SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

In re STEVEN ALLEN CHAMPION, Petitioner, ON HABEAS CORPUS.	California Supreme Court Case Number: S065575 Los Angeles County Superior Court Case Number: A365075

REFEREE'S REPORT OF PROCEEDINGS CONDUCTED PURSUANT TO SUPREME COURT APPOINTMENT

Honorable Francisco P. Briseño
Judge of the Orange County Superior Court
Sitting as Referee by Appointment
By the California Supreme Court

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Counsel for Petitioner: Karen A. Kelly, Esq.
Attorney at Law

Counsel for Respondent: Brian R. Kelberg, Esq.
Office of the Los Angeles County District Attorney

Dates of Reference Hearing: February 6, 2006 to January 17, 2008

DEATH PENALTY

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Key to Abbreviations Used in Report

RHT	-	Reporter's Transcript of Reference Hearing
RT	-	Reporter's Transcript of Petitioner's Trial
CT	-	Clerk's Transcript of Petitioner's Trial
MPHT	-	Reporter's Transcript of Malett's Preliminary Hearing
MRT	-	Reporter's Transcript of Malett's Trial
PGE	-	Guilt Claim Exhibit to Habeas Corpus Petition

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I. INTRODUCTION

A. Background

In the southwest area of Los Angeles three separate murders took place under the jurisdiction of the Los Angeles Police Department (hereinafter referred to as 'LAPD') and the Los Angeles County Sheriff's Department (hereinafter referred to as 'LASD').

Homicides

(1) Teheran Jefferson (Date of Offense: 11-15-80)

862 West 126th Street, Apt. #5

Teheran Jefferson was found kneeling on the floor with his body on a bed and a pillow covering his head. His hands were bound with ties. A cloth was forced into his mouth. He was shot in the back of the head at point blank range with a .38 or .357 caliber revolver with "six left rifling characteristics." The victim was a marijuana user and dealer.

(2) Bobbie and Eric Hassan (Date of Offense: 12-12-80)

849 West 126th Street

Bobbie Hassan was found lying on a waterbed with his hands tied behind him. He sustained a gunshot wound to the head that entered through the left ear canal. The thirty-five year old victim was a marijuana dealer who also sometimes sold cocaine.

Eric Hassan, a thirteen year old boy, was also found dead with a gunshot wound to the head. The gunshot entered on the right side of the victim's head three inches above the right ear and exited through the left back side of the head.

The house had been ransacked. Christmas gifts in the closet had been unwrapped and taken. Bobbie Hassan's gold medallion, shaped like half a card, and a diamond ring were missing as well as Hassan's hand gun.

A witness at a neighbor's house saw four persons arrive and enter the residence. The same witness later saw the same four individuals leave the home with sacks containing property. The last person leaving was observed laughing and was later identified as the petitioner. He was described as wearing gloves. The police recovered the fingerprints of co-defendant Craig Ross from the Christmas package wrappings.

(3) Michael Taylor (Date of Offense: 12-27-80)

11810 ½ Vermont Avenue, Los Angeles

A few blocks north of the Jefferson and Hassan murders, Michael Taylor was killed in his mother's duplex. He was shot in the head at point blank range with a revolver. Taylor lived with his mother (Cora Taylor) and sister (Mary Taylor). Cora, Mary, and a friend, William Birdsong, were in the duplex at the time of the killing. Cora and Mary testified that the incident took place between 11 p.m. and midnight. Three suspects entered the victim's apartment demanding money. One suspect forced Mary into the bathroom and raped her. This suspect was later identified as Craig Ross. The first suspect that entered displayed a gun. He attempted to have sex with Mary after Ross. The person with the gun was later identified as Evan Mallet. Cora described a third suspect as a slim male Negro between 5 feet, 10 inches and 6 feet tall with a dark complexion. The suspect was between the ages of 19 and 20 weighing between 150 and 160 pounds and wearing a brown long sleeve shirt and a gold earring on his left ear. Mary described the suspect as a short male Negro about 5 feet 7 or 8 inches tall with brown eyes and dark skin. The suspect was between the ages of 18 and 19 years

old weighing between 160 and 165 pounds and wearing an earring on his left ear. Cora observed a fourth suspect in the door area. The suspects ransacked the house. They were told where the victim kept his money. Cora, Mary and Birdsong were placed into the bathroom. While they were inside the bathroom they heard a gunshot. After waiting for a period of time, they exited to find Michael Taylor had been killed.

Police Investigation

At 12:10 a.m. on December 28, 1980, LAPD received a radio call of the shooting at the Taylor residence. The ambulance responded to the Taylor house at 12:12 a.m. The Taylor homicide took place east of Vermont Avenue which falls within LAPD's jurisdiction.

While LAPD responded to the Taylor residence to investigate, the LASD, in a separate matter, responded to Helen Keller Park located west of Vermont and just a few blocks south of the Taylor residence. LASD responded to investigate a complaint that some persons were in the park after closing hours.

One unit of the LASD detained four individuals at about 11:45 p.m. on December 27, 1980. Petitioner was not one of them.

Another LASD unit observed a vehicle in the park area driving without its headlights on. The driver failed to comply when told to stop. In fact, he attempted to evade resulting in a brief car chase. The car chase terminated a couple of blocks west of Helen Keller Park when the driver lost control and crashed. Four suspects fled the vehicle. The four split into two teams fleeing in a westerly direction. The LASD deputies in pursuit lost visual contact almost immediately. The description of the fleeing suspects given by pursuing deputies was general in nature. The LASD established a one block containment area. A control center (a patrol unit) was located at 126th Street and Budlong. Petitioner's home is about four houses west of 126th and Budlong.

Petitioner, Wayne Harris and Marcus Player approached the containment area from outside the perimeter. They were initially observed at 125th Street and Budlong

walking south toward the LASD field command post at 126th Street and Budlong. After being questioned briefly they were directed to proceed south on Budlong to the next control post at 127th and Budlong. At that control point they were directed to go west on 127th Street to the next street (Raymond). While doing so Robert Simms came out of the containment area. At the control point at 127th and Raymond the group of four were detained by the LASD. Simms gave a false name of Taylor. Simms appeared to match the general description of one of the suspects that fled the car. He was not specifically identified. Since Simms (Taylor) did not belong in the area, he was taken into custody and transported to the LASD's Lennox Station.

When the group of four was detained at 127th Street and Raymond, the LAPD brought the Taylor surviving victims for a field show up. They did not identify any one of the four. At the Lennox Station, Simms' clothing was inventoried. Simms was fully identified as Robert Aaron Simms. The sixteen year old Sims was subsequently released to his mother. It is unknown whether Simms was booked, fingerprinted or photographed.

Petitioner, Harris and Player were subsequently released by the LASD and told to go to petitioner's home. After they arrived at petitioner's home is when Mallet was found in petitioner's backyard. Mallet was arrested for theft (auto that crashed) and robbery. He was initially not arrested for murder. In a field show up he was viewed by the Taylor victims but was not identified.

The suspects' car crashed at the southwest corner of 126th Street and Budlong. It is from this location that the suspects fled. A revolver was found in the car. The revolver was later identified as the gun stolen from Hassan. The Hassan gun was also subsequently determined to be the gun used to kill Taylor. Also found at the car crash site was personal property stolen from Taylor.

Petitioner was arrested on January 9, 1981. He was wearing an earring on his left ear. He was also wearing the jewelry that Marci Hassan identified as belonging to

her husband Bobbie Hassan. Petitioner also possessed a Redi-Rentals application in the name of Craig Ross dated December 27, 1980.

On January 14, 1981, petitioner's home was searched pursuant to a search warrant and police recovered photographs which show petitioner holding a revolver that appeared to be a .38 caliber and throwing Raymond Avenue Crips gang signs. The photos also show petitioner's association with other gang members of the alleged conspiracy.

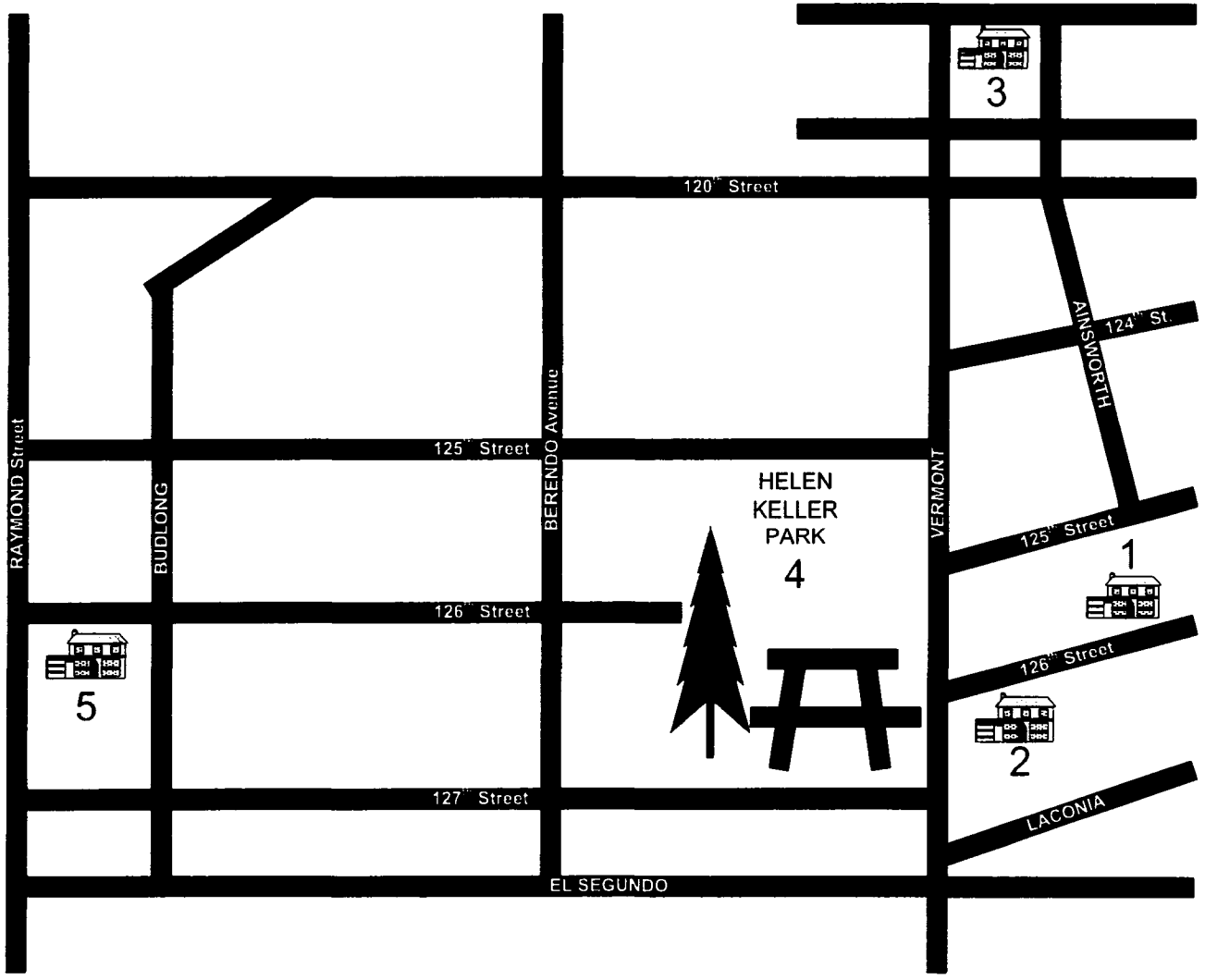
Craig Ross was arrested August 1, 1981. Marcus Player was present at the residence where Ross was found hiding. Marcus Player initially told the police that Ross was not present.

B. Diagram of Crime Scenes

A diagram depicting the geographic location of each of the three crimes scenes in relation to petitioner's residence and Helen Keller Park is reflected on the next page (page 5-A) of this report.

C. Champion Trial Chronology

10-23-80	Petitioner released from the California Youth Authority (hereinafter referred to as 'CYA').
11-15-80	Jefferson murdered.
11-19-80	Mallet arrested for robbery.
	Marcus Player present; claims to be Michael Player.
	Player car involved-location Raymond/El Segundo.
12-12-80	Bobby and Eric Hassan murdered.
12-18-80	Petitioner posts bail for Mallet $250 cash.
12-24-80	Mallet released from custody.
12-27-80	Taylor murdered.



LEGEND FOR CRIME SCENES:

1 Jefferson Murder –
862 126th St.
Date: 11-15-80

2 Hassan Murders –
849 126th St.
Date: 12-12-80

3 Taylor Murder –
11810½ Vermont St.
Date: 12-27-80

4 Helen Keller Park

5 Champion residence –
1212 126th St.

12-27-80	Redi-Rentals-signed off by Craig Ross. Found later in possession of petitioner.
12-28-80	Robert Aaron Simms and Evan Mallet arrested for auto theft and robbery. Taken to the LASD Lennox Station. Simms clothing kept by the LASD.
	Taylor victims at field show up of petitioner, Marcus Player, Wayne Harris, Simms. No identification.
	Field show up of Mallet by Taylor victims. No identification.
	Hassan's gun and Taylor property found in Player car.
	Later gun matched to Taylor murder.
12-30-80	Mallet arrested for Taylor murder after LAPD officer Calagna completed his investigation.
	Mallet transferred to LAPD.
1-9-81	Witness Elizabeth Moncrief identifies petitioner from a photo line-up.
	Petitioner arrested. Booking records show petitioner wearing an earring in his left ear, also wearing two pieces of jewelry which Mrs. Hassan identified as having been taken during Hassan's murder.
	Petitioner possesses Ross' Redi-Rental receipt.
1-12-81	Deputy Naimy can't identify Simms as driver of Player car.
	Moncrief identifies petitioner at a live line up.
	Cora Taylor is unable to identify petitioner.
1-14-81	Search of petitioner's residence. Photos found.
	The photographs shows petitioner's association with members of the conspiracy and other members of the Raymond Avenue Crips. They show petitioner and Ross holding Colt .38 caliber revolver with six left barrel twist.
1-23-81	Mallet preliminary hearing.
2-27-81	Petitioner's preliminary hearing. Petitioner represented by William Jacobsen.

3-24-81	Petitioner represented by Homer Mason.
5-12-81	Mallet statutory motion to suppress all eyewitness identifications.
6-15-81	Ex parte motion to appoint a sentence mitigation expert (Evid. Code, §§ 730/952) to obtain information on petitioner and background (which may be useful at time of penalty phase of trial should petitioner be found guilty) filed by Homer Mason. Motion granted.
6-18-81	Penal Code § 995 motion filed.
6-18-81	Motion to exclude Jefferson homicide (Evid. Code, § 1101).
	Motion to exclude photographs of petitioner holding a handgun.
6-18-81	Motion in limine to suppress all in court identification of petitioner/improper photo line up/show up.
6-18-81	Motion to suppress evidence seized by search warrant.
8-1-81	Craig Ross arrested. Marcus Player present, lies to police-Ross not there.
8-4-81	Motion for psychiatric exam by Dr. Pollack.
8-10-81	Taped conversation of Ross and petitioner.
8-21-08	Petitioner identification hearing (Pen. Code, § 1538.5).
8-24-81	Ronald Skyers (hereinafter referred to as 'Skyers' or 'trial counsel') retained as petitioner's counsel - $10,000 fee for all purposes.
9-4-81	Ross preliminary hearing.
	Mallet jury trial (A619837).
9-8-81	Mallet pretrial motions (Evid. Code, § 402).
	Motion to suppress the in-court identification based on law enforcement allowing all potential identification witnesses to be together while engaging in attempted photo identification.
9-28-81	Mallet convicted of first degree murder. Mallet jury hung on two special circumstance allegations on Count 1 (robbery, burglary).
10-10-81	Skyers letter to Dr. Seymour Pollack.

10-14-81	Skyers advised by prosecution they are seeking death and prosecution would seek to introduce Jefferson murder as aggravation.
10-26-81	Mallet sentenced.
12-2-81	Motion to sever petitioner's case from Ross case.
1-8-82	Marcus Player arrested for unrelated murder.
2-9-82	Motion in opposition to prosecution motion to join petitioner with Ross.
2-9-82	Skyers filed formal discovery request from the Los Angeles County District Attorney's Office as to any evidence intended to be used in penalty phase (Exhibit 23a).
	Motion to exclude evidence of gang involvement.
2-16-82	Motion to sever denied. Skyers took a writ which was denied (Exhibit 1n).
2-25-82	Prosecution files notice of aggravation on petitioner.
6-21-82	Motion to suppress tape conversation between Ross and petitioner.
9-13-82	Jury trial commences.
	Court rules no impeachment by prior juvenile offenses.
10-6-82	Petitioner's trial attorney objects to introduction of any gang evidence. Motion denied. (RT 2616-2632.)
10-12-82	Defense witnesses testify including family members Azell Champion Jackson, Rita Champion Powell, Reginald Champion, Terri Trabue and Traci Robinson.
10-19-82	Jury verdict.
10-21-82	Penalty phase.
10-22-82	Defense penalty witnesses: Thomas Crawford (CYA/parole), Azell Champion Jackson.
10-25-82	Jury instructed.
10-26-82	Jury questions:
	1. Any possibility of parole when sentenced life without parole? Answer-No.

2. Ask to see file on petitioner re: West Covina hold-up.
Answer-No.

10-27-82 Verdicts.

12-10-82 Motion for new trial.
Petitioner sentenced to death.

D. Petitioner's Reference Hearing Claims

Petitioner's main claims (among others) are the following:

That trial counsel failed to conduct an adequate independent investigation of the penalty phase mitigating evidence.

That petitioner had suffered brain damage and/or had significant cognitive defects at the time of trial.

That petitioner's development and functioning had been substantially impaired by family matters such as poverty, poor school performance, sibling abuse and a lack of adequate supervision by his mother.

That petitioner could have presented a credible case of amenability for rehabilitation and/or adjustment to a structured environment such as prison.

That petitioner could have presented a credible alibi defense to his alleged involvement in the Taylor murder.

That petitioner could have presented mitigation to the Factor A circumstances (Hassan murders).

That petitioner had redeeming personal characteristics and value to others.

Specific claims that petitioner's trial attorney failed to:

(1) Retain an investigator to conduct a penalty phase investigation.

(2) Conduct his own separate independent investigation of potential mitigation areas:

a) Petitioner's poor school performance.

i) review petitioner's school records.

ii) interview petitioner's school teachers.

b) Alibi for Taylor murder.

i) interview the Taylor surviving victims.

ii) interview the percipient witnesses involved in the circumstances of:

(aa) LASD's detention of Raymond Avenue Crips members at Helen Keller Park on the evening of 12-27-80.

(bb) LASD's pursuit of four suspects in a vehicle that crashed on 12-28-80.

(cc) LASD's apprehension of Mallet in the backyard of petitioner's home.

(dd) LASD's apprehension of Robert Aaron Simms.

(ee) The finding of the stolen gun from the Hassan murder that later was matched to the Taylor murder.

c) Interview CYA staff and CYA medical staff that evaluated petitioner in 1978 through 1980.

d) Obtain and read the Mallet trial transcripts available in 1981 before petitioner's trial.

e) Send the CYA medical reports to Drs. Pollack/Imperi.

f) Interview available witnesses of all of petitioner's juvenile arrests/adjudications including the two juvenile aggravators.

E. Summary of Referee's Findings

1. Investigation by Trial Counsel

Trial counsel did not adequately conduct a separate, independent investigation. He failed to retain a penalty phase investigator. He did not interview all potential mitigation witnesses including petitioner's teachers, friends, CYA staff, CYA doctors,

fellow gang members or law enforcement personnel. He did not assemble all documents including school records and co-defendant Mallet's trial transcripts.

2. Non-Disclosure of Family History

The referee finds the nondisclosure of family history by petitioner or members of his immediate family was purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose.

Skyers personally investigated the following:

(1) He read the entire penalty phase discovery provided by the prosecution.

(2) He visited the Hassan crime scene.

(3) He became acquainted with the general proximity of petitioner's home, Helen Keller Park, and the Jefferson and Taylor crime scenes as they related to the Hassan crime scene.

(4) He met with the family members at their home, his office and in court.

(5) He attempted to discuss with the family and petitioner matters related to petitioner's family history and up bringing. In none of his meetings did anyone, including petitioner, say anything about any of the now claimed family difficulties including poverty, fetal abuse, traffic accident head trauma, sibling physical beatings, death of petitioner's stepfather and its impact on the family and the domestic violence and abuse suffered by petitioner's mother at the hands of petitioner's biological father.

(6) He reviewed the CYA doctor evaluations conducted between 1978 and 1980.

(7) He reviewed the report by Doctors Seymour Pollack (hereinafter referred to as 'Dr. Pollack') and Lillian Imperi (hereinafter referred to as 'Dr. Imperi') prior to trial.

(8) He reviewed the CYA/YTS staff reports.

(9) He reviewed the juvenile arrest reports including the two juvenile aggravators.

(10) Skyers fully understood the impact and magnitude of the guilt phase evidence as to factor A (the Hassan murders) in the penalty phase. He appropriately sought to prevent:

a. the joint trial with co-defendant Ross.

b. the introduction of the taped conversation between petitioner and Ross.

c. the introduction of gang evidence.

d. the introduction of Evidence Code § 1101(b) evidence of the Jefferson and Taylor murders in the guilt phase and as factor B evidence in the penalty phase.

The referee's finding on the failure to disclose is based on Skyers' testimony, Dr. Deborah Miora's (hereinafter referred to as 'Dr. Miora') observations in her report that petitioner's mother did not disclose the abuse she suffered at the hands of Lewis Champion II to others, petitioner's statement to Dr. Miora that his mother was secretive and had told the children not to talk about family matters on the street, and petitioner's statement to a CYA doctor that he did not confide in others except one girlfriend whom he found he could talk to. Lastly, the referee finds that no counsel or investigator would have been able to discover and develop the family mitigation at the time of trial.

3. Claim of Brain Damage

Petitioner did not suffer any brain damage as result of 1) fetal abuse; 2) trauma from a 1968 traffic accident; or 3) physical beatings of petitioner by siblings.

Petitioner did not suffer from substantial cognitive defects at the time of trial.

Petitioner's neuropsychologist, while a good witness and well qualified, lacked adequate foundation for the opinion that petitioner suffered in-utero brain damage or significant cognitive defects. The following circumstances were proven during the reference hearing:

(1) The administration, scoring and interpretation of

neuropsychological tests by Dr. Nell Riley (hereinafter referred to as 'Dr. Riley') were seriously flawed.

(2) Allowing a third party (who had a vested interest in the outcome) to be present during the neuropsychological test of petitioner was a very grave error on Dr. Riley's part.

(3) Dr. Riley's 1997 test results were inconsistent with:

a. petitioner's history.

b. the opinions of petitioner's family, friends and gang members.

c. the opinions of six doctors who conducted mental status evaluations of petitioner from 1978 through 1980.

d. the opinions of credible, well qualified experts Doctors Charles Hinkin (hereinafter referred to as 'Dr. Hinkin') and Saul Faerstein (hereinafter referred to as 'Dr. Faerstein').

Even if the opinion of petitioner's neuropsychologist, along with Dr. Miora's (petitioner's mitigation specialist) observation that the reason the six doctors who examined petitioner between 1978 and 1980 missed cognitive defects was probably due to petitioner's very strong verbal skills, are correct, the referee concludes no trial attorney could be faulted for not asking for further testing or concluding that no mitigating evidence existed at the time of trial as to petitioner's mental status.

4. Petitioner's Family Background

The testimony from petitioner's mother and sister (Rita Powell) that petitioner was physically beaten by his older brothers, and in particular Lewis Champion III, was not credible. Given the nature of the alleged beatings and the complete absence of any observations of injuries, bruises or complaints by petitioner to his best friend Gary Jones or fellow gang members that testified at the reference hearing, the referee finds that petitioner's mother and sister exaggerated their testimony. Having said that, the referee finds Lewis Champion III was a chronic disruptive factor in petitioner's family.

Petitioner was not malnourished, nor was he denied the basic essentials of shelter, clothing, medical care or transportation. The referee found Skyers' testimony very credible that petitioner lived in a nice, well kept home in a pleasant, middle class neighborhood. Photographs (Trial Exhibit Number 5) depicting the interior of petitioner's home corroborate Skyers' testimony.

The referee finds that petitioner's mother faced a daily financial struggle to provide for and maintain a large family. In performing the duties of a single parent, seeking and obtaining employment, she was not present at home to attend to petitioner's care and supervision.

5. Poor School Performance

Skyers failed to review petitioner's school records. The records indicate poor performance, a low IQ and reading difficulties. Whether the poor performance was due to mental deficiencies or lack of effort or adverse impact of hardcore gang activities (all viable theories) was problematic at time of trial and remained so at the end of the reference hearing. School records do not reflect any evidence of physical abuse. The records also contain petitioner's mother's statements that indicate no developmental problems as to petitioner.

6. Mitigation for Hassan Murders (Factor A)

Mitigation does not exist as to petitioner's claim that:

(1) Thirteen year old Eric Hassan was not handicapped.

(2) Petitioner was substantially dominated by co-defendant Ross.

(3) The incriminating taped conversation was deficient or incorrect.

(4) Petitioner was not a member of the Raymond Avenue Crips at the time of the crimes. The testimony during the reference hearing clarified any residual questions and confirmed that petitioner was a hardcore member of the Raymond Avenue Crips. The evidence

indicates that the Raymond Avenue Crips, and petitioner in particular, were the source of the increase in violent crime in petitioner's neighborhood.

7. Love, Affection and Support for Petitioner from Family and Friends

At the time of trial, credible evidence existed of the love, affection and high regard for petitioner on the part of his family and some lifelong friends.

Gary Jones was available and credible as to his favorable recollections about petitioner. He recalled petitioner's leadership and protective nature. He had heart felt feelings that petitioner should not be given the penalty of death. His recollections were that he and petitioner had a beautiful life when they were young and saw each other every day.

Whether reasonable counsel would have presented this evidence is a close question in view of the difficulty of calling witnesses whose alibi testimony had been rejected during the guilt phase of the trial. Respondent's arguments are well taken. My decision is subjective and based on intangibles. When petitioner's mother described her feelings about her son and when Jones described his feelings about petitioner and his mother were some of the best moments for petitioner at the reference hearing in my judgment.

8. Amenability

A reasonable trial attorney would not have presented evidence of amenability or rehabilitation given the potential rebuttal evidence the prosecutor might seek to introduce. That evidence includes the prior conduct of petitioner in other violent crimes that was not presented to the jury, other violent conduct at the CYA that was not presented to the jury and a detailed history of petitioner's lack of control of his anger and temper as described in petitioner's probation reports.

9. Alibi for Taylor Murder

A close, detailed review of petitioner's proposed alibi claim is simply not supported by the testimony given during the reference hearing.

The three Raymond Avenue Crips gang members, who testified as to the alibi at the reference hearing, were not credible.

The *Strickland* expert's opinion, that there was no downside to the introduction of alibi evidence for the Taylor murder, lacks foundation. The expert did not read Wayne Harris, Earl Bogans and Marcus Player's testimony. He did not review the evidence reflecting the nature and extent of petitioner's association with Ross, Marcus Player, Evan Mallet, Harris and Bogans. He did not read the reference hearing testimony of the LASD deputies called by petitioner nor did he read Mallet's preliminary hearing transcript, Penal Code § 1538.5 and Evidence Code § 402 motions, or trial transcripts which contain the testimony of the LASD deputies who participated in the post Taylor murder activities at Helen Keller Park, the car chase and crash and the arrest of Simms and Mallet on the morning of December 12, 1980.

To properly evaluate the question whether a reasonable, competent attorney would or would not present the alibi evidence requires a careful review of the reference hearing testimony identified above and the Mallet proceedings.

The referee finds that the proposed alibi has serious proof problems and that a reasonable, competent attorney would not present this claimed mitigation.

F. Carry Over

At times, particularly where expert witnesses offered opinions in more than one reference question area, the discussion portion pertaining to that witness or expert carried over to other reference questions.

G. De Novo Review

A number of findings are subject to de novo review and in an effort to assist that process findings made in reference to question number two are set out in detail in order to allow for a rapid evaluation of the evidentiary material that falls within the proposed mitigation area. The difficulty is that some factors or evidence pertain to more that one category.

H. Petitioner and Respondent's Proposed Findings

Both Ms. Karen Kelly and Mr. Brian Kelberg write very well and submitted careful and well thought out proposed findings. Even in areas where I ultimately did not agree with the proposed findings of counsel, I sought to include that portion of the reference hearing testimony relied upon by counsel as to a particular claimed area of mitigation.

In addition, the parties' proposed findings and the transcript of their concluding arguments are attached to facilitate the Supreme Court's review.

In drafting my report, I included or incorporated counsel's proposed findings where appropriate, but only after considering the merits of counsel's arguments and reviewing the actual testimony, documents or evidence. Some of counsel's proposed findings were modified, deleted or augmented as deemed appropriate.

Generally speaking, I agreed with petitioner as to claimed deficiencies that related to the thoroughness of trial counsel's preparation and investigation. I agreed with respondent's position as to some credibility matters and some of his assessments on whether reasonably competent counsel would or would not have presented some proposed mitigation.

If a proposed finding by either side was partially correct, I simply deleted those parts I did not agree with. By attaching the full proposed findings as submitted by the parties, the Supreme Court will have the benefit of counsel's full explanation as to their respective positions.

I. Reference Questions

1. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?
2. What additional mitigating evidence, if any, could petitioner have presented at the penalty phase? How credible was this evidence?
3. What investigative steps, if any, would have led to this additional evidence? In 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to obtain such evidence and to present it at the penalty phase?
4. What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?
5. Did petitioner do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase, or did he ask that any such evidence not be presented? If so, what did he do or say?

II. REFERENCE QUESTION NO. 1

A. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?

B. Summary of Referee's Findings

1. Skyers read all pretrial discovery provided by the prosecution dealing with the:

a. Hassan murder (Factor A).

b. Jefferson murder (Factor B).

c. Taylor murder (Factor B).

d. Juvenile aggravators (Factor B).

e. CYA reports of petitioner (Factors D, H, and K).

2. Skyers personally spoke to, visited and investigated the following persons, locations or information:

a. Drs. Pollack and Imperi (mental status report Factors D, H).

b. Petitioner (Factor K).

c. Family members (Factors D, H, K).

d. Family home and neighborhood conditions (Factor K).

e. Jefferson, Hassan, Taylor crime scenes (Factor B).

f. Petitioner's age (Factor I).

C. Evidence Adduced During Reference Hearing

1. The December 12, 1980 Hassan Murders and the Special Circumstances Alleged (Factor A)

Although the Supreme Court reference questions are limited only to the penalty phase, in view of the fact that the jury was allowed to consider the evidence presented during the guilt phase under Factor A (the circumstances of the present crime and the special circumstances alleged), it is appropriate to address what investigative steps Skyers undertook as to Factor A for the penalty phase. As to this aspect, Skyers personally read the entire discovery provided by the prosecution, visited the Hassan crime scene, Helen Keller Park, the Champion residence, spoke to petitioner and his family including petitioner's brother, Reggie Champion. The principle focus as to Factor A was lingering doubt dealing with any reasonable doubt a juror may hold (if any) as to petitioner's guilt or degree of criminal culpability. Skyers was aware that the trial prosecutor could not show who the actual shooter was. The prosecution's argument, as

to petitioner's culpability and/or that of his co-defendant, was restricted to aiding and abetting or co-conspirator. Skyers did not independently investigate or interview any of the prosecution witnesses. No evidence existed that petitioner was the leader.

It is important to note that Skyers did realize the magnitude of the aggravating factors attributable to the circumstances of the Hassan murders. Skyers' assessment that the manner of killing and the purpose or reason for the killing would constitute an almost insurmountable burden on any reasonable trial attorney in identifying and presenting sufficient mitigation was confirmed during the extended reference hearing.

Skyers was aware that during the guilt phase evidence from the Jefferson and Taylor murders, offenses petitioner was not charged with, would be presented as to petitioner under Evidence Code § 1101(b) and co-conspiracy for the purpose of determining guilt as to the Hassan murders. However, for the Jefferson and/or Taylor murder to be considered under Factor B during the penalty phase, the prosecutor would need to prove those crimes beyond a reasonable doubt.

2. Jefferson Murder (Factor B)

Skyers was aware that the prosecutor was unable to link petitioner or Ross to the Jefferson homicide with any physical evidence or witness identification. Evidence from the Jefferson murder was introduced as an aggravator under Factor B. Skyers concluded that the prosecutor could not prove petitioner's criminal liability beyond a reasonable doubt. He undertook no separate investigation of the Jefferson murder.

3. Taylor Murder (Factor B)

Skyers' pre-trial review of discovery indicates that the prosecutor did not have any physical evidence linking petitioner to the Taylor murder. The surviving victims of the Taylor murder were unable to identify petitioner at the field show up or at the photographic line up. The discovery indicates that Ross' fingerprints were found at two locations within the Taylor residence. The gun taken from the Hassan murder is found

in Player's car and the physical evidence connects the gun to the Taylor killing. Evan Mallet is identified by the surviving victims and is arrested in petitioner's backyard on December 28, 1980. The Player car belongs to Frank Harris. Petitioner is not connected to the Player car by prints or by any law enforcement witness who chased the Player vehicle. Petitioner, Harris, and Marcus Player were observed approaching the LASD perimeter from outside the perimeter and were detained by the LASD. They are directed to walk the perimeter. While doing so a fourth person who identified himself as James Taylor (Robert Aaron Simms) joined the threesome and the group was detained by the LASD at the next check point. The Taylor murder victims viewed them at the field show up. No one is positively identified. Taylor (Simms) is taken to the police station while petitioner is directed to his home which is within the perimeter. Evan Mallet is arrested hiding in petitioner's backyard and he is identified by some of the Taylor victims at the field show up.

4. Juvenile Aggravators (Factor B)

Skyers received and read the discovery of the noticed juvenile aggravators including the November 6, 1977 West Covina crimes involving seven to eight individuals, including petitioner, who robbed three persons and the September 29, 1978 assault with a deadly weapon (pocket knife and bottle) at Helen Keller Park where four to five persons along with petitioner were involved. Petitioner cut the victim's finger, kicked him and broke a bottle over the victim's back. Petitioner was 17 years old and sent to the CYA. The main mitigation reflected in this information was petitioner's age and lack of maturity. Petitioner's file also contained other crimes/arrests including a 1976 burglary.

5. Skyers' Review of CYA Reports

In 1977, petitioner had been in custody at Camp Munoz and was again in custody at the CYA between September 27, 1978 and October 23, 1980. The records

reflected detailed information about petitioner's past arrests, the nature of the alleged conduct on the part of petitioner, the type of crime, the location and the identity of his companions. In addition, the records set out CYA evaluation/goals as to petitioner's primary issues (anger, temper and use of violence). The report also contained extensive evaluations by four separate doctors (two psychologists, two psychiatrists) who concluded that petitioner had a below average IQ, was impulsive, had reading difficulties, needed to take remedial classes, and that he was not suffering from any mental defects, disorders or illnesses. The CYA reports also documented petitioner's conduct within a structured setting. Some notable acts of misconduct were observed as well as some positive adjustments. The CYA reports as well as staff and medical evaluations will be discussed in detail in reference questions numbers 1, 2, 3, and 4. The mental evaluations by CYA doctors were not given to Drs. Pollack/Imperi by Skyers. Skyers did not discuss the CYA reports with the family or petitioner. Skyers did not interview any CYA staff or doctors. The CYA reports contain some crucial statements by petitioner's mother and by petitioner that have a major impact on the referee's determination of credibility of the reference hearing witnesses or the validity of claimed mitigation. Petitioner claimed to have severed gang ties. He did not report any family abuse or head injuries. He outlined his future plans. He was paroled on October 23, 1980. Although this section addresses what were the results of the investigation undertaken by Skyers, it is necessary to discuss the relationship between the CYA material and the reference hearing evidence presented by family members and experts. (See detailed discussion that follows summary of evidence.)

6. Drs. Pollack and Imperi's Mental Status Report (Factor D, H)

Petitioner's prior counsel, Mr. Homer Mason, had the court appoint Drs. Pollack and Imperi to conduct a mental status evaluation of petitioner as to both the guilt and penalty phase.

Skyers received and read the written reports that addressed five separate areas including their findings of no mental illness, defect or disorder. The doctors did not use any psychological testing other than in person clinical interviews.

7. Interview of Petitioner (Factor K)

Skyers personally interviewed and consulted with petitioner about the Hassan charges as well as his childhood and background on several occasions. Petitioner did not disclose any information about family abuse, poverty or neglect.

8. Interview of Family Members (Factors D, H and K)

Skyers personally interviewed petitioner's mother, older sisters and brother Reggie Champion concerning petitioner's home life, childhood and other family matters. Skyers did not use a penalty phase investigator to assist in investigating petitioner or the family's background. Skyers did not interview petitioner's older brother, Lewis Champion III, or the younger family brothers or sisters. Skyers did not gather family documents or petitioner's school records. He did not contact extended family members who lived in the area. He did not question the family members in a specific detailed method, although he had substantial contact with petitioner's mother and sisters (Rita, Linda) and allowed them an opportunity to discuss petitioner and the family's background. The family did not tell Skyers about claimed fetal abuse, petitioner's 1968 head injury, infliction of head trauma by older brothers, poverty or gang activity.

9. Family Home and Neighborhood Conditions (Factor K)

Skyers personally visited on several occasions the family home of petitioner. The home is located at 1212 W. 126th Street and is very close to Helen Keller Park and the Jefferson, Hassan and Taylor crime scenes. The home was within the perimeter established by the LASD on December 28, 1980.

Skyers, who is African-American, observed the living conditions of petitioner and the community and noted no issues as to this subject. The home was neat and well kept as was the neighborhood. The park was in very good condition except for the gang members' presence. Skyers' testimony as to how often he visited the petitioner and family members and nature of their discussions is accepted as very credible by the referee.

10. Jefferson, Hassan, Taylor Crime Scenes (Factors A and B)

Skyers personally visited the crime scenes and was aware of their close proximity to each other and Helen Keller Park, the car crash scene, the location of the perimeter and areas where potential witnesses were detained. Skyers did not interview any witness or conduct an independent investigation.

11. Petitioner's Age (Factor I)

Skyers was aware of petitioner's young age and lack of maturity at time of the Hassan murders. Petitioner was 18 years old. Skyers was aware petitioner did not have an adult criminal record.

D. Detailed Discussion of Evidence and Findings

1. The Jefferson Murder (Factor B)

Skyers received pretrial discovery concerning the Jefferson murder from the prosecutor. (See, RHT 979-982, 1023-1027, 1032-1036 and Exhibits 1P, 3H, 5A, 6, 6A & 6B.)[1] Skyers read all of the reports. (RHT 5027.) Skyers visited the area of the Jefferson murder to see how far it was from the Hassan murder scene. (RHT 1051, 1069-1070.) Skyers conducted no additional investigation of the Jefferson murder such as contacting witnesses identified in the police reports (RHT 1050.); investigating

[1] All references in this section to exhibits will be to reference hearing exhibits unless expressly stated to be trial exhibits.

whether Jefferson, Bobby Hassan and Taylor were drug dealers (RHT 1052.); independently investigating the similarity or lack of similarity between the Jefferson, Taylor and Hassan crimes (RHT 1054-1055.); or seeking an analysis of fragments of the bullet recovered from Jefferson to compare with any gun, including the type of gun petitioner is shown holding in Exhibit 47 (RHT 1042, 1047.) Skyers was aware the prosecutor intended to use the Jefferson murder as a penalty phase aggravator (Factor B).

2. The Taylor Murder and Related Crimes (Factor B)

Skyers received pretrial discovery concerning the Taylor murder and the related crimes. (See, Exhibits 3M, 7B, 11A, 14 and 14A, 17, 17A-I, 20V, 22A-B, 25F, 26A, 27A, 29, 29A-C.) Skyers substituted in as petitioner's trial counsel on August 24, 1981. (RHT 826; 2 CT 569.) Skyers did not attend the trial of Evan Jerome Mallet, who was successfully prosecuted for the Taylor murder and related crimes in a separate trial from that of petitioner and Craig Ross following Mallet's arrest by LASD deputies at approximately 3:00 a.m. on December 28, 1980 in the backyard of petitioner's residence. Skyers did not read the transcripts of the Mallet trial which was concluded before petitioner's trial began. (RHT 849, 1715; see also, Exhibit MMMM [Reporter's and Clerk's Transcripts on Appeal of *People v. Mallet*, Los Angeles Superior Court Case No. A619834, of which the referee has taken judicial notice].) Skyers investigated the geographical proximity between the Taylor and Hassan residences. (RHT 1093-1094.) Skyers did not contact the surviving victims of the Taylor crimes, Cora Taylor, Mary Taylor and William Birdsong, nor did he contact any of the Taylor neighbors. He did not contact Frank Harris, the registered owner of the crashed Buick automobile chased by police, or investigate any possible involvement of Robert Aaron Simms in the Taylor crimes, including making a request to the prosecution to have Simms' fingerprints run against latent prints recovered at the Taylor residence. (RHT 1094-1095, 1104-1105, 5017.) Skyers did not attempt to speak with Marcus Player, Wayne Harris or any of the

four individuals listed in the report of Deputies Lambrecht and Tong (Earl Bogans, Willie Marshall, Angulus Wilson and Marcus Player) concerning a detention late on the evening of December 27, 1980 in Helen Keller Park, a detention interrupted by the chase of the Buick. (RHT 1105-1106, 1109-1110.) Skyers could not specifically recall whether he had in fact spoken with petitioner about the Taylor crimes and a possible alibi for when those crimes were committed. (RHT 1106.) Skyers interviewed petitioner's brother, Reginald Champion, concerning petitioner's whereabouts on December 27-28, 1980. (Exhibit B, p. 12241.) Skyers did not contact any of the LAPD or LASD officers involved in the Taylor murder investigation, the detention of petitioner, Marcus Player and Wayne Harris, and the arrest of Evan Jerome Mallet on December 28, 1980. (RHT 1109.) Skyers did not undertake any independent investigation of petitioner's involvement in the Raymond Avenue Crips, including any effort to verify petitioner's involvement with that gang or the Taylor crimes based upon photographs used by Deputy Williams in his trial testimony. (RHT 1096, 1119-1120.) Skyers testified that he conducted no independent investigation of the Taylor case separate and apart from reviewing the discovery he received. (RHT 1120, 5026-5027.)

Although Skyers had no recollection of interviewing any of the witnesses of the Taylor case, he nevertheless believed that he "must have talked to Natasha Wright." (RHT 1165.)

3. Petitioner's Social History, Mental and Physical Impairments

a. Skyers' Conversations with Petitioner and Family Members

Skyers estimated he had had between 10 and 20 conversations with petitioner prior to trial, although the actual number of such conversations might have been more. Skyers believed it was possible he discussed matters relevant to the penalty phase during each of these conversations, although other than the Hassan crimes, Skyers had no present recollection of any other specific areas of penalty phase investigation they discussed. (RHT 998-999, 1214.) "I would talk with [petitioner] about his life." (RHT

1215.) These conversations continued during the trial itself. (RHT 1214-1215.) Skyers testified: "I can't recall specifically, but I knew of [petitioner's] childhood on the whole because of my involvement with his family, and surely I would have talked to him about his childhood situation while visiting him." (RHT 1000: 2-5.)

Skyers spoke with petitioner's mother discussing with her petitioner's "aspirations to better himself in life," his schooling, his brothers and sisters and how petitioner got along with them.[2] Skyers received no indication from petitioner, his mother or any of petitioner's siblings with whom Skyers spoke that they did not get along, that petitioner had been assaulted by his older brothers and that petitioner had ever been malnourished or gone hungry as a child (at all times while Skyers represented petitioner, petitioner appeared physically fit as did the siblings Skyers interviewed and called as witnesses at trial). Petitioner's home, as seen by Skyers during his representation, was well kept as was the neighborhood. Skyers saw no evidence that alleged poverty in the Champion household had impacted petitioner. (RHT 1216-1219, 1140 ["[The Champion family] lived in the neighborhood that was [a] nice looking neighborhood. Mrs. Champion was a very nice lady. The family that I met were very cordial to me and they seemed to be, you know, I don't know how to classify below middle class or middle class except by money. I wouldn't think that there was an abundance of money. But their home was well kept. I've been in the home many times. The street itself was a nice street. Helen Keller Park wasn't very far away. It's a nice park except for the gathering of gang members as the Raymond Crips were. Other than that, I wouldn't be able to classify the home as below middle class."].)

When Skyers was questioned by petitioner's counsel whether he specifically asked family members about any possible head injuries sustained by petitioner, Skyers testified that he spoke to family members for purposes of developing information potentially relevant to the penalty phase of the case. "Well, when I talked to his mother,

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[2] Skyers estimated he had perhaps 50 conversations with petitioner's mother. (RHT 4965-4966.)

his brother, his sisters about Steve on a whole, I didn't ask about head injuries, of course. But nothing came up that Steve was in any way injured or retarded or had been to the neurosurgeon or anything like that. And he appeared to me be a normal youngster. He talked to me, and even though I'm not a neurologist, I could talk to him like I talk to any other client, and he responded well. Didn't seem like anything was out of order." (RHT 1141.)[3] "I didn't specifically remember discussing any injuries to [petitioner] or head injuries to him. But I believe the opportunity was presented for discussion on all of these areas. (RHT 1142.)[4] When asked by petitioner's counsel to which family members he posed questions relevant to the penalty phase of the case, Skyers testified: "I think to all, at different times to all of the family members, to the sisters, the brother Reginald, I didn't speak to Lewis Champion too much. I didn't see him. I think he might have been living somewhere else, but I'm not so sure. But I talked to them and to Mrs. Champion, Azell Champion." (RHT 1143.)[5] When petitioner's counsel asked Skyers whether the family members to whom he spoke "gave [Skyers] no information in this area which you felt you could use at the penalty phase[,]" Skyers testified: "That's correct. Nothing to do with the health situations." (RHT 1143.) In Skyers' conversations with petitioner's mother and siblings, nothing was said to Skyers to suggest petitioner was victimized by his older brothers or that he was a "punching bag" for them. (RHT 1335.) Similarly, no one indicated petitioner's mother had been physically abused by petitioner's biological father while she was pregnant with petitioner, although from the nature of Skyers' conversations with petitioner's family, that information should have been disclosed had those circumstances actually occurred. (RHT 1338.) Finally, while Skyers represented petitioner, he never received any

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[3] Skyers described his relationship with petitioner during the trial as "very good as an attorney-client relationship. I felt free to discuss with Steve anything I wanted to and he would answer me." (RHT 4940.) This relationship continued during the penalty phase. (RHT 4941.)

[4] Skyers testified that he used "open-ended questions of the family members in order to elicit information about [petitioner's] life[.]" (RHT 4931-4932.)

[5] Skyers testified that he "considered Mrs. Champion quite accessible. I considered his two [older] sisters quite accessible and also Reginald Champion, his brother, quite accessible." (RHT 4941.)

information from petitioner's mother or any other family member that petitioner had been involved in a traffic accident in which his stepfather had been killed, although once again, Skyers testified that based on the conversations he did have with Azell Champion (hereinafter referred to as 'petitioner's mother' or 'Mrs. Champion') and petitioner's other family members, he believed that information should have been disclosed to him. [Under "Developmental History," the December 13, 1978 Initial Home Investigation Report summarizing the interview with petitioner's mother, states in part: "'Subject was described as a full-term infant and experienced normal delivery. There were no serious illnesses or injuries suffered as a child. He demonstrated no abnormal developmental behavior during his formative years.'" (RHT 1329, 1336-1337; Exhibit H.)]

The referee finds Skyers' reference hearing testimony in this area fully credible. While petitioner's family members who testified at the reference hearing disputed Skyers' recollections, the referee notes that petitioner's older sister, Rita Champion Powell, testified that she, her mother and other family members met with Skyers at Mrs. Champion's home four to five different times during the pendency of petitioner's case with each meeting lasting approximately several hours. Although Powell claimed that Skyers never asked her questions about petitioner's childhood, Powell nevertheless testified that she thought that she would be called as a witness at the penalty phase of petitioner's trial, "maybe ask[ing] me about Steve, or how I feel about him getting the death penalty." (RHT 5324-5325, 5208.)

Petitioner's other older sister, Linda Champion Matthews, testified at the reference hearing that her August 12, 1997 Declaration (Exhibit 124) was inaccurate where it stated on page 8, paragraph 25: "Skyers did not ask about our family history, our home, or our community." (RHT 5718-5719, 5815.) Matthews testified that "pretty much [Skyers] asked the question at the time and I probably just took it and ran with it from there." She also testified that she "told him what was going on in the family and in

the area and stuff like that." (RHT 5721.) "[Skyers] didn't ask a whole series [of questions], it was like tell me about your family." (RHT 5722.)

Petitioner's mother admitted on cross-examination that in an interview with petitioner's habeas counsel the day before her reference hearing testimony, she told petitioner's habeas counsel that she had in fact discussed "Steve's childhood" with Skyers. (RHT 5531-5534.)

The failure of petitioner's mother, siblings and petitioner to "reveal" to Skyers (1) the alleged circumstances of beatings petitioner sustained from his older brothers Lewis and Reginald; (2) the 1968 traffic accident that killed petitioner's stepfather and in which petitioner probably sustained a fractured collarbone but no head injury; (3) the alleged family poverty and its impact on petitioner, including the claim of malnutrition; and (4) the alleged fetal abuse sustained by petitioner from alleged beatings petitioner's biological father inflicted on petitioner's mother during the gestational period, is highly relevant to reference questions numbers 2, 3 and 4.

As will be detailed further, the referee has grave concerns whether petitioner in fact ever sustained the alleged beatings or fetal abuse claimed during this reference hearing or whether the family suffered from the degree of poverty presently claimed. Certainly, the credibility of the reference hearing testimony of petitioner's mother and siblings in this area is marginal at best. (See, Exhibit H.)

Even if one assumes *arguendo* the truth of the present allegations concerning available mitigation, the referee finds that reasonably competent counsel could not have discovered evidence in these three areas. As more fully discussed in a review of the Declaration and reference hearing testimony of petitioner's "mitigation specialist," Dr. Miora, the unwillingness of petitioner's family members to disclose family business to outsiders was and is a well-recognized phenomenon. Thus, even if one or more of the mitigation "themes" now raised by petitioner's habeas counsel and presented through the reference hearing testimony of petitioner's mother, siblings, best friend Gary Jones and Dr. Miora, in fact were supported by credible evidence, Skyers' failure to uncover

these circumstances in light of a deliberate and concerted effort by petitioner's mother and family to keep such matters from Skyers fails to reflect a failure of reasonably competent counsel to conduct an appropriate investigation in anticipation of a possible penalty phase trial.

Finally, in addition to the reference hearing testimony of Gary Jones, Wayne Harris, Earl Bogans and Marcus Player which substantially undermined petitioner's present claims of available mitigation evidence in these and other areas, the prosecution had readily available rebuttal evidence to refute petitioner's present claims such as Exhibit H (Initial Home Investigation Report), Exhibit CCC (Los Angeles Unified School District [hereinafter referred to as 'LAUSD'] school records), Exhibits D, I & J (the CYA psychological and psychiatric evaluations) and the absence of any contemporaneous medical, police, probation, school, social services or financial records relating to petitioner to support petitioner's present claims of available mitigation evidence.

b. Skyers' Review of Petitioner's CYA File, Including Psychiatric and Psychological Reports and Initial Home Investigation Report

Although initially uncertain as to whether he had reviewed petitioner's CYA file or that of another client at the parole office on Bullis Road (RHT 927-928; Exhibits 2-GG & 2-II [Authorization for Release].), Skyers ultimately testified it was petitioner's CYA file which he reviewed, including the psychological and psychiatric reports of Drs. Audrey Prentiss [hereinafter referred to as 'Dr. Prentiss'], Michael J. Perrotti [hereinafter referred to as 'Dr. Perrotti'], Daniel Minton [hereinafter referred to as 'Dr. Minton'] and Richard C. Brown, Jr. [hereinafter referred to as 'Dr. Brown'] (Exhibits D, I and J). (RHT 1430-1431, 5053-5055, 5060-5061, 5083; see also, Exhibits 20-G & 20-L.)[6] Skyers also testified that the December 13, 1978 Initial Home Investigation Report

[6] See also, RHT 1223-1230 [Skyers' testimony concerning Exhibits 20-G, 20-L (November 1981 SDT for the "Director of Parole [from the California Youth Authority], Sacramento, SDT"), 2-GG & 2-II (original and copy of release form) and 23 A-1 (March 25, 1982 YTS evaluation of petitioner)].

(Exhibit H), describing a December 11, 1978 interview conducted by parole agent Thomas Condon with petitioner's mother at her home on 1212 W. 126th St., was the type of report Skyers would have expected to be present in petitioner's CYA parole file at the Compton office, as well as the kind of report Skyers would be permitted to see and/or copy if the appropriate release form was submitted. While Skyers had no independent recollection as to whether he had reviewed Exhibit H or had obtained a copy of that exhibit, in light of Skyers' testimony that he expected this report would be in petitioner's CYA parole file and his subsequent testimony that he did in fact review that file, it is clear that Skyers did review Exhibit H before petitioner's trial began. (RHT 1330-1331.)[7]

The referee finds Skyers did review petitioner's CYA file, including Exhibits D, G-13 (December 12 1979 Youth Training School [hereinafter referred to as 'YTS'] Case Report), H, I, J,[8] 23 A-1 (March 25, 1980 YTS Case Report) and the November 8, 1978 juvenile court probation report prepared as part of the 1978 juvenile adjudication of petitioner for assault with a deadly weapon which is included within Exhibit 147 at page BS105 et seq. (an exhibit consisting of copies of selected documents found in petitioner's CDC file, Exhibit G; see also, RHT 9263-9265.).[9]

In the December 1978 reports of psychologist Dr. Prentiss and psychiatrist Dr. Minton, the January 1979 case conference summary report, the December 1979 report of psychologist Dr. Perrotti and the July 1980 report of psychiatrist Dr. Brown, there is a

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[7] Prior to undertaking petitioner's representation, Skyers had acquired extensive experience handling juvenile court cases, which included gaining familiarity with the process needed to obtain juvenile court records with either an authorization or subpoena duces tecum. (RHT 1004.)

[8] The referee has admitted Exhibits D, G-13, H, I and J for all purposes. (RHT 7355-7356.)

[9] In light of the fact that it is petitioner who bears the ultimate burden of proving the factual allegations that serve as the basis for the requested relief (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 675), it is petitioner's burden to prove, as part of petitioner's claim that Skyers failed to act as a reasonably competent advocate in his investigation of potential penalty phase evidence, that Skyers did not review petitioner's CYA file and the specific exhibits identified. Thus, even if the evidence on whether Skyers reviewed the file were in equipoise, in light of petitioner's burden, the referee would have to conclude Skyers had in fact reviewed the file. Nevertheless, the referee is convinced Skyers did in fact review the file and the various exhibits identified.

uniform consistency which was correctly summarized by respondent's board certified clinical neuropsychologist, Dr. Hinkin, as follows: "That [petitioner was not suffering from brain damage] was the conclusion of all the psychological testing, as well as psychiatric evaluations that I had available for review, for they consistently concluded that he had no evidence of any mental, emotional, organic disorder. Some used testing to help establish that. Some base that solely upon their diagnostic interview. But uniformly all the folks who saw him when he was in the CYA or when he was imprisoned, concluded that he did not have any evidence of any neurological disorder." (RHT 6219.) Further, not one of the four psychologists and psychiatrists who evaluated petitioner at the CYA recommended any additional psychological or neuropsychological testing such as that conducted by petitioner's neuropsychologist, Dr. Riley, in 1997. In addition, according to the reports, in providing a history, petitioner never mentioned abuse at the hands of his older brothers, the 1968 traffic accident in which petitioner sustained a broken collar bone and in which petitioner's stepfather was killed, any adverse effects from the absence of petitioner's stepfather or a father figure or the effects from alleged family poverty.

Although Dr. Prentiss' report indicates that petitioner appeared "to be suffering from recurring episodes of depressive feelings[,]" (Exhibits D & J, Report of Dr. Prentiss, p. 1.), in Dr. Minton's report concerning his evaluation conducted only one day after Dr. Prentiss' assessment, he made no finding of clinical depression and explicitly stated petitioner "denied depression or suicidal ideation." (Exhibit D, Report of Dr. Minton, p. 2.) Further, in Dr. Perrotti's report following his December 1979 assessment of petitioner, Dr. Perrotti specifically noted that there had been reports in the file concerning depression but, according to Dr. Perrotti: "[Petitioner] does not appear to be clinically depressed whatsoever." (Exhibit J, Report of Dr. Perrotti, p. 1.) Similarly, in Dr. Brown's July 29, 1980 psychiatric evaluation report (three months before petitioner's release from the CYA and four and a half months before the Hassan murders), Dr.

Brown noted that petitioner "gave no indications of any type of depression, suicidal or homicidal ideations, nor any lack of judgment or insight skills." (Exhibit I, p. 2.)

Although Dr. Prentiss' report noted that petitioner had "feelings of remorse for his past behavior" (Exhibits D & J, Report of Dr. Prentiss, p. 1.), Dr. Minton's report stated that petitioner "showed no guilt or remorse over his offense." (Exhibit D, Report of Dr. Minton, p. 2.) Dr. Perrotti's report reflects that petitioner "relates that he repeatedly became involved with the law because he thought that he could get away with things. He states that this is no longer his attitude. He states that he feels he has changed in that he has severed ties with gangs and is able to talk to different ethnic groups.[10] He also states that he used to have a bad temper but that now he has made the decision to control his temper. When I asked him what the impetus for his change was, he states that he has the support of family who don't want him going back to jail. He states that he sits in his room and thinks about the ability which he has to do the things which he wants to do, but that he does not utilize these. He states that in the past, if someone said things which he did not agree with, he exploded. He states that he now tries to comply with authority." (Exhibit J, Report of Dr. Perrotti, p. 1.) Dr. Perrotti also noted: "Mr. Champion related that his history of violent offenses is partially due to his association with gangs of youths subscribing to violence. It seems that he, in all probability, subscribes to their values and attitudes. [] Mr. Champion related that most of his offenses were for 'fast money.' He states that 'if it were not for fast money, I would not have committed the offenses.'" (*Id.* at p. 2.)

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[10] In addition to the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player and Gary Jones indicating petitioner was still a member of the Raymond Avenue Crips in December 1980, photographs Marcus Player identified as having been taken while Player and petitioner were housed at the California Youth Authority (Exhibits DD, EE and FF) contradicted petitioner's claim he had severed his ties with the gang. In Exhibit DD, petitioner is seen throwing up a Raymond Avenue Crips gang sign. (RHT 2023-2026.) Although petitioner's jury had seen these photographs (Trial Exhibits 174-176) and Skyers believed at that time that the photographs had been taken while petitioner was at the CYA, the jury did not receive evidence that the photos were taken while petitioner was in the CYA. Instead, the jury only learned through Deputy Williams' testimony that "an anonymous person had given him" the three photographs. (*People v. Champion* (1995) 9 Cal.4th 879, 920.)

As a result of an MMPI test, Dr. Perrotti described individuals with a profile similar to that produced in petitioner's case "as extroverted, overactive and rather irresponsible. These individuals usually are seen as hostile, or engaging in superficial and shallow relationships with others, as having fluctuating morals and poor conscience development. Although their social skills may appear to be quite good, they eventually display lack of judgment and neglect of obligations. They typically show flagrant excess in their search for pleasure and self-stimulation. The profile is also suggestive of lack of conscience, lack of long-term relationships and goals, failure to plan ahead for consequences, and a need to more judiciously and prudently regulate their feelings and emotions. Self-defeating behavior is suggested. Moreover, shallow, poor planning ability is suggested." (*Id.* at pp. 2-3.)

As part of Dr. Riley's neuropsychological testing of petitioner in 1997, Dr. Riley asked petitioner to define the word "remorse." The definition petitioner provided Dr. Riley was: "'Regret something you did.'" Petitioner received full credit from Dr. Riley for this definition. (RHT 6267-6268, quoting from Exhibit DDD, BS010077.) On page 15 of Exhibit F (Trial Exhibit 180-A), the transcript of the surreptitiously recorded conversation between petitioner and his codefendant, Craig Ross, petitioner told Ross that with respect to the Hassan murders "I didn't feel bad or nothing." As noted, Dr. Minton's December 14, 1978 psychiatric report (Exhibit D) stated that "This ward showed no guilt or remorse over his [1978 assault with a deadly weapon] offense." In addition, at petitioner's trial, Elizabeth Moncrief testified that when petitioner was seen leaving the Hassan residence, wearing gloves and carrying a pillowcase that appeared to have something within it other than a pillow, petitioner was laughing. (RHT 1437-1448, setting out verbatim the trial testimony of Ms. Moncrief which began at 8 RT 1719: 17.)

Dr. Hinkin testified that "[i]ntellectually, based on Dr. Riley's testing here, [petitioner] understands the meaning of the word 'remorse,' meaning of the concept of remorse. Whether or not he experienced remorse at the time of that act, I don't know. But this data does suggest that he does understand what that concept means." (RHT

6270: 10-15.) Dr. Hinkin further testified that from a neuropsychological standpoint, looking at the "intellectual neurological side," there is no indication [that petitioner lacks the mechanism to be able to feel remorse for the Hassan crimes]. On the psychiatric side, [petitioner] had received a diagnosis of antisocial personality disorder in the past. Some individuals with antisocial personality disorder do not experience remorse for their acts. Whether or not Mr. Champion falls in that category, there is not enough data in the record for me to opine one way or the other. But there are individuals with antisocial personality disorder -- There are many individuals with antisocial personality disorder who well know what the word means, yet still don't experience the emotional feeling." (RHT 6271-6272.)[11]

Dr. Perrotti also concluded that "Mr. Champion is well able to reason through situations in a logical fashion and to arrive at appropriate conclusions. He fully realizes the need to reason things through when friends ask him to go along with their plans. At this point, he admittedly is well able to decide a right or wrong course of action to follow." (Exhibit J, Report of Dr. Perrotti, p. 3.) Further, Dr. Perrotti found that petitioner "has the capacity to appreciate the criminality or wrongfulness of his conduct and to conform his conduct to the requirements of the law. He is well able to differentiate right from wrong, to understand the nature and quality of his actions when he gets into trouble and to inhibit himself from acting out. Therefore, he should be held strictly accountable and responsible for his actions. There are also statements in the file regarding his being easily influenced by others. He disagrees with this and feels that he does what he wants to do and that he is autonomous." (*Id.* at p. 1.)

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[11] Dr. Faerstein identified the criteria for antisocial personality disorder set forth in the DSM-III, the applicable edition at the time of petitioner's trial. (RHT 6567-6581.) From the review of records provided to Dr. Faerstein, although he had some question with respect to whether or not petitioner satisfied Criterion B, in Dr. Faerstein's opinion, petitioner met all other criteria for the diagnosis of antisocial personality disorder reached by Dr. Steinke following petitioner's transfer in December 1982 to San Quentin. (RHT 6580-6581; see also, Exhibit G-3.) Dr. Faerstein also noted that the diagnosis of antisocial personality disorder "includes the characteristic of the inability to empathize with victims, or feel remorse for one's conduct." (RHT 6568.)

In Dr. Brown's report, he noted that petitioner "states that he is sorry for having become involved in this incident and many of the other things that he has done in the past. He states that he has made some changes and some of the improvements he notes are his betterment of his educational skills, his improvement in his reading and the improvement in his understanding himself." (Exhibit I, p. 1.) According to Dr. Brown's report, petitioner "describes his family life upbringing as being a regular family with both sad and happy times. He states that although he's had the usual sibling rivalry with his brothers and sisters, he does not see this as being any major problem in his past." (*Ibid.*) Dr. Brown also noted that petitioner "has had some gang involvement in the past but states at the present time that he has severed these ties." (*Ibid.*)[12] Dr. Brown's report also notes what petitioner stated were his plans for parole including "continuing his college education by having already applied for a college grant, [] [p]ossibly working in either the area of construction with an uncle or in the area of auto mechanics, which was his trade here at the Youth Authority." (*Ibid.*)

Dr. Brown also noted that petitioner "during the entire interview seemed quite eager to help in any way possible and deal with any information. His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease, or any kind of cognitive abnormalities. His memory as tested to both conversation and direct questioning was very good. His calculating abilities showed him to be rather sharp and occasional mistakes may, he felt, be due to anxiety." (*Id.* at p. 2.)

Further, Dr. Brown noted: "There is, of course, the possibility of manipulation, however the youth does seem quite sincere in the information that he gave me today and in his presentation." (*Ibid.*)

According to Dr. Minton's report, petitioner's "drug history includes smoking marijuana twice a week and drinking two cans of beer on weekends." (Exhibit D, Report

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[12] See, footnote 10, *ante*, at page 34.

of Dr. Minton, p. 2.) According to Dr. Brown's report, "[petitioner] admits to occasional use of alcohol and grass in the past; however, he states that this usage is somewhat minimal." (Exhibit I, p. 1.)

Dr. Perrotti's report also noted: "Insofar as his institutional program is concerned, Mr. Cruz, youth counselor on O/R, related to me that Mr. Champion did a very marginal program on O/R. He stated that [petitioner] needed constant supervision to stay out of trouble." (Exhibit J, p. 2, par. 2.)[13]

Under "PROGRESS IN TREATMENT," a December 12, 1979 Youth Training School Case Report documents that on March 20, 1979, "[petitioner] was transferred to that Treatment Program for assaulting another ward and a staff member. [Petitioner] went through the I/J Treatment Program with only two Level A Behavior Reports, one for yelling at staff, and one for wearing the wrong type of clothes to trade. On 6/30/79, [petitioner] was transferred to U/V Company. While on U/V Company, [petitioner's] rule and behavior violations became more severe. He was involved in an incident of destruction of State property, placa writing, and on 7/21/79, he was involved in a race riot between blacks and whites. In this riot, several wards were injured and hospitalized. As result of [petitioner's] participation in this incident, he was placed on T/D in O/R Company on 7/23/79." (Exhibit G-13, p.1 [BS 000896].)

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[13] Although petitioner's *Strickland* expert, Jack Earley (hereinafter referred to as 'Earley'), claimed to have reviewed the 13 volumes of penalty phase exhibits submitted with the Petition for Writ of Habeas Corpus, exhibits which included a copy of Dr. Perrotti's report, when specifically questioned about whether he had reviewed that report before writing either of his two reports (Exhibits 109 and 110) or before testifying, Earley had no recollection of having done so. (RHT 3085, 4399.) Earley also admitted he had not reviewed the specific paragraph of Dr. Perrotti's report setting forth the information from Mr. Cruz, the youth counselor. (RHT 4427-4429.) When Earley was specifically asked whether the information from Mr. Cruz contained in Dr. Perrotti's report "sounded like someone who has made a good institutional adjustment at the Youth Authority[,]" Earley refused to answer that question. (RHT 4429-4430 "I can't answer that question just based on this paragraph in the abstract].)
In addition to the fact Earley had not reviewed Dr. Perrotti's report and thus was unaware of information inconsistent with a claim that petitioner had in fact adjusted well in the institutional setting of the CYA, Earley did not review petitioner's CDC records (See, Exhibit JJJ; RHT 4400.), which included not only the "Initial Home Investigation Report" (Exhibit H) and Dr. Brown's July 29, 1980 "Psychiatric Evaluation" (Exhibit I), but also a December 12, 1979 Youth Training School Case Report (Exhibit G-13 similar in nature to the March 25, 1980 report, Exhibit 23 A-1) received for all purposes in this proceeding. (RHT 7355-7356.)

In the same report, under "INSTITUTIONAL ADJUSTMENT," the report reflects: "[Petitioner's] overall behavior at YTS is considered marginal by staff, due to some of his behavior problems. He has had three Level A Behavior Reports: 5/21/79-wearing the wrong type of clothes to trade; 5/24/79-yelling at staff; and 8/25/79-disrespect to staff. [Petitioner] came from SRCC with a Level B Behavior Report for assault on his record, and has continued this behavior at YTS. The first was on 3/18/79 for assaulting another ward and a staff member on M/N Company. This resulted in his being placed on Phase A from 3/15/79 to 4/17/79. The second Level B was for damaging State property by placa writing. The third Level B resulted from [petitioner's] participation in the racial riot on U/V Company on 7/21/79. This put [petitioner] on Phase A again from 7/23/79 to 9/15/79 on O/R Company. While [petitioner] was on O/R, he behaved in an acceptable manner, but should be exposed longer to the general population to see if he can continue this behavior. So far on W/X Company he has continued to behave and has gotten no Behavior Reports." (Exhibit G-13, p. 2 [BS 000897].)

Finally, under "TREATMENT SUGGESTIONS," the report reflects in part: "Steven Champion is usually cooperative, and can be dealt with in an effective manner. The exception to this is if things don't go as he believes they should. If this happens, he becomes angry, starts yelling, and becomes very difficult to deal with until he cools down. This, in addition to his record of assaultive behavior, demonstrates his tendency for impulsive and violent behavior." (Exhibit G-13, p. 2 [BS 000897].)

Petitioner's mother was questioned extensively about a December 13, 1978 Initial Home Investigation Report (Exhibit H) documenting an interview conducted on December 11, 1978 at her home by parole agent Thomas Condon.[14] Under "Intrafamily Relationship," the report states: "The family is described as normal in all aspects. The children all relate well to each other, respect the parent, and are helpful at home. The two oldest girls work regularly on a full-time basis and contribute to the support of the

[14] In the report, petitioner's mother is referred to as "Azell Champion."

family." Under "Developmental History," the report states: "Subject was described as a full-term infant and experienced normal delivery. There were no serious illnesses or injuries suffered as a child. He demonstrated no abnormal developmental behavior during his formative years. Ward is said to enjoy mixed group activities and is at ease with the opposite sex. He has some friends, mainly unknown to his mother. Subject began school at age 5 and did well until junior high school. He last attended the 11th grade at Washington High School. Subject is said to be interested in sports, has no particular vocational interest, and 'learns easily'."

During her reference hearing testimony, Mrs. Champion denied ever having this or any conversation with a CYA investigator. (RHT 5447-5450, 5493.) She adamantly denied ever making the statement set forth in the report under "Intrafamily Relationship." (RHT 5448-5449 ["No. No. I couldn't [have said that]."].) When asked to explain why she could not have said that, Mrs. Champion testified: "Because Lewis and Reggie was so abusive to the kids, no, I never said that." (RHT 5449: 11-12.) Nevertheless, Mrs. Champion admitted that when the two older daughters, Rita and Linda, began working full-time, they did contribute to the family as a portion of the report under "Intrafamily Relationship" stated. (RHT 5522: 15-26; 5523: 1-12.) When specifically asked "Now, if all of the other aspects of this report that we have gone through appear to be accurate, can you explain how it is that the person making the report got it so wrong about the description of the family, which in the report is described as, 'normal in all aspects'[,]" Mrs. Champion testified: "I don't know, sir. I really don't. I don't know." (RHT 5524: 16-22.) Mrs. Champion further admitted that if she had told an investigator from the CYA that the Champion home was not normal, that the oldest child Lewis was terrorizing the family, "that would not help to get [Mrs. Champion's] son Steven home from the Youth Authority[.]" (RHT 5525: 18-26; 5526: 1.) Nevertheless, Mrs. Champion denied lying to an investigator from the CYA in order to give petitioner "a chance to be released to [Mrs. Champion's] home [.]" (RHT 5526: 2-8.)

With respect to that portion of the "Developmental History" describing petitioner "as a full-term infant and experienced normal delivery[,]" Mrs. Champion testified that information was accurate. (RHT 5510.) Mrs. Champion further admitted that that portion of "Developmental History" stating that "there were no serious illnesses or injuries suffered as a child by petitioner[,]" was also accurate. (RHT 5510: 18-23.)[15] Mrs. Champion also admitted that that portion of the "Developmental History" stating that petitioner "demonstrated no abnormal developmental behavior during his formative years" was accurate. (RHT 5520: 21-26; 5521: 1-11.) Further, Mrs. Champion confirmed the accuracy of that portion of the "Developmental History" stating that petitioner "began school at age 5 and did well until junior high school." (RHT 5521: 21-26; 5522: 1-2.) Finally, Mrs. Champion confirmed the accuracy of that portion of the "Developmental History" stating "trouble began at age 13 and has characterized [petitioner's] behavior since." (RHT 5522: 3-7.)

Despite denying having ever spoken to an investigator from the CYA and having made the specific statements attributed to Mrs. Champion under "Intrafamily Relationship," Mrs. Champion nevertheless admitted the accuracy of the other information set forth in Exhibit H (such as her street address as of December 11, 1978; her telephone number; her age; the length of time she had occupied the residence; the number of bedrooms in the home; the number of children making up the "family constellation" and their ages; the absence of an adult male presently in the home; Mrs. Champion's source of income from disability payments and DPSS; the state of good health of all family members with the exception of Mrs. Champion herself who was listed as having "diabetes;" the lack of any serious hereditary or debilitating ailments in the family history with the exception of heart trouble and diabetes; the marital information,

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[15] Despite admitting this information was correct, Mrs. Champion nevertheless believed that the traffic accident involving petitioner in 1968 had long-term after effects related to petitioner's arm and head. (RHT 5510: 24-26; 5511: 1-8.) However, Mrs. Champion also admitted that petitioner only complained of headaches for "a couple of weeks" after the traffic accident; after that, the headaches went away. (RHT 5514: 4-12.) Mrs. Champion also admitted that petitioner was a very bright child, an intelligent child, a circumstance which never changed throughout the time he grew up. (RHT 5513: 18-26; 5514: 1-3.)

including the location and year of the marriage, for Mrs. Champion and petitioner's biological father; the move of Mrs. Champion and Lewis Champion II to California in 1958; the number of children produced during that marriage; the fact that "the couple separated in 1963 for undisclosed reasons, and there has been no word from Mr. Champion since[;]"[16] "the separation [from Lewis Champion Sr.] apparently has had no ill effects on [petitioner] or the other children;"[17] Mrs. Champion's status in December 1978 that she had been married and widowed twice; and the summary in the report concerning Mrs. Champion's feelings regarding how petitioner would perform at the CYA and the family's plan and hopes concerning petitioner). (RHT 5494-5509.) When asked to "explain how the person who made this report could know all of those things without [Mrs. Champion] having told him, as the report reflects [she had done]," Mrs. Champion testified: "I don't think I can, I can't remember that." (RHT 5509: 25-26; 5510: 1-2.)[18]

In short, the referee finds that from a review of Exhibit H, information Skyers gleaned about petitioner and his family from his conversations with petitioner, petitioner's mother, older sisters and older brother Reginald, was confirmed. Further, Exhibit H did not reference the 1968 traffic accident or the death of petitioner's stepfather, Gerald Trabue, Sr. (hereinafter referred to as 'Trabue Sr.'). In addition, according to the report petitioner "did well until junior high school. Trouble began at age

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[16] Although Mrs. Champion admitted that the report's information "the couple separated in 1963 for undisclosed reasons, and there has been no word from Mr. Champion since" was accurate (RHT 5500: 17-22.), when confronted with paragraph 32 of page 11 of Mrs. Champion's Declaration (Exhibit 121) in which she had stated that "even after I had Steve, Lewis, Sr., still found me and forced me to have sex with him[,]" Mrs. Champion provided a series of nonresponsive answers until she finally admitted she had in fact originally stated on cross-examination that the report's account was accurate, but claimed in so testifying, she had made "a mistake." (RHT 5500-5505.)

[17] Although initially having difficulty understanding the question, Mrs. Champion admitted that "it was a good thing [for the family] when Lewis Sr. left [her] house." (RHT 5506: 10-15.) She further admitted that "by getting [Lewis Sr.] out of the house, it helped the kids, it didn't hurt the kids...." (RHT 5507: 5-7.)

[18] Petitioner never described his feelings about his family to his mother in the way he told Dr. Brown as recorded in Dr. Brown's July 29, 1980 Psychiatric Evaluation (Exhibit I) under "Family History." (RHT 5527-5528 ["'He [Steve] describes his family life upbringing as being a regular family with both sad and happy times. He states that although he has had the usual sibling rivalry with his brothers and sisters, he does not see this as being any major problem in his past.'"].)

13 and has characterized his behavior since." (Exhibit H, p. 1.) This correlates closely with petitioner's statements to petitioner's "mitigation specialist" Dr. Miora who testified petitioner told her he began his gang membership in the Raymond Avenue Crips when petitioner was approximately 12 or 13 years old. (RHT 8446.) Also, no reference is made to financial distress or the effects of poverty on petitioner or petitioner's family. It should be noted that Exhibit H reflects that the interview with petitioner's mother was conducted at petitioner's home at 1212 West 126th St. on December 11, 1978. No mention is made in the report that the house appeared to be in disrepair or in any way showing the effects of alleged poverty.

c. The December 2, 1981 Report by Drs. Seymour Pollack and Lillian Imperi (Exhibit 46)

Prior to petitioner's trial, Skyers obtained a three page report from Drs. Pollack and Imperi who examined petitioner pursuant to a court order signed on August 4, 1981 by Superior Court Judge Everett E. Ricks (Exhibit 46).[19] The court order appointing Dr. Pollack is found at 2 CT 579-580. Judge Ricks' order also included a monetary limit of $135. Both that order and Exhibit 46 set forth the issues to be addressed by Dr. Pollack in his assessment of petitioner. The questions posed to Dr. Pollack were: "1. Whether or not the defendant was mentally ill at the time this offense was committed; 2. Whether or not the defendant falls within the purview of the Drew decision; 3. Whether or not he was suffering from diminished capacity at the time of the offense; 4. Whether or not he was unconscious at the time of the offense; 5. Whether or not he was suffering from an irresistible impulse at the time of the offense." (Exhibit 46, pp. 1-2; 2 CT 579-580.)

In their report, Drs. Pollack and Imperi stated that "there is insufficient data to support any mental responsibility defense in Mr. Champion's case." (Exhibit 46, p. 2.) Doctors Pollack and Imperi indicate that while petitioner was cooperative, he "gave very

[19] Exhibit 46 was not included within the file materials produced by petitioner's counsel at this hearing and represented to be trial counsel Skyers' trial file (Exhibits 1-31). Rather, it appears as counsel stipulated that petitioner's habeas counsel attached Dr. Pollack's original report as Exhibit 5 to petitioner's Informal Reply filed in the California Supreme Court. (RHT 947-951, 972-973.)

minimal replies to questions and offered little information spontaneously. He stated that he was 'innocent' and that 'it's a case of mistaken identity.'" (Exhibit 46, p. 2.) Further, "[petitioner] could not recall where he was or what he was doing on the date of the alleged offense, 12/12/80." (*Ibid.*) On the issue of petitioner's use of drugs, the report indicates that "Mr. Champion stated that he smokes Marijuana on special occasions such as Halloween, 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." (*Ibid.*)

The report also states that "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 any more'. 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." (Exhibit 46, pp. 2-3.)

Under "MENTAL STATUS EXAMINATION," the report indicates: "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." (Exhibit 46, p. 3.) Under

"SUMMARY OPINION," the report states: "Since Mr. Champion stated that he is unable to recall where he was an [*sic*] 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." (Exhibit 46, p. 3.)

The report also indicates what materials were reviewed in addition to the clinical interviews conducted with petitioner. These materials included a November 10, 1981 letter from Skyers (See, Exhibit 1-J.), autopsy reports dated January 16, 1981, arrest reports, the February 27, 1981 preliminary hearing transcript and a telephone conversation on November 25, 1981 with Skyers. (Exhibit 46, p. 1.) The report describes the telephone conversation with Skyers as follows: "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 else's 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 similar 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'." (Exhibit 46, p. 3.)

Exhibit 1-L is a document with directions to Dr. Pollack's office. Skyers testified that he lacked any present recollection whether in fact he visited with Dr. Pollack at his office. (RHT 867-868.) However, after Skyers received Dr. Pollack's report, Skyers did not consult with Dr. Pollack or any other mental health expert. (RHT 1157.)

The record is clear that Skyers did not specifically ask Dr. Pollack to conduct a social history evaluation of petitioner's life for the specific purpose of developing potential penalty phase evidence. Although petitioner's prior trial counsel, Homer Mason, had obtained a court order authorizing the use of a "Probation Consultant to

assist counsel in gathering information relative to defendant's background in order to properly represent the defendant at trial and, should the defendant be convicted, at the penalty phase of the trial[,]" an order authorizing up to $250 for such purpose (1 CT 227-228, 2 CT 382.), Skyers did not take advantage of that order. (RHT 803-805.) Rather, the record is equally clear that Skyers independently conducted the investigation "relative to defendant's background" by (1) interviewing petitioner, petitioner's mother, petitioner's two older sisters, and petitioner's older brother, Reginald and (2) reviewing petitioner's CYA file which included the psychological and psychiatric reports of Drs. Prentiss, Minton, Perrotti and Brown, as well as the January 4, 1979 case conference report (Exhibits D, I & J), the December 13, 1978 Initial Home Investigation Report (Exhibit H), the December 12, 1979 Youth Training School Case Report (Exhibit G-13), Exhibit 23-A and the November 8, 1978 Juvenile Court probation report (Exhibit 147.). Finally, Skyers had the benefit of the report prepared by Drs. Pollack and Imperi, which provided additional insight into petitioner's background with respect to drug use, schooling, contacts with the legal system and petitioner's future intentions. The report also provided Skyers with expert opinion that petitioner did not suffer from any brain disorder or dysfunction or any cognitive or volitional impairment, whether or not rising to the level of a mental defense or legal insanity. Information of this type would be relevant to any evaluation of whether Penal Code § 190.3 factors (d), (h) and (k) applied to petitioner.[20]

Dr. Faerstein, a well credentialed board-certified forensic psychiatrist with training and experience in neurology and extensive experience in criminal matters, including

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[20] Respondent's expert witness, Dr. Faerstein, testified that in 1981, Dr. Pollack was familiar with the capital case sentencing structure in California. Dr. Pollack would know what crime or crimes carried potential capital sentences. Dr. Faerstein would have expected Dr. Pollack to know in 1981 that a person such as petitioner, charged with two counts of murder and two counts of robbery with the allegation that the murders were committed during the commission of the robberies, would face a potential capital sentence. (RHT 6492.) Skyers testified that the report by Drs. Pollack and Imperi provided him with no basis to offer mitigating evidence under Penal Code section 190.3, factors (d), (h) or (k). (RHT 1238-1240.) Skyers testified that the same was true with respect to Dr. Minton's December 15, 1978 psychiatric report (Exhibit D). (RHT 1311.)

capital case litigation, and who had not only trained but also taught under Dr. Pollack (Exhibit ZZZ [*curriculum vitae* of Dr. Faerstein]; RHT 6444-6464, 6472-6474, 6481-6491, 6493-6495 [education, training and experience testimony of Dr. Faerstein].)[21], testified that he was referred to Dr. Pollack for additional training by Dr. "Robert Sadoff, who was in charge of the forensic psychiatry program at the University of Pennsylvania." (RHT 6447: 14-16.) "[Dr. Sadoff] suggested that [Dr. Faerstein] study with Seymour Pollack, who was the foremost forensic psychiatrist at that time in the United States, and he was in Southern California at the University of Southern California." (RHT 6447: 17-23.) When Dr. Faerstein was asked "[i]f in December of 1981 an attorney representing a person charged with capital charges, capital case charges, wanted to have a forensic psychiatrist evaluate his client, and the name Seymour Pollack was suggested, and you were asked about that suggestion, what would your response be[,]" Dr. Faerstein testified: "I would say he's gotten the best guy to do it." (RHT 6486: 5-11.) Dr. Faerstein further testified that Dr. Pollack's reputation in the field of forensic psychiatry in 1981 was "that he was one of the premier forensic psychiatrists in the United States." (RHT 6486: 12-17.) Dr. Faerstein was asked "in your relationship with Dr. Pollack, [were you] exposed to Dr. Pollack's view regarding funding from the court and how that impacted assessments done by Dr. Pollack?" (RHT 6496: 11-14.) After answering that he had in fact had such exposure, Dr. Faerstein explained: "Well, throughout the time I was at the Institute the court was paying the Institute a hundred dollars per case. Later on, as I see here, it was increased to $135. I don't recall whether there was any interim increase. But during the time I was there, that was just one source of funding for the Institute. This is not money that went into Dr. Pollack's pocket or my pocket or anybody's pocket. It wasn't our source of livelihood. It was a source of income that helped support the Institute. There was money from the

[21] Although Dr. Faerstein's certification is in the field of psychiatry, in order to receive that certification from the American Board of Psychiatry and Neurology, Dr. Faerstein had to "demonstrate proficiency in neurology" as part of both his oral and written examinations. (RHT 6484-6485.)

county, there was money from placements that the fellows served at the probation department, or other jobs that you were assigned, and all of this money went into the general pool that supported the Institute. So it was not relevant that we received a hundred dollars for a case to determine how much time we spent on the case. We spent as much time as necessary, and as I said earlier, Dr. Pollack recommended that you spend hours and hours, and he would spend countless hours going over the reports with us into the evening, correcting the words and the language you use on cases that he was receiving only a hundred dollars from the county on. The money never determined how much time [Dr. Pollack] put into a case." (RHT 6496-6497.)[22]

Dr. Faerstein, who, as noted, did have substantial professional experience with Dr. Pollack as of 1981, testified that from his familiarity with Dr. Pollack, Dr. Faerstein would have expected Dr. Pollack to put in his report a finding of evidence of a mental defect, disease or disorder, even though Dr. Pollack felt that the condition was insufficient to rise to the level needed to support any of the issues submitted to Dr. Pollack for his consideration as part of his assessment of petitioner. (RHT 6533.)

Dr. Faerstein also testified that Dr. Pollack taught there was a distinction to be drawn for a person who may have evidence of a mental defect, disease or disorder, but where the condition was insufficient to establish, for example, diminished capacity or legal insanity. According to Dr. Faerstein, Dr. Pollack trained doctors to point out in their written reports any finding of a mental defect, disease or disorder, even though it was insufficient to meet the legal criteria necessary to successfully raise a particular defense, such as diminished capacity. As Dr. Faerstein put it: "[Dr. Pollack] wrote reports like that. We were taught that if that's present, we would write reports like that."

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[22] On the other hand, when petitioner's *Strickland* expert was asked whether it was his understanding Dr. Pollack was one of the preeminent forensic psychiatrists in 1981, Earley answered: "I am just looking at a fee [not] to exceed $135, that just does not appear to me -- so when you ask whether he is one of the preeminent in the State, I know my memory is he was a good doctor, we paid money for him, I just don't know, I'm looking at that, wondering if he is the preeminent doctor in the State, why he is doing an exam on a death penalty case necessarily for $135...." (RHT 4494: 18-24.)

(RHT 6533: 2-26; 6534: 1-10.) Dr. Faerstein also noted that the reports from Drs. Prentiss, Minton, Perrotti and Brown (Exhibits D, I & J), all of which Dr. Faerstein reviewed and none of which petitioner's *Strickland* expert had an independent recollection of having reviewed, were consistent with the findings of Drs. Pollack and Imperi. (RHT 6527-6529.)

Among the materials reviewed by respondent's expert witnesses, Drs. Hinkin and Faerstein, were the reports of Drs. Pollack and Imperi, Brown, Perrotti, Prentiss and Minton, as well as the December 13, 1978 Home Investigation Report (Exhibit H), petitioner's school records (Exhibit CCC), CDC records (Exhibit G and subparts) and the declarations, raw test data, interview notes and reference hearing testimony of petitioner's neuropsychologist, Dr. Riley. (RHT 6085-6118 & Exhibit PPP (Dr. Hinkin); RHT 6498-6513 & Exhibit AAAA (Dr. Faerstein).)

Although the issue of whether or not petitioner suffers from brain damage applies more directly to reference question numbers 2, 3 and 4, the referee believes it is important to take into consideration that issue in assessing the significance of the evidence gleaned from Skyers' pretrial investigation. As such, the referee will now summarize the relevant testimony of Drs. Faerstein and Hinkin concerning this issue, testimony which the referee finds to be credible and reliable.

Dr. Faerstein testified it was his opinion petitioner did not suffer from brain damage. "He does not suffer from symptoms of brain damage which would manifest either on clinical examination or on neuropsychological testing. There is no evidence in his function, in his testing, in any of his productions or adaption that would reflect impairment consistent with brain damage." (RHT 6527.) In reaching this conclusion, Dr. Faerstein took into account the reports from Drs. Prentiss, Minton, Perrotti and Brown. "They fit into my conclusion because he's been examined over many years by different examiners under different circumstances in different settings, and not one of the psychiatrists or psychologists who have evaluated him have found evidence of brain damage." (RHT 6527-6528.)

Even though Dr. Faerstein had no independent basis on which to judge the capabilities of the four doctors, he testified that "the fact that they are consistent shows some reliability in the assessment that they are examining the same individual and coming to the same conclusion using similar kinds of instruments, whether it's a mental status examination, a psychiatric clinical examination or testing. All of these doctors who I assume -- I think I start with an assumption that they are competent, until shown otherwise, and the results that they report, whether it's IQ scores, whether it's reports of their interview, assessing his cognition, his understanding, his responses, his mood, as [*sic*] affect, his orientation. The facts that they set forth in their reports about his level of function are consistent and, therefore, they are reliable, and I assume that they are competent doctors who can reach a conclusion using these instruments." (RHT 6528-6529.)

Further, Dr. Faerstein testified that the reports of Drs. Brown, Perrotti, Minton and Prentiss were "consistent with Dr. Pollack's findings. Dr. Pollack also found no evidence of mental disease, disorder or defect." (RHT 6529: 15-20.) From the materials Dr. Faerstein reviewed, including the materials from the CYA, Dr. Faerstein found that "they reached the same conclusion and they were using similar methodologies in doing this evaluation, psychiatric examination, mental status examination, assessment of this thinking, and they reach the same conclusions. So the consistency of their findings [to the findings of Drs. Pollack and Imperi] is significant." (RHT 6530: 4-12.) Dr. Faerstein further concluded that had petitioner suffered from the type of brain damage petitioner's expert witness, Dr. Riley, opined petitioner suffered from, the clinical examinations of Drs. Pollack, Imperi, Brown, Perrotti, Prentiss and Minton would have reflected evidence of that brain damage. (RHT 6531: 10-15.)

Dr. Faerstein also testified that the reports prepared by Drs. Levy and Grollmus (Exhibits G-10 and G-12), the two neurosurgeons who evaluated petitioner after he was committed to San Quentin, lent additional support to Dr. Faerstein's conclusion that at the time of petitioner's trial, petitioner did not suffer from any mental defect, disease or

disorder. "The primary significance of these evaluations, and there are two examinations by Levy and one by Grollmus, I believe, is that they were conducted by neurosurgeons, who are skilled and trained in evaluating central and peripheral nervous system disorders. And they also, as neurologists, do conduct evaluations of the cranial nerves and the central nervous function in a mental status examination, that's part of their normal examination. In none of these reports did they find any evidence of any central nervous system disorder, which is brain disorder. And, in fact, in the Levy report that you asked me about, the one dated March 18, he states explicitly in the third from last paragraph: 'His deficit appears to relate to right side multiple levels of the cord. The diminished reflexes on the right along with the atrophy suggests a lower motor neuron lesion, not a spinal cord lesion.' What he is looking for is the cause of the problem and trying to determine the origin or the location of the deficit that would lead to this disorder, this impairment. And he is saying it is a peripheral nervous system disorder, the peripheral nervous system, which are the nerves that come out of the spinal cord, it is not due to anything in the spinal cord, and is not due to anything in the brain, which is the central nervous system. If a neurosurgeon would have found evidence of central nervous disorder, which is brain disorder, I would expect to find it in his report. There are three reports from neurosurgeons here, and none of them contain evidence or report of a central nervous system defect." Dr. Faerstein concluded that the findings of the neurosurgeons were "entirely consistent with all the other reports [of Dr. Pollack and the psychiatrists and psychologists at the Youth Authority]." (RHT 6544-6547.)

Dr. Faerstein also opined that evidence petitioner wore gloves when he was seen by Elizabeth Moncrief leaving the Hassan residence, smiling and carrying a pillowcase which appeared to be filled, demonstrated planning on petitioner's part which reflected his ability to have learned from the 1976 burglary on which he was apprehended based

upon latent prints left by petitioner at the scene of that crime. As Dr. Faerstein testified: "That type of planning would be inconsistent with brain damage." (RHT 6578.)[23]

From his review of all of the materials (which also included Dr. Hinkin's report and reference hearing testimony), it was Dr. Faerstein's opinion that when Drs. Pollack and Imperi assessed petitioner, "there was nothing in [the materials reviewed by Faerstein] that would have suggested a need for psychological testing." (RHT 6465: 2-10; 6517.)[24] Dr. Faerstein further testified that even in today's environment on cases in which he is asked by the defense to assess a defendant facing capital charges, unless "there are indications of the suspicion of organic brain damage, suspicions that might be found on mental status examination, on the psychiatric clinical evaluation, or from information in the history that tell you that there is brain damage[,]" neuropsychological testing is not required. (RHT 6517-6518.)

Dr. Hinkin independently reached the same opinion held by Dr. Faerstein that there was no basis from all the records reviewed by Dr. Hinkin to indicate the need for neuropsychological testing of petitioner at the time of his trial in 1982.[25] (RHT 6423,

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[23] When asked what significance, if any, she could draw from the circumstance petitioner wore gloves in the commission of the Hassan murders and robberies after petitioner had been apprehended for his December 1976 residential burglary on the basis of latent fingerprints having been left by petitioner at the scene of the crime, Dr. Miora, petitioner's "mitigation specialist," claimed an inability to answer. (RHT 8802 ["that would call for speculation on my part that I don't believe I'm in a position to make"], 8802-8803 [" No, I cannot make that assumption or speculate in that regard. I don't have that ability or information that would permit me to make such a determination"]; 8804 ["It assumes a thought process that I can't speak to. I don't know what he was thinking or deciding or anything of that sort"].)

[24] Dr. Faerstein testified that when he trained under Dr. Pollack, Dr. Pollack had as one of the instructors a psychologist who taught Dr. Faerstein and the other fellows about the psychological testing instruments. Dr. Pollack's program accepted psychologists as fellows. One of Dr. Faerstein's other fellows in the forensic training program was a psychologist. (RHT 6513-6514.)

