SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

) CAPITAL CASE

IN RE STEVE ALLEN CHAMPION) No. S065575
PETITIONER,)
)
)
ON HABEAS CORPUS.)

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

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

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DEATH PENALTY

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I.

INTRODUCTORY STATEMENT

In response to the referee's 377-page report, respondent filed a combined 67-page Brief on the Merits and Exceptions to the Referee's Report. Other than repeating the reporter's transcript cites employed by the referee in his findings, respondent does not independently cite to or discuss any of approximately 10,000 pages of testimony contained in the reporter's transcript of reference hearing proceedings. Respondent mentions the testimony of only 12 of the 26 witnesses who testified at the hearing and

then only to restate -- and sometimes wildly overstate – the conclusions of the referee. (See Respondent's Brief on the Merits and Exceptions to the Referee's Report, hereinafter "RBOM," 17-35.)

Although pursuant to Evidence Code sections 450-452 it would be subject to judicial notice, respondent dedicates more than 12 pages of its 67-page brief to setting forth this Court's statement of facts from the direct appeal opinion which was authored ten years before the beginning of the reference hearing. (RBOM 4-17.) [1]

Respondent employs the referee's practice of citing to the exhibits and briefing filed during the reference hearing by use of exhibit numbers rather than citing to the relevant locations within the 135 volumes of Clerk's Transcripts filed with this Court. Even then, and only insofar as they are mentioned by the referee in his findings, respondent discusses only 7 of the more than 450 exhibits entered into evidence at the reference hearing. Only one of those cites is to trial counsel's files and none to the vast number of

[1] Note, this Court appears to accept and confirm petitioner's position that four perpetrators were involved in the Taylor crimes. (RB at pp. 7-8.) As discussed in detail in his Brief on the Merits, given the evidence adduced at trial of Mallet and Ross' guilt, the prosecutor's concession at trial that either Michael Player or Marcus Player was the third perpetrator and respondent's concession at the reference hearing that Robert Aaron Simms was one of the four perpetrators, petitioner has not only raised a reasonable doubt as to his involvement in those crimes but has proven beyond a reasonable doubt that he was not one of the four men who committed the Taylor crimes. (See Petitioner's Brief on the Merits and Exceptions to the Referee's Report, hereinafter "PBOM,"pp. 193-221.)

documents which independently support petitioner's claims of available mitigation are mentioned. (See RBOM 20, 25, 26, 39, 43.)

Respondent's discussion of the applicable law on the issue of competency of counsel is lacking in both quantity and substance. For example, except for a fleeting mention of *Williams v. Taylor* (RBOM at p. 53), respondent fails to acknowledge – much less apply – for example the opinions of the United States Supreme Court in *Wiggins v. Smith* (2003) 539 U.S. 510, *Rompilla v. Beard* (2005) 545 U.S. ___, 125 S.Ct. 2456, and *Penry* v. *Lynaugh* (1989) 492 U.S. 302. Respondent fails to acknowledge or distinguish this Court's decisions which compel conclusions contrary to its own such as *In re Gay* (1984) 19 Ca.4th 771, *In re Lucas* (2004) 33 Cal.4th 682, and *In re Marquez* (1992) 1 Ca1.4th 584. Like the referee, respondent ignores relevant ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and ABA Standards for Criminal Justice. Where respondent employs what might be considered legal reasoning, it omits any serious application of the relevant case law, constitutional authority, or defense counsel guidelines to the facts of this case. Like the referee, respondent has an unconstitutionally limited view of what constitutes mitigation in a capital case and what would constitute reasonable tactical decisions by a capital defense attorney in determining what should or

should not be offered in mitigation at the penalty phase.

Respondent asserts that "[t]he referee found...that even a virtually limitless investigation such as that conducted by Champion's current attorney would *not* have produced evidence that a reasonable trial attorney would have presented at a penalty phase." (RBOM at p. 3.) It is simply wrong to characterize petitioner's post conviction investigation as "limitless." As it pertained to the reference questions, petitioner's post-conviction investigation consisted of interviewing witnesses with knowledge relevant to the incidents noticed as aggravation and to petitioner's life history. The investigation included the gathering of records for petitioner and his family and consultation with appropriate experts. These investigative efforts constitute "basic" death penalty case investigation. (See generally *Wiggins v. Smith* (2003) 539 U.S. 510, *Rompilla v. Beard* (2005) 545 U.S. ___, 125 S.Ct. 2456, *Williams v. Taylor* (2000) 537 U.S. 19, *In re Lucas* (2004) 33 Cal.4th 682, ABA Standards for Criminal Justice, Second Edition, 1980, the Defense Function, sections 4-1.1, commentary.)

Moreover, the referee credited important facets of petitioner's mitigation evidence, which, as argued in petitioner's Brief on the Merits are sufficient to support relief. Also, the referee was wrong in concluding that a reasonable attorney would not have used most, if not all, of the mitigating

evidence adduced at the reference hearing. (See PBOM pp. 232-284.)

Respondent credits the referee with conducting "an exhaustive, careful, and painstaking review of the documentary evidence and live testimony that was introduced at the hearing...." (RBOM at p. 17.) This is simply not so. Like respondent, the referee chose to ignore the testimony of many witnesses or arbitrarily deemed them in whole or in part not credible – and ignored hundreds of pages of documentary evidence corroborative of petitioner's claims. These reports include CYA reports, school records, social security records and police reports. Moreover, one can hardly credit the referee for his 377-page voluminous, verbose, and argumentative report when more that 225 pages of the report mirrors nearly word for word respondent's proposed findings of fact. [2]

Respondent also repeats a number of the referee's careless errors. For example, there was no evidence at trial or offered at the reference hearing from which to make a determination that Eric Hassan was "handicapped." (RBOM 1; Referee's Report at 14.) Dr. Deborah Miora was called as a psychologist. She was not a "mitigation specialist." (RBOM 25; Referee's

[2] Compare Referee Report to Respondent's Proposed Findings of Fact as follows: RR pp. 31-76 to RPFF 267-310; RR 167-224 to RPFF 310-363, 367, 369, 371-382; RR 224-244 to RPFF 383-406; RR 247-260 to RPFF 412-423, 425; RR 262, 272-274 to RPFF 436-438; RR 276-286 to RPFF 439-450; RR 312-326 to RPFF 452-468; RR 326-376 to RPFF 471-521.

