SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

In re **Alameda County # 109184**

DELANEY GERAL MARKS **Supreme Court # S110988**

On Habeas Corpus

_____/

ENDORSED
FILED
ALAMEDA COUNTY

JUN 1 3 2006

CLERK OF THE SUPERIOR COURT
By NORA BECERRA
Deputy

FINDINGS AND JUDGMENT OF THE COURT

On March 16, 2005, the California Supreme Court issued an order to show cause why petitioner's death sentence should not be vacated and petitioner sentenced to life imprisonment without the possibility of parole on the ground that he is mentally retarded within the meaning of Atkins v. Virginia (2002) 536 U.S. 304. In this Order, the Supreme Court directed the Superior Court to assign the matter to the judge who presided over the trial that led to the death judgment, if available, to hear the matter.

Since the Order of the Supreme Court on March 16, 2005, petitioner Delaney Marks filed a number of motions in the Superior Court. Upon denial of these motions, Mr. Marks petitioned for review and extraordinary relief in the Supreme Court. The proceedings in the Superior Court were stayed several times in order that such petitions for review and extraordinary relief could be litigated. Following the denial of all such petitions, these proceedings commenced in this Department of the Superior Court, before the undersigned, as the Judge who presided over the trial that led to the death judgment.

All of the evidence has now been presented to the Court. Counsel have presented their closing statements to the Court. The Court took the matter under submission, and continued the matter for one week, for ruling. (The continuance for this period of time was in order that the Court would

be able to review the voluminous transcripts, declarations, reports and other exhibits submitted to the Court as evidence during the course of the hearing.) The Court has now completed this review of the documentary evidence, as well as the testimony presented by the various witnesses in these proceedings and the arguments of counsel, and by this Order sets forth its findings and judgment.

The procedures to be used in these proceedings, the applicable statutory definitions, and the burden of proof involved, are all set forth in the opinion of the California Supreme Court in In re Hawthorne (2005) 35 Cal. 4th 40 (hereafter Hawthorne). The matter shall be heard by a Judge, not a jury. (Hawthorne, supra, at pages 49-50.) The burden of proof shall be on the petitioner, to prove his mental retardation by a preponderance of the evidence. (Penal Code section 1376(b)(3); Hawthorne, supra, page 45, footnote 3, and page 50).

"Mentally retarded" means "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Penal Code section 1376, subd. (a); Hawthorne, supra, at pages 44 and 47. (The Hawthorne opinion notes, at page 47, that the Legislature derived this standard from the two standard clinical definitions referenced by the United States Supreme Court in Atkins v. Virginia (2002) 536 U.S. 304, at page 309, footnote 3.)

Finally, the Hawthorne opinion states: "[A]t the hearing, "the court . . . shall decide only the question of the [petitioner's] mental retardation.", citing Penal Code section 1376(b)(2). The Hawthorne court then states "[T]he court "shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." " (Hawthorne, supra, at page 50; emphasis added).

Elsewhere, the Hawthorne opinion emphasizes that I.Q. tests are not dispositive, stating: ". . . the California Legislature has chosen not to include a numerical IQ score as part of the definition of "mentally retarded." " The opinion goes on to state . . . "mental retardation is a question of fact. [citations omitted] It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of

all the relevant evidence." [citations omitted.] (Hawthorne, supra, at pages 48-49; emphasis added.

I will now turn to an analysis of the evidence presented during these proceedings. First, let me address the scope of the evidence received during this hearing. The Petitioner, Mr. Marks, has called several expert witnesses, who have testified that the defendant suffers from a number of mental or psychological impairments, variously diagnosed as schizophrenia, schizo-affective disorder (and perhaps several additional impairments generally related to schizophrenia and schizo-affective disorder), post traumatic stress disorder (PTSD), dementia, possible seizure disorder (discounted by some but not all physicians), possible chemical dependency, and mental retardation. On occasion, a particular diagnosis was the subject of the opinion of only one expert, with the other experts not reaching the same diagnosis. During the course of the testimony of all of the expert witnesses called by the Petitioner, many hours were devoted to detailed descriptions of the various mental or psychological impairments other than mental retardation. Both sides apparently acquiesced in this --- at no time did Mr. Harmon object to the testimony of the defense experts regarding impairments other than mental retardation; at no time did Mr. Sowards or Ms. Moseby object to questions by Mr. Harmon of the same witnesses on the same subjects.

At this juncture, I need to remind all counsel of the exhortation of the Supreme Court in the Hawthorne case: "At the hearing, the court . . . shall decide only the question of the [petitioner's] mental retardation." (Hawthorne, supra, at pages 45 and 50, citing Penal Code section 1376(b)(2). Emphasis added). While it may have been necessary (and I am emphasizing the word "may") that each expert to be allowed to testify as to all of the impairments he or she perceives present in the defendant, such multi-faceted diagnoses may have the result (perhaps unintended) of significantly confusing the record. But confused record or not, the basic principal of the Hawthorne case remains --- the petitioner bears the burden of proof of establishing that he is mentally retarded, and that this condition manifested before the age of 18, by a preponderance of the evidence. He does not meet his burden of proof by establishing that he suffers from schizophrenia, or schizo-affective disorder, or dementia, or post traumatic stress disorder, or seizure disorder, or chemical dependency, or any combination of these conditions, no matter when any or all of these conditions may have manifested. ***He only meets his burden of proof by***

establishing, by a preponderance of the evidence, that the defendant is mentally retarded and that this condition manifested before the age of 18.

