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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **STEVEN CHAMPION,** On Habeas Corpus.	**CAPITAL CASE** Case No. S065575

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

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

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INTRODUCTION

Spanning nearly two years for the presentation of evidence, oral argument and written submissions of proposed findings by counsel for the parties, and generating a record consisting of approximately 10,000 pages of reporter's transcript and thousands of pages of exhibits, the reference hearing ordered by this Court concluded with the appointed referee filing his 377 page Referee's Report (hereinafter "RR" or "report"). In that carefully crafted and meticulously detailed report, the Referee provided a concise, seven-page summary outline of his overall findings. (RR 10-16.) When addressing each of the first four reference questions, the Referee first provided an initial "Summary of Referee's Findings" (RR 18-19 [Reference Question 1]; 78-88 [Reference Question 2]; 262-272 [Reference Question 3]; and 287-298 [Reference Question 4]).[1] Following the initial "Summary" provided for Reference Questions 1, 2 and 3, the Referee then outlined the "Evidence Adduced during Reference Hearing" with respect to those three questions. (RR 19-24 [Reference Question 1]; 89-166 [Reference Question 2]; and 298-312 [Reference Question 3].) In these outlines, the Referee included a number of findings relevant to the particular reference question, but without citation to the underlying record. Rather, the Referee provided with respect to each of the first four reference questions a "Detailed Discussion of Evidence and Findings" that restates many of the findings previously set forth, sets forth many additional findings, provides thorough analysis and, with painstaking clarity, references the basis in the record to support the various findings reached by the Referee that are set forth throughout the report. (RR 24-76 [Reference

[1] In light of the brevity of discussion and findings required with respect to Reference Question 5, the Referee provided no summary with respect to that reference question.

Question 1]; 167-262 [Reference Question 2]; 272-287 [Reference Question 3]; and 312-375 [Reference Question 4].) Finally, the Referee completed the body of his report with the "Referee's Conclusions." (RR 376-377.)[2]

As will be detailed below, none of petitioner's exceptions to the Referee's report and findings has merit. Petitioner fails in many, if not most instances, to address the Referee's "Detailed Discussion of Evidence and Findings." Further, even when petitioner cites to the record in support of a particular exception, petitioner tends to understate, overstate, or, in some instances, misstate that record. For the reasons that follow, respondent urges this Court to reject each and every exception by petitioner to the Referee's findings and report.

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[2] The Referee has also provided this Court with a roadmap of how the Referee utilized the proposed findings submitted by the parties. (RR 17 ["In drafting my report, I included or incorporated counsel's proposed findings where appropriate, *but only after considering the merits of counsel's arguments and reviewing the actual testimony, documents or evidence. Some of counsel's proposed findings were modified, deleted or augmented as deemed appropriate*"], italics added.)

I. BECAUSE EACH OF PETITIONER'S PROPOSED EXCEPTIONS TO THE REFEREE'S REPORT AND FINDINGS IS DEVOID OF MERIT, THIS COURT SHOULD REJECT ALL OF THEM[3]

A. Petitioner's Exception That "There Is No Basis For The Referee's Finding That Skyers Obtained A Penalty Phase Evaluation From Pollack" (PB 46-47.)

Without citation to the report, petitioner contends that the Referee made a finding "that [trial counsel] Skyers obtained a Penalty Phase evaluation from [Dr.] Pollack."[4] (PB 46-47.) Petitioner then proceeds to quote from pages 45-46 of the report in which the Referee found that trial counsel "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." (RR 45.) Contrary to petitioner's contention, what the Referee actually found concerning Dr. Pollack dealt with the adequacy of a penalty phase assessment of petitioner's mental health, including cognitive functioning and impulse control. The Referee explained,

> In light of the express findings made by Drs. Brown, Pollack and Imperi, the referee finds [petitioner's *Strickland* expert's] opinion that the referral to Dr. Pollack was inadequate *for penalty phase assessment of petitioner's mental health, including cognitive functioning and impulse control*, "is not supported by the evidence." (Cf. CALCRIM No. 332.) [¶] Similarly, despite the findings by Dr. Perotti, some of which were read into the record for Earley's consideration (RHT 4508-4511), Earley refused to concede that if

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[3] On pages 6-7 of Petitioner's Brief (hereinafter cited as "PB"), petitioner lists in generic terms the 6 areas of findings to which petitioner takes exception without citation to the record of the Referee's report where these findings can be located. As such, rather than attempt to provide a shotgun response to petitioner's amorphous claims of exceptions, respondent addresses the specific exceptions set forth later in the brief.

[4] This appears to be the first specific exception petitioner is raising to the referee's findings.

> Skyers had read the three reports from Drs. Brown, Perotti and Pollack in preparation for petitioner's trial, "he could reasonably reach the conclusion that a psychologist and two psychiatrists, who assessed this man both before and after the crimes, all reached the same conclusion that he has no mental illness, defect or disease[.]" (RHT 4512.) The opinion from petitioner's *Strickland* expert is unreasonable in light of what the medical reports of 1978-80 state. [¶] The lack of support for Earley's opinions is confirmed by testimony from respondent's experts, Drs. Hinkin and Faerstein, whose opinions and rationale the referee finds to be reliable and objective. [¶] In short, reasonably competent counsel conducting the appropriate investigation for penalty phase evidence would have been well within the standards of competent practice to have done at petitioner's penalty phase exactly as petitioner's trial counsel did.

(RR 285-286, alteration in original; italics added.)

Rather than provide this Court with the entirety of the relevant findings by the Referee on the subject of the Dr. Pollack referral in the paragraph cited by petitioner in his brief, petitioner conspicuously omitted the remainder of the Referee's findings in the paragraph beginning on page 45 of the report and concluding at line 20 of page 46. Those findings read as follows:

> Rather, the record is equally clear that Skyers independently conducted the investigation "relative to defendant's background" by (1) interviewing petitioner, petitioner's mother, petitioner's two older sisters, and petitioner's older brother, Reginald and (2) reviewing petitioner's CYA file which included the psychological and psychiatric reports of Drs. Prentiss, Minton, Perrotti and Brown, as well as the January 4, 1979 case conference report (Exhibits D, I & J), the December 13, 1978 Initial Home Investigation Report (Exhibit H), the December 12, 1979 Youth Training School Case Report (Exhibit G-13), Exhibit 23-A and the November 8, 1978 Juvenile Court probation report (Exhibit 147.). Finally, Skyers had the benefit of the report prepared by Drs. Pollack and Imperi, which provided additional insight into petitioner's background with respect to drug use, schooling, contacts with the legal system and petitioner's future intentions. The report also provided Skyers with expert opinion that petitioner did not suffer from any brain disorder or dysfunction or any cognitive or volitional impairment, whether or not rising to the level of a mental defense or legal insanity. Information of this type would

be relevant to any evaluation of whether Penal Code § 190.3, factors (d), (h) and (k), applied to petitioner.[5]

(RR 46.)

Thus, the Referee's findings and the underlying supporting record discredit petitioner's contention that "[i]n the areas of social history mitigation investigation, Skyers undertook no investigation . . . ." (PB 40.) Similarly, the Referee's findings and the underlying documentation set forth in his report concerning Skyers's investigation of petitioner's background (see, e.g., RR 23 ["Interview of Family Members (Factors D, H and K)"]; 26-31 ["Skyers' Conversations with Petitioner and Family Members"]; 31-43 ["Skyers' Review of Petitioner's CYA File, Including Psychiatric and Psychological Reports and Initial Home Investigation Report"]; & 46) undermine petitioner's own characterization of what the Referee found with respect to Skyers's investigative efforts: "In finding trial counsel's investigation deficient, the referee noted that 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*

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[5] "Respondent's expert witness, Dr. Faerstein, testified that in 1981, Dr. Pollack was familiar with the capital case sentencing structure in California. Dr. Pollack would know what crime or crimes carried potential capital sentences. Dr. Faerstein would have expected Dr. Pollack to know in 1981 that a person such as petitioner, charged with two counts of murder and two counts of robbery with the allegation that the murders were committed during the commission of the robberies, would face a potential capital sentence. (RHT 6492.) Skyers testified that the report by Drs. Pollack and Imperi, Exhibit 46, provided him with no basis to offer mitigating evidence under Penal Code section 190.3, factors (d), (h) or (k). (RHT 1238-1240.) Skyers testified that the same was true with respect to Dr. Minton's December 15, 1978 psychiatric report (Exhibit D). (RHT 1311.)" (RR 46, fn. 20.)

number of petitioner's juvenile records. (Report at pp. 10, 23, 31.)" (PB 3-4; fn. omitted, italics added.)

Simply put, the Referee never made the finding to which petitioner now asserts in the exception set forth at pages 46-47 of his brief. The Referee's actual finding -- that the referral to Dr. Pollack was adequate for penalty phase assessment of petitioner's mental health, including cognitive functioning and impulse control – is amply supported by the record. The Referee sets forth in elaborate detail the bases for these findings. (See, e.g., at pp. 10-14 ["Summary of Referee's Findings" re: "Investigation by Trial Counsel;" "Non-Disclosure of Family History;" "Claim of Brain Damage;" and "Petitioner's Family Background"]; 18-19 ["Summary of Referee's Findings" re: Reference Question 1]; 26-31 ["Petitioner's Social History, Mental and Physical Impairments [¶] a. Skyers' Conversations with Petitioner and Family Members"); 31-43 ["Skyers' Review of Petitioner's CYA File, Including Psychiatric and Psychological Reports and Initial Home Investigation Report"]; 43-71 ["The December 2, 1981 Report by Drs. Seymour Pollack and Lillian Imperi (Exhibit 46)"]; 80-83 ["Summary of Referee's Findings" re: Reference Question 2 on subject of "Brain Damage"]; 85-86 and 87-88 ["Summary of Referee's Findings" re: Reference Question 2 on subjects of "Sibling Abuse," "Family Matters," "CYA Reports," "Petitioner's Statements," "Ronald Skyers' Credibility" & "Mrs. Champion's Credibility"]; 186-193 [Mental Impairments"]; 218-224 ["Trial Counsel's Testimony and Credibility"]; 230-234 ["Sibling Abuse"]; 240-244 ["The Impact of Family Abandonment by Petitioner's Biological Father, the Death of Trabue Sr. and General Family Chaos on Petitioner's Functioning and Development"]; 247-259 ["Evidence of Petitioner's 'Institutional Adjustment' at the CYA"]; 267-269 ["Summary of Referee's Findings" re: Reference Question 3 on subjects of "CYA mental evaluations" & "Petitioner's family/social history"]; 270-272 ["Summary

of Referee's Findings" re: Reference Question 3 on subject of "Conclusions Concerning Trial Counsel's Performance"]; 276-286 ["Petitioner's Social History, Mental and Physical Impairments" addressing the testimony of petitioner's *Strickland* expert with respect to the Pollack referral issue - see, e.g., p. 282 ("Earley's erroneous understanding of what the *Drew* and *M'Naghten* tests actually assess demonstrates an additional reason to conclude that his opinion, deeming the referral to Dr. Pollack as inadequate, is unreasonable" (fn. omitted))]; 287-288 ["Summary of Referee's Findings" re: Reference Question 4, "1) Petitioner's family members did not disclose any adverse family history to Skyers" & "5) The referee agrees with petitioner's claim that Skyers should have interviewed CYA staff and doctors. No circumstance precluded this investigation. However, in view of the extensive psychological CYA evaluations available and the consistency of the doctors' findings, the referee finds that reasonably competent counsel did not need to conduct further psychological evaluations or testing, including neuropsychological examination. As previously stated, the referee finds that Skyers had access to and did review the CYA records including the doctors' reports"]; 289-290 ["Summary of Referee's Findings" re: Reference Question 4 on subject of significant factors weighing against the presentation of additional mitigating evidence, factors 1), 2), 4) & 5)]; 295-296 and 297-298 ["Summary of Referee's Findings" re: Reference Question 4 on subject of potential prosecutorial rebuttal evidence not presented at petitioner's 1982 trial, item "x) CYA Amenability" & item "xiv" discussing petitioner's *Strickland* expert ("He did not review the entire Mallet preliminary hearing or trial proceedings. He did not review most of Mr. Skyers' reference hearing testimony. He did not review the reference hearing testimony of Harris, Bogans and Player and he seemed unfamiliar with some of the CYA doctor evaluations. *Earley also had a marked tendency to evaluate Mr. Skyers' trial*

performance for omissions from the perspective of what he would or would not do in a capital case in lieu of applying the Strickland standards . . . . Nevertheless, this court must adhere to principles of law that require a showing as to what a reasonable competent attorney (not the best) would or would not do. *This court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or testimony that was not considered by an expert witness*") (italics added)]; 312-323 ["Materials Not Provided to or Reviewed by Petitioner's *Strickland* Expert"]; 376-377 ["Referee's Conclusions" on subjects of trial counsel's conscientiousness and credibility].)

Petitioner's argument is built almost entirely on the discredited opinions of petitioner's *Strickland* expert. (See, PB 47-53.) Further, while arguing that "[r]easonably competent counsel would have developed petitioner's history and determine from that history what sorts of experts to consult[]" (PB 53), petitioner fails to address the Referee's finding that "nondisclosure of family history by petitioner or members of his immediate family was purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose." (RR 11; see *Mickey v. Ayers* (9th Cir. June 7, 2010) __ F.3d __ [2010 WL 2246411], at *15 [finding no ineffective assistance for failure to investigate or present newly minted mitigation themes concerning social history and psychological problems, noting that counsel is entitled to rely on information provided (or withheld) from the client].)

Concerning this "purposeful" "nondisclosure of family history by petitioner or members of his immediate family," the Referee made extensive findings that are supported by substantial evidence. (See RR 26-31, 218-224, 268-269 ["Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty,

financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death and the lack of father figure. [¶] . . . [¶] Reference hearing witnesses Gary Jones, Harris, Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse. [¶] Mrs. Champion's prior statements to school authorities or CYA staff were significantly inconsistent with her testimony during the reference hearing."].)

For all of the foregoing reasons, petitioner's exception to the Referee's finding concerning the referral to Dr. Pollack is without merit and should be rejected.

B. Petitioner's Exception That "Skyers Did Not Review The CYA Mental Health Evaluations As Proposed By Respondent" (PB 54.)

Without providing any citation to the report, petitioner contends that the Referee's "finding that Skyers reviewed petitioner's CYA records" is "unsupported[.]" (PB 54.) While petitioner's assertion that "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[]" is correct with one exception (PB 54; italics added)[6], the Referee

[6] In the materials brought by petitioner's habeas counsel to the hearing and represented to be Skyers's files, two copies of the March 25, (continued...)

never found that Skyers "*retrieved*" the CYA documents. These CYA documents included the psychological and psychiatric reports of Drs. Prentiss, Perotti, Minton and Brown (Exs. D, J & I), the Home Investigation Report detailing a CYA investigator's December 11, 1978 visit to petitioner's home during which time petitioner's mother was interviewed (Ex. H), the December 12, 1979 Youth Training School (YTS) Case Report (Ex. G-13), the March 25, 1980 YTS Case Report (Ex. 23 A-1) and the November 8, 1978 juvenile court probation report prepared as part of the 1978 juvenile adjudication of petitioner for assault with a deadly weapon, an adjudication which ultimately led to a disposition committing petitioner to the CYA (Ex. 147). Rather, the Referee consistently found that Skyers "*reviewed*" these materials. (RR 11, 19, 32, 46, 186-187 & fn. 96, 222, 256, fn. 145, 265 ["Skyers did review petitioner's juvenile criminal history and he did interview a parole official"] & 288.)[7]

(...continued)
1980 Youth Training School ("YTS") status report were identified and marked as exhibits, Exhibits 23 A-1 and 26 B.

[7] In Exhibit 39 (Respondent's List of Pertinent Citations, Volume I), respondent set forth the reference hearing testimony demonstrating a lack of integrity in the "Skyers' Legal File" (Exs. P-1 through P-31; Ct. Ex. 1) produced by petitioner's habeas counsel at the hearing. (Ex. 39, pp. 2-3.) While the Referee chose not to address this issue in his report, the lack of integrity in the file produced by petitioner's counsel is relevant when petitioner, who bears the burden of proving any fact essential to the relief requested, contends that deficient performance is reflected by the absence from "Skyers' Legal File" of what petitioner contends are essential documents to be contained within competent counsel's file. This is especially so when one remembers that at the time Skyers testified at the reference hearing, he was being asked about events that occurred approximately 25 years earlier. (Cf. *In re Burton* (2006) 40 Cal.4th 205, 216-217 ["Burton complains first that [trial counsel's] memory on this issue was 'extraordinarily poor' in that he could not recall precisely when he had informed Burton of his intended strategy, nor could he relate any details of
(continued...)

Petitioner's contention that "[t]here is no circumstantial evidence upon which one can make a finding based on substantial evidence that Skyers *retrieved* these documents" (PB 54, italics added) is not completely accurate even as stated, because "Skyers' Legal File" produced by petitioner's habeas counsel at the hearing contained two copies of the March 25, 1980 YTS report. (See fn. 6, *ante*.) However, if one substitutes the word "*reviewed*" for petitioner's use of the word "*retrieved*," the evidentiary record at the hearing completely undermines the contention. There is powerful direct and circumstantial evidence to support the Referee's factual determination that Skyers did review all of the aforementioned CYA records months before petitioner's trial began. The Referee set forth in detail on pages 31-32 of his report the evidentiary basis on which he supports his finding that Skyers reviewed petitioner's CYA file.[8]

As the Referee explained, "Although initially uncertain as to whether he had reviewed petitioner's CYA file or that of another client at the parole

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(...continued)
their conversations on the issue, and that [trial counsel's] recollection was rarely, if ever, refreshed by written materials. Yet, as the referee observed at the hearing, it is understandable that [trial counsel] would have difficulties reconstructing his thinking and would be unable to recall details of conversations that occurred 20 years earlier."].)

[8] The Referee set forth in his report at pages 32-46 a detailed account of what information trial counsel gleaned from his review of these materials, as well as from his review of the report of Drs. Pollack and Imperi, and how this information dovetailed with information Skyers obtained from his multiple interviews with petitioner, petitioner's mother, his older sisters and older brother Reginald. The Referee also noted the absence from these records of any information which petitioner's habeas counsel contends should have been discovered and presented as mitigation at petitioner's penalty phase trial such as the 1968 traffic accident and death of petitioner's stepfather, Gerald Trabue, Sr.

office on Bullis Road [citations], Skyers ultimately testified it was petitioner's CYA file which he reviewed, including the psychological and psychiatric reports of Drs. Audrey Prentiss . . . , Michael J. Perotti . . . , Daniel Minton . . . and Richard C. Brown, Jr. . . . (Exhibits D, I and J) [Citations]." (RR 31, fn. omitted.) Among the exhibit references cited by the Referee in support of this finding are Exhibits 20-G, 20-L, 2-GG, 2-II, and 23 A-1, documents located within the " Skyers' Legal File" produced by petitioner's habeas counsel at the hearing. (*Ibid.*)

Skyers testified that Exhibit 20-G reflects two notes that he wrote. The first note, dated September 16, 1981, provides the address for petitioner's CYA parole office on Bullis Road and the name of petitioner's parole officer, Mary Bullin. (RHT 1224-1225.) Skyers testified that the reason he would need the address of petitioner's parole office was either to allow him to go to the office to look at the records or to know where to send a release form to obtain copies of the records. Skyers could think of no other reason for having the Bullis Road address of petitioner's CYA parole office. (RHT 1226.)

The second handwritten note on Exhibit 20-G, dated February 8, 1982, reflects a conversation Skyers had with a person at the parole office named Hawthorne, who informed Skyers that Ms. Bullin had retired and that Skyers would need an authorization from petitioner to see petitioner's file. (RHT 1226-1227.) Skyers could think of no reason for the information contained in this note other than as a reflection of his intention to obtain a release from petitioner to allow Skyers to view petitioner's file at the CYA parole office. (RHT 1227.) Exhibits 2-II and 2-GG are the original and photocopy respectively of a release signed by petitioner and dated February 11, 1982 (three days after Skyers's conversation with Hawthorne at the parole office). (RHT 1228.)

From Skyers's review of these documents and the two copies of the March 25, 1980 YTS report found within the "Skyers' Legal File" produced by petitioner's habeas counsel at the hearing, Skyers testified that "[i]t would only be [petitioner's] case" for which he went to the Bullis Road office to look at a client's file. (RHT 1430.) The Referee noted in his report that "[p]rior to undertaking petitioner's representation, Skyers had acquired extensive experience handling juvenile court cases, which included gaining familiarity with the process needed to obtain juvenile court records with either an authorization or subpoena duces tecum. (RHT 1004.)" (RR 32, fn. 7.) Skyers made clear the basis on which he was able to say that he reviewed petitioner's CYA parole file including the reports from the four doctors:

> My belief that I have reviewed these files, and I don't think I have said that I am certain, but my belief is based on the fact that I had a signed authorization from Steve in his own handwriting to get his C.Y.A. file. And that these files would have been at the C.Y.A.[9] I have notes where my memory was refreshed that showed that I went to the Bullis Road address to get the files. And based on that, my statement is that I would have reviewed them, if I took the time to go there and get them, that I would have reviewed them. And if I did I would have seen these reports. So that's the kind of certainty that I am talking about.

(RHT 5083.)

Skyers's reference hearing testimony, coupled with his experience as a juvenile court practitioner familiar with the expected contents of files maintained at CYA parole offices and the exhibits contained within the

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[9] "While Skyers had no independent recollection as to whether he had reviewed Exhibit H or had obtained a copy of that exhibit, in light of Skyers' testimony that he expected this report would be in petitioner's C.Y.A. parole file and his subsequent testimony that he did in fact review that file, it is clear that Skyers did review Exhibit H before petitioner's trial began. (RHT 1330-1331.)" (RR 32, fn. omitted.)

"Skyers Legal File" produced for the hearing by petitioner's counsel, constitute substantial evidence amply supporting the Referee's finding that Skyers did review the records set forth on page 32 of his report. As such, petitioner's exception should be rejected.[10]

C. Petitioner's Exception That "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" (PB 107.)

Petitioner contends: "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." (PB 107.) Petitioner's exception should be rejected. The Referee set forth both detailed outlines of his findings concerning petitioner's claim of brain damage (see RR 12-13, 80-83, 129-130), and provided an extensive review of the evidence with citations to the record supporting those findings (see RR 46-71 [review of the testimony from Drs. Hinkin and Faerstein], 186-193; see also *id.* at p. 52, fn. 25, pp. 194-233, pp. 240-242 & fn. 132, pp. 244-259 & fn. 148 ["further, not only would reasonably competent counsel not seek to present evidence of institutional adjustment for the reasons already discussed, evidence that petitioner had the ability to successfully manipulate staff, including doctors, at the CYA runs counter to claims raised in this proceeding that petitioner suffers from brain damage and low intellectual functioning"], pp. 267-268, 271-272, 288-292).

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[10] Although not specifically designated as an exception, petitioner appears to raise a complaint concerning petitioner's background. (See PB 59 [claiming the referee "erroneously concluded" that certain mitigating evidence would not have been available because of family secretiveness.) Respondent fully addresses the reasonableness of the Referee's conclusions in this regard beginning at page 72 of the instant brief.

For example, the Referee found:

4. Brain Damage

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

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

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

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

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

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

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

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

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

j) Dr. Prentiss found no neurological impairments.

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

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

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

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

o) A major discrepancy was noted between Dr. Miora's written report and her reference hearing testimony as to the scope of her assigned reference question. Dr. Miora's signed declaration under penalty of perjury states that her job was to evaluate petitioner's development and functioning. She also stated she uses a method of psychological evaluation that includes 3 major components, biological, psychological, and social history. The biological portion includes a review of any pre-natal trauma, but in her in court testimony she stated that her evaluation was limited from the time of petitioner's childhood until the time of trial. Thus, she did not evaluate whether petitioner suffered fetal abuse. Given the fact that Dr. Miora seeks to consider family history that predates petitioner's birth, it is amazing that for unexplained reasons, she limited her review of petitioner's life experiences while testifying.

p) Petitioner stated to Dr. Miora that his mother told family members not to talk about family business with others and that she

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

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

(RR 80-83; italics added.)

As previously noted, in his report at various points, the Referee fleshed out the record supporting these detailed findings. The Referee explained, for example,

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

(RR 49.) The Referee then provided that summary at pages 49-71 of his report. At pages 129-130 and 186-193, the Referee provided further analysis and record citation in support of his finding. As also previously noted, the Referee provided additional analysis and record citation in support of these findings later in the report. (See RR at p. 240, footnote 132 [noting Dr. Riley's interview notes, while indicating that petitioner was a "good historian," indicate that petitioner's history regarding the traffic accident claimed only injury to petitioner's "collarbone" without reference to any head injury], 267-268 [noting that the "medical reports, evaluations and opinions that petitioner is not mentally ill, does not have a mental disorder, defect, disease and functions overall, normally [as set forth in the CYA mental evaluations] normally would not have been presented [by reasonably competent counsel at petitioner's trial]. These examinations

were conducted by four separate doctors between 1978 and 1980. Reasonably competent counsel would have concluded that no further testing was necessary nor any further examinations warranted. [¶] (5) Petitioner's family/social history. Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure. [¶] Beyond the non-disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family witnesses that testified in support of petitioner's alibi for the Hassan murders during the guilt phase. [¶] Reference hearing witnesses Gary Jones, Harris, Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse. [¶] Mrs. Champion's prior statements to school authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing. . . ."], 289-290 ["Most of the significant factors that weighed against the presentation of the additional evidence have been discussed in reference questions numbers 1, 2 and 3. The following factors are briefly restated: [¶] 1) The lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner

to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation. [¶] 2) The lack of any documents to support the claimed mitigation of brain damage based on fetal abuse, traffic accident head trauma, or head injury as a result of physical beatings by older brothers. [¶]. . . [¶] 4) The existence of contemporaneous CYA psychological/psychiatric evaluations that petitioner did not suffer from any mental illness, defect, or disorders. These reports were written between 1978 and 1980 by four separate doctors and are consistent with each other. [¶] 5) The absence of any evidence by any close family member, relative, friend, neighbor or fellow gang member who would opine that petitioner suffered from any type mental impairment during petitioner's life"], 290-292 [had trial counsel offered mitigation evidence at petitioner's trial that petitioner suffered from "mental impairments/brain damage/fetal abuse," the "prosecution would have likely sought to introduce the following rebuttal evidence that is damaging to petitioner but was not presented at the guilt or penalty phase: [¶]. . . [¶] . . . [¶] . . . [¶] Petitioner's Development/Functioning Social history [¶] i) The testimony of Harris, Bogans and Player given during the reference hearing undermines petitioner's claim of poverty, malnutrition or physical abuse, poor home environment or that petitioner was a follower or exhibits mental defects. [¶] ii) The testimony of Gary Jones given during the reference hearing is inconsistent with petitioner's claim of poverty, malnutrition or physical abuse. Jones describes their childhood as 'we had a beautiful life.' In his opinion, petitioner displayed leadership traits and was athletic. He expressed high regard for Mrs. Champion as a mother. Jones recalled that petitioner was unable to participate in organized sports due to a lack of funds to pay required fees. [¶] iii) Petitioner's mother's statement to school authorities that petitioner had a normal child birth (Exhibit CCC). [¶] iv) Petitioner's mother's statement to CYA authorities that all was well

at home (Exhibit H). [¶] v) Petitioner's statement to CYA authorities that he has a regular family with both sad and happy times and that he has had the usual sibling rivalry with his brothers which he did not view as a major problem (Exhibit I). Petitioner's statement to CYA authorities that he is not a follower or easily influenced by others (Exhibit I). Petitioner told Dr. Minton he has had no contact with his biological father (Exhibit D)"], underlining in original.)

Despite the Referee's impressive, carefully-detailed and documented analysis, and record citation in support of his findings in this area, petitioner takes exception. First, without citation to the record, petitioner appears to contend that the Referee, Drs. Faerstein and Hinkin, the four CYA doctors who assessed petitioner between 1978 and 1980 (Drs. Prentiss, Perrotti, Minton and Brown), and Drs. Pollack and Imperi (who assessed petitioner for trial counsel in advance of petitioner's 1982 trial) all limited their assessments or evaluations of petitioner's cognitive functioning to "brain damage." Petitioner contends that such an approach "presumes a healthy brain having suffered some injury." (PB 107-108.) But as the Referee's report makes clear, the Referee found that "[p]etitioner did not suffer any brain damage as a result of 1) fetal abuse; 2), from a 1968 traffic accident; or 3) physical beatings of petitioner by siblings." (RR 12.) In short, "*Petitioner did not suffer from substantial cognitive defects at the time of trial.* [¶] Petitioner's neuropsychologist, while a good witness and well qualified, lacked adequate foundation for the opinion that petitioner suffered in-utero brain damage *or significant cognitive defects*." (*Ibid.*, italics added.) Similarly, as previously noted, the Referee found that "Dr. Riley's administration, scoring, and opinions as to the existence of brain damage *and cognitive impairment* are discussed in a detailed manner. The Referee finds that her scoring process is flawed." (RR 81, italics added.) As the Referee explained, "h) The psychological

evaluations performed prior to trial by six separate doctors are found to be consistent and credible. [¶] i) All of the doctors who examined petitioner prior to trial found he did not suffer from any *mental defects, disorders or significant impairments. Not one of the six doctors recommended additional psychological or neuropsychological testing of petitioner.* [¶] j) Dr. Prentiss found no *neurological impairments*." (*Ibid.*, italics added.) "Petitioner's school records, the evaluations performed by CYA doctors and Dr. Pollack/Imperi's report revealed *some impairment* . . . . [¶] m) Petitioner's pre-trial *impairments* that were identified were a low IQ, low intellectual functioning, reading and learning difficulties, attention deficits, a flat affect, deficiency in ability to conceptualize, low self-esteem, impulsiveness and a bad temper. The Referee finds this information credible and available at time of trial." (RR 81-82; italics added.)

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

(RR 55; italics added.)

The record is eminently clear that neither the Referee nor any of the doctors at CYA, Drs. Pollack and Imperi, or Drs. Hinkin and Faerstein, limited their assessments of petitioner's cognitive functioning and possible neurological impairment to an assumption that petitioner was born with a normal brain. In fact, assessing whether petitioner showed evidence of neurological impairment at time of birth was an important evaluation in light of petitioner's contention that his mother was beaten during the course of her pregnancy with petitioner, and that petitioner suffered brain damage as a result. The unanimity of expert opinion (with the exception of Dr. Riley) that petitioner in fact did *not* suffer from cognitive impairment or brain damage at time of birth further undermines petitioner's apparent contention that the Referee and respondent's experts employed too narrow a view of what constitutes "brain damage."

Petitioner further observes, in an apparent criticism, that "[n]one of the CYA experts were called by respondent to testify at the reference proceedings. Nor did respondent call Dr. Imperi. Dr. Pollock [*sic*] died in 1982." (PB 108.) Setting aside that it is petitioner's burden to prove by a preponderance of the evidence each fact necessary to obtain the relief sought in this proceeding[11] (such as the brain damage, cognitive

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[11] """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.]"' [Citations.]" (*In re Cox* (2003) 30 Cal.4th 974, 997-998.) "The referee's findings of fact, though not binding on the court, are given great weight when supported by substantial evidence. Deference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. On the other hand, any conclusions of law or resolution of mixed questions of fact and law that the

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impairment, neurological deficits petitioner seeks to prove existed in 1982 and which petitioner contends trial counsel was constitutionally ineffective for not identifying and presenting at petitioner's 1982 penalty phase), petitioner fails to acknowledge a stipulation entered into by petitioner's habeas counsel and accepted by the Referee on August 14, 2006, Court's Exhibit 26.

As relevant to petitioner's present contention, the Stipulation provides:

> DRS. AUDREY PRENTISS, DANIEL MINTON, MICHAEL J. PERROTTI AND RICHARD C. BROWN, JR. be deemed called this date, duly sworn, and to have testified that: (1) each has no present recollection of their respective examinations of petitioner, Steve Allen Champion, while petitioner was a ward in the California Youth Authority as reflected in the respective reports marked at this reference hearing as respondent's Exhibits D and J regarding Dr. Prentiss; J regarding Dr. Perrotti; D regarding Dr. Minton; and I regarding Dr. Brown and (2) despite reviewing the aforementioned exhibits relating to their respective examinations of petitioner, the present memory of each has not been refreshed as to the examinations performed by each while petitioner was at the California Youth Authority.

(Ct's Ex. 26, pp. 2-3; see also RHT 6808-6809 [stipulation set forth in Ct's Ex. 26 orally entered into on the record and Exs. D, I & J received in evidence]; RHT 7003-7004 [Ct's Ex. 26 marked and signed by the Referee].)

Petitioner also fails to point out that it was petitioner's habeas counsel who expressed an intent to call Dr. Imperi as a witness on behalf of petitioner at the reference hearing. (See, Oct. 14, 2005 letter from Karen Kelly to DDA Brian Kelberg, Vol. 10 of 135, Item E, Vol. 4 of 8, pp. 1024-

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(...continued)
referee provides are subject to our independent review." (*Id.* at p. 998, fn. omitted, citations and quotation marks omitted.)

1035 ["Attached is a preliminary list of witnesses I expect to call to testify at the reference hearing of Steve Champion. [¶] . . . Summaries of expected testimony is included for witnesses who did not execute declarations, prepare police reports or testify in proceedings attached to the pleadings in this case." (p. 1024)]; *id.* at p. 1026 ["*Lilliam [*sic*] Imperi . . . ."]; *id.* at p. 1034 ["LILLIAN IMPERI [¶] Dr. Imperi will testify to the evaluation of Mr. Champion undertaken by Drs. Pollock [*sic*] and Imperi. She is expected [to] discuss her contact with Mr. Champion and Mr. Skyers. *Her opinions will include that the evaluation was an evaluation undertaken for the purpose of assessing the possible mental state defenses associated with defending against murder and not undertaken for the purpose of developing penalty phase mitigation.* Dr. Imperi is expected to testify to the internal operating procedures of the Institute for Psychiatry and Law at the time of her evaluation of Mr. Champion."] (italics added).)

Having expressed an intent to call Dr. Imperi as a witness at the reference hearing and then electing not to call her, petitioner was subject to having the Referee and now this Court draw an adverse inference from such failure. (See *People v. Vargas* (1973) 9 Cal.3d 470, 475, cited by the Referee at RR 360 and fn. 203.) In addition, this Court may invoke the rule embodied in Evidence Code section 412 and invoked by the Referee: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." The Referee invoked this section in evaluating petitioner's deliberate election not to call Lewis Champion III, Reginald Champion, "any of [petitioner's] LAUSD teachers, any juvenile court probation officer or CYA psychologists, psychiatrists,

caseworker or teacher of petitioner's during the period of time petitioner was at the CYA." (RR 233.)[12]

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[12] In a related issue, petitioner erroneously contends, "respondent offered almost no evidence in rebuttal. [] Respondent offered absolutely no evidence in rebuttal which was not a noticed aggravator and/or already presented to petitioner's jury." (PB 32.) Contrary to petitioner's contention, the Referee outlined some, but not all, of the potential rebuttal evidence the prosecution could have presented at petitioner's penalty phase had petitioner offered mitigation evidence such as that presented by petitioner at the reference hearing. The Referee's outline is clearly is at odds with petitioner's contention that the rebuttal presented at the hearing by respondent constituted "almost no evidence . . . ." (RR 290-297.) For example, the Referee noted that respondent likely would have presented expert witnesses such as Drs. Hinkin and Faerstein to rebut any claims such as those set forth by Dr. Riley in her reference hearing testimony. Further, petitioner fails to recognize that much of the rebuttal evidence that respondent presented at the reference hearing was developed through respondent's cross-examination of petitioner's witnesses, including trial counsel Skyers, petitioner's mother and older sisters, petitioner's *Strickland* expert, and Dr. Riley. (See, e.g., RR 31-43 [the Referee reviews the contents of petitioner's CYA file the Referee found trial counsel Skyers had reviewed prior to petitioner's trial].) As both this Court and the United States Supreme Court have recognized, "cross-examination is the '"greatest legal engine ever invented for the discovery of truth."' [Citations.]" (*Kentuck v. Stincer* (1987) 482 U.S. 730, 736 [107 S.Ct. 2658, 2662, 96 L.Ed.2d 631]; see also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 840.) Addressing a claim of constitutionally ineffective assistance of counsel at the penalty phase of a capital case for which a reference hearing like petitioner's had been ordered, this Court observed:

> We agree with this general assessment of the realities of prosecuting a capital case. Based on the reference hearing testimony, we also conclude the thrust of the referee's finding—that the prosecutor would have responded to the mitigating evidence now proposed—is supported by substantial evidence and not necessarily inconsistent with [the trial prosecutor's] testimony. It appears [the trial prosecutor] disavowed the likelihood of rebuttal only with respect to prison conditions. He did, however, indicate he would have altered the focus of his closing argument to respond to such evidence. It is also clear from the record that much damaging testimony regarding

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Petitioner contends that because the type of neuropsychological battery of tests administered by Dr. Riley to petitioner in 1997 was not administered by any of the four psychologists and psychiatrists who evaluated petitioner at CYA, or Drs. Pollack and Imperi who evaluated petitioner for trial counsel in 1981 (PB 108-112), "[i]t 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].)" (PB 112.) In addition to relying upon Dr. Riley, petitioner's reference hearing witness, to support this contention, petitioner asserts, "[i]n no uncertain terms Dr. Hinkin testified that 'in 1982, the cornerstone of a neuropsychological of

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(...continued)

> petitioner's own violent conduct in prison and other circumstances desensitizing inmates to violence could have, and undoubtedly would have, been elicited on cross-examination. [Citation.] Similar inferences can be drawn with respect to the mitigating evidence of family background. While it may be unlikely the prosecutor would have sought to locate rebuttal witnesses in Alabama to contradict evidence of petitioner's upbringing, the mitigating impact could nevertheless have been undermined on cross-examination and through closing argument, particularly regarding petitioner's early criminal acts. With respect to mental health rebuttal, the realities of trial surely would have prompted the prosecutor to present expert testimony in contradiction since such witnesses were generally available.

(*In re Andrews* (2002) 28 Cal.4th 1234, 1251.) In the end, it is not the number of witnesses called by respondent that matters. What matters is the quality of the rebuttal evidence, however developed at the hearing.

valuation [*sic*] is the administration of neuropsychological tests . . . .' (RT 6350.)" (PB 112.)

First, through the use of an ellipsis, petitioner has omitted a crucial caveat that Dr. Hinkin tried to provide in response to a question from petitioner's counsel about neuropsychological testing in 1982, but to which petitioner's counsel successfully objected. In response to petitioner's counsel's question: "[I]if I were to ask you whether you agree or disagree with the statement, in 1982, that the cornerstone of the neuropsychological evaluation is the use of standardized reliable and valid psychometric test instruments?" Dr. Hinkin's complete answer was: "I would agree with that in 1982, that the cornerstone of a neuropsychological evaluation is the administration of neuropsychological tests. *What I would not agree with-*" At this point, petitioner's counsel objected and the court instructed respondent's counsel to address this point on redirect examination. (RHT 6350-6351; italics added.) On edirect examination, when Dr. Hinkin was asked whether he was "offering an opinion that in 1982, in order to assess potential brain damage, a full neuropsychological battery of tests was required to be administered . . .[,]" Dr. Hinkin testified: "*No, there was no indication in the record, there was* [sic] *numerous psychological and psychiatric reports that had been performed, all coming to the conclusion that there is no neurological impairment. So there was no indication that that would be necessary or warranted.*" (RHT 6423, italics added; see also RHT 6440 ["Q. But for answering the question of Mr. Champion with brain damage or being normal, and given the psychiatric and psychological reports that existed, along with the records you found to exist, is it still your testimony that in 1982, administration of a neuropsychological battery was not required or called for? A. I don't see, there weren't the indications present at the time that would call for that. [] I saw in the records no indications to call for the need for a neuropsychological evaluation."]; see

also RR 52-64 [detailed discussion of Dr. Hinkin's reference hearing testimony supporting Referee's findings petitioner suffered from no brain damage or substantial cognitive defects in 1982 at the time of his trial and that no neuropsychological testing such as was done by Dr. Riley in 1997 was indicated or required in 1982]; RR 49-52 [detailed discussion of Dr. Faerstein's reference hearing testimony including the bases for his opinions that petitioner did not suffer from brain damage and that there was no basis to suggest the need for psychological testing of petitioner in 1982]; RR 80-83, 129-130 & 186-193 [Referee's detailed outline of findings concerning Dr. Riley and additional detailed discussion supporting those findings, including the bases for rejecting Dr. Riley's opinions and conclusions].)

Thus, contrary to petitioner's suggestion, Dr. Hinkin recognized at the reference hearing that both neuropsychologists such as Dr. Hinkin and forensic psychiatrists are fully capable of identifying organic brain damage, even though they may employ different approaches in making their assessments. (RHT 6422-6423; see also 6343-6344 [after noting that psychiatrists and neuropsychologists employ different approaches to diagnose neurological diseases, Dr. Hinkin testified he had "no reason to doubt Dr. Brown's opinions [that petitioner suffered from no cognitive abnormalities or organic brain syndrome]".)

While petitioner seeks to highlight Dr. Hinkin's testimony on cross-examination concerning perceived deficiencies in the various CYA evaluations (PB 110-112), when asked on redirect examination about that examination by petitioner's counsel and whether Dr. Hinkin "drew [his] conclusions in this case, by looking at isolated pieces of information, and forming opinions based upon only an isolated piece of information[,]" Dr. Hinkin testified: "No." He explained, "How one arrives at a diagnosis is to look for patterns, look for themes that repeat. Not to take any single data point in isolation, but to look for consistencies across evaluation and across

time. To look for things that kind of hang together and make sense, that are consistent, you know, with over the longitudinal course of the patient's life, and across examinations by differing disciplines and differing doctors. So I didn't look at any single one of them in isolation, but in aggregate, and they all arrived at very similar conclusions." (RHT 6428.) Dr. Hinkin confirmed that those conclusions were consistent with his ultimate conclusion that petitioner did not not suffer from brain damage. (RHT 6428.)

As previously set forth in this brief, the Referee quoted Dr. Hinkin's testimony responding to a question asking whether he found a consistency between the CYA reports and his opinion that petitioner did not suffer from brain damage. "'That was the conclusion of all the psychological testing, as well as psychiatric evaluations that I had available for review [including Dr. Riley's report], that they consistently concluded that [petitioner] had no evidence of any mental, emotional, organic disorder. Some used testing to help establish that. Some based that solely upon their diagnostic interview. But uniformly all the folks who saw him when he was in the CYA or when he was in prison, concluded that he did not have any evidence of any neurological disorder.' (RHT 6219.)" (RR 54-55.)

The Referee employed a similar gestalt approach when concluding it was reasonable for trial counsel not to obtain additional psychological and/or neuropsychological testing before petitioner's trial. As the Referee explained,

> Skyers' failure to obtain additional psychological and/or neuropsychological testing before petitioner's trial is reasonable in light of the CYA psychological and psychiatric evaluations, as well as the evaluation from Drs. Pollack and Imperi and the information contained within Exhibit H, the Initial Home Investigation Report, all of which Skyers had reviewed. Similarly, all of the information imparted to Skyers by petitioner, his mother, his older sisters and brother additionally supported Skyers' actions. Further, Skyers'

> review of these materials only confirmed that there was no evidence petitioner suffered from brain damage and thus no basis to offer evidence of such at petitioner's penalty phase. Even had Dr. Riley's opinion that petitioner suffered from brain damage been available in 1982, reasonably competent counsel would quite understandably have chosen not to present it in light of the more contemporaneous psychiatric and psychological evaluations, all of which failed to identify any evidence of brain damage. The referee finds petitioner did not suffer from brain damage in 1982.

(RR 52, fn. 25; see also RR 13 [Referee's outline of findings including that "(3) Dr. Riley's 1997 test results were inconsistent with: [¶] a. petitioner's history. [¶] b. the opinions of petitioner's family, friends and gang members. [¶] c. the opinions of six doctors who conducted mental status evaluations of petitioner from 1978 through 1980 [*sic*]. [¶] d. the opinions of credible, well qualified experts Doctors Charles Hinkin . . . and Saul Faerstein . . . ."]; see also RR 80 ["4. Brain Damage [¶] a)"].)[13]

Petitioner next appears to contend that because "[n]either [Dr.] Hinkin nor [Dr.] Faerstein conducted a personal evaluation of petitioner" (PB 112), the Referee could not base his finding that petitioner suffered from no brain damage in 1982 on their reference hearing testimony. Petitioner relies on a

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[13] As the Referee noted as part of the detailed discussion of the evidence in support of his findings in this area, "[petitioner's *Strickland* expert] conceded he could not identify any controlling legal authority in 1982 obligating defense counsel in a capital case to obtain an assessment of the defendant from a neuropsychologist or to require the defendant undergo a battery of neuropsychological tests. (RHT 4436-4438.)" (RR 277; see also RR 187 [in support of his findings "that the reference hearing testimony of Drs. Hinkin and Faerstein is credible and reliable and . . . that petitioner did not suffer from brain damage or dysfunction in 1982 when petitioner's case was tried[,]" the Referee stated that "petitioner's *Strickland* expert could not identify any legal authority existing at the time of petitioner's trial which would have mandated reasonably competent trial counsel to have petitioner undergo neuropsychological testing such as that administered by Dr. Riley in 1997, some 15 years after petitioner's trial"], fn. omitted.)

1968 opinion from this Court, *People v. Bassett* (1968) 69 Cal.2d 122. (PB 112-116.) Petitioner's reliance is misplaced.

First, assuming *arguendo* that in 2006-2007 during the pendency of the reference hearing petitioner could have been compelled by court order at request of respondent to submit to clinical assessments by Drs. Hinkin and Faerstein,[14] petitioner's reliance on *Bassett* is misplaced. The relevant time frame for assessing petitioner's possible brain damage, neurological injury or cognitive defects is *1982*, the year of petitioner's trial, not 15 years later in 1997 when Dr. Riley assessed petitioner, nor 24 years later when Drs. Riley, Hinkin, and Faerstein testified at the reference hearing. In *Bassett*, one of the defense experts, Dr. Smith, "*examined defendant for several hours approximately one month after the killings*." (*Bassett*, *supra*, 69 Cal.2d at p. 128; italics added.) Another defense expert psychiatrist, Dr. Krofcheck, "*examined defendant two months after the killings*. The examination lasted approximately two hours and was directed to determining defendant's current mental condition. In Dr. Krofcheck's opinion defendant was suffering from paranoid schizophrenia." (*Id.* at p. 135; italics added.) Another defense expert, psychiatrist Dr. Langer, "conducted a series of seven examinations of defendant, each lasting approximately two hours. He also caused defendant to be examined by . . . a clinical psychologist, to determine *inter alia* whether defendant had any tendency to lie, distort or conceal the truth; the results of the tests showed no such tendency." (*Id.* at pp. 130-131.)

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[14] *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1115 ["neither the criminal discovery statutes (§ 1054 et seq.) nor any other statute specifically authorize[d] the People to discovery in the form of a court-ordered mental examination of [the defendant]"]; *In re Scott* (2003) 29 Cal.4th 783, 813-814 [Penal Code discovery statutes are not directly applicable to habeas corpus reference hearings, but may be used by referee in fashioning appropriate discovery orders].)

In the case *sub judice*, the roles of the *Bassett* doctors were filled by Drs. Prentiss, Perrotti, Minton, Brown, Pollack and Imperi, psychologists and psychiatrists who personally examined petitioner between 1978 and 1981, a period encompassing approximately 2 years before the Hassan murders to approximately one year after the murders. The evaluation by Drs. Pollack and Imperi was conducted less than one year before petitioner's trial began. Each doctor generated a report prepared contemporaneous to the examinations. As the Referee found: "Among the materials reviewed by respondent's expert witnesses, Drs. Hinkin and Faerstein, were the reports of Drs. Pollack and Imperi, Brown, Perrotti, Prentiss and Minton, as well as the December 13, 1978 Home Investigation Report (Exhibit H), petitioner's school records (Exhibit CCC), CDC [California Department of Corrections, now the California Department of Corrections and Rehabilitation] (Exhibit G and subparts) and the declarations, raw test data, interview notes and reference hearing testimony of petitioner's neuropsychologist, Dr. Riley. (RHT 6085-6118 & Exhibit PPP (Dr. Hinkin); RHT 6498-6513 & Exhibit AAAA (Dr. Faerstein).)" (RR 49.) Because Drs. Hinkin and Faerstein could not have examined petitioner in 1982, any value to such a personal examination in 2006, 24 years after the relevant time frame, is greatly diminished. Further, the very testimony of Dr. Hinkin which petitioner relies upon—"In no uncertain terms Dr. Hinkin testified that 'in 1982, the cornerstone of the neuropsychological of valuation [*sic*] is the administration of neuropsychological tests . . . .' (RT 6350.)" (PB 112, ellipsis in original)—demonstrates that the core of Dr. Riley's assessment was the raw test data generated by petitioner (Ex. DDD) and Dr. Riley's later evaluation of that raw test data from which she concluded petitioner suffered from brain damage. As noted, respondent's experts reviewed that material. Dr. Faerstein also had the benefit of reviewing Dr. Hinkin's report (Ex. VVV)

and reference hearing testimony, which addressed Dr. Riley's evaluation, conclusions, and test data. (RR 52.)

This Court's recent decision in *Verdin v. Superior Court*, *supra*, 43 Cal.4th 1096, also undermines petitioner's reliance on *Bassett*. In *Verdin*, this Court rejected the prosecution's contention that precluding a prosecution mental health expert from personally examining a defendant who placed his mental state in issue through presentation of his own mental health expert deprived the People of their right to due process under the California Constitution. As this Court reasoned, "While is probable the People could more effectively challenge [the defendant's] anticipated mental defense if a prosecution expert were granted access to [the defendant] for purposes of a mental examination . . . [,] [s]hould petitioner present a mental defense at trial, the People's strong interest in prosecuting criminals can often be vindicated by challenging that defense in other ways. The People can challenge the defense expert's professional qualifications and reputation, as well as his perceptions and thoroughness of preparation. The People will have access to 'any relevant written or recorded statements' examined by [the defendant's expert], 'including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.' [Citation.] *The People can also have their own expert review [the defendant's expert's] report and interview notes and comment on petitioner's alleged mental condition.*" (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at pp. 1115-1116; italics added.)

Further, petitioner's own citation to the *Bassett* court's summary of the "showing of Drs. Abe and McNiel [the prosecution rebuttal experts]" (PB 115, citing to pp. 144-145 of the *Bassett* opinion), provides ample support for why the Referee in this case was fully justified in relying on the

credible testimony of Drs. Hinkin and Faerstein. While not cited by petitioner in his brief, the *Bassett* court began this portion of the opinion by noting:

> Even more inadequate than the factual basis of the testimony of Drs. Abe and McNiel is their statement of the *reasoning* by which they assertedly progressed from the facts to their conclusions. It is settled that "In this class of case, as in any other, the opinion of an expert is no better than the reasons upon which it is based." [Citation.] And the chief value of such an expert's testimony, we reiterate, lies "in the explanation of the disease and its dynamics, that is how it occurred, developed, and affected the mental and emotional processes of the defendant; . . ." [Citation.] [¶] In sharp contrast, however, is the showing of Drs. Abe and McNiel. Their meager testimony provided essentially no "reasons" whatever for their conclusions . . . . Yet neither witness attempted to refute the mass of defense evidence explaining that the 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.

(*People v. Bassett*, *supra*, 69 Cal.2d at pp. 144-145; italics in original.)

Unlike the prosecution witnesses in *Bassett*, Drs. Hinkin and Faerstein provided anything but "meager testimony." Dr. Hinkin's direct examination is found at RHT 6076-6279 and encompassed more than a full day of testifying. Cross-examination, redirect examination and recross-examination are found at RHT 6280-6442, and encompassed the remainder of the second day of Dr. Hinkin's reference hearing testimony. Dr. Faerstein's direct examination is found at RHT 6444-6612, and encompassed nearly a full day of testifying. The cross-examination, redirect and recross-examinations of Dr. Faerstein are found at 6613-6796, and encompassed slightly more than a full day of testifying. In addition, unlike Drs. Abe and McNiel in *Bassett*, and as the Referee's detailed discussion of the evidence and findings relevant to Drs. Hinkin and

Faerstein shows, both Drs. Hinkin and Faerstein provided detailed and elaborate reasoning in moving from the voluminous materials reviewed and relied upon by the experts to their ultimate opinions relevant to the reference hearing issues. (RR 46-52 & 64-69 [Dr. Faerstein], 52-64 & 69-71 [Dr. Hinkin], 129-130, 186-193, 276-283 [the Referee finds "[t]he lack of support for [petitioner's *Strickland* expert's] opinions [concerning petitioner's social history, mental and physical impairments] is confirmed by testimony from respondent's experts, Drs. Hinkin and Faerstein, whose opinions and *rationale* the referee finds to be reliable and objective"], italics added.)

Further, the aforementioned cited portions of the Referee's report dealing with Drs. Hinkin and Faerstein, as well as pages 12-13 and 80-83 of that report, undermine petitioner's further contentions that "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" (PB 116) and that "Dr. Hinkin's criticisms of Dr. Riley's test results are *minimal*." (PB 117, italics added.)

Petitioner's allegation about Dr. Hinkin borders on the frivolous.[15] This is confirmed by Dr. Hinkin's relevant reference hearing testimony,

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[15] To make his claim that Dr. Hinkin's criticisms of Dr. Riley's test results were "minimal," petitioner concedes that petitioner must "put[] aside" Dr. Hinkin's criticisms of Dr. Riley for (1) failing to employ at the time of her reference hearing testimony ethnically corrected norms; (2) violating standardized test procedures when she permitted petitioner's habeas counsel to be present during the first day of the neuropsychological testing administered to petitioner in 1997; (3) failing to timely administer a malingering test to petitioner; and (4) Dr. Riley's scoring on one test result. (PB 117.) On the other hand, petitioner later contends in his brief that the Referee improperly discredited Dr. Riley's opinions on the grounds that Dr. Riley inappropriately employed a one standard deviation below the mean "cut point" generating a false positive rate of impairment of 15%, rather

(continued...)

which is set forth in the report at page 55 in support of the Referee's finding petitioner did not suffer from brain damage or substantial cognitive defects at the time of his trial in 1982. As Dr. Hinkin testified, "All of the reports, whether reflecting an assessment before petitioner's crimes or after, uniformly concluded petitioner had no brain damage at the time of testing, the time of petitioner's crimes or at the time of petitioner's trial. '*That's my interpretation of all the data. Dr. Riley arrived at a different interpretation of her data and she opined that he has suffered brain damage, but my interpretation of her data, as well as the opinions of all the other doctors you mentioned, I found no evidence of that.*' (RHT 6242-6243; see also RHT 6410-6411 [out of all the various doctors' reports reviewed by Dr. Hinkin, *only Dr. Riley concluded that petitioner suffered from brain damage*].)" (RR 55, fn. omitted; italics added.)

(...continued)
than the appropriate two standard deviation "cut point." (PB 124.) Petitioner, however, fails to point out that it was Dr. Hinkin's criticism of Dr. Riley's inappropriate methodology which the Referee relied upon in finding: "4. Brain Damage [¶]. . . [¶] . . . [¶] . . . [¶] d) Dr. Hinkin and Dr. Faerstein's opinions that petitioner did not suffer from brain damage at the time of trial are credible. [¶] e) Dr. Hinkin's opinion that Dr. Riley's scoring of petitioner's test results was not reliable is credible. [¶] f) Dr. Riley's administration, scoring and opinions as to the existence of brain damage and cognitive impairment are discussed in a detailed manner. The referee finds that her scoring process is flawed." (RR 80-81.) The Referee details in his report Dr. Hinkin's testimony with respect to the appropriate two standard deviations below the mean "cut point" to determine impairment. (See, RR 53-54, fn. 27.) Although respondent will address later in this brief petitioner's contention that the Referee's finding with respect to Dr. Riley's scoring is flawed, at this point respondent merely points out this additional significant criticism of Dr. Riley's neuropsychological assessment identified by Dr. Hinkin in his reference hearing testimony as further evidence that petitioner's contention "Dr. Hinkin's criticisms of Dr. Riley's test results are minimal" borders on the frivolous.

Similarly, the Referee "*found it disquieting that Dr. Riley clearly stated in her report that petitioner's brain damage was attributed to in utero events but would later seek to distance herself from her original position by stating it was awkwardly stated.* Dr. Riley lectures other doctors on the importance of proper phrasing of opinions so as to maximize the impact on jurors." (RR 80-81, italics added.) In contrast, the report's detailed discussion of evidence and findings states: "Dr. Hinkin noted that petitioner's normal developmental history outlined by petitioner's mother in petitioner's school records (Exhibit CCC) as well as petitioner's IQ score of 88 (obtained on an IQ test administered when petitioner was six years old), were inconsistent with petitioner's claim of *in utero* insult— i.e., fetal abuse— resulting in brain damage identified by petitioner's neuropsychologist, Dr. Riley. (RHT 6223-6226 []; see also RHT 6410].)" (RR 55-56, fn. omitted; see also RR 129-130.)

Petitioner fares no better with his contention concerning Dr. Faerstein's testimony. Dr. Faerstein did provide relevant evidence concerning Dr. Pollack, including Dr. Faerstein's opinion that he would "have expected Dr. Pollack to put in his report a finding of evidence of a mental defect, disease or disorder, even though Dr. Pollack felt that the condition was insufficient to rise to the level needed to support any of the issues submitted to Dr. Pollack for his consideration as part of his assessment of petitioner (RHT 6533.)" (RR 48.) Dr. Faerstein, however, also testified "that the reports from Drs. Prentiss, Minton, Perrotti and Brown (Exhibits D, I & J), all of which Dr. Faerstein reviewed and none of which petitioner's *Strickland* expert had an independent recollection of having reviewed, were consistent with the findings of Drs. Pollack and Imperi. (RHT 6527-6529.)" (RR 49; see also RR 50.) The Referee further observed,

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

(RR 49, see also RR 50.) Dr. Faerstein also testified that reports found within petitioner's CDC records (Exs. G-10 & G-12) from two neurosurgeons who evaluated petitioner following his commitment to San Quentin. As noted by the Referee, this evidence

> lent additional support to Dr. Faerstein's conclusion that at the time of petitioner's trial, petitioner did not suffer from any mental defect, disease or disorder. "The primary significance of these evaluations . . . is that they were conducted by neurosurgeons, who are skilled and trained in evaluating central and peripheral nervous system disorders. And they also, as neurologists, do conduct evaluations of the cranial nerves and the central nervous function in a mental status examination, that's part of their normal examination. In none of these reports did they find any evidence of any central nervous system disorder, which is brain disorder. And, in fact, in the Levy report that you asked me about, the one dated March 18, he states explicitly in the third from last paragraph: 'His deficit appears to relate to right side multiple levels of the cord. The diminished reflexes on the right along with the atrophy suggests a lower motor neuron lesion, not a spinal cord lesion.' What he is looking for is the cause of the problem and trying to determine the origin or the location of the deficit that would lead to this disorder, this impairment. And he is saying it is a peripheral nervous system disorder, the peripheral nervous system, which are the nerves that come out of the spinal cord, it is not due to anything in the spinal cord, and is not due to anything in the brain, which is the central nervous system. If a neurosurgeon would have found evidence of central nervous disorder, which is brain disorder, I would expect to find it in his report. There are three reports from neurosurgeons here, and none of them contained

> evidence or report of a central nervous system defect." Dr. Faerstein concluded that the findings of the neurosurgeons were "entirely consistent with all the other reports [of Dr. Pollack and the psychiatrists and psychologists at the Youth Authority]." (RHT 6544-6547.)

(RR 50-51.) This detailed explanation from Dr. Faerstein, representative of the type of detailed reasoning provided in reference hearing testimony by both Drs. Faerstein and Hinkin in support of their opinions, further disproves petitioner's contention concerning the perceived role of Dr. Faerstein at the reference hearing, and further distinguishes this case from *Bassett*.

The Referee's report details other areas of Dr. Faerstein's testimony that discredit petitioner's contention and support the Referee's findings. This includes testimony concerning: (1) the significance that petitioner, who had been apprehended for a 1976 burglary based upon latent fingerprints left by petitioner at the scene of that crime, left the Hassan residence following the murders *wearing gloves*, smiling, and carrying a pillowcase filled with property taken in the robberies (RR 51-52); (2) Dr. Faerstein's opinions that at the time of the assessment by Drs. Pollack and Imperi, nothing in the materials reviewed by Dr. Faerstein suggested a need for psychological testing and that "even in today's environment on cases in which [Dr. Faerstein] is asked by the defense to assess a defendant facing capital charges, unless 'there are indications of the suspicion of organic brain damage, suspicions that might be found on mental status examination, on the psychiatric clinical evaluation, or from information in the history that tell you that there is brain damage[,]' neuropsychological testing is not required. (RHT 6517-6518.)" (RR 52); (3) Dr. Faerstein's opinion based on his review of petitioner's trial testimony that petitioner appeared to have outgrown an attention deficit hyperactivity disorder ("ADHD") at the time of his testimony (RR 63, fn. 33) and that had ADHD existed at the time of

the 1981 clinical interview of petitioner by Dr. Pollack, Dr. Faerstein would have expected Dr. Pollack's report to have at a minimum "'reported tangentiality, circumstantial tangentiality, difficulty staying on topic, distractibility, he would have recovered [*sic*] the symptoms of ADHD and there were no reports of any of those symptoms.' (RHT 6548-6549.)" (RR 64); (4) Dr. Faerstein's opinion based upon petitioner's trial testimony in which petitioner "'showed his ability to adapt his conduct and conform his conduct to the circumstances of the trial, of responding in court in a legal setting to direct examination and cross-examination, the language he used [and] [h]is nature of responding to questions [which] showed an ability to conform to the circumstances of the trial, which is a very structured and organized setting[]' (RHT 6541-6542.)" (RR 66), that "petitioner could control any impulsivity towards inappropriate conduct." (RR 66-67); (5) Dr. Faerstein's opinions concerning petitioner's awareness as to what guns and bullets were, the effect of pointing a loaded gun at the head of another person and pulling the trigger, the consequences of firing a bullet into the head of another person and the meaning of taking property of another by force in the form of a gunshot wound to the head of that other person, as well as petitioner's ability to stop himself from pulling the trigger of a gun if he chose to and to control his conduct at the time of the crimes (RR 67); (6) the significance of petitioner's March 25, 1980 YTS annual review report (Exs. 23 A-1 & 26-B) to Dr. Faerstein's conclusion that petitioner demonstrated his ability to control impulsivity when to do so might serve his interest in getting released at an earlier time on parole from the CYA and Dr. Brown's report (Ex. I) to Dr. Faerstein's conclusion that "petitioner had 'learned to verbalize what he needs to verbalize to impress the authorities to allow him to be released'[]" (RR 67, fn. omitted); and (7) the significance of petitioner's MMPI test results from tests administered while petitioner was at CYA and later following his commitment to San Quentin

to the issue of petitioner's impulsivity and ability to control his conduct (RR 68-69).