Report at 13, 30, 52, 55, 185, 228, 233.) Petitioner's mother's name is not "Mrs. Champion" but rather "Mrs. Jackson." (RBOM 25; Referee's Report at 108, 134, 137, 138139, 143, 144, 145, 146.) Petitioner's trial counsel Ronald Skyers is not African American. He is of Jamaican descent. (RBOM 21; Referee's Report at 24.)

By contrast, for the benefit of this Court and because petitioner is convinced that the facts adduced at the hearing compel relief, petitioner's brief on the merits and exceptions to the referee's report contains detailed citations to the Reporter's Transcript of the hearing and his cites identify the speaker. So that this Court might review *de novo* whether findings are based on substantial evidence, petitioner discusses and cites to hundreds of pages of relevant documentary evidence. Petitioner has cited and applied a multitude of United States Supreme Court, California Supreme Court and other relevant authority to the facts adduced at the hearing.

As discussed below and in Petitioner's Brief on the Merits and Exceptions to the Report of the Referee, petitioner has carried his burden of demonstrating both deficient representation on the part of trial counsel and the prejudice which compels relief.

II.

INACCURATE STATEMENTS OF RESPONDENT CONTAINED IN THE SUMMARY OF REFERENCE HEARING FINDINGS

As a preliminary matter, petitioner takes issue with a number of statements contained in respondent's "Summary of Reference Hearing Findings." (RBOM at pp. 17-38.)

Respondent asserts Skyers "testified at length...about the scope of his representation and investigation into potential mitigating evidence." (RBOM at p. 17.) If by this comment respondent means to imply that Skyers' "lengthy" testimony contains a discussion of multiple avenues of mitigation themes explored but discarded, techniques such as detailed witness interviews, record gathering, or consultation with appropriate experts, this is just not so. As recognized by the referee, Skyers' investigation was deficient, specifically:

> "He undertook no separate investigation of the [noticed aggravators] Jefferson[and Taylor] murder[s]." (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's school records. He did not contact extended family members who lived in the area. He did not question the family members in a specific detailed method...." (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.)

In that same section, respondent asserts "Skyers personally spoke to, visited and investigated the following persons, locations, or information: Drs. Pollack and Imperi, Champion, family members, family home and neighborhood conditions, the Jefferson, Hassan, and Taylor crime scenes, and Champion's age." (RBOM at p. 18.) Not so. Although Skyers communicated by letter with Pollack and Imperi, he had no recollection of visiting their offices. (RT 1230.) Skyers' communications with petitioner were limited -- perhaps exclusively to when they were in court and petitioner was in the holding cell. At those "interviews" Skyers would not take detailed notes and would not discuss in detail petitioner's life. (RT 1213-1215, 1403.) [3] Skyers did not "visit" the Taylor, Hassan or Jefferson crime scenes other than to drive by them. Skyers did not interview any surviving witness and complained that he "had enough to do to defend against Hassan," and so did not investigate Taylor, Jefferson, or juvenile aggravators

[3] The record reflects 11 court appearances from when Skyers became involved in the case (8/21/81) to the day jury selection began (9/13/82.) During that 13 month period of time only the 8/21/81 interview notes (prior to Skyers appointment) between Skyers and petitioner reflect any communications between petitioner and his attorney. Except for the motion to sever/consolidate these court appearances involved continuing the case. Petitioner signed a release on 2/11/82. That document may reflect the only visit with petitioner which occurred on a date when the case was not in court. (TCT 562 [8/21/81], 569 [8/24/81 sub'd in], 576 [10/23/81 cont.], 581 [12/8/81 cont], 589 [2/25/82 cont.], 589 [2/16/82 consolidation granted], 593 [2/25/82 cont.], 595 [3/2/82 cont.], 602 [4/28/82 cont.], 605 [6/21/82 cont.], 608 [7/13/82 cont.], 611 [7/27/82 cont.], 613 [9/13/82 jury selection begins].)

beyond the "basic familiarity" which came from reading police reports. (Vol. 86 of 135 at pp. 1674-1675, 1682.) The only family members Skyers spoke to were petitioner's mother, Azell, sisters Rita and Linda, and brother Reggie. Even then in his communications with family members, Skyers relied on a process of asking "open ended questions of the sort that would have called on them to provide [him] with any other information that they could think of other than what they had told me in response to [his] questions that would give [Skyers] instances of good conduct on the part of [petitioner] or that could be used at the penalty phase." (Vol. 86 of 135 at pp. 1656-1657.) [4]

Whether "Skyers had substantial contact with Champion's mother and sisters and allowed them to discuss Champion and the family's background" [RBOM, 21 (emphasis supplied)], was hardly adequate penalty phase preparation (see *In re Lucas, supra,*), particularly given any family's natural reluctance, as recognized by Skyers -- and confirmed by the *Strickland* expert -- to reveal embarrassing information and likely lack of understanding as to what might be considered mitigating. (Vol. 86 of 135 p. 1567, RT 4015-4016.)

Although Skyers visited petitioner's home, his familiarity with the

[4] This convoluted comment was drafted by the Deputy Attorney General who interviewed Skyers.

neighborhood came from driving through the area. (RT 1259-1260.) Skyers may have been aware of petitioner's age (just a few months over 18 at the time of the crimes), but he did not use it as a factor in mitigation and it was employed by the prosecutor as a factor in aggravation. (RT 1120-1121, TRT 3713.)