The record should be quite clear that this Court has been extremely, extremely liberal in its' interpretation of what is relevant and what is not relevant on that issue. Thus, the Court has listened while various of the expert witnesses testified, at very considerable length, on both direct and cross examination (and often on re-direct and re-cross examination, also at considerable length) to all of the various impairments noted above. In so doing, the Court's presumption was that there could arguably be some connection, direct or indirect, immediate or tangential, between the other impairments and mental retardation. [The Court did in fact draw the line with Dr. Pablo Stewart, who Mr. Sowards had called at the request of Mr. Harmon, when the Court learned that Dr. Stewart was only retained to ascertain the possible effects of medication upon Mr. Marks during the period between 1990 through 1994, and that Dr. Stewart was not asked to diagnose, nor did he have any opinion on, the subject of Mr. Marks' alleged mental retardation. Upon learning that, and after hearing offers of proof and argument by all counsel, and after further inquiry of Dr. Stewart on this subject, the Court granted Mr. Sowards' motion, and struck all of the testimony of Dr. Stewart, on the grounds that it had nothing whatsoever to do with any issues to be resolved by this Court, as those issues have been defined by the Supreme Court in the Hawthorne case, 35 Cal. 4th at pages 45 and 50.]

The defendant called three expert witnesses --- Dr. Ruben Gur, Dr. Nancy Cowardin, and Dr. George Woods. (Two additional expert witnesses were testified: Dr. Pablo Stewart, called by the defendant at the request of the prosecutor, and previously addressed; and Dr. Erin Bigler, called by the defendant to address the issue of whether or not the brain imaging procedure used by Dr. Gur was generally accepted in the relevant scientific community. With respect to the testimony of Dr. Bigler, the Court has previously ruled that the defendant, as the proponent of the evidence, has established that the brain imaging procedure has gained general acceptance in the relevant scientific community, and thus has satisfied the 'three prong' test of the Kelly/Frye rule).

Turning to the testimony of Drs. Gur, Cowardin, and Woods: as the California Supreme Court stated in the Marks opinion (People v. Marks

(2003) 31 Cal. 4th 197, at 219, wherein the Court unanimously affirmed the defendant's conviction and death sentence, the Supreme Court found the defense expert testimony in the various competency proceedings was "not compelling." The Court went on to state: ". . .[A]s we have explained, expert testimony is only as reliable as its bases (Marshall, supra, 15 Cal. 4th at p. 32), and here they were suspect." [Emphasis added]. This principal is reiterated in countless decisions of the California Supreme Court, and is clearly set forth in the applicable jury instructions on the subject of expert testimony: CALJIC instruction 2.80, and CALCRIM instruction 332. Thus, CALJIC instruction 2.80, in pertinent part, tells the jury that ". . .[a]n opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based. You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable." [emphasis added]. CALCRIM instruction 332 tells the jury, in pertinent part, ". . .[Y]ou must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence. . . ." [emphasis added].

In view of these principals, it is necessary to review the bases of the experts' opinions, to determine whether they have in fact been proved, or whether, as the Supreme Court found to be the case with respect to defense evidence in the various competency proceedings in the Marks case, it is "suspect".

The expert witnesses, in particular Dr. Gur, all relied, and relied very heavily, in support of their diagnoses of various mental and psychological impairments of the defendant, including mental retardation, upon the factual allegations contained in a number of declarations filed by various people in the year 2002, at the beginning the habeas corpus proceedings which have led to this hearing. These declarations were apparently all prepared by Mr. Sowards and other members of the defense team in these habeas corpus proceedings. These declarations made a number of factual allegations regarding the circumstances of the defendant's growing up as a young child in the family home, including that the defendant Delaney Marks was regularly and severely beaten by both of his parents; that the defendant was regularly beaten by his siblings; that other siblings and friends of the

defendant were beaten in the defendant's presence; that the defendant was forced to engage in fistfights with his siblings; that the defendant watched his mother being severely beaten by his father on frequent occasions; that the defendant was, at various times, thrown out of his home by his parents, was not allowed to return, and was abandoned by them; that the defendant suffered from acute food deprivation over a long period of time; that the defendant, on at least one occasion, was chased by his mother with a gun; and that both of the defendant's parents continually and regularly abused alcohol. As I have noted, these factual allegations contributed very heavily to the experts' opinions and diagnoses of various mental impairments, including mental retardation.

Unfortunately for the defendant's position in these proceedings, many of these same individuals had previously testified, under oath, at the penalty phase of the defendant's trial in 1994. When they testified, they were subject to cross-examination, which of course was not the case with the declarations filed in the year 2002. **The testimony of those witnesses at the penalty phase of the trial in 1994 contradicts, in very significant and important respects, many of the allegations contained in the declarations filed in 2002.** The testimony of these witnesses at the defendant's 1994 penalty trial is accurately and fairly summarized by the California Supreme Court in the Marks opinion (People v. Marks, supra, 31 Cal. 4th at pp. 212-213.) I will quote that portion of the Marks opinion in its entirety:

> Several other witnesses testified at the penalty phase, including defendant's daughter Relisha Marks, his sister Elaine Marks Bell, his aunt Bobbie Jane Redic, his cousin Lorraine Winn, his brother Damon Marks, and three women who had known defendant since his childhood or birth, Reverend Betty Williams, Effie Jones, and Willoris Childs, the grandmother of defendant's daughter. They presented mostly consistent testimony that described defendant as having grown up in a good family environment with religion, where there was no drug or alcohol abuse, no domestic violence, and with a father who encouraged education and hard work. Defendant was helpful to his family as a child. He had no more problems than the average child and was never in serious trouble.
>
> Defendant's problems began after his discharge from the Navy where he "lost himself" through drugs. "[I]t seem[ed] as if there had been [a] deterioration in [defendant's] thought processes," as

defendant was "talking off the wall." Defendant's father disapproved of defendant's drug use, but defendant refused to listen to his father's advice. Because of defendant's trouble his father did not want him at the family home, at the home of defendant's grandmother, or at the funeral of defendant's mother. Defendant had a close relationship with his mother and his inability to attend her funeral may have contributed to his problems.

Defendant never hit his daughter (age 15 when she testified), or anyone else in her presence. She never saw him intoxicated and never had any problems with him. When he was not in prison, she saw him once or twice a week.

(People v. Marks, supra, 31 Cal. 4th at pp. 212-213.)