In short, Dr. Faerstein's reference hearing testimony and the Referee's findings detailed in his report based in part on that testimony demonstrate the misguided nature of petitioner's assertion that "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." (PB 116.)

Petitioner appears to contend that because the Referee (1) characterized petitioner's neuropsychologist, Dr. Riley, as "'a good witness and well qualified'" (RR 12), and (2) noted that "no other qualified expert has ever administered a battery of neuropsychological tests to petitioner" (PB 118), insufficient evidence supports the Referee's finding "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.)" (PB 118, alteration in original.)[16] Petitioner's claim is meritless.

First, as already noted in this brief, the context in which the Referee made the characterization about Dr. Riley ("while a good witness and well qualified" (RR 12)) centered on the Referee's finding that Dr. Riley "lacked adequate foundation for the opinion that petitioner suffered in-utero brain damage or significant cognitive defects." (RR 12.) As also noted above, the Referee immediately thereafter set out a series of six findings in support of the overarching finding that Dr. Riley lacked adequate foundation for her opinion. Those six findings included that Dr. Riley's "administration,

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[16] The Referee's full finding was that "Petitioner's neuropsychologist, while a good witness and well qualified, lacked adequate foundation for the opinion that petitioner suffered in-utero brain-damage or significant cognitive defects." (RR 12.)

scoring and interpretation of neuropsychological tests [she administered to petitioner] *were seriously flawed*[;]" Dr. Riley's decision to allow petitioner's habeas counsel, "a third-party (who had a vested interest in the outcome) to be present during the neuropsychological test of petitioner *was a very grave error on Dr. Riley's part* [;]" and "Dr. Riley's 1997 test results were inconsistent with: [¶] a. petitioner's history. [¶] b. the opinions of petitioner's family, friends and gang members. [¶] c. the opinions of six doctors who conducted mental status evaluations of petitioner from 1978 through 1980.[17] [¶] d. the opinions of credible, well qualified experts Doctors Charles Hinkin . . . and Saul Faerstein . . . ." (RR 12-13; see also RR 80-83 [the Referee provided an even more detailed outline of his findings regarding petitioner's claim of "Brain Damage," including specific criticisms related to Dr. Riley's assessment and opinions].)

Second, petitioner confuses a characterization that an expert witness may be well qualified to testify as an expert in a particular area, with the very different legal concept that because of an inadequate foundation to support the expert's opinions, the expert's opinions could be properly rejected as unreasonable. Remarkably, petitioner relies on *People v. Bassett*, *supra*, 69 Cal.2d 122, to contend that the opinions of Drs. Faerstein and Hinkin, whom the Referee deemed "impressive, well-qualified witnesses" (RR 80), should be rejected because neither expert personally examined petitioner (PB 112-116). *Bassett*, in fact, fully supports the Referee's findings, as previously discussed.

As *Bassett* stated, the value of an expert's opinion depends on the facts and reasons supporting it, and the Referee here carefully evaluated

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[17] As respondent has previously noted, the six doctors, including the 4 psychiatrists and psychologists at CYA and Drs. Pollack and Imperi, evaluated petitioner between 1978 and late 1981, not 1980 as the report erroneously states.

these relevant factors in assessing Dr. Riley's testimony. Immediately after finding that "Dr. Hinkin, Dr. Faerstein and Dr. Riley are all impressive, well qualified witnesses[]," the Referee stated: "However, I found it disquieting that Dr. Riley clearly stated in her report that petitioner's brain damage was attributed to in utero events but would later seek to distance herself from her original position by stating it was awkwardly stated. Dr. Riley lectures other doctors on the importance of proper phrasing of opinions so as to maximize the impact on jurors." (RR 80-81.) Both before and after this finding, the Referee set out his detailed outline of findings to support his conclusion that "Dr. Riley's opinion is not supportable." (RR 80-81; see also RR 129-130.)

Petitioner next erroneously contends,

> 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 a result of neuropsychological testing as part of petitioner's case in mitigation. More specifically, the Referee asserts that Dr. Riley's test results lacked validity because Dr. Riley (1) in scoring the tests she administered did not utilize ethnically 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.

(PB 118-119.)

First, it is plain from the pages 80-81 of the Report, which Respondent quoted above at Argument I.C, that the Referee rejected Dr. Riley's opinions for far more than two reasons. At a minimum, the Referee provided *10 separate findings*, with additional sub-indings, to support the ultimate conclusions that in 1982 petitioner did not suffer from brain damage or substantial cognitive defects and that Dr. Riley's contrary opinions lacked adequate foundation. (RR 80-81; see also RR 12-13 ["(1)

The administration, scoring and interpretation of neuropsychological test results by Dr. Nell Riley . . . were seriously flawed. [¶] (2) Allowing a third party (who had a vested interest in the outcome) to be present during the neuropsychological test of petitioner was a very grave error on Dr. Riley's part. [¶] (3) Dr. Riley's 1997 test results were inconsistent with: [¶] a. petitioner's history. [¶] b. the opinions of petitioner's family, friends and gang members. [¶] d. the opinions of credible, well qualified experts Doctors Charles Hinkin . . . and Saul Faerstein . . . ."]; RR 129-130 ["The opinion offered by Drs. Riley and Miora that petitioner suffered from 'brain damage' and 'significant brain dysfunction' is not supported by petitioner's history and the extensive record of examinations and evaluations he underwent before and after the offenses. The psychiatric and psychological data do not support an opinion that petitioner was 'unable to draw inferences in ambiguous circumstances and leaves him especially vulnerable to missing or misreading cues concerning the intentions of other persons.' He adapted to his environment when he was in the community[,] at the CYA and in prison. In fact, the record shows that he was able to adapt appropriately to social situations and he understood the social cues sufficiently well to conduct himself appropriately in court as a witness using appropriate language, but when speaking with his co-defendant he utilized street language and adapted to that milieu, as was documented in a recording. Institutional records noted that he responded to peer pressure and adapted to the inmate environment, reflecting an ability to read and respond to those cues and behave in a way necessary to receive the support and approval of his peers. Contrary to petitioner's assertions in this action, there is no evidence that any mental impairment interfered with his capacity to read and respond to social cues. The opinions submitted by Drs. Riley and Miora as mitigating are not credible. (Exhibit RRR.) [¶] The opinion of Dr. Riley is totally at variance with the overwhelming evidence

concerning petitioner in his life prior to their evaluations. There is no evidence that he suffered any perinatal or developmental injuries which might have caused brain damage. (Exhibit RRR.) [¶] Petitioner's school records are also consistent with the opinion that there was no evidence of organic brain damage. A May [*sic*][18] LM test done on October 2, 1968 when petitioner was six years old and in the first grade, found a mental age of five years, five months, with a calculated IQ of 88. His reading grade and his arithmetic grade were in the normal range. (Exhibit RRR.) [¶] In the fourth grade, petitioner was found to have an IQ of 75 (20th percentile) and a reading score of 34, stanine 4 (40th percentile). If the hypothesis proposed by Dr. Riley that petitioner suffered brain damage during gestation when his mother was kicked in the stomach was true, the evidence for his brain damage would have manifested itself during his developmental years and during elementary school. The records, however, reflect that he scored in the low-average range, and there are no findings of any significance that he had brain damage."]; RR 189-191 ["Other factors [in addition to those set forth at pp. 186-188 of the rpt.] adversely affecting the reliability and credibility of Dr. Riley's 1997 neuropsychological test results and the interpretation of those results include: (1) Dr. Riley's bias against the death penalty (RHT 3299-3300.); (2) Dr. Riley's failure to review petitioner's San Quentin records encompassing the period 1982-1997 when addressing possible causes for organic brain damage (RHT 3346-3347, 3449-3452; see also RHT 3347-3349 [no San Quentin CDC records reviewed before Dr. Riley's preparation of a second Declaration, Exhibit BBB].); (3) Dr. Riley's inappropriate use of a one standard deviation 'cut point,' rather than a two standard deviation 'cut point,' to identify cognitive impairment (See, RHT 6169 [testimony of Dr. Hinkin

[18] Respondent believes the word "May" should read "Binet."

addressing this issue].); (4) Dr. Riley's failure to review the reference hearing testimony of petitioner's contemporaries, Wayne Harris and Earl Bogans (RHT 3429.), in which the witnesses painted a portrait of petitioner at odds with the cognitively impaired and abused picture of petitioner Dr. Riley, Dr. Miora and petitioner's mother, siblings and uncle proffered at the reference hearing; (5) Dr. Riley's failure to review the December 13, 1978 Home Investigation Report (Exhibit H) prior to Dr. Riley's preparation of either her 1997 Declaration (Exhibit AAA) or 2002 Declaration (Exhibit BBB) (RHT 3407.), in which the parole agent summarizes petitioner's mother's contemporaneous account of petitioner's normal home life, the mother's normal pregnancy with petitioner, petitioner's normal developmental behavior and the absence of any serious illnesses or injuries suffered by petitioner as a child; (6) Dr. Riley's uncritical acceptance of petitioner's social history based upon 1996 interview notes from interviews conducted with petitioner's mother, four sisters and Mrs. Champion's older brothers, Czell Gathright and E.L. Gathright (RHT 3397-3400, 3401-3402 ['I assumed that it was, the substance was largely true'].) despite the absence of independent corroborative data such as obstetrical, pediatric, police or court records to support a claim of fetal abuse raised by petitioner's family members; (7) Dr. Riley's failure to address entries in petitioner's school records (Exhibit CCC) in which petitioner's mother described her pregnancy with petitioner as normal and petitioner's development to the time the records were completed as essentially normal (RHT 3413-3419; see also RHT 6223-6227, 6410 [testimony of Dr. Hinkin], 6556-6558 [testimony of Dr. Faerstein].); (8) Dr. Riley's failure to address or adequately explain in light of her test results the absence of any clinical finding of organic brain damage or dysfunction by any of the four CYA psychologists and psychiatrists who evaluated petitioner between 1978 and 1980 or by Drs. Pollack and Imperi who assessed petitioner late

in 1981; (9) the inconsistency between petitioner's IQ test result of 88 obtained when petitioner was six years old and Dr. Riley's hypothesis that petitioner sustained brain damage as a result of fetal abuse; and (10) Dr. Riley's failure to adequately address petitioner's denial of ever having suffered any 'serious head injury' or other injury or accident which could account for alleged brain damage or dysfunction seen by Dr. Riley. (See, e.g., Exhibits G-5, G-6, G-7, G-8 & G-9, RHT 6097-6105 [testimony of Dr. Hinkin], 3439-3443 [testimony of Dr. Riley], Exhibit UUU, p. 2 [Dr. Riley's notes of interview with petitioner concerning the traffic accident], compare reference hearing testimony of Drs. Faerstein and Hinkin, RHT 6560-6563 [testimony of Dr. Faerstein in which Dr. Faerstein opined that he would have expected to see more in the way of headache reports had petitioner sustained the degree of brain damage identified by Dr. Riley and had that brain damage been caused by the traffic accident], 6249-6251 [testimony of Dr. Hinkin in which, assuming the accuracy of reference hearing testimony from petitioner's mother that petitioner had headaches for a couple of weeks after the accident, Dr. Hinkin nevertheless opined that this was a common experience after one sustained a concussion which does not typically translate into brain damage].)"], fns. omitted.)

In footnote 99 appearing at pages 189-190 of the report, the Referee noted: "Dr. Riley testified before Gary Jones testified and as such could not have been provided with Jones' reference hearing testimony before Dr. Riley testified. Nevertheless, given the substance of Jones' testimony which was inconsistent with claims of physical abuse suffered by petitioner at the hands of his older brothers or evidence of brain dysfunction as a result of either such alleged beatings or the 1968 traffic accident, it is noteworthy that during the pendency of this reference hearing, another source of information inconsistent with conclusions reached by Dr. Riley was never provided to Dr. Riley in order for her to explain the apparent

inconsistency between Dr. Riley's findings and the source information." In the footnote 100 appearing at page 190 of the report, the Referee noted: "In Dr. Riley's 1997 Declaration (Exhibit AAA, paragraph 29), Dr. Riley opined: '"There are several possible sources or etiologies of Mr. Champion's cognitive brain dysfunction. In my opinion, a prominent source of these deficits is the in utero insults he may have suffered when his mother was beaten by her husband during pregnancy."' (RHT 3397; see also RHT 3416-3417.) When asked to address the apparent discrepancy between Exhibit H and how petitioner's mother described petitioner's pregnancy and family life to the CYA parole agent and the post-1995 claims by Mrs. Champion of fetal abuse inflicted during petitioner's pregnancy by petitioner's biological father (RHT 3407-3410.), Dr. Riley testified: ['']I believe that the way -- you know, I'm not an expert on that. My understanding is that some families -- that when people are being interviewed, I don't know who -- what this investigation was about, whether it was about Steve's -- I don't know the cause of this. But that many families will try to put, if they believe in the welfare of their child's home life, perhaps describe their home life as perhaps being a lot more normal and comfortable. Many people do not want to report physical abuse. I think there is some possibility that maybe Mrs. Champion underreported any kinds of abuse she might have suffered.' (RHT 3410-3411.) This testimony, as well as testimony and the Declaration of Dr. Deborah Miora (Exhibit 136 at pages 5-6.), further supports the testimony of petitioner's trial counsel that when he talked with petitioner's mother and siblings about petitioner and his home life, no reports of physical abuse to petitioner's mother during petitioner's pregnancy or to petitioner as a result of beatings by his older brothers were received. For reasons to be set forth later, the referee finds that assuming *arguendo* such physical abuse occurred, reasonably competent trial counsel in 1982 would not have

discovered that evidence due to the deliberate determination of petitioner's mother and family not to disclose such 'dirty family business.'"

Reference Question 2 from this Court specifically directed the Referee to make findings concerning the credibility of any additional mitigation evidence which petitioner could have presented at his penalty phase. Thus, as framed, the first issue is whether in 1982 petitioner could have presented evidence of brain damage at his penalty phase, and if so, how credible was that evidence. Obviously, if petitioner did not in fact suffer from brain damage either in 1982 at the time of his trial or in 1997 at the time Dr. Riley administered the battery of neuropsychological tests to petitioner, any evidence of brain damage petitioner proffered at the reference hearing would not be credible, a finding which clearly would fall within the province of the Referee to make based on this Court's instructions. Therefore, evidence relevant to both the scientific reliability and validity of the neuropsychological test results Dr. Riley obtained from petitioner, and Dr. Riley's opinion petitioner suffered from brain damage, was clearly admissible at the reference hearing and properly considered by the Referee in evaluating Dr. Riley's opinions. Although petitioner professes an interest in seeking the truth (PB 117), his contention is belied by his misguided complaint that the Referee erred by relying on this admissible evidence in resolving the facts against him.

Petitioner contends since "[t]here 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* [citation]" (PB 122, italics added), the Referee could not rely upon such policy to assess the scientific reliability and validity of the tests she administered to petitioner at San Quentin in the presence of an

interested third party, petitioner's habeas counsel. (PB 122-123.)[19] Presumably, the "specific policy" to which petitioner refers is the 1999 National Academy of Neuropsychology (NAN) position paper concerning the presence of a third party during the administration of neuropsychological testing, Exhibit 101-B, a policy statement drafted May 15, 1999, and printed in The Archives of Clinical Neuropsychology in 2000. (RHT 6126.)

As Dr. Hinkin testified, at the time Dr. Riley tested petitioner in 1997, it was well known in the field of neuropsychology that the presence of a third party during the administration of neuropsychological testing can invalidate the results of the testing. (RHT 6126-6127.) "In a nutshell, [the NAN position paper, Exhibit 101-B indicates] that the presence of a third party during a psychological or neuropsychological evaluation runs a risk of biasing the testing and confounding the testing. It's a nonstandard way of administering the test. [¶] Research has shown -- the research is cited in this position paper that the presence of third-party observers runs the risk of causing patients to perform worst particularly on more complex psychological tests, and in contrast, they perform a little bit better on more

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[19] It is interesting to note that petitioner relies upon the usual and customary practice of *only* Dr. Riley in conducting neuropsychological assessments of death row inmates in the presence of the inmates' counsel. The fact petitioner presented no evidence that it was the prevailing practice of neuropsychologists in general to administer forensic neuropsychological testing in the presence of the subject's counsel, an interested third party, is significant. Of course, where the evidence conclusively demonstrates that such third-party presence implicates the scientific reliability and validity of the test results, even if petitioner could marshal and present evidence at the reference hearing that it was the general practice of *all* neuropsychologists to permit the subject's attorney to be present on request at such forensic neuropsychological testing, such a professional practice (i.e., to use the popular vernacular: "everybody does it") cannot serve to validate scientifically invalid test data.

overlearned easier neuropsychological tests. [¶] Also, this is magnified when the third party is a person whose -- who have some relationship with the testee, with the patient, and they give the example in the position paper of a legal representative who may have a stake in the outcome of the examination." (RHT 6124-6125.)

As Exhibit 101-B reflects and Dr. Hinkin testified, the policy statement cites to multiple research sources published *prior* to 1997 when Dr. Riley administered tests to petitioner, some of which go back to 1985, 12 years before Dr. Riley's testing. (Ex. 101-B & RHT 6126-6129.) One research article was cited in support of the position paper's finding that "'[third-party] observer effects can be such that performance on more complex tasks declines in contrast to enhanced performance on overlearned tasks leading to a *spuriously magnified picture of neuropsychological deficit*'" (Ex. 101-B, RHT 6129-6130, italics added). Dr. Hinkin testified that the concern expressed in the aforementioned quoted section of the policy statement can also be described as concern with creating "a false positive, [a circumstance in which] one makes a diagnosis when it's actually not there, so they are falsely saying someone has a problem that does not exist." (RHT 6130-6131.)

Exhibit 101-B further reflects, as Dr. Hinkin also testified, that based on research pre-existing Dr. Riley's 1997 testing of petitioner, "'[t]he presence of a third-party observer introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and *potentially precludes valid interpretation of the test results* [citation][.]'" (Ex. 101-B & RHT 6128-6129, italics added.) Once again relying upon research predating Dr. Riley's 1997 testing of petitioner, the policy statement points out: "'Observer effects can be magnified by the presence of involved parties who have a significant relationship with the patient (E.G. Legal

representatives who have a stake in the outcome of the examination.)[.]'" (Ex. 101-B & RHT 6131.) The presence of petitioner's habeas counsel at Dr. Riley's testing of petitioner clearly falls within this concern expressed by the policy statement. (RHT 6131.)

As Dr. Hinkin also testified, once again citing to a research article published prior to Dr. Riley's 1997 testing of petitioner, Exhibit 101-B reads: "'Thus, the presence of a third-party observer during formal testing may represent a threat to the validity and reliability of data generated by an examination conducted under these circumstances and may compromise the valid use of normative data in interpreting test scores. Observer effects also extend to situations such as court reporters, attorneys, attorney representatives viewing from behind one-way mirror and through electronic means of observation such as the presence of a camera, which can be a significant distraction.'" (RHT 6131-6132.)

Exhibit 101-C, a 2001 policy statement on the presence of third-party observers in neuropsychological assessments promulgated by the American Academy of Clinical Neuropsychology, relies on much of the same published research as the 1999 National Academy of Neuropsychology position paper, and expresses many of the same concerns as Exhibit 101-B. However, the scope of the policy is limited: "Likewise, this policy is not intended for application to criminal forensic consultations that involve issues of criminal liability or culpability *because the right to legal representation and a third party observer is absolute in criminal matters.*" (Ex. 101-C quoted at RHT 3192, italics added; see also PB 123.) Petitioner contends that "the referee ignored [this] most pertinent aspect of these post 1997 papers . . . ." (PB 122-123.) Petitioner's contention lacks merit for a multitude of reasons.

First, petitioner uses the plural "papers" when in fact it is only the policy statement from the American Academy of Clinical

Neuropsychology, Exhibit 101-C, which contains this policy limitation. For example, in addition to the NAN policy statement and the scientific discussion in the policy statement of the American Academy of Clinical Neuropsychology (which, contrary to petitioner's assertion, is in fact the "most pertinent aspect" of that organization's policy statement), the Referee also had the benefit of Exhibit EEE, the position paper from the promulgator of the WAIS III IQ test. This position paper sets forth that company's policy concerning administration of the test under "nonstandard conditions":

> "In our opinion -- it is our opinion that the presence of a third party audio or video taping or other nonstandard conditions *may not result in a statistically accurate or psychometrically sound scaled score*. As you may know, norms for standardized tests are developed under strict conditions. *If such conditions are not met, the scaled scores obtained by application of the test norms are not statistically defensible*. Although it is the position of Harcourt that the validity of any scaled score which results from a non-standard administration is suspect, it is the responsibility of the individual psychologist administering the tests to determine whether testing under nonstandard conditions serves any other purpose."

(Ex. EEE, p. 4, quoted at RHT 6137-6138, italics added; see also RR 188, fn. 98.)

In footnote 98 at page 188 of his report, the Referee also cites to a chapter in the textbook, Forensic Neuropsychology, "The Presence of Third Parties." "'The focus of this chapter is purposely narrowed to consider only trained third-party observers who are defined as neuropsychologists or technicians trained in the use and administration of neuropsychological tests. *The current author would not suggest or condone as appropriate the presence of any untrained observer, such as a parent, spouse, or attorney, during a neuropsychological assessment*[.]'" (Italics added.)

Second, and most important, neither petitioner nor Dr. Riley attempts to dispute that the presence of an interested third party during the

administration of neuropsychological testing raises scientific concerns about the reliability and validity of the test results, and the ability to apply to those test results normative data generated from testing conducted under standardized conditions without the presence of such third parties. For example, in Dr. Riley's 2003 lecture, Exhibit FFF, at pages 11-12, she asserted:

> "Another thing that happens in these prison evaluations, *probably less than desirable, but sometimes you just have to put up with*, is that there is a third party present. Now, in private practice, in personal injury cases, in workers' comp, I think in California in the Civil Code, psychologists and psychiatrists can object to the presence of a third party because it's private personal information. But in jail settings that's not always true. Sometimes it's the attorneys who really want -- who insist on being present; that they wouldn't feel they should be there for every -- that they want to witness everything that goes on between you and the defendant and they really feel that's a part of their -- that's part of their job and *you have to comply with that.*"

(RHT 6134-6135; italics added.) Dr. Riley continued:

> When there have to be third parties present, you need to, as much as possible, minimize their presence. They need to be quiet, they need to sit out of the line of sight of the defendant as much as possible, and not chitchat or comment on tests, because it's going to affect how the defendant reacts. And we know from all kinds of studies, both human studies and animal studies, that just having an observer watch you do something will affect the way you do it. Often even rats will press the bar faster if there is another rat watching. It's called . . . "social facilitation." You tend to step up your activity level when you are being observed. And on the other hand, some people get anxious when they are being observed, *so the test results can be changed in one direction or another and you don't know which way.* [¶] So as much as possible, to minimize third parties, that would be optimal. Sometimes you can't, you just have to deal with that.

(RHT 6136-6137, quoting from Ex. FFF; italics added.)

Thus, more than three years after the policy statement of the National Academy of Neuropsychology was published, Dr. Riley did not contest the scientific soundness underpinning the policy set forth in Exhibit 101-B not to allow interested third parties such as petitioner's habeas counsel to be

present during the neuropsychological assessment. Contrary to Dr. Riley's testimony, Dr. Hinkin testified that the neuropsychologist conducting a forensic evaluation need not comply with the demand of the subject's attorney to be present during such assessment. "Quite the contrary, I think you have to strongly resist that." (RHT 6135-6136.) "Whether or not there is a -- any legal right [for the subject's attorney to be present during a neuropsychological assessment], it's just bad clinical practice to allow an attorney to sit in on an examination, and [Dr. Riley] should have simply said no, you can't sit in on the examination." Even if petitioner's habeas counsel had insisted on being present during Dr. Riley's neuropsychological assessment of petitioner, Dr. Hinkin testified that the appropriate response would be for Dr. Riley to inform petitioner's counsel that Dr. Riley cannot participate in this examination as long as petitioner's counsel wishes to be present. (RHT 6134.)

It is therefore important to recognize that petitioner does not attempt to justify the presence of his counsel at Dr. Riley's neuropsychological testing on a basis that counsel's presence did not threaten the scientific reliability and validity of the testing, but offers an excuse that the neuropsychologist cannot legally exclude counsel because a criminal defendant has a constitutional right to have counsel present. The Referee was therefore fully entitled to take into account evidence presented at the reference hearing that by allowing petitioner's counsel to be present during the neuropsychological testing, Dr. Riley jeopardized the scientific reliability and validity of the very results she relied upon to opine that petitioner suffered from brain damage.

Whether Dr. Riley's test results are scientifically reliable and valid, and whether they provide a sound basis for Dr. Riley's opinions, were critical questions the Referee was required to address in determining the nature of the mitigating evidence petitioner could have introduced in his

1982 trial. The question before the Referee was not whether Dr. Riley had some acceptable explanation for allowing the presence of habeas counsel during the testing, but whether counsel's presence could have affected the test results and the weight they should be given as mitigating evidence. That was the assessment made by the Referee with respect to the issue of the presence of petitioner's habeas counsel at the neuropsychological testing administered by Dr. Riley to petitioner in 1997.

Third, even if somehow relevant to the underlying question of the scientific reliability and validity of the neuropsychological testing administered by Dr. Riley to petitioner in 1997, petitioner cannot successfully invoke the constitutional right to counsel argument used by the American Academy of Clinical Neuropsychology to create a criminal-case exception to its warning against the presence of third parties during neuropsychological assessments. As the Referee set forth in his report at page 188, "[m]ore than 30 years before Dr. Riley's assessment of petitioner and more than 40 years before Dr. Miora's nine to ten hours of interviews and assessment of petitioner, the California Supreme Court in *In re Spencer* (1965) 63 Cal.2d 400 (*Spencer*) made clear that a criminal defendant had no absolute constitutional right to the presence of counsel during a court-ordered psychological or psychiatric evaluation." In *Spencer*, this Court held:

> Although we have held that the court-appointed psychiatrist's testimony as to petitioner's incriminating statements should not have been admitted at the guilt trial because petitioner had been deprived of his constitutional right to the presence of counsel during the psychiatric examination, *we recognize that such presence may largely negate the value of the examination. Surely the presence and participation of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination.* [Citations.] As Judge Bazelon has said, "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." [Citations.] The attendance of counsel

at the interview might thus frustrate the legislative goal of obtaining the evaluation of defendant's mental state by an impartial expert in the event of an insanity plea. (Pen. Code, § 1027.)

Recognizing the force of the above factors, as well as the constitutional rights of the defendant, we point out that the presence of counsel at the psychiatric examination is not constitutionally required so long as certain safeguards are afforded to defendant. To the described extent we thereby preserve the effectiveness of the psychiatric examination.

Before submitting to an examination by court-appointed psychiatrists a defendant must be represented by counsel or intelligently and knowingly have waived that right. Defendant's counsel must be informed as to the appointment of such psychiatrists. [Citation.] If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should not be permitted to testify at the guilt trial. If defendant does specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should be permitted to testify at the guilt trial, but the court should instruct the jurors that the psychiatrist's testimony as to defendant's incriminating statements should not be regarded as proof of the truth of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of showing the information upon which the psychiatrist based his opinion.

In view of these rules, once a defendant, under the advice of counsel, submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. If the defendant does not specifically place his mental condition into issue at the guilt trial, the exclusion of counsel at the examination cannot affect the guilt trial since the psychiatrist may not testify at that trial. If defendant does specifically place his mental condition into issue at the guilt trial, he can offer no valid complaint as to the testimony of the psychiatrist at that trial. After voluntarily submitting to the examination, defendant cannot properly preclude expert testimony on a subject that he has himself injected into the trial. Moreover, the limiting instruction furnishes further protection. *Thus, whether or not defendant places his mental condition into issue at the guilt trial, the above safeguards are sufficient to justify the exclusion of counsel from the psychiatric examination and at the same time avoid a deprivation of defendant's constitutional rights.*

> Although, with these protections, a defendant is not entitled to counsel at the psychiatric examinations, the court may in its discretion authorize defense counsel to be present as an observer, not as a participant. Such authorization would depend on the attitude of the psychiatrists involved. As the Supreme Court of New Jersey has said, "If in their [court-appointed psychiatrists'] view the presence of such a non professional would hinder or operate to reduce the effectiveness of their examination, or if they assert they cannot examine in his presence, the court may in the exercise of its discretion exclude counsel from the examination." [Citation.] Moreover, the court, upon request, may allow a defense psychiatrist to be present during the examination by a court-appointed psychiatrist.
>
> Under this formulation, a defendant's constitutional rights are amply protected, while the court, the prosecution, and the defendant will obtain the benefit of the testimony of an impartial psychiatrist as to defendant's mental condition.

(*In re Spencer*, *supra*, 63 Cal.2d at pp. 411-413; fns. omitted; italics added.) Similarly, there is no right to the presence of counsel at court-ordered mental examinations in civil cases. (See discussion in *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 837, 844-846.)

In short, this Court had made clear well before 1997 that even in the circumstances of a court-ordered adversarial mental evaluation, whether in a criminal or a civil case, the subject of the examination and in particular a criminal defendant had no constitutional or absolute right to have counsel present during that evaluation. Certainly in 1997, petitioner's habeas counsel must be held to know this black letter law. The overwhelming evidence presented at the reference hearing also makes clear that as of 1997, Dr. Riley should have been aware of the dangers to the scientific reliability and validity of neuropsychological testing conducted in the presence of the subject's attorney. In any event, as of the time of Dr. Riley's testimony at the reference hearing in 2006, in light of (1) the scientific implications to the results of Dr. Riley's first day of neuropsychological testing arising from the presence of petitioner's habeas counsel, (2) scientific implications set forth in the 2000 and 2001 policy

statements of the National Academy of Neuropsychology and the American Academy of Clinical Neuropsychology, Exhibits 101-B and 101-C respectively, and (3) based on published research dating back to the 1980s, the Referee would have been remiss not to consider those implications in evaluating the scientific reliability and validity of the test results proffered by Dr. Riley and the credibility of Dr. Riley's opinions and testimony predicated upon such test results.

In sum, neither science nor law supports petitioner's contention that the Referee erred in rejecting Dr. Riley's opinions and testimony based in part on the fact that Dr. Riley permitted petitioner's counsel, an interested third party, to be present during the first day of Dr. Riley's neuropsychological testing of petitioner.

In a one paragraph argument, petitioner also contends the Referee erred in "discrediting Dr. Riley" due to "'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 is an 85% chance the defendant has significant impairment. (Vol. 112 of 135 p. 4991.)" (PB 124; italics in original.)[20]

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[20] Respondent is perplexed at the reference hearing citation petitioner relies upon to support his characterization that Dr. Hinkin's testimony concerning a one-standard deviation "cut point," "*reflected an 85% probability of impairment*[]"— *viz.* "(Vol. 112 of 135 p. 4991.)." Volume 112 of 135 contains pages 4201-4500; it does not contain page 4991. Volume 114 of 135 does contain page 4991; however, in the copy of the record provided to respondent by the Orange County Superior Court, page 4991 is blank other than for the Bate stamped page number "4991."

While petitioner cites to and quotes from page 189 of the Referee's Report, factor (3)—"Dr. Riley's inappropriate use of a one standard deviation 'cut point,' rather than a two standard deviation 'cut point' to identify cognitive impairment" (PB 124)—petitioner does not include the Referee's reference hearing citation to support this factor as one "adversely affecting the reliability and credibility of Dr. Riley's 1997 neuropsychological test results and the interpretation of those results"—i.e., "(See, RHT 6169 [testimony of Dr. Hinkin addressing this issue].)" (RR 189.) In that testimony, Dr. Hinkin stated:

> Perhaps a much more significant concern though is where you set the threshold for what you are going to decide to be impairment or not. You know, we had talked earlier about that false positive issue. And if you do as Dr. Riley suggested doing, is using that cut point of one standard deviation below the mean to be impaired, mildly impaired, what you are going to have there is by definition a false positive rate of 15, 16 percent. So if you take normal individuals and administer a test to them, 15 to 16% of normal people will fall below that cut point.
>
> So what you are doing by using that standard, is that you have to be willing to accept a false positive error rate of 15 percent. *15 percent of normal individuals will be called impaired.*
>
> In my clinical practice at U.C.L.A., and at the V.A. Medical Center, we use a two standard deviation cut point. There you are only going to have, you know, one to two percent of individuals being called impaired when they truly are not. So you have a much lower false positive rate than Dr. Riley is willing to accept.

(RHT 6169, italics added.)

Petitioner's contention that "a 15% false positive rate -- . . . *reflected an 85% probability of impairment*" (PB 124, italics in original) has no basis in the record or in the science of statistical analysis. Petitioner's contention merely reflects his own misunderstanding of Dr. Hinkin's testimony concerning a 15% false positive rate. Dr. Hinkin's testimony means that 15% of the population who are in fact normal will be falsely considered impaired based upon a test result which uses a one standard deviation,

rather than two standard deviation, cut point. (See also RHT 6170-6171 [Dr. Hinkin's testimony that the impaired range is "at the 1st or 2nd percentile and lower" & that in clinical cases, unlike research, "having a 15 percent error rate is unacceptably high"]; see also RR 53-54 & fn. 27 [discussion of Dr. Riley's 2003 lecture, Ex. FFF, regarding defining impairment and Dr. Hinkin's reference hearing testimony criticizing Dr. Riley's approach].) Once again, petitioner fails to establish any error by the Referee's reliance upon Dr. Riley's inappropriate use of a one standard deviation cut point to define impairment on petitioner's neuropsychological test scores.

Lastly, petitioner criticizes the Referee's reliance on Dr. Riley's failure to employ at the time of her testimony available ethnically corrected norms in assessing the significance of petitioner's neuropsychological test scores. (PB 118-122.) Dr. Hinkin's reference hearing testimony and supporting admitted published research exhibits on the use of ethnically corrected norms provide substantial evidence for the Referee to have considered and relied in part on such evidence to find that Dr. Riley's scoring and interpretation of the neuropsychological tests she administered to petitioner in 1997 were flawed.

While petitioner's brief summarizes Dr. Riley's testimony and view concerning the use of ethnically corrected norms in evaluating neuropsychological test results, including IQ test results (PB 119-121), petitioner fails to address at all Dr. Hinkin's testimony and the documentary evidence introduced at the reference hearing on this subject. (See, e.g., Exs. III & XXX [which the Referee set out in great detail in his report (RR 58-61, 187-188) and which the Referee relied upon as credible and reliable (RR 80-81, 186) in reaching his conclusions that petitioner did not suffer from brain damage at the time of his trial in 1982; that Dr. Riley's scoring of petitioner's test results was not reliable (RR 80-81); and that Dr. Riley's

administration, scoring and interpretation of petitioner's neuropsychological tests "were seriously flawed" (RR 13)].) For example, as the Referee explained:

> Dr. Hinkin's testimony at the reference hearing concerning ethnically corrected norms begins at RHT 6172. African-Americans score on average one half to one standard deviation lower on neuropsychological tests than Caucasians of similar age, education and gender perform. (RHT 6172:9-13.) This also applies to IQ testing. (RHT 6172.) Some of the tests Dr. Riley administered to petitioner have very good normative data bases, while others have very weak normative data bases. In 1991, Dr. Heaton published normative data taking into account age, education and gender corrections. In approximately 2002 to 2003, Dr. Heaton published "upgraded normative data which in addition to those other demographic factors, he now also includes ethnicity corrections for at least white versus African-American." (RHT 6174-6175.) Dr. Riley used norms which did not include ethnicity correction. (RHT 6175.) In his testimony, Dr. Hinkin set forth various reasons suspected for the difference in performance on neuropsychological testing by African-Americans in comparison to Caucasians. (RHT 6175-6176.) These include a lack of equivalent quality of education, even though both sets of individuals completed the same level of education; parental education levels; socioeconomic status; and acculturation. Dr. Jennifer Manley, an African-American neuropsychologist at Columbia, conducted a study of 170 neurologically normal African-Americans. Using Dr. Heaton's 1991 norms and databases (the ones used by Dr. Riley), Dr. Manley "found these normal individuals had a really unacceptably high rate of impairment being diagnosed, ranging from like 30 percent to 60 percent of these normal individuals being termed impaired using those ethnically corrected one standard deviation cut points." (RHT 6177-6178.) Dr. Manley's research is presented in a published study marked as respondent's Exhibit XXX. (RHT 6178.) Dr. Hinkin reiterated that Dr. Manley's research reflected "the rates of impairment amongst normal African-American folks in the range of 30 percent on the Category Test, 32 percent on Trails B, up to a high of 65 percent of normal individuals been misclassified as impaired using the Heaton norms." (RHT 6179:1-5.) Although Dr. Riley did not use all of the tests used by Dr. Manley, she used "most of them." From the ones she did use, the false positive rates ranged from a low of 7 percent false positive rate up to a high of 65 percent. 10 of the -- 10 of the 16 measures had impairment rates in

excess of 30 percent.[ ] (RHT 6179: 8-14; see also respondent's Exhibit III [Dr. Manley's 2005 article, *Advantages and Disadvantages of Separate Norms for African Americans*, discussing the pluses and minuses of using ethnically corrected norms.]) Dr. Hinkin's testimony summarizing Dr. Manley's findings can be found at RHT 6179-6180.

In Exhibit III, Dr. Manly notes at page 272: "Given the social and political climate surrounding this work, it is important that normative studies include complete and accurate measurement of factors that not only underlie cognitive test performance but are also the variables for which race/ethnicity serves as a proxy. [¶] We must always remember that although norms are a reasonable first step, we are still using measures that were originally developed by and for well-educated Caucasians. *Even the largest and most comprehensive normative sample would not improve the questionable construct validity of cognitive measures when used among African Americans [citations]. Traditional neuropsychological assessment is based on skills that are considered important within White, Western, middle-class culture, but which may not be salient or valued within African American culture [citation]. Cognitive skills and strategies of ethnic minorities are not adequately tapped by standard cognitive tasks—our tests simply do not elicit the full potential of African Americans. Therefore, differences in salience of cognitive skills, exposure to items, and familiarity with certain problem-solving strategies could attenuate performance of African Americans on neuropsychological measures.* Cultural variability in response set, participant/examiner interactions, test-taking attitudes, and motivation during the testing session may also account for ethnic group differences based on tests of verbal and nonverbal ability."

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

Dr. Hinkin pointed out that Dr. Manley's concern with the use of ethnically corrected norms did not deal with the reliability and validity of those norms; rather, Dr. Manley expressed concerns that use of the ethnically corrected norms would retard the development of IQ and neuropsychological tests able to identify both the true

> cognitive capability of African-Americans and the reasons for differences in performance by African-Americans in comparison to Caucasians. (RHT 6180.) Dr. Manley also expressed concerns of a political nature that using ethnically corrected norms might suggest to some people African-Americans are not as smart as Caucasians. (RHT 6185-6186.)
>
> Dr. Hinkin also noted that when correcting for education, Dr. Heaton's 1991 norms treat equivalent levels of education the same; i.e., he does not take into account the quality of the education. (RHT 6181.)
>
> By not using ethnically corrected norms with petitioner, one will obtain a picture of someone who will appear more impaired than if the ethnically corrected norms were applied. Even though the ethically [*sic*] corrected norms were not available at the time Dr. Riley tested petitioner, they were available at the time Dr. Riley testified at the reference hearing. While there would be no reason for Dr. Riley's earlier Declaration to make reference to the as yet nonexistent ethnically corrected norms, there would be no reason Dr. Riley during her reference hearing testimony could not have presented the data from petitioner's testing both with reference to the ethically [*sic*]corrected norms and without reference to those particular corrected norms. Even Dr. Riley's concern with what to do if one has an African-American mother and a Caucasian father (a hypothetical inapplicable to petitioner whose parents are both African-American) can be easily addressed by presenting the test results using both the ethnically corrected norms and the norms without ethnic correction. (RHT 6189-6190.)

(RR 58-61, italics added.)

The Referee also found that "the neuropsychological testing conducted by Dr. Riley in 1997, at the behest of petitioner's habeas counsel, provides no credible evidence that petitioner suffered from any brain damage or dysfunction at the time of petitioner's 1982 trial. As noted by Dr. Manley on page 272 of Exhibit III, there is questionable construct validity of neuropsychological testing, such as that performed by Dr. Riley, when applied to African-Americans such as petitioner who are far removed from the white, middle-class American culture on which such testing was developed. As Dr. Hinkin testified and Dr. Manley's research documented,

unacceptably high false positive rates suggesting cognitive impairment are seen when such neuropsychological testing is administered to African-Americans." (RR 187-188.)

The Referee's resolution of the conflict in testimony between Drs. Hinkin and Faerstein on the one hand and Drs. Riley and Miora on the other, and his findings of fact based on those resolutions, are entitled in this Court to great weight and deference. (See, *ante*, fn. 11 ["The referee's findings of fact, though not binding on the court, are given great weight when supported by substantial evidence. Deference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying."].) (*In re Cox*, *supra*, 30 Cal.4th at p. 998; italics added, citations and fn. omitted.)

In short, while petitioner is understandably dissatisfied with the Referee's resolution of the expert testimony in favor of respondent, petitioner offers no credible basis, let alone a compelling one, for this Court to overturn the Referee's findings. Those findings are supported by overwhelming credible and reliable expert testimony and documentary evidence that Dr. Riley's administration, scoring, and interpretation of the neuropsychological tests she administered to petitioner were flawed, as is Dr. Riley's opinion that petitioner suffers from brain damage. For all of the foregoing reasons, respondent submits that this Court should reject petitioner's exception to the Referee's findings regarding Dr. Riley.

D. Petitioner's Exceptions That (1) "Based On His Misunderstanding Of What Constitutes Mitigating Evidence And The Relationship Of Proffered Evidence To Petitioner's Functioning And Development, And [*Sic*] The Referee Erred In Excluding Expert [Testimony] And Erroneously Excluded Evidence In Mitigation, Deemed It Irrelevant, And/Or Gave It Little Weight" (PB 124); (2) "The Referee Erroneously Attributes Skyers' Failure To Uncover Mitigating Evidence To A Family Member Conspiracy To Keep Information From Him" (PB 161); (3) "The Referee Erred In Failing To Fully Credit The *Strickland* Expert's Opinions" (PB 233-234); And (4) The Referee Rubberstamped And "Plagiarized From The Los Angeles District Attorney's Briefing" Of Proposed Findings Submitted By Respondent (PB 242-247, 267)[21]

1. Introduction

In Reference Question 2, this Court tasked the Referee to address: "What additional mitigating evidence, if any, could petitioner have presented at the penalty phase? How credible was this evidence?" (RR 18.) In addressing this question, the Referee agreed with petitioner's contention "that this question asks what evidence '*could have been* presented' not necessarily whether reasonably competent counsel '*would*' have presented it." (RR 76, italics added.)

As to such additional mitigating evidence, Reference Question 3 directed the Referee to make findings concerning: "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

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[21] Respondent has grouped together these four exceptions due to their interrelationship on the subject of the scope of mitigation evidence excluded and admitted by the Referee. The fourth exception listed by respondent is not delineated as such by petitioner in his brief, although it is clearly set forth as a legal objection by petitioner to the Referee's report. (See PB 242-247, 267.)

tried to obtain such evidence and to present it at the penalty phase?" (RR 18.)

Reference Question 4 then directed the Referee to make findings concerning: "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?" (RR 18.)

Prior to petitioner's presentation of evidence from Dr. Deborah Miora, and at a time when it was expected that Dr. Roderick Pettis would testify on behalf of petitioner, respondent filed a January 19, 2006 supplemental letter brief addressing two issues, one of which was the proper "scope of mitigating evidence concerning social history" petitioner should be allowed to present at the reference hearing. (Vol. 11 of 135, pp. 1249-1265.) In this letter brief, respondent alerted the Referee to three cases relevant to this issue, two of which were decided by this Court, *In re Scott* (2003) 29 Cal.4th 783 (*Scott*) and *People v. Harris* (2005) 37 Cal.4th 310 (*Harris*), and one of which was decided by the United States Supreme Court, *Tennard v. Dretke* (2004) 542 U.S. 274 [124 S.Ct. 2562, 159 L.Ed.2d 384] (*Dretke*). (Vol. 11 of 135, pp. 1260-1265.) Respondent took the position "that petitioner's social history motion should be deferred until specific objections on relevancy grounds are raised to specific testimony offered by actual witnesses testifying in front of [the Referee] at the reference hearing." (Vol. 11 of 135, p. 1265.)

On April 17, 2007, shortly before the beginning of Dr. Miora's reference hearing testimony, the Referee and counsel discussed the proper scope of Dr. Miora's testimony. As part of this discussion, counsel for respondent again cited this Court's opinion in *In re Scott*, *supra*, 29 Cal.4th at pages 820-821, a portion of the opinion which counsel for respondent set

forth verbatim on the record for the Referee's consideration. (RHT 7399-7401.) That portion of *Scott* reads as follows:

> Petitioner claims the "referee had an erroneously narrow view of the scope of mitigating and mental health evidence, and, as a result, improperly excluded and/or refused to consider important mitigating and mental-health-related evidence." **Throughout the hearing, the referee limited mitigating evidence to matters involving petitioner himself, and not merely his family or others. Early in the hearing, the referee ruled, "In a death penalty case, what is admissible in the penalty phase are** the facts of the crime and the special circumstances and **anything dealing with the background and character of the defendant, including sympathy for the defendant . . . . [¶] We cannot go beyond that to sociological aspects that have nothing to do with the defendant personally. You can link things to the defendant personally, of course. Then they are admissible. But things of general social ills in and of themselves cannot be the basis of mitigating factors. They have to be related in some way specifically, and fact-specifically, to Mr. Scott." In accordance with this general ruling, the referee refused to admit certain evidence regarding petitioner's family and conditions at home that were not linked to petitioner. These rulings were correct. "[T]he background of the *defendant's family* is of no consequence in and of itself. That is because under both California law [citation] and the United States Constitution [citation], the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the '*defendant's* character or record' that 'the sentencer . . . [may] not be precluded from considering'--not *his family's*. [Citations.] [¶] To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself."** (*People v. Rowland* (1992) 4 Cal.4th 238, 279 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The referee admitted evidence linked to petitioner personally. For example, he admitted and discussed in his report evidence that trial counsel knew that petitioner's mother had had "psychiatric difficulties." **He merely excluded evidence not linked to petitioner at all. We see no abuse of discretion.**

(*In re Scott*, *supra*, 29 Cal.4th at pp. 820-821; alteration & italics in original, boldface added.)[22]

Respondent also referred the Referee again to the two other cases cited in respondent's aforementioned January 19, 2006 letter brief, *Tennard v. Dretke*, *supra*, 542 U.S. at pages 284-285 [discussing the relevancy standard for mitigating evidence], and *People v. Harris*, *supra*, 37 Cal.4th at pages 352-353 [discussing a court's "'. . . authority to exclude [at the penalty phase] as irrelevant evidence that does not bear on the defendant's character, record or circumstances of the offense'"]. (RHT 7426-7427.) In sum, there can be no doubt but that the Referee was fully aware at the time of the reference hearing of the rules governing admissibility of mitigation evidence at a penalty phase of a capital case.

Interestingly, when petitioner discusses the "Applicable Law" that he contends is relevant to his exception concerning the scope of mitigation evidence admitted at the reference hearing, he fails to cite either in general the *Scott* opinion from this Court, or specifically pages 820-821 quoted above in which this Court sets forth the controlling holding and analysis for the identical issue presented at petitioner's capital case reference hearing and by petitioner's exception. (See PB 129-134.) Rather, petitioner first cites *Scott* in a footnote appearing at page 147 of the brief.[23] In that

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[22] This Court's decision in *Scott* requiring a link between proffered mitigation evidence and the petitioner broke no new legal ground. In its seminal decision in *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973], the United States Supreme Court made clear that "*[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character*, prior record, or the circumstances of his offense." (*Id.* at p. 604, fn. 12; italics added.)

[23] The footnote at page 147 of petitioner's brief is numbered as footnote "2," even though the footnote at page 139 of the brief is numbered "78." Respondent also notes that the arguments made by petitioner

(continued...)

footnote, without citation to the record of the reference hearing, petitioner erroneously contends in part: "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." (PB 147, fn. 2; 3rd italics added.)

Contrary to petitioner's assertion, the analysis and holding at pages 820-821 of the *Scott* decision are neither "case-specific" nor "based on the facts of that particular case." Rather, they reflect this Court's instructions that for evidence of a defendant's family's background to be admissible at the penalty phase of a capital trial, it must "'relate[] to the background of defendant himself[]' [citation]" or, in other words, be "linked to petitioner personally." (*In re Scott*, *supra*, 29 Cal.4th at p. 821.) While conceding that petitioner was aware that the admissibility of family member history required a linkage to petitioner himself, once again without citation to the record, petitioner nevertheless erroneously contends in his brief that the Referee "prevented [petitioner] from allowing his expert to establish that 'linkage.'" (PB 150, fn. omitted.)[24] As the Referee's report makes clear, it

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(...continued)
beginning with the second full paragraph on page 152 of petitioner's brief ["During the Testimony of Linda Matthews . . ."] through the first full paragraph on page 154 ["Likewise, although petitioner, at age 3 . . ."] appear to be a draft of the nearly identically-worded arguments beginning with the second full paragraph on page 155 ["During the testimony of Linda Matthews . . ."] through the first full paragraph on page 157 ["Likewise, although petitioner at age 3 . . ."].

[24] In the omitted footnote, footnote 79, petitioner erroneously contends that "[t]here was no evidence that the family or other witnesses in (continued...)

(...continued)
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*[.]" (PB 150, fn. 79.) The record of the reference hearing and the Referee's findings undermine this contention. (See, e.g., RR 13 ["the testimony from petitioner's mother and sister (Rita Powell) that petitioner was physically beaten by his older brothers, and in particular Lewis Champion III, was not credible. Given the nature of the alleged beatings and the complete absence of any observations of injuries, bruises or complaints by petitioner to his best friend Gary Jones or fellow gang members that testified at the reference hearing, the referee finds that petitioner's mother and sister exaggerated their testimony"]; RR 30 ["[a]s will be detailed further, the referee has grave concerns whether petitioner in fact ever sustained the alleged beatings or fetal abuse claimed during this reference hearing or whether the family suffered from the degree of poverty presently claimed. Certainly, the credibility of the reference hearing testimony of petitioner's mother and siblings in this area is marginal at best. (See, Exhibit H.)"]; RR 79 ["Alibi for Taylor Murder [¶] The primary alibi witnesses called to support petitioner's claimed alibi were fellow Raymond Avenue Crips gang members. Their testimony is inconsistent with their own declarations, with each other and with petitioner's own trial testimony. The testimony given by [Wayne] Harris, [Earl] Bogans and [Marcus] Player is not credible and does not support an alibi for the Taylor murder"]; RR 83 ["the referee does not find the claimed mitigation of poverty, extreme financial hardship, malnutrition or deprivations of childhood necessities to be credible. Dr. Minton's December 15, 1978 report describes petitioner as well developed and well nourished"]; RR 85 ["Mrs. Champion, E.L. Gathright, Rita and Linda Champion are the primary witnesses on [the] subject [of sibling abuse]. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers. Their testimony was i) inconsistent with that offered by other witnesses during the reference hearing who were close friends or fellow gang members of petitioner; ii) inconsistent with Mrs. Champion's statement to school officials and the CYA; and lastly, iii) petitioner's description of his family life to CYA staff. The referee did not find the claim of physical beatings of petitioner to be credible. [¶] The absence of any medical report, police report or observation by anyone of physical bruises or injuries on petitioner, particularly by Gary Jones, discredits the claim by family members that petitioner was physically beaten by Lewis III"]; RR 87 ["Mrs. Champion's prior statements concerning [petitioner's] birth, childhood and development to school authorities and CYA personnel as well as her in court testimony

(continued...)

is petitioner who failed to establish the requisite linkage which thus precluded admissibility of the challenged evidence.

2. The Referee's findings, record citations and analysis

In his report, the Referee addressed the "Scope of Social History" evidence that petitioner proffered at the reference hearing. "Petitioner sought to introduce social factors that extend beyond the immediate personal experiences of petitioner on the basis that some social factors affect the family's functioning and the ability of the caretakers to provide care for petitioner. [¶] Petitioner also sought to present the circumstances of petitioner's community including the impact of the Watts riots, the relationship between the black community and the LAPD [Los Angeles Police Dept.] or the LASD [Los Angeles County Sheriff's Dept.] on petitioner's functioning and development. [¶] *The referee found there was*

(...continued)
greatly reduce her credibility"]; RR 88 ["15. Ronald Skyers' Credibility [¶] The referee found Skyers to be a very credible witness. Where the record reveals a conflict between Skyers' direct testimony and that of Mrs. Champion and Rita Champion as to discussion of family matters, I found Skyers to be more reliable. I found that family members, including petitioner, knowingly did not disclose family matters to counsel. This is confirmed by Dr. Miora's interview report"]; RR 88 ["16. Mrs. Champion's Credibility [¶] With the exception of areas dealing with her love and affection for petitioner and her family, I found that when Mrs. Champion was confronted with her prior written statements, she was less than truthful"]; RR 289 [among the significant factors weighing against the presentation of the additional mitigation evidence proffered at the reference hearing was "the lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation"].)

an insufficient showing by petitioner to show an adequate link between the total life experiences to petitioner's parents, siblings and extended family members and petitioner's development, functioning or petitioner's individual background. Petitioner could not show any genetic link between prior generations in terms of acts of violence, psychological make up or traits and the petitioner." (RR 159, italics added.)

The Referee then "[a]ttached for the purpose of making a record on the offer of proof by petitioner [] the Court's determination on specific items addressed during the hearing." (RR 159.) Confirming his correct understanding of the legal requirements for the admissibility of mitigation evidence, the Referee began by noting, "[t]he background of the petitioner's family is material if it relates to the background of the petitioner himself. Where there is no link or the connection is marginal or remote, the offered evidence is deemed not relevant. Family background that addresses individual family members that have no connection at all was either excluded or given no weight. The maternal/paternal ancestry, i.e. slavery, discrimination in Georgia, Mississippi, Jim Crow laws, the segregation in the old south are considered as having no bearing on the defendant's culpability." (RR 159-160.) The Referee then made a series of findings with respect to trial counsel's obligation to investigate potential penalty phase evidence.

> Trial counsel is obligated to investigate the defendant's medical history, educational history, employment and training history, and family and social history. However, defense counsel is not obligated to engage in an exhaustive investigation that simply amounts to obtaining all documents that can be assembled as to any known family member, no matter how remote the connection is, nor is defense counsel required to attempt to identify all conceivable sympathetic themes that might be part of a life experience of the individual family members who have not had an impact on the defendant's life, upbringing or any association with the defendant. The upbringing of [E.L.] Gathright [Mrs. Champion's 78 year-old brother] or Mrs.

> Champion's brothers, sisters, and even Mrs. Champion's own upbringing is simply too remote and lacks sufficient showing by petitioner of a viable basis to conclude that the offered evidence has had an influence on petitioner's character or his upbringing. It is noted that petitioner did not testify at the reference hearing. All of petitioner's prior statements, including those made during interviews by Dr. Riley, do not demonstrate any link. No case authority indicates that if a defendant's extended family members have suffered a traumatic or deeply sympathetic life experience that a defendant is entitled to its admissibility.

(RR 160.)[25]

The Referee's findings concerning the scope of investigation required from reasonably competent counsel in a capital case tried in 1982 have proved prescient. In an opinion filed after the Referee issued the report, but before petitioner filed his brief on the merits and exceptions in this Court, the United States Supreme Court decided the case of *Bobby v. Van Hook*

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[25] In the concluding segment of his report, "Referee's Conclusions," the Referee revisited the issue of the scope of social and family history mitigation evidence admissible at the penalty phase. "The reference hearing has shown that from 1995 [petitioner's habeas counsel] has devoted herself to petitioner's claim that mitigation evidence was available at the time of trial and that petitioner did not receive the benefit of adequate representation. The areas investigated and presented by [petitioner's habeas counsel] are extensive and the product of intense preparation. [¶] One area that deserves further comment is the legal issue of the scope of the proposed social and family history. This area, in itself, is voluminous. I found that it was not relevant or there was insufficient foundation to permit its admissibility. *I found that no capital case attorney is required to engage in the type of investigation of a defendant's family background that was conducted in this particular case [by petitioner's habeas counsel].* However, recognizing that death penalty cases are always evolving, I believe we have preserved a clear record of what evidence petitioner sought to present." (RR 376-377, italics added; see also RR 163 ["the school performance records of Lewis Champion III and Reggie Champion, noted on page 90 of Dr. Miora's report, and the absence of a genetic link, are not relevant to petitioner's life history. *Skyers was not required to engage in the overly broad background research conducted and prepared by habeas counsel from 1995 through 2007*"], italics added.)

(2009) 130 S.Ct. 13 [175 L.Ed.2d 255] (per curiam).[26] In this capital case arising out of a 1985 murder, the United States Supreme Court reversed a decision from the Sixth Circuit Court of Appeals finding Van Hook was entitled to a writ of habeas corpus as to his sentence based on a finding that "his lawyers performed deficiently in investigating and presenting mitigating evidence." (*Id.* at p. 16 [175 L.Ed.2d at p. 258].) In granting relief to the petitioner, the Sixth Circuit had relied "on guidelines published by the American Bar Association (ABA) *in 2003* . . . ." (*Ibid.*, italics added.) In reversing the Sixth Circuit decision, the high court noted:

> The Sixth Amendment entitles criminal defendants to the "'effective assistance of counsel'" -- that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). That standard is necessarily a general one. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S., at 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, *but only to the extent they describe the professional norms prevailing when the representation took place*. *Id.*, at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.
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> The Sixth Circuit ignored this limiting principle, *relying on ABA guidelines announced 18 years after Van Hook went to trial.* See 560 F.3d at 526-528 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7, comment., pp. 81-83 (rev. ed. 2003)). The ABA standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the

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[26] Curiously, petitioner does not cite *Van Hook* in his brief, although he cites a case decided after *Van Hook*, namely *Porter v. McCollum* (2009) 130 S.Ct. 447 (per curiam). (PB 139.)

case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA Standards for Criminal Justice 4-4.1, p. 4-53 (2d ed. 1980). The accompanying two-page commentary noted that defense counsel have "a substantial and important role to perform in raising mitigating factors," and that "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." *Id.*, at 4-55.

Quite different are the ABA's 131-page "Guidelines" for capital defense counsel, published in 2003, on which the Sixth Circuit relied. Those directives expanded what had been (in the 1980 Standards) a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants. They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. See ABA Guidelines 10.7, comment., at 80-85. They include, for example, the requirement that counsel's investigation cover every period of the defendant's life from "the moment of conception," id., at 81, and that counsel contact "virtually everyone . . . who knew [the defendant] and his family" and obtain records "concerning not only the client, but also his parents, grandparents, siblings, and children," id., at 83. *Judging counsel's conduct in the 1980's on the basis of these 2003 Guidelines -- without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial -- was error.*

To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel "'must fully comply.'" 560 F.3d at 526 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 693 (CA6 2006)). *Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. *We have since regarded them as such.* See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, *we have held that the Federal Constitution imposes one general requirement: that counsel make*

objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).[27]

(*Bobby v. Van Hook*, *supra*, 130 S.Ct. at pp. 16-17 [175 L.Ed.2d at pp. 258-259], fn. omitted; alterations in original, italics added.)[28]

The Supreme Court also noted:

> Despite all the mitigating evidence the defense did present, Van Hook and the Court of Appeals fault his counsel for failing to find more. What his counsel did discover, the argument goes, gave them "reason to suspect that much worse details existed," and that suspicion should have prompted them to interview other family members -- his stepsister, two uncles, and two aunts -- as well as a psychiatrist who once treated his mother, all of whom "could have helped his counsel narrate the true story of Van Hook's childhood experiences." 560 F.3d at 528. But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for Van Hook's counsel to cover several broad categories of mitigating evidence, see 1 ABA

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[27] Insofar as petitioner appears to suggest that the referee was required to consider ABA guidelines in determining the applicable standard, petitioner fails to recognize what the United States Supreme Court made explicitly clear in *Van Hook*—that the ABA standards do not define the standard of care required of criminal defense counsel and that the *Strickland* "standard is necessarily a general one." (*Bobby v. Van Hook*, *supra*, 130 S.Ct. p. 16 [175 L.Ed.2d p. 258].)

[28] In the omitted footnote, footnote 1, the Supreme Court cautioned: "The narrow grounds for our opinion should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation. For that to be proper, the Guidelines must reflect '[p]revailing norms of practice,' *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, and 'standard practice,' *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), *and must not be so detailed that they would 'interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions*,' *Strickland*, *supra*, at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. We express no views on whether the 2003 Guidelines meet these criteria." (*Bobby v. Van Hook*, *supra*, 130 S.Ct. at p. 17, fn. 1 [175 L.Ed.2d at p. 259]; italics added.)

> Standards 4-4.1, comment., at 4-55, which they did. And given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents. *This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face*, cf. *Wiggins*, 539 U.S., at 525, 123 S.Ct. 2527, 156 L.Ed.2d 471, *or would have been apparent from documents any reasonable attorney would have obtained*, cf. *Rompilla v. Beard*, 545 U.S. 374, 389-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S., at 699, 104 S.Ct. 2052, 80 L.Ed.2d 674.

(*Bobby v. Van Hook*, *supra*, 130 S.Ct. at p. 19; fn. omitted; italics added.)

