IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

) CAPITAL CASE

IN RE STEVE ALLEN CHAMPION) No. S066575
PETITIONER,)
)
)
ON HABEAS CORPUS)

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

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

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I.
INTRODUCTION

In his habeas petition, Steve Champion alleged, among other claims, that his trial counsel, Ronald Skyers, had provided ineffective assistance at the guilt and penalty phases of his 1982 capital trial. As discussed below, this Court issued an order to the Director of Corrections to show cause why petitioner is not entitled to relief as a result of trial counsel's "failure to adequately investigate and present evidence at the penalty phase of petitioner's trial." At the reference hearing which followed, evidence was presented on five (5) reference questions which, as argued by petitioner

below, ultimately satisfies petitioner's burden of demonstrating his trial counsel's performance "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

At the reference hearing, petitioner presented evidence showing that mitigating evidence was available to his trial counsel, Ronald Skyers, but was not investigated or presented at trial. This included evidence to refute or mitigate alleged and noticed (Pen. Code section 190.3) aggravating factors, including (1) evidence to refute petitioner's involvement in the Taylor murder, (2) evidence to refute petitioner's involvement in the Jefferson murder, (3) evidence of petitioner's lesser age, maturity and criminal history relative to codefendant Craig Ross, (4) evidence to mitigate petitioner's involvement in juvenile aggravators, (5) evidence to explain and thereby mitigate the tape-recorded conversation between petitioner and Ross, and (6) evidence to refute and explain petitioner's involvement with the Raymond Avenue Crips.

The evidence produced at the reference hearing also included mitigating evidence relating to petitioner's social history, development and functioning such as (7) evidence of petitioner's biological father's abuse of

petitioner's mother, (8) evidence of poverty, (9) evidence of the impact of the death of petitioner's stepfather on petitioner and his family, (10) evidence of petitioner's mother's inability to provide proper nurturing, care, and supervision, (11) evidence of petitioner's drug and alcohol use, (12) evidence of petitioner's poor academic functioning, (13) evidence of the poor educational achievement, criminal, juvenile justice, and drug and alcohol problems of petitioner's siblings, (14) evidence of petitioner's amenability to rehabilitation and outlook for positive institutional adjustment, (15) evidence of petitioner's low IQ and limited neuropsychological functioning, (16) evidence of abuse and mistreatment to petitioner by petitioner's siblings and (17) evidence of the love of petitioner by his family and friends and of petitioner's love for and protective behavior towards others.

Based on the evidence adduced at the hearing, the referee found trial counsel's investigative efforts wholly deficient and that at the time of petitioner's 1982 trial, reasonably competent counsel would have undertaken most of the investigative efforts which led to the discovery of the evidence post conviction.

In finding trial counsel's investigation deficient, the referee noted trial counsel's investigative efforts into petitioner's life history was limited to

asking "open ended" questions of a limited number of petitioner's immediate family members, reviewing documents provided by the prosecution through discovery and perhaps, a cursory review (but not obtaining) of a small number of petitioner's juvenile records.1 (Report at pp. 10, 23, 31.)

The referee found that Skyers "did not adequately conduct a separate, independent investigation. He failed to retain a penalty phase investigator. He did not interview all potential mitigation witnesses including petitioner's teachers, friends, CYA staff, CYA doctors, fellow gang members, or law enforcement personnel. He did not assemble...documents including school records...." (Report at pp. 10-11.)

As found by the referee, trial counsel did not conduct an independent investigation into the evidence he knew would be offered in aggravation at the penalty phase and did not collect any life history records. (Report at pp. 18-19.)

As found by the referee, because of trial counsel's deficient investigative efforts, he did not discover the penalty phase mitigating evidence which could have been presented at the penalty phase. The referee also found that the retaining of "a penalty phase investigator" and an

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1 As discussed below, petitioner take exception with the referee's findings that Skyers reviewed some of petitioner's juvenile records.

"independent investigation of the availability and credibility of percipient or law enforcement witnesses" would have "uncovered" and "produced" the additional evidence presented at the reference hearing. (Report at p. 262.) Further, the referee found that reasonably competent counsel would have tried to obtain such evidence in 1982. (Report at p. 264.) The referee found that "generally, no circumstances weighed against the investigation of the proposed additional evidence" and that "petitioner is correct that reasonably competent counsel in a capital case penalty phase had the obligation to conduct an independent investigation of potential areas of mitigation." (Report at p. 287.) The referee further found that petitioner did not do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase. (Report at pp. 375-376.)

The referee made some findings against petitioner. Those findings should not be credited by this Court. This is so because frequently, the referee makes "findings" which are contrary to established law, which are based on factual errors, which overlook indisputable and undisputed evidence contained in the record, which rely entirely on argument rather than fact, which rest on faulty logic and unsupported inferences, and/or are internally inconsistent with other "findings."

Additionally, except for a few noteworthy exceptions which support

respondent's position, the referee ignored hundreds of pages of certified and other records, including Social Security records, juvenile, mental health, school records and police reports.

As discussed fully below, petitioner takes exception with the referee's findings in at least the following areas:

Any finding that any "nondisclosure" of painful or embarrassing family history by members of petitioner's immediate family relieved Skyers' of his duty to perform an independent penalty phase investigation or would have prevented reasonably competent counsel from discovering the readily available mitigating evidence.

Any finding that trial counsel's obligation to investigate mitigation related to petitioner's development and functioning was discharged by prior counsel's retention of a mental health expert to address potential guilt phase mental defense issues

Any finding that the opinions of petitioner's experts were lacking foundation.

Any finding that reasonably competent counsel would not have presented evidence that petitioner was not involved in the Taylor murder just because he did not have an "iron clad" alibi.

Any finding that rebuttal was available to the prosecution, should trial

counsel have presented the mitigating evidence discovered post conviction.

Any finding that a portion of the mitigating evidence offered by petitioner was inadmissible. The referee's understanding that the scope of mitigation is narrow stands utterly at odds with the rulings of this Court and the United States Supreme Court.

In this Brief on the Merits and Exceptions to the Report of the Referee, petitioner will demonstrate that the evidence proffered at the hearing requires that petitioner's death sentence be set aside.

II.

SUMMARY OF PROCEEDINGS

Petitioner and co-defendant Craig Anthony Ross were charged with the December 12, 1980, murders of Bobby and Eric Hassan, burglary, and robbery. In connection with the murder counts, the information alleged the special circumstances of multiple murder, robbery and burglary. As to each crime, it was further alleged that the perpetrators were armed with a handgun.2 (TCT 530-544.) 3

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2 Court transcripts and police reports indicate four perpetrators of these crimes.
3 The record of reference proceedings consists of 65 volumes of Reporter's Transcripts and 135 volumes of Clerk's Transcripts. Where petitioner cites to the original trial court proceedings he has designated the citations as follows: "TCT" (trial court clerk's transcript) and "TRT" (trial court reporter's transcript). Reporter's transcripts of the reference court proceedings are designated "RT." (For example, RT 225.) Where petitioner has cited to the 135 volumes of clerk's transcripts the volume number precedes the citation. (For example Vol 1 of 135 pp. 3-5.)

In addition, Mr. Ross was charged with the December 27, 1980, murder of Michael Taylor, and burglary, robbery, and rape perpetrated in connection with Mr. Taylor's death.4 As to the Michael Taylor homicide, four special circumstances were alleged: burglary, robbery, rape and multiple murder. (TCT 530-544.)

At the guilt phase of the trial, in addition to evidence of the Hassan crimes charged against both defendants and the Taylor crimes charged against Mr. Ross, the prosecution introduced evidence of a third homicidal incident which it argued petitioner and Ross committed: the November 1982 murder of Teheran Jefferson.5 The prosecutor argued the four murders both as basis for petitioner's guilt as well as for imposing the death penalty.

On October 19, 1982, petitioner was found guilty as charged of the Hassan offenses. But for a single Taylor incident robbery count, the same jury also found Mr. Ross guilty as charged of both the Hassan and Taylor offenses. The arming and special circumstance allegations were each found to be true. (TCT 725-763.)

The penalty phase was conducted before the same jury. The jury returned verdicts of death as to both Mr. Ross and petitioner on October 27,

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4 Court transcripts and police reports indicate four perpetrators of these crimes.

5 Court transcripts and police reports indicate an unknown number of perpetrators of this crime.

1982. (TCT 798.) As a result of these verdicts and findings, on December 10, 1982, petitioner was formally sentenced to death.

On April 6, 1995, this Court affirmed petitioner's and Ross's convictions and sentences on automatic appeal. (*People* v. *Champion* (1995) 9 Cal.4th 879.) On June 1, 1995, rehearing before this Court was denied. On January 8, 1996, the United States Supreme Court denied petitioner's petition for writ of certiorari.

On October 7, 1997, following the District Court's ruling on exhaustion of claims presented in a petition to that court on April 21, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. (*Champion v. Calderon*, case number CV 96-2845.) The District Court ordered petitioner file any unexhausted claims in the California Supreme Court by November 6, 1997.

On November 5, 1997, petitioner filed his petition for writ of habeas corpus in this Court. Accompanying the petition were 17 volumes of exhibits. On November 9, 1998, respondent filed its informal response. On June 25, 1999, petitioner filed his reply to respondent's informal response.

On February 20, 2002, the Court issued an order to the Director of Corrections to show cause why petitioner is not entitled to relief as a result of trial counsel's "failure to adequately investigate and present evidence at

the penalty phase of petitioner's trial." On May 22, 2002, respondent filed its written return. Petitioner filed his traverse on November 19, 2002.

On June 25, 2003, the Court ordered a reference hearing and directed a Los Angeles County referee to take evidence and make findings of fact on five (5) reference questions.

A. The Reference Questions

> 1. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's capital trial? What were the results of that investigation?
>
> 2. What additional mitigating evidence, if any, could petitioner have presented at the penalty phase? How credible was this evidence?
>
> > On September 22, 2003, this Court granted petitioner's Motion to Clarify the Scope of the Reference Hearing, and ordered that "[t]he term 'mitigating evidence,' as used in the reference order, refers not only to evidence of petitioner's social history and his mental and physical impairments, but also to evidence refuting petitioner's involvement in the Taylor and Jefferson homicides." (S.Ct. Ord. 12/10/03)
>
> 3. What investigative steps, if any, would have led to this additional evidence? In 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to obtain such evidence and to present it at the penalty phase?
>
> 4. What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?

5. Did petitioner do or say anything to hinder or prevent the investigation or presentation of mitigating evidence at the penalty phase, or did he ask that any such evidence not be presented? If so, what did he do or say?

On July 30, 2003, this Court vacated the previous appointment order and directed the presiding judge of Orange County to select a judge of the Orange County Superior Court to sit as a referee and take evidence and make findings of fact related to the same 5 questions.

On September 10, 2003, The Honorable Francisco P. Briseno was appointed to sit as a referee and take evidence and make findings of fact. The referee was also the person to whom petitioner was required to submit his funding requests. The referee's funding recommendations were reviewed by this Court.

B. The Reference Hearing

Testimony began on February 6, 2006 and continued through January, 2008.

At the hearing, the reference court heard the testimony of the following twenty-six (26) witnesses:

1. Ronald Skyers, petitioner's trial counsel. (RT 591- 1947, 4915-5085)

2. Marcus Player, petitioner's friend. (RT 1960-2090)

3. Theodore Naimy, Los Angeles County Sheriff's Deputy

(RT 2093-2258)

4. Steven Koontz, Los Angeles County Sheriff's Deputy (RT 2259-2319)

5. Thomas Martin, Los Angeles County Sheriff's Deputy (RT 2358-2423)

6. Michael Smith, Los Angeles County Sheriff's Deputy (RT 2424-2449)

7. Gregory DeWitt, Los Angeles Police Officer (RT 2451-2549)

8. Thomas Lambrecht, Los Angeles County Sheriff's Deputy (RT 2552-2592)

9. Owen Tong, Los Angeles County Sheriff's Deputy (RT 2593-2618)

10. James Merwin, petitioner's first postconviction capital habeas counsel (RT 2622-2641)

11. Earl Bogans, petitioner's friend (RT 2642-2720)

12. Wayne Harris, petitioner's friend (RT 2727-2815)

13. Stephen Strong, investigator (RT 2821-3004, 4802-4913)

14. Jack Earley, attorney (RT 3698-4800)

15. Nell Riley, neuropsychologist (RT 3156-3678)

16. E. L. Gathright, petitioner's uncle (RT 5088-5170)

17. Rita Powell, petitioner's sister (RT 5188-5358)

18. Azell Jackson, petitioner's mother (RT 5363-5547)

19. Traci Hoyd, petitioner sister (RT 5556-5596)

20. Terri McGill petitioner's sister, (RT 5596-5645)

21. Gary Jones, petitioner's friend (RT 5658-5714)

22. Linda Matthews, petitioner's sister (RT 5715-5820, 6832-6872)

23. Charles Hinkin, neuropsychologist (RT 6076-6442)

24. Saul Faerstein, psychiatrist (RT 6444-6796)

25. William Eagleson, Los Angeles Police Officer (RT 6920-6943) 6

26. Debora Miora, psychologist (7450-9303)

The referee's findings and the record of the reference hearing have been filed in this Court. The reporter's transcript of the reference is approximately 10,000 pages. The clerk's transcript of proceedings, including copies of exhibits and briefing filed during the reference hearing accounts for more than 10,000 additional pages. The Referee's report numbers 377 pages.

This Court invited the parties to serve and file exceptions to the referee's report and simultaneous briefs on the merits.

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6 Hinkin, Faerstein and Eagleson were the only witnesses called by respondent.

III.

STANDARD OF REVIEW

" 'A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]'" *(In re Lucas* (2004) 33 Cal.4th 682, 694, quoting *In re Cudjo* (1999) 20 Cal.4th 673, 687.)

The informal briefing process relating to habeas proceedings (petition, informal response, informal reply) was designed to assist this Court in determining whether to issue an order to show under California Rules of Court, rule 60, which then obligates this Court to decide the issues on the merits and issue a written opinion. At the petition stage of the habeas proceeding, the question is "whether the petition states a *prima facie* case for relief - that is, whether it states facts that, if true, entitle the petitioner to relief - and also whether the stated claims are for any reason procedurally barred . . ." *(In re Romero* (1994) 8 Cal.4th 728,737.) "The informal response . . . performs a screening function" that is roughly analogous to a demurrer. (*Id.* at 742, and n. 9.) If the state can demonstrate that a procedural bar exists, or that the claims in the habeas petition lack merit as a matter of law, even if the factual allegations are true, the reviewing court

"may summarily dismiss the claims without requiring formal pleadings . . . or conducting an evidentiary hearing." (*Id.* at 742.)

Where a petitioner's entitlement to relief hinges on the resolution of factual disputes, the court should issue an order to show cause in order to resolve the factual disputes. (*In re Romero, supra,* 8 Cal.4th at pp. 739-740, emphasis added.) Formal briefing that follows an order to show cause consists of the Return and Traverse. If after the filing of the Return and Traverse there are no disputed factual matters requiring an evidentiary hearing, the matter may be decided without an evidentiary hearing.

Evidentiary hearings are particularly appropriate for ineffective assistance of counsel claims, which often can only be made in a habeas corpus proceeding that allows the Court to review evidence outside the record in order to intelligently evaluate if trial counsel's actions, or failure to act, in the manner complained of constituted ineffective assistance of counsel. (See *People* v. *Pope* (1979) 23 Cal.3d 412,426.) Jurisdiction is retained by this Court when an evidentiary hearing is ordered. This Court decides the case. The role of the referee is limited to taking evidence and making findings of fact on specified reference questions.

Pursuant to this Court's Reference Hearing Order, the referee in the instant case was "to take evidence and make findings of fact" on the five

reference questions. For evidence to be admissible it must be relevant. All relevant evidence, except as otherwise provided by statute, is admissible. (Evid. Code sections 350, 351.)

A finding of fact is defined in Black's Law Dictionary as "determinations from the evidence in the case...," and "a conclusion by way of reasonable inference from the evidence," and "a conclusion drawn by trial court from facts without exercise of legal judgment."

Thus, as noted, there is a distinction between findings of law and findings of fact. The term findings of law applies to rulings of law made by a court in connection with findings of fact. A finding of fact must be established by the evidence.

This Court will give weight to only those factual findings by the referee that are supported by substantial evidence. The reference court's only task is to resolve disputed facts within the framework of the reference questions. All questions of law and mixed questions of law and fact will be resolved de novo by this Court.

Although this Court will defer to the referee on factual and credibility matters, in all other areas this Court should give no deference to the referee's findings. This Court independently reviews prior testimony, as well as all mixed questions of fact and law. Whether or not counsel's performance was

deficient, and whether any deficiency prejudiced petitioner, are both mixed question subject to independent review. (*In re Thomas* (2006) 37 Cal.4th 1249, 1256, internal citation omitted.)

In the instant case, the reference court agreed with petitioner that the reference questions anticipated both parties proffering evidence at the reference hearing – for example, reference question four regarding potential rebuttal places the burden to produce substantial evidence on respondent. Petitioner had no burden to offer evidence on this question or reference question five (concerning any interference by petitioner with counsel's investigating or presenting mitigating evidence). Thus, in those instances where the reference court has made a finding of fact on questions to which respondent had the burden, respondent was obligated to meet its burden of presenting substantial evidence to support the desired finding. Like all other findings, these findings must be supported by "ample, credible evidence" or "substantial evidence." (See *People v. Ledesma (*1987) 43 Cal.3d 171, 219; *In re Ross* (1995) 10 Cal.4th 184; *In re Burton* (2006) 40 Cal.4th 205, 214.) Where the referee's factual findings are not supported by ample, credible evidence, they should be disregarded. *(In re Hitchings* (1993) 6 Cal.4th 97, 122.)

VI.

SUMMARY OF EVIDENCE PRESENTED AT THE REFERENCE HEARING [7]

In response to the reference questions, petitioner presented evidence on the prevailing professional norms for reasonably competent counsel defending a capital murder case in 1982, including ABA rules in place at the time of petitioner's trial, references to contemporaneous case law and California codes as well as reference to constitutional protections extended to criminal defendants, particularly those facing the death penalty. To establish the investigative efforts of petitioner's trial counsel, petitioner offered the trial file and testimony of petitioner's trial attorney Ronald Skyers. To evaluate those efforts, petitioner offered *Strickland* expert, attorney, Jack Earley.

Petitioner presented evidence he argued reasonably competent counsel would have discovered and presented at the penalty phase of his 1982 capital trial. Roughly speaking, this evidence was divided into the categories of social history mitigation and evidence to rebut or mitigate noticed aggravators.

Petitioner offered evidence to rebut or mitigate each noticed

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7 Throughout this brief petitioner cites directly to the reference hearing record and/or the trial record. This section is intended to summarize the evidence presented at the reference hearing.

aggravator petitioner faced.

The Murder of Michael Taylor

On December 27, 1980 a number of African-American males had been socializing and playing basketball at the Helen Keller Park. Some of these young men including Marcus Player – who testified at the hearing – Earl Bogans – who too testified at the hearing, were detained by Sheriff's deputies. Others, including Wayne Harris – who testified at the hearing, and petitioner were not detained by the deputies but were also at the park.

Upon leaving the park and returning to their routine patrol, Los Angeles County Sheriff's Deputies Theodore Naimy and Steven Koontz – who testified at the hearing-- spotted a suspicious vehicle and began to give chase. The deputies in the park and others including Thomas Martin, Michael Smith, Thomas Lambrecht, and Owen Tong – all of whom testified at the hearing – left the men in the park to join Naimy and Koontz. Within a couple of blocks from the park and near petitioner's home, the vehicle crashed. The four individuals seen in the car as it passed Naimy and Koontz were seen exiting the car. The deputies set up a containment area bordering the four block area of 126th St to the north, 127th St to the south, Budlong to the east, and Raymond to the west. The area enclosed the crash site – which was in front of petitioner's home and the area where the individuals who had

fled the car were seen to run. Deputies positioned themselves at each of the four corners and vehicles traveled the perimeter in hopes of capturing the two suspects who ran into the containment area and/or the other two who ran parallel to it.

Preceding the car chase, approximately a mile away on Vermont Avenue, Michael Taylor was shot and killed when three African-American men entered the apartment he shared with his mother Cora and sister Mary. Present at the time was a family friend named William Birdsong. The individuals were robbed, the home was burgled, and Mary was taken into the bathroom where she was raped. During the incident, a fourth African-American male came to the door. His face was not seen.

The Taylor killing was investigated by the Los Angeles County Police Department, not the Sheriff's Department which undertook the detentions at the park and the chase of the vehicle the young men had fled from.

Initially, the Sheriff's deputies who had detained the men in the park, participated in the car chase and setting up of the containment area were not aware of the Taylor murder. Their belief was that the car had been stolen. According to Los Angeles Police Officer, Gregory DeWitt -- who testified at the hearing, it was some time between the time after the containment area had been set up, the vehicle license plates run to determine if the car been

stolen, the car had been searched and a gun was recovered and the fleshing out of bushes Robert Aaron Simm's (a suspect who was ultimately identified as a participant in the Taylor murder) that the Sheriff's deputies were informed by Los Angeles police that there might be a connection between the vehicle and the Taylor homicide.

That night two of the men who had fled the vehicle were captured. Evan Mallet was found hiding in petitioner's backyard. Robert Aaron Simms was captured as he exited the containment area. The gun found in the vehicle was later determined to be the Taylor murder weapon. Craig Ross was arrested at a later date when his fingerprints were matched to some in the Taylor residence. Pretrial, Mallet's fingerprints were also recovered from the Taylor residence. At the reference hearing it was revealed that Simm's fingerprints were recovered from inside the Taylor residence on an item the robber searched for money.

Due to the fact that the Taylor murder and the detention at the park occurred at the same time, the men whose detention at Helen Keller Park was documented in incident reports were never considered suspects to the Taylor crimes. Marcus Player and Earl Bogans were two whose detention in the park was documented by deputies. Petitioner and Wayne Harris were not. Although the suspect vehicle was registered to Frank Harris who was

Wayne Harris' father and the stepfather of Marcus Player and his brother Michael Player, at the time of the incident, Wayne Harris and petitioner were never considered suspects to the Taylor crimes.

Pretrial the theory of the prosecutor was that petitioner had knowledge of the Taylor crimes and was involved in a conspiracy that included those crimes. After Cora Taylor identified petitioner as one of the men inside the home and Mary Taylor said he resembled a perpetrator, the trial prosecutor changed his theory to include petitioner as one of the actual perpetrators. Once Simms' fingerprints were positively identified as being in the Taylor residence, making him the perpetrator identified as petitioner, at the hearing, respondent scrambled to find some basis for speculating petitioner too could have been party to the crime. As discussed below, those efforts fail.

At the time the suspect vehicle was fleeing Naimy and Koontz, Marcus Player recognized that it belonged to his step father Frank Harris. Marcus, Wayne, and petitioner each had observed various aspects of the detention and the suspect vehicle leaving the park. They decided to follow on foot to see what had happened. As they entered the containment area at 126th and Budlong, the three were stopped and questioned by Sheriff's deputies. Marcus told the deputies that the car was his stepfather's and the last person driving was his brother Michael. The deputies checked Marcus,

Wayne, and petitioner's heart rates and made observations that they had not been running – eliminating them as any of those seen in or running from the vehicle. In other words, in spite of the lack of documentation that they were in the park when the Taylor crimes occurred, Harris and petitioner were ruled out as suspects.

Using the three as decoys, deputies had Marcus, Harris and petitioner walk the containment area – checking in with deputies at each corner – until they were joined by Simms, who exited from between some bushes on 127th St. and Raymond to join them as if he had been walking with them all along.

After Simms exited the bushes the now four young men were detained at the corner of 127th and Raymond. Simms first correctly identified himself, but later gave a false name of James Taylor. He also gave a date of birth that made him an adult. Later that night, William Birdsong, Mary Taylor, and Cora Taylor were brought by LAPD to view the four individuals. None made a positive identification. When Naimy was asked to view the men, he noted Simms resembled one of the individuals he had seen in the suspect vehicle and that he was wearing close similar to what he had observed. None of the others matched the men he had seen. Simms, although a juvenile, was arrested and booked into the county jail. He was released to his mother approximately 4 hours later and apparently was never

contacted again regarding the Taylor case.

Marcus Player, Wayne Harris, and petitioner were told to go home. Michael Player was never interviewed regarding his involvement in the Taylor homicide. Marcus Player, Wayne Harris nor any of the men detained in the park were ever interviewed about the facts of that evening.

The Jefferson Murder

Private investigator Steve Strong, was a police officer with the Los Angeles Police Department from 1975 through 1993. Strong reviewed police reports and other documentation relating to the Hassan, Taylor, and Jefferson homicides. According to Strong, there was no evidence that any of these three homicides was gang motivated, although the presence of Ross at both the Taylor and Hassan murders, and Mallet's involvement in the Taylor murder indicated gang members were involved. There was no evidence that the Jefferson homicide was perpetrated by any of the individuals involved in either the Hassan or Taylor homicides. There was no evidence which implicated petitioner in either of the Jefferson or Taylor homicides. Wall graffiti which was alleged by the prosecutor to tie petitioner to the Taylor homicide was misread by the gang expert who testified at trial. Moreover, the pictures were taken months after the murder and there was no way to date when it was placed on the wall. There was significant evidence,

credited by respondent, that the graffiti was not authored by petitioner but rather authored by Karl Owens, whose gang moniker appears in the graffiti.

Strong noted there were significant differences between the three murders. Hassan was a large-scale drug dealer, having just returned from Florida with a trunk full of marijuana, which was not taken by the robbers. Michael Taylor was a small time drug dealer. Only the Taylor offense involved a rape. Although the Taylor victims seem to have recognized at least one of the perpetrators, witnesses were left alive. No witnesses were left alive in the Hassan home. Fingerprints were left at both the Taylor and Hassan scenes. There was no forensic evidence to identify any perpetrator of the Jefferson offense. It could not be determined how many, if more than one perpetrator, was involved in the Jefferson murder.

Strickland expert, Jack Earley, testified that legally there were insufficient grounds for admitting the Jefferson murder as a similar offense.

Strong testified there were significant lapses in normal investigative measures, particularly in the Taylor case. Because the murder weapon had been found in Frank Harris' car he and any individual who had access to the car, which included Marcus Player, Michael Player, Wayne Harris, and his sister should have been brought in for questioning. They were not. Police reports clearly implicated Simms as a perpetrator. However, no effort was

made to match his fingerprints to the Taylor scene or Harris car until the reference hearing. Simms – a minor who had been booked into county jail as adult James Taylor had been released and never again brought in for questioning. It could not be determined that photographs of Michael Player and/or Simms were shown to the Taylor surviving victims. Neither was part of a physical lineup. There were no "six pack" photographic arrays of Michael Player or Simms shown to the surviving victims.

There was virtually no investigation conducted in the Jefferson case. Jefferson's girlfriend who was away at the time was questioned and a couple of neighbors were canvassed. Although the theory the prosecution was that Raymond Avenue Crips were involved in the Jefferson -- particularly petitioner and Ross -- no identification efforts were used to determine if any witness saw them in the vicinity of the Jefferson residence.

Gang Affiliation

A noticed aggravator was petitioner's alleged "violent character in the community as a gang member." Extensive evidence of petitioner's alleged gang affiliation was presented at the guilt phase. This included testimony of a prosecution gang expert, photographs of petitioner throwing gang signs while at CYA, photographs of petitioner in the company of known gang members -- sometimes while holding a weapon, and graffiti which was

argued to have been authored by petitioner. The prosecutor at trial argued petitioner's alleged gang affiliation both to convict and to support his plea for death.

Although the referee denied petitioner's funding requests for a "gang expert" or psychologist qualified to address gang related themes such as a) the impermanency of gang membership and gang criminality, b) the psychological factors leading to gang membership, c) the negative and positive impact of gang affiliation on petitioner and d) that because the Raymond Avenue Crips were established at a time when petitioner was not yet a teenager, the prosecution's assertion that petitioner was an "original gangster" was subject to dispute, petitioner presented some social history testimony, such as lack of a father figure, poverty, dangerous community, and lack of community resources which addressed some of those themes.

The tape recording of petitioner's conversation with Craig Ross

Petitioner presented evidence that Skyers did not listen to the tape recorded conversation of petitioner and Ross until trial began. Skyers made no effort to have the recording transcribed. Skyers did not appreciate the significance of photographs which had been entered into evidence at Ross' preliminary examination of the Hassan murder scene depicting a waterbed which had been referred to in the tape as explaining why Ross and perhaps

petitioner would have known about the waterbed.

The *Strickland* expert, Jack Earley noted that much of the recording had not been transcribed and that some of the gaps in transcription were significant to adverse themes put forth by the prosecution. In other words, reasonably competent counsel would have made an independent effort to have that tape transcribed to see if what was missing could be determined. 8 From what could be determined from the existing transcription, a reasonably competent counsel would have argued that petitioner's conversation consisted primarily of "tough talk," that he was in a secured van at the time and little danger to custodial officers or other inmates, that Ross clearly was exhibiting a leadership role, and that experts on future dangerousness could be called at the penalty phase to ensure the jury that if given life petitioner would be securely housed.

At the reference hearing petitioner presented significant evidence on a number of themes related to of petitioner's social history, his development and functioning, and his mental impairments.

Petitioner's mother, Azell Jackson and uncle E.L. Gathright testified to petitioner's biological father, Lewis Champion II's abuse of petitioner's

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8 At the reference hearing petitioner requested the court order the prosecutor provide a copy of the tape, which was not included in Skyers' trial file, to habeas counsel to independently transcribe. At the request of respondent, the reference court declined to make such an order unless habeas counsel agreed to accept the prosecutor's transcription as factually accurate, should tape break during the copy process.

mother, some of which are occurred while petitioner's mother was pregnant with petitioner. They also testified to extreme poverty in which petitioner's family suffered when petitioner's mother was pregnant with petitioner and then again after the death of his stepfather until petitioner's older sisters, Rita Powell and Linda Mathews were old enough to contribute financially to the family. As described fully below, petitioner's biological father left before petitioner was born. While he remained in the family he did not contribute to it financially but rather took what little food was available for petitioner's mother and older siblings Lewis III, Reggie, Rita, and Linda. After he abandoned pregnant Azell, and before Azell began a common law marriage with Gerald Trabue, the Champion family was shifted between relatives, lived in shelter, subsisted on aid to families, welfare and the generosity of relatives. There were times when Rita and petitioner were given to relatives to take care of because Azell could not support all of her children. 9

Petitioner's sisters Linda, Rita and Teri, testified to life while Gerald was part of their family and the devastating impact on the family when, in

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9 Azell and Lewis were married II 10/8/55. Lewis III was born 7/28/56, Reggie 3/31/58, Linda 7/18/59, Rita 3/17/61, petitioner 9/26/62. Azell began a relationship with Gerald Trabau sometime in 1962 and gave birth to Gerald on 8/5/63 and Teri on 9/21/67. Gerald died on 6/28/68. Azell married Henry Robinson 10/20/69. Petitioner's youngest sister, Traci, was born on 9/28/70. Henry left while Azell was pregnant with Traci. There was no further father figure in petitioner's family.

June of 1968, Gerald Trabue was killed in a car accident which resulted in the entire family been taken to hospital. Once again the Champion family was plunged into poverty. After Gerald died, the family was once again assisted by aunts and uncles. They provided clothing and food. Aunts and uncles took petitioner and his family food to eat, gave them money and took them shopping for clothes. While in elementary school, after Gerald's death, petitioner and his siblings wore shoes with holes in them and were teased by the other children. Petitioner was teased about his buck teeth, his dark complexion, and his old clothing.

E.L., Azell, petitioner's sisters and childhood friend Gary Jones testified to the destructive influence of petitioner's older brothers, Lewis III and Reggie. From the time Gerald died, when petitioner was in first grade to when he was old enough to stand up to Lewis III, Lewis III terrorized his siblings. Azell was employed outside the home and worked mostly nights. Lewis III assumed the role of man of the house. He physically and emotionally abused petitioner and his siblings. Frequently under the influence of PCP Lewis destroyed the Champion home by breaking doors and furniture and setting fires. When Lewis III would go on one of his rampages petitioner frequently stepped in to protect his youngest siblings from harm.

Reggie was a destructive influence in the family to a much lesser extent than Lewis III. He was however mentally ill and it did not substitute for the absent father figure petitioner so desperately needed.

Petitioner's family members and friend spoke of the great love they held for petitioner. They testified about how petitioner was kind, gentle, generous, and protective toward them.

Petitioner presented evidence of the poor academic functioning of himself and his sisters and brothers. Although Linda and Rita, much later in life, managed to acquire their GED's only Terri and Traci graduated high school. Terri and Traci had been sent to a parochial school and benefited from a far superior education to the Los Angeles County public school system which had been offered their siblings.

Petitioner presented evidenced a serious neuropsychological deficits, learning disabilities and low I.Q.. Petitioner presented evidence of positive institutional adjustment while he was housed at the California Youth Authority.

Petitioner presented extensive expert psychological testimony regarding the impact of various people and incidents on petitioner's development, functioning and behavior.

Respondent's experts concluded petitioner suffered from learning

disabilities. The social history and mental impairment themes which were testified to and the evidence to refute and/or mitigate notice aggravators was supported by documentation, 10 and while they express doubt as to the credibility of petitioner's family member witnesses – based only on the fact that they are related to petitioner – neither respondent or his experts offered any evidence which undermines the content of the contemporaneous documents.

Likewise, respondent offered almost no evidence in rebuttal. Petitioner was barely 18 at the time of the Hassan crimes. He had no adult record and what juvenile record he had was either before the jury as a noticed aggravator, noticed but not used by the prosecutor or insignificant in comparison to the multiple murders the jury found the prosecution had proved. Any additional evidence regarding petitioner's affiliation with Raymond Avenue Crips was cumulative to the expert testimony and photographs before the jury already. Respondent offered absolutely no evidence in rebuttal which was not a noticed aggravator and/or already presented to petitioner's jury.

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10 These records are identified fully below with citation to the reference hearing record.

V.

ARGUMENT AND EXCEPTIONS

A. Prevailing Professional Norms Required Counsel in a Death Penalty Trial to Conduct a Timely and Comprehensive Social History; Trial Counsel's Investigative Efforts Fell Far Short of this Professional Standard

1. The Applicable Law

A claim of ineffective representation has two components. A petitioner must show that: 1) counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness; and 2) the deficiency was prejudicial to the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to the defendant. *(Strickland* v. *Washington, supra,* 466 U.S. at p. 688; see also *In re Lucas, supra,* 33 Ca1.4th at p. 721.) A reasonable probability is one sufficient to undermine confidence in the outcome.

Counsel's performance does not meet the "objective standard of reasonableness" if it is not reasonable under "prevailing professional norms." *(In re Lucas, supra,* 33 Ca1.4th at p. 721, quoting *Wiggins* v. *Smith* (2003) 539 U.S. 510, 521.) Further, counsel's performance is reasonable only where counsel has made "a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *(In re*

Lucas, supra, 33 Cal.4th at p. 721, quoting *In re Marquez* (1992) 1 Cal.4th 584, 602; see also *Strickland* v. *Washington, supra,* 466 U.S. at pp. 690-691 ["strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"].)

This Court has endorsed the inquiry made by the United States Supreme Court in *Wiggins* v. *Smith,* for assessing counsel's performance at the penalty phase of a capital trial: "[O]ur primary focus is not on evaluating whether, in light of the evidence in their possession, counsel properly decided not to present evidence in mitigation. 'Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable.'" (In re Lucas, supra,* 33 Cal.4th at p. 725, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 522 [emphasis in original].) As put by the Ninth Circuit, "[a] decision not to ... offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision." *(Lambright* v. *Schriro* (9th Cir. 2007) 490 F.3d 1103, 1116, citing *Wiggins* v. *Smith, supra,*

539 U.S. at pp. 522-523; *Stankewitz* v. *Woodford* (9th Cir. 2004) 365 F.3d 706, 719.)

In *Wiggins* v. *Smith,* the Supreme Court held that counsel's failure to investigate the defendant's life history fell below reasonable professional standards. The Court relied on the well-defined norms articulated by the American Bar Association to determine counsel's reasonableness: "ABA Guidelines provide that investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence .. . .'" *(Wiggins* v. *Smith, supra,* 539 U.S. at p. 524 [emphasis in original]; see also *ibid.,* citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 11.8.6 at p. 133 ["noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences"]; *In re Lucas, supra,* 33 Ca1.4th at p. 723.)

Thus, in determining the reasonableness of counsel's investigation, prevailing norms require that counsel conduct a "reasonably thorough independent investigation of the defendant's social history as ... reflected in the ABA standards relied on by the court in the *Wiggins* case." *(In re Lucas, supra,* 33 Ca1.4th at p. 725.)

As consistently held by the Ninth Circuit, bound as it is by the above constitutional standards, "[t]o perform effectively ... counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" *(Allen* v. *Woodford* (9th Cir. 2005) 395 F.3d 979, 1000, citing *Mayfield* v. *Woodford* (9th Cir. 2001)(en banc) 270 F.3d 915, 927.) Thus, it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. (*Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1117(quoting *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227.)

"To that end, the investigation should include inquiries into social background and evidence of family abuse." *(Summerlin* v. *Schriro* (9th Cir. 2005) 427 F.3d 623,630, citing *Boyde* v. *Brown* (9th Cir. 2005) 404 F.3d 1159, 1176.) "The defendant's history of drug and alcohol abuse should also be investigated." *(Summerlin* v. *Schriro, supra,* 427 F.3d at p. 630, citing *Jennings* v. *Woodford* (9th Cir. 2002) 290 F.3d 1006, 1016-17.) Courts have long "recognized an attorney's duty to investigate and present mitigating evidence of mental impairment." (*Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 636-37.) This includes examination of mental health records. *(Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152, 1161.)

Defense counsel should also examine the defendant's physical health history, particularly for evidence of potential organic brain damage and other disorders. *(Stankewitz v. Woodford, supra,* 365 F.3d at p. 723.) This list is not meant to be exhaustive, but only illustrative of the minimal type of "objectively reasonable" investigation any competent capital defense attorney should conduct in preparing a penalty phase defense

> [I]t is necessary to identify and interview the defendant's family members as well as past and present friends, fellow workers, etc., in order to adequately prepare for a capital trial. It is also necessary to obtain records, such as school records, employment records and medical records that may result in identifying mitigation themes and mitigation witnesses. *(Allen* v. *Woodford, supra,* 395 F.3d at p. 1001.)

For counsel to compile a comprehensive, reliable and well documented social history, investigation must therefore begin immediately upon counsel's entry into the case. (See ABA Guidelines, 11.4.1.) As the United States Supreme Court noted in *Williams* v. *Taylor,* counsel's failure to begin preparing for the penalty phase until one week before trial was unreasonable and precluded adequate investigation and presentation of mitigating evidence. *(Williams* v. *Taylor* (2000) 529 U.S. 362, 395.) This Court has also recognized the necessity for a timely penalty phase investigation. *(In re Lucas, supra,* 33 Cal.4th at pp. 725-726.)

As demonstrated below, and correctly found by the referee, petitioner's trial counsel conducted a deficient investigation as to multiple areas of mitigation.

2. Skyers' Investigative Efforts and the Evidence of Social History Mitigation Offered at the Penalty Phase of Petitioner's Trial

The referee made a number of findings supporting petitioner's assertion that trial counsel's performance was prejudicially deficient with respect to investigating and presenting mitigating evidence relating to petitioner's background, development, and functioning. The referee found that:

> "Trial counsel did not adequately conduct a separate, independent investigation. He failed to retain a penalty phase investigator. He did not interview all potential mitigation witnesses including petitioner's teachers, friends, CYA staff, CYA doctors, fellow gang members or law enforcement personnel. He did not assemble all documents including school records . . .." (Report at p. 10-11.)

The referee agreed with petitioner "as to claimed deficiencies that related to the thoroughness of trial counsel's preparation and an investigation." (Report at p. 17.) As noted by the referee, "Skyers had no present recollection of any specific areas of penalty phase investigation (he, petitioner and the few family members who were interviewed) discussed."

(Report at p. 26.) 11

Trial counsel Mr. Skyers, was retained by petitioner's family to represent petitioner at his capital trial, for the sum of approximately $10,000. The family used petitioner's sibling's settlement money from Gerald Trabue Sr.'s death and money Rita and Linda could pitch in. (RT 781 [Skyers, Azell, Rita].)

Previous appointed counsel Homer Mason had applied to the trial court under PC § 987.9 for a limited amount of funding which consisted of $450.00 for a ballistics expert, $400.00 for an eyewitness identification expert, $250.00 for a probation consultant and $135.00 for a psychiatric evaluation of specified guilt phase issues12. The ballistics expert funding was never used by either Mr. Mason or Mr. Skyers. The eyewitness expert funding was never used by either Mr. Mason or Mr. Skyers. At Mr. Mason's instruction the investigator performed a few hours of investigation focused primarily on a potential alibi defense to the Hassan charge. The probation consultant conducted no investigation at all. (TCT 214, 216, 224, 227, 232,

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11 Skyers' trial files contained few notes or other documents which could be construed as investigative results except where the results concerned the guilt phase. (Vol 81-87 of 135.)

12 The referral letter for the psychiatric evaluation specified only the guilt phase mental health defense issues. The three page report generated as a result of the evaluation addressed only those issues. As discussed further below. The referee's finding that prior counsel had the experts "conduct a mental status evaluation of petitioner as to both guilt and penalty phases (Report at 22) is wholly without factual basis and must be rejected.

236, 245, 251, 257, 262, 265, 272, 281, 337, 379, 391, 552, 558.)

By declaration Mr. Skyers' avers his investigation into the Hassan, Taylor, and Jefferson homicides consisted of reading police reports and/or visiting the scenes. Skyers stated that he "had enough to do to defend against the Hassan [sic]." (Vol. 86 of 135 at p. 1671.) He conducted no investigation of penalty issues other than speaking with some of petitioner's siblings, petitioner's mother, and petitioner's juvenile probation officer. Documentary evidence bearing on petitioner's history and issues in mitigation was not collected. (Vol. 86 of 135 pp. 1642-1696.)

In the areas of social history mitigation investigation, Skyers undertook no investigation, did not collect any records, and did not consult any expert for the purpose of learning about petitioner's history and development in order to make a determination as to what mitigation to present. Skyers conducted no investigation from which to decide whether or not to present a case of positive adjustment at the California Youth Authority or from which to decide whether to attempt to portray petitioner as a young man who was trying to turn his life around. (RT 3837[Earley].) This was in spite of the fact that Skyers' "strived very hard to demonstrate" petitioner's "good behavior record" at CYA. (Vol. 86 of 135 at p. 1666 [Skyers' Dec.].)

Skyers was aware that some of petitioner's siblings had a different father. Skyers did not perform additional investigation in this area. (RT 1258, 4929 [Skyers, Earley].)

Prior to his representation of petitioner, having driven in the area, Skyers was generally familiar with petitioner's residential neighborhood of 126th St. in South Central Los Angeles, California.[13] Skyers did not perform additional investigation into community conditions in this area or their impact on petitioner's development. (RT 4934.)

Prior to his representation of petitioner, Skyers had some familiarity with Helen Keller Park. (RT 1260 [Skyers].) Skyers did not perform additional investigation into this area.

Prior to his representation of petitioner, Skyers had some impressions regarding the quality of the educational system in the Los Angeles Unified School District within the geographical area. [14] Skyers did not perform

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[13] "I was familiar with it before Steve Champion's case by driving through the area, by the area, over the years that I have been going to courts, and then also with Steve." Skyers stated that he had represented people who lived in that community prior to petitioner and had been to other homes as part of his representation of these other people. "The homes were not out of the ordinary. It wasn't a poor looking neighborhood. Whether or not people were poor or not, I don't know. It wasn't a poor looking neighborhood. Houses were well kept, painted. The streets were pretty much paved, not nicely paved. Shrubbery and gardening seemed to be in good order." (RT 1259-1260. [Skyers])

[14] "I hadn't studied that. Well, my idea would just probably be the school system on a whole, the whole area spreading out through Lennox, Hawthorne, Lawndale area, have schools that seem to be functioning well, sports activities. No real reputation for the schools that gang members such as in certain other areas in South Central area. So I

additional investigation into this area regarding the education received by petitioner, and whether it was sub-standard. (RT 1261.)