[25] Skyers' failure to obtain additional psychological and/or neuropsychological testing before petitioner's trial was reasonable in light of the CYA psychological and psychiatric evaluations, as well as the evaluation from Drs. Pollack and Imperi and the information contained within Exhibit H, the Initial Home Investigation Report, all of which Skyers had reviewed. Similarly, all of the information imparted to Skyers by petitioner, his mother, his older sisters and brother additionally supported Skyers' actions. Further, Skyers' review of these materials only confirmed that there was no evidence petitioner suffered from brain damage and thus no basis to offer evidence of such at petitioner's penalty phase. Even had Dr. Riley's opinion that petitioner suffered from brain damage been available in 1982, reasonably competent counsel would quite understandably have chosen not to present it in light of the more contemporaneous psychiatric and psychological evaluations, all of which failed to identify any evidence of brain damage. The referee finds petitioner did not suffer from brain damage in 1982.

6440 ["I don't see, there weren't the indications present at the time that would call for that [neuropsychological testing]"].)[26]

Dr. Hinkin also opined petitioner did not suffer from any brain damage at the time petitioner was tested by Dr. Riley in 1997. "Based upon my review of records and in particular, Dr. Riley's assessment, but also including psychological testing that had been done throughout his incarceration, I saw no basis to conclude that Mr. Champion has suffered any sort of brain damage." (RHT 6120.) With respect to petitioner's IQ, Dr. Hinkin testified: "[Petitioner has] been administered a number of IQ tests from 1972, I believe, through 1997, and his IQ has ranged from a low of 75 to a high of 90, with most being in the 80s. Dr. Riley's own testing had [petitioner] having an IQ of 83, which is in the low average range. I think that's probably a pretty fair approximation of where his actual IQ stands." (RHT 6120-6121.) The term "low average" reflects an IQ range from 80 to 90 and is considered "to be normal." Thus, in Dr. Hinkin's opinion, petitioner's IQ is "normal." (RHT 6121, 6408.)[27] In fact, from data generated from various subtests

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[26] In footnote 73 of Exhibit UUUU, written by petitioner's counsel, Ms. Andrews (RHT 8756.), Ms. Andrews wrote in part: "'At best, these tests [the psychological tests administered by Dr. Prentiss to petitioner in December 1978 at CYA] might sometimes provide red flags regarding neuropsychological issues, but they are not a substitute for a battery of neuropsychological tests, nor a basis for definitively ruling out organic impairments in functioning.'" (RHT 8758, quoting from fn. 73 of Exhibit UUUU at p.BS000020.) Dr. Miora incorporated verbatim this portion of footnote 73 written by Ms. Andrews in Dr. Miora's declaration as part of footnote 100 at page 190. (RHT 8758.) Although Dr. Miora had read the testimony of both Drs. Hinkin and Faerstein in which each opined that in 1982 no additional neuropsychological testing of petitioner was indicated, she failed to put in her Declaration that it was the opinion of a board-certified clinical neuropsychologist, Dr. Hinkin, as well as the opinion of an experienced forensic psychiatrist, Dr. Faerstein, that no additional neuropsychological testing of petitioner was indicated in 1982. (RHT 8759-8761.) In addition, while Dr. Miora wrote in her Declaration (Exhibit 136) about circumstances in general when, in her opinion, diagnostic testing may be indicated, when Dr. Miora was specifically asked why she had then not put in her Declaration that with respect to Mr. Champion specifically, two experts had testified in the course of the reference hearing that no additional neuropsychological testing for petitioner was indicated in 1982, Dr. Miora testified: "Given the wealth and breath of information I was reviewing and commenting on and using for the basis of my opinions, while I do appreciate that that would have been one way to go about it, I assumed that was all in evidence and, therefore, proceeded with my -- the development of my opinions." (RHT 8762-8763.)

[27] In Dr. Riley's 2003 lecture, a transcript of which is Exhibit FFF, she stated: "'Okay. Another thing that is important to consider is how you define the level of impairment and how do you convey that information to a jury. It's really, it's difficult for them to sit there and hear all of these testings, and all of these numbers, and what does it all mean. It's generally, I think, considered that jurors understand percentiles better than they do other kinds of scaling or norming considerations. But percentiles get interpreted differently according to what kind of schemes you are using. If you are looking at IQ tests, test percentile, somebody scores at the 10th percentile on an IQ test, that would be equivalent to an IQ of 81, and in the

administered to petitioner by Dr. Riley, Dr. Hinkin testified that the results "certainly [were] not at all consistent with brain damage, as was characterized by Dr. Riley[, but] "suggest[ed] [petitioner's] IQ of 83 is probably an underestimate of his intellectual ability." (RHT 6199-6200.)[28]

When Dr. Hinkin was asked whether he found "a consistency from [the] findings [of Drs. Prentiss, Minton, Perrotti and Brown as reflected in their reports, Exhibits D, J and I] with [Dr. Hinkin's] opinion from all the material [he] reviewed, including Dr. Riley's

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scheme that is used in the IQ score that's called a low average IQ. Now, if on some of the other sets of tests in some norms of rating systems that have been developed by Heaton, the 10th percentile is considered equivalent to a T-score of 37, which would be called mild impairment. It makes a big difference, sort of a semantic difference, but if you say somebody is low average versus mildly impaired, it really makes a difference as to how the jury perceives that. [¶] So you have to have some internal definitions and be consistent, you have to be, I think, consistent and explicit, you have to let other people know where you are drawing these markings, where you are saying that this is impaired, this is just low average, and you have to use the same criteria across cases.'" (RHT 6167-6168.) Dr. Hinkin criticized Dr. Riley's approach, noting that "it shouldn't [matter which term is perceived by the jury as more favorable to the person being tested]. "And from a neuropsychologist's perspective, regardless of the label you place on it, you have a test score. And you can, if you label it low average or mildly impaired, it doesn't change the actual test score, and how that stacks up compared to normative data." (RHT 6167.) Dr. Hinkin expressed "perhaps a much more significant concern" with Dr. Riley's approach as it pertained to the issue of false positives. Under Dr. Riley's approach, "using that cut point of one standard deviation below the mean to be impaired, mildly impaired, what you are going to have there is by definition a false positive rate of 15, 16 percent. So if you take normal individuals and administer a test to them, 15 to 16 percent of normal people will fall below that cut point. [¶] So what you are doing by using that standard, is you have to be willing to accept a false positive error rate of 15 percent. 15 percent of normal individuals will be called impaired. [¶] In my clinical practice at UCLA, and at the V.A. Medical Center, we use a two standard deviation cut point. There you are only going to have, you know, one to two percent of individuals called impaired when they truly are not. So you have a much lower false positive rate than Dr. Riley is willing to accept." (RHT 6169.) In addition to creating "a substantially increased concern that what is viewed as impairment is actually a false positive for the individual[,]" Dr. Hinkin noted that Dr. Riley's approach was also "complicated and aggravated by the fact that the norms that [Dr. Riley] used for Mr. Champion, although they might have been the most appropriate norms at the time, still did not account for the effect of ethnicity on performance. [¶] There is a lot of research out there to suggest that African-Americans in general score on the average of one half to one standard deviation lower on neuropsychological tests than do white patients of similar age, education and sex. So not only is that cut point I believe too high just in general, but particularly in the use, applying it to an African-American patient, when you are not using ethnically corrected norms, research would suggest the error rate is far higher." This applies to IQ testing. (RHT 6172.)

[28] Dr. Hinkin testified that even assuming petitioner's IQ was approximately 83, in the real world, petitioner would join "millions of people in the United States with IQs in that range." (RHT 6265.) While people with IQs in the 83 range "would encounter difficulty in jobs that require extensive amount of reading, extensive amount of higher order thinking [] [s]o professions, physicians, lawyers, professors, those types of positions would be very difficult for someone with an IQ of 83 to engage in[,] such an individual would be able to perform approximately 5000 of the 10,000 job listings provided by the United States; pay his or her bills on time, get to and from work; "have a happy, loving relationship[;] [and] engage in hobbies and whatnot ...." (RHT 6266-6267.)

test results, that Mr. Champion is not suffering from brain damage[,]" Dr. Hinkin testified: "That was the conclusion of all the psychological testing, as well as psychiatric evaluations that I had available for review, that they consistently concluded that he had no evidence of any mental, emotional, organic disorder. Some used testing to help establish that. Some based that solely upon their diagnostic interview. But uniformly all the folks who saw him when he was in the CYA or when he was in prison, concluded that he did not have any evidence of any neurological disorder." (RHT 6219.) The same applied to the assessments reflected in the reports of Drs. Pollack and Imperi and Dr. Faerstein. All of the reports, whether reflecting an assessment before petitioner's crimes or after, uniformly concluded petitioner had no brain damage at the time of testing, the time of petitioner's crimes or at the time of petitioner's trial. "That's my interpretation of all the data. Dr. Riley arrived at a different interpretation of her data and she opined that he has suffered brain damage, but my interpretation of her data, as well as the opinions of all the other doctors you mentioned, I found no evidence of that." (RHT 6242-6243; see also, RHT 6410-6411 [out of all the various doctors' reports reviewed by Dr. Hinkin, only Dr. Riley concluded that petitioner suffered from brain damage].)[29]

Dr. Hinkin noted that petitioner's normal developmental history outlined by petitioner's mother in petitioner's school records (Exhibit CCC) as well as petitioner's IQ score of 88 (obtained on an IQ test administered when petitioner was six years old), were inconsistent with petitioner's claim of *in utero* insult—i.e., fetal abuse—resulting in brain damage identified by petitioner's neuropsychologist, Dr. Riley. (RHT 6223-6226

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[29] Dr. Miora, petitioner's "mitigation specialist," conceded that not one of the psychologists or psychiatrists who evaluated petitioner when he was at the CYA identified evidence of brain damage, using Dr. Miora's broadest definition for that concept which included "brain dysfunction," "brain impairment," "organicity," and "brain damage." (RHT 9292-9294.) Similarly, Dr. Miora agreed that neither Dr. Hinkin nor Dr. Faerstein identified evidence of brain damage. However, using Dr. Miora's "broadest definition" of brain damage, she believed that Dr. Hinkin "opine[d] that there was a distinct possibility that Mr. Champion suffered an attentional disorder [] -- I can't recall if he said ADHD or ADD, but an attentional disorder, and a reading disorder in childhood[, although] [i]t was [Dr. Hinkin's] opinion based on his review of the test data of Dr. Riley that [petitioner] appeared to have outgrown this condition. (RHT 9293.)

["it is part of the standard clinical evaluation, we always assess for developmental milestones. You know, is a patient able to, you know, learn how to walk and talk and read and write in expected years. With the assumption if they are developmentally delayed, that may suggest some sort of problem, either in utero or soon after birth. The absence of any developmental delays, at least as laid out in these records, would not be indicative of someone who suffered in utero brain damage"]; 6226-6227 ["one could make a hypothetical argument that perhaps he would have had a 130 IQ, and that he suffered such severe damage that it dropped his IQ down to 88. That can't be ruled out. But there is certainly nothing in the record that stands that suggests that. Or, B, it is not suggestive of someone who suffered any significant in utero brain damage"]; see also, RHT 6410].)[30]

In his reference hearing testimony, Dr. Hinkin addressed the assumptions petitioner had been in a traffic accident, sustaining a head injury as a youngster, and that petitioner's mother had sustained beatings to the abdomen or stomach during her pregnancy with petitioner. Those events don't necessarily translate into infliction of brain damage. "Head injuries, being struck in the head in car accidents is very common. The typical aftermath of that, unless someone was unconscious for many hours, if someone is briefly knocked unconscious, the typical sequelae of that is after a

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[30] From Dr. Faerstein's review of petitioner's school records (Exhibit CCC), those records are not consistent with a claim petitioner was subjected to fetal abuse leading to brain damage. According to the information provided by petitioner's mother in the school records, "the pregnancy was normal[;]...there were no complications[;] there was no bleeding. This does not indicate that fetal abuse occurred." Dr. Faerstein also reviewed the testimony of Drs. Hinkin and Riley in which both basically agreed that the developmental history outlined by petitioner's mother in the school records indicated normal development. Dr. Faerstein opined that if petitioner had brain damage such as that attributed to him by Dr. Riley and if such brain damage had been the result of fetal abuse, petitioner's normal development outlined in the school records would not be consistent with such brain damage. (RHT 6556-6557.) Further, had petitioner sustained brain damage from fetal abuse, his IQ test administered when petitioner was six years old should have reflected that. Instead, the results on that IQ testing were inconsistent with a finding of brain damage at the time the Stanford Benet LM test was administered. (RHT 6557-6558.) Dr. Miora also conceded that the developmental history set forth in petitioner's school records was suggestive of a normal development, a conclusion consistent with the testimonies of Dr. Riley and Dr. Hinkin which Dr. Miora had reviewed. Further, Dr. Miora conceded that had petitioner sustained brain damage from *in utero* insult, "very possibly" the developmental history in the school records would read differently. (RHT 8838-8844.)

couple weeks, a couple months, it dissipates and they are back to normal. We have a lot of studies from folks who get knocked out in sports, unconscious in sporting events, to really fully understand this. So even if one is involved in an automobile accident, it does not necessarily mean that they are going to have brain damage and be impaired for the rest of their life." (RHT 6249-6250.) Assuming the accuracy of testimony from petitioner's mother that petitioner had headaches for a couple weeks after the accident, Dr. Hinkin testified that "that's the kind of thing, you might get that post-concussion syndrome where you may have some headaches and dizziness, some nausea, problems sleeping, feeling just foggy. That's kind of common after you have a concussion." This does not translate typically into brain damage. (RHT 6250-6251.)

Had fetal abuse led to brain damage, Dr. Hinkin would have expected that "the blow to the abdomen caused some sort of anoxic thing where the child was no longer able to breathe in utero, you could, of course, have some profound damage that could occur and that would be reflected at birth with a child who has horrible Apgars and who can't walk or talk and meet developmental milestones." (RHT 6251.) Had petitioner suffered brain damage in utero, "someone would not be normal and then have this emerge 8, 10 years later, 12 years later. That's not the way of any kind of in utero damage would emerge." (RHT 6252.)

Assuming petitioner had been beaten repeatedly by one or both of his older brothers, Dr. Hinkin stated that brain damage could result "if you're beaten to the point of being unconscious for long periods of time.... If it doesn't suffer loss of -- extended periods of loss of consciousness, then no, that would not result in brain damage." (RHT 6252-6253.) Had petitioner sustained brain damage from brutal beatings as claimed, Dr. Hinkin would have expected Drs. Prentiss, Perrotti, Minton and Brown to have seen evidence of this. (RHT 6253.) Likewise, had petitioner been beaten to the point he sustained brain damage during the period between October 23, 1980 and January 9, 1981 when petitioner was free from custody, Dr. Hinkin would have expected Drs. Pollack and Imperi to have seen evidence of that. (RHT 6253-6254 ["if he was beaten

to the point of being knocked into a coma for a week, then that damage would certainly be picked up. If he was beaten, but not knocked unconscious, there wouldn't be any damage"].) Further, petitioner's CDC records (Exhibits G-5, 6, 8 and 9) are inconsistent with any claim petitioner might make to having sustained serious head injuries from beatings during the two and a half months before petitioner's arrest in January 1981. (RHT 6254-6255.)

Dr. Hinkin also discussed the inconsistency between petitioner's mother's description of the family and petitioner as set forth in Exhibit H and claims now raised of brain damage inflicted on petitioner as a result of a 1968 traffic accident, the alleged beatings of petitioner's mother during her pregnancy with petitioner and the alleged beatings inflicted on petitioner by his two older brothers. (RHT 6255-6256.)

Dr. Hinkin's testimony at the reference hearing concerning ethnically corrected norms begins at RHT 6172. African-Americans score on average one half to one standard deviation lower on neuropsychological tests than Caucasians of similar age, education and gender perform. (RHT 6172: 9-13.) This also applies to IQ testing. (RHT 6172.) Some of the tests Dr. Riley administered to petitioner have very good normative data bases, while others have very weak normative data bases. In 1991, Dr. Heaton published normative data taking into account age, education and gender corrections. In approximately 2002 to 2003, Dr. Heaton published "upgraded normative data which in addition to those other demographic factors, he now also includes ethnicity corrections for at least white versus African-American." (RHT 6174-6175.) Dr. Riley used norms which did not include ethnicity correction. (RHT 6175.) In his testimony, Dr. Hinkin set forth various reasons suspected for the difference in performance on neuropsychological testing by African-Americans in comparison to Caucasians. (RHT 6175-6176.) These include a lack of equivalent quality of education, even though both sets of individuals completed the same level of education; parental education levels; socioeconomic status; and acculturation. Dr. Jennifer Manley, an African-American neuropsychologist at Columbia, conducted a study of 170

neurologically normal African-Americans. Using Dr. Heaton's 1991 norms and databases (the ones used by Dr. Riley), Dr. Manley "found these normal individuals had a really unacceptably high rate of impairment being diagnosed, ranging from like 30 percent to 60 percent of these normal individuals being termed impaired using those ethnically corrected one standard deviation cut points." (RHT 6177-6178.) Dr. Manley's research is presented in a published study marked as respondent's Exhibit XXX. (RHT 6178.) Dr. Hinkin reiterated that Dr. Manley's research reflected "the rates of impairment amongst normal African-American folks in the range of 30 percent on the Category Test, 32 percent on Trails B, up to a high of 65 percent of normal individuals been misclassified as impaired using the Heaton norms." (RHT 6179: 1-5.) Although Dr. Riley did not use all of the tests used by Dr. Manley, she used "most of them." From the ones she did use, the false positive rates ranged from a low of 7 percent false positive rate up to a high of 65 percent. 10 of the -- 10 of the 16 measures had impairment rates in excess of 30 percent." (RHT 6179: 8-14; see also respondent's Exhibit III [Dr. Manley's 2005 article, *Advantages and Disadvantages of Separate Norms for African Americans*, discussing the pluses and minuses of using ethnically corrected norms.]) Dr. Hinkin's testimony summarizing Dr. Manley's findings can be found at RHT 6179-6180.

In Exhibit III, Dr. Manley notes at page 272: "Given the social and political climate surrounding this work, it is important that normative studies include complete and accurate measurement of factors that not only underlie cognitive test performance but are also the variables for which race/ethnicity serves as a proxy. We must always remember that although norms are a reasonable first step, we are still using measures that were originally developed by and for well-educated Caucasians. Even the largest and most comprehensive normative sample would not improve the questionable construct validity of cognitive measures when used among African Americans [citations]. Traditional neuropsychological assessment is based on skills that are considered important within White, Western, middle-class culture, but which may not be

salient or valued within African American culture [citation]. Cognitive skills and strategies of ethnic minorities are not adequately tapped by standard cognitive tasks—our tests simply do not elicit the full potential of African Americans. Therefore, differences in salience of cognitive skills, exposure to items, and familiarity with certain problem-solving strategies could attenuate performance of African Americans on neuropsychological measures. Cultural variability in response set, participant/examiner interactions, test-taking attitudes, and motivation during the testing session may also account for ethnic group differences based on tests of verbal and nonverbal ability."

Given the evidence adduced at the reference hearing that petitioner was raised under circumstances far different than the "White, Western, middle-class culture" (*ibid.*) on which traditional neuropsychological assessment was developed, Dr. Manley's article, corroborated by the testimony of Dr. Hinkin, makes clear that petitioner's neuropsychological test results, including his results on the WAIS R administered by Dr. Riley in 1997, underestimate petitioner's cognitive functioning.

Dr. Hinkin pointed out that Dr. Manley's concern with the use of ethnically corrected norms did not deal with the reliability and validity of those norms; rather, Dr. Manley expressed concerns that use of the ethnically corrected norms would retard the development of IQ and neuropsychological tests able to identify both the true cognitive capability of African-Americans and the reasons for differences in performance by African-Americans in comparison to Caucasians. (RHT 6180.) Dr. Manley also expressed concerns of a political nature that using ethnically corrected norms might suggest to some people African-Americans are not as smart as Caucasians. (RHT 6185-6186.)

Dr. Hinkin also noted that when correcting for education, Dr. Heaton's 1991 norms treat equivalent levels of education the same; i.e., he does not take into account the quality of the education. (RHT 6181.)

By not using ethnically corrected norms with petitioner, one will obtain a picture of someone who will appear more impaired than if the ethnically corrected norms were

applied. Even though the ethically corrected norms were not available at the time Dr. Riley tested petitioner, they were available at the time Dr. Riley testified at the reference hearing. While there would be no reason for Dr. Riley's earlier Declaration to make reference to the as yet nonexistent ethnically corrected norms, there would be no reason Dr. Riley, during her reference hearing testimony, could not have presented the data from petitioner's testing both with reference to the ethically corrected norms and without reference to those particular corrected norms. Even Dr. Riley's concern with what to do if one has an African-American mother and a Caucasian father (a hypothetical inapplicable to petitioner whose parents are both African-American) can be easily addressed by presenting the test results using both the ethnically corrected norms and the norms without ethnic correction. (RHT 6189-6190.)

Dr. Hinkin further opined that had petitioner had the type of deficits identified by Dr. Riley in her October 22, 1997 Declaration (Exhibit AAA), deficits which, in Dr. Riley's opinion, "...'render[ed petitioner] unable to draw inferences in ambiguous circumstances, and [left] him especially vulnerable to missing or misreading cues concerning the intentions of other persons[,]'" Dr. Hinkin would have expected clinical interviews conducted by experts such as Drs. Prentiss, Minton, Perrotti and Brown to have identified those deficits. "A good psychological or psychiatric evaluation should be able to pick up deficits in appreciation of social nuance and social cues. The entire interview is an interpersonal give and take. And it is exactly that kind of dysfunction that would be most likely be picked up. You can miss some things in simply talking to somebody, but the kind of things you would tend not to miss are their ability to understand where you are coming from, to pick up on social cues, the nuance of interpersonal communications are exactly the type of areas of dysfunction that are among the most likely to be picked up in an interview." (RHT 6220.)[31]

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[31] Dr. Faerstein also addressed Dr. Riley's contention set forth in paragraph 32 of Dr. Riley's report (Exhibit AAA) that "'Mr. Champion's deficits as revealed by the neuropsychological testing and problem solving, nonverbal reasoning, attention and slowed information processing, render him unable to draw inferences in ambiguous circumstances and lead him especially vulnerable to missing or misleading [*sic*]

Further, Dr. Hinkin testified that had petitioner suffered from "visual-spatial dysfunction," the Bender Gestalt test administered by Dr. Prentiss to petitioner "is the kind of test that would pick that up." To the contrary, Dr. Prentiss' report reflected that she identified no neurological deficit. (RHT 6222.)[32] In addition, Dr. Hinkin noted that various subtests administered as part of IQ testing of petitioner had the ability to assess visual-perceptual capability. From the various records reviewed, only an IQ score of 75 received from a test administered to petitioner when he was in the fourth grade (See, Exhibit CCC.) conceivably could have identified problems in this area, although because Dr. Hinkin did not know the exact type of IQ test administered, he could not say with certainty what that test actually showed in this area. (RHT 6222-6223.) On the other hand, from an IQ test administered on October 2, 1968 when petitioner was six years, one month old and for which petitioner's school records reflected an IQ test result of 88, Dr. Hinkin testified he would have expected that result to have provided clues as to any visual-perceptual difficulties, had such difficulties existed. The records did not reflect any such difficulties were identified. (RHT 6223-6224.)

Dr. Hinkin testified petitioner's school records (Exhibit CCC) were "suggestive" that petitioner "may have had an attention deficit hyperactivity disorder as a child. Again, these are common in maybe about 5 per cent or so of young boys will evidence this, a lesser percent of girls. And it's trouble paying attention in school, being

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cues concerning the intentions of other persons.'" (RHT 6531-6532.) Had that problem existed when Dr. Pollack examined petitioner in 1981, Dr. Faerstein testified he would have expected Dr. Pollack to have been able to identify that kind of problem. Dr. Faerstein explained: "Because Dr. Pollack's examination, a psychiatric clinical examination, is an example of a situation in which there are lots of subtle clues and cues involved. Interpersonal exchange with give and take, with observation of behavior, with response to behaviors, questions, cues and clues from the psychiatrist that are responded to by the person being evaluated. [¶] It does detect subtle responses in the individual. How they answer your questions, what date she is to answer, how they answer questions. It's a give and take pairing, verbal pairing, which does reflect a person's vulnerability, if it existed. (RHT 6532.)

[32] Petitioner's *Strickland* expert admitted familiarity with the Bender Gestalt test as one "used by psychologists and psychiatrists." He conceded that "[i]t can" be used to assess evidence of organic brain damage. (RHT 4514-4515.) Earley further conceded that that portion of Dr. Prentiss's report stating "'[t]here is no neurological impairment and there appears to be no suicidal or homicidal ideation" (Exhibit J, Prentiss Report, p. 1.), could be interpreted by reasonably competent counsel reading that aspect of Dr. Prentiss's report as a finding by Dr. Prentiss that petitioner suffered "no evidence of organicity [or] organic brain damage...[.]" (RHT 4515: 2-14.)

distractible, being fidgety and hyper, maybe getting into trouble, getting sent to the principal type of things. These are the kind of things that the hyper kids with ADHD may run into." (RHT 6262.) Dr. Hinkin further testified that "[t]he majority of people who have ADHD as a kid outgrow it. There is an adult manifestation of childhood ADD [attention deficit disorder]. There are plenty of adults who had ADD as a child who continue to have attentional problems as adults, may be very distractible, have difficulties staying focused. Their homes tend to be cluttered and disorganized. But then there is another chunk, and probably the majority, that simply outgrow it and you don't really see any signs of it at all as an adult." (RHT 6262-6263.)

Based on Dr. Riley's 1997 test results, it appeared to Dr. Hinkin that petitioner had "largely grown out of [ADHD]." (RHT 6263.) Dr. Hinkin testified that children begin to outgrow ADHD "in the high school years" so that "by college they -- if you're going to outgrow it, typically around those years it will be -- they will be through that." (RHT 6263-6264.)

Dr. Hinkin reviewed petitioner's 1982 trial testimony. Although that review did not permit Dr. Hinkin to speak to whether or not at the time of his testimony petitioner showed signs of hyperactivity such as being very fidgety and restless, the testimony supported Dr. Hinkin's opinion that in fact petitioner did outgrow ADHD since that testimony did not reflect petitioner having "difficulty tracking what was going on, [petitioner] getting distracted, [or petitioner] losing track of the conversation." (RHT 6264-6265.)[33]

[33] Dr. Faerstein independently reached the same conclusion from his review of petitioner's trial testimony. "Well, I'd state first that when you read a transcript, it is very different than actually witnessing somebody provide evidence. You just don't see in a transcript what the lag phase is between questions and answers. [¶] But in terms of the content of the testimony, [petitioner] was responsive. He stayed on message. He didn't lose track of the questions. He didn't go off on tangents with information that was irrelevant. He seemed to be able to pay attention, to stay on message, and there was no confusion or tangentiality ["to go off on a tangent, just go off into another topic"] on his part, which is generally what you see in people who have ADHD." (RHT 6548.)

Dr. Hinkin further testified that he was aware of no literature which showed any relationship existed between ADHD and criminal propensity in general or commission of violent crimes like murder and armed robbery in particular. (RHT 6267.)

Dr. Faerstein testified that he would have expected Dr. Pollack to have seen evidence of ADHD had it existed at the time of Dr. Pollack's 1981 clinical interview with petitioner. "I believe you would see it, because a person might go off on tangents. One of the things you report in a mental status examination, is a person a [*sic*] tangential, which is to go off on tangents, or circumstantial, which is do they beat around the bush before they come to their answer. So those are things you look for in a mental status examination. I don't know whether [Dr. Pollack] would have reported it as ADHD, but he would have reported tangentiality, circumstantial tangentiality, difficulty staying on topic, distractibility, he would have recovered [*sic*] the symptoms of ADHD, and there were no reports of any of those symptoms." (RHT 6548-6549.) Unlike Dr. Faerstein's inability to detect from his review of petitioner's trial testimony whether petitioner showed signs of hyperactivity when he testified at his trial (See, *ante*, fn. 33 at p. 63.), Dr. Faerstein testified "[b]ut [Dr. Pollack] would see that in doing a one-on-one examination." (RHT 6549.)[34]

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[34] Dr. Miora, petitioner's "mitigation expert," testified that during her 9 to 10 hours of interviewing petitioner in December 2006 and February 2007, she saw no evidence that petitioner suffered from either ADD or ADHD. (RHT 8692, 8702-8704, 8707; see also, Exhibit 136 (Dr. Miora's Declaration) at pp. 8-10.) Dr. Miora had also reviewed Dr. Hinkin's testimony on this issue. She agreed with Dr. Hinkin's opinion that it was common for children to outgrow ADD and ADHD. (RHT 8692-8693.) Unlike Dr. Hinkin who opined that in a majority of cases, children outgrow that condition, Dr. Miora could not give "a yes or no answer" to a question asking her whether "based upon [her] experience, education and training as a psychologist who dealt with children, are you unable to say today whether or not it is your opinion that in a majority of cases children outgrow ADHD or ADD by the time they reach their late teens and early 20s? Yes or no." (RHT 8694.) On the other hand, Dr. Miora appeared to agree with Dr. Hinkin's testimony that Dr. Riley's test results and petitioner's trial testimony did not reflect petitioner suffered from ADD at the time of those events. (RHT 8694-8702.) Dr. Miora also acknowledged that none of the psychologists and psychiatrists who evaluated petitioner while he was at the CYA or Drs. Pollack and Imperi made reference in their respective reports to any observation of ADHD or ADD. (RHT 8709, 8711-8712.) Dr. Miora further testified in response to the question whether she "would [] have expected the doctors to have been able to see the evidence of ADD or ADHD had it existed at the time of [the CYA] evaluations" that she "would say for the large part, yes." (RHT 8709.) While admitting that she had not placed in her Declaration anything about the absence in the CYA doctors ' reports about any findings of ADD or ADHD, Dr. Miora testified: "[B]ut I wasn't arguing there was ADHD. So it wasn't a need to compare and contrast what may or may not have been found." (RHT 8709-8710.) Dr. Miora further testified that "[m]y findings

Dr. Faerstein noted that one of the issues directed to Dr. Pollack and restated in Dr. Pollack's report was whether or not petitioner fell within the purview of the *Drew* decision. (RHT 6534-6535.) Unlike the *McNaughton* test of legal insanity which focused exclusively on cognitive ability, the test in *Drew* looked at both cognitive functioning and ability to control conduct. (RHT 6535.) An additional referral question to Dr. Pollack was whether petitioner "...suffer[ed] from an irresistible impulse at the time of the [Hassan crimes]?" (RHT 6536.) Dr. Faerstein testified that the term "irresistible impulse" in the period of 1981-1982 "was an older test that, in a sense, was adapted into the *Drew* rule by looking at a person's ability to resist impulses and to conform one's conduct. (RHT 6536.) From Dr. Faerstein's review of petitioner's trial testimony, "[t]here [was] nothing that showed [petitioner] had that kind of impairment." (RHT 6537.)[35]

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were consistent with [the findings of the CYA doctors], and I don't really understand how, how it would have been important for me to note a -- there was no disparity, so I don't understand how that would have been important for me to note." (RHT 8710-8711.) Nevertheless, despite admitting that Dr. Miora's findings that petitioner did not suffer from ADD or ADHD were consistent with the absence of findings of that condition in any of the reports from the CYA doctors, Dr. Miora refused to conclude that petitioner did not in fact suffer from ADD or ADHD when he was evaluated at the Youth Authority between December 1978 and July 1980 by the four doctors. "No, I did not testify that he didn't have it. I testified that, as you questioned me, there was no problem of ADD or ADHD noted by any of those evaluators, and I stand by that testimony. (RHT 8711.) Dr. Miora did admit that the absence of any such reference in the four doctors' reports indicated to her that the CYA doctors "did not believe [petitioner] suffered from [ADHD]." (RHT 8711; see also 9154-9156.) Once again, Dr. Miora admitted that she did not put in her Declaration her understanding that the absence of any reference in the doctors' CYA reports to ADD or ADHD indicated that the doctors at CYA did not believe petitioner suffered from either condition. (RHT 8711.) Dr. Miora also acknowledged that had Drs. Pollack and Imperi seen evidence of ADD or ADHD, she "suspect[ed] they would have [commented upon that in their report, Exhibit 46]." (RHT 8711-8712.)

[35] The report by Drs. Pollack and Imperi concluded by noting that "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." (Exhibit 46 at p. 3, ¶ 4.) These findings by Drs. Pollack and Imperi by definition mean that in their opinion, petitioner did not lack as a result of a mental defect, disease or disorder the substantial capacity to control his conduct to the requirements of the law or suffer from any irresistible impulse which caused petitioner to participate in the murders and robberies of Bobby and Eric Hassan. Dr. Miora conceded that evidence petitioner suffered from ADD or ADHD could be relevant to a consideration of the issue of irresistible impulse as Dr. Miora defined that term. (RHT 8713.) Dr. Miora did not include in her Declaration her belief that in light of the referral question to Drs. Pollack and Imperi concerning irresistible impulse and Dr. Miora's own understanding of what that defense meant in 1981, the absence in the Pollack-Imperi report of any reference to ADD or ADHD signified to Dr. Miora that neither doctor believed petitioner suffered from either of those conditions at the time of their evaluation. Her reason for not doing so was because that opinion was consistent with Dr. Miora's own findings "that the issue of attention was a non-issue, if you will." (RHT 8713-8714.)

Dr. Faerstein testified: "I think the manner in which he presented his testimony showed his ability to adapt his conduct and conform his conduct to the circumstances of the trial, of responding in court in a legal setting to direct examination and cross-examination, the language he used. His nature of responding to questions showed an ability to conform to the circumstances of the trial, which is a very structured and organized setting." (RHT 6537.) Further, Dr. Faerstein noted the contrast between petitioner's "language and behavior" as reflected in the surreptitiously recorded conversation between petitioner and his co-defendant, Craig Ross (Exhibit F), and petitioner's "conduct and behavior in trial in direct and cross-examination [which] demonstrated his ability to conform to the circumstances of his environment." (RHT 6537.)

Dr. Faerstein also testified that he had reviewed reports which described petitioner as "impulsive." (RHT 6541-6542.) While noting that evidence of impulsivity was not necessarily inconsistent with one's ability to control one's conduct to the requirements of the law, Dr. Faerstein described "impulsivity" as "a characteristic where one may act without giving full consideration to the consequences of one's conduct. But when we are talking about the capacity to conform one's conduct to the requirements of the law, we are talking about behaving consistently in such a fashion, and conforming is different than controlling, conforming really is a chronic kind of behavior that describes a person's use of control and judgment over time to adhere to the law. So people can be impulsive here and there in terms of what they do, striking out maybe inappropriately, losing one's temper, acting in such a behavior, but the capacity to stop when there is a big enough stop sign, that's generally still present in a person who may have impulsivity." (RHT 6542.) In Dr. Faerstein's opinion, petitioner's trial testimony provided evidence that petitioner could control any impulsivity towards inappropriate conduct. "The transcript [of petitioner's trial testimony] reflects no inappropriate conduct, inappropriate language. It appeared that he conformed to the decorum of the

courtroom, and was able to conform his conduct to the circumstances." (RHT 6542-6543.)

Dr. Faerstein testified that in December 1980, in his opinion petitioner was "fully aware of what a gun was[;] what bullets were[;] what the effect was of pointing a loaded gun at the head of another person and pulling the trigger[;] what the consequences would be of firing a bullet into the head of another person[;] and what it meant to take the property of someone else without permission, including using force in the form of a gunshot wound to the head to obtain that property. (RHT 6552-6553.) Further, in Dr. Faerstein's opinion, there was nothing which precluded petitioner from being able to stop pulling the trigger of a gun if he chose to do so or to control his conduct at the time of the crimes. (RHT 6552-6553.)

Dr. Faerstein reviewed the December 12, 1979 YTS annual review report (Exhibit G-13), which reported petitioner's misconduct while at the facility during the review period, and the March 25, 1980 YTS annual review report (Exhibits 23 A-1; 26-B) reflecting that during that reporting period, "'[petitioner's] behavior and accountability for his actions has been above average.'" (RHT 6543.) Dr. Faerstein acknowledged that there was nothing inconsistent with petitioner, while at the CYA, recognizing that his best chance for early parole required him to conform his conduct to what was expected of him and to give the kind of responses to people evaluating him for possible parole which would enhance his chances of being paroled. Dr. Faerstein concluded that petitioner "demonstrated he controlled his impulsivity" to accomplish that which he would understand as necessary to enhance his chances for early parole." (RHT 6544; see also, Dr. Faerstein's testimony at RHT 6609-6610 [from his review of Dr. Brown's report (Exhibit I) Dr. Faerstein concluded that petitioner had "learned to verbalize what he needs to verbalize to impress the authorities to allow him to be released"].)[36]

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[36] Petitioner's ability to manipulate forensic examiners was an express concern raised by Dr. Brown in his July 29, 1980 report (Exhibit I). One example of petitioner's effort at manipulation can be seen from petitioner's *pre-conviction* account of his use of drugs to Drs. Pollack and Imperi and quite different *post-conviction* account to Dr. Miora although this effort is far from the first demonstration by petitioner at

Dr. Faerstein reviewed the two-page December 27, 1982 psychological evaluation conducted at San Quentin following petitioner's trial by Dr. Steinke (Exhibit G-3).[37] Dr. Steinke's report noted elevated MMPI scores on scales 4, 8 and 9. As Dr. Faerstein testified, "scale 9, sometimes called the manic scale, is a measure of activity, which may reflect maladaptive hyperactivity. And it may be masking feelings of depression, according to [Dr. Steinke's] report." (RHT 6584-6585.) When asked to correlate ADHD and "maladaptive hyperactivity," Dr. Faerstein testified that "scale 9 would be elevated in someone who has ADHD because of the hyperactivity, the restlessness, the kind of manic quality to their behavior." (RHT 6585.) Nevertheless, Dr. Faerstein testified that even if Dr. Steinke's conclusions were accurate, in Dr. Faerstein's opinion, petitioner would still have been able to control his conduct. (RHT 6585-6586.)

Referring to Dr. Perrotti's report (Exhibit J) and in particular Dr. Perrotti's reference to the MMPI administered to petitioner as valid, Dr. Faerstein testified that petitioner's ability to complete the MMPI test "tells you that [the petitioner wasn't] so hyperactive they couldn't complete that task and apply themselves to some particular goal." (RHT 6586.) While not timed, Dr. Faerstein recalled that the test encompasses

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attempted manipulation. In the probation report dated November 8, 1978 arising from petitioner's juvenile adjudication for assault with a deadly weapon, petitioner denied the allegations of the petition, stating "'that he did not observe any type of assaultive behavior on anyone's part. He indicated to the probation officer that if anything happened, it happened before he arrived.'" (RHT 9268, quoting from Exhibit 147 at BS107.) Nevertheless, approximately 1 year later while at the CYA, when speaking to Dr. Perrotti, petitioner admitted that he "became involved in a fight with the victim and the ward states that the victim picked up a stick so "I got to cutting on him." [The ward] denies knowing anything about the victim being robbed. In retrospect, the ward states that he saw it as a stupid thing to do. He states that, "I could have pulled my friend away, but I did not believe in that then."'" (RHT 9269-9270, quoting from Exhibit J., Dr. Perrotti's Report.) Dr. Miora conceded that she recognized the disparity in descriptions given by petitioner in the two documents. (RHT 9270-9271.) Dr. Miora conceded that it was a possible explanation for the discrepancy that petitioner when speaking to Dr. Perrotti realized it might advance his effort at getting released from CYA to express contrition for his misconduct rather than to continue denying any involvement in the episode. (RHT 9271.) Of course, even in his statement of contrition to Dr. Perrotti, petitioner refused to take full responsibility for the crimes.

[37] Of course, this report would not have been available to petitioner's trial counsel. Any signs of depression from petitioner must be considered in the context that he had just been sentenced to death and transported to San Quentin to await execution.

567 questions and generally takes most people approximately one and a half hours to complete. (RHT 6586.)

It should also be noted that Dr. Perrotti's report also indicates that "[petitioner] is well able to inhibit himself from acting out." (Exhibit J, Perrotti Report, p. 3.) Petitioner's *Strickland* expert conceded that this finding by Dr. Perrotti "can deal with impulse control." In addition, while Dr. Perrotti reported that "'[t]here [were] statements in the file regarding [petitioner] being easily influenced by others. [Petitioner] disagrees with this and feels that he does what he wants to do and that he is autonomous.'" (Exhibit J, Perrotti Report p. 1; RHT 4516.), Earley did not agree that had the jury heard this aspect of Dr. Perrotti's report, it would not be helpful at the penalty phase to support a penalty of life without possibility of parole on a theory that petitioner was merely a follower, not the leader his co-defendant Craig Ross was alleged to have been. (RHT 4516-4517.)

Dr. Hinkin also testified that based upon his review of petitioner's school records (Exhibit CCC) and Dr. Riley's examination, "there is evidence to suggest that [petitioner] has dyslexia, trouble with reading, and particularly trouble with being able to read and pronounce non-words, nonsense words." (RHT 6259: 6-10.) Dr. Hinkin noted that petitioner "performed quite poorly" on one of Dr. Riley's tests—the "Word Attack test"—which "tests the ability to sound out nonsense words." Petitioner's poor performance "is characteristic of someone with a dyslexia, a reading disability." (RHT 6259: 10-15.)

While Dr. Hinkin noted that "often folks with dyslexia also have [reading] comprehension problems[,]" Dr. Riley's testing demonstrated that "[petitioner's] reading comprehension is quite good, quite normal." Petitioner's reading comprehension level was recorded at "11th grade plus," while his word attack level was at grade level 3.8. (RHT 6260: 5-13.) In summary, Dr. Hinkin noted that "[petitioner's] ability to comprehend what he reads is normal. He just has a hard time reading, would have a hard time reading some words aloud, particularly nonsense words." (RHT 6260: 14-16.)

Dr. Hinkin noted that the areas of reading interest provided to Dr. Riley by petitioner reflected petitioner's "native intellect, that he is able, despite having a bad educational background, that he's...interested in things like economics and politics." Dr. Riley's testing suggested to Dr. Hinkin that it was "probable" that petitioner was able to read and comprehend the subjects he told Dr. Riley were subjects of interest to him. In short, in Dr. Hinkin's opinion, "[petitioner's] reading comprehension problems is [*sic*] secondary to a dyslexia." (RHT 6260-6261.)

Dr. Hinkin opined that petitioner's inability to pronounce nonsense words had "very, very little" impact on petitioner's functioning in the real world. (RHT 6261: 6-9.) According to Dr. Hinkin, that inability "may affect, if he had perhaps to read something aloud, that he might stumble a little bit on a task like that. But if he wasn't doing a job involving public speaking, it wouldn't have -- it would have very little, if any, real-word [*sic*] effect." (RHT 6261: 9-13.)[38]

Further, Dr. Hinkin testified that there would be no relationship between any inability to pronounce nonsense words and petitioner's participation in the robbery and murders of Eric and Bobby Hassan. Dr. Hinkin was aware of no research which suggested any causal relationship existed between the type of dyslexic disorder Dr. Hinkin testified petitioner may have had and criminality in general or specifically with respect to the commission of violent crimes like murder and armed robbery. (RHT 6261.)[39] Dr. Hinkin noted that perhaps 5% of children suffer from dyslexia. This kind of

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[38] Dr. Hinkin's opinion that petitioner "might stumble a little bit" if petitioner "had perhaps to read something aloud," underestimates petitioner's actual ability to speak publicly using polysyllabic words. (See, Exhibit ZZZZ, petitioner's poetry recital and Exhibit DDDDD, the transcript of Exhibit ZZZZ [petitioner speaks fluidly using phrases such as "a very surreal experience;" "I have walked, lived and blossomed during the time of his presence. My emotions are too raw, my senses too frayed to tell them, tell anyone -- for 20 brass-knuckle years;" "bask in his charisma;" "probe his razor-sharp mind or excite his insatiable curiosity;" "against all naysayers who sought to pigeonhole and fossilize him;" and "daggers black pride, emasculates black strength"].) In a similar vein, although Dr. Miora included in her Declaration (Exhibit 136, at pages 9-10) information about petitioner mispronouncing a number of words "in idiosyncratic ways," it was not Dr. Miora's intention to place any clinical significance on that observation. (RHT 8724-8725.)

[39] When Dr. Miora was asked whether she agreed with Dr. Hinkin's testimony that no scientific literature existed which established that there was any causal relationship between the type of dyslexic disorder Dr. Hinkin attributed to petitioner and criminality in general, Dr. Miora testified that she "[was] not an expert in

problem is "very common at least." As Dr. Hinkin put it: "A lot of those kids don't go on to commit violent crimes." (RHT 6261-6262.)

d. Petitioner's School Records (Exhibit CCC)[40]

Skyers testified that he believed he made efforts to get petitioner's school records, but could not recall due to the passage of time if he had obtained the records from the LAUSD. (RHT 1000-1001 ["It seems to me I got some school records, but whether or not I got it [*sic*] directly from the school or the CYA, I don't recall"; "I can't recall whether or not I saw Steve's school records in any other source except for maybe his CYA records. But I'm not sure about that."].) While the file materials produced by petitioner's counsel as Exhibits 1-31 with subparts were recognized by Skyers, he could not say whether materials he possessed when he represented petitioner were missing from the materials produced at this hearing by petitioner's counsel. (RHT 748-749.)

Following the completion of petitioner's trial and sentencing, Skyers gave his file first to co-defendant Ross' attorney and then gave originals to attorney Merwin. These events occurred approximately 15 years before the reference hearing. No copies were made by Skyers nor did he make any list of the items turned over. Skyers testified that he lacked independent memory of events without having his original file materials to review to refresh his recollection. In addition, Skyers had no knowledge of how petitioner's counsel received Exhibits 1-31. Exhibit B, a Copy of "Skyers' File" received by respondent's counsel from petitioner's counsel and Bate stamped, was sent by respondent's counsel to Skyers. Exhibit B, page 12241, is a copy of Skyers' interview notes of his July 13, 1982 interview of petitioner's brother, Reginald Champion, regarding a possible alibi for petitioner to the Michael Taylor murder and related

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that area[,]" as a result of which she was "unable to answer [the question] based on [her] knowledge of the literature." (RHT 8722-8723.)

[40] Aspects of Exhibit CCC have already been addressed, *ante,* in the referee's review of Drs. Hinkin and Faerstein's testimony, which the referee, as already stated, finds to be credible and reliable.

crimes.[41] Without having seen that page, Skyers would have been unable to recall specifically what Reginald Champion had told Skyers. The file materials produced by petitioner's counsel at the reference hearing and marked as Exhibits 1-31 with subparts do not include Skyers' interview notes as found in Exhibit B at page 12241, petitioner's school records or as previously noted, the report of Drs. Pollack and Imperi. (RHT 1183-1198.)

The referee finds that Skyers did not in fact see or possess petitioner's school records at the time he represented petitioner. This failure to review is a deficient performance by reasonably competent counsel in the investigation phase of petitioner's case. Skyers did not provide Drs. Pollack and Imperi with a copy of petitioner's school records, petitioner's CYA file, including the reports of Drs. Prentiss, Minton, Perrotti and Brown (Exhibits D, I & J), the December 13, 1978 Initial Home Investigation Report (Exhibit H), the Youth Training School reports (Exhibits G-13 and 23-A) or the November 8, 1978 probation report (Exhibit 147).

The school records include a health history component which petitioner's mother filled out to reflect a birth history which was normal and a developmental history which likewise was essentially normal.[42] In this respect, Exhibit CCC is fully consistent with the account petitioner's mother gave to the CYA parole officer some 10 years later as reflected in the December 13, 1978 Initial Home Investigation Report (Exhibit H).

Petitioner's mother testified that she was aware that the hearing at which she was now called to testify could ultimately result in her son, petitioner, receiving a new penalty phase trial. Mrs. Champion testified that she would not lie in an effort to obtain that result "because I have a conscience." (RHT 5367.) She admitted that she filled out the health history information concerning petitioner contained in Exhibit CCC. (RHT

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[41] Page 12241 of Exhibit B was read into the record at RHT 1196-1197.

[42] Petitioner's mother also indicated that petitioner had no nightmares, facial tics or tantrums and was not shy. She also indicated petitioner did not bite his nails, although he did suck his thumb and wet his bed.

5489.)[43] Specifically, she wrote in the answers of "No" to questions dealing with any complications during the pregnancy involving petitioner. (RHT 5490.) In spite of the fact that Mrs. Champion considered her pregnancy with petitioner not to be a normal one, in part because of the complications produced from beatings she received while pregnant with petitioner by petitioner's biological father (RHT 5488-5489.), she could not explain the inconsistency between the record she filled out indicating the pregnancy had no complications and her testimony in which she admitted that the pregnancy was fraught with complications, including those created by the beatings. (RHT 5490-5491.)

Mrs. Champion also answered a series of questions in Exhibit CCC asking about petitioner's condition such as whether the child had "frequent complaints," or whether the child appeared "restless or overactive" with answers of "No." (RHT 5491-5492.) In a non-responsive but nevertheless enlightening answer to the question: "And Steve was about five years old when you filled this form out [,]" Mrs. Champion testified: "Well, now like -- I did that because he have a problem at home. That's why I did, because I was -- he was having problems. And I didn't want to, you know, put down, I didn't put the problem down that I -- when I filled it out." (RHT 5492-5493.) When asked in follow-up if she "didn't want to let the school know the truth, so that they would take Steve as a child and get him out of the house; is that what your motive was [for not listing the problems][,]" Mrs. Champion testified: "No, I just put down, 'No.' That wasn't a problem. That was not the problem, I just put down, 'No.'" (RHT 5493.) On redirect examination, petitioner's counsel revisited the issue of why Mrs. Champion answered the questions in Exhibit CCC as she did. Mrs. Champion testified: "Well, I was trying to fill out for his to, you know, get into school. And I was working. And I wouldn't put that down, because I felt that would interfere with my job." The follow-up questioning by petitioner's counsel went as follows:

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[43] Exhibit CCC has been admitted for all purposes. (RHT 7246.)

"Q. So the information about Steve being beaten at home was something you didn't want to put into a school record?

A. That's correct.

Q. Because it might hurt you in your job?

A. My job.

Q. And if you lost your job, what would happen?

A. I wouldn't have no -- I would, you know, wouldn't have the money to take care of my kids."

(RHT 5535.)

The referee then asked for a clarification regarding the school records: "Is this when petitioner is five years old?" Petitioner's counsel answered: "Yes." (RHT 5535.) On re-cross-examination, Mrs. Champion confirmed that at the time petitioner was five years old, Gerald Trabue, Sr. was still alive. There had been no abuse in the family while Trabue Sr. was alive. According to Mrs. Champion the abuse only started "after Gerald passed." Mrs. Champion then expanded that answer by stating that "after [Gerald] passed is when [petitioner] got abused. Before that, when we were together, [Gerald] took care of everything." While Gerald was alive, "the kids was great." (RHT 5544.) Mrs. Champion then admitted that she had testified in response to questioning by petitioner's counsel that she did not want to put in the medical records portion of petitioner's school records that petitioner had been abused "because it would affect [her] ability to continue working." (RHT 5545.) Mrs. Champion, reiterating that "[w]hen Gerald Trabue was alive, [Mrs. Champion] had a happy and beautiful life. A beautiful life. After he passed, that's when Lewis was abused to the kids[,]". Mrs. Champion could not reconcile her stated reason for not truthfully answering the questions in petitioner's school records with the reality that existed at the time those records were filled out by her, a reality which was inconsistent with the reason given for not being fully candid. (RHT 5545-5547.)

Exhibit CCC also includes records pertaining to petitioner's academic performance from kindergarten through 10th grade, although for the period from kindergarten through sixth grade, there are no letter grades provided; rather, there are only cursory comments which in most instances are not initialed by the respective authors. There is also a "School History" record which identifies attendance from kindergarten through sixth grade. With the exception of the second grade where the record reflects petitioner was absent 71 out of 141 actual days, petitioner's attendance record was quite good, including for grades 3, 4, 5 and 6. For those grades, the record reflects petitioner missed only 3 out of 174 days, 3 out of 177 days, 11 out of 175 days and 8 out of 173 days respectively. The notes for second grade appear to reflect: "Many absences, much fighting, having difficulties in family life. Easily distracted but can do good work when in the proper mood[.]" The notes for grade 3 appear to reflect: "Below grade level in all academic subjects. Quick tempered, much fighting, easily distracted. Home problems disturb child." The notes for grade 4 appear to reflect: "Growth in all academic areas-enthusiastic-well liked by peers-needs to feel that he can succeed-easily distracted[.]" The notes for grade 5 appear to reflect: "Can control himself but usually doesn't-bad temper-does not work hard. Below grade level." The notes for grade 6 appear to reflect: "Can be somewhat of a discipline problem at times. Works below grade level-can be distracted easily-likes to be a leader of his peers[.]"

Exhibit CCC also reflects that in October 1968, petitioner scored an 88 on a Binet LM IQ test, a score which correlated with a mental age of five years and five months for petitioner who was chronologically six years and one month old at the time of the test. There is also an indicated IQ score of 72 obtained in April 1972, although as already noted, Dr. Hinkin could not identify from Exhibit CCC the type of test involved.

The academic records for junior high school, grades 7-9, reflect in general a progressive deterioration in performance, work habits and cooperation. The last record is for grade 10, the first semester, where petitioner failed all three subjects taken and demonstrated an unsatisfactory work habit in each of those three classes.

There is no mention anywhere in the school records of a claim of fetal abuse, the 1968 traffic accident, the death of Gerald Trabue, Sr., the remarriage of petitioner's mother to Henry Robinson in approximately 1970, any concern with petitioner's well-being from the standpoint of food, shelter or clothing or any concerns that petitioner had been the subject of physical or emotional abuse, whether by one of his older brothers or from any other source. There is no indication in the record suggesting a referral should be made to any law enforcement authority, department of social services or juvenile authority because of concerns with petitioner's health and welfare.

The referee also notes that petitioner has not called in this proceeding a single teacher or school administrator to testify to petitioner's actual school performance or the circumstances surrounding the schools, their resources or their problems, although petitioner did obtain and attach as exhibits to the habeas petition declarations from three teachers, at least one of whom claimed to have taught petitioner.

III. REFERENCE QUESTION NO. 2

A. What additional mitigation evidence, if any, could petitioner have presented at the penalty phase? How credible was the evidence?

B. Petitioner's Claim

1. Petitioner claims the following additional mitigating evidence could have been presented. (Petitioner contends that this question asks what evidence "could have been presented" not necessarily whether reasonably competent counsel "would" have presented it. The referee agrees.)

   a) Additional evidence to mitigate the aggravating factors (Factor A):

      i) The murders of Bobby Hassan and thirteen year old child Eric Hassan.

         (1) Victim Eric Hassan was not handicapped.

(2) The transcript of the taped conversation between petitioner and Ross was not correct.

(3) Petitioner's age and relationship to co-defendant Ross was that petitioner was the follower and Ross was the leader.

(4) Petitioner's lack of gang involvement, changing neighborhood and reasons for joining a gang.

(5) Petitioner's violent character as a gang member.

b) Evidence to mitigate or rebut petitioner's involvement in the Jefferson murder (Factor B).

c) Evidence to mitigate petitioner's juvenile aggravators (Factor B).

d) Petitioner's drug and alcohol use (Factor K).

e) Evidence to mitigate or rebut petitioner's involvement in the Taylor murder (Factor B).

i) Petitioner was at Helen Keller Park with fellow gang members on the evening of December 27, 1980 at the time of the killing (i.e., alibi).

ii) Deficient police investigation.

iii) Robert Aaron Simms' fingerprints found at Taylor residence exonerate petitioner or create reasonable doubt.

f) Petitioner's social history, development and functioning (Factor K).

i) Petitioner's mental status.

(1) Doctor evaluations.

<u>Pretrial</u>

CYA doctors (Drs. Prentiss, Minton, Perrotti, Brown [1979-1980]);

Drs. Pollack/Imperi [1982]

<u>Post trial / Post conviction</u>

Dr. Riley (1997), Dr. Miora (2006-07)

Brain damage

Head injury, fetal abuse, traffic accident head trauma, sibling abuse

(2) School records.

(3) Family matters.

(aa) Petitioner's biological father, Lewis Champion II.

I) Abuse of petitioner's mother.

II) Abuse of petitioner.

(bb) Gerald Trabue, Sr.

(cc) Abuse by Lewis Champion III.

(dd) Inability of petitioner's mother to provide proper nurturing, care, supervision.

g) Petitioner's amenability to rehabilitation and institutional adjustment.

h) Love of petitioner by family and friends.

C. Summary of Referee's Findings

1. Mitigation Evidence as to Factor A (Hassan Murders)

a) The jury was aware of petitioner and Ross's ages, that petitioner was not the shooter and that petitioner was not the leader. The jury was also aware that petitioner's role was that of an aider and abettor or co-conspirator. The jury was instructed under the felony-murder rule (i.e., that even an accidental shooting could incriminate a principal in the offense). Petitioner did not present any additional evidence as to the roles or relationship between the four participants involved in the Hassan murders nor did he present additional evidence to show that the tape or

transcript concerning the conversation between himself and Ross was incorrect or deficient in any manner.

b) Petitioner was identified as a member of the Raymond Avenue Crips which was known as a violent criminal street gang at the time of the Hassan crimes. Deputy Williams' opinions, which petitioner sought to impeach through gang expert Steven Strong, were confirmed by the reference hearing testimony. Additionally and in spite of discrepancies noted as to the gang graffiti, the evidence adduced during the reference hearing established that petitioner was an active gang participant since the age of twelve and that he had personally been involved in violent crimes since the age of twelve or thirteen. It was further established that the Raymond Avenue Crips was a significant source of increased danger to the community.

c) Petitioner did not present or identify what mitigation could have been presented as to either juvenile aggravator (1977 robbery or 1978 assault with deadly weapon).

2. Mitigation or Rebuttal Evidence for Jefferson Murder

Petitioner did not present any additional mitigation or rebuttal evidence as to the Jefferson murder.

3. Alibi for Taylor Murder

The primary alibi witnesses called to support petitioner's claimed alibi were fellow Raymond Avenue Crips gang members. Their testimony is inconsistent with their own declarations, with each other and with petitioner's own trial testimony. The testimony given by Harris, Bogans and Player is not credible and does not support an alibi for the Taylor murder.

The calling of fellow gang members would not serve petitioner's best interests. If called, their testimony would only confirm petitioner's gang involvement as well as his past and current association with co-defendant Ross. This evidence does not support the finding that Simms was booked or a determination that his fingerprint found at Taylor crime scene exonerates petitioner.

4. Brain Damage

a) Petitioner's habeas counsel had Dr. Riley test petitioner in 1997. As a result of those tests, Dr. Riley's opinion is that petitioner suffers from brain damage. The possible source of brain damage is fetal abuse, traffic accident head injury or physical abuse by older brothers. Dr. Riley's opinion is not supportable. Mrs. Champion's prior statements to school officials and CYA authorities are inconsistent with her post conviction declaration and her brother's reference testimony as to fetal abuse. The absence of medical records or police reports does not assist claims of head trauma caused by fetal abuse, traffic accident or physical trauma at the hands of older siblings. Petitioner's statements to CYA doctors or staff are inconsistent with this claim. The opinions rendered by Drs. Hinkin and Faerstein are inconsistent with Dr. Riley's findings and consistent with contemporary psychological/psychiatric evaluations conducted by CYA doctors between 1978 and 1980.

b) Petitioner told Dr. Riley he hurt his collarbone in the 1968 car accident. He did not tell her he hurt his head.

c) Dr. Hinkin, Dr. Faerstein and Dr. Riley are all impressive, well qualified witnesses. However, I found it disquieting that Dr. Riley clearly stated in her report that petitioner's brain damage was attributed to in utero events but would later seek to distance herself from her original position by stating it was awkwardly stated. Dr. Riley lectures other doctors on the

importance of proper phrasing of opinions so as to maximize the impact on jurors.

d) Dr. Hinkin and Dr. Faerstein's opinions that petitioner did not suffer from brain damage at time of trial are credible.

e) Dr. Hinkin's opinion that Dr. Riley's scoring of petitioner's test results was not reliable is credible.

f) Dr. Riley's administration, scoring and opinions as to the existence of brain damage and cognitive impairment are discussed in a detailed manner. The referee finds that her scoring process is flawed.

g) Dr. Riley's decision to allow petitioner's counsel to be present during the testing of petitioner constitutes a major defect. The presence of an extremely interested party during the neurological testing of petitioner violates basic test standards. No rational reason for allowing counsel to be present was provided.

h) The psychological evaluations performed prior to trial by six separate doctors are found to be consistent and credible.

i) All of the doctors who examined petitioner prior to trial found he did not suffer from any mental defects, disorders or significant impairments. Not one of the six doctors recommended additional psychological or neuropsychological testing of petitioner.

j) Dr. Prentiss found no neurological impairments.

k) The referee finds that Skyers did not have any reason to order any additional evaluations based on his review of existing examinations prior to trial.

l) Petitioner's school records, the evaluations performed by CYA doctors and Dr. Pollack/Imperi's report revealed some impairment. These records/documents existed at time of trial. The referee finds that Skyers did not gather or review the school records. The referee finds that Skyers

did gather and review petitioner's CYA/YTS records. The school records and CYA/YTS records are credible.

m) Petitioner's pre-trial impairments that were identified were a low IQ, low intellectual functioning, reading and learning difficulties, attention deficits, a flat affect, deficiency in ability to conceptualize, low self esteem, impulsiveness and a bad temper. The referee finds this information credible and available at time of trial.

n) The referee accepts Dr. Miora's (as well as Dr. Riley's) opinion that petitioner has strong verbal skills.

o) A major discrepancy was noted between Dr. Miora's written report and her reference hearing testimony as to the scope of her assigned reference question. Dr. Miora's signed declaration under penalty of perjury states that her job was to evaluate petitioner's development and functioning. She also stated that she uses a method of psychological evaluation that includes three major components, biological, psychological, and social history. The biological portion includes a review of any pre-natal trauma, but in her in court testimony she stated that her evaluation was limited from the time of petitioner's childhood until the time of trial. Thus, she did not evaluate whether petitioner suffered fetal abuse. Given the fact that Dr. Miora seeks to consider family history that predates petitioner's birth, it is amazing that for unexplained reasons, she limited her review of petitioner's life experiences while testifying.

p) Petitioner stated to Dr. Miora that his mother told family members not to talk about family business with others and that she was secretive. Dr. Miora observed that petitioner's mother would not talk to others about matters that brought shame to her family. This information corroborates Skyers' testimony that despite several conversations with petitioner and his mother, no one discussed family matters with him.

q) Dr. Riley and Dr. Miora's statements that petitioner has/had strong verbal abilities corroborates Skyers' testimony that during his interviews with petitioner he did not notice anything abnormal about him.

5. Scope of Social History

a) Dr. Miora's written report (Exhibit 136) contains an extensive family history detailing social events of other family members including prior generations. The referee finds that petitioner failed to show a sufficient link between the social history of other members of his extended family and petitioner's own development and functioning. Petitioner did not show or develop any genetic link between other family members and his development. Petitioner is not mentally ill and any offer of proof as to other family members' mental status has not been connected to petitioner's development.

b) The referee does not find the claimed mitigation of poverty, extreme financial hardship, malnutrition or deprivations of childhood necessities to be credible. Dr. Minton's December 15, 1978 report describes petitioner as well developed and well nourished.

c) The referee does find that Mrs. Champion was placed in the role of being a single parent with the responsibility of providing financial support for a very large family. Her efforts to find employment resulted in her absence from home. When not employed, she relied on government financial assistance. The referee finds Skyers' testimony and recollection to be credible, that is that in 1981 petitioner lived in a nice home and in a well maintained neighborhood. A viewing of Trial Exhibit No. 5 (photos of interior of petitioner's home) seem to support Skyers' statements.

d) The referee finds that when Mrs. Champion was employed her absence from the home resulted in her inability to provide proper care, guidance and supervision for petitioner.

6. Petitioner's Drug Use is Credible

Petitioner's statement to Dr. Miora that he limited or stopped his dependence on drugs in order not to put himself at risk with rival gangs minimizes the duration and level of use. Neither Dr. Riley nor Dr. Miora was able to link this aspect of petitioner's life to any brain damage or mental impairment they opined existed.

7. Gang Participation

Petitioner's reasons for joining a gang were developed by the gang expert, CYA reports and Dr. Miora's interview. This information does not constitute mitigating evidence when viewed within the context of all circumstances of petitioner's development, conduct and character. This type of evidence does not rebut the aggravating aspects of Factor A. Petitioner's expressions of how loyal he was to the Raymond Avenue Crips and other members support respondent's position that fellow gang members in the reference hearing would do anything to aid a fellow gang member.

8. School Records and Teachers

Skyers did not obtain petitioner's school records. The records reflect petitioner's poor academic functioning in school. He displayed learning disability, read slowly, and had an IQ test below average. Petitioner was easily distracted and problems at home affected his school efforts. He displayed a bad temper. However, the records did not reflect any physical abuse, any significant medical issues or malnutrition or a lack of clothing. Petitioner's mother told school officials all was well. A teacher notes that petitioner seeks to be leader.

Petitioner's school records support the proposed mitigation theme of poor academic functioning in elementary, junior and high school. However, this claim is subject to being neutralized by petitioner's involvement in gangs when he was twelve. Some records indicate petitioner could do well when he applied himself. Petitioner told Dr. Perrotti that he felt he could have done better in school.

Skyers did not interview any of petitioner's school teachers or visit any of petitioner's schools. Petitioner did not call any teacher to testify during the reference hearing.

9. Sibling Abuse

Mrs. Champion, E.L. Gathright, Rita and Linda Champion are the primary witnesses on this subject. Neither Reggie nor Lewis Champion III were called to testify during the reference hearing. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers. Their testimony was i) inconsistent with that offered by other witnesses during the reference hearing who were close friends or fellow gang members of petitioner; ii) inconsistent with Mrs. Champion's statement to school officials and the CYA; and lastly, iii) petitioner's description of his family life to CYA staff. The referee did not find the claim of physical beatings of petitioner to be credible. I do find that Lewis III was disruptive and harsh in his discipline. The disruptive aspect could have been presented if discussed or disclosed.

The absence of any medical report, police report or observation by anyone of physical bruises or injuries on petitioner, particularly by Gary Jones, discredits the claim by family members that petitioner was physically beaten by Lewis III.

10. Family Matters

Petitioner's biological father, Lewis Champion II, abandoned the family when petitioner was born. Normally this would be clearly mitigating evidence under factor K.

However, petitioner's mother testified that Lewis Champion II was so abusive that his departure was a good thing for petitioner.

Gerald Trabue, Sr. was the father figure for petitioner from 1962 to 1968 and he was a wonderful person and provider. His death due to a traffic accident in 1968 was a traumatic event for the family. Trabue Sr.'s loss caused major financial difficulties for the family. Mrs. Champion was forced to be a single parent in need of employment. The referee finds that petitioner was adversely impacted by Trabue Sr.'s death and that he did not have another father figure afterwards. This information would have been very credible evidence had it been disclosed to Skyers.

These matters could have been presented but for the failure to disclose them by family members.

11. CYA Reports

Petitioner's CYA reports provide some credible support as to his amenability for rehabilitation. The CYA staff and doctors' reports indicate that petitioner did comply with CYA rules and regulations, that he engaged in CYA programs, that he obtained good grades in his classes, that he was respectful to staff and that he could do well in a structured facility and program such as CYA. These positive remarks as well as others are credible. However, the short time lapse from the time he was paroled and the time of the Hassan murders nullify this mitigation. The CYA reports also contain reference to other violent conduct on part of petitioner while at CYA. The CYA reports also contain evidence that impeach other claims of mitigation, including prior arrests and crimes by petitioner. The question as to whether this type of evidence would be presented by a reasonable competent attorney is deferred to reference question numbers 3 and 4.

12. Love and Support for Petitioner from Family and Friends

While Mrs. Champion was not the best of witnesses, the clear exception is her degree of love and affection for petitioner. While her support is evident from her trial

testimony, Skyers should have given more consideration to calling her and testifying as to why she felt his life, age and relationship to others did not warrant death. Respondent's position, that reasonable trial counsel would not have called petitioner's mother, is clearly supported by the evidence introduced during the reference hearing. Her depth of feelings for petitioner, however, is so remarkable as demonstrated by the manner of how she testified, that I find she should have been asked direct questions by trial counsel.

The referee further finds that evidence of love and care for petitioner by family members is credible. Gary Jones' regard for him is deemed credible. The testimony of the younger family members that he was protective is likewise credible.

13. Petitioner's Neighborhood

The increased community dangers, which started to develop in petitioner's neighborhood, are not considered mitigation evidence that was available to trial counsel. Petitioner's involvement in a violent criminal street gang at or about the time of the increase in violent crimes and the gang's use of Helen Keller Park as their hangout would be rebuttal to any claimed mitigation based on increased community dangers.

14. Petitioner's Statements

Petitioner's statements during the trial, to co-defendant Ross, to CYA staff, to doctors and more recently to Drs. Riley and Miora, diminish the value of some of the proposed mitigation themes suggested by his counsel. Mrs. Champion's prior statements concerning his birth, childhood and development to school authorities and CYA personnel as well as her in court testimony greatly reduce her credibility.

Petitioner's statements aggravate the nature of his gang involvement, corroborate the prosecution's gang expert, Deputy Williams, and corroborate Skyers' testimony that neither petitioner nor the family disclosed family secrets. The school

records and CYA reports contain substantial credible evidence that would be inconsistent or prejudicial to many of the claimed themes of mitigation.

15. Ronald Skyers' Credibility

The referee found Skyers to be a very credible witness. Where the record reveals a conflict between Skyers' direct testimony and that of Mrs. Champion and Rita Champion as to discussion of family matters, I found Skyers to be more reliable. I found that family members, including petitioner, knowingly did not disclose family matters to counsel. This is confirmed by Dr. Miora's interview report.

16. Mrs. Champion's Credibility

With the exception of areas dealing with her love and affection for petitioner and her family, I found that when Mrs. Champion was confronted with her prior written statements, she was less than truthful. While she faced daunting day to day challenges as a single parent with a large family and very limited financial resources, I did not find that petitioner suffered from extreme family poverty or that he was denied the basic essentials of food, shelter, clothing, education, transportation or family support.

In view of the purposeful withholding of family matters, Skyers could not have presented evidence of abuse, the impact of Trabue Sr.'s death on petitioner or poverty. A more limited mitigation that is consistent with the evidence adduced during the reference hearing and that might be supportable is that the financial difficulties encountered by petitioner's mother resulted in her absence from home and a lack of supervision of petitioner.

The feasibility of presenting the mitigating evidence by a reasonable competent attorney is discussed in detail in the discussion portion of reference question numbers 2, 3, and 4.

D. Evidence Adduced During Reference Hearing

Prior to summarizing the evidence of additional mitigation presented during the reference hearing, it is important to first note those areas of additional mitigation for which no evidence was presented at the hearing.

Petitioner did not present any mitigating evidence that the 13 year old victim, Eric Hassan, was not handicapped.

Petitioner did not present any further mitigating evidence to demonstrate that co-defendant Ross was the dominant participant. There also was no further mitigating evidence presented to show the nature of the relationship between Ross and petitioner as it relates to both the crime and their gang relationship at the time of the Hassan murders[44].

Petitioner did not present any evidence to support the claims that if Skyers had properly investigated the taped conversation between Ross and petitioner he could have shown that the transcript was deficient or incorrect. No mitigating evidence was presented by petitioner.

Petitioner did not present any mitigating evidence concerning the Jefferson murder. The evidentiary status remains the same as it existed at the time of trial.

Petitioner made no showing that any mitigating evidence existed at the time of the trial as to the two juvenile aggravators presented to the jury. The juvenile aggravators were the 1977 robbery and the 1978 assault with a deadly weapon. The jury was aware of petitioner's age.

1. Petitioner's Claim of Mitigating Evidence (i.e., alibi) for the Taylor Murder

Petitioner's Claim and Evidence Introduced in Support Thereof

Petitioner maintains trial counsel did not properly investigate and present mitigating evidence establishing an alibi for the Taylor murder and related crimes. The

[44] Gary Jones did have a lesser role relative to the older gang members including Ross. This evidence appears to relate to the time between 1973 and 1976.

referee received the following evidence presented by petitioner during the reference hearing:

1) Evidence existed that petitioner was in the company of friends who were never considered viable suspects because they were detained by LASD deputies at the time the Taylor crimes were being committed.

2) Petitioner did not match the description of any suspect who law enforcement saw exiting the suspect vehicle.

3) Petitioner approached the officers from an area which would have made it very difficult, if not impossible for him to have been involved.

4) Deputy Koontz testified Mallet looked like one of the men who fled from the vehicle. (PGE 28 – MPHT.)[45] Mallet was not the driver of the vehicle.

5) It is likely Simms was seated behind the driver. (PGE 22; Court's Exhibit 34.)

6) During that period of time, Deputy Hollins saw three pedestrians walking from outside the containment area, down Budlong from the command post at 126th and Budlong.

7) Harris recalled LASD deputies asking Marcus who was driving the

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[45] Referee's note:
1. PGE 28 - Mallet preliminary hearing reporter's transcript pages 255-285
2. PGE 18 (Exhibit 17C) - Arrest report of T. Naimy and S. Koontz (9 pages)
3. PGE 22 - Mallet Jury Trial Reporter's transcript pages 582-619
4. PGE 16 - Mallet PC 1538.5 Motion Reporter Transcript Deputy Hollins pages 75-83
5. PGE 13 - Sheriff's Department memo from Deputies T. Lambrecht and O. Tong to LAPD (4 pages) (Exhibit GG 17B) also Exhibit 26A
6. PGE 15 - 1-10-81 Telephonic interview with Deputy T. Lambrecht (Exhibit 17B contains PGE 15)
7. PGE 19 - Police Log 1-12-81 entry (Exhibit 7B)
8. Exhibit 17B
9. PGE 32 - F1 cards (Exhibit 29b)

car. Marcus told Deputy Lambrecht the car belonged to his stepfather and that Michael Player had been driving it.

8) Deputy Hollins identified the new fourth pedestrian who was taken to the command post and identified by Deputy Naimy as having left the suspect vehicle.

9) Simms was ultimately correctly identified when he was booked. (PGE 18; PGE 22 – Mallet Jury Trial.)

10) When the mother of Michael Taylor was brought by, she identified Simms as one of the individuals involved in the homicide/robbery.

11) According to Deputy Naimy's testimony, one of the men who exited the driver's side wore "a white jacket."

12) Whether an individual was a juvenile or an adult during the relevant time period, whether LAPD or LASD, if that person was arrested and booked they would have been fingerprinted.

13) Michael Player was the fourth individual. In closing argument at petitioner's trial, the prosecutor himself urged that one of the Player brothers must have been involved in the Taylor crimes, although, he claimed, he was not sure which one.

14) 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.

15) Newly discovered fingerprint evidence excludes petitioner as the third individual inside the Taylor residence. The prosecution theory at trial was that petitioner was one of three inside Taylor home.

16) Simms was booked wearing Navy shoes, blue plaid shorts, a white T-shirt, a blue short sleeve shirt, *white jacket*, blue Levis. (PGE 18.) Simms was a 16 year old juvenile.

Referee's Assessment of the Evidence and Petitioner's Claim

The referee's assessment of petitioner's claim, in view of the evidence presented on the issue during the reference hearing, is as follows (same numerical sequence as petitioner's claims):

1) The referee disagrees. No law enforcement officer testified or reported that petitioner or Harris was detained at the time of the Taylor murder. No LASD deputy can place petitioner at Helen Keller Park at the time of the Taylor murder. The reported crime took place at 11 p.m. to just past midnight or 11:45 p.m. to 12:10 a.m. Three Raymond Avenue Gang members testified at the reference hearing to seeing or being with petitioner on the evening of December 27, 1980. Petitioner testified as to his whereabouts during the trial. Mallet testified he was with petitioner on December 27, 1980 at petitioner's home. Each witness testimony is discussed individually.

2) Petitioner claims his description does not match any suspect observed exiting the suspect vehicle on December 28, 1980 that crashed at 126th Street and Budlong. Deputies Koontz and Naimy pursued the suspect vehicle after they passed each other on Berendo going in opposition directions about three feet apart just past midnight. The duration of the deputies' initial observation was a matter of a second or two. Koontz's and Naimy's broadcast description was "four young male Negroes."

Deputy Koontz said he was two hundred yards away at the time of the car crash. His best description of who got out of the car was any male negro of a youthful age with an afro. Koontz added four persons between five feet and six and half feet tall. Naimy describes the suspects as all male blacks late teens, early twenties

types. One suspect that exited the right side of the vehicle had dark clothing and a plaidish dark jacket. Another suspect exited the right side he was not sure what he was wearing. I think he had dark clothing on. On the left side one person had a white jacket, maybe the jacket had some other colors in it. That person was taller that the first one that got out on the right. Of the four people who got out, two were taller and two were shorter. Naimy also said during the Mallet jury trial that one suspect that got out on left side was wearing a light jacket. When Simms was detained he was wearing a white jacket. Naimy could not say he was absolutely positive Simms came from car. (PGE 19.) Simms clothing when detained, white jacket, blue shirt and pants. (PGE 18, p. 1.) Petitioner's clothing yellow coat, gray shirt and pants. (PGE 32 and 29B.) (But see Exhibit 17A- Simms jacket described as green in color when inventoried.)

3) Petitioner claims petitioner could not be involved since he approached from outside the containment area. The referee disagrees. The four suspects that fled the car, two of them went westbound on 126th Street. (PGE 22, p. 588.) Koontz and Naimy lost sight of them as soon as they went past the corner house at southwest side of intersection of 126th Street and Budlong. (PGE 22, p. 612.) The two that exited on left side went south and then onto the backyard of the second house south of 126th Street and Budlong in westbound direction. Contact was lost immediately. (PGE 22, p. 611.)

At approximately 12:30 a.m. or thereabout while at the command post with Koontz and Naimy, Hollins observed three persons

approach his location from outside the containment area. He first observed them at about 125th and Budlong walking southbound.

4) Petitioner claims that Koontz testified Mallet looked like one of the men who fled from vehicle. (PGE 28 – MPHT.) However, a complete reading of Koontz testimony (PGE 28) leads to different conclusion.

Direct question to Koontz:

Q. Are you identifying Mr. Mallet seated in court as being one of the people who got out of that car?

A. I'm identifying him as possibly being in the car. (PGE 28 MPHT 273: 22-24.) I didn't say that he was one of them that got out of the car. I said that he looks like one of the four that was in the car. (PGE 28 MPHT 274: 10-12.)

On the same page Koontz said that any male negro of a youthful age, with an afro resembled someone who got out of the car. Naimy could not say if his recollection of the bluish jacket was based on his observation of Mallet when he was apprehended or his view of a suspect that fled westbound. (PGE 22, p. 613.)

5) Koontz testified he cannot describe the driver (PGE 28, MPHT 270.) but testified Simms looked like someone who exited left side of car.

6) Hollins testified that he first saw three persons north of his position. Hollins was at 126th and Budlong and the three pedestrians were at 125th and Budlong. (PGE 16.)

7) Marcus Player told Lambrecht his brother Michael was driving the vehicle the last time he saw the vehicle. (PGE 13, p. 3.) Note that

on November 20, 1980 when Marcus was arrested along with Mallet for robbery, Marcus was driving the Player car and at first Marcus claimed he was Michael Player. (Exhibit 27 contains November 20, 1980 police report of arrest of Marcus Player and Mallet.)

8) Naimy never identified Simms as having left the suspect vehicle. Naimy could not make facial identification of anyone. (PGE 22, p 617.) Naimy was not absolutely positive that Simms came from car. (PGE 19; Exhibit 7B.)

9) No document reflects Simms being booked. He was detained and taken into custody but it is unknown if he was booked. (See, Exhibit HH.)

10) Petitioner claims Cora Taylor identified Simms at a field show-up. No other document reflects that Cora Taylor identified Simms at field show-up on December 28, 1980.

11) Naimy at first described the driver with white jacket. (PGE 22, p. 606.) Later he describes it as light jacket. (PGE 22, p. 611.) Petitioner had on a yellow coat. (PGE 32.) The property inventory of Simms clothing describes his jacket as GREEN.

12) Was Simms fingerprinted? See petitioner's LAPD arrest for violating Vehicle Code § 23110 (throwing a rock at a car). Petitioner's arrest report indicates he was not mugged or fingerprinted due to his age. Exhibit 23 contains several police reports, including this arrest report. But this report was not marked individually during the reference hearing.

13) Petitioner's claim that Michael Player was the fourth person at the Taylor residence is just that! A prosecutor's comments during argument are not always evidence. Mr. Strong testified that

Michael Player was a suspect. True, but no reference hearing evidence has been presented to support this claim.

14) The referee disagrees. Exhibit 17B contains Cora and Mary Taylor's descriptions of the suspects. Cora Taylor describes suspect number 2 as M/N 19/20 5'10/6' 160/160 slim, gold earring left ear, dark complexion.

Mary Taylor describes suspect number 2 as M/N 18/19 5'7/5'8 160/165, dark skin, earring left ear.

Petitioner was arrested wearing earring on his left ear and two pieces of jewelry which Mrs. Hassan identified as being taken during robbery/murder committed on December 12, 1980. (Exhibit JJ 1-9-81.)

15) Petitioner's claim that Simms' fingerprint match exonerates him has some defects. The Taylor victims' recollection is that the crimes occurred between 11 p.m. and midnight. They also testified they were locked inside the bathroom when Michael was killed. (RT 2167-2170.) What took place inside the residence while they were locked up in the bathroom is unknown other than the victim was shot by someone.

Simms' fingerprints inside the Taylor residence do not eliminate petitioner from being inside and being identified by Cora Taylor. (PGE 32.) Field identification of petitioner on December 28, 1980: 6 ft, wt 185, clothing yellow coat, gray shirt and pants.

16) It is unknown if Simms was booked. The property inventory of Simms' clothing describes his jacket as green. (Exhibit 17B.)

Car Chase – Containment Area – Arrests

A review of reference hearing documents, police reports and the testimony of witnesses indicates the following as to car chase of the Player car and subsequent events on December 28, 1980.

PGE 28	**Mallet Preliminary RT pp. 255-285**
	Deputy Koontz, Steven J.
	Observed suspect car without lights traveling southbound on Berendo. LASD car was traveling northbound on Berendo in the vicinity of Helen Keller Park. Suspect told to pull over but continues southbound on Berendo before making a right turn onto westbound 126th Street. Deputies Koontz and Naimy pursue the suspect vehicle followed by three LASD units out of Helen Keller Park. The suspect vehicle had four younger male negroes inside the car. The car eventually crashes at 126th and Budlong.
PGE 28 MPHT 260	Four occupants exit the vehicle. Two go between the corner house and the next house to the south. Koontz exited his unit and went back between the buildings then back to the crashed vehicle. He observed a handgun inside the vehicle and a stereo unit in street.
PGE 28 MPHT 263	Koontz first sees the suspect vehicle about 10 minutes past midnight.
PGE 28 MPHT 265: 18-25	Q. Now, at the time that you first observed the defendant, Jerome Mallet, do you recall at this time what clothing he

was wearing? (Note: Koontz has just testified that Mallet was arrested at 1212 W. 126th Street.) (MPHT 265: 4-9.)
A. I believe he was wearing blue jeans. I know positively he was wearing a very heavy plaid type of wool jacket, almost like a very heavy Pendleton. It was a dark – it was grayish, brownish. However, it had many colors, blues and reds in the background.

PGE 28 MPHT 268: 20-24 Q. --- That person that you saw apparently in the custody of Deputy Bogardus, who you have identified as being the Defendant Mallet, did he appear to be one of the four men that you saw actually in the car or not.
A. Yes, he did.

PGE 28 MPHT 269 Koontz testifies that he is about three or four feet away from the suspect car as they pass each other on Berendo.

PGE 28 MPHT 270 Koontz testifies he cannot describe the driver or driver's clothing. He could not tell if the driver had a jacket or just a shirt. Also could not tell if driver had a mustache, a goatee or hat.

PGE 28 MPHT 271 Koontz testifies driver window is open. The duration of Koontz's observation of occupants in the suspect car is a matter of a second or two. The suspect vehicle's estimated speed was between 20 and 30 mph. The estimated speed of Koontz's patrol unit was 20 MPH.

	Koontz could not describe what the right front passenger was wearing at the time the two vehicles passed each other. Koontz saw two persons seated in the front of the suspect vehicle and two persons in the rear. Koontz stated that the two rear passengers were clothed but could not say whether they had a mustache or goatee. (PGE 28 MPHT 273.)
PGE 28 MPHT 273	Koontz testifies that the distance from the suspect car when it crashed was a couple of hundred yards. Koontz could not tell who exited the car first on the left side or right side. Direct question put to Koontz. (PGE 28 MPH 273: 22-23.) Q. Are you identifying Mr. Mallet seated in court as being one of the people who got out of that car? A. I'm identifying him as possibly being in the car.
PGE 28 MPHT 274: 6-12	Koontz best description – they were four, young, male negroes in car. Q. So, when you say that Mr. Mallet was one of the people getting out of the car, you are simply saying -- A. I didn't say that. Q. -- that it was possible? A. I didn't say that he was one of them that got out of the car. I said that he looks like one of the four that were in the car.

PGE 28 MPHT 274: 19-22	Q. So, any male negro of a youthful age, with an afro, you could say he resembled someone who got out of the car A. I believe that would be reasonable.
PGE 28 MPHT 275	Police radio description of the suspects put out by Naimy was "four young male negroes."
PGE 28 MPHT 279	Field show up of Simms at 126th and Budlong around 1:30 a.m. Simms was arrested before show up. (MPHT 279: 12-16.) Simms was not arrested on charge of murder and was released at an unknown time.
PGE 28 MPHT 279: 19-28	Koontz did not identify Simms as being someone who left the suspect car. However, he did not rule out Simms. He testified he looked like he was one of them that exited the car on the left side.
PGE 28 MPHT 280: 20-28	Koontz's statement on police report, "Subject 1, Simms, exited the vehicle from the left side door of the vehicle and ran south on Budlong." But when questioned on the statement Koontz qualified it by saying "it appeared that he was."
PGE 28 MPHT 282	Koontz's description of Mallet, other than he was a youthful male Black, he added that Mallet was the same approximate size.

PGE 28 MPHT 283	Two of the suspects ran westbound on 126th Street and could not be seen once they ran past the corner house.
PGE 28 MPHT 284	Two of the suspects were on the north side of the corner house, which put them on 126th Street. The other two suspects ran on the south side of corner house. Koontz gives a further description of suspects as four persons between five feet tall and six feet six inches tall.
PGE 18 (Exhibit 17C)	**<u>Arrest Report of T. Naimy and S. Koontz</u> (9 pages written by Naimy)**
PGE 18 p. 5	The report describes the number of units involved and the established containment area. Robert Simms was seen emerging between two houses on the north side of 127th Street and walk westbound on 127th and join three others.
PGE 18 p. 6	Simms was detained because he fit the description of a vehicle occupant.
PGE 18 p. 8	Suspect Mallet located hiding in the rear of 1212 W. 126th Street. Simms parents were contacted at 0420 hours.
PGE 18 p. 1	Simms' clothing consists of a white jacket, blue shirt and pants.

PGE 22	**<u>Mallet Jury Trial Reporter's Transcript</u> pp. 582-619** **<u>Testimony of Theodore R. Naimy Jr.</u>**
PGE 22 p. 588	Naimy describes how four suspects exited the vehicle, two ran southbound and between some houses and two went westbound on 126th Street. He chased the two suspects that went southbound.
PGE 22 p. 590	Naimy describes all of the suspects as male Blacks, late teens, early twenties type.
PGE 22 p. 605	Naimy requested a helicopter and a canine unit. No helicopter was made available due to fog.
PGE 22 p. 606	Naimy's description of suspects. One suspect that exited on the right side wore dark clothing and a plaidish dark jacket. Naimy was unsure about what the second suspect to exit from the right side was wearing but thought he had dark clothing on. From the left side of the vehicle, one suspect wore a white jacket perhaps containing some additional colors. That person was taller than the first one that got out on the right side.
PGE 22 p. 607	Naimy testifies that of the four people who exited the vehicle two were taller and two were shorter. The person who had a plaidish jacket on the right side was shorter.

PGE 22 p. 608	Naimy cannot say whether the person apprehended (Simms) was or was not one of the four suspects that fled the car. His clothing and body configuration was consistent with one of the person's that exited on the left side.
PGE 22 p. 611	Naimy describes one suspect that got out from the left side of the vehicle as wearing a light jacket. He also indicated he was one of the taller persons that ran southbound and then into the backyard.
PGE 22 p. 612	The second person also ran in the same direction and was shorter. He had dark clothing but could not say if he wore jacket, shirt or sweatshirt. The other two suspects that exited the vehicle from the right side ran west along 126th Street. Naimy could not see how far they ran west on 126th Street. He lost sight of them as then ran past a corner house.
PGE 22 p. 613	Naimy's description of the two suspects who ran west on 126th Street. One wore dark pants, dark shoes and a dark plaid color jacket believed to be bluish in color. He could not say if his recollections of the bluish jacket were based on his observation of Mallet when apprehended or his view of the suspect that fled westbound. The person with the jacket was shorter than the other person who got out from the right side. The other person had dark colored clothing.

PGE 22 p. 615	Simms' physical description is that he is 5 feet, 6 inches tall weighing 130 pounds.
PGE 22 p. 617	Naimy could not make a facial identification of anyone.
PGE 16	**Mallet Penal Code § 1538.5 RT pp. 75-83**
	Deputy Hollins Testifies
PGE 16 p. 76	LASD Deputies Hollins and Doam assigned as rover patrol for containment area at approximately 0030 hours. The streets are about a quarter of a mile in length 126th to 127th, Budlong to Raymond.
PGE 16 p. 78	Arrested Mallet. When he first arrived, Hollins went to the command post located at 126th and Budlong and spoke to Deputies Naimy and Koontz.
PGE 16 p. 81	Three individuals approached the command post. They were first observed at about 125th and Budlong walking southbound.
PGE 16 p. 82	Later Hollins took Simms from 127th and Raymond to the command post. Simms was identified as possibly one of the subjects that exited the vehicle in the crash.

PGE 13 (Exhibit GG, 17B)	**LASD Memo from Deputies T. Lambrecht and O. Tong to LAPD (4 pages)**
PGE 13 p. 3	Notes the following: Subject/Player stated the vehicle belonged to his stepfather. As Deputy Lambrecht asked subject/Player who was driving the vehicle now, subject/Player replied his brother Michael was driving the vehicle the last time he saw the vehicle.
PGE 15 (Exhibit 17B)	**January 10, 1981 Telephonic Interview of Deputy Tom Lambrecht - 1015 Lennox Sheriff** When the vehicle was stopped and the investigation was being conducted, Marcus Player came by the location. Lambrecht asked if the car was his, he stated no it is my stepfather's and Michael Player (brother) had the car. At this time he noticed that Steve Champion was with Marcus but was not with him during the earlier interview. Lambrecht and Tong had interviewed four men at Helen Keller Park around midnight. One of those was Marcus Player. Note the time of the crime is not definite; 2345-0115 hours.
PGE 19 (Exhibit 7B)	**Police Log (1 page)** January 12, 1981 Log entry Contacted Naimy at Lennox Sheriff – states Simms had similar clothing, height, weight, age and came from cordoned area, without reason for being there but was not absolutely positive that Simms came from car. Has vague recollection

of how suspects looked when they drove by. Could possibly be brought out with hypnosis.

Exhibit 17B

Mary Taylor's Description of Suspects to LAPD on December 28, 1980 – Interview by G. Dewitt.

First suspect to enter residence

M/N black hair, brown eyes, height 5'4 / 5'5 150 lbs 18/19 wearing beige/brown checked jacket, blue levis/cords, little beanie, dark colored medium brown complexion, real thin side burns

Second suspect to enter residence

M/N Black short natural, brown eyes about 5'7/5'8 160/165 lbs, 18/19 years old, dark skin, earring in left ear, big lips – kind of wide mouth, dark long sleeve shirt, and blue jeans.

Third suspect to enter residence

M/N Black hair with a jerry curl 5'6 tall 145/150 lbs 20 years old, maybe mustache, big eyes, Levis and plaid beige jacket.

Cora Taylor's Description of Suspects to LAPD on December 28, 1980 – Interview by Detective Calagna.

First suspect to enter residence

M/N 17/20 5'4/5'6 130-140 Light complexion, slim, black hair, multi-colored jacket (NFD) like plaid jacket, had gun.

Second suspect to enter residence

M/N 19/20 5'10/6' 150/160 lbs., slim, dark complexion, brown long sleeve shirt, gold earring left ear (NFD)

Third suspect to enter residence

M/N 19/20 5'10/6' 150/60 slim, dark complexion (NFD) Black hair.

Fourth suspect to enter residence

M/N (NFD)

PGE 32 (Exhibit 29b)

Field ID cards Steve Allen Champion 12/28/80

Champion Physical Description: Height 6', Weight 185

Clothing: Yellow coat, gray shirt and pants

Exhibit 17B

Mallet arrest report dated December 28, 1980. (Calagna/Dewitt)

M/N black hair brown eyes 5'5 140 lbs blue shirt and pants black shoes

Exhibit 17B

LASD Property Report dated December 28, 1980 – Simms

Green jacket, blue Levis pants, shirt, blue nylon s/s, navy shoes

[LASD Property Report written by Dewitt/Calagna. Page two – inventory of clothing taken from Simms – item 44 – 1 jacket – brand reeves- color green.]

Exhibit 17B

Weather on December 28, 1980: Light fog

Exhibit 17C

Mallet Arrest Report

Naimy/Koontz

Robert Aaron Simms

M/N black hair brown eyes, 5'6, 130 lbs, 16 years old, DOB 7-5-64

Clothing white jacket, blue shirt and pants

Exhibit 17D

Arrest Report Craig Ross 8-01-81

M/N black hair, brown eyes, 5'7, 180 lbs, DOB 2-01-59

Referee's Findings Concerning Credibility of Claimed Alibi for Taylor Crimes

1. The alibi testimony of the three Raymond Avenue Crips gang members, Harris, Player and Bogans is not credible. Petitioner's comments to Dr. Miora confirm the loyalty of gang members to each other. The three witnesses were members of a violent street gang for a substantial period of time and were gang members at the time of the crimes and the trial.
2. No LASD or LAPD deputy/officer detained petitioner or Harris at the time of the Taylor murder.
3. The description of the four suspects that fled the car on December 28, 1980 was too broad and general to exclude petitioner.
4. The fact that LASD deputies lost immediate visual contact with two suspects at the corner of 126th and Budlong does not eliminate the possibility of petitioner approaching that same location from 125th and Budlong. The loss of visual contact and an unsecured perimeter does not preclude petitioner as a Taylor suspect.
5. The descriptions of the Taylor crime suspects given by Mary and Cora Taylor does not eliminate petitioner.
6. Simms' fingerprints were not available at the time of trial.
7. The fingerprint match of Simms to the Taylor crime scene does not exonerate petitioner.
8. A diagram depicting the containment area established by the LASD on December 28, 1980 is reflected on the next page (page 108-A) of this report.

