 239-240.) However, petitioner ignores this Court's finding that because the killings "shared various significant characteristics," the jury properly could consider evidence that petitioner was involved in the murder of Michael Taylor in deciding whether petitioner participated in the murders of Eric and Bobby Hassan. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 905.) Certainly, evidence of the Taylor murder also would include details of the rape and attempted rape that occurred during the commission of the robbery and murder. Since this evidence would have been admissible even if petitioner had been tried separately, he has failed to make a prima facie showing entitling him to relief.

2. Cora Taylor's Identification

Petitioner argues that had he been tried alone, Cora Taylor never would have identified him. (Petn. 240-241.) However, as discussed above, the evidence of the Taylor murder, rape, and robbery were admissible against petitioner. Therefore, Cora Taylor might well have testified at petitioner's separate trial as to the events of the Taylor crimes, and the identification of petitioner as one of the Taylor participants still would have occurred.

Moreover, petitioner was neither charged nor convicted of the Taylor crimes. Therefore, he was not prejudiced by Cora Taylor's identification.

Finally, as discussed in Argument XC below, petitioner's assertions that the prosecutor's conduct was unethical and amounted to bad faith amounts to no more than conclusory and unsubstantiated allegations. Such allegations do not form the basis for relief. (*People* v. *Duvall, supra,* 9 Cal.4th at p. 474.) Consequently, petitioner has failed to make a prima facie showing entitling him to relief.

3. Gang Graffiti And Other Gang Evidence

Merely repeating the arguments he made in his direct appeal, petitioner argues that the gang evidence should not have been admitted. He also appears to argue that the gang evidence and gang graffiti would not have been admitted in a separate trial. (Petn. 241-243.)

On direct appeal, petitioner extensively argued that the evidence of gang membership and graffiti should not have been admitted for a number of reasons, including: the prosecution did not adequately prove that petitioner was a member of the Raymond Avenue Crips; the evidence was irrelevant to the question of petitioner's guilt or innocence; and the evidence was highly prejudicial. (Ch.OB 38-58; Ch.Supp.OB 12-20; Ch.RB 46-59; Ross OB 66-86; Ross Supp.OB 54-79; Ross Closing Brief [hereinafter "Ross CB"] 57-73.) Since this issue already has been raised and rejected on direct appeal, petitioner is procedurally barred from raising it here. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.) To the extent that this Court views the present issue differently from that

raised on appeal, petitioner also is procedurally barred as it could have and should have been raised on appeal. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

In any event, petitioner has failed to make a prima facie showing for relief based on the admitted gang evidence. Despite petitioner's argument to the contrary, this Court determined that the prosecution did show that petitioner and Ross were members of the Raymond Avenue Crips and still associated with other admitted gang members at the time of the murders. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 921.) This Court also found that evidence of gang membership was relevant as there was substantial evidence that Raymond Avenue Crips participated in the Taylor and Hassan murders, items stolen during each of the murders was found in a car owned by the father of three members of the gang, and another gang member was identified as a participant in one of the murders. (*Ibid.*)

Additionally, this Court found evidence that petitioner and Ross were Raymond Avenue Crip members was important to explain the portion of the tape recorded conversation between petitioner and Ross, in which they discussed Bobby Hassan, Jr., the son of murder victim Bobby Hassan. As this Court noted, the cryptic comments became significant if petitioner, Ross, and Bobby Hassan, Jr. were members of the same gang. (*Ibid.*)

This Court further found that because the gang evidence was significant to connect defendants to the car in which police found the property stolen during the Hassan and Taylor murders, the probative value of the evidence of gang membership was not substantially outweighed by its prejudicial effect. (*Id.*, at pp. 922-923.)

As to the gang-related graffiti, petitioner has failed to make a prima facie showing for relief because he presents no reasonably available documentary evidence establishing the graffiti evidence should not have been admitted. Petitioner does provide a declaration of Rouselle Ray Shepard, a purported gang expert, who asserts that Deputy Williams misread the graffiti and erroneously interpreted the meaning of the graffiti. (Vol.2 Guilt Exhibit 41.) However, as discussed in Argument IIIG, *supra,* even assuming such contradictory evidence had been presented at trial, it only would have gone to the weight of the evidence and not to its admissibility. (*People* v. *Williams, supra*, 16 Cal.4th at pp. 249-250; *People* v. *Carpenter* (1997) 15 Cal.4th 312, 369.) Indeed, this Court found the graffiti evidence to be relevant and admissible. (*People* v. *Champion, supra*, 9 Cal.4th at p. 923.) This Court further concluded that, assuming petitioner had adequately objected to the testimony,[60] any error in admitting the graffiti was harmless.

> "Any bearing the graffiti had on Champion's guilt of the crimes of which the jury eventually convicted him -- the robberies and murders of Bobby and Eric Hassan -- was tangential, and not likely to affect the outcome of the case."

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60. This Court noted that while petitioner's counsel objected to the testimony regarding the graffiti, he never specifically objected that the evidence was hearsay. Defense counsel merely pointed out that it could not be established who put the writings on the wall. (*People* v. *Champion, supra*, 9 Cal.4th at p. 924, fn. 14.) To the extent that petitioner never properly objected to the graffiti evidence, he is procedurally barred from raising this claim now. (*People* v. *Cain, supra,* 10 Cal.4th at p. 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34.)

Since the gang evidence and graffiti was admissible and relevant, petitioner has failed to make a prima facie showing entitling him to relief.

4. The Murder Of Teheran Jefferson

Petitioner asserts that evidence of the Jefferson murder was irrelevant and prejudicial. (Petn. 243-246.) As discussed more fully in Argument XB below, this argument merely repeats arguments previously raised on direct appeal. Therefore, the claim is procedurally barred. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

Moreover, as noted by this Court, although defense counsel objected to evidence of the Jefferson murder at trial, he failed to state grounds for the objection, and made no further objection to the admission of evidence of the Jefferson murder until the conclusion of the prosecution's case, when the parties were discussing the admissibility of the prosecution's exhibits. (*People* v. *Champion, supra,* 9 Cal.4th at p. 918) Because courts will not consider a challenge to the admissibility of evidence absent a specific and timely objection in the trial court on the ground sought to be urged on appeal (*People* v. *Raley* (1992) 2 Cal.4th 870, 892; *People* v. *Green, supra,* 27 Cal.3d at pp. 27-34, Evid. Code, § 353), this Court properly did not consider the claim on appeal (*People* v. *Champion, supra,* 9 Cal.4th at p. 918). For the same reason, this Court should not consider this claim now.