The referee found:

> "The referee finds that Skyers did not in fact see or possess petitioner's school records at the time he represented petitioner. This failure to review is a deficient performance by reasonably competent counsel in the investigation phase of petitioner's case." (Report at p. 72.)

With regard to Skyers relationship with petitioner and his family, according to Earley, regardless of the number of times Skyers met with petitioner, and it did not appear to be many, he did not establish a relationship with them sufficient to advise petitioner. Skyers files contains virtually no notes of conversations with family members. What notes there are demonstrate Skyers was concerned with establishing an alibi for Hassan almost exclusively. Skyers conducted his interviews with petitioner, for the most part, in holding cell before trial. He would not have talked about personal matters with petitioner because frequently petitioner was in the holding cell with Ross or other inmates. (RT 1053-1054, 1214-1215, 5198, 5209, 5373, 4688-4689 [Earley, Rita, Azell, Skyers]; Vol. 86 of 135 pp. 1642-1696.).)

Skyers' communications with petitioner's family members for the

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would say the schools were within the average kind of schools that would be in the Los Angeles community." (RT 1261 [Skyers].)

purpose of conducting an investigation for penalty phase presentation fell below the standard of reasonably competent counsel. Reasonably competent counsel at the time would have in mind what constitutes Factor (k) evidence. None of Skyers' communications with family members or other investigation evidenced Skyers had an understanding or appreciation of Factor (k) evidence. (RT 3862 [Earley].) Reasonably competent counsel at the time understood poverty, abuse, mental health issues were mitigating – reasons based in petitioner's background that may have led jurors to vote for life instead of death. None of Skyers' communications with family members or other investigation evidenced Skyers had an understanding or appreciation of this fact . (RT 3862 [Earley].)

In his declaration, Skyers expressly stated that he did not view and would not have presented evidence of abuse, mental illness or poverty as mitigation. Skyers said that he would not have introduced evidence that petitioner had any mental disease or defect or had been abused because that "most likely[would have] been regarded by the jury as a concession that my client had done the killings." (Vol. 86 of 135 at p. 1660.) Skyers stated "had I offered mental illness conflict defect, disease, or abuse evidence, it would have given the jury the impression that since it was Mr. Champion who was 'making excuses,' it was he who had to offer explanations and excuses

because he was either the sole, or at least one, killer..." (Vol. 86 of 135 at p. 1660.)

Skyers also declared that evidence that petitioner's ancestors had suffered slavery and discrimination, and that petitioner's mother had been abused by his father would have caused him "great concern." This was because "evidence concerning the history of abuse, both by and of Mr. Champion's natural father, his father's life long history of mental illness, and the fact that his mother may have been physically abused while Mr. Champion was in utero," may have caused the jury to think that Skyers "was offering to explain why Mr. Champion did the shooting by showing a pattern of violence and abuse and his family as an excuse there of." (Vol. 86 of 135 at p. 1664-1665.) Skyers' understanding of mitigation is very similar to that of the deficient trial attorney in the *Lucas* case.

In this same declaration, on multiple occasions, Skyers offers as an explanation for his reasoning not to introduce social history mitigation that having been "involved in the callous execution of a **wheelchair-bound handicapped child"** the jury would naturally not feel sympathy for petitioner. (Vol. 86 of 135 at pp. 1660, 1665, 1694.)

Both the trial record and the record at the reference hearing are completely devoid of any evidence that Eric Hassan was a "wheelchair-

bound handicapped child." When asked to explain why he thought Eric Hassan was handicapped Skyers could only say that didn't know whether or not this was true but he "probably would have gleaned it from police reports." (RT 4957.) Skyers conducted no investigation to determine whether Eric was handicapped what the handicapped was and none exists in the reference hearing transcripts, exhibits or Skyers' trial file. (RT 4957-4959.)

The investigation of a reasonably competent counsel at the time would have been directed towards issues of age, culpability, mental health, alcohol and drugs, family history, and environmental history. None of Skyers' communications with family members evidenced Skyers had an understanding or appreciation of these factors or directed – in his communications with family members– any significant or sufficient inquiry into such penalty phase themes. (RT 3863 [Earley].) The investigation of a reasonably competent counsel at the time would have involved document gathering. None of Skyers' communications with family members or other investigation evidenced that Skyers had an understanding or appreciation of the need to gather documentation prior to tactically deciding on a theme of mitigation. (RT 3863 [Earley].) Family members were not asked to sign waiver forms or releases. Petitioner signed but one release for the "parole"

with no description of documents sought or evidence it was ever served. The original, however, remained in the file. (Vol. 82 of 135 at p. 420.)

Reasonably competent counsel at the time would understand that certain factors including divorce, lower socioeconomic status, low education, might result in family members being poor historians. None of Skyers' communications with family members or other investigation evidenced that Skyers had an understanding or appreciation of this fact. (RT 3863 [Earley].) Reasonably competent counsel at the time understood how to ask questions of family members and what to look for, and if they did not they would associate someone, such as an investigator who did. None of Skyers communications with family members or other actions or investigation evidenced that Skyers had an understanding or appreciation of this fact.

From the trial record, it appeared Skyers met with petitioner seldom. From his declarations and given the work that was done, Skyers' estimate of the number of meetings with petitioner and his family seemed to Earley to be an excessive estimate.

> "Skyers was deficient in not obtaining petitioner's school records or interviewing his teachers.... Skyers was deficient in not seeking to obtain family history documents, social security records, etc. (Report at 271.)
>
> a. Exception: There is no basis for the referee's finding that Skyers obtained a penalty phase evaluation from

Pollack.

The referee found:

> "The record is clear that Skyers did not specifically ask Dr. Pollack to conduct a social history evaluation of petitioner's life for the specific purpose of developing potential penalty phase evidence. Although petitioner's prior trial counsel, Homer Mason, had obtained a court order authorizing the use of a "Probation Consultant to assist counsel in gathering information relative to defendant's background in order to properly represent the defendant at trial and, should the defendant be convicted, at the penalty phase of the trial[,]]" an order authorizing up to $250 for such purpose (1 CT 4 227-228, 2 CT 382.), Skyers did not take advantage of that order. (RHT 803-805.)" (Report at pp. 45-46.)

Also,

> Skyers did not provide Drs. Pollack and Imperi with a copy of petitioner's school records, petitioner's CYA file, including the reports of Drs. Prentiss, Minton, Perrotti and Brown (Exhibits D, 1& J), the December 13,1978 Initial Home Investigation Report (Exhibit H), the Youth Training School reports (Exhibits G-13 and 23-A) or the November 8,1978 probation report (Exhibit 147). (Report at p. 72.)

Skyers' efforts to explore mental health issues was limited to looking at the report of the Pollack examination.

> "Skyers testified that he lacked any present recollection whether in fact he visited with Dr. Pollack at his office. (RHT 867-868.) However, after Skyers received Dr. Pollack's report, Skyers did not consult with Dr. Pollack or any other mental health expert. (RHT 1157.)"(Report at p. 45.)

According to petitioner's *Strickland* expert, the referral question to Pollack directed him toward "what would be a typical interview for the purposes of guilt phase mental defenses and insanity phase issues." There

was nothing in the correspondence with Dr. Pollack to indicate the case was a death penalty case. (RT 3793[Earley].) This opinion is supported by the fact that the records that accompanied the Pollack referral did not include the types of records you would forward with a request to evaluate for penalty phase purposes. (RT 3794 [Earley].) Skyers did not request or discuss with Dr. Pollack an evaluation of petitioner "as it pertained to matters that may not constitute a legal defense, but may pertain to sympathy or mercy or leniency." (RT 1405 [Skyers].) Skyers did not ask Pollack to focus on penalty phase situations, sympathy, or any of those factors. (RT 1405[Skyers]; Vol. 81 of 135 at pp. 102-104.)

In his motion to have Pollack retained to examine petitioner Mason informed the trial court that Pollack would be asked to: "examine [supplied] documentation such as photographs, police reports, files and other data pertaining to this case for the purpose of determining whether or not the defendant was mentally ill at the time this offense was committed; to determine whether or not the defendant falls within the purview of the Drew decision; to determine whether or not he was suffering from diminished capacity at the time the offense was committed; to determine whether or not he was unconscious at the time of the offense; to determine whether or not he was suffering from an irresistible impulse at the time of the offense."

(TCT 397-398.)

In his declaration attached to the motion, Mason declared "I have reviewed the preliminary hearing transcript, and I hereby request that the court-appointed psychiatrist to determine **if there are any psychiatric defenses in the case.**" (TRT 399.)

The resulting court's order to Dr. Pollack mirror the requests of the motion. (TCT 579-580.) Drs. Pollack and Imperi were provided only documentation which related to the guilt phase. Drs. Pollack and Imperi did not discuss petitioner's life history in any great detail. There is no indication that Skyers had information or was himself investigating petitioner's social history and therefore there is not substantial evidence upon which to base a finding of fact that Drs. Imperi and Pollack would have done so on their own. To do so would have been beyond the scope of the court order which concisely outlined the area of inquiry. (RT 1233-1236 [Skyers].)

As Earley explained, "There is a difference between asking for an expert at guilt phase and another at penalty phase. You can have one doctor do both, or you can use two doctors, because you may decide there are two different issues." (RT 3794-3795.) "There is nothing in here [Pollack documents] that addresses the issues that are asked for in a penalty phase,

which are mental health issues that mitigate the crime, but are less than a defense to the crime." (RT 3797[Earley].)

The referee's reliance upon the testimony of Dr. Faerstein as to how Dr. Pollack always behaved (Report at pp. 22, 46-50) -- even in the absence of the clues one might ordinarily expect from defense counsel in a capital case – reflects the referee's bias and habit of embracing speculation and argument of the deputy district attorney as a substitute for substantial evidence.

Any argument that Pollack's evaluation and report was sufficient for the purpose of developing themes in mitigation is belied by Pollock's own writings, which were entered into evidence at the reference hearing and verified by Faerstein as accurate and in accordance with Pollack's general practice. [1] Dr. Pollack died shortly after petitioner's evaluation. A 1968 article from "Psychiatric Consultation for the Court" which was represented by Dr. Faerstein to have been authored by Dr. Pollack. (RT 6788, 6456; Vol. 112 of 135 at pp. 4302-4321)

Dr. Pollack's article recognized the importance of collateral source material and specifically noted "there are also historical corroborative materials, such as school records, military records, psychiatric records, medical records, hospital records, all kinds of records that would provide an

accurate record of the history that you are obtaining. The psychiatrist consultant should review as much material as possible prior to interviewing the litigant in reporting to the court. Reports of attorneys, parole officers, probation agents and law enforcement agencies are frequently not provided unless the consultants insist upon seeing them. Many patients, particularly those involved in criminal cases, communicate more freely if they know their records have been seen. Interviews with relatives or other interested parties often reveal significant information quite different from that given by the patient or stated in legal reports. Unfortunately, most consultants rely on their impressions solely upon the clinical interview with the patient and the litigant's subjective verbalization. This may not only reduce the validity of the psychiatrist's conclusions, but sometimes may lead to erroneous conclusions." (Vol. 112 of 135 at pp. 4302-4321; RT 6470-6472 [Hinkin].)

Although Pollack's report was not sufficient for exploring themes in mitigation, it did contained red flags which would have caused reasonably competent counsel to do follow-up. There was indications that petitioner was not functioning at a "full level," that he was functioning below average, had minimal replies, was not very spontaneous, was using drugs on holidays which would indicate either his whole family was using or he was not spending holidays with his family, evidence of self medication evidence,

difficulties in school including suspensions and fighting, and some indication of gang association. (RT 3795, 4748, 4750-4752 [Earley].)[15][16]

Based on information in the "mental status examination" paragraph of Dr. Pollack's report and the summary of his opinion, reasonably competent counsel would have undertaken investigation of penalty phase issues. In other words, even though the referral was for guilt phase purposes, the result of that referral would have led reasonably competent counsel to undertake further penalty phase investigation. This would include notations regarding petitioner's poor fund of general information, difficulty with simple calculations, concreteness of thought and flat affect. (RT 3797 [Earley].) [17]

Even without the indications in Pollack's report, reasonably competent counsel would have undertaken an investigation to evaluate mental health issues so as to make an informed decision concerning what to present not just for the guilt phase, but also the penalty phase of the trial. (RT 3798 [Earley].) Case law at the time of petitioner's trial required appropriate

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[15] "[Reasonably competent counsel] would start looking at what was the reason for self-medicating, what were the reasons for the drug abuse, the drinking." (RT 3795.)

[16] "He talks about being in trouble in elementary and junior high school. This would be signs of acting out that could be mental health issues, family issues, abuse issues... those are things to look at." (RT 3795.)

[17] One mitigating factor is mental illness that does not amount to incompetence, insanity or diminished capacity. "Because if the jury finds any of those, then you don't get to a penalty phase, because you don't find first-degree [murder]. So the mental health issue at the penalty phase is less than those, it is not a defense to the case. It is not competence. It is not insanity. It is not diminished capacity or actuality, or as he had in here, irresistible impulse, because those would erase the crime itself." (RT 3797.)

experts be hired. (RT 4436-4439 [Earley].) [18]

Reasonably competent counsel would have developed petitioner's history and determined from that history what sorts of experts to consult. By 1982 attorneys used a team approach which would have included a psychologist and/or a psychiatrist evaluation for the penalty phase.19

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[18] "Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques - probation, parole, work furloughs, to name a few - and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence. There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586 [psychiatric and psychological reports ordered]; see too *Bell v. Ohio* (1978) 438 U.S. 637, [psychiatric report ordered]; *Eddings v. Oklahoma* (1982)455 U.S. 104 [sociologist specializing in juvenile behavior, psychologist, and psychiatrist gave mitigating evidence].)

19 Both the referee and respondent misconstrue the application of *Ake* to the instant case. (Report at p. 277-278, RPF 441.) *Ake* stands for the proposition that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Neurological testing being done by psychologists was fairly common in 1980-1982. (RT 4440, 4561, 4596.) [20]

b. Exception: Skyers did not review the CYA Mental Health Evaluations as Proposed by Respondent

The evidence at the hearing supports the referee's findings about the minimal investigation, except the unsupported finding that Skyers reviewed petitioner's CYA records.

Skyers did not testify that he had either the recollection of retrieving the documents after viewing them in court and copies of the documents were not in petitioner's trial file. There is no circumstantial evidence upon which one can make a finding based on substantial evidence that Skyers retrieved these documents. It was not Skyers' custom and habit to obtain such documents as he could only recall having gone to the Bullis office on two occasions even though large percentage of his caseload was juvenile cases.

There is no evidence that the CYA records would be at the Bullis office. Skyers testified only that he believed that that these "types" of records could be retrieved from that office but where was there evidence that petitioner's CYA records were in Sacramento. The original release is

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Neither *Ake* nor California case law nor codes limit a defendant to only one mental health expert, particularly for the purposes of presenting a case in mitigation.

[20] Exhibit 111 (Vols. 90-91 pp. 2996-3005) represents a number of cases in which neuropsychological testimony was given in capital cases during the time of petitioner's representation by Mr. Skyers. (RT 4587-4591.)

still in the file and it does not indicate what if any records were to be. There are no notes that he discussed the content of these records with anybody. Petitioner's parole officer Mr. Crawford did not bring a file to court when he testified. Crawford's testimony was no of the type that one could glean Skyers knowledge of the contents of petitioner's CYA records. Even after having been read the contents by respondents counsel there was no refreshed recollection or any testimony at these proceedings upon which this court might presume he had a prior familiarity with the contents.

Finally the overall tenor of Mr. Skyers' testimony was that he did not believed that having been sent to the California Youth Authority would in any way be helpful in a case in mitigation. From his declarations and testimony it is evident that Mr. Skyers believed that evidence of bad character, which included having been sent to CYA, could not be helpful in a case in mitigation. The focus of Skyers' penalty phase investigation, and I use the term " investigation" very loosely, centered on lingering doubt and demonstrating that petitioner could not have been the kind of person who would have killed Eric Hassan. (RT 1223 [Skyers.]

In spite of the fact that the referee sustained an objection for speculation as to whether or not Skyers visited the parole office, the referee agreed with respondent's position that although Skyers "was uncertain of

which of two cases he had gone [to the Bullis office] to look at the file, he then believed based on his juvenile court experience that [the CYA reports] would have been in the file, he believed he went to the office on petitioner's case." (RT 1281, 4795.) Moreover, even if Skyers had viewed and/or retrieved some documents from a local office he did not obtain the files from Sacramento or use information he had to investigate a case for penalty phase.

Although Skyers was aware through documentation provided by the prosecution that petitioner had been in custody from 9/27/78 to 10/23/80 (RT 1266), Skyers did not undertake any investigation into the reasons for or circumstances and conditions of petitioner's incarceration at Juvenile Hall or the California Youth Authority. Skyers did not speak to any of petitioner's counselors, teachers, attorneys or any other person associated with the fact that petitioner had been in custody in Los Angeles juvenile court custodial facilities or the California Youth Authority. Casting further doubt on whether or not he reviewed petitioner's CYA file at all, ***Skyers did not obtain the probation report which was prepared prior to petitioner's sentencing to CYA.*** (RT 3791, 3839, 3858 [Earley]; Vols. 95-96 pp. 1446-1511.) Although petitioner's juvenile records reflect that he was visited by a representative from the California Youth Authority while in custody

awaiting trial on the Hassan homicides, Skyers did not speak to any of these CYA officials. (RT 3220; Exhibit 147: Vols. 95-96 pp. 1446-1511.)

Although the referee (erroneously) found that Skyers reviewed the CYA reports, there was no finding that he obtained them, copied them, took notes about their contents or had their contents in mind for any purpose whatsoever or that the referee found that the reports were given to Pollack for his review.

Petitioner's mother and probation officer were the only witnesses presented in mitigation, and each testified very briefly. Thomas Crawford, identified to the jury by Skyers as petitioner's CYA parole agent, testified that petitioner was to sign up for a part-time job at Gompers High School. Petitioner was cooperative and maintained satisfactory performance on parole – at least until, as pointed on cross- examination – the Hassan murders. (TRT 3665-3675.)

Petitioner's mother testified petitioner had not yet registered for the high school job and that he had been visited by his parole officer at home. (TRT 3681-3682.) 21

According to Earley, reasonably competent counsel would not have

21 Petitioner's *Strickland* expert testified that if Skyers intended to present a case in mitigation based on good guy evidence, his efforts were completely ineffective: "[T]here was tons of [good guy] evidence," including petitioner's attempts to save his younger sisters from abuse. "He didn't even ask the mother [do you] loved [your] son? Do you want to be able to visit him?" (RT 3859-3860.)

looked at the evidence that was expected to come in at the guilt phase and opted to rely on "good guy" evidence as the only penalty phase theme.

> "In this case I don't think any competent lawyer would look and say... there are [four] homicides, a criminal street gang, pictures of people with guns, graffiti, someone who has been to California Youth Authority or at least has prior convictions and the jury was going to hear all this... in the guilt phase. Then in the penalty phase you have all the other evidence....No reasonably competent lawyer would look and say that this evidence would make a drop in the bucket alone in this case." (RT 3858.)

According to Earley, to the extent that Skyers relied on a theory of "good guy" evidence, his investigation, presentation, and argument of this theme fell below the standard of care of reasonably competent counsel at the time.

> "Institutional adjustment is good guy evidence.... if you're going to put on good guy evidence, you would want to talk to people in the neighborhood, other family members, anyone and put those people forth.... In this case not only did he not do the investigation that you would expect that someone is going to do, because usually good guy evidence is when someone has a long job history, when they save somebody's life, they save somebody in a traffic accident, that was what was believed to be good guy evidence. [Petitioner made an] effort...when there was abuse to try to save the younger sisters by the other brother from it. There was tons of evidence that was at least present here that if he did the investigation he would have it available.... He didn't even ask the mother do you love your son? Do you want to be able to visit him? Will it hurt you? Those are simple questions that you would expect a lawyer would do that in this case.... So he doesn't present [good guy evidence], he doesn't argue it, he didn't combat it at all." (RT 3859-3860.)

> "[Additionally] there was no argument in this case [Skyers told the jury that] good guy evidence is factor (k).... The jury was not

[instructed or told]. There was no argument that." (RT 3861.)

Reasonably competent counsel would have known that the parole officer's testimony would not be viewed as strong mitigation. This was so because petitioner had only seen the parole officer twice and he did not remember petitioner well. Moreover, the timing and circumstances of the crime rebutted testimony from the parole officer that petitioner had done well on parole.

> "A reasonably competent lawyer would have known that it's really not mitigation given that he only saw the parole officer twice, and knowing that he would be cross examined on being convicted of committing at least two murders, and potentially the jury believing that he committed three [sic] others. He put on that person to say that he had adjusted well on parole, which would fly in the face of the convictions that the jury had already had." (RT 3837.)

3. Petitioner's Social History, Development and Functioning: Evidence Presented at the Reference Hearing

At the reference hearing, petitioner presented considerable evidence which petitioner contends reasonably competent counsel could have discovered and presented in mitigation at petitioner's penalty phase. The referee agreed that much of this mitigating evidence could have been presented by reasonably competent counsel, but also erroneously concluded that some of it would not have been available because of the Champion family's secretiveness and unwillingness to disclose embarrassing family matters. (Report at pp. 76-159.)

a. Lewis II's Abuse of Petitioner's Mother

According to petitioner's mother (Azell Jackson), after Lewis III was born Lewis II, petitioner's biological father, did not want any more children. When she got pregnant again, Lewis II began physically abusing her. (RT 5387-5388.)[22] [23]

Petitioner's uncle, E.L. Gathright, petitioner's mother's brother, remembered Lewis II did not properly care for petitioner's mother or his older siblings. [24] Lewis II would work a little and then quit. Azell did day work. Lewis II beat Azell and called her a whore. Azell put up no resistance. She was very, very afraid of Lewis II. (RT 5118-5119, 5125 [E.L.]) On several occasions, E.L. had seen Azell with a black eye and bruises to her face. (RT 5125-5126)

Once, when Azell was pregnant with petitioner, E.L. saw Lewis II hit her. E.L. remembered that Lewis jumped on Azell. "He was whupping Azell." E.L. stepped in to stop the beating. (RT 5147-5148.) [25] When Azell

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[22] Azell and Lewis III's children together are born very close to each other – within 12 to 18 months. Lewis III would expect Azell to continue with sexual relations within five days of giving birth. (RT 5389 [E.L.].)

[23] The reference court did not permit any further questions to petitioner's mother regarding the abuse she suffered at the hands of petitioner's biological father before she was pregnant with petitioner. (RT 5390. [E.L.])

[24] "He was no man at all. He wouldn't feed his kids, and when he would – he will eat, and wouldn't let the kids eat – the kids eat. They will be crying sometimes for food, and he wouldn't let them. He would just eat it up himself." (RT 5118 E.L.])

[25] "He was striking Azell and she was hollering. He slapped her, he was

was pregnant with Linda, E.L. saw Lewis II beat her and attempted to choke her. (RT 5150-5151.)[26] E.L. also observed bruises, scratches, and whip marks on Reggie and Lewis III. (RT 5130.) E.L. described Lewis II as 5'10 weighing approximate 210 pounds and described Azell as "small." (RT 5124.) Azell suffered "bruised eyes" and "busted lips." (RT 5392.) On several occasions, E.L. had seen Azell with a black eye and bruises to her face. (RT 5125-5126)[27]

When pregnant with petitioner, Lewis II would beat, choke, and kick Azell complaining that he did not want to have any more children. Lewis II did not believe that any of the children other than Lewis III were his. (RT 5390-5391[E.L.]) Petitioner's mother's religion did not permit divorce. (RT 5393 [E.L.].) When asked about Lewis II's mental state, E.L. stated that he felt there was something wrong Lewis II but didn't know what it was. (RT 5131.) When Lewis II visited the family in later years, petitioner's mother was visibly affected. (RT 5219-5220 [Rita].)

b. Poverty, Absence of a Father Figure, and Mother's Inability to Provide Proper Care

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slapping. I saw with my own eyes." (RT 5149 [E.L.].)

[26] "He jumped on her. He choked her, picked her up, and that's when I said don't. I stepped in. I roughed him up pretty good. He wasn't no man. He just abused his wife." (RT 5119-5120 [E.L.].)

[27] According to EL, at one time Lewis received a small settlement after being hurt on the job. He put money down on a house but then made no further payments and the family was evicted. (RT 5132.)

Petitioner presented evidence at the reference hearing that at various times in his life, petitioner's family was impoverished and petitioner's mother was unable to provide proper nurturing, care, and supervision. (Report at pp. 142-147.)

Petitioner's mother's family consisted of nine boys and four girls. E.L. is five years older than Azell. They grew up on a farm in the state of Mississippi. At the time of his reference hearing testimony E. L. was 78 years old. (RT 5089-5092.) [28]

E.L. moved to Los Angeles in 1955. His brothers Czell and Jadell had earlier moved to this area of Los Angeles, which E.L. described as "South Central." (RT 5112-5113.)

In 1959, petitioner's mother, Azell, followed her brothers to Los Angeles. For a time she stayed with Czell. Azell was married to petitioner's biological father. Lewis III and Reggie had been born and Azell was pregnant with Linda. (RT 5115-5117.) E.L. recalled that once Linda was

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[28] The reference court did not permit petitioner to develop, through the testimony of E.L. Gathright or petitioner's mother, evidence of poverty, discrimination, and lack of opportunity for advancement experienced by Mr. Gathright and petitioner's mother prior to petitioner's birth which counsel argued could be linked directly to petitioner. That court also precluded **that testimony** which petitioner's counsel argued was foundational and corroborated petitioner's theme that he had intentions of bettering himself and furthering his education following release from the California Youth Authority. The reference court further precluded, through the testimony of E.L. Gathright and petitioner's mother, evidence of abuse by Lewis Champion II and the impact of the absence of a positive father figure on petitioner's mother and older siblings, which petitioner argued could be directly linked to his own social history. (RT 5099-5112.)

born, Lewis II and Azell moved into their own home on the East Side of Los Angeles. (RT 5127.)

For three or four years, perhaps once a month, E.L. and Czell brought food for Azell's family. Lewis II was still living with the family and he was employed from time to time. (RT 5120, 5128-5129, 5395-5396 [E.L., Azell]) [29] While pregnant with petitioner, Azell sought medical care at a clinic. She was told that she was very thin and she needed to eat more protein. She was given food vouchers. (RT 5397[E.L, Azell].)

Lewis II was a musician and did not hold down a steady job. Petitioner's mother depended on her brothers and sisters to provide food and clothing. Whatever money petitioner's biological father made was used on his own needs. (RT 5394 [Azell.) Petitioner's mother worked day jobs and tried to work between her pregnancies. Up to the time when she was pregnant with petitioner, petitioner's mother cleaned houses a couple of days a week because she couldn't work full time with the other children. (RT 5394-5395 [Azell].)

After Lewis II left, petitioner's family went on welfare. Azell moved

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[29] "I can't describe what kind of man he was. Just wouldn't work. And Czell and I, we bought food for them, a lot of food for them off and on. I'll go by, my wife and my sister, she older, they - they have stopped by in the afternoon before work, and the little girl Rita, my wife was telling me Rita was just crying and crying and ...she would go to the ice box, open ice box up, there wasn't nothing but a gallon of water." (RT 5120-5121[E.L.].)

in with her brother Jadell. Jadell had four children of his own, so for a while Azell moved in with her sister. After living with her sister, Azell – pregnant with petitioner-- Lewis III, Reggie, Linda, and Rita moved to a shelter. Once petitioner was born, Azell had five children to care for her on her own. She lived in a rented two-bedroom home . (RT 5398-5401[Azell].)[30]

E.L. described his family as a close one and one that was very worried about Azell whom he described as kind of "a sickly lady" who for a time of three to four weeks was confined to bed. (RT 5129-5130.) According to E.L., Azell was not very happy. She was sad and she was under pressure at all times, raising so many young children alone. (RT 5125.)

Lewis II left before petitioner was born. E.L. continued to visit the family, which now consisted of Lewis III, Reggie, Linda, Rita, and petitioner, once or twice a week. (RT 5133-5134 [E.L.].) After Lewis II left and before Azell was married to Gerald Trabue Sr., she still required the help of her family, who continued to buy groceries and clothing. (RT 5135.) Petitioner remembered going to the store at a very young age and his mother

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[30] Azell testified that the following information contained in an investigative report was correct: "I had an emotional breakdown during my pregnancy with Steve. I had been living near the intersection of 127th and Figueroa. The children and I stayed with Jadell, and then with Ceola, because I did not have enough money to pay rent anywhere. Had trouble eating and sleeping because I was so depressed." As Lewis II left when petitioner's mother was still pregnant, the portion of the investigative report stating that after she had Steve, Lewis II still expected her to have sex, was not correct. (RT 5501.)

buying puffed rice in order to sustain her children during rough times. (RT 7699 [Miora].)

The family had less financial hardship during the six years that Azell was involved with Gerald Trabue, Sr. After Gerald died, when petitioner was only six years old, the family was once again assisted by aunts and uncles. They provided clothing and food. Aunts and uncles took petitioner and his family food to eat, gave them money and took them shopping for clothes. (RT 5143, 5236 [E.L. Azell].) At various times petitioner's family received AFDC funding. (RT 7699 [Miora].)

Azell became involved with Gerald Trabue in 1962. Social Security records indicate Azell did not work between 1960 and 1966, and reported very little income before that. For three years the Champion children benefited from two incomes. However, there were two more children to feed and clothe, Gerald Jr., and Terri. Gerald died in June of 1968. Azell married Henry Robinson in October of 1969. He left the family in early 1970 when Azell was pregnant with petitioner's youngest sibling, Traci who was born in September 1970. Azell's highest earnings were reported during the period of 1973-1975. Other than a small amount reported for 1976, no income was reported beyond 1975 through petitioner's trial in 1982. (RT 5401, 5405-5413, 5430; Vol 95 of 135 pp. 4401-4405.)

After Gerald Trabue Sr., died, the family, which consisted of Azell and her seven children, moved to a two-bedroom home on the West Side of Los Angeles. The boys slept in a converted porch, the older girls shared a room and the younger girls (after Traci was born and Henry Robinson left) slept with Azell. (RT 5416-5417, 7826-7827 [Azell, Miora].)

While in elementary school, after Gerald's death, petitioner and his siblings wore shoes with holes in them and were teased by the other children. Petitioner was teased about his buck teeth and his clothing. (RT 5237-5238 [Rita].)

Petitioner's friend Gary Jones belonged to organized sports but petitioner did not. Petitioner was athletic. Petitioner's participation would end at the time that fees would need to be paid. (RT 5666-5668 [Jones].) [31]

During their childhoods, Azell sent Rita and petitioner to live with relatives. (RT 5238, 7700 [Rita, Miora].)[32] Between 1975 and 1980 there was some financial contribution to the family by petitioner's older sisters

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[31] Gary Jones was born on 3/5/63. At the time of his testimony, Mr. Jones was a youth counselor and an apartment manager working on his real estate license. Jones mentored youth so as to discourage them from using drugs. Jones had known petitioner since petitioner was five or six years old. Jones was one year younger than petitioner. He described their relationship as episodic, meaning they were friends when petitioner was out of custody but did not see each other when petitioner was incarcerated. Jones and petitioner both attended school at West Athens Elementary. During their elementary school years Jones described Steve as his best friend. They saw each other daily. At the time of petitioner's trial, Jones did not have a felony record. Jones was associated with the Raymond Avenue Crips until 10th grade. (RT 5659-5660, 5662.)

[32] Rita was sent away for almost a year when she was eight or nine years old. (RT 5239.)

Linda and Rita however, it was not until 1975 when Linda was 16 years old and 1977 when Rita was 16 years old. (RT 8020 [Miora].) [33] Linda would give some spending money to petitioner –perhaps $.75 to a dollar at the time. (RT 6838-6840 [Linda].)

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

In the mid 70's, Azell worked the assembly line at Xerox. In 1976, she went on disability and then when she retired received Social Security. (RT 5437; Vol. 95 of 135 pp. 4400-4405; Vol. 108 of 135 at pp. 3087-3089.)

The evidence is uncontroverted and the referee found that reasonably competent counsel could have presented evidence that for a time Azell lived with family members, in a shelter, received aid to families for approximately 7 years of petitioner's life, and that petitioner's mother was a single mother of eight children. Petitioner's mother was marginally employed at best and struggled to support the needs of her family. According to a 1978 Los Angeles County Probation report, the family's income was approximately $650 a month which came from government-subsidized aid to families and

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

workers compensation. Of that amount petitioner's mother was paying $243 per month towards the purchase of her home. (Report at pp. 144-147; Vols. 95-96 of 135 pp. 1446-1511.)

The referee found that petitioner had presented evidence on the inability of petitioner's mother -- because of a variety of factors such as depression, poverty, spousal death, and being overwhelmed by the demands of multiple children – to provide proper nurturing, care and supervision to petitioner. (Report at pp. 142-147.)

Also,

> "The referee finds that petitioner's mother faced a daily financial struggle to provide for and maintain a large family. In performing the duties of a single parent, seeking and obtaining employment, she was not present at home to attend to petitioner's care and supervision." (Report at p. 14.)

And,

> "[T]here was credible evidence of family financial hardship and deprivation. It was clear to Skyers that Mrs. Champion was a single parent struggling to support a large family with a limited income. It was also clear that Mrs. Champion, when employed, was not able to provide the necessary supervision and attention needed by her family." (Report at p. 229.)

Dr. Miora was of the opinion that during Azell's pregnancy with petitioner and during petitioner's infancy and early childhood, Azell was not emotionally stable. Her "attention was diverted from being able to attend to Mr. Steve Champion as a baby and a young child. And . . . she was

suffering from symptoms of anxiety and depression." (RT 7735 [Miora].)

> "In a state of anxiety, depression, or being overwhelmed by circumstances, that she would not have had an opportunity to work through, in other words, to put to rest, not simply the absence of Mr. Champion's father, but the psychological effects of what had transpired previously, it would be difficult for her to provide ongoing consistent attention required for an infant in his early months and years of life. To provide, as I was talking about yesterday, a sense of containment, a sense of continuity, a sense of consistency, and attachment that would permit the sense of security or what's sometimes referred to in the literature as a secure base from which the infant or young child, out of which he or she develops. Just the number of children at that point would have been challenging, never mind the circumstances we have been discussing that beset the family, the poverty, the lack of a father figure." (RT 7736 [Miora].)

c. Gerald Trabue Sr. and the Impact of His Death

Azell Jackson, petitioner's mother, had a six-year relationship with Gerald Trabue. Gerald Trabue died when petitioner was six years old. Petitioner and his siblings remember Gerald Trabue, and not Lewis Champion II as their "father." Gerald Trabue died on 6/28/68. 34 (RT , 5405-5413, 5430, 5220-5224 [Rita, Azell].)

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

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34 The referee found that Skyers pretrial investigation failed to disclose that petitioner had been in a car accident in which his stepfather was killed and/or that Gerald's death adversely affected petitioner's development and functioning and associated claims of lack of a strong father figure, the impact of divorce, parental death, and general family chaos. (Report at p. 243.)

and visiting relatives. Gerald Trabue was gainfully employed and contributed financially to the family. Petitioner's mother had two children, Gerald Jr., and Terri Lynn, with Gerald Trabue Sr. (RT 5221-5222 [Rita].)

Childhood memories during the time that Gerald Trabue was with the family were very positive. The family had a strong connection to extended family. (RT 5223 [Rita].) Extended family members also remembered Gerald kindly. [35]

In Dr. Miora's opinion, Gerald Trabue, Sr., played an important stabilizing role for the period of time that he was in the home of petitioner. The loss of Gerald Trabue had a very destabilizing effect on petitioner's development specifically because this was a person he thought of and called father. (RT 7746 [Miora].)

The referee found that reasonably competent counsel could have presented evidence that during this period of time when both petitioner's mother and Mr. Trabue were working (1966-1968: petitioner aged 4-6) the financial situation of the family had slightly improved but was still very difficult. Within a short time of Mr. Trabue's entry into the family two additional children were born. (8/5/63 DOB Gerald and 9/21/67 DOB

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[35] "Well, he would take the kids, and they would go riding, they would go to the park. And he survived [sic] [provided] them. He would [provide] for them very good, to the best of his knowledge." (RT 5141[E.L.].)

Terri.) It was Dr. Miora's understanding that Gerald worked three jobs to fill in the financial gaps of the family. There is evidence that the children wore old clothes which didn't fit properly or had holes in them. The family still resided on the more dangerous East Side of Los Angeles. (Report at p. 138; RT 7798-7799 [Miora].)

Gerald Trabue Sr. died from injuries received in a car accident in 1968. The family, consisting of Lewis III, Reggie, Linda, Steve, Gerald Jr., Terri, Gerald Sr., and Azell were in a station wagon looking for a new home when the accident occurred.[36] (RT 5224 [Rita].) [37] Many members of the family were injured in the accident. All went to the hospital. (RT 5226-5227, 5309, 5311 [Rita].) [38]

The referee found that petitioner presented evidence that the loss of Gerald Trabue Sr., had a devastating impact on petitioner's family.

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[36] "That particular day we were house hunting. We were riding around looking at homes and stuff. We were just riding along having a good time, talking and stuff like that. The next thing I knew, I seen a car coming at us broadside, hitting us, and I just remember the car tumbling over, rolling over, and I just remembered glass going everywhere, everybody screaming, yelling. I remember the police coming out, ambulance coming out, taking everybody to the hospital, and basically that's what happened that day." (RT 5225-5226 [Rita].)

[37] "We were out house shopping, and this kid ran the red light. He said he was late from going to work, and hit us. I was knocked out in the middle of the street. And he was slumbered over the car seat was a big gash cut his head.... and the other kids were all, you know, banged up, and they called the ambulance and rushed us to the hospital." (RT 5405-5406.)

[38] "I recall my father bleeding from the head. I recall my mother thrown out of the car. I recall the tire bouncing around in the car from the impact landing on Steve, because he was screaming that his shoulder was hurting.... I just recall Steve screaming about a shoulder." (RT 5226- 5227[Rita].)

Petitioner's mother became very depressed and the children were left without the stability and financial support from their father. Gerald Trabue Sr. was the only father figure petitioner ever had. (Report at pp. 136; RT 7753 [Miora].) [39]

Directly after Gerald's death, when petitioner would still been six years old, his mother was homebound, bedridden, and by 1969 no longer employed. Petitioner's mother relied on her siblings to bring over groceries. It is Dr. Miora's understanding that due to the fact they were not married, petitioner's mother did not receive the settlement from the wrongful death of Gerald in a car accident. (Vol.95 of 135 at pp. 4400-4405; RT 7799-7780 [Miora].)

Azell was very affected by Gerald's death. For a period of time she did not work, she did not drive, she was depressed and physically injured. (RT 5229-5231 [Rita].) [40] Petitioner's mother's depression was evidenced through crying, low energy and the fact that she stayed in bed a lot of the time. Petitioner's mother required the assistance of her siblings with her children and by all accounts was unable to function at the level she was

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[39] Petitioner's mother and Gerald Trabue were never legally married. (RT 5404 [Azell].)

[40] "Well, he died, and everything just fell apart. I just – I just lost it.... I just couldn't think straight. I just couldn't, I was just lost. And the kids, they miss him. The kids just loved him. They loved him. And he would take Lewis and Reggie would go to the store and clean up and he would give them allowance. [W]e was just lost without him. He was a great man." (RT 5412-5413 [Azell].)

functioning at prior to the injury and death of Gerald Trabue Sr. (RT 7758 [Miora].)

The referee found that reasonably competent counsel could have presented evidence that petitioner was injured in the car accident that killed his stepfather as petitioner required medical attention to his shoulder and hit his head. [41] [42] Petitioner complained about headaches for a couple of weeks. (Report at pp. 136-137; RT 5228, 5312, 5408, 5511, 5514 [Rita, Azell].)

Following the accident, petitioner's mother was very jumpy and nervous and unable to drive. She also suffered physical injuries. Although Linda was not of legal age to drive she would do so to pick up groceries and pay bills. (RT 5409, 7770 [Azell, Miora].)

Gerald was hospitalized for approximately 1 week. When Gerald returned from the hospital he was not the same. (RT 5228, 5411 [Rita, Azell].) [43] [44] Days later he returned to the hospital and he never came back.

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[41] Q: How did you know that Steve hurt his head?

A: Because he was crying, yes, and said his head and everything was hurt in the shoulder, and he went to the doctor and he did - he had a shoulder messed up. (RT 5408 [Azell].)

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

[43] "I noticed my father wasn't himself. He wasn't joking and playing with us. He was basically lying around the house on the floor or either on the couch. He wouldn't talk with us. He was very quiet." (RT 5228 [Rita].)

[44] "He didn't have much to say.... I said you need to go back to the doctor. You don't feel good, you know. So he didn't play with the kids and like he was, like they was used to and all that. I took him back to the hospital and they kept him.... he died in the

(RT 5229 [Rita].) According to Dr. Faerstein, Gerald Trabue's suffered severe injuries which resulted in his death. (RT 6714.)

After Gerald Trabue died, Azell and the children move to 1212 W. 126th St. This home, which was petitioner's home until he was arrested, consisted of two bedrooms, a den, a patio that Azell converted into a room, a kitchen, a living room and 1 ½ baths. It measured approximately 1400 sq. ft. (RT 5233 [Rita].)

After Gerald died, there was a delegation of responsibility household and child-rearing to the older girls and the family. Linda and Rita took responsibility for cooking, cleaning, daily maintenance of the home, and caring for the two youngest girls. (RT 7758-7759 [Miora].)

Gerald Jr. and Terri received money in a settlement after their biological father's death, which was apparently held in trust for them. Azell hired a lawyer and understood that Gerald was to have had surgery because he had a blood clot in his brain. It was from the settlement money that Azell hired Skyers. (RT 5414-5415 [Azell].) Azell got money from an insurance policy on Gerald's life with which she made a down payment on the family home at 1212 W. 126th St. (RT 5415 [Azell].)

Within a year of Gerald's death, petitioner's mother married Henry

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hospital." (RT 5412. [Azell])

Robinson. Together they had another child, Traci. Henry Robinson had a large family with 10 children of his own and was not involved in the care of petitioner and his siblings. Mr. Robinson was only in the family for approximately one year and left when petitioner's mother was pregnant with Traci. Mr. Robinson focused his attention on his own children. His addition to the family was disruptive. (RT 7828-7831 [Miora].) [45]

Reasonably competent counsel could have presented evidence that after Henry Robinson left (when petitioner was 7 years old) there was no adult father figure in petitioner's home. (RT 5565 [Traci].) [46]

d. The Destructive Influence of Petitioner's Brother, Lewis III

After Gerald Trabue's death (6/28/68) and the family's move to 126th Street, except for that short period of time during Henry Robinson's entry into the family, Lewis Champion III took on the role of father figure. Lewis III was six years older than petitioner. (RT 5143, 5156, 5577, 5517 [Azell, E.L.].)

According to the referee petitioner's brother "Lewis Champion III

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[45] "The presence of yet another man who did not demonstrate an interest in Mr. Steve Champion, compounded by the influx of a number of other children who did not have a relationship to Mr. Steve Champion, was disruptive and led to, in my opinion, greater absence of his mother's attention and focus." (RT 7831 [Miora].)

[46] Azell did not remarry again until she married William Jackson in 1985 or 1986. (RT 5240-5241 [Azell].)

was a chronic disruptive factor in petitioner's family" (Report at p. 13) and "the source of family disruption and inappropriate discipline." (Report at p. 231.)