Clearly, both versions of the defendant's childhood cannot be true. The testimony of the witnesses at the penalty phase trial in 1994, summarized above by the Supreme Court, simply cannot be reconciled with the portrayal in the 2002 declarations of a home rife with unrelenting violence, repeated beatings, alcohol abuse, food deprivation, abandonment, and the like. If the factual allegations in the 2002 declarations are true, this would lend strong support to the conclusion that the opinions of the defense experts are valid, and are entitled to great weight. But if the testimony of the witnesses in the 1994 penalty trial are true, this calls into very, very serious question the validity of the defense experts' opinions. It makes those opinions, and those diagnoses, in the words of the Supreme Court in the Marks opinion, "not compelling" and "suspect".

SO: who is telling the truth --- the witnesses in 1994, or the declarants in 2002?

In determining whether or not the witnesses at the 1994 penalty trial were telling the truth, I have one arguably significant advantage over everyone else involved in this case. I was the trial judge in the defendant's penalty trial in 1994; as such, I personally observed each and every witness as they testified. I paid very close attention to that testimony. I have a clear recollection of that testimony now, and have, in addition, refreshed my memory by carefully reviewing the transcripts of the testimony of each witness. In observing the testimony of each witness, I carefully observed such things as the extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness

testified; the ability of the witness to remember or to communicate any matter about which the witness testified; the character and quality of that testimony; the demeanor and manner of the witness while testifying; the existence or nonexistence of any fact testified to by the witness; the attitude of the witness toward this action and toward the giving of testimony, and other factors relating to a decision concerning the believability of the witness, and the weight to be given to the witness' testimony. (If these factors have a familiar ring, they should --- they are among the factors listed in CALJIC jury instruction 2.20, and in CALCRIM jury instruction 226.) In making these observations, particularly with respect to observations of the demeanor and manner of the witness while testifying, I paid special attention to such 'intangibles' as are not necessarily found in a cold transcript of court proceedings --- such things as the witness' facial expressions and body language; whether the witness pauses before giving an answer; whether the witness appears equivocal, hesitant, evasive or reflects some level of concealment in answering a question, and the like. (Another of the factors listed, described in the CALJIC instruction as "the existence or nonexistence of a bias, interest, or other motive", and described in the CALCRIM instruction as "was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided", will be the subject of a separate and more extended analysis later in this opinion.)

Based on my own careful, personal observations of each witness as they testified during the 1994 penalty trial, and considering all of the factors I have just listed, in assessing the credibility of the witnesses whom I both heard and observed, **I make the factual determination that the witnesses named by the California Supreme Court in the portion of the Marks opinion set forth above were telling the truth when they testified at the defendant's penalty phase trial in 1994.**

I have a good deal more to say in this ruling, regarding both the testimony of these witnesses, the conflicting declarations of the same witnesses, and others, filed in 2002, the methodology used by the defense experts in reaching their opinions, whether or not those opinions are reasonable, and whether or not those opinions reflect some level of partiality or bias. However, before I go on, I will state that **the factual determinations I have made, in assessing the credibility of the witnesses who testified in the 1994 penalty phase trial, and my factual determination that they were telling the truth in their testimony at that**

trial, will play a very significant role in my ultimate decision and ruling in this case.

I indicated earlier that I would separately examine one element used to determine the credibility of the witnesses who testified at the 1994 penalty trial --- what the CALJIC instruction refers to as "the existence or nonexistence of a bias, interest, or other motive", and what the CALCRIM instruction refers to as "was the witness's testimony influenced by a factor such as . . . a personal interest in how the case is decided?" (I will make this same kind of analysis, with respect to the statements contained in the declarations filed in 2002, later in this opinion.)

SO --- did the witnesses in the 1994 penalty phase trial have a "bias, interest, or other motive" to lie, or to fabricate, or to conceal that which was asserted in the declarations filed in 2002? Did the witnesses in the 1994 penalty phase trial have a "personal interest in how the case is decided" which would cause them to lie, or to fabricate, or to conceal that which was asserted in the declarations filed in 2002? In my judgment, when these witnesses testified in the 1994 penalty trial, they did **not** have such a bias, motive, interest, or personal interest in the outcome which would cause them to falsify their testimony, or to lie, fabricate or conceal that which was asserted in the declarations filed in 2002.

My reasoning for this conclusion is as follows: the context of their testimony was perfectly clear to each of the witnesses, to the defendant, and to both of the defendant's seasoned, experienced and extremely competent counsel. The defendant had been convicted of multiple murders with special circumstances. He was on trial for his life. The jury would have only two choices by way of verdict: the death penalty, or life in prison without the possibility of parole. The prosecution had presented very powerful testimony in aggravation, including the horrific circumstances of the crimes themselves, the testimony of various members of the murder victims' families, who testified to the devastating impact the murders had and continued to have on them, and evidence of four prior felony convictions. It was now the opportunity for the defense to present evidence in mitigation, which might persuade the jury to return a verdict less than death.

Under the applicable law, as embodied by several CALJIC jury instructions [reference at this point will only be made to the CALJIC instructions, not to CALCRIM, as the CALJIC instructions were those given

to the jury, and were the subject of considerable discussion between the Court and all counsel] the jury would be instructed regarding the meaning of the term "mitigating circumstance" as follows: "A mitigating circumstances is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." Later in the same instruction, the jury would be told "you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider". (CALJIC 8.88). In CALJIC instruction 8.85, the jury would be more specifically instructed as to three particular factors which, if found to be true, could constitute mitigating factors justifying a sentence less than death. They were 8.85, factor (d), "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"; factor (h), "whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication", and, perhaps most significantly, factor (k) **"any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle."** (CALJIC 8.85, emphasis added)