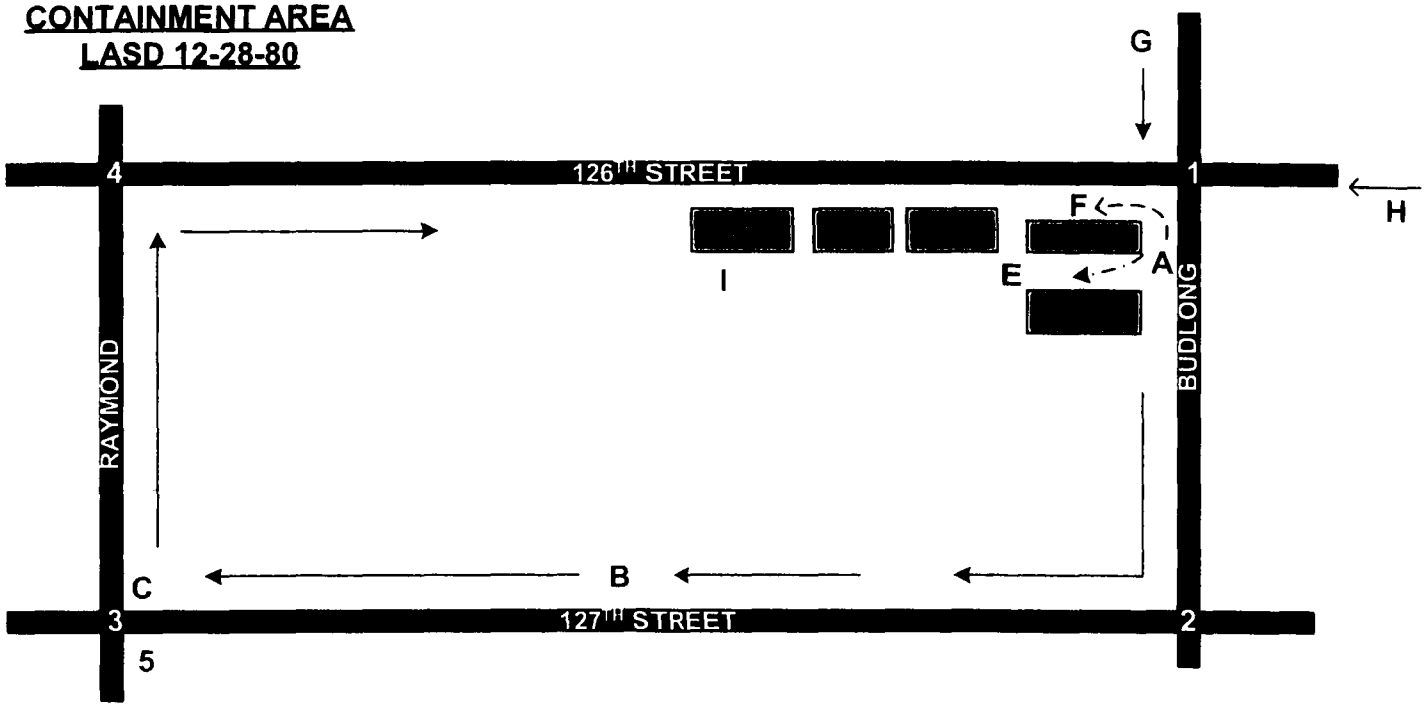
2. Petitioner's Social History, Mental Status, Development and Functioning

a) Petitioner's Gang Affiliation and Changing Neighborhood

Petitioner's family moved to 1212 126th St. in 1968. The neighborhood was considered by Mrs. Champion to be a nice neighborhood until 1978. (RHT 5417-5418.)

IN RE CHAMPION
HABEAS PROCEEDING

CONTAINMENT AREA
LASD 12-28-80



LEGEND:

1 Officers Koontz and Naimy* Command Post
*Deputy Hollins briefly joined them at this position
Hollins sees Petitioner/Player/Harris S/B from 125th and Budlong approaching his position
2 Deputies Smith and Martin
3 Deputies Lambrecht and Tong
4 Deputies Duran and Bragg
5 Rover Unit - Hollins/Doan
A Car Crash
B Simms joins Petitioner/Player/Harris
Simms tells LASD - he was with a person named "Jerome" NOTE: Mallet's middle name is "Jermone"
C Simms/Petitioner/Player/Harris stopped-question-Simms (who ID'd himself as Taylor) detained
D 1212 W. 126th Street - Petitioner's residence
E Two suspects flee car go between corner house (S/W corner of 126th St) and
second house (S/W side of 126th & Budlong). LASD Officers Naimy/Koontz follow lose contact at E.
2 other suspects go W/B on South side of 126th St. LASD loses sight as they go around corner house at F.
G Deputy Hollins while at 1 with Koontz/Naimy sees three persons walking toward his position. Hollins first sees Petitioner/Player/Harris at 125 & Budlong
H Harris testified Petitioner and himself approached LASD command post 1 by walking W/B from Helen Keller Park. While walking W/B on 126th St joined by Player
I Evan Jermone Mallet arrested at backyard of Petitioner's residence

Sources Ex 76 Aerial Photo

From 1976 forward, when Rita Champion was still in high school, she noticed evidence of gangs which included graffiti and violence in the neighborhood. (RHT 5265-5266, 5272.)

By the time Rita Champion was 17 years old (1978) the neighborhood had changed. There was increased police presence, fights at Helen Keller Park -- which was just down the street from where the family lived, and people's homes were burglarized. (RHT 5263-5264.)[46]

Gary Jones recalled the neighborhood in which he and petitioner grew up as "really rough." "I remember some guy shooting at me and Steve one night, and we ran and ran.... we ran and looked for Reggie, and Reggie came out and checked everything out and made sure we were okay, and we felt a little safe." Jones remembered this incident occurring when he was 11 years old. (RHT 5671.)

The neighborhood was not always dangerous. Jones moved in when he was five years old. He described the neighborhood at the time as beautiful. By the time Jones was in the seventh grade the neighborhood had begun to change. Gangs began to dominate the area. Every 10 to 12 blocks there was a different gang. When the neighborhood began to change Jones noticed that drugs became more available, Denny's restaurant was robbed and people were being shot. (RHT 5672, 5679.)

By seventh grade, Jones and petitioner affiliated themselves with the Raymond Avenue Crips. Jones described their association in the gang as meeting in the park drinking "40 ouncers" and smoking marijuana. If there was a fight Jones and petitioner would fight and they would be protected. Jones described his association in the gang as a "social club." (RHT 5672.) Jones had no knowledge of petitioner participating in criminal activities such as burglaries or robberies. (RHT 5674, 5677.)

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[46] "I noticed it was changing. And I felt about 15, 16, there was the graffiti on the walls. Homes were being broken into. People were starting to get beat up a lot. And there were a lot of incidents were the police was always at the Park. And I believe they came up with the gang unit at the Park." (Referee Note: Helen Keller Park was the Raymond Avenue Crips' gang hangout)

"Lacking a sense of belonging, again, that is consistent with my understanding of, and the development of my opinion that his gang affiliation was to a large extent, although I'm not saying it was the only factor, driven by his desire to be connected, to feel a sense of belonging, to feel a sense of protection that was not available in other contexts, in his academic world, at home, and in the community at large." (Dr. Miora RHT 8130.)

Linda Champion noticed changes in the neighborhood in the mid-1970s. (RHT 6861.) Changes in the neighborhood began before petitioner went to the CYA and escalated from that time. (RHT 5354.)[47] Traci Robinson did not recall her neighborhood being unsafe. (RHT 5587.)

According to family members, petitioner did not associate with gangs until 1977-1978 when he was 15 or 16 years old and became involved in the juvenile justice system. (RHT 5266.) Petitioner started hanging out with older young men who Rita Champion suspected were in gangs. Some of these individuals included Marcus Player, Craig Ross, and Raymond Winbush.[48]

A number of individuals described as Raymond Avenue Crips gang members were neighbors and family friends that had grown up and gone to school with petitioner and/or his siblings.[49] (RHT 5268.)

According to Earl Bogans, who was a member of the Raymond Avenue Crips in December 1980, petitioner was a member of the Raymond Avenue Crips in December 1980. Petitioner had the moniker of Treach. Craig Ross, Jerome Evan Mallet, Michael

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[47] "People were starting to get shot. People were actually getting beat up more frequently, and stuff like that. The park became a place where you really didn't want to go anymore, because a lot of fights and robberies and stuff was occurring around in that area and stuff. It just got really bad." (RHT 5355.)

[48] Petitioner's gang expert, Steve Strong, testified that "[People join] gangs for several reasons. Some joined for what they missed at home, a family structure. They had no one that cared about them, clothed or fed them. Some joined because they like the respect and status. Some like the style of dress and camaraderie. Some people, young and old in the neighborhood, adopted the type of dress and color up again in the area." (RHT 4887-4888.)

[49] "We grew up together. [Evan Mallet] is a little younger than me, but his sister and his brother were – we are pretty much all this age as my sisters and brothers, went elementary together and middle school together." (RHT 5212.)

Player, Marcus Player, Lavell Player, and Robert Aaron Simms were also Raymond Avenue Crips and known respectively by the monikers Evil, Kooc, Scragg, Spark, Scrooge, and Lil Owl. (RHT 2659-2662.)

According to Wayne Harris, petitioner was a member of the Raymond Avenue Crips and had been one since 1975. (RHT 2766.)

According to Linda Champion, Wayne Harris was much older than petitioner. He was Linda's age. She found it unlikely that Wayne Harris would know whether or not petitioner was a member of the Raymond Avenue Crips. (RHT 6841.)

Petitioner's Statements to Doctors

1. Dr. Brown (Exhibit I)
2. Dr. Perrotti (Exhibit J)
3. Dr. Miora's interview of petitioner (Exhibit 136)
4. Dr. Minton (Exhibit D)

July 29, 1980 Psychiatric Evaluation by Dr. Brown (BS 000071)-

The youth has had some gang involvement in the past but states at the present time that he has severed these ties.

December 5, 1979 Psychological Evaluation by Dr. Perrotti (BS 000900)-

Mr. Champion related that his history of violent offenses is partially due to his association with gangs of youths subscribing to violence. It seems that he, in all probability, subscribes to their values and attitudes. Mr. Champion related that most of his offenses were for "fast money." He states that "if it were not for fast money, I would not have committed the offenses."

He sees one of his primary mistakes as his decision to associate with individuals who have a propensity to become involved in trouble. He tends to cover up feelings within himself that he is not successful.

Petitioner's Statements to Dr. Moira-

"In the first of three interviews Mr. Champion spoke extensively about the central place of gang affiliation in his life as a source of consistency, attention, and security. He was sought out when he was not present in expected context, protected and cherished as a valuable member and boosted because older affiliates included him in the fold. This experience was completely contrary to the unstable, unpredictable home environment. There was room to explore, play, and develop, albeit in a dangerous context of posts Watts and unwarranted police interrogation, see articles on South Central post-riots of 1965 and police brutality in South Central. Mr. Champion recalls having raised pigeons and dogs with his "homies." These were memorable violence free activities and occupied hours of time when Mr. Champion was younger and prior to his placement with the California Youth Authority. By the age of 14 years Mr. Champion reports it was necessary to be armed to go to parties and dances as the circumstances were unpredictable. He understood that guns were obtained from burglaries and it was considered a badge of honor to a homeboy. The guns were stashed a designated location permitting everyone needing access. However, stealing the gun would be grounds for instant dismissal from the gang. Mr. Champion distinguished that reputation was built on fighting rather than use of guns. His perception is that "older gangs have to use guns. They were grown men fighting young guys." In other words, the younger man had more strength and agility. When asked the value of his gang involvement, Mr. Champion stated pride, status, unity, respect, honor. The increase in murders escalated while Mr. Champion was in YA for the first time. He recalls a prominent Bloods gang member having been murdered by Crips gang member in 1975. There was a retaliatory murder of a Crips gang member by the Bloods, which retribution was much too Steve Champion's horror commemorated by a repeat anniversary murder of a Crips gang member for each of the next several years. Concomitant to Mr. Champion's legal involvements all of his brothers had exposure to legal system." (Exhibit 136, p. 14-15; RHT 8297-8299.)

In Dr. Miora's opinion, petitioner's association and gang life "afforded a modicum of safety in school context, community context, and for Mr. Champion, specifically, home context that was not safe and was not predictable and was not protected." (RHT 8045.)[50]

Gang members were considered by petitioner to be family. "[P]eople he could rely on and whom, if he could be relied on..." (RHT 8045.) He laments his uncles not having asked him personal questions in an effort to make a connection with him. He stated that they asked "no penetrating questions" as compared to his homeboys about whom he said, "these guys were willing to die for you." (Exhibit 136, p. 16.)

Petitioner told Dr. Miora of the efforts he would undertake in order to stay safe in the community prior to his commitment at the CYA. These included limiting his alcohol intake so that he would feel more in control and able to maintain a state of hyper vigilance, feeling the need to be armed because "there was never a sense of who might be there or what kind of unpredictable violence circumstance might erupt," and taking evasive measures when walking down the street. (RHT 8044-8045.)

Dr. Miora opined that these circumstances had a negative impact on petitioner's functioning and development and indicated his perception of fear, lack of protection, and danger in his neighborhood. (RHT 8052.)

It was noted in petitioner's juvenile records (Exhibit 147) that petitioner was not totally committed to or immersed in the gang subculture. The CYA evaluators

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[50] The reference court repeatedly denied petitioner's requests for funding with which to retain a "gang expert." As a result, petitioner has been denied the opportunity to address gang related themes such as a) the impermanency of gang membership and gang criminality, b) the psychological factors leading to gang membership and c) the negative and positive impact of gang affiliation on petitioner. Moreover, petitioner would have presented evidence that because the Raymond Avenue Crips were established at a time when petitioner was not yet a teenager, the prosecution's assertion that petitioner was an "original gangster" was subject to dispute.
Petitioner was permitted to elicit from an investigator some information regarding the makeup of the Raymond Avenue Crips, including that O.G. stands for original gangster which was any name given to a small number of gang members who dictated what went on. More or less an older and more mature leader, with age being the major factor. (RHT 2879-2884.) Also that from the ages of 19 to 21 most individuals leave active gang participation and focus on personal gain. (RHT 2884-2885.)

suggested that petitioner would be amenable to a different kind of adjustment given the opportunity to do so. This comment was followed by recognition that petitioner was a follower and that he was actually used by gang members. (RHT 8133.)

Petitioner raised the issue of leaving the Raymond Avenue Crips during his interview with Dr. Miora. He reported that when he got out of the CYA the individuals he used to hang out with were gone. (RHT 8302-8303.)

December 15, 1978 Psychiatric Report by Dr. Minton (BS 000097)-

He also states that he's been a member of gang for two or three years. He was last active in this gang one year ago.

b) Petitioner's Drug and Alcohol Use

It was reported that petitioner began using alcohol and drugs in elementary school. (RHT 6717; Exhibit 18; Exhibit 46.)

Linda Champion thought both her sister Rita and petitioner used marijuana and that petitioner drank alcohol. (RHT 6833.) When petitioner smoked, his reactions became slowed and he did "abnormal stuff." (RHT 6837.)

Indications in petitioner's 1979 juvenile records are that petitioner had been using alcohol and marijuana several times per week over the last couple of years, which would have placed the activity between the ages of 15 and 17. (RHT 8125.)

By seventh grade, Jones and petitioner affiliated themselves with the Raymond Avenue Crips. Jones described their association in the gang as meeting in the park drinking "40 ouncers" and smoking marijuana. (RHT 5672.)

<u>December 15, 1978 Psychiatric Report by Dr. Minton (Exhibit D - BS 000097)</u>

This ward's drug history includes smoking marijuana twice a week and drinking two cans of beer on weekends.

July 29, 1980 Psychiatric Evaluation by Dr. Brown (Exhibit I – BS 000071)

The youth admits to occasional use of alcohol and grass in the past; however, he states that this usage is somewhat minimal.

Petitioner's Statement to Dr. Moira (Exhibit 136)

Mr. Champion's substance abuse began in late elementary school when he found Lewis' leftover marijuana and purchased small amounts of the substance from friends. He spent most of his Junior High School days high on marijuana and weekends drinking with friends at vacant apartments which shelters were treated "like a clubhouse." His friends and he listened to music and consumed alcohol. He ceased and desisted rapidly as he "did not like the sloppiness." He felt he needed to maintain a degree of alertness at all times and thus, was not attracted to other substances. He had "street fears, being caught slipping, not able to defend self." He remained hyper vigilant and cautious. Two of his close friends refused drugs, including Craig Ross and Raymond Winbush. Marijuana permitted Mr. Champion to relax but maintain a sense of control in what he perceived to be an increasingly dangerous world. (Exhibit 136, p. 20.)

The referee finds above notations/opinions/statements to be credible.

c) Petitioner's Mental Status

Impressions of Family Members and Friends

Wayne Harris knew petitioner since 1970. Earl Bogans knew petitioner since 1975.

Petitioner's mother told a CYA investigator on December 11, 1978 that petitioner "learns easily." E.L. Gathright thought he was a bright kid. (RHT 5147.) Gary Jones testified that petitioner was bright and intelligent. (RHT 5688-90.)

Petitioner appeared to be mentally sound. He never complained of headaches. (RHT 2731-32.) Petitioner was not mentally slow. (RHT 2695-97.) Petitioner did not appear to his friends to be "mentally slow" or suffer from "brain damage." (RHT 2695.)

Mental Evaluations

While petitioner was at the CYA between 1978 and 1980, he was evaluated by two psychologists and two psychiatrists.

1. Doctor Prentiss (Psychologist - Exhibit D and J)
2. Doctor Minton (Psychiatrist - Exhibit D)
3. Doctor Perrotti (Staff Clinical Psychologist - Exhibit J)
4. Doctor Brown (Psychiatrist - Exhibit I)

Prior to trial, petitioner was examined by Drs. Pollack and Imperi. The date of the report is December 2, 1981. (Exhibit 46)

Subsequent to petitioner's conviction and sentence, petitioner was evaluated by the four additional doctors.

1. Examined and tested by Doctor Riley (Psychologist specializing in clinical neuropsychology) on February 12, 25, 1997. (Exhibit AAA)
2. Doctor Faerstein. The date of the report is May 11, 2005. (Exhibit RRR)
3. Neuropsychological report of Doctor Hinkin dated March 28, 2005. (Exhibit VVV)
4. Doctor Miora (Clinical psychologist). Report dated April 1, 2007. (Exhibit 136)

Summary of CYA Doctors' Evaluations

December 13, 1978 Report by Dr. Prentiss-

This ward is suffering from an underlying depression which appears to be recurrent and episodic. It appears to be related to some internal conflict in which the ward is torn between prosocial and antisocial behavior. Antisocial behavior seems to

attract him as it provides the acceptance and approval that he needs and at the same time gets him attention from his family. It also gives him a measure of competency and helps to carry out tasks in his struggle for independence. He is likely to be aggressive toward others if provoked. He tends to be easily influenced by others and is somewhat impulsive. Self-esteem is also low. Psychological procedures: clinical interview, draw a person, Bender Gestalt, Rorschach and Thematic Abperception test. There is no neurological impairment. His feelings of remorse for his past behavior in general and his recognition of having problems are good prognostic signs. This ward would benefit from a structured and closely supervised environment.

December 15, 1978 Report by Dr. Minton-

Well developed and well nourished adolescent male who appeared to be his stated age. He was alert and oriented to time, place and person. His intelligence was in the average range. He conceptualized concretely. His memory was intact. His associations were tight throughout the interview. His affect was appropriate to the content of the interview. His mood was polite and friendly. This ward showed no guilt or remorse over his offense. He denied depression and denied a history of hallucinations. There was no evidence of a thought disorder or mood disorder. Impulse control and judgment were impaired. Insight was limited.

December 5, 1979 Report by Dr. Perrotti-

The Minnesota Multiphasic Personality Inventory profile was valid. Individuals who obtain similar profile tend to be rather open and blunt in speech and manner. Individuals who obtain similar profiles are often described as extroverted, overactive and rather irresponsible. These individuals usually are seen as hostile, engaging in superficial and shallow relationships with others, as having fluctuation morals and poor conscience development.

He was oriented to time, person and place, alert and quite cooperative with the interview. His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease, or any kind of cognitive abnormalities. His memory as tested to both conversation and direct questioning was very good. His calculating ability showed him to be rather sharp and occasional mistakes may, he felt, be due to anxiety. The youth gave no indications of any type of depression, suicidal or homicidal ideations, or any lack of judgment or insight skills.

July 29, 1980 Report by Dr. Brown-

At the time of his examination of petitioner in July 1980, Dr. Brown saw no evidence of mental retardation, organic brain syndrome, psychotic mental health disease, or any kind of cognitive abnormalities. Brown described petitioner's memory as very good and his calculating ability as rather sharp. (RHT 6340-6341; Exhibit I.)

Summary of December 2, 1981 Pre-Trial Mental Evaluation by Drs. Pollack and Imperi

Dr. Pollack's report has a notation indicating his 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.

Summary of Post-Conviction Mental Evaluations

February 1997 Neuropsychological Evaluation by Dr. Riley-

Dr. Riley is a clinical neuropsychologist. (RHT 3156.) She tested petitioner at San Quentin State Prison on February 12 and February 25, 1997 for a total time period of between eight and ten hours. (RHT 3174-3175.)

The purpose of Dr. Riley's testing was to determine the existence, severity and effect of brain damage and cognitive impairment and to analyze petitioner's performance in light of inherited physical or psychiatric dysfunction, substance use or abuse, pre or perinatal trauma, acquired brain damage or psychiatric disorder. (RHT 3176-3177.)

The purpose of her evaluation was to identify dysfunction if it existed. More specifically, the purpose of her evaluation "was to determine if there was any neuropsychological impairment that might have been offered in mitigation against the death penalty." (RHT 3230-3231.)

Dr. Riley received a number of materials she was asked to review which included school records of petitioner and many of his siblings, information about family background, interview notes with various family members and friends, some criminal records of siblings, a statement of facts from the opening brief in petitioner's appellate case, the Pollack report, and some CDC records. (RHT 3178-3185; Exhibit 106.)

There are several possible sources or etiologies of Mr. Champion's cognitive deficits and brain dysfunction. In my opinion, a prominent source of these deficits is the in utero insults he may have suffered when his mother was beaten by her husband during pregnancy. Other sources included physical abuse suffered by Mr. Champion during his childhood and early adolescence, and his abuse of drugs. (Exhibit AAA.)

Dr. Riley recognized that her declaration contains the phrase "in my opinion a prominent source of those deficits is the in utero insult he may have suffered." Dr. Riley explained that her opinion could have been phrased better, however the phrase does in fact indicate in utero abuse may or may not have been suffered. Additionally, Dr. Riley was not tasked with determining a cause for the neuropsychological deficits she attributed to petitioner.

It is likely that in Mr. Champion's case, his home environment greatly exacerbated, rather than ameliorated his brain dysfunction. His home environment offered no protection and afforded him no resiliency. Instead, his environment likely

provided an additive effect to the possible effects of early brain insults. Research on the effects of abuse and violence in the home on children's school behavior suggests that abused children and children who witness violence in the home have greater difficulty sitting in the classroom and are more vulnerable to a range of learning difficulties.

Head trauma is known to cause brain damage and cognitive deficits. Moreover, the effect of multiple head trauma is cumulative. An injury which itself is unlikely to leave lasting damage can, when combined with other injuries, result in neuropsychological impairment.

Mr. Champion's deficits, as revealed by the neuropsychological testing, in problem solving, nonverbal reasoning, attention and slowed information processing render him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misreading cues concerning the intentions of other persons.

As a discipline, neuropsychology existed in 1982. (RHT 3207.)

Dr. Riley administered the Weschler Adult Intelligence Scale Revised (WAIS-R), which is a standard IQ test. Petitioner earned a verbal IQ of 92, a performance IQ of 74, and a full scale IQ of 83. (RHT 3208-3209.) The 18 point difference between petitioner's verbal IQ and performance IQ is a marker or indicator of brain dysfunction. (RHT 3210.)

Dr. Riley noted petitioner's strengths confirmed the higher verbal IQ test, including his vocabulary skills and the fact that he was articulate, well read, and interested in sophisticated reading materials. (RHT 3212.) Petitioner was strongest on measures of verbal comprehension. He fell into the 39th percentile which is in the average range on those kinds of tests. (RHT 3243.)

Petitioner fell into the 10th percentile for measures involving numbers and his attention and concentration process (RHT 3243.) Petitioner fell into the 3rd percentile on measures involving spatial processing. (RHT 3243.)

Using IQ scoring available in 1980, petitioner's verbal score of 92 would have placed him in the 30th percentile. Petitioner's performance IQ of 74 would have placed him in the fourth percentile. Petitioner's full scale score of 83 would have placed him in the 13th percentile. (RHT 3246.) This is considered the low average range of intelligence. (RHT 3300.)

Dr. Riley reviewed petitioner's school records which indicated at one point he was given an IQ test score of 75. Because there was no indication of what test was given to petitioner, Dr. Riley was not able to attribute any weight to that score. However, a score of 75 is low and suggestive that at least early in his school career petitioner was performing sub optimally. (RHT 3214.)

The only test designed to assess any impairment that did not exist in 1980 which was given to petitioner was the Memory Assessment Scale. (RHT 3224.) The Halstead Reitan Battery used to evaluate petitioner was available for use in 1980. (RHT 3246.)

Dr. Riley described the tests which made up the Halstead Reitan Battery, and particularly those seven components which are deemed to be most predictive of brain dysfunction-making up what is called the Halstead Impairment Index which were used to assess petitioner. Petitioner scored in the impaired range on all seven components. (RHT 3247-3253.)

Dr. Hinkin was asked the significance of petitioner's performance "if in fact he performed at the level no better than two out of 10,000." However, it was not Dr. Riley's opinion that petitioner performed "no better than number two of 10,000," rather that his scores on the Halstead Impairment Index was statistically rare. Dr. Hinkin would place petitioner in the bottom 1,000 to 2,000 of 10,000 people. (RHT 6399.)

Dr. Riley also saw significant impairment on other tests. Dr. Riley identified those tests which would have been available in 1980. She indicated the version with which she tested petitioner would have been available in 1980 and that the scores received by petitioner in 1997 would have been the same if scored in 1982. (RHT 3254-3255, 3259-3270.)

Based only on the tests that would have been available and scored in 1982, Dr. Riley's overall conclusion was that petitioner had significant neuropsychological impairment that spanned a variety of functions. (RHT 3270-3271.)

Dr. Hinkin and Dr. Riley were of the opinion that petitioner suffered from ADHD and dyslexia which impacted his academic performance. Dr. Faerstein saw no contrary evidence that led him to believe that petitioner did not have ADHD or dyslexia during his school years. (RHT 6719.) Dr. Hinkin noted that there was information contained in Dr. Perrotti's report which could be interpreted as evidence of attention deficit hyperactivity disorder (RHT 6423-6424.)

In petitioner's school records it was noted that he had difficulty, was performing below average on perceptual motor skills, needed to improve his ability to listen, was easily distracted, was working below grade level, had difficulties in his family life, and an IQ score of 75 at fourth grade. Also, in the seventh grade petitioner was reading at the second-grade level, in eighth grade at the fourth grade level and failing nearly every subject. Petitioner was also placed in remedial classes. While at the Youth Authority, when petitioner was in the 11th grade his reading level was at the fifth grade, arithmetic between the fifth and sixth grade, English grammar at the third grade, and spelling at the sixth grade level. Comments there also indicate he was not adaptable to paper or book work. (RHT 3281-3283.) When tested by Dr. Riley in 1997, petitioner was at the 11th grade level in reading comprehension. (RHT 3371.)

Dr. Riley reviewed mental health evaluations which predated her testing. Among those reviewed was a psychological report by Dr. Prentiss, a psychiatric report by Dr. Minton, a psychological evaluation by Dr. Perrotti, a psychiatric evaluation by Dr. Brown, a letter authored by Dr. Pollack, a psychiatric evaluation by Dr. Geiger at San Quentin and a psychological evaluation by Dr. Charles Steinke at San Quentin. (RHT 3285.) Dr. Riley reviewed these materials after she prepared her declaration but prior to her testimony at the reference hearing. (RHT 3324-3329.)

None of the individuals who authored those reports was a neuropsychologist. There is no indication within those reports that any of those individuals gave petitioner the same battery of neuropsychological tests that Dr. Riley gave to petitioner (RHT 3286.)

The only neuropsychological test indicated in the reports was a Bender Gestalt Test given by Dr., Prentiss in 1978 and a Bender Gestalt Test and a Ravens given by Dr. Steinke at the time of petitioner's intake at San Quentin prison. (RHT 3286.)

Dr. Prentiss' conclusion of no neurological damage is consistent with the Bender she gave petitioner if she read it correctly. However, it cannot be said that her finding of no neurological deficit is supported merely by a "good" Bender and Dr. Riley had no raw data from which to determine whether Dr. Prentiss' read petitioner's Bender correctly. (RHT 3368-3369.)

Although it has fallen into disrepute, no credible neuropsychologist would say that you can get an IQ from giving the Ravens, it was at one time thought that one could derive an IQ from scoring this test. The test was known to overestimate IQ. In petitioner's case he scored a 90. (RHT 3291-3292.)

Failure to identify petitioner's neuropsychological deficits by those who evaluated petitioner prior to Dr. Riley can be explained by the fact that they relied primarily on verbal interviews. Petitioner's verbal abilities are normal, he has a good vocabulary and he can be articulate. However, "when one moves away from the verbal area of strength, and one starts to test other nonverbal or performance types of tasks, including visual, spatial and more complex problems solving, that's when the deficits become apparent. And those were never fully assessed." (RHT 3293.)

According to Dr. Riley, Dr. Pollack's report does contain information which indicates petitioner was functioning less than optimally. Dr. Riley would question the reliability of Pollack's assessment given the fact that he relied solely on a clinical interview with petitioner and did not have outside information relating to petitioner's social history. (RHT 3432.) Dr. Pollack's report does not reflect his having obtained or

had access to a number of records that according to his methodology he might have considered relevant and useful in addressing his questions. (RHT 8275; Exhibit 150.)

Dr. Riley described how petitioner's deficits translated in the real world as follows: "Mr. Champion's deficits as revealed by the neuropsychological testing in problem solving, nonverbal reasoning, attention, and slowed information processing, rendered him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misleading cues concerning the intentions of other persons." (RHT 3617.)

Dr. Riley did not believe petitioner's neurological deficits would affect his ability to recognize bullets and recognize what would happen if one put bullets in a gun and fired the gun. (RHT 3615-3616.)

Dr. Riley explained that she was talking about the entire context of arriving at the scene and if there was confusion or chaos, different people yelling, "because of the deficits he has with rapid information processing, attention, etc., he would have impairments in his ability to comprehend the whole situation and make decisions." (RHT 3617.)

Dr. Riley did not agree that petitioner's performance on the witness stand was "one of the best real-world indicators of whether he could focus his attention." Dr. Riley explained that she expected his attorneys had worked with him and prepared him and that he is very verbal. (RHT 3620.)

Petitioner tells Dr. Riley he broke his collarbone in a car accident. He does not indicate any head injury. (Exhibit UUU.)

Dr. Riley's understanding of the most current scientific literature is not that the majority of children with ADD or ADHD outgrow it by their mid to late 20s. (RHT 3622.)

April 1, 2007 Evaluation by Dr. Miora-

Dr. Miora's written report indicates that the referral question was to conduct an assessment of the factor affecting Mr. Champion's development, behavior and

functioning, as part of a case in mitigation (Exhibit 136, p. 2.) However, at some undisclosed point it was modified to read: Dr. Miora's referral question was to evaluate the development and functioning of petitioner from childhood to the end of his trial in 1982. (RHT 7455-7456.)

Dr. Miora states she uses a bio-psycho-social model of assessment. She indicates possibly significant contributory biological factors may include genetic predisposition, in utero events, birth trauma, congenital abnormalities, illness, injuries and exposure to toxins. Psychological factors may include the inherent personality make up of the individual, exposure and response to trauma and signs and symptoms of cognitive or emotional dysfunction. She also refers to social factors that may affect a person's ability to function including poverty, psychosocial events affecting the caretaker to provide for the needs of child. (Exhibit 136, p. 3.)

In the clinical interview, she evaluates the following factors: 1) concentration; 2) attention; 3) effort; 4) capacity to relate to others; 5) memory and learning; 6) thought process and content; 7) language comprehension and expression; and 8) cognitive behavior. (Exhibit 136, p. 4.)

She expressly states her evaluation looks for red flags; such as prenatal insults to developing fetus, including head injuries and drug use. (Exhibit 136, p. 7.)

Dr. Miora's report reflects the following observations:

When Champion was interviewed, he showed no signs of restlessness or hyperactivity, he demonstrated language fluency and decent verbal expressive skills. His verbal intellectual functioning was in the average range based on his use of words and language. He was not tangential or circumstantial. He had difficulty gaining access to his emotional states or feelings.

Champion was attentive. He showed an anosognosia like quality. Memory for remote events was strong. Affect and mood consistent. No overt signs of depression. Concentration was excellent. No indication that his thought processes or content were delusional. No paranoid ideation. No loose associations. (Exhibit 136, p. 9, 10.)

"More subtle processes consistent with Dr. Riley's finding of right hemispheric dysfunction were reflected in Mr. Champion's difficulty processing emotional stimuli and identifying feeling states beyond anger, as well as a lack of awareness of said difficulties."

Elementary school records suggest right hemispheric defects, perceptual issues, organizational problems, and signs of an attentional disorder. Petitioner's difficulties with articulation of words, was a primary indication of a possible disorder. Dr. Miora noted the possible presence of attention deficit and a reading disorder from her review of the school records. (RHT 8265.)

Dr. Miora's interview with petitioner also covered his development areas in psychosocial, biological and cultural domains and in particular, the impact of Gerald Trabue, Sr. on petitioner. Petitioner considered Trabue Sr. his father. However, his only description of his stepfather was notably a physical one. Emotional attributions were not at his disposal. (Exhibit 136, p. 13.)

The impact of Trabue Sr.'s death has been testified to by family members but not the petitioner. In Dr. Miora's report, petitioner described an image of his mother crying while washing dishes after Trabue Sr.'s death. He did not understand her behavior. Petitioner keenly recalls his mother dictum, "don't be telling your business in the streets." (Exhibit 136, p. 14.)

He told Dr. Miora of the impact of gangs-why he joined. (Exhibit 136, p. 14) The central place in his life was gang affiliation, a source of consistency, attention and security. He was sought when not present, protected and cherished as a valuable member and boosted because older affiliates included him in the fold. (Exhibit 136, p. 14.) Petitioner laments not having a father figure.

Dr. Faerstein testified it was his opinion petitioner did not suffer from brain damage. "He does not suffer from symptoms of brain damage which would manifest either on clinical examination or on neuropsychological testing. There is no evidence in his function, in his testing, in any of his productions or adaptions that would reflect

impairment consistent with brain damage." (RHT 6527.) Dr. Faerstein considered the reports of Drs. Prentiss, Minton, Perrotti and Brown in rendering his opinion. "They fit into my conclusions because he's been examined over many years by different examiners under different circumstances in different settings, and not one of the psychiatrists or psychologists who have evaluated him have found evidence of brain damage. (RHT 6527-6528.)

Dr. Faerstein also noted the consistency of the different doctors in their evaluations of petitioner whether it was their interviews assessing cognition....mood...affect, etc. He also found that Dr. Pollack's findings were consistent with the four CYA doctors.

Dr. Hinkin felt that there was no need for a neuropsychological testing of petitioner at the time of his trial in 1982. (RHT 6423, 6440.)

Dr. Faerstein testified that based on his review of all materials, including Dr. Hinkin's report and reference hearing testimony, that when Dr. Pollack and Imperi evaluated petitioner "There was nothing in the materials reviewed by Faerstein that would have suggested a need for psychological testing" (RHT 6465, 6517 and 6508.)

Dr. Hinkin observed that there was consistency by all the doctors who saw petitioner at CYA and before trial (i.e., he had no brain damage or any evidence of neurological disorder). Dr. Faerstein testified that if petitioner had brain damage as indicated by Dr. Riley and if the brain damage was a result of fetal abuse, petitioner's normal development outlined in the school records would not be consistent with brain damage. (RHT 6556-6557.)

Dr. Hinkin concluded that the school records (Exhibit CCC) reflect normal development and an IQ score of 88, when petitioner was six years old, which were inconsistent with Dr. Riley's claim of in utero abuse. (RHT 6223-6226.) Dr. Faerstein likewise testified. (RHT 6556-6557.)

Dr. Hinkin testified extensively about the norms used by Dr. Riley in her scoring and expressed the concern that petitioner's neuropsychological test results by Dr. Riley

in 1997 underestimated petitioner's cognitive functioning. In addition, the failure of Dr. Riley to use ethnically-corrected normative data was another factor Dr. Hinkin considered in evaluating the reliability of Dr. Riley's conclusions. (Exhibit VVV.)

Both Drs. Miora and Hinkin agree that it is common for children to outgrow ADD and ADHD. (RHT 8692-8693.) None of the doctors who tested petitioner in CYA or before trial noted ADD or ADHD.

Dr. Hinkin testified the school records of petitioner had evidence to suggest petitioner had dyslexia, trouble with reading and being able to read and pronounce nonsense words. (RHT 6259.). Dr. Hinkin concluded that petitioner's ability to comprehend what he reads is normal. Dr. Hinkin opined that petitioner's inability to pronounce nonsense words had "very, very little" impact on petitioner's functioning in the real world (RHT 6261.)

Dr. Hinkin criticized Dr. Riley for allowing a third party to be present at the time of the neuropsychological testing. (RHT 6123-6144.) The presence of an interested third party during a neuropsychological assessment, especially an attorney representing petitioner, threatens the reliability of the examiner's assessment. If the norms are not followed, the scaled scores of the test are not statistically defensible. (Exhibit EEE.) Dr. Hinkin testified "it's just bad clinical practice to allow an attorney to sit in on the examination". (RHT 6133-6134.)

Dr. Hinkin testified that school records also indicated petitioner may have had an attention deficit hyperactivity disorder as a child. (RHT 6262.) He also stated that most persons who have ADHD as a kid outgrow it. (RHT 6262-6263.) His review of Dr. Riley's tests showed that petitioner had largely out grown ADHD. His review of petitioner's trial testimony did not show that petitioner was unable to track what was going on.

Dr. Faerstein also had similar views. He noted he did not go off on tangents, there was no confusion, and he was able to pay attention. (RHT 6548.) Dr. Miora testified that during her 9 to 10 hours of interviewing petitioner in December

2006/February 2007 she saw no evidence that petitioner suffered from ADD or ADHD. (Exhibit 136.) She felt it was common for children to outgrow ADD or ADHD.

The opinion offered by Drs. Riley and Miora that petitioner suffered from "brain damage" and "significant brain dysfunction" is not supported by petitioner's history and the extensive record of examinations and evaluations he underwent before and after the offenses. The psychiatric and psychological data do not support an opinion that petitioner was "unable to draw inferences in ambiguous circumstances and leaves him especially vulnerable to missing or misreading cues concerning the intentions of other persons." He adapted to his environment when he was in the community at the CYA and in prison. In fact, the record shows that he was able to adapt appropriately to social situations and he understood the social cues sufficiently well to conduct himself appropriately in court as a witness using appropriate language, but when speaking with his co-defendant he utilized street language and adapted to that milieu, as was documented in a recording. Institutional records noted that he responded to peer pressure and adapted to the inmate environment, reflecting an ability to read and respond to those cues and behave in a way necessary to receive the support and approval of his peers. Contrary to petitioner's assertions in this action, there is no evidence that any mental impairment interfered with his capacity to read and respond to social cues. The opinions submitted by Drs. Riley and Miora as mitigating are not credible. (Exhibit RRR.)

The opinion of Dr. Riley is totally at variance with the overwhelming evidence concerning petitioner in his life prior to their evaluations. There is no evidence that he suffered any perinatal or developmental injuries which might have caused brain damage. (Exhibit RRR.)

Petitioner's school records are also consistent with the opinion that there was no evidence of organic brain damage. A May LM test done on October 2, 1968 when petitioner was six years old and in the first grade, found a mental age of five years, five

months, with a calculated IQ of 88. His reading grade and his arithmetic grade were in the normal range. (Exhibit RRR.)

In the fourth grade, petitioner was found to have an IQ of 75 (20th percentile) and a reading score of 34, stanine 4 (40th percentile). If the hypothesis proposed by Dr. Riley that petitioner suffered brain damage during gestation when his mother was kicked in the stomach was true, the evidence for his brain damage would have manifested itself during his developmental years and during elementary school. The records, however, reflect that he scored in the low-average range, and there are not findings of any significance that he had brain damage.

d) Petitioner's Academic Functioning

School Records

Skyers did not obtain petitioner's school records (Exhibit CCC). Such records reflect petitioner's poor academic functioning in school. Petitioner was easily distracted with home problems affecting his school efforts in third grade. Petitioner had a bad temper, a learning disability, read slowly and had IQ tests below average. However, the records do not reflect any physical abuse, any significant medical issues or malnutrition or lack of clothing. The mother tells the school officials all is well. The teacher notes that petitioner seeks to be leader.

School Teachers

Skyers did not interview any of petitioner's school teachers or visit any of petitioner's schools. No teacher testified at the reference hearing.

Elementary School (1967-1974)

Petitioner's mother thought that he was learning well and thought that he was very smart.[51] (RHT 5420.)

School records indicate that in kindergarten and first grade petitioner had difficulty following directions, he was working below grade level, needed help in learning to listen, needed direction and was easily distracted. (Exhibit CCC; RHT 7679.)

Dr. Miora explained that these comments were red flags for possible learning difficulties, possible attentional difficulties and possible difficulties stemming from his environment which may be contributing to problems with attention, learning, and distractibility.[52, 53] (RHT 7680.)

In second grade, it was noted that petitioner had many absences, there was "much fighting," "learning difficulties," "difficulties in family life," and petitioner was described as being "easily distracted but can do good work when in the proper mood."[54, 55] (Exhibit CCC; RHT 6745, 7683.) Petitioner would have been approximately 7 years

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[51] "He would make me little – drawing pictures and give it to me, to mommy, he would say, I got the best mommy in the whole wide world. His little friend would come to the house and they would play out there in the yard, and I would make him cookies. And his closest friend was Gary Jones, they would take cookies from house to house, from my house, and everything." (RHT 5420.)

[52] "There are normative expectations for children at various levels, various ages, in terms of their ability to sit, to focus, to concentrate, to perform work, which hopefully is appropriate to their age level or grade level. When there are children who are clearly not performing in the manner expected of a child at whatever that designated age is, then one considers a need to evaluate further or try to understand what is contributing to the behavior that's outside of what would be expected for a child in that age or grade level." (RHT 7681.)

[53] "Given appropriate resources and attention, a teacher might talk with the parents, a teacher might make a suggestion that the child be evaluated or further investigation would be warranted, especially when you see a pattern of behavior that is occurring over a series of months and years and doesn't seem to be remitting." (RHT 7682.)

[54] Dr. Faerstein testified that this information was significant, however he was not able to determine what specific conclusion might be drawn "whether they are talking about mood, that he when he is depressed he is not paying attention, or that when paying attention that he does good work, it is generally stating that he has the capacity to perform good work." (RHT 6745.)

[55] "In my experience in pediatric work, often when a child has difficulty paying attention, if he's easily distracted or has trouble focusing, it's not infrequent that that is considered something over which the child has control. And in many cases, what is then determined if indeed the child is referred to a professional is that there is not necessarily the degree of self control the teacher might attribute to the child. This is another reason an evaluation might not get triggered, if there is a belief that perhaps the individual could indeed could control him or herself." (Dr. Miora: RHT 7683.)

old. This would have been one year after Trabue Sr. died and Lewis III assumed the role of disciplinarian.

In third grade, school records indicate petitioner was performing "below grade level and all academic subjects. Quick-tempered. Much fighting. Easily distracted. Home problems disturb child."[56] (Exhibit CCC; RHT 6745-6746, 7686.) Petitioner would have been approximately 8 years old.

In fourth grade, petitioner exhibited "growth in all academic areas." He was described as "enthusiastic" and "well-liked by his peers," "easily distracted," and "needs to feel that he can succeed."[57] (Exhibit CCC; RHT 6746-6747.) Petitioner's IQ was measured at 75 and in all areas as evidenced by other test scores, petitioner functioned below average. (Exhibit CCC; RHT 7775.)

Middle School (1974-1977)

In seventh grade, petitioner's reading comprehension level was at 2.3 grade placement. (Exhibit CCC; RHT 3422-3433.)

In eighth grade, petitioner's reading comprehension level was at 4.4 grade placement. (Exhibit CCC; RHT 3434.)

Petitioner's work habits and cooperation for eighth and ninth grade were described as unsatisfactory. (Exhibit CCC; RHT 6758-6759.)

High School

Petitioner was in the public school system until February 3, 1978. (Exhibit CCC.) Family members viewed petitioner as bright and intelligent. (RHT 5273.)

Records indicate petitioner was withdrawn from high school by October 23, 1980. This was the date of his release from the CYA. (Exhibit 147; RHT 8137.) While at the

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[56] In Dr. Faerstein's opinion these records indicated that there were problems at home which were disturbing petitioner. (RHT 6746.)

[57] According to Dr. Faerstein, this information is consistent with somebody who has a lot of friends. (RHT 6747.)

CYA, petitioner took primarily remedial classes. Petitioner took remedial classes in English, world history, mathematics, and general science. The only two classes which were not designated remedial classes were physical education and woodshop.

Generally speaking, petitioner performed better in academics as his time at the Youth Authority progressed. (RHT 8138.) Assigned courses were a combination of academically oriented and vocationally oriented courses and petitioner was generally perceived as not performing well with complex and abstract materials, such as bookkeeping, yet he was described as doing well in vocational fields and it was noted that he worked in a self-directed fashion.[58] (RHT 8141-8142, 8216.)

Dr. Miora offered her opinion that based on the grades that petitioner had achieved he was not faring very well during junior high into high school. In grades seven and eight petitioner was given a "Nelson Reading test" which placed him at second grade. A number of months later he scored in the fourth grade. (RHT 8027-8028.)

Dr. Minton's Psychiatric Report of December 15, 1978

The minor states that he was in the 11th grade when he was arrested and was last in public school in 1978. According to the probation officer's report, this minor had experienced extreme adjustment problems in school. On one occasion he was expelled from the school program when he was discovered to have a gun in his possession on the junior high school campus. Prior to his expulsion, he had received failures or incompletes in the eight grade program.

The referee finds all of the above notations/remarks/opinions to be credible.

[58] Petitioner's improved academic performance, improved vocational skills, lack of negative behaviors, and improved relationships with staff and other wards is counter indicative of malingering.

e) Petitioner's Family Matters

Abuse of Petitioner's Mother by Lewis Champion II

According to petitioner's mother, after Lewis III was born, petitioner's biological father did not want any more children. When petitioner's mother got pregnant again that's when he began physically abusing her. (RHT 5387-5388.)

Petitioner's uncle, E.L. Gathright, is Mrs. Champion's brother. Gathright remembered Lewis Champion II did not properly care for petitioner's mother or petitioner's older siblings. Lewis II would work a little and then quit. Mrs. Champion did day work. Lewis II beat petitioner's mother and called her a whore. She put up no resistance. She was very, very afraid of Lewis II. (RHT 5118-5119, 5125.)

Gathright described Lewis II as 5 feet, 10 inches tall weighing approximately 210 pounds and described Mrs. Champion as "small." (RHT 5124.) Once, when Mrs. Champion was pregnant with petitioner, Gathright saw Lewis II hit her. He remembered that Lewis II jumped on Mrs. Champion. "He was whupping Azell." Gathright stepped in to stop the beating. (RHT 5147-5148.)

While pregnant with petitioner, Lewis II would beat, choke, and kick Mrs. Champion complaining that he did not want to have any more children. Mrs. Champion suffered "bruised eyes" and "busted lips." (RHT 5392.) On several occasions, Gathright observed Mrs. Champion with a black eye and bruises to her face. (RHT 5125-5126.) Lewis II did not believe that any of the children other than Lewis III were his. (RHT 5390-5391.)

When Mrs. Champion was pregnant with Linda, Gathright saw Lewis II beat her and attempt to choke her. (RHT 5150-5151.) He also observed bruises, scratches, and whip marks on Reggie and Lewis III. (RHT 5130.)

Mrs. Champion's religion did not permit divorce. (RHT 5393.)

When asked about his mental state, Gathright felt there was something wrong with Lewis II but didn't know what it was. (RHT 5131.) When Lewis II visited the family in later years, petitioner's mother was visibly affected.

Doctor Miora's Statements

The reports of Steve Champion as well as those of family members in interview explain Ms. Jackson's [Mrs. Champion] presentation as though there were no problems in the home when briefly queried by investigators from CYA when Steve was first detained and to counsel in the original trials of Mr. Steve Champion. The shame and fear were so pronounced that even factual information was not forthcoming, similar to Ms. Azell Jackson's experience managing the spousal abuse by Mr. Lewis Champion II for many years. (Exhibit 136, p. 47.)

Lewis Champion II

Lewis Champion II, petitioner's biological father, left the family before petitioner was born. Lewis Champion II had very little contact with petitioner and his family.[59]

Petitioner's mother was practically four and a half months pregnant with petitioner when Lewis II left. Petitioner's mother considered it positive when Lewis II left. (RHT 5506-5507.) Petitioner's mother remembered that he came by to visit when petitioner was approximately one month old. (RHT 5393.)

Trabue Sr. and the Impact of His Death on Petitioner

Petitioner's mother had a six-year relationship with Gerald Trabue, Sr. Trabue Sr. died on June 28, 1968 when petitioner was six years old. Petitioner and his siblings remember Trabue Sr. and not Lewis Champion II as their "father."

Trabue Sr.'s impact on the Champion family was extremely positive. For the six years he was involved in their lives, family members remember him taking care of them,

[59] Rita Champion Powell was younger than two years old at the time. She met her biological father for the first time when she was about 10 or 11 years old. He visited the home and until her mother explained, Rita did not know who he was. Rita believed Trabue Sr. was her biological father. Rita remembers he played the piano and entertained them. Lewis Champion II did not stay long. Rita does not remember that he took any particular interest in their lives. He came around every once in awhile – perhaps once a year. In between he did not maintain contact with the children. (RHT 5214-5215.)

cooking for them, taking them places and visiting relatives. He was gainfully employed and provided for the family financially and took care of all of Mrs. Champion's children. (RHT 5141.) Petitioner's mother had two children Gerald Jr. and Terri Lynn with Trabue Sr. (RHT 5221-5222.) Extended family members also remembered Trabue Sr. kindly.

In Dr. Miora's opinion, Trabue Sr. played an important stabilizing role for the period of time that he was in petitioner's home. His loss had a very destabilizing effect on petitioner's development specifically because this was a person he thought of and called father as was true for a number of the other siblings as well. (RHT 7746.) At this time there was food which was available consistently and the children were better clothed. They were also able to move to a bigger home. (RHT 5402-5403, 7750-7751.)

Trabue Sr. died from injuries received in a car accident in 1968. The family, consisting of Lewis III, Reggie, Linda, Rita, Steve, Gerald, Terri, Trabue and Mrs. Champion were in a station wagon looking for a new home when the accident occurred. (RHT 5224.)

The loss of Trabue Sr. had a devastating impact on petitioner's family. Petitioner's mother became very depressed and the children were left without the stability and financial support from their father. Trabue Sr. was the only father figure petitioner had ever identified as his father.[60, 61] (RHT 7753.)

Petitioner's mother was depressed – which was evidenced through crying, low energy and the fact that she stayed in bed a lot of the time. Petitioner's mother required the assistance of her siblings with her children and by all accounts was unable to function at the level she was functioning at prior to Trabue's death. (RHT 7758.)

Many members of the family were injured in the accident. All went to the hospital. (RHT 5226-5227, 5309, 5311.) Petitioner required medical attention for his

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[60] Dr. Miora relied on interviews, declarations, reference hearing testimony, and collateral records for her opinion. (RHT 7753.)

[61] Petitioner's mother and Trabue were never legally married. (RHT 5404.)

shoulder.[62, 63] (RHT 5228, 5312, 5408, 5511.) Petitioner complained about headaches for a couple of weeks. (RHT 5514.)

After Trabue Sr. died, Mrs. Champion and the children moved to 1212 W. 126th St. This home, which was petitioner's home until he was arrested, consisted of two bedrooms, a den, a patio that Mrs. Champion converted into a room, a kitchen, a living room and 1 ½ baths. It measures approximately 1400 sq. ft. (RHT 5233.)

Petitioner's development and functioning from infancy to age 6 was affected by the number of siblings when he was born (4) and then the birth of three additional siblings (Gerald at 11 months, Terri at 4 year, 11 months, and Traci at 8 years of age), the financial status of the family[64], the emotional condition of petitioner's mother, the effects of Lewis II, Lewis II's abuse of petitioner's mother, Trabue Sr.'s influence and subsequent death, the immediate neighborhood in which petitioner was raised in and his school environment. (RHT 7788-7790.)

Mrs. Champion had to work when she was able to do so and that prevented her from being physically present in the home. Additionally, with so many children, it's tiring and she was known to be suffering from various states of depression and anxiety, which would have affected her emotional presence in the home at various points through those years. (RHT 7794.)

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[62] Q: How did you know that Steve hurt his head?
A: Because he was crying, yes, and said his head and everything was hurt in the shoulder, and he went to the doctor and he did – he had a shoulder messed up. (RHT 5408.)

[63] "He, Steve hit his head and did have cuts, and he had his arm. And he complained of headaches. Now what he filled out [at San Quentin], I don't know." (RHT 5513.)

[64] As reflected in Certified Social Security records (Exhibit 143), petitioner's mother's earnings from the time of her pregnancy with petitioner through the age of six is as follows:

1962	-0-
1963	-0-
1964	-0-
1965	-0-
1966	$1,838.76 Mattel
1967	$ 789.13 Mattel
1968	$ 363.08 Mattel

During this period of time when both petitioner's mother and Trabue Sr. were working (1966-1968: petitioner aged 4-6) the financial situation of the family had slightly improved but was still very difficult. Within a short time of Trabue Sr.'s entry into the family two additional children were born. It was Dr. Miora's understanding that Trabue Sr. worked three jobs to fill in the financial gaps of the family. There is evidence that the children wore old clothes which didn't fit properly or had holes in them. The family still resided on the east side of Los Angeles. (RHT 7798-7799.)

Directly after Trabue Sr.'s death, petitioner's mother was homebound, bedridden, and by 1969, no longer employed. She relied on her siblings to bring over groceries. It is Dr. Miora's understanding that due to the fact they were not married, petitioner's mother did not receive the settlement from the wrongful death of Trabue Sr. in a car accident. (Exhibit 143; RHT 7799-7780.)

Trabue Jr. and Terri received money from the settlement of Trabue Sr.'s wrongful death action. Petitioner's mother hired a lawyer and understood that Trabue Jr. was to have had surgery because he had a blood clot in his brain. It was from the settlement money that Mrs. Champion hired Skyers. (RHT 5414-5415.) Petitioner did not present evidence as to amount of the settlement.

Mrs. Champion received money from an insurance policy with which she bought the family home at 1212 W. 126th St. (RHT 5415.) Petitioner did not present evidence as to amount of the policy proceeds.

Henry Robinson

Mrs. Champion married Henry Robinson on October 20, 1969. Robinson is the biological father of Traci Robinson who was born on September 28, 1970. Robinson left before Traci was born. (RHT 5240.) After Robinson left there was no adult father figure in the home. (RHT 5565, 5430.)

Lewis Champion III

After Trabue Sr.'s death and the family's move to 126th St., Lewis Champion III, except for that short period of time during Henry Robinson's entry into the family (from October 1969 through approximately February 1970), took on the role of father figure. Lewis III was 12 years old when the family moved to 126th St. and 13 when Henry left. Lewis III is six years older than petitioner.

Mrs. Champion remembered that neither Lewis nor Reggie were abusive until after Trabue Sr. died. (RHT 5517.)

Petitioner's mother observed whip marks and bruises on her children. (RHT 5422.) Petitioner's mother observed Lewis III hit the children with belts and an extension cord. (RHT 5424.) Social services were not called. (RHT 5429.)

In 1973, the 17 year old Lewis III began using PCP and LSD resulting in a dramatic change in how he behaved.[65] (RHT 5297.) After Lewis III returned from the Job Corps, he began using PCP. The frequency and severity of the abuse accelerated. (RHT 5250-5251, 5425-5426, 5441.) Lewis III was abusive before using PCP but the abuse was worse afterwards. (RHT 5516.)

Petitioner's mother recalled one instance when petitioner was 11 or 12 years old when she was working at Xerox. Petitioner had walked from his home to where his mother worked. He told someone at Xerox that he had been beat up. She went out and saw that Lewis III had beat him up. She got to work by riding with a girl friend who allowed petitioner to sleep in the car until they were done for the night. Petitioner was crying. His nose was bleeding. (RHT 5443-5444.)

When using PCP, Lewis III would become paranoid and destructive. He destroyed family pictures, clothing, dishes, furniture, he put holes in walls and he dug up

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[65] Mrs. Champion testified that Lewis began using PCP at the age of 15. (RHT 5515.)

the front lawn. He knocked out windows and caved in the back door. (RHT 5253-5254, 5563, 5564-5565.)

Lewis III's disciplinary measures became most abusive during that time that petitioner's mother was employed at Xerox (1973-1975). During this period of time Lewis III was approximately 16 to 18 years old. Petitioner was 9 to 11 years old. Lewis III used physical discipline on his younger siblings. He would hit them – sometimes with a closed fist and sometimes with an open fist. Lewis III disciplined the children with a belt, sometimes leaving bruises. He was described as a "monster" "crazy" and "mean." (RHT 5245-5246, 5438 5562, 5603-5604.) The abuse was daily. (RHT 5247, 5562.)

Lewis III's abuse of petitioner occurred when petitioner was 9 through 13 or 14 years old. Family members personally witnessed Lewis III abuse petitioner. Lewis III was much bigger than petitioner. (RHT 5138, 5247, 5562, 5605.)

Gary Jones and petitioner visited each other's homes. Jones knew petitioner's siblings and mother. Jones never met Trabue Sr. or Henry Robinson. (RHT 5668.) Jones described Lewis III as "a very dominating figure." Lewis III was older and bigger and petitioner and Jones tried to stay out of his way. "He's not going to like something about something, so let's just stay out of his way" is how Jones explained it. (RHT 5669.)

Jones described one incident when petitioner was 10 or 11 where Lewis III chased petitioner down the street throwing golf balls at him. Jones described petitioner as being very afraid and running for his life. Petitioner ran into Jones's house and Lewis ran in right after him. Jones' mother intervened and got Lewis out of the house before he hurt petitioner although Lewis did break a mirror with a golf ball. (RHT 5670.)

The police were called on more than one occasion. Sometimes they would take Lewis III away and drop him off far from home. On more than one occasion Lewis III was taken to the state hospital in Lynwood where he was held on a three-day hold.

Family members sponsored trips to get him out of the house and sent him to Illinois, Louisiana or Oregon. [66] (RHT 5254-5255, 5426-5427.)

In order to escape, the siblings would try to gang up on Lewis III. Extended family members also interceded. (RT 5248, 5251, 7854.) Terri and Traci would hide in the cabinets and closets. The siblings ran to neighbors' houses. (RHT 5563, 5605.)

Petitioner suffered a split lip at the hands of Lewis III. (RHT 5299.) Gathright saw Lewis III "slap Steve down." He also saw Lewis III hit Rita and the other kids. (RHT 5137-5138, 5155.) Petitioner would cry because he was afraid of Lewis III. (RHT 5138.) According to Gathright, Reggie and Lewis III became abusive towards the kids after Trabue Sr.'s death. (RHT 5143, 5156.) The beatings ceased when the children got older.

Property destruction and physical abuse by Lewis III on his younger siblings adversely affected the development and functioning of petitioner.[67] In "a very unpredictable fashion" Lewis III would rip up pictures, rip up the concrete in the backyard which contained the hand prints of the children, broke walls, threw things, ranted and raved and lashed out physically. (RHT 7843.) Petitioner sometimes took the abuse from Lewis III to protect his younger siblings. (RHT 7843.)

Assuming the abuse testified to and discussed in declarations and interviews occurred, witnessing such abuse on his siblings would impact petitioner's development and functioning in a negative manner by contributing to a sense of insecurity and the lack of stability in petitioner's world.[68] (RHT 7848-7849.)

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[66] "[I paid for trips] to get him out of the home, because he was destructive, and he was on drugs, and I thought if he had a change of scenery, and go somewhere else, give the family a break away from him or hopefully he would, you know, go somewhere different and he wouldn't be able to get a hold of any drugs or he will maybe hopefully he will stay. That was the real idea." (RHT 5255.)

[67] "Being beaten has effects, different effects on different children. My understanding is that Mr. Champion, in a state of fear, on numerous occasions fled the house in an effort to avoid his brother's terror, and at other times spoke up in an effort to protect his siblings, leaving himself vulnerable to further abuse by his brother Lewis." (RHT 7842.)

[68] "The way we develop an internal sense of self is through our experiences and relationships with the external world, for that which is compound, witnessing the abuse of others, which become pounding his own internal sense of fragility, lack of security and lack of identity." (RHT 7849.)

Reggie Champion

Reggie Champion was born on March 31, 1958. He is four and a half years older than petitioner. During his teenage years, Reggie became distant and quiet. He showed signs of depression and slept a lot. This behavior was unusual. (RHT 5260-5261.)

When petitioner was eight, nine, or ten years old, Reggie hit and punched him but he was not as bad as Lewis III who would whip them with an extension cord and belt. (RHT 5444-5446.) Gathright remembered both Reggie and Lewis were abusive. (RHT 5136.)

Petitioner's Mother's Inability to Provide Proper Nurturing, Care and Supervision

Dr. Miora was of the opinion that during her pregnancy with petitioner, petitioner's infancy and early childhood, petitioner's mother was not emotionally stable. Her "attention was diverted from being able to attend to Mr. Steve Champion as a baby and a young child. And that she was suffering from symptoms of anxiety and depression." (RHT 7735.) Petitioner's biological father left before petitioner was born.

Petitioner's mother began working at Mattel in 1966 when Trabue Sr. was still alive and petitioner was six years old. According to Social Security records, she stopped working in June 1968 which was the same month Trabue Sr. died. Until she began work at Xerox in 1973, when petitioner was 11 years old, Social Security records show no income except for $143 in 1971. (Exhibit 143.) Mrs. Champion worked the night shift at both Mattel and Xerox. (RHT 5434-5435.)

Trabue Sr. and Mrs. Champion's son, Gerald Jr., was born 11 months after petitioner was born.[69] (RHT 7702.) Trabue Sr. and Mrs. Champion's daughter, Terri,

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[69] "The largeness of the family is another factor, but I think these are the family factors." (RHT 7702.)

was born on September 21, 1967, approximately 9 months before Trabue Sr. died. (RHT 5241-5242.)

Rita Champion was first employed with Los Angeles County in August 1978. She was 17 years old. At this time both she and her sister Linda contributed financially to the family's needs. (RHT 5263.) Social Security records indicate no independent income for Mrs. Champion between 1977 and 1982 although she did collect disability and then social security. (Exhibit 143.)

According to Dr. Miora, Mrs. Champion return to work in 1973 had a substantial impact on the functioning and development of petitioner. She could provide less guidance to petitioner and discipline in the home. Rita and Linda assumed more responsibility and took care of their younger siblings. (RHT 7837.)

The circumstances of petitioner's mother being ill and unemployed would have impacted petitioner insofar as her ability to care for him was diminished by her own needs. (RHT 8053.)

In 1976 petitioner was 14 years old. When petitioner's mother was working at Xerox, she worked the night shift and could not protect the children from Lewis III. She was described as "nervous" and "depressed." (RHT 5564, 5609.)

According to petitioner's juvenile reports (Exhibit 147), petitioner had been receiving double messages from his mother. On the one hand feeling rejected and isolated and on the other hand having the perception of her being overly protective when he got into trouble. (RHT 8133-8144.)

Pre-Birth of Petitioner

In 1959, petitioner's mother followed her brothers to Los Angeles. For a time she stayed with Czell. Mrs. Champion was married to petitioner's biological father. Lewis III and Reggie had been born and she was pregnant with Linda. (RHT 5115-5117.)

Gathright recalled that once Linda was born, Lewis II and Mrs. Champion moved into their own home on the east side of Los Angeles. (RHT 5127.) Lewis II was a

musician and did not hold down a steady job. Petitioner's mother depended on her own brothers and sisters to provide her with food and clothing. Whatever money petitioner's biological father made was used on his own needs. (RHT 5394.)

While pregnant with petitioner, Mrs. Champion sought medical care at a clinic. She was told that she was very thin and she needed to eat more protein. They gave her food vouchers. (RHT 5397.)

Petitioner's Birth/Post-Birth

Petitioner's mother worked day jobs and tried to work between her pregnancies. Between 1966 and 1968, petitioner's mother was employed at Mattel Toys. Up to the time when she was pregnant with petitioner, petitioner's mother cleaned houses a couple of days a week because she couldn't work full time with the other children. (RHT 5394-5395.)

After Lewis II left, petitioner's family went on welfare. Mrs. Champion moved in with her brother Jadell. Jadell had four children of his own, so for a while she moved in with her sister. After living with her sister, Mrs. Champion – pregnant with petitioner-- Lewis III, Reggie, Linda, and Rita moved to a shelter. Once petitioner was born, Mrs. Champion had five children to care for her on her own. She lived in a rented two-bedroom home.[70] (RHT 5398-5401.)

Lewis II left before petitioner was born. Gathright continued to visit the family which now consisted of Lewis III, Reggie, Linda, Rita, and petitioner, once or twice a week. (RHT 5133-5134.)

After Lewis II left and before Mrs. Champion was married to Trabue Sr., although things were better it was still hard on her. She still required the help of her family who

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[70] Petitioner's mother testified that the following information contained in an investigative report was correct: "I had an emotional breakdown during my pregnancy with Steve. I had been living near the intersection of 127th and Figueroa. The children and I stayed with Jadell, and then was Ceola, because I did not have enough money to pay rent anywhere. Had trouble eating and sleeping because I was so depressed." (RHT 5501.)

continued to buy groceries and clothing. (RHT 5135.) Petitioner remembered going to the store at a very young age and his mother buying puffed rice in order to sustain her children during rough times. (RHT 7699.)

After Trabue Sr. died, the family was once again assisted by aunts and uncles who provided clothing and food. Aunts and uncles took petitioner and his family to eat, gave them money and took them shopping for clothes. (RHT 5143, 5236.) At various times petitioner's family received AFDC funding. (RHT 7699.)

Mrs. Champion became involved with Trabue Sr. in 1962. Social Security records indicate she did not work between 1960 and 1966, and reported very little income before that. Mrs. Champion worked for Mattel Toys in 1966, 1967, and for half of the year of 1968. Trabue Sr. died in June of 1968. She married Henry Robinson in October 1969. He left the family in early 1970 when Mrs. Champion was pregnant with Traci who was born in September 1970. Her highest earnings were reported during the period of 1973-1975. Other than a small amount reported for 1976, no income was reported beyond 1975 through petitioner's trial in 1982.

While in elementary school after Trabue Sr.'s death, petitioner and his siblings wore shoes with holes in them and were teased by other children. Petitioner was teased about his buck teeth and his clothing. (RHT 5237-5238.)

Gary Jones belonged to organized sports but petitioner did not. Petitioner would be around but he would not participate. Petitioner's participation would end at the time that fees would need to be paid.[71] (RHT 5666-5668.)

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[71] Gary Jones was born on March 5, 1963. At the time of his testimony, Mr. Jones was a youth counselor and an apartment manager working on his real estate license. Jones worked as a counselor to youth mentoring them so as to discourage them from using drugs. (RHT 5659.) Jones has known petitioner since he was five or six years old. Jones was one year younger than petitioner. He described their relationship as episodic, meaning they were friends when he was out of custody but did not see each other when he was incarcerated. Jones and petitioner both attended school at West Athens Elementary. During their elementary school years Jones would describe Steve as his best friend. They saw each other daily. (RHT 5660, 5662.) At the time of petitioner's trial, Jones did not have a felony record. Jones was associated with the Raymond Avenue Crips until 10th grade. (RHT 5660.)

During their childhoods, Mrs. Champion sent Rita and petitioner to live with relatives. (RHT 5238, 7700.) Between 1975 and 1980 there was some financial contribution to the family by Linda and Rita however, it was not until 1975 when Linda was 16 years old and 1977 when Rita was 16 years old.[72] (RHT 8020.) Linda would give money to petitioner –perhaps $.75 to a dollar at the time. (RHT 6838-6840.)

In the early 1970s, Mrs. Champion bought Lewis a car. Lewis fixed up the car as a low rider. (RT 6857.) According to Linda, Mrs. Champion bought Lewis the car because she depended on her children to drive, run errands and take people places. (RHT 6864.) The family only had this one car. (RHT 6866.)

Mrs. Champion worked the assembly line at Xerox. In 1976, she went on disability and then received Social Security when she retired. (RHT 5437; Exhibit 143; Exhibit H.)

After Trabue Sr. died, the family, which consisted of Mrs. Champion and her seven children, moved to a two-bedroom home on the west side of Los Angeles. The boys slept in a converted porch, the older girls shared a room and the younger girls (after Traci was born and Henry Robinson left) slept with Mrs. Champion. (RHT 5416-5417, 7826-7827.)

When asked by respondent's counsel whether they saw signs that petitioner was malnourished, lacked in clothing or lacked in adequate shelter, petitioner's friends responded that they did not notice these things.

The second period of financial difficulties followed Trabue Sr.'s death and extended to petitioner's mother's employment with Xerox and his sister's financial contributions to the family. Petitioner would have been ages 6 through 11.

According to a 1978 Los Angeles County Probation report, the family's income was approximately $650 a month which came from government-subsidized aid to

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[72] Rita and Linda were employed through the government's CETA program after a training period. (RHT 8021.)

families and workers' compensation. Of that amount, petitioner's mother was paying $243 per month towards the purchase of her home. (Exhibit 147.)

3. Petitioner's Amenability for Rehabilitation

Petitioner claims he was amenable for rehabilitation and that a review of his conduct, performance, adjustment and attitude demonstrates he did well when placed in a structured environment like the CYA setting. An evaluation of this claim requires a detailed review of the evidence, both positive and negative, presented during the reference hearing pertaining to petitioner's prior record, his prior performance while on probation/parole, CYA staff observations/reports, CYA doctor reports, evaluations and opinions, Dr. Miora's report and testimony, petitioner's 1978 offense and petitioner's statements. The evidence considered by the referee during this proceeding is set forth below and continues from page 147 to page 155 of this report.

a) Prior Record

1) 10-6-76 - LAPD VC § 23110 – counseled and released. Age 13.
2) 1-14-77 - LAPD PC § 626.6; PC § 12020 gun possession on school grounds. Age 14.
3) 1-13-77 - LAPD PC § 187.2; grand theft of person. Age 14
4) 12-21-76 - LAPD PC § 459; residential burglary. Petition sustained 6-30-77, placed on probation 8-16-77. Age 14
5) 10-11-77 - LAPD PC § 211. Age 15.
6) 11-6-77 - West Covina PD PC § 487.2, PC § 211, PC § 664-211, two co-defendants used guns. Petition sustained on 11-29-77, petitioner placed in community camp program on 12-13-77. Age 15.
7) 9-27-78 - LASD PC § 245, petition sustained 10-24-78. Petitioner placed in CYA on 11-8-78.

b) Prior Probation

1) 8-16-77 - Petitioner placed on probation after residential burglary sustained in juvenile court. Among terms and conditions: obey all laws, not possess any deadly weapons, do not be in vehicle where any person has such a weapon.

2) 11-6-77 - Petitioner violated the prior terms of probation imposed on 8-16-77. On 12-13-77 petitioner placed in community camp program.

3) 7-31-78 - Petitioner successfully completed the community camp program located at Camp Munoz after spending 25 weeks in the junior camp program.

4) 9-27-78 - Petitioner assaulted another at Helen Keller Park with a deadly weapon (small knife), kicked the victim and hit him with a bottle. Juvenile petition sustained 10-24-78. Petitioner in violation of prior terms of probation imposed 8-16-77.

c) Personal History (as reflected in 1978 probation report)

1) Petitioner lives in a home with his mother and four siblings. Home was purchased at the rate of $243 per month. Father left in 1962 after divorce. The family has had no contact with father since that time.

2) Petitioner's mother is on medical leave and receiving workman's compensation and aid to families with dependent children program. Total income $650 per month.

3) Petitioner was expelled from school due to possession of a gun on campus. (see 1-14-77 PC § 626.6/§ 12020 arrest)

4) Petitioner enrolled in Washington High School prior to his

detention on September 27, 1978 for robbery.

5) Probation officer remarks reference petitioner's prior conduct: "minor reportedly has a long standing problem of associating with negatively oriented peers in the community. Minor has an extensive history of involvement in gang activities, guns and law violations involving violence". He noted that the 1977 robbery involved a situation in which a gun was used.

6) While facing assault charges in 1978, petitioner was involved in an October 30, 1978 fight at Juvenile Hall.

d) Probation Officer's Analysis and Plan for 1978 Assault Crime

1) Petitioner associating with hardened delinquent gang members who frequently participate in violent and assaultive behavior in the community.

2) Petitioner continued to associate with delinquent youths after his return to the community from Camp Munoz.

3) The victim was injured due to petitioner's assault. Petitioner has not developed behavioral controls. He took note of prior probation officer's observation in 12-13-77 report "it appears that Steve's record of delinquent behavior since 1976 has been fraught with violence and serious offenses. The Probation officer feels that Steve is amenable and danger to the community, unwarned embarrassment and worry to his family/and he should be sent to the California Youth Authority before it is too late to effect a change in his life-style".

4) Probation recommended a rehabilitation program at CYA.

e) 1978 CYA Commitment

1) Petitioner committed to the CYA on 11-8-78 for assault. (BS00028 – BS 000087) (Exhibit G)

2) Petitioner delivered to the CYA on 1-27-78. (BS000085) Steve is described as a delinquently oriented young man whose violence potential, within a structured setting where he cannot be influenced by delinquent peers, appears to be minimal. Since he has been involved in violent antisocial behavior over the past four years, and this behavior was not significantly reduced by camp placement, it is felt that a longer period in a highly structured setting is appropriate. Therefore, continued placement in the Youth Authority is recommended.

3) Petitioner transferred to the Youth Training School on January 10, 1979. (BS000085) On January 10, 1979, Steven made his initial appearance before the Youth Authority Board. He transferred to the Youth Training School and screened for the younger ward unit.

4) Reason for January 10, 1979 transfer to the Youth Training School: Parole denied because of gravity of offense and the degree of danger posed to public safety and ward's history of prior assaultive behavior. Category V determined as appropriate in that reports indicate that injuries to victim were not substantial and did not require hospitalization, sutures, or even medial treatment. Reason for deviation above one year and Full Board designation: a) physical assault against victim; b) ward's history of prior assaultive behavior.

5) Petitioner released from the Youth Training School on October 23, 1980. (BS000044) (See, CYA report.)

6) Petitioner's conditions of parole from CYA. (see BS 000057 – BS000049 Exhibit G Violation report dated 1-21-81.) There is probable cause to believe that Steve Champion violated that condition of parole which states, "X agree to obey all municipal, county, state, and federal laws and ordinances," in that on December 12, 1980, he entered a residence located at 849 W. 126 St., L.A., ransacked the residence, shot and killed the victims, and removed unknown property. (The victims were identified as Hassan, Bobby, age 35; and his son Hassan, Eric, age 14)

f) Post CYA Parole

1) Hassan murders 12-12-80

2) Petitioner arrested 1-09-81

g) CYA Staff Reports 1978-80 (BS000028; BS000087)

On November 8, 1978, petitioner was committed to the CYA for assault with an expiration date of August 26, 1985. There were prior (1977) charges of burglary, grand theft, attempted robbery and robbery that resulted in petitioner's camp placement for twenty-five (25) weeks. Petitioner's contacts with police began at age 13. His gang association with the Raymond Street Crips and his violent behavior began at about the same time.

Petitioner was transferred from SRCC to the YTS. He was the leader in a race riot at YTS on July 21, 1979 in which he agitated black wards to attack white wards. Petitioner was found guilty of using force, other than mutually agreed upon combat without the use of weapons against another person with the intent of and/or injury.

Behavior problems involving assaults on other wards and on staff resulted in restrictive housing and movement. YA Board denied petitioner parole on January 10, 1979 and continued the matter to May 1980 for a progress review. Parole was denied again on February 20, 1979 with the matter continued to November 1980. The Full Board hearing made referral for parole for November 1980.

On August 17, 1980, petitioner was found guilty of illegal possession of a controlled substance (Hash oil) leading to 60 days time added to his parole date, to wit, release for January 1981. Noted is an April 6, 1980 incident for returning late from day pass. Petitioner was released from the YTS on parole on October 23, 1980.

h) Race Riot YTS Report Dated October 10, 1979; Incident date July 21, 1979 (BS000082)

Report of Findings-

Petitioner was found guilty of using force, other than in mutually agreed upon combat, without the use of weapons against another person with the intent of and/or injury.

Basis of Evidence-

The true finding was based entirely on confidential witness testimony. One witness observed ward Champion, along with other black wards, attack ward Tucker, and attempt to hurt Tucker. Another confidential witness was almost attacked by Champion. After the riot incident was over, three white wards had to receive medical attention – including short hospital admittances.

Reasons for Disposition-

Steven's past assaultive behavior and recent DDMS case indicates that he has been involved in violent acts with weapons. He has two Level B DDMS incidents at YTS and one prior at SRCC involving a similar incident.

i) January 4, 1979 CYA Report on Prior Conviction (BS000088)

Most Recent Offense-

On or about September 27, 1978, the victim and his girlfriend were in a park listening to a radio. Two minors approached them, took the radio, and fled; the victim followed them. At one point, several other minors came to the rescue of the suspects. Later, the victim was to identify Steve as the minor who cut his finger with a knife, hit him in the head with a bottle and kicked him in the head when he was down on the ground. After the victim was attacked, he notified the police who eventually located Steve and his companions who were gathered around an automobile. The victim's radio was found inside the automobile. Steven was eventually convicted of assault with a deadly weapon with force likely to produce great bodily injury.

Ward's Version-

Steve denies the allegations of the instant offense. He states that he was on his way to a shopping mall when he observed his brother's friend in his car and he decided to have a brief chat with him. It was then that the police arrived and arrested everybody.

j) January 4, 1979 Case Conference Report dictated by John Spurney (BS000089 through BS000093)

Steve has a history of six prior contacts, beginning at age 13, of which two resulted in sustained petitions. In December 1976, Steve was placed home on probation following a true finding of burglary; he admitted to stealing a television set from a private residence. In November 1977, Steve and six companions systematically robbed the people while the victims were waiting at a bus stop. Steve was convicted of grand theft, robbery, and attempted robbery; he was placed in Camp Munoz where he remained for 25 weeks. Although he has relatively few prior contacts, it is an indication of violence in Steve's past history. For example, in January 1977, a petition was filed charging Steve with possession of a deadly weapon. In that instance, a rifle shot was

heard at school. A sawed-off rifle was subsequently located in Steve's locker. Steve said that the student who shared the locker with him had put the rifle in the locker and that he never had possession of it. This petition was subsequently rejected. In June 1977, Steve reportedly used physical force on a 75 year old woman while his companion stole her purse. This charge was also rejected. Four months later, a petition was filed charging Steve with choking a victim while his companion stole the victim's wallet; this charge was dismissed. Finally, in the most recent sustained petition, at least one of Steve's companions was armed.

The probation report recommended Steve's commitment to the CYA because he has had further law enforcement contacts; he has continued to associate with hardened delinquent and gang oriented peers; he has a history of violence and serious offenses; and he has not yet developed the necessary behavioral controls to be within the community. It is felt that he needed to be committed before it was too late to change his lifestyle. Camp placement was rejected because his behavior failed to improve following his previous camp placement.

The current psychiatric evaluation found no gross evidence of any psychotic material of organicity. It describes Steve as conceptualizing in concrete, pragmatic terms. His impulse control and judgment are impaired, and he evidences limited insight into his personality and behavior. He did not express any guilt or remorse for his misbehavior. The evaluation described Steve as having a violence potential that is negligible in a structured setting, and that he is amenable to the Youth Authority. He can benefit from both educational and vocational training as well as exposure to reality therapy.

His antisocial behavior is a way of getting attention and also a way of getting acceptance and approval from his peer group. In addition, through his associations and activities, he acquires feelings of confidence and feelings of independence. He evidenced difficulty in handling angry feelings which are usually acted out in antisocial ways. Steve was seen as likely to resort to aggressing behavior, if provoked. He has

an impaired perception of social situations and does not fully recognize his own potential for violence. He suffers from an impaired sense of self esteem. However, there was no gross evidence of any mental, emotional, or personality disorders. He has remorse for his past behavior and recognized that he does have problems. The prognosis for his future would appear to be good. He is in need of a structured setting with close supervision. He can benefit from academic instruction plus vocational preparation.

His involvement with delinquent oriented and gang oriented peers seems to meet several of these needs. For example, it provides him with the opportunity to act out his anger and hostility in non-direct ways; and opportunity to confirm his own self-perception as being an outcast; and, the opportunity to get acceptance and approval from his peer group gives him a certain reassurance regarding his future as an adult male. At the same time, however, it does not appear likely that Steve was totally immersed and committed to the gang subculture. Further, it would seem that he was actually used by the gang members, or at least he was only a follower.

I do not see Steve as being a hardened criminal-type of personality, nor do I see any gross signs of mood, thought, or personality disorders; nor signs of organicity. As stated earlier, he does not have a lengthy criminal history, but there are indicators of potential violence. He appears to be of at least average intelligence, plus he is both sensitive and perceptive.

In a structured and supportive setting, along with opportunities to enhance his self-image through such activities as improving his educational skills; plus opportunities for participating in closer, positive relationships with adult males, the prognosis for his future would appear to be quite favorable.

Steve's overall adjustment to the group living situation has been fairly good. He has presented no disciplinary problems and has required only minimum supervision. Although he associated primarily with wards of his own ethnic group, he is able to get along with the other wards on the unit. He maintains a fairly quiet profile, and at the

same time he is an active participant in group activities. By and large he remains both respectful and cooperative towards staff. However, periodically, he will engage in verbally provocative or challenging exchanges of a relatively minor nature with staff.

The commitment of Steve to the Youth Authority is seen as appropriate because the Youth Authority can provide the needed resources, including time.

4. Love of Petitioner by Family and Friends

Petitioner's family is very close knit. (RHT 5235, 5135, 5143.) Family members spoke of petitioner with love and affection and were universally positive.[73, 74, 75, 76, 77] The family, including petitioner, attended church three to four times a week. (RHT 5236.) Petitioner had close relationships with extended family, primarily his mother's siblings.[78]

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[73] "[As a child, Steve was] very playful, always want to have fun. We just, just being his self, just having fun, playing around all the time." (RHT 5235.) "I love my brother Steve. I'm close to Steve, out of all my brothers, because I guess we are close and eight, and we grew up together. And Steve always been very protective of me and his siblings, very caring, very loyal." (RHT 5270.)

[74] "I have great memories. I remember my brother [Steve] taking me to the park. Me and my sister Terri, would go to the park and he would play with us, always looked out for us, spent time with us. We've gone to amusement parks, the pike, we've gone over to friends' house, and we just, you know, spent time together. Never seen a mean streak in my brother [Steve]." (RHT 5566.)

[75] "I just remember him taking an interest in me. You know, always talking to me and stuff like that. And... just being a good big brother. He used to take me and my younger sister to the park. You know, let us win and stuff like that. He used to just talk to us, you know, and just, you know, just talk to us and just look after us. You know, get us a popsicle and, you know, just fun stuff like that." (RHT 5610.)

[76] "I just remember him always been nice and caring." (RHT 5644-5655.)

[77] "I could remember Steve and the kids were playing and things. And Steve was the boy he always was, all the kids love to be around him, and they played, you know, he was a very joyful kid. All the kids wanted to know where Steve is." (RHT 5136.)

[78] "My understanding is that visits to aunts and uncles, meaning the siblings of Ms Azell Jackson, were a source of comfort and pleasure to Mr. Steve Champion, as well as to Ms. Azell Champion and other siblings. The siblings... of Ms. Azell Champion, also were helpful to Ms. Azell Champion in her least mentally stable times, which fluctuated, of course as we've discussed, by coming by, bringing food, visiting with the children on weekends. In fact, I believe it was in the time frame, but it wasn't clear whether or when Mr. Champion was six or seven, he was sent by Ms. Azell Champion for a very brief period of time, it didn't work out, with one of her siblings. Ms. Azell Jackson... hoped that she could, by delivering him onto one of her siblings, provide him with a more protective environment as opposed to the risk filled environment with Lewis, who according to all accounts, having become aggressive and violent both in the home and towards the children. That she was hoping for some more stability an opportunity for him that she believed would be provided." (RHT 7850-7851.)

Family members attended petitioner's trial for support even though they were required to sit outside the courtroom. (RHT 5207.) Family members visited petitioner when he was at the CYA. (RHT 5282, 5624.)

Petitioner was always respectful towards his mother. (RHT 5340.) In juvenile records (Exhibit 147), Spurney noted that petitioner was sensitive and introspective which Dr. Miora considered significant with respect to the relationships that he had with family members and good friends. (RHT 8134.) Petitioner protected his family members.[79, 80] (RHT 5566.)

Petitioner was very different than Lewis III. Petitioner never raised his hand or spoke in a mean manner to his siblings.[81] (RHT 5566-5567, 5610-5611.)

Gary Jones described his first meeting with petitioner and recalls that petitioner was very protective of him. Jones was sitting on the curb of a street getting "whooped" by his brother. Petitioner came up and asked whether he was going to put up with that behavior. Jones described petitioner's showing deep concern about the situation. (RHT 5661.)

Jones described petitioner as athletically competitive and a leader. (RHT 5665.) He explained their childhood together as "beautiful."

When Jones was eight years old he was hit by a car. As a result of his injuries Jones lost all of the hair on his head and his eyebrows and his eyelashes. After this, some children began to treat Jones differently. Jones would wear a hat to cover his

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[79] "There was one scenario. I remember me and my sister Terri, we were skating down the hill. There was a guy looked down the hill, very mean. He came outside and told us basically don't come down the street again. We're like, well, we want to skate, so we went up and told my brother [Steve]. [Steve] went down and talked to the guy and he said, you know, is there a problem, Steve, is there a problem, and the guy said oh no, not a problem at all, and he just wanted to know why can't his sisters skate or whatever, and it was resolved, no violence, no nothing, they talked. There was no problem and we skated on." (RHT 5566.)

[80] "[I saw] compassion [in Steve]. He cared about his family. He loved his family. He looked out for his family. And I do admire at that time for him to be a teen and wanting to spend time with me and my sister, because it meant a lot. I never had that with any of my brothers." (RHT 5567.)

[81] "Like I said, Lewis was very evil, very mean, verbally, physically. I've never seen that in my brother Steve." (RHT 5567.)

bald head and people would take it off of him and laugh. Petitioner did not do this and did not treat Jones any differently after he had lost his hair. Rather, petitioner would try to encourage Jones to just be himself and not be embarrassed about being bald. (RHT 5682.)

"He encouraged me to be what was, and it was okay, you know, and eventually I did. I took that hat off and walked side by side with my friend Steve, you know. I, over the years, developed a sense of self, you know, and might identity as being this baldheaded kid, you know, and Steve encouraged me and he helped me through that, you know." (RHT 5683.)

When asked what he would have told a penalty phase jury, Jones said "I would have said if you don't have enough evidence or you have an iota of doubt that this man did what you said he did, then spare his life. I've personally missed a lot of years with a very dear friend, you know, and I – missed a lot of years, like a void in my life and how much, you know when is enough enough, when are you going to let him go. To me, it was like, at first it was like Steve could not – it was like Steve is coming home again soon in my life loud and clear and then adjust over the years, Steve's coming home, and it got lower, Steve's coming home, you know. And we were in each other's lives of episodically, and how long was it going to go on, you know. Is Steve coming home, you know, again, you know. It I don't know." (RHT 5688.)

If given the opportunity to testify at petitioner's penalty phase trial, Traci Robinson-Hoyd would have testified "my brother is a good man. He's always been a good brother to me and my sisters. Very kind, very loving, very, you know, he cares about family, you know. He always took out the time to see how we were doing, you know, when he would call, basically he talk to my kids, stay focused with your education, you know. Just felt like I lost a father figure I could have had. I lost it when my brother was sent away, you know. To have that type of love from my brother, I've never really experienced that was none of my other brothers. And you know, I felt like

he was taken from me and my family. He's a good person, and I love my brother very much." (RHT 5568.)

If given the opportunity to testify during petitioner's penalty phase, Terri would tell the jurors that petitioner "is a good person. They didn't commit these murders. That they took someone that means a lot to me away." (RHT 5612.)

5. Scope of Social History

Petitioner sought to introduce social factors that extend beyond the immediate personal experiences of petitioner on the basis that some social factors affect the family's functioning and the ability of the caretakers to provide care for petitioner.

Petitioner also sought to present the circumstances of petitioner's community including the impact of the Watts riots, the relationship between the black community and the LAPD or the LASD on petitioner's functioning and development.

The referee found there was an insufficient showing by petitioner to show an adequate link between the total life experiences of petitioner's parents, siblings and extended family members and petitioner's development, functioning or petitioner's individual background. Petitioner could not show any genetic link between prior generations in terms of acts of violence, psychological make up or traits and the petitioner. Attached for the purpose of making a record on the offer of proof by petitioner is the Court's determination on specific items addressed during the hearing.

Mr. E.L. Gathright (Mrs. Champion's 78 year old Brother)

The background of the petitioner's family is material if it relates to the background of the petitioner himself. Where there is no link or the connection is marginal or remote, the offered evidence is deemed not relevant. Family background that addresses individual family members that have no connection at all was either excluded or given no weight. The maternal/paternal ancestry, i.e. slavery, discrimination in Georgia,

Mississippi, Jim Crow laws, the segregation in the old south are considered as having no bearing on the defendant's culpability.

Trial counsel is obligated to investigate the defendant's medical history, educational history, employment and training history, and family and social history. However, defense counsel is not obligated to engage in exhaustive investigation that simply amounts to obtaining all documents that can be assembled as to any known family member, no matter how remote the connection is, nor is defense counsel required to attempt to identify all conceivable sympathetic themes that might be part of a life experience of the individual family members who have not had an impact on the defendant's life, upbringing or any association with the defendant. The upbringing of Gathright or Mrs. Champion's brothers, sisters, and even Mrs. Champion's own upbringing is simply too remote and lacks sufficient showing by petitioner of a viable basis to conclude that the offered evidence has had an influence on petitioner's character or his upbringing. It is noted that petitioner did not testify at the reference hearing. All of petitioner's prior statements, including those made during interviews by Dr. Riley, do not demonstrate any link. No case authority indicates that if a defendant's extended family members have suffered a traumatic or deeply sympathetic life experience that a defendant is entitled to its admissibility.

To the extent Gathright has recollections of how Mrs. Champion brought up petitioner, how she was treated by Lewis Champion III particularly when she was pregnant with petitioner, of neglect on part of Lewis Champion II toward his children and Mrs. Champion, or any information dealing with the presence or absence of poverty while the Champion family lived in Los Angeles; such evidence is deemed to fall within existing law. Petitioner was born in 1962; the family was relocated to Los Angeles in early fifties. The family relocated from Chicago. The stated reason was that "it was too cold".

Gathright - What Is In

The relationship between petitioner and his two older brothers.

Any evidence of abuse, particularly by Lewis Champion III, inflicted upon petitioner and the rest of the family.

No father figure in the home.

The lack of support, money, food and day to day love, affection and direction due to being abandoned by father (note – this has to be balanced with the understanding that since Lewis Champion III was so abusive, his absence was really a blessing).

Any evidence of malnutrition including the time when Mrs. Champion was pregnant with petitioner.

The difficulties Mrs. Champion endured in raising eight children, her depression and inability to care for the children.

Lewis Champion II did not work or provide for his family.

Petitioner's life was stable and good from the time that he was provided for by Gerald Trabue Sr. (1962-1968).

The auto accident which resulted in Trabue Sr.'s death.

The change of circumstances wherein, as result of Trabue Sr.'s death, Mrs. Champion was a single provider.

Within a year Mrs. Champion was living with Robinson.

Gathright thought that petitioner was bright and intelligent. He was very popular with other children in the family. Gathright has little recollection as to what happened between Lewis Champion II and Mrs. Champion when she was pregnant with petitioner. His best recollection is that he slapped Mrs. Champion on the face.

Gathright – What Is Not In

The general conditions in Mississippi that Gathright and petitioner's mother grew up in.

Community relationships among African-Americans.

The discrimination suffered by Gathright or petitioner's mother as they were brought up.

Broader aspects of discrimination in Mississippi.

The life experience of a black person in Mississippi in the 1950's.

The broad subject of lack of opportunity for advancement by blacks.

The family's transition moving from Mississippi to Los Angeles.

The family's quest for better opportunities not available to them in the South; and

Gathright's observation or impression that not all was well with Lewis Champion III: "There was something wrong with him. I don't know what," was given little weight.

Dr. Miora's Social History Report of Petitioner (Exhibit 136)

Dr. Miora's portion of review and evaluation labeled "Narrative of Petitioner's Life History" that deals with other family member's life history is not relevant, starting on page 47 of her report through page 85.

The part of the report dealing with direct events relating to petitioner (i.e., "Lewis Champion II beat and abused Azell while she was pregnant with Steve Champion etc.") is relevant. The testimony of petitioner's mother, as it relates to the abuse suffered by her at the hands of Lewis Champion II, is relevant to the development of petitioner. Her emotional and economic condition at the time of petitioner's birth is likewise considered relevant. As to specific testimony as to the nature of the abuse suffered by her is a matter of credibility. Mrs. Champion had previously reported to authorities that petitioner had not suffered any type of injuries or harm. Also, Mrs. Champion is not a good witness as to past events dealing with petitioner's birth or early childhood events.

