ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

INFORMAL REPLY

KAREN KELLY
ATTORNEY AT LAW
California State Bar No. 118105
P.O. Box 520
Ceres, California 95307
Telephone: (209) 537-9270

Attorney for Petitioner
by Appointment of the California
State Supreme Court

DEATH PENALTY

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[1] Exhibits 1-5 attached to this Informal Reply are referred to in the text of the Informal Reply as Exhibits1A-5A. This is to distinguish Exhibits 1-5 attached to the Informal Reply from Exhibits 1-5 attached to the Petition.

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INFORMAL REPLY

I.

THE PETITION HAS BEEN TIMELY FILED

Respondent asserts that petitioner's claims should be denied as untimely. (Informal Response at p. 16.) Specifically, respondent asserts that petitioner has failed to establish the absence of substantial delay, has not established good cause for delay, and finally, has not demonstrated the applicability of any of the miscarriage of justice exceptions to the timeliness bar. (Informal Response at pp. 17-27.)

Respondent is wrong. The Court should address the merits of each of petitioner's claims.

A. General Reply to Respondent's General Assertion of Untimeliness

Respondent misstates the basic standard governing the obligation to present habeas claims. Respondent asserts 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." (Informal Response at p. 19.) This statement is not quite correct. The "trigger" respondent describes is that which triggers defense counsel's *duty to investigate*, but not her duty to present the claims. Counsel's *duty to present claims* arises once counsel has (or should have had) information sufficient to support a prima facie case for relief. (*In re Robbins* (1998) 18 Cal.4th 770, 806 fn. 28 and 29 (majority), 820 (Justice Kennard concurring and dissenting); *In re Gallega* (1998) 18 Cal.4th 825, 834; *In re Clark* (1993) 5 Cal. 4th 750, 781.)

Although respondent may be correct in noting that "triggering facts" for some claims were contained in materials available to appellate counsel, R. Charles Johnson, to previous habeas counsel, Jim Merwin, and then to present habeas counsel, Karen Kelly (i.e., many of these "triggering facts" were in police reports and/or the appellate record) (Informal Response p. 20 and fn. 9), it does not follow that there was undue or unjustified delay in developing and presenting the claims and supporting facts.

1. No Substantial, Unjustifiable Delay is Attributable to Mr. Johnson

Respondent erroneously asserts that appellate counsel R. Charles Johnson (1) was qualified to conduct a habeas investigation, (2) agreed to undertake such responsibility and (3) was under an obligation to do so. (Informal Response at pp. 21-22.) Respondent grossly misstates the record in asserting that Attorney Johnson accepted the duty to investigate habeas claims. (Informal Response at p. 21.) Clearly he did not.

Mr. Johnson was appointed as petitioner's appellate counsel on May 23, 1983. (Exhibit 1, Guilt Phase Exhibits Vol. 1.) The new Standards regarding the preparation and filing of habeas petitions were issued over *six years later* in June of 1989. [1] In September of 1989, Mr. Johnson requested second counsel be appointed to petitioner's case. Mr. Johnson *explained that he was not qualified* to undertake habeas responsibilities. (Exhibits 2, 3, Guilt Phase Exhibits Vol. 1.) In his declaration to this Court, Mr. Johnson noted that he had never acted as the attorney of record in a habeas corpus hearing, had no knowledge as to how such a hearing should be conducted and that he did not feel competent to undertake the

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[1] See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions (hereinafter "Standards"), originally adopted effective June 6, 1989.

investigation and preparation necessary to a habeas proceeding. (Exhibit 3, Guilt Phase Exhibits Vol. 1.) [2]

Respondent concedes that this Court tentatively granted Mr. Johnson's request for second counsel in March of 1990, approximately six months after the request was made. (Exhibit 4, Guilt Phase Exhibits Vol. 1.) Mr. Merwin was finally appointed on September 22, 1992, approximately four years after Mr. Johnson made his request for second counsel and approximately three and one-half years after this Court tentatively granted Mr. Johnson's request.

Respondent asks this Court to attribute the delay in the appointment of habeas counsel to petitioner's appellate counsel and then (apparently) to petitioner. Respondent is wrong in assuming that anyone was at fault or that the Court on its own was simply ignoring the need for habeas counsel. The truth is, as respondent should be aware, it is not easy to find counsel to accept appointment in these cases -- particularly where the appointment is just for purposes of representing petitioner

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[2] More than a year earlier, in June of 1988, Mr. Johnson had previously responded to a court-directed California Appellate Project poll that he did not feel capable of representing petitioner in habeas corpus proceedings. (Exhibit 3, Guilt Phase Exhibits Vol. 1.) In September of 1986, Mr. Johnson filed a single-issue petition calculated only to permit the assertion of what was essentially an appellate claim and requiring no extra record investigation. (See Petition, pp. 2 and 5.)

in habeas and clemency proceedings. [3]

2. No Substantial, Unjustifiable Delay is Attributable to Mr. Merwin

As discussed in the petition, Mr. Merwin was associate counsel from September 22, 1992 through June 28, 1995. (Exhibit 8, Guilt Phase Exhibits Vol. 1.) [4] Between September 22, 1992 and February 23, 1993, Mr. Merwin reviewed approximately 1400 pages of training materials regarding "Representation in Capital Cases" and "Habeas Corpus Workshop Materials" which were furnished to Mr. Merwin by the California Appellate Project. (Exhibit 1A, Declaration of James Merwin.) After receiving a copy of the record on appeal, Mr. Merwin reviewed most of the greater than 5,000 page record, discussed the case and potential issues with Mr. Johnson and with CAP Attorney Steven Parnes. Mr. Merwin secured release forms from Mr. Champion and *attempted to visit him.* (Exhibit 1A.)

As discussed in the petition, during his tenure as habeas counsel, Mr. Merwin experienced difficulty in investigation caused by San Quentin's unwillingness to permit him to visit with petitioner in a confidential setting. (Petition, pp. 6-7.)

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[3] As this Court is aware there is currently a four year delay in the appointment of appellate counsel and even greater difficulty and delay in finding habeas counsel. The recent creation of the California Habeas Resource Center (Govt. Code § 68650-68656) will hopefully alleviate the latter problem.

[4] Mr. Merwin moved to withdraw from petitioner's case in March of 1995. (Exhibit 6, Guilt Phase Exhibits Vol. 1.)

Counsel could not form any final plan of investigation, let alone file a petition, without an opportunity to confer with his client about a variety of sensitive information. Indeed the Standards themselves now explicitly recognize that habeas counsel must make "reasonable efforts to discuss the case with the defendant." (Standard 1-1, par. 2.) Surely this duty includes efforts to obtain an opportunity to confer in a confidential setting --- particularly where the client is fearful of institutional eavesdropping.

By June of 1993, in addition to the previously discussed tasks, Mr. Merwin obtained and reviewed Mr. Champion's central file at San Quentin State Prison and visited petitioner in a non-confidential setting. Mr. Merwin also located and interviewed trial counsel Ronald Skyers, reviewed and copied petitioner's trial file and began an evaluation of trial counsel's investigation and preparation for trial. Notably, between February 23, 1993 and June 1993, Mr. Merwin researched, prepared and filed with this Court, a motion ancillary to his habeas corpus petition for prior authorization for funds to prepare and litigate a petition for a writ of habeas corpus in Marin County Superior Court addressing petitioner's housing status and the unavailability of confidential visits with counsel. (Exhibit 1A.)

On August 25, 1993, this Court denied Mr. Merwin's motion for funds for the Marin County writ. The motion was *denied without prejudice to his seeking such a*

writ directly from the California Supreme Court. (Exhibit 6, Guilt Phase Exhibi Vol. 1.) To that end, and under the Court's direction, Mr. Merwin began drafting a petition to this Court regarding contact visits with Mr. Champion. By November 22, 1993, this petition was nearly complete. (Exhibit 1A.) [5]

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[5] As explained in the Petition (pp. 6-7), Mr. Merwin never finished or filed this confidential-visit petition. While he was working on the petition, he learned that the same issue was being litigated in the Marin County Superior Court in *In re Ayala*, Case No. SC059389A, and, rather than duplicate the efforts of Mr. Ayala's counsel, Mr. Merwin decided to delay completion of his confidential-visit petition until the Superior Court ruled. In May 1995, two months after Mr. Merwin's personal problems had forced him to move to withdraw as petitioner's counsel, the Superior Court granted in part Mr. Ayala's petition, and issued an order confirming the reasonableness of petitioner's and Mr. Merwin's appraisal of the nonconfidential nature of the attorney-client visiting which San Quentin had permitted them:

> Reasonable exercise of the right to counsel necessarily includes confidential communication with counsel. *Barber v. Municipal Court* (1979) 24 Cal. 3d 742, 751; *Ching v. Lewis* 895 F. 2d 608, 609. The observed condition of the interview rooms currently provided, A-1, A-2, and A-3, does not appear to the Court to assure such confidential communications. The Court has found that conversation at an ordinary volume can be heard outside on either the prison side or the visitor side with the doors closed. Sound appears to carry through the space under the doors but this may not be all of the problem. If the Prison continues to restrict Petitioner's attorney interviews to these rooms, reasonable steps must be taken to correct this deficiency and to allow confidential communication between Petitioner and his counsel.

(*In re Ayala, supra*, Order Granting Petition in Part and Denying Petition in Part, May 16, 1995, par. 5; a copy of the *Ayala* order is appended as Exhibit 2A.)

Mr. Merwin agreed with Mr. Champion's assessment that the visiting option available did not afford an opportunity for confidential communication. [6] Mr. Merwin and Mr. Champion continued to visit but for the purpose of client confidentiality, the two did not discuss certain matters. In spite of these difficulties, Mr. Merwin continued to explore areas of trial counsel's investigation and trial preparation and ultimately identified areas of trial counsel's performance which were likely to yield specific claims of ineffective assistance of counsel. This preliminary evaluation of trial counsel's performance, made after review of trial counsel's files and the appellate record, consultation with trial counsel, nonconfidential interviews with petitioner, initial contact with some of petitioner's immediate family, and preliminary contacts with forensic experts concerning their fees and availability provided the basis for Mr. Merwin's funding request which was

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The issues surrounding petitioner's right to confidential, contact visits with habeas counsel became moot when San Quentin, subsequent to Mr. Merwin's withdrawal from this case, opted to change petitioner's custody status and permit contact visits with counsel. This did not occur until September 1995, three months after the appointment of petitioner's current counsel, Ms. Kelly. (Petition, p.10 note 12.)

[6] Respondent is troubled because petitioner does not allege why telephone calls and letters were insufficient means of communicating with counsel. (Informal Response at p. 22.) The phone, of course, is not private; conversations are taped. Further, written correspondence is hardly an adequate substitute given the delicate nature of topics, the need to develop trust, the uncertain confidentiality of prison mail, and Mr. Champion's personal impairments.

filed on February 15, 1994. (Exhibit 1A.) [7]

Respondent overstates the extent of Mr. Merwin's petition investigation and preparation prior to being forced by a combination of financial difficulties and health problems to discontinue work on petitioner's case in early October 1994. (See Informal Response, pp. 23-24.) It will be recalled that Mr. Merwin, because of financial difficulties, was forced to close his private law practice and take a job with the Office of the Orange County Public Defender beginning on October 11,1994, and that the pressures of that job and recurrent health problems precluded his doing further work on outside cases, including petitioner's case. (Petition, pp. 7-8.)

Respondent overlooks that Mr. Merwin did not receive funding authorization for habeas investigation until August 24, 1994, just seven weeks before starting work with the public defender's office and discontinuing work on petitioner's case -- hardly time enough to conduct a habeas investigation in a capital case in which trial counsel had conducted little or no guilt or penalty phase investigation and which involved three separate homicidal incidents.

As previously noted, Mr. Merwin's pre-funding investigation included

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[7] At this time too, Mr. Merwin took some responsibility for Claim V, in Appellant's Opening Supplemental Brief.

reading the transcripts of the case and trial counsel's files,[8] initial contacts with trial counsel and some members of petitioner's immediate family, and preliminary contacts with forensic experts concerning fees and availability to assist.

Respondent appears to accord great significance to these preliminary contacts with potential experts (Informal Response, pp. 23-24), but it should be kept in mind that these were only preliminary contacts designed to permit application for funding. None of these experts reviewed pertinent records provided by counsel, interviewed petitioner, performed any testing, or consulted with counsel on the actual development of claims. (Exhibit 1A.) And, as the Court is aware, the Court's August 24, 1994 funding order denied the forensic expert funding requested by Mr. Merwin.

After the Court issued its August 24, 1994 funding order, Mr. Merwin was able to make some further progress on investigating petitioner's life history and developing evidence in mitigation that reasonably diligent trial counsel could have presented, but Mr. Merwin was unable to complete the task. Indeed, he was just beginning to realize how much there remained to do --- and how much about petitioner's background needed to be further explored. (Exhibit 1A.) In this regard, it should be noted that Mr. Merwin, in his declaration in support of his Motion for

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[8] These activities were necessarily performed by present habeas counsel as well.

Leave to Withdraw as Counsel, erred in stating that his investigator had "interviewed dozens of family members and friends of petitioner" (Guilt Exhibit 6, p. 5). While the investigator had identified dozens of potential witnesses, only 7 people had been interviewed in some detail when Mr. Merwin moved to withdraw. (Exhibit 1A.)

Respondent asserts that "triggering facts" were available to Mr. Merwin "certainly by February 1994," when Mr. Merwin made his funding request. But, as noted above, "triggering facts" triggered only counsel's *duty to investigate and request investigative funds*, not his duty to present the claims. Again, counsel's *duty to present claims* arises once counsel has (or should have had) information sufficient to support a prima facie case. (*In re Robbins, supra,* 18 Cal.4th at p. 806 fn. 28 and 29 (majority), 820 (Justice Kennard concurring and dissenting, *In re Gallego, supra,* 18 Cal.4th at 834; *In re Clark, supra,* 5 Cal.4th at 781.)

Further, in his funding request, Mr. Merwin identified claims in fairly broad terms, such as "counsel's failure to investigate Taylor incident" or "counsel's failure to conduct a penalty phase investigation." Identification of such failings doesn't suggest *how* to conduct the investigation that trial counsel should have conducted. In other words, respondent fails to distinguish between tasks of identifying trial counsel's failings — which is relatively easy when counsel does little guilt or

penalty investigation — and tasks of (i) planning and (2) carrying out the investigation that trial counsel should have conducted.

Further, although it might have been possible to plead and present subclaims resting on the appellate record and/or trial court discovery documents this would not have made sense when Mr. Merwin was just beginning to undertake the investigation of potentially meritorious claims requiring investigation, and it shortly became clear that he would have to withdraw and pass the case on to another counsel who would be appointed to carry forward the investigation and would have her own views as to which claims were most important and how to best present them.

3. No Substantial, Unjustified Delay is Attributable to Ms. Kelly

As explained in the petition, Ms. Kelly had to begin by reviewing the entire appellate record, the trial file, police reports, and related records from the court proceedings of other alleged participants so that she could reach her own judgment -- as she was ethically obligated to do — as to the full range and relative strength of potential claims, how best to pursue the investigation, which claims to present, with what documentary support, and how to perform each of these tasks most effectively. (Petition, pp. 8-11.) After seeking and obtaining some additional investigative funding (Petition, p. 11), she proceeded, as neither petitioner nor any prior counsel

of petitioner — through no fault of their own — had been able to do, to carry forward the investigation and develop information sufficient to support a prima facie case for relief, and did so in a reasonable and efficient manner.

Although filed more than 90 days after the reply brief, petitioner's habeas claims are timely because they have been filed without substantial delay (i.e., within a reasonable time after petitioner and his counsel knew or should have known the factual and legal bases for the claims raised), and/or because there is good cause for any substantial delay. (Standards 1-1.2 and 1.2.; *In re Robbins, supra*, 18 Cal.4th at 784,787-788.) The "factual basis" which actually triggers a duty to present the claim, as noted before (*In re Robbins, supra*, 18 Cal.4th at 806 fn. 28 and 29 (majority), 820 (Justice Kennard, concurring and dissenting); *In re Clark, supra*, 5 Cal.4th at 781), is information sufficient to support a prima facie case for relief — something that, of course, requires a judgment call, but which in light of the relative rarity of this Court's issuance of orders to show cause, a reasonable lawyer would assume requires a compelling showing. This, of course, requires counsel to exercise caution to not unnecessarily risk summary denial by filing before counsel has in hand information enough to set forth prima facie claims for relief. [9] As to claims or

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

subclaims which, standing alone, may be insufficient to support a prima facie case for relief, counsel may properly delay filing such claims until such time as the related claims or subclaims to which the withheld claims can be joined to support a prima facie case are ready to be filed. (*In re Robbins, supra*, 18 Cal.4th at 806-807 n. 29 (majority), and 820-821(Justice Kennard, concurring and dissenting.) Further, in the interest of avoiding piecemeal litigation, the Court has also made clear that even a claim as to which a prima facie case for relief is in hand may properly be withheld if petitioner is engaged in an ongoing investigation of another potentially meritorious habeas claim as to which a prima facie case can't be stated without additional investigation. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806; *In re Clark*, *supra*, 5 Cal.4th at 781, 784). In his claim by claim response, petitioner will demonstrate that, within the meaning of these standards, each of his claims has been filed without substantial delay and/or that there is good cause for any such delay.

Here, however, petitioner would ask the Court to bear in mind that all of the claims and subclaims concerning the Taylor crimes, the Hassan crimes and the Jefferson crimes are interrelated and dependent on each other. The claim that trial counsel provided ineffective assistance in defense of the Taylor crimes is comprised of eight specific instances of failings but for which, the jury, would have never credited the prosecutor's contention that petitioner was involved in the Taylor

crimes. Alleged proof of petitioner's involvement in the Taylor crimes was relied upon as proof of his involvement in the Jefferson crimes and his alleged involvement in both those crimes was argued as proof of his participation in the Hassan crimes and his having acted with the homicidal mens rea essential to special circumstance liability. Petitioner's guilt in the Hassan crimes, the finding of special circumstances and the imposition of the death penalty was dependant on his participation in the Taylor crimes. The prosecution could not make its case against petitioner without proof of each of these three homicidal incidents. As a result, counsel was required to investigate potential claim relating to each of these crimes before filing the petition. [10]

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[10] Respondent's footnote 13 (Informal Response at p. 27) is wrong for at least two reasons. First, it's just factually inaccurate. The April 21, 1997 federal petition did not contain "similar claims" to the claims in this petition. That petition attempted to include only, and ultimately did include only, exhausted claims. Respondent is well aware of this as she, present counsel and federal co-counsel David Reed stipulated to strike certain inadvertent embellishments of claims raised on direct appeal. The claims in the petition pending herein were drafted for this petition alone.

Second, the suggestion that the decision to file the federal petition in April 1997 was a "tactical" decision to delay filing the instant state petition is absurd. As respondent surely must recall, in April 1996 AEDPA had enacted a one year federal statute of limitations which in petitioner's case would run on April 23, 1997. At the time, no one knew which cases the statute would apply to, nor what would be deemed a "properly filed" state petition for purposes of tolling that federal statute of limitations. Counsel for petitioner had no choice but to research, prepare and file a federal petition while in the process of investigating and preparing the state petition.

B. Miscarriage of Justice Exception to Timeliness Bar

In claiming that no miscarriage of justice has been demonstrated, respondent ignores the importance to the prosecution case of the Taylor crimes and the jewelry. It ignores the impact of the neuropsychological evidence on the mens rea issue central to the charge of capital murder, and ignores the penalty phase significance of both (a) the wealth of mitigating evidence that was available but not produced and (b) undoing the suggestion that petitioner had been involved in not just one, but three separate homicidal incidents. Respondent instead relies on an assertion, unsupported by documentary evidence, that none of the individual claims have merit. (Informal Response pp. 26-27.) Were respondent correct that the individual claims lack merit, the Court's finding that any claims were untimely might not require serious consideration of the miscarriage of justice issue. But respondent is not correct.

Petitioner respectfully urges that this Court consider the impact of various claims in combination to fully appreciate the miscarriage of justice that would result if the petition were not addressed on the merits. The Court has declared that a miscarriage of justice will have occurred in any proceeding in which it can be demonstrated "that error of constitutional magnitude led to a trial so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the

petitioner." (*In re Clark, supra,* 5 Cal.4th at 797; *In re Robbins, supra,* 18 Cal.4th at 811.) Here, as discussed in the petition, had trial counsel provided effective guilt phase assistance and adduced available evidence to show that petitioner was not involved in the Taylor crimes (claims VI.A-VI.H), and that the ring found in petitioner's possession was not victim Bobby Hassan's ring (Claim VII.A), the prosecutor would have been left with nothing but the contradiction-riddled identification testimony of Elizabeth Moncrief, and on that basis alone no reasonable judge or jury would have convicted petitioner of involvement in the Hassan killings.[11]

Further, had counsel, as he should have, adduced evidence showing that petitioner was not involved in the Taylor crimes, no reasonable judge or jury would have accepted the prosecutor's speculative invitation to assume that petitioner was involved in the Jefferson homicide, a crime as to which the prosecutor had no direct evidence linking petitioner, co-defendant Ross or any person known to either of them. With no basis for linking petitioner to either the Taylor or the Jefferson crimes (Claims VI.A-VI.H, and VIII.A-VIII.D), and in light of evidence which counsel should have presented concerning neurological impairments which make it

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

more difficult for petitioner than for most people to draw accurate inferences about what others around him are intending (Claim VII.H), no reasonable judge or jury would have been able to conclude beyond a reasonable doubt that petitioner, if he were one of the four men who entered the Hassan residence on the day of the homicides, understood that a homicide would occur or personally intended that anyone be killed.[12] Hence, but for counsel's ineffective assistance, no reasonable judge or jury could have found true the special circumstance allegations or convicted petitioner of capital murder. Moreover, as a result of trial counsel's ineffective assistance in failing to adequately investigate petitioner's life history and mental impairments (Claims VII.H and IX.C) and in failing to adequately challenge the prosecution's misleading claims concerning petitioner's alleged involvement in three homicidal incidents (Claims VI.A-VI.H, VII.A-VII.I, VIII.A-VIII.D), "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark, supra*, 5 Cal.4th at 798).

In evaluating whether the Court's miscarriage of justice standards would

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

authorize the Court's consideration of the merits of petitioner's claims were they deemed untimely, the Court should consider the concluding thoughts of petitioner's trial counsel, now Judge, Ronald Skyers:

> In conclusion, Mr. Champion's case has always bothered me. It rings in my ears. I recall that at the time the guilty verdicts were read, Mr. Ross jumped up and said "Oh no, not you Steve." Although I had earlier been convinced of Mr. Champion's innocence, at that point in time I knew for certain that Steve was not involved. It was as if Mr. Ross was recognizing that wealth of evidence that put him at the scene of both crimes and expressed outrage that his innocent friend would be convicted "on his coattails." I can only guess that ultimately, Steve got caught up in the evidence against Ross.' (Guilt Phase Exhibit 47,¶28 - Declaration of Ronald Skyers.)

II.
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE TAYLOR HOMICIDE

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

Specific to this claim are eight detailed subclaims. These claims are as follows:

(1) Trial counsel 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) Trial counsel failed to identify the actual or likely perpetrators, as to whom the police had reliable, incriminating information;

(3) Trial counsel 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) Trial counsel failed to adequately demonstrate that no forensic evidence or other identification procedures resulted in a pretrial identification of, or linkage to, petitioner;

(5) Trial counsel failed to demonstrate that motives other than the prosecution's conspiracy theory accounted for Michael Taylor's killing;

(6) Trial counsel failed to consult with a gang expert and 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) Trial counsel failed to object to the prosecutor's efforts to link petitioner to the Taylor crime; and

(8) Trial counsel failed to adequately impeach Cora Taylor's identification of petitioner.

Contrary to the assertion of respondent, these claims of ineffective assistance of counsel are not precluded by the procedural bar against unjustifiably delayed claims.

Further, insofar as trial counsel had no valid, tactical reason for the errors and omissions complained of and petitioner was deprived of a fair trial as a result of these errors and omissions, petitioner has established a prima facie case for relief.

Attached to petitioner's petition are 43 exhibits, [13] including the declaration of trial counsel, now Los Angeles County Municipal Court Judge, Ronald K. Skyers, which individually and cumulatively represent reasonably available documentary evidence demonstrating that petitioner was not involved in the Taylor crimes and that trial counsel's failure to discover, present and argue evidence of petitioner's lack of involvement was not the result of a reasonable tactical decision.

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[13] See Exhibits 9-51.

A. Correction of Respondent's Erroneous Factual Allegations Regarding This Claim

At pages 28 through 30 of the Informal Response, respondent sets forth facts concerning the Taylor claim. This factual recitation consists of a mere eight paragraphs which, with only slight exception, appear to have been taken from its previous appellate briefing. [14] In other words, respondent fails to present documentary evidence, independent of the facts adduced at trial which it alleges controvert, refute, or otherwise cast doubt on the facts contained in the documentary evidence provided by petitioner. [15]

Further, factual allegations which may or may not have been taken from the appellate record, this Court's opinion, and the petition and exhibits attached thereto, have been misstated, overstated, or in some cases are facts which are completely unsupported by the appellate record or the record in these habeas proceedings. Below, and in addressing the specific subclaims, petitioner will clarify those factual inaccuracies.

Respondent asserts that the Taylor residence "was located near the Hassan

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[14] Here, as with many "facts" alleged throughout the Informal Response, respondent does not cite to that portion of the appellate record or habeas proceeding from which the "facts" have been culled.

[15] For example, as discussed more fully below, respondent does not attempt to dispute that the graffiti photograph contains the words "do-or-die" and not "do-re-me."

home." (Informal Response at p. 28.) Although the Hassan and Taylor residences are both located in a community commonly referred to as South Central Los Angeles, eight blocks separated the Hassan residence at 126th and Vermont from the Michael Taylor's residence at 118th and Vermont. (See RT 1654, Exhibit 27, 28 at p. 256.) Were the two residences so close, one might have expected the district attorney to argue that the photograph of graffiti taken from the wall located in the 11800 block of Vermont Avenue, which was at a 45 degree angle and across the street from Michael Taylor's residence (RT 2658, 3658), also advertised petitioner's alleged involvement in the Hassan robbery-murders.

Similarly, respondent asserts without support from the record, that the brown Buick which police pursued after the Taylor crimes "was the same car as the one that was seen parked in front of the Hassan residence on December 12, 1980." (Informal Response at p. 29.) Here, as with the entire factual rendition of the Taylor crime offered by respondent, respondent does not cite to any portion of the appellate or habeas record from which this "fact" is drawn. As fully discussed in petitioner's petition and supported by documentary evidence, the descriptions of the vehicle parked outside of the Hassan residence varied greatly. Ms. Moncrief testified alternately that the car was a "shiny light yellow" Buick Electra 225 (RT 2056), and a "gold or cream" large Cadillac. (RT 1716.) Ms. Moncrief had previously claimed

the car was a Buick Riviera (RT 2067), and later she was sure that it was a Chrysler. (RT 2067.) Ms. Moncrief could not credibly describe the color of the car. At various times she claimed the car was "brown," "white and yellow," "yellow," "yellow-gold" and "light goldish." (RT 1723, 1839.) Initially, Ms. Moncrief positively identified the automobile associated with Benjamin Brown and Clarence Reed as the car she had seen in front of the Hassan residence. (RT 1739.) [16] At no time did Ms. Moncrief or any other witness testify that the car associated with the Taylor crimes was parked in front of the Hassan home.

In addition, the Attorney General is mistaken as to the time of entry which she says was "about 11:00 p.m." (Informal Response at p. 28), when it was really closer to midnight. (See Petition, p. 25.)

Similarly, respondent overstates the certitude of Mary Taylor's "identification" of petitioner. As fully discussed in the petition, after Mary Taylor had identified Evan Mallet as the first man to enter the residence, the prosecutor asked Mary for descriptions of the other two men who entered. The appellate record indicates the following:

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

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[16] In his petition, petitioner discussed in great detail the inability of Ms. Moncrief to adequately perceive the events preceding Bobby and Eric Hassan's deaths. (See Petition pp. 83-93.)

A Yes.

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

A A little taller.

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

A Yes.

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

After Mary described the tallest suspect the prosecutor asked her to say whether or not she saw the man she had described or anyone who looked like him in the courtroom. In response, **Mary Taylor identified Craig Ross**. When Mary identified Mr. Ross instead of petitioner, the prosecutor corrected Ms. Taylor's identification in order to get her back on the track toward an identification of petitioner.

Q Would you point to that person, please?

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

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

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

A Short one.

Q And you were speaking a minute ago about somebody having his hair

sort of back[17] a full face, thick lips and earring and a thin mustache. Do you recall that description?

A Yes.

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

A It's the description of the other person.

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

A I'm not sure.

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

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

Respondent's factual assertion that "Mary Taylor testified that petitioner was similar in appearance to one of the robbers" (Informal Response at p. 29), goes too far. When asked whether petitioner resembled or appeared to be the tallest of the men in the house, Ms. Taylor responded "Just the mouth or something, lips." (RT 2133.) Ms. Taylor clearly stated that petitioner looked different than the men who

[17] A fact not in evidence.

robbed her that night. (RT 2134.)

Finally, for reasons which seem obviously self-serving, respondent gives only a brief summary of petitioner's testimony and does not fully discuss its details. (Informal Response at pp. 34-35.) Petitioner explained that he could have gone out as early at 10:00 that night. Petitioner played basketball at Helen Keller Park and upon leaving a store behind the park, saw Marcus Player and others detained. Sometime between 5 and 15 minutes later, petitioner was detained and required to walk the perimeter of a site established by LAPD and Sheriff's deputies. [18] (RT 3090-3101.)

In an effort to support what it imagines to be a reasonable tactical decision by trial counsel to forego a defense to the Taylor homicide, respondent falsely asserts that there was no direct evidence of petitioner's involvement in the Taylor crimes. (Informal Response at p. 40.) This is not true as, of course, there had been an in court identification by Cora Taylor.

Respondent frequently chooses to ignore various exhibits and portions of the appellate record to make its point. For example, respondent repeatedly ignores the fact that Simms was wearing a white jacket when he was arrested. (Exhibit 18, Guilt Phase Exhibits Vol. 1.) Hence, there is no basis in fact to believe that the yellow

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[18] Petitioner's trial testimony is set out more fully in section C.

sweat clothes worn by petitioner were mistaken for the "white" or "light-colored" jacket observed by police on one of the fleeing suspects. (Informal Response at pp. p. 37, 41,42, 44.)

Respondent also argues facts to support contrary positions. For example, contrary to respondent's claim, there **was** evidence that Michael Player was involved in the Taylor crimes. (Informal Response at p. 41.) Certainly there was enough evidence for the prosecutor to argue at trial that Michael Player was involved. (RT 3158-3160, 3338.) Similarly why isn't Evan Mallet's statement that Michael Player was driving the car credible documentary evidence? Respondent offers nothing to refute it. Ultimately, when it suits its purpose, the assertion that Michael Player was involved in the Taylor crimes is an assertion readily accepted by respondent. (Informal Response at p. 42.)

In an attempt to match petitioner's physical description that night with the physical descriptions of various Taylor witnesses, respondent points out that petitioner was wearing an earring when he was arrested. (Informal Response at p. 44.) This is an obvious attempt to confuse the issue as it was not noted that petitioner was wearing an earring when he was detained. Petitioner wore an earring on the day of his arrest **for the Hassan crimes**, *the same earring* that Mary Taylor stated *was not the earring* worn by the tallest suspect, ultimately identified by her

mother as petitioner. (RT 2327-2328.) [19]

B. Trial counsel's failure to investigate, discover, and present evidence in defense of the Taylor Crimes was not the product of a reasonable tactical decision

Respondent first contends that petitioner has not presented reasonably available documentary evidence demonstrating his counsel's failures to discover, present and argue evidence in defense of the Taylor crimes was not a tactical decision. (Informal Response at pp. 32, 40, 43, 46, 49-50, 52-53, 60, 62, 66.) This is so, contends respondent, because trial counsel stated in his declaration that his investigation into the Taylor crimes was limited -- and he did not present a defense as to those crimes -- because petitioner was not charged with any crimes in connection with Mr. Taylor's death and therefore counsel did not consider the contents of police reports documenting the Taylor crimes as being crucial to his defense of petitioner vis-a-vis the Hassan crimes. Further, as he did not believe that the prosecution had proof of petitioner's involvement in the Taylor crimes and did not expect that Mr. Champion would be identified as a participant, trial counsel made a tactical decision to limit his investigation and presentation of evidence.

[19] The earring was taken from petitioner when he was arrested. (RT 2327-2328.)

(Informal Response at pp. 32-33, 35, 40, 43, 46, 48, 50, 53, 64, 66.) [20]

Here, respondent has quoted only portions of trial counsel's declaration. The full extent of trial counsel's explanation for his failure to discover, present and argue petitioner's lack of involvement in the Taylor crimes is as follows:

Counsel did no investigation into the Taylor crimes other than to read the police reports and visit the scene. He may also have asked a family member where petitioner was that night. He did not consider the police reports *at all relevant* to petitioner's involvement in the Hassan crimes. This was so because counsel *did not anticipate the prosecuting attorney would use evidence of the Taylor crimes to implicate petitioner in the Hassan crimes*. (Exhibit 47, Guilt Phase Exhibits Vol. 3.)

Clearly, however counsel should have anticipated precisely such use of evidence of the Taylor crimes. Prior to admission of evidence at trial the prosecutor informed defense counsel and the court of his conspiracy theory of the case and the connection between the Taylor, Jefferson and Hassan homicides and the Raymond Avenue Crips. (RT 1502-1503, 3152-3159.) The prosecutor also gave defense counsel the Taylor murder book and said that if relevant, he would use it. (Exhibit

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[20] As to allegations of trial counsel's failure to raise evidentiary objections to hearsay and expert testimony, respondent asserts that these omissions were either not error or were harmless or both. (Informal Response at pp. 60, 62, 64.)

71, Guilt Phase Exhibits Vol. 3.)

It was counsel's "sense" that petitioner had not been and would not be identified as one of the perpetrators of those crimes. [21] But, counsel acknowledged, that he fully anticipated that Deputy District Attorney Semow would ask both Mary Taylor and Cora Taylor whether or not they saw anyone in the courtroom who resembled the perpetrators. [22] Counsel recognized that this procedure would necessarily include petitioner as he would be seated at counsel table when the question was asked. Counsel acknowledged that he knew there was a possibility either or both Mary and Cora would identify petitioner. Even so, counsel did not prepare to counter this eventuality. (Exhibit 47, Guilt Phase Exhibits Vol. 3.)

Trial counsel admits that he undertook no investigation so as to impeach Cora Taylor's identification of petitioner. He had none of the information, in hand or in mind, which would cast doubt on this identification. Counsel did not perform any independent investigation into the customary areas of witness identification impeachment, such as personal bias, physical disabilities and infirmities — such as

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[21] Although it is true that petitioner had not been previously identified, trial counsel relied on police and district attorney documentation of this fact and performed no independent investigation to either confirm the lack of identification, the certainty of the witnesses' statements or to insure a mistaken or surprise identification would not occur.

[22] As explained later, this too was error.

poor eyesight or lack of opportunity to observe — in order to determine whether or not Cora Taylor's identification could be impeached. Neither did trial counsel review Ms. Taylor's testimony at Evan Jerome Mallet's trial; thus he was unaware of the fact that the judge in that trial commented very strongly that Ms. Taylor did not make a good eyewitness. (Petition at p. 52.)

Trial counsel ultimately decided that the worst that could come of introduction of the Taylor crimes at petitioner's trail would be the jurors' tendency to take the association between petitioner and Craig Ross and draw an inference that because of that association, petitioner may have had some knowledge of the crime. Trial counsel explained that he decided that the best way to deal with this was "not to deal with it." (Exhibit 47 Guilt Phase Exhibits Vol 3.) Here, trial counsel did not realize the significance of attributing knowledge of these crimes to petitioner and was unprepared to respond to Mr. Semow's request that the jury should "reason backward" from Taylor to Hassan to find petitioner guilty.

Trial counsel referred to Cora Taylor's identification of petitioner as one of the three men who entered the residence "a shocker." Even after recognizing the incredibly prejudicial impact of this testimony, trial counsel felt that it was better to "leave it alone" and that in that way perhaps "it would go away." (Exhibit 47, Guilt Phase Exhibits Vol 3.)

Clearly, this was more in the nature of wishful thinking than a reasonable tactical decision, and the untenability of such an approach should have become all the more apparent once the prosecutor elicited from his gang "expert," deputy Williams, testimony interpreting graffiti as an express admission and/or advertisement of petitioner's participation in the Taylor robbery-murder. Clearly, the prosecutor was set on trying to prove petitioner's participation in that crime and was going to use that alleged participation as part of the conspiracy-to-kill-marijuana-dealers theory he was advancing to prove petitioner's guilt of the Hassan murder. This is all the more certain given the prosecutor's attempt to elicit an identification from Natasha Wright, a witness to a confrontation at the Taylor residence which preceded the killing.

Following the identification of petitioner by Cora Taylor and the graffiti testimony of Deputy Williams, trial counsel did not perform any investigation or in any way prepare petitioner for the possibility that he might be questioned about the Taylor crimes during cross-examination. [23] It was unreasonable to think it would be better to ignore the matter and just hope that the jury wouldn't notice it.

While it is certainly true that trial counsel "decided" to limit his investigation

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[23] Petitioner's testimony followed the testimony of both Mary and Cora Taylor, and the graffiti testimony of Deputy Williams.

into the Taylor crimes and presentation of evidence of petitioner's lack of involvement therein, the decision was not a reasonable one.

"Under both the...United States Constitution...and the California Constitution, a criminal defendant has the right to the effective assistance of counsel." [Citations.] Specifically, he is entitled to reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. [Citation.] This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*In re Marquez* (1992) 1 Cal.4th 584, 602, citation omitted.) "Generally, the Sixth Amendment requires counsel's diligence and active participation in the full and effective preparation of his client's case." (*People v. Pope* (1979) 23 Cal.3d 412, 424-425.) Defense counsel is required to investigate all possible defenses, research applicable law, make an informed recommendation to the client regarding the appropriate strategy, and present that strategy on behalf of the client. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 222.) Because "investigation and preparation are the keys to effective representation [citation], counsel has a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings, and laws involved." (*Von Moltke* v. *Gillies* (1948) 332 U.S. 708, 721 [92 L.Ed. 309, 68 S.Ct. 316].)

"One of the primary duties defense counsel owes his client is the duty to prepare adequately for trial." (*Magill* v. *Dugger* (11th Cir. 1987) 824 F.2d 879, 886.) In the same vein, counsel must take steps to exclude inadmissible evidence, which is critical to the state's case or is highly prejudicial. (*Walker* v. *United States* (8th Cir. 1974) 490 F.2d 683, 684-685 .) The duty of trial counsel to investigate and prepare is "so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." (*United States* v. *Tucker* (9th Cir. 1983) 716 F.2d 576, 583, fn. 16.)

Here, Mr. Skyers' failure to discover, present, and argue evidence that petitioner did not participate in the Taylor crimes was not the product of a rational and informed tactical decision founded on adequate investigation and preparation. Mr. Skyers failed to anticipate, as he should have, the importance of the Taylor crimes to the prosecution case against petitioner and failed to respond as trial events made clearer and clearer the need to defend against prosecution claims of his client's involvement in those offenses.

Respondent contends that trial counsel's response to the Taylor crimes was reasonable because petitioner had not been charged with the Taylor crimes and was not identified, prior to trial, as participating in them. (Informal Response at p. 33.) Although it is true that petitioner was not charged with the Taylor crimes and there

was no pretrial identification of him, because of the importance of the Taylor crimes to the prosecution's conspiracy theory and the necessity of petitioner's knowledge of, if not actual participation in these crimes, [24] to the intent requirements of the special circumstances and given the in-court identification of petitioner as a participant, trial counsel's decision to not adequately investigate and present evidence was unreasonable.

As stated in the petition, the only evidence directly linking petitioner to the Hassan crimes was the eyewitness testimony of prosecution witness Elizabeth Moncrief and petitioner's possession of jewelry which was identified as having been worn by Bobby Hassan. Because Moncrief's identification of petitioner was so fatally flawed, the prosecutor was forced to admit to the jury that without something more than her flawed identification testimony, the jury had insufficient evidence to render a finding of guilt. (RT 3172.)

Prior to trial, in a letter addressed to Mr. Skyers, the prosecuting attorney provided trial counsel, in addition to other evidence, a copy of the LAPD Taylor

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[24] The prosecutor never promised that he did not intend to prove that petitioner was actually involved rather than just having knowledge. Instead, the prosecutor informed the court and counsel only that he did not have direct evidence that petitioner was one of the men who entered the Taylor home. This certainly left open the possibility that Mr. Semow might attempt to prove that petitioner was the man outside the residence that no one could identify. (RT 1519-1520.)

murder book. Not excluding evidence of the Taylor crimes, Mr. Semow informed Mr. Skyers in this letter that he intended to offer "all relevant and admissible evidence at the guilt trial." (Exhibit 71, Guilt Phase Exhibits.) In light of the thin evidence of petitioner's guilt, the prosecutor hypothesized a theory of conspiracy to which he claimed petitioner was a party. The prosecutor argued that in order to determine *who* committed the murders, it was necessary to understand *how* they were committed, i.e., it was necessary to understand the pattern which the prosecutor claimed emerged from its comparison of the Hassan, Taylor and Jefferson murders. (RT 3152.)

According to the prosecutor, the similarities between the crimes indicated they were committed by the same group of people. "[I]t is clear that this murder is connected to this murder, that is, part of the same common plan, part of the same conspiracy, to rob and kill people in their homes." (RT 3156.) "[A] conspiracy specifically to rob and kill a certain type of victim...to wit, a marijuana dealer." (RT 3156.) "It's obvious that [the crimes] were all committed by the same group of people, although the participants may have varied one or two of them from one crime to the next, such as Mallet, but they were all committed by the same group of coconspirators pursuant to a single common plan or common pattern, and part of the same conspiracy....we're talking about one continuous crime spree or one

continuous crime." (RT 3159.)