Even if this claim were properly before this Court, petitioner fails to make a prima facie showing entitling him to relief because he provides no reasonably available documentary evidence in support of such a claim. Indeed, he simply argues the "lack of connection"

between petitioner and the Jefferson murder, and disparages this Court's conclusions as "backward reasoning." (Petn. 243-245.)

Petitioner ignores the fact that despite his counsel's failure to object in the trial court, this Court did nevertheless consider the issue and found any error in admitting the evidence of Jefferson's death to be harmless.

> "As defendants themselves point out, the prosecution offered no evidence directly connecting defendants to Jefferson's death. Thus, it seems unlikely that the jury gave the evidence substantial weight. We conclude there is no reasonable probability that the outcome of the trial would have been different if the trial court had excluded the evidence of Jefferson's murder." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919.)

Accordingly, petitioner fails to make a prima facie showing entitling him to relief on the basis of the Jefferson evidence.

E. Alleged Cumulative Constitutional Defects

Petitioner claims the cumulative effect of the alleged errors regarding joinder require reversal of both the guilt and penalty phases. (Petn. 246.) However, despite the fact that most if not all of petitioner's claims regarding joinder and severance were raised on direct appeal, petitioner never presented these claims in the cumulative manner he now presents in his petition. Petitioner has demonstrated no justification for failing to raise the cumulative effect claim in his direct appeal. Thus, this claim is subject to the *Dixon* default. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Assuming arguendo this claim is properly before this Court, petitioner cites no additional documentary evidence or pertinent legal authority supporting a prima facie case for relief on any individual claim. Thus, having shown above that each claim is either without the support of a prima facie case for relief or procedurally barred, it necessarily follows that a claim that a compilation of all of these unsupported claims into a claim that their cumulative effect warrants relief also fails to establish a prima facie case for relief or a fundamental miscarriage of justice.

X.

PETITIONER'S CLAIM XIII, OF PROSECUTORIAL MISCONDUCT, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XIII, petitioner alleges that a variety of the prosecutor's actions amounted to misconduct severe enough to deprive him of his "rights under the 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 . . . which resulted in a denial of petitioner's 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." (Petn. 247-255.) Specifically, petitioner complains that the prosecutor committed knowing misconduct

> "(1) when he secretly, without notice to petitioner's counsel, applied to the trial court for permission to, and did, specially transport petitioner alone with Evan Mallet and then alone with Craig Ross for the purpose of inducing and tape recording self-incriminating conversations, and further manipulated the trial court's calendar with a bogus motion to carry out his plan; (2) when he knowingly misrepresented the similarities between the Jefferson killing and the Hassan and Taylor crimes to the trial court; and (3) when he represented to both defense counsel and the trial court that he had 'no direct evidence Mr. Champion was inside the [Taylor house]' but proceeded to elicit an 11th hour identification from Cora Taylor and the inference that petitioner was not only involved in the conspiracy, but was the tallest of the three individuals

who entered the residence, from Mary Taylor, knowing the contrary to be true." (Petn. 247.)

However, because petitioner offers no explanation, argument or authority for any violations other than those implicating his right to due process and a fair trial under the Fifth Amendment, as incorporated by the Fourteenth Amendment, these other unsupported claims should be deemed meritless. (See, e.g., *People* v. *Gionis, supra,* 9 Cal.4th at p. 1214, fn. 19.)

Moreover, as stated in Argument II, *supra*, the instant claims are precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner's claims of prosecutorial misconduct are subject to other procedural bars. And, petitioner has failed to make a prima facie case for relief.

In general, a prosecutor commits misconduct by the use of "deceptive or reprehensible methods to persuade either the court or the jury." (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds by *People* v. *Hill* (1998) 17 Cal.4th 800.) A general allegation of prosecutorial misconduct, which fails to implicate any specific guaranty of the Bill of Rights, will only state a claim for a constitutional violation "when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*Gionis, supra*, 9 Cal.4th at pp. 1214-1215, citation omitted; *Donnelly* v. *DeChristoforo* (1974) 416 U.S. 637, 642-643; *Darden* v. *Wainwright* (1986) 477 U.S. 168, 181-183.) Stated another way, "To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in

the denial of a defendant's right to a fair trial.'" (*People* v. *Bell, supra*, 49 Cal.3d at p. 534 [citation and internal quotation marks omitted].)

Accordingly, petitioner must not merely prove that misconduct occurred, but also that it was prejudicial -- that the error was not harmless:

> "Reversal of judgment is designed not so much to punish prosecutors as to protect the fair trial rights of defendants. Hence, in the absence of prejudice to the fairness of a trial, prosecutor misconduct will not trigger reversal." (*People* v. *Bolton* (1979) 23 Cal.3d 208, 214; see also *People* v. *Clair* (1992) 2 Cal.4th 629, 661 ("'What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant.'" [quoting *People* v. *Benson* (1991) 52 Cal.3d 754, 793].)

The standard is well-settled: Any error is harmless where "[t]here is no reasonable probability that a result more favorable to the defendant would have been reached in the absence of the misconduct." (*People* v. *Stansbury, supra*, 4 Cal.4th at p. 1057, reversed on other grounds in *Stansbury* v. *California* (1994) 511 U.S. 318; see also *People* v. *Arias* (1996) 13 Cal.4th 92, 183 [no prejudice where there was no reasonable likelihood the jury was misled or improperly influenced by the prosecutor's remarks].)

A. The Tape Recorded Conversations

In Claim XIIIA, petitioner alleges the prosecutor committed misconduct when he moved the superior court for an order permitting him to transport petitioner and Evan Mallet, and then petitioner and Craig Ross, to court in a van equipped to tape record their

conversations. Petitioner further alleges that the prosecutor "manipulated the trial court's calendar with a bogus motion to carry out his plan." (Petn. 249-251.)

On direct appeal, petitioner made numerous challenges to the admissibility of the tape recorded conversations. Thus, petitioner could have, and should have, raised the issue of misconduct relating to the tape recorded conversations on direct appeal. In light of petitioner's failure to justify his not raising this issue on direct appeal, petitioner has forfeited this claim. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Moreover, in addition to the timeliness arguments raised in Argument II, petitioner's untimeliness as to this claim in particular is further evidenced by the fact that petitioner supports this claim with the transcript of a pretrial motion held in the Evan Mallet case, in which he asserts the prosecutor conceded misconduct. (See Vol.3, Guilt Exhibit 68.) Clearly, the hearing on this motion, as well as the tape recorded conversations, occurred prior to petitioner's trial and long before petitioner filed his first habeas petition. Thus, this subclaim is substantially delayed without justification or exception.