Lewis Champion III's moods and behaviors were uncertain and unpredictable. (RT 7768 [Miora] .) Petitioner's mother observed whip marks and bruises on her children. (RT 5422 [Azell].) Petitioner's mother observed Lewis III hit the children with belts and an extension cord. (RT 5424.) The police, but not social services were called. (RT 5429 [Azell].)

Lewis III was away from the home at Job Corps for approximately 4 to 7 months from 1972 into 1973. (RT 5427-5428 [Azell].) When Lewis III was at the Job Corps everything was better in the family. After Lewis III returned from the Job Corps he began using PCP. The frequency and severity of abuse accelerated. (RT 5250-5251, 5425-5426, 5441 [Azell, Rita].) Lewis III was abusive before using PCP but the abuse was worse afterwards. (Report at p. 139; RT 5516-5517 [Azell].)

Petitioner's mother described one incident when petitioner was 11 or 12 years old and she was working at Xerox. Petitioner had walked from his home to where his mother worked. He told someone at Xerox that he had been beat up. Azell went out and saw that petitioner had suffered injuries due to the beating, reportedly at the hands of his older brother, Lewis III.

Petitioner was crying. His nose was bleeding. Azell had gotten to work by riding with a girl friend that let petitioner sleep in the car until they were done for the night. (Report at p. 139; RT 5443-5444.)

When using PCP, Lewis III would become paranoid and destructive. Lewis III destroyed family pictures, clothing, dishes, furniture, he put holes in walls, and he dug up the front lawn. He knocked out windows and caved in the back door. (Report at p. 140-141; RT 5253-5254, 5563, 5564-5565, 7843 [Rita, Azell, Miora]). The police were called on more than one occasion. [47] (Report at p. 141.) Sometimes the police would take Lewis III away and drop him off far from home. On more than one occasion Lewis III was taken to the state hospital in Lynwood where he was held on a three-day hold. Family members sponsored trips to get him out of the house and sent him to Illinois, Louisiana and Oregon. (Report at p. 141; RT 5254-5255, 5426-5427 [Azell, Rita]; CT Exh. 42C 1984-1986.) [48]

In order to escape, the siblings would try to band together. Sometimes

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[47] "He knocked holes in the wall, tear the doors down.... break up pictures. And in my bedroom, I heard this bang on the phone, he knocked a hole all the way through the wall. Vacuum cleaner, sell my vacuum cleaner. Anything he would get hold of, and I had pictures, pictures, tore them all up, picture books. Oh yeah. He destroyed my house." (RT 5454 [Azell].)

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

a sibling would provide distraction so the others could hide or escape. Extended family members also interceded. (RT 5248, 5251, 7854 [Rita, Miora].) Terri and Traci were hidden in the cabinets and the closets. The siblings ran to neighbors' houses. (RT 5563, 5605[Traci].)

Petitioner suffered injuries at the hands of Lewis. (RT 5299 [Rita].) E.L. saw Lewis III "slap Steve down." He also saw Lewis III hit Rita and the other children. (RT 5137-5138, 5155.) Steve would cry because he was afraid of Lewis III. (RT 5138 [E.L].) The beatings eventually stopped when the children got older. (Report at p. 141 [E.L.].)

Property destruction and physical abuse by Lewis III on his younger siblings adversely affected petitioner's development and functioning.[49] Petitioner sometimes took Lewis III's abuse to protect his younger siblings. (RT 7843 [Miora].) [50] (Report at p. 141.)

The referee found that the family members exaggerated the tales of Lewis III abuse, however, the abuse was confirmed by petitioner's friend

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

[50] "He knocked holes in the wall, tear the doors down.... break up pictures. And in my bedroom, I heard this bang on the phone, he knocked a hole all the way through the wall. Vacuum cleaner, sell my vacuum cleaner. Anything he would get hold of, and I had pictures, pictures, tore them all up, picture books. Oh yeah. He destroyed my house." (RT 5454 [Azell].)

Gary Jones who the referee fully credited. (Report at p. 211, 213, 229, 230, 5669-5670 [Jones].)

e. Petitioner's Brother Reggie's Impact on Petitioner

Reggie Champion was born on March 31, 1958. He is 4 ½ years older than petitioner. During his teenage years, Reggie became distant and quiet. He showed signs of depression and slept a lot. This behavior was unusual. (Report at p. 142; RT 5260-5261 [Rita].) When petitioner was eight, nine, or 10 years old, Reggie hit and punched him, but he was not as bad as Lewis III who would whip them with an extension cord and belt. (Report at p. 142; RT 5444-5446 [Azell].) The referee denied petitioner's attempts to introduce medical records of Reggie which, although postdating trial, were relevant to Dr, Miora's opinion that Reggie exhibited signs of mental illness.

f. Petitioner's Poor Academic Functioning

Petitioner's school records "indicate poor performance, a low IQ and reading difficulties." (Report at p. 14.)

The referee acknowledged evidence could have been presented to petitioner's penalty phase jury that petitioner experienced difficulties in school which may have been attributable to his below average IQ, dyslexia, trouble with reading, and attention deficit hyperactivity disorder, (Report at

pp.127, 128, 130-133.) The referee noted school records reflected that when petitioner was tested at six years old and in the first grade he had an IQ of 88. When tested in fourth grade, he had an IQ of 75. (Report at pp. 129-130.)

The referee noted that petitioner's trial counsel did not obtain petitioner's school records which reflected petitioner's poor academic functioning, that he was easily distracted with home problems, had a learning disability, read slowly and had a below average IQ. (Report at p. 130.)

School records also indicate that in kindergarten and first grade petitioner had difficulty following directions, he was working below grade level, needed help in learning to listen, needed direction and was easily distracted. (Vol. 111 of 135 at pp. 3917-3940; RT 7679 [Miora].)

In second grade, it was noted that petitioner had many absences, there was "much fighting," "learning difficulties," "difficulties in family life," and petitioner was described as being "easily distracted but can do good work when in the proper mood." (Vol. 111 of 135 at pp. 3917-3940; RT 7645, 7683 [Miora].)

In third grade, school records indicate petitioner was performing "below grade level and all academic subjects. Quick-tempered. Much

fighting. Easily distracted. Home problems disturb child." (RT 6745-6746, 7686 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

There is no indication of intervention or referral for evaluation of petitioner for any of the problems noted by teachers in petitioner's first three years of elementary school. (RT 7686 [Miora].) There is no evidence that petitioner received special education or special help at school. (RT 7775-7776 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

In fourth grade, petitioner exhibited "growth in all academic areas." He was described as "enthusiastic" and "well-liked by his peers," "easily distracted," and "needs to feel that he can succeed." (RT 6746-6747 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

In fourth grade petitioner's IQ was measured at 75 and in all areas as evidenced by other test scores, petitioner functioned below average. (RT 7775 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

In fifth grade, petitioner was working below grade level. (RT 6747, 7781 [Miora]; Vol. 111 of 135 at pp. 3917-3940) In sixth grade petitioner was described as liking "to be a leader of his peers." (RT 6747, 7778-7779, 7783 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

In seventh grade, petitioner's reading comprehension level was at 2.3 grade placement. (Vol. 111 of 135 at pp. 3917-3940, RT 3422-3433 [Riley].)

In eighth grade, petitioner's reading comprehension level was at 4.4 grade placement. (Vol. 111 of 135 at pp. 3917-3940, RT 3434 [Riley].) Petitioner's work habits and cooperation for eighth and ninth grade were described as unsatisfactory. (RT 6758-6759 [Miora]; Vol. 111 of 135 at pp. 3917-3940)

Records indicate petitioner was withdrawn from high school by October 23, 1980. This was the date of his release from CYA. (Vols. 95-96 pp. 1446-1511; RT 8137 [Miora].) While at the California Youth Authority, petitioner took primarily remedial classes. Petitioner took remedial classes in English, world history, mathematics, and general science. The only two classes which were not designated remedial classes were physical education and woodshop. (Report at pp. 131-133.; Vol. 95 of 135 at p. 4480.)

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

Petitioner never graduated from high school. (Vol. 111 of 135 3917-3940; RT 8028 [Miora].)

g. Amenability to Treatment at CYA/Institutional Adjustment

Petitioner was sent to CYA in 1978. The referee recognized that petitioner produced evidence at the reference hearing and that reasonably competent counsel could have presented evidence of petitioner's amenability to treatment as evidenced by his CYA records. (Report at pp. 147-156; Vol. 95-96 of 135 pp. 1446-1511.) [51] 52

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[51] In reverse chronological order by Exhibit 147 [petitioner's CYA file Vol. 95-96 of 135 pp. 1446-1511.] contains:

000043 Parole Report	10/22/82
44 Ann. GC Review	10/19/81
45 Case Review summary	{?}
46 Case Review Summary	5/29/81
47-48 Case Review Summary	2/5/81
49-50 Violation Report	1/21/81
51 Detention Report	1/21/81
52-61Police Report	
62 First Contact Report-Parole	10/23/80
63 Letter to SAC	8/20/82
64 Conditions of Parole	10/23/80
65 Case Report	10/15/80
66-67 Case Report	7/11/80
68-69 Re Entry Report	8/22/80
70 Case Report	10/2/80
71 YTS Psych Eval (Brown)	7/29/80
72 Re entry Report	4/24/80
75-76 Case Report YTS	3/25/80
77-78 Case Report YTS	12/12/79
79-81Psych report (Perotti)	12/5/79
82 Case Report YTS	10/10/79
84 letter to SAC	3/20/79
85 letter to juvi commissioner LA	2/23/79
86 Transcript	

Working forward from petitioner's juvenile records (Vol. 95-96 of 135 pp. 1446-1511), competent counsel could have made a case for positive institutional adjustment based on credible evidence.[53] Accompanied by the discussion of a psychologist, such as reference hearing psychologist Dr. Miora, this evidence could humanize petitioner and explain or mitigate much of the negative evidence presented at the guilt and penalty phases. Reasonably competent counsel could have made the presentation below – which is supported entirely by CYA records.

When he entered CYA at the age of 16, following an assault with a deadly weapon charge, petitioner's criminal conduct had been escalating for a couple of years. Petitioner had been associating with older members of a street gang, the Raymond Avenue Crips. In the context of gang association petitioner found acceptance, structure, love, and brotherhood. He also found a way to make fast money and was involved in crimes which were certainly hurtful to others. (Vol. 95-96 of 135 at pp. 1446-1511; RT 8060-

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87 Referral Doc	11/17/78
94 Eval for Referral for program Prentiss	12/13/78
96 Eval for Referral for program Minton	12/14/78
101 Initial Home Investigation Report	12/13/78
105 LA probation report	11/1/78

52 Petitioner will later discuss any concerns expressed by the referee that such presentation would have resulted in rebuttal evidence.

[53] Exhibit 147 was retrieved from petitioner's California Department of Corrections files. The documents WERE NOT found in trial counsel's files.

8068 [Miora].)

Petitioner, now fatherless for approximately 10 years, was cared for primarily by an absentee mother. Not absent because she was not physically available -- although for many of petitioner's preteen years his mother was out of the home working at night -- but because she was emotionally unavailable. Prior contacts with the juvenile justice system led one evaluator, after leaving messages which went unanswered, to conclude petitioner's mother was not really involved in petitioner's life. It was also noted that petitioner's mother didn't know who petitioner's friends were. Later on it was determined that petitioner's mother had been giving him mixed messages that were detrimental to the stability a young man needs from his parent.[54] (Vol. 95-96 of 135 pp. 1446-1511; RT 8060-8068 [Miora].)

By the time petitioner was sentenced to CYA, petitioner's mother had been raising eight children all on her own for 10 years. The family's financial resources were severely limited. The probation report generated from the assault with a deadly weapon charge indicated that petitioner's

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[54] "I don't have any reason to doubt that she cared about her children. Her availability emotionally as described in the various documents that have been made available to me, the interviews with Mr. Champion, are to the contrary. They are suggestive of a – and it's my understanding she couldn't possibly be available in the ways that she might have wished to be available. But it's possible to care without being able to be present emotionally, physically, and otherwise." (RT 8068 [Miora].)

family's income was approximately $650 a month which came from government-subsidized aid to families and workers compensation. Of that amount petitioner's mother was paying $243 per month towards the purchase of her home. (RT 8061-8063 [Miora]; Vol. 95-96 of 135 pp. 1446-1511.)

When he entered the Youth Authority petitioner had been expelled from high school. He had received mostly unsatisfactories when he did attend. Never in his formal public education was there intervention by way of meetings with the family or specialized educational programs or counseling. It was recognized almost immediately that petitioner would benefit from a structured program and on that basis petitioner was committed to CYA. (RT 8063, 8075-8076 [Miora]; Exh. 147: Vol. 95-96 of 135 pp. 1446-1511.)

Once at the Youth Authority it was confirmed that petitioner's biological father had left the family and that since then, petitioner's mother had been married and widowed twice. It was noted that petitioner's mother supported herself, Rita and Linda, Gerald and Steve, and Traci and Terri on disability and government aid to families. Rita and Linda, having participated in the government training CETA program were now employed and also contributed financially to the support of the family. Petitioner's mother suffered from diabetes. Nevertheless, petitioner's family fully

intended to visit him at CYA and encourage him to do well in the program. Every indication is that the family did in fact visit Steve regularly. (RT 8064-8067 [Miora]; Vol. 95-96 pp. 1446-1511, Vol 108 of 135 at pp. 3087-3089.)

According to this first CYA report, petitioner's mother described the family as being normal in all aspects. After being at the Youth Authority for approximately two years, petitioner gave a description of his family as being "regular." Given the fact that petitioner had been involved in the juvenile justice system for more than two years, his brother Gerald had been sentenced at CYA, none of the children had graduated from high school, at the age of 16 petitioner was performing between the third and sixth grade levels, the family received government aid for financial support, petitioner's mother suffered from a serious disease, petitioner smoked marijuana, drank beer and associated with members of the criminal street gang, petitioner's biological father had left the family and petitioner's mother had married two other individuals both of whom have died – facts which were verifiable in readily available documentation which existed at the time of petitioner's trial – one might wonder what normal or regular was for the Champion family. (Vol. 95-96 pp. 1446-1511; Vol. 108 of 135 at pp.3087-3089, RT 5497, 8068-8070 [Azell, Miora].)

Early in the CYA evaluation process evidence of learning disabilities or just not functioning mentally at an optimal level were noted. Although there were conflicting indications at this early stage as to whether petitioner was depressed and petitioner did not have any psychotic episodes indicated by hallucinations or delusions, Dr. Minton noted petitioner's impaired impulse control and impaired judgment as well as the fact that petitioner conceptualized in a concrete manner. (Vol. 95-96 of 135 pp. 1446-1511, RT 8077-8085, 8090[Miora].) [55]

As to petitioner's behavioral issues, at this very early stage it was also noted that if provided a structured setting petitioner had very little potential for violence. [56] Petitioner's aggression was noted to be a response to some provocation rather than gratuitous. It was noted that petitioner had poor self-esteem, had the need to be accepted, and was attracted to antisocial behavior because of the acceptance it provided. Petitioner was impulsive and easily influenced by others. It was also noted that petitioner felt remorse.

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[55] "It [impaired impulse control and impaired judgment] implies dysregulation, problems with being able to control himself, problems, while I can't go any further, the problems and judgment are an area as well as the impulse control but I would, as in my training experience, want to see further explored." (RT 8091 [Miora].)

[56] "It is suggesting that structure and that type of environment will be beneficial to him and provide him with an opportunity for growth and development that had not been at his disposal. That's very meaningful. His recommendations that Mr. Champion be provided an opportunity for what he calls 'reality therapy' is meaningful as well, as it is suggestive of a recognition that this is an adolescent who is in need of or could possibly benefit from a counseling or therapeutic experience." (RT 8093 [Miora].)

Petitioner felt guilty for how he had disappointed his family. (RT 8092-8094, 8103 [Miora]; Vol. 95-96 of 135 pp. 1446-1511; Vol. 108 of 135 pp. 3093-3101.)57

Overall the CYA records note that petitioner had made a fairly good adjustment, was not a disciplinary problem, and required only minimal supervision. Petitioner was described as cooperative, respectful, and it was noted that he participated in activities. Petitioner received regular visits from his mother and interacted well with staff and other individuals he encountered at CYA. (Vol. 95-96 of 135 pp. 1446-1511, RT 8135-8136 [Miora].)58

Petitioner's next evaluation occurred approximately a year after his entry at CYA. Dr. Perotti's referral question was to assess petitioner's potential for violence and determine an appropriate program for him. Perotti noted petitioner had been involved in behaviors for which he was disciplined and transferred to another unit. Once transferred, his behavior

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57 "There is another point of significance, it runs through a variety of the reports, having to do with a, and it's here as well, having to do with Mr. Steve Champion appearing to perform better, to adjust better, when placed in structured environment. Providing the kind of containment and direction that I have developed and am of the opinion was not available in his home throughout his upbringing." (RT 8122 [Miora].)

58 Dr. Prentiss noted in her report that petitioner had feelings of remorse for his past behavior. To her this was a good prognostic sign. It would suggest some ability to reflect on his behavior and was significant in suggesting that perhaps petitioner would be amenable to some formal intervention were made available to him. (RT 8110 [Miora].)

was what was expected of him. It was noted that petitioner still had anger issues and yelled when things were not going his way. However, it was equally noted that petitioner was gaining some impulse control and learning how to deal with his anger in more appropriate ways. Petitioner told Perotti that he had severed his ties with gang members. Petitioner was 17 years old. (Vol. 95-96 of 135 pp. 1446-1511; RT 8143-8152 [Miora].) 59

The referee found that petitioner continued his association with members of Raymond Avenue Crips while at the Youth Authority and upon his release. That may have been the case as these individuals were neighborhood and lifelong friends of petitioner and his family and petitioner's community offered little support for finding alternative cliques. Even if it could be shown petitioner continued to associate with old friends, reasonably competent counsel would have explained the pull of gang association, particularly what it meant to petitioner in terms of love and protection. Continued association only demonstrated that given the best of petitioner's intentions, leaving it behind was extremely difficult particularly

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59 According to Dr. Miora, these notations indicate that petitioner had learned some tools for controlling his anger and modulating his behavior, had matured, and had demonstrated growth, and suggested he was making an effort to have some introspection or reflection about himself and what was positive and what was negative, which included realizing his temper was negative and not having applied himself academically also negative and that he had been making an effort to appreciate the experiences of others. (Exh. 147: Vol. 95-96 pp. 1446-1511; RT 8156, 8160-8161.)

in light of petitioner's age, the lack of services available to petitioner upon his release from CYA, and his position as a follower – a theme that could have been argued given co-defendant Ross' age and more serious criminal record. Moreover, throughout the remainder of petitioner's stay, his CYA records do not indicate that he was continuing to associate with Raymond Avenue Crips – something one might expect CYA staff to be on alert for. In fact, eight months later, in Brown's evaluation it is noted that petitioner had severed his ties from Raymond Avenue Crips (Vol. 95-96 of 135 pp. 1446-1511), so, at least while at CYA, petitioner had made an effort.

When petitioner was half way through the program, Dr. Perotti noted it was important for him to achieve long term goals, better his education and obtain some job skills for use on his eventual release. For the first time there was a recommendation that petitioner receive psychological counseling through an established program, although it does not appear from the any records retrieved that this actually occurred. (Vol. 95-96 pp. 1446-1511; RT 8173-8174 [Miora]

Six months later, having been at the youth authority for a year and a half, petitioner suffered only minor infractions for yelling or wearing the wrong clothing, and one instance of participating in a racially motivated fight, for which petitioner was punished by being transferred to a different

unit. It was noted CYA staff that petitioner's social attitude and behavior were considered to have been above average and there had been progress or fulfillment of the stated objectives contained in Dr. Perotti's report. (Vol. 95-96 pp. 1446-1511; RT 8177-8179, 8185.)60

Petitioner fulfilled the objective of being able to interact with authority figures in a respectful and adult manner. Petitioner fulfilled the objective of participating in a group and being responsible for his own actions. No behavioral reports were noted. "There were no acts of a negative nature, either on his own, or within a group context." The author was of the opinion that petitioner had remorse for the incident which sent him to CYA. Petitioner had accepted responsibility and had an understanding of how wrong it was to use a weapon as a means to enforce his will on others. Petitioner understood bad behavior had consequences. The author was of the

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60 "These kinds of comments by Dr. Perotti suggest amenability and perhaps some progress from a time where his behavior was impulse driven and there did not appear to be consideration or forethought. The assessment is Dr. Perotti's appraisal of the material he had gathered through interviews, through his assessment tools, for testing instruments he employed. He noted that Mr. Champion, along the lines of increased maturity, seemed to be accepting responsibility for his getting into trouble. And Mr. Champion, according to Dr. Perotti, was aware of needing to deliberate and think about the consequences of his actions before simply behaving. It's interesting that Mr. Champion at this point communicates to Dr. Perotti... that an area of difficulty for him was receiving positive critical feedback from others about his behavior. This is interesting to me given that in his home there was not a positive father figure for a number of important formative years, and the installation of Lewis did not provide an opportunity to receive any critical feedback about his behavior. Children need reinforcement, positive and negative...." (RT 8162 [Miora].)

opinion that petitioner was in need of reinforcement of the progress he had made, both from his family and parole agent, to mitigate against his getting involved in negative criminal activity again. Petitioner was commended for what he had accomplished. Given petitioner's openness to criticism and eagerness to improve himself and learn from his mistakes, it was suggested it would be helpful for petitioner to have that kind of reinforcement at his disposal. (Vol. 95-96 pp. 1446-1511; RT 8177-8179, 8185.)61

The subsequent CYA evaluations which preceded petitioner's release from CYA indicated petitioner's continued amenability to treatment and improvement in the program. Petitioner showed growth and development and maturity. Petitioner never refused a work assignment. Given petitioner's success in learning a trade and improvement in other areas of education, more specific consideration was given to petitioner's future job and education goals. (RT 8207-8214.)

Upon his release into the community petitioner continued to do what was expected of him. He enrolled in school, visited with his parole officer and was involved in no negative community incidents or drug related

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61 The author recommended that petitioner be introduced to available community resources. However, no resources were identified. Petitioner's records do not indicate that petitioner's family was provided with any form of assistance, whether it was written materials or training or counseling so that they might better reinforce this structure which had positively impacted petitioner.

behaviors. (Vol. 95-96 pp. 1446-1511; RT 8217-8219 [Miora].)62

Petitioner's evidence that he responded to treatment at the California Youth Authority is powerful mitigation. Not only does it demonstrate that petitioner would not be a future danger if sentenced to life in prison rather than death, it demonstrates through what most jurors would consider to be fairly unimpeachable witnesses that petitioner matured and grew; that he recognized his actions were harmful to others; that he reflected on his own issues of anger and his need to disassociate from negative influences and better himself through work and education. The records and likely testimony would have indicated to a penalty phase jury that petitioner faced some fairly substantial barriers to normal growth and development such as his lack of a father figure, low economic status in the family and low intellectual functioning, but that he had the support of a loving and well-meaning – if not altogether perfect – family.

h. IQ/Neurological Impairment

In 1997, petitioner was evaluated by Dr. Nell Riley. Dr. Riley is a

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62 Dr. Miora found it significant that there was a notation in these documents to the effect that petitioner hadn't "displayed a need for any special counseling." "Given the reports while he was in the youth authority system on the instant offense, there were numerous references to his need for support and continued encouragement in the direction of developing self-control, making any adjustments, progressing with his insights and efforts to establish a lifestyle outside of one involving gang affiliation, drugs and violence." (RT 8219 [Miora].)

clinical neuropsychologist. She tested petitioner at San Quentin State prison on February 12, and February 25, 1997, for a total time period of between eight and 10 hours. The purpose of Dr. Riley's testing was to determine the existence, severity and effect of any neuropsychological impairment and to analyze petitioner's performance in light of inherited physical or psychiatric dysfunction, substance use or abuse, pre or perinatal trauma, acquired brain damage or psychiatric disorder. (RT 3156, 3174-3177.) The purpose of her evaluation was to identify dysfunction if it existed. More specifically: "to determine if there was any neuropsychological impairment that might have been offered in mitigation against the death penalty." (RT 3230-3231.) 63

Dr. Riley reviewed a number of documents prior to testing and before testifying, reviewed mental health evaluations which predated her testing, including four reports prepared while petitioner was at CYA (a psychological report by Audrey Prentiss, Ph.D., a psychiatric report by D.A. Minton, M.D., a psychological evaluation by Michael Perrotti, Ph.D. , and a psychiatric evaluation by R. C. Brown, M.D.), a pretrial letter addressed to trial counsel by Seymour Pollack, M.D., and two post-judgment evaluations by San Quentin staff (a psychiatric evaluation by Dr. Geiger at San Quentin,

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63 The referee's description of evidence adduced at the reference hearing through the testimony of Dr. Riley is significantly less than what was produced during her 2 1/2 days of testimony. (Report attachment 2; Report at pp. 118-124.)

and a psychological evaluation by Charles Steinke Ph.D. at San Quentin). (RT 3285-3288 [Riley].)

Through personal observation and results of tests developed to pick up malingering, Dr. Riley concluded petitioner was "very intent on doing well." Neither Dr. Riley nor any mental health professional who ever evaluated petitioner or who reviewed Dr. Riley's raw data or conclusions found evidence to suggest that petitioner was malingering. (RT 3197, 3203-3204, 3207, 6314-6315 [Riley, Hinkin].)

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

Dr. Riley noted petitioner's strengths confirmed the higher verbal IQ test, including his vocabulary skills and the fact that he was articulate, well read, and interested in sophisticated reading materials. (RT 3212.)

Using IQ scoring available in 1980, petitioner's verbal score of 92 would have placed him in the 30th percentile. Petitioner's performance IQ of 74 would have placed him in the fourth percentile. Petitioner's full scale

score of 83 would have placed him in the 13th percentile. (RT 3246.) This is considered the low average range of intelligence. (RT 3300 [Riley].) 64

Supportive also of petitioner's low IQ were public school and CYA records which indicated at one point he was given an IQ test score of 75, that he did not complete high school and took remedial classes as well as vocational courses. (RT 3214, 3216 [Riley].)

Use of the discrepancy between verbal and performance IQ as a marker of brain dysfunction has been accepted practice since the 1960's. (RT 3210-3211 [Riley].) Trial counsel could have had available to him an IQ test in school records, had he collected those records, which revealed a below average IQ. Therefore, even if reasonably competent counsel would not initially have had petitioner evaluated through a neuropsychological battery, reasonably competent counsel would have had petitioner's IQ retested, and if in 1980 the discrepancy between verbal and performance was revealed, reasonably competent counsel would have had evidence to suggest further testing was required.

The referee agreed that as a discipline, neuropsychology existed in 1982 (RT 3207.) He permitted Dr. Riley to testify only as to those tests

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64 Petitioner was strongest on measures of verbal comprehension. He fell into the 39th percentile, which is in the average range on those kinds of tests. Petitioner fell into the 10th percentile for measures involving numbers and his attention and concentration process. Petitioner fell into the 3rd percentile on measures involving spatial processing. (RT 3243 [Riley].)

which were available at the time of petitioner's trial and for which the 1980 "version" was given petitioner. Even limited to those tests which were available in 1980 and scored with 1980 data, the results demonstrated significant neuropsychological deficits. (RT 3218-3225, 3247-3253.)

The tests which made up the (available in 1982) Halstead Reitan Battery, and particularly those seven components which are deemed to be most predictive of brain dysfunction – making up what is called the Halstead Impairment Index -- were used to assess petitioner. Petitioner scored in the impaired range on all seven components. (RT 3247-3253.)

> "If I go through all of the seven components that make up that index, Mr. Champion's score was in the impaired range on all seven. Sometimes it was clearly in the impaired range, there were a couple of incidents in which he was right on the edge of impairment, still falling on the impaired side of that....And that means he had seven impaired scores out of seven possibilities, which gives him an impairment index of 1.0, seven divided by seven. That is a rare score. It is very unusual for somebody to actually fall in the impaired range on seven out of seven. And when I calculated that using the Heaton norms, it came out to be very, very rare, which is mentioned in my declaration. That it would be approximately, by chance, a score that low would occur at that .02 percentile. So that is 2/100 of the lowest percentile. So very rare. If there were 10,000 people, [petitioner] would be about second from the bottom, statistically. It is very rare." (RT 3253-3254 [Riley].)

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

3270-3271[Riley].)

According to Dr. Riley, petitioner "had an impairment in overall visual spatial processing." (RT 3272.) "He had a widespread diffuse problem in the area of nonverbal tests." (RT 3273.) There were indications of attentional problems. (RT 3273.) "He had problems on tasks that measured fine motor functioning." (RT 3273.) He had "significant impairment in developmental reading." (RT 3273.) "He still had the remnants of a developmental dyslexia or reading disorder that was inborn." (RT 3274.) "He had a lot of problems with spatial processing." (RT 3274.) He had difficulties in nonverbal problem solving. (RT 3274 [Riley].)

Dr. Riley described how petitioner's deficits translated in the real world as follows: " Mr. Champion's deficits as revealed by the neuropsychological testing in problem solving, nonverbal reasoning, attention, and slowed information processing, rendered him unable to draw inferences in ambiguous circumstances and leave him especially vulnerable to missing or misleading cues concerning the intentions of other persons." (RT 3614 [Riley].)

"Because of the deficits he has with rapid information processing, attention, etc., he would have impairments in his ability to comprehend the whole situation and make decisions." (RT 3617 [Riley].) Dr. Prentiss had

similarly reported that petitioner's **perception of social situations** and **ability to recognize the potential for violence was impaired** and that his self-esteem is low. (Vols 95-96 of 135 at 1446-1511, Vol. 8 of 135 at p. 3093-3101.)

Additionally, Dr. Hinkin and Dr. Riley were of the opinion that petitioner suffered from ADHD and dyslexia which impacted his academic performance. Dr. Faerstein saw no contrary evidence that led him to believe that petitioner did not have ADHD or dyslexia during his school years. (RT6719 [Hinkin].) In the absence of evidence to the contrary, and in view of petitioner's academic records, which showed that he progressed very slowly, was in remedial classes and never had very good grades, Dr. Riley concluded that the deficits she observed were probably long-standing. (RT 3277[Riley].) 65

Dr. Riley cited the fact that petitioner was in an automobile accident and that his mother suffered abuse while caring for him in utero as possible contributing factors for cognitive impairments. (RT 3340, 3343 [Riley])

i. Love of Petitioner by Family and Friends/ Love by Petitioner of Others

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65 Dr. Hinkin agreed dyslexia and attention deficit disorder, which are suggested as being suffered by petitioner both through testing and document review, are indicative of brain impairment or neurological disorder. (RT 3276, 3284, 6423-6424 [Riley, Hinkin])

The referee found that evidence adduced at the reference hearing demonstrated that petitioner's family loved and cared for petitioner and that petitioner loved and cared for them and others. (Report at pp. 156-159.) "At the time of trial, credible evidence existed of the love, affection, and high regard for petitioner on the part of his family and some lifelong friends." (Report at 15.)

Petitioner's family is very close knit. (RT 5235, 5135, 5143 [Rita].) Family members spoke of petitioner with love and affection and were universally positive.

> As a child, Steve was very playful, always want to have fun. We just, just being his self, just having fun, playing around all the time." (RT 5235 [Rita].)
>
> "I love my brother Steve. I'm close to Steve, out of all my brothers, because I guess we are close and eight, and we grew up together. And Steve always been very protective of me and his siblings, very caring, very loyal." (RT 5270 [Rita].)
>
> "I have great memories. I remember my brother [Steve] taking me to the park. Me and my sister Terri, would go to the park and he would play with us, always looked out for us, spent time with us. We've gone to amusement parks, the park, we've gone over to friends house, and we just, you know, spent time together. Never seen a mean streak in my brother [Steve]." (RT 5566 [Traci].)
>
> "I just remember him taking an interest in me. You know, always talking to me and stuff like that. And... just being a good big brother. He used to take me and my younger sister to the park. You know, let us win and stuff like that. He used to just talk to us, you know, and just, you know, just talk to us and

just look after us. You know, get us a popsicle and, you know, just fun stuff like that." (RT 5610. [Terri.])

"I just remember him always been nice and caring." (RT 5644-5655 [Terri].)

"I could remember Steve and the kids were playing and things. And Steve was the boy he always was, all the kids love to be around him, and they played, you know, he was a very joyful kid. All the kids wanted to know where Steve is." (RT 5136 [E.L.].)

The referee found:

"While Mrs. Champion was not the best of witnesses, the clear exception is her degree of love and affection for petitioner. While her support is evident from her trial testimony, Skyers should have given more consideration to calling her and testifying as to why she felt his life, age and relationship to others did not warrant death. . . . Her depth of feelings for petitioner, however, is so remarkable as demonstrated by the manner of how she testified, that I find she should have been asked direct questions by trial counsel. (Report at p. 86.)

And,

The testimony of the younger family members that he was protective is likewise credible."(Report at p. 87.)

The family, including petitioner, attended church three to four times a week. (RT 5236 [Rita].) Petitioner had close relationships with extended family, primarily his mother's siblings. [66]

[66] "My understanding is that visits to aunts and uncles, meaning the siblings of Ms Azell Jackson, were a source of comfort and pleasure to Mr. Steve Champion, as well as to Ms. Azell Champion and other siblings. The siblings... of Ms. Azell Champion, also were helpful to Ms. Azell Champion in her least mentally stable times, which

Family members attended petitioner's trial for support even though they were required to sit outside the courtroom. (RT 5207 [Rita].) Family members visited petitioner when he was at the California Youth Authority. (RT 5282, 5624 [Rita, Terri].) Petitioner was always respectful towards his mother. (RT 5340 [Rita].)

In juvenile records (Vols. 95-96 of 135 at pp. 1446-1511.), CYA official Spurney noted that petitioner was sensitive and introspective, which Dr. Miora considered significant with respect to the relationships that he had with family members and good friends. (RT 8134 [Miora].) Petitioner protected his family members. (RT 5566 [Traci].) [67] [68]

Petitioner was very different than Lewis III. Petitioner never raised

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fluctuated, of course as we've discussed, by coming by, bringing food, visiting with the children on weekends. In fact, I believe it was in the time frame, but it wasn't clear whether or when Mr. Champion was six or seven, he was sent by Ms. Azell Champion for a very brief period of time, it didn't work out, with one of her siblings. Ms. Azell Jackson... hoped that she could, by delivering him onto one of her siblings, provide him with a more protective environment as opposed to the risk filled environment with Lewis, who according to all accounts, having become aggressive and violent both in the home and towards the children. That she was hoping for some more stability an opportunity for him that she believed would be provided.' (RT 7850-7851 [Miora].)

[67] "There was one scenario. I remember me and my sister Terri, we were skating down the hill. There was a guy looked down the hill, very mean. He came outside and told us basically don't come down the street again. We're like, well, we want to skate, so we went up and told my brother [Steve]. [Steve] went down and talked to the guy and he said, you know, is there a problem, Steve, is there a problem, and the guy said oh no, not a problem at all, and he just wanted to know why can't his sisters skate or whatever, and it was resolved, no violence, no nothing, they talked. There was no problem and we skated on." (RT 5566 [Traci].)

[68] "[I saw] compassion [in Steve]. He cared about his family. He loved his family. He looked out for his family. And I do admire at that time for him to be a teen and wanting to spend time with me and my sister, because it meant a lot. I never had that with any of my brothers." (RT 5567 [Traci].)

his hand or spoke in a mean manner to his siblings (RT 5566-5567, 5610-5611 [Traci, Terri].)

Petitioner told Dr. Miora that he had suffered a number of losses of friends and family members to violence in his young adulthood. According to Dr. Miora these losses had a profound effect on petitioner's development and functioning. Dr. Miora's information as to the losses, as indicated by petitioner, was corroborated by certified death certificates which accompany the petition. (RT 8038-8044.) 69

Gary Jones, petitioner's friend, described his first meeting with petitioner when they were children. Jones was sitting on the curb of a street getting "whooped" by his brother. Petitioner came up and asked whether he was going to put up with that behavior. Jones described petitioner as showing deep concern about the situation. (RT 5661.) Jones described petitioner as athletically competitive. Jones and petitioner remained close friends until petitioner was sent to CYA. He explained their childhood together as "beautiful." They built go-carts and bicycles and played sports every day. (RT 5665-5666 [Jones].)

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69 Petitioner's uncle Jethro Nunn was murdered in 1976 when petitioner was 14 years old. (RT 8039 [Miora].) Petitioner's cousin Emil Overstreet was murdered. (RT 8041-8042 [Miora].) Petitioner's friends Raymond Winbush, Rock, Mack Thomas, Salty, Speed, Andre, Paul Crenshaw, Wilbur, and Donald Kelly were all murdered. (RT 8043-8044 [Miora].)

When Jones was eight years old he was hit by a car. He and petitioner had been riding bikes when the accident happened. Jones was injured and bedridden for a couple of weeks. As a result of his injuries Jones lost all of the hair on his head, his eyebrows and his eyelashes. Jones said that the condition was called "alopecia totalis." After this, some children began to treat Jones differently. Jones would wear a hat to cover his bald head and people would take it off of him and laugh. Petitioner did not do this and did not treat Jones any differently after he had lost his hair. Rather, petitioner would try to encourage Jones to just be himself and not be embarrassed about being bald. (RT 5682 [Jones].)

> "He encouraged me to be what was, and it was okay, you know, and eventually I did. I took that hat off and walked side by side with my friend Steve, you know. I, over the years, developed a sense of self, you know, and might identity as being this baldheaded kid, you know, and Steve encouraged me and he helped me through that, you know." (RT 5683 [Jones].)

The referee found Jones credible:

> "The referee further finds that evidence of love and care for petitioner by family members is credible. Gary Jones' regard for him is deemed credible." (Report at p. 87.)

When asked what he would have told a penalty phase jury, Jones said "I would have said if you don't have enough evidence or you have an iota of doubt that this man did what you said he did, then spare his life. I've personally missed a lot of years with a very dear friend, you know, and I –

missed a lot of years, like a void in my life and how much, you know when is enough when are you going to let him go." (RT 5688 [Jones].) This statement would have been very helpful to Skyers' "lingering doubt" theme.

If given the opportunity to testify at petitioner's penalty phase trial, Traci Robinson-Hoyd would have testified "my brother is a good man. He's always been a good brother to me and my sisters. Very kind, very loving, very, you know, he cares about family, you know. He always took out the time to see how we were doing, you know, when he would call, basically he talked to my kids, stay focused with your education, you know. Just felt like I lost a father figure I could have had. I lost it when my brother was sent away, you know. To have that type of love from my brother, I've never really experienced that with none of my other brothers. And you know, I felt like he was taken from me and my family. He's a good person, and I love my brother very much." (RT 5568 [Traci].)

If given the opportunity to testify petitioner's penalty phase, Terri would tell the jurors that petitioner "is a good person. That he didn't commit these murders. That they took someone that means a lot to me away." (RT 5612 [Terri].) This statement too would have been very helpful to Skyers' "lingering doubt" theme.

The referee concluded,

"The referee finds that even though from the guilt phase testimony of petitioner's mother, two older sisters, two younger sisters and older brother Reginald, the jury was well aware of the family's love for petitioner, the best practice for trial counsel would have been to recall the mother and sisters for this express purpose. It is an intangible emotional factor but an important one. Mrs. Champion's [sin] depth of affection for her son is remarkable as was demonstrated during her reference hearing testimony. In addition, the sisters' comments of his protective nature should have been presented. Jones' recollection as to his childhood experience with petitioner should have been presented. These areas are an exception to the referee's findings that a reasonable competent attorney would encounter an impossible task in seeking to call family members who had testified in the guilt phase." (Report at p. 260.)

4. Exception: The referee erred in rejecting Dr. Riley's conclusion that petitioner, as of the time of his trial in 1982, suffered from longstanding neuropsychological dysfunction

The referee found that petitioner did not suffer from brain damage or dysfunction in 1982 when petitioner's case was tried. (Report at pp. 186-193.) Petitioner takes exception to this finding.

Foremost, petitioner notes that it more than just semantic significance that both the referee and respondent speak of petitioner's neuropsychological impairments and deficits as "brain damage." (Report at p. 186.) As Dr. Riley explained, brain damage presumes a healthy brain having suffered some injury. Thus, the car accident and petitioner's mother's abuse while pregnant are considered possible causes of an injury to petitioner's brain. However as Dr. Hinkin agreed, sometimes brains are just bad from the start.

(RT 6405-6407[Hinkin].) For purposes of mitigation and explaining someone's behavior and the difficulties he may have faced, it does not matter whether the neurological deficits resulted from an injury or were a part of one's genetic endowment.

One basis relied upon by the referee for his finding of no brain damage or dysfunction was the fact that none of evaluations pre-dating petitioner's trial -- the four CYA evaluations and the Pollock-Imperi evaluation obtained by trial counsel -- reported evidence of brain damage or recommended additional psychological or neuropsychological testing of petitioner. (Report at pp. 186-187.)

None of the CYA experts were called by respondent to testify at the reference proceedings. Nor did respondent call Dr. Imperi. Dr. Pollock died in 1982. The reference court, on the basis of respondent's hearsay objection, precluded Dr. Riley from articulating what impact if any the recently expressed impressions of Dr. Prentiss, who had evaluated petitioner at the California Youth Authority and had recently spoken with respondent's counsel about petitioner's case – as revealed in notes provided to petitioner through discovery and reviewed by Dr. Riley -- had on her own opinions. (RT 3214-3215.)

Dr. Riley reviewed the four CYA reports, the letter authored by Drs.

Seymour Pollack, M.D. and Lilian Imperi, and also reviewed two post-judgment reports -- the psychiatric evaluation by Dr. Geiger at San Quentin, and the psychological evaluation by Charles Steinke Ph.D. at San Quentin. (RT 3285.) None of the individuals who authored those reports was a neuropsychologist. There was no indication within those reports that any of those individuals gave petitioner the same battery of neuropsychological tests that Dr. Riley gave to petitioner or anything resembling a neuropsychological test battery. (RT 3286-3288.) The only neuropsychological tests indicated in the reports was a Bender Gestalt Test given by Dr. Prentiss in 1978 and a Bender Gestalt Test and a Ravens given by Dr. Steinke at the time of petitioner's intake at San Quentin prison. (RT 3286.)[70]

There was no raw data available for any expert, including respondent's experts, to review Dr. Prentiss' testing or conclusions that there was no neurological impairment. (RT 3289[Riley].) There exists a copy of the Bender given petitioner by Dr. Steinke. Steinke noted that the Bender did not show gross distortions but was of a generally poor quality. On reviewing this Bender, based on the number of significant distortions and

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[70] Dr. Prentiss gave petitioner personality tests which differ from neuropsychological tests. Neuropsychological tests look at cognitive functioning and test of mental ability. Personality tests look at personality factors such as whether or not an individual is depressed or has a mental disorder. (RT 3287-3288 [riley].)

additional minor distortions, Dr. Riley concluded that it showed petitioner was impaired. (RT 3290-3291 [Riley].) Dr. Hinkin did not testify otherwise.

In fact, Dr. Hinkin, who is wholly credited by the referee (Report at 186), agreed with Dr. Riley that the CYA evaluations were not adequate for diagnosis of neurological impairment.

Dr. Hinkin is a licensed clinical psychologist and a diplomate in clinical neuropsychology. (Vol. 111 of 135 at pp. 4141.) Called by respondent, his referral question was to review medical and legal records "with a particular emphasis on the neuropsychological evaluation conducted by [petitioner's neuropsychological expert] Nell Riley, Ph.D." (Vol. 112 of 135 at p. 4225.)

During cross examination, Dr. Hinkin was asked to evaluate the CYA evaluations petitioner underwent.