Respondent asserts "[t]he referee determined that the jury knew . . . that Champion was not the shooter, and that Champion was not the leader." [RBOM 22.] Although the referee did say this, and while petitioner agrees there is no basis for believing that petitioner (if he was involved) was the shooter or the leader, it is not an accurate statement as to what the jury "knew." (Report at 78) Indeed, the prosecutor argued there was "a very good possibility" that petitioner personally shot the Hassans. (TRT 3714-3715.) Hence, reasonably competent counsel would have made use of available evidence concerning the relative ages and criminal records of petitioner and his codefendant and others possibly involved in the Hassan offenses and so given the jury more of a basis for confidence that petitioner,

if he was involved, was neither the shooter nor the leader.

Citing to the report at pages 18-19, 24, 25, and 79, respondent states that the referee found that Skyers knew the prosecutor could not link petitioner or Ross to the Jefferson homicide with physical evidence or witness identification. (RBOM 18-19.) As stated in this brief and petitioner's Brief on the Merits, Skyers' conclusion to this effect, if there was one [respondent neglects to cite to that portion of Skyers' testimony which contains this "conclusion", was not based on any independent investigation but rather stemmed entirely from the reading of police reports. As noted in *Rompilla, supra,* without conducting an independent investigation, defense counsel could have had no hope of knowing whether the evidence presented by the prosecution was accurate.

At petitioner's trial the prosecution presented testimony and photographic evidence of the gruesome execution style killing of Mr. Jefferson. In spite of the fact that Skyers knew evidence of petitioner's involvement in the Jefferson homicide was to be offered both at the guilt phase and as a noticed penalty phase aggravator, Skyers undertook no effort to independently investigate whether petitioner or Ross had been involved.

Similarly, as discussed in great detail in petitioner's Brief on the Merits (PBOM at pp. 193-218, 232-283.), it mattered not that Skyers'

pretrial review of discovery indicated to him that the prosecutor had no physical or identification evidence linking petitioner to the Taylor murder. (RBOM at p. 19.) Both in a pretrial argument to the court and to the jury later, the prosecutor specifically linked petitioner to the Taylor murders. Initially, the theory of the prosecutor at trial was that petitioner was involved in the Taylor offense as a member of an ongoing criminal conspiracy. (TRT 1520.) Unlike the Jefferson homicide, the prosecutor had physical evidence connecting Ross to the Taylor homicide. It was on the basis of petitioner's connection to Ross and other Raymond Avenue Crips that the prosecutor sought to connect petitioner to the Taylor homicide – perhaps as the getaway driver -- but after Cora Taylor's identification of petitioner as the third perpetrator inside the residence, the prosecutor expanded his theory of petitioner's guilt to being one of the men inside the residence. (TRT 3705-3709; see PBOM at pp. 257, 188 fn. 99.)

In spite of the fact that Skyers knew evidence of petitioner's involvement in the Taylor homicide was to be offered both at the guilt phase and as a noticed penalty phase aggravator, Skyers undertook no effort to independently investigate whether petitioner had been involved. Post conviction counsel performed the investigation which should have been performed by both Skyers and the police and ultimately demonstrated who

was inside the Taylor residence - - a threesome consisting of Craig Ross, Evan Mallet, and Robert Aaron Simms. (See PBOM at p. 194.)

Respondent notes that Skyers' investigation into petitioner's juvenile offenses consisted entirely of reading discovery provided by the prosecutor. (RBOM 19.) As noted in petitioner's brief on the merits, each of petitioner's juvenile offenses was noticed as a potential aggravator, and yet no independent investigation was conducted. (PBOM 273, 294; vol. 82 of 135 at pp. 556-559.)

Respondent errs in asserting Skyers reviewed petitioner's CYA *file*. At most the referee found that Skyers reviewed five CYA *evaluations*. The referee made no finding that Skyers reviewed petitioner's entire CYA file, some of which was admitted into the reference proceedings as exhibit number 147. (See PBOM at pp. 54-57; Vols. 95-96 at pp. 1446-1511.) [6]

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[6] Recall, Skyers did not testify that he had a recollection of retrieving the CYA evaluations after viewing them in court, and copies of the documents were not in petitioner's trial file. It was not Skyers' custom and habit to obtain such documents. There is no evidence that the CYA records would have been at the Bullis office. After considerable prompting by respondent's counsel, Skyers testified only that he believed that that these "types" of records could be retrieved from that office, but there was evidence that petitioner's CYA records were in Sacramento. The original release for petitioner's "parole" records is still in Skyers' trial file. There are no trial file notes that Skyers discussed the content of these records with anybody. Petitioner's parole officer Mr. Crawford did not bring a file to court when he testified at trial. Crawford's testimony was not of the type from which one could glean Skyers' knowledge of the contents of petitioner's CYA records. Even after having been read the contents by respondent's counsel, there was no refreshed recollection or any testimony at these proceedings from

Respondent erroneously asserts that Drs. Pollack and Imperi were appointed to evaluate petitioner's mental status "as to both the guilt and penalty phase."(RBOM at p. 20.) This is simply not so. As discussed in detail in petitioner's Brief on the Merits (PBOM at pp. 47.), the referee found "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 [and that a]lthough 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' ... Skyers did not take advantage of that order. " (Report at pp. 45-46.) Also, the referee found that Skyers did not provide Drs. Pollack and Imperi with a copy of petitioner's school records, the reports of Drs. Prentiss, Minton, Perrotti and Brown, the December 13, 1978 Initial Home Investigation Report, the Youth Training School reports, or the November 8, 1978 probation report. (Report at p. 72.)