Furthermore, although petitioner challenged the admissibility of the tape recorded conversations at trial, he did not object to the taped conversations on the basis of prosecutorial misconduct. Therefore, he has waived this claim of misconduct by failing to object at trial. (*People* v. *Cain, supra,* 10 Cal.4th at 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215.)

In any event, petitioner has failed to establish a prima facie case for relief. Petitioner's allegations of prosecutorial misconduct relating to the Champion-Mallet conversations fail because he fails to

provide evidentiary support demonstrating misconduct. Petitioner's sole support for his claim of misconduct is a stipulation that was offered into evidence at the hearing in the *Mallet* case, wherein Jeffrey Semow, the prosecutor in the *Champion* case, was deemed called and would have testified: that he moved to consolidate the *Champion* case with the *Mallet* case; that an opposition had been filed by Charles Gessler, Mallet's defense counsel, which cited to *People* v. *Ortiz* (1978) 22 Cal.3d 38, a case favorable to the defense; that Mr. Semow was unsure if that case was controlling law; that in the meantime, Mr. Semow filed and obtained an order to transport Champion and Mallet in a van equipped to tape record their conversations; that sometime before August 4, 1981, Mr. Semow decided that the *Ortiz* case was controlling law and that the consolidation was not well taken, but he did not take the matter off calendar because he desired to obtain the tape of the conversation between Champion and Mallet. (Vol. 3, Guilt Exhibit 68.) The above stipulation does not evidence either misconduct or a due process violation.

As discussed in Argument IXC, *supra,* it is important to keep in mind that this Court determined the tape recording procedure was proper. This Court concluded that the tape recording did not violate petitioner's rights to remain silent and to counsel, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, because the investigatory technique used had "'no capability of leading the conversation into any particular subject or prompting any particular replies.'" (*People* v. *Champion, supra,* 9 Cal.4th at p. 911, quoting *United States* v. *Henry, supra,* 447 U.S. at p. 271, fn.9.) Additionally, the prosecution merely listened to the tape recorded conversations, but did not question the defendants. Therefore, "[the prosecution] did not

engage in 'secret interrogation' by any techniques that were 'the equivalent of direct police interrogation.'" (*Ibid.*, quoting *Kuhlmann* v. *Wilson, supra,* 477 U.S. at p. 459.) This Court further found that petitioner's privacy rights were not violated because petitioner had no reasonable expectation of privacy while confined in the back of a police car. (*Id.*, at p. 912.) Finally, this Court found that the trial court's order permitting the prosecution to record petitioner's conversations lacked any aspect of compulsion. In fact, this Court likened the order permitting the tape recording to a search warrant and found that was a proper evidence-gathering activity. (*Id.*, at p. 913.) Consequently, the tape recording procedure was appropriate and did not constitute misconduct.

Nor does the fact that Mr. Semow did not take the motion to consolidate off calendar demonstrate prosecutorial misconduct. The motion for consolidation was set to be heard on August 4, 1981, as were several other motions that had been continued from their original hearing date of July 26, 1981. Petitioner had been present at every pretrial hearing prior to August 4, 1981. (See RT A1, A4, A7, A12, A21, A25, A27, A29.) Thus, even if the motion to consolidate had been taken off calendar, petitioner still was scheduled to come to court for hearings on other motions.[61/] Therefore, the fact that the prosecutor

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61. To the extent that petitioner may argue that Mallet would not have been transported to court had the matter been taken off calendar, petitioner has no standing to assert an alleged violation of Mallet's constitutional rights. (*People* v. *Badgett* (1995) 10 Cal.4th 330, 343-344; see also *Rakas* v. *Illinois* (1978) 439 U.S. 128, 148; and see *United States* v. *Payner* (1980) 447 U.S. 727, 731, 735; *Faretta* v. *California* (1975) 422 U.S. 806, 819-821; *People* v. *Douglas* (1990) 50 Cal.3d 468, 501; *United States* v. *Partin* (9th Cir. 1979) 601 F.2d 1000, 1006.) Significantly, Mallet unsuccessfully argued in his motion to suppress the tape recorded conversation that his constitutional rights had been violated

did not take the motion to consolidate off calendar is of no consequence.

In any event, regardless of whether the prosector's conduct is found to constitute misconduct, petitioner has failed to demonstrate prejudice. Significantly, the tape of the conversation between petitioner and Mallet was *not* played for the jury. And the prosecutor's reference to the conversation between Champion and Mallet was limited to a few questions relating to whether petitioner told Evan Mallet that Elizabeth Moncrief had confused petitioner with a Raymond Crip named "Nicky" because "Nicky" is now dead. (See RT 3040-3042.) Elizabeth Moncrief was a witness as to the *Hassan* crime. Consequently, petitioner's claim that the prosecutor used the taped recorded conversation between Mallet and petitioner to connect petitioner to the *Taylor* crime (Petn. 251) is erroneous.

Finally, any claim of prosecutorial misconduct relating to the tape recorded conversations between petitioner and Craig Ross must fail as it is completely unsupported. Indeed, the only mention of the conversation between petitioner and Craig Ross appears in the heading to petitioner's argument. (See Petn. 249.) Petitioner presents no facts to support his claim that tape recording the conversation between petitioner and Craig Ross constitutes misconduct. To the contrary, the stipulation that petitioner claims demonstrates misconduct applied only as to the August 4, 1981, hearing on the motion to consolidate the *Mallet* and *Champion* cases. The conversation between petitioner and Craig Ross was taped on August 10, 1981. Thus, no such "bogus" motion was scheduled in order to tape record petitioner and Ross'

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by the prosecutor's conduct. The trial court in the *Mallet* case denied the motion. (Vol. 3, Guilt Exhibit 68 at pp. 342-344.)

conversations. It bears repeating, this Court found the tape recording procedure to be appropriate. (*People* v. *Champion*, *supra*, 9 Cal.4th at pp. 911-914.) Consequently, petitioner has failed to make a prima facie showing of prosecutorial misconduct or to establish a fundamental miscarriage of justice based on the tape recorded conversations, which would relieve him of the effects of the untimeliness bar.