With regard to Dr. Prentiss' evaluation, Dr. Hinkin testified that there were "certainly ways one could take issue with [her] report. He noted Dr. Prentiss administered only one neuropsychological test and that she "did not administer a comprehensive battery of neuropsychological tests." (RT 6331.) "With out a doubt" "she certainly could have administered a greater degree of tests." (RT 6332.) On that basis Dr. Hinkin found "it's quite conceivable she could have missed something" and "that it's quite conceivable [Dr.

Prentiss] could be in error" when she concluded petitioner had no neurological impairment. (RT 6331 [Hinkin].)

As for Dr. Brown's assessment, Hinkin agreed that Brown did not administer neuropsychological tests, neither did he refer to any of the other tests or assessments petitioner underwent at CYA. (RT 6339-6340.) Hinkin agreed that as a psychiatrist who engaged only in a mental status evaluation of petitioner it is possible he could err and "may miss something that is there." (RT 6343 [Hinkin].)

> "He is a psychiatrist who conducted a psychiatric examination. Psychiatrist don't typically employ any neuropsychological tests. So what he was doing is something that is different than what a neuropsychologist would be doing...I think a neuropsychological evaluation is better suited for detecting neural cognitive problems...." (RT 6344 [Hinkin].)

As far as Dr. Brown's report, Hinkin testified:

> "There are probably hundreds of shortcomings in the report. It is a two page report. There is much, much more that can be said about Mr. Champion that is not included in that report. So, you know, certainly there is a lot more that could have been added. There is very little about his history in there. There is very little about his social functioning. His occupational functioning. His educational background. There is very little, I don't think there is anything about his medical background in there, the psychiatric background, his substance abuse history. There is [sic] many things that are not in there, recorded in that psychiatric examination that can be in there. So if your question is, is there more data that is not in there that would be useful to have in there, certainly." (RT 6346-6347 [Hinkin].)

Regarding Dr. Minton's report, Hinkin noted that as a psychiatrist,

who evaluated petitioner for thought and mood disorders, Minton failed to administer any neuropsychological tests which "commonly" psychiatrists request. (RT 6347-6348.)

In no uncertain terms Dr. Hinkin testified that "in 1982, the cornerstone of a neuropsychological of valuation is the administration of neuropsychological tests...." (RT 6350.) It follows that the failure to identify petitioner's neuropsychological deficits by those who evaluated petitioner prior to Dr. Riley can be explained by the fact that they relied primarily on verbal interviews. Petitioner's verbal abilities are normal, he has a good vocabulary and he can be articulate. However "when one moves away from the verbal area of strength, and one starts to test other nonverbal or performance types of tasks, including visual, spatial and more complex problem solving, that's when the deficits become apparent. And those were never fully assessed." (RT 3293 [Riley].)

The referee also based his finding of no brain damage on the opinions of respondent's expert's Hinkin and Faerstein that there was no credible evidence of brain damage. (Report at p. 187.) Neither Hinkin nor Faerstein conducted a personal evaluation of petitioner.

Instructive to this exception is this Court's opinion in *People v. Bassett.* In *Bassett,* a capital defendant pleaded not guilty by reason of

insanity. (*People v. Bassett* (1968) 69 Cal.2d 122.) At trial, the prosecution offered the testimony of expert witnesses who had not personally evaluated the defendant. This Court independently weighed the "substantiality" of the prosecution's evidence of mental capacity. After doing so, the verdict was overturned. *Bassett* is instructive on the question of how much weight the court should attach to the opinion of a mental health expert who has not personally evaluated and/or tested the individual whose mental health is at issue.

In *Bassett* the prosecution offered the testimony of two mental health professionals in what this Court characterized as an effort "to create a 'conflict' in the psychiatric evidence." (*Ibid.*) Neither prosecution expert had examined defendant in person; both had read various documentary materials prepared prior to trial; and both were presented with a lengthy set of "hypothetical" facts by the prosecutor. After purporting to summarize substantial portions of the evidence the prosecutor asked each witness if, "based on these assumed facts," he had an opinion about the defendant's mental capacity. The opinions conflicted with defense expert testimony. (*Ibid.*)

This Court found it significant that "[t]he testimony of the experts called by the defense...was predicated upon many cumulative hours of

private, professional confrontation with defendant, provoking his reactions, observing his demeanor, and listening to the intonation of his responses. By contrast, [the prosecution experts] conceded on the stand that they had never talked with this defendant, and the record does not disclose they had ever seen him until they entered the courtroom to testify against him." (*Id.,* at p. 141.)

This Court noted:

> "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject. Gill, Newman & Redlich, The Initial Interview in Psychiatric Practice (1954). See also Finesinger, Psychiatric Interviewing: principles and Procedure in Therapy, 105 Am.J.Psychiat. 187 (1948). More than three or four hours are necessary to assemble a picture of a man. A person sometimes refuses for the first several interviews to reveal his delusional thinking, or other evidence of mental disease. Menninger, A Manual for Psychiatric Case Study, ch. 1-4 passim (2d ed. 1962) (hereafter cited as Menninger). See Noyes & Kolb, Modern Clinical Psychiatry, ch. 7 (with bibliography); Knight, Borderline States, 17 Bull. of Menninger Clinic 1, 8 (1953). Paranoid patients particularly may be able to guard against revealing their disorder with extraordinary skill. Menninger 64-65. See Noyes & Kolb, Modern Clinical Psychiatry 112-13. From hours of interviewing, and from the tests and other materials, a skilled psychiatrist can construct an explanation of personality and inferences about how such a personality would react in certain situations. And he can explain his findings in nontechnical terms to a jury." (Fn. omitted.) (*Rollerson v. United States* (D.C.Cir. 1964) 343 F.2d 269, 274 [119 App.D.C. 400] (per Bazelon, C. J.).) (*Ibid,* emphasis added.)

Contrasting the defense mental health expert testimony to that of the prosecution the *Bassett* court stated:

"From the portions of the record quoted and summarized hereinabove it is evident that the psychiatric witnesses called by the defense conscientiously undertook to present such an explanation to the jury. They supported their conclusions by detailed explorations into defendant's childhood, family life, and adolescent behavior; they provided instructive analyses of the nature of paranoid schizophrenia, and painstakingly interpreted the significance of defendant's delusions and hallucinations.

In sharp contrast, however, is the showing of Drs. Abe and McNiel. Their meager testimony provided essentially no "reasons" whatever for their conclusions: after flatly asserting that defendant had the mental capacity described, each witness merely agreed with the prosecutor that a person with a truly severe case of paranoid schizophrenia "would not have been able" to make the detailed plan followed by this defendant or to take adequate notes, as he did, in college-level philosophy and psychology classes. Yet neither witness attempted to refute the mass of defense evidence explaining that defendant's apparent "plan" was the product not of his free will but of the imperative demands of his delusional system and hallucinated voices; and neither witness sought to harmonize his reliance on defendant's classroom performance with the evidence . . . that at defendant's stage of this illness he could still accomplish such abstract intellectual tasks as writing class notes. Moreover, although the filed reports of Drs. Crahan, Smith, Langer, and Bessent reached reasoned conclusions directly contrary to their own, Drs. Abe and McNiel merely agreed with the prosecutor that nothing in those reports "would alter" the opinions they had just pronounced on the witness stand: no effort was made to discuss the facts recited in the reports, or to dispute the inferences drawn from those facts. Thus in the case at hand, as in *People v. Williams* (1962) *supra,* 200 Cal.App.2d 838, 845, "the opinions of both [prosecution psychiatrists] were offered as if it were their principal function merely to tell the jury what its verdict should be on the issue of premeditation." (*Id.,* at pp. 144-145.)

Ultimately this Court held the prosecution had not presented "substantial" evidence to support the implied finding of defendant's mental capacity on the guilt phase of this trial. (*Id.*, at p. 146.)

In the instant case, neither Hinkin nor Faerstein personally evaluated petitioner. Both were asked by respondent to address the opinions of petitioner's expert rather than to conduct their own assessments of petitioner's functioning, development, and life history or to assess and test for neuropsychological deficits. Faerstein in particular based his opinions on his speculation that petitioner's family members might have a bias in the outcome of these proceedings. However, Faerstein did not personally interview petitioner or his family members and did not sit in during the testimony of the witnesses so as to make an individual assessment as to whether or not they possessed a certain bias and whether or not that bias was reflected in their testimony.

Moreover, the primary purpose of Dr. Faerstein's testimony appears to be to bolster whatever arguments respondent chose to make about the scope and credibility of Dr. Pollack's evaluation. (See RT 6448-6449, 6453-6455, 6457-6460, 6462-6465, 6486-6487[Faerstein].) Dr. Faerstein never spoke to Dr. Pollack about this case. Dr. Faerstein's opinions -- which are truly based on nothing more than his own personal opinions having nothing to do with the specific facts of this case -- were offered as if it were their principal function merely to tell this Court what its credibility determination as to petitioner's family witnesses and Dr. Pollack should be.

Ultimately, Dr. Hinkin's criticisms of Dr. Riley's test results are minimal. Putting aside whether he would have employed 2004 norms – which were not available at the time of petitioner's trial or testing, are only available for a limited number of tests, and apply to African Americans only – and whether he would have permitted petitioner's counsel to be present during one testing session, and when he would have given a malingering test, Dr. Hinkin took issue only with one test result where he would have given petitioner one more point. (RT 6273 [Hinkin].) Likewise, the purpose of Dr. Hinkin's testimony was to give this Court a basis to disregard Dr. Riley's opinion– not because after employing the same tests and evaluation he has reached a contrary conclusion – but because that was the task he was given by respondent. Moreover, as stated earlier Dr. Hinkin agreed that the earlier diagnoses were not sufficient to rule out neurological deficit and petitioner did have a learning disability which evidenced neurological impairment as well as a low IQ..

"'[A] trial is a search for the truth.'" (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1171.) "For the public to have confidence in the result, they must have confidence in the process. As the United States Supreme Court has observed, 'Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice

suffers when an accused is treated unfairly.'" (*Id.*, at p. 1171 citing *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

In instant case, it is not as if the referee had been presented with two evaluations of equal type or quality. It is not as if two fingerprint experts, one testifying for the defense and one for the prosecution, had examined the same evidence and come to contrary conclusions. Dr. Hinkin and Dr. Faerstein's opinions are designed to conflict with those of petitioner's experts as opposed to being independent evaluations of the same information resulting in a contrary conclusion. As in *Bassett,* this Court should find those opinions do not carry substantial weight.

In support of rejecting Dr. Riley's conclusions, the referee also asserts that "the neuropsychological testing conducted by Dr. Riley... provides no credible evidence that petitioner suffered from any brain damage or dysfunction ...." (Report at p. 187.) The referee makes this finding despite a recognition that Dr. Riley, a board-certified neuropsychologist, was "a good witness and well qualified" (Report at p.12), and the fact that no other qualified expert has ever administered a battery of neuropsychological tests to petitioner.

The two principal reasons advanced by the referee as a basis for his finding that Dr. Riley's test results were not credible evidence reflect the

referee's unwarranted rejection of what has been standard practice in the neuropsychological testing of California Death Row inmates, as well as the insertion into a proceeding about a 1982 trial of more recent developments and debates that could have had no role in petitioner's trial had trial counsel obtained and introduced the result of neuropsychological testing as part of petitioner's case in mitigation. More specifically, the referee asserts that Dr. Riley's test results lack validity because Dr. Riley (1) in scoring the tests she administered did not utilize ethnicity adjusted norms, developed for African Americans only, in 2004, and (2) on the first of two days of testing permitted petitioner's counsel to be in the room.

As noted above the referee precluded petitioner's expert from discussing the impact of Dr. Prentiss' 2005 notes may or may not have had on Dr. Riley's ultimate opinion and restricted her testimony to tests and scoring available in 1982 only, but in a stunning about-face, over petitioner's objection, relied upon the opinions of a non-testifying expert (Jennifer Manly), whose 2004 research paper discussed the advantages and disadvantages to using different norms to test results of African-Americans, to discredit Dr. Riley's test results. (Vol. 111 of 135 pp. 4090-4095.)

On redirect examination, concerning the use of ethnicity adjusted norms, Dr. Riley discussed in great detail the limitations and policy

considerations which arise when using a different set of norms for one race in the arena of death penalty prosecutions for which the neuropsychological community had not yet reached a consensus. (RT 3634-3636.)

Dr. Riley explained that norms she used stratified people according to educational background, gender and age. In 2004 there was a new revision of some limited number of norms which added a dimension of ethnicity for African-Americans only. This was due to concerns that in a clinical setting some African-Americans were being over diagnosed with certain kinds of conditions, like dementia. (RT 3649.) 71

In the arena of her expertise is as a testifying witness in death penalty cases, Dr. Riley expressed concern. She explained that a white person would be deemed impaired where an African-American might not – perhaps making it easier for juries to sentence an African American to death -- and asked "should you be using just how person performed, how much they can do and how much they can't do, which is called just level of performance, versus sort of considering the person relative to certain groups." (RT 3662.)

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71 "There is a lot of ambiguity out there that simply has not been resolved yet, and I think it will take some resolution of those questioned before people have the confidence to know when they should use these norms, whether, in fact, the norms are valid, given they are limited geographic representation. Those are questions that need to be resolved. There are questions that come up with every new tester every major revision, and they just have not been resolved. The use of ethnicity is a whole new area. There are a lot of questions." (RT 3659.)

She continued:

> "sometimes these demographic corrections may be very important and helpful and sometimes they are not....I sometimes evaluate pilots. It doesn't matter how many years of education or what their ethnicity is, you have to have an absolute level of function, rapid information processing, good attention, fine motor coordination. You don't consider all these other demographic variables, you just look at their absolute level of performance. When you're trying to determine if a person has had a chance in relationship to an injury or disease, then I agree, comparing post injury performance to estimated premorbid function may be the best way to [determine] how you in decision-making. ¶So I think that the norm recognized this whole question of when it is important to use absolute level of performance, how did he do on that test, versus comparisons of pre-and post-morbid functioning has been around for decades. I think that's a question and that has to be considered for determination of mitigation in death penalty cases. It's not going to be made by a neuropsychologist. It's going to be made by members of the legal community." (RT 3662-3663.) 72

Moreover, the 2004 African American norms are currently not available for the majority of the tests given to petitioner. The 2004 African American norms are only available on a small number of tests and do not addressed persons of mixed race or Asians. There are entirely different Hispanic norms which too have not been accepted in the neuropsychological community, let alone the legal community. (RT 3657-3659, 3675 [Riley].)

This Court should resist any temptation to set a precedent -- on unproven and unaccepted scientific discussion -- which would make it easier

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72 "At this point there is no guidance. All these questions about validity and appropriateness of use have not been determined, and I did not feel and till those issues are resolved that I would apply these norms." (RT 3677.)

to execute African-Americans over White, Asians, Hispanics, and mixed race individuals.

Further, petitioner would submit, in the context of mitigation to be considered in a capital sentencing proceeding, a defendant's relative impairments and capacities should be measured against those of the overall community in which the defendant has had to live and function, and not simply against those of any smaller subset of that larger community, particularly a subset likely to have shared disproportionate levels of hardship and deprivation.

The referee also relies on Dr. Hinkin's opinion that Dr. Riley's test results should not be credited because petitioner's habeas corpus counsel was present during the first day of testing. (Report at p. 188.) Once again applying different evidentiary rules for respondent than he did for petitioner, the referee relied on post-trial and post-testing neuropsychological discussion papers which addressed potential detriments and/or benefits to having a third party present during testimony.

There was no specific policy in place when Dr. Riley tested petitioner and Dr. Riley testified it was standard procedure to have an attorney present in 80% or more San Quentin cases she evaluated. (RT 3193-3195.) Moreover, the referee ignored the most pertinent aspect of these post 1997

papers expressing concern which stated:

> "THIS POLICY IS NOT INTENDED FOR APPLICATION TO CRIMINAL FORENSIC CONSULTATIONS THAT INVOLVE THE ISSUES OF CRIMINAL LIABILITY OR CULPABILITY, BECAUSE THE RIGHT TO LEGAL REPRESENTATION AND A THIRD PARTY OBSERVER IS ABSOLUTE IN CRIMINAL MATTERS." (RT 3192.)

Moreover, Dr. Riley testified that there was no policy in place when petitioner was tested; that she instructed petitioner's counsel to remain quiet, and sit out of petitioner's view; that counsel followed those directives and that petitioner may have even scored better i.e., appeared less impaired with counsel present. (RT 3188-3196.)

The referee's additional reasons for concluding that Dr. Riley's neuropsychological testing provided no credible evidence of brain damage or dysfunction largely concern her not having read some reference hearing testimony and/or CDC files, containing observations by petitioner's friends or family members which the referee viewed as inconsistent with the impairments revealed by Dr Riley's testing. (Report at pp. 189-193.) Dr. Riley addressed these concerns directly explaining that her opinions were based on her test data not on anecdotal information from family members or others. (RT 3391.) Further, observations by friends or family members who may themselves have significant educational and other deficits, and/or may not have wanted to speak disparagingly of someone they cared about, are

hardly a substantial basis for rejecting the results of a properly administered neuropsycholical test battery.

The one additional reason the referee mentioned discrediting Dr. Riley, was "Dr. Riley's inappropriate use of a one standard deviation 'cut point,' rather than a two standard deviation 'cut point,' to identify cognitive impairment" (Report at 189.) Dr. Hinkin's criticism was that this produced a 15% false positive rate --- i.e., *it reflected an 85% probability of impairment.* Surely that is something a capital sentencer should know --- that there's an 85% chance the defendant has significant impairment. (Vol. 112 of 135 p. 4991.)

In short, there was no substantial basis for rejecting Dr. Riley's conclusions.

5. Exception: Based on His Misunderstanding of What Constitutes Mitigating Evidence and the Relationship of Proffered Evidence to Petitioner's Functioning and Development, and the Referee Erred in Excluding Expert and Erroneously Excluded Evidence in Mitigation, Deemed it Irrelevant, and/or Gave it Little Weight

a. Procedural History

In support of his Petition for Writ of Habeas Corpus, petitioner submitted a 1997 Declaration of Roderick Pettis, M.D. Dr. Pettis was scheduled to testify at petitioner's evidentiary hearing on July 17, 2006. Dr. Pettis withdrew from the case unexpectedly.

On August 15, 2006, the referee denied petitioner's motion for a continuance to enable a new mental health expert to prepare an assessment of his history, development, and functioning, and then testify to his or her expert findings, in support of petitioner's showing that he was prejudiced by his trial counsel's failure to conduct investigation and present mitigating evidence at the penalty phase of his 1982 trial. This Court granted the motion for a continuance and directed the referee to continue the reference hearing for six months.

The declaration of psychologist Dr. Deborah Miora, dated April 1, 2007, was filed as a proffer of her expert testimony. (Vols. 91 and 92 of 135 at pp. 3166-3390.)

A hearing was held on April 17, 2007, to address issues regarding Dr. Miora's testimony. Respondent sought to exclude from the expert's consideration and testimony a broad range of information reviewed and relied upon by Dr. Miora, including declarations of family members executed after the time of trial and other documents which predated and postdated petitioner's trial. Respondent requested the court read Dr. Miora's declaration and exclude any material that did not exist in 1982 even if those materials contained references to matters which predated petitioner's trial. (RT 7388, 7396, 7431, 7434.) The reference court held the matter in

abeyance until the beginning of Dr. Miora's testimony. (RT 7445.)

Dr. Miora testified for 13 days. 73

Throughout Dr. Miora's testimony issues arose about the scope of mitigating evidence. The referee excluded or limited testimony regarding matters which occurred before petitioner's gestation and in different geographic areas (for example, evidence concerning petitioner's mother's upbringing in Mississippi, and violence in her marriage to petitioner's biological father that created the situation into which petitioner was born), matters occurring outside the home (for example, the experiences and direct observations of petitioner's family during the 1965 Watts Riots, events of which were easily viewed and heard from the family home) and matters which occurred after 1982, even where that evidence corroborated opinions based on information available in 1982 (for example Reggie's psychiatric records and Gerald's juvenile records). The referee also expressed concern that petitioner's counsel had aided in the preparation of a portion of Dr.

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73 The reference court adopted respondent's characterization of Dr. Miora as a "mitigation specialist." (Compare Report at pp. 13, 30, 43, 52, 55, 185, 28, 233, 282, 315, and 316 to Respondent's proposed findings Vol. II. at pp. 266, 278, 286, 290, 328, 371, 390, 395, 447, 449, 455, and 456.) Dr. Miora testified as a psychologist asked to discuss the impact of various events on petitioner's development and functioning. She was not a "mitigation specialist." (See 2003 ABA Guidelines Vol. 96 of 135 at pp. 4749, 4754-4755.) While not made explicit on the record, respondent's apparent goal in characterizing Dr. Miora in this fashion was to diminish her status as contrasted with respondent's experts who testified as mental health experts.

Miora's declaration, which was submitted as a proffer of her anticipated testimony. (RT 7725, 7460.)

Ultimately, when he authored his report, the referee found that there was an insufficient showing by petitioner "to show an adequate link between the total life experiences of petitioner's parents, siblings and extended family members and petitioner's development, functioning or petitioner's individual background" (Report at p. 159), and on that basis deemed certain events in petitioner's family history petitioner sought to have introduced through the family members who experienced these events as "remote" (Report at p. 159), "lacking sufficient showing by petitioner of a viable basis to conclude that the offered evidence has had an influence on petitioner's character or upbringing" (Report at p. 160), "immaterial" (Report at p. 163), and/or "not relevant." (Report at p. 165.)

The excluded evidence covered a variety of topics such as petitioner's mother's disadvantaged childhood, petitioner's parents' ancestry of slavery and discrimination, violence inflicted on petitioner's mother by petitioner's biological father prior to petitioner's mother becoming pregnant with petitioner, violence in petitioner's community -- specifically petitioner and his siblings own experiences and impressions during the Watts Riots-- , and evidence of the similar educational difficulties, contact with the criminal

justice system, and mental deficits of petitioner's immediate siblings and biological father. (Report at pp. 159-167.)

In his report, the referee found pages 47 through 85 (Vol. 91 at pp. 3213-3251), of Dr. Miora's report were not relevant. That portion of Dr. Miora's report generally dealt with family history matters which predated petitioner's mother's pregnancy with petitioner.

The referee also found that due to the lack of a *genetic connection*, the school performance records of petitioner's siblings were not relevant to petitioner's life history. (Report at p. 163, 164.) On that same basis, the referee found the life history of Gerald Trabue Jr., which was considered by Dr. Miora, immaterial to petitioner and that Gerald Jr.'s declaration was untrustworthy. (Report at p. 163.)

Because the two brothers did not testify, the referee found the declarations of Lewis III and Reggie, which were considered by Dr. Miora, were unreliable, despite the fact that Dr. Miora personally interviewed Lewis III. (Report at p. 163.) 74

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74 There was no evidence supporting the finding that these witnesses were available to testify at the time of the hearing. Reggie Champion was in custody and had been found incompetent. Lewis III lived out of state.

While the fact that these witnesses did not testify can properly be used in deciding the weight of the information in the declarations the expert was permitted under EC 801 to consider and weigh that information together with all of the other information available. The expert did not simply credit the statements in the declarations, and those statements did not stand alone. The information generally corroborated other accounts of disruption,

Elsewhere in the report the referee discussed Dr. Miora's qualifications, objectivity, and testimony. The referee credited Dr. Miora's opinions when they could be construed to support respondent's position regarding the credibility of witnesses and tendency to hide embarrassing information and discredited them when they supported petitioner's claims of poverty, abuse, and similar themes in mitigation. (Report at pp. 82-84, 88, 110, 112, 115, 124, 131, 142, 162, 185, 194-247.)

b. Applicable Law

As this Court knows well,

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the **appropriate** punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; emphasis added.)

From this principle, the High Court has elaborated on the breadth of mitigation evidence. In *Lockett v. Ohio* (1978) 438 U.S. 586, at 604, the United States Supreme Court held:

> "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . **not be precluded** from considering as a mitigating factor, any aspect of a defendant's character or

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poverty, and violence in the family, the abandonment by their natural father, the loss of a stepfather who brought stability to the family, the increasing dangerousness of the neighborhood, such as live testimony and certified records, as discussed below.

> record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis in the original).

In *Eddings v. Oklahoma* (1982) 455 U.S. 104, decided the year of petitioner's trial, the Supreme Court held that the penalty phase factfinder in a capital case must consider mitigating evidence, even if it does not provide a legal excuse from criminal liability:

> "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (*Id.*, at p. 113-114; emphasis in the original.)

A long line of cases following *Lockett* and *Eddings* confirm the importance and breadth of mitigation evidence. As the Supreme Court explained in *Penry v. Lynaugh* (1989) 492 U.S. 302, 319:

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse. *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)."

The *Penry* opinion holds that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background or character or the circumstances of a crime." (*Penry*, at 328.) For that reason, the High Court has held that:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." (*McCleskey v. Kemp* (1989) 481 U.S. 279, 304; emphasis in original.)

More recently, in *Wiggins v. Smith* (2003) 539 U.S. 510, the Supreme Court held that at a minimum, trial counsel should have considered presenting "medical history, educational history, employment and training history, family and social history, prior . . . juvenile correctional experience, and religious and cultural influences." (*Id.*, at 24.)

In *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, the Ninth Circuit Court of Appeal found trial counsel in a capital case ineffective for failing to investigate and present evidence of mitigating cultural evidence:

> Defense counsel failed to present any mitigating evidence regarding Mak's background, family relationships or cultural dislocations that might have affected his behavior. .... The district court found there was "substantial and important mitigating evidence readily available," including testimony of family members to show Mak's human qualities, and expert testimony of Dr. Graham Edwin Johnson to show the effects of cultural conflict on young Chinese immigrants. .... [fn. omitted.] Id., at 1497. (*Mak*, at pp. 617-618; references to record omitted.)

Similarly, in *Caro v. Calderon* (9th Cir.1999) 165 F.3d 1223, the Ninth Circuit found relevant as mitigating evidence the history of his family, its culture, and its circumstances. The opinion summarizes, at p. 1225:

> Caro is of Mexican-American and Yaqui Indian heritage. He was raised in a racially divided rural community in conditions of abject poverty. The oldest son of farm laborers, Caro spent most of his childhood living in a shack surrounded by livestock yards and agricultural fields.

Trial counsel in *Caro* was found ineffective for failing to investigate and present mitigating evidence (primarily but not exclusively brain damage due to pesticide exposure), despite the fact that Mr. Caro was examined by four experts prior to trial. (*Ibid.*, at 1226.) As the court stated:

> "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. 'The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.' *Hendricks*, 70 F.3d at 1044 (quoting *Deutscher v. Whitley,* 884 F.2d 1152, 1161 (9th Cir. 1989), *vacated and remanded on other grounds,* 500 U.S. 901 (1991)); *see also Penry v. Lynaugh,* 492 U.S. 302, 319, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)." (*Ibid.*)

The *Caro* court held,

> "In addition, this Court has held that overwhelming evidence of guilt does not ameliorate the failure to present mitigating evidence at the penalty phase. *Hendricks,* 70 F.3d at 1044. 'The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. **The statutory factors [in California] give the jury broad latitude to consider amorphous human factors, to weigh the worth of one's life against his culpability**." *Id.* The type of mitigating evidence omitted here is precisely the type most likely to affect a jury's evaluation of the punishment Caro should receive. (*Ibid.*; emphasis added.)

In the case of *In re Gay* (1998) 19 Cal.4th 771, this Court heavily

relied upon the opinions of mental health experts who testified at the petitioner's reference hearing on an order to show cause involving ineffective assistance of counsel at the penalty phase of trial. Mr. Gay was granted a new penalty trial. Experts at the *Gay* hearing – psychologist Gretchen White, Ph.D., and psychiatrist and neurologist David Foster, M.D. – testified concerning the social, family, and personal history of the petitioner.

This Court stated:

> The type of mental health evaluation performed by Dr. Foster was not uncommon in capital cases at the time of this trial. (See *People v. Ledesma* [1987] 43 Cal.3d at ppl 200-201; *People v. Brown* (1985) 40 Cal. 3d 512, 537 [parallel citations omitted].) A minimal inquiry and review of documents available to [trial counsel] should have alerted him that such an evaluation might produce potentially mitigating evidence. He not only failed to investigate this possibility, but also engaged an expert who was not willing to undertake an extensive analysis and placed unreasonable limits on the scope of his expert's investigation and examination that precluded discovery of this evidence." (*In re Gay*, *supra*, 19 Cal. 4th at 807.)

Dr. Foster's evaluation was described as follows in the opinion:

> David Foster, M.D., a psychiatrist and neurologist with extensive training and experience in forensic psychiatry which included examinations of 12 death row inmates, did offer a mental health evaluation. He testified on direct by declaration and was cross-examined by deposition. He had undertaken a 10-hour psychiatric evaluation of petitioner, including a mental status examination, a structured psychiatric diagnostic interview, and a lengthy open-ended interview designed to assist in eliciting contradictions and evidence of malingering

> and falsification. He had also reviewed extensive documents related to petitioner's childhood and adolescence, the trial and habeas corpus evidentiary hearing testimony of Dr. Weaver, petitioner's evidentiary hearing testimony, the testimony of the other witnesses at that hearing, and the social history testimony of Dr. White, the 1992 test results of neuropsychologist Dale Watson. (*Id.*, at p. 802.)

Dr. Foster's psychiatric evaluation rested in part on a social history evaluation conducted by Dr. White, which was quite broad in scope:

> Dr. Gretchen White, licensed as a clinical psychologist and as a marriage and family counselor, testified, offering evidence regarding the effect of family and childhood and social influences on petitioner's development, personality, and psychosocial history. That testimony was offered as evidence that might have been, but was not, put forth at trial as mitigating evidence. Based on her approximately 120 hours of reviewing documents about petitioner's background, declarations from family members and friends about his background, and interviews with petitioner and his mother, Dr. White formed the opinion that petitioner came from a dysfunctional family that had a profound genetic vulnerability to mental illness and substance abuse. Petitioner had attentional problems that affected his ability to learn, and had substance abuse problems. Throughout the time petitioner was growing up, the family was under profound stress because his parents were of different races and he experienced severe psychological and physical abuse while growing up. These factors affected his behavior and functioning throughout his childhood and into adulthood. (*Id.*, at p. 816.)

> c. The referee improperly impugned the professional integrity of counsel in preparing a proffer of Dr. Miora's anticipated expert testimony, and then improperly inferred a discrediting "bias" on Dr. Miora's part on the basis of that proffer's failure to include mention of information the referee deemed favorable to respondent.

The referee erroneously and falsely accused habeas counsel of professional misconduct for aiding in the preparation of a declaration intended as a proffer of evidence.

> "The 154 page "Petitioner's Life History" core of "Dr. Miora's" 213 page April 1, 2007 Declaration (Exhibits 136 and PPPP, pp. 47-201.) [fn. omitted] *created by petitioner's counsel and not the witness*, reflects a biased and highly selective "spin" of the reference hearing evidence and exhibits. Dr. Miora admitted that this reflected "a selection of testimony, declarations and other materials" by Ms. Andrews, a selection "independently" undertaken by Ms. Andrews. (RHT 9037-9039.)" (Report at p. 195, emphasis in original.)75

The participation of counsel, particularly one acting in the capacity of a mitigation specialist, in preparing declarations is an ordinary function of counsel. The preparation of an offer of proof is squarely within an attorney's obligations; it can not be delegated, as no witness holds counsel's obligations to present a case that furthers the client's position legally.76

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75 Other references to counsel's preparation of a portion of the declaration appear in the Referee's Report at pp. 53[fn. 26], 196, 199, 203, 204, 206, 209, 210, 211, 215, 217, and 226.

76 Defense counsel in capital case have "obligation to conduct a thorough investigation of the defendant's background") (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)); *Wiggins v. Smith, supra*, 539 U.S. at p. 522 ("The ABA Guideline provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that my be introduced by the prosecutor." (Emphasis by Supreme Court); 4.1 Commentary, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) ("The Mitigation Specialist") ("the mitigation specialist [who should be assigned to every capital case as an indispensable part of the defense team] compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and

Moreover, Dr. Miora's declaration was her work product which reflected her opinions.

As to the preparation of her declaration, Dr. Miora testified:

> ". . . with the exception of the social narrative, that was completely written by myself. The social narrative, here's the qualification, the social narrative was developed in conjunction with Ms. Andrews, meaning as I was proceeding through my evaluations, through my review of documents, I shared with her the themes that I was developing.
>
> "I had reviewed all of the original documents upon which that portion of the social narrative authored by Ms. Andrews, including all the declarations, all of the community conditions resources, all of the records, all of the court testimony, everything, and when that was offered to me, I had already developed my opinions and was in the process of writing my report." (RT 8289.)

Dr. Miora testified that she was instructed as follows:

> ". . . that I use it as I saw fit, that it was expected, as it had always been understood and consistently stated, I would be developing my autonomous opinions, to delete, use, not use, alter, as I saw fit; that clearly my declaration was to be my declaration." (RT 9005.)
>
> She testified further:
>
> "This is my declaration under penalty of perjury. This is my professional integrity. And this is very important to m e in any case and circumstance in which I'm involved. I wouldn't want to put my integrity on the line." (RT 9007.)

Although he criticized the process in this instance, even the reference

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behavior; finds mitigation themes in the client's life history; identifies the needs for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations, and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation." *(Williams v. Taylor* (2000) 529 U.S. 362, 396.)

court recognized the process undertaken between counsel and Dr. Miora was not unusual:

> It's not uncommon that the attorney will assist a potential witness or a person being interviewed to prepare the declaration. Once the declaration is completed provide it to that, person that person reviews it, and then they sign off under penalty of perjury. That's not uncommon. (RT 8431-8432.)

Ultimately, the declaration was prepared to comply with the reference court's order that counsel make a proffer of the witness' anticipated testimony. The portion of Dr. Miora's declaration prepared by counsel consisted of a summary of underlying materials that she had reviewed and considered, which she was directed to delete, add to, or amend as needed. Dr. Miora drafted herself the conclusions she reached in assessing petitioner's development, behavior, and functioning.

During the hearing, respondent's counsel complained that certain material beneficial to its view of the case was omitted or given less attention than respondent's counsel desired. On this basis, the referee concluded that Dr. Miora was "biased." (Report at p. 202.) However, in a courtroom setting cross-examination is available when a witness is called to testify. That is the vehicle by which opposing counsel may explore the witness' testimony. Respondent was afforded that opportunity in this case and when confronted with the contrary opinions of respondent's experts Dr, Miora's

opinions remained the same.

For example, the referee complained that Dr. Miora was not provided with the *reference hearing testimony* of Wayne Harris, Earl Bogan and Marcus Player who were called by petitioner to testify about petitioner's alibi for an alleged uncharged crime introduced in aggravation. (Report at 196-202.)77

The fact that these witnesses (peers of petitioner) did not see petitioner being attacked by members of his family and did not consider petitioner's family destitute or him to be brain-damaged may have some small relevance, but is hardly the definitive word on either petitioner's family life or his neuropsychological status. Both Dr. Miora and the *Strickland* expert testified that the impressions of peers who themselves lived in similar conditions would not be sufficient to rebut the evidence of abuse, poverty, and lack of care presented in this case. Moreover, Gary Jones, another peer of petitioner, specifically testified that he experienced far more structure and discipline in his own life as compared to petitioner. (RT 4051-4044, 5683-5688, 8540-8541 [Earley, Jones].)

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77 The referee's report treats the testimony of Harris, Bogan, and Player as a dispositive rejection of petitioner's life history mitigation evidence throughout the report; see also, Report at 31, 34, 110, 115-116, 189, 199-200, 202, 213, 223, 227, 228-229, 230, 231, 233, 239.

At the same time, the referee finds their alibi evidence for the Taylor offense – the purpose for which they were called – to lack credibility. (Report at 79, 108, 168.) These findings lack consistency.

Additionally, a penalty phase jury would have been the proper decision maker to determine the weight to be given testimony that petitioner's peers might not have observed certain aspects of his life which were presented to the jury as mitigation. (See generally *Porter v. McCollum* (2009) 558 U.S. ___ ["It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury...."].)

That a prosecutor could have argued different conclusions is immaterial to petitioner's right to have a case in mitigation at the penalty phase of his capital trial. Thus, the fact that a prosecutor could have highlighted certain information and advanced arguments urging jurors to reject petitioner's case in mitigation provides no constitutionally sound basis for the referee's conclusion that Dr. Miora's opinions must be entirely discounted due to "bias." [78]

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78 At page 53, footnote 26 of the Referee's Report, the referee criticizes a footnote in Dr. Miora's declaration because it does not include the opinions of respondent's witnesses, and because the footnote was drafted initially by counsel and endorsed by the expert. Later, the referee further criticizes Dr. Miora for not including in her declaration the adverse conclusion of a non-examining expert for respondent, who concluded that petitioner did not suffer "brain damage" (Report at 208-209). But the declaration was intended as a statement of Dr. Miora's anticipated testimony – her conclusions and the bases for them. Dr. Miora, who herself had training and experience in conducting neuropsychological testing (RT 7451-53), had credited Dr. Riley's test results --- and as we have seen above in section A.5 of this brief, there was ample reason for doing so. There was no reason, however, to include a discussion of the contrary views of respondent's experts. Dr. Miora and counsel could safely assume that those views would be addressed on cross-examination

d. The referee's view of the scope of mitigation evidence is unconstitutionally narrow.

Because of the referee's unconstitutionally narrow view of the scope of mitigation evidence, he improperly found irrelevant and excluded or ignored testimony of Dr. Miora regarding subjects that she considered relevant to her psychological assessment of petitioner's development, behavior, and functioning. Likewise, because the life histories of petitioner's siblings are relevant to petitioner's life history, exclusion of evidence contained in petitioner's siblings' school and juvenile records was error. The referee excluded as irrelevant the very type of mitigating evidence envisioned under both California and United States Supreme Court cases law.

For example, in Gay, the petitioner's presented expert testimony regarding the dysfunctional and violent home in which Gay **and his siblings experienced** "extreme physical abuse....(*In re Gay, supra*, 19 Cal.4th at p. 787.) The expert described additional evidence of childhood and adolescent problems of petitioner **and his siblings**, none of which evidence was presented by trial counsel and most of which would have been relevant, mitigating evidence. (*Ibid.*) The expert opined too that: "[t]hroughout the time petitioner was growing up, the family was under profound stress [due to being mixed race]..." (*Id.,* at p.816.)

In the instant case, petitioner sought to have Dr. Miora offer her opinions on what, if any, significance information contained in petitioner's siblings school and criminal justice records had on petitioner's development and functioning. Over argument and petitioner's offers of proof, the reference court did not permit Dr. Miora to base any opinions on that information. (RT 7908-7922, 8034)

So, for example, when petitioner asked Dr. Miora to discuss the impact of petitioner's mother's marriage to Henry Robinson on petitioner, the reference court clarified that it would permit the presentation of evidence which had an emotional or physical impact on petitioner, but not permit the presentation of evidence that impacted a sibling or other family member. Dr. Miora explained that in her training and experience it is not always possible to separate the child's experience from the immediate family system. (RT 7887- 7889.)

Likewise, when the reference Court limited Dr. Miora's discussion of themes such as poverty, abuse, and other negative impacts on petitioner to only those that he recalled and discussed with Dr. Miora during her interviews with petitioner, (see, for example, RT 7895, 7889-7890, 7902, 7905), Dr. Miora explained that negative recollections of siblings while petitioner was in the home, even if not recalled by petitioner himself, if true,

would have had an impact on petitioner and were considered by her in forming her opinions. (RT 7905.)

In seeking to justify his ruling precluding consideration of sibling school records, the reference court referred to what it called the "absence of a genetic link." This reference court's reference to an "absence of a genetic link" is unexplained and mystifying.[1] Petitioner's older brothers and sisters are his full siblings; they were raised in the same household. The pattern of poor school performance in the family is relevant because, for whatever combination of reasons, petitioner and his older siblings were unable to succeed in school; petitioner's struggles were not the exception. Moreover, petitioner's older siblings were among his caretakers; not only were they children themselves, but children with fewer resources than most.

The referee found that "the life history of Gerald Trabue, Jr. is immaterial to petitioner." (Report at p. 163.) Gerald Jr. is the sibling closest in age to petitioner, born just eleven months later. They lived in the same home, attended the same schools, and were both middle children who received less of the guidance and attention than was provided to the

[1] Petitioner is unaware of any genetic testing that would demonstrate a propensity for poor school performance, and certainly nothing like that was available at the time of his trial. Petitioner, however, shared his older siblings' genetic endowments, and was raised in the same household and community. Petitioner's younger brother Gerald Jr. is a half-brother, but also shares the genetic heritage from his mother's side, and was raised in the same home.

youngest children. Gerald Jr. also had a juvenile history, beginning before petitioner's. It is reasonable to infer that some of the factors affecting petitioner's development, behavior and functioning also affected his closest brother.

Ultimately, petitioner's was precluded from having Dr. Miora discuss a myriad of impacts on petitioner's development and functioning that would have constituted mitigation if presented at petitioner's penalty trial , and would have helped explain the bases for her conclusions and thereby supported the credibility of those conclusions. This was error.

Like the mental health expert in *Gay*, Dr. Miora's referral question was to "conduct an assessment of the factors affecting petitioner's development, behavior and functioning, as part of a case in mitigation which could have been presented at his capital penalty trial in 1982." (Vols. 91 and 92 of 135 at pp. 3166-3390; RT 7455-7456.)

Like the mental health expert in *Gay*, Dr. Miora was provided with extensive materials. In petitioner's case these included declarations of family members and other lay witnesses declarations and testimony of Nell Riley, Ph.D., who conducted neuropsychological testing of petitioner; testimony of lay witnesses at the evidentiary hearing; trial testimony of petitioner, his mother, and siblings; school records of petitioner, his

siblings, and his father; vital records of family members, a copy of the recorded conversation between petitioner and his co-defendant after arrest; criminal records of petitioner's two older brothers; the report of Dr. Pollack regarding potential mental state defenses to guilt, prepared before trial; and materials prepared in connection with petitioner's time in the California Youth Authority. (RT 7624-7629; Vols. 91 and 92 of 135 p. 3190, 3397-3404) The assessment of petitioner's development, behavior and functioning also included clinical interviews of petitioner on three occasions. (Vol. 91 pp. 3173-3190.) Dr. Miora also personally interviewed petitioner's mother and four of his siblings. (RT 7629-7631; Vol. 91 of 135 at pp. 3195-3207.)

Similar to the opinions of the mental health expert who testified in *Gay*, Dr. Miora formed opinions based on these materials and interviews. Those opinions included that:

(1) petitioner was raised in an environment of poverty, violence, and chaos, with few internal and external resources with which to cope (RT 7794, 7798-7800, 7814-7817, 7827, 7902-7904);

(2) petitioner lacked a secure attachment to his mother, necessary to healthy development, because of "her own fragile state and variable mental stability" (Vol. 92 of 135 p. 3374; RT 7794, 8052-8055.);

(3) petitioner's mother lacked the resources to raise so many children so she delegated care of the youngest daughters to her older daughters; the older sons, Lewis III and to a lesser extent Reggie, were tyrannical rulers of the younger children; petitioner and his brother Gerald, middle children, were largely left to fend for themselves. This lack of supervision as well as availability in the community facilitated drug and alcohol use by petitioner and his siblings (Vol. 92 of 135 3376-3377; RT 7762 – 7765, 7768, 7793, 7837, 7840, 7972-7975, 8045-8056);

(4) and that petitioner's association with a gang arose from a need to belong, and provided some protection against the violence of the community. (Vol. 92 at pp. 3373-3374; RT 7814-7818, 7975-7976, 7991-7994, 8003-8010, 8038-8045.)

(5) Dr. Miora formed the opinion that the pattern of abuse in petitioner's family was of psychological significance, affecting petitioner's development as well as the ability of family members to provide appropriate caretaking. Petitioner was abused by his older brothers, just as his mother had been abused by his father.

