No. _____

IN THE

Supreme Court of the United States

WAYNE CLYDE MEZZLES,

Petitioner,

v.

JOHN N. KATAVICH,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Before trial, the court ruled that defense expert Robert Owen could testify about Mezzles's PTSD but not about his capacity to form the specific intent required to convict on the criminal threats charges or whether he had in fact formed that intent. Nevertheless, the prosecutor repeatedly asked the expert questions on these forbidden topics, and the numerous defense objections he provoked made it falsely appear that the defense was hiding important information from the jury and that, had the information been disclosed, it would have hurt the defense. The state court concluded deliberate prosecutorial misconduct had occurred, but that the claim had either been forfeited by defense counsel's failure to request "additional admonitions," or the intentional misconduct was harmless. Mezzles was sentenced to 80-years-to-life from a single incident of domestic violence.

(1) Does the state's application of a forfeiture bar for failure to request additional admonitions discriminate against federal claims when the trial court concluded the jury had been adequately admonished in the wake of defense counsel's sixteen objections and motion for a mistrial?

(2) Was the state court reasonable in finding harmlessness when the deliberate prosecutorial misconduct went to the heart of the defense case, a jury note and the length of deliberations suggest the jury viewed Mezzles's guilt as a close question, and the court's conclusion was based solely on the presumption that jurors follow their instructions?

(3) Is the 80-years-to-life sentence grossly disproportionate to the crimes?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

State Cases

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Wayne Clyde Mezzles ("Mezzles" or "Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Mezzles v. Katavich*, No. 16-56781.

I. OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals in *Mezzles v. Katavich*, No. 16-56781 (Apr. 26, 2018), was not published. Petitioner's Appendix ("Pet. App.") A. The order of the United States District Court denying relief is also unreported. Pet. App. B. The California Supreme Court's order denying the petition for review in *People v. Mezzles*, No. S125626 (Feb. 11, 2014) was not unpublished. Pet. App. E. The California Court of Appeal's reasoned decision on direct appeal was also not published. Pet. App. F.

II. JURISDICTION

The Ninth Circuit affirmed the district court's dismissal of Mezzles's habeas corpus petition filed pursuant to 28 U.S.C. § 2254 challenging his judgment of sentence by the California state court on April 26, 2018. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment to the U.S. Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the U.S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IV. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Petitioner is in state custody at California State Prison in Solano, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his convictions and sentence. The district court dismissed the petition on the merits with prejudice. Pet. App. B. The Ninth Circuit reviewed pursuant to 28 U.S.C. § 2253 and affirmed. Pet. App. A.

B. Facts Material to the Consideration of the Question Presented

1. The Trial

In the months prior to the events at issue, Mezzles and his wife, Laura Mezzles, had been sober for months and attended alcohol-abuse treatment programs together. Pet. App. H-373. On the night of October 30, 2010, Laura Mezzles asked her husband to go to the liquor store for another bottle of Southern Comfort. Pet. App. F-2. When Mezzles returned home, his wife, her daughter Amy Schwind, Schwind's boyfriend Willie Williams, and their friend Cory Stephens were all in Schwind's room. Laura Mezzles sat next to Stephens, showing him her hands and telling him that he shouldn't punch walls because Schwind had just gone to the

hospital for punching a wall. Through the window, Mezzles saw his wife holding Stephens's hand. *Id.*

Laura Mezzles then heard a loud bang at the door. Pet. App. F-2. Mezzles entered Schwind's bedroom, yelling at Laura. Pet. App. F-2-3. He grabbed his wife by the hair and threw her into the dresser, breaking her eyeglasses and giving her a black eye. Pet. App. F-3. When Schwind tried to intervene, Mezzles pushed her to the ground and pulled Laura down the hallway to the master bedroom. Pet. App. F-3. At some point, Stephens left the scene. *Id.* He never saw Mezzles hit or threaten anyone. 1 Reporter's Transcript ("RT") 127-28, 131, 141-44.

Schwind followed her mother and step-father into the master bedroom, yelling to Williams to call the police. 1 RT 160. Mezzles then returned to Schwind's room and tried to tackle Williams, but stumbled and fell. 2 RT 241. Schwind called the police. Pet. App. F-3. She testified that before Mezzles was taken away, he looked at her and said, "I'll kill you." *Id.* Schwind testified that Mezzles hit her with brass knuckles. 1 RT 77, 86, 89, 96, 162, 164-65, 190, 195, 197.

Laura Mezzles testified that Mezzles was intoxicated and looked "just gone," "like he had snapped." 1 RT 96, 105. She also said he looked psychotic and crazy; she had never seen him that angry before. 1 RT 105-07. Schwind also testified that Mezzles was acting out of character. 1 RT 198. She told the jury that her mother and Mezzles were both intoxicated and that the alcohol fueled the violence that night. 1 RT 155, 190. Stephens testified that Mezzles "appeared drunk out of his

mind," "disoriented due to alcohol," and was "stumbling and had trouble walking." 1 RT 141, 144.

Schwind's veracity was impeached on cross-examination. She admitted repeatedly lying under oath and intentionally giving false testimony at the preliminary hearing. 1 RT 177, 195.

2. Prosecutorial Misconduct in the Defense Case

Mezzles's core defense was that he lacked the necessary intent to be convicted of the four criminal threat counts. In support of that defense, clinical psychologist Dr. Robert Owen testified that Mezzles's history of physical and sexual abuse at the hands of his alcoholic stepfather had caused Post Traumatic Stress Disorder ("PTSD"), for which Mezzles was never treated.[1] Pet. App. H-21-22. As such, Mezzles was prone of hyperarousal, intrusive memories, irritability, outbursts of anger, depression, and anxiety and Mezzles sought to assuage these symptoms with drugs and alcohol, resulting in a chronic alcohol disorder. Pet. App. H-15-17, H-19-22. Owen testified that although Mezzles attended rehab and sustained periods of sobriety, his untreated PTSD "would rear its ugly head and he would resume drinking; that's exactly what happened before this instant offense." Pet. App. H-12.

California law prohibited Owen from opining on the impact PTSD might have on Mezzles's mental capacity or on the ultimate question of whether Mezzles actually had the required mental state to be found guilty of criminal threats at the

[1] Owen testified that Mezzles reported being physically and sexually abused from the ages of 7 to 12. Pet. App. H-10-13. His step-father sexually abused him monthly during this period. *Id.* As a result, Mezzles started abusing alcohol by age twelve. Pet. App. H-19.

time of the offenses. *See* Penal Code §§ 25, 28, 29, 29.4.[2] The trial court limited Owens's testimony accordingly. Pet. App. F-6. Nevertheless, on cross-examination, the prosecutor repeatedly asked Owen questions about these forbidden topics:

> Mr. Verburgt: Let me help you. You said you were assessing the defendant's psychological function. Let's start with that. How is that relevant to the crimes the defendant is charged with in this case?
>
> Mr. Scott: Objection.
>
> The Court: Sustained.
>
> Mr. Verburgt: Do you know if there's a jury instruction that asks jurors to evaluate the defendant's emotional function?
>
> Mr. Scott: Objection; relevance.
>
> The Court: Sustained.
>
> Mr. Verburgt: Would it be fair to say that the defendant's emotional functioning may be of interest, but it's largely irrelevant in a case in determining guilt?
>
> Mr. Scott: Objection; relevance.
>
> The Court: Sustained.
>
> [¶]
>
> Mr. Verburgt What's the intent required for a violation of Penal code section 273.5?
>
> Mr. Scott: Objection; relevance.
>
> The Court: Sustained.

[2] All references to the Penal Code herein are to the California Penal Code.

Mr. Verburgt: Do you know what it is?

Mr. Scott: Objection.

The Court: Sustained.

Mr. Verburgt: Do you know what the mental state required, "yes" or "no," for violation of penal code section 422, criminal threats?

Mr. Scott: Objection.

The Court: Sustained.

Mr. Verburgt: So is the term "specific intent" a legal term or a term from psychology?

Mr. Scott: Objection.

The Court: What is the legal objection?

Mr. Scott: Lack of foundation to qualify as an attorney to speak with crimes of specific intent.

The Court: Sustained.

Mr. Verburgt: Your honor, I'm asking with regard to his training; if it's a term of psychology or not. It's either a term of psychology or a term of law; I'm trying to find out.

The Court: Overruled.

The Witness: It's a term of law, not psychology.

Mr. Verburgt: So you agree that specific intent has nothing to do with psychology?

Mr. Scott: Objection; lack of foundation.

The Court: Overruled.

The Witness: Well, intent is a psychological term in the sense of it deals with motivation.

Mr. Verburgt: I said "specific intent"; the term "specific intent."

The Witness: I would clarify; that's a legal term. That's not specifically addressed in something like the DSM.

Mr. Verburgt: So it's not a psychology term; is that fair to say?

The Witness: The term "specific intent" is not.

Mr. Verburgt: Did you ever—in your training and when you were seeking your degree, did you ever take a course about legal terminology?

The Witness: No.

Mr. Verburgt: So what is the defense in this case?

Mr. Scott: Objection.

The Court: Sustained.

Pet. App. H-25-28.

The prosecutor turned to permissible topics only briefly before returning to the same topic that had already repeatedly garnered multiple sustained objections:

Mr. Verburgt: Are you saying that what happened to the defendant as a child—let's start with the incident when he was one-year-old—made him violent and made him threaten his wife and stepdaughter in this case?

Mr. Scott: Objection.

The Court: Sustained.

Mr. Verburgt: Are you saying that this child molestation that occurred is what caused the defendant to become violent toward his wife and stepdaughter?

Mr. Scott: Objection. May we approach, Judge?

The Court: Sustained. Yes.

Pet. App. H-35.

At a sidebar, Mezzles's counsel argued that the prosecutor was improperly asking about state of mind. Pet. App. H-41. The trial court restated its ruling, but the prosecutor remained undeterred:

> Mr. Verburgt: So with that in mind, you indicated in your report under the "Summary and Recommendation," you indicated Mezzles's complex emotional problems appear to be mitigating factors that can be considered in this case that were beyond his control and attributed to his aggressive conduct; right?
>
> The Witness: Right.
>
> Mr. Verburgt: How is it someone who can have PTSD, and without, both be in a jealous rage based on what they're saying, and you said both would know what's going on and where they are, how does that translate then to something being beyond one's control?
>
> The Court: Mr. Scott, is there an objection?
>
> Mr. Scott: There is, yes.
>
> The Court: This witness may not answer those questions. Sustained.
>
> Mr. Verburgt: I'll rephrase, your honor. You wrote that in your report, that statement?
>
> The Court: The jury is directed to disregard the last question, the last reference by the prosecutor.
>
> Mr. Verburgt: May I approach, your Honor?
>
> The Court: No. We've made this clear. I've told you several times, do not go into that area. Next question.

Pet. App. H-52-53.

Mezzles moved for a mistrial. The trial court denied the motion, explaining, "I admonished him in front of the jury and I think that is sufficient to cure anything that might have been detrimental to the defense." Pet. App. H-58-60.

3. The Prosecutor's Closing Argument

Without explaining that the court had prohibited Owen from addressing specific intent, the prosecutor argued the significance of that omission from his testimony, referring to it as a "defense distraction." Pet. App. I-6. "It's not enough to simply be diagnosed with it. It has to rise to the level that makes you incapable of forming that specific intent when you do something. Merely having PTSD and drinking alcohol is not enough." Pet. App. I-7. "This is not a situation where you would think—where it rises to the level of negating or cancelling out or making someone incapable of having that specific intent. It is not a Vietnam flashback situation." Pet. App. I-6. "There's no nexus between being molested as a child and domestic violence as an adult. Dr. Owen conceded there [are] no studies that correlate those things." *Id.* In summary, the prosecutor explained, "[e]ven if you think, well, we heard about his history, heard from this expert who says he has PTSD; fine. That diagnosis of Dr. Owen, not enough." Pet. App. I-33.

4. Jury Verdict and Sentencing

Mezzles was convicted by a Santa Barbara County jury of inflicting corporal injury upon a spouse (Count 1); possession of a deadly weapon (Count 8); criminal threats (Counts 3-6); and simple assault (of Williams) (Count 9). As to the assault count involving Schwind (Count 2), the jury rejected the assault with a deadly weapon charge and instead convicted of simple assault, disbelieving Schwind's

testimony regarding Mezzles's use of brass knuckles. Pet. App. D-3. The court found true sentence enhancement allegations based on prior convictions for criminal threats in 1999 and 2007. *Id.*

On March 30, 2012, the court sentenced Mezzles to an aggregate term of 90 years-to-life in prison under California's Three-Strikes Law: a determinate term of 10 years followed by a concurrent indeterminate sentence of 25 years-to-life on the criminal threat conviction in Count 3; a determinate term of 10 years, consecutive, followed by concurrent indeterminate sentences of 25 years-to-life on the three other criminal threats convictions (Counts 4-6); a stayed indeterminate sentence of 25 years-to-life on the spousal injury conviction (Count 1); and 180 days, concurrent, on each of the assault convictions (Counts 2 and 9). Pet. App. D-2-4; Pet. App. K.

5. The California Court of Appeal affirms and the California Supreme Court denies review

On direct appeal, Mezzles raised the two issues raised in this petition, among others. The California Court of Appeal reversed the criminal threat conviction on Count 4 and modified the sentence accordingly (reducing the sentence to 80 years to life), but otherwise affirmed the judgment. Pet. App. F. It held that the prosecutorial misconduct claim had been forfeited by defense counsel's failure to "request another admonition." Pet. App. F-7. Nevertheless, it found that "Mr. Verburgt engaged in improper questioning in light of the court's repeated admonitions" and "engaged in deliberate misconduct dedicated to the evasion, or outright defiance, of the court's ruling and admonitions." Pet. App. F-8. It rejected the Eighth Amendment claim, reasoning that "[s]ince appellant's strikes include

violent offenses, the justification for a lengthy sentence here is more compelling than in *Rummel* [*v. Estelle*, 445 U.S. 263, 274 (1980)]." Pet. App. F-9-10.

The California Supreme Court summarily denied the petition for review on February 11, 2014. Pet. App. E.

C. Federal Proceedings

Mezzles, acting pro se, timely filed a federal petition for habeas corpus on September 23, 2014. Pet. App. D-1. The Magistrate Judge filed a final report on October 13, 2016, recommending that the district court deny the petition. Pet. App. D. On October 17, 2016, the district court accepted the Magistrate Judge's recommendations, dismissed the petition with prejudice, and granted a certificate of appealability on the issues addressed below. Pet. App. B, C, G.

The Ninth Circuit Court of Appeal affirmed. It held that the California Court of Appeal was not unreasonable in finding the prosecutor's deliberate misconduct harmless. Pet. App. A-4-5. It further held that the California Court of Appeal was not unreasonable in finding Mezzles's 80-years-to life sentence was not grossly disproportionate to his offense. Pet. App. A-6-8.

V. REASONS FOR GRANTING THE WRIT

A. Certiorari review is necessary because the state-imposed procedural bar discriminates against Mezzles's federal claims

The Magistrate Judge ruled that Mezzles's prosecutorial misconduct claim was procedurally defaulted. Pet. App. D-26-29. The Ninth Circuit found that

> Here, Mr. Mezzles' trial counsel objected over a dozen times to the prosecutor's misconduct, but never requested a jury admonition. On the prosecutor's last attempt at asking an improper question, the trial court sua sponte

> admonished the prosecutor and directed the jury to disregard the question. After the expert witness was dismissed, Mr. Mezzles' trial counsel moved for a mistrial based on the prosecutor's misconduct. The trial court denied the motion because it believed admonishing the prosecutor in front of the jury was sufficient to cure any possible harm.

Pet. App. A- 3. Neither the Ninth Circuit nor the district court reached the question of the procedural bar's adequacy, but instead denied Mezzles's claims on the merits. Yet, the application of the bar imposed here is not only surprising and unfair, in that defense counsel objected to the prosecutor's misconduct sixteen times and requested a mistrial, but it also discriminates against Mezzles's federal claims.

"The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard v. Kindler*, 558 U.S. 53, 60 (2009). A "litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Even when the procedural rule serves a legitimate interest in its general application, it can be deemed inadequate when its enforcement in a particular case "would serve no substantial state interest." *Id.* at 448.

In *Henry*, a state court procedural rule requiring contemporaneous objection to the admission of illegal evidence was deemed inadequate, despite the state's legitimate interest in avoiding a trial that would be tainted by such evidence. 379 U.S. at 448-49. This Court held that because the interests of the contemporaneous objection rule were "substantially served" by the defendant's motion for a directed

verdict at the close of the prosecution's case, the contemporaneous objection rule did not bar federal review of the issue. *Id.*

Similarly, in *Lee v. Kemna*, 534 U.S. 362 (2002), this Court found a state procedural rule that continuance motions be presented in writing inadequate to bar federal review even though it was "[b]eyond doubt" that the rule served the "important interest" of preventing the use of such motions as a delaying tactic. *Id.* at 366. Despite this state interest, the Supreme Court held that because the petitioner had "substantially, if imperfectly, made the basic showings" required under the rule, the state's application of the rule would not bar review of the federal claim. *Id.*; *see Osborne v. Ohio*, 495 U.S. 103, 125 (1990) ("[T]he general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.").

As *Henry*, *Lee*, and *Osborne* each make clear, the "unyielding application" of a state procedural rule that fails to serve legitimate interests as applied in a particular case does not prevent federal review of a federal question. *Lee*, 534 U.S. at 380. The California Supreme Court's carve-out of pervasive prosecutorial misconduct as an exception to the forfeiture rule only strengthens the conclusion that the court of appeal's application of the bar here is overly rigid and discriminatory. *People v. Dykes*, 46 Cal. 4th 731, 775 n.8 (2009); *People v. Hill*, 17 Cal. 4th 800, 821 (1998) (holding that defense counsel was "excused from the legal

obligation to continually object, state the grounds of his objection, and ask the jury be admonished" because "any additional attempts on his part to do so would have been futile and counterproductive to his client").

Here, defense counsel objected on sixteen separate occasions and moved for a mistrial. The trial court gave admonishments and concluded they were adequate to neutralize the harm. Yet, the court of appeal concluded the claim was forfeited because defense counsel should have requested at least one more admonishment. The application of the forfeiture bar here is rigid, exacting and serves no legitimate interest. As shown below, Mezzles is entitled to relief on the merits of his prosecutorial misconduct claim, but he can obtain such relief only if this Court rules that his claim is not defaulted. Accordingly, this Court should grant certiorari to determine the exceptionally important question of whether the forfeiture bar here discriminated against Mezzles's federal claims.

B. Certiorari review is necessary because the prosecutor's deliberate misconduct was not harmless

This Court has clearly established for purposes of § 2254(d) that a prosecutor's "improper comments" can "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (per curiam); *Darden v. Wainwright*, 477 U.S. 168, 180 (1986); *Deck v. Jenkins*, 814 F.3d 954, 977-78 (9th Cir. 2016). Federal habeas courts "must examine the 'entire proceedings' to determine whether the prosecutor's remarks" violated due process. *Sechrest v. Ignacio*, 549 F.3d 789, 807 (9th Cir. 2008) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Here, the California Court of Appeal held that the prosecutor engaged in "deliberate misconduct dedicated to the evasion, or outright defiance, of the court's ruling and admonitions." *Id.* Because that finding binds the federal courts, 28 U.S.C. § 2254(e)(1), the only question remaining is whether the misconduct was harmless.

An error is not harmless if it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation marks omitted)). When "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error . . . the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). The State bears the burden of demonstrating harmlessness. *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015); *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015).

The court of appeal's conclusion that the misconduct here "was harmless under any standard of review," Pet. App. F-7, was unreasonable. 28 U.S.C. § 2254(d)(1). It reached this conclusion solely based on the presumption that juries understand and follow their instructions. Pet. App. F-7-8. This presumption proves too much; such instructions are likely a feature of every criminal jury trial and do not inoculate judgments from being vacated in cases involving repeated, deliberate misconduct.

The state court's conclusion is also contrary to and an unreasonable application of clearly established federal law and based upon unreasonable fact-

finding because it fails to examine the "entire proceedings." *Donnelly*, 416 U.S. at 643. Thus, the court of appeal

- ignored the prosecutor's exploitation of his misconduct in closing argument. Pet. App. I-27-35; Pet. App. I-49-51; *Banks v. Dretke*, 540 U.S. 668, 701 (2004) (prejudice from prosecutorial misconduct shown by prosecutor's exploitation of misconduct in closing); *United States v. Young*, 470 U.S. 1, 18-19 (1985) (a "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence");
- failed to consider the jury note asking questions on the criminal threat charges, Pet. App. J, which evidenced that the jury was struggling on those counts. *Miller-El v. Dretke*, 545 U.S. 231, 254 (2005);
- overlooked that the key witness to the threats, Schwind, was disbelieved by the jury on a material point of her testimony that Mezzles assaulted her with brass knuckles. *See, supra,* pages 4, 10;
- failed to take into account that the jury deliberated two days before reaching its verdicts. Pet. App. A-5.

Accordingly, the state court's denial of this claim is not entitled to deference. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007). This Court should grant certiorari to correct the real injustice that occurred at Mezzles's criminal trial.

C. Certiorari review is necessary because an 80-years-to-life sentence is grossly disproportionate to the offense

A sentence for a term of years violates the Eighth Amendment when it is "grossly disproportionate." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003); *see Solem v. Helm*, 463 U.S. 277, 286-288 (1983); *Weems v. United States*, 217 U.S. 349 (1910). The analysis involves a "threshold comparison of the crime committed and the sentence imposed" in order to determine if the sentence "leads to an inference of gross disproportionality." *Solem*, 463 U.S. at 286-288. If the sentence satisfies this threshold query, a comparative analysis must be conducted, weighing "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

Under *Solem*, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Ramirez v. Castro*, 365 F.3d 755, 770 (9th Cir. 2004), *as amended* (Apr. 27, 2004) (*quoting Solem*, 463 U.S. at 291). When considering the gravity of the defendant's offense, the court "must place on the scales not only his current felony" but also his criminal history. *Ewing v. California*, 538 U.S. 11 (2003).

Mezzles's 80-years-to-life sentence is effectively a life sentence, given the average life expectancy. When compared to the gravity of Mezzles's crimes of corporal injury, criminal threats, and simple assault, as well as his criminal history, this life sentence raises an inference of gross disproportionality.

The sentence imposed here is the second most serious available in California. Apart from death, it is the most severe punishment that the State of California can impose on "any criminal for any crime." *Solem*, 463 U.S. at 297 (emphasis added). California punishes more serious crimes with far less time in prison. For example, first degree murder carries a sentence of 25 years-to-life; second degree murder carries a sentence of 20 years-to-life; manslaughter carries a sentence of 3, 6, or 11 years; and rape carries a sentence of 3, 6, or 8 years. Penal Code §§ 190, 193, 261.

Like the defendant in *Solem*, Mezzles "received the penultimate sentence for relatively minor criminal conduct" and his sentence is grossly disproportionate. 463 U.S. at 3016. Although Mezzles's triggering offense, a crime against a person, was not "one of the most passive felonies a person could commit," Mezzles's criminal history is significantly less serious than Helm's criminal history, which consisted of three burglary convictions, each carrying a sentence of up to 15 years in prison. *Solem*, 463 U.S. at 296. In contrast to the defendant in *Solem*, Mezzles was convicted of "wobblers" for robbery and criminal threats. He was initially sentenced to probation for both.

Likewise, Mezzles's criminal history does not implicate the state's interest in deterring repeat offenders and segregating them from society. Mezzles's sentence of 80 years-to-life is three times as long as the sentences imposed in *Ewing*, 538 U.S. at 11 (upholding California Three Strikes–sentence under the proportionality principle), and *Andrade*, 538 U.S. 63 (2003) (accord). But Mezzles's criminal history is significantly less serious.

In *Ewing*, this Court upheld a sentence of 25 years-to-life for shoplifting golf clubs worth $1200.00. The defendant was convicted while on parole from a 9 year prison term for first degree robbery and residential burglary. Ewing's "long history of felony recidivism," included convictions for three felony residential burglaries, a robbery at knife point, and nine incarcerations. *Ewing*, 538 U.S. at 29. In *Andrade*, this Court upheld a sentence of two terms of 25 years-to-life where petitioner's instant offenses were two felony counts of petty theft for stealing $150 worth of video tapes. 538 U.S. at 76. In that case, petitioner's criminal history included three prior qualifying convictions for first-degree residential burglary, federal drug transportation charges, and escape from federal prison. *Id.* at 67.

Mezzles's criminal history does not fall into the same category as that of *Ewing* or *Andrade*; the State of California punished his 1999 robbery offense and 2007 criminal threats conviction with terms of probation rather than prison sentences. And Mezzles has not demonstrated himself "incapable of conforming to the norms of society as established by its criminal law." Instead, his current conviction is only his second non-wobbler felony. It is the first time he has been sentenced to prison in California for an offense—his two prior prison sentences were the result of probation violations. Thus, the state's interest in punishing repeat violent offenders is not implicated here to the same extent it was in *Lockyer* and *Ewing*. *See Rummel v. Estelle*, 445 U.S. 263, 278 (1980) (upholding life sentence under Texas recidivist law for three non-violent felonies where petitioner would be eligible for parole in twelve years.)

Finally, the fact that Mezzles's crimes involved violence should not bar relief. "[N]o penalty is per se constitutional . . . . A single day in prison may be unconstitutional in some circumstances." *Solem*, 463 U.S. at 290.

Because this is the extremely rare case giving rise to an inference of gross disproportionality, a comparative analysis of Mezzles's sentence is required. *Solem*, 463 U.S. at 292. This analysis demonstrates the unconstitutionality of Mezzles's sentence.

California punishes far more serious crimes much less severely than the sentence imposed here. As noted, second-degree murder is punishable by 15 years-to-life in prison. Penal Code § 190. Voluntary manslaughter is punishable by up to 11 years in prison. Penal Code § 193. Rape is punishable by up to 8 years in prison. Penal Code § 261. Sexual assault on a minor is punishable by up to 13 years in prison. Penal Code § 261. Moreoverm, persons convicted of such crimes are often eligible for parole, resulting in even shorter sentences. *Ramirez*, 365 F.3d at 770. Indeed, the current Board of Prison Terms regulations recommend that parole be made available after 19-21 years for a person convicted of second-degree murder involving the most aggravated circumstances. Cal. Code Regs. Tit. 15, §§ 2320, 2329. Those circumstances include "severe trauma inflicted with deadly intensity," like "beating, clubbing, stabbing, strangulation," or "multiple wounds inflicted with a weapon" upon a victim that had "little or no personal relationship" with the prisoner, or whose death occurred during a "robbery, rape, or other felony." Cal. Code Regs. Tit. 15, § 2403(c). Thus, a person convicted of a gruesome second-degree

murder could be eligible for parole in 21 years, but Mezzles, convicted of corporal injury resulting in no serious injury, will not be eligible for parole for 80 years.

Mezzles's criminal history is also minimal in comparison to the average California Three Strikes offender according to statistics this Court relied upon in *Ewing*. Then, California's Three Strikes defendants averaged five prior felony convictions each, and the majority—about 84 percent—had been convicted of at least one serious violent crime such as homicide, attempted murder, or sexual assault. *Ewing*, 538 U.S. at 26-27. None of Mezzles's crimes rises to that level. Even among California's Three Strikes offenders, Mezzles's sentence is an outlier, strongly indicating that it violates the gross disproportionality principle of the Eighth Amendment.

In prior Eighth Amendment challenges, the State of California has conceded that "the statute employed against [petitioner] is the most stringent in the nation." *Ramirez*, 365 F.3d at 772. Though the statute was revised in 2012 and now requires the third strike to be a violent or serious felony to warrant a life sentence, California retains "the toughest recidivist Three Strikes law in the country[.]" California Official Voter's Guide (November 6, 2012), http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf. Only Rhode Island, Texas, West Virginia, and Louisiana had recidivist statutes comparable to California's. *Ramirez*, 365 F.3d 755, 772 (2004). And the wide discretion retained by prosecutors and judges with respect to charging "wobblers" as either felonies or misdemeanors for the purpose of

the first two strikes contributes to the harshness of the penalties. *Ewing*, 538 U.S. at 48-50 (Breyer, J. dissenting).

Even in states that have similar recidivist statutes, Mezzles would not have received the functional equivalent of a life sentence for his crimes. For example, Rhode Island's habitual offender law applies a 25-year enhancement to a defendant who has been sentenced to serve a term in prison two or more times. *See* R.I. Gen. Laws § 12-19-21(a). Mezzles had only served time in prison as a result of parole violations. Even if he had been sentenced to serve at least two terms as required in Rhode Island, Mezzles's enhancement would be capped at 25 years. *Id.*

Likewise, West Virginia's constitution "contains an express requirement of proportionality in sentencing which mandates a stricter review of recidivist sentencing than that required by the United States Supreme Court under federal constitutional principles." *State v. Deal*, 178 W. Va. 142, 147 (1987). Under circumstances similar to those here, the Supreme Court of West Virginia held that a life sentence for an unlawful assault conviction punishable by 10 years or less when none of defendant's underlying felonies "actually involved" violence was unconstitutional. *State v. Miller*, 184 W. Va. 462, 465–66 (1990). Mezzles's triggering offense was much less violent than that of the defendant in *Miller*, who was convicted of shooting a victim in the hand and stomach, and Mezzles's criminal history was comparable to that of the defendant in Miller, who was convicted of breaking and entering, forgery, and writing a false check. *Id.* Thus, it is unlikely that West Virginia would impose a sentence nearly as harsh on Mezzles. Of all the

50 states, only Texas or Louisiana might impose an equivalent sentence. Thus, Mezzles's sentence is uniquely harsh among the 50 states.

Relying exclusively on *Rummel*, the court of appeal held that Mezzles's sentence was constitutional because Mezzles's strikes included violent offenses, so the justification for the lengthy sentence was "more compelling than in *Rummel*." Pet. App. F-9. In making the comparison to Rummel's sentence, however, the state court ignored the critical fact that Mezzles's sentence was at least seven times more severe than Rummel's sentence. Rummel, who was sentenced to life, was eligible for parole after 12 years; Mezzles, sentenced to 80 years-to-life, will be eligible for parole after serving 80 years, or when he is 125 years-old. Failing to consider the severity of Mezzles's sentence was an objectively unreasonable application of the gross disproportionality principle. *Solem*, 463 U.S. at 300.

Compounding the error, the California Court of Appeal overestimated Mezzles's culpability, propensity for crime, and criminal history, and failed to note that, unlike the petitioner in *Rummel*, Mezzles had not been incarcerated on back-to-back occasions for two prior felonies. Instead, Mezzles was incarcerated only once in state prison after violating a condition of parole for a "wobbler" conviction. CT 524. Otherwise, Mezzles was sentenced to probation or county jail for alcohol-related misdemeanors and one instance of felony grand theft. CT 523-526. It was unreasonable of the state court to conclude that Mezzles's criminal history was in line with that of *Rummel*, who "twice demonstrate[d] that conviction and actual imprisonment do not deter him from returning to crime once he is released."

Rummel, 445 U.S. at 278. This Court reasoned that "Rummel's life sentence with the possibility of parole after twelve years was justified "only after shorter terms of actual imprisonment . . . proved ineffective." *Id.* But California has not yet attempted to sentence Mezzles to a prison term longer than 6 years. Surely, it should before sentencing him to life in prison.

Thus, the court of appeal's rejection of Mezzles's Eighth Amendment challenge was an unreasonable application of clearly established law. *Ramirez*, 365 F.3d at 768; *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) (holding on AEDPA review that a sentence of 28 years-to-life under California's Three Strikes law for failing to register under the sex offender statute violated the Eighth Amendment); *Reyes v. Brown*, 399 F.3d 964 (9th Cir. 2005) (remanding for an evidentiary hearing defendant's Eighth Amendment habeas challenge to a sentence of 26 years-to-life).

Mezzles is entitled to relief.

VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 23, 2018

By: _____
Tracy Casadio*
Deputy Federal Public Defender
Attorneys for Petitioner
WAYNE CLYDE MEZZLES
**Counsel of Record*

INDEX TO APPENDICES

APPENDIX A

FILED

APR 26 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYNE CLYDE MEZZLES, Petitioner-Appellant, v. JOHN N. KATAVICH, Warden, Respondent-Appellee.	No. 16-56781 D.C. No. 2:14-cv-07430-JVS-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted March 9, 2018
Pasadena, California

Before: W. FLETCHER and OWENS, Circuit Judges, and MOSKOWITZ,** Chief District Judge.

Wayne Clyde Mezzles appeals from the district court's denial of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Mr. Mezzles was convicted of inflicting corporal injury upon a spouse, possession of a deadly weapon, four

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barry Ted Moskowitz, Chief United States District Judge for the Southern District of California, sitting by designation.

counts of criminal threats, and two counts of assault. He was sentenced in accordance with California's Three Strikes Law and is currently serving an aggregate 80-years-to-life in state prison. Mr. Mezzles challenges his conviction on the grounds that the prosecutor's misconduct in examining the defense expert witness violated his right to due process and a fair trial. He also challenges his sentence under the Eighth Amendment to the United States Constitution. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 2253 and we affirm.

As a threshold matter, the parties dispute whether Mr. Mezzles' prosecutorial misconduct claim is barred under California's procedural default doctrine. The Court of Appeal held that Mr. Mezzles forfeited his claim under California law because he failed "to request another admonition." Under California law, "[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." *People v. Williams*, 56 Cal.4th 630, 671 (2013) (quoting *People v. Alfaro*, 41 Cal.4th 1277, 1328 (2007)). When sitting as a habeas court, the Ninth Circuit "generally respects state court determinations of state law." *Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007). However, where a state court's interpretation is "clearly untenable and amounts to a subterfuge to avoid federal review of a deprivation by the state of

rights guaranteed by the Constitution," the Ninth Circuit has recognized an exception. *Id.* (quoting *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir. 1982)).

Here, Mr. Mezzles' trial counsel objected over a dozen times to the prosecutor's misconduct, but never requested a jury admonition. On the prosecutor's last attempt at asking an improper question, the trial court sua sponte admonished the prosecutor and directed the jury to disregard the question. After the expert witness was dismissed, Mr. Mezzles' trial counsel moved for a mistrial based on the prosecutor's misconduct. The trial court denied the motion because it believed admonishing the prosecutor in front of the jury was sufficient to cure any possible harm. While California courts have permitted imperfect compliance, we need not reach the issue of whether here the claim is procedurally defaulted because the claim fails on its merits. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

On its merits, Mr. Mezzles' claim fails because the misconduct was harmless. The Court of Appeal held that the prosecutor "engaged in deliberate misconduct dedicated to the evasion, or outright defiance, of the court's ruling and admonitions." However, the court decided that under any standard, the

prosecutor's misconduct was harmless given the trial court's jury instructions and presumption that the jurors understood and followed those instructions.

It is clearly established law under Supreme Court precedent that a prosecutor's actions constitute misconduct if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "When a [*Chapman v. California*, 386 U.S. 18 (1967)] decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2224 unless *the harmlessness determination itself* was unreasonable.'" *Rademaker v. Paramo*, 835 F.3d 1018, 1023 (9th Cir. 2016) (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015)). However, because on habeas review prosecutorial misconduct warrants relief only if it "had substantial and injurious effect or influence in determining the jury's verdict," the Ninth Circuit often finds it sufficient to only address this question. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993); *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2014) ("Because it is more stringent, the *Brecht* test 'subsumes' the AEDPA/*Chapman* standard for review of a state court determination of the harmlessness of a constitutional violation."); *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (applying the *Brecht* standard to prosecutorial misconduct claim).

The prosecutor's deliberate misconduct was harmless for several reasons. First, the trial court instructed the jury that "[n]othing the attorneys say is evidence" and that it must "decide what the facts are in this case," using "only evidence that was presented in this courtroom." The trial court also instructed the jury on specific intent and the People's burden of proving it for the criminal threat counts. Under Supreme Court precedent, a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Second, while the jury did ask two questions related to the criminal threat counts, none indicated confusion or a particular struggle over the specific intent element. Though the length of jury deliberations may be examined when assessing harmlessness, given the charges, a two-day deliberation is not enough to find that no fairminded jurist would agree that the prosecutor's misconduct was harmless. *Cf. United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (finding that a four-day jury deliberation for a two-count drug importation and possession case was relatively lengthy and suggested a difficult case).

Lastly, the weight of the evidence suggests that Mr. Mezzles did not suffer actual prejudice. Mr. Mezzles argues that the testimony supported that he could not form a specific intent because he was intoxicated and suffered from PTSD at the time of the crimes. However, the witnesses also testified to facts that support a jury's finding of specific intent. For example, when Mr. Mezzles learned that his

stepdaughter called the police, he returned to the master bedroom and stated "now that I'm going to jail for good, I'm going to kill you." Accordingly, in light of the evidence, the jury instructions, and the trial court's vigilance in sustaining Mr. Mezzles' objections, he has not been able to demonstrate that the Court of Appeal's decision was objectively unreasonable or that the prosecutor's misconduct "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637–38.

Mr. Mezzles also challenges his sentence, arguing that it is in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. Relying on *Rummel v. Estelle*, 445 U.S. 263, 274 (1980), the Court of Appeal rejected Mr. Mezzles' contention that his sentence is grossly disproportionate to his offense and violates the Eighth Amendment. It stated that "[s]ince [his] strikes include violent offenses, the justification for a lengthy sentence here is more compelling than in *Rummel*."

Supreme Court precedent has established "gross disproportionality" as the controlling principle in assessing a petitioner's Eighth Amendment claims. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). In non-capital cases, the court must first compare the gravity of the offense with the severity of the sentence to determine whether it is one of the "rare" cases which leads to an inference of gross disproportionality. *See Graham v. Florida*, 560 U.S. 48, 59–60 (2010). If the

sentence gives rise to such an inference, the court next compares the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id.* at 60. Therefore, in order for Mr. Mezzles to be entitled to relief, he must demonstrate that it was objectively unreasonable for the Court of Appeal to determine that this is not one of the rare cases which leads to an inference of gross disproportionality. *See id.*

While Mr. Mezzles' 80-years-to-life sentence is harsh, given Mr. Mezzles' triggering violent offense and criminal history, we cannot say that it is contrary to or an unreasonable application of clearly established law under AEDPA's stringent standards. *See* 28 U.S.C. § 2254(d). Mr. Mezzles' triggering conviction is for inflicting corporal injury upon a spouse, possession of a deadly weapon, making criminal threats, and misdemeanor assaults. This is certainly not "one of the most passive felonies a person could commit." *Solem v. Helm*, 436 U.S. 277, 296 (1983). Indeed, it is substantially more serious than a conviction for obtaining money under false pretenses, for uttering a false check, or for theft. *See Rummel*, 445 U.S. at 275–76; *Solem*, 463 U.S. at 281; *Ewing v. California*, 538 U.S. 11, 17–19 (2003); *Andrade*, 538 U.S. at 77; *Ramirez v. Castro*, 365 F.3d 755, 768 (9th Cir. 2004).

Moreover, his prior convictions underlying the sentence enhancements were violent as well. Mr. Mezzles was convicted in 1999 for punching a homeless, wheelchair-bound man in the face and taking his money pouch after the man refused to give Mr. Mezzles money to buy beer. Mr. Mezzles initially received probation for the offense but was eventually sentenced to six years in state prison due to numerous probation violations. In 2007, Mr. Mezzles was convicted for criminal threats when he left his girlfriend a drunk message threatening to cut her throat. Mr. Mezzles was on parole for the 1999 conviction when he committed the 2007 offense. He was sentenced to probation and was still on probation when he committed the triggering offense. Mr. Mezzles also has other prior convictions which include violent offenses such as misdemeanors for corporal injury upon a spouse and battery. Therefore, given that his triggering offense and prior convictions were for violent crimes, we conclude that the Court of Appeal's decision rejecting this claim was not objectively unreasonable. *See Andrade*, 538 U.S. at 70–71.

AFFIRMED.

APPENDIX B

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE CLYDE MEZZLES, Petitioner, vs. JOHN N. KATAVICH, Warden, Respondent.	Case No. CV 14-7430-JVS (KES) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

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IT THEREFORE IS ORDERED that Judgment be entered dismissing the Petition with prejudice.

DATED: October 17, 2016

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX C

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE CLYDE MEZZLES,
Petitioner,
vs.
JOHN N. KATAVICH, Warden,
Respondent.

Case No. CV 14-7430-JVS (KES)

JUDGMENT

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: October 17, 2016

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE CLYDE MEZZLES, Petitioner, vs. JOHN N. KATAVICH, Warden, Respondent.	Case No. CV 14-7430-JVS (KES) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This amended Report and Recommendation is submitted to the Honorable James V. Selna, United St ates District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On Septemberr 23, 2014, Wayne Clyde Mezzles ("Petitioner") filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody. (Dkt.1.) Petitioner is a California state prisoner currently serving a 30-year determinate sentence followed by an indeterminate sentence of 50 years to life after being

convicted by a jury of corporal injury to a spouse, assault, criminal threats and possession of a deadly weapon. (Id. at 2[1]; Lodged Document ["LD"] 1, 2 Clerk's Transcript ["CT"] 539, 543 [abstract of judgment]; LD 2, 3 Clerk's Transcript ["CT"] 619 [sentencing hearing]; LD 6 [California Court of Appeal opinion reversing Petitioner's conviction on count four and striking the sentence attributable to count four].)[2]

Following multiple extensions of time, on March 12, 2015, Respondent filed an "Answer To Petition For Writ Of Habeas Corpus." (Dkt. 19.) On June 8, 2015, Petitioner filed a request for an extension of time to file his "Traverse/Reply," indicating that he intended to return to state court to exhaust a new ineffective assistance of counsel ("IAC") claim. (Dkt. 30.) The previously assigned Magistrate Judge granted him an extension, but noted as follows:

> [I]t appears to the Court that granting such a motion to hold the Petition in abeyance would be futile because the federal statute of limitations already has run on a claim by Petitioner that his trial counsel rendered ineffective assistance in failing to object to the prosecutor's alleged misconduct. ... If Petitioner disagrees that his unexhausted ineffective assistance of counsel claim is time barred ..., he should file a separate stay-and-abeyance motion concurrently

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[1] All page citations are to the electronic CM/ECF pagination.

[2] Petitioner's original determinate sentence of 40 years consisted of four 10-year terms imposed consecutively. His original indeterminate sentence consisted of six terms of 25 years to life on counts 1, 3, 4, 5, 6, and 8, with the two terms for counts 3 and 8 to run consecutively, the three terms for counts 4-6 to run concurrently, and the term for count 1 to be stayed. (2 CT 543.) After the Court of Appeal struck the sentence associated with count 4, his determinate sentence was reduced to 30 years and his indeterminate sentence became the two terms of 25 years to life on counts 3 and 8, to be served concurrently with the same two terms for counts 5 and 6.

with his Traverse/Reply.

(Dkt. 31.)

Accordingly, after several more extensions of time, on December 16, 2015, Petitioner filed his "Traverse/Reply" and a "Motion to Stay the Habeas Petition and Proceed in Abeyance." (Dkt. 50, 51.) The Court directed Respondent to respond to the Motion to Stay. (Dkt. 52.) After receiving multiple extensions of time, Respondent filed an Opposition on April 11, 2016. (Dkt. 60.) Petitioner filed a Reply to the Opposition on June 6, 2016. (Dkt. 63.)

On July 25, 2016, the Court issued a Report and Recommendation ("R&R") recommending that both the Stay Motion and the Petition be denied. (Dkt. 66.)

On September 6 and September 14, 2016, Petitioner filed objections and amended objections, respectively, to the R&R. (Dkt. 69, 70.) In light of Petitioner's objections, the Court drafted this amended R&R modifying the discussion of the length of Petitioner's sentence. The Court continues to recommend that both the Stay Motion and the Petition be denied.

II.

BACKGROUND

On February 2, 2012, Petitioner was convicted by a Santa Barbara County Superior Court jury of inflicting corporal injury upon a spouse (count 1), possession of a deadly weapon (count 8) and four counts of criminal threats (counts 3, 4, and 5). (2 CT 381, 384, 388-96.) He was also convicted of simple assault, a lesser included offense to assault with a deadly weapon as charged in count 2. (Id.)

After the jury returned its verdicts, the trial court found true sentence enhancement allegations based on two prior convictions for criminal threats in 2007 (while drunk, he left his girlfriend a voicemail threatening to slit her throat) and robbery in 1999 (he took a wheelchair-bound, homeless man's money pouch

from around his neck containing $22.00). (Id. at 398-99, 404-06.) In accordance with California's Three Strikes Law, the trial court subsequently sentenced Petitioner to an aggregate term of 90 years to life in state prison. (Id. at 538-40, 543-44.)