The prosecutor advised the jurors to reason backward. "[I]f the Michael Taylor murder is inextricably connected to the Bobby [and] Eric Hassan['s] murder, then it logically follows that any evidence connecting...either of the defendants to the Michael Taylor murder logically connects that same defendant to the Bobby Hassan and Eric Hassan murder." (RT 3161, 3168.) "[T]he evidence connecting Mr. Champion to Mr. Taylor connects him to Bobby and Eric Hassan." (RT 3171.) "[F]urthermore, any evidence connecting either of the defendants to any other of the known participants in these conspiracies logically tend to connect then to the crimes in question." (RT 3161.)

Thus, evidence of the Taylor crimes was central to the prosecution's theory of petitioner's guilt in the Hassan crimes. This was in spite of the fact that the Taylor killing occurred after the Hassan crimes. The prosecution relied on what it perceived to be the similarities between the two crimes, the common participation of Mr. Ross, petitioner's alleged association with Mr. Ross and another known perpetrator, Evan Jerome Mallet, and a suspected perpetrator, Michael Player. The prosecutor argued Cora Taylor's in-court identification of petitioner was credible and supported by Mary Taylor's inability to state emphatically that petitioner was

not present at the scene. (RT 3170.) [25]

It was not reasonable, as asserted by respondent, to forgo presenting a defense to the Taylor crimes merely because petitioner had not been formally charged. Simply put, the prosecutor argued that if petitioner was guilty of the Taylor crimes he was necessarily guilty of the Hassan crimes, and by implication, of the Jefferson murder as well. Moreover, under this theory, the Jefferson and Taylor crimes provided sufficient evidence to find petitioner possessed the mental state necessary to prove the Hassan special circumstances. This was so because it was reasoned that knowledge of the Jefferson and Taylor crimes meant that the perpetrators of the Hassan crimes had entered the Hassan residence with the requisite criminal intent, i.e., an intent to kill or assist in the killing of a human being.[26]

Should this Court agree with petitioner, respondent unpersuasively contends that petitioner nonetheless suffered no prejudice from the inadequate representation by trial counsel. Respondent once again asserts "At the risk of stating the obvious,

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[25] Cora Taylor and Mary Taylor had previously failed to identify petitioner during numerous pretrial identification opportunities. (See Petition at pp. 48-49.)

[26] The prosecutor conceded that he did not know who fired the shots that killed Bobby and Eric Hassan. (RT 3338.) Petitioner's murder convictions and the special circumstance findings necessarily rest on an accomplice theory. Accordingly, special circumstance liability required proof of intent to kill.

petitioner was neither charged nor convicted of the Taylor crimes." (Informal Response at p. 33-34.) Does respondent expect us to believe that being identified as a man who participated in the murder of a man, terrorized and robbed his sister, friend and elderly mother would have no prejudicial effect on the jury?

Assuming arguendo any reasonable juror could have ignored such potent testimony as a reason for convicting on any and all available charges, respondent, in effect, asks us to ignore the very theory of the prosecution's case against petitioner. Respondent also asks us to ignore the very strong and influential impact petitioner's actual innocence of the Taylor crimes would have on the jury's Hassan verdicts.

This Court specifically noted that "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...." (*People v. Champion, supra.,* 9 Cal.4th at p. 905) Again, this was, of course, the very theory of the prosecutor, a theory of which trial counsel had pretrial knowledge. Further, as this Court noted in explaining its conclusion that the Taylor evidence was admissible against petitioner on the Hassan murder charges, "[b]ecause the car [from which the Taylor suspects fled] contained items stolen during the commission of the Hassan and Taylor killings, the jury could reasonable infer that the same four men who had fled from the Buick had also participated in

the [Hassan] murders." (*Ibid.*, at p. 906.) Thus, evidence confirming that petitioner was not one of the men who fled the Buick following the Taylor homicide would not only have undercut the prosecution theory of the case, but offered the jury affirmative evidence that petitioner was not one of the men involved in the Hassan crimes.

Finally, respondent does not attempt to counter petitioner's claim that trial counsel was ineffective for failing to present a defense to the Taylor crimes at the penalty proceedings, [27] where the prosecutor offered up petitioner's alleged role in those crimes as a reason for imposing death. (RT 3705-3706.) This point is effectively conceded.

The cumulative effect of trial counsel's errors and omissions in failing to effectively defend against the prosecution's theory of petitioner's involvement in the

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[27] The prosecution's Notice of Evidence in Aggravation, filed in February of 1982, should have alerted counsel long before trial of the need to prepare a defense against allegations of petitioner's involvement in the Jefferson and Taylor homicides. The Notice listed, inter alia,

> " 3. That the defendant robbed and murdered Teheran Jefferson on or about November 14, 1980.
>
> 4. The facts underlying the charges in Case No. A365075 [the information included both the Hassan and and Taylor charges (CT 530-544)].
>
> 5. The defendant's violent character and activity as a gang member, as testified to by an officer of the L.A.S.O. Lennox Gang Detail."

In a capital case, reasonable counsel, even if anticipating an acquittal, must prepare for a possible penalty phase trial. (Mitchell v. State (Fla. 1992) 595 So.2d 938, 941-942.)

Taylor crimes severely prejudiced petitioner, deprived him of a fair trial on the issue of his guilt or innocence, and rendered his convictions and death sentence inherently unreliable. This is so because, as demonstrated here and in the petition, the only proof remaining of petitioner's involvement in the Hassan killing is the unreliable identification by Elizabeth Moncrief. Insofar as the prosecutor was forced to admit that this evidence alone could not support a guilty verdict, petitioner has presented a prima facie case that he was prejudiced by the errors and omissions complained of here.

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

1. This subclaim is not untimely.

In addition to the trial transcripts of *People v. Champion* Los Angeles County Superior Court case number A365075, petitioner relies on Exhibits 9-28, 32, and 47.) These exhibits fall into the following categories:

Investigative reports and other documents generated by Los Angeles Police Department and/or Los Angeles County Sheriff's Department (Exhibits 9, 12, 13,

15, 18, 19, 20, 21, 32), Mallet trial transcripts (Exhibits 10, 11, 16, 22, 28, 30), Declarations (Exhibits 14, 17, 23, 24, 29, 47)[28], Newspaper Articles (Exhibit 31), Maps (Exhibits 26, 27), and the Mallett letter (Exhibit 25). Except Exhibits 19 and 32 all of the investigative and police reports were in trial counsel's file.

The second Exhibit 32 and Exhibit 19 were obtained through a Freedom of Information Act request to the Los Angeles County District Attorney and reviewed by present habeas counsel by December 1997. Exhibit 26 was also in trial counsel's files. The map prepared by habeas counsel (Exhibit 27) was done during the drafting of the claim to help demonstrate the path of the suspects, pursuit vehicles and containment area.

The Mallet reporter's transcripts were obtained from both Mr. Mallet and his attorney Charles Gessler. The files of Mr. Mallet in the custody of trial counsel Charles Gessler's were obtained in December 1996. Following a personal visit at California Department of Corrections, Lancaster, California, near Los Angeles, with Mallet in 1997, his transcripts were forwarded to present habeas counsel in February, 1997. Mr. Mallet's transcripts contained the letter Exhibit 25.

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[28] Petitioner attaches to this reply the declaration of Deputy Sheriff Thomas Lambrecht, which was executed on November 22, 1997. The note to tom Lange from Deputy Lambrecht attached to the Deputy Lambrecht's declaration indicates that it was mistakenly placed in a retired deputy's mail box. (Exhibit 3A: Declaration of T. Lambrecht.)

Only the investigative reports and other police generated documents contained in trial counsel's file and the transcript of the case of *People v. Champion* were in the possession of Mr. Merwin during his tenure as habeas counsel. As discussed fully above, Mr. Merwin was allocated funds with which to investigate the Taylor crimes but, this money was not approved until August 24, 1994, approximately seven weeks before Mr. Merwin took a job with the Orange County Public Defender's Office and then because of the pressures of that job and recurrent health problems, became unable to do further work on petitioner's case. Until funding was secured, Mr. Merwin concentrated his efforts on penalty phase investigation, obtaining confidential legal visits, record review, formulation of possible claims and contacting possible expert witnesses. [29]

Present habeas counsel's review of the appellate record and trial counsel's file was completed in August of 1996. Having familiarized herself with the case and set investigative priorities, counsel requested funding for investigation from both this Court and the federal district court in early November 1996. State funding was denied on January 28, 1997. A few weeks earlier, on January 7, 1997, the federal

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[29] Here, petitioner incorporates fully the section entitled *2. No Substantial, Unjustifiable Delay is Attributable to Mr. Merwin* at pp. 5-12.

court partially granted and partially denied petitioner's federal request. [30] Once federal funding was authorized in January of 1997, petitioner could begin actual guilt phase investigation in earnest. With funds provided by the federal court, petitioner was able to hire investigators in Los Angeles to search for, interview, and retrieve declarations from Wayne Harris, Frank Harris, Earl Boganx, Deputy Tong, Sergeant Hollins, and Deputy Lambrecht. These declarations were obtained between April and November of 1997, when the petition was filed. The declarations provide facts and documentary support essential to the ground for relief set forth in subclaim VI.A., and hence the subclaim was filed without substantial delay. (*Robbins*, *supra*, 18 Cal.4th at 787 ("Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.").)

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[30] James Merwin's funding request was granted in part. He was authorized to spend (1) **$1,200** to investigate the Taylor murder, (2) **$800** to investigate other suspects to the Hassan murders, (3) **$4,000** to investigate trial counsel's penalty performance, and (4) **$400** to interview trial counsel and obtain necessary records.

The investigator retained by previous habeas counsel Merwin expended **$2,926.72** of the benchmark **$3,000.00**, for services rendered *during Mr. Merwin's* tenure as petitioner's habeas counsel. Thus, prior to January 7, 1997, present habeas counsel had approximately **$2,000** available to investigate guilt issues and **$4,000** for penalty phase investigation. These monies and all of the federal funding approved for penalty investigation as well as most of the federal funding approved for guilt phase investigation, were exhausted by August of 1997, when petitioner again applied to this Court for funds with which to investigate penalty phase issues.

Further, even had it been possible to obtain the declarations and submit this subclaim substantially sooner, it would have been appropriate to delay filing in light of ongoing investigation into other potentially meritorious claims which required additional investigation until close to the November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806 (in the interest of avoiding piecemeal litigation, a claim as to which a prima facie case for relief is in hand may properly be withheld if petitioner is engaged in an ongoing investigation of another potentially meritorious habeas claim as to which a prima facie case can't be stated without additional investigation); *In re Clark*, *supra*, 5 Cal.4th at 781, 784 (same)). See, in particular, the discussions below concerning the ongoing investigations into claims addressing counsel's ineffective assistance (a) in failing to challenge the prosecution's graffiti and gang expert testimony (Claim VI.G; discussed below), (b) in failing to discover and present evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan (Claim VII.A, discussed below), (c) in failing to discover and present mental impairment evidence that would have undermined the prosecutor's special circumstance mens rea theory (Claim VII.H, discussed below), and (d)in failing to discover and present substantial mitigating evidence at petitioner's penalty phase trial (Claim IX.C, discussed below). Habeas counsel had

to coordinate investigation in all of these areas, which added to the time required to complete the necessary investigative work and obtain the required supporting documentation.

Finally, for the reasons set forth at greater length in Part I.B of this informal reply, if subclaim VI.A were deemed untimely it is a claim which should be reviewed on the merits pursuant to this Court's miscarriage of justice exceptions to the timeliness bar. Subclaim VI.A, particularly when viewed in combination with the other subclaims of claim VI, undermines the prosecution contention that petitioner was involved in the Taylor crimes, and as explained above, by so doing,(1) undermines (in combination with claims VII and VIII)the prosecution's case that petitioner was involved in the Jefferson and Hassan homicides, (2) undermines (in combination with claim VII.H) the prosecutor's special circumstance mens rea theory, and (3) dramatically alters (in combination with claim IX.C) the grossly misleading profile of petitioner presented to his sentencing jury. Accordingly, the claim should be addressed on the merits. [31]

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[31] Prior to federal authorization for funding, petitioner had only $2,000.00 available for guilt phase investigation. Because the sum was so limited, a comprehensive investigative plan, one which would result in the investigation of all three homicidal incidents, had to be carefully budgeted. In other words, it was necessary to determine which areas of investigation should be given top priority to justify the expenditure of funds. See footnote 27 below for a full description of funding available to present habeas counsel.

2. Petitioner's factual innocence of the Taylor crimes is established by the police reports, Mallet transcripts, declarations and other exhibits attached to this petition.

a. Petitioner has presented a prima facie case that effective counsel could have confirmed petitioner's of alibi

There is no doubt that petitioner's alibi testimony could have been greatly strengthened with the information contained in the exhibits attached to the habeas petition.

At trial, on cross-examination, petitioner was asked whether or not he had an alibi for when the Taylor crimes were committed. Petitioner explained that he did. (RT 3089-3098.)

After explaining that he could have gone out as early as 10:00 that night, when asked where he was petitioner stated: "Well, the police, Los Angeles Lennox Sheriffs, had me apprehended at a corner approximately on my block on 126th and Budlong." (RT 3090.) Petitioner saw the suspect vehicle "just at the time that he was stopped. Although he didn't know if it had collided with a telephone poll, petitioner testified that he "saw it parked up on a curb next to it like it was rammed up on a pole." (RT 3090-3091.)

Over constant prosecution interruption, petitioner tried to explain the events of the evening:

Q: All right. And it was after you saw [the stopped Player car] that the Sheriff's stopped, wasn't it?

A: Yes. Well, they had us apprehended in the park.

Q: Mr. Champion, are you saying that they apprehended you in the park before they apprehended you on Budlong?

A: Well, see, that night I came from the store they had Marcus Player and everybody apprehended, the Los Angeles Lennox had took off. So, we was walking up my street, and that's when we saw –

Q: Mr. Champion, you are saying that Marcus Player was stopped by Sheriff's deputies at some time prior to the time that you were stopped with him?

A: Yes, we were.

Q: All right. Now, you were stopped with Marcus Player on Budlong?

A: Yes.

Q: At the time that you saw the car up against the telephone pole, is that not correct?

A: Yes.

Q: Now, you are saying that Marcus Player was stopped – that was some time after midnight, wasn't it between about 12:00 and 12:30?

A: It could have been, I'm not sure of the time.

Q: And you are saying at some time earlier than that you are saying the sheriffs stopped Marcus Player; is that correct?

A: Yes.

Q: Now, they didn't stop you at that time?

A: No, because I was at the --

Q: I'm not asking you why, Mr. Champion, I am just asking you yes or no.

A: If you let me explain.

Q: Your attorney can ask you that. I am asking you were you or were you not stopped with Marcus Player the first time?

A: No, I wasn't.

Q: All right. Do you know of any Sheriff's deputies who would have seen you –

MR. SKYERS: Objection. Calls for speculation.

THE COURT: It sounds like it is going to, but I will hear the question.

MR. SEMOW: The first time Marcus Player was stopped, that was shortly before midnight, wasn't it?

A: I'm not sure of the time. It could have been.

Q: It was about how much time before you were stopped together?

A: Ten minutes, five. [32]

Q: And that was in Helen Keller Park, was it not?

A: Yes.

Q: Now, did you see who stopped Marcus Player at that time?

A: When I was coming out from the store, which is behind Helen Keller Park, they had around seven young men on the ground; and I asked Marcus, I said, What happened, you know because we was at the park playing basketball and he said Lennox Sheriffs apprehended him and had him on the ground asking him questions.

Q: On the ground when you were talking to him?

A: No. He was just getting off the ground.

Q: And were the Sheriff's deputies still right over him at that time?

A: No. They had took off. (RT 3091-3095.)

Later in the examination:

Q: Now, the first time that you personally came in contact with the police was when they detained you and Marcus Player together on Budlong, is that correct?

A: Yes.

Q: And you think that was 15 minutes or so later?

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[32] This time estimate is consistent with Exhibits 13, 15, and 16 which show that Marcus Player was stopped the first time from 11:50 p.m. to after 12:05 a.m. and the second stop, with petitioner, was in progress at 12:30 a.m.

A: About 10 or 15 minutes because they kept us on the corner a while.

Q: Could have been as much as a half hour, couldn't it, Mr. Champion?

A: No. (RT 3096-3097.)

On redirect examination the following consistent facts were established:

Q: Now, as to that car crash on Budlong and 126th did you see that happen?

A: No.

Q: When you came along you saw the car in that position?

A: Yes.

Q: And you were going to say something about you were stopped at your street. Is that what you said?

A: Yes.

Q: When you were approaching did you see police officers there?

A: Yes.

Q: Did you turn and run in any direction, go anywhere?

A: No.

Q: So you approached them?

A: Yes.

Q: And you came towards your house?

A: Yes.

Q: And did they stop you at that time?

A: Yes.

Q: Okay, and did they let you go on home?

A: No. They made me walk to 127th and Budlong.

Q: And at that place what did they do?

A: Some more officers took out a pencil and pad, and took down my name and told me to walk to 127 and Raymond.

Q: Okay, and then what else took place?

A: They held me on the corner and LAPD came flashing a light on us, and they told me to go on home.

Q: Did they bring anyone to look at you?

A: I couldn't really see. It was an LAPD car. I didn't see who was behind it because the lights was in my eyes. (RT 3099-3101.)

Respondent refers to police reports and declarations submitted with the petition and asserts that "such evidence does not negate petitioner's involvement in the Taylor crimes and completely contradicts evidence presented on petitioner's behalf at trial." (Informal Response at p. 34.) Respondent is wrong.

The police reports, declarations and other exhibits attached hereto demonstrate that petitioner was being truthful in his testimony and he was not

involved in the Taylor crimes. Contrary to the assertion of respondent, with the exception of minor detail, the petitioner's testified-to alibi is entirely consistent both with contemporaneous police reports and with declarations obtained some 13 years after the fact and submitted in support of this claim.

In the petition, in painstaking detail, petitioner has documented the events of the night of and early morning following the Taylor crimes. It bears repeating here.

At *11:50, while the Taylor crimes were in progress*, several alleged members of the Raymond Street Crips gang, including Marcus Player, Earl Boganx, Willie Marshall, and Angulus [33] Wilson were being detained, for reasons unrelated to the Taylor crimes. The men were detained at Helen Keller Park by Los Angeles Sheriff's Deputies Lambrecht and Tong. (Exhibit 13 -- Sheriff's Department Memorandum from Deputies T. Lambrecht and O. Tong to LAPD Homicide.)[34] [35]

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[33] This name bears striking resemblance to "Andy," a young man that petitioner had just met and recalled was detained with Marcus Player when petitioner exited the store. (RT 305, 3097.) Earl Bogans too recalls Angulus Wilson as "Andy" Wilson. (Guilt Phase Exhibits, Vol. 1, Exhibit 24.)

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

[35] Thus, petitioner's trial testimony that *he was at the park and that he saw* Marcus Player and others detained *at the park* **at the time that the Taylor crimes were being committed** is supported by police reports, declarations and testimony.

At *12:05 a.m.*, Lambrecht and Tong observed deputies Naimy and Koontz activate their red lights *in pursuit of the Taylor suspect vehicle*. The deputies followed Naimy's vehicle to 127th and Budlong. Thus, this first detention of Marcus Player and others– *the very time petitioner testified he exited the store* -- was in progress before and during the pursuit of the Taylor suspect vehicle. (Exhibit 15 -- January 10, 1981, telephonic interview with Deputy T. Lambrecht.) In other words the detainees *and petitioner* –if he was indeed viewing them as he exited the store -- were necessarily eliminated as possible perpetrators of the Taylor crimes.

Respondent blatantly misstates petitioner's claim by asserting that petitioner "changed his story and argues that he could not have been involved in the Taylor crimes because he ...*was being detained with* [with his friends] at the time of the Taylor crimes." Petitioner emphatically testified and asserted in his petition that he was with his friends in the park and exited the store

just following the first detention of Marcus Player. (At p. 37, respondent cites page 27 of petitioner's petition as asserting he was detained at the time of the commission of the Taylor crimes. Page 27 contains no such assertion by petitioner.) It is therefore of no consequence that neither petitioner nor his mother testified that petitioner was detained between 10 and 11 p.m. (See Informal Response at p. 34.) Petitioner's detention, which followed this first detention of Marcus Player is

supported by his testimony and uncontroverted police reports and other documents.

Respondent also mischaracterizes Mrs. Champion's testimony. Mrs. Champion testified that she came home between 8:30 and 9:00 that night. That she went to bed at approximately 10:00 and that when police arrested Mallet from the backyard, Steve was home. Mrs. Champion did not know the time of Mallet's arrest. (RT 2834-2838.) Mrs. Champion saw Steve at 8:30 or 9:00 p.m. then not again until when Mallet was arrested, and then the next morning. (RT 2838-2839.) At no time did Mrs. Champion testify that "petitioner was home <u>*all evening*</u> on December 27th." (Informal Response at p. 34, emphasis in original.)

The second detention of Marcus Player occurred within only a few minutes of the Taylor suspect vehicle crash. At the suppression hearing on Evan Mallet's case, held May 12, 1981, Sheriff's Deputy Hollins testified that the detention of three men -- *one of whom was petitioner* — commenced at approximately 12:30 a.m. Petitioner, Marcus Player, and Wayne Harris, were stopped as they walked southbound from 125th and Budlong *into the containment area.* (Exhibit 16 at 75 et. seq; Exhibit 13; Exhibit 15.)

<u>b. Petitioner approached officers from a location which would have made it very difficult, if not impossible for him to have been inside of the suspect vehicle.</u>

Respondent's blatant and perhaps willful distortion of the facts leads it to

conclude that, to the extent that Robert Simms was one of the perpetrators of the Taylor crimes, *since petitioner and Simms were detained at the same time*, petitioner could also have been involved. (Informal Response at p. 37.) This is simply not so.

After the suspect vehicle crashed, the pursuing and other officers set up a perimeter *in order to contain the suspects in an area bordered by four city blocks.* A patrol vehicle was positioned at each corner and at least one other vehicle was assigned to travel around the containment area as a "rover." Officers Koontz and Naimy were positioned at 126th and Budlong. This position was called the "command post." The officers were joined by Deputy Hollins *when he escorted petitioner*, Marcus Player, and Wayne Harris *to the command post.* (Exhibit 16 at 80-81.) In other words, petitioner was detained *as he came toward* the containment area. By contrast, Simms was seen to emerge from within the containment area through bushes along 127th Street, and join petitioner, Harris and Marcus Player as they were, under constant police surveillance, required to walk from the checkpoint at 127th and Budlong to the checkpoint at 127th and Raymond. (See Petition at pp. 34-35 and Exhibits 16 and 18, and 27, Guilt Phase Exhibits Vol. 1.)

Likewise, the fact that petitioner was detained after the crash and after the containment area had been established in no manner indicates that he could have

been involved in the Taylor crimes. (See Informal Response at p. 36.) To make this assertion, respondent must ignore not only the declarations of lay witnesses and petitioner's sworn testimony, but must also ignore the police reports and declarations of law enforcement officers.

As indicated, petitioner was first observed outside of the containment area walking southbound from 125th and Budlong towards the containment area. The suspect vehicle proceeded from 125th down Berundo. It turned west onto 126th and crashed at the corner of 126th and Budlong. In other words, the car traveled down a path that would parallel the eventual path of petitioner, Marcus Player and Wayne Harris. [36] The car must have traversed this route before petitioner was in a position to see it. This is supported by the fact that Marcus Player was still detained when the car headed west from the park. Then, petitioner exited the store and began to walk with Marcus and Wayne Harris. Petitioner saw the car after it had already crashed, so it is likely that the crash occurred before petitioner, Harris and Player got far from the park.

Petitioner respectfully requests this Court consider the two maps submitted at

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[36] As it is uncontroverted that these three men viewed the car *after* it had crashed respondent's theory that petitioner got out of the crashed vehicle, "ran west on 126th, turned the corner and ran north on Raymond" then continued around the block to join Marcus Player and Wayne Harris heading south on Budlong is unsupported by the established facts not to mention reason.

exhibits 27 and 28, in conjunction with the attached police reports and sworn testimony of police officers. It would have been impossible for petitioner to have come from the suspect vehicle. In order for this to have happened, Mr. Champion would have had to exit the vehicle, cross 126th Street in front of the pursuing police officers and then join up with friends coincidentally walking toward the scene. Moreover, it begs all logic to believe that petitioner, if in the containment area, would not have gone to his home [37] which was in the containment area, or alternatively, that petitioner having somehow escaped the containment area would have casually walked back toward it with his friends just minutes after having escaped.

Under the logic of respondent if petitioner had been a perpetrator so too could have been Wayne Harris. But police knew that petitioner, Harris and Marcus player were not involved. Although ultimately in the company of one of the perpetrators, Robert Simms, none of these original three pedestrians was arrested.

Contrary to respondent's hope, the declaration of Wayne Harris supports petitioner's trial testimony and the fact that petitioner was not involved in the Taylor crimes. It is of slight consequence that 13 years after the fact Wayne Harris is

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[37] Petitioner's address on the date of the Taylor homicide was 1212 W. 126th Street. (Exhibits 44, 45 Guilt Phase Exhibits Vol. 2.)

confused as to the time of the detention. He never claims, and the police reports do not indicate, that Harris was detained at the first detention of Marcus Player. Thus, the only contradiction in Harris' declaration is that the detention occurred between 9:30 p.m. and 10:00 p.m. rather that 12:30 p.m. [38]

Similarly, Earl Bogans' declaration does not cast doubt upon petitioner's sworn testimony, which incidentally is completely supported by police officers' sworn testimony and contemporaneous official reports. Mr. Bogans recalled that he was in the park that night drinking, smoking and playing basketball. Although he is certain that petitioner was in the park with him for these activities, he does not indicate that petitioner was physically with him when he was detained by Sheriff's deputies and told to lie on the ground. (Exhibit 24, Guilt Phase Exhibits Vol. 1.) The fact that petitioner was not actually with Bogans and Marcus Player is supported by the fact that police did not take down petitioner's name at this time, as Bogans recalls the officers doing for him and others.

Respondent seems confused regarding Bogans activities subsequent to this detention and its importance to Simms arrest. Respondent states, "contrary to

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[38] Respondent does not dispute that "Lil Owl," James Taylor and Robert Simms are one in the same and that Simms gave the false name of James Taylor when he was arrested. (Informal Response at p. 35.) Respondent does not address the reason why Simms lied to police about his identity. In contrast, petitioner was forthright in his identity and fully cooperated with police.

Harris' story, Bogan states that Simms "was not with [them] that night before or while [they] were being detained by police." (Informal Response at p. 35.) Of course this is true. Simms was not present for the first detention because he was in the car fleeing from the Taylor home. Bogans went directly home after this first detention and therefore was not there when Simms snuck out from the containment area "in an apparent attempt to appear as if he were part of three pedestrians walking [westbound] on 127th." (Exhibit 18.)

c. Petitioner did not match the physical or clothing descriptions of the men who exited the suspect vehicle

Respondent relies too much on speculation to dispute petitioner's claim that he did not fit the physical description of any of the suspects seen by police. The officers who observed the crash and saw the suspects leave the vehicle gave descriptions of the suspects which in no way fit petitioner. All of the officers observed dark clothing. The only further descriptions was that of a "white jacket" and a "plaid coat." Petitioner wore yellow clothing at the time he was detained and was told to walk the perimeter of the containment area. (Exhibit 32.) [39] Simms was arrested wearing a *white jacket*. (Exhibit 18.) In his report, Deputy Naimy noted

[39] Respondent speculates that petitioner's pants were grey, or dark. (Informal Response at p. 37.) The field identification card does not specifically state this. (Exhibit 32.)

that Mr. Simms had similar clothing, height, weight, and age and "came from the cordoned area without reason for being there." (Exhibit 19.) Officer Naimy testified at Mr. Mallet's trial that Mr. Simms "clothing, body size, approximate weight and the general shape and configuration" matched one two tallest suspects Officer Naimy saw flee the vehicle. (Exhibit 22 at 615.) Also according to Naimy's testimony, one of the men who exited the driver's side wore "a white jacket." The other had on dark colored clothing. (Exhibit 22 at 606, 612.) These descriptions are far more certain than respondent's speculation that "based on the time the car chase occurred, and the lighting or lack thereof, petitioner's yellow jacket [sic] may have appeared to be white or light colored." (Informal Response at p. 37.)

Further, the suspect in the white jacket was seen by officers Koontz and Naimy to exit the driver's side of the crashed vehicle and to then run south and then west directly into the containment area. (Exhibit 18, Guilt Phase Exhibits Vol. 1.) It is totally implausible, if not impossible that this suspect could have been petitioner since petitioner, very soon after the crash, approached the containment area from the north. (Exhibit 16 at p. 81, Guilt Phase Exhibits Vol.1.)

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

1. This claim is not untimely

The exhibits which support this claim, with the addition of Exhibits 34 and 31 which are a portion of the Mallet transcript and newspaper articles, are the same exhibits which support the previously discussed claim VI.A. Petitioner incorporates his timeliness analysis as to the above claim VI.A. here to demonstrate that he has presented this claim in a timely fashion. In addition, it was **while** investigating petitioner's alibi that it became apparent that the police had other suspects who in all likelihood committed the Taylor crimes along with Evan Mallet and Craig Ross. These were Michael Player and Robert Simms. Both claims had to be fully investigated before either could be presented. Thus, for the reasons stated above, this claim could not have been filed sooner.

Further, for the reasons stated above in connection with subclaim VI.A, even had it been possible to submit this subclaim substantially sooner, it would have been appropriate to delay filing in light of ongoing investigation into other potentially meritorious claims, and finally, even if the claim were deemed untimely, it should be reviewed on the merits pursuant to this Court's miscarriage of justice exceptions to

the timeliness bar. (See timeliness discussion re VI.A.)

2. The fact that police and the prosecution had reliable information that four other persons committed the Taylor crimes is supported by the documentary evidence submitted by petitioner.

a. Robert Aaron Simms

To make its case, respondent would have this Court ignore positive identifications by two sheriff's deputies (Naimy and Koontz), as Simms fled the suspect vehicle, [40] the fact that Simms was wearing similar clothing, matched the height, weight, and age of a fleeing suspect, and "came from the cordoned area without reason for being there," [41] officers' beliefs that Simms did so as to establish an alibi for himself, [42]the fact that Simms gave a false name,[43] and the fact that Simms was actually recovered from the containment area which he was seen to enter.[44] Contrary to respondent's assertion (Informal Response at p. 40.), the evidence produced by petitioner does clearly establish that Simms was involved in

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[40] Exhibit 16 at 80-83; Exhibit 18, Exhibit 22 at 615, Guilt Phase Exhibits Vol. 1.

[41] Exhibit 19, Guilt Phase Exhibits Vol. 1.

[42] Exhibit 18, Guilt Phase Exhibits Vol. 1.

[43] Informal Response at p. 35 fn.18.

[44] Officer Koontz stated that Mr. Simms exited the vehicle from the left side door and ran south on Budlong. Mr. Simms ran along the sidewalk then disappeared between the corner house and the first house on Budlong (Exhibit 28 at 279-281; Exhibit 18, Guilt Phase Exhibits Vols. 1, 2.), i.e., into the containment area.

the Taylor crimes.

Although somewhat less certain of their identifications after Simms was released from custody, ultimately officers did not rule him out as being one of the suspects who fled the vehicle.[45] The officers who arrested Simms were correct. The officials who released him were wrong to do so. The case against Simms is a strong one. Thirteen years after these crimes, petitioner has presented documented and reliable proof of Simms' involvement. Respondent offers nothing to base its claim that petitioner rather than Simms was actually involved other than Cora Taylor's incredible and erroneous identification and respondent's own speculation.

b. Michael Player

Although it discounts petitioner's proof of Michael Player's involvement in the Taylor crimes, ultimately respondent concedes that it is likely he was involved. (Informal Response at p. 42.) This is not surprising given the fact that the car belonged to Michael Player's stepfather, Michael Player was the last one known to drive it that evening, he was a known serial killer, Evan Mallet's statement that Michael was the driver of the fleeing vehicle, and the trial prosecutor's own assertion in closing argument that one of the Player brothers was likely involved. (RT 3158-3160, 3338.)

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[45] Exhibit 28, Guilt Phase Exhibits Vol. 2 at 279.

c. Petitioner has met his burden.

Finally, respondent overstates petitioner's burden here. Petitioner is not required to prove conclusively that Robert Simms or Michael Player were involved in the Taylor crimes. Petitioner need only make out a prima facie case for relief. He has done so.

Given the incriminating evidence as to Simms, including his emergence from the containment zone to join petitioner, Marcus Player, and Wayne Harris and appear to have been walking with them, his giving a false identification to police and the tentative (or stronger) identifications by two officers, including identification of the white coat he was arrested wearing, and given the prosecutor's concession that one of the Player brothers was likely involved, Marcus Player's statement that Michael was the last to drive the suspect vehicle, Frank Harris' statement that petitioner never drove his car and the proceeding evidence of petitioner's alibi, it is certainly reasonably probably that the jury, had it been presented with the evidence described in the petition under this subclaim, would have rejected any invitation to rely upon petitioner's alleged involvement in the Taylor homicide as a basis for convicting him of the Hassan crimes, for finding he harbored the mens rea essential to capital murder or for imposing a sentence of death.

In light of the evidence we have adduced (and which trial counsel could and

should have adduced), it is clearly more likely that Robert Simms and Michael Player --and not petitioner -- were among the men involved in the Taylor crimes and that they, along with Mallet and Ross were the four responsible parties. Had the jury seen this evidence, it is likely that the jury would have so concluded.

Given that the prosecutor relied upon Steve's purported involvement in the Taylor crimes to prove guilt of the Hassan crimes and the uncharged Jefferson homicide, to prove intent to kill, and to argue the appropriateness of a sentence of death, the failure to adduce this evidence was clearly prejudicial.

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

1. This claim is not untimely

In addition to the exhibits supporting the Taylor claims discussed above, petitioner offered Exhibit 33, an official document describing petitioner as having buck teeth, Exhibit 35, Craig Ross' rap sheet, and Exhibit 36, a reporter's transcript from the Mallet case. Except for the Mallet transcript, the other additional exhibits were contained in trial counsel's file.

The importance of the Mallet transcript to this claim -- when coupled with Exhibit 33 -- is clear. This is so because at Mallet's trial, during cross-examination

of Birdsong, Mr. Mallet's counsel asked whether or not any suspect had "any missing teeth, anything like that stood out" in his mind. Mr. Birdsong replied, "No." (Exhibit 34 at 812.) Even if had been possible to submit this subclaim substantially sooner, it would have been appropriate to delay filing in light of ongoing investigation into other potentially meritorious claims which required additional investigation until close to the November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806.) These included other subclaims relating to counsel's ineffectiveness in failing to defendant against the contention that petitioner was involved in the Taylor crimes, i.e., subclaims VI.A and VI.B (failure to discover and present evidence that petitioner could not have been involved and that the perpetrators were four other young men; discussed above) and subclaim VI.G (failure to challenge the prosecution's graffiti and gang expert testimony; discussed below). Counsel was also engaged in ongoing investigations into claims addressing counsel's ineffective assistance (a) in failing to discover and present evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan (Claim VII.A, discussed at below), (b) in failing to discover and present mental impairment evidence that would have undermined the prosecutor's special circumstance mens rea theory (claim VII.H, discussed below), and (c) in failing to

discover and present substantial mitigating evidence at petitioner's penalty phase trial (Claim IX.C, discussed below).

Further, in light of the rarity of this Court's issuance of orders to show cause, counsel doubted that the Court would deem claim VI.C. standing alone, without presentation of the other Taylor-related claims sufficient to state a prima facie case for relief, and accordingly for that reason as well counsel would have been warranted in delaying presentation of this subclaim. (*In re Robbins, supra*, 18 Cal.4th at 806-807 n. 29 (majority), and 820-821(Justice Kennard, concurring and dissenting (counsel may properly delay filing claims or subclaims which, standing alone, may be insufficient to support a prima facie case until such time as the related claims or subclaims to which the withheld claims can be joined to support a prima facie case are ready to be filed). Finally, as explained above in connection with the discussion of the timeliness of Subclaim VI.A, each of the subclaims of Claim VI, which together undermine the prosecution contention that petitioner was involved in the Taylor crimes, should be reviewed on the merits pursuant to this Court's miscarriage of justice exceptions to the timeliness bar even if deemed untimely.

3. The fact that the physical and clothing descriptions offered by witnesses did not fit that of petitioner on the night of the Taylor crimes is supported by the documentary evidence submitted by petitioner.

Contrary to the assertion of respondent, Mary Taylor did not testify that *any*

of the suspects who entered the residence resembled petitioner. Mary Taylor's testimony is recited above. When asked whether she saw someone, in the courtroom, who looked like the man she described in her home as having an earring in his left ear, short hair, big lips, a full face, was dark complected and had a little mustache, Mary Taylor pointed to *Craig Ross*. (RT 2129-2130.) As to petitioner, the only similarity noted by Mary Taylor was something about his mouth or lips. Ms. Taylor did not describe in what way petitioner's lips were similar to the lips of one of the perpetrators. (RT 2133.) Mary Taylor was certain that petitioner's earing was not the earring worn by the perpetrator she described. (RT 2327-2328.) Certainly, respondent does not expect us to believe that based on a similarity of lips, the witness testified that petitioner resembled one of the men who entered her home.

The man Cora ultimately identified as petitioner was suspect number two, the "tallest" one. Neither Cora Taylor's physical description of suspect number two, nor her description of the clothing that person wore match petitioner.

Respondent would like us to bootstrap Mary Taylor's description of a "dark long-sleeved shirt" to Cora Taylor's description of a "brown" shirt, as matching petitioner's "grey" shirt. (Informal Response at p. 44.) As with so many factual assertions contained in this Response, respondent does not cite to any portion of the appellate or habeas record for the location of these descriptions. Petitioner is forced

to comb through thousand of pages of transcripts and proceedings in order to verify that respondent has not misstated these facts like so many others. Here, it may be of little consequence, brown is not grey and neither brown nor grey are necessarily dark. Respondent asks this Court to liken petitioner's clothing to the "light-colored" clothing described by police and the "dark or brown" clothing described by witnesses. This invitation to speculate must be turned down.

Petitioner disagrees with respondent's assertion that it is of no consequence that petitioner is described as having "buck teeth." (Informal Response at p. 45.) According to Mary Taylor, Cora Taylor, and the prosecuting attorney, the perpetrators threatened the family and asked for money and dope. Buck teeth are certainly a distinguishing facial characteristic worth noting. Moreover, it is apparent from Exhibits 33 and 34 that had one of the suspects had missing, buck, or noticeably different teeth, Birdsong would have used the opportunity when asked about teeth deformities of the suspects to say so.

Respondent makes much of Birdsong's description of the tallest suspect as "pretty close" to petitioner's height. In fact, Mr. Birdsong testified that he is 6'0 tall and that this suspect *was shorter than he*, thus eliminating 6'0 to 6'1 petitioner as a suspect. (Exhibit 34 at 805-807, Guilt Phase Exhibits Vol. 2.) Respondent also ignores the clothing description given by Birdsong where he clearly recalls the man

wore an earring in his left ear, was dressed in *blue jeans* and wore a "*lumber jacket*" *plaid coat.* (Exhibit 36 -- at 805, 821.)

Further, in response to this claim too, respondent attempts again to make much of a speculative point that petitioner's yellow clothing could have been the "white or light-colored" jacket Naimy observed one of the suspects to be wearing. (Informal Response at p. 37, 41,42, 44.) Respondent must once more ignore exhibits to make this point. ROBERT SIMMS WAS ARRESTED WEARING A WHITE JACKET. (Exhibit 18, Guilt Phase Exhibits Vol. 1.) Similarly, respondent asks us to assume that the reason it was not noted that on the night he was detained petitioner was wearing an earring, had a scar or injury was that the "space provided on the identification card was very limited." (Informal Response at p. 45.) By negative inference respondent would have us assume that each of these distinguishing marks existed, but the officers failed to recognize the significance to record them. Moreover, petitioner was detained while the Taylor witnesses were being interviewed. He was shown to them by police. There was no reason not to confirm important identifying information before his release...had any existed.

Finally, there is a complete lack of any evidence that petitioner was involved. No blood, fingerprint, or other forensic evidence. Not one of the numerous statements regarding petitioner had him sweating from running away from pursing

vehicles. He was cooperative, truthful and above the suspicion of any of the numerous police officers and sheriff's deputies who encountered him that night.

Respondent is simply wrong in asserting that the failure to demonstrate petitioner did not match the descriptions of the suspects given by the victims was not prejudicial. In light of the evidence we have adduced (and which trial counsel could and should have adduced), it is clearly more likely that Robert Simms and Michael Player --and not petitioner was the other men involved in the Taylor crimes. Had the jury been presented with the fact that petitioner did not match police or victim descriptions, it would have been more inclined to disbelieve Cora Taylor's identification. Further, given that the prosecutor relied upon petitioner's purported involvement in the Taylor crimes to prove guilt of the Hassan crimes and the uncharged Jefferson homicide, to prove intent to kill, and to argue the appropriateness of a sentence of death, the failure to counter Cora's identification by adducing and arguing that the police and victim descriptions did not match petitioner was clearly prejudicial.

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

1. This claim is not untimely

Other than trial counsel's declaration, all of the exhibits which support this subclaim are contained in the appellate record. While it might have been possible to submit this subclaim at an earlier date this course would not have made sense here. This claim is a subclaim to a much greater claim of ineffective assistance of counsel which required extensive support from documentation outside the record. Further, when the "triggering facts" of this claim were learned, petitioner was in the process of investigating other aspects of the Hassan, Jefferson, and penalty phase IAC claims, all potentially meritorious claims requiring investigation. This subclaim should be deemed timely and should be addressed on the merits for the same reasons that subclaim VI.C. should be deemed timely and should be addressed on the merits.