Petitioner's prior attorney Mason's motion to have Pollack appointed specified that a psychiatrist be appointed "to determine **if there are any**

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which this Court might infer that Skyers had a prior familiarity with the contents. Finally, the overall tenor of Mr. Skyers' testimony was that he did not believe that petitioner's having been sent to the California Youth Authority could in any way be helpful to a case in mitigation. (RT 1223 [Skyers]; Vol. 84 of 135 at p. 1038A, 1063.)

psychiatric defenses in the case." (TCT 399.) Skyers made no additional requests of the trial court to expand that appointment and gave no additional orders to Pollack to perform a penalty phase psychological examination. 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.)

Moreover, 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 an attorney would forward with a request to evaluate for penalty phase purposes. (RT 3794 [Earley].)

Respondent makes similar errors in discussing the question of what additional mitigating evidence petitioner could have presented at the penalty phase. (RBOM at pp. 22-30.)

Initially, respondent suggests that petitioner presented little evidence to refute or otherwise address or minimize his role in the Hassan murders. (RBOM at pp. 22-23.) But petitioner was not provided funding with which to do so, and as respondent overlooks, throughout the proceedings, the

reference court sustained respondent's objections to any attempt by petitioner to do so as beyond the scope of the reference questions.

As discussed in detail in petitioner's prior briefing, and contrary to the findings repeated by respondent (RBOM at p. 23), petitioner did indeed present evidence at the reference hearing that could have been offered to refute or mitigate his role in the Jefferson homicide (PBOM at pp. 221-223), explain and mitigate his involvement with a criminal street gang (PBOM at pp. 228-229),[7] demonstrate deficiencies in the prosecutor's themes of aggravation as contained in the tape-recorded conversation between petitioner and Ross (PBOM at pp. 229-232), and explain or mitigate petitioner's involvement in juvenile offenses. (PBOM at pp. 223-228.)

Petitioner offered credible evidence of his noninvolvement in the Taylor crimes which was not dependent on the testimony of lay witnesses

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[7] Respondent has adopted the referee's opinion that petitioner's involvement in a criminal street gang increased community dangers and would rebut any claimed mitigation based on having been raised in a dangerous community (RBOM at p. 29.) But petitioner's involvement in a criminal street gang itself stemmed from the lack of safety in his home and community. The increasing dangers in the neighborhood, and the lack of safety at home, help explain in a mitigating way WHY petitioner became involved with a gang, and so mitigate his gang activity and related criminal acts, regardless of whether those actions themselves made the neighborhood more dangerous. Of course violent gang activity increases neighborhood danger, but explaining why petitioner became involved in gang activity was crucially important mitigation.

the reference court deemed not credible. [8] This evidence included proof beyond a reasonable doubt based on fingerprint evidence that Robert Aaron Simms – not petitioner – was the third perpetrator inside the Taylor residence (PBOM at pp. 195-197), evidence that petitioner was elsewhere with friends at the time of the Taylor crimes and approached the containment area from a location making it unlikely he had been in the getaway car (PBOM at pp. 201-212), evidence which could have led reasonable jurors to conclude that Simms and Michael Player were the two additional perpetrators who, along with Ross and Mallet, had committed the Taylor crimes (PBOM at pp. 214-218), and evidence of additional deficiencies in law enforcement investigation which would have supported a reasonable juror's conclusion that the Taylor murder was not proven against petitioner beyond a reasonable doubt. (PBOM at pp. 218-221.)

Like the referee, respondent takes conflicting positions regarding whether or not petitioner suffered from neuropsychological deficits. This is so because while both the referee and respondent take the position that petitioner does not suffer from "brain damage," they both readily acknowledge that petitioner suffered from impairments such as low IQ and

[8] Petitioner takes exception to any finding by the reference court that the lay witnesses were not credible and/or that reasonably competent counsel would not have offered some or all of them at trial. (PBOM at pp. 214-218.)

intellectual functioning, reading and learning difficulties, attention deficits, a flat affect, deficiency in ability to conceptualize, and impulsiveness. (RBOM at p. 24; Report at p. 82.) [9]

While petitioner's neuropsychological expert, Dr. Riley, opined that possible causes of petitioner's neuropsychological deficits could be related to *in utero* abuse by petitioner's biological father, abuse by petitioner's older brother, and/or injury resulting from a car accident that sent all of the members of the Champion family to the hospital and killed petitioner's stepfather, it was agreed between Dr. Riley and respondent's expert Dr. Hinkin that the cause of petitioner's neuropsychological deficits might not ever be determined and that sometimes brains are just bad from the start. (RT 3171-3172, 3177 [Riley]; RT 6405-6407[Hinkin].) As argued in petitioner's Brief on the Merits, 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. (PBOM at p. 108.)

Moreover, the experts the referee found at most credible, Dr. Faerstein

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[9] It is unclear to what "20 contemporary psychological/psychiatric evaluations conducted by CYA doctors between 1978 and 1980" respondent refers. (RBOM at p. 24.) The referee found that Skyers had seen only the CYA evaluations of Minton, Perotti, Brown, and Stanke. The referee's discussion of the CYA evaluations was limited to those reports and a home investigation report. (Report at pp. 31-45.)

and Dr. Hinkin agreed that petitioner suffered from a low IQ and learning and/or attentional disabilities. Dr. Hinkin agreed with Dr. Riley that the CYA evaluations, upon which the referee and respondent rely to counter Dr. Riley's opinions regarding neuropsychological deficit and to forgive Skyers from any further investigation in this area, were not adequate for diagnosis of neurological impairment. (See PBOM at pp. 107-124.)

Therefore, substantial evidence of neuropsychological impairment was presented at the reference hearing even if one looks only to the points on which all testifying experts agreed. Further, as explained in petitioner's brief on the merits, Dr. Riley's testimony as to additional significant impairments (1) was every bit as credible as any contrary testimony, (2) unlike the testimony of respondent's experts, was based on actual first hand testing of and contact with petitioner, and (3) was likely to have influenced one or more jurors even if the referee personally deemed respondent's experts more credible. (PBOM at pp. 107-124.)