The failure to receive financial support from petitioner's father, the fact that Lewis Champion II abandoned the family just prior to petitioner's birth and that he claimed that petitioner was not his child are also relevant.

The school performance records of Lewis Champion III and Reggie Champion, noted on page 90 of Dr. Miora's report, and the absence of a genetic link, are not relevant to petitioner's life history. Skyers was not required to engage in the overly broad background research conducted and prepared by habeas counsel from 1995 through 2007.

The declarations of Lewis Champion III and Reggie Champion are unreliable. The fact that they could have been subpoenaed to testify but were not weighs against their admissibility and their use as a basis for the experts' opinions.

The recollection and testimony of petitioner's mother as to her and her family's relationship to Trabue Sr. is considered relevant, material and believable.

The life history of Gerald Trabue, Jr. is immaterial to petitioner. Gerald Trabue, Jr.'s declaration is untrustworthy.

The family history documents detailing the make-up of the family appear to be accurate and meaningful. This information was available to petitioner's attorney before and during the trial.

Lewis Champion III	DOB 08/28/56
Reginald Champion	DOB 03/31/58
Linda Champion (Matthews)	DOB 07/18/59
Rita Champion (Powell)	DOB 03/17/61
Steve Champion	DOB 08/26/62
Gerald Trabue Jr.	DOB 08/05/63
Terri Trabue	DOB 09/21/67

The physical location of the family residence after petitioner's birth is relevant to petitioner's circumstances. Mrs. Champion's living conditions are also relevant.

Residential History:	127th and Figueroa (1962)
	115th and Avalon (1964-65)
	83rd and Unknown
	76th and McKinley

Petitioner was cared for by Trabue Sr. from 1962 to 1968. This period of time is viewed as the best of times by all family members including petitioner. Mrs. Champion's depression, emotional instability, her inability to attend to petitioner and the lack of food or money do not appear to be in existence during this period of time.

Dr. Miora's report refers to Linda, Rita, and Gerald Jr.'s school records. The school records are not relevant. Skyers was not required to investigate their school performance in order to effectively present mitigating evidence on behalf of petitioner during the penalty phase of trial.

Watts Riots

At the time of the Watts Riots, South Central Los Angeles included the areas of Main Street (West), Alameda (East), Washington (North) and Slauson (South). Petitioner lived most of his life (1968-1978) on 1212 W. 126th Street (just west of Vermont and north of El Segundo). An area distinctly different than the hardcore area referred to in the August 1965 Watts Riot Report. If applicable, the conditions associated with the Watts Riots might be relevant environmental information. As previously noted, petitioner was three years old. Any recollection, however fleeting, noted by petitioner over twenty years later during a very controlled interview is extremely tenuous at best.

It is also noted that Skyers was a conscientious attorney who is African-American. He was fully knowledgeable about the social conditions in South Central Los Angeles and the general conditions in existence where petitioner and his family lived. He evaluated petitioner's neighborhood as good place to live.

The Watts Riots, like the subjects of slavery, Jim Crow laws, and historical information as to how blacks were treated in the South, is simply not relevant. Skyers was not obligated to investigate these areas or present evidence concerning the same during the penalty phase of petitioner's trial.

Community Matters (Exhibit 141)

Environmental Justice in Los Angeles

This information is not relevant. Skyers was not obligated to engage in the preparation or presentation of information pertaining to civil rights and environmentalism. Petitioner did not sufficiently demonstrate how this specific study was relevant to his development and/or functioning.

Wikipedia Article on South Central Los Angeles

There was no showing this document was available to Skyers. Skyers was not required to engage in an extensive effort to connect the development of the south portion of Los Angeles to petitioner's background.

Conditions at Juvenile Facilities

(1) Sanitation problems discovered at Juvenile Hall.[82]

(2) The business isn't warehousing. (4/79)

(3) Juvenile Hall probe ordered. (8/83)

(4) Unruly youngsters face shackles, mace. (7/84)

[82] A 1976 newspaper article describing the facilities at Central Juvenile Hall. No evidentiary connection was established between this report and petitioner.

(5) Youth Authority hard-pressed to find good jobs for parolees. (11/70)

(6) Thirteen youths flee Chino facility in plot. (9/76)

(7) Older youths release strains inside YTS. (9/76)

(8) Department of Youth Authority. (1/78)

All of the aforementioned itemized information describes the conditions of juvenile facilities in either Los Angeles or at the CYA facilities in Chino, California. The evidence presented concerning petitioner's performance, evaluation, functioning and testing is contained in other relevant documents. These articles are not relevant and are beyond the scope of this reference hearing. There is no evidence linking this information to petitioner or indicating that this type of investigation or preparation was necessary on the part of Skyers during his representation of petitioner.

Police Brutality Towards Blacks

(1) LAPD use of chokeholds.

(2) Historic South Central Los Angeles.

School Conditions/Violence

Studies

The referee observes that the authors of these reports assembled by petitioner's counsel in 2006 are very slanted or biased. The article titled "Perception of Police Brutality in South Central Los Angeles" has several interesting expressions including "a policeman trying to do his job could create crime by inciting a crowd of bystanders to riot" and "The School and family prove meaningless to blacks".

The aforementioned items were written in response to the Los Angeles Riot study. All events took place in 1965 when petitioner was three years old.

The report "Police Malpractice and Watts Riots" has detailed descriptions of reported conduct of individuals that allegedly took place in 1965 in the Watts area, but again there is no link between these specific events and petitioner. This material would not have been deemed relevant for the penalty phase of petitioner's trial.

E. Detailed Discussion of Evidence and Findings

1. Alibi for Taylor Murder and Related Crimes

Petitioner called witnesses relevant to the Taylor murder and related crimes. These included Earl Bogans, Marcus Player and Wayne Harris who testified to a possible alibi for petitioner for the Taylor crimes.

They also included LASD deputies involved in: (1) the Helen Keller Park detention of Earl Bogans, Marcus Player, Angulus Wilson and Willie Marshall (but not petitioner) late on the evening of December 27, 1980; (2) the car pursuit of the Buick owned by Frank Harris and the foot pursuit of the occupants of that car once it crashed; (3) the setting up of a perimeter in an effort to apprehend the four occupants who fled the Buick after the crash; (4) the detention of Marcus Player, Wayne Harris, Robert Aaron Simms (a.k.a. James Taylor) and petitioner approximately 1 hour after the Taylor crimes were committed; and (5) the arrest of Evan Jerome Mallet in the backyard of petitioner's residence at approximately 3:00 a.m. on December 28, 1980. These witnesses included: Anthony Hollins, Steven Koontz, Thomas Lambrecht, Thomas Martin, Theodore Naimy, Michael Smith and Owen Tong. Petitioner also called one of the investigating homicide detectives from the LAPD responsible for the Taylor murder investigation, Gregory DeWitt.

Finally, petitioner offered testimony from Steven Strong, testifying as a "gang and homicide investigation" expert and Jack Earley, testifying as a *Strickland* expert. In addition, the parties entered into two stipulations relevant to the Taylor case. The first deals with the testimony of Frank Harris, the registered owner of the Buick automobile chased by Deputies Naimy and Koontz in the early morning hours of December 28, 1980[83] (Court's Exhibit 26 in conjunction with two reports of interviews of Frank Harris conducted by a DA investigator, Chris Briggs, and Mr. Harris' Declaration, which was one of the habeas petition exhibits submitted by petitioner). The second concerns

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[83] Throughout these proceedings, the Buick has been referred to as the "Player" automobile. See also, Exhibits R-1 through R-8 [photographs of the Buick automobile].

fingerprint comparisons of latent fingerprints taken from the Hassan, Taylor and Jefferson residences and the Player automobile with an exemplar set of fingerprints of Robert Aaron Simms taken following his arrest in 1987 (Court's Exhibit 34 in conjunction with Exhibits HHHH and IIII). This exhibit also deals with whether or not an exemplar set of Robert Aaron Simms' fingerprints were taken as a result of his detention on December 28, 1980 (efforts by DA investigator Chris Briggs to locate a record of any such booking prints were unsuccessful; only exemplar prints of Simms taken long after the completion of petitioner's trial in 1982 were located).

As will be detailed, the referee finds evidence of petitioner's alibi for the Taylor murder, presented through the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player, not credible. Although the referee recognizes that more than 25 years have passed since the events of December 27-28, 1980, the alibi testimony presented at the reference hearing was not only inconsistent in significant ways between each of the three witnesses, but more importantly, inconsistent with testimony from LASD deputies and petitioner's own alibi testimony for the Taylor crimes elicited by the prosecution on cross-examination of petitioner during the guilt phase of the trial. Other credibility factors such as bias, past felony convictions and a willingness to help a fellow gang member out of a tough situation adversely affect the alibi testimony. Further, as the reference hearing testimony from the various LASD deputies involved in the perimeter search for the four apparent occupants of the crashed Player automobile documented, the perimeter was not sufficiently tight so as to preclude the possibility of petitioner having been inside the Player automobile when it crashed, to thereafter have escaped from the perimeter and then to have been detained as he was at approximately 1:00 a.m. on December 28, 1980 when petitioner walked from an area outside of the perimeter towards his home which was inside the perimeter. The geographical proximity between the Taylor residence and petitioner's residence was such that neither time nor distance could exclude petitioner as one of the Taylor crime perpetrators.

In addition, the referee finds that Marcus Player would not have cooperated with trial counsel in any effort to develop and present an alibi through his testimony. The referee also finds that Marcus Player, if called as a witness at petitioner's trial in 1982, would have refused to answer questions by invoking his privilege against self-incrimination in light of his exposure to prosecution as an accessory after-the-fact for his efforts to assist Craig Ross in evading arrest on August 1, 1980. In addition, at the time of petitioner's trial, Player was himself facing robbery murder charges (for which he would later be convicted and sentenced to a term of 31 years to life imprisonment, a sentence Player was still serving at the time he testified in this reference hearing).

The referee further finds that petitioner has failed to prove by a preponderance of the evidence that exemplar fingerprints of Robert Aaron Simms were available at the time of petitioner's trial for trial counsel to have a court-appointed latent fingerprint comparison analyst use to compare with all latent prints obtained from the Hassan, Taylor and Jefferson crime scenes and the Player automobile.[84]

Petitioner has not established the existence in 1982 of any significant police reports, witness statements or forensic evidence analysis reports relating to the Taylor crimes which trial counsel did not receive in discovery or review prior to petitioner's trial.

As will be detailed further in the referee's findings with respect to reference question number 3, setting aside grave concerns any trial counsel would have had with the alibi defense based upon testimony from petitioner's fellow gang members, Wayne Harris, Earl Bogans and Marcus Player, the referee also finds that it was well within the range of reasonable strategy and tactics for reasonably competent trial counsel not to present that alibi at the penalty phase. Skyers had a simple, straightforward and reasonable response to any prosecution effort to use the Taylor and Jefferson crimes as aggravating evidence in support of a penalty verdict of death. The prosecution had the

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[84] A 2006 match was obtained using an exemplar of Simms' fingerprints taken in 1987; five years after the completion of petitioner's trial.

burden to prove those aggravating circumstances beyond a reasonable doubt before they could be considered by penalty phase jurors. (See, *People v. Champion*, *supra*, 9 Cal.4th at pp. 949-950 ["in his closing argument, the prosecutor acknowledged that the jury could not consider the evidence of the Jefferson murder (as to both defendants) and of the Taylor murder (as to defendant Champion) unless it found *beyond a reasonable doubt* that the defendants committed these crimes, and the prosecutor implied that the jury should not consider those crimes at all"]; italics in original.) As Skyers made clear to the jury, the prosecution itself had concluded that there was insufficient evidence to charge petitioner with either the Jefferson or the Taylor murders because, in the view of the prosecution, the evidence was insufficient to prove petitioner's involvement beyond a reasonable doubt.

Petitioner was charged with the murder, robbery and associated burglary of Eric and Bobby Hassan with an armed allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who was the actual killer of the victims. Co-defendant Ross was charged with the Taylor murder and related crimes without a personal use allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who the actual killer of Michael Taylor was. (RHT 1199-1201.) Petitioner's jury knew that petitioner had not been charged with the Taylor murder and related crimes, a fact petitioner's trial counsel reminded the jury of as part of Skyers' guilt phase argument. (14 RT 3300; see also RHT 1467-1468.) As Skyers testified in this proceeding, "the argument was intended to highlight to [the jury] that Steve was not charged with the Taylor case." (RHT 1468: 21-22.) Further, Skyers admitted that the trial prosecutor appeared both to Skyers and from Skyers' perspective to the jury as the type of prosecutor who left no stone unturned looking for evidence to prove who was guilty of the crimes involved. Skyers also admitted that petitioner's trial jury had heard the prosecutor concede to the jury that the prosecution did not have sufficient evidence to prove beyond a reasonable doubt either the identity of the actual

shooter in the Taylor murder or that petitioner was involved in that crime. (RHT 1469-1470.)

Similarly, petitioner was not charged with the Jefferson murder, a point Skyers also reminded the jury about during Skyers' guilt phase closing argument. (14 RT 3227, 3269; see also, RHT 1470-1471.)

In his reference hearing testimony, Skyers also acknowledged that petitioner's jury heard no evidence that any fingerprints of petitioner were found at the Taylor, Hassan or Jefferson crime scenes or in the Player automobile. Further, the prosecution presented no evidence to petitioner's jury that any physical evidence taken from the Taylor or Jefferson residences was ever found with petitioner, despite the fact that a search warrant was served on petitioner's residence on January 14, 1981. No property connecting petitioner to either the Taylor or Jefferson murders was found during that search. Further, in light of the fact the prosecution did present evidence that Craig Ross' fingerprints had been found at the Hassan and Taylor crime scenes, but offered no such evidence as to petitioner, the jury could have inferred the absence of this corresponding evidence related to petitioner. (RHT 1472-1474.) In addition, petitioner's trial jury knew that Cora Taylor had been unable to identify petitioner at a live lineup conducted on January 12, 1981, less than three weeks after the Taylor murder and related crimes. Further, the jury knew Mary Taylor also had been unable to identify petitioner at that lineup. From the failure of the prosecution to call William Birdsong at petitioner's trial, the jury could also conclude that Birdsong had not been able to identify either petitioner or Ross at that lineup. (RHT 1474-1475, 1477.) Petitioner's jury also knew that Mary Taylor had been able to identify Craig Ross both from a photographic lineup and later at a live lineup conducted in August 1981. (RHT 1475-1477.) In sum, as Skyers understood the state of the record at the time of petitioner's trial, petitioner's jury could have concluded that the prosecution did not believe it had proof beyond a reasonable doubt to charge petitioner with the Taylor crimes; the prosecution had no fingerprints or physical evidence to connect petitioner to the Taylor crimes; and no

surviving witness to the Taylor crimes had been able to identify petitioner at the January 12, 1981 lineup. (RHT 1479-1481.)

By pursuing a strategy not to contest the Taylor and Jefferson cases at the penalty phase, trial counsel not only avoided the dangers created by credibility problems associated with the Taylor alibi through witnesses Harris, Bogans and Player, of equal, if not greater importance, counsel's strategy also avoided the crippling effect testimony from these witnesses (i.e., that petitioner was still a member of the Raymond Avenue Crips at the time of the Hassan murders) would have had in light of petitioner's guilt phase testimony that he had left the Raymond Avenue Crips gang in 1979.

Even if evidence, that one of the latent prints obtained from the Taylor crime scene was matched to Robert Aaron Simms, could have been obtained in 1982 and presented at petitioner's trial, trial counsel's strategy not to litigate the Taylor crimes during the penalty phase but to remind the jury that those crimes had never been filed by the prosecution against petitioner because of the prosecution's own belief the evidence was insufficient to prove those crimes as to petitioner beyond a reasonable doubt was still eminently sound. No witness could testify that only four people were involved in the Taylor crimes. Moreover, because of petitioner's conviction for the robberies and murders of Eric and Bobby Hassan, his posting of bail for Evan Jerome Mallet[85] (from what arguably were proceeds obtained from the Hassan crimes), the commonality of Craig Ross as one of the perpetrators in both the Hassan and Taylor crimes and Wayne Harris' reference hearing testimony,[86] the jury might have deduced from petitioner's alibi witnesses that petitioner was fully culpable for the Taylor murder and related crimes as the natural and probable consequences of the conspiracy to rob and murder drug dealers the jury had undoubtedly found petitioner to be a member of at the time of the Hassan murders and robberies for which petitioner had been convicted.

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[85] One of the acknowledged perpetrators of the Taylor murder and related crimes.

[86] That when petitioner and Harris arrived at petitioner's home after the two were released by LASD deputies following their detention at approximately 1:00 a.m. on December 28, 1980, Craig Ross was inside petitioner's residence.

Trial counsel's reasonable strategy not to contest the Taylor crimes at the penalty phase with witness testimony also avoided letting the jury hear once again about the aggravating circumstances which were the Taylor crimes.[87]

At the reference hearing, petitioner's alibi witnesses, Wayne Harris, Earl Bogans and Marcus Player testified as follows:

Wayne Harris

a. Background

Harris was born on March 8, 1960. (RHT 2731.) Petitioner and Harris grew up together in the same neighborhood. Harris had known petitioner since approximately 1970. He considered himself to be a very good friend of petitioner. Harris knew petitioner's family. He attended the same junior high school as petitioner. (RHT 2730-2731, 2764.) Harris knew Reginald and Lewis Champion III during this same time frame. Harris never saw either Reginald or Lewis Champion III attack petitioner. Petitioner never complained of headaches. Petitioner appeared to be physically and mentally sound. Petitioner never appeared to need food, clothing or medical attention. During the period Harris knew petitioner, petitioner did not work nor was he going to school through December 1980. (RHT 2790-2793.) Harris and petitioner had normal middle-class upbringings; neither Harris nor petitioner came from dysfunctional families. (RHT 2812-2813.) Harris is related to Marcus Player, Michael Player, Lavelle Player and Frank Harris, who is Wayne Harris' uncle. (RHT 2731-2732.)

b. Gang Affiliation

In December 1980, Harris was a member of the Raymond Avenue Crips and had been so for five years. His gang moniker was "Pops." Petitioner was a member of the

[87] Penalty phase testimony from petitioner's alibi witnesses would also have raised questions of credibility with respect to social history mitigating evidence petitioner claims in this proceeding trial counsel was deficient for not obtaining and presenting. This issue will be discussed in the findings concerning social history mitigating evidence.

Raymond Avenue Crips in December 1980. His moniker was "Treach." Previously, his moniker was "Crazy 8." Other members included Craig Ross ("Little Evil"); Marcus Player ("Spark"); Michael Player ("Scragg"); and Jerome Evan Mallet (known to Harris as "Kook"). Petitioner, Ross, Mallet, Lavelle and Michael Player were original Raymond Avenue Crips. (RHT 2764-2767.) The Raymond Avenue Crips used Helen Keller Park as their hangout in December 1980. Harris didn't know if members of the Raymond Avenue Crips used drugs at that time; Harris denied that he did. (RHT 2782.)

c. Prior Felony Convictions

Harris sustained prior felony convictions in 1978 and 1983 or 1984, the latter involving convictions for robbery and kidnapping. (RHT 2727-2728, 2772-2773; see also, Exhibit TT.)

d. Reference Hearing Testimony Regarding Alibi for Petitioner; Inconsistencies with October 7, 1997 Declaration Under Penalty of Perjury Signed by Wayne Harris (Exhibit S) and Notes of a 1997 Interview with Harris (Exhibit SS, Bate Stamped Pages 012524-012525)

At the reference hearing, Harris testified that on December 27, 1980, petitioner, Marcus Player and 10 others played basketball with Harris at Helen Keller Park after dark. Petitioner could have been at the park when Harris arrived at the park at approximately 2:00 p.m. After a couple of hours of playing basketball at the location, Harris and petitioner left at approximately 10:30 p.m. to go to the store. While petitioner was with Harris, Harris saw an LASD unit drive into the park. Harris saw his associates ordered to come to the car and place their hands on the car. Marcus Player was one of those ordered to the LASD car. Harris and petitioner were just watching this. At that point, the Player car "came into the park," and after apparently seeing the LASD car, "immediately went into reverse and...sped out of the park." (RHT 2733-2742, 2755, 2809.) The LASD car gave chase. At that point the crowd dispersed. Harris and petitioner walked back to the crowd. Then petitioner, Marcus Player and Wayne Harris started walking westbound on 126th St. (RHT 2745-2746.) Harris subsequently noticed

that the Player car had crashed. (RHT 2750.) Harris, Marcus Player and petitioner were stopped by LASD personnel at approximately 11:00 p.m. (RHT 2751-2752.) The three were then ordered to walk to another LASD car. (RHT 2756.) A person known to Harris as Lil' Owl "popped out of the bushes" and joined Harris, Marcus Player and petitioner. (RHT 2757.) At some point, possibly after Lil' Owl had joined Harris, Marcus Player and petitioner, an LASD car in which Harris could see a young lady in the backseat crying shined its light on the group so the lady could see the group. (RHT 2758-2759.) Eventually, the police let Harris, Marcus Player and petitioner go to petitioner's house. On arrival, Harris saw Craig Ross inside the house with petitioner's mother and brother. (RHT 2761-2762.)

Harris signed his declaration (Exhibit S) only after reading it. Harris understood this document was to be used to try to get petitioner a new trial. Harris signed the document under penalty of perjury. According to Exhibit S, Harris had been at the park from approximately 2:00 p.m. until late in the evening. According to Exhibit S, petitioner, Marcus Player and Wayne Harris were detained by the officers. Harris admitted that Exhibit S states that petitioner, Marcus Player and Wayne Harris were detained in the park and the three of them were continuously detained for the next four hours. Harris signed off on that statement as the truth. Further, contrary to Harris' reference hearing testimony, Harris admitted that Exhibit S states that petitioner, Marcus Player and Wayne Harris were all detained at the time the Player car drove into the park. Harris admitted that his memory of the events in question was much fresher in 1997 when he signed his declaration under penalty of perjury. (RHT 2768-2771, 2773-2780, 2786-2787, 2808.) Further, Harris admitted knowing the definition of the word "detention" such that there was no confusion in his mind as to how that word was used in his declaration when the document states petitioner, Marcus Player and Wayne Harris were detained together in the park when the Player car was first seen. (RHT 2809-2812.)

While Harris admitted speaking to an investigator he believed was working for petitioner in 1997 (RHT 2767.), he denied telling the investigator that which is reflected in Exhibit SS on Bate stamped pages 012524-012525: "'Before midnight, 2130 to 2200, can't recall exactly, for about four hours the police sent them from police car to police car, Steve Champion & Marcus & Wayne, about 6 police cars & had to tell their same stories to each cop. Never out of the sight of any police that night. finally let them go at Steve Champion's house. Right up til the car came into view. Too far away from car to see who was in it. Standing up with hands on hood as car came into Helen Keller Park eastbound on 126th to dead end to park. They were a block away from park. Didn't know what was happening.'" (Exhibit SS; RHT 2773-2774.) Harris further denied seeing petitioner and others, including Earl Bogans, "taking hits on some marijuana" after they had played basketball on December 27, 1980 as Bogans testified at the reference hearing. (RHT 2783.)[88]

e. Familiarity with Player Car

Harris had been in the Player car. Marcus and Michael Player had access to the car. Petitioner was a good friend of Marcus and Michael Player. Harris never saw petitioner in that car identified from photographs (Exhibits RR 1-8). The Player car seats five people. (RHT 2785-2786, 2797-2798.)

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[88] Compare Exhibit GG (LASD report of Deputies Lambrecht and Tong concerning events of December 27 and 28, 1980) and the reference hearing testimony from Lambrecht (now retired) and Sergeant Tong concerning detention of four men at Helen Keller Park at approximately 11:50 p.m. on December 27, 1980. The four detained individuals were identified as: Marcus Player, Earl Bogans, Willie Marshall, and Angulus Wilson. (Exhibit GG; RHT 2601-2602.) No one identified himself as Steve Allen Champion. (RHT 2614.) While detaining these four individuals, Lambrecht and Tong saw another unit with its red lights on apparently chasing another car. They followed in their car. (RHT 2562-2563, 2566-2570, 2603-2604.) Later, working as part of a team of LASD units attempting to secure a perimeter, Lambrecht and Tong detained a group of four individuals at approximately 1:00 a.m. on December 28, 1980. The four included: Marcus Player, James Taylor, Wayne Harris and petitioner. Petitioner and Wayne Harris were not among the individuals detained in Helen Keller Park prior to the observation of the LASD car involved in an apparent car chase and Earl Bogans was not detained as part of the group of four individuals detained after the containment area had been established (Exhibit GG; RHT 2562-2563, 2566-2570, 2579, 2607-2610, 2614-2615.)

f. Exhibits 55 (Trial Exhibit 179) and DD (Trial Exhibit 174)

Harris identified Raymond Avenue Crips' gang graffiti with petitioner's gang moniker, "treacherous" in a photograph (Exhibit 55). Harris identified petitioner in Exhibit DD. Harris testified that he couldn't tell "what [petitioner was] throwing up." Harris then denied having said "throwing up." Harris claimed he said "holding up." Harris testified he couldn't tell if petitioner was throwing a gang sign. (RHT 2795-2796.)

g. Henry Clay Junior High School

Harris attended seventh grade at Henry Clay Junior High School. Harris never had problems with any teachers. There was a mix of teachers from different races. Harris had the sense that the teachers tried to give the children a good education. Harris does not recall any textbook shortage. Harris completed the eighth and ninth grades at Gompers Junior High School. Harris completed the tenth grade at Washington High School and grades eleven and twelve at the CYA. Harris received a good enough education to train to be an electrician which is now his profession. (RHT 2787-2790.)

Earl Bogans

a. Background

Bogans has known petitioner since 1975. (RHT 2644.) He saw petitioner "quite often." He knew petitioner's brothers Reginald and Gerald. (RHT 2706-2707.) Bogans had been in petitioner's house on 126th St. a couple of times. The home was nicely kept. Bogans never saw anything suggesting that petitioner had been deprived of food, clothing or shelter. Petitioner did not appear destitute. Bogans did not know if petitioner was working. Petitioner never claimed he was in need of money. Petitioner was not mentally slow nor did he appear brain-damaged. (RHT 2695-2697.)

b. Gang Affiliation

In December 1980, Bogans and petitioner were members of the Raymond Avenue Crips.[89] Bogans had been a member since approximately 1977. Petitioner was already a member of the gang at that time. Petitioner's gang moniker was "Treach." Other members with their monikers in parentheses included: Craig Ross (Evil), Jerome Evan Mallet (Kooc), Marcus Player (Spark)[90], Michael Player (Scragg), Lavelle Player (Scrooge), Robert Aaron Simms (Lil Owl) and Jerome Evan Mallet's brother. (RHT 2659-2662, 2714.) Bogans identified petitioner in Exhibit DD (Trial Exhibit 174). In the photograph, petitioner is throwing a Raymond Avenue Crips' gang sign. Bogans also identified petitioner in Exhibit 47. Bogans had seen petitioner with a gun before petitioner went to CYA. That gun, a 12 gauge shotgun, was not the gun petitioner was handling in Exhibit 47. Bogans had not seen that gun before. (RHT 2680-2683.) The gun seen in Exhibits 47, AA and BB appeared to be one and the same gun. (RHT 2704-2705.)

c. Bogans' Alibi for Petitioner; Inconsistencies with Petitioner's Trial Testimony, the Reference Hearing Testimony of Wayne Harris and Marcus Player, the Declaration of Wayne Harris, the Reference Hearing Testimony of LASD Deputies Lambrecht and Tong and Their Report (Exhibit GG), the Notes of a 1997 Interview with Bogans (Exhibit 22) and Bogans' Declaration (Exhibit T)

Bogans arrived at Helen Keller Park between 7:00 and 7:30 p.m. on December 27, 1980. Petitioner was already there. (RHT 2645-2647, 2679.)[91] Bogans was clear that petitioner was with Bogans from the point Bogans arrived at Helen Keller Park

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[89] Bogans' testimony that petitioner was a member of the Raymond Avenue Crips in December 1980 was inconsistent with petitioner's trial testimony in which he claimed he had disassociated himself from the gang as of the time of the Hassan murders in December 1980. (13 RT 3035, 3068.)

[90] Bogans' testimony that Marcus Player was a member of the Raymond Avenue Crips in December 1980 is contrary to Marcus Player's reference hearing testimony during which he denied ever being a member of the Raymond Avenue Crips. (RHT 2085.)

[91] According to petitioner's trial testimony, he did not leave his home until 10:00 to 11:00 or 11:30 p.m. on December 27, 1980. (13 RT 3089; see also, Exhibit B, page 12241 [the July 13, 1982 interview of petitioner's brother, Reginald Champion, conducted by trial counsel Ronald Skyers, during which Reginald claimed petitioner was at his home until 10:00 to 11:00 p.m. on December 27, 1980]; see also, RHT 1536-1546.)

through when the police officers, who had been detaining Bogans, Marcus Player and petitioner, took off to chase the Player car. Even in the face of petitioner's trial testimony that he was not detained when officers were detaining others in Helen Keller Park, Bogans refused to alter his recollection. (RHT 2652, 2676-2677.)[92] After looking at the names listed on the Lambrecht/Tong report (Exhibit GG), Bogans deduced that the deputies simply did not get petitioner's name for a field identification while petitioner was detained by the officers before they took off after the Player car. However, Bogans admitted that he had no independent recollection of who besides himself had been identified by the officers during the detention. (RHT 2717-2719.) In a 1997 interview, Bogans indicated: "police drove up and made them walk up to parking lot and get on ground-took names Marcus Player, Andy Wilson, Steve C. and Willie Marshall" (Exhibit SS.)[93] Bogans testified that after playing basketball, Bogans and petitioner smoked marijuana and drank. Bogans claimed that petitioner was acting normally like he was when he was sober. (RHT 2694-2695.) Bogans also admitted signing his declaration (Exhibit T). All of the typed material was on the document before Bogans signed it. According to Bogans' declaration, Bogans was with petitioner, Marcus Player, Willie Marshall and Andy Wilson in Helen Keller Park since approximately 8:00 p.m. They were playing basketball, smoking and drinking. The group, including petitioner, Marcus Player and Earl Bogans, was detained by officers in the park before the Player car was seen. (Exhibit T; see also RHT 2058-2061 [reference hearing testimony of Marcus Player].)

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[92] Bogans' reference hearing testimony is also inconsistent with the Lambrecht/Tong report (Exhibit GG) and the reference hearing testimony of Lambrecht and Tong describing the detention of four individuals in Helen Keller Park including Bogans, Marcus Player, Willie Marshall and Angulus Wilson. (See, fn. 88, *ante*, at p. 176.)

[93] Because respondent did not present Bogans with the opportunity to admit or deny having made this prior inconsistent statement and because the referee did not find that the interests of justice otherwise required, the referee limited the admissibility of this exhibit to any relevant non-hearsay purpose. (RHT 3686-3687.) The inconsistency is relevant to attack the credibility of Bogans' reference hearing testimonial claim that petitioner was detained with Bogans by LASD deputies before the pursuit of the Player car began.

d. Bogans' Contact with Petitioner at County Jail Following Petitioner's Arrest

Bogans testified that petitioner claimed to him that authorities were trying to pin on petitioner a murder which occurred on Vermont on December 27, 1980. Petitioner knew that Bogans could be an alibi witness for petitioner. Bogans went down to the county jail to tell petitioner that Bogans was an alibi witness for petitioner. On December 28, 1980, Bogans learned petitioner had been arrested for murder. Bogans was told about the arrest by Reginald Champion. Bogans didn't realize at first that Bogans was petitioner's alibi witness. It took a couple of weeks. Bogans had not concluded that he was petitioner's alibi witness when Bogans went to visit petitioner at the county jail. Bogans then changed his testimony claiming that he did know that he was petitioner's alibi witness right away (i.e., before Bogans went to see petitioner at the county jail). (RHT 2662-2667.) At the county jail, petitioner did not say Bogans should call petitioner's lawyer. Petitioner did not even give the name of the lawyer to Bogans. Bogans never went back to the jail. (RHT 2668.) Bogans never asked petitioner to give Bogans the name, address and telephone number of petitioner's lawyer. (RHT 2705.)

e. The "Blank Declaration" Sent to Bogans by Jerome Evan Mallet (Exh. U)

Following Mallet's conviction, Mallet called Bogans to tell Bogans that he was sending him a declaration that could help Mallet get out of jail. Bogans signed the otherwise blank declaration. Bogans had two conversations with Mallet. (RHT 2668-2774.) Bogans testified he was willing to help Mallet or any similarly situated member of the gang. (RHT 2675.)

f. The Player Automobile (Exhibits RR 1-8)

Bogans recognized the photographs (Exhibits RR 1-8) as the Player automobile. The car could seat approximately 5 people. When Bogans was being detained in the parking lot at Helen Keller Park, Bogans saw the Player car with its headlights on. It was turning into the park at a "pretty fast" rate of speed, in the neighborhood of 35 to 40

mph. Bogans could not tell how many people were in the car. Nor was he testifying that he saw Michael Player driving the car. (RHT 2691-2694.)

g. Prior Felony Convictions

Bogans was convicted of armored car robbery committed in 1998. Bogans was serving a sentence for his conviction in federal prison at the time of the reference hearing. (RHT 2642-2643.)

Marcus Player

a. Refusal to Cooperate with Petitioner's Trial Counsel

Marcus Player testified that he would not have discussed the subject of his reference hearing testimony with petitioner's trial attorney had the attorney contacted Player. Player testified his refusal was based upon the fact that "at that time, I was a little bit more street wise." (RHT 2001.) On cross-examination, Player denied having testified that he would have refused to discuss the subject of his reference hearing testimony with petitioner's trial counsel. (RHT 2008-2009.) After having his testimony on direct exam on this point read back, Player admitted that he had said he wouldn't have discussed the matter with petitioner's trial counsel. (RHT 2009-2010.) Player also testified he would not have freely testified in this matter "because I was under a different state of consciousness and I had another mentality then." (RHT 2008.) Further, on advice of counsel, Player would have invoked his privilege against self-incrimination if he had been called to testify at petitioner's trial because by testifying, he could incriminate himself as an accessory after the fact to the Taylor murder based on the circumstances surrounding the arrest of petitioner's co-defendant, Craig Ross, on August 1, 1981. Player had been present at the location when Ross was arrested. According to the police report (Exhibit 17-D), Player had falsely told the officers that Ross was not present at the location even though Ross was ultimately found hiding in the bathroom. (RHT 2029-2037.)

b. Marcus Player's Adult Felony Conviction Record

Marcus Player was convicted of armed robbery in 1978 based upon the November 1977 incident in West Covina in which petitioner, Michael Player and others were also involved. (RHT 2021-2022.) In 1983, Player was convicted of felony murder and robbery which occurred in December 1981. Marcus Player has been in custody for that offense since January 8, 1982 (i.e., before petitioner's trial). Marcus Player is currently serving a sentence of 31 years to life imprisonment. (RHT 1962-1963.)

c. Marcus Player's Relationship with Petitioner

Marcus Player has known petitioner since petitioner was five years old. Player has known petitioner's brother, Reggie, even longer. Marcus Player had a closer relationship with Reggie than he had with petitioner, although when petitioner was 14 or 15 years old, Player and petitioner "developed a little closer relationship." (RHT 1965, 2027, 2088.)

d. Marcus Player's Alibi For Petitioner; Inconsistencies between Reference Hearing Testimony and (1) Player's Statement to Petitioner's Counsel in 1996 or 1997; (2) Wayne Harris' Declaration (Exhibit S); (3) Earl Bogans' Declaration (Exhibit T); and (4) the LASD Report by Deputies Lambrecht and Tong (Exhibit GG)

Player testified that he left his fiancée's home on the night of the Taylor murder to walk to a liquor store for orange juice and/or milk. He was uncertain of the time, although he believed it to be somewhere around 10 o'clock to 11:00 p.m. (RHT 1969-1970.) On the way, Player saw petitioner and Wayne Harris at Helen Keller Park's basketball court. Player stayed to talk with them for approximately one-half hour. (RHT 1970-1974, 2038-2039.) Thereafter, Player went to the liquor store where he spent approximately 5 minutes obtaining the orange juice and/or milk. While carrying a bag with the merchandise purchased at the store, Player was detained alone (i.e., not with petitioner or Wayne Harris) by personnel from the LASD who ordered Marcus Player onto the hood of the police car. The officer called Marcus Player by his nickname,

Spark or Sparky. (RHT 1974-1977, 2040-2042.) While detained by the officer, Marcus Player first noticed the Player car, which Player assumed was coming into the park. The car belonged to Marcus Player's stepfather, Frank Harris. The LASD deputies left Marcus Player to give chase to the car. Then, Marcus Player heard what he thought was a car crash. (RHT 1977-1982, 2042-2044.) Player went to see what happened. On the way, Player ran into Wayne Harris and petitioner. The three of them thereafter went looking for the crash. (RHT 1982, 2044-2045.) Marcus Player, petitioner and Wayne Harris were then stopped by LASD deputies at 126th and Budlong where they were questioned. (RHT 1982-1985, 2045.) Marcus Player told the officers that Michael Player was the last person to drive the car, a belief not based on Marcus Player's personal knowledge, but derived from a process of elimination used by Marcus Player. (RHT 1985-1986.) The officers ordered Marcus Player, petitioner and Wayne Harris to walk to another unit's location. After doing so, the three were ordered to walk to the next unit's location. While doing so, a fourth person joined them. Marcus Player knew this person as Owl or Lil Owl. (RHT 1986-1990, 2045.) Player and the three others were ordered to sit on a curb for approximately one-half hour, during which time an LAPD car came by and shined its spotlight on everyone. Player believed the LAPD had witnesses and/or victims in the car for purposes of a possible identification. (RHT 1990-1992, 2045.) Eventually, Marcus Player, Wayne Harris and petitioner were ordered to go to petitioner's home. (RHT 1994-1995.) While Marcus Player was at petitioner's home, a commotion was heard emanating from the backyard. This commotion involved a dog biting someone although Player did not see the actual arrest. (RHT 1995-1996.)

In 1996 or 1997, Marcus Player was interviewed by petitioner's counsel, Ms. Kelly. According to a summary of that interview, Marcus Player told petitioner's counsel he was with friends, including petitioner, at Helen Keller Park. Marcus Player and others, but not petitioner, were detained in the park. Marcus Player and others were released when officers chased the Player car. Marcus Player and petitioner (without

any mention of Wayne Harris) were detained again near the site of the Player car crash. (RHT 2013-2014; Exhibit LLLL.)

Marcus Player's alibi testimony was inconsistent with the declaration of Wayne Harris (Exhibit S). In that declaration, Harris stated under penalty of perjury that Harris, Marcus Player and petitioner were detained in Helen Keller Park and that they were constantly detained for four hours. While questioned at a location one block away from the park, Harris could see the Player car driving into the park. (RHT 2055-2058; Exhibit S.) Marcus Player's alibi testimony was also inconsistent with the declaration of Earl Bogans (Exhibit T). According to Bogans' declaration, petitioner, Marcus Player, Willie Marshall and Andy Wilson were with Bogans in Helen Keller Park since approximately 8:00 p.m. playing basketball, smoking and drinking. In his reference hearing testimony, Marcus Player denied playing basketball, smoking or drinking. According to Bogans' declaration, the group, including petitioner, Marcus Player and Bogans, was detained by officers in the park before the Player car was seen. (RHT 2058-2061; Exhibit T.)[94] Finally, Player's reference hearing testimony is inconsistent with the Lambrecht/Tong report (Exhibit GG; RHT 2062-2064.) and the reference hearing testimony of Lambrecht and Tong. (See, fn. 88, *ante*, at p. 176.)

e. Gang Affiliation; Photographs of Petitioner and Marcus Player at CYA (Exhibits DD, EE and FF); Photographic Exhibits 47, AA, BB and CC

Marcus Player identified Exhibits DD, EE and FF as photographs taken at the CYA while both Player and petitioner were housed there. Marcus Player was released in approximately August 1980. Marcus Player and petitioner are shown in Exhibits EE and FF. In Exhibit DD, petitioner is seen throwing up a Raymond Avenue Crips' gang sign, suggesting to Marcus Player that petitioner was a member of the Raymond Avenue Crips. (RHT 2023-2026.) Contrary to the testimony of Gary Jones, Wayne

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[94] As previously noted, any claim that petitioner was detained in the park before the Player car was seen is inconsistent with petitioner's own trial testimony in which petitioner claimed to see others being detained in the park but that he was not himself detained. (13 RT 3091-3095.)

Harris and Earl Bogans, Marcus Player denied ever having been a member of the Raymond Avenue Crips. (RHT 2025-2026, 2085.) Player identified petitioner in Exhibit 47. Player identified Lavelle Player and Craig Ross in Exhibit AA, a photograph taken around 1980. Exhibit BB, a photograph also taken around 1980, shows Lavelle Player; Marcus Player and Craig Ross are seen in Exhibit CC. That photograph was taken after Marcus Player had been paroled from CYA in August 1980 and before the photograph had been seized from petitioner's residence on January 14, 1981. Marcus Player first met Craig Ross in the second or third grade. (RHT 2026-2029.)

f. Arrest of Marcus Player and Jerome Evan Mallet on November 19, 1980 For Robbery

On November 19, 1980, Marcus Player and Jerome Evan Mallet were arrested for robbery. (RHT 2047-2050; Exhibit X.) Marcus Player testified he could not recall if he had attempted to pass himself off to officers as Michael Player as Exhibit X indicates he unsuccessfully attempted to do. (RHT 2048-2050.)[95]

2. Petitioner's Social History, Mental and Physical Impairments

In this proceeding, through the testimony of petitioner's mother, his older sisters, his younger sisters, his uncle, friend Gary Jones, Dr. Miora (a psychologist testifying as a "mitigation specialist"), Dr. Riley (a board-certified neuropsychologist) and petitioner's *Strickland* expert, petitioner has maintained that the following categories of evidence affecting petitioner's functioning and development or otherwise reflecting relevant evidence in mitigation of penalty would have been disclosed and should have been presented at petitioner's trial by reasonably competent counsel. These include: (1) family poverty and its effect on petitioner; (2) Lewis Champion III, and to a lesser extent, Reginald Champion, as sources of abuse, disruption, chaos and inflictors of inappropriate disciplinary measures on petitioner and his siblings; (3) petitioner's poor

[95] Exhibit N (Trial Exhibit 114) reflects that after the Hassan murders and before the Michael Taylor murder, petitioner bailed Jerome Evan Mallet out of jail.

academic functioning in elementary, junior high and high school; (4) lack of intervention by the school system during petitioner's public-school experience; (5) the loss of Gerald Trabue, Sr. as a father figure and financial support for petitioner and his family; (6) the lack of a strong father figure from the period of petitioner's birth until his mother married Trabue and again following Trabue's death; (7) the impact of divorce and general family chaos; (8) petitioner's demonstrated amenability to rehabilitation within the context of the CYA;[96] (9) Lewis Champion II's treatment of petitioner's mother which impacted her ability to be a proper caregiver to petitioner; (10) the majority of petitioner's immediate family loved and cared for him very much; (11) family members during petitioner's childhood thought of petitioner as a protector, a good big brother; (12) community dangers; and (13) petitioner suffered from brain damage and dysfunction reflecting severe impairment.

In setting forth the referee's findings and supporting reasons, it should be noted that they will to some degree overlap with findings and supporting reasons in response to reference question numbers 3 and 4.

a. Mental Impairments

For reasons already stated, the referee finds that the reference hearing testimony of Drs. Hinkin and Faerstein is credible and reliable and further finds that petitioner did not suffer from brain damage or dysfunction in 1982 when petitioner's case was tried. The reasons for this finding by the referee are as follows.

First, the preponderance of the evidence clearly shows that petitioner's trial counsel did review petitioner's juvenile file which would have included Exhibits D, H, I and J (the CYA reports of Drs. Prentiss, Minton, Perrotti and Brown and the December 13, 1978 Home Investigation Report summarizing a December 11, 1978 interview a

[96] Skyers did in fact have the March 25, 1980 YTS report (Exhibits 23A-1 & 26-B), a document which would also have been included within petitioner's CYA file. As with Exhibit G-13, the December 12, 1979 YTS report, the referee finds Skyers reviewed this report during his representation of petitioner.

CYA parole agent conducted with petitioner's mother). Before petitioner's trial, Skyers also had the December 1981 report from Drs. Pollack and Imperi (Exhibit 46) summarizing their clinical assessment of petitioner. Not one of the six aforementioned psychologists and psychiatrists who evaluated petitioner at times proximal to the December 12, 1980 charged offenses, whether within two years before the charged offenses or one year after, reported finding any evidence of brain damage or brain dysfunction or evidence of ADHD or ADD. Not one of the aforementioned six experts recommended the need for additional psychological or neuropsychological testing of petitioner.

Second, respondent's experts in forensic psychiatry and neuropsychology, Drs. Faerstein and Hinkin respectively, testified at the reference hearing that they were in agreement with the experts from the CYA and Drs. Pollack and Imperi in concluding that there was no credible evidence to show petitioner suffered from brain damage. Drs. Hinkin and Faerstein also testified that based upon the materials they had reviewed, which would have been available to petitioner's trial counsel at the time of petitioner's trial, new or additional neuropsychological testing of petitioner was not warranted. The report of Drs. Pollack and Imperi makes no recommendation for the need for any psychological testing. Finally, petitioner's *Strickland* expert could not identify any legal authority existing at the time of petitioner's trial which would have mandated reasonably competent trial counsel to have petitioner undergo neuropsychological testing such as that administered by Dr. Riley in 1997, some 15 years after petitioner's trial.[97]

Third, the neuropsychological testing conducted by Dr. Riley in 1997, at the behest of petitioner's habeas counsel, provides no credible evidence that petitioner suffered from any brain damage or dysfunction at the time of petitioner's 1982 trial. As noted by Dr. Manley on page 272 of Exhibit III, there is questionable construct validity of neuropsychological testing, such as that performed by Dr. Riley, when applied to

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[97] Drs. Hinkin, Faerstein and Riley all agreed that based on petitioner's full scale IQ test result of 83, reached from testing administered by Dr. Riley, petitioner was not mentally retarded.

African-Americans such as petitioner who are far removed from the white, middle-class American culture on which such testing was developed. As Dr. Hinkin testified and Dr. Manley's research documented, unacceptably high false positive rates suggesting cognitive impairment are seen when such neuropsychological testing is administered to African-Americans.

In addition to the general lack of construct validity to the neuropsychological testing administered to petitioner, Dr. Riley's willingness to permit petitioner's counsel to be present during the first of two days of testing compromised the scientific validity of any test results. (Exhibit AAA, ¶ 8, pp. 3-4 [October 22, 1997 Decl. of Dr. Riley].) Dr. Hinkin's testimony concerning the presence of third parties during neuropsychological testing is found at RHT 6123-6144.[98]

More than 30 years before Dr. Riley's assessment of petitioner and more than 40 years before Dr. Miora's nine to ten hours of interviews and assessment of petitioner, the California Supreme Court in *In re Spencer* (1965) 63 Cal.2d 400 made clear that a criminal defendant had no absolute constitutional right to the presence of counsel during a court ordered psychological or psychiatric evaluation. Thus, as Exhibits 101-B, 101-C and EEE make clear, the presence of an interested third party such as an attorney representing petitioner threatens the reliability and validity of any assessment made by the expert. Drs. Riley and Miora were not aware of the holding of *In re Spencer.* Their uncritical acceptance of the policy exclusion for criminal cases set forth in Exhibit 101-C

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[98] See also, Exhibits 101-B [NAN 1999 policy statement]; 101-C [AACN 2001 policy statement]; EEE [Harcourt Brace position statement]; FFF at pp. 11-12 [Dr. Riley's 2003 presentation discussing problems with the presence of third parties at examinations conducted at prison facilities]; pages 369-373 from Chapter 14, Forensic Neuropsychology, "The Presence of Third Parties" ["The focus of this chapter is purposely narrowed to consider only trained third-party observers who are defined as neuropsychologists or technicians trained in the use and administration of neuropsychological tests. The current author would not suggest or condone as appropriate the presence of any untrained observer, such as a parent, spouse, or attorney, during a neuropsychological assessment"]; RHT 8611-8612; RHT 8595-8622; Exhibit RRRR at BS000155 [Dr. Miora's Dec. 15, 2006 e-mail to petitioner's counsel informing them of the aforementioned Chapter 14 discussion by Dr. John Blasé of the issue of third-party presence during a neuropsychological assessment]; Exhibit 136 & PPPP, pp.7-8 [Dr. Miora's April 1, 2007 Declaration's discussion of the presence of third-parties during a neuropsychological assessment]; *In re Spencer* (1965) 63 Cal.2d 400; RHT 6152-6155 [testimony of Dr. Hinkin].

can best be summed up by testimony given by Dr. Hinkin on this issue. After acknowledging that he had read Dr. Riley's reference hearing testimony concerning the issue of counsel's presence during part of Dr. Riley's testing and the application of *In re Spencer*, in response to respondent's counsel's question asking Dr. Hinkin to set aside the legal issue of whether petitioner had a right to Ms. Kelly's presence, but rather to address whether there was any scientifically valid reason supporting Dr. Riley's decision to permit Ms. Kelly's presence, Dr. Hinkin testified: "No. Whether or not there is a -- any legal right, it's just bad clinical practice to allow an attorney to sit in on the examination." (RHT 6133-6134.) Even if petitioner's counsel insisted on being present, Dr. Hinkin testified there was no ethical standard requiring Dr. Riley to continue participation in the examination in the presence of counsel. (RHT 6134.)

Other factors adversely affecting the reliability and credibility of Dr. Riley's 1997 neuropsychological test results and the interpretations of those results include: (1) Dr. Riley's bias against the death penalty (RHT 3299-3300.); (2) Dr. Riley's failure to review petitioner's San Quentin records encompassing the period 1982-1997 when addressing possible causes for organic brain damage Dr. Riley opined petitioner suffered from (RHT 3346-3347, 3449-3452; see also RHT 3347-3349 [no San Quentin CDC records reviewed before Dr. Riley's preparation of a second Declaration, Exhibit BBB].); (3) Dr. Riley's inappropriate use of a one standard deviation "cut point," rather than a two standard deviation "cut point," to identify cognitive impairment (See, RHT 6169 [testimony of Dr. Hinkin addressing this issue].); (4) Dr. Riley's failure to review the reference hearing testimony of petitioner's contemporaries, Wayne Harris and Earl Bogans (RHT 3429.), in which the witnesses painted a portrait of petitioner at odds with the cognitively impaired and abused picture of petitioner Dr. Riley, Dr. Miora and petitioner's mother, siblings and uncle proffered at the reference hearing;[99] (5) Dr.

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[99] Dr. Riley testified before Gary Jones testified and as such could not have been provided with Jones' reference hearing testimony before Dr. Riley testified. Nevertheless, given the substance of Jones' testimony which was inconsistent with claims of physical abuse suffered by petitioner at the hands of his older brothers or evidence of brain dysfunction as result of either such alleged beatings or the 1968 traffic

Riley's failure to review the December 13, 1978 Home Investigation Report (Exhibit H) prior to Dr. Riley's preparation of either her 1997 Declaration (Exhibit AAA) or 2002 Declaration (Exhibit BBB) (RHT 3407.), in which the parole agent summarizes petitioner's mother's contemporaneous account of petitioner's normal home life, the mother's normal pregnancy with petitioner, petitioner's normal developmental behavior and the absence of any serious illnesses or injuries suffered by petitioner as a child;[100] (6) Dr. Riley's uncritical acceptance of petitioner's social history based upon 1996 interview notes from interviews conducted with petitioner's mother, four sisters and Mrs. Champion's older brothers, Czell Gathright and E.L. Gathright (RHT 3397-3400, 3401-3402 ["I assumed that it was, the substance was largely true"].) despite the absence of independent corroborative data such as obstetrical, pediatric, police or court records to support the claim of fetal abuse raised by petitioner's family members; (7) Dr. Riley's failure to address entries in petitioner's school records (Exhibit CCC) in which petitioner's mother describes her pregnancy with petitioner as normal and petitioner's development to the time the records were completed as essentially normal (RHT 3413-

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accident, it is noteworthy that during the pendency of this reference hearing, another source of information inconsistent with conclusions reached by Dr. Riley was never provided to Dr. Riley in order for her to explain the apparent inconsistency between Dr. Riley's findings and the source information.

[100] In Dr. Riley's 1997 Declaration (Exhibit AAA, paragraph 29), Dr. Riley opined: "'There are several possible sources or etiologies of Mr. Champion's cognitive brain dysfunction. In my opinion, a prominent source of these deficits is the in utero insults he may have suffered when his mother was beaten by her husband during pregnancy.'" (RHT 3397; see also, RHT 3416-3417.) When asked to address the apparent discrepancy between Exhibit H and how petitioner's mother described petitioner's pregnancy and family life to the CYA parole agent and the post-1995 claims by Mrs. Champion of fetal abuse inflicted during petitioner's pregnancy by petitioner's biological father (RHT 3407-3410.), Dr. Riley testified: I believe that the way -- you know, I'm not an expert on that. My understanding is that some families -- that when people are being interviewed, I don't know who -- what this investigation was about, whether it was about Steve's -- I don't know the cause of this. But that many families will try to put, if they believe in the welfare of their child's home life, perhaps describe their home life as perhaps being a lot more normal and comfortable. Many people do not want to report physical abuse. I think there is some possibility that maybe Mrs. Champion underreported any kinds of abuse she might have suffered." (RHT 3410-3411.) This testimony, as well as testimony and the Declaration of Dr. Deborah Miora (Exhibit 136 at pages 5-6.), further supports the testimony of petitioner's trial counsel that when he talked with petitioner's mother and siblings about petitioner and his home life, no reports of physical abuse to petitioner's mother during petitioner's pregnancy or to petitioner as a result of beatings by his older brothers were received. For reasons to be set forth later, the referee finds that assuming *arguendo* such physical abuse occurred, reasonably competent trial counsel in 1982 would not have discovered that evidence due to the deliberate determination of petitioner's mother and family not to disclose such "dirty family business."

3419, see also, RHT 6223-6227, 6410 [testimony of Dr. Hinkin], 6556-6558 [testimony of Dr. Faerstein].); (8) Dr. Riley's failure to address or adequately explain in light of her test results the absence of any clinical finding of organic brain damage or dysfunction by any of the four CYA psychologists and psychiatrists who evaluated petitioner between 1978 and 1980 or by Drs. Pollack and Imperi who assessed petitioner late in 1981; (9) the inconsistency between petitioner's IQ test result of 88 obtained when petitioner was six years old and Dr. Riley's hypothesis that petitioner sustained brain damage as a result of fetal abuse; and (10) Dr. Riley's failure to adequately address petitioner's denial of ever having suffered any "serious head injury" or other injury or accident which could account for alleged brain damage or dysfunction seen by Dr. Riley. (See, e.g., Exhibits G-5, G-6, G-7, G-8 & G-9, RHT 6097-6105 [testimony of Dr. Hinkin], 3439-3443 [testimony of Dr. Riley], Exhibit UUU, p. 2 [Dr. Riley's notes of interview with petitioner concerning the traffic accident], compare reference hearing testimony of Drs. Faerstein and Hinkin, RHT 6560-6563 [testimony of Dr. Faerstein in which Dr. Faerstein opined that he would have expected to see more in the way of headache reports had petitioner sustained the degree of brain damage identified by Dr. Riley and had that brain damage been caused by the traffic accident], 6249-6251 [testimony of Dr. Hinkin in which, assuming the accuracy of reference hearing testimony from petitioner's mother that petitioner had headaches for a couple of weeks after the accident, Dr. Hinkin nevertheless opined that this was a common experience after one sustains a concussion which does not typically translate into brain damage].)

Fourth, assuming that petitioner's school records (Exhibit CCC) do more than merely "suggest" ADHD and/or a reading disorder and that in some fashion reasonably competent trial counsel could have established in 1982 with appropriate expert testimony that petitioner suffered from ADHD and/or a reading disorder when he was in elementary school some eight or more years earlier, petitioner has failed to set forth a coherent approach which trial counsel could have undertaken to present such evidence without opening up a Pandora's box of prosecution rebuttal evidence in the form of the

CYA reports from Drs. Prentiss, Minton, Perrotti and Brown, as well as the December 13, 1978 home investigation report. All of the CYA reports and the report of Drs. Pollack and Imperi make abundantly clear that by the time petitioner reached CYA, these experts saw no evidence petitioner suffered from ADHD. None of the CYA reports or the report of Drs. Pollack and Imperi identified any brain damage. Petitioner's statements to the CYA experts such those made to Dr. Perrotti,[101] Dr. Brown's acknowledgment of possible manipulation of the CYA psychologists and psychiatrists by petitioner (Exhibit I, p. 2.) and reports of petitioner's misconduct while at CYA (e.g., Exhibits G-13 [involvement in a "race riot"] & J, Report of Dr. Perrotti, p. 2.), could not have reasonably advanced petitioner's case during the penalty phase had petitioner's trial jury been exposed to such evidence.[102] In addition, during the guilt phase of the trial, petitioner's jury had a full opportunity to assess petitioner's levels of intelligence and articulateness, as well as degree of attention, when petitioner testified in his own

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[101] "Mr. Champion relates that he repeatedly became involved with the law because he thought that he could get away with things. He states that this is no longer his attitude. He states that he feels he has changed in that he has severed ties with gangs and is able to talk to different ethnic groups. He also states that he used to have a bad temper but that now he has made the decision to control his temper." (Exhibit J, Report of Dr. Perrotti, p. 1.)

[102] Dr. Miora wrote in her Declaration: "'In this particular case the presence of Mr. Champion's attorney permitted him to acquaint himself with the examiner as a source dedicated to learning about his psychosocial history rather than yet another evaluator whose intent was unclear.'" (RHT 8632) Dr. Miora's reference to the dedicated examiner was a reference to herself. (RHT 8633.) Dr. Miora conceded that she never asked petitioner during her three interviews with him what was petitioner's understanding of Drs. Prentiss, Minton, Brown and Perotti's intention when each evaluated petitioner while he was at CYA. (RHT 8632-8633.) The only reference in Dr. Miora's notes to her questioning of petitioner concerning the CYA psychologists or psychiatrists can be found at BS000039 of Exhibit UUUU. The entry reads in its entirety: "' Evals@CYA: Give an answer and get out.'" Dr. Miora spent no more than "several minutes. Several, maybe five minutes" asking petitioner about the evaluations done by the four psychologists and psychiatrists at CYA. (RHT 8638-8640.) Despite having at least some, if not all, of the reports of Drs. Prentiss, Minton, Perrotti and Brown when she questioned petitioner, Dr. Miora did not even "consider" taking the time to show each of the reports to petitioner and then ask him specifically about the circumstances under which the evaluation took place, including what was petitioner's understanding of what was at stake in the assessment and how petitioner approached it. (RHT 8640-8641.) Similarly, Dr. Miora never asked petitioner what his understanding was of Dr. Pollack's role when Pollack evaluated petitioner prior to the trial. (RHT 8663-8664.)

defense.[103] In short, competent counsel would not be unreasonable in concluding that the best course of action at the penalty phase was to "let sleeping dogs lie."[104]

In addition, even assuming *arguendo* that the school records might serve as a basis to suggest to a competent expert in 1982 the conditions identified by Dr. Hinkin, and further assuming, contrary to the state of the record in this proceeding, that there would be no countervailing reasons not to have presented evidence based upon petitioner's school records that petitioner may have suffered from ADHD and/or a learning disorder, the referee agrees with the findings by a recent panel from the 9th Circuit Court of Appeals which noted: "Dyslexia and ADD -- assuming they could have even been diagnosed in adults in the early 1980's -- are somewhat common disorders; although they add quantity to the mitigation case, they add little in terms of quality." (*Brown v. Ornoski* (9th Cir. 2007) 503 F.3d 1006, 1016.)

Before addressing the additional areas of potential mitigating evidence petitioner contends trial counsel should have discovered through pretrial investigation and presented at petitioner's penalty phase, it is first necessary to address the subject of the objectivity, credibility and reliability of Dr. Miora's reference hearing testimony on which most of petitioner's claims in this area rest. The referee will then address whether reasonably competent trial counsel would have been able to discover evidence in many,

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[103] While obviously not available to trial counsel, petitioner's poetry recital CD (Exhibit ZZZZ) provides some insight into what petitioner's jury saw and heard when petitioner testified. It also provides an additional basis to question Dr. Riley's conclusions.

[104] Volume 2 of the 1980 Death Penalty Manual included an August 1979 article by Michael J. Kallis entitled "The Penalty Phase Hearing in a Capital Case under Proposition 7." While not personally knowing Mr. Kallis, petitioner's *Strickland* expert, Mr. Earley, conceded that he felt Mr. Kallis "would know about capital case litigation." Earley admitted that materials included in these death penalty manuals were "as a general rule...looked at by other people to make sure that...there is some value to it." The article appears to provide a step-by-step discussion of the penalty phase proceeding. In his article, on page N17, Mr. Kallis states: "'In the all too common, "hopeless," case where there is no mitigating evidence to present, request that the jury be instructed that they are free to reject the death penalty even if they fail to find a single statutory mitigating circumstance.'" (RHT 4521-4522.) When asked whether reasonably competent counsel who read this portion of Mr. Kallis' article "could draw the conclusion...that it is a common situation [in capital cases for there to be no mitigating evidence available to present to the penalty phase jury]," Earley testified that he couldn't "answer that [question] yes or no." (RHT 4523-4524.)

if not most, of the claimed areas of mitigation had trial counsel conducted the type of pretrial investigation required of reasonably competent trial counsel.

b. Dr. Miora's Qualifications, Testimony and Objectivity

Dr. Miora testified that petitioner's case is the first capital case in which she has been asked to conduct a psychosocial assessment. (RHT 7454, 7493-7494.) In the four capital cases for which Dr. Miora's services have been sought, all have been at the request of the defendant's counsel. (RHT 8348-8350.) In addition, petitioner's case "is the first time [Dr. Miora has] testified as an expert evaluator in [her] field in court." (RHT 7496.) The only other times Dr. Miora has testified in court were on cases in which she was the treating psychologist. (RHT 7496.) Dr. Miora had never testified at any probation and sentencing hearing in any criminal case. (RHT 7496.) Dr. Miora has never been a member of the Los Angeles County Superior Court panel of psychiatrists and psychologists from which appointments of experts in those fields can be made for indigent defendants by trial courts. Dr. Miora has never received an order from the Los Angeles County Superior Court to conduct a psychosocial history on behalf of a capital case defendant facing trial in Los Angeles County. (RHT 7473.) Dr. Miora has never completed a postdoctoral fellowship in forensic psychiatry and psychology. (RHT 7471-7472.) Dr. Miora worked for one year between 1981 and 1982 at an internship at the "Center for Legal Psychiatry." (RHT 7451-7452, 7467-7472, see also Exhibit 137, at p. 3.) This facility was not in fact associated with UCLA. (RHT 7468.) In that internship, Dr. Miora worked under supervision, with the ultimate responsibility for any report submitted to the court for these MDSO and NGI committed patients resting with the supervisor, not Dr. Miora. (RHT 7469.)

Dr. Miora is not board certified in clinical and neuropsychology. (RHT 7496.) Dr. Miora conceded she had not been qualified in this proceeding as a neuropsychologist, only as a psychologist. (RHT 8280, 8511-8512, 8517, 8607.)

Dr. Miora conceded that Dr. Hinkin's qualifications in neuropsychology were superior to her own. (RHT 8722 ["Yes, indeed, [Dr. Hinkin] has many more years of experience. He's been qualified as a neuropsychologist in this matter."].)

The 154 page "Petitioner's Life History" Core of "Dr. Miora's" 213 page April 1, 2007 Declaration (Exhibits 136 & PPPP, pp. 47-201.),[105] *created by petitioner's counsel and not the witness*, reflects a biased and highly selective "spin" of the reference hearing evidence and exhibits. Dr. Miora admitted that this reflected "a selection of testimony, declarations and other materials" by Ms. Andrews, a selection "independently" undertaken by Ms. Andrews. (RHT 9037-9039.)

In response to the referee's request, Dr. Miora reviewed the contents of the 154 page social narrative included within her Declaration (Exhibit 136) to identify those portions of the document initially created by petitioner's counsel which Dr. Miora had reviewed and either modified, deleted or augmented. (RHT 9170.) Dr. Miora produced Exhibit YYYY (RHT 9170-9171.), the first page of which is an "Index of Changes Made to Social Narrative Portion of Declaration of Dr. Deborah S. Miora, Ph.D. Signed and Dated April 1, 2007." The balance of Exhibit YYYY is a copy of Dr. Miora's 213 page Declaration which Dr. Miora has highlighted with respect to substantive changes she made to what Ms. Andrews initially created. (RHT 9170-9171, 9197-9200.) The single largest substantive input from Dr. Miora in Exhibit YYYY can be found at pages 102-104 and continuing on to the first sentence of page 105. (RHT 9198-9200.)

Exhibit TTTT is a copy of the "preliminary, incomplete draft 3-18-07" of the "Narrative of Petitioner's Life History" created by petitioner's counsel. (RHT 8352-8359; Exhibit TTTT at BS000001 [e-mail from Ms. Andrews to Dr. Miora, quoted verbatim at RHT 8357-8359].) One can look at Exhibit TTTT and compare it with the "Narrative of Petitioner's Life History" beginning on page 47 of Dr. Miora's Declaration (Exhibit 136)

[105] For ease of reference, all further references to Dr. Miora's Declaration will be to Exhibit 136, unless transcript references are to Exhibit PPPP.

as another way to see what changes, if any, Dr. Miora made to the work created by petitioner's counsel.

While Dr. Miora claimed that she did not see her role in this case as that of an advocate for petitioner,[106] she admitted that the role of petitioner's counsel in representing the petitioner differed from Dr. Miora's role. Petitioner's counsel did not share the same intention to be independent and objective in deciding which materials to send Dr. Miora for her review. Dr. Miora believed petitioner's counsel were advocates for petitioner. Dr. Miora admitted that in their advocacy role, counsel for petitioner may be biased, a bias which could be reflected by petitioner's counsel's selection of materials which were provided or not provided to Dr. Miora for her review. (RHT 8291-8294.)[107]

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[106] The record from the reference hearing reflects Dr. Miora at times did in fact act as an advocate for petitioner.

[107] Dr. Miora admitted that none of the materials from petitioner's peers, Wayne Harris, Marcus Player, Earl Bogans and Gary Jones, dealing with the subject of possible abuse had been included by Dr. Miora in her final Declaration. "That's correct. I did not have these testimonies, from which you read yesterday, at my disposal, and in the best of all worlds, I would have been able to review everything, but I think as you well know from whenever it was you provided to your experts and my experience working in legal cases, we have at our disposal hopefully enough information to make our best assessments." (RHT 8373.)

After admitting these materials were not at Dr. Miora's "disposal" because counsel did not provide the materials to Dr. Miora, she testified that at the time she finalized her Declaration, she did not consider whether the failure to provide these materials was an "oversight on the part of counsel[.]" (RHT 8373-8374.) Nevertheless, even though Dr. Miora now knew at the time of her testimony that counsel had not provided her with these materials in which petitioner's peers testified to the absence of any observed physical abuse to petitioner by his older brothers, Dr. Miora refused to concede that such conduct by counsel "may reflect that they were biased in their selection of the material [Dr. Miora was] provided[.]" "I'm not in a position to speculate or hypothesize about that." (RHT 8374.) When questioned whether she had testified the day earlier that counsel had a potential bias which could influence what materials were sent to Dr. Miora, Dr. Miora refused to admit that she had in fact testified to that effect. "I would need to see the record, and the dailies are not provided to me, so I had not seen them, and I do not know exactly what I said, honestly." (RHT 8374-8375.) After admitting that she "may have said there could have been a potential bias[,]" Dr. Miora testified: "I did not have the experience in working with these attorneys that they were not willing to consider or submit for my review negative materials." (RHT 8375.) However, when once again confronted with the follow-up question recognizing that Dr. Miora now knew that petitioner's counsel had not sent her reference hearing testimony from three peers of petitioner's and asking whether that now caused Dr. Miora to say that the potential bias on the part of counsel "may be reflected in the decision not to send [Dr. Miora] those materials[,]" Dr. Miora again testified: "Again, I'm not in a position to make that evaluation." (RHT 8375.)

Dr. Miora testified that she was not provided with the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player or Ronald Skyers. (RHT 8303-8304, 8525.) Further, she was not told what Harris, Bogans or Player testified to at the reference hearing. (RHT 8304.) Dr. Miora assumed that petitioner's counsel had access to the reference hearing transcripts of these witnesses. When asked whether she had been told anything by petitioner's counsel as to why counsel chose not to send these transcripts to her, Dr. Miora answered, "My understanding is that the materials that were sent to me were what they felt would be most helpful to me in answering the referral question about Mr. Steve Champion's development and functioning." (RHT 8323.)

Dr. Miora conceded that her assignment to assess petitioner's functioning and development included the period up to the time of petitioner's arrest in January 1981, a period which included the timeframe from petitioner's release from CYA on October 23, 1980 through the time of the Hassan murders on December 12, 1980. (RHT 8324.) Because Dr. Miora was unaware of Wayne Harris' reference hearing testimony, she did not know that this witness, who was petitioner's good friend and who knew petitioner's family, testified that he had never seen either Reginald or Lewis Champion III attack petitioner. Petitioner never complained of headaches. Petitioner appeared to be physically and mentally sound. Petitioner never appeared to need food, clothing or medical attention. According to Harris, he and petitioner had normal middle-class upbringings with neither coming from a dysfunctional family. (See, *ante*, at p. 173.)

Similarly, Dr. Miora was unaware that Earl Bogans testified he had known petitioner since 1975; that he had seen petitioner "quite often;" that he had been in petitioner's home a couple of times and that the home was nicely kept; that Bogans never saw anything suggesting petitioner had been deprived of food, clothing or shelter or that petitioner appeared destitute; petitioner never claimed he was in need of money nor did petitioner appear to Bogans to be mentally slow or brain-damaged. (See, *ante*, at p. 177.)

In addition, Dr. Miora was unaware that Marcus Player testified in this proceeding he had known petitioner since petitioner was five years old; that he had known petitioner's brother Reggie for an even longer period of time; and that while Player's relationship was closer to Reggie than petitioner, when petitioner was 14 or 15 years old, Player and petitioner "developed a little closer relationship." (See, *ante*, at p. 182.)

Prior to testifying at the reference hearing, Dr. Miora had not been provided with photographs of petitioner and Marcus Player taken while both were at the CYA (Exhibits DD, EE and FF), including a photograph of petitioner throwing a gang sign of the Raymond Avenue Crips (Exhibit DD). (RHT 2023-2026.) Similarly, Dr. Miora had not seen Exhibit 47 (the photograph of petitioner holding a gun) or Exhibits AA (photograph of Lavalle Player and Craig Ross taken around 1980), BB (photograph of Lavalle Player taken around 1980) and CC (photograph of Marcus Player and Craig Ross taken after Marcus Player was paroled from the CYA in August 1980 and before January 14, 1981 when the photograph was seized from petitioner's residence pursuant to a search warrant). (RHT 2026-2029.) Dr. Miora never discussed any of these photographs in her Declaration, because as she testified: "I'm not in a position to discuss the photographs in my Declaration." (RHT 8318.)

Dr. Miora testified that she never asked petitioner whether he remained a member of the Raymond Avenue Crips following his release from the CYA on October 23, 1980. (RHT 8295, 8444-8446 [Dr. Miora testified when she talked with petitioner about his return to gang activities, she did not ask him if he was a member of the Raymond Avenue Crips.].) Nevertheless, in the course of the first of three separate interviews with petitioner,[108] the subject of gangs made out "a large portion of [that] interview...." (RHT 8301.) In a portion of her Declaration which was entirely written by

[108] Dr. Miora interviewed petitioner for approximately four hours and ten minutes on February 15, 2007, roughly between two and three hours on February 16, 2007 and three hours on December 11, 2006 for a total of no more than ten hours. (RHT 8385-8388, 8390-8391; see also, Exhibit UUUU, BS 000036, 000052-53, 000060 [Dr. Miora's interview notes].)

Dr. Miora rather than by petitioner's counsel (Exhibit 136, pp. 14-15.), Dr. Miora set forth what petitioner told her about his gang affiliation. (RHT 8296-8301.)

In the first interview, Dr. Miora admitted she never asked petitioner whether he ever left the gang. (RHT 8301.) While admitting that she discussed with petitioner his activities following his release from the CYA, in response to a question asking whether she asked petitioner whether he was a member of the Raymond Avenue Crips at that time, Dr. Miora testified: "He offered that information. I didn't need to ask." (RHT 8302.) From her notes of the interview with petitioner (Exhibit UUUU, page 000031.), Dr. Miora testified that petitioner told her that once he was released by the CYA, "he found that the people he kicked with were gone. He said his buddies were gone, in jail." (RHT 8302-8303.) After admitting that petitioner did not directly tell Dr. Miora that he had left the Raymond Avenue Crips after his release from the CYA, Dr. Miora testified in response to the question whether she could "draw the impression that he had [left the gang]," "I don't believe I can answer that with a yes or no." (RHT 8303.)

The referee finds, based on the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player, in addition to what the aforementioned photographic exhibits demonstrate, there is significant and credible evidence to establish that petitioner's trial testimony in which he claimed to have left the Raymond Avenue Crips following his release from CYA was false.[109] Dr. Miora was asked on cross-examination to assume that petitioner had in fact lied at his trial when he claimed he left the Raymond Avenue Crips, in response to the question whether such a circumstance would "cause [Dr. Miora] to at least question the credibility, reliability and validity of the

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[109] As Exhibit GG (the Lambrecht/Tong report which had not been provided by petitioner's counsel to Dr. Miora [RHT 8525-8526.]) and the testimony of Wayne Harris make clear, on December 28, 1980, some 2 months following petitioner's release from CYA, petitioner was with two Raymond Avenue Crips when detained by LASD deputies at 12:30 a.m. In response to a question asking whether these circumstances would not be of some significance to issues of what petitioner was doing following his release from the CYA and the credibility of petitioner's claims to CYA officials as documented in their reports, Dr. Miora provided her response of not enough time or funding to look at all possibly useful materials. Nevertheless, Dr. Miora felt confident her opinions "would [not] have changed in any significant way." (RHT 8525-8526.)

information [petitioner] provides you in the three interviews[,]" Dr. Miora testified: "I can't answer that in a yes or no, but I'd be happy to respond." (RHT 8307-8308.)

Dr. Miora could not answer whether "Craig Ross [was] in the community once Mr. Champion was released from the Youth Authority in October of 1980[.]" (RHT 8314: 1-4 ["I don't know. I don't have an answer to that."].) When asked whether it would matter to her whether Craig Ross was a buddy of petitioner's, a member of the same gang as petitioner, in the same community as petitioner following petitioner's release from the CYA and someone whom petitioner continued to run with following his release from the CYA, Dr. Miora's answer was: "I could answer the question without being confined to a yes or no. The emphasis of my evaluation and my understanding of my referral question was to evaluate Steve Champion's development and functioning. As I noted earlier, I did not have the time to complete my evaluation as thoroughly as I might like to have done." When pressed to answer the question which was posed, Dr. Miora testified: "Assuming all those facts were true, and assuming I had interpreted the comments in my evaluation on [Exhibit UUUU] Bates stamp page 000031 to mean literally that all of his buddies were gone, that could be a source of concern." (RHT 8314-8316.)

Dr. Miora admitted that at the time she signed off on her Declaration, she was not aware Wayne Harris had testified that on December 28, 1980, following the release of Harris and petitioner by LASD deputies at 1:00 a.m., Harris and petitioner went to petitioner's home where they found Craig Ross. When asked if it would not have been relevant to Dr. Miora's assessment to know this, assuming that Ross was a high-ranking member of the Raymond Avenue Crips and that, as Harris and Earl Bogans testified in this proceeding, petitioner was also a member of the Raymond Avenue Crips in December 1980, Dr. Miora responded, "Again, I cannot answer that with a yes or no, because a single piece of information such as that out of context would not necessarily have provided me with any meaningful source of information." (RHT 8540-8541.)

Nevertheless, when asked earlier whether it would have been helpful to have received and reviewed Wayne Harris' reference hearing testimony, Dr. Miora admitted that she didn't "know without having had an opportunity to review that testimony to what extent that may have aided me in addressing the referral question that I was given by counsel." (RHT 8320-8321.) When asked the same question with respect to the reference hearing testimony of Marcus Player, Dr. Miora answered the question: "With permission, I need to make a comment." (RHT 8321.) When the referee refused the witness' request to comment, Dr. Miora admitted: "This could perhaps have been useful to me." (RHT 8321.) When asked the same question with respect to the reference hearing testimony of Earl Bogans, Dr. Miora would only admit that it would "perhaps" have been helpful to her. (RHT 8322.)

Nevertheless, petitioner had told Dr. Miora during one of his interviews that Craig Ross was a close friend of his. (RHT 8880-8881, citing to Exhibit 136 at p. 20 ["'two of his close friends refused drugs, including Craig Ross and Raymond Winbush'"].) Further, Dr. Miora understood that Craig Ross was alive in December 1980. While Dr. Miora disclaimed knowledge that Ross was a member of the Raymond Avenue Crips in December 1980 ("I don't know that"), she conceded that the materials she had received for review included appellant's opening brief which made reference to evidence that showed Craig Ross was a member of the Raymond Avenue Crips in December 1980. Thus, despite not having received from petitioner's counsel the reference hearing testimony of Earl Bogans and Wayne Harris which included testimony that Ross was a member of the Raymond Avenue Crips in December 1980, Dr. Miora had the information available reflecting that Craig Ross, a member of the Raymond Avenue Crips in December 1980, was a close friend of petitioner's. (RHT 8880-8882.) Had Dr. Miora been provided the reference hearing testimony of Wayne Harris, Dr. Miora would have been aware that Harris, Marcus Player and petitioner found Craig Ross in petitioner's home at approximately 1:00 a.m. on December 28, 1980 following their

release from detention by LASD deputies approximately one hour after the commission of the Taylor murder and related crimes. (RHT 2761-2762, see, *ante*, at p. 175.)

After admitting that she had discussed in her direct examination the effect of the alleged poverty in the Champion family on both petitioner and his family, Dr. Miora was asked to assume that in the reference hearing testimony from Wayne Harris and Earl Bogans, they testified to their perceptions of petitioner with respect to issues of malnutrition, lack of clothing and lack of adequate shelter. When asked if that wouldn't be the kind of information that would be important to Dr. Miora coming from people who were friends of petitioner in the relevant time period Dr. Miora was assessing, Dr. Miora testified: "I would be considering the context of the information provided and by whom. These are peers living, I'm assuming, in similar contexts at the moment." (RHT 8326.) Dr. Miora testified it was possible these people were not "reliable witnesses." When asked whether these witnesses "knew Mr. Champion better than his mother knew him during this relevant time period[,]" Dr. Miora testified: "I'm not in a position to answer that question." (RHT 8327.) After acknowledging her recollection that Mrs. Champion testified at the reference hearing she did not know her son, petitioner, was a gang member, Dr. Miora was asked whether witnesses such as Wayne Harris and Earl Bogans who testified that petitioner was a member of the Raymond Avenue Crips might know petitioner better than his mother. Dr. Miora testified: "It would be suggested that [Mr. Harris] knew Mr. Champion in ways that his mother did not know him, in ways that peers at that, in that age range tend to know their friends better than do their parents in certain circumstances." (RHT 8327-8328.)

The referee finds Dr. Miora was less than objective and at times assumed an advocate's role on petitioner's behalf.[110, 111]

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[110] Dr. Miora was not provided with Exhibit N, the bail receipt showing petitioner posted $250.00 cash bail for Evan Jerome Mallet after the Hassan murders and before the Taylor crimes. (RHT 8442.) Dr. Miora was unsure whether she was aware Mallet was a member of the Raymond Avenue Crips. (RHT 8441.) Dr. Miora failed to ask petitioner how he was able to post $250.00 cash bail for Mallet. (RHT 8445.) Dr. Miora never asked petitioner what his source(s) of income were following petitioner's release

On page 86 of Exhibit 136, Dr. Miora discusses the allegation that E.L. Gathright observed petitioner's biological father, Lewis Champion II, beating and kicking Mrs. Champion in the stomach while she was pregnant with petitioner. In the paragraph, there is no reference to the explicit reference hearing testimony from E.L. Gathright that he had never seen that event occur. (RHT 9041-9043.)

Ms. Andrews' inclusion in the social history of the alleged fetal abuse suffered by petitioner at the hands and feet of his biological father and Dr. Miora's verbatim inclusion of this in her Declaration are interesting on a separate level. Dr. Miora testified that she "was not asked to consider the question of whether Mr. Champion suffered any perinatal or developmental injuries which might have caused brain damage. That's -- I'm not in a position to speak to that question." (RHT 8271.) The referral question provided by petitioner's counsel to Dr. Miora, as stated on page 2 of Exhibit 136, reads: "'Counsel for Steve Champion asked me to conduct an assessment of the factors affecting Mr. Champion's development, behavior and functioning as part of the case in mitigation which could have been presented in Mr. Champion's capital penalty trial in 1982.'" (RHT 8543-8544.) Dr. Miora admitted that the referral question provided "contains no limitations on what would be considered by [Dr. Miora] relevant factors that may have existed prior to 1982's trial which [she was] to assess...[.]" (RHT 8544.) Further, Dr. Miora described her "model of assessment" on page 3 of Exhibit 136, stating: "'Possibly significant contributory biological factors may include genetic predisposition, loading, in utero events, birth trauma, congenital abnormalities, illnesses and injuries and exposure to toxins, in particular neurotoxins.'" (RHT 8544.)

from the CYA in October 1980, although Dr. Miora reviewed records showing "highly temporary assignments" paying less than one hundred dollars. (RHT 8452-8453.)

[111] An example documenting Dr. Miora's, at times, lack of objectivity in this proceeding can be found in her testimony concerning Exhibit ZZZZ. Dr. Miora was asked if she could identify petitioner's voice as the individual reciting a poem about the execution of Stanley "Tookie" Williams. Despite having recently interviewed petitioner for 9 to 10 hours, Dr. Miora testified: "Not being a voice recognition specialist, there is a likeness in the voice." (RHT 9303.) Dr. Miora's unwillingness to admit the obvious simply reflects an absence of neutrality on her part.

Clearly, fetal abuse falls within Dr. Miora's own description of her model of assessment; nevertheless, as noted, Dr. Miora maintained that she was not in a position to assess the question of whether petitioner suffered any perinatal or developmental injuries which might have caused brain damage. Dr. Miora also conceded that petitioner's counsel "specifically charged me with the assessment of Mr. Champion's development, behavior and functioning." (RHT 8542.) Dr. Miora denied being explicitly told by either of petitioner's counsel that she should not consider the issue of fetal abuse to the development and functioning of petitioner. (RHT 8543.) Further, Dr. Miora testified that she did not specifically ask either or both of petitioner's counsel whether she should address the issue of possible fetal abuse and the consequences of same to petitioner's development and functioning. (RHT 8543.)

Dr. Miora conceded that she had "carefully read" the reference hearing testimony of E.L. Gathright. (RHT 8552.) The purpose in reading such testimony carefully was to permit Dr. Miora a basis to decide whether to incorporate verbatim that portion of the social narrative written by petitioner's counsel concerning alleged fetal abuse in Dr. Miora's Declaration. (RHT 8552.) After Dr. Miora confirmed that she had read that portion of Mr. Gathright's reference hearing testimony in which he specifically denied ever seeing petitioner's biological father punch or kick Mrs. Champion in the abdomen or stomach while she was carrying petitioner, Dr. Miora conceded both that she had noted petitioner's counsel failed to include in the social narrative any reference to that portion of Mr. Gathright's reference hearing testimony and further that Dr. Miora did not put any reference to this testimony in the final Declaration. (RHT 8552-8556.) Dr. Miora testified: "Again, no, specifically **I didn't apparently feel it was important to put this particular individual's perspective on this very particular incident in here**." (RHT 8556-8557.) Nevertheless, Dr. Miora conceded that evidence E.L. Gathright did not see the biological father kick or strike Mrs. Champion in the abdomen or stomach might be evidence to undermine Dr. Riley's claim that brain damage identified by Dr. Riley was the product of fetal abuse, among other causes. (RHT 8557-8558.)

Although Dr. Miora testified "that it is possible" Mr. Gathright's testimony would serve to undermine Dr. Riley's claim as to a possible source of brain damage, even assuming Dr. Miora's understanding that Dr. Riley's testimony was that fetal abuse *may have been* a factor, not that it *was* a factor, in causing the brain damage, was accurate, Dr. Miora's initial effort to discount Mr. Gathright's testimony by claiming it was her recollection he testified that he "didn't recall specifically seeing [Azell Champion] hit or kicked in the stomach" was clearly unavailing. (RHT 8558-8560.) After conceding that there was no equivocation in Mr. Gathright's testimony that he did not witness Mrs. Champion being kicked in the abdomen, Dr. Miora's fallback position was that simply because he never saw that alleged abuse occur did not mean it never happened. (RHT 8559.) Although it may be true that there are alternative explanations or inferences to draw, Dr. Miora's claim that "[[h]er] role was to be fair and objective in my assessment of the factors affecting [petitioner's] development, behavior and functioning, not just opine on any legal claim to the veracity of Azell's complaints" (RHT 8558.), is untenable in light of her failure to include conflicting information of which she was in fact aware and the adverse inferences which could be reasonably drawn from such information in the Declaration.

Dr. Miora testified that the only court testimony she had received and reviewed in which the witness claimed to have seen or witnessed Mrs. Champion being beaten or kicked in the abdomen or stomach was Mrs. Champion's testimony. (RHT 8560.) In that testimony, petitioner's mother testified that she understood a pregnancy would not be considered normal if she had been beaten by petitioner's father as she now claimed. (RHT 5487, read verbatim to Dr. Miora at RHT 8575-8576.)[112] Dr. Miora admitted that she had a recollection of this testimony by petitioner's mother. (RHT 8569-8570.)

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[112] See, *post*, at pages 213-214, for discussion of that portion of the December 13, 1978 Initial Home Investigation Report (Exhibit H) under "Developmental History," in which petitioner's mother described petitioner "as a full-term infant and experienced normal delivery. There were no serious illnesses or injuries suffered as a child. He demonstrated no abnormal developmental behavior during his formative years."

Neither petitioner's counsel, Ms. Andrews, nor Dr. Miora included in the social history as originally drafted or the completed Declaration of Dr. Miora reference to petitioner's mother's aforementioned testimony about beatings of her by petitioner's father during petitioner's pregnancy resulting in a pregnancy which would not be considered normal. (RHT 8581; Exhibits 136 at pp. 191-192 & fn. 103; UUUU at p. BS000022 & fn. 76; YYYY at pp. 191-192 & fn. 103.)[113]

When Dr. Miora was asked whether she "accepted that Mrs. Jackson, at the time she testified [at the reference hearing], had a motive to paint a picture which she believed would help get her son off death row? Yes or no[,]", Dr. Miora's initial non-responsive answer was: "Do I think that any mother would have preferred to get her son off death row?" When advised her answer did not respond to the question posed, Dr. Miora then answered: "My answer would be yes." (RHT 8586.) Dr. Miora again conceded that she did not put in her Declaration her own recognition that petitioner's mother's testimony in 2006 came at a time when petitioner's mother had a motivation to lie in an effort to get her son off death row. (RHT 8586.) Contrary to that concession, when Dr. Miora was then asked whether she considered that petitioner's mother had a similar motivation to lie when she was interviewed many years after petitioner was sentenced to death as part of the process leading to Mrs. Champion's Declaration, Dr. Miora rejected the idea that Mrs. Champion had such a motivation. "No, I don't believe that Ms. Azell Jackson, as I know her, had a motivation to lie." (RHT 8587-8589.) Further, Dr. Miora conceded that she had reviewed that portion of the reference hearing testimony of petitioner's mother where the mother conceded that she knew that if she

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[113] In her testimony, Dr. Miora testified: "I'm not sure [petitioner's mother] claimed fetal abuse. She claimed that she was hit in the stomach. I don't recall any specific commentary that the fetus was injured, which is what I understand fetal abuse to mean." (RHT 8590.) While conceding that the mother testified that petitioner's biological father, not wanting petitioner, basically tried to kill this baby by striking the mother in the stomach and the abdomen, Dr. Miora did not agree that that description constituted fetal abuse. "No, it constituted abuse against Ms. Jackson. Beyond that, I'm not in a position to say." (RHT 8591.) Dr. Miora further testified that she didn't "know if the intention was to kill the baby. I can't speak to Mr. Champion, II's, Lewis Champion, II's intention. I understand there were feelings toward the fetus. Number two, it is quite possible, but I'm really, I'm not a medical expert, who could say whether, indeed, the fetus would have been abused. I don't know, I can't speak to that." (RHT 8591-8592.)

had told an investigator from the CYA that the Champion home was not normal and that Lewis terrorized the family, that would not help get petitioner home from the CYA. (RHT 8589-8590, citing verbatim to Mrs. Champion's reference hearing testimony at RHT 5525-5526.) Nevertheless, when asked if she agreed that because petitioner's mother "knew the kind of information if heard by people at the Youth Authority [which] would not be helpful to get her son out of the Youth Authority, she also was capable of knowing what kind of claims might be made to help get her son off of death row? Yes or no[,]" Dr. Miora testified: "I'm not in a position to evaluate that claim." (RHT 8590.) The referee finds that a good, credible, independent and objective expert would in fact engage in this type of assessment of claims that alleged fetal abuse, physical abuse by petitioner's brothers, the 1968 traffic accident, alleged poverty, possible brain damage, gang activity, school resources and conditions in the neighborhood affected petitioner's development and functioning.

Dr. Miora reviewed petitioner's school records (Exhibit CCC). (RHT 8560.) Dr. Miora understood, both from the reference hearing testimony of petitioner's mother and Dr. Miora's review of the exhibit itself, that petitioner's mother was the informant regarding the birth history section of petitioner's school records. (RHT 8561.) Petitioner's listed birth weight of 9 pounds was something considered by Dr. Miora to be significant in evaluating the referral question. Dr. Miora considered 9 pounds to be a normal sized baby. Conditions associated with low birth weight would fall within possibly significant contributory biological factors or *in utero* events which could affect development and functioning. (RHT 8562-8563; Exhibit 136, at p. 3.) Further, the listed length for the pregnancy resulting in the birth of petitioner, nine months, was considered by Dr. Miora to be normal. Dr. Miora conceded that the listed duration of labor, 12 hours, would "not necessarily" be considered unusually long.[114] The reference in

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[114] Dr. Miora had been provided with no contemporaneous obstetrical records for the labor and delivery period nor any contemporaneous records documenting any concern for petitioner's well-being by the people involved with the labor and delivery of petitioner. (RHT 8564-8565.)

Exhibit CCC to no anesthesia was something which would not cause a red flag to go up in Dr. Miora's mind about a possible problem with petitioner's well-being from the effects of anesthetics. Entries reflecting no infection and no bleeding were good things since both conditions create risk to the newborn. Further, the notation of the absence of high blood pressure in the mother was also a good thing since high blood pressure during pregnancy can adversely affect the fetus. (RHT 8560-8568.)

Dr. Miora reviewed the reference hearing testimony of petitioner's mother in which she admitted that she wrote in petitioner's school records (Exhibit CCC) "no" to all of the listed complications for the pregnancy resulting in the birth of petitioner. (RHT 8570-8572, reciting verbatim the reference hearing testimony of petitioner's mother beginning at RHT 5490; RHT 8577-8579, reciting verbatim from RHT 5489, including testimony from petitioner's mother in response to a question asking why she had written "no" in the line provided for "other" complications when she in fact considered her pregnancy with petitioner not to have been normal.)

Dr. Miora said that she had not put in her Declaration (Exhibit 136) any reference to the information provided by petitioner's mother in Exhibit CCC indicating that the pregnancy with petitioner was normal with no complications. (RHT 8584-8585.) When asked whether the absence of any type of complication during the pregnancy as set forth by petitioner's mother in her answers to questions about the pregnancy in Exhibit CCC "might be some indication that [petitioner's] history and development did not include something that occurred during the gestational period and the early childhood which caused any kind of brain damage as claimed by Dr. Riley[,]" Dr. Miora answered: "I was not evaluating for brain damage per se. That was not my charge, to the best of my understanding of my charge." (RHT 8585.)

Dr. Miora did not include in her Declaration comments from Dr. Hinkin's report in which he concluded that petitioner suffered no brain damage. (RHT 8519.) Similarly, Dr. Miora did not include in her Declaration any citation to Dr. Hinkin's or Dr. Faerstein's

reference hearing testimony in which each expressed his independent opinion, contrary to Dr. Riley's, that petitioner had sustained no brain damage. (RHT 8521-8522.)[115]

Dr. Miora failed to include in her Declaration such impeaching evidence. Dr. Miora admitted reading the reference hearing testimony of Gary Jones. From that testimony, it was Dr. Miora's understanding that Jones and petitioner were "best friends." (RHT 8328.) Dr. Miora admitted reading that Jones testified petitioner had been in Jones' home practically every day petitioner was not at the Youth Authority or in some other custodial setting. When asked if Jones had also testified that he had been in petitioner's home on frequent occasions, Dr. Miora testified: "That I don't recall. I would need to see the testimony." (RHT 8329.) After respondent's counsel referred to Jones' testimony at RHT 5668 in which Jones testified that he had gone to petitioner's home "pretty often," Dr. Miora admitted that that did in fact ring a bell. (RHT 8329.)

Dr. Miora further admitted that the following summary of Jones' testimony was consistent with her own recollection: "Jones had known Steve Champion since Jones was five or six years old. Jones was in kindergarten while Steve Champion was in first grade. Their relationship continued except when petitioner was incarcerated. That Jones first met Steve Champion when Steve Champion stepped into a situation in which Jones' brother was trying to whoop Jones with a belt, and that Steve Champion, 'had enough nerve to tell my brother this is going to stop,' That Jones saw petitioner daily, was his best friend. Petitioner was very competitive in athletics. That Steve Champion had 'certain leadership abilities which Jones admired.' 'We had a really beautiful childhood.'" (RHT 8329-8330.)

When asked if she had included in her Declaration a reference to Jones' testimony describing the childhood he and petitioner had as a beautiful childhood, Dr.