Petitioner appealed, raising inter alia claims corresponding to the two grounds for relief being alleged in the Petition herein (i.e., prosecutorial misconduct and grossly disproportionate sentencing). (Cf., Dkt 1 at 5 and LD 3.) On December 2, 2013, in an unpublished opinion, the California Court of Appeal reversed one of the criminal threat convictions and modified Petitioner's sentence accordingly, but otherwise rejected Petitioner's claims (including those corresponding to Petitioner's two grounds for relief herein) and affirmed the judgment. People v. Mezzles, 2013 Cal. App. Unpub. LEXIS 8662 (Cal. App. 2d Dist. Dec. 2, 2013); (LD 6.)[3]

In his ensuing Petition for Review prepared by counsel, Petitioner raised inter alia a prosecutorial misconduct claim that corresponds to Ground One of the Petition and an Eighth Amendment claim attacking his sentence. (LD 7.) Counsel's brief erroneously represented that Petitioner's sentence, as modified on appeal, totaled 55 years to life rather than 80. (LD 7 at 26.)[4]

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[3] While his direct appeal was pending, Petitioner on May 16, 2012 filed a pro per petition for writ of habeas corpus in the Santa Barbara County Superior Court, which the Superior Court denied without prejudice as premature on June 4, 2012. (LD 9, 10.)

[4] Appellate counsel apparently considered both components of count four's stricken sentence (10 years determinate + 25 years indeterminate = 35 years) and subtracted 35 from 90 to arrive at 55. (Dkt. 1 at 14 [letter from appellate counsel].) Petitioner filed his Petition for Review as an exhibit to his federal Petition. (Dkt. 1 at 17-53.) Respondent noted this error, explaining that because the determinate component was consecutive, whereas the indeterminate component was concurrent, striking Petitioner's sentence on count four only reduced his aggregate sentence by 10 years. (Dkt. 19 at 26 n.5.)

On February 11, 2014, the California Supreme Court summarily denied the Petition for Review without comment or citation to authority. (LD 8.)

On September 23, 2014, Petitioner filed the instant Petition.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Since neither of Petitioner's claims challenges the sufficiency of the evidence to support Petitioner's conviction, the following summary of the evidence presented at trial is taken from the "Factual and Procedural Background" section of the California Court of Appeal decision on direct appeal.[5]

Prosecution Evidence

On October 30, 2010, [Petitioner] was home, drinking beer and Southern Comfort with his wife, Laura. At about 10:30 p.m., he went out to get more Southern Comfort. Laura's 15–year–old daughter, Amy, her boyfriend, Will, and his friend, Cory, were in Amy's room. Laura was talking with them while [Petitioner] was out. She was sitting next to Cory, holding up and examining one of his hands and talking about hand scars. Suddenly they heard a loud thud or bang on the outside wall or window, and noticed

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Petitioner agrees that his current aggregate sentence is 80 years comprised of a 30-year determinate sentence followed by 50 years to life. (Dkt. 1 at 16 [letter written by Petitioner]; Dkt. 70-1 at 39 [letter written by appellate counsel] and Dkt. 69 at 1 [objections to R&R].)

[5] The Court notes that Ninth Circuit cases have accorded the factual summary set forth in a state appellate court decision a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1), which a party may rebut only by clear and convincing evidence that the facts were otherwise. See, e.g., Thompson v. Runnels, 705 F.3d 1089, 1091-92 (9th Cir. 2013); Ybarra v. McDaniel, 656 F.3d 984, 989 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012). Here, Petitioner has not challenged the presumption of correctness accorded to the Court of Appeal's factual summary.

[Petitioner] outside, yelling. He barged inside, with brass knuckles on one hand, and headed toward Amy's room. [Petitioner] "raise[d] his hand in a violent gesture ... toward" Cory, who fled.

[Petitioner] entered Amy's room, grabbed Laura's hair, and said something like, "You lying bitch, whore." He slammed Laura's head into Amy's dresser, breaking her eyeglasses and giving her a black eye.

Amy jumped between Laura and [Petitioner], and told him to get away from her mom. He threw Amy to the floor, and then pulled Laura through the hallway, to the master bedroom. Amy followed them. After hearing [Petitioner] yell, "I'm going to kill you," Will called the police. [Petitioner] left Laura's room and went to Amy's room briefly, where he tried to tackle Will. Will brushed him off.

When [Petitioner] left Laura's room, Amy called the police. He returned to Laura's room and said, "Now that I'm going to jail for good, I'm going to kill you guys." He also yelled, "You fucking bitches, I'm going to kill you."

The police arrived and arrested [Petitioner]. Before the police took him away, he looked at Amy and said, "I'll kill you." Amy was scared.

Defense Evidence

[Petitioner's] mother, Karen Brennan, testified regarding [Petitioner's] childhood, his alcoholic father, and his alcoholic stepfather. The defense also called Dr. Robert Owen, a clinical psychologist, as an expert witness. Dr. Owen diagnosed [Petitioner] with post-traumatic stress disorder (PTSD) and alcoholic dependence disorder. He testified that PTSD impairs a person's ability to process information and weigh consequences. (LD 6 at 2-3.)

IV.

PETITIONER'S CURRENT CLAIMS

1. Petitioner's federal constitutional right to due process and a fair trial was violated by the prosecutor's misconduct in repeatedly asking the defense expert improper questions relating to Petitioner's intent. (Dkt. 1 at 5.)

2. Petitioner's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. (Id.)

V.

PETITIONER'S PROPOSED ADDITIONAL CLAIMS

1. Trial counsel was ineffective in cross-examining witnesses due to counsel's "fail[ure] to investigate the factual circumstances surrounding the crime" and the "backgrounds of the testifying witnesses." (Dkt. 51 at 8.)

2. Appellate counsel was ineffective based on her refusal to file a "Petition for Review of his appellate issues" and failure to raise ineffective assistance of trial counsel claims. (Dkt. 51 at 9.)

VI.

PETITIONER'S MOTION FOR A STAY

On December 16, 2015, Petitioner filed a "Motion to Stay the Habeas Petition and Proceed in Abeyance." (Dkt. 51.) Petitioner requests the Court stay this action and hold his Petition in abeyance while he exhausts the above-identified claims of ineffective assistance of trial and appellate counsel. (Id. at 1-2, 8-10.) Petitioner, however, does not specify whether he seeks a stay pursuant to Rhines v. Weber, 544 U.S. 269, 278 (2005) or Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by, Robbins v Carey, 481 F.3d 1143 (9th Cir. 2007). See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir.) cert. denied, 130 S. Ct. 214 (1999).

Respondent contends that Petitioner is not entitled to a stay because he has not shown good cause for his failure to exhaust state remedies and the unexhausted claims are time-barred and do not relate back to the filing date of his Petition.

As explained below, Petitioner is not eligible for a stay-and-abeyance under Rhines or Kelly.

A. A Rhines Stay Is Not Warranted.

The Supreme Court follows a rule of "total exhaustion," requiring that all claims in a habeas petition be exhausted before a federal court may grant the petition. See Rose v. Lundy, 455 U.S. 509, 522 (1982). Pursuant to the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), all federal habeas petitions are subject to a one-year statute of limitations, and claims not exhausted and presented to the federal court within the one-year period are forfeited. 28 U.S.C. § 2244(d). Under Rhines, a district court has discretion to stay an unexhausted or mixed petition to allow a petitioner to exhaust his claims in state court without running afoul of the one-year statute limitations period for receiving federal habeas review imposed by AEDPA. Rhines, 544 U.S. at 273–75.

Here, the operative Petition is neither unexhausted nor mixed. Rather, the proposed unexhausted claims have not yet been filed in an amended federal petition. In deference to Petitioner's pro se status and recognizing that Petitioner followed the instructions of the previously assigned Magistrate Judge (who directed him to move for a stay concurrently with filing his Traverse/Reply and did not specifically direct him to file a First Amended Petition [Dkt. 31]), the Court will liberally construe Petitioner's stay motion which articulates the proposed claims (Dkt. 51) as if it were an amended petition for purposes of evaluating Petitioner's request for a Rhines stay.

Under Rhines, a district court may stay a petition if: (1) the petitioner has good cause for his failure to exhaust his claims; (2) the unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner intentionally engaged in dilatory tactics. Id. at 278. The Supreme Court has not articulated with precision what constitutes "good cause" for purposes of granting a stay under Rhines. In Pace v. Digugliemo, 544 U.S. 408, 416 (2005), the Supreme Court stated in dicta that a "petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for

him to file in federal court" without exhausting state remedies first. The Ninth Circuit has clarified that "good cause" for failure to exhaust does not require "extraordinary circumstances." Jackson v. Roe, 425 F.3d 654, 661–62 (9th Cir. 2005). Nonetheless, the good cause requirement should be interpreted in light of the Supreme Court's admonition that stays be granted only in "limited circumstances" so as not to undermine the AEDPA's twin goals of reducing delays in the execution of criminal sentences, and streamlining federal habeas proceedings by increasing a petitioner's incentive to exhaust all claims in state court. Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008).

More recently, in Blake v. Baker, 745 F.3d 977, 983 (9th Cir. 2014), the Ninth Circuit held that "[ineffective assistance] by post-conviction counsel can be good cause for a Rhines stay," finding that such a conclusion was consistent with and supported by Martinez v. Ryan, - U.S. -, 132 S. Ct. 1309 (2012), in which it established a limited exception to the rule of Coleman v. Thompson, 501 U.S. 722, 753 (1991), that ineffective assistance of post-conviction counsel may constitute cause for overcoming procedural default. The court found that the "good cause element is the equitable component of the Rhines test," and that "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify [the failure to exhaust.]" Blake, 745 F.3d at 982. The petitioner in Blake argued that he failed to exhaust his ineffective assistance of trial counsel claim because state post-conviction counsel failed to discover evidence that he suffered extreme abuse as a child, as well as organic brain damage and psychological disorders. Id. He supported his argument with evidence of his abusive upbringing and history of mental illness. Id. In light of this showing, the Ninth Circuit found that the district court abused its discretion in denying a stay and remanded the case. Id. at 983–84.

Here, Petitioner asserts that good cause exists for granting the instant motion because he received ineffective assistance from both trial and appellate

counsel. (Dkt. 51 at 8.) Petitioner contends that trial counsel's inability to cross-examine witnesses effectively was the result of counsel's "fail[ure] to investigate the factual circumstances surrounding the crime" and the "backgrounds of the testifying witnesses ...." (Id.) Petitioner contends that his appellate counsel failed to file a Petition for Review raising the best issues, including Petitioner's claims of ineffective assistance of trial counsel. (Id. at 9.)

Petitioner, however, has not demonstrated "good cause" (or any cause) for his failure to exhaust his claims of ineffective assistance of counsel in state court earlier. Rhines, 544 U.S. at 277. Petitioner plainly knew of the facts underlying his claims concerning trial counsel's performance during cross-examination by the time his trial concluded. He knew what claims his appellate counsel had included in the Petition for Review by the time it was denied on February 11, 2014, at the latest. (LD 7.) He received a letter from appellate counsel advising him of the deadline for filing a federal habeas petition. (Dkt. 70-1 at 42.) Despite this knowledge, Petitioner did not raise these claims in his Petition or ask for a stay until his June 8, 2015 motion for an enlargement of time to file his Traverse. (Dkt. 30.)

Petitioner's conclusory allegations of ineffective assistance of trial counsel are insufficient to constitute good cause for failing to exhaust this claim earlier. To the extent Petitioner seeks to exhaust his claims of ineffective assistance of trial counsel that he included in his Santa Barbara County Superior Court habeas petition, constructively filed on May 16, 2012, he fails to explain why he did not exhaust his claims sooner upon the issuance of the denial order on June 4, 2012. (LD 9-10.[6]) Instead, Petitioner waited over three years and six months (and after

[6] That petition does not mention trial counsel's cross-examination performance, but it does complain that his investigation did not "seek out" all of the character witnesses identified by Petitioner. (LD 9 at 3.)

Respondent filed an Answer to the Petition) to file the instant stay-and-abeyance motion. See Hernandez v. Sullivan, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005) (holding that ineffective assistance of appellate counsel did not constitute good cause because petitioner was free to seek state habeas relief on unexhausted claims).

Further, insofar as Petitioner claims ineffective assistance of appellate counsel, Petitioner has not submitted to this Court any evidence in support of his ineffective assistance of appellate counsel claim beyond the miscalculation of his reduced sentence. As the Ninth Circuit made clear in Blake, a "bald assertion" does not amount to a showing of good cause. Blake, 745 F.3d at 982; see also Nogueda v. California, No. CV14-1045 GGH P, 2014 WL 5473548, at *2 (E.D. Cal. Oct. 23, 2014) ("petitioner has failed to demonstrate that he qualifies for a stay because he has failed to support his request as required in Blake (i.e., there is no documentation—as opposed to oral assertions—showing that he discussed these claims with trial and/or appellate counsel and was ignored)"); Lisea v. Sherman, No. CV 14-1766 CKD P, 2014 WL 4418632, at *3 (E.D. Cal. Sept. 8, 2014) (denying a motion for a stay and abeyance because the petitioner supplied no evidence in support of his contention that appellate counsel was ineffective in failing to raise certain claims); Davis v. Biter, No. CV 12-3001 BEN (BLM), 2014 WL 2894975, at *8 (S.D. Cal. June 25, 2014) (denying a motion for a stay and abeyance because the petitioner had not presented any evidence to support his good cause argument); Martin v. Neotti, No. CV 10-01279 R (SS), 2010 WL 4570043, at *4 (C.D. Cal. Aug. 10, 2010) ("If the Court accepted Petitioner's argument as good cause, all habeas petitioners raising claims based on ineffective assistance of appellate counsel would be entitled to a stay."), R&R adopted by 2010 WL 4570217 (C.D. Cal. Nov. 3, 2010); but see Cruz v. Mitchell, No. CV 13-02792 JST, 2015 WL 78779, at *3 (N.D. Cal. Jan. 5, 2015) (petitioner's showing of ineffective assistance of

counsel met the good cause requirement because he supported his argument with juror questionnaires, declarations from prior counsel, and trial transcripts).

In sum, Petitioner had ample opportunity to present his unexhausted claims to the state courts and he does not show adequate excuse for his failure to exhaust these claims. Thus, this is not one of the "limited circumstances" contemplated under Rhines in which a stay is appropriate.

Furthermore, a petitioner's lack of legal training or knowledge—a commonplace circumstance of many pro se petitioners—does not alone constitute good cause for delay in exhausting claims in state court. See, e.g., Labon v. Martel, No. CV 14–6500 DSF (RNB), 2015 WL 1321533, at *7 (C.D. Cal. Mar.17, 2015) ("The fact that petitioner was untrained in the law and lacked legal assistance does not constitute good cause for petitioner's delay in exhausting his state remedies"). Indeed, finding good cause under these circumstances would render stay-and-abeyance orders routine and "would run afoul of Rhines and its instruction that district courts should only stay mixed petitions in 'limited circumstances.'" Wooten, 540 F.3d at 1024 (quoting Rhines, 544 U.S. at 277). Accordingly, Petitioner is not entitled to a stay under Rhines.[7]

B. A Kelly Stay Is Not Warranted.

Alternatively, the Court may grant a stay under Kelly which does not have the Rhines good cause requirement. King, 564 F.3d at 1139-40. A Kelly stay and abeyance requires compliance with the following three-step procedure:

[7] In general, a magistrate judge lacks the authority under 28 U.S.C. § 636 to deny a motion to stay a habeas petition to allow for exhaustion in state court. See Mitchell v. Valenzuela, 791 F.3d 1166, 1173-74 (9th Cir. 2015); Bastides v. Chappell, 791 F.3d 1155, 1163 (9th Cir. 2015). Instead the magistrate judge must submit his or her recommended ruling on the motion to the District Judge. Mitchell, 791 F.3d at 1173-74.

(1) petitioner files an amended petition deleting his unexhausted claims; (2) the district court "stays and holds in abeyance the amended, fully exhausted petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted claims;" and (3) petitioner must subsequently seek to amend the federal habeas petition to reattach "the newly-exhausted claims to the original petition." Id. at 1135. The petitioner, however, is only allowed to amend his newly-exhausted claims back into his federal petition if the claims are timely under the AEDPA as of the date of amendment or "relate back" to the exhausted claims in the pending petition. (Id. at 1140–41).

A new claim relates back to an existing claim if the two claims share a "common core of operative facts." Mayle v. Felix, 545 U.S. 644, 646 (2005). A new claim does not "relate back" to an existing claim simply because it arises from "the same trial, conviction or sentence." Id. If the newly-exhausted claim is not timely under the AEDPA or the relation-back doctrine, it may not be added to the existing petition. See, e.g., Stein v. Director of Corrections, 2009 WL 4755727, at *2 (E.D. Cal. Dec. 8, 2009) (denying stay motion governed by Kelly procedure where any amended petition based on unexhausted claims would not be timely); Rodriguez v. Small, 2009 WL 3763531, at *2 (E. D. Cal. Nov. 9, 2009) (denying stay motion governed by Kelly procedure where currently unexhausted claims were time barred).

As discussed hereafter, Petitioner's proposed ineffective assistance of trial and appellate counsel claims are already untimely and they do not "relate back" to the original Petition; thus, a Kelly stay is unavailable.

1. The Proposed Claims Are Untimely.

The Petition is subject to the AEDPA's one-year limitation period, which provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the

> judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d). The Court must evaluate the commencement of the limitations period on a claim-by-claim basis. See Mardesich v. Cate, 668 F.3d 1164, 1169-71 (9th Cir. 2012).

Here, the California Supreme Court denied Petitioner's Petition for Review on February 11, 2014. (LD 8.) There is no indication that Petitioner filed a petition for writ of certiorari in the United States Supreme Court. As a result, his conviction became final ninety days later, on May 12, 2014. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999); see also Caspari v. Bohlen, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Given the nature of Petitioner's proposed additional claims, none of

which are based on newly discovered facts, none of the other "trigger" dates under 28 U.S.C. § 2244(d)(1) apply here. See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when a prisoner "knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance"). Thus, unless a basis for tolling the statute existed, Petitioner's last day to file his federal habeas petition was May 12, 2015. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

a. Petitioner is Not Entitled to Statutory Tolling.

Petitioner has failed to show the limitations period was sufficiently tolled. As stated above, the limitation period began on May 13, 2014. However, even before the start of the statute of limitations, Petitioner constructively filed a habeas petition in the Santa Barbara County Superior Court on May 12, 2012, which was denied on June 4, 2012. (LD 9,10.) This petition did not toll the statute of limitations, because it was filed and denied before the judgment became final and the statute of limitations began running. See 28 U.S.C. § 2244(d)(2); Rosati v. Kernan, 417 F. Supp. 2d 1128, 1130 n.1 (C.D. Cal. 2006) (collateral actions filed before petitioner's judgment becomes final had no tolling consequences).

Petitioner has not filed any other state habeas petitions or applications for state collateral review, and his federal Petition in this Court did not toll the limitations period. Duncan v. Walker, 533 U.S. at 167,181-82 (2001).

b. Petitioner is Not Entitled to Equitable Tolling.

A prisoner seeking equitable tolling bears the burden of showing that: (1) an extraordinary circumstance prevented the timely filing of his habeas petition, and (2) he diligently pursued his rights under AEDPA to seek federal habeas review. Holland v. Florida, 560 U.S. 631, 649 (2010).

In Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010), the Ninth Circuit held that proof of a severe mental impairment can qualify for equitable tolling where the

petitioner meets the following two-part test:

> (1) First, a petitioner must show his [or her] mental impairment was an "extraordinary circumstance" beyond his [or her] control [citation], by demonstrating the impairment was so severe that either
>
> (a) petitioner was unable rationally or factually to personally understand the need to timely file, or
>
> (b) petitioner's mental state rendered him [or her] unable personally to prepare a habeas petition and effectuate its filing.
>
> (2) Second, the petitioner must show diligence in pursuing the claims to the extent he [or she] could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance. [citation].

Id., at 1099-1100; see also Stancle v. Clay, 692 F.3d 948, 952 (9th Cir. 2012) (illiterate prisoner did not satisfy Bills test where assistance from another inmate was available).

Petitioner's stay motion does not mention equitable tolling or mental illness. (Dkt. 51.) Nevertheless, Petitioner lodged his mental health records with his supplemental objections to the R&R, which the Court construes as an attempt to support an argument for equitable tolling. (Dkt. 70.)

The Court has reviewed those records and summarizes them in chronological order, as follows:

• June 2012: In a "mental health evaluation form" completed shortly after Petitioner's sentencing, he was diagnosed as suffering from depression, substance abuse, and posttraumatic stress disorder ("PTSD") arising out of childhood sexual abuse. (Dkt. 70-1 at 25.) He was taking medications including Cogentin, Risperdal and Celexa. (Id. at 25, 30, 35.) He reported experiencing

racing thoughts and "seeing things." (Id. at 25.) Various aspects of his cognition such as concentration, attention and memory, were all "within normal limits." (Id. at 27.) He was assessed with "moderate impairment with regard to work/school." (Id. at 28.)

At that time, he was assigned a GAF score of 35 or 45. (Id. at 23, 25, 28.) GAF scores reflect a clinician's "rough estimate of an individual's psychological, social, and occupational functioning used to reflect the individual's need for treatment." Garrison v. Colvin, 759 F.3d 995, 1003 n.4 (9th Cir. 2014). A GAF score between 41 and 50 describes "serious" impairment in social, occupational, or school functioning, whereas a GAF score between 51 to 60 describes "moderate" impairment and a score between 61 and 70 indicates "mild" impairment. Id.; Nicholl v. Colvin, 2016 U.S. Dist. LEXIS 114997, at *12-13 (N.D. Cal. Aug. 26, 2016).

• November 2012: A few months later, Petitioner was assigned a GAF score of 60. (Dkt. 70-1 at 8.) Petitioner told the prison psychiatrist that he had been "depressed since childhood." (Dkt. 70-1 at 11.)

• February 2013: Petitioner was taking Effexor, Celexa and Buspar. (Dkt. 70 at 34.) Celexa is an anti-depressant, while Effexor and Buspar are psychotropic medications. (Dkt. 70-1 at 1, 10.)

• May 2013: Petitioner was evaluated as in compliance with his medications and having "linear and logical" though processes, no psychosis or delusions, "normal" cognition, and "good" insight and judgment. (Dkt. 70 at 31.)

• November 2013: Petitioner was continuing treatment for depression and sadness, and he reported hoping for a reduction in his life sentence. (Dkt. 70 at 25.) He was "alert, verbal, [and] clear." (Id.)

• June 2014: Records show his GAF score as both 47 and 61. (Cf., Dkt. 70 at 18 and 20.) The medical staff reported that Petitioner has "been clean and

sober for several years and is not involved in AA/NA meetings ...." (Id.) He remained "agitated, depressed and stressed" over his sentence and appeals. (Id.)

• July 2014: Petitioner's GAF score was again 61. (Dkt. 70 at 19.)

• March 2015: Petitioner's GAF score remained at 61 (Dkt. 70 at 11.) He was sad, anxious and depressed. (Id. at 10.) He asked to see a psychiatrist to review his medications. (Id. at 7.)

• April 2015: In this most recent medical record, Plaintiff was documented as refusing to take certain medications. (Id. at 6.)

For purposes of filing a timely federal petition, the critical time period is between February 2014 (when the California Supreme Court denied his Petition for Review) and May 2015 (when the AEDPA limitations period expired). During that year, it appears that Petitioner suffered from depression and was taking medication, but he also had a GAF score of 61, indicating only mild impairment. He corresponded with his appellate counsel during this time. In February 2014, she sent him a letter concerning her miscalculation of his reduced sentence. (Dkt. 70-1 at 39.) In May 2014, she sent him a federal petition that she had prepared for him to file on his own, but also included a blank petition form that he could use if he decided he wanted to include different or additional claims. (Id. at 44-45.) Indeed, that form listed a number of IAC claims that had been raised in Petitioner's 2012 state habeas petition. (Dkt. 1 at 4.) In August 2014, he wrote a letter concerning his Petition for Review misstating the length of his sentence. (Dkt. 1 at 16.) He filed his Petition in September 2014. (Dkt. 1.) Taken together, Plaintiff's mental health records and filing activities demonstrate that he does not meet the Bills standard for equitable tolling due to mental illness.

Without statutory or equitable tolling, Petitioner had until May 12, 2015 to timely file his ineffective assistance of both trial and appellate counsel claims. The deadline of May 12, 2015, has long since passed. Indeed, it expired before

Petitioner first asked for more time to exhaust claims in state court on June 8, 2015. (Dkt. 30.) Therefore, even if the Court were to grant a stay under Kelly and Petitioner were permitted to amend his Petition after exhaustion to include his IAC claims, those claims would be time-barred unless they shared a "common core of operative facts with the claims in the pending petition." King, 564 F.3d at 1141(internal quotation marks omitted).

2. Neither of Petitioner's Proposed Claims Relate Back to the Filing of Petitioner's Original Petition.

Under Federal Rule of Civil Procedure 15(c)(1)(B), an amendment made after the statute of limitations has run relates back to the date of an original pleading if the amendment "asserts a claim ... that arose out of the conduct, transaction, or occurrence set out ... in the original pleading[.]" Id.; see also Mayle, 545 U.S. at 655. "[R]elation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." Id. at 659. If "the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." Id. at 664. On the other hand, an amended petition "does not relate back (and thereby escape AEDPA's one-year time limit) when it ***asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.***" Id. at 650; see also id. at 662 ("If claims asserted after the one-year period could be revived simply because they relate to the same trial ... as a timely filed claim, AEDPA's limitation period would have slim significance"); Pace, 544 U.S. at 416 n.6 (habeas claims must be assessed for timeliness on a claim-by-claim basis); Ford v. Gonzalez, 683 F.3d 1230, 1237 n.3 (9th Cir. 2012) ("[A] new claim in an amended petition relates back to avoid a limitations bar, when the limitations period has run in the meantime, only when it arises from the same core of operative facts as a claim contained in the original petition.")

Thus, under Mayle, as construed in King, 564 F.3d at 1141-42, once the

limitation period has expired, a habeas petitioner can only add a newly exhausted claim into a pending, fully exhausted federal habeas petition if the newly exhausted claim relates back to the exhausted claims alleged in the pending petition. For purposes of the Kelly procedure, this means that, "the newly-exhausted claims, which are to be set forth in an amended petition after the stay is lifted, must relate back to claims in the fully-exhausted stayed petition." Petrocelli v. McDaniel, 2011 WL 868662, at *19 (D. Nev. Mar. 10, 2011); see also Leonard v. Ahlin, 2010 WL 3245480, at *1 (E.D. Cal. Aug. 16, 2010) ("[U]sing the Kelly procedure means that the newly-exhausted claims set forth in any amended petition must relate back to the claims in the stayed petition").

Petitioner asserted the following two grounds for relief in his original Petition: (1) Petitioner's federal constitutional right to due process and a fair trial was violated by the prosecutor's misconduct in repeatedly asking the defense expert improper questions relating to Petitioner's intent; and (2) Petitioner's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. (Dkt. 1 at 5.)

Petitioner plainly relies on different facts and legal claims to support his ineffective assistance of trial and appellate counsel claims. Petitioner did not raise ineffective assistance of trial or appellate counsel in his original Petition. Thus, the unexhausted claims are not "tied to a common core of operative facts." Mayle, 545 U.S. at 664 n.7. Instead, they are entirely different and unrelated claims separated in time and type. See Hebner, 543 F.3d at 1137-39. Because Petitioner's ineffective assistance of trial and appellate counsel claims do not relate back to the claims in the original Petition, the claims are untimely, and Petitioner's Stay Motion should be denied.

VII.

STANDARD OF REVIEW

Under the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Carey v. Musladin, 549 U.S. 70, 74 (2006).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. See Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal

habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'" Early, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state the Strickland standard correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 24-27; Williams, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. Williams, 529 U.S. at 409-10; Visciotti, 537 U.S. at 25. Moreover, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

As the Supreme Court explained:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Harrington v. Richter, 562 U.S. 86, 102 (2011). Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." Id. at 103.

Here, claims corresponding to the two grounds for relief being alleged in the Petition were raised by Petitioner on direct appeal and denied by the California Court of Appeal in a reasoned decision. (LD 6.) Those same claims corresponding to Petitioner's two grounds for relief herein were then presented in Petitioner's Petition for Review, which the California Supreme Court denied. Accordingly, for purposes of applying the AEDPA's standard of review here, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits. Berghuis v. Thompkins, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA standard of review).[8]

[8] "Exhaustion requires a statement of the 'operative facts' that support the federal legal theory giving rise to the claim." Gentry v. Sinclair, 705 F.3d 884, 901 (9th Cir. 2013). Here, Petitioner presented the claim that his sentence was unconstitutional to the California Supreme Court, but his Petition for Review misstated his aggregate sentence as 55 years rather than 80 years. See n.3, supra. Petitioner was born in 1966. Adding either of these numbers to his 2012 sentencing date would result in a term ending in 2067 (at age 101) or 2092 (at age 126). As a result, regardless of which number it used, the California Supreme Court considered whether a sentence longer than Petitioner's life expectancy was constitutional.

VIII.

DISCUSSION

A. **Habeas relief is not warranted with respect to Petitioner's prosecutorial misconduct claim.**

In Ground One of the Petition, Petitioner claims that his federal constitutional right to due process and a fair trial was violated by the prosecutor's misconduct in repeatedly asking the defense expert improper questions relating to Petitioner's intent. (Dkt. 1 at 5.)

1. The Trial Court Proceedings.

As summarized by the California Court of Appeal (see LD 6 at 6-7):

The trial court ruled that the [defense] expert could testify about PTSD, but not about [Petitioner's] capacity to form the requisite specific intent for criminal threats or whether he had that intent at the time of the crimes. The prosecutor nonetheless repeatedly asked questions regarding intent. Some examples follow: "By Mr. Verburgt: Q: Would it be fair to say that the [Petitioner's] emotional functioning may be of interest, but it's largely irrelevant in a case in determining guilt?" "Q: What's the intent required for a violation of Penal Code section 273.5?" "Q: Do you know what the mental state required, "yes" or "no," for violation of Penal Code section 422, criminal threats?" The court sustained objections to the just quoted questions. Thereafter, at the bench, the court reminded Mr. Verburgt of its ruling limiting Dr. Owen's testimony regarding "the [Petitioner's] specific state of mind." Mr. Verburgt persisted in asking improper questions. The court excused the jury, conferred with counsel, and restated its ruling regarding the limits on Dr. Owen's testimony. Mr. Verburgt again returned to the topic of [Petitioner]'s state of mind, asking, "So you have no way of knowing what the [Petitioner's] state of mind was on that date, do you?" The court interrupted and admonished him, "It's an improper question." Mr. Verburgt soon asked another improper question, leading the court to admonish him, yet again as follows: "No. We've made this clear. I've told you several times, do not go into that area. Next question."

...

Defense counsel moved for a mistrial based upon prosecutorial misconduct after Dr. Owen completed his testimony. Counsel argued the prosecutor's repeated violations of the ruling limiting Dr. Owen's testimony were prejudicial because they suggested the defense was hiding the truth from the jury. The trial court concluded the improper questions hurt the prosecutor and any detriment to the defense was cured by the court's admonishment to the prosecutor. Defense counsel submitted the matter without requesting any further admonition, and the court denied the motion. (LD 6 at 6-7.)

2. The Court of Appeal Decision.

In rejecting Petitioner's prosecutorial misconduct claim, the California Court of Appeal found that the prosecutor, Mr. Verburgt, "engaged in improper questioning in light of the court's repeated admonitions," and that "[i]t appear[ed] from this record that Mr. Verburgt engaged in deliberate misconduct dedicated to the evasion, or outright defiance, of the court's ruling and admonitions." (LD 6 at 8.) However, the Court of Appeal concluded in the first instance that, under California law, Petitioner had forfeited his prosecutorial misconduct claim by failing to request another admonition and by not showing that an admonition would not have cured the harm. (LD 6 at 7 (citing People v. Williams, 56 Cal.4th 630, 671 (2013).)

The Court of Appeal further concluded that the cited misconduct was harmless:

Forfeiture aside, the cited misconduct was harmless under any standard of review. The trial court instructed the jury that "[n]othing the attorneys say is evidence" and the jury must "decide what the facts are in this case," using "only the evidence that was presented in this courtroom." (CALCRIM No. 222.) It further instructed the jury that attorneys' "questions are not evidence," and it should "not assume that something is true just because one of the attorneys asked a question that suggested it was true." (Ibid.) It is

presumed that the jury understood and followed the instructions. (People v. Mooc (2001) 26 Cal.4th 1216, 1234.) There is no reasonable likelihood that the jury construed or applied the challenged questions in an improper or erroneous manner. (People v. Samayoa (1997) 15 Cal.4th 795, 843-844; People v. Frye (1998) 18 Cal. 4th 894, 970, overruled on other grounds by People v. Doolin (2009) 45 Cal. 4th 390, 421, fn. 22.) (LD 6 at 7-8.)

3. Analysis.

a. This Claim is Procedurally Defaulted.

Respondent contends that Petitioner's prosecutorial misconduct claim is procedurally barred because of the California Court of Appeal's rejection of it on independent and adequate state law procedural grounds and Petitioner's failure to make the requisite showing of cause and prejudice to overcome the state procedural bar. (Dkt. 19 at 1, 21-23.)

In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989). Under California law, the failure to request a curative admonition for a prosecutor's objectionable conduct independently serves as a procedural bar to consideration of the issue by the appellate courts. See, e.g., People v. Davis, 46 Cal. 4th 539, 612 (2009) ("To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm."), cert. denied, 558 U.S. 1124 (2010); People v. Tafoya, 42 Cal. 4th 147, 176 (2007) ("Generally, a claim of prosecutorial misconduct is not reviewable on appeal unless the defendant makes a timely objection and asks the trial court to admonish the jury to disregard the prosecutor's improper remarks."), cert. denied, 552 U.S. 1321 (2008); People v. Benson, 52 Cal. 3d

754, 794 (1990) ("It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."), cert. denied, 502 U.S. 924 (1991).

Here, the California Court of Appeal "clearly and expressly" invoked the foregoing procedural bar when it found in the first instance that Petitioner had forfeited his prosecutorial misconduct claim by failing to request a curative admonition for the prosecutor's objectionable conduct.[9]

The failure to comply with a state's procedural rules concerning contemporaneous objections (which encompass California's curative instruction rule) results in a procedural default which bars federal consideration of the issue, unless petitioner can demonstrate both "cause" for his failure to request the curative instruction at trial and "prejudice" accruing from the error. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1989).

In order to demonstrate "cause" for a procedural default, Petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Mere attorney negligence will not establish cause, but if the procedural default is the result of ineffective assistance of counsel, then "the Sixth Amendment itself requires that responsibility for the default be imputed to the State." Id. at 488.

Here, Petitioner contends his trial attorney provided ineffective assistance

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[9] It makes no difference that the Court of Appeal also addressed this prosecutorial misconduct claim on the merits in the alternative. See Harris, 489 U.S. at 264 n.10; Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc), cert. denied, 507 U.S. 992 (1993); Thomas v. Lewis, 945 F.2d 1119, 1122-23 (9th Cir. 1991).

in failing to object to the prosecutor's misconduct. (Dkt. 50 at 8.) Claims of ineffective assistance of counsel are analyzed under the standard set forth in Strickland v. Washington, 466 U.S. 668, 685 (1984). Under that standard, a habeas petitioner arguing that he received ineffective assistance of counsel must make two showings: (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. Id. at 687. In evaluating whether the performance of counsel was deficient in a constitutional sense, the relevant question is whether "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In considering prejudice, the appropriate inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Here, even *assuming arguendo* that counsel's failure to object to the prosecutor's statements was deficient performance, Petitioner cannot show prejudice. As discussed below in rejecting Ground One on the merits, the jury was instructed not to view the prosecutor's statements as evidence, and juries are presumed to follow the instructions. Thus, Petitioner has failed to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

By failing to demonstrate ineffective assistance of counsel, Petitioner fails to demonstrate "cause" to excuse his procedural default. Because Petitioner must demonstrate both cause and prejudice (see Murray, 477 U.S. at 494), his inability to demonstrate the requisite "cause" obviates the need for the Court to even reach the issue of whether Petitioner has demonstrated the requisite "prejudice." Thomas v. Lewis, 945 F.2d at 1123 n.10.

The Supreme Court has recognized an exception to the requirement that the petitioner demonstrate both "cause" and "prejudice," where the petitioner can demonstrate that failure to consider the procedurally defaulted claims will

result in a fundamental miscarriage of justice because he is actually innocent of the crimes of which he was convicted. See, e.g., Coleman, 501 U.S. at 750; Murray, 477 U.S. at 496; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993). However, in order to qualify for this "miscarriage of justice" exception, the petitioner must "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995) (recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327. Here, Petitioner has not even purported to adduce the kind of new reliable evidence described in Schlup; nor has he even purported to make the requisite showing of actual innocence.

b. Even on the Merits, Habeas Relief is Not Warranted.

Federal habeas review of prosecutorial misconduct claims is limited to the narrow issue of whether the alleged misconduct violated due process. Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974); Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir.), cert. denied, 519 U.S. 889 (1996). Misconduct is reviewed in light of the entire trial record, and relief will be granted only if the misconduct by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly, 416 U.S. at 639-43; see also Smith v. Phillips, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"); Darden v. Wainwright, 477 U.S. 168, 181 (1986) (prosecutorial misconduct violates the Constitution only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due

process."); Deck v. Jenkins, 768 F.3d 1015, 1022 (9th Cir. 2014) (recognizing Darden as "clearly established Federal law" regarding when "prosecutorial misconduct amounts to a constitutional violation") (citing id.).

Moreover, even if the prosecutorial misconduct amounted to a due process violation, federal habeas relief is appropriate only if the due process violation had a substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see also Sechrest v. Ignacio, 549 F.3d 789, 807-08 (9th Cir. 2008) (analyzing impact of prosecutor's misleading and inflammatory arguments under Brecht), cert. denied, 130 S. Ct. 243 (2009); Leavitt v. Arave, 383 F.3d 809, 834 (9th Cir. 2004), cert. denied, 545 U.S. 1105 (2005). A federal habeas court applies the Brecht test without regard for the state court's harmlessness determination. Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011); Pulido v. Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that, on federal habeas review, the prejudicial impact of constitutional error in a state-court criminal trial must be assessed under the Brecht standard whether or not the state court applied the Chapman standard).

Here, as noted by the California Court of Appeal in its harmless error determination, the jury was instructed pursuant to CALCRIM No. 222 that "[n]othing the attorneys say is evidence" and that the jury must "decide what the facts are in this case," using "only the evidence that was presented in this courtroom." (1 CT 290.) The jury further was instructed that attorneys' "questions are not evidence," and that the jury should "not assume that something is true just because one of the attorneys asked a question that suggested it was true." (Id.)

Jurors are presumed to follow the instructions given at trial, and Petitioner has failed to adduce any evidence that the jury did not do so in this case. See, e.g., Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481

U.S. 200 (1987); Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985). The Court therefore has no basis for finding that the prosecutor's misconduct in persisting in asking the defense expert improper questions relating to Petitioner's intent had a substantial and injurious effect or influence in determining the jury's verdict.

B. Habeas relief is Not Warranted on Petitioner's Eighth Amendment Claim.

In Ground 2, Petitioner claims that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. In support of this claim, Petitioner contends that his past and present crimes did not result in serious injury or the use of a weapon, and thus render his sentence "grossly disproportionate to the crimes." Moreover, he suffers from post-traumatic stress disorder and alcohol dependence, and he committed the past and current crimes while he was intoxicated, which rendered him less culpable than other adult offenders. (Dkt. 1 at 5.)

In Rummel v. Estelle, 445 U.S. 263, 274 (1980), the Supreme Court stated that "for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Noting that it would only employ a proportionality principle in an extreme case (see id. at 274 n.11), the Supreme Court upheld against an Eighth Amendment challenge a mandatory sentence of life imprisonment with the possibility of parole imposed on a Texas recidivist[10] who had been convicted

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[10] The purpose of a recidivist statute was described as follows:

"... Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an

of obtaining $120.75 under false pretenses, after prior convictions for fraudulent use of a credit card to obtain $80 worth of goods or services, and for passing a forged check for $28.36. Id. at 285.

Three years after the Rummel decision, in Solem v. Helm, 463 U.S. 277, 281 (1983), the Supreme Court ruled that the Eighth Amendment prohibited a life sentence without the possibility of parole for a seventh nonviolent felony where the triggering offense was uttering a no account check for $100. The Supreme Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the [petitioner] has been convicted," and that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id. at 290-92. However, the Supreme Court specifically stated in Solem that it was not overruling Rummel, whose facts the Court characterized as "clearly distinguishable." Id. at 288 n.13, 303-04 n.32.

Although there was no majority opinion on the proportionality issue in the Supreme Court's subsequent decision rejecting an Eighth Amendment challenge in Harmelin v. Michigan, 501 U.S. 957 (1991), the Supreme Court has construed the Rummel, Solem, and Harmelin trilogy of cases as standing for the "clearly established" rule that "[a] gross disproportionality principle is applicable to sentences for terms of years." Lockyer v. Andrade, 538 U.S. 63, 73 (2003). The Supreme Court further observed that the precise contours of the gross disproportionality principle "are unclear, applicable only in the

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extended period of time. This segregation and its duration are based not merely on the person's most recent offense but also on the propensities he has been convicted of and sentenced for other crimes." Rummel, 445 U.S. at 284.

'exceedingly rare' and 'extreme' case." Id.

In Andrade, the Supreme Court rejected a state habeas petitioner's Eighth Amendment challenge to a sentence of 50 years to life imposed under California's Three Strikes Law. There, the petitioner's current offenses were two counts of petty theft. The total value of the stolen property was only $150; however, by virtue of a prior misdemeanor petty theft conviction, both petty thefts were charged as felonies. Andrade had an extensive criminal history record dating back 13 years, which included three residential burglary convictions (which had been charged as prior "strikes"), as well as convictions for misdemeanor theft, transportation of marijuana (two times), and petty theft. In rejecting petitioner's cruel and unusual punishment claim, the California Court of Appeal had concluded that the 50 years to life sentence was not disproportionate after comparing Andrade's crimes and criminal history with that of Rummel. The Supreme Court held that the California Court of Appeal's decision neither was contrary to nor involved an unreasonable application of the clearly established gross disproportionality principle. Andrade, 538 U.S. at 73-77.

In Ewing v. California, 538 U.S. 11 (2003), a companion case to Andrade decided the same day, the petitioner received a 25 years to life sentence following a third strike conviction for shoplifting three golf clubs worth approximately $1,200. The Supreme Court stated that, "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." Id. at 29. Ewing's extensive criminal history record dated back 16 years and included numerous misdemeanor and felony convictions (including three residential burglary convictions and one robbery conviction that had been charged as prior "strikes"), for which Ewing had served nine separate terms of incarceration, with most of his crimes being committed while on probation or parole. The Supreme Court concluded that "Ewing's

sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record," and that "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" Accordingly, the Supreme Court held that the sentence of 25 years to life did not violate the Eighth Amendment's prohibition on cruel and unusual punishments. Id. at 30-31.

The Ninth Circuit subsequently held in Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004), that a sentence of 25 years to life was grossly disproportionate to the crime committed where the current offense was petty theft with a prior theft related conviction and the two prior strike convictions were for second-degree robbery. The Ninth Circuit found that this was one of the "extremely rare" cases that gave rise to an inference of gross disproportionality because Ramirez's present offense was a "wobbler" felony for the nonviolent shoplifting of a $199 VCR and Ramirez's two prior strikes arose from one guilty plea for which he received a sentence of one year in county jail and three years of probation. Id. at 768-70. The Ninth Circuit stressed that all three of Ramirez's convictions were for nonviolent crimes in which no weapons were involved and that his only prior incarceration was the one-year sentence in county jail. Id. at 768-79. In particular, the Ninth Circuit found that Ramirez's "criminal history" "pales in comparison to the lengthy recidivist histories" in Solem, Ewing, and Andrade, and that, unlike any of these recidivists, "Ramirez had never been sentenced to nor served any time in state prison prior to committing the instant petty theft." Id. at 769.