The Referee's extensive findings[29] are not only fully supported by the reference hearing record and case law such as *Van Hook*, but also by

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[29] The Referee's relevant – and dispositive – findings are as follows: (1) petitioner failed to make an adequate showing of a "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" (RR 159); (2) "defense counsel is not obligated to engage in exhaustive investigation that simply amounts to obtaining all documents that can be assembled as to any known family member, no matter how remote the connection is, nor is defense counsel required to attempt to identify all conceivable sympathetic themes that might be part of a life experience of the individual family members who have not had an impact on the defendant's life, upbringing or any association with the defendant" (RR 160); (3) "[t]he upbringing of Gathright or Mrs. Champion's brothers, sisters, and even Mrs. Champion's own upbringing is simply too remote and lacks sufficient showing by petitioner of a viable basis to conclude that the offered evidence has had an influence on petitioner's character or his upbringing" (RR 160); (4) "Dr. Miora's portion of review and evaluation [in Exhibit 136, Dr. Miora's Social History Report of Petitioner] labeled 'Narrative of Petitioner's Life History' that deals with other family member's life history is not relevant, starting on page 47 of her report through page 85" (RR 162); (5) "[t]he school performance records of

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Lewis Champion III and Reggie Champion, noted on page 90 of Dr. Miora's report, and the absence of a genetic link, are not relevant to petitioner's life history. Skyers was not required to engage in the overly broad background research conducted and prepared by habeas counsel from 1995 through 2007" (RR 163); (6) "[t]he declarations of Lewis Champion III and Reggie Champion are unreliable. The fact that they could have been subpoenaed to testify but were not weighs against their admissibility and their use as a basis for the experts' opinions" (RR 163); (8) "[t]he life history of Gerald Trabue, Jr. is immaterial to petitioner. Gerald Trabue, Jr.'s declaration is untrustworthy" (RR 163); (9) "Dr. Miora's report refers to Linda, Rita, and Gerald Jr.'s school records. The school records are not relevant. Skyers was not required to investigate their school performance in order to effectively present mitigating evidence on behalf of petitioner during the penalty phase of trial" (RR 164); (10) "[a]t the time of the Watts Riots, South-Central Los Angeles included the areas of Main Street (West), Alameda (East), Washington (North) and Slauson (South). Petitioner lived most of his life (1968-1978) on 1212 W. 126th Street (just west of Vermont and north of El Segundo) [which is][a]n area distinctly different that the hardcore area referred to in the August 1965 Watts Riot Report. If applicable, the conditions associated with the Watts Riots might be relevant environmental information. As previously noted, petitioner was three years old. Any recollection, however fleeting, noted by petitioner over twenty years later during a very controlled interview is extremely tenuous at best. [¶] It is also noted that Skyers was a conscientious attorney who is African-American. He was fully knowledgeable about the social conditions in South Central Los Angeles and the general conditions in existence where petitioner and his family lived. He evaluated petitioner's neighborhood as [a] good place to live. [¶] The Watts Riots, like the subjects of slavery, Jim Crow laws, and historical information as to how blacks were treated in the South, is simply not relevant. Skyers was not obligated to investigate these areas or present evidence concerning the same during the penalty phase of petitioner's trial" (RR 164-165); (11) "Community Matters (Exhibit 141) [¶] *Environmental Justice in Los Angeles* [¶] This information is not relevant. Skyers was not obligated to engage in the preparation or presentation of information pertaining to civil rights and environmentalism. Petitioner did not sufficiently demonstrate how this specific study was relevant to his development and/or functioning" (RR 165, underlining & italics in original); (12) "*Wikipedia Article on South-Central Los Angeles* [¶] There was no showing this document was available to Skyers. Skyers was not required to engage in an extensive effort to connect the

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additional findings made by the Referee concerning the deliberate nondisclosure of potential mitigating evidence by petitioner and his family to trial counsel Skyers during his multiple interviews with them. Such finding are further bolstered by the absence of any contemporaneous records existing as of 1982 documenting the present claims of poverty,

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development of the south portion of Los Angeles to petitioner's background" (RR 165, italics in original); (13) "*Conditions and Juvenile Facilities* [¶] (1) Sanitation problems discovered in juvenile hall. [¶] (2) The business isn't warehousing. (4/79) [¶] (3) Juvenile probe ordered. (8/83) [¶] (4) Unruly youngsters face shackles, mace. (7/84) [¶] (5) Youth Authority hard-pressed to find good jobs for parolees. (11/70) [¶] (6) Thirteen youths flee Chino facility in plot. (9/76) [¶] (7) Older youths release strains inside YTS. (9/76) [¶] (8) Department of Youth Authority. (1/78) [¶] All of the aforementioned itemized information describes the conditions of juvenile facilities in either Los Angeles or at the CYA facilities in Chino, California. The evidence presented concerning petitioner's performance, evaluation, functioning and testing is contained in other relevant documents. These articles are not relevant and are beyond the scope of this reference hearing. There is no evidence linking this information to petitioner or indicating that this type of investigation or preparation was necessary on the part of Skyers during his representation of petitioner" (RR 165-166, fn. omitted); and (14) "*Police Brutality Towards Blacks* [¶] (1) LAPD use of chokeholds. [¶] (2) Historic South-Central Los Angeles. [¶] *School Conditions/Violence* [¶] *Studies* [¶] The referee observes that the authors of these reports assembled by petitioner's counsel in 2006 are very slanted or biased. The article titled 'Perception of Police Brutality in South Central Los Angeles' has several interesting expressions including 'a policeman trying to do his job could <u>create</u> crime by inciting a crowd of bystanders to riot' and 'The School and family prove meaningless to Blacks'. [¶] The aforementioned items were written in response to the Los Angeles Riot study. All accounts took place in 1965 when petitioner was three years old. [¶] The report 'Police Malpractice and Watts Riots' has detailed descriptions of reported conduct of individuals that allegedly took place in 1965 in the Watts area, but again there is no link between the specific events and petitioner. This material would not have been deemed relevant for the penalty phase of petitioner's trial" (RR 166, italics & underlining in original).

financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, the impact on petitioner and his family resulting from the death of Gerald Trabue, Sr. and the lack of a father figure. The Referee's findings concerning the non-disclosure of family history[30]

In the Report, the Referee explained:

> The referee finds the nondisclosure of family history by petitioner or members of his immediate family purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose. [¶] Skyers personally investigated the following: [¶] . . . [¶] . . . [¶] . . . [¶] (4) He met with the family members at their home, his office and in court. [¶] (5) He attempted to discuss with the family and petitioner matters related to petitioner's family history and up bringing. In none of his meetings did anyone, including petitioner, say anything about any of the now claimed family difficulties including poverty, fetal abuse, traffic accident head trauma, sibling physical beatings, death of petitioner's stepfather and its impact on the family and the domestic violence and abuse suffered by petitioner's mother at the hands of petitioner's biological father. [¶] . . . [¶] . . . [¶] . . . [¶] . . . [¶] . . . [¶] The referee's finding on the failure to disclose is based on Skyers' testimony, Dr. Deborah Miora's (hereinafter referred to as 'Dr. Miora') observations in her report that petitioner's mother did not disclose the abuse she suffered at the hands of Lewis Champion II to others, petitioner's statement to Dr. Miora that his mother was secretive and had told the children not to talk about family matters on the street and petitioner's statement to a CYA doctor that he did not

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[30] Petitioner appears to take exception to the Referee's findings relating to (1) the nondisclosure by petitioner, his mother and siblings to trial counsel Skyers concerning information relevant to the mitigation claims presented for the first time at the reference hearing and (2) that no reasonably competent counsel would have been able to discover and develop at the time of petitioner's trial the newly minted family mitigation evidence, although petitioner frames the actual exception: "*The referee erroneously attributes Skyers' failure to uncover mitigating evidence to a family member conspiracy to keep information from him*[.]" (PB 161, italics added.) Respondent addresses this apparent exception in this section of respondent's reply brief.

confide in others except one girlfriend he found he could talk to. Lastly, the referee finds that no counsel or investigator would have been able to discover and develop the family mitigation at the time of trial.

(RR 11-12, underlining in original.)

Later in his report, the Referee noted:

Even if one assumes *arguendo* the truth of the present allegations concerning available mitigation, the referee finds that reasonably competent counsel could not have discovered evidence in these three areas [alleged beatings, fetal abuse and extreme poverty]. As more fully discussed in a review of the Declaration and reference hearing testimony of petitioner's "mitigation specialist," Dr. Miora, the unwillingness of petitioner's family members to disclose family business to outsiders was and is a well-recognized phenomenon. Thus, even if one or more of the mitigation "themes" now raised by petitioner's habeas counsel and presented through the reference hearing testimony of petitioner's mother, siblings, best friend Gary Jones and Dr. Miora, in fact were supported by credible evidence, Skyers' failure to uncover the circumstances in light of a deliberate and concerted effort by petitioner's mother and family to keep such matters from Skyers fails to reflect a failure of reasonably competent counsel to conduct an appropriate investigation in anticipation of a possible penalty phase trial. [¶] Finally, in addition to the reference hearing testimony of Gary Jones, Wayne Harris, Earl Bogans and Marcus Player which substantially undermined petitioner's present claims of available mitigation evidence in these and other areas, the prosecution had readily available rebuttal evidence to refute petitioner's present claims such as Exhibit H (Initial Home Investigation Report), Exhibit CCC (Los Angeles Unified School District [hereinafter referred to as "LAUSD"] school records), Exhibits D, I & J (the CYA psychological and psychiatric evaluations) and the absence of any contemporaneous medical, police, probation, school, social services or financial records relating to petitioner to support petitioner's present claims of available mitigation evidence.[31]

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[31] Petitioner erroneously contends that "[t]he referee's report treats the testimony of Harris, Bogan[s], and Player as *a dispositive rejection* of petitioner's life history mitigation evidence . . . ." (PB 138, fn. 77; italics added.) As the multiple excerpts from the Referee's report cited by respondent in this brief amply demonstrate, the Referee did not treat the

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(RR 30-31, italics added; see also RR 222-223 [Referee's conclusions regarding trial counsel's investigation of petitioner's development and functioning, the absence of contemporaneous records supporting petitioner's claims, the existence of records and reference hearing testimony contradicting those claims and reference hearing testimony from family members supporting Skyers's reference hearing testimony concerning nondisclosure of these claims despite trial counsel's questioning of family members about petitioner's childhood and family history], RR 173-174 [testimony of Wayne Harris concerning petitioner and petitioner's gang affiliation], RR 177-178 [testimony of Earl Bogans regarding same], RR 182, 184-185 [testimony of Marcus Player regarding same], RR 230-234 [detailed review of testimony from Gary Jones and additional reasons for finding petitioner's claim of sibling abuse not credible, not discoverable

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testimony of Harris, Bogans and Player "as dispositive" on the issue of the credibility of "petitioner's life history mitigation evidence." Rather, their testimony, in conjunction with that of petitioner's best friend, Gary Jones, the contemporaneous records in existence at the time of petitioner's trial (e.g., Exs. D, H, I, J & CCC) that failed to document the claimed mitigation raised for the first time at the habeas reference hearing, the absence of contemporaneous records supporting the newly claimed mitigation themes and the nondisclosure of such mitigation claims by petitioner, his mother, sisters and brother Reggie to trial counsel, collectively provided Referee compelling evidence demonstrating the lack of credibility of petitioner's newly minted mitigation themes. Petitioner also contends that because the Referee found the "alibi evidence for the Taylor offense" provided by Harris, Bogans and Player not to be credible, the Referee's acceptance of their testimony on the subject of petitioner's life history "*lack[ed] consistency*." (PB 138, fn. 77; italics added.) But the Referee was entitled to accept as reliable and credible portions of a witness's testimony, but reject as unreasonable or lacking in credibility other aspects of that same witness's testimony.

by reasonably competent counsel in 1982, and subject to impeachment by the prosecution with significant rebuttal evidence].)[32]

The Referee also found:

> c. Trial Counsel's Testimony and Credibility [¶] Even if petitioner's present claims of fetal abuse, physical abuse by his older brothers, adverse effects from family poverty, neighborhood dangers unrelated to petitioner's own gang and criminal activities and any inferior public school system have some credibility, Dr. Miora's declaration and testimony fully supports the credibility of trial counsel's reference hearing testimony that petitioner and his family deliberately withheld this dirty "family business" from trial counsel such that any failure by counsel to discover this undisclosed information does not reflect deficient performance by trial counsel in his representation of petitioner during either the investigative stage or the penalty trial of petitioner's case. [¶] In her Declaration (Exhibit 136, at pages 5-6.) Dr. Miora wrote: [¶] "Second, both patients and informants may intentionally misreport information, either in an effort to exaggerate or to minimize events and their impacts, for reasons of their own. Patients and informants are frequently reluctant to reveal information that is personally embarrassing or intensely shameful, or equally unacceptable if one has been raised with the cultural proscription that one does not disclose 'family business' to outsiders. Fear and lack of education about the roles and motives of mental health professionals can reduce the willingness of patients and collateral sources to disclose the true nature of highly pertinent and relevant events and affairs. A history of negative experiences with the mental health

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[32] Once again, the Referee's findings and analysis were prescient of a later pronouncement by the United States Supreme Court: "This is not a case in which the defendant's attorneys failed to act *while potentially powerful mitigating evidence stared them in the face*, cf. *Wiggins* [*v. Smith* (2003)] 539 U.S. [510], at 525, [123 S.Ct. 2527, 156 L.Ed.2d 471], *or would have been apparent from documents any reasonable attorney would have obtained*, cf. *Rompilla v. Beard*, 545 U.S. 374, 389-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)." (*Bobby v. Van Hook*, *supra*, 130 S.Ct. at p. 19 [175 L.Ed.2d at p. 261]; italics added.) Unlike *Rompilla* and *Wiggins*, petitioner has failed to identify any credible contemporaneous documents or other evidence establishing the existence of petitioner's newly minted mitigation themes that a minimally competent trial counsel would have discovered with proper investigation.

> system can lead patients and collateral others to withhold important information of a highly charged nature. Familiarity with the evaluator or someone close to the evaluator can serve to lessen apprehension and shame about disclosure of long-held and perhaps repressed material (those experiences barred from consciousness). Further, what is normative to one subset of individuals, subset being defined possibly by culture, socioeconomic group, multi-generational context, or other variables, may not be considered so by inquiring bodies such as mental health or criminal investigators. Thus, responses generated may well be skewed by a context, which context it behooves the mental health professional to attempt to understand and about which to become informed. Regarding events that are dramatic and painful, the reluctance or inability to fully describe (or in many cases, even speak of) the event may be a symptom of traumatic stress. On occasion, patients malinger, exaggerating symptoms or events for personal gain, requiring that mental health professionals routinely assess the potential for malingering in a given case."

(RR 218-219, fn. omitted.)

At the reference hearing, Dr. Miora testified that "she was told that family business was not to be shared outside of the family." (RHT 9073:20-22.) Dr. Miora later clarified this testimony: "'As I'm looking, I'll remind the court it was a statement made by Mr. Champion in reference to his mother saying that family business was not to be discussed outside of the home. Very consistent with his culture, I might add.' (RHT 9287:3-7.)" (RR 221-222 & fn. 122.)

Thus, the Referee found: "Skyers' testimony that petitioner, his mother, his sisters and brother disclosed none of the presently claimed mitigating circumstances to Skyers during his multiple conversations with them is buttressed by Dr. Miora's Declaration and reference hearing testimony concerning the well-recognized phenomenon that families will not disclose family business to outsiders. [¶] In sum, even if petitioner's present claims of mitigating evidence available to present at petitioner's trial in 1982 are credible, the failure of petitioner's trial counsel to uncover and present such mitigating evidence is not the product of any deficient

performance by trial counsel; rather it is the product of the Champion family not disclosing family business to petitioner's trial counsel, Ronald Skyers." (RR 224; see *Mickey v. Ayers*, *supra*, __ F.3d __ [2010 WL 2246411], at *15 [finding no ineffective assistance for failure to investigate or present newly minted mitigation themes concerning social history and psychological problems, noting that counsel is entitled to rely on information provided (or withheld) from the client].)

Addressing Reference Question 3, and in particular whether "a reasonably competent attorney [would] have presented" at the penalty phase evidence concerning "Petitioner's family/social history," the Referee wrote in part:

> Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure. [¶] Beyond the non-disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family members that testified in support of petitioner's alibi for the Hassan murders during the guilt phase. [¶] Reference hearing witnesses Gary Jones, [Wayne] Harris, [Earl] Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse. [¶] Mrs. Champion's prior statements to school authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing.

(RR 268-269.)

As respondent has noted, petitioner frames his exception to the issue of family nondisclosure as follows: "The referee erroneously attributes

Skyers' failure to uncover mitigating evidence to a family member conspiracy to keep information from him[.]" (PB 161.) Petitioner characterizes the Referee's findings as follows: "The referee *excuses Skyers' deficient investigative efforts* to explore petitioner's social history *by placing blame on family members*. (Referee [*sic*] at p. 11, 218, 224.)" (PB 161, italics added.) Nothing could be further from the truth.

Although the Referee did find "the nondisclosure of family history by petitioner or members of his immediate family was purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose[]" (RR 11), the record is clear that the Referee did not use that finding, along with those also cited by respondent in this brief and found in the Referee's report at pages 12, 30-31, 218-219, and 268-269, as an *excuse* for what petitioner perceives to be Skyers's "deficient investigative efforts to explore petitioner's social history . . . ." (See, e.g., RR 10-11 ["[t]rial counsel did not adequately conduct a separate, independent investigation. He failed to retain a penalty phase investigator. He did not interview all potential mitigation witnesses including petitioner's teachers, friends, CYA staff, CYA doctors, fellow gang members or law enforcement personnel. He did not assemble all documents including school records and co-defendant Mallet's trial transcripts"];[33] RR 264-266 [in addressing Reference Question 3 asking whether "a reasonably competent attorney [would] have

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[33] The Referee set forth a series of summary findings with respect to those areas of the case "Skyers personally investigated" (RR 11-12) and what actions Skyers took to investigate potential evidence that could have been presented in mitigation at the penalty phase (RR 18-24), followed by a "Detailed Discussion of Evidence and Findings" related to these areas (RR 24-76). These findings clearly undermine petitioner's contention that "Skyers conducted no investigation into the areas of mitigation permissible under Penal Code section 190.3." (PB 164.)

tried to obtain [the additional mitigation evidence identified in response to Reference Question 2]," the Referee summarizes his findings, including findings with respect to whether trial counsel did or did not do as reasonably competent counsel would have done with respect to each of the enumerated areas].)

Rather, the Referee did use his finding of a purposeful nondisclosure by petitioner and his immediate family as one of a multitude of factors from which the Referee ultimately found "that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose." (RR 11.) This finding by the Referee is in direct response to that part of this Court's request in Reference Question 3 asking: "What investigative steps, *if any*, would have led to this additional evidence?" (RR 18, italics added.) Skyers's lack of awareness of the "family mitigation now presented [at the reference hearing by petitioner]" was not simply the product of a failure to disclose by petitioner and his family. Rather, as detailed by the Referee, that lack of awareness was reinforced by the contemporaneous records that Skyers did review or should have reviewed as reasonably competent counsel, and the absence of contemporaneous records documenting the newly minted family mitigation claims. (See, e.g., CYA reports such as Exs. D, H, I & J; RR 22 ["the CYA reports contain some crucial statements by petitioner's mother and by petitioner that have a major impact on the referee's determination of credibility of the reference hearing witnesses or the validity of claimed mitigation"]; RR 31 ["finally, in addition to the reference hearing testimony of Gary Jones, Wayne Harris, Earl Bogans and Marcus Player which substantially undermined petitioner's present claims of available mitigation in these and other areas, the prosecution had readily available rebuttal evidence to refute petitioner's present claims such as Exhibit H (Initial Home Investigation Report), Exhibit CCC (Los Angeles Unified School

District . . . school records) Exhibits D, I & J (the CYA psychological and psychiatric evaluations) and the absence of any contemporaneous medical, police, probation, school, social services or financial records relating to petitioner to support petitioner's present claims of available mitigation evidence"].) Consistent with petitioner's contention that "reasonably competent counsel would not have relied solely on the information given by family members" (PB 165), the Referee relied on the *combination* of the aforementioned factors, including nondisclosure by petitioner and his family members, to support his finding "that no counsel or investigator would have been able to discover and develop the family mitigation at the time of trial." (RR 12.)[34]

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[34] In its seminal decision in *Strickland v. Washington*, 466 U.S. 668, the United States Supreme Court observed: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. [Citation.]" (*Id.* at p. 691.) In the case *sub judice*, the Referee quite properly considered the information provided by petitioner and his mother and siblings, in conjunction with the contents of the available contemporaneous records and the absence of contemporaneous records documenting any of petitioner's mitigation themes newly minted for this reference hearing, in assessing the scope of investigation required by reasonably competent counsel in 1982

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Thus, petitioner's contentions—"Any finding that petitioner's family engaged in a deliberate and concerted effort to keep mitigating evidence from Skyers is of [*sic*] simply ludicrous" (PB 165)—must be rejected, along with petitioner's underlying exception to the Referee's findings of nondisclosure and its bearing on the ability of trial counsel to have discovered in 1982 the existence of the claims presented at the reference hearing (PB 161). The record clearly justifies the Referee's contrary determination that petitioner and his family members deliberately withheld from Skyers any information regarding the social history mitigation claims presented for the first time at the reference hearing.[35] As this Court itself noted: "The referee's conclusion that the lay witnesses' testimony was incredible and recently fabricated is certainly relevant to whether counsel could have discovered that evidence before trial." (*In re Scott*, *supra*, 29 Cal.4th at p. 822.)

Before outlining the broad range of mitigation evidence proffered by petitioner at the reference hearing and which the Referee admitted, it is first

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(...continued)
and the futility for any lawyer or investigator in 1982 "to discover and develop the family mitigation at the time of trial." (RR 12.)

[35] Of course, nondisclosure presupposes the existence in 1982 of the newly minted mitigation themes presented at the reference hearing in 2006-2007. As the Referee found, however, claims of physical abuse to petitioner by his older brothers, in particular Lewis Champion III, are not credible. It is therefore not surprising that there would be no disclosure to trial counsel Skyers of beatings which in fact never occurred. That is why the Referee carefully couched his findings to reflect that the claims that petitioner presented for the first time at the reference hearing would fail, even if one assumes for sake of argument that they were credible. Indeed, the nondisclosure by petitioner's family, along with the absence of contemporaneous records to support the newly disclosed claims and the existence of contemporaneous records contradicting those claims, support the Referee's finding that reasonably competent counsel could not have discovered in 1982 the existence of such claims.

useful to address petitioner's allegation that "[t]he 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." (PB 134.)

In petitioner's introductory paragraph in support of this contention, petitioner further contends: "The referee erroneously and *falsely accused habeas counsel of professional misconduct* for aiding in the preparation of the declaration intended as a proffer of evidence." (PB 135, italics added.) The sole record citation offered by petitioner to support this contention is a single paragraph from page 195 of the report, in which the Referee noted, "'[t]he 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.)" (PB 135, fn. omitted.)[36]

Once again, even a cursory review of the Referee's discussion belies petitioner's allegation. The Referee's discussion of "Dr. Miora's Qualifications, Testimony and Objectivity" (RR 194-218) documents how (1) Dr. Miora was not provided materials necessary for an objective review of the issues for which she had been retained; (2) petitioner's habeas

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[36] In the omitted footnote, footnote 75, petitioner cites to other portions of the report making "[o]ther references to counsel's preparation of a portion of the declaration. . . ."

counsel was highly selective in choice of materials provided to Dr. Miora; (3) Dr. Miora failed to objectively evaluate all relevant evidence, both favorable and unfavorable to petitioner, before reaching conclusions which, for the most part, amounted to blanket adoptions of the draft Declaration prepared for Dr. Miora by habeas counsel. The Referee then explained how these factors resulted in a witness who in fact was not objective, was an advocate for petitioner, was biased, and whose core opinions were not credible. Some examples follow.

Dr. Miora, who had never testified at a probation and sentence hearing in any criminal case and for whom petitioner's case represented the first capital case in which she had been asked to conduct a psychosocial assessment, was not board certified in clinical psychology and clinical neuropsychology. Dr. Miora conceded that in petitioner's reference hearing she had not been qualified as a neuropsychologist, but only as a psychologist. (RR 194.)

Dr. Miora admitted that the 154-page "Petitioner's Life History" core of her 213-page April 1, 2007 Declaration "reflected 'a selection of testimony, declarations and other materials' by [petitioner's habeas counsel], a selection 'independently' undertaken by [petitioner's habeas counsel]. [Citation.]" (RR 195.) Dr. Miora recognized that petitioner's attorneys were advocates and that in that role they may be biased in a way that "could be reflected by petitioner's counsel's selection of materials which were provided or not provided to Dr. Miora for her review. [Citation.]" (RR 196, fn. omitted.) In footnote 107, which petitioner omits from his discussion, the Referee cites to Dr. Miora's testimony admitting that in her final Declaration she did not address the reference hearing testimony of "petitioner's peers, Wayne Harris, Marcus Player, Earl Bogans and Gary Jones, dealing with the subject of possible abuse . . . ." (RR 196, fn. 107.) Dr. Miora admitted she had not been provided with the reference

hearing testimony of Wayne Harris, Earl Bogans, Marcus Player or trial counsel Skyers, nor had she been apprised "what Harris, Bogans or Player testified to at the reference hearing. (RHT 8304.)" (RR 197.)

Dr. Miora testified that she assumed petitioner's habeas counsel had access to the reference hearing transcripts, but it was Dr. Miora's "'understanding . . . that the materials that were sent to [her] were what [petitioner's habeas counsel] felt would be most helpful to me in answering the referral question about [petitioner's] development and functioning.' [Citation.]"

Dr. Miora had not been provided with photographs depicting petitioner and Marcus Player when both were at CYA, including one photograph showing petitioner throwing a Raymond Avenue Crips gang sign. Dr. Miora conceded that because she had not seen these photographs or the photographs such as Exhibit 47 showing petitioner holding a gun and other photographs depicting Craig Ross with Lavelle Player and with Marcus Player, she was not able to discuss the significance of those photographs in her Declaration. (RR 198.) Despite spending a large segment of her first interview with petitioner on the subject of gangs, Dr. Miora never asked petitioner whether he remained a member of the gang following his October 23, 1980 release from CYA. (RR 198.) Dr. Miora could not answer how evidence that petitioner lied in his trial testimony (when he claimed to have left his gang following his release from CYA) would affect Dr. Miora's assessment of the credibility, reliability, and validity of information petitioner provided to Dr. Miora. (RR199-200.) After addressing a series of other deficiencies in Dr. Miora's assessment (RR 200-202), the Referee found, "Dr. Miora was less than objective and at times assumed an advocate's role on petitioner's behalf." (RR 202, fns. omitted.)

On page 82 of the report, the Referee found:

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

The record support for this finding is set forth in detail by the Referee at pages 203-205 of his report. Despite having received the reference hearing testimony of E.L. Gathright in which he specifically denied ever seeing petitioner's biological father punch or kick petitioner's mother in the abdomen or stomach while she was carrying petitioner, "Dr. Miora conceded both that she had noted petitioner's counsel failed to include in the social narrative any reference to that portion of Mr. Gathright's reference hearing testimony and further that Dr. Miora did not put any reference to this testimony in the final Declaration. (RHT 8552-8556.) Dr. Miora testified: 'Again, no, specifically **I didn't apparently feel it was important to put this particular individual's perspective on this very particular incident in here**.' (RHT 8556-8557.) Nevertheless, Dr. Miora conceded that evidence E.L. Gathright did not see the biological father kick or strike Mrs. Champion in the abdomen or stomach might be evidence to undermine Dr. Riley's claim that brain damage identified by Dr. Riley was the product of fetal abuse, among other causes. (RHT 8557-8558.)" (RR 204, emphasis in original.)

Dr. Miora testified she had not put in her Declaration any reference to the information in petitioner's school records, Exhibit CCC, that

petitioner's mother had characterized her pregnancy as normal with no complications. Nor did Dr. Miora include in her Declaration the findings by Drs. Hinkin and Faerstein that petitioner had not suffered brain damage. (RR 208-209.) Although Dr. Miora had read the reference hearing testimony of Gary Jones, in the portions of Dr. Miora's Declaration alluding to that testimony – portions written by petitioner's habeas counsel – "Dr. Miora conceded that in none of those references to the reference hearing testimony of Gary Jones[] did Dr. Miora include in her Declaration reference to Mr. Jones' testimony petitioner and Jones 'had a really beautiful childhood.'" (RR 210.) Nor could Dr. Miora satisfactorily answer whether it would be significant to petitioner's development and functioning if someone like Jones, who had had daily contact with petitioner and had frequently been in petitioner's home, testified that during the relevant period he saw no injuries to petitioner or ever saw petitioner's brothers beating up on petitioner. When asked whether this reference hearing testimony from Jones had significance, Dr. Miora's non-answer was: "'Not necessarily and perhaps.' (RHT 8340-8341.)" (RR 210-211.) The Referee found: "It is noted that the omitted evidence of Jones undermines petitioner's claim at this hearing that he was the subject of repeated abuse by his older brothers. [¶] Dr. Miora's determination to exclude from her Declaration any mention of credible evidence, which impeached petitioner's claim, adversely reflects upon her credibility." (RR 211.) In like fashion, the Referee found, "in light of the reference hearing testimony from Gary Jones, Wayne Harris, Earl Bogans, Marcus Player, Rita Champion Powell and the absence of any contemporaneous records documenting such beatings, Dr. Miora's unwillingness to acknowledge from this plethora of evidence that post-conviction claims family members were 'badly beaten' and all windows in the home broken by Lewis [Champion III] may be unreliable undermined her credibility." (RR 213.)

The Referee also found: "Dr. Miora failed to independently and objectively address materials available to her which were unfavorable to petitioner. This is demonstrated by how Dr. Miora assessed the CYA reports of the four psychologists and psychiatrists, Drs. Prentiss, Minton, Perrotti and Brown." (RR 214-215.) The Referee then set out in detail the underlying record supporting this finding. (RR 215-218.) As part of that detail, the Referee wrote:

> Petitioner's counsel also wrote a discussion of Dr. Brown's July 29, 1980 CYA psychiatric evaluation of petitioner (Exhibit I) which Dr. Miora incorporated verbatim in her Declaration (Exhibit 136, at pages 197-198). [Citation.] Dr. Miora deliberately chose not to add to [petitioner's habeas counsel's] recitation any additional commentary regarding Dr. Brown's report. (RHT 8822.) Rather, Dr. Miora made reference to Dr. Brown's report in Exhibit 136 at page 205 where Dr. Miora, not [petitioner's habeas counsel], wrote: "Dr. Richard Brown's Psychiatric Consultation Report (dated July 29, 1980) similarly concluded that there was no 'organic brain syndrome' or **gross** 'cognitive abnormalities.' (Exhibit I)" (RHT 8822-8823.) However, what Dr. Brown in his report actually wrote was: "'His speech was clear and his thought processes gave no indication of mental retardation, organic brain syndrome, psychotic mental health disease or any kind of cognitive abnormalities.'" (RHT 8823, quoting verbatim from Exhibit I.) It was Dr. Miora who chose to insert the word "gross" before the words "cognitive abnormalities" in lieu of what Dr. Brown had actually written which was "no indication of . . . any kind of cognitive abnormalities." (RHT 8821.)

(RR 217-218, emphasis in original.)

On the subject of whether petitioner's alleged family poverty adversely impacted petitioner's functioning and development, the Referee noted that "petitioner has not provided the referee with any contemporaneous financial records documenting, during the relevant time period of 1962-1982, the annual gross income for the family, including all government assistance received by any member of the family living in the household with petitioner during each of those years." (RR 223, fn. 123.) Dr. Miora never received from petitioner's counsel "records reflecting the

amount of government assistance received by petitioner's family." (RR 225.) As the referee found, "[a]n expert witness asked to address a claim of alleged family poverty affecting petitioner's development and functioning should ascertain all assets available to the family during the relevant period of time and all its liabilities in order for the witness to provide a credible and reliable evaluation." (RR 225, fn. omitted.) Dr. Miora received no information that mortgage payments for the family home had ever been delinquent or that any effort to foreclose on the property for lack of payment of that mortgage had been threatened. (RR 224.) Dr. Miora never asked petitioner or members of his family how they paid for illegal drugs and alcohol they used nor did Dr. Miora ask petitioner whether he committed robberies or residential burglaries in order to obtain the money or property necessary to buy drugs. Dr. Miora never asked petitioner how he was able to post a $250 bail for Evan Jerome Mallet, a posting made after the Hassan murders and before the Taylor crimes were committed. Dr. Miora never received documentation reflecting how much money petitioner's older sisters Linda and Rita contributed on an annual basis to petitioner's family. Nor could Dr. Miora testify to how much money petitioner's mother paid for private schools attended by three of her children, including Gerald Trabue, Jr. (RR 226-227.) Relevant evidence on the claim of alleged family poverty affecting petitioner's development and functioning, such as reference hearing testimony from Wayne Harris, Earl Bogans, Marcus Player, and trial counsel Skyers, was neither provided to nor reviewed by Dr. Miora. In addition, petitioner's school records (Ex. CCC) and the Initial Home Investigation Report (Ex. H), fail to support the contention "petitioner's family lived in impoverished conditions affecting petitioner's development and functioning." Despite petitioner's frequent contacts with the juvenile court system, petitioner submitted no probation reports that suggested he lived in impoverished conditions. Trial counsel's

own observations of petitioner's home and neighborhood and his conversations with petitioner, his mother, and siblings, failed to "suggest[] poverty as an adverse factor affecting petitioner's development and functioning." (RR 227, fn. omitted.)

While additional deficiencies in Dr. Miora's evaluation and testimony are detailed by the Referee in his discussion of petitioner's claimed mitigation themes of "community dangers affecting petitioner's development and functioning" (RR 234-240), "the impact of family abandonment by petitioner's biological father, the death of Gerald Trabue Sr. and general family chaos on petitioner's functioning and development" (RR 240-244) and "petitioner's school performance and the lack of intervention by the LAUSD system" (RR 244-247), the examples cited above demonstrate the overwhelming evidentiary support justifying the Referee's findings that "[t]he 154 page 'Petitioner's Life History' Core of 'Dr. Miora's' 213 page April 1, 2007 Declaration (Exhibits 136 and PPPP, pp. 47-201.), created by petitioner's counsel and not the witness, reflects a biased and highly selective 'spin' of the reference hearing evidence and exhibits[]" (RR 195, italics omitted) and that "Dr. Miora was less than objective and at times assumed an advocate's role on petitioner's behalf." (RR 202, fns. omitted.)

In so evaluating Dr. Miora's opinions, the Referee followed the clear directions provided by this Court in *People v. Bassett*, *supra*, 69 Cal.2d 122 by focusing on the *materials* reviewed (and not reviewed) by the expert as the foundation for the expert's opinions and the *reasoning* employed by the expert to go from the materials reviewed to the opinions expressed, rather than focusing on the opinions *per se*. As the Referee appropriately found, the failure of petitioner's counsel to provide Dr. Miora with readily available materials that were unfavorable to petitioner's newly minted mitigation themes, coupled with Dr. Miora's willingness to render opinions

without having reviewed the full panoply of relevant materials and Dr. Miora's reluctance, if not refusal, on cross-examination to recognize the significance of the unfavorable materials to her opinions, rendered Dr. Miora's opinions biased and lacking in credibility. In evaluating Dr. Miora's testimony, the Referee quite properly took into consideration the fact that petitioner's counsel, not the witness, prepared the bulk of Dr. Miora's Declaration, employing a biased selection and "spin" process for the materials that were cited in support of the opinions set forth in the draft declaration, and provided to Dr. Miora with the draft declaration. Petitioner's contention to the contrary should be rejected by this Court.[37]

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[37] Petitioner appears to contend that the Referee was not entitled to find Dr. Miora's opinions were biased and lacked foundation. Jettisoning the teachings of *Bassett*, which petitioner embraces in his effort to discredit the Referee's findings concerning Drs. Hinkin and Faerstein, petitioner appears to contend that the deficiencies in Dr. Miora's preparation of her Declaration and formulation of opinions are only relevant for cross-examination by respondent's counsel. For example, petitioner states, "During the hearing, respondent's counsel complained that certain material beneficial to its view of the case was omitted or given less attention [by Dr. Miora] than respondent's counsel desired. On this basis, the referee concluded that Dr. Miora was 'biased.' [Citation.] 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[s] and Marcus Player who were called by petitioner to testify about petitioner's alibi for an alleged uncharged crime introduced in aggravation. [Citation.] [¶] 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." (PB 137-138, fn. omitted; italics in original & boldface added.) Petitioner understandably attempts to minimize the

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While criticizing the Referee's exclusion of irrelevant proposed mitigation evidence not linked to petitioner's functioning and development, petitioner fails to credit the Referee's admission of a broad spectrum of mitigation evidence that petitioner contended his trial counsel should have presented at the 1982 penalty phase trial. In the "Summary of Referee's Findings" to that part of Reference Question 2 asking: "What additional mitigation evidence, if any, could petitioner have presented at the penalty phase?" the Referee addressed evidence he admitted concerning alleged brain damage (RR 80-83); "claimed mitigation of poverty, extreme financial hardship, malnutrition or deprivations of childhood necessities" (RR 83); the effect of petitioner's mother's absence from the home when employed resulting "in her inability to provide proper care, guidance and supervision for petitioner" (RR 84); petitioner's use of drugs (RR 84); petitioner's gang participation (RR 84); petitioner's academic performance (RR 84-85); "sibling abuse" allegedly inflicted on petitioner and other family members by petitioner's older brothers Reggie and Lewis Champion III (RR 85); "family matters" including abandonment of petitioner's family by petitioner's biological father, the subsequent contribution made by Gerald Trabue, Sr. to petitioner's family, and the impact on the family from Trabue, Sr.'s death (RR 85-86); petitioner's amenability to rehabilitation

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damage to Dr. Miora's credibility and opinions resulting from her failure to review highly probative reference hearing testimony and other materials, her failure to change her opinions when confronted with these materials on cross-examination, and her failure to provide logical and convincing reasoning how such materials could fit with Dr. Miora's previously formed opinions. Consistent with *Bassett,* however, the Referee was not required to not required to credit her impeached opinion.

(RR 86; see also RR 147-155); "love and support for petitioner from family and friends" (RR 86-87); and "community dangers" (RR 87).[38]

The Referee also addressed the "Scope of Social History" at pages 159-166 of the report, listing on these pages broad areas of evidence admitted as relevant to the issue of "petitioner's development, functioning or petitioner's individual background." (RR 159.) This evidence included: "The relationship between petitioner and his two older brothers. [¶] Any evidence of abuse, particularly by Lewis Champion III, inflicted upon petitioner and the rest of the family. [¶] No father figure in the home. [¶] The lack of support, money, food and day to day love, affection and direction due to being abandoned by father (note-this has to be balanced with the understanding that since Lewis Champion III [*sic*] was so abusive, his absence was really a blessing). [¶] Any evidence of malnutrition including the time when Mrs. Champion was pregnant with petitioner. [¶] The difficulties Mrs. Champion endured in raising eight children, her depression and inability to care for the children. [¶] Lewis Champion II did not work or provide for his family. [¶] Petitioner's life was stable and good from the time that he was provided for by Gerald Trabue Sr. (1962-1968). [¶] The auto accident which resulted in Trabue Sr.'s death. [¶] The change of circumstances wherein, as a result of Trabue Sr.'s death, Mrs. Champion was a single provider. [¶] Within a year Mrs. Champion was living with Robinson." (RR 161.)

Similarly, the Referee clearly delineated those portions of Dr. Miora's report considered to be admissible evidence. This included "direct events relating to petitioner (i.e., 'Lewis Champion II beat and abused Azell while

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[38] In his Summary, the Referee also addressed the subjects of mitigation evidence relevant to the Hassan murders and the uncharged Jefferson and Taylor murders. (RR 78-79.)

she was pregnant with Steve Champion etc.') . . . . The testimony of petitioner's mother, as it relates to the abuse suffered by her at the hands of Lewis Champion II, is relevant to the development of petitioner. Her emotional and economic condition at the time of petitioner's birth is likewise considered relevant." (RR 162.) "The failure to receive financial support from petitioner's father, the fact that Lewis Champion II abandoned the family just prior to petitioner's birth and that he claimed that petitioner was not his child are also relevant." (RR 163.) "The recollection and testimony of petitioner's mother as to her and her family's relationship to Trabue Sr. is considered relevant, material and believable. [¶] . . . [¶] The family history documents detailing the make-up of the family appear to be accurate and meaningful. This information was available to petitioner's attorney before and during the trial." (RR 163.) "The physical location of the family residence after petitioner's birth is relevant to petitioner's circumstances. Mrs. Champion's living conditions are also relevant." (RR 164.) "Petitioner was cared for by Trabue Sr. from 1962 to 1968. This period of time is viewed as the best of times by all family members including petitioner. Mrs. Champion's depression, emotional instability, her inability to attend to petitioner and the lack of food or money do not appear to be in existence during this period of time." (RR 164.)

In his "Detailed Discussion of Evidence and Findings" with respect to Reference Question 2, the Referee addressed in more detail the 13 subcategories of evidence set forth at pages 185-186 of his report falling under the rubric of "Petitioner's Social History, Mental and Physical Impairments," which petitioner's counsel contended reasonably competent counsel would have discovered and presented as mitigation evidence at the penalty phase of petitioner's trial. Thus, the subject of "Mental Impairments" is further addressed at pages 186-193 of the report; the subject of "Family Poverty's Alleged Adverse Impact on Petitioner's

Functioning and Development" is addressed at pages 224-230 of the report; the subject of "Sibling Abuse" is further addressed at pages 230-234 of the report; the subject of "Community Dangers Affecting Petitioner's Development and Functioning" is addressed at pages 234-240 of the report; the subject of "The Impact of Family Abandonment by Petitioner's Biological Father, the Death of Trabue Sr. and General Family Chaos on Petitioner's Functioning and Development" is addressed at pages 240-244 of the report; "Petitioner's School Performance and the Lack of Intervention by the LAUSD System" is addressed at pages 244-247 of the report;[39] the subject of "Petitioner's 'Institutional Adjustment' at the CYA" is addressed at pages 247-259 of the report;[40] and the subject of "The Love

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[39] "The referee finds that when petitioner put his mind to his education, he could be successful. On the other hand, when he preferred to participate with his gang beginning at age 12 or 13, skip school, use drugs and alcohol and commit crimes, his school work suffered." (RR 246, fn. omitted.)

[40] In this section of the report, the Referee rejected the opinion of petitioner's *Strickland* expert that reasonably competent counsel would have presented evidence of petitioner's successful adjustment while at CYA. "Earley's failure to review either Dr. Perrotti's report, including that portion dealing with Mr. Cruz's observations about petitioner's behavior at CYA, or Exhibit G-13 documenting petitioner's repeated acts of misconduct at CYA; and Earley's failure to read all of Skyers' reference hearing testimony [citation] undermines the reasonableness of his opinions castigating the approach of petitioner's and Ross' trial counsel taken during the trial's penalty phase. [¶] In light of petitioner's disruptive and assaultive behavior while at the CYA, his disruptive behavior in front of the jury when the first guilty verdict against petitioner was read and the surreptitiously recorded conversation between petitioner and Craig Ross discussing possible escape from county jail, trial counsel's closing penalty argument, in conjunction with the closing penalty argument by counsel for petitioner's co-defendant (from which the jury could conclude petitioner would not in fact present a future danger if incarcerated under a sentence of life without possibility of parole), protected petitioner from available prosecution rebuttal impeachment evidence demonstrating that petitioner

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of Petitioner's Family for Petitioner" is addressed at pages 259-260 of the report.[41]

In sum, the Referee did not err in excluding as irrelevant proffered mitigation evidence, including that proffered by Dr. Miora, which petitioner failed to link to his own functioning and development. The Referee afforded petitioner a full opportunity to present a broad range of mitigation evidence relevant to petitioner's functioning and development. The Referee's rejections of many of Dr. Miora's opinions for lack of foundation, bias, and faulty reasoning bordering on advocacy for petitioner are fully supported by the record and the Referee's report. The same goes for the Referee's finding that deliberate nondisclosure by petitioner, his mother, and siblings prevented trial counsel (and would have prevented any reasonably competent trial counsel or investigator) from discovering many of the mitigation themes that petitioner's habeas counsel presented for the first time at the reference hearing. Petitioner's exceptions to the contrary should be rejected.

Moreover, many of petitioner's arguments in support of his exceptions regarding the scope of mitigation evidence admitted, the role of nondisclosure by family members and other exceptions still to be addressed in this brief are predicated on a series of assumptions, none of which has

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had the ability to manipulate the staff at the CYA and did in fact engage in conduct suggesting he would be a future danger 'if things don't go as [petitioner] believes they should.'" (RR 258, last alteration in original.)

[41] At pages 45-51 of respondent's brief on the merits and exceptions filed with this Court (RB), respondent has taken exception to the Referee's use of a non-*Strickland* standard in addressing the issue of trial counsel's alleged deficient performance for not recalling petitioner's mother and sister to testify at the penalty phase about their love for petitioner—"*the best practice* for trial counsel would have been to recall the mother and sisters for this express purpose." (RR 260, italics added.)

support in the law or the record of the reference hearing. As a separate exception, petitioner contends: "The Referee Erred in Failing to Fully Credit the *Strickland* Expert's Opinions[.]" (PB 233-234.) In support, petitioner argues:

> 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. As the very nature of these proceedings was to determine whether petitioner was afforded reasonably competent representation by Mr. 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 [*sic*] 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 responsibilities of defense counsel.
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> *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.*[42] *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*

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[42] Respondent notes petitioner has cited nothing in the record of the reference hearing regarding the professional experiences of either the Referee or the deputy district attorney representing respondent at the reference hearing. Regardless, resolution of petitioner's contention can be easily reached even if one assumes *arguendo* petitioner's characterizations of the professional experiences of the Referee and deputy district attorney are accurate.

the deputy district attorney's opinions over the opinion of petitioner's qualified Strickland *expert.* [Citations.]

(PB 242-244, fn. omitted; italics added.)

Petitioner's complaint that the Referee should have given more weight to petitioner's *Strickland* expert is unavailing. It is beyond serious debate that "[t]he *fact finder* determines the facts, not the experts. Indeed, the fact finder may reject even 'a unanimity of expert opinion. "To hold otherwise would be in effect to substitute a trial by 'experts' for a trial by jury . . . ." [Citation.] "The chief value of an expert's opinion . . . rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion." [Citation.]' [Citation.] Although experts may testify about their opinions, the fact finder decides what weight to give those opinions. This is especially important when the witnesses are not neutral court-appointed experts but experts hired by a party specifically seeking evidence supporting that party's position. [Citation.]" (*In re Scott*, *supra*, 29 Cal.4th at p. 823, alteration & italics in original.)[43] Further, this Court has specifically addressed the issue of

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[43] Petitioner's failure to cite to this settled law is puzzling in light of the reliance petitioner places upon this Court's opinion in *People v. Bassett* (1968) 69 Cal.2d 122 (PB 112-118), a case which cites at pages 136 and 148 to *People v. Wolff* (1964) 61 Cal.2d 795, one of the cases in turn cited by this Court in *Scott* at 29 Cal.4th at page 823 regarding the proper role of experts. In addition, for the detailed reasons set forth by the Referee in his report, deficiencies in foundation for many of the opinions of petitioner's experts, including his *Strickland* expert and Dr. Miora, go to the core bases cited in *Bassett* for rejecting expert opinion. "'The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion; . . . it does not lie in his mere expression of conclusion.' (Italics added.) [Citation.] In short, 'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions.' (Italics added.) [Citations.]"

(continued...)

whether opinions expressed by a *Strickland* expert are binding. "We note that reliance on attorney experts is commonplace [citations], and we may consider such evidence, *although we are not bound by it.* [Citation.]" (*In re Avena* (1996) 12 Cal.4th 694, 720-721, italics added.)[44]

Petitioner appears to contend that because, according to petitioner, neither the Referee nor the deputy district attorney representing respondent at the reference hearing "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" (PB 243), the Referee is somehow precluded from rejecting opinions proffered by petitioner's *Strickland* expert and petitioner's proposed findings to the

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(*People v. Bassett*, *supra*, 69 Cal.2d at p. 141; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["like a house built on sand, the expert's opinion is no better than the facts on which it is based"].)

[44] Petitioner also contends that because respondent chose not to present a *Strickland* expert to rebut petitioner's *Strickland* expert, the Referee could not reject the opinions of petitioner's *Strickland* expert. (PB 247.) Setting aside once again the legal reality that it is petitioner who bears the burden of proving each fact necessary to obtain relief on habeas corpus, an assessment of trial court's performance does not require testimony from a *Strickland* expert. (*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 910-911 [in finding district court did not abuse its discretion in excluding four expert witnesses petitioner at evidentiary hearing sought to call in support of his ineffective assistance of counsel claims, the appellate court noted: "Expert testimony, while not necessary, is sometimes relied upon in determining claims of ineffective assistance of counsel. [Citation.] A court reviewing an ineffective assistance claim should consider counsel's performance in the context of then '"prevailing professional norms," which include[] a context dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."' [Citation.] [¶] Nonetheless, this standard does not 'require [] that expert testimony of outside attorneys be used to determine the appropriate standard of care.' [Citations.] [¶] . . . . Here, the district court was qualified to assess the factual and legal issues involved in Hovey's *Strickland* claim."].)

reference questions predicated on that expert's opinions in lieu of the proposed findings to the reference questions submitted by respondent.[45] In short, contrary to the well established law cited by respondent in this brief, petitioner's contention demands that ultimate findings regarding the adequacy of defense counsel's performance in a capital case can only be established by a defense attorney with capital case experience. Carried to its logical extreme, petitioner's contention would preclude all nine presently sitting members of the United States Supreme Court – none of whom, according to their official biographies posted online, has practiced as a capital case defense trial counsel – from deciding *Strickland* claims in a capital case independent of any view expressed in the particular case by a *Strickland* expert.[46]

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[45] In making this argument, petitioner repeatedly mischaracterizes respondent's proposed *findings* to the reference questions as "arguments." (See, e.g., PB 243 ["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"]; PB 247 ["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"].) As discussed later in this brief, the Referee's findings rejecting the opinions of petitioner's *Strickland* expert for lack of foundation and for use of a standard inconsistent with *Strickland* are fully supported by the evidentiary record cited by the Referee in his report.

[46] See http://www.supremecourtus.gov/about/biographiescurrent.pdf (as visited Feb. 26, 2010). Although none of the presently sitting Justices indicates in his or her biography any experience as a capital case defense trial counsel, a number of them have professional experiences with prosecutorial agencies including Chief Justice Roberts ("Principal Deputy Solicitor General, U.S. Department of Justice from 1989-1993"), Justice Scalia ("Assistant Attorney General for the Office of Legal Counsel from 1974-1977"), Justice Thomas ("served as an Assistant Attorney General of Missouri from 1974-1977"), Justice Breyer ("Assistant Special Prosecutor (continued...)

Petitioner's contention that the alleged lack of capital case defense counsel trial experience on the part of the Referee precludes the Referee from rejecting petitioner's *Strickland* expert's unsupported opinions and adopting findings proposed by the respondent whose counsel also allegedly lacks capital case defense counsel trial experience, a contention petitioner frames in a more colorful and argumentative way—"*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*" (PB 267, italics added)—borders on frivolous and should be rejected by this Court.

Before undertaking a detailed analysis of the Referee's findings with respect to petitioner's *Strickland* expert, respondent will first address another of petitioner's unsupported assumptions: that the Referee "rubber stamped" the proposed findings submitted by respondent, which, as previously noted, petitioner characterizes as "arguments" rather than "findings." (PB 242-247.) Petitioner writes,

> 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

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of the Watergate Special Prosecution Force, 1973"), Justice Alito ("Assistant U.S. Attorney, District of New Jersey, 1977-1981, Assistant to the Solicitor General, U.S. Department of Justice, 1981-1985, Deputy Assistant Attorney General, U.S. Department of Justice, 1985-1987, and U.S. Attorney, District of New Jersey, 1987-1990") and Justice Sotomayor ("Assistant District Attorney in the New York County District Attorney's Office from 1979-1984").

footnotes of respondent which vouch for respondent's hearing experts and criticize petitioner's experts.

(PB 267, italics added.)

Petitioner's accusation denigrates the service of the Referee in this case, who invested years of his time, energy, perseverance, and perhaps most importantly, his patience in this reference hearing. The record of these proceedings unequivocally refutes petitioner's contention and demonstrates that in the eight months between the submission of the case to the Referee and the issuance of his draft report, the Referee carefully reviewed the reference hearing testimony and exhibits as well as the parties' proposed findings before issuing the report. Most importantly, the Referee provided this Court and the parties with a clear roadmap of how the Referee utilized the proposed findings submitted by *both* the parties, a roadmap not cited by petitioner in his brief arguing that the Referee rubberstamped and "plagiarized" the proposed findings submitted by respondent.

The matter was submitted for the Referee's determination on January 17, 2008. (Vol. 6 of 135, Item D, Vol. 2 of 2, p. 424 [Min. Order].) In separate September 16, 2008 Memos, one directed to counsel for the parties with a copy to the Clerk of this Court (Vol. 14 of 135, Item E, Vol. 8 of 8, p. 2329) and one directed to the Clerk of this Court with a copy to counsel for the parties (*id.* at p. 2328), the Referee stated: "1. The Referee's eport has been completed." In the Memo directed to counsel for the parties, the Referee also noted: "3. The Report has incorporated portions of each counsel's proposed findings. At times where appropriate, counsel's proposed findings/discussions have been edited to conform to Referee's findings." (*Id.* at p. 2329.)

In the Referee's final report filed with this Court, the Referee devoted a section of the report to a detailed explanation of how the Referee treated

the proposed findings submitted by the parties. (RR 17.) As the Referee explained:

> **H. Petitioner and Respondent's Proposed Findings**
>
> Both Ms. Karen Kelly and Mr. Brian Kelberg write very well and submitted careful and well thought out proposed findings. Even in areas where I ultimately did not agree with the proposed findings of counsel, I sought to include that portion of the reference hearing testimony relied upon by counsel as to a particular claimed area of mitigation.
>
> In addition, the parties' proposed findings and the transcript of their concluding arguments are attached to facilitate the Supreme Court's review.
>
> *In drafting my report, I included or incorporated counsel's proposed findings where appropriate, but only after considering the merits of counsel's arguments and reviewing the actual testimony, documents or evidence. Some of counsel's proposed findings were modified, deleted or augmented as deemed appropriate.*
>
> Generally speaking, I agreed with petitioner as to claimed deficiencies that related to the thoroughness of trial counsel's preparation and investigation. I agreed with respondent's position as to some credibility matters and some of his assessments on whether reasonably competent counsel would or would not have presented some proposed mitigation.
>
> If a proposed finding by either side was partially correct, I simply deleted those parts I did not agree with. By attaching the full proposed findings as submitted by the parties, the Supreme Court will have the benefit of counsel's full explanation as to their respective positions."

(Italics added.)

As set forth at page 1, *ante*, it is also clear that in addition to the Referee's efforts with respect to the parties' proposed findings as set forth in his report at page 17, the Referee created summaries of his findings with respect to each of the first four reference questions. Just two of many examples demonstrate unequivocally that the Referee did not "rubberstamp" respondent's proposed findings, but instead meticulously

and carefully examined the proposed findings and supporting record, before reaching his own findings.

For example, the Referee wrote at page 72 of his report: "The referee finds that Skyers did not in fact see or possess petitioner's school records [Ex. CCC] 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." By contrast, in respondent's proposed finding on this matter, Court's Exhibit 38, respondent submitted: "As the Referee has previously noted, it is petitioner's burden to prove by a preponderance of the evidence each fact necessary to obtain the relief sought by him through this proceeding. [Citation.] Because petitioner has failed to establish the integrity of the [petitioner's] Exhibits 1-31, including subparts, as the only records actually possessed by Skyers while he represented petitioner such that the Referee could conclude from the absence of a copy of petitioner's school records, Exhibit CCC, in those exhibits, Skyers had not obtained or seen them, petitioner has failed to prove by a preponderance of the evidence that Skyers did not in fact see or possess petitioner's LAUSD records at the time he represented petitioner. If he had not reviewed those records, clearly, that would have been deficient performance by reasonably competent counsel in the investigation phase of petitioner's case." (Ct's Ex. 38, p. 306.)

In a second example, in footnote 97 at page 189 of his report, the Referee wrote: "Drs. Hinkin, Faerstein and Riley all agreed that based on petitioner's full scale IQ test result of 83, reached from testing administered by Dr. Riley, petitioner was not mentally retarded." By contrast, in respondent's proposed finding set forth in Court's Exhibit 38, page 330, footnote 281, respondent submitted: "In light of the fact that Drs. Hinkin, Faerstein and Riley all agreed that based on petitioner's full scale IQ test result of 83 on testing administered by Dr. Riley petitioner was not

mentally retarded, the Referee finds that petitioner is not mentally retarded." While the difference between the Referee's actual findings and some of respondent's proposed findings might seem minimal, the subtle differences between the two demonstrate that even in proposed findings buried in footnotes in the middle of hundreds of pages of proposed findings, nothing escaped the Referee's review and consideration.

In sum, a review of the record makes inescapably clear that in the eight months between the completion of oral arguments and the Referee's filing of his draft report, the Referee undertook the Herculean effort to (1) examine each and every proposed finding submitted by the parties; (2) review the underlying testimony and documentary evidence relevant to the proposed findings; (3) reach his own determination as to the appropriate findings; (4) incorporate, modify or delete as necessary the parties' proposed findings to correlate with the Referee's findings to be set forth in the final report; and (5) write detailed summaries of his overall findings and his specific findings with respect to each of the first four reference questions for the final report. In a reference hearing with a record as voluminous and technical as petitioner's, it is remarkable that the Referee was able to complete this report in only eight months. This Court should flatly reject petitioner's bald assertion that this Referee did nothing more than "rubberstamp" proposed findings submitted by respondent.

Returning now to petitioner's exception to the Referee's rejection of various opinions of petitioner's *Strickland* expert in response to Reference Question 4, and in particular to evidence concerning "Petitioner's Development/Functioning/Social history," the Referee wrote:

> xiv) The *Strickland* expert has opined that trial counsel failed to properly investigate potential areas of mitigation. The referee agrees with Mr. Earley. In addition, Earley has with justification, noted that a trial attorney cannot properly assess what tactical choices should be made in the best interest of his client unless he has first investigated

> and assembled all available evidence. Again, the referee agrees. However, where I choose a separate path from petitioner's *Strickland* expert is in the areas of how credible is the mitigating evidence petitioner could have presented at the penalty phase, would a reasonably competent attorney present the mitigating evidence and what evidence damaging to petitioner, but not presented by the prosecution at the guilt/penalty trials, would likely have been presented in rebuttal if petitioner had introduced the proposed evidence in mitigation.
>
> Petitioner's habeas counsel argues that a failure to properly investigate is per se incompetence of counsel. Mr. Earley likewise agrees. Earley's extensive capital case qualifications may be the basis for his failure to follow through in his evaluation of Mr. Skyers' legal representation of petitioner during the 1982 penalty phase proceedings. *He did not review the entire Mallet preliminary hearing or trial proceedings. He did not review most of Mr. Skyers' reference hearing testimony. He did not review the reference hearing testimony of Harris, Bogans and Player and he seemed unfamiliar with some of the CYA doctor evaluations. Earley also had a marked tendency to evaluate Mr. Skyers' trial performance or omissions from the perspective of what he would or would not do in a capital case in lieu of applying the Strickland standards. This court regards Mr. Earley as one of the best criminal defense attorneys in this state and he ably demonstrated his legal insights both as to law and capital case procedures during the reference hearing. He certainly has earned being treated with great deference in regard to his observations and opinions. Nevertheless, this court must adhere to principles of law that require a showing as to what a reasonable competent attorney (not the best) would or would not do. This court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or testimony that was not considered by an expert witness.*

(RR 297-298; italics added.)

In his "Detailed Discussion of Evidence and Findings" concerning Reference Question 4, the Referee dealt directly with the issue of "Materials Not Provided to or Reviewed by Petitioner's *Strickland* Expert." (RR 312-323.) Noting that Earley testified prior to petitioner calling any of his family members or Gary Jones as witnesses at the reference hearing, the Referee found,

> Earley has never reviewed the actual reference hearing testimony of Rita Champion Powell, Linda Champion Matthews, Terri McGill, E.L. Gathright, Azell Champion Jackson, Gary Jones or Tracy Hoyd Robinson. Further, since Gary Jones apparently never provided any Declaration (the 13 Volumes of Penalty Phase Exhibits to the habeas petition did not include any such Declaration), Earley at no time prior to testifying had reviewed the substance of what Gary Jones would ultimately reveal in his reference hearing testimony. Nor did petitioner choose to recall Earley to address relevant opinions he might hold in light of the actual reference hearing testimony concerning petitioner's social history.

(RR 316, fn. omitted.) In the omitted footnote, footnote 166, the Referee also found that Earley did not review the reference hearing testimony of Dr. Riley who had testified before Earley until sometime after Earley began his testimony. When he did review Dr. Riley's testimony, "he reviewed 'a very small amount of Dr. Riley's testimony' dealing with a list of some of the neuropsychological testing Riley administered to petitioner. When asked why he reviewed that portion of Riley's testimony, Earley answered: 'I just -- it was available, and was given to me -- [.]' [Citation.] Nor was Earley recalled to address the reference hearing testimony of Drs. Hinkin and Faerstein who testified after Earley completed his testimony." (RR 316, fn. 166.) "Finally, Earley was not recalled to address the testimony from Dr. Miora, petitioner's 'mitigation specialist,' whose Declaration (Exhibit 136) was prepared and reference hearing testimony given only after Earley had completed his testimony." (*Ibid.*)

Earley had not reviewed "[t]he December 13, 1978 'Initial Home Investigation Report' (Exhibit H) . . . before he signed off on [his 22 page January 27, 2006 report outlining his findings and conclusions,] Exhibit 110" or before he testified at the reference hearing. (RR 316, alteration added.) That exhibit was in petitioner's CDC file, records of which were not provided to Earley by petitioner's habeas counsel. Earley never reviewed the entire transcript from the trial of Evan Jerome Mallet. (RR

318 ["according to Earley, 'I received some, I believe, of the Mallet transcript. I only reviewed -- I did review a little bit, but not much.' [Citation.]" "Despite the statements in [Earley's final report] Exhibit 110 concerning the expected receipt of the Mallet transcript, Earley never contacted petitioner's counsel to ask where they were. [Citation.]" (RR 318, fn. omitted.) As a result, the Referee found: "In light of Earley's subsequent admission that without reviewing the Mallet trial transcript in its entirety, he was in no position to know its effect on opinions addressing whether Skyers should or should not have put on evidence of the Taylor crimes alibi at petitioner's penalty phase (RHT 3921-3922.), his testimony that he believed he could give a complete opinion on the matter without having read that entire transcript is not only inconsistent with Earley's own subsequent testimony but unreasonable." (RR 319-320, fn. 168.)