> "Well known to the researchers and in the literature pertaining to multigenerational abuse, genetic and psychiatric factors, identification with the aggressor, repetition compulsion and learned behavior are common effects of having been abused. Substance abuse, spousal abuse, child abuse, raging tempers and a host of underlying neuropsychiatric problems abounded and wove a tapestry incapable of

being unraveled through at least several generations of oppressed people in the Gathright and Champion families." (Vol. 92 of 135 at p. 3376; see too RT 7842-7843, 7847-7949.)

(6) School records document petitioner's problems in learning and that until he was housed at CYA, no resources, such as counseling, remedial or special education classes were extended. (RT 7775-7783, 8033.) As mentioned elsewhere in this brief, petitioner's siblings suffered similar and significant school difficulties which Dr. Miora explained were relevant to petitioner's development and functioning because:

> When patterns of performance or patterns of social and emotional functioning emerge, they tell you something about the individual, and if patterns of performance are seen among siblings in a family, it can give one clues into possible difficulties that are family-wide, as well as a possible indication about relationships in the family. (RT 7785.)

School records are the kinds of records upon which experts in Dr. Miora's field rely. She found them relevant to her referral question, to assess the petitioner's development, behavior and functioning. (RT 8034.)

(7) At the time of trial, petitioner suffered from neurodevelopmental deficits, which were to some extent masked by his relatively stronger verbal abilities, but nevertheless noted by those who evaluated petitioner pretrial. (Vol. 91 of 135 at pp. 3208-3211; RT 8234-8237, 8172, 8173-8174, 8185, 8203-8207, 8227-8247.)

(8) Violence in the community impacted petitioner's development. Some of petitioner's friends were killed, and petitioner, along with others, were unsafe on the streets. (Vol 92 of 135 at p.3377; RT 8038-8045, 8051-8052.)

The referee found information about community matters (Vols. 94-95 of 135:Exhibit 141), provided to Dr. Miora and considered by her in her assessment, to be irrelevant. (Report at p. 165.) Material in those documents tended to corroborate the accounts of lay witnesses about conditions in the community and in youth facilities. Again, the referee's conception of relevant mitigating evidence was unduly narrow. The credibility of all witnesses was at issue[2]; contemporaneous documentation of some patterns addressed by witnesses has a tendency in reason to demonstrate the credibility of their accounts.

The referee found that various reports regarding police brutality and school conditions in petitioner's community to be "very slanted or biased." (Report at p. 166.) Whether or not the referee personally believes the police

[2] Respondent's counsel at the evidentiary hearing frequently cited this Court's opinion in *In re Scott* (2003) 29 Cal.4th 783 for the proposition that all family mitigation witnesses fabricate evidence. Of course, that was not this Court's ruling in *Scott*. No court would make such a ruling. The ruling in Scott was case-specific, reflecting a finding based on the facts of that particular case. In any event, the credibility of petitioner's witnesses was attacked in as many ways as respondent's counsel's imagination would allow. Information tending to demonstrate that witness accounts were credible was therefore highly relevant.

were brutal or the schools violent, this information corroborates and documents that those perceptions were held by members of petitioner's family, and thus corroborates to some extent the information from lay witnesses about those matters.

These perceptions in the community have some bearing on why petitioner's family may have been reluctant to report domestic violence to authorities, and the circumstances under which petitioner became affiliated with a gang in his youth.

Additionally, the reference court erred when it excluded the testimony of *percipient* witnesses to incidents which, according to Dr. Miora, impacted petitioner's development and functioning on the ground that those incidents pre-dated petitioner's birth or were not directly experienced or recalled by petitioner, even though there was reason to believe they shed light on the capacities and behavior of petitioner's caretakers or otherwise impacted petitioner's development.

As was true in *Gay*, in the instant case, petitioner attempted to present to the referee "readily available background and **family history evidence** of the kind that was routinely offered at the penalty phase of capital cases at the time of this trial (see, e.g., *People v. Deere* (1985) 41 Cal.3d 353; *People v. Davenport* (1985) 41 Cal.3d 247, 276), [which] might have been considered

mitigating by the jury." (In *re Gay, supra,* 19 Cal.4th at p. 811.)

Early in his testimony, petitioner's uncle, E.L. Gathright, was asked about his life in Mississippi growing up on a farm, picking cotton plowing fields, and milking cows. (RT 5089, 5091-5093.) Respondent objected to the line of questioning on the grounds of relevancy citing to this court's decision in *In Re Scott* (2003) 29 Cal.4th 783. (RT 4093.) Respondent's counsel argued that the background he would describe in Mississippi was not linked to petitioner. (RT 5095-5096.) Petitioner responded that respondent was attempting to narrow the category of mitigation evidence to "those factual situations and circumstances that are either directly witness by or experienced by a defendant...." (RT 5097.) Petitioner explained that the witnesses were being called to present firsthand testimony of life experiences which would ultimately be linked to petitioner to the testimony of a psychologist. (RT 5097.) Petitioner suggested that the court could take the testimony subject to a motion to strike if the appropriate linkage was not established --a procedure which would protect petitioner's right to meaningful review. (RT 5098, 5111.)

Petitioner argued further that there was a separate and additional ground of relevancy, i.e., that it tended to corroborate the expected testimony of additional family witnesses which respondent had put the parties on

notice he intended to attack as recently fabricated for the purpose of helping petitioner obtain a new penalty trial. Ultimately, in attacking the credibility of the lay witnesses, respondent put the court and parties on notice that it thereby also intended to attack the credibility of the opinions of the mental health expert. Petitioner argued that having the witnesses testify for the reference court directly, it could then judge the credibility of those witnesses. (RT 5098.)

Finally, petitioner reminded the reference court that *Scott* did not stand for the proposition that a family member's history is not admissible but rather is admissible so long as a linkage can be established. (RT 5099.) Petitioner, however, was prevented from allowing his expert to establish that "linkage."[79]

Ultimately, the referee ruled that "what took place in Mississippi with this witness [E.L.]... or his understanding or observations as to what happened with defendant's mother in the state of Mississippi" was "too remote for the purposes of the reference hearing." (RT 5112.) The referee was wrong. As explained in petitioner's offer of proof and the summary of Dr. Miora's anticipated testimony evidence concerning the poverty, racism,

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79 There was no evidence that the family or other witnesses in petitioner's case "fabricated" their testimony. This was simply the working theory of respondent's counsel at the hearing, based on his mis-reading of the opinion in *In re Scott*

limited schooling, and violence that Azell and her siblings faced growing up in Mississippi was relevant to an understanding of the personal resources Azell (and her siblings) brought to the difficult task of raising a large family in South Central Los Angeles, and explained why Azell may have been hampered in her ability to provide for and guide her children, why she may have been less able and less likely to access public resources available to assist her and her family than a more middle class, non-African American, California born, better educated person might have been, and why she might have been more hesitant to call upon police for protection from domestic or neighborhood violence. The jury was entitled to know who petitioner's guardian was and what resources she brought to the task of raising her children --- and petitioner was entitled to tell them.

During petitioner's mother's testimony, petitioner sought to introduce evidence of the physical, emotional, and sexual abuse suffered by petitioner's mother at the hands of petitioner's biological father from the time of their marriage in 1958 until petitioner's birth in 1962. Petitioner argued that Lewis II Champion's treatment of petitioner's mother impacted her as a mother, caretaker, and provider to her son. Although the court initially overruled respondent's objection on grounds of relevancy, ultimately the court would not permit petitioner to ask the witness about abuse she suffered

before her pregnancy with petitioner. (RT 5389-5390.) That excluded testimony would have shown a longstanding pattern of physical abuse, which negatively affected Azell's ability to care for herself and her children, both before and after petitioner's birth, and would have also helped confirm the credibility of testimony concerning Lewis II's abuse of Azell during her pregnancy with petitioner.

The referee also excluded evidence of "the circumstances of petitioner's community including the impact of the Watts riots, the relationship between the black community and the LAPD or the LASD on petitioner's functioning and development." (Report at p. 159.)

During the testimony of Linda Matthews, petitioner's sister, Linda was asked whether she remembered Watts riots of 1965, to which she responded "Yes, I do." (RT 5745.)

When asked to discuss what she remembered, respondent interposed an objection as to relevancy, which the Court sustained. When asked whether when she was living on the East side of Los Angeles Linda recalled a time when the National Guard were in her neighborhood. Linda responded that she did. Again respondent interposed an objection of relevancy. The court again sustained respondent's objection. Petitioner established that during the time of the Watts riots, which Linda remembered, petitioner was

three years old. (RT 5745.) When petitioner returned to the subject of the Watts riots later in Linda's examination, respondent objected to any inquiry in the area. The court excused the witness and requested an offer of proof from petitioner. (RT5789-5790.)

Petitioner's offer of proof was not petitioner's sister, who would have been six or seven years old, observed fighters along Central Avenue, which was a block away from the Champion family home. She observed the National Guard with rifles in the street. She heard the bullhorns that the National Guard employed to advise residents of the curfew which extended from dusk to dawn, observed and heard gunshots and helicopters. (RT 5790.) The court asked whether or not petitioner was going to testify at the reference hearing proceedings. When petitioner responded that he would not, the court explained that he curtailed the examination into this area because he didn't think the older sister could testify as to petitioner's perceptions or the impact of those perceptions. As an offer of proof, petitioner explained that the circumstances of the Watts riots created an atmosphere of fear in the family and because of the resulting degree of mistrust of the authorities, family members did not always called the police when things happened in their own home. (RT 5792.) Petitioner also explained that Dr. Pettis, who was expected to testify at that time, would

address the impact the Watts Riots had as part of the theme of in the larger community petitioner did not have the same access to opportunities, systems of support and sense of safety that others might have had. Finally, petitioner asserted that he experiences of the caretakers of petitioner were directly relevant to petitioner. (RT 5793-5794.) Ultimately, the court ruled that whatever impact at the Watts riots had on Linda would not necessarily impact petitioner and on that basis precluded further examination into this area. (RT 5794-5795.)

Likewise, although petitioner, at age 3 had memories of the Watts riots, the reference court precluded Dr. Miora's discussion of how the riots impacted his functioning and development. (RT 8001.)

As a result of the court's rulings, although the referee took note of petitioner's mother's move to Los Angeles, the birth of petitioner's older siblings, that the family depended on the mother's siblings for food and clothing, her emotional breakdown, and the family's struggles to find shelter, by adopting such a narrow view of mitigation, the report omits uncontradicted references to violence and racism experienced by petitioner's mother Azell during her own development and the abuse she suffered at the hands of her husband prior to his abandonment of the family when she was pregnant with petitioner.

So, although Dr. Miora considered the extended family history and community conditions to be of significance to petitioner's development, behavior and functioning, and some of petitioner's lay witnesses were percipient witnesses to these events, because the court restricted lay testimony and deleted any reference to those conditions and the materials Dr. Miora reviewed as any basis for her opinions, the court's order resulted in a denial of petitioner's right to a full and fair opportunity for his expert to explain the significance of these matters, (Exh. 136, Declaration of Dr. Miora, p. 210; RT 7806-7807.)

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Likewise, although petitioner at age 3 had memories of the Watts riots, the reference court precluded Dr. Miora's discussion of how the riots impacted his functioning and development. (RT 8001.)

The referee's rejection of the Watts Riots as a factor affecting petitioner's background and development reflects a stunningly narrow view of the scope of mitigation. Petitioner and his family endured that terrifying incident and all the disruption flowing from it. Petitioner's family also endured the conditions surrounding and leading up to that incident – including but not limited to poverty, discrimination, few job opportunities, poor community relations on the part of the police, and inadequate transportation.

Although the referee also improperly rejected a large body of

mitigating life history information on the ground that the family had not offered it to trial counsel, the referee, however, credited that portion of Dr. Miora's declaration, in which she notes that it may be difficult for family members to reveal "information that is personally embarrassing or intensely shameful . . .." (Report at 213.) 80 This passage is offered in support of the respondent and the referee's position that the failure of petitioner and his family to offer such information to trial counsel relieved trial counsel of any duty to investigate -- thus supporting of the referee's finding that "no counsel or investigator would have been able to discover and develop the family mitigation at the time of trial." (Report at pp. 12, 30.) However, as discussed in detail below, no evidence exists to support that conclusion. . But having reached such a conclusion on the basis of Dr. Miora's testimony about family members' difficulty in revealing embarrassing or painful family history, it makes absolutely no sense for the referee to infer from the family's (or Azell's) failure to disclose such embarrassing information to Skyers (or to a CYA home report investigator) that such information was false.

Thus, the reference court both unduly restricted Dr. Miora's and lay

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80 . That evidence was similarly rejected as a basis for Dr. Miora's opinions, although reports of family members and lay witnesses are a type of information upon which persons in her professional field rely. (Report at pp. 12, 23, 30, 213, 218-224, 227-28, 231, 241.)

witness testimony concerning events and expert opinions which could have been offered at petitioner's penalty phase as mitigation, and baselessly discounted the family history testimony and analysis they were permitted to present.

Further, the referee adopted various flawed arguments of respondent's counsel at the evidentiary hearing to reject Dr. Miora's conclusions and family member testimony about powerful evidence in mitigation.

For example, the referee opined that petitioner's family members may not have been believed because some had testified to petitioner's alibi at the guilt phase, and the jury had convicted petitioner. (Report at 228; see also Report at 15, 229, 236, 242, 268, 276, 286, 289.) While it may be that some or all of the jury might not have believed petitioner's mother, Rita, and Reggie, other family members could have been called at the penalty phase. Also, jurors are instructed on what factors to consider when determining credibility and may find a witness credible as to some things, and not as to others. (See generally Evid. Code 780.) This basis for rejecting the opinions of Dr. Miora is, in fact, inconsistent with some of the referee's own findings: that petitioner's brother "Lewis Champion III was a chronic disruptive factor in petitioner's family" (Report at 13) and "the source of family disruption and inappropriate discipline" (Report at 231); that "petitioner's mother

faced a daily financial struggle to provide for and maintain a large family" and "[i]n performing the duties of a single parent, seeking and obtaining employment, she was not present at home to attend to petitioner's care and supervision" (Report at 14); that "there was credible evidence of family financial hardship and deprivation" and that "Mrs. Champion, when employed, was not able to provide the necessary supervision and attention needed by her family." (Report at 229); that "[a]t the time of trial, credible evidence existed of the love, affection, and high regard for petitioner on the part of his family and some lifelong friends" and that petitioner's mother should have been called to express her love for her son. (Report at 15.)

As discussed by petitioner's *Strickland* expert, reasonable jurors could have credited and given weight to some of the evidence of family members, even if they rejected other parts of that testimony. (RT 3985-3988 [Earley].)

Thus, while a zealous prosecutor could have advanced some or all of these arguments, reasonable jurors could well have rejected them, and instead concluded that petitioner's experiences of abandonment, loss, and chaos in the home were mitigating. Indeed, they are precisely the kinds of life experiences that this Court and others have found that jurors must consider.

6. Exception: The referee erroneously attributes Skyers' failure to uncover mitigating evidence to a family member conspiracy to keep information from him

The referee excuses Skyers' deficient investigative efforts to explore petitioner's social history by placing blame on family members. (Referee at p. 11, 218, 224.)

This finding is (1) contrary to California and United States Supreme Court precedent; (2) not supported by substantial evidence and (3) in conflict with the statements of trial counsel Ronald Skyers.

a. The Finding is Contrary to California and United States Supreme Court Precedent

Simply put, the referee faults petitioner's family with a failure which properly belongs to Skyers. It is the responsibility of trial counsel to conduct a thorough social history investigation. Basic investigation includes not only speaking to the defendant, his mother and a sibling or two, as was done by Skyers, but also gathering records, talking to neighbors, teachers, employers, doctors, CYA personal and others who have information about the defendant.

As this Court discussed in *In re Lucas*:

> "Petitioner did not direct counsel not to contact petitioner's relatives and friends, nor did he direct counsel not to investigate the circumstances of petitioner's childhood... Furthermore, contemporary professional standards required counsel to conduct an adequate investigation of petitioner's background

> even if petitioner himself failed to come forward with evidence of his difficult history. It was counsel, not petitioner, who should have decided what information was relevant to the case in mitigation. We reject respondent's assertion that petitioner's failure to inform defense counsel that he, petitioner, had been abused as a child constitutes a lack of cooperation excusing defense counsel's perfunctory investigation. As noted above, it was counsel's obligation to initiate investigation into petitioner's background. Further, the accused would not necessarily understand the significance of the information that would be uncovered by such an investigation. We observe that [trial counsel] did not press petitioner to reveal information concerning such matters as child abuse--indeed, he apparently viewed such information as having minimal use at the penalty phase. (*In re Lucas, supra,* 33 Cal.4th .) 81

As discussed further below, it is significant that Skyers apparently believed that only "good" information would prove mitigating to a jury. First, his failure to recognize that circumstances unique to the defendant –

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81 Inexplicably, the referee's report cites to neither the ABA standards nor the myriad California and United States Supreme Cases which have, for decades, defined the standard of care required of criminal defense counsel such as: *In re Ledesma* (1992) 3 Cal.4th 578; *In re Marquez* (1992) 1 Cal.4th 584, 607-609; *In re Lucas* (2004) 33 Cal.4th 682, *Strickland v. Washington* (1984) 466 U.S. 668, *Williams v. Taylor* (2000) 529 US 362; *Wiggins v. Smith* (2003) 539 U.S. 510; *Rompilla v. Beard* (2005) 545 U.S. ___, 125 S.Ct. 2456; *People* v. *Pope* (1979) 23 Cal.3d 412,426; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Furman v. Georgia* (1972) 408 U.S. 238; *Proffitt v. Florida* (1976) 428 U.S. 242; *Jurek v. Texas* (1976) 428 U.S. 262; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts (Stanislaus) v. Louisiana* (1976) 428 U.S. 325; *Roberts (Harry) v. Louisiana* (1977) 431 U.S. 633; *Coker v. Georgia* (1977) 433 U.S. 584; *Enmund v. Florida* (1982) 458 U.S. 782; *Bullington v. Missouri* (1981) 451 U.S. 430; *Gardner v. Florida* (1977) 430 U.S. 349; *Presnell v. Georgia* (1978) 439 U.S. 14; *Green v. Georgia* (1979) 442 U.S. 95; *Estelle v. Smith* (1981) 451 U.S. 454; *Dobbert v. Florida (*1977) 432 U.S. 282; *Beck v. Alabama* (1980) 447 U.S. 625; *Hopper v. Evans* (1982) 456 U.S. 605; *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Davis v. Georgia* (1976) 429 U.S. 122; *Adams v. Texas* (1980) 448 U.S. 38; *Williams v. New York* (1949) 337 U.S. 241, 247; *Boyde v. California* (1990) 494 U.S. 370, 382; *Lockett v. Ohio* (1978) 438 U.S. 586 ; *Bell v. Ohio* (1978) 438 U.S. 637; *Eddings v. Oklahoma* (1982) 455 U.S. 104 *Gregg v. Georgia* (1976) 428 U.S. 153.

cognitive impairments, a disadvantaged background, the circumstances of his development – could provide a basis for a sentence less than death was not only inconsistent with constitutional standards and the actual practice of reasonably competent capital defense lawyers at the time of petitioner's trial, but also acted as a set of blinders. Had other forms of mitigating evidence come to his attention, the likelihood is that he would not have paid any attention, as he did not understand the potential relevance.

b. The referee's finding is not supported by substantial evidence

Basic death penalty case investigation included reading police reports, interviews with the client and his family members, gathering information such as school records, family records, birth records, mental health records, prior imprisonment records, prior conviction records, prior arrest records, juvenile records, 1101 evidence, any records associated with a gang allegation, information about the schools that the defendant attended and the neighborhood in which he grew up, and records dealing with petitioner's family including economic conditions and mental health history such as psychiatric files, social service records, birth records and death records. The referee found Skyers conducted no such investigation. The referee found

Skyers investigative efforts deficient. 82

In every instance where Mr. Skyers was asked to describe his investigative efforts, the picture which consistently emerged, was that Skyers' investigative efforts were mostly limited to reading police reports provided by the prosecution and interviewing petitioner, a limited number of petitioner's family members, and perhaps petitioner's parole officer. Nearly exclusively, Mr. Skyers investigative efforts were directed toward the guilt phase of petitioner's case. Skyers' strategy for the penalty phase – if there was one -- was directed toward the theme of lingering doubt – which would be of course guilt issue related.

The referee found that Skyers spoke only with petitioner and some of his immediate family members. According to his testimony and declaration Skyers asked "open ended questions." (Vol. 86 of 135 at p. 1656.)

Skyers conducted no investigation into the areas of mitigation permissible under Penal Code section 190.3. Having failed to conduct an investigation into any potential themes of mitigation other than lingering

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82 "He undertook no separate investigation of the Jefferson murder." (Report at p. 20.) "Skyers did not discuss the CYA reports with the family or petitioner. Skyers did not interview any CYA staff or doctors." (Report at p. 22.) "Skyers did not gather family documents or petitioner school records. He did not contact extended family members who lived in the area. He did not question the family members in a specific detailed method...." (Report at p. 23.) "Skyers did not interview any witnesses or conduct an independent investigation [as to Taylor or Jefferson.]" (Report at p. 24- 26.) "Skyers did not undertake any independent investigation of petitioner's involvement in the Raymond Avenue Crips." (Report at p. 26.)

doubt or an investigation to mitigate or refute the prosecution's evidence in aggravation, Skyers presented virtually nothing to the penalty jury to support a verdict for life.

Any finding that petitioner's family engaged in a deliberate and concerted effort to keep mitigating evidence from Skyers is of simply ludicrous. This is a family which, at the time, did not have a GED or high school diploma among them. According to Skyers, most of his communications were with petitioner's mother who expressed her opinion that petitioner could not have committed the crime because he was on the telephone. (RT 814.)

There is not substantial evidence upon which to affirmatively find that petitioner's mother deliberately and in a calculating manner set out to deceive and actually did deceive a trained and educated lawyer. Moreover, there is no evidence of any collusion on the part of family members to keep information from Skyers. Finally, in light of Dr. Miora's testimony, this Court's recognition (See *Lucas*) that family member's may hesitate to divulge embarrassing information and *Skyers' own recognition* of the same (Vol. 86 of 135 p. 1567; sec. c below), reasonably competent counsel would not have relied solely on the information given by family members.

Had trial counsel conducted even a minimal investigation – collecting

available records – trial counsel would have had numerous red flags indicating that further investigation was needed of family members and family experiences affecting petitioner's background, development, and functioning. These records indicated poor school performance, poverty, family dysfunction, and trauma following the death of petitioner's stepfather, among other things. Petitioner's juvenile custody records established continued poor cognitive abilities (with academic achievement at roughly the 5th grade level), and petitioner's amenability to rehabilitation. All these indicators would have provided trial counsel specific areas of mitigation to pursue in interviews with family members and others.

b(1). Multiple Certified Records from Different Agencies Support Petitioner's Claims 83

Entered into evidence were multiple certified records which support

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83 SIBILING COURT RECORDS EXH. 140: Vols. 92-94 of 135 pp. 3412-3997
COURT EXH. 42 Vol. 135 of 135 (petitioner's copy not bound) pp. 1805-2089

SSI RECORDS
- LEWIS 11 EXH. 142: Vol. 95 of 135 pp. 4387-3398
- AZELL EXH. 143 Vol. 95 0f 135 pp. 4400-1405

SCHOOL RECORDS
- LEWIS III EXH. 144: Vol. 95 of 135 pp. 4406-4416
- REGGIE EXH. 145: Vol. 95 of 135 pp. 4417-4425
- PETITIONER EXH. 146: Vol. 95 of 135 pp. 4426-4445
- RITA EXH 148: Vol. 96 of 135 pp. 4512-4527
- GERALD EXH 149: Vol. 96 of 135 pp. 4528-4542

CYA RECORDS
- PETITIONER EXH. 147: Vol. 95-96 of 135 pp. 1446-1511

each of petitioner's themes in mitigation. The referee inexplicably excluded records pertaining to siblings raised in the same home, and declines to credit others except when they provide an arguable basis for rejecting other evidence.

Certified school records record the difficulties experienced by Lewis III, Reggie, Rita, petitioner and Gerald.

While in elementary school it was noted that Lewis III was not entirely adjusted socially and emotionally and he had achieved little academic growth. He was markedly below grade average and one teacher thought he needed to exercise self-control. (Vol. 95 of 135 pp. 4412.)

Lewis III received mostly C's and D's while in junior high school. (Vol. 95 of 135 p. 4408.) One interesting teacher comment in eighth grade was that Lewis III was not interested in academic subjects; may have problems at home and that "he's never really sure what his mother is using for a last name." (Vol. 95 of 135 p. 4409.) Although it was commented that Lewis III matured in ninth grade he was still an absence and tardy problem. (Vol. 95 of 135 p. 4409.)

After receiving only D's and C's, and multiple unsatisfactories, Lewis III withdrew from high school before graduation. (Vol. 95 of 135 pp. 4407.)

Reggie achieved only C's and D's throughout middle school. (Vol. 95

of 135 pp. 4418.) Reggie did not graduate from high school. (Vol. 95 of 135 pp. 4419.)

Teacher comments indicate that Reggie did not bring writing materials to class and was very slow in whatever he did. Reggie had difficulty in following directions and did not always comprehend what was being said. He was not very successful academically and was noted to be obstinate, cranky and not willing to open up in class. (Vol. 95 of 135 pp. 4420.)

Throughout his academic career Reggie was noted to perform below average academically. He had difficulty getting along with peers, was considered very restless, and may have had a speech impediment. (Vol. 95 of 135 pp. 4423-4425.)

Like her brothers, of Rita received mostly C's and D's throughout her Jr. high and high school careers. Although she too received many unsatisfactory marks, she did receive satisfactory marks in the area of cooperation and sometimes in her work habits. Rita attended high school but she did not graduate. (Vol. 96 of 135 pp. 4513-4514.) Rita was viewed as easily distracted and fearful of new situations. (Vol. 96 of 135 p. 4518.)

In elementary school it was noted that petitioner was an enthusiastic student and that he had good peer relationships. However, he had

difficulties in academics and was easily distracted. There were many absences and difficulties in his family life were noted. (Vol. 95 of 135 pp. 4433.)

In fourth grade it was noted that petitioner had a heart disorder. (Vol. 95 of 135 pp. 4438.)

Petitioner too received mostly C's and D's while in middle school. Like his older brothers he received mostly unsatisfactory marks in work habits and cooperation. Petitioner nearly failed the entire eighth grade. (Vol. 95 of 135 p. 4427.) Petitioner did not complete 10th grade. (Vol. 95 of 135 pp. 4429.)

Gerald Jr. received mostly C's and D's throughout his junior high school and high school years. Gerald did not graduate high school. (Vol. 96 of 135 p. 4534-4535.)

Petitioner's brother Gerald's contact with the juvenile justice system predated petitioner's. In fact Gerald was housed at the California Youth Authority and petitioner's brother Reggie was facing criminal charges for assault during the time petitioner was represented by Skyers. According to an O.R report, dated August 29, 1980, Gerald's criminal record included a 1975 petty theft, a 1978 joyride, a 1979 possession of marijuana, and pending charges of attempted murder and burglary. (Court Exh. 42A pp.

1830.)

In documents available to but not gathered by Skyers, in a probation report prepared for a 10/22/80 sentencing hearing, it was revealed that petitioner's brother Lewis III had suffered several drug-related arrests and was currently in jail for treatment. It was noted that petitioner was at the Youth Training School. Petitioner's family was supported by Social Security and petitioner's mother was unemployed. (Court Exh. 42C pp. 1984-1986.)

Similar to petitioner's mother's attempts to paint a rosy picture about petitioner's home life, Azell told the probation officer in Gerald's case that "she has never had any problems with him in the home. He was always obedient and well mannered." Azell felt that Gerald was probably associating with older kids that influenced him to get into trouble with the police and she felt that he should get probation and be permitted to continue his schooling. (Court Exh. 42C pp. 1992.)

Azell seemed to have little understanding of who Gerald was associating with and while she admitted that he probably should not have had a gun and she said that if he had not had a gun that he may have been killed. (Court Exh. 42C pp. 1992; Vol. 92 of 135 p. 3439.) The probation officer noted that Gerald had had contact with law enforcement agencies

since he was 12 years old. In November, 1980, Gerald was committed to the California Youth Authority after he pled guilty to burglary, two counts of assault with intent to commit murder and admitted to the use of a firearm. (Court Exh. 42C pp. 1997-1998; Vol. 92 of 135 p. 3444.)

Gerald's CYA records indicate he was evaluated by a staff psychologist in November of 1980. In documents available to but not gathered by Skyers, the psychologist found that Gerald's overall level of intellectual ability was below average and that his performance level was "dull normal." (Court Exh. 42C pp. 1997-1999.)

A CYA staff psychiatrist diagnosed Gerald with "conduct disorder of adolescence socialized aggression with a moderate degree of depression." The psychiatrist believed "the current incident has appeared to reactivate old feelings dealing with traumatic effects including the death of his father as well as his treatment in the family." (Court Exh. 42C p. 2000; Vol. 92 of 135 p. 3440.)

When questioned Gerald said that he had a close relationship with his mother but it was indicated that "his development lacked the presence of a strong, positive, father figure who could have provided values, emotional support, and structure and an adequate male model with whom to identify." (Court Exh. 42C p. 2001; Vol. 92 of 135 p. 3441.)

Unlike any of the evaluations petitioner underwent, Gerald was given not only IQ tests but a number of neuropsychological tests which indicated a poor fund and range of information, poor social judgment and poor practical intelligence and vocabulary. Similar to petitioner Gerald overall estimated level of intellectual ability was low average, his verbal level was average and his performance level was below normal. (Court Exh. 42C p. 2002; Vol. 92 of 135 p. 3442.)

The year prior to Skyers representation of petitioner, in police reports available to but not gathered by Skyers, it was documented that Reggie was facing charges of assault by means of force likely to produce great bodily injury and with a deadly weapon. (Vol. 92 of 135 p. 3489.) Reggie's criminal history during the pendency of petitioner's trial included robbery, and grand theft auto. (Vol. 92 of 135 p. 3547.) Certified court documents indicate that in November, 1981, while Skyers was representing petitioner, petitioner's brother Reggie was in the process of dissolution of marriage proceedings. Reggie's then wife alleged that she did not want Reggie around the couple's baby at all. (Vol. 92 of 135 at pp. 3469-3471.) Reggie's wife's request for a stay away order was granted. (Vol. 92 of 135 p. 3474.)

Petitioner has discussed in detail indications in his certified juvenile court record which supported the mitigation theme of positive institutional

adjustment. There are other notations in these records which support other mitigation themes petitioner claims Skyers would have discovered had he conducted a most basic penalty phase investigation and which support the testimony of petitioner's witnesses.

For example, a number of reports discussed petitioner's alleged gang association. In a November 1977, probation report it was noted that petitioner had difficulty "exercising independent judgment in a group situation." (Vol. 96 of 135 at p. 4504, 4510.) Later, petitioner accepted responsibility for his actions and realized it was important to stay away from negative influences. (Vol. 95 of 135 at p. 4465, 4474-4475.)

The love of petitioner's mother for her son was obvious to a visiting parole agent who described Azell as "friendly and cooperative and obviously keenly interested in her son's circumstance." Azell told the parole agent the family planned to visit petitioner regularly. (Vol. 95 of 135 at p. 4495.)

This same report made it clear that Azell might not be the best historian for her son's life. Azell thought petitioner's commitment to the Youth Authority was unfair because "he didn't have time to do it," and that he had some friends who were mainly unknown to his mother. (Vol. 95 of 135 at p. 4495.) Later it was noted that Azell had been giving petitioner "double messages" for many years. "He acquires feelings of rejection and

isolation from other members of his family. But his mother would become overprotective when he got into trouble." (Vol. 95 of 135 at p. 4486.)

The family's reliance on Welfare and disability payments was noted in a December 1978 psychiatric report. (Vol. 95 of 135 at p. 4490.)

Clinical testing in December 1978 revealed petitioner was academically well below grade level – reading at a 5th grade level and performing math between a 5th and 6th grade level. (Vol. 95 of 135 at p. 4493.) He took mainly remedial classes at the Youth Training School. (Vol. 95 of 135 at p. 4480.)

In a December 1978 psychological report, it was noted that petitioner suffered from underlying depression that seemed to be "recurrent and episodic." Petitioner was described as easily influenced by others and somewhat impulsive. Petitioner expressed remorse for his past behavior. Petitioner expressed guilt at having let down his family. (Vol. 95 of 135 at p. 4488, 4485.)

In a January 1979 report, it was noted that petitioner used alcohol and marijuana several times a week over the past two years (aged 15-16 years.) (Vol. 95 of 135 at p. 4484.)

Certified Social Security records paint a picture of a family of few economic opportunities or resources.

Azell and Lewis II married in October 1955. For the most part, both Azell and Lewis II worked at odd jobs. Lewis changed jobs frequently. In the years before Lewis left, the most he earned was $4,000 in 1958. After that year, although the number of children increased, Lewis' income decreased to between $2,000-$3,000 for 1959 and 1960 to under $1,000 for 1961 and 1962. (Vol. 95 of 135 at p. 4388-4406.) Until Azell was employed at Mattel, in 1966, she contributed only minimal amounts to the family income. (Vol. 95 of 135 at p. 4388-4406.) For three of the four years she worked at Xerox between 1973 and 1976, Azell made a combined total of approximately $12,000. Other years, Azell's income was only in the hundred's of dollars each year. She had NO reported income for the 12 years between 1976 and 1988. (Vol. 95 of 135 at p. 4388-4406.)

> c. Skyers was aware that family members might be hesitant to reveal embarrassing information but made no effort to discover evidence in another manner

From his declarations (which the referee admitted for all purposes, including for the truth of the matter stated therein) as well as Skyers' testimony, it is clear that Skyers employed two methods of retrieving information from petitioner's family. As to the underlying capital crime (Hassan) and in particular petitioner's alibi, Skyers asked some directed questions and elicited specific information. For example, Skyers learned

what time petitioner got up the morning of the Hassan murders, what he did, where he went and with whom, who was he on the telephone with and for how long, when he visited with his parole officer and how he appeared at the parole meeting most recent to the Hassan crimes. (Vol. 84 of 135 pp. 1058-1066.)

Skyers' efforts for penalty phase development, of which there were little, was far less focused. Skyers did not discuss with family members the difference between a noncapital and a capital case. (RT 5205.) Skyers did not ask the family to sign releases. Skyers did not collect any life history records. Skyers did not speak to any friends, extended family, teachers, counselors, or anyone else associated with petitioner. 84

As noted above, no evidence in Skyers' files, his reference hearing testimony or his trial presentation documents any investigative results from which one might conclude that Skyers asked petitioner and/or his family about life history themes such as medical histories, economic conditions, or school, marital, criminal, or community experiences.85

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84 Actually, Skyers did not personally interview any one other than petitioner's mother and some family members for guilt phase preparation. In other words, he interviewed no percipient witnesses and conducted no independent investigation.

85 The referee makes an incorrect and racially biased observation that Skyers was African American and therefore could somehow intuit from an observation of petitioner's home and neighborhood that there were "no issues" regarding petitioner's living conditions. (Report at p. 24.) Skyers is not African American, he is of Jamaican descent. His understanding of the living conditions of petitioner's South Central "living

Moreover, Skyers *knew* he could not rely on the answers of family members given to his "open ended questions"...what ever those might have been. At page 5 of his declaration prepared by the Attorney General, Skyers stated: "Of course, I am assuming that any such information was not such that the relatives may have decided for their own reasons to withhold." He explained further that "[i]n the early 1980s, in my experience, most lawyers and lay people felt that the best way to succeed at the penalty phase was to show the defendant as being as good a person as they could get the jury to believe he was. I did not believe that the jury would spare the life of people that they believed to be bad or dangerous, no matter what the excuse or reason there may have been for him becoming that way. Therefore, when asked by an attorney for information that would be helpful to a defendant in a death case, the defendant's family might typically want to paint as rosy a picture as possible and *might not want to volunteer any information, even to their attorney*, that might suggest a motive why the defendant would have been angry and dangerous and therefore would have been the type of person who committed the crime or worst, would be likely to do so again." (Vol. 86 of 135 p. 1567 emphasis supplied.) In this paragraph Skyers clearly recognizes the family members might not want to volunteer certain

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conditions" was limited to what he saw when he visited the area surrounding the Champion home. (RT 1140.)

information which they might perceive as being dangerous to their loved one, and reveals further that he himself was not interested in learning such information. Thus, IF he employed an "open ended" question format HE KNEW it would not likely reveal potentially significant family history.

As demonstrated at the reference hearing, there was a wealth of readily available and credible social history mitigating evidence which reasonably could have been presented had Skyers only gathered appropriate records and properly interviewed people who knew petitioner.

B. Prevailing Professional Norms Required Counsel in a Death Penalty Trial to Conduct a Timely and Comprehensive Investigation into the Evidence He Knows Will be Offered in Aggravation; Counsel's Investigative Efforts Failed to Satisfy these Norms

1. Applicable Law

The United States Supreme Court, in *Rompilla v. Beard* (2005) 545 U.S. ___, 125 S.Ct. 2456, made it abundantly clear that even where a defendant's family and the defendant suggest there is no mitigating evidence available, defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

Rompilla bears striking similarities to Champion's case.

In *Rompilla*, defense counsel conducted some investigation into petitioner's background. Counsel interviewed Rompilla, some of his family

members, but, unlike petitioner, Rompilla was examined by three mental health experts. According to the Supreme Court, none of these sources proved particularly helpful. Rompilla had nothing unusual to report and at times even sent his attorney on false leads. Family members too did not relate anything unusual about Rompilla's childhood. [86] Defense counsel thought the family members were focused on petitioner's actual innocence, so they weren't really looking for reasons why he may have committed the offense. Similar to the Pollack evaluation, the Rompilla mental health experts were asked to evaluate the defendant's competency and mental state at the time of the offense. Nothing in these evaluations revealed any historical information about Rompilla, and the attorneys did not pursue this area further.

As in Champion's case, in Rompilla, postconviction counsel retrieved school records and records of Rompilla's juvenile and adult incarceration. Lower courts concluded that Rompilla's trial counsel had no obligation to retrieve specific records. The United States Supreme Court disagreed and held that regardless of the family responses, *knowing that the prosecution intended to offer Rompilla's criminal history in aggravation, counsel had the*

[86] Unlike the instant case, defense counsel in Rompilla asked "detailed questions" and the reason the interviewed family members had no information about Rompilla is that they did not really know him. (*Rompilla v. Beard*, *supra*, 125 S.Ct.)

responsibility to perform record collection. [87]

The United States Supreme court noted:

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. (*Rompilla v. Beard, supra*, 125 S.Ct.)

The High Court found that without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details

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[87] "There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial." (*Rompilla v. Beard, supra*, 125 S.Ct. at 2464.)

and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

The *Rompilla* court noted that obtaining the prior conviction file was more than just a matter of common sense it was required by the ABA rules in effect at the time of [Champion and] Rompilla's trial. [88] 89

The Court stated further,

> It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let

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[88] "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

89 " **Facts form the basis of effective representation**. The lawyer also has a substantial and important role to perform in raising mitigating factors, both to the prosecutor initially, and to the court at sentencing. **This cannot effectively be done on the basis of broad general emotional appeals**, or on the strengths of statements made to the lawyer by the defendant. **Information concerning the defendant's background, education, employment records, mental and emotional stability, family relationships and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself.** Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution, and will be relevant at trial and sentencing." And "effective investigation by the lawyer has an important bearing on competent representation at trial. **For without adequate investigation, the lawyer is not in a position to make the best use of such mechanisms as cross examination or impeachment of adverse witnesses at trial, or to conduct plea discussions effectively**. The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If they are eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity, as well as their capacity for observation. The effectiveness of advocacy is not be measured solely by what the lawyer does at trial. **Without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel.** (ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

> alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony. (*Rompilla v. Beard*, *supra*, 125 S.Ct. at 2467.)

In the instant case, in addition to being noticed aggravators, Skyers knew the theory of guilt of the prosecution was that all three murder incidents were tied together as a conspiracy among Raymond Avenue Crips to rob and kill drug dealers. Nevertheless, although he based his penalty phase theme on the theory of lingering doubt, he made no effort to gather evidence concerning the homicides and did no investigation other than reading police reports and driving by the murder scenes. For both his failure to investigate the crimes as aggravators and to investigate to present a theme of lingering doubt, Skyers performance falls well below that of reasonably competent counsel.

2. Skyers' Investigative Efforts and Evidence Offered at the Trial

In the instant case, the referee found petitioner's trial counsel's investigative efforts regarding noticed aggravation deficient. Skyers' efforts consisted solely of reading pretrial discovery provided by the prosecution and visiting the Jefferson, Taylor and Hassan crime scenes. (Report at pp.

18-19.) 90

Although the reference court found Skyers was aware that the Jefferson and Taylor murders, juvenile aggravators and gang affiliation were to be offered as evidence in aggravation, counsel conducted no independent investigation into the Jefferson murder or the Taylor murder other than driving by the scenes of those two crimes. (Report pp. 80-21, 25-26.)

Skyers was aware that Mallet's jury trial on the Taylor crimes preceded petitioner's, but he did not attend any of the proceedings or read any transcripts. (RT 641, 849 [Skyers].) Skyers failure to sit in on any of the Mallet proceedings or review transcripts fell below the standard of reasonably competent trial counsel. (RT 3866 [Earley].)

Skyers failure to sit in on Ross' preliminary hearing (which followed petitioner's) or obtain a transcript of those proceedings fell below the standard of reasonably competent trial counsel. (RT 3866 [Earley]) Had Skyers sat in on Ross' preliminary hearing he would have seen that photographs entered into evidence clearly depicted a waterbed in the Hassan bedroom (Vol. 91 of 135 at pp. 3013-3021 [Trial exhibits 56, 67, 69, 75,

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90 Although the referee cites "CYA reports of petitioner" (Report pp. 19, 21-22), among the pretrial discovery provided by the prosecution, there was no evidence that any Youth Authority reports other than the juvenile aggravators police reports were provided to Skyers by the prosecutor. In fact, the referee later finds Skyers **did not obtain a copy** of petitioner's CYA file from any source but rather found he reviewed petitioner's CYA file at a field office. (Report 31-32.)

77]), and would have had a solid, non-inculpatory explanation for what could have been a waterbed reference during the tape-recorded conversation between petitioner and Ross.

Skyers acknowledged he had the Naimy and Koontz report regarding Mallet and Simms. (RT 663 [Skyers].) Skyers was aware that the prosecution would argue petitioner was with Ross and Mallet in a car frequently driven by Player and that this car was associated with the Taylor crimes. Skyers was aware of the circumstances of the police pursuit and that the individuals fled the scene from the abandoned Player car. (RT 1080-1088 [Skyers].)[91] [92] Skyers was aware that Robert Aaron Simms was a possible suspect in the Taylor homicide. Skyers performed no independent investigation to determine what if any involvement Simms had in the Taylor offenses. (RT 1104 [Skyers].)

Skyers had information in his possession that petitioner approached the scene of the Taylor crash vehicle with Marcus Player and Wayne Harris. Nevertheless, Skyers made no attempt to contact Wayne Harris or Marcus

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[91] Skyers did not contact Frank Harris regarding who had been driving his vehicle the evening of the Taylor homicides or for any other purpose. Skyers was aware that Marcus Player had been eliminated as a potential suspect from Taylor because he was being detained by police at Helen Keller Park at about the time of the offense. Skyers made no attempt to contact Marcus Player. (RT 1105 [Skyers].)

[92] Skyers undertook no efforts to compare the clothing of the Taylor suspects to clothing worn by petitioner. Skyers did not interview any of the Los Angeles Police or Sheriff's deputies regarding their observations as to the Taylor offense. (RT 1109 [Skyers].)

Player. (RT 1106 [Skyers].)[93] Skyers failure to speak to these witnesses, or to have an investigator do so was "incompetence." (RT 4050 [Earley].)