Respondent recites (with apparent approval) the referee's finding that evidence concerning the reasons for petitioner's becoming involved in gang activity did not constitute mitigating evidence. (RBOM at p.26, citing Report at p.84.) Respondent does not attempt to justify this finding or explain any possible reasoning supporting it, and petitioner is also at a loss

to discern any basis for it.

Evidence of petitioner's involvement in a criminal street gang was a noticed aggravator. As such Skyers was required to investigate the circumstances of petitioner's involvement and be prepared to counter the aggravating nature of petitioner's association with Raymond Avenue Crips. And contrary to the referee's finding, it is entirely possible and indeed likely that at least one juror, having heard evidence of petitioner's association with a criminal street gang from an early age and his alleged commission of criminal offenses with that gang, would have understood and recognized the mitigating force of petitioner's evidence that petitioner's association with a gang arose from a need to belong and to obtain some protection against the violence of the community and his home. (Vol. 92 at pp. 3373-3374; RT 7814-7818, 7975-7976, 7991-7994, 8003-8010, 8038-8045; PBOM at p. 145.) [10]

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[10] Indeed, 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].)

Likewise, a reasonable juror could have found petitioner's poor performance within the Los Angeles County school system – which was corroborated by the equally dismal performance of petitioner's older sisters and each of his brothers in the same school system -- was mitigating and also helped to explain his gravitation toward a criminal street gang.

Here respondent wildly overstates the finding of the referee. The referee stated that petitioner's proposed mitigation theme of poor academic functioning in elementary, junior and high school was "subject" to being [not actually] neutralized by petitioner's involvement in gangs when he was 12. (Report at p. 85; RBOM at p. 26.)

It must be recalled that by the beginning of petitioner's penalty phase, the jury had 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 in 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.

As discussed in detail in petitioner's Brief on the Merits, while entirely mitigating on its own, petitioner's poor school performance was part of a broader mitigating social history. Petitioner and his siblings' poor school performance help to paint a sympathetic picture of a young man with limited intellectual abilities who, when without a father figure for most of his life and a mother who was not emotionally or financially available to protect him from a dangerous community, used drugs as a means of self-medication, and gravitated to a group of similarly situated, but older and more criminally experienced youth in the neighborhood. (PBOM at pp. 61-94, 284-294.)

Reasonably competent counsel would have attempted to mitigate the prosecutor's aggravators by evidence of the age of petitioner, his relative lack of involvement, the ages of the other perpetrators, poor school performance, drug and alcohol use beginning at an early age, evidence of

family dysfunction, poverty, neighborhood conditions, reasons for gang association, and lack of parental control. (RT 4386, 4390-4391; PBOM at pp. 26-27, 84-85, 259.)

After noting that the referee found that the most basic of investigation would have uncovered the evidence in mitigation petitioner presented at the hearing and that reasonably competent counsel would have undertaken that investigation in the effort to obtain the evidence introduced by petitioner RBOM at pp. 30-31), respondent asserts that the referee found that the only evidence the referee thought worthy of presentation i.e., family love, petitioner's protective nature, petitioner's mother's difficulties as a single mother with a large family and little income, petitioner's lack of father figure, and the impact of petitioner's stepfather's death on petitioner could not have been discovered because of the family secretiveness. (RBOM at pp. 31-32, 35, 59.) This is absurd. Surely, Skyers could have gotten family members to affirm their love for petitioner. As noted by the *Strickland* expert, although Skyers called Azell to testify the penalty phase he did not even ask whether she loved her son and would visit him in prison if he were given life without the possibility of parole. (RT 3859-3860.) [11]

[11] In his Briefs on the Merits, petitioner raised an exception to the referee's finding that Skyers' failure to uncover mitigating evidence was due to a family member conspiracy to keep information from him. (PBOM at pp. 161-178.)

Moreover, contemporaneous documentation consisting of certified school records, certified Social Security records, and juvenile justice and criminal justice records confirmed that the Champion family had little income, for all but six years of his life petitioner had no father figure, both before he came into their lives and after the death of Gerald Trabue petitioner and his siblings were impoverished , lacked food and shelter, wore dirty and/or old clothes, had difficulties in school, expressed that there were difficulties at home, became involved in the juvenile justice system at an early age and then the criminal justice system, and that petitioner's mother had little connection to or understanding of petitioner's life. (See for example Vol. 92 of 135 3376-33Vols. 95-96 pp. 1446-1511; Vol. 111 of 135 pp. 3917-3940; Court Exh. 42C; RT 3208-3210, 5118, 5120-5126, 5128-5129, 5135, 5143, 5236-5238, 5395-5396-5397, 7699-7700, 7753, 7762 – 7765, 7768, 7793, 7837, 7840, 7972-7975, 8045-8056.)

Basic death penalty investigation such as discussing family matters with extended family members and other matters with teachers, doctors, and neighbors and collecting basic records would have revealed these themes to reasonably competent counsel in spite of any secretiveness of immediate family members.

Respondent goes on to assert that the referee found that any

mitigation expert who sought to introduce mitigation concerning petitioner's development, functioning, and social history, would be impeached with damaging evidence of petitioner's "extensive, violent criminal arrest record, his positive statements about his family's background and incriminating statements about his reasons for committing crimes for fast money, and his participation in a criminal street gang since age 12." (RBOM at p. 35.)

This comment reveals the referee's and respondent's lack of understanding of both what constitutes evidence in mitigation and what a reasonably competent defense counsel would deem worthy of introducing in order to convince one juror to spare his client's life. Foremost, all of the evidence of a violent criminal record either was before the jury or, having been included in the prosecutor's notice of aggravation, was already available for the prosecutor to place into evidence. Further, given the general reluctance of people to reveal embarrassing information about their families, a reluctance recognized by trial counsel (see PBOM at pp. 175-178), any positive statements by petitioner about his family would hardly be powerful impeachment of a more thorough and open family history. It seems especially ludicrous to assert that a capital defense counsel would not attempt to humanize his client to a penalty jury by offering evidence that his family loved him, he was protective of his younger siblings, his mother was

a single parent with a large family and limited income, he lacked a father figure for most of his life and the only person he thought of as a father died in a devastating car accident that sent his entire family to the hospital.