In my judgment, had the kind of factors which were outlined in the declarations filed in 2002 been present in the defendant's upbringing as a young child --- factors including repeated, severe and prolonged beatings inflicted on him by both parents and by his siblings, prolonged alcohol abuse by both parents, prolonged and severe food deprivation, expulsion from the home and abandonment, prolonged domestic violence, the defendant observing his father beat his mother on a regular basis --- these factors would have been the subject of testimony by some or all of the witnesses who testified in the 1994 penalty phase trial. These kinds of circumstances of a particular defendant's abusive childhood and upbringing are often the subject of testimony at the penalty phase of a capital trial, and can

potentially constitute powerful evidence in mitigation to persuade a jury that a sentence less than death is appropriate. There is simply no conceivable reason or motive why these witnesses, who surely cared for the defendant in 1994 and wanted him to receive a sentence other than death, would conceal these facts, **if those facts existed.** There is simply no conceivable reason why these witnesses would testify that, contrary to what would be said a decade later, the defendant grew up in a good family environment with religion, where there was no drug or alcohol abuse, no domestic violence, with a father who encouraged education and hard work, where the defendant was helpful to his family as a child, had no more problems than the average child, and was never in serious trouble --- **unless those facts were the truth.**. In my judgment, the only reasonable inference to be drawn from the witnesses' 1994 testimony is that it was the truth; there were no factors present such as would be the subject of declarations a decade later. **The reason why the facts and circumstances related by way of declarations in 2002 had not been the subject of testimony in 1994 is because they simply did not happen and did not exist.**

Before turning to a further analysis of the declarations filed in 2002, let me touch on the testimony of Mr. Mike Richard, the only witness called by the prosecution during these proceedings, who testified that he had spent a great deal of time with the defendant and the members of the defendant's family while the defendant was growing up in Oakland and Alameda. Mr. Richard, now 48 years old, testified that had spent 4 years in the United States Marine Corps, and was in the 20th year of a career in law enforcement. Mr. Richard, a first cousin of the defendant Delaney Marks, testified that he first knew the defendant when he (Mr. Richard) was between 5 and 6 years old. Mr. Richard testified that he would spend a couple of weekends each month in the Marks household, usually from Friday through Sunday, continuously from when he (Mr. Richard) was 5-6 years old until he was approximately 15 years old.

Mr. Richard testified that the defendant was the oldest of the Marks children, and that the defendant was larger, 'tougher', and better at all sports than any of his siblings. In Mr. Richard's judgment, the defendant was the leader of all the siblings; he (the defendant) would decide what sports would be played (including baseball, football, and basketball), and in what other activities the group would engage. Mr. Richard stated that the defendant was 'good' at fighting. He testified that there was always food in the Marks household --- the 'cupboard was never bare'. He testified that there always

existed a normal relationship between the defendant, his siblings, and his parents. He testified that the defendant was never beaten by his parents or by his siblings, although the defendant would occasionally be the recipient of normal spankings, 'like kids normally get'. Mr. Richard testified that in the Marks family, just as in the Richard family, you took care of your younger siblings.

During the entire time Mr. Richard associated with the defendant and his family [approximately 9 or 10 years] while he and the defendant were growing up, Mr. Richard saw no signs of mental retardation in the defendant Delaney Marks.

Mr. Richard testified that he stopped hanging out with the Marks children when he (Mr. Richard) was about 15 years old, as the Marks children were starting to do things Mr. Richard thought were not appropriate.

As was the case with each of the witnesses who testified in 1994, Mr. Richard was subject to cross-examination. [This cross-examination did not in any way weaken or refute any of the statements Mr. Richard made on direct examination]. And, as was the case with each of the witnesses who testified in 1994, Mr. Richard was subject to the Court's own personal observation and evaluation of his demeanor, attitude, and the manner of giving testimony, using the various factors listed above in connection with the Court's evaluation of the 1994 witnesses. **Using these same criteria, the Court makes the same *factual determination* in assessing the credibility of this witness as the Court made in assessing the credibility of the 1994 witnesses --- that *Mr. Richard was telling the truth* when he testified in these proceedings on Thursday, June 1, 2006.**

Obviously, the testimony of Mr. Richard very powerfully corroborates the testimony of the various witnesses who testified at the penalty trial in 1994, and, just as powerfully, refutes the contradictory statements contained in the various declarations filed in 2002, upon which the defense experts so heavily relied. It is especially noteworthy that Mr. Richard was called to testify in these proceedings on habeas corpus. He was subject to cross examination in these proceedings. Thus, this testimony (unlike the statements of the various 2002 declarants, none of whom have been called to testify in these proceedings) has been 'tested in the crucible of cross examination', in the same manner as the testimony of the witnesses in 1994.

Because of this fact, the testimony of Mr. Richard, in the Court's judgment, is entitled to great weight.

I will now turn, briefly, to a review of the statements contained in the 2002 declarations, relating abusive, violent, food-deprived, alcohol-drenched circumstances of the defendant's upbringing and family life. Was there a motive for the declarants to make these kinds of statements, and in many cases to significantly change statements they had made under oath in the penalty trial a decade earlier? In my judgment, there is a clear and very powerful motive for such a change. Simply put, this motive is an almost inevitable result of the decision of the United States Supreme Court in Atkins v. Virginia (2002) 536 U.S. 304. With the Atkins decision, defendants' counsel, well-wishers and supporters now had a legal means potentially available to them to bypass the jury's verdict of death --- in fact, to bypass all of the testimony received at the guilt and penalty phases of any capital trial, and to achieve that which the defendant had been unable to achieve at that jury trial. It was now at least potentially possible to set that verdict entirely aside, and substitute the lesser sentence of life in prison without the possibility of parole. It was now possible to achieve that result, not by going back to the same jury (which had heard all of the evidence at trial, including any evidence in aggravation), but by going before a judge, sitting without a jury, perhaps a decade or more after the case was originally tried.

In my judgment, that is an extraordinarily powerful motive to re-write history; to embellish or change the truth; to lie. In view of the stark contrasts and contradictions between what was said under oath in 1994 and what was said after the Atkins decision in 2002, that, in my judgment, is exactly what has occurred. The 2002 recitations are not of fact, but of what the declarants fervently wish the facts had been, in order that the defendant could take advantage of a newly-decided legal doctrine, and thus that his life could be spared. It is understandable that the declarants in 2002 might feel this way. They obviously all cared for the defendant; many were his relatives; all wished that something better might come his way than that which had been his lot so far. It is understandable. But it is not the truth.

