IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

STEVEN CHAMPION,

On Habeas Corpus.

CAPITAL CASE

Case No. S065575

Los Angeles County Superior Court Case No. A365075
The Honorable Francisco P. Briseno, Referee

RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
STEVEN E. MERCER
Deputy Attorney General
State Bar No. 196911
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1344
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

About 27 years ago, a jury convicted Champion and his codefendant Craig Ross of the first degree murders of Bobby Hassan and his handicapped 14-year-old son, Eric.[1] On October 27, 1982, following a penalty trial, the jury fixed Champion's sentence at death. (3CT 798.)[2]

On January 27, 1986, Champion filed his opening brief on automatic appeal. On September 10, 1986, he filed a petition for writ of habeas corpus, wherein he argued only that he was denied effective assistance of counsel for his trial counsel's failure to secure a ruling on a pretrial motion regarding the death qualification of jury voir dire.

On April 6, 1995, this Court issued its opinion in the automatic appeal. (*People v. Champion* (1995) 9 Cal.4th 879.) This Court ordered that one of Champion's two multiple-murder special circumstances be stricken as duplicative (*id.*, at pp. 935-936), and otherwise affirmed the judgment and sentence (*id.*, at p. 952). One month later, this Court denied Champion's petition for writ of habeas corpus.

On April 21, 1997, Champion filed a petition for writ of habeas corpus in the United States District Court, Central District of California, raising 27 claims. Respondent moved to dismiss the petition. On

---

[1] The jury also convicted Champion of two counts of robbery and one count of burglary. The jury also found true three special circumstances making Champion death-eligible: (1) that there was a multiple murder; (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed during the commission of a burglary. (3CT 780-782.)

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

September 8, 1997, the district ruled it could not entertain the petition because it contained unexhausted claims. The district court ordered the federal proceedings held in abeyance while Champion returned to state court to exhaust his remedies.

On November 5, 1997, Champion filed the underlying petition for writ of habeas corpus in this Court. On February 20, 2002, following informal briefing, this Court issued a limited Order to Show Cause as to "why Champion is not entitled to relief as a result of trial counsel's failure to adequately investigate and present mitigating evidence at the penalty phase of Champion's trial." Respondent filed a Return and supporting exhibits on May 22, 2002. As respondent explained there, Champion failed to carry his burden of proof to show ineffective assistance of counsel concerning the penalty phase.

On July 30, 2003, this Court ordered the presiding judge of the Orange County Superior Court to select a judge of that court to sit as a referee in this proceeding. The referee was directed to take evidence and make findings on the following five questions:

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

2. What additional mitigating evidence, if any, could Champion 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 Champion'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 Champion, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if Champion had introduced this evidence?

5. Did Champion 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 reference hearing commenced on February 6, 2006, and concluded two years later on January 17, 2008. The 377-page report of the referee was filed with this Court on March 11, 2009.

The referee found that trial counsel Ronald Skyers did not conduct an adequate independent investigation into potential mitigating evidence. The referee found, however, that even a virtually limitless investigation such as that conducted by Champion's current attorney would *not* have produced evidence that a reasonable trial attorney would have presented at a penalty phase. Thus, after exhaustive fact-finding, the referee concluded that Skyers might be correct in his assessment that "no mitigating evidence existed to outweigh the aggravating circumstances of those two [Hassan] murders." (Rpt. 377.) Thereafter, this Court invited the parties to file exceptions to the report of the referee and briefs on the merits.

Respondent concurs with virtually all the referee's findings. On one occasion, the referee stated a finding with ambiguous language, and respondent takes "exception" to the finding to the extent it is unclear. Respondent also takes exception to the referee's one-time use of a "subjective," "best-practice" standard for judging an attorney's performance, rather than the objective standard of reasonable performance

required by this Court's precedent and *Strickland v. Washington*.[3] Regardless of these minor exceptions, however, the reference hearing conclusively showed that no possible prejudice resulted from any deficiencies in trial counsel's performance. As the referee correctly found, even assuming the undisclosed and undiscovered evidence in question had been available to trial counsel, a reasonable attorney would have declined to present most of it, and in any event, none of the evidence would have resulted in a different penalty verdict.

STATEMENT OF FACTS

I. FACTS RELATING TO GUILT[4]

A. Murders Of Bobby Hassan And His Son, Eric

On the morning of December 12, 1980, Mercie Hassan left her home at 849 West 126th Street, Los Angeles, to go to work. Residing with her were her husband, Bobby Hassan (an unemployed carpenter who sold marijuana and sometimes cocaine), and their four children. Mercie spoke to Bobby on the telephone between 11 and 11:30 that morning. Bobby normally picked up their 14-year-old son, Eric, from school at noon and brought him home for lunch.

Sometime around noon, Elizabeth Moncrief, a nurse working for an elderly woman across the street from the Hassan residence, saw Bobby and Eric return home. Half an hour later, she saw a l[illegible]ge gold or cream-colored

---

[3] *Strickland v. Washington* (1984) 466 U.S. 668, 688-690 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*).

[4] The facts from the guilt and penalty phase of Champion's trial are quoted from this Court's opinion in *People v. Champion* (1995) 9 Cal.4th 879, 897-904. These facts influenced many of the referee's factual findings, credibility determinations, and ultimate conclusion that the bulk of Champion's proposed mitigation themes would have been damaging and/or ineffective if presented at the penalty phase.

Cadillac containing 4 Black males, ages 19-25, parked in front of the Hassan home. Moncrief went outside and took a close look at the car. About five minutes later, she saw two of the men get out of the car and knock at the Hassans' door. There was a struggle at the door, and the two men entered. The other two men then got out of the car and entered the house, and someone closed the curtains in the Hassan residence.

Later, Moncrief saw all four men leave the house. One was holding a pink pillowcase with something in it; the others were carrying paper bags containing unknown items. Moncrief was able to get a particularly good look at the last man who left the house, a tall man with heavy lips, a scar on his face, and either a chipped tooth or a gap between his teeth. She paid closer attention to this man because she had seen him once in Helen Keller Park, which was just across the street.

Mercie Hassan returned home about 3:30 p.m. The house had been ransacked. Part of the lunch she had prepared for Bobby and Eric was on the floor, along with wrapping paper from the children's Christmas presents. Several of the presents were missing, as were some colored pillowcases and a .357-caliber Ruger Security Six revolver. Police, called to the scene, found the bodies of Bobby and Eric Hassan in the bedroom, lying on the bed. Each had been shot once in the head. Bobby's hands were tied behind his back, and three rings and a necklace he customarily wore were missing.

Defendant Champion was arrested on January 9, 1981. When arrested, he was wearing a yellow metal ring with white stones and a gold chain necklace that contained a charm bearing half of a king-of-hearts playing card. Mercie Hassan identified the ring and charm as belonging to her husband, Bobby. Latent fingerprints lifted from the Christmas wrapping paper and from a white cardboard box matched defendant Ross's fingerprints.

A month after the robbery, Moncrief selected defendant Champion's picture from a photographic lineup, saying he could have been one of the men she had seen at the Hassan house. Three days later she positively identified Champion at a physical lineup at the Los Angeles County jail. She also positively identified him at trial as the fourth man she saw leaving the Hassan home. In addition, she identified a photograph of a brown Buick automobile linked to defendants (see pt. I.A.2., *post*) as being the car she had seen in front of the Hassan home.[FN2] Earlier, at a wrecking yard to which the police had taken her, Moncrief recognized the Buick as the car in question because of a distinctive dent on its right front.

[FN2 Before identifying the photograph of the brown Buick, Moncrief testified that the car she had seen in front of the Hassan home was a gold or cream-colored Cadillac.]

On cross-examination, Moncrief acknowledged that at an early stage in the murder investigation she had identified two other men, Benjamin Brown and Clarence Reed, as the men she saw visit the Hassan home, and she had identified their car, a Chrysler, as the one she had seen in front of the Hassan home.

Reed and Brown had become suspects in the police investigation because: (1) both were involved in an attempted robbery elsewhere in Los Angeles the day after the Hassan murders, during which Reed was killed; (2) Mercie Hassan identified Brown as a person who had been to her house to buy marijuana from her husband; and (3) Mercie Hassan told police that on several occasions she had answered telephone calls from a person named "Clarence" who wanted to buy drugs. To show that Reed and Brown did not commit the murders, the prosecution called Brown, who testified that he had spent the day at home, and Reed's employer, who produced a "time card" (on the back of a cigarette carton) showing that Reed was at work in a grocery/liquor store at the time of the murder.

A ballistics expert testified that Bobby Hassan was killed by a .357-caliber bullet with rifling characteristics; the latter are produced by the gun that fired the bullet, and were described by the expert as "six lands and grooves with a left hand twist." The expert also testified that most Colt revolvers produce these particular characteristics. The prosecution produced photographs, found in defendant Champion's home, showing each defendant holding a Colt revolver. But Benjamin Brown, when arrested for the attempted robbery that resulted in the death of Clarence Reed, was found in possession of a gun that produced the same rifling characteristics.

A jury found defendants Champion and Ross guilty of burglarizing the Hassan home and of robbing and killing Bobby and Eric Hassan.

B. The Murder Of Michael Taylor

During the evening of December 27, 1980, three men came to the door of Cora Taylor's apartment at 11810 1/2 Vermont Avenue, not far from the Hassan home. Residing with Cora were her son Michael (who sold marijuana) and her daughter Mary. The men, one of whom Cora identified at trial as defendant Ross, walked into the living room and asked to speak to Michael. When Michael and Mary came out of the next room, accompanied by William Birdsong, a friend who was visiting, one of the men, whom Cora and Mary later identified as Evan Malett, grabbed Birdsong. A struggle ensued, which ended when Malett drew a gun and ordered Cora, Mary, Michael, and Birdsong to sit on the bed. Malett then demanded money and drugs. When Mary said they did not have any, one of the three men hit her in the jaw with his fist. The men then ordered the Taylors and Birdsong to lie face down on the bed, opened Cora's purse, and ransacked the premises. While the three robbers were rummaging through the apartment, a fourth man (apparently a lookout) came to the door but did

not enter.

At Cora's urging, Michael told the robbers that there was money in a box in the kitchen. At that point one of the men, whom Mary later identified as defendant Ross, grabbed Mary by the hair and forced her to go into the bathroom, where he raped her. He then left the bathroom, returning moments later to rape Mary again. Thereafter, Malett entered the bathroom and unsuccessfully tried to rape Mary.

The three men then ordered Birdsong and Cora to join Mary in the bathroom. A short time later, Cora and Mary heard a shot. After a few minutes, they left the bathroom and found Michael in the living room, dead. A prosecution expert testified that Michael had died from a single shot from a high-powered weapon (such as a .357 magnum), fired at close range. The agent also testified that the gun used to kill Bobby Hassan could not have been the murder weapon, but that the bullet could have been fired by the .357-caliber Ruger stolen from the Hassan home.

Missing from the Taylor's apartment was an eight-track tape player. Also missing was a Christmas present–a photo album–which had been taken out of its wrapping.

Later that night, shortly after midnight, Los Angeles County Deputy Sheriff Ted Naimy saw a brown Buick automobile that contained four Black males and did not have its headlights turned on in the neighborhood where Michael Taylor had been murdered. As the Buick pulled alongside of him, Deputy Naimy and his partner ordered it to stop. Instead, the car sped away. As the deputies pursued the Buick, it went out of control, struck a curb, and came to a halt. Its four occupants jumped out of the car and ran. Inside the car, the deputy found the eight-track tape player stolen from the Taylor apartment and the .357-caliber Ruger revolver stolen from the Hassan home. The gun contained two live rounds and an empty shell casing, and smelled as if it had recently been fired. Under the car, Deputy

Naimy found the photograph album stolen from the Taylors.