B. Allegedly Knowingly Misrepresenting to the Trial Court the Purported Similarities Between the Jefferson Killing, and the Taylor and Hassan Crimes

In Claim XIIIB, petitioner contends that the prosecutor committed prejudicial misconduct by representing to the trial court purported similarities between the Jefferson, Taylor, and Hassan murders, as to the weapons used and motive, when the two crimes are "glaringly dissimilar." (Petn. 252-254.) Petitioner argues that such misconduct was so prejudicial that it violated his "rights to confrontation, due process and a fair trial and to fair and reliable guilt and sentencing determination." (*Ibid.*)

Respondent notes this claim constitutes petitioner's second attempt to challenge the prosecutor's alleged misrepresentations to the court regarding the similarities between the Jefferson, Hassan and Taylor murders. On direct appeal, petitioner made a similar argument in his opening brief that the prosecutor failed to meet the foundational requirement of proving that the unadjudicated crimes were linked to petitioner. (Ch.OB 28-34.) In that argument, petitioner focused on the prosecution's misleading offer of proof regarding the similarities between the murders and petitioner's involvement therein. (*Ibid.*) Petitioner also joined in Ross' argument that the prosecutor was guilty

of misconduct as a result of his misleading offer of proof regarding the Jefferson incident, which allegedly prevented the trial court from carrying out it's responsibility to exercise discretion in determining the admissibility of evidence. (Ross OB 63-65.) Petitioner further joined in Ross' supplemental argument that the prosecutor's misleading offer of proof with respect to the Jefferson homicide constituted misconduct. (Ch.OB 163; Ch.Supp.OB 123; Ross' Opening Supplemental Brief [hereinafter "Ross Supp.OB"] 44-46.)

Despite the slight variation in the phrasing of the claim raised in the instant petition, clearly it is based on the same factual and legal grounds already presented on direct appeal. This Court considered and rejected these arguments, finding that there were no inaccuracies in the prosecutor's offer of proof. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919.) Since petitioner now raises virtually the same claim that has been raised on direct appeal, unsupported by additional facts pertinent to his claim,[62/] his claim on habeas is procedurally barred, and should be

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62. Petitioner supports his claim with the following documents: the police report from the Jefferson homicide (Vol.3, Guilt Exhibit 69), a witness statement of Natasha Wright (Vol.3, Guilt Exhibit 48), a witness statement of Cynthia Wilte (Vol.3, Guilt Exhibit 49), and two unsigned, undated, handwritten notes (Vol.3, Guilt Exhibit 50). These exhibits should not be considered in support of petitioner's misconduct claim as such evidence is cumulative to the evidence presented at trial. For example, all of the evidence contained in the Jefferson police report was presented through the testimony of Los Angeles Police Department Officer Billy Leader, who wrote the report (RT 1543-1563), Sandra Taylor, who lived with Jefferson in the weeks before he was killed (RT 1565-1568), William Sherry, who performed the autopsy on Jefferson (RT 1569-1574), and ballistics expert Patrick Slack (RT 2376-2412). Similarly, Natasha Wright testified consistently with her written statement. (RT 2352-2369.) Although Cynthia Wilte did not testify at trial, her observation that she saw Michael Taylor get into a fight over marijuana with Evan Mallet's brother two days before he was killed is

rejected. (*In re Clark, supra,* 5 Cal.4th at p. 765; *In re Waltreus, supra,* 62 Cal.2d at 225.)

To the extent that this Court views the claim of prosecutorial misconduct presented on appeal different from the issue presented on habeas, the claim on habeas is procedurally barred under *Dixon*. As discussed above, as to the prosecutor's alleged misrepresentations, this claim was raised on direct appeal. Therefore, any variations of this claim could have, and should have, been raised on appeal. In light of petitioner's failure to justify his not raising this issue on direct appeal, petitioner has forfeited this claim. (*In re Harris*, *supra*, 5 Cal.4th at p. 829; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Moreover, in addition to the timeliness arguments raised in Argument II, petitioner's untimeliness as to this claim in particular is further evidenced by the fact that any alleged misrepresentations by the prosecutor would have been apparent at the conclusion of the testimony at trial; at that point, it would have been known whether the prosecutor's offer of proof accurately represented the evidence actually presented. Thus, this subclaim is substantially delayed without justification or exception.

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not inconsistent with the prosecution's theory that Taylor was murdered because he was a marijuana dealer.

In addition, petitioner's Exhibit 50, the unsigned and undated handwritten note is not "in such a form that perjury may be assigned upon the allegations if they are false." (*People* v. *Von Villas* (1992) 10 Cal.App.4th 201, 252-253; *People* v. *Scott* (1982) 129 Cal.App.3d 301, 309; *People* v. *Madaris* (1981) 122 Cal.App.3d 234, 242.) Moreover, the note obviously involves inadmissible hearsay. Thus, this exhibit should not be considered in support of petitioner's misconduct claim.

Furthermore petitioner has waived this claim of misconduct by failing to object to the prosecutor's misrepresentations at trial. As this court noted,

> "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 offer of proof. They thus have not preserved the right to raise the issue on appeal. [Citation omitted.]" (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919.)

Finally, petitioner has failed to establish a prima facie case for relief as to his claim of misconduct based on the prosecutor's alleged misrepresentations. Prior to opening statements, defense counsel made a nonspecific objection to the use of a photograph during the prosecutor's opening argument, which depicted petitioner in a black outfit with a gun in his right hand and a knife in his left. (RT 1506.) As an offer of proof, the prosecutor stated that the ballistics experts was expected to testify that the Hassans and Jefferson were shot to death with a .38 or .357 caliber revolver with a six left barrel twist, which is a characteristic commonly found in Colt revolvers. (RT 1507.) The expert also was expected to testify that the gun shown in the photograph in question was a Colt .38 caliber revolver. (RT 1508.) The prosecutor explained the photograph also was relevant because it was part of a set of photographs, which showed both petitioner and Ross holding what apparently was the same gun, and both petitioner and Ross were charged with the Hassan murders. (*Id.*, at pp. 1508-1509) The prosecutor added that the photographs were relevant because they depicted Marcus Player, whose vehicle was identified by Elizabeth Moncrief as seen at the Hassan residence at or near the time

of the murders. (*Id.*, at p. 1509.) The prosecutor further argued the photograph would be used to counter the anticipated defense that Clarence Reed and Benjamin Brown also were armed with a Colt revolver. (*Ibid.*) The trial court overruled petitioner's objection. (*Ibid.*)

Petitioner's counsel subsequently made another nonspecific objection to any reference by the prosecutor during his opening argument of the uncharged Jefferson murder. (RT 1510.) The prosecutor responded that the Jefferson murder was relevant to show the guilt of both defendants by showing that the Hassan murder was not an isolated incident but part of an ongoing conspiracy to commit robbery and murder of dope dealers in the neighborhood. (RT 1511.) The prosecutor explained that the Jefferson murder was the first in a series of murders and that it was uniquely similar to the Hassan murder in that both Bobby Hassan and Jefferson were marijuana dealers, they lived three doors apart, they were killed within a month of each other, and neither residence was broken into but both were ransacked. (*Ibid.*) The prosecutor added that Jefferson and one of the Hassan victims' bodies were found in similar positions and that both Jefferson and one of the Hassan victims had a pillow covering their heads. (*Ibid.*) The prosecutor reiterated that both victims were shot in the head with a .38 revolver with a six left twist. (RT 1512.) The prosecutor further explained that the Jefferson murder was relevant to show intent because the jury reasonably could infer that since the Hassan murder was subsequent to the Jefferson murder, the persons involved in the Hassan murder went into the house knowing that a murder had been committed before and would be committed again. (*Ibid.*) The trial court overruled petitioner's objection. (RT 1514.)