Subsequently, in Reyes v. Brown, 399 F.3d 964 (9th Cir. 2005), cert. denied, 547 U.S. 1218 (2006), the Ninth Circuit followed Ramirez in finding that Reyes's 26 years-to-life sentence, based on his current offense of felony perjury for falsifying a driver's license application (which could have been

charged as a misdemeanor under a California Vehicle Code section rather than as felony perjury) and his criminal history of one prior strike for residential burglary and one for armed robbery along with other convictions for petty theft, being under the influence of a controlled substance, misdemeanor DUI, and misdemeanor battery, might raise an inference of gross disproportionality. In Reyes, the Ninth Circuit examined the "factual specifics" of each of Reyes's prior convictions in order to "determine whether the offense was a 'crime against a person' or involved violence." Reyes, 399 F.3d at 969. Because the record in the case was not sufficiently developed to determine whether Reyes's conviction for armed robbery involved the use of a weapon or whether Reyes merely "had a knife" on his person, the Ninth Circuit remanded to the district court to further develop the factual record. Id. at 969-70 (remanding in order to "determine the true weight of the offense beyond the label of the crime").

Here, Petitioner's current conviction is for inflicting corporal injury upon a spouse, possession of a deadly weapon, making criminal threats (three counts), and misdemeanor assault. These *current* offenses are substantially more serious than the petty theft convictions in Andrade, the shoplifting conviction in Ewing, the uttering a false check conviction in Solem, the obtaining money under false pretenses conviction in Rummel, the petty theft conviction in Ramirez, and the felony perjury for falsifying a drivers' license application in Reyes, none of which were crimes against persons.

Further, the prior convictions upon which the sentence enhancements were based (i.e., the strong-arm robbery of a wheelchair-bound, homeless man and the making of a criminal threat to slice the throat of his ex-girlfriend (2 CT 502-03)) were substantially more serious than the prior convictions in Rummel (i.e., fraudulent use of a credit card to obtain $80 worth of goods or services, and passing a forged check for $28.36). As also noted by the California Court of Appeal, Petitioner's criminal history record included other violent crimes, such

as a misdemeanor corporal injury upon a spouse or former spouse and battery, and also reflected that the courts and prosecution repeatedly had given him opportunities on probation and in treatment programs instead of sentencing him to prison, but that "didn't work." (LD 6 at 9; see also 2 CT 523-27.[11]) In contrast to the petitioner in Ramirez, Petitioner here also had served multiple jail terms and had served time in state prison for a probation violation; indeed, the instant crimes were committed while he was on probation. (2 CT 523-27.)

It is true that all of Petitioner's felony convictions in this case were "wobblers" (2 RT 611), meaning that the prosecutor could have charged them as misdemeanors, or the trial court could have reduced them to misdemeanors at sentencing to avoid application of the Three Strikes law. Ramirez, 365 F.3d at 758. The trial court was aware of the facts of this case and Petitioner's prior convictions when it declined to do so. Instead, the trial court considered those facts and found that Petitioner posed "a danger to our community" by repeatedly committing crimes that caused "terror," making him "the kind of person that is within the scope of the Three Strikes Law." 2 RT 616.

In accordance with the United States Supreme Court's reasoning and conclusion in Andrade, the Court finds that Petitioner has failed to meet his AEDPA burden of showing that the California courts' rejection of his Eighth Amendment claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."

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[11] The cited pages reflecting Petitioner's criminal history record are contained in Petitioner's Probation Report, which was separately lodged by Respondent under seal.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's request for a Stay and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATE: October 13, 2016

Karen E. Scott

KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

Court of Appeal, Second Appellate District, Division Six - No. B240078

S215626

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Daniel C. Chang

THE PEOPLE, Plaintiff and Respondent,

v.

WAYNE MEZZLES, Defendant and Appellant.

No. LA2012604152

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX F

Filed 12/2/13 P. v. Mezzles CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WAYNE MEZZLES, Defendant and Appellant.	2d Crim. No. B240078 (Super. Ct. No. 1359458) (Santa Barbara County)

Wayne Mezzles appeals from the judgment following his conviction by jury of inflicting corporal injury upon a spouse (Pen. Code, § 273.5, subd. (a));[1] possession of a deadly weapon (former § 12020, subd. (a)(1))[2]; four counts of criminal threats (§ 422); and two counts of assault (§ 240). In a bifurcated proceeding, the trial court found true allegations of two prior serious felony convictions (§ 667, subd. (a)(1)), and two prior serious or violent felony convictions within the meaning of California's "Three Strikes"

[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Appellant possessed metal (brass) knuckles in violation of former section 12020, subdivision (a)(1). In connection with the possession of metal knuckles, the current operative provisions are section 16920, which defines metal knuckles, and section 21810, which continues former section 12020, subdivision (a)(1) without substantive change. (38 Cal.L.Rev.Comm. Reports (2009) p. 217.)

law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court sentenced him to an aggregate term of 90 years to life in state prison.[3]

Appellant contends that, with respect to count 4, the evidence of his threat is not sufficient to support the verdict, "as a matter of law," and that the jury was wrongly instructed. He also asserts that (1) prosecutorial misconduct denied him a fair trial; (2) the court abused its discretion in refusing to strike his prior serious felony convictions; and (3) the resulting 90 years to life sentence constituted cruel and unusual punishment. We conclude that the evidence fails to establish that the alleged victim of count 4 was the recipient of any "criminal threat" as defined by section 422. We will reverse that conviction, modify the sentence accordingly, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On October 30, 2010, appellant was home, drinking beer and Southern Comfort with his wife, Laura. At about 10:30 p.m., he went out to get more Southern Comfort. Laura's 15-year-old daughter, Amy, her boyfriend, Will, and his friend, Cory, were in Amy's room. Laura was talking with them while appellant was out. She was sitting next to Cory, holding up and examining one of his hands and talking about hand scars. Suddenly they heard a loud thud or bang on the outside wall or window, and noticed appellant outside, yelling. He barged inside, with brass knuckles on one hand, and headed

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[3] The trial court sentenced appellant as follows: count 3 (§ 422, Laura), a determinate term of 10 years (two § 667, subd. (a) enhancements), followed by a consecutive indeterminate sentence of 25 years to life (§ 667, subd. (e)(2)(A)); count 1 (§ 273.5, Laura), a stayed indeterminate sentence of 25 years to life (§ 654); count 4 (§ 422, Amy), determinate term of 10 years, consecutive (two § 667, subd. (a) enhancements), followed by a concurrent indeterminate sentence of 25 years to life; count 5 (§ 422, Amy), a determinate term of 10 years, consecutive (two § 667, subd. (a), enhancements), followed by a concurrent indeterminate sentence of 25 years to life; count 6 (§ 422, Amy), a determinate term of 10 years, consecutive (two § 667, subd. (a) enhancements), followed by a concurrent indeterminate sentence of 25 years to life; count 8 (§ 12020, subd. (a)(1)), a consecutive indeterminate sentence of 25 years to life; counts 2 and 9 (§ 240), 180 days each, concurrent.

toward Amy's room. Appellant "raise[d] his hand in a violent gesture . . . toward" Cory, who fled.

Appellant entered Amy's room, grabbed Laura's hair, and said something like, "You lying bitch, whore." He slammed Laura's head into Amy's dresser, breaking her eyeglasses and giving her a black eye.

Amy jumped between Laura and appellant, and told him to get away from her mom. He threw Amy to the floor, and then pulled Laura through the hallway, to the master bedroom. Amy followed them. After hearing appellant yell, "I'm going to kill you," Will called the police. Appellant left Laura's room and went to Amy's room briefly, where he tried to tackle Will. Will brushed him off.

When appellant left Laura's room, Amy called the police. He returned to Laura's room and said, "Now that I'm going to jail for good, I'm going to kill you guys." He also yelled, "You fucking bitches, I'm going to kill you."

The police arrived and arrested appellant. Before the police took him away, he looked at Amy and said, "I'll kill you." Amy was scared.

Defense Evidence

Appellant's mother, Karen Brennan, testified regarding appellant's childhood, his alcoholic father, and his alcoholic stepfather. The defense also called Dr. Robert Owen, a clinical psychologist, as an expert witness. Dr. Owen diagnosed appellant with post-traumatic stress disorder (PTSD) and alcoholic dependence disorder. He testified that PTSD impairs a person's ability to process information and weigh consequences.

DISCUSSION

Amy is Not a Victim of the Count 4 Threat

Appellant argues his count 4 criminal threat conviction must be reversed because Amy is not a victim for purposes of section 422, as a matter of law. More specifically, he argues Amy "was not the person threatened" because he did not direct the count 4 threat at her. (*Id.*, subd. (a).) We agree.

Section 422, subdivision (a) provides in relevant part as follows: "Any person who willfully threatens to commit a crime which will result in death or great bodily

injury to another person. with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

In response to the jury's request for clarification, the trial court advised the jury that count 4 was based on "the statement made by [appellant] to Laura Mezzles, heard by Amy [S.] prior to the police being called, I'm going to kill you." The prosecution drafted that response, which tracked its theory that Amy heard appellant threaten to kill Laura, her mother, which frightened Amy.

Appellant asserts that section 422 "applies only to a threat that is communicated to a particular person and causes that same person to be in fear for herself, or for members of her family, or both." Continuing in that vein, he asserts that because his "I'm going to kill you," threat was not made "to Amy," she cannot be "the 'person threatened'" under section 422. We agree.

"A [section 422] criminal threat . . . is a specific and narrow class of communication." (*In re Ryan* (2002) 100 Cal.App.4th 854, 863.) "When interpreting a statute, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.) "'If the language is clear and unambiguous there is no need for construction . . . .'" *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1154.) Under section 422, the victim of a criminal threat is "the person threatened," the person to whom the perpetrator directs, or communicates his threat. (§ 422, subd. (a); *People v. Wilson* (2010) 186 Cal.App.4th 789, 806 ["[T]he defendant must intend for the victim to receive and understand the threat."]) Amy was not "the person threatened" in count 4.

Substantial Evidence

Appellant argues that there is not sufficient evidence to support the count 4 threat. We agree.

In reviewing the sufficiency of the evidence, we review the entire record in the light most favorable to the prosecution "to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Silva* (2001) 25 Cal.4th 345, 368.) We do not resolve credibility issues or evidentiary conflicts, and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) A reversal is unwarranted unless there is no substantial evidence to support the finding under any hypothesis whatever. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Using CALCRIM No. 1300, the trial court instructed the jury as follows regarding the criminal threat counts which named Amy as the victim: "The defendant is charged in Counts 4, 5, and 6 with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Amy [S.]; [¶] 2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to Amy [S.] a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused Amy [S.] to be in sustained fear for her own safety; [¶] AND 6. Amy [S.]'s fear was reasonable under the circumstances." (CALCRIM No. 1300.) That instruction reflects the elements of a section 422 criminal threat, including the requirement that the perpetrator directed the threat at the victim.

The prosecution's theory was that the count 4 threat was directed at Laura before the police were called, but overheard by Amy, the named victim. While these facts, for which there was ample evidence, would support a conviction if Laura were the named victim, they do not support a like conviction for the count 4 threat naming Amy as the

victim. The crime contemplates a victim, "the person threatened" and words that cause "*that* person reasonably to be in sustained fear for . . . her own safety or for . . . her immediate family's safety . . . ." (§ 422 subds. (a), italics added.) The theory of the prosecution would define the victim as either the person threatened or a member of their immediate family who overheard the threat. That theory is contrary to the plain language of section 422. (*People v. Rubalcava, supra,* 23 Cal.4th at p. 328; *People v. Talibdeen, supra,* 27 Cal.4th at pp. 1154-1155.) Substantial evidence does not establish that Amy was the victim of the count 4 threat.[4]

Prosecutorial Misconduct

Appellant contends that the prosecutor committed misconduct by seeking to elicit inadmissible opinion testimony from appellant's psychiatric expert, Dr. Robert Owen. The trial court ruled that the expert could testify about PTSD, but not about appellant's capacity to form the requisite specific intent for criminal threats or whether he had that intent at the time of the crimes. The prosecutor nonetheless repeatedly asked questions regarding intent. Some examples follow: "By Mr. Verburgt: Q: Would it be fair to say that the defendant's emotional functioning may be of interest, but it's largely irrelevant in a case in determining guilt?" "Q: What's the intent required for a violation of Penal Code section 273.5?" "Q: Do you know what the mental state required, "yes" or "no," for violation of Penal Code section 422, criminal threats?" The court sustained objections to the just quoted questions. Thereafter, at the bench, the court reminded Mr. Verburgt of its ruling limiting Dr. Owen's testimony regarding "the defendant's specific state of mind." Mr. Verburgt persisted in asking improper questions. The court excused the jury, conferred with counsel, and restated its ruling regarding the limits on Dr. Owen's testimony. Mr. Verburgt again returned to the topic of appellant's state of mind, asking, "So you have no way of knowing what the defendant's state of mind was on that date, do you?" The court interrupted and admonished him, "It's an improper question." Mr. Verburgt soon asked another improper question, leading the court to admonish him, yet

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[4] Our resolution of this issue obviates the need to address appellant's instructional error claim.

again as follows: "No. We've made this clear. I've told you several times, do not go into that area." Next question."

The standards of review of prosecutorial misconduct are well settled. (*People v. Williams* (2013) 56 Cal.4th 630, 671.) A prosecutor who uses deceptive or reprehensible methods to persuade commits misconduct. (*Ibid.*) If the prosecutor's actions infect the trial with such unfairness as to deny due process, the federal Constitution demands reversal. (*Ibid.)* Under California law, a prosecutor who uses such methods commits misconduct even if his actions do not result in a fundamentally unfair trial. (*Ibid.*)

To preserve a claim of misconduct, a defendant must make a timely objection and request an admonition. (*People v. Williams, supra*, 56 Cal.4th at p. 671.) Defendant's claim is preserved, however, if an admonition would not have cured the harm. (*Ibid.*) When a misconduct claim challenges comments made by the prosecutor, the pertinent inquiry is whether there is a reasonable likelihood the jury construed or applied the remarks in an objectionable manner. (*Ibid.*)

Defense counsel moved for a mistrial based upon prosecutorial misconduct after Dr. Owen completed his testimony. Counsel argued the prosecutor's repeated violations of the ruling limiting Dr. Owen's testimony were prejudicial because they suggested the defense was hiding the truth from the jury. The trial court concluded the improper questions hurt the prosecutor and any detriment to the defense was cured by the court's admonishment to the prosecutor. Defense counsel submitted the matter without requesting any further admonition, and the court denied the motion.

Appellant has forfeited his claim by failing to request another admonition. (*People v. Williams, supra*, 56 Cal.4th at p. 671.) Moreover, he has not shown that an admonition would not have cured the harm. (*Ibid.*) Forfeiture aside, the cited misconduct was harmless under any standard of review. The trial court instructed the jury that "[n]othing the attorneys say is evidence" and the jury must "decide what the facts are in this case," using "only the evidence that was presented in this courtroom." (CALCRIM No. 222.) It further instructed the jury that attorneys' "questions are not evidence," and it

should "not assume that something is true just because one of the attorneys asked a question that suggested it was true." (*Ibid.*) It is presumed that the jury understood and followed the instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) There is no reasonable likelihood that the jury construed or applied the challenged questions in an improper or erroneous manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 843-844; *People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) That said, we join with the trial court in concluding that Mr. Verburgt engaged in improper questioning in light of the court's repeated admonitions. It appears from this record that Mr. Verburgt engaged in deliberate misconduct dedicated to the evasion, or outright defiance, of the court's ruling and admonitions.

Romero

Appellant contends that the trial court abused its discretion by denying his motion to strike one or both of his prior convictions for purposes of three strikes sentencing, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, or reduce them to misdemeanors. We disagree.

Defense counsel argued that the victims' injuries were minimal; appellant was under the influence of alcohol at the time of the offense; his stepfather sexually abused him for many years, which caused appellant to suffer from a mental disorder (PTSD); and he had taken steps to rehabilitate himself. The prosecution stressed appellant's long criminal history, which included convictions for violent offenses and violations of parole and probation, the absence of mitigating factors, and the numerous aggravating factors in his case. The court declined to strike either of the prior "strike" convictions.

A trial court has the discretion to strike a prior conviction for purposes of sentencing if the defendant falls outside the spirit of the three strikes law. (§ 1385; *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 529-530.) In deciding whether to exercise its discretion, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant

may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The refusal to strike a prior conviction is likely to be considered an abuse of discretion only in extraordinary cases where the trial court was unaware of its discretion, or considered impermissible factors. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In the absence of such a showing, trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

There was no abuse of discretion. Appellant's prior strikes were a 1999 robbery of a homeless man (§ 211) and a 2007 criminal threat (§ 422) he made against a woman who ended their dating relationship. His prior convictions include other violent crimes, such as a misdemeanor corporal injury upon a spouse/or former spouse (§ 273.5, subd. (a)) and battery (§ 242). As the trial court observed, the courts and the prosecution repeatedly gave him opportunities on probation, in treatment programs, instead of sentencing him to prison, but that "didn't work." The court also had "to balance the safety of the community," and appellant's "danger to the community." The court reasonably determined that appellant "is the kind of person that is within the scope of the Three Strikes Law" and denied his *Romero* motion.

Cruel and Unusual Punishment

We reject appellant's contention that his sentence is grossly disproportionate to his offense and constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. In *Rummel v. Estelle* (1980) 445 U.S. 263, 274, the United States Supreme Court upheld a mandatory life sentence under a Texas recidivist statute even though the defendant had been convicted of obtaining $120.75 by false pretenses and his prior convictions consisted of two nonviolent felonies. The Court reasoned that the sentence under a recidivist statute is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time

during which he has been convicted of and sentenced for other crimes." (*Id.* at p. 284.) The statute serves the legitimate goal of deterring repeat offenders and of segregating the recidivist "from the rest of society for an extended period of time." (*Ibid.*) Since appellant's strikes include violent offenses, the justification for a lengthy sentence here is more compelling than in *Rummel.*

We also reject appellant's contention that his sentence violates the state constitutional prohibition against cruel or unusual punishment. (Cal.Const., art. 1, § 17.) A punishment violates the state constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Appellant's sentence was warranted because of his recidivism, the violent nature of his prior offenses, and the circumstances of the present offense. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502.)

DISPOSITION

Appellant's conviction on count 4 is reversed and dismissed, and the sentence attributable to that count is stricken. The clerk shall prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Edward H. Bullard , Judge

Superior Court County of Santa Barbara

Linda C. Rush, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE CLYDE MEZZLES, Petitioner, v. JOHN N. KATAVICH, Warden, Respondent.	Case No. CV 14-7430-JVS (KES) ORDER GRANTING A CERTIFICATE OF APPEALABILITY

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts was amended to read as follows:

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time

to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court held that, to obtain a COA under § 2253(c), a habeas prisoner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack, 529 U.S. at 483-84 (internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322 (2003).

Here, after duly considering Petitioner's contentions in support of the claims alleged in the Petition, including in his Objections to the Report and Recommendation, the Court finds and concludes that Petitioner has made the requisite showing with respect to the following issues:

1. Whether habeas relief is warranted under 28 U.S.C. § 2254(d) with respect to Petitioner's claim that his right to due process and a fair trial was violated by the prosecutor's misconduct in repeatedly asking the defense expert improper questions relating to Petitioner's intent.

2. Whether habeas relief is warranted under 28 U.S.C. § 2254(d) with respect to Petitioner's claim that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment.

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THEREFORE, pursuant to 28 U.S.C. § 2253(c)(2) and Habeas Rule 11, a COA is GRANTED with respect to the two issues set forth above.

DATED: October 17, 2016

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

Presented by:

Karen E. Scott
United States Magistrate Judge

APPENDIX H

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF SANTA BARBARA

***

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF-RESPONDENT,

-VS-

WAYNE MEZZLES,

DEFENDANT-APPELLANT.

NO._____

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 20, 2011, JANUARY 23, 24, 25, 27, 30, 31, FEBRUARY 1, 2, 7 & MARCH 20, 2012

APPEARANCES OF COUNSEL:

FOR PLAINTIFF-RESPONDENT:

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FOR DEFENDANT-APPELLANT:

CALIFORNIA APPELLATE PROJECT
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REPORTED BY: CORRY LYNN COBB, CSR NO. 11762, AND JOYCE L. GOBLE, CSR NO. 6976

VOLUME II OF III VOLUMES
PAGES 213 THROUGH 449, INCLUSIVE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA BRANCH; MILLER STREET DIVISION

***

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -VS- WAYNE MEZZLES, DEFENDANT.	CASE NO. 1359458

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 27, 2012 AND JANUARY 30, 2012

APPEARANCES OF COUNSEL:

FOR PLAINTIFF: JOYCE E. DUDLEY
DISTRICT ATTORNEY
312-D EAST COOK STREET
SANTA MARIA, CALIFORNIA 93454

FOR DEFENDANT: GREGORY PARASKOU,
PUBLIC DEFENDER
312-E EAST COOK STREET
SANTA MARIA, CALIFORNIA 93454

REPORTED BY: CORRY LYNN COBB, CSR NO. 11762, AND
JOYCE L. GOBLE, CSR NO. 6976

YOUR NAME IN FULL FOR THE RECORD.

THE WITNESS: ROBERT OWEN, O-W-E-N.

THE COURT: MR. SCOTT, YOU MAY PROCEED.

MR. SCOTT: THANK YOU.

DIRECT EXAMINATION

BY MR. SCOTT:

Q. DR. OWEN, WHAT IS YOUR PROFESSION?

A. I'M A LICENSED CLINICAL PSYCHOLOGIST, PRIVATE PRACTICE.

Q. WOULD YOU PLEASE DESCRIBE FOR THE JURY YOUR EDUCATIONAL TRAINING TO GET TO THIS POINT?

A. WELL, I RECEIVED A DOCTORATE DEGREE IN CLINICAL PSYCHOLOGY IN 1987 FROM PACIFIC GRADUATE SCHOOL. I DID AN INTERNSHIP IN THE BAY AREA AND POST DOCTORATE WORK UP AT THE STATE HOSPITAL IN ATASCADERO. I WAS LICENSED IN 1989 AND BEGAN A PRIVATE PRACTICE THAT SAME YEAR. I HAVE AN OFFICE HERE IN SANTA MARIA AND ANOTHER UP IN SHELL BEACH.

Q. TO BE A LICENSED PSYCHOLOGIST IN THIS STATE ARE YOU REQUIRED TO HAVE SOME CERTIFICATION FROM ANY PARTICULAR AGENCY?

A. YES. YOU HAVE TO COMPLETE A DOCTORATE DEGREE FROM AN ACCREDITED UNIVERSITY. WHEN I WAS GETTING LICENSED YEARS AGO, YOU HAD TO TAKE A WRITTEN AND ORAL EXAM THAT PEOPLE TYPICALLY PREPARED FOR FOR ONE OR TWO YEARS.

Q. WE LAWYERS HAVE REQUIREMENTS THAT EVERY FEW YEARS WE HAVE TO COMPLETE A CERTAIN AMOUNT OF TRAINING TO MAKE SURE

THAT WE'RE KEEPING UP WITH OUR PROFESSION. DO YOU HAVE ANY SIMILAR REQUIREMENT IN YOUR FIELD?

A. WE DO. WE HAVE TO HAVE CONTINUING EDUCATION COURSES, WHICH I TAKE ON A VARIETY OF TOPICS; DIAGNOSIS OF MENTAL ILLNESS, TREATMENT ISSUES, ASSESSMENT OF RISK, SEXUAL PREDATORS AND SUCH.

Q. NOW, I NOTED IN THE DISCUSSION OF YOUR BACKGROUND, TO BE A PSYCHOLOGIST THERE'S MORE THAN JUST GETTING A DEGREE. THERE IS A CERTAIN AMOUNT OF TRAINING AND INTERNSHIP THAT GOES INTO THAT PROCESS?

A. THERE IS. I HAD SUPERVISED TRAINING IN THE BAY AREA DOING THERAPY, CONDUCTING ASSESSMENTS WITH A VARIETY OF PATIENTS. AT THE STATE HOSPITAL, I HAD MORE SPECIFIC TRAINING IN FORENSIC PSYCHOLOGY, WHICH IS THE INTERACTION BETWEEN THE COURT SYSTEM AND THE PSYCHOLOGICAL SYSTEM. HANDS-ON TRAINING BY A CHIEF PSYCHOLOGIST, WHO ASSESSES YOUR WORK AND FOLLOWS YOUR PROGRESS.

Q. AMONG THOSE AREAS WHERE YOU WORKED, OTHER THAN YOUR PRIVATE PRACTICE, I BELIEVE YOU WERE ASSOCIATE PROFESSOR AT CHAPMAN UNIVERSITY FOR A PERIOD TIME?

A. YES.

Q. AND ATASCADERO STATE HOSPITAL, YOU WERE EMPLOYED THERE AS A PSYCHOLOGIST AS WELL?

A. I WAS. I WORKED THERE FOR FOUR YEARS. I WORKED IN THE UNIT FOR SPANISH-SPEAKING MEN WHO WERE INCOMPETENT TO STAND TRIAL.

Q. AND YOU ALSO DID A PRE-DOCTORAL PSYCHOLOGY INTERNSHIP AT WEST VALLEY MENTAL HEALTH AND ALCOHOL SERVICES?

A. YES.

Q. WHAT WAS THE CLIENT BASE THERE, SIR?

A. IT WAS A COMMUNITY OUTPATIENT TREATMENT CENTER. SO PEOPLE CAME IN WITH A VARIETY OF PROBLEMS; DEPRESSION, ANXIETY, CHILD-REARING ISSUES. THERE WERE ALSO ADDICTION ISSUES, ALCOHOL AND DRUGS.

Q. AND YOU PRESENTLY HAVE A PRIVATE PRACTICE?

A. I DO. ALL OF MY WORK NOW IS ASSESSING PEOPLE. I DON'T TREAT CLIENTS LIKE I DID FOR ABOUT 15 YEARS, MAYBE 20 YEARS. ALL OF MY WORK IS FOR THE STATE OF CALIFORNIA, PRIVATE ATTORNEYS AND SUCH.

Q. ALSO COURT APPOINTMENTS TO -- BY COURT APPOINTMENT TO INTERVIEW A PARTICULAR INDIVIDUAL?

A. YES.

Q. AND HAVE YOU TESTIFIED AS AN EXPERT IN THE COURTS OF CALIFORNIA IN THE PAST?

A. I HAVE. I'VE TESTIFIED PROBABLY AT LEAST 400 TIMES. TESTIFYING THIS WEEK -- ACTUALLY TOMORROW IN SANTA ANA. I TESTIFY REGULARLY, TYPICALLY ON CASES INVOLVING SEXUALLY VIOLENT PREDATORS OR CASES OF INCOMPETENCY TO STAND TRIAL, SANITY, OR PERSONAL INJURY TYPE CASES.

Q. AND YOU WERE RETAINED BY MY OFFICE TO DO SOME WORK IN THIS CASE?

A. I DID.

Q. SO YOU ARE, IN FACT, COMPENSATED BY MY OFFICE TO PERFORM THIS WORK?

A. YES.

Q. WHAT IS YOUR COMPENSATION RATE?

A. I BILL AT $200 AN HOUR FOR EVERYTHING I DO; TRAVEL, FILE REVIEW, ASSESSMENT AND SUCH.

Q. I BELIEVE YOU WERE ALSO A PAST CHAIRMAN OF THE ATASCADERO STATE HOSPITAL INTERNSHIP COMMITTEE, WERE YOU NOT?

A. I WAS QUITE INVOLVED IN TRAINING INTERNS. I ENJOYED THAT WORK.

Q. ARE YOU A MEMBER OF THE AMERICAN PSYCHOLOGIST ASSOCIATION?

A. I AM.

Q. WOULD YOU GIVE US KIND OF A BRIEF DEFINITION OF WHAT PSYCHOLOGY IS, SIR?

A. WELL, IT'S REALLY THE STUDY OF HUMAN BEHAVIOR, OF EMOTIONS, OF THE WAY WE THINK, INTELLECTUAL PROCESSES, HOW WE INTERACT, HOW WE RELATE TO OTHER PEOPLE. IT'S A FAIRLY BROAD FIELD.

Q. IN YOUR FIELD, SIR, THERE IS, I GUESS WHAT SOME OF US REFER TO AS THE BIBLE, I GUESS IT WOULD BE DSM-IV TR PRESENTLY; RIGHT?

A. THIS IS DIAGNOSTIC AND STATISTICAL MANUAL. IT'S A RATHER THICK BOOK THAT REPRESENTS THE CONSENSUS IN MY FIELD. WHAT DO PSYCHOLOGISTS AND PSYCHIATRISTS AGREE ON ABOUT DIAGNOSES? WHAT DOES A PERSON HAVE TO HAVE TO BE DEPRESSED OR SCHIZOPHRENIC OR ANTISOCIAL OR POST TRAUMATIC STRESS DISORDER? WHAT ARE THE PARTICULAR SYMPTOMS THAT WOULD RELATE TO THOSE PROBLEMS?

Q. THE DIAGNOSTICAL STATISTICAL MANUAL HAS EVOLVED. IT STARTED OUT AS A DSM OR DSM-I?

A. I THINK IT STARTED WHEN I WAS BORN. THERE'S A NEW

EDITION COMING OUT NEXT YEAR; IT'S BEEN IN THE NEWS QUITE A BIT.

Q. I THINK DSM-V IS THE ONE COMING OUT IN 2013; CORRECT?

A. CORRECT.

Q. SO THE ONE THAT GOES IN YOUR FIELD YOU USE NOW, WOULD BE DSM-IV TR?

A. THE "TR" STANDS FOR TEXT REVISED. SO THAT'S THE LATEST EDITION WE'RE USING TODAY AND I'LL USE TODAY IN COURT.

Q. NOW, IN THIS PARTICULAR CASE, WERE YOU ASKED TO DO A PSYCHOLOGICAL EVALUATION OF MR. MEZZLES?

A. I WAS.

Q. THAT REQUEST CAME FROM MY OFFICE?

A. YES.

Q. WERE YOU PROVIDED VARIOUS POLICE REPORTS AND DISTRICT ATTORNEY INVESTIGATION REPORTS AND A FELONY COMPLAINT TO ASSIST YOU BEFORE THE INTERVIEW WITH MR. MEZZLES?

A. YES.

Q. DID YOU REVIEW THOSE MATERIALS?

A. I DID.

Q. THEN IN JUNE OF 2011, DID YOU HAVE AN INTERVIEW WITH MR. MEZZLES?

A. YES, I INTERVIEWED HIM IN THE COUNTY JAIL ON JUNE 24TH, 2011.

Q. APPROXIMATELY HOW LONG DID THAT INTERVIEW TAKE?

A. PROBABLY AN HOUR AND A HALF.

Q. WHAT IS THE PURPOSE, IN GENERAL TERMS, OF AN INTERVIEW WHEN YOU'RE CHARGED WITH DOING AN EVALUATION? WHAT

ARE THE BENEFITS AND WHY DO YOU NEED TO DO SUCH AN INTERVIEW?

A. I NEED TO HAVE BACKGROUND INFORMATION ON AN INDIVIDUAL TO UNDERSTAND THEIR CHILDHOOD AND DEVELOPMENT. I LOOK AT VARIOUS ASPECTS OF THEIR LIFE. I LOOK AT THEIR EDUCATION, THEIR RELATIONSHIPS, THEIR WORK, IN ORDER TO FORM AN OVERALL COMPOSITE OF WHO THEY ARE. I'M ALSO LOOKING TO SEE, DO THEY HAVE ANY MENTAL DISORDERS THAT WE SHOULD DISCUSS.

Q. PRIOR TO THE JUNE 24 INTERVIEW WITH MR. MEZZLES, HAD YOU EVER MET MR. MEZZLES BEFORE?

A. NO.

Q. AT THE END OF THE INTERVIEW, SIR -- I ASSUME THE INTERVIEW WAS SEGMENTED IN THE SENSE THAT YOU GOT BACKGROUND INFORMATION; IS THAT RIGHT?

A. YES.

Q. AND DID YOU USE ANY KIND OF EXAMINATION, AN MMPI OR ANYTHING OF THAT SORT, IN YOUR EVALUATION OF MR. MEZZLES?

A. I USE A MENTAL STATUS EXAMINATION.

Q. WHAT IS THAT, PLEASE?

A. IT ASSESSES A VARIETY OF COMPONENTS OF AN INDIVIDUAL'S EMOTIONS, THINKING, REALITY TESTING AND SUCH.

Q. NOW, IS PART OF THE INTERVIEW PROCESS TO SEE, ONE, IF MR. MEZZLES UNDERSTANDS WHY HE WAS THERE AND WHAT THE NATURE OF THE CHARGES WERE?

A. YES.

Q. AND DID MR. MEZZLES SEEM TO UNDERSTAND WHY HE WAS THERE AND WHAT HE WAS CHARGED WITH?

A. HE DID.

Q. NOW, YOU TOOK A HISTORY FROM MR. MEZZLES, DID YOU

NOT?

A. I DID.

Q. YOU PREPARED A REPORT, DID YOU NOT, AFTER YOUR INTERVIEW?

A. YES.

Q. THERE WAS WHAT IS KNOWN AS A DEVELOPMENTAL HISTORY. WHAT INFORMATION DID YOU GATHER DURING THAT PROCESS AS PART OF THE INTERVIEW?

A. THIS WAS LOOKING AT HIS BACKGROUND AND CHILDHOOD, BECAUSE MUCH OF WHO WE ARE AS AN ADULT DEPENDS ON THE CHILD REARING WE EXPERIENCE AS CHILDREN. HIS WASN'T VERY GOOD, WHICH PROBABLY ISN'T MUCH OF A SURPRISE. HE COMES FROM A BROKEN HOME AND HIS MOTHER REMARRIED TO MIKE, WHO WAS PHYSICALLY AND SEXUALLY ABUSIVE. MR. MEZZLES DIDN'T HAVE A LOT OF PERSONAL SUCCESSES OR ENRICHING EXPERIENCES AS A CHILD TO BOOST HIS SELF-ESTEEM. IT WASN'T A VERY GOOD CHILDHOOD.

MR. VERBURGT: OBJECTION; HEARSAY.

THE COURT: IT IS HEARSAY. IT'S BEING OFFERED FOR THE LIMITED PURPOSE AS TO HELP THIS EXPERT WITNESS RENDER AN OPINION.

MR. SCOTT: THANK YOU, JUDGE.

THE COURT: YOU SHOULD CONSIDER IT ONLY FOR THAT PURPOSE.

MR. SCOTT: VERY WELL.

Q. IN GETTING THE HISTORY FROM MR. MEZZLES, DID MR. MEZZLES REPORT WHETHER OR NOT HIS FATHER AND STEPFATHER, MIKE, WERE ALCOHOLICS?

A. THEY WERE. SO SINCE HIS FATHER WAS AN ALCOHOLIC,

WE HAVE A PRETTY STRONG GENETIC DISPOSITION AND HE GREW UP IN AN ALCOHOLIC HOME. KIND OF A DOUBLE WHAMMY; GENETICS AND THE NURTURING EXPERIENCE.

Q. HOW CAN THAT -- ESPECIALLY IF THIS WOULD HAVE OCCURRED AS A VERY YOUNG AGE IN HIS LIFE?

A. YES.

Q. THOSE SORTS OF EXPERIENCES, NOT TALKING ABOUT THE SEXUAL ABUSE AT THE MOMENT, BUT HAVING AN ALCOHOLIC FATHER, DIVORCED EARLY ON, A STEPFATHER WHO IS ALSO AN ALCOHOLIC, HOW CAN THAT AFFECT ONE'S LATER DEVELOPMENT?

A. WELL, AS I SAID, THERE'S A PARTICULARLY STRONG GENETIC TIE BETWEEN FATHER AND SON OF ALCOHOLISM, LESS SO THAN BETWEEN FATHER AND DAUGHTER AND MOTHER AND SON, FOR SOME REASON.

WE HAVE, AGAIN, HE COMES INTO THE WORLD WITH KIND OF A GENETIC PREDISPOSITION TO A PRETTY SERIOUS PROBLEM THAT WE SEE THROUGH MOST OF HIS LIFE, HIS ALCOHOLISM. ALCOHOLIC PARENTS ARE NOT GOOD PARENTS AND I DON'T THINK HIS FATHER WAS, HE WAS AN ABUSIVE GUY. MIKE WAS EVEN LESS SO, BECAUSE HE WAS PHYSICALLY AND SEXUALLY ABUSIVE.

Q. WHAT DID MR. MEZZLES RELATE ABOUT ABUSE HE SUFFERED AT THE HAND OF THE STEPFATHER, MIKE?

A. THERE WAS PHYSICAL ABUSE, BUT I THINK MORE IMPORTANT IN THIS CASE WAS SEXUAL ABUSE THAT STARTED WHEN MR. MEZZLES WAS 7 YEARS OLD AND CONTINUED FOR ANOTHER FIVE YEARS, UNTIL HE WAS 12. THOSE ARE CRITICAL TIMES IN A BOY'S LIFE, 7 TO 12, KIND OF A FORMATIVE TIME WHEN OUR PERSONALITY IS DEVELOPING AND OUR SENSE OF SELF-CONTROL, EMOTIONAL

ADJUSTMENT, ATTACHMENT ISSUES, FEELINGS OF SELF-CONFIDENCE. ALL OF THOSE ARE KIND OF EMERGING AT THAT TIME AND, UNFORTUNATELY, THEY WERE STUNTED IN THIS CASE BECAUSE MR. MEZZLES WAS SUBJECTED TO SERIOUS SEXUAL ABUSE, FONDLING, ORAL COPULATION AND SUCH, ABOUT ONCE A MONTH BY MIKE.

Q. THE FACT THAT IT WAS OVER SUCH A PROLONGED PERIOD OF TIME, DOES THAT FURTHER COMPOUND THE PROBLEMS?

A. IT REALLY DOES. HE MENTIONED THIS. I WORKED WITH SEXUALLY ABUSED KIDS HERE IN SANTA MARIA FOR SEVERAL YEARS AND YOU SEE THE SAME THEME. WHEN IT GOES ON AND ON, KIDS BEGIN TO WONDER, DID I HAVE SOME PART IN THIS? DID I CAUSE THIS? WHAT DOES THIS MEAN ABOUT MY OWN SEXUALITY? THESE QUESTIONS ABOUT ONE'S SELF AND ONE'S INVOLVEMENT IN THE ACTUAL MOLEST ARE PRETTY DAMAGING TO A PERSON'S SELF-ESTEEM AND THAT'S EXACTLY WHAT MR. MEZZLES TOLD ME HE DID, AND HE STILL DOES.

MR. VERBURGT: OBJECTION; RELEVANCE, YOUR HONOR.

THE COURT: OVERRULED.

BY MR. SCOTT:

Q. DID MR. MEZZLES DESCRIBE TO YOU CERTAIN BEHAVIORS WHEN HE WAS GROWING UP, ACTING OUT AND BEHAVIORAL PROBLEMS THAT MAY HAVE BEEN CAUSED BY THE SITUATION IN THE HOME?

A. HE DID HAVE BEHAVIORAL PROBLEMS. HE HAD PROBLEMS WITH SELF-CONTROL, HE HAD EMOTIONAL OUTBURSTS, HE HAD PROBLEMS IN SCHOOL, DIDN'T GRADUATE FROM HIGH SCHOOL, STRUGGLED IN SOME RELATIONSHIPS. THERE WERE PROBLEMS WITH IRRITABILITY, ANGER AND SUCH.

Q. FIGHTING? DID HE REPORT TO YOU THAT HE GOT INTO FIGHTS AT SCHOOL?

A. YES.

Q. DID HE, MR. MEZZLES, TELL YOU WHAT HE DID TO TRY TO SELF-MEDICATE, IF YOU WILL? DID HE DESCRIBE TO YOU AVOIDING THESE ISSUES WITH ALCOHOL AND DRUGS DURING HIS LIFE?

A. HE DID. HE STARTED DRINKING AT THE VERY EARLY AGE OF 12, JUST ABOUT THE TIME THIS SEXUAL OFFENDING WAS ENDING AND JUST ABOUT THE TIME BOYS START GOING INTO PUBERTY. HE STARTED WITH DRINKING AND HE STARTED WITH A VENGEANCE, HEAVY DRINKING, BLACK-OUTS, WITHDRAWAL SYMPTOMS; HE BECAME A SERIOUS ALCOHOLIC.

Q. DID HE REPORT THAT THROUGHOUT HIS LIFE THERE WOULD BE PERIODS OF SOBRIETY, WHERE HE'D GO TO REHAB AND HAVE SUSTAINED PERIODS OF SOBRIETY, AND HE WOULD RELAPSE?

A. HE WENT TO DELANCEY STREET AND HE WENT TO OTHER REHAB PROGRAMS AND WOULD DO WELL FOR A PERIOD OF TIME, BUT THEN THE PROBLEM WOULD REAR ITS UGLY HEAD AND HE WOULD RESUME DRINKING; THAT'S EXACTLY WHAT HAPPENED BEFORE THIS INSTANT OFFENSE.

Q. GIVEN HIS HISTORY, IS THERE ANYTHING PARTICULARLY UNIQUE OR SURPRISING ABOUT HIS RELIANCE ON DRUGS AND ALCOHOL AND IN AND OUT OF REHABS, GIVEN HIS CHILDHOOD?

A. GIVEN HIS CHILDHOOD, GIVEN HIS GENETICS, GIVEN HIS MOLEST, GIVEN THE LACK OF SUCCESSES IN HIS LIFE, I GUESS IT'S NOT SURPRISING.

Q. DID MR. MEZZLES REPORT TO YOU ABOUT HIS RELATIONSHIPS WITH WOMEN DURING THE INTERVIEW?

A. HE DID. HE'S BEEN MARRIED FOUR TIMES, TWICE TO THE SAME WOMAN. THESE RELATIONSHIPS WERE NEVER PARTICULARLY

FULFILLING AND THERE WERE PROBLEMS IN ALL OF THEM; SUBSTANCE ABUSE, SOME DOMESTIC VIOLENCE AND SUCH. THEY'VE BEEN AS TROUBLED AS OTHER ASPECTS OF HIS LIFE, TO TELL YOU THE TRUTH.

Q. DID HE SPECIFICALLY TALK ABOUT LAURIE, OUR VICTIM HERE?

A. HE DID. IT'S INTERESTING, HE KIND OF IDOLIZED LAURIE AND SAW HER IN MANY WAYS AS THE PERFECT MATE FOR HIM. SHE HAD HER OWN ALCOHOL PROBLEMS AND THE COMBINATION OF THE TWO OF THEM WITH THE ALCOHOL WASN'T VERY GOOD.

MR. VERBURGT: OBJECTION; LACK OF FOUNDATION.

THE COURT: OVERRULED. IT ONLY GOES TO THE OPINION OF THE DOCTOR.

BY MR. SCOTT:

Q. HE, MR. MEZZLES, REPORTED THAT WHILE HE AND LAURIE WOULD DRINK TOGETHER, THERE WAS ALSO A PERIOD OF TIME WHEN THEY WENT TO REHAB TOGETHER TO ADDRESS THE PROBLEM, THE DRINKING?

A. THEY DID, YEAH.

Q. DID HE, MR. MEZZLES, REPORT TO YOU ANY FEELINGS OF JEALOUSY IN REGARD TO LAURIE, OR WOMEN IN GENERAL?

A. PARTICULARLY WITH LAURIE. I THINK, AGAIN, IT'S BECAUSE HE IDOLIZED HER. HE DID HAVE SOME JEALOUSY. HE KIND OF MINIMIZED IT WITH ME, BUT I NOTED IT IN THE POLICE REPORT.

Q. DID YOU GET INTO WITH MR. MEZZLES, IN HIS INTERVIEW, HIS SUBSTANCE ABUSE HISTORY? I BELIEVE YOU TOUCHED ON IT EARLIER ABOUT HIS DRINKING AT A VERY EARLY AGE.

A. IT WASN'T JUST ALCOHOL. THERE WERE OTHER SUBSTANCES; MARIJUANA, LSD, METHAMPHETAMINE, HEROIN. HE

ABUSED THOSE UNTIL ABOUT 1999. HIS DRUG OF CHOICE IS ALCOHOL, WHICH IS PROBABLY AS DAMAGING AS ANY OF THOSE OTHERS IN TERMS OF ITS AFFECT UPON THE BODY AND THE BRAIN.

Q. DID HE RELATE TO YOU THAT WHEN HE WAS EXPERIMENTING WITH LSD, HE EXPERIENCED FLASH-BACKS?

A. HE DID.

Q. WHAT ARE FLASH-BACKS?

A. FLASH-BACKS ARE WHERE YOU SUDDENLY SEE SOMETHING THAT HAS OCCURRED IN THE PAST; OFTENTIMES SOMETHING TROUBLING.

Q. REGARDING HIS USE OF METHAMPHETAMINE, DID HE REPORT TO YOU FEELINGS OF PARANOIA AND EVEN AUDITORY HALLUCINATIONS?

A. YEAH, THOSE ARE COMMON SYMPTOMS OF HEAVY METHAMPHETAMINE ABUSE.

Q. IN TERMS OF HIS MEDICAL HISTORY, DID MR. MEZZLES REPORT ANY HEAD TRAUMA DURING HIS LIFE?

A. AS A TEENAGER HE HAD A MOTORCYCLE ACCIDENT, STRUCK ON THE HEAD, WAS IN A COMA FOR --

MR. VERBURGT: OBJECTION, YOUR HONOR. THE WITNESS APPEARS TO BE READING A REPORT. IF THAT'S GOING ON, I WOULD ASK LEAVE OF THE COURT TO REFER TO THE REPORT TO REFRESH ANY KIND OF RECOLLECTION.