Skyers was aware that hours after petitioner, Marcus Player, and Harris were detained by deputies, that Mallet was found hiding in petitioner's backyard. (RT 1101 [Skyers].) Skyers was aware that individuals had been detained at Helen Keller Park immediately prior to the chase of the Player vehicle. Skyers made no effort to determine whether any of these individuals had information which could be helpful to petitioner[94]

Skyers was aware that a .358 Magnum belonging to the Hassan victim was in the car associated with the Taylor killing and that the same car may have been seen at the Hassan residence. (RT 1046, 1084-1086 [Skyers].) Skyers was aware that Ross was involved in both cases and that there was an allegation of gang association which the prosecution argued connected

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[93] When asked whether he had any conversations with petitioner about where he was on the evening of the Taylor homicide just prior to approaching the perimeter area with Marcus Player and Wayne Harris, Skyers responded "I can't recall correctly. I might've talked to him about that, but I can't recall." Skyers did not ask petitioner when he testified any questions regarding the Taylor offense. Petitioner was asked questions about Taylor during cross- examination. (RT 1106 [Skyers], TCT 3026-3123.)

[94] When asked whether, if Mr. Champion had been with these detainees wouldn't that have been evidence that you would have wanted to offer at trial should the prosecution attempt to implicate Mr. Champion in the Taylor offense, Skyers responded "I didn't assess that evidence as necessary, so it would be hard for me to say at this time whether or not it would be. ***If I knew that the Taylor case was either charged to Steve or was going to be brought up for some other reason, my answer would be yes, I think it would be very important."*** (RT 1111 [Skyers].) Skyers, of course, had been put on notice that the Taylor case was going to be "brought up for some other reason," i.e., that it was going to be introduced against petitioner as Evidence Code 1101 evidence at the guilt phase and as a sentencing aggravator at the penalty trial if the case got that far.

petitioner to the Taylor case. (RT 664-665, 1083 [Skyers])

Skyers was aware that the prosecution's theory that the Hassan, Taylor, and Jefferson homicides were all part of a continuing conspiracy of Raymond Avenue Crips to rob and kill drug dealers. Skyers believed that any association with Craig Ross would negatively impact petitioner. Skyers was aware that the prosecution was relying on petitioner's purported involvement in Taylor as evidence that he was involved in Hassan. Skyers relied upon the fact that petitioner was not charged with Taylor to justify his lack of investigation into this crime.

Skyers did not then or at the time of his testimony at these proceedings appreciate the evidentiary value of what evidence there was connecting petitioner to the perpetrators of Taylor, or the fact that it was noticed aggravation. [95] [96] Skyers relied on his motion to sever petitioner's case from Ross's case to prevent evidence of Taylor coming in at petitioner's trial – when it failed, he still undertook no investigation to meet the evidence he knew would be offered against his client. Moreover, Skyers conducted no independent investigation to demonstrate appropriate grounds for

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[95] The number of documents relating to Taylor and provided to Skyers by the prosecution would have alerted reasonably competent counsel that the prosecution believed there was a connection to the defendant and that case. (See RT 1071 [Skyers].)

[96] "I did not find that there was enough to connect him with that case, and I felt they would have charged him." (RT 1086 [Skyers].)

severance. (RT 1084-1086 [Skyers].) [97]

Skyers' preparation for the testimony of Cora Taylor and his cross-examination of the witness after she positively identified petitioner as a perpetrator of the crimes against herself and her family fell below the standard of reasonably competent counsel at the time. (RT 3867.) [98]

Based on the fact that the prosecution *didn't charge* petitioner with Taylor, Skyers drew the conclusion that the offenses *were not being offered* against him. Not understanding the significance of Evidence Code section 1101(b) evidence, Skyers did not give any consideration to the use of the Taylor evidence as evidence of a similar crime, as evidence of a conspiracy,

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[97] Skyers was aware that efforts had been made to have petitioner identified by Mary Taylor, Cora Taylor and William Birdsong at a physical lineup prior to trial. However, even after Cora Taylor's in court identification and Mary Taylor testified that petitioner looked like one of the men in the home, Skyers did not introduce the evidence of failures to identify petitioner by surviving witnesses. (TRT 1114.)

[98] "I don't believe he was competent. [Although] there is no way you can prevent a witness from coming in. You can anticipate the question being asked, do you see someone in the room.... there are reasons that a competent lawyer would have been prepared for identification procedures in Taylor. It is apparent that he was not. The fact that Mr. Champion was not identified at an earlier show up, assuming if you just assume for fact that in order to be prepared for an in court identification you would certainly be prepared to show that he was not identified as a participant in a killing, especially knowing that the prosecution was trying to link all these crimes to the same gang and potentially the same person and introducing them in aggravation against your client, and it's 1101 evidence. That evidence would be evidence that would point towards exoneration, so at the very least, you'd want to attempt to interview the witnesses. I didn't see any effort in this case at all that Skyers interviewed any percipient witness to the crimes. Sending an investigator out, that's a minimum thing you do on a death penalty case is percipient witnesses. But certainly would be prepared to present no i.d. of Mr. Champion, if you're assuming that the witnesses are not going to be able to identify him at trial. If they do identify at the trial, you have an added benefit, you now have those witnesses under subpoena, you have the reports, and you at least know what to impeach them on." (RT 3868 [Earley])

or as a basis for arguing, as respondent did at trial, that petitioner was involved in the Hassan crimes. (TRT 1520.)

Further, Skyers conclusion that the Taylor offenses were not being offered against petitioner was contrary to what Skyers was informed by the trial prosecutor about the use of Taylor. [99] The decision not to investigate the Taylor crimes fell well below the standard of reasonably competent counsel at the time. (RT 3868.) [100]

Other than reading police reports, the referee found that Skyers did not conduct any investigation into the juvenile aggravators presented by the prosecutor. (Report pp. 19, 21.)

The referee found that Skyers conducted no independent investigation into petitioner's relationship with his co-defendant Craig Ross, the tape-recorded conversation between the two, or petitioner's association with Raymond Avenue Crips. (Report at pp. 10-11, 12, 21.)

Although the taped conversation with Ross was a noticed aggravator,

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[99] [pretrial] DA: "I don't understand what counsel means by being involved. I think Mr. Champion is involved in this entire conspiracy. I do not have any evidence that he was directly inside the Taylor residence." (TRT 1520.)

[100] "If you're looking at just the penalty phase and you're looking at culpability between Mr. Ross and Mr. Champion, and you assume Mr. Champion, that there was no evidence that he was involved... obviously you would want to show that. So that you would have the argument that Mr. Ross obviously is involved, much more involved than Mr. Champion was much more likely to be a leader and Mr. Champion follower. So you would assume that he would be prepared for that, to present that evidence, even if there had been no identification, you would expect a reasonably competent lawyer present that evidence at guilt and certainly at penalty." (RT 3869 [Earley].)

Skyers did not have the tape independently transcribed and did not request any transcription from the prosecution. On the day testimony began it was Ross's attorney asked for a transcription. There is no indication in the record that Skyers was aware of the requirement that a transcript be provided. (RT 1926-1927, 1933, 1935-1936 [Skyers].)

Skyers undertook no investigation into the relationship between Ross and petitioner, whether Ross and petitioner associated during the relevant time period, or Ross's criminal record and character.

Skyers was aware that at the time of these offenses petitioner had turned 18 only by a couple of months, however Skyers did not offer evidence under factor (i) or argue it was a mitigator. Skyers seemed to believe age was synonymous with build; however in the instant case, themes of mental domination and influence and positive prison adjustment were supported factually by petitioner's young age, the fact that his codefendant was more than 3 years older and had been to prison, petitioner's low intelligence and how he performed at CYA. (RT 1120-1121 [Skyers].)

To the extent that Skyers engaged at the time in a thought process which led him to exclude age as a mitigation theme, any decision in this regard was not a reasonably competent decision and was not based on any

investigation whatsoever, particularly where the prosecutor used age to aggravate the offenses. (See Argument Below.)

The referee found that "the principal focus [of Skyers investigation, preparation and presentation at the penalty phase] was lingering doubt. 101 (Report at p. 19.) In spite of his reliance on petitioner's innocence of the underlying capital murder i.e., lingering doubt, the referee found that "Skyers did not independently investigate or interview any of the prosecution witnesses [to the Hassan murder, i.e., did not investigate lingering doubt]." (Report at p. 20.) 102

In the instant case, Skyers was aware the prosecution intended to offer juvenile offenses and petitioner's corresponding commitment to the Youth Authority. As a result, Skyers had the responsibility to gather all of petitioner's juvenile records. As discussed above, those records – particularly when coupled with Gerald Jr.'s CYA records, Lewis III and Reggie's criminal records, and sibling school records, would have prompted

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101 At the penalty phase, through petitioner's CYA parole officer, Skyers attempted to offer evidence of petitioner's innocence arguing to the court "I think it is never too late, even in the penalty phase, to offer evidence that goes to the guilt of the defendant." Following established case law, the trial court refused Skyers permission to do so. (TRT 3669.)

102 Skyers: "Well, I guess, I don't know if you call it a theory. But the case, I thought the case in chief itself was guilt phase, I thought was still, even though he was convicted, was still weak on Steve. And one of the factors in 190.3 is for the jury to look at the case itself, and I felt that in penalty phase there should be probably some jurors who would have some continuing doubt about the case." (RT 1124.)

reasonably competent counsel to, at the very least, continue an investigation in the areas of poor school performance, positive institutional adjustment, and mental health issues such as depression and drug use.

Skyers was aware that the prosecution intended to offer in aggravation petitioner's association with Raymond Avenue Crips. As a result of that knowledge Skyers had the responsibility to thoroughly investigate petitioner's alleged association, status within the gang, reasons for association, and intention and attempts to disassociate.103

Skyers had no expertise as a sociologist or a gang specialist. Skyers did not consult a sociologist regarding any assertions of petitioner's involvement in a gang and did not consult a gang expert. (RT 1123 [Skyers].)

Skyers believed the prosecution's representation of petitioner as an original (O. G.) Raymond Avenue Crip was accurate. However, petitioner was only 12 or 13 years old when he first associated with the Crips. The Crips were already well established as petitioner's older brothers made way for him to join. He could not have been an "original" member. Other known members were much older and attended school with petitioner's older siblings. Skyers undertook no investigation to determine the genesis of

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103 The referee denied petitioner's request for funding to consult with a gang expert to speak to gang issues.

the Raymond Avenue Crips, who the founding members were and where petitioner's association fit into the evolution of the gang. (RT 640, 660-661[Skyers].)

Skyers was aware that the prosecution intended to offer in aggravation petitioner's association with Evan Mallet104 and Craig Ross as evidenced by the tape recorded conversations. As a result of that knowledge Skyers had the responsibility to investigate the circumstances of the conversations and the meaning behind the language.

3. Mitigating Evidence Presented at the Reference Hearing

By the time petitioner's penalty phase trial commenced, petitioner had been found guilty of murdering 13 year old Eric Hassan and his father. Petitioner had been identified by a surviving victim – the mother of the female rape victim and the male murder victim – as the third perpetrator inside the Taylor house. Petitioner had been portrayed as a gang member. Pictures of petitioner holding a gun had been displayed to the jury. The jury had heard a taped conversation between petitioner and Ross which could have been interpreted as evidencing no remorse, knowledge of the Hassan murder scene, plans to escape, and potential danger to law enforcement. The jury had heard argument that petitioner was involved in the murder of four

104 Skyers' file did not contain a tape or transcription of the taped conversation with Mallet, and it was not offered into evidence at petitioner's trial.

people on three separate occasions.

a. Taylor

On December 27, 1980, Michael Taylor, was killed in his mother's duplex in South Central Los Angeles. (TRT 2122.) Taylor had been shot in the head at point blank range with a revolver. (TRT 2340.) Mr. Taylor lived with his mother, Cora Taylor, and his sister, Mary Taylor. Cora Taylor, Mary Taylor, and a friend, William Birdsong, were in the duplex at the time of the killing. Only Mary Taylor and Cora Taylor testified at petitioner's trial. Each testified that three men entered the apartment and a fourth man remained outside the apartment door, apparently serving as a driver/look out. Cora identified petitioner as one of the three men who entered the apartment. Mary testified that petitioner resembled one of the men. Insofar as all three surviving victims were locked inside the bathroom when Michael was killed, there were no eyewitnesses to the murder. (TRT 2133-2134, 2167-2170, 2245.)

The theory of the prosecution was that whoever committed the Hassan crimes committed the Taylor crimes. This was so, because evidence from the Hassan scene was tied to the vehicle associated with the Taylor murder.

The prosecution introduced physical evidence including jewelry and eyewitness identification as evidence of petitioner's guilt in Hassan. After

Cora Taylor's identification, the prosecutor reframed his theory of petitioner's involvement in the Taylor crimes to include arguing the possibility he was inside the residence.

At the reference hearing petitioner proved, beyond a reasonable doubt, that the four perpetrators who committed the Taylor murder were Ross, Mallet, **Robert Aaron Simms** and **Michael Player.** 105 106

The facts surrounding the Taylor murder and their indication of petitioner's innocence as well as the guilt of Michael Player and Robert Aaron Simms are set out in great detail in petitioner's pre-reference hearing pleadings and his proposed findings of facts. (See Pet Claim IV: Vol 35 of 135 pp. 35-83; Pet. Exhibits: Vol 18 of 135 pp. 44-276, Vol. 19 of 135 pp. 282-429; Pet. Prop. Findings: Vol. 1 of 135 pp. 57-75.) The evidence admitted at the reference hearing confirmed petitioner's pre-hearing theory of who committed the Taylor crimes. The supporting documentation was admitted into evidence at the reference hearing as part of Skyers' trial file

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105 Ross and Mallet were convicted of the crimes. At the reference hearing, petitioner presented no additional evidence of their guilt. At trial the prosecutor conceded that either Marcus or Michael Player was one of the four men involved, however Marcus' alibi was iron clad as he was detained in the park during the Taylor crimes. (Vol 85 of 135 pp. 1402-1406, Vol. 85 of 135 pp. 1414-1419.)

106 The prosecution's burden was to prove petitioner guilty beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21.) Thus, as testified to by petitioner's *Strickland* expert, it would not be necessary to present evidence of an iron clad alibi and it would not dissuade reasonably competent counsel from presenting petitioner's alibi because of any inconsistencies between the testimony of lay witnesses and the testimony of law enforcement witnesses.(RT 3962-3963, 3886, 3972 [Earley].)

and law enforcement officers testified to the events of the incident. Petitioner also presented lay testimony – as well as his own trial testimony on cross examination -- as to his whereabouts at the time the Taylor crimes were committed.

Contrary to the conclusion of the referee, petitioner's noninvolvement in Taylor is not dependent on the testimony of lay witnesses, but rather can be established from examination of police reports which were provided to trial counsel and admitted into evidence at the reference hearing and the testimony of police witnesses at petitioner and Mallet's trial and at the reference hearing.

But for the erroneous finding of Simms fingerprints and Marcus Player's "unavailability" – which petitioner will address below, the referee agreed with petitioner that at the time of petitioner's trial, reasonably competent counsel could have presented evidence that petitioner had an alibi for the Taylor murder. (Report at 270, 288, 297.)

i. Exception: The Referee Errs in Failing to Find that Simms' Fingerprint Would Have Been Available at the Time of Petitioner's Trial

Foremost, fingerprint evidence received at the reference hearing leaves no doubt, as was conceded by respondent, that Robert Aaron Simms

was the third person inside the Taylor residence. 107 Simms' fingerprint was found in the residence having been lifted from an object one of the robbers had handled. (Vol 134 of 135 pp. 1753-1755.)

At the time of petitioner's trial, exemplars of Simms' fingerprints would have been available to law enforcement and/or Skyers. Simms was arrested and booked into jail. The booking process in LA county jails required taking fingerprints. It was during the booking process that Simms was positively identified. (RT 2480, 2545, Vol 83 of 135 p. 621; Vol. 71 of 135 at pp. 658-659; see too Vol 112 of 135 at pp. 4377: **Simms was booked under case no. 596717, but the file was destroyed.)**

Thus, Cora Taylor's identification of petitioner as one of the three men inside her house was mistaken. That identification of petitioner as having been involved in another murder just two weeks after the Hassan murders could certainly have weighed heavily in jurors' sentencing deliberations. Had trial counsel undertaken the efforts undertaken by petitioner post conviction, he could have proved Robert Aaron Simms involvement as the third person in the Taylor home. 108 As the theory of

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107 There is no dispute that the other two persons who entered the Taylor residence were Ross and Mallet, each having been convicted of the Taylor offenses and identified as having raped and/or attempted to rape Mary Taylor in the bathroom of that residence.
108 As mentioned above and explained fully below, Robert Aaron Simms was arrested after he exited from the containment area set up by Sheriff's deputies to captured two of the men who fled the Player vehicle and was identified as matching the description of one

the prosecutor at trial was that either Marcus Player or Michael Player was involved in the crime and it was proved that the Taylor vehicle -- the getaway car – was last seen in Michael Player's possession, there is no doubt trial counsel could have then, and petitioner has now raised more than just a reasonable doubt that petitioner was involved.

Overlooking the enormous weight of the fingerprint evidence inculpating the true perpetrator, the referee found that petitioner had failed to prove by a preponderance of the evidence that an exemplar of Simms' fingerprints was available to trial counsel. What the referee overlooks is that had Skyers undertaken the efforts at trial undertaken by petitioner post conviction, the fingerprints of Simms, who had been arrested and booked into jail, would have been available through Simms' jail records as well as from Simms himself. (Vol. 112 of 135 at p. 4377: **A file had existed [no. 5967617] but was purged.)**

ii. Exception: The Referee Erred in Finding that Marcus Player Would Have Been Unavailable to Skyers in Support of Petitioner's Defense Against the Allegation That He was Involved in the Taylor Murder

The referee found that Marcus Player would not have cooperated with trial counsel in an effort to develop and present petitioner's alibi to the

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of the men seen in the getaway car.

Taylor crimes. The referee found Marcus Player may not have cooperated with Skyers because he might face prosecution for "harboring" Ross. (Report at p. 169.) However, Player was arrested on 1/8/82, more than four months after Mr. Skyers began his representation of petitioner. (Vol. 108-135 at pp. 3261-3263; RT 4166.) In other words, Skyers could have spoken to Marcus when he was not facing a "harboring" charge and as he was already under arrest at the time of trial, he faced no further chance of being charged if he testified. Moreover, Marcus testified that he was not fearful of a perjury charge because he had nothing to do with the Taylor crime – a fact confirmed by law enforcement testimony and contemporaneous documentation. (RT 2037.)

Also, Player's actions and statements which support petitioner's noninvolvement were recorded by police officers on the night of the crimes. In police reports provided to Skyers, Marcus' noninvolvement in the Taylor crimes was established, and he told police his brother Michael was last seen driving his stepfather's car which was the Taylor get away vehicle. (Vol. 85 of 135 pp. 1414-1419, 1440; Vol 18 of 135 at p. 177.)

Marcus Player's testimony was that he might not have cooperated with **police** on the Taylor case. However, reasonably competent counsel would not forgo investigation of the Taylor crimes or presentation of petitioner's

alibi and noninvolvement based on this testimony. (RT 2036, 4163-4164 [Earley].) 109

iii. Exception: The Referee Errs in Concluding that Petitioner's Defense Evidence was Not Credible

In support of a defense to the penalty phase allegation of involvement in the Taylor murder, petitioner submitted the transcribed testimony of police officers at both his own and Mallet's criminal trials and the live testimony of police officers at the reference hearing. Many of these officers prepared police reports at the time of the Taylor crimes. These police reports had been provided to Skyers pretrial, they accompany petitioner's pre-hearing pleadings and were identified by Skyers at the reference hearing. (RT 2093-2251: Deputy Naimy; RT 2259-2316 Deputy Koontz; RT 2320-2356: Deputy Hollins; RT 2358-2423: Deputy Martin; RT 2424-2448 Deputy Smith; RT 2451-2548: Detective Dewitt; RT 2552-2590 Deputy Lambrecht: RT 2593-2614 Deputy Tong; Vol. 84 of 135 at pp. 910-1007.)

Respondent did not argue and the referee did not find that the facts testified to regarding the Taylor crimes, which were supported by contemporaneous police reports, were not accurate. Petitioner's position was that given these facts – especially in light of the prosecution's argument

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109 Fearing retribution from prison officials, Player believed he was testifying at a risk to himself. Nevertheless, he cooperated with petitioner's post conviction counsel. (RT 2083.)

at trial that petitioner was involved in the Taylor crimes, its reliance on that involvement to prove petitioner's guilt of the capital crime (Hassan) as well as a noticed aggravator and its presentation of Cora Taylor's identification of petitioner as the third person inside her home, that as a noticed aggravator reasonably competent counsel would have used the evidence adduced at the reference hearing in hopes of creating a reasonable doubt as to petitioner's involvement, so as to convince one or more jurors that petitioner should not be sentenced to death.110

The referee found that "the evidence and witnesses as to a possible alibi were readily available [with the exception of Marcus Player]." (Report at p. 264.) Other than the testimony of petitioner's lay witnesses, the referee did not find the (law enforcement) evidence "not credible" but rather found that it did not necessarily eliminate petitioner as a perpetrator and for that reason reasonably competent counsel would not have presented it. (Report at p.108, 312.) In so doing, the referee appears to have lost sight of a capital defendant's penalty phase burden, which is only to raise a reasonable doubt as to other crimes aggravating evidence, and also to have abandoned his role of appraising how reasonable jurors might have responded to evidence by

110 In his petition, petitioner claimed that this evidence should have been offered at the guilt phase, however, at a very minimum, it should have been offered at the penalty phase in response to this noticed aggravator.

anointing himself a 13th juror – one who is not personally persuaded of petitioner's noninvolvement.

Petitioner discusses in question no. 3 below why reasonably competent counsel would have presented evidence to raise doubt as to petitioner's involvement in the Taylor crimes. Here, he summarizes the evidence supporting petitioner's noninvolvement that no party disputes as credible and was reasonably likely to have persuaded one or more jurors that the prosecution had not proved petitioner guilty of the Taylor crimes beyond a reasonably doubt.[111]

> a.) Petitioner was elsewhere with friends at the time of the Taylor crimes and approached the containment area from a location making it unlikely that he had been in the getaway car

Shortly before midnight, 12/27/80, several Los Angeles County Sheriff units were dispatched to Helen Keller Park following a call of a gang disturbance. (RT 2367, 2371, 2380 [Martin].) The deputies detained several Black males. Not every male in the park at the time was detained and/or identified. Not all deputies prepared reports (RT 2362 [Martin]), and when the chase of the Player vehicle began, the deputies abandoned their detention

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111 The referee found that Skyers never made a decision whether to introduce Taylor alibi evidence or not. Even though his hope was to exclude evidence of Taylor by a motion to sever based on the dissimilarity of the crimes, he did not investigate the Taylor homicide AT ALL "because he had enough to do with the Hassan crimes." (Exh. 33 Vol 86 of 135 pp. 1670-1671.)

of the individuals in the process of obtaining identifying information. (RT 2565 [Tong].) Reserve officer Naimy recalled that all of the men in the park were not kept together. (RT 2111-2112, 2198.) 112

As he testified at trial, petitioner was in the park when the crimes at the Taylor residence were being committed. (Compare TRT 3026 [petitioner's trial testimony] with RT 2460-2461[testimony of Detective DeWitt, placing time of Taylor offenses between 11:45 p.m., December 27th and 12:15 a.m., December 28th, 1980.) 113 Although petitioner's testimony

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112 Wayne Harris was not detained in the park with Marcus, and although he had a connection to the Player vehicle (registered to his uncle Frank Harris) he was not considered a suspect in the Taylor crimes.

113 TRT 3026-
Q: [BY DA SEMOW]Where were you on the night of December 27 through 28
A: I was home some and I was out
Q: what time were you home
A: Between 10:00-11:00
Q: And what time were you out
A: Around that time, Maybe 11:00, 11:30
Q: And you were out after 12 o'clock, weren't you?
A: Yes. It may have been close to 12:00.
Q: Where were you, Mr. Champion, when you were out that night?
A: Well, the police, Los Angeles Lennox Sheriffs, had me apprehended at a corner approximately of my block on 126th and Budlong, me and Marcus Player.
Q: And you saw that car just at the time that the sheriff's deputies stopped you on December 27th-28th, didn't you"
A: Yes.
Q: The car had already collided with a telephone pole at the corner of 126th and Budlong, wasn't it?
A: Budlong.
Q: Isn't that a fact?
A: I don't know if it collided, but I saw it parked up on a curb next to a pole like it was rammed up on a pole.
Q: All right. And it was after you saw that that the Sheriffs stopped, wasn't it?
A: Yes. Well, they had us apprehended in the park.

Q: Mr. Champion, are you saying that they apprehended you in the park before they apprehended you on Budlong?
A: Well, see, that night when I came from the store they had Marcus Player and everyone apprehended, the Los Angeles Lennon had took off. So we was walking up on my street, and then that's when we saw the –
Q: Mr. Champion, you are saying that Marcus Player was stopped by deputies at some time prior to the time that you were stopped with him?
A: Yes, we were.
Q: All right. Now, at the time that you saw the car up against the telephone pole, is that no correct?
A: Yes.
Q: Now, you are saying that Marcus Player was stopped – that was same time after midnight, wasn't it, between about 12:00 and 12:30
A: It could have been, I'm not sure of the time.
Q: And you are saying at some time earlier than that you are saying the sheriffs stopped Marcus Player, is that correct?
A: Yes.
Q: Now they didn't stop you at that time?
A: No, because I was at the –
Q: I'm not asking you why, Mr. Champion, I am asking you yes or no.
A: If you let me explain
Q: Your attorney can ask you that. I'm asking you were you or were you not with Marcus Player the first time.
A: No I wasn't
Q: All right. Do you know any Sheriff's deputies who would have seen you –
Q: I will rephrase the question. The first time Marcus Player was stopped, that was shortly before midnight, wasn't it.
A: I'm not sure of the time. It could have been close.
Q: It was about how much time before you and he were stopped together?
A: Ten minutes, five.
Q: And that was in Helen Keller Park, was it not.
A: Yes.
Q: Now, did you see who stopped Marcus Player at that time?
A: When I was coming from the store, which is behind Helen Keller Park, they had around about seven young men on the ground, and I asked, I said, What happened, you know, because we was at the park playing basketball, and he said Lennox Sheriffs apprehended him and had him on the ground asking questions.
Q: On the ground when you were talking to him?
A: No. He was just getting off the ground.
Q: And were the Sheriff's deputies still right over him at that time?
A: No. They had took off.
Q: So, you did not personally come into contact with any Sheriff's deputies at that time.
A: No.
Q: Who was on the ground besides Marcus Player at that time?

A: Marcus and some of the younger guys.
Q: What are their names?
A: I can't recall their names, One time it was Andy, I remember that.
Q: And you know of your own personal – did you see the car crash?
A: No.
Q: So, you don't know if this happened before or after the car crashed?
A: I don't know....
Q: Now, the first time then that you personally came in contact with the police was when they detained you and Marcus Player on Budlong, is that correct?
A: Yes.
Q: Any you think that that was 15 minutes or so later?
A: About 10 or 15 because they kept us on a corner for a while.
Q: Could it have been as much as a half hour, couldn't it Mr. Champion?
A: No.
Q: Who was with you at this time besides Marcus Player?
A: Another guy by the name of Pops, and that's it.
Q: What is Pops' true name?
A" Wayne.
Q:" Wayne Harris?
A; Yes.
Q: Is he a Raymond Crip?
A At one time he was....
Q: Was he with you when you saw Marcus Player earlier in the evening?
A: Yes. We was all together.
Q: Who else besides Pops?
A: It was another – around four, five more dudes and another guy. I remember his name; buy the name of Andy. I had just met him.
Q: do you know where he lives?
A: No.
Q: Do you know where Pops lives, don't you?
A: I know where his mother lives....
REDIRECT
Q: Now, as to that car crash on Budlong and 126th did you see it happen?
A: No.
Q: When you came along you saw the car in that position?
A: Yes.
Q: And you were going to say something about you were stopped at your street. Is that what you said.?
A: Yes.
Q: Were you on your street at that time?
A: Yes.
Q: When you were approaching did you see police officers there?
A: Yes.
Q: Did you turn and run in any direction, go anywhere?
A: No.

Q: You approached them?
A: Yes
Q: And you came towards your house?
A: Yes?
Q: And did they stop you at that time?
A: Yes.
Q: Okay, and did they let you go home?
A: No, They made me walk to 127th and Budlong.
Q: And at that place what did they do?
A: Some more officers took out a pencil and pad, took down my name and told me to walk to 127 and Raymond.
Q: Okay, and then what else took place?
A: They held me on the corner and then LAPD came flashing a light on me, and they told me to go home.
Q: Did they bring anyone to look at you?
A: I couldn't really see. It was an LAPD car. I didn't see who was behind it because the lights was in my eyes.
Q: then they made you go home
A: Yes.
Q: Now, the mention bout the apprehension in the park, there were not three or four, but more than that?
A: About five or six
Q: And did you see police officers
A; Yes
Q: At that time?
And did you walk towards where you saw them?
A: Yes.
Q: And by that time the police offices had left?
A: Yes.
Q: And you asked Marcus what happened?
A: Yes.
Q: Okay. Now, that night of the 27th you were out of your house. Did you at some time – were you at some time in your house when the officers surrounded the area?
A: Yes.
Q: And did you hear dogs barking and so forth.
A: Yes.
Q: And were you in your house at that time?
A: Yes.
Q: And was your mother home?
A: Yes.
Q: And was your sister Linda home?
A: Yes
Q: And was your sister Rita home?
A: Yes.

at trial—while on cross examination -- is lengthy, because it is corroborated by the testimony of the witnesses at the reference hearing and the documentation available to Skyers and presented at the reference hearing it is set out in full.

According to Officer Naimy, as soon as they turned on their lights and siren (i.e. before the suspect vehicle crashed), the four or more sheriff's vehicles in the park left the park and joined the pursuit. By the time they "got on the radio," in other words within a very short time, the containment area was being set up. (RT 2144, 2146 [Naimy].) 114 The containment area was a square city block bordered on the north by 126th, on the east by Budlong, on the south by 127th, and on the west by Raymond. (Photographic Exhibits 74, 75, 76 [not copied or bound].)

When the vehicle crashed, two of the suspects fled into the containment area and two fled parallel to it. Mallet and Simms were the two who fled into the containment area. Mallet was captured hours later while hiding in petitioner's back yard. Simms was captured when he exited the containment area on 127th St and Raymond. (RT 2163, 2167-2169, 2302, 2340, 2349 [Naimy, Hollins].)

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114 The referee's diagram (Report at p. 108-A) is not entirely accurate. The suspect vehicle came to rest diagonally on the curb on 126th St. (See Exhibit 70 [Naimy drawing]; RT 2130.)

The perimeter was completely set up quickly. (RT 2434 [Smith].) Petitioner was seen approaching the containment area from the vicinity of 125th and Budlong, a block north of the containment area. He was accompanied by Marcus Player and Wayne Harris. (RT 2330-2332 [Hollins].) Field identification cards were prepared on the three and they were ordered to travel a path around the containment area and stop at each command post along the way. As they passed the corner of 127th and Budlong and headed on 127Th toward Raymond, they were joined by Simms who stepped out of the bushes. (RT 2333, 2337-2338 [Hollins], Vol 86 of 135 at pp. 1603-1604; RT 2437-2438 [Smith].)

Petitioner was never considered a suspect at the time. Officers questioned the men. Petitioner, Marcus, and Harris answered their questions, were not identified by any officer and were ruled out as suspects after Taylor witness failed to identify any of the three were eventually told to go to petitioner's house. (RT 2571-2574 [Lambrecht].)

Officers had examined petitioner, Marcus, and Wayne Harris for signs they had been running or anything else that might tie them to the suspect car. (RT 2448-2449, 2760 [Smith, Harris].) Petitioner told the officers that he lived within the perimeter. (RT 2439 [Smith].) Officers believed it "unreasonable" that petitioner, having a home inside the perimeter would

exit the home and voluntarily subject himself to the scrutiny of the officers who manned the perimeter and patrolled the area. (RT 2409 [Martin].) Moreover, the perimeter was set up to prevent people entering or *exiting.* Officers took note of who was around and made sure they were who they said they were and that sort of information. (RT 2434 [Smith].)

Petitioner's trial testimony that he was in the park with friends when a car chase began -- and so could not have been a participant in the Taylor crimes -- is further supported by the testimony of lay witnesses.

Marcus Player testified that on the night of the Taylor crimes, before the car chase and crash, he was at his fiancée's house. He left her house to go to Joe's market which was located on the south end of Helen Keller Park on El Segundo. (RT 1971 [See too petitioner's trial testimony].)

On his way to the market, Marcus observed a number of people in the park including his cousin, Wayne Harris and petitioner. Player stopped to talk to Harris and petitioner. After leaving petitioner and Harris, Marcus proceeded to Joe's liquor store. Marcus did not see where petitioner or Harris went. Marcus went into Joe's liquor store and made a purchase. (RT 1972-1974 [Marcus].)

It was as Marcus proceeded back through Helen Keller Park that he first observed Sheriff's cars. He recalled that when the sheriffs arrived, the

people playing basketball scattered. Marcus was told to place his hands on top of a sheriff's vehicle. Marcus formed the impression that the deputy detaining him knew who he was. It was while the deputy continued his questioning that Marcus first saw his stepfather Frank Harris' car about to come into the park at 126th St. (RT 1975-1977[Marcus].) Marcus overheard someone say the name of a rival gang, "Denver Lanes." The Sheriff's deputies got into their cars and left immediately. (RT 1978-1979[Marcus].)

The vehicle, (Frank Harris' car) traveled west on 126th St. Because that street is sloped, Marcus lost sight of it almost immediately. Marcus heard the crash and because he thought it was his stepfather's car he decided to see what happened. Just as he was about to leave the park, Marcus heard either petitioner or Wayne Harris call his name. The three decided to see what had happened together. (RT 1981-1983 [See petitioner's trial testimony].)

The three traveled west on 126th St, following the path of the car. They were stopped by Sheriff's deputies when they approached Budlong. From that vantage point, Marcus could see the car had crashed. (RT 1983.)

Before the car chase and crash, sometime after dark and around dinner time on the night of the Taylor homicides, Wayne Harris went to Helen Keller Park to play basketball. Wayne recalled there were a number of

people in the park but could only remember petitioner and Marcus Player by name. (RT 2734-2735 [Harris].)

As Harris and petitioner were leaving the basketball courts to go to the store, Harris saw LASO cars coming into the park. (RT 2735-2737 [Wayne].) Harris heard the deputies shout at the people in the park to come over and put their hands on the deputies' cars. Harris recalled perhaps six people did so, including Marcus Player, who he and petitioner had been speaking to earlier. (RT 2739 [see petitioner's trial testimony].)

After seven or eight minutes, Harris saw the suspect vehicle attempt to turn into the park from 126th St. It appeared to him as if the occupants of the vehicle saw the Sheriff's deputy's cars parked in the parking lot because it immediately reversed and sped off. At the time Harris did not recognize the car as belonging to Frank Harris. (RT 2742-2743.)

The individuals who were detained disbursed. Harris and petitioner met up with Player and began to follow the car's path. (RT 2746 [Harris].)

As they were approaching the crash site of the car, Harris, petitioner and Marcus were stopped by Sheriff's deputies. They were asked where they had been for the last 20 or 30 minutes. Harris responded that they were in the park. The deputies asked Marcus whether he was driving the car. Marcus responded that he was not and another deputy said that he could not

have been driving the car because he had been detained in the park. (RT 2751-2752 [Harris].)

The deputies continued to ask questions about Harris and petitioner's whereabouts. Harris explained that they were at the south end of the park observing their friends' detention. After a few more questions, the deputies sent the three to another deputy's car. (RT2754.)

When Harris approached the crash site he knew the car belonged to Frank. Wayne, Marcus Player and Michael Player all drove the car. Petitioner never drove the car. (RT 2755-2756 [Harris].)

Before the car chase and crash -- from about 7:30 p.m. on the night of the Taylor homicide, Earl Bogans was playing basketball at Helen Keller Park. (RT 2645.) There were a number of other people in the park including petitioner, Marcus Player and Andy Wilson. (See petitioner's trial testimony.) Neither Simms nor Michael Player, both of whom Bogans knew, were in the park. When sheriff's deputies arrived Bogans and his friends had stopped playing basketball and were sitting around smoking marijuana. Bogans estimated the time as before midnight and sometime after 10 p.m.. (RT 2648-2650, 2658.)

At first there were only two deputy's cars. They shined lights on the group, then had them lie down on the pavement where they were searched.

(RT 2651[Bogans].)

All of a sudden a car entered the park, went into reverse and sped away. The deputies stopped what they were doing, got into their cars and sped away. Bogans went home (RT 2654-2657 [Bogans].)

The last time Bogans saw petitioner was when he was in jail awaiting trial. Petitioner told Bogans that they were trying to pin a murder on him that happened on Vermont Street [Taylor]. (RT 2662.) Because petitioner had been with Bogans at the park at the time of the Taylor homicide, Bogans knew that petitioner was not involved. He fully expected to be contacted by petitioner's lawyer, but never was. (RT 2658, 2663-2664, 2666-2667. [Bogans])

(i.) Exception: The Reference Court Erred in finding Petitioner's Lay witnesses not Credible

Based on the fact that they were "loyal" gang members at the time of the Taylor crimes and trial, the referee found that the testimony of Marcus Player, Earl Bogans and Wayne Harris was not credible. (Report at p. 108.) This finding is not based on substantial evidence.

Marcus had no reason to lie for petitioner because, thinking petitioner only faced the Hassan charges, he did not realize the importance of his information to petitioner's defense. (RT 2069 [Marcus].) Petitioner's testimony at trial, of which none of the three was aware further indicates the

credibility of their testimony. (TRT 3026 and above.)

Discrepancies between these witness' recollections does not mean one or all are lying. It is not uncommon for there to be discrepancies between the recollections of various witnesses, particularly after the passage of decades. "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often see or hear it differently." (CALJIC no. 2.21.1.)

Should reasonably competent counsel have determined that any one of these three witnesses was not credible, they were not all necessary to support petitioner's alibi. (RT 3963-3965, 3972, 4174, 4176, 4217-4218.) Lay witnesses gave the names of others in the park, some of whom are documented in police reports, who may or may not have been detained, who could be contacted and used should counsel determine the gang members were risky witnesses. (RT 1969-1970, 1997, 2665-2667, 2708.) Moreover, potential difficulties with credibility did not relieve trial counsel of the obligation to conduct a reasonable investigation, or present evidence tending to show that the state had not met its burden of proof beyond a reasonable

doubt.

Petitioner's family members' testimony also supported petitioner's Taylor alibi.

Rita recalled the evening of December 27, 1980. Of her family, her mother, Linda and her two little sisters were home. Rita could not remember whether Reggie was there. She did remember petitioner coming in some time after 11 o'clock at night. Rita also saw Marcus Player and Wayne Harris at the house. She did not see Craig Ross. (RT 5322.) She remembered the night because there was a lot of police activity outside. (RT 5314-5315, 5317-5318.)

b.) Reasonable jurors could have concluded that Simms and Michael Player were the two additional perpetrators who, along with Ross and Mallet, had committed the Taylor crimes

Even without the absolute proof through fingerprint evidence that Simms, rather than petitioner, was inside the Taylor residence, there is sufficient evidence for reasonable jurors to have concluded -- or at least accepted as a reasonable possibility -- that Simms and Michael Player were the other two perpetrators who had joined with Ross and Mallet to commit the Taylor crimes.

Simms was seen exiting the bushes to join petitioner, Marcus Player and Wayne Harris by officers. (RT 2394-2399[Martin].) Officers formed

The referee found that reasonably competent counsel would have consulted with a fingerprint expert. (Report at p. 265.) Had Skyers done so, he could have asked that Simms' prints be compared with the Taylor scene – that comparison did not take place until the reference hearing.

In any event, Naimy's identification of Simms and Simms' suspicious actions would have been enough to have further investigative efforts undertaken. (See discussion of inadequate investigative efforts below.) This is so because Naimy's recollection of one man based on the same characteristics – height, general body description, race, general description of age and clothing—that matched Mallet -- led to the successful prosecution of Mallet for the Taylor murder. (Vol 71 of 135 at p. 661.) 115

Michael Player was the third perpetrator – the lookout/get away driver. The vehicle used in the Taylor homicide was registered to Frank Harris, Marcus and Michael Player's stepfather and Wayne Harris' uncle. When interviewed about who was the last known driver of the vehicle, Marcus told police it was Michael. (RT 2479-2480, 2576, 2580 Lambrecht].)

Shortly after it crashed the vehicle plates were run and it was not listed as stolen. (RT 2150-2151 [Naimy].) At the time of the crime, Naimy

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115 Also, none of the surviving Taylor witnesses could identify Mallet at the scene. (Vol 70 of 135 pp. 241, 306, 390; Vol 72 of 135 p. 872.) Both Ross and Mallet were identified from photographs. (RT 2475.)

the conclusion that Simms joined petitioner, Marcus and Harris as if he was trying to "hook up with the other three individuals who were walking away from us." He was in a place he should not have been and had no excuse for being there. He gave a false name and matched descriptions of one of the men seen in the suspect vehicle before it crashed. (RT 2438 [Smith].)

Deputy Naimy testified that Simms was brought to his location for identification. Naimy testified Simms' "clothing, body size, approximate weight, and the general shape and configuration" was consistent with one of the people that exited the left side of the vehicle. (Vol. 71 of 135 at p. 652, 659.) Simms was one of the taller men in the car. (RT 2133, 2141 [Naimy]; Vol 71 of 135 at p. 655, 659.)

Although, Simms identified himself to Naimy by his true name, he later he gave the false name of James Taylor to another officer. (Vol. 69 of 135 at p. 83; Vol 71 of 135 at p. 658, 659, RT 2130-3133, 2141.) Simms' actions and similarity to the person Naimy saw flee resulted in "a determination that Simms...was one of them." (RT 2172.)

Simms was arrested, booked – and therefore fingerprinted -- into custody at the Los Angeles County Jail under booking no. 5967617 – a case which, because Simms was a juvenile and not charged with any crime following his booking – was destroyed. (Vol. 112 of 135 at pp. 4376-4377.)

Player was not conducted. Photographs of Simms were not shown to any of the three surviving Taylor witnesses. Dewitt admitted that the log does not indicate any efforts to make such a comparison between witness descriptions and Simms and/or Michael Player. No effort was made to match Simms' clothing to witness descriptions. (RT 2519-2521, 2523, 2945 [[DeWitt, Strong].)

> c.) Evidence of additional deficiencies in law enforcement's investigation would have supported a reasonable juror's conclusion that the Taylor murder was not proven against petitioner beyond a reasonable doubt

At the reference hearing, petitioner presented evidence that there were additional deficiencies in the Taylor police investigation and the prosecution's evidence presented at trial. These were not investigated or presented at trial.

(1) One complication which impacted the Taylor investigation was that it involved both the Los Angeles County Police Department and the Los Angeles County Sheriff's Department. This was perhaps due to the fact that the Taylor residence was located in the jurisdiction of Los Angeles Police Department rather than the sheriff's department. In the initial stages, sheriff's deputies did not have any information that a homicide had occurred and believed they were pursuing a stolen vehicle.

It appears Simms was released to his mother before the connection

had information that Michael was likely the driver of the vehicle, and this was the very theory that was argued by the prosecutor [who knew from police reports that Marcus was not involved.] (RT 2195 [Naimy].)

Law enforcements' failure to pursue either Simms or Michael Player as a suspect was either due to inept police work, oversight, or intentionally done for reasons unknown.116 Officer Dewitt, the lead homicide investigator assigned to the Taylor case testified that there was no indication in the Taylor police reports and other documentation that any investigation was done whatsoever regarding Michael Player's involvement. It appeared he was never called in for questioning. Michael Player was not interviewed. (RT 2486-2487, 2491-2493.) Michael Player's prints did not match prints taken from the crime scene (RT 2497 [DeWitt]), thus supporting the conclusion that he was the fourth man -- the getaway driver.