Petitioner fails to establish a prima facie claim of misconduct because nothing in the prosecutor's offers of proof evidenced a deceptive or reprehensible method to persuade the court. (See *People* v. *Berryman*, *supra*, 6 Cal.4th at p. 1072.) To the contrary, all of the evidence outlined in the offer of proof was in fact presented at trial. Indeed, this Court observed, "We have examined the offer of proof and find no inaccuracies." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919.)

Just as was outlined in the prosecutor's offer of proof, Patrick Slack, a ballistics expert, testified that the slug taken from Jefferson (People's Exhibit 37A) was a .38 or .357 caliber bullet with the specific rifling characteristics of six lands and grooves with a left hand twist. (RT 2391.) Slack also testified that the slug taken from Bobby Hassan (People's Exhibit 133) was a .38 or .357 caliber bullet with six lands and grooves with a left hand twist. (RT 2394.) Slack further explained that the Colt revolver, more frequently than any other revolver, exhibits the rifling characteristics of six lands and grooves with a left hand twist, and that the gun displayed in the photographs of petitioner and Ross was a .38 or .357 caliber Colt revolver. (RT 2396-2398.)

Just as was outlined in the prosecutor's offer of proof, Detective Ronnie Williams testified that People's Exhibits 174 through 176 were photographs depicting Marcus Player, and that petitioner, Craig Ross, and Level Player were depicted in photographs which were designated People's Exhibits 117 through 120. (RT 2648-2649.) The evidence at trial further demonstrated that both Bobby Hassan and Teheran were marijuana dealers (RT 1556, 1590, 2138), they lived three doors from each other[63] (RT 1544, 1588), they were killed within the

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63. Merci Hassan testified that she lived with her husband and family at 849 West 126th Street, in Los Angeles. (RT 1588.) Teheran

same month (RT 1544, 1589), and neither residence was broken into, but both had been ransacked (RT 1546, 1597, 1730). Finally, the evidence showed that Jefferson and Bobby and Eric Hassan were found lying on the beds in similar positions (RT 1546, 1597), and that Jefferson and Eric Hassan both had a pillow covering their heads (RT 1546, 1883-1884). Thus, the prosecutor's offer of proof was completely accurate.

Furthermore, none of the documents supporting petitioner's petition demonstrate misconduct. The statement by Natasha Wright dated December 28, 1980 (Vol 3, Guilt Exhibit 48), is consistent with her testimony at trial. (See RT 2352-2369.) She testified, in short, that she lived next door to Michael Taylor and she saw four persons arrive at Taylor's residence the day before he was murdered. One person stayed in the car, the other three went to the door, they argued briefly with Taylor over money and then left. (*Ibid.*) Nothing in Wright's statement demonstrates the prosecutor misled the court.

Cynthia Wilte's statement (Vol 3, Guilt Exhibit 49) merely states that she saw Michael Taylor get into a fight with Evan Mallet's brother on Christmas day at Helen Keller Park. This statement certainly does not prove that the prosecutor made any misrepresentations to the court or committed misconduct.

Petitioner claims that his Guilt Exhibit 50 is a report that police received that someone named Binkey "killed Mike." (See Vol. 3, Guilt Exhibit 50.) As discussed previously, this unsigned, undated, handwritten "scribble" certainly cannot be considered competent evidence that "Mike" refers to Michael Taylor, or that petitioner was not involved in the Taylor murder. Nor do the police reports relating

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Jefferson lived at 862 West 126th Street, in Los Angeles. (RT 1544.)

to the Jefferson murder (Vol. 3, Guilt Exhibit 69) demonstrate anything different than was presented at trial.

Petitioner claims that from these documents, a jury reasonably could conclude that the suspects entered the Taylor home to settle a personal debt. (Petn. 67.) At best, these documents present an alternate motive for the murder of Michael Taylor. However, such a theory does not make the prosecution's theory incorrect or misleading. Such evidence certainly does not demonstrate prosecutorial misconduct.

In any event, petitioner has failed to show he was prejudiced. As discussed previously, petitioner was neither charged nor convicted of the Taylor murder, a fact his counsel oft repeated to the jury. Nor was petitioner prejudiced by evidence of the Jefferson murder. As this Court found, the admission of evidence of the Jefferson murder was harmless. (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 919).

> "As defendants themselves point out, the prosecution offered no evidence directly connecting defendants to Jefferson's death. Thus, it seems unlikely that the jury gave the evidence substantial weight. We conclude there is no reasonable probability that the outcome of the trial would have been different if the trial court had excluded the evidence of the Jefferson murder." (*Ibid.*)

Consequently, petitioner has failed to make a prima facie showing of prosecutorial misconduct that violated his due process rights. Nor has he established a fundamental miscarriage of justice.

C. Allegedly Eliciting an Identification From Cora Taylor That Petitioner Participated in the Taylor Murder After Representing to the Court That the Prosecution had No Direct Evidence Petitioner Was Inside the Taylor House

In Claim XIIIC, petitioner alleges the prosecutor committed misconduct when he represented to defense counsel and the court that he had no direct evidence petitioner was inside the Taylor house and then proceeded to elicit an "11th hour identification" from Cora Taylor, and an inference from Mary Taylor that petitioner not only was involved in the conspiracy, but was the tallest of the individuals to enter the Taylor residence. (Petn. 255.) Petitioner further claims the prosecutor argued to the jury that petitioner's involvement in the Taylor murder was proof of his involvement in the Hassan crimes, and that such a statement constitutes "outrageous misconduct." (*Ibid.*) Petitioner claims that this misconduct was so severe as to result in a denial of his "rights to due process and a fair trial, and to a fair and reliable guilt and sentencing determination." (*Ibid.*)

However, petitioner never objected at trial to the prosecutor's questions on the grounds of prosecutorial misconduct or any other grounds for that matter. Therefore, this claim was waived and is now procedurally barred. (*People* v. *Cain, supra,* 10 Cal.4th at 48; *People* v. *Gionis, supra,* 9 Cal.4th at p. 1215.)