I will now turn to a review of some particular aspects of the testimony of the three expert witnesses called by the defense --- Dr. Ruben Gur, Dr. Nancy Cowardin, and Dr. George Woods. As I have previously noted, these witnesses were of the opinion that the defendant suffered from a variety of mental and psychological impairments. As I have noted, the experts (in

particular Dr. Gur, but in fact, all three experts) relied heavily upon statements contained in the various 2002 declarations, from members of the family, neighbors, and members of the community, relating details of the defendant's supposedly violent upbringing. **Yet, incredibly, none of the experts reviewed any of the testimony presented on the defendant's behalf in the 1994 penalty trial, which testimony refuted or contradicted many of these recitations.** I simply find it astonishing, and totally, wholly unreasonable and unprofessional, for these experts to base their opinions of a variety of mental and psychological impairments, including mental retardation, upon the circumstances of the defendant's youth, and yet to steadfastly refuse to read or even consider the sworn testimony of the very people who presumably would know the defendant best at this exact period of his life, and who presumably would be the very best, the most reliable, the most accurate 'historians' (to use the expert's own term) of these circumstances. That makes the testimony of these expert witnesses, to use the words of the California Supreme Court in criticizing the defense expert testimony in the various competency proceedings, **"not compelling"** and **"suspect"**

The defense expert testimony presented at the various competency proceedings in the Marks case was found to be "not compelling", and "suspect" by the Supreme Court for two related reasons: (1) at least one of the expert's information about the defendant's history was limited to that which she received from defense counsel and her meetings with the defendant; and (2), the defense experts who considered defendant incompetent were unfamiliar with much of the evidence that tended to render defendant's behavior comprehensible. (Marks, supra, 31 Cal. 4th at 219.) **These flaws, considered dispositive by the Supreme Court in the Marks opinion, are present in equal or greater measure in the testimony of Dr. Gur, Dr. Cowardin, and Dr. Woods in these proceedings.** Defense Counsel for Mr. Marks in these habeas proceedings had failed to provide the experts with a very considerable body of evidence which greatly weakens the defense position. The experts had thus failed to consider this evidence. Just as this was considered to be a fatal flaw to the defendant's position regarding the competency proceedings in the Marks case, I find it to be a fatal flaw to the defendant's position in these habeas proceedings. Simply put, if a defendant's counsel retain experts to investigate the possibility of mental or psychological impairments, they have an obligation to provide those experts with all of the material which could conceivably bear on the subject. The sworn testimony of the many people who testified at the 1994

penalty trial obviously and undeniably falls into the category of material which bears on this subject. To have deliberately withheld this information from the experts is to place their ultimate opinions into the same "not compelling" and "suspect" category as the Supreme Court placed defense expert testimony in the Marks case.

While I believe that criticism can and should be aimed at defendant's counsel, for their failure or refusal to supply their own experts with evidence contradictory to counsel's desired result, criticism needs also to be directed at the experts themselves in this regard. Each of the experts were confronted, extensively, on cross-examination, with the substance of the 1994 sworn testimony. Each of the defense experts brushed this testimony aside as a matter of little consequence. Thus, Dr. Gur proclaimed, at one point in his testimony, that he was "suspicious" of the "self-serving testimony" given by family members at the trial; at another point in his testimony, he dismissed this testimony (which, of course, he had never read) as the "rose-colored-glasses outlook of family members." I find these statements both preposterous and at the same time illuminating of a significant lack of objectivity or impartiality on the part of the witness. As I have discussed at some length earlier in this opinion, there is nothing in what the family members and others stated in their 1994 testimony which can reasonably or even remotely be classified as "self-serving". On the contrary, for them to fail to relate circumstances which, if true, might have provided significant evidence in mitigation at a penalty trial is hardly "self-serving". If any part of the evidence is these habeas proceedings can be considered "self-serving", it surely must be the newly-discovered and newly re-written history found in the 2002 post-Atkins declarations. For Dr. Gur to brush this most significant evidence aside (that is, the sworn 1994 trial testimony), with the back of his hand, in this fashion, confirms a growing suspicion in my mind that Dr. Gur, and to an extent both of the other experts, are not wholly impartial, and not wholly objective, but are instead, to a certain degree (in Dr. Gur's case, perhaps to a rather considerable degree) simply partisans attempting to achieve a partisan result.

Other examples of a certain lack of objectivity or partisanship, or at the least reflect opinions both unreasonable and wholly speculative, on the part of one or another of the experts can be found in the record. Thus, when presented with evidence of the defendant's apparently extensive efforts to obtain general assistance, Dr. Gur acknowledged that he had not reviewed any of these materials, explaining that he didn't need these things, and he

could not imagine that any of these materials would change his diagnosis. I find this somewhat cavalier refusal to consider materials which, arguably at least, might demonstrate that the defendant possessed certain 'adaptive skills', when the possession of or lack of such skills is presumably a significant factor in reaching a diagnosis of mental retardation, to be illustrative of an attitude demonstrating a certain lack of objectivity or impartiality.

When asked about the declaration of Raymond Bradley (Exhibit 108), which in part described the defendant as a "good dresser" and "good talker", Dr. Gur testified that the defendant "probably made no sense" when he talked to Raymond Bradley. While experts are certainly given broad latitude in forming their opinions, this kind of utter speculation, wholly unsupported by any evidence, only casts doubt on the varacity of the witness (Dr. Gur) in other particulars. In the words of the applicable CALCRIM instruction, such speculation is "unbelievable, unreasonable [and] unsupported by the evidence." (CALCRIM 332).

At one point in his testimony, Dr. Gur discussed a prison interview with the defendant which he had conducted in 2003, in which the subject of the defendant's apparently obsessive concerns about food came up. The fact that the defendant "really enjoyed a snack" Dr. Gur obtained for him during the interview apparently corroborated, in Dr. Gur's mind, the reports by siblings and neighbors (in the 2002 declarations) that the defendant suffered from food deprivation in his house while a youth. This conclusion, even when coupled with Dr. Gur's passing statements that the defendant had exhibited some degree of 'hoarding behavior' while in prison, seems to be, shall we say, somewhat of a stretch.