Los Angeles Homicide Detective Dewitt was questioned about the police log of events entered into evidence. (Vol 83 of 135 pp. 609-622.) A photo six pack was not prepared with a picture of Simms. A photographic six pack was not prepared for Michael Player. Frank Harris was not interviewed. A physical lineup which contained Simms and/or Michael

116 Dewitt was not permitted to answer whether or not Michael Player was engaged in informant activities prior to 1980. (RT 2495.)

between him and the Taylor murder vehicle was determined. Additionally, given the presence of Ross and the "alleged" connection between him and petitioner, efforts were focused on petitioner rather than Michael Player or Simms. (RT 2935-2927;Vol. 85 of 135 at pp. 1402-1406, Vol. 108-135 at pp. 3203-3206, 86 of 135 at pp. 1599-1602.)

(2) Standard police procedure would have required showing compilations of photographs of robbery suspects and rape suspects to the surviving victims of the Taylor crimes. There is no indication this was done. (RT 2910-2911 [Strong]; Vol 83 of 135 pp. 609-622.)

(3) Standard police procedure would have involved not only interviewing the surviving victims at the Taylor residence and compiling photos for their identification but also a more thorough investigation involving evidence from the rape, canvassing the area for forensic or witness information, thorough fingerprint analysis, documentation of cars or individuals seen in the area, impounding of the Player vehicle, interviewing anyone who had ever had contact with the vehicle and interviewing the registered owner (RT 2940-2944 [Strong].)

(4) Given the fact that the Player/Taylor vehicle was eventually identified as associated with the Hassan crime, one would have expected the Hassan detectives, were they following standard investigative procedures, to

show photographs of Michael Player and Marcus Player to any Hassan witnesses and have their prints run from the Hassan scene. The fact that the vehicle contained the murder weapon should have made it a focal point of the investigation. (RT2945, 2976 [Strong].)

(5) In reality the graffiti – which the prosecution argued advertised petitioner's involvement in Taylor, said "Do or Die" not "Do Re Mi" -- thus rendering the trial gang expert's testimony that it advertised a robbery erroneous and irrelevant. Because the pictures were taken just days before petitioner's trial rather than any time near the Taylor offenses, the graffiti could not be dated -- thus rendering any opinions about the graffiti's connection to Taylor as pure speculation. Finally, because the graffiti was actually authored by Karl Owens, any connection between it and petitioner's involvement in Taylor was disproved. (RT 693, 1117-1120, 3803 [Skyers, Earley]; Trial exhibits 177, 178, 179.) Respondent established that Karl Owens declared that he was the author of the graffiti by declaring: "In the early 1980's I was known by Drac. I recognized the writing of Lil Drac as my own. I believe I wrote the other words." (Vol. 108 of 135 at pp. 3257-3258; RT 4872-4874 [Strong].)

(6) Although there was sufficient evidence to associate Simms with the Player/Taylor vehicle and the suspects who fled from it, the investigation

of Simms was extremely limited. Standard procedure would have required a lengthy interview with Simms to determine whether or not he had been involved in the homicide. Efforts would be made to determine whether the surviving victims could identify him. The fact that he had given a false name and a suspicious alibi was significant. (RT 2948-2953 [Strong].) Because he was taken into custody he could have been checked for gunshot residue and his reasons for being within the containment area would have been determined. (RT 2977 [Strong].)

(7) None of the leads as to possible causes or motives for the Taylor homicide, which included personal motives, were followed up by law enforcement. (RT 2904-2905 [Strong].)

None of these investigative tools were employed in the Taylor case.

b. Jefferson

i. Exception: The Referee Errs in Finding that Petitioner Presented No Evidence at the Hearing Rebutting Any Alleged Connection Between Petitioner and the Jefferson Murder

The referee found that petitioner did not present any additional mitigation or rebuttal evidence as to the Jefferson murder. (Report at p. 79.) This is simply not so. At the reference hearing, petitioner presented testimony by Steve Strong, a former Los Angeles Police Department homicide detective and expert in homicide investigation, establishing that:

(1) There was nothing in the commission of the Jefferson crimes which indicated petitioner or Ross was involved. (RT 2894-2895 [Strong].)

(2) The Jefferson homicide did not bear any sufficient similarity to either the Taylor or Hassan crimes to indicate they all were gang motivated or committed by the same individuals. (RT 2863-2864, 2872-2876, 2888-2894, 2893-2894 [Strong] .)

(3) The Jefferson homicide had the indications of a drug robbery/homicide. These types of crimes occurred frequently during the relevant time period. (RT 2895 [Strong].)

(4) Although Hassan and Jefferson were both known to be drug dealers, a large quantity of drugs was left behind at the Hassan crime. Taylor was not known to be a drug dealer of the same quality as Hassan or Jefferson.

(5) As to the police investigation of the three homicides – Hassan, Taylor, and Jefferson -- one available area of defense would have been to criticize and/or explain the circumstances of the various investigations. For example, although the Jefferson and Hassan crimes were in the same geographic area they were handled by different detectives. The Robbery/Homicide division handled the Hassan crimes because of multiple victims. (RT 2898-2999 [Strong].)

(6) Before making a determination that petitioner was "a crime partner" of Ross, standard police procedures required some documentation that the individuals were being arrested together, stopped together, had prior arrests together, and socialized at a certain location together. (RT 2913-2915 [Strong].) No such information existed for petitioner and Ross. (RT 2916 [Strong].) In fact, until only a few months earlier, petitioner had been in CYA since 1978 and Ross in state prison.

Reasonably competent capital defense counsel would have marshaled the evidence to demonstrate that the state had failed to prove petitioner's culpability for this alleged other violent crime, beyond a reasonable doubt.

c. Juvenile Aggravators

i. Exception: The referee erred in not recognizing that petitioner presented evidence mitigating his involvement in the juvenile offenses and in denying funding for a gang expert, whose testimony would have permitted presentation of more such mitigating evidence

The referee made no credibility determination regarding petitioner's evidence mitigating his participation in the juvenile aggravators, but rather, inexplicably stated petitioner offered no such evidence. (Report at p. 89.)

Although – some 30 years after their occurrence – petitioner did not offer evidence as to the facts involved in the 1977 robbery and 1978 burglary, petitioner did in fact offer mitigating evidence which could have

been presented to petitioner's penalty jury. The referee's failure to recognize petitioner's evidence as mitigation is another example of the referee's misunderstanding of just what constitutes mitigation and, as these offenses were noticed aggravators, the responsibilities of reasonably competent counsel defending a capital client.

Much of the social history mitigation evidence petitioner discovered post conviction is relevant to mitigating and understanding petitioner's involvement in the juvenile gang-related offenses. The fact that petitioner from the age of six years on grew up without a strong, stable, nurturing father figure and an abusive older brother is certainly relevant to his gravitation to the love and protection of older boys in the neighborhood. Unfortunately, petitioner recognized too late that many of these young man would be a negative influence on him. Although petitioner realized while at the California Youth Authority that he was responsible for his own actions, as testified to by Dr. Miora, for petitioner being in a gang "meant having a sense of family, being part of a group, being taken in, being paid attention, being cared for in a way and that he had felt lost at home and not recognized." (RT 8003 [Miora].)

Petitioner first became associated with a criminal street gang around the age of 11. A number of individuals described as Raymond Avenue Crips

gangs members were neighbors and family friends who had grown up and gone to school with petitioner and/or his siblings. (RT 5268 [Rita].) By virtue of his older brother's involvement petitioner entered the gang "by proxy". He was invited to participate in various activities such as drinking alcoholic beverages at Helen Keller Park. Petitioner told Dr. Miora that if he didn't show up when he was expected or where his associates planned to meet he would be looked for. These friends cared about what was going on in his life in a way that petitioner did not experience at home. For petitioner this was a positive affiliation, a feeling of belonging, and a feeling that somebody was really looking after him and caring about his whereabouts. (RT 8004 [Miora].)

Dr. Miora explained that this positive association correlated with a lack of father figure in petitioner's home. Petitioner associated with gang members who were older by several years, and so they became "somewhat of a replacement for a father figure." (RT 8004.)

There was no effort made by petitioner's mother to protect petitioner or keep him away from associating with gang members. At this time of petitioner's life, petitioner's mother's emphasis was on raising her girls. Her male children were permitted to run out in the streets unprotected. (RT 8008 [Miora].)

Community dangers also contributed to petitioner's association with gang members and participation in street crimes. Until shortly after Gerald Sr.'s death, the family lived on the east side of Los Angeles. The area was very dangerous. Lewis III and Reggie were getting into fights frequently. Lewis III and Reggie also beat up petitioner as a way" to toughen him up." (RT 7800, 7932 [Miora].) Petitioner began walking around the neighborhood unsupervised when he was as young as five or six years old in a neighborhood that was extremely dangerous. There were shootings, fights, lootings and robberies. Dr. Miora was of the opinion that petitioner was inadequately supervised and exposed to great potential danger. (RT 7815-7817.)

Petitioner's mother moved the family to the West Side because of her perception that it was less dangerous. (RT 7819 [Miora].) Rita recalled that while this seemed to be true at first then the neighborhood changed into a very dangerous place. The neighborhoods surrounding petitioner's West Side home began to change in the mid-1970s. Rita noticed that there were a lot of fights in the park and people's homes were getting broken into. She saw evidence of gangs and the neighborhood continued to deteriorate. Rita also noticed there was a lot greater police presence. (RT 5263-5264 [Rita].)

In addition, evidence was presented that it was not until junior high

school that petitioner started to get into trouble. When he was sent away to a juvenile offender camp, his friend Gary Jones was very upset. Jones and petitioner had heart-to-heart discussions about the troubles petitioner was going through. Jones thought petitioner was a good kid, just mixed up and without proper parental supervision. Jones' parents supervised him in ways petitioner was never supervised. Jones saw petitioner when he was released from the California Youth Authority. It was in 1980 the year Jones graduated from high school. Petitioner never graduated from high school. To Jones it seemed as if the two picked up their friendship right where they left off. Jones was getting ready to go to college and petitioner also talked of going to college. (RT 5683-5688 [Jones].)

Finally, because the referee denied petitioner's repeated requests for funding with which to retain a gang expert, petitioner was prevented from fully presenting evidence to address gang related themes such as a) the impermanency of gang membership and gang criminality, b) the psychological factors leading to gang membership, and c) the negative and positive impact of gang affiliation on petitioner. This information would have been relevant to mitigate petitioner's juvenile aggravators, which were both gang crimes. Nevertheless, as with the Taylor and Jefferson murders, the referee found that reasonably competent counsel would have investigated

petitioner's juvenile arrests and adjudication history. (Report at p. 264-265.)

d. Gang Association

i. Exception: Given that Gang Affiliation was a Noticed Aggravator, the Referee Erred in Refusing to Fund a Gang Expert, thereby Preventing Petitioner from Fully Exploring Gang Related Issues and Presenting Relevant Mitigating Evidence on this Subject

Although petitioner was denied funding with which to retain a gang expert, as discussed above, petitioner did present some evidence related to this noticed aggravator which the referee found to be credible. (Report at pp. 108-115.) The referee found that petitioner's neighborhood was considered to be nice until the mid-1970s. From that point forward Rita, who was still in high school, noticed evidence of gangs which included graffiti and violence in the neighborhood. By 1978 there was an increased police presence, fights at Helen Keller Park and homes were being burglarized. (RT 5265-5266, 5272 [Rita].) Gary Jones recalled the neighborhood in which he and petitioner grew up as really rough. (RT 5671.) By the time petitioner was in middle school gangs began to dominate the area. Every 10 to 12 blocks there was a different gang. Drugs became more available. Restaurants were robbed and people were being shot. (RT 5672, 5679 [Jones].)

By seventh grade Jones and petitioner affiliated themselves with the

Raymond Avenue Crips. At that time their affiliation consisted of meeting in the park to drink beer and smoke marijuana. If there was a fight Jones and petitioner would fight and they would be protected. Jones described his association in the gang as "a social club." (RT 5672, 5674, 5677.)

The referee credited Dr. Miora's opinion:

> "Lacking a sense of belonging, again, that is consistent with my understanding of, and the development of my opinion that his gang affiliation was to a large extent, or I'm not saying it was the only factor, driven by his desire to be connected, to feel a sense of belonging, to feel a sense of protection that was not available in other contexts, in his academic world, at home, and in the community at large." (RT 8130, Report at p. 110.)

The referee also found reasonably competent counsel would have "independently investigated petitioner's involvement in the Raymond Avenue Crips – which investigation Skyers did not perform. (Report at p. 265.) The referee did not find petitioner's evidence was not credible or that reasonably competent counsel would not have presented it.[117]

e. Taped Conversation

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117 The referee only found that a mitigation expert or other expert seeking to introduce mitigation concerning positive CYA adjustment, childhood development/functioning, increasing community dangers, lack of gang involvement and lack of association with the Raymond Avenue gang members , might be questioned about petitioner's violent history, gang membership or petitioners prior statements. (Report at p. 293.) As discussed below and noted by petitioner's Strickland expert, petitioner's violent history, gang membership and prior statements were all placed before the jury at the guilt phase and argued by the prosecutor as grounds for finding him guilty of murder and for imposing death. Therefore reasonably competent counsel would have offered some mitigating evidence to explain petitioner's history and alleged association with a street gang.

i. Exception: The referee errs in finding that petitioner presented no evidence to support claims that if Skyers had properly investigated the taped conversation between Ross and petitioner he could have shown that the transcript was deficient or incorrect and mitigated the contents and impact of the recorded conversation

Skyers was on notice that the prosecution intended to introduce the taped conversation between petitioner and Ross as a circumstance in aggravation. The prosecutor offered the tape to show petitioner's awareness of the facts of the Hassan crime, violent character, lack of remorse, future dangerousness and connection to Ross. The tape was introduced at the guilt phase, and the prosecutor relied upon it to argue lack of remorse at the penalty phase. 118 Skyers did not have the tape independently transcribed. Ross's attorney asked for a transcription on the first day of testimony. There is no indication in the record that Skyers was aware of the requirement for a transcript. Skyers did not discuss the tape with petitioner. Skyers made no effort to determine whether petitioner had knowledge that the Hassan home had a water bed and from what sources. Petitioner could have obtained such knowledge from Ross, or from any of petitioner's three attorneys, Ross's two

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118 SEMOW: Are these people with remorse? Are these people who care anything whatsoever about other human beings? Are these people that deserve any kind of mercy? Did he show remorse – to Mr. Ross show remorse during that conversation that they had on that taping months later? They laughed. Mr. Champion laughed when he heard Mr. Ross mistake Bobby Hassan, senior for Bobby Hassan, Jr. "Was that a waterbed in that room?" (RT 3727-3728.)

attorneys, or from the photographs entered into evidence at Ross's preliminary hearing.

The referee found that petitioner did not present any evidence to support claims that if Skyers had properly investigated the taped conversation between Ross and petitioner he could have shown that the transcript was deficient or incorrect and that no mitigating evidence was presented by petitioner. (Report at p. 89.) These findings are incorrect and not supported by substantial evidence.

At the reference hearing petitioner presented evidence that there were numerous plausible explanations to counter arguments the prosecutor made regarding the taped conversation between petitioner and Ross. Although it contained "tough talk" and talk of escape plans, petitioner and Ross were in a secured police van that the jury could have witnessed through photographs or the testimony of a police witness. Much of the tape is unintelligible and not transcribed, including those portions which directly precede and follow the "water bed" comment. The water bed information was part of prior court proceedings, and that information was contained in police reports and photographs. Given Ross's identification as a perpetrator though fingerprints, one might expect he would have had information about the inside of the Hassan home. Also, Ross appears to be doing most of the

talking. (RT 3095, 3829 [Earley].)

Reasonably competent counsel would have recognized that there were ways to mitigate the taped conversation, including referring petitioner to a psychologist or psychiatrist to evaluate his mental functioning, determining whether or not petitioner was a leader or a follower, and investigating petitioner's prior history. (RT 3830 [Earley].)

C. Reasonably Competent Counsel Would Have Presented the Evidence Discovered Post Conviction and There Were No Circumstances (i.e. No Rebuttal) Which Weighed Against Presentation

After concluding that reasonably competent counsel would have tried to obtain the evidence that petitioner presented at the reference hearing (Report at pp. 262-266), the referee concluded that reasonably competent counsel would not have presented the evidence presented by petitioner as to petitioner's "alibi" for Taylor or evidence of petitioner's adjustment while it CYA. (Report at pp. 266-267.) The referee found that based on CYA evaluations, reasonably competent counsel would have concluded that no further testing or further examination of petitioner were warranted. (Report at p. 267-268.) The referee found that the only areas of petitioner's social history which should have been presented were petitioner's family members love and affection for petitioner, his history of being loving toward them and his protective nature, petitioner's mother's difficulties in being a single

parent raising a large family with very limited income, the absence of a father figure, the impact of Gerald Trabue's death on the family and petitioner's school difficulties. (Report at p. 268-269.) 119

The referee made additional findings about petitioner's gang membership, substance abuse, probation/parole history, juvenile adjudication history which are unclear but appear to signal the referee's opinion that evidence presented at the reference hearing regarding each of these areas would not be mitigating. (Report at p. 269.)

Thereafter, the referee concluded with his gratuitous finding that "reasonably competent counsel conducting the appropriate investigation for penalty phase evidence would have been well within the standards of competent practice to have done at petitioner's penalty phase exactly as petitioner's trial counsel did." (Report at p. 286)

The referee is wrong and multiple reasons compel the conclusion that reasonably competent counsel would have presented the evidence presented by petitioner at the reference hearing and that that evidence presented no danger that damaging rebuttal evidence would follow.

1. Exception: The Referee Erred in Failing to Fully Credit the

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119 The referee repeatedly erroneously refers to petitioner's mother as "Mrs. Champion." At the time of her testimony, petitioner's mother's legal name was a Azell Jackson.

Strickland Expert's Opinions

Petitioner contends the referee erred in failing to fully credit the *Strickland* expert's opinions. First, this Court's reference question no. 3 specifically requested evidence be taken on the standard of care of reasonably competent counsel defending a capital case in 1982. Petitioner presented expert testimony in response to that question. Respondent did not. Many of the referee's findings on question no. 3 and question no. 4 (rebuttal), are couched in the referee's opinion of what reasonably competent counsel would or would not do, however, those findings are based on speculation and not substantial evidence.

The referee's speculation as to what reasonably competent counsel would or would not have done mirror the proposed findings of fact of respondent's counsel -- a Deputy District Attorney. As Mr. Earley stressed during cross examination, defense counsel in a capital case in 1982 functioned under different considerations than a Deputy District Attorney would.

In every instance, other than the finding of deficient investigation, the *Strickland* expert disagreed with the "opinions" of the referee/respondent.

The referee's failure to credit the opinions of the *Strickland* expert should be rejected for additional reasons. Mr. Earley's opinions regarding

the standard of care of reasonably competent counsel defending a capital case in 1982 find support in the factual record in this case, the ABA guidelines in effect at the time, and by state and federal legal precedent. Earley offered credible testimony on what reasonably competent counsel representing a capital client in 1982 would have done. He offered credible opinions on specific deficiencies of Skyers' performance and he specifically disagreed with each of the arguments and propositions put forth by respondent and adopted by the referee to support an ultimate finding that reasonable counsel in 1982 would not have presented substantial portions of the mitigating evidence adduced by petitioner at the reference hearing.

The referee acknowledged he knew Jack Earley, and knew of his reputation as a respected defense attorney. Although the referee found that Mr. Earley was "a highly competent capital case litigator," he concluded that Mr. Earley's opinions were "flawed" on baseless grounds, such as not reading all of the reference hearing testimony and the referee's unsupported speculation that Earley based his opinions on a heightened standard of care. (Report at p. 274.)

Mr. Earley is a certified criminal law specialist who has practiced criminal law since 1974. He estimated he had tried over 300 cases to jury including over 90 homicides and 7 capital cases on the issue of penalty. Mr.

Earley represented defendants in an additional 15 or 20 capital cases where the death penalty was taken off the table before the case went to trial. (RT 3699-3702[Earley].)

Mr. Earley tried capital cases both before California's former death penalty statute was declared unconstitutional in 1976 and after new statutes were enacted in 1977 and 1978. (RT 3702 [Earley].) 120

As discussed below, Mr. Earley testified that in 1980-1982, in accordance with ABA standards, California law and United States Supreme Court authority, reasonably competent counsel was under the obligation to conduct a thorough investigation prior to determining what themes to advance at the penalty phase. Earley explained that at the time of petitioner's trial, the idea that the penalty phase and guilt phase were phases of one single trial was well established by United States Supreme Court case law. (RT 3756.)

Paraphrasing Mr. Earley, competent counsel would look at the statutory factors in mitigation and attempt to determine what those factors cover and conduct an investigation to make a determination as to what evidence to present. He explained, "Without having that information, a

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120 Mr. Earley's qualifications are set out fully in Exhibit 110 -A Vol. 90 of 135 pp. 2974-2995.)

reasonably competent lawyer in the time period ...would not be able to make a reasonably competent decision on what kind of jurors to pick, what kind of evidence to put on, what advice to give the client as to guilt and penalty, what to talk to your witnesses about, and what to fight and what not to fight. You wouldn't be able to do it without the investigation." (RT 3763.)

According to Mr. Earley, "the investigation of the case is everything....Competence is only based on knowledge. The standard in the legal community at the time was that nobody could make a competent decision without knowing the facts. Just as the prosecution had investigative forces including police and their own investigators, competent lawyers were required to do the same thing." (RT 3759-3760 [Earley].)

Federal and State law is in accord.

> "[B]efore counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Marquez*, *supra*, 1 Cal.4th at p. 602; accord, *In re Avena*, *supra*, 12 Cal.4th at p. 722; see also *In re Jones* (1996) 13 Cal.4th 552, 564-565.) " '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " (*In re Lucas* (2004)33 Cal.4th 682, 722, quoting *Strickland*, *supra*, 466 U.S. at pp. 690-691.)

According to Mr. Earley, investigation of the guilt phase of a case is necessary and essential to the decision of what to present at the penalty phase. This is so because the statutory factors in aggravation permit the jury to use the circumstances of the crime in aggravation or mitigation. Also factors in aggravation and mitigation can include information about the victim's participation in the offense and the mental state of the defendant during the offense. Investigation of the guilt phase would permit reasonably competent counsel to know which of these factors in the case at hand were aggravators or mitigators. In other words, if there was evidence that the defendant's participation was minimal, reasonably competent counsel could argue this as a mitigator. If there was evidence that the defendant's participation was extensive, reasonably competent counsel would expect the prosecutor to argue it in aggravation. (RT 3771, 3778-3779 [Earley].)

Common to any capital case, Mr. Earley explained that during this relevant time period, counsel were using Penal Code section 987.9 funds for investigation in preparation of common themes in mitigation, such as personal and family history, prison adjustment, poverty, child abuse, sexual abuse, posttraumatic stress syndrome, child abuse accommodation syndrome, and rape accommodation syndrome. Reasonably competent counsel at this time hired investigators to interview family members,

neighbors, teachers and obtain records. Penal Code section 987 funds would be used for psychologists and psychiatrists, penalty phase investigators, sentencing specialists, neurological testing, and other expert witnesses. (RT 3754-3756 [Earley].)

Reasonably competent counsel, while gathering documentation would also be interviewing individuals in petitioner's neighborhood, any immediate family, teachers, and doctors. (RT 3782-3783 [Earley].) Although reasonably competent counsel could use agents such as investigators and experts to gather information, "the lawyer is the person that has the duty to make sure they are gathered." (RT 3783 [Earley]) From the time Earley began practicing in 1974 it was always understood that a lawyer must do investigation in order to make informed competent decisions. (RT 3760-3761 [Earley].)

As explained by Mr. Earley and in accordance with established case law, an attorney can not rely solely on the reports of family members and the client when investigating for preparation of a penalty phase. According to Mr. Earley, at a penalty phase in order for the lawyer to perform competently, he would need to understand what a penalty phase is and what mitigation is. "It is counterintuitive to think that a history of mental illness can be a mitigator. Some people may think... that it is not a mitigator.

Alcohol, drug abuse can be mitigators. They may not know it. Economic conditions.... so if you are directing [the investigation], you're trying to get information. So you don't want to try to tell somebody, we're looking for evidence of good behavior only. Because they may then filter out any evidence that is maybe not, they may term it as not good behavior, but may be symptomatic of something else, of mental illness or drug or alcohol abuse, or deteriorating economic conditions." (RT 3784-3785 [Earley].)

In *In re Lucas, supra,* 33 Cal.4th at 726, this Court recognized that evidence of disturbing themes do in fact constitute mitigation. In *Lucas* this Court found that evidence that the petitioner had been sheltered as an abused and neglected child was "a clear source of mitigating evidence." (*Id.,* at p. 730.) Moreover, the testimony of Lucas' trial counsel -- like the conclusions of Skyers' and the referee in the instant case -- indicated he did not regard evidence of child abuse or alcoholism in the family as particularly mitigating—"an apparently idiosyncratic view not commonly shared by contemporary capital defense attorneys." (*Ibid.*) This Court noted that, similar to the instant case, trial counsel did not press the petitioner to reveal information concerning such matters as child abuse--indeed, he apparently viewed such information as having minimal use at the penalty phase. (*Id.*, at pp. 729-730.)

The referee's conclusion that when testifying to what reasonably competent counsel would or would have not done, Mr. Earley was adopting some heightened standard of care, is not supported by the record. The referee adopted the briefing of respondent. (Compare Report at pp. 252, fn.139, 336 fn. 185, 341 fn. 191 to respondent's reference court proposed findings at RT 4 of 135 pp. 519 fn. 414, 505 fn. 403 and 510 fn. 409.) Earley specifically denied doing so (RT 3825, 3873 [Earley]).

Mr. Earley's referral question was to look at the case as it was tried, the information available to trial counsel, the standard of care at the time and offer his opinion as to whether trial counsel in his representation of petitioner, specifically at the penalty phase, met the standard of care. (RT 3716.) Mr. Earley understood the questions put to him and meant his answers to reflect what reasonably competent counsel, at the very minimum would do in a death penalty case. Mr. Earley was not describing some heightened standard of care. (RT 3781 [Earley].) Earley's opinions are supported by case law and contemporaneous ABA standards. As discussed in detail in section IV.A.1 and B.1, prevailing professional norms require counsel in a death penalty trial to conduct a timely and comprehensive social history investigation and a timely and comprehensive investigation into the evidence he knows will be offered in aggravation.

As recognized by this Court a capital defendant has "the right to the effective assistance of counsel at trial, and thus [is] entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." (*In re Lucas, supra,* 233 Cal.4th at 721.)

> "The American Bar Association Standards for Criminal Justice published at the time described the duty to investigate this way: 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore *all avenues* leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' (1 ABA Stds. for Crim. Justice (2d ed. 1982 supp.) std. 4-4.1, italics added.) These standards have consistently been relied on by the United States Supreme Court as relevant indicia of the prevailing practice norms." (*In re Thomas, supra,* 37 Cal.4th at p. 1265.)

The referee's disagreement with the *Strickland* expert's opinions as to what reasonably competent counsel would or would not have done is not based on substantial evidence.

The only witness offered at these proceedings as to what qualified as a reasonably competent representation in 1982, was petitioner's expert Jack Earley. 121 As the very nature of these proceedings was to determine whether petitioner was afforded reasonably competent representation by Mr.

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121 Unlike his efforts to counter petitioner's mental health experts' opinions by calling his own neuropsychologist and psychiatrist, respondent's counsel DID NOT call a *Strickland* expert, a practice followed by respondent in other reference hearings. (See *In re Lucas* (2004) 33 Cal.4th 682.)

Skyers, for the purpose of these proceedings Mr. Skyers was neither deemed reasonably competent nor incompetent – except by Earley who found him to be totally incompetent. Likewise, neither respondent's counsel nor the reference court are experts as to what reasonably competent defense counsel would or would not have done. In fact, the conclusions of the referee, which mirror those of respondent's counsel – and are in conflict with ABA standards -- clearly demonstrate a lack of understanding as to what constitutes evidence in mitigation and the responsibilities of defense counsel.

As a preliminary matter, it is worth noting that neither respondent's reference hearing counsel, deputy district attorney Brian Kelberg, nor the referee, Judge Briseno, has ever been a defense attorney, much less qualified as an expert on the standard of care required by reasonably competent counsel practicing capital defense work in 1982. Nevertheless, the referee saw fit to adopt tens of pages of the deputy district attorney's arguments as if those arguments constituted substantial evidence of the standard of care of reasonably competent defense counsel practicing capital death penalty law in 1982. Lifted nearly word-for-word from the district attorney's briefing is the referee's selective discussion of Earley's testimony and adoption of the deputy district attorney's opinions over the

opinion of petitioner's qualified *Strickland* expert. (Compare Report pp. 312-375 to RT Vol. 4 of 135 pp. 476-545 [respondent's proposed findings of fact.].)

The United States Supreme Court, the federal courts, many state courts, and numerous commentators have long condemned the practice of "verbatim adoption of findings of fact prepared by prevailing parties" as an abdication of responsibility by the assigned fact-finder and a disservice to reviewing courts. (See, *e.g.*, *Anderson v. City of Bessemer*(1985) 470 U.S. 564, 572; *United States v. El Paso Natural Gs Co.*, (1962) 376 U.S. 651, 656-57 & n. 4 (quoting J. Skelly Wright, *The Nonjury Trial – Preparing Findings of Fact, Conclusions of Law, and Opinions,* SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 159, 166; see generally, Annotation, *Propriety and Effect of Trial Court's Adoption of Findings Prepared by Prevailing Party*, 54 A.L.R.3d 868).

Similarly, the United States Court of Appeals for the Fifth Circuit demands that "rubber-stamped" findings receive increased scrutiny. (*McClennan v. American Eurocopter Corp., Inc.* (5th Cir. 2001) 245 F.3d 403, 409 ("the district court's decision to adopt one party's proposed findings and conclusions without change may cause us to approach such findings with greater caution, and as a consequence to apply the standard of

review more rigorously"); *Matter of the Complaint of Luhr Bros.* (5th Cir. 1998) 157 F.3d 333, 338 & n.4; *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.* (5th Cir. 1996) 73 F.3d 546, 574; *Federal Deposit Insurance Corp. v. Texarkana National Bank*, 874 F.2d 264, 267 (5th Cir. 1989); *Amstar Corp. v. Domino's Pizza, Inc.* (5th Cir. 1980) 615 F.2d 252, 258.)

Recently, the Supreme Court of Indiana, in a capital post-conviction case, carefully scrutinized findings of fact which, as in this case, were prepared by the State and adopted "virtually verbatim" by the trial court. (*Prowell v. State* (Ind. 2001) 741 N.E.2d 704, 708.) The court ultimately determined that many of the findings were either misleading because they presented testimony and evidence out of context, or that they were simply incorrect. (*Id.* at 709-712.) The court cautioned that the legitimate need for convenience and efficiency can lead to an erosion of confidence that the lower court has actually rendered a considered opinion:

> It is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party. The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party's proposed findings. ***But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment***

> ***of the trial court.*** This is particularly true when the issues in that case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony. For the reasons explained below, most of the statements in the findings of fact and conclusions of law are correct if viewed in isolation, but many are presented out of context and, as a result are significantly misleading. *Id.* at 708-09 (emphasis added).

The Florida Supreme Court perceived a similar problem in the context of allegations that the trial judge "abdicated [his] sentencing responsibility to the prosecution, depriving [appellant] of an independent weighing of the aggravating and mitigating circumstances during the sentencing phase of his trial," by signing a sentencing order drafted by the State's Attorney. (*Card v. State* (Fla. 1995) 652 So.2d 344, 345). The trial judge in *Card* submitted an affidavit explaining that:

> [I]t was customary for [him] to receive sentencing orders in capital cases from the State Attorney; that this customary practice was followed in the capital cases assigned to [him]; that [he] did not dictate findings to or request that the State Attorney submit the orders before the orders were prepared and given to [him]; that the prosecutors in [his] division provided the orders to [him] as a matter of course...[and] that [t]he orders would then have been issued as [the State's Attorney] provided [it] to [him]. (*Id.* at 345.)

The court held that these allegations were "sufficient to require an evidentiary hearing on the question of whether [appellant] was deprived of an independent weighing of the aggravators and the mitigators." (*Ibid.*)

As noted above, although it could have done so, respondent did not present a *Strickland* expert. The referee was not faced with resolving a credibility determination or factual discrepancy between two qualified witnesses. Wholesale adoption of respondent's speculative and factually unsupported argument amounted to nothing more than an abdication of the obligation and duties imposed on the referee, by this higher court. It was inappropriate, contrary to established habeas reference hearing standards and an indication of the referee's bias in favor of the prosecution for the referee to have done so. This Court should not accept the substitution of speculation and argument as factual support for findings when competent and uncontroverted evidence was offered by Mr. Earley.

Additionally, the referee's failure to adopt the opinions of the *Strickland* expert demonstrates the referee's disparate treatment of the parties' witnesses.

For example, the referee "forgave" respondent's failure to call certain witnesses but chastised petitioner for failing to call certain witnesses. (See Report at p. 233.)

Also, although within ABA guidelines for capital defense counsel, the referee criticized petitioner's assisting counsel, Andrews and expert witness Miora for counsel's assistance in compiling historical data about petitioner's

family and his upbringing (See Miora discussion above.) The referee accepted respondent counsel's participation in witness declarations. (See Skyers dec.)

Additionally, while the referee discounted Earley's opinion that reasonably competent counsel would have presented evidence of petitioner's non-involvement in the Taylor offense because he had not read some of the reference hearing testimony of the Taylor police officers and some of the Mallet transcripts, the referee did not similarly fault police officer witnesses who did not read documentation referring to the Taylor crimes. (See Report at p. 312, RT 2099, 2277, 2426, 2554, 2594.)

Finally, as noted above, the referee agreed with petitioner **and the opinion of petitioner's *Strickland* expert** that the investigative efforts of Mr. Skyers work deficient. Petitioner contends that Mr. Earley's testimony regarding Skyers deficient performance at the investigative stage -- testimony credited by the referee-- is, at the very least, circumstantial evidence of the validity of his opinions as to what reasonably competent counsel would have presented at the penalty phase.

a. Credible Evidence Which Reasonably Competent Counsel Would have Tried to Present and would not lead to Damaging Rebuttal

While agreeing that reasonably competent counsel would have

attempted to obtain all of the evidence presented by petitioner at the reference hearing, the referee concluded, as to a substantial portion of that evidence, that reasonable counsel would not have attempted to present it. The referee's conclusion rests on a faulty understanding of what reasonable counsel seeking a life sentence would elect to present, the value of mitigating evidence, a misappraisal of the weight and credibility of the evidence adduced by petitioner, and a wildly overblown appraisal of the rebuttal evidence that would have been available to the prosecution. The referee's conclusion that reasonably competent counsel would not have presented the "evidentiary mitigating themes" presented by petitioner at the reference hearing is contrary to the opinions of the *Strickland* expert, not based on substantial evidence, and in conflict with ABA standards and state and federal cases which have addressed the subject. Moreover, in his assessment of what would possibly be offered in rebuttal, the referee ignores the evidence already before the jury. (Report at pp. 266-270, 289-298.)

Punishment should be directly related to the personal culpability of the criminal defendant. In capital cases. "[r]ather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime." *(Penry* v.

Lynaugh (1989) 492 U.S. 302, 328.)

In *Lockett v. Ohio*, the United States Supreme Court concluded that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S.)

Contemporaneous ABA standards dictated:

> " Facts form the basis of effective representation. The lawyer also has a substantial and important role to perform in raising mitigating factors, both to the prosecutor initially, and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals, or on the strengths of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment records, mental and emotional stability, family relationships and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." (1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

As the referee concludes that certain "evidentiary mitigating themes" would not have been presented to petitioner's penalty phase jury by reasonably competent counsel, it is helpful to consider the "mitigating themes" Skyers' actually presented at the penalty phase -- which presentation Mr. Earley testified also fell below the standard of competent counsel.

As previously noted, Skyers' relied on a theory of lingering doubt (which he did not investigate, present evidence of, argue, or request the jury be instructed on) and "good guy" evidence to persuade the jury to opt for life. Skyers offered two witnesses: petitioner's parole agent, who testified that petitioner had made his post release appointments, and petitioner's mother, who testified that petitioner had intended to become a tutor.

As discussed above in IV.A.2, according to the *Strickland* expert, reasonably competent counsel would not look at the evidence that was expected to come in at the guilt phase and rely on "good guy" evidence for a penalty phase theme, and to the extent that Skyers relied on a theory of "good guy" evidence, his investigation, presentation, and argument of this theme fell below the standard of care of reasonably competent counsel at the time.

By the beginning of petitioner's penalty phase, the jury found petitioner guilty of two homicides and his codefendant guilty of three. Petitioner had been identified as a participant in a third murder and both he and his codefendant were implicated in a fourth. Another participant of that third murder had been found in petitioner's backyard. But for petitioner's testimony on cross examination regarding his whereabouts on the night of the Taylor homicide, there was no evidence that petitioner had not

committed the Taylor or Jefferson homicides. Additionally, the jury heard petitioner and his codefendant discussing escape and possibly killing a prison guard. Petitioner, his codefendant, and others were identified as members of a violent criminal street gang. Pictures of petitioner, his codefendant, and others throwing gang signs and carrying weapons had been displayed. Before the penalty phase began, the jury learned that petitioner had been released from CYA only months before the Hassan killings. Skyers had attacked, mitigated, or explained none of this additional evidence.

The referee found Mr. Earley's opinion that reasonably competent counsel would present evidence of petitioner's noninvolvement in the Taylor homicide "unreasonable." (Report at p. 312.) The referee is wrong. Demonstrating to the jury that petitioner had not participated in the Taylor crimes would certainly have limited their consideration of appropriate penalty to only the Hassan crimes.

Reasonably competent counsel would not have decided not to present petitioner's alibi on the remote possibility that Mallet could be called to testify, at petitioner's trial, as he had at his own trial that he was with petitioner at petitioner's home when the Taylor crimes were committed. (RT 3926, 3937-3938.) Although Mallet had been found guilty, he would appeal

his convictions. It is unlikely that a prosecutor would attempt to call him much less that a judge would have permitted the prosecution to call Mallet to the stand if it was known he intended to exercise his Fifth Amendment privilege. (RT 3930, 3936 [Earley].)

Moreover, the fact that Mallet used petitioner as his alibi is not evidence that petitioner was involved in the Taylor crimes, but just the opposite i.e., Mallet was attempting to associate himself with an innocent person. (RT 3937-3938 [Earley].)

Likewise, reasonably competent counsel would not have based his decision not to present petitioner's alibi evidence on the assumption that the jury knew the prosecution had not filed Taylor charges against petitioner; Mary Taylor, Cora Taylor, and William Birdsong had not identified petitioner at earlier opportunities; or that but for Cora Taylor's identification, the prosecution introduced no physical evidence of petitioner's presence at the Taylor crimes (RT 3939-3940, 3942, 3945-3947, 4083 [Earley].) The prosecutor strongly argued petitioner's guilt and a sympathetic eyewitness put him at the scene of the murder.

Reasonably competent counsel would not have relied on petitioner's testimony as to his whereabouts on the night of the Taylor homicide and a conflict, if any, between the witness's testimonies as to the time of the

crimes, on which to base a tactical decision not to introduce evidence of petitioner's alibi. Petitioner's testimony, on cross-examination, fully corroborates his lack of involvement in the Taylor offenses. Coupled with Sheriff's deputies' reports and lay testimony, reasonably competent counsel would have raised a reasonable doubt as to petitioner's involvement in the Taylor offenses. Although it certainly would have been stronger proof if, like Marcus Player petitioner had been detained, like petitioner, Wayne Harris was not detained and he was not considered a suspect.

In total, taking into consideration Simms' fingerprints in the Taylor residence, the circumstantial evidence that Michael Player was the driver of the vehicle and the entry of petitioner onto the scene from outside the containment area strong doubt would have been raised about petitioner's participation in the Taylor crimes. (RT 3962-3965, 3972, 4168-4174, 4179, 4195-4196.) [Earley].)

Although there may have been inconsistencies between witnesses' recollections of time and some unessential facts, for the most part, the testimony of the lay and law enforcement witnesses strongly corroborated petitioner's testimony that he was not involved in the Taylor offenses. It is not unusual to have witnesses perceive and/or remember specific instances differently (CALJIC No. 2.12.1), particularly after the passage of decades.

According to Mr. Earley, reasonably competent counsel would go back to his client and the individuals interviewed and try to clarify any discrepancy. If there were still discrepancies between witnesses' testimony and petitioner's anticipated testimony, and petitioner was intent on testifying, reasonably competent counsel would make a decision which of the other witnesses to call. But in any event, reasonably competent counsel would not have made the decision not to put on any evidence at the penalty phase merely because of witness discrepancies in the Taylor alibi evidence. (RT 4217-4218, 4242, 4252, 4253-4263, 4278, 4281, 4283-4284.)

Reasonably competent counsel would not have foregone presentation of petitioner's alibi for Taylor merely because the jury (apparently) rejected his alibi on Hassan. Petitioner had the right to have the jury hear any evidence which raised doubt as to his involvement in this noticed aggravator. (*Lockett v. Ohio, supra.*, *Rompilla, supra*, RT 4237 [Earely].)

Reasonably competent counsel would not have relied the possibility that the jury might conclude, on the fact that Mallet was given a sentence of life with the possibility for parole, that petitioner did not deserve death. Mr. Earley noted that comparatively speaking, Ross and Champion looked a lot worse than Mallet because Mallet had only been convicted of one homicide. (RT 4101 [Earley].)

Reasonably competent counsel would not rely on any concessions the prosecutor made in argument as a sufficient penalty phase presentation. (RT 4651, 4660 [Earley.) Those "concessions," such as petitioner's young age and Ross' apparent domination, were few and far between because in truth, the prosecuting attorney argued each of these mitigating factors as aggravation. (See TRT 3697-3733, some of which is quoted below.)

The prosecutor argued petitioner would be dangerous to prison guards if given life:

> SEMOW: ...[P]rison is a terrible place. For people like you and me it is a jungle for the weak and so for the civilized, it's a horrible place. But for men who live by the law of the jungle or who live by no laws at all, for street toughs and killers, prison can be a very tolerable place, it can even be an enjoyable and satisfying place to live and. you may be told by the defense...that life in prison without possibility of parole is adequate to protect society from any killer, and that the only thing additional that the death penalty accomplishes is vengeance and retribution. Anticipating the possibility that argument...I would... ask you to recall the tape recording of defendants Champion and Ross on that Sheriff's Van and what they spoke of at great length what they are hoping for, and again ask yourselves is life imprisonment without possibility of parole sufficient to protect society from them. I would like you also to remember that society includes not only the people outside the people inside prison. Not everybody in prison is a killer, not all of the inmates are killers, most of them are not. Some people imprisoned have not committed any crime at all, those people are guards and corrections officers, they are a part of society as well that has a right to be protected from the defendants. And in that regard I ask you this, and I ask you to recall the display that was put on for you by the defendants...[i]s that the kind of person for whom we can protect not only the society outside of prison but society inside prison by incarcerating him for the rest of his life? (TRT 3698-3700.)

The prosecutor argued petitioner did not raise a lingering doubt at the penalty phase:

> SEMOW: Neither side has to establish anything beyond a reasonable doubt. (TRT 3703.)