2. Trial counsel's failure to object, and/or move for a mistrial, was both unreasonable and prejudicial.

As above, respondent responds to this subclaim with no independent or contradicting documentary evidence. It asserts that petitioner has not presented reasonably available documentary evidence to demonstrate that this was not a reasonable tactical decision. Again, respondent misconstrues the record and omits reference to established facts which belie this conclusion. Foremost, respondent ignores the fact that pretrial, trial counsel had moved to exclude such evidence of

identification and all other evidence that petitioner was involved in the Taylor crimes. [46] Clearly, at the pretrial stages of this case, trial counsel fully recognized the prejudicial impact an in-court identification of petitioner as a participant of the Taylor crimes would have on the jury. Thus, once the testimony had been elicited, counsel could not have reasonably formed a tactical decision that leaving it alone was the right strategy. Further, trial counsel's error in following this course is all the more obvious on review of the record which demonstrates how the prosecutor seized on Cora Taylor's identification of petitioner to make its case. The prosecutor reinforced this identification, and specifically referred to petitioner by name, coupling him with Mallet and Mr. Ross, as one of the perpetrators of the crimes, numerous times during his questioning of this witness. (RT 2246, 2248, 2250, 2255, 2263, 2302, 2304, 2305.)

Respondent is wrong when it asserts that the fact that Cora Taylor was generally not a good witness at the Mallet trial was "of no consequence" and "irrelevant." (Informal Response at p. 47, fn. 24.) [47] In his claim regarding counsel's failure to object to Cora Taylor's identification, petitioner argued that

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[46] Unfortunately, trial counsel failed to get a ruling on this motion. (Petition at p. 46.)

[47] The rest of respondent's paragraph to footnote 24 is nonsensical.

defense counsel was ineffective for failing to object to or impeach Cora Taylor's identification of petitioner. In support of this claim, petitioner cited a portion of the Mallet trial where the presiding judge stated the following:

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

In every trial, the believability of a witness and the weight to be given her testimony is a matter for the jury to determine. A jury may consider *anything which has a tendency in reason to prove or disprove the truthfulness of the testimony of a witness.* (See CALJIC No. 2.20.) [48] Among the specific factors outlined in CALJIC No. 2.20, is "[t]he ability of the witness to remember or to communicate any matter about which the witness testified." (CALJIC No. 2.20.)

Further, Mrs. Taylor's testimony at Mr. Mallet's trial was available as impeachment evidence at petitioner's trial. (Evidence Code section 769; CALJIC No. 2.20.) Finally, as the above-stated opinion was rendered at an Evidence Code section 402 hearing, the Mallet judge's opinion regarding Mrs. Taylor's identification was arguably admissible as an expert opinion (Evidence Code section

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[48] This was not testimony regarding some unrelated incident, but testimony which specifically related to the events to which she purported to testify to at petitioner's trial.

80), and certainly the repeated character of her testimony which formed the opinion of the trial judge's negative view of her credibility could have been adduced. [49] For these reasons, Mrs. Taylor's testimony at the Mallet proceedings and the opinion of the Mallet judge were both relevant and of great consequence to the defense of petitioner here.

Respondent faults petitioner for failing to cite any authority requiring his counsel to obtain and read the transcripts of a co-perpetrator's case. (Informal Response at p. 47, fn. 24.) Certainly, the prior testimony of a prosecution witness regarding the circumstances of a crime, for which a defendant is not charged but a crime which defense counsel is on notice that the prosecution tends to use to prove a defendant's guilt of the crime actually charged, is an area of investigation to be undertaken. This is particularly true given the fact that trial counsel believed that the prosecutor would attempt to have petitioner identified by the Taylor victims.

Trial counsel's failure to object and/or move for a mistrial following Cora Taylor's mistaken identification resulted in prejudice. Although counsel took some steps to discredit the in-court identification, there is no guarantee that it wasn't credited. The prosecutor certainly found it to credible enough to rely on it numerous

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[49] Evidence Code section 402, contains the procedure by which a court hears and determines the question of the admissibility of evidence.

occasions after he reinforced this identification and specifically referred to petitioner by name as one of the perpetrators of the Taylor crimes. (RT 2246, 2248, 2250, 2255, 2263, 2302, 2304, 2305.) [50] Ultimately, the importance of the identification was argued by the prosecutor in closing.

Moreover, it was inherently prejudicial to have the surviving victim of a brutal robbery and murder (which also involved the rape of another survivor), particularly the mother of the murder victim (and of the rape victim as well), connect petitioner to these crimes. If believed, the identification of petitioner provided the jury sufficient evidence to convict petitioner of the Taylor crimes and following the prosecutor's theory, the Hassan crimes. This is in spite of the weakness of the evidence and of the theory itself.

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[50] Even respondent cannot avoid the invitation to credit Mrs. Taylor's testimony as she argues that petitioner was in fact involved in the Taylor crimes and she then refers to petitioner as a perpetrator of the Taylor crimes. (Informal Response at pp. 42, 47, footnote 24, and 59 [quoting this Court].)

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

1. This claim is timely.

As with all claims above and below, respondent responds to this subclaim with no independent or contradicting documentary evidence. By contrast, in addition to the exhibits supporting the Taylor claims above, petitioner offers Exhibit 37, scientific evidence documentation from the Taylor murder book, which according to Exhibit 71, Guilt Phase Exhibits Vol. 3, was given to trial counsel by the prosecutor on or about June 2, 1982. Petitioner incorporates here his timeliness arguments as to the previously discussed Taylor claims. This subclaim should be addressed on the merits for the same reasons that subclaim VI.C. should be deemed timely and addressed on the merits.

2. Factual misrepresentation by respondent

In footnote 25, which is appended to its response to the failure-to-object claim, and in the body of its argument to this claim, respondent mistakenly asserts that Mary and Cora Taylor had only one occasion to observe petitioner. (Informal Response at p. 48, fn. 25, and p. 51-52.) This is not true.

Initially, Cora Taylor, Mary Taylor and William Birdsong had an opportunity to observe petitioner at a police show-up on the night of the crime. Both the appellate and habeas records confirm this fact. Petitioner recalled that while he, Marcus Player, Wayne Harris and Robert Simms were detained outside of the containment area, a police vehicle stopped an shone a light at the group. (RT 3103.) Officer Koontz testified that at approximately 1:30 p.m. some civilians -- presumably Birdsong and Mary and Cora Taylor — were taken to a show up of Simms. (Exhibit 28 at 268, 274, 278.) In earlier testimony he described these civilians as "a young Black male, and a young female Black, and an older female Black." (Exhibit 28, at p. 266.) [51] Mary testified that she, her mother and Birdsong were taken to two show-ups, one of which that had "some guys" and the other that was only Mallett. (RT 2237.)

In addition, petitioner has reason to believe that his photograph was shown to the victims. Respondent characterizes this belief as speculation. The record indicates that these witnesses were shown photographs at the Lennox Station on three separate occasions. (Exhibit 36.) On one of these occasions, the witnesses were shown approximately eight mug-books, each containing over 100 photographs.

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[51] These same three were also given the opportunity to observe Mallet. (Exhibit 28 p. 281-282, Guilt Phase Exhibits Vol. 2.)

(Exhibit 36, pp. 169, 184.) Were petitioner not one of these people shown to the victims, respondent has access to the people and exhibits shown, and yet has offered no evidence whatsoever that petitioner's speculation is not fact.

Finally, Cora Taylor testified that she saw petitioner in court on at least two occasions. (RT 2307.) There is no reason to believe that Mary Taylor did not observe petitioner on those occasions too.

3. Trial counsel's failure was not the result of a reasonably tactical decision.

Respondent asserts first that the decision not to present evidence demonstrating there was no credible evidence that petitioner was involved in the Taylor crimes was a tactical decision and in any event, not prejudicial. (Informal Response at pp. 49-50.) Unlike its previous responses to petitioner's claims, respondent does not allege here that the error was not prejudicial because petitioner had not been charged with or convicted of the Taylor crimes, but rather that counsel's failure to present evidence that there was no physical or other evidence of petitioner's involvement in the Taylor crimes and that to the contrary, numerous pretrial identification attempts failed to identify petitioner as a suspect, fingerprint analysis did not implicate petitioner, and a secretly-taped conversation between Evan Mallet and petitioner produced no incriminating admissions was a reasonable decision "in light of the defense presented." (Informal Response at p. 50.) In

support of this response, respondent cites to two short passages of trial counsel's guilt phase argument [52] and concludes that it would have been inconsistent for counsel to have asked the jury to rely on the very evidence trial counsel had asked them to ignore. (*Ibid.*) Respondent is wrong to assert that it would have been "inconsistent" for counsel to point out the multifaceted lack of incriminating evidence that might have been expected to be available. Rather, than inconsistent, it would have confirmed counsel's assertion that nothing concerning the Taylor (and Jefferson) crimes had anything to do with petitioner's guilt or innocence in the Hassan crimes.

Respondent is simply wrong in asserting that the lack of incriminating evidence, where it would be expected to be found, is irrelevant or speculative. In light of the evidence presented (and which trial counsel could and should have presented), it is clearly more likely that Robert Simms and Michael Player --and not petitioner were the other men involved in the Taylor crimes. Had the jury been presented with the lack of forensic and identification evidence directly tying petitioner to the Taylor crimes, it would have been more inclined to disbelieve Cora

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[52] Trial counsel's argument to the jury that the quality of the evidence was such that everything should be distrusted was made in reference to the Hassan crimes, and not in reference to the alleged evidence of petitioner's involvement in the Taylor crimes. (RT 3226.)

Taylor's identification. Further, given that the prosecutor relied upon petitioner's purported involvement in the Taylor crimes to prove guilt of the Hassan crimes and the uncharged Jefferson homicide, to prove intent to kill, and to argue the appropriateness of a sentence of death, the failure to counter Cora's identification in this manner was clearly prejudicial.

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

Here, respondent relies primarily on its response to claim VI.D. Respondent adds only that trial counsel anticipated that the district attorney would attempt to have petitioner identified, believed that this was permissible, and therefore chose not to object and decided that, ultimately that the best way to deal with Mrs. Taylor's surprise identification was to "leave it alone." (Informal Response at pp. 52-53.)

Respondent, like trial counsel was wrong, is wrong. Except in anticipating that the prosecutor would attempt to have petitioner identified, Mr. Skyers' belief that the procedure was permissible and his response to the identification were erroneous. Although the procedure was appropriate as to Ross, there was no legal basis justifying the prosecutor's question to Cora as to whether petitioner resembled any of the men who robbed her family and killed her son. This is certain because if Ross had not been tried with petitioner, Cora Taylor's testimony, in its entirety,

would have been irrelevant and inadmissible. Further, as the prosecutor himself recognized, he had no factual foundation upon which to base a belief or suspicion that petitioner was inside of the Taylor home and therefore seen by Cora or any other witness. The question he posed to Mrs. Taylor was nothing more that a fishing expedition. As such, it constituted misconduct – misconduct which went unobjected to by defense counsel. Misconduct which ultimately permitted the jury to conclude that petitioner murdered Bobby and Eric Hassan.

Here again, respondent argues that Cora Taylor's testimony at the Mallet trial and the Mallet judge's opinion were irrelevant. (Informal Response at p. 54.) According to the court which judged Cora Taylor testimony and observed her ability to recall and recollect vital information, Mrs. Taylor changed her testimony enough times on important points concerning identification that "the tryer of fact would have to take her identification with a grain of salt." (Exhibit 38 at p. 318.) The court recognized the traumatic nature of the experience that affected her testimony. (*Ibid.*) The court noted that defense counsel had "plenty of impeaching grounds" (*Id.*, at p. 319), including that Mrs. Taylor may have picked two pictures of different men and identified them both as Mallet. (*Id.*, at pp. 322-323.)

As outlined above, had trial counsel known of Ms. Taylor's prior testimony and the court's opinion regarding its character, trial counsel would have been

negligent in failing to bring both before the jury. Mrs. Taylor's prior testimony – which related directly to a robbery and murder that she pinned on petitioner and court's opinion thereabout would have been of great value in assisting the finder of fact at petitioner's case.

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

1. The claim is timely.

As with all other claims, respondent responds to this subclaim with no independent or contradicting documentary evidence. In addition to the exhibits supporting the Taylor claims above, petitioner offers Exhibits 39-46. Exhibits 39 and 40 contain color photocopies of the photographs of the graffiti which were entered into evidence at trial. These photocopies were made after present habeas counsel went to Los Angeles Superior Court to view the evidence. *Trial counsel's files contained no photographs of graffiti*, therefore, these items were not available to Mr. Merwin. It was not until after present habeas counsel reviewed the evidence, in January 1997, that the error in reading "Do-or-Die" as Do-re-mi," and therefore

the faulty basis for Deputy Williams' incriminating "expert" opinion became apparent. It also then became more apparent that the actual author, Karl Owens, had to be found to determine why the words were written and that a gang expert would be necessary to properly evaluate the meaning of the writing on the arcade wall as well as give credence to the declaration of Karl Owens. Petitioner did not receive funding from this Court with which to retain a gang expert. On January 7, 1997, petitioner was permitted $2,000.00 for this purpose from the federal court. [53] It was not until the federal court authorized this expenditure that petitioner had the resources to consult with a gang expert, to have the expert review the graffiti photo exhibits and relevant portions of the trial record, and to obtain from the expert a declaration setting forth his conclusions on topics relevant to this subclaim. Under this Court's decision in *Gallego*, the facts and conclusions set forth in the October 8, 1997 declaration of expert Rouselle Ray Shepard (Exhibit 41, Guilt Phase Exhibits Vol. 2) was not information which petitioner should have unearthed at any earlier date. (*In re Gallego, supra,* 18 Cal.4th at 828(denial of timely request for investigation funds "will support a determination that the petitioner not only did not actually know of the information earlier but also should not reasonably have known

[53] Note, at the time petitioner discovered the error in Deputy William's opinion, counsel would have had, at most $2,000.00 for the entire guilt phase investigation.

of the information earlier"; emphasis in original).) Thus, subclaim VI.G was filed without substantial delay. (*Robbins*, *supra*, 18 Cal.4th at 787 ("Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.").)

Once petitioner learned that Li'l Drac was the moniker of Karl Owens, petitioner began the search to find him. Petitioner had no other information than a name. No date of birth, no address, and no social security number. [54] Petitioner asserts that there was no undue delay in filing this claim which is attributable to time spent locating Mr. Owens.

The remaining exhibits are juvenile records which were obtained by present habeas counsel when she requested copies of petitioner's Department of Correction file. When it was determined that Deputy Williams was seriously wrong about both what was written on the wall and what it meant, the true need to evaluate Deputy

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[54] Petitioner did not have funds sufficient to conduct an investigation to find Mr. Owens until the federal court authorized funding in January, 1997. Thereafter, counsel formulated a plan based on allocated funding and retained an investigator to perform the investigative tasks. Working with a name only, my investigator found a Karl Owens in custody. I then corresponded with Mr. Owens, determined that he authored the graffiti and secured his declaration. Of course, once the funding had been secured, both may investigator and myself were engaged in numerous tasks. My investigator was given the task of attempting to locate and interview numerous guilt phase witnesses for whom we had no current addresses.

Williams' expertise and each of his opinions – including but not limited to his opinion that petitioner was a Raymond Avenue Crip who "frequently" associated with Craig Ross during the summer preceding the murders -- that petitioner's duty to investigate this claim arose. Again, because each of the Taylor subclaims are interdependent and cumulatively join to strengthen petitioner's main point that trial counsel's ineffective representation as to the Taylor crimes combined with the ineffective representation as to the Jefferson, Hassan crimes and as to the penalty phase and to undermined the fairness and reliability of the guilt and penalty verdicts, all claims needed to be fully investigated and investigation of some was continuing as the investigation of others was concluding. Petitioner incorporates here his timeliness arguments as to the previously discussed Taylor claims. This subclaim should be addressed on the merits for the same reasons that subclaim VI.C. should be deemed timely and addressed on the merits.

2. Trial counsel failed impeach Deputy William's testimony and opinions which followed.

Simply put, Deputy Williams either *misread* or *misrepresented* what was depicted in the photograph of the arcade graffiti . Either way, Williams *erroneously* read the words "Do or Die" as "do-re-me." Based entirely on this mistake, Williams premised his speculative, unfounded, and erroneous interpretation of the

meaning of "do-re-me" coupled with the dollar sign as meaning "to obtain money in a robbery or burglary." (RT 2657, 2675.) By associating petitioner's name with the graffiti and the fact that it was on a wall near Michael Taylor's home, the conclusion that petitioner was involved in an alleged gang conspiracy to rob and murder marijuana dealers and thus petitioner's involvement in the Taylor robbery-murder and Hassan robbery-murders become obvious conclusions for the jury to reach. Each of these conclusions stemmed from a very basic and easily remedied erroneous representation of the words "do-or-die." [55]

3. Trial counsel's failure to adequately review the photograph and properly object to it and to Williams' opinion was prejudicial.

The prejudicial nature of Williams' misreading of the graffiti is clear. As this Court recognized, if one accepted Williams' misreading "it could be inferred from the graffiti that defendant Champion participated in the robbery and murder of Michael Taylor...." (*People v. Champion, supra.,* 9 Cal.4th at p.) Further, this Court specifically noted that "the jury could properly consider the evidence that defendant Champion was involved in the murder of Michael Taylor in deciding

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[55] Because the prosecutor made an offer of proof alerting the court and defense counsel that his expert was prepared to testify that "do-re-me" coupled with a dollar sign was an advertisement of having successfully completed a robbery or robberies (RT 2631), this was a mistake that could have been remedied before Williams offered this erroneous and prejudicial opinion.

whether he participated in the murders of Bobby and Eric Hassan...." (*People v. Champion, supra.,* 9 Cal.4th at p. 905) This was, of course, the very theory of the prosecution.

In its Informal Response, respondent does not attempt to dispute that Deputy Williams either made a mistake or misrepresented the words "do-or-die" as "do-re-me." Neither does respondent dispute that the meaning of "do-or-die," and therefore, the meaning of the graffiti located on the wall near Michael Taylor's home, has absolutely nothing to do with obtaining money in a robbery or burglary. Thus, respondent effectively concedes that the writing on the arcade wall -- contrary to the impression created at trial -- in no way what-so-ever indicated, implied, advertised, or otherwise supported the proposition that petitioner was involved in the Raymond Avenue Crips conspiracy to rob and murder marijuana dealers, the Taylor robbery-murder or, by association with the conspiracy and the Taylor crimes, the Hassan robbery-murders. [56]

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[56] Respondent cites this Court as authority for a footnoted assertion that the words "do-re-me" were written on the wall. (Informal Response 54 fn. 28.) This Court did not have the photographs or Rouselle Shepard's declaration when it rendered the appellate opinion in this case. In preparing its opinion, this Court was provided with only Mr. Williams' uncontroverted testimony concerning the writing on the wall. (*People v. Champion, supra.,* 9 Cal.4th at p. 920.) Thus, respondent's attempt to bootstrap the witness' clearly erroneous reading of the graffiti which unquestionably says do-or-die to a finding by this Court must be rejected.

4. Trial counsel was ineffective in relying solely on the defense that petitioner did not author the graffiti

Respondent chooses to ignore the obvious error in the very premise of the admissibility of Williams' erroneous testimony and opinion and trial counsel's failure to remedy those errors, and simply asserts that trial counsel was not ineffective. This is so it argues, because if "counsel convinced the jury that petitioner was not the author of the graffiti then it did not matter *who* wrote the graffiti or *what* it said." (Informal Response at 56.) Even if trial counsel had persuaded the jury that petitioner did not author the graffiti it was still possible for the jury to reach the conclusion that the graffiti supported the prosecution's assertion that petitioner was involved in the alleged Raymond Avenue Crips conspiracy to rob and murder marijuana dealers, the Taylor robbery-murder and by association to the conspiracy and the Taylor crimes, the Hassan robbery-murders.

As an offer of proof, the prosecutor argued as follows:

> Of the greatest relevance of all of these graffiti photographs is the one that says "treacherous" which is Mr. Champion's most recent moniker, and says below it "Raymond Crips." That photograph is additionally relevant because it was taken across the street from the victim Taylor's residence, and that there is a dollar sign and the words "do re mi" next to writing. ¶ I don't think it takes an expert to figure out, but the expert is prepared to testify that that would symbolize, in his expert opinion, an advertisement of having successfully completed a robbery or robberies. (RT 2631.)

As noted above, Ronnie Williams was called as an "expert" witness by the prosecutor not only for the purpose of establishing petitioner's involvement in the Taylor crimes but also for the purpose of establishing the prosecution's theory that the Taylor and Hassan homicides were part of a conspiracy plan among Raymond Street Crips to rob and murder marijuana dealers.

Williams described his experience in investigating gang incidents and stated that he was acquainted with "a gang known as the Raymond Crips." (RT 2636) According to Williams, a minimum of 30 men were members of the Raymond Avenue Crips. These members were divided into factions. One of these factions was called the "OG's." (RT 2637-2638.) The OG's were the leaders of the Raymond Avenue Crips. They tended to be more loyal to each other than to other Raymond Avenue Crips. Marcus Player, Michael Player, Lavell Player, Evan Jerome Mallett, Craig Ross and petitioner were known by Williams as OG's. (RT 2639-2642.) Williams saw all of the men named above during November and December of 1980. Williams saw petitioner and Ross together and petitioner, Ross and Mallet together. (RT 2643-2644.)

Williams testified that the significance of graffiti in general was to advertise one's membership in a gang. (RT 2653.) The graffiti which proportedly advertised petitioner's involvement in a robbery or burglary was located at a 45-degree angle

across the street from Michael Taylor's residence. (RT 2658.)

The obvious import of the prosecutor's line of questioning was to establish that petitioner was involved in a gang, a gang which was involved in a conspiracy to rob and murder marijuana dealers and finally, that the arcade graffiti which allegedly was authored by petitioner advertised his involvement in the actual robbery and murder of Michael Taylor.[57] Clearly, the jury was not required to find that petitioner actually authored the graffiti in order to find that he was involved in the conspiracy and the murders. Thus, contrary to respondent's conclusion, even had trial counsel convinced the jury that petitioner did not author the graffiti the jury could nevertheless have relied upon the graffiti to find that in accordance with Williams' opinion and the very theory of the prosecution's case, that petitioner was involved in a conspiracy to rob and murder drug dealers Bobby Hassan and Michael Taylor and actually participated in both men's deaths.

As noted above, this Court expressed its opinion that the jury could find, by the graffiti and Williams' opinion that petitioner was involved in the Taylor crimes.

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[57] To this end, during his cross-examination of petitioner, the prosecutor asked if petitioner knew what was meant by the dollar sign and do-re-me in the graffiti photograph. Petitioner responded that he had no idea what the two meant. The prosecutor then asked petitioner if he had heard gang members use those terms to mean they have "jacked" somebody. The prosecutor elicited that to "jack" meant to rob, thereby implying that petitioner had "jacked" or robbed somebody. (RT 3068-3070.)

Based on his involvement in the Taylor crimes, the jury was entitled, according to this Court, to find petitioner was involved in the Hassan crimes.

Finally, in a footnote, respondent asserts that Karl Owens' declaration that he recognized the writing "Lil Drac" as his own and believes he wrote other words, is not a convincing statement to establish that he in fact authored the word "do-or-die." Respondent does not give a reason why this is so. [58] At this stage of the proceedings, in the absence of any articulated reason to doubt Mr. Owen's declaration, the Court in deciding whether to issue an OSC, should assume the accuracy of his declaration and of the petition allegations based thereon. (*In re Duvall* (1995) 9 Cal.4th 464, 474-475.)

Respondent contends that trial counsel was not required to put on a gang defense expert if he could accomplish the same result through cross-examination. (Informal Response at p. 56.) Certainly, trial counsel did not effectively cross-examine Deputy Williams regarding the factual representations he made or the opinions which he based on those factual representations. Foremost, trial counsel

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[58] For some unknown reason, respondent claims that Karl Owens "effectively [admits] to committing a robbery or burglary. Foremost, because, Mr. Owens correctly reads what looks to him as his handwriting "do-or-die" and there is no evidence that such phrase carries any such meaning, Mr. Owens makes no such admission. Respondent simply ignores the actual text of the graffiti (Exhibit 40), the declaration of Rouselle Shephard (Exhibit 41), and the text of Mr. Owens' declaration. (Exhibit 42.)

failed to point out the erroneous reading of the words "do-or-die" as "do-re-me." Counsel failed to point out -- and indeed could not have done so without the assistance of a gang expert -- that the term "do-or-die" has no known connection to obtaining money in a robbery or burglary. (Exhibit 41.) [59] All further implications and conclusions that rested upon Williams' erroneous factual representations and irrelevant and inadmissible opinion as to the meaning of the words "do-re-me" should never have been before this jury. In failing to effectively cross-examine Williams in the areas outlined above, counsel permitted the prosecution to effectively argue that petitioner had advertised his involvement in the conspiracy and its subsequent murders.

In any event, trial counsel did not consider consulting with a gang expert. He reviewed the photographs of the graffiti, but did not notice that the words "do-or-die" and not "do-re-me" appeared. Trial counsel was therefore unprepared cross-examine the expert offered by the prosecution on this central issue. (Exhibit 47.)

Respondent asserts that petitioner has failed to demonstrate that there was an expert available at the time of the trial who would have presented the same opinions regarding the graffiti as petitioner's expert Rouselle Shepard. Respondent is wrong when it concludes that Mr. Shepard himself would not have been qualified to render

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[59] Respondent does not dispute, and thus apparently concedes this point.

the same expert opinion at the time of trial as he did in his declaration.

According to the supplemental declaration of Rouselle Shepard, attached hereto as Exhibit 4A, Mr. Shepard began his tenure with the Los Angeles Police Department on February 22, 1972. He retired from the department in 1993. Mr. Shepard was first assigned to CRASH, or Community Resources Against Street Hoodlums, which is a gang detail, in 1975. He was assigned to the centralized CRASH unit in 1976 and remained with this unit his retirement from the force. Unlike Deputy Williams, who was a deputy with the Los Angeles County Sheriff's Department, Mr. Shepard was an officer with the Los Angeles Police Department. The Los Angeles Police Department does not, and did not at the time of Mr. Williams' testimony or tenure with the sheriff's department, have jurisdiction over the Los Angeles Court facilities. Therefore, Mr. Shepard, unlike Mr. Williams, would never have been assigned to in-court bailiff and other non critical, non specialty duties. Unlike Mr. Williams, Mr. Shepard spent nearly his entire tenure in gang related assignments. At the time of petitioner's trial, Mr. Shepard was a qualified gang expert who had testified numerous times. (Exhibit 3A.) [60]

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[60] Respondent fails to grasp the distinction of duties and assignments between police officers of the Los Angeles Police Department and sheriff's deputies of the Los Angeles County Sheriff's Department and erroneously refers to Mr. Shepard as a "deputy."(See footnote 30.) Further, respondent's own calculations about the length and nature of Mr. Shepard's pre-1980 experience (see Informal Response at p. 57, fn. 30), are

According to the declaration of Karl Owens, had he been contacted by trial counsel, he would have testified that he was known as "Lil Drac" and that he had written his name on the wall. Mr. Owens would have testified that the words "do-re-me" were not written on the wall and that the words "do-or-die" had no particular meaning. Mr. Owens believes it was he who wrote petitioner's alleged moniker. [61]

Finally, respondent asserts that 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. (Informal Response at p. 58.) This is not true. Only relevant evidence is admissible. (Evid. Code § 351.) Because the graffiti did not contain the words "do-re-me" Williams' opinion as to the alleged meaning of those words was irrelevant and for that reason inadmissible. The mere fact that petitioner's alleged moniker appeared on a wall which was located near the Taylor home may have been admissible on the issue of gang membership but it was otherwise inadmissible as having no tendency in reason to prove or disprove any

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based on nothing in the trial, appellate, or habeas record.

[61] Respondent does not contest that simple comparison of the letters "R" and "C" reveal that the words "Drac" and "Trecherous Popeye Raymond Ave Crips" were all written by the same person. Neither does respondent contest that on comparison of the handwriting between the "Crazy 8" graffiti and "Trecherous,"it is clear that two different people authored those words. Petitioner testified that he was not the author of the word "trecherous" and respondent suggests no reason to reject Mr. Owens' declaration that he authored the arcade graffiti – certainly not without an evidentiary hearing.

disputed fact that was of consequence to the crimes for which petitioner was tried. (See generally Evid. Code § 210.)

Respondent disagrees with petitioner's assertion that Deputy Williams' opinions and conclusions were impeachable on other grounds. Williams testified that he had seen petitioner during the summer months of 1980. There was no testimony to support respondent's speculative conclusion that Williams could have seen petitioner during his April furlough (See Informal Response at p. 58), and, in any event, April is not a summer month.

According to petitioner's juvenile custody records, attached to the petition as Guilt Phase Exhibits 43-46, petitioner was housed at the Youth Training School during 1980. Petitioner attended Youth Training School from February 15, 1979 to his release date on October 23, 1980. (Guilt Phase Exhibits Vol. 2, Exhibit 43.)

The attached exhibits demonstrate that petitioner was in custody during the period of time Williams claimed to have seen him at Helen Keller Park in the company of alleged members of the Raymond Avenue Crips, and in particular, Craig Ross. According to the exhibits attached as number 43 through 46, petitioner was in custody from April 1980 through his release in October 1980. Respondent speculates but presents no contradictory documentation that petitioner received any furloughs other than the April furlough. Respondent suggests no reason to conclude

other than that Williams' testimony that he saw petitioner and Ross together at and around the park during the middle or summer of 1980 was not true.

The prejudicial impact of Williams' testimony can not be overstated. It was crucial to the prosecution's case against petitioner that he be firmly connected with the Raymond Avenue Crips. The prosecutor relied on petitioner's alleged involvement in the Taylor crimes to persuade the jury of petitioner's involvement in the Hassan killings. Further, the prosecutor relied upon petitioner's membership in the alleged conspiracy and participation in the Taylor crime to prove petitioner acted with the mens rea essential to capital murder.

An offer of proof by the prosecutor demonstrates as much:

> It is our position that this mutual gang affiliation, and particularly this affiliation in a gang within a gang, is the glue from which this conspiracy was formed and with which it was held together.¶ The evidence [Williams' testimony] is necessary to show the depth of the association between the co-conspirators and evidence of association per se is, of course, relevant in a conspiracy case....¶ These are, and it is out theory and always has been our theory, that all of these murders are OG Raymond Crip murders. (RT 2619-2620.)

Were trial counsel prepared to demonstrate the falsity of Williams' sworn testimony that petitioner was seen in the company of the Player brothers, Mallet and most frequently Ross during the months immediately preceding the crimes, petitioner's connection to any alleged conspiracy, his knowledge of any killings

prior to the Hassan killing, and his involvement in either the Taylor or Hassan crimes would have been severely undercut.

Finally, had counsel consulted a gang expert, that expert would have rendered the opinion that it does not necessarily follow that if one member of the inner circle of the Raymond Street Crips had knowledge of a crime which had been committed by certain Crips all of members of that inner circle would have that knowledge even if they had not actually participated in the crime. As stated in Mr. Shepard's declaration, it is not true that the each member of the inner circle of the Raymond Street Crips had actual knowledge of the criminal activities of every other member of the inner circle of the gang. In the early 1980's many of the street gangs, including the Raymond Avenue Crips were loosely organized groupings of young men who sometimes participated in street crimes and who sometimes came together for non criminal purposes and motives, such as for protection and companionship. These men and boys were not part of the kind a sophisticated criminal enterprise we associate with street gangs today. (Exhibit 41, Guilt Phase Exhibits Vol. 2.)

5. Deputy Williams' qualifications were objectionable

Respondent disagrees with petitioner's claim that Williams' qualifications were insufficient to qualify him as a gang expert under California Evidence Code section 720. Evidence Code section 720, subdivision (a), requires that the expert

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

As argued in the petition, at best, Williams participated in a number of arrests and had passing conversations and opportunities to observe alleged members of the Raymond Street Crips. As such, he was not qualified to testify as a gang expert.

Respondent attempts to explain trial counsel's failure to object to Williams' qualification by asserting that trial counsel "believed Williams was in fact qualified as an expert...." (Informal Response at p. 60.) Judge Skyers made no such declaration. (See Guilt Phase Exhibits Vol. 3, Exhibit 47.) Moreover, as Williams' alleged observations of various members of the Raymond Avenue Crips are suspect, so too are his qualifications for testifying as an expert in the area of the gangs activities. Had trial counsel investigated petitioner's and Ross's whereabouts for the months preceding the crimes, he could have rendered a successful objection regarding the extent of Williams' contact with the gang and demonstrated that the witness's credibility and perhaps motive to testify as he did were also suspect.

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

Contrary to respondent's assertion, Williams possessed no "diverse and strong" foundation for his opinion. Following the rule of *People v. Gamez* (1991) 235 Cal.App.3d 957, 966, cited by respondent as authority, the record reflects only that at the time he testified (October 6, 1982) , Williams had been assigned to the street gang detail for a little over three years. That means that at the time of his personal observations of the (alleged) inner circle of the Raymond Avenue Crips (summer 1980), Williams had been assigned to the detail for perhaps one year. [62]

California Evidence Code section 801, subdivision (a), limits expert opinion to subjects sufficiently beyond the range of common experience that the opinion of

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[62] In the summer of 1980, Mr. Shepard, by contrast, would have had five years of assignment to an exclusively gang detail. (See Exhibit 4A.)

an expert is of assistance to the jury. Here, Williams' opinion that appellant was a gang member was purely gratuitous, being based on nothing more than unsupported speculation.

6. Petitioner was prejudiced

Respondent relies solely on the opinion of this Court and concludes that petitioner has not suffered prejudice as a result of the deficient performance of counsel described under Claim VI.G. (Informal Response at p.. 64-65.) Petitioner disagrees and respectfully requests this Court reconsider its earlier ruling in light of the further evidence now available that because the ring taken from petitioner *was not Bobby Hassan's ring*, (see Claim VII.A.) and therefore the only evidence of petitioner's guilt is Elizabeth Moncrief's unreliable and insufficient identification.

As stated in the petition, trial counsel's failure to object to the graffiti as hearsay, to impeach Williams' erroneous factual statements that petitioner was seen by him in the company of Ross, Mallet, and the Player brothers in the months preceding the crimes and that the graffiti said "do-re-me," counsel's failure to consult and call a gang expert on behalf of petitioner, to find and call the author of the graffiti, and to point out that, when compared, the writing on the two walls and that on the arcade wall appeared to be authored by different persons reflect seriously deficient performance by counsel. Trial counsel should have known that Williams

opinion that the graffiti on the wall across from the Taylor residence advertised petitioner's involvement in a robbery would be argued by the prosecution to support its theory that petitioner was involved in a conspiracy to rob and murder marijuana dealers and actually participated in both the Hassan and Taylor crimes, and further that the prosecution would use the erroneous, speculative and unfounded opinions of Williams to establish that petitioner had the requisite mental state to find him guilty of capital murder.

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

1. Factual misrepresentation by respondent

Respondent states that the testimony of Natasha Wright is consistent with her pretrial statement to police. (Informal Response at p. 65.) This is not so.

In her pretrial statement, Ms. Wright stated that she saw a grey Buick Electra 225 drive up the alley. There were four Black men in the vehicle. The two men in the front seat got out of the car and went to the Taylor home. [63] They knocked on the door but no one answered. Ms. Wright knew that no one was home as the

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[63] Pretrial, Ms. Wright stated that she went into her home and left her door cracked so that she could watch the men. At trial she testified that she sat on the porch with her daughter and watched the men. (RT 2364, 2366-2367.)

Taylor car was gone. As the two turned to leave one of them stated, "When we catch Michael we're gonna kick his ass." Both men seemed very angry. When the two men who were still seated in the car noticed that Ms. Wright was watching, one of them went into the front seat and drove the car from sight. Ms. Wright gave descriptions of the two men who had gone to the door and stated that the shorter of these two looked like the nephew of a neighbor, Otis Porter. (Exhibit 48, Guilt Phase Exhibits Vol. 3.)

Contrary to respondent's assertion, Ms. Wright's trial testimony was almost entirely inconsistent with her earlier statement.

At trial, Ms. Wright stated that each of the four men got out of the vehicle. [64] One stayed at the car, another stood at the side of the apartment and two went to the door. When one of the men knocked at the door, Cora Taylor called for Michael. Michael came to the door but remained behind the screen. Ms. Wright overheard the men arguing over money. One man grabbed Michael, then they all left. (RT 2355-2356.)

Ms. Wright identified one of the men who went to the door as co-defendant Craig Ross. The man with Ross at the door was taller. This taller man was the man who grabbed Michael. (RT 2356.)

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[64] Note, this was not the vehicle associated with the Taylor homicide.

2. The claim is timely.

As with all claims above, respondent responds to this subclaim with no independent or contradicting documentary evidence. In addition to the exhibits supporting the Taylor claims above, petitioner offers Exhibits 48-51. Exhibits 48, 49, and 50 were contained in trial counsel's file. Exhibit 51 is a portion of the Mallet transcripts.

To reiterate, although investigative reports and other police generated documents contained in trial counsel's file were in the possession of Mr. Merwin during his tenure as habeas counsel, Mr. Merwin was not allocated funds with which to investigate the Taylor crimes until 8/24/94, less than two months before Mr. Merwin was required to quit work on petitioner's case. Before funding was secured, Mr. Merwin concentrated his efforts on penalty phase investigation, attempting to obtain confidential legal visits, record review, formulation of possible claims and contacting possible expert assistance. After limited funds were approved, Mr. Merwin continued penalty phase background investigation.

Present habeas counsel's review of the appellate record and trial counsel's file was completed in August of 1996. Having familiarized herself with case and set investigative priorities, counsel requested funding for investigation from both the state and federal courts in early November 1996. State funding was denied on

January 28, 1997. A few weeks earlier, on January 7, 1997, the federal court partially granted and partially denied petitioner's federal request. Once federal funding was authorized in January of 1997, petitioner could begin actual guilt phase investigating in earnest.

As argued above, all of the Taylor subclaims are interrelated areas of proof that petitioner was not involved in the Taylor crimes and therefore support the larger claim that trial counsel provided ineffective representation as to the Taylor crimes. Again, the fact that petitioner was not guilty of the Taylor crimes bears directly on his guilt of the Hassan crimes, the Jefferson crimes, the finding of special circumstances and imposition of the death penalty.

Petitioner incorporates here his timeliness arguments as to the previously discussed Taylor claims. This subclaim should be addressed on the merits for the same reasons that subclaim VI.C. should be deemed timely and addressed on the merits.

> *3. Trial counsel's failure to discover, present and argue evidence that the motive for the Taylor killing was personal retribution thereby undercutting the prosecution theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers was not a reasonable tactical decision and was prejudicial.*

Respondent asserts once more that the decision not to present evidence which indicated the motive for the Taylor crimes was personal retribution rather than a

conspiracy to rob and murder marijuana dealers was a reasonable tactical decision and in any event, not prejudicial as petitioner was not charged or convicted of the Taylor crimes. (Informal Response at p. 68.) As with each subclaim referring to the Taylor crimes, petitioner restates that it was not reasonable to forgo presenting a defense to the Taylor crimes merely because petitioner had not been charged. To repeat, the prosecutor argued that *if petitioner was guilty of the Taylor crimes he was necessarily guilty of the Hassan crimes*, and by implication, of the Jefferson murder as well. Moreover, under this theory, the Jefferson and *Taylor crimes provided the prosecutor's principle evidence to support a finding that petitioner possessed the mental state necessary to prove the Hassan special circumstances.*

Moreover, any tactical decision allegedly made by counsel was not reasonable. In making this claim, respondent relies on counsel's having made a "forceful" argument that Ms. Wright did not identify petitioner, therefore it argues, it was a reasonable tactical decision not to cross-examine Natasha Wright or call Cynthia Wilte. However "forceful" counsel's argument may or may not have been, respondent overstates the lack of identification in Ms. Wright's testimony.

At trial, the prosecutor pushed hard for an identification of petitioner. At no time did Ms. Wright state that she was certain petitioner was not one of the four men, only that she didn't "know one way or the other" and that she was "not sure"

about petitioner. (RT 2354, 2357.) [65] Thus, regardless how forceful counsel's argument that there wasn't a positive identification, the jury was entitled to draw the opinion that petitioner may have been present. A thorough cross-examination of Ms. Wright by impeaching her with her earlier inconsistent statements would have permitted the jury to question her credibility and any identification of petitioner, however uncertain that identification may have been.

Respondent is wrong to assert that "leaving Wright's identification alone" was a reasonable and tactical decision. (Informal Response at p. 66.) This could not be so because, as with every aspect of the Taylor crimes, counsel performed no independent investigation regarding this incident. Mr. Skyers did not interview Ms. Wright or Ms. Wilte. Mr. Skyers did not establish an alibi for petitioner on this day either. The bottom line is that counsel undertook no investigation into the Taylor crimes other than to read the police reports and visit the scene. Because counsel did not consider the police reports relevant to petitioner's involvement in the Hassan crimes. This was because counsel did not anticipate the prosecuting attorney would use evidence of the Taylor crimes to implicate petitioner in the Hassan crimes. (Exhibit 47, Guilt Phase Exhibits Vol. 3.)

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[65] In this respect, Natasha Wright's testimony does not differ greatly from Mary Taylor's.

Further, disclosure of the fact that two other identifiable persons may have threatened Michael Taylor was crucial in countering Cora Taylor's identification of petitioner. According to the documentation submitted with the petition, with some certainty these witnesses identified two men, in addition to Craig Ross, a known perpetrator of the Taylor crimes, who had a grudge against Michael Taylor. "Binkey" was identified as one of the men who killed Michael. Evan Mallet is tied to the crime by this earlier confrontation. (Exhibit 49, Guilt Phase Exhibits Vol. 3.) This witness gave a location for Binkey – he lived across from the park and had more than a nick name or moniker as this man had a brother named La Mar Davis. (Exhibit 50, Guilt Phase Exhibits Vol. 3 and Exhibit 19, Guilt Phase Exhibits Vol. 1.) One man, who may or may not have been Ross, looked like the nephew of a neighbor, Otis Porter. (Exhibit 48, Guilt Phase Exhibits Vol. 3.) There is no indication in trial counsel's files that either he or the police chose to follow up these leads. This is in spite of the fact that police called "Binkey" a "possible suspect." (Exhibit 19, Guilt Phase Exhibits Vol. 1.) Use of all of the information could have cast further doubt on Cora Taylor's identification of petitioner as well as the entire conspiracy theory, petitioner's involvement in the alleged conspiracy and his involvement in the Hassan crimes.