When questioned about portions of a 1983 Alameda County court record which reflect the defendant's stated fears of being evicted from his premises while he was in jail; Dr. Gur stated that the defendant "should have had a social network to prevent this", and that, because he did not, this confirmed Dr. Gur's diagnosis. This more than somewhat arrogant and presumptuous statement regarding what should be expected of an incarcerated defendant in terms of a 'social network' tells us more about Dr. Gur, I submit, than it does about the defendant. Along the same lines, I submit, is Dr. Gur's description of the defendant's apparent desire, reflected at one point in the Alameda County court files, that a woman lawyer represent him, as being "irrational", and thus presumably supportive of the Doctor's various diagnoses of mental and psychological impairments.

Perhaps this is simply reflective of Dr. Gur's lack of significant exposure to the criminal justice system. Some persons, charged with crimes, wish male attorneys to represent them. Others prefer female attorneys. Others have no preference. The reasons for each choice are unique to each defendant. But the choice surely cannot, reasonably, be considered per se "irrational", and thus be attributed to mental illness or psychological impairment.

When questioned about the 2002 declaration of Chester Langlois, who worked with the defendant in the Navy on board the USS Nimitiz, Dr. Gur's attention was called to the declarant's statement that the defendant "acted like a good-natured kid'". Dr. Gur testified that this reference implies that the good-naturedness was an "act", and constituted a symptom of mental retardation. I find it hard, if not absolutely impossible, to believe that this conclusion can reasonably be drawn from the simple statement that the defendant "acted like a good-natured kid". If that should be the case, then I suppose that every pleasant and good-natured young person in the world can be so labeled, at least in Dr. Gur' mind. To pursue this a bit further: this example reflects a pattern of opinions apparently shared by Dr. Cowardin --- that statements such as that of Mr. Langlois, that the defendant acted like a "good natured kid" or (in the case of Dr. Cowardin, that of Jude Bullock, who stated that the defendant "talked so much") are examples of the defendant "masking" his mental or psychological deficits. I submit that what this kind of analysis produces is a "no-win" situation by the person being evaluated – abnormal or bizarre behavior is of course suggestive of mental or psychological impairments; seemingly normal behavior is simply an "act" (according to Dr. Gur), or an attempt to "mask" one's deficits (according to Dr. Cowardin). Either way, abnormal or normal behavior both corroborate the diagnosis of mental illness. Joseph Heller could not have said it better. But while this kind of approach had a kind of ironic humor in Heller's novel "Catch 22"; it has far more serious overtones in our setting, where it seems not to matter how the defendant acts --- normal or abnormal, ordinary or bizarre --- it all leads to the same result with these expert witnesses: a diagnosis of mental illness or psychological impairment.

A surprising example of lack of impartiality, and of partisanship, occurred early in the testimony of Dr. Cowardin. Because of the importance of this incident, I will discuss it at some length. On direct examination by defense counsel, Dr. Cowardin addressed the subject of the definition of the term "mental retardation". She acknowledged the definition of mental retardation contained in Penal Code section 1376, which definition

includes the requirement that the condition be "manifested" before the age of 18. (Penal Code section 1376 subd. (a), emphasis added; Reporter's Transcript page 462.) In the questions from defense counsel that followed, however, the word "onset" began to be substituted for the word "manifested". (e.g., Reporter's Transcript p. 466, line 19). During the course of this testimony, defense counsel and Dr. Cowardin referred to several 'Power Point' slides to illustrate the Doctor's testimony, including one slide which depicted the definition of mental retardation Dr. Cowardin wished to use. The Court, perceiving that this definition appeared to differ from that contained in Penal Code section 1376(a), in turn accepted by the Supreme Court in In re Hawthorne, supra, 35 Cal. 4th at pages 44 and 47, asked a question of the witness, and the following exchange took place:

THE COURT: Can I ask you, can you go back to the previous slide one more time. Whose definition is this? Is this the AARM's? [Previous testimony established that AARM stood for The American Association on Mental Retardation; see Hawthorne, supra, 35 Cal. 4th at p. 47].

THE WITNESS: No, this is our wording as far as I know. [emphasis added].

THE COURT: Who is "our"? [emphasis added].

THE WITNESS: This team, this defense team. We were changing the wording of this. This is true. [emphasis added].

THE COURT: I'm sorry, the defense team has made a definition?

THE WITNESS: I made the definition. I made this slide up. [emphasis added].

THE COURT: But it's different than the AAMR standard or the statutory standard?

THE WITNESS: It's not different than any of those standards.

THE COURT: Is it consistent?

THE WITNESS: It is.

THE COURT: Okay, thank you.

THE WITNESS: The AAMR says it simpler. They say it manifests before the age of 18. I think what we are trying to do is describe it more in depth.

THE COURT: Okay. Thank you. Sorry to interrupt. Go ahead.

(Reporter's transcript p. 469)

Thereafter, defense counsel posed several more questions of the witness, leading to this exchange:

Q. [by defense counsel]: And part of this slide is explaining that it is a developmental disability, and going through the developmental process to explain how it has to occur before age 18? [emphasis added].

A. If you can put the AAMR definition back on, that is quoted directly from the AAMR, and there it is. It's a disability characterized by the limitations of intellect and adaptive skills. Then it says one sentence: this disability originates before age 18. And that's all that they say. We were simply trying to clarify that in our slide. [emphasis added].

Q. Thank you.

THE COURT: Let me – I'm sorry. Doesn't the standard of the American Association for Mental Retardation state "mental retardation manifests before age 18?" Don't they use the word manifests? [emphasis added]

THE WITNESS: I believe so.

THE COURT: But you are changing that to what?

THE WITNESS: Originates. [emphasis added].

THE COURT: Why?

THE WITNESS: Either way. I guess the point is that it is noticed, and usually we would hope it would be tested, someone wouldn't just wonder if they had it. There would be some record that there was a testing and they discovered a disability.

THE COURT: Okay. Thank you.

(Reporter's Transcript pp. 470-471.)