THE COURT: SUSTAINED.

BY MR. SCOTT:

Q. IF YOU NEED TO LOOK AT YOUR REPORT TO REFRESH YOUR RECOLLECTION, THERE'S NOTHING WRONG WITH THAT. IF YOU LOOK DOWN, REFRESH YOUR RECOLLECTION AND THEN LOOK UP.

A. SURE. I WAS GLANCING AT MY REPORT ABOUT THE COMA

TO SEE THE AGE AND THE AFFECTS. HE DID HAVE IT AS A TEENAGER. HE'S ALSO BEEN DIAGNOSED WITH HEPATITIS C THAT WAS PROBABLY CONTRACTED -- I THINK IT WAS PROBABLY CONTRACTED FROM THE DRUGS, BUT HE THINKS IT WAS A TATTOO.

MR. VERBURGT: OBJECTION; SPECULATION.

THE COURT: OVERRULED.

BY MR. SCOTT:

Q. DID YOU FIND, THROUGH MR. MEZZLES'S REPORTING, SOME SYMPTOMS OF POST TRAUMATIC STRESS DISORDER RELATED TO HIS MOLESTATION AS A YOUNG BOY?

A. I DID.

Q. WHAT WERE THEY?

A. I NEED TO DEFINE WHAT THIS DISORDER IS TO MAKE SENSE --

Q. I WAS GOING TO DO IT LATER, BUT WHY DON'T WE DO IT NOW.

CAN YOU GIVE US WHAT, IN YOUR PROFESSION, IS THE DEFINITION OF POST TRAUMATIC STRESS DISORDER?

A. SURE. FIRST OF ALL, IT'S EXPOSURE TO SOME SERIOUS TRAUMA; SOME LIFE-THREATENING EXPERIENCE OR SOME SERIOUS CHILDHOOD TRAUMA. SEXUAL ABUSE QUALIFIES IN CHILDREN.

NUMBER TWO, THERE HAVE TO BE EPISODES OF KIND OF RE-EXPERIENCING THIS, RELIVING IT IN SOMEWAY; NIGHTMARES, FLASH-BACKS, WHAT WE CALL INTRUSIVE MEMORIES, WHERE YOU'RE KIND OF SITTING THERE AND ALL OF A SUDDEN YOU HAVE THIS MEMORY OF SOMETHING BAD THAT HAPPENED TO YOU IN THE PAST.

THE THIRD ASPECT OF IT IS YOU TEND TO AVOID ANY SITUATION THAT IS RELATED TO THE TRAUMA. FOR A VIETNAM VET,

HE WOULD BE TENSE DURING A HELICOPTER HOVERING ABOVE, OR THE SMELL OF FIRE OR SOMETHING THAT MIGHT TRIGGER THESE TERRIBLE MEMORIES.

FINALLY, THERE ARE WHAT'S CALLED HYPERAROUSAL, THIS COULD BE BEING EASILY STARTLED OR GENERALLY FEARFUL OR AS THE MANUAL SAYS, IRRITABILITY AND ANGRY OUTBURSTS. SO THESE ARE THE VARIOUS CRITERIA FOR POST TRAUMATIC STRESS DISORDER.

Q. WE OFTEN THINK OF POST TRAUMATIC STRESS ORDER IN TERMS OF COMBAT VETERANS, BUT IT'S NOT LIMITED TO THAT CATEGORY OF PEOPLE, IS IT?

A. NO. YOU KNOW WHO REALLY COINED THE TERM WAS A PSYCHIATRIST LENORE TARE (PHONETIC), WHO STUDIED THE KIDS WHO HAD BEEN KIDNAPPED UP AT CHOWCHILLA IN THE MID-'70S AND SHE CAME UP WITH THE TERMS AND EARLY DIAGNOSIS FOR CHILDREN WITH POST TRAUMATIC STRESS DISORDER.

Q. AS I RECALL IT, IN THE PAST, REFERRING TO THE VETERANS, IT WAS OFTEN REFERRED TO AS COMBAT FATIGUE OR SHELL SHOCK, OR WORDS OF THAT KIND, WOULD IT NOT?

A. SHELL SHOCK WAS WORLD WAR I; THIS PROBLEM GOES WAY, WAY BACK. CERTAINLY A LOT OF OUR WORLD WAR II VETS CAME HOME WITH POST TRAUMATIC STRESS DISORDER AND, SADLY, A LOT OF OUR VETS TODAY ARE COMING HOME TODAY WITH IT, FROM AFGHANISTAN AND IRAQ, WITH SIMILAR SYMPTOMS.

Q. IS THERE ALSO CPTSD OR COMPLEX POST TRAUMATIC STRESS DISORDER?

A. THERE ISN'T IN THE DSM-IV TR.

Q. IS THERE DISCUSSION ABOUT -- STRIKE THAT.

DO YOU BELIEVE THERE IS SUCH A DISORDER AS COMPLEX

POST TRAUMATIC STRESS DISORDER?

A. I THINK EVERY ONE OF THESE IS COMPLEX. I STAY VERY CLOSE TO THE DIAGNOSTIC CRITERIA OF THE MANUAL. THERE ARE LOTS OF SYNDROMES THAT PEOPLE DESCRIBE THAT ARE OUTSIDE THE MANUAL, BUT IN COURT PROCEEDINGS, I'M MORE COMFORTABLE STAYING CLOSE TO THE CONSENSUS OF MY PROFESSION.

Q. POST TRAUMATIC STRESS DISORDER, ACCORDING TO THE MANUAL, DOESN'T REQUIRE PROLONGED OR MULTIPLE EVENTS, DOES IT?

A. NO, IT DOESN'T. YOU CAN HAVE A SINGULAR EVENT, SUCH AS A SERIOUS CAR ACCIDENT WITH LOSS OF LIFE OR LIMB, THAT WOULD QUALIFY.

Q. AND THE FACT THAT ONE WOULD BE, AS MR. MEZZLES REPORTED, BEING SEXUALLY MOLESTED BY HIS STEPFATHER OVER A PERIOD OF FIVE YEARS, WOULD THAT COMPOUND THE PROBLEMS?

A. YEAH. THE FACT THAT IT CONTINUED SO LONG AND THAT, AS A BOY, HE WAS HELPLESS TO LEAVE THE SITUATION WOULD ABSOLUTELY COMPOUND THE PROBLEM.

Q. IS THERE ANYTHING IN THE RESEARCH THAT INDICATES THAT THOSE THAT HAVE PTSD WHO HAVE BEEN EXPOSED TO EXTREME STRESSORS SOMETIMES HAVE A SMALLER HIPPOCAMPUS?

A. THERE ARE STUDIES THAT LOOK AT THE HIPPOCAMPUS, AN AREA OF THE BRAIN. THERE ARE STUDIES THAT LOOK AT THE PHYSIOLOGICAL CHANGES IN INDIVIDUALS; MRI STUDIES HAVE LOOKED AT SOME OF THESE. THERE'S ALWAYS GOING TO BE SOME KIND OF BRAIN CORRELATE; HOW WE FEEL AND HOW WE ACT. SO IT'S CERTAINLY POSSIBLE.

I DON'T THINK WE HAVE ANY DEFINITIVE WORK YET THAT ABSOLUTELY SHOWS THERE ARE ANATOMICAL CHANGES RELATED TO THE

DISORDER, BUT IT MAKES SENSE THAT SOME OF THE BRAIN CONNECTIONS AND NEURO CONNECTIONS ARE ALTERED PERMANENTLY IN INDIVIDUALS, PARTICULARLY ONES WHO HAVE HAD LONG-TERM EXPOSURE TO TRAUMA AND DYSFUNCTIONAL WAYS OF DEALING WITH IT.

Q. HOW CAN PTSD OR THE STRESSORS THAT CAUSE IT, WHAT KIND OF CONSEQUENCES CAN THEY HAVE FOR THE PERSON WHO HAS IT?

A. I'VE SEEN A WHOLE RANGE FROM THE MOST PROFOUND AND DISABLED INDIVIDUAL TO RATHER MILD, BUT TYPICALLY INDIVIDUALS HAVE SOME EMOTIONAL COMPONENT; THEY'RE DEPRESSED AND THEY'RE ANXIOUS. THE RATE OF ALCOHOL AND DRUG ABUSE IS VERY HIGH IN INDIVIDUALS WITH POST TRAUMATIC STRESS DISORDER AND -- I'M BLANKING ON YOUR QUESTION HERE; I'M SORRY.

Q. WE WERE TALKING ABOUT FUTURE CONSEQUENCES, HOW WOULD IT IMPACT THEM IN DAY-TO-DAY LIFE, THINGS OF THAT SORT, IF IT GOES UNTREATED.

A. IF IT GOES UNTREATED, AND OFTENTIMES IT DOES GO UNTREATED IN INDIVIDUALS, IT CAN AFFECT JUST ABOUT EVERY ASPECT OF THEIR BEING; HOW THEY FEEL, HOW THEY RELATE TO OTHER PEOPLE. ARE THEY ABLE TO SIGNIFICANTLY CONTRIBUTE TO SOCIETY THROUGH WORK AND WHOLESOME RELATIONSHIPS? ALL OF THOSE SEEM TO BE DAMAGED IN INDIVIDUALS, PARTICULARLY WITH MORE SERIOUS PTSD.

Q. WHAT ABOUT ONE'S COGNITIVE ABILITIES? THE ABILITY TO PROCESS INFORMATION AND WEIGH CONSEQUENCES, CAN THAT BE AFFECTED BY SOMEONE WITH PTSD?

A. SURE. ONE OF THE DIAGNOSTIC CRITERIA IS IMPAIRED CONCENTRATION. SO RIGHT OFF THE BAT, YOU'RE NOT FOCUSING TOO WELL UPON WHAT'S GOING ON. WHEN PEOPLE ARE DEPRESSED, THEY

DON'T THINK VERY WELL. WHEN PEOPLE ARE ANXIOUS, THEY STRUGGLE TO WEIGH OUT THE CONSEQUENCES, THE IMPORTANT THINGS IN LIFE. THERE ARE DEFINITE KINDS OF COGNITIVE CHANGES THAT GO ALONG WITH THIS DISORDER.

Q. IN OUR CASE, MR. MEZZLES REPORTED TO YOU THINKING HE HAD ADHD BECAUSE HE COULDN'T FOCUS OR CONCENTRATE. DID THAT HAVE SIGNIFICANCE IN TERMS OF YOUR ULTIMATE POSSIBLE DIAGNOSIS IN THIS CASE?

A. YEAH. AGAIN, I THINK THAT WAS PROBABLY THE POST TRAUMATIC STRESS DISORDER. HE COULDN'T CONCENTRATE BECAUSE HE CARRIED INCREDIBLE SHAME WITH HIM. BOYS THIS AGE FEEL THAT OTHER PEOPLE CAN LOOK AT THEM AND JUST TELL THAT THEY'RE INVOLVED IN SOME UNHEALTHY SEXUAL RELATIONSHIP. HE'S CARRIED THIS SHAME THROUGHOUT HIS ADULTHOOD, BUT AS A KID, I THINK IT DEFINITELY AFFECTED HIS ABILITY TO THINK CLEARLY AND FOCUS ON THE RELEVANT ISSUES. HE WAS TOO STUCK UP HERE IN WHAT WAS GOING ON AT HOME WITH MIKE.

Q. HIS MOTHER REPORTED THIS MORNING THAT MR. MEZZLES SEEMED TO BE TWO DIFFERENT PEOPLE. THERE WAS THE SOBER SON WHO WOULD SEEM JUST FINE, AND THEN THERE WAS THE SON WHO WOULD ABUSE ALCOHOL AND BE VERY DIFFERENT. IS THAT CONSISTENT WITH YOUR OBSERVATIONS AND OPINIONS?

A. YEAH, JUST THE SELF-MEDICATING AND TEMPORARY FEELINGS OF RELIEF THAT AT LEAST THIS -- NOT FOCUSED ON THE MOLEST, BUT THEN OUT COMES THE ANGER AND FRUSTRATION AND IRRITABILITY WITH THE ALCOHOL.

Q. SHE ALSO REPORTED THAT HE WOULD HAVE CRYING JAGS. WHEN HE WOULD DRINK, HE WOULD CRY TO TRY TO FORGET. IS THAT

CONSISTENT WITH YOUR OPINIONS IN THIS CASE?

A. SURE.

MR. VERBURGT: OBJECTION; MISSTATES TESTIMONY.

THE COURT: WHAT'S YOUR OBJECTION?

MR. VERBURGT: MISSTATES TESTIMONY.

THE COURT: SUSTAINED.

BY MR. SCOTT:

Q. WHEN HE WOULD DRINK, HIS MOTHER REPORTED THAT HE WOULD CRY. IS THAT INCONSISTENT WITH YOUR OPINIONS IN THIS CASE? THE FACT THAT WHEN HE WOULD DRINK AS AN ADULT, HE WOULD CRY TRYING TO FORGET?

A. YEAH, THERE'S A LOT OF PAIN IN THERE. A LOT OF PAIN THAT HE NEVER PROCESSED; HE COULDN'T PROCESS AS A BOY AND THAT HE'S AVOIDED AS AN ADULT.

Q. I BELIEVE THAT SOME OF THE SYMPTOMS OR SIGNS OF PTSD INCLUDE CHRONIC PHYSICAL SIGNS OF HYPERAROUSAL, INCLUDING SLEEP PROBLEMS, TROUBLE CONCENTRATING, IRRITABILITY, ANGER, POOR CONCENTRATION, BLACK-OUTS OR DIFFICULTY REMEMBERING THINGS, INCREASING TENDENCY AND REACTION TO BEING STARTLED AND HYPERVIGILANCE; IS THAT ACCURATE, SIR?

A. THAT IS ACCURATE, YEAH.

Q. DID YOU, BASED ON YOUR INTERVIEW WITH MR. MEZZLES AND REVIEWED REPORTS, FIND THAT ANY WERE PRESENT IN HIM IN HIS LIFE?

A. HE DOES HAVE THOSE SIGNS OF HYPERAROUSAL. HE CERTAINLY HAS THE IRRITABILITY AND ANGRY OUTBURSTS. HE HAS IMPAIRED CONCENTRATION. HE'S HAD DIFFICULTY KIND OF MANAGING HIS THOUGHTS AND FEELINGS WITHOUT BEING OVERWHELMED BY THEM.

SO, YEAH, SOME OF THOSE ARE CERTAINLY PRESENT.

Q. DID PTSD -- IS THERE A TREATMENT REGIMEN FOR THOSE WHO SUFFER FROM PTSD?

A. THERE IS. THERE ARE A VARIETY OF COMPONENTS. ONE WOULD BE MEDICATION TO REDUCE SOME OF THAT AROUSAL THAT WE JUST TALKED ABOUT; HYPERAROUSAL, HYPERVIGILANCE, TENSION AND ANXIETY.

NUMBER TWO, THERE WOULD BE COUNSELLING SESSIONS. IN THIS CASE IT WOULD BE SITTING DOWN WITH A THERAPIST AND VERY CAREFULLY GOING OVER SOME OF THESE ISSUES THAT OCCURRED IN CHILDHOOD AND HELPING HIM BETTER PROCESS THOSE AS AN ADULT.

Q. DURING YOUR INTERVIEW WITH MR. MEZZLES, DID HE REPORT ANY SUICIDAL IDEATION OR ATTEMPTS AT SUICIDE IN HIS YOUTH OR AT ANYTIME?

A. I THINK AT AGE 13, HE FELT SUICIDAL AND WANTED TO HANG HIMSELF.

Q. IS THAT ALSO A SIGN OR SYMPTOM OF THOSE SUFFERING FROM PTSD?

A. IT IS, AND IT'S VERY RELEVANT IN THIS CASE BECAUSE IT HAPPENS, AGAIN, JUST ABOUT THE ONSET OF PUBERTY. HIS SEXUALITY IS TOTALLY DISTURBED BY THE YEARS OF MOLEST AND HE WANTED TO KILL HIMSELF. THE SHAME, THE GUILT, THE EMBARRASSMENT, THE ANGER WERE JUST TOO MUCH.

Q. DOCTOR, BASED UPON YOUR TRAINING AND EXPERIENCE AND REVIEW OF THE REPORTS AND INTERVIEW WITH MR. MEZZLES, DID YOU COME TO ANY CONCLUSIONS OR OPINIONS REGARDING WHETHER HE SUFFERED FROM ANY TYPE OF DISORDER?

A. YEAH. TODAY I WOULD DIAGNOSE HIM WITH POST

TRAUMATIC STRESS DISORDER AND ALCOHOL DEPENDENCE DISORDER.

Q. POST TRAUMATIC STRESS DISORDER, IS THAT A TYPE OF ANXIETY DISORDER THEN?

A. IT IS.

Q. AND POST TRAUMATIC STRESS DISORDER COUPLED WITH ALCOHOL IS THAT A BAD COMBINATION? NOT JUST A GLASS OF WINE AT DINNER, BUT IF ONE DRINKS TO EXCESS AND ONE HAS PTSD, DOES THAT EXACERBATE THE CONDITION?

A. IT EXACERBATES IT BECAUSE PEOPLE WILL DRINK TO AVOID DEALING WITH THE TRAUMA. SO IT'S A VICIOUS CYCLE WHERE THE FEELINGS OF SHAME AND ANGER AND FRUSTRATION ARISE, THE INDIVIDUAL DRINKS HEAVILY TO AVOID IT AND, IN FACT, DOES AVOID IT AND THAT'S VERY REENFORCING FOR THE ALCOHOLISM. THE ALCOHOL ABUSE WORKED EVEN THOUGH IT BROUGHT ALONG WITH IT MANY OTHER PROBLEMS.

Q. THOSE WITH PTSD, IF THEY HAVE SOMEWHAT IMPAIRED COGNITIVE ABILITIES, WOULD THE USE OF EXCESSIVE ALCOHOL COMPOUND THOSE DIFFICULTIES?

A. YES.

Q. AND, DOCTOR, WHAT IS YOUR OPINION THAT YOU JUST RENDERED BASED UPON, IF YOU COULD -- I THINK YOU'VE ALREADY GIVEN IT TO US, BUT THE FORMALITY, WHAT DO YOU BASE THAT OPINION ON, SIR?

A. I BASE IT ON UPON MY INTERVIEW WITH HIM, A REVIEW OF THE RECORDS AND HE HAD A LETTER FROM HIS MOTHER THAT ALSO MENTIONED THE SEXUAL MOLEST.

MR. SCOTT: THANK YOU, DOCTOR, THAT'S ALL I HAVE ON DIRECT.

THE COURT: THANK YOU. PEOPLE?

MR. VERBURGT: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. VERBURGT:

Q. GOOD AFTERNOON, DR. OWEN.

A. GOOD AFTERNOON.

Q. SO YOU TESTIFIED, YOU SAID, 400 TIMES?

A. YES.

Q. WOULD YOU CONSIDER YOURSELF A PROFESSIONAL WITNESS?

A. NO. EVEN THOUGH I DO A LOT OF TESTIMONY, I CONSIDER MYSELF A FORENSIC PSYCHOLOGIST.

Q. YOU'RE ALWAYS HIRED BY EITHER THE COURT OR DEFENSE IN A CASE WHEN YOU'RE ASKED TO TESTIFY; CORRECT?

A. NO, MOST OF MY TESTIMONY IS ACTUALLY FOR THE DISTRICT ATTORNEY AND I'M HIRED BY THE STATE OF CALIFORNIA TO TESTIFY.

Q. WHEN WAS THE LAST TIME YOU WERE HIRED BY THE DISTRICT ATTORNEY'S OFFICE?

A. YEARS AGO.

Q. NAME THE DEPUTY DISTRICT ATTORNEY YOU WERE HIRED BY?

A. MATT KROUT (PHONETIC), SAN LUIS OBISPO.

Q. WHAT YEAR WAS THAT?

A. I DON'T RECALL. SEVERAL YEARS AGO.

Q. COULD IT HAVE BEEN TEN YEARS OR MORE?

A. COULD HAVE BEEN.
Q. WHAT CASE WAS IT?
A. IT WAS A SEXUAL MOLEST CASE.
Q. YOU SAID THAT YOU PRIMARILY HANDLE CASES INVOLVING SEXUALLY VIOLENT PREDATORS?
A. THAT'S THE BULK OF MY WORK NOW, YES.
Q. HOW MUCH DO YOU MAKE A YEAR ON THOSE SVP OR SEXUALLY VIOLENT PREDATOR CASES?
A. IT'S DIFFERENT --
MR. SCOTT: OBJECTION; RELEVANCE.
THE COURT: SUSTAINED.
BY MR. VERBURGT:
Q. ISN'T IT TRUE THAT IN 2007 YOU MADE $1.5 MILLION THAT YEAR JUST EVALUATING SVP'S?
MR. SCOTT: OBJECTION; RELEVANCE.
THE COURT: SUSTAINED.
BY MR. VERBURGT:
Q. HOW MUCH ARE YOU PAID TO DO A STANDARD PSYCH EVAL?
A. I BILL $200 AN HOUR.
Q. HOW MUCH WERE YOU PAID IN THIS CASE?
A. I THINK I BILLED ON THIS ABOUT $1,500; I'M NOT SURE.
Q. YOU SAY YOU MET WITH THE DEFENDANT ONE TIME?
A. YES.
Q. THAT WAS FOR ONE AND A HALF HOURS?
A. YES.
Q. HOW MANY TIMES HAVE YOU TESTIFIED IN A DOMESTIC VIOLENCE CASE ABOUT POST TRAUMATIC STRESS DISORDER?

A. PROBABLY THREE OR FOUR TIMES.
Q. WHEN WAS THE LAST TIME?
A. SEVERAL YEARS AGO.
Q. COULD YOU TELL THE JURY THE NAME OF THE CASE AND ATTORNEYS INVOLVED IN THAT CASE?
A. THE ATTORNEY IN THE CASE WAS ED SAMOGIAN UP IN SAN LUIS OBISPO. I DON'T RECALL -- I WAS TESTIFYING ON BEHALF OF THE VICTIM AND I DON'T RECALL HER NAME.
Q. SO YOU TESTIFIED ABOUT POST TRAUMATIC STRESS DISORDER AS IT RELATED TO THE VICTIM IN THIS CASE?
A. YES.
Q. HAVE YOU TESTIFIED IN A DOMESTIC VIOLENCE CASE ABOUT PTSD INVOLVING THE DEFENDANT?
A. NOT THAT I RECALL.
Q. SO NEVER?
A. NO.
Q. SO YOU WROTE IN YOUR REPORT THAT YOU HAD -- THE PURPOSE OF YOUR EVALUATION WAS TWO REASONS, TWOFOLD. WITHOUT LOOKING AT YOUR REPORT HERE, WHAT WERE THOSE TWO REASONS?
A. YOU WANT ME TO ANSWER THIS WITHOUT LOOKING AT MY REPORT?
Q. YEAH. WHAT WERE THE TWO REASONS THAT YOU EVALUATED THE DEFENDANT IN THIS CASE?
A. I WAS ASSESSING THE PSYCHOLOGICAL FUNCTIONING, THAT WAS THE PRIMARY REASON.
Q. THE SECOND?
A. I WOULD HAVE TO LOOK.
Q. LET ME HELP YOU. YOU SAID YOU WERE ASSESSING THE

DEFENDANT'S PSYCHOLOGICAL FUNCTION. LET'S START WITH THAT.

HOW IS THAT RELEVANT TO THE CRIMES THE DEFENDANT IS CHARGED WITH IN THIS CASE?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. DO YOU KNOW IF THERE'S A JURY INSTRUCTION THAT ASKS JURORS TO EVALUATE THE DEFENDANT'S EMOTIONAL FUNCTION?

MR. SCOTT: OBJECTION; RELEVANCE.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. WOULD IT BE FAIR TO SAY THAT THE DEFENDANT'S EMOTIONAL FUNCTIONING MAY BE OF INTEREST, BUT IT'S LARGELY IRRELEVANT IN A CASE IN DETERMINING GUILT?

MR. SCOTT: OBJECTION; RELEVANCE.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. THE SECOND PURPOSE YOU WROTE WAS TO DETERMINE IF THERE IS ANY MITIGATING FACTORS THAT MIGHT AFFECT THIS CASE; IS THAT CORRECT?

A. YES.

Q. "MITIGATING FACTORS" MEANS BASICALLY ASSUMING GUILT AND SEEING IF THERE'S ANYTHING TO EXPLAIN OR MINIMIZE CULPABILITY; RIGHT?

A. RIGHT.

Q. NOW, WOULD YOU AGREE THAT MITIGATING FACTORS ARE MORE RELEVANT TO SENTENCING, RATHER THAN GUILT?

A. I THINK THAT'S FOR THE TRIER OF FACT TO DECIDE,

HOW THE MITIGATING FACTORS WOULD BE CONSIDERED. I'M SIMPLY PRESENTING THEM.

Q. WHAT'S THE INTENT REQUIRED FOR A VIOLATION OF PENAL CODE SECTION 273.5?

MR. SCOTT: OBJECTION; RELEVANCE.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. DO YOU KNOW WHAT IT IS?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. DO YOU KNOW WHAT THE MENTAL STATE REQUIRED, "YES" OR "NO," FOR VIOLATION OF PENAL CODE SECTION 422, CRIMINAL THREATS?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. SO IS THE TERM "SPECIFIC INTENT" A LEGAL TERM OR A TERM FROM PSYCHOLOGY?

MR. SCOTT: OBJECTION.

THE COURT: WHAT IS THE LEGAL OBJECTION?

MR. SCOTT: LACK OF FOUNDATION TO QUALIFY AS AN ATTORNEY TO SPEAK WITH CRIMES OF SPECIFIC INTENT.

THE COURT: SUSTAINED.

MR. VERBURGT: YOUR HONOR, I'M ASKING WITH REGARD TO THIS TRAINING; IF IT'S A TERM OF PSYCHOLOGY OR NOT. IT'S EITHER A TERM OF PSYCHOLOGY OR A TERM OF LAW; I'M TRYING TO FIND OUT.

THE COURT: OVERRULED.

THE WITNESS: IT'S A TERM OF LAW, NOT PSYCHOLOGY.

BY MR. VERBURGT:

Q. SO YOU AGREE THAT SPECIFIC INTENT HAS NOTHING TO DO WITH PSYCHOLOGY?

MR. SCOTT: OBJECTION; LACK OF FOUNDATION.

THE COURT: OVERRULED.

THE WITNESS: WELL, INTENT IS A PSYCHOLOGICAL TERM IN THE SENSE OF IT DEALS WITH MOTIVATION.

BY MR. VERBURGT:

Q. I SAID "SPECIFIC INTENT"; THE TERM "SPECIFIC INTENT."

A. IT WOULD CLARIFY; THAT'S A LEGAL TERM. THAT'S NOT SPECIFICALLY ADDRESSED IN SOMETHING LIKE THE DSM.

Q. SO IT'S NOT A PSYCHOLOGY TERM; IS THAT FAIR TO SAY?

A. THE TERM "SPECIFIC INTENT" IS NOT.

Q. DID YOU EVER -- IN YOUR TRAINING AND WHEN YOU WERE SEEKING YOUR DEGREE, DID YOU EVER TAKE A COURSE ABOUT LEGAL TERMINOLOGY?

A. NO.

Q. SO WHAT IS THE DEFENSE IN THIS CASE?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

MR. VERBURGT: YOUR HONOR --

Q. SO ARE YOU AWARE OF THAT IN THIS CASE, THE DEFENDANT UTILIZED A WEAPON, PARTICULARLY BRASS KNUCKLES?

A. I AM.

Q. AND ARE YOU AWARE THAT -- YOU MENTIONED THERE WAS A JEALOUSY THAT YOU FOUND INDICATED IN THE POLICE REPORTS INVOLVED IN THIS CASE; CORRECT?

A. RIGHT.

Q. ARE YOU AWARE THAT THE ALLEGATIONS INVOLVED NOT ONLY THE DEFENDANT HITTING HIS WIFE IN THIS CASE, BUT ALSO HIS DAUGHTER?

A. HIS DAUGHTER AND SWINGING AT HIS DAUGHTER'S BOYFRIEND.

Q. SO YOU'RE AWARE IT INVOLVES VIOLENCE TOWARD HIS DAUGHTER, NOT JUST HIS WIFE?

A. RIGHT.

Q. YOU'RE AWARE THAT THIS CASE INVOLVES THE DEFENDANT THREATENING TO KILL HIS DAUGHTER AS WELL, NOT JUST HIS WIFE?

A. I AM.

Q. SO YOU AGREE THAT THIS DYNAMIC THAT YOU'VE MENTIONED ABOUT JEALOUSY AND ALCOHOL DOESN'T REALLY COME INTO PLAY WHEN WE'RE TALKING ABOUT VIOLENCE TOWARD A DAUGHTER; CORRECT?

A. RIGHT; JEALOUSY WOULDN'T APPLY.

MR. SCOTT: YOUR HONOR, I'M GOING TO OBJECT.

THE COURT: THE LAST QUESTION?

MR. SCOTT: YES, YOUR HONOR.

THE COURT: SUSTAINED. ANSWER IS STRICKEN.

BY MR. VERBURGT:

Q. SO NOW YOU SAID YOU INTERVIEWED THE DEFENDANT FOR ONE AND A HALF HOURS; RIGHT?

A. RIGHT.

Q. DID YOU REVIEW ANY KIND OF MEDICAL HISTORY?
A. YOU MEAN A WRITTEN MEDICAL?
Q. CORRECT.
A. NO, I HAVEN'T.
Q. DID YOU LOOK AT ANY KIND OF MEDICAL RECORDS FOR THE DEFENDANT?
A. I HAVEN'T.
Q. DID YOU LOOK AT ANY PSYCHOLOGICAL RECORDS?
A. THERE WERE NONE, SO NO.
Q. YOU MENTIONED ON DIRECT ABOUT THE GENETIC PREDISPOSITION TOWARD ALCOHOLISM; IS THAT RIGHT?
A. I DID.
Q. DID YOU CONDUCT ANY KIND OF GENETIC TEST ON THE DEFENDANT?
A. I DID NOT.
Q. DO YOU HAVE A DEGREE IN GENETICS?
A. DO NOT.
Q. IN COMING UP WITH YOUR REPORT, IN ADDITION TO INTERVIEWING THE DEFENDANT, DID YOU INTERVIEW ANY OF THE WITNESSES IN THIS CASE?
A. I DID NOT.
Q. SO YOU INTERVIEWED THE DEFENDANT ON JUNE 24TH OF 2011?
A. I DID.
Q. IT'S QUITE A LONG TIME AFTER THE INCIDENT; RIGHT?
A. RIGHT.
Q. YOU WOULD AGREE THAT YOU PUT A LOT OF WEIGHT ON THE INTERVIEW OF THE DEFENDANT MONTHS AFTER THE CRIME HAD

OCCURRED; RIGHT?

A. I INTERVIEW IN MY OBSERVATION OF HIM, YES.

Q. YOU'D AGREE THAT GIVEN THE AMOUNT OF TIME THAT HAD PASSED, THE DEFENDANT HAD A LONG TIME TO THINK ABOUT WHAT TO SAY TO YOU; RIGHT?

A. IF HE KNEW DURING THAT WHOLE PERIOD OF TIME THAT I WAS COMING TO SEE HIM, AND I DON'T THINK HE DID.

Q. ABOUT HOW FAR IN ADVANCE DID HE BECOME AWARE?

A. I HAVE NO IDEA.

Q. WHEN WERE YOU CONSULTED ABOUT INTERVIEWING THE DEFENDANT?

A. PROBABLY JUST A FEW WEEKS BEFORE THIS INTERVIEW.

Q. SO WOULD IT BE FAIR TO SAY THAT YOU RELIED HEAVILY ON THE DEFENDANT'S OWN WORDS, HIS ONLY PERSONAL HISTORY IN THIS CASE TO FORM YOUR OPINION?

A. AS I SAID, I RELIED UPON HIS STATEMENTS TO ME AND MY OBSERVATION OF HIM AND THE REVIEW OF THE POLICE REPORTS AND SUCH.

Q. WOULD IT BE FAIR TO SAY THAT YOU'RE INTERVIEWING A PERSON WHO HAS A MOTIVE TO LIE; RIGHT?

A. DEFENDANTS DO HAVE MOTIVES TO LIE, YES.

Q. IN THE "DEVELOPMENTAL HISTORY" SECTION OF YOUR REPORT -- LET ME QUOTE IT FOR YOU, "WHEN HE WAS ONE-YEAR-OLD HIS PARENTS SEPARATED AFTER HIS FATHER THREATENED TO KILL HIM AND HIS MOTHER"; RIGHT?

A. RIGHT.

Q. DIDN'T YOU TESTIFY YOU ONLY INTERVIEWED THE DEFENDANT?

A. RIGHT.

Q. HOW ON EARTH WOULD THE DEFENDANT KNOW, IF HE WAS ONE-YEAR-OLD, IF THAT HAD OCCURRED?

A. I THINK MANY OF US TALK TO PARENTS AND FIND OUT WHAT HAPPENED TO US IN CHILDHOOD.

Q. SO IT WAS SOMETHING THAT HE HAD BEEN TOLD HAPPENED?

A. PROBABLY.

Q. WOULD YOU AGREE THAT THE DEFENDANT COULD HAVE MADE UP THAT FACT?

A. IT'S POSSIBLE.

Q. WOULD YOU AGREE THAT HE COULDN'T REMEMBER HIMSELF WHAT HAD HAPPENED WHEN HE WAS ONE?

A. I WOULD AGREE.

Q. SO YOU RELIED NOT ONLY ON THE DEFENDANT BEING TRUTHFUL ABOUT THAT OCCURRENCE, BUT ALSO HIS MOTHER BEING TRUTHFUL BECAUSE THAT'S THE LIKELY SOURCE OF WHERE HE GOT THAT INFORMATION?

A. RIGHT.

Q. HAVE YOU MET THE DEFENDANT'S MOTHER?

A. I HAVE NOT.

Q. WOULD YOU AGREE THAT IT'S POSSIBLE THAT THE DEFENDANT'S MOTHER COULD HAVE PAINTED THE DEFENDANT'S MOTHER (SIC) IN THE WORST POSSIBLE LIGHT FOR A NUMBER OF REASONS?

A. YOU HAVE TO REPEAT THE QUESTION. I THINK YOU GOT A WORD WRONG THERE.

Q. WOULD IT BE FAIR TO SAY THAT THE DEFENDANT'S MOTHER COULD HAVE PAINTED HIS FATHER IN A PARTICULARLY

NEGATIVE LIGHT FOR A VARIETY OF DIFFERENT REASONS?

A. SURE.

Q. YOU COULD HAVE CONTACTED THE DEFENDANT'S MOTHER TO VERIFY THAT INFORMATION; RIGHT?

A. IF I FELT IT WAS CRITICAL IN THIS CASE.

Q. YOU DIDN'T FEEL IT WAS CRITICAL?

A. THAT ASPECT WASN'T, REALLY.

Q. SO ALTHOUGH YOU'RE RELYING ON THIS ONE-AND-A-HALF-HOUR INTERVIEW WITH THE DEFENDANT AND HIS DEVELOPMENTAL HISTORY, WHICH YOU INDICATED IN CHILDHOOD IS CRITICAL, YOU DIDN'T FEEL IT WAS IMPORTANT TO VERIFY THE FACTS UPON WHICH YOU WERE RELYING?

A. I HAD SOME VERIFICATION OF FACTS THAT I THOUGHT WERE MUCH MORE RELEVANT TO THIS CASE, THAT'S THE MOLEST, BUT I DIDN'T VERIFY THE FACTS OF HIS MOTHER'S DIVORCE.

Q. HOW DID YOU VERIFY THE FACTS ABOUT THE MOLEST?

A. AS FAR AS I COULD. OBVIOUSLY, I WASN'T THERE TO SEE THEM, BUT HE DID HAVE A LETTER FROM HIS MOTHER THAT HE SHOWED ME THAT TALKED ABOUT THE MOLEST.

Q. WOULD IT CHANGE YOUR OPINION AT ALL IF THE DEFENDANT'S MOTHER LEARNED ABOUT THE MOLEST FROM THE DEFENDANT HIMSELF?

A. WELL, THAT'S PROBABLY THE WAY MOTHER'S MOST COMMONLY LEARN ABOUT MOLEST. SO IT WOULDN'T HAVE CHANGED MY OPINION, NO.

Q. WOULD IT STILL PROVIDE VERIFICATION IF THE SOURCE OF THE LETTER IS THE DEFENDANT?

A. I DON'T UNDERSTAND THE QUESTION.

Q. YOU'RE SAYING THE DEFENDANT TOLD YOU HE WAS MOLESTED; RIGHT?

A. HE TOLD ME HE WAS MOLESTED, YES.

Q. AND THEN YOU SAY YOU VERIFIED THAT INFORMATION BASED ON A LETTER FROM THE DEFENDANT'S MOTHER; RIGHT?

A. RIGHT.

Q. IF THE LETTER FROM THE DEFENDANT'S MOTHER IS BASED SOLELY ON WHAT THE DEFENDANT HAS TOLD HER, WOULDN'T THAT MAKE IT ONE SOURCE RATHER THAN TWO?

A. I THINK IT'S CRITICAL TO SEE WHEN HE TOLD HER.

IF HE TOLD HER TWO WEEKS AFTER HIS ARREST, I THINK WE WOULD BE SOMEWHAT SUSPICIOUS OF THAT. IF HE TOLD HER YEARS AGO, AND I'VE HEARD A BIT OF HER TESTIMONY FROM MR. SCOTT, THEN IT WOULD BE A DIFFERENT MATTER.

Q. SO YOU'RE SAYING THAT YOU'RE RELYING ON WHAT THE DEFENSE ATTORNEY HAS TOLD YOU ABOUT HER TESTIMONY?

A. I'M REALLY NOT; I WASN'T HERE TO HEAR HER TESTIMONY, BUT THE JURY DID. IF SHE TESTIFIED THAT SHE LEARNED ABOUT IT YEARS AGO FROM HIM THEN I THINK WE HAVE SOME CORROBORATION.

Q. SO ONE SOURCE IN THIS CASE IS SUFFICIENT THEN TO VERIFY SOMETHING THAT YOU'RE BASING YOUR OPINION ON; IS THAT FAIR TO SAY?

A. WE HAVE TWO SOURCES IN A SENSE. WE HAVE THE DEFENDANT AND WE HAVE HIS MOTHER.

Q. BUT YOU AGREE THAT IF THE DEFENDANT'S MOTHER WAS TOLD BY THE DEFENDANT THAT THIS HAPPENED, YOU'RE RELYING ON, BASICALLY, TWO LEVELS OF HEARSAY? YOU'RE RELYING ON WHAT THE

DEFENDANT SAID TO HIS MOTHER AND WHAT HIS MOTHER SAID TO YOU; RIGHT?

A. TO ME, IT'S CRITICAL WHEN HE TOLD HER.

Q. ARE YOU SAYING THAT WHAT HAPPENED TO THE DEFENDANT AS A CHILD -- LET'S START WITH THE INCIDENT WHEN HE WAS ONE-YEAR-OLD -- MADE HIM VIOLENT AND MADE HIM THREATEN HIS WIFE AND STEPDAUGHTER IN THIS CASE?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. ARE YOU SAYING THAT THIS CHILD MOLESTATION THAT OCCURRED IS WHAT CAUSED THE DEFENDANT TO BECOME VIOLENT TOWARD HIS WIFE AND STEPDAUGHTER?

MR. SCOTT: OBJECTION. MAY WE APPROACH, JUDGE?

THE COURT: SUSTAINED. YES.

(SIDE BAR DISCUSSION HELD OFF THE RECORD.)

THE COURT: YOU MAY CONTINUE.

MR. VERBURGT: THANK YOU.

Q. LET'S MOVE ON TO WHAT THE DEFENDANT TOLD YOU ABOUT BEING SEXUALLY ABUSED FROM AGE 7 TO 12. THIS IS BY HIS STEPFATHER MIKE?

A. YES.

Q. DID YOU CONTACT MIKE ABOUT THESE ALLEGATIONS?

A. NO.

Q. DO YOU KNOW IF THERE WERE ANY DISCLOSURES MADE BY THE DEFENDANT AT SCHOOL?

A. NO.

Q. DO YOU KNOW IF THERE WAS EVER A CRIMINAL

INVESTIGATION?

A. NOT THAT I KNOW OF.

Q. YOU SAID THERE WAS A LETTER FROM THE DEFENDANT'S MOTHER THAT DOCUMENTS THE HISTORY OF HIS SEXUAL TRAUMA?

A. RIGHT.

Q. DO YOU HAVE THAT LETTER WITH YOU?

A. NO, HE KEPT IT IN HIS POSSESSION. I READ IT WHILE I WAS WITH HIM.

Q. SO YOU DON'T HAVE IT?

A. I DO NOT.

Q. YOU SAID THAT, IN PART, YOUR OPINIONS RELY ON THAT INFORMATION; RIGHT?

A. RIGHT.

Q. DO YOU THINK IT WOULD HAVE BEEN IMPORTANT TO BRING THAT LETTER ALONG TO THE COURT TODAY?

A. THAT WAS HIS LETTER FROM HIS MOTHER. I DIDN'T HAVE THE LETTER TO BRING TODAY.

Q. YOU DIDN'T ASK FOR A COPY?

A. WE WERE IN THE JAIL. I DIDN'T HAVE MEANS FOR MAKING A COPY.

Q. DO YOU HAVE ANY -- DO YOU HAVE ONE PIECE OF EVIDENCE THAT SUPPORTS THE DEFENDANT'S CLAIMS ABOUT BEING MOLESTED AS A CHILD?

A. DO I -- AGAIN, I WASN'T THERE TO VIEW IT. I DON'T HAVE A POLICE REPORT ABOUT IT. AS I SAID, I REVIEWED A LETTER FROM HIS MOTHER. OTHER THAN THAT, I DON'T HAVE ANY EVIDENCE.

Q. LET'S ASSUME FOR A MOMENT THAT THE MOLESTATION DID OCCUR FROM AGE 7 TO 12. ARE YOU SAYING THAT MAKES SOMEONE

PREDISPOSED TO BEAT THEIR WIFE OR CHILD?

A. I DON'T THINK THERE'S A SPECIFIC PREDISPOSITION TO BEAT ANYONE WITH PTSD (SIC).

Q. SO "NO"?

A. NO.

Q. DOES THAT MAKE SOMEONE PREDISPOSED TO THREATEN THEIR WIFE OR THEIR KIDS?

A. I DON'T THINK THERE'S ANY SPECIFIC PREDISPOSITION FROM THIS DISORDER.

Q. ARE THERE ANY STUDIES THAT MAKE A CONNECTION BETWEEN SEXUAL ABUSE AS A CHILD AND DOMESTIC VIOLENCE?

A. NOT THAT I KNOW OF, NO.

Q. ARE THERE ANY JOURNAL ARTICLES THAT PROVIDE ANY CORRELATION TO DOMESTIC VIOLENCE AND SEXUAL ABUSE AS A CHILD?

A. THE CORRELATION IS THAT INDIVIDUALS ENGAGING IN DOMESTIC VIOLENCE OFTENTIMES HAVE PSYCHOLOGICAL DISTURBANCES.

Q. BUT MY QUESTION WAS IF THERE ARE ANY JOURNAL ARTICLES THAT HAVE ANY CORRELATION BETWEEN DOMESTIC VIOLENCE AND SEXUAL ABUSE AS A CHILD?

A. I DON'T KNOW ANY OF ANY CORRELATION.

Q. YOU'D AGREE THAT PEOPLE WHO HAVE BEEN -- MANY PEOPLE WHO HAVE BEEN MOLESTED AS A CHILD NEVER BECOME VIOLENT; RIGHT?

A. RIGHT. I THINK THE PROBLEMS MANIFEST IN A VARIETY OF WAYS. SOME MAY BECOME VIOLENT, SOME MAY BECOME SUBSTANCE ABUSERS, SOME MAY BECOME CHRONICALLY DEPRESSED.