III.

INEFFECTIVE ASSISTANCE OF COUNSEL

CLAIMS RELATING TO THE HASSAN HOMICIDES

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

Specific to this claim are eight detailed subclaims. These claims are as follows:

(1) Trial counsel failed 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.

(2) Trial counsel failed to discover, present and argue evidence that petitioner at the time of the Hassan crimes was at home or picking up his pay check.

(3) Trial counsel failed to discover, present, and argue evidence that the identifications by Elizabeth Moncrief were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief did not match petitioner.

(4) Trial counsel failed to introduce readily available and significantly exculpatory forensic evidence.

(5) Trial counsel failed to request attorney, investigative, and expert support from the trial court, or utilize those funds authorized by the court prior to his appointment.

(6) Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Evan Mallet both at pretrial stages and when used by the prosecution during its cross-examination of petitioner.

(7) Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Craig Ross, and

(8) Trial counsel failed 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 petitioner, if present at the victims' residence, possessed the intent to kill required for special circumstance liability.

Contrary to the assertion of respondent, these claims of ineffective assistance of counsel are not precluded by the procedural bar against unjustifiably delayed claims. Here, petitioner incorporates those portions of this Informal Reply, beginning at page two through page nineteen, and described as: I A. General Reply to Respondent's General Assertion of Untimeliness and B. Miscarriage of Justice Exception to Timeliness Bar.

Further, in so far as trial counsel had no valid, tactical reason for the errors and omissions complained of and petitioner was deprived of a fair trial as a result of these errors and omissions, petitioner has established a prima facie case for relief.

Attached to petitioner's petition are 18 exhibits, [66] including the declaration of trial counsel, now Los Angeles County Municipal Court Judge, Ronald K. Skyers (Exhibit 47), which individually and cumulatively represent reasonably available documentary evidence demonstrating that petitioner was not involved in the Hassan crimes and that trial counsel's failure to discover, present and argue evidence of

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[66] See Exhibits 47, 52-68.

petitioner's lack of involvement was not the result of a reasonable tactical decision.

A. Correction of Respondent's Erroneous Factual Allegations Regarding This Claim

As with the Taylor crimes, in stating the "facts" applicable to the Hassan crimes, respondent once more fails to cite to the record or exhibits. (Informal Response at pp. 69-70.)

Apparently, respondent culls many of its "facts," which consists primarily of Ms. Moncrief's trial testimony, from previous briefing. (See Respondent's Brief at pp. 4-8.) Unlike the appellate briefing, here respondent fails to acknowledge the myriad of inconsistencies in Ms. Moncrief's testimony in all areas of her observations, including the description of the men, the car, their activities, and the time of the crime which are all apparent from the record.

Petitioner has demonstrated with the exhibits attached to his petition that Ms. Moncrief's testimony is even more unbelievable than was acknowledged by the prosecutor at trial. A full discussion of Ms. Moncrief's testimony and many statements is set out below.

Respondent also asserts that "when petitioner was arrested, he was wearing one of the rings and the necklace taken from Bobby Hassan." (Informal Response at p. 70.) This factual rendition goes further than respondent's assertion in previous

briefing that the ring and necklace were identified by Merci Hassan (RB at p. 14), and necessarily ignores petitioner's proof at trial that the necklace was a mass produced piece of costume jewelry and here that the ring was also mass produced, and most importantly, not Bobby Hassan's.

B. Trial counsel's failure to investigate, discover, and present evidence in defense of the Hassan Crimes was not the product of a reasonable tactical decision.

To each subclaim, respondent contends that petitioner has not presented reasonably available documentary evidence demonstrating his counsel's failures to discover, present and argue evidence in defense of the Hassan crimes was not a tactical decision. (Informal Response at pp. 72, 78, 79, 82, 86, 88, 90, 93, 99.) Like its response to the Taylor claims, as to allegations of trial counsel's failure to raise evidentiary objections, respondent asserts that these omissions were either not error or were harmless or both. (Informal Response at pp. 89, 91, 94.)

As to each subclaim below, petitioner will address the question of whether the errors and omissions of trial counsel were based on reasonable tactical decision and whether these errors and omissions resulted in prejudice to petitioner. Generally, petitioner incorporates his argument above, in section II B, beginning with the first full paragraph of page 35 through the first paragraph of page 36.

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

1. This subclaim is not untimely.

In addition to the trial transcripts of *People v. Champion* Los Angeles County Superior Court case number A365075, petitioner relies on Exhibits 55, 56, 57, 58, 59, 60, 61, and Judge Skyers declaration, exhibit 47. Exhibits 55, 56, and 58 (Sue Rose Winbush investigative report, the ring receipt and the ring drawing) were available in trial counsel's files. The remaining exhibits (the declarations of Elridge Moore, Walter Winbush, Mike Reese, and the Best Catalog page), were obtained through the efforts of current habeas counsel and her investigative team.

As was the case with investigation of the Taylor claims, present habeas counsel's review of the appellate record and trial counsel's file was completed in August of 1996. Having familiarized herself with case and set investigative priorities, counsel requested funding for investigation from both the state and federal courts in early November 1996. State funding was denied on January 28, 1997. A few weeks earlier, on January 7, 1997, the federal court partially granted and partially denied petitioner's funding request. With funds provided by the federal court, petitioner was able to hire investigators in Los Angeles to search for and

interview witnesses and obtain declarations. [67] It was through the efforts of these investigators that Walter and Sue Winbush were located, that the size of the ring seized from petitioner was determined (Exhibit 60), that a declaration from jeweler Mike Reese was obtained confirming that the ring seized from petitioner was not Bobby Hassan's ring (Exhibit 59), and that a declaration was obtained from Mr. Winbush confirming that his son Raymond -- shortly before Raymond's death - had given petitioner a ring identical to the one seized from petitioner at the time of petitioner's arrest (Exhibits 60 and 61). The ring size was measured in February 1997 (Exhibit 60); jeweler Mike Reese was contacted in March 1997, and provided his declaration September 5, 1997 (Exhibit 59); and Mr. Winbush was located and contacted in September 1997 and provided his declaration in October 1997 (Exhibits 60 and 61). The petition was filed November 5, 1997. Subclaim VII.A was thus filed without substantial delay.

Further, even had it been possible to obtain the declarations and submit this subclaim substantially sooner, it would have been appropriate to delay filing in light

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[67] Prior to the authorization of federal funding, petitioner had approximately $800.00 with which to investigate the entirety of the Hassan claims. A good deal of time, effort, and expense was devoted to various aspects of investigating the Hassan crimes, including attempting to locate Elizabeth Moncrief, Merci Hassan, and Bobby Hassan Jr. -- all essential witnesses -- and none of whom counsel was able to locate prior to filing the Petition.

of ongoing investigation into other potentially meritorious claims which required additional investigation until close to the November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806 (in the interest of avoiding piecemeal litigation, a claim as to which a prima facie case for relief is in hand may properly be withheld if petitioner is engaged in an ongoing investigation of another potentially meritorious habeas claim as to which a prima facie case can't be stated without additional investigation); *In re Clark*, *supra*, 5 Cal.4th at 781, 784 (same)). See, in particular, the discussions concerning the ongoing investigations into claims addressing counsel's ineffective assistance (a) in failing to discover and present evidence that petitioner could not have been involved and that the perpetrators were four other young men (subclaims VI.A and VI.B discussed, above), (b) in failing to challenge the prosecution's graffiti and gang expert testimony (Claim VI.G; discussed above), (c) in failing to discover and present mental impairment evidence that would have undermined the prosecutor's special circumstance mens rea theory (Claim VII.H, discussed below), and (d) in failing to discover and present substantial mitigating evidence at petitioner's penalty phase trial (Claim IX.C, discussed below). Habeas counsel had to coordinate investigation in all of these areas, which added to the time required to complete the necessary investigative work and obtain the required supporting documentation.

Finally, for the reasons set forth at greater length in Part I.B of this informal reply, if subclaim VII.A were deemed untimely it is a claim which should be reviewed on the merits pursuant to this Court's miscarriage of justice exceptions to the timeliness bar. Subclaim VII.A, particularly when viewed in combination with the other subclaims of claim VII and the various subclaims of claims VI (Taylor)and VIII (Jefferson), undermines the prosecution case that petitioner was involved in the Hassan homicides, and (2) dramatically alters (in combination with claim IX.C) the grossly misleading profile of petitioner presented to his sentencing jury. Accordingly, for all of the foregoing reasons, this subclaim should be addressed on the merits.

2. Counsel's failings were not the product of a reasonable and tactical decision.

As above, respondent responds to this subclaim with no independent or contradicting documentary evidence.

Respondent misunderstands the thrust of petitioner's claim. Respondent defends trial counsel for failing to call Sue Winbush to testify about the ring her brother Raymond Winbush gave petitioner. (Informal Response at pp.72-73), but petitioner does not fault counsel for not calling Sue Winbush concerning the ring. Rather, petitioner faults counsel for failing to demonstrate the ring in evidence was

not Bobby Hassan's -- because it is the wrong size -- and for failing to call Walter Winbush, Raymond's father.

Although trial counsel spoke with Sue Winbush, he did not interview Sue's (and Raymond's) father. Years after his son's death, Walter Winbush has a specific memory of the ring given to Mr. Champion which is tied directly to the painful memory of his son's death. (Exhibit 61, Guilt Phase Exhibits Vol. 3.) It is particularly telling that when Mr. Winbush was shown a copy of the Best catalog page, without hesitation and without any prompting, Mr. Winbush pointed directly to the picture of the ring which matches the description of the ring Bobby Hassan had ordered, as the ring which his son Raymond had given to Steve Champion. Mr. Winbush picked the ring from a photograph containing *twenty* different styles of rings. (Exhibit 60, Guilt Phase Exhibits Vol. 3.)

Any inconsistency, should they exist, between the statements of petitioner, Walter Winbush, and Rita Champion are not significant. Although Rita Champion testified that she had seen her brother wear Raymond's ring "about four ago, something like that," Ms. Champion testified in mid-October of 1982. As Raymond Winbush gave petitioner the ring in April of 1980 – nearly three years before the date of Ms. Champion's testimony, Ms. Champions' testimony is not significantly inconsistent.

At trial, petitioner testified that Raymond Winbush gave him the ring in April of 1980, on Easter Sunday -- two weeks before Raymond Winbush was killed. (RT 3027, 3029.) Contrary to respondent's claim, petitioner did not testify that Raymond Winbush gave him the ring to hold as "Raymond was going off to CYA." This is trial counsel's recollection of what petitioner said. Raymond Winbush was shot to death at his home on April 15, 1980. Clearly, two weeks earlier he was not going off to CYA. [68] Petitioner's trial testimony is consistent with the recollection of his sister Rita and Walter Winbush.

Respondent asserts that any further evidence on the issue of whose ring and charm petitioner was wearing at the time of his arrest is "cumulative." (Informal Response at p.73-74.) This is nonsense, unless of course, respondent would like to stipulate that the ring wasn't Bobby Hassan's.

Walter Winbush's memory was very precise and his testimony would have been compelling given the timing of his son's death. Documentation which supported Raymond's date of death and when, if ever, he was housed at the California Youth Authority, as well as other supporting documentation could have

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[68] Respondent offers no documentary evidence to support its assertion that Raymond Winbush was housed at the California Youth Authority at any time during April of 1980, or in custody at any institution after the April 4, 1980 date Walter Winbush identifies as the date Raymond was released from prison. (Informal Response at p. 73.) (Exhibit 61, Guilt Phase Exhibits Vol. 3.)

been gathered.

Moreover, the evidence as to the size of the ring is conclusive. Respondent's effort to suggest that measurement of ring is "suspect" because neither counsel nor her investigator is a jeweler is disingenuous. Measuring a ring with a conical ring sizer is a very straightforward, simple matter. Respondent offers no contrary evidence; and certainly for purposes of determining whether or not to issue an order to show cause, this Court must assume the truth of what is set forth in the petition and supported by petitioner's Exhibits 56, 59-61, i.e., that the ring found in petitioner's possession at the time of his arrest was not the same size as the ring taken from Mr. Hassan.

As the Court states in *People v. Duvall* (1995) 9 Cal.4th 464, 4774-475, a court receiving a habeas petition "evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief? . . . If . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC." Petitioner's exhibits are certainly sufficient to establish "the bona fides of the allegations" (*In re Fields* (1990) 51 Cal.3d 1063, 1070 n.2).

To repeat: The ring found in petitioner's possession at the time of his arrest wasn't the victim's ring.

Finally, respondent suggests that even if the ring found in petitioner's possession at the time of his arrest was not Bobby Hassan's ring, it doesn't matter because petitioner does not, according to respondent, attempt to address the question of ownership of the charm. (Informal Response at pp.74-75.) Respondent forgets that there was trial evidence that the charm was a mass produced item which was not at all unique. Moreover, what the prosecutor at trial relied upon was petitioner's alleged possession of *two* mass produced items matching the two that were allegedly taken from Bobby Hassan at the time of the homicide. This, according to the prosecutor, was too much of a coincidence to have an innocent explanation.

In his closing argument, the prosecutor stressed:

> "Now, if you were to ask me is there one single piece of evidence against Mr. Champion on which I can say yes, based on this alone beyond a reasonable doubt Mr. Champion is guilty, I would say a qualified yes to this.
>
> What I mean by a qualified yes is that the mere fact that somebody winds up in possession a month later of jewelry belonging to a murder victim, if you don't have any other evidence in the case that almost proves him guilty, but it does not quite beyond a reasonable doubt because there are other possible explanations for how that person acquired the jewelry....
>
> [The defense argues that the ring] is not a one of a kind item and the charm is not a one of a kind item.
>
> Agreed. No doubt that somebody else in the world has a ring just like the one in People's 37. No doubt that somebody else in the world has a King of

Heart thing just like that, People's 37, the little medallion.

But, although neither of those items are by themselves one of a kind, as a combination they are, I submit to you, a one of a kind combination.

The chances that there are two separate people in the world each of whom possesses both of those items at the same time, in other words, one person who has that identical ring and that identical charm and another person who has a ring and a charm identical to both of those, are absolutely -- the probability of that are absolutely minuscule." (RT3178-3180.)

The coincidence loses it s incriminating significance once evidence is adduced showing that one of the items — the ring -- clearly wasn't Bobby Hassan's.

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

1. This claim is timely.

Each of the exhibits which support this subclaim were available from trial counsel's file. Although the investigative reports contained in trial counsel's file were in the possession of Mr. Merwin during his tenure as habeas counsel, as discussed in reference to the Hassan claims, Mr. Merwin was allocated funds with which to investigate the Taylor crimes but, this money was not approved until August 24, 1994 just seven weeks before Mr. Merwin took a job with the Orange County Public Defenders office and then, because of job and recurrent health problems, became unable to do further work on the petition. (Petition at pp. 7-8,

Exhibit IA.) Until funding was secured, Mr. Merwin concentrated his efforts on penalty phase investigation, attempting to obtain confidential legal visits, record review, formulation of possible claims and contacting possible expert assistance. Mr. Merwin acted quite reasonably in not filing a petition before being replaced. This is so because Mr. Merwin couldn't finish the investigation. New counsel had to begin by reviewing the entire appellate record, the trial file, police reports, and related records from the court proceedings of other alleged participants before present counsel could reach her own judgment --- as she was ethically obligated to do — as to the relative strength of potential claims, how best to pursue the investigation, which claims to present, what further documentary support and how, with the available funding, to perform each of these task effectively.

Further, the subclaim that petitioner was at home or picking up his paycheck at the time of the Hassan crimes does not stand alone. All of the subclaims relating to the Hassan crimes, the Taylor crimes and the Jefferson crimes are interrelated and dependent on each other, because the prosecution relied on the Taylor and Jefferson incidents to prove petitioner guilt of the Hassan killings and to support a finding of the mens rea required for the finding of special circumstances.

At any earlier date when current habeas counsel could have submitted this subclaim, it was appropriate to delay filing in light of ongoing investigation into

other potentially meritorious claims which required additional investigation until close to the November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806.) This encompassed ongoing investigation into claims relating to counsel's ineffectiveness (a) in failing to discover and present evidence that petitioner could not have been involved in the Taylor crimes and that the perpetrators were four other young men (subclaims VI.A and VI.B discussed above), (b) in failing to challenge the prosecution's graffiti and gang expert testimony (subclaim VI.G; discussed above), (c)in failing to discover and present evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan (subclaim VII.A, discussed above), (d) in failing to discover and present mental impairment evidence that would have undermined the prosecutor's special circumstance mens rea theory (Claim VII.H, discussed below), and (e) in failing to discover and present substantial mitigating evidence at petitioner's penalty phase trial (subclaim IX.C, discussed below).

Further, in light of the rarity of this Court's issuance of orders to show cause, counsel doubted that the Court would deem claim VII.B standing alone, without presentation of the other related claims sufficient to state a prima facie case for relief, and accordingly for that reason as well counsel was warranted in delaying presentation of this subclaim. (*In re Robbins, supra*, 18 Cal.4th at 806-807 n. 29

(majority), and 820-821(Justice Kennard, concurring and dissenting (counsel may properly delay filing claims or subclaims which, standing alone, may be insufficient to support a prima facie case until such time as the related claims or subclaims to which the withheld claims can be joined to support a prima facie case are ready to be filed). Finally, as explained above in connection with the discussion of the timeliness of Subclaim VII.A each of the subclaims of Claim VII, particularly when viewed collectively and in combination with Claims VI (Taylor claims) and VIII (Jefferson claims), should be reviewed on the merits pursuant to this Court's miscarriage of justice exceptions to the timeliness bar even if deemed untimely.

2. Trial counsel's failure to discover and present evidence was not the product of a reasonable tactical decision.

In petitioner's defense, trial counsel attempted to establish an alibi for petitioner for the time of the Hassan crimes. Cumulatively, the witnesses testified that on the day Bobby and Eric Hassan were killed petitioner was home, that he spent some time on the telephone with Sue Winbush, and then went with his brother to pick up his paycheck. In his petition, petitioner claims that through incomplete investigation trial counsel failed to present other evidence *to support* the testimony he offered to establish that petitioner had an alibi for the Hassan killings. This is so because trial counsel made no effort to obtain either the employer's list which would

have contained petitioner's signature, and perhaps the signatures of others who too might recall the time they had gone to pick up their paychecks or petitioner's telephone records so that the time at which each of petitioner's activities for the day had taken place could have been supported by documentation and thereby corroborate petitioner's testimony that he could not have committed the Hassan crimes because at the time of the Hassan' deaths he was either at home on the phone or going to get his paycheck. (Petition at pp. 80-81.) [69]

Respondent claims that counsel was correct not to attempt to bolster the oral testimony of witnesses with documentary evidence because "such records could have been detrimental to petitioner's defense." (Informal Response at p. 77.) This is nonsense and not supported by any independent documentation offered by respondent to counter this claim.

On review, as with his other failings, trial counsel recognizes that the alibi defense he offered was not strong, and that he had the responsibility to attempt to discover and then produce evidence to support the testimony of petitioner's family members and friend. (Exhibit 47, Guilt Phase Exhibit Vol. 3.)

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[69] In his closing argument, the prosecutor accepted, for the sake of argument, that petitioner and his brother went to pick up petitioner's paycheck on the day of the Hassan crimes, and faulted trial counsel for failing to demonstrate with any certainty that doing so necessarily meant that petitioner was not involved in the killings. (RT 3391-3393.)

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

1. This subclaim is not untimely

In addition to the timeliness arguments which have been previously alleged specifically as to the Hassan claims and generally to the petition as a whole, this subclaim has been timely presented for additional reasons. Although many of the exhibits which support this subclaim are contained in the appellate transcripts and/or trial counsel's files, at least one of these exhibits, Exhibit 64, was only discovered after the Los Angeles County District Attorney complied with present habeas counsel's Freedom of Information Act request for records. In addition, at the time present habeas counsel was appointed, only $800.00 was available for investigation into the Hassan crimes. One priority was to attempt to locate Elizabeth Moncrief. Petitioner spent a significant amount of time attempting to locate this witness, but to date, has been unsuccessful.

Petitioner incorporates here his timeliness arguments as to subclaim VII.B. Those arguments apply fully to this subclaim, and for the reasons stated in these arguments, this subclaim is timely, and even if it were deemed untimely, should be

addressed on the merits.

2. Respondent's factual rendition omits the sequence of conflicting statements.

Respondent devotes a mere two paragraphs to Ms. Moncrief's pretrial identifications and trial testimony. (Informal Response at pp. 78-79.) Respondent's summarization is inadequate. In order to give the reader a true flavor of the incredible identification by Ms. Moncrief, it is necessary to fully recite the witness's pretrial and trial statements.

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

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

When questioned by police, petitioner's arrest, Ms. Moncrief positively identified Benjamin Brown as the individual she later identified as petitioner. She further identified Clarence Reed as the driver of the car and identified Mr. Brown's car as the car she had seen at the Hassan residence on the day the Hassans were killed. (RT 1825.) Mr. Brown and Mr. Reed were two young African American men who, perhaps not so coincidentally, were involved in an armed robbery *the day after* the Hassan killings. Mr. Reed was killed during this incident. (RT 2061.) Mr. Brown generally matched Ms. Moncrief's description of the Hassan perpetrators as he had chipped front teeth and was close in height to all of the individual described by Ms. Moncrief to police.[70] (RT 1991-1992, 2095-2096.) Mr. Brown was also identified by Hassan's wife, Merci Hassan, as an individual who had purchased marijuana from Hassan three weeks prior to the homicide. (RT 2058-2059.) The

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

property report for Mr. Reed -- prepared in connection with Brown's arrest for the armed robbery, which too occurred in South Central Los Angeles -- included a gun fitting the description of the gun used in the Hassan killings, two gold chains, such as those claimed to have been taken from Hassan, and dark gloves such as Ms. Moncrief claimed to have seen petitioner wearing when he exited the Hassan residence. (RT 1726, 1803, 2405-2407, 2994-2995.) Ms. Moncrief and Mr. Brown resided on the same street. (RT 1797.)

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

Further evidence of Ms. Moncrief's incredibly faulty memory is the fact that she testified that she was certain that she had been employed for "almost a year."

(RT 1765.) In fact, as testified to by her patient's daughter Ms. Moncrief began her employment in November, 1980. (RT 2787.) But, Ms. Moncrief was never cross-examined about this striking disparity. [71]

According to her trial testimony, on the day of the killing, Ms. Moncrief last saw Bobby alive at 11:15 a.m. Ms. Moncrief and Hassan had a conversation outside at that time. (RT 1713-1714.) When she returned from the store five minutes later, Ms. Moncrief saw Hassan's car in the driveway. She went into her employer's house and saw people at Bobby Hassan's house. Ms. Moncrief also saw a car parked in front of where she worked. There were four men in the car. (RT 1720.) The men were African American. Unlike her pretrial testimony, here, the car arrived before noon rather than after and the car was not seen by Ms. Moncrief as it arrived. Two rather than four men were inside of the car.

Thereafter, Ms. Moncrief went to get her patient lunch. (RT 1714.) By this time the car was empty. The next thing she saw was "four guys leaving -- one at a time -- from Bobby's front door." Two of the men were the two who she had seen in the car earlier. All four men were carrying something. One had a pink pillow case and the others had shopping bags. The fourth individual was wearing gloves

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[71] According to undated handwritten notes contained in the district attorney files, (Exhibit 62), Ms. Moncrief had been employed for 3 ½ weeks prior to Bobby Hassan's killing.

and covered his face when a car drove by. (RT 1723-1727.)

In an undated report (Exhibit 62), Ms. Moncrief described the four men as follows:

Number 1 -- 5'6-5'7 small, 145 lbs. 20-25 years old, processed, superfly hair style, dark complected, and wearing a plaid Pendelton-type coat, blue shirt, dark pants. Number 1 carried the pillow case and was the driver of the vehicle.[72] This man was seen by Ms. Moncrief at the location on the Monday or Tuesday preceding the crimes.

Number 2 -- smaller than the driver, approximately 5'5 and weighing 135 lb. This man wore a dark jacket, shirt, hat, dark pants and suspenders. He was dark complected, had hair protruding from under a hat and had a **scar on the upper bridge of his nose.**[73]

Number 3 -- 5'7 and weighing 135 to 140 pounds. He was 20 to 25 years old, light complected, wearing natural hair. This man was bowlegged. He wore a plaid shirt and dark pants and carried a paper sack.[74]

Number 4 -- wore gloves, a wool jacket, a beanie, and dark shoes. He was dark

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

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

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

complected, had **long hair**, and **a long nose**. This man covered his face when a car passed and carried a paper sack. This man was also previously seen at the residence. (Exhibit 62 -- Undated Handwritten Report.)

In a December 16, 1980, statement taken by Officers Dorman and Crews, (Exhibit 63), Ms. Moncrief added to the above statement that **Number 1** had a jheri curl, and that **Number 4** was number 2 of a photographic spread.[75] **Number 4** was now described as "husky," with a "broken front tooth." Ms. Moncrief is consistent in that **the second guy out of Bobby's house had a scar on the bridge of his nose.** (Exhibit 63 -- 12/16/80 Statement of Elizabeth Moncrief.)

In a typed statement dated January 9, 1981, (Exhibit 64), Ms. Moncrief made some additional and significant changes to her initial identifications. Ms. Moncrief added that **Number 1** had a light mustache and big, open eyes. **Number 2** also wore a light mustache. In this version it was now **Number 3** who was described as having not only **a scar on the bridge of his nose** but also **a little bit of a scar running on to the left side of his face.** **Number 3** rather than number 4 had **chipped front upper teeth**. He was 5'5-5'7, 135-165, solidly built with long hair and thick lips. Ms. Moncrief now described **Number 4** as 5-5-5-7, 145, solidly built, 20-25 years old. **Number 4 rather than Number 3** was bowlegged with

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[75] Later identified as Benjamin Brown

natural long hair coming from under his cap, side burns and light hair on his face. (Exhibit 64 -- Typed Statement re: Hassan Suspects.)

On January 9, 1981, petitioner was arrested. The investigator's report indicates the following description of petitioner at the time of his arrest. **6'1, 183 lbs,** and 18 years old. Petitioner had **a light scar on his cheek and lip,** thick lips, **protruding and irregular upper teeth.** Petitioner wore his hair in a **bushy afro.** His ears were described as small and close to the head. Petitioner had a left earring. He wore a **thin mustache and goatee.** (Exhibit 65 -- Police Report.)

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

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

(CT 17, 28.) In this version, Ms. Moncrief purposely walked past the car so that she could see what the men were doing. (CT 33.)

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

Ms. Moncrief saw the curtain go back again three times, then saw a man come out with a pillow case. Another came out with a bag a few seconds later. Another came out with a bag about two seconds later, then petitioner allegedly came out last and carrying a bag. (CT 19-20.) Ms. Moncrief put the time of this man's exit at 12:25 p.m. (CT 20.)[76]

When a green Mercedes came down the street, the man Moncrief identified as petitioner put his hand over his face and turned toward the window Ms. Moncrief

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

was looking out of. Ms. Moncrief saw a scar on his face and a "broken tooth." (CT 20.) This man wore brown gloves. (CT 21.) On cross-examination Ms. Moncrief added that petitioner had on a big jacket. (CT 25.) He was "wider" and "heavier" then the other men. Ms. Moncrief did not describe him a taller. (CT 25.)

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

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

On January 9, 1981, Ms. Moncrief was shown a series of six photographs. Ms. Moncrief was unable to identify anyone. (RT A-109.) A few days later, Ms. Moncrief was presented with a live line-up at which she identified petitioner. (RT A-111.) Ms. Moncrief now stated that she had seen petitioner **several** times before the date of the incident. (RT A-112.) Ms. Moncrief gave the following descriptions:

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

She testified that the two men in the back seat got out first. (RT A-118.) The man seated in the back seat behind the passenger was described as **5'5, 165 lb.,** dark, beanie, dark clothes, very thick lips, **a scar across his face on the left side** and **a chipped tooth.** (RT A-116-A-117.) The other back seat passenger was

identified as wearing **braids** and suspenders, 5'5-5'6, 160, and very rugged looking. (RT A-118.) Ms. Moncrief saw the men when she went down to retrieve something from her car. She went outside to see what they were doing *because they had been there for so long* she became concerned. (RT A-121.) At this juncture, Ms. Moncrief claimed to come outside *two, rather than one* additional times. The first time she went out all four were sitting in the car. When she went out the second time, there were only **two** men in the car. (RT A-122.)

Ms. Moncrief explained that she saw the car after she had gone out and had seen the four men in the car, then she went inside. As she was sitting and having (rather than preparing lunch) she watched them for awhile and saw two of the men get out of the car and walk up to the Hassan house, ring the doorbell, and rush around the side of the house. (RT A-123.) She assumed they were there on business *because they had been there before.* (RT A-124.) **She did not see these two go into the house.** (RT A-128.)

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

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

At trial, Ms. Moncrief testified as follows:

After she returned from the store, she had a conversation with Bobby Hassan. Hassan left and Ms. Moncrief went inside. Thereafter, she went inside to make lunch for her patient. Ms. Moncrief looked out the window while making lunch and saw a car parked in front of the house.[77] It was a large car and there were four men seated inside of it. (RT 1714-1716.) The men remained in the car **until Bobby Hassan returned home**. (This conflicts with her earlier statement in which she recalled that Bobby Hassan had already returned prior to the car's arrival.) (RT 1716.)

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

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

the house. (RT 1722.)

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

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

Thus, at various times, Ms. Moncrief claimed that suspects numbered 2, 3, and 4 had a facial scar.[78] Initially, Ms. Moncrief did not recall anything unusual about suspect number 4's teeth. When she did, she initially described the abnormality as "chipped front upper teeth, " then definitely not a gap, then as a broken tooth, and finally as a gap or a space. Again, the police described

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

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

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

petitioner's teeth as "buck teeth" or "protruding and irregular." (Exhibit 65.)

At no time was Ms. Moncrief's description of petitioner's height or weight remotely close to petitioner's actual size. As noted by police, on January 9, 1981, when arrested petitioner's height was 6'1 and his weight as 185 pounds. The earlier, November 28, 1980 field identification card has his height as 6'0 and weight as 185 pounds. Ms. Moncrief consistently described the man she identified as petitioner as being between 5'5 and 5'7. Ms. Moncrief estimated this suspects weight at 165 pounds. He was husky, solidly built, or heavy. According to Ms. Moncrief, all of the men were essentially the same size with one of them being only slightly taller. (RT 1777.)[79]

On cross-examination at trial, Mr. Skyers attempted to impeach Ms. Moncrief's identification of petitioner and the Player car by pointing to the certainty of Ms. Moncrief's earlier identifications of Mr. Brown and Mr. Reed and the automobile associated with them. As he stated in his declaration, his focus was not to point out the multiple inconsistences in her various statements and identifications and he instead chose to rely on her earlier identification of Brown and Reed to demonstrate that her second identification, that of petitioner, was unreliable.

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

(Exhibit 47.) Unfortunately, Ms. Moncrief disputed the certainty of her earlier identifications and let the jury believe that those were only tentative and her identification of petitioner was the most solid. For example, when Mr. Skyers questioned Ms. Moncrief about her identification of the car associated with Benjamin Brown and Clarence Reed, Ms. Moncrief responded that she hadn't been entirely certain of her first identification. (RT 1739-1741.) Although Ms. Moncrief ultimately admitted that she changed her initial identifications of the passenger, the driver, and the car, Ms. Moncrief explained that she never told anyone that she had been positive, only that the Brown and Reed car resembled the car she had seen at the Hassan residence and that Mr. Brown looked familiar and that she had seen him before. (RT 1742, 1751, 1757-1758.)

In only one instance on cross and three on re-cross was Ms. Moncrief actually confronted with her earlier statements or testimony. Mr. Skyers impeached Ms. Moncrief with her preliminary examination testimony on three occasions, twice having to do with Ms. Moncrief's prior description of the suspect's teeth as "chipped" rather than with a gap, and once on whether the first two men went around the house. (RR 1778-1780, 1793, 1803.) On re-cross examination, Mr. Skyers specifically referred to Ms. Moncrief's December 16, 1980 statement to police. That statement was marked as defendant's F and Ms. Moncrief was asked

to read it. (RT 1837.) Although her discrepancies in the description of the car were noted, Mr. Skyers neglected to point out that in this version, Ms. Moncrief said the scar was on person number Two. (Exhibit 63; RT 1838-1848.)[80]

It is clear that contrary to respondent's claim, Ms. Moncrief's inconsistent statements were not only not explored at length (Informal Response at p. 80), but some of the most damaging aspects of her testimony, i.e., who had a scar and where, what sort of teeth deformity a suspect had and which suspect had it, were not before the jury at all. Respondent erroneously implies that the bulk of Ms. Moncrief's inconsistencies were before the jury. This is simply not true. Finally, although the prosecutor acknowledged that there were problems with Ms. Moncrief's identification, he did entirely forego reliance upon it. The prosecutor argued that Ms. Moncrief's identification of petitioner was correct and entitled to some weight and that based on the identification and other evidence of the case the jury should find petitioner guilty. (RT 3172-3178.) [81]

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

[81] In closing, the prosecutor vouched for the witness. "It's only when you look at her testimony in the light of everything else in this case that you realize that whether or

3. Trial counsel's failings were not the product of a reasonable tactical decision.

Respondent asserts that trial counsel made a tactical decision not to fully impeach Ms. Moncrief with her many inconsistent identifications. Respondent argues this point as follows:

> "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.) [82] Accordingly, counsel's decision to limit Moncrief's impeachment was tactical and reasonable." (Informal Response pp. 79-80, (see also p. 81).)

Characterizing trial counsel's strategy this way is completely unsupported by the record. During trial, counsel clearly stated that it was not his intent to prove that

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not she is intrinsically convincing as a witness, she has to be correct. (RT 3172.) And later, "So, I am not telling you to base this case entirely around Elizabeth Moncrief, I don't think I have ever indicated you should, and I never will. But I think you have to give her some significant credibility, and I think that credibility is ultimately bolstered when you look at all the other evidence in the case. (RT 3178.)

[82] Trial counsel never asserted that Brown and Reed committed the Hassan murders. Rather, counsel countered the prosecutor's argument of mathematical probabilities of someone who hadn't committed the murders to have both a ring and chain identical to the ones belonging to a victim with the mathematical probabilities inherent in a eyewitness identification of a suspect and his car and a similar weapon which was never subjected to forensic comparisons *which the police chose to ignore when they decided to prosecute defendant based on his alleged association with Raymond Street Crips.* (RT 3256-3259.)

Brown or Reed committed the Hassan murders. (RT 2627.) The only reason counsel questioned Moncrief about her prior identifications of Brown and Reed was for the purpose of impeaching her subsequent identification of petitioner. (*Ibid.*) Neither does Judge Skyers declaration indicate otherwise. Judge Skyers clearly states that he cross-examined Ms. Moncrief in order to impeach her identification of petitioner. He does not assert that he made a tactical decision to use Ms. Moncrief's identification of Brown and Reed to demonstrate that one or both were involved in the Hassan crimes. (See Exhibit 47 ¶ 20, Guilt Phase Exhibits Vol. 3.) Once again, respondent mischaracterizes the record.

Respondent describes petitioner's exhibits as "neither corroborated nor authenticated." (Informal Response at p. 80.) Exhibit 62 is a copy of a document provided to present habeas counsel by the Los Angeles County District Attorney, two identical, but not redacted documents are contained in trial counsel's file in a folder marked "Statement – Champion." Each of trial counsel's copies of exhibit 62 is stapled to other investigative reports which bear the signature of witnesses and/or police officers.

Exhibit 64, which is not undated, was also provided to present habeas counsel by the Los Angeles County District Attorney and was accompanied by an

investigative report. [83] If it is true that Exhibit 64 was not provided to trial counsel, petitioner has a claim of *Brady* [84] error.

In any event, the documents attached as Exhibits 62 and 64 are sufficiently corroborated and authenticated for their use here. There is no reason to believe that the exhibits are not investigative reports. There is also no reason to believe that they do not contain descriptions from Elizabeth Moncrief, as she was the only witness (revealed to petitioner) to have seen the Hassan suspects. Were these neither police generated documents nor statements from Moncrief, respondent is certainly in the position to explain what they are.

Insofar as respondent has suggested no reason to believe the exhibits are not as described by petitioner, and at least at this stage of the proceedings, i.e., before petitioner has access to discovery, this Court should assume that these reports, taken from the district attorney and/or trial counsel's files, are as petitioner alleges, notes regarding interviews with the only eyewitness, Ms. Moncrief.

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[83] Second page of Exhibit 64.

[84] *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194.)

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

1. This claim has been timely filed.

Petitioner incorporates here the timeliness arguments which have been previously alleged as specifically as to the Hassan claims and generally to the petition as a whole. Further, petitioner requested funding for forensic tests from both this Court and the federal court. Each of petitioner's requests have been denied. Further, petitioner incorporates here his timeliness arguments as to subclaim VII.B. Those arguments apply fully to this subclaim, and for the reasons stated in these arguments, this subclaim is timely, and even if it were deemed untimely, should be addressed on the merits.

2. Trial counsel's failure to introduce exculpatory forensic evidence was not the product of a reasonable tactical decision.

Respondent asserts that "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.* (Informal Response at p. 82.) As in so many instances, respondent mischaracterizes trial counsel's declaration. Trial counsel was not so emphatic in his declaration. To the contrary,

Judge Skyers declared the he "could offer no tactical reason for failing to present this information to the jury except for the fact that [the evidence] was negative." (Exhibit 47, Guilt Phase Exhibits Vol. 3.) Judge Skyers does not say that he made any intentional decision to not introduce the evidence. At most, he identifies a possible reason.

In any event, the decision not to introduce negative evidence, for what ever reason, was not a reasonable one. Negative results are exculpatory. This is especially true given the testimony at trial.

Elizabeth Ms. Moncrief testified that the person she ultimately identified as petitioner was wearing **dark gloves.** (RT 1726, 1732.) Detective David Crews testified that there was a large amount of splattered blood at the scene. (RT 1938.) [85]

According to the prosecution's account of the murder, Bobby and Eric Hassan were killed with a high-powered .38 caliber revolver and the bullets from the gun entered with such force that they "pulped" brain matter and shattered the skulls as they exited. (RT 2075-2077.)

Certainly had a gun been fired by petitioner while he wore them -- recall, this was Ms. Moncrief's testimony -- gun-shot residue would be spread over the surface of the gloves.

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[85] Crime scene photos depicted as much. (Trial exhibits 66, 67, and 76.)

Respondent is also quite wrong in suggesting this claim "presupposes petitioner's presence at the scene." (Informal Response at p. 82.) Petitioner argues, to the contrary, that if petitioner had been at the scene, there would have been blood and/or gun-shot residue on his gloves. Since there was no blood or gun-shot residue on petitioner's gloves, he was not present.

Finally, as to the prong of prejudice, the absence of blood and/or gun-shot residue goes beyond the special circumstance issue, which the prosecution conceded rested on an accomplice theory. Finally, negating the possibility that petitioner was the gunman would have impacted the jury's decision at the penalty phase.

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

In this claim, respondent again misrepresents the record. Respondent's factual misstatements and illogical argument lead respondent to the erroneous conclusion that counsel acted in accordance with a reasonable tactical decision.

Contrary to respondent's claim trial counsel Ronald Skyers never consulted with, employed, or called to aid in petitioner's defense *any* of the experts for whom Homer Mason received funding authorization. (Informal response at p. 84-85.) Further, Mr. Skyers never, on his own, sought any funding with which to consult and retain experts, second counsel or an investigator.

When Mr. Skyers took over representation of petitioner he had the following funding available:

$450.00	Ballistics expert. (CT 224-225.)
$400.00	Eyewitness identification expert (Dr. Robert Wm. Shomer) (CT 224-231.)
$250.00	Probation consultant (Clyde Longmire) (CT 382.)
$135.00 [86]	Doctor to perform a psychiatric evaluation (Dr. Seymour Pollack, M.D.(CT 397-399, 578-580.)
$ to be paid by Los Angeles County:	Investigator (CT 572.)

The ballistics expert funding was never used by either Mr. Mason or Mr. Skyers. [87] The eyewitness expert funding [88] was never used by either Mr. Mason or

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[86] Trial counsel recalled the amount as $450.00. This appears to be the product of faulty recollection. (Compare Exhibit 47 par. 5 with CT 579-580.)

[87] Respondent's assertion that a ballistics expert was hired and utilized by Mr. Mason (Informal Response at p. 85, fn. 38), is not supported by the record. The record on appeal contains only one order for removal of the Brown/Reed gun and the bullet fragments from Bobby Hassan and Eric Hassan in order to perform comparison tests. This order was applied for, but never used, by Mr. Skyers. (CT 410-411.)

[88] Petitioner apologizes for the error at page 121 of his petition, where he inadvertently states that Dr. Shomer, rather than Dr. Pollack performed a cursory examination of petitioner. Respondent misuses this clerical error to argue that petitioner confirms that Dr. Shomer was hired and conducted an examination of petitioner. (Informal Response at p. 84.) Respondent is aware that Dr. Pollack and not Dr. Shomer examined petitioner (see Informal Response at pp. 85, 100 fn. 47), and in any event, tht since Dr. Shomer was appointed as an "eyewitness expert," any examination of petitioner for this purpose would have been nonsensical.

Mr. Skyers. The probation consultant was never used by Mr. Skyers. According to billing between March 1981 and August 1981 (5 months), Mr. Mason consulted with an investigator and a probation consultant for a total of four hours. (CT 597-601.)