Police searched the neighborhood for the occupants of the Buick. They found Evan Malett hiding in a backyard of a nearby house, in which defendant Champion was living.

Natasha Wright, the Taylors' next-door neighbor, identified defendant Ross at trial as one of the men she saw arrive at the Taylors' apartment. Prosecution experts testified that two latent fingerprints lifted from the bathtub in the Taylors' apartment belonged to Ross, and that spermatozoa found on Mary's pants were consistent with Ross's blood type, which is shared by roughly 11 percent of the population.

The jury convicted defendant Ross of burglarizing the Taylor residence; of robbing Cora, Michael, and Mary Taylor; of raping Mary; and of murdering Michael. Although Cora Taylor identified defendant Champion as one of the robbers, and Mary Taylor testified that Champion was similar in appearance to one of the robbers, Champion was neither charged with nor convicted of any of the crimes committed at the Taylor apartment. (Apparently, no one had identified defendant Champion as a participant in the robbery before trial.)

C. Other Prosecution Evidence At The Guilt Phase

At the guilt phase of the trial, the prosecution also presented evidence of the murder of Teheran Jefferson. The relevant facts relating to Jefferson's death will be discussed in part II.F.[5]

---

[5] This Court summarized the Jefferson murder evidence as follows:

> Los Angeles Police Officer Billy Leader arrived at the scene of a homicide at 862 West 126th Street, Los Angeles. He found the victim, Teheran Jefferson, with his upper torso on the bed, and his knees and feet on the floor. Jefferson's hands were tied behind his back, a pillow was over his head, and his mouth was gagged with a T-
>
> (continued...)

The prosecution also offered expert testimony that both defendants were members of the Raymond Avenue Crips, a gang whose territory encompassed the houses where the murders occurred; that defendant Ross's nickname in the gang was "Little Evil" or "Evil"; and that defendant Champion's gang nickname was "Trecherous," "Trech," or "Mr. Trech," all standing for treacherous. This testimony will be discussed in part II.G.[6]

(...continued)

shirt. He had been shot in the back of the head. The wound was a "contact wound," meaning that the killer had placed a gun against Jefferson's head and pulled the trigger. In the kitchen was a box containing "marijuana debris" and some plastic baggies. In Officer Leader's expert opinion, the owner of the marijuana possessed it for the purpose of sale. Sandra Taylor, Jefferson's ex-girlfriend, testified that Jefferson sold marijuana.

The bullet that killed Jefferson was found under his body. A prosecution ballistics expert testified that the bullet was either of a .38 or .357-caliber, and had rifling characteristics, which were produced by the gun that fired it, and which the expert described as "six lands and grooves and a left hand twist." It was thus similar to the bullet that killed Bobby Hassan, which was a .357-caliber bullet, bearing six lands and grooves and a left-hand twist. The expert was unable to say, however, that the two bullets were fired by the same gun. He also explained that Colt revolvers generally produced six lands and grooves with a left-hand twist.

The prosecution introduced no evidence directly connecting either defendant in this case with Jefferson's murder.

(*People v. Champion*, *supra*, 9 Cal.4th at p. 917.)

[6] This Court summarized the gang expert testimony as follows:

Deputy Williams was familiar with the Raymond Avenue Crips. That gang's "prime hangout" was Helen Keller Park. Defendant Ross, defendant Champion, and Evan Malett (identified by Mary and Cora Taylor as the man who held a gun during the robbery in which Michael Taylor was murdered) had each told Williams that they were members of the Raymond Avenue Crips. According to other gang

(continued...)

(...continued)

members, the gang's nicknames for defendant Ross were "Evil" and "Little Evil"; Champion's gang nickname was originally "Mr. Crazy," and later "Treacherous," "Trech," and "Mr. Trech." Champion, Ross, and Malett were all members of a subgroup of the Raymond Avenue Crips called the "Old Gangsters," because they had been gang members for a long time.

Deputy Williams also testified about a brown Buick automobile. As we discussed earlier in our summary of the facts, sheriff's deputies saw four Black males in a brown Buick automobile, driving without its headlights, on the night Michael Taylor was murdered. When they attempted to stop the car, it took off at high speed. The deputies gave chase; the car struck a curb and was abandoned by its occupants. Inside the car, police found items stolen from the Taylors' apartment as well as the .357-caliber Ruger revolver stolen from the Hassan residence. According to Deputy Williams, a man named Frank Harris owned the Buick. Three of Harris's sons-Lavell, Marcus, and Michael Player-were members of the Raymond Avenue Crips. Deputy Williams had seen Marcus and Michael Player driving the Buick. In the months immediately preceding the murders of the Hassans and Michael Taylor, Williams had frequently observed defendants together with the Player brothers and Malett.

Deputy Williams explained that gang members use graffiti to "advertise" their gang membership. He had taken three photographs of gang graffiti in the neighborhood of Helen Keller Park. Two of the photographs, which were admitted into evidence, showed a circle with the number 8 and the letters O/R/C. The circle and the number 8 identified defendant Champion by his earlier nickname, "Mr. Crazy 8," and the letters "O/R/C" stood for "Old Raymond Crips." The third photograph showed a building diagonally across the street from the home of Michael Taylor. On the building was written "Trecherous," "Popeye," "Raymond Avenue Crips Cuzzins," and "do-re-me" and a dollar sign. According to Deputy Williams, "Treacherous" was defendant Champion's nickname, "Popeye" was the name of another member of the Raymond Crips, and the word "do-re-me" and a dollar sign referred to the obtaining of money in a robbery or burglary.

Deputy Williams identified the persons appearing in a set of four

(continued...)

In addition, the prosecution introduced a tape recording of a conversation between defendants that took place in a bus transporting them from jail to court. The contents of the tape recording will be discussed in part II.A [*sic*].[7]

(...continued)

photographs found in defendant Champion's bedroom when he was arrested. One photograph showed Lavel Player clasping defendant Ross's left hand, while Ross held a revolver in his right hand. A second photograph depicted defendant Ross embracing Marcus Player. A third showed defendant Champion standing in the kitchen, brandishing a revolver, while the fourth depicted Lavel Player holding a bat, with a gun (apparently the same revolver) thrust into the top of his trousers. Deputy Williams also identified three other photographs, which an anonymous person had given him. Two of the photos showed defendant Champion standing face-to-face with Marcus Player, while the third depicted defendant Champion "making a Raymond Crip sign" with his hand.

Deputy Williams also identified Bobby Hassan, Jr., who was the son of murder victim Bobby Hassan and the brother of murder victim Eric Hassan, as a "junior member" of the Raymond Avenue Crips gang.

(*People v. Champion*, *supra*, 9 Cal.4th at pp. 920-921.)

[7] The Court discussed the tape-recorded conversations at part II.*D* of the opinion, as follows:

After obtaining authorization from the trial court, the police tape recorded defendants' conversations in the van transporting them to and from the court. At trial, the prosecution played the tape recording to the jury, over the objection of both defendants.

In the two tape-recorded conversations, which contained numerous profanities, defendants fantasized about taking a "stroll" out of the jail and about "blow [ing] 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." Their conversations also included the following interchange, in which

(continued...)

(...continued)

they talked about Bobby Hassan, Jr., the son of victim Bobby Hassan and a "junior member" of defendants' gang, the Raymond Avenue Crips. (See pt. II.G., *post.*) According to the prosecution, in this interchange defendants discussed whether Bobby Hassan, Jr., had told the police about defendants' participation in the murder of his father and brother, and discussed whether the bed on which victims Bobby and Eric Hassan were lying when they were shot was a waterbed:

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

R: "Bobby Hassan what you mean?

C: "His father-the one that got killed.

R: "A picture?

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

R: "What you mean? He's dead.

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

R: "Oh, the Raymond Crip.

C: "Yeah.

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

R: "Yeah?

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

R: "He's in court (inaudible)?

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

R: "He ain't never said nothing?

C: "No, he's a punk ass.

R: "They supposed to be witnesses?

(continued...)

D. Defense Evidence At The Guilt Phase

Defendant Champion, who was charged only with the burglary of the Hassan residence and with the robbery and murder of Bobby and Eric Hassan, presented an alibi defense. He testified that on the morning of the murders he and his brothers, Reginald and Louis, picked up his paycheck from Prompt Service, a "temporary personnel" agency that had employed him. He then went home, where he spent the afternoon. His brother Reginald corroborated his account, as did his mother.

According to defendant Champion, the ring and charm that he was wearing when arrested and that Mercie Hassan identified as belonging to her murdered husband, Bobby Hassan, had been given to him eight months earlier by one Raymond Winbush, who was killed two weeks after giving him the jewelry. Champion's sister, Rita, testified that she had seen Champion wearing the ring four years before the murders, and the charm a month or two before the murders. The ring and the charm were both mass-produced items (with a combined retail value of roughly $400), and the defense argued that Mercie Hassan had mistakenly identified them as belonging to her murdered husband.

Defendant Ross offered no evidence at the guilt phase.

(...continued)

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

R: "(Inaudible)

C: "(Inaudible)

R: "Was that a waterbed in that room?

C: "Uh-uh."

(*People v. Champion*, *supra*, 9 Cal 4th at pp. 909-910.)

II. EVIDENCE AT THE PENALTY PHASE

At the penalty phase of the trial, the prosecution presented the following evidence of violent criminal conduct involving defendants Champion and Ross.

A. Robbery At The West Covina Bus Station

On November 6, 1977, Vincent Verkuilen, Jerry Stanger, and Laura Surgot were standing at the Greyhound Bus Depot in West Covina when eight young men approached them. Two of the youths drew handguns, and one of them demanded Verkuilen's wallet and his watch, while others in the group attempted to take belongings from Stanger and Surgot. When police officers arrived at the scene, the youths ran away; as they did so, the two gunmen fired shots. Verkuilen identified defendant Champion as one of the robbers.

Based on this incident, a petition was filed in juvenile court charging defendant Champion with grand theft, attempted robbery, and robbery. The trial court found the petition to be true, and ordered Champion removed from his home and placed in a "camp community placement" program.

B. Robbery Of Jose Bustos

Court Reporter Buelah Pugh read to the jury in this case the juvenile court testimony of Jose Bustos: On September 27, 1978, Bustos and his wife were in a park, listening to a radio. They were approached by five youths, including defendant Champion. One of the boys took the radio, and when Bustos tried to retrieve it, the other four attacked him. Champion kicked him, hit him on the head with a bottle, and cut his finger with a switchblade knife.

Court Reporter Pugh testified that she had worked in juvenile court for eight years; that a minor in a juvenile proceeding is analogous to a defendant in an adult proceeding; that the referee who hears juvenile

proceedings is, "for all intents and purposes, a judge at that hearing;" and that "a finding of true is the equivalent in juvenile court of a finding of guilty in an adult court."

C. Assault On Mark Howard

On July 29, 1977, Mark Howard, a gang member, was in Helen Keller Park when Walter Gregory approached and said that defendant Ross wanted to talk to him. Howard walked to another part of the park and spoke to Ross, who was with a group of people. Ross demanded that Howard return a radio that Howard had taken from Gregory. Howard said he took the radio because Gregory owed him money. When Howard refused to return the radio, Ross produced a revolver, and said that if Howard did not return the radio he would blow Howard's head off. Howard then slapped Ross, whereupon Ross shot Howard six times in the stomach and the chest. Howard recovered, but a bullet remains lodged close to his spine, and his ability to use his left leg is seriously impaired. As a result of this incident, defendant Ross entered a plea of guilty to a charge of assault with a deadly weapon, and was sentenced to three years in prison.