Also, petitioner has failed to make a prima facie case for relief. The support for his claim consists of conclusory allegations of misconduct and utter speculation. Such a basis does not warrant relief. (*People* v. *Duvall, supra,* 9 Cal.4th at p. 474.) As this Court noted, prior to trial, "no eyewitness had identified [petitioner] as one of the Taylor killers; it was only at the trial itself that Cora Taylor unexpectedly identified him." (*People* v. *Champion*, *supra*, 9 Cal.4th at

p. 905.) In fact, Cora Taylor testified that she had not been able to identify any of the perpetrators at the lineup that she attended. (RT 2243.) She did identify Evan Mallet from a photograph as one of the three intruders that entered her home. Since there was substantial evidence that Ross too had been inside the Taylor residence, it was not improper for the prosecutor to ask Cora whether she saw any of the other perpetrators in court. In fact, petitioner's counsel anticipated that the prosecutor would ask Mary and Cora Taylor whether they saw anyone in the courtroom who resembled the perpetrators, and counsel believed that the prosecutor was "well within his rights to ask a witness whether any person, including a specific defendant could be identified." (See Vol. 3, Guilt Exhibit 47.)

The record demonstrates clearly that the prosecutor was as surprised as the defense when Cora Taylor identified petitioner. Indeed, it makes sense that the prosecutor would not have emphasized that Cora Taylor was unable to pick out any of the perpetrators in a lineup or in photographs if the prosecutor actually anticipated that Cora Taylor would identify petitioner in court.

Petitioner's claim that Mary Taylor inferred that petitioner was the tallest of the three individuals to enter the Taylor residence again is a conclusory allegation unsupported by the record. When asked if Mary Taylor saw anyone in the courtroom who looks like the tallest of the three perpetrators, she stated that she was not sure. (RT 2132.) Mary stated that petitioner looked different than the tallest person. (RT 2134.) The prosecutor in his closing reiterated that Mary Taylor "does not identify Steve Champion . . . nor can she even say he was

there for that matter, yes or no." (RT 3170.) Thus, there was no impermissible inference suggested.[64/]

Finally, without citation to the record, petitioner baldly asserts the prosecutor committed misconduct by arguing that petitioner's involvement in the Taylor murder was proof of his involvement in the Hassan murders. (Petn. 255.) Petitioner's conclusory allegations are not a basis for relief. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th 827; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) Nevertheless, even assuming arguendo that the prosecutor made such statements, they did not constitute misconduct. As this Court noted, in his penalty phase closing argument,

> "the prosecutor acknowledged that the jury could not consider the evidence of the Jefferson murder (as to both defendants) and of the Taylor murder (as to defendant Champion) unless it found *beyond a reasonable doubt* that the defendants committed these crimes, and the prosecutor implied that the jury should not consider these crimes at all." (*People* v. *Champion, supra,* 9 Cal.4th at p. 949, emphasis in original.)

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64. It should be noted that the prosecutor was not precluded from asking for possible in-court identifications from Cora and Mary Taylor simply because he represented to the court and/or defense counsel that he had no "direct evidence" that petitioner was inside the Taylor house. Certainly, there was circumstantial evidence connecting petitioner to the Taylor murder. Petitioner had not been completely eliminated from suspicion in the Taylor murder; he had no alibi at the time of the Taylor murder, he had a number of connections to others involved in that murder, he resembled the original description of the perpetrator given by Mary Taylor, and there was no conclusive evidence that four persons other than petitioner were the four persons who committed the Taylor murder.

In his closing, the prosecutor also acknowledged that the jury had not explicitly made findings at the guilt phase that defendants committed the Jefferson murder and that petitioner committed the Taylor murder, and said that he was not asking the jury to make such findings at the penalty phase. (*Id.* at 950.) Against the backdrop of such admonitions by the prosecutor, any alleged statements by the prosecutor in his closing argument that petitioner was tied to the Hassan murders through his involvement in the Taylor crimes cannot constitute misconduct. Consequently, petitioner has not made a prima facie showing of misconduct that violated his constitutional rights. Nor has he established a fundamental miscarriage of justice.

XI.

PETITIONER'S CLAIM XIV, THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED DUE TO CALIFORNIA'S STATUTORY SENTENCING SCHEME, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XIV, petitioner alleges multiple violations of his state and federal constitutional, and state statutory, rights stemming from California's death sentencing scheme. (Petn. 256-260.) Specifically, petitioner claims that California's death penalty statute "fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion." (Petn. 256-257.) He further claims that his rights under the Eighth Amendment have been violated because the death penalty statute contains so many special circumstances that it fails to narrow the class of death-eligible individuals. (Petn. 257-260.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, as explained below, petitioner is procedurally barred from raising this claim for other reasons, and has failed to make a prima facie case for relief.

On direct appeal, petitioner made a number of challenges to the constitutionality of California's capital scheme, including the claim raised herein. (Ch.Supp.OB 104-119.) This Court rejected those claims, noting, "We have rejected each of these contentions in the past . . . and we decline to reconsider these holdings." (*People* v. *Champion*, *supra*, 9 Cal.4th at p. 951, internal citations omitted.) Petitioner has

raised nothing new in the instant petition justifying reconsideration of these claims. Thus, the claims are procedurally barred under *Waltreus* as they were correctly rejected by this Court on direct appeal.

To the extent this claim could be characterized as a different issue than the one raised on appeal, respondent notes there is no reason whatsoever why this issue was not raised on direct appeal as part of petitioners challenges to the constitutionality of the death penalty. Therefore, petitioner should be procedurally barred from raising this claim on habeas corpus. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Petitioner also has failed to make a prima facie case for relief because this Court has repeatedly rejected the claim that California's death penalty statute fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion. (*People* v. *Holt* (1997) 15 Cal.4th 619, 698; *People* v. *Sanchez* (1995) 12 Cal.4th 1, 60-61; *People* v. *Stanley* (1995) 10 Cal.4th 764, 842-843; see *California* v. *Ramos* (1983) 463 U.S. 992, 1008.) Likewise this Court has reiterated that the death penalty statute does not contain so many special circumstances that it fails to narrow the class of death-eligible individuals. (*People* v. *Scott* (1997) 15 Cal.4th 1188, 1228; *People* v. *Bacigalupo* (1993) 6 Cal.4th 457, 467-469 [special circumstances set forth in California's death penalty statute serve to both "guide" and "channel" jury discretion by strictly confining the class of offenders eligible for the death penalty].)

Consequently, the instant claim must be rejected because it is subject to procedural bars, does not fall within any exception of the applicable procedural bars (*In re Harris, supra,* 5 Cal.4th at pp. 828-829,

834-841; *In re Clark, supra*, 5 Cal.4th at pp. 785-787, 797-799) and fails to state a prima facie case for relief or to establish a fundamental miscarriage of justice.