Q. SO IF YOU COULD CONNECT THE DOTS FOR ME, HOW WOULD SEXUAL MOLESTATION FROM AGE 7 TO 12 RESULT IN SOMEONE, AS AN

ADULT, THREATENING THEIR WIFE OR THEIR DAUGHTER?

MR. SCOTT: OBJECTION.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. IN ANY CASE; NOT SPECIFICALLY THIS ONE.

A. IN GENERAL?

Q. IN GENERAL.

A. SURE --

MR. SCOTT: OBJECTION; THE FACT PATTERN THAT THE OPINION IS BASED ON.

THE COURT: REPEAT THE QUESTION AND I'LL RULE ON IT.

MR. VERBURGT: SURE.

Q. IF YOU COULD CONNECT THE DOTS FOR ME, HOW WOULD SOMEONE EXPERIENCING SEXUAL ABUSE AS A CHILD, LET'S SAY, BEFORE THEIR TEENAGED YEARS, A MALE, HOW WOULD THAT CONNECT TO DOMESTIC VIOLENCE AS AN ADULT, SPECIFICALLY VIOLENCE TOWARD THEIR SPOUSE OR CHILDREN?

THE COURT: IS THERE AN OBJECTION?

MR. SCOTT: YES.

THE COURT: SUSTAINED.

BY MR. VERBURGT:

Q. IS THERE ANY CONNECTION -- THERE'S NO DEFINITE, YOU'RE SAYING, CONNECTION OR NO STUDY THAT HAS CONNECTED SEXUAL ABUSE AS A CHILD TO DOMESTIC VIOLENCE; CORRECT?

A. I DON'T KNOW OF A STUDY THAT SPECIFICALLY SHOWS THAT. THERE ARE CERTAINLY STUDIES THAT SHOW THAT MOLESTATION AT AN EARLY AGE IMPACTS JUST ABOUT EVERY ASPECT OF A PERSON'S

FUNCTIONING, MAKES THEM MORE LIKELY TO BE HOSPITALIZED AND HAVE A MYRIAD OF PSYCHOLOGICAL PROBLEMS; IT'S DIFFERENT IN EVERY PERSON.

Q. BUT THERE'S NO STUDY THAT DOCUMENTS THAT SPECIFIC CONNECTION; CORRECT?

A. THERE MAY BE A STUDY; I DON'T KNOW OF IT OFF THE TOP OF MY HEAD.

Q. SO THE DEFENDANT ALSO TOLD YOU THAT HE HAD ADD OR ADHD?

A. HE SUSPECTED HE DID, YES.

Q. DID YOU TEST FOR THAT?

A. NO.

Q. NOW, HE TOLD YOU THAT HE DROPPED OUT OF SCHOOL IN 11TH GRADE?

A. RIGHT.

Q. DID YOU LOOK AT ANY KIND OF SCHOOL TRANSCRIPTS TO VERIFY THAT?

A. NO.

Q. DID YOU FIND ANY INFORMATION OR DOCUMENTATION THAT VERIFIED THAT?

A. NO.

Q. DID YOU LOOK INTO THE DEFENDANT'S -- WHETHER THE DEFENDANT EVER SERVED IN THE MILITARY?

A. HE SAID HE DIDN'T.

Q. HE SAID THAT HE'S NEVER SERVED IN THE MILITARY?

A. RIGHT.

Q. THE DEFENDANT TOLD YOU ABOUT HIS RELATIONSHIPS; RIGHT?

A. RIGHT.
Q. SAID HE WAS MARRIED FOUR TIMES, TWICE TO THE SAME WOMAN?
A. TWICE TO KAREN.
Q. DID YOU INTERVIEW ANY OF THE DEFENDANT'S EX-WIVES?
A. NO.
Q. WHY NOT?
A. THAT'S NOT A TYPICAL PART OF THE PSYCHOLOGICAL EVALUATION, TO CALL UP EX-WIVES.
Q. YOU AGREE THEY'VE KNOWN THE DEFENDANT AND THEY COULD PROVIDE RELEVANT INFORMATION; RIGHT?
A. THEY COULD.
Q. AND THEY COULD ALSO VERIFY OR DISPROVE THE DEFENDANT'S CLAIMS OR INFORMATION HE'S GIVEN YOU?
A. ABOUT THEM?
Q. ABOUT HIMSELF.
A. THEY COULD.
MR. VERBURGT: YOUR HONOR, COULD WE APPROACH BRIEFLY?
THE COURT: WHY DON'T WE TAKE A SHORT BREAK. PLEASE DO NOT DISCUSS THIS CASE OR FORMULATE ANY OPINIONS. WE'LL BE BACK IN A FEW MINUTES.
(JURY EXITS THE COURTROOM.)
THE COURT: I'M GOING TO ASK THE WITNESS TO STEP OUTSIDE. WE'LL CALL YOU BACK IN JUST A FEW MOMENTS.
THE WITNESS: YES, YOUR HONOR.
(WITNESS EXITS THE COURTROOM.)
THE COURT: THE WITNESS HAS LEFT. THE JURY IS

GONE.

THERE WAS ONE SIDE BAR THAT WE APPROACHED AND DEFENSE WAS OBJECTING TO THE INQUIRIES OF THE PROSECUTION DEALING WITH -- MR. SCOTT?

MR. SCOTT: THE DEFENDANT'S STATE OF MIND AT THE TIME OF THE OFFENSE, WHILE HE DID NOT SPECIFICALLY USE THE WORDS "SPECIFIC INTENT," HE WAS ASKING IF YOU'RE MOLESTED AS A CHILD, ARE YOU GOING TO BEAT YOUR WIFE AND DAUGHTER BECAUSE OF BEING MOLESTED; THINGS OF THAT SORT, WHICH THE MOLEST WAS THE BASIS FOR THE PTSD DIAGNOSIS. MY OBJECTION WAS HE'S ASKING FOR MY CLIENT'S STATE OF MIND AT THE TIME OF OFFENSE WHICH IS PROHIBITED BY BOTH SIDES.

THE COURT: THE COURT INDICATED THAT THIS WITNESS WAS LIMITED IN HIS ABILITY TO TESTIFY AS TO THE DEFENDANT'S SPECIFIC STATE OF MIND.

MR. VERBURGT, WOULD YOU LIKE TO PUT ANYTHING ELSE ON THE RECORD FROM THE SIDE BAR?

MR. VERBURGT: NO, YOUR HONOR.

THE COURT: THAT'S COVERED. YOUR ISSUE?

MR. VERBURGT: I WAS JUST, PRIOR TO DELVING INTO THIS, I WAS PLANNING ON ASKING QUESTIONS ABOUT THE DEFENDANT'S CRIMINAL HISTORY, BUT I KNOW WE HAVE HAD MOTIONS IN LIMINE ABOUT THAT, HOWEVER.

MR. SCOTT: THE DOCTOR, IN HIS REPORT, REFERS TO -- WHEN MY CLIENT MENTIONED HE WAS ON PROBATION, THAT HE HAD A PRIOR ROBBERY CONVICTION, I TOLD THE DOCTOR BEFORE HE CAME IN, IF THERE'S AN IN LIMINE ORDER FOR WITNESSES NOT TO DISCLOSE OR REFER TO THE FACT THAT HE WAS ON PROBATION AT THE TIME OF THE

OFFENSE OR THAT HE SUFFERED THE ROBBERY CONVICTION, I TOLD HIM IF ASKED THAT QUESTION, ALLOW ME TO OBJECT AND YOUR HONOR WOULD MAKE A DETERMINATION OF WHETHER OR NOT THE FACT THAT HE WAS ON PROBATION OR HE HAS A PRIOR ROBBERY WERE RELEVANT TO THIS PARTICULAR DIAGNOSIS IN HIS OPINION. SO I SUPPOSE THAT'S WHAT MR. VERBURGT WANTS TO CROSS-EXAMINE ABOUT, THE FACT THAT MY CLIENT SAID HE HAD A PRIOR ROBBERY CONVICTION AND WAS ON PROBATION.

THE COURT: I GUESS I'D HAVE TO FIND OUT FROM THE DOCTOR WHETHER THAT WAS RELEVANT IN HIS -- MY QUESTION WOULD BE IT'S NOT, BUT I DON'T KNOW, IT MIGHT BE.

BEFORE WE RESUME, WE'LL BRING HIM BACK IN AND WE CAN MAKE THAT INQUIRY. IF IT WAS NOT, IT DOESN'T SEEM LIKE IT WOULD NOT BE AN APPROPRIATE QUESTION TO ASK IN FRONT OF THE JURY.

MR. SCOTT: AGREED. IS THAT IT, MR. VERBURGT?

MR. VERBURGT: YES.

THE COURT: WHY DON'T WE TAKE -- SINCE WE'RE IN THIS POSITION, LET'S TAKE A BREAK.

MR. SCOTT: THAT'S FINE.

MR. VERBURGT: ABOUT HOW LONG?

THE COURT: TEN MINUTES MAX.

(RECESS TAKEN.)

THE COURT: ALL PARTIES ARE PRESENT. THE WITNESS HAS RETAKEN THE STAND. WE'D LIKE TO ASK YOU A -- NOT "WE" -- THE PEOPLE WOULD LIKE TO ASK YOU A COUPLE OF QUESTIONS OUTSIDE THE PRESENCE OF THE JURY. THEN WE'LL MAKE A RULING FROM THAT AS TO WHETHER WE WANT TO ASK THOSE QUESTIONS IN FRONT OF THE

JURY. YOU MAY PROCEED.

BY MR. VERBURGT:

Q. DOCTOR, YOU INDICATED IN YOUR REPORT THE DEFENDANT'S CRIMINAL HISTORY?

A. I DISCUSSED HIS CRIMINAL HISTORY; THAT'S CORRECT.

Q. THERE'S A SECTION ENTITLED, "CRIMINAL HISTORY"?

A. RIGHT.

Q. AND SPECIFICALLY PAGE 4 TALKS ABOUT THE GRAND THEFT, TWO PRISON PRIORS. TWO PRIOR PRISON TERMS FOR GRAND THEFT FOR ROBBERY AND BEING ON PROBATION TODAY FOR A 422 CONVICTION?

A. RIGHT.

Q. DID THAT FACTOR INTO YOUR OPINION?

A. OPINION ABOUT HIS PSYCHOLOGICAL DISORDER?

Q. YES.

A. NO.

Q. DID IT HAVE ANY EFFECT -- DID IT PLAY ANY ROLE IN YOUR OPINION OR HOW YOU WROTE THIS REPORT?

A. OBVIOUSLY I INCLUDED IT IN THIS REPORT, BUT IN TERMS OF MY ULTIMATE OPINION, NO.

Q. WHAT ROLE DID IT PLAY, IF ANY?

A. SIMPLY TO DESCRIBE PART OF HIS BACKGROUND; THIS IS PART OF HIS EXPERIENCES IN THE PAST. HE'S BEEN TO PRISON TWICE, HE WAS ON PROBATION.

Q. YOU INDICATED THAT DEFENDANT'S HISTORY IS WHAT MADE HIM WHO HE IS TODAY?

A. YES.

Q. SO WHEN FORMULATING YOUR OPINION, YOU'RE SAYING

YOU DIDN'T RELY ON THAT PART OF HIS HISTORY?

A. IN TERMS OF FORMULATING MY PSYCHOLOGICAL OPINION ABOUT HIM, I DID NOT.

THE COURT: WE WILL NOT DISCUSS THAT IN THE PRESENCE OF THE JURY. PLEASE BRING THE JURY IN.

MR. VERBURGT: MAY I REQUEST A CLARIFICATION ON THAT RULING?

THE COURT: YES, GO AHEAD.

MR. VERBURGT: BECAUSE THE JURY'S ALREADY SEEN EVIDENCE WITH REGARD TO THE PRIOR CASE REGARDING STACY LEROY.

THE COURT: WHAT'S THE RELEVANCE IF IT DIDN'T AFFECT HIS DECISION?

MR. VERBURGT: THAT'S WHAT I WANTED TO CLARIFY.

THE COURT: THANK YOU.

(THE JURY RE-ENTERS THE COURTROOM.)

THE COURT: THE JURY IS NOW PRESENT.

YOU MAY RESUME WITH YOUR INQUIRY.

MR. VERBURGT: THANK YOU, YOUR HONOR.

Q. PART OF WHAT YOU REVIEWED IN THIS CASE WAS THE PSYCH HISTORY OF THE DEFENDANT, CORRECT, PSYCHOLOGICAL HISTORY?

A. I DIDN'T HAVE A WRITTEN PSYCHOLOGICAL HISTORY.

Q. SO YOU RELIED UPON THE DEFENDANT'S OWN SUMMARY OR BIOGRAPHY IN ORDER TO GET THAT INFORMATION?

A. AND MY OBSERVATION OF HIM, YES.

Q. I MEAN SPECIFICALLY PSYCH HISTORY. YOU DIDN'T RECEIVE ANY KIND OF PSYCH HISTORY INFORMATION FROM THE DEFENDANT?

A. NO -- YOU MEAN, A VERBAL PSYCHOLOGICAL HISTORY?

Q. YEAH.

A. SURE. MANY OF THE THINGS I MENTIONED IN COURT TODAY WERE RELATED TO HIS PERSONAL HISTORY AND PSYCHOLOGICAL FUNCTIONING.

Q. IN YOUR REPORT YOU INDICATED THAT IN TERMS OF PSYCHIATRIC HEALTH, HE WENT TO A FEW COUNSELLING SESSIONS AS A CHILD?

A. RIGHT.

Q. THAT'S THE ENTIRE PSYCHIATRIC HISTORY YOU HAD; RIGHT?

A. HE WENT TO REHABILITATION. I MENTIONED DELANCEY STREET AND ANOTHER FACILITY.

Q. YOU SAID THAT THE DEFENDANT REPORTED SYMPTOMS OF POST TRAUMATIC STRESS DISORDER?

A. YES.

Q. WHAT WERE THOSE SYMPTOMS?

A. I MENTIONED THE FLASH-BACK, ESSENTIALLY, OF HIM SEEING HIMSELF ENTERING THROUGH THE SCREEN DOOR OF HIS HOUSE WHEN HE WAS A CHILD, THE FIRST TIME THAT MIKE MOLESTED HIM. MIKE TELLING HIM TO COME IN AND GIVE HIM A MASSAGE. WE TALKED ABOUT THE AVOIDANCE, WHICH IS A PART OF THE PTSD AND HE ACKNOWLEDGED THAT HE HAS TRIED TO AVOID THINKING ABOUT IT OR ANYTHING ASSOCIATED WITH IT. I THINK THE ALCOHOL ABUSE IS PART OF THAT AVOIDANCE. HE TALKED ABOUT WHAT I DESCRIBED AS HYPERAROUSAL, PROBLEMS WITH CONCENTRATION. OF COURSE, WE SEE IRRITABILITY AND ANGRY OUTBURSTS.

Q. OKAY. DID YOU DIAGNOSE THE DEFENDANT WITH POST

TRAUMATIC STRESS DISORDER?

A. YES.

Q. WAS THAT BASED ENTIRELY ON YOUR ONE-AND-A-HALF-HOUR INTERVIEW WITH HIM?

A. YES.

Q. IF I'M CORRECT -- IF I UNDERSTAND YOU CORRECTLY, ONE AND A HALF HOURS WITH THE DEFENDANT AND JUST RELYING ON HIS OWN BIOGRAPHY, VERBAL BIOGRAPHY, NOT LOOKING AT ANY OTHER MEDICAL RECORDS OR VERIFYING ANY OTHER INFORMATION OTHER THAN THIS LETTER THAT WE WERE DISCUSSING FROM HIS MOTHER, YOU CAME TO A DIAGNOSIS OF POST TRAUMATIC STRESS DISORDER; CORRECT?

A. IT'S MORE THAN THAT. IT'S ALSO ME USING MY PROFESSIONAL EXPERIENCE TO ASSESS THE VORACITY OF STATEMENTS THAT AN INDIVIDUAL MAKES. ARE THEY CONSISTENT WITH WHAT WE WOULD EXPECT FROM A BOY WHO EXPERIENCED LONG-TIME SEXUAL TRAUMA? ARE THEY MARKEDLY DIFFERENT?

Q. ARE YOU FAMILIAR WITH MALINGERING?

A. YES.

Q. WHAT'S THE DEFINITION OF MALINGERING?

A. MALINGERING IS ESSENTIALLY TO FABRICATE SYMPTOMS OF A MENTAL DISORDER FOR SOME TYPE OF PERSONAL GAIN.

Q. WOULD THAT PERSONAL GAIN INCLUDE GETTING A LIGHTER CRIMINAL SENTENCE?

A. SURE.

Q. YOU SAY THAT IT'S IMPORTANT TO SUSPECT MALINGERING ESPECIALLY WHEN A DEFENDANT IS FACING SERIOUS CHARGES?

A. THAT ALWAYS NEEDS TO BE CONSIDERED.

Q. DID YOU CONDUCT ANY KIND OF TEST FOR MALINGERING

IN THIS CASE WITH THE DEFENDANT?

A. SIMPLY LOOKING AT THE CONSISTENCY OF HIS SELF-REPORTS AND DO THEY FIT WITH HIS PERSONAL HISTORY. THERE ISN'T REALLY ANY GREAT TEST, SHORT OF A POLYGRAPH, THAT YOU COULD USE.

Q. THERE ARE NO OTHER MALINGERING TESTS THAT EXIST, BESIDES POLYGRAPH?

A. THE MALINGERING TESTS ARE MORE SPECIFIC TO COGNITIVE FUNCTION. THERE ARE TESTS THAT LOOK AT WHETHER AN INDIVIDUAL IS MALINGERING SIGNIFICANT COGNITIVE DEFICITS. YOU MIGHT SHOW THEM A LETTER "M" AND SAY, WHAT IS THIS? IF THEY SAY IT'S AN "R" THEN YOU'RE GOING TO BE SUSPECT THAT THERE'S SOME MALINGERING THERE.

Q. YOU DID DISCUSS COGNITIVE ISSUES IN THIS CASE, DIDN'T YOU?

A. YES.

Q. BUT YOU SAID YOU DID NOT ADMINISTER ANY KIND OF TEST TO DETERMINE WHETHER THE DEFENDANT WAS MALINGERING; RIGHT?

A. I SAID THERE IS NO APPROPRIATE TEST FOR THIS TYPE OF CONDITION, TO ASSESS MALINGERING.

Q. SO THERE'S NO WAY TO TELL IF SOMEONE IS FAKING IT WHEN WE'RE TALKING ABOUT PTSD, IS THAT WHAT YOU'RE SAYING?

A. I DID MENTION ONE. I THINK YOU COULD ADMINISTER A POLYGRAPH.

Q. BUT YOU DIDN'T DO THAT?

A. I DON'T HAVE THE CAPACITY TO DO THAT. I DON'T HAVE A POLYGRAPH.

Q. IS IT FAIR TO SAY YOU HAVE NO WAY OF TELLING WHETHER THE DEFENDANT IN THIS CASE WAS BEING TRUTHFUL OR NOT WHEN YOU INTERVIEWED HIM?

A. I HAVE NO ABSOLUTE WAY OF CONFIRMING IT.

Q. YOU'RE NOT SAYING THAT THE DEFENDANT IS SUFFERING FROM PTSD LIKE A SOLDIER WHO FOUGHT IN VIETNAM, ARE YOU?

A. HE WASN'T A SOLDIER.

Q. BUT IT'S NOT LIKE THAT, IS IT?

A. IT IS LIKE THAT IN THE SENSE THAT IT IS POST TRAUMATIC STRESS DISORDER AND THE SYMPTOMS ARE SIMILAR.

Q. YOU WERE NOT PRESENT ON OCTOBER 30TH, 2010 ON 6TH STREET IN LOMPOC WHERE THIS INCIDENT WAS ALLEGED TO HAVE TAKEN PLACE; CORRECT?

A. I WAS NOT.

Q. SO YOU HAVE NO WAY OF KNOWING WHAT THE DEFENDANT'S STATE OF MIND WAS ON THAT DATE, DO YOU?

MR. SCOTT: OBJECTION.

THE COURT: IT IS AN IMPROPER QUESTION. SUSTAINED.

BY MR. VERBURGT:

Q. YOU'RE NOT ABLE TO GIVE AN OPINION ON THE DEFENDANT'S STATE OF MIND ON OCTOBER 30TH --

THE COURT: IT'S AN IMPROPER QUESTION. SUSTAINED. I DIRECT THE WITNESS NOT TO ANSWER.

BY MR. VERBURGT:

Q. SO HYPOTHETICALLY, SOMEONE WHO IS DIAGNOSED WITH PTSD, OR LET 'S SAY -- YOU SAY THAT THEY'RE PREDISPOSED TO BE VIOLENT TOWARD MEMBERS OF THEIR FAMILY?

A. I SAID THAT ONE OF THE CRITERIA FOR PTSD IS IRRITABILITY AND ANGRY OUTBURSTS. SO THE CONDITION ITSELF MAY MANIFEST IN THAT WAY.

Q. SO SOMEONE WHO HAS BEEN SEXUALLY ABUSED -- HYPOTHETICALLY SEXUALLY ABUSED AS A KID WOULD BE PREDISPOSED, OR ONLY IF THEY HAVE A DIAGNOSIS WITH PTSD?

A. THEY WOULD NEED THE DIAGNOSIS OF PTSD.

Q. SO SOMEONE WHO HAS PTSD AND HAS AN ANGRY OUTBURST, DO THEY FORGET WHO THEY ARE IN THAT MOMENT?

A. THERE ARE SOME SERIOUS SEVERE CASES OF PTSD WHERE PEOPLE DO HAVE DISSOCIATIVE SYMPTOMS. SO IT'S POSSIBLE.

Q. DID YOU SEE THAT IN THIS CASE?

A. IF THERE WAS FORGETTING IT WAS PROBABLY ALCOHOL INDUCED.

Q. SO, NO, YOU DID NOT SEE THAT DISSOCIATIVE BEHAVIOR IN THIS CASE?

A. NOT AS A RESULT OF THE PTSD.

Q. SO SOMEONE WITH PTSD, CAN THEY HAVE AN EPISODE OR SITUATION WHERE THEY DON'T KNOW WHAT THEY'RE SAYING?

A. YES.

Q. CAN YOU GIVE AN EXAMPLE OF THAT?

A. SURE. AN INDIVIDUAL CAN BE REMINDED OF SOME SERIOUS TRAUMA, THEY'RE SUDDENLY IN AN ALTERED STATE WHERE THEY REALLY ARE CONFUSED ABOUT WHO THEY ARE AND WHERE THEY ARE AND WHAT'S OCCURRING. THEY COULD TALK OR ACT IN A WAY THEY TYPICALLY WOULDN'T.

Q. THE THINGS THAT THEY MAY SAY, WOULD THAT BE RELEVANT TO THAT FLASH-BACK EXPERIENCE RATHER THAN THE

EXPERIENCE THAT THEY'RE CURRENTLY IN?

A. YES.

Q. SO IT WOULD SEEM IF SOMEONE WAS IN THAT KIND OF PTSD FLASH-BACK STATE, THE THINGS THEY ARE SAYING WOULDN'T MAKE SENSE TO THE PEOPLE AROUND THEM GIVEN THE CONTEXT?

A. THEY MAY NOT. THEY MAY BE MORE RELEVANT TO THE TRAUMATIC SITUATION THE INDIVIDUAL EXPERIENCED BEFORE.

Q. IN YOUR REPORT, IN YOUR SUMMARY AND RECOMMENDATIONS, YOU INDICATED THAT HE FEELS GUILTY ABOUT HIS CONDUCT; IS THAT RIGHT?

A. THAT'S RIGHT.

Q. YOU'RE REFERRING TO THE DEFENDANT?

A. YES.

Q. YOU INDICATE IN YOUR REPORT THAT IN MANY WAYS THE DEFENDANT'S LIFE HAS BEEN A PERIOD OF SELF-DESTRUCTIVE BEHAVIOR; IS THAT RIGHT?

A. IT REALLY HAS.

Q. WOULD YOU AGREE THAT THE DEFENDANT HAS MADE POOR CHOICES IN HIS LIFE?

A. YES.

Q. WOULD YOU AGREE THAT THE DEFENDANT IS RESPONSIBLE FOR THOSE POOR CHOICES THAT HE MADE IN HIS LIFE?

A. YES.

Q. YOU TALKED ABOUT ALCOHOLISM IN THIS CASE; RIGHT?

A. I DID, YES.

Q. YOU DISCUSSED -- AS PART OF YOUR EVALUATION OF THE DEFENDANT, DID YOU DISCUSS THE AMOUNT OF ALCOHOL THAT HE CONSUMED ON OCTOBER 30TH, 2010?

A. DID I DISCUSS IT?
Q. YES.
A. YEAH, THERE WERE SEVERAL SHOTS AND I THINK SOME BEER.
Q. WAS THERE A DISCUSSION OVER HOW MUCH TIME THAT WAS CONSUMED?
A. LET ME REFRESH MY MEMORY HERE.
(PAUSE IN PROCEEDING.)
THE WITNESS: I DON'T SEE THE TIME LISTED HERE.
BY MR. VERBURGT:
Q. THERE WAS DISCUSSION AS WELL ABOUT JEALOUSY; CORRECT --
A. RIGHT.
Q. -- IN THIS CASE? SO, HYPOTHETICALLY SPEAKING, SOMEONE WHO IS DIAGNOSED WITH PTSD FROM SEXUAL ABUSE AS A CHILD, HOW WOULD JEALOUSY IN AN ADULT RELATIONSHIP BE A TRIGGER OR FLASH-BACK OF WHAT HAPPENED?
A. AN INDIVIDUAL COULD BE VERY INSECURE ABOUT HIS SEXUALITY. HE QUESTIONED WHETHER HE WAS GAY OR STRAIGHT. HE COULD FEEL THAT HE DIDN'T DESERVE A VERY GOOD PARTNER BECAUSE OF SOME SHAMEFUL THINGS THAT HAPPENED TO HIM YEARS EARLIER; THIS COULD MAKE HIM PERSUASIVELY INSECURE IN A RELATIONSHIP AND JEALOUS.
Q. WOULD YOU AGREE THAT IN ORDER FOR THAT TO HAPPEN THE PERSON WOULD HAVE TO BE ABLE TO PERCEIVE THINGS HAPPENING IN FRONT OF THEM TO BE ABLE TO BECOME JEALOUS?
A. YES.
Q. THEY COULDN'T BE IN SOME ALTERED STATE WHERE THEY

FEEL LIKE THEY'RE IN DISNEYLAND OR SOMETHING? THEY WOULD HAVE TO HAVE THEIR FEET ON THE GROUND AND KNOW WHAT'S GOING ON?

A. I THINK THERE HAS TO BE SOME REALITY IN ORDER FOR THE JEALOUSY TO EMERGE. THEY HAVE TO RECOGNIZE THE PERSON AS A SPOUSE OR MATE.

Q. IS THAT DIFFERENT FROM ANYBODY BECOMING JEALOUS ABOUT THEIR SPOUSE?

A. IT'S OUR SPOUSE OR PARTNER TO BE JEALOUS.

Q. AND SOMEONE WITHOUT IT CAN BOTH BECOME JEALOUS ABOUT SEEING THEIR SPOUSE IN SOME KIND OF INTERACTION WITH ANOTHER PERSON?

A. THE DIFFERENCE IS HOW THEY COPE WITH IT.

Q. "COPING WITH IT" IN TERMS OF --

A. CORRECT.

Q. HOW ABOUT WOULD IT BE FAIR TO SAY THAT SOMEONE WITH PTSD CAN GO INTO A JEALOUS RAGE?

A. SURE.

Q. WOULD THE THINGS THAT THEY SAY IN THAT RAGE BE SIMILAR TO SOMETHING SOMEONE WOULD SAY IN A PTSD STATE?

A. YES.

Q. BOTH SOMEONE WITH PTSD AND WITHOUT BEING IN A JEALOUS RAGE, THEY BOTH WOULD KNOW WHERE THEY ARE AND WHAT'S GOING ON; RIGHT?

A. GENERALLY, YES.

Q. SO WITH THAT IN MIND, YOU INDICATED IN YOUR REPORT UNDER THE "SUMMARY AND RECOMMENDATION," YOU INDICATED MR. MEZZLES COMPLEX EMOTIONAL PROBLEMS APPEAR TO BE MITIGATING FACTORS THAT CAN BE CONSIDERED IN THIS CASE THAT WERE BEYOND

HIS CONTROL AND ATTRIBUTED TO HIS AGGRESSIVE CONDUCT; RIGHT?

A. RIGHT.

Q. HOW IS IT SOMEONE WHO CAN HAVE PTSD, AND WITHOUT, BOTH BE IN A JEALOUS RAGE BASED ON WHAT THEY'RE SAYING, AND YOU SAID BOTH WOULD KNOW WHAT'S GOING ON AND WHERE THEY ARE, HOW DOES THAT TRANSLATE THEN TO SOMETHING BEING BEYOND ONE'S CONTROL?

THE COURT: MR. SCOTT, IS THERE AN OBJECTION?

MR. SCOTT: THERE IS, YES.

THE COURT: THIS WITNESS MAY NOT ANSWER THOSE QUESTIONS. SUSTAINED.

MR. VERBURGT: I'LL REPHRASE, YOUR HONOR.

Q. YOU WROTE THAT IN YOUR REPORT, THAT STATEMENT?

THE COURT: THE JURY IS DIRECTED TO DISREGARD THE LAST QUESTION, THE LAST REFERENCE BY THE PROSECUTOR.

MR. VERBURGT: MAY I APPROACH, YOUR HONOR?

THE COURT: NO. WE'VE MADE THIS CLEAR. I'VE TOLD YOU SEVERAL TIMES, DO NOT GO INTO THAT AREA. NEXT QUESTION.

BY MR. VERBURGT:

Q. DID YOU GIVE AN MMPI OR MULTIPHASIC EXAM IN THIS CASE?

A. NO.

Q. WHY NOT?

A. I DIDN'T THINK IT WAS NECESSARY.

Q. DID YOU CONDUCT ANY KIND OF STANDARDIZED TESTING IN THIS CASE WHEN YOU WERE EVALUATING THE DEFENDANT?

A. NO.

Q. SO DID YOU JUST BASICALLY SIT DOWN WITH THE

DEFENDANT AND DISCUSS HIS BIOGRAPHY?

A. I THINK I SAID WHAT I DID. I BEGAN BY REVIEWING THE FILE. I SPOKE WITH HIM. I READ THE LETTER FROM HIS MOTHER AND I WROTE A REPORT.

(PAUSE IN PROCEEDING.)

BY MR. VERBURGT:

Q. DID YOU REVIEW ANY KIND OF DOCUMENTS THAT INDICATED THE DEFENDANT HAD A DIAGNOSIS OF ALCOHOLISM?

A. NO.

Q. SO YOUR OPINION -- YOUR STATEMENTS WITH REGARD TO HIS ALCOHOLISM ARE JUST BASED ON, AGAIN, YOUR ONE-AND-A-HALF-HOUR INTERVIEW?

A. AND THE FILE, OBVIOUSLY, IT'S MENTIONED IN THE INSTANT OFFENSE.

Q. HAVE YOU WORKED WITH PEOPLE -- THERE WERE QUESTIONS ABOUT LSD AND FLASH-BACKS?

A. YES.

Q. DO YOU HAVE TRAINING AND EXPERIENCE IN THAT AREA, FLASH-BACKS INDUCED BY DRUG ABUSE?

A. SURE.

Q. YOU RECALL THE STATEMENTS -- DURING THE INTERVIEW THE DEFENDANT INDICATED THAT HE USED LSD AT AGE 13?

A. RIGHT.

Q. IS IT POSSIBLE TO HAVE FLASH-BACKS FROM LSD 34 YEARS LATER?

A. POSSIBLE.

Q. LIKELY?

A. DEPENDS ON THE EXTENT OF USAGE AND THE PERSON'S

PSYCHOLOGICAL ADJUSTMENT; IT'S POSSIBLE.

Q. BUT NOT LIKELY?

A. I THINK MY ANSWER STANDS. AGAIN, DEPENDS ON HOW MUCH LSD IS ABUSED, FOR HOW LONG OF A PERIOD OF TIME, AND HOW WELL PUT TOGETHER AN INDIVIDUAL IS. MOST PEOPLE WHO USED LSD IN THE '60S PROBABLY DON'T HAVE FLASH-BACKS.

Q. YOU DIDN'T CONDUCT ANY KIND OF BRAIN SCAN OF THE DEFENDANT; RIGHT?

A. NO BRAIN SCAN.

MR. VERBURGT: NOTHING FURTHER.

THE COURT: MR. SCOTT?

MR. SCOTT: THANK YOU.

REDIRECT EXAMINATION

BY MR. SCOTT:

Q. JUST A COUPLE OF QUESTIONS, DOCTOR, TO FOLLOW UP.

REGARDING MALINGERING, DID YOU SEE ANY INDICATION DURING YOUR INTERVIEW IN JUNE OF 2011 WITH MR. MEZZLES THAT HE HAD COMMITTED TO MEMORY THE SYMPTOMS OF POST TRAUMATIC STRESS DISORDER AND WAS JUST PARROTING THEM BACK TO YOU?

A. NO, IN FACT, I WAS NEVER ASKING SPECIFICALLY, DO YOU HAVE THESE CRITERIA. I WAS JUST INTERVIEWING HIM. I WAS LOOKING FOR THEM, BUT, NO, HE NEVER SPECIFICALLY MENTIONED SYMPTOMS.

Q. AND THE PAPERWORK YOU REVIEWED BEFORE HAVING EXAMINATION, THERE WAS NO DIRECTION AS TO WHAT POSSIBLE DIAGNOSIS -- LET ME REPHRASE IT.

I SENT YOU A LETTER SIMPLY ASKING YOU TO DO AN EVALUATION; RIGHT?

A. RIGHT.

Q. IN MY LETTER DID I SUGGEST TO YOU WHAT DISORDER HE MIGHT HAVE, PLANT SOME SEED IN YOUR MIND?

A. NO.

Q. THINGS THAT MR. MEZZLES DESCRIBED IN THE INTERVIEW, THINGS THAT HE WENT THROUGH IN HIS CHILDHOOD AND LATER IN LIFE, WERE THEY CONSISTENT WITH SOMEONE WITH POST TRAUMATIC STRESS DISORDER?

A. THEY ARE. EVERYTHING WAS CONSISTENT. IT WAS HARD FOR ME TO IMAGINE THIS WAS ALL A CHARADE.

Q. AN INDIVIDUAL WITH POST TRAUMATIC STRESS DISORDER, WHAT WOULD -- I GUESS ONE OF THE MANIFESTATIONS OF POST TRAUMATIC STRESS DISORDER, AS YOU INDICATED, IS ANGRY OUTBURSTS? NOT IN EVERYONE, BUT IN SOME PEOPLE?

A. RIGHT.

Q. DOES IT USUALLY REQUIRE SOME SORT OF STRESSOR TO TRIGGER SUCH AN OUTBURST?

A. IT DOES. A PERSON CAN GENERALLY BE IRRITABLE, BUT IN TERMS OF THE ACTUAL OUTBURST, MANY TIMES THERE ARE STRESSFUL STIMULANTS.

Q. MR. VERBURGT ASKED YOU ABOUT MR. MEZZLES IS RESPONSIBLE FOR HIS POOR CHOICES. DO YOU RECALL THAT?

A. RIGHT.

Q. A PERSON WITH PTSD, I BELIEVE YOU INDICATED THAT THAT CAN IMPAIR, IMPEDE COGNITIVE ABILITIES; CORRECT?

A. IT CAN.

Q. CAN A PERSON WITH PTSD, CAN IT IMPAIR THEIR ABILITY TO MAKE RATIONAL DECISIONS?

A. YES.

Q. CAN IT IMPAIR THEIR ABILITY TO REALIZE CONSEQUENCES OF THEIR ACTIONS AT THE TIME THEY DO IT?

A. YEAH, PARTICULARLY IF THEY'RE LIVING IN THE MOMENT AND AREN'T CONTEMPLATING THE OUTCOME OF THEIR BEHAVIOR.

MR. SCOTT: THANK YOU, SIR. THAT'S ALL I HAVE.

THE COURT: PEOPLE?

MR. VERBURGT: NOTHING FURTHER.

THE COURT: THANK YOU FOR YOUR TIME. YOU ARE EXCUSED.

THE WITNESS: THANK YOU, YOUR HONOR.

THE COURT: I'M NOT SURE HOW LONG THIS BREAK WILL BE, MAYBE 10 OR 15 MINUTES.

PLEASE DO NOT DISCUSS THIS CASE OR FORMULATE ANY OPINION.

(JURY EXITS THE COURTROOM.)

THE COURT: IT IS VERY DIFFICULT I THINK SOMETIMES WHEN WE DEAL WITH THIS KIND OF A WITNESS, BECAUSE IT'S A LIMITED FORMAT.

MR. SCOTT, IN HIS DIRECT EXAMINATION, WAS VERY GOOD AS FAR AS KEEPING IT, I THINK, WITHIN THE LIMITS. THE PERSON SUFFERS FROM POST TRAUMATIC DISTRESS STRESS DISORDER AND GAVE REASONS WHY AND YOUR CONCLUSION WAS THAT IT CAN IMPAIR COGNITIVE ABILITIES AND THAT LEAVES MR. SCOTT FREE TO ARGUE WHETHER THE PERSON WAS ABLE TO FORMULATE THE SPECIFIC INTENT BECAUSE OF ALCOHOL CONSUMPTION AND POST TRAUMATIC

STRESS DISORDER.

THE PEOPLE WENT A LITTLE FAR AFIELD AND THAT'S WHY I HAD TO REIN YOU BACK IN. I APOLOGIZE FOR THAT, BUT I THINK IT WAS NECESSARY TO MAKE IT CLEAR, AFTER NUMEROUS TIMES MENTIONING IT TO YOU, THAT WE REALLY NEED TO KEEP IT FOCUSED AS TO WHAT MR. SCOTT DID IN THE BEGINNING AND, OF COURSE, MR. SCOTT ON HIS REDIRECT I THINK SLIPPED A LITTLE BIT OUT BEYOND THAT WHEN HE TALKED ABOUT CONSEQUENCES AND ABLE TO UNDERSTAND THE CONSEQUENCES OF A DECISION AND RATIONAL DECISIONS, BUT I THINK THAT WAS IN RESPONSE TO SOME OF THE QUESTIONS OF THE PEOPLE THAT CAME IN.

ANY FURTHER COMMENTS ON THAT ISSUE WITH THIS WITNESS?

MR. SCOTT: YES, JUDGE. AT THIS TIME, I MOVE FOR A MISTRIAL BASED UPON MISCONDUCT OF MR. VERBURGT. THE COURT -- WE HAD A SIDEBAR, WE HAD NUMEROUS DISCUSSIONS. I THOUGHT THE COURT MADE IT VERY CLEAR WHAT THE PARAMETERS WERE OF THIS WITNESS TO BE EXAMINED, YET MR. VERBURGT CONTINUED TO CROSS THAT BOUNDARY AND IT GAVE THE JURY THE IMPRESSION THAT THE DEFENSE, BECAUSE WE'RE THE ONES DOING THE OBJECTING, IS HIDING THE TRUTH FROM THEM; THERE'S SOMETHING OUT THERE THAT THEY SHOULD KNOW BUT THEY'RE NOT BEING TOLD BECAUSE I'M OBJECTING AND BEING AN OBSTRUCTIONIST AND THAT'S NOT THE CASE AT ALL. WE WERE TRYING TO KEEP THE QUESTIONING AND ANSWERS WITHIN THE FRAMEWORK OF WHAT THE LAW ALLOWS. I BELIEVE THAT WORKS TO THE PREJUDICE OF MY CLIENT AND I WOULD MOVE FOR MISTRIAL AT THIS TIME.

THE COURT: MR. VERBURGT?

MR. VERBURGT: YES, YOUR HONOR. THE PEOPLE'S QUESTIONING WAS NOT INTENDING TO RUN AFOUL OF THE COURT'S RULING. I UNDERSTOOD YOUR HONOR'S INSTRUCTION AT TRIAL AND AT SIDEBAR AND THAT'S NOT SOMETHING THAT I WAS LOOKING TO RUN AFOUL AND I DON'T THINK I HAVE RUN AFOUL OF THE COURT'S ORDER.

THE PEOPLE'S QUESTIONING WAS DIRECTED SPECIFICALLY WITHIN THE FRAMEWORK OF DR. OWEN'S REPORT, THE BASIS OF HIS OPINION AND ASKING A QUESTION OF THE INVERSE IS NOT THE SAME AS ASKING -- IF HE CAN RENDER AN ULTIMATE OPINION IS NOT THE SAME AS GETTING HIM TO ACKNOWLEDGE THE LIMITS OF HIS TESTIMONY OR OPINION. THAT TYPE OF QUESTIONING DOES NOT RISE TO THE LEVEL OF MISCONDUCT, JUST HAVING A WITNESS ACKNOWLEDGE HIS OWN LIMITATIONS.

MY QUESTIONS DID NOT ALLUDE TO ANYTHING. MY QUESTIONS WERE SUSTAINED. THE COURT ADMONISHED ME IN FRONT OF THE ENTIRE JURY THAT MY QUESTIONS WERE IMPROPERLY FORMULATED AND I ATTEMPTED TO, IN GOOD FAITH, REFORMULATE THOSE QUESTIONS, BUT APPARENTLY WAS UNSUCCESSFUL IN THE EYES OF THE COURT AND I RESPECT THE COURT'S RULING. THAT DOES NOT MEAN THAT THE PEOPLE WERE TRYING TO SOMEHOW UTILIZE SOME KIND OF INDIRECT MANNER IN ALTERING THE PERCEPTION OF THE DEFENDANT OR DEFENSE COUNSEL BY THE JURY THAT THERE WAS SOMETHING ELSE HIDDEN OR GOING ON.

THE COURT: I'LL GIVE YOU A LAST CHANCE, MR. SCOTT, BUT --

MR. SCOTT: I'LL SUBMIT.

THE COURT: I TEND TO AGREE WITH MR. VERBURGT AND THE PEOPLE. I THINK -- THE QUESTIONS, I THINK, IF ANYTHING --

IF THEY TEND TO HURT THE ANYONE, TEND TO HURT THE PEOPLE. I ADMONISHED HIM IN FRONT OF THE JURY AND I THINK THAT IS SUFFICIENT TO CURE ANYTHING THAT MIGHT HAVE BEEN DETRIMENTAL TO THE DEFENSE. SO YOUR REQUEST FOR MISTRIAL IS DENIED.

MR. SCOTT: I THINK THE NEXT ORDER OF BUSINESS BEFORE YOU BRING THE JURY BACK IS WE WERE TO FORMULATE A STIPULATION REGARDING A FEW THINGS. THE FIRST WAS A STIPULATION -- THE COURT'S LANGUAGE IS BETTER THAN I COULD COME UP WITH -- REGARDING THE USE OF THE TRANSCRIPTS FOR PRELIMINARY HEARING.

THE COURT: DID YOU WRITE THAT DOWN?

MR. SCOTT: I DIDN'T. I WISH I HAD, BUT THE REPORTER DID.

THE COURT: I'LL ASK THE REPORTER, CAN YOU LOOK BACK?

THE REPORTER: SURE.

(PAUSE IN PROCEEDING.)

THE COURT: IT SOUNDED BETTER EARLIER BEFORE I HAD IT READ BACK.

I SAID DURING THE TESTIMONY OF THE WITNESSES, THERE WAS A REFERENCE TO THE TRANSCRIPT FROM THE PRELIMINARY HEARING; THAT'S HOW WE START OFF.

MR. SCOTT: YES, I WOULD PROPOSE THE FOLLOWING STIPULATION BY THE PEOPLE AND THE DEFENSE THAT DURING THE TRIAL, VARIOUS WITNESSES WERE EXAMINED REGARDING TESTIMONY AT THE PRELIMINARY HEARING. FOR YOUR PURPOSES, YOU ARE TO ASSUME THAT THE QUESTIONS AND ANSWERS ASKED OF THE WITNESSES WERE TRUE AND ACCURATE.

APPENDIX I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF SANTA BARBARA

***

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF-RESPONDENT,

-VS-

WAYNE MEZZLES,

DEFENDANT-APPELLANT.