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[115] A discussion of Dr. Hinkin's testimony in which he set forth why he believed the evidence did not support a claim of brain damage in general and why specifically any alleged fetal abuse or *in utero* insult did not result in brain damage is set forth, *ante*, at pages 52-58. A discussion of Dr. Faerstein's testimony in which he also opined the evidence did not support a finding petitioner suffered from brain damage, including brain damage as a result of alleged fetal abuse, is set forth *ante*, at pages 49-52.

Miora lacked an immediate recollection on that point. (RHT 8330-8331.) Respondent's counsel then directed Dr. Miora to portions of her Declaration, initially written by petitioner's counsel, in which reference is made to the testimony of Gary Jones. (RHT 8331-8339 [referring to the relevant excerpts of Exhibit 136 at pp. 127-128, 152, 159, 171-172 & 177 in which reference is made to the testimony of Gary Jones]; see also, RHT 8375-8377, 8381-8383 [comparing excerpts in Exhibit TTTT created by Ms. Andrews referring to reference hearing testimony of Gary Jones and the unchanged corresponding entries in Exhibit 136].) Dr. Miora conceded that in none of those references to the reference hearing testimony of Gary Jones, did Dr. Miora include in her Declaration reference to Mr. Jones' testimony petitioner and Jones "had a really beautiful childhood."

Dr. Miora also testified that the following account from Gary Jones' reference hearing testimony was consistent with her own recollection from reading the transcript of that testimony. "Steve Champion's older brother Lewis was a very dominating figure due to his size and strength. Jones recalls one incident in which Lewis tried to hurt petitioner by throwing golf balls at petitioner while petitioner was running to Jones' home. The only resulting damage was to a mirror in the Jones home which was broken by one of the golf balls. Jones never saw Lewis to [*sic*] do anything else to Steve Champion. Steve Champion's brother Reggie was closer in age to Jones and petitioner than was Lewis Champion. Reggie was 'more of a protector of us.' Reggie did not appear odd in any way." (RHT 8340.) Dr. Miora again conceded that she had made no reference to that testimony of Jones in her Declaration. (RHT 8340; see also Exhibit YYYY.)

When Dr. Miora was asked whether it would be significant to the issue of petitioner's development and functioning that someone like Mr. Jones, who had had the type of daily contact with petitioner Jones had had, including being in petitioner's home quite often, testified that during this period he saw no injuries to petitioner nor episodes

of petitioner's brothers beating up on petitioner, Dr. Miora testified: "Not necessarily and perhaps." (RHT 8340-8341.)

It is noted that the omitted evidence of Jones undermines petitioner's claim at this hearing that he was the subject of repeated abuse by his older brothers.

Dr. Miora's determination to exclude from her Declaration any mention of credible evidence, which impeached petitioner's claim, adversely reflects upon her credibility.

Dr. Miora conceded that in the course of the 12 year relationship between Jones and petitioner, Jones' observation of only one incident involving petitioner's older brother Lewis and petitioner was not consistent with the claim petitioner presently raised that he and other family members had been repeatedly beaten up by Lewis and Reggie. (RHT 8343.)[116] Dr. Miora's decision not to alter the draft created by petitioner's counsel (Exhibit YYYY.) further undermines Dr. Miora's credibility.

Dr. Miora conceded that it was a choice on her part not to include in her Declaration references to those portions of the reference hearing testimony of Gary Jones in which he talked about the childhood he shared with petitioner as "a very beautiful childhood" and in which he talked about never having seen any evidence of serious bruising on petitioner. (RHT 8368-8369.)

Dr. Miora testified that she saw no school records dated January 1, 1983 or earlier which reflected any concern by anyone that petitioner was malnourished, ill clothed, in need of adequate shelter and safety or that recent injuries to petitioner had been observed.[117] (RHT 8460-8461.) Dr. Miora had reviewed Exhibit G-8, the March 2, 1994 CDC questionnaire in which in response to question 16 asking whether petitioner "ever had any serious head injuries," petitioner checked the "no" box. (RHT 8461-8462.) Dr. Miora had also reviewed a similar CDC record from 1986, Exhibit G-9, in

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[116] It is noteworthy that no contemporaneous records of any type documenting any concerns with physical abuse to petitioner have been produced by petitioner at this hearing.

[117] From Dr. Miora's review of petitioner's school records (Exhibit CCC), she identified a notation of a scar on petitioner's head which, according to the record, was attributed to an injury received three years earlier. (RHT 8461.)

which petitioner provided a similar response to a similar question asking about any history of serious head injuries. (RHT 8463.)

Dr. Miora had seen no medical records dated January 1, 1983 or earlier which reflected a concern petitioner suffered from malnutrition or inadequate care in his home environment. (RHT 8463-8465.) Similarly, Dr. Miora testified she saw no probation report dated January 1, 1983 or earlier which indicated that petitioner appeared to be a dependent child in need of care outside of his home environment. (RHT 8465.) Dr. Miora saw no police report dated January 1, 1983 or earlier or any medical report which alleged that petitioner had been physically assaulted by a member of his family. (RHT 8465-8466.)

Dr. Miora also conceded that she had reviewed the reference hearing testimony of Rita Champion Powell in which Ms. Powell testified that petitioner had never required medical attention as result of the alleged beatings petitioner suffered at the hands of his older brother Lewis. (RHT 8466-8468.) Dr. Miora admitted that she had not put this information in her Declaration. The apparent fact that petitioner never received medical treatment is significant evidence as to both the nature and duration of the alleged beatings petitioner received or whether they took place.

Dr. Miora was not provided by petitioner's counsel with either Exhibits MMM or NNN, the 1996 investigation reports summarizing an interview with Mrs. Champion and interviews with petitioner's sisters respectively. (RHT 8469-8470.) In Exhibit NNN, Rita Champion Powell told investigators that "[Lewis] often made Linda, Rita, Steve and Gerald standup against the wall, forced them to hold up their hands and beat them badly." (RHT 8470, quoting from Exhibit NNN.) She also told investigators that "Lewis Jr. broke all the windows in the house, punched a hole in the wall, destroyed things in the house, and chased his siblings around the house, knocking things over and throwing things." (RHT 8470, quoting from Exhibit NNN.)

In contrast to these post-conviction statements by Rita Champion Powell, Gary Jones, who testified he had been in petitioner's home often, did not testify to any

destruction of the type identified by Ms. Powell to petitioner's investigators in 1996. Dr. Miora found neither Gary Jones' testimony describing his relationship with petitioner as "a very beautiful childhood" nor his testimony that he never saw any kind of injuries of a serious nature on petitioner inconsistent with Ms. Powell's description to investigators that family members were "badly beaten" and their home destroyed by Lewis. (RHT 8470-8472, 9147-9148.)[118]

The referee agrees with respondent's submission that in light of the reference hearing testimony from Gary Jones, Wayne Harris, Earl Bogans, Marcus Player, Rita Champion Powell and the absence of any contemporaneous record documenting such beatings, Dr. Miora's unwillingness to acknowledge from this plethora of evidence that post-conviction claims family members were "badly beaten" and all windows in the home broken by Lewis may be unreliable undermines her credibility.

In her Declaration, Dr. Miora wrote: "Patients and informants are reluctant to reveal information that is personally embarrassing or intensely shameful, or equally unacceptable if one has been raised with the cultural proscription that one does not disclose 'family business' to outsiders." The failure of petitioner's mother to tell the CYA parole agent about any of these matters is not only consistent with what Dr. Miora herself has written, but is consistent with the testimony of petitioner's trial counsel that none of these matters were disclosed to him by petitioner, his mother or any of the other family members with whom Skyers spoke, despite the multitude of conversations and opportunities presented to bring these matters to Skyers' attention.

Also included in the reference hearing testimony of Mrs. Champion, as read to Dr. Miora, was her testimony acknowledging the accuracy of that portion of the December 13, 1978 Initial Home Investigation Report (Exhibit H), under "Developmental History" describing petitioner "as a full-term infant and experienced normal delivery.

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[118] As previously noted, petitioner's counsel chose not to send Dr. Miora the reference hearing testimony from petitioner's peers, Wayne Harris, Earl Bogans and Marcus Player, none of whom testified to seeing any such injuries on petitioner.

There were no serious illnesses or injuries suffered as a child. He demonstrated no abnormal developmental behavior during his formative years." (RHT 8572-8573, reciting from Mrs. Champion's reference hearing testimony at RHT 5510.) Dr. Miora did not include any reference in the initial social narrative or Dr. Miora's final Declaration, to the "Developmental History" narrative in Exhibit H. (RHT 8581-8583.)

While Dr. Miora considered the possibility that petitioner's mother was someone who might be willing to lie to a parole agent from the CYA in an effort to get petitioner released, when specifically asked if she considered "that [petitioner's mother] lied to the people -- to the person who came from the Youth Authority to talk to her on December 11, 1978[,]" Dr. Miora testified: "I considered it and did not consider it a possibility. And without being disrespectful, this does not seem like a psychologically sophisticated savvy woman who had a number of her children at this juncture having been involved in the criminal justice system. It did not -- I considered it. It did not seem a likely possibility to me." (RHT 8485-8486.) Nevertheless, Dr. Miora conceded that petitioner's mother wanted to get petitioner out of the Youth Authority. Dr. Miora conceded that it was possible for petitioner's mother, in a desperate effort to get petitioner released from the CYA, to lie about the home environment. (RHT 8487-8488.)

Petitioner's *Strickland* expert opined that trial counsel would have had to concede to the jury that petitioner's mother lied to the CYA parole agent during the December 1978 interview; however, Dr. Miora, would have petitioner's trial jury believe that petitioner's mother was in fact truthful with the parole agent. Simply put, trial counsel cannot credibly present these diametrically opposite positions regarding petitioner's mother's credibility during her interview with the CYA parole agent without losing trial counsel's own credibility with the penalty phase jury, a loss which could have catastrophic consequences on the jury's penalty phase determination.

Dr. Miora failed to independently and objectively address materials available to her which were unfavorable to petitioner. This is demonstrated by how Dr. Miora

assessed the CYA reports of the four psychologists and psychiatrists, Drs. Prentiss, Minton, Perrotti and Brown. Although Dr. Prentiss was a clinical psychologist, Dr. Miora referred to her as a "'clinical social worker who evidently administered the testing [but who] is not professionally trained or qualified to either diagnose or rule out organic brain deficits in any event.'" (RHT 8728-8729, quoting verbatim fn. 73, in Exhibit UUUU, at BS000020.) The only change Dr. Miora made to the footnote as written by petitioner's counsel was to change the reference to Dr. Prentiss as a "social worker" to "the psychologist." (RHT 8730.) The footnote as revised by Dr. Miora appears in her Declaration as footnote 100, on page 190, of Exhibit 136.

As originally written by petitioner's counsel and incorporated verbatim by Dr. Miora in her Declaration, the footnote included that "'[Dr. Prentiss] did note "recurring episodes of depressive feelings," which are consistent with other evidence....'" (RHT 8729, quoting from fn. 73 of Exhibit UUUU.) In footnote 111, at page 211 of Exhibit 136, a footnote written by Dr. Miora, not petitioner's counsel, Dr. Miora wrote: "Reports from CYA and San Quentin note Steve Champion's low self-esteem and depressive symptoms, suggesting that the underlying issues were of long-standing duration." (See also, RHT 8733-8734.)

Dr. Miora conceded she had reviewed Dr. Minton's report (Exhibit D), which is dated December 14, 1978, one day after Dr. Prentiss' report. (RHT 8734.) Dr. Minton's report not only failed to include any finding of depression, there is a specific reference that petitioner denied being depressed. (RHT 8734-8735.) Nevertheless, in footnote 111 of Exhibit 136, Dr. Miora failed to include reference to Dr. Minton's assessment and report, material which would be *inconsistent*, rather than consistent, with Dr. Prentiss' report's notation of "[petitioner] appear[ing] to be suffering from recurring episodes of depressive feelings." (Exhibit J., Report of Dr. Prentiss, at p. 1; RHT 8736.)

Dr. Miora had also reviewed Dr. Perrotti's December 5, 1979 report of his assessment of petitioner at the CYA. (RHT 8736.) On page 1 of his report (part of Exhibit J), Dr. Perrotti wrote: "There are some reports in the file regarding depression.

He does not appear to be clinically depressed whatsoever." (RHT 8736.) Dr. Miora admitted that she did not consider putting in footnote 111 the fact that a doctor who examined petitioner one year after Dr. Prentiss specifically had found no evidence of clinical depression. (RHT 8737 ["No, as I didn't see it as significant in the development of the ideas that I was making to support my opinions."].) This was so even though in footnote 111, Dr. Miora described the depressive symptoms as "suggesting the underlying issues were of long-standing duration." Dr. Miora denied that Dr. Perrotti's conclusion petitioner did not suffer from clinical depression "would be some evidence to suggest there wasn't a long-standing problem whatsoever[.]" (RHT 8738.) In addition, Dr. Miora admitted that Dr. Brown's July 29, 1980 report (Exhibit I) noted: "'The youth gave no indications of any type of depression, suicidal or homicidal ideations, nor any lack of judgment or insight skills.'" (RHT 8743, quoting from Exhibit I.) Dr. Miora conceded that she did not include in her Declaration reference to the fact that the last two assessments of petitioner at the CYA by a psychologist and a psychiatrist stated that petitioner did not show any signs of clinical depression, a conclusion which clearly is at odds with Dr. Miora's contention as set forth in footnote 111 that petitioner's depressive symptoms were "of long-standing duration." (RHT 8743.)

Further, while Dr. Miora claimed that she "considered the depressive symptoms noted by Dr. Prentiss in a broader context, that being the life-long history and circumstances that had led up to Mr. Champion's confinement, and yes, of course considering the context of being confined as well[,]" Dr. Miora failed to mention in footnote 111 the possibility that the depression identified in Dr. Prentiss' report was simply the product of petitioner having just arrived at the Youth Authority. (RHT 8738-8739 ["I did not have any reason to suspect, and I did not say that I considered that it was for no other reason. I did not have any reason to suspect that it was for no other reason, nor did Dr. Prentiss or others who commented on his depression opine that it was believed his depressive symptoms were a function solely [of] his being confined. I did, however, further along in the report discuss the perceptions of a number of people

in Mr. Champion's immediate environment subsequent to his placement at CYA who observed depression, seriousness and other qualities in Mr. Champion[;]" RHT 8741 ["I did not make written notation [in Exhibit 136] that I considered [the fact that Mr. Champion had just been committed to the Youth Authority] as a possible cause [of the depression identified by Dr. Prentiss]"].)[119] This was so despite Dr. Miora's acknowledgment that "it would be reasonable to assume that somebody [who is taken from the person's home where he has had complete freedom of movement and is placed in a facility like the Youth Authority] might be unhappy." (RHT 8741-8742.)

Petitioner's counsel also wrote a discussion of Dr. Brown's July 29, 1980 CYA psychiatric evaluation of petitioner (Exhibit I) which Dr. Miora incorporated verbatim in her Declaration (Exhibit 136, at pages 197-198). (RHT 8818-8822; see, Exhibit UUUU, at BS000024-000025, quoted verbatim at RHT 8819-8820.) Dr. Miora deliberately chose not to add to Ms. Andrews' recitation any additional commentary regarding Dr. Brown's report. (RHT 8822.) Rather, Dr. Miora made reference to Dr. Brown's report in Exhibit 136 at page 205 where Dr. Miora, not Ms. Andrews, wrote: "Dr. Richard Brown's Psychiatric Consultation Report (dated July 29, 1980) similarly concluded that there was no 'organic brain syndrome' or **gross** 'cognitive abnormalities.' (Exhibit I)" (RHT 8822-8823.) However, what Dr. Brown in his report actually wrote was: "'His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease or any kind of cognitive abnormalities.'" (RHT 8823, quoting verbatim from Exhibit I.) It was Dr. Miora who chose to insert the word "gross" before the words "cognitive abnormalities" in lieu of what Dr. Brown had

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[119] Dr. Miora could not provide a single reference to a psychologist or psychiatrist, other than Dr. Prentiss, who identified petitioner as suffering from clinical depression or complaining of signs of depression, despite the fact petitioner had been evaluated subsequent to Dr. Prentiss' evaluation and prior to petitioner's trial by Drs. Minton, Perrotti, Brown, Pollack and Imperi. (RHT 8739-8748.) While Dr. Pollack and Imperi's report (Exhibit 46) described petitioner as having a "flat affect," the report did not reference any finding of clinical depression. Further, while Dr. Miora considered that "flat affect" "could be consistent with depression, it doesn't have to be, it could be reflective of other conditions, as well[.]" Dr. Miora also testified that flat affect could be due to petitioner having been incarcerated for approximately 10 months at the time he was evaluated by Drs. Pollack and Imperi under circumstances in which petitioner faced the death penalty on capital charges. (RHT 8748-8750.)

actually written which was "no indication of... any kind of cognitive abnormalities." (RHT 8821.)

c. Trial Counsel's Testimony and Credibility

Even if petitioner's present claims of fetal abuse, physical abuse by his older brothers, adverse effects from family poverty, neighborhood dangers unrelated to petitioner's own gang and criminal activities and an inferior public school system have some credibility, Dr. Miora's declaration and testimony fully support the credibility of trial counsel's reference hearing testimony that petitioner and his family deliberately withheld this dirty "family business" from trial counsel such that any failure by counsel to discover this undisclosed information does not reflect deficient performance by trial counsel in his representation of petitioner during either the investigative stage or the penalty trial of petitioner's case.

In her Declaration (Exhibit 136, at pages 5-6.) Dr. Miora wrote:

> "Second, both patients and informants may intentionally misreport information, either in an effort to exaggerate or to minimize events and their impacts, for reasons of their own. Patients and informants are frequently reluctant to reveal information that is personally embarrassing or intensely shameful, or equally unacceptable if one has been raised with the cultural proscription that one does not disclose 'family business' to outsiders. Fear and lack of education about the roles and motives of mental health professionals can reduce the willingness of patients and collateral sources to disclose the true nature of highly pertinent and relevant events and affairs. A history of negative experiences with the mental health system can lead patients and collateral others to withhold important information of a highly charged nature. Familiarity with the evaluator or someone close to the evaluator

> can serve to lessen apprehension and shame about disclosure of long-held and perhaps repressed material (those experiences barred from consciousness). Further, what is normative to one subset of individuals, subset being defined possibly by culture, socioeconomic group, multi-generational context, or other variables, may not be considered so by inquiring bodies such as mental health or criminal investigators. Thus, responses generated may well be skewed by a context, which context it behooves the mental health professional to attempt to understand and about which to become informed. Regarding events that are traumatic and painful, the reluctance or inability to fully describe (or in many cases, even speak of) the event may be a symptom of traumatic stress. On occasion, patients malinger, exaggerating symptoms or events for personal gain, requiring that mental health professionals routinely assess the potential for malingering in a given case."[120]

Dr. Miora testified that the declarants whose declarations she had reviewed could be considered "informants" as Dr. Miora used the term in her Declaration. (RHT 8887-8888.) Further, the term "collateral sources" as used by Dr. Miora in her Declaration refers to informants. (RHT 8889.)

Dr. Miora conceded that petitioner's mother and his sisters could have a reason to lie. The reasons to lie could include efforts to get a loved one off of death row; personal opposition to the death penalty; bias against police and government and racial bias. (RHT 8888-8889.)[121]

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[120] See, RHT 8887, 8889-8890 for direct quotation of this paragraph with the exception of the last sentence.

[121] As an example of how such motivations influenced testimony, Dr. Miora conceded that there was a discrepancy between Mrs. Champion's Declaration in which she claimed petitioner had a history of

Dr. Miora did not receive from petitioner's counsel the reference hearing testimony of trial counsel for her review and consideration. (RHT 8892.) When Dr. Miora, however, was asked to assume that (1) Skyers testified to having had numerous conversations with petitioner's mother and two older sisters during which he had not been apprised by anyone regarding the alleged abuse petitioner suffered at the hands of his older brothers or that petitioner had been malnourished or gone hungry as a child; (2) Skyers testified he visited petitioner's home and neighborhood, both of which were well kept; and (3) Skyers testified that he saw no evidence that alleged poverty in the Champion household had impacted petitioner who had always appeared to Skyers to be physically fit (RHT 8893-8894, citing to RHT 1216-1219.), and Dr. Miora was then asked whether Skyers' testimony was consistent with what she had described as the

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nightmares and the contemporaneous school records of petitioner (Exhibit CCC) wherein petitioner's mother had written "no" in response to a question asking about nightmares. (RHT 8826-8827.) After conceding petitioner's school records were the most contemporaneous record on the subject of "nightmares" in contrast to the mother's Declaration, Dr. Miora nevertheless continued: "I also understand from her testimony that there were differences in what she presented to school officials, understandably different from what she might testify to given an opportunity to consider and think about home circumstances relevant to her child, Mr. Champion's, Steve Champion's development and functioning." (RHT 8827.) Dr. Miora conceded that the only source(s) for claims petitioner suffered from nightmares was petitioner's mother, and possibly either the Declaration or testimony of petitioner's uncle, "possibly E. L. [Gathright]." (RHT 8828-8829.) While acknowledging that Mrs. Champion's Declaration was completed approximately 19 years after petitioner's mother answered the health history questions included in petitioner's school records and that the Declaration was generated after Mrs. Champion's son, petitioner, had been sentenced to death and sent to San Quentin prison, when asked whether she considered whether Mrs. Champion "may have a motive to paint a picture that she thought might help him get Mr. Champion off of death row," Dr. Miora answered: "It did not occur to me that saying that her son had nightmares would get him off of death row or that she might have had a motivation to believe that that kind of account would get him off of death row." (RHT 8837.) This was so despite the mother's previous testimony, reviewed by and read back to Dr. Miora during cross-examination, wherein petitioner's mother claimed to have deliberately withheld information regarding physical abuse suffered by petitioner at home when she filled out the school records (Exhibit CCC) because of her fear such information could affect her job status, even though such testimony was at odds with other testimony from petitioner's mother that at the time the school records were filled out, Gerald Trabue, Sr. was still alive and no physical abuse had been inflicted on petitioner. (RHT 8829-8836.) Given Dr. Miora's belief that petitioner's mother claimed in her Declaration that the nightmares did not start until after Gerald Trabue's death when petitioner was 7 or 8 years old (RHT 8836-8837, 9144-9145), which, if true, meant petitioner's mother had not lied in the school records, Dr. Miora's initial explanation proffered to explain discrepancies between what contemporaneous records reflected and what post-conviction and sentence of death exhibits and testimony claimed—"I also understand from her testimony that there were differences in what she presented to school officials, understandably different from what she might testify to given an opportunity to consider and think about home circumstances relevant to her child, Mr. Champion 's, Steve Champion's development and functioning"—is completely misplaced.

unwillingness of families to disclose "family business" to outsiders, Dr. Miora refused to give a direct answer. Her initial answer was: "I can't make that assumption as I have no idea what the quality or experience of the interview was." (RHT 8894.) When the question was put to her again, Dr. Miora testified: "I have no knowledge of the kinds of questions that were asked, what the conversations were about. My understanding would be, and please correct me if I'm wrong, that the visit to the house would have been in 1980 or '81 or possibly '82. This was not the period of time that the bulk of my Declaration makes reference to with respect to poverty, abuse, and other variables that I will not enumerate." (RHT 8894-8895.)

Nevertheless, on re-direct examination, petitioner's counsel asked Dr. Miora: "What factors did you consider, and if you can give a brief example of how they -- how you saw them play out in your interviews with Mr. Champion's family members, to stick with now, that would be helpful." (RHT 9072: 12-15.) Dr. Miora testified that she "took into consideration the possibility that there would be an effort to misrepresent information, any effort to exaggerate, for example, or minimize the impact of the events." (RHT 9072: 20-23.) Dr. Miora continued: "Now, I do mention shame and embarrassment as one of the factors that may cause people to minimize what they have to say. One of the ways that I address that is by trying to understand contextually what the, by contextually, I mean in terms of somebody's culture, somebody's subculture, their family culture, what is the rule about whether you do share or don't share information." (RHT 9073.) Petitioner's counsel then asked Dr. Miora: "Did you find that significant in the interviews with Mr. Champion's family?" (RHT 9073: 18-19.) Dr. Miora answered: "It was significant to the extent I was told that family business was not to be shared outside of the family." (RHT 9073: 20-22.)[122]

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[122] In recross-examination, Dr. Miora was referred to the redirect-examination questions at RHT 9072 and 9073 and Dr. Miora's answer at RHT 9073—"it was significant to the extent I was told that family business was not to be shared outside of the family." Dr. Miora testified to the best of her present recollection no family member told her that the Champion family did not discuss their family business with outsiders. (RHT 9283-9285.) Only petitioner himself told Dr. Miora that. (RHT 9283: 5-8.) "As I'm looking, I'll remind the court it was a statement made by Mr. Champion in reference to his mother saying

In sum, the present record establishes that petitioner's trial counsel undertook an investigation of petitioner's development and functioning by interviewing petitioner, petitioner's mother, petitioner's two older sisters and petitioner's brother Reginald. Skyers also reviewed petitioner's juvenile file which included among other matters the four psychiatric and psychological reports from Drs. Prentiss, Minton, Perrotti and Brown, as well as Exhibit H, the December 13, 1978 Initial Home Investigation Report. As Skyers himself testified, it is also possible Skyers had reviewed petitioner's school records (Exhibit CCC) although because of the passage of time and the failure of petitioner to establish in this proceeding the integrity of Skyers' "trial file," Skyers could not say with certainty whether he had or had not seen those records. Nevertheless, the referee has concluded Skyers did not review Exhibit CCC. Skyers had the benefit of the evaluation of petitioner conducted by Drs. Pollack and Imperi shortly before petitioner's trial began.

Further, petitioner has supplied the referee with no contemporaneous medical, school, probation, financial, governmental assistance or police reports documenting any of the claims presently raised by petitioner concerning alleged fetal abuse inflicted on petitioner's mother while pregnant with petitioner by petitioner's biological father, Lewis Champion II; physical abuse allegedly inflicted on petitioner by his two older brothers, Lewis Champion III and Reginald Champion; alleged poverty resulting in insufficient food and other necessities for petitioner; and adverse effects on petitioner's development and functioning resulting from the 1968 traffic accident in which petitioner

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that family business was not to be discussed outside of the home. Very consistent with his culture, I might add." (RHT 9287: 3-7.) In light of this testimony, Dr. Miora's earlier inability and/or unwillingness to directly answer whether Skyers' reference hearing testimony on this issue was consistent with a family unwillingness to disclose family business to outsiders is indeed curious. Finally, Dr. Miora could find no notation in her notes of the 9 to 10 hours she interviewed petitioner (Exhibit UUUU) where petitioner told her the Champion family did not discuss their family business with outsiders. (RHT 9286-9287.) On the other hand, Dr. Miora testified that petitioner never told her that petitioner suffered severe beatings from his older brother Lewis. (RHT 9150.) Likewise, when Dr. Miora interviewed Lewis Champion III, he did not tell her that he had repeatedly beaten petitioner nor did he admit to the allegations of physical abuse raised in the declarations of other family members. (RHT 9124-9125.) Dr. Miora conceded that Lewis' account and that of other family members were 180° diametrically opposite each other. (RHT 9125.)

was injured and his step-father, Trabue Sr., was killed.[123] In fact, the contemporaneous records which are exhibits in this proceeding contradict the present claims. (See, e.g., Exhibits D, H, I, J, & CCC.)

In addition to the contemporaneous records which contradict the present claims, the reference hearing testimony from Ronald Skyers, Gary Jones, Wayne Harris, Earl Bogans and Marcus Player further cast grave doubt on the credibility of petitioner's present claims. Skyers testified that, in none of his many conversations with petitioner, his mother, his two older sisters and his brother did anyone ever mention anything to him about alleged fetal abuse, physical abuse to petitioner at the hands of his older brothers, family poverty which adversely affected petitioner, the 1968 traffic accident, or the dangerous nature of the neighborhood where petitioner lived, even though the nature of the conversations Skyers had with petitioner and his family were such as to expect disclosure by petitioner and his family of the presently claimed mitigating circumstances had they in fact existed at the time.

Skyers' testimony in this regard is supported by the reference hearing testimony of petitioner's mother during which she conceded she had told petitioner's habeas counsel before her testimony that she had discussed "Steve's childhood" with Skyers. (RHT 5531-5534.) Further, Linda Champion Matthews testified that paragraph 25 on page 8 of her Declaration (Exhibit 124) which states: "Skyers did not ask about our family history, our home, or our community" was inaccurate. (RHT 5718-5719, 5815.) Matthews testified that she talked about the subjects with Skyers for "about an hour or two" as part of one of the meetings Matthews had with Skyers. (RHT 5719-5720.) Matthews further testified that rather than Skyers asking a lot of questions when family history came up, "[p]retty much [Skyers] asked the question at the time and I probably

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[123] While petitioner has supplied Social Security records for petitioner's mother and biological father, Exhibits 143 and 142 respectively, petitioner has not provided the referee with any contemporaneous financial records documenting, during the relevant time period of 1962-1982, the annual gross income for the family, including all government assistance received by any member of the family living in the household with petitioner during each of those years.

just took it and ran with it from there." "[I] told him what was going on in the family and in the area and stuff like that." (RHT 5721.)

Skyers' testimony that petitioner, his mother, his sisters and brother disclosed none of the presently claimed mitigating circumstances to Skyers during his multiple conversations with them is buttressed by Dr. Miora's Declaration and reference hearing testimony concerning the well-recognized phenomenon that families will not disclose family business to outsiders.

In sum, even if petitioner's present claims of mitigating evidence available to present at petitioner's trial in 1982 are credible, the failure of petitioner's trial counsel to uncover and present such mitigating evidence is not the product of any deficient performance by trial counsel; rather, it is the product of the Champion family not disclosing family business to petitioner's trial counsel, Ronald Skyers.

d. Family Poverty's Alleged Adverse Impact on Petitioner's Functioning and Development

Dr. Miora was never apprised that mortgage payments for petitioner's home at 1212 West 126th St. had ever been delinquent or that any effort to foreclose on the property for lack of payment of the mortgage had been undertaken. (RHT 8378.) Further, Dr. Miora was aware that petitioner's mother purchased a low rider automobile for Lewis Champion III in 1972 and that such automobile had been described by Linda Champion Matthews in her reference hearing testimony as not being a "necessity of life".

In her Declaration, Dr. Miora chose not to include in that portion dealing with the subject of poverty and its possible effect on petitioner's functioning and development the fact that Linda Champion Matthews testified such an automobile had been purchased by the mother in 1972, even though the automobile was not deemed to be a necessity for the family. (RHT 8379-8380.)[124] Dr. Miora conceded it would be relevant to

[124] Although Dr. Miora admitted reading Linda Champion Matthews reference hearing testimony that the car was not a necessity of life (RHT 8379.), she testified that that testimony did "not counter my

consider such a discretionary purchase on the issue of whether or not there was family poverty. (RHT 8380.) Such evidence was also conceded by Dr. Miora to be of a type which could call into question the legitimacy of the claim of poverty as a factor adversely affecting petitioner's development and functioning. (RHT 8380.) Nevertheless, Dr. Miora deliberately left out of her Declaration the fact of this discretionary automobile purchased in 1972, choosing instead to "select what I felt would be most reflective of my opinions about -- based on all of the materials available to me, most reflective of his development, behavior, and functioning." (RHT 8380-8381.)

Although it was Dr. Miora's understanding that the family received government assistance, petitioner's counsel never provided her with records reflecting the amount of government assistance received by petitioner's family. Dr. Miora understood that the Social Security records reflecting income earned by Mrs. Champion would not be expected to include the level of government assistance received by the family during the relevant time period prior to 1981 when petitioner was arrested for the Hassan murders and robberies. (RHT 8384-8385.)[125] An expert witness asked to address a claim of alleged family poverty affecting petitioner's development and functioning should ascertain all assets available to the family during the relevant period of time and all its liabilities in order for the witness to provide a credible and reliable evaluation.[126]

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impression that a car was necessary and that Linda Matthews, for example, was driving at the age of 12 or 13, as Ms. Azell Jackson was not driving with any regularity and required transportation to work. The family required transportation to get to various places, to secure what they needed for the home." (RHT 8392.) Nevertheless, a review of Linda Champion Matthews' reference hearing testimony on this subject, recited verbatim to Dr. Miora at RHT 8392-8394 (quoting from the actual testimony beginning at RHT 6856: 18), demonstrates how the actual testimony from a person who lived in the home at the relevant time differed from Dr. Miora's "impression" drawn 35 years after the fact.

[125] On redirect examination, when petitioner's counsel asked whether the absence of records concerning government assistance to the Champion family affected Dr. Miora's ultimate opinions "as to whether or not this was a family in poverty[,]" Dr. Miora conceded that "it would have been ideal to have records, and I would prefer to have records." (RHT 9135.)

[126] When respondent's counsel sought to have Dr. Miora confirm that she did not "know what amount of money of any type, significant or otherwise, was actually received by [petitioner's] family from the government during the relevant period," Dr. Miora refused to answer the question with a "yes" or "no." After Dr. Miora answered "my understanding is the AFDC is provided to families in need and that there is a calculation made to determine need[,]" the referee interjected that "it's clear this witness did not get any information as to how much government assistance was received by the family at any given period of time." (RHT 8538-8539; see also, 9258-9259 [Dr. Miora could not provide any estimate of how much

Dr. Miora never asked how petitioner or his family members paid for the illegal drugs or alcohol they used. (RHT 8391.) Dr. Miora never asked petitioner whether he committed robberies or residential burglaries to obtain money or property to purchase drugs. (RHT 8397.)

Nevertheless, in her Declaration (Exhibit 136, page 20), in a portion written by Dr. Miora, not petitioner's counsel, she wrote: "Mr. Champion's substance abuse began in late elementary school when he found Lewis' leftover marijuana and purchased small amounts of the substance [from] friends. He spent most of his Junior High School days high on marijuana and weekends drinking with friends at vacant apartments which shelters were treated 'like a clubhouse.'" (RHT 8455-8456.)[127] Dr. Miora never asked petitioner how he was able to purchase small amounts of marijuana from friends. (RHT 8456-8457.)

Dr. Miora never asked petitioner how he was able to post $250 bail for Evan Jerome Mallet following the Hassan murders and robberies and before the Taylor crimes were committed. (RHT 8438-8445.) Dr. Miora did not ask him about sources of income following his release from the CYA, although Dr. Miora "understood [petitioner] had a couple of temporary employment assignments...." (RHT 8452-8453.)

Dr. Miora was never provided any documentation reflecting how much money Linda Champion Matthews and/or Rita Champion Powell contributed on an annual basis to the Champion family. (RHT 8536-8537.) Dr. Miora never asked Ms. Powell how

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money in the form of government assistance petitioner's mother with seven dependent children was entitled to receive for the period 1968-1978 following the death of Gerald Trabue, Sr.].)

[127] Dr. Miora testified that she didn't "see the connection" between petitioner's claim that he took Lewis' marijuana when Lewis wasn't around and the claim that petitioner was constantly in fear of retribution by his older abusive brother, Lewis. When Dr. Miora was asked whether she would expect petitioner to "go out of his way not to do something that may cause his brother, this allegedly abusive brother, to go off and beat him further," Dr. Miora testified: "Its quite possible that that kind of consideration in that kind of environment in Mr. Steve Champion's youth would not have been made." (RHT 8398.) Nevertheless, Dr. Miora wrote in her Declaration (Exhibit 136, page 13.): "[Petitioner] attributes [Lewis and Reggie's] later mistreatment of his sister Linda and him to their substance abuse. [Petitioner] qualifies that he did not truly know their business but understood that substances were a part of their lives. He recalled incidents of being abused by his older brother Lewis, running from the house, and returning for retaliation when his brother was asleep and therefore no longer an instant risk for further abuse." (RHT 8399.)

much the "vacations" Ms. Powell allegedly paid for Lewis Champion III to take cost. (RHT 8533-8536.)

Dr. Miora could not testify to how much money petitioner's mother paid for private schooling attended by three of her children, Terri, Traci and Gerald Trabue, Jr. (RHT 9136-9138, 9259-9260.)

Evidence calling into question petitioner's present claim of alleged family poverty affecting petitioner's development and functioning, such as the reference hearing testimony from Wayne Harris, Earl Bogans, Marcus Player and trial counsel, was not provided to or reviewed by Dr. Miora. Further, records such as petitioner's school records (Exhibit CCC) and the Initial Home Investigation Report (Exhibit H), fail to support a contention that petitioner's family lived in impoverished conditions affecting petitioner's development and functioning. For example, petitioner's school records do not include any reference from any teacher expressing concern for malnutrition, inadequate clothing or inadequate shelter or that petitioner's health and well-being were jeopardized as a result of alleged family poverty. Although petitioner had frequent contacts with the juvenile court system, petitioner has submitted no probation reports which suggest that petitioner was the victim of impoverished circumstances reflected in inadequate food, shelter or clothing. Finally, Skyers testified that in his numerous conversations with petitioner, petitioner's mother, petitioner's older sisters and brother Reggie, no claim of impoverished circumstances affecting petitioner's welfare and development was ever raised and nothing Skyers saw at petitioner's home or in his neighborhood suggested poverty as an adverse factor affecting petitioner's development and functioning.[128] A review of Trial Exhibit 5, which consists of a series

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[128] In assessing petitioner's functioning and development in an allegedly impoverished household, it is also worth noting that in petitioner's interviews with Dr. Miora, petitioner told her his older brother Reggie had taught him to swim. Further, petitioner had an aunt, Aunt Virgie, who was older than petitioner's mother, "hip" and who, in 1972, took petitioner to the Watts Stats. (RHT 8905-8906; see also, Exhibit UUUU, at BS000059.) Petitioner also told Dr. Miora that his older brother Lewis and his older sister Linda both used the family "guest house" located in the back of the main residence at 1212 W. 126th St. as a "springboard" to independence. (RHT 8907, 8910-8911; see also, Exhibit UUUU, at BS000053.) Petitioner also expressed his belief to Dr. Miora that his brother Reggie should have been off on his own

of photographs depicting the interior of petitioner's residence (1212 W. 126th Street), indicate a well kept home.

Finally, in 1982, reasonably competent trial counsel addressing the issue of possibly presenting evidence of family poverty and its affect on the functioning and development of petitioner would be faced with the same daunting task of how such a claim could be credibly presented as existed with the issues of presenting evidence of community dangers, the traffic accident and the death of Trabue Sr., and the abandonment of petitioner's family before petitioner's birth by his biological father. Two central witnesses to the poverty issue who testified in this reference hearing, petitioner's mother and his older sister, Rita Champion Powell, had testified on petitioner's behalf at the guilt phase of petitioner's trial. So too had petitioner and his brother Reginald. (*People v. Champion*, *supra*, 9 Cal.4th at p. 902.) Having convicted petitioner for the Hassan capital murders, the jury had obviously discredited the testimony of petitioner's mother, sister, brother and petitioner himself. Under such circumstances, reasonably competent counsel could well choose not to recall the same discredited witnesses to present a claim of poverty and its effect on petitioner's functioning and development where to this date there is no contemporaneous objective records to support the claim. (See, *Bell v. Cone* (2002) 535 U.S. 685, 698-702.) Had trial counsel attempted to present a "mitigation specialist" such as Dr. Miora to opine that poverty played a significant role in the development and functioning of petitioner, the expert would need to rely upon information provided by the very same discredited family members and petitioner whose guilt phase testimony had already been rejected by petitioner's jury.

Even if this dilemma were not enough to lead trial counsel away from presenting the claim of alleged poverty, if trial counsel were still contemplating doing so and even if trial counsel chose not to call Taylor alibi witnesses Marcus Player, Earl Bogans and

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rather than living in the home in 1980 when petitioner returned from the CYA. (RHT 8909-8910; see also, Exhibit UUUU, at BS000053.)

Wayne Harris, trial counsel would have had to have reasonably expected the prosecution to respond to this claim with evidence such as petitioner's school records and Exhibit H. In addition, the prosecution could seek to introduce petitioner's CYA psychological and psychiatric evaluations in which petitioner himself made no reference to having suffered the effects of malnutrition, inadequate shelter or inadequate clothing as a result of alleged family poverty. In fact, statements by petitioner contained within those evaluations such as petitioner's statement to Dr. Perrotti "that he repeatedly became involved with the law because he thought that he could get away with things" (Exhibit J, Report of Dr. Perrotti, p. 1.) only serve to aggravate the Hassan murders and robberies without in any way furthering petitioner's present claim that impoverished circumstances as a youth adversely affected petitioner's functioning and development. In addition, petitioner's juvenile probation officers could have been called to testify to their own observations about whether there was any observable indication petitioner suffered the adverse effects of family poverty. Certainly, evidence that petitioner's mother owned a well kept family home in a nice neighborhood since 1968 or 1969, had income from the settlement of the traffic accident death of Trabue Sr., had a life insurance award from the same traffic accident, as well as the financial ability to send three of the children to private school some distance from home on a daily basis, would hamper the claim of extreme poverty.

For the reasons discussed above, the referee finds that claims of significant physical abuse and poverty are not credible. However, the referee does find as indicated before that there was credible evidence of family financial hardship and deprivation. It was clear to Skyers that Mrs. Champion was a single parent struggling to support a large family with limited income. It was also clear that Mrs. Champion, when employed, was not able to provide the necessary supervision and attention needed by her family. However, the dilemma for a reasonable competent attorney would continue to exist, the basic witnesses or informants would be the very same family members who were petitioner's key alibi witnesses.

Thus, even if credible evidence of alleged family poverty that adversely affected petitioner's functioning and development existed in 1982, assumptions not borne out by the credible evidence adduced in this proceeding, reasonably competent trial counsel, aware of available impeachment evidence to undermine such a claim, could and would wisely choose to forego introduction of this contention at petitioner's penalty phase.

e. Sibling Abuse

The referee has already addressed in large measure this claim. In short, the referee finds that no credible evidence existed in 1982, at the time of petitioner's trial, to indicate that Lewis Champion III and/or Reginald Champion physically abused petitioner or other members of his family following the 1968 death of Trabue Sr. It is not until approximately 15 years after petitioner's trial that these allegations surfaced in interviews conducted with petitioner's mother and sisters. (See, Exhibits MMM & NNN.) Further, even these interviews suggested that the alleged abuse inflicted by Lewis Champion III did not begin until he began using drugs such as PCP at age 17 which would be in approximately 1973, some five years after Trabue Sr.'s death.

In addition to the fact petitioner has failed to supply any contemporaneous record to suggest that he was in fact the victim of physical abuse at home (e.g., medical records, police reports, probation reports, teacher reports), records which did exist in 1982, such as Exhibit H and Exhibit CCC, do not reflect any such abuse. In particular, the December 13, 1978 Initial Home Investigation Report (Exhibit H) reports that petitioner's mother describes the family "as normal in all aspects. The children all relate well to each other, respect the parent and are helpful at home. The two oldest girls work regularly on a full-time basis and contribute to the support of the family." (Exhibit H, p. 1.)

In addition, reference hearing testimony from Gary Jones, Wayne Harris and Earl Bogans fully supports the conclusion that no such persistent and violent abuse by Lewis Champion III and/or Reginald Champion occurred. Although the referee has outlined in

some measure the reference hearing testimony of these three witnesses, in particular Harris and Bogans, the referee has found the reference hearing testimony of Gary Jones to be particularly relevant and credible on the issue of alleged physical abuse. The referee does find that Lewis Champion III was the source of family disruption and inappropriate discipline. However, this was not disclosed to Skyers.

Jones has known petitioner since Jones was 5 or 6 years old. Jones was in kindergarten while petitioner was in the first grade. Their relationship continued except when petitioner was incarcerated. (RHT 5660, 5665.) Jones first met petitioner when petitioner stepped into a situation in which Jones' brother was trying to whoop Jones with a belt. Petitioner "had enough nerve to tell my brother this is going to stop." (RHT 5664, 5695-5696.) Jones saw petitioner daily. Petitioner was Jones' best friend. Petitioner was very competitive in athletics. Petitioner had "certain leadership abilities" Jones admired. (RHT 5665, 5688.) "We had a really beautiful childhood." (RHT 5665-5666, 5689.) Petitioner was bright and intelligent. Petitioner was not one to blindly follow others. (RHT 5688-5690.) Petitioner came to Jones' home daily, while Jones went to petitioner's home "pretty often." (RHT 5668.) Jones never saw bruises or serious injuries on petitioner while they were growing up. (RHT 5695.) Jones and petitioner went to junior high school together. After petitioner returned from the CYA, petitioner was back in the neighborhood for a few months in 1980. Jones had started to go to college. Petitioner talked about going to college. (RHT 5683-5685.) Jones and petitioner drank beer and smoked marijuana. Jones never saw petitioner use drugs other than marijuana or beer. Petitioner never acted differently when he used marijuana or drank beer than how he acted otherwise. (RHT 5690, 5695.) Although Jones recognized petitioner in Exhibit 47, Jones was shocked to see this photograph of petitioner holding a gun. This was not the person Jones knew. Petitioner appears to be 18 years old in Exhibit 47. (RHT 5690-5691.) Jones was not aware of petitioner's December 21, 1976 burglary or the November 1977 robbery incident or the 1978

assault with a deadly weapon incident. Petitioner would go away for periods of time but Jones was not aware of the particulars. (RHT 5694-5695.)

Petitioner's older brother Lewis was a very dominating figure due to his size and strength. Jones recalled one incident in which Lewis tried to hurt petitioner by throwing golf balls at him while petitioner was running to Jones' home. The only resulting damage was to a mirror in the Jones' home which was broken by one of the golf balls. (RHT 5669-5670.) Jones never saw Lewis do anything else to petitioner. (RHT 5712.) Petitioner's brother Reggie was closer in age to Jones and petitioner than was Lewis. Reggie was "more of a protector of us...." (RHT 5671.) Reggie did not appear odd in any way. (RHT 5671.)

Jones was a member of the Raymond Avenue Crips until he was in the 10th or 11th grade. Petitioner was also a member of the Raymond Avenue Crips. (RHT 5672-5673, 5702.) Jones described the gang as a social club. No crimes were committed by Jones or petitioner. (RHT 5673.) Jones knew Marcus Player, Michael Player, Lavelle Player, Jerome Evan Mallet, Emanuel Mallet and Craig Ross. These people were really high up in the gang's hierarchy. (RHT 5674-5675.) Jones testified to one incident in which he saw Craig Ross shoot someone. Petitioner was present. Jones never saw petitioner hangout with Craig Ross during the two month period in 1980 after petitioner returned from the CYA. (RHT 5686, 5708-5709.)

The neighborhood changed when Jones was in the seventh grade. Different gang affiliations appeared. (RHT 5672.) More drugs appeared in the neighborhood. Jones remembers learning or hearing of, but not actually seeing, instances of people getting shot. (RHT 5679, 5703-5704.)

Jones' mother and stepfather separated when Jones was in the eighth or ninth grade. (RHT 5680.) While riding a bicycle without a helmet, Jones was hit by a car. Petitioner was also present. Jones hurt his head, but other than the loss of all hair which was attributed to the accident, he suffered no permanent injuries.

Given the nature and extent of the relationship between Jones and petitioner for the entire period of time after the death of Trabue Sr., the possibility that the alleged physical beatings inflicted on petitioner, his family and the family residence at 1212 West 126th St. by Lewis Champion III could have occurred without Jones being aware of it is not likely. Jones testified to a single incident during the more than 10 year relationship in which Lewis Champion III threw golf balls at petitioner.

It is also important to note again that none of these claims were made by petitioner's mother, two older sisters or older brother Reginald in conversations they had with Skyers during his more than one year of representation of petitioner. Further, in none of the CYA records is there any indication whatsoever that petitioner was the victim of such alleged abuse.

The referee also finds significant that petitioner has elected not to call either Lewis Champion III or Reginald Champion, both of whom were available to petitioner to call as witnesses at this proceeding. Petitioner's deliberate election not to call either of these available witnesses invokes application of Evidence Code § 412. The same can be said of petitioner's failure to call any of his LAUSD teachers, any juvenile court probation officer or CYA psychologists, psychiatrists, caseworker or teacher of petitioner's during the period of time petitioner was at the CYA.

For these and other reasons already set forth, the referee finds that the claim of physical beatings or abuse by Lewis Champion III and/or Reginald Champion is not true. Further, the referee finds that in 1982 reasonably competent counsel would not have been able to discover evidence of this alleged physical abuse. In addition, reasonably competent counsel, even if aware in 1982 of the claim, would not have presented it at penalty phase. Even had a "mitigation specialist" such as Dr. Miora been employed in 1982, that expert's opinion would need to have relied on the same family members whose reliability and credibility the jury had already rejected. Second, if as petitioner contends in this proceeding, reasonably competent counsel should have interviewed Wayne Harris, Earl Bogans, Marcus Player and Gary Jones, assuming

those witnesses gave statements consistent with their reference hearing testimony relevant to the issue of alleged physical abuse, reasonably competent counsel would have had an additional reason to question the credibility of the accounts from family members on this issue and to be concerned about the possibility that if reasonably competent counsel could have located and interviewed these witnesses, so too could the prosecution had petitioner chosen to present at the penalty phase evidence of this physical abuse claim. The prosecution would also have had significant rebuttal evidence available through Exhibits H, CCC, D, I, J and the November 8, 1978 juvenile court probation report in Exhibit 147 to impeach any claim petitioner was subject to physical beatings or abuse from his older brothers.

f. Community Dangers Affecting Petitioner's Development and Functioning

Dr. Miora understood that the Raymond Avenue Crips, a gang of which petitioner was a member, hung out at Helen Keller Park. (RHT 8400.) Dr. Miora agreed that petitioner's community became more dangerous at least in part because of gang activity. (RHT 8400.) It was Dr. Miora's understanding, based on what she was told by petitioner, that petitioner joined the Raymond Avenue Crips when he was 12 or 13 years old. (RHT 8446.) Based on his date of birth (August 26, 1962), petitioner joined the gang in approximately 1974 or 1975, either just before or at the time when, according to the majority of the witness testimony in this proceeding, petitioner's neighborhood began to become more dangerous because of gang activity. According to Gary Jones, the neighborhood changed when Jones was in the seventh grade with the appearance of different gang affiliations and more drugs. (RHT 5672, 5679, 5703-5704.) According to Rita Champion Powell, the neighborhood changed in approximately 1978 when she was 17 years old with fights at Helen Keller Park, greater police presence and burgled homes, although Powell testified to seeing evidence of gangs, including graffiti, around 1976 or 1977. (RHT 5264-5265, 5271-5272.) According to Linda Champion Matthews, changes in the neighborhood began in the mid 1970s with the appearance of gangs,

although violence associated with gangs was not immediately seen with their initial appearance. One of the reasons the neighborhood became dangerous was because homes were burgled. (RHT 6861-6862, 6866-6869.)[129] According to petitioner's mother, the neighborhood surrounding the Champion home at 1212 West 126th St. did not begin to change until 1978 when petitioner was already at the CYA. (RHT 5528-5529.)

Dr. Miora conceded "I'm not gang expert, so I can't speak specifically to the Raymond Crips gang and their influence on that particular community." (RHT 8401.) Although Dr. Miora understood petitioner had committed a residential burglary in December 1976, she declined to ask him whether he was a member of the Raymond Avenue Crips at the time he committed that burglary. (RHT 8405 ["I did not pursue his gang affiliation in connection to the charges"].) Further, although Dr. Miora had been provided "a chronological cheat sheet by [petitioner's] counsel" which included the time in 1977 when petitioner was involved with the juvenile justice system, Dr. Miora could not testify to the period of time in 1977 when petitioner was outside of his community at Camp Munoz. (RHT 8403-8404.) Dr. Miora conceded that for whatever period in 1977 when petitioner was committed to Camp Munoz and for the period in 1978 through October 23, 1980 when petitioner was committed to the CYA as the result of his 1978 commission of an assault with a deadly weapon (See Exhibits 49 [petitioner's juvenile packet for 1978 incident] & 48 [petitioner's juvenile packet for 1977 incident].), petitioner was removed from the very community whose present dangers could have adversely affected petitioner's functioning and development. (RHT 8404-8405.)[130]

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[129] Petitioner committed a residential burglary on December 21, 1976, a circumstance Matthews testified she became aware of through rumors in 1976. (RHT 6863; see, Exhibit II.)

[130] Dr. Miora testified that "from the information, the various sources of information made available to [her], including testimony, declarations, interviews, and some of the community documents [she] reviewed, it [was her] understanding that while there was danger prior to Mr. Steve Champion being taken into custody, there was an escalation in the level of violence between the time he entered into custody and was released from CYA in 1980." (RHT 9140.)

Although Dr. Miora conceded she was not a gang expert, she admitted to having some understanding of the rivalry that existed between the Crips and Blood gangs. It was her understanding that because the rival gangs would commit offenses against one another, members of the Raymond Avenue Crips would have to be aware of the possibility of retaliatory crimes committed against them in their territory by a Blood gang. (RHT 8406-8407.) Dr. Miora refused to recognize, that the members of the Raymond Avenue Crips, while petitioner was a member and living in the community, were a major factor in the increased violence in petitioner's community. A claim of mitigation from petitioner's community exposure to dangers for which petitioner and his fellow gang members were a principal originating source has little merit.

As the evidence at petitioner's trial and this proceeding document, Helen Keller Park became the hangout for the Raymond Avenue Crips. (See, e.g., *People v. Champion, supra,* 9 Cal.4th at 919 ["the prosecution called Deputy Sheriff Ronnie Williams, an expert in juvenile gangs, to testify. He testified as follows: Deputy Williams was familiar with the Raymond Avenue Crips. That gang's 'prime hangout' was Helen Keller Park"].) No evidence has been adduced in this proceeding to even suggest the possibility that a cause other than the Raymond Avenue Crips is responsible for making Helen Keller Park dysfunctional for law-abiding citizens in the community.

In assessing the issue of potential mitigating evidence which could have been presented at petitioner's penalty phase concerning community dangers which may have affected petitioner's development and functioning, reasonably competent counsel would have had to take into account the jury's convictions of petitioner for the Hassan capital murder charges, convictions which reflected both the jury's express rejection of petitioner's alibi trial testimony and the jury's implicit rejection of petitioner's trial testimony in which he disclaimed continued membership in the Raymond Avenue Crips at the time of the Hassan crimes. Thus, reasonably competent counsel at the penalty phase could easily have concluded that presenting evidence that petitioner's community had become more dangerous before and while petitioner was at the CYA as a result of

increased gang activity in the form of shootings, residential burglaries and drug usage by members of the Raymond Avenue Crips, a gang in which petitioner's trial jury had obviously concluded petitioner was still a member of at the time of the Hassan murders, could only serve to aggravate the nature of the Hassan crimes and highlight petitioner's perjured trial testimony in which petitioner disclaimed continued membership in the gang. Neither of those reasonably foreseeable consequences from introduction of such evidence would have provided counsel with a platform to argue for mercy for petitioner, including that petitioner bore less responsibility for the Hassan murders.

In addition, Dr. Miora made no assessment whatsoever of whether the Raymond Avenue Crips were at least in part responsible for what she characterized as rising community violence in petitioner's community while he was at the CYA, even though Dr. Miora was willing to address community violence as an adverse factor in petitioner's functioning and development. (RHT 9280.)

These conclusions are further supported by statements petitioner made to Dr. Miora. Petitioner told Dr. Miora that by the time he was 14 years old "'it was necessary to be armed to go to parties and dances as the circumstances were unpredictable. [Petitioner] understood that guns were obtained from burglaries and it was considered a badge of honor to arm a home boy. The guns were stashed in a designated location permitting everyone in need access. However, stealing the guns would be grounds for "instant dismissal" from the gang. Mr. Champion distinguished that reputation was built on fighting rather than use of guns.'" (RHT 9231-9232, quoting from Exhibit 136, p. 14.) Petitioner described to Dr. Miora his need to be hyper vigilant to potential dangers which existed in petitioner's community when he was approximately 14 years old.[131] Dr. Miora admitted that petitioner told her he carried guns for his protection at this time. (RHT 9235.)

[131] Given petitioner's date of birth as August 26, 1962, petitioner would have been 14 years old in the period 1976-1977.

Petitioner described the value of his gang involvement as "pride, status, unity, respect, honor." (RHT 9233, quoting from Exhibit 136, p. 15.) Petitioner told Dr. Miora that he saw his gang as protection for him from dangers in the community. In addition, petitioner told Dr. Miora that while petitioner was at the CYA, three of his friends had been killed. (RHT 9236; see also, Exhibit 136, p. 194.) Further, petitioner told Dr. Miora his belief was that his neighborhood had become more dangerous while he had been in the Youth Authority.

Given these circumstances, Dr. Miora "imagine[d] that [petitioner] continued to feel a need to be vigilant and aware." (RHT 9237.) Dr. Miora further conceded that petitioner could see his gang, the Raymond Avenue Crips, "as a continued source for protection from an increasingly dangerous neighborhood once [petitioner] was released from the Youth Authority[.]" (RHT 9238.) Nevertheless, when asked whether she agreed that "it would be expected for Mr. Champion to go back to the gang and go back to carrying guns to protect himself from this ever increasing danger in his community[,]" Dr. Miora answered: "No, I can't say it would be expected, that that implies a degree of probability that I am not in a position to speak to." (RHT 9238.) Dr. Miora never asked petitioner if he had gone back to the Raymond Avenue Crips following petitioner's release from the CYA. (RHT 8295, 8444-8446, 9230.) Similarly, Dr. Miora never asked petitioner whether he ever carried a gun once he got out of the Youth Authority. (RHT 9235-9236.) Nevertheless, Exhibit 47, showing petitioner holding a handgun, was seized from petitioner's home on January 14, 1981. According to the testimony of Gary Jones, petitioner appears to be 18 years old in Exhibit 47. Given that petitioner was not released from the CYA until October 23, 1980, Exhibit 47 appears to be a photograph taken after petitioner's release from the CYA.

Petitioner's statements to Dr. Miora concerning community violence, the need to be armed, hyper vigilance, the value of gang involvement as security from dangers in the community and the heightened level of dangerousness in the community on petitioner's return from the CYA, in conjunction with Exhibit 47 and Dr. Miora's

demonstrated failure to explicitly ask petitioner whether on his release from the CYA he returned to the Raymond Avenue Crips or carried guns, only serve to further confirm that when petitioner testified in the guilt phase of his trial that he did not return to the Raymond Avenue Crips on his release from the CYA, petitioner deliberately lied.

Petitioner's neighborhood did not appear to become more dangerous until at least 1975, the year when petitioner, by his own account to Dr. Miora, was already a member of the Raymond Avenue Crips. Further, the circumstances making the neighborhood dangerous arose directly from gang activity of the Raymond Avenue Crips and their rivals. As such, residential burglaries, drug use and increased violence marked the contours of the community danger. Petitioner's commission of a residential burglary in December 1976 was itself a crime which increased community danger. Of course, for the nearly two year period petitioner was in the CYA between 1978 and October 23, 1980, petitioner was not affecting or affected by community dangers.

In this proceeding, petitioner has failed to identify any community dangers which reasonably competent trial counsel should have uncovered which were not of petitioner's and his fellow Raymond Avenue Crips gang members' own doing and which adversely affected petitioner's functioning and development. Petitioner's functioning and development were adversely affected by the fact that petitioner was not only a member of a dangerous street gang, but one actively involved in that gang's criminal activity which made petitioner's community the danger it was. However, in light of petitioner's guilt phase testimony in which he claimed to have left the Raymond Avenue Crips in 1979, the jury's rejection of that testimony expressed through petitioner's convictions for the Hassan murders and robberies, the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player and Gary Jones, the availability to the prosecution of using petitioner's December 21, 1976 residential burglary to impeach claims of community dangers unrelated to petitioner's own actions and the potential for evidence to inform the jury that the photographic exhibits (Exhibits DD, EE and FF) were taken while petitioner was at the CYA, even had there been available evidence of

community dangers affecting petitioner's functioning and development unrelated to petitioner and the Raymond Avenue Crips, reasonably competent counsel would have wisely chosen not to pursue the issue at the penalty phase. There does not appear to have been any evidence of community danger available for use by petitioner's counsel in 1982 which did not involve directly or indirectly the danger created by petitioner and his fellow Raymond Avenue Crips gang members.

g. The Impact of Family Abandonment by Petitioner's Biological Father, the Death of Trabue Sr. and General Family Chaos on Petitioner's Functioning and Development.

Although Dr. Miora discussed in her Declaration the effects of the traffic accident in 1968 that claimed the life of Trabue Sr., she made no reference to records from the CDC in which petitioner denied having sustained any serious head injuries. (RHT 8507-8508.) While including in her Declaration many statements attributed to petitioner, Dr. Miora made no reference to petitioner's own statements denying he had sustained any serious head injury. (RHT 8509-8510.)[132] Further, Dr. Miora had seen no medical records for care petitioner received as result of the traffic accident suggesting either that petitioner had sustained a head injury in the accident or complained of headaches as a result of the accident. (RHT 8515-8516, 9141.) While Dr. Miora testified that petitioner had suffered nightmares, the source of that information came from his mother's declaration, not Dr. Miora's interview with petitioner's mother. However, petitioner's mother did not link the traffic accident to petitioner's alleged nightmares. (RHT 9145-9146.) Further, Dr. Miora did not opine that as a result of petitioner's having

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[132] While Dr. Miora's Declaration failed to include statements by petitioner denying any significant head injury, Dr. Riley's interview notes (Exhibit UUU) reflect petitioner's account of the traffic accident. Petitioner's history included a claim that he injured his "collar bone;" no reference is made to any head injury. Further, in the notes, Dr. Riley indicates that petitioner was a "good historian." (RHT 6209-6210 [according to Dr. Hinkin, Dr. Riley's notes—"'Good historian. Recounting details of another case. Supplies many details. Puts details in organized context. Remembers specific details.'"—are not consistent with what one would expect had petitioner the type of brain damage Dr. Riley ultimately opined petitioner has], 6238.) As already discussed, Dr. Hinkin testified that even if petitioner had been in the 1968 car accident and sustained a concussion, that would not typically translate into brain damage and in petitioner's case, it did not.

experienced the traffic accident, petitioner suffered "post-traumatic effects[.]" (RHT 9146.)

Further, although Dr. Miora included in her Declaration references to Dr. Riley's assessment of brain damage, including Dr. Riley's neuropsychological test results, she failed to include evidence that Dr. Riley did not review petitioner's CDC records to ascertain whether there was any history occurring between 1983 and 1997 when petitioner was tested by Dr. Riley which could account for the brain damage Dr. Riley believed petitioner had sustained. (RHT 8506, 8512-8514.) Dr. Miora conceded the issue was whether or not as of the time of petitioner's trial he had evidence of brain damage which could have been produced by trial counsel; the issue was not whether petitioner sustained brain damage following his trial. Thus, it would have been helpful in Dr. Miora's view for Dr. Riley to have reviewed the CDC records. (RHT 8511-8513.) While refusing to consider Dr. Riley's failure to review petitioner's CDC records as "a failure per se[,]" Dr. Miora conceded "that it was a limitation, as were my not having been exposed to all the sources of information that may have influenced or affected the development of my opinions." (RHT 8514.)

Similarly, although Dr. Miora had reviewed records within the CDC package reflecting that petitioner had engaged in fighting since being housed at San Quentin during which petitioner may have been struck in the head (RHT 8514-8515.), her declaration fails to make note of that.

In addition, as noted, petitioner, petitioner's mother, petitioner's older sisters and brother Reggie never told trial counsel about the 1968 traffic accident or that petitioner's development and functioning had been adversely impacted either by such accident or the death of his stepfather, Trabue Sr. The fact that petitioner and his family attributed no long-term significance to the 1968 traffic accident is also fully consistent with what petitioner's mother told the CYA parole agent during the December 11, 1978 home interview as reflected in the Initial Home Investigation Report (Exhibit H).

In Exhibit H, petitioner's "mother stated that the separation [of petitioner's mother and biological father] apparently has had no ill effects on subject or the other children. [Petitioner's mother] stated that she has been married and widowed twice since." Under "Intrafamily Relationship," the investigator wrote that "[t]he family is described as normal in all aspects. The children all relate well to each other, respect the parent, and are helpful at home. The two oldest girls work regularly on a full-time basis and contribute to the support of the family." In describing petitioner's "Developmental History," petitioner's mother told the investigator that "there were no serious illnesses or injuries suffered as a child. [Petitioner] demonstrated no abnormal developmental behavior during his formative years." It is clear that although given the opportunity to claim petitioner's functioning and development had been adversely affected by not only the separation of petitioner's mother and biological father, but the traffic accident, petitioner's mother painted quite the opposite picture.

It must also be recalled that in none of the CYA psychological and psychiatric evaluations (Exhibits. D, I & J) or the Pollack/Imperi assessment (Exhibit 46) did petitioner in any way raise the history of the 1968 traffic accident, either as to his own injuries or the death of his stepfather, or suggest that the accident or the abandonment of petitioner's family by Lewis Champion II before petitioner's birth in any way affected petitioner's development and functioning. If Lewis Champion II was as abusive as petitioner now claims, common sense dictates that removing this disruptive influence could only have helped, not harmed petitioner.

Finally, even had petitioner and his family made the claims presently raised with respect to the 1968 traffic accident, the death of Trabue Sr. and the abandonment of petitioner's family before petitioner's birth by his biological father, Lewis Champion II, in their conversations with trial counsel before petitioner's 1982 trial, reasonably competent counsel would have had to confront the practical problem of how to present such evidence requiring testimony from petitioner and petitioner's family, including his mother, older sisters and brother, when the jury had already concluded that they were

not credible witnesses in their effort to provide petitioner with an alibi for the Hassan murders and an innocent explanation for petitioner's possession of Bobby Hassan's jewelry taken in the course of the execution murders/robberies of Bobby and Eric Hassan.

Separate and apart from that task is the equal prospect of having such claims impeached by evidence reflected in Exhibits D, H, I, J and CCC, all of which, with the exception of petitioner's school records (Exhibit CCC), had been reviewed by trial counsel before petitioner's trial.

In sum, Skyers' pretrial investigation failed to disclose that petitioner had been in a traffic accident in 1968 in which petitioner's stepfather had been killed or that his death had allegedly adversely affected petitioner's development and functioning. However, in light of the jury's rejection of the credibility of the very witnesses Skyers would need to recall at penalty phase to bring these matters before the jury, reasonably competent counsel would have done as Skyers did at penalty phase.

In general, the same analysis applies to petitioner's ancillary claims raised in this proceeding, principally through the testimony of Dr. Miora, that the lack of a strong father figure both before Trabue Sr. entered petitioner's life and after his death in 1968, the general impact of divorce and general family chaos, and Lewis Champion II's mistreatment of petitioner's mother all adversely affected petitioner's functioning and development. As noted, assuming the allegations of abuse inflicted on petitioner's mother by petitioner's biological father are true, having this abusive individual out of petitioner's life would seem to have benefited petitioner's development and functioning. Second, at no time did petitioner's mother, older sisters, older brother or petitioner himself in any way suggest that petitioner's development and functioning or the functioning of petitioner's family in general had been adversely affected by the absence of petitioner's biological father or the absence of a strong father figure either before or after Trabue Sr. Once again, one is drawn back to the statements made by petitioner's mother in December 1978 as reflected in Exhibit H, statements which would not have

raised any concerns in these areas for trial counsel who had reviewed this document and who, as a result of conversations with petitioner's mother, older sisters and older brother, had received no information contrary to that reflected in the mother's account of a normal happy family with no serious accidents or injuries to petitioner.

In addition to the incredibly difficult strategic problem of presenting these areas as potential mitigation evidence at the penalty phase in light of the contrary information available to trial counsel and the compromised credibility of family members, even if trial counsel had an "expert" witness such as Dr. Miora available to testify to the significance of these areas (testimony which would have been subject to impeachment through the very records which corroborated the pretrial accounts given trial counsel by petitioner and his family), the gravamen of Dr. Miora's reference hearing testimony is predicated on the credibility of the claims of general family chaos, poverty and physical abuse to petitioner and other family members by petitioner's older brothers, claims which the referee has not found to be credible. While the referee does not doubt the difficulties for a single parent raising a family, in particular a family as large as petitioner's immediate family was, a competent attorney would have grounds not to present this evidence based on family credibility issues as well as its selectability. The referee finds particularly credible Gary Jones' reference hearing testimony describing the childhood he shared with petitioner. "We had a really beautiful childhood." (RHT 5665-5666, 5689.)

h. Petitioner's School Performance and the Lack of Intervention by the LAUSD System

The only relevant exhibits describing petitioner's school progress are the contemporaneous school records of petitioner (Exhibit CCC). One entry under the sixth grade, attributable to declarant Barbara Williams (RHT 8860-8864.), reads: "'Can be somewhat of a discipline problem at times, works below grade level, can be distracted easily. Likes to be a leader of his peers.'" (RHT 8864-8865, quoting verbatim from Exhibit CCC.) A similar entry for petitioner's fourth grade performance reads: "'Growth

in all academic areas. Enthusiastic. Well liked by peers. Needs to feel that he can succeed. Easily distracted.'" (RHT 8866, quoting verbatim from Exhibit CCC.)[133]

Petitioner's school records also reflected that for the fourth grade, he missed only 3 out of 177 days of school; for the fifth grade petitioner missed only 11 out of 175 days; and for the sixth grade, it appears petitioner missed only 8 out of 173 days of school. (RHT 8866-8867.)

Although Dr. Miora understood that petitioner was already the recipient of beatings from his older brother Lewis at the time petitioner attended the fourth grade (RHT 8870.), she conceded that no teacher's comments for the fourth and sixth grade reflected any expression of concern that petitioner was being abused in any way. (RHT 8871.)[134]

Dr. Miora conceded in her testimony that the noted improvement in petitioner's performance during the fourth grade was "certainly significant in terms of a mark of stability to be able to get to school. This is a positive thing, several years after the accident." (RHT 9057.) Dr. Miora further conceded that over time, she would expect there to be "some healing from the wounds, if there were any, [resulting from] the death of Gerald Trabue[.]" (RHT 9057.)

One of the teacher declarations reviewed by Dr. Miora was that of Barbara Williams. (RHT 9240.) Ms. Williams' Declaration describes the elementary school petitioner attended, West Athens elementary school. Ms. Williams' description of that school is set forth verbatim at RHT 9240-9244. Ms. Williams' Declaration describing scarce resources, overcrowded classrooms, lack of physical facilities such as a gym

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[133] Reasonably competent trial counsel would have immediately recognized the concrete danger presented if petitioner's school records reflecting that in the sixth grade, approximately 6 years before the Hassan capital murders were committed, petitioner had been characterized by his teacher as someone who "[l]ikes to be a leader of his peers." Certainly, any competent prosecutor could argue such evidence served to undermine any defense effort to mitigate petitioner's responsibility and role as a follower vis-à-vis Craig Ross and other members of the Raymond Avenue Crips involved in the Hassan capital murders.

[134] In fact, nowhere in petitioner's school records is there any indication from any teacher or other school official reflecting any concern that petitioner was subject to physical abuse or neglect in his home or by members of his family.

and cafeteria, problems with "vandalism, break-ins, littering and violence," as well as fighting on school grounds both during and after school hours, a playground "littered with liquor bottles, drug paraphernalia, and spent rounds from guns," as well as overt racism at the school and teachers afraid to stay after class due to the dangerous nature of the area and who lacked concern for the children, painted a bleak picture of the learning environment to which petitioner was exposed. Nevertheless, Dr. Miora opined that "relative to [petitioner's] home environment, [the school environment] may well have been [a safe and structured environment which would enhance Mr. Champion's learning experience]." (RHT 9244-9245.) Yet, Dr. Miora refused to say whether she perceived petitioner's home environment to be worse than his school environment as described by the Williams' Declaration or vice versa. (RHT 9245: 11 ["I didn't say that [the home environment was worse than the school environment], no"]; 9245: 15 ["I didn't say that [the home environment as Dr. Miora understood it was a better environment than the school environment] either"].) When then asked to confirm she had testified to the significance of petitioner's fourth grade improvement as a reflection of a structured and predictable context of the school environment at that time, Dr. Miora answered: "May have, yes, I hypothesized, I didn't know that to be true. It was one possible explanation for the improved performance." (RHT 9245: 23-25.)[135]

The referee finds that when petitioner put his mind to his education, he could be successful. On the other hand, when he preferred to participate with his gang beginning at age 12 or 13, skip school, use drugs and alcohol and commit crimes, his school work suffered.[136]

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[135] While Barbara Williams' Declaration indicates that she came to petitioner's elementary school after petitioner completed the fourth grade, Dr. Miora understood that Ms. Williams came to the school approximately one year after petitioner completed the fourth grade. Dr. Miora conceded that she could "not believe that I could say with any degree of certainty that there was anything particularly different at the school during his fourth grade year. However, these kinds of transitions in performances are not unusual." (RHT 9246-9248.)

[136] For example, in a probation report concerning petitioner which is dated November 8, 1978, under personal history, the probation officer noted: "'Prior to minor's camp placement, he experienced extreme adjustment problems in the school setting. On one occasion, he was expelled from the program when he was discovered to have a gun in his possession on the junior high school campus. Prior to minor's

Based on reasons already discussed demonstrating how petitioner's school records (Exhibit CCC), the "Initial Home Investigation Report (Exhibit H)" and petitioner's CYA records could be used by the prosecution to rebut claims petitioner's habeas counsel now contends trial counsel should have introduced as mitigating evidence at petitioner's penalty phase and the failure of petitioner's habeas counsel to call a single teacher to testify in this proceeding about either the school environment petitioner faced or petitioner's performance in school or for that matter, what could have been done by the school system with available resources, reasonably competent counsel could have wisely chosen not to put forth a claim suggesting a failure on the part of petitioner's schools to intervene with petitioner and his family adversely affected petitioner's development and functioning.

3. Evidence of Petitioner's "Institutional Adjustment" at the CYA

At trial, the jury heard evidence from a surreptitiously recorded August 10, 1981 conversation between petitioner and his co-defendant Craig Ross from which the jury could conclude the two defendants were hatching a plan to escape. (*People v. Champion*, *supra*, 9 Cal.4th at p. 909 ["in the two tape-recorded conversations, which contained numerous profanities, defendants fantasized about taking a 'stroll' out of the jail and about 'blowing up' the driver of the transport van and escaping. They spoke in derogatory terms of a man named Ishimoto, apparently a guard at the jail, calling him a 'little Jap,' a 'Buddha head motherfucker,' and a 'little bastard Buddha head'"]; *id.* at p. 914 ["[f]inally, the trial court could reasonably determine that when [the defendants] discussed the possibility of escape, the defendants showed a consciousness of guilt]; see also, Exhibits E & F (Trial Exhibits 180 & 180-A) and RHT 1284-1291 [at the time of petitioner's trial, trial counsel had a copy of the transcript, Exhibit F, and trial counsel

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expulsion, he recorded all fails and U's in the eighth grade program. Minor was subsequently placed in the camp program before he had an opportunity to improve on his performance.'" (RHT 9263-9264, quoting from Exhibit 147 at BS109.) These observations are consistent with petitioner's statement to Dr. Miora that he first joined the Raymond Avenue Crips when he was 12 or 13 years old. (RHT 8446.)

heard the tape recording (Trial Exhibit 180) played both to the jury and before it was played in court for the jury].)

The jury also witnessed a disruption by petitioner and Ross in open court when it returned its verdicts of guilty, specifically when the jury's first guilty verdict as to petitioner was read in open court. (15 RT 3480: 18 et seq.; RHT 1455-1465.) Despite the repeated admonitions by Judge Keene, the trial judge, to petitioner and Ross to have a seat, neither complied. Petitioner's trial counsel agreed that what had occurred in front of the jury as reflected in the transcript of the proceedings was that petitioner and Ross had "acted up in front of the jury...." (RHT 1466: 22-25.)[137] Skyers testified that he did not believe he had anything to rebut what the jurors had seen and heard petitioner and Ross do and say when the guilty verdicts were returned. (RHT 1466: 2-11.)

Petitioner's *Strickland* expert conceded that at the time of petitioner's penalty phase, the jury had heard the evidence from the surreptitiously recorded conversation in which Ross and petitioner talked about possibly escaping and the jury had witnessed the "disruption" engaged in by petitioner and Ross when the guilty verdicts were returned. (RHT 4401-4402.) Earley also conceded that petitioner's trial counsel was aware that petitioner had been placed at the CYA as a result of the 1978 incident involving the assault with a deadly weapon. (RHT 4396-4397.) Petitioner's probation report, prepared following petitioner's convictions and sentence of death (a copy of which was in "Skyers' file" and marked as Exhibit 1-S), reflects petitioner's arrest on November 6, 1977 for the West Covina crimes; his subsequent placement in juvenile camp on December 13, 1977 and his subsequent release from that camp on July 31, 1978. (1 CT 119.) That same report reflects petitioner's arrest on September 27, 1978

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[137] Skyers also testified that the transcript did not reflect a comment Skyers heard uttered by co-defendant Craig Ross. That comment was "'not you, Steve.'" (RHT 1466: 6-16.) Skyers also acknowledged that although Ross could have taken the stand at petitioner's trial, admitted his own responsibility for the Taylor crimes and attempted to exonerate petitioner from involvement in those crimes, Ross had not done so. (RHT 1466: 17-21.)

for the robbery and assault incident which resulted in petitioner's commitment to the CYA on November 27, 1978 from which he was paroled on October 23, 1980. (1 CT 119.) The Hassan murders and robberies for which petitioner stands convicted of were committed on December 12, 1980, approximately 7 weeks after petitioner's release from the CYA. (*People v. Champion, supra,* 9 Cal.4th at 898-899; RHT 1433: 2-8.)

In their respective penalty phase arguments, both petitioner's trial counsel and counsel for co-defendant Craig Ross, Mr. Lenoir, addressed the issue of future dangerousness, including the disruptive conduct of petitioner and Ross when the guilty verdicts were returned. Mr. Lenoir, arguing on behalf of Craig Ross before petitioner's trial counsel's penalty phase argument, told the jury:

> "Mr. Semow [the trial prosecutor] brings to your attention the display that these two men unfortunately did before your very eyes. At no time did Mr. Billy Wyatt [Judge Keene's bailiff, see 3 CT 775-783] have any problems with those men. It was not until two persons from the audience, one in a tee shirt, and I still don't know who they are, ran over towards them. That could not possibly happen at Folsom. You can reasonably infer that Mr. Ross behaved during the two years he was imprisoned. There is nothing to show otherwise. There is nothing, and you can rest assured, as diligent as Mr. Semow has been in this case, and I commend him for it, as diligent as he has been in the marshaling of evidence, if there was one black mark on Ross' record while he was in confinement, it would have been presented to you. That's a mitigating circumstance."
>
> (15 RT 3738-3739; see also, RHT 1482-1483, 4408-4409.)

In his penalty phase argument, after telling the jury that he would not "belabor those points that have been said adequately by both Mr. Semow and Mr. Lenoir" (15 RT 3743), petitioner's trial counsel addressed the issue of petitioner's future dangerousness and the disruptive conduct witnessed by the jury.

> "Now, as to the display of the defendant's [*sic*], I will agree with Mr. Lenoir, it was Mr. Champion who stood up first, I think I recall that. And I don't know if standing up first or second decides who is a leader or not. I think when Mr. Champion jumped to his feet and said something like, 'It's all over, I don't want to hear any more,' was extremely spontaneous. It was right at that moment that the clerk read the very first conviction. She said, 'We find Steve Champion guilty of burglary,' I think that's what it was, that was the moment that he jumped up and went to that door over there. His back was turned, his face was towards the door, and I think it is significant he was saying, 'I don't want to hear any more.' He was ready to go into the lockup, he wasn't challenging anyone, and I don't think it was said by Mr. Semow he was. I think it is evident to you he was not challenging anyone and was not trying to escape, or anything like that. The testimony about Steve Champion's getting ready to go to Gompers to enroll in a program where he is trained as a tutor for the parolees I think is a legitimate thing to bring out because I think that shows that there is at least something where Steve Champion is concerned, some response to some kind of authority. He has been in the California Youth Authority and he was paroled. Now, he had a parole officer, there was no statement about what he did while he was in the Youth Authority. And you can rest assured there is a file that would have said on such and such a

date he threatened to fight the guard, on such and such date he stabbed someone, nothing to that effect, but he was paroled. And he had a parole officer who verifies that he was going to be signed out to become a tutor at Gompers. I think considering everything, the bad and the good, that there is something there that tells you that Steve Champion could function in an institution, he is not going to escape. I think the words on that tape had to do, and I think you see that, that it has to do with a lot of talk while someone was chained up on a chair. He is not going to escape from Folsom, or any other institution that he is put in. In fact, all the talk that we have had about persons paroled, and we have seen persons going up to prevent someone's parole because they have killed people and are now getting out, every one of those had to do with persons who had got the death penalty and then that death penalty was either overturned for some reason or another that doesn't concern us here, but when it was overturned they didn't get life without parole but life. And when someone gets a life sentence it means with parole. But all we are asking is that you give Steve Champion, and Craig Ross, life without possibility of parole."

(15 RT 3755-3757; see also, RHT 1483-1484, 4410.)

Against this background evidence, Earley contended that based upon Exhibit 23 A-1, the March 25, 1980 Youth Training School (sometimes hereinafter "YTS") "Case Report" found in "Skyers' file,"[138] trial counsel should have presented evidence of petitioner's institutional adjustment while at CYA to demonstrate in essence that because he had adjusted well at the CYA, petitioner could be successfully managed in

[138] A second copy of the same report, also located within "Skyers' file," has been marked as Exhibit 26-B.

an institutional setting where he would present no danger to anyone. As Earley put it: "The main thrust of it is that people's behavior can be different on the inside than outside." (RHT 4397.)

Earley conceded that petitioner's trial jury could have concluded from the absence of any evidence presented by the prosecution of disruptions by either petitioner or Craig Ross while they were housed at the county jail following their arrests for the charged crimes that no such evidence existed, although Earley opined that "I don't agree that you put on a lack of evidence and you rely on that." (RHT 4409.)[139] Earley criticized trial counsel's penalty argument asking the jury to infer, from the absence of evidence presented by the prosecution establishing institutional misconduct by petitioner, that petitioner presented no danger while housed in an institutional setting under a sentence of life without possibility of parole. (RHT 4410-4412.)

In light of cases such as *People v. Vargas* (1973) 9 Cal.3d 470, 475, addressing and approving the propriety of a prosecutor's comment on the failure of the defense to introduce material evidence or call logical witnesses, Evidence Code § 412[140] and the right of the prosecution at petitioner's penalty phase to offer evidence of "'criminal activity by the defendant which involved the use or attempted use of force or violence....' ([Pen. Code,] § 190.3, factor (b))[,]" even though the defendant "was a minor when the violent activity occurred" (*People v. Champion*, *supra*, 9 Cal.4th at pp. 936-937),[141] there was no impropriety for trial counsel to argue to the jury that petitioner presented no future dangerousness if sentenced to life imprisonment without the possibility of parole based on petitioner's parole from the CYA and the prosecutor's failure to present any evidence of violent criminal activity by petitioner.

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[139] Once again, Earley's use of the first person, rather than the standard of reasonably competent counsel, reflects only on what Earley would or would not have done and does not establish that reasonably competent counsel could not have viewed things differently than Earley.

[140] "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence the evidence offered should be viewed with distrust."

[141] "As we explained in *People v. Cox* [(1991)], *supra*, 53 Cal.3d [618] at page 689: '"It is not the [juvenile] adjudication, but the conduct itself, which is relevant." [Citations.] Accordingly,...evidence of a wardship adjudication is inadmissible....'" (*People v. Champion*, *supra*, 9 Cal.4th at p. 937.)

As will be discussed next, by arguing the issue in this manner rather than attempting to present evidence of petitioner's actual conduct while at the CYA, trial counsel avoided evidence demonstrating petitioner's ability and willingness to manipulate CYA officials as well as evidence of disruptive behavior by the petitioner while at that CYA that is inconsistent with the theory petitioner would present no future danger housed in an institutional setting if given life without possibility of parole.

In the last psychiatric evaluation conducted less than three months before petitioner's parole from the CYA on October 23, 1980, Dr. Brown wrote under "DISCUSSION AND PROGNOSIS: The youth has definite plans laid out for his future, and although he still is approximately 17 years of age, he seems to be showing definite maturation and improvement in his personality. I feel that his violence potential for the future is probably low. There is, of course, the possibility of manipulation, however, the youth does seem quite sincere in the information that he gave me today and in his presentation." (Exhibit I, p. 2.)[142] Concerns about manipulation are heightened when one notes Dr. Brown's findings under "MENTAL STATUS EXAMINATION: The youth during the entire interview seemed quite eager to help in any way possible and deal with any information. He was oriented to time, person and place, alert and quite cooperative with the interview. His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease, or any kind of cognitive abnormalities. His memory as tested to both conversation and direct questioning was very good. His calculating abilities showed him to be rather sharp and occasional mistakes may, he felt, be due to anxiety. The youth gave no indications of any type of depression, suicidal or homicidal ideations, nor any lack of judgment or insight skills." (Exhibit I, p. 2.)

Given (1) Dr. Brown's findings and those of the other psychologists and psychiatrists who evaluated petitioner while he was at the CYA (See, Exhibits D & J.)

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[142] Earley admitted he had not reviewed Exhibit I at any time before testifying. (RHT 4399.)

reflecting petitioner's intelligence, lack of evidence of brain damage or other neurological impairment and eagerness to help; (2) the fact petitioner was paroled less than 90 days after Dr. Brown's favorable evaluation; and (3) the fact petitioner committed the Hassan murderers and robberies less than 45 days after being paroled from the CYA, as petitioner's trial counsel himself admitted, "[a]n argument could be made" "that Mr. Champion fooled the people at the Youth Authority when they decided to parole him by doing what [petitioner] knew they needed to see from him in order to parole him." (RHT 1433: 9-13.)

Further, favorable comments in the March 25, 1980 YTS report (Exhibit 23 A-1) would also be subject to a reasonable argument that petitioner had "put his best foot forward at the Youth Authority in an effort to get paroled...[.]" (RHT 1431-1436.) Even the author's opinion that "[petitioner] is sorry this [1978 assault with a deadly weapon] incident happened" would be subject to this same argument of manipulation. (RHT 1435.) In light of petitioner's candid remarks to his co-defendant Craig Ross that "he didn't feel bad or nothing" about the Hassan execution murders and robberies (Exhibit F, p. 15.), Elizabeth Moncrief's trial testimony that petitioner was laughing as he left the Hassan residence with a pillowcase filled with property immediately after the brutal murders and Dr. Minton's findings that "[petitioner] showed no guilt or remorse over his [1978 assault with a deadly weapon] offense[,]" reasonably competent counsel could readily conclude a jury would be less than impressed, if not outright offended, by petitioner's apparent remorse expressed not out of true feelings of remorse, but out of a calculated plan to impress those at the CYA with the means and the power to parole petitioner. (RHT 1436-1449.)

In addition, evidence that petitioner had the ability, if he put his mind to it, to satisfactorily learn, that he had set goals for himself, and that he desired to pursue education at El Camino College and possible employment with his uncle in the construction field (Exhibit 23 A-1), would all be the type of evidence from which a jury could find petitioner was a "manipulative, sophisticated individual who could fool even

professional people in the prison system[,]" especially in light of the actual evidence heard by the jury which did not include petitioner enrolling at El Camino College or undertaking employment with an uncle in the construction field. (RHT 1449-1454.)[143] Petitioner's motivation to manipulate is itself set forth in Exhibit 23 A-1: "Steven desires placement with his mother Azell Champion."

It must also be remembered that at the time of the penalty phase, the jury had already rejected petitioner's guilt phase testimony denying involvement in the Hassan crimes. Since reasonably competent counsel could readily infer from the guilty verdicts that the jury concluded petitioner lied to them in an effort to exonerate himself from criminal responsibility for the Hassan crimes, reasonably competent counsel could also conclude that any efforts to sell petitioner's self-serving statements to officials at the CYA would be counterproductive for all the reasons previously set forth and would ultimately adversely affect trial counsel's credibility with the penalty phase jury when counsel argued for a sentence of life without possibility of parole. (Cf. CALJIC 2.21 [Witness Willfully False]; CT 656.)

In Dr. Perrotti's December 5, 1979 "Psychological Evaluation (Exhibit J)," a report generated less than four months before the YTS March 25, 1980 report (Exhibit 23 A-1), Dr. Perrotti noted: "Insofar as his institutional program is concerned, Mr. Cruz, youth counselor on O/R, related to me that Mr. Champion did a very marginal program on O/R. He stated that [petitioner] needed constant supervision to stay out of trouble." (Exhibit J, p. 2, par. 2.)[144] When Earley was specifically asked whether the information from Mr. Cruz contained in Dr. Perrotti's report "sounded like someone who has made a

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[143] Petitioner did not tell Skyers that he intended to enroll at El Camino College. Trial counsel was not given any evidence by petitioner or any member of his family indicating that petitioner had become employed with an uncle in the construction field. In fact, Skyers was not aware whether petitioner even had an uncle in the construction field. (RHT 1453-1454.)

[144] Although Earley claimed to have reviewed the 13 volumes of penalty phase exhibits submitted with the Petition for Writ of Habeas Corpus, exhibits which included a copy of Dr. Perrotti's report, when specifically questioned about whether he had reviewed that report before writing either of his two reports (Exhibits 109 and 110) or before testifying, Earley had no recollection of having done so. (RHT 3085, 4399.) Earley also admitted he had not reviewed the specific paragraph of Dr. Perrotti's report setting forth the information from Mr. Cruz, the youth counselor. (RHT 4427-4429.)

good institutional adjustment at the Youth Authority[,]" Earley refused to answer that question. (RHT 4429-4430 ["I can't answer that question just based on this paragraph in the abstract].)

In addition to the fact that Earley had not reviewed Dr. Perrotti's report and thus was unaware of information inconsistent with a claim that petitioner had in fact adjusted well in the institutional setting of the CYA, Earley did not review petitioner's CDC records (See, Exhibit JJJ; RHT 4400.), which included not only the "Initial Home Investigation Report" (Exhibit H) and Dr. Brown's July 29, 1980 "Psychiatric Evaluation" (Exhibit I), but also a December 12, 1979 Youth Training School Case Report (Exhibit G-13 [an exhibit similar in nature to the March 25, 1980 report, Exhibit 23 A-1]) received for all purposes in this proceeding. (RHT 7355-7356.)[145]

Under "PROGRESS IN TREATMENT," the report documents that on March 20, 1979, "[petitioner] was transferred to that Treatment Program for assaulting another ward and a staff member. [Petitioner] went through the I/J Treatment Program with only two Level A Behavior Reports, one for yelling at staff, and one for wearing the wrong type of clothes to trade. On 6/30/79, [petitioner] was transferred to U/V Company. While on U/V Company, [petitioner's] rule and behavior violations became more severe. He was involved in an incident of destruction of State property, placa writing, and on 7/21/79, he was involved in a race riot between blacks and whites. In this riot, several wards were injured and hospitalized. As result of [petitioner's] participation in this incident, he was placed on T/D in O/R Company on 7/23/79." (Exhibit G-13, p. 1 [BS 000896].)

In the same report, under "INSTITUTIONAL ADJUSTMENT," the report reflects: "[Petitioner's] overall behavior at YTS is considered marginal by staff, due to some of his behavior problems. He has had three Level A Behavior Reports: 5/21/79-wearing the wrong type of clothes to trade; 5/24/79-yelling at staff; and 8/25/79-disrespect to

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[145] As previously noted, the referee finds that petitioner's trial counsel had reviewed Exhibits D, G-13, H, I, J and 23 A-1.

staff. [Petitioner] came from SRCC with a Level B Behavior Report for assault on his record, and has continued this behavior at YTS. The first was on 3/18/79 for assaulting another ward and a staff member on M/N Company. This resulted in his being placed on Phase A from 3/15/79 to 4/17/79. The second Level B was for damaging State property by placa writing. The third Level B resulted from [petitioner's] participation in the racial riot on U/V Company on 7/21/79. This put [petitioner] on Phase A again from 7/23/79 to 9/15/79 on O/R Company. While [petitioner] was on O/R, he behaved in an acceptable manner, but should be exposed longer to the general population to see if he can continue this behavior. So far on W/X Company he has continued to behave and has gotten no Behavior Reports." (Exhibit G-13, p. 2 [BS 000897].)

Finally, under "TREATMENT SUGGESTIONS," the report reflects in part: "Steven Champion is usually cooperative, and can be dealt with in an effective manner. The exception to this is if things don't go as he believes they should. If this happens, he becomes angry, starts yelling, and becomes very difficult to deal with until he cools down. This, in addition to his record of assaultive behavior, demonstrates his tendency for impulsive and violent behavior." (Exhibit G-13, p. 2 [BS 000897].)

The favorable assessment of petitioner's progress as reflected in the March 25, 1980 report (Exhibit 23 A-1), was subject to impeachment. Under "PROGRESS IN TREATMENT," the author of the report writes: "The following goals were established for [petitioner] as part of his overall program.....3. Be able to disassociate himself from negative peers. Since Steven has been on x company he has not been involved in any acts of a negative nature either singly or in a group." (Exhibit 23 A-1, p. 1 [BS 000894].)

As previously described, in his reference hearing testimony, Marcus Player identified Exhibits DD, EE and FF (Trial Exhibits 174-176) as photographs taken while petitioner and Marcus Player were housed at the CYA.[146] Marcus Player also identified

[146] Although Skyers believed at the time of trial these photographs were taken while petitioner was at the CYA, the jury was not so informed. Rather, the jury only learned through Deputy Williams' testimony that "an anonymous person had given him" the three photographs. (*People v. Champion*, *supra*, 9 Cal.4th at p. 920.)

petitioner in Exhibit DD (Trial Exhibit 174) as throwing a Raymond Avenue Crips' gang sign. (RHT 2023-2026.)[147] In his reference hearing testimony, Earl Bogans also identified petitioner in Exhibit DD throwing a Raymond Avenue Crips' gang sign. (RHT 2680.) Earley himself conceded that Exhibit DD was most likely taken by a visitor rather than someone associated with the facility. (RHT 4422.)

Earley's failure to review either Dr. Perrotti's report, including that portion dealing with Mr. Cruz's observations about petitioner's behavior at CYA, or Exhibit G-13 documenting petitioner's repeated acts of misconduct at CYA; and Earley's failure to read all of Skyers' reference hearing testimony (RHT 3913, 4398-4399, 4430.) undermines the reasonableness of his opinions castigating the approach of petitioner's and Ross' trial counsel taken during the trial's penalty phase.