Several aspects of this portion of Dr. Cowardin's testimony greatly trouble me. First, Dr. Cowardin clearly identifies herself with "the defense team". There is an implication in this terminology alone which suggests a certain allegiance to one party in this action, of partisanship, as opposed to the role one would expect (and hope) an expert witness would fill in any case --- that of an impartial and neutral examiner and fact-finder. Second, and far more significant to me, is the fact that this "defense team" does not hesitate to change material portions of the definition of mental retardation to suit their purpose. **The definition of mental retardation is not subject to modification by the "defense team" or anyone else.** It is set forth in the statutes of this State (see Penal Code section 1376, sudv. (a), which definition has been accepted ver batim by the California Supreme Court (Hawthorne, supra, 35 Cal. 4th at page 44). The definition states that the condition must be **"manifested"** before the age of 18. Not **"originates"** as the defense team would wish, not **"onset"**, as defense counsel suggests in her questions, but **"manifested"**. The fact that the defense team, and Dr. Cowardin in particular, have nevertheless attempted to make these changes is extremely alarming to this Court. It raises the question (which cannot be answered, on this record) of 'how many other definitions of critical terms involved in the description and diagnosis of mental retardation or other mental or psychological impairments which have been the subject of testimony in these proceedings has the "defense team" modified or changed to suit their own purposes?'

A third area of concern troubles this Court. In response to questions by defense counsel on direct examination, and referring to a 'power point' slide presumably prepared by defense counsel and the defense team, Dr. Cowardin testified that the definition of mental retardation promulgated by the American Association on Mental Retardation (AAMR) contains the sentence "this disability originates before age 18." Dr. Cowardin stated that this definition, including this sentence, is "quoted directly from the AAMR." This statement was simply false, as Dr. Cowardin, on questioning by the Court, later admits. The AAMR definition is set forth by the Supreme Court in the Hawthorne opinion. It does not use the word "originate". It uses the word "manifested". (See Hawthorne, supra, 35 Cal. 4th at p. 47). I wonder

whether, had the Court not itself intervened at this point, and directly questioned Dr. Cowardin on this point, would either defense counsel or Dr. Cowardin ever have corrected the false statements contained in Dr. Cowardin's oral testimony and the pre-prepared 'power point' slide? Unfortunately, this question also cannot be answered from the record in these proceedings.

Another troubling question arises: why was the "defense team" so concerned about changing the definition of mental retardation, to remove the word "manifested", and substitute the word "originates"? Perhaps the commonly-accepted definition of the word "manifest" will give some guidance. Webster's New Collegiate Dictionary defines the word "manifest" in this fashion: "**Manifest** *adj* **1:** readily perceived by the senses and esp. by the sight. **2:** easily understood and recognized by the mind: OBVIOUS ***syn*** see EVIDENT ***ant*** latent, constructive --- . . . **Manifest:** *vt* : to make evident or certain by showing or displaying ***syn*** see SHOW." Having in mind the above definition of "manifest", and having in mind the deliberate efforts by the defense counsel and by the expert witnesses themselves to either conceal or ignore the sworn testimony of so many friends and relatives and neighbors and colleagues of the defendant who never 'perceived', never 'understood', never 'recognized', never 'saw', never had 'shown' or 'displayed' to them, any signs whatsoever that the defendant was mentally retarded (or that any of the so-called 'facts' of the 2002 declarations --- the abuse, the beatings, the alcohol, the food deprivation, the abandonment, etc. etc. --- ever occurred), **no wonder the defense team had to get rid of the word "manifest". No wonder the defense team had to substitute a word such as "occur", or "originate", neither of which carry any of the requirements of being readily perceived by the senses and especially by the sight, being easily understood and recognized by the mind, being obvious, being evident, being shown or displayed, all of which are part of the definition of "manifest".** Because by these standards, by any of them or all of them together, symptoms of mental retardation, or any of the factual 'prerequisites' of mental retardation, were **never, ever "manifested"** to any of the people who saw the defendant, and lived with him, from his tender years until he was 18 years old, and who provided sworn testimony at the defendant's penalty trial in 1994, or who (in the case of Mr. Richard) testified here in this courtroom during these proceedings in 2006.

Turning to another issue: at various points in their testimony, on cross examination, the defense experts acknowledged that at no time during the several protracted competency proceedings which occurred before the defendant's murder trials did any of the mental health experts ever diagnose the defendant has having been mentally retarded. In fact, with perhaps one exception (a reference in a Department of Corrections file, which Mr. Sowards appropriately called to the Court's attention in his closing statement) there appears to be no formal diagnosis of the defendant's mental retardation by any mental health professional until the year 2002, following the United States Supreme Court's decision in Atkins v. Virginia. Of course, this would appear to roughly parallel the case with 'non-expert' observations as well --- no lay person (friend, relative, neighbor, co-worker) ever stated their observations of mental retardation, or any of what the experts apparently accept as factual 'prerequisites' of mental retardation --- until 2002, after the Atkins opinion was decided. In other words, a great many people, lay people and mental health experts, had observed the defendant "up close and personal", to borrow from ABC television commentator Bob Costa's vocabulary, during the defendant's formative years, until well after he was 18 years old. None of them (with one exception, in prison) ever observed mental retardation --- until 2002, after Atkins was decided. There is a certain coincidence in this which, I submit, should not be lost on any of us.

Dr. Gur, as I have previously noted, brushes aside the lay observations in the 1994 trial (and presumably the 2006 observations of Mr. Richard) as 'self serving' and 'rose-colored-glasses' views. Dr. Gur then turns his attention to the various mental health experts who had previously been involved in the defendant's various competency proceedings, none of whom ever diagnosed the defendant as being mentally retarded. Dr. Gur vehemently attacks them and their diagnoses, calling their work, among other things, a "regrettably and shamefully inadequate job of analysis", and "the worst reports he has ever seen". Without belaboring the point, I would submit that, given the large number of significant failings and deficits in Dr. Gur's own performance in this case, and in the performances of the other defense experts, perhaps Dr. Gur should direct some of this critical evaluation inward, towards himself and the other members of the "defense team".