NO._____

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 20, 2011, JANUARY 23, 24, 25, 27, 30, 31, FEBRUARY 1, 2, 7 & MARCH 20, 2012

APPEARANCES OF COUNSEL:

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REPORTED BY: CORRY LYNN COBB, CSR NO. 11762, AND JOYCE L. GOBLE, CSR NO. 6976

VOLUME III OF III VOLUMES
PAGES 450 THROUGH 622, INCLUSIVE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA BRANCH; MILLER STREET DIVISION

***

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -VS- WAYNE MEZZLES, DEFENDANT.	CASE NO. 1359458

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 31, FEBRUARY 1, FEBRUARY 2,

FEBRUARY 7 AND MARCH 20, 2012

APPEARANCES OF COUNSEL:

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REPORTED BY: CORRY LYNN COBB, CSR NO. 11762, AND
JOYCE L. GOBLE, CSR NO. 6976

OF THE GREATER CRIME AND YOU ALSO AGREE THAT THE PEOPLE HAVE PROVED BEYOND A REASONABLE DOUBT THAT HE IS GUILTY OF THE LESSER CRIME, COMPLETE AND SIGN THE VERDICT FORM FOR NOT GUILTY OF THE GREATER CRIME AND A VERDICT FORM FOR GUILTY FOR THE LESSER CRIME.

IF ALL OF YOU AGREE THAT THE PEOPLE HAVE NOT PROVEN BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF THE GREATER CRIME OR LESSER CRIME, COMPLETE AND SIGN THE VERDICT FORM FOR NOT GUILTY OF THE GREATER CRIME AND THE VERDICT FORM FOR NOT GUILTY OF THE LESSER CRIME.

IF ALL OF YOU AGREE THAT THE PEOPLE HAVE NOT PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS NOT GUILTY OF THE GREATER CRIME, BUT YOU CANNOT AGREE AS TO THE LESSER CRIME, COMPLETE AND SIGN THE VERDICT FORM OF NOT GUILTY TO THE GREATER CRIME AND INFORM ME ONLY THAT YOU CANNOT REACH AN AGREEMENT WITH ABOUT THE LESSER CRIME.

MR. VERBURGT?

MR. VERBURGT: THANK YOU, YOUR HONOR.

GOOD MORNING, LADIES AND GENTLEMEN. THANK YOU ALL FOR YOUR TIME AND ATTENTION.

YOU'VE HEARD THIS CASE, THE EVIDENCE, NUMEROUS WITNESSES, PHOTOGRAPHS, AND NOW IN DECIDING GUILT ON THESE COUNTS, YOU NEED TO FOCUS ON THE FACTS; EYEWITNESS OBSERVATIONS, THE PHOTOS OF THE INJURIES, THE DEFENSE STATEMENTS AND DEFENDANT'S HISTORY OF MAKING THREATS.

HERE'S THE EVIDENCE THAT WAS PRESENTED IN THIS CASE BY THE PEOPLE. THE TESTIMONY OF THE EYEWITNESSES WHO WERE THERE ON OCTOBER 30TH, 2010, LAURA MEZZLES, AMY SCHWIND,

WILL WILLIAMS, CORY STEPHENS. THEN AFTER THE POLICE ARRIVED, OFFICER XIONG, OFFICER MARTIN AND THEN YOU HEARD FROM THE VICTIM IN A PRIOR CASE, STACY WOLFORD, AND THEN YOU ALSO HEARD FROM INVESTIGATOR TANORE AND SOME OF THE CONSISTENT STATEMENTS THAT SHE FOUND -- PRESENTATION OF STATEMENTS THAT SHE FOUND FROM WITNESSES DURING THE COURSE OF THIS INVESTIGATION.

IN ADDITION, THERE WERE PHOTOGRAPHS THAT WERE IDENTIFIED BY THE WITNESSES WHO TESTIFIED AS TO WHAT THEIR INJURIES WERE, WHEN THEY OCCURRED, WHAT THEY LOOKED LIKE THE DAY OFF AND A FEW DAYS LATER. PHOTOGRAPHS OF BRASS KNUCKLES, THE ACTUAL BRASS KNUCKLES THAT OFFICER MARTIN TOOK OUT OF THE EVIDENCE BAG AND SHOWED HERE IN COURT, THE ONES THAT HE FOUND IN THE DEFENDANT'S POCKET; THAT'S THE TYPE OF EVIDENCE THAT WE'RE SEEING HERE.

YOU HEARD A VOICE RECORDING, VOICEMAIL FROM STACY LEROY BACK IN 2007, THAT DISK IS IN EVIDENCE; THAT'S SOMETHING THAT CAN BE LISTENED TO.

WE'RE GOING TO EXAMINE THEM, GO THROUGH EACH OF -- THE ELEMENTS OF EACH OF THE COUNTS AND MATCH THEM UP WITH THE EVIDENCE THAT WAS PRESENTED IN THIS CASE.

HERE ARE THE CRIMES THAT ARE CHARGED, EIGHT CRIMES, AND THEY'RE RIGHT HERE. COUNT 1 IS CORPORAL INJURY TO A SPOUSE AND THE JUDGE JUST READ THE JURY INSTRUCTION FOR THAT, AS WELL AS THE LESSER-INCLUDED OFFENSE OF BATTERY ON A SPOUSE. THEN THERE'S ASSAULT WITH A DEADLY WEAPON ON AMY SCHWIND UTILIZING THE BRASS KNUCKLES. CRIMINAL THREATS AGAINST LAURA MEZZLES; CRIMINAL THREATS AGAINST AMY SCHWIND, IN THREE SEPARATE INSTANCES, AND WE'LL GO THROUGH EACH ONE OF

THOSE. THEN COUNT 8, THE POSSESSION OF A DEADLY WEAPON AND THAT'S THE BRASS KNUCKLES AGAIN FOUND IN THE DEFENDANT'S POCKET, WITNESSES TESTIFIED THAT HE HAD IT ON HIM DURING THIS WHOLE ORDEAL AND THEN SIMPLE ASSAULT AGAINST WILLIAM WILLIAMS. LET'S GO THROUGH EACH ONE OF THESE AND TAKE A LOOK AT THE EVIDENCE.

WHEN WE'RE GOING TO TAKE A LOOK AT EACH OF THESE COUNTS, LET'S TALK A LITTLE BIT -- I'LL GIVE YOU AN INTRODUCTION AS TO THE MENTAL STATE. YOU'VE GOT INJURY INSTRUCTIONS ON THIS, JURY INSTRUCTION 252, TALKING A BIT ABOUT THE GENERAL INTENT AND SPECIFIC INTENT AND THE DIFFERENCES.

GENERAL INTENT IS WHEN YOU INTEND TO DO SOMETHING. YOU HAVE TO INTEND TO SWING YOUR ARM OR KICK YOUR LEG. YOU DON'T HAVE TO HAVE A MENTAL STATE OF ACHIEVING SOMETHING BEYOND THAT ACTION; THAT'S GENERAL INTENT. THE CRIMES CHARGED IN THIS CASE THAT ARE GENERAL INTENT CRIMES ARE COUNT 1, CORPORAL INJURY TO A SPOUSE AND IT'S LESSER-INCLUDED, AND ASSAULT WITH A DEADLY WEAPON AGAINST AMY SCHWIND, IN COUNT 2, POSSESSION OF THE BRASS KNUCKLES AND SIMPLE ASSAULT OF WILL WILLIAMS; THOSE ARE GENERAL INTENT CRIMES. WE'LL GO THROUGH THAT DEFINITION.

THEY'RE NOT SPECIFIC INTENT CRIMES, THE WAY THAT CRIMINAL THREATS ARE. AN EXAMPLE OF SPECIFIC INTENT IS BURGLARY -- THAT'S NOT SOMETHING CHARGED IN THIS CASE -- BUT AS AN EXAMPLE, BURGLARY IS WHEN SOMEONE DOES TWO THINGS, ENTERS A ROOM, THAT'S THE ACTION AND THEN WHEN THEY ENTER THE ROOM, WHAT'S GOING ON UP HERE (INDICATING)? WHAT THEY MEAN TO

DO WHEN THEY ENTER, EITHER STEAL SOMETHING OR COMMIT A FELONY; THAT REQUIRES TWO THINGS, NOT ONLY DO THEY HAVE TO ENTER THE ROOM, BUT THEY HAVE TO HAVE A MENTAL STATE. THAT'S WHAT SPECIFIC INTENT IS. WE'RE GOING TO SEE THAT OVER AND OVER AS I GO THROUGH EACH OF THE COUNTS, BUT I WANTED TO GIVE YOU A BIT OF AN INSTRUCTION SO YOU'RE NOT SITTING THERE WONDERING WHAT DOES HE MEAN BY GENERAL AND SPECIFIC INTENT.

THE REASON THAT I'M BRINGING IT UP AND PUTTING IT IN CONTEXT, IS THAT HEARD SOME OF THE DEFENSES IN THIS CASE -- WE'LL GET TO THEM IN MORE DETAIL -- THE CLAIMED DEFENSE OF VOLUNTARY INTOXICATION AND THEN THE POST TRAUMATIC STRESS DISORDER, ABBREVIATED AS PTSD, AND THOSE ONLY APPLY TO SPECIFIC INTENT CRIMES, LIKE CRIMINAL THREATS, VIOLATION OF PENAL CODE 422, WHICH ARE CHARGED IN COUNTS 3 THROUGH 6. SO WE'LL GO THROUGH EACH ONE OF THOSE.

THE DEFENDANT, WITH REGARD TO SPECIFIC INTENT, WAS CAPABLE OF FORMULATING THAT INTENT. WE DON'T HAVE A CASE HERE WHERE WE HAVE A DOCTOR COMING IN SAYING, LOOK, THIS PERSON HAS PTSD BASED ON MY HOUR-AND-A-HALF INTERVIEW. IT'S NOT ENOUGH TO SIMPLY BE DIAGNOSED WITH IT; IT HAS TO RISE TO A LEVEL THAT MAKES YOU INCAPABLE OF FORMING THAT SPECIFIC INTENT WHEN YOU DO SOMETHING. MERELY HAVING PTSD AND DRINKING ALCOHOL IS NOT ENOUGH.

THIS IS NOT A SITUATION WHERE YOU WOULD THINK -- WHERE IT RISES TO THE LEVEL OF NEGATING OR CANCELLING OUT OR MAKING SOMEONE INCAPABLE OF HAVING THAT SPECIFIC INTENT. IT IS NOT A VIETNAM FLASHBACK SITUATION, THAT PEOPLE IMAGINE WHERE THE WAR VETERAN IS LYING IN HIS BED AT NIGHT AND HAS A

NIGHTMARE OR FLASHBACK THAT HE'S BACK ON THE BATTLEFIELD AND FIGHTING THE VIETCONG, HE'S PUNCHING AND KICKING AND IN THE MIDST OF COMBAT IN HIS MIND, BUT HE'S ACTUALLY LYING NEXT TO HIS WIFE AND SHE GETS PUMMELED BY HIS FISTS; THAT'S SOMETHING WHERE YOU DON'T KNOW WHERE YOU ARE, YOU THINK YOU'RE SOMEWHERE ELSE. YOU THINK THAT YOU'RE BACK IN THAT TRAUMATIC SITUATION THAT GAVE YOU THAT POST TRAUMATIC STRESS CONDITION, RATHER THAN PERCEIVING THE EVENTS AS THEY HAPPENED, HAVING REACTIONS THE WAY THAT PEOPLE WITHOUT PTSD WOULD HAVE THEM; GETTING JEALOUS, GETTING ANGRY. IT NEEDS TO RISE TO THE LEVEL IN ORDER TO BE ABLE TO NEGATE THAT AND THAT'S NOT WHAT WE'VE SEEN HERE.

THERE'S NO NEXUS BETWEEN BEING MOLESTED AS A CHILD AND DOMESTIC VIOLENCE AS AN ADULT. DR. OWEN CONCEDED THERE'S NO STUDIES THAT CORRELATE THOSE THINGS. WE HAVEN'T SEEN EVIDENCE THAT ACTUALLY SHOWS THAT THE DEFENDANT, ASSUMING THAT HE HAS THAT CONDITION, RISES TO THAT LEVEL. WE'LL COME BACK TO THAT. HISTORICALLY, THE DEFENDANT'S MOTHER SAID SHE'S NEVER SEEN THE DEFENDANT DRINK TO THE POINT WHERE HE DOES NOT KNOW WHERE HE IS OR WHAT'S GOING. SHE SAID, HE CRIES AND GETS SAD, BUT IT'S NOT LIKE HE DOESN'T KNOW WHERE HE IS.

THEN WE HEARD THE TESTIMONY FROM WITNESSES ON OCTOBER 30TH, 2010, THE DEFENDANT DID NOT DRINK TO THE POINT OF EVEN HAVING SLURRED SPEECH. THE OFFICERS, WHO ARE TRAINED TO IDENTIFY PUBLIC INTOXICATION, SAID, WELL, LOOK, HE'D BEEN DRINKING, WE COULD SMELL IT, BUT HE DIDN'T HAVE SLURRED SPEECH AND HE WAS ABLE TO WALK UNDER HIS OWN POWER. I WANTED TO GIVE THAT INTRODUCTION.

COUNT 1, CORPORAL INJURY TO A SPOUSE; THIS IS A GENERAL INTENT CRIME. YOU JUST NEED TO DO THE ACT, NOT HAVE SOME OTHER MENTAL STATE WHEN YOU DO IT.

NOW, THE DEFENDANT HAS TO HAVE WILLFULLY INFLICTED PHYSICAL INJURY ON HIS SPOUSE. WE'RE TALKING ABOUT LAURA MEZZLES HERE. IT HAS TO BE INJURY AND THE PERSON HAS TO BE A SPOUSE. WE HEARD TESTIMONY FROM LAURA MEZZLES AS TO BOTH. THEN THE INJURY INFLICTED HAS TO RESULT IN A TRAUMATIC CONDITION, WILLFULLY.

GOING BACK TO THE SPECIFIC INTENT, SOMEONE COMMITS AN ACT WILLFULLY WHEN THEY DO IT WILLINGLY OR ON PURPOSE. TRAUMATIC CONDITION IS ALSO DEFINED IN THE JURY INSTRUCTION, IT'S RIGHT THERE, WOUND OR OTHER BODILY INJURY, WHETHER MINOR OR SERIOUS, CAUSED BY THE DIRECT APPLICATION OF PHYSICAL FORCE. TRAUMATIC CONDITION, INJURY AND WE'VE GOT PHOTOS OF LAURA MEZZLES, WHICH ARE EXHIBITS ENTERED INTO EVIDENCE; THAT'S PROOF THAT THE INJURY OCCURRED.

THEN THE LESSER-INCLUDED BATTERY REQUIRES THAT THERE WAS A TOUCHING, BUT THERE DOESN'T NEED TO BE INJURY AND THAT LAURA MEZZLES IS THE DEFENDANT'S SPOUSE, AND WE HEARD TESTIMONY TO BOTH OF THAT. SO THAT'S THE MAIN DIFFERENCE, BUT, OBVIOUSLY -- WE'LL GET TO IT -- THERE WERE PHOTOGRAPHS OF INJURIES.

NOW, LAURA MEZZLES; SHE TESTIFIED THAT THE DEFENDANT THREW HER AGAINST A DRESSER, GRABBED HER BY HER HAIR, THREW HER AGAINST A DRESSER CAUSING THAT BLACK EYE THAT BECAME WORSE AFTER A FEW DAYS AND WAS PHOTOGRAPHED AGAIN. HE THREATENED TO KILL HER AND BURN THE HOUSE DOWN DURING THIS AND

HE HIT AND KICKED HER ON THE GROUND, WHILE SHE AND AMY WERE ON THE GROUND PROTECTING EACH OTHER AND HE WAS STRIKING THEM BOTH; THAT'S WHAT SHE TESTIFIED TO. HERE'S THE PHOTOGRAPH THAT WAS ENTERED INTO EVIDENCE, ASKED ABOUT. IT'S KIND OF HARD TO SEE AT THIS ANGLE, BUT WE'RE TALKING ABOUT THE LEFT EYE. THERE'S THE CLOSE-UP OF THE DAY OF THE OFFENSE, THESE TWO PHOTOGRAPHS, OF HER EYE. SHE TESTIFIED THAT THE DEFENDANT THREW HER INTO THE DRESSER AND THAT'S HOW SHE GOT THAT; HER GLASSES CAME OFF. THEN WE HAVE, A FEW DAYS LATER, THE BLACK EYE GETS WORSE AND WE SEE THE INJURY.

SHE TESTIFIED SHE'D BEEN MARRIED TO THE DEFENDANT FOR TWO YEARS, HUSBAND/WIFE, SPOUSES; THAT ELEMENT IS MET. WE HAVE BEFORE YOU IN PHOTOGRAPHIC EVIDENCE TAKEN BY THE POLICE OFFICERS; THAT INJURY DID OCCUR. A BLACK EYE; IT WOULD BE A MINOR OR SERIOUS INJURY AS DEFINED UNDER THAT JURY INSTRUCTION FOR TRAUMATIC CONDITION. SO WE HAVE THOSE ELEMENTS MET.

I'M GOING TO SKIP TO COUNT 3 BECAUSE WE'RE TALKING ABOUT LAURA MEZZLES HERE AND HER TESTIMONY. WE'LL COME BACK TO COUNT 2, BUT THE ELEMENT HERE IS BEFORE YOU. THIS IS ONE OF THE SPECIFIC INTENT CRIMES THAT WE WERE TALKING ABOUT. THE DEFENDANT WILLFULLY THREATENED TO UNLAWFULLY KILL OR UNLAWFULLY CAUSE GREAT BODILY INJURY TO LAURA MEZZLES. HE THREATENED TO KILL HER, HE THREATENED TO BURN HER HOUSE DOWN. HE SAID IT MULTIPLE TIMES.

IT WAS A LONG ORDEAL, 15, 20, 30 MINUTES, DEPENDING ON THE WITNESS, BUT IT WAS A LENGTH OF TIME WHERE THIS WAS HAPPENING; THE ASSAULT WAS HAPPENING. THE DEFENDANT WAS STRIKING LAURA MEZZLES, THROWING HER AGAINST A DRESSER,

THREATENING TO KILL HER, THREATENING TO BURN THE HOUSE DOWN. THE THREAT WAS MADE ORALLY. OBVIOUSLY, HE SPOKE THE THREAT AND HE INTENDED IT BE UNDERSTOOD AS ONE. HE WAS ANGRY; HE WAS EXPRESSING THAT ANGER. HE WAS STRIKING HER AT THE SAME TIME. THIS WAS OBVIOUSLY NOT SOME KIND OF LIGHT-HEARTED STATEMENT. THIS WAS SOMETHING THAT HE INTENDED TO CAUSE FEAR, TO EXPRESS HIS ANGER AT HER. THE THREAT WAS SO CLEAR AND IMMEDIATE AND UNCONDITIONAL THAT IT WOULD CAUSE LAURA MEZZLES SERIOUS INTENTION AND IMMEDIATE PROSPECT THAT SHE WOULD BE -- THE THREATS ARE BEING MADE AS HE'S ATTACKING HER. SO, OBVIOUSLY, IT'S IMMEDIATE AND CLEAR.

THE THREATS CAUSED LAURA MEZZLES TO BE IN SUSTAINED FEAR OF HER SAFETY. SHE SAID SHE WAS SCARED. SHE SAID THIS WAS A THING THAT HAPPENED OVER A PERIOD OF TIME THAT EVENING. THE DEFENDANT GOT ANGRY, CAME IN, MADE THREATS, ATTACKED HER, THREW HER AGAINST THE DRESSER, ATTACKED HER AGAIN IN THE BEDROOM, KICKING AND HITTING HER ON THE GROUND. SOMEONE, OBVIOUSLY, IN THAT SITUATION BEING FEARFUL OF THOSE THREATS, IT WOULD BE REASONABLE UNDER THE CIRCUMSTANCES.

SO THERE IT IS AGAIN, WHAT WE JUST TALKED ABOUT. IT WAS MULTIPLE THREATS. NOW, THIS IS A CONTINUOUS COURSE OF CONDUCT, THERE WERE MULTIPLE THREATS MADE BY THE DEFENDANT. SHE SAID IT WAS 10, 20 TIMES, I'M GOING TO KILL YOU, I'M GOING TO BURN THE HOUSE DOWN. HE KEPT DOING IT AS THIS ATTACK WAS HAPPENING. IT WAS OVERHEARD BY AMY. IT WAS OVERHEARD BY WILL WILLIAMS IN THE NEXT ROOM. HE HEARD THE THREATS HAPPENING IN THE NEXT ROOM.

LET'S TALK A BIT ABOUT HER DEMEANOR ON THE STAND.

SHE WAS CLEARLY ANGRY. SHE WAS SOMEONE WHO HAS BEEN THROUGH THIS ORDEAL BACK ON OCTOBER 30TH, 2010. SHE'S GONE THROUGH A RANGE OF EMOTIONS, AS WOULD BE EXPECTED. TWO YEARS MARRIED TO THE DEFENDANT. THINGS ARE GOING FINE AND THEN THIS HAPPENS ON OCTOBER 30TH, 2010. THEN NOW YOU'RE SITTING HERE IN TRIAL IN JANUARY OF 2012 TALKING TO A ROOMFUL OF PEOPLE THAT YOU DON'T KNOW ABOUT WHAT HAPPENED. SHE'S ANGRY ABOUT WHAT HAPPENED TO HER, WHAT HAPPENED TO HER DAUGHTER AND THAT CAME THROUGH; THAT'S SOMETHING THAT YOU WOULD EXPECT FROM SOMEONE HAVING GONE THROUGH THIS.

SHE ALSO INDICATED THAT AT FIRST SHE ASKED FOR LENIENCY, SHE WROTE LETTERS. THEN WHEN SHE CAME IN LAST WEEK, SHE WAS -- SHE SAID SHE WANTED A DIVORCE. SHE DIDN'T WANT TO HAVING ANYTHING TO DO WITH THE DEFENDANT ANYMORE. THIS IS THE RANGE OF EMOTIONS YOU WOULD EXPECT. YOU MAY BE THINKING, NOW SHE'S BIASED, NOW SHE WANTS A DIVORCE, NOW SHE'S IN HERE FOR HER OWN AGENDA. WHAT WE HAVE TO DO, ASSUMING THAT YOU FEEL THIS WAY -- MAYBE SOME OF YOU DO -- LOOK AT THE CORROBORATING EVIDENCE. THE PHOTOGRAPHS SHOW THE INJURY. SHE DIDN'T FAKE AN INJURY; THEY WERE ACTUAL INJURIES THAT OCCURRED. THEY WERE NOT PRESENT ACCORDING TO THE OTHER WITNESSES AND HER BEFORE THIS ORDEAL. THEN THEY WERE PHOTOGRAPHED AND DOCUMENTED BY THE POLICE WHO RESPONDED TO THE 911 CALL AND THEN WE HEARD TESTIMONY OF OTHER WITNESSES.

HERE'S A LITTLE CHART I MADE WITH REGARD TO LOOKING AT CORROBORATION. THE DEFENDANT THREW HER INTO THE DRESSER -- LAURA MEZZLES INTO THE DRESSER. PHOTOGRAPHS AGAIN. BLACK EYE, BRUISING ON THE ARMS, ON THE HIP, STATEMENT OF HER

DAUGHTER AMY AS TO WHAT HAPPENED. THE DEFENDANT THREATENED TO KILL HER. AMY HEARD THE THREATS; WILLIAM HEARD THE THREATS. THEN YOU CAN CONSIDER EVIDENCE OF DEFENDANT'S PRIOR CONDUCT, 2007, IN A GIRLFRIEND/BOYFRIEND RELATIONSHIP WITH STACY LEROY; YOU HEARD THE RECORDING YOURSELF. HE THREATENED TO SLIT HER THROAT. THIS IS SOMETHING HE'S CAPABLE OF, THIS IS SOMETHING HE'S DONE BEFORE. HE GETS IN A RELATIONSHIP, HE GETS ANGRY, AND THIS IS HOW HE TRIES TO RESOLVE THE SITUATION, BY THREATENING TO KILL SOMEBODY. SO THAT'S WHAT YOU NEED TO LOOK FOR. WHEN YOU'RE EXAMINING LAURA MEZZLE'S TESTIMONY YOU CAN ACCEPT, MAYBE SHE'S BITTER, MAYBE SHE'S ANGRY, BUT, LOOK, WE HAVE OTHER EVIDENCE THAT SHOWS THAT WHAT SHE CAME IN HERE AND SAID HAPPENED.

LET'S GO BACK TO COUNT 2, ASSAULT WITH A DEADLY WEAPON. THIS IS AGAINST AMY SCHWIND, THE DEFENDANT'S STEPDAUGHTER, DAUGHTER OF LAURA MEZZLES. SHE WAS 15 AT THE TIME. THIS IS ONE OF THOSE GENERAL INTENT CRIMES. AGAIN, THIS IS SOMEONE THAT YOU HAVE TO INTEND TO DO THE ACTION. YOU DON'T HAVE TO HAVE THAT OTHER MENTAL STATE. WE'RE NOT TALKING ABOUT PTSD. HERE ARE THE ELEMENTS (INDICATING); THEY'RE RIGHT THERE. IT'S A LOT OF INFORMATION, IT'S A BLOCK OF TYPE, BUT THIS IS -- THIS WILL BE IN A JURY INSTRUCTION AS WELL. LET'S GO THROUGH EACH ONE OF THESE ELEMENTS.

THE DEADLY WEAPON. OBVIOUSLY, THE BRASS KNUCKLES. WHO WAS IT USED AGAINST? AMY SCHWIND. SHE TESTIFIED TO THAT IN COURT. THE DEFENDANT DID IT WILLFULLY. SHE JUMPED IN BETWEEN HIM, THE DEFENDANT, AND HER MOTHER TO PREVENT HER FROM BEING INJURED AND SHE GOT INVOLVED AND WAS ASSAULTED BY THE

DEFENDANT USING THOSE BRASS KNUCKLES. YOU HEARD -- LET'S FINISH WITH THE ELEMENTS, THEN I'LL GET TO THE EVIDENCE.

WHEN THE DEFENDANT ACTUALLY WAS AWARE THAT HE -- A REASONABLE PERSON TO REALIZE THAT HIS ACT, BY ITS NATURE, WOULD DIRECTLY AND PROBABLY RESULT IN THE APPLICATION OF FORCE. YOU HAVE THE BRASS KNUCKLES AND YOU'RE SWINGING AT A 15-YEAR-OLD, YES. A REASONABLE PERSON WOULD SAY, YES, THAT'S GOING TO INJURE SOMEONE.

WHEN THE DEFENDANT ACTED, HE HAD THE PRESENT ABILITY TO APPLY FORCE WITH A DEADLY WEAPON TO A PERSON; YES. HE WAS ABLE-BODIED AND HE WAS ABLE TO SWING. THIS WASN'T AN INVOLUNTARY FLAILING; HE MEANT TO DO IT.

REASONABLE PERSON STANDARD; THAT'S SOMETHING THAT WAS JUST EMBEDDED IN ONE OF THE ELEMENTS OF THIS CRIME; THAT WHEN -- THAT'S THE STANDARD THAT YOU NEED TO APPLY. WOULD A REASONABLE PERSON ON THE STREET, THAT'S THE STANDARD. WOULD THEY THINK THAT SOMEBODY WHO PUTS ON BRASS KNUCKLES AND SWINGS AT A PERSON IS GOING TO CAUSE INJURY.

ACTUAL TOUCHING IS NOT REQUIRED. THERE WERE SOME QUESTIONS FROM DEFENSE COUNSEL THAT AMY SCHWIND SAYS -- HE SAID SHE DIDN'T FEEL IT. SHE SAID, LOOK, SOME OF THE HITS WERE HARDER THAN OTHERS. YOU CAN CHOOSE TO ACCEPT THAT AS TESTIMONY OR NOT. YOU KNOW WHAT? IT'S NOT EVEN REQUIRED FOR THIS CRIME. CONTACT IS NOT REQUIRED. THE FACT THAT THE DEFENDANT WAS COMING AT LAURA MEZZLES AND AMY SCHWIND, THEY WERE ON THE GROUND, SHE LOOKED UP AND SAYS, MOM, HE'S GOT BRASS KNUCKLES. THEN THEY FEEL STRIKES; THAT'S ENOUGH. LET'S SAY HE MISSED EVERY TIME, IT DOESN'T MATTER. THERE DOESN'T

HAVE TO BE INJURY, DOESN'T HAVE TO BE ACTUAL TOUCHING. THE FACT THAT THERE WERE INJURIES IS SOMETHING YOU CAN CONSIDER THAT GOES TO THE WEIGHT THAT IT ACTUALLY HAPPENED, BUT IT'S NOT REQUIRED.

THEN JUST TO COVER BRIEFLY THE ELEMENTS OF SIMPLE ASSAULT. WE'LL COME BACK TO THIS BECAUSE IT'S COUNT 9, BUT THIS IS A LESSER-INCLUDED OFFENSE OF ASSAULT WITH A DEADLY WEAPON. THE ONLY DIFFERENCE REALLY IS THAT YOU DON'T HAVE TO HAVE A DEADLY WEAPON.

LET'S TAKE A LOOK AT THE EVIDENCE. THE DEFENDANT HAD POSSESSION OF THE BRASS KNUCKLES, WHICH ARE A DEADLY WEAPON. HE WAS SEEN BY AMY, CORY AND WILLIAM EARLY ON IN THE ORDEAL. CORY AND WILLIAM BOTH SAID HE CAME IN AND HAD THEM ON; THIS IS AT THE BEGINNING. REMEMBER, CORY LEFT, HE LEFT EARLY ON BEFORE THE MAJORITY OF ALL THIS HAPPENED AND HE SAW THE BRASS KNUCKLES; THEY CAME OUT EARLY ON. THEN AMY TESTIFIED WHEN SHE WAS DOWN ON THE GROUND, TRYING TO PROTECT HER MOM, SHE LOOKED UP AND SAW THE BRASS KNUCKLES WERE ON THE DEFENDANT'S HAND.

THEN LATER ON, WHEN THE POLICE ARRIVED, THEY WERE FOUND IN THE DEFENDANT'S LEFT FRONT POCKET. SO HE STILL HAD THEM FROM THE BEGINNING TO THE END OF THIS WHOLE SITUATION.

WHEN THE OFFICERS RESPONDED, THEY FOUND LAURA AND AMY BOTH IN THE BEDROOM, THEIR PATH BLOCKED TO EXIT BY THE DEFENDANT. THEIR POSITIONING CORROBORATES WHAT HAPPENED, THEIR STORY THAT THEY WERE ON THE GROUND THERE, THAT THEY WERE TRAPPED BY THE DEFENDANT. AGAIN, THERE'S NO INJURY REQUIRED, BUT AS WE SAW THERE WERE INJURIES AND THERE'S PHOTOGRAPHS THAT

FOLLOW THAT DOCUMENT THAT. AMY TESTIFIED THAT SHE DID HAVE INJURIES AS A RESULT OF THIS WHOLE THING. THERE'S A PICTURE THAT'S FROM AFAR AND THEN WE GET A CLOSE-UP. IT'S HARD TO SEE ON THE PHOTOGRAPH. SHE INDICATED THAT HER LEFT ARM HAD BEEN INJURED AND THAT SHE HAD BUMPS ON HER HEAD AND I GUESS THEY DON'T SHOW UP IN THE PHOTOGRAPH, BUT, AGAIN, THIS COUNT IS A GENERAL INTENT CRIME, AND AGAIN THIS COUNT DOES NOT REQUIRE INJURY, DOESN'T EVEN REQUIRE TOUCHING, BUT THE FACT THAT SHE REPORTED INJURIES GOES TO THE WEIGHT. THE FACT THAT SHE SAID IT ACTUALLY HAPPENED.

LET'S TALK ABOUT AMY'S TESTIMONY. SHE TESTIFIED AT THE JURY TRIAL THAT SHE FELT THE DEFENDANT HIT HER MANY TIMES. SHE TESTIFIED THAT SOME HITS WERE HARDER THAN OTHERS. ONE HIT IS A FIST, ONE IS A FIST WITH BRASS KNUCKLES. SHE TESTIFIED THAT SHE LOOKED UP AND SAW THEM; MOM, HE'S GOT BRASS KNUCKLES, IT WAS DURING THIS WHOLE THING. SHE TESTIFIED SHE HAD INJURIES TO HER ARM, RIBS AND HEAD.

THEN LET'S GO TO COUNTS 4, 5 AND 6. THIS IS THE SAME -- AGAINST THE SAME PERSON, AMY SCHWIND, BUT IT'S THREE SEPARATE ACTIONS THAT WE'RE GOING TO TALK ABOUT. WE ALREADY WENT THROUGH THESE ELEMENTS.

I'M GOING TO DRAW YOUR ATTENTION TO ELEMENT 5, DID THE THREAT ACTUALLY CAUSE AMY SCHWIND TO BE IN SUSTAINED FEAR FOR HER SAFETY OR THE SAFETY OF HER IMMEDIATE FAMILY? THIS IS SOMETHING THAT SOMEONE -- LAURA MEZZLES BEING THREATENED, AMY HEARING THAT, SHE WAS AFRAID, SHE JUMPED IN BETWEEN TRYING TO PROTECT HER MOM, SHE WAS ON THE GROUND TRYING TO PROTECT HER MOM, SHE WAS IN FEAR FOR HER MOTHER'S SAFETY, HEARING THE

DEFENDANT THREATEN HER LIFE. LET'S TALK ABOUT THAT ONE.

SHE HEARD THE DEFENDANT THREATEN TO KILL HER MOM WHEN HE ENTERED THE ROOM WITH BRASS KNUCKLES. SHE WAS SCARED. SHE TESTIFIED SHE JUMPED UP, GOT IN BETWEEN THREE TIMES, WAS PUSHED OUT OF THE WAY, AND THIS FEAR WAS REASONABLE BECAUSE THE DEFENDANT HAD A WEAPON, ONLY ONE IN THIS ENTIRE HOUSE, OF THE FIVE PEOPLE WHO WERE THERE, WHO HAD A WEAPON ON HIM. YOU SAW HER SIZE. SHE'S 15 AT THE TIME. SHE IS A SMALL INDIVIDUAL. WHEN SHE CAME INTO COURT SHE SAID SHE WAS PROBABLY A LITTLE SMALLER BACK IN OCTOBER OF 2010. SOMEBODY WITH THAT SIZE DIFFERENTIAL HAVING JUST SEEN HER MOM BEING THROWN INTO A DRESSER, WITNESSING THIS VIOLENCE, HEARING THESE THREATS, THE FEAR OF THOSE THREATS THAT SOMEONE WAS ACTUALLY GOING TO CARRY THEM OUT IS REASONABLE.

COUNT 5 IS ANOTHER THREAT THE DEFENDANT MADE. SHE AND WILL WERE TRYING TO CALL THE POLICE. DEPENDING ON HOW THE TESTIMONY CAME OUT, AMY SAID SHE CALLED THE POLICE; WILL SAID THAT IT WAS DIALED AND THEN HANDED TO HIM. THE POLICE SHOWED UP; THE POLICE WERE CALLED. WHEN THE DEFENDANT BECAME AWARE OF THAT, HE SAID SOMETHING TO THE EFFECT OF, IF I'M GOING TO JAIL THEN I MIGHT AS WELL FINISH YOU OFF. THIS THREAT WAS ALSO HEARD BY WILLIAM. THIS IS THE SECOND THREAT THAT WE'RE TALKING ABOUT, COUNT 5. WE'LL COME BACK TO THE SIGNIFICANCE OF THE DEFENDANT'S ABILITY TO PERCEIVE AND UNDERSTAND THE FACT THAT POLICE WERE CALLED IN TERMS OF BEING ORIENTED TO THE SITUATION.

THE ELEMENTS HERE ARE MET. SHE SAID SHE WAS CARED WHEN THIS HAPPENED. AGAIN, SAME TYPE OF REASONING AS THE

FIRST ONE. THERE'S A LOT OF VIOLENCE GOING ON, A LOT OF HITTING, A WEAPON INVOLVED. SHE HEARS THIS THREAT AND SHE'S SCARED.

THEN COUNT 6, CRIMINAL THREATS AGAINST AMY. I'LL KILL YOU. OBVIOUSLY THIS IS THE THREAT AS THE DEFENDANT'S BEING ESCORTED OUT BY THE POLICE. OFFICER XIONG WAS STANDING RIGHT THERE ESCORTING OUT THE DEFENDANT. OFFICER MARTIN WAS RIGHT THERE, HE HEARD THE DEFENDANT YELL SOMETHING. HE TOLD OFFICER XIONG THAT'S IMPORTANT FOR YOU TO PUT IN YOUR REPORT. OFFICER XIONG HEARD IT AND PUT IT IN HIS REPORT.

I'LL KILL YOU, LOOKING DOWN THE HALLWAY DIRECTLY AT HER. SHE TESTIFIED HE LOOKED RIGHT AT HER. SHE TESTIFIED THAT SHE WAS SCARED. OFFICER XIONG TESTIFIED THAT SHE HAD A BLANK LOOK ON HER FACE. WILLIAMS TESTIFIED THAT AN HOUR OR SO AFTER THIS AMY COULDN'T EVEN TALK, SHE WAS SO SHAKEN BY WHAT HAPPENED.

AMY TALKED ABOUT TESTIFYING AT THE PRELIMINARY HEARING AND WHY SHE MINIMIZED WHAT HAPPENED THERE. ONE OF THE REASONS THAT SHE SAID WAS BECAUSE THE DEFENDANT IS SITTING RIGHT THERE. SHE WAS AFRAID OF HIM THEN. AFRAID HE WAS GOING TO GET OUT AND HURT HER. SO SUSTAINED FEAR. THE PRELIMINARY HEARING WAS IN FEBRUARY OF 2011; THIS THREAT OCCURRED ON OCTOBER 30TH, 2010.

THEN WE HAVE THE ATTEMPTED CRIMINAL THREATS. IF YOU THINK THAT THE DEFENDANT MADE THE THREAT, BUT SOMEBODY WASN'T IN SUSTAINED FEAR OR YOU DON'T THINK THE FEAR IS LONG ENOUGH, THEN THAT'S A LESSER-INCLUDED OFFENSE, BUT I THINK THE EVIDENCE SHOWS THAT THE ACTUAL THREATS OCCURRED AND ACTUAL

FEAR WAS SUSTAINED AND THE PEOPLE WHO WERE THREATENED, LAURA AND AMY, WERE ACTUALLY AFRAID, BUT THIS IS SOMETHING YOU CONCLUDE IF THAT'S HOW YOU DETERMINE THE EVIDENCE TO BE.

LET'S TALK ABOUT AMY'S TESTIMONY FROM KIND OF A GLOBAL PERSPECTIVE. HER TESTIMONY AT TRIAL WAS, AT TIMES, INCONSISTENT. DEFENSE MADE A BIG DEAL AT THE PODIUM WITH THE PRELIMINARY HEARING TRANSCRIPT AND HOW IT WAS DIFFERENT THAN WHAT SHE TESTIFIED TO AT THE JURY TRIAL; THAT WAS EXPLAINED. FOR ONE THING, I WAS ABLE TO HIGHLIGHT THE FACT THAT SHE TESTIFIED CONSISTENTLY IN SOME OTHER AREAS. WHEN ASKED WHY SHE MINIMIZED, WHY THINGS WERE DIFFERENT AT THE PRELIMINARY HEARING, SHE WAS ABLE TO EXPLAIN IT. SHE FELT LIKE SHE WAS LITERALLY CAUGHT BETWEEN HER MOTHER AND HER STEP DAD.

PHYSICALLY DURING THIS ORDEAL, SHE JUMPED IN BETWEEN THREE TIMES AND WAS PUSHED OUT OF THE WAY, BUT THROUGHOUT THIS ORDEAL, FROM OCTOBER 30, 2010 UNTIL SHE CAME INTO THIS COURTROOM AND TESTIFIED, SHE WAS STUCK BETWEEN THESE TWO ADULTS. THESE TWO PEOPLE WHO WERE MARRIED, THESE TWO PEOPLE IN A RELATIONSHIP. SHE IS A TEENAGER; SHE FEELS CAUGHT BETWEEN THEM. SO SHE THINKS SHE'S GOING TO MINIMIZE TO MAKE THINGS -- TRY TO CONTROL THINGS SOMEHOW.

SHE WAS AFRAID OF THE DEFENDANT. SHE MINIMIZED; HE'S SITTING RIGHT THERE. SHE DIDN'T WANT HER MOTHER TO BE ALONE FOREVER. FOLLOWING THIS, HER MOTHER WROTE LETTERS, WANTED TO HAVE LENIENCY, WANTED TO HAVE HIM BACK. SHE'S MINIMIZING AT THE PRELIMINARY HEARING BECAUSE SHE WANTS HER MOM TO BE HAPPY. SHE DOESN'T WANT HER MOTHER TO BE ALONE.

SHE COMES IN HERE INTO COURT, SHE SAYS THAT SHE

FEELS LIKE SHE'S LOSING HER STEP DAD, THE PERSON SHE COULD TALK TO. IN ALL OF THIS, IN ALL THAT HAD HAPPENED, SHE COMES INTO COURT AND SAYS HE WAS THE PERSON I COULD TALK TO. THEN ALL THIS HAPPENED AND I FEEL LIKE I'M LOSING HIM. THERE'S REASONS WHY SHE MINIMIZED AT THE PRELIMINARY HEARING AND HER TESTIMONY WAS DIFFERENT.

HER DEMEANOR WHILE SHE SAT HERE SPEAKS VOLUMES. SHE SHOULD EITHER WIN AN ACADEMY AWARD -- YOU TAKE THAT AND APPLY THAT TO THE WORDS SHE SPOKE IN THIS COURTROOM. SHE BROKE DOWN, SHE HAD A MELT DOWN. SHE NEEDED TO TAKE A BREAK. SHE SOBBED, SHE HAD TROUBLE MAINTAINING COMPOSURE THROUGHOUT HER TESTIMONY. THIS WAS A VERY EMOTIONAL ORDEAL THAT SHE HAD TO RE-EXPERIENCE IN COURT AND IT EXPLAINS WHY SOMEONE OF HER AGE, PUTTING SO MUCH ON HER SHOULDERS, WOULD MINIMIZE AT A PRELIMINARY HEARING AND WOULD THEN COME INTO COURT AND TESTIFY, KNOWING THAT WHAT SHE'S SAYING IS GOING TO BE HARMFUL TO THE PERSON WHO SHE FEELS LIKE SHE'S LOSING; THAT'S A LOT FOR SOMEONE OF ANY AGE TO DEAL WITH ESPECIALLY SOMEONE HER AGE.

THEN AGAIN, SHE DID TESTIFY CONSISTENTLY TO SOME THINGS AT THE PRELIMINARY HEARING, THE THREAT THAT WAS MADE, THE THREATS THAT WERE MADE AGAINST HER. SHE TESTIFIED AT THE PRELIMINARY HEARING THE SAME SHE DID AT THE JURY TRIAL, THAT AFTER THE POLICE WERE CALLED THE DEFENDANT THREATENED TO KILL HER NOW THAT THE POLICE WERE CALLED. SHE TESTIFIED THE SAME AT THE PRELIMINARY HEARING THAT SHE DID AT JURY TRIAL THAT AS THE DEFENDANT WAS BEING LED OUT BY THE POLICE, THAT HE LOOKED DOWN THE HALLWAY AND SAID, I'LL KILL YOU; THAT WAS CONSISTENT.

WHEN SHE WAS INTERVIEWED BY INVESTIGATOR TANORE, WITHOUT HER MOTHER IN THE ROOM PUTTING PRESSURE ON HER, WITHOUT THE DEFENDANT IN A ROOM STARING DOWN AT HER --

THE COURT: DO WE NEED A BREAK?

JUROR NUMBER 12: MY DAUGHTER'S SCHOOL KEEPS CALLING. I NEED TO MAKE SURE SHE'S OKAY.

THE COURT: WE'LL STOP. YOU CAN'T MISS ANYTHING. WE'LL TAKE A BREAK. DO NOT DISCUSS THIS CASE OR FORMULATE ANY OPINION.

(JURY EXITS THE COURTROOM.)

THE COURT: MR. VERBURGT, SORRY TO INTERRUPT YOU, BUT I THINK THAT WAS THE BEST COURSE OF ACTION. WE'LL TAKE A LITTLE BREAK.

(RECESS TAKEN.)

THE COURT: ALL PARTIES ARE PRESENT. PLEASE BRING THE JURY BACK IN.

(JURY RE-ENTERS THE COURTROOM.)

THE COURT: THE JURY IS NOW PRESENT. PEOPLE MAY RESUME.

MR. VERBURGT: THANK YOU, YOUR HONOR. THANK YOU AGAIN FOR YOUR ATTENTION.

WHERE WE LEFT OFF, TALKING ABOUT AMY SCHWIND AND TALKING ABOUT SOME OF THE MINIMIZATION OF THE PRELIMINARY HEARING AND TESTIMONY HERE AT TRIAL. YOU'RE THE SOLE JUDGE OF CREDIBILITY OF A WITNESS.