D. Defense Evidence

Thomas Crawford, who was defendant Champion's California Youth Authority parole agent, testified that Champion was cooperative and maintained satisfactory contact in the three months between his release and the time he was arrested for the murders in this case.

Champion's mother testified that on the day he was arrested for the murders, he was scheduled to start work as a tutor at Gompers Junior High School.

Defendant Ross offered no evidence at the penalty phase. The parties stipulated that he was born on February 1, 1959; thus, he was 21 years old

at the time of the murders.

At defendants' request, the trial court took judicial notice that Evan Malett was convicted of first degree murder and seven other felonies based on his role in the murder of Michael Taylor and the robberies and rapes at the Taylor residence, and that he was sentenced to a prison term of 46 years to life.

III. SUMMARY OF REFERENCE HEARING FINDINGS[8]

A. Reference Question 1

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

After begin briefly represented by two other attorneys, Ronald Skyers was retained by Champion's mother to represent Champion for all further trial proceedings. (Rpt. 6-7.)[9] Skyers, now a Los Angeles Superior Court Judge, testified at length at the reference hearing about the scope of his representation and his investigation into potential mitigating evidence. The referee found Judge Skyers was "fully credible," and that he had engaged in an "extensive personal investigation." (Rpt. 29, 270, 376.) Skyers read all pretrial discovery provided by the prosecution dealing with the Hassan

---

[8] A highly detailed account of the reference hearing evidence is contained in the voluminous Report. There, over the span of 377 pages, the referee conducts an exhaustive, careful, and painstaking review of the documentary evidence and live testimony that was introduced at the hearing over the course of two years. This section therefore provides a summary of the pertinent findings for each of the five reference questions.

[9] "Rpt." refers to the referee's Report, and "RHT" refers to the reference hearing transcripts. The exhibit designations correspond to those used by the referee in the Report.

murders (Factor A[10]), the Tehran Jefferson murder (Factor B), and the Michael Taylor murder (Factor B). Skyers also read all pretrial discovery provided by the prosecution dealing with juvenile offenses (Factor B), and the CYA reports of Champion (Factors D, H, and K). Skyers personally spoke to, visited and investigated the following persons, locations or information: Drs. Pollack and Imperi (mental status report Factors D), Champion (Factor K), family members (Factors D, H, K), family home and neighborhood conditions (Factor K), the Jefferson, Hassan, and Taylor crime scenes (Factor B), and Champion's age (Factor I).

As to the underlying charges, Skyers personally read the entire discovery provided by the prosecution, visited the Hassan crime scene, Helen Keller Park, the Champion residence, spoke to Champion and his family including Champion's brother, Reggie Champion. His principal focus as to Factor A was lingering doubt dealing with any reasonable doubt a juror may hold (if any) as to Champion's guilt or degree of criminal culpability. Skyers believed 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. Skyers was aware that during the guilt phase evidence from the uncharged Jefferson and Taylor murders would be presented for determining guilt as to the Hassan murders. (Rpt. 19-20.)

1. Investigation of the Tehran Jefferson murder

The referee found that Skyers knew the prosecutor could not link Champion or Ross to the Jefferson homicide with physical evidence or witness identification. Skyers concluded that the prosecutor could not prove Champion's criminal liability beyond a reasonable doubt. He did not

---

[10] The referee specifically cited these "Factors" in his report, and they refer to subdivisions (a) through (k) of Penal Code section 190.3.

undertake a separate investigation of the Jefferson murder. (Rpt. 18-19, 24-25, 79.)

2. Investigation of the Michael Taylor murder and related crimes

The referee found that Skyers's pretrial review of discovery showed that the prosecutor had no physical or identification evidence linking Champion to the Taylor murder. Champion, Harris, and Marcus Player were seen approaching the Los Angeles Sherriff's Department (LASD) perimeter from outside the perimeter and were detained by the LASD. They were directed to walk the perimeter. While doing so a fourth person who was identified as James Taylor (Robert Aaron Simms) joined the threesome and the group was detained by the LASD at the next checkpoint. The Taylor murder victims viewed the group at the field show up. No one was identified. Taylor (Simms) was taken to the police station while Champion was directed to his home, which is within the perimeter. Evan Mallet was arrested hiding in Champion's backyard and he was identified by some of the Taylor victims at the field show up. (Rpt. 20-21, 25-26.)

3. Investigation into juvenile offenses

The referee found that that Skyers received and read the discovery of the noticed juvenile offenses, namely the November 6, 1977 West Covina crimes in which Champion and others robbed three persons and the September 29, 1978, assault with a deadly weapon at Helen Keller Park in which Champion, while accompanied by four to five others, cut the victim's finger, kicked him, and broke a bottle over his back. The potential mitigation reflected in this information was Champion's age (17 years old) and lack of maturity. Champion's file also contained other crimes/arrests including a 1976 burglary. (Rpt. 21.)

4. Review of California Youth Authority (CYA) reports

Champion was in CYA custody in 1977, and again between September 27, 1978, and October 23, 1980. Skyers reviewed Champion's CYA file, which detailed Champion's past arrests, the nature of the alleged conduct on the part of Champion, the type of crime, the location and the identity of his companions. The records also noted that Champion had issues involving anger, bad temper, and use of violence. The CYA reports also documented Champion's misconduct at CYA as well as some positive adjustments. The report also contained extensive evaluations by four doctors who concluded that Champion had a below average IQ, was impulsive, had reading difficulties, needed to take remedial classes, and that he was *not* suffering from any mental defect, disorder, or illness. The CYA reports contained statements that Champion claimed (falsely) to have severed his gang ties. (Rpt. 11, 19, 31-43, 46, 186-187 & fn. 96, 222, 256, fn. 145, 264, 265; Exs. D, G, H, I, J, G.)

5. Drs. Pollack and Imperi's mental status report

Champion's prior trial counsel had the trial court appoint Drs. Pollack and Imperi to evaluate Champion's mental status as to both the guilt and penalty phase. The referee found that Skyers received and read the written reports that addressed five separate areas including their findings of no mental illness, defect or disorder. (Rpt. 22-23, 43-46; Ex. 46.)

6. Interview of Champion

The referee found that Skyers personally interviewed and consulted with Champion about the Hassan charges as well as his childhood and background on at least 10 to 20 occasions. (Rpt. 23, 26-27.)

7. Interview of family members

The referee found that Skyers personally interviewed Champion's mother, older sisters, and brother Reggie Champion concerning Champion's home life, childhood, and other family matters. Skyers had substantial contact with Champion's mother and sisters and allowed them to discuss Champion and the family's background. The family gave no information to Skyers about Champion's now-claimed fetal abuse, 1968 head injury, infliction of head trauma by older brothers, poverty, or gang activity. (Rpt. 23, 26-31.)

8. Family home and neighborhood conditions

The referee found that Skyers personally interviewed Champion, Champion's mother, older sisters, and brother Reginald regarding matters relevant to factors (d), (h) and (k). He visited on several occasions Champion's family home, which is very close to Helen Keller Park, the Jefferson, Hassan, and Taylor crime scenes, and within the perimeter established by police on December 28, 1980. Skyers, who is African-American, observed the living conditions of Champion 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's testimony as to how often he visited the Champion and family members and nature of their discussions was accepted as "very credible" by the referee. (Rpt. 9, 21-24, 26-30, 222-224, 264-265, 268, 270-271.)

9. Jefferson, Hassan, Taylor crime scenes

The referee found that Skyers 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. (Rpt. 24.)

10. Champion's age

Skyers was aware of Champion's young age (18 years old) and lack of maturity at time of the Hassan murders. Skyers was aware that Champion did not have an adult criminal record. (Rpt. 24.)

B. Reference Question 2

What additional mitigating evidence, if any, could Champion have presented at the penalty phase? How credible was this evidence?

1. Potential mitigation and rebuttal evidence as to the Hassan murders

The referee determined that the jury knew Champion's and Ross's ages, that Champion was not the shooter, and that Champion was not the leader. The jury was also aware that Champion'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). Champion 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. (Rpt. 78-79, 89.)

Champion was identified at trial as a member of the Raymond Avenue Crips, which was a violent criminal street gang at the time of the Hassan crimes. The evidence adduced at the reference hearing established that Champion was an active gang participant since age 12 and had personally been involved in violent crimes since age 12 or 13. The referee found that Champion's gang was a significant source of increased danger to the community, a mitigation theme claimed by Champion in his habeas proceedings.

Champion did not present or identify what mitigation could have been presented as to either juvenile offenses (1977 robbery or 1978 assault with deadly weapon). (Rpt. 79.)

2. There was no potential mitigation evidence for Jefferson murder

Champion did not present any additional mitigation or rebuttal evidence as to the Jefferson murder. (Rpt. 79, 89, 266, 270.)

3. There was no credible alibi evidence for Taylor murder

The referee found that the primary alibi witnesses called to support Champion's claimed alibi were fellow gang members Harris, Bogans, and Player. (Rpt. 79.) The referee deemed their testimony was neither consistent nor credible, and that it did not support an alibi for the Taylor murder. The referee also determined that calling fellow gang members would be "prejudicial" to Champion because it would confirm and highlight his gang involvement and association with codefendant Ross. (Rpt. 79, 92-108, 167-185, 287, 291-292.)

4. Champion did not suffer from brain damage or any substantial cognitive defect

The referee found no credible evidence to support Champion's claim that he had any brain damage or substantial cognitive defect. (Rpt. 12, 186.) Champion's habeas counsel had Dr. Riley test Champion in 1997. The referee found "not supportable" and "not credible" Dr. Riley's opinion that Champion suffers from brain damage from possible fetal abuse, traffic accident head injury, or physical abuse by older brothers. (Rpt. 80, 129.) The referee based his finding in part because (1) the opinion lacked support form any medical records or police reports, (2) was inconsistent with

statements by Champion and his mother, and (3) was inconsistent with the opinions of the People's experts (Drs. Hinkin and Faerstein) whose testimony was deemed credible and whose findings were consistent with 20 contemporary psychological/psychiatric evaluations conducted by CYA doctors between 1978 and 1980. The referee found that Skyers had no reason to order additional evaluations based on his review of existing examinations prior to trial. (Rpt. 12-13, 49-71 & fn. 40, 80-83, 129-130, 186-193.)

The referee found that Champion's school records, the evaluations performed by CYA doctors, and Dr. Pollack/Imperi's report revealed some impairment, and that these records and documents existed at time of trial. Skyers did not gather or review the school records, but did gather and review the CYA records. (Rpt. 81-82, 129-133.) The referee found that Champion's pre-trial "impairments" were (1) low IQ and intellectual functioning, (2) reading and learning difficulties, (3) attention deficits, (4) a flat affect, (5) deficiency in ability to conceptualize, (6) low self-esteem, (7) impulsiveness, and (8) a bad temper. The referee found this information credible and available at time of trial. (Rpt. 82.) The referee found that Champion has strong verbal skills. However, the referee concluded "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 [Champion's] mental status." (Rpt. 13, 52, fn. 25, 186-187, 267-268.) The referee also found that "[r]easonably competent counsel would have concluded that no further testing was necessary nor any further examinations warranted." (Rpt. 271-272, 288.)

The referee determined that Champion's mother instructed family members not to talk about family business with others, and Champion told Dr. Miora, the "mitigation expert" he retained after trial, that his mother was secretive. This information corroborated Skyers's testimony that no

one discussed family matters with him. Drs. Riley and Miora's statements that Champion had strong verbal abilities corroborated Skyers's testimony that during his interviews with Champion he did not notice anything abnormal about him. (Rpt. 80-83, 186-193, 284-290; Ex. CCC.)