Petitioner outlined abundant, detailed and uncontroverted evidence in support of a multitude of additional themes in mitigation. These are discussed fully in his Brief on the Merits. (See PBOM pp. 59-161, 192-268.)

Ultimately, respondent notes only two exceptions to the referee's findings (RB 39-51), and ultimately endorses the ridiculous and gratuitous conclusion of the referee that "reasonably competent counsel...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" (RB 55), in other words, nothing.

III.

ARGUMENT

A. THIS COURT SHOULD REJECT REPONDENT'S EXCEPTION TO ANY FINDING THAT PETITIONER'S SCHOOL DIFFICULTIES SHOULD HAVE BEEN PRESENTED TO THE PENALTY JURY

The referee found that an attorney providing reasonably competent representation would have gathered petitioner's school records – which Skyers did not do – and from those records, would have learned of

petitioner's school difficulties. The referee found that petitioner's school reports – in conjunction with information in the CYA evaluations and the Pollack and Imperi report -- contained evidence of petitioner's low IQ, low intellectual functioning, reading and learning difficulties, attention deficits, a flat affect, low self esteem, and deficiencies in the ability to conceptualize. (Report at pp. 81-82.) The referee also found that reasonably competent counsel would have presented the evidence of petitioner's school difficulties to the penalty phase jury. (Report at pp. 10, 127, 128-133, 269-271.) Respondent takes exception to this finding on the basis that petitioner's school difficulties could be interpreted as petitioner's fault (RBOM at p. 40), the records do not contain information of another of petitioner's themes in mitigation – abuse by Lewis III (RBOM at p. 40), petitioner's mother did not reveal any "developmental problems" experienced by petitioner (RBOM at pp. 40-41), and that the theme of school difficulties could be "neutralized" by petitioner's association with a criminal street gang. (RBOM at pp. 41-44.)

As discussed in his Brief on the Merits and below, reasonably competent counsel would not have decided to withhold the information about petitioner's school difficulties based on any of the concerns expressed by respondent. (PBOM at 79-100.)

School records reflected that when petitioner was tested 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.) In elementary school petitioner had difficulty following directions, worked below grade level, needed help in learning to listen, direction and was easily distracted. (Vol. 111 of 135 at pp. 3917-3940; RT 7679 [Miora].) 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].) Petitioner worked "below grade level in all academic subjects" and it was noted that *"[h]ome problems disturb child."* (RT 6745-6746, 7686 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

Although in fourth grade, petitioner exhibited "growth in all academic areas, " was described as "enthusiastic" and "well-liked by his peers," he was still "easily distracted," and "need[ed] to feel that he can succeed." Petitioner's IQ was measured at 75 (RT 6746-6747 [Miora]; Vol. 111 of 135 at pp. 3917-3940.)

By seventh grade, petitioner's reading comprehension level was at 2.3 grade placement. In eighth grade, petitioner's reading comprehension level was at 4.4 grade placement. (Vol. 111 of 135 at pp. 3917-3940, RT 3422-

3434 [Riley].)

After being withdrawn from public school, petitioner was schooled at CYA. While at the California Youth Authority, petitioner took primarily remedial classes. 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. Petitioner was described as doing well in vocational fields and it was noted that he worked in a self-directed fashion. (RT 8138, 8141-8142, 8216 [Miora]; Vol 95 of 135 at p. 4480.)

Although the referee found that "the life history of Gerald Trabue, Jr. is immaterial to petitioner" (Report at p. 163), because 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 guidance and attention than was provided to the youngest children, it is reasonable to infer that some of the factors affecting petitioner's development, behavior and functioning also affected his closest brother. This is important because as mentioned in petitioner's Brief on the Merits (PBOM at p. 146), petitioner's siblings suffered similar and

significant school and other difficulties which Dr. Miora explained were relevant to petitioner's development and functioning. (RT 7785.)

Certified school records record the difficulties experienced by Lewis III, Reggie, Rita, 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 (achieving mostly C's and D's) and one teacher thought he needed to exercise self-control. It was noted that Lewis III was "never really sure what his mother is using for a last name." Lewis III withdrew from high school before graduation. (Vol. 95 of 135 pp. 4407- 4409, 4412.)

Reggie achieved only C's and D's throughout middle school and also did not graduate from high school. (Vol. 95 of 135 pp. 4418- 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. 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. 4420, 4423-4425.)

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.)

Like her brothers, 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. Rita was viewed as easily distracted and fearful of new situations. (Vol. 96 of 135 p. 4513-4514, 4518.)

It seems unlikely that any court would deem petitioner's gang association as "rebuttal" to evidence of petitioner's school difficulties. But,

in any case, evidence of petitioner's gang membership via expert testimony and pictures of petitioner, his codefendant, and others throwing gang signs and carrying weapons was already before the jury.

Petitioner's difficulties in school would provide still another reason for his becoming involved in gang activity. And while the referee and respondent might see petitioner's failure to learn as a product of his "choice" as a 12-year-old to join a gang, a reasonable jury could easily see a different cause-and-effect relationship.

Further, as explained in petitioner's Brief on the Merits, the failure of the school records to reveal evidence of abuse at home may simply reflect petitioner's mother's reluctance to reveal embarrassing information to school authorities --- a reluctance which the referee and respondent, when it serves respondent's litigational goals, are willing to elevate to an impermeable conspiratorial barrier preventing reasonable trial counsel from ever discovering such information. (PBOM at pp. 161-178.)