Mr. Skyers neither consulted with the probation consultant nor an investigator, although Mr. Skyers apparently read investigative reports prepared by Mr. Mason's investigator. [89] Although further funding was not disapproved, Mr. Skyers did not request the investigator perform any follow-up or different investigation than that which was performed at Mr. Mason's request. Mr. Skyers himself did not discuss the impressions, if any, and suggestions, if any which were the topic of conversation between Mr. Mason, the investigator and the probation consultant.

Funding for Dr. Seymour Pollack was secured by Mr. Mason. [90] Petitioner

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[89] This would certainly be a requisite task for any replacement attorney to perform.

[90] The motion for appointment of Dr. Pollack was filed on August 4, 1981. Although Mr. Skyers name is stamped on the front, Mr. Mason's name is referenced in the body of the motion. (CT 579-580.) Mr. Skyers was appointed on August 24, 1981. (CT 569.)

was examined by Dr. Pollack at Mr. Skyers' request. Petitioner has not alleged that no psychiatric evaluation was performed (Informal Response at p. 85), only that the examination was minimal, insufficient, and insofar as the expert was not provided with necessary background information, [91] any decision not to call Dr. Pollack or to request further testing, was not the result of a reasonable tactical decision. Attached hereto as Exhibit 5A is the letter detailing findings by Dr. Pollack to Mr. Skyers. Besides being entirely consistent with petitioner's claim of innocence, the letter demonstrates the truly limited nature of the inquiry performed by Dr. Pollack and the complete lack of substantial information from which Dr. Pollack had to work. In addition to a letter from Mr. Skyers, Dr. Pollack reviewed only arrest reports, autopsy reports, and preliminary transcripts. Dr. Pollack's inquiry was limited to five "legal" defenses. (Exhibit 5A.)

Similarly, trial counsel's decision *not* to utilize ballistics funding was not reasonable. Trial counsel explained that he "did not think the ballistic issue was major, or failed to see it as a major issue." (Exhibit 47, guilt Phase Exhibits Vol. 3.)

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

Respondent argues that this was a reasonable decision in light of the prosecution's concession that he did not know the identity of the triggerman, and the special circumstance findings necessarily rested on an accomplice theory. (Informal Response at p. 86.) Respondent is wrong.

The prosecutor's reliance on accomplice theory of responsibility did not make the ballistics testing less relevant. If Benjamin Brown's gun matched, the prosecution's theory of the case would have collapsed. Further, the prosecutor ultimately argued that petitioner was likely to have been the gunman. [92] Finally, trial counsel did, at one time, form the impression that ballistic testing was necessary. To that end, in December, 1981, he applied for an order to remove the Brown/Reed gun and the bullet fragments from Bobby Hassan and Eric Hassan in order to perform comparison tests. (CT 410-411.) The gun was released on February 2, 1982. There is no explanation why Mr. Skyers did not have the comparisons performed during the two months preceding the release of the gun and following the court's order. (CT 443-444.)

Respondent argues that petitioner can not demonstrate prejudice. This is not so. Certainly, the services of an investigator would have been useful to trial

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[92] "Based on this evidence, if I had to give you my best estimate, I would say that in the Hassan case it is more likely Mr. Ross or Mr. Champion who were the shooters than the other two unknown individuals who were involved." (RT 3338.)

counsel, as they have been to habeas counsel, to uncover the wealth of exculpatory information that petitioner has presented to this Court. [93] Further, trial counsel's meager effort at presenting mitigating evidence at the penalty phase could have been enhanced by the services of a probation consultant. [94] Given the obvious problems with Ms. Moncrief's identification testimony, an expert here may have provided persuasive expert opinion which would have countered the prosecutor's inappropriate, and decidedly non expert opinion and argument which described the nature of perception and memory in an attempt to explain away the problems with Ms. Moncrief's statements. [95] Finally, petitioner does not deny that he is now unable to set forth the evidence that would have been forthcoming had counsel acted in a timely fashion to obtain ballistics testing and consulted with an eyewitness

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[93] See for example, petitioner's arguments that he could not have been involved in the Taylor homicides, petitioner's argument that the jewelry did not belong to Bobby Hassan, that the graffiti was authored by Karl Owens and the many other claims where the investigation is premised on police reports written at the time of the incidents described.

[94] Petitioner has no specific knowledge, but believes that this expert was retained for the purpose of developing mitigation themes should the case proceed to a penalty phase.

[95] The prosecutor argued strenuously that no one understands how the memory works (RT 3173), that the human memory is an "image-forming instrument" rather than a logic or reasoning instrument (*ibid*), and that "truths seem to generate themselves out of the human memory long after logically they should have."(*Ibid.*) He also repeatedly vouched for the "facts" recalled by Moncrief which were helpful to his theory of the case and discounted those that were not, all based on his "expert" opinion as to how perception and memory work. (See RT 3175, 3176, 3177, 3355-3359.)

identification expert. This is so, in part, because one of the guns to be tested ceased to be available because of trial counsel's delay, and also because the court has not approved funding for the services of ballistic and eyewitness experts. (Petition at p. 99 fn. 75.) [96] [97]

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

1. This claim was timely filed.

The only exhibit not in trial counsel's files, or the record on appeal, is Exhibit 68, which is a transcript of proceedings in Evan Mallet's case. Petitioner incorporates here all of his previous arguments as to why Mr. Merwin may not be charged with delay and asserts again, since the Mallet transcripts were obtained in a timely fashion by present habeas counsel, no delay occurred during her tenure

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[96] Respondent erroneously suggests that Mr. Merwin was awarded funding for expert services. He was not and never stated that he had consulted with experts, only that, in preparation of his funding request, he identified areas in which expert assistance was required and located persons willing to assist, should funding be granted. Present habeas counsel has been repeatedly denied expert assistance, except for a graffiti expert, which was approved by the federal court. Further, any order by the Los Angeles Superior Court for ballistic expert Ram Tec **in 1981, at Homer Mason's request** was not available to and of absolutely no benefit to counsel in these habeas proceedings.

[97] This is also the reason why this subclaim has been filed in a timely fashion. In support of the timeliness of this subclaim, and the appropriateness of considering this subclaim on the merits even if it is deemed untimely, petitioner incorporates here the timeliness arguments as to subclaim VII.B., which arguments apply fully to this subclaim.

either. Further, petitioner incorporates here his timeliness arguments as to subclaim VII.B. Those arguments apply fully to this subclaim, and for the reasons stated in these arguments, this subclaim is timely, and even if it were deemed untimely, should be addressed on the merits.

2. Trial counsel's failings were not the product of a reasonable tactical decision.

Petitioner apologizes for erroneously stating that the suppression motion raised by Mr. Gessler, on Mr. Mallet's behalf, was successful. Nevertheless, it does not follow that trial counsel was correct to forgo any objection to admission of the conversation at petitioner's trial.

First, it is clear that counsel made the objection to admission of the Mallet tape, but did not follow through for a ruling. Mr. Skyers' motion, which did specify the Mallet tape, was filed on or about June 10, 1982. (CT 232-234.) The motion was heard months later on October 12, 1982. (RT 2859 et. seq.) During the hearing on the motion, counsel make reference to a Penal Code section 1538.5 motion "which has already been heard." [98] (RT 2861.) Throughout the October 12, 1982 motion, trial counsel continually referred to only one tape, the Ross/Champion conversation. At no time does anyone specifically refer to the taped conversation

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

between petitioner and Mallet. The court was not asked to and did not specifically rule on the Mallet/Champion tape. Thus, trial counsel failed to get a ruling on his motion to exclude the taped conversation between petitioner and Mallet.

Although the tape was not suppressed at the Mallet proceedings it should have been. Mr. Gessler's arguments on behalf of Mr. Mallet were meritorious. The prosecuting attorney should not have been permitted to misuse the trail court's calendar and pursue sham motions. (See petition at pp. 101-104.) Petitioner's counsel should have advanced the same arguments on petitioner's behalf and obtained a ruling on counsel's own motion.

Reference to the Mallet/Champion tape was not harmless. Mr. Mallet is a rapist and a murderer. Mr. Mallet figured strongly in the prosecution's case against petitioner. [99] The prosecutor elicited testimony that Mr. Mallet was found in

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[99] The full extent of the testimony regarding the tape is set out below.

Q: Nicky was a Raymond Crip, wasn't he?
A: Yes, at one time he was.
Q: And Nicky is dead too?
A: Yes, he is.
Q: Do you recall having a conversation with Evan Malett [sic] about Nicky?
A: We might have had a conversation about him.
Q: And do you recall talking to Evan Mallet about saying that Elizabeth Moncrief confused you with Nicky because he's dead now?
A: No.
Q: Do you recall Evan Malett [sic] suggesting that to you?
A: No, not at this time.
Q: Isn't it a fact you had that conversation with him again on a sheriff's

petitioner's backyard and that when he was arrested, petitioner had a bail sheet for Mr. Mallet in his pocket. Mr. Mallet was frequently mentioned as one of Mr. Champion's co-conspirators. It certainly was of advantage to the prosecutor to imply, as he did, that a conversation between petitioner and Mr. Mallet was similar to the one between petitioner and Mr. Ross, a conversation upon which the prosecutor offered as proof of petitioner's involvement in the Hassan crimes.

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

1. This claim is timely.

As argued above claims based largely on the appellate record may be raised without extensive extra record investigation, it would not have made sense for Mr. Merwin, who was just beginning to undertake the investigation of potentially

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van one week before you had the conversation that we played for the jury yesterday with you and Mr. Ross?

A: Not that I recall.

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

A: I am not aware of that portion.

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

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

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

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

meritorious claims requiring investigation to raise such record based claims when it became clear that he would have to withdraw and pass the case on to another counsel who would have her own views as to which claims were most important and how to best present them to file this claim. Further, present habeas counsel was under not required to file this claim while investigating other potentially meritorious claims, and while awaiting this Court and federal court approval – or denial – of funding. Finally, petitioner incorporates here his timeliness arguments as to subclaim VII.B. Those arguments apply fully to this subclaim, and for the reasons stated in these arguments, this subclaim is timely, and even if it were deemed untimely, should be addressed on the merits.

2. Trial counsel's failure to object was not the product of a reasonable tactical decision.

Respondent asserts that because trial counsel objected to admission of the tape as violative of the Fourth, Fifth, and Sixth Amendments and as irrelevant and hearsay, trial counsel's decision not to object to the taped conversation as more prejudicial than probative and most importantly, to request that portions of the taped conversation be redacted was "reasonable and tactical." (Informal Response at p. 92-93.) To make this point, respondent misses the thrust of petitioner's argument and ignores the finding of this Court.

Respondent cites the portion of this Court's opinion which discussed the admissibility of limited portions of the taped conversations. (Informal Response at p. 93-94.) This Court found that portions of the tape in which the waterbed and the fact that Bobby Jr. had not said anything were discussed and a portion where the defendants may have discussed escape were all relevant and therefore admissible. (*People v. Champion, supra.*, 9 Cal.4th at p. 913-914.) As to the highly inflammatory and prejudicial portions of the tape that are set out fully in petitioner's petition at Claim VII G this Court held on direct appeal that "[d]efendants fault the trial court for not deleting from the tape recording those portions of defendants' conversation that were irrelevant and prejudicial. But defendants never asked the trial court to edit the tape recording, and never notified the court that, in their view, portions of the tape recording were particularly prejudicial. Accordingly, they have not preserved this issue for appeal." (*Id.*, at 914.)

Respondent counters petitioner's claim that trial counsel was prejudicially ineffective in failing to properly object by pointing to what respondent characterizes as the "overpowering evidence" that tied petitioner to the Hassan crimes. (Informal Response at p. 95.)

In his petition and throughout this Informal Reply, petitioner has demonstrated that contrary to respondent's evaluation of the strength of the

evidence against petitioner (which rests on the state of the evidence at trial and ignores the additional and conflicting evidence provided by the petition and its supporting documentation), the case against petitioner is weak. Petitioner can, with perhaps absolute certainty, be excluded from the Taylor crimes. Petitioner did not have Mr. Hassan's ring in his possession. The remaining evidence, Ms. Moncrief's eyewitness identification testimony, was so incredible that even the prosecutor would not rely on it for sufficient proof of petitioner's involvement in the crime.

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

1. This claim is timely filed.

Attached in support of this claim, is the declaration of Dr. Nell Riley. Dr. Riley is a licensed psychologist specializing in clinical neuropsychology. She holds a Diplomate in Neuropsychology from the American Board of Clinical Neuropsychology (ABPP) and the American Board of Professional Neuropsychology. Dr. Riley is presently employed as a staff neuropsychologist at the Neurodiagnostics Service of the Department of Neurology at Stanford University Hospital. (Exhibit 67 -- Declaration of Nell Riley, Ph.D. ABPP.)

This claim is timely because it has been filed "without substantial delay." Petitioner could not have filed this claim without Dr. Riley's having examined petitioner and provided her declaration — and that couldn't happen until petitioner raised the funding for the examination and declaration.

Prior habeas counsel, James Merwin requested funding for a neuropsychologist. This Court denied this request on August 24, 1994. Present habeas counsel also made such a request. This Court denied this request on January 28, 1997. Federal funding for such purpose was denied on January 7, 1997. On February 12, and February 26, 1997, Dr. Riley conducted a neuropsychological examination of Mr. Champion. Dr. Riley's services were paid for entirely from present habeas counsel's personal monies. [100]

Under this Court's decision in *Gallego*, the evidence of petitioner's brain damage -- and hence the information supporting subclaim VII.H -- was not something Ms. Kelly, as reasonable habeas counsel, should have unearthed at any earlier date. (*In re Gallego, supra*,18 Cal.4th at 828 (denial of timely request for investigation funds "will support a determination that the petitioner not only did not actually know of the information earlier but also should not reasonably have known

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[100] In January, 1999, this Court denied counsel's request to have these funds reimbursed.

of the information earlier"; emphasis in original).) Further, Dr. Riley, in March, 1997, after analyzing the results of the testing she had administered, requested that counsel attempt to obtain additional information concerning the possible etiology and effects of petitioner's impairments so she and the Court could be confident that petitioner's brain damage occurred early in his life and that the resulting impairments were fully in effect prior to the charged homicides and hence were relevant to cast doubt on the mens rea element of the special circumstance allegations. Ms. Kelly sought and obtained such confirming information between March 1997 and November 1997, which information was integrated into the Declaration of psychiatrist Dr. Roderick W. Pettis, whose declaration along with that of Dr. Reilly provide important support for petitioner's claim of penalty phase ineffective assistance of counsel. (See Penalty Phase Exhibit 1, Declaration of Roderick W. Pettis, M.D., October 30, 1997.) Dr. Riley provided her declaration on October 22, 1997. (Exhibit 67, Guilt Phase Exhibits, Vol. 3, Declaration of Nell Riley, Ph.D.) Subclaim VII.H could not have been completed or filed substantially sooner. Thus, this claim was filed "without substantial delay"(i.e., within a reasonable time after petitioner and his counsel knew or should have known the factual and legal bases for the claims raised). (Standards 1-1.2; *In re Robbins, supra*, 18 Cal.4th at 784,787-788.)

Further, even had it been possible to submit subclaim VII.H substantially sooner, it would have been appropriate to delay filing in light of ongoing investigation into other potentially meritorious claims which required additional investigation until close to the November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806; *In re Clark*, *supra*, 5 Cal.4th at 781, 784). See, in particular, the discussions concerning the ongoing investigations into claims addressing counsel's ineffective assistance (a) in failing to discover and present evidence that petitioner could not have been involved in the Taylor crimes and that the perpetrators were four other young men (subclaims VI.A and VI.B discussed above), (b) in failing to challenge the prosecution's graffiti and gang expert testimony (subclaim VI.G; discussed above), (c) in failing to discover and present evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan (subclaim VII.A, discussed above) and (d) in failing to discover and present substantial mitigating evidence at petitioner's penalty phase trial (subclaim IX.C, discussed below). Habeas counsel had to coordinate investigation in all of these areas, which added to the time required to complete the necessary investigative work and obtain the required supporting documentation.

Finally, if subclaim VII.H were deemed untimely, it should nonetheless be

addressed on the merits under the Court's miscarriage of justice exceptions. Subclaim VII.H, particularly when viewed in combination with claims VI (Taylor) and VIII (Jefferson), undermines the prosecutor's inherently speculative case in support of a finding of the homicidal mens rea required for special circumstance liability. But for the constitutional error set forth in subclaim VII.H, "no reasonable judge or jury would have" found the special circumstance allegations true or convicted petitioner of capital murder. (*In re Clark, supra,* 5 Cal.4th at 797; *In re Robbins, supra,* 18 Cal.4th at 811.)

2. Respondent misstates petitioner's claim.

Respondent's argument is premised on a misrepresentation of petitioner's claim. Respondent seems to imply that petitioner's claim is, that, based on information readily available to him, trial counsel was ineffective for failing to pursue any investigation of mental defenses. (Informal Response at p. 98.) This is not petitioner's claim. Petitioner alleges that trial counsel failed to conduct a reasonable investigation into his client's background and personal history, and that if he had done so and provided relevant information to a mental health expert, either counsel on his own or any mental health expert he consulted with, would have initiated or recommended neuropsychological testing. Neuropsychological testing at the time of trial would have revealed the impairment shown by the battery of tests

administered by Dr. Riley.

In his declaration, Judge Skyers acknowledges that had he known that petitioner had been abused in utero and been involved in a serious car accident, each of which suggested a possibility of resulting brain damage, he would have requested funding for neuropsychological examination. (Exhibit 47, par. 26, Guilt Phase Exhibits Vol. 3.) Judge Skyers has stated 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; but counsel admits that he never asked petitioner or any member of petitioner's family whether petitioner had suffered any head injuries. (*Ibid.*) Certainly it is not reasonable for counsel to rely upon a capital defendant or the defendant's family --- particularly a family with as many problems as petitioner's family [101] — to know what information would be helpful to the defendant's guilt and penalty phase defenses and to volunteer that information

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[101] For example, petitioner's father, Lewis Burnis Champion II, has been diagnosed alternately as having schizophrenia or bipolar mood disorder, either one of which is a major psychiatric illness which causes grave impairment in cognition and day to day functioning. Many other members of Steve's maternal family have a history of mental health problems, substance abuse, addiction, and domestic violence. Lewis III, Steve's oldest brother, "had learned how to behave by watching his father." Reginald's kindergarten teacher at Russell Elementary School noted he had "below average academic growth" and needed "help in oral expression." Steve's sister Linda also performed below her peers in elementary school. Steve's second sister, Rita, had academic and behavioral problems similar to her siblings. (See Petition at pp. 157, 167-168, 179, 185-186.)

without being asked.

It is certain that had counsel conducted a reasonable inquiry, such as the inquiry conducted by habeas counsel, he would have learned of the in utero abuse and childhood auto accident (which resulted in head injury and loss of consciousness) and requested neuropsychological testing. Further, as is set forth more fully in Claim IX of the petition, had counsel conducted a reasonable investigation of his client's personal history and background, counsel also would have learned of petitioner's malnourishment as an infant, the repeated blows to the head petitioner suffered at the hands of his two mentally ill older brothers, petitioner's early and recurrent problems at school, petitioner's inhalation of organic solvents and his ingestion of nearly lethal amounts of liquor in childhood. (See Petition Claim IX.C., pars. 1a through 1e.) Had counsel learned this information and provided it to a mental health expert -- which reasonable counsel certainly would have done given its obvious relevance to a mental health evaluation — the mental health expert would have discerned and communicated to counsel the appropriateness of neuropsychological testing. (See Exhibit 1 par. 11 a., Penalty Phase Ineffective Assistance of Counsel Exhibits Vol. 1.)

Further, there can be little doubt that counsel was obligated to conduct a reasonable thorough investigation of his capital client background and person

history. (See, e.g., *In re Jackson* (1992) 3 Cal.4th 578, 586, 612 [defendant's trial counsel, by failing to conduct a reasonable investigation of defendant's background and childhood to enable him to make an informed decision as to the best manner of proceeding at the penalty phase, failed to provide competent representation under the prevailing professional standards]; and *Siripongs v. Calderon* (9th Cir. 1998) 35 F.3d 1308, 1316 [counsel was well below accepted standards in failing to conduct more than a cursory investigation of (petitioner's) background].) That counsel's investigation of petitioner's background was no more than cursory is apparent from (1) the very meager penalty phase case he presented on petitioner's behalf (fully set out in two sentences in this Court's direct appeal opinion, *People v. Champion, supra.,* 9 Cal.4th at p. 904) and (2) the fact that counsel was unaware of petitioner's "family mental illness . . ., divorce, poverty, and life threatening danger at home and in the community" (Exhibit 47, Guilt Phase Exhibits Vol. 3.) — facts which a reasonable investigation would have easily unearthed. If counsel had conducted more than a cursory investigation into petitioner's background and personal history, he could not have helped but discover the facts suggesting a reasonable possibility of brain damage and hence the appropriateness of neuropsychological testing.

3. Trial counsel's failings were not the product of a reasonable tactical decision.

Respondent's assertion that trial counsel's failure to present evidence of petitioner's mental impairments is untenable. (Informal response at p. 98-99.) Such a tactical decision would be reasonable *only* if based on reasonable investigation - and, as noted above, trial counsel performed no such investigation. It is certain that if counsel had conducted a reasonable investigation and learned of the in utero abuse, auto accident, and other head trauma, he would have acted differently. This is so because as Judge Skyers himself declares, he would have requested neuropsychological testing and, "[h]ad findings consistent with Dr. Riley's been available at trial, I would have presented them at both the guilt and penalty phases of trial." (Exhibit 47, par. 26.) Given the thoroughness of Dr. Riley's testing, and the fact that the likely causes of petitioner's impairments date back to events preceding his birth and/or occurring during his childhood and early adolescence, (Exhibit 67, par. 29; Penalty Phase Exhibit 1, par. 11.a), there is little reason to doubt that the same findings would have been available if pretrial neurological testing had been conducted.

Likewise, respondent's argument of "inconsistent defenses" is not to be credited. There is nothing inconsistent in arguing that "petitioner was not involved,

but if you disagree and somehow conclude that he was, there's still no basis for finding him guilty of capital murder."

Moreover, the available evidence of neurological impairment was relevant and exculpatory without any concession of petitioner's presence at the crime scene. Petitioner's primary defense was, and remains, that he wasn't there. But petitioner's neurological impairment was relevant and important because the prosecutor was forced to rely upon a very strained circumstantial evidence theory to argue that petitioner, if he was there, must have acted with an intent to assist in a killing. Because there was no evidence as to who actually killed the Hassans and no evidence concerning the conduct of any particular perpetrator while inside the Hassan residence, the prosecutor had to argue that regardless of which of the four men fired the fatal shots, all four must have entered with an understanding and intent that whoever was home would be killed. (RT 3180, 3338, 3194.) But the prosecutor had no evidence of any admissions of homicidal intent by petitioner, no evidence of any statements of homicidal intent or planning by any of the four perpetrators, and no evidence of any express agreement to kill or even of any discussions of such a possibility. The prosecutor was forced to rely upon circumstantial evidence as to what, in the prosecutor's view, each of the four men must have inferred and understood prior to entering the Hassan residence,

circumstantial evidence which in turn was based on a shaky assumption that each of the four must have know what had happened to Mr. Jefferson and would have understood the same would happen to the Hassans – even though the Hassans, unlike Mr. Jefferson, were relatives of a member of the same street gang as the four alleged perpetrators. This speculative mens rea case against petitioner, based on dubious inferences concerning what each of the perpetrators must have understood upon entering the Hassan residence, would have been undermined had trial counsel conducted a reasonable investigation of his client's personal history and discovered and presented available evidence that as of the date of the Hassan crimes, petitioner suffered from longstanding mental impairments of a severe and global nature which impaired his ability to discern or accurately read cues concerning the intentions of other persons, to draw his own inferences in ambiguous circumstances, or to engage in planning activity. Even assuming it was reasonable to conclude that a fully intact person would have understood that homicide was intended, there's no basis for concluding beyond a reasonable doubt that a person with petitioner's impairments would have so understood.

Respondent's discussion of subclaim VII. H. indicates that respondent is confused and misunderstands the nature of petitioner's claim (Informal Response, pp. 101, 102, 104, 105-106) Respondent repeatedly writes as though petitioner is

claiming that petitioner's impairments made him incapable of forming an intent to kill. Respondent even refers without citation to "petitioner's conclusory allegation that a mental disorder 'caused' an inability to form the intent to kill." (Id. at 102.) Once again, that is not petitioner's claim.

Petitioner has presented evidence demonstrating that he suffers from longstanding neuropsychological deficits "in problem solving, nonverbal reasoning, attention and slowed information processing [which] render him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misreading cues concerning the intentions of other persons." (Exhibit 67, par. 32, Guilt Phase Exhibits Vol. 3.) Petitioner's deficits are extreme, placing him in the bottom 0.02 percentile of the normal population (*id.* at par. 15). This evidence is not offered to demonstrate an inability to form an intent to kill. Rather, it is offered here, and should have been offered at trial, to undermine the prosecutor's only theory at trial to support a finding of the mens rea essential to capital murder. As noted above, there was no evidence of any statements by any of the four men who entered the Hassan residence, no evidence of express prior agreement or discussions, and no evidence as to what any particular member of the group did while in the Hassan residence. The prosecutor had to rely upon a speculative circumstantial-evidence theory that each of the four men must have

somehow understood and intended that the residents would be killed. However permissible such an inference might be as applied to a member of the group who was mentally intact — and that is subject to debate — it becomes completely untenable as applied to someone with petitioner's neuropsychological deficits. The jury should have learned of petitioner's impairments. Had it been informed of petitioner's impairments, there's no way it could have concluded beyond a reasonable doubt that petitioner, if he was involved, must have understood and intended that the Hassans would be killed.

Respondent's misunderstanding of petitioner's claim may also account for respondent's erroneous assertions that the exculpating relevance of the proffered evidence required (1) a concession that petitioner was present at the crime scene (Informal Response at p. 107) and (2) a mental health expert's explanation how the impairment affected petitioner's capacity to form the requisite intent at the time of the crime (Informal Response, p 105). Neither is true. Petitioner's deficits make it impossible to draw confident conclusions about what he would necessarily have inferred and understood — particularly when the prosecution is able to offer no evidence as to any words or nonverbal cues that may have been exchanged. Petitioner need not concede he was there to make the simple and obvious point, that even if the jury found petitioner had participated, it couldn't make confident

conclusions about what he would have understood upon entering.

Finally, it is of no consequence that attached California Youth Authority reports indicate no signs of organicity (Informal Response, pp. 102-103). The authors of these reports did not have the information that counsel would have had had he investigated his client's history discussed above -- information that would have made clear there was a reason to suspect brain damage. Further, Dr. Riley's credentials and methodology are unchallenged and impeccable. There's simply no basis for doubting the accuracy of her declaration and the test results set forth therein. Had counsel conducted a reasonable investigation, that type of testing and those results would have been presented to the jury.

IV.

INEFFECTIVE ASSISTANCE OF COUNSEL

CLAIMS RELATING TO THE JEFFERSON HOMICIDE

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

Specific to this claim are four detailed subclaims. These claims are as follows:

(1) Trial counsel failed to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes which would have

precluded admission of the Jefferson evidence and undercut the prosecution's theory that petitioner was a participant in or at least had knowledge of all three incidents and its theory that petitioner's alleged knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true.

(2) Trial counsel failed to object to introduction of the Jefferson crimes on grounds that the introduction of this other crimes evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101.

(3) Trial counsel failed to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof, and

(4) Trial counsel failed to object to the prosecution's conspiracy evidence and argument.

Contrary to the assertion of respondent, these claims of ineffective assistance of counsel are not precluded by the procedural bar against unjustifiably delayed claims. (Informal Response at p. 110.)

Further, insofar as trial counsel had no valid, tactical reason for the errors and omissions complained of and petitioner was deprived of a fair trial as a result of these errors and omissions, petitioner has established a prima facie case for relief.

Attached to petitioner's petition are 8 exhibits, [102] including the declaration

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[102] See Exhibits 47, 69-75.

of trial counsel, now Los Angeles County Municipal Court Judge, Ronald K. Skyers, which individually and cumulatively represent reasonably available documentary evidence demonstrating that petitioner was not involved in the Jefferson crimes and that trial counsel's failure to discover, present and argue evidence of petitioner's lack of involvement was not the result of a reasonable tactical decision.

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

1. This claim was timely filed.

Other than the general allegations of untimeliness made in the Response (see pp. 16-27), respondent does not otherwise argue its contention that this claim was not filed in a timely fashion. (Informal Response at p. 110.) Other than the declaration of trial counsel and declaration of Tom Lange (Exhibits 47 and 72 respectively), the remaining exhibits which support this claim were in trial counsel's file, which was passed on from previous habeas counsel, James Merwin, to present habeas counsel. Although the police reports, letters, memorandum, and analyzed

evidence report which complete the exhibits in support of this claim were in the possession of Mr. Merwin, it does not follow that this claim should have been filed earlier.

As stated in reference to the timeliness of this petition generally, Mr. Merwin was associate counsel from September 22, 1992 through June 28, 1995. Between September 22, 1992 and February 23, 1993, Mr. Merwin reviewed materials which were furnished to him by the California Appellate Project and the record on appeal. Although he was able to discuss the case and potential issues with Mr. Johnson and with CAP Attorney Steven Parnes, Esq., Mr. Merwin was unable to visit with petitioner and discuss the facts of the case and possible areas of investigation with petitioner. This was so, because during his entire tenure as habeas counsel, Mr. Merwin was denied any opportunity for confidential communications by San Quentin State Prison with petitioner. As stated above, counsel could not form any final plan of investigation, let alone file a petition, without upholding his duty to discuss the case and otherwise confer with his client about a variety of sensitive information.

By June of 1993, in addition to the previously discussed tasks, Mr. Merwin completed a number of essential tasks toward the ultimate completion of the petition including reviewing petitioner's central file at San Quentin State Prison and visiting

petitioner in a non-contact visit setting. Mr. Merwin located and interviewed trial counsel Ronald Skyers and at this time copied petitioner's trial file and began an evaluation of trial counsel's investigation and preparation for trial. Mr. Merwin also researched, prepared and filed with this Court, a motion ancillary to his habeas corpus petition for prior authorization for funds to prepare and litigate a petition for a writ of habeas corpus in Marin County Superior Court addressing petitioner's housing status and the unavailability of confidential visits with counsel.

On August 25, 1993, this Court denied Mr. Merwin's motion for funds for the Marin County writ petition. The motion was *denied without prejudice to Merwin's seeking such a writ directly from the California Supreme Court.* So, between August and November, 1993, and under the Court's direction, Mr. Merwin began a petition to this Court regarding contact visits with Mr. Champion. Mr. Merwin was correct to pursue this course as he agreed with Mr. Champion's assessment of the visiting option available and he too determined that the visits were not confidential.

In spite of these difficulties, Mr. Merwin continued to explore areas of trial counsel's investigation and trial preparation and ultimately identified general areas of trial counsel's performance which were likely to yield specific claims of ineffective assistance of counsel. This preliminary evaluation of trial counsel's performance, made after review of trial counsel's files, the appellate record, a few

nonsecure interviews with petitioner, initial contacts with some members of petitioner's immediate family, and preliminary contact with experts regarding their fees and availability provided the basis for Mr. Merwin's funding request which was filed on February 15, 1994. Mr. Merwin did not receive authorization for funding until August 24, 1994, less than two months prior to discontinuing work on petitioner's case.

Thus, although it is true as to this claim that certain "triggering facts" were available to Mr. Merwin by February 1994 when Mr. Merwin made his funding request, the availability of these facts only triggered counsel's *duty to investigate*, not his duty to present the claims. Again, counsel's *duty to present claims* arises once counsel has (or should have had) information to support a prima facie case. (*In re Robbins, supra,* 18 Cal.4th at p. 806 fn. 28 and 29 (majority), 820 (Justice Kennard Concurring and Dissenting.)

In his funding request, Mr. Merwin identified claims in very fairly broad terms, such as "counsel's failure to investigate Taylor incident" or "counsel's failure to conduct a penalty phase investigation" or appellate record claims such as "counsel's failure to make objections." Identification of the failing in no way suggests *how* to conduct the investigation that trial counsel should have conducted. In other words, respondent fails to distinguish between tasks of identifying trial

counsel's failings — which is relatively easy when counsel does little guilt or penalty investigation — and tasks of (i) planning and (2) carrying out the investigation that trial counsel should have conducted. To this end, petitioner again asserts that Mr. Merwin acted reasonably in not filing a petition before being replaced. This is so because for health reasons Mr. Merwin couldn't finish the investigation. Present counsel had to begin by reviewing the entire appellate record, the trial file, police reports, and related records from the court proceedings of other alleged participants before present counsel could reach her own judgment -- - as she was ethically obligated to do — as to the relative strength of potential claims, how best to pursue the investigation, which claims to present, what further documentary support and how, with the available funding, to perform each of these task effectively.

Present habeas counsel has earlier stated the course of her investigation and the funding available at the time of her appointment. Based on the reasons above and below and in the petition, petitioner's habeas petition was filed in a timely manner i.e., within a reasonable time after present counsel knew the factual and legal basis for the claims raised.

Foremost, it has been demonstrated that the subclaims to the Jefferson crimes, to the Hassan crimes and to the Taylor crimes are interrelated and dependent on

each other. Alleged proof of petitioner's involvement in the Jefferson crimes was argued as proof of his participation in Hassan. Petitioner's guilt in the Hassan crimes, the finding of special circumstances and the imposition of the death penalty was dependant on his participation in the Taylor crimes. The prosecution could not make its case against petitioner without proof of each of these three homicidal incidents. Moreover, a finding by the jury that petitioner was guilty of or involved in more murders than that which he had been charged contributed greatly to a finding of death as the appropriate punishment. The claim that trial counsel provided ineffective assistance in defense of the Jefferson crimes is comprised of specific instances of failings which, if brought to the jury's attention, would have convinced the jury that petitioner was not involved in the Jefferson crimes and thereby, proof that he was not involved in either the Taylor or Hassan crimes. As a result, counsel was required to investigate all of these crimes before filing the petition. At any earlier date when current habeas counsel could have submitted this subclaim, it was appropriate to delay filing in light of ongoing investigations into other potentially meritorious claim which required additional investigation until close to November 1997 filing date in order to set forth a prima facie case for relief. (*In re Robbins, supra,* 18 Cal.4th at 780, 805-806.) This encompassed, in particular, the discussions concerning the ongoing investigations into claims

addressing counsel's ineffective assistance (a) in failing to discover and present evidence that petitioner could not have been involved and that the perpetrators were four other young men (subclaims VI.A and VI.B discussed, above), (b) in failing to challenge the prosecution's graffiti and gang expert testimony (Claim VI.G; discussed above), (c) in failing to discover and present mental impairment evidence that would have undermined the prosecutor's special circumstance mens rea theory (Claim VII.H, discussed below), and (d) in failing to discover and present substantial mitigating evidence at petitioner's penalty phase trial (Claim IX.C, discussed below).

Further, in light of the rarity of this Court's issuance of orders to show cause, counsel doubted that the court would deem claim VIII.A standing alone, without presentation of other related claims sufficient to state a prima facie case for relief, and accordingly for that reason as well counsel was warranted in delaying presentation of this subclaim. (*In re Robbins*, *supra*, 18 Cal.4th at 780, 805-806.) Finally, as explained above each of the subclaims of this claim, particularly when viewed collectively and in combination with claims VI (Taylor), VII (Hassan and IX (penalty phase ineffective assistance of counsel) should be reviewed on the merits pursuant to this court's miscarriage of justice exceptions to the timeliness bar even if deemed untimely in that they undermine the prosecution's case for guilt and for the

special circumstance liability, and serve to correct the grossly misleading profile of petitioner presented to this sentencing jury.

2. Trial counsel's failure to discover and produce evidence that the Jefferson crimes were not similar to the Taylor and Hassan Crimes would not have been futile and his failure to do so was prejudicial.

Respondent acknowledges that trial counsel offers no tactical reason for his failure to demonstrate for the trial court and for the jury dissimilarities between the Jefferson and the Hassan and Taylor crimes. (Informal Response at p. 111.) Respondent confines itself to arguing that no prejudice resulted from trial counsel's failure to discover and produce evidence that the Jefferson crimes were not similar to the Taylor and Hassan crimes. (Informal Response at pp. 112-114.) [103]

Here, respondent is wrong to characterize petitioner's discussion of the numerous dissimilarities between the homicides as "misleading." Petitioner's claim supported by police reports and investigative reports which were provided by the prosecution, readily available to trial counsel and not disputed as authentic or countered by documentation submitted by respondent. Respondent's single

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[103] Once again, respondent misstates petitioner's claim. Petitioner does not argue that trial counsel was ineffective for failing to object to admission of evidence of the Jefferson crime. (See informal Response at p. 112 [any attempt (to do so) would have been futile].) Trial counsel did this. (RT 1510.) Petitioner's claim is that trial counsel failed to inform the trial court of numerous dissimilarities and to argue to the court that the prosecution had no evidence which tended to show participation by petitioner in the Jefferson murder. (Petition at p. 128.) Respondent acknowledges as much in its response to the next claim. (See Informal Response at p. 114.)

paragraph of "similarities" is borrowed from the argument of the prosecutor pretrial. (Compare Informal Response at pp. 111-112, RT 1511-1512.) [104] Although these general similarities may exist in one or more of the cases, the number and degree of dissimilarities outweigh the probative value of those similarities argued by respondent.

Further, the "similarities" noted by respondent are similarities common to any number of home invasion robberies of a drug dealer where a killing results. The extent of the similarities noted by respondent are only the nonforcible entry of the home of a drug dealer, who was shot in the head with a muffled shot. Including the fact that all three homicides occurred in South Central Los Angeles does not amount to either a pattern and or to characteristics so unusual and distinctive as to be "like a signature." (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

In contrast, police and prosecution reports and other documentation concerning the Jefferson killing indicate the crimes were glaringly dissimilar in at least the following respects:

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[104] Respondent's invitation to consider the "Bascue Memorandum" as supporting its argument the crimes were similar should be rejected. Likewise, its speculation that the decision not to prosecute petitioner for the Jefferson crime was a tactical one should also be rejected. Neither of these conclusions is based on reasonably available documentary evidence which contradicts the conclusions of petitioner which are supported by the exhibits which accompany his petition.

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

2. Mr. Jefferson was killed in his apartment some time between 10:00 p.m., November 14, 1980 and 11:40 a.m., November 15, 1980. [105] There was evidence that during this time span, from 10:00 p.m., on November 14 and continuing to some unknown hour, Mr. Jefferson was in his apartment "getting high" with "a partner" of his. (Exhibit 69 -- statement of Jefferson's wife.) While habeas counsel has not yet been able to identify Mr. Jefferson's partner there is no reason to suspect that Jefferson's partner was anyone connected in any with petitioner or Ross or to the Raymond Avenue Crips. Thus, there is evidence that during the time span when Jefferson was killed in his apartment, he was "getting high" in the apartment with someone having no apparent connection to petitioner or the Raymond Avenue Crips, and thus, as to the Jefferson crime, there was either an alternative suspect with no apparent ties to the Crips (unlike the Taylor crimes) or a witness who was allowed

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

to leave the scene of the crime (unlike the Hassan case).

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

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

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

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

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

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

Finally, respondent is wrong to assert that no prejudice resulted to petitioner. Respondent ignores the importance to the prosecution case of the Jefferson crimes.

Pretrial, the prosecutor forcefully argued that his position was that evidence of the Jefferson crimes was relevant to show the guilt of both defendants and *particularly* petitioner. (RT 1511.) He argued further that the Hassan murder was not an isolated incident but a part of a single ongoing conspiracy to rob and murder of dope dealers in that neighborhood. (*Ibid.*) The prosecutor argued that the initial act in this series was the Jefferson murder. (*Ibid.*)

Here too, respondent ignores the prosecution's reliance on the Jefferson crime to support its contention that petitioner acted with the homicidal intent necessary to capital murder, and also ignores the penalty phase significance of undoing the suggestion that petitioner had been involved in not just one, but three separate homicidal incidents.

As discussed in his petition, had trial counsel provided effective guilt phase assistance and adduced available evidence to show that petitioner was not involved in the Taylor crimes and Jefferson crimes, or at the very least, demonstrate the dissimilarities between the three incidents so as to cast a doubt on petitioner's involvement in or knowledge of the Taylor and Jefferson crimes and that the ring found in petitioner's possession was not victim Bobby Hassan's ring, the prosecutor would have been left with nothing but the faulty identification testimony of Elizabeth Moncrief. As conceded by the prosecution, on that basis alone no

reasonable judge or jury would have convicted petitioner of involvement in the Hassan killings. Further, had counsel adduced evidence showing that petitioner was not involved in the Jefferson homicide -- a crime as to which the prosecutor had no direct evidence linking petitioner, Ross or any person known to either of them – no reasonable judge or jury would have accepted the prosecutor's speculative invitation to assume that petitioner was involved in the Taylor crimes. [106] With no basis for linking petitioner to either the Taylor or the Jefferson crimes, and in light of evidence which counsel should have presented concerning neurological impairments which make it more difficult for petitioner than for most people to draw accurate inferences about what others around him are intending, no reasonable judge or jury would have been able to conclude beyond a reasonable doubt that petitioner, if he were one of the four men who entered the Hassan residence on the day of the homicides, understood that a homicide would occur or personally intended that anyone be killed. Hence, but for counsel's ineffective assistance, no reasonable judge or jury could have found true the special circumstance allegations or convicted petitioner of capital murder. Moreover, as a result of trial counsel's ineffective assistance in failing to adequately investigate petitioner's life history and

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[106] This is particularly true given the certainty with which petitioner can now argue that he was not involved in the Taylor crimes.

mental impairments and in failing to adequately challenge the prosecution's misleading claims concerning petitioner's alleged involvement in three homicidal incidents, "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark, supra*, 5 Cal.4th at 798).