5. Scope of social history

Dr. Miora, a mitigation expert hired by Champion after his trial, submitted a written report (Exhibit 136) containing an extensive family history detailing social events of *other* family members including prior generations. The referee found the evidence would have been inadmissible because it was "not relevant" or lacked sufficient foundation. (Rpt. 376.) The referee found no sufficient link between the social history of other members of Champion's extended family and his own development and functioning. (Rpt. 82-89, 159-160, 376.) The referee found that Champion's claims of physical abuse "are not credible." (Rpt. 229.)

The referee did find that Mrs. Champion was a single parent with the responsibility of providing financial support for a very large family. Her efforts to find employment resulted absences from home. When employed, her absence from the home resulted in her inability to provide proper care, guidance and supervision for Champion. Skyers's testimony and recollection that in 1981 Champion lived in a nice home and in a well-maintained neighborhood was deemed credible and was supported by Trial Exhibit No. 5 (photos of interior of Champion's home). (Rpt. 82-89, 160-161, 224-230.)

6. Champion's drug use did not result in mental impairment

The referee found that Champion minimized the duration and level of his drug use in his statements to Dr. Miora, but that there was no evidence that linked his drug use to any brain damage or mental impairment. (Rpt.

84.)

7. Champion's participation in a criminal street gang was not mitigating

As the referee explained, Champion's reasons for joining a gang were developed at the hearing by a gang expert, CYA reports, and Dr. Miora's interview. In light of all circumstances of Champion's development, conduct, and character, the referee found the gang evidence was not mitigating, and would not rebut the aggravating aspects of Factor A. As the referee reasoned, Champion's expressions of how loyal he was to the Raymond Avenue Crips and his fellow gang members support the finding that fellow gang members would do anything to aid one another. (Rpt. 84.)

8. School history showed some poor functioning and bad behavior, but it was "neutralized" by Champion's active gang involvement from age 12

The referee found that Skyers did not obtain Champion's school records, interview any of Champion's schoolteachers, or visit any of Champion's schools. The records reflect Champion's poor academic functioning in school. He displayed learning disability, read slowly, and had an IQ test below average. Champion was easily distracted and problems at home affected his school efforts. He displayed a bad temper. Champion's school records therefore support the proposed mitigation theme of poor academic functioning in elementary, junior and high school. (Rpt. 14, 81-82; Ex. CCC.) However, the referee found this mitigation theme was subject to being "neutralized" by Champion's gang involvement from the time he was 12. (Rpt. 85.) Moreover, the school records indicate Champion could do well when he applied himself, and Champion told Dr. Perrotti that he felt he could have done better in school. The records did not reflect any physical abuse, any significant medical issues, malnutrition,

or a lack of clothing. Champion's mother told school officials all was well. A teacher notes that Champion seeks to be leader. (Rpt. 84-85; 245-246, 286-287.)

9. No credible evidence of sibling abuse was available to trial counsel

Mrs. Champion, E.L. Gathright, Rita and Linda Champion testified on this subject. Neither Reggie nor Champion's older brother (Lewis Champion III) were called to testify. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers, but the referee found their testimony was not credible. As the referee explained, it was inconsistent with other testimony from close friends or fellow gang members, with Mrs. Champion's statement to school officials and the CYA, and with Champion's positive description of his family life to CYA staff. (Rpt. 85, 230-234.) The referee found "no credible evidence" existed to support Champion's claim of physical abuse. (Rpt. 230.) In addition, although Lewis Champion III had been disruptive and harsh with Champion, this information was withheld from Skyers. (Rpt. 11, 23, 85-86, 233-234.)

10. No credible mitigating evidence concerning family matters was disclosed to Skyers

Champion's biological father, Lewis Champion II, abandoned the family when Champion was born. The referee found that although this would normally be mitigating evidence under Factor K, the man was so abusive that his departure was *good* for Champion. The referee found that Gerald Trabue, Sr. was the Champions' father figure from 1962 to 1968 and that he was a "wonderful person and provider." (Rpt. 85-86.)

The referee found that Champion was adversely impacted by Trabue's death in a traffic accident in 1968, and did not have another father figure

afterward. The referee found that an attorney could have presented these matters in mitigation but for the failure to disclose them by family members. (Rpt. 86.)

11. CYA reports contained some amenability evidence, but it was "nullified" by negative information

The referee found that Champion's CYA reports, which Skyers reviewed, provide some credible support as to his amenability for rehabilitation. The CYA staff and doctors' reports indicated that he complied with CYA rules and regulations, engaged in CYA programs, obtained good grades in his classes, was respectful to staff, and could do well in a structured facility and program such as CYA. But the referee found that any potential mitigation theme was "nullified" by the brief lapse of time between the time Champion was paroled and when he murdered the Hassans. The referee further found that even if the CYA reports been presented at a penalty phase, the prosecution could have used them to impeach other claims of mitigation because they referred to Champion's violent conduct at CYA and his prior arrests and crimes. (Rpt. 86, 241-242, 253-259.)

12. There was credible evidence that Champion was loved and supported by family and friends

The referee found that the hearing evidence "clearly supported" a finding that reasonable trial counsel would *not* have called Champion's mother at the penalty phase. However, the referee opined that because her love for Champion was so "remarkable," Skyers should have asked her direct questions, and should have given "more consideration" to calling her to testify as to why she felt his life, age, and relationship to others did not warrant death. The referee found credible the evidence of love and care for Champion by family members and childhood friend Gary Jones, as well as

the evidence that he was protective of his younger siblings. (Rpt. 86-87, 259-260.) The referee found "particularly credible" Jones's reference hearing testimony describing the positive childhood he shared with Champion, in which Jones stated, "We had a really beautiful childhood." (Rpt. 244; RHT 5665-5666, 5689.)

13. The increase in community dangers in Champion's neighborhood was not mitigating evidence

The referee found that the increased community dangers in Champion's neighborhood was not mitigation evidence available to trial counsel and that Champion's own street gang contributed to making the community more dangerous. As the referee reasoned, Champion's involvement in a violent criminal street gang around the time of the increase in violent crimes, and the gang's use of Helen Keller Park as their hangout, would rebut any claimed mitigation based on increased community dangers. (Rpt. 87, 234-240.)

14. Champion's statements were "inconsistent or prejudicial" to many of his proposed mitigation themes

The referee found that Champion's own statements during the trial, to codefendant Ross, to CYA staff, to doctors, and to Drs. Riley and Miora, were damaging to his proposed mitigation themes. As the referee explained, Champion's statements aggravated the nature of his gang involvement, corroborated the prosecution's gang expert, and corroborated Skyers's testimony that neither Champion nor the family disclosed family secrets. Moreover, the referee found that the school records and CYA reports contain substantial credible evidence that would be inconsistent or prejudicial to many of the claimed themes of mitigation. (Rpt. 87-88.)

15. Trial counsel was "very credible"

Skyers was deemed a "very credible witness" whose testimony was more reliable than Champion's mother and sister as to discussions of family matters. As Dr. Miora's interview report confirmed to the referee, Champion and his family members knowingly withheld family matters from Skyers. (Rpt. 88, 266-269.)

16. Mrs. Champion's absence from the family home adversely affected Champion, but she was not credible and purposefully withheld information from Skyers

With the exception of areas dealing with her love and affection for Champion and her family, the referee found Mrs. Champion was "less than truthful." The referee explained that in contrast to her testimony, Champion did not suffer from extreme family poverty, and was not denied the basic essentials of food, shelter, clothing, education, transportation or family support. (Rpt. 88, 229.)

Given the purposeful withholding of family matters, the referee found that Skyers could *not* have presented credible evidence of abuse, the impact of Trabue Sr.'s death on Champion, or poverty. The referee did find that a more limited mitigation theme "might be supportable," in the sense that the financial difficulties of Champion's mother resulted in her absence from home and a lack of supervision of Champion. (Rpt. 88, 218.)

C. Reference Question 3 (Three Parts)

Part One: What investigative steps, if any, would have led to this additional evidence?

The referee found that the retaining of an "evidence and penalty phase investigator" would have uncovered the additional evidence. The referee also found that an independent investigation of the availability and

credibility of certain percipient civilian or law enforcement witnesses would also have produced the additional evidence. (Rpt. 262.)

Part Two: Would a reasonably competent attorney in 1982 have *tried to obtain* such evidence?

The referee answered this question "Yes." (Rpt. 264.)

Part Three: Would a reasonably competent attorney in 1982 have *presented* this evidence at the penalty phase?

The referee answered this question as "No," for virtually all of the proposed mitigation evidence. The referee determined that the "*only* areas . . . that should have been presented *if disclosed* are: Mrs. Champion and other family members' love and affection of [Champion] 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 [Champion's] school difficulties." (Rpt. 269, italics added.) However, the referee concluded that "[t]he family's deliberate nondisclosure of relevant family history precluded Skyers from considering these mitigation themes." (*Id.* at p. 271, italics added.)[11]

---

[11] It is not entirely clear whether Champion's "school difficulties" is one of the mitigation themes that Skyers was "precluded" from considering because of the family's nondisclosure. For example, the referee listed "school difficulties" as one of "family/social history" themes that "should have been presented *if disclosed.*" (See Rpt. 269.) This suggests that Skyers was not deficient in failing to obtain or present such evidence. But elsewhere, the referee found that reasonably competent counsel would have obtained Champion's school records and interviewed his teachers. (Rpt. 271.) As discussed below, respondent takes exception to this ambiguity to the extent it could be construed as a finding that trial counsel was deficient for not presenting evidence of Champion's "school difficulties" at the penalty phase.

Thus, the reference hearing resulted in a determination that there was no available mitigating evidence that a reasonably competent attorney would have presented at a penalty phase, and that the only evidence that should have been presented (the areas identified above) was not available to trial counsel through no fault of his own.

As to the rest of the Champion's proposed mitigation themes, the referee unambiguously found that "[a] reasonably competent attorney would not have presented" it. (Rpt. 266, original emphasis.) The referee explained his reasoning in detail. (See Rpt. 272-286.) As to the proposed Jefferson alibi, for example, the referee explained that no evidence was presented at reference hearing. (Rpt. 266, 272.) As to the proposed Taylor alibi, the referee found that no credible witness could testify as to Champion's whereabouts at the time, and Champion's trial testimony as to his "alibi" was inconsistent with Mallet's. The referee found that Champion's statements were also inconsistent with the recollection of fellow gang members Harris, Bogans, and Player. (Rpt. 266-267, 272-275.)

The referee also determined that evidence of Champion's adjustment while at the CYA "would not have been presented." (Rpt. 267.) The referee explained that the Hassan murders took place soon after Champion's release on parole from the CYA, thus supporting the prosecution's argument that CYA reports, which commented on the potential for manipulation by Champion, were correct. The referee further found that the CYA mental evaluations by four separate doctors–which indicated that Champion was functional and not mentally ill–would not have been presented. (Rpt. 267-268.)

As to most of Champion's family and social history, the referee found this information had been deliberately withheld from Skyers, and, in any event, would not have been presented even if it had been disclosed. In support of that finding, the referee explained how the primary witnesses to

such matters would have had little credibility because the jury had already rejected their guilt phase testimony in support of Champion's discredited alibi claim. (Rpt. 268-269.)

As to Champion's gang involvement, the referee found that the hearing "only confirmed that [Champion] *was an active, hardcore gang member since the age of twelve* and the evidence has confirmed [Champion's] association with [gang members] Marcus Player, Evan Mallet and Craig Ross." (Rpt. 269, italics added.) The referee further found that Champion's substance abuse was "not a major factor," because Champion denied being dependant on marijuana. (Rpt. 269.)