Moreover, even if the school records contained information inconsistent with another mitigating theme --- which they don't --- that would not be a basis for abandoning both themes, but rather, only for abandoning one or the other. It would not be a reason for going to penalty

trial with essentially no case in mitigation and no evidence offering any insight into who Steve Champion was.

B. THIS COURT SHOULD REJECT REPONDENT'S EXCEPTION TO ANY FINDING THAT PETITIONER'S FAMILY MEMBERS SHOULD HAVE BEEN CALLED TO TESTIFY ABOUT THEIR LOVE FOR PETITIONER AT THE PENALTY PHASE

The referee's finding that reasonable counsel would have, and Skyers should have, called family members to testify to their love for petitioner, his love for them, and his protective nature as an older brother is clearly correct.

That some of petitioner's family members testified at the guilt phase was not a reason to not call family members to testify to their love for petitioner and his love and protective behavior towards them.

There is no reason to assume that petitioner's conviction meant that the jurors had concluded that the family member guilt phase witnesses were perjurers. Only two family members, petitioner's mother and brother Reggie testified to an alibi. A reasonable juror could have believed these witnesses could have been mistaken as to date or time. Petitioner's sisters Traci, Terri and Rita testified only to the fact that a camera seized by police from the Champion home appeared to be the camera that Rita had given Terri for Christmas; Rita also testified to having seen Steve wear jewelry similar to the jewelry in evidence (and allegedly belonging to Bobby

Hassan) prior to the Hassan incident. Their testimony was consistent with the conviction and may have been entirely or partially believed. Linda did not testify at all at guilt phase.

Further, even if some jurors had concluded that some of the family members testifying at guilt phase had lied to support a guilt phase defense, this would in no way impeach testimony about their love for petitioner. In fact, their love for him, and his love and protective behavior towards him, could well have explained why they might have been willing to testify falsely at the guilt phase trial. Moreover, there were no prior statements by any family members to in any way impeach testimony as to their love for him. Not only was there no impeachment for an expression of love, there would have been no reason to doubt such testimony.

This type of testimony would have been crucially important. Other than testimony that petitioner had kept appointments with his CYA parole officer for two months and had signed up to begin a training program as a tutor, Skyers presented no evidence of any positive attributes petitioner may have and offered no mitigating insight into his personality. Such insight is crucial if a jury is to be moved to mercy. (PBOM 238-268.) Further, testimony concerning petitioner's protective behavior towards his little sisters would have lent support to the lingering doubt counsel hoped to

exploit as to whether petitioner actually fired the shots which killed 14-year old Eric Hassan and his father.

C. PETIONER IS ENTITLED TO RELIEF

Respondent contends that "By concluding that Champion's proposed mitigation themes were so weak that *no* reasonably competent attorney would have been compelled to present them, the referee has resolved this question against Champion." (RBOM at pp. 55-56, underlined emphasis added.) Respondent is wrong in its conclusion and has misstated the *Strickland* standard. The issue before this Court is not whether reasonably competent counsel would have been compelled to present the evidence, but simply whether reasonably competent counsel would have done so.

As demonstrated in petitioner's Brief on the Merits, reasonably competent counsel would have presented most if not all of the mitigating themes and evidence adduced at the hearing in an attempt to humanize petitioner to the jury and convince them to show mercy. Even if reasonably competent counsel would not have presented every bit of evidence adduced, presenting none of it and going forward as Skyers did with essentially no case in mitigation was not a reasonable option. Further, it is important to recall that Skyers did not make a decision to not present the evidence

adduced at the reference hearing --- he just didn't do an investigation and never had to make such a decision. (PBOM 238-268.)

Respondent's "no prejudice from deficient performance" argument has three parts:

First, according to respondent, much of the proposed mitigation was non-discoverable because of the family's purposeful nondisclosure (RBOM at p. 56) Petitioner has debunked this family-member conspiracy theory in petitioner's Brief on the Merits. Summarizing the arguments in petitioner's Brief, this Court should be persuaded that the referee's finding of non-discoverability is:

(1) contrary to California and United States Supreme Court precedent

It is the responsibility of trial counsel to conduct a thorough social history investigation. The referee erroneously faults petitioner's family with a failure which properly belongs to Skyers. (See *In re Lucas* (2004) 33 Cal.4th 682; *Rompilla v. Beard* (2005) 545 U.S. ___, 125 S.Ct. 2456; PBOM at pp. 161-163.)

Further, entered into evidence were multiple certified records supporting each of petitioner's themes in mitigation which Skyers could have discovered had he only performed basic recollection investigation.

(2) not supported by substantial evidence

Skyers never attempted to get such information from petitioner or his family. 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.

Moreover, any finding that petitioner's family engaged in a deliberate and concerted effort to keep mitigating evidence from Skyers is simply ludicrous. This is a family which, at the time, did not have a GED or high school diploma among them. There is no evidence upon which to affirmatively find that petitioner's family 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. (PBOM at pp. 163-166.)

(3) in conflict with the statements of trial counsel Ronald Skyers

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.

Skyers' efforts for penalty phase development, of which there were few, were 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. He asked "open-ended" questions which he *knew* he could not rely upon to elicit a full and frank disclosure of social history facts inconsistent with a positive and rosy portrait of petitioner's upbringing.

Skyers clearly recognized family members might not want to volunteer certain information which they might perceive as being dangerous to their loved one, and revealed 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. (See PBOM at pp. 161-178.)

Second, respondent asserts that reasonably competent counsel would not have presented the mitigating evidence produced at the hearing because of the risk of exposing petitioner to damaging rebuttal evidence. (RBOM at

pp. 56-59.) Contrary to respondent's assertions, there was no devastating rebuttal that would or could have been presented. There was no significant aggravating evidence that could have been offered in rebuttal that was not otherwise already admitted, formally "noticed" or otherwise admissible and none was offered at the reference hearing. (PBOM at pp. 268-283.)