The prosecutor argued petitioner's guilt in Jefferson and Taylor, his participation in juvenile offenses, his age and his release from CYA just two months before the Hassan crimes were circumstances warranting death:

> SEMOW: If you found that the defendants committed the Jefferson murder, or Champion committed the Taylor murder, obviously, you must use that for what it's worth, and it's worth a lot, but this is why we have the opportunity, the people, to present in the penalty phase of the trial evidence of crimes which we could not present to you in the guilt phase. Defendant Champion, two juvenile crimes. 1977 a robbery, a rat pack robbery....A serious crime for which Mr. Champion, because of his age, only goes to youth camp. He gets out of youth camp, and what does he do? In 1978 he and another rat pack assault on an innocent man with his wife in Helen Keller Park.... Champion goes to CYA. He's out only two months from CYA when the Hassans are murdered.... (TRT 3705-3709.)

The prosecutor argued that even if Ross was a leader, petitioner was bigger and went along willingly:

> SEMOW: But the fact that Mr. Ross is or may be the leader here does not mean Mr. Champion was acting under duress or under domination. Mr. Champion follows along because he wants to. He's bigger than Mr. Ross, first of all, and there is no evidence in this case presented at the guilt phase, or at the penalty phase of this trial, that Mr. Champion was acting under the duress of anybody. So again we a factor in aggravation as to both defendants. (TRT 3711-3712.)

The prosecutor argued age was not a powerful mitigator:

> SEMOW: The age of the defendant at the time of the crime: Mr. Ross was 21 years old, I believe, and Mr. Champion was 18. For what that is worth, then I think as to Mr. Champion at least that must be considered a factor in mitigation. But at a time when people of his age group are largely responsible for the most heinous crimes that are being committed in our cities that as a factor in mitigation which would not seem to weigh as heavily as other possible factors that might be present. Those other factors, as I will point out to later, though, being conspicuously absent in this case. (TRT 3713.)

The prosecutor argued the only thing it failed to prove beyond a reasonable doubt who was the shooter, but argued the "probability" petitioner was the shooter in Hassan:

> SEMOW: The people do not prove beyond a reasonable doubt – and then again I don't know what you found in this regard, but I told you once before, it will tell you again, that we didn't proved beyond a reasonable doubt, I thought that either of the defendants actually was a shooter in any of these murders. There is a very good probability that Mr. Ross was on the Taylor case, or that both of them were as to the two victims on the Hassan case, but that was not proved (RT 3714-3715.)

The prosecutor argued petitioner's case in mitigation was not compelling, pointing out it consisted only of petitioner's mother, who said little and petitioner's parole officer who testified petitioner kept his appointments:

> SEMOW: Rule K, any other circumstance which extenuate set the gravity of the crime, even though it is not a legal excuse for the crime. This is where we give the defendants the opportunity in the penalty phase to present any evidence of mitigation, not only surrounding the crime itself, but about their lives in general what does defendant Champion come up with? His mother. All his mother can say for him

is that he was about to start another job program when he was arrested for the murder. His parole agent comes in and says "yes, during the three months he was on parole he performed with me satisfactorily." Certainly cooperate with him satisfactorily. He knew he had to give that superficial cooperation to keep his parole agent from jerking them back into the ***state prison***, but while he's cooperating with his parole agent satisfactorily he's out killing the Hassans. That is the entire extent of evidence in mitigation presented by Mr. Champion at the penalty phase of his trial. (TRT 3717-3718.)

And

SEMOW: You will have voted for the death penalty only after giving them an opportunity, even though they're guilt was clearly established, to come up with anything that they could come up with on their behalf of us in mitigation. (TRT 3731.)

By comparison, Mallet's participation in Taylor was less aggravating, warranting a life sentence:

SEMOW: Now, it's clear then from all of that that the Mallet case it's so totally is far less aggravated than the case as to either of these two defendants. (TRT 3722.)

The prosecutor argued petitioner showed no remorse:

SEMOW: Did either of them show you any remorse when they did that mock display of indignation for you when you rendered the verdicts of guilt, verdicts which you rendered not because you delighted in doing so but because you had to, and you had no choice based on the law and the evidence. (TRT 3728.)

Implication of petitioner in four homicides weighed heavily in a decision for death, and reasonably competent counsel presenting a case for life would have made every effort to refute petitioner's involvement in both the Taylor and Jefferson's crimes. (RT 2863-2864, 2872-2876, 2888-2894,

2893-2895, 4345, 4348-4351 [Strong, Earley].)

Reasonably competent counsel would have attempted to mitigate the juvenile aggravators by evidence of the age of petitioner, his relative lack of involvement, the age of the other perpetrators, evidence of family dysfunction, poverty, neighborhood conditions, reasons for gang association, and lack of parental control. (RT 4386, 4390-4391.) Evidence adduced at the reference hearing, which reasonable counsel would have presented at trial, showed, for example, that from age six, petitioner did not have a strong father figure in the home but rather, was disciplined by an erratic bully, his brother Lewis III, who beat and terrorized not only petitioner but also his siblings. Petitioner's mother was largely ineffectual in protecting petitioner from his older brother or from the dangers on the streets in general. Petitioner formed a close association with older males who he felt protected and included him. Indeed, petitioner needed protection from the dangers in community he grew up in. Actually, the entirety of the social history evidence adduced by petitioner -- including the evidence of family dysfunction, violence in the home and neighborhood, neuropsychological deficits and academic difficulties -- which could have been offered to mitigate petitioner's involvement in the capital offense, would also have served to mitigate the juvenile offenses, since that evidence helped to make

more understandable and more forgivable petitioner's affiliation with a neighborhood gang and involvement in gang-related criminal activity, which encompassed both the juvenile aggravators and the capital offense.

Reasonably competent counsel would have also informed the jury that petitioner was treated and sentenced as a juvenile rather than an adult and petitioner's adjustment at the California Youth Authority had been positive. (RT 4386, 4390-4391 [Earley].)

Respondent's counsel conceded that the jury knew that petitioner had been sent to the California Youth Authority -- in fact as shown above it was argued by the prosecutor at trial as aggravation. (RT 4396 [Earley].) Reasonably competent counsel were aware that positive adjustment in prison was a viable theme in mitigation. Reasonably competent counsel would have consulted experts and presented expert testimony on this theme. (RT3839 [Earley].) [122]

Thus, reasonably competent counsel would have put on evidence of petitioner's positive institutional adjustment, which is summarized above. (RT 4403-4406 [Earley].)

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[122] "These types of documents in evidence as to prior adjustment in prison were well-known in the community, and especially people practicing capital cases, that it was powerful evidence for jurors, two, to be able to hear this kind of evidence. And I would say that one of the things in this case, to show how powerful it was, the juror sent out a note saying is he ever going to be paroled. They were concerned about prison adjustment." (RT 3839.)

Reasonably competent counsel would have known that the tape-recorded conversation was relevant to the prosecution's theory of petitioner's violent nature as a gang member who would present a danger to prison guards and inmates if given a life sentence and showed no remorse. (RT 3829[Earley]) As shown above, the prosecutor did in fact argue those factors as warranting a death sentence.

Reasonably competent counsel would recognize that there were ways to mitigate the taped conversation including referring petitioner to a psychologist or psychiatrist to evaluate his mental functioning, to determine whether or not petitioner was a leader or a follower and was just "talking tough" and investigating petitioner's prior history. (RT 3829-3830, 4865.)

Unlike Skyers, reasonably competent counsel would have addressed the contents of the tape, particularly in light of the outburst at the reading of guilt verdicts.[123] Had he done so, after adequate investigation, he could have pointed out to the jury that Ross and not petitioner was the leader in

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[123] "[A] reasonably competent lawyer, I believe, would have listened to the tape, would have had at least known the allegations of escape, danger to other people, overpowering prison guard or sheriff at the time, and would have known, okay that's going to be coming in, I have to deal with this, and how my going to deal with it, whether it's accurate or not. Mr. Skyers didn't deal with it at all. He just ignored it. I think a reasonable lawyer that was a first-year lawyer would have seen and said this may bother a juror, someone who I've just found guilty of first-degree murder, this talking about escape with somebody and talking about overpowering a guard. I don't think it takes a reasonably competent lawyer. I think an eighth grader would be able to know that and would say you better deal with it." (RT 3830-3831 [Earley].)

whatever relationship existed between the two of them, that the reference to the waterbed could be explained by the photos of the crime scene that had been made available to the defendants and their counsel, and that petitioner, despite any tough talking escape fantasies on the tape, had in fact adjusted safely and well in his prior incarceration at CYA

Extensive evidence of petitioner's gang affiliation, including prosecution expert testimony and photographs, were before the jury at the guilt phase. A conspiracy of Raymond Avenue Crips to rob and kill drug dealers was the prosecution's theory of the case. The prosecutor noticed each of petitioner's gang related juvenile offenses as aggravators and introduced evidence of two, and yet no efforts were made by Skyers to confront or mitigate petitioner's alleged gang affiliation. The referee found that "due to petitioner's juvenile arrest records and underlying conduct on the part of petitioner and the extent and duration of his [gang] membership, any potential mitigation theme that would allow the prosecutor to rebut...would cause a reasonable [sic] competent counsel not to present the mitigation evidence." (Report at p. 272.)

Reasonably competent counsel would have addressed the photographs of petitioner throwing gang signs and holding weapons in the company of other gang members in conjunction with other allegations of petitioner's

association with gangs. Reasonably competent counsel could have been presented information regarding petitioner's position as a follower, his youth, his learning disabilities and brain neurological deficits as well as presenting an explanation for petitioner's alleged association with a street gang. Skyers undertook no such investigation and presented no such explanation. (RT 3843-3845.) The *Strickland* expert strongly noted it was absolutely necessary to confront and mitigate the aggravating evidence of gang affiliation, and reasonably competent counsel would not have relied on what was before the jury or common or "lay" knowledge about gangs as a reason to forgo investigation and confront gang affiliation [124] [125]

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[124] "A reasonably competent lawyer in a death penalty case has to look at the issues that are there. If he is not familiar with those issues, he has a duty to then either hire somebody, or associate somebody in that is. So in a gang case, if Mr. Skyers says I don't know about gangs, I don't know how to handle them, he has a duty to find out. He has a duty to do research, go to school, read the books, do the work, or he hires a gang expert who explains it all to him. It's his duty. He can't say I don't know about it, so I don't have to deal with that. If he doesn't know about eyewitnesses he has a duty in those cases to read. If he doesn't know about family history, if he doesn't know about economic conditions he has a duty either to learn, to look at it, or to make sure that he is somebody there that is available to do it. That's what reasonably competent lawyers do. So if you have a gang case, it's your duty to learn about gangs, how people get involved in them, the type of people that are involved, what your clients position may be in a game. That's your duty when you take on a death penalty case." (RT 3845-3846.)

[125] "A person noting that the gangs control or infiltration is a big part of [Helen Keller] Park [knows] it affects the community. The community is the jurors. If that is all the lawyer knows he knows it is a big issue for this community. This is something that needs to be dealt with. He has a duty to investigate whether the person is in a gang, what kind of control he has. ...Then you have a duty to presented to the jurors. To do and **in**effective penalty phase investigation, you then have to know about the jurors... which would tell you to ask the question what about gangs, how you feel, is it always mitigating, is that aggravating? [Gang affiliation] is an issue that's important, it's explosive, how are the jurors going to deal with it and how should I deal with them. If

Reasonably competent counsel would have presented evidence to explain or mitigate petitioner's association with codefendant Ross, a gang member.

Mr. Skyers did not effectively deal with the relationship between petitioner and Craig Ross. " He didn't deal with it at all...." (RT 3852 [Earley].) Reasonably competent counsel would have been aware of the age difference between petitioner and Mr. Ross. Because age can be an aggravator or a mitigator, Skyers was required to put something forward to show in this case it should have been used as a mitigator and also prepared to answer any assertion by the prosecutor that in this case age was an aggravator. (RT 4730-4731.)

Reasonably competent counsel would have been aware of, presented evidence of and argued what looked like a relationship of leader and follower, including Mr. Ross' more extensive criminal history which consisted of adult convictions. (RT 3852 [Earley] Vol. 82 of 135 at pp. 556-558.)[126]

There was a wealth of readily available and credible mitigating

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you don't ask the question, you don't know." (RT 3848.)

[126] "Reasonably competent counsel... would have known age was going to be a mitigator. Mr. Champion was younger, his involvement was less. There is a question of leader and follower. This goes to K factor. It goes to a number of factors under the code that tells you that this evidence...would have been available been to argue in mitigation of the client." (RT 3852.)

evidence which reasonably competent counsel performing the most rudimentary investigation could have discovered, which would have led to further investigation and would have been offered in mitigation at the penalty phase and was offered at these proceedings. Records in existence at the time indicated petitioner had been placed in juvenile hall, had a lower than average intelligence and took remedial classes at school. Experts who examined petitioner at or before his trial assessed his home and school life and wrote of gang association, depression, trouble at home, low intelligence, drug and alcohol use from an early age, as well as a positive outlook and amenability to rehabilitation. Records which existed at the time indicated divorce, parental death and disability, low economic and vocational standing, use of public welfare, and poor school performance by petitioner and his siblings.

Substantial evidence supports petitioner's position that reasonably competent counsel would have presented at trial the evidence of petitioner's social history petitioner presented at the reference hearing.

The accounts of family members regarding petitioner's social history were corroborated by school records, social security records, and juvenile records . (RT 3979 [Earley].)

As with other sections of the referee's report discussed in this

briefing, the referee lifts nearly word for word his criticism of Earley's opinions regarding what reasonably competent counsel would have done with regard to mental health assessments of petitioner at the time of trial from the briefing of respondent's reference hearing counsel. (Compare Report at pp. 277-286 with Respondent's Proposed Findings pp. 441-451.) Plagiarized from the Los Angeles District Attorney's briefing are numerous lengthy footnotes of respondent which vouch for respondent's hearing experts and criticize petitioner's experts.

In an area so important to the resolution of the order to show cause as to whether petitioner should be granted relief due to trial counsel's ineffective assistance at the penalty phase, lifting the opinions of the Los Angeles County Deputy District Attorney on the standard of care of defense counsel in a capital case in 1982 is surely inappropriate. Respondent had the option of presenting a *Strickland* expert.

Given the failings of Mr. Skyers on petitioner's behalf perhaps the most important opinion of Mr. Earley was that no reasonably competent lawyer would look at the work of Mr. Skyers and offer the opinion that it was competent. (RT 4520.) This Court should not substitute the specious opinions of a deputy district attorney – from the same office that put Mr. Champion on death row – over those of a qualified expert.

In Mr. Earley's opinion the evidence offered with the petition and at this reference hearing is a "very compelling mitigation case." (RT 4710.) Mr. Earley found Mr. Skyers' work in this case "an embarrassment," and demonstrated "blinding indifference" to his responsibilities. (RT 3925.)

> 2. Exception: No evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced at trial the mitigating evidence adduced at the reference hearings; nor were there other circumstances which would have led reasonable counsel to not present this mitigating evidence.

Reference Question no. 4 asks: what evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty trials, would likely have been presented in rebuttal if petitioner had introduced at trial the mitigating evidence adduced at the reference hearing?

The referee agreed with petitioner that this reference question contains a number of qualifiers. (Report at p. 296.) The evidence has to be "damaging to petitioner, " "not presented by the prosecution at the guilt or penalty trials" and "likely" to have been presented in rebuttal. As will be demonstrated below and was explained by petitioner's *Strickland* and medical experts, evidence which the referee characterizes as damaging rebuttal was not actually damaging or not substantially so. Also, evidence which the referee characterizes as "likely" to have been offered in rebuttal

would not likely have been entered into evidence in rebuttal at petitioner's trial, was already before the jury or was noticed aggravation.

The referee found that the three alibi witnesses – Harris, Player and Bogans --were gang members, thus reducing their credibility and that two of them contradicted petitioner as to the timing of his and their own gang membership. However, as explained above petitioner would not have had to call all three lay witnesses. While each of these three men could have testified that petitioner was in the park at the time of the Taylor crimes, the most compelling testimony regarding petitioner's whereabouts that evening came from his impromptu testimony at the behest of the prosecutor at trial and from corroborating reference hearing testimony of law enforcement officers

Also, there was a multitude of gang membership evidence before the jury already. The added danger of confirming petitioner's gang membership was minor compared to the danger of the jury finding petitioner guilty of a second home invasion robbery-murder two weeks after the Hassan murders. And further, on the credibility issue, the gang member testimony must not be weighed in isolation: it is corroborated by police officer testimony making it very improbable that petitioner had been one of the four men in the crashed vehicle in which the Taylor perpetrators had fled, and evidence was also

adduced as to the identity of the four actual perpetrators (Ross, Mallet, Michael Player, and Robert Simms), thereby eliminating petitioner as a suspect.

The referee noted that Wayne Harris testified that when he, Marcus and petitioner got to petitioner's house after the LASD let them go Ross was there – a recollection Rita disputed. But, assuming this was accurate, petitioner contends that this was not particularly incriminating. If accurate, the jury knew petitioner was associated with Ross; it would not have been surprising for Ross – like Mallet --to go to the home of someone he knew in the containment area.

The referee characterizes as rebuttal the testimony that no law enforcement witness confirmed the physical detention of petitioner or Harris at the park. (Report at 292). While that may be true, it's not rebuttal to anything asserted by petitioner. Moreover, this evidence overlooks, as discussed earlier in the brief that the reference hearing police officer testimony did make it highly unlikely that petitioner had been in the vehicle in which the Taylor perpetrators had fled the Taylor residence. Further, of the two, Harris, who was associated with the Taylor vehicle would have been more likely to be suspected if the police suspected Harris or petitioner – which they obviously did not.

Finally, as noted by the *Strickland* expert and discussed above, petitioner was not under an obligation to prove his non-involvement in the Taylor crimes by a standard of beyond a reasonable doubt. Petitioner's alleged involvement in the Taylor murder was a noticed aggravator. Petitioner was identified during the guilt phase as having been inside the Taylor residence. Petitioner's only burden was to raise a reasonable doubt as to his involvement in the Taylor murder, and reasonably competent counsel would have attempted to do so at petitioner's penalty trial.

Elsewhere in the report, the referee notes other potential Taylor rebuttal evidence that the referee deems significant. Including:

The prosecutor's calling Mallet to testify as he had at his own trial that he had been with petitioner that night from 9:00 o'clock until he was arrested in Champion's backyard -- thereby, according to the referee, connecting Champion to the Taylor crimes. (Report at 318-319, 328-329.) But no reasonable prosecutor would have called Mallet, and if he had and Mallet had repeated his false alibi, the jury would never have given it any weight. The prosecutor knew that Mallet's alibi ("I was with Champion at Champion's house") was untrue. Mallet was arrested in Champion's back yard, within the containment area, after having fled the crashed vehicle. So it wasn't surprising that he said he had been in petitioner's house and he

needed some reason for being in petitioner's backyard. The jury wouldn't have believed he had been in petitioner's house and so would have had no basis for believing that he otherwise had been with petitioner. This is a particularly ridiculous finding especially in light of evidence that petitioner, unlike Mallet – was not in the backyard --- but was approaching the containment area from the north. One might also conclude Mallet used petitioner as an alibi *because he knew petitioner was not involved* and wanted the alibi of having been with an innocent person.

The referee also noted that evidence of a 1976 burglary in which petitioner had left fingerprints behind could be offered to account for the absence of petitioner's fingerprints at the Taylor residence. (Report at 330-31, footnote 180)

This is silly. The 1976 crime would not have been admissible to rebut the Taylor defense. The fact that Steve Champion had committed a burglary four years earlier at the age of 15 in which he had left incriminating fingerprints leading to a juvenile adjudication has no probative significance on the issue of who the third in-the-residence Taylor perpetrator was. There is nothing unique about a burglar leaving or not leaving fingerprints behind. That petitioner had left fingerprints behind in a 1976 burglary doesn't indicate that he committed the fingerprint-free burglary in 1980. If the prior

burglary had any probative value at all, it would have been excludable under Evidence Code section 352. (RT 4069-4071 [Earley].) Additionally, the 1976 burglary was a noticed aggravator which the prosecutor could have brought in at any time.

Further, insofar as this prior burglary, even if not probative on the issue of the Taylor crimes, was to be feared as a potential independent aggravator, the nature of the burglary was hardly so aggravating as to warrant a decision to not counter an in-court identification painting petitioner as culpable for another home-invasion robbery-murder.

Reasonably competent counsel would not have refrained from putting on evidence that petitioner would not be a danger in the future if given a life sentence because of a potential counter argument that petitioner did a marginal program and needed supervision to stay out of trouble. (RT 4427-4432[Earley].)

As discussed above, one would expect reasonably competent counsel to recognize that petitioner had been sent to CYA for a reason. The documentation shows that petitioner had matured, become thoughtful, become remorseful, and sought to better himself and his family. It also showed that CYA authorities had the expectation that petitioner could succeed upon his release. The information in the CYA documents of

petitioner's disciplinary problems occurred early in petitioner's stay. When a problem arose a sanction was imposed and petitioner continued to improve. What the referee defines as rebuttal is actually mitigation. The whole of petitioner's stay demonstrated a positive adjustment to confinement. While a prosecutor might be expected to argue against the mitigating value of this evidence, reasonably competent counsel could expect that with all mitigation and would not have decided not to present a case for positive institutional adjustment in mitigation based on fear of a potential counter argument.

As noted above, most of the gang evidence the referee feared would be offered as rebuttal was already before the jury. What little additional evidence was not weighty given what the jury already knew about or was noticed as aggravation and thus potentially admissible regardless of Skyers' presentation (Vol. 82 of 135 at pp. 556-558 [the prosecutor specifically informed Skyers that "he intended to offer" each of petitioner's juvenile offenses as aggravators at the penalty trial.].) Also, had the trial prosecutor had the CYA records or other "rebuttal" discussed by the referee, if so inclined he could have used it in response to the "good guy" evidence Skyers put on.

Of course, reasonably competent counsel might expect a prosecutor to point out those times when petitioner was not 100% successful at CYA.

However, the fact that petitioner would not be 100% successful during his commitment was something which could be spoken to by any number of expert witnesses, such as psychologists, CYA counselors, and experts in positive institutional adjustment.

Additionally, no rebuttal evidence to positive institutional adjustment was submitted at the reference hearing proceedings.

Reasonably competent counsel would not have forgone the introduction of information regarding petitioner's social history merely because contemporaneous records did not contain direct reference to abuse, mental illness or malnutrition and that fact could be used in rebuttal. As Mr. Earley explained, " Most abusive families don't self report. They don't go to school and say I'm at home abusing my son.... They usually do just the opposite, is they usually paint a very rosy picture, rather than saying I'm here as an abusive parent to talk about my child." (RT 4014.) In addition, many records spoke to trouble in the family, poverty, parental death, school problems and the other themes advanced by petitioner.

The referee agreed with respondent's supposition that "the use of petitioner's family to develop proposed mitigating themes constitutes a difficult area for reasonably competent counsel [because] (Azell, Linda [and] Rita) testified in support of an alibi defense at the guilt phase." (Report

at p. 286.) But this was not an insurmountable difficulty, nor a reason not to present any of petitioner's family members at the penalty phase (RT 4023 [Earley].)

It was not necessarily true that "all of them" "had their credibility tarnished in the eyes of the jury by the fact that the jury convicted Mr. Champion" and therefore would not be believed. (RT 4018.) As Mr. Early explained, "Sometimes witnesses are very credible but they are wrong. So the jury may have looked and said you know this family, they're misremembering the times are not right. I do not remember reading a verdict where they came out and said we find the Champion family guilty of perjury." (RT 4019.)

Nor was the fact that petitioner's mother described her family as "normal" and may not been not have been open or fully truthful in the interview with Youth Authority officials reason not to put on petitioner's social history at the penalty phase. (RT 3985-3986.) As already noted, there was documentary evidence to support that social history. And the fact that a family member witness at a capital penalty trial or in dealing with Youth Authority officials considering a child's release may have motives to be less than fully open is a common phenomenon. As Mr. Early explained, "[t]here are witnesses all the time in penalty phase that you have to deal with the fact

that, yes they have motives. But what you have to do is when you look at the totality of the evidence we had in this case, from witnesses that are family members, distant family members, relatives, neighbors who saw some of the things they saw, brothers and sisters, the weight of the evidence, a competent lawyer would not have a concern that a mother going to [C]YA when she is concerned about losing her other kids, trying to get her son home, may have painted a rosy picture at the time. Is that misleading? Yes, but I think a competent lawyer knows it is easy to deal with." (RT 3987.) Indeed, among other things, trial counsel, if confronted with Azell's statement to the Youth Authority, could have relied upon the theme frequently cited by the referee in aid of respondent's position, i.e., Azell's reluctance to reveal embarrassing family business. Furthermore, in the present case, Skyers did put on Azell at penalty phase. (RT 3986.) [127]

As it is not necessarily true that the family members are the best sources of information when presenting a petitioner's life history (RT 4018), reasonably competent counsel is required to conduct a thorough investigation to determine what evidence is available from what sources. Reasonably competent counsel then makes the decision what to present at

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[127] "You're saying a competent lawyer would have known this woman was rejected, and the jury is going to be angry and not believe a word she said. This whole penalty phase was this man was looking for work and he went out to do a mentoring program he put no other witnesses on other than the mother to say that that's all he put on." (RT 3986-3987.)

what phase taking into consideration credibility concerns. (RT 4018.)[128]

As discussed fully above, the *Strickland* expert did not believe reasonably competent counsel would not put on petitioner's family members simply because some of them had testified at the guilt phase. In any event, Skyers DID put on petitioner's mother. Other family members and friends, including Tracy, Terri, E.L., Gary Jones and others could have testified to their love for petitioner and the circumstances of his life. Evidence of Lewis II's beatings of petitioner's mother and Lewis III's beatings of petitioner and other family members is anecdotal. Any lack of contemporaneous medical records could be explained by a social historian, as Dr. Miora testified at the reference hearing. Additionally, contemporaneous records did reveal petitioner had troubles at home and Reggie's and Gerald, Jr.'s criminal records speak to problems during the time frame at issue.

In attempting to identify rebuttal evidence that the trial prosecutor was likely to have offered in rebuttal to the mitigating evidence adduced at the reference hearing concerning petitioner's development, functioning, and social history, the referee cites five factors categories of evidence which may not have been available to a prosecutor and/or do not constitute rebuttal

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[128] "A reasonably competent lawyer would have known what was available in the penalty phase. He would have known the other evidence and he would have made a decision... including do you put the witnesses on in the guilt phase. If he's decided that he's ruining credibility, that's one reason you get second counsel.... " (RT 4019.)

evidence damaging to petitioner:

> "i) The testimony of Harris, Bogan and Player given during the reference hearing undermines petitioner's claim of poverty, malnutrition or physical abuse, poor home environment or that petitioner was a follower or exhibits mental defects.
>
> ii) The testimony of Gary Jones given during the reference hearing is inconsistent with petitioner's claim of poverty, malnutrition or physical abuse. Jones describes their childhood as "we had a beautiful life." In his opinion, petitioner displayed leadership traits and was athletic. He expressed high regard for Mrs. Champion as a mother. Jones recalled that petitioner was unable to participate in organized sports due to a lack of funds to pay required fees.
>
> iii) Petitioner's mother's statement to school authorities that petitioner had a normal child birth (Exhibit CCC).
>
> iv) Petitioner's mother's statement to CYA authorities that all was well at home (Exhibit H).
>
> v) Petitioner's statement to CYA authorities that he has a regular family with both sad and happy times and that he has had the usual sibling rivalry with his brothers which he did not view as a major problem (Exhibit I). Petitioner's statement to CYA authorities that he is not a follower or easily influenced by others (Exhibit I). Petitioner told Dr. Minton he has had no contact with his biological father (Exhibit D)." (Report at p. 292.)

It is highly unlikely that the prosecutor would have called Wayne Harris, Earl Bogans, Marcus Player or Gary Jones to testify as to petitioner's upbringing. Even if the prosecutor at the time of trial had some CYA reports and evaluations, it is ludicrous to characterize as "rebuttal evidence damaging to petitioner" that petitioner had a "normal child birth," that petitioner's mother told a CYA authority "that all was well at home," that

petitioner described his home to a CYA authority as "a regular family with both sad and unhappy times and that he has had the usual sibling rivalry with his brothers which he did not view as a major problem," "that he did not view himself as a follower or easily influenced by others" and "that he had no contact with his biological father." (Report at p. 292.)

Like respondent, the referee latches on to petitioner's mother's description of her family as "normal" and petitioner's description of his family as "regular" as if those two words describe the reality of petitioner's family life. Given the fact that petitioner had been involved in the juvenile justice system for more than two years, his brother Gerald had been sentenced at CYA, his brother Reginald had a criminal history, none of the children had graduated from high school, at the age of 16 petitioner was academically performing between the third and sixth grade levels, the family received government aid for financial support, petitioner's mother suffered from a serious emotional difficulties and depression, petitioner smoked marijuana, drank beer and associated with members of a criminal street gang, petitioner's biological father had left the family and petitioner's mother had married two other individuals both of whom had died – facts which were verifiable in readily available documentation which existed at the time of petitioner's trial – one might wonder what normal or regular was for the

Champion family. Certainly jurors were not likely to understand this upbringing as normal or regular. And certainly too jurors were likely to understand that petitioner and/or his mother might have been hesitant to reveal embarrassing family business to school or CYA officials.

Mr. Earley repeatedly and forcefully maintained that, even if there was conflict between prospective testimony and other information discovered, that does not necessarily mean the testimony would not be presented. As Mr. Earley explained:

> "So when a parent goes to a school, when a parent is reporting somewhere, they have agendas, you know that's going to come in, there is no -- every lawyer knows you don't have perfect cases that come in. ¶ So the question is not, well, I'm not going to put it in because it's not perfect, it's yes, these come with all of the disabilities. then you say okay, how am I going to handle the disabilities. . . . ¶¶ It's very common in these cases for these things to go on. It reasonably isn't an issue that means I don't put it on. That would be an incompetent lawyer that said this is a little problem here, I'm not putting it on. A competent lawyer looks and says okay, here we have a -- he learns why do these things happen and he incorporates it into his case just like district attorneys do and defense lawyers do in every other case. They look at it and they look and they say okay is this something that, how do I deal with this. It's here, how do I deal with it, not there is a little problem here, so I'm just going to give up." (RT 4015-4016.)

The referee misunderstood petitioner's claim of poverty. (Report at p. 161.) Credible and uncontradicted testimony and documentation described a family which bounced from relative to relative, sometimes lived in shelter, and lost their home because petitioner's biological father would

not pay the rent. For three to four years petitioner's mother's siblings supported the family with food and clothing. Petitioner's mother sought medical care from a clinic. Petitioner's mother's and fathers' certified Social Security records support the lack of income in the family during the relevant periods of time. Moreover the reports which are credited by the referee contain information that petitioner's mother was on welfare, AFDC and lived on disability payments. Because of financial constraints, for a time petitioner and his sister Rita were sent away to live with relatives. (RT 5120, 5128-5129, 5135, 5143, 5236, 5238, 5394-5401, 7699-7700; Exh. 142-144 Vol. 95 of 135 at pp. 4387-4406.)

The second period of poverty followed Gerald's death and extended to petitioner's mother's employment with Xerox and his sister's financial contributions to the family. Petitioner would have been ages 6 through 11. What if any assessment his peers, who would have been near the same age and living in the same neighborhood could make about the quality of petitioner's standard of living would have been in relation to their own.

The documentary and testimonial evidence established that but for approximately 7 years of petitioner's life, petitioner's mother was a single mother of eight children. Petitioner's mother was marginally employed at best and struggled to support the needs of her family. According to a 1978

Los Angeles County Probation report, the family's income was approximately $650 a month which came from government-subsidized aid to families and workers compensation. Of that amount petitioner's mother was paying $243 per month towards the purchase of her home. (Exh. 147: Vols. 95-96 at pp. 1446-1511.) 129

As discussed above, petitioner presented credible evidence of neuropsychological deficit. Moreover, low I.Q. and learning disabilities (which respondent's expert agreed represent a neurological deficit) were established by contemporaneous school and CYA records.

Additionally, it should be noted that there was no expert testimony or any testimony whatsoever as to what rebuttal evidence the prosecutor would have sought to introduce at trial. The trial prosecutor, Jeffrey Semow, was employed in the same office as a Deputy District Attorney who handled the case for respondent. There was no showing that Semow was unavailable to testify.

In short there was no rebuttal evidence damaging to petitioner not otherwise presented or admissible at the guilt or penalty phase, nor any other circumstance, which would have precluded reasonably competent counsel from presenting the mitigating evidence adduced at the reference hearing.

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129 The referee found credible evidence that petitioner could not afford to play organized sports with his friend Gary Jones. (Report at p. 292; RT 5666-5668.)

D. Given the Abundance of Credible Mitigating Evidence that Could Have Been Presented, Trial Counsel's Failure To Obtain and Present Such Evidence was Prejudicial

Counsel's failure to adhere to prevailing professional norms in investigating mitigating evidence is prejudicial where, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *(Strickland* v. *Washington, supra,* 466 U.S. at p. 694.) To state the standard a different way, could a reasonable juror have credited and been persuaded by some of petitioner's mitigating evidence? The High Court explains that it does not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome," but rather that he establish "a probability sufficient to undermine confidence in [that] outcome." (*Strickland v. Washington, supra*, 466 U.S., at 693-694.)

A determination of prejudice for claims of ineffective assistance of counsel at the penalty phase requires the court to " 'reweigh the evidence in aggravation against the totality of available mitigating evidence.' " *(In re Lucas, supra,* 33 Ca1.4th at p. 733, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 534.) The question is whether "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the

defendant's] moral culpability." *(Wiggins* v. *Smith, supra,* 539 U.S. at p. 538, quoting *Williams* v. *Taylor, supra,* 529 U.S. at p. 398.) Prejudice is found where there is a reasonable probability that "'at least one juror would have struck a different balance.'" *(In re Lucas, supra,* 33 Ca1.4th at p. 690, quoting *Wiggins* v. *Smith, supra,* 539 U.S. at p. 537.) By contrast, the referee in this case viewed his responsibility as finding reasons why a reasonable juror might *reject* particular pieces of mitigating evidence.

It is well recognized that evidence of a defendant's upbringing "may be the basis for a jury's determination that a defendant's relative moral culpability is less than would be suggested solely by reliance upon the crimes of which he stands convicted and the other aggravating evidence." *(In re Lucas, supra,* 33 Ca1.4th at pp. 731-732; see also *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 319 ["[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse"]; *Eddings* v. *Oklahom, supra,* 455 U.S. at p. 112 [noting that consideration of the offender's life history is "part of the process of inflicting the penalty of death"].)

Strickland v. Washington makes clear that the prejudice prong of an ineffective assistance of counsel claim is to be evaluated by an **objective** standard: whether it is reasonably likely the outcome would have been different. Thus, this Court is required to decide whether reasonable trial jurors, or some number of them, would be reasonably likely to have accorded weight to, and been affected by, the witnesses' testimony. The Ninth Circuit too has recognized that the determination of prejudice is governed by an objective standard. In assessing prejudice, the court has stated, "we are not asked to imagine what the effect of certain testimony would have been upon us personally," but what the effect would have been on the sentencer. (*Smith v. Stewart* (9th Cir. 1998) 140 F.3d 1263, 1271, cert. denied, 525 U.S. 929 (1998).)

In the instant case, the aggravating evidence included the murder of Bobby and Eric Hassan. These murders – of which petitioner still maintains his innocence, but which the jury had already found him guilty of – were brutal. But, as recognized by the state, insofar as revealed by the evidence petitioner's role at worst was as an aider and abettor, not as the shooter. At the time of the Hassan crimes, petitioner had only turned 18 years by a couple of months. The prosecution established petitioner's association with a violent street gang from the age of 12. The prosecution displayed

photographs of petitioner throwing gang signs and holding weapons well in the company of known gang members. The prosecution offered evidence of juvenile offenses which petitioner committed in the company of fellow gang members. The prosecutor portrayed petitioner as a hardened criminal who would be a danger to prison guards and other inmates if given a life sentence. Finally, the prosecutor offered evidence that petitioner was involved in the Taylor and Jefferson homicides.

The prosecutor predictably capitalized on counsel's inadequate presentation by arguing that petitioner lacked remorse, was cold blooded, was involved in Taylor and Jefferson, would be dangerous in prison, and was criminally associated with a violent street gang.

The defense case to spare Steve Champion's life at the penalty phase was grossly incomplete - - one might even go so far as to say nonexistent. In mitigation, Skyers relied on the unsupported, unargued, and not instructed upon theory of lingering doubt for the crimes the jury had just found petitioner guilty. Petitioner's mother and his juvenile parole officer were the only witness is offered in mitigation. Each testified briefly about petitioner meeting with his parole officer and his aspirations to be a tutor of young people.

The folly of forgoing all investigation into other penalty phase themes

and in relying solely on lingering doubt was demonstrated by Skyers' lack of **investigation, presentation, or argument** to the jury on the theory of lingering doubt and applicable law. Moreover, other than where a different jury makes the penalty determination, at the time of petitioner's trial, no California case stands for the proposition that a defendant is entitled to **introduce evidence** of lingering doubt at the penalty phase. He basically did nothing to support the single defense he had embraced.130

Evidence on the theories of mitigation presented at the reference hearing, which reasonably competent counsel would have offered on petitioner's behalf at the penalty phase were not speculative and reasonable jurors could well have found they were sufficient to overcome the aggravating factors.

At the reference hearing, petitioner presented compelling evidence that he was not involved in the Taylor crimes. The evidence at trial of petitioner's involvement in the Jefferson murder was not substantial. Coupled with reference hearing testimony of petitioner's lack of involvement in Taylor, the lack of similarity between Jefferson and Hassan and lack of indicia to show petitioner's involvement in Jefferson would have caused at

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130 Although defendant is free to **argue** the concept as a basis for imposing life, he is not entitled to specific instructions on the topic. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 942; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174.)

least one juror to find that the Jefferson homicide had not been proven beyond a reasonable doubt.

Unlike Ross, petitioner had no adult criminal record. Petitioner's juvenile record was not substantial. Petitioner's "criminal association" with the Raymond Avenue Crips – as opposed to his friendship with lifelong neighbors -- was at least in question. Petitioner associated with older gang members because he felt a sense of protection and belonging. This evidence is certainly sufficient to inspire sympathy in one or more jurors and to help explain and mitigate his involvement in gang-related criminal activity to whatever extent he was involved.

In addition to providing evidence of petitioner's non-involvement in Taylor and demonstrating Jefferson was not proved beyond a reasonable doubt, Petitioner offered an explanation for why petitioner might have known there was a waterbed in the Hassan home -- a singularly important piece of evidence if Skyers really had intended to put forth a case of lingering doubt. Petitioner could explain the tough talk between Ross and petitioner and mitigate his commission of juvenile offenses by showing positive adjustment at CYA. At the reference hearing, petitioner introduced lay and expert testimony and supporting documentation that petitioner had been placed in juvenile hall, had a lower than average intelligence and took

remedial classes at school. Experts who examined petitioner at or before his trial assessed his home and school life and wrote of gang association, depression, trouble at home, low intelligence, drug and alcohol use from an early age as well as positive outlook and amenability to rehabilitation. Records which existed at the time indicate divorce, parental death and disability, low economic and vocational standing, use of public welfare, poor school performance by petitioner and his siblings and criminality of petitioner's male siblings that predated his own. Petitioner was reared in a dangerous neighborhood and for most of his life, without the guidance of a father. Petitioner was physically and emotionally abused by his oldest brother and while his mother may have had the best of intentions, she was largely ineffectual in protecting her son. Ultimately, petitioner's mother opted to save the girls. Perhaps the only option to be expected of a loving but emotionally and financially strapped mother of eight.

Reasonable jurors hearing of petitioner's poor school performance and low academic abilities throughout his childhood and adolescence, together with the expert testimony confirming neurocognitive deficits, could have considered and given mitigating weight to that evidence, even in the face of a prosecutor's arguments and evidence minimizing its importance.

Reasonable jurors could have considered and given weight to the

evidence of poverty, even in the absence of additional proof that the referee suggests is necessary, such as records of delinquent house payments or of financial contributions made by other family members. (Report at pp. 224, 226-227). Reasonable jurors may *not* have considered the purchase of a used car in a Los Angeles neighborhood without good transit to be "discretionary," as it was characterized by the referee (Report at p. 225); grocery shopping for a large family, for example, is not an easy task without transportation. They may not have considered purchases of alcohol and/or drugs by some family members to demonstrate that the family was financially secure (Report at p. 226); to the contrary, jurors may have concluded that the expenditures of petitioner's brother Lewis Champion III on alcohol and drugs placed the family in tighter economic circumstances. That outsiders may not have taken particular note of the family's financial struggles (Report at 227-228) may have struck reasonable jurors as entirely unsurprising; many ordinary citizens have struggled with their own finances at certain points, and done their best *not* to reveal that embarrassment to others.

A reasonable juror could have accepted that violence in the home can and does occur without contemporaneous documentation by authorities, or witnesses outside the family. The abuse reported by multiple family

members obviously reflects the "kind of troubled history [that the United States Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability." (*Wiggins v. Smith, supra,* 539 U.S. at p. 535.) The nature and extent of the violence in the home is certainly something that a reasonable juror could have found weighty in considering whether petitioner should be executed or sentenced to life imprisonment without parole.

Reasonable jurors could well have concluded that petitioner's development and functioning was adversely affected by living in a community plagued by violence, in which there were poor relations between members of the community and the police, and in which few educational and other resources were available to youth. Other children with disrupted home lives might find refuge in the community, but for petitioner, neither place really offered safety.

These conditions, together with aspects of petitioner's extended family history, make up the kind of cultural evidence that places a human being such as petitioner in context. Petitioner was *not* raised in a reasonably safe, relatively affluent community with good schools, by people with the advantages of education, steady employment, sound mental health, and access to resources, and neighbors similarly situated. A reasonable juror could decide that children being beaten by persons from rival

neighborhoods, gunfire in the streets, and the perception (backed by accounts from family and friends, and reported contemporaneously in newspapers and studies) that the police were not on one's side represents a very substantial set of obstacles to healthy development.

The mitigating evidence that the jury could have heard is far more compelling than the evidence the jury weighed in determining petitioner's sentence. But without evidence of Champion's traumatic upbringing and positive attributes the jurors were likely to agree with the prosecutor's view that petitioner was an evil person who chose to associate with hardened gang members and was therefore deserving of death. 131

Had petitioner's jury heard of petitioner's challenges in life, and those of his family, there is a reasonable probability that they would not have decided he was "the worst of the worst" and condemned him to death.

Moreover, the mitigating evidence counsel failed to present would not have been subject to impeachment and would not have opened the door to potentially damaging rebuttal. (See, e.g., *In re Ross* (1995) 10 Cal.4th

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131 See *Boyde* v. *Brown, supra,* 404 F.3d at pp. 1177-1178 [counsel's failure to investigate and present evidence of the abuse the defendant had suffered in childhood was not only harmful because it deprived the jury of relevant information about Boyde's childhood, but because the evidence counsel did elicit suggested that Boyde had a normal, non-violent childhood].)

184,206.) The jury was already made aware of petitioner's gang affiliation, his juvenile "record" and his prior association with the likes of Mallet, Ross and the Player brothers. The additional juvenile offenses committed by petitioner were noticed aggravators, would not have been offered in rebuttal, but rather as a part of petitioner's case demonstrating his positive adjustment at CYA.

Because it cannot be concluded with confidence that the jury unanimously would have sentenced petitioner to death if counsel had presented and explained all of the available mitigating evidence, reversal is required. (See *Williams* v. *Taylor, supra,* 529 U.S. at pp. 368-369, 399).

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be granted insofar as it is based upon counsel's constitutionally inadequate representation of petitioner at the penalty phase of the trial, and the death sentence imposed upon petitioner should be vacated.

Dated: 12/15/09

Respectfully submitted,

Karen Kelly
Attorney for Steve Champion

PROOF OF SERVICE

I am a citizen of the United States and am employed in Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

PETITIONER'S EXCEPTIONS AND BRIEFING ON THE MERITS

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

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I, K. KELLY, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 12/22/09 at Modesto California.