In light of petitioner's disruptive and assaultive behavior while at the CYA, his disruptive behavior in front of the jury when the first guilty verdict against petitioner was read and the surreptitiously recorded conversation between petitioner and Craig Ross discussing possible escape from county jail, trial counsel's closing penalty argument, in conjunction with the closing penalty argument by counsel for petitioner's co-defendant (from which the jury could conclude petitioner would not in fact present a future danger if incarcerated under a sentence of life without possibility of parole), protected petitioner from available prosecution rebuttal impeachment evidence demonstrating that petitioner had the ability to manipulate the staff at the CYA and did in fact engage in conduct suggesting he would be a future danger "if things don't go as [petitioner] believes they should."

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[147] In light of Marcus Player's reference hearing testimony that he remained at the CYA until August 1980 and the absence of testimony adduced either at trial or in this reference hearing as to when exactly Exhibits DD, EE and FF were taken, the photographs could have been taken either before or after the March 25, 1980 report was prepared. In either event, Exhibit DD would impeach any claim of institutional adjustment predicated on the observations of the author of the March 25, 1980 report. If the photograph was taken after the report was written, it would demonstrate either a relapse by petitioner or an inaccurate assessment by the author of the March 25, 1980 report or both. If taken before that report was prepared, it would still demonstrate the failure of CYA personnel to be fully cognizant of petitioner's relevant behavior while at the CYA.

The referee finds that Skyers was aware at the time of trial of the reports relevant to petitioner's adjustment at the CYA. Other than the opinions of his *Strickland* expert, petitioner has introduced no additional evidence relevant to this issue at the reference hearing.

For all of the aforementioned reasons, the referee finds that reasonably competent counsel could have chosen the path pursued by petitioner's trial counsel to argue the issue of future dangerousness to the jury without rebuttal by the prosecution and reject the path suggested by petitioner's *Strickland* expert to pursue the issue of "institutional adjustment" through use of Exhibit 23 A-1 and witness testimony, both of which would be subject to damaging rebuttal impeachment evidence from the prosecution.[148]

4. The Love of Petitioner's Family for Petitioner

Skyers testified that he believed petitioner's mother loved her son, that she would have preferred petitioner receive a sentence of life without possibility of parole rather than a sentence of death and that she would have preferred petitioner be acquitted. (RHT 1129.) The referee asked Skyers whether he "consider[ed] calling the mother and other family members just to simply indicate their love, their affection, other redeeming aspects of the defendant's character, behavior or conduct in the penalty phase?" Skyers answered: "Not -- when I called the mother at the penalty phase, I didn't specifically use those words. But the idea was that she was there, she didn't -- I didn't ask her questions to say, do you love your son, I don't think I asked her those questions." In response to the referee's follow-up question asking Skyers whether he felt the mother's "mere presence, her mere support was sufficient and adequate from

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[148] Further, not only would reasonably competent counsel not seek to present evidence of institutional adjustment for the reasons already discussed, evidence that petitioner had the ability to successfully manipulate staff, including doctors, at the CYA runs counter to claims raised in this proceeding that petitioner suffers from brain damage and low intellectual functioning.

your perspective, or you simply did not ask those types of questions[,]" Skyers testified: "I felt her presence was sufficient, and that the jury would gather from her presence, her support and her love." (RHT 1405-1406.)

The referee finds that even though from the guilt phase testimony of petitioner's mother, two older sisters, two younger sisters and older brother Reginald, the jury was well aware of the family's love for petitioner, the best practice for trial counsel would have been to recall the mother and sisters for this express purpose. It is an intangible emotional factor but an important one. Mrs. Champion's depth of affection for her son is remarkable as was demonstrated during her reference hearing testimony. In addition, the sisters' comments of his protective nature should have been presented. Jones' recollection as to his childhood experience with petitioner should have been presented. These areas are an exception to the referee's findings that a reasonable competent attorney would encounter an impossible task in seeking to call family members who had testified in the guilt phase.

5. Mitigation of Petitioner's Aggravating Juvenile Crimes from 1977 and 1978

In his final report (Exhibit 110, last paragraph on page 16), Earley addressed the issue of "Mitigation of Participation in Juvenile Aggravators." Earley's specific criticism of trial counsel on this issue is found in one sentence, the last sentence of the paragraph. "While there are police reports for the events in Mr. Skyers [*sic*] file, there are no juvenile court documents, no transcripts of the proceedings and no indication whatsoever that Mr. Skyers made any attempt to talk to any of the witnesses, victims, or attorneys of either of these offenses." Nowhere in this report does Earley identify what mitigating evidence for these 1977 and 1978 crimes reasonably competent counsel should have presented at petitioner's penalty phase.

With respect to the 1978 incident, Earley again proffered the relative ages of the suspects as potential mitigating evidence petitioner's trial counsel should have presented, although once again, neither Earley nor petitioner has established what the

relative ages of any participants other than petitioner in the 1978 crime were. (RHT 4390.) The only other areas Earley offered dealt in general with family history based upon his review of declarations submitted as exhibits with the habeas petition,[149] petitioner's housing in a juvenile facility to "show that [petitioner] was still not treated as an adult in that crime, to booster [*sic*] the evidence that age is a mitigator" and evidence that while "housed in a structured environment [at CYA petitioner's] behavior changes." (RHT 4390-4391, 4394.)[150]

Nevertheless, since neither of these areas directly addressed the commission of the crime in 1978, when Earley was again asked to identify specific admissible evidence directly related to the 1978 crime which he contended trial counsel had an obligation as reasonably competent counsel to present, Earley repeated his earlier opinions. (RHT 4394: 21-26; 4395: 1-24.)[151]

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[149] As previously noted, Earley testified before any of the family members and Gary Jones testified with respect to petitioner's social history.

[150] See discussion of petitioner's institutional adjustment at CYA, *ante*, at pages 253-258.

[151] In a December 14, 1978 psychiatric report from Dr. Daniel Minton (Exhibit D), under "Psychiatric History," Dr. Minton wrote: "This is a 16 year old male who is committed to the California Youth Authority for the first time for Assault With a Deadly Weapon." Under "Mental Status Examination," Dr. Minton wrote in part: "This was a well-developed, well-nourished adolescent male who appeared to be his stated age. He was alert and oriented to time, place and person. His intelligence was in the average range. He conceptualized concretely. His memory was intact. His associations were tight throughout the interview. His affect was appropriate to the content of the interview. His mood was polite and friendly. This ward showed no guilt or remorse over his offense." Although as noted, Earley claimed to have read the 13 volumes of penalty phase exhibits appended to petitioner's Petition for Writ of Habeas Corpus, material which included Dr. Minton's report, when directly asked whether he had reviewed Dr. Minton's report before preparing either Exhibit 109 or Exhibit 110 or before testifying on direct examination, Earley indicated he had not. (RHT 4399.) Thus, Earley's contention that there was mitigating evidence to the 1978 crime reflecting petitioner's remorse for that crime flies directly in the face of evidence contemporaneous to petitioner's commission of that crime which reflected the exact opposite. Petitioner exhibited the identical callous lack of guilt or remorse for the Hassan murders and robberies. (See, Exhibit F (Trial Exhibit 180-A), p. 15 ["I didn't feel bad or nothing."]; see also, *People v. Champion, supra*, 9 Cal.4th at pp. 909-910, 913-914; RHT 1284-1296 [trial counsel Skyers agreed that petitioner's attitude demonstrating a lack of remorse for the Hassan murders was consistent with petitioner's lack of remorse for the assault with a deadly weapon incident as reflected in Dr. Minton's report and that in Skyers' opinion, assuming there had been some basis to offer mitigating evidence regarding the 1978 crime, evidence of petitioner's lack of remorse for that crime as reflected in Dr. Minton's report would be admissible for the prosecution to rebut whatever mitigating circumstances trial counsel could theoretically have developed regarding that crime].) In addition, petitioner's lack of guilt or remorse for the 1978 assault with a deadly weapon as found by Dr. Minton is a precursor to petitioner's immediate response following the execution murderers of Eric and Bobby Hassan as testified to at petitioner's trial by Elizabeth Moncrief. In Moncrief's testimony on this issue, beginning at 8 RT 1719: 17 and set out verbatim at RHT

In short, petitioner has failed to produce any evidence of what mitigating circumstances actually existed which would serve to mitigate petitioner's 1977 and 1978 aggravating crimes for which he was adjudicated a ward of the juvenile court system.

IV. REFERENCE QUESTION NO. 3

A. What investigative steps, if any, would have led to this additional evidence? In 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to obtain such evidence and to present it at the penalty phase?

B. Summary of Referee's Findings

a. What investigative steps, if any, would have led to this additional evidence?

The retaining of an evidence and penalty phase investigator would have uncovered the additional evidence. An independent investigation of the availability and credibility of percipient civilian or law enforcement witnesses relevant to the following areas of inquiry would have produced the additional evidence.

(1) A potential alibi for the Jefferson and Taylor murders.

(2) The ability of the Taylor surviving victims to identify petitioner.

(3) Petitioner's CYA adjustment – interview CYA staff.

(4) School records of petitioner – interview school teachers, document petitioner school performance.

(5) A review of petitioner's CYA mental evaluation reports, interview the reporting doctors.

(6) Petitioner's family/social background. Interview all immediate family members, available extended family members, friends,

1437-1448, she identified petitioner as the person she saw leaving the Hassan residence, wearing gloves, carrying a pillowcase that appeared to have something within it other than a pillow, and laughing.

neighbors and document any significant development/conduct of petitioner.

(7) Gang membership. Interview petitioner and fellow gang members as to membership association and gang activity, if available, and/or their willingness to be interviewed or to testify.

(8) Substance abuse. Interview petitioner, friends, family members, gang members and teachers as to substance dependence.

(9) Employment history. Determine if petitioner was employed and interview employer and supervisors.

(10) Probation/Parole. Interview probation and parole officials. Document petitioner's performance/conduct.

(11) Juvenile arrest/adjudication history. Document the arrest incidents. Interview arresting officers, if available, and determine if any percipient witnesses are available including any fellow gang members.

(12) Appropriate experts. Independently determine if any forensic experts as to the Taylor murder are available and the nature of their investigations and testimony. Review the existing records that pertain to petitioner's mental status, development or functioning, medical reports as to injuries, illness or other major health matters.

(13) Co-defendants and/or third party culpability. Investigate the degree of involvement of any co-defendant or third party in the Hassan and Taylor murders.

(14) Any other potential factor (K) or lingering doubt.

b. Would a reasonably competent attorney have tried to obtain such evidence in 1982?

(1) Yes, the evidence and witnesses as to a possible alibi were readily available with the exception of witnesses who were identified as gang members of the Raymond Avenue Crips. The Taylor surviving victims were available. The law enforcement witnesses to the detention at Helen Keller Park, the car chase, the car crash, the setting of the perimeter, the observation of petitioner, Harris, Player as they approached the perimeter, their detention, their compliance with LASD directions, the observation of Simms joining petitioner from within the perimeter, the field show up of petitioner, Harris, Player, Simms with the Taylor surviving victims, the release of petitioner, Harris, Player to petitioner's home, the detention/arrest of Simms, the arrest of Mallet in petitioner's backyard, the field show up of Mallet and the arrest of Mallet. Skyers did not interview any witness to the Taylor murder.

(2) CYA adjustment. Yes, CYA staff members were available to be interviewed. Skyers did not interview CYA staff.

(3) School records. Yes, school records and some of the appropriate school teachers may have been available.

(4) Review the CYA medical reports. Yes, reasonably competent counsel would have reviewed these reports and interviewed the doctors. Skyers did review the CYA medical reports of petitioner.

(5) Interview family for petitioner background and social history. Yes, reasonably competent counsel would have interviewed all immediate family members. Skyers personally interviewed petitioner's mother (Azell), his two older sisters (Linda and Rita),

and one of his older brothers (Reggie). He did not interview any other family members, neighbors or friends.

(6) Gang membership. Yes, reasonably competent counsel would have independently investigated petitioner's involvement in the Raymond Avenue Crips. Skyers did not conduct any investigation other than his interview of petitioner.

(7) Substance abuse. Yes, reasonably competent counsel would have determined whether petitioner was drug dependent and whether that dependence had any relevance to the charged offenses or mitigation. Skyers did not conduct any separate investigation.

(8) Employment history. Yes, reasonably competent counsel would have conducted an investigation as to employment history, type of work, extent of work history and identify his employers/supervisors. Skyers did not interview any employer/supervisor.

(9) Probation/parole. Yes, reasonably competent counsel would have reviewed petitioner's criminal history and contacted/interviewed his probation and/or parole officers. Skyers did review petitioner's juvenile criminal history and he did interview a parole official.

(10) Juvenile arrest/adjudication history. Yes. A detailed account of petitioner's juvenile arrest and adjudication history is itemized on pages 298 to 311 of this report.

(11) Appropriate experts. Yes, reasonably competent counsel would have independently interviewed the following potential experts:

- Forensic, fingerprint, firearms experts.
- Gang experts; review the photographs.
- Medical/mental doctors; consult with CYA doctors as to petitioner's mental status, functioning.

Skyers did not independently investigate or interview any forensic or gang experts. He did have Dr. Pollack/Imperi appointed to evaluate petitioner's mental status. He did review CYA medical reports.

(12) Co-defendants/third party culpability. Yes, reasonably competent counsel would have reviewed the transcripts of Mallet's preliminary hearing and trial as well as conferred with Mallet's counsel. Skyers did not read and/or review the record of Mallet's trial. He did not confer with Mallet's attorney.

(13) Any other factor (K) or lingering doubt. Yes, reasonably competent counsel would have reviewed petitioner's history, including factor (A) circumstances, to determine the existence of any other potential mitigating factor or whether any potential mitigating theme previously identified would serve petitioner's best interest in the penalty trial. Skyers did evaluate the aggravating factors present in factor (A) and further he did evaluate whether any evidence presented in the guilt phase would support an argument for lingering doubt as to reasonable doubt or degree of culpability of petitioner.

c. Would a reasonably competent attorney have presented this evidence at the penalty phase?

A reasonably competent attorney would not have presented the following evidentiary mitigating themes at the penalty phase.

(1) Jefferson alibi. No evidence was presented at reference hearing.

(2) Taylor alibi. No law enforcement officer can testify as to where petitioner was at the time of the Taylor murder. Petitioner was not detained by the LAPD or LASD at the time of Taylor's murder.

Petitioner's trial testimony as to his alibi is inconsistent with Mallet's trial testimony. Petitioner's statements are inconsistent with Harris, Bogans and Player's recollection and testimony at the reference hearing. Harris and Bogans' reference hearing statements are inconsistent with each other and their own prior declarations. Marcus Player was not available to petitioner's trial counsel at the time of trial. Harris and Bogans admitted they were Raymond Avenue Crips at the time of trial and they testified at the reference hearing that petitioner, Ross, Mallet, Marcus and Michael Player were all Raymond Avenue Crips at the time of trial. This testimony impeaches petitioner's trial testimony. Harris testified that Ross was present at Champion's home on the morning of December 28, 1980.

(3) Evidence of petitioner's adjustment while at the CYA would not have been presented. The fact that the Hassan murders took place so close to the time petitioner was released from the CYA and placed on parole would support the prosecution's argument that the CYA reports that commented on the potential for manipulation by petitioner were correct. The positive comments by CYA staff, if introduced, would permit the introduction of the negative number of comments and reported acts of misconduct by petitioner while in CYA custody. Marcus Player's testimony at the reference hearing, dealing with photos taken while he and petitioner were in the CYA, would also be admissible.

(4) CYA mental evaluations. The medical reports, evaluations and opinions that petitioner is not mentally ill, does not have a mental disorder, defect, disease and functions overall, normally would not have been presented. These examinations were conducted by four

separate doctors between 1978 and 1980. Reasonably competent counsel would have concluded that no further testing was necessary nor any further examinations warranted.

(5) Petitioner's family/social history. Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure.

Beyond the non-disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family witnesses that testified in support of petitioner's alibi for the Hassan murders during the guilt phase.

Reference hearing witnesses Gary Jones, Harris, Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader.

A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse.

Mrs. Champion's prior statements to school authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing. The only areas the referee finds that should have been presented if disclosed are: Mrs. Champion and other family members' love and affection of petitioner; his traits of being loving toward them and his protective nature; Mrs. Champion's difficulties in being a single parent and raising a large family with very limited income; the absence of a father figure after Mr. Robinson left the home; the impact that Trabue Sr.'s death had on the family; and petitioner's school difficulties.

(6) Gang membership. Though evidence was introduced at the guilt phase as to petitioner's gang involvement, the reference hearing has only confirmed that petitioner was an active, hardcore gang member since the age of twelve and the evidence has confirmed petitioner's association with Marcus Player, Evan Mallet and Craig Ross.

(7) Substance abuse. This was not a major factor. Petitioner stated he was not dependant on marijuana because it made him mellow and that would put him at risk with rival gangs.

(8) Probation/Parole history. This proposed mitigation theme would not have served petitioner well in the penalty phase. It would have directed the jurors' attention to petitioner's arrests and his performance on probation.

(9) Juvenile arrest/adjudication history. The jury was not informed as to petitioner's other acts of violence, arrests or juvenile adjudication including a prior burglary.

(10) Appropriate Experts. In view of CYA records, no further testing or examinations were required. Simms' prints were not available in 1982.

d. Conclusions Concerning Trial Counsel's Performance

Trial counsel was deficient in not retaining an investigator to conduct an independent investigation. Although Skyers did engage in extensive personal investigation, he did not contact or interview any witnesses in reference to the Jefferson or Taylor murders.

In view of the fact that a review of the Jefferson murder showed that the prosecution could not link petitioner or any Raymond Avenue Crip, including Ross, to the crime, a reasonable competent attorney would not have presented any additional evidence. However, since any alibi would involve fellow gang members and their availability is questionable, a reasonable defense attorney would not have called these witnesses.

Simms' fingerprints were not available to trial counsel in 1982.

Skyers was deficient in not interviewing witnesses to the Taylor murder to determine the availability of alibi evidence for December 27, 1980.

Marcus Player was not available to testify on behalf of petitioner or concerning his observations at Helen Keller Park on December 27, 1980.

The availability of Raymond Avenue Crips members, including Wayne Harris and Earl Bogans, to testify is problematic.

Skyers did seek to determine petitioner's background and social history. Skyers did interview key family members and petitioner over an extended period of time. The key family members consisted of Azell Champion Jackson (mother), Rita Champion Powell (older sister), Linda Champion Matthews (older sister) and Reggie Champion (older brother). He did not interview the other siblings or extended family members, teachers, neighbors, friends, employers, probation officers or CYA staff. Skyers did

investigate petitioner's CYA performance and juvenile aggravators by reading the CYA file and the prosecution's juvenile offense reports. Skyers was aware of CYA's medical reports by Drs. Brown, Minton, Prentiss and Perotti as well as the medical report prepared by Drs. Pollack and Imperi at the time of the trial.

Skyers was deficient in not obtaining petitioner's school records or interviewing his teachers. Skyers was deficient in not reviewing the Evan Mallet file, transcripts of Mallet's trial or attempting to confer with Mallet's trial counsel. Skyers was deficient in not seeking to obtain family history documents, social security records, etc. Skyers was deficient in not investigating petitioner's gang involvement with the Raymond Avenue Crips.

The family's nondisclosure of relevant family history precluded Skyers from considering these mitigation themes.

No evidence as to mental defect, disease or illness was available to trial counsel in 1982. The CYA mental evaluations of petitioner did not indicate a need for any additional psychological evaluations or testing. CYA staff members were available to Skyers if he determined to present the positive aspects of petitioner's performance in a custodial setting.

Gary Jones was available to testify to petitioner's childhood, home life and conduct. Jones speaks well of petitioner and petitioner's family. That information should have been considered for the purpose of mitigating background. No evidence was available about the school resources or failure to intervene at the time of trial.

No evidence was available about the lack of community resources that affected petitioner's development. Evidence of community dangers might have been available but was not disclosed by the family members. Psychologists were available to test, evaluate and testify as to petitioner's test performance and psychological traits. Neuro-psychologists were also available to test and evaluate petitioner in 1982. Based on a review of CYA records and the number of entries inconsistent with good adjustment, I find that a reasonable competent attorney would not have introduced CYA adjustment

evidence. Based on CYA mental evaluation reports and the report by Drs. Pollack and Imperi, no evidence existed to reflect mental illness, defects, disease or impairment on the part of petitioner. Reasonable counsel would not have a need for further testing or psychological examination.

Due to petitioner's juvenile arrest records and the underlying conduct on the part of petitioner and the extent and duration of his Raymond Avenue Crips membership, any potential mitigation theme that would allow the prosecution to rebut with petitioner's criminal and/or gang history would cause a reasonable competent attorney not to present the potential mitigation evidence. This includes any psychological experts seeking to testify as to petitioner's childhood development, any defense gang expert, CYA adjustment and community dangers.

The juvenile aggravators did not reflect any mitigation aspects other than age and lack of maturity. The jury was aware of petitioner's age at the time of trial. Any effort to develop this area of mitigation would result in the consideration of the prosecution seeking to introduce all of petitioner's arrests, the evidence relating to his culpability, evidence of his gang association since the age of twelve and the identity of his associates.

C. Detailed Discussion of Evidence and Findings

1. The Jefferson Murder

As noted in response to reference question number 2, petitioner has introduced no additional evidence on the Jefferson murder which reasonably competent counsel could and should have introduced at petitioner's penalty phase.

2. The Taylor Murder and Related Crimes

As noted earlier, the referee finds petitioner has not shown in this proceeding the existence in 1982 of any police reports, significant or otherwise, witness statements or forensic evidence analysis reports which trial counsel had not received or reviewed

before petitioner's trial. As further noted, the referee finds that petitioner has failed to prove by a preponderance of the evidence that an exemplar set of fingerprints belonging to Robert Aaron Simms existed in 1982.[152] Also, the referee finds that Marcus Player would not have cooperated with trial counsel nor is it reasonable to expect he would have testified in light of his own exposure as an accessory after the fact and his pending robbery murder trial. While the referee finds that trial counsel could have personally or through the use of an investigator interviewed Wayne Harris, Earl Bogans and all of the LASD deputies and LAPD personnel involved with the Taylor crimes and further assumes that reasonably competent counsel would have conducted such interviews, the referee also finds that petitioner has not identified and produced at this reference hearing any unimpeachable, credible, independent and objective witness whose testimony would have indisputably absolved petitioner of criminal responsibility for the Taylor crimes, or for that matter, raised a reasonable doubt.

For reasons already set forth in detail in response to reference question number 2, *ante*, at pages 167-185, the referee finds that reasonably competent counsel would not have presented petitioner's alibi case for the Taylor crimes at the penalty phase. In addition to those reasons, the referee notes that petitioner's *Strickland* expert recognized that any decision to present the Taylor alibi at petitioner's penalty phase was a judgment call in light of the credibility issues surrounding Wayne Harris, Earl Bogans and Marcus Player who the expert conceded were essential witnesses to the

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[152] Separate and apart from the issue of whether an exemplar set of fingerprints belonging to Robert Aaron Simms existed in 1982, Exhibit HH reflects comparisons of latent prints from the various crime scenes and the Player car with exemplar prints of various individuals, including Michael Player and James Taylor. As reflected in the Stipulation (Court's Exhibit 34 and Exhibit HHHH), the James Taylor whose prints were compared is not Robert Aaron Simms who used the false name of "James Taylor" as reflected in the Lambrecht/Tong report (Exhibit GG). When asked if he would agree "without having spoken to Mr. Gessler, that what happened may well be that both the prosecution and the defense assumed that the James Taylor who was eliminated on the sheet was in fact Robert Aaron Simms, who identified himself to Lambrecht and Tong as James Taylor, rather than a different James Taylor unrelated to Robert Aaron Simms[,]" Earley admitted: "I don't know. I do know that Mr. Gessler's defense for Mr. Mallet is different than a defense would be for Mr. Champion." (RHT 4307.) The referee finds that no exemplar of Simms' fingerprints was obtained following his December 28, 1980 detention/arrest or that any such exemplar was available for use by trial counsel or the prosecution at the time of petitioner's trial.

presentation of the alibi. (See, Exhibit 110, p. 20, ¶ 3 ["if these witnesses had testified their credibility would have come into question for a number of reasons. They are all friends or acquaintances of Mr. Champion. Marcus Player and Frank Harris had records. All but Wayne Harris may have had gang associations. As a reasonably competent counsel I would have had concerns about this but, in [*sic*] balance, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers-and given the importance of rebutting Mr. Champion's involvement I would have called these witnesses. Certainly, I would have conducted an investigation which consisted of talking to them in person."])[153] Further, while the referee recognizes that Mr. Earley is a highly competent capital case litigator, some of his opinions in this matter are flawed because he employed a standard of whether he would or would not have taken certain action, rather than the appropriate and applicable standard of whether reasonably competent trial counsel would or would not have taken the action. Mr. Earley conceded that the standard for what reasonably competent counsel would do is not set by what the very best capital case litigators would or would not have done in a particular case. (RHT 3966.) In addition, Mr. Earley's opinions lacked foundation which detracted from the objectivity of his opinions. (See, fn. 150.) Because Mr. Earley's reference hearing testimony was extensive and his opinions are relevant to reference questions numbers 3 and 4 concerning both the Jefferson and Taylor murders and the social history and mental and physical impairment mitigating evidence, the referee will set forth in detail Earley's reference hearing testimony concerning all of these areas as part of the findings with respect to reference question number 4.

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[153] Earley's opinion that the alibi witnesses would be consistent with testimony from law enforcement personnel whose credibility would be unassailable is simply wrong. Earley never reviewed the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player or any of the deputy sheriffs who testified in this proceeding. (RHT 3905, 3912-3913.) Further, Earley never reviewed the entire transcript of Evan Jerome Mallet's trial, including Mallet's trial testimony. (RHT 3912; 3892-3893 ["I did review a little bit [of the Mallet transcript], but not much"].) For the reasons already detailed, the record is clear that the alibi witnesses petitioner presented at this reference hearing, if called to testify at petitioner's penalty phase, would have provided testimony inconsistent with each other, inconsistent with law enforcement personnel and inconsistent with petitioner's own alibi testimony given at the guilt phase of the trial.

Trial counsel should have interviewed the witnesses associated with Taylor's murder, the witnesses identified in the Helen Keller Park detention, the witnesses involved in the area perimeter and persons present at the Champion residence at the time Mallet was arrested. In particular, counsel should have independently interviewed the witnesses that participated in the field show up of petitioner, Simms, Harris and Marcus Player on December 28, 1980, the field show up of Mallet on December 28, 1980 as well as subsequent photo and live line ups. This failure is regarded as falling below the standards of competent trial counsel in place in 1980-1982.

The additional investigative steps required are fairly simple; review the police report, identify the witnesses, interview them independently and prepare the witnesses for trial or detailed examinations if they are called by the prosecution. Reasonably competent counsel would have gone through this process and procedure in preparing for the penalty phase. However, the more difficult question is whether a reasonably competent attorney would present this information or evidence.

Finally, Skyers received, read and personally investigated the police reports dealing with Teheran Jefferson, his assessment that although the prosecution had given pretrial notice that it would seek to implicate petitioner as to Jefferson under Evidence Code § 1101(b) and under conspiracy laws, Skyers recognized that the prosecutor had not charged petitioner with Jefferson's death because the DA could not prove their case beyond a reasonable doubt and there was no physical evidence implicating petitioner, Ross, Mallet or any other Raymond Avenue Crips to the Jefferson offenses.

Likewise, at the start of the joint trial, petitioner had not been implicated directly by any physical evidence or witness to the Taylor murder. Though the referee finds that Skyers should have undertaken more extensive investigative steps, a reasonable attorney could be forgiven to some extent due to the status of the evidence at the time of commencement of the joint trial.

3. Petitioner's Social History, Mental and Physical Impairments

The referee has already set forth in some detail findings and reasoning concerning petitioner's social history, mental and physical impairments. The only additional testimony to be addressed herein concerns the testimony of petitioner's *Strickland* expert.

Earley admitted that in light of the jury verdict rejecting the alibi and jewelry explanation evidence presented by petitioner's family members at the guilt phase, trial counsel at the penalty phase "may have [had credibility problems in the jury's mind] with some of those [family members had they been called to testify to petitioner's social history at the penalty phase]." (RHT 3979.) When questioned as to why he used the term "may have," Earley explained "[trial counsel] had other family members, you had neighbors, you had Y.A. records." (RHT 3979: 19-21.)

However, Earley admitted that he had never seen (1) obstetrical medical records for Mrs. Champion's pregnancy with petitioner (RHT 3979.); (2) any pediatric records for petitioner (RHT 3979-3980.); (3) any medical records suggesting petitioner's mother received beatings to the abdomen during the time she was carrying petitioner (RHT 3980.);[154] (4) anything in petitioner's school records (Exhibit CCC) reflecting a report

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[154] Earley admitted that petitioner's school records (Exhibit CCC) provided "an indication" that there had been no fetal abuse sustained during this pregnancy in light of Mrs. Champion's answers in those records concerning her pregnancy with petitioner. (RHT 3980-3981.) Earley also admitted that in light of the answers given by petitioner's mother to the CYA investigator (Exhibit H), had petitioner's trial counsel called petitioner's mother at penalty phase to talk about alleged physical abuse she sustained while carrying petitioner, counsel would have had to admit to the jury "that [petitioner's mother] was, at that point that she was not being open and less than truthful in that interview." (RHT 3982-3985.) Of course, as noted earlier, in her reference hearing testimony, petitioner's mother, rather than admitting she lied to the investigator in an effort to win her son's release from CYA, denied ever speaking to an investigator from CYA. (RHT 5447-5450, 5493.) In light of Earley's concession that "if [trial counsel] put[s] evidence on and the jury believed that the evidence that you put on was phony evidence with no basis in fact, of course that hurts you." (RHT 3975: 12-15.), it would undoubtedly be objectively reasonable for petitioner's trial counsel at the penalty phase not to recall petitioner's already discredited mother for the purpose of putting on such easily impeached evidence as her claim of fetal abuse would be. (See, *Bell v. Cone* (2002) 535 U.S. 685, 698-702.) Earley admitted that the United States Supreme Court opinion in *Bell* "indicates that it is not unreasonable for [trial] counsel [at penalty phase] to try and limit, perhaps entirely or narrowly, the testimony of a mother at a penalty phase after the witness testified at the guilt phase and was found by the lawyer in this case and by the jury in the Champion case not to be such a credible witness." (RHT 3989: 22-26; 3990: 1-2.) Earley explicitly agreed that petitioner's mother had not been found credible by the jury that convicted petitioner. (RHT 3992: 15-17.) The objective reasonableness for

from a teacher or school administrator indicating that petitioner ever appeared to be the victim of physical abuse or expressing concerns petitioner appeared to show signs of malnutrition, sexual, physical or psychological abuse, lack of adequate clothing or proper shelter or showed signs of suffering from mental illness (RHT 4007-4009, 4012);[155] or (5) any agency records from agencies such as DPSS or any police department expressing concerns from anyone that petitioner was the victim of physical or sexual abuse or had mental health problems. (RHT 4013.)

Earley never saw any declaration from a teacher stating the teacher saw petitioner being abused by anyone. (RHT 4137.) Likewise, he never saw any police report concerning an investigation by police of a complaint from anyone that petitioner had been abused by anyone. (RHT 4137-4138.) Nor did he see any medical record indicating petitioner had been treated for injuries apparently sustained as a result of abuse inflicted on petitioner by anyone. (RHT 4138.) Earley saw no record reflecting fetal abuse sustained by petitioner while he was in the womb of his mother nor any record documenting physical abuse sustained by petitioner while he lived at his home through the time of his arrest on January 9, 1981. (RHT 4138.)

Earley conceded he could not identify any controlling legal authority in 1982 specifically obligating defense counsel in a capital case to obtain an assessment of the defendant from a neuropsychologist or to require the defendant undergo a battery of neuropsychological tests. (RHT 4436-4438.) Earley also conceded that there was no United States Supreme Court decision, prior to the 1985 decision in *Ake v. Oklahoma*

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not recalling at the penalty phase petitioner's mother to talk about alleged fetal abuse is even more apparent in light of Earley's concession that whatever motivation petitioner's mother may have had to lie to the investigator at CYA in an effort to gain her son's release, she would have had an even greater motivation to lie at petitioner's penalty phase in an effort to save his life. (RHT 3985-3986.)

[155] While admitting that he found no direct indications of any of the kinds of abuse raised by respondent's counsel's questions, Earley did believe the records' indication of absenteeism and lack of effort by petitioner might be an indication of behavioral problems, although Earley admitted that absenteeism can be due to nothing more than truancy. Although Earley claimed "truancy is definitely related to a [*sic*] abusive home," he subsequently admitted that he could not say "if one thing causes it or another, you would just be concerned enough to say I want to look a little bit further on those issues." (RHT 4009-4011.) Earley also admitted that whatever problem existed "it could be from him, Mr. Champion just himself...." (RHT 4012.)

(1985) 470 U.S. 68, imposing an obligation on the State to provide an indigent defendant with access to a mental health expert. (RHT 4476-4477.) While Earley testified he believed *Ake* set a minimum of one expert without saying that an indigent defendant could not have more than one expert, that portion of the Court's opinion found at 470 U.S. at pages 82-84 discusses the right of "the defendant [to have] access to a competent psychiatrist...." (RHT 4477-4478.)

On August 4, 1981, Homer Mason, petitioner's court-appointed trial counsel before Skyers substituted in as retained counsel on August 24, 1981 (2 CT 569), filed a motion requesting the appointment of Dr. Seymour Pollack "to perform a psychiatric evaluation of [petitioner.]" (2 CT 397-399.) According to the motion, "as part of said examination the doctor is to consider the following [5 referral issues]...." (2 CT 397.) Exhibit 1-K sets forth the five areas of referral directed to Dr. Pollack for his consideration as part of his court ordered assessment of petitioner for the benefit of petitioner's counsel. Those five issues are repeated verbatim on pages 1-2 of Exhibit 46, the report prepared by Drs. Pollack and Imperi. The "Order Appointing Expert" Dr. Seymour Pollack, filed August 4, 1981, incorporated those same five areas of inquiry set forth in the initial motion seeking the appointment of Dr. Pollack. (2 CT 579-580.)[156]

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[156] Earley recalled using Dr. Pollack one time on an issue of insanity while Earley was affiliated with the Riverside County Public Defender's Office. (RHT 4493.) Earley further recalled "[Dr. Pollack] had a good reputation, he had a very good reputation, that's why I used him on an insanity case." (RHT 4496.) Dr. Faerstein, the forensic psychiatrist called by respondent at this hearing, testified that he was referred to Dr. Pollack for additional training by Dr. "Robert Sadoff, who was in charge of the forensic psychiatry program at the University of Pennsylvania." (RHT 6447: 14-16.) "[Dr. Sadoff] suggested that [Dr. Faerstein] study with Seymour Pollack, who was the foremost forensic psychiatrist at that time in the United States, and he was in Southern California at the University of Southern California." (RHT 6447: 17-23.) When Dr. Faerstein was asked "[i]f in December of 1981 an attorney representing a person charged with capital charges, capital case charges, wanted to have a forensic psychiatrist evaluate his client, and the name Seymour Pollack was suggested, and you were asked about that suggestion, what would your response be[,]" Dr. Faerstein testified: "I would say he's gotten the best guy to do it." (RHT 6486: 5-11.) Dr. Faerstein further testified that Dr. Pollack's reputation in the field of forensic psychiatry in 1981 was "that he was one of the premier forensic psychiatrists in the United States." (RHT 6486: 12-17.) On the other hand, when Earley was asked whether it was his understanding Dr. Pollack was one of the preeminent forensic psychiatrists in 1981, Earley answered: "I am just looking at a fee [not] to exceed $135, that just does not appear to me -- so when you ask whether he is one of the preeminent in the State, I know my memory is he was a good doctor, we paid money for him, I just don't know, I'm looking at that, wondering if he is the preeminent doctor in the State, why he is doing an exam on a death penalty case necessarily for $135...." (RHT 4494: 18-24.) Dr. Faerstein was asked "in your relationship with Dr.

Question 2 asked Dr. Pollack "[t]o determine whether or not [petitioner] falls within the purview of the *Drew* decision." (2 CT 397; 2 CT 579; RHT 4479.) When Earley was asked to define his understanding of the *Drew* case, he initially stated he would have to look at the decision to provide "an accurate answer of the *Drew* rule." (RHT 4479: 24-26.) After Earley acknowledged that he had testified on direct examination it was his opinion that the referral to Dr. Pollack was inadequate because it only asked Dr. Pollack to address issues Earley perceived as relating to guilt without consideration of issues relevant to penalty (RHT 4480: 1-7.), Earley was asked how he could give the opinion that "there was no reference to Dr. Pollack about issues that may be relevant to penalty" without knowing what the *Drew* decision stood for. (RHT 4480: 8-11.) Earley's answer was that he "kn[ew] what the *Drew* rule dealt with, I know that when I looked here, I was looking at the issues that I would look at at trial, which is competence to stand trial, I believe they were talking about, mentally ill, whether the person was mentally ill, the diminished capacity, unconscious at the time of the offense, and irresistible impulse." (RHT 4480: 12-18.) When Earley was again asked how he

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Pollack, [were you] exposed to Dr. Pollack's view regarding funding from the court and how that impacted assessments done by Dr. Pollack?" (RHT 6496: 11-14.) After answering that he had in fact had such exposure, Dr. Faerstein explained: "Well, throughout the time I was at the Institute the court was paying the Institute a hundred dollars per case. Later on, as I see here, it was increased to $135. I don't recall whether there was any interim increase. But during the time I was there, that was just one source of funding for the Institute. This is not money that went into Dr. Pollack's pocket or my pocket or anybody's pocket. It wasn't our source of livelihood. It was a source of income that helped support the Institute. There was money from the county, there was money from placements that the fellows served at the probation department, or other jobs that you were assigned, and all of this money went into the general pool that supported the Institute. So it was not relevant that we received a hundred dollars for a case to determine how much time we spent on the case. We spent as much time as necessary, and as I said earlier, Dr. Pollack recommended that you spend hours and hours, and he would spend countless hours going over the reports with us into the evening, correcting the words and the language you use on cases that he was receiving only a hundred dollars from the county on. The money never determined how much time [Dr. Pollack] put into a case." (RHT 6496-6497.) Earley's limited contact with Dr. Pollack makes understandable his inability to know Dr. Pollack's status in the forensic psychiatric community in 1981. While Earley's misconception about the relationship between a $135 limitation for the court ordered psychiatric assessment and whether such a court-appointed forensic psychiatrist could be preeminent in the field while accepting such a small compensation is of little significance to the issue of Dr. Pollack's status, that misconception takes on far greater significance because of its obvious impact on Earley's assessment as to the quality of the psychiatric assessment performed by Dr. Pollack. Earley operated under a belief that Dr. Pollack provided a "$135 assessment," which, because of the size of the fee, cannot be considered adequate.

could offer the opinion he had without knowing what the *Drew* rule, incorporated into referral question number 2, actually was, Earley claimed: "I know what the *Drew* rule is, I can't give you the full basis of the *Drew* rule, I know it goes to trial issues. Trial issues, not to penalty issues." (RHT 4480: 22-26; 4481: 1-6.)

Respondent's counsel provided the definition of the *Drew* rule to Earley. (RHT 4482: 10-16 ["does the defendant, as a result of a mental defect, disease or disorder, lack the substantial capacity to appreciate and understand the wrongfulness of his conduct, or to control his conduct to the requirements of the law"].)

Earley admitted that the *Drew* rule looks at the defendant's "cognitive functioning." Earley was asked to contrast that rule with the rule regarding insanity in existence at the time of the *Drew* decision, the *M'Naghten* rule. (RHT 4482-4483.) When Earley was then asked to confirm that in fact the *M'Naghten* test only dealt with the defendant's lack of ability to know and appreciate the nature and quality of his act or to know that his conduct is wrong without any volitional component, Earley continued to maintain that "it does have to do with volitional, I believe, in the proof of it." (RHT 4483: 14-22.)[157] When Earley was asked to admit that "*Drew* focuses on both cognitive

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[157] Under the *M'Naghten* test adopted in California, "'...it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.' [Citation.]." (*People v. Drew* (1978) 22 Cal.3d 333, 341, abrogated by Proposition 8 and Pen. Code, §25, subd. (b), see, *People v. Skinner* (1985) 39 Cal.3d 765, 768-769 ["we shall conclude that [Penal Code] section 25(b) was intended to, and does, restore the *M'Naghten* test as it existed in this state before *Drew*]).) "Despite its widespread acceptance, the deficiencies of *M'Naghten* have long been apparent. Principal among these is the test's exclusive focus upon the cognitive capacity of the defendant, an outgrowth of the then current psychological theory under which the mind was divided into separate independent compartments, one of which could be diseased without affecting the others. [Citation.]" (*People v. Drew*, *supra*, 22 Cal.3d at p. 341.) "*M'Naghten's* exclusive emphasis on cognition would be of little consequence if all serious mental illness impaired the capacity of the affected person to know the nature and wrongfulness of his action. Indeed, the early decision of *People v. Hoin* (1882) 62 Cal. 120, 123, in rejecting the defense of 'irresistible impulse,' rested on this gratuitous but doubtful assumption. Current psychiatric opinion, however, holds that mental illness often leaves the individual's intellectual understanding relatively unimpaired, but so affects his emotions or reason that he is unable to prevent himself from committing the act. [Citation.] 'Insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of the mental disease.' [Citation.]" (*People v. Drew*, *supra*, 22 Cal.3d at p. 342.)

functioning and volitional functioning, by looking at whether the defendant, as a result of a mental defect, disease or disorder, lacks the substantial capacity to control his conduct to the requirements of the law," Earley answered: "I know that that is the difference. However, I can't say that I have the language of *Drew* in mind." (RHT 4486: 22-26; 4487: 6-8.)

After Earley interjected the concept of "irresistible impulse" into his answer addressing the comparative degrees of incapacitation required under *Drew* and *M'Naghten* (RHT 4489: 18-22.), Earley admitted that the issue of irresistible impulse had been separately posed to Dr. Pollack under referral question number 5. (RHT 4489: 23-26; 4490: 1-11.) Earley conceded that "irresistible impulse deals with volitional control[.]" (RHT 4490: 12-15.) Earley was then asked: "So if Dr. Pollack is asked to look at irresistible impulse, he is being asked to look at an aspect of what might be called an aspect of executive functioning in the frontal lobes, dealing with the ability of Mr. Champion to control his impulses rather than to commit crime, isn't he?" (RHT 4490: 25-26; 4491: 1-4.) Earley answered: "Well, let me think about that. Irresistible impulse was committing a crime, but just you could not stop yourself from doing it." (RHT 4491: 5-7.) In response to the follow-up question "That's what I am asking though, Dr. Pollack is being asked to address whether Mr. Champion had the executive functioning capabilities in his frontal lobes to inhibit acting upon impulses that would otherwise say, go commit a crime, that's what he is being asked to look at, isn't he[,]" Earley answered: "Yeah. Even though, if I may, I think I would have to just qualify that with it may be the frontal lobes are the ones that control it, there may be other parts of the brain that have dysfunction, that make it so that the frontal lobes can not control what may be an impulse." (RHT 4491: 8-20.)

When Earley was then asked to confirm that he would expect Dr. Pollack to be looking for that very type of evidence, Earley interjected a limitation not present in the referral question: "At the guilt phase, the level of that evidence at a guilt phase." (RHT 4491: 21-24.) Even though neither Exhibit 1-K or Exhibit 46 in any way limits Dr.

Pollack's consideration of "irresistible impulse" under referral question number 5 to the guilt phase of petitioner's case. Earley's effort to read into referral question number 5 a limitation precluding Dr. Pollack from considering evidence of "irresistible impulse" for any purpose other than the guilt phase of petitioner's case is particularly egregious in light of Earley's knowledge and awareness that under Penal Code section 190.3, factors (d), (h) and (k), evidence petitioner suffered from impulse control dysfunction would be clearly admissible at the penalty phase of petitioner's case, even if such dysfunction failed to provide a guilt phase defense.[158]

Earley's erroneous understanding of what the *Drew* and *M'Naghten* tests actually assess demonstrates an additional reason to conclude that his opinion, deeming the referral to Dr. Pollack as inadequate, is unreasonable.[159]

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[158] Dr. Faerstein testified that in 1981, Dr. Pollack was familiar with the capital case sentencing structure in California. Dr. Pollack would know what crime or crimes carried potential capital sentences. Dr. Faerstein would have expected Dr. Pollack to know in 1981 that a person such as petitioner, charged with two counts of murder and two counts of robbery with the allegation that the murders were committed during the commission of the robberies, would face a potential capital sentence. (RHT 6492.) Trial counsel testified that the report by Drs. Pollack and Imperi (Exhibit 46) provided him with no basis to offer mitigating evidence under Penal Code section 190.3, factors (d), (h) or (k). (RHT 1238-1240.) Skyers testified that the same was true with respect to Dr. Minton's December 15, 1978 psychiatric report (Exhibit D). (RHT 1311.)

[159] Although petitioner's "mitigation specialist," Dr. Miora, had a less than precise understanding of what the concept of "irresistible impulse" in 1981 meant, her testimony confirmed the potential usefulness at the penalty phase of any positive finding by Dr Pollack on the referral question regarding "irresistible impulse." (RHT 8712-8713 ["The best of my -- to the best of my recollection, at that time, that would have had to do with some type of circumstance or condition that would mitigate or make it impossible for, relatively impossible for somebody to prevent him or herself from engaging in a -- in this context, criminal behavior."]) When first asked if she was aware about the case, Dr. Miora answered: "Not thoroughly, no." (RHT 8771.) When asked to provide her own understanding, all Dr. Miora could provide was that she "kn[e]w it has to do with some kind of mental responsibility defense, and I don't believe that it is any longer used, specifically, as the *Drew* defense." (RHT 8772.) Dr. Miora testified that she participated in a forensic internship from 1981 to 1982, during which her responsibilities included treating persons found to be not guilty by reason of insanity and writing quarterly progress reports to the court "evaluating the psychosocial circumstances of these individuals' lives at the current time, and addressing possible risk factors for recidivism." (RHT 7451-7452, 7468-7469; see also, Exhibit 137, at p. 3.) Although this internship occurred at a time when the *Drew* standard for legal insanity governed in the State of California (*People v. Skinner, supra*, 39 Cal.3d at pp. 768-769 [the Court holds that the California electorate's adoption in June 1982 of Proposition 8 reflected an intent to eliminate the *Drew* test adopted in 1978 and to restore the *M'Naghten* test as it existed in California before *Drew*]), Dr. Miora admitted that despite her forensic internship at a time when *Drew* was the controlling authority, her forensic training had not given her knowledge of what the *Drew* case stood for. (RHT 8772.) It should also be noted that Dr. Miora conceded that while she "d[id] forensic psychology[,] I would not say I'm necessarily an expert." (RHT 7489.) When Dr. Miora was asked whether it was her understanding that *Drew* included an assessment of cognitive capabilities, Dr. Miora answered: "I don't know that -- no, I don't know that." (RHT 8775.)

The December 2, 1981 report from Drs. Pollack and Imperi (Exhibit 46) to petitioner's trial counsel, under " SUMMARY OPINION[,]" the doctors wrote: "Since Mr. Champion stated that he is unable to recall where he was an [*sic*] 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." (Exhibit 46, p. 3; see also, RHT 4496.) Earley refused to see a distinction between how Drs. Pollack and Imperi wrote that there did not appear to be "any evidence of mental illness, defect or disorder now or at the time of the instant offense" and a finding which would indicate that while the doctors found evidence petitioner suffered from a mental illness, defect or disorder, the degree of impairment was insufficient to support any insanity defense or mental responsibility defense. (RHT 4497-4502.) Nevertheless,

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Even when prompted by respondent's counsel, Dr. Miora could not provide the correct definition for the *Drew* test. (RHT 8775-8776, 8782-8783.) Nevertheless, in her Declaration (Exhibit 136, page 205), Dr. Miora made reference to the report of Drs. Pollack and Imperi (Exhibit 46) which Dr. Miora had reviewed for possible significance to the referral question given Dr. Miora. (RHT 8772, 8780.) Dr. Miora wrote in part: "'While the psychiatric concerns regarding competency and other "mental defenses," were addressed by virtue of ruling out psychosis, as well as obvious and extreme neurocognitive function, the cognitive issues reported were not explored or a referral made to examine possible neuropsychological deficits underlying Steve's observed difficulties.'" (RHT 8780, citing verbatim from Exhibit 136, at p. 205.) In light of the fact that Drs. Pollack and Imperi were asked in part to assess the applicability *vel non* of the *Drew* test to petitioner, Dr. Miora could provide no satisfactory explanation for how she would have been able to properly evaluate the significance of the report by Drs. Pollack and Imperi without knowing and understanding what that test required. (RHT 8772-8773 ["My training had led me to understand that it had to do with some kind of mental health defense. I reviewed the psychiatric-legal issues he was asked -- on which he was asked to opine. That was not my referral question. I took the information that he provided in his report and understood that generally speaking he didn't have sufficient data to support any kind of mental responsibility defense and, further, used the details of his findings in the assessment of Mr. Champion's development, behavior and functioning, as I understood my charge"]; 8774-8775 ["I thought I had enough information to draw the kinds of information and conclusions that I needed for the purpose of my evaluation. No, there was not enough data, it's stated, to support any mental responsibility defense, whether it be a mental health defense, diminished capacity, his being unconscious at the time of this offense or unable to control himself, an irresistible impulse at the time of the offense. That's all I can say in that regard"].) The significance of Dr. Miora's unfamiliarity with the *Drew* test is further amplified by her concession that the finding by Drs. Pollack and Imperi, that there was not any substantial evidence to support a conclusion of irresistible impulse, would be relevant in assessing the accuracy of the opinion set forth by Dr. Prentiss in her report (Exhibit J) that petitioner "is somewhat impulsive." (RHT 8771.)

Earley conceded that he could not testify to what Dr. Pollack meant. (RHT 4498: 25-26; 4499: 1-2.)

On the other hand, Dr. Faerstein, who did have substantial professional experience with Dr. Pollack as of 1981, testified that from his familiarity with Dr. Pollack, Dr. Faerstein would have expected Dr. Pollack to put in his report a finding of evidence of a mental defect, disease or disorder, even though Dr. Pollack felt that the condition was insufficient to rise to the level needed to support any of the issues submitted to Dr. Pollack for his consideration as part of his assessment of petitioner. (RHT 6533.)

Dr. Faerstein also testified that Dr. Pollack taught there was a distinction to be drawn for a person who may have evidence of a mental defect, disease or disorder, but where the condition was insufficient to establish, for example, diminished capacity or legal insanity. According to Dr. Faerstein, Dr. Pollack trained doctors to point out in their written reports any finding of a mental defect, disease or disorder, even though it was insufficient to meet the legal criteria necessary to successfully raise a particular defense, such as diminished capacity. As Dr. Faerstein put it: "[Dr. Pollack] wrote reports like that. We were taught that if that's present, we would write reports like that." (RHT 6533: 2-26; 6534: 1-10.) Dr. Faerstein also noted that the reports from Drs. Prentiss, Minton, Perrotti and Brown (Exhibits D, I & J), all of which Dr. Faerstein reviewed and none of which Earley had an independent recollection of having reviewed, were consistent with the findings of Drs. Pollack and Imperi. (RHT 6527-6529.)[160]

Earley did agree as a general rule that mental evaluations of petitioner conducted closer in time to the date of the Hassan murderers would be considered more relevant and reliable by jurors than reports generated months or years later. (RHT 4504-4505.)[161] Dr. Brown's July 29, 1980 report (Exhibit I) summarizes an assessment

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[160] Unlike Earley, trial counsel had no difficulty ascertaining from the report of Drs. Pollack and Imperi that the doctors found no evidence of any mental disease, defect or disorder and that they further concluded there was no basis to find any type of mental defense, whether based on insanity, diminished capacity, unconsciousness, irresistible impulse or the *Drew* rule. (RHT 1237-1238.)

[161] Dr. Miora agreed with this assessment. (RHT 8849-8850.)

conducted by Dr. Brown approximately four and a half months before the Hassan murders. The December 2, 1981 report of Drs. Pollack and Imperi (Exhibit 46) reflects an assessment of petitioner conducted slightly less than one year after the Hassan murders. (RHT 4507-4508.) Dr. Perrotti's December 5, 1979 report (Exhibit J) reflects an assessment of petitioner conducted slightly more than one year before the Hassan murders. (RHT 4508.) Dr. Prentiss's December 13, 1978 report (Exhibit J) reflects an assessment of petitioner conducted two years before the Hassan murders. (RHT 4513-4514.) Dr. Minton's report (Exhibit D) reflects an evaluation conducted one day after the evaluation performed by Dr. Prentiss. (Exhibit D; RHT 8734.)

That portion of Dr. Brown's report reflecting the "Mental Status Examination," was read to Earley. (RHT 4505-4506.) Petitioner "was oriented to time, person and place, alert and quite cooperative with the interview. His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease, or any kind of cognitive abnormalities. His memory as tested to both conversation and direct questioning was very good. His calculating ability showed him to be rather sharp, and occasional mistakes may, he felt, be due to anxiety. The youth gave no indications of any type of depression, suicidal or homicidal ideations, nor any lack of judgment or insight skills." (Exhibit I, p. 2.) Despite the assessment of Dr. Brown as well as that provided by Drs. Pollack and Imperi, Earley nevertheless refused to concede that if Skyers had in fact reviewed these two reports in preparation for petitioner's trial, he could have reasonably concluded both experts found no evidence that petitioner suffered from any mental defect, disease or disorder. (RHT 4505-4507.)

In light of the express findings made by Drs. Brown, Pollack and Imperi, the referee finds Earley's opinion that the referral to Dr. Pollack was inadequate for penalty phase assessment of petitioner's mental health, including cognitive functioning and impulse control, "is not supported by the evidence." (Cf. CALCRIM No. 332.)

Similarly, despite the findings by Dr. Perrotti, some of which were read into the record for Earley's consideration (RHT 4508-4511.), Earley refused to concede that if

Skyers had read the three reports from Drs. Brown, Perrotti and Pollack in preparation for petitioner's trial, "he could reasonably reach the conclusion that a psychologist and two psychiatrists, who assessed this man both before and after the crimes, all reached the same conclusion that he has no mental illness, defect or disease[.]" (RHT 4512.) The opinion from petitioner's *Strickland* expert is unreasonable in light of what the medical reports of 1978-80 state.

The lack of support for Earley's opinions is confirmed by testimony from respondent's experts, Drs. Hinkin and Faerstein, whose opinions and rationale the referee finds to be reliable and objective.

In short, reasonably competent counsel conducting the appropriate investigation for penalty phase evidence would have been well within the standards of competent practice to have done at petitioner's penalty phase exactly as petitioner's trial counsel did.

4. Trial Counsel's Dilemma – Family Members' Testimony

The use of petitioner's family to develop some proposed mitigating themes constitutes a difficult area for reasonably competent counsel. The major difficulties arise from the fact that key family members (Azell, Reginald, Rita) testified in support of an alibi defense during the guilt phase. A defense rejected by the jury. Additionally, some of the family members and petitioner have made direct statements to authorities that erode or expressly conflict with some claims of mitigation identified by petitioner's habeas counsel. Petitioner's membership with the Raymond Avenue Crips commences from the age of 12 to the time of the Hassan crimes. This latter aspect includes reference hearing evidence indicating petitioner had a close association with Craig Ross from 1977 through the Taylor murder. In addition, a close examination of petitioner's arrest record reveals his involvement in serious violent crimes and further indicates petitioner was arrested or associated with Marcus Player and Evan Mallet in other Raymond Avenue Crips activities.

Any proposed mitigating theme that would permit the prosecutor to present additional evidence of gang membership or petitioner's criminal history would be prejudicial to petitioner.

V. REFERENCE QUESTION NO. 4

A. What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt and penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?

B. Summary of Referee's Findings

a. What circumstances, if any, weighed against the investigation of the additional evidence?

Generally, no circumstances weighed against the investigation of the proposed additional evidence. Petitioner is correct that reasonably competent counsel in a capital case penalty phase had an obligation to conduct an independent investigation of potential areas of mitigation.

However, some exceptions to this observation have been noted as a result of the reference hearing and a review of the evidence and documents presented during the hearing. The exceptions are:

1) Petitioner's family members did not disclose any adverse family history to Skyers.

2) Marcus Player was not available to trial counsel in 1982.

3) Evan Mallet's availability or willingness to testify is unknown at time of trial.

4) Lewis Champion III's availability or willingness to be interviewed and/or testify is unknown. Lewis Champion III was interviewed by petitioner's habeas counsel but he did not testify. In view of the

claim of physical beatings by Lewis Champion III, his absence as a witness is remarkable.

5) The referee agrees with petitioner's claim that Skyers should have interviewed CYA staff and doctors. No circumstance precluded this investigation. However, in view of the extensive psychological CYA evaluations available and the consistency of the doctors' findings, the referee finds that reasonably competent counsel did not need to conduct further psychological evaluations or testing, including neuropsychological examination. As previously stated, the referee finds that Skyers had access to and did review CYA records including the doctors' reports.

6) The availability of reference hearing witnesses who were active members of the Raymond Avenue Crips at time of trial and their willingness to testify or identify other gang members or their gang's activities is deemed highly unlikely. Their willingness to talk to Skyers is also unlikely. The witnesses are Harris, Bogans, and Marcus Player.

7) The referee finds that there is insufficient evidence from which to conclude that Aaron Robert Simms' fingerprints were available at time of trial. The Taylor homicide was investigated by the LAPD. Simms arrested by the LASD. Simms was not identified by any of the surviving victims from the Taylor crime scene on December 28, 1980. However, Simms matched the description of one of the persons that fled from the fleeing car. He was transported to the LASD Lennox station. His clothing was taken by the LASD at the station and the documents reflect his mother was called at approximately 4 a.m. on December 28, 1980. Simms was a minor (16 years old). No further report or documents were presented at

the reference hearing as to whether or not he was in fact booked and/or fingerprinted.

In reviewing the documents submitted, it was noted that exhibit #23 contained a police report for petitioner's January 6, 1976 arrest indicating petitioner (a minor) was not printed or mugged due to his age. This police report was prepared by the LAPD and not the LASD. In view of the above items, it is inconclusive whether Simms was or was not fingerprinted on December 28, 1980.

b. What circumstances weighed against the presentation of the additional evidence?

Most of the significant factors that weighed against the presentation of the additional evidence have been discussed in reference questions numbers 1, 2 and 3. The following factors are briefly restated:

1) The lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation.

2) The lack of any documents to support the claimed mitigation of brain damage based on fetal abuse, traffic accident head trauma, or head injury as result of physical beatings by older brothers.

3) The need to modify the claimed mitigation of extreme poverty, malnutrition or lack of clothing to one that is consistent with the reference hearing evidence (i.e., single parent struggling financially, emotionally with providing support and care to a large family).

4) The existence of contemporaneous CYA psychological/psychiatric evaluations that petitioner did not suffer from any mental illness, defect, or disorders. These reports were written between 1978 and 1980 by four separate doctors and are consistent with each other.

5) The absence of any evidence by any close family member, relative, friend, neighbor or fellow gang member who would opine that petitioner suffered from any type mental impairment during petitioner's life.

6) Petitioner's gang membership and violent history.

7) Petitioner's prior statements to CYA or law enforcement.

8) The additional reasons why the referee disagrees with the *Strickland* expert as to what a reasonable competent attorney would present will be discussed below.

c. What evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty phase trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?

If petitioner had presented the following mitigation evidence at the time of trial:

a) Alibi for Taylor murder.

b) CYA amenability/rehabilitation.

c) Lack of gang involvement.

d) Increasing community dangers.

e) Lack of association with other Raymond Avenue Crips and/or co-defendants including Mallet, Marcus Player, and Craig Ross.

f) Petitioner's development/functioning/social history.

(1) Mental impairments/brain damage/fetal abuse.

Fetal abuse.

Traffic accident.

Physical beatings by Lewis Champion III.

(2) Abandonment by biological father.

(3) Extreme childhood poverty, malnutrition.

(4) Drug abuse.

The prosecution would have likely sought to introduce the following rebuttal evidence that is damaging to petitioner but was not presented at the guilt or penalty phase:

Alibi for Taylor Murder

i) The alibi for the Taylor murder as submitted by petitioner at the reference hearing would require the testimony of Wayne Harris, Earl Bogans and Marcus Player. The three witnesses were members of the Raymond Avenue Crips at the time of the trial. Marcus Player was arrested for robbery in November 1980 and at the time of the trial was in custody pending trial for an unrelated murder. Marcus Player denied being a Raymond Avenue Crip at the reference hearing. Wayne Harris and Earl Bogans identified that they as well as Marcus Player, petitioner, Mallet and Ross were active Raymond Avenue Crips before and at the time of the trial. This testimony is inconsistent with petitioner's trial testimony and his statements to CYA authorities and doctors that he and the others were not gang members at the time of the trial.

ii) Harris testified that upon being released by the LASD on December 28, 1980, he went to petitioner's home where Craig Ross was present. Petitioner told Dr. Miora that Ross and Winbush were two of his best friends and that they did not use drugs.

iii) No law enforcement witness exists that confirms the physical detention of petitioner or Harris at the time of the Taylor murder.

Petitioner's Development/Functioning/Social history

i) The testimony of Harris, Bogans and Player given during the reference hearing undermines petitioner's claim of poverty, malnutrition or physical abuse, poor home environment or that petitioner was a follower or exhibits mental defects.

ii) The testimony of Gary Jones given during the reference hearing is inconsistent with petitioner's claim of poverty, malnutrition or physical abuse. Jones describes their childhood as "we had a beautiful life." In his opinion, petitioner displayed leadership traits and was athletic. He expressed high regard for Mrs. Champion as a mother. Jones recalled that petitioner was unable to participate in organized sports due to a lack of funds to pay required fees.

iii) Petitioner's mother's statement to school authorities that petitioner had a normal child birth (Exhibit CCC).

iv) Petitioner's mother's statement to CYA authorities that all was well at home (Exhibit H).

v) Petitioner's statement to CYA authorities that he has a regular family with both sad and happy times and that he has had the usual sibling rivalry with his brothers which he did not view as a major problem (Exhibit I). Petitioner's statement to CYA authorities that he is not a follower or easily influenced by others (Exhibit I). Petitioner told Dr. Minton he has had no contact with his biological father (Exhibit D).

Mitigation Expert

i) Any mitigation expert or other expert seeking to introduce the mitigation areas of positive CYA adjustment, childhood development/functioning, increasing community dangers, lack of gang involvement and lack of association with Raymond Avenue gang members, might be questioned about petitioner's violent history, gang membership or petitioner's prior statements.

ii) At the time of trial, petitioner had an extensive, violent criminal arrest record. Only two juvenile offenses were given to the jury. As to the two given to the jury not all the circumstances were provided. The underlying facts of petitioner's prior arrests might become admissible to impeach a witness or impeach the basis of petitioner mitigation expert's opinion.

iii) As to the two juvenile aggravators presented at trial, the prosecution had the complete circumstances available including some additional aspects that were not disclosed to the jury.

(1) A 1977 West Covina robbery that involved among others Marcus and Michael Player. Both Marcus and Michael displayed handguns to the victim in petitioner's presence.

(2) A 1978 police report of an assault with a deadly weapon that took place at Helen Keller Park which indicates that Evan Mallet was present when petitioner was arrested. A witness claimed Mallet placed the victim's radio into the car trunk.

iv) Any efforts by petitioner to minimize or rebut prosecution gang evidence would face the same possible introduction of evidence showing the degree and extent of petitioner's involvement in gangs.

v) Petitioner was a gang member since the age of twelve (1974) and he and Raymond Avenue Crips committed crimes in his neighborhood. This would impeach petitioner's mitigation of increased community dangers.

vi) Petitioner's extended association with Mallet, Player, and Ross would be shown by close examination of petitioner arrest records.

vii) The referee notes that evidence was given during the guilt and penalty phase on the subject of petitioner and co-defendants' gang association with the Raymond Avenue Crips and the violent nature of charged crimes. However, more evidence existed at the time of trial dealing with theses subjects. This evidence is detrimental to petitioner's proposed mitigation.

viii) Petitioner's Arrest Record. The location of each juvenile arrest, the nature of petitioner's conduct and the identity of co-participants are a significant erosion of the claim of increasing community dangers. Petitioner's arrest record, when viewed in the context of date, location and nature of offenses by Evan Mallet, Marcus Player (arrest for 11-19-80 robbery at El Segundo/Raymond) and Craig Ross (1977 attempted murder of Mark Hartman that took place in Helen Keller Park), illustrates that the Raymond Street Crips were the major source of violent crime in petitioner's neighborhood. The reference hearing evidence indicates petitioner was present at Helen Keller Park when Ross shot Hartman.

Evidence of a 1977 residential burglary was not presented to the jury. This crime took place in petitioner's neighborhood. Petitioner's fingerprints were found at the scene.

ix) The admissibility and scope of rebuttal evidence would be contingent on the manner that petitioner's mitigation evidence would be presented.

x) CYA Amenability. The CYA records contain numerous statements by petitioner and reports of conduct that were not presented to the jury that are prejudicial to petitioner's claim. Petitioner's statements have been previously set out as to his family, absence of head injuries, absence of beatings by siblings, use of drugs and gang involvement. However, several statements are highlighted at this point to reflect the level of impeachment available to the prosecution.

(1) Statements to Dr. Perotti (1979)..... He is not easily influenced by others.....he feels that he does what he wants to do....he became involved with the law because he thought he could get away with things..... most of his offenses were for fast money....if not for fast money I would not have committed the offenses. These statements by petitioner, when connected to the special circumstances of factor A (Hassan burglary, robbery), are viewed as extremely detrimental to petitioner's claim that the introduction of CYA records would demonstrate that he was amenable to rehabilitation in a structural setting.

(2) The short time lapse between being paroled on October 23, 1980 and the Hassan murders committed on December 12, 1980 trumps the claim of rehabilitation.

xi) Petitioner's habeas counsel has noted a qualifier on reference question number 4 (evidence not presented) on which the referee agrees. However, even though evidence was provided to the jury regarding petitioner and his gang involvement, that does not preclude the identification of additional evidence not presented to the jury that would clearly establish the exact nature and duration of his and crime partner associates' gang activity from 1973 to the time of trial. The reference hearing evidence established petitioner was a gang member since the age of twelve, that he was involved in violent acts, and showed the extent and degree of association with Marcus Player, Evan Mallet and Craig Ross. The reference hearing evidence would corroborate the prosecution gang expert's (Deputy Williams) opinion.

xii) The potential harm to petitioner's claims of mitigation through the prosecution's presentation in rebuttal of petitioner's other acts of violence at the CYA such as the race riot led by petitioner, an assault of another inmate, and combined with evidence of prior acts or use of force against others in the prior arrests, are so detrimental that a reasonable competent attorney would not introduce the proposed themes of mitigation referred to above.

xiii) The submitted reference hearing documents that pertain to petitioner that would disclose:

(1) Prior criminal acts of violence and/or arrests; location of the offenses; identification of co-defendants or other participants.

(2) Prior statements by petitioner to the CYA.

(3) Prior acts of misconduct by petitioner at the CYA.

(4) Chronology of petitioner while at the CYA.

xiv) The *Strickland* expert has opined that trial counsel failed to properly investigate potential areas of mitigation. The referee agrees with Mr. Earley. In addition, Earley has with justification, noted that a trial attorney cannot properly assess what tactical choices should be made in the best interest of his client unless he has first investigated and assembled all available evidence. Again, the referee agrees. However, where I choose a separate path from petitioner's *Strickland* expert is in the areas of how credible is the mitigating evidence petitioner could have presented at the penalty phase, would a reasonably competent attorney present the mitigating evidence and what evidence damaging to petitioner, but not presented by the prosecution at the guilt/penalty trials, would likely have been presented in rebuttal if petitioner had introduced the proposed evidence in mitigation.

Petitioner's habeas counsel argues that a failure to properly investigate is per se incompetence of counsel. Mr. Earley likewise agrees. Earley's extensive capital case qualifications may be the basis for his failure to follow through in his evaluation of Mr. Skyers' legal representation of petitioner during the 1982 penalty phase proceedings. He did not review the entire Mallet preliminary

hearing or trial proceedings. He did not review most of Mr. Skyers' reference hearing testimony. He did not review the reference hearing testimony of Harris, Bogans and Player and he seemed unfamiliar with some of the CYA doctor evaluations. Earley also had a marked tendency to evaluate Mr. Skyers' trial performance or omissions from the perspective of what he would or would not do in a capital case in lieu of applying the *Strickland* standards. This court regards Mr. Earley as one of the best criminal defense attorneys in this state and he ably demonstrated his legal insights both as to law and capital case procedures during the reference hearing. He certainly has earned being treated with great deference in regard to his observations and opinions. Nevertheless, this court must adhere to principles of law that require a showing as to what a reasonable competent attorney (not the best) would or would not do. This court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or testimony that was not considered by an expert witness.

A detailed evaluation of Mr. Earley's expert's testimony, opinions, the basis of such opinions and this referee's findings are set out below.

C. Evidence Adduced During Reference Hearing

The following evidence was admitted and considered by the referee.

1. Petitioner's Juvenile Record

1. Source: Exhibit Folder #23

Unmarked Police Report in Folder #3 LAPD 1-6-76 1800 Hrs.

Steve Champion Location: El Segundo/Vermont

VC 23110 - Throw object at vehicle

Champion 13 years old

Address #1212 W. 126th, Los Angeles

Henry Clay Jr. High School 8th grade

Blue pants, blue shirt

Note: Champion released to parents. Not printed or mugged due to age. Officers recognized Champion from past contacts at 126th and Vermont. V#1 and W#1 observed Champion and two others throw rock at car. Rock shattered front window showering the victim with flying glass causing lacerations on V's face, neck and head.

a. Source: Probation report – Exhibit #33

10/6/76 LAPD-23110(B) VC-Counseled and released.

Age 13 (During previous investigation the defendant and his mother said he was at the park with another boy who threw a rock and hit a passing car. Defendant denied any involvement.)

Note: Probation report has this incident dated 10-6-76. It should be dated 1-6-76.

2. Source: Probation report – Exhibit #33

1/14/77-Age 14 LASO-602 WIC; (626.9 PC (Possession of firearms in public school grounds without permission) and 602 WIC 12020 PC (Possession of a blackjack) – JUV Released. Petition requested. 3/21/77, D.A. reject due to insufficient evidence.

(A gunshot was fired at Henry Clay Junior High School. Upon investigation by security officers it was learned that defendant and several companions were involved one of whom identified the defendant as the person who had given him the gun and the sawed-off rifle. However, there was no way to connect possession of the weapon to the defendant. During previous investigation both the defendant and his mother denied that he had the gun. At the time he has been expelled for about six months). This incident also referred to Exhibit D.

3. Source: Probation report – Exhibit #33

1/24/77-Age 14 LAPD – 602 WIC, 459 PC (Burglary) – Petition filed and sustained. Declared court ward pursuant to 602 WIC. Released home on probation.

(Defendant forced entry into a private residence by removing several louvered windows from which he took a 19-inch color television set. He admitted burglary with another companion whom he claimed to let the television set in the alley, because it did not work. He said that his companion had never been arrested for the offense.) This incident also documented in Exhibit D.

4. Source: Exhibit #23B

6/13/77 1330 hrs LAPD - arrest of Champion for PC 487.2-purse snatch - $115.00

Location: El Segundo/Vermont

Crime took place 6/12/77. Champion purposely ran into 75 year old woman with his bicycle knocking her off balance. Alvin Bobo, co-defendant, then ran by and grabbed the purse. Champion denied allegation. Bobo address: 856 West 126th

St. Champion address: 1212 West 126th St. Bob. Bobo DOB: 4/27/61 Champion DOB: 8/26/62 14 years old.

a. Source: Probation report - Exhibit #33

6/13/77-Age 14 LAPD – 487.2 PC (Grand theft person) – Petition requested. D.A. reject because victim was unable to identify.

(According to the police report, defendant ran his ten-speed bicycle into a 75 year old female, knocking her off balance while his juvenile companion snatched her purse and fled. Defendant was arrested after he was named by his companion as the one who had assisted him in the perpetration of the offense. During previous investigations the defendant denied that he participated in the offense, although he said that he was nearby when it occurred.) See also Exhibit D.

5. Source: Exhibit #23

Unmarked police report - LAPD - 10/13/77 - Location: Helen Keller Park – 211 PC - Champion, Washington high School, 10th grade, on Probation

Off duty police officer s/b Vermont observed three juveniles beating and choking victim. They take wallet from victim. Victim rendered unconscious. Victim's loss- wallet and watch. Victim selected Champion's photo. Both arresting officer's familiar with Champion. Champion's teacher at Washington High School –seldom at school.

Record at time of arrest:

LAPD 10/6/76 23110(b) V.C. Cited/Released

1/24/77 PC 459 Petition requested

	6/13/77	PC 487.2	Petition requested
Lennox	1/14/77	PC 626.9	
		PC 12020	Petition requested
	8/17/77	PC 459	Cited/Released

a. Source: Probation report - Exhibit #33

10/11/77 LAPD – 211 PC (Robbery) – Petition requested. Dismissed 12/16/77, People unable to proceed.

(According to available information, the defendant and two companions took by force a wallet containing $10 from a male victim as the defendant physically choked the victim.) See also Exhibit D.

6. Source: Exhibit #23-B-1

11/6/77 Arrest of Champion for PC 211, 487 PC (auto); PC 182 (conspiracy to commit robbery) Location: West Covina

Seven suspects abandon two stolen cars, approach three victims at Greyhound bus station, two suspects brandish guns. Michael Player displayed a pistol, Marcus Player demanded a wallet from one victim and Marcus took V's watch. Marcus Player and other defendants fled on foot when police arrived. Champion arrested hiding in the bushes. Marcus Player had on his person 45 cal. semi-automatic handgun.

Address given 1201 W. 120th, Los Angeles - DOB: 9/9/61 - 16 years old
Michael Player - DOB: 9/6/60 - 1201 W. 120th St. , Los Angeles
Champion - 1212 W. 120th St., Los Angeles

a. Source: Probation report - Exhibit #33

11/6/77 Age 15 Covina PD – 487.3 PC, 182 PC (Robbery/Conspiracy) - Petition sustained. Declared court ward pursuant to 602 WIC, camp placement ordered on 12/13/77.

(Defendant was involved with several companions in this crime including Marcus and Michael Player (referred to in the present offense). Several victims were robbed at gunpoint near a central business district near a bus station. At the time of the crime the defendant and his companions had abandoned several stolen vehicles and fled after the robberies. Following the arrest in the area, they were identified by the victims. During the investigation the defendant said that he should not have been arrested and acknowledged that he knew Marcus Player had a gun, but denied any involvement in the robberies. His mother reported that he had been hard to handle and felt that if he was given another chance he would do better.)

Defendant was released from Camp Munoz on 7/31//78. See also Exhibit D.

7. Source: Exhibit #23C

9/27/78 - LASO Lennox - 211 PC; PC 245; PC 148 - Location: 126th and Vermont

Six suspects approached a young couple at Helen Keller Park, one suspect steals their radio, male victim attempts to retrieve the radio, two suspects including Champion physically restrained the victim from chasing and began hitting victim with their fists. Later Champion cut victim's hand with pocket.

9/28/78 Statement by suspect No. 1 (Elwyn Lee Patterson) denied involvement, claimed to see Holt, Mallet, Champion, Robinson at bus stop. Stopped to give

them ride, Mallet gave him a radio, books and coat in truck of his car. The victim ID'd her radio in the truck of car.

Addresses: Suspect No. 1 - E. Patterson, 1039 W. 131st, Gardena
Suspect No. 2 - D. Robinson, 1080 W, 134th, Gardena
Suspect No. 3 - R. Patterson, 1039 W. 131st , Gardena
Suspect No. 4 - Juvenile – Steve Champion, 1212 W. 126th, Los Angeles – 16 years old.

a. Source: Probation report - Exhibit #33

9/27/78 Age 15 LASO - Robbery and Assault – Petition filed and sustained. Committed to the CYA. Received CYA, Norwalk 11/27/78, paroled 10/23/80.

(Defendant was apprehended by Lennox Sheriff's Deputies with two adult companions and three juvenile companions for his involvement in an alleged robbery and assault in which the victim had been cut with a knife, hit on the head with a bottle and kicked in the head and chest.) See also Exhibit D.

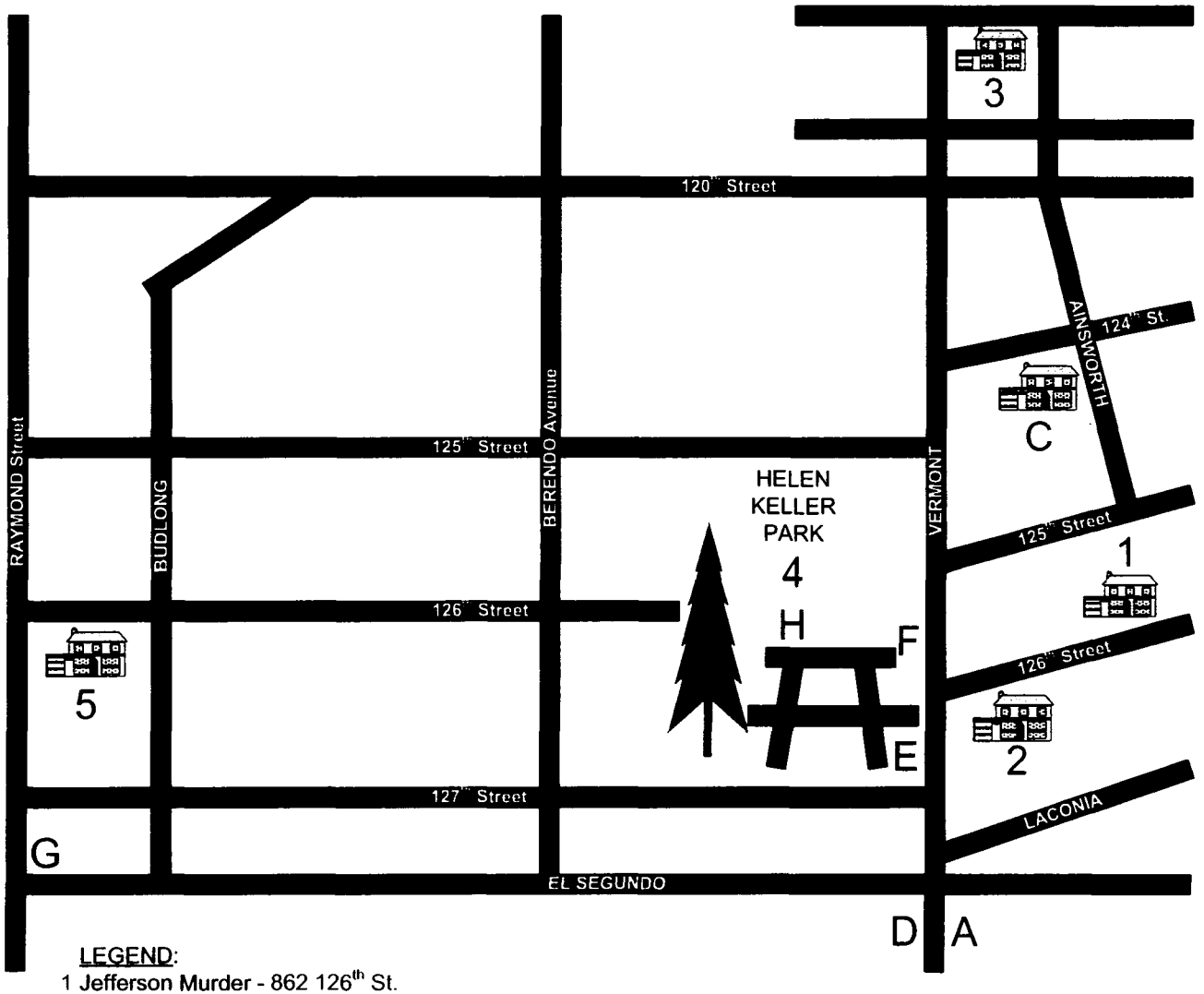
Psychological Report 12/5/79 Exhibit J, Exhibit I.

b. Diagram of Community Dangers

A diagram depicting the danger to the community represented by the numerous neighborhood crimes committed by petitioner and/or members of the Raymond Avenue Crips is reflected on the next page (page 304-A) of this report.

2. Petitioner's Statements to CYA Staff and Doctors

1. Dr. Audrey Prentiss (Psychologist) 12-13-78
Dr. Daniel Minton (Psychiatrist) 12-15-78



LEGEND:

1 Jefferson Murder - 862 126th St.
Date: 11-15-80

2 Hassan Murders - 849 126th St.
Date: 12-12-80

3 Taylor Murder - 11810½ Vermont St.
Date: 12-27-80

4 Helen Keller Park

5 Champion residence - 1212 126th St.

Legend For Community Dangers
Raymond Avenue Crips
Neighborhood Crimes

A 1-6-76 Location: El Segundo/Vermont- VC 23110 - Petitioner with another throws rock at moving vehicle, shatters window, shattered glass causes lacerations on victim's face, neck & head

B 1-14-77 Location: Henry Clay Jr High School (not on diagram) – PC 626.9, PC 12020 - Possession of firearm/blackjack in public school. Petitioner expelled from school

C 1-21-77 Location: 124th & Ainsworth - PC 459 – Residential burglary. Petitioner enters residence at 12416 S. Ainsworth, takes TV. Based on fingerprint match petitioner arrested 1-24-77

D 6-13-77 Location: El Segundo/Vermont PC 487.2 - Purse snatch. Petitioner runs into 75 y/o woman with bicycle, Alvin Bobo grabs purse

E 10-13-77 Location: Helen Keller Park – PC 211-Three juveniles beat & choke victim, take wallet & watch. Victim rendered unconscious. Victim selects petitioner's photo

F 9-27-78 Location: Helen Keller Park - PC 245 - One suspect steals radio, petitioner restrains victim from chasing, cuts victim with knife, kicks & hits victim with bottle

G 11-19-80 Location: Raymond/El Segundo PC 211 - Evan Mallet & Marcus Player take victim's purse

H 7-29-77 Location: Helen Keller Park - PC 664-187 - Craig Ross shoots Hartman, petitioner/Gary Jones present

Conference Group Report 01-04-79

(See, Exhibit D.)

The Crime – (9-27-78 assault with deadly weapon)

Petitioner denies the allegations. He states he was on his way to a shopping mall when he observed his brother's friend in his car and he decided to have a brief chat with him. It was then that the police arrived and arrested everyone.

To Dr. Minton he stated he was not part of the crime. He states that he was a friend of the person who had used the knife on the victim and had arrived on the scene of the crime to talk to his friend when they were all arrested as a group.

The Family – To Dr. Minton petitioner stated:

This minor has three brothers and four sisters. He is the fourth from the youngest child in his family. At the time of his arrest, he was residing with his mother, four sisters, and two brothers. This minor's parents were married in 1955 and divorced in 1962. The family has had no contact with the father since 1962. This ward's mother was formerly employed by the Xerox Company as a machine operator. At the time of his arrest the mother was on medical leave from Xerox Corporation and was receiving Workmen's Compensation benefits and assistance from Aid to Families With Dependent Children.

Gang and Drugs – To Dr. Minton petitioner stated:

This ward's drug history includes smoking marijuana twice a week and drinking two cans of beer on weekends. He also states that he's been a member of a gang for two or three years. He was last active in this gang one year ago.

2. Dr. Michael J. Perrotti (Exhibit J) 12-05-79

Influenced by others – He disagrees with prior reports that he is easily influenced by others. He feels that he does what he wants to do and that he is autonomous.

Law Violations – Became involved with the law because he thought that he could get away with things. He states that this is no longer his attitude.

Gangs – He has severed ties with gangs.

The Crime – (9-27-78 assault with deadly weapon)
He states that he saw an individual fighting one of his friends. The ward became involved in the fight with the victim and the victim picked up a stick so "I got to cutting on him". He denies knowing anything about the victim being robbed.

Law Violations. Additionally, the report states the following:
Mr. Champion related that most of his offenses were for "fast money". He states that "if it were not for fast money, I would not have committed the offenses."

3. Dr. Brown (Exhibit I) 7-29-80

The Crime – (9-27-78 assault with deadly weapon)
He states that only his own involvement in allowing himself to be around certain individual types led to his having to be here in the Youth Authority.

Gangs – The report contains the following:
The youth has had some gang involvement in the past but states at the present time that he has severed these ties.

Substance Abuse – The youth admits to occasional use of alcohol and grass in the past; however, he states that this usage is somewhat minimal.

Family – He states that his mother and father divorced since approximately 1972, and although there is a noted separation, he remains close to both his mother and father. He describes his family life upbringing as being a regular family with both sad and happy times. He states that although he's had the usual sibling rivalry with his brothers and sisters, he does not see this as being a major problem in the past.

The youth admits to having had a girlfriend or associate for approximately the last two years. He states that she's very special in that she's the only person that he has allowed to know certain things about himself.

4. Dr. Miora (Exhibit 136)

Substance Abuse - Mr. Champion's substance abuse began in late elementary school when he found Lewis' leftover marijuana and purchased small amounts of the substance from friends. He spent most of his Junior High School days high on marijuana and weekends drinking with friends at vacant apartments which shelters were treated "like a clubhouse." His friends and he listened to music and consumed alcohol. He ceased and desisted rapidly as he "did not like the sloppiness." He felt he needed to maintain a degree of alertness at all times and thus, was not attracted to other substances. He had "street fears, being caught slipping, not able to defend self." He remained hyper vigilant and cautious. Two of his close friends refused drugs, including Craig Ross and Raymond Winbush. Marijuana permitted Mr. Champion to relax but maintain a sense of control in what he perceived to be an increasingly dangerous world. (Exhibit 136, p. 20.)

Gangs – In the first of three interviews, Mr. Champion spoke extensively about the central place of gang affiliation in his life as a source of consistency, attention and security. He was sought when he was not present in expected contexts, protected and cherished as a valuable member, and boosted because older affiliates included him in the fold. This experience was completely contrary to the unstable, unpredictable home environment. There was room to explore, play and develop, albeit in a dangerous context of post Watts and unwarranted police interrogatories (see articles on South Central post riots of 1965 and police brutality in South Central). Mr. Champion recalls having raised pigeons and dogs with his "homies." These were memorable violence free activities that occupied hours of time when Mr. Champion was younger and prior to his placement with the California Youth Authority.

By the age of 14 years, Mr. Champion reports that it was necessary to be armed to go to parties and dances as the circumstances were unpredictable. He understood that guns were obtained from burglaries and it was considered a badge of honor to arm a homeboy. The guns were stashed at a designated location, permitting everyone in need access. However, stealing the guns would be grounds for "instant dismiss" [al] from the gang. Mr. Champion distinguished that reputation was built on fighting rather than use of guns. His perception is that "older gangs has to use guns – they were grown men fighting young guys," in other words, the younger men has more strength and agility. When asked the value of his gang involvement, Mr. Champion reflected, "Everything was so fast; no time for reflection; nothing reinforced; nothing consistent." (Exhibit 136, p. 14.)

He laments his uncles, mothers' brothers, not having asked him personal questions in an effort to make a connection with him. He stated that they asked

"no penetrating questions" as compared to his homeboys about whom he said, "these guys were willing to die for you." (Exhibit 136, p. 16.)

3. CYA Chronological

1.	11-06-77	Petitioner arrested for West Covina crimes.
2.	12-13-77	Petitioner placed in juvenile camp.
3.	7-31-78	Petitioner released.
4.	9-27-78	Petitioner arrested for robbery and assault.
5.	11-08-78	Petitioner committed.
6.	11-27-78	Petitioner delivered to YA.
7.	12-08-78	Psychological testing of petitioner (Exhibit J).
8.	12-11-78	CYA parole agent interviewed Mrs. Champion.
9.	12-13-78	Dr. Prentiss, psychological report (Exhibit D).
10.	12-14-78	Dr. Minton, psychiatric report (Exhibit D).
11.	1-04-79	Five page case conference report – dictated by John Spurney, social worker. Conference group consisted of youth counselor, Dr. Audrey Prentiss, staff psychologist, a parole agent and Mr. Spurney (Exhibit D).
12.	1-10-79	Initial appearance before YA Board; given parole consideration date of November 1980 – Transferred to Youth Training School.
13.	3-20-79	Petitioner assaulted another ward and staff. Petitioner yells at staff. Destruction of state property (Placa writing).
14.	7-21-79	Race riot – several wards injured and hospitalized. Petitioner's role – leader in race riot. Staff notes at times becomes involved in incidents of disrespect and yells at staff. Petitioner's overall behavior at YTS marginal.

If angry, difficult to deal with.

15. 12-05-79 Dr. Perrotti, clinical psychologist report (Exhibit J).

16. 7-29-80 Dr. Brown psychiatric report (Exhibit I).
Purpose of report – evaluate petitioner's violence potential in preparation for possible parole.

17. 8-17-80 Possess control substance (Hash oil).

18. 10-23-80 Petitioner paroled.

19. 11-26-80 Transcript of high school record and Youth Training School (Exhibit J).

20. 12-12-80 Hassan murders.

21. 1-09-81 Petitioner arrested for Hassan murders.

Note:

(1) Petitioner's release date from CYA first time is 7-31-78. Date of arrest 9-27-78 for robbery and assault.

(2) Petitioner's release date from CYA second time is 10-23-80.

Jefferson murder 11-15-80
Hassan murders 12-12-80
Taylor murder 12-27-80

(3) Petitioner arrest for Hassan murders is 1-9-81.

4. CYA File – Examples of Positive/Negative Staff Remarks

Positive:

(Exhibit G-17 BS No. 000078)

- Efforts at weekly counseling session were good.
- Overall behavior and performance on program goals were good.
- Performance in trade was good.
- Gets along with other wards; however only associates with other Black wards.
- Relationship with staff is average.

- Usually cooperative.

(Exhibit G-17 BS No. 000085-93 and Exhibit D dated 3-9-79.)

- No gross psychotic material concrete, impulse control and judgment impaired.
- Violence potential negligible in structured setting and amendable to YA (G-17 BS No. 000091 and Exhibit D) for 9/78 PC 245 offense.
- Impaired self esteem (G-17 BS No. 000091 and Exhibit D).
- Remorse for past behavior (G-17 BS No. 000091).
- Prognosis for future good (G-17 BS No. 000091).
- Not hardened criminal type.

Negative:

3/20/79:

Assaulted another ward and staff (Exhibit G-17 BS No. 000077).

Unknown date:

Yelling at staff and wrong clothes (Exhibit G-17 BS No. 000077).

Destruction state property (Placa writing).

7/21/79:

Race riot; several wards injured and hospitalized; leader in race riot (G-17 BS No. 000028).

At times becomes involved in incidents of disrespect or yelling at staff (Exhibit G-17 BS No. 000078).

Steve's overall behavior at YTS marginal by staff (G-17 BS No. 000078).

If angry, difficult to deal with (G-17 BS No. 000078).

8/17/80:

Posses control substance (Hash oil) (G-17 BS No. 000079) (G-17 BS No. 000070).

He did not express remorse or guilt for 9/78 PC 245.

No mental, emotional, or personality disorder; No mood, thought, personality disorders (G-17 BS No. 000092 and Exhibit D).

5. 1982 Probation Report (BS 000020) – Eric Hassan

Eric Hassan's 13-year-old son was never involved in any kind of dope dealing and was physically impaired in that he had been born with one lung. At the time of his death he only weighed 40 pounds and had been receiving medical treatment in special clinics. Victims were shot execution style in the back of the head and it is Officer Crews' belief that Eric was killed to eliminate a possible witness.

D. Detailed Discussion of Evidence and Findings

While no circumstances may have weighed against trial counsel conducting additional investigation for the Taylor murder, for the reasons set forth in the referee's findings concerning reference questions numbers 2 and 3, the referee finds there were multiple circumstances weighing against the presentation of the Taylor alibi evidence.[162] In addition, the referee rejects any opinion from petitioner's *Strickland* expert to the contrary as unreasonable. The referee sets forth a summary of Earley's relevant reference hearing testimony and the referee's findings regarding Earley's opinions concerning the Taylor and Jefferson murders here.[163]

1. Materials Not Provided to or Reviewed *by* Petitioner's *Strickland* Expert

A November 7, 2005 draft of a report of Earley's findings and conclusions (Exhibit 109) was followed by a 22 page January 27, 2006 report outlining his findings and conclusions in this matter (Exhibit 110). (RHT 3717-3723.) Exhibit 110 was not prepared by Earley; rather, "[i]t was prepared by [petitioner's habeas counsel] Ms. Kelly

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[162] Through the testimony of Wayne Harris, Earl Bogans, Marcus Player, Steven Strong, all LAPD and LASD personnel and petitioner's *Strickland* expert, significantly damaging evidence, not only to petitioner's alibi regarding the Taylor crimes, but also to his disclaimer of gang membership in December 1980 and the claim of social history mitigation evidence was disclosed. In addition, as set forth in answering reference question numbers 1, 2 and 3 regarding social history and physical and mental impairments, *ante*, the referee finds that the prosecution would have had significant and credible rebuttal evidence to present at penalty phase to undermine the credibility of petitioner's present claims of social history and physical and mental impairment mitigation evidence.

[163] In this section of the referee's findings, the referee addresses the issue of *Keenan* second counsel.

based on conversations that [Earley and Kelly] had." (RHT 3883: 20-25.) By signing Exhibit 109, Earley intended his signature to reflect that the views expressed in the report were his. (RHT 3081.) Exhibit JJJ, dated December 29, 2006 [*sic*], is a letter from petitioner's counsel to Earley, intended to be dated December 29, 2005. Exhibit JJJ lists nine items of materials being provided to Earley under the cover letter and also lists a series of materials Earley had received before signing off on his November 7, 2005 draft (Exhibit 109). Although Earley may have reviewed some of the nine items listed in the December 29 letter before signing off on Exhibit 109, there was nothing Earley reviewed before signing off on Exhibit 109 which was not listed as one of the nine items or as the items previously provided to Earley as set forth in the cover letter. (RHT 3880-3883.)[164]

Earley described the process involved in reviewing materials and having a report generated as follows: "Well, there was [*sic*] meetings over the phone where they -- there was a question of whether I would be involved, they sent materials. There was a meeting in my office where they had materials. I requested to have copies of all of them. So there was a meeting where there was [*sic*] files -- there was [*sic*] files I had. There was [*sic*] additional materials. I'm not sure how much I went through, but there was some additional material I looked at, and I know I requested to have anything they wanted me to review, I wanted to have a copy of it in my possession so I would know everything I reviewed." (RHT 3882: 12-22.) Earley received Exhibit JJJ with enclosures before Exhibit 110 was prepared and signed off by him. (RHT 3884.)