B. Defense counsel provided constitutionally ineffective assistance in failing to object to the introduction of the Jefferson crimes on grounds that the introduction of this other crimes evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101.(Claim VIII.B.) [107]

First, respondent argues that because trial counsel believed at the time that his general objection to the admission of evidence of the Jefferson crime was sufficiently specific that "trial counsel did have a tactical reason for not pursuing more specific reasons." (Informal Response at p. 115.) This is specious. Counsel's mistake concerning the adequacy of his nonspecific objection can not be elevated to a "tactic." It was a mistake. Further, it is clear that counsel never adequately prepared to deal with and attempt to exclude the Jefferson evidence.

"Under both the...United States Constitution...and the California Constitution,

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[107] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

a criminal defendant has the right to the effective assistance of counsel." [Citations.] Specifically, he is entitled to reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. [Citation.] This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*In re Marquez, supra,* 1 Cal.4th at p. 602, citation omitted.) "Generally, the Sixth Amendment requires counsel's diligence and active participation in the full and effective preparation of his client's case." (*People v. Pope, supra,* 23 Cal.3d at pp. 424-425.) Defense counsel is required to investigate all possible defenses, research applicable law, make an informed recommendation to the client regarding the appropriate strategy, and present that strategy on behalf of the client. (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 222.) Because "investigation and preparation are the keys to effective representation [citation], counsel has a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings, and laws involved." (*Von Moltke* v. *Gillies, supra,* 332 U.S. at p. 721 [92 L.Ed. 309, 68 S.Ct. 316].)

"One of the primary duties defense counsel owes his client is the duty to prepare adequately for trial." (*Magill* v. *Dugger, supra,* 824 F.2d at p. 886.) In the same vein, counsel must take steps to exclude inadmissible evidence, which is

critical to the state's case or is highly prejudicial. (*Walker* v. *United States, supra,* 490 F.2d at pp. 684-685 .) The duty of trial counsel to investigate and prepare is "so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." (*United States* v. *Tucker, supra,* 716 F.2d at p. 583, fn. 16.)

Here, Mr. Skyers' failure to object to the introduction of the Jefferson crimes on grounds that the evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101 was not the product of a rational and informed tactical decision founded on adequate investigation and preparation. Mr. Skyers failed to anticipate, as he should have, the importance of the Jefferson crimes to the prosecution case against petitioner. This is certainly true as Judge Skyers has no recollection of the fact that the prosecutor intended to argue petitioner's participation in the guilt phase. (Exhibit 47, Guilt Phase Exhibits Vol. 3) Being unprepared to counter the evidence, trial counsel was unprepared to object to it fully. Thus, trial counsel was not prepared to argue that the foundational requirements of California Evidence Code section 1101 subdivision (b), had not been met. [108] This permitted the prosecutor to rely on petitioner's alleged

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[108] First, the accused must be implicated in the charge under trial. Second, there must be proof that the accused was involved in the uncharged offense. Finally, there must be identity of person or crime, scienter, intent, system, or some integral evidence

involvement in the Jefferson shooting to besmirch petitioner's character and to establish petitioner's guilt by association and alleged propensity. (See RT 1522-1523, 3192, 3706.) Also, admission of evidence of the Jefferson murder increased the likelihood of confusing the issues which affected more than the guilt phase of the trial. Since the jury was instructed at penalty phase to consider "all of the evidence which has been received during any part of the trial in this case" (CT 793), it undoubtedly considered not only the evidence of the Jefferson murder, but also the evidence of the Taylor murder with which only codefendant Mr. Ross was charged, in assessing whether petitioner should live or die, thus undermining petitioner's Eighth Amendment right to a reliable penalty verdict.

Similarly, trial counsel's failure to object to the admission of the Jefferson crimes under Evidence Code section 352 was not a reasonable tactical decision and highlights trial counsel's failure to respond as trial events made clearer and clearer the need to defend against prosecution claims of his client's involvement in this killing. Given that there was no direct or circumstantial evidence to connect petitioner or Ross — or anyone known to either of them — to the Jefferson killing,

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established between the charge under trial and that sought to be introduced, clearly connecting the accused, showing that the person who committed the one crime must have committed the other. (*People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Far more than superficial similarities must be present before uncharged crimes are admissible under this theory. (See generally, *People v. Rivera* (1985) 41 Cal.3d 388, 392.)

the evidence had no legitimate probative value. Nonetheless, given the inflammatory nature of the evidence and the prosecutor's apparent willingness to exploit it to show guilt by propensity and association, there was a clear danger that the evidence would improperly influence the jury's verdicts as to guilt, special circumstance liability, and penalty. Insofar as this is true, respondent's assertion that any objection by trial counsel would have been "fruitless" is wrong. [109] (Informal Response at p. 115.)

In arguing that evidence of the Jefferson crime was relevant to the issue of intent, respondent relies on the same circuitous logic employed by the prosecutor in his offer of proof, and in arguing petitioner's guilt. (Informal Response at p. 117.) Although no conspiracy was charged and there was no evidence tending to implicate either petitioner or Mr. Ross in the Jefferson murder, to justify the admission of evidence of the Jefferson killing, the prosecutor and respondent assume the existence of the conspiracy in order to establish the Jefferson killing's relevance. The prosecutor then used the evidence of the Jefferson killing to prove the very conspiracy it assumed was in existence. Thus, evidence of the Jefferson killing was essential to the prosecution's case as there was no evidence of a

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[109] To make this claim, respondent is forced to rely on the previously stated "similarities" between the offenses. (Consider the single paragraph at pages 116-117 of the Informal Response.)

conspiracy without it and no way to even arguably attribute the requisite homicidal intent to all four of the perpetrators of the Hassan burglary/robbery unless a related killing preceded the killing of Bobby and Eric Hassan. The argument now carries less weight than at trial.

There is still no evidence to show petitioner or anyone known by petitioner was involved in or aware of the Jefferson crimes, and now petitioner has demonstrated that he was not involved in the Taylor crimes. This alleged multi-crime conspiracy which supported the admission of, and was in turn allegedly proven by, the evidence of the Jefferson crimes, is sheer fantasy.

C. Trial counsel was ineffective in failing to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof. (Claim VIII.C) [110]

On appeal, petitioner and Craig Ross argued that the prosecutor's offer of proof with respect to the Jefferson murder was highly misleading in that he failed to disclose that he had no evidence to present of participation by either petitioner or Ross in the Jefferson murder. (Ross Opening Brief at p. 64.) As mentioned in his petition, and noted on appeal the prosecutor implied that he would directly implicate both defendants when he told the court:

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[110] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

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

The prosecutor went on to argue "that those persons involved in the Hassan murder, whether or not any of them were the actual triggermen, went into the house knowing that murder had been committed before and would be committed again." (RT 1512.) This could only have been true if the prosecutor had presented some evidence that petitioner was involved in the Jefferson crime.

Respondent cites this Court's examination of the appellate record to support its conclusion that there were no inaccuracies in the offer of proof. As respondent is aware, this Court was provided with only the prosecution's uncontroverted testimony regarding the facts of the case. Petitioner has provided this Court and opposing party with police reports and investigative reports which demonstrate the significant dissimilarities between the cases. Thus, respondent's attempt to bootstrap the incomplete comparison of the three incidents and its allegation of no prejudice (Informal Response at p. 120), to a finding by this Court must be rejected.

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

In response to this claim, respondent alternatively argues (1) the claim is procedurally barred; (2) trial counsel's failures were the result of a reasonable tactical decision; (3) any objection would have been futile, and (4) any error in failing to object was not prejudicial. Each of these arguments is flawed and therefore must be rejected.

1. Petitioner's claim is not procedurally barred.

Respondent has misread the opinion of this Court when it argues that petitioner's claim here is procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218. (Informal Response at pp. 120-121, fn. 52.) The *Waltreus* rule provides that issues will not be reconsidered on habeas corpus once they have been raised and rejected on direct appeal. (*In re Waltreus, supra*, 62 Cal.2d at p. 225.) That is not the case here. The disposition of this claim by this Court was as follows:

> "Defendants also complain that the prosecutor was guilty of misconduct because, throughout the trial, he asserted that the murders of Bobby and Eric Hassan and the murder of Teheran Jefferson were part of an ongoing conspiracy involving defendants and other members of the Raymond Avenue Crips gang. Even if we were to assume that the prosecutor's allegations of a conspiracy were in some way improper, defendants have not preserved their right to raise the issue on appeal, because they failed to object to the prosecutor's comments at trial." (*People v. Champion, supra,* 9 Cal.4th at p. 31.)

Clearly, this Court only found that the issue had not been preserved for appeal. Here petitioner argues that his attorney was ineffective for failing to object to the prosecution's conspiracy evidence and argument, the claim must be raised in this a petition for writ of habeas corpus. [111]

2. Counsel's failure was not the result of a reasonable tactical decision.

Respondent asserts that trial counsel's failure to object was the result of a reasonable tactical decision. Respondent argues that "because a conspiracy was not charged, there was no concern that the prosecutor argued that one might have existed" (Informal Response at p. 121 fn. 53), and that this was a reasonable tactical decision. This is absurd. First, the second phrase of respondent's assertion does not make sense. Perhaps respondent means to say that because a conspiracy was not charged, trial counsel was not concerned that the prosecutor would argue that one existed. If this is what respondent means to assert, the record belies such a conclusion.

First, trial counsel makes clear that he was on notice that a conspiracy theory was going to be relied on by the prosecutor, albeit not until after the jury had been selected and before the prosecutor's opening guilt phase statement on September

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[111] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

28, 1982. (RT 1511-1514.) It may be that trial counsel was aware, but perhaps did not appreciate the significance of the prosecutor's stated intention, at an earlier date. According to his declaration, in June, 1982, Judge Skyers received a letter from the prosecutor regarding his intention to introduce evidence of the Jefferson crime at petitioner's penalty trial. [112] As early as November *1981*, trial counsel was notified that petitioner's and Ross' alleged involvement in the Jefferson crimes would be used at the penalty phase. (Exhibit 70, Guilt Phase Exhibits Vol. 3.)

Trial counsel should have been on notice that the prosecutor would attempt to implicate petitioner by asserting a conspiracy theory from the time he took over representation of petitioner. This is so because the prosecutor informed both Mr. Skyers and petitioner's previous counsel, Homer Mason, of his intent to do so.

As argued in his petition, as early as June 16, *1981*, the prosecution informed the defense that it believed that there was a "strong factual connection" between the Hassan killings and the Taylor killing. At the June 16, 1981 hearing the prosecutor voiced his intention to move to consolidate petitioner's case with that of Evan Jerome Mallet. In July, the court ruled, preliminarily, that evidence of gang membership and petitioner's affiliation with specific alleged Raymond Avenue Crips

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[112] Trial counsel does not recall having received the letter but acknowledges that he must have seen it because it bears his handwriting.

would be permitted so long as it was relevant to the theory of the case. Petitioner's counsel at this time was Homer Mason. (RT 21a-22a; 29a, 37a-38a.) On August 4, *1981*, the prosecutor' s motion to consolidate Mallet and petitioner's cases was denied. (RT 54a-56a.) On August 10, *1981*, the prosecutor explained that the decision to seek the death penalty against petitioner was that the four murders — the two Hassan, the Taylor, and the Jefferson murder — *were all connected.* (RT 60a.) During a suppression motion there was extensive testimony that petitioner was involved with the Raymond Street Crips, and individually with Evan Mallet, Craig Mr. Ross, and Marcus Player. On August 21, *1981*, Deputy Paul Bradley testified that he formed the opinion that petitioner was involved in the Taylor homicide because of his association with Mallet, Player, and Mr. Ross. (RT 63a, 90a-91a.) On February 16, *1982,* petitioner's case was consolidated with that of Craig Ross. (RT 280a-283a.) On September 28, *1982*, the prosecutor specifically argued that the case was "a series of crimes committed by the Raymond Crips." (RT 1502.)

It was unreasonable for trial counsel not to realize pretrial that the theory of the prosecution's case was that certain members of the Raymond Avenue Crips formulated a plan to commit and committed the robberies and murders of Jefferson, Michael Taylor and Bobby Hassan who were all involved in drug sales.

Moreover, prior to the introduction of evidence, the prosecutor secured a

ruling from the court which permitted him to argue a conspiracy theory. (RT 1511-1514.) At the very minimum, trial counsel should have objected here.

3. Any objection would not have been futile.

As recognized by this Court in *People v. Durham* (1969) 70 Cal.2d 171, "[c]onspiracy principles are often properly utilized in cases wherein the crime of conspiracy is not charged in the indictment or information. 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. [Citations.] 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 charged aided and abetted in its commission." (*Id.,* at p. 181 fn. 7, citations omitted.)

The *Durham* case, as well as the instant case fall in the last category, i.e., the prosecutor sought to show *through the existence of conspiracy* that petitioner, who was not the direct perpetrator of the criminal offense charged, aided and abetted in its commission. [113]

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[113] "All persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... are principals. ..." (Pen. Code, §

Thus, in the instant case the prosecution, in support of its sole theory of guilt as to petitioner, sought to show that he "instigated or advised the commission of the crime" in that he was a party to a criminal conspiracy which included within its scope the robbery and murder of drug dealers and that he was also "present for the purposes of assisting in its commission" in that his conduct at the Hassan residence was wholly consistent with such purposes. [114] Because the prosecutor's offer of proof and the evidence ultimately produced did not support this theory, trial counsel was ineffective for failing to render his objection and this failing was prejudicial to petitioner.

4. Petitioner was prejudiced by trial counsel's ineffective assistance.

Respondent lumps its assertion of absence of prejudice in the admission of the conspiracy evidence along with its general claim that admission of the Jefferson crime was not prejudicial. (Informal Response 124.) As noted above, this Court's examination of the appellate record, which contains only the prosecution's uncontroverted testimony regarding the facts of the case, led to the Court's conclusion that there were no inaccuracies in the offer of proof. Petitioner has

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31.) In this instant case it was alleged that petitioner was present at the time of the act constituting the offense. As the prosecutor did not present evidence that petitioner fired the shot that killed Bobby and/or Eric Hassan, it is clear that he was found guilty as a principal on the theory that he aided and abetted in the commission of the act.

presented additional facts contained in police reports and investigative reports which demonstrate the significant dissimilarities between the cases. Had counsel adequately prepared and made appropriate objections to the prosecutor's conspiracy evidence (including the Jefferson evidence) and argument, those objections would have been granted.

V.

PENALTY PHASE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

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

Specific to this claim are three detailed subclaims. These claims are as follows:

(1) Trial counsel failed to object to the prosecutor's argument that petitioner would kill again if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation.

(2) Trial counsel failed to object to the prosecutor's argument that an alleged

lack of a mitigating factor was, as to each factor, to be considered a factor in aggravation.

(3) Trial counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial, evidence which counsel would have discovered had he conducted a reasonably competent penalty phase investigation.

Contrary to the assertion of respondent, these claims of ineffective assistance of counsel are not precluded by the procedural bar against unjustifiably delayed claims.

Further, in so far as trial counsel had no valid, tactical reason for the errors and omissions complained of and petitioner was deprived of a fair trial as a result of these errors and omissions, petitioner has established a prima facie case for relief.

Attached to petitioner's petition are 242 exhibits,[115] including the declaration of trial counsel, now Los Angeles County Municipal Court Judge, Ronald K. Skyers, which individually and cumulatively represent reasonably available documentary evidence demonstrating that trial counsel rendered ineffective assistance of counsel at the penalty phase and that the failures and omissions discussed were not the result of a reasonable tactical decision.

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[115] See Exhibits to Penalty Phase Ineffective Assistance of Counsel Claims 1-240, and Guilt Phase Exhibits 47 and 67.

A. Trial counsel was ineffective in 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

1. Trial counsel's failure to object was not the result of a reasonable tactical decision.

In his closing argument at the penalty phase of the trial, the prosecutor commented three times on petitioner's and Ross' in-court response to the guilt phase verdicts. First, he argued that defendants' behavior showed that they would be a danger to others if they were sentenced to life imprisonment without possibility of parole. [116] The prosecutor again referred to this incident when he discussed whether either defendant had acted under the domination of another person in committing the murders. [117] At a later point, the prosecutor argued that defendants' behavior in

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[116] The prosecutor said: "I ask you to recall the display that was put on for you by the defendants, and particularly Mr. Ross, when the verdicts were rendered at a time when it should have been most important in his whole life to behave like a civilized person in front of the jury. [¶] Mr. Ross engaged in a confrontation with the guards here and almost got into a fight with them. [¶] Is that the kind of person from whom we can protect not only the society outside of prison but society inside prison by incarcerating him for the rest of his life?" (RT 3699-3700.)

[117] The prosecutor said: "When you rendered those verdicts that you so carefully considered after listening to so much evidence, [defendant Ross] was the one who first got up and in mock indignation started to walk toward the lockup, Mr. Champion followed. [¶] But the fact that Mr. Ross is or may be the leader here does not mean that Mr. Champion was acting under duress or under domination. [¶] Mr. Champion follows along because he wants to." (RT 3712.)

response to the jury's verdicts showed defendants' lack of remorse for their crimes.[118] (*People v. Champion, supra.*, 9 Cal. 4th at p. 941.)

Respondent contends that petitioner has neither presented a prima facie case of deficient performance nor demonstrated prejudice resulting from trial counsel's failure to object to the prosecutor's remarks. (Informal Response at p. 127-128.)

Initially, respondent "splits-hairs" when it argues that trial counsel's declaration regarding his absence of objection is not documentary evidence establishing his failure to object was not a tactical decision. In stating that he had no tactical reason for failing to object and/or to raise specific objections to certain evidence, trial counsel is clearly referring to those portions of this Court's opinion where trial counsel is faulted for failing to object. (Exhibit 47, Guilt Phase Exhibits Vol. 3.)

In any event, there is no question that trial counsel's failure to object was not the product of a **reasonable** tactical decision. As recognized by this Court, a timely objection and admonition would have negated any harm arising from the prosecutor's comments. (*Id.*, at p. 941-942, citation omitted.) Had trial counsel

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[118] "Did either of them show you any remorse when they did that mock display of indignation for you when you rendered the verdicts of guilt, verdicts which you rendered not because you delighted in doing so but because you had to, you had no choice based upon the law and the evidence. [¶] Did that show remorse on their part?" (RT 3727-2728.)

objected, his objection would have been sustained [119] and trial counsel's assurances to the jury that petitioner was not challenging anyone would have been unnecessary. (See Informal Response at p. 128.)

2. The prosecutor's remarks were improper.

It has long been recognized that misconduct by a prosecutor in closing argument may be grounds for reversing a conviction. (*Berber v. United States* (1934) 295 U.S. 78, 85-88.) Part of this recognition stems from a systematic belief that a prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Id.,* at 88.)

Beyond the concern of the proper role of the prosecutor, courts also have held that prosecutorial misconduct is particularly dangerous because of its harmful influence on the jury. Such misconduct "can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor . . ." (*People v. Bolton* (1979) 23 Cal.3d 208, 213.)

Decisions concerning penalty phase prosecutorial misconduct, like those regarding other features of a capital trial, have been predicated on the principle that "death is a different kind of punishment from any other which may be imposed in

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[119] See full discussion below in section V.A.2 of this argument.

this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) This difference has required the courts to ensure, by means of procedural safeguards and a heightened degree of judicial scrutiny that the death penalty is not the product of arbitrariness or caprice. "To pass constitutional scrutiny under this heightened standard, the death penalty must not be applied in an arbitrary or capricious manner. Rather, there must be 'an individualized determination whether the defendant in question should be executed, based on the character of the individual and the circumstances of the crime.'" (*Adamson v. Ricketts* (9th Cir. 1988) 865 F.2d 1011, 1021.) Consequently, "[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law." (*Coleman v. Brown* (10th Cir. 1986) 802 F.2d 1227, 1239.)

In the context of prosecutorial penalty phase closing arguments, the courts have sought to implement these rights in three general ways. First, in order to reduce the possibility of arbitrariness, courts have applied careful scrutiny to prosecutorial arguments that appeal to the emotions of the jury. This Court has declared that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason in imposing the death

penalty." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Thus, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Ibid.*) The federal courts have gone further and held that "even if a prosecutor's comments are confined to permissible subjects, if those comments are nevertheless designed to evoke a wholly emotional response from the jury, constitutional error can result." (*Coleman v. Brown, supra,* 802 F.2d at 1239.)

The avoidance of arbitrariness in the jury's exercise of its discretion also requires that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human . . . ." (*Lockett v. Ohio* (1978) 438 U.S. 586, 598.) Improper prosecutorial comments "present an intolerable danger that the jury will in fact choose to minimize the importance of its role, a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case." (*Caldwell v. Mississippi, supra,* 472 U.S. at 331-334.) This Court has also reversed death judgments on the ground that the prosecutor misled the jury as to its sentencing responsibility. (See e.g. *People v. Crandell* (1988) 46 Cal.3d 833, 881-885; *People v. Milner* (1988) 45 Cal.3d 227, 253-258; *People v. Edelbacher* (1989) 47 Cal.3d 938, 1038-1041.)

Another approach employed to channel the jury's discretion has been to limit its consideration to those matters brought out in evidence. This approach has been unreservedly adopted by this Court, which long ago declared that the prosecutor's penalty phase argument "must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicial noticed facts." (*People v. Love* (1961) 56 Cal.2d 720, 730.) Moreover, the United States Supreme Court has declared that standards applied to capital case sentencing should be stricter than those applied in non-capital cases. (*Gardner v. Florida, supra*, (1977) 430 U.S. at 349.) In *Gardner*, the Court held that a death sentence could not rest on non-record information, which was not presented to the defendant and which he had no opportunity to rebut. The Eighth Amendment and due process concerns expressed by the Court regarding the unreliability of such information is equally applicable to statements made by the prosecutor that lack any support in the record. Petitioner submits that for the reasons stated above and below, the prosecutor's comments were improper and constitute reversible error.

As argued in the petition, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of "relevant evidence" as that which "tends logically, naturally (or) by reasonable inference to prove or disprove a

material issue" at trial. (*People v. Jones* (1954) 42 Cal.2d 219, 222.) Neither can it be properly considered by the jury as evidence of defendant's demeanor since demeanor evidence is only relevant as it bears on the credibility of a witness. (California Evidence Code section 780.) If anything, focusing the jury's attention of a defendant's courtroom conduct distracts attention from, and may diminish, the weight the jury assigns to the permissible factors identified by the instructions as legitimately aiding in the determination of the appropriate penalty. How the defendant comports himself -- or, more accurately, how he appears to be comporting himself -- at the counsel table within the highly structured and artificial world of the courtroom is the product of many factors. Regardless of what the defendant is really feeling, the way in which he appears to be acting is open to vast misinterpretation. Given the proof contained in this petition, it is likely that Mr. Champion was not, as Mr. Semow accused, "displaying mock indignation," but rather was genuinely feeling indignant at the miscarriage of justice that had resulted in his being found guilty.

Moreover, the point is that what the prosecutor really argued was not simply that the jurors take into account what actually occurred, but to draw inferences therefrom regarding petitioner's state of mind. In other words, the prosecutor urged the jury to speculate, to infer a guilty mental state from petitioner's appearance.

Behavior of no rational probative value was used as the basis for an argument to the jury. Moreover, the argument was not just that the jury take the behavior into account, but that unreliable factual inferences should be drawn from the behavior, and that the inferences then be used to support a capital sentence. The defense had no opportunity to rebut such an argument, or could rebut it only at the cost of surrendering the defendant's right to remain silent.

The prosecutor's comment to the jury as to petitioner's demeanor, lack of remorse, and attempt to characterize petitioner as a "bad guy" was also a violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendments. Moreover, as trial counsel never raised the issue of remorse, the prosecution's argument was in violation of petitioner's privilege against self-incrimination and right to refuse to testify. (*Griffin v. California* (1965) 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229.) Finally, California's prohibition against a capital sentencer's weighing nonstatutory aggravating factors on death's side of the scale establishes an important procedural safeguard. That safeguard is protected not only by state law, but by the Due Process Clause of the Fourteenth Amendment as well. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Campbell v. Blodgett, supra,* 997 F.2d at p. 522; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) The prosecutor's argument undermined that

safeguard and violated due process. [120]

B. Trial counsel failed 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.

Respondent concedes that the prosecutor's argument that an alleged lack of a mitigating factor was, as to each factor, to be considered a factor in aggravation was improper under *People v. Davenport* (1985) 41 Cal.3d 247, [121] but argues that petitioner has not demonstrated that trial counsel was ineffective for his failure to object. (Informal Response at p. 139.) Respondent is wrong.

Respondent implies that this Court concluded, based on the fact that this case was tried before *Davenport,* that trial counsel was not ineffective for failing to object. This is not what this Court said. Rather, this Court noted that neither petitioner nor Mr. Ross objected to the prosecutor's argument, and therefore they had not preserved the issue for consideration on appeal. (*People v. Champion, supra.,* 9 Cal.4th at p. 939, citations omitted.) Further, this Court determined that the argument was nonprejudicial (*Id.,* at pp. 939-940, citations omitted.)

Here, as in his petition, petitioner respectfully disagrees. As he did earlier,

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[120] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

[121] Court specifically recognized that the prosecutor's argument here was improper. (*People v. Champion, supra.,* 9 Cal.4th at p. 939.)

petitioner respectfully urges that this Court consider the impact of various guilt and penalty claims in combination. Had trial counsel provided effective guilt phase assistance and adduced available evidence to show that petitioner was not involved in the Taylor crimes (Claim VI) , that the ring found in petitioner's possession was not victim Bobby Hassan's ring (subclaim VII.A), the full extent of contradiction in the testimony of Elizabeth Moncrief (subclaim VII.C), no reasonable judge or jury would have found that petitioner was involved in any of the three killing incidents. Had trial counsel presented the evidence habeas counsel has presented concerning petitioner's neurological impairments no reasonable judge or jury would have been able to conclude beyond a reasonable doubt that petitioner, even if he were one of the four men who entered the Hassan residence on the day of the homicides, understood that a homicide would occur or personally intended that anyone be killed. But for counsel's ineffective assistance, no reasonable judge or jury could have found true the special circumstance allegations or convicted petitioner of capital murder. Moreover, as a result of trial counsel's ineffective assistance in failing to adequately investigate petitioner's life history and mental impairments and in failing to adequately challenge the prosecution's improper argument and misleading claims concerning petitioner's alleged involvement in three homicidal incidents, "the death penalty was imposed by a sentencing authority which had such

a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark, supra*, 5 Cal.4th at 798).[122]

C. Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial.

1. This claim was timely filed.

a. No delay is attributable to Mr. Merwin [123]

During his tenure as petitioner's habeas counsel, Mr. Merwin identified the apparent inadequacies of the penalty phase investigation and presentation of trial counsel Mr. Skyers. Mr. Merwin retained the services of an investigator and began locating and interviewing petitioner's family members. Mr. Merwin's investigator began to construct a family tree and identified for Mr. Merwin dozens of potential penalty phase witnesses to locate, contact and interview.

In February of 1994, Mr. Merwin, relying upon the preliminary information that he and his investigator had gathered, requested funds from this Court (a) to

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[122] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

[123] For the reasons stated at pp. 3-5, under the general allegations of the timeliness of this petition, insofar as Mr. Johnson was not appointed to represent petitioner in habeas proceedings and at no time undertook doing so, no delay is attributable to Mr. Johnson.

investigate possible mental health defenses, (b) to retain a neuropsychologist to examine petitioner, and (c) to conduct the life history investigation that trial counsel should have conducted as part of his penalty phase preparations. Six months later, on August 24, 1994, the Court denied the request for funds to investigate mental health issues and retain a neuropsychologist, but authorized Mr. Merwin to expend up to $4,000 to investigate trial counsel's penalty phase performance. As noted above in Argument I, the authorized funding was available for only seven weeks before Mr. Merwin was required to discontinue work on petitioner's case. Mr. Merwin was unable to complete the investigation required to set forth a prima facie case for relief.

b. No delay is attributable to Ms. Kelly

Ms. Kelly's tenure as habeas counsel began in June of 1995. As explained in the petition, Ms. Kelly had to begin by reviewing the entire appellate record, the trial file, police reports, and related records from the court proceedings of other alleged participants so that she could reach her own judgment – as she was ethically obligated to do — as to the full range and relative strength of potential claims, how best to pursue the investigation, which claims to present, with what documentary support, and how to perform each of these tasks most effectively. (Petition, pp. 8-11.) She also, of course, reviewed Mr. Merwin's files. Contained within the file

were notes of interviews with various family members who had been contacted during Mr. Merwin's tenure as habeas counsel and Mr. Merwin's funding request to this Court which identified in a very general way potentially viable areas of penalty phase investigation. Ms. Kelly used the funding secured and unspent by Mr. Merwin for preliminary penalty phase investigation, primarily in the collection of relevant documents and preliminary interviews with members of petitioner's family.

In November, 1996, having nearly exhausted the remainder of the funding secured by Mr. Merwin, Ms. Kelly applied for additional funding from this Court and from the federal district court. The results of the preliminary investigation indicated that several factors had shaped and influenced petitioner's development and functioning during his childhood, adolescence and young adulthood,[124] and that he had struggled to overcome emotional, intellectual, and psychological impairments that may have been caused by a number of factors, including but not limited to, genetic mental illness, prenatal exposure to physical abuse, the traumatic loss of his stepfather and abandonment by his biological father, multiple head and other injuries, compromised intellectual functioning, and an intergenerational history of substance abuse. Funding was sought to continue the investigation to develop a full

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[124] Petitioner was just eighteen years old when arrested for the charged capital offense. (Exhibit 32; CT 39, 115.)

and reliable social and medical history for petitioner, so events in petitioner's life and petitioner's own behavior could be placed in proper perspective. Developing an accurate social and medical history and accurate mitigation evidence required further confidential interviews with petitioner, and further interviews with petitioner's family members, and others who observed petitioner over time, including friends, neighbors, social service providers, teachers, and clergy. It also required the gathering of school records, medical records, employment records, social service records, juvenile and adult criminal records, probation and parole records, and psychological and psychiatric records concerning petitioner and his extended family. Such records are essential to ensure the accuracy, and shed light on the meaning and significance, of orally reported information, and essential to ensure the reliability and coherence of the case in mitigation offered in support of a life sentence. In January of 1997, the federal district court authorized $11,000 in federal funding for Ms. Kelly, Mitigation Specialist Dr. Scharlette Holdman, and Dr. Holdman's staff of case workers to continue to investigate petitioner's life history. This Court denied counsel's funding request later that same month.

Following the authorization of additional investigative funds, petitioner's

habeas team continued to investigate petitioner's social and medical history.[125] By August of 1997, the authorized federal funding and what had remained of the authorized state funding for penalty phase investigation was exhausted in the course of locating and contacting witnesses; conducting interviews; traveling; and identifying, locating, obtaining, and reviewing relevant life history documents. On August 6, 1997, Ms. Kelly applied once again to this Court for funding to complete the penalty phase/life history investigation so that petitioner could present a prima facie showing of penalty phase ineffective assistance of counsel. It was Ms. Kelly's belief that she then had in hand more information to demonstrate the likely merit of a claim of ineffective assistance of counsel and hence make a more persuasive showing of the appropriateness of funding further investigation. See Habeas Standards, standard 2-4.2; see also *In re Gallego, supra*, 18 Cal.4th at 834 (seeking reconsideration of previously denied funding request is appropriate where counsel can "produce additional documentation or explanation to support the proposed investigation"). In support of the funding request Ms. Kelly explained that

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[125] During this same period, Ms. Kelly also had to devote considerable time and energy to the drafting and completion of an initial federal habeas petition (setting forth only exhausted claims) so that a federal petition could be filed on petitioner's behalf prior to the possible expiration of the federal statute of limitations on April 23, 1997. Because of uncertainties about how the newly enacted federal statute (AEDPA) would be construed, Ms. Kelly had no choice but to research, prepare and file a federal petition — while in the process of investigating and preparing the state petition.

petitioner's habeas team had in hand tentative information demonstrating the prejudicial impact of trial counsel's failure to investigate petitioner's life history and mental health. Accordingly, she requested that this Court reconsider its previous denial of funds to investigate the claim of penalty phase assistance of counsel, and authorize petitioner's habeas team to go forward and complete the preliminary investigation so as to confirm the reliability of the information gathered to date, determine the scope and true nature of the mitigating facets of petitioner's life history so far identified, and by obtaining appropriate declarations and other documentary support, place the information in proper form before this Court. (See, *In re Duvall* (1995) 9 Cal.4th 464, 474.)

It is, of course, difficult for habeas counsel to gauge precisely when counsel has in hand sufficient facts and documentary support to establish a prima facie case for relief, and hence an obligation under this Court's standards to present the claim in a habeas petition. (*In re Robbins*, *supra*,18 Cal.4th at 806 fn. 28 and 29 (majority), 820 (Justice Kennard Concurring and Dissenting); *In re Gallego, supra*, 18 Cal.4th at 834; *In re Clark*, supra,5 Cal. 4th at 781.) In light of the relative rarity of this Court's issuance of orders to show cause, a reasonable attorney would assume that a prima facie case for relief requires a compelling showing, and hence that counsel must exercise caution to not unnecessarily risk summary denial by filing

before counsel has in hand information enough to set forth a prima facie case for relief. [126]

However difficult a determination this is vis-a-vis most habeas claims, it is all the more difficult and complex vis-a-vis a claim of penalty phase ineffective assistance of counsel for failure to conduct an adequate investigation into his client's social and medical history as a source of mitigating evidence. For example, by contrast, the "Garton subclaim" recently considered by the Court in *In re Robbins*, supra,18 Cal.4th at 785-787 – a claim based on the trial prosecutor's having allegedly lied and committed misconduct during the discovery process – was essentially based on a single declaration from a New Jersey police officer concerning materials he had delivered to the prosecutor prior to Mr. Robbins' trial. A claim based on trial counsel's failure to investigate his client's social and medical history, as least in a case like petitioner's where counsel's failure to investigate was near total and petitioner's history is so replete with mitigating evidence, involves a far more complicated, multi-layered investigation and reasonably requires far more elaborate and extensive documentary support.

Here, by August of 1997, habeas counsel's investigation had revealed a

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

number of broad but interrelated areas of mitigation: a family history of mental illness,[127] petitioner's own brain damage,[128] petitioner's harsh and inadequate treatment while a ward of the California Youth Authority,[129] chronic and severe

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[127] A history of mental illness exists in both petitioner's maternal and paternal families. By August, 1997 habeas counsel had identified nine members of petitioner's family who had been diagnosed and treated for schizophrenia, mood disorders, addictive diseases, and other serious mental illnesses.

[128] By March 1997, Dr. Nell Riley Ph.D., had diagnosed petitioner with severe brain damage and had requested additional data in order to determine the etiology of the impairment and its effect on petitioner's development, including academic performance. By August 1997, habeas counsel had discovered several events and factors in petitioner's prenatal and perinatal development that could be responsible for the brain damage, including exposure to neurotoxins; birth trauma caused by anaesthetics, prolonged labor, or forceps; and prenatal injury caused by physical assault. Petitioner's mother was beaten numerous times during her pregnancy with him. She was choked and repeatedly struck in the abdomen by petitioner's father, with the specific intention of killing petitioner *in utero*. In one such instance, petitioner's mother lost consciousness for several minutes.

Additional significant factors which may have affected petitioner's neurological condition include injury caused by physical assault during childhood and teenage years, the drugs and alcohol petitioner ingested beginning at age eight, inhalation of organic solvents, and malnutrition due to poverty. Petitioner's mother breast-fed her children months past the age of weaning, to the point that her nipples bled, because she could not afford to feed them properly. Additional factors include untreated childhood diseases, inadequate medical care, and loss of consciousness and head trauma sustained in an automobile accident at age six. By August 1997, it became clear that it was important to attempt to document each of these factors and the events surrounding them so that Dr. Riley and the Court could be confident that petitioner's brain damage was long-standing and hence was relevant to understanding his life history and to mitigating his involvement in criminal activity.

[129] Initial records from CYA reported that petitioner suffered from depression severe enough to require treatment in the psychiatric unit. His counselors indicated that he continued to strive for rehabilitation to escape gang pressure despite his mental illness. In August of 1997, habeas counsel requested funds with which to investigate and document the severity of petitioner's mental illness, the treatment he received for it, and the effect the following conditions of confinement at CYA had on his preexisting mental

violence within petitioner's family home,[130] chronic exposure to violence within petitioner's community and school,[131] and petitioner's lesser (and mitigated) role among juveniles committing the criminal conduct offered as evidence in aggravation.[132] Precisely how many of these interrelated themes had to be shown (and with what level of factual detail and documentary support) to establish for the Court a prima facie case for relief was difficult for counsel to evaluate. But having

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condition: inadequate programs for learning disabled and brain damaged students, physical violence, traumatic stress, and solitary confinement.

[130] Petitioner, his siblings, and his mother were subject to chronic physical assault and psychological trauma inflicted by petitioner's father and two older brothers. The physical abuse was severe and included kicking, suffocating, punching, slapping, throwing, and attempts to kill. The mother and children in the family were knocked or chocked unconscious, bruised, burned, cut, struck with blunt objects, and seriously injured repeatedly. By August, 1997, habeas counsel had identified almost 20 neighbors, teachers, family friends, employers, and relatives who witnessed the violence and its effects. It was important to interview these people and attempt to gather declarations and other documentary evidence of the severe violence within petitioner's home.

[131] Preliminary investigation showed that petitioner grew up in an impoverished area of South Central Los Angeles where he was exposed to life-threatening danger and violence on a daily basis in both his neighborhood and schools. During 1997, efforts were underway to document, with records, experts' analyses, and witnesses' observations of petitioner's personal experiences, the environment in which petitioner and his family lived, and the resources available to them.

[132] Preliminary investigation had uncovered reports that petitioner was under the influence of others at the time of the offenses introduced during the penalty phase of his trial. He did not plan, instigate, or lead the others in commission of the offenses. Habeas counsel needed to interview the witnesses, co-defendants, and victims of both prior offenses.

discovered facts suggesting each of these mitigating themes, it was reasonable for Ms. Kelly to attempt to confirm and flesh out each theme in order to ensure an accurate and reliable social history and to establish a prima facie case for relief that would lead to this Court's issuance of an OSC. That, of course, was Ms. Kelly's purpose in seeking additional funding in August of 1997.

One of the important elements of petitioner's social and medical history, and in habeas counsel's ability to make a preliminary showing of prejudice flowing from trial counsel's investigative failure, was the evidence of petitioner's brain damage. This was something Ms. Kelly was unable to effectively investigate until February 1997 when Ms. Kelly, using her own funds, retained Dr. Nell Riley, a neuropsychologist, to examine petitioner. Both this Court and the federal district court had denied requests for funds to retain a neuropsychologist.[133] Under this Court's decision in *Gallego*, this major facet of the never-presented case in mitigation — and hence of the showing of prejudice flowing from trial counsel's investigative failure — was not something Ms. Kelly, as reasonable habeas counsel, should have unearthed at any earlier date. (*In re Gallego, supra*, 18 Cal.4th at

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[133]Mr. Merwin's February 15, 1994, request for funds with which to retain a neuropsychologist was denied in August 1994. Ms. Kelly's November 1996 requests to this Court and the federal court for funds for psychological, neurological and psychiatric testing and examination were denied in January 1997.

828(denial of timely request for investigation funds "will support a determination that the petitioner not only did not actually know of the information earlier but also should not reasonably have known of the information earlier"; emphasis in original).)[134] Further, as noted above in footnote 132, Dr. Riley, in March, 1997, after analyzing the results of the testing she had administered, requested that counsel attempt to obtain additional information concerning the possible etiology and effects of petitioner's impairments so she and the Court could be confident that petitioner's brain damage occurred early in his life and both contributed to his long standing difficulties and mitigated his involvement in criminal activity (as well as casting doubt on the mens rea element of the special circumstance allegations). This too was part of what Ms. Kelly was seeking funding to accomplish in her August 1997 request for funding.

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[134] As the Court explained in *Gallego, supra*, 18 Cal.4th at 828-29, "If (i) discovery of the information offered in support of a claim requires the expenditure of funds, (ii)the petitioner is indigent and cannot fund the investigation personally, and (iii) the petitioner timely files a request for funding of a specific proposed investigation, fulling disclosing all asserted triggering information in support of the proposed investigation, the petitioner's appointed counsel has exercised due diligence with respect to the proposed claim. When our court denies such a request for investigative funds – having determined that the petitioner has failed to present sufficient 'triggering facts' to support the proposed investigation – we cannot properly find that the petitioner should have discovered such information without first obtaining funding from some other source or learning of the information in some other manner. Appointed counsel for the petitioner has no obligation to personally fund a habeas corpus investigation . . . ." (Emphasis in original.)

Ms. Kelly did not have luxury of waiting for the Court's response to her August 1997 funding request. Using her own funds, and considerable pro bono assistance from Scharlette Holdman and her staff of case workers and volunteers, Ms. Kelly moved forward with the investigation, obtaining witness declarations and other documentary support needed to show the prejudicial impact of trial counsel's investigative nonfeasance and to set forth a prima facie case for relief.[135] Counsel also expended further funds of her own to obtain a declaration from Dr. Riley (Exhibit 67, Declaration of Nell Riley, PhD; October 22, 1997) and to obtain the services of psychiatrist Dr. Roderick W. Pettis, who examined petitioner at San Quentin and whose evaluation of petitioner's impairments and of various documented influences on petitioner's development was necessary in order to place what we had learned about petitioner into a cohesive and illuminating narrative. (See Penalty Phase Exhibit 1, Declaration of Roderick W. Pettis, M.D., October 30, 1997.) There simply was no way the claim presented could have been filed substantially sooner than November 5, 1997, the date on which the petition was filed. The process of locating, fully interviewing and obtaining declarations from

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[135] The federal district court ordered that petitioner file before this Court a petition setting forth his unexhausted claims by November 6, 1997.