As to Champion's probation and parole history, the referee determined that this proposed "mitigation" theme actually would have been damaging in the penalty phase. As the referee explained, it would have directed the jurors' attention to Champion's arrests and poor performance on probation. The referee also found that Champion's juvenile arrest and adjudication history would not have been presented, and by not presenting such evidence, the jury was not exposed to Champion's other acts of violence and arrests, including a prior burglary. Lastly, the referee found that reasonably competent counsel would not have presented additional expert testimony, because in view of CYA records, no further testing or examinations were required. Moreover, the referee found that Simms's prints were not available in 1982. (Rpt. 267-270, 286.)

D. Reference Question 4 (Two Parts)

Part One: What circumstances, if any, weighed against the investigation and presentation of this additional evidence?

Except for several categories of evidence, no circumstances weighed against the *investigation* of the proposed additional evidence. (See Rpt. 287-289.) However, the referee found that multiple circumstances weighed

against the *presentation* of virtually all of the proposed additional evidence. (Rpt. 289.) According to the referee, these circumstances included (1) the lack of credibility of Champion and key family members; (2) the lack of any documents to support the claimed mitigation of brain damage; (3) the need to modify the claimed mitigation of extreme poverty, malnutrition or lack of clothing to be consistent with the much less severe reference hearing evidence (i.e., Champion's mother was single parent struggling to care for a large family); (4) the existence of four consistent and contemporaneous CYA psychological/psychiatric evaluations that Champion did not suffer from any mental illness, defect, or disorder; (5) the absence of any evidence by any close family member, relative, friend, neighbor, or fellow gang member who would opine that Champion ever suffered from any type mental impairment; (6) Champion's gang membership, allegiance, and violent history; and (7) Champion's prior damaging statements to CYA or law enforcement. (Rpt. 287-290.) Moreover, the referee found that "[a]ny proposed mitigation theme that would permit the prosecutor to present additional evidence of gang membership or [Champion's] criminal history would be prejudicial to [Champion]." (Rpt. 287, 293-297.)

Part Two: What evidence damaging to Champion, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if Champion had introduced this evidence?

The referee found that if the additional proposed mitigation evidence had been disclosed to Skyers and that Skyers presented it, the prosecution would have rebutted it with extensive damaging evidence that had not been presented at the guilt or penalty phase. (Rpt. 287, 290-291.) As the referee discussed, for Champion to claim he had an alibi for the Taylor murder, he would need to rely on the inconsistent, not credible, and incriminating testimony from fellow Raymond Avenue Crips. The referee found that the

gang member statements were inconsistent with Champion's trial testimony and his statements to doctors and CYA authorities, in which he claimed he was *not* a gang member at the time of trial. (Rpt. 291.)

Concerning Champion's claimed problems of development, functioning, and social history, the referee found the claims were "undermined" by the reference hearing testimony of Harris, Bogans, Player, Jones, Champion's mother, and Champion's own statements to CYA authorities. (Rpt. 292.) Moreover, the referee found that any mitigation expert who sought to introduce mitigation concerning Champion's development, functioning, and social history, would be impeached with damaging evidence of Champion's (1) "extensive, violent criminal arrest record," (2) his positive statements about his family background and incriminating statements about his reasons for committing crimes for "fast money," (3) and his participation in a criminal street gang since age 12. (Rpt. 287, 293-297.)

E. Reference Question 5

Did Champion 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 found that Champion and his family members deliberately withheld information about Champion's familial love, support, and difficulties during his upbringing, i.e., the only mitigating evidence that the referee deemed worthy of potentially presenting.[12] As to Champion's

---

[12] As discussed below, however, the referee concluded "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 [Champion's] penalty phase *exactly as*

(continued...)

remaining proposed mitigation themes, the referee answered this question "No." (Rpt. 375-376.)

F. The Referee's Ultimate Conclusions That Trial Counsel's Performance Was Partly Deficient, But That Any Deficiencies Did Not Affect The Presentation Or Outcome Of The Penalty Phase

The referee concluded that Judge Skyers had been a "very conscientious, credible attorney," who was dedicated to Champion's interests and who by no means abandoned his client. Skyers had engaged in "extensive personal investigation" into potential mitigating evidence. Moreover, the referee found that no attorney or investigator could have acquired or developed the proposed family mitigation themes due to the willful nondisclosure of family history by Champion and his family members. (Rpt. 11-12, 376.)

The referee found, however, that Skyers's investigation was deficient in the following aspects: (1) not obtaining an investigator to conduct an independent investigation; (2) not interviewing witnesses to the Taylor murder to determine the availability of alibi evidence for December 27, 1980; (3) not obtaining Champion's school records or interviewing teachers; (4) not reviewing the Evan Mallet file, transcripts of Mallet's trial, or attempting to confer with Mallet's trial counsel; (5) not seeking to obtain family history documents, social security records, etc.; and (6) not investigating Champion's gang involvement with the Raymond Avenue Crips. (Rpt. 10, 270-271.)

However, the referee found that even if an exhaustive investigation had been conducted, the mitigation assertions were "diminished or

---

(...continued)
[Champion's] trial counsel did . . . ." (Rpt. 286, italics added.)

nullified" by the evidence adduced at the reference hearing. (Rpt. 377.) The referee explained, for example, that at the time of trial Champion (1) did not have brain damage or any substantial cognitive defect; (2) was fully functional and had "very strong verbal skills"; (3) was not malnourished or denied any basic needs; (4) lived in a "nice, well kept home in a pleasant, middle class neighborhood"; (5) had no credible evidence to present of physical abuse or developmental problems; and (6) had no supporting evidence for his claims of mitigation as to the Hassan and Jefferson murders. (Rpt. 13-14.) The referee further determined that no reasonable attorney would have presented evidence of amenability because it would have opened the door to damaging rebuttal concerning his lack of control, bad temper, violent crimes, and violent conduct at CYA. Similarly, given the "serious proof problems" exposed at the reference hearing, the referee found that no reasonable attorney would have advanced Champion's proposed claim of alibi for the Taylor murder. (Rpt. 15-16.) Thus, the referee concluded, "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 [Champion's] penalty phase *exactly as [Champion's] trial counsel did* . . . ." (Rpt. 286, italics added.)

Moreover, even as to the limited credible evidence of familial love, affection, support, and difficulties during Champion's upbringing, the referee found it was a "close question" as to whether reasonable counsel would have presented such evidence, and recognized that such evidence would require testimony of witnesses whose guilt phase testimony in support of an alibi defense had already been rejected by the jury. (Rpt. 15, 242-243.) As the referee explained, "[I]n 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 the penalty phase." (Rpt. 243.) The referee nonetheless opined that Skyers's performance was deficient in this regard because he should have asked "direct questions" when interviewing Mrs. Champion, and should have given "more consideration" to having her to testify to such a theme at the penalty phase. The referee conceded, however, that his opinion on the matter was "subjective" and based on intangibles. (Rpt. 15.)

Even if the additional credible mitigating evidence had been fully disclosed to trial counsel *and* presented at the penalty phase, the referee made clear that damaging rebuttal would have neutralized any of the proposed mitigating themes. As the referee explained:

> 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.

(Rpt. 20, emphasis added.)

Thus, the referee concluded the Report by finding Skyers "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*." (Rpt. 377, italics added.)

ARGUMENT

I. TO THE EXTENT IT MIGHT BE CONSTRUED AS A FINDING OF DEFICIENT PERFORMANCE, RESPONDENT TAKES EXCEPTION TO THE REPORT'S AMBIGUOUS LANGUAGE AS TO WHETHER EVIDENCE OF CHAMPION'S "SCHOOL DIFFICULTIES" SHOULD HAVE BEEN PRESENTED AT THE PENALTY PHASE

In answer to Reference Question 3, the referee found:

> The only areas . . . that should have been presented [at penalty phase] *if disclosed* are: Mrs. Champion and other family members' love and affection of [Champion]; 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 *[Champion's] school difficulties.*

(Rpt. 269, italics added.) Shortly thereafter, the referee found that that "[t]he family's deliberate nondisclosure of relevant family history precluded Skyers from considering these mitigation themes." (*Id.* at p. 271, italics added.) However, the referee also made a finding in a different part of his report that Skyers should have independently reviewed Champion's school records and interviewed his teachers. (See Rpt. 10, 270-271.)

Thus, it is not entirely clear whether the above cited "school difficulties" refer to (1) matters that Skyers could not have presented at the penalty phase because Champion and his family failed to disclose it (and therefore trial counsel's performance with respect to this issue was not deficient), or (2) those difficulties identified in Champion's school records [Ex. CCC] (which the referee found Skyers should have reviewed but did not), and CYA records (which the referee found Skyers did review). To the extent this aspect of the referee's finding dealing with presentation of

"school difficulties" might be interpreted as a finding that Skyers was deficient for not presenting "school difficulties" at the penalty phase, respondent takes exception to such a finding, because it would be wholly inconsistent with the referee's other, well-supported factual determinations.

As noted, the referee found that Champion's school records, the CYA doctors' evaluations, and Drs. Pollack and Imperi's report revealed "some" pretrial impairments, including "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 found this information to be "credible and available at time of trial." (Rpt. 81-82.) The referee observed that "whether the poor [school] 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." (Rpt. 14, italics added.)[13] Moreover, the referee noted that Champion's school records "do not reflect any evidence of physical abuse . . . [and] contain [Champion's] mother's statements that indicate *no*

---

[13] Of course, as already discussed, the referee found that Champion suffered from no brain damage or substantial cognitive impairments. As the referee also noted, even if Champion's school records did show the presence of ADHD (attention deficit hyperactivity disorder) or a learning disorder, this had little mitigation value in light of the commonality of such conditions. These findings further indicated that trial counsel was not deficient for failing to present evidence of Champion's "school difficulties" at the penalty phase. Furthermore, had such evidence been presented, the prosecution would have presented rebuttal evidence from an expert such as Dr. Hinkin to show that Champion's intelligence was "normal." In addition, potential rebuttal evidence from the prosecution could have included Champion's best friend, Gary Jones, and his fellow Raymond Avenue Crips associates, Earl Bogans, Marcus Player and Wayne Harris, whose reference hearing testimony described Champion as "very bright" who "liked to be a leader." (Rpt. 268.)

developmental problems as to [Champion]." (*Id.* at p. 14, italics added.)

Moreover, the referee expressly found that "when [Champion] 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." (Rpt. 246.) The referee also wrote that while the school records support a proposed mitigation theme of poor academic functioning, "this claim is subject to being neutralized" by Champion's gang involvement, and the fact that "[s]ome [school] records indicate [Champion] could do well when he applied himself. [Champion] told Dr. Perotti that he felt he could have done better in school." (Rpt. 85.)

Notably, the referee determined that "[a]ny proposed mitigating theme that would permit the prosecutor to present additional evidence of gang membership or [Champion's] criminal history would be prejudicial to [Champion]." (Rpt. 287.) Indeed, the referee found that "the evidence adduced during the reference hearing established that [Champion] 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" (Rpt. 79.)

Therefore, the referee reasoned, "Reasonably competent trial counsel would have immediately recognized the concrete danger presented if [Champion]'s school records reflecting that in the sixth grade, approximately 6 years before the Hassan capital murders were committed, [Champion] 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 [Champion'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." (Rpt. 245, fn. 133.)