As the Referee further noted,

> Earley never reviewed the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player, or that provided by any of the present or former LASD deputies involved in the activities of December 27-28, 1980 . . . . [Citation.] As noted previously, Earley did not review the trial testimony given by Evan Jerome Mallet at his own trial. [Citation.] Nor did Earley review testimony given in the Mallet case by one of the Taylor homicide investigators from the LAPD, Detective Calagna, concerning the creation of a series of 12 photographic six-packs, each of which focused on a suspect selected by Lennox LASD Sheriff's Detective Jerome from available gang materials. That focus was based upon the suspect's affiliation with the Raymond Avenue Crips. [Citations.] These photographic six-packs were subsequently shown to the survivors from the Taylor incident: Mary Taylor, Cora Taylor and William Birdsong.

(RR 320.)

Moreover, the Referee found that:

> Earley did not review the entire reference hearing testimony of petitioner's trial counsel. [Citation.] Earley failed to read that portion of Skyers' reference hearing testimony dealing with Skyers' belief, based upon his experience with juvenile matters involving the Youth

Authority, that Skyers would have seen Exhibits D [December 1978 psychological and psychiatric reports of Drs. Prentiss and Minton], H [December 13, 1978 Initial Home Investigation Report summarizing a December 11, 1978 interview conducted with petitioner's mother at her residence at 1212 W. 126th St.],[47] I [July 29, 1980 psychiatric

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[47] In testimony given by petitioner's mother "at the reference hearing after Earley had completed his testimony, she denied ever having made the statements under 'Developmental History' or those under 'Intrafamily Relationship' in which she described the family as normal in all aspects. In fact, in her reference hearing testimony, petitioner's mother denied that she spoke with an investigator from the CYA. [Citations.] The way in which Earley opined trial counsel could have credibly dealt with Exhibit H and at the same time credibly presented Mrs. Champion's testimony at the penalty phase in front of the same jury which had already rejected her guilt phase testimony (i.e., by conceding that petitioner's mother lied to the CYA investigator in an effort to get her son home) was unreasonable. Earley acknowledged that whatever motivation petitioner's mother had to lie to the CYA investigator, her motivation to lie at the penalty phase when her son's life hung in the balance was even greater. [Citation.]" (RR 317.) In footnote 154 at pages 276-277 of his report, the Referee noted Earley's admission that petitioner's school records (Ex. CCC) "provided 'an indication' that there had been no fetal abuse sustained [by petitioner's mother] during [petitioner's] pregnancy," and Earley's opinion that had petitioner's mother been called at the penalty phase to talk about such alleged physical abuse sustained during that pregnancy, "counsel would have had to admit to the jury 'that [petitioner's mother] was, at that point that she was not being open and less than truthful in that interview [Ex. H].' [Citation.]" The Referee then noted in her reference hearing testimony, petitioner's mother denied ever talking to the CYA investigator. "*In light of Earley's concession that 'if [trial counsel] put[s] evidence on and the jury believed that the evidence that you put on was phony evidence with no basis in fact, of course that hurts you.'* (RHT 3975:12-15.), *it would undoubtedly be objectively reasonable for petitioner's trial counsel at the penalty phase not to recall petitioner's already discredited mother for the purpose of putting on such easily impeached evidence as her claim of fetal abuse would be.* (See, *Bell v. Cone* (2002) 535 U.S. 685, 698-702.)" (RR 276, fn. 154; italics added.) "The objective reasonableness for not recalling at the penalty phase petitioner's mother to talk about alleged fetal abuse is even more apparent in light of Earley's concession that whatever motivation petitioner's mother may have had to lie to the investigator at CYA in an effort to gain her son's release, she would have had an even

(continued...)

> report of Dr. Brown] and J [December 1978 and December 1979 psychological evaluations by Dr. Prentiss and Perrotti] when he visited the CYA parole office on Bullis Road. [Citations.] [¶] When Earley was specifically asked whether he "had [] reviewed any or all of the exhibits I have just mentioned, D, H, I and J[]" before preparation of [Earley's preliminary report,] Exhibit 109, he testified: "I don't believe I did." [Citation.] When asked the same question with respect to the same four exhibits for the time frame before preparation of Exhibit 110, Earley answered: "I don't think I did. I have to look back and see if I got these. I don't recall reading these before." [Citation.] After reviewing Exhibit JJJ, Earley added that "it wouldn't appear that these [four exhibits] came at that time." [Citation.] When specifically asked whether "prior to testifying on direct examination had [Earley] reviewed any or all of those exhibits[,]" Earley responded: "No." [Citation.]

(RR 321-322, fns. omitted; see also RR 38, fn. 13.)[48]

In addition, the Referee observed that:

> Earley admitted he was familiar with *People v. Bassett* (1968) 69 Cal.2d 122, a case describing the value of expert opinion. [Citation.] Earley accepted [the quotation from page 141 of the *Bassett* opinion] as an accurate statement of the law in this area. Earley agreed "if you're giving an opinion [as an expert witness] as to the ultimate facts or the facts of the case, that the expert's opinion is only as valuable as the materials he receives and the reasoning that he uses." [Citation.] Earley further agreed that he was giving "ultimate opinions" in his reference hearing testimony. [Citation.] [¶] Earley also addressed

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(...continued)
greater motivation to lie at petitioner's penalty phase in an effort to save his life. (RHT 3985-3986.)" (RR 276-277, fn. 154.)

[48] Earley's January 27, 2006, 22 page report, Exhibit 110, "was not prepared by Earley; rather, '[i]t was prepared by [petitioner's habeas counsel] Ms. Kelly based on conversations that [Earley and Kelly] had.' [Citation.]" (RR 312-313, last alteration added.) "Earley admitted that the responsibility to provide the expert with the necessary material on which an expert will base his opinion rests with the party consulting the expert, not with the opposing counsel. (RHT 3920:12-14 ['I think it is their [petitioner's counsel] responsibility, or I think it is a good practice to provide everything that you think may weigh on a decision.'].)" (RR 314, alteration in original.)

> the effect of a failure by petitioner's counsel to provide the expert with relevant material which may be adverse to the petitioner: "I would tell anybody, if you don't give me something that is obviously against your position, any competent opponent on the other side is going to point it out to me. And if they don't, if you don't give it to me, that goes against your position, if it exists. So if there is something that exists that is substantially different, then, yes, the person who hires an expert gives the material and does not give something to them that would make a difference, that obviously is going to hurt them in the eyes of the *trier of fact*." [Citation.]

(RR 314, italics added.)[49] Of course, in this proceeding, the "trier of fact" was the Referee. And the Referee's rejection of Earley's opinions as unreasonable and lacking in foundation–due to Earley's failure to review significant materials relevant to the issues for which he rendered ultimate opinions–was itself tangible proof of what Earley himself forecast would happen under these very circumstances.

Further, "Earley also admitted that 'it is always a danger' that 'once an expert has rendered an opinion, [the] expert may be less willing to admit having made a mistake when shown additional information that the expert should have reviewed initially before giving the opinion that the expert did render[.]' (RHT 3924.) In describing his own approach in the matter *sub judice*, Earley testified: 'However, when I am reading the material, I start forming opinions, and it had nothing to do with just the reference materials or what they say, when you read this case, you have to say at the beginning you look and you say, it is an embarrassment, and I will keep my mind open for what was not done and what happened in the case. You try to keep your mind open.' (RHT 3925:2-8.)" (RR 323, alteration in original.)

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[49] "Earley made clear that he would not have allowed time or monetary constraints to interfere with his need to review all information relevant to the issues for which his opinions had been sought. [Citations.]" (RR 313-314.)

Thus, the record is clear that Earley formed opinions about the case and trial counsel's performance long before he testified at the reference hearing. Moreover, Early formed such opinions without the benefit of having reviewed (1) the reference hearing testimony of petitioner's mother, siblings, E.L. Gathright, Gary Jones, Earl Bogans, Marcus Player, Wayne Harris and the LASD officers involved in the Taylor case; (2) "most of Mr. Skyers' reference hearing testimony" (RR 298) and most of Dr. Riley's; and (3) petitioner's psychological and psychiatric records from CYA, the December 13, 1978 Initial Home Investigation Report (Ex. H) and most of the Mallet trial and related transcripts.

Any careful review of Earley's reference hearing testimony and the Referee's detailed discussion of that testimony shows that Earley himself fell into the trap he conceded experts are always in danger of experiencing when they prematurely render an opinion. When confronted with additional materials Earley should have reviewed before forming any opinions, and which demonstrated that Earley's prematurely formed opinions were mistakes, Earley refused to concede the errors of his ways. The Referee, however, clearly recognized the error of Earley's opinions and set forth in his report the detailed record supporting his findings. In those findings the Referee reasonably rejected various opinions of the expert as lacking in foundation, the product of faulty reasoning, and the result of the expert's application of an erroneous legal standard for competency of counsel.

As the reference hearing record reviewed above abundantly establishes, the Referee's findings are fully justified. Thus, the Referee's rejections of opinions expressed by Earley, consistent with the Referee's finding that "[t]his court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or

testimony that was not considered by an expert witness," (RR 298) are well-supported and binding.[50]

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[50] In addition to Earley's failure to review significant materials relevant to the opinions for which his services had been sought by petitioner's habeas counsel, as reflected in the Referee's detailed discussion of Earley's testimony with respect to petitioner's social history, mental and physical impairments (RR 276-286), the Referee also noted and/or found (1) Earley's concession that "he could not identify any controlling legal authority in 1982 specifically obligating defense counsel in a capital case to obtain an assessment of the defendant from a neuropsychologist or to require the defendant undergo a battery of neuropsychological tests (RHT 4436-4438.)" (RR 277); (2) "Earley's erroneous understanding of what the *Drew* and *M'Naghten* tests actually assess demonstrates an additional reason to conclude that his opinion, deeming the referral to Dr. Pollack as inadequate, is unreasonable" (RR 282, fn. omitted); and (3) "In light of the express findings made by Drs. Brown, Pollack and Imperi, the referee finds Earley's opinion that the referral to Dr. Pollack was inadequate for penalty phase assessment of petitioner's mental health, including cognitive functioning and impulse control, 'is not supported by the evidence.' (Cf. CALCRIM No. 332.) [¶] Similarly, despite the findings by Dr. Perrotti, some of which were read into the record for Earley's consideration (RHT 4508-4511.), Earley refused to concede that if Skyers had read the three reports from Drs. Brown, Perrotti and Pollack in preparation for petitioner's trial, 'he could reasonably reach the conclusion that a psychologist and two psychiatrists, who assessed [petitioner] both before and after the crimes, all reached the same conclusion that he has no mental illness, defect or disease[.]' (RHT 4512.) The opinion from petitioner's *Strickland* expert is unreasonable in light of what the medical reports of 1978-80 state. [¶] The lack of support for Earley's opinions is confirmed by testimony from respondent's experts, Drs. Hinkin and Faerstein, whose opinions and rationale the referee finds to be reliable and objective. [¶] In short, reasonably competent counsel conducting the appropriate investigation for penalty phase evidence would have been well within the standards of competent practice to have done at petitioner's penalty phase exactly as petitioner's trial counsel did." (RR 285-286.) Further, as noted in footnote 40, *ante*, the Referee rejected the opinion of petitioner's *Strickland* expert that reasonably competent counsel would have presented evidence of petitioner's successful adjustment while at CYA. "Earley's failure to review either Dr. Perrotti's report, including that portion dealing with Mr. Cruz's observations about petitioner's behavior at CYA, or Exhibit G-13

(continued...)

Further, Earley conceded, "the test for reasonably competent counsel's actions is not based on what he would or would not have done nor is it based upon what premier capital case defense counsel would do. *Strickland* provides for an objective standard about what reasonably competent counsel should have done. [Citation.]" (RR 323.) Nevertheless, as the Referee noted in footnotes 185 at page 336 and 191 at page 341, Earley's reference in his report to what *Earley* would have done had he been trial counsel for petitioner failed to employ the appropriate *Strickland* standard of what reasonably competent counsel should or should not have done. (See RR 336, quoting Ex. 110, p. 20, par. 3 ["'As a reasonably competent counsel I would have had concerns about this but, *in* [*sic*] *balance*, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers-and given the importance of rebutting Mr. Champion's involvement I would have called these witnesses. Certainly, I would have conducted an investigation which

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(...continued)
documenting petitioner's repeated acts of misconduct at CYA; and Earley's failure to read all of Skyers' reference hearing testimony [citation] undermines the reasonableness of his opinions castigating the approach of petitioner's and Ross' trial counsel taken during the trial's penalty phase. [¶] In light of petitioner's disruptive and assaultive behavior while at the CYA, his disruptive behavior in front of the jury when the first guilty verdict against petitioner was read and the surreptitiously recorded conversation between petitioner and Craig Ross discussing possible escape from county jail, trial counsel's closing penalty argument, in conjunction with the closing penalty argument by counsel for petitioner's co-defendant (from which the jury could conclude petitioner would not in fact present a future danger if incarcerated under a sentence of life without possibility of parole), protected petitioner from available prosecution rebuttal impeachment evidence demonstrating that petitioner had the ability to manipulate the staff at the CYA and did in fact engage in conduct suggesting he would be a future danger 'if things don't go as [petitioner] believes they should.'" (RR 258, last alteration in original.)

consisted of talking to them in person.'"], italics in original, fn. omitted; see also RR 340-341, fn. omitted; italics added ["When asked his opinion whether 'no other reasonably competent counsel might see a downside that you don't accept [concerning the use of the field identifications involving the Taylor witnesses,]' Early [*sic*] testified: '*I* don't see it, and maybe it is, *I* don't think it is a mixing of terms, you are saying that's an [*sic*] negative, *I* don't see it as a negative. *I* view things that are strong positives, they can be not as strong positives, *I* am looking and *I* am saying *I* don't see that a negative. *I* am saying each one becomes stronger than the other.' [Citation.]"], fn. omitted; italics added.)

In rejecting various opinions proffered by Earley as unreasonable, the Referee was thus fully justified in finding that

> Earley also had a marked tendency to evaluate Mr. Skyers' trial performance or omissions from the perspective of what he would or would not do in a capital case in lieu of applying the *Strickland* standards. This court regards Mr. Earley as one of the best criminal defense attorneys in this state and he ably demonstrated his legal insights both as to law and capital case procedures during the reference hearing. He certainly has earned being treated with great deference in regard to his observations and opinions. Nevertheless, this Court must adhere to principles of law to require a showing as to what a reasonable competent attorney (not the best) would or would not do. This court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or testimony that was not considered by an expert witness.

(RR 298.)[51] As this Court itself noted in *People v. Dickey* (2005) 35 Cal.4th 884, 925-926:

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[51] It is important to recognize, as the Referee did, that in this reference hearing, Earley did not appear as trial counsel for a defendant in a capital case. Rather, he appeared as an expert witness on behalf of a habeas petitioner already sentenced to death. Just as this Court's rejection of the expert opinions proffered by the prosecution's experts, Drs. Abe and McNiel, in *Bassett*, due to the lack of factual foundation and adequate

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At the penalty phase as at the guilt trial, defendant bears the burden of showing ineffective assistance. He must show (1) deficient performance under an objective standard of professional reasonableness, and (2) prejudice under a test of reasonable probability. [Citations.] Prejudice is established when there is a reasonable probability that, absent the errors of counsel, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death. As in the guilt phase, reasonable probability is defined as one that undermines confidence in the verdict. [Citations.]

In measuring counsel's performance, the United States Supreme Court has cautioned that judicial scrutiny "must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." [Citations.]

(...continued)
reasoning supporting those opinions did not cast aspersions on the doctors' professional skills, in the case *sub judicie*, the Referee's rejection of various opinions expressed by petitioner's *Strickland* expert for lack of foundation, inadequate reasoning and failure to employ the proper *Strickland* test is in no way inconsistent with the Referee's recognition of the expert's exemplary skills as a capital case defense trial litigator.

For all of the foregoing reasons, respondent submits that this Court should reject petitioner's exception that "The Referee Erred in Failing to Fully Credit the *Strickland* Expert's Opinions."[52]

E. Petitioner's Exceptions That (1) "The Referee Errs In Failing To Find That Simms' Fingerprint Would Have Been Available At The Time Of Petitioner's Trial" (PB 195); (2) "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" (PB 197); (3) "The Referee Errs In Concluding That Petitioner's Defense Evidence Was Not Credible" (PB 199); (4) "The Reference Court Erred In Finding Petitioner's Lay Witnesses Not Credible" (PB 212); And (5) "The Referee's Finding [Petitioner's *Strickland* Expert's] Opinion That Reasonably Competent Counsel Would Present Evidence Of Petitioner's Noninvolvement In The Taylor Homicide 'Unreasonable'. . . Is Wrong" (PB 252.)[53]

The Referee began his report with a brief overview of the Jefferson, Hassan, and Taylor murders (RR 1-5), providing the most detail with respect to the Taylor murder and subsequent police investigation. (RR 2-5.) In the Referee's initial Summary of his overall findings, he specifically

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[52] Respondent will revisit the issue of the Referee's rejection of various opinions expressed by petitioner's *Strickland* expert when addressing petitioner's exceptions to findings concerning the uncharged Taylor incident and interrelated matters, *post*.

[53] Although petitioner has not specifically delineated as an exception his contention that the Referee erred in finding unreasonable the expert's opinion that reasonably competent counsel would have presented evidence of petitioner's alibi for the Taylor murder, petitioner's arguments set forth at pages 252-260 of petitioner's brief appear to fall under petitioner's general exception that "the referee erred in failing to fully credit the *Strickland* expert's opinions[.]" (PB 233-234, capitalization removed.)

addressed petitioner's "Alibi for Taylor Murder." (RR 16.) As the Referee found:

> A close, detailed review of petitioner's proposed alibi claim is simply not supported by the testimony given during the reference hearing.
>
> The three Raymond Avenue Crips gang members, who testified as to the alibi at the reference hearing, were not credible.
>
> The *Strickland* expert's opinion, that there was no downside to the introduction of the alibi evidence for the Taylor murder, lacks foundation. The expert did not read Wayne Harris, Earl Bogans and Marcus Player's testimony. He did not review the evidence reflecting the nature and extent of petitioner's association with Ross, Marcus Player, Evan Mallet, Harris and Bogans. He did not read the reference hearing testimony of the LASD deputies called by petitioner nor did he read Mallet's preliminary hearing transcript, Penal Code § 1538.5 and Evidence Code § 402 motions, or trial transcripts which contained the testimony of the LASD deputies who participated in the post-Taylor murder activities at Helen Keller Park, the car chase and crash and the arrest of Simms and Mallet on the morning of December 12 [*sic*], 1980.[54]
>
> To properly evaluate the question whether a reasonable, competent attorney would or would not present the alibi evidence requires a careful review of the reference hearing testimony identified above and the Mallet proceedings.
>
> The referee finds that the proposed alibi has serious proof problems and that a reasonable, competent attorney would not present this claimed mitigation.

(RR 16.)

In response to Reference Question 2, the Referee outlined petitioner's claimed mitigation with respect to the Taylor murder. "e) Evidence to mitigate or rebut petitioner's involvement in the Taylor murder (Factor B). [¶] i) Petitioner was at Helen Keller Park with fellow gang members on the evening of December 27, 1980 at the time of the killing (i.e., alibi). [¶] ii)

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[54] As the Referee's summary makes clear, the Taylor murder and related crimes were committed on December 27, 1980. (RR 2-3; see also *People v. Champion* (1995) 9 Cal.4th 879, 900-901.)

Deficient police investigation. [¶] iii) Robert Aaron Simms' fingerprints found at Taylor residence exonerate petitioner or create reasonable doubt." (RR 77.)

Summarizing his findings with respect to petitioner's "Alibi for Taylor Murder," the Referee found: "The primary alibi witnesses called to support petitioner's claimed alibi were fellow Raymond Avenue Crips gang members. Their testimony is inconsistent with their own declarations, with each other and with petitioner's own trial testimony. The testimony given by Harris, Bogans and Player is not credible and does not support an alibi for the Taylor murder. [¶] The calling of fellow gang members would not serve petitioner's best interests. If called, their testimony would only confirm petitioner's gang involvement as well as his past and current association with co-defendant Ross. This evidence does not support the finding that Simms was booked or a determination that his fingerprint found at the Taylor crime scene exonerates petitioner." (RR 79-80.)

At pages 89-91 of his report, the Referee set forth the 16 points of relevant evidence presented by petitioner at the reference hearing concerning the Taylor crimes. Following that, the Referee provides a five-page, point-by-point response to petitioner's 16 points regarding Taylor. (RR 92-96.) The Referee thereafter provides a summary of his "Findings concerning Credibility of Claimed Alibi for Taylor Crimes" and a diagram reflecting the "Containment Area LASD 12-28-80" with a detailed Legend. (RR 108-108A.)

For example, the Referee found that contrary to petitioner's claim that "petitioner was in the company of friends who were never considered viable suspects because they were detained by LASD deputies at the time the Taylor crimes were being committed" (RR 90), "[n]o law-enforcement officer testified or reported that petitioner or Harris was detained at the time of the Taylor murder. No LASD deputy can place petitioner at Helen

Keller Park at the time of the Taylor murder. The reported crime took place at 11:00 p.m. to 12:10 a.m. Three Raymond Avenue Gang members testified at the reference hearing to seeing or being with petitioner on the evening of December 27, 1980. Petitioner testified as to his whereabouts during the trial. Mallet testified he was with petitioner on December 27, 1980 at petitioner's home. Each witness testimony is discussed individually." (RR 92.)

In response to petitioner's claim that he "did not match the description of any suspect law enforcement saw exiting the suspect vehicle" (RR 90), the Referee described the car chase during which "the deputies' initial observation was a matter of a second or two. Koontz's and Naimy's broadcast description was 'four young male Negroes.' [¶] Deputy Koontz said he was two hundred yards away at the time of the car crash. His best description of who got out of the car was any male negro of a youthful age with an afro. Koontz added four persons between five feet and six and half feet tall. Naimy describes the suspects as all male blacks late teens, early twenties types. One suspect that exited the right side of the vehicle had dark clothing and a plaidish dark jacket. Another suspect exited the right side he was not sure what he was wearing." (RR 92-93, underlining in original.)

The Referee then continues to outline descriptions given by Naimy, including his testimony at the Mallet jury trial where he described that "one suspect that got out on left side was wearing a light jacket. When Simms was detained he was wearing a white jacket. Naimy could not say he was absolutely positive Simms came from the car. [Citation.] Simms clothing when detained, white jacket, blue shirt and pants. [Citation.] Petitioner's clothing yellow jacket, gray shirt and pants. [Citation.] (But see Exhibit 17A-Simms jacket described as green in color when inventoried.)" (RR 93, underlining in original.)

Rejecting petitioner's claim that he "could not be involved since he approached from outside the containment area [set up by the LASD after the car crash,]" the Referee found: "The four suspects that fled the car, two of them went westbound on 126th Street. [Citation.] Koontz and Naimy lost sight of them as soon as they went past the corner house at the southwest side of intersection of 126th Street and Budlong. The two that exited on left side went south and then onto the backyard of the second house south of 126th Street and Budlong in westbound direction. Contact was lost immediately. [Citation.] [¶] At approximately 12:30 a.m. or thereabout while at the command post with Koontz and Naimy, Hollins observed three persons approach his location from outside the containment area. He first observed them at about 125th and Budlong walking southbound." (RR 93-94, underlining in original.)[55]

Rejecting petitioner's claim "that Koontz testified Mallet looked like one of the men who fled from the vehicle," the Referee found that "a complete reading of Koontz testimony [citation] leads to [a] different conclusion." The Referee noted, "Koontz said that any male negro of a youthful age, with an afro resembled someone who got out of the car. Naimy could not say if his recollection of the bluish jacket was based on his observation of Mallet when he was apprehended or his view of the suspect that fled westbound. [Citation.]" (RR 94.)

In this section of his report, the Referee continued his point-by-point response to petitioner's remaining 12 claims. (RR 94-96.) For example,

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[55] See also pages 354-355 of the report, where the Referee reviews the concession by petitioner's *Strickland* expert in his reference hearing testimony "that he had not intended to suggest it was physically very difficult or impossible for petitioner to have been where he was when he was detained by LASD personnel and still to have been in the Player car which crashed. (RHT 4257-4259.)"

rejecting claim 14 that "[n]either petitioner's physical description nor the clothing he was known to be wearing near the time of the crimes matched the victims' descriptions of any perpetrator" (RR 91), the Referee found that "Exhibit 17B contains Cora and Mary Taylor's descriptions of the suspects. Cora Taylor describes suspect number 2 as M/N 19/20 5'10/6' 160/160 slim, gold earring left ear, dark complexion. [¶] Mary Taylor describes suspect number 2 as M/N 18/19 5'7/5'8 160/165, dark skin, earring left ear. [¶] Petitioner was arrested wearing earring on his left ear and two pieces of jewelry which Mrs. Hassan identified as being taken during robbery/murder committed on December 12, 1980. (Exhibit JJ 1-9-81.)" (RR 96.)

Rejecting claim 13 that "Michael Player was the fourth person at the Taylor residence [as] just that!" (RR 95), the Referee noted that "[a] prosecutor's comments during argument are not always evidence. Mr. Strong testified that Michael Player was a suspect. True, but no reference hearing evidence has been presented to support this claim." (RR 95-96.)[56]

Rejecting claim 10 in which "[p]etitioner claims Cora Taylor identified Simms at a field show-up[,]" the Referee found there was no documentation reflecting that Cora Taylor identified Simms at the field show-up on December 28, 1980. (RR 95.)

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[56] See also pages 349-350 of the report, where the Referee addresses in detail the absence of any admissible evidence identifying Michael Player as the driver of the Player automobile in the early morning hours of December 28, 1980. Coupled with the absence of any positive comparison between latent fingerprints obtained from any of the 3 murder crime scenes and the Player automobile and exemplar prints of Michael Player, petitioner's failure to establish Michael Player as the driver of the Player automobile fully supports the Referee's finding that "petitioner's claim that Michael Player was the fourth person at the Taylor residence is just that!"

In his "Referee's Findings Concerning Credibility of Claimed Alibi for Taylor Crimes," the Referee found:

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

(RR 108.)

In his diagram of the "Containment Area LASD 12-28-80" (RR 108-A), the Referee summarizes testimony reflecting where the suspects fled after the car crash, where petitioner, Harris and Player were first seen by deputies, where Simms joined petitioner, Player and Harris and where Mallet was arrested in petitioner's backyard.[57]

In his "Detailed Discussion of Evidence and Findings" with respect to petitioner's "Alibi for Taylor Murder and Related Crimes" (RR 167-185), the Referee first outlined the relevant witnesses who testified at the hearing, including petitioner's "gang and homicide investigation" expert, Steven

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[57] This diagram created by the Referee from reference hearing testimony and an aerial photograph of the area admitted as an exhibit is another reflection of the time and care given to this matter by the Referee and further refutes petitioner's contention that the Referee merely "rubberstamped" proposed findings submitted by respondent.

Strong, and *Strickland* expert, Jack Earley.[58] The Referee next summarized two stipulations entered into by the parties relevant to the Taylor issues. The Referee then provided a more detailed overview of his findings with respect to (1) each of petitioner's alibi witnesses, Harris, Bogans and Player; (2) petitioner's ability to have been involved in the Taylor crimes despite the perimeter set up by LASD after the car crash; (3) Marcus Player's unavailability to trial counsel; (4) petitioner's failure to prove that exemplar fingerprints of Robert Aaron Simms were available at the time of petitioner's trial for trial counsel to have examined, and even if available at the time of petitioner's trial, why such evidence did not exclude petitioner's involvement in and criminal liability for the Taylor crimes; (5) petitioner's failure to establish the existence in 1982 of any significant reports, witness statements or forensic evidence analysis reports pertaining to the Taylor crimes which trial counsel did not receive in discovery or review prior to petitioner's trial; and (6) why trial counsel's decision not to present a defense to the Taylor crimes at the penalty phase of petitioner's trial was well within the range of reasonable strategy and tactics for reasonably competent trial counsel. Following this, the Referee concluded this

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[58] Petitioner raises a separate exception that "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[.]" (PB 228-229.) Although respondent will address this exception later in this brief, respondent confesses to being somewhat mystified by this exception in light of the fact Strong held himself out as a gang expert and was permitted to testify as such. (See RR 110, fn. 48, ["Petitioner's *gang expert*, Steve Strong, testified that '[People join] gangs for several reasons. Some joined for what they missed at home, a family structure. They had no one that cared about them, clothed or fed them. Some joined because they like the respect and status. Some like the style of dress and camaraderie. Some people, young and old in the neighborhood, adopted the type of dress and color up again in the area.' (RHT 4887-4888.)"], italics added & alteration in original.)

segment of his report concerning the Taylor crimes with a detailed recitation of the testimony provided by petitioner's alibi witnesses Harris, Bogans and Player, a recitation which provides far more than substantial evidence to support the Referee's ultimate findings that petitioner's alibi defense was not credible, his alibi witnesses Harris, Bogans and Player were not credible with respect to their alibi testimony and reasonably competent counsel would not have presented the Taylor alibi defense at petitioner's penalty phase.

Because a proper evaluation of petitioner's exceptions to the Referee's findings concerning the Taylor crimes requires a detailed look at the record, respondent begins by setting out verbatim the Referee's detailed summary leading up to his detailed recitation of the reference hearing testimony from petitioner's alibi witnesses Harris, Bogans and Player. (RR 167-173.) As the Referee summarized:

> Petitioner called witnesses relevant to the Taylor murder and related crimes. These included Earl Bogans, Marcus Player and Wayne Harris who testified to a possible alibi for petitioner for the Taylor crimes.
>
> They also included LASD deputies involved in: (1) the Helen Keller Park detention of Earl Bogans, Marcus Player, Angulus Wilson and Willie Marshall (but not petitioner) late on the evening of December 27, 1980; (2) the car pursuit of the Buick owned by Frank Harris and the foot pursuit of the occupants of that car once it crashed; (3) the setting up of a perimeter in an effort to apprehend the four occupants who fled the Buick after the crash; (4) the detention of Marcus Player, Wayne Harris, Robert Aaron Simms (a.k.a. James Taylor) and petitioner approximately 1 hour after the Taylor crimes were committed; and (5) the arrest of Evan Jerome Mallet in the backyard of petitioner's residence at approximately 3:00 a.m. on December 28, 1980. These witnesses included: Anthony Hollins, Steven Koontz, Thomas Lambrecht, Thomas Martin, Theodore Naimy, Michael Smith and Owen Tong. Petitioner also called one of the investigating homicide detectives from the LAPD responsible for the Taylor murder investigation, Gregory DeWitt.

Finally, petitioner offered testimony from Steven Strong, testifying as a "gang and homicide investigation" expert and Jack Earley, testifying as a *Strickland* expert. In addition, the parties entered into two stipulations relevant to the Taylor case. The first deals with the testimony of Frank Harris, the registered owner of the Buick automobile chased by Deputies Naimy and Koontz in the early morning hours of December 28, 1980 (Court's Exhibit 26 in conjunction with two reports of interviews of Frank Harris conducted by a DA investigator, Chris Briggs, and Mr. Harris' Declaration, which was one of the habeas petition exhibits submitted by petitioner). The second concerns fingerprint comparisons of latent fingerprints taken from the Hassan, Taylor and Jefferson residences and the Player automobile with an exemplar set of fingerprints of Robert Aaron Simms taken following his arrest in 1987 (Court's Exhibit 34 in conjunction with Exhibits HHHH and IIII). This exhibit also deals with whether or not an exemplar set of Robert Aaron Simms' fingerprints were taken as a result of his detention on December 28, 1980 (efforts by DA investigator Chris Briggs to locate a record of any such booking prints were unsuccessful; only exemplar prints of Simms taken long after the completion of petitioner's trial in 1982 were located).

As will be detailed, the referee finds evidence of petitioner's alibi for the Taylor murder, presented through the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player, not credible. Although the referee recognizes that more than 25 years have passed since the events of December 27-28, 1980, the alibi testimony presented at the reference hearing was not only inconsistent in significant ways between each of the three witnesses, *but more importantly, inconsistent with testimony from LASD deputies and petitioner's own alibi testimony for the Taylor crimes elicited by the prosecution on cross-examination of petitioner during the guilt phase of the trial.* Other credibility factors such as bias, past felony convictions and a willingness to help a fellow gang member out of a tough situation adversely affect the alibi testimony. Further, as the reference hearing testimony from the various LASD deputies involved in the perimeter search for the four apparent occupants of the crashed Player automobile documented, the perimeter was not sufficiently tight so as to preclude the possibility of petitioner having been inside the Player automobile when it crashed, to thereafter have escaped from the perimeter and then to have been detained as he was at approximately 1:00 a.m. on December 28, 1980 when petitioner walked from an area outside of the perimeter towards his home which

was inside the perimeter. The geographical proximity between the Taylor residence and petitioner's residence was such that neither time nor distance could exclude petitioner as one of the Taylor crime perpetrators.

In addition, the referee finds that Marcus Player would not have cooperated with trial counsel in any effort to develop and present an alibi through his testimony. The referee also finds that Marcus Player, if called as a witness at petitioner's trial in 1982, would have refused to answer questions by invoking his privilege against self-incrimination in light of his exposure to prosecution as an accessory after the fact for his efforts to assist Craig Ross in evading arrest on August 1, 1980 [*sic*]. In addition, at the time of petitioner's trial, Player was himself facing robbery murder charges (for which he would later be convicted and sentenced to a term of 31 years to life imprisonment, a sentence Player was still serving at the time he testified in this reference hearing).

The referee further finds that petitioner has failed to prove by a preponderance of the evidence that exemplar fingerprints of Robert Aaron Simms were available at the time of petitioner's trial for trial counsel to have a court-appointed latent fingerprint comparison analyst used to compare with all latent prints obtained from the Hassan, Taylor and Jefferson crime scenes and the Player automobile.

Petitioner has not established the existence in 1982 of any significant police reports, witness statements or forensic evidence analysis reports relating to the Taylor crimes trial counsel did not receive in discovery or review prior to petitioner's trial.

As will be detailed further in the referee's findings with respect to reference question number 3, setting aside grave concerns any trial counsel would have had with the alibi defense based upon testimony from petitioner's fellow gang members, Wayne Harris, Earl Bogans and Marcus Player, the referee also finds that it was well within the range of reasonable strategy and tactics for reasonably competent trial counsel not to present that alibi at the penalty phase. Skyers had a simple, straightforward and reasonable response to any prosecution effort to use the Taylor and Jefferson crimes as aggravating evidence in support of a penalty verdict of death. The prosecution had the burden to prove those aggravating circumstances beyond a reasonable doubt before they could be considered by penalty phase jurors. (See, *People v. Champion*, *supra*, 9 Cal.4th at pp. 949-950 ["in his closing argument, the prosecutor acknowledged that the jury could not consider the evidence of the Jefferson murder (as to both defendants)

and of the Taylor murder (as to defendant Champion) unless it found *beyond a reasonable doubt* that the defendants committed these crimes, and the prosecutor implied that the jury should not consider those crimes at all"]; italics in original.) As Skyers made clear to the jury, the prosecution itself had concluded there was insufficient evidence to charge petitioner with either the Jefferson or the Taylor murders because, in the view of the prosecution, the evidence was insufficient to prove petitioner's involvement beyond a reasonable doubt.

Petitioner was charged with the murder, robbery and associated burglary of Eric and Bobby Hassan with an armed allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who was the actual killer of the victims. Co-defendant Ross was charged with the Taylor murder and related crimes without a personal use allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who the actual killer of Michael Taylor was. (RHT 1199-1201.) Petitioner's jury knew that petitioner had not been charged with the Taylor murder and related crimes, a fact petitioner's trial counsel reminded the jury of as part of Skyers' guilt phase argument. (14 RT 3300; see also RHT 1467-1468.) As Skyers testified in this proceeding, "the argument was intended to highlight to [the jury] that Steve was not charged with the Taylor case." (RHT 1468:21-22.) Further, Skyers admitted that the trial prosecutor appeared both to Skyers and from Skyers' perspective to the jury as the type of prosecutor who left no stone unturned looking for evidence to prove who was guilty of the crimes involved. Skyers also admitted that petitioner's trial jury had heard the prosecutor concede to the jury that the prosecution did not have sufficient evidence to prove beyond a reasonable doubt either the identity of the actual shooter in the Taylor murder or that petitioner was involved in that crime. (RHT 1469-1470.)

Similarly, petitioner was not charged with the Jefferson murder, a point Skyers also reminded the jury about during Skyers' guilt phase closing argument. (14 RT 3227, 3269; see also RHT 1470-1471.)

In his reference hearing testimony, Skyers also acknowledged that petitioner's jury heard no evidence that any fingerprints of petitioner were found at the Taylor, Hassan or Jefferson crime scenes or in the Player automobile. Further, the prosecution presented no evidence to petitioner's jury that any physical evidence taken from the Taylor or Jefferson residences was ever found with petitioner, despite the fact that a search warrant was served on petitioner's residence on January 14, 1981. No property connecting petitioner to either the Taylor or

Jefferson murders was found during that search. Further, in light of the fact the prosecution did present evidence that Craig Ross' fingerprints had been found at the Hassan and Taylor crime scenes, but offered no such evidence as to petitioner, the jury could have inferred the absence of this corresponding evidence related to petitioner. (RHT 1472-1474.) In addition, petitioner's trial jury knew that Cora Taylor had been unable to identify petitioner at a live lineup conducted on January 12, 1981, less than three weeks after the Taylor murder and related crimes. Further, the jury knew Mary Taylor also had been unable to identify petitioner at that lineup. From the failure of the prosecution to call William Birdsong at petitioner's trial, the jury could also conclude that Birdsong had not been able to identify either petitioner or Ross at that lineup. (RHT 1474-1475, 1477.) Petitioner's jury also knew that Mary Taylor had been able to identify Craig Ross both from a photographic lineup and later at a live lineup conducted in August 1981. (RHT 1475-1477.) In sum, as Skyers understood the state of the record at the time of petitioner's trial, petitioner's jury could have concluded that the prosecution did not believe it had proof beyond a reasonable doubt to charge petitioner with the Taylor crime; the prosecution had no fingerprints or physical evidence to connect petitioner to the Taylor crime; and no surviving witnesses to the Taylor crimes had been able to identify petitioner at the January 12, 1981 lineup. (RHT 1479-1481.)

By pursuing a strategy not to contest the Taylor and Jefferson cases at the penalty phase, trial counsel not only avoided the dangers created by credibility problems associated with the Taylor alibi witnesses Harris, Bogans and Player, of equal, if not greater importance, counsel's strategy also avoided the crippling effect testimony from these witnesses (i.e., that petitioner was still a member of the Raymond Avenue Crips at the time of the Hassan murders) would have had in light of petitioner's guilt phase testimony that he had left the Raymond Avenue Crips gang in 1979.

Even if evidence, that one of the latent prints obtained from the Taylor crime scene was matched to Robert Aaron Simms, could have been obtained in 1982 and presented at petitioner's trial, trial counsel's strategy not to litigate the Taylor crimes during the penalty phase but to remind the jury that those crimes had never been filed by the prosecution against petitioner because of the prosecution's own belief the evidence was insufficient to prove those crimes as to petitioner beyond a reasonable doubt was still eminently sound. No witness could testify that only four people were involved in the Taylor crimes. Moreover, because of petitioner's conviction for the robberies and

> murders of Eric and Bobby Hassan, his posting of bail for Evan Jerome Mallet (from what arguably were proceeds obtained from the Hassan crimes), the commonality of Craig Ross as one of the perpetrators in both the Hassan and Taylor crimes and Wayne Harris' reference hearing testimony ["[t]hat when petitioner and Harris arrived at petitioner's home after the two were released by LASD deputies following their detention at approximately 1:00 a.m. on December 28, 1980, Craig Ross was inside petitioner's residence" (RR 172, fn. 86)], the jury might have deduced from petitioner's alibi witnesses that petitioner was fully culpable for the Taylor murder and related crimes as the natural and probable consequences of the conspiracy to rob and murder drug dealers the jury had undoubtedly found petitioner to be a member of at the time of the Hassan murders and robberies for which petitioner had been convicted.
>
> Trial counsel's reasonable strategy not to contest the Taylor crimes at the penalty phase with witness testimony also avoided letting the jury hear once again about the aggravating circumstances which were the Taylor crimes.

(RR 167-173, fns. omitted & italics added.)

In one of the omitted footnotes, footnote 87, the Referee found: "Penalty phase testimony from petitioner's alibi witnesses would also have raised questions of credibility with respect to social history mitigating evidence petitioner claims in this proceeding trial counsel was deficient for not obtaining and presenting. This issue will be discussed in the findings concerning social history mitigating evidence." (RR 173, fn. 87.)

In response to that portion of Reference Question 4 asking "[w]hat evidence damaging to petitioner, but not presented by the prosecution at the guilt and penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence[,]" the Referee found that the prosecution would have likely sought to introduce the following rebuttal evidence to petitioner's alibi for the Taylor murder:

> i) The alibi for the Taylor murder as submitted by petitioner at the reference hearing would require the testimony of Wayne Harris, Earl Bogans and Marcus Player. The three witnesses were members of the Raymond Avenue Crips at the time of the trial. Marcus Player was arrested for robbery in November 1980 and at the time of trial was in

> custody pending trial for an unrelated murder. Marcus Player denied being a Raymond Avenue Crip at the reference hearing. Wayne Harris and Earl Bogans identified that they as well as Marcus Player, petitioner, Mallet and Ross were active Raymond Avenue Crips before and at the time of the trial. This testimony is inconsistent with petitioner's trial testimony and his statements to CYA authorities and doctors that he and the others were not gang members at the time of the trial. [¶] ii) Harris testified that upon being released by the LASD on December 28, 1980 he went to petitioner's home where Craig Ross was present. Petitioner told Dr. Miora that Ross and Winbush were two of his best friends and that they did not use drugs. [¶] iii) No law enforcement witness exists that confirms the physical detention of petitioner or Harris at the time of the Taylor murder.

(RR 291-292, underlining in original.)

As respondent has summarized, the Referee detailed the reference hearing testimony of petitioner's alibi witnesses Wayne Harris (RR 173-177), Earl Bogans (RR 177-181) and Marcus Player (RR 181-185). With respect to each of those witnesses, the Referee broke the testimony down into various categories such as "Background," "Gang Affiliation," "Prior Felony Convictions" and reference hearing alibi testimony. With respect to Marcus Player, the first category summarized is Player's "Refusal to Cooperate with Petitioner's Trial Counsel." (RR 181.) With respect to this category and issue, the Referee wrote:

> Marcus Player testified that he would not have discussed the subject of his reference hearing testimony with petitioner's trial attorney had the attorney contacted Player. Player testified his refusal was based upon the fact that "at that time, I was a little bit more street wise." (RHT 2001.) On cross-examination, Player denied having testified that he would have refused to discuss the subject of his reference hearing testimony with petitioner's trial counsel. (RHT 2008-2009.) After having his testimony on direct exam on this point read back, Player admitted that he had said he wouldn't have discussed the matter with petitioner's trial counsel. (RHT 2009-2010.) Player also testified he would not have freely testified in this matter "because I was under a different state of consciousness and I had another mentality then." (RHT 2008.) Further, on advice of counsel, Player would have invoked his privilege against self-incrimination if he had

> been called to testify at petitioner's trial because by testifying, he could incriminate himself as an accessory after the fact to the Taylor murder based on the circumstances surrounding the arrest of petitioner's co-defendant, Craig Ross, on August 1, 1981. Player had been present at the location when Ross was arrested. According to the police report (Exhibit 17-D), Player had falsely told the officers that Ross was not present at the location even though Ross was ultimately found hiding in the bathroom. (RHT 2029-2037.)

(RR 181.)

As previously noted, the Referee found "that Marcus Player would not have cooperated with trial counsel in any effort to develop and present an alibi through his testimony. The referee also finds that Marcus Player, if called as a witness at petitioner's trial in 1982, would have refused to answer questions by invoking his privilege against self-incrimination in light of his exposure to prosecution as an accessory after-the-fact for his efforts to assist Craig Ross in evading arrest on August 1, 1980 [*sic*]. In addition, at the time of petitioner's trial, Player was himself facing robbery murder charges (for which he would later be convicted and sentenced to a term of 31 years to life imprisonment, a sentence Player was still serving at the time he testified in this reference hearing)." (RR 169; see also RR 287 [Referee's finding "Marcus Player was not available to trial counsel in 1982"], RR 288 ["the availability of reference hearing witnesses who were active members of the Raymond Avenue Crips at time of trial and their willingness to testify or identify other gang members or their gang's activities is deemed highly unlikely. Their willingness to talk to Skyers is also unlikely. The witnesses are Harris, Bogans, and Marcus Player"].)[59]

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[59] As part of petitioner's argument in support of his exception that the Referee erred in concluding petitioner's defense evidence was not credible, petitioner erroneously contends, "[t]he 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.)" (PB 200, second alteration in

(continued...)

Petitioner takes exception to the Referee's "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." (PB 197, capitalization removed.) Petitioner contends that because Player was not arrested until January 8, 1982, "more than 4 months after Mr. Skyers began his representation of petitioner [citation]," "Skyers could have spoken to Marcus when he was not facing any 'harboring' charge and as he was already under arrest at the time of the trial, he faced no further chance of being charged if he testified." (PB 197-198.) Petitioner also contends, "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 getaway vehicle. [Citations.]" (PB 198.) Finally, petitioner contends, "Marcus Player's

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(...continued)
original.) What the Referee actually found was that "the evidence and witnesses as to a possible alibi were readily available *with the exception of witnesses who were identified as gang members of the Raymond Avenue Crips.* The Taylor surviving victims were available. The law enforcement witnesses to the detention at Helen Keller Park, the car chase, the car crash, the setting of the perimeter, the observation of petitioner, Harris, Player as they approached the perimeter, their detention, their compliance with LASD directions, the observation of Simms joining petitioner from within the perimeter, the field show up of petitioner, Harris, Player, Simms with the Taylor surviving victims, the release of petitioner, Harris, Player to petitioner's home, the detention/arrest of Simms, the arrest of Mallet in petitioner's backyard, the field show up of Mallet and the arrest of Mallet." (RR 264, italics added.) Thus, contrary to petitioner's contention, the Referee actually found as explicitly set forth at page 288 of his report that witnesses Harris, Bogans and Marcus Player, active members of the Raymond Avenue Crips at the time of trial, were "highly unlikely" to be willing to testify or identify other gang members or their gang's activities and "unlikely" to willingly talk to Skyers.

testimony [at the reference hearing] was that he might not have cooperated with **police** on the Taylor case." (PB 198, emphasis in original.)

Taking the last contention first, the only page citation provided by petitioner in support of his contention that Player testified at the reference hearing "that he might not have cooperated with **police** on the Taylor case" is RHT 2036. (PB 7, fn. 3.)[60] That page does not contain any such testimony by Player. Rather, in the testimony cited by the Referee in support of his findings, on direct examination by petitioner's counsel, Player was asked: "Q. If you had been contacted by an attorney, would you have felt free to discuss the information you discussed with us today? A. No. Q. You would not have discussed this with him? A. No. Q. Why not? A. At that time I was a little bit more street oriented." (RHT 2001: 12-20.)

Second, even though Player was not arrested until January 1982, his actions in seeking to aid Craig Ross in evading arrest occurred August 1, 1981, when Skyers had not yet even been retained to represent petitioner. (See RR 7 ["8-24-81 Ronald Skyers (hereinafter referred to as 'Skyers' or 'trial counsel') retained as petitioner's counsel-$10,000 fee for all purposes."].) Petitioner's jury trial commenced September 13, 1982 (RR 8), approximately eight months after Player's arrest. Petitioner does not appear to contest the Referee's finding that Player would have refused to testify at petitioner's trial, invoking his privilege against self-incrimination. Player himself tried to explain his inconsistent testimony about not discussing the matter with petitioner's trial counsel by testifying, "I said I was street oriented at the time and I would not have freely testified in this matter about what I'm testifying here today, because I was under a different state of consciousness and I had another mentality then." (RR 2008:9-13.)

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[60] Petitioner uses the designation of RT rather than RHT for the reporter's transcript of the reference hearing.

Player reiterated that he would not have testified at petitioner's trial: "I said I would not have testified as I'm testifying today." (RR 2009:9-10.) Even if petitioner's trial counsel attempted to speak to Player before trial and even if, contrary to his reference hearing testimony, he spoke with trial counsel, Player made it absolutely clear at the reference hearing that he would not have testified for petitioner at petitioner's trial. Facing his own robbery murder charge at that time, and having the clear right against self-incrimination arising from his August 1, 1981 efforts to aid Craig Ross in evading arrest, Player would have been well within his constitutional rights not to have answered questions concerning petitioner's alibi at petitioner's trial in September 1982.

While petitioner contends that "Player's actions and statements which support petitioner's noninvolvement were recorded by police officers on the night of the crimes" (PB 198), petitioner offers no legal analysis of how Skyers could have introduced Player's hearsay statements at petitioner's trial in the event Player refused to testify. In short, Player would not have been available to petitioner's trial counsel in September 1982 to present testimony in support of the alibi. As respondent will discuss later, even if Player were available to testify to the alibi, the Referee's finding – that reasonably competent counsel would be well within the constitutional parameters of effective assistance by choosing not to present petitioner's alibi through witnesses Wayne Harris, Marcus Player and Earl Bogans – is amply supported by the reference hearing record.

For the foregoing reasons, petitioner's exception to the Referee's findings regarding the availability of Marcus Player should be rejected in its entirety.

Turning to petitioner's exceptions to the Referee's rejection of the credibility of petitioner's alibi defense to the Taylor crimes in general (PB 199 et seq.) and the credibility of petitioner's alibi witnesses Harris, Bogans

and Player specifically (PB 212 et seq.), it bears stressing the great weight this Court affords credibility findings made by a referee in a reference hearing when supported by substantial evidence. "'"The referee's findings of fact, though not binding on the court, are given great weight when supported by substantial evidence. The deference accorded factual findings derives from the fact that the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying." [Citations.]' [Citation.]" (*In re Roberts* (2003) 29 Cal.4th 726, 741.)

Once again, to properly evaluate petitioner's exceptions, it is necessary and helpful to review the Referee's detailed assessment of the three alibi witnesses at issue: Wayne Harris, Earl Bogans and Marcus Player. The Referee wrote as follows:

> Wayne Harris
>
> a. Background
>
> Harris was born on March 8, 1960. (RHT 2731.) Petitioner and Harris grew up together in the same neighborhood. Harris had known petitioner since approximately 1970. He considered himself to be a very good friend of petitioner. Harris knew petitioner's family. He attended the same junior high school as petitioner. (RHT 2730-2731, 2764.) Harris knew Reginald and Lewis Champion III during this same time frame. Harris never saw either Reginald or Lewis Champion III attack petitioner. Petitioner never complained of headaches. Petitioner appeared to be physically and mentally sound. Petitioner never appeared to need food, clothing or medical attention. During the period Harris knew petitioner, petitioner did not work nor was he going to school through December 1980. (RHT 2790-2793.) Harris and petitioner had normal middle-class upbringings; neither Harris nor petitioner came from dysfunctional families. (RHT 2812-2813.) Harris is related to Marcus Player, Michael Player, Lavelle Player and Frank Harris, who is Wayne Harris' uncle. (RHT 2731-2732.)
>
> b. Gang Affiliation
>
> In December 1980, Harris was a member of the Raymond Avenue Crips and had been so for five years. His gang moniker was "Pops." Petitioner was a member of the Raymond Avenue Crips in December

1980. His moniker was "Treach." Previously, his moniker was "Crazy 8." Other members included Craig Ross ("Little Evil"); Marcus Player ("Spark"); Michael Player ("Scragg"); and Jerome Evan Mallet (known to Harris as "Kook"). Petitioner, Ross, Mallet, Lavelle and Michael Player were original Raymond Avenue Crips. (RHT 2764-2767.) The Raymond Avenue Crips used Helen Keller Park as their hangout in December 1980. Harris didn't know if members of the Raymond Avenue Crips used drugs at that time; Harris denied that he did. (RHT 2782.)

c. Prior Felony Convictions

Harris sustained prior felony convictions in 1978 and 1983 or 1984, the latter involving convictions for robbery and kidnapping. (RHT 2727-2728, 2772-2773; see also Exhibit TT.)

d. Reference Hearing Testimony Regarding Alibi for Petitioner; Inconsistencies with October 7, 1997 Declaration Under Penalty of Perjury Signed by Wayne Harris (Exhibit S) and Notes of a 1997 Interview with Harris (Exhibit SS, Bate Stamped Pages 012524-012525)

At the reference hearing, Harris testified that on December 27, 1980, petitioner, Marcus Player and 10 others played basketball with Harris at Helen Keller Park after dark. Petitioner could have been at the park when Harris arrived at the park at approximately 2:00 p.m. After a couple of hours of playing basketball at the location, Harris and petitioner left at approximately 10:30 p.m. to go to the store. While petitioner was with Harris, Harris saw an LASD car drive into the park. Harris saw his associates ordered to come to the car and place their hands on the car. Marcus Player was one of those ordered to the LASD car. Harris and petitioner were just watching this. At that point, the Player car "came into the park," and after apparently seeing the LASD car, "immediately went into reverse and . . . sped out of the park." (RHT 2733-2742, 2755, 2809.) The LASD car gave chase. At that point the crowd disbursed. Harris and petitioner walked back to the crowd. Then petitioner, Marcus Player and Wayne Harris started walking westbound on 126th St. (RHT 2745-2746.) Harris subsequently noticed that the Player car had crashed. (RHT 2750.) Harris, Marcus Player and petitioner were stopped by LASD personnel at approximately 11:00 p.m. (RHT 2751-2752.) The three were then ordered to walk to another LASD car. (RHT 2756.) A person known to Harris as Lil' Owl "popped out of the bushes" and joined Harris, Marcus Player and petitioner. (RHT 2757.) At some point, possibly after Lil' Owl had joined Harris, Marcus Player and

petitioner, an LASD car in which Harris could see a young lady in the backseat crying shined its light on the group so the lady could see the group. (RHT 2758-2759.) Eventually, the police let Harris, Marcus Player and petitioner go to petitioner's house. On arrival, Harris saw Craig Ross inside the house with petitioner's mother and brother. (RHT 2761-2762.)

Harris signed his Declaration, Exhibit S, only after reading it. Harris understood this document was to be used to try to get petitioner a new trial. Harris signed the document under penalty of perjury. According to Exhibit S, Harris had been at the park from approximately 2:00 p.m. until late in the evening. *According to Exhibit S, petitioner, Marcus Player and Wayne Harris were detained by the officers. Harris admitted that Exhibit S states that petitioner, Marcus Player and Wayne Harris were detained in the park and the three of them were continuously detained for the next four hours. Harris signed off on that statement as the truth. Further, contrary to Harris' reference hearing testimony, Harris admitted that Exhibit S states that petitioner, Marcus Player and Wayne Harris were all detained at the time the Player car drove into the park. Harris admitted that his memory of the events in question was much fresher in 1997 when he signed his declaration under penalty of perjury.* (RHT 2768-2771, 2773-2780, 2786-2787, 2808.) Further, Harris admitted knowing the definition of the word "detention" such that there was no confusion in his mind as to how that word was used in his declaration when the document states petitioner, Marcus Player and Wayne Harris were detained together in the park when the Player car was first seen. (RHT 2809-2812.)

While Harris admitted speaking to an investigator he believed was working for petitioner in 1997 (RHT 2767.), Harris denied telling the investigator that which is reflected in Exhibit SS on Bate stamped pages 012524-012525: "'Before midnight, 2130 to 2200, can't recall exactly, for about four hours the police sent them from police car to police car, Steve Champion & Marcus & Wayne, about 6 police cars & had to tell their same stories to each cop. Never out of the sight of any police that night. finally let them go at Steve Champion's house. Right up til the car came into view. Too far away from car to see who was in it. Standing up with hands on hood as car came into Helen Keller Park eastbound on 126th to dead end to park. They were a block away from park. Didn't know what was happening.'" (Exhibit SS, RHT 2773-2774.) Harris further denied seeing petitioner and others, including Earl Bogans, "taking hits on some marijuana" after

they had played basketball on December 27, 1980 as Bogans testified at the reference hearing. (RHT 2783.)[61]

e. Familiarity with Player Car

Harris had been in the Player car. Marcus and Michael Player had access to the car. Petitioner was a good friend of Marcus and Michael Player. Harris never saw petitioner in that car, identified from photographs (Exhibits RR 1-8). The Player car seats five people. (RHT 2785-2786, 2797-2798.)

f. Exhibits 55 (Trial Exhibit 179) and DD (Trial Exhibit 174)

Harris identified Raymond Avenue Crips gang graffiti with petitioner's gang moniker, "treacherous" in a photograph (Exhibit 55). Harris identified petitioner in Exhibit DD. Harris testified that he couldn't tell "what [petitioner was] throwing up." Harris then denied having said "throwing up." Harris claimed he said "holding up." Harris testified he couldn't tell if petitioner was throwing a gang sign. (RHT 2795-2796.)

g. Henry Clay Junior High School

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[61] "Compare Exhibit GG (LASD report of Deputies Lambrecht and Tong concerning events of December 27 and 28, 1980) and the reference hearing testimony from Lambrecht (now retired) and Sergeant Tong concerning detention of four men at Helen Keller Park at approximately 11:50 p.m. on December 27, 1980. The four detained individuals were identified as: Marcus Player, Earl Bogans, Willie Marshall, and Angulus Wilson. (Exhibit GG; RHT 2601-2602.) No one identified himself as Steve Allen Champion. (RHT 2614.) While detaining these four individuals, Lambrecht and Tong saw another unit with its red lights on apparently chasing another car. They followed in their car. (RHT 2562-2563, 2566-2570, 2603-2604.) Later, working as part of a team of LASD units attempting to secure a perimeter, Lambrecht and Tong detained a group of four individuals at approximately 1:00 a.m. on December 28, 1980. The four included: Marcus Player, James Taylor, Wayne Harris and petitioner. Petitioner and Wayne Harris were not among the individuals detained in Helen Keller Park prior to the observation of the LASD car involved in an apparent car chase and Earl Bogans was not detained as part of the group of four individuals detained after the containment area had been established (Exhibit GG; RHT 2562-2563, 2566-2570, 2579, 2607-2610, 2614-2615.)"

Harris attended seventh grade at Henry Clay Junior High School. Harris never had problems with any teachers. There was a mix of teachers from different races. Harris had the sense that the teachers tried to give the children a good education. Harris does not recall any textbook shortage. Harris completed the eighth and ninth grades at Gompers Junior High School. Harris completed the tenth grade at Washington High School and grades eleven and twelve at the CYA. Harris received a good enough education to train to be an electrician which is now his profession. (RHT 2787-2790.)

Earl Bogan

a. Background

Bogans has known petitioner since 1975. (RHT 2644.) He saw petitioner "quite often." He knew petitioner's brothers Reginald and Gerald. (RHT 2706-2707.) Bogans had been in petitioner's house on 126th St. a couple of times. The home was nicely kept. Bogans never saw anything suggesting that petitioner had been deprived of food, clothing or shelter. Petitioner did not appear destitute. Bogans did not know if petitioner was working. Petitioner never claimed he was in need of money. Petitioner was not mentally slow nor did he appear brain-damaged. (RHT 2695-2697.)

b. Gang Affiliation

In December 1980, Bogans and petitioner were members of the Raymond Avenue Crips.[62] Bogans had been a member since approximately 1977. Petitioner was already a member of the gang at that time. Petitioner's gang moniker was "Treach." Other members with their monikers in parentheses included: Craig Ross (Evil), Jerome Evan Mallet (Kooc), Marcus Player (Spark)[63], Michael Player (Scragg), Lavelle Player (Scrooge), Robert Aaron Simms (Lil Owl) and Jerome Evan Mallet's brother. (RHT 2659-2662, 2714.)

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[62] "Bogans' testimony that petitioner was a member of the Raymond Avenue Crips in December 1980 was inconsistent with petitioner's trial testimony in which he claimed he had disassociated himself from the gang as of the time of the Hassan murders in December 1980. (13 RT 3035, 3068.)"

[63] "Bogans' testimony that Marcus Player was a member of the Raymond Avenue Crips in December 1980 is contrary to Marcus Player's reference hearing testimony during which he denied ever being a member of the Raymond Avenue Crips. (RHT 2085.)"

Bogans identified petitioner in Exhibit DD (Trial Exhibit 174). In the photograph, petitioner is throwing a Raymond Avenue Crips' gang sign. Bogans also identified petitioner in Exhibit 47. Bogans had seen petitioner with a gun before petitioner went to CYA. That gun, a 12 gauge shotgun, was not the gun petitioner was handling in Exhibit 47. Bogans had not seen that gun before. (RHT 2680-2683.) The gun seen in Exhibits 47, AA and BB appeared to be one and the same gun. (RHT 2704-2705.)

c. Bogans' Alibi for Petitioner; Inconsistencies with Petitioner's Trial Testimony, the Reference Hearing Testimony of Wayne Harris and Marcus Player, the Declaration of Wayne Harris, the Reference Hearing Testimony of LASD Deputies Lambrecht and Tong and Their Report (Exhibit GG), the Notes of a 1997 Interview with Bogans (Exhibit 22 [*sic*][64]) and Bogans' Declaration (Exhibit T)

Bogans arrived at Helen Keller Park between 7:00 and 7:30 p.m. on December 27, 1980. Petitioner was already there. (RHT 2645-2647, 2679.)[65] *Bogans was clear that petitioner was with Bogans from the point Bogans arrived at Helen Keller Park through when the police officers who had been detaining Bogans, Marcus Player and petitioner took off to chase the Player car. Even in the face of petitioner's trial testimony that he was not detained when officers were detaining others in Helen Keller Park, Bogans refused to alter his recollection. (RHT 2652, 2676-2677.)*[66] *After looking at the names listed on the Lambrecht/Tong report (Exhibit GG), Bogans deduced that the deputies simply did not get petitioner's name for a*

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[64] Respondent believes this should be "Exhibit SS." (See RR 179:9-12.)

[65] "According to petitioner's trial testimony, he did not leave his home until 10:00 to 11:00 or 11:30 p.m. on December 27, 1980. (13 RT 3089; see also Exhibit B, page 12241 [the July 13, 1982 interview of petitioner's brother, Reginald Champion, conducted by trial counsel Ronald Skyers, during which Reginald claimed petitioner was at his home until 10:00 to 11:00 p.m. on December 27, 1980]; see also RHT 1536-1546.)"