While Ms. Kelly was unable to complete all of the investigative steps set forth in her August 1997 funding application, petitioner believes that what she did complete has enabled her to set forth a prima facie case for relief.

witnesses , of collecting, reviewing and presenting documentary support and arranging for the examinations and declarations by Drs. Riley and Pettis was not, and could not have been, completed substantially sooner by petitioner's counsel, Karen Kelly. Thus, this claim was filed "without substantial delay" (i.e., within a reasonable time after petitioner and his counsel knew or should have known the factual and legal bases for the claims raised). (Standards 1-1.2; *In re Robbins, supra*, 18 Cal.4th at 784,787-788.) Further, insofar as there may be any delay flowing from either Mr. Johnson's inability to serve as habeas counsel, or Mr. Merwin's having to withdraw as habeas counsel because of personal financial and health-related problems, there is "good cause" for such delay. (Standard 1.2.)

Finally, petitioner would note that even if this claim were deemed untimely, it is a claim which must be addressed under this Court's miscarriage of justice exception to the timeliness bar. A fuller discussion of the prejudicial impact of counsel's investigative failure is discussed below as part of the discussion of the merits of the claim. But petitioner would submit that as a result of trial counsel's ineffective assistance in failing to adequately investigate and present mitigating evidence concerning petitioner's life history and mental impairments, particularly when viewed in combination with counsel's failure to adequately challenge the prosecution's misleading claims concerning petitioner's alleged involvement in three

homicidal incidents (Claims VI, VII, and VIII), "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark, supra*, 5 Cal.4th at 798).

2. Trial counsel's failure to present substantial and credible mitigating evidence was not the result of a reasonable tactical decision.

Respondent asserts that trial counsel was under no obligation 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. (Informal Response at p. 143.) The reasoning employed by respondent here is unclear, but respondent seems to imply that perhaps a thorough and complete penalty phase investigation was conducted by Homer Mason (petitioner's prior trial counsel), and/or Mr. Skyers, and that Mr. Skyers decided not to present the information elicited from these investigations. [136] This is not so.

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[136] Respondent disingenuously refers to Mr. Skyers' and Mr. Mason's "investigators" (Informal Response at p. 144), as if there was more than one investigator and as if Mr. Skyers utilized the services of an investigator. Mr. Skyers clearly states that he performed limited investigation and retained no investigator to assist him. (Exhibit 47, Guilt Phase Exhibits Vol. 3.)

Mr. Skyers plainly states that his preparation for the penalty phase of petitioner's case consisted only of talking to family members and petitioner's youth parole officer. (Exhibit 47, Guilt Phase Exhibits Vol. 47.) Mr. Skyers did not gather supporting documentation so as to present evidence of petitioner's full social history. Mr. Skyers was unaware of 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.

Contrary to respondent's claim, Mr. Skyers did not make a tactical decision to present some evidence and not to present other -- Mr. Skyers did not know of any of the information which is contained in the petition and in the numerous documents which support this claim, because he did not conduct the investigation necessary to reveal the substantial mitigating evidence petitioner has presented here.

Respondent relies on Penal Code section 987 ancillary services orders obtained by Mr. Mason as proof that investigation into petitioner's social history was performed. (Informal Response at p. 144-145.) In doing so, respondent misrepresents the type of expert assistance requested, the extent of expert assistance ordered and the results of expert consultation. For example, Mr. Mason did not

request the services of psychologist Robert Wm. Shomer to assist in penalty phase preparation. Mr. Shomer was requested and approved as an eyewitness identification expert. [137] (CT 224-231.) Further, this expert was neither used by Mr. Skyers or Mr. Mason. (CT 597-601.) Similarly, the court approved $250.00 for probation consultant Clyde Longmire. (CT 382.) The probation consultant was never used by Mr. Skyers and there is no indication that any expert or investigator, directly or indirectly, provided any information to Mr. Skyers whatsoever. Mr. Skyers confirms that he did not rely on any such documentation or discussions between Mr. Mason and anyone else.

As argued above petitioner has not alleged that no psychiatric evaluation was performed (Informal Response at p. 144), only that the examination was minimal, insufficient, and insofar as the expert was not provided with necessary background information, any decision not to call Dr. Pollack or to request further testing, was not the result of a reasonable tactical decision. Attached hereto as Exhibit 5A is the letter detailing findings by Dr. Pollack to Mr. Skyers. Besides being entirely consistent with petitioner's claim of innocence, the letter demonstrates the truly

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[137] Petitioner is at a loss to explain why respondent is under the impression that Dr. Shomer was approved for services beyond those necessary to eyewitness issues (Informal Response at p. 144), as Mr. Mason's motion and the court order are clearly limited in this regard.

limited nature of the inquiry performed by Dr. Pollack and the complete lack of substantial information from which Dr. Pollack had to work. In addition to a letter from Mr. Skyers, Dr. Pollack reviewed only arrest reports, autopsy reports, and preliminary transcripts. Dr. Pollack's inquiry was limited to five "legal" defenses. No inquiry was made or requested concerning possible bases for mitigation of sentence. (Exhibit 5A.)

Respondent seems to imply that petitioner's claim is, that, based on information readily available to him, trial counsel was ineffective for failing to pursue investigation of mental defenses. (Informal Response at p. 146.) This is not petitioner's claim. Petitioner's claim is that trial counsel failed to conduct a reasonable investigation into his client's background and personal history, and that if he had done so he would have unearthed the wealth of mitigating evidence set forth in the petition. Further, had counsel conducted such an investigation and provided relevant information to a mental health expert, either counsel on his own or any mental health expert he consulted with, would have initiated or recommended neuropsychological testing. Neuropsychological testing at the time of trial would have revealed the impairment shown by the battery of tests administered by Dr. Riley.

In his declaration, Judge Skyers acknowledges that had he known that

petitioner had been abused in utero and been involved in a serious car accident, each of which suggested a possibility of resulting brain damage, he would have requested funding for neuropsychological examination. (Exhibit 47, par. 26, Guilt Phase Exhibits Vol. 3.) Judge Skyers has stated 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; but counsel admits that he never asked petitioner or any member of petitioner's family whether petitioner had suffered any head injuries. (*Ibid.*) Certainly it is not reasonable for counsel to rely upon a capital defendant or the defendant's family --- particularly a family with as many problems as petitioner's family — to know what information would be helpful to the defendant's guilt and penalty phase defenses and to volunteer that information without being asked.

It is certain that had counsel conducted a reasonable inquiry, such as the inquiry conducted by habeas counsel, he would have learned of the in utero abuse and childhood auto accident (which resulted in head injury and loss of consciousness) and requested neuropsychological testing. Further, as is set forth more fully in Claim IX of the petition, had counsel conducted a reasonable investigation of his client's personal history and background, counsel also would have learned of petitioner's malnourishment as an infant, the repeated blows to the

head petitioner suffered at the hands of his two mentally ill older brothers, petitioner's early and recurrent problems at school, petitioner's inhalation of organic solvents and his ingestion of nearly lethal amounts of liquor in childhood. (See Petition Claim IX.C., pars. 1a through 1e.) Had counsel learned this information and provided it to a mental health expert -- which reasonable counsel certainly would have done given its obvious relevance to a mental health evaluation — the mental health expert would have discerned and communicated to counsel the appropriateness of neuropsychological testing. (See Exhibit 1 par. 11 a., Penalty Phase Ineffective Assistance of Counsel Exhibits Vol. 1.)

Further, there can be little doubt that counsel was obligated to conduct a reasonable thorough investigation of his capital client's background and personal history. (See, e.g., *In re Jackson* (1992) 3 Cal.4th 578, 586, 612 [defendant's trial counsel, by failing to conduct a reasonable investigation of defendant's background and childhood to enable him to make an informed decision as to the best manner of proceeding at the penalty phase, failed to provide competent representation under the prevailing professional standards]; and *Siripongs v. Calderon* (9th Cir. 1998) 35 F.3d 1308, 1316 [counsel was well below accepted standards in failing to conduct more than a cursory investigation of petitioner's background].) That counsel's investigation of petitioner's background was no more than cursory is apparent from

(1) the very meager penalty phase case he presented on petitioner's behalf (fully set out in two sentences in this Court's direct appeal opinion, *People v. Champion, supra.,* 9 Cal.4th at p. 904) and (2) the fact that counsel was unaware of petitioner's "family mental illness . . ., divorce, poverty, and life threatening danger at home and in the community" — facts which a reasonable investigation would have easily unearthed. If counsel had conducted more than a cursory investigation into petitioner's background and personal history, he could not have helped but discover the facts suggesting a reasonable possibility of brain damage and hence the appropriateness of neuropsychological testing.

The same argument is applicable to trial counsel's failure to trial counsel's failure to recognize, adequately investigate, consult and prepare appropriate lay witnesses and experts, and present evidence of petitioner's full social history, which includes, in addition to 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.

Faced with the convincing mitigation profile submitted in this petition and completely supported by credible documentation, respondent resorts to an unpersuasive argument that petitioner suffered no prejudice from trial counsel's failings. Respondent cites to potential cross-examination of witnesses and the facts

of the crime to support this argument. [138] (Informal Response at p. 146-148.)

Certainly, neurological and psychiatric experts as well as lay witnesses, would have been subject to cross-examination. They would also have been subject to redirect examination.

Respondent ignores more that 240 declarations, records and other documents which present a full, comprehensive and persuasive history of petitioner's severe brain damage, parental loss, family mental illness and neurologic disease, divorce, poverty, and life threatening danger at home and in the community, in mitigation of penalty. Instead respondent focuses on small portions of four exhibits but ignores the wealth of documentation describing the absence of compensatory or protective forces in petitioner's life which exacerbated the long term consequences of risks that affected every sphere of petitioner's life. Petitioner fully documents that his ability to understand the world in which he lives was and is compromised by severe brain damage, most likely the result of prenatal trauma caused by his mentally ill father's attempts to kill him in utero, infant malnourishment, head injury from a serious automobile accident which resulted in the death of his step father, intentional blows to his head by his two older mentally ill brothers, voluntary inhalation of

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[138] Respondent wrongly accuses petitioner of killing "innocent children." (Informal Response at p. 145.) Petitioner did not kill Eric Hassan or any other child.

organic solvents, and ingestion of nearly lethal amounts of liquor in childhood. Petitioner's family was plunged into chaos and poverty when the only positive father figure he ever had, his mother's second husband, was killed in an automobile accident when petitioner was only six years old. Petitioner's maternal and paternal families have a significant history of major mental illness that contributed to his parents' inability to protect and nurture him and his siblings. Petitioner also faced the threat of annihilation daily in his home at the hands of his two older brothers, one diagnosed as suffering from schizophrenia and the other addicted to violence producing drugs. The brothers terrorized petitioner, his mother, and his siblings with knives, guns, physical assaults, and threats to kill. The oldest brother tortured petitioner and his other siblings, destroyed their treasured possessions at will, and kept them isolated from others in the community. Finally, by fortuity or design, Steve Champion's community lacked the resources it needed to intervene and protect the lives of children like petitioner, whose basic physical and emotional needs went unmet. Schools, health care providers, law enforcement agencies, and social service organizations in South Central Los Angeles had few if any adequate programs aimed at identifying, assisting, and protecting at risk children in South Central Los Angeles. (Exhibit 1, Vol. 1, Claims relating to Penalty Phase Ineffective Assistance of Counsel.)

The cumulative impact of this powerful array of mitigating evidence demonstrates that petitioner never had a fair chance in life, that it was unlikely (given his impairments) that petitioner would have been a dominant actor in any crime-committing foursome, and that there are multiple bases for having compassion for petitioner and for holding him less morally responsible for his actions than someone who is neurologically intact and not scarred by so violent and non-nurturing an upbringing. Had trial counsel conducted a reasonable investigation and found and presented this evidence, it is more than reasonably likely that a verdict less than death would have been returned.[139]

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[139] This likelihood would have been all the greater had counsel adequately prepared to defendant against prosecution assertions that petitioner was involved in the uncharged Taylor and Jefferson homicides and prevented the sentencing jury from finding or suspecting that petitioner was involved in three separate homicidal incidents. (See claims VI and VIII.)

VI.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR IMPLYING THAT PETITIONER HAD A CRIMINAL RECORD AND BY THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL (Claim X)

A. This claim is timely and not otherwise procedurally barred.

In addition to its general assertions of untimeliness as discussed in *Robbins* and *Clark*, respondent asserts that this claim is procedurally barred by either by *Waltreus* (the claim was previously raised on direct appeal) or *Dixon* (the claim should have been raised on direct appeal). Respondent concludes its litany of procedural bars by asserting that petitioner has waived any right to claim a violation of due process as he failed to make such an objection at trial. (Informal Response at pp. 149-150.)

All of the reasons which petitioner argues permit presentation in his petition of other largely record based claims apply equally to this claim. While easily raised, petitioner was in the process of investigating other claims in this petition. Further, insofar as a prima facie case for relief requires a compelling showing counsel exercised caution so as not to unnecessarily risk summary denial by filing before counsel has in hand information enough to set forth a prima facie case for

relief. (*In re Clark, supra*, 5 Cal.4th at 781.) [140]

Respondent argues that petitioner has waived his claim of a violation of due process because trial counsel failed to object on that basis. (Informal Response at p. 150.) At trial, Mr. Ross' attorney objected as follows:

> Yesterday Detective Crews testified to arresting two persons, and the question was then asked did these persons have a record, and the officer responded that they did not. Those people being released leaves the inference that our clients have a record and that is why we are here. They were looking for persons with a record, and I think that that is tantamount to – I couldn't ask the question of one of my witnesses, whether or not one of their witnesses had a record or not. That would be improper. I think it is prejudicial. (RT 1908.)

Mr. Skyers joined in the motion. Without discussion, the motion was denied by the trial court. (RT 1908.)

Clearly, it would have been futile for trial counsel to raise, at this point, the specific and additional objection of a due process violation. (See generally *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn. 27 ["rule that failure to objet bars appellate review applies only if a timely objection or request for admonition would have cured the harm...[here] an objection by defense counsel would almost certainly have been overruled, and consequently would have failed to cure the effect of the

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[140] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

prosecutor's argument"]; *People v. Price* (1990) 223 Cal.App.3d 606, 692 [rule that objection is necessary to preserve issue on appeal "is not applicable where any objection would almost certainly be overruled.") [141]

B. Petitioner has presented a prima facie case for relief.

Respondent asserts that the testimony of Detective Crews was permissible and therefore no mistrial should have been granted. In doing so, respondent mistakenly relies on a portion of this Court's opinion. (Informal Response at p. 151-152.) Contrary to respondent's implication, while this Court may have determined that the trial court's denial of the mistrial motion was correct, this Court did not conclude that the comments were proper. (*People v. Champion, supra,* 9 Cal.4th at p. 926.)

As argued in the petition, the fact that an individual does or does not have a criminal record is inadmissible for any purpose. The existence or nonexistence of a criminal record is of too little probative value to be admissible for any purpose. (California Evidence Code sections 352 and 1101; *People v. Ozuna* (1963) 13

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[141] Assuming this Court disagrees with petitioner's claim of futility, petitioner claims that trial counsel's failure to object on specific grounds of a due process violation amounted to ineffective assistance of counsel. As trial counsel did object for the record, it was unnecessary for him to request a curative instruction. (*People v. Green* (1980) 27 Cal.3d 1.) Any failure to raise the issue on direct appeal has resulted in a violation of petitioner's right to effective assistance of counsel on appeal.

Cal.App.2d 338, 341-342.) Detective Crew's testimony strongly inferred petitioner was involved in prior crimes was therefor improper and violated petitioner's due process rights.

VII.

DEFENSE COUNSEL'S CONFLICT OF INTEREST PREVENTED HIM FROM RENDERING EFFECTIVE ASSISTANCE OF COUNSEL (Claim XI)

1. This claim is timely filed.

In addition to its general argument asserting the procedural bar against unjustifiably delayed claims, respondent contends that "by the time the jury returned its verdict, petitioner should have known or reasonably discovered whether the fees paid to his counsel were sufficient to compensate him for the time spent on petitioner's case." (Informal Response at p. 153.) Respondent's contention is wholly without merit.

First, respondent seems to imply that the test is whether or not trial counsel's fees were sufficient to cover the work he did rather than the work he should have done. The essence of petitioner's claim is that trial counsel did not request, either from the court or other sources, sufficient monies to adequately prepare this case. As pointed out in the petition, counsel here was presented with the task of investigating and preparing for both a guilt and penalty phase trial. The guilt phase consisted of four homicides which occurred in three separate instances. Other complex issues of gang membership, conspiracy, eyewitness identification, third

party culpability, and forensic evidence required extensive investigation, legal research, briefing, and argument. Finally, petitioner was before the jury with a co-defendant whose involvement was strongly indicated. Finally, a prior trial of one of the Taylor perpetrators had occurred. $10,000.00 was not a sufficient fund for pretrial legal preparation alone. In addition court time was also extensive. Petitioner's trial began on September 28, 1982. The sentence of death was imposed on December 10, 1982. (CT 725-735; RT 3807-3808.)

It is absurd to assert that this claim should have been filed in 1982. Petitioner is a layman with serious neurological impairments and a limited education. He was in no position to discern the conflict of interest under which his lawyer labored and, all the more clearly, was not able on his own to prepare a habeas petition. Petitioner did not have habeas counsel until Mr. Merwin was appointed in 1992 and, as explained above (Argument I.A.), Mr. Merwin was forced to stop working on petitioner's case before being able to file a petition on his behalf. Further, this claim is entirely dependent on all of the Taylor, Hassan, Jefferson, and penalty phase IAC claims which required the investigation which led to the proof here. In other words, the monies collected by Mr. Skyers could be not be deemed insufficient until it was determined just what investigation and preparation Mr. Skyers should have done, as

is presented by the petition and its supporting documentation. [142]

2. An actual conflict of interest is apparent.

It is remarkable that respondent discerns no actual conflict of interest. For a flat all-inclusive payment of $10,000 trial counsel accepted the responsibility of representing a capital defendant and proceeded to trial without investigating at all two of the three homicidal incidents which he knew or should have known were the lynch pins of the prosecution case against petitioner and the bases for the prosecution's case to establish the mens rea necessary for death eligibility. Representing a client faced with being implicated in four homicides -- all of which the prosecutor put counsel on notice that he intended to introduce as aggravation in the penalty phase -- trial counsel did not adequately investigate or prepare a penalty phase.

Trial counsel's representation of petitioner, however well intentioned it may have been, was woefully inadequate. Again, petitioner respectfully urges that this Court consider the impact of various guilt and penalty claims in combination. (Please see pp. 16-18of this Informal Reply.)

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[142] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

The funds Mr. Skyers collected from the Champion family were not sufficient to compensate him for the time actually spent in preparation of or presentation of petitioner's case, much less compensate him for the work that he knew or should have known was necessary to adequately represent petitioner.

VIII.

THE UNCONSTITUTIONAL JOINDER OF PETITIONER'S CASE WITH THAT OF CRAIG ROSS DENIED PETITIONER DUE PROCESS OF LAW AND IN COMBINATION WITH PROSECUTORIAL BAD FAITH, INEFFECTIVE ASSISTANCE OF COUNSEL, AND ERRONEOUS TRIAL COURT RULINGS RESULTED IN FUNDAMENTALLY UNFAIR GUILT AND PENALTY TRIALS (Claim XII)

Here, as in his petition, petitioner claims the convictions and death sentence were unlawfully and unconstitutionally obtained in violation of petitioner's rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under article I, section 1, 7, 15, 16, 17, and 24 of the California Constitution and the statutory and decisional law of California, in that petitioner was denied effective assistance of counsel by the unconstitutional joinder of petitioner's case with that of codefendant Craig Ross, in combination with prosecutorial bad faith, ineffective assistance of counsel, and erroneous trial court rulings.

Contrary to the assertion of respondent, this claim is not precluded by the procedural bar against unjustifiably delayed claims.

Contrary to the assertion of respondent, petitioner has presented a prima facie case for relief.

As previously stated, some of the claims referenced herein appear as separate claims in the petition. In its Informal Response, respondent does not further address

those claims here except to the extent petitioner claims the error is cumulative. (Informal Response at p. 157.) For that reasons, in this Informal Reply, petitioner replies to only those further assertions in pages 156-176.

A. Ineffective Assistance of Trial Counsel

Respondent's argument IX A. adds nothing to its prior argument IV.

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

Other than its assertion of procedural bars, Respondent's argument IX B. relies entirely on this Court's opinion on direct appeal and adds or argues nothing additional. (Compare Argument IX B to Arguments III.A. at p. 39 and V.A. at p. 113-114.) [143]

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[143] Respondent once again relies on this Court's opinion, which was based entirely on the appellate record, to conclude that petitioner has failed to establish a prima facie case for relief based on the unconstitutional joinder of the Taylor case. (Informal Response at pp. 159-160.) Once again, the ring found in petitioner's possession was not Bobby Hassan's ring. (See guilt phase exhibits 56-59.) Ms. Moncrief's trial testimony was so fatally flawed that the prosecutor conceded that it could not, standing alone, support a finding of guilt. In his petition, petitioner attached documentation which demonstrated how truly unbelievable this woman's identification testimony was. (See guilt phase exhibits 62-64.) Had this information been introduced it is certain petitioner would not have been convicted. If he had, it would only have been due to his association with Mr. Ross.

Respondent once again cites this Court's opinion to support its conclusion that petitioner was not prejudiced by the evidence of the Taylor crimes. (Informal Response at p. 160.) Unlike this Court at the time of issuing its automatic appeal opinion, respondent has the benefit of all of the documentation which leads to the inevitable conclusions that petitioner was not involved in the Taylor crimes and the prosecutor knew or should have known this fact.

Respondent bootstraps this Court's statement that "[b]ecause the car [from which the Taylor suspects fled] contained items stolen during the commission of the Hassan and

f. This claim is not procedurally barred

Respondent asserts that petitioner's claim of improper, bad faith joinder was raised or should have been raised on direct appeal, and for those reasons is procedurally barred by *Waltreus* or *Dixon*. (Informal Response at p. 158-159.) This is not so. The documents which are attached to the petition, particularly those which support petitioner's lack of involvement in the Taylor, Hassan, and Jefferson crimes, demonstrate the case against petitioner was far weaker than indicated by the record on appeal, and further, that the prosecutor knew or should have known that (1) his case against petitioner was weak, (2) that petitioner was not involved in the Taylor crimes, and (3) that the Jefferson killing was dissimilar to the Hassan and Taylor crimes, and accordingly that the prosecutor pursued joinder and the introduction of evidence concerning and/or purporting to connect petitioner to the Jefferson and Taylor crimes in bad faith.[144] Thus, while portions of the joinder claim were argued on appeal, evidence available only via habeas was necessary to

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Taylor killings, the jury could reasonable infer that the same four men who had fled from the Buick had also participated in the [Hassan] murders" (*People v. Champion, supra.*, 9 Cal.4th at p. 905, 906), to what is now an unsupportable theory that the Taylor evidence was admissible against petitioner and thus joinder lawful. Petitioner was not one of the men who fled the Buick following the Taylor homicide.

[144] That same evidence, of course, helps demonstrate that if trial counsel had done an adequate job investigating the Taylor and Jefferson crimes, he would have been in a far better position to oppose both joinder and the improper introduction of evidence concerning and/or purporting to connect petitioner to the Jefferson and Taylor crimes.

demonstrate the prosecutor's bad faith manipulation of the legal process – as well as to demonstrate the full prejudice and miscarriage of justice resulting from that manipulation of the legal process. There is thus no basis for a Dixon procedural bar.

Respondent further asserts that because the gunshot residue test, Rose Winbush's statement, and the actual ring size were known or could have been discovered at or near the time of trial this subclaim is substantially delayed without justification or exception. (Informal Response at p. 159.) This too is not so. As explained above, although it is true as to this claim that certain "triggering facts" were available to Mr. Merwin before February 1994 when Mr. Merwin made his funding request, the availability of these facts only triggered counsel's *duty to investigate*, not his duty to present the claims. (*In re Robbins, supra,* 18 Cal.4th at p. 806 fn. 28 and 29, 820.)

This claim is more than "record-based." It would not been possible or prudent for Mr. Merwin to make this claim prior to conducting the investigation conducted by present habeas counsel. Further it has been demonstrated that the subclaims to the Jefferson crimes, to the Hassan crimes and to the Taylor crimes are interrelated and dependent on each other. Alleged proof of petitioner's involvement in the Jefferson crimes was argued as proof of his participation in Hassan. Petitioner's guilt in the Hassan crimes, the finding of special circumstances and the

imposition of the death penalty was dependant on his participation in the Taylor crimes. The prosecution could not make its case against petitioner without proof of each of these three homicidal incidents. As a result, counsel was required to investigate all of these crimes before filing the petition. [145]

C. The Bad Faith of the Prosecutor.

There are five subsections to this Argument by respondent. Respondent does not argue anything it had not argued in previous arguments X.A and X.C. [146]

D. The unconstitutionality of Joinder and Resulting Prejudice.

Once again, respondent asserts that petitioner's claim of unconstitutionality of joinder and resulting prejudice was raised or should have been raised on direct appeal, and for those reasons is procedurally barred by *Waltreus* or *Dixon.* (Informal Response at p. 168-169.) Although similar claims were made by petitioner on direct appeal, numerous exhibits, which accompany petitioner's petition augment the record here. Thus, neither bar applies.

1. The Taylor Rape/Murder

Respondent relies entirely on this Court's opinion of direct appeal to

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[145] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

[146] Any allegation of a procedural bar is similarly pled in those arguments and has been fully addressed by petitioner in preceding sections of this Informal Reply.

conclude that the Taylor crimes would have been admissible at petitioner's separate trial. (Informal Response at p. 170.) As discussed in great detail above the prosecutor knew that petitioner was not involved in the Taylor crimes and that there was no evidence whatsoever that he was involved in the Jefferson crimes. Therefore, there was no evidence to support the prosecutor's conspiracy theory and so it follows, no proper ground upon which to admit any evidence of the Taylor crime at petitioner's separate trial

2. Cora Taylor's Identification

For the same reasons as discussed just above (Section 1) and the additional reasons set out Claims VI.A-H, had petitioner been tried alone, Ms. Taylor would never have been given the opportunity to mistakenly identify petitioner as one of the men who entered her home and participated in the robbery and murder of her son.

3. Gang Graffiti and Other Gang Evidence

Respondent reasserts familiar procedural bars and arguments made earlier. Here too, respondent once again relies on this Court's direct appeal opinion, which was decided without reference to the numerous exhibits petitioner has attached here and to his petition.

Here, in response to procedural bars and to respondent's argument that petitioner has failed to present a prima facie case, petitioner incorporates those

arguments and claims made in the petition at sections IV and VI.A. through VI.H, and above in section II.I. Specifically, the following bears repeating:

Simply put, Deputy Williams either *misread* or *misrepresented* what was depicted in the photograph of the arcade graffiti . Either way, Williams *erroneously* read the words "Do or Die" as "do-re-me." Based entirely on this mistake, Williams premised his speculative, unfounded, and erroneous interpretation of the meaning of "do-re-me" coupled with the dollar sign as meaning "to obtain money in a robbery or burglary." (RT 2657, 2675.) By associating petitioner's name with the graffiti and the fact that it was on a wall near Michael Taylor's home, the conclusion that petitioner was involved in an alleged gang conspiracy to rob and murder marijuana dealers and thus petitioner's involvement in the Taylor robbery-murder and Hassan robbery-murders become obvious conclusions for the jury to reach. Each of these conclusions stemmed from a very basic and easily remedied mistaken and/or erroneous representation of the words "do-or-die." As hearsay, and erroneous hearsay at that, all implications and conclusions that rested upon Williams' factual representations were irrelevant and inadmissible and should never have been before this jury.

Respondent's argument that petitioner's expert's testimony would not have affected the admissibility of Williams' testimony, only the weight attributed to it is

unpersuasive. Only relevant evidence is admissible. (Evid. Code § 351.) Because the graffiti did not contain the words "do-re-me" Williams' opinion as to the alleged meaning of those words was irrelevant and for that reason inadmissible. The mere fact that petitioner's alleged moniker appeared on a wall which was located near the Taylor home may have been admissible on the issue of gang membership[147] but it was otherwise inadmissible as having no tendency in reason to prove or disprove any disputed fact that was of consequence to the crimes for which petitioner was tried.

On the question of prejudice, respondent here again relies solely on the opinion of this Court and concludes that petitioner has not suffered prejudice. Petitioner disagrees and respectfully requests, once again, this Court reconsider its earlier ruling in light of the further evidence now available that the ring taken from petitioner *was not Bobby Hassan's ring*, and therefore the only evidence of petitioner's guilt is Elizabeth Moncrief's unreliable and insufficient identification.

As stated in the petition and above, the erroneous introduction of the graffiti, Williams' erroneous factual statements that petitioner was seen by him in the company of Ross, Mallet, and the Player brothers in the months preceding the crimes and that the graffiti said "do-re-me," and trial counsel's failure to consult and

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[147] Petitioner does not concede this point.

call a gang expert on behalf of petitioner, to find and call the author of the graffiti, and to point out that, when compared, the writing on the two walls and that on the arcade wall appeared to be authored by different persons seriously prejudiced petitioner's case. Williams' opinion that the graffiti on the wall across from the Taylor residence advertised petitioner's involvement in a robbery was argued by the prosecution to support its theory that petitioner was involved in a conspiracy to rob and murder marijuana dealers and actually participated in both the Hassan and Taylor crimes, and further that petitioner had the requisite mental state to find him guilty of capital murder.

4. The Murder of Teheran Jefferson

Respondent has not added any argument which it had not made earlier and which petitioner has not adequately addressed. (See Informal Response Argument X.B.)

5. Alleged Cumulative Effect

Respondent raises the familiar *Dixon* procedural bar. Of course, these claims rely on numerous exhibits which were not part of the record on direct appeal. Therefore the *Dixon* bar does not apply.

IX.

CLAIMS OF PROSECUTORIAL MISCONDUCT (Claim XIII)

Here, as in his petition, petitioner asserts that the death sentence was unlawfully and unconstitutionally obtained in violation of petitioner's 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, in that the prosecutor committed acts of prejudicial misconduct which ultimately 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.

Specific to this claim are three claims of prosecutorial misconduct. Those claims are:

(1) The prosecutor knowing committed prejudicial misconduct when he applied to the court for permission to and did secretly tape two conversations between petitioner and Evan Mallet and again between petitioner and Craig Ross;

(2) The prosecutor knowing committed prejudicial misconduct when he knowingly misrepresented the similarities between the Jefferson killing and the Taylor and Hassan crimes to the trial court; and

(3) The prosecutor knowing committed prejudicial misconduct when he represented to both defense counsel and the 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.

Contrary to the assertion of respondent, this claim is not precluded by the procedural bars.

Contrary to the assertion of respondent, petitioner has presented a prima facie case for relief.

1. Petitioner's claim is timely filed.

To respondent's general allegation of untimeliness, petitioner responds as before. In short, Mr. Johnson was not required to investigate or present habeas claims. Mr. Merwin could not file a completed position and was correct to continue his investigation but not to actually file. As the claims in this petition, including those of prosecutorial misconduct, are dependent upon each other and penalty phase investigation was in progress present habeas counsel investigated and presented

these claims in a timely fashion. [148]

2. The prosecutor knowingly 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 in order to tape record their conversations.

Before claiming petitioner has failed to establish a prima facie case for relief, respondent asserts a number of procedural bars to petitioner's claim here. First, respondent asserts that petitioner should have raised this claim on direct appeal. This is so, says respondent, because "[o]n direct appeal, petitioner made numerous challenges to the admissibility of the tape recorded conversations. Thus, he could have and should have raised the issue of misconduct...on direct appeal." (Informal Response at p. 180.) This assertion is without merit as petitioner's claim of prosecutorial misconduct relies, in large part, on the transcript of pretrial proceedings in the Evan Mallet case. Respondent recognizes this is so. (Informal Response at p. 180.) Obviously, those transcripts were not part of the record on direct appeal. Thus, the claim is properly brought here.

The mere existence of the Mallet transcript prior to trial and prior to these proceedings does not indicate the petition was untimely filed. Petitioner has faulted

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[148] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

trial counsel for failing to read the Mallet transcripts and for failing to bring them to the attention of the trial court. (See for example Claims VI.A, B, C, E, F, G, H, VII.F, VIII.A, and D; Exhibits 10, 11, 16, 22, 28, 30, 34, 36, 38, 51, 68, 75.) It stands to reason that trial counsel could not effectively object to the tapes on the ground of prosecutorial misconduct because that objection was based on information that he was unaware existed. [149] It follows that appellate counsel could not raise a claim that relied on information that trial counsel had not discovered and was not made part of the appellate record.

a. Petitioner has established a prima facie case for relief.

Respondent wrongly asserts that "petitioner's sole support for his claim of misconduct is a stipulation in the Mallet case...." (Informal Response at p. 181.) This simply is not so, and, yet another instance of respondent wilfully ignoring exhibits and the record.

As discussed above on July 30, 1981, prosecuting deputy district attorney Semow moved the superior court for an order permitting him to secretly tape two conversations between petitioner and Jerome Evan Mallet. (CT 401-402.) In his

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[149] For all of those reasons stated in other claims and in reference to the petition in general neither Mr. Merwin nor Ms. Kelly were untimely in the discovery of the Mallet transcripts and in raising those claims which rely in part on those transcripts to establish a prima facie case.

declaration in support of his request, Semow justified his request on his information and belief that Mallet and petitioner's separate cases bore "close factual connections." (CT 403.) Semow requested that the taping take place on August 4, 1981, a time which he declared would be "the first and possibly the only time [Mallet and petitioner would] appear in court together." (CT 403.) The reason Mallet and petitioner would be in court together on August 4, 1981, was because Semow had scheduled a motion to consolidate the two men's cases for that date. (CT 383-387.) Semow's motion to consolidate was filed on July 24, 1981. (CT 383.)

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

The timing of Mr. Semow's actions belie respondent's assertion that neither misconduct nor a due process violation occurred. According to the stipulation and not disputed by respondent, Semow's motion to secretly tape petitioner and Mr. Mallet as they were brought together to court followed Semow's realization that by law the two men's cases could not be consolidated. In other words, Semow applied

to the court for permission to tape while petitioner was being transported for hearing on a motion which the prosecutor had every intention of taking off calender, but which Mr. Semow let remain on calender so as not to lose the opportunity to tape petitioner's conversation with Mr. Mallet. Moreover, when Semow applied to the court for permission to tape he did not advise the court that the motion was "not well taken." In other words, Mr. Semow's "good faith," ceased to influence any of his requests once he knew Mallet and petitioner could not be joined. According to the stipulation "at that point when [Semow] became convinced that *Ortiz* was controlling law, he had time to take the consolidation off calendar but did not do so, and the reason that he did not do so was his desire to get the tape of conversation between Mr. Champion and Mr. Mallet, and that he did not notify counsel for Mr. Mallet of the proposed tape recording." (Exhibit 68, Guilt Phase Exhibits Vol. 3.) Mr. Semow misrepresented the legality of his request to tape to the court and the defendants' counsel.

Respondent relies on this Court's finding, on direct appeal, that the taping of petitioner and Ross' conversation was permissible to support its assertion that the taping of petitioner and Mallet's conversation did not constitute misconduct. (Informal Response at pp. 181-182.) This Court did not have the Mallet transcripts and the stipulation of the parties before it.

Respondent's argument that it was of no consequence that the motion to consolidate was not taken off calendar as "petitioner was scheduled to come to court for hearings on other motions" (Informal Response at p. 182), is perhaps its most disingenuous. The date of August 4, 1981 was "the first and possibly the only time [Mallet and petitioner would] appear in court together." (CT 403.) If the motion were taken off calender, Mallet and petitioner would not have been transported **together** for the motion to consolidate or any other motion. [150]

Finally, as argued in the petition, the prosecutor's misconduct was prejudicial to petitioner. During cross-examination, Mr. Semow discussed petitioner's conversation with Mr. Mallet. (See Claim V.I.) By referring to the taped conversation between Mr. Mallet and petitioner, Mr. Semow further connected petitioner to the Taylor crime. This was despite the fact that Mr. Semow had previously represented to the court that he had no reason to believe petitioner was directly involved in Mr. Taylor's murder and despite the fact that, as proved in the Taylor claims above, the prosecution had actual or imputed knowledge that petitioner was not involved in the Taylor crimes. Further, the portion of the conversation emphasized by Mr. Semow implied that petitioner and Mr. Mallet

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[150] Respondent offers no documentary evidence to indicate that Mr. Mallet was scheduled to appear on August 4, 1981 for any purpose other than the motion to consolidate.

were attempting to fabricate an alibi for petitioner as to the Hassan killings, by implying that Nicardo Petit was involved. [151]

3. The prosecutor committed prejudicial misconduct when he knowingly misrepresented the similarities between the Jefferson killing and the Taylor and Hassan crimes to the trial court.

a. Petitioner's claim is not procedurally barred.

Initially, respondent argues that petitioner's claim here is procedurally barred. (Informal Response at pp. 184-186.) Of course this is not so. On direct appeal, petitioner advanced similar arguments and claimed that the prosecutor committed misconduct in misleading the court in its offer of proof regarding the similarities between the Jefferson and Hassan crimes (joining Ross' briefs), and that the prosecutor failed to meet a foundational requirement for admission of the Taylor and Jefferson crimes. Here, as in his petition, petitioner argues that the prosecutor knowingly committed prejudicial misconduct when he knowingly misrepresented the similarities between the Jefferson killing and the Taylor and Hassan crimes to the

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[151] Respondent mistakenly states that petitioner has not presented a prima facie case on prosecutorial misconduct relating to the tape recording of conversations between petitioner and Mr. Ross. (Informal Response at pp. 183-184.) Petitioner fully incorporated here numerous claims involving the Champion-Ross tapes. (See p. 249 referring to paragraphs 1-18 of Claim VII and paragraphs D1-D10 of Claim XII. Here, he incorporates the reply to respondent's assertions as outlined in above sections.

trial court. [152] In support of this claim, petitioner relies on 14 attached exhibits. [153] Insofar as this claim relies on documentary evidence outside of the appellate record, the claim could not have been made on direct appeal and is not procedurally barred. (See *In re Harris* (1993) 5 Cal.4th 813, 828, fn. 7.) Further, for the reasons stated above, Mr. Johnson was under no obligation to advance this habeas claim. For all of the reasons stated above and incorporated herein, neither Mr. Merwin not Ms. Kelly could have made this claim any sooner. [154]

Respondent singles out 4 of the 14 exhibits and argues each (exhibits 48, 49, 50, and 69) is "cumulative to the evidence at trial" and additionally that exhibit 50 "is not 'in such a form that perjury may be assigned upon the allegations if they are false" and further that it involves "inadmissible hearsay." (Informal Response at pp. 185-186, fn. 62.) [155] These arguments are wholly without merit.

None of the above mentioned exhibits is cumulative. As argued in the

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[152] Petitioner fully incorporated claims VIII.C, VIII.D., and VI.H. in this claim. (See Petition at p. 252.)

[153] Exhibits 18, 28, 32, 33, 34, 35, 36, 47, 48, 49, 50, 69, 74, and 75.

[154] Petitioner incorporates here his timeliness arguments as to subclaim VIII.A. Those arguments fully apply to this subclaim, and, for the reasons stated in those arguments, this subclaim, even if deemed untimely, should be addressed on the merits.

[155] In making its argument that petitioner's claim here is "unsupported by additional facts pertinent to his claim" respondent ignores the other 10 exhibits petitioner has attached hereto and incorporated herein.

petition, police and prosecution reports and other documentation concerning the Jefferson killing indicate the crimes were glaringly dissimilar in at least the following respects:

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

b. Mr. Jefferson was killed in his apartment some time between 10:00 p.m., November 14, 1980 and 11:40 a.m., November 15, 1980. [156] There was evidence that during this time span, from 10:00 p.m. on November 14 and continuing to some unknown hour, Mr. Jefferson was in his apartment "getting high" with "a partner" of his. (Exhibit 69 -- statement of Jefferson's wife.) While habeas counsel has not yet been able to identify Mr. Jefferson's partner there is no reason to suspect that Jefferson's partner was anyone connected in any with petitioner or Ross or to the Raymond Avenue Crips. Thus, there is evidence that during the time span when Jefferson was killed in his apartment, he was "getting high" in the apartment with

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

someone having no apparent connection to petitioner or the Raymond Avenue Crips, and thus, as to the Jefferson crime, there was either an alternative suspect with no apparent ties to the Crips (unlike the Taylor crimes) or a witness who was allowed to leave the scene of the crime (unlike the Hassan case).

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

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

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

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

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

h. Although Mr. Jefferson was shot in the back of the head like the Taylor and Hassan victims, only Jefferson was gagged, as well as bound. A rag was forced

into his mouth. (Exhibit 69.)

Neither are petitioner's attached exhibits barred by the hearsay rule. It has long been the rule that declarations and other exhibits attached to a petition "may be incorporated into the allegations, or simply serve to persuade the court of the bona fides of the allegations. If the return does not dispute the material factual allegations, the court may take them as true, and resolve the issues without a reference hearing." (*In re Fields* (1990) 51 Cal.3d 1063, 1071 fn. 2 citations omitted.) Here, petitioner has attached documentation which was contained in trial counsel's file and which was provided to defense counsel Skyers by the prosecuting attorney. [157] If Exhibit 50 is not a note given to the police or written by a police officer. respondent is in the position to demonstrate as much.

Respondent's final procedural bar, waiver, is equally unpersuasive. Respondent recognizes that Mr. Skyers objected on more than one occasion and on more than one ground that evidence of the Jefferson homicide should not be offered against petitioner. (Informal Response at pp. 187-188.) [158] He also objected to

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[157] Recall, trial counsel did not conduct any independent investigation of the Taylor homicide.

[158] Petitioner argued in claim VIII. A. that defense counsel provided constitutionally ineffective assistance by failing to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes which would have precluded admission of the Jefferson evidence and undercut the prosecution's theory that petitioner was a participant in or at least had knowledge of all three incidents and its

evidence of offering the Taylor crimes against petitioner.[159] Contrary to respondent's assertion, Mr. Skyers' objections were not "nonspecific." An objection is sufficient if the record shows the trial judge understood the issue presented. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Here, Mr. Skyers objected to admission of crimes in which his client was not implicated by direct evidence and which his client was charged with committing. The prosecutor's presentation of circumstantial evidence in his offer of proof was incomplete and misleading.