Earley made clear that he would not have allowed time or monetary constraints to interfere with his need to review all information relevant to the issues for which his

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[164] Earley was "not sure how close of a check [he] did of the Clerk's Transcript and the docket. I can't say I read word for word on those [before signing off on the January 27, 2006 report, Exhibit 110]." (RHT 3884: 13-18.) Likewise, Earley indicated that from the "15 volumes of Reporter's Transcript [of petitioner's trial], I went through maybe 50 percent, 60 percent of the voir dire. I would spot check it. I went through the beginning of it to know what kind of questions they were being asked, what they were doing, and it would appear that they became repetitious as they went through jurors." (RHT 3884: 24-26; 3885: 1-4.)

opinions had been sought. (RHT 3921: 3-6 ["There is a time where on this case I know I won't be paid for some of my hours, because there is not funding available, and I am willing to read and do whatever needs to be done, since I am an expert."]; 3921:19-20 ["My position is, I would not -- if there is something that I should have, I would prefer to get it."]; 4053: 15-16 ["If they [petitioner's counsel] would have sent the material to me, I would have reviewed the material."].) Earley admitted that the responsibility to provide the expert with the necessary material on which an expert will base his opinion rests with the party consulting the expert, not with the opposing counsel. (RHT 3920: 12-14 ["I think it is their [petitioner's counsel] responsibility, or I think it is a good practice to provide everything that you think may weigh on a decision."].)

Earley admitted he was familiar with *People v. Bassett* (1968) 69 Cal.2d 122, a case describing the value of expert opinion. (RHT 3877-3878 [*Bassett* quotation from p. 141, cited in *People v. Lawley* (2002) 27 Cal.4th 102, 132, read into the record].) Earley accepted this as an accurate statement of the law in this area. Earley agreed "if you're giving an opinion [as an expert witness] as to the ultimate facts or the facts of the case, that the expert's opinion is only as valuable as the materials he receives and the reasoning that he uses." (RHT 3878-3879.) Earley further agreed that he was giving "ultimate opinions" in his reference hearing testimony. (RHT 3879-3880.)

Earley also addressed the effect of a failure by petitioner's counsel to provide the expert with relevant material which may be adverse to the petitioner: "I would tell anybody, if you don't give me something that is obviously against your position, any competent opponent on the other side is going to point it out to me. And if they don't, if you don't give it to me, that goes against your position, if it exists. So if there is something that exists that is substantially different, then, yes, the person who hires an expert gives the material and does not give something to them that would make a difference, that obviously is going to hurt them in the eyes of the trier of fact." (RHT 3923-3924.)

Earley reviewed the 13 volumes of Penalty Phase Exhibits to the Petition for Writ of Habeas Corpus. (RHT 3085.) Earley agreed that many of those documents were declarations obtained in 1996 or 1997 from various members of the Champion family and friends of petitioner. Earley was aware of concerns discussed in the California Supreme Court decision, *In re Scott*, (2003) 29 Cal.4th 783, regarding reliability of declarations obtained following conviction and imposition of a death sentence from family members and friends of the condemned inmate concerning alleged abuse suffered by the defendant. Although Earley initially testified with respect to the declarations from family and friends of petitioner which he reviewed in the Penalty Phase Exhibits that he "presume[d] they were correct in what they were being told; in other words, that they reflected what the investigators said they were told, whether they were necessarily true or not, I did not -- I don't think I made that assumption." (RHT 3886: 7-11). Almost immediately thereafter Earley admitted that he had done an assessment of the credibility of the witnesses providing the declarations in 1996 and 1997 to assess whether reasonably competent counsel could have found sufficient credibility in these materials to have presented it to the jury. (RHT 3886-3887.)

After discussing the *Scott* decision, Earley was asked the following question: "Q. I'm asking you whether a reasonably competent counsel could have concluded in this case from the materials you reviewed, just as Judge Schwab did in looking at similar materials from the same mitigation specialist in the *Scott* reference hearing, that the material was the creation of untruths, exaggerations and lies by family members who were, many years after the fact trying to give reasons to support a new trial?" Earley answered: "When you answer that question with all of the hypotheticals you put in, of course." (RHT 3889: 24-26; 3890: 1-7.)[165]

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[165] In later testimony given by Mr. Earley that very same day, he denied having made this concession. (RHT 3987: 24-26; 3988: 1-10 ["Q. Except all this other material you're talking about comes primarily in the form of declarations of these family members created in 1996 or thereafter, under circumstances which you agreed this morning, based upon *In re Scott* and our discussion about Pettis, a reasonably competent counsel might find to be suspect, without verifiable objective records to support the conclusions, given their motivation many years after the crimes, and the conviction and sentence of

Earley testified at the reference hearing before any of petitioner's family members or his best friend, Gary Jones, testified. Thus, Earley has never reviewed the actual reference hearing testimony of Rita Champion Powell, Linda Champion Matthews, Terri McGill, E.L. Gathright, Azell Champion Jackson, Gary Jones or Traci Hoyd Robinson. Further, since Gary Jones apparently never provided any Declaration (the 13 volumes of Penalty Phase Exhibits to the habeas petition do not include any such Declaration), Earley at no time prior to testifying had reviewed the substance of what Gary Jones would ultimately reveal in his reference hearing testimony. Nor did petitioner choose to recall Earley to address relevant opinions he might hold in light of the actual reference hearing testimony concerning petitioner's social history.[166]

The December 13, 1978 "Initial Home Investigation Report" (Exhibit H) had not been seen by Earley before he signed off on Exhibit 110, since that is not one of the documents listed as having been reviewed by Earley. (RHT 3982: 22-23 ["If I don't have it listed in there, I would not have seen that."].) In addition to not reviewing Exhibit H before Exhibit 110 was prepared, Earley had not reviewed Exhibit H before he testified at the reference hearing. (RHT 4399: 4-26.) Exhibit H was found within petitioner's CDC file (Exhibit G at BS000101-000102), records which were not provided to Earley by petitioner's counsel. (See, Exhibit JJJ.) Significant portions of Exhibit H were read into the record including the "Developmental History" portion describing petitioner as a full-term infant who did not demonstrate abnormal developmental behavior and experienced no serious illnesses or injuries as a child. Earley admitted

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death, to fabricate evidence to help Mr. Champion get a new trial. Didn't you tell us that this morning? A. No, I don't believe that's what I said this morning."].)

[166] Earley also did not initially review the reference hearing testimony of Dr. Riley who testified before Earley did. (RHT 4006-4007.) However, sometime after Earley testified on May 31, 2006 and before he continued his testimony on June 5, 2006, he reviewed "a very small amount of Dr. Riley's testimony" dealing with the list of some of the neuropsychological testing Riley administered to petitioner. When asked why he reviewed that portion of Riley's testimony, Earley answered: "I just -- it was available, and it was given to me -- [.]" (RHT 4575.) Nor was Earley recalled to address the reference hearing testimony of Drs. Hinkin and Faerstein who testified after Earley completed his testimony. Finally, Earley was not recalled to address the testimony from Dr. Miora, petitioner's "mitigation specialist," whose Declaration (Exhibit 136) was prepared and reference hearing testimony given only after Earley had completed his testimony.

that if petitioner's mother had been called at a penalty phase, trial counsel would have had to have acknowledged to the jury "that she was, at that point that she was not being open and less than truthful in that interview." (RHT 3983-3985.)

When petitioner's mother testified at the reference hearing after Earley had completed his testimony, she denied ever having made the statements under "Developmental History" or those under "Intrafamily Relationship" in which she described the family as normal in all aspects. In fact, in her reference hearing testimony, petitioner's mother denied that she spoke with an investigator from the CYA. (RHT 5447-5450, 5493.) The way in which Earley opined trial counsel could have credibly dealt with Exhibit H and at the same time credibly presented Mrs. Champion's testimony at the penalty phase in front of the same jury which had already rejected her guilt phase testimony (i.e., by conceding that petitioner's mother lied to the CYA investigator in an effort to get her son home) was unreasonable. Earley acknowledged that whatever motivation petitioner's mother had to lie to the CYA investigator, her motivation to lie at a penalty phase when her son's life hung in the balance was even greater. (RHT 3985-3986.)

Earley's January 27, 2006 report (Exhibit 110), on pages 3-4 under "PURPOSE OF THIS REPORT: "My direction from Ms. Kelly, counsel for Mr. Champion, was to prepare a report which discusses my opinions, the basis for those opinions, the materials relied upon in forming those opinions and to be as complete and thorough as possible given my review to date. It is my understanding that some additional materials, specifically the transcripts of the proceedings in People v. Evan Jerome Mallet will be forwarded to me upon receipt and copying by Ms. Kelly, so, my opinions here do not reflect my review of those materials. Further, my normal practice in preparing to be an expert in court is to undertake a detailed and thorough review of materials near the time of testifying. My review to date consisted of a thorough review of the materials provided to date, which are incomplete, but my opinions may be altered slightly upon a re-review. Ms. Kelly has informed me that if necessary a supplemental report should be prepared

and submitted upon review of the Mallet transcript, interviews of witnesses, and final review of materials provided." (See also, RHT 3890-3891.)

Further, Exhibit 109, which Earley signed off on in November, 2005, reflects on page 3 that: "Mr. Early's [*sic*] opinions are only preliminary in nature, at this point, because funding has not yet been approved to permit him to complete his review of materials and assessment of trial counsel's performance in this case. Mr. Early [*sic*] has reviewed portions of the trial transcripts, the petition and most exhibits, and trial counsel's file, which are the basis for his preliminary opinions[.]"

Earley never reviewed the entire transcript of the Evan Jerome Mallet trial which preceded petitioner's trial. According to Earley, "I received some, I believe, of the Mallet transcript. I only reviewed -- I did review a little bit, but not much." (RHT 3892: 21-23, 3893: 21 ["I did not read the full trial transcript, no."].)[167] Those portions which Earley reviewed, appended as exhibits to the petition, dealt principally with testimony from various LASD deputies concerning "perimeter searches." (RHT 3896: 7-18.) Despite the statements in Exhibit 110 concerning the expected receipt of the Mallet transcripts, Earley never contacted petitioner's counsel to ask where they were. (RHT 3898.)

Earley never reviewed Mallet's alibi testimony given at his trial for the murder and related crimes in the Michael Taylor incident, an alibi in which Mallet testified he was with petitioner at petitioner's home from approximately 9:00 p.m. on December 27, 1980 until Mallet was extracted from the backyard of petitioner's home in the early morning hours of December 28, 1980. (RHT 3912; 5 MRT 1109-1110, 1120-1121, 1142-1147 [Mallet's trial testimony concerning his alibi for the Taylor crimes]; see also, RHT 1581-1594 [after reading into the record the verbatim trial testimony of Mallet concerning his alibi for the Taylor crimes, Skyers admitted Mallet's alibi was inconsistent to the alibi petitioner testified to at the guilt phase of petitioner's trial]; RHT 1594-1596 [although

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[167] Petitioner's counsel informed the court: "I just know that I didn't photocopy them [the complete set of Mallet transcripts]. I mean, they are sitting in my office. There wasn't the time or the money to photocopy them, so I never passed them down to Mr. Earley. I still have the volumes in my office. (RHT 3894: 16-20.)

Skyers had not gone through the reasoning process, Skyers nevertheless agreed that if petitioner had pursued the alibi defense to the Taylor crimes at petitioner's penalty phase, there was a risk the prosecutor could have called Mallet as a rebuttal witness and that Mallet could have chosen to testify, rather than invoke his privilege against self-incrimination; in that case, if Mallet testified to the same alibi as he had at his own trial or if he chose to testify differently but was impeached as to that alibi with his alibi testimony presented in his own trial in which Mallet claimed to have been with petitioner from 9:00 p.m. on December 27, 1980 until the early morning hours of December 28, 1980 when Mallet was apprehended in petitioner's backyard, "that evidence would be damning to [petitioner], as one of the participants [to the Taylor crimes]...[;]" by putting on no alibi evidence to the Taylor crimes at the penalty phase of petitioner's trial, the prosecution had no basis to call Mallet as a witness at that phase of petitioner's trial].)

Earley admitted that the Mallet transcripts were not "relatively unimportant, trivial matter" on those opinions expressed by Earley concerning the Taylor presentation issues. (RHT 3899, 3901: 24-26 ["It is material that is -- all of it is important including that material. The more I have, the better it is."].) Earley further admitted that without reviewing the Mallet trial transcript in its entirety, he was in no position to know whether this was the type of material the expert would like to have when addressing the issue of whether Skyers should or should not have put on evidence of the Taylor crimes alibi at petitioner's penalty phase. (RHT 3921-3922.) Earley admitted that in direct examination he had criticized petitioner's trial counsel for his failure to obtain the Mallet trial transcripts. (RHT 3896: 23-26; 3897: 1.) Nevertheless, when asked whether his own review could be deemed deficient for Earley's failure to do that which he criticized Skyers for not doing—i.e., not reviewing the entire Mallet transcript—Earley refused to answer the question directly. (RHT 3897: 2-24.)[168]

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[168] In light of Earley's subsequent admission that without reviewing the Mallet trial transcript in its entirety, he was in no position to know its effect on opinions addressing whether Skyers should or should not have put on evidence of the Taylor crimes alibi at petitioner's penalty phase (RHT 3921-3922.), his

Earley admitted that a finder of fact could reject his opinion regarding the alleged incompetency of Skyers for not presenting the Taylor alibi at the penalty phase simply because in forming his opinion, Earley did not review the entire transcript of the Mallet trial. (RHT 3902: 25-26; 3903: 1-4.)

Earley never reviewed the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player, or that provided by any of the present or former LASD deputies involved in the activities of December 27-28, 1980 (i.e., Messrs. Naimy, Koontz, Hollins, Lambrecht, Tong, Martin and Smith). (RHT 3905, 3912-3913.)[169] As noted previously, Earley did not review the trial testimony given by Evan Jerome Mallet at his own trial. (RHT 3912.) Nor did Earley review testimony given in the Mallet case by one of the Taylor homicide investigators from the LAPD, Detective Calagna, concerning the creation of a series of 12 photographic six-packs, each of which focused on a suspect selected by Lennox LASD Sheriff's Detective Jerome from available gang materials. That focus was based upon the suspect's affiliation with the Raymond Avenue Crips. (RHT 3912; 1 MRT 177-178, 187-188.) These photographic six-packs were subsequently shown to the survivors from the Taylor incident: Mary Taylor, Cora Taylor and William Birdsong. Mary Taylor positively identified Mallet while Birdsong selected Mallet's picture "as looking like the person." Cora Taylor did not identify Mallet or anyone else. (1 MRT 176-178, 187-194.)

When asked whether he had rendered a reliable opinion concerning what reasonably competent counsel would or would not have done at the penalty phase regarding the Taylor crimes given that Earley had not reviewed the entire Mallet trial transcript nor reviewed the reference hearing testimony of any of the LASD deputies nor petitioner's alibi witnesses, Harris, Bogans and Player, Earley testified: "Based on what I know, yes, I believe it is reliable." (RHT 3923: 4-12.) But as Earley then admitted, his

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testimony that he believed he could give a complete opinion on the matter without having read that entire transcript is not only inconsistent with Earley's own subsequent testimony but unreasonable.

[169] Earley did review the Declarations of Wayne Harris (Exhibit S) and Earl Bogans (Exhibit T), both appended as exhibits to the habeas petition. (RHT 3904-3905.)

view that his Taylor opinion was reliable, despite the lacuna in his base of materials reviewed, could only be based on what he knew, not what he had not reviewed. As to the latter, Earley had no way to know the contents of materials he had not reviewed, and their possible effect on opinions he expressed concerning the Taylor crimes (RHT 3923: 13-14.)

Earley did not review the entire reference hearing testimony of petitioner's trial counsel. (RHT 3913: 23-26.) Earley failed to read that portion of Skyers' reference hearing testimony dealing with Skyers' belief, based upon his experience with juvenile matters involving the Youth Authority, that Skyers would have seen Exhibits D [December 1978 psychological and psychiatric reports of Drs. Prentiss and Minton], H [December 13, 1978 Initial Home Investigation Report summarizing a December 11, 1978 interview conducted with petitioner's mother at her residence at 1212 West 126th St.], I [July 29, 1980 psychiatric report of Dr. Brown] and J [December 1978 and December 1979 psychological evaluations by Drs. Prentiss and Perrotti] when he visited the CYA parole office on Bullis Road. (RHT 4398: 18-26; 4399: 1 ["I don't recall that part of his testimony. I don't know if I got that far in it where -- I remember that time, and I don't remember if I got as far as him talking about seeing these exhibits].)

When Earley was specifically asked whether he "had [] reviewed any or all of the exhibits I have just mentioned, D, H, I and J[]" before preparation of Exhibit 109, he testified: "I don't believe I did." (RHT 4399: 4-7.) When asked the same question with respect to the same four exhibits for the timeframe before preparation of Exhibit 110, Earley answered: "I don't think I did. I'd have to look back and see if I got these. I don't recall reading these before." (RHT 4399: 8-11.) After reviewing Exhibit JJJ, Earley added that "it wouldn't appear that these [four exhibits] came at that time." (RHT 4399: 12-18.) When specifically asked whether "prior to testifying on direct examination had

[Earley] reviewed any or all of those exhibits[,]" Earley responded: "No." (RHT 4399: 24-26.)[170]

After respondent's counsel informed Earley that Exhibit I, Dr. Brown's July 29, 1980 psychiatric report, had been a part of petitioner's CDC file obtained by respondent pursuant to an order signed by the referee, Earley confirmed he had not seen that document before he testified at the reference hearing. (RHT 4400: 1-25.)[171]

Although Earley claimed to have read the California Supreme Court's opinion on petitioner's direct appeal from his convictions and sentence of death, *People v. Champion* (1995) 9 Cal.4th 879 (RHT 3915.), Exhibit 110 does not list that opinion as one of the items received and reviewed. (RHT 3916.) Rather, Earley recalled: "I believe at the time when they called [to see about Earley reviewing the case as a *Strickland* expert], when I first received a call about the case, I believe I read it at that time what the case was about." (RHT 3916: 23-25.) That would have been 7 or 8 months before Exhibit 110 was "signed off on" by Earley. (RHT 3917: 17-20.) Earley could only recall reading the opinion that one time; he never discussed the opinion with petitioner's counsel, Ms. Kelly. (RHT 3916-3918.)

On the last page of Exhibit 109, in the last paragraph, Earley stated: "There were no circumstances that weighed against the investigation or presentation of the additional evidence presented in Mr. Champion's petition and subsequent pleadings." That was also the essence of Earley's opinion as expressed in his report (Exhibit 110). (RHT 3918.) But as Earley then admitted, "there may well have been circumstances presented in the material [he] did not review, such as the full Mallet trial transcript, such as the reference hearing testimony of people like Wayne Harris, Earl Bogans, Marcus

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[170] As previously noted, Earley testified that he had reviewed the 13 volumes of Penalty Phase Exhibits to the Petition for Writ of Habeas Corpus. (RHT 3085.) While the reports of Drs. Prentiss, Perrotti and Minton were included within those 13 volumes, it is evident from Earley's testimony that he did not give them careful review. As a result, when Earley testified, his answers with respect to reviewing those documents before either of his reports was prepared or before he testified were either in terms of "I don't think [or believe] I did" or an emphatic "No." (RHT 4399.)

[171] Dr. Brown's July 29, 1980 "Psychiatric Evaluation" report (Exhibit I) was found within petitioner's CDC file (Exhibit G) at pages BS 000071-000072.

Player, the reference hearing testimony from the various present or former sheriff's deputies, that might create the basis why reasonably competent counsel would not have presented the Taylor matters at penalty phase[.]" (RHT 3918-3919.)[172]

Earley also admitted that "it is always a danger" that "once an expert has rendered an opinion, [the] expert may be less willing to admit having made a mistake when shown additional information that the expert should have reviewed initially before giving the opinion that the expert did render[.]" (RHT 3924.) In describing his own approach in the matter *sub judice*, Earley testified: "However, when I am reading the material, I start forming opinions, and it had nothing to do with just the reference materials or what they say, when you read this case, you have to say at the beginning, you look and you say, it is an embarrassment, and I will keep my mind open for what was not done and what happened in the case. You try to keep your mind open." (RHT 3925: 2-8.)

2. *Strickland* Standards and *Keenan* Second Counsel

Earley admitted that the test for reasonably competent counsel's actions is not based on what he would or would not have done nor is it based upon what premier capital case defense counsel would do. *Strickland* provides for an objective standard about what reasonably competent counsel should have done. (RHT 3966.)

Earley acknowledged the issue of maintaining trial counsel's credibility with the jury was an issue to be addressed at all times in the trial. (RHT 3973-3974.) Nevertheless and contrary to Exhibit LLL, which includes a "Death Penalty Update" disseminated shortly after the California Supreme Court decision in *Keenan v. Superior Court* (1982) 31 Cal.3d 424 (and before petitioner's trial) describing how a majority of veteran trial counsel believed that trial counsel at the guilt phase should continue as the only counsel at the penalty phase despite the jury's apparent rejection of the defense at

[172] He admitted that the unreviewed materials could provide the basis for reasonably competent counsel not to have presented the Taylor alibi at petitioner's penalty phase.

the guilt phase, Earley opined that a change in trial counsel at the penalty phase would have permitted the credible presentation of family members who testified at the guilt phase and whose testimony was apparently rejected by that jury. (RHT 4018, 4029, 4031; compare *Bell v. Cone* (2002) 535 U.S. 685, 698-702 [state court determination that capital case counsel did not provide deficient performance under *Strickland* for not recalling the defendant's mother to testify at penalty phase to "provide[] further information about [the defendant's] childhood and [to speak] of her love for him," a decision motivated by trial counsel's conclusion that the mother "had not made a good witness at the guilt stage, and he did not wish her subject to further cross-examination" (*Id.* at p. 700), not an objectively unreasonable application of *Strickland's* performance standard].)[173]

Earley testified that in 1982 it would not have been standard practice to have second counsel, although he opined "because of the [particular fact] situation, second counsel would be required...." (RHT 4445.) Exhibit LLL is made up of pages 2 SG-3 through 2 SG-8 from the 1982 Death Penalty Manual Supplement produced by the California State Public Defender's Office dealing with the decision in *Keenan v. Superior Court* (1982) 31 Cal.3d 424 and the issue of "APPOINTMENT OF SECOND COUNSEL IN CAPITAL CASES." (RHT 4448-4453.)[174] Although pages 2SG-3 and 2SG-4 of Exhibit LLL identify six areas acknowledged by the California Supreme Court in the *Keenan* decision as areas for which Keenan's attorney requested funding for second counsel, there is no listing provided for obtaining a second lawyer to appear in front of the jury at the penalty phase of the trial. (RHT 4454-4455.) Earley conceded that Exhibit LLL does not expressly state that retained counsel in capital cases may seek the

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[173] Earley admitted that in the period 1978-1982, second counsel was not obtained in every capital case. He further testified that "for funding purposes," public defender's offices, which were responsible for the majority of cases, did not "want to have two courtroom lawyers...even though they had two lawyers working on the case." In the case of the Los Angeles County Public Defender's office, the second lawyer would be from the "writs and appeals section" and would seldom, if ever, appear as one of the trial lawyers before the jury for cases tried in the period 1980-1982. (RHT 4037-4039.)

[174] Earley accepted the representation by respondent's counsel that the *Keenan* decision issued on February 8, 1982. (RHT 4453: 18-20.)

appointment of second counsel through use of Penal Code § 987.9 funding. (RHT 4455-4457.) Exhibit LLL, part of the 1982 Supplement, came out in July 1982, approximately three months before petitioner's trial (RHT 4457-4458.) However, the annual death penalty seminar in 1982 was either in January (before *Keenan* was actually decided) or in February shortly after the decision issued. (RHT 4458-4459.)

Under "Tactical Considerations" on page 2SG-6 of Exhibit LLL, the document reads: "(a) There is a general consensus among defense attorneys that a second attorney is virtually always helpful in the preparation of a capital case. However, there is a divergence of opinion whether the second attorney should actually participate at trial. One school of thought is that only one attorney should try the case for such reasons as the focusing of responsibility on one attorney and the avoidance of conflicting styles." Earley conceded there is a difference between something "being helpful" and "being required" or "being necessary" as it pertained to any requirement to obtain second counsel at the time of petitioner's trial. (RHT 4459-4460.) Earley also conceded that in light of the divergence of opinion expressed in Exhibit LLL concerning presentation by second counsel to the jury at trial, in 1982 when petitioner's case was tried, reasonably competent counsel was not required to have second counsel appear in front of the jury. (RHT 4460-4461.)

The last page of Exhibit LLL, page 2SG-8, is a "DEATH PENALTY UPDATE" reporting "a free-wheeling discussion on the use of two counsel in capital trials" at the recent annual convention of the California Public Defenders' Association. (RHT 4461.)[175] The third paragraph of this page states:

> "Most trial veterans present took the position that only one attorney should actually present the case to the jury -- to focus responsibility on that attorney, to avoid conflicting styles of presentation, and to increase the

[175] According to Earley, these Updates "are sent to those who subscribed, and through the tracking they were also sent to anyone who had a capital case, even if they didn't subscribe." (RHT 4466: 7-13.)

sympathy of the jury for an understaffed defense trying to battle a well-armed prosecution. Others argued that two attorneys could be helpful -- because of tactical considerations specific to the case, because it conveyed an added sense of the importance of the case, and because separate penalty phase counsel might be more effective where the jury has rejected the argument presented by the attorney who tried the guilt phase."

(Exhibit LLL, p. 2 SG-8; see also RHT 4461-4462.)

3. Skyers' Credibility

As previously noted, Earley testified that he only read some of Skyers' reference hearing testimony. (RHT 3913.) From what he reviewed, Earley characterized petitioner's counsel's direct examination of Skyers as "sound[ing] like cross[-examination]" and respondent's counsel's cross-examination of Skyers as "sound[ing] like direct [examination]...." (RHT 3914.)

Earley was unwilling to admit that Skyers did a good job when Skyers obtained from the District Attorney's office an offer allowing petitioner to plead guilty to murder in exchange for a sentence of life with the possibility of parole. (RHT 4043.)

4. Taylor Murder and Related Crimes

In both Exhibits 109 and 110, Earley opined, as stated on the last page of Exhibit 109, in the third full paragraph, first sentence: "There were no circumstances that weighed against the investigation of [*sic*] presentation of the additional evidence presented in Mr. Champion's petition and subsequent pleadings." (See, RHT 3918.) Nevertheless, Earley admitted that materials he did not review such as the full Mallet trial transcript, the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player and the reference hearing testimony of Messrs. Naimy, Koontz, Lambrecht, Tong, Hollins, Martin and Smith might well have provided the basis for

reasonably competent counsel's decision not to present the Taylor matter at the penalty phase of petitioner's trial. (RHT 3918-3919.) Despite this admission, Earley subsequently testified that in his opinion no reasonably competent counsel would have failed to put on a defense at the penalty phase to the Michael Taylor crimes "based on the record in this case...." (RHT 3925-3926.)

a. Mallet's Alibi Testimony

As previously noted, at his own trial, Mallet testified in his own behalf to an alibi defense to the Taylor crimes. The alibi placed Mallet with petitioner from approximately 9:00 p.m. on December 27, 1980 until the early morning hours of December 28, 1980 when Mallet was arrested in the backyard of petitioner's home. (5 MRT 1120-1121, 1142-1146.)[176] Earley acknowledged that Mallet would not have had a Fifth Amendment privilege not to be called to the stand as a witness at petitioner's trial, had the prosecution elected to do so in the face of an alibi presented by petitioner to the Michael Taylor crimes. (RHT 3928-3932.)[177] Although Earley testified that he had never had a client take the witness stand against Earley's advice not to do so, he acknowledged that there are some criminal defendants who did testify against the advice of their counsel. (RHT 3934-3935.) He further admitted that Mallet had the right to testify in petitioner's trial even if his lawyer advised him against doing so. (RHT 3935: 13-16.) Earley also testified that he did not know whether Mallet testified in his own trial against the advice of his trial counsel, Charles Gessler, considered by Earley to be one of the premier capital case defense attorneys in California. (RHT 3935-3936.)

Nevertheless, Earley opined that "a reasonably competent lawyer during that time period would know that somebody who just finished a trial and is on appeal, his lawyer is not going to let him, he is not going to take the witness stand in front of the

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[176] All of the Mallet Reporter's and Clerk's Transcripts on Appeal and preliminary hearing transcripts, of which this Court has taken judicial notice, have been collectively marked as Exhibit MMMM.

[177] See, *People v. Ford* (1988) 45 Cal.3d 431, 436, 439-441.

jury." (RHT 3932: 13-17.) When asked whether there would be a 100% guarantee Mallet would never testify in front of petitioner's jury, given that the decision ultimately was Mallet's to make, Earley further testified: "A reasonably competent lawyer would be very safe, would not be very competent if he thought there was any danger that Mallet was going to take the stand for no apparent benefit." (RHT 3932: 18-24) In response to a question asking whether "a reasonably competent counsel could nevertheless feel there is a risk, no matter how small the risk may be, that there did exist a risk that if one wanted to pursue the Taylor crime defense at penalty phase, the prosecution could call Mallet, and Mallet might testify, no matter what he said, there is some risk, right[,]" Earley expanded on his earlier answer: "No, I don't believe that there is any risk. I don't even believe that a reasonably competent prosecutor would call a fellow gang member, not knowing what he is going to testify to in a case to begin with. So I don't even see the first light, where a prosecutor would put him on, puts him on to begin with in a case such as this." (RHT 3936: 7-18.)[178]

Later when Earley reiterated this view (RHT 4360-4361.), Earley was then shown Exhibit U, a "Declaration of Earl C. Bogans," a document Earley did not recall having previously reviewed. (RHT 4361.) In his reference hearing testimony, Bogans testified that he signed a blank "Declaration," which was in fact a blank piece of paper, sent to him by Mallet in an effort to "help get [Mallet] out of jail" following Mallet's convictions for the Taylor crimes. The substance appearing in Exhibit U was not prepared by Bogans and was not truthful. That information was added after Bogans signed the blank "Declaration" and sent it back to Mallet. (RHT 2668-2675.)

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[178] Because Mallet's trial preceded that of petitioner, the prosecutor at petitioner's trial would be aware of what Mallet had testified to at Mallet's own trial. In the event Mallet chose to testify at petitioner's trial and testified differently than he had at his own trial, Mallet could have been successfully impeached with his former testimony in which he claimed to have been with petitioner from 9:00 p.m. on December 27, 1980 until the early morning hours of December 28, 1980 when Mallet was arrested in petitioner's backyard. Under those circumstances, Mallet's former testimony would be received not only to attack the credibility of any different account given by Mallet at petitioner's trial but for the truth of the matter asserted therein; *viz.*, that Mallet was with petitioner during the period when the Taylor crimes were committed. (Evid. Code, § 1235.)

It is self-evident that no one could conclude with absolute certainty that Mallet, willing to suborn perjury from his gang buddy Earl Bogans, would not be willing to testify at petitioner's trial. In light of Earley's unfamiliarity with Exhibit U and his failure to ascertain from Mallet's trial counsel whether Mallet testified at his own trial over the advice of his counsel, Earley's unwillingness to recognize any risk to Mallet testifying at petitioner's trial is both unreasonable and a recognition of the danger presented to petitioner's case if Mallet in fact testified at petitioner's trial.

After agreeing that Mallet's position just from reading the police reports was "weak" and that in light of Mallet's conviction "there is a good argument that [his] position was weak enough not to carry the day[,]" Earley also ultimately agreed that "it would be potentially damaging to [petitioner's] position if Mr. Mallet was to be believed." (RHT 3936-3939.)[179]

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[179] Earley opined that he didn't "think a district attorney would put evidence on, obviously a lying witness in that position, and to say, see, he is a liar." (RHT 3938: 25-26; 3939: 1.) But Earley had to admit the possibility as respondent's counsel's question put it: "All the D.A. has to tell the jury is he may not be truthful in whole, but the part about being with Champion and the part about being with Champion from 9:00 o'clock on, they weren't in Champion's house, they were over at the Taylor residence, isn't that what the D.A could argue to the jury based on the testimony of Mallet, if he testified as he did in his own trial?" (RHT 3939: 2-11, cf. *People v. Zack* (1986) 184 Cal.App.3d 409, 416-418 ["'Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action in which he is a party..., regardless of whether the statement was made in his individual or representative capacity.' (Evid. Code, §1220.) 'Statements to be admissions need not be incriminating.' [Citations.] As aptly stated by Witkin, '...any prior statement of a party may be offered against him, even though it may not have been against his interest or even may have been self-serving when made.' [Citation.] Here, the People introduced all of the extrajudicial statements appellant uttered in an attempt to persuade the jury that appellant was untruthful in his explanation as to his whereabouts at the time of the murder. '[W]hen each of the statements is isolated from the others it is entirely exculpatory. However, "statements merely intended to be exculpatory by the defendant are often used...to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word...." [Citation.]' [Citation.]" (ellipses in original); see also, *People v. Carpenter* (1999) 21 Cal.4th 1016, 1048-1049 ["Evidence Code section 1220 refers to a 'statement,' not an 'admission.' It is true that the section heading refers to 'Admission of party,' but the heading is irrelevant to its construction. [Citation.] The hearsay rule does not compel exclusion of *any* statement offered against a party declarant, whether or not it can be described as an admission." (italics in original)].)

b. Awareness by the Jury of the Lack of Evidence Connecting Petitioner to the Taylor Murder and Related Crimes and the Evidence Connecting Co-Defendant Ross to both the Hassan and Taylor Crime Scenes

Earley acknowledged that the jury in petitioner's trial knew the prosecution had only charged Ross and not petitioner with the Taylor murder and related crimes. (RHT 3940-3941.) Earley also admitted that it was "a reasonable interpretation" for the jury to draw the common sense understanding from the difference between petitioner and Ross's situation with respect to the Taylor crimes that it was significant the prosecution did not charge petitioner with those crimes but did charge his co-defendant Ross. (RHT 3942-3943.) Earley had also read trial counsel's guilt phase argument in which he reminded the jury that petitioner was only charged with the Hassan crimes, not the Jefferson or Taylor crimes. (RHT 3943.)

Earley admitted that the jury knew the prosecution offered no physical evidence connecting petitioner to the Taylor crimes and that no fingerprints of petitioner were lifted from either the Taylor residence where the crimes were committed or the Player car. (RHT 3945.) In light of the prosecution's presentation of evidence of Ross's fingerprints having been obtained from the Hassan and Taylor residences, Earley admitted that the jury could infer from the prosecution's failure to present evidence of petitioner's fingerprints that no such evidence existed. (RHT 3945-3946.) Nevertheless, despite these realities known to the jury which did not require Skyers to put on an alibi involving potentially suspect witnesses, Earley rejected the view that a reasonably competent counsel could have decided not to present that alibi defense under these circumstances. (RHT 3946.)[180] In reaching this conclusion, Earley

[180] Earley was questioned regarding the admissibility of petitioner's 1976 residential burglary for which crime petitioner had been identified through the identification of fingerprints left by him at the crime scene. (See, Exhibit II.) Earley was aware that trial counsel had police reports in his file concerning petitioner's arrest in 1977 for the December 1976 burglary. (RHT 4069.) Earley considered it "a fanciful thing, looking in the past" to believe that a prosecutor would have offered evidence of that crime in rebuttal at petitioner's penalty phase should petitioner have presented his alibi defense supported by the absence of petitioner's fingerprints from the Taylor crime scene. (RHT 4070.) Earley had to admit that when he read the material he reviewed, evidence that petitioner had been identified through the presence of petitioner's fingerprints at the residential burglary crime scene and the potential relevance of that evidence to rebut the absence of petitioner's fingerprints from the Taylor crime scene "wasn't the first thing that jumped out

addressed the prosecution argument that the similarity of the circumstances between the Hassan crimes and the Taylor crimes suggested that the individuals involved with the Hassan crimes were also involved in the Taylor crimes, citing to Evidence Code § 1101. (RHT 3946-3950.)

c. Jury's Ability to Conclude Petitioner Was Involved in Taylor Murder and Related Crimes Based on Petitioner's Conviction for the Hassan Crimes and the Significance of Evidence Tying Petitioner to the Taylor Crimes Under the "Common Crime Partner" Theory.

Earley admitted that in light of prosecution evidence establishing Ross's fingerprints at both the Hassan and Taylor crime scenes, Ross "ha[d] a lot of problems" to deny his involvement in those crimes. When Earley was first asked about his familiarity with the California Supreme Court decisions in *People v. Haston* (1968) 69 Cal.2d 233 and *People v. Cavanaugh* (1968) 69 Cal.2d 262, he testified that he did not believe he had "ever seen [*Haston*] before" and, although he claimed to be familiar with *Cavanaugh*, he could not immediately state what the case stood for. (RHT 3947.)

After a brief recess during which Earley had an opportunity to review the two cases, Earley confirmed that he had not been familiar with the *Haston* case, but was with *Cavanaugh*. (RHT 3948.) Earley agreed that those decisions permitted a trial court to admit evidence of an uncharged robbery committed by the defendant and the same common crime partner involved in the charged robbery to prove the identity of the defendant as that crime partner's partner in the charged robbery, even though the robberies may not have been otherwise sufficiently similar to have permitted, pursuant

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at [Earley]." (RHT 4078.) Nevertheless, in light of the evidence provided by witness Moncrief that petitioner left the Hassan crime scene wearing gloves and carrying a pillowcase, evidence of petitioner's 1976 residential burglary provided fertile rebuttal evidence to not only the issue of petitioner's lack of fingerprints at the Taylor crime scene (had petitioner presented his alibi defense to those crimes at the penalty phase), but also to the claims (1) petitioner suffered from brain damage, since it could reasonably be inferred that petitioner had the ability to learn from his mistakes, one of which was not to wear gloves when he committed the 1976 residential burglary; and (2) petitioner's neighborhood had become more dangerous by the middle 1970s. Petitioner's 1976 residential burglary demonstrates petitioner was a cause, not the product of, the neighborhood becoming more dangerous.

to Evidence Code § 1101(b), admission of evidence of the uncharged robbery without the element of the common crime partner to prove the defendant's identity in the charged robbery. (RHT 3949.) Earley also admitted from testimony at petitioner's trial provided by the eyewitness across the street from the Hassan residence, Ms. Moncrief, "it was clear, uncontested that there were four people [involved in the Hassan crimes]." (RHT 3951.)[181] By contrast, in the Taylor crimes, Earley admitted that there was no eyewitness like Moncrief positioned outside of the Taylor residence who could directly identify the number of people involved in those crimes. Rather, the only witnesses who could directly identify the number of perpetrators would be the survivors, Mary Taylor, Cora Taylor and William Birdsong, witnesses who were at all times within the Taylor residence when the crimes were committed. (RHT 3952-3953.)

Nevertheless, Earley conceded that reasonably competent counsel could conclude from evidence (1) Craig Ross was involved with petitioner in the Hassan crimes; (2) Craig Ross was involved in the Taylor crimes; (3) four people were involved in the Hassan crimes (according to witness Elizabeth Moncrief); and (4) at least four people were involved in the Taylor crimes (according to descriptions provided by the three surviving witnesses from those crimes) that a jury could conclude petitioner was one of Ross's crime partners in the Taylor crimes. (RHT 4353-4354.) When asked whether evidence establishing that the gun stolen in the Hassan murders and robberies for which petitioner and Ross had been convicted was the murder weapon in the Taylor crimes could have been viewed by reasonably competent counsel as additional evidence from which a jury would find petitioner was involved in the Taylor crimes, Earley initially provided a non-responsive answer. When the question was re-asked with specific reference to the underlying issue set forth in the second part of reference question number 3 ["In 1982, when petitioner's case was tried, would a reasonably

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[181] Earley also acknowledged that at petitioner's trial, Moncrief identified petitioner as the perpetrator "who was wearing gloves, carrying the pillowcase, and smiling as he left the [Hassan] residence...[.]" (RHT 3951-3952.)

competent attorney have tried... to present [petitioner's alibi defense to the Taylor crimes] at the penalty phase?"]— Earley refused to directly answer the question. (RHT 4354: 19-26; 4355: 1-4 ["A. I don't believe there is sufficient foundation to answer that question."].)

Earley also conceded that evidence the same car was involved in both the Hassan crimes for which petitioner and Ross were convicted and the Taylor crimes for which Ross was convicted could be viewed by reasonably competent counsel as strong evidence connecting petitioner to the Taylor crimes. (RHT 4355-4356.)

Earley was also asked whether evidence petitioner bailed Mallet out of jail after the Hassan crimes and before the Taylor crimes, at a time when petitioner lacked sufficient funds from any job to pay the bail (See, Exhibit N; Trial Exhibit 114 bail receipt.), could be considered by reasonably competent counsel as additional strong evidence a jury could use to connect petitioner to the Taylor crimes in which Mallet was one of the perpetrators. (RHT 4356: 12-20.) In follow-up questioning to Earley's initial answer— "Well, that assumes a lot of unanswered questions that I had. But it would be, again, some proof of relationship between the various people."

When asked whether reasonably competent counsel in deciding whether to put on the alibi defense to the Taylor crimes at the penalty phase could consider evidence that Mallet was found hiding in the backyard of the Champion residence after the Player car crash following the Taylor crimes as additional significant evidence connecting petitioner to the Taylor crimes, in light of evidence petitioner bailed Mallet out of jail following the Hassan crimes, Earley conceded that reasonably competent counsel could consider it but he refused to acknowledge it could be considered "significant evidence." (RHT 4358: 2-20 ["A. Well, I don't know what you mean by 'significant.' It would be, it may be significant for the defense to put it on."].) When pressed to directly answer with a "yes" or "no" whether reasonably competent counsel could have considered evidence petitioner bailed Mallet out of jail following the Hassan crimes as evidence a jury could find significant to proving petitioner was involved with the Taylor crimes, Earley

answered: "I think they could use it for that purpose, how significant would depend on all the other evidence in the case. I can't answer it in a vacuum." (RHT 4358: 21-26; 4359: 1.)

d. Petitioner's Alibi to the Taylor Crimes

Earley admitted having reviewed page 12241 from Exhibit B, the July 13, 1982 note summarizing Skyers' interview with petitioner's brother, Reginald Champion, concerning a possible alibi for petitioner to the Taylor crimes. Earley also admitted having reviewed petitioner's trial testimony in which petitioner provided an alibi for the Taylor crimes by stating that he was home until 10 o'clock to 11:00 p.m. on December 27, 1980. (RHT 3953-3954.)[182] Earley also acknowledged that it "may be an interpretation" from Reginald Champion's alibi statement given to petitioner's trial counsel that Reginald Champion's call to the Taylor residence (made at a time when petitioner was allegedly still at his residence) was made during the time the crimes were being committed. (RHT 3954-3957.) Earley stated that in establishing in his mind the time when the Taylor crimes were committed, he considered statements given to the LAPD by the surviving victims of the Taylor crimes, Cora Taylor, Mary Taylor and William Birdsong. (RHT 3958-3959.) Earley estimated the time for the Taylor crimes to be somewhere between 10:30 p.m. and midnight. (RHT 3959.) He reviewed no information suggesting that the timeframe for the Taylor crimes was 9 or 10 p.m. (RHT 3960.)

Earley admitted that the LASD deputies involved in the events of December 27 and 28, 1980 would be the kind of witnesses "you would assume jurors are going to find [] to be credible." (RHT 3960: 22-26; 3961: 1.) Earley admitted having reviewed the Lambrecht/Tong report concerning the detention in Helen Keller Park shortly before midnight on December 27, 1980 (Exhibit GG). He had also reviewed the Naimy/Koontz

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[182] Petitioner's trial testimony addressing his alibi for the Taylor crimes can be found at 13 RT 3089-3099.

report. (RHT 3961-3962.) Earley further admitted that from these reports he reviewed, there was no police officer who would be able to give direct testimony placing petitioner in the presence of the officer at a time while the Taylor crimes were being committed, unlike the circumstance for Marcus Player who, according to Exhibit GG, was detained by deputies at the time the Taylor crimes were committed. (RHT 3962-3963, 4252.) Thus, Earley would have expected testimony from Lambrecht and Tong to be that petitioner was not one of the people detained in Helen Keller Park by deputies at 11:50 p.m. on December 27, 1980, testimony which would have been consistent with petitioner's own trial testimony that he was not detained by the deputies in the park. (RHT 3962.)[183]

It was Earley's opinion that presentation of petitioner's alibi for the Taylor crimes required calling as alibi witnesses Wayne Harris, Marcus Player and Earl Bogans. (RHT 3963.) In Earley's January 2006 report (Exhibit 110, page 20), in the third full paragraph, he stated:

> "This conclusion [that Simms and Michael Player were likely participants in the Taylor crimes] also depends in part on the declarations of witnesses, Marcus Player, Wayne Harris, Frank Harris, Angulus Wilson and Earl Bogans. If these witnesses had testified their credibility would have come into question for a number of reasons. They are all friends or acquaintances of Mr. Champion. Marcus Player and Frank Harris had records. All but Wayne Harris may have had gang associations.[184] As a

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[183] In his trial testimony, petitioner admitted that he was not stopped the first time when Marcus Player and "some of the younger guys" were detained by deputies at Helen Keller Park. At that time, petitioner did not personally come in contact with any deputies nor were there any deputies within petitioner's immediate view. Later, deputies detained petitioner with Marcus Player and Wayne Harris. (13 RT 3092-3097.)

[184] Because Earley failed to read the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player, he was unaware that Wayne Harris and Earl Bogans both admitted being members of the Raymond Avenue Crips, the same gang each claimed petitioner was a member of in December 1980. The latter testimony was inconsistent with petitioner's trial testimony that he was no longer a member of the gang in December 1980.

reasonably competent counsel I would have had concerns about this but, *in* [*sic*] *balance*, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers-and given the importance of rebutting Mr. Champion's involvement *I* would have called these witnesses. Certainly, I would have conducted an investigation which consisted of talking to them in person."[185]

(Exhibit 110, p. 20, par. 3; bold and italics added; see also, RHT 3964: 20-26; 3965:1-18.)

Earley admitted that by using the term "in [*sic*] balance" to describe the decision to call these alibi witnesses, he was signifying that this decision was "certainly a judgment call...." (RHT 3965-3966.) Earley further admitted that not only was there a balancing of considerations in the ultimate determination to present these alibi witnesses, he believed "in almost all calls there is some balancing that goes on." (RHT 3966: 7-12.) Finally, Earley admitted that when one engages in the balancing process, one is "always" exercising judgment. (RHT 3966: 13-15.)

By contrast, Earley claimed that there was no downside to presenting at trial petitioner's alibi witnesses to the Taylor crimes. (RHT 3971: 20-24.) Given that claim, Earley was then asked to explain why in his report he used the term "on balance" to describe the decision whether to put on these alibi witnesses if the matter was as clear cut as he now claimed. (RHT 3971: 25-26; 3972: 1-8.) In answering that question, Earley admitted "there was a downside" to the presentation of these alibi witnesses. But it was Earley's "belief" "that a competent lawyer decides the downside did not affect

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[185] Earley's statement raises two additional points. First of all, given his claim that he would have interviewed these witnesses, Earley's failure to review their reference hearing testimony has even greater impact on the reliability to be given to any opinion he expressed on the Taylor incident. Secondly, the report's assessment in terms of what Earley would have done ("*I* would have called these witnesses. Certainly *I* would have conducted an investigation which consisted of talking to them in person."), rather than what reasonably competent counsel was required to do, is further evidence that Earley's opinions are driven by what Earley would have done had he been trial counsel in this case and not by the appropriate standard under *Strickland*—i.e., what reasonably competent counsel was required to do.

Mr. Champion, especially given the other mitigating evidence that was out there that would have fit in with this theory, why he was present with people that were gang members and associate with them at that time. That is a concern. And that's why I said, as a lawyer I think they need to look at that and say where does it fit in? When you look at that with the other mitigating evidence that was not presented, the gang evidence, when you look at that, there is an explanation that tells you that there is really no downside to it, and it is not going to be aggravating, so it is mitigating." (RHT 3972: 9-22.)[186] But Earley had to then admit that his report (Exhibit 110) acknowledged that even he had concerns with the credibility of these alibi witnesses ("If these witnesses had testified their credibility would have come into question for a number of reasons. [] As a reasonably competent counsel I would have had concerns about this but, in balance, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers— and given the importance of rebutting Mr. Champion's involvement I would have called these witnesses."). (RHT 3972-3973.)[187]

Much as Earley conceded a finder of fact could reject his opinions on the Taylor crimes for his failure to have reviewed the entire Mallet trial transcript, so too did Earley

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[186] Earley's opinion is unreasonable in light of the actual reference hearing testimony from Harris and Bogans that petitioner continued to be involved with the gang in December 1980 (contrary to petitioner's trial testimony), their testimony that they never saw evidence of abuse or neglect sustained by petitioner, and the obvious inconsistencies between the alibi as claimed by these witnesses (and Marcus Player) and the alibi testified to by petitioner at his trial, the two reports from Lambrecht/Tong and Naimy/Koontz and the reference hearing testimony from all of the deputies involved. Of course, this does not even take into account the reference hearing testimony from Marcus Player (of which Earley was unaware) that he would not only have refused to talk with Skyers before petitioner's trial, he would have followed the advice of his counsel if called as a witness at petitioner's trial and refused to answer questions citing his Fifth Amendment privilege against self-incrimination.

[187] In fact, when one looks at the constellation of evidence concerning potential alibi witnesses Wayne Harris, Earl Bogans and Marcus Player (e.g., reference hearing testimony of each, Declarations of Harris and Bogans, previous statements made by Marcus Player to petitioner's counsel, the two LASD reports from Lambrecht/Tong and Naimy/Koontz and the reference hearing testimony from all of the deputies involved), it is clear that petitioner's potential alibi witnesses' testimony would not have "corroborate[d] what most jurors would find credible evidence--the testimony of police officers..." as Earley stated in his report. It also would not have corroborated petitioner's own trial testimony dealing with petitioner's alibi for the Taylor crimes. Wayne Harris's reference hearing testimony that when petitioner and Harris arrived back at petitioner's home, Craig Ross was inside the Champion residence, cannot in any conceivable way have been helpful to petitioner's effort to disassociate himself from Ross's involvement in the Taylor crimes.

concede that under *Bassett*, *Lawley* and CALJIC 2.80, a finder of fact could reject his opinions regarding the calling of alibi witnesses to the Taylor crimes given Earley's failure to have reviewed their reference hearing testimony as part of the basis for his opinion. (RHT 4056-4057.)

Earley also conceded that "if [trial counsel] put[s] evidence on and the jury believed that the evidence that you put on was phony evidence with no basis in fact, of course that hurts you." (RHT 3975: 12-15.) Earley also conceded that the verdicts of the jury convicting petitioner for the Hassan murders and related crimes, despite the testimony provided by petitioner's family members to supply an alibi for those crimes and an explanation for the Hassan jewelry worn by petitioner at the time of his arrest, "was [an] across the board defeat." (RHT 3976-3977 ["Well, I would say that when you look at it, it was across the board defeat."] (RHT 3977: 19-20.).)[188]

e. Failure of Surviving Victims of Taylor Crimes to Identify Petitioner During January 12, 1981 Live Lineup

Earley claimed that trial counsel failed to adequately address the unexpected in-court identification made at the guilt phase by one of the survivors from the Taylor crimes, Cora Taylor. (RHT 4081-4082.) Nevertheless, Earley somewhat grudgingly admitted[189] that Skyers did bring out for the jury the fact that none of those three witnesses identified petitioner at the live lineup conducted approximately two weeks after the December 27, 1980 crimes. (RHT 4082; see also, RHT 1689-1690, 1697-1698 [Skyers confirming that none of the three surviving witnesses from Taylor crimes identified petitioner at the January 12, 1981 lineup, a fact presented to petitioner's trial jury].) In spite of the fact Cora Taylor failed to identify petitioner in person within two weeks of the crime and only identified him in court some 18 months later and without

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[188] Given this "across the board defeat" of petitioner's Hassan crimes alibi, it is unreasonable for Earley to opine that presentation of an alibi to the Taylor crimes presented by witnesses he acknowledged had questionable credibility presented no downside to petitioner should the jury find this new alibi to have as little credibility as the jury obviously afforded petitioner's Hassan crimes alibi.

[189] "Q. The question is, he [petitioner's trial counsel, Skyers] brought it out, he didn't [*sic*] bring it out." A. Okay. So he brought it out. (RHT 4082: 22-24.)

any confirmation of her identification coming from Mary Taylor or any other witness called at petitioner's trial, Earley nevertheless maintained that this was inadequate to address Taylor's in court identification. (RHT 4083.) Thus, Earley opined that trial counsel should have presented evidence that Cora Taylor failed to identify petitioner "at the arrest scene, the night of the crime." (RHT 4083: 17-26.)

Mary Taylor testified at petitioner's trial to circumstances concerning two field identification opportunities involving Mary Taylor, Cora Taylor and William Birdsong shortly after the Taylor crimes were committed. (10 RT 2235-2237; see also RHT 1690-1693 [cross-examination of trial counsel concerning this trial testimony from Mary Taylor and Skyers' understanding at the time of petitioner's trial that none of the surviving Taylor witnesses could identify petitioner or Robert Aaron Simms at a field identification held shortly after the Taylor crimes were committed].)

In the first of two field identification procedures, none of the witnesses could identify any of the group of guys lined up somewhere off of 120th St between Budlong and Vermont. (10 RT 2237.) The subsequent field identification procedure concerned Jerome Evan Mallet following his apprehension in the early morning hours of December 28, 1980 in petitioner's backyard. Earley had not reviewed the Mallet preliminary hearing transcript. (RHT 4087-4088.) At Mallet's preliminary hearing, his counsel cross-examined the investigating officer, Detective Calagna, about information Calagna received from the watch commander that a car had been stopped in the Lennox area, two persons were in custody at Lennox and that witnesses Cora and Mary Taylor and William Birdsong had been taken by radio car to the scene of the arrest for the purpose of a possible identification. The information received by Calagna was that no one had been identified in that field identification opportunity. (1 MPHT 181-183; see also, RHT 1714-1716 [verbatim recitation of a portion of this preliminary hearing testimony and cross-examination of petitioner's trial counsel concerning it].) Further, Mary Taylor testified at greater length at Mallet's preliminary hearing regarding the field identification circumstances involving the Taylor witnesses. (See, 1 MPHT 175-181.) Mary Taylor

testified to a field identification conducted "in the 120 something block" after going "on Budlong" and "down Raymond[.]" (1 MPHT 175.) Mary Taylor testified that there was "a line of dudes, 4 or 5 of them one time." (1 MPHT 176.) Mary Taylor further testified that she did not pick any of the 4 or 5 dudes as persons involved with the Taylor crimes. (1 MPHT 176.)

At a subsequent field identification involving Mallet alone, both Mary Taylor and Cora Taylor told the officer they could not be sure this was one of the persons involved. (1 MPHT 176-181.)[190] Further, in his trial testimony, petitioner testified about the circumstances of his detention, including the presence of an LAPD car shining its lights on petitioner. (13 RT 3100-3101; see also, RHT 1693-1697 [cross-examination of petitioner's trial counsel regarding Skyers' re-direct examination of petitioner at petitioner's trial concerning the field identification; Skyers confirmed that this re-direct examination was his "effort to highlight [] that the Taylor witnesses had, in fact, been shown Champion and the people detained with him as Mary Taylor had alluded to in her testimony earlier" and that from the evidence petitioner had been allowed by the police to leave after that field identification opportunity, the jury could infer that none of those witnesses had been able to identify petitioner at that field identification opportunity].)

Earley did not believe that the failure of the Taylor witnesses to identify Robert Aaron Simms at the same time they failed to identify petitioner created a potential downside to the value of those witnesses' failure to identify petitioner even though petitioner claimed Simms was one of the perpetrators of the Taylor crimes. (RHT 4090-4092, 4094-4096.) But Earley conceded that evidence the Taylor witnesses failed to identify Simms at the same time they failed to identify petitioner meant that the failure to identify petitioner did not "help as much" to attack the in court identification of petitioner by Cora Taylor. (RHT 4094: 24-26.) When asked his opinion whether "no other

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[190] Mary Taylor's testimony at Mallet's preliminary hearing concerning the field identification opportunities is set forth verbatim and is the subject of cross-examination of petitioner's trial counsel at RHT 1674-1689.

reasonably competent counsel might see a downside that you don't accept [concerning the use of the field identifications involving the Taylor witnesses,]" Early testified: "I don't see it, and maybe it is, I don't think it is a mixing of terms, you are saying that's an negative, I don't see it as a negative. I view things that are strong positives, they can be not as strong positives, I am looking and I am saying I don't see that's a negative. I am saying each one becomes stronger than the other." (RHT 4117-4118.)[191]

Earley acknowledged that not only in the reference hearing but at petitioner's trial, it was the position of both petitioner and his co-defendant Ross that Mallet was in fact one of the Taylor crime perpetrators. (RHT 4098.)[192] Nevertheless, as Mary Taylor testified at Mallet's preliminary hearing, neither she nor Cora Taylor could positively identify Mallet at a field identification conducted within hours of the crimes and shortly after the initial field identification involving the "line of dudes" at which no identification had been made. (1 MPHT 176, 179.)

However Earley chooses to characterize the facts of the Taylor surviving witnesses' failure to identify Simms and positively identify Mallet at field show ups occurring almost immediately after the Taylor crimes were committed and their negative effect on not only the probative value of the witnesses' failure to identify petitioner at the same time they failed to identify Simms, but also on their subsequent failure to identify petitioner at the January 12, 1981 live lineup—"not as strong positives" or "it doesn't help as much" (RHT 4094: 24-26)—the fact remains that a jury could conclude that the value of the Taylor surviving witnesses' inability to identify petitioner as one of the perpetrators was of limited significance. In contrast, by not pursuing evidence of the field identification inability to identify either Simms or petitioner or to positively identify Mallet and instead focusing on the failure of these witnesses to identify only petitioner at

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[191] Earley's repeated use of the first person "I" rather than reasonably competent counsel is further evidence that in assessing the issues, his opinions are based on what he would have done, not what a reasonably competent counsel might have done. (See also, footnote 185, *ante*, at page 336.)

[192] This was done in an apparent effort to have evidence admitted that Mallet ultimately received a sentence allowing for parole. Petitioner's jury was informed of Mallet's sentence of 46 years to life imprisonment. (*People v. Champion* (1995) 9 Cal.4th 879, 904.)

the January 12, 1981 live lineup, as trial counsel did, there was no dilution of the probative value of the January 12, 1981 failures to identify petitioner to impeach the reliability of Cora Taylor's in court identification of petitioner.

f. Marcus Player's Refusal to Speak with Trial Counsel and to Voluntarily Testify at Petitioner's Trial

Earley admitted he had not been made aware as of the time of his testimony that Marcus Player testified at the reference hearing he would not have voluntarily spoken with trial counsel had Skyers attempted to interview him as part of the pre-trial investigation of petitioner's case. (RHT 4163.) Early admitted that "depending on the circumstance of why [the witness] wouldn't speak [with trial counsel], that [failure to speak with trial counsel] would cause concern." (RHT 4164: 7-8.) Such concern would be "heighten[ed]" if the witness would not even tell trial counsel why the witness refused to talk with him. (RHT 4164: 9-13.) When asked if it "is dangerous for counsel to put witnesses on the stand who counsel do not know what the testimony will be from the mouth of that witness[,]" Earley testified: "I generally don't ascribe to that, as there is all the time there is witnesses that -- I mean, in most cases there are witnesses that won't talk to you." (RHT 4164: 14-20) When pressed to distinguish between his answer that he did not "ascribe to that" but reasonably competent counsel could have a different point of view, Earley continued: "Well, they use that as an excuse that they would not call a witness they haven't been able to talk to. I don't think that would be reasonably competent. To have a -- to at least look at it, yes, I believe that competent lawyers would look and weigh those choices. (RHT 4164: 25-26; 4165: 1-3) Earley admitted that by characterizing the issue as one involving the weighing of choices, he was acknowledging that this entailed "a judgment call." Earley further admitted that because this was a judgment call, reasonably competent counsel might take a point of view different than his. (RHT 4165.)

"Without reviewing stuff, [Earley] couldn't tell [respondent's counsel] what [Earley] recalled about [Marcus Player's] custodial status [at the time of petitioner's trial.]" (RHT

4165: 24-26.) Earley acknowledged that Exhibit NN, a CII report on Marcus Player which was a part of Skyers' file, reflected that Player had been arrested for murder on January 8, 1982 some eight months before petitioner's trial. Earley was aware, from another police report and not from the reference hearing testimony of Marcus Player, that Marcus Player had allegedly lied to a police officer on August 1, 1981 when an officer was at a residence to arrest Craig Ross. Earley was unaware that in Marcus Player's reference hearing testimony, Player testified that he would have invoked his privilege against self-incrimination on advice of counsel had he been called at petitioner's trial. (RHT 4168-4169.) When asked whether reasonably competent counsel looking at the report reflecting that Marcus Player lied to authorities in an apparent effort to assist Craig Ross in evading arrest should have recognized that if called at petitioner's trial, Marcus Player would have to take "the fifth," Earley answered: "Well, I don't know if I could put all those docs [*sic*] together. There is a risk anytime someone lies to the police of putting them on the stand. But I don't know if I put all the docs together that he would have been charged with a PC 32." (RHT 4169: 4-17.)

Earley was aware that Marcus Player had prior adult felony convictions arising out of the November 1977 West Covina incident for which petitioner was also processed as a juvenile subject. (RHT 4171.) Earley conceded that Player's felony conviction for robbery would be admissible to impeach his trial testimony had he been called as a witness at petitioner's trial. Earley also conceded that Player's relationship with petitioner as a common crime partner in the 1977 incident would have been potentially admissible to show the close relationship between Player and petitioner. Earley also conceded that these matters would have to go "into the calculus" about calling Marcus Player as a witness. (RHT 4171-4174.) Earley also admitted that reasonably competent counsel would have had to have considered the fact that on November 19, 1980, Marcus Player and Evan Jerome Mallet were arrested for a robbery incident and that at the time of his arrest, Marcus Player attempted to pass himself off to officers as

his brother Michael. A report to this effect was contained within Skyers' file which Earley reviewed. (RHT 4174-4175.)

In his reference hearing testimony, Marcus Player identified photographs introduced as Exhibits DD, EE and FF (Trial Exhibits 174-176) as photographs taken while Marcus Player and petitioner were housed at the CYA. In his direct testimony, Earley was shown by petitioner's counsel photos showing petitioner and Marcus Player (Exhibits EE and FF). He was not shown the photograph of petitioner throwing a Crips' gang sign (Exhibit DD). Earley conceded that at petitioner's trial, the jury did not know that these three photographs were taken at the CYA. Earley admitted that reasonably competent counsel considering the possibility of calling Marcus Player as an alibi witness would have to consider the possible dangers of exposing the trial jury to evidence that these photographs were taken while petitioner and Marcus Player were both at the CYA with petitioner still throwing a Crips' gang sign. Earley further conceded that the issue was not "black and white." (RHT 4175-4180.)

On cross-examination, Earley was questioned regarding reference hearing Exhibits Z (a photograph of Lavelle Player with a gun in his waistband), AA (a photograph of Lavelle Player and Craig Ross holding a gun) and CC (a photograph of Marcus Player and Craig Ross), all photographs which Marcus Player in his reference hearing testimony admitted had to have been taken after Marcus Player was released from the CYA (August 1980). These photographs (Trial Exhibits 116, 118 and 120) were seized from petitioner's home on January 14, 1981. Although Earley had not seen reference hearing Exhibit 47 (the photograph of petitioner holding a gun), he was aware of it. It was Earley's understanding from trial testimony that the gun held by petitioner in Exhibit 47, the gun held by Craig Ross in Exhibit AA and the gun in the waistband of Lavelle Player in Exhibit Z, could all be the same gun and a gun consistent with the gun used to kill both Teheran Jefferson and Eric and Bobby Hassan.[193]

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[193] Petitioner was not released from the CYA until October 23, 1980. It is reasonable to conclude that Exhibit 47, also recovered from petitioner's home on January 14, 1981, was a photograph taken after

Earley also conceded that reasonably competent counsel would have concluded that the gun recovered after the Player car crashed in the early morning hours of December 28, 1980 was the gun used to kill Michael Taylor. Earley was further aware that that gun had been identified as the gun taken during the commission of the Hassan murders, crimes for which petitioner had been convicted. Earley rejected the contention that reasonably competent counsel aware of the facts that (1) the gun used to kill Michael Taylor had been taken during the commission of the Hassan crimes for which petitioner stood convicted and (2) Exhibits 47, Z, AA and CC showing petitioner, Lavelle Player and Craig Ross with what could be the same gun used to kill Teheran Jefferson and Bobby and Eric Hassan, could conclude that it was too dangerous to present an alibi defense starting with Marcus Player. (RHT 4181-4185.) Earley rejected the contention that reasonably competent counsel could have concluded that rather than put on such an alibi which would strain the credibility of trial counsel at the penalty phase in the eyes of the jury, trial counsel could rely on the fact which the jury knew that the prosecution did not believe they could prove petitioner's involvement in the Taylor crimes. (RHT 4185-4186.)

g. Gang Membership

Before testifying, Earley had not been apprised that Marcus Player, in his reference hearing testimony, denied that he was a member of the Raymond Avenue Crips though he admitted he associated with people who were. The only material Earley had on this point came from the police who said Marcus Player was a member. Further, Earley was not aware that in their reference hearing testimony, both Wayne Harris and Earl Bogans claimed Marcus Player was in fact a member of the Raymond Avenue Crips in December 1980. Earley admitted that reasonably competent counsel

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petitioner was released from the CYA. In fact, petitioner admitted at trial that the photograph (referred to as trial Exhibit 115-E and a blow up of which was marked and received into evidence as Exhibit 117) was taken in October or November 1980 but not as late as December 1980. (13 RT 3060-3065.)

would have to consider the fact that Marcus Player would deny being a member, only to be contradicted by two other alibi witnesses for petitioner in deciding whether to present an alibi defense beginning with Marcus Player. Earley admitted that reasonably competent counsel could not only consider this but finally determine that it was simply too dangerous to put Marcus Player on as an alibi witness. (RHT 4186-4188 ["Depending on what else you put on for the alibi, what other witnesses, police officers, other evidence."].) Earley also admitted that at the time his reports (Exhibits 109 and 110) were prepared, he was not aware of what Wayne Harris was going to say at the reference hearing nor was he completely aware of what Earl Bogans was going to say, although as to Bogans, Earley testified he "probably had some idea." (RHT 4188: 17-23.)

Earley conceded that if Wayne Harris and Earl Bogans testified that petitioner was a member of the Raymond Avenue Crips in December 1980, such testimony would be contradictory to petitioner's own guilt phase testimony that he was not a member at that time. (RHT 4188-4189; see 13 RT 3068: 10-12 [petitioner testified he had stopped being a Raymond Avenue Crip in 1979].) When Earley was asked the effect of Wayne Harris and Earl Bogans testifying as alibi witnesses who would impeach petitioner's trial testimony that he was not a Raymond Avenue Crip in December 1980, Earley initially refused to directly answer the question. (RHT 4189: 8-21.) Ultimately, Earley implicitly acknowledged the significance of this impeachment by answering: "I don't know if I would use the word 'devastating impeachment.'" (RHT 4190: 1-2.)

Earley was unaware that at the reference hearing both Bogans and Harris identified Craig Ross, Evan Jerome Mallet, Lavelle Player, Michael Player, Marcus Player and petitioner as members of the Raymond Avenue Crips in December 1980. (RHT 4225-4226.) In petitioner's trial testimony, petitioner claimed that Craig Ross, Evan Jerome Mallet and Marcus Player had been members at one time. Petitioner claimed both Ross and Mallet had stopped being members long before each was arrested. He similarly claimed Marcus Player had stopped being a member long before

he was arrested. (13 RT 3043.) Petitioner also claimed Lavelle Player was a Raymond Avenue Crip at one time, but quit long before he was arrested. (13 RT 3045.)

In his reference hearing testimony (of which Earley was unaware), Wayne Harris also admitted that he was a member of the Raymond Avenue Crips in December 1980. (RHT 4226.) Nevertheless, Earley stated in his final report (Exhibit 110, page 20) that "'All but Wayne Harris may have had gang associations.'" (RHT 4226.) This would be inconsistent with Harris's own reference hearing testimony. (RHT 4226-4227.) Similarly, Earley was not aware that in their reference hearing testimony, Bogans and Harris not only confirmed the prosecution gang expert's testimony at petitioner's trial as to who were members of the gang in December 1980, they also corroborated the expert's testimony as to the gang monikers of each of those persons. (RHT 4227.) When asked whether reasonably competent counsel "could conclude that not only is it not helpful to have Harris and Bogans contradict the petitioner's own claim that he wasn't a member of the gang in December 1980, but that had those people corroborate[d] the gang expert's own testimony doesn't help Mr. Champion's position? Reasonably competent counsel could have thought that way," Earley admitted: "I think reasonably -- I think reasonably competent counsel, when they get all of this information, and given what the gang expert says, had some real questions as to whether he puts on something that flies in the face of what everybody else says. (RHT 4227: 13-26.)

In Earley's final report (Exhibit 110, page 18), he stated: "'For example, it would have been possible to demonstrate that Steve Champion was no longer closely associated with Mr. Ross.'" (See RHT 4240: 5-13)[194] In his reference hearing

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[194] In his earlier report (Exhibit 109, page 4), Earley wrote: "' Had Mr. Skyers recognized the import of the information which was available to him through discovery and the most rudimentary of investigative efforts, he would have impeached the prosecutor's gang expert in his opinion that petitioner was linked to Michael Taylor's killing through graffiti, his membership in the Raymond Street Crips, and his close association with Craig Ross.'" (See, RHT 4247: 4-12.) Earley rather grudgingly appeared to concede that the reference hearing testimony from Earl Bogans and Wayne Harris concerning petitioner's gang membership and the gang membership of others, testimony which corroborated the accuracy of the prosecution's gang expert's testimony at petitioner's trial, and Wayne Harris's testimony that Craig Ross

testimony, Wayne Harris testified that when petitioner and Harris were released by deputies, they went to petitioner's home where they found Craig Ross inside the Champion residence with petitioner's brother and mother. (RHT 2761-2762.) Earley admitted that before he wrote his report (Exhibit 110), he was not aware that Harris claimed Craig Ross was present in the Champion residence in the early morning hours of December 28, 1980. (RHT 4241.) After again conceding that Ross's participation in the Taylor crimes was clearly established through the fingerprints he left behind, Earley nevertheless refused to concede that evidence Ross was in Champion's home shortly after the Taylor murder and related crimes were committed undermined any claim that petitioner was no longer closely associated with Ross. (RHT 4241: 26; 4242: 1-18 ["I don't think it undermines it. I think it's a factor."].) Earley expanded on that answer by testifying: "I don't think the fact that he shows up after a car crash in a home nearby I don't believe undermines that alone." (RHT 4243: 15-17)[195]

Earley also did not agree with a characterization that reasonably competent counsel could see the picture as one in which "Ross was looking for a safe house where he knew he would be protected from being turned over to the police because he had just committed a murder and rape and other crimes at the Taylor residence and no better place to go than Steve Champion's house." (RHT 4243: 18-26.) When asked whether reasonably competent counsel could have reasoned the issue in that fashion,

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was in petitioner's home shortly after the Taylor crimes were committed, testimony which Earley did not have available when he wrote Exhibit 109, undermine Earley's contention set forth in Exhibit 109 that Skyers would have recognized that he could have impeached the prosecution's gang expert concerning petitioner's membership in the Raymond Street Crips and to a lesser extent his close association with Craig Ross. (RHT 4246-4248.)

[195] Earley was also questioned about Exhibit O (Trial Exhibit 113) the rental agreement in the name of Craig Ross dated December 27, 1980 (the date of the Taylor crimes) and recovered from petitioner at the time of his arrest on January 9, 1981. Although Earley conceded the exhibit "would go to the fact that [Ross and Champion] knew each other", he did not believe this evidence would undermine efforts to disassociate petitioner from Ross. (RHT 4266-4268.) Earley refused to concede that because of the date of the document, the exhibit would demonstrate that the association between petitioner and Ross continued right up to the date of the Taylor crimes. (RHT 4268-4269.) Nevertheless, Earley conceded that reasonably competent counsel could infer petitioner obtained the document from Ross on some date between December 27, 1980 and January 9, 1981. (RHT 4269-4270.) Earley's refusal to accept the obvious is an example of the unreasonableness of his opinions.

even if Earley did not personally agree, Earley attempted to explain the answer by agreeing that "in a vacuum" reasonably competent counsel "may do that. But I don't think reasonably competent counsel can look in a vacuum and take one fact and say this fact alone will make my decision on each one. I think they have to look at it in a whole." (RHT 4244: 1-8.) Nevertheless, when pressed with the fact Earley reached conclusions about what reasonably competent counsel should have done in putting on the alibi evidence without ever having looked at the entire Mallet trial transcript or the reference hearing testimony from the alibi witnesses Earley claimed trial counsel should have presented, his explanation was: "I did not review every document that was available."

h. Inconsistencies in Marcus Player's Reference Hearing Testimony

Earley was not apprised of Marcus Player's reference hearing testimony concerning the alibi he could offer for petitioner. After being apprised of Player's reference hearing testimony on this point, including Player's claim that he had been detained alone at an area different than the area where he and three others were listed in the Lambrecht/Tong report as having been detained by deputies, Earley admitted the location change created an inconsistency with Player's expected testimony as reflected in former Court Exhibit 3 (now Exhibit LLLL), but he would not concede it was a material inconsistency. On the other hand, Earley conceded that it was a different question when one looked to the inconsistency between Player's reference hearing testimony that he was detained alone and the report from Lambrecht/Tong showing he was one of four individuals detained as a group. (RHT 4192-4196 ["I don't necessarily see that as a reason to say I wouldn't put that witness on."])

i. Marcus Player's Lack of Personal Knowledge of the Identity of the Driver of the Player Car

Since Earley did not review Marcus Player's reference hearing testimony, he was not aware that at the hearing Marcus Player testified he never personally saw Michael

Player driving the Player car on December 27, 1980. Rather, Marcus Player testified that he went through a process of elimination to conclude that Michael Player had been driving the car. Earley conceded that conclusion would be inadmissible on objection by the prosecutor. (RHT 4196-4198.) Further, Earley was not aware of anyone identifying the actual driver. Further, he never saw anything claiming that Frank Harris, the registered owner, personally saw Michael Player take the car. (RHT 4198-4199.)[196] Further, in Earley's report (Exhibit 110, pages 19-20) he suggested that Wayne Harris was in a situation similar to petitioner. Earley stated in part: "'In fact, further connecting Harris is the fact that the Taylor getaway car was registered to his father, Frank Harris.'" (See also, RHT 4201: 1-16.) Earley admitted that his report was in error when it described Wayne Harris as the son of Frank Harris. Wayne Harris is in fact Frank Harris' nephew, a more removed biological relationship. (RHT 4201.)

j. Earl Bogans

Although Earley testified he had not seen Bogans' reference hearing testimony, he had reviewed Bogans' Declaration (Exhibit T). In that Declaration, Bogans placed petitioner in Helen Keller Park at 8:00 p.m. on December 27, 1980 playing basketball, smoking and drinking. (Exhibit T, pars. 1 & 2; see also RHT 4207-4208.) Earley acknowledged that petitioner's trial testimony was that he left his home around 10 o'clock to 11:00 p.m. on December 27, 1980. (RHT 4208; see also, 13 RT 3089.) Further, Reginald Champion's statement to trial counsel about petitioner's whereabouts on December 27, 1980 (Exhibit B, p. 12241.) also placed petitioner in his home at approximately the same time petitioner's trial testimony placed him at his home, providing Reginald Champion and petitioner were to be believed. (RHT 4208-4210.) On the other hand, Bogans' Declaration placed petitioner at Helen Keller Park at least two hours earlier than petitioner claimed he left his home. Because Earley had not

[196] See Court Exhibit 26 and Exhibit EEEE, the stipulation concerning Frank Harris and his lack of personal knowledge regarding who, if anyone, took the Player car on December 27, 1980.

reviewed Bogans' reference hearing testimony, he was not aware that Bogans testified at the reference hearing petitioner and the others were at Helen Keller Park at 7:30 p.m., even earlier than the time Bogans placed petitioner at Helen Keller Park in his Declaration. (RHT 4210-4211.)

Earley conceded that reasonably competent counsel would have to be "concerned" that a reasonable juror could find the difference between the time and whereabouts of petitioner as testified to by Bogans at the reference hearing and as testified to by petitioner at his trial to be a material inconsistency, rather than an inconsistency involving a mere trivial detail. (RHT 4211-4214.) Earley had no independent recollection of having seen Exhibit SS, an exhibit containing notes of interviews with among others, Earl Bogans. Those notes reflect that Bogans claimed petitioner had been detained with Marcus Player, Andy Wilson, Willie Marshall and Earl Bogans at 10:30 p.m. at Helen Keller Park. (RHT 4216-4217.) Earley conceded that this information claiming that petitioner had been detained with Marcus Player and others was inconsistent with petitioner's own trial testimony that he had not been detained by deputies when Marcus Player was first detained. Earley also was not aware that in his reference hearing testimony, Bogans confirmed his recollection that petitioner had been detained with these other people. Earley further conceded that a reasonable reading of Exhibit T reflects that at the time the Player car was seen, Bogans, petitioner, Marcus Player and others were still detained by deputies, a circumstance inconsistent with petitioner's trial testimony.[197] (RHT 4220-4222.)

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[197] Contrary to what Earley stated in his final report (Exhibit 110, page 20), that "'as a reasonably competent counsel, I would have had concern about this [the relationship of the friends and acquaintances who were the alibi witnesses], but in balance, these witnesses corroborate what most jurors would find credible evidence, the testimony of police officers. And given the importance of rebutting petitioner's involvement, I would have called these witnesses[]'", the potential witnesses neither corroborated the testimony of the police officers or petitioner's own guilt phase testimony. Despite all of the issues presented with respect to these witnesses, Earley nevertheless continued to maintain that he would have put on the alibi with witnesses Bogans, Player and Wayne Harris. (RHT 4217-4220.)

k. Wayne Harris as an Alibi Witness

Earley had reviewed Harris' Declaration (Exhibit S) prior to preparing his reports (Exhibits 109 and 110). In paragraph 2 of that exhibit, Harris stated that he had been at Helen Keller Park with friends from about 2:00 p.m. on December 27, 1980 until late in the evening. In the next paragraph, paragraph 3, Harris claimed that police officers drove into the park at approximately 9:30 to 10:00 p.m. and detained Harris, petitioner, and Marcus Player. Others were detained but Harris could not recall their identities due to the passage of time. In paragraph 10 of Exhibit S, Harris stated that he would have told trial counsel that petitioner could not have been in the Player car because at the time it drove by, petitioner, Wayne Harris and Marcus Player "[were] still being detained by the police." In paragraph 4 of his Declaration, Harris stated: "'For the next four hours, the police kept us detained with our hands on the police car and...we were not allowed to leave. We had to go from one police car to another until we had been to about six different patrol cars. We were made to tell where we had been and what we were doing there to all six different police patrol officers at each of their vehicles.'" (See, RHT 4224: 12-18.) Paragraph 5 of Exhibit S states: "'We were never allowed to be out of the view of police officers for the entire period.'" (See, RHT 4224: 19-20.)

Earley admitted that in his Declaration, Harris has petitioner detained not only before the Player car is seen and pursued by deputies but for a period of four hours thereafter. Earley further admitted that this is inconsistent with petitioner's trial testimony that he was stopped by police only after the car chase. (RHT 4224-4225.) Of course, Harris' claim concerning petitioner's detention is also inconsistent with Exhibit GG (the Lambrecht/Tong report) as well as the deputies' reference hearing testimony.

l. Wayne Harris' Familiarity with Petitioner's Social History

Since Earley did not review the reference hearing testimony given by Harris, he was not aware that Harris admitted "he had known Mr. Champion for ten years since about 1970; that he never saw any evidence that Mr. Champion was abused, physically

abused by his brothers or anybody else; that Mr. Champion never appeared to be neglected through food, shelter or clothing; that Mr. Champion appeared to be very normal, just like Mr. Harris in all respects; that Mr. Harris was an articulate witness on the stand and indicated that Mr. Champion was a similar kind of individual, able to communicate, able to understand what others were saying so forth and so on. Had no evidence to indicate any kind of mental problems whatsoever." (RHT 4248-4249.)

Earley conceded that such testimony, if given by Harris at petitioner's penalty phase, would not corroborate any claim made by petitioner that he came from an abused and neglected home where he was beaten by his brothers. (RHT 4249-4250.) Earley attempted to minimize the impact of Harris' reference hearing testimony by questioning whether Harris himself provided an appropriate reference point for Harris to compare himself with petitioner, even though Harris grew up in the same neighborhood as petitioner and had known him for 10 years at the time of the Hassan murders. (RHT 4250-4251.) Earley refused to admit that reasonably competent counsel could have determined, from talking with Harris and gleaning everything that Harris said in the courtroom about his background with petitioner, that putting Harris on at the penalty phase in light of what his expected testimony would be concerning the "gang situation," the "Craig Ross situation," the "inconsistency in the alibi with respect to [petitioner's] trial testimony" and now the social history background inconsistent with petitioner's claim of an abused and neglected home was not a tactically sound approach. (RHT 4251-4252 ["I don't believe that they could, unless they did the research, the work, and found out that he is going to testify to."])[198]

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[198] Earley's answer implicitly admits that such a decision by reasonably competent counsel would be considered tactically sound, since the hypothetical question posed to him asked the expert witness to assume that competent counsel had in fact talked with Harris and learned that which Harris would have testified to in the courtroom. Thus, Earley's precondition requiring counsel to do "the research, the work, and [find] out what [Harris] is going to testify to" had been satisfied in the hypothetical question. Therefore, Earley's answer "I don't believe that they could, unless..." admits that if reasonably competent counsel satisfied the precondition, reasonably competent counsel could have reached the conclusion posed in the hypothetical question that not calling Harris could be considered tactically sound.

m. Petitioner's December 28, 1980 Detention; the Detention of Robert Aaron Simms; Latent Fingerprint Comparisons to Exemplar Prints from Known Gang Members; Petitioner's Criminal Liability for Taylor Murder

In Earley's initial report (Exhibit 109, second to last page), Earley stated: "'Reasonably competent counsel would have discovered, presented and argued evidence that Mr. Champion could not have been involved in the Taylor crime as he was in the company of friends who were never considered viable suspects and were detained by Los Angeles County deputies at the time the Taylor crimes were being committed, did not match the description of any suspect 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.'" (See also, RHT 4254-4255.) Earley testified he did not mean to convey petitioner had been detained by LASD personnel when the Taylor crimes were being committed. Rather, Earley conceded that it was petitioner's friends who may have been detained while the Taylor crimes were being committed and, as to those friends detained, they could not be viable suspects. (RHT 4255.)

Before Earley began his testimony, he had not been apprised that various LASD personnel, who testified at the reference hearing, testified to the issue of whether it would have been difficult or impossible for petitioner to have been in the Player car which crashed, to then have escaped the perimeter subsequently established by LASD personnel and finally, to then have walked back into the perimeter when he was detained at some point after 12:30 a.m. on December 28, 1980. (RHT 4256-4257.)[199] When asked to assume hypothetically that former Deputy Naimy, former Sergeant Hollins and one or both of the captains who testified at the reference hearing all testified it would not have been difficult or impossible for petitioner to have escaped the perimeter had he been in the car at the time it crashed, and with that hypothetical in mind, whether testimony of that type would serve to undermine the contention stated in

[199] Exhibit 29-B, the December 28, 1980 field identification card, documents that petitioner was detained at 1:00 a.m. on December 28, 1980.

Exhibit 109 that petitioner "had approached the officers from an area which would have made it very difficult, if not impossible, for him to have been involved [in the Taylor crimes]," Earley conceded that he had not intended to suggest it was physically very difficult or impossible for petitioner to have been where he was when he was detained by LASD personnel and still to have been in the Player car which crashed. (RHT 4257-4259.) Rather, the suggestion that petitioner's conduct did not "sound logically to be what one would [expect] the conduct of someone who was involved" to be was deemed by Earley to be "closer to what I intended, because timing is always an issue. And I was basing it on police reports and affidavits." (RHT 4258.) Rather, petitioner's conduct suggested "a dumb move on the part of Mr. Champion" if he had in fact been in the Player car at the time it crashed "from the way the people ran in the direction [petitioner] was coming from." (RHT 4259.)

Earley agreed that suspects do dumb things "a lot because we read about it a lot." (RHT 4260.) On the other hand, because petitioner's home was within the perimeter, his decision to walk back into the perimeter after escaping, if petitioner had been in the Player car at the time it crashed, could be viewed as a sign of arrogance on the part of petitioner or even overconfidence. (RHT 4262-4263.) When asked to assume one of the LASD captains who testified at the reference hearing, either Captain Martin or Captain Smith, testified that there would be reasons why a suspect who fled the Player car but lived within the perimeter might choose not to immediately go to his home out of fear of leading the police to the suspect's home and, with that assumption, whether that would be an alternative explanation to the explanation petitioner's move was simply "a dumb thing to do," once again Earley conceded "of course it could happen." (RHT 4261-4263.)

Over the weekend preceding Earley's testimony on May 30, 2006, he had an opportunity to read for the first time reference hearing testimony given by former deputies Naimy and Koontz. (RHT 4264, 4273-4274.) Earley testified he "got more to Mr. Naimy than Mr. Koontz." When asked whether he reviewed that portion discussing

Koontz's testimony given in the Mallet case, Earley testified: "I did breeze through there were questions asked about the Mallet case." But Earley did not get to that portion dealing with Koontz's ability to describe the perpetrators in the car with respect to height. (RHT 4264-4265.) When asked to confirm that he had not read the part where Koontz described the persons in the car as "all between four feet tall and six feet six inches tall, between midgets and basketball players," Earley testified: "You know, I breezed through that and I saw that there was some talk about that, but I didn't spend any time on it." (RHT 4265.)

Despite Earley's general unfamiliarity with the details of Naimy's reference hearing testimony, Earley recalled Naimy's description of the opportunity he had to observe the occupants of the Player car as "a very short time," although he couldn't recall the exact words "'a second or two[.]'" (RHT 4273.) Earley conceded that Naimy's ability to describe the fleeing occupants as "taller" or "shorter," his description of the "shorter" occupant as wearing the plaid jacket (inferentially identifying Mallet), the 7 inch differential between the six-foot height of Champion (See, Exhibit 29-B.) and the 5'5" height of Mallet (See, Exhibit 77.) and the 1 inch differential between Mallet's height and the 5' 6" height of Robert Aaron Simms (See, Exhibit 77.), would have allowed Naimy to differentiate the occupants fleeing as "taller" and "shorter," whereas the 1 inch differential in height between Mallet and Simms would not, constituted "just another factor that [reasonably competent counsel would have to] look at" on the issue of whether a jury would place any weight whatsoever on Naimy's identification of Simms as the driver of the Player car. (RHT 4274-4277.)[200]

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[200] See also, Exhibit 7B, part of the LAPD's homicide book chronological log, reflecting a conversation on January 12, 1981 at 9:50 a.m. between Detective DeWitt or Detective Calagna and Deputy Naimy during which Naimy conceded he could not identify Simms as the driver by facial identification. (See also, RHT 4280-4281 ["'Contacted Naimy at Lennox station. States Simms had similar clothing, height, weight, age, and came from cordoned area without reason for being there, but was not absolutely positive that Simms came from car. Has a recollection of how suspect looked when they drove by. It could possibly be brought out with hypnosis.'"].)

Similarly, Earley also conceded that Naimy's ability to identify based upon height differential, the significant height differential between petitioner's height and that of Mallet and the correlative slight height differential between Mallet and Simms would also have to be "a factor that [reasonably competent counsel] would look at." (RHT 4278.)

When asked whether he had read over the weekend that portion of Naimy's reference hearing testimony in which Naimy acknowledged that contrary to his description of the jacket worn by the taller person leaving the Player car as "white" or "light," the jacket could have been "yellow" given the circumstances that the observation by Naimy was made at nighttime with artificial lighting in limited circumstances for Naimy to see the color of the jacket, Earley testified: "I read that portion, I wasn't paying -- I was trying to read it fast, the exact colors, if you let me look at it again." (RHT 4278-4279.) Exhibit 29-B, the aforementioned field identification card, reflects that petitioner was wearing a yellow coat at the time of his detention whereas Exhibit 77 reflects Simms was wearing a white jacket at the time of his detention. (RHT 4279.)

In addition, Earley conceded that in the police reports describing the surviving Taylor victim/witnesses' accounts, including the descriptions of the perpetrators, the description provided by William Birdsong for suspect number two, the person petitioner contends was Robert Aaron Simms, not petitioner, referred to the person wearing "a brown coat." (RHT 4285-4286.) Earley further conceded that "Brown and light are different colors." Further, Birdsong's description of the individual's height as 5'10" was closer to petitioner's height than Simms'. (RHT 4286-4287.) Further, Birdsong's description of suspect number 2's age, 19 to 20 years old, was closer to petitioner's age of 18 than Simms' age of 16. (RHT 4288.) Further, Birdsong described an earring in that suspect's left ear. Cora Taylor's description included an earring in that suspect's left ear as well. (RHT 4288; see also, Exhibit 87.) Mary Taylor's description of suspect 2, as set forth in Exhibit R, included that the individual was 5'5" or 5'8" (the taller one), approximately 160 to 165 pounds, 18 to 19 years old with dark skin and "'an earring in

his left ear. He had big lips and kind of a wide mouth. He was wearing a dark long-sleeved shirt and blue jeans.'" (See, RHT 4289.)[201]

Earley conceded that there did not appear to be anyone who could testify to the number of people in the Player car when it arrived at the Taylor residence. (RHT 4292.) Similarly, Earley was not aware of anyone who could identify the number of persons in the Player car when it left the Taylor residence after the crimes were committed and before the car was observed by police officers. Thus, Earley was not aware of anyone who could say whether the number of people in the car on arrival differed from the number of people at the time of departure or that the number of people in the car at time of departure was the same number in the car when the car was first seen by deputies Naimy and Koontz. (RHT 4292-4293.) Earley also conceded that none of the alibi witnesses Earley believed should have been presented claimed to be able to identify who was actually driving the Player car just before the chase by deputies Naimy and Koontz began. (RHT 4294.) Earley did not see as a matter for concern the possibility that the jury might conclude the claim by Bogans, Marcus Player and Wayne Harris that none could identify the driver of the Player car might be a fabrication to protect a fellow gang member. (RHT 4294.)

Further, even if the surviving Taylor witnesses had been shown a photographic lineup card with Michael Player's picture in it and had not identified him as one of the perpetrators, Earley did not "see that as a reason not to put on other evidence." (RHT 4295.) It was Earley's understanding that Michael Player's fingerprints were run against latent prints obtained from the Player car and the Taylor residence and no match was

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[201] See Exhibit JJ, the two page booking records for petitioner's January 9, 1981 arrest reflecting that petitioner wore an earring in his left ear at the time of booking. Earley admitted reviewing this report as part of the materials in Skyers' possession. (RHT 4377-4378.) Earley further conceded that this report documenting petitioner wearing an earring in his left ear would be evidence that the prosecution could use to help establish petitioner's identification as the second suspect based upon the descriptions given by all three survivors with respect to this characteristic. (RHT 4378: 10-17.) The Naimy/Koontz report (Exhibit 77) does not reflect that at the time of his detention, Robert Aaron Simms was observed to be wearing any earring. (See also, Exhibits 17 C & 17C-1, another copy of the Naimy/Koontz report produced by petitioner as part of the Skyers file.)

made. (RHT 4295-4296.) Earley also acknowledged that the Taylor survivors had not been able to make a field identification of Robert Aaron Simms shortly after the Taylor crimes. (RHT 4297.) Trial counsel testified that at the time of petitioner's trial he was aware that Simms had been released rather than charged with the Taylor murder. Skyers further testified that releasing Simms was consistent with the inability of any of the Taylor surviving victims/witnesses to make a field identification of Simms. (RHT 1797.)

Although Earley spoke with Mallet's trial counsel "very briefly about [petitioner's] case," he never asked Mallet's counsel whether counsel had made an effort to obtain exemplar prints of Robert Aaron Simms to compare with latent prints obtained from the Taylor crime scene and Player automobile. (RHT 4297.) Further, Earley could not recall seeing anything indicating that petitioner's counsel or anyone representing petitioner had talked to Mallet's counsel on that subject. (RHT 4297-4298.)[202]

Earley appeared to concede that in order to conduct a fingerprint comparison between latent prints from the Player car and Taylor residence to exemplar prints from Robert Aaron Simms, trial counsel for petitioner would have had to have obtained Simms' exemplar prints from the prosecution or the police through discovery. Earley appeared to suggest that in order to insulate from prosecutorial discovery defense counsel's focus on Simms as one of the Taylor perpetrators, trial counsel's discovery request would request exemplar prints from a wide variety of possible suspects. However, when Earley was asked whether in the event trial counsel failed to present

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[202] In her October 14, 2005 letter identifying potential witnesses petitioner intended to call at the reference hearing, petitioner's counsel listed Charles Gessler as one such potential witness. In petitioner's counsel's November 9, 2005 letter to respondent's counsel, a copy of which was sent to this court, in the final paragraph of page 1, petitioner's counsel expanded on the anticipated testimony to be offered by "Charles Gessler, Esq." "Only preliminary contact was made with Mr. Gessler. As stated in the 10/15/05 [*sic*] memorandum, if called Mr. Gessler's testimony will relate to the Taylor crimes and specifically, the investigation and preparation undertaken by him as counsel for Evan Jerome Mallet. At this time, petitioner does not intend to call Mr. Gessler as an expert. Of course, petitioner did not call Mr. Gessler as a witness. (See, Evid. Code, § 412 ["if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].)

evidence of a positive comparison involving Simms' prints, the prosecution could have argued to the jury that the failure of petitioner's trial counsel to put on an expert to say that a positive comparison had been made between Simms' exemplar prints and one or more latent prints obtained from the Taylor residence or Player car meant that no such match had been made, Earley testified that he "would have to reread the cases [cited to him by respondent's counsel, *People v. Vargas* (1973) 9 Cal.3d 470, 475 and *People v. Kaurish* (1990) 52 Cal.3d 648, 679-680] to see if they are allowed to do that completely." (RHT 4298-4301.)[203]

When asked whether he had seen any evidence that a Simms' exemplar card existed as of the time of petitioner's trial, Earley answered: "I have -- I did not see anyone request or see an exemplar card." Earley further testified that "[he doesn't] know one way or the other whether there was [a Simms' exemplar card available in 1982 when petitioner's case was tried]." (RHT 4310.) Earley conceded "you certainly could not make a comparison with police exemplar cards [] that don't exist." (RHT 4310-4311.)