In light of these express findings, it is eminently clear that had trial counsel presented evidence of Champion's "school difficulties" at the penalty phase, the prosecution would have introduced in rebuttal damaging evidence of Champion's gang involvement and criminal activity to explain that his "school difficulties" resulted not from limitations in his ability, but from choices he made that adversely affected his school performance. The referee's well-founded, express findings that such rebuttal evidence would be "prejudicial" to Champion and would lead trial counsel *not* to present the proposed mitigation evidence can only lead to one conclusion: that trial counsel was not deficient for failing to present evidence of Champion's "school difficulties" at the penalty phase. (See Rpt. 287.)

Moreover, if the "school difficulties" required disclosure from Champion and his family, as the referee seems to indicate (see Rpt. 43), multiple findings by the referee (and common sense) undercut any possible finding that a minimally competent attorney would be required to discover and present such evidence. As the referee explained, "[Champion's] family members did not disclose any adverse family history to Skyers" (Rpt. 287); "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, [Champion's] gang involvement, the impact on the family and [Champion] resulting from Trabue Sr.'s death, and the lack of father figure" (Rpt. 268); and there was a "lack of credibility of key family members including [Champion's] mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury [and t]he availability to the prosecution of prior statements by [Champion's] mother and [Champion] to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation." (Rpt. 289).

Furthermore, the referee recognized that presentation of such evidence–regardless of its source–would have opened the door to devastating rebuttal. As the referee explained:

> The CYA records contain numerous statements by [Champion] and reports of conduct that were not presented to the jury that are prejudicial to [Champion's] claim. [Champion'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 [that] . . . [h]e 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.

(Rpt. 295; see also 287 [explaining how any of Champion's proposed mitigation themes that would allow rebuttal evidence of his gang participation, i.e., virtually any of the Champion's proposed themes, would be "prejudicial" to Champion's penalty phase case].)

The referee found that "the school records and CYA reports contain substantial credible evidence that would be inconsistent or prejudicial to many of the claimed themes of mitigation." (Rpt. 87-88) Moreover, the referee noted,

> [Champion's] school records (Exhibit CCC), the "Initial Home Investigation Report (Exhibit H)" and [Champion's] CYA records could be used by the prosecution to rebut claims [Champion's] habeas counsel now contends trial counsel should have introduced as mitigating evidence at [Champion's] penalty phase and the failure of [Champion's] habeas counsel to call a single teacher to testify in this

proceeding about either the school environment [Champion] faced or [Champion'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 [Champion's] schools to intervene with [Champion] and his family adversely affected [Champion's] development and functioning.

(Rpt. 247.)[14]

Thus, the referee concluded, "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 [Champion's] penalty phase exactly as [Champion's] trial counsel did." (Rpt. 286.) Any ambiguity concerning the referee's mention of "school difficulties" should therefore not be interpreted to include a finding that reasonably competent counsel was required to present evidence of any pre-trial impairments disclosed by the school records.

---

[14] See also, Report at page 233:

> The referee also finds significant that [Champion] has elected not to call either Lewis Champion III or Reginald Champion, both of whom were available to [Champion] to call as witnesses at this proceeding. [Champion's] deliberate election not to call either of these available witnesses invokes application of Evidence Code §412. "*The same can be said of [Champion's] failure to call any of his LAUSD teachers, any juvenile court probation officer or CYA psychologist, psychiatrist, caseworker or teacher of [Champion's] during the period of time [Champion] was at the CYA.*"
>
> (Italics added.) As the referee later noted, "Lewis Champion III was interviewed by [Champion'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." (Rpt. 287-288.)

II. TO THE EXTENT IT ALSO COULD BE CONSTRUED AS A FINDING OF DEFICIENT PERFORMANCE, RESPONDENT TAKES EXCEPTION TO THE REFEREE'S USE OF A NON-*STRICKLAND* STANDARD WHEN OPINING THAT SKYERS SHOULD HAVE RECALLED CHAMPION'S MOTHER AND SISTER TO TESTIFY AT THE PENALTY PHASE ABOUT THEIR LOVE FOR CHAMPION

As noted above, the referee found as to Reference Question 3, "The only areas . . . that should have been presented [at penalty phase] *if disclosed* are: Mrs. Champion and other family members' love and affection of [Champion]; his traits of being loving toward them and his protective nature . . . ." (Rpt. 269, italics added.) With respect to this specific finding, the referee wrote:

> Skyers testified that he believed [Champion's] mother loved her son, that she would have preferred [Champion] receive a sentence of life without possibility of parole rather than a sentence of death and that she would have preferred [Champion] 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 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.)
(Rpt. 259-260.)

The referee then concluded:

> [E]ven though from the guilt phase testimony of [Champion's] mother, two older sisters,[15] two younger sisters and older brother Reginald, the jury was well aware of the family's love for [Champion], 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 [Champion] 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.

(Rpt. 260, emphasis added.) The referee further explained his reasoning in the summary of findings. The referee found it was a "close question" whether reasonable trial counsel would have presented the evidence of love, affection, and support from family and friends. As the referee further acknowledged, "My decision is subjective and based on intangibles. When [Champion's] mother described her feelings about her son and when [Gary] Jones described his feelings about [Champion] and his mother were some of the best moments for [Champion] at the reference hearing in my judgment." (Rpt. 15.)

---

[15] One of Champion's two older sisters, Linda Champion Matthews, did not testify at the guilt phase of Champion's trial.

Although isolated and limited to evidence of familial love that would not have changed the outcome of a penalty phase, the referee's finding that "the *best* practice for trial counsel would have been to recall the mother and sisters" to testify about such matters nonetheless fails to employ the proper test of reasonably competent counsel. As the referee noted elsewhere in quoting the testimony of a defense expert, "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." (Rpt. 323, citing RHT 3966.) As the Court in *Strickland* noted:

> a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citation.]

(*Strickland*, *supra*, 466 U.S. at pp. 688-690.)

Besides conflicting with *Strickland* itself, the referee's "best practice" performance test is at odds with the referee's own acknowledgement elsewhere in the Report that Skyers could not be held to such a standard. For example, the referee found that although Champion's *Strickland* expert "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." (Rpt. 274, citing RHT 3966.) As the referee further explained,

> 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.

(Rpt. 298, italics added; see also Rpt. 336, fn. 185, and 341 and fn. 191 [criticizing Earley's standard which substituted what Earley would or would not have done for what reasonably competent counsel would or would not have done].)

Any suggestion that a minimally competent attorney was duty-bound to recall Champion's family members to testify about familial love and support is also fatally flawed and contrary to the referee's earlier findings that "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." (Rpt. 15, italics added.) Of course, as noted, the *Strickland* standard is an objective, not subjective, test. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland*, *supra*, 466 U.S. at pp. 687-688.)

Moreover, in light of the referee's findings concerning credibility problems with Mrs. Champion and the availability of significant impeachment/rebuttal evidence (such as her statements in Exhibits H and CCC), Skyers's opinion that Mrs. Champion's "'presence was sufficient, and that the jury would gather from her presence, her support and her love' (RHT 1405-1406.)" (Rpt. 259-260) was *objectively* reasonable, notwithstanding the referee's subjective belief that the "best practice" would have been to recall family members on this issue. The reasonableness of this "close question" is bolstered by the relevant case law such as *Bell v. Cone* (2002) 535 U.S. 685, 698-702 [122 S.Ct. 1843, 152 L.Ed.2d 914], which the referee explicitly cited, stating,

> Having convicted [Champion] for the Hassan capital murders, the jury had obviously discredited the testimony of [Champion's] mother, sister, brother and [Champion] 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 [Champion'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.)

(Rpt. 228.)

Last, with respect to Gary Jones, the referee's summary of Jones's reference hearing testimony at pages 231-232 of the Report leaves no question about the objective reasonableness of a decision not to call Jones for this or any other issue. Indeed, Jones paints a picture of Champion which is unhelpful to Champion's penalty phase presentation: that Champion was intelligent, a leader, and not subjected to abuse at home. (Rpt. 231, 244.) The referee found "particularly credible" Jones's testimony that he and Champion had "a really beautiful childhood." (Rpt. 244.) And contrary to Champion's trial testimony, Champion was a

member of the Raymond Avenue Crips. This reflected Jones's naïveté and lack of familiarity with the life Champion led once he immersed himself in the activities of his gang.

The referee observed, for example, that Jones testified at the reference hearing that: (1) Champion "had 'certain leadership abilities' [that] Jones admired" (Rpt. 231); (2) Champion "was bright and intelligent [and] was not one to blindly follow others" (*ibid.*); (3) "Jones never saw bruises or serious injuries on [Champion] while they were growing up" (*ibid.*); (4) after Champion returned from the CYA, he "talked about going to college" (*ibid.*); (5) "Jones was shocked to see [the Exhibit 47] photograph of [Champion] holding a gun. This was not the person Jones knew. [Champion] appears to be 18 years old in Exhibit 47" (*ibid.*); (6) "Jones was not aware of [Champion's] December 21, 1976 burglary or the November 1977 robbery incident or the 1978 assault with a deadly weapon incident. [Champion] would go away for periods of time but Jones was not aware of the particulars" (Rpt. 231-232); (7) other than "recall[ing] one incident in which [Champion's older brother] Lewis tried to hurt [Champion] by throwing golf balls at him while [Champion] was running to Jones' home [][,] Jones never saw Lewis do anything else to [Champion]" (Rpt. 232); (8) "Jones was a member of the Raymond Avenue Crips until he was in the 10th or 11th grade. Champion 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 Champion. (RHT 5673.) Jones knew Marcus Player, Michael Player, Lavelle Player, Jerome Evan Mallet, Emanuel Mallet and Craig Ross [who] 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. Champion was present. Jones never saw Champion hang out with Craig Ross during the two-month period in 1980 after [Champion] returned from

the CYA" (Rpt. 232); and (9) "'[w]e had a really beautiful childhood.'" (Rpt. 231, 244; RHT 5665-5666, 5689.)

In sum, the referee's findings that "the best practice for trial counsel would have been to recall the mother and sisters for this express purpose" (Rpt. 260) and that "[t]hese 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 at the guilt phase" (*ibid.*) fail to employ the proper *Strickland* standard, or support any conclusion that Skyers was deficient for doing as he did.

III. CHAMPION IS NOT ENTITLED TO HABEAS RELIEF ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Regardless of any ambiguities identified by respondent in the Report, the referee's well-supported findings, made after have a comprehensive, two-year exploration into Champion's ineffective counsel claim, confirm that Champion is not entitled to habeas relief. Despite the extensive post-conviction investigation into potential themes of mitigation conducted by Champion's habeas attorney, the referee determined that, in the end, there was little if any evidence worthy of presentation at the penalty phase. The referee did find that trial counsel's mitigation investigation should have been more thorough, and, if it not been deliberately withheld, that a reasonably competent attorney could have presented more evidence of familial love, affection, support, and difficulties in Champion's upbringing. Nonetheless, the referee also made clear that no prejudice resulted. As the referee determined, "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 [Champion's] penalty phase *exactly as [Champion's] trial counsel did.*" (Rpt. 286, italics

added.) Further dooming Champion's claim, the referee did not disagree with Skyers's key assessment that "no mitigating evidence existed to outweigh the aggravating circumstances of those two [charged] murders." (Rpt. 377.) In short, the referee's findings confirm that even if a reasonably competent attorney representing Champion at trial had conducted a flawless investigation, the result of the penalty phase would have been the same, and therefore Champion suffered no prejudice under *Strickland*.