[66] "Bogans' reference hearing testimony is also inconsistent with the Lambrecht/Tong report (Exhibit GG) and the reference hearing testimony of Lambrecht and Tong describing the detention of four individuals in Helen Keller Park including Bogans, Marcus Player, Willie Marshall and Angulus Wilson. (See fn. 88, *ante*, at p. 176.)"

field identification while petitioner was detained by the officers before they took off after the Player car. However, Bogans admitted that he had no independent recollection of who besides himself had been identified by the officers during the detention. (RHT 2717-2719.) In a 1997 interview, Bogans indicated: "police drove up and made them walk up to parking lot and get on ground-took names Marcus Player, Andy Wilson, Steve C. and Willie Marshall" (Exhibit SS.)[67] Bogans testified that after playing basketball, Bogans and petitioner smoked marijuana and drank. Bogans claimed that petitioner was acting normally like he was when he was sober. (RHT 2694-2695.) Bogans also admitted signing his Declaration (Exhibit T). All of the typed material was on the document before Bogans signed it. *According to Bogans' Declaration, Bogans was with petitioner, Marcus Player, Willie Marshall and Andy Wilson in Helen Keller Park since approximately 8:00 p.m. They were playing basketball and smoking and drinking. The group, including petitioner, Marcus Player and Earl Bogans, was detained by officers in the park before the Player car was seen.* (Exhibit T.; see also RHT 2058-2061 [reference hearing testimony of Marcus Player].)

d. Bogans' Contact with Petitioner at County Jail Following Petitioner's Arrest

Bogans testified that petitioner claimed to him that authorities were trying to pin on petitioner a murder which occurred on Vermont on December 27, 1980. Petitioner knew that Bogans could be an alibi witness for petitioner. Bogans went down to the county jail to tell petitioner that Bogans was an alibi witness for petitioner. On December 28, 1980, Bogans learned petitioner had been arrested for murder. Bogans was told about the arrest by Reginald Champion. Bogans didn't realize at first that Bogans was petitioner's alibi witness. It took a couple of weeks. Bogans had not concluded that he was petitioner's alibi witness when Bogans went to visit petitioner at the county jail. Bogans then changed his testimony, claiming that he

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[67] "Because respondent did not present Bogans with the opportunity to admit or deny having made this prior inconsistent statement and because the referee did not find that the interests of justice otherwise required, the referee limited the admissibility of this exhibit to any relevant nonhearsay purpose. (RHT 3686-3687.) The inconsistency is relevant to attack the credibility of Bogans' reference hearing testimonial claim that petitioner was detained with Bogans by the sheriff's deputies before the pursuit of the Player car began."

did know that he was petitioner's alibi witness right away (i.e., before Bogans went to see petitioner at the county jail). (RHT 2662-2667.) At the county jail, petitioner did not say Bogans should call petitioner's lawyer. Petitioner did not even give the name of the lawyer to Bogans. Bogans never went back to the jail. (RHT 2668.) Bogans never asked petitioner to give Bogans the name, address and telephone number of petitioner's lawyer. (RHT 2705.)

e. The "Blank Declaration" Sent to Bogans by Jerome Evan Mallet (Exh. U)

Following Mallet's conviction, Mallet called Bogans to tell Bogans that he was sending him a declaration that could help Mallet get out of jail. Bogans signed the otherwise blank declaration. Bogans had two conversations with Mallet. (RHT 2668-2774.) Bogans testified he was willing to help Mallet or any similarly situated member of the gang. (RHT 2675.)

f. The Player Automobile (Exs. RR 1-8.)

Bogans recognized the photographs (Exhibits RR 1-8) as the Player automobile. The car could seat approximately 5 people. When Bogans was being detained in the parking lot at Helen Keller Park, Bogans saw the Player car with its headlights on. It was turning into the park at a "pretty fast" rate of speed, in the neighborhood of 35 to 40 mph. Bogans could not tell how many people were in the car. Nor was he testifying that he saw Michael Player driving the car. (RHT 2691-2694.)

g. Bogans' Prior Felony Conviction; Bogans Was Convicted of an Armored Car Robbery Committed in 1998 for Which Bogans Was Serving a Sentence in Federal Prison at the Time of the Reference Hearing. (RHT 2642-2643.)

Marcus Player

b. Marcus Player's Adult Felony Conviction Record[68]

Marcus Player was convicted of armed robbery in 1978 based upon the November 1977 incident in West Covina in which petitioner, Michael Player and others were also involved. (RHT 2021-2022.) In 1983, Player was convicted of felony murder and robbery which

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[68] Respondent has already set forth the Referee's detailed summary of the reference hearing testimony of Marcus Player concerning "a. Refusal to Cooperate with Petitioner's Trial Counsel" (RR 181), *ante*, at pages 139-140.

occurred in December 1981. Marcus Player has been in custody for that offense since January 8, 1982 (i.e., before petitioner's trial). Marcus Player is now serving a sentence of 31 years to life imprisonment. (RHT 1962-1963.)

c. Marcus Player's Relationship with Petitioner

Marcus Player has known petitioner since petitioner was five years old. Player has known petitioner's brother, Reggie, even longer. Marcus Player had a closer relationship with Reggie than he had with petitioner, although when petitioner was 14 or 15 years old, Player and petitioner "developed a little closer relationship." (RHT 1965, 2027, 2088.)

d. Marcus Player's Alibi For Petitioner; Inconsistencies between Reference Hearing Testimony and (1) Player's Statement to Petitioner's Counsel in 1996 or 1997; (2) Wayne Harris's Declaration (Exhibit S); (3) Earl Bogans' Declaration (Exhibit T); and (4) the LASD Report of Deputies Lambrecht and Tong (Exhibit GG)

Player testified that he left his fiancée's home on the night of the Taylor murder to walk to a liquor store for orange juice and/or milk. He was uncertain of the time, although he believed it to be somewhere around 10 o'clock to 11:00 p.m. (RHT 1969-1970.) On the way, Player saw petitioner and Wayne Harris at Helen Keller Park's basketball court. Player stayed to talk with them for approximately one-half hour. (RHT 1970-1974, 2038-2039.) Thereafter, Player went to the liquor store where he spent approximately 5 minutes obtaining the orange juice and/or milk. *While carrying a bag with the merchandise purchased at the store, Player was detained alone (i.e., not with petitioner or Wayne Harris) by personnel from the LASD who ordered Marcus Player onto the hood of the police car.* The officer called Marcus Player by his nickname, Spark or Sparky. (RHT 1974-1977, 2040-2042.) While detained by the officer, Marcus Player first noticed the Player car, which Player assumed was coming into the park. The car belonged to Marcus Player's stepfather, Frank Harris. The LASD deputies left Marcus Player to give chase to the car. Then, Marcus Player heard what he thought was a car crash. (RHT 1977-1982, 2042-2044.) Player went to see what happened. *On the way, Player ran into Wayne Harris and petitioner. The three of them thereafter went looking for the crash.* (RHT 1982, 2044-2045.) Marcus Player, petitioner and Wayne Harris were then stopped by LASD deputies at 126th and Budlong where they were questioned. (RHT 1982-1985, 2045.) Marcus Player told the officers that Michael Player was the last person to drive the car, a belief not

based on Marcus Player's personal knowledge, but derived from a process of elimination used by Marcus Player. (RHT 1985-1986.) The officers ordered Marcus Player, petitioner and Wayne Harris to walk to another unit's location. After doing so, the three were ordered to walk to the next unit's location. While doing so, a fourth person joined them. Marcus Player knew this person as Owl or Lil Owl. (RHT 1986-1990, 2045.) Player and the three others were ordered to sit on a curb for approximately one-half hour, during which time an LAPD car came by and shined its spotlight on everyone. Player believed the LAPD had witnesses and/or victims in the car for purposes of a possible identification. (RHT 1990-1992, 2045.) Eventually, Marcus Player, Wayne Harris and petitioner were ordered to go to petitioner's home. (RHT 1994-1995.) While Marcus Player was at petitioner's home, a commotion was heard emanating from the backyard. This commotion involved a dog biting someone, although Marcus Player did not see the actual arrest. (RHT 1995-1996.)

In 1996 or 1997, Marcus Player was interviewed by petitioner's counsel, Ms. Kelly. *According to a summary of that interview, Marcus Player told petitioner's counsel that Marcus Player was with friends, including petitioner, at Helen Keller Park. Marcus Player and others, but not petitioner, were detained in the park. Marcus Player and others were released when officers chased the Player car. Marcus Player and petitioner (without any mention of Wayne Harris) were detained again near the site of the Player car crash.* (RHT 2013-2014; Ex. LLLL.)

Marcus Player's alibi testimony was inconsistent with the declaration of Wayne Harris (Exhibit S). In that declaration, Harris stated under penalty of perjury that Harris, Marcus Player and petitioner were detained in Helen Keller Park and that they were constantly detained for four hours. While questioned at a location one block away from the park, Harris could see the Player car driving into the park. (RHT 2055-2058; Exhibit S.) Marcus Player's alibi testimony was also inconsistent with the declaration of Earl Bogans (Exhibit T). According to Bogans' declaration, petitioner, Marcus Player, Willie Marshall and Andy Wilson were with Bogans in Helen Keller Park since approximately 8:00 p.m., playing basketball, smoking and drinking. In his reference hearing testimony, Marcus Player denied playing basketball, smoking or drinking. According to Bogans' declaration, the group, including petitioner, Marcus Player and Bogans, was detained by officers in the park before the Player car was

seen. (RHT 2058-2061; Exhibit T.)[69] Finally, Player's reference hearing testimony is inconsistent with the Lambrecht/Tong report (Exhibit GG, RHT 2062-2064.) and the reference hearing testimony of Lambrecht and Tong. (See, fn. 88, *ante*, at p. 176.)

e. Gang Affiliation; Photographs of Petitioner and Marcus Player at CYA (Exhibits DD, EE and FF); Photographic Exhibits 47, AA, BB and CC

Marcus Player identified Exhibits DD, EE and FF as photographs taken at the CYA while both Player and petitioner were housed there. Marcus Player was released in approximately August 1980. Marcus Player and petitioner are shown in Exhibits EE and FF. In Exhibit DD, petitioner is seen throwing up a Raymond Avenue Crips' gang sign, suggesting to Marcus Player that petitioner was a member of the Raymond Avenue Crips. (RHT 2023-2026.) *Contrary to the testimony of Gary Jones, Wayne Harris and Earl Bogans, Marcus Player denied ever having been a member of the Raymond Avenue Crips.* (RHT 2025-2026, 2085.) Player identified petitioner in Exhibit 47. Player identified Lavelle Player and Craig Ross in Exhibit AA, a photograph taken around 1980. Exhibit BB, a photograph also taken around 1980, shows Lavelle Player; Marcus Player and Craig Ross are seen in Exhibit CC. That photograph was taken after Marcus Player had been paroled from CYA in August 1980 and before the photograph had been seized from petitioner's residence on January 14, 1981. Marcus Player first met Craig Ross in the second or third grade. (RHT 2026-2029.)

f. Arrest of Marcus Player and Jerome Evan Mallett on November 19, 1980 For Robbery

On November 19, 1980, Marcus Player and Jerome Evan Mallet were arrested for robbery. (RHT 2047-2050; Exhibit X.) Marcus Player testified he could not recall if he had attempted to pass himself off to

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[69] "As previously noted, any claim that petitioner was detained in the park before the Player car was seen is inconsistent with petitioner's own trial testimony in which petitioner claimed to see others being detained in the park but that he was not himself detained. (13 RT 3091-3095.)"

officers as Michael Player as Exhibit X indicates he unsuccessfully attempted to do. (RHT 2048-2050.)[70]

(RR 173-185, italics added.)

While petitioner contends that "[d]iscrepancies between these witnesses' [Harris, Bogans and Player] recollections does not mean one or all are lying[,]" (PB 213), petitioner misses the point. The Referee was well within his discretion to consider those and other discrepancies on material points set forth in his detailed findings (such as inconsistencies with petitioner's own trial testimony and that of the LASD deputies' reference hearing testimony and contemporaneous report, witness bias, the existence of prior felony convictions and the demeanor of all of the Taylor witnesses as they testified at the reference hearing), to conclude petitioner's alibi witnesses and alibi defense were not credible. In light of a reference hearing record providing overwhelming evidence in support of the Referee's credibility findings, those findings are entitled in this Court to great weight.

Petitioner also argues, "[s]hould 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. [Citations.]" (PB 213.) Earley's testimony suggested that all three of the alibi witnesses, not just one or two of them, should have been called. "It was Earley's opinion that presentation of petitioner's alibi for the Taylor crimes required calling as alibi witnesses Wayne Harris, Marcus Player and Earl Bogans. (RHT 3963.)" (RR 335, see also RR 273-274 ["the referee notes that petitioner's *Strickland* expert recognized that any decision to present the Taylor alibi at petitioner's penalty phase was a judgment call in light of the credibility

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[70] "Exhibit N (Trial Exhibit 114) reflects that after the Hassan murders and before the Michael Taylor murder, petitioner bailed Jerome Evan Mallet out of jail."

issues surrounding Wayne Harris, Earl Bogans and Marcus Player who the expert conceded were essential witnesses to the presentation of the alibi"].)[71] In addition, for the reasons already set forth, the Referee's findings that Marcus Player would not have cooperated with trial counsel and would not have been available as a witness at petitioner's trial are fully supported by the reference hearing record, as are the Referee's additional findings that "[t]he availability of reference hearing witnesses who were active members of the Raymond Avenue Crips at time of trial and their willingness to testify or identify other gang members or their gang's activities is deemed highly unlikely. Their willingness to talk to Skyers is also unlikely. The witnesses are Harris, Bogans, and Marcus Player" (RR 288, underlining in original). Further, the Referee's findings that alibi witnesses would also provide damaging evidence undermining petitioner's trial testimony that he had left the Raymond Avenue Crips gang before the Hassan and Taylor murders (including that the photograph of petitioner throwing a Raymond Avenue Crips gang sign was taken while petitioner and Marcus Player were at CYA, a fact not known to petitioner's trial jury) and had disassociated himself from co-defendant Craig Ross (Harris testifying at the reference hearing that when petitioner and Harris were

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[71] Respondent notes that petitioner's argument is not directly relevant to his exceptions to the Referee's findings rejecting the credibility of petitioner's alibi defense and his alibi witnesses Harris, Bogans and Player. This argument relates more directly to petitioner's exception that "the referee erred in failing to fully credit the *Strickland* expert's opinions" (PB 233-234, capitalization removed), an exception that includes petitioner's contention that "[t]he referee is wrong" in finding the opinion of petitioner's *Strickland* expert "that reasonably competent counsel would present evidence of petitioner's noninvolvement in the Taylor homicide 'unreasonable.' (Report at p. 312.)" (PB 252.) Respondent has addressed this exception in part *ante*, at pages 105-107, but will address it further as it pertains to the Taylor related crimes, *post*.

released by the LASD deputies in the early morning hours of December 28, 1980, they found Craig Ross in petitioner's home) are also amply supported by the record. All of these findings are separate and apart from the Referee's finding that petitioner's alibi witnesses would also undermine petitioner's proposed mitigation social history evidence (e.g., petitioner was not beaten by his older brothers, was intelligent and did not suffer deprivations of food, clothing and shelter).

In sum, petitioner's alibi defense is predicated on the foundation of the credibility of petitioner's alibi witnesses and their availability to have testified for petitioner at the penalty phase. Because the Referee's well documented and amply supported findings rejecting the credibility of those alibi witnesses and *ipso facto* the credibility of petitioner's alibi defense are entitled to great deference by this Court, petitioner's exceptions to those findings must be rejected.

Moreover, the Referee's finding rejecting the credibility of the foundational alibi witnesses Harris, Bogans and Player required for petitioner's alibi defense to the Taylor crimes is sufficient in and of itself to provide full support for the Referee's additional finding that reasonably competent counsel would not have presented this alibi defense.

Respondent turns now to petitioner's exception to the Referee's finding that petitioner failed to prove by a preponderance of the evidence that a fingerprint exemplar of Robert Aaron Simms would have been available to trial counsel at the time of petitioner's trial in 1982. (PB 195.) In the Referee's introductory summary of the police investigation into the Taylor crimes, the Referee stated:

> Simms gave a false name of Taylor. Simms appeared to match the general description of one of the suspects that fled the car. He was not specifically identified. Since Simms (Taylor) did not belong in the area, he was taken into custody and transported to the LASD's Lennox station. [¶] When the group of four [petitioner, Harris,

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

(RR 4.)

In the Referee's summary of his findings with respect to Reference Question 2 and the Taylor alibi evidence, the Referee found: "This evidence does not support the finding that Simms was booked or a determination that his fingerprint found at the Taylor crime scene exonerates petitioner." (RR 80.) In responding to petitioner's 16 points related to the Taylor alibi, the Referee found:

> 9) No document reflects Simms being booked. He was detained and taken into custody but it is unknown if he was booked. (See, Exhibit HH.) [¶] . . . [¶] . . . [¶] 12) Was Simms fingerprinted? See petitioner's LAPD arrest for violating Vehicle Code §23110 (throwing a rock at a car). Petitioner's arrest report indicates he was not mugged or fingerprinted due to his age. Exhibit 23 contains several police reports, including this arrest report. But this report was not marked individually during the reference hearing. [¶] . . . [¶] . . . [¶] 15) Petitioner's claim that Simms' fingerprint match exonerates him has some defects. The Taylor victims' recollection is that the crimes occurred between 11:00 p.m. and midnight. They also testified they were locked inside the bathroom when Michael was killed. (RT 2167-2170.) What took place inside the residence while they were locked up in the bathroom is unknown other than the victim was shot by someone. [¶] Simms' fingerprints inside the Taylor residence do not eliminate petitioner from being inside and being identified by Cora Taylor. (PGE 32.) Field identification of petitioner on December 28, 1980: 6 ft, wt 185, clothing yellow coat, gray shirt and pants. [¶] 16) It is unknown if Simms was booked. The property inventory of Simms' clothing describes his jacket as green. (Exhibit 17B.)

(RR 95-96.)

In the "Referee's Findings Concerning Credibility of Claimed Alibi for Taylor Crimes," the Referee found in part: "6. Simms' fingerprints

were not available at the time of trial. [¶] 7. The fingerprint match of Simms to the Taylor crime scene does not exonerate petitioner." (RR 108.) In his "Detailed Discussion of Evidence and Findings" concerning petitioner's alibi for the Taylor crimes, as previously set forth by respondent, the Referee found that Court's Exhibit 34 "deals with whether or not an exemplar set of Robert Aaron Simms' fingerprints were taken as a result of his detention on December 28, 1980 (efforts by DA investigator Chris Briggs to locate a record of any such booking prints were unsuccessful; only exemplar prints of Simms taken long after the completion of petitioner's trial in 1982 were located)." (RR 168.) "The referee further finds that petitioner has failed to prove by a preponderance of the evidence that exemplar fingerprints of Robert Aaron Simms were available at the time of petitioner's trial for trial counsel to have a court-appointed latent fingerprint comparison analyst use to compare with all latent prints obtained from the Hassan, Taylor and Jefferson crime scenes and the Player automobile." (RR 169, fn. omitted.) In the omitted footnote, footnote 84, the Referee pointed out that the 2006 match obtained by respondent to a latent print at the Taylor crime scene used exemplar fingerprints of Simms taken in 1987, "five years after the completion of petitioner's trial." (RR 169, fn. 84.)

The Referee also found that

> [e]ven if the evidence, that one of the latent prints obtained from the Taylor crime scene was matched to Robert Aaron Simms, could have been obtained in 1982 and presented at petitioner's trial, trial counsel's strategy not to litigate the Taylor crimes during the penalty phase but to remind the jury that those crimes had never been filed by the prosecution against petitioner because of the prosecution's own belief the evidence was insufficient to prove those crimes as to petitioner beyond a reasonable doubt was still eminently sound. *No witness could testify that only four people were involved in the Taylor crimes. Moreover, because of petitioner's conviction for the robberies and murders of Eric and Bobby Hassan, his posting of bail*

for Evan Jerome Mallet (from what arguably were proceeds obtained from the Hassan crimes), the commonality of Craig Ross as one of the perpetrators in both the Hassan and Taylor crimes and Wayne Harris' reference hearing testimony [that when petitioner and Harris arrived at petitioner's home after the two were released by LASD deputies following their detention at approximately 1:00 a.m. on December 28, 1980, Craig Ross was inside petitioner's residence] the jury might have deduced from petitioner's alibi witnesses that petitioner was fully culpable for the Taylor murder and related crimes as the natural and probable consequences of the conspiracy to rob and murder drug dealers the jury had undoubtedly found petitioner to be a member of at the time of the Hassan murders and robberies for which petitioner had been convicted.

(RR 172, fns. omitted; italics added.)

In his summary of findings with respect to Reference Question 4, the Referee once again addressed the issue of Simms's fingerprints:

> 7) The referee finds that there is insufficient evidence from which to conclude that Aaron Robert Simms' fingerprints were available at time of trial. The Taylor homicide was investigated by the LAPD. Simms arrested by the LASD. Simms was not identified by any of the surviving victims from the Taylor crime scene on December 28, 1980. However, Simms matched the description of one of the persons that fled from the fleeing car. He was transported to the LASD Lennox station. His clothing was taken by the LASD at the station and the documents reflect his mother was called at approximately 4:00 a.m. on December 28, 1980. Simms was a minor (16 years old). No further report or documents were presented at the reference hearing as to whether or not he was in fact booked and/or fingerprinted. [¶] In reviewing the documents submitted, it was noted that exhibit #23 contained a police report for petitioner's January 6, 1976 arrest indicating petitioner (a minor) was not printed or mugged due to his age. This police report was prepared by the LAPD and not the LASD. In view of the above items, it is inconclusive whether Simms was or was not fingerprinted on December 28, 1980.

(RR 288-289.)

In the Referee's "Detailed Discussion of Evidence and Findings" with respect to Reference Question 4, the Referee first found: "While no circumstances may have weighed against trial counsel conducting additional investigation for the Taylor murder, for the reasons set forth in

the referee's findings concerning reference questions numbers 2 and 3, the referee finds there were multiple circumstances weighing against the presentation of the Taylor alibi evidence. *In addition, the Referee rejects any opinion from petitioner's* Strickland *expert to the contrary as unreasonable*." (RR 312, fn. omitted; italics added.) As part of his detailed summary of the *Strickland* expert's "relevant reference hearing testimony and the referee's findings regarding [the *Strickland* expert's] opinions concerning the Taylor and Jefferson murders" (RR 312-375), the Referee addressed "Petitioner's December 28, 1980 Detention; the Detention of Robert Aaron Simms; Latent Fingerprint Comparisons to Exemplar Prints from Known Gang Members; [and] Petitioner's Criminal Liability for Taylor Murder[.]" (RR 354-364.)

> Earley conceded that there did not appear to be anyone who could testify to the number of people in the Player car when it arrived at the Taylor residence. (RHT 4292.) Similarly, Earley was not aware of anyone who could identify the number of persons in the Player car when it left the Taylor residence after the crimes were committed and before the car was observed by police officers. Thus, Earley was not aware of anyone who could say whether the number of people in the car on arrival differed from the number of people at the time of departure or that the number of people in the car at time of departure was the same number in the car when the car was first seen by deputies Naimy and Koontz. (RHT 4292-4293.) (RR 358.)
>
> The Referee also found: Petitioner has maintained throughout these proceedings that four people were involved in the commission of the Taylor murder and related crimes; viz., Evan Jerome Mallet, Craig Ross, Robert Aaron Simms and Michael Player. It is petitioner's contention that by establishing Simms and Michael Player as the two confederates with Mallet and Ross, petitioner is eliminated from criminal responsibility for the Taylor crimes. However, as already noted, there is no witness viewing the events from outside the Taylor residence, equivalent to Elizabeth Moncrief for the Hassan murders, who could identify the number of persons arriving in the Player car at the Taylor residence, the number of persons leaving the Player car to enter the Taylor residence, the number of persons leaving the Taylor residence after the crimes were committed and the number of persons

> entering the Player car after the crimes were committed before the car left the area. As also noted earlier, at the reference hearing, both Wayne Harris and Earl Bogans testified that the Player car, seen in photographic Exhibits RR1-8, sat five people. [Citation.]

(RR 362.)

"Trial counsel testified that at the time of petitioner's trial he was aware that Simms had been released rather than charged with the Taylor murder. Skyers further testified that releasing Simms was consistent with the inability of any of the Taylor surviving victims/witnesses to make a field identification of Simms. (RHT 1797.)" (RR 359.)

> When asked whether he had seen any evidence that a Simms' exemplar card existed as of the time of petitioner's trial, [petitioner's *Strickland* expert] answered: "I have -- I did not see anyone request or see an exemplar card." [The expert] further testified that "[he doesn't] know one way or the other whether there was [a Simms' exemplar card available in 1982 when petitioner's case was tried]." (RHT 4310.) [The expert] conceded "you certainly could not make a comparison with police exemplar cards[] that don't exist." (RHT 4310-4311.) [¶] [The expert] further conceded that he would like to know whether Mallet's trial counsel had made efforts to obtain Simms' exemplar prints because "if he [Mr. Gessler] made reasonable steps and they [Simms' exemplar prints] just weren't available, yes, that would weigh into whether a reasonably competent lawyer, if he wanted to would be successful." (RHT 4313.) [The expert] admitted that he knew Mr. Gessler well and he "could ask him [if he tried to obtain Simms' exemplar prints]." (RHT 4313.) As previously noted in footnote 202, *ante*, at page 359, petitioner's habeas counsel initially listed Mr. Gessler as a possible witness at the reference hearing expected to testify "to the Taylor crimes and specifically, the investigation and preparation undertaken by him as counsel for Evan Jerome Mallet." At no time did [petitioner's *Strickland* expert] testify, even on re-direct examination, that he had spoken to Mr. Gessler on this issue. Furthermore, petitioner never called Mr. Gessler on this or any other issue.

(RR 360-361.)[72]

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[72] In the aforementioned October 14, 2005 letter from petitioner's habeas counsel to respondent's counsel listing witnesses petitioner's

(continued...)

"Deputy Koontz testified at Mallet's preliminary hearing on January 23, 1981 that Simms was in custody at the time of the December 28, 1980, 1:30 a.m. field show up involving Simms and the Taylor witnesses. After this show up, Simms was not arrested for murder; rather, he was let go, although Koontz could not say whether he was let go 'that night [*sic*].' (RHT 1789-1792, reading from Koontz's Mallet preliminary hearing testimony, 2 MPHT 277 et seq.)" (RR 361.)

Based upon the foregoing, the Referee concluded: "In light of Exhibit IIII (the August 3, 2006 reports from DA investigator Briggs documenting his unsuccessful efforts to locate exemplar prints of Robert Aaron Simms existing in 1982), Exhibit HHHH and Court Exhibit 34 [dealing with the Stipulation that a match was made between a latent print lifted from the kitchen of the Taylor residence and exemplar prints of Robert Aaron Simms generated following a 1987 arrest], Deputy Koontz's testimony at Mallet's preliminary hearing and petitioner's deliberate tactical decision at this hearing not to call Mallett's trial counsel, petitioner has failed to present evidence establishing by a preponderance of the evidence that exemplar prints for Robert Aaron Simms did in fact exist at the time of

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(...continued)
counsel anticipated calling at the reference hearing (Vol. 10 of 135, pp. 1024-1035), counsel lists "Charles Gessler" as a potential witness to be called by petitioner (*id.* at p. 1026) and describes that "*Mr. Gessler's testimony will relate to the Taylor crimes and specifically, the investigation and preparation undertaken by him as counsel for Evans Jerome Mallet.*" (*Id.* at p. 1034, italics added.) In the November 9, 2005 letter from petitioner's habeas counsel to respondent's counsel (*id.* at pp. 1077-1078), counsel wrote: "**Charles Gessler, Esq.** Only preliminary contact was made with Mr. Gessler. As stated in the 10/15/05 [*sic*] memorandum, if called Mr. Gessler's testimony will relate to the Taylor crimes and specifically, the investigation and preparation undertaken by him as counsel for Evan Jerome Mallet. At this time, petitioner does not intend to call Mr. Gessler as an expert." (*Id.* at p. 1077, emphasis in original.)

petitioner's trial, a failure which undermines any effort to establish deficient performance by trial counsel arising from any failure to obtain a latent print comparison prior to petitioner's 1982 trial. (See also fn. 202, *ante*, at p. 359, citing Evid. Code, §412.)" (RR 361-362, fn. omitted.)[73]

In support of his exception contending that "the Referee err[ed] in failing to find that Simms' fingerprint would have been available at the time of petitioner's trial" (PB 195-197, capitalization removed), petitioner argues: "At the time of petitioner's trial, exemplars of Simms' fingerprint 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. (R[H]T 2480, 2545, Vol[.] 83 of 135[,] p. 621;

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[73] In the omitted footnote, footnote 204, the Referee found:

> Exhibit HH reflects comparisons of latent prints from the various crime scenes and the Player car with exemplar prints of various individuals, including Michael Player and James Taylor. As reflected in the Stipulation, Court Exhibit 34, and Exhibit HHHH, the James Taylor whose prints were compared is not Robert Aaron Simms who used a false name of "James Taylor" as reflected in the Lambrecht/Tong report (Exhibit GG). When asked if he would agree, "without having spoken to Mr. Gessler, that what happened may well be that both the prosecution and the defense assumed that the James Taylor who was eliminated on the sheet was in fact Robert Aaron Simms, who identified himself to Lambrecht and Tong as James Taylor, rather than a different James Taylor unrelated to Robert Aaron Simms[,]" [petitioner's *Strickland* expert] admitted: "I don't know. I do know that Mr. Gessler's defense for Mr. Mallet is different than a defense would be for Mr. Champion." (RHT 4307.) *The Referee agrees with respondent's submission that a reasonable mistake in this area by trial counsel and the prosecution cannot establish deficient performance by trial counsel or that an exemplar of Simms' fingerprints was obtained following his December 28, 1980 detention/arrest or that any such exemplar was available for use by trial counsel or the prosecution at the time of petitioner's 1982 trial.*

(RR 362, fn. 204; italics added.)

Vol. 71 of 135 at pp. 658-659; see too Vol[.] 112 of 135 at pp. [*sic*] 4377: **Simms was booked under case no. 596717, but the file was destroyed.)**" (PB 196, emphasis in original.) The sources cited by petitioner in support of this argument do not bear out the argument's prerequisite claim that Simms was fingerprinted following his detention/arrest by LASD deputies.

Pages 2480 and 2545 of the reference hearing transcripts cited by petitioner deal respectively with the testimony of LAPD Detective Greg DeWitt on the subject of Michael Player [there is no reference to Robert Aaron Simms or to the subject of fingerprints]; the subject of Simms as a possible suspect in the mind of Detective DeWitt; and Deputy Naimy's inability to make a facial identification of Simms as one of the persons fleeing the crashed Player automobile [again, there is no reference to the subject of fingerprints in general, Simms's exemplar prints or the issue of whether Simms was in fact ever booked and fingerprinted].

Petitioner's citation to page 621 of Volume 83 of 135 is a citation to one of multiple pages of LAPD Detective DeWitt's "Chronological Record" (Vol. 83 of 135, pp. 619-622) outlining his activities in the Taylor murder investigation, a document marked and received in evidence at the reference hearing as Exhibit 7B (*id.* at p. 618). Page 621 has no entry reflecting that Simms was in custody, booked and fingerprinted. There is a "0850" entry for contact Detective DeWitt made with Deputy Naimy at Lennox Station, an entry indicating that with respect to "Sims" [*sic*] Naimy "had vague recollection of how susp looked when they drove by. Could possibly be brought out with hypnosis[]" and that Naimy "was not absolutely positive that Sims came from car." The same page has a "1300" entry reflecting that a positive match had been made between latent prints obtained from the bathtub and wall at the Taylor residence and an exemplar print card of co-defendant Craig Ross and a series of entries indicating that no match had been made between exemplar prints of petitioner and any

latent prints. Page 622 of Exhibit 7B has a "0750" entry: "contacted Herrera at latent prints-ordered susp Mallet & the Player Brothers card against the lifts from the scene." (Vol. 83 of 135, p. 622.) *On this same page, there is a "1100" 12/28/80 entry: "Lennox Sta-interviewed poss susps-Mallet & Simms*[.]" (*Ibid.*, italics added.) *Seven entries after this entry is a "1630" entry for what appears to be 12/29/80: "Lennox Sta-arrested Evan Mallet for 187."* (*Ibid.*, italics added.) *There is no corresponding entry reflecting the arrest of Simms.* The last entry on this page is a "1311" entry: "contacted Herrera latent prints ran two suspects assoc. of Mallet [¶] (1) Ross, Craig Anthony LA #1234473R [¶] (2) Champion, Steve Allen LA #1524431c." (*Ibid.*) In sum, Exhibit 7B at page 622 of Volume 83 of 135, not cited by petitioner in support of his Simms's exemplar fingerprint card exception, fails to establish Simms, a minor, was booked into jail or any juvenile detention facility or fingerprinted at Lennox Station. While Detective DeWitt sought fingerprint comparisons with suspects Ross, Mallet, Marcus and Michael Player, and petitioner, his "Chronological Record" fails to reflect any effort to have Simms's fingerprints run against the latent prints. While DeWitt appears to have questioned Simms at Lennox Station later on the morning of December 28, 1980, the absence of any entry reflecting DeWitt's actions to detain and/or arrest the minor Simms confirms Deputy Koontz's testimony at Mallet's preliminary hearing that Simms was released. Rather than proving any of petitioner's assertions that "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." (PB 196, italics added.) Detective DeWitt's "Chronological Record" provides additional support for the Referee's ultimate finding petitioner failed to prove by a preponderance of the evidence that Simms was in fact fingerprinted.

Turning to petitioner's next record citation in support of this exception, pages 658-659 of Volume 71 of 135, the citation is from cross-examination of Deputy Naimy by Mallet's trial counsel, Mr. Gessler, concerning "Robert Sims [*sic*]." Naimy testified that Simms was taken into custody because "his clothing, body size, approximate weight, and the general shape and configuration" were consistent with one of the persons Naimy had seen run from the Player car after it crashed. (*Id.* at p. 659.) Naimy does not testify that Simms was booked and fingerprinted or even arrested. There has never been any dispute about the fact Simms was taken into custody by LASD; however, the fact that Simms was held at Lennox Station until at least 11:00 a.m. when Detective DeWitt interviewed him does not establish that Simms was in fact fingerprinted and booked into a LA County jail or juvenile detention facility.

Petitioner's last record citation in support of this exception is to page 4377 of Volume 112 of 135. This is reference hearing Exhibit IIII, the two-page August 3, 2006 report from DA investigator Chris Briggs summarizing his efforts to locate any documentation regarding the existence of an arrest report or fingerprint cards for Robert Aaron Simms. (Vol. 112 of 135, pp. 4375-4378.) Briggs learned from another DA investigator who had made inquiry at Lennox Station "regarding the existence of an arrest report or fingerprint cards for Robert Aaron Simms on or about 12/27/1980[,]" that "due to the date of the occurrence, *if any records did exist* they would not be retained at the station level. The records would have been sent to the LASD Records and Identification Bureau (RIB)." (*Id.* at p. 4376, italics added.) Briggs learned that "arrest records dating back to the year 1980 were purged. [He] confirmed this information with Information Retrieval Supervisor Brenda Sutton, who further stated *if the report did exist* and was purged there would be no record showing its' existence." (*Ibid.*, italics added.) Briggs next contacted

"LASD's Prints Unit and requested a search for fingerprint cards related to booking number 5967617. According to LASD arrest report number 480-22458-0378-023, Simms was arrested and booked on 12/28/1980 under booking number 5967617. LASD Prints Unit Supervisor Gloria Coleman was unable to locate fingerprint cards associated with booking number 5967617." (*Id.* at p. 4377.)[74]

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[74] The "LASD arrest report number 480-22458-0378-023" alluded to by investigator Briggs is the report prepared by Deputies Naimy and Koontz summarizing the circumstances of the car chase, crash and subsequent events occurring during the early morning hours of December 28, 1980. Two copies of that report were received in evidence as Exhibits 17C and C-1 and 77. A copy of that report is at pages 5106-5114 in Volume 115 of 135. The face sheet of the report, page 5106, identifies Simms by his correct full name, Robert Aaron Simms, and lists him as a "SJ" [subject], age "16." The same page lists Evan Jerome Mallet as a suspect. The booking number alluded to in investigator Briggs's report, 5967617, is the number listed in the face sheet box for "Booking No." for Simms. There is also a booking number provided for Mallet. (Vol. 115 of 135, p. 5106.) The report describes Simms as exiting the Player car after it crashed, running away from the pursuing Deputy Naimy until Naimy terminated his foot pursuit. (*Id.* at p. 5110.) The report then describes how Simms was observed by other LASD deputies. Simms was questioned about "what he was doing walking in the area." Simms told the deputies, "he came to visit a friend 'Jerome' who was not at home & who's [*sic*] last name and address were unknown." (*Id.* at pp. 5110-5111.) "[Simms] was *detained* by Dep Dam when the Dep. learned that the susp fit the description of a veh. occupant and the subj gave evasive answers to the Dep. questions. The subj. was advised of his rights per SHER -477 and not questioned further." (*Id.* at p. 5111, italics added.) Later in the report, the deputies wrote: "The subj/susp were transported to Lennox Station and booked with the approval of watch commander Lt. Huss on the above captioned charges. [¶] Subj's Simms parent, Helen Simms, was contacted by Dep (undecipherable) and advised he was in custody at 0420 Hrs. 12-28-80. [¶] LAPD homicide investigator DeWitt, ph 777-7771, of Southeast Division is handling the LAPD 187 investigation. Various LAPD witnesses obse'd subj & susp at the scene of the arrests." (*Id.* at p. 5113.)

Briggs' report then reflects that contact was made with the California Department of Justice (DOJ) "in an attempt to locate arrest records and fingerprint cards for Aaron Robert Simms and James Edward Taylor. DOJ was unable to locate a 1980 arrest record or fingerprint cards for either individual." (Ex. IIII, Vol. 112 of 135, at p. 4377.) Following this, Briggs spoke with a DOJ program technician who "conducted a records inquiry of the LASD booking number 5967617. She was unable to locate any records or print cards associated with booking number 5967617. [The program technician] also advised [Briggs] that during 1980 if a juvenile was not convicted or if the case lacked a disposition the file (including fingerprint cards) was destroyed." (*Ibid.*) Briggs's report concludes by stating, "our efforts to locate the existence of any documents which would confirm the arrest of Aaron Robert Simms, aka James Edward Taylor on or about 12/27/1980 have met with negative results." (*Ibid.*)

Neither investigator Briggs's report (Ex. IIII) nor the underlying Naimy/Koontz LASD report (Exs. 17 C & C-1, 77) proves the contention that Simms in fact was fingerprinted, even if he was booked. Petitioner produced no witness who had personal knowledge that Simms was fingerprinted. As noted, petitioner conspicuously failed to call Mallet's trial counsel, Charles Gessler, whose efforts, if any, to locate exemplar prints of Simms were a matter of interest to petitioner's *Strickland* expert. Information received by DA investigator Briggs about records being purged came with the caveats "if any records did exist" and "if the report did exist and was purged[.]" (Ex. IIII, Vol. 112 of 135, p. 4376.)[75] Petitioner's

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[75] Petitioner failed to prove that the existence of a booking number necessarily meant that a file had been created for Simms, or that Simms was fingerprinted at Lennox Station. And as noted, DA investigator Briggs's findings only demonstrated that *if* a file had been in existence in 1980, it would have been purged by 2006.

record citations do establish that Simms was held at Lennox Station until late in the morning on December 28, 1980, at which time Detective DeWitt interviewed Simms. However, in light of (1) DeWitt's "Chronological Record," Exhibit 7B, which reflect DeWitt's efforts to have exemplar prints of petitioner, Craig Ross, Marcus and Michael Player, *but not Simms*, run against latent prints from the Taylor crime scene; (2) Deputy Koontz's testimony at Mallet's preliminary hearing that Simms was released; (3) DA investigator Briggs's inability to locate any record establishing that fingerprints were in fact obtained by LASD from Simms; and (4) petitioner's failure to call any witnesses with personal knowledge that Simms was in fact fingerprinted or that exemplar fingerprints of Simms were available at the time of petitioner's 1982 trial, substantial evidence supports the Referee's findings that petitioner failed to prove by a preponderance of the evidence that exemplar prints of Simms were in fact obtained at Lennox Station and were available to petitioner's trial counsel at the time of petitioner's trial in 1982.

The Referee also recognized that even if Simms's fingerprints had been available to trial counsel in 1982, evidence of the match of a latent print from the Taylor crime scene to Simms made in 2006 did not, as petitioner contends, eliminate petitioner as having personally participated in the Taylor murder and related crimes. The Referee also noted that any such evidence would not have absolved petitioner of full criminal responsibility for the Taylor crimes even if petitioner had not been personally present at the time the crimes were committed. Petitioner contends that "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." (PB 195-196, fn. omitted; italics added.) In the omitted footnote, footnote 107, petitioner also contends, "[t]here is no

dispute that *the other two persons who entered the Taylor residence* were Ross and Mallet . . . ." (PB 196, fn. 107; italics added.)

While respondent readily "concedes" that the fingerprint match to Simms, in conjunction with his activities observed by the LASD deputies in the early morning hours on December 28, 1980, and his "explanation" for his presence in the containment area, fully supports a finding that Simms was *a participant* in the Taylor crimes (as found by the Referee in his report), petitioner produced no evidence to support petitioner's contention that only four persons were present as participants in the Taylor murder and related crimes. As found by the Referee and as fully supported by the reference hearing record, the surviving Taylor victims were locked in the bathroom when Michael Taylor was shot and no witness observing from outside the Taylor residence could identify the number of people who arrived in the Player car, entered the Taylor residence, or left the residence after the crimes were completed. Thus, as the Referee concluded, identification of Simms as a participant does not eliminate petitioner from having also been a participant, especially in light of descriptions given by the surviving Taylor crime victims which were consistent with petitioner.

Furthermore, as the Referee also found, had petitioner attempted to present a defense at the penalty phase to the Taylor-related crimes, a defense including evidence of the latent print match from the Taylor crime scene to Robert Aaron Simms would not have exculpated petitioner from criminal responsibility for the Taylor crimes. Rather, the prosecution simply could have argued to petitioner's penalty phase jury, supported by CALJIC 6.11, that petitioner was fully responsible for the Taylor-related crimes because they were the natural and probable consequence of the conspiracy to rob and murder drug dealers. Indeed, as the Referee noted, this was the theory employed by the prosecution in its successful effort to have petitioner and Ross convicted for the murders and robberies of Bobby

and Eric Hassan. (See, RR 172.) The Referee reiterated this point in his discussion of petitioner's *Strickland* expert's opinion concerning presentation of a defense at the penalty phase to the Taylor crimes.

As the Referee noted, CALJIC 6.11 provides as follows:

> Each member of a criminal conspiracy is liable for each act, and bound by each declaration of every other member of the conspiracy, if that act or declaration is in furtherance of the object of the conspiracy. The act of one conspirator, pursuant to or in furtherance of the common design of the conspiracy, is the act of all conspirators. *A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though that crime or act was not intended as part of the agreed-upon objective, and even though he was not present at the time of the commission of that crime or act.*
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and if so whether the crime alleged in counts, [fill in the blank], was perpetrated by a co-conspirator or co-conspirators, in furtherance of that conspiracy, and was a natural and probable consequence of the agreed-upon criminal objective of that conspiracy. (RHT 4315-4316.)
>
> [Petitioner's *Strickland* expert] testified he was familiar with this jury instruction. (RHT 4316-4317.) He further conceded that had trial counsel raised a full defense at the penalty phase in an effort to establish that petitioner was not involved in the Taylor crimes, petitioner's criminal responsibility for the Taylor crimes could be found by a jury through use of CALJIC 6.11, even if petitioner had not been present at the time those crimes were committed, "assuming that there is evidence of an underlying conspiracy, and agreement." (RHT 4314.) [The expert] further admitted that the prosecution theory advanced before the penalty phase started had been that there was a conspiracy among members of the Raymond Avenue Crips to kill and rob dope dealers. (RHT 4315.) [The expert] also conceded that the jury had convicted both petitioner and Ross for the double murderers [*sic*] and robberies of Bobby and Eric Hassan. (RHT 4315.)
>
> In spite of his earlier concessions and admissions in this area, [the expert] refused to admit that had trial counsel fought the battle to prove petitioner was not present at the Taylor crime scene, the

> prosecution could have requested CALJIC 6.11 at the penalty phase to establish petitioner's criminal responsibility for the Taylor crimes as Penal Code section 190.3, factor (b), aggravating evidence. (RHT 4317-4318.) *However, [the expert] had to concede that he had not considered the possibility of petitioner's liability under CALJIC 6.11 in the event petitioner was not physically present at the Taylor crimes when [the expert] reviewed the material.* (RHT 4318 ["*I wasn't thinking of that, because if the district attorney, if he was thinking of it, would have asked for it*"].)

(RR 362-364, fns. omitted; italics added.)

In the omitted footnote 207, the Referee recognized that contrary to the *Strickland* expert's opinion that the prosecutor would have asked for CALJIC 6.11 "if he was thinking of it[,]"

> *[o]ne fallacy of [the expert's] statement regarding the prosecutor not asking for CALJIC 6.11 at petitioner's trial* is that trial counsel did not put on an alibi defense in an effort to raise a reasonable doubt that petitioner was in fact one of the perpetrators physically present at the Taylor crime scene. *There was no need for the prosecutor to present a theory of CALJIC 6.11 co-conspirator extended liability. [Petitioner's trial counsel] testified that if he had put on a defense to the Taylor crimes, the prosecution could have attempted to establish petitioner's liability for those crimes on the theory that they were the natural and probable or foreseeable consequence of the conspiracy to rob and murder which culminated in the earlier robberies and murders of Eric and Bobby Hassan.* (RHT 5077-5079.) *[Petitioner's* Strickland *expert] erroneously claimed that trial counsel did in fact put on alibi evidence that petitioner was at home at the time of the Taylor crimes.* (RHT 4319:11-13 ["If he is thinking of that, when he was putting on the evidence to begin with, *he put an alibi evidence on that he was at home. So he is putting it on* --"].) When respondent's counsel pointed out to [the expert] that trial counsel did not put on an alibi that petitioner was at home during the Taylor crimes; rather, petitioner was asked on cross-examination his whereabouts at the time of the Taylor crimes, [the expert] contended "Well, then he put the mother on and asked some questions of the mother in the guilt phase." (RHT 4319:14-18.) [Petitioner's expert] failed to directly respond to the follow-up question whether in fact the mother was asked on cross-examination by the prosecutor concerning petitioner's whereabouts on the date of the Taylor crimes rather than trial counsel calling the mother to elicit alibi testimony for those crimes on direct examination.

(RHT 4319-4321.) In fact, it was the prosecutor on cross-examination of petitioner's mother at the guilt phase who interjected the issue of petitioner's whereabouts on December 27 and 28, 1980. (12 RT 2833-2840.) Petitioner's mother placed him at home throughout the evening on December 27 and by inference throughout the early morning hours of December 28, 1980. (12 RT 2834-2839.) On his re-direct examination, trial counsel did not ask any questions regarding petitioner's whereabouts on December 27 or 28, 1980. (12 RT 2851-2856.)

A second fallacy to [petitioner's Strickland *expert's] statement* is his failure to recognize that the decision of the prosecutor not to ask at the penalty phase for CALJIC 6.11 extended liability for co-conspirators was fully consistent with the California Supreme Court finding that there was "no reasonable possibility that the outcome of the penalty phase was affected by the trial court's failure to instruct the jury that it could consider 'other crimes' evidence [specifically as to petitioner, the Jefferson and Taylor murders] only if it found beyond a reasonable doubt that defendants committed those crimes." (*People v. Champion*, *supra*, 9 Cal.4th at pp. 949-950.)

(RR 364-365, fn. 207; italics added.)

In omitted footnote 206, the Referee also found: "Given (1) the jury's convictions of petitioner and Ross for the Hassan robberies and murders, crimes committed by the two defendants with two others; (2) the fact Evan Jerome Mallet could not have been one of those two others due to his incarceration for the November 19, 1980 robbery (petitioner would not bail Mallet out until after the Hassan crimes—see, Exhibit N, Trial Exhibit 114.); and (3) petitioner['s] and [petitioner's *Strickland* expert's] concession that Ross and Mallet were two of the Taylor crime perpetrators, [the expert's] condition precedent that there be 'evidence of an underlying conspiracy and agreement' to support CALJIC 6.11 extended liability is satisfied." (RR 364, fn. 206.)

As this Court recognized in *People v. Ray* (1996) 13 Cal.4th 313, 351, "[t]he sentencer in a capital proceeding is entitled to know about other incidents involving the use or threat of violence for which the defendant is shown to be criminally liable beyond a reasonable doubt whether he

participated as an actual perpetrator or in some other capacity." (See also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 136-137 [applying factor (b) to violent crimes committed by another person and for which defendant "could have been liable as an accomplice"].)

Had petitioner sought to present his alibi defense to the Taylor crimes at the penalty phase, an alibi defense found by the Referee lacking in credibility and inconsistent with petitioner's own trial testimony as to his alibi for the Taylor crimes and as to his claimed disassociation from the Raymond Avenue Crips, the prosecution could have readily sought to have the jury instructed pursuant to CALJIC 6.11. The instruction would instruct that any penalty phase juror could consider the Taylor crimes as aggravating evidence against petitioner under factor (b) of Penal Code section 190.3 if that juror was convinced beyond a reasonable doubt that the Taylor murder and related crimes were the natural and probable consequence of a conspiracy between petitioner, Craig Ross, and other members of the Raymond Avenue Crips to rob and murder drug dealers.

Setting aside all of the Referee's findings against petitioner on this point,[76] there remains the incontrovertible evidence that (1) the gun used to murder Michael Taylor was taken from the Hassan home during the robberies and murders of Bobby and Eric Hassan and recovered in the Player automobile after it crashed following the Taylor crimes (*People v.*

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[76] E.g., the Referee's findings that (1) the proposed alibi defense was not credible; (2) the required alibi witnesses, even if available to petitioner's trial counsel, were not credible and would have undermined not only petitioner's trial alibi testimony and testimony that he was no longer a member of the Raymond Avenue Crips at the time of the Hassan and Taylor crimes, but also petitioner's social history mitigation evidence presented for the first time at the reference hearing; and (3) reasonably competent counsel would not have presented an alibi defense to the Taylor crimes at the penalty phase.

Champion, *supra*, 9 Cal.4th at pp. 898-901, 905-906); (2) the Player automobile was used in both the Hassan and Taylor crimes (*id.* at pp. 899-901, 905-906); (3) Craig Ross was a common crime partner in both the Hassan and Taylor crimes, having been tied to both crime scenes through latent fingerprints left by Ross during the commission of the crimes (*id.* at pp. 899, 901); (4) Craig Ross was found in petitioner's home shortly after the Taylor crimes were committed and the Player automobile crashed following the chase involving Deputies Naimy and Koontz (RR 172, fn. 86; RR 175; RHT 2761-2762); (5) petitioner bailed out Evan Jerome Mallet after the Hassan crimes (with proceeds arguably obtained as a result of the Hassan crimes) and before the Taylor crimes in which by all agreement he [Mallet] was one of the participants (Ex. N); (6) "[t]he murders occurred in the same neighborhood, 15 days apart" (*Champion*, at p. 905); and (7) "[i]n both cases, the victims included drug dealers (Bobby Hassan and Michael Taylor) who were robbed in their homes, ordered to lie on their beds, and shot in the back of the head at close range. These common features of the two killings are sufficiently distinctive to support an inference that both crimes were committed by the same persons." (*Ibid.*)

Thus, it is inconceivable that any penalty phase juror would not have been convinced beyond a reasonable doubt that the Taylor crimes were the natural and probable consequence of petitioner's participation in the conspiracy to rob and murder drug dealers, as reflected by the jury's convictions of petitioner for the robberies and murders of Bobby and Eric Hassan committed 15 days before the Taylor crimes. In short, had trial counsel attempted to put forward petitioner's alibi defense to the Taylor crimes, CALJIC 6.11 would have permitted the prosecution at petitioner's penalty phase to easily establish the Taylor murder and related crimes as proper aggravating evidence to be considered against petitioner under factor (b) of Penal Code section 190.3.

The sum and substance of this argument is that the Referee correctly found based on substantial evidence that even had Simms's fingerprints been available to trial counsel in 1982, that evidence would have had very little evidentiary value to petitioner in either convincing a jury petitioner was not present during in the Taylor crimes or, if not present, not criminally responsible for those crimes as the natural and probable consequence of the conspiracy to rob and murder drug dealers, in furtherance of which the robberies and murders of Bobby and Eric Hassan were committed 15 days earlier. As such, the Referee also correctly found that even with evidence of Simms's fingerprints, reasonably competent counsel would not have presented the Taylor alibi at petitioner's penalty phase trial. For all of the above reasons, this Court should reject petitioner's exceptions to the Referee's findings concerning the issue of Simms' fingerprints.

Finally, in response to that portion of Reference Question 3 asking whether a reasonably competent attorney *would have presented* evidence of petitioner's Taylor alibi at the penalty phase of petitioner's trial, the Referee found:

> A reasonably competent attorney would not have presented the . . . . [¶] . . . [¶] (2) Taylor alibi. No law enforcement officer can testify as to where petitioner was at the time of the Taylor murder. Petitioner was not detained by the LAPD or LASD at the time of Taylor's murder. Petitioner's trial testimony as to his alibi is inconsistent with Mallet's trial testimony. Petitioner's statements are inconsistent with Harris, Bogans and Player's recollection and testimony at the reference hearing. Harris and Bogans' reference hearing statements are inconsistent with each other and their own prior declarations. Marcus Player was not available to petitioner's trial counsel at the time of trial. Harris and Bogans admitted they were Raymond Avenue Crips at the time of trial and they testified at the reference hearing that petitioner, Ross, Mallet, Marcus and Michael Player were all Raymond Avenue Crips at the time of trial. This testimony impeaches petitioner's trial testimony. Harris testified that Ross was present at Champion's home on the morning of December 28, 1980.

(RR 266-267, underlining in original.)

In addition, as respondent previously set forth, the Referee also found:

> A close, detailed review of petitioner's proposed alibi claim [shows it] is simply not supported by the testimony given during the reference hearing.
>
> The three Raymond Avenue Crips gang members, who testified as to the alibi at the reference hearing, were not credible.
>
> The *Strickland* expert's opinion, that there was no downside to the introduction of the alibi evidence for the Taylor murder, lacks foundation. The expert did not read Wayne Harris, Earl Bogans and Marcus Player's testimony. He did not review the evidence reflecting the nature and extent of petitioner's association with Ross, Marcus Player, Evan Mallet, Harris and Bogans. He did not read the reference hearing testimony of the LASD deputies called by petitioner nor did he read Mallet's preliminary hearing transcript, Penal Code § 1538.5 and Evidence Code § 402 motions, or trial transcripts which contained the testimony of the LASD deputies who participated in the post-Taylor murder activities at Helen Keller Park, the car chase and crash and the arrest of Simms and Mallet on the morning of December 12 [*sic*], 1980.
>
> To properly evaluate the question whether a reasonable, competent attorney would or would not present the alibi evidence requires a careful review of the reference hearing testimony identified above and the Mallet proceedings.
>
> The referee finds that the proposed alibi has serious proof problems and that a reasonable, competent attorney would not present this claimed mitigation.

(RR 16.)

Respondent has already reviewed (1) the Referee's "Detailed Discussion of Evidence and Findings" concerning Reference Question 4, pages 312-323 of the report, dealing with the numerous relevant and important "Materials Not Provided to or Reviewed by Petitioner's *Strickland* Expert;" and (2) the Referee's finding that petitioner's *Strickland* expert "had a marked tendency" to employ a personal standard for what the expert would or would not have done, rather than the *Strickland* required standard of what reasonably competent counsel would

or would not have done. (RR 298; see also RR 336, fn. 185 & 341, fn. 191.)

Even without the benefit of all of the above well-documented and firmly supported findings by the Referee, one need look no further than the expert's own report, Exhibit 110, drafted by petitioner's habeas counsel and the expert signed the report without the benefit of any review by the expert of the witnesses' reference hearing testimony outlined by the Referee in his report as critical to any evaluation of whether reasonably competent counsel would have presented the Taylor alibi defense. "It was [petitioner's *Strickland* expert's] opinion that presentation of petitioner's alibi for the Taylor crimes required calling as alibi witnesses Wayne Harris, Marcus Player and Earl Bogans. (RHT 3963.)" (RR 335.) The Referee then quoted the expert's January 2006 report (Exhibit 110, page 20), in the third full paragraph, in which the expert stated:

> This conclusion [that Simms and Michael Player were likely participants in the Taylor crimes] also depends in part on the declarations of witnesses, Marcus Player, Wayne Harris, Frank Harris, Angulus Wilson and Earl Bogans. If these witnesses had testified their credibility would have come into question for a number of reasons. They are all friends or acquaintances of Mr. Champion. Marcus Player and Frank Harris had records. All but Wayne Harris may have had gang associations. As a reasonably competent counsel I would have had concerns about this but, *in* [*sic*] *balance*, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers-and given the importance of rebutting Mr. Champion's involvement *I* would have called these witnesses. Certainly, I would have conducted an investigation which consisted of talking to them in person.

(RR 335-336, fns. and citations omitted, italics added.)

In omitted footnote 184, the Referee found that "[b]ecause [petitioner's *Strickland* expert] failed to read the reference hearing testimony of Wayne Harris, Earl Bogans and Marcus Player, he was unaware that Wayne Harris and Earl Bogans both admitted being members

of the Raymond Avenue Crips, the same gang each claimed petitioner was a member of in December 1980. The latter testimony was inconsistent with petitioner's trial testimony that he was no longer a member of the gang in December 1980." (RR 335, fn. 184.) The Referee further noted,

> [Petitioner's *Strickland* expert] admitted that by using the term "in [*sic*] balance" to describe the decision to call these alibi witnesses, he was signifying that this decision was "certainly a judgment call . . . ." (RHT 3965-3966.) [The expert] further admitted that not only was there a balancing of considerations in the ultimate determination to present these alibi witnesses, he believed "in almost all calls there is some balancing that goes on." (RHT 3966:7-12.) Finally, [the expert] admitted that when one engages in the balancing process, one is "always" exercising judgment. (RHT 3966:13-15.)
>
> By contrast, [the expert] claimed that there was no downside to presenting at trial petitioner's alibi witnesses to the Taylor crimes. (RHT 3971:20-24.) Given that claim, [the expert] was then asked to explain why in his report he used the term "on balance" to describe the decision whether to put on these alibi witnesses if the matter was as clear cut as he now claimed. (RHT 3971:25-26; 3972:1-8.) In answering that question, [the expert] admitted "there was a downside" to the presentation of these alibi witnesses. But it was [the expert's] "belief" "that a competent lawyer decides the downside did not affect Mr. Champion, especially given the other mitigating evidence that was out there that would have fit in with this theory, why he was present with people that were gang members and associate with them at that time. That is a concern. And that's why I said, as a lawyer I think they need to look at that and say where does it fit in? When you look at that with the other mitigating evidence that was not presented, the gang evidence, when you look at that, there is an explanation that tells you that there is really no downside to it, and it is not going to be aggravating, so it is mitigating." (RHT 3972:9-22.) But [the expert] had to then admit that his report (Exhibit 110) acknowledged that even he had concerns with the credibility of these alibi witnesses ("If these witnesses had testified their credibility would have come into question for a number of reasons. [] As a reasonably competent counsel I would have had concerns about this but, in balance, these witnesses corroborate what most jurors would find credible evidence -- the testimony of police officers— and given the importance of rebutting Mr. Champion's involvement I would have called these witnesses."). (RHT 3972-3973.)

(RR 336-337, fns. omitted.)

Contrary to the expert's report, in omitted footnote 186, the Referee found:

> [Petitioner's *Strickland* expert's] opinion is unreasonable in light of the actual reference hearing testimony from Harris and Bogans that petitioner continued to be involved with the gang in December 1980 (contrary to petitioner's trial testimony), their testimony that they never saw evidence of abuse or neglect sustained by petitioner, and the obvious inconsistencies between the alibi as claimed by these witnesses (and Marcus Player) and the alibi testified to by petitioner at his trial, the two reports from [LASD deputies] Lambrecht/Tong and Naimy/Koontz and the reference hearing testimony from all of the deputies involved. Of course, this does not even take into account the reference hearing testimony from Marcus Player (of which [the expert] was unaware) that he would not only have refused to talk with Skyers before petitioner's trial, he would have followed the advice of his counsel if called as a witness at petitioner's trial and refused to answer questions citing his Fifth Amendment privilege against self-incrimination.

(RR 337, fn. 186; alterations added.)

Similarly, contrary to the expert's report, the Referee found in omitted footnote 187:

> In fact, when one looks at the constellation of evidence concerning potential alibi witnesses Wayne Harris, Earl Bogans and Marcus Player (e.g., reference hearing testimony of each, Declarations of Harris and Bogans, previous statements made by Marcus Player to petitioner's counsel, the two LASD reports from Lambrecht/Tong and Naimy/Koontz and the reference hearing testimony from all of the deputies involved), it is clear that petitioner's potential alibi witnesses' testimony would not have "corroborate[d] what most jurors would find credible evidence -- the testimony of police officers . . ." as [the expert] stated in his report. It also would not have corroborated petitioner's own trial testimony dealing with petitioner's alibi for the Taylor crimes. Wayne Harris's reference hearing testimony that when petitioner and Harris arrived back at petitioner's home, Craig Ross was inside the Champion residence, cannot in any conceivable way have been helpful to petitioner's effort to disassociate himself from Ross's involvement in the Taylor crimes.

(RR 337, fn. 187.)

Having recognized in his own report that the decision for trial counsel as to whether to put on petitioner's Taylor alibi defense at the penalty phase was a judgment call, and one which "on balance" warranted the presentation of the defense (Ex. 110, p. 20, par. 3), the expert has implicitly, if not expressly, conceded that reasonably competent counsel engaged in the same balancing process *could* choose not to present that defense. By contrast, the Referee's findings, made only after hearing all of the relevant witnesses' reference hearing testimony and reviewing all of the relevant documentation, were supported by substantial evidence and fully warranted the conclusion that reasonably competent counsel *would* choose not to present that defense for all of the reasons identified by the Referee in his report.