Earley further conceded that he would like to know whether Mallet's trial counsel had made efforts to obtain Simms' exemplar prints because "if he [Mr. Gessler] made

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[203] "It is now well established that although *Griffin* [*v. California* (1965) 380 U.S. 609] prohibits reference to a defendant's failure to take the stand in his own defense, that rule 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]' [Citations.]" (*People v. Vargas*, *supra*, 9 Cal. 3d at p. 475.) "Prior to making his closing argument, defendant asked that the prosecutor be barred from commenting on [the defense expert's] failure to appear at trial. He contended, as he does on appeal, that prosecutorial comment would impermissibly burden his exercise of the attorney-client privilege [citation], just as comment on a defendant's failure to take the stand impermissibly burdens the privilege against self-incrimination [citation]. The court ruled in defendant's favor. Nevertheless the prosecutor, while not mentioning [the defense serologist] by name, referred to the absence of a defense serologist and used the pronoun 'her.' Defendant maintains this is prejudicial error. We disagree. The prosecution is entitled to comment on the state of the evidence, including the lack of conflicting serological evidence. (See, *People v. Vargas* (1973) 9 Cal. 3d 470, 475-476 [108 Cal.Rptr. 15, 509 P.2d 959].)" (*People v. Kaurish*, *supra*, 52 Cal. 3d at p. 680.) Given the fact that petitioner's *Strickland* expert has in excess of 30 years experience, much of it dealing with capital case litigation, and given his role as an expert in the matter *sub judice*, Earley's lack of familiarity with this most basic and well-established black letter rule of law is to say the least "surprising," especially in light of this rule of law's significance to the issue of whether petitioner's trial counsel was deficient for not seeking to have the latent prints from the Taylor crime scene and the Player car compared with exemplar prints of Robert Aaron Simms.

reasonable steps and they [Simms' exemplar prints] just weren't available, yes, that would weigh into whether a reasonably competent lawyer, if he wanted to would be successful." (RHT 4313.) Earley admitted that he knew Mr. Gessler well and he "could ask him [if he tried to obtain Simms' exemplar prints]." (RHT 4313.) As previously noted in footnote 202, *ante*, at page 359, petitioner's habeas counsel initially listed Mr. Gessler as a possible witness at the reference hearing expected to testify "to the Taylor crimes and specifically, the investigation and preparation undertaken by him as counsel for Evan Jerome Mallet." At no time did Earley testify, even on re-direct examination, that he had spoken to Mr. Gessler on this issue. Furthermore, petitioner never called Mr. Gessler on this or any other issue.

Deputy Koontz testified at Mallet's preliminary hearing on January 23, 1981 that Simms was in custody at the time of the December 28, 1980, 1:30 a.m. field show up involving Simms and the Taylor witnesses. After this show up, Simms was not arrested for murder; rather, he was let go, although Koontz could not say whether he was let go "that night [*sic*]." (RHT 1789-1792, reading from Koontz's Mallet preliminary hearing testimony, 2 MPHT 277 et seq.)

In light of Exhibit IIII (the August 3, 2006 reports from DA Investigator Briggs documenting his unsuccessful efforts to locate exemplar prints of Robert Aaron Simms existing in 1982), Exhibit HHHH and Court Exhibit 34 [dealing with the Stipulation that a match was made between a latent print lifted from the kitchen of the Taylor residence and exemplar prints of Robert Aaron Simms generated following a 1987 arrest], Deputy Koontz's testimony at Mallet's preliminary hearing and petitioner's deliberate tactical decision at this hearing not to call Mallet's trial counsel, petitioner has failed to present evidence establishing by a preponderance of the evidence that exemplar prints for Robert Aaron Simms did in fact exist at the time of petitioner's trial, a failure which undermines any effort to establish deficient performance by trial counsel arising from

any failure to obtain a latent print comparison prior to petitioner's 1982 trial.[204] (See also, fn. 202, *ante*, at p. 359, citing Evid. Code, § 412.)

Petitioner has maintained throughout these proceedings that four people were involved in the commission of the Taylor murder and related crimes; viz., Evan Jerome Mallet, Craig Ross, Robert Aaron Simms and Michael Player. It is petitioner's contention that by establishing Simms and Michael Player as the two confederates with Mallet and Ross, petitioner is eliminated from criminal responsibility for the Taylor crimes. However, as already noted, there is no witness viewing the events from outside the Taylor residence, equivalent to Elizabeth Moncrief for the Hassan murders, who could identify the number of persons arriving in the Player car at the Taylor residence, the number of persons leaving the Player car to enter the Taylor residence, the number of persons leaving the Taylor residence after the crimes were committed and the number of persons entering the Player car after the crimes were committed before the car left the area. As also noted earlier, at the reference hearing, both Wayne Harris and Earl Bogans testified that the Player car, seen in photographic Exhibits RR 1-8, sat five people. (*Ante*, at pp. 176, 180.) CALJIC 6.11 provides:

> Each member of a criminal conspiracy is liable for each act, and bound by each declaration of every other member of the conspiracy, if that act or declaration is in furtherance of the

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[204] Exhibit HH reflects comparisons of latent prints from the various crime scenes and the Player car with exemplar prints of various individuals, including Michael Player and James Taylor. As reflected in the Stipulation, Court Exhibit 34, and Exhibit HHHH, the James Taylor whose prints were compared is not Robert Aaron Simms who used the false name of "James Taylor" as reflected in the Lambrecht/Tong report (Exhibit GG). When asked if he would agree, "without having spoken to Mr. Gessler, that what happened may well be that both the prosecution and the defense assumed that the James Taylor who was eliminated on the sheet was in fact Robert Aaron Simms, who identified himself to Lambrecht and Tong as James Taylor, rather than a different James Taylor unrelated to Robert Aaron Simms[,]" Earley admitted: "I don't know. I do know that Mr. Gessler's defense for Mr. Mallet is different than a defense would be for Mr. Champion." (RHT 4307.) The referee agrees with respondent's submission that a reasonable mistake in this area by trial counsel and the prosecution cannot establish deficient performance by trial counsel or that an exemplar of Simms' fingerprints was obtained following his December 28, 1980 detention/arrest or that any such exemplar was available for use by trial counsel or the prosecution at the time of petitioner's 1982 trial.

> object of the conspiracy. The act of one conspirator, pursuant to or in furtherance of the common design of the conspiracy, is the act of all conspirators. A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though that crime or act was not intended as part of the agreed-upon objective, and even though he was not present at the time of the commission of that crime or act.
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and if so whether the crime alleged in counts, [fill in the blank], was perpetrated by a co-conspirator or co-conspirators, in furtherance of that conspiracy, and was a natural and probable consequence of the agreed-upon criminal objective of that conspiracy.

(RHT 4315-4316.)

Earley testified he was familiar with this jury instruction. (RHT 4316-4317.) He further conceded that had trial counsel raised a full defense at the penalty phase in an effort to establish that petitioner was not involved in the Taylor crimes, petitioner's criminal responsibility for the Taylor crimes could be found by a jury through use of CALJIC 6.11, even if petitioner had not been present at the time those crimes were committed, "assuming that there is evidence of an underlying conspiracy, and

agreement." (RHT 4314.)[205] Earley further admitted that the prosecution theory advanced before the penalty phase started had been that there was a conspiracy among members of the Raymond Avenue Crips to kill and rob dope dealers. (RHT 4315.)[206] Early also conceded that the jury had convicted both petitioner and Ross for the double murderers and robberies of Bobby and Eric Hassan. (RHT 4315.)

In spite of his earlier concessions and admissions in this area, Earley refused to admit that had trial counsel fought the battle to prove petitioner was not present at the Taylor crime scene, the prosecution could have requested CALJIC 6.11 at the penalty phase to establish petitioner's criminal responsibility for the Taylor crimes as Penal Code section 190.3, factor (b), aggravating evidence. (RHT 4317-4318.) However, Earley had to concede that he had not considered the possibility of petitioner's liability under CALJIC 6.11 in the event petitioner was not physically present at the Taylor crimes when Earley reviewed the material. (RHT 4318 ["I wasn't thinking of that, because if the District Attorney, if he was thinking of it, would have asked for it"].)[207]

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[205] Trial counsel readily acknowledged that while not charged, conspiracy was the prosecution's theory which tied together because of the similarities between the charged and uncharged murders and related crimes. (RHT 1054-1055, 1084.)

[206] "Before the prosecutor's opening statement, counsel for defendant Champion objected to the evidence of Jefferson's murder, without, however, stating grounds for the objection. When the trial court asked for 'the People's position on this issue,' the prosecution responded with a lengthy offer of proof, and explained that the evidence was admissible to show an ongoing conspiracy by defendants to murder drug dealers in their neighborhood, because the crimes exhibited a similar modus operandi, and because the Jefferson murder showed that in this case defendants harbored the intent to kill Bobby and Eric Hassan and (as to defendant Ross) Michael Taylor." (*People v. Champion* (1995) 9 Cal.4th 879, 918.) Given (1) the jury's convictions of petitioner and Ross for the Hassan robberies and murders, crimes committed by the two defendants with two others; (2) the fact Evan Jerome Mallet could not have been one of those two others due to his incarceration for the November 19, 1980 robbery (petitioner would not bail Mallet out until after the Hassan crimes—see, Exhibit N, Trial Exhibit 114.); and (3) petitioner and Earley's concession that Ross and Mallet were two of the Taylor crime perpetrators, Earley's condition precedent that there be "evidence of an underlying conspiracy and agreement" to support CALJIC 6.11 extended liability is satisfied.

[207] One fallacy of Earley's statement regarding the prosecutor not asking for CALJIC 6.11 at petitioner's trial is that trial counsel did not put on an alibi defense in an effort to raise a reasonable doubt that petitioner was in fact one of the perpetrators physically present at the Taylor crime scene. There was no need for the prosecutor to present a theory of CALJIC 6.11 co-conspirator extended liability. Skyers testified that if he had put on a defense to the Taylor crimes, the prosecution could have attempted to establish petitioner's liability for those crimes on the theory that they were the natural and probable or foreseeable consequence of the conspiracy to rob and murder which culminated in the earlier robberies and murders of Eric and Bobby Hassan. (RHT 5077-5079.) Earley erroneously claimed that trial counsel did in fact put on alibi evidence that petitioner was at home at the time of the Taylor crimes. (RHT 4319:

n. Gang Graffiti Depicting "$" and Petitioner's Gang Moniker "Treacherous"

In his report (Exhibit 110, page 19), Earley wrote: "For example, the prosecution had a police officer, Ronnie Williams, qualified as a gang expert, examine some photographs of graffiti and testify that the graffiti identified Mr. Champion a [*sic*] one of the authors and as an OG or original gangster. And that the graffiti indicated that the money was to be taken in a robbery. All of which could support the implication that Mr. Champion had been involved in the Taylor robbery." (See also, RHT 4321-4322.)

Earley conceded that his reference to testimony by Ronnie Williams identifying petitioner as the author of the graffiti was intended to convey that petitioner was the author of the graffiti. After respondent's counsel referred Earley to the California Supreme Court's discussion of this issue (*People v. Champion*, *supra*, 9 Cal.4th at page 924, fn. 14.), Earley conceded that Deputy Williams did not testify petitioner wrote the graffiti. (RHT 4324: 3-6.)

Nevertheless, in the same report Earley appeared to criticize the prosecution for failing to seek a handwriting comparison between the graffiti and handwriting samples the prosecution had obtained from petitioner to determine whether a match could be established ["'Although the prosecution had obtained handwriting samples of Mr.

11-13 ["If he is thinking of that, when he was putting on the evidence to begin with, he put an alibi evidence on that he was at home. So he is putting it on --"].) When respondent's counsel pointed out to Earley that trial counsel did not put on an alibi that petitioner was at home during the Taylor crimes; rather, petitioner was asked on cross-examination his whereabouts at the time of the Taylor crimes, Earley contended "Well, then he put the mother on and asked some questions of the mother in the guilt phase." (RHT 4319: 14-18.) Earley failed to directly respond to the follow-up question whether in fact the mother was asked on cross-examination by the prosecutor concerning petitioner's whereabouts on the date of the Taylor crimes rather than trial counsel calling the mother to elicit alibi testimony for those crimes on direct examination. (RHT 4319-4321.) In fact, it was the prosecutor on cross-examination of petitioner's mother at the guilt phase who interjected the issue of petitioner's whereabouts on December 27 and 28, 1980. (12 RT 2833-2840.) Petitioner's mother placed him at home throughout the evening on December 27 and by inference throughout the early morning hours of December 28, 1980. (12 RT 2834-2839.) On his re-direct examination, trial counsel did not ask any questions regarding petitioner's whereabouts on December 27 or 28, 1980. (12 RT 2851-2856.) A second fallacy to Earley's statement is his failure to recognize that the decision of the prosecutor not to ask at the penalty phase for CALJIC 6.11 extended liability for co-conspirators was fully consistent with the California Supreme Court finding that there was "no reasonable possibility that the outcome of the penalty phase was affected by the trial court's failure to instruct the jury that it could consider 'other crimes' evidence [specifically as to petitioner, the Jefferson and Taylor murders] only if it found beyond a reasonable doubt that defendants committed those crimes." (*People v. Champion*, *supra*, 9 Cal.4th at pp. 949-950.)

Champion, there was no effort made to match it to or distinguish it from the graffiti.'"]. (RHT 4324.) When Earley was confronted with the obvious problem that his criticism of the prosecution's failure to do handwriting comparisons was irrelevant in light of Deputy Williams' actual testimony which failed to claim petitioner was the author of the graffiti, he conceded the point.

The particular exhibit under discussion is Trial Exhibit 179 (part of Exhibit 55 which includes Trial Exhibits 177, 178 & 179), a color blowup of which is Exhibit 100. Earley admitted that the prosecution's theory at trial with respect to Trial Exhibit 179 "was this graffiti shows a robbery that was committed near the area at the time. And that Treacherous relates to Mr. Champion. So their theory was Mr. Champion committed the Taylor homicides [*sic*], or was involved with the Taylor homicide and robbery." (RHT 4326: 22-26; 4327: 1-2.) Earley also admitted that in Deputy Williams' trial testimony, Williams only relied upon the presence of the "$" in Trial Exhibit 179 to indicate that money was obtained in a robbery or burglary; Williams did not rely in his trial testimony on the disputed words "Do Re Mi" in the photographic exhibit to support that premise. (RHT 4327.)

As previously noted, although Earley conceded that, if Earl Bogans and Wayne Harris in their reference hearing testimony in which they identified members of the Raymond Avenue Crips and their gang monikers, corroborated Deputy Williams' trial testimony regarding gang membership and monikers, reasonably competent counsel would have "had some real questions as to whether he puts on something that flies in the face of what everybody else says." (RHT 4227.) Earley nevertheless claimed that such testimony would "not necessarily corroborate [Williams' trial testimony] if there is more than one person with the same moniker." (RHT 4329-4331: 1-12.) However, whether or not more than one member of the Raymond Avenue Crips shared the same gang moniker, reference hearing testimony from Harris and Bogans, which was fully consistent with Deputy Williams' trial testimony identifying specific members of the Raymond Avenue Crips, as well as those members' gang monikers, corroborates

Williams' trial testimony. Earley's contention that this testimony from Harris and Bogans would not necessarily corroborate Williams' testimony is unreasonable.

In light of the prosecution's theory that the graffiti identified in Trial Exhibit 179 connected petitioner to the commission of the Taylor murder and related crimes, Earley conceded that to fit within that theory, the graffiti would have had to have been written after the December 27, 1980 Taylor murder and related crimes (RHT 4337.) Although Earley could not recall the specifics of petitioner's trial testimony with respect to when the graffiti appeared on the wall, he recalled that "it was long enough [before the Taylor crimes] that it obviously wouldn't be related to the Taylor crime." (RHT 4337: 1-15.) Thus, Earley admitted that under the prosecution theory, the graffiti would have had to have been written "many years after the petitioner himself testified it had appeared...[.]" (RHT 4337: 16-19.)[208]

In Earley's report (Exhibit 110, page 19), he also wrote as part of his criticism: "Second, the photograph of the graffiti was taken nearly two years after the Taylor crimes. No effort was made to date the existence of the graffiti at any time near the time of the offenses." In that same paragraph of his report, Earley also wrote: "'Finally, because there were other names on the walls, simple investigation yielded a witness who would have testified that he wrote the graffiti, when he wrote it, and that it did not say or mean what Williams said it said or meant.'" (See also, RHT 4337-4338.)[209]

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[208] See, 13 RT 3031-3032, 3110, that portion of petitioner's direct and re-direct examination at trial in which he denied writing the word "Treacheous" in Trial Exhibit 179 and claiming that the graffiti in that photograph "ha[d]...been on that wall[] for at least 6 or 7 years." (See also reference hearing testimony from trial counsel RHT 1854-1865 [identifying Trial Exhibit 179 as the photograph shown by Skyers to petitioner during his trial testimony and to which petitioner addressed his testimony that the graffiti had been written 6 or 7 years earlier], 5037-5049 [reaffirming that Trial Exhibit 179 was the only photograph shown to petitioner, was the photograph to which petitioner addressed his trial testimony that the graffiti had been written 6 or 7 years earlier and admitting that in his reference hearing testimony on re-direct examination, Skyers had mistakenly identified Trial Exhibit 177, rather than Trial Exhibit 179, as the photograph shown to petitioner]; compare RHT 5003-5007 [Skyers mistakenly identified Trial Exhibit 177, rather than Trial Exhibit 179, as the photograph Skyers showed petitioner during petitioner's trial testimony and to which petitioner's trial testimony regarding the age of the graffiti was directed].)

[209] In the final analysis, the only difference petitioner has identified between Williams' trial testimony as to what the graffiti in Trial Exhibit 179 says and what petitioner has proffered as evidence in this hearing centers on the words Williams testified at trial stated "Do Re Mi." From a Xeroxed black and white copy of Trial Exhibit 179 and a color blow up photocopy of Trial Exhibit 179 (reference hearing Exhibit 100)

As part of petitioner's documentary support for his Petition for Writ of Habeas Corpus filed with the California Supreme Court, petitioner submitted the Declaration of Karl Owens (reference hearing Exhibit LL). Earley admitted that from Owens' Declaration, Owens was claiming that he wrote the graffiti in Trial Exhibit 179 in the early 1980s. (RHT 4338-4339.) Earley refused to directly answer the question whether putting Owens on to testify with his claim that the graffiti was written in the early 1980s would be inconsistent with petitioner's guilt phase testimony that the graffiti had been written six to seven years before either petitioner testified at his trial (1982) or before the Taylor crimes were committed in December 1980. (RHT 4339-4340.) The referee finds that a reasonable competent trial counsel would not seek to call Owens as a witness.[210]

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provided to Earley by petitioner's habeas counsel without showing Earley the actual trial photograph, Trial Exhibit 179, Earley could clearly make out the word "Do" and certain letters from the remaining two words which suggested to Earley the phrase actually reads "Do or Die." (RHT 4331, 4375-4377.) As previously noted, Deputy Williams trial testimony relied exclusively on the "$" in Trial Exhibit 179 to suggest a robbery or burglary; he did not rely on the phrase " Do Re Mi" to make that suggestion. Even petitioner's "gang expert," Steve Strong, admitted that the "$" would be consistent with robberies and in particular a "robbery/murder of a dope dealer[.]" (RHT 4881: 13-19; see also, RHT 2923-2924.) Of course, petitioner's jury had the opportunity to look at Trial Exhibit 179 and to determine for itself before convicting petitioner of the Hassan murders and robberies what those words actually were and whether Williams' trial testimony was credible and reasonable.

[210] See, RHT 1861-1863 for a verbatim recitation of Exhibit LL. As petitioner's trial counsel testified in this proceeding, had Karl Owens been called by trial counsel at the penalty phase, his testimony would communicate to the jury that petitioner "at best [is] wrong as to when that graffiti appeared on the wall [] and that [] the graffiti appeared on the wall at a time after the [] Taylor crimes were committed...[.]" (RHT 1864: 2-10.) Unlike petitioner's *Strickland* expert, trial counsel readily and reasonably conceded that it would not have been helpful to petitioner's interests to have Owens testify in the manner set forth in his Declaration because, from that information, the jury could further conclude petitioner had lied when he claimed the graffiti had been on the wall long before the Taylor crimes were committed. Trial counsel further agreed that presenting such a witness would "create the kind of loss of credibility at penalty phase that [trial counsel was] trying [his] utmost to avoid[.]" (RHT 1864.) Of course, petitioner has failed to produce at this reference hearing Karl Owens or any other witness claiming to have been the author of the graffiti in Trial Exhibit 179 or to corroborate petitioner's trial testimony as to when the graffiti in that exhibit was written. In fact, with the exception of the "R.A.C." graffiti, the reference hearing testimony of petitioner's "gang expert," Steve Strong, corroborated the prosecution's theory supported by the trial testimony of Deputy Williams as to when the graffiti in Trial Exhibit 179 was written and undermined the credibility of petitioner's trial testimony on that issue. (RHT 4867-4879.) However, by contending that the "R.A.C." graffiti had been written significantly earlier than the rest of the graffiti in the photograph, Strong's reference hearing testimony is inconsistent with the claim by Karl Owens as set forth in his Declaration that he wrote all of the graffiti in that photograph in the early 80s. (RHT 4872-4874.)

5. The Jefferson Murder/Robbery

In Earley's preliminary report (Exhibit 109, first paragraph of last page), he addressed the Jefferson murder/robbery: "As to the Jefferson homicide, reasonably [*sic*] competent counsel would have discovered and produced evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes. As there was no physical or witness evidence to Mr. Champion's (or any other identifiable person's) involvement in the Jefferson crimes, it is likely that had [counsel] done so, introduction of the Jefferson crimes would have been precluded on grounds that its introduction violated Mr. Champion's due process rights, and Evidence Code §§ 352 and 1101. Finally, reasonably competent counsel would have requested a mistrial or to have the court strike testimony once the prosecution's offer of the proof of the similarity of the Jefferson crimes did not conform with the evidence actually admitted at trial. Reasonably competent counsel would have objected to the prosecution's conspiracy evidence and argument." (See also, RHT 4344.)

While the Supreme Court in its December 10, 2003 order expanded the scope of the term "mitigating evidence" as used in the original reference order filed September 10, 2003 to include "evidence refuting petitioner's involvement in the Taylor and Jefferson homicides[,]" the five specific reference questions do not address any allegation of ineffective assistance of counsel at the guilt phase of petitioner's trial.[211] Nevertheless, Earley's criticism of petitioner's trial counsel with respect to the Jefferson crimes clearly refers to Earley's perception of trial counsel's failures at the guilt phase to exclude the evidence, or once the evidence was admitted, to seek a mistrial in light of the prosecution's alleged failure to prove up the circumstances permitting admissibility as set forth in the prosecution's offer of proof, matters which are irrelevant to this

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[211] By limiting its OSC to petitioner's claim that petitioner's trial counsel rendered ineffective assistance of counsel at the penalty phase of petitioner's capital case trial, the California Supreme Court has determined that petitioner failed to make a prima facie case as to the other issues presented in his Petition for Writ of Habeas Corpus, including all guilt phase claims. (*People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37, citing *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.)

reference hearing.[212] When directly confronted with that criticism, Earley appeared to concede the point. (RHT 4345: 2-21.)[213]

In contrast to Exhibit 109, Earley wrote in his subsequent report (Exhibit 110, page 21) with respect to the Jefferson crimes: "Rebuttal of Participation in Jefferson Killing. In November of 1981, the prosecution advised counsel for Mr. Ross and Mr. Champion that he thought petitioner and Ross were guilty of the Jefferson killing, that they decided to hold the filing of this charge in abeyance until the conclusion of the

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[212] In affirming petitioner's convictions and death sentence on direct appeal, the California Supreme Court in dicta addressed the concerns referred to in Exhibit 109. "Before the prosecutor's opening statement, counsel for defendant Champion objected to the evidence of Jefferson's murder, without, however, stating grounds for the objection. When the trial court asked for 'the People's position on this issue,' the prosecution responded with a lengthy offer of proof, and explained that the evidence was admissible to show an ongoing conspiracy by defendants to murder drug dealers in their neighborhood, because the crimes exhibited a similar modus operandi, and because the Jefferson murder showed that in this case defendants harbored the intent to kill Bobby and Eric Hassan and (as to defendant Ross) Michael Taylor. Defense counsel made no further objection to the admission of the evidence of the Jefferson murder until the conclusion of the prosecution's case, when the parties were discussing the admissibility of the prosecution's exhibits." (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) In ruling on these contentions, the Supreme Court in dicta held: "Assuming for the sake of argument that we may consider the issue [that evidence of the Jefferson killing should have been excluded because it was irrelevant], we find any error in admitting the evidence of Jefferson's death to be harmless. As defendants themselves point out, the prosecution offered no evidence directly connecting defendants to Jefferson's death. Thus it seems unlikely that the jury gave the evidence substantial weight. We conclude there is no reasonable probability that the outcome of the trial would have been different if the trial court had excluded the evidence of Jefferson's murder. [Citation.] Defendants accuse the prosecutor of misconduct, asserting that his offer of proof, setting forth the evidence he intended to introduce regarding Jefferson's murder, misled the trial court into believing that the prosecution would be able to link the killing of Jefferson to defendants. We have examined the offer of proof and find no inaccuracies. In any event, defendants made no objection, after the jury heard the evidence relating to Jefferson's death, on the ground that the evidence was inconsistent with the prosecutor's offer of proof. They thus have not reserved the right to raise the issue on appeal. [Citation.]" (*Id.* at p. 919.)

[213] "[Penal Code, §190.3,] [f]actor (b) expressly makes a capital defendant's other violent crimes admissible on the issue of penalty. Evidence Code § 352 therefore does not permit the trial court to exclude from a capital penalty trial *all* evidence of such a crime on grounds that the jury's consideration of the episode would be more prejudicial than probative. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 586 (italics in original); see also, *People v. Cunningham* (2001) 25 Cal.4th 926, 1017 ["[s]ection 190.3, factor (b), permits the trier of fact to take into consideration at the penalty phase 'evidence of violent criminality committed at any time in the defendant's life, and whether or not adjudicated, to show his propensity for violence and to assist the sentencer in determining whether he is the type of person who deserves to die. [Citations.] The prosecution may prove commission of such conduct by any competent means, and may also place the incident "in context, so that the jury has full opportunity, in deciding the appropriate penalty, to determine its seriousness." [Citations.] The trial court has no discretion to exclude such *incidents* under Evidence Code section 352 on the ground they are substantially more prejudicial than probative at the penalty phase. [Citation.] Nor is the defendant entitled to preclude admission of the graphic or sordid details of his factor (b) crimes by stipulating to any resulting conviction or to a sanitized version of the facts surrounding the offense. [Citations.]' [Citations.]" (italics in original, bold added)].)

Taylor and Hassan murder cases and that evidence of the Jefferson murder would be presented as a factor in aggravation at the penalty phase in that trial. In June, 1982, Deputy District Attorney Semow informed trial counsel, by letter, that he intended to introduce evidence of the Jefferson homicide at both the guilt and penalty phases of the Champion and Ross trial. The prosecution presented very little by way of evidence in the Jefferson case. There were some similarities between Jefferson, Taylor, and Hassan, those being that there was no sign of forced entry, some of the residences appeared to be ransacked, the victim had been tied, and killed execution style with a gun, and Mr. Jefferson was a marijuana user and dealer. According to police reports, the time and date of Mr. Jefferson's death was unknown. The number of perpetrators was unknown, the weapon that was used to kill him was narrowed down to a .32, .38 caliber or .357 caliber weapon. Trial counsel, by his own admission, performed absolutely no investigation into the facts of the Jefferson killing and made no efforts to discover information which would exonerate petitioner of this crime." (See also, RHT 4345-4346.)[214]

Earley conceded that his characterization of the Jefferson crimes vis-à-vis the Hassan and Taylor murders as set forth in Exhibit 109 ["the Jefferson case was not similar to either the Hassan or Taylor crimes"] and his characterization in Exhibit 110 ["[t]here were some similarities between Jefferson, Taylor, and Hassan,...."] differed. (RHT 4346-4347.)[215] When asked what Earley had "reviewed between the time Exhibit

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[214] Even as to those similarities identified by Earley, he failed to articulate fully the degree of similarities identified. For example, while pointing out that "Jefferson was a marijuana user and dealer[,]" Earley failed to point out that evidence adduced at petitioner's trial established that both Bobby Hassan and Michael Taylor were drug dealers, like Jefferson. (*People v. Champion*, *supra*, 9 Cal.4th at p. 898 ["Bobby Hassan (an unemployed carpenter who sold marijuana and sometimes cocaine)"]; *id.* at p. 900 ["Michael [Taylor] (who sold marijuana)"].)

[215] Thereafter, when asked to identify "any transcript, police report, declaration, investigator summary, that caused [Earley] between the report of [Exhibit] 109 being prepared, and the report of [Exhibit] 110 being prepared to change [his] assessment of the lack of similarity to similarities[,]" Earley responded: "I do not -- well, I don't believe that is a -- I don't believe that's an accurate representation, and on the first one I said there was [*sic*] no similarities. I said the case was not similar to either one, which doesn't mean that the fact there was a gun used in each one, that I was denying that fact or didn't know that fact. I was just saying that the cases were not similar when I went through, when I wrote -- [] so when I was asked to write a more complete and detailed report, I would have went [*sic*] through at least and look [*sic*] at some

109 was prepared, and Exhibit 110 was prepared, that caused [Earley] to change [his] characterization from that [given] in Exhibit 109 to that [given] in Exhibit 110[,]" Earley answered: "I can't say, I can't answer that question the way it is worded." (RHT 4347: 9-23.)

Nevertheless, Earley's final report (Exhibit 110) failed to note other similarities between the three crimes. One involved the geographical proximity ["862 West 126th Street, Los Angeles" (Jefferson residence) (*People v. Champion*, *supra*, 9 Cal.4th at p. 917); "849 West 126th Street, Los Angeles" (Hassan residence) (*Id.* at p. 898); "11810 1/2 Vermont Avenue" (Taylor residence) (*Id.* at p. 900)] between the three crime scenes.[216] While recognizing that the geographical relationship between the Jefferson and Hassan residences was "within a block," Earley testified that he "wouldn't consider those similarities, if you are talking about just in the area." (RHT 4348-4349.) Nevertheless, he subsequently conceded that geographical proximity "could be" a relevant factor regarding similarities "if all three of them [i.e., the residences] were all within that same geographic area." (RHT 4349.)[217]

A second similarity not recognized by Earley was the temporal proximity between the three crimes. Bobby and Eric Hassan were murdered on December 12, 1980. (*People v. Champion*, *supra*, 9 Cal.4th at p. 898.) Michael Taylor was murdered shortly before midnight on December 27, 1980. (*Id.* at p. 900.) According to the Jefferson police reports in the possession of petitioner's trial counsel (Exhibit 6-b), Jefferson had

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of the reports over again. I thought it was more complete, to talk about what was similar and what was dissimilar about the two crimes." (RHT 4347-4348.)

[216] When rejecting petitioner's claim on direct appeal that the trial court erred in refusing to sever petitioner's case from that of his co-defendant Ross, the California Supreme Court "conclude[d] that evidence of the Taylor murder was admissible against defendant Champion." (*People v. Champion*, *supra*, 9 Cal.4th at p. 906.) In reaching that conclusion, the Court 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, because the killings shared various significant characteristics. The murders occurred in the same neighborhood, 15 days apart." (*Id.* at p. 905.)

[217] Certainly, the California Supreme Court considered the geographical proximity between the Taylor and Hassan residences—" the murders occurred in the same neighborhood, 15 days apart"— as one of the "various significant characteristics" shared by the two sets of murders.

been murdered sometime on either November 14 or November 15, 1980. Nevertheless, when Earley was asked about the use of temporal proximity as a factor establishing similarity between the Jefferson and Hassan crimes, Earley testified: "Well, I don't see that as 1101 type evidence, because then 1101 would let in any crime as a specific time, I don't see that." (RHT 4350: 2-9.) In response to the follow-up question seeking to confirm Earley's view that "temporal proximity [was] not a proper consideration in evaluating similarities between crimes[,]" Earley responded: "No , I don't think so, not because they are within a week or a month of each other." (RHT 4350: 10-13.)

Setting aside the fact that the California Supreme Court considered the temporal proximity between the Hassan and Taylor crimes, "15 days apart," as one of the significant characteristics shared between the two sets of crimes (see, fn. 216, *ante*, at p. 372, citing to *People v. Champion*, *supra*, 9 Cal.4th at p. 905 ["the jury could properly consider the evidence that defendant Champion was involved in the murder of Michael Taylor in deciding whether he participated in the murders of Bobby and Eric Hassan, because the killings shared various significant characteristics. The murders occurred in the same neighborhood, 15 days apart"]), Earley erroneously sought to inject guilt phase considerations of Evidence Code § 1101 foundational requirements into the relevant ineffective assistance of counsel at the penalty phase reference questions addressing (1) what, if any, additional mitigating evidence with respect to the Jefferson crimes could competent trial counsel have identified; and (2) whether competent counsel would have presented such evidence at the penalty phase of petitioner's trial.

A third similarity concerned the fact that the same gun could have been used to kill both Teheran Jefferson and Bobby and Eric Hassan, a gun consistent with one held by petitioner in Exhibit 47 and Ross in Exhibit AA. (*People v. Champion*, *supra*, 9 Cal.4th at pp. 917, 924.) Earley conceded he failed to mention this similarity in his final report (Exhibit 110) and further conceded the fact that the same gun could have killed both Jefferson and the Hassans would be a relevant similarity shared by the two sets of

crimes. (RHT 4350.) Nevertheless, Earley continued to mix apples and oranges by contending that his discussion of the issue of similarities focused on Evidence Code § 1101, rather than on Penal Code § 190.3, factor (b), violent crimes evidence concerning the Jefferson and Taylor crimes, the latter being the relevant consideration in light of the specific reference questions posed by the California Supreme Court for this reference hearing. (RHT 4351-4353.)[218]

Finally, as respondent notes, petitioner has failed to introduce any new evidence received for the truth of the matter asserted relevant to raise a reasonable doubt as to petitioner's involvement in the Jefferson murder and robbery. Earley conceded that he had not identified any evidence exonerating petitioner from the Jefferson crimes which he contended reasonably competent counsel should have presented at petitioner's penalty phase trial. (RHT 4378 ["if you mean exonerating in the sense of alibis, those types of things? No."].)[219]

The state of the record with respect to the Jefferson crimes remains substantially identical to the state of the record reviewed by the California Supreme Court on petitioner's direct appeal, a record which led the Supreme Court to conclude as to petitioner's guilt that "there [was] no reasonable probability that the outcome of the trial would have been different if the trial court had excluded the evidence of Jefferson's murder. [Citation.]" (*People v. Champion*, *supra*, 9 Cal.4th at p. 919.) Similarly, as to petitioner's penalty, the Court concluded that in light of the prosecutor's closing argument in which "the prosecutor acknowledged that the jury could not consider the

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[218] While contending that it was his intent to employ Evidence Code § 1101 and § 352 in his discussion of the similarities *vel non* of the Jefferson, Taylor and Hassan crimes in his final report, Earley conceded that he did not mention either Evidence Code § 1101 or § 352 in his discussion of this issue in his report. (RHT 4352-4353.)

[219] Trial counsel had obtained through discovery copies of the Jefferson police reports (Exhibit 6-B (16 pages)) and coroner's report (Exhibit 6-A (14 pages)). (RHT 1023, 1032-1037; see also, Exhibits 1-P (6-2-82 letter from prosecutor Semow to Skyers) & 5-A (June 23, 1982 letter from prosecutor Semow to Skyers).) Skyers read all of the Jefferson reports provided to him through discovery. (RHT 1036-1037, 1070.) Other than visiting the scene of the Jefferson murder to determine its proximity to the Hassan residence where the Hassan murders and robberies took place, Skyers conducted no independent investigation of the Jefferson murder. (RHT 1069-1070.)

evidence of the Jefferson murder (as to both defendants) and of the Taylor murder (as to defendant Champion) unless it found *beyond a reasonable doubt* that the defendants committed these crimes, and the prosecutor implied that the jury should not consider those crimes at all" (*id.* at p. 949, italics in original), "[g]iven this concession, we find no reasonable possibility that the outcome of the penalty phase was affected by the trial court's failure to instruct the jury that it could consider 'other crimes' evidence only if it found beyond a reasonable doubt that the defendants committed those crimes." (*Id.* at p. 950, fn. omitted.)

6. Petitioner's Social History and Mental/Physical Impairments

The referee's findings and reasoning concerning petitioner's social history, mental and physical impairments relevant to reference question number 4 are fully set forth in the referee's findings and reasoning concerning petitioner's social history, mental and physical impairments in response to reference question numbers 1, 2 and 3.

VI. REFERENCE QUESTION NO. 5

A. Did petitioner do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase, or did he ask that any such evidence not be presented? If so, what did he do or say?

1. The Jefferson Murder

As noted in response to reference question number 2, petitioner has introduced no additional evidence on the Jefferson murder which reasonably competent counsel could and should have introduced at petitioner's penalty phase. In any event, the answer to this question is "no."

2. The Taylor Murder and Related Crimes

No.

3. Petitioner's Social History, Mental and Physical impairments

No. However, whether petitioner and petitioner's family were honest in speaking with trial counsel about petitioner, his social history, mental and physical impairments, functioning and development is a separate matter which the referee has attempted to fully address in earlier responses.

VII. REFEREE'S CONCLUSIONS

Trial counsel was a very conscientious, credible attorney. He was and still is dedicated to the best interests of his client, Steven Allen Champion. He sincerely believed and appears to retain the belief that petitioner was not culpable for the charged crimes. My observations of the exchange of non-verbal greetings and recognition between petitioner and the witness when Mr. Skyers testified, is that they continue to respect each other. Petitioner's last comment on the trial record to Mr. Skyers was "you did a good job". This is not a case where trial counsel abandons his client.

One aspect of Mr. Skyers' testimony that warrants a comment is his demeanor and presence while on the stand. He never got defensive regardless of how pointed the questions or claims of defective representation. I found that remarkable and extraordinary in view of all the other hearings I have conducted on competency of counsel claims in my career.

The reference hearing has shown that from 1995 Ms. Karen Kelly has devoted herself to petitioner's claim that mitigation evidence was available at the time of trial and that petitioner did not receive the benefit of adequate representation. The areas investigated and presented by Ms. Kelly are extensive and the product of intense preparation.

One area that deserves further comment is the legal issue of the scope of the proposed social and family history. This area, in itself, is voluminous. I found that it was not relevant or there was insufficient foundation to permit its admissibility. I found that no capital case attorney is required to engage in the type of investigation of a

defendant's family background that was conducted in this particular case. However, recognizing that death penalty cases are always evolving, I believe we have preserved a clear record of what evidence petitioner sought to present.

The other area is petitioner's position that the failure to independently investigate is per se incompetence. I did not agree.

Many of the proposed mitigation assertions, even if credible, are diminished or nullified as a result of the statements by petitioner's mother or petitioner. While it is difficult to make any final determination on the admissibility of some of petitioner's statements to others, the likelihood is great that the statements would be introduced if trial counsel sought to present some of "mitigation" identified by petitioner's counsel.

I am reluctant to criticize Azell Champion Jackson. She is a very likeable person who has survived a difficult life. I do not fault her for her loyalty to her son.

The record should include a statement that petitioner, without exception, conducted himself with grace and courtesy in and out of court while he was in Orange County during the duration of the hearing.

I do wish to acknowledge both counsel for their professionalism during the hearing and their prompt response and assistance when imposed upon by the Court.

I conclude by noting that trial counsel might be correct when he observed that given the nature of the evidence presented in the guilt phase and given the nature and manner of death of Bobby Hassan and his thirteen year old boy, Eric, that no mitigating evidence existed to outweigh the aggravating circumstances of those two murders.

Dated: Jan 29th 2009

F P Briseño

Francisco P. Briseño
Judge of the Superior Court

JOHN C. ROSSI
ASSISTANT CLERK-ADMINISTRATOR
SAN FRANCISCO

NATALIE ROBINSON
SUPERVISING DEPUTY CLERK
LOS ANGELES

Supreme Court of California

FREDERICK K. OHLRICH
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CLERK OF THE SUPREME COURT

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September 10, 2003

Hon. William Fahey
Superior Court of California
County of Los Angeles
210 West Temple St., Dept. 27
Los Angeles, CA 90012

Re: In re Steve Allen Champion on Habeas Corpus – S065575

Dear Judge Fahey:

The Supreme Court has appointed Orange County Superior Court Judge Francisco Briseño as the referee in this proceeding. We would appreciate it if you would forward the copies of the briefs to him at the following address:

Superior Court of California, County of Orange
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Thank you for your assistance in this matter.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

By: Mary Jameson
Automatic Appeals Unit Supervisor

cc: Hon. Francisco Briseño
Karen Kelly
Lisa Brault, Deputy Attorney General
Rec.

IN THE SUPREME COURT OF CALIFORNIA

In re STEVE ALLEN CHAMPION	)	
	)	
on Habeas Corpus.	)	S065575
	)	

THE COURT:

Based on the record in this matter and good cause appearing:

The Honorable Francisco P. Briseño, Judge of the Superior Court, County of Orange, is appointed to sit as a referee in this proceeding. He is directed to take evidence and make findings of fact on these questions regarding the case of *People v. Steve Allen Champion* (Los Angeles County Superior Court No. A365075; Judge William B. Keene):

1. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?

2. What additional mitigating evidence, if any, could petitioner have presented at the penalty phase? How credible was this evidence?

3. What investigative steps, if any, would have led to this additional evidence? In 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to obtain such evidence and to present it at the penalty phase?

4. What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?

5. Did petitioner do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase, or did he ask that any such evidence not be presented? If so, what did he do or say?

The Referee is directed to prepare and submit to this court a report of the proceedings conducted pursuant to this appointment, of the evidence adduced, and the findings of fact made.

All requests for discovery should be addressed to the referee.

IN THE SUPREME COURT OF CALIFORNIA

In re STEVE ALLEN CHAMPION	)	
	)	
on Habeas Corpus.	)	S065575
	)	

THE COURT:

Based on the record in this matter and good cause appearing:

The Honorable Francisco P. Briseño, Judge of the Superior Court, County of Orange, is appointed to sit as a referee in this proceeding. He is directed to take evidence and make findings of fact on these questions regarding the case of *People v. Steve Allen Champion* (Los Angeles County Superior Court No. A365075; Judge William B. Keene):

1. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?

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All requests for discovery should be addressed to the referee.

IN THE SUPREME COURT OF CALIFORNIA

In re STEVE ALLEN CHAMPION)
)
on Habeas Corpus.)
)

S065575

THE COURT:

At issue in this matter is whether the representation provided by petitioner's trial counsel at the penalty phase of trial violated petitioner's right to the effective assistance of counsel. On June 25, 2003, this court issued an order directing Judge Robert Dukes, the Presiding Judge of the Los Angeles Superior Court, to select a Los Angeles Superior Court Judge to act as referee. Judge Dukes selected Judge William Fahey, and on July 16, 2003, this court issued an order appointing Judge Fahey to act as referee. On July 18, 2003, petitioner filed a motion for reconsideration on the ground that William Skyers, who served as petitioner's trial counsel, is now a Los Angeles Superior Court Judge.

The motion for reconsideration is granted. This court's orders directing Judge Dukes to select a Los Angeles Superior Court Judge to act as referee and appointing Judge Fahey to act as referee are hereby vacated. The Honorable Frederick P. Horn, Presiding Judge of the Orange County Superior Court, is directed to select a Judge of the Orange County Superior Court to sit as a referee in this proceeding and shall promptly notify this court of that selection. After appointment by this court, the Referee is to take evidence and make findings of fact on the following questions regarding the case of People v. Steve Allen Champion (Los Angeles Superior Court No. A365075; Judge William B. Keene):

1. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?

2. What additional mitigating evidence, if any, could petitioner have presented at the penalty phase? How credible was this evidence?

3. What investigative steps, if any, would have led to this additional evidence? In 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to obtain such evidence and to present it at the penalty phase?

4. What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?

5. Did petitioner do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase, or did he ask that any such evidence not be presented? If so, what did he do or say?

Petitioner's motion to move the reference hearing to San Francisco, Santa Clara, or Alameda County is denied.

CHAMPION REFERENCE HEARING WITNESSES

2-6-06	RONALD SKYERS
2-7-06	RONALD SKYERS
2-8-06	RONALD SKYERS
2-14-06	RONALD SKYERS
2-27-06	RONALD SKYERS
2-28-06	RONALD SKYERS
3-1-06	RONALD SKYERS
4-3-06	RONALD SKYERS
4-4-06	RONALD SKYERS
4-5-06	RONALD SKYERS
4-10-06	MARCUS PLAYER
4-11-06	THEODORE NAIMY
4-11-06	STEVE KOONTZ
4-12-06	STEVE KOONTZ
4-12-06	ANTHONY D. HOLLINS
4-18-06	THOMAS MARTIN, LASO
4-18-06	MIKE SMITH, LASO
4-18-06	GREG W. DEWITT, LAPD'
4-19-06	THOMAS LAMBRECHT, LASO RETIRED
4-19-06	OWEN TONG, LASO
4-24-06	JAMES G. MERWIN
4-24—6	EARL CARLTON BOGANS
4-25-06	WAYNE HARRIS
5-2-06	STEVEN STRONG, LAPD RETIRED
5-3-06	STEVEN STRONG
5-8-06	DR. NELL RILEY
5-9-06	DR. NELL RILEY
5-10-06	DR. NELL RILEY
5-22-06	JACK EARLEY
5-23-06	JACK EARLEY
5-24-06	JACK EARLEY
5-30-06	JACK EARLEY
5-31-06	JACK EARLEY
6-5-06	JACK EARLEY
6-6-06	JACK EARLEY
6-6-06	STEVEN STRONG
6-12-06	RONALD SKYERS
6-13-06	E.L. GATHRIGHT
6-14-06	RITA CHAMPION POWELL
6-19-06	AZELL JACKSON
6-20-06	TRACI HOYD
6-20-06	TERRI MC GILL
6-21-06	GARY JONES
6-21-06	LINDA MATTHEWS

7-24-06	DR. CHARLES HINKIN
7-25-06	DR. CHARLES HINKIN
7-31-06	DR. SAUL FAERSTEIN
8-1-06	DR. SAUL FAERSTEIN
8-08-06	LINDA MATTHEWS
8-9-06	DET. WILLIAM EAGLESON, LAPD
4-23-07	DR. DEBORAH MIORA
4-24-07	DR. DEBORAH MIORA
4-25-07	DR. DEBORAH MIORA
4-26-07	DR. DEBORAH MIORA
7-23-07	DR. DEBORAH MIORA
7-24-07	DR. DEBORAH MIORA
7-25-07	DR. DEBORAH MIORA
7-26-07	DR. DEBORAH MIORA
7-30-07	DR. DEBORAH MIORA
7-31-07	DR. DEBORAH MIORA
8-1-07	DR. DEBORAH MIORA
8-2-07	DR. DEBORAH MIORA
8-6-07	DR. DEBORAH MIORA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

FINAL

checked in 6-13-08

Exhibit List of: **Petitioner**
Case Name: **In Re Steven Allen CHAMPION on Habeas Corpus**
Case Number: **S065575 Supreme Court** Dept. **C45**
Type of Hearing: **Reference**
Date(s) of Trial / Hearing: **February 6, 2006**

COPY

Capital Case

#	ID	EV	DESCRIPTION (Photo's must be described in detail)			Prior Hrg # Jury Trial LACO	
			PETITIONER'S EXHIBITS				
			Defense counsel, Ronald Skyers', trial files marked 1-31 as follows:				
1	x	x	Motions and Research file folders with contents				
1a	x	x	Mr. Skyers' Ex parte request for funds for Dr. Shomer				
1b	x	x	Homer Mason Notice of Motion for Pretrial Discovery BS-0104				
1c	x	x	Homer Mason Notice of Motion to Limit Voir Dire of Jury as to Cause BS-0078				
1d	x	x	Homer Mason Notice of Motion to Suppress Evidence SB-0108				
1e	x	x	Homer Mason Notice of Motion to Suppress Evidence de Novo SB-0110				
1f	x	x	Homer Mason Notice of Motion in Limine re Gangs BS-0082				
1g	x	x	Homer Mason Notice of Motion in Limine re Lineups BS-0084				
1h	x	x	Homer Mason Notice of Motion to Strike Special Circumstances BS-0099				
1i	x	x	Homer Mason Notice of Motion for Pretrial Discovery, etc. BS-0102				
1j	x	x	letter to Dr. Pollack dated 11-10-81 BS-0178				
1k	x	x	Order appointing Pollack filed stamped 8-4-81 BS-0085				
1l	x	x	notes from file regarding Pollack-Imperi BS-0004				
1m	x	x	L.A. D.A. Semow letter to Mr. Skyers dated 11-17-81 BS-0120				
1n	x	x	Petition for Writ of Prohibition BS146				
1n1	x	x	Court of Appeal post card denial dated 2-24-82 to Skyers BS144-145				
1o	x	x	letter from L..A. DA's office to Court of Appeal dated 2-23-82 BS155				
	x	x	LA DA Semow letter to Skyers' regarding Champion/Ross Motion in Limine in red at top of page dated 6-2-82 BS121-123				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

1q	x		yellow legal paper file notes "Penalty Phase" BS41-43 Withdrawn				
1r	x	x	yellow file notes "Issues to raise on record" BS142-143				
1s	x	x	Steve Champion Probation Report date of hearing 12-9-82 BS157-176				
1t	x	✓	News clippings BS229-242 Withdrawn				
1u	x	✓	yellow legal size paper file notes "Steve" "Butcher knife" BS33 Withdrawn				
1v	x	x	file note "ID leaving house-lunch time" from front inside file number one BS0002				
2	x	x	Subpoenas file folder with contents				
2a	x	x	Prompt subpoena dated 10-22-81 BS-0280				
2b	x	x	11-6-81 letter from Prompt Agency BS-0279				
2c	x	x	Subpoena Duces Tecum Payroll-Harbor General Hospital served 11-25-81 BS 0271-0272				
2d	x	x	SDT Pacific Telephone dated 11-20-81 BS 0275				
2e	x	x	SDT Student Attendance, Hawthorne High School dated 11-20-81 BS0277				
2f	x	x	SDT Prompt Employment Service (3 pages) dated 10-22-81 BS0279				
2g	x	x	SDT Jacoby and Meyer Clinics (2 pages) dated 11-20-81 BS0285				
2h	x	x	Subpoena for Clementina Wareham dated 10-7-82 BS0289				
2i	x	x	Subpoena for Milard Osborne undated BS0291				
2j	x	x	Subpoena for Simon Tabello undated BS0293				
2k	x	x	Subpoena for Scott Avery dated 10-11-82 BS0295				
2l	x	x	SDT Prompt served 10-26-81 BS 0297				
2m	x	x	SDT Prompt Employment Services dated 9-8-81 BS0304				
2n	x	x	Subpoena for Deputy S. Koontz dated 2-12-82 BS0308				
2o	x	x	Subpoena for Linda Chapman dated 2-12-82 BS0310				
2p	x	x	Subpoena for Officer Recio dated 9-27-82 BS0312				
2q	x	x	Subpoena for Officer M. Enquist dated 10-6-82 BS0314				
2r	x	x	Subpoena for Officer J. Anslow dated 9-27-82 BS0316				
2s	x	x	Subpoena for Officer D. Crewsdated 2-12-82 BS0318				
2t	x	x	Subpoena for Officer L. Slack 2-12-82 BS0320				
2u	x	x	Subpoena for Officer D. Dorman dated 2-12-82 BS0324				
v	x	x	Subpoena for Reginald Champion dated 2-12-82 BS0327				
2w	x	x	Subpoena for Rose Winbush dated 2-12-82 BS0328				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

2x	x	x	Subpoena for Pothena Kelly dated 2-12-82 BS0330				
2y	x	x	Subpoena for Thomas Crawford dated 10-21-82 BS0332				
2z	x	x	SDT Myron Goldberg dated 12-22-81 BS0336				
2aa	x	x	SDT Custodian of Records-Payroll Harbor General Hospital dated 1-12-82 BS0346				
2bb	x	x	SDT Custodian of Records-Aides in Action dated 11-20-81 BS0351				
2cc	x	x	SDT Custodian of Records-Harbor General Hospital dated 11-20-81 BS0377				
2dd	x	x	SDT Custodian of Records-Student Attendance Hawthorne High School dated 11-20-81 BS0364				
2ee	x	x	SDT Custodian of Records-Pacific Telephone dated 11-20-81 BS0283				
2ff	x	x	hand written list of subpoenas BS0345				
2gg	x	x	copy of letter of Authorization-Parole signed by Skyers' dated 2-11-82 BS0348 (See Exhibit 2-II)				
2hh	x	x	SDT Deputy T. Naimy dated 2-12-82 BS0380				
2ii	x	x	original letter of Authorization-Custodian of Records-Parole 2-11-82 BS0348 (See 2gg)				
2jj	x	x	Aides in Action letter and envelope to Ronald Skyers' dated 1-13-82 BS0369				
2kk	x	x	Reginald Champion SS number and envelope from Azell Champion addressed to Ronald Skyers BS0253				
2ll	x	x	file note re SDT Pacific Telephone with date of 12-8 BS0258				
2mm	x	x	file note 10-22 with name Mr. Crawford BS0259				
2nn	x	x	file note with name of Eric Hassan at top BS0260				
2oo	x	x	file note re SDT Jacoby and Meyers return date 12-8 BS0261				
2pp	x	x	file note re SDT 12-22-81 "check Harbor General" BS0266				
2qq	x	x	file notes date of 1-14-82 BS0265				
2rr	x	x	telephone memo with date of 1-12 re Pac Bell BS0267				
2ss	x	x	telephone memo sheets with date of 1-12 re John Kaiser BS0268				
2tt	x	x	file note 12-8-81 re SDT Pacific Telephone BS0269				
2uu	x	x	file note re Anslow with date of 9-27 BS0256				
2vv	x	x	file note re payroll checks Steve and Reginald Champion BS0263				
~ww	x	x	file note re Prompt paycheck and Reggie Champion dated 12-28-81				
ɔ	x	x	Ballistics file folder and contents				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

3a	x	x	S.I.D. Ballistics report dated 1-5-81 BS0395				
3b	x	x	file note 11-30-81 BS0398				
3c	x	x	Mason Ex parte Order to Appoint Ballistics Expert 7-3-81 BS390				
3d	x	x	file note 2-11-82 "Called Macey" BS403				
3e	x	x	orange file note 3-25-82 "called Semow" BS400				
3f	x	x	file note on legal sized paper 3-30-82 "called Slack, et al" dated 3-30-82 BS404				
3g	x	x	file note re court order/designating items to be released BS411				
3h	x	x	Firearms & Explosive Analyzed Evidence Report-Jefferson dated 1-12-81 BS389				
3i	x	x	yellow note 2-26-82 to Ronald A Macey Ramtech Lab, Inc BS401				
3j	x	x	legal size paper file note "Spoke to Jim Trahen of SID" with attached phone memo dated 4-5-82 BS405				
3k	x	x	telephone memo sheet "Spoke to Macey" dated 4-12 BS397				
3l	x	x	Order allowing removal of evidence for purpose of scientific analysis dated 12-4-81 BS 393-394				
3m	x	x	Firearms & Explosives Analyzed Evidence Report 1-7-81 Michael Taylor BS 396				
3n	x	x	Firearms & Explosives Analyzed Evidence Report 1-5-81 Benjamin Brown BS 388				
3o	x	x	phone memo sheet 9-22 time "Found gun" BS406				
3p	x	x	blue file note 4-27-82 "Spoke to Macey on 4-27-82 @ 5pm BS407				
3q	x	x	phone memo sheet "Test completed" dated 5-3 at 10:32 a.m. BS408				
3r	x	x	phone memo sheet to Skyers' from Jeff Semow "see file on ballistics" in red dated 11-30				
4	x	x	Jury file folder with contents				
4a	x	x	Jury selection sheets BS412-422				
4b	x	x	Panel 1-18 with hand written notes re jury selection BS423-433				
4c	x	x	Jury instructions BS437-442				
4d	x	x	file notes entitled "Jury Selection" BS434				
4e	x	x	three legal sized yellow pages of juror and case information BS443-445				
4f	x	x	Jury selection notes "Groups of 12" BS446-452				
g	x	x	yellow legal size paper of notes "Voir Dire:" BS447				
5	x	x	Discovery folder with contents				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

5a	x	x	LADA letter 6-23-82 to Skyers signed by Semow BS458				
6	x	x	Jefferson, Teheran file folder with contents				
6a	x	x	Autopsy Report-Teheran Jefferson dated 11-16-80 @ 11:00 hrs (14 pages) BS0460-0473				
6b	x	x	Death Investigation Report-Jefferson 11-17-80 (16 pages) BS488-503				
7	x	x	Chronology file folder with contents				
7a	x	x	Chronological Record (8 pages) DR#80-820521-2 BS504-511				
7b	x	x	LAPD Chronological Record, DR#80-831051 BS512-515				
8	x	x	Tapes file folder with contents				
8a	x	x	Transcript of taped conversation between Champion and Ross BS0518-0524				
9	x	x	Raps file folder with contents				
10	x	x	Brown & Reed file folder with contents				
11	x	x	Exhibits file folder with contents				
11a	x	x	Frank Harris DMV printout dated 2-26-81 BS587				
12	x	x	Clinton file folder with contents				
13	x	x	Hassan file folder with contents				
14	x	x	Line-up file folder with contents				
14a	x	x	LA Co Sheriff's Dept line up (5 pages) dated 1-12-81 BS636,639,637,643,649				
15	x	x	Transcripts file folder with contents				
15a	x	x	Steve Champion Prelim reporter's transcript dated 2-27-81				
15b	x	x	Steve Champion 1538.5 hearing reporter's transcript dated 8-21-81				
16	x	x	Moncrief file folder with contents				
17	x	x	Mallet-Taylor case file folder with contents				
17a	x	x	various police reports regarding Evan Mallet numbered 1-19 by Skyers BS664-683				
17b	x	x	various police reports regarding Michael Taylor 187, numbered 28-57 by Skyers BS683-712				
7c	x	x	LAPD Naimy and Koontz report dated 12-28-80 BS713,715-721				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

17c1	x	x	page two of 17c				
17d	x	x	Arrest Report Craig Anthony Ross 8-1-81 BS722-726				
17e	x	x	four Analyzed Evidence Reports regarding Michael Taylor 187 12-30-80 BS728-731				
17f	x	x	Continuation sheet regarding Michael Taylor 187 dated 12-28-80 BS732				
17g	x	x	LASD Supplementary Report regarding Evan Mallet dated 12-28-80 BS733				
17h	x	x	Continuation sheet regarding Michael Taylor 187 BS734				
17i	x	x	four handwritten file notes written by author unknown, not Skyers " BS736-739				
18	x	x	Property Reports file folder with contents				
19	x	x	Press file folder with contents				
20	x	x	Investigation file folder with contents				
20a	x	x	file notes 6-21-82				
20b	x	x	packet of Lawrence investigative reports to Homer Mason BS-0788				
20c	x	x	June calendar page with notes BS-0812				
20d	x	x	telephone memo sheet to Skyers from Crawford dated 6-23				
20e	x	x	copy of Prompt employment check with notes				
20f	x	x	note from file with 9-16-81 in body of note				
20g	x	x	interview sheet with file notes BS-0798				
20h	x	x	file notes on legal size paper dated 9-30-81 BS-0802				
20i	X	x	telephone memo sheet to Skyers from Semow dated 9-30 BS-0828				
20j	x	x	telephone memo sheet from Semow dated 10-6-81 BS-0810				
20k	x	x	10-14-81 notes from file BS-0811				
20l	x	x	notes from file dated 11-4-81 BS-0825				
20m	x	x	11-18-81 notes from file BS-0805				
20n	x	x	10-22 notes from file BS-0807				

20o	x	x	undated notes from file				
20p	x	x	School records regarding Eric Hassan BS781				
20q	x	x	yellow legal sized paper file note BS801				
20r	x	x	yellow legal size paper file note re Steve Champion BS800				
20s	x	x	blue legal size note BS797				
20t	x	x	file note with Mr. Crawford, phone # and address BS815				
20u	x	x	file note "Wits" BS816				
20v	x	x	file note "Wit Natasha Wright" BS823				
20w	x	x	phone memo sheet to Skyers from Colbert dated 6-25 at 3:46 BS818				
20x	x	x	yellow legal size file note 7-13-82 BS799				
21	x	x	Information file folder with contents				
22	x	x	Statements file folder with contents				
22a	x	x	Statement of Cora Taylor 12-28-80 BS869-871,863				
22b	x	x	Wright, Natasha Lloyd statement dated 12-28-80 BS866-868				
22c	x	x	Statement of Cynthia Wiltz updated BS864				
23	x	x	Priors file folder with contents				
23a	x	x	letter dated 2-9-82 from Skyers to John Van de Kamp BS0947				
23a1	x	x	CYA report dated 3-25-80 BS0924 (See Exhibit 26b)				
23b	x	x	Juvenile investigation report of 6-13-77 regarding Steve Allen Champion BS885-889				
23b1	x	x	West Covina PD incident report dated 11-7-77 CR#77-7700 BS890-912				
23c	x	x	LA SD reports dated 9-27-78 re Steve Allen Champion BS0915-0923				
24	x	x	Search Warrants file folder with contents				
25	x	x	Reports file folder with contents				
'5a	x	x	5 pages of file notes author unknown, not Skyers BS0991-994, 996				

25b	x	x	copy of file note re phone message 1-20-81 @ 0930 "Telephone with James Hassan" BS1000				
25c	x	x	SAC Arrest Report signed by Dorman and Crews dated 1-9-81 BS0104-0106				
25d	x	x	memo from J. Bragg to R. Williams with attachments dated 12-30-80 BS1028-1032				
25e	x	x	dark copies of 4 pages of file notes dated 3-24-81 BS1101-1104				
25f	x	x	LASD Lambrecht and Tong report (See Exhibit 26a) BS1105-1109				
26	x	x	Miscellaneous file folder with contents				
26a	x	x	LASD Lambrecht and Tong memorandum without preimeter sketch (See Exhibit 25f) BS1279-1282				
26b	x	x x	Steve Champion CYA Report on Champion 3-25-80 (See Exhibit 23-a-1) BS1254-1255				
26c	x	x	2 page Hassan police notes				
27	x	x	Analyzed Evidence file folder with contents				
27a	x	x	Firearms & Explosives Analyzed Evidence report regarding Michael Taylor 187 dated 1-9-81 BS1294C				
27b	x	x	Analyzed Evidence Report Property Division regarding Bobby Hassan 187 dated 6-1-82 BS1294D				
28	x	x	Witnesses file folder with contents				
28a	x	x	file notes on legal sized paper dated 8-24-81 BS1294O-1294P				
28b	x	x	undated file notes on legal sized paper BS1294C				
29	x	x	Gang Information file folder with contents				
29a	x	x	LASD memorandum Bragg to Williams with attachments dated 12-30-80 BS1303,1301-1302				
29b	x	x	Harris Champion, Marcus Player F.I. cards dated 12-28-80 BS1300				
29c	x	x	single sheet with names, DOB, addresses of gang members BS1295				
30	x	x	Hassan, Bobby and Eric-Autopsy file folder with contents				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

31	x	x	Hassan, James D, James D. Jr, Michael Dekent Hilliard, Teddy Hassan file folder with contents		LA MTN			Jury Trial LA
32	x	x	Declaration of Ronald Skyers dated 11-10-97 BS1410-1419					
33	x	x	Declaration of Ronald Skyers dated 5-6-02 BS1324-1366					
34	x	x	Transcript of taped interview of Ronald Skyers 3-26-02 BS1367-1399					
35	x		Questions to Judge Skyers BS1421-1430					
36	x	x	Mr. Mason's file BS004586-004934					
37	x	x	two drafts of declarations with yellow post-it on front					
38	x	x	letter from Kelly to Skyers attached Declaration of Dr. Riley dated 10-21-97					
39	x		post conviction correspondence between Appellate and/or trial counsel for Champion and/or Ross					
40	x	x	Chrono of events 11-14-80 thru 8-24-81					
41	x	x	" " 9-4-81 thru 9-13-82					
42	x	x	" " 9-14-82 thru 9-23-82					
43	x	x	" " 9-24-82 thru 10-5-82					
44	x	x	" " 10-6-82 thru 10-19-82					
45	x	x	Chrono of events 10-21-82 thru 12-10-82					
46	x	x	Pollack-Imperi report to Skyers dated 12-2-81					
47	x	x	photo of Steve Champion with gun in right hand					LA#117
48	x	x	Juvenile Petition packet filed 11-8-77 Champion					LA#182
49	x	x	Steve Champion Juvenile Petition packet filed 9-29-78					LA#181
50	x	x	1980 ABA Standards regarding investigation and preparation BS1454-1455					
51	x	x	two color photos of live line up with Steve Champion dated 1-12-81		4			95&110
52	x	x	Dealer's Record of Sale of Revolver or Pistol to Mercie Hassan dated 2-2-80					43a
53	x	x	Evidence envelope containing bullet fragments Hassan, B. 12-12-80					109

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

54	x	x	Witness card "Cora Lee Taylor" 1-12-81				J
55	x	x	three Polaroid snaps of graffiti on wall (See Exhibits 99 and 100)				177,178 179
56	x	x	Evidence envelope containing "Slug" Jefferson, Teheran				37a
57	x	x	CDC packet for Marcus Player dated 2-9-05 BS5309-5316				
58	x	x	CII Record for Marcus Player BS 5319-5329				
59	x	x	large map of LA County area				
60	x	x	Three Polaroid snaps of Player vehicle marked collectively front of vehicle rear of vehicle passenger side of vehicle				 103 104 105
61	x	x	colored copy photo of Michael Player standing				
62	x	x	black and white copy of photo of Michael Player with stats underneath BS003478				
63	x	✓	colored copy of photo of two male blacks sitting on couch Withdrawn				
64	x	✓	black and white photo of male black " Lil Owl" Withdrawn				
65	x	x	small map of portion of South Central Los Angeles				
66	x	x	Taylor chronology of witnesses starting with Officer Ronnie Williams				
67	x	x	Taylor chronology of witnesses starting with Officer Jack Hayden				
68	x		2 pages of Semow notes re tape of 12-28-80 BS0605-0606				
69	x	✓	letter dated 1-18-05 from Kelberg to Theodore Naimy Withdrawn				
70	x	x	hand drawn diagam by Naimy of 126th St at Budlong				
71	x	✓	letter dated 5-23-05 to Steve Koontz from Brian Kelberg Withdrawn				
72	x	✓	letter dated 1-13-05 to Anthony Hollins from Brian Kelberg Withdrawn				
73	x	✓	copy of letter dated 1-13-05 to Tom Martin from Brian Kelberg Withdrawn				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

74	x	x	blowup aerial photo of Helen Keller Park and neighboring city streets				
75	x	x	blowup aerial photo with Helen Keller Park at bottom right and LA Southwest College upper left corner				
76	x	x	blowup aerial photo, close view, of city block of 126th and 127th, Raymond and Budlong				
77	x	x	copy of Naimy-Koontz LASD report with handwritten notations BS 000622-000639				
78	x	x	Semow hand written notes with four pages of Taylor LAPD chrono and Wiltzs note BS 000468-000493				
79	x	✓	copy of letter dated 1-13-05 to Mike Smith from Brian Kelberg Withdrawn				
	x	✓	copy of letter dated 1-13-05 to Greg DeWitt from Brian Kelberg Withdrawn				
80	x	x	Police report/continuation report of Michael Taylor homicide BS 002294-002304 (Missing BS 002298)				
81	x	x	Police report regarding Michael Taylor 187 BS 002324-2325				
82	x	x	Police report regarding Michael Taylor 187 BS 001298				
83	x	x	typed statement of Cora Taylor, Mary Taylor and William Birdsong BS 00002791-2798				
84	x	x	LASD Supplemental Police report regarding Evan Mallet dated 12-28-80 (See Exhibit 17g) BS 001441				
85	x	x	Portion of witness statement of William Birdsong BS 002319				
86	x	x	signed police report/witness statement Mary Taylor BS 002774-2777				
87	x	x	signed police report/witness statement Cora Taylor BS 002769-2273				
88	x	x	Police report regarding Michael Taylor 187 BS 001299-1303				
89	x	x	Police report regarding Michael Taylor 187 BS 001363-1365				
90	x	x	Police report regarding Michael Taylor 187 BS 000853-0854				

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

91	x	x	Police report regarding Michael Taylor 187 BS 002012				
92	x	x	Police Property report Michael Taylor 187 BS 002277-2279 and 001988				
93	x	x	Criminal history of Michael Player BS 003960-3961				
94	x	x	copy of juvenile index cards regarding Michael Player BS 002210-2212				
95	x	✓	letter dated 1-13-05 to Tom Lambrecht from Brian Kelberg Withdrawn				
96	x	✓	letter dated 1-13-05 to Owen Tong from Brian Kelberg Withdrawn				
97	x	x	blow up aerial map of 122nd Street and Vermont				
98	x		Declaration of Rouselle Ray Shepard				
99	x	x	photo of graffiti (blowup of portion of Petitioner's Exhibit 55)				
100	x	x	photo of graffiti (blowup of portion of Petitioner's Exhibit 55)				
101	x	x	Nell Riley's binder				
101a	x	x	normative guidelines re education (from Section 6 of Exhibit 101)				
101b	x	x	National Academy of Neuropsychology Position Papers				
101c	x	x	Policy Statement of AACN-Third Party Observer				
101d	x	x	Revised Comprehensive Norms for an Expanded Halstead-Reitan Battery				
101e	x		Declaration of Dr. Pettis				
101f	x	x	documents from section 5 of Exhibit 101 Slick, et al research article re Detection of Malingering				
102	x	x	definition of mental retardation				
103	x	x	list of neuropsychological tests				
104	x	x	raw data of Steven Champion				
105	x		Reggie Champion court and medical needs				
106	x	x	index of material provided to Nell Riley				
107	x	x	Death Penalty Update-Issue 80				

108	x	x	Death Penalty Update-Issue 85				
109	x	x	draft report of Jack Earley dated 11-7-05				
110	x	x	draft report of Jack Earley dated 1-27-06				
110a	x		draft report of Jack Earley dated 1-27-06 22 pages (Withdrawn)				
111	x	x	Yahoo e-mail letter dated 6-2-06 with attachments				
112	x	x	list of capital cases, trial dates and name of counsel				
113	x	x	List of Materials reviewed by Steve Strong				
114	x	x	Steve Strong LAPD Gang and Homicide Training and Experience				
115	x	x	Five crime scene photos, marked collectively, described and marked for jury trial as follows:				
			photo of red carpet at foot of bed				56
			photo of two bodies on bed, close view				67
			photo, close up, of adult male victim's head				69
			photo taken from behind foot of bed showing two bodies				75
			photo of bed showing lower body of child victim				77
116	x	x	Legend of appearances by Mr. Skyers at both guilt and penalty phase of Champion LA Co trial				
117	x	x	Declaration signed by E.L. Gathright on 8-13-97				
118		x	Champion family tree				
119	x	x	Rita Champion Powell Declaration				
120	x	x	gold chain necklace with 2 gold charms and gold and diamond ring				37b
121	x	x	Declaration of Azell Jackson				
122	x	x	Declaration of Traci Evette Robinson-Hoyd				
123	x	x	Declaration of Terri Lynn Geter				
124	x	x	Declaration of Linda Champion Matthews				
125	x	x	Principles & Practices of Forensic Psychiatry 2nd Edition				
126	x	x	hand written chart in green ink by Dr. Hinkin				

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

127	x	✓	Single sheet entitled Interpretative (T-scores & percentiles) guide used by Heaton et al, 2004 Withdrawn				
128	x	x	Single sheet entitled Revised Comprehensive Norms for an Expanded Halstead-Reitan Battery-Client/Testing Information				
129	x	✓	List of documents reviewed by Dr. Faerstein (3 pages) Withdrawn				
130	x	✓	total of all notes by Dr. Faerstein (28 pages) Withdrawn				
131	x	✓	notes made when reviewing medical and psychological reports (6 pages) Withdrawn				
132	x	✓	notes by Dr. Faerstein of areas of opinion (2 pages) Withdrawn				
133	x	✓	notes by Dr. Faerstein of Dr. Riley's testing (8 pages) Withdrawn				
134	x	✓	notes by Dr. Faerstein of consultation by Dr. Hinkin (1 page) Withdrawn				
135	x	x	billing notes by Dr. Faerstein (3 pages)				

Date Received: _____ Received by: _____
Revised 1/04 DS

Superior Court of California, County of Orange
Single Party Exhibit List

Exhibit List of: **Petitioner**
Case Name:
In re, **CHAMPION, STEVEN ALLEN**
Case Number: **SO65575** Dept: **C45**
Type of Hearing: **Reference Hearing**
Date(s) of Trial/ Hearing: **4-17-07 Continued**

#	ID	EV	Description (Photo's must be described in detail)	Returned to Submitting Party	Prior Hrg #
136	X	X	Original of Dr. Deborah Miora report		
137	X	X	Curriculum Vitae of Dr. Miora		
138	X	X	Master list of materials provided to Dr. Miora		
139	X	X	Series of photos taken at the residence of Azell Jackson		
140	X	X	Certified court records of siblings of Steven Champion		
141	X	X	Black binder containing materials designated community conditions		
142	X	X	Social Security Records of Lewis Champion II		
143	X	X	Social Security Records of Azell Gathright		
144	X	X	Certified School Records of Lewis Champion II		
145	X	X	Certified School Records of Reggie Champion		
146	X	X	Certified School Records of Steve Champion		
147	X	X	Parole Records of Steve Champion-copies of Respondent's Exhibit G (BS 00043-000117) as well as copies of Respondent's Exhibits D,H,I and J		
148	X	X	Certified School Records of Rita Champion		
149	X	X	Certified School Records of Gerald Trabue Jr.		
150	X	X	A portion of Respondent's Exhibit BBBB entitled Suggested Format for Psychiatric Report to attorney or court		
151	X	X	7-31-07 e-mail with attachment record of attorney contacts/consults during preparation of declaration		
152	X	X	Document entitled Addition references consulted since April 2007 testimony (one page)		
153	X	X	Addendum to Declaration of Dr. Deborah S. Miora, PH.D. (3 pages)		
154	X	X	Cover sheet 12-6-06 from Ms. Andrews with attachment Life Chronology in re Steven Champion		
155	X	X	March 2007 e-mail transmitting chronology (3 pages total)		
156	X	X	Handwritten notes by Ms. Andrews regarding 7-31-07 meeting between Ms. Kelly, Ms. Andrews and Dr. Miora (one page)		
157	X	X	Guidelines for the Appointment and Performances of Defense Counsel in Death Penalty Cases (February 2003 Revised Edition)		
158	X	X	6 page document entitled Older youths raise strains inside YTS Ontario Daily Report 9/22/76		

- Added on the Court's own motion for purposes of showing what was reviewed in the Referee's Finding on the Habeas

23d X X 3 page document of Juvenile Records on Champion, Steve Allen

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

Exhibit List of **Respondent**
Case Name : **In re Steven Allen CHAMPION on Habeas Corpus**
Case Number: **S065575 Supreme Court** Dept. **C45**
Type of Hearing: **Reference**
Date(s) of Trial / Hearing: **February 6, 2006**

#	ID	EV	DESCRIPTION (Photo's must be described in detail)	Returned to submitting party	Prior hrg # Jury Trial LA Ct	
A	x	x	three boxes of binders with cover letter from Ms. Kelly to DDA Kelberg dated 10-29-04 with copies of Skyers' file BS010628-012089			
B	x	x	box containing binder with cover letter from Ms. Kelly to DDA Kelberg dated 3-3-05 with copies of additional Skyers' file BS012090-012479			
C	x	x	Petitioner's letter with attachments to Mr. Jack Earley dated 12-29-06 (typo s/b 12-29-05)			
D	x	x	2-~~22~~23-79 letter with attachments			
E	x	x	taped conversation of Champion and Ross dated 8-10-81			LA#180
F	x	x	transcript of taped conversation between Champion and Ross			LA#180a
G	x	x	marked collectively three envelopes from Department of Corrections BS000001-000102			
			G1 thru G13 (documents from CDC from envelope 3 of Exhibit G)			
G-1	x	x	3 page 1-12-83 Psychiatric Evaluation San Quentin Prison by Dr. Geiger BS 985-987			
G-2	x	x	two pages of hand drawings BS 980-981			
G-3	x	x	two page 12-27-82 psychological evaluation by Dr. Steinke BS 994-995			
G-4	x	x	psychological tests given to Mr. Champion BS 996-998			
G-5	x	x	2-28-91 Medical History and Reception Center Physical Examination of Mr. Champion BS 761-762			
G-6	x	x	periodic health review of Mr. Champion BS 763-764			
G-7	x	x	6-23-95 record of neurological examination BS 799			
G-8	x	x	medical history completed by Mr. Champion-denial of serious head injury BS 803 (EYE EXAM)			
G-9	x	x	8-10-88 eye exam report BS 809			

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

G-10	x	x	3-18 and 10-29-96 Neurosurgical consultation reports BS 838-842			
G-11	x	x	7-6-95 MRI reports BS 847-848			
G-12	x	x	10-5-95 Neurosurgical evaluation BS 850-852			
G-13	x	x	12-12-79 annual review report from the Youth Training School BS 896-898			
G-14	x	x	Interdepartmental Communication California State Prison at San Quentin dated 11-30-84			
G-15	x	x	Interdepartmental Communication San Quentin 2-11-84 list of inmates, including Mr. Champion, involved in altercation BS 311-313			
G-16	x	x	Rules Violation Report dated 10-8-83 reference an altercation involving Mr. Champion BS 368-373			
G-17	x	x	Certification of Custodian of Records CDC BS000001			
H	x	x	Youth Authority Initial Home Investigation Report ~~dated 12-15-78~~ BS000101-000102			
I	x	x	two page psychiatric evaluation by Dr. Brown dated 7-29-80 BS000071-000072			
J	x	x	report by Dr. Perrotti dated 12-13-78			
J-1	x	✓	copy of exhibit "J" Dr. Perotti report Withdrawn			
K	x	x	Mary Taylor witness card dated 8-20-81			LA#150
L	x	x	Ross color photo live line up dated 8-20-81			LA#148a
M	x	x	signed Cora Lee Taylor document dated 12-28-80			LA#159
N	x	x	bail receipt for Mallett signed by Champion			LA#114
O	x	x	receipt from Ready Rental-Fred Ross 12-27-80			LA#113
P	x	x	2 page hand written document with the name of William Birdsong dated 12-28-80 B/S #001355-56			
Q	x	x	5 page hand written document with the name of Cora Lee Taylor dated 12-28-80 BS#001349-53			
R	x	x	6 page hand written and typed document with the name of Mary Elizabeth Taylor dated 12-28-80 BS#001330-36			
S	x	x	Declaration of Wayne Harris			
T	x	x	Declaration of Earl Carl Bogans dated 4-27-97(1 page)			
U	x	x	2 page Declaration of Earl Bogans with face sheet from Federal Habeas Corpus on Mallet Case #CV-00-08451-SVW (EE)			

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

V	x	x	Department of Corrections Packet dated 2-9-05 for Marcus William Player BS 005308-005318			
W	x	x	LA Sheriff's Department Case Activity Report dated 11-20-80 for Evan Jerome Mallett (5 pages) BS 1200-1204			
X	x	x	A Sheriff's Department Complaint Report dated 11-19-80 for strong armed robbery and battery Marcus Player and Evan Mallett (12 pages) BS1201-1213			
Y	x	x	LA County Jail Booking and Property Report for Marcus William Player (1 page-booking #5923363 in upper left corner) BS 1278			
Z	x	x	8x10 photo of male black standing in kitchen with bat in right hand and gun in waistband (Lavell Player)			LA#116
AA	x	x	8x10 photo of two male black seated facing each other with hands on bat, male on left with gun in right hand and male on right with cigarette in left hand (Lavell Player & Craig Ross)			LA#118
BB	x	x	8x10 photo is duplicate of Respondent's Exhibit Z (Levell Player)			LA#119
CC	x	x	8x10 photo two male blacks embracing each other (Craig Ross & Marcus Player)			LA#120
DD	x	x	Polaroid snap of male black standing making gang sign with hands (Steve Champion)			LA#174
EE	x	x	Polaroid snap of two male blacks face to face(Champion & Marcus Player)			LA#175
FF	x	x	Polaroid snap of three male blacks: two are standing face to face and the third male is behind and to the left in photo (Steve Champion & Marcus Player)			LA#176
GG	x	x	4 page report by Lambrecht and Tong			
HH	x	x	32 pages Collection of reports re latent prints and comparisons			
II	x	x	9 documents, marked collectively, re arrest of Steven Champion for burglary BS0941-0946 & 0948-0950			
JJ	x	x	2 page booking records report for 1-9-81 arrest of Steven Allen Champion BS# 0980-0981			
KK	x	x	2 page Declaration of Anthony D. Hollins			
LL	x	x	1 page Declaration of Carl Owen			

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

Case# 19834 ST

MM	x	x	property report for Champion dated 1-14-81 at 1600 hrs for seizure of gloves BS 9757			
NN	x	x	2 page CII report of Marcus Player BS 1287-1288			
OO	x	x	six pack photo line up with Ross	19		LA#14(
PP	x	x	Photo Identification Report of Craig Ross dated 5-11-81 signed by Mary Taylor			LA#14
QQ	x	✓	letter to Greg DeWitt from Brian Kelberg dated 10-26-05 Withdrawn			
RR1	x	x	snapshot of front of Player vehicle with white truck at left rear BS 4084 F			
RR2	x	x	snapshot of drivers side of Player vehicle BS4084 G			
RR3	x	x	snapshot of passengers side of Player vehicle BS4084 H			
RR4	x	x	snapshot of rear of Player vehicle BS4084 I			
RR5	x	x	snapshot of interior drivers seat of Player vehicle BS4084 J			
RR6	x	x	snapshot of interior drivers rear seat of Player vehicle BS4084 K			
RR7	x	x	snapshot of interior passengers front seat of Player vehicle BS4084 L			
RR8	x	x	snapshot of interior passengers rear seat of Player vehicle BS4084 M			
SS	x	x	letter dated 7-10-05 from Karen Kelly to Brian Kelberg with attachments BS012523-012529			
TT	x	x	Department of Corrections document re Wayne Harris BS 005168-005172			
UU	x	x	Department of Corrections document re Wayne Harris BS 005173-005177			
VV	x	x	Steven Strong report (11 pages)			
WW	x	x	30 pages, including e-mails, reports, letters and handwritten notes regarding Steve Strong			
XX	x	x	booklet of materials received by Nell Riley before 1997 declaration finalized			

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

YY	x	x	3 page index prepared for review by Dr. Nell Riley March 1997			
ZZ	x	x	2 page diagram/part of psychological evaluation			
AAA	x	x	10-22-97 declaration by Dr. Riley (11 pages)			
BBB	x	x	11-8-02 declaration by Dr. Riley (5 pages)			
CCC	x	x	school records for Steve Champion with cover letter dated 4-15-05			
DDD	x	x	Dr. Riley's raw data BS 010000-010096			
EEE	x	x	Harcourt Legal Terms and Policies			
FFF	x	x	19 page transcript, 2003, Stanford School of Medicine, Dr. Riley-Brain Injury and Impairment in Civil and Criminal Cases			
FFF-1	x	x	copy of original uncorrected copy of Exhibit FFF sent to Dr. Faerstein			
GGG	x	x	one page "Normal Range" Impaired Range"			
HHH	x	x	table of tests, 1950's cutpoint, score, demographically corrected percentile			
III	x	x	Advantages and Disadvantages of Separate Norms for African Americans			
JJJ	x	x	cover letter from Petitioner to Jack Earley dated 12-29-06 (s/b 05)			
KKK	x	x	cover letter from Petitioner ~~to Jack Earley~~ dated 10-14-05			
LLL	x	x	Appointment of Second Counsel in Capital Cases			
LLL-1	x	x	Appointment of Second Counsel with case numbers			
MMM	x	x	copy of Kelly letter to Kelberg dated 7-25-05 with attached investigative report regarding interview of Azell Jackson BS 012530-012537			
NNN	x	x	Kelly letter to Kelberg dated 7-25-05 with attachment re 1996 interview with Petitioner's sisters BS 012538-012547			
OOO	x	x	Curriculum Vitae of Dr. Charles Hinkin			
PPP	x	x	series of transmittal letters to Dr. Charles Hinkin			
QQQ	x	x	letter from Kelly to Kelberg dated 12-2-05 with attachments by Dr. Riley regarding list of tests (See Exhibit TTT)			

court exhibit reference

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

RRR	x	x	Dr. Faerstein report dated 5-11-05			
SSS	x	x	Dr. Faerstein report dated 5-31-05			
TTT	x	x	2 pages from Manual for tests administered to Mr. Champion by Dr. Riley (See Exhibit QQQ)			
UUU	x	x	handwritten notes by Dr. Riley of Champion interview			
VVV	x	x	Dr. Hinkin report dated 3-28-05			
WWW	x	x	single page from manual for administration of VSVT test			
XXX	x	x	Manly, et al Research article re Effect of African American acculturation in neuropsychological test performance			
YYY	x	x	African American acculturation and neuropsychological test performance following traumatic brain injury			
ZZZ	x	x	Curriculum Vitae of Dr. Saul Faerstein			
AAAA	x	x	Referral letters from District Attorney's Officer to Dr. Faerstein			
BBBB	x	x	Article by Dr. Pollack entitled Psychiatric Consultation for the Court			
CCCC	x	x	handwritten list of Death Penalty Cases by Dr. Faerstein			
DDDD	x	x	pages 320 and 321 from DSM 3 "Antisocial Personality Disorder"			
EEEE	x	x	5 page document containing Investigative Report dated 6-20-06 re witness Frank Harris, Confidential Witness Information form, Investigative Report dated 7-10-06 and Declaration of Frank Harris			
FFFF	x	x	letter dated 2-27-06 with attachments, to LA Co District Attorney's Office from Cipi Saldana, Ward Master File Unit, California Youth Authority, regarding commitment of Steve Champion to CYA			
GGGG	x	x	letter dated 5-17-06 to Det. Eagleson from Brian Kelberg with attachments of investigative reports and handwritten notes			
HHHH	x	x	packet of latent prints re Robert Aaron Simms comparison			
IIII	x	x	Investigative reports of Investigator Briggs of 8-3-06 re Robert Aaron Simms fingerprints			
JJJJ	x	x	four two ring binders containing copies of Skyers files as bate stamped		1	

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

KKKK	x	x	Petitioner's hand written notes of 4-10-06 interview with Marcus Player		2	
LLLL	x	x	Petitioner's letter of 11-17-05 to respondent re testimony of Marcus Player		3	
MMMM	x		Clerk's transcripts, reporter's transcripts and prelim transcripts of Los Angeles Co. Case #A619834, People vs. Jerome Evan Mallet (Marked for the Judicial Notice hearing)			

Date Received: _____ Received by: _____
Revised 1/04 DS

Superior Court of California, County of Orange
Single Party Exhibit List

Exhibit List of: **Respondent**
Case Name:
In re, **CHAMPION, STEVEN ALLEN**
Case Number: **SO65575** Dept: **C45**
Type of Hearing: **REFERENCE HEARING**
Date(s) of Trial/ Hearing: **4-17-07 Continued**

#	ID	EV	Description (Photo's must be described in detail)	Returned to Submitting Party	Prior Hrg #
NNNN	X	X	3 page letter dated 3-20-07 from Ms. Kelly to Dr. Miora		
OOOO-1	X	X	Volume 1 of 3 with cover letter dated 3-16-07 of materials sent to Dr. Miora BS000000-000201		
OOOO-2	X	X	Volume 2 of 3 BS 000202-000529		
OOOO-3	X	X	Volume 3 of 3 BS000530-000915		
PPPP	X	X	Fax cover letter dated 4-2-07 with Dr. Miora report BS 000001-000225		
QQQQ	X	X	Dr. Miora report dated 4-1-07 BS000001-000226		
RRRR	X	X	Declaration of Dr. Miora to Kelberg dated 4-10-07 BS 000001-000167		
SSSS	X	X	Letter from Ms. Kelly to Mr. Kelberg dated 2-23-07 re materials sent to Dr. Miora BS000001-000165		
TTTT	X	X	Copy of narrative draft of Petitioner's social history dated 3-20-07 BS000000-000162		
UUUU	X	X	Copy of letter dated 3-26-07 from ms. Kelly to Mr. Kelberg of Dr. Miora interview notes BS000001-000083		
VVVV	X	X	7 bound volumes of "Fielding Institute" materials BS 000001-000915		
WWWW	X	X	Supplemental information about Steve Champion BS 000000-000175		
XXXX	X	X	Copy of pagers 318 & 319 of National Accademy of Neuropsychology Bylaws		
YYYY	X	X	Corrected copy of Dr. Miora report with highlighted portions		
ZZZZ	X		CD of poem by Petitioner Steven Champion		
AAAAA	X	W/D	Portion of transcript of CD (pages 000164 and 000165 of WWWW) (Withdrawn 1-17-08 by Resp)		
BBBBB	X	X	List of felony/misdemeanor cases (7 pages)		
CCCCC	X	X	Memo dated 3-28-07 from Kelberg to File (1 page)		
DDDDD	X		Transcript of CD (poetry recital)		

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

Exhibit List of: **Court**
Case Name: **In re Steven Allen Champion on Habeas Corpus**
Case Number: **S065575** Dept. **C45**
Type of Hearing: **Reference**
Date(s) of Trial / Hearing: **February 6, 2006**

#	ID	EV	DESCRIPTION (Photo's must be described in detail)	Returned to submitting party	Prior Hrg # Resp Reference HR	
1	x		Four two-ring binders containing copies of Skyers files as bates stamped		JJJJ	
2	x		Petitioner's hand written notes of 4-10-06 interview with Marcus Player		KKKK	
3	x		Petitioner's letter of 11-17-05 to Respondent re testimony of Marcus Player		LLLL	
4	x		In camera hearing–Correspondence from Petitioner to Mr. Earley Marked collectively items 1-19			
5	x		In camera hearing–Legend Sealed			
6	x		In camera hearing–e-mails from Parnes to Earley Sealed			
7	x		Sealed Declaration of Karen Kelly (in camera hearing re Dr. Pettis)			
7a	x		Redacted portion of Ms. Kelly's Declaration provided to Respondent			
8	x		Sealed Declaration of Kathryn Andrews (in camera hearing re Dr. Pettis)			
8a	x		Redacted portion of Ms. Andrew's Declaration provided to Respondent			
9	x		binder of materials, not included in the habeas petition, reviewed by Dr. Pettis			
10	x		Second Confidential Declaration of Kathryn K. Andrews in Support of Motion for Continuance (Sealed)			
11	x		Redacted version of Second Declaration of Kathryn K. Andrews in Support of Motion for Continuance (that was provided to Respondent)			
12	x		California Appellate Courts Case Information on Steve Champion (9 pages)			
13	x		copy of in camera hearing transcript of 7-17-06 (Sealed)			
13a	x		Redacted portion of in camera hearing transcript of 7-17-06 provided to Respondent			
14	x		copy of in camera hearing transcript of 7-18-06 (Sealed)			
14a	x		Redacted portion of in camera hearing transcript of 7-18-06			

			provided to Respondent			
15	x		copy of reporter's transcript of in camera hearing of 8-8-06	(Sealed)		
16	x		copy of reporter's transcript of in camera hearing of 8-9-06	(Sealed)		
17	x		letter from Ms. Kelly to Mr. Kelberg dated 1-15-04			
18	x		Petitioner's Request to Appear Telephonically or to Set a New Hearing Date dated 1-7-05			
19	x		letter from Ms. Kelly to Mr. Kelberg dated 1-28-05			
20	x		page two of Respondent's Opposition to Petitioner's Motion for Discovery Compliance			
21	x		letter from Ms. Kelly to Mr. Kelberg dated 10-14-05			
22	x		letter from Ms. Kelly to Mr. Kelberg dated 6-28-06			
23	x		letter from Ms. Kelly to Judge Briseno dated 7-8-06			
24	x		letter from Ms. Kelly to Mr. Kelberg dated 7-12-06			
25	x		letter to Kelly from Kelberg re Drs Hinkin and Faerstein dated 7-5-05			
26	x		Stipulation re: (1) Frank Harris, (2) Dominic Hatfield, (3) Drs. Audrey Prentiss, Daniel Minton, Michael Perrotti and Richard Brown, Jr.			
27	x		Supplemental Brief in Support of Motion for Continuance received 8-15-06			
28	x		Chronological Index of Sealed Materials			
			Items marked for Judicial Notice Hearing			
29	x		Updated list of petition exhibits Petitioner requests be Judicially Noticed			
30	x		Index of Exhibits to Guilt Phase			
31	x		Index of Exhibits to Penalty Phase			
32	x		copy of Respondent's letter brief reply and opposition to Petitioner's updated request for Judicial Notice			
33	x		Court file, clerk's transcripts and reporter's transcripts of Los Angeles Co. Case #A365075, People vs. Steve Allen Champion			

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
SINGLE PARTY EXHIBIT LIST

34	x		Stipulation signed 9-6-06 re fingerprints of Robert Aaron Simms			
35	x		Respondent's list of legal authorities			
36	x		Brief of Petitioner dated 4-24-07			
37	x		Copy of Petitioner's Proposed Findings and Conclusions			
38	x		Copy of Respondent's Proposed Findings of Fact (Volume 1 of 2)			
39	x		Copy of Respondent's Proposed Findings of Fact (Volume 2 of 2)			
40	x		Respondent's Amended List of Legal Authorities received 12-27-07			
41	x		Petitioner's List of Legal Authorities received 1-22-08			
42	x		Copies of three LA Co. court files of Gerald Trabue Jr. reviewed in camera w/ worksheets			
42 a	x		Court file #A618996 Sealed			
42b	x		Court file #A910097 Sealed			
42c	x		Court file #A618712 Sealed			

Date Received: _____ Received by: _____

Revised 1/04 DS