XII.

PETITIONER'S CLAIM XV, OF CUMULATIVE EFFECT OF ERRORS ON THE ISSUES OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XV, petitioner alleges violations of his rights under the "Fifth, Sixth, Eighth and Fourteenth Amendments" to the federal Constitution arising from the cumulative effect of combining the errors found by this Court on appeal with the errors alleged in the petition. (Petn. 261-262.)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at p. 785-787.) In addition, petitioner has failed to make a prima facie case for relief.

Petitioner has failed to make a prima facie showing of relief because his blanket assertion of cumulative error does not raise to the level of a constitutional violation without demonstrating some nexus between the errors. Indeed, this Court found that, individually, the errors were harmless. And, petitioner has failed to establish a prima facie case for relief as to any of the claimed errors in the instant proceeding. *A fortiori*, petitioner has failed to establish either a prima facie case for relief from any cumulative effect of errors or a fundamental miscarriage of justice.

XIII.

PETITIONER'S CLAIM XVI, THAT HIS EXECUTION AFTER PROLONGED CONFINEMENT UNDER A SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XVI, petitioner alleges violations of his rights under the "Fifth, Sixth, Eighth and Fourteenth Amendments" to the federal Constitution arising from his having to spend over 15 years on death row without being executed. (Petn. 263-264.)

Petitioner has failed to make a prima facie case for relief. Petitioner cannot fight the carrying out of his death sentence as he has for most of the last 15 years and, at the same time, in effect complain that it has not occurred soon enough. At any point after his automatic appeal was final, petitioner could have chosen to shorten his stay on death row. By continuing to attack his judgment, however, he has himself lengthened that stay.

If petitioner's sentence is found to be just, he has only benefited from the delay of his execution. On the other hand, if his sentence is found to be unjust, there is "no conceivable basis" on which to claim the delay resulted in prejudice since, obviously, the death sentence has not been carried out and petitioner would have spent the last 15 years in effect serving the sentence he is now in effect requesting -- life in prison without the possibility of parole. (*People* v. *Hill* (1992) 3 Cal.4th 959, 1015-1016; see also *McKenzie* v. *Day* (9th Cir. 1995) 57 F.3d 1461, 1468 [no fundamental miscarriage of justice exception for *Lackey* claims].) Thus, petitioner's allegations do not establish a prima facie case for relief.

XIV.

PETITIONER'S CLAIM XVII, THAT HIS EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XVII, petitioner alleges violations of his rights under the "Eighth and Fourteenth Amendments" to the federal Constitution and under Article I, section 17 of the California Constitution because execution by lethal injection violates the prohibition against cruel and unusual punishment.
(Petn. 265-275.)

Petitioner has failed to failed to establish a prima facie case for relief. Petitioner's claim the Department of Corrections failed to comply with Penal Code section 3604 in adopting standards for the administration of lethal injection (Petn. 265-266) is belied by petitioner's own Guilt Phase Exhibit 78 -- California Execution Procedures: Lethal Injection. This document clearly establishes that California has in fact adopted standards for the administration of the lethal injection.

Notwithstanding the existence of this document, which sets forth the lethal injection procedure, petitioner claims these procedures are inadequate because they do not prescribe a minimum level of training for personnel involved in inserting the intravenous line and administering the lethal injection, and because a physician or medical expert need not be present in the event of an emergency. (Petn. 267-268.) Petitioner's claim is without merit.

First, the Department of Corrections may establish its own set of standards. (See Pen. Code, § 3604, subd. (a).) These standards

include the presence of two physicians who, along with the warden, are in the anteroom of the chamber. (See Vol.4, Guilt Exhibit 78 at p.3.) Thus, there are two physicians present in the event of an emergency. Additionally, petitioner has provided "no authority for the proposition that a prisoner is entitled . . . to have a lethal injection administered by a physician." (See *McKenzie* v. *Day, supra,* 57 F.3d at p. 1469.)

Petitioner next describes the litany of horribles that potentially could occur during the execution, and catalogs 12 "botched" executions; 8 from Texas, 1 from Arkansas, 1 from Oklahoma, 1 from Illinois, and 1 from Missouri. (Petn. 269-274.) Petitioner supports his claim with declarations from two doctors, including John Davis Palmer, a doctor on the staff of the College of Medicine at the University of Arizona. (See Vol.4, Guilt Exhibits 79-80.) Petitioner also includes an affidavit from Michael L. Radelet, a sociologist. (See Vol.4, Guilt Exhibit 81.)

Coincidentally, the petitioners in *Poland* v. *Stewart* (9th Cir. 1997) 117 F.3d 1094, 1105, and *LaGrand* v. *Stewart* (9th Cir. 1998) 133 F.3d 1253, 1264-1265, recently presented to the Court of Appeals for the Ninth Circuit similar reports. The LaGrands submitted an affidavit from a doctor on the staff of the College of Medicine at the University of Arizona,[65] and an affidavit from Michael Radelet. Poland, too, submitted an affidavit from Radelet. The courts in both cases noted that none of the "botched" executions had taken place in Arizona, and therefore Radelet's affidavits "prove[] nothing about problems using the Arizona protocol." (*Poland, supra*, 117 F.3d at 1105; see also *LaGrand, supra,* 133 F.3d at p. 1265.) The court in *Poland* found that since Poland had not presented evidence of problems with the executions that had utilized lethal injection as a method of execution in Arizona,

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65. This appears to be John Davis Palmer.

the court could assume that no such problems had occurred. (*Poland, supra*, 117 F.3d at 1105.)

The court in *LaGrand* further noted that the doctor from the University of Arizona had not witnessed either of the executions that had taken place in Arizona and that his affidavit was "replete with speculation." (*LaGrand, supra,* 133 F.3d at p. 1265.) While the doctor stated that there may be some risks, the two Arizona executions showed no such problems in actual practice. "'The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.'" (*LaGrand, supra,* 133 F.3d at p. 1265, quoting *Campbell* v. *Wood* (9th Cir. 1994) 18 F.3d 662, 668.)

Likewise, the doctors' declarations here are replete with speculation. Apparently, neither of the two doctors have witnessed an execution in California, and none of the "botched" executions occurred in California. Consequently, Radelet's affidavit proves nothing about alleged problems using the California protocol. Indeed, since petitioner has not presented any evidence relating to executions that have taken place in California, this Court may assume that no such problems have occurred here.