LOOKING AT HER DEMEANOR, TAKE THAT INTO ACCOUNT WHEN DETERMINING THE CREDIBILITY OF WHAT SHE SAID, HER EMOTIONAL STATE, HER CONSISTENT STATEMENTS BOTH AT THE

PRELIMINARY HEARING AND TO INVESTIGATOR TANORE. ALSO, CORROBORATION. JUST LIKE THE CHART THAT I MADE FOR LAURA MEZZLES, WE HAVE -- WHENEVER YOU'RE EVALUATING A WITNESS'S TESTIMONY YOU CAN TAKE A LOOK AT THE OTHER EVIDENCE THAT MATCHES UP WITH WHAT A WITNESS SAID. SO THE DEFENDANT HAD BRASS KNUCKLES -- SHE SAID THE DEFENDANT HAD BRASS KNUCKLES AND HIT HER WITH THEM. BRASS KNUCKLES WERE SEEN EARLY ON -- THIS MAY SEEM REPETITIVE, BUT I WANT TO POINT OUT THE CORRELATION.

BRASS KNUCKLES WERE SEEN EARLY ON BY BOTH CORY AND WILLIAM, THEY BOTH TESTIFIED TO THAT. THEY WERE ALSO FOUND IN THE POCKET BY OFFICER MARTIN. THE DEFENDANT THREATENED AMY'S MOTHER, LAURA. SHE TESTIFIED TO THAT; THAT THREAT WAS ALSO HEARD BY WILLIAM AND ALSO HEARD BY LAURA. AMY SAID THE FIRST THREAT WAS AGAINST HER AFTER THE POLICE WERE CALLED; WILLIAM TESTIFIED TO THAT. THE SECOND THREAT AGAINST HER, BUT THE THIRD THREAT IN THIS SCENARIO, THE "I'LL KILL YOU" THREAT WAS HEARD BY OFFICER XIONG, WHO WAS RIGHT THERE ON THE SCENE, ESCORTING THE DEFENDANT OUT.

AGAIN, WE'RE LOOKING AT THINGS -- OTHER EVIDENCE, WE HEARD TESTIMONY FROM OTHER WITNESSES THAT GO TO SHOW -- THAT GO TOWARD THE CREDIBILITY OF WHAT THE WITNESS SAID, MATCH UP TO WHAT THEY'VE SAID.

LET'S GO TO CORY STEPHENS. HE WAS IN CUSTODY; THERE WAS A JURY INSTRUCTION ABOUT HOW YOU'RE NOT TO CONSIDER THAT. HE TESTIFIED THAT HE HEARD THE BANG ON THE WINDOW AND THE DEFENDANT YELLING. HE TESTIFIED THAT HE SAW THE BRASS KNUCKLES EARLY ON BEFORE HE LEFT, EARLY ON IN THIS ORDEAL. HE

BECAME ANGRY, BUT DID NOT ENGAGE THE DEFENDANT. INSTEAD HE CHOSE TO LEAVE THE SCENE, BUT CAME IN AND TESTIFIED, LOOK, I HEARD THE BANG, I HEARD THE YELLING, I SAW THE BRASS KNUCKLES. I STARTED TO FEEL LIKE I WAS GOING TO GET ANGRY AND I LEFT. IT'S IMPORTANT THAT WE LOOK AT HIS TESTIMONY AS WELL, YET ONE MORE PERSON ON THE SCENE WHO SAW THE DEFENDANT WITH THE BRASS KNUCKLES IN A MENACING WAY.

POSSESSION OF A DEADLY WEAPON. THIS IS A GENERAL INTENT CRIME AGAIN. INTOXICATION, POST TRAUMATIC STRESS DISORDER THAT DOES NOT APPLY. SOMEONE JUST NEEDS TO WILLFULLY POSSESS THE BRASS KNUCKLES. HERE ARE THE ELEMENTS, THERE'S AN INSTRUCTION ON THAT. THE DEFENDANT POSSESSED THE BRASS KNUCKLES, HE KNEW THAT HE POSSESSED THE BRASS KNUCKLES AND HE KNEW THE OBJECT WAS BRASS KNUCKLES. AGAIN, WE SAW MULTIPLE WITNESSES TESTIFY WHO SAW THAT HE HAD IT ON HIM, CORY, WILLIAM AND AMY ALL TESTIFIED TO THAT. THE BRASS KNUCKLES WERE FOUND ON THE DEFENDANT'S PERSON SPECIFICALLY IN HIS RIGHT FRONT POCKET BY OFFICER MARTIN WHEN HE PATTED HIM DOWN AND SEARCHED HIM.

WE DON'T HAVE TO PROVE THAT THE DEFENDANT INTENDED TO USE THAT AS A WEAPON AND THE WEAPON DID NOT HAVE TO BE CONCEALED. IT DOESN'T MATTER THAT IT WAS IN HIS POCKET; WE DON'T HAVE TO PROVE THAT. IT WAS SIGNIFICANT THAT IT WAS ACTUALLY FOUND ON HIS PERSON AT THE TIME THAT HE WAS ARRESTED. OFFICER MARTIN WAS THE FIRST ONE IN THE ROOM, TOOK THE DEFENDANT OUT AND THEN LATER PATTED HIM DOWN AND FOUND THEM. SO THAT'S THE EXHIBIT. IT'S ONE OF THE MANY EXHIBITS AND THIS IS THE SLIDE THAT I JUST TALKED ABOUT. HERE'S THE PHOTOGRAPH.

YOU SAW THEM ACTUALLY WHEN OFFICER MARTIN TOOK THEM OUT THE EVIDENCE BAG. HERE'S A PHOTOGRAPH OF THOSE BRASS KNUCKLES WITH A MEASURING RULER TO SHOW THEIR SIZE.

COUNT 9, SIMPLE ASSAULT. LIKE I SAID, THIS IS LIKE THE JURY INSTRUCTION FOR ASSAULT WITH A DEADLY WEAPON, EXCEPT YOU DON'T HAVE TO HAVE THE DEADLY WEAPON PART. WHAT WE'RE TALKING ABOUT IN COUNT 9 IS ASSAULT OF WILL WILLIAMS. IT'S A GENERAL INTENT CRIME. VOLUNTARY INTOXICATION, PTSD, THAT DOES NOT APPLY. THIS IS WHERE -- THE ELEMENTS, HERE THEY ARE. I'M NOT GOING TO GO OVER THEM AGAIN. I'VE TALKED ABOUT THEM ENOUGH.

WILLIAM WILLIAMS SAID HE SAW THE BRASS KNUCKLES, HE HEARD THE DEFENDANT THREATEN LAURA AND AMY AND WHEN THE POLICE WERE CALLED. HE HEARD THE THREAT THAT IF HE WAS GOING BACK TO JAIL THAT HE MIGHT AS WELL FINISH THEM OFF. SIMPLE ASSAULT IS WHEN THE DEFENDANT CAME BACK INTO THE ROOM AND LUNGED AT WILL WILLIAMS AND HE MOVED OUT OF THE WAY AND HE BRUSHED HIM WITH HIS ARM. THE DEFENDANT MISSED, BUT, AGAIN, NO CONTACT IS REQUIRED. SO IT DOESN'T MATTER WHETHER A DEFENDANT ACTUALLY MADE CONTACT WHEN HE MADE THAT LUNGE AT WILLIAM OR NOT.

WAYNE (SIC) TESTIFIED ABOUT THE THINGS HE COULD REMEMBER SEEING AND HEARING. HE ACTUALLY REMEMBERED SOME OF THE DETAILS. HE'S LIKE, LOOK, I REMEMBER THE IMPORTANT STUFF. I REMEMBER HEARING THE THREATS. I REMEMBER HIM LUNGING AT ME. I REMEMBER HIM HEARING THE ASSAULT FROM THE OTHER ROOM. HE TESTIFIED TO WHAT HE HEARD, WHAT HE SAW. HE DIDN'T SIT THERE AND EXAGGERATE OR EMBELLISH ANYTHING THAT HAPPENED THAT DAY.

OFFICER KEVIN MARTIN TESTIFIED THAT HE'S THE FIRST TO ENTER THE HOUSE. HE RESPONDED AS BACKUP, BUT FIRST ONE IN. SAW THE POSITION OF LAURA AND AMY IN THE MASTER BEDROOM WITH THE DEFENDANT STANDING BETWEEN THEM. THEY WOULD HAVE HAD TO GO OVER THE BED OR AROUND HIM TO GET OUT THE DOOR. HE TESTIFIED ABOUT THE DEFENDANT'S DEMEANOR. HE WAS ANGRY, YELLING, HE TOOK OFF HIS SHIRT. THESE ARE ALL OBSERVATIONS THAT HE MADE RIGHT WHEN HE GOT ON THE SCENE, WHICH GO TO CORROBORATE WHAT IT WAS LIKE BEFORE THEY EVEN ARRIVED.

DEFENDANT STOOD IN THE KITCHEN LATER AND OBSERVED -- AND OFFICER MARTIN OBSERVED THAT HE DID NOT HAVE SLURRED SPEECH. HE SAID HE WAS ABLE TO CARRY ON A CASUAL CONVERSATION WITH HIM. OFFICER MARTIN IS TRAINED -- HAS TRAINING AND EXPERIENCE ON IDENTIFYING PEOPLE WHO ARE INTOXICATED OR WHO HAVE BEEN DRINKING. HE SAID, LOOK, I REMEMBER OBSERVING SOMETHING OF A SMELL, BUT IT DIDN'T SEEM LIKE HE WAS REALLY DRUNK. HE DIDN'T HAVE SLURRED SPEECH, WAS ABLE TO WALK OUT UNDER HIS OWN POWER.

HE FOUND THE BRASS KNUCKLES WHEN HE SEARCHED HIM AND HE HEARD THE DEFENDANT YELL DOWN THE HALLWAY TOWARD AMY, AND TOLD OFFICER XIONG, PUT THAT DOWN IN YOUR REPORT.

OFFICER XIONG, HE TESTIFIED THAT HE SAW AMY STANDING ALONE IN THE HALLWAY WHEN HE WAS TAKING THE DEFENDANT OUT. NO ONE ELSE THERE, JUST AMY STANDING IN THE HALLWAY. THE DEFENDANT TURNED HIS HEAD TO LOOK DOWN THE HALLWAY IN HER DIRECTION AND THE DEFENDANT MADE THE THREAT, I'LL KILL YOU. HE HEARD THOSE WORDS SPOKEN, WROTE IT IN HIS REPORT AND TESTIFIED TO IT HERE. HE SAW THE BLANK LOOK ON AMY'S FACE

WHEN THAT THREAT WAS MADE.

SO HERE'S JURY INSTRUCTION 852, THIS IS -- YOU'LL GET THIS, BUT THE HIGHLIGHTED POINTS ARE BASICALLY THAT YOU CAN CONSIDER THE TESTIMONY OF STACY LEROY AND THE RECORDING OF THE VOICEMAIL AS IT GOES TO COUNTS 1 AND 3. THESE ARE COUNTS AGAINST LAURA MEZZLES, THE DOMESTIC VIOLENCE COUNTS. YOU CAN CONSIDER THAT, THE FACT THAT THE DEFENDANT, IN 2007, THREATENED TO SLIT THE THROAT OF STACY LEROY; THAT HE'S CAPABLE OF DOING THAT; THAT HE'S SOMEONE WHO DOES COMMIT ACTS DOMESTIC VIOLENCE. YOU CAN CONSIDER THAT WHEN YOU'RE CONSIDERING THE EVIDENCE IN THE CASE AGAINST THE DEFENDANT AS IT RELATES TO WHAT HE DID TO LAURA MEZZLES, THE CORPORAL INJURY TO A SPOUSE IN COUNT 1 AND CRIMINAL THREATS IN COUNT 3.

THAT LEVEL OF PROOF IS PREPONDERANCE OF THE EVIDENCE. WE'VE TALKED IN THIS CASE, THE JUDGE HAS GIVEN THE INSTRUCTION AND DURING VOIR DIRE I TALKED ABOUT HOLDING ME TO MY BURDEN OF PROVING THINGS BEYOND A REASONABLE DOUBT. ONLY SLIGHT DIFFERENCE HERE IS THAT PREPONDERANCE OF THE EVIDENCE IS A LOWER STANDARD. SO IF YOU FEEL THAT THE THREAT AGAINST STACY LEROY WAS PROVEN BY A PREPONDERANCE, WHICH IS A FACT THAT MORE LIKELY THAN NOT IS TRUE, THEN YOU CAN CONSIDER THAT, AS THE DEFENDANT IS CAPABLE OR INCLINED TO COMMIT ACTS OF DOMESTIC VIOLENCE, WHEN YOU THINK ABOUT WHAT HAPPENED TO LAURA MEZZLES.

LET'S TALK ABOUT STACY LEROY, STACY WOLFORD'S TESTIMONY. SHE SAID SHE WAS IN A PRIOR RELATIONSHIP WITH THE DEFENDANT BACK IN 2007, BOYFRIEND/GIRLFRIEND. THE DEFENDANT DESTROYED HER PERSONAL PROPERTY. SHE SAID IT WAS SIGNIFICANT

DAMAGE AND THEN THE DEFENDANT THREATENED TO HAVE HER THROAT SLIT AND THIS IS CORROBORATED BY THE ACTUAL RECORDING OF THE VOICEMAIL THAT THE DEFENDANT LEFT. SHE TESTIFIED THAT SHE WAS SCARED AND SHE HAD TO CHANGE HER BEHAVIOR BY HAVING HER BROTHER ESCORT HER AROUND EVERYWHERE AND IT WAS FOR WEEKS AFTER WHAT HAPPENED. THEN THE RECORDING WAS LEFT ON HER VOICEMAIL AND THAT'S THE DISK IN EVIDENCE. YOU HEARD THAT THREAT FOR YOURSELF. YOU HEARD WHAT THE DEFENDANT IS CAPABLE OF AND YOU HEARD THE EXAMPLE OF THE DEFENDANT BEING IN A JEALOUS RAGE.

THEN YOU HEARD THE TESTIMONY OF INVESTIGATOR TANORE. SHE INTERVIEWED LAURA MEZZLES AND AMY SCHWIND ON JANUARY 18TH, 2011. SHE TESTIFIED THAT AMY, IN THE SAFETY OF THE OFFICE WITH HER, TOLD HER THAT THE DEFENDANT HIT HER IN THE HEAD WITH BRASS KNUCKLES; THAT'S SOMETHING THAT WAS TESTIFIED TO AGAIN HERE AT TRIAL AND DEFENSE COUNSEL MADE A BIG DEAL ABOUT THE FACT THAT IT NEVER WAS MENTIONED BEFORE, BUT IT HAD BEEN TO DETECTIVE TANORE ALMOST A YEAR BEFORE BY AMY WHEN SHE WAS NOT IN A ROOM WITH EITHER THE DEFENDANT, WHERE SHE FELT AFRAID, OR WITH HER MOTHER WHERE SHE FELT PRESSURE OF HER MOTHER NOT WANTING TO BE ALONE FOREVER, THINGS LIKE THAT. SHE SAID SHE WAS HIT 10 TO 20 TIMES. SHE SAID THAT IN THE COURTROOM IN THE JURY TRIAL HERE THIS WEEK AND LAST WEEK THAT SHE WAS HIT.

THEN LAURA MEZZLES WAS ALSO INTERVIEWED BY INVESTIGATOR TANORE AND WE HAD CONSISTENT STATEMENTS THERE. SHE TOLD INVESTIGATOR TANORE THAT THE DEFENDANT GRABBED HER AND THREW HER INTO THE DRESSER AND THAT'S WHAT SHE TESTIFIED

TO AT TRIAL; THAT'S MORE CONSISTENCY OR CORROBORATION FROM THE WITNESSES.

THEN WE HEARD FROM THE DEFENDANT'S MOTHER, KAREN BRENNAN, IN THE DEFENSE CASE. SHE TESTIFIED THAT WHEN THE DEFENDANT DRINKS, HE CRIES AND GETS DEPRESSED, BUT STILL KNOWS WHERE HE IS. SHE SAID SHE'S NEVER OBSERVED HIM GETTING DISORIENTED. SHE SAID THAT LAURA MEZZLES IS NOT KNOWN TO MAKE UP STORIES ABOUT THE DEFENDANT TO GET HIM INTO TROUBLE; THAT'S WHAT SHE TESTIFIED TO.

THEN WE HAVE JURY INSTRUCTION 332, THIS RELATES TO DR. OWEN. HE TESTIFIED AS AN EXPERT IN THIS CASE. YOU'RE NOT REQUIRED TO ACCEPT WHAT HE TESTIFIED TO AS TRUE AND CORRECT; THAT'S SOMETHING THAT YOU ARE THE SOLE JUDGES OF AND YOU MUST DECIDE WHETHER -- IN DECIDING HOW MUCH WEIGHT OR ANY WEIGHT TO GIVE TO DR. OWEN, HIS TESTIMONY, IS WHAT IT WAS BASED ON. WHAT ARE THE FACTS? WHAT DID HE RELY UPON? WAS THAT INFORMATION TRUE AND ACCURATE. THE LAST LINE, YOU MAY DISREGARD ANY OPINION THAT YOU FIND UNBELIEVABLE, UNREASONABLE OR UNSUPPORTED BY THE EVIDENCE. LET'S GET INTO THAT.

JURY INSTRUCTION 360, DR. OWEN TESTIFIED IN REACHING HIS CONCLUSIONS AS AN EXPERT, HE CONSIDERED STATEMENTS BY THE DEFENDANT. DO NOT CONSIDER THE STATEMENTS THAT HE TALKED ABOUT AS PROOF THAT THAT INFORMATION WAS, IN FACT, TRUE. IT'S ONLY TO BE CONSIDERED FOR THE LIMITED PURPOSE OF DETERMINING WHETHER HIS OPINION IS SOMETHING THAT CAN BE RELIED UPON. JUST BECAUSE YOU HEARD ABOUT STATEMENTS -- OR AN INTERVIEW THAT WE HAD, THE ONE-AND-A-HALF HOUR INTERVIEW WITH THE DEFENDANT, DOES NOT MEAN WHAT THE DEFENDANT

TOLD HIM IS TO BE TAKEN AS TRUE. YOU'RE ONLY TO CONSIDER AND SAY -- ASSUMING THAT THE DEFENDANT TOLD DR. OWEN THOSE THINGS, IS THAT SOMETHING THAT IS SUPPORTED OR IS THAT SOMETHING THAT IS -- SOMEONE CAN REASONABLY DRAW THE CONCLUSIONS THAT DR. OWEN TALKED ABOUT REACHING.

SO DR. OWEN'S OPINION, DIAGNOSIS OF THE DEFENDANT WAS BASED ENTIRELY ON ONE-AND-A-HALF-HOUR MEETING WITH THE DEFENDANT; THAT'S IT. HE DIDN'T REVIEW THE DEFENDANT'S MEDICAL RECORDS. HE DIDN'T REVIEW THE DEFENDANT'S PSYCHIATRIC RECORDS. HE DIDN'T REVIEW ANYTHING, OTHER THAN THE POLICE REPORTS IN THIS CASE AND HE INTERVIEWED THE DEFENDANT FOR AN HOUR AND A HALF. HE DIDN'T BOTHER TO VERIFY THAT INFORMATION THAT HE RECEIVED FROM THE DEFENDANT.

HE SAID THERE WAS A LETTER FROM THE DEFENDANT'S MOTHER. WHEN I ASKED HER ABOUT IT -- OR HIM ABOUT IT, LOOK, WE'RE REALLY TALKING ABOUT ONE SOURCE HERE. YOU'RE TALKING ABOUT AN HOUR-AND-A-HALF INTERVIEW WITH THE DEFENDANT AND BASING YOUR OPINION ON THE FACT THAT THE DEFENDANT IS BEING TRUTHFUL AND HE'S BEING A RELIABLE SOURCE.

THEN YOU TALK ABOUT THIS LETTER THAT HE GOT FROM HIS MOTHER, BUT HIS MOTHER DIDN'T PERSONALLY OBSERVE ANY OF THIS ALLEGED CHILD ABUSE; THIS IS ALL INFORMATION SHE GOT FROM THE DEFENDANT. SO HER LETTER IS STATEMENTS, BASICALLY, TOLD TO HER BY THE DEFENDANT. THEN DR. OWEN IS TRYING TO SAY THAT LETTER IS VERIFYING WHAT THE DEFENDANT TOLD ME. WELL, IT'S, IN FACT, THE SAME SOURCE. PERSON A TOLD ME WHAT HAPPENED AND PERSON B VERIFIED IT, BUT PERSON B ONLY HEARD FROM PERSON A. IN FACT, YOU'RE ONLY TALKING ABOUT ONE SOURCE. YOU'RE NOT

TALKING ABOUT MULTIPLE SOURCES. HE DID NOTHING TO VERIFY THE INFORMATION UPON WHICH HE WAS RELYING. IT WAS ONE SOURCE, THE DEFENDANT, AND IT WAS ONE AND A HALF HOURS.

HE CONCEDED THAT THERE'S NO STUDY THAT LINKS SEXUAL ABUSE AS A CHILD TO DOMESTIC VIOLENCE AS AN ADULT. HE DIDN'T KNOW OF ANY JOURNAL ARTICLES THAT LINK THE TWO. HE CONCEDED THAT THE DEFENDANT MADE POOR CHOICES IN THE PAST AND THE DEFENDANT IS RESPONSIBLE FOR THOSE CHOICES.

HE CONCEDED THAT SOMEONE WITH PTSD AND SOMEONE WITHOUT PTSD, WHO IS IN A JEALOUS RAGE, WOULD KNOW BOTH WHERE THEY ARE AND WHAT THEY ARE DOING; HE CONCEDED THAT ON THE STAND. HE SAID THAT THE DEFENDANT DID NOT EXHIBIT SIGNS OF RELIVING CHILDHOOD ABUSE.

IN TERMS OF THE TESTIMONY THAT WE HEARD, THERE WAS NO EVIDENCE THAT THERE WAS A PTSD FLASH-BACK. WE HEARD EVIDENCE THAT THE DEFENDANT THOUGHT HE SAW SOMETHING GOING ON BETWEEN LAURA AND CORY THROUGH THE WINDOW, THAT HE GOT UPSET, THAT HE BANGED ON THE WINDOW. WE HEARD TESTIMONY THAT HE ENTERED THE ROOM, HE KNEW WHO EVERYONE WAS, HE KNEW WHO HE WAS GOING AFTER, HE KNEW IT WAS HIS OWN HOME. HE REACTED TO STIMULI OR THINGS HAPPENING ON THE SCENE.

WHEN HE FOUND OUT THE POLICE WERE CALLED, HE DIDN'T REACT IN SOME BIZARRE MANNER OR OUT OF CONTEXT. HE WAS IN A RAGE, HE WAS ATTACKING PEOPLE, POLICE WERE CALLED AND HE SAID, LOOK, IF I'M GOING TO GO JAIL, I MAY AS WELL FINISH YOU OFF. HE KNEW, HE COULD SEE AND HEAR WHAT WAS GOING ON IN THAT SCENE. HE WAS NOT IN SOME OTHER PLACE. HE WAS NOT RELIVING THIS CHILDHOOD -- THIS EPISODE OF ABUSE THAT DR. OWEN TALKED

ABOUT; GOING THROUGH A SCREEN DOOR, HAVING TO GIVE MIKE A MASSAGE. THERE WAS NOTHING ABOUT THAT. NO STATEMENT THAT WENT TOWARD -- NO INDICATING THAT HE WAS RELIVING THAT EVENT. THE STATEMENTS AND CONDUCT OF THE DEFENDANT SHOWED THAT HE WAS REACTING TO WHAT WAS HAPPENING RIGHT IN FRONT OF HIM.

THERE'S DISTRACTIONS THAT DR. OWEN -- THESE ARE DEFENSE DISTRACTIONS. DR. OWEN ONLY MET WITH THE DEFENDANT FOR AN HOUR AND A HALF, AGAIN, HE DIDN'T VERIFY ANY OF THIS INFORMATION AND HIS OPINION WAS BASED ON RELIANCE OF THE DEFENDANT TO BE TRUTHFUL. HE'S FACING SERIOUS CHARGES, FOLKS. THIS IS SOMEBODY WHO HAS A MOTIVE NOT TO BE FORTHCOMING OR TRUTHFUL ABOUT WHAT HAPPENED TO HIM WHEN HE WAS BEING INTERVIEWED.

DR. OWEN WAS RELYING ON THE DEFENDANT TO BE A RELIABLE HISTORIAN, WHEN HE DID NOTHING TO VERIFY ANY OF THESE EVENTS; DIDN'T TALK TO THE DEFENDANT'S EX-WIVES, DIDN'T LOOK AT MEDICAL REPORTS, DIDN'T DO ANYTHING. MITIGATION, AGAIN, HE'S TALKING ABOUT MITIGATING FACTORS AS ONE OF THE PURPOSES OF HIS REPORT; MITIGATION IS NOT A DEFENSE. JUST BECAUSE THERE'S AN EXPLANATION, OTHER FACTORS GOING ON, DOES NOT LESSEN IN HIS -- IN DR. OWEN'S MIND, LESSEN WHAT WAS GOING ON; DOESN'T MEAN THAT'S A DEFENSE. AGAIN, WE'RE TALKING ABOUT -- THERE HAS TO BE A CONDITION, PTSD, THAT RISES TO A LEVEL TO MAKE SOMEONE INCAPABLE OF HAVING THIS SPECIFIC INTENT TO THREATEN SOMEONE. LET'S TALK ABOUT THAT.

ONCE AGAIN, VOLUNTARY INTOXICATION, PTSD, DO NOT APPLY TO COUNTS 1, 2, 8 OR 9. THEY ONLY APPLY TO THE SPECIFIC INTENT CRIME OF CRIMINAL THREATS OR ATTEMPTED CRIMINAL

THREATS. THEY DON'T APPLY TO GENERAL INTENT.

SO LET'S START WITH INVOLUNTARY INTOXICATION. OFFICERS MARTIN AND XIONG TESTIFIED THAT THE DEFENDANT WAS NOT TOO INTOXICATED; NO SLURRED SPEECH, ABLE TO WALK, CARRYING ON A CASUAL CONVERSATION WITH OFFICER MARTIN. WILL WILLIAMS TESTIFIED THAT THE DEFENDANT HAD BEEN DRINKING, BUT KNEW WHERE HE WAS AND WHAT WAS GOING ON -- OR APPEARED TO KNOW WHAT WAS GOING ON. THEN THE ALCOHOL BOTTLE THAT WAS INVOLVED, SOUTHERN COMFORT, WAS A ONE PINT BOTTLE. IT AS NOT A LARGE BOTTLE. IT WAS BEING DRANK BY TWO PEOPLE OVER THE COURSE OF A COUPLE HOURS AND IT WAS A SMALLER BOTTLE.

THIS IS NOT THE TYPE OF INTOXICATION WHERE WE SEE THAT SOMEONE HAS ACTUALLY NO IDEA WHAT'S GOING ON, WHERE THEY'RE FALLING ALL OVER THEMSELVES AND THE FLOOR AND THEY CAN'T TALK BECAUSE THERE'S TOO MUCH ALCOHOL IN THEIR BLOOD. HE WAS ANGRY, PLAIN AND SIMPLE, JEALOUS; THAT'S WHAT WAS GOING ON. THIS IS NOT SOMEONE WHO DRANK INTO A STUPOR AND THEN DIDN'T HAVE ANY IDEA WHAT HE WAS DOING.

SO I'M SURE THE DEFENSE HAS BUILT A HOUSE OF CARDS. THEY HAVE TO PLAY THE HAND THEY'RE DEALT. THEY CAN'T CHANGE THE FACTS. THIS IS THE FACTS OF THE CASE. THE DEFENDANT'S PTSD CLAIM IS NOT SUPPORTED BY HIS OWN HISTORY. HE'S GOT NO PRIOR DIAGNOSIS OF IT; THERE'S NO EVIDENCE OF THAT PRIOR TO MEETING WITH DR. OWEN FOR AN HOUR AND A HALF. THERE'S NO PRIOR SIMILAR CONDUCT THAT WE'VE HEARD. HIS MOTHER WHO HAS KNOWN HIM HIS WHOLE LIFE, SAID, NO, I DIDN'T SEE ANYTHING LIKE THAT, NO FLASH-BACKS.

NO BEHAVIOR IN THIS CASE BASED ON THE WITNESS

TESTIMONY OR EVIDENCE THAT THERE WAS PTSD FLASH-BACK IN THE MIX. AGAIN, NO VIETNAM VET STYLE -- LIKE VIETCONG FIGHTING GOING ON AND THEN NOT REALIZING THAT YOU'RE ACTUALLY ATTACKING YOUR WIFE BECAUSE YOU THINK YOU'RE ATTACKING THE VIETCONG OR SOMETHING. HIS INTOXICATION CLAIM IS NOT SUPPORTED BY THE EVIDENCE THAT HE WAS DRINKING, BUT HE KNEW WHAT WAS GOING ON. THE OFFICERS, THEY OBSERVED -- AGAIN, OBSERVED ALL THE CONDUCT OF THE DEFENDANT THAT INDICATED HE DID NOT HAVE THAT MUCH TO DRINK. HE HAD BEEN DRINKING, BUT NOT THAT MUCH.

SO THINGS THAT ARE NOT A DEFENSE: INVOLUNTARY INTOXICATION, PTSD DOES NOT APPLY IN A GENERAL INTENT CRIME. LACK OF IMPULSE CONTROL, LACK OF ANGER MANAGEMENT, THE SUBSTANCE ABUSE YOU HEARD ABOUT, THESE ARE NOT DEFENSES. THESE ARE NOT SOMETHING THAT SOMEBODY CAN SAY, LOOK, I'M NOT CAPABLE OF FORMULATING INTENT. I'M NOT CAPABLE OF KNOWING WHAT I'M DOING OR REALIZING WHAT I'M DOING BECAUSE I'VE GOT -- I'VE ABUSED DRUGS OR BECAUSE I'M AN ANGRY PERSON BECAUSE OF MY OWN PERSONAL ISSUES. I'M ANGRY ABOUT WHAT HAPPENED TO ME AS A KID. I'M AN IRRITABLE PERSON BECAUSE OF WHAT HAPPENED TO ME AS A KID. I GET INTO FIGHTS BECAUSE OF WHAT HAPPENED TO ME AS A KID.

PEOPLE HAVE DIFFERENT EXPERIENCES IN LIFE; THEY GET ANGRY ABOUT DIFFERENT THINGS. SOME PEOPLE HAVE TROUBLE CONTROLLING THAT ANGER; THAT IS NOT A DEFENSE, BECAUSE WHAT HAS TO BE THE DEFENSE IN THIS CASE, WHAT WOULD HAVE TO BE WOULD BE THAT NOT ONLY DOES HE HAVE POST TRAUMATIC DISTRESS ORDER OR ALCOHOLISM OR THE COMBINATION OF THE TWO, IT HAS TO BE SUCH THAT HE HAS ABSOLUTELY NO IDEA WHAT'S GOING ON, HE IS

INCAPABLE OF REALIZING THAT WHEN HE THREATENS TO KILL HIS WIFE, THREATENS TO KILL HIS STEPDAUGHTER, HE DOESN'T KNOW WHAT HE'S DOING OR SAYING. THERE'S NO INDICATION OF THAT. HE REACTED SPECIFICALLY -- THE POLICE WERE CALLED, IF I'M GOING BACK TO JAIL, I MIGHT AS WELL FINISH YOU OFF.

THE PERSON WHO CALLED THE POLICE, AMY SCHWIND, FROM THE DEFENSE PERSPECTIVE -- WHETHER IT WAS AMY OR WILL -- HE'S BEING LED OUT BY THE POLICE, THEY'VE COME TO APPREHEND HIM. HE LOOKS DOWN THE HALLWAY; I'LL KILL YOU. ANGRY ABOUT WHAT HAPPENED. HE'S AGITATED AGAIN IN THE KITCHEN WHEN HE WAS STANDING NEXT TO OFFICER MARTIN. THESE ARE ALL BEHAVIORS THAT INDICATE HE KNEW WHAT WAS GOING ON. MULTIPLE ROOMS; HE KNEW HOW TO NAVIGATE THE HOUSE. HE RESPONDED TO THINGS THAT HE'S HEARING.

EVEN IF YOU THINK, WELL, WE HEARD ABOUT HIS HISTORY, HEARD FROM THIS EXPERT WHO SAYS HE HAS PTSD; FINE. THAT DIAGNOSIS OF DR. OWEN, NOT ENOUGH. IT HAS TO RISE TO THE LEVEL, LIKE THE EXAMPLE THAT I GAVE YOU ABOUT VIETNAM, THAT SOMEBODY JUST DOESN'T KNOW WHAT'S GOING ON, THAT THEY'RE RELIVING THAT EXPERIENCE BACK IN THE WAR. THEY THINK THEY'RE ATTACKING SOMEBODY WHO IS IN THE OTHER ARMY, BUT, IN FACT, THEY'RE JUST ATTACKING THEIR SPOUSE, WHO HAPPENS TO BE THE PERSON NEXT TO THEM AT THE TIME THEY'RE HAVING THIS FLASH-BACK. WE HAVE DIRECT RESPONSES TO EVENTS AND STIMULI IN THAT EVENT THAT HE WAS BEHAVING IN A WAY THAT, IN CONTEXT, MADE SENSE IN TERMS OF ANGER.

JURY INSTRUCTION 371, MOTIVE. JEALOUSY, YOU CAN CONSIDER THAT IN DETERMINING WHAT IS GUILT. REASONABLE DOUBT.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU WITH AN ABIDING CONVICTION THAT THE CHARGE IS TRUE. THE EVIDENCE NEED NOT ELIMINATE ALL POSSIBLE DOUBT BECAUSE EVERYTHING IN LIFE IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. BASE IT ON OF THE EVIDENCE. DO NOT SPECULATE OR RELY ON CONJECTURE. A MERE CONFLICT IN TESTIMONY IS NOT REASONABLE DOUBT. ASSUMPTIONS ARE NOT REASONABLE DOUBT; PLAYING "WHAT IF." JUST BECAUSE THERE WERE DIFFERENCES IN TESTIMONY FROM A PRIOR HEARING AND THE JURY TRIAL, POINTED OUT BY DEFENSE COUNSEL THAT IS NOT ENOUGH. THE EVIDENCE THAT WAS PRESENTED IN THIS CASE IN THE FORM OF MULTIPLE WITNESS TESTIMONY, EYEWITNESS TESTIMONY, THE CORROBORATION OF THE STATEMENTS BY OTHER WITNESSES, BY PHOTOGRAPHS OF THE INJURIES, BY THE BRASS KNUCKLES THAT WERE FOUND ON THE DEFENDANT'S PERSON, BY THE TESTIMONY OF THE OFFICERS, PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF EACH ONE OF THESE COUNTS.

SO I URGE YOU WHEN YOU'RE REVIEWING THIS EVIDENCE TO KEEP IN MIND THE JURY INSTRUCTION ABOUT SYMPATHY. DO NOT LET BIAS, SYMPATHY OR PUBLIC OPINION INFLUENCE YOUR DECISION. YOU MAY FEEL, AFTER HEARING THE TESTIMONY FROM DR. OWEN, YOU MAY FEEL SYMPATHY FOR THE DEFENDANT BECAUSE OF HIS PAST OR BECAUSE OF WHAT HAPPENED, BUT THAT'S NOT TO BE CONSIDERED AS -- JUST BECAUSE YOU MAY SYMPATHIZE IS NOT A DEFENSE. AGAIN, IT HAS TO RISE TO THE LEVEL OF DIAGNOSING THE CONDITION, OF HAVING A FLASH-BACK BECAUSE OF THAT CONDITION AND THEN NEGATING THE SPECIFIC INTENT, WHICH IS NOT SHOWN HERE. THE FACTS ARE NOT THERE.

SO WATCH OUT FOR JURY PITFALLS. DON'T PLAY "WHAT

IF"; DON'T DISCUSS PENALTY OR CONSEQUENCE OR SENTENCING IN THIS CASE; DON'T ALLOT BLAME; DON'T ALLOW YOUR DETERMINATION OF HIS GUILT TO BE BASED UPON SYMPATHY OR PITY. JUST FOCUS ON WHAT THE ELEMENTS ARE IN EACH OF THE EIGHT COUNTS, COUNTS 1 THROUGH 9. YOU DON'T NEED TO CONSIDER 7, YOU DON'T NEED TO THINK ABOUT WHY THAT'S BEEN REMOVED.

THINK ABOUT EACH OF THOSE ELEMENTS, APPLY THE FACTS TO THOSE, LOOK FOR THE CORROBORATION BETWEEN THE DIFFERENT WITNESSES. KEEP FOCUSED ON THE EVIDENCE AND AVOID GETTING CAUGHT UP IN DEFENSE DISTRACTIONS. I'M CONFIDENT THAT ONCE YOU DO THAT, ONCE YOU HAVE REVIEWED THE INSTRUCTIONS, LOOK AT THE ELEMENTS, LOOK AT THE FACTS OF THIS CASE, LOOK AT THE CORROBORATION OF EACH OF THESE WITNESSES, THAT YOU'LL BE ABLE TO RETURN A VERDICT OF GUILTY ON ALL COUNTS. THANK YOU.

THE COURT: THANK YOU. MR. SCOTT, 1:15?

MR. SCOTT: THAT WOULD BE FINE, JUDGE.

THE COURT: PLEASE DO NOT DISCUSS THIS CASE OR FORMULATE ANY OPINION. I'D ASK YOU TO RETURN AT 1:15; SEE YOU AT 1:15.

(JURY EXCUSED FOR THE NOON RECESS.)

THE COURT: THE JURY HAS NOW LEFT. MR. SCOTT, MR. VERBURGT, ANY ISSUES?

MR. SCOTT: NONE FOR ME, JUDGE.

MR. VERBURGT: YOUR HONOR, I WILL RETURN WITH VERDICT FORMS AFTER LUNCH?

MR. SCOTT: I HAVEN'T SEEN THEM YET.

MR. VERBURGT: I'LL GIVE THEM TO YOU. THEY WERE BEING WORKED ON THIS MORNING. I APOLOGIZE I DIDN'T HAVE THEM

AND NOT GUILTY OF THE 422'S, ALL OF THEM. THANK YOU.

THE COURT: MR. VERBURGT?

MR. VERBURGT: THANK YOU. THANK YOU AGAIN FOR YOUR ATTENTION.

I'D LIKE TO THINK THAT AFTER I FINISHED MY INITIAL CLOSING ARGUMENT, THINGS WERE QUITE CLEAR. I TOLD YOU ABOUT THE LAW, I TOLD YOU ABOUT THE ELEMENTS. THEN WE DISCUSSED THE FACTS, THE TESTIMONY OF THE WITNESSES, AND I SHOWED YOU HOW THE FACTS AND THE LAW MATCH UP AND HOW EACH COUNT -- THE DEFENDANT IS GUILTY OF EACH COUNT AND THEN DEFENSE COUNSEL GETS UP AND MUDDIES THE WATERS; THIS PERSON DID THIS AND NOBODY WAS SURE OF ANYTHING AND NOTHING REALLY HAPPENED IN THAT RESIDENCE ON OCTOBER 30TH, 2010, THAT WASN'T THAT BIG OF A DEAL. WE DON'T KNOW WHAT HAPPENED.

WELL, WE DO. WE HEARD TESTIMONY FROM MANY DIFFERENT EYEWITNESSES. AS YOU RECALL DURING VOIR DIRE, I ASKED ALL OF YOU ABOUT EYEWITNESSES TO AN INCIDENT. HOW DO YOU FIND OUT WHAT REALLY HAPPENED? THERE WAS A DISCUSSION. YOU LOOK FOR THE COMMON THREAD. YOU LOOK FOR THE COMMONALITIES IN THE DIFFERENT WITNESS STATEMENTS. YOU LOOK FOR CORROBORATING EVIDENCE. THAT'S SOMETHING THAT'S DEFINITELY BEEN PRESENTED IN THIS CASE.

PHOTOGRAPHS OF INJURIES; THOSE INJURIES DID NOT COME OUT OF THIN AIR. FINDING THE BRASS KNUCKLES; TESTIMONY OF DIFFERENT WITNESSES, INCLUDING POLICE OFFICERS WHO ARRIVED AFTER, WHO HEARD THE THREATENING STATEMENTS THE DEFENDANT MADE AGAINST THE VICTIMS IN THIS CASE.

LET ME JUST GO THROUGH SOME OF THE POINTS THAT

DEFENSE COUNSEL MADE AND TRY TO CLEAR THINGS UP AGAIN. HE MADE A VERY BIG DEAL ABOUT THE DIFFERENCES IN THE TESTIMONY OF AMY AT THE PRELIMINARY HEARING AND THEN AT JURY TRIAL. BUT AS YOU RECALL, AMY WAS VERY FORTHRIGHT DURING THE JURY TRIAL OF THINGS THAT WERE NOT ACCURATE OR TRUE THAT SHE SAID AT THE PRELIMINARY HEARING AND SHE HAD AN EXPLANATION FOR THEM. SHE WAS THROWN BETWEEN THESE TWO PEOPLE, THESE TWO ADULTS IN HER LIFE, HER MOTHER AND STEPFATHER. SHE THOUGHT THAT MINIMIZING WOULD BE THE BEST THING FOR HER MOTHER TO NOT BE ALONE AND TO PROTECT HERSELF. SHE WAS AFRAID. THE DEFENDANT WAS SITTING RIGHT THERE DURING THE HEARING. I'LL GET BACK TO THAT BECAUSE THAT'S SIGNIFICANT.

TALKING ABOUT SUSTAINED FEAR; TALKING ABOUT THE CRIMINAL THREATS. JUST BECAUSE THE DEFENDANT WAS IN HANDCUFFS BEING LED OUT BY TWO POLICE OFFICERS WHEN HE MADE THE THREAT, I'LL KILL YOU, DOESN'T MEAN THAT HER FEAR WAS UNREASONABLE OR HE'S NOT CAPABLE OF IT. IT DOESN'T HAVE TO BE THAT IMMEDIATE. SOMEONE CAN BE IN JAIL OR PRISON AND MAKE A THREAT TO KILL SOMEBODY AND IT CAN BE, UNDER THE LAW, IMMEDIATE ENOUGH TO BE CONSIDERED CRIMINAL THREATS.

SO THE FACT THAT AT THAT VERY MOMENT WHEN THE DEFENDANT LOOKED DOWN THE HALLWAY AT THE VICTIM AND SAID, I'LL KILL YOU, THAT HE WAS BEING ESCORTED OUT BY TWO POLICE OFFICERS IN HANDCUFFS, IS NOT A REQUIREMENT -- LOOK AT THE ELEMENTS -- IT IS NOT A REQUIREMENT THAT HE, IN THAT VERY MOMENT, BE CAPABLE. WE'D BE PLAYING "WHAT IF" GAMES IF THAT WERE THE CASE. COULD HE HAVE GOTTEN THE HANDCUFFS OFF? COULD HE HAVE OVERPOWERED TWO POLICE OFFICERS IN HIS RAGE AND GONE

AFTER HER? IT DOESN'T EVEN HAVE TO GET TO THAT; THAT IS NOT A REQUIREMENT UNDER THE LAW TO FIND THE DEFENDANT GUILTY OF CRIMINAL THREATS.

AGAIN, LOOKING AT THE DIFFERENT VERSIONS OR ACCOUNTS AND STORIES FROM THE EYEWITNESSES, LOOK FOR THE CORROBORATION. I HAVE THE CHART WITH THOSE STATEMENTS IN WHITE ON ONE SIDE OF THE WITNESSES, LAURA AND AMY, IN PARTICULAR, AND THEN THE ORANGE, WHAT WE SAW AS CORROBORATING. WE HAVE THE TESTIMONY FROM POLICE OFFICERS. WE HAVE PHOTOGRAPHS OF THE INJURIES. WE HAVE THE ACTUAL PHYSICAL BRASS KNUCKLES.

DEFENSE COUNSEL SAID THE EVIDENCE IS CLEAR THAT CORY DID NOT SEE ANYONE STRIKE ANYONE, NEITHER DID WILLIAM OR THE POLICE. WELL, WE HAVE GOT CIRCUMSTANTIAL EVIDENCE FROM THOSE THREE WITNESSES THAT VIOLENCE TOOK PLACE. WE HAVE GOT DIRECT EVIDENCE FROM LAURA AND AMY, THEY TESTIFIED THAT THEY WERE ATTACKED AND STRUCK BY THE DEFENDANT, THROWN INTO A DRESSER, ON THE GROUND FOR WHAT SEEMED LIKE FOREVER TRYING TO PROTECT EACH OTHER AS THE DEFENDANT ATTACKED THEM.