Petitioner's arguments in support of this exception, pages 252-260 of petitioner's brief, rely with one exception on the opinions of petitioner's *Strickland* expert. For all of the reasons set forth above, the Referee correctly rejected these opinions as unreasonable.[77] In his "Detailed

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[77] The only additional evidentiary support cited by petitioner is to reference hearing testimony by petitioner's "gang and homicide investigation" expert, Steven Strong, evidence cited by petitioner on the issue of whether reasonably competent counsel "would have made every effort to refute petitioner's involvement in both the Taylor and Jefferson crimes." (PB 259-260.) Respondent fully addresses the credibility and qualifications of Steven Strong below. Nothing needs to be added at this point other than to recognize that the Referee unsurprisingly did not choose to rely on any opinion from Steven Strong. (See, RR 79 ["petitioner was identified as a member of the Raymond Avenue Crips which was known as a violent criminal street gang at the time of the Hassan crimes. Deputy Williams' opinions, **which petitioner sought to impeach through gang expert Steven Strong**, were confirmed by the reference hearing testimony. Additionally and in spite of discrepancies noted as to the gang graffiti, the evidence adduced during the reference hearing established that petitioner was an active gang participant since the age of twelve and that he had personally been involved in violent crimes since the age of twelve or

(continued...)

Discussion of Evidence and Findings" with respect to the *Strickland* expert's opinions regarding presentation of the Taylor alibi (RR 312-368) the Referee addressed the "Materials Not Provided to or Reviewed by Petitioner's *Strickland* Expert" (RR 312-323), "*Strickland* Standards and *Keenan* Second Counsel" (RR 323-326),[78] "Skyers' Credibility" (RR 326) and "Petitioner's Alibi to the Taylor Crimes." (RR 334-338)

The Referee also addressed: (1) "Mallet's Alibi Testimony" (RR 327-329); (2) the "Awareness by the Jury of the Lack of Evidence Connecting Petitioner to the Taylor Murder and Related Crimes and the Evidence Connecting Co-Defendant Ross to Both the Hassan and Taylor Crimes Scenes" (RR 330-331); (3) the "Jury's Ability to Conclude Petitioner Was Involved in Taylor Murder and Related Crimes Based on Petitioner's Conviction for the Hassan Crimes and the Significance of Evidence Tying Petitioner to the Taylor Crimes under the 'Common Crime Partner' Theory" (RR 331-334); (4) the "Failure of Surviving Victims of Taylor Crimes to Identify Petitioner During January 12, 1981 Live Lineup" (RR 338-342 ["the fact remains that a jury could conclude that the value of the Taylor surviving witnesses' inability to identify petitioner as one of the perpetrators was of limited significance. In contrast, by not pursuing evidence of the field identification inability to identify either Simms or petitioner or to positively identify Mallet and instead focusing on the failure of these witnesses to identify only petitioner at the January 12, 1981 live lineup, as trial counsel did, there was no dilution of the probative value of

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(...continued)
thirteen. It was further established that the Raymond Avenue Crips was a significant source of increased danger to the community"].)

[78] In his merits brief, petitioner has made no claim with respect to the issue of second counsel pursuant to *Keenan v. Superior Court* (1982) 31 Cal.3d 424.

the January 12, 1981 failures to identify petitioner to impeach the reliability of Cora Taylor's in court identification of petitioner"]); (5) "Marcus Player's Refusal to Speak with Trial Counsel and to Voluntarily Testify at Petitioner's Trial" (RR 342-345);[79] (6) "Gang Membership" (RR 345-349); (7) "Inconsistencies in Marcus Player's Reference Hearing Testimony" and (8) "Marcus Player's Lack of Personal Knowledge of the Identity of the Driver of the Player Car" (RR 349-350 [because petitioner's expert had not reviewed Player's reference hearing testimony, the expert "was not aware that at the hearing Marcus Player testified he never personally saw Michael Player driving the Player car on December 27, 1980. Rather, Marcus Player testified that he went through a process of elimination to conclude

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[79] In this section, the Referee noted that "[petitioner's *Strickland* expert] conceded that Player's relationship with petitioner as a common crime partner in the 1977 [West Covina robbery] incident would have been potentially admissible to show the close relationship between Player and petitioner. [The expert] also conceded that these matters would have to go 'into the calculus' about calling Marcus Player as a witness. (RHT 4171-4174.)" (RR 343, underlining in original.) The Referee also noted,

> In his reference hearing testimony, Marcus Player identified photographs introduced as Exhibits DD, EE and FF (Trial Exhibits 174-176) as photographs taken while Marcus Player and petitioner were housed at the CYA. In his direct testimony, [petitioner's *Strickland* expert] was shown by petitioner's counsel photos showing petitioner and Marcus Player (Exhibits EE and FF). He was not shown the photograph of petitioner throwing a Crips' gang sign (Exhibit DD). [The expert] conceded that at petitioner's trial, the jury did not know that these three photographs were taken at the CYA. [The expert] admitted that reasonably competent counsel considering the possibility of calling Marcus Player as an alibi witness would have to consider the possible dangers of exposing the trial jury to evidence that these photographs were taken while petitioner and Marcus Player were both at the CYA with petitioner still throwing a Crips' gang sign. [The expert] further conceded that the issue was not "black and white." (RHT 4175-4180.)

(RR 344, underlining in original.)

that Michael Player had been driving the car. [The expert] conceded that conclusion would be inadmissible on objection by the prosecutor. (RHT 4196-4198.) Further, [the expert] was not aware of anyone identifying the actual driver"]);[80] (9) "Earl Bogans" (RR 350-351 ["[the expert] conceded that reasonably competent counsel would have to be 'concerned' that a

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[80] In footnote 196 at page 350 of the report, the Referee refers to "Court Exhibit 26 and Exhibit EEEE, the stipulation concerning Frank Harris and *his lack of personal knowledge regarding who, if anyone, took the Player car on December 27, 1980.*" (Italics added.) (See also RR 167 ["the first [stipulation] deals with the testimony of Frank Harris, the registered owner of the Buick automobile chased by Deputies Naimy and Koontz in the early morning hours of December 28, 1980 (Court's Exhibit 26 in conjunction with two reports of interviews of Frank Harris conducted by a DA investigator, Chris Briggs, and Mr. Harris' Declaration, which was one of the habeas petition exhibits submitted by petitioner)"].) Exhibit EEEE, found in Volume 112 of 135, pages 4328-4333 establishes that Frank Harris had no personal knowledge as to who, if anyone, took the Player automobile on December 27-28, 1980. Although some days after the Taylor crimes were committed, Michael Player admitted to Frank Harris that he took the car and was with Craig Ross together in the car on December 27, 1980, Player's hearsay statement to Harris is clearly inadmissible. Petitioner does not claim to the contrary. In sum, petitioner has failed to present any admissible evidence at the reference hearing establishing that Michael Player drove the Player automobile on December 27 or December 28, 1980 at the time Deputies Naimy and Koontz began their car pursuit. This lacuna of evidence, coupled with the absence of any evidence matching latent prints from any of the three homicide crime scenes and the Player automobile to Michael Player, fully supports the Referee's finding: "13) Petitioner's claim that Michael Player was the fourth person at the Taylor residence is just that! A prosecutor's comments during argument are not always evidence. Mr. Strong testified that Michael Player was a suspect. True, **but no reference hearing evidence has been presented to support this claim.**" (RR 95-96, italics added.) In light of petitioner's contention that only four persons were involved in the Taylor crimes, petitioner's inability to provide admissible evidence that Michael Player was the driver of the Player automobile in the early morning hours on December 28, 1980 also has the concomitant effect of strengthening the case against petitioner as one of the actual participants in the Taylor murder and related crimes.

reasonable juror could find the difference between the time and whereabouts of petitioner as testified to by Bogans at the reference hearing and as testified to by petitioner at his trial to be a material inconsistency, rather than an inconsistency involving a mere trivial detail. (RHT 4211-4214.) [The expert] had no independent recollection of having seen Exhibit SS, an exhibit containing notes of interviews with among others, Earl Bogans. Those notes reflect that Bogans claimed petitioner had been detained with Marcus Player, Andy Wilson, Willie Marshall and Earl Bogans at 10:30 p.m. at Helen Keller Park. (RHT 4216-4217.) [The expert] conceded that this information claiming that petitioner had been detained with Marcus Player and others was inconsistent with petitioner's own trial testimony that he had not been detained by deputies when Marcus Player was first detained. [The expert] also was not aware that in his reference hearing testimony, Bogans confirmed his recollection that petitioner had been detained with these other people. [The expert] further conceded that a reasonable reading of Exhibit T reflects that at the time the Player car was seen, Bogans, petitioner, Marcus Player and others were still detained by deputies, a circumstance inconsistent with petitioner's trial testimony. (RHT 4220-4222.)" (fn. omitted)]); (10) "Wayne Harris as an Alibi Witness" (RR 352 ["[the expert] admitted that in his Declaration [Ex. S], Harris has petitioner detained not only before the Player car is seen and pursued by deputies but for a period of four hours thereafter. [The expert] further admitted that this is inconsistent with petitioner's trial testimony that he was stopped by police only after the car chase. (RHT 4224-4225.) Of course, Harris' claim concerning petitioner's detention is also inconsistent with Exhibit GG (the Lambrecht/Tong report) as well as the deputies' reference hearing testimony"]); (11) "Wayne Harris' Familiarity with Petitioner's Social History" (RR 352-353 ["since [petitioner's expert] did not review the reference hearing testimony given by Harris, he was not

aware that Harris admitted 'he had known Mr. Champion for ten years since about 1970; that he never saw any evidence that Mr. Champion was abused, physically abused by his brothers or anybody else; and Mr. Champion never appeared to be neglected through food, shelter or clothing; that Mr. Champion appeared to be very normal, just like Mr. Harris in all respects; that Mr. Harris was an articulate witness on the stand and indicated that Mr. Champion was a similar kind of individual, able to communicate, able to understand what others were saying so forth and so on. Had no evidence to indicate any kind of mental problems whatsoever.' (RHT 4248-4249.) [¶] [The expert] conceded that such testimony, if given by Harris at petitioner's penalty phase, would not corroborate any claim made by petitioner that he came from an abused and neglected home where he was beaten by his brothers. (RHT 4249-4250.)"]); (12) "Petitioner's December 28, 1980 Detention; the Detention of Robert Aaron Simms; Latent Fingerprint Comparisons to Exemplar Prints from Known Gang Members; Petitioner's Criminal Liability for Taylor Murder" (RR 354-364[81] ["before [petitioner's expert] began his testimony, he had not been apprised that various LASD personnel, who testified at the reference hearing, testified to the issue of whether it would have been difficult or impossible for petitioner to have been in the Player car which crashed, to then have escaped the perimeter subsequently established by LASD personnel and finally, to have walked back into the perimeter when he was detained at some point after 12:30 a.m. on December 28, 1980. (RHT 4256-4257.) When asked to assume hypothetically that former Deputy Naimy, former Sergeant Hollins and one or both of the captains who

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[81] Much of the subject matter in this section of the report has been reviewed as part of respondent's reply to petitioner's exception concerning the issue of the availability of exemplar fingerprints from Robert Aaron Simms, *ante*, at pages 157-171.

testified at the reference hearing all testified it would not have been difficult or impossible for petitioner to have escaped the perimeter had he been in the car at the time it crashed, and with that hypothetical in mind, whether testimony of that type would serve to undermine the contention stated in [the expert's initial report] Exhibit 109 that petitioner 'had approached the officers from an area which would have made it very difficult, if not impossible, for him to have been involved [in the Taylor crimes],' [the expert] conceded that he had not intended to suggest it was physically very difficult or impossible for petitioner to have been where he was when he was detained by LASD personnel and still to have been in the Player car which crashed. (RHT 4257-4259.) Rather, the suggestion that petitioner's conduct did not 'sound logically to be what one would [expect] the conduct of someone who was involved' to be was deemed by [the expert] to be 'closer to what I intended, because timing is always an issue. And I was basing it on police reports and affidavits.' (RHT 4258.) Rather, petitioner's conduct suggested 'a dumb move on the part of Mr. Champion' if he had in fact been in the Player car at the time it crashed 'from the way the people ran in the direction [petitioner] was coming from.' (RHT 4259.) [¶] [The expert] agreed that suspects do dumb things 'a lot because we read about it a lot.' (RHT 4260.) On the other hand, because petitioner's home was within the perimeter, his decision to walk back into the perimeter after escaping, if petitioner had been in the Player car at the time it crashed, could be viewed as a sign of arrogance on the part of petitioner or even overconfidence. (RHT 4262-4263.) When asked to assume one of the LASD captains who testified at the reference hearing . . . testified that there would be reasons why a suspect who fled the Player car but lived within the perimeter might choose not to immediately go to his home out of fear of leading the police to the suspect's home and, with that assumption, whether that would be an alternative explanation to the explanation petitioner's

move was simply 'a dumb thing to do,' once again [the expert] conceded 'of course it could happen.' (RHT 4261-4263.)" (RR 354-355, ellipses added & fn. omitted)]); and (13) "Gang Graffiti Depicting '$' and Petitioner's Gang Moniker 'Treacherous'" (RR 365-368 ["in his report (Exhibit 110, page 19), [the expert] wrote: 'For example, the prosecution had a police officer, Ronnie Williams, qualified as a gang expert, examine some photographs of graffiti and testify that the graffiti identified Mr. Champion a [*sic*] one of the authors and as an OG or original gangster. And that the graffiti indicated that the money was to be taken in a robbery. All of which could support the implication that Mr. Champion had been involved in the Taylor robbery.' (See also RHT 4321-4322.) [¶] [The expert] conceded that his reference to testimony by Ronnie Williams identifying petitioner as the author of the graffiti was intended to convey that petitioner was the author of the graffiti. After respondent's counsel referred [the expert] to the California Supreme Court's discussion of this issue (*People v. Champion*, *supra*, 9 Cal.4th at page 924, fn. 14.), [the expert] conceded that Deputy Williams did not testify petitioner wrote the graffiti. (RHT 4324:3-6.) [¶] Nevertheless, in the same report [the expert] appeared to criticize the prosecution for failing to seek a handwriting comparison between the graffiti and handwriting samples the prosecution had obtained from petitioner to determine whether a match could be established. . . . (RHT 4324.) When [the expert] was confronted with the obvious problem that his criticism of the prosecution's failure to do handwriting comparisons was irrelevant in light of Deputy Williams' actual testimony which failed to claim petitioner was the author of the graffiti, he conceded the point. [¶] . . . [The expert] also admitted that in Deputy Williams' trial testimony, Williams only relied upon the presence of the '$' in Trial Exhibit 179 [part of Exhibit 55 which includes trial exhibits 177, 178 & 179] to indicate that money was obtained in a robbery or burglary;

Williams did not rely in his trial testimony on the disputed words 'Do Re Mi' in the photographic exhibit to support that premise. (RHT 4327.) [¶] As previously noted, although [the expert] conceded that, if Earl Bogans and Wayne Harris in their reference hearing testimony in which they identified members of the Raymond Avenue Crips and their gang monikers, corroborated Deputy Williams' trial testimony regarding gang membership and monikers, reasonably competent counsel would have 'had some real questions as to whether he puts on something that flies in the face of what everybody else says.' (RHT 4227.) [The expert] nevertheless claimed that such testimony would 'not necessarily corroborate [Williams' trial testimony] if there is more than one person with the same moniker.' (RHT 4329-4331:1-12.) However, whether or not more than one member of the Raymond Avenue Crips shared the same gang moniker, reference hearing testimony from Harris and Bogans, which was fully consistent with Deputy Williams' trial testimony identifying specific members of the Raymond Avenue Crips, as well as those members' gang monikers, corroborates Williams' trial testimony. [The expert's] contention that this testimony from Harris and Bogans would not necessarily corroborate Williams' testimony is unreasonable. [¶] In light of the prosecution's theory that the graffiti identified in Trial Exhibit 179 connected petitioner to the commission of the Taylor murder and related crimes, [petitioner's expert] conceded that to fit within that theory, the graffiti would have had to have been written after the December 27, 1980 Taylor murder and related crimes (RHT 4337.) Although [the expert] could not recall the specifics of petitioner's trial testimony with respect to when the graffiti appeared on the wall, he recalled that 'it was long enough [before the Taylor crimes] that it obviously wouldn't be related to the Taylor crime.' (RHT 4337:1-15.) Thus, [the expert] admitted that under the prosecution theory, the graffiti would have had to have been written 'many years after the petitioner

himself testified it had appeared . . . [.]' (RHT 4337:16-19.) [¶] . . . [¶] As part of petitioner's documentary support for his Petition for Writ of Habeas Corpus filed with the California Supreme Court, petitioner submitted the Declaration of Karl Owens (reference hearing Exhibit LL). [The expert] admitted that from Owens' Declaration, Owens was claiming that he wrote the graffiti in Trial Exhibit 179 in the early 1980s. (RHT 4338-4339.) [The expert] refused to directly answer the question whether putting Owens on to testify with his claim that the graffiti was written in the early 1980s would be inconsistent with petitioner's guilt phase testimony that the graffiti had been written six to seven years before either petitioner testified at his trial (1982) or before the Taylor crimes were committed in December 1980. (RHT 4339-4340.) The referee finds that a reasonably competent trial counsel would not seek to call Owens as a witness" (fns. omitted)].)

For all the foregoing reasons, the Referee's "Detailed Discussion of Evidence and Findings" regarding petitioner's alibi for the Taylor murder and related crimes and the testimony of petitioner's *Strickland* expert, Jack Earley (RR 167-185, 272-275 & 312-368), provides abundant support from the reference hearing record for the Referee's findings set forth at pages 16, 79-80, 92-96, 108-108-A, 266-267, 269-270, 287-298 of his report. These findings can be summarized as follows: (1) petitioner's alibi for the Taylor crimes is not credible; (2) the essential witnesses for the Taylor crimes' alibi, Wayne Harris, Earl Bogans and Marcus Player were not available to trial counsel and, even if available, not credible with respect to their alibi testimony; and (3) reasonably competent counsel would not have presented petitioner's alibi defense to the Taylor crimes at the penalty phase notwithstanding the contrary opinions of petitioner's *Strickland* expert, whose opinions are flawed and rejected as unreasonable due to (a) lack of foundation, (b) faulty reasoning, and (c) the expert's inappropriate use of a subjective standard rather than the objective standard required by

Strickland. As such, this Court should reject each and every one of petitioner's Taylor related exceptions.

F. Petitioner's Exception That "The Referee Errs In Finding That Petitioner Presented No Evidence At The Hearing Rebutting Any Alleged Connection Between Petitioner And The Jefferson Murder" (PB 221-223.)

In this Court's December 10, 2003 Order granting petitioner's motion to clarify the scope of the reference hearing, the Court ruled: "The 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."

In his "**Summary of Referee's Findings**" with respect to Reference Question 2, the Referee found: "2. Mitigation or Rebuttal Evidence for Jefferson Murder [¶] Petitioner did not present any additional mitigation or rebuttal evidence as to the Jefferson murder." (RR 79; see also RR 89 ["Petitioner did not present any mitigating evidence concerning the Jefferson murder. The evidentiary status remains the same as it existed at the time of trial"]; RR 266 ["A reasonably competent attorney would not have presented the following evidentiary mitigating teams at the penalty phase. [¶] (1) Jefferson alibi. No evidence was presented at reference hearing" (underlining in original)].)

In petitioner's exception to the Referee's finding, petitioner presented no additional mitigation or rebuttal evidence to the Jefferson murder. Petitioner relies exclusively on opinion evidence provided by Steven Strong, "testifying as a 'gang and homicide investigation' expert . . . ." (RR 167.) Before addressing each of the six proffered opinions, a few preliminary observations are in order. First, the obtuse nature of petitioner's characterization of Strong's opinions as new mitigation

evidence for the Jefferson uncharged murder is reflected not only by the Referee's alleged "failure" to recognize such opinions as new mitigation evidence, but also by the "failure" of petitioner's *Strickland* expert, Jack Earley, to similarly recognize such opinions as new mitigation evidence for the Jefferson crimes. "Earley conceded that he had not identified any evidence exonerating petitioner from the Jefferson crimes which he contended reasonably competent counsel should have presented at petitioner's penalty phase trial. (RHT 4378 ['if you mean exonerating in the sense of alibis, those types of things? No.'].)" (RR 374, fn. omitted.)

Second, petitioner's brief merely sets forth Strong's opinions without any analysis of the materials reviewed, and once again more importantly, *not reviewed* by Strong as the basis for his opinions or reasoning. As respondent has discussed in detail with respect to earlier exceptions raised by petitioner, this Court in *People v. Bassett*, *supra*, 69 Cal.2d 122, and other cases has made clear that expert opinion in and of itself has little value. Any value to expert opinion derives from the materials reviewed and the reasoning process used by the expert in going from those materials to the opinions expressed. (*Id.* at p. 141.)

In this case, Strong testified that petitioner's habeas counsel "chose the materials [he] received to review[.]" (RHT 3048.) In Exhibit VV, on page 2, the report states: "'In order fully to prepare my evaluation, I have reviewed the following materials: the claims and exhibits from Mr. Champion's petition for writ of habeas corpus having to do with the Taylor and Jefferson crimes.'" (RHT 3122.) Strong testified he "mainly had police reports and they were labeled as exhibits." (RHT 3122.) Thus, Strong did not receive nor did he request from petitioner's habeas counsel transcripts of the Mallet proceedings and the Champion/Ross trial with the exception of testimony provided at petitioner's trial by the prosecution gang expert, LASD Deputy Ronnie Williams. Strong did review Williams's

testimony, but Strong could not recall it at the time of the reference hearing. Strong testified that it would "not necessarily" have been helpful to have those materials "to fully understand what witnesses can actually say . . . ." (RHT 3048-3049, 4861-4862.) In addition, Strong did not even receive this Court's opinion in *People v. Champion*, *supra*, 9 Cal.4th 879. (RHT 3068.) While Strong acknowledged that reviewing this Court's opinion could provide a summary of the facts presented at trial, which might obviate the need to read the actual trial transcripts, Strong testified, "Well, I suppose I could have done that, but it was a limited role in what I was retained to do here. But I imagine that could have been done." (RHT 3068-3069.) Strong further conceded there were no financial limitations that impacted his decision not to seek transcripts from the Mallet and Ross/Champion trials, or to obtain this Court's opinion on direct appeal from petitioner's convictions and sentence of death. (RHT 3069-3070.) Petitioner's habeas counsel also did not provide Strong with the reference hearing testimony of Wayne Harris and Earl Bogans, testimony that identified petitioner, Craig Ross, Mallet, Michael, Marcus and Lavell Player as active members of the Raymond Avenue Crips in December 1980. Strong conceded that the people who would best know whether someone was an active gang member would be other active members of the gang at that time, not Steven Strong. (RHT 3024-3025.) Strong also did not receive the reference hearing testimony of various LASD personnel involved with the Player automobile chase and crash and who subsequently established perimeter. (RHT 4830.)

Compounding Strong's failure to have been provided and to have considered important materials relevant to his opinions, Strong's patently defective reasoning was best illustrated by his malleable and ever changing definitions of what constituted "gang related" crimes versus "gang motivated" crimes. The significance of this issue derives from Strong's testimony that his "beginning role and focused role in what I was retained

to do was to focus on the gang issues, and so I don't know if [review of the Mallet and Champion/Ross trial transcripts] would have assisted me in any way in changing my opinion as to whether someone was active or someone, if it was a gang-motivated crime or not." (RHT 3070-3071.)

On direct examination in response to petitioner's habeas counsel asking Strong for his "definition of gang-related or gang-motivated offense[s]," Strong testified, "Gang-related would mean that a crime was committed or a crime involves gang members, whether on both sides, suspect and victim, or just on one side or the other, the victim was a gang member or a suspect was a gang member. That would mean that it was gang-related. [¶] Gang-motivated would mean that the crime itself was motivated into what they call now benefiting or in furtherance of the gang. The motive for the crime was a gang motive, such as retaliation, mainly." (RHT 2831-2832.)[82] Strong was then asked, "So a gang-related crime

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[82] Strong's reference to "what they now call benefiting or in furtherance of the gang" was to Penal Code section 186.22, which Strong "guess[ed]" was enacted in 1990. (RHT 3062.) "I don't remember my exact words yesterday, but the inference I was trying to get across was that they don't use the word 'motivated' anymore since the 186.22 statute; that they use in furtherance of the gang or in benefit of the gang, and in association with the gang. They don't use the word 'motivated.'" (RHT 3064.) Strong conceded that motive deals with "why somebody does something" so that "if the Hassan murder was committed by Raymond Avenue Crips members for the purpose of robbing Bobby Hassan of marijuana, the motive was financial gain . . . [.]" (RHT 3064.) Despite Strong's final report stating that "'generally speaking, gang-related or gang-motivated activity means that a member's actions *benefit the entire gang* as typically occurs in retaliation for a crime committed against another gang[]'" (RHT 3057, quoting from p. 3 of Ex. VV; italics added), and Strong's reference hearing testimony that "generally speaking, gang-related or gang-motivated activity means that a gang member's actions *benefit the entire gang*[]" (RHT 3058, italics added), Strong later testified, "They [members of the gang] don't all have to be involved or they don't all have to like get a portion of the proceedings [*sic*] for it to qualify as being gang-

(continued...)

(...continued)
motivated or benefiting the gang." As this Court explained in *People v. Gardeley* (1996) 14 Cal.4th 605, "the Legislature in 1988 enacted the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act. ([Pen. Code,] § 186.20 et seq.) As relevant here, the STEP Act prescribes certain penal consequences for crimes committed 'for the benefit of, at the direction of, or in association with' a criminal street gang. (§ 186.22.) Underlying the enactment of the statutory scheme was a legislative finding declaring that 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' (§ 186.21.) To combat the problem, the Legislature declared its intent 'to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs.' (*Ibid.*)" (*Gardeley*, at p. 615.) "To summarize, to subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute [which include robbery and unlawful homicide]; and (3) include members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citations.]" (*Id.* at pp. 616-617, italics in original.)

Because petitioner's crimes were committed in 1980, some eight years before enactment of the STEP Act, no crimes or enhancements provided by that legislation could have been alleged against petitioner. Nevertheless, as interpreted by this Court in *Gardeley*, evidence at petitioner's trial clearly establishes that, contrary to Strong's opinion, the Hassan robberies and murders and the Taylor murder and robberies were "'committed for the benefit of, at the direction of, or in association with [the Raymond Avenue Crips] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by [Raymond Avenue Crips] gang members.'"

could be also a gang-motivated crime, *but not necessarily*." Strong's response: "Correct." Strong answered petitioner's counsel's follow-up question asking "And a gang-motivated crime would have to necessarily be gang-related[]" with an unqualified "Yes." (RHT 2832, italics added.)[83]

On cross-examination, after confirming the accuracy of his direct examination testimony defining "gang-related" versus "gang motivated" crimes, and testifying that he was "a hundred percent certain" of his definitions (RHT 3032-3033, 3058-3059), Strong read into the record from page 3 of his report, Exhibit VV: "'Generally speaking, gang-related *or* gang-motivated activity means that a member's actions benefit the entire gang as typically occurs in retaliation for a crime committed against another gang. For example, drive-by shootings are often gang-motivated, because the purpose of the activity is to retaliate against another gang, to avenge an act allegedly committed against the gang or a member of that gang.'" (RHT 3057, italics added.) In his report, Strong confirmed that he has the terms "gang-related" and "gang-motivated" in quotation marks and that in this portion of the report he was defining those terms. (RHT 3057-3058.)

Denying that his report provided an interchangeable definition for the two terms, Strong claimed, "What it means is you can't have gang-motivated without having gang-related." (RHT 3058.) When respondent's counsel pointed out that his report said "'gang-related or gang-motivated,'" and then asked Strong whether by using the disjunctive "'or,'" the report meant "that either term can apply to the definition you're giving . . . [,]"

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[83] Strong opined that there was no evidence of gang motivation for the Hassan, Jefferson or Taylor crimes, but the Taylor and Hassan crimes were gang-related because at least one perpetrator of the crimes was a known gang member. (RHT 2988-2989.) As to the latter opinion, Strong testified he was "absolutely one hundred percent certain. . . [.]" (RHT 3056-3057.)

Strong answered: "You could interpret it that way." When then asked: "Sir, it's not a question of my interpreting. Isn't that the way it reads?", Strong responded: "Well, sir, that's what those words are and the way they are spelled on this report in that paragraph. You can interpret it any way that you want. You can take any report and get different interpretations of what people say. That happens all the time. *That's why I don't generally write reports, because of this, what's occurring right now.*" (RHT 3059, italics added.)

Strong elaborated on his explanation for why he did not generally write reports "because things can be taken out of context." "Just by what I said, that in this paragraph everything is condensed, it's just generalizing. Generally speaking, generalizing. And your testimony and your questioning of me earlier, it wasn't generalizing. I specifically said gang-related is that when a gang member is involved as either a suspect, witness or a victim in a crime. Gang-motivated is that the crime itself benefits or goes to promote the gang itself. [¶] But common sense -- well, to me, common sense would be that to have gang-motivated, it would have to be gang-related. A gang member would have had to have been involved in that crime." (RHT 3059-3060.) After Strong conceded that that definition was not in the quoted paragraph from his report, he was asked whether he "[r]egret[ted] having written it that way . . . [.]" Strong responds, "*I regret writing any report.*" He elaborated, "Well, you know, for a career it's not fun getting grilled, to be honest with you, because people can take things out of context. You can look at written reports and say whatever you want. *Same thing as I can say whatever I want about what people write.* But you know, that's just the nature of the beast. So no, it's not fun." (RHT 3060-3061, italics added.)

In Exhibit VV, Strong's report reads: "'My review of the applicable police reports and exhibits indicates serious errors in the L.A.P.D. and

L.A.D.A.'s assessment that these crimes were *gang-related* and that Mr. Champion was involved.'" (RHT 3115, reading from Ex. VV; italics added.) After agreeing that the Hassan crimes were gang-related, Strong refused to concede that his report was in error in contending that the LAPD and LADA erroneously concluded they were gang-related. "No, it is not erroneous. It is just that in error, gang-related is there, rather than gang motive. It is a common mistake that happens quite a bit when you are using the term, and you are talking about gang-related and gang motive, *because you can use them interchangeably, as they practically mean the same thing.* It just depends on the context of the sentence that you are using, or the interpretation you are using it of. But, you know, that's open to interpretation obviously."

Strong admitted that in his earlier testimony he never suggested that definitions for the terms were used *interchangeably*, although Strong claimed he "wasn't asked that either, so I didn't answer or state anything to that effect, because I wasn't asked anything about it." (RHT 3115-3116.) When specifically asked whether in his earlier testimony on direct examination "that you could not have a gang-motivated crime that was not gang-related, but you could have a gang-related crime which was not gang-motivated, [Strong] made clear that they are separate and distinct concepts . . . [,]" Strong testified, "Well, in the questions and the answers that I gave in previous testimony here, the way the question was asked of me and the way I answered, you could infer that there was a definite distinction between the two. But like I said, I was never asked anything about being able to interchange related and motivated, or use them in the same sentence, or in the same manner." (RHT 3116-3117.)

As previously discussed, Strong's testimony that he wasn't asked about the interchangeable use of the definitions for the terms is simply wrong. "Denying that his report provided an interchangeable definition for

the two terms, Strong claimed that '[w]hat it means is you can't have gang-motivated without having gang-related.'" (RHT 3058.)

In footnote 82, *ante*, respondent summarized Strong's opinions that while finding no evidence to support a claim that the Jefferson, Taylor and Hassan crimes were "gang-motivated," Strong nevertheless agreed that the Hassan and Taylor crimes were "gang-related." On page 3 of Strong's report, Exhibit VV, the report reads: "'During the time period relevant to Mr. Champion's case, it was quite common for an alleged gang member to commit a criminal act that was not gang-related, as law enforcement personnel understood the term, because it was not done on behalf of the gang.'" (RHT 3105, quoting from Ex. VV.) When Strong was asked on cross-examination to concede that the report was not accurate in light of his testimony defining gang-related, Strong first answered, "Not totally, no." When pressed, however, with the following question: "So this sentence which talks about the time period of Mr. Champion's case it was quite common for an alleged gang member to commit a criminal act that was not gang-related as law enforcement personnel understood the term, is inconsistent with your own definition, because by definition, if a gang member committed the crime, it was gang-related, right?"—Strong finally conceded the point. (RHT 3105-3106.) Strong could not recall whether he informed petitioner's habeas counsel that this portion of his report was an inaccurate statement of his views. Had he notified her, he would have expected counsel to correct this error. But Strong also admitted that if he had notified petitioner's counsel of the inaccuracy and did not get a corrected version, he would *not* have followed up on the matter with petitioner's counsel "[p]robably because of my work load and time constraints, and other issues and other things going on in my work." (RHT 3106-3108.) This would have been the case despite Strong's knowledge

that a report had to be provided to the prosecution and that report had to be accurate. (RHT 3106-3107.)

Strong's report, Exhibit VV, also stated at page 3: "'Prosecutors were aware that gang-motivated crimes were those caused by "gang" activity. In a case where a crime is committed but neither the perpetrator nor the victim are gang members, for example, there *may be insufficient grounds* for alleging a gang motive.'" (RHT 3109-3110, reading from Ex. VV; italics added.) On cross-examination, Strong was asked, "And, therefore, it is not a question of there may be insufficient grounds, there would in fact be no grounds; there is a difference in your mind, isn't there, between there being no grounds and there possibly being insufficient grounds?" Strong's response: "Not in my mind, there may have been a poor choice of words at the time this was written, but not in my mind there is no difference." (RHT 3110-3112.)

In the last sentence of the aforementioned paragraph from Exhibit VV, page 4, the report reads: "'Thus, even when both the suspect and the victims are members of gangs, there may be other reasons for their activities that are not properly characterized as *gang-related or gang-motivated* for purposes of law enforcement investigation or prosecution.'" (RHT 3112, reading from Ex. VV; italics added.) Despite Strong's previous definition for gang-related crime as involving a gang member either as a suspect or a victim, Strong did not find any inaccuracy in the quoted sentence from his report. "Not in my mind, no." (RHT 3112-3113.) When then asked, "Except that gang-related and gang-motivated are different terms, right?" Strong testified, "In your mind. In my mind you can use them either way, and they have been used either way. But, you know, *splitting hairs*, that's inconsistent with what I answered to your question, but in the way that this is phrased, it is not incorrect." (RHT 3113.)

In light of (1) the significant deficiencies shown by the materials not reviewed by Strong, materials that clearly proved petitioner to be an active member of the Raymond Avenue Crips after petitioner's release from CYA in October 1980, and that the robbery murders of drug dealers Bobby Hasson and Michael Taylor by members of the Raymond Avenue Crips were gang-related crimes that benefited members of the gang; and (2) Strong's ever-vacillating, illogical, and completely unconvincing reasoning represented by his testimony concerning the terms "gang-related" and "gang motivated," terms central to Strong's retention as an expert in this matter, Strong's opinions on which petitioner relies as new mitigating evidence for the Jefferson crimes can carry no more weight than the opinions of the prosecution experts in *Bassett*, which this Court dismissed because of similar failures by those experts to review relevant materials and to provide cogent reasoning to support their opinions.

Third, petitioner does not address critical concerns about Strong's qualifications to render expert opinions about the Raymond Avenue Crips in this matter and whether Strong deliberately exaggerated his credentials. On direct examination by petitioner's counsel, Strong testified that his contact with the Raymond Avenue Crips arose in "an undercover capacity purchasing of narcotics. I would assist and go with other officers that were African-American down to Helen Keller Park and areas in that vicinity to basically back them up as narcotics were purchased, and we would see and talk to people that were Raymond Avenue Crips at the time." Strong further testified that in the period of 1979 through 1980, over the course of approximately "14 or 15 months" "[he] would hang out with the other officers I was with who were there and we would hang at the park, or there is a liquor store around the corner just west of Vermont on El Segundo. We would stop there and talk to -- and hang out there at the parking lot and narcotics would be purchased, and I would be with the officers when they

are talking to them. And there were some other locations we went to in and around Helen Keller Park, but to remember the exact addresses today would be impossible. [] [¶] There would be periods where I would be down there maybe three days a week for maybe a month, and then I would be in another area for a month, and then I would get assigned to come back and go with officers for another couple of weeks, three, sometimes four days a week. It would vary as we traveled around hitting the different locations." (RHT 2870-2871.) Strong testified he would investigate "the selling of narcotics, whether they happen to be by a Raymond Avenue Crip or someone that lives right there in Raymond Avenue territory, whether they were an actual member or not would be something that you would have to look at personally to make that determination, whether you saw a tattoo or they were dressed in a certain way or something of that nature." (RHT 2871-2872.) Strong testified that he "probably personally came in contact or saw 15 to 20 different [Raymond Avenue Crips] members." (RHT 2872.)

On cross-examination, Strong conceded that he only did "several" one-month tours at Helen Keller Park during this 13 month period, each month's tour involving working "approximately 3 days a week . . . ." (RHT 3011.) Strong testified he was familiar with a detective from LAPD by the name of Billy Eagleson. Strong denied that Eagleson worked the undercover narcotics unit in 1979-1980 when Strong was assigned to the unit, although Strong conceded Eagleson "worked that unit at one time." When asked to address a statement detective Eagleson gave to respondent's investigator that LAPD did not send white undercover officers such as Strong to South Central Los Angeles for undercover drug buys "because of concern the officer would be jumped because he is white, working in a black neighborhood, and as a result the white officers working undercover

were sent to areas other than South Central Los Angeles, including to the Valley," Strong denied that was true. (RHT 3007-3010.)

Detective William Eagleson, a 30-year veteran with the LAPD, testified that in the latter part of 1978 to January 1980, Eagleson worked "Administrative Narcotic Division." His "responsibility was just to go out within the city and try to buy drugs. I used my own vehicle." Eagleson "was allowed to go to the Hispanic and Black neighborhoods, and [LAPD] would have the White operators work within Hollywood or the Van Nuys area." (RHT 6920-6923.) In this assignment, Eagleson came to know Steven Strong. Strong was assigned to the same unit as Eagleson. "Well, he had come into the unit and he was sitting right next to me and we started up a conversation. And we shared some moments as far as our military past. And he was not in the same squad I was, but he was assigned to the Hollywood, and what we would call the Valley area, downtown area." The rules that applied to Eagleson in this assignment applied to Strong. In this period of time, Eagleson was familiar with Helen Keller Park. The Los Angeles Sheriff's Department Lennox Station had jurisdiction over Helen Keller Park. When asked whether it would "have been a regular practice, that is to go to let's say Helen Keller Park, Sheriff's Department jurisdiction, three times a week for four weeks at a time in conducting undercover buys[,]" Eagleson testified, "Absolutely not, that's not the concept of the program at all." (RHT 6928-6929.) When asked whether Steven Strong went "to Helen Keller Park in the late '70's, early '80's, as part of that program[,]" Eagleson testified, "Absolutely not." During this period of time, Eagleson testified, "Steve and I in that capacity had seen each other for anywhere from six to eight months. I just said I first met him during the first few days. And then we will meet again on a Monday, where we will get additional monies. But aside from coming in in the

evening and booking your dope, I would always see him at least once a week [when everybody would get together]." (RHT 6931-6932.)

A portion of Exhibit 114, Steven Strong's LAPD gang and homicide training and experience resume prepared by Strong after he testified at the reference hearing and was cross-examined with a reference to Detective Eagleson. (RHT 4802, 4809.) Strong indicated, "'During assignment in Central also did the following: three one-year special problems unit assignments. One-year undercover major narcotic. My assignments were all over Los Angeles County area. Had gone to Helen Keller Park several times and liquor store as backup for other officers during their investigations. Had minimal contact with [Raymond Avenue Crips]. I was not a gang expert at that time.'" (RHT 6932, quoting from Ex. 114.)[84] When asked whether what Strong claimed in this document had happened, Eagleson testified, "Again, based on my knowledge and seeing Steve, this is totally impossible to have happened, working outside of the county and all areas of the county. And the program wasn't designed for that, absolutely not." (RHT 6932-6933.) When Detective Eagleson was given Strong's testimony concerning his work experience at Helen Keller Park (RHT 3010:22-26; 3011:1-21) and then asked whether that had in fact happened, Eagleson testified, "Not in the program I am working, absolutely

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[84] When Strong was asked to explain the discrepancy between his characterization of activities at Helen Keller Park set forth in Exhibit 114 ("'had gone to Helen Keller Park *several times* . . . . Had minimal contact with RAC'" (italics added)) and his earlier reference hearing testimony (RHT 2870-2872) that he had been there approximately 3 days a week for maybe a month (i.e., approximately 12 days), Strong testified that the term "several times" meant to him "anything over two, three." (RHT 4803-4808.) Strong also admitted that he did not prepare Exhibit 114 until after he had been apprised through cross-examination that Detective Eagleson would contest Strong's testimony about Strong's alleged undercover buy activity at Helen Keller Park. (RHT 4809.)

not. That's not the concept of the program. That's not our jurisdiction. And that's not the concept, we wouldn't have gone into a location for three days and then reinsert even once a month or once every three months, it just doesn't work that way. I don't understand why he would say that." (RHT 6935-6936.)

Detective Eagleson also testified that the Raymond Avenue Crips in the period 1979 to 1980, fell within the responsibility of the Sheriff's Department to monitor. "They had their own what we call database gathering intelligence, and if for some reason we had individuals that would come north on us, it would cross reference within our database, but for the most part the hard files on the Raymond Street Crips would be a county gang." (RHT 6936-6937.)[85]

Strong also conceded on cross-examination that from 1979 through 1980, he did not personally know and had never met any of the relevant Raymond Avenue Crips members including petitioner, Ross, Mallet, Michael, Marcus and Lavell Player, Earl Bogans, Wayne Harris, Robert Aaron Simms, Willie Marshall or Angulus Wilson. Strong did not know any of their gang monikers. (RHT 3011-3014.) Strong could not identify petitioner in Exhibit 47, nor could he identify petitioner or any of the other relevant Raymond Avenue Crips members shown in Exhibits AA, BB, CC, DD, EE and FF. (RHT 3015-3016.) Strong testified that he did not know why petitioner or Craig Ross or Marcus Player or Michael Player or Lavell Player or Jerome Evan Mallet or Robert Aaron Simms joined the Raymond Avenue Crips. (RHT 4892.) Strong had no independent recollection of

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[85] Eagleson also called into question the credibility of other aspects of Strong's testimony concerning Strong's qualifications as a gang and homicide investigation expert. (See, RHT 6937-6938 [discussing "D.S.D. [Detective Support Division]" and the disbanding of C.R.A.S.H. [Community Resources against Street Hoodlums].)

ever having testified as a gang expert about the Raymond Avenue Crips during the period 1979 to 1982. Strong conceded that in 1979 to 1980, he was not qualified to be a gang expert nor was he qualified to render opinions as to why people joined gangs. (RHT 4824-4825, 4894-4895.)[86]

Fourth, petitioner does not address the fact that petitioner's habeas counsel wrote Strong's draft report (Ex. WW) and his final report (Ex. VV) in which petitioner's counsel expressed her theories of the case. (RHT 3041-3046.) For example, petitioner's counsel wrote: "'Steve, what follows is my sense of what should have been done, what was omitted, what was required. Please edit wherever you see fit with what you know to be the proper investigative procedures, and refer to specific regulations or procedures where you see fit.'" (RHT 3046, quoting from p. 5 of Ex. VV.) "'Steve, attached is the first draft of the report. It covers your expertise and

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[86] Strong's qualifications as a homicide investigation expert fare no better than his gang qualifications. Strong only worked as a homicide detective for approximately 2 years, late in his LAPD career, during the period April 1989 to April 1991. From April 1991 to 1993, Strong worked as a detective at Newton Division assigned to the "juvenile table" and the "auto theft table." He did not work during this period as a homicide detective. Thereafter, for the remaining 2 years of his LAPD career, Strong was assigned as a liaison between LAPD and the LADA "assisting getting the paperwork properly handled with the filing deputies in the District Attorney's office on the 17th floor of the Criminal Courts Building. . . [.]" (RHT 4817-4821.) During Strong's many years with the LAPD, he was **never** called by either the prosecution or the defense as a homicide investigation expert. (RHT 4826.) In the 11 years since he left LAPD and set up Dominguez-Strong Investigations, a firm for which 80% of its business comes from court appointments to assist criminal defense attorneys in the preparation and/or presentation of a criminal case and an additional 10% or more from testifying as an expert witness on behalf of criminal defendants, Strong had only been retained or appointed to act as a homicide investigation expert for a defendant in a criminal case or a convicted defendant seeking review through habeas corpus "maybe three or four times. . . ." (RHT 4821-4823, 4826.)

some general opinions about the Taylor and Jefferson crimes. I see you testifying to the following: is there sufficient evidence to conclude that Taylor and Jefferson crimes were *gang-related* (D.A. theory RAC conspiracy to to [*sic*] [] rob and murder neighborhood marijuana dealers). And if so, is there sufficient evidence to conclude Mr. Champion as the alleged Raymond Avenue Crip involved. If so, on what basis. If not, why not.'" (RHT 3042, quoting from p. 1 of Ex. WW, italics added.) Strong testified that he reviewed the draft, Exhibit WW, for accuracy. Strong had the opportunity to "correct any mistake that [he] believe[d] [petitioner's habeas counsel] had made in putting forth what she believed would be [his] view of the matter . . . [.]" (RHT 4831-4832.)

Just as habeas counsel's preparation of the 154-page life history portion of Dr. Miora's report raised grave concerns about the facts underlying her expert opinion, in Strong's draft report, Exhibit WW, page 8 of the report, but page 9 of the exhibit, petitioner's habeas counsel wrote: "'While they ultimately did not make absolute in-court identifications, *both Deputies Naimy and Koontz identified Robert Simms as he fled the vehicle.*'" (RHT 3050, quoting from Ex. WW, p. 8; italics added.) That same paragraph is repeated verbatim in Strong's final report, Exhibit VV. (RHT 3051.) When asked the basis for that information, Strong testified: "Ms. Kelly." "On that particular statement there, I relied on Ms. Kelly for that information, yes." (RHT 3051.) When presented with a summary of the testimony provided by Deputy Koontz in the Mallet case concerning his limited observation of the individuals in the Player car, including his characterization of the occupants as ranging in size from that "of a midget, four feet, and the size of a basketball player, six-foot-six inches," Strong conceded that was inconsistent with his understanding of what petitioner's habeas counsel was telling him on this point. (RHT 3051-3052.) Rather than requesting the record of the testimony of Koontz and Naimy, Strong

did nothing "because I had read in the documents that *one of the two* deputies identified [Simms] *as being similar* to one of the people in the car because of the jacket and his physical size." (RHT 3052.) When confronted with the discrepancy between his report claiming "both deputies Naimy and Koontz identified Robert Simms," and Strong's recollection that "one of the two identified [Simms] as being similar to one of the people in the car[,]" Strong testified that this was only "technically" inconsistent. Strong was then asked: "It's technically different whether two people identify somebody or only one person can make the identification. Is that your testimony?" Strong responded: "Yes." (RHT 3052.) Nevertheless, when pressed whether "in a car used as the getaway car from a murder scene, don't you think it would be important, not a technical difference, but an important difference as to whether two people could identify somebody as coming from that car or only one person could[,]" Strong conceded it was an important difference. (RHT 3053.)

Just as the actions of petitioner's habeas counsel in selecting materials for Dr. Miora's review and then drafting a significant portion of Dr. Miora's Declaration inescapably contaminated both the expert's Declaration and reference hearing testimony, so too with petitioner's gang expert. With Steven Strong, petitioner's habeas counsel's actions in selecting the materials for Strong's review and then drafting his initial and final reports undermine the reliability and credibility of Strong's opinion testimony.

Respondent turns now to the six opinions of Strong which petitioner contends represented new mitigation evidence concerning the Jefferson murder that was not recognized by the Referee. "(1) There was nothing in the commission of the Jefferson crimes which indicated petitioner or Ross was involved. (R[H]T 2894-2895 [Strong].)" (PB 222.) Strong testified that from his review of the documents, he did not see anything to indicate

petitioner or Ross was involved in the Jefferson homicide. He also agreed that there were no identifiable witnesses to the murder. This opinion is not new mitigation evidence refuting petitioner's involvement in the Jefferson crimes. As this Court recognized in its opinion on direct appeal summarizing the evidence presented at trial concerning the Jefferson murder, "[t]he prosecution introduced no evidence directly connecting either defendant in this case with Jefferson's murder." (*People v. Champion*, *supra*, 9 Cal.4th at p. 917; see also *id.* at p. 919 ["As defendants themselves point out, the prosecution offered no evidence directly connecting defendants to Jefferson's death. Thus, it seems unlikely that the jury gave the evidence substantial weight"].) Strong's opinion adds nothing to what petitioner's trial jury already knew about evidence connecting petitioner to the Jefferson crimes.

"(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. (R[H]T 2863-2864, 2872-2876, 2888-2894, 2893-2894 [Strong].)" (PB 222.)[87] Given Strong's testimony on direct examination that (1) a "gang-related" crime required identification of either the perpetrator(s) or the victim as a gang member; (2) the reports he reviewed did not reflect any known eyewitnesses to the crimes who could identify the perpetrator(s) and thus rule in or rule out the perpetrator(s) as gang members rendering the crime, and (3) without evidence that the crime was "gang-related" one could not establish that the crime was "gang-motivated," even if "gang motivation" and Strong's definition of that term were relevant to rebut petitioner's involvement in the

[87] Respondent finds nothing in petitioner's citation to Strong's testimony found at RHT 2872-2876 that is relevant and supportive of this opinion of Strong's.

Jefferson crimes as mitigation evidence, petitioner's jury already knew there were no eyewitnesses establishing that gang members committed the crimes and thus establishing, again using Strong's definition, that the Jefferson crimes were gang-related. Given that fact, and given Strong's definition requiring that a "gang motivated" crime be "gang related," it is nothing more than a self fulfilling prophecy for Strong to conclude from the reports he did review that there was no evidence the Jefferson crimes were "gang-motivated." More important, as petitioner's trial counsel repeatedly argued to the jury, the prosecution itself believed there was insufficient evidence to prove beyond a reasonable doubt petitioner's connection to the Jefferson crimes, a belief reflected by the failure of the prosecution to charge either petitioner or Craig Ross with the Jefferson crimes.

In finding harmless error for the failure of the trial court to instruct petitioner's jury that before evidence of the Jefferson murder could be considered at the penalty phase as aggravating evidence a juror must first find beyond a reasonable doubt that petitioner committed the Jefferson crimes, this Court observed: "Thus, in his closing argument, the prosecutor acknowledged that the jurors could not consider, in aggravation, the fact that defendants had engaged in other criminal activity unless they found beyond a reasonable doubt that such activity occurred. The prosecutor also acknowledged that the jury had not explicitly made such findings at the guilt phase of the trial, and said that he was not asking jurors to make such findings at the penalty phase. Given this concession, we find no reasonable possibility that the outcome of the penalty phase was affected by the trial court's failure to instruct the jury that it could consider 'other crimes' evidence only if it found beyond a reasonable doubt that defendants committed those crimes." (*People v. Champion, supra*, 9 Cal.4th at pp. 949-950.)

In fact, in Strong's testimony cited in support of petitioner's contention that his opinion was new mitigation evidence, Strong conceded that "[the Jefferson crimes] *mirrored* the other crime *across the street* [i.e., the Hassan murders and robberies]; that it appeared to be drugs involved, and so that would be my first target of investigation would have been the drug motive." (RHT 2890-2891, italics added.) When asked on direct examination "what similarities did [Strong] see between Jefferson and Hassan, if any[,]" Strong testified: "Well, just the M.O. of the crime, the way the crime was carried out [presumably the execution style murders with shots to the head, the hands of both Bobby Hassan and Teheran Jefferson tied behind their backs, with Bobby and Eric Hassan lying on a waterbed while Jefferson's upper torso was on his bed and the fact that there were drug sales apparently involved in both locations]." (RHT 2891-2892; *People v. Champion*, *supra*, 9 Cal.4th at pp. 898-900, 917-918.) Strong failed to include both the geographical and temporal proximities of the Jefferson and Hassan crimes. (See, RR 5-A.)[88] Jefferson's murder was committed sometime during the evening hours of November 14 or morning hours of November 15, 1980. The Hassan crimes were committed December 12, 1980. The bullet that killed Jefferson was "similar to the bullet that killed Bobby Hassan," and bore rifling characteristics consistent with those generally found in Colt revolvers, the type of gun held by both petitioner and his codefendant Ross in photographs recovered from

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[88] In response to a later leading question by petitioner's counsel, Strong admitted that another connection between the Jefferson and Hassan crimes included the close proximity of the two residences. (RHT 2895.)

petitioner's home.[89] (*People v. Champion*, *supra*, 9 Cal.4th at pp. 900, 917.)

Finally, because as noted, petitioner's habeas counsel did not provide Strong with this Court's opinion on direct appeal, Strong did not have the benefit of this Court's analysis rejecting petitioner's claim on direct appeal that the trial court erred in joining the Taylor and Hassan charges. "Moreover, the jury could properly consider the evidence that defendant Champion was involved in the murder of Michael Taylor in deciding whether he participated in the murders of Bobby and Eric Hassan, because the killings shared various significant characteristics. The murders occurred in the same neighborhood, 15 days apart. Both involved four

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[89] Once again, with subsequent leading questions, petitioner's habeas counsel convinced Strong to admit that another similarity between the Hassan and Jefferson crimes was the same or similar weapon used to kill all three victims. (RHT 2895-2896.) However, Strong failed to recognize the connection between the type of gun that could have been responsible for the three murders based on the rifling characteristics of the bullets involved—i.e., Colt revolver—and photographs of petitioner and Ross holding that type of gun in photographs recovered at petitioner's home within a month of the Hassan murders and two months of the Jefferson murder. "Deputy Williams identified the persons appearing in a set of four photographs found in defendant Champion's bedroom when he was arrested. One photograph showed Lavel Player clasping defendant Ross's left hand, while Ross held a revolver in his right hand. A second photograph depicted defendant Ross embracing Marcus Player. A third showed defendant Champion standing in the kitchen, brandishing a revolver, while the fourth depicted Lavel Player holding a bat, with a gun (apparently the same revolver) thrust into the top of his trousers." (*People v. Champion*, *supra*, 9 Cal.4th at p. 920; see also *id.* at p. 900 ["a ballistics expert testified that Bobby Hassan was killed by a .357-caliber bullet with rifling characteristics; the latter are produced by the gun that fired the bullet, and were described by the expert as 'six lands and grooves with a left hand twist.' The expert also testified that most Colt revolvers produce these particular characteristics. The prosecution produced photographs, found in defendant Champion's home, showing each defendant holding a Colt revolver"].)

perpetrators and the same getaway car; when police seized that car on the night Michael Taylor was killed, they found in it items stolen from both the Hassan and the Taylor homes. In both cases, the victims included drug dealers (Bobby Hassan and Michael Taylor) who were robbed in their homes, ordered to lie on their beds, and shot in the back of the head at close range. These common features of the two killings are sufficiently distinctive to support an inference that both crimes were committed by the same persons. [Citation.]" (*People v. Champion*, *supra*, 9 Cal.4th at p. 905.)

In sum, petitioner's contention that "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" is neither new mitigation evidence refuting petitioner's involvement in the Jefferson crimes nor accurate.

"(3) The Jefferson homicide had the indications of a drug robbery/homicide. These types of crimes occurred frequently during the relevant time period. (R[H]T 2895 [Strong].)" (PB 222.) Over respondent's objections for lack of foundation and calling for speculation, the Referee allowed Strong to testify: "We routinely got information from officers and read teletypes on murders throughout not only our city, but other cities in the county, on murders and the way they occurred, and it was a common occurrence of people basically being executed from what appeared to be over drugs most of the time." (RHT 2893.) When then asked by petitioner's habeas counsel, "[s]o there was nothing unusual or unique about the homicide of Mr. Jefferson and the homicide of Mr. Bobby Hassan in your estimation[,]" Strong answered: "Only that they mirrored a lot of drug-related-type murders." (RHT 2893-2894.)

First, this is nothing more than a variation on the previous argument based on Strong's opinions that there were insufficient similarities between

the Jefferson, Hassan and Taylor crimes to connect petitioner to the Jefferson crimes. Second, during the relevant time frame of 1979-1981, Strong was neither a gang expert nor a homicide investigator. Further, as previously set forth, responsibility for the Raymond Avenue Crips and Helen Keller Park fell within the jurisdiction of the LASD, not LAPD of which Strong was a member. Fourth, petitioner has produced absolutely no evidence, either documentary or testimonial, about specific drug-related robbery murders occurring near the Taylor, Hassan, and Jefferson crimes during 1979-1981, let alone evidence that those robbery-murders were substantially similar to the Taylor, Hassan and Jefferson crimes but *were not committed* by members of the Raymond Avenue Crips. To the extent petitioner's argument can be viewed as raising a third-party culpability theory, he has not provided an adequate foundation to admit Strong's testimony for that purpose. In *People v. Kaurish* (1990) 52 Cal.3d 648, 684-687, this Court reiterated,

> the standard for admitting evidence of third party culpability was the same as for other exculpatory evidence: the evidence had to be relevant under Evidence Code section 350, and its probative value could not be "substantially outweighed by the risk of undue delay, prejudice, or confusion" under Evidence Code section 352. [Citation.] In addition to articulating a general standard in [*People v.*] *Hall* [(1986) 41 Cal.3d 826], we formulated more specific guidelines to judge admissibility of evidence of third party culpability: the rule does not require "that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." [Citation.]

(*People v. Kaurish*, *supra*, 52 Cal.3d at p. 685; alteration in original.)

Recently, citing to *Kaurish* and *Hall*, this Court applied the same standard for admitting evidence of third-party culpability at the guilt phase

of a trial to the penalty phase of a capital case trial. (*People v. Hamilton* (2009) 45 Cal.4th 863, 913-914.)

In *Kaurish*, this Court also addressed the defendant's contention that he was improperly denied discovery of "'police reports pertaining to child molestation killings in the Hollywood area' for the six months preceding and following the murder." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 686.) In finding no error, this Court observed:

> In the present case defendant's request was broad and somewhat burdensome, both with regard to expenditure of police resources to review files and to the privacy interests of third parties. *Moreover, he made no specific allegations that similar sexual molestation/child murders had occurred in Hollywood during the same period that might justify the imposition of such a burden.* (Cf. *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118 [defendant's discovery request granted for 12 homicide investigation reports on murders similar to the murder with which he was charged].) Because defendant failed to provide greater specificity or a greater showing of relevance in his broad discovery requests, we conclude that the court did not abuse its discretion in denying it. [¶] Moreover, even if the court erred in denying the request, no prejudice resulted. There is no indication that similar murders did in fact take place in the Hollywood area during the relevant period. On the contrary, Detective Thies testified on cross-examination that no such similar murders had occurred.

(*People v. Kaurish*, *supra*, 52 Cal.3d at p. 687, italics added.)[90]

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[90] In *Kaurish*, Detective Thies was not like the petitioner's witness Steven Strong. Strong was (1) not the homicide investigator assigned to the Jefferson, Taylor or Hassan murder investigations; (2) not qualified as a homicide investigator during the relevant time of 1979-1981; (3) not qualified during the relevant time as a gang expert or even shown as of the time of the reference hearing to be at all familiar with petitioner, Craig Ross, Evan Jerome Mallet, Marcus, Michael and Lavell Player, Wayne Harris and Earl Bogans as members of the Raymond Avenue Crips, their gang monikers, and their reasons for becoming members of the gang; and (4) without adequate foundation to establish his familiarity with robbery homicides committed during the relevant time and in the relevant area of

(continued...)

In petitioner's case, petitioner failed to produce evidence showing that robbery-murders substantially similar to the Jefferson, Hassan and Taylor robbery-murders were committed during the relevant time in the relevant area. Strong provided no foundation establishing he was qualified to provide admissible evidence regarding such occurrences during the relevant time and in the relevant area. Further, without police reports and other evidence from which judgment could be made as to whether such other crimes were, in fact, substantially similar to the Taylor, Jefferson and Hassan crimes except that they were not committed by members of the Raymond Avenue Crips, Strong's opinion has little if any value in refuting petitioner's involvement in the Jefferson crimes, for the same reasons this Court rejected the expert opinions from the prosecution experts in *Bassett*.

"(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." (PB 222.) Petitioner offers no citation in support of this contention as new mitigation evidence refuting petitioner's involvement in the Jefferson crimes. Regardless, this Court found "common features of the two killings [of Michael Taylor and Bobby Hassan] . . . sufficiently distinctive to support an inference that both crimes were committed by the

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(...continued)
the Jefferson, Taylor and Hassan robbery murders. In *Kaurish*, Detective Thies was the homicide investigator assigned to the murder of 12 year old Monique and the detective who arrested Kaurish. (*People v. Kaurish*, *supra*, 52 Cal.3d at pp. 669-673, 675-676.) In addition, Thies "reviewed Hollywood police reports for the relevant period and found no similar crime." (*Id.* at p. 687.) Petitioner has produced no evidence that Strong undertook a review of robbery-murder police reports for the relevant period and the relevant area to assess whether substantially similar robbery-murders of drug dealers committed by other than members of the Raymond Avenue Crips occurred in that area during that period.

same persons. [Citation.]" (*People v. Champion*, *supra*, 9 Cal.4th at p. 905.) In addition, this Court found, "[b]ecause the [Player] car contained items stolen during the commission of the Hassan and Taylor killings, the jury could reasonably infer that the same four men who had fled from the Buick had also participated in the murders." (*Id.* at pp. 905-906.) Petitioner's contention that evidence Michael Taylor was not as prolific a drug dealer as Teheran Jefferson or Bobby Hassan has no relevance to show a dissimilarity between the Jefferson and Hassan robbery murders. In fact, petitioner's contention simply adds another dimension of similarity between the crimes, i.e., that all three murder victims were in involved with drugs. Given this Court's findings with respect to the evidentiary connection of the Hassan and Taylor robbery murders, including Craig Ross as a common crime partner whose latent fingerprints were found at both crime scenes, petitioner's contention that "a large quantity of drugs . . . left behind at the Hassan crime" (PB 222) constitutes new evidence refuting petitioner's involvement in the Jefferson robbery murder not only fails to undermine the linkage between the Taylor and Hassan crimes, it lacks any relevance to the Jefferson crimes. At most, petitioner's contention reflects another argument that trial counsel could have presented at petitioner's trial had he so chosen. But since trial counsel had a much more compelling argument disassociating petitioner from involvement in the Jefferson and Taylor crimes—i.e., the prosecution's recognition that there was insufficient evidence to prove beyond a reasonable doubt petitioner's involvement in the Jefferson or Taylor crimes—trial counsel cannot be faulted for failing to pursue what can only be described in comparison as a trivial argument. In any event, from the evidence presented at trial petitioner's jury could have considered for itself any dissimilarities between the Jefferson and Hassan crimes and the significance of those dissimilarities.