A. Standard Of Review

To demonstrate ineffective assistance of counsel, Champion must first show counsel's performance was "'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.'" (*People v. Avena* (1996) 13 Cal.4th 394, 418, quoting *Strickland*, *supra*, 466 U.S. at pp. 688-690.) When considering claims of ineffective assistance of counsel, the Court addresses not what is prudent or "'appropriate, but only what is constitutionally compelled.'" (*Burger v. Kemp* (1987) 483 U.S. 776, 794 [107 S.Ct. 3114, 97 L.Ed.2d 638], quoting *United States v. Cronic* (1984) 466 U.S. 648, 665, fn. 38 [104 S.Ct. 2039, 80 L.Ed.2d 657].) The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. (*In re Visciotti* (1996) 14 Cal.4th 325, 352, quoting *Strickland*, at p. 686.)

Even if this Court is persuaded that Skyers engaged in "unprofessional errors," *Strickland* is not satisfied unless Champion also affirmatively shows "prejudice flowing from counsel's performance or lack thereof." (*People v. Avena*, *supra*, 13 Cal.4th at p. 418, citing *Strickland*, *supra*, 466 U.S. at pp. 691-692.) Prejudice can only be shown if there is "a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different." (*Avena*, at p. 418, citing *Strickland*, at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) In other words, counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. (*Strickland*, at p. 694.) As the United States Supreme Court held: "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (*Id.* at p. 687.)

In this case, the prejudice prong of the *Strickland* test placed on Champion a burden—and in this case an insurmountable one—to show that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different." (*Williams v. Taylor* (2000) 529 U.S. 362, 391 [120 S.Ct. 1495, 146 L.Ed.2d], italics added.) And, as *Strickland* explained, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

B. The Referee's Findings Confirm That Champion Suffered No Prejudice During The Penalty Phase From Any Deficiencies In Trial Counsel's Investigation Or Presentation Of Mitigating Evidence

As noted above, the referee concluded that Judge Skyers had been a "very conscientious, credible attorney," who conducted an "extensive personal investigation" into potential mitigating evidence. Nonetheless, the referee found that the investigation was deficient in the following aspects: (1) in not interviewing witnesses to the Taylor murder to determine the availability of alibi evidence for December 27, 1980; (2) not obtaining Champion's school records or interviewing teachers; (3) not reviewing the

Evan Mallet file, transcripts of Mallet's trial, or attempting to confer with Mallet's trial counsel; (4) not seeking to obtain family history documents, social security records, etc.; and (5) not investigating Champion's gang involvement with the Raymond Avenue Crips. (Rpt. 10, 270-271.) In addition, the referee found the "best practice" would have been for Skyers to attempt to recall Champion's family members to testify at the penalty phase about familial love, support, and difficulties, and that counsel should have presented Gary Jones's positive recollection of his childhood with Champion. (Rpt. 260, 269.)

The referee's findings regarding deficiencies in trial counsel's investigation are supported by substantial evidence in the now-expanded record. The referee's finding of a single deficiency in trial counsel's presentation of penalty phase evidence–in not attempting to present more evidence of Champion's upbringing[16]–is undermined, however, by the referee's other, well-founded findings. Moreover, as explained above, this isolated finding concerning counsel's conduct at the penalty phase is not based on the *Strickland* standard, but rather a "subjective," "best practice" test of attorney performance. (See Argument I & II, *ante*.)

---

[16] The referee wrote:

> The only areas . . . that should have been presented if disclosed are: Mrs. Champion and other family members' love and affection of [Champion]; 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 [Champion's] school difficulties.

(Rpt. 269.) The referee, however, also found that that "[t]he family's nondisclosure of relevant family history precluded Skyers from considering these mitigation themes." (*Id.* at p. 271.)

Nonetheless, assuming without conceding that Skyers's performance was deficient, it was not prejudicial. The referee made clear and the factual findings plainly establish, that the outcome of the penalty phase would have been the same, no matter who represented Champion, because the proposed mitigation themes were either not discoverable at the time of trial, would not have been presented anyway, and would not have made a difference even if presented. Moreover, as the referee aptly determined, the only credible mitigating evidence worthy of presentation would have not resulted in a different verdict, because it was "diminished or nullified" by other evidence, and in any event could not overcome the insurmountable aggravating circumstances of this case. (Rpt. 377.)

1. The referee was correct in opining that absent any deficiencies in trial counsel's performance, the penalty phase would have proceeded just as it did

After meticulously reviewing the Champion's mitigation assertions, and after weighing the available mitigating evidence against the prosecution's available rebuttal evidence, the referee came to a telling conclusion that aptly summarizes respondent's prejudice prong argument. The referee wrote, "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 [Champion's] penalty phase *exactly as [Champion's] trial counsel did.*" (Rpt. 286, italics added.) Although couched in terms of reasonable performance, the conclusion also speaks to the petitioner's burden of proving prejudice from the alleged ineffective assistance, i.e., whether Champion has proved that the outcome of the penalty phase would have been different absent the deficiencies in Skyers's performance. By concluding that Champion's proposed mitigation themes were so weak that *no* reasonably competent

attorney would have been compelled to present them, the referee has resolved this question against Champion. And, as discussed below, a conclusion that the penalty phase would have proceeded "exactly" as it did absent any errors is well supported by the record.

First, much of Champion's proposed mitigation assertions were not available for presentation at the time of trial. For example, as to the proposed mitigation themes concerning his family and social history, the referee determined that "no attorney or investigator could have acquired or developed the family mitigation" due to the purposeful nondisclosure of such history by Champion and his family members. (Rpt. 11-12, 268.) The referee based this finding upon Skyers's testimony, Dr. Miora's observations in her report that Champion's mother did not disclose the abuse she suffered at the hands of Lewis Champion II to others, Champion's statement to Dr. Miora that his mother was secretive, and Champion's statement to a CYA doctor that he did not confide in others except one girlfriend whom he found he could talk to. (Rpt. 12.) The referee also determined that the proposed social and family history "was not relevant or there was insufficient foundation to permit its admissibility." (Rpt. 376.)[17]

Second, even if *all* the mitigation themes had been discoverable at the time of trial, the referee determined that "a reasonably competent attorney would not have presented" such evidence. (Rpt. 266, original emphasis.)

---

[17] The referee explained why he nonetheless included the "voluminous" proposed family history in the Report, despite finding that it would have been inadmissible at the penalty phase. The referee wrote, "I found that no capital 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 [Champion] sought to present." (Rpt. 376-377.)

As the referee explained, even aside from serious roadblocks of non-disclosure and inadmissibility, the reference hearing evidence showed that Champion's mitigation assertions were unfounded, were "diminished or nullified" by other evidence, were prejudicial to Champion, or would have subjected Champion to devastating rebuttal. (Rpt. 287, 290-298, 376-377.)

For example, the referee found there was no potential mitigation evidence at all for Jefferson murder (Rpt. 79, 89, 266, 270), and no credible alibi evidence for Taylor murder (Rpt. 15-16, 79). The referee emphasized that only Champion's fellow gang members could testify regarding the Taylor murder, but that their testimony was not credible, did not support an alibi, and would only "prejudice" Champion by confirming his active involvement in his criminal street gang and his association with codefendant Ross. (Rpt. 79, 92-108, 167-185, 266-267, 287, 291-292.) The referee further determined that evidence of Champion's adjustment while at CYA "would not have been presented." (Rpt. 267.) The referee explained that the fact Champion committed the charged murders just 45 days after being released from CYA would support the prosecution's argument about the correctness of the CYA reports that indicated Champion had the potential to manipulate. The referee further explained that the introduction of any positive comments by CYA staff would permit the prosecution to introduce all the negative comments and acts of misconduct while in CYA custody. (Rpt. 267.)

The referee also determined that the CYA mental evaluations and opinions that Champion has no mental disorder, defect, or disease, "would not have been presented" by a reasonably competent counsel at the penalty phase. The referee also decided that reasonably competent counsel would have concluded that no further testing was warranted. (Rpt. 268.) In any event, the referee concluded that Champion had no brain damage or any substantial cognitive defect at the time of trial; thus, his proposed

mitigation theme concerning his mental health was baseless. (Rpt. 12-14, 49-71 & fn. 40, 80-83, 186-193.)

The referee similarly determined that a reasonable trial attorney "would not have presented evidence of amenability or rehabilitation given the rebuttal evidence that prosecution might seek to introduce." (Rpt. 15.) Per the referee's findings, such rebuttal evidence would include Champion's prior violent crimes, active gang involvement, violent conduct at CYA, and a "detailed history of [Champion's] lack of control of his anger and temper." (Rpt. 15, 287.)[18]

In addition, the referee found that a reasonable trial attorney would not have presented the proposed mitigation themes of gang membership, substance abuse, or history on probation or parole, or the violent acts and crimes that Champion committed while a juvenile. (Rpt. 269.) As the referee explained, any effort to develop such areas would result in the prosecution "seeking to introduce all of [Champion's] arrests, the evidence relating to his culpability, evidence of his gang association since the age of twelve and the identity of his [fellow gang member] associates." (Rpt. 272.) According to the referee, "This includes any psychological experts seeking to testify as to [Champion's] childhood development, and defense gang expert, CYA adjustment and community dangers." (*Ibid.*)

In short, the Report makes clear that any penalty phase pertaining to Champion would have proceeded and ended just as it did, because even a fully informed attorney who had conducted an exhaustive investigation "would not have presented" the so-called "mitigating" themes proposed by

---

[18] The referee, in fact, found that most of Champion's proposed mitigation themes would suffer the same fate, and thus "would cause a reasonably competent counsel to not present the potential mitigation evidence." (Rpt. 272, 286-287.)

Champion after the trial. (Rpt. 266-270, original emphasis.) Even the single theme that was credible and should have been given "more consideration" by Skyers (Champion's familial love and difficulties in his upbringing) could not have been introduced, because, according to the referee, Champion and his family was secretive and not forthcoming with trial counsel.[19] These findings are based on the referee's well-supported assessments of the credibility of witnesses and the persuasiveness of the proposed mitigating themes, following the referee's painstaking review of the voluminous evidence adduced at the reference hearing. Because these findings are well supported by substantial evidence, they should not be disturbed.

2. Even if trial counsel had presented further evidence as to the single mitigating area deemed by the referee to be credible, or as to any of the mitigating themes now suggested by Champion, the jury would not have returned a different verdict

Even if this Court determines the referee was wrong, i.e., that the family matters were either *not* withheld, or that a minimally competent attorney should have somehow developed that information anyway, it is not reasonably probable that presentation of such evidence would have resulted in a different verdict. As the Report explains, reasonably competent counsel would have to confront the daunting practical problem of how to present such evidence–which required testimony from Champion and his

[19] As the referee explained, "no attorney or investigator could have acquired or developed the family mitigation" due to the "purposeful" nondisclosure of such history by Champion and his family members. (Rpt. 11-12, 268, 271.)

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 Champion with an alibi for the Hassan murders and an innocent explanation for Champion's possession of Bobby Hassan's jewelry taken in the course of the execution murders/robberies of the Hassans. (Rpt. 286.) Two central witnesses to the issue who testified in the reference hearing, Champion's mother and older sister Rita Champion Powell, had testified on Champion's behalf at the guilt phase. So too had Champion and his brother Reginald. (*People v. Champion*, *supra*, 9 Cal.4th at p. 902.) Having convicted Champion for the Hassan capital murders, the jury had obviously discredited their testimony. Moreover, the jury had heard from Mrs. Champion during the penalty phase and had seen her love of her son, so presenting such evidence at a penalty phase would have been cumulative.

Turning to the other mitigation themes, had trial counsel attempted to present a "mitigation specialist" such as Dr. Miora to opine that poverty or lack of a father figure for part of his life played a significant role in Champion's development and functioning, the expert would need to rely upon information provided by the very same discredited witnesses whose guilt phase testimony had already been rejected by the jury. As this Court has noted, "like a house built on sand, the expert opinion is no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Thus, the referee rightly found that assuming arguendo such evidence had been presented, it would carry little weight with the jury, even if unrebutted. Moreover, when viewed in light of the available devastating impeachment evidence that the prosecution could bring to bear at the penalty phase had such evidence been introduced, Champion cannot persuasively show that the result of the penalty phase would have been different.