WE HAVE CIRCUMSTANTIAL EVIDENCE FROM CORY, WHO SAW THE DEFENDANT BRANDISH THE KNUCKLES BEFORE HE LEFT. FROM WILLIAM WHO HEARD THE CRYING AND THE STRUGGLE COMING FROM THE NEXT ROOM AND FROM THE POLICE OFFICERS WHO SHOWED UP ON THE SCENE AND FOUND THE DEFENDANT STILL IN A RAGE IN THE MASTER BEDROOM, CORNERING AMY AND LAURA, TAKING HIS SHIRT OFF, GETTING AGITATED AGAIN IN THE KITCHEN AND THEN MAKING A THREAT TO AMY. THOSE ARE ALL -- NOT ONLY ARE THEY DIRECT EVIDENCE OF A THREAT, IT'S ALSO CIRCUMSTANTIAL EVIDENCE OF THE VIOLENCE

THAT TOOK PLACE BEFORE THE POLICE ARRIVED. WE HAVE BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE THAT POINTS TO AN ATTACK THAT TOOK PLACE, THESE INJURIES THAT YOU SAW PHOTOGRAPHS OF WERE NOT PRESENT BEFORE THIS ORDEAL. THEY DIDN'T COME OUT OF THIN AIR.

LAURA HAS BRUISES ON HER ARMS AND A BLACK EYE BECAUSE OF THE ATTACK. THAT'S NOT SOMETHING THAT WAS SELF-INFLICTED. YOU HEARD THE EVIDENCE OF EXACTLY HOW THAT HAPPENED. THE DEFENDANT'S RAGE, THE DEFENDANT'S JEALOUSY. HE'S THE ONLY ONE IN THAT HOUSE WHO HAD A WEAPON. HE'S THE ONLY ONE WHO HAD THE BRASS KNUCKLES. IT WAS A 15- TO 30-MINUTE ORDEAL, WHERE HE'S THREATENING TO KILL PEOPLE, WHERE HE'S CAUSING INJURIES THAT SHOW UP ON THEIR BODIES, YOU CAN SEE IT FOR YOURSELF.

NOW, DEFENSE COUNSEL ALSO MADE A BIG DEAL ABOUT THE LOCATION OF THE ATTACK AS BEING MORE CRITICAL THAN THE FACT THAT THE ATTACK TOOK PLACE. WITH EYEWITNESSES, SOMETIMES IT'S, DID IT HAPPEN AT POINT A INSTEAD OF POINT B? DID IT HAPPEN IN THE MASTER BEDROOM OR IN AMY'S ROOM? WE KNOW THE ATTACKED HAPPENED. WE KNOW THAT LAURA WAS THROWN INTO A DRESSER. WE SAW THAT HER GLASSES CAME OFF; HEARD TESTIMONY TO THAT EFFECT. WE SAW THE BLACK EYE.

THIS DETAIL ABOUT WHERE EXACTLY IT TOOK PLACE IS NOT AS CRITICAL AS THE FACT THAT IT DID TAKE PLACE AND HOW IT TOOK PLACE. THEY BOTH SAID THAT THE DEFENDANT GRABBED LAURA AND THREW HER INTO THE DRESSER. WHICH DRESSER? IS THAT IMPORTANT? NOT AS CRITICAL AS THE FACT THAT SHE WAS THROWN INTO A DRESSER. A LOT OF THINGS WERE HAPPENING. IT WAS AN

EMOTIONALLY-CHARGED SITUATION. THEY WERE IN FEAR FOR THEIR LIVES. SOMETIMES THOSE DETAILS CAN BE DIFFICULT TO RECALL, BUT IT'S NOT A REQUIREMENT THAT YOU FIND WHICH DRESSER LAURA'S HEAD HIT THAT DAY; THAT'S NOT AN ELEMENT TO FIND THE DEFENDANT GUILTY OF COUNT 1, CORPORAL INJURY TO A SPOUSE.

THE FACT THAT WILLIAM TESTIFIED THAT HE WASN'T IN FEAR. IF YOU REMEMBER CORRECTLY, THE TESTIMONY FROM WILLIAM WAS THAT HE WASN'T IN FEAR FOR HIMSELF BECAUSE THE THREATS WERE DIRECTED AT LAURA AND AMY. HE WAS IN FEAR FOR THEM. HE DIDN'T TAKE OFF THE WAY CORY DID, HE STAYED AROUND. HE HELPED AMY CALL THE POLICE. HE KNEW THERE WAS SOMETHING BAD HAPPENING THAT HE HAD FEAR FOR THEIR SAFETY AND NEEDED TO DO SOMETHING.

DEFENSE COUNSEL ALSO TALKED ABOUT THE DEFENDANT BEING UNREASONABLY JEALOUS AND BECOMING ANGRY. THOSE THINGS ARE NOT DEFENSES; THAT'S NOT A DEFENSE TO CRIMINAL THREATS; IT'S NOT A DEFENSE TO ASSAULTING SOMEONE WITH A DEADLY WEAPON OR CAUSING INJURY TO YOUR SPOUSE.

NOW, DEFENSE COUNSEL ALSO POINTED OUT, WITH REGARD TO AMY, THAT SHE WOULD DO ANYTHING TO SUPPORT HER MOM AND AT THE PRELIMINARY HEARING LAURA WANTED LENIENCY, SO AMY MINIMIZED. AT THE JURY TRIAL, LAURA WANTED A DIVORCE, SO AMY WAS EMBELLISHING.

NOW, SHE'S TELLING THE STORY SHE WANTS TO, I THINK DEFENSE COUNSEL SAID, HANG HIM FROM THE HIGHEST TREE. WE HAVE TO LOOK AGAIN -- DON'T BE DISTRACTED BY STATEMENTS LIKE THAT OR PERCEPTIONS OR CHARACTERIZATIONS OF WITNESS TESTIMONY, WHEN YOU CAN VERY WELL SEE FOR YOURSELF THE CORROBORATION OF AMY'S

STATEMENTS, THE INJURIES, WHAT OTHER WITNESSES HEARD -- WILLIAM, OFFICER XIONG, WHEN IT COMES TO THREATS. THAT'S HOW YOU CAN ASSESS IT. YOU'RE THE JUDGE OF WHO'S CREDIBLE. YOU CAN SEE THE EMOTIONS THAT ARE RUNNING THROUGH HER MIND AS SHE'S TESTIFYING, THAT SHE HAS TO TAKE A MOMENT TO COLLECT HERSELF, THAT SHE HAS TROUBLE MAINTAINING COMPOSURE. THAT'S NOT SOMETHING THAT IS MADE UP; THAT WAS GENUINE EMOTION ASSOCIATED WITH HAVING TO COME INTO COURT AND TESTIFY AGAINST YOUR STEPFATHER ABOUT HOW HE ATTACKED NOT ONLY HER MOTHER, BUT HER. SHE WAS FEARFUL AT THE TIME; SHE WAS FEARFUL AT THE PRELIMINARY HEARING. SOMETHING LIKE THAT WOULD CAUSE SOMEBODY TO TRY TO MINIMIZE WHAT HAPPENED OR TRY TO MAKE THINGS GO AWAY, HOPING THINGS WILL GO AWAY AT THE PRELIMINARY HEARING.

REMEMBER IN THE JURY TRIAL SHE SAID THAT IT DIDN'T HURT SO MANY BECAUSE OF THE HITS, BUT WHO WAS HITTING HER; IT WAS HER STEP DAD. THIS WHOLE EVENT MADE HER FEEL LIKE SHE WAS GOING TO LOSE HER STEPFATHER AND THEN SHE FELT SHE WAS STUCK IN BETWEEN AND HAD TO CHOOSE.

THIS WHOLE ISSUE ABOUT LAURA'S CLOTHING, WHAT SHE WAS WEARING AT THE TIME. YOU SAW THE PHOTOGRAPHS OF HER BARE ARMS ON THE FOLLOW-UP A FEW DAYS LATER WITH THE BRUISES. THIS DETAIL ABOUT WHETHER SHE WAS WEARING A COAT OR T-SHIRT. SHE SAID SHE CHANGED BECAUSE SHE PEED HER PANTS; THAT'S SOMETHING VERY EMBARRASSING TO ADMIT, BUT THAT'S SOMETHING THAT SHE SAID. SHE DOESN'T REMEMBER EXACTLY WHAT SHE WAS WEARING AT THE TIME. IS THAT A CRITICAL FACT? NO. IS IT AN ELEMENT OF ANY OF THE OFFENSES? NO. SHE HAD ACTUAL INJURIES. IF THEY HAPPENED THROUGH A JACKET OR T-SHIRT, THAT'S NOT

CONSEQUENTIAL. THAT'S A DIFFERENCE IN TESTIMONY. SOMETHING THAT SHE DOESN'T REMEMBER ACCURATELY? SURE, BUT DOES SHE REMEMBER BEING STRUCK? YES. DOES SHE HAVE INJURIES? THAT'S NOT TESTIMONY; YOU CAN SEE THAT'S PHOTOGRAPHIC EVIDENCE. DOES SHE HAVE INJURIES FROM THE ATTACK ON THAT DAY? YES. ALL THOSE THINGS CAN BE CONSIDERED WHEN YOU'RE CONSIDERING WHETHER THE DEFENDANT IS GUILTY OF COUNT 1.

NOW, DEFENSE COUNSEL INDICATED THAT THE INJURY TO THE LAURA'S EYE, AT THE PRELIM, THE WITNESS SAID IT WAS NOT A RESULT OF BEING PUNCHED OR STRUCK. WELL, THE QUESTION WAS AT THE PRELIM, AS DEFENSE READ, "DID YOU GET THAT BLACK EYE FROM BEING PUNCHED OR STRUCK?" THE ANSWER, NO, WOULDN'T BE INCONSISTENT BECAUSE IT'S FROM BEING THROWN INTO A DRESSER, NOT FROM A PUNCH OR A STRIKE. THAT'S A DETAIL -- I DON'T WANT TO GET NIT-PICKY HERE -- BUT WHEN WE'RE EXAMINING WHETHER SOMEBODY IS BEING INCONSISTENT, WE HAVE TO REMEMBER THE SURROUNDING CIRCUMSTANCES.

IF SOMEONE SAYS THAT BLACK EYE IS NOT FROM BEING PUNCHED OR STRUCK. WELL, IF IT'S FROM BEING THROWN INTO A PIECE OF FURNITURE, WE HAVE TO KEEP THAT IN MIND. DEFENSE COUNSEL WOULD HAVE YOU BELIEVE THAT THAT TESTIMONY FROM THE PRELIM IS INCONSISTENT, AND IT'S NOT.

WHEN DEFENSE COUNSEL WAS HIGHLIGHTING INCONSISTENCIES OF TESTIMONY, OBVIOUSLY, HE'S ADVOCATING FOR THE DEFENDANT AND HE FAILED TO MENTION ALL THE CONSISTENCIES. AS YOU RECALL DURING THE TRIAL, WHEN DEFENSE COUNSEL GOT UP AT THE PODIUM WITH HIS TRANSCRIPT FROM THE PRELIMINARY HEARING AND HIGHLIGHTED SOME OF THE INCONSISTENCIES FROM THE

WITNESSES. THEN I GOT UP AFTER THAT AND READ FROM THAT SAME TRANSCRIPT AND TALKED ABOUT THE CONSISTENCIES OF ALL THESE WITNESS STATEMENTS. SOME OF THE THINGS THEY REMEMBER AT THE PRELIM ARE THE SAME AS THE JURY TRIAL. THE CRITICAL THINGS THAT GO TO THE ELEMENTS.

FOR EXAMPLE, WHEN THE THREAT OCCURRED FROM THE DEFENDANT ABOUT CALLING THE POLICE, THAT'S SOMETHING THAT WAS TESTIFIED TO AT THE PRELIMINARY HEARING, SAME AS THE JURY TRIAL. WHEN THE THREAT OCCURRED IN FRONT OF OFFICER XIONG AS THE DEFENDANT WAS BEING LED OUT OF HIS HOME, SAME AT THE PRELIM AS THE JURY TRIAL.

WHEN CONSIDERING THE TESTIMONY OF AMY SCHWIND AND ANY DIFFERENCES, IT'S AN UNFORTUNATE QUALITY OR CHARACTERISTIC OF DOMESTIC VIOLENCE CASES WHERE THERE'S PEOPLE INVOLVED THAT ARE FAMILY. THE PEOPLE WHO ARE INVOLVED ARE RELATED. OFTENTIMES, LIKE IN THIS CASE, RESIDING IN THE SAME HOME. FAMILY DYNAMICS ARE AT WORK. THERE'S MOTHERS WHO DON'T WANT TO LET GO OF AN ABUSER. THERE'S CHILDREN WHO HAVE TO PUT UP WITH THEIR PARENTS POOR DECISIONS; DECISIONS TO STAY WITH SOMEONE, OR DECISIONS TO FORGIVE SOMEONE OR WANT TO GET BACK TOGETHER WITH SOMEONE; THINGS LIKE THAT INFLUENCE KIDS.

THEY COME IN HERE INTO A COURT OF LAW AND ALL THEY HAVE IN THEIR MIND IS WHAT'S GOING ON AT HOME, THE HOME THEY WERE AT BEFORE THEY CAME TO COURT AND THE HOME THEY HAVE TO GO TO WHEN THEY LEAVE COURT. THEY'RE HERE MOMENTARILY, TALKING ABOUT AN EVENT THAT IS EMOTIONAL AND REALLY DIFFICULT. SO KEEP THAT IN MIND WHEN YOU'RE EVALUATING THE CREDIBILITY OF AMY SCHWIND. CONSIDER THE EMOTIONS INVOLVED WITH SOMEONE OF

HER AGE AND GOING THROUGH THE ORDEAL THAT SHE WENT THROUGH.

AGAIN, SHE CONCEDED ON THE STAND WHEN SHE SAID -- WHEN SOMETHING WAS READ FROM THE TRANSCRIPT AND IT WASN'T ACCURATE, SHE SAID, NO, THAT'S NOT ACCURATE OR, NO, THAT WASN'T TOTALLY HONEST. WHEN SHE TESTIFIED HERE AND SHE HAD TO GIVE MORE DETAILS ABOUT WHAT HAPPENED, IT WAS VERY UPSETTING. SHE WAS THROWN BETWEEN HER PARENTS AGAIN. SHE WAS HAVING TO CONFRONT HER STEP DAD; THAT'S ALL REALLY DIFFICULT AND THAT EMOTION CAME THROUGH AND SHOWED THAT WHAT SHE WAS TALKING ABOUT WAS GENUINE AND EMOTIONAL AND DIFFICULT.

DEFENSE COUNSEL ALMOST LUMPED TOGETHER THE DEMEANORS OF LAURA AND AMY, CALLING THEM BOTH ANGRY AND VINDICTIVE. WE SAW NO ANGER FROM AMY. YOU RECALL HER TESTIMONY, SHE DID NOT GET UP THERE AND SHAKE HER FISTS OR STARE DOWN THE DEFENDANT OR SAY THINGS IN A WAY THAT WERE CUTTING. SHE WAS FORTHRIGHT AND CONCEDED WHEN THINGS WEREN'T ACCURATE AND SHE WAS EMOTIONAL WHEN SHE HAD TO TESTIFY AND SAY, LOOK, THIS IS WHAT HAPPENED. YEAH, HE THREW MY MOM INTO THE DRESSER, YEAH, HE THREATENED TO KILL ME. IT WAS SAD. IT'S SOMETHING THAT'S REALLY HARD. SHE'S SAD, SHE'S CRYING; SHE'S NOT ANGRY AND VINDICTIVE.

WITH REGARD TO HER MOTHER LAURA, YEAH, SHE WAS ANGRY. SHE'S AN ADULT. SHE WENT THROUGH THIS. SHE'S MARRIED TO THE DEFENDANT FOR TWO YEARS AND THEN HE GOES AND DOES THIS. HE ATTACKS HER, ATTACKS HER DAUGHTER AND SHE FEELS LIKE AN IDIOT. WHY DID I WANT HIM BACK? WHY DID I ASK FOR LENIENCY? WHY WOULD I WANT TO STAY WITH SOMEBODY LIKE THAT?

AGAIN, WHEN YOU'RE EVALUATING THE TESTIMONY, YEAH,

SHE'S ANGRY; YEAH, SHE'S GETTING A DIVORCE, BUT LOOK AT THE CORROBORATING EVIDENCE, LOOK AT THE OTHER WITNESSES' TESTIMONY, LOOK AT THE PHOTOGRAPHS. THE PHOTOGRAPHS AREN'T DIVORCING THE DEFENDANT, THE BRASS KNUCKLES AREN'T DIVORCING THE DEFENDANT, THE POLICE OFFICERS AREN'T DIVORCING THE DEFENDANT; THEY DON'T HAVE SOME ALTERNATIVE AGENDA.

WHEN LAURA WAS IN HERE TALKING ABOUT THINGS, IF YOU DOUBT HER TESTIMONY OR THINK THIS IS A VERY BIASED WOMAN, LOOK AT THE CORROBORATING EVIDENCE. COMPARE HER TESTIMONY TO WHAT OTHER PEOPLE TESTIFIED TO.

THAT GOES RIGHT INTO JURY INSTRUCTION 224 THAT DEFENSE COUNSEL WAS REFERRING TO AND YOU'LL GET THAT INSTRUCTION, ALONG WITH MANY OTHERS, ABOUT DRAWING CONCLUSIONS BETWEEN EVIDENCE. ONE POINTS TO INNOCENCE, ONE POINTS TO GUILT. YOU HAVE TO ACCEPT THE ONE THAT POINTS TO NOT GUILTY ONLY IF IT'S REASONABLE. YOU DON'T HAVE TO ACCEPT UNREASONABLE CONCLUSIONS. TO ACCEPT THE DEFENSE'S ARGUMENT, YOU HAVE TO BELIEVE THAT EVERYONE IS LYING IN THIS CASE. YOU HAVE TO IGNORE THE PHOTOS OF THE INJURIES IN THIS CASE; THEY MUST HAVE BEEN OUT OF THIN AIR. YOU HAVE TO IGNORE THE POLICE OFFICER FINDING THE BRASS KNUCKLES. YOU HAVE TO IGNORE THE TESTIMONY OF THE POLICE OFFICERS WHO HEARD THE THREATS -- OFFICER XIONG WHO HEARS THE THREATS. YOU HAVE TO IGNORE THE COMMON THREADS.

YOU HAVE TO FOCUS ON ALL THESE BIASES AND PERCEIVED BIASES. YOU HAVE TO FOCUS ON THE FACT THAT SOME OF THE DETAILS CHANGED. YOU HAVE TO IGNORE THE BIGGER PICTURE. YOU HAVE TO IGNORE THE COMMONALITIES, THE COMMON THREAD, THE

CORROBORATION, AND THAT'S JUST NOT REASONABLE.

YOU CANNOT IGNORE THE CONSISTENCY OF THE WITNESSES' STATEMENTS WHEN YOU COMPARE THEM TO EACH OTHER; THAT IS UNREASONABLE.

DEFENSE COUNSEL TALKED ABOUT THE SUPER BOWL, BUT WE ALL KNOW THIS IS NOT A GAME, THIS IS REAL LIFE, WITH REAL PEOPLE, INVOLVING REAL EMOTIONS. KEEP THAT IN MIND WHEN YOU'RE GOING THROUGH AND LOOKING AT EACH OF THESE WITNESSES' TESTIMONY. THERE IS NO -- WHEN YOU LOOK AT THE EVIDENCE, THERE'S NO REASONABLE INTERPRETATION THAT POINTS TO INNOCENCE, OF THE DEFENDANT NOT BEING GUILTY. THE REASONABLE INTERPRETATION OF BOTH THE DIRECT EVIDENCE, WHAT PEOPLE SAW AND HEARD, AND FROM THE CIRCUMSTANTIAL EVIDENCE, WHAT PEOPLE SAW AND HEARD, IS THAT THE DEFENDANT IS GUILTY.

THE DEFENDANT DID ATTACK LAURA MEZZLES THAT DAY, OCTOBER 30TH, 2010. HE WAS JEALOUS, HE WAS IN A RAGE. HE KNEW WHAT WAS GOING ON. HE KNEW THAT THAT WAS HIS WIFE, CALLED HER A WHORE, THREATENED TO KILL HER, CHASED HER AROUND THE APARTMENT, CORNERED HER IN A BEDROOM. 15-YEAR-OLD DAUGHTER COMES TO HER RESCUE, GETS IN BETWEEN THEM, PUSHED OUT SEVERAL TIMES AND AT A CERTAIN POINT THEY END UP ON THE FLOOR. THE DEFENDANT ARMED WITH BRASS KNUCKLES, TOWERING OVER BOTH OF THEM AS THEY'RE ON THE FLOOR COWERING, TRYING TO PROTECT EACH OTHER; THAT DID NOT STOP. YOU HEARD THE TESTIMONY; THAT ATTACK DID NOT STOP UNTIL THE POLICE ARRIVED.

THE POLICE DESCRIBED HIS AGITATED MOOD, THE DEFENDANT'S AGITATED DEMEANOR WHEN OFFICER MARTIN WALKED INTO THE BEDROOM. HE RIPPED HIS SHIRT OFF, HE WAS YELLING, HE WAS

552

ANGRY. AGAIN IN THE KITCHEN, HE WAS YELLING, HE WAS ANGRY; TAKE ME TO JAIL, TAKE ME TO JAIL.

ON THE WAY OUT, AGAIN, AGAIN, IN FRONT OF THE POLICE, HE LOOKS AT HIS 15-YEAR-OLD DAUGHTER DOWN THE HALLWAY AND SAYS, I'LL KILL YOU. THE CONSEQUENCES, LOOK AT WHAT YOU'VE DONE. I'M BEING TAKEN AWAY BY THE POLICE. ALL OF THAT INDICATES THAT THE DEFENDANT HAD THE CAPABILITY TO FORMULATE SPECIFIC INTENT WHEN HE MADE THOSE THREATS.

WE KNOW WHAT HE WAS THINKING WHEN HE THREATENED AMY AND LAURA BECAUSE HE ATTACKED THEM, HE ATTACKED THEM WITH A WEAPON. HE HAD A WEAPON IN HIS POSSESSION. HE DIDN'T STOP UNTIL THE POLICE ARRIVED. EVEN WHEN HE DID, LIKE I SAID, HE GOT AGITATED, CONTINUED TO BE ANGRY AND THREATENING; THAT'S HOW WE KNOW WHAT WAS GOING ON IN HIS MIND.

THE EXAMPLE I GAVE EARLIER ABOUT BURGLARY. ONE IS THE ACTION OF STEPPING INTO THE ROOM AND THE OTHER IS WHAT'S GOING ON IN YOUR MIND. IN THIS CASE, THE WORDS AND ACTIONS, THE THREATS HE'S MAKING, WE KNOW WHAT WAS IN HIS MIND BECAUSE HE WAS DEMONSTRATING IT. HE HAD DEMONSTRATED IT FOR A LONG TIME BEFORE THE POLICE GOT THERE TO STOP HIM. HE MEANT TO HURT THEM, HE MEANT TO DO THEM HARM. HE KEPT THREATENING TO KILL THEM, KEPT THREATENING TO BURN THE HOUSE DOWN. HE WAS IN THE PROCESS OF CARRYING OUT THESE THREATS UNTIL THE POLICE CAME AND INTERVENED. THEY STOPPED HIM; THAT'S WHY HE STOPPED, THE POLICE SHOWED UP.

DEFENSE TALKED ABOUT BRANDISHING A WEAPON VERSUS ASSAULT WITH A DEADLY WEAPON. BRANDISHING, I TALKED ABOUT CORY AND WILLIAM SEEING THE DEFENDANT BRANDISH THE BRASS

KNUCKLES; THAT'S CIRCUMSTANTIAL EVIDENCE THAT THE DEFENDANT USED THE BRASS KNUCKLES TO ATTACK AMY BECAUSE HE WAS SEEN WEARING THEM, NOT JUST CARRYING THEM AROUND. THEY WERE IN HIS POCKET EVENTUALLY, BUT THEY WERE IN HIS FIST. HE WAS BRANDISHING THEM IN A MENACING MANNER. THE EVIDENCE SHOWS THAT HE WAS DEAD-SET ON USING THEM. THEN THIS ATTACK TOOK PLACE AND WHEN THE POLICE RESPONDED, THEY FOUND IT ON HIS PERSON.

DURING THE ATTACK, AMY LOOKED UP -- HER MOTHER COULDN'T SEE BECAUSE HER GLASSES WERE KNOCKED OFF OF HER FROM THE ATTACK EARLIER -- AMY LOOKED UP AND SAID, MOM, HE HAS THE BRASS KNUCKLES. THIS IS WHEN THEY'RE ON THE GROUND COWERING. THEY TESTIFIED THEY WERE ON THE GROUND BEING ATTACKED TRYING TO PROTECT EACH OTHER AND FEELING THE BLOWS.

THERE ISN'T ANY CONFUSION OVER THE THREATS. THE THREATS THAT I'VE LAID OUT, I LAID OUT IN ANY INITIAL CLOSING ON THE POWERPOINT. WE'VE GOT THE THREAT THE DEFENDANT MADE MULTIPLE TIMES TO KILL LAURA AND BURN THE HOUSE DOWN. SHE SAID, HE KEPT MAKING THE THREAT, KEPT REPEATING IT THROUGHOUT THIS ORDEAL. WE HAVE THE THREATS AFTER THE DEFENDANT FOUND OUT THAT -- THAT GOES TO COUNT 3, AGAINST LAURA MEZZLES.

WE HAVE THE THREATS THAT AMY OVERHEARD HER MOTHER BEING THREATENED, THAT'S COUNT 4. THEN WE'VE GOT COUNT 5, WHICH IS I'M GOING TO KILL YOU -- THE THREAT, IF I'M GOING TO GO TO JAIL, I MIGHT AS WELL FINISH YOU OFF AND THE ATTACK RESUMES; THAT'S COUNT 5. THEN COUNT 6 OF, I'LL KILL YOU. THE WORDS, I'LL KILL YOU WHEN OFFICER XIONG SHOWS UP. AGAIN, THE FACT THAT HE WAS IN CUSTODY, IN POLICE HANDCUFFS, BEING LED

OUT DOESN'T MATTER. IT'S NOT REQUIRED THAT AT THE VERY MOMENT HE BE ABLE TO CARRY IT OUT. YOU HEARD AMY TESTIFY THAT AT THE PRELIMINARY HEARING, IF SHE SAID SOMETHING WRONG, THE DEFENDANT WAS GOING TO COME AFTER HER. SHE WAS AFRAID THEN.

LET'S TALK ABOUT THE DOCTOR, DR. OWENS. MALINGERING; SOMEBODY FAKING IT TO TRY TO GET OUT OF SOMETHING. HE DIDN'T CONDUCT ONE TEST FOR MALINGERING. HE CONDUCTED AN HOUR AND A HALF INTERVIEW AND DURING THAT TIME HE NEVER TESTED FOR MALINGERING. HE NEVER VERIFIED THE INFORMATION. I WENT THROUGH THAT THE FIRST TIME. HE CLAIMED, I VERIFIED IT THROUGH THIS LETTER FROM HIS MOM. THE LETTER FROM HIS MOM JUST LAID OUT WHAT THE DEFENDANT TOLD HIS MOM; IT'S ONE SOURCE. YOU CAN'T VERIFY WHAT THE DEFENDANT IS SAYING BY ANOTHER STATEMENT BY THE DEFENDANT.

IN AN HOUR AND A HALF HE COMES UP -- HE EVALUATES THE DEFENDANT AND COMES UP WITH THIS PTSD DIAGNOSIS AND SAYS THE DEFENDANT IS INCAPABLE OF FORMING INTENT. ARE YOU KIDDING ME? AN HOUR AND A HALF? NO MEDICAL RECORDS, NO PSYCHIATRIC RECORDS, NO TESTS. YOU CAN SEE THAT MANY PEOPLE WHO SUFFERED ABUSE AS A CHILD NEVER BECOME VIOLENT. IN AN HOUR AND A HALF HE SAYS, THIS PERSON IS DIFFERENT. THIS PERSON, THE DEFENDANT, HAS PTSD AND NOW HE CAN'T FORMULATE SPECIFIC INTENT; THAT'S RIDICULOUS.

AGAIN, DR. OWEN CONCEDED THAT THERE'S NO NEXUS BETWEEN ABUSE AS A CHILD AND DOMESTIC VIOLENCE; THERE'S NO STUDY. HOW DO WE KNOW THAT DR. OWENS IS WRONG BY HIS CONCLUSIONS? WELL, 2007, THE DEFENDANT THREATENED TO KILL HIS EX-GIRLFRIEND. WE SEE A PATTERN OF CONDUCT HERE. WE HAVE TO

-- BACK IN 2007, WHEN HE WAS ON THE PHONE THREATENING STACY, THEN HE WAS HAVING A PTSD EPISODE, TOO? THESE ARE UNREASONABLE CONCLUSIONS TO DRAW. WE HAVE NO TEST TO DETERMINE WHETHER THE DEFENDANT WAS MALINGERING OR FAKING IT. WE DON'T HAVE ANY VERIFICATION. SO YOU SHOULD REJECT DR. OWEN'S CONCLUSIONS. IT'S UNREASONABLE FROM THE LIMITED AMOUNT OF INFORMATION THAT HE HAD.

EVEN IF, FOR SOME REASON, YOU DO -- BECAUSE HE HAS A PH.D. -- YOU WANT TO ACCEPT HIS CONCLUSIONS, THAT DOES NOT APPLY TO COUNT 1, DOESN'T APPLY TO GENERAL INTENT, CORPORAL INJURY TO A SPOUSE, LAURA MEZZLES. IT DOESN'T APPLY TO COUNT 2, ASSAULT WITH DEADLY WEAPON AGAINST AMY SCHWIND. IT DOESN'T APPLY TO COUNT 8, POSSESSION OF A DEADLY WEAPON THE BRASS KNUCKLES, AND IT DOESN'T APPLY TO THE SIMPLE ASSAULT AGAINST WILL WILLIAMS.

I URGE WHEN YOU GO BACK TO DELIBERATE AND YOU EXAMINE THE EVIDENCE, YOU START DELIBERATING, YOU TALK ABOUT THE TESTIMONY, THE PHOTOGRAPHS, THE EVIDENCE IN THIS CASE, THAT YOU DRAW REASONABLE CONCLUSIONS. THOSE ARE -- THE REASONABLE CONCLUSIONS TO BE DRAWN IN THIS CASE POINT TOWARD GUILT. HOLD THE DEFENDANT ACCOUNTABLE FOR WHAT HE DID ON OCTOBER 30TH, 2010. HOLD HIM ACCOUNTABLE FOR HIS ACTIONS. HE DOESN'T GET A FEE PASS BECAUSE HE HAD A FEW DRINKS. HE DOESN'T GET A FREE PASS BECAUSE HE HAD A BAD CHILDHOOD. YOU SHOULDN'T CONSIDER SYMPATHY. IF ANY OF YOU FEEL SYMPATHETIC TO WHAT HAPPENED, WELL, IT'S TRAGIC, BUT THAT'S NOT A DEFENSE.

HE KNEW WHAT HE WAS DOING. HIS ACTIONS DEMONSTRATE THAT HE WAS AWARE HE WAS IN HIS HOME, DEALING WITH

HIS WIFE AND DEALING WITH HIS STEPDAUGHTER. HIS ACTIONS -- THE OBSERVATIONS OF THE POLICE OFFICERS, THEIR TESTIMONY DEMONSTRATES HE WAS NOT INTOXICATED TO THE POINT WHERE HE DIDN'T KNOW WHAT WAS GOING ON.

IT'S TIME TO HOLD HIM ACCOUNTABLE FOR ALL COUNTS, AND WHEN YOU REVIEW THE EVIDENCE, I'M CONFIDENT THAT YOU'LL FIND IT POINTS TO GUILTY ON ALL COUNTS. THANK YOU.

THE COURT: THANK YOU. AS MR. SCOTT AND MR. VERBURGT INDICATED, THERE ARE FOUR COUNTS OF 422. IF YOU'RE LOOKING TO DETERMINE AS TO WHICH ALLEGED VICTIM THEY APPLY, IF YOU LOOK TO JURY INSTRUCTION 1300, IT WILL TELL YOU THAT COUNT 3 APPLIES TO LAURA MEZZLES AND THE REMAINING COUNTS APPLY TO AMY AND THAT WILL ASSIST YOU, IF YOU NEED TO MAKE THAT DETERMINATION.

WHEN YOU GO INTO THE JURY ROOM, THE FIRST THING YOU SHOULD DO IS CHOOSE A FOREPERSON. THE FOREPERSON SHOULD SEE TO IT THAT YOUR DISCUSSIONS ARE CARRIED ON IN AN ORGANIZED WAY AND THAT EVERYONE HAS A FAIR CHANCE TO BE HEARD. IT IS YOUR DUTY TO TALK WITH ONE ANOTHER AND DELIBERATE IN THE JURY ROOM. YOU SHOULD TRY TO AGREE ON A VERDICT, IF YOU CAN. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT ONLY AFTER YOU HAVE DISCUSSED THE EVIDENCE WITH THE OTHER JURORS.

DO NOT HESITATE TO CHANGE YOUR MIND IF YOU BECOME CONVINCED YOU ARE WRONG, BUT DO NOT CHANGE YOUR MIND JUST BECAUSE OTHER JURORS DISAGREE WITH YOU. KEEP AN OPEN MIND AND OPENLY EXCHANGE YOUR THOUGHTS AND IDEAS ABOUT THE CASE. STATING YOUR OPINIONS TOO STRONGLY AT THE BEGINNING OR IMMEDIATELY ANNOUNCING HOW YOU PLAN TO VOTE MAY INTERFERE WITH

AN OPEN DISCUSSION.

PLEASE TREAT ONE ANOTHER WITH COURTESY. YOUR ROLE IS TO BE IMPARTIAL JUDGES OF THE FACTS, NOT TO ACT AS AN ADVOCATE FOR ONE SIDE OR THE OTHER.

AS I TOLD YOU AT THE BEGINNING THE TRIAL, DO NOT TALK ABOUT THIS CASE OR ANY PEOPLE OR ANY SUBJECT INVOLVED WITH ANYONE, INCLUDING BUT NOT LIMITED TO YOUR SPOUSE, FAMILY FRIENDS, SPIRITUAL LEADERS, ADVISORS OR THERAPISTS. YOU MUST DISCUSS THIS CASE ONLY IN THE JURY ROOM AND ONLY WHEN ALL JURORS ARE PRESENT. IF SOMEONE GOES TO USE THE RESTROOM, YOU MUST STOP YOUR DELIBERATIONS. IF SOMEONE WANTS TO MAKE A CELL CALL -- YOUR CELL PHONES SHOULD BE OFF DURING DELIBERATIONS, BUT IF SOMEBODY WANTS TO MAKE A CALL, YOU TAKE A BREAK. WHEN YOU'RE ON BREAK, YOU CAN USE YOUR PHONES AT THAT PARTICULAR TIME, BUT WHEN YOU'RE DELIBERATING, ALL JURORS ARE PRESENT AND THAT'S EXACTLY WHAT YOU'RE DOING AND NOTHING ELSE.

DO NOT DISCUSS YOUR DELIBERATIONS WITH ANYONE. DO NOT COMMUNICATE USING FACEBOOK, TWITTER, BLOGS DURING YOUR DELIBERATIONS. IT IS VERY IMPORTANT THAT YOU NOT USE THE INTERNET, IN ANY WAY, IN CONNECTION WITH THIS CASE DURING YOUR DELIBERATIONS.

DURING THE TRIAL, SEVERAL ITEMS WERE RECEIVED INTO EVIDENCE AS EXHIBITS. YOU MAY EXAMINE WHATEVER EXHIBITS YOU THINK WILL HELP YOU IN YOUR DELIBERATIONS. THESE EXHIBITS WILL BE SENT INTO THE JURY ROOM WHEN YOU BEGIN TO DELIBERATE.

IF YOU NEED TO COMMUNICATE WITH ME WHILE YOU ARE DELIBERATING, SEND A NOTE THROUGH THE BAILIFF, SIGNED BY THE FOREPERSON OR BY ONE OR MORE MEMBERS OF THE JURY. TO HAVE A

COMPLETE RECORD OF THIS TRIAL, IT'S IMPORTANT THAT YOU COMMUNICATE WITH ME ONLY THROUGH WRITTEN NOTE.

IF YOU HAVE QUESTIONS, I WILL TALK WITH THE ATTORNEYS BEFORE I ANSWER, SO IT MAY TAKE SOME TIME. YOU SHOULD CONTINUE YOUR DELIBERATIONS WHILE YOU AWAIT MY ANSWER. I WILL ANSWER YOUR QUESTIONS EITHER IN WRITING OR HERE ORALLY IN OPEN COURT.

DO NOT REVEAL TO ME OR ANYONE ELSE HOW YOUR VOTE STANDS ON THE QUESTION OF GUILT, UNLESS I SPECIFICALLY ASK YOU TO DO SO. YOUR VERDICT ON EACH COUNT OR ANY SPECIAL FINDING MUST BE UNANIMOUS. THIS MEANS THAT TO RETURN A VERDICT, ALL OF YOU MUST AGREE UPON IT. IT IS NOT MY ROLE TO TELL YOU WHAT YOUR VERDICT SHOULD BE. DO NOT TAKE ANYTHING I SAID OR DID DURING THIS TRIAL AS AN INDICATION OF WHAT I THINK ABOUT THE FACTS, THE WITNESSES OR WHAT YOUR VERDICT SHOULD BE.

YOU MUST REACH YOUR VERDICT WITHOUT ANY CONSIDERATION OF PUNISHMENT. YOU WILL BE GIVEN VERDICT FORMS. AS SOON AS ALL THE JURORS HAVE AGREED UPON A VERDICT, THE FOREPERSON MUST DATE AND SIGN THE APPROPRIATE VERDICT FORM AND NOTIFY THE BAILIFF. IF YOU ARE UNABLE TO REACH AN UNANIMOUS DECISION ON ONLY ONE OR SOME OF THE CHARGES, FILL IN THOSE VERDICT FORM ONLY AND NOTIFY THE BAILIFF. WHEN YOU COME BACK IN, MAKE SURE YOU HAVE ALL THE VERDICT FORMS WITH YOU.

PLEASE SWEAR THE BAILIFFS.

(BAILIFFS SWORN.)

BAILIFF 1: I DO.

BAILIFF 2: I DO.

THE COURT: YOU CAN BEGIN YOUR DELIBERATIONS.

APPENDIX J

C-2
R-3

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, Vs. WAYNE CLYDE MEZZLES, Defendant and Appellant.	)	No. 1359458 03-20-12 B240078

APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY

THE HONORABLE EDWARD H. BULLARD, JUDGE PRESIDING

APPEARANCES:

For Plaintiff and Respondent:

KAMALA D. HARRIS, Attorney General
State of California
300 South Spring Street
Los Angeles, California 90013

For Defendant and Appellant:

CALIFORNIA APPELLATE PROJECT
520 South Grand Ave., 4th Floor
Los Angeles, California 90071

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C L E R K ' S T R A N S C R I P T

VOLUME II OF II

Jury Note #4 rec'd at 3:1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

PEOPLE OF THE STATE OF CALIFORNIA,
VS
WAYNE CLYDE MEZZLES,

CASE NO: 1359458

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA
FEB 0 1 2012
GARY M. BLAIR, Executive Officer
BY Deputy Clerk

WE, THE JURY IN THE ABOVE ENTITLED ACTION, REQUEST THE FOLLOWING:

Clarification as to what statements/events are tied to each of counts 3, 4, 5.

Count 3
The People have alleged, in Count 3, the statement made by the defendant to Laura Mezzles prior to the police being called: "I am going to kill you and burn the house down."

Count 4
The People have alleged, in Count 4, the statement made by the defendant to Laura Mezzles, heard by Amy Schwind prior to the police being called: "I am going to kill you."

Count 5
The People have alleged, in Count 5, the statement made by the defendant to Amy Schwind after the police were called: "If I am going to jail, then I may as well finish you off."

THIS 1 DAY OF February 2012

JUDGE 2-1-12

Please explain why our instructions say Count 3 is Laura + 4, 5, 6

385

APPENDIX K

C-2
R-3

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, Vs. WAYNE CLYDE MEZZLES, Defendant and Appellant.	No. 1359458 03-20-12 B240078

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THE HONORABLE EDWARD H. BULLARD, JUDGE PRESIDING

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300 South Spring Street
Los Angeles, California 90013

For Defendant and Appellant:

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520 South Grand Ave., 4th Floor
Los Angeles, California 90071

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C L E R K ' S T R A N S C R I P T

VOLUME II OF II

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED]

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SANTA BARBARA
Miller Division - 312-M E. Cook Street, Santa Maria, CA 93454

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA
MAR 21 2012
GARY M. BLAIR, Executive Officer
By J. Redley J. REDLEY, Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: WAYNE CLYDE MEZZLES
AKA: WAYNE CLYDE MEZZELS
CII NO.: A08578590
BOOKING NO.: 23984
DOB: 03/04/66
☐ NOT PRESENT

1359458 -A
-B
-C
-D

COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT
☐ AMENDED ABSTRACT

DATE OF HEARING	DEPT. NO.	JUDGE
03/20/12	SM6	EDWARD H. BULLARD

CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER	
D. MERRY	J. GOBLE	PRESLEY	☐ IMMEDIATE SENTENCING

COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	
E. VERBURGT	M. SCOTT	☒ APPTD.

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/YR.)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	CONCURRENT	CONSECUTIVE	654 STAY
1	PC	273.5(a)	CORPORAL INJURY TO SPOUSE	2010	02/02/12	X					X
3	PC	422	CRIMINAL THREATS	2010	02/02/12	X				X	
4	PC	422	CRIMINAL THREATS	2010	02/02/12	X			X		
5	PC	422	CRIMINAL THREATS	2010	02/02/12	X			X		
6	PC	422	CRIMINAL THREATS	2010	02/02/12	X			X		
8	PC	12020(a)(1)	POSSSESSION OF A DEADLY WEAPON	2010	02/02/12	X				X	

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	
667(a)(1) PC	10					10	0
667(a)(1) PC	10					10	0
667(a)(1) PC	10					10	0
667(a)(1) PC	10					10	0

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts ____
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts ____
6. a. ☐ 15 years to Life on counts ____ c. ☐ ____ years to Life on counts ____
   b. ☒ 25 years to Life on counts 1,3,4,5,6,8 d. ☐ ____ years to Life on counts ____
   PLUS endhancement time shown above
7. ☐ Additional determinate terms (see CR-290).
8. ☒ Defendant was sentenced pursuant to ☒ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.7 ☐ other (*specify*):

543

Form Adopted for Mandatory Use
Judicial Council of California
CR-292 [Rev. July 1, 2009]

ABSTRACT OF JUDGMENT-PRISON COMMITMENT-INDETERMINATE

Penal Code, § 1213, 1213.5

CR-292

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

PEOPLE FOR THE STATE OF CALIFORNIA vs. DEFENDANT: WAYNE CLYDE MEZZLES			
1359458-A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 10,000 per PC 1202.4(b) forthwith per PC 2085.5; $ 10,000 per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC1202.4(f):

Case A: $ 450.00 ☐ Amount to be determined to ☐ victim(s)* ☒ Restitution Fund

Case B: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

Case C: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

Case D: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ * Victim name(s), if known, and amount breakdown in item 11, below. ☐ * Victim name(s) in probation officer's report.

c. Fine(s):

Case A: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Security Fee: $40.00 per PC 1465.8.

10. TESTING: a. ☐ Compliance with PC 296 verified b. ☐ AIDS per PC1202.1 c. ☒ other *(specify)*: DNA per 296 PC

11. Other orders *(specify)*:

DEFENDANT SHALL PAY A CRIMINAL CONVICTION ASSESSMENT FEE PURS TO 70373 GC IN THE SUM OF $180. COURT RETAINS JURISDICTION OVER VICTIM RESTITUTION PURS TO 1202.4(f) PC.

12. IMMEDIATE SENTENCING:
☒ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin: WHI

13. EXECUTION OF SENTENCING IMPOSED
a. ☒ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ other *(specify)*:

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT	
A	762	508	254	[x] 4019 [ ] 2933.1
B				[ ] 4019 [ ] 2933.1
C				[ ] 4019 [ ] 2933.1
D				[ ] 4019 [ ] 2933.1

Date Sentence Pronounced	Time Served in State Institution
03—20—12	DMH [ ] CDCR [ ] CRC [ ]

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ other *(specify)*:

CLERK OF THE COURT

544

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
J. REDLEY J. Redley	03/21/12

CR-292 [Rev. July 1, 2009] ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE Page 2 of 2