"(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. (R[H]T 2898-2999 [*sic*] [Strong].)" (PB 222.) Petitioner has failed to identify how evidence that the Jefferson and Hassan crimes were handled by different detectives refutes petitioner's involvement in the Jefferson crimes, which was the definition for mitigating evidence this Court provided in its December 10, 2003 Order. Petitioner's exception identifies no other specific evidence related to this subject that would refute petitioner's involvement in the Jefferson crimes. Petitioner's fifth stated evidentiary basis is simply irrelevant.

"(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. (R[H]T 2913-2915 [Strong].) No such information existed for petitioner and Ross. (R[H]T 2916 [Strong].) In fact, until only a few months earlier, petitioner had been in CYA since 1978 and Ross in state prison." (PB 223.)

First, setting aside whether Strong was qualified to opine about standard police procedures for gang-related murder investigations in 1979-1981, whether or not standard police procedures required documentation is simply irrelevant as evidence that petitioner and Ross were crime partners. As this Court observed on direct appeal:

> [T]he prosecution called [LASD] Deputy Sheriff Ronnie Williams, an expert in juvenile gangs, to testify. Deputy Williams was assigned to the "street gang detail" at the Los Angeles County Sheriff's Lennox Sub-Station; for the previous four and one-half to five years his work

had involved the investigation of street gangs in the Lennox area. He testified as follows: [¶] Deputy Williams was familiar with the Raymond Avenue Crips. That gang's "prime hangout" was Helen Keller Park. *Defendant Ross, defendant Champion and Evan Malett (identified by Mary and Cora Taylor as the man who held a gun during the robbery in which Michael Taylor was murdered) had each told Williams that they were members of the Raymond Avenue Crips.* According to other gang members, the gang's nicknames for defendant Ross were "Evil" and "Little Evil"; Champion's gang nickname was originally "Mr. Crazy 8," and later "Treacherous," "Trech ," and "Mr. Trech." Champion, Ross, and Malett were all members of a subgroup of the Raymond Avenue Crips called the "Old Gangsters," because they had been gang members for a long time. [¶] [] According to Deputy Williams, a man named Frank Harris owned the Buick. Three of Harris's sons—Lavell, Marcus, and Michael Player—were members of the Raymond Avenue Crips. Deputy Williams had seen Marcus and Michael Player driving the Buick. In the months immediately preceding the murders of the Hassans and Michael Taylor, Williams had frequently observed defendants together with the Player brothers and Malett. [¶] . . . [¶] Deputy Williams identified the persons appearing in a set of four photographs *found in defendant Champion's bedroom when he was arrested.* One photograph showed Lavel Player clasping defendant Ross's left hand, while Ross held a revolver in his right hand. A second photograph depicted defendant Ross embracing Marcus Player. A third showed defendant Champion standing in the kitchen, brandishing a revolver, while the fourth depicted Lavel Player holding a bat, with a gun (apparently the same revolver) thrust into the top of his trousers.[91] Deputy Williams also identified three other photographs, which an anonymous person had given him. Two of the photos show defendant Champion standing face-to-face with Marcus Player, while the third

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[91] "Player identified petitioner in Exhibit 47. Player identified Lavelle Player and Craig Ross in Exhibit AA, a photograph taken around 1980. Exhibit BB, a photograph also taken around 1980, shows Lavelle Player; Marcus Player and Craig Ross are seen in Exhibit CC. That photograph was taken after Marcus Player had been paroled from CYA in August 1980 and before the photograph had been seized from petitioner's residence on January 14, 1981." (RR 184-185; see also RR 344.)

depicted defendant Champion "making a Raymond Crip sign" with his hands.[92]

(*People v. Champion*, *supra*, 9 Cal.4th at pp. 919- 920; italics added.)

Second, "[p]etitioner was identified as a member of the Raymond Avenue Crips which was known as a violent criminal street gang at the time of the Hassan crimes. Deputy Williams' opinions, which petitioner sought to impeach through gang expert Steven Strong, were confirmed by the reference hearing testimony." (RR 79.) "In December 1980, [Wayne] Harris was a member of the Raymond Avenue Crips and had been so for five years. His gang moniker was 'Pops.' Petitioner was a member of the Raymond Avenue Crips in December 1980. His moniker was 'Treach.' Previously, his moniker was 'Crazy 8.' Other members included Craig Ross ('Little Evil'); Marcus Player ('Spark'); Michael Player ('Scragg'); and Jerome Evan Mallet (known to Harris as 'Kook'). Petitioner, Ross, Mallet, Lavell and Michael Player were original Raymond Avenue Crips. (RHT 2764-2767.) The Raymond Avenue Crips used Helen Keller Park as their hangout in December 1980." (RR 173-174.) "In December 1980, [Earl] Bogans and petitioner were members of the Raymond Avenue Crips. Bogans had been a member since approximately 1977. Petitioner was already a member of the gang at that time. Petitioner's gang moniker was 'Treach.' Other members with their monikers in parentheses included: Craig Ross (Evil), Jerome Evan Mallet (Kooc), Marcus Player (Spark),

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[92] "Marcus Player identified Exhibits DD, EE and FF as photographs taken at the CYA while both Player and petitioner were housed there. Marcus Player was released in approximately August 1980. Marcus Player and petitioner are shown in Exhibits EE and FF. In Exhibit DD, petitioner is seen throwing up a Raymond Avenue Crips' gang sign, suggesting to Marcus Player that petitioner was a member of the Raymond Avenue Crips. (RHT 2023-2026.)" (RR 184; see also RR 344 ["[petitioner's *Strickland* expert] conceded that at petitioner's trial, the jury did not know that these three photographs were taken at the CYA" (underlining in original)].)

Michael Player (Scragg), Lavelle Player (Scrooge), Robert Aaron Simms (Lil Owl) and Jerome Evan Mallet's brother. (RHT 2659-2662, 2714.)" (RR 178, fns. omitted.) Further, Wayne Harris testified that after "the police let Harris, Marcus Player and petitioner go to petitioner's house[,] [o]n arrival Harris saw Craig Ross inside the house with petitioner's mother and brother. (RHT 2761-2762.)" (RR 175; see also RR 291 ["Harris testified that upon being released by the LASD on December 28, 1980, he went to petitioner's home where Craig Ross was present. Petitioner told Dr. Miora that Ross and Winbush were two of his best friends and that they did not use drugs" (underlining in original)][93].)

Third, as the Referee noted,

> [Petitioner's *Strickland* expert] was also questioned about Exhibit O (Trial Exhibit 113) the rental agreement in the name of Craig Ross dated December 27, 1980 (the date of the Taylor crimes) and recovered from petitioner at the time of his arrest on January 9, 1981. Although [petitioner's expert] conceded the exhibit "would go to the fact that [Ross and Champion] knew each other", he did not believe this evidence would undermine efforts to disassociate petitioner from Ross. (RHT 4266-4268.) [The expert] refused to concede that because of the date of the document, the exhibit would demonstrate that the association between petitioner and Ross continued right up to the date of the Taylor crimes. (RHT 4268-4269.) Nevertheless, [the expert] conceded that reasonably competent counsel could infer petitioner obtained the document from Ross on some date between December 27, 1980 and January 9, 1981. (RHT 4269-4270.) [The expert's] refusal to accept the obvious is an example of the unreasonableness of his opinions.

(RR 348, fn. 195.)

Fourth, "Petitioner's Arrest Record. The location of each juvenile arrest, the nature of petitioner's conduct and the identity of co-participants

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[93] "Nevertheless, petitioner had told Dr. Miora during one of his interviews that Craig Ross was a close friend of his. (RHT 8880-8881, citing to Exhibit 136 at p. 20 [""two of his close friends refused drugs, including Craig Ross and Raymond Winbush""].)" (RR 201)

are a significant erosion of the claim of increasing community dangers. Petitioner's arrest record, when viewed in the context of date, location and nature of offenses by Evan Mallet, Marcus Player (arrest for 11-19-80 robbery at El Segundo/Raymond) and Craig Ross (1977 attempted murder of Mark Hartman that took place in Helen Keller Park), illustrates that the Raymond Street Crips were the major source of violent crime in petitioner's neighborhood. *The reference hearing evidence indicates petitioner was present at Helen Keller Park when Ross shot Hartman.*" (RR 294, italics added.)

Fifth, petitioner's jury had already convicted petitioner and Craig Ross of the robbery murders of Eric and Bobby Hassan, crimes committed on December 12, 1980.

In light of the above evidence adduced at both trial and the reference hearing showing petitioner's continued relationship with Craig Ross and active membership in the Raymond Avenue Crips after October 23, 1980, Strong's unsubstantiated opinion rendered without foundation–"[b]efore 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[] (R[H]T 2913-2915 [Strong][])" (PB 223) – is simply not new evidence refuting petitioner's involvement in the Jefferson robbery murder. The LASD, not the LAPD, was responsible for the Raymond Avenue Crips in the relevant time frame. It was exactly because of that that Deputy Williams developed the information concerning petitioner, Ross, and other members of the Raymond Avenue Crips to which he testified at petitioner's trial. As previously noted, Strong could not even identify by picture or gang moniker petitioner, Ross, or any of the other relevant Raymond Avenue Crips members.

For all of the foregoing reasons, petitioner's exception to the Referee's finding that petitioner failed to present new mitigation evidence refuting petitioner's involvement in the Jefferson crimes should be rejected.

G. Petitioner's Exception That "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" (PB 223-228.)

Citing to the Referee's finding that "petitioner made no showing that any mitigating evidence existed at the time of the trial as to the two juvenile aggravators presented to the jury. The juvenile aggravators were the 1977 robbery and the 1978 assault with a deadly weapon. The jury was aware of petitioner's age[,]" petitioner admits that he failed to "offer evidence as to the facts involved in the 1977 robbery and 1978 burglary [*sic*]." (PB 223.)[94] Nonetheless, petitioner insists that he "did in fact offer mitigating evidence which could have been presented to petitioner's penalty jury." (PB 223.) Petitioner contends:

> 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 than many of these young men 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,

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[94] Petitioner's 1978 juvenile offenses were robbery and assault with a deadly weapon, not burglary. (See, RR 304-305.)

being cared for in a way and that he had felt lost at home and not recognized." (R[H]T 8003 [Miora].)

(PB 223-224, italics added.) Petitioner contends that 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." (PB 224.)

First, with respect to petitioner's foundational predicates for his newly minted "reasons for joining a gang" mitigation evidence—"absence of a strong, stable, nurturing father figure and an abusive older brother"—the Referee found (1) the evidence could not have been discovered by reasonably competent counsel conducting the appropriate penalty phase investigation due to deliberate nondisclosure to trial counsel by petitioner, his mother and siblings, compounded by (a) the absence of contemporaneously available records identifying evidence of physical abuse to petitioner by his older brothers or a dysfunctional family environment resulting from the absence of a father figure and (b) the presence of contemporaneously available records indicating a properly functioning family environment and a healthy and well petitioner; and (2) in the case of petitioner's claim of sibling abuse, evidence of that claim was not credible.

The Referee's painstaking findings on these points are fully explained and well founded. (See, e.g., RR 13 ["the testimony from petitioner's mother and sister (Rita Powell) that petitioner was physically beaten by his older brothers, and in particular Lewis Champion III, was not credible. Given the nature of the alleged beatings and the complete absence of any observations of injuries, bruises or complaints by petitioner to his best friend Gary Jones or fellow gang members that testified at the reference hearing, the referee finds that petitioner's mother and sister exaggerated

their testimony"]; RR 30 ["[a]s will be detailed further, the referee has grave concerns whether petitioner in fact ever sustained the alleged beatings or fetal abuse claimed during this reference hearing or whether the family suffered from the degree of poverty presently claimed. Certainly, the credibility of the reference hearing testimony of petitioner's mother and siblings in this area is marginal at best. (See, Exhibit H.)"]; RR 83 ["the referee does not find the claimed mitigation of poverty, extreme financial hardship, malnutrition or deprivations of childhood necessities to be credible. Dr. Minton's December 15, 1978 report describes petitioner as well developed and well nourished"]; RR 85 ["Mrs. Champion, E.L. Gathright, Rita and Linda Champion are the primary witnesses on [the] subject [of sibling abuse]. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers. Their testimony was i) inconsistent with that offered by other witnesses during the reference hearing who were close friends or fellow gang members of petitioner; ii) inconsistent with Mrs. Champion's statement to school officials and the CYA; and lastly, iii) petitioner's description of his family life to CYA staff. The referee did not find the claim of physical beatings of petitioner to be credible. [] [¶] The absence of any medical report, police report or observation by anyone of physical bruises or injuries on petitioner, particularly by Gary Jones, discredits the claim by family members that petitioner was physically beaten by Lewis III"]; RR 87 ["Mrs. Champion's prior statements concerning [petitioner's] birth, childhood and development to school authorities and CYA personnel as well as her in court testimony greatly reduce her credibility"]; RR 88 ["15. Ronald Skyers' Credibility [¶] The referee found Skyers to be a very credible witness. Where the record reveals a conflict between Skyers' direct testimony and that of Mrs. Champion and Rita Champion as to discussion of family matters, I found Skyers to be more reliable. I found that family members, including

petitioner, knowingly did not disclose family matters to counsel. This is confirmed by Dr. Miora's interview report"]; RR 88 ["16. Mrs. Champion's Credibility [¶] With the exception of areas dealing with her love and affection for petitioner and her family, I found that when Mrs. Champion was confronted with her prior written statements, she was less than truthful"]; RR 289 [among the significant factors weighing against the presentation of the additional mitigation evidence proffered at the reference hearing was "the lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation"]; RR 11-12 ["2. Non-Disclosure of Family History [¶] The referee finds the nondisclosure of family history by petitioner or members of his immediate family purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose. [¶] Skyers personally investigated the following: [¶]. . . [¶] . . . [¶] . . . [¶] (4) He met with the family members at their home, his office and in court. [¶] (5) He attempted to discuss with the family and petitioner matters related to petitioner's family history and up bringing. In none of his meetings did anyone, including petitioner, say anything about any of the now claimed family difficulties including poverty, fetal abuse, traffic accident head trauma, sibling physical beatings, death of petitioner's stepfather and its impact on the family and the domestic violence and abuse suffered by petitioner's mother at the hands of petitioner's biological father. [¶] . . . [¶] . . . [¶] . . . [¶] . . . [¶] The referee's finding on the failure to disclose is based on Skyers' testimony, Dr. Deborah Miora's (hereinafter referred to as 'Dr. Miora') observations in her report that petitioner's

mother did not disclose the abuse she suffered at the hands of Lewis Champion II to others, petitioner's statement to Dr. Miora that his mother was secretive and had told the children not to talk about family matters on the street and petitioner's statement to a CYA doctor that he did not confide in others except one girlfriend he found he could talk to. Lastly, the referee finds that no counsel or investigator would have been able to discover and develop the family mitigation at the time of trial." (underlining in original)]; RR 30-31 ["Even if one assumes *arguendo* the truth of the present allegations concerning available mitigation, the referee finds that reasonably competent counsel could not have discovered evidence in these three areas [alleged beatings, fetal abuse and extreme poverty]. As more fully discussed in a review of the Declaration and reference hearing testimony of petitioner's 'mitigation specialist,' Dr. Miora, the unwillingness of petitioner's family members to disclose family business to outsiders was and is a well-recognized phenomenon. Thus, even if one or more of the mitigation 'themes' now raised by petitioner's habeas counsel and presented through the reference hearing testimony of petitioner's mother, siblings, best friend Gary Jones and Dr. Miora, in fact were supported by credible evidence, Skyers' failure to uncover the circumstances in light of a deliberate and concerted effort by petitioner's mother and family to keep such matters from Skyers fails to reflect a failure of reasonably competent counsel to conduct an appropriate investigation in anticipation of a possible penalty phase trial. [¶] Finally, in addition to the reference hearing testimony of Gary Jones, Wayne Harris, Earl Bogans and Marcus Player which substantially undermined petitioner's present claims of available mitigation evidence in these and other areas, the prosecution had readily available rebuttal evidence to refute petitioner's present claims such as Exhibit H (Initial Home Investigation Report), Exhibit CCC (Los Angeles Unified School District [hereinafter referred to as 'LAUSD']

school records), Exhibits D, I & J (the CYA psychological and psychiatric evaluations) and the absence of any contemporaneous medical, police, probation, school, social services or financial records relating to petitioner to support petitioner's present claims of available mitigation evidence."]; RR 222-223 [Referee's conclusions regarding trial counsel's investigation of petitioner's development and functioning, the absence of contemporaneous records supporting petitioner's claims, the existence of records and reference hearing testimony contradicting those claims and reference hearing testimony from family members supporting Skyers's reference hearing testimony concerning nondisclosure of these claims despite trial counsel's questioning of family members about petitioner's childhood and family history]; RR 173-174 [testimony of Wayne Harris concerning petitioner and petitioner's gang affiliation], RR 177-178 [testimony of Earl Bogans regarding same], RR 182, 184-185 [testimony of Marcus Player regarding same], RR 230-234 [detailed review of testimony from Gary Jones and additional reasons for finding petitioner's claim of sibling abuse not credible, not discoverable by reasonably competent counsel in 1982, and subject to impeachment by the prosecution with significant rebuttal evidence]; RR 268-269 ["Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure. [¶] Beyond the non-disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family members that testified in support of petitioner's alibi for the Hassan murders during the guilt phase. [¶] Reference hearing witnesses Gary Jones, [Wayne] Harris, [Earl]

Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse. [¶] Mrs. Champion's prior statements to school authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing."]; RR 241-244 ["In addition, as noted, petitioner, petitioner's mother, petitioner's older sisters and brother Reggie never told trial counsel about the 1968 traffic accident or that petitioner's development and functioning had been adversely impacted either by such accident or the death of his stepfather, Trabue Sr. The fact that petitioner and his family attributed no long-term significance to the 1968 traffic accident is also fully consistent with what petitioner's mother told the CYA parole agent during the December 11, 1978 home interview as reflected in the Initial Home Investigation Report (Exhibit H). [¶] In Exhibit H, petitioner's 'mother stated that the separation [of petitioner's mother and biological father] apparently has had no ill effects on subject or the other children. [Petitioner's mother] stated that she has been married and widowed twice since.' Under 'Intrafamily Relationship,' the investigator wrote that '[t]he family is described as normal in all aspects. The children all relate well to each other, respect the parent, and are helpful at home. The two oldest girls work regularly on a full-time basis and contribute to the support of the family.' In describing petitioner's 'Developmental History,' petitioner's mother told the investigator that 'there were no serious illnesses or injuries suffered as a child. [Petitioner] demonstrated no abnormal developmental behavior during his formative years.' It is clear that although given the

opportunity to claim petitioner's functioning and development had been adversely affected by not only the separation of petitioner's mother and biological father, but the traffic accident, petitioner's mother painted quite the opposite picture. [¶] It must also be recalled that in none of the CYA psychological and psychiatric evaluations (Exhibits D, I & J) or the Pollack/Imperi assessment (Exhibit 46) did petitioner in any way raise the history of the 1968 traffic accident, either as to his own injuries or the death of his stepfather, or suggest that the accident or the abandonment of petitioner's family by Lewis Champion II before petitioner's birth in any way affected petitioner's development and functioning. If Lewis Champion II was as abusive as petitioner now claims, common sense dictates that removing this disruptive influence could only have helped, not harmed petitioner. [¶] Finally, even had petitioner and his family made the claims presently raised with respect to the 1968 traffic accident, the death of Trabue Sr. and the abandonment of petitioner's family before petitioner's birth by his biological father, Lewis Champion II, in their conversations with trial counsel before petitioner's 1982 trial, reasonably competent counsel would have had to confront the practical problem of how to present such evidence requiring testimony from petitioner and petitioner's family, including his mother, older sisters and brother, when the jury had already concluded that they were not credible witnesses in their effort to provide petitioner with an alibi for the Hassan murders and an innocent explanation for petitioner's possession of Bobby Hassan's jewelry taken in the course of the execution murders/robberies of Bobby and Eric Hassan. [¶] Separate and apart from that task is the equal prospect of having such claims impeached by evidence reflected in Exhibits D, H, I, J and CCC, all of which, with the exception of petitioner's school records (Exhibit CCC), had been reviewed by trial counsel before petitioner's trial. [¶] In sum, Skyers' pretrial investigation failed to disclose that petitioner had been in a

traffic accident in 1968 in which petitioner's stepfather had been killed or that his death had allegedly adversely affected petitioner's development and functioning. However, in light of the jury's rejection of the credibility of the very witnesses Skyers would need to recall at penalty phase to bring these matters before the jury, reasonably competent counsel would have done as Skyers did at penalty phase. [¶] In general, the same analysis applies to petitioner's ancillary claims raised in this proceeding, principally through the testimony of Dr. Miora, that the lack of a strong father figure both before Trabue Sr. entered petitioner's life and after his death in 1968, the general impact of divorce and general family chaos, and Lewis Champion II's mistreatment of petitioner's mother all adversely affected petitioner's functioning and development. As noted, assuming the allegations of abuse inflicted on petitioner's mother by petitioner's biological father are true, having this abusive individual out of petitioner's life would seem to have benefited petitioner's development and functioning. Second, at no time did petitioner's mother, older sisters, older brother or petitioner himself in any way suggest that petitioner's development and functioning or the functioning of petitioner's family in general had been adversely affected by the absence of petitioner's biological father or the absence of a strong father figure either before or after Trabue Sr. Once again, one is drawn back to the statements made by petitioner's mother in December 1978 as reflected in Exhibit H, statements which would not have raised any concerns in these areas for trial counsel who had reviewed this document and who, as a result of conversations with petitioner's mother, older sisters and older brother, had received no information contrary to that reflected in the mother's account of a normal happy family with no serious accidents or injuries to petitioner. [¶] In addition to the incredibly difficult strategic problem of presenting these areas as potential mitigation evidence at the penalty phase in light of the

contrary information available to trial counsel and the compromised credibility of family members, even if trial counsel had an 'expert' witness such as Dr. Miora available to testify to the significance of these areas (testimony which would have been subject to impeachment through the very records which corroborated the pretrial accounts given trial counsel by petitioner and his family), the gravamen of Dr. Miora's reference hearing testimony is predicated on the credibility of the claims of general family chaos, poverty and physical abuse to petitioner and other family members by petitioner's older brothers, claims which the referee has not found to be credible. While the referee does not doubt the difficulties for a single parent raising a family, in particular a family as large as petitioner's immediate family was, a competent attorney would have grounds not to present this evidence based on family credibility issues as well as its selectability. The referee finds particularly credible Gary Jones' reference hearing testimony describing the childhood he shared with petitioner. 'We had a really beautiful childhood.' (RHT 5665-5666, 5689.)"].)

Second, petitioner's contention that the Referee failed to recognize petitioner proffered this evidence as mitigation evidence is simply wrong. Petitioner fails to cite to the Referee's findings at page 84 of his report. "7. Gang Participation [¶] Petitioner's reasons for joining a gang were developed by the gang expert, CYA reports and Dr. Miora's interview. This information does not constitute mitigating evidence *when viewed within the context of all circumstances of petitioner's development, conduct and character.*" (RR 84, italics added.) As the Referee explained, "This type of evidence does not rebut the aggravating aspects of Factor A. Petitioner's expressions of how loyal he was to the Raymond Avenue Crips and other members support respondent's position that fellow gang members in the reference hearing would do anything to aid a fellow gang member." (*Ibid.*)

The Referee's findings make clear that while the Referee understood petitioner offered evidence of why he joined the Raymond Avenue Crips as "mitigation" evidence, the Referee nevertheless found that under the totality of evidence concerning petitioner's character, development, and functioning, such evidence was not, in fact, mitigating. The Referee's findings also make clear that when the Referee found at page 89 of his report that petitioner "made no showing that any mitigating evidence existed at the time of the trial as to the two juvenile aggravators presented to the jury. The juvenile aggravators were the 1977 robbery and the 1978 assault with a deadly weapon. The jury was aware of petitioner's age[,]" the Referee was limiting these findings to evidence mitigating petitioner's actual involvement in the crimes, not the more general issue of why petitioner was an active gang member participating in these crimes, the issue the Referee specifically dealt with at page 84 of his report.

Petitioner also fails to direct this Court to the relevant "Summary of Referee's Findings" with respect to Reference Question 3 set forth at page 272 of the report. "Due to petitioner's juvenile arrest records and the underlying conduct on the part of petitioner and the extent and duration of his Raymond Avenue Crips membership, any potential mitigation theme that would allow the prosecution to rebut with petitioner's criminal and/or gang history would cause a reasonable competent attorney not to present the potential mitigation evidence. This includes any psychological experts seeking to testify as to petitioner's childhood development, any defense gang expert, CYA adjustment and community dangers. [¶] The juvenile aggravators did not reflect any mitigation aspects other than age and lack of maturity. The jury was aware of petitioner's age at the time of trial. Any effort to develop this area of mitigation would result in the consideration of the prosecution seeking to introduce all of petitioner's arrests, the evidence

relating to his culpability, evidence of his gang association since the age of twelve and the identity of his associates."[95]

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[95] In rejecting petitioner's claim that he was amenable to rehabilitation based upon his conduct while at CYA, the Referee painstakingly set forth over eight pages of his report petitioner's "Prior Record," "Prior Probation," "Personal History (as reflected in 1978 probation report)," "Probation Officer's Analysis and Plan for 1978 Assault Crime," "1978 CYA Commitment," "Post-CYA Parole," "CYA Staff Report 1978-80 (BS000028; BS000087)," "Race Riot YTS Report Dated October 10, 1979; Incident date July 21, 1979 (BS000082)," "January 4, 1979 CYA Report on Prior Conviction (BS000088)" and "January 4, 1979 Case Conference Report dictated by John Spurney (BS000089 through BS000093)." (RR 147-156; see also RR 298-312 [summary of "evidence . . . admitted and considered by the referee" concerning (1) "Petitioner's Juvenile Record," "Petitioner's Statements to CYA Staff and Doctors," "CYA Chronological," "CYA File-Examples of Positive/Negative Staff Remarks" and "1982 Probation Report (BS000020)-Eric Hassan"].) As the Referee found, "Petitioner's membership with the Raymond Avenue Crips commences from the age of 12 to the time of the Hassan crimes. This latter aspect includes reference hearing evidence indicating petitioner had a close association with Craig Ross from 1977 through the Taylor murder. In addition, a close examination of petitioner's arrest record reveals his involvement in serious violent crimes and further indicates petitioner was arrested or associated with Marcus Player and Evan Mallet in other Raymond Avenue Crips activities. [¶] Any proposed mitigating theme that would permit the prosecutor to present additional evidence of gang membership or petitioner's criminal history would be prejudicial to petitioner." (RR 286-287; see also RR 293-297 [summarizing the Referee's findings concerning rebuttal evidence damaging to petitioner but not presented at the guilt or penalty phase of petitioner's trial, noting the prosecution would have likely sought to introduce in response to a "mitigation expert" called by petitioner including "[a]s to the two juvenile aggravators presented at trial, the prosecution had the complete circumstances available including some additional aspects that were *not* disclosed to the jury. [¶] (1) A 1977 West Covina robbery that involved among others Marcus and Michael Player. Both Marcus and Michael displayed handguns to the victim in petitioner's presence. [¶] (2) A 1978 police report of an assault with a deadly weapon that took place at Helen Keller Park which indicates that Evan Mallet was

(continued...)

Third, even petitioner's *Strickland* expert failed to identify what petitioner now claims to be mitigating evidence for the juvenile aggravators arising from the absence of a father figure and the presence of sibling abuse which allegedly drove petitioner to the Raymond Avenue Crips. "In his final report (Exhibit 110, last paragraph on page 16), Earley addressed the issue of 'Mitigation of Participation in Juvenile Aggravators.' Earley's specific criticism of trial counsel on this issue is found in one sentence, the last sentence of the paragraph. 'While there are police reports for the events in Mr. Skyers [*sic*] file, there are no juvenile court documents, no transcripts of the proceedings and no indication whatsoever that Mr. Skyers made any attempt to talk to any of the witnesses, victims, or attorneys of either of these offenses.' Nowhere in this report does Earley identify what mitigating evidence for these 1977 and 1978 crimes reasonably competent counsel should have presented at petitioner's penalty phase." (RR 260.)

Fourth, petitioner contends, "Community dangers also contributed to petitioner's association with gang members and participation in street crimes." (PB 226.) To the contrary, the Referee found that petitioner and his fellow Crips created the community dangers, not the other way around.

Specifically, the Referee found: "13. Petitioner's Neighborhood [¶] The increased community dangers, which started to develop in petitioner's neighborhood, are not considered mitigation evidence that was available to trial counsel. Petitioner's involvement in a violent criminal street gang at or about the time of the increase in violent crimes and the gang's use of Helen Keller Park as their hangout would be rebuttal to any claimed mitigation based on increased community dangers." (RR 87.) Following a

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(...continued)
present when petitioner was arrested. A witness claimed Mallet placed the victim's radio into the car trunk" (italics added)].)

discussion of Dr. Miora's reference hearing testimony concerning "community dangers affecting petitioner's development and functioning," including statements made by petitioner to Dr. Miora (RR 234-239), the Referee found:

> Petitioner's neighborhood did not appear to become more dangerous until at least 1975, the year when petitioner, by his own account to Dr. Miora, was already a member of the Raymond Avenue Crips. Further, the circumstances making the neighborhood dangerous arose directly from gang activity of the Raymond Avenue Crips and their rivals. As such, residential burglaries, drug use and increased violence marked the contours of the community danger. Petitioner's commission of a residential burglary in December 1976 was itself a crime which increased community danger. Of course, for the nearly two year period petitioner was in the CYA between 1978 and October 23, 1980, petitioner was not affecting or affected by community dangers. [¶] In this proceeding, petitioner has failed to identify any community dangers which reasonably competent trial counsel should have uncovered which were not of petitioner's and his fellow Raymond Avenue Crips gang members' own doing and which adversely affected petitioner's functioning and development. Petitioner's functioning and development were adversely affected by the fact that petitioner was not only a member of a dangerous street gang, but one actively involved in that gang's criminal activity which made petitioner's community the danger it was. However, in light of petitioner's guilt phase testimony in which he claimed to have left the Raymond Avenue Crips in 1979, the jury's rejection of that testimony expressed through petitioner's convictions for the Hassan murders and robberies, the reference hearing testimony of Wayne Harris, Earl Bogans, Marcus Player and Gary Jones, the availability to the prosecution of using petitioner's December 21, 1976 residential burglary to impeach claims of community dangers unrelated to petitioner's own actions and the potential for evidence to inform the jury that the photographic exhibits (Exhibits DD, EE and FF) were taken while petitioner was at the CYA, even had there been available evidence of community dangers affecting petitioner's functioning and development unrelated to petitioner and the Raymond Avenue Crips, reasonably competent counsel would have wisely chosen not to pursue the issue at the penalty phase. There does not appear to have been any evidence of community danger available for use by petitioner's counsel in 1982 which did not involve directly or

indirectly the danger created by petitioner and his fellow Raymond Avenue Crips gang members.

(RR 239-240.)

For all of the foregoing reasons, this Court should reject that portion of petitioner's exception claiming that the "referee erred in not recognizing that petitioner presented evidence mitigating his involvement in the juvenile offenses . . . ." (PB 223.)

The second part of petitioner's exception concerning the juvenile aggravators is: "[t]he referee erred . . . in denying funding for a gang expert, whose testimony would have permitted presentation of more such mitigating evidence." (PB 223, 227-228.) Petitioner claims, "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." (PB 227.)

This second part of the exception should be rejected. First, petitioner fails to include record citations to show he requested funding for a gang expert and any decisions by the Referee or this Court in response to such applications. Volume 7 of 135, Item E, Volume 1 of 8, in the initial unpaginated pages, itemizes "**Item F From Table of Contents (Sealed)- Petitioner's Confidential Funding Material**, Request to Supreme Court for Funds" for entries beginning 12/19/2003 and concluding with an entry for 7/23/2007. Respondent has not been provided with the sealed documents nor has petitioner referred to them in petitioner's brief seeking to support petitioner's exception regarding denial of funding for a gang

expert. Rather than delay these proceedings by seeking to have the sealed documents unsealed, respondent addresses the exception on the present state of the record. Respondent notes, "a trial court's order may be set aside only if it constitutes an abuse of discretion. *An order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.* [Citation.]" (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321, italics added.) In the case of petitioner's capital case reference hearing, the Referee was not entrusted with the final word on funding requests for experts submitted by petitioner's habeas counsel. Rather, while the Referee made the initial assessment of the propriety of the funding requests, the Referee forwarded any such recommendation to this Court, which made the ultimate determination as to whether funding would be approved as requested, denied in part or in whole. (See, e.g., Docket of this Court, entries pertaining to funding requests dated July 13, 2005 through February 14, 2006.)

Second, petitioner received funding for not one, but two experts, Steven Strong and Dr. Deborah Miora, who testified to mitigation evidence arising from petitioner's gang involvement with the Raymond Avenue Crips. There is no record citation by petitioner to support his claim that either of these experts were "foisted on" him by this Court. There is no record citation by petitioner to support his claim that the two experts were foisted on him. Moreover, on cross-examination, Strong admitted testifying in another case,

> "what happens a lot when you deal with gang members, when they are very young and they initially get in, you see a pattern of activity that gravitates from misdemeanor up into felonies. It's pretty consistent except for times that they are in prison or jail, there will be a lapse. Generally when they get older, 21 years and older and up, they tend to gravitate away from the active participation as a gang member for several reasons. Sometimes they will mature. Sometimes they will

> get married or have children. Sometimes they found that participating in a gang and gang activity gets you put in jail, because you have too many people involved and someone -- somebody will rat you out and put you in jail. It's not uncommon to see someone that's getting up in, you know, the early to mid-twenties, late twenties, that they tend to gravitate away from the active gang banging."

(RHT 3018-3019.) Clearly, this testimony addressed "the impermanency of gang membership and gang criminality."[96]

Strong also testified with respect to underlying causes for the existence and proliferation of gangs and gang activity, stating in his final report, Exhibit VV, at page 11: "'Youth at the time join gangs for several reasons. Some join for what they missed at home, a family structure. They had no one that cared about them, clothed or fed them. Some joined because they liked the respect and status. Some like the style of dress and camaraderie. Some people, young and old in the neighborhood, adopted the type of dress and color of the gang in the area.'" (RHT 4887-4888.) Strong also testified that some joined the gang because they could make easy money committing robberies. (RHT 4891.) Strong conceded that some members of the gang might have liked the fact that they put people in fear for their lives, holding power over them when they pointed guns at the people, threatening them. (RHT 4891-4892.) In his final report, Strong also wrote: "'As gangs grew in size and number, kids joined for protection. But you have to be careful who you label as a gang member. Sometimes kids in the neighborhood adopted similar dress to get along, but were not forced to join because they grew up with the kids in the neighborhood. Not every young adult in the neighborhood is a gang member.'" (RHT 4894, quoting from Ex. VV, p. 11, ¶ 2.) Clearly this testimony went to "the psychological factors leading to gang membership."

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[96] At the time of the Hassan murders, petitioner was 18 years old. (RR 234 [petitioner's date of birth is Aug. 26, 1962].)

Dr. Miora testified to her conversations with petitioner regarding membership in the Raymond Avenue Crips. "Petitioner described the value of his gang involvement as 'pride, status, unity, respect, honor.' (RHT 9233, quoting from Exhibit 136, p. 15.) Petitioner told Dr. Miora that he saw his gang as protection for him from dangers in the community. In addition, petitioner told Dr. Miora that while petitioner was at the CYA, three of his friends had been killed. (RHT 9236; see also Exhibit 136, p. 194.) Further, petitioner told Dr. Miora his belief was that his neighborhood had become more dangerous while he had been in the Youth Authority." (RR 238.) As the Referee noted,

> Petitioner told Dr. Miora that by the time he was 14 years old "'it was necessary to be armed to go to parties and dances as the circumstances were unpredictable. [Petitioner] understood that guns were obtained from burglaries and it was considered a badge of honor to arm a home boy. The guns were stashed in a designated location permitting everyone in need access. However, stealing the guns would be grounds for "instant dismissal" from the gang. Mr. Champion distinguished that reputation was built on fighting rather than use of guns.'" (RHT 9231-9232, quoting from Exhibit 136, p. 14.) Petitioner described to Dr. Miora his need to be hypervigilant to potential dangers which existed in petitioner's community when he was approximately 14 years old. Dr. Miora admitted that petitioner told her he carried guns for his protection at this time. (RHT 9235.)

(RR 237, fn. omitted; see also RR 112-113.) Dr. Miora's testimony clearly goes to the negative and positive impact of gang affiliation on petitioner.

As previously noted, the Referee wrote, "Petitioner's reasons for joining a gang were developed by the gang expert, CYA reports and Dr. Miora's interview." (RR 84.) For example, Exhibit J, the CYA report of Dr. Perrotti, reflects

> that petitioner "relates that he repeatedly became involved with the law because he thought he could get away with things. He states that this is no longer his attitude. He states that he feels he is changed in that he has severed ties with gangs and is able to talk to different ethnic groups. He also states that he used to have a bad temper but

> that now he has made the decision to control his temper. When I asked him what the impetus for his change was, he states that he has the support of family who don't want him going back to jail. He states that he sits in his room and thinks about the ability which he has to do the things which he wants to do, but that he does not utilize these. He states that in the past, if someone said things which he did not agree with, he exploded. He states that he now tries to comply with authority." (Exhibit J, Report of Dr. Perrotti, p. 1.) Dr. Perrotti also noted: "Mr. Champion related that his history of violent offenses is partially due to his association with gangs of youths subscribing to violence. It seems that he, in all probability, subscribes to their values and attitudes. [] Mr. Champion related that most of his offenses were for 'fast money.' He states that 'if it were not for fast money, I would not have committed the offenses.'" (*Id.* at p. 2.)

(RR 34.)

Respondent is not aware of any case authority addressing denial of funding for ancillary services such as an expert witness by either a referee or this Court for a habeas corpus petitioner in a capital case reference hearing ordered by this Court. Assuming arguendo standards applicable to an indigent defendant seeking ancillary services to prepare a defense before trial apply to this capital case reference hearing, petitioner fails to establish any abuse of discretion in the denial of additional funding for yet a third expert witness to opine on issues related to petitioner's gang activity and membership. "An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense. ([Pen. Code] § 987.9, subd. (a); *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 [204 Cal.Rptr. 165, 682 P.2d 360].) The defendant has the burden of demonstrating the need for the requested services. (*Corenevsky v. Superior Court, supra*, at p. 320.) The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary. (*Ibid.*) On appeal, a trial court's order on a motion for ancillary services is reviewed for abuse of discretion. [Citations.] [Citations.]" (*People v.*

Guerra (2006) 37 Cal.4th 1067, 1085, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "'[T]he right to counsel guaranteed by both the federal and state Constitutions includes, and indeed presumes, the right to effective counsel [citations], and thus also includes the right to reasonably necessary defense services. [Citations.]' [Citation.]" (*People v. Blair* (2005) 36 Cal.4th 686, 732.)[97]

> Neither *Ake*, however, nor the broader rule guaranteeing court-appointed experts necessary for the preparation of a defense [citation], gives rise to a federal constitutional right to the effective assistance of a mental health expert. Numerous federal decisions have held that the

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[97] Unlike the federal and state constitutionally protected right to effective assistance of counsel at the trial stage, petitioner has no constitutional right to counsel in a state collateral proceeding, even one which is a capital case, and *a fortiori*, no right to effective assistance of counsel at such collateral proceeding. (*Murray v. Giarratano* (1989) 492 U.S. 1, 3-10 [109 S.Ct. 2765, 2767-2771, 106 L.Ed.2d 1]; *Johnson v. Avery* (1969) 393 U.S. 483, 488 [89 S.Ct. 747, 750; 21 L.Ed.2d 718]; see also *Coleman v. Thompson* (1991) 501 U.S. 722, 752 [111 S.Ct. 2546, 2568, 115 L.Ed.2d 640] [no right to counsel beyond first appeals as a matter of right].) Given that the purpose for ancillary services to trial counsel is to protect a criminal defendant's right to effective assistance of counsel at trial, a right not available to petitioner in this reference hearing, it is not clear that the same standards applicable to trial level funding for ancillary services necessarily would apply to review funding decisions in the case *sub judice* whether made by the referee or this Court. On the other hand, the United States Supreme Court in *Ake v. Oklahoma* (1985) 470 U.S. 68 [105 S.Ct. 1087, 84 L.Ed.2d 53] relied upon the due process clause of the 14th Amendment to hold that "when an indigent defendant has demonstrated that his sanity is likely to be a significant factor in his defense on the issue of guilt, the State must provide the defendant with 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.' (*Ake*, *supra*, 470 U.S. at p. 83 [105 S.Ct. at p. 1096].)" (*People v. Samayoa* (1993) 15 Cal.4th 795, 838.) For purposes of this argument, respondent assumes once this Court has ordered a reference hearing in response to petitioner's petition for writ of habeas corpus, petitioner has a due process right to receive funding for ancillary services reasonably necessary to present his case in that hearing.

> federal Constitution does not recognize a right to the effective assistance of a psychiatrist or other mental health expert, *or of the effective assistance of a witness.* [Citations.] These decisions recognize that a mental health expert is clearly distinguishable from legal counsel with regard to the protection of a defendant's fundamental rights in the adversarial process and, unlike the ascertainable standard of competent legal representation, the question whether a mental health expert has performed "competently" with regard to the assistance provided in the presentation of a defense is not readily determinable. [Citations.] [¶] *In the present case, defendant was provided access to the services of two licensed psychologists of his choice to conduct neuropsychological testing and evaluation. These witnesses presented substantial testimony regarding defendant's mental disorders. The circumstance that these witnesses did not provide testimony at defendant's trial which in defendant's view persuasively supported his defense that he lacked the intent to kill does not give rise to a claim of a violation of a federal constitutional safeguard.* [Citation.]

(*People v. Samayoa, supra*, 15 Cal.4th at pp. 838-839, italics added.)

As previously outlined, petitioner received funding for two experts, Steven Strong and Dr. Deborah Miora, both of whom testified on issues related to petitioner's gang membership and gang activity. This case is not unlike *People v. Panah* (2003) 35 Cal.4th 395, where the defendant contended on appeal that the trial court erred in denying defendant's request for the appointment of a third mental health expert after the defendant entered a plea of not guilty by reason of insanity and the trial court had already appointed two psychiatrists to examine the defendant, one chosen by the defense and one chosen by the prosecution. (*Id.* at p. 435.) As this Court explained in *Panah*,

> Defendant contends the trial court's refusal to appoint a third mental health expert violated his federal and state constitutional rights, including the right to ancillary defense services as part of the right to effective assistance of counsel. [Citation.] His claim is without merit. [¶] . . . defendant received reasonable ancillary services, and there was no showing that the appointed psychiatrists were unqualified or incapable of administering psychological tests defendant now argues were crucial to his defense.

(*People v. Panah*, *supra*, 35 Cal.4th at pp. 435-436.)[98]

Petitioner has failed to establish affirmatively any abuse of discretion or error in denying funding for a third expert witness. He has also failed to establish affirmatively that the two experts chosen by petitioner's habeas counsel and funded by this Court's order were unqualified or incompetent to provide whatever additional relevant and probative evidence concerning petitioner's gang membership and gang activity petitioner now claims he wished to present at the reference hearing.

For all of the foregoing reasons, this Court should deny petitioner's exception that the referee erred in denying funding for a gang expert.[99]

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[98] In *Ake*, the high court held that the defendant's due process right to a psychiatrist did not require the state to permit "the indigent defendant . . . to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the individual defendant have access to *a* competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right." (*Ake v. Oklahoma*, *supra*, 470 U.S. at p. 83 [105 S.Ct. at p. 1096]; italics added.)

[99] Petitioner has filed an additional 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[.]" (PB 220-229.) This exception appears to be either a duplication of the earlier exception set forth in petitioner's brief at pages 227-228 or subsumed within that aforementioned exception. Petitioner fails to set forth what additional evidence not presented by the two, court-funded experts who testified on petitioner's gang membership and activity petitioner now claims could only be presented through a third, court-funded expert. Petitioner fails to establish affirmatively any error or abuse of discretion. Respondent incorporates all of respondent's arguments with respect to petitioner's exception set forth at pages 227-228 of petitioner's brief. For all of those reasons, this apparently redundant exception should also be rejected by this Court.

H. Petitioner's Exception That "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" (PB 230-232.)

In his report, the Referee found: "Petitioner did not present any evidence to support the claims that if Skyers had properly investigated the taped conversation between Ross and petitioner he could have shown that the transcript was deficient or incorrect. No mitigating evidence was presented by petitioner." (RR 89.) The relevant exhibits were Exhibits E (taped conversation between Ross and Champion dated 8-10-81) and F (transcript of taped conversation), Trial Exhibits 180 and 180a.

Petitioner contends, "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 attorneys or from the photographs entered into evidence at Ross's preliminary hearing." (PB 230, italics added.) Petitioner further contends,

> 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. [] 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 [*sic*] 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. (R[H]T 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. (R[H]T 3830 [Earley].)]

(PB 231-232, italics added.)

Petitioner cites no actual evidence introduced at the reference hearing to demonstrate that his knowledge that the bed in the Hassan home on which Bobby and Eric Hassan were executed came not from petitioner's presence during the execution murders, but from some other source such as Craig Ross, petitioner's counsel, Ross's counsel or photographs received at Ross's preliminary hearing. The opinions of petitioner's *Strickland* expert, cited as the only evidentiary source for this claim, constitute only rank speculation. Petitioner chose not to testify at the reference hearing nor did he choose to call Craig Ross or petitioner's counsel prior to Ronald Skyers. Given that Skyers was not retained as counsel for petitioner until August *24*, 1981, but the taped conversation between petitioner and Ross occurred 2 weeks earlier on August *10*, 1981 (RR 7), obviously Skyers could not have been the source for petitioner's knowledge demonstrated in his taped conversation with Ross that the bed at the Hassan home was a water bed. Similarly, Ross's preliminary hearing was not until September 4, 1981, nearly one month *after* the taped conversation in question, thereby eliminating petitioner's speculative theory that his knowledge could have been obtained "from the photographs entered into evidence at Ross's preliminary hearing." (PB 231.)

As this Court has recognized on many occasions, speculation is not evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 735 ["But there was simply no evidence, substantial or otherwise, that Waidla intended to take *only* items of the Pirisilds' personal property concerning which he had a 'bona fide belief' of a 'right or claim' [citation]. One might, of course, speculate that he harbored such a particularized intent. 'But speculation is not evidence, less still substantial evidence.' [Citations.]"].)

The failure of petitioner to testify to how he knew the bed in the Hassan home was a water bed, or to call Ross or other witnesses to testify

that one or more of them informed petitioner of this fact before August 10, 1981, brings into play Evidence Code section 412. This is the same section relied upon by the Referee with respect to petitioner's failure to call Lewis Champion III or Reggie Champion to support petitioner's claim he was physically abused as a child by his older brothers. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code § 412.) Of course, in petitioner's case, he did not even offer "weaker and less satisfactory evidence." Rather, he offered only speculation to counter the reasonable interpretation from petitioner's taped remark that his knowledge about the water bed came from his presence in the home during the execution murders of Eric and Bobby Hassan.

Nor has petitioner produced evidence indicating he was a mere follower. In fact, the evidence adduced at the reference hearing reflected the contrary. As the Referee determined:

> [Gary] Jones has known petitioner since Jones was 5 or 6 years old. Jones was in kindergarten while petitioner was in the first grade. Their relationship continued except when petitioner was incarcerated. (RHT 5660, 5665.) Jones first met petitioner when petitioner stepped into a situation in which Jones' brother was trying to whoop Jones with a belt. *Petitioner "had enough nerve to tell my brother this is going to stop."* (RHT 5664, 5695-5696.) Jones saw petitioner daily. Petitioner was Jones' best friend. Petitioner was very competitive in athletics. *Petitioner had "certain leadership abilities"* Jones admired. (RHT 5665, 5688.) "We had a really beautiful childhood." (RHT 5665-5666, 5689.) *Petitioner was bright and intelligent. Petitioner was not one to blindly follow others.* (RHT 5688-5690.)

(RR 231, italics added; see also RR 268 ["In the view of family members, fellow gang members and friends, petitioner was very bright and *liked to be a leader*" (italics added)].) Petitioner's school records, Exhibit CCC, include notes for grade 6: "Can be somewhat of a discipline problem at

times. Works below grade level-can be distracted easily-*likes to be a leader of his peers* [.]" (RR 75.) Finally, petitioner fails to address "[p]etitioner's statement to CYA authorities that he is not a follower or easily influenced by others (Exhibit I)." (RR 292.)

The Referee's findings that "[p]etitioner did not present any evidence to support the claims that if Skyers had properly investigated the taped conversation between Ross and petitioner he could have shown that the transcript was deficient or incorrect [] [and] [n]o mitigating evidence was presented by petitioner[]" (RR 89) are fully supported by the record. As such, this Court should reject petitioner's exception.

I. Petitioner's Exceptions That "The Referee Erred In Failing To Fully Credit The *Strickland* Expert's Opinions" (PB 233-234) And "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 [*Sic*]; Nor Were There Other Circumstances Which Would Have Led A Reasonable Counsel To Not Present This Mitigating Evidence" (PB 268.)

Respondent has already addressed in detail petitioner's exception that the Referee failed to credit fully the opinions of petitioner's *Strickland* expert. This includes a thorough discussion of the Referee's findings with respect to: (a) petitioner's *Strickland* expert's opinions being unreasonable; (b) the Taylor crimes, petitioner's Taylor related exceptions and the *Strickland* expert's Taylor related opinions[100]; (c) the *Strickland* expert's

[100] Petitioner repeats many of the arguments raised in his Taylor related exceptions in his exception claiming that "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 (continued...)

(...continued)
trial the mitigating evidence adduced at the reference hearings; nor were there other circumstances which would have led a reasonable counsel to not present this mitigating evidence." (PB 268, capitalization & underlining removed.) For example, petitioner claims that he would not have had to call all three alibi witnesses, Harris, Player and Bogans[] (PB 269), a position diametrically opposite to petitioner's *Strickland* expert's opinion as respondent has noted. Petitioner's contentions—(1) "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" (PB 269-270) and (2) "[t]he referee characterizes as rebuttal 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[]" (RR 270)—are contrary to the factual findings made by the Referee including (1) "as the reference hearing testimony from the various LASD deputies involved in the perimeter search for the four apparent occupants of the crashed Player automobile documented, the perimeter was not sufficiently tight so as to preclude the possibility of petitioner having been inside the Player automobile when it crashed, to thereafter have escaped from the perimeter and then to have been detained as he was at approximately 1:00 a.m. on December 28, 1980 when petitioner walked from an area outside of the perimeter towards his home which was inside the perimeter. The geographical proximity between the Taylor residence and petitioner's residence was such that neither time nor distance could exclude petitioner as one of the Taylor crime perpetrators[]" (RR 168; see also RR 93-94); (2) "[e]ven if evidence, that one of the latent prints obtained from the Taylor crime scene was matched to Robert Aaron Simms, could have been obtained in 1982 and presented at petitioner's trial, trial counsel's strategy not to litigate the Taylor crimes during the penalty phase but to remind the jury that those crimes had never been filed by the prosecution against petitioner because of the prosecution's own belief that the evidence was insufficient to prove those crimes as to petitioner beyond a reasonable doubt was still eminently sound. No witness could testify that only four people were involved in the Taylor crimes.

(continued...)

opinion concerning the alleged inadequacy of trial counsel's referral of petitioner to Dr. Pollack; (d) the *Strickland* expert's opinion concerning presentation of evidence about petitioner's alleged successful adjustment while at CYA; (e) the *Strickland* expert's opinion concerning Exhibit O (Trial Exhibit 113), the December 27, 1980 rental agreement in the name of Craig Ross recovered from petitioner at the time of his arrest on January 9, 1981, and its relevance to petitioner's claim he had disassociated himself from Ross after petitioner was released from CYA; (f) alleged mitigation evidence relevant to the "juvenile aggravators"; and (g) the absence of mitigation evidence concerning the surreptitiously taped August 10, 1981 conversation between petitioner and Ross.

(...continued)
Moreover, because of petitioner's conviction for the robberies and murders of Eric and Bobby Hassan, his posting of bail for Evan Jerome Mallet (from what arguably were proceeds obtained from the Hassan crimes), the commonality of Craig Ross as one of the perpetrators in both the Hassan and Taylor crimes and Wayne Harris' reference hearing testimony [[t]hat when petitioner and Harris arrived at petitioner's home after the two were released by LASD deputies following their detention at approximately 1:00 a.m. on December 28, 1980, Craig Ross was inside petitioner's residence (RR 172, fn. 86)], the jury might have deduced from petitioner's alibi witnesses that petitioner was fully culpable for the Taylor murder and related crimes as the natural and probable consequences of the conspiracy to rob and murder drug dealers the jury had undoubtedly found petitioner to be a member of at the time of the Hassan murders and robberies for which petitioner had been convicted[]" (RR 172; see also RR 96 ["15) Petitioner's claim that Simms' fingerprint match exonerates him has some defects. [] What took place inside the residence while they were locked up in the bathroom is unknown other than the victim was shot by someone. [¶] Simms' fingerprints inside the Taylor residence do not eliminate petitioner from being inside and being identified by Cora Taylor"]); and (3) "[p]etitioner's claim that Michael Player was the fourth person at the Taylor residence is just that! A prosecutor's comments during argument are not always evidence. Mr. Strong testified Michael Player was a suspect. *True, but no reference hearing evidence has been presented to support this claim*" (RR 95-96; italics added).

Thus, in response to the instant exception, respondent only offers some additional observations concerning the core of petitioner's argument that "reasonably competent counsel would have presented the evidence discovered post conviction and there were no circumstances (i.e.[,] no rebuttal) which weighed against presentation." (PB 232, capitalization removed.)

First, petitioner mischaracterizes certain findings by the Referee cited by petitioner in support of this argument. For example, petitioner claims: "The referee found that the only areas of petitioner's social history which should have been presented were petitioner's family members [*sic*] 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[p]. 268-269, fn. omitted.)" (PB 232-233.) *What the Referee actually wrote* in his report is: "The only areas the referee finds that should have been presented *if disclosed* are: Mrs. Champion and other family members' love and affection of petitioner; his traits of being loving toward them and his protective nature; Mrs. Champion's difficulties in being a single parent and raising a large family with very limited income; the absence of a father figure after Mr. Robinson left the home; the impact that Trabue Sr.'s death had on the family; and petitioner's school difficulties." (RR 269, italics added.)

On the finding of nondisclosure which respondent has addressed in great detail, the Referee found:

> No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure. [¶] Beyond the non-

> disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family witnesses that testified in support of petitioner's alibi for the Hassan murders during the guilt phase. [¶] Reference hearing witnesses Gary Jones, Harris, Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] . . . [¶] *Mrs. Champion's prior statements to school authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing.*

(RR 268-269, italics added; see also RR 88 ["in view of the purposeful withholding of family matters, Skyers could not have presented evidence of abuse, the impact of Trabue Sr.'s death on petitioner or poverty. A more limited mitigation that is consistent with the evidence adduced during the reference hearing *and that might be supportable* is that the financial difficulties encountered by petitioner's mother resulted in her absence from home and a lack of supervision of petitioner. [¶] The feasibility of presenting the mitigating evidence by a reasonable competent attorney is discussed in detail in the discussion portion of reference question numbers 2, 3, and 4"] (italics added).)

In a detailed discussion, the Referee found:

> Finally, in 1982, reasonably competent trial counsel addressing the issue of possibly presenting evidence of family poverty and its effect on the functioning and development of petitioner would be faced with the same daunting task of how such a claim could be credibly presented as existed with the issues of presenting evidence of community dangers, the traffic accident and the death of Trabue Sr., and the abandonment of petitioner's family before petitioner's birth by his biological father. Two central witnesses to the poverty issue who testified in this reference hearing, petitioner's mother and his older sister, Rita Champion Powell, had testified on petitioner's behalf at the guilt phase of petitioner's trial. So too had petitioner and his brother Reginald. (*People v. Champion*, *supra*, 9 Cal.4th at p. 902.) Having convicted petitioner for the Hassan capital murders, the jury had obviously discredited the testimony of petitioner's mother, sister, brother and petitioner himself. *Under such circumstances, reasonably competent counsel could well choose not to recall the same*

discredited witnesses to present a claim of poverty and its effect on petitioner's functioning and development where to this date there is no contemporaneous objective records to support the claim. (See, *Bell v. Cone* (2002) 535 U.S. at 685, 698-702.) Had trial counsel attempted to present a "mitigation specialist" such as Dr. Miora to opine that poverty played a significant role in the development and functioning of petitioner, *the expert would need to rely upon information provided by the very same discredited family members and petitioner whose guilt phase testimony had already been rejected by petitioner's jury.* [¶] Even if this dilemma were not enough to lead trial counsel away from presenting the claim of alleged poverty, if trial counsel were still contemplating doing so and even if trial counsel chose not to call Taylor alibi witnesses Marcus Player, Earl Bogans and Wayne Harris, *trial counsel would have had to have reasonably expected* the prosecution to respond to this claim with evidence such as petitioner's school records and Exhibit H. In addition, the prosecution could seek to introduce petitioner's CYA psychological and psychiatric evaluations in which petitioner himself made no reference to having suffered the effects of malnutrition, inadequate shelter or inadequate clothing as a result of alleged family poverty. In fact, statements by petitioner contained within those evaluations such as petitioner's statement to Dr. Perrotti "that he repeatedly became involved with the law because he thought that he could get away with things" (Exhibit J, Report of Dr. Perrotti, p. 1.) only serve to aggravate the Hassan murders and robberies without in any way furthering petitioner's present claim that impoverished circumstances as a youth adversely affected petitioner's functioning and development. In addition, petitioner's juvenile probation officers could have been called to testify to their own observations about whether there was any observable indication petitioner suffered the adverse effects of family poverty. Certainly, evidence that petitioner's mother owned a well kept family home in a nice neighborhood since 1968 or 1969, had income from the settlement of the traffic accident death of Trabue Sr., had a life insurance award for the same traffic accident, as well as the financial ability to send three of the children to private schools some distance from home on a daily basis, would hamper the claim of extreme poverty. [¶] *For the reasons discussed above, the referee finds that claims of significant physical abuse and poverty are not credible.* However, the referee does find as indicated before that there was credible evidence of family financial hardship and deprivation. It was clear to Skyers that Mrs. Champion was a single parent struggling to support a large family with limited income. It was also clear that Mrs. Champion,

when employed, was not able to provide the necessary supervision and attention needed by her family. *However, the dilemma for a reasonable competent attorney would continue to exist*, the basic witnesses or informants would be the very same family members who were petitioner's key alibi witnesses. [¶] Thus, even if credible evidence of alleged family poverty that adversely affected petitioner's functioning and development existed in 1982, assumptions not borne out by the credible evidence adduced in this proceeding, *reasonably competent trial counsel aware of available impeachment evidence to undermine such a claim could and would wisely choose to forego introduction of this contention at petitioner's penalty phase.*

(RR 228-230, italics added; see also RR 227-228, 286-287.)

On the subject of petitioner's school difficulties, the Referee found:

The [school] records [Ex. CCC] reflect petitioner's poor academic functioning in school. He displayed learning disability, read slowly, and had an IQ test below average. Petitioner was easily distracted and problems at home affected his school efforts. He displayed a bad temper. *However, the records did not reflect any physical abuse, any significant medical issues or malnutrition or a lack of clothing. Petitioner's mother told school officials all was well. A teacher notes that petitioner seeks to be a leader.* [¶] Petitioner's school records support the proposed mitigation theme of poor academic functioning in elementary, junior and high school. *However, this claim is subject to being neutralized by petitioner's involvement in gangs when he was twelve*. Some records indicate petitioner could do well when he applied himself. Petitioner told Dr. Perrotti that he felt he could have done better in school.

(RR 84-85, italics added.)

In addition, "[t]he referee finds that when petitioner put his mind to his education, he could be successful. On the other hand, when he preferred to participate with his gang beginning at age 12 or 13, skip school, use drugs and alcohol and commit crimes, his school work suffered." (RR 246, fn. omitted; italics added.)[101] "Any proposed

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[101] In the omitted footnote, footnote 136, the Referee quoted from petitioner's November 8, 1978 probation report: ""Prior to minor's camp placement, he experienced extreme adjustment problems in the school (continued...)

mitigating theme that would permit the prosecutor to present additional evidence of gang membership or petitioner's criminal history would be prejudicial to petitioner." (RR 287.)

As respondent has already discussed in detail, at pages 147-156 of his report, the Referee outlined petitioner's extensive criminal history and gang involvement, and at pages 298-304-A, the Referee outlined petitioner's "Juvenile Record," most of which petitioner's penalty phase jury had not heard. As the Referee clearly recognized, the extensive nature of petitioner's gang activity and involvement with criminal misconduct since petitioner was approximately 12 years old, could be introduced by the prosecution to explain petitioner's academic performance had trial counsel introduced petitioner's school records as evidence in mitigation. As the Referee also clearly recognized, introduction of such evidence by the prosecution in rebuttal would not have been in petitioner's best interest in seeking to avoid a death sentence. The Referee also recognized that the school records, Exhibit CCC, and the December 13, 1978 Initial Home Investigation Report, Exhibit H, contained evidence in the form of statements by petitioner's mother to school authorities and petitioner's juvenile parole agent which undercut claims of a dysfunctional family life or abnormal developmental history. And, in the case of the school records, the evidence included statements by a teacher commenting on petitioner's

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(...continued)
setting. *On one occasion, he was expelled from the program when he was discovered to have a gun in his possession on the junior high school campus.* Prior to minor's expulsion, he recorded all fails and U's in the eighth grade program. Minor was subsequently placed in the camp program before he had an opportunity to improve on his performance.'" (RHT 9263-9264, quoting from Exhibit 147 at BS109; italics added.) These observations are consistent with petitioner's statement to Dr. Miora that he first joined the Raymond Avenue Crips when he was 12 or 13 years old. (RHT 8446.)" (RR 246-247, fn. 136.)

desire to be a leader among his peers, further evidence that could not assist petitioner's trial counsel in seeking a life sentence from petitioner's penalty phase jury. As the Referee also properly found, the same prejudicial impact applies to petitioner's own statements made during the course of the CYA evaluations, evidence which petitioner's penalty phase jury also had not heard.