In evaluating the evidence presented in these proceedings, I have carefully examined the results of various I.Q. tests administered to the defendant. As the Hawthorne case notes, mental retardation ". . . is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individuals's overall capacity based on a consideration of all the relevant evidence." (Hawthorne, supra, 35 Cal. 4th at p. 49). However, as Justice Chin appropriately notes, such tests remain important. (Hawthorne, supra, 35 Cal. 4th at p. 52, concurring opinion of Justice Chin). In Mr. Marks' case, however, the IQ tests results of the defendant, administered from the ages of 6 and 10, are all above the level where some form of mental retardation is presumed --- in fact, are all in the range where the person tested is "very likely **not** mentally retarded" (see Hawthorne, supra, 35 Cal. 4th at p. 52, concurring opinion of Justice Chin; emphasis added). Of the tests administered before the defendant is 18, only one test, at age 11, reflects a test score (74) in the range of 'borderline' mental retardation --- and it is at the high end of even this range. Then, significantly, no further IQ testing is done until the defendant is 27 years old --- almost a decade past the 18 year old limit contained in the statutory and decisional definitions of mental retardation. These results were as follows: 27 years old (IQ 60), 32 years old (IQ 74), 33 years old (IQ 65), 46 years old (IQ 74), and 49 years old (IQ 72). These results, while the defendant was an adult, place the defendant either in the 'borderline' range, or on two occasions, below that level.

Several observations must be made about these IQ test results. First, the results certainly fluctuate, sometimes very substantially, and sometimes when only a single year separated the tests. The testimony related how the test procedures were different from each other in nearly every case, which might partially explain the range (although the record is devoid of evidence on this point). But the variations, often extreme variations, remain. This widely fluctuating pattern, from substantially above the mental retardation "cutoff" range to substantially below, may give us some insight on why the California Legislature has chosen not to include a numerical IQ score as part of the definition of "mentally retarded". (See Hawthorne, supra, 35 Cal. 4th at p. 48). Test result which vary this widely, and which (while the defendant is under 18) barely dip into the range for borderline mental retardation on only one single occasion, cannot be considered very "powerful evidence" supporting a finding of mental retardation. Indeed, the test results while the defendant is under 18, standing alone, would seem to support the contrary

inference, that the defendant does not meet the statutory definition of mental retardation, with at least equal weight and equal convincing force.

Second, the second grouping of IQ tests, performed while the defendant was between 27 and 49 years of age, were (as noted above) all performed well after the defendant was as adult (the first such test was administered almost a decade after defendant's 18th birthday). They were also performed well after the evidence in this case shows the defendant had been exposed (again, as an adult) to a wide variety of serious traumatic events, including possible head injuries as a result of a motor vehicle accident, the loss of his mother (with whom defendant had a particularly close relationship), his inability to attend his mother's funeral due to his incarceration, his incarceration in prison itself, his rape while in prison, his exposure to drugs, and, of course, his personal commission of the violent murders and other crimes which resulted in his conviction and death sentence by verdict of jury. Even assuming the relevance of IQ tests performed so long after the defendant became 18, in my judgment IQ test results performed after the defendant has been subjected to such a substantial number of significant intervening traumatic events are of very dubious value in helping us determine whether the defendant was mentally retarded and whether this condition was manifested before the age of 18.

In examining the evidence in these proceedings, I have also examined the various school records, which were the object of a great deal of attention by Dr. Cowardin. The doctor testified, among other things, regarding the defendant's overall poor academic performance, his having to repeat the second grade, teacher comments reflecting his "immaturity" and that he was 'slow' and 'below grade level skills' at various points in elementary school, and the fact that he graduated from high school near the bottom of his class. I have some relatively brief comments about these observations. First, as Dr. Cowardin (and Dr. Gur, reflecting on his own daughter's experience) admitted, there are often reasons for a child repeating a grade in the elementary school level which do not reflect mental retardation. Second, whatever the teacher's subjective thoughts about the defendant, the fact remains that he consistently was passed upward, from class to class (with the exception I've noted, the second grade). The fact remains that he was on the 'medium track' while in school. The record shows that some teachers may have thought he should have been on the 'low' track, but they apparently did nothing about that thought, and the defendant remained on the 'medium'

track. The fact remains that he graduated. He may have been near the bottom of his class, but he graduated.

The fact also remains that he attended classes in a Junior College, where he passed some classes, dropped out of or withdrew from other classes, over a 13 year period. He apparently never completed the curriculum at the Junior College. But the fact is that he attended --- and despite the many distractions and obstacles which would arise over the years, including his own entry into the criminal justice system, he attended Junior College at various times spanning more than a decade. The fact is that he did pass some classes, including classes in basic skills in reading, mathematics, and writing, classes in typing, office management, physical education, and a language class in Swahili. This may not be a scholastic record which Dr. Cowardin, or the other experts, would consider as exemplary. The defendant was certainly never on any Dean's list. But, standing alone, it is not indicative of a person who is mentally retarded. And, in combination with other evidence, it indicates that, for at least some time after he turned 18, the defendant retained, and attempted to better, some level of intellectual and academic achievement. Overall, this also does not support a finding of mental retardation.

After a review of all of the evidence presented to the Court during these proceedings, IT IS THE ORDER AND JUDGMENT OF THIS COURT that the Petitioner Delaney Geral Marks' petition for a writ of habeas corpus vacating the sentence of death on the ground that he is mentally retarded is denied. It is the finding and judgment of this Court that Petitioner Delaney Geral Marks has failed to prove by a preponderance of the evidence that he is mentally retarded within the meaning of Atkins v. Virginia (2002) 536 U.S. 304. (See In re Hawthorne (2005) 35 Cal. 4th 40).

The Clerk of this Court is ordered to transmit the original of this written order and judgment to the Supreme Court of the State of California.

JEFFREY W. HORNER

JEFFREY W. HORNER

Judge of the Superior Court, State of California, County of Alameda.

Dated: June 13, 2006.