Respondent follows the referee's train of thought and considers gang membership as "rebuttal" to evidence of petitioner's noninvolvement in Taylor. This is simply not so. There was a great deal of gang membership evidence already before the jury. The added danger of confirming petitioner's gang membership on rebuttal was minor compared to the danger of the jury finding petitioner guilty of another home invasion robbery-murder two weeks after the Hassan murders. If some of the lay witnesses were thought not to be credible or had recollections different from petitioner's, they did not all have to be called. Further, the gang member testimony of petitioner's noninvolvement in Taylor 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. At the reference hearing 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.

Additionally, 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. (PBOM at pp. 192-221.)

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 at CYA petitioner did a marginal program and needed supervision to stay out of trouble. The jury knew that petitioner was a gang member who had been sent to CYA. It also knew that the Hassan crimes came just two months after his release. It seems of utmost importance to demonstrate that during petitioner's two plus years at CYA he consistently did better and was less of a danger or anger threat, and hence was unlikely to pose a danger to guards or other inmates if given a sentence of life without possibility of parole. (PBOM at pp. 83-94.)

Reasonably competent counsel would not have forgone the introduction of information regarding petitioner's social history merely because contemporaneous records did not contain direct or extensive references to abuse, mental illness or malnutrition and that fact could have been used in rebuttal. (Although as petitioner has explained, many contemporaneous records did confirm the many themes in mitigation offered by petitioner. [See PBOM at pp. 166-175.]) Further, as the *Strickland* expert explained at the hearing and could have been explained to the jury, "[m]ost abusive families don't self report." (RT 4014.)

It is simply not true that the use of petitioner's family to develop proposed mitigating themes constituted a difficult area for reasonably competent counsel because some family members had testified in support of an alibi defense at the guilt phase. This was not an insurmountable difficulty, nor a reason not to present any of petitioner's family members at the penalty phase. 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." (RT 4019.)

There was no significant rebuttal to the evidence of

neuropsychological impairment offered by petitioner which could have been offered at trial --- at least none which was adduced at the reference hearing. The "ethnicity corrected" norms and the policy paper concerning third-party observers upon which Dr. Hinkin relied simply did not exist in 1982, and hence the criticisms he based on those materials could not have been made or presented in 1982. (See PBOM at pp. ***-***.) The CYA records contained information helpful to petitioner and any evidence that they did not contain evidence of neuropsychological impairment could be explained by the fact that none of the evaluators performed neuropsychological testing and, as respondent's expert agreed, "one could take issue" with the various reports particularly where the evaluators "did not administer a comprehensive battery of neuropsychological tests." (RT 6331, 6344.) Dr. Hinkin found "it's quite conceivable [Prentiss and/or Brown] could have missed something" and "that it's quite conceivable [Prentiss] could be in error" when she concluded petitioner had no neurological impairment. (RT 6331, 6339-6340, 6343 [Hinkin]; see PBOM at pp. 94-100.)

Some of the CYA reports contained "hundreds of shortcomings" and said little about Mr. Champion's history, social functioning, occupational functioning, educational background, medical background, psychiatric background, and substance abuse history. (RT 6346-6347 [Hinkin]; see

PBOM at pp. 94-100.)

Third, respondent asserts presenting all of the mitigation evidence adduced at the hearing was not reasonably likely to have produced a different result (RBOM at pp. 59-67.) Respondent is wrong.

Respondent provides only a short list -- most of which are 10th and 11th Circuit cases predating *Lucas*, *Rompilla*, *Williams* and *Wiggins* -- in which the failure to discover and/or present mitigating evidence was found not to have been prejudicial. (RBOM at pp. 65-66.) As noted above, respondent and the referee overlook the wealth of United States Supreme Court and California Supreme Court contrary authority.

And while the underlying Hassan crime was indeed a terrible crime --- a home-invasion double murder – there was no evidence as to who pulled trigger, and no evidence that petitioner, who was then only 18 by a couple of months, was any more than a follower to the older intruders (who included at least Ross, who was 21 and had already done prison time). Further, the unpresented evidence of cognitive deficits, which suggested an impaired ability to pick up on social cues, would have added force to any lingering doubt as to whether petitioner in fact understood that any of the intruders planned to kill and hence whether he shared that intent. Finally, with the negation of petitioner's alleged involvement in the Taylor homicide, the

aggravating evidence other than the capital crime itself, was relatively minor and consisted of only two juvenile incidents.

Respondent suggests that there was some inconsistency between presenting the guilt phase defense Skyers presented (reasonable doubt as to petitioner's involvement based *inter alia* on the very flawed eyewitness testimony by Moncrief, and inconsistencies in testimony about the victim's jewelry), and then presenting a case in mitigation setting forth a difficult and abusive social history and cognitive deficits. (RBOM at pp. 61-62.)

However, there would have been no inconsistency in this case. The case in mitigation would have (a) helped to explain petitioner's becoming involved in gang activity in the first place, which was not something which was denied or could be denied, and (b) would have served to bolster, not weaken, lingering doubt as to petitioner's level of culpability if he was involved in the double murder.

Finally, it is important to keep in mind too that the ultimate issue is whether 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.) A panel of jurors is not a panel of prosecutors or former prosecutors. Different jurors will have different views on when a death sentence is called for and how much and

what sort of mitigation warrants a lesser sentence. Given the wealth of mitigating evidence adduced at the hearing and available to reasonably competent counsel at the time of petitioner's trial, it is reasonably probable that one or more jurors would have declined to vote for a sentence of death had the available mitigating evidence been presented.

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: 1/25/10

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:

REPLY TO
RESPONDENT'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:

Steven Mercer
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300 South Spring St.
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Steven Parnes, Esq.
CAP
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San Francisco, CA 94105

Steve Champion C58001
San Quentin Prison
San Quentin, CA 94974

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 1/26/10 at Modesto, California.