It is important to note that the prohibition against cruel and unusual punishment recognizes "'evolving standards of decency that mark the progress of a maturing society.'" (*Penry* v. *Lynaugh* (1989) 492 U.S. 302, 330-331, quoting *Trop* v. *Dulles* (1958) 356 U.S. 86, 101 (plurality opinion).) Legislative trends are particularly relevant when determining society's evolving standards. (*Penry, supra*, 492 U.S. at p. 331.) Since execution by lethal injection is the method of execution which most states have adopted in recent years (see *Fiero* v. *Gomez* (N.D.Cal. 1994) 865 F.Supp. 1387, 1404-1408), it is not cruel and

unusual punishment. In fact, no state has found execution by lethal injection to be unconstitutional. (See *Hunt* v. *Nuth* (4th Cir. 1995) 57 F.3d 1327, 1338 fn. 16.) Consequently, petitioner has failed to demonstrate the use of lethal injection as a method of execution violates his constitutional rights. Thus, he has not established a prima facie case for relief or a fundamental miscarriage of justice.

XV.

PETITIONER'S CLAIM XVIII, THAT HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW, IS PROCEDURALLY BARRED AND FAILS TO ESTABLISH A PRIMA FACIE CASE FOR RELIEF

In Claim XVIII, petitioner claims he was denied his right to a fair trial because his death sentence violates international law. (Petn. 276-277.) Specifically, petitioner contends the "racial discrimination endemic in the death penalty process" violates customary international law. (*Ibid.*)

As stated in Argument II, *supra*, the instant claim is precluded by the procedural bar against unjustifiably delayed claims. (*In re Robbins, supra,* 18 Cal.4th at p. 770; *In re Clark, supra,* 5 Cal.4th at pp. 785-787.) Additionally, as explained below, petitioner is procedurally barred from raising this claim, and has failed to make a prima facie case for relief.

Whereas the instant claim involves a constitutional challenge to the death penalty law that could have been raised on direct appeal, petitioner has not presented any justification for failing to raise his contentions on appeal. Indeed, petitioner has presented no evidence outside of the record pertinent to this claim.[66/] He merely asserts his death sentence would violate international law. Under these circumstances, petitioner's claim must be denied because he forfeited

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66. In support of this claim, petitioner attaches Argument XXXII of the appellant's opening brief in the case of *People* v. *Jenkins* S077522. (See Vol.4, Guilt Exhibit 82.) The fact that this argument appeared in the brief on direct appeal in the *Jenkins* case proves that this argument is more appropriately raised in a direct appeal. Habeas corpus is not a substitute for direct appeal. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

his claim by failing to raise it on appeal. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Additionally, petitioner has failed to make a prima facie case for relief. A mere conclusory allegation of a violation of a constitutional right, without the presentation of any facts or legal authority to support it, does not establish a prima facie case for relief. (*People* v. *Duvall, supra,* 9 Cal.4th at p. 474; *People* v. *Karis, supra,* 46 Cal.3d at p. 656.) Despite petitioner's broad assertions in his petition regarding racial discrimination in the death penalty process (Petn. 276), petitioner has failed to demonstrate that his trial was infected with racial discrimination or that his verdict was based on anything besides his overwhelming guilt. Consequently, petitioner has failed to establish a prima facie case for relief or a fundamental miscarriage of justice.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the petition for writ of habeas corpus be denied in its entirety. More specifically,

Claim VI, subclaim A-F, subclaim G, subparts 1-4, and subclaim H should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The same claims and subclaims also should be denied on their merits;

Claim VII, subclaims A-H should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The same claims and subclaims also should be denied on their merits;

Claim VIII, subclaims A-D should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The same claims and subclaims also should be denied on their merits. To the extent that subclaim D raises a separate claim of prosecutorial misconduct, it is barred under *In re Waltreus, supra*, and waived under *People* v. *Green, supra;*

Claim IX, subclaim A, subparts 1-5, and subclaims B and C should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The same claims and subclaims also should be denied on their merits;

Claim X should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The claim also is barred under *In re Waltreus, supra,* and *In re Dixon, supra,* and waived under *People* v. *Green, supra.* The claim further should be denied on its merits;

Claim XI should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The claim also should be denied on its merits;

Claim XII, subclaims A-E should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. Subclaim B also is barred under *In re Waltreus, supra,* and *In re Dixon, supra.* Subclaim C, subparts 1 and 2, are barred under *In re Dixon* and waived under *People* v. *Green, supra*. Subclaim C, subpart 3, is barred under *In re Waltreus, supra,* and *In re Dixon, supra,* and waived under *People* v. *Green, supra.* Subclaim C, subpart 4, is barred under *In re Dixon, supra,* and waived under *People* v. *Green, supra.* Subclaim C, subpart 5, is barred under *In re Dixon, supra.* Subclaim D is barred under *In re Waltreus, supra,* and *In re Dixon, supra,* and waived under *People* v. *Green.* Subclaim E is barred under *In re Dixon, supra*. All of the claims and subclaims also should be denied on their merits;

Claim XIII, subclaims A-C should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. Subclaim A also is barred under *In re Dixon, supra,* and waived under *People* v. *Green, supra.* Subclaim B is barred under *In re Waltreus, supra,* and *In re Dixon, supra,* and waived under *People* v. *Green, supra.* Subclaim C is barred under *In re Dixon, supra,* and waived under *People* v. *Green, supra*. All of the claims and subclaims also should be denied on their merits;

Claim XIV should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The claim also is barred under *In re Waltreus, supra,* and *In re Dixon, supra,* and should be denied on its merits;

Claim XV should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*, and also should be denied on its merits;

Claim XVI should be denied on its merits;

Claim XVII should be denied on its merits;

Claim XVIII should be denied as untimely under *In re Robbins, supra* and *In re Clark, supra*. The claim also is barred under *In re Dixon, supra,* and should be denied on its merits.

Dated: November 6, 1998.

Respectfully submitted,

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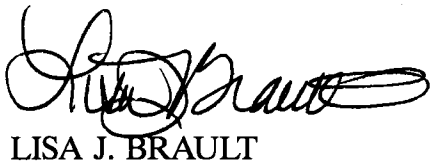

LISA J. BRAULT
Deputy Attorney General

Attorneys for Respondent

LJB:pi
LA1996XW0006

DECLARATION OF SERVICE BY MAIL

Case Name: **In re STEVE ALLEN CHAMPION** No.: **S065575**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On NOV 0 9 1998, I placed the attached

INFORMAL RESPONSE

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

Karen Kelly
Attorney at Law
P.O. Box 520
Ceres, California 95307

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on NOV 0 9 1998, at Los Angeles, California.

GIL CARBON

LJB:pi
LA1996XH0026