In any event, after the jury heard the evidence relating to the Jefferson homicide, trial counsel was in no better position to object more fully. This is because, as argued above, trial counsel performed no investigation into the Jefferson homicide, only read the Taylor crime reports and so did not have in mind any of the information demonstrating the dissimilarities of these crimes and the Hassan crimes, and so was unable to fully object to the testimony.

b. Petitioner has made a prima facie case.

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theory that petitioner's alleged knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true.

[159] Prior to trial, defense counsel objected to any reference to petitioner as having been involved in the Taylor crimes. Trial counsel argued that, "[t]he Taylor killing [was] not charged to Champion at all, and to make some reference or some hint that he might be involved in some way...would be highly prejudicial...." (RT 1519.) The prosecutor responded that he had no direct evidence that petitioner was inside the Taylor house, and that he had given defense counsel "evidence of one negative identification that was [not] contained in any written report." (RT 1519.)

Once again, petitioner relies on this Court's opinion on direct appeal to support its argument that petitioner has not made a prima facie case. On direct appeal, this Court was not privy to the wealth of documentary evidence which this court and respondent, now have on habeas. These documents independently and cumulatively demonstrate the dissimilarities noted above between the Jefferson killing and the Taylor and Hassan crimes, dissimilarities undermining the prosecutor's theory for admitting the Jefferson evidence. (See preceding section of this argument.) Further, the prosecutor argued to the jury that knowledge of the Jefferson killing meant that the perpetrators of the Hassan crimes had entered the Hassan residence with the requisite criminal intent, i.e., an intent to kill or assist in the killing of a human being. The prosecutor attributed petitioner's alleged knowledge of the Jefferson crime to his alleged membership in the Raymond Avenue Crips, his alleged association with the Evan Mallet, the Player brothers and Craig Ross and connected the Crips, Mallet, the Player brothers and Ross to the Jefferson killing by misleading the court and jury as to the purported similarities between the Jefferson killing and the charged offenses.

4. The prosecutor knowingly committed prejudicial misconduct when he represented to both defense counsel and the 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.

a. Petitioner's claim is supported by reasonably available documentary evidence.

Initially, respondent argues that the support for petitioner's claim consists of "conclusory allegations of misconduct and utter speculation." (Informal Response at p. 192.) This is not so. Petitioner's claim is adequately supported by documentary evidence and is neither conclusory or speculative. This claim of misconduct is based on the specific arguments here as well as fully incorporated Claims VI.A though VI.H and the exhibits in support of those claims. (See Petition at p. 255.) The merits of this claim is discussed in more detail below.

b. Petitioner has made a prima facie case for relief.

Respondent asserts that petitioner has not made out a prima facie case of misconduct. In support of that assertion, it implies that the prosecutor sought an in-court identification from Mrs. Taylor **of Ross** and concludes that "[t]he record

demonstrates clearly that the prosecutor was as surprised as the defense when Cora Taylor identified petitioner." (Informal Response at p. 193.)

It has been demonstrated, both above and in the petition, the prosecutor did not seek an identification of Mr. Ross, but rather, went on a fishing expedition in the hope that Mrs. Taylor -- who was recognized as a poor eyewitness-- might mistakenly, but to the prosecution's benefit, identify petitioner as one of the men who entered her home and murdered her son. (RT 2244-2245.) After Mrs. Taylor's surprise and mistaken identification, the prosecutor asked that the record reflect that Mrs. Taylor identified petitioner as one of the men who entered her home, then, on numerous occasions reinforced this identification and specifically, during questioning, referred to petitioner by name as one of the perpetrators of the Taylor crimes. (RT 2246, 2248, 2250, 2255, 2263, 2302, 2304, 2305.)

If the prosecutor was surprised by Cora Taylor's identification, his follow-up questions and argument indicate that he willingly seized upon this mistake in order to bolster his case against petitioner. This was misconduct given (1) the prosecutor's prior representations to the court and counsel, and (2) the information available to the prosecutor concerning the actual identities of the four men involved in the Taylor crimes.

Mr. Semow was privy to the exhibits that petitioner has attached to his

petition which demonstrate to near certainty that petitioner was not involved in the Taylor crimes. The wealth of evidence documenting petitioner was not only not inside the residence but not present at the crimes at all is information that Mr. Semow must have known -- most of the evidence was contained in discovery provided to petitioner's counsel by Mr. Semow.

It is beyond belief that respondent would argue that the prosecutor was not precluded from asking for a possible in-court identification from Cora and Mary Taylor as "[c]ertainly, there was circumstantial evidence connecting petitioner to the Taylor house." (Informal Response at p. 194, fn. 64.) To make this assertion, respondent relies on the fact that petitioner was a friend of Craig Ross and Evan Mallet. Respondent wilfully ignores all of the evidence, which was known by Semow, which demonstrates petitioner's alibi for the night of the Taylor crimes, and at a least a prima facie case that Robert Simms and Michael Player were involved with Mallet and Ross in the Taylor crimes. [160]

Contrary to respondent's claim, petitioner does not "baldly assert" "without

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[160] Assuming arguendo that Mr. Semow did not have direct knowledge of the contents of the numerous police reports and pretrial and trial transcripts submitted in support of this claim and claim V.I., as the courts have refused to draw a distinction between the different agencies under the same government, focusing instead upon the "prosecution team," which includes both investigative and prosecutorial personnel (see generally, *Izazaga v. Superior Court* (1991) 54 Cal.3d 356), knowledge to Semow should be presumed.

citation to the record" that the prosecutor committed misconduct by arguing petitioner's involvement in the Taylor crimes was proof of his involvement in the Hassan crimes._ (Informal Response at p. 194.) Through incorporated portions of claims VII.A through VII. H, petitioner cited numerous instances of the prosecutor's argument tying petitioner to the Hassan crimes through his alleged, and obviously untrue, involvement in the Taylor crimes. As argued above, because of the insufficient evidence of petitioner's guilt, the prosecutor hypothesized a theory of conspiracy to which he claimed petitioner was a party. Specifically, Semow argued that in order to determine *who* committed the murders, it was necessary to understand *how* they were committed, i.e., it was necessary to understand the pattern which the prosecutor claimed emerged on its comparison of the Hassan, Taylor and Jefferson murders. (RT 3152.) According to the prosecutor, the similarities between the crimes indicated they were committed by the same group of people. "[I]t is clear that this murder is connected to this murder, that is, part of the same common plan, part of the same conspiracy, to rob and kill people in their homes." (RT 3156.) "[A] conspiracy specifically to rob and kill a certain type of victim...to wit, a marijuana dealer." (RT 3156.) The prosecutor advised the jurors to reason backward. "[I]f the Michael Taylor murder is inextricably connected to the Bobby [and] Eric Hassan['s] murder, then it logically follows that any evidence

connecting...either of the defendants to the Michael Taylor murder logically connects that same defendant to the Bobby Hassan and Eric Hassan murder." (RT 3161, 3168.) "[T]he evidence connecting Mr. Champion to Mr. Taylor connects him to Bobby and Eric Hassan." (RT 3171.) "[F]urthermore, any evidence connecting either of the defendants to any other of the known participants in these conspiracies logically tend to connect then to the crimes in question." (RT 3161.)

Evidence of the Taylor crimes was central to the prosecution's theory of petitioner's guilt in the Hassan crimes. The prosecutor argued Cora Taylor's in-court identification of petitioner was credible and supported by Mary Taylor's inability to state emphatically that petitioner was not present at the scene. (RT 3170.) Clearly, Semow argued that if petitioner was guilty of the Taylor crimes he was necessarily guilty of the Hassan crimes.

The cumulative effect of trial counsel's failure to effectively defend against the prosecution's theory of petitioner's involvement in the Taylor crimes, coupled with the proof offered by the prosecutor through the identification by Cora Taylor and opinions of Deputy Williams severely prejudiced petitioner, deprived him of a fair trial on the issue of his guilt or innocence of the charges, and also rendered his convictions and death sentence inherently unreliable. This is so because, as demonstrated here and in the petition, the only proof remaining of petitioner's

involvement in the Hassan killing is the unreliable identification by Elizabeth Moncrief. Insofar as the prosecutor was forced to admit that this evidence alone could not support a guilty verdict, petitioner has presented a prima facie case that he was prejudiced by the errors and omissions complained of here.

X.

THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL

In his petition, petitioner set forth facts establishing a prima facie case that the California death penalty statute under which petitioner was sentenced to death is unconstitutional because it fails to adequately narrow the class of persons eligible for the death penalty and thus permits a constitutionally impermissible risk of arbitrary capital sentencing. (Petition, Claim XIV, pp. 256-60, and Exhibit 77, Supplemental Declaration of Steven P. Shatz.) Respondent asserts that petitioner's failure-to-narrow claim is procedurally barred as untimely, as a claim which was raised and rejected on appeal, and (alternatively) as a claim which should have been (but wasn't) raised on appeal. (Informal Response, pp. 196-197.) Respondent is wrong; the claim is properly before the Court.

As to the asserted timeliness bar, respondent overlooks that a "fundamental miscarriage of justice" exception to the bar against untimely petitions is established by showing "that the petitioner was . . . sentenced under an invalid statute." (*In re Clark, supra,* 5 Cal.4th at 797-798; *In re Robbins, supra,* 18 Cal.4th at 780-781.) That, of course, is precisely the thrust of petitioner's failure-to-narrow claim; and hence, the claim is not time-barred. Further, as noted above, except for the period

when Mr. Merwin was unable to work on petitioner's case because of personal financial and health problems, petitioner, since being provided with habeas counsel, has been engaged in good faith, ongoing investigation into other claims as to which a prima facie case for relief could not be pled until shortly before the petition was filed,[161] and hence it was reasonable to withhold this claim until those additional claims could be pled. (*In re Robbins, supra*, 18 Cal.4th at 780, 805-806; *In re Clark, supra*, 5 Cal.4th at 781, 784.)

As for the contention that the claim either was, or should have been, raised on appeal, and hence is subject to a procedural bar under either *In re Waltreus* (1965) 62 Cal.2d 218 or *In re Dixon* (1953) 41 Cal.2d 756, respondent completely overlooks that the claim is supported by empirical evidence set forth in the declaration of Professor Steven P. Shatz, who has studied the California statute's actual narrowing effect (or lack thereof). (See Exhibit 77, Supplemental Declaration of Steven P. Shatz.)[162] This empirical evidence was not part of the record on

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[161] See, in particular, the discussion of Claims VI, VII, VIII and IX, supra, in parts I, IIC1, IID2, IIE2, IIF1, IIG1, III1, IIJ2, IIIC1, IIID1, IIIE1, IIIF1, IIIH1, IIII1, IIIJ1, IVA1, and VC1 of this informal reply.

[162] Since the filing of the petition herein, Professor Shatz has published the results of a more comprehensive empirical study than that which formed the basis for Petitioner's Exhibit 77. The results were essentially identical to those set forth in Exhibit 77. See Shatz & Rivkind, The California Death Penalty Scheme: Requiem for Furman? (1997) 72 NYU L.Rev. 1283.

appeal, and hence the claim, as presented here, was not and could not have been presented on appeal. (See Appellant Champion's Opening Supplemental Brief, pp. 114-118 [raising failure-to-narrow claim on basis of statutory language and legislative history, but without empirical evidence]; and *People v. Champion, supra*, 9 Cal.4th at 950-951 [rejecting claim].)

In support of its contention that petitioner has not set forth a prima facie case for relief, respondent asserts that the failure-to-narrow claim has been repeatedly rejected by this Court. (Informal Response, p. 197.) But in the cases cited by respondent (*People v. Holt* (1997) 15 Cal.4th 619; *People v. Scott* (1997) 15 Cal.4th 1188; *People v. Stanley* (1995) 10 Cal.4th 764), the Court was not presented with empirical evidence concerning the statute's actual narrowing effect (or lack thereof). Thus the claim is essentially a new one for the Court's evaluation.

Respondent doesn't dispute the facts set forth in the petition and Professor Shatz' declaration, nor suggest any reason to doubt their accuracy. Thus, for purposes of determining whether to issue an order to show cause, the Court should adhere to its customary practice of assuming the petition's factual allegations to be true and accurate. (*People v. Duvall, supra*, 9 Cal.4th at 474-475.) Accordingly, for present purposes, petitioner should be deemed to have established as an empirical matter (1) that 83% of convicted first degree murderers were statutorily death-

eligible under the 1978 statute (the statute in effect at the time of petitioner's alleged capital offense), and (2)that only 11.5% of the statutorily death-eligible class of first degree murderers were in fact sentenced to death. (Petition, pp. 259-260.)

A statutory scheme under which 83% of first degree murderers are death-eligible does not "genuinely narrow" (see *Wade v. Calderon*, (9th Cir. 1994) 29 F.3d 1312, 1319 , cert. den.__ U.S. __, 130 L.Ed.2d 802 (1995)). Further, a statutory scheme under which only 11.5% of those statutorily death-eligible are sentenced to death, permits an even greater risk of arbitrariness than the schemes considered in *Furman v. Georgia* (1972) 408 U.S. 238, [163] and, like those schemes, is unconstitutional. The 1978 statute does not genuinely narrow the class of death-eligible offenders, certainly not to a degree sufficient to satisfy Eighth Amendment standards. Petitioner has accordingly made a prima facie showing of the unconstitutionality of the statute under which he was sentenced to die.

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[163] As noted in the Petition (p. 258), at the time of the decision in *Furman*, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386 n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (402 U.S. at p. 309, n. 10). *Furman* establishes that any capital sentencing scheme so overbroad that less than 20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment. See also, The California Death Penalty Scheme, supra, 72 NYU L.Rev. at 1288-1290.

XI.

THE CUMULATIVE EFFECT OF THE ERRORS ON THE ISSUES OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY WARRANT REVERSAL

1. This claim is timely.

For all of the reasons stated above as to each individual claim and subclaim and to the petition in general, this claim is timely filed. This is certainly so because the cumulative effect of all errors could not have been pled before each individual error was discovered, investigated and a prima facie case established.

2. Petitioner has pled a prima facie case for relief.

The "nexus" which respondent asserts is lacking in petitioner's petition is adequately demonstrated both in the petition and in this pleading.

For those errors recognized by this Court on direct appeal (described as a-i at pp. 261-262 of the petition), and for the errors claimed in this petition, the nexus is clear. Respondent here again ignores the importance to the prosecution case of the Taylor crimes and the jewelry. It ignores the impact of the neuropsychological evidence on the mens rea issue central to the charge of capital murder, and ignores the penalty phase significance of both (a) the wealth of mitigating evidence that was available but not produced and (b) undoing the suggestion that petitioner had been involved in not just one, but three separate homicidal incidents. Respondent

instead relies on this Court's finding that individually, the errors on direct appeal were harmless and a blanket assertion that petitioner has failed to establish a prima facie case for relief as to any of the errors claimed in these habeas proceedings. (Informal Response p. 199.) Once again, respondent is wrong.

As he did above, petitioner once again urges that this Court consider the impact of various claims in combination to fully appreciate the cumulative nature of all errors complained of as well as the miscarriage of justice that would result if the petition were not addressed on the merits. Had trial counsel provided effective guilt phase assistance and adduced available evidence to show that petitioner was not involved in the Taylor crimes (claims VI.A-VI.H), and that the ring found in petitioner's possession was not victim Bobby Hassan's ring (Claim VII.A), the prosecutor would have been left with nothing but the contradiction-riddled identification testimony of Elizabeth Moncrief, and on that basis alone no reasonable judge or jury would have convicted petitioner of involvement in the Hassan killings.

Further, had counsel, as he should have, adduced evidence showing that petitioner was not involved in the Taylor crimes, no reasonable judge or jury would have accepted the prosecutor's speculative invitation to assume that petitioner was involved in the Jefferson homicide, a crime as to which the prosecutor had no direct

evidence linking petitioner, co-defendant Ross or any person known to either of them. With no basis for linking petitioner to either the Taylor or the Jefferson crimes (Claims VI.A-VI.H, and VIII.A-VIII.D), and in light of evidence which counsel should have presented concerning neurological impairments which make it more difficult for petitioner than for most people to draw accurate inferences about what others around him are intending (Claim VII.H), no reasonable judge or jury would have been able to conclude beyond a reasonable doubt that petitioner, if he were one of the four men who entered the Hassan residence on the day of the homicides, understood that a homicide would occur or personally intended that anyone be killed. Hence, but for counsel's ineffective assistance, no reasonable judge or jury could have found true the special circumstance allegations or convicted petitioner of capital murder. Moreover, as a result of trial counsel's ineffective assistance in failing to adequately investigate petitioner's life history and mental impairments (Claims VII.H and IX.C) and in failing to adequately challenge the prosecution's misleading claims concerning petitioner's alleged involvement in three homicidal incidents (Claims VI.A-VI.H, VII.A-VII.I, VIII.A-VIII.D), "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (*In re Clark,*

supra, 5 Cal.4th at 798.)

XII.

EXECUTION AFTER PROLONGED

CONFINEMENT UNDER SENTENCE OF DEATH

In his petition, petitioner made a prima facie showing that his execution following so long a period of confinement under sentence of death would constitute cruel and unusual punishment. (Petition, pp. 263-264.) As of the date the petition was filed, petitioner had been continuously confined under sentence of death for over fourteen years. (*Ibid.*) The period is now over sixteen years. As international authority has increasingly recognized, such prolonged confinement under sentence of death is cruel and degrading and in violation of international human rights. (*Ibid.*) Further, an execution so long after pronouncement of judgment can do little to further the goals of deterrence or retribution – the theoretical justifications for capital punishment which keep it from being no more than a "gratuitous infliction of suffering." (*Gregg v. Georgia* (1976)428 U.S. 153, 182-187(plurality opinion).)

Respondent makes two points in response to this showing. First, respondent asserts that after the finality of petitioner's non-waivable automatic appeal, petitioner himself extended his stay on death row by continuing to challenge the judgment against him. (Informal Response, p. 200.) Respondent thus concedes that at least the first twelve years of this extended death row confinement were not

attributable to petitioner.[164] Respondent nonetheless appears to suggest that the claim is somehow waived by petitioner's subsequent conduct. But petitioner's position has always been, and continues to be, that he is innocent of the capital charges and was unconstitutionally convicted. Surely, petitioner, by pursuing that claim and seeking to set aside his conviction, has not waived his right to be free from cruel and unusual punishment!

Second, respondent suggests that there is no conceivable prejudice flowing from the extended period of life under sentence of death – either petitioner will have lived longer than he otherwise would have, or he will simply have been serving the extended prison sentence he would otherwise have been appropriately sentenced to serve. (Informal Response, p. 200.) Respondent simply ignores the torturous impact – recognized by the authorities cited in the petition – of being under sentence of death for so long a period, as well as the complete undermining of the justifications that theoretically support the state's taking the life of one of its citizens.

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[164] Petitioner was sentenced to death on December 10, 1982. (RT 3807-3708.) This Court issued its automatic appeal opinion on April 6, 1995, and denied rehearing on June 1, 1995. (*People v. Champion, supra.*) A petition for certiorari was denied on January 8, 1996.

XIII.

EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

In his petition, petitioner alleges that his execution by lethal injection pursuant to the vague protocol issued by the California Department of Corrections in March 1996 (Exhibit 78, California Execution Procedures - Lethal Injection) would constitute cruel and unusual punishment because, as the petition explains in some detail, that protocol fails to adequately guard against the risk of "unnecessary and wanton infliction of pain." (*Gregg v. Georgia, supra*, 428 U.S. at 173(plurality opinion).) (Petition, pp. 265-275.) In support of his allegations petitioner has submitted, inter alia, the declarations of two highly qualified medical experts, Dr. Kim Marie Thorburn (Exhibit 79) and Dr. John Davis Palmer (Exhibit 80), who reviewed the March 1996 protocol and concluded for reasons detailed in their declarations and in the petition that the prescribed procedures "will pose substantial and grave risks of subjecting the prisoner to extreme physical pain and suffering during execution." (Exhibit 79, ¶4; Exhibit 80, ¶4.) Respondent does not counter these declarations with any evidence of its own, nor suggest any reason why, at this stage of the proceedings, the declarations should not be fully credited.

Respondent makes two points. First, respondent states that "the Department

of Corrections may establish its own set of standards. (See Pen. Code, § 3604, subd. (a).)" (Informal Response, p.201.) This may be true, but it's of little consequence. Petitioner's claim is that the Department's standards do not satisfy the Eighth Amendment.

Second, respondent argues that the doctors' declarations are speculative because neither has witnessed a California lethal injection execution. (Informal Response, p. 203.) But respondent does not suggest in what way or why the doctors' medical expertise is inadequate to permit them to reliably describe the dangers inherent in the Department of Corrections lethal-injection procedures. Nor does respondent suggest how in the pre-OSC, pre-discovery phase of these proceedings petitioner, or any medical expert acting on his behalf, could have gotten access to a California lethal-injection execution. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1255-1261 (no pre-OSC discovery is available in habeas proceedings).) Further, respondent offers no evidence of its own concerning actual California lethal-injection executions.[165] Thus, for purposes of determining whether to issue an order to show cause, the Court should adhere to its customary practice of

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[165] The present case is thus distinguishable from *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3rd 1253, 1264-1265, upon which respondent relies, in that the court in that case explicitly relied upon evidence concerning actual Arizona lethal-injection executions to counter an expert declaration concerning the inadequacies of the Arizona lethal-injection protocol.

assuming the petition's factual allegations to be true and accurate. (*People v. Duvall, supra*, 9 Cal.4th at 474-475.) Accordingly, for present purposes, petitioner should be deemed to have established that the Department of Corrections' lethal-injection procedures, for the reasons and with the effects set forth in the petition, unnecessarily create substantial and grave risks of subjecting an inmate to extreme physical pain and suffering. Petitioner has accordingly met his burden of pleading a prima facie case for relief and respondent should be required to formally respond.

XIV.

PETITIONER'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Petitioner has alleged that his death sentence violates international law because it is being imposed despite the fact that he was denied the right to a fair trial, and to appellate and habeas review by an independent tribunal as required by customary international law. Petitioner also contends that the death penalty, as implemented in the state of California and in the United States, is imposed based on improper racial considerations, also in violation of international law.

Respondent contends that this claim is procedurally barred because it could have been raised on direct appeal. (Informal Response, pp. 205-206.) Respondent is mistaken. In support of this claim, petitioner has presented several exhibits, (see Exhibits 82-84), that are not a part of the record on direct appeal and thus could not be considered during the course of the proceeding. In particular, petitioner relies upon the June 1996 Report of the International Commission of Jurists on the "Administration of the Penalty in the United States" – a report which did not exist until after the conclusion of petitioner's direct appeal.[166] In that report, the International Commission of Jurists made the following findings, inter alia, directly

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[166] This Court issued its automatic appeal opinion on April 6, 1995, and denied rehearing on June 1, 1995. (*People v. Champion, supra.*)

supportive of petitioner's claim:

> "(iii) Capital sentencing as it actually operates in the states is inconsistent with the obligations undertaken by the United states under the Political Covenant and the Race Convention . . .
>
> . . . . . .
>
> (vi) The Mission is of the opinion that in the absence of a nation-wide law framed on the pattern of the Racial Justice Act, the administration of capital punishment in the United States continues to be discriminatory and unjust and hence 'arbitrary' and thus not in consonance withe Articles 6 and 14 of the Political Covenant and Article 2(c) of the Race Convention. (Exhibit 84, pp.65 and 68.[167])

Respondent also contends that petitioner's international law claim should be barred as untimely. (Informal Response, p. 205.) But, as noted above, except for the period when Mr. Merwin was unable to work on petitioner's case because of personal financial and health problems, petitioner, since being provided with habeas counsel, has been engaged in good faith, ongoing investigation into other claims as

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[167] The "Political Covenant" and "Race Convention" referred to in the quoted text are, respectively, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the texts of which appear at pages 163-187 and 195-210 of Exhibit 84.

to which a prima facie case for relief could not be pled until shortly before the petition was filed,[168] and hence it was reasonable to withhold this claim until those additional claims could be pled. (*In re Robbins, supra*, 18 Cal.4th at 780, 805-806; *In re Clark, supra*, 5 Cal.4th at 781, 784.)

Because petitioner's death sentence was imposed in violation of international law to which the United States is fully subject, petitioner's sentence must be set aside.

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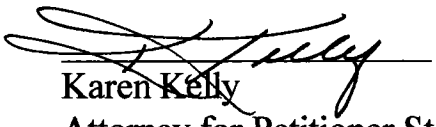
[168] See, in particular, the discussion of Claims VI, VII, VIII and IX, supra, in parts I, IIC1, IID2, IIE2, IIF1, IIG1, III1, IIJ2, IIIC1, IIID1, IIIE1, IIIF1, IIIH1, IIII1, IIIJ1, IVA1, and VC1 of this informal reply.

CONCLUSION

For the reasons stated above and in the petition, petitioner respectfully requests this Court grant the relief requested in the petition.

DATED: June 18, 1999

Respectfully submitted,



Karen Kelly
Attorney for Petitioner Steve Allen Champion

VERIFICATION

I, KAREN KELLY, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California. I am one of the attorneys representing Mr. Champion, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this Informal Reply on Mr. Champion's behalf. I am making this verification because Mr. Champion is incarcerated in Marin County, and because these matters are more within my knowledge than his.

I have read the foregoing Informal reply and know the contents of it to be true.

Signed June 18, 1999, at Modesto, California.

KAREN KELLY 118105

DECLARATION OF JAMES MERWIN

1. I was associate counsel in the case of *People v. Champion* Crim. No., 22955, from September 22, 1992 through June 28, 1995.

2. Between September 22, 1992 and February 23, 1993, I reviewed training materials regarding "Representation in Capital Cases" and "Habeas Corpus Workshop Materials" which were furnished to me by the California Appellate Project. After receiving a copy of the record on appeal, I reviewed most of the greater than 5,000 page record, discussed the case and potential issues with appellate counsel Mr. Johnson and with CAP Attorney Steven Parnes. I secured release forms from Mr. Champion and *attempted to visit him.*

3. From the very start, I experienced difficulty in investigating this case and in communicating with Mr. Champion because of San Quentin's unwillingness to permit me to visit with petitioner in a confidential setting. During my entire tenure as habeas counsel, I was unable to meet with petitioner in a confidential setting.

4. Between February 23, 1993 and June 1993, I consulted with CAP and other attorneys in hopes of expediting resolution of this impediment to filing Mr. Champion's petition. To that end, I researched, prepared and filed with this Court, a motion ancillary to his habeas corpus petition for prior authorization for funds to prepare and litigate a writ of habeas corpus in Marin County addressing petitioner's housing status and the unavailability of confidential visits with counsel. That motion was denied on August 25, 1993. The motion was *denied without prejudice to file for such a writ directly to the California Supreme Court.* Thus, under this Court's direction, I began drafting a petition to this Court regarding contact visits with Mr. Champion. By November 22, 1993, this petition was nearly complete. As ultimately, another case, *In re Ayala* addressed the visit issue, I did not need to complete my writ.

5. As a result of our inability to meet in a confidential setting I could not form any final plan of investigation, let alone file a petition. As part of my ethical obligation to Mr. Champion I believed I must undertake all steps necessary to obtain an opportunity to confer in a confidential setting --- particularly because my client and I were both fearful of institutional eavesdropping. Although confidential visits were not possible, in order to file Mr. Champion's petition in a timely fashion we visited but did not discuss specific sensitive facts.

6. By June of 1993, in addition to the previously discussed tasks, I also obtained and reviewed Mr. Champion's central file at San Quentin State Prison. I located and interviewed trial counsel Ronald Skyers, and reviewed and copied petitioner's trial file.

7. I continued to explore areas of trial counsel's investigation and trial preparation and ultimately identified areas of trial counsel's performance which were likely to yield specific claims of ineffective assistance of counsel. This preliminary evaluation of trial counsel's performance, made after review of trial counsel's files and the appellate record, and nonconfidential interviews with petitioner and preliminary contacts with forensic experts concerning their fees and availability provided the basis for my funding request.

8. In September of 1993, I retained an investigator who, between September and November, 1993, and then again between December 1994 and January 1995, interviewed 7 family members of Mr. Champion. The investigator and I identified more than two dozen potential guilt and penalty phase witnesses. The investigator began preparing a Champion family tree.

9. In November of 1993, I requested the investigator wait further investigation until funding was granted by this Court. At this time, I was in the process of preparing my confidential funding request which was filed in February of

1994 and acted on by this Court in August 1994. Thereafter, the investigator continued penalty phase investigation. Although my investigator and I identified a number of potential witnesses, both as to guilt and penalty issues, only 7 family members were actually interviewed in some detail.

10. In my declaration in support of my motion to withdraw I declared that "I have 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), submitted my [request for funds]...continued my efforts to put together a life history of petitioner and develop penalty phase evidence.... "

11. That portion of my declaration contains some inaccuracies. My investigator and I identified more than two dozen witnesses and interviewed 7 in some depth. Although investigative efforts were continuing, "dozens of witnesses" had not been interviewed to any degree necessary to plead a prima facie case for any IAC claim which I had identified. Any inaccuracies were unintentional and simply reflect a general characterization of the progress of the case at the time I was forced to withdraw. [1]

12. In my funding request, I identified a number of experts who were willing to confer and consult on Mr. Champion's case. My contact with these experts was preliminary and designed to permit application for funding. None of these experts

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[1] Similarly, I might add, although I had interviewed petitioner, the statement was not meant to reflect that I had completed my interviews with Mr. Champion, or for that matter, when I stated that I interviewed experts, these interviews were not final interviews but limited to whether or not the experts' expertise and schedules would permit future consultation of petitioner's case. All investigation was continuing, none, including the interviews of the 7 family members was complete or even sufficient to present a prima facie case for filing any specific claim.

were given or reviewed pertinent records provided by me, interviewed petitioner, performed any testing, or consulted with me on the actual development of claims. This Court's funding order denied the forensic expert funding requested by me.

13. By the fall of 1994, because of financial difficulties, I was forced to close my private law practice. I took a job with the Office of the Orange County Public Defender beginning on October 11,1994. Although I had hoped to work on Mr. Champion's case on weekends, the pressures of that job and recurrent health problems precluded me from doing further work on outside cases, including petitioner's case.

14. Although my investigator undertook some additional penalty phase background investigation, I did not authorize or conduct any investigation into guilt phase issues. This was so because I did not receive funding authorization for habeas investigation until August 24, 1994, just seven weeks before starting work with the public defender's office and discontinuing work on petitioner's case. In my professional opinion, this was hardly enough time to conduct a habeas investigation in a capital case in which trial counsel had conducted little or no guilt or penalty phase investigation and which involved three separate homicidal incidents.

15. Thus, during the seven week period between the Court's August 24, 1994, funding order and my taking a job with the Orange County Public Defender's Office, I was able to make some further progress on investigating petitioner's life history and developing the evidence in mitigation that reasonably diligent trial counsel could have presented, but I was unable to complete the task.

16. Although it perhaps would have been possible, for me to plead and present subclaims resting on the appellate record and/or trial court discovery documents prior to the time when I discontinued work on Mr. Champion's case, I determined that this would not have made sense. This is so because when I was

just beginning to undertake the investigation of potentially meritorious claims requiring investigation it shortly became clear that I would have to withdraw and pass the case on to another counsel who would be appointed to carry forward the investigation and would have her own views as to which claims were most important and how to best present them.

The foregoing is declared under penalty of perjury in the State of California and these United States.

Dated: 6-8-99

James Merwin

Attorney Copy

FILED

MAY 16 1995

HOWARD HANSON
JOHN [illegible]
BY J. SIMMONS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

In Re

REYNALDO AYALA

Petitioner,

For a Writ of Habeas Corpus

No. SC 059289

ORDER GRANTING PETITION IN PART AND DENYING PETITION IN PART

The Court has read and considered all of the evidence and arguments submitted and additionally considers its own findings on site in the subject attorney interview area of San Quentin Prison.

The Court therefore Finds and Orders as follows:

1. Petitioner has a constitutional right of access to the Courts pursuant to the Fourteenth Amendment to the United States Constitution and an ancillary right to confer with his counsel in invoking that right. *Casey v. Lewis* (9th Cir. 1993) 4 F.3d 1516, 1520; *Ching v. Lewis* (9th Cir. 1990) 895 F.2d 608, 610. Petitioner also has a right to counsel pursuant to Article I, Section 15, of the California Constitution.
2. The current arrangements for Petitioner's attorney/client conferences in meeting rooms A-1, A-2, and A-3 allow for some "contact" including direct acoustic communication through a metal screen and the ability to pass papers through a slot. No authority is presented to support the assertion by Petitioner that more "contact" is constitutionally or statutorily required. And the court finds that the current limitations on "contact" constitute no impediment to the reasonable exercise of the rights to access to the courts and counsel.
3. The attorney interview rooms, A-1, A-2, and A-3, available to Petitioner are by no means

sumptuous or commodious but they are not uncomfortable or oppressive to the point of constituting an impediment to the reasonable exercise of the constitutional rights to access to the courts and counsel.

4. To the extent that there is restriction placed by the Prison upon Petitioner's access to counsel, the Court finds no showing that it is not "reasonably related to legitimate penological interests" (Penal Code Section 2600) with the one exception noted in paragraph 5 below.

5. Reasonable exercise of the right to counsel necessarily includes confidential communication with counsel. *Barber v. Municipal Court* (1979) 24 Cal. 3d 742, 751; *Ching v. Lewis* 895 F. 2d 608, 609. The observed condition of the interview rooms currently provided, A-1, A-2, and A-3, does not appear to the Court to assure such confidential communication. The Court has found that conversation at an ordinary volume can be heard outside on either the prison side or the visitor side with the doors closed. Sound appears to carry through the space under the doors but this may not be all of the problem. If the Prison continues to restrict Petitioner's attorney interviews to these rooms, reasonable steps must be taken to correct this deficiency and to allow confidential communication between Petitioner and his counsel.

The Writ sought is therefore granted in part and denied in part consistent with the above Findings and Order.

Dated: MAY 16, 1995

JOHN STEPHEN GRAHAM
Judge of the Superior Court

DECLARATION OF THOMAS LAMBRECHT

I, THOMAS LAMBRECHT, hereby declare as follows:

1. I am a deputy sheriff with the Los Angeles County Sheriff's Department. I was so employed on December 27, 1980 and December 28, 1980.

2. Having reviewed a four page Sheriff's Department Memorandum by myself and Deputy Owen Tong regarding the detention of Marcus Player, Steve Champion, Wayne Harris and James Taylor, I recall no further details of the incident. Neither do I recall information or details that conflict with the information contained in the memorandum.

3. Prior to discussing the above with investigator Tom Lange, I was never contacted by any lawyer representing Steve Champion. If Steve Champion's trial attorney had approached me, I would have told him that the above information is true and that the information contained in the above-referred to memorandum was true. If I had been asked to testify to the above, I would have testified consistently with the memorandum referred to above.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed the 23 day of NOV 1997.

Thomas Lambrecht

76M176—SH-AD-131

COUNTY OF LOS ANGELES **SHERIFF'S DEPARTMENT**

MEMORANDUM Date_____

File No._____

From: T LAMBRECHT To: TOM LANGE

Subject: CHAMPION V CALDERON

SORRY THIS IS SO LATE IN COMING. YOUR LETTER WAS PLACED IN A RETIRED DEPUTY'S MAIL BOX.

T Lange

☐ FOR YOUR INFORMATION. ☐ REPORT ON RESULTS REQUIRED. ☐ VERBAL REPORT ONLY; CONFIDENTIAL.

SUPPLEMENTAL DECLARATION OF ROUSELLE SHEPARD

1. I began my tenure with the Los Angeles Police Department on February 22, 1972.

2. I retired from the department in 1993.

3. I was first assigned to CRASH, or Community Resources Against Street Hoodlums, which is a gang detail, in 1975. I was assigned to the centralized CRASH unit in 1976 and remained with this unit until my retirement from the force.

4. Unlike Deputy Williams, who, at the time of the crimes of this petition, was a deputy with the Los Angeles County Sheriff's Department, I was an officer with the Los Angeles Police Department. The Los Angeles Police Department does not, and did not at the time of Mr. Williams testimony or tenure with the sheriff's department, have jurisdiction over the Los Angeles Court facilities. Therefore, I Shepard, unlike Mr. Williams, could never and was never assigned to in-court bailiff and other non-critical, non-specialty duties.

5. Unlike Mr. Williams, I spent nearly my entire tenure in gang related assignments. At the time of petitioner's trial, I was a qualified gang expert who had testified numerous times.

The foregoing is declared under penalty of perjury of the State of California and these United States.

Dated: June 10, 1999

Rouselle Shepard

DEPARTMENT OF PSYCHIATRY
Institute of Psychiatry, Law and
Behavioral Science
Seymour Pollack, M.D., Director deceased

December 2, 1981

Fee to post in motion
Dr. Weinberger to call

2945, LA 90051
4A 4'61

Mr. Ronald V. Skyers, Esquire
3701 Wilshire Boulevard, 7th Floor Suite
Ahmanson Plaza East Tower
Los Angeles, California 90010

Re: Steve Allen Champion
Case No. A 365875

Dear Mr. Skyers:

Pursuant to Superior Court Order by Superior Judge E. Ricks, dated August 4, 1981, Mr. Champion was examined psychiatrically by Lillian L. Imperi, M.D., at New County Jail for a period of approximately one hour on November 17, 1981. He was examined by Drs. Lillian Imperi and Seymour Pollack on December 1, 1981, for a period of approximately one and one-half hours.

Mr. Champion is charged with violation of 187 of the Penal Code. The confidential nature of the examination was explained to Mr. Champion and he understood it.

In addition to the clinical interviews, the following materials were reviewed:

(1) Letter from Mr. Ronald V. Skyers, attorney for defendant dated November 10, 1981.

(2) Autopsy Reports, January 16, 1981

(3) Arrest Reports

(4) Preliminary Hearing Transcript, dated February 27, 1981

(5) Telephone conversation with Mr. Ronald Skyers on 11/25/81.

PSYCHIATRIC - LEGAL ISSUES

(1) Was the defendant mentally ill at the time of the offense?

PSYCHIATRIC - LEGAL ISSUES (Continued)

(2) Does the defendant fall within the Drew rule?

(3) Was the defendant suffering from diminished capacity at the time of the offense?

(4) Was the defendant unconscious at the time of the offense?

(5) Was the defendant suffering from an irresistable impulse at the time of the offense?

PSYCHIATRIC - LEGAL OPINION

There is insufficient data to support any mental responsibility defense in Mr. Champion's case.

DATA AND REASONING BASIC TO OPINION

Mr. Champion is a 19 year old black man who was cooperative for the interview but gave very minimal replies to questions and offered little information spontaneously. He stated that he was "innocent" and that "it's a case of mistaken identity." He stated that he had been identified by"mug shots" and in the "line up." Maintained that he "was not there (seene of crime) and did not do it." He could not recall where he was or what he was doing on the date of the alleged offense, 12/12/80, Mr. Champion stated that he smokes Marijuana on special occasions, such as Holloween, Thanksgiving, and Christmas. He admitted that "it (Marijuana) keeps me mellow." He denied experimenting with or using any other drugs. He said that he would not be able to recall using Marijuana or drinking on any particular date in the past except for the holidays.

Mr. Champion indicated that he was suspended from school for fighting once or twice and was "in a lot of trouble" in elementary and junior high school. He was in jail for robbery twice, six months one time. However he graduated from high school while in CYA and planned to work his way through El Camino College. Mr. Champion at age 14, was arrested for burglary and grand theft person but released because of lack of evidence. He mentioned, however that he had spent some time in camp, for robbery, at age 15 for 6 - 9 months and subsequently was sent to CYA at age 16 for assault with a deadly weapon. He was released from CYA during October of 1980.

Mr. Champion admitted that he had been a member of the Crips gang in the past; however, he is not a member at the present time. He feels, that he has "changed" and does not have to "run with a gang or affiliate with anyone anymore".

DATA AND REASONING BASIC TO OPINION (Continued)

At the time of his arrest Mr. Champion was in training to be a tutor in elementary schools. He would like to continue tutoring at night and go to college during the days.

MENTAL STATUS EXAMINATION

Mental status examination revealed that Mr. Champion had a very poor fund of general information, difficulty with simple calculations, and concreteness of thought, affect was flat, no hallucinations or delusions were noted or elicited. Mr. Champion does not appear to be suffering from a mental illness of any kind at the present time.

TELEPHONE CONVERSATION WITH MR. RONALD SKYERS

Mr. Skyers maintained in Mr. Champion's case, that it was "very likely" a case of mistaken identity because the identifying witness gave varying descriptions prior to picking Mr. Champion out of a "line-up." Further, the murder weapon was found in someone elses car. There was also some question regarding the description of the car by the identifying witness. The only implicating factor appeared to be two pieces of jewelry similiar to that of one of the victims. Mr. Skyers indicated that he had requested the psychiatric evaluation"to cover all bases." He also stated that his client would plead "not guilty".

SUMMARY OPINION

Since Mr. Champion stated that he is unable to recall where he was an the date of the crime; since he denies being under the influence of any intoxicant on the date of the crime; since there is no other data to support that he was under such influence; since there does not appear to be any evidence of mental illness, defect, or disorder now or at the time of the instant offense; we must opine that Mr. Champion was sane at the time of the alleged offense and does not qualify for any of the mental responsibility defenses.

Thank you for referring Mr. Champion.

Lillian Imperi, M.D.
Fellow Psychiatry & Law

LI:rm

Seymour Pollack, M.D.
Diplomate American Board of Psychiatry & Neurology
Diplomate American Board of Forensic Psychiatry

PROOF OF SERVICE

I am a citizen of the United States and employed in the Stanislaus County. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 520 Ceres, CA 95307. On the date specified below I served the attached:

INFORMAL REPLY

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Ceres, CA addressed as follows:

California Attorney General
300 South Spring Street
Los Angeles, CA 90013
L. Brault

Steven Parnes, Esq.
1 Ecker Place
San Francisco, CA 94105

I, _____, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 6/28/99 at Ceres, California.

_____