Taken together, all of these findings by the Referee, amply supported by substantial evidence, ineluctably lead to the conclusion that reasonably competent counsel would not have introduced evidence of petitioner's "school difficulties" as mitigation evidence at petitioner's penalty phase trial in light of the abundant, credible, contemporaneous and powerful impeachment evidence available to the prosecution in rebuttal to said school difficulties evidence.[102] (See also RR 247 ["Based on reasons already discussed demonstrating how petitioner's school records (Exhibit CCC), the 'Initial Home Investigation Report (Exhibit H)' and petitioner's CYA records could be used by the prosecution to rebut claims petitioner's habeas counsel now contends trial counsel should have introduced as mitigating evidence at petitioner's penalty phase and the failure of petitioner's habeas counsel to call a single teacher to testify in this proceeding about either the school environment petitioner faced or petitioner's performance in school or for that matter, what could have been done by the school system with available resources, reasonably competent counsel could have wisely chosen not to put forth a claim suggesting a

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[102] In respondent's brief on the merits, respondent has taken an exception to the ambiguous language in the Referee's report concerning presentation of petitioner's "school difficulties" at the penalty phase, if said language is interpreted to mean that trial counsel was deficient for failing to present evidence of the "school difficulties" identified at the reference hearing at petitioner's penalty phase. (RB 39-44.)

failure on the part of petitioner's schools to intervene with petitioner and his family adversely affected petitioner's development and functioning"].)

In a second mischaracterization of the Referee's findings, petitioner states: "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." (PB 233.) Beginning on page 266 of his report, the Referee answered that portion of Reference Question 3 asking whether "[i]n 1982, when petitioner's case was tried, would a reasonably competent attorney have tried to . . . present [this additional mitigation evidence identified in response to Reference Question 2] at the penalty phase?" Leaving no doubt as to his findings on this point, the Referee began his findings by stating, "A reasonably competent attorney would not have presented the following evidentiary mitigating themes at the penalty phase." (RR 266, underlining in original.) The Referee then identified 10 specific categories of evidence which the Referee found reasonably competent counsel *would not have presented* at petitioner's penalty phase, including evidence of (1) the Jefferson alibi; (2) the Taylor alibi; (3) petitioner's adjustment while at the CYA; (4) petitioner's CYA mental evaluations; (5) petitioner's family/social history; (6) petitioner's hardcore gang membership since petitioner was 12 years old and his association with Marcus Player, Evan Mallet and Craig Ross; (7) petitioner's limited substance abuse; (8) petitioner's probation/parole history which the Referee found "would have directed the jurors' attention to petitioner's arrests and his performance on probation[;]" (9) petitioner's juvenile arrest/adjudication history, the Referee finding that petitioner's "jury was not informed as to petitioner's other acts of violence, arrests or juvenile adjudication including a prior burglary[;]" and (10) appropriate

experts in light of the Referee's findings that no further psychological/neuropsychological testing or examinations were required in light of petitioner's CYA records and the unavailability in 1982 of exemplar fingerprints from Robert Aaron Simms to use for comparison purposes with latent prints recovered from the Taylor, Hassan and Jefferson crime scenes and the Player automobile. (RR 266-270.) As to each of these 10 categories, the Referee provided a capsule summary of his reasoning to support the finding that reasonably competent counsel would not have presented evidence related to the particular category at petitioner's penalty phase trial. These findings are fully supported by the reference hearing record and the Referee's report.

Petitioner contends that 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." (PB 233.) It is important to recognize that petitioner conflates that portion of Reference Question 3 asking whether reasonably competent counsel would have presented evidence of the newly minted mitigation themes presented at the reference hearing with Reference Question *4* asking in part: "What circumstances, if any, weighed against the . . . presentation of this additional evidence? What evidence damaging to petitioner, but not presented by the prosecution at the guilt and penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence?" The Referee recognized this overlap in the preamble to his findings in response to that portion of Reference Question 4 asking "[w]hat circumstances weighed against the presentation of the additional evidence?" As the Referee explained, "Most of the significant factors that weighed against the <u>presentation</u> of the additional evidence

have been discussed in reference questions numbers 1, 2 and 3." (RR 289, underlining in original.)[103]

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[103] Thus, as previously discussed in detail, the Referee correctly found certain of petitioner's newly minted mitigation themes could not have been reasonably discovered by competent trial counsel in 1982. This was due to many factors, including (1) deliberate and intentional nondisclosure by petitioner, his mother and siblings; (2) the absence of contemporaneous records identifying mitigation themes such as sibling abuse, the 1968 traffic accident, and the impact on petitioner's family from the death of Gerald Trabue Sr., and the effect on petitioner's functioning and development from the absence of a father figure; and (3) the presence of contemporaneous records such as petitioner's school records, Exhibit CCC, the December 13, 1978 Initial Home Investigation Report, Exhibit H, and petitioner's CYA records such as Exhibits D, I and J confirming the information trial counsel did receive from petitioner, his mother and siblings and impeaching the newly minted mitigation themes. Petitioner's Taylor alibi claim requiring the presentation of evidence from Marcus Player, Wayne Harris, and Earl Bogans suffered from the Referee's findings that (1) Marcus Player would not have cooperated with trial counsel; (2) the dubious availability in 1982 of any of petitioner's fellow Raymond Avenue Crips gang members to testify at petitioner's trial; (3) the lack of credibility in the alibi testimony of Player, Harris and Bogans and the damage testimony from those alibi witnesses would have done to impeach petitioner's trial testimony that he had left the Raymond Avenue Crips prior to the Hassan and Taylor murders and to rebut petitioner's newly minted mitigation themes of poverty, low intellectual functioning and sibling abuse. Certain of petitioner's newly minted mitigation themes such as brain damage, sibling abuse, and the Taylor alibi were properly found by the Referee not to be credible. Petitioner's claims of brain damage and sibling abuse were subject to impeachment from sources including (1) petitioner's CYA reports of evaluations by Drs. Prentis, Perrotti, Minton and Brown which also included statements by petitioner which would have proved very damaging if heard by petitioner's jury such as: "'He is not easily influenced by others . . . he became involved with the law because he thought he could get away with things . . . if not for fast money I would not have committed the offenses[]'" (RR 295); (2) Exhibits CCC and H; and (3) in addition to petitioner's necessary Taylor alibi witnesses, Player, Harris and Bogans, petitioner's best friend Gary Jones. Petitioner's claim of poor school performance was subject to impeachment with rebuttal evidence outlined in great detail by the Referee, evidence

(continued...)

Therefore, in answering this portion of Reference Question 4, the Referee "briefly restated" 8 factors including:

> 1) The lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner to school, police and CYA authorities that would impeach the reference hearing testimony or claimed mitigation. [¶] 2) The lack of any documents to support the claimed mitigation of brain damage based on fetal abuse, traffic accident head trauma, or head injury as result of physical beatings by older brothers. [¶] 3) The need to modify the claimed mitigation of extreme poverty, malnutrition or lack of clothing to one that is consistent with the reference hearing evidence (i.e., single parent struggling financially, emotionally with providing support and care to a large family). [¶] 4) The existence of contemporaneous CYA psychological/psychiatric evaluations that petitioner did not suffer from any mental illness, defect, or disorders. These reports were written between 1978 and 1980 by four separate doctors and are consistent with each other. [¶] 5) The absence of any evidence by any close family member, relative, friend, neighbor or fellow gang member who would opine that petitioner suffered from any type of mental impairment during petitioner's life. [¶] 6) Petitioner's gang membership and violent history. [¶] 7) Petitioner's prior statements to CYA or law enforcement. 8) The additional reasons why the referee disagrees with the *Strickland* expert as to

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(...continued)
including petitioner's hardcore gang activity, arrests, and juvenile adjudications, as well as petitioner's performance on probation and CYA parole which explained why petitioner's school performance suffered. Further, in addition to finding petitioner's claim of brain damage not credible, the Referee also found that reasonably competent counsel was not required to obtain additional psychological evaluations or to have petitioner undergo a battery of neuropsychological testing such as Dr. Riley administered in 1997 in light of petitioner's CYA psychological and psychiatric records and the referral report from Drs. Pollack and Imperi. In short, these representative examples demonstrate both the overlapping nature various aspects of Reference Questions 2, 3, and 4 bore on the analysis of petitioner's claims and the Referee's recognition and application of this overlap in his analysis of those claims throughout the report.

what a reasonable competent attorney would present will be discussed below.

(RR 289-290, underlining in original.)

Beginning on page 291 of his report, the Referee outlined the likely rebuttal evidence to be introduced by the prosecution had petitioner sought to present evidence of the newly minted mitigation themes presented at the reference hearing, including rebuttal evidence as to the Taylor alibi (RR 291-292), "Petitioner's Development/Functioning/Social History" (RR 292), and to any "mitigation expert" (RR 293-298).

As previously discussed, with one exception, the only evidentiary source for petitioner's contention that reasonably competent counsel would have presented the newly minted mitigation themes and that "there were no circumstances (i.e.[,] no rebuttal) which weighed against presentation" (PB 232) is the opinion testimony from petitioner's discredited *Strickland* expert. As already detailed in this reply brief, the Referee properly found that testimony to be unreasonable for the multitude of failures of the expert witness to review relevant material, employ logical reasoning, and apply the correct objective *Strickland* standard. (See, PB 234-242, 252-256, 259-268, 273-278, 281.) As previously reviewed, in answering that part of Reference Question 4 asking "what evidence damaging to petitioner, but not presented by the prosecution at the guilt and penalty trials, would likely have been presented in rebuttal if petitioner had introduced this evidence[,]" the Referee found:

> [Petitioner's *Strickland* expert] did not review the entire Mallet preliminary hearing or trial proceedings. He did not review most of Skyers' reference hearing testimony. He did not review the reference hearing testimony of Harris, Bogans and Player and he seemed unfamiliar with some of the CYA doctor evaluations. Earley also had a marked tendency to evaluate Mr. Skyers' trial performance or omissions from the perspective of what he would or would not do in a capital case in lieu of applying the *Strickland* standards. This court regards Mr. Earley as one of the best criminal defense attorneys in this

> state and he ably demonstrated his legal insights both as to law and capital case procedures during the reference hearing. He certainly has earned being treated with great deference in regard to his observations and opinions. Nevertheless, this court must adhere to principles of law that require a showing as to what a reasonable competent attorney (not the best) would or would not do. This court can not grant latitude where serious omissions have been shown to exist such as the lack of review of evidence or testimony that was not considered by an expert witness.

(RR 297-298.)[104]

Once again, looking to just one example of petitioner's "rose colored glasses" view of petitioner's *Strickland* expert's opinions underscores the propriety of the Referee's findings and his rejection of contrary opinions from the *Strickland* expert as unreasonable. Petitioner asserts, "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 [at CYA]. (R[H]T 4427-4432 [Earley].)" (PB 273.)

What petitioner describes as "a marginal program" and that petitioner "needed supervision to stay out of trouble" is described in detail in Exhibit G-13, a December 12, 1979 Youth Training School Case Report. Like Dr.

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[104] In light of this Court's opinion in *People v. Bassett*, *supra*, 69 Cal.2d 122, which clearly sets forth that expert opinion in and of itself has little, if any, value without consideration of the materials reviewed and the reasoning employed by the expert to reach any opinion (*id.* at p. 141), petitioner's contention – that "[the referee] 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)" (PB 235, italics added) – once again borders on the frivolous. This is even more so because petitioner himself relies on *Bassett*. (See, PB 112-118.)

Perrotti's report, however, petitioner's *Strickland* expert had not reviewed this one either. (RR 255-256.) As the Referee observed:

> Under "PROGRESS IN TREATMENT," the report documents that on March 20, 1979, "[petitioner] was transferred to that Treatment Program *for assaulting another ward and a staff member.* [Petitioner] went through the I/J Treatment Program with only two Level A Behavior Reports, one for yelling at staff, and one for wearing the wrong type of clothes to trade. On 6/30/79, [petitioner] was transferred to U/V Company. *While on U/V Company, [petitioner's] rule and behavior violations became more severe. He was involved in an incident of destruction of state property, placa writing, and on 7/21/79, he was involved in a race riot between blacks and whites. In this riot, several wards were injured and hospitalized.* As a result of [petitioner's] participation in this incident, he was placed on T/D in O/R Company on 7/23/79." (Exhibit G-13, p. 1 [BS000896].)

(RR 256, italics added.)

Assaulting another ward and a staff member and engaging in a race riot between blacks and whites reflect far more than petitioner doing "a marginal program and need[ing] supervision to stay out of trouble." (PB 273.)[105] Such violent conduct clearly provides an evidentiary basis for petitioner's penalty phase jury to conclude that sentencing petitioner to life without possibility of parole would not ensure the safety of other inmates exposed to petitioner in state prison and prison guards responsible for managing petitioner in a state prison system for the rest of petitioner's life. The Referee's detailed analysis correctly rejecting petitioner's claim that reasonably competent counsel would have introduced evidence of

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[105] Thus, petitioner's claim that "no rebuttal evidence to positive institutional adjustment was submitted at the reference hearing proceedings[]" (PB 275) is patently wrong. Exhibit G-13 and Dr. Perrotti's report, Exhibit J, constitute powerful evidence rebutting petitioner's claim of positive institutional adjustment, evidence which, as noted above, petitioner's *Strickland* expert had never reviewed. (See also fn. 12, *ante*, discussing respondent's development of rebuttal evidence through cross-examination of petitioner's witnesses.)

petitioner's institutional adjustment at the CYA is found at pages 247-259, an analysis which petitioner completely fails to address.[106] (See also RR

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[106] For example, the Referee found from "(1) Dr. Brown's findings and those of the other psychologists and psychiatrists who evaluated petitioner while he was at the CYA (see, Exhibits D & J.) reflecting petitioner's intelligence, lack of evidence of brain damage or other neurological impairment and eagerness to help; (2) the fact petitioner was paroled less than 90 days after Dr. Brown's favorable evaluation; and (3) the fact petitioner committed the Hassan murderers [*sic*] and robberies less than 45 days after being paroled from the CYA, as petitioner's trial counsel himself admitted, '[a]n argument could be made' 'that Mr. Champion fooled the people at the Youth Authority when they decided to parole him by doing what [petitioner] knew they needed to see from him in order to parole him.' (RHT 1433:9-13.)" (RR 253-254.) The Referee thus concluded: "Earley's failure to review either Dr. Perrotti's report, including that portion dealing with Mr. Cruz's observations about petitioner's behavior in CYA, or Exhibit G-13 documenting petitioner's repeated acts of misconduct at CYA; and Earley's failure to read all of Skyers' reference hearing testimony (RHT 3913, 4398-4399, 4430.) undermines [*sic*] the reasonableness of his opinions castigating the approach of petitioner's and Ross' trial counsel taken during the trial's penalty phase. [¶] In light of petitioner's disruptive and assaultive behavior while at the CYA, his disruptive behavior in front of the jury when the first guilty verdict against petitioner was read and the surreptitiously recorded conversation between petitioner and Craig Ross discussing possible escape from county jail, trial counsel's closing penalty argument, in conjunction with the closing penalty argument by counsel for petitioner's co-defendant (from which the jury could conclude petitioner would not in fact present a future danger if incarcerated under a sentence of life without possibility of parole), protected petitioner from available prosecution rebuttal impeachment evidence demonstrating that petitioner had the ability to manipulate the staff at the CYA and did in fact engage in conduct suggesting he would be a future danger 'if things don't go as [petitioner] believes they should.' [¶] The referee finds that Skyers was aware at the time of trial of the reports relevant to petitioner's adjustment at the CYA. Other than the opinions of his *Strickland* expert, petitioner has introduced no additional evidence relevant to this issue at the reference hearing. [¶] For all of the aforementioned reasons, the referee finds that reasonably competent counsel could have chosen the path pursued by petitioner's trial counsel to argue the issue of future dangerousness to the jury without rebuttal by the

(continued...)

296 ["the potential harm to petitioner's claims of mitigation through the prosecution's presentation in rebuttal of petitioner's other acts of violence at the CYA such as the race riot led by petitioner, an assault of another inmate, [ ] combined with evidence of prior acts or use of force against others in the prior arrests, are so detrimental that a reasonable competent attorney would not introduce the proposed themes of mitigation referred to above"].)

Petitioner contends without citation to the record, "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." (PB 278.) Petitioner conveniently overlooks the reference hearing testimony of Gary Jones, a witness called by petitioner, who thoroughly discredited petitioner's claim of physical abuse from his older brothers as the Referee found. (See RR 13 ["the testimony from petitioner's mother and sister (Rita Powell) that petitioner was physically beaten by his older brothers, and in particular Lewis Champion III, was not credible. Given the nature of the alleged beatings

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(...continued)
prosecution and reject the path suggested by petitioner's *Strickland* expert to pursue the issue of 'institutional adjustment' through the use of Exhibit 23 A-1 and witness testimony, both of which would be subject to damaging rebuttal impeachment evidence from the prosecution." (RR 258-259, fn. omitted.) In the omitted footnote, footnote 148, the referee further found that "not only would reasonably competent counsel not seek to present evidence of institutional adjustment for the reasons already discussed, *evidence that petitioner had the ability to successfully manipulate staff, including doctors, at the CYA runs counter to claims raised in this proceeding that petitioner suffers from brain damage and low intellectual functioning.*" (RR 259, fn. 148; italics added.) Petitioner completely ignores all of these findings by failing to directly address any of them. (See PB 273-275.)

and the complete absence of any observation of injuries, bruises or complaints by petitioner to his best friend Gary Jones or fellow gang members that testified at the reference hearing, the referee finds that petitioner's mother and sister exaggerated their testimony[;]" see also RR 85 ["9. Sibling Abuse [¶] Mrs. Champion, E.L. Gathright, Rita and Linda Champion are the primary witnesses on this subject. Neither Reggie nor Lewis Champion III were called to testify during the reference hearing. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers. Their testimony was i) inconsistent with that offered by other witnesses during the reference hearing who were close friends or fellow gang members of petitioner; ii) inconsistent with Mrs. Champion's statement to school officials and the CYA; and lastly, iii) petitioner's description of his family life to CYA staff. The referee did not find the claim of physical beatings of petitioner to be credible. I do find that Lewis III was disruptive and harsh in his discipline. The disruptive aspect could have been presented *if discussed or disclosed.* [¶] The absence of any medical report, police report or observation by anyone of physical bruises or injuries on petitioner, particularly by Gary Jones, discredits the claim by family members that petitioner was physically beaten by Lewis III" (italics added)]; RR 268-269.)

As respondent has already discussed in detail, the Referee also found as a separate and independent basis concerning the non-presentation of sibling abuse evidence that "the nondisclosure of family history by petitioner or members of his immediate family was purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose." (RR 11.)

Petitioner appears to suggest that because respondent did not call the deputy district attorney who prosecuted petitioner's trial, "there was no expert testimony or any testimony whatsoever as to what rebuttal evidence

the prosecutor would have sought to introduce at trial." (RR 283.)

Petitioner overlooks this Court's opinion in *In re Andrews*, *supra*, 28 Cal.4th 1234, 1250-1252. As respondent has pointed out in footnote 12, *ante*, in *Andrews* this Court found:

> The referee rejected the testimony of [the trial prosecutor] that he would not have introduced any rebuttal evidence, with the possible exception of petitioner's second escape. In the referee's view, "This position ignores reality . . . . [T]he time constraints that hampered the prosecution at the time, such as the difficulty [the trial prosecutor] spoke of in retrieving priors' [*sic*] information, would have been alleviated by the consumption of trial time in presenting the large number of witnesses contemplated by the defense as shown in these hearings . . . . Had any defense attorney called in excess of fifty witnesses with virtually hundreds of hours of testimony portraying the defendant as a victim of life's circumstances, these rebuttal witnesses would have undoubtedly been called and presented by the prosecution during a penalty trial."
>
> We agree with this general assessment of the realities of prosecuting a capital case. Based on the reference hearing testimony, we also conclude the thrust of the referee's finding—that the prosecutor would have responded to the mitigating evidence now proposed—is supported by substantial evidence and not necessarily inconsistent with [the trial prosecutor's] testimony. It appears [the trial prosecutor] disavowed the likelihood of rebuttal only with respect to prison conditions. He did, however, indicate he would have altered the focus of his closing argument to respond to such evidence. *It is also clear from the record that much damaging testimony regarding petitioner's own violent conduct in prison and other circumstances desensitizing inmates to violence could have, and undoubtedly would have, been elicited on cross-examination. [Citation.] Similar inferences can be drawn with respect to the mitigating evidence of family background. While it may be unlikely the prosecutor would have sought to locate rebuttal witnesses in Alabama to contradict evidence of petitioner's upbringing, the mitigating impact could nevertheless have been undermined on cross-examination and through closing argument, particularly regarding petitioner's early criminal acts. With respect to mental health rebuttal, the realities of trial surely would have prompted the prosecutor to present expert testimony in contradiction since such witnesses were generally available.*

> Petitioner counters that if [the trial prosecutor] had found the testimony of Woodall and Pettis so useful, he would have introduced it even without petitioner's presenting the mitigating evidence. Their testimony, however, did not fit with the focus of the People's case, which was not petitioner's past crimes, but the gratuitously brutal circumstances of the current ones. Given the disturbing nature of the facts, the prosecutor had little incentive to parse the details of petitioner's criminal history. Rather, as was more common in the 1980's, he emphasized the circumstances of the crimes to persuade the jury death was appropriate. *If, however, the jury were to hear details of petitioner's background in mitigation, the prosecutor would reasonably want to ensure it received a balanced and accurate picture.* [Citation.]

(*Id.* at pp. 1251-1252, ellipses in original & italics added.)

Thus, respondent was simply not required to call the trial prosecutor as a witness at the reference hearing in order to establish the rebuttal evidence the prosecution would have introduced at petitioner's penalty phase trial had petitioner sought to introduce evidence of the newly minted mitigation themes presented at this reference hearing. For the same reasons, petitioner's related contention – "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" (PB 279) – misses the point. Respondent elicited the damaging rebuttal evidence undermining petitioner's newly minted mitigation themes presented at the reference hearing through the cross-examination of witnesses called by petitioner including Wayne Harris, Earl Bogans, Marcus Player and Gary Jones. The trial prosecutor would have done the same had petitioner's trial counsel called them as witnesses at the penalty phase to testify to matters to which they testified at the reference hearing.

While petitioner chooses to characterize as "ludicrous" the Referee's findings that the information in petitioner's CYA records, including the four psychological and psychiatric reports of Drs. Prentiss, Perrotti, Minton and Brown (Exs. D, I and J), the December 13, 1978 Initial Home

Investigation Report (Ex. H) and the December 12 1979 Youth Training School Case Report (Ex. G-13), provides devastating impeachment/rebuttal evidence undermining the credibility of many of petitioner's newly minted mitigation themes (PB 279-280), the lengthy excerpts culled from those records cited by the Referee quickly disabuse that view.[107] (Cf. *In re Ross* (1995) 10 Cal.4th 184, 205 [at reference hearing ordered in response to the habeas corpus allegation of petitioner's codefendant, Craig Ross, of ineffective assistance at the penalty phase of Ross's trial, the "mitigating evidence consisted of the testimony of 15 members of petitioner's family testifying primarily that they loved petitioner, that he was protective and caring to other family members, and that he was abused as a child by his stepfather, Henry Brown, especially when Brown had been drinking or at the racetrack. There was also testimony that petitioner lived in a violent neighborhood, that his failure to be rehabilitated was partly the fault of institutional authorities, and that he expressed remorse for his earlier crimes"].) In *Ross*, this Court found no *Strickland* prejudice in part due to available impeachment/rebuttal evidence consisting of (1) statements by

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[107] For example, the Referee noted, "The CYA records contain numerous statements by petitioner and reports of conduct that were not presented to the jury that are prejudicial to petitioner's claim. *Petitioner's statements have been previously set out as to his family, absence of head injuries, absence of beatings by siblings, use of drugs and gang involvement.* However, several statements are highlighted at this point to reflect the level of impeachment available to the prosecution. [¶] (1) Statements to Dr. Perotti (1979). . . . . He is not easily influenced by others . . . he feels that he does what he wants to do....he became involved with the law because he thought he could get away with things . . . most of his offenses were for fast money . . . if not for fast money I would not have committed the offenses. These statements by petitioner, when connected to the special circumstances of factor A (Hassan burglary, robbery), *are viewed as extremely detrimental* to petitioner's claim that the introduction of CYA records would demonstrate that he was amenable to rehabilitation in a structural setting." (RR 295, italics added.)

petitioner contained in a psychiatric report "prepared when [Ross] was 15 years old" in which [Ross] denied "that he had []ever been beaten or physically abused by anyone, he liked and got along well with Brown, and he felt better when there was a man at home fulfilling the role of father" (*id.* at p. 206); (2) statements made by Ross's mother in 1973 when Ross was 14 years old to "a juvenile probation officer that petitioner was cooperative at home, but that when he was with his peers he had no control of himself or his behavior[,]" in 1974 "that [Ross] had been mischievous from the time he was a child, and that he had a problem with his temper[, and i]n 1975 . . . [that Ross] 'has a hate for whites, shows a great deal of resentment towards all type of people'" (*ibid.*); and (3) "criminal conduct while [Ross] was a juvenile[,]" Ross's "jury [having] heard no evidence of misconduct by [Ross] before he was 18 years old and none at all in a custodial setting" (*ibid.*); see also *id.* at p. 209 ["we thus find that the mitigating evidence was readily impeachable by the mother's and [Ross's] own words and actions and would have triggered strong rebuttal"].[108]

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[108] Despite evidence proffered by Ross at the reference hearing "that it is common for an abused child to deny the abuse, and argu[ment] that because [Ross] had been institutionalized for a long time and wanted to go home, he had a motive to minimize problems in his home life[,]" this Court nevertheless found that "[Ross's] own words, more contemporaneous to the alleged incidents than the later testimony of his relatives, would have made effective impeachment." (*In re Ross*, *supra*, 10 Cal.4th at p. 206.) Similarly, noting that rebuttal evidence was not subject to Penal Code section 190.3 notice requirements and "'need not relate to any specific aggravating factor under section 190.3[]' [citation][,]" this Court found evidence of Ross's juvenile criminal misconduct "would have been admissible to rebut evidence portraying [Ross] as a kind, protective, caring person." (*Id.* at pp. 206-207.) The Court also rejected Ross's contention "that evidence of the sustained juvenile petitions, as distinct from the criminal behavior itself, was not admissible" and held that juvenile misconduct not resulting in a criminal conviction would have constituted properly admitted rebuttal evidence to rebut Ross's claim of good character.

(continued...)

In sum, while petitioner's *Strickland* expert laid out a penalty phase approach in which trial counsel would throw every available theory and witness at the jury and hope that one or more "stuck," for the multitude of reasons set forth by the Referee, reasonably competent counsel would wisely have chosen a different approach. The "throw in the kitchen sink" approach from petitioner's *Strickland* expert also flies in the face of what the expert himself admitted with respect to the importance for trial counsel to maintain credibility with the penalty phase jury. "Earley acknowledged the issue of maintaining trial counsel's credibility with the jury was an issue to be addressed at all times in the trial. (RHT 3973-3974.)" (RR 323.) "Earley also conceded that 'if [trial counsel] put[s] evidence on and the jury believed that the evidence that you put on was phony evidence with no basis in fact, of course that hurts you.' (RHT 3975:12-15.)" (RR 338, alterations in original.) The essential need for trial counsel to maintain credibility with the penalty phase jury provides yet another reason why the Referee's findings that reasonably competent counsel would not have put on mitigation themes lacking in credibility and subject to impeachment–such as petitioner's sibling abuse, brain damage and Taylor alibi claims–are based on substantial evidence and are fundamentally sound. In conjunction with the mitigation themes which the Referee properly found were not discoverable by reasonably competent counsel due in part to nondisclosure

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(...continued)
(*Id.* at p. 209.) In the case *sub judice*, as outlined by the Referee, the number and quality of statements by petitioner and his mother reflected in petitioner's CYA and school records and the availability of significant additional evidence of petitioner's gang related criminal activity and misconduct at CYA not previously presented to petitioner's jury at either the guilt or penalty phase provide a record of available impeachment and rebuttal evidence to petitioner's newly minted mitigation themes which is at a minimum comparable to the available impeachment and rebuttal evidence in *Ross*, if not significantly greater.

by petitioner, his mother and siblings, the Referee got it right when he found: "*In short, reasonably competent counsel conducting the appropriate investigation for penalty phase evidence would have been well within the standards of competent practice to have done at petitioner's penalty phase exactly as petitioner's trial counsel did.*" (RR 286, italics added.)

For all of the foregoing reasons, petitioner's exceptions that "the referee erred in failing to fully credit the *Strickland* expert's opinions" and "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 a reasonable counsel to not present this mitigating evidence" should be rejected by this Court.

J. Conclusion

Because the Referee's findings to which petitioner has filed numerous exceptions are fully supported by substantial evidence and are the product of the Referee's "resolution of testimonial conflicts and assessment of witnesses' credibility" (*In re Cox*, *supra*, 30 Cal.4th at p. 998), those findings are entitled in this Court to "great weight" and "deference." (*Ibid.*) For all of the foregoing reasons set forth by respondent in response to petitioner's exceptions, this Court should reject each and every one of the exceptions.

II. IN LIGHT OF THE REFEREE'S PROPERLY SUPPORTED FINDINGS, PETITIONER FAILS TO MEET HIS BURDEN OF PROVING *STRICKLAND* PREJUDICE AS A RESULT OF ANY DEFICIENT PERFORMANCE BY PETITIONER'S TRIAL COUNSEL[109]

Petitioner contends, "given the abundance of credible mitigating evidence that could have been presented, trial counsel's failure to obtain and present such evidence was prejudicial[.]" (PB 284.) Respondent disagrees. The Referee's findings, meticulously detailed in his report, demonstrate both a dearth of "credible mitigating evidence" that reasonably competent counsel could have presented at petitioner's penalty phase trial, and an abundance of available impeachment and rebuttal evidence that the prosecution could have introduced to undermine petitioner's newly minted mitigation themes, had trial counsel sought to introduce such evidence at the penalty phase of petitioner's trial.

Thus, while petitioner argues that he "presented *compelling evidence* that he was not involved in the Taylor crimes[]" (PB 288, italics added), the Referee reasonably found to the contrary. (See, e.g., RR 16 ["a close, detailed review of petitioner's proposed alibi claim is simply not supported by the testimony given during the reference hearing. [¶] The three Raymond Avenue Crips gang members, who testified as to the alibi at the reference hearing, were not credible. [¶] The *Strickland* expert's opinion, that there was no downside to the introduction of alibi evidence for the Taylor murder, lacks foundation. The expert did not read Wayne Harris, Earl Bogans and Marcus Player's testimony. He did not review the evidence reflecting the nature and extent of petitioner's association with Ross, Marcus Player, Evan Mallet, Harris and Bogans. He did not read the

[109] Respondent has thoroughly addressed the issue of prejudice in respondent's brief on the merits at pages 51-67, an argument which respondent incorporates in this reply brief to petitioner's claim of prejudice.

reference hearing testimony of the LASD deputies called by petitioner nor did he read Mallet's preliminary hearing transcript, Penal Code § 1538.5 and Evidence Code § 402 motions, or trial transcript which contain the testimony of the LASD deputies who participated in the post-Taylor murder activities at Helen Keller Park, the car chase and crash and the arrest of Simms and Mallet on the morning of December 12, 1980"]; RR 79 ["the primary alibi witnesses called to support petitioner's claimed alibi were fellow Raymond Avenue Crips gang members. Their testimony is inconsistent with their own declarations, with each other and with petitioner's own trial testimony. The testimony given by Harris, Bogans and Player is not credible and does not support an alibi for the Taylor murder. [¶] The calling of fellow gang members would not serve petitioner's best interests. If called, their testimony would only confirm petitioner's gang involvement as well as his past and current association with co-defendant Ross"]; see also RR 167-185 ["Detailed Discussion of Evidence and Findings [¶] 1. Alibi for Taylor Murder and Related Crimes"]; RR 288 ["the availability of reference hearing witnesses who were active members of the Raymond Avenue Crips at time of trial and their willingness to testify or identify other gang members or their gang's activities is deemed highly unlikely. Their willingness to talk to Skyers is also unlikely. The witnesses are Harris, Bogans, and Marcus Player" (underlining in original)]; RR 291-292 ["Alibi for Taylor Murder [¶] i) The alibi for the Taylor murder as submitted by petitioner at the reference hearing would require the testimony of Wayne Harris, Earl Bogans and Marcus Player. The three witnesses were members of the Raymond Avenue Crips at the time of the trial. Marcus Player was arrested for robbery in November 1980 and at the time of trial was in custody pending trial for an unrelated murder. Marcus Player denied being a Raymond Avenue Crip at the reference hearing. Wayne Harris and Earl Bogans

identified that they as well as Marcus Player, petitioner, Mallet and Ross were active Raymond Avenue Crips before and at the time of the trial. This testimony is inconsistent with petitioner's trial testimony and his statements to CYA authorities and doctors that he and the others were not gang members at the time of the trial. [¶] ii) Harris testified that upon being released by the LASD on December 28, 1980, he went to petitioner's home where Craig Ross was present. Petitioner told Dr. Miora that Ross and Winbush were two of his best friends and that they did not use drugs. [¶] iii) No law enforcement witness exists that confirms the physical detention of petitioner or Harris at the time of the Taylor murder" (underlining in original & italics added)]; RR 312-368 [as a preamble to the Referee's detailed discussion of evidence and findings relating to the Taylor crimes and the opinions of petitioner's *Strickland* expert, the Referee noted that "[w]hile no circumstances may have weighed against trial counsel conducting additional investigation for the Taylor murder, for the reasons set forth in the referee's findings concerning reference questions numbers 2 and 3, the referee finds that there were multiple circumstances weighing against the presentation of the Taylor alibi evidence. In addition, the referee rejects any opinion from petitioner's *Strickland* expert to the contrary as unreasonable" (*id.* at p. 312, fn. omitted)].)

Recycling arguments he raised in support of exceptions to findings of the Referee, petitioner further contends in support of his claim of prejudice, "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." (PB 289.) As respondent has detailed above, petitioner presented no evidence to support any inference petitioner's

knowledge regarding the waterbed at the Hassan home came from a source other than petitioner's presence in the home during the execution murders and robberies of Bobby and Eric Hassan. Rather than calling relevant witnesses on this issue, including Craig Ross and petitioner, petitioner presented only a speculative theory. Similarly, for the reasons detailed by respondent at footnotes 40, 50, and 106, the Referee provided abundant findings supported by substantial evidence from the record as to why reasonably competent counsel would not have introduced evidence of petitioner's "positive adjustment at CYA," and these findings also establish why there was no prejudice in failing to present this evidence. These findings included the availability of devastating impeachment evidence that while at CYA petitioner had assaulted another ward and a staff member, engaged in a race riot between blacks and whites, and successfully manipulated staff at CYA to obtain a favorable parole recommendation.

As the Referee correctly found, "[e]vidence that petitioner had the ability to successfully manipulate staff, including doctors, at the CYA runs counter to claims raised in this proceeding that petitioner suffers from brain damage and low intellectual functioning." (RR 259, fn. 148; see also RR 267 [reasonably competent counsel would not have presented "[e]vidence of petitioner's adjustment while at the CYA . . . . The fact that the Hassan murders took place so close to the time petitioner was released from the CYA and placed on parole would support the prosecution's argument that the CYA reports that commented on the potential for manipulation by petitioner were correct. The positive comments by CYA staff, if introduced, would permit the introduction of the negative number of comments and reported acts of misconduct by petitioner while in CYA custody. Marcus Player's testimony at the reference hearing, dealing with photos taken while he and petitioner were in the CYA, would also be admissible"]; RR 15 ["a reasonable trial attorney would not have presented

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

Petitioner also claims in support of his prejudice argument that he "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." (PB 290.)

Once again, petitioner ignores the Referee's multiple relevant findings supported by substantial evidence that petitioner's claim of physical abuse at the hands of his older brothers was not credible. (See RR 13 ["the testimony from petitioner's mother and sister (Rita Powell) that petitioner was physically beaten by his older brothers, and in particular Lewis Champion III, was not credible. Given the nature of the alleged beatings and the complete absence of any observation of injuries, bruises or complaints by petitioner to his best friend Gary Jones or fellow gang members that testified at the reference hearing, the referee finds that petitioner's mother and sister exaggerated their testimony"]; RR 85 ["9. Sibling Abuse [¶] Mrs. Champion, E.L. Gathright, Rita and Linda Champion are the primary witnesses on this subject. Neither Reggie nor Lewis Champion III were called to testify during the reference hearing. Rita and Linda testified as to emotional and physical abuse inflicted by older brothers. Their testimony was i) inconsistent with that offered by other witnesses during the reference hearing who were close friends or fellow gang members of petitioner; ii) inconsistent with Mrs. Champion's statement to school officials and the CYA; and lastly, iii) petitioner's

description of his family life to CYA staff. *The referee did not find the claim of physical beatings of petitioner to be credible.* I do find that Lewis III was disruptive and harsh in his discipline. The disruptive aspect could have been presented *if discussed or disclosed.* [¶] The absence of any medical report, police report or observation by anyone of physical bruises or injuries on petitioner, particularly by Gary Jones, discredits the claim by family members that petitioner was physically beaten by Lewis III" (italics added)]; RR 230-234 [during a thorough discussion of the claim of "Sibling Abuse," the Referee (1) details the reference hearing testimony of Gary Jones; (2) highlights the failure of petitioner's mother and siblings to inform Skyers of these beatings during his more than one year representation of petitioner; (3) points out the absence of any indication in petitioner's CYA records of such abuse; (4) finds significance in the failure of petitioner to call either of his two available older brothers, Lewis III and Reginald, at the reference hearing, citing to Evid. Code, § 412; and (5) concludes by finding "*that the claim of physical beatings or abuse by Lewis Champion III and/or Reginald Champion is not true*. Further, the referee finds that in 1982 reasonably competent counsel would not have been able to discover evidence of this alleged physical abuse. In addition, reasonably competent counsel, even if aware in 1982 of the claim, would not have presented it at penalty phase. Even had a 'mitigation specialist' such as Dr. Miora been employed in 1982, *that expert's opinion would need to have relied on the same family members whose reliability and credibility the jury had already rejected.* Second, if as petitioner contends in this proceeding, reasonably competent counsel should have interviewed Wayne Harris, Earl Bogans, Marcus Player and Gary Jones, assuming those witnesses gave statements consistent with the reference hearing testimony relevant to the issue of alleged physical abuse, reasonably competent counsel would have had an additional reason to question the credibility of the accounts from

family members on this issue and to be concerned about the possibility that if reasonably competent counsel could have located and interviewed these witnesses, so too could the prosecution had petitioner chosen to present at the penalty phase evidence of this physical abuse claim. *The prosecution would also have had significant rebuttal evidence available through Exhibits H, CCC, D, I, J and the November 8, 1978 juvenile court probation report in Exhibit 147 to impeach any claim petitioner was subject to physical beatings or abuse from his older brothers*" (italics added)].)

Petitioner fares no better with his claim that he was raised in a dangerous neighborhood. The Referee resolved this claim flatly against petitioner, finding, "*Mitigation does not exist* as to petitioner's claim that: [¶] . . . [¶] . . . [¶] . . . [¶] (4) Petitioner was not a member of the Raymond Avenue Crips at the time of the crimes. The testimony during the reference hearing clarified any residual questions and confirmed that petitioner was a hardcore member of the Raymond Avenue Crips. *The evidence indicates that the Raymond Avenue Crips, and petitioner in particular, were the source of the increase in violent crime in petitioner's neighborhood.*" (RR 14-15, italics added; see also RR 87 ["13. Petitioner's Neighborhood [¶] The increased community dangers, which started to develop in petitioner's neighborhood, are not considered mitigation evidence that was available to trial counsel. Petitioner's involvement in a violent criminal street gang at or about the time of the increase in violent crimes and the gang's use of Helen Keller Park as their hangout would be rebuttal to any claimed mitigation based on increased community dangers"]; RR 234-240 [the Referee concluded his discussion of Dr. Miora's testimony regarding the subject of "Community Dangers Affecting Petitioner's Development and Functioning" by finding, "There does not appear to have been any evidence of community danger available for use by petitioner's counsel in 1982

which did not involve directly or indirectly the danger created by petitioner and his fellow Raymond Avenue Crips gang members"]; RR 293-295 ["Mitigation Expert [¶] i) Any mitigation expert or other expert seeking to introduce the mitigation areas of positive CYA adjustment, childhood development/functioning, increasing community dangers, lack of gang involvement and lack of association with Raymond Avenue gang members, might be questioned about petitioner's violent history, gang membership or petitioner's prior statements. [¶] ii) At the time of trial, petitioner had an extensive, violent criminal arrest record. Only two juvenile offenses were given to the jury. As to the two given to the jury not all the circumstances were provided. The underlying facts of petitioner's prior arrests might become admissible to impeach a witness or impeach the basis of petitioner['s] mitigation expert's opinion. [¶] . . . [¶] iv) Any efforts by petitioner to minimize or rebut prosecution gang evidence would face the same possible introduction of evidence showing the degree and extent of petitioner's involvement in gangs. [¶] v) Petitioner was a gang member since the age of twelve (1974) and he and Raymond Avenue Crips committed crimes in his neighborhood. This would impeach petitioner's mitigation of increased community dangers. [¶] vi) Petitioner's extended association with Mallet, Player, and Ross would be shown by close examination of petitioner arrest records. [¶] vii) The referee notes that evidence was given during the guilt and penalty phase on the subject of petitioner and co-defendants' [*sic*] gang association with the Raymond Avenue Crips and the violent nature of the charged crimes. However, more evidence existed at the time of trial dealing with theses [*sic*] subjects. This evidence is detrimental to petitioner's proposed mitigation. [¶] viii) Petitioner's Arrest Record. The location of each juvenile arrest, the nature of petitioner's conduct and the identity of co-participants are a significant erosion of the claim of increasing community dangers. Petitioner's arrest

record, when viewed in the context of date, location and nature of offenses by Evan Mallet, Marcus Player (arrest for 11-19-80 robbery at El Segundo/Raymond) and Craig Ross (1977 attempted murder of Mark Hartman that took place in Helen Keller Park), illustrates that the Raymond Street Crips were the major source of violent crime in petitioner's neighborhood. The reference hearing evidence indicates petitioner was present at Helen Keller Park when Ross shot Hartman. [¶] Evidence of a 1977 residential burglary was not presented to the jury. This crime took place in petitioner's neighborhood. Petitioner's fingerprints were found at the scene" (underlining in original)].)

As respondent has discussed, petitioner's contention in support of prejudice that petitioner was raised without a father figure fails to address the multiple findings by the Referee regarding the deliberate nondisclosure of petitioner's family/social history to trial counsel by petitioner's mother, siblings and petitioner himself. As the Referee found:

> Skyers' reference hearing testimony is very credible. Skyers did visit petitioner's home and interviewed key family members. No information was disclosed by family members as to poverty, financial difficulties, sibling abuse, brain damage due to fetal abuse, head injury, head trauma inflicted by older brothers, petitioner's gang involvement, the impact on the family and petitioner resulting from Trabue Sr.'s death, and the lack of father figure. [¶] Beyond the non-disclosure are the additional factors that the primary witnesses that this evidence would depend on are the family members that testified in support of petitioner's alibi for the Hassan murders during the guilt phase. [¶] Reference hearing witnesses Gary Jones, [Wayne] Harris, [Earl] Bogans and Marcus Player testified in a manner inconsistent with petitioner's current claim of poverty, malnutrition and inadequate clothing. In the view of family members, fellow gang members and friends, petitioner was very bright and liked to be a leader. [¶] A complete absence of documentation by non-family members is not a small matter. No medical records support petitioner's claim of fetal abuse, head injury, infliction of head trauma by older brothers or physical abuse. [¶] Mrs. Champion's prior statements to school

> authorities or CYA staff are significantly inconsistent with her testimony during the reference hearing.

(RR 268-269; italics added.)

In addition, while recognizing that "[g]enerally no circumstances weighed against the investigation of the proposed additional [mitigating] evidence[,]" in response to the first aspect of Reference Question 4 asking "[w]hat circumstances, if any, weighed against the investigation or presentation of this additional [mitigating] evidence?" (RR 287), the Referee found certain notable exceptions based on the evidence and documents presented at the reference hearing including: "1) Petitioner's family members did not disclose any adverse family history to Skyers. [¶] 2) Marcus Player was not available to trial counsel in 1982. [¶] . . . [¶] 4) Lewis Champion III's availability or willingness to be interviewed and/or testify is unknown. Lewis Champion III was interviewed by petitioner's habeas counsel but he did not testify. In view of the claim of physical beatings by Lewis Champion III, his absence as a witness is remarkable." (RR 287-288.)[110]

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[110] It is also important to remember that the Referee did *not* find Skyers's penalty phase investigation concerning the newly minted family mitigation themes presented for the first time at the reference hearing to be deficient, the other requisite prong for a *Strickland* constitutional violation. Quite the contrary:

> The referee finds the nondisclosure of family history by petitioner or members of his immediate family was purposeful and that no attorney or investigator could have acquired or developed the family mitigation now presented in view of the failure to disclose. [¶] Skyers personally investigated the following: [¶] . . . [¶] . . . [¶] . . . [¶] (4) He met with the family members at their home, his office and in court. [¶] (5) He attempted to discuss with the family and petitioner matters related to petitioner's family history and upbringing. In none of his meetings did anyone, including petitioner, say anything about any of the now claimed family difficulties including poverty, fetal abuse, traffic accident head trauma, sibling physical beatings, death of

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> petitioner's stepfather and its impact on the family and the domestic violence and abuse suffered by petitioner's mother at the hands of petitioner's biological father. [¶] (6) He reviewed the CYA doctor evaluations conducted between 1978 and 1980. [¶] (7) He reviewed the reports by Doctors Seymour Pollack . . . and Lillian Imperi . . . prior to trial. [¶] (8) He reviewed the CYA/YTS staff reports. [¶] (9) He reviewed the juvenile arrest records including the two juvenile aggravators.

(RR 11-12, italics added.)

Thus, separate and apart from petitioner's failure to prove prejudice from any properly established deficient performance by his trial counsel, petitioner cannot prove he was deprived of his constitutional right to effective assistance of counsel at the penalty phase with respect to the family mitigation themes presented for the first time at the reference hearing in light of the Referee's findings supported by substantial evidence that trial counsel did not render deficient performance in this area. The same applies with respect to trial counsel's decision not to seek additional psychological or neuropsychological evaluation and/or testing. Separate and apart from the Referee's findings that "[p]etitioner did not suffer any brain damage as a result of 1) fetal abuse; 2) from a 1968 traffic accident; or 3) physical beatings of petitioner by siblings[]" (RR 12) and that "[p]etitioner did not suffer from substantial cognitive defects at the time of trial" (*ibid.*), the Referee's properly supported findings demonstrate trial counsel was not deficient either in failing to seek additional psychological/neuropsychological evaluations and/or testing or to present evidence of such at the penalty phase of petitioner's trial. (See, RR 13 ["no trial attorney could be faulted for not asking for further testing or concluding that no mitigating evidence existed at the time of trial as to petitioner's mental status"]; RR 81 ["i) All of the doctors who examined petitioner prior to trial found he did not suffer from any mental defects, disorders or significant impairments. Not one of the six doctors recommended additional psychological or neuropsychological testing of petitioner. [¶] j) Dr. Prentiss found no neurological impairments. [¶] k) The referee finds that Skyers did not have any reason to order any additional evaluations based on his review of existing examinations prior to trial"]; RR 271 ["Skyers was aware of CYA's medical reports by Drs. Brown, Minton, Prentiss and Perotti as well as the medical report prepared by Drs. Pollack and Imperi at the time of trial"]; RR 271 ["No evidence as to mental defect, disease or illness was available to trial counsel in 1982.

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The CYA mental evaluations of petitioner did not indicate a need for any additional psychological evaluations or testing"]; RR 271-272 ["Based on CYA mental evaluation reports and a report by Drs. Pollack and Imperi, no evidence existed to reflect mental illness, defects, disease or impairment on the part of petitioner. Reasonable counsel would not have a need for further testing or psychological examination. [¶] Due to petitioner's juvenile arrest records and the underlying conduct on the part of petitioner and the extent and duration of his Raymond Avenue Crips membership, any potential mitigation theme that would allow the prosecution to rebut with petitioner's criminal and/or gang history would cause a reasonable competent attorney not to present the potential mitigation evidence. This includes any psychological experts seeking to testify as to petitioner's childhood development, any defense gang expert, CYA adjustment and community dangers"]; RR 287-288 [in a series of exceptions to the Referee's general finding that "no circumstances weighed against the investigation of the proposed additional evidence[,]" one of the Referee's listed exceptions was "5) The referee agrees with petitioner's claim that Skyers should have interviewed CYA staff and doctors. No circumstance precluded this investigation. However, in view of the extensive psychological CYA evaluations available and the consistency of the doctors' findings, the referee finds that reasonably competent counsel did not need to conduct further psychological evaluations or testing, including neuropsychological examination. As previously stated, the referee finds that Skyers had access to and did review CYA records including the doctors' reports"]; RR 289-290 [in answering that part of Reference Question 4 asking "what circumstances weighed against the presentation of the additional evidence[,]" the Referee's findings included "1) The lack of credibility of key family members including petitioner's mother and sister (Rita Champion Powell) whose alibi testimony had been rejected by jury. The availability to the prosecution of prior statements by petitioner's mother and petitioner to school, police and CYA authorities that would impeach their reference hearing testimony or claimed mitigation. [¶] 2) The lack of any documents to support the claimed mitigation of brain damage based on fetal abuse, traffic accident head trauma, or head injury as a result of physical beatings by older brothers. [¶] . . . [¶] 4) The existence of contemporaneous CYA psychological/psychiatric evaluations that petitioner did not suffer from any mental illness, defect, or disorders. These reports were written between 1978 and 1980 by four separate doctors and are consistent with each other. [¶] 5) The absence of any evidence by any close family member, relative, friend, neighbor or fellow gang member
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who would opine that petitioner suffered from any type mental impairment during petitioner's life" (underlining in original)]; and RR 292-293 [in answering that part of Reference Question 4 asking "what evidence damaging to petitioner, but not presented by the prosecution at the guilt or penalty phase trials, would likely have been presented in rebuttal if petitioner had introduced this evidence[,]" the Referee's findings included "Petitioner's Development/Functioning/Social history [¶] i) The testimony of Harris, Bogans and Player given during the reference hearing undermines petitioner's claim of poverty, malnutrition or physical abuse, poor home environment or that petitioner was a follower or exhibits mental defects. [¶] ii) The testimony of Gary Jones given during the reference hearing is inconsistent with petitioner's claim of poverty, malnutrition or physical abuse. Jones describes their childhood as 'we had a beautiful life.' In his opinion, petitioner displayed leadership traits and was athletic. He expressed high regard for Mrs. Champion as a mother. Jones recalled that petitioner was unable to participate in organized sports due to a lack of funds to pay required fees. [¶] iii) Petitioner's mother's statement to school authorities that petitioner had a normal childbirth (Exhibit CCC). [¶] iv) Petitioner's mother's statement to CYA authorities that all was well at home (Exhibit H). [¶] v) Petitioner's statements to CYA authorities that he has a regular family with both sad and happy times and that he has had the usual sibling rivalry with his brothers which he did not view as a major problem (Exhibit I). Petitioner's statement to CYA authorities that he is not a follower or easily influenced by others (Exhibit I). Petitioner told Dr. Minton he has had no contact with his biological father (Exhibit D). [¶] Mitigation Expert [¶] i) Any mitigation expert or other expert seeking to introduce the mitigation areas of positive CYA adjustment, childhood development/functioning, increasing community dangers, lack of gang involvement and lack of association with Raymond Avenue gang members, might be questioned about petitioner's violent history, gang membership or petitioner's prior statements. [¶] ii) At the time of trial, petitioner had an extensive, violent criminal arrest record. Only two juvenile offenses were given to the jury. As to the two given to the jury not all the circumstances were provided. The underlying facts of petitioner's prior arrests might become admissible to impeach a witness or impeach the basis of petitioner['s] mitigation expert's opinion" (underlining in original)].) It is also important to remember that petitioner's jury had an ample opportunity to assess any intellectual limitations petitioner might have possessed during petitioner's extensive guilt phase testimony during which petitioner held his own under the skilled, intensive and persistent cross-examination by an

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At the end of the day, shorn of mitigation themes presented for the first time at the reference hearing–themes that the Referee properly found to be (1) not reasonably discoverable by competent counsel; (2) not credible; or (3) not themes that reasonably competent counsel was required to present–the Referee accurately assessed the state of petitioner's case as follows: (1) "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[]" (RR 286); (2) "Skyers did realize the magnitude of the aggravating factors attributable to the circumstances

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experienced prosecutor. (*People v. Champion*, *supra*, 9 Cal.4th at p. 902.) As forensic psychiatrist Dr. Faerstein testified at the reference hearing: "'I think the manner in which [petitioner] presented his testimony showed his ability to adapt his conduct and conform his conduct to the circumstances of the trial, of responding in court in a legal setting to direct examination and cross-examination, the language he used. His nature of responding to questions showed an ability to conform to the circumstances of the trial, which is a very structured and organized setting.' (RHT 6537.) Further, Dr. Faerstein noted the contrast between petitioner's 'language and behavior' as reflected in the surreptitiously recorded conversation between petitioner and his co-defendant, Craig Ross (Exhibit F), and petitioner's 'conduct and behavior in trial in direct and cross-examination [which] demonstrated his ability to conform to the circumstances of his environment.' (RHT 6537.)" (RR 66, first alteration added.) "In Dr. Faerstein's opinion, petitioner's trial testimony provided evidence that petitioner could control any impulsivity towards inappropriate conduct. 'The transcript [of petitioner's trial testimony] reflects no inappropriate conduct, inappropriate language. It appeared that he conformed to the decorum of the courtroom, and was able to conform his conduct to the circumstances.' (RHT 6542-6543.)" (RR 66-67, alteration in original.) Thus, because petitioner cannot establish deficient performance by trial counsel in this area, petitioner cannot prove deprivation of his right to constitutionally effective assistance of counsel based on this claim. These findings also demonstrate that there was no prejudice within the meaning of *Strickland.*

of the Hassan murders. Skyers' assessment that the manner of the killing and the purpose or reason for the killing would constitute an almost insurmountable burden on any reasonable trial attorney in identifying and presenting sufficient mitigation was confirmed during the extended reference hearing[]" (RR 20); and (3) "trial counsel might be correct when he observed that given the nature of the evidence presented in the guilt phase and given the nature and manner of death of Bobby Hassan and his thirteen year old boy, Eric, that no mitigating evidence existed to outweigh the aggravating circumstances of those two murders." (RR 377)[111]

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[111] In finding no *Strickland* prejudice from the performance by trial counsel for petitioner's codefendant Craig Ross at Ross's penalty phase, this Court assumed trial counsel would have presented the mitigating evidence presented for the first time at Ross's reference hearing, because said mitigating evidence "substantial." (*In re Ross*, *supra*, 10 Cal.4th at pp. 205, 213.) "[Ross] was convicted of three murders on two separate occasions, including the cold-blooded killing of a father and fourteen-year-old son, who were shot while lying on a bed, one with his hands tied behind his back. [Ross] personally raped the sister of the third murder victim. Although the additional mitigating evidence, had it been presented, might have evoked sympathy, there was no compelling connection between that evidence and the crimes of this case. *The crimes were gang-conducted robbery murders, not sudden explosions of angry violence or psychopathic serial killings.* Moreover, the mitigating evidence would have elicited damaging impeachment and rebuttal evidence, with the inevitable adverse effect on the actual defense strategy at trial. For all these reasons, we find no reasonable probability the result would have been different had the mitigating evidence been presented." (*Id.* at p. 213, italics added.)

First, unlike the mitigating evidence presented by Ross at his reference hearing which this Court characterized as "substantial" and which this Court assumed reasonably competent counsel would have presented at Ross's penalty phase trial, the same cannot be said for petitioner's newly minted mitigation themes in light of the Referee's properly supported findings that (1) much of said mitigation evidence could not have been discovered by reasonably competent counsel; and (2) as to both that which could not have been discovered and that which reasonably competent counsel could have discovered, the mitigating evidence was not credible,

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was subject to substantial impeachment and/or rebuttal evidence and/or was inconsistent with petitioner's own guilt phase testimony such that reasonably competent counsel would not have presented the mitigation evidence. Although unlike petitioner, Ross was charged and convicted of the Taylor murder and related crimes, Ross was not found to have personally killed Michael Taylor or Bobby or Eric Hassan. (*People v. Champion*, *supra*, 9 Cal.4th at pp. 897-898.) Petitioner had not been found to have personally killed Bobby or Eric Hassan. (*Id.* at p. 897.) Like petitioner's penalty phase jury, Ross's jury was aware of Ross's age (21 at the time of the crimes, 3 years older than petitioner). (*In re Ross*, *supra*, 10 Cal.4th at p. 210; RR 78 ["the jury was aware of petitioner and Ross's ages, that petitioner was not the shooter and that petitioner was not the leader. The jury was also aware that petitioner's role was that of an aider and abettor or co-conspirator. The jury was instructed under the felony-murder rule (i.e., that even an accidental shooting could incriminate a principal in the offense)"]; see also RR 170 ["petitioner was charged with the murder, robbery and associated burglary of Eric and Bobby Hassan with an armed allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who was the actual killer of the victims. Co-defendant Ross was charged with the Taylor murder and related crimes without a personal use allegation which meant to Skyers that the prosecution could not prove beyond a reasonable doubt who the actual killer of Michael Taylor was. (RHT 1199-1201.) Petitioner's jury knew that petitioner had not been charged with the Taylor murder and related crimes, a fact petitioner's trial counsel reminded the jury of as part of Skyers' guilt phase argument. (14 RT 3300; see also RHT 1467-1468.) As Skyers testified in this proceeding, 'the argument was intended to highlight to [the jury] that Steve was not charged with the Taylor case.' (RHT 1468:21-22.)" (alteration in original)].) Ross' trial counsel addressed the issue of future dangerousness in argument, indicating to the jury the absence of evidence of even "one black mark on Ross' record while he was in confinement" demonstrated Ross could conform his conduct in a structured setting. "This argument, a potentially compelling one when the jury must decide whether the defendant should spend the rest of his natural life in a 'confined environment,' could not have been made if counsel had produced the mitigating evidence suggested in this proceeding and triggered the rebuttal evidence that petitioner had a sustained juvenile petition 'for brandishing a weapon based on threatening a probation camp cook with a large serving fork.'" (*In re Ross*, *supra*, 10 Cal.4th at pp. 210-211.) In a similar vein, following a detailed discussion of the evidence and

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For all of the foregoing reasons, including those set forth in respondent's brief on the merits (RB 51-67), petitioner has failed to prove *Strickland* prejudice from any properly found deficient performance by his trial counsel at the penalty phase of petitioner's trial.

(...continued)
issue at pages 248-259 of his report, with respect to petitioner Champion the Referee found: "In light of petitioner's disruptive and assaultive behavior while at the CYA, his disruptive behavior in front of the jury when the first guilty verdict against petitioner was read and the surreptitiously recorded conversation between petitioner and Craig Ross discussing possible escape from county jail, trial counsel's closing penalty argument, in conjunction with the closing penalty argument by counsel for petitioner's co-defendant (from which the jury could conclude petitioner would not in fact present a future danger if incarcerated under a sentence of life without possibility of parole), protected petitioner from available prosecution rebuttal impeachment evidence demonstrating that petitioner had the ability to manipulate the staff at CYA and did in fact engage in conduct suggesting he would be a future danger 'if things don't go as [petitioner] believes they should.'" (RR 258, alteration in original; see also RR 259 ["for all of the aforementioned reasons, the referee finds that reasonably competent counsel could have chosen the path pursued by petitioner's trial counsel to argue the issue of future dangerousness to the jury without rebuttal by the prosecution and reject the path suggested by petitioner's *Strickland* expert to pursue the issue of 'institutional adjustment' through use of Exhibit 23 A-1 and witness testimony, both of which would be subject to damaging rebuttal impeachment evidence from the prosecution" (fn. omitted)].) In sum, in light of the dearth of credible mitigating evidence which (1) was not subject to impeachment and/or rebuttal evidence by the prosecution; (2) was not inconsistent with petitioner's guilt phase testimony; (3) was reasonably discoverable by competent counsel; and (4) reasonably competent counsel could have presented at the penalty phase of petitioner's trial, petitioner's claim of prejudice can fare no better than the identical claim presented by petitioner's codefendant, Craig Ross, in his habeas petition.

CONCLUSION

Because each of the Referee's findings to which petitioner has filed exceptions with this Court is supported by substantial evidence and therefore entitled to great weight and deference by this Court, each of petitioner's exceptions should be rejected. Further, even as to those properly supported findings by the Referee of deficient performance in the investigation and/or presentation of potential penalty phase evidence, petitioner has failed to establish *Strickland* prejudice. Having failed to carry his burden of proof as to both prongs of *Strickland*, petitioner cannot prevail on his claim that he was denied his constitutional right to effective assistance of counsel at the penalty phase of petitioner's trial. For all of the foregoing reasons, respondent respectfully submits that this Court should deny the petition for writ of habeas corpus.

Dated: July 21, 2010

Respectfully submitted,

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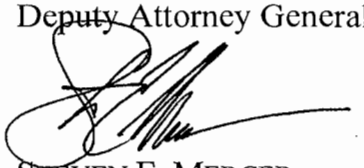

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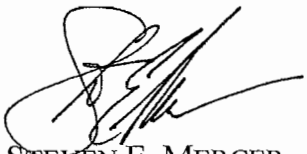
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY TO PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 100,478 words.

Dated: July 21, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On July 22, 2010, I served the attached **RESPONDENT'S REPLY TO PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 22, 2010, at Los Angeles, California.

Frances Conroy
Declarant

Signature

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