In addition to the referee's cogent observation that Champion's mitigation themes would rely on discredited witnesses and would expose him to damaging rebuttal, it would have shifted the focus of the defense from "I didn't do it" to "here's why I did it." This dramatic shift would have completely destroyed any remaining credibility that the defense still had at the penalty phase and it would have made Champion's lingering doubt argument largely ineffectual. (White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care* (1993) 1993 U. Ill. L. Rev. 323, 357 ["it 'does not work' to put on a 'he didn't do it' defense at the guilt stage and then a 'he's sorry he did it' defense at the sentencing stage"].)

Moreover, any evidence of Champion's difficulties in childhood would have been a double-edged sword because the jury could have inferred that his childhood experiences desensitized him and made him more likely to engage in violence as an adult. (See Haney, *The Social Context of Capital Murder*: *Social Histories and the Logic of Mitigation* (1995) 35 Santa Clara L. Rev. 547, 570 [abused children are much more likely to engage in violence as adults, giving rise to what some have called a "cycle of violence."]; see also White, *A Deadly Dilemma: Choices by Attorney's Representing "Innocent" Capital Defendants* (2004) 102 Mich. L. Rev. 2001, 2035 [potential mitigation evidence of brain damage, a troubled childhood, and abuse "is double-edged in the sense that, while it does explain where the defendant has come from and how he got to be the way he is, it also has the potential to not only eliminate any lingering doubts jurors might have had as to the defendant's guilt, but also to strengthen their perception that sparing his life will enhance the danger to society, a consideration that empirical data indicate will weigh heavily in the penalty jury's decision."].) Regardless, any sympathy gained by claiming there were "difficulties" in Champion's upbringing would all but

vanish into the aether once the jury heard best friend Gary Jones give his "particularly credible" account of their "really beautiful childhood." (See Rpt. 231-232.)

Additionally, any "mental health penalty defense would also have given the prosecution several opportunities to repeat the circumstances of the crime as well as [Champion's] past criminality in questioning the experts on both direct and cross-examination as to whether [Champion] exhibited an antisocial personality rather than some form of mental impairment." (*In re Andrews* (2002) 28 Cal.4th 1234, 1258.) Thus, much of the evidence that Champion now claims should have been introduced–even that which the referee determined was undiscoverable, unfounded, inadmissible, or would not have been presented by reasonably competent counsel–would have accentuated the negative aspects of his character or background rather than the positive aspects which trial counsel tried to highlight. As the referee recognized, such a strategy would have been unhelpful to Champion. (Rpt. 22; see *Burger v. Kemp*, *supra*, 483 U.S. at p. 794 [evidence related to defendant's tragic childhood could have been used by the prosecutor to emphasize the defendant's unpredictable propensity for violence].)

Champion's inability to establish prejudice in this case is further demonstrated by *In re Visciotti*, *supra*, 14 Cal.4th 325, a death penalty case in which this Court rejected petitioner's claim of ineffective assistance of counsel during the penalty phase for lack of prejudice. In *Visciotti*, the defendant (Visciotti) and another man lured two co-workers to remote area and robbed them. (*Id.* at pp. 330-331.) During the robbery, Visciotti shot and killed one of the victims and then shot the second victim (who miraculously survived) in the torso and face. (*Ibid.*) Visciotti and the other man then left the victims in the remote area. (*Ibid.*) For his crimes, Visciotti was found guilty by a jury of first degree murder with a robbery-

murder special circumstance, attempted murder and robbery. (*Id.* at p. 329.) The jury determined that Visciotti should be sentenced to death after hearing the circumstances of the current offenses and Visciotti's previous acts of violence related to the knifing of one man and the repeated stabbing of a female who was pregnant. (*Id.* at pp. 329, 355.)

As in this case, Visciotti claimed in habeas proceedings that his trial attorney was constitutionally deficient for failing to investigate, discover, and present evidence of his background at the penalty phase. (*In re Visciotti, supra*, 14 Cal.4th at p. 331.) This evidence consisted of a birth deformity,[20] physical and psychological abuse inflicted upon Visciotti by his parents,[21] the transient nature of his family,[22] paternal abandonment,[23] neuropsychological impairment,[24] drug abuse,[25] feelings of low self-

---

[20] Visciotti was born with severe club feet and did not walk until age three. As a result he was stigmatized and isolated. (*In re Visciotti, supra*, 14 Cal.4th at p. 334.)

[21] Family members described Visciotti's home as a "battle zone." (*Id.* at p. 342.) The interaction of Visciotti's parents was extremely volatile and physically and verbally abusive. (*Id.* at p. 341.) The children lived in terror and were concerned that their parents would kill each other. (*Ibid.*) The children were beaten with a belt and defendant's father constantly berated him calling by him "retarded." (*Ibid.*)

[22] Visciotti's family moved at least 20 times by the time Visciotti was 16 years old. (*Id.* at p. 334.)

[23] Visciotti's father abandoned the family when Visciotti was in grammar school. (*Id.* at p. 334.)

[24] Visciotti was previously diagnosed with possible seizure disorder which may have resulted in brain damage. (*Id.* at p. 334.) Visciotti suffered from neuropsychological impairment and difficulty in complex/abstract thinking. (*Id.* at p. 334.)

[25] Visciotti experimented with drugs in grammar school and then a variety of street drugs during his adolescence. (*Id.* at p. 334.) In his teens,

(continued...)

esteem,[26] family criminality,[27] and financial difficulties[28] for the family. (*Id.* at pp. 333-334, 341-345.) In rejecting Visciotti's claim, this Court assumed counsel was deficient for failing to present the aforementioned evidence (*id.* at p. 353), but then held that counsel's deficiency did not result in prejudice because the omitted mitigating evidence was minimal in comparison to the overwhelming aggravating facts. (*Id.* at pp. 355-357.)

The United States Supreme Court later confirmed the reasonableness of this Court's decision in *Woodford v. Visciotti* (2002) 537 U.S. 19, 27 [123 S.Ct. 357, 154 L.Ed.2d 279]. The Court specifically held: "The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. It is not that here." (*Ibid.*)

The omitted proffered mitigating information in the case at bar relating to Champion's background, experiences, and history are far less compelling than, or at least comparable to, those in *Visciotti*. Moreover, the aggravating factors in Champion's case are more egregious than, or at the very least comparable to, those in *Visciotti*. As the referee found, "Skyers'

(...continued)
Visciotti used amphetamines and cocaine. (*Id.* at p. 344.) He progressed to injecting PCP intravenously. (*Id.* at p. 344.)

[26] In addition to being belittled by his parents (*id.* at p. 343), the family's transience made Visciotti always feel like an outsider. (*Ibid.*) The constant moving disrupted and undermined Visciotti's education and social development and apparently contributed to his low self-esteem and insecurity. (*Id.* at p. 334)

[27] Visciotti's father and several of his siblings had criminal records. (*Id.* at p. 345.)

[28] Treatment for Visciotti's clubfeet was expensive and it strained the family resources. (*Id.* at p. 342.) As a result, Visciotti's father resented Visciotti. (*Ibid.*)

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." (Rpt. 20, italics added.) Thus, as the referee concluded, Skyers "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*." (Rpt. 377, italics added.)

Consequently, as in *Visciotti*, the omission of any of Champion's proposed mitigation evidence at the penalty phase was not prejudicial in Champion's case because it would not have outweighed the overwhelming aggravating circumstances. (*In re Visciotti*, *supra*, 14 Cal.4th at pp. 355-357.) A legion of cases with comparable mitigating themes supports that conclusion. (See *Fields v. Brown* (9th Cir. 2005) 431 F.3d 1186, 1204-1205 [when the aggravating evidence is powerful, the mitigating evidence that would have been produced at trial following a proper investigation must be sufficiently compelling to undermine confidence in the outcome]; *Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 836 ["[I]n cases . . . where the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence."]; see also, e.g., *Foster v. Ward* (10th Cir. 1999) 182 F.3d 1177, 1188-1189 [counsel's failure to present evidence at the penalty phase pertaining to Mr. Foster's tragic familial and societal background, including his mental retardation and brain damage was not prejudicial in light of the evidence against the defendant, the number of aggravating factors found by the jury, and the nature of victim's murder]; *Cooks v. Ward* (10th Cir. 1998) 165 F.3d 1283, 1296 [no reasonable probability that

mitigating evidence of defendant's troubled childhood, borderline I.Q., and history of alcohol and drug abuse would have led to a different sentence because of defendant's criminal history and the egregious nature of the crime]; *Marek v. Singletary* (11th Cir. 1995) 62 F.3d 1295, 1297-1298, 1300-1301 [given the overwhelming evidence against the defendant and the particular circumstances of this case in which the defendant kidnapped and raped a woman and stole some of her jewelry, evidence of an abusive and difficult childhood would have carried little, if any, mitigating weight]; *Francois v. Wainwright* (11th Cir. 1985) 763 F.2d 1188, 1191 [evidence not set forth at the penalty phase that defendant was the product of a sordid and impoverished environment in which his father was an abusive heroin addict and his mother worked as a prostitute would not have changed the outcome of defendant's sentence of death]; *Francis v. Dugger* (11th Cir. 1990) 908 F.2d 696, 703-704 [concluding that the failure to present mitigating evidence of brain dysfunction and an impoverished and abused childhood did not prejudice capital defendant at penalty phase].) Thus, Champion's instant ineffective assistance of counsel claim should be rejected.

Finally, it must be remembered that Champion has the burden of proof. The evidence before Champion's jury was that he was a hardened gang member and cold-blooded killer, who actively participated in robbing and executing a father and his handicapped son. The reference hearing confirmed that even a perfect investigation into possible mitigating evidence ultimately would have been fruitless. There was simply no credible, admissible, and compelling mitigating evidence available to Champion that would have withstood impeachment by the prosecution's evidence, and which would have persuaded this jury to return a different penalty phase verdict. The reference hearing thus conclusively demonstrated that the result of Champion's capital trial would be the same

regardless of any errors or omissions by trial counsel. Simply put, the extensive reference hearing *bolstered*, rather than "undermined," confidence in the outcome of Champion's trial. (*In re Sixto*, *supra*, 48 Cal.3d at p. 1257.) Because Champion has failed to carry his burden to prove both deficient performance and probable prejudice, he is not entitled to habeas relief for his ineffective counsel claim.

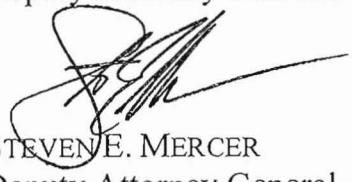
CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court deny the petitions for writ of habeas corpus.

Dated: September 2, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General



STEVEN E. MERCER
Deputy Attorney General
Attorneys for Respondent

SEM:fc
LA1997XH0026
60455294.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Steven Champion, On Habeas Corpus**
No.: **S065575 (CAPITAL CASE)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2009, I served the attached **RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Karen Kelly
Attorney at Law
P.O. Box 6308
Modesto, CA 95357

John A. Clarke, Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Michael G. Millman, Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Brian Kelberg, Deputy District Attorney
Los Angeles County District Attorney's Office
Habeas Corpus Litigation Team
320 West Temple Street, Room 540
Los Angeles, CA 90012

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2009, at Los Angeles, California.

Frances Conroy
Declarant

Signature

SEM:fc
LA1997XH0026
60455952.doc