No. _____

IN THE

Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, Warden,

Respondent.

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

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, *Petitioner-Appellant,* v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, *Respondent-Appellee.*	No. 13-99010 D.C. No. 2:05-cv-07606-RGK OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted June 26, 2019
Pasadena, California

Filed August 21, 2019

Before: Kim McLane Wardlaw, Jacqueline H. Nguyen, and John B. Owens, Circuit Judges.

Opinion by Judge Owens

SUMMARY*

Habeas Corpus

The panel affirmed the district court's denial of Hooman Panah's habeas corpus petition challenging his State of California conviction and sentence for the first-degree murder and sexual assault of an eight-year-old girl.

The district court granted a certificate of appealability as to Panah's claim brought pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959), in which Panah, relying on post-conviction DNA reports, contended that he was prejudiced by the State's presentation of serology testimony which, he argued, the State knew was false and misleading. The panel held that the California Supreme Court reasonably rejected this claim. The panel held that even assuming there was no reasonable basis for the state court to deny the claim as to the first two *Napue* requirements – that the testimony was false or misleading, and that the State knew or should have known that – the panel could not say that it would be unreasonable to conclude that the testimony did not satisfy the third requirement – materiality. Observing that even setting aside the serology testimony, the case against Panah was devastating, the panel held that the California Supreme Court would not have erred in finding no reasonable likelihood that the testimony could have affected the verdict.

The panel expanded the certificate of appealability to encompass Panah's claim that his trial counsel rendered

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ineffective assistance by failing to conduct a reasonable investigation and therefore not rebutting the State's serology and pathology evidence. The panel expressed concern with counsel's lack of pre-trial investigation, but held that even assuming counsel's performance was deficient, it could not say – in light of the overwhelming evidence of Panah's guilt and the deference owed the state court judgment – that the California Supreme Court would have erred in finding no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

COUNSEL

Joseph A. Trigilio (argued), Mark R. Drozdowski, and Susel B. Carrillo-Orellana, Deputy Federal Public Defenders; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; Firdaus F. Dordi, Los Angeles, California; for Petitioner-Appellant.

Toni R. Johns Estaville (argued), Ana R. Duarte, A. Scott Hayward, and Dana M. Ali, Deputy Attorneys General; Lance E. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

OPINION

OWENS, Circuit Judge:

California state prisoner Hooman Panah appeals from the district court's denial of his habeas corpus petition challenging his conviction and sentence for the first-degree murder and sexual assault of eight-year-old Nicole Parker. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. Background

A. Murder & Sexual Assault of Parker

In the early afternoon of November 20, 1993, Parker went missing from her father's apartment complex, where Panah also lived with his mother. While searching for her in the complex, Parker's father knocked on Panah's door and asked if Panah had seen her. Panah responded something like, "oh, is she missing." He then offered to help Parker's father look for her, "persistent[ly]" suggesting they search outside the apartment complex. Soon after, the police arrived and conducted a door-to-door search for Parker, including Panah's apartment. The police did not find Parker or any clues as to her whereabouts.

That day, Panah reported to work in the mid-afternoon. Around 5:30 pm, his mother, who was with two police officers, called Panah. The officers asked him if he knew Parker or had seen her that day. He responded that he knew her only "vaguely" and denied having seen her that day. Shortly after the officers' inquiry – hours before his shift ended – Panah left work without telling anyone. He later called his manager to say that he would not return "because some people that he knew [were] trying to get him in trouble and would [his manager] please inform his mother to get out

of town." Panah also paged his co-worker, Rauni Campbell, asking for help. He told her that he "d[id] something very bad," "so big" that she would find out.

The next morning, Panah showed up without warning at Campbell's apartment. His wrists were cut, and he requested sleeping pills, which she helped him buy. Campbell asked Panah if he had anything to do with "the little girl that was missing from his apartment complex." He said yes. She then asked him whether Parker was still alive. He said no. At this point, Campbell surreptitiously called the police. When they arrived, Panah tried to evade arrest but was eventually caught and taken to the hospital. At the hospital, under the influence of drugs and reportedly in a psychotic state, Panah told police, in response to questions about Parker, that he "liked her very much, even [to] carry her skeleton remains around."

Later that evening, the police, armed with a search warrant, returned to Panah's apartment. In his bedroom closet, they found Parker's naked body, wrapped in a bedsheet and stuffed in a suitcase. The police then gathered evidence from Panah's bedroom, including examining his bed and Parker's body for evidence of sexual assault.

Panah was indicted on charges of first-degree murder with special circumstances alleging that the murder occurred during a kidnapping, sodomy, lewd acts on a person under fourteen years old, and oral copulation of a person under fourteen years old. He was also charged with the substantive counts of kidnapping, sodomy by force, lewd acts on a person under fourteen years old, penetration of genital or anal openings by a foreign object with a person under fourteen years old, and oral copulation of a person under fourteen years old. Panah pled not guilty.

B. Pre-Trial Proceedings

Panah was initially represented by a family friend, Syamak Shafi-Nia, who had limited criminal law experience. But prior to trial, the court appointed Robert Sheahen, a veteran criminal lawyer, as lead counsel, and allowed Shafi-Nia to stay on as second counsel. Sheahen had requested this appointment, promising the court that he would facilitate a settlement, which would "save[] a great deal of time and the taxpayers would be saved a great deal of money" by avoiding "an extremely costly trial."

In July 1994, several months before trial, the State notified the court and defense that it had ordered DNA testing on evidence found at the crime scene. While awaiting the test results in September, the court urged Sheahen to "find a DNA expert to assist you" and "see if there's any basis for questioning the results." In October, two months before trial, the State shared the DNA test results with the defense. Again, the court advised Sheahen to retain an expert, to which Sheahen responded, "That will be taken care of."

However, as trial approached, the State decided not to introduce the DNA evidence. The court pressed defense counsel why he had not yet independently tested the DNA. Counsel explained that doing so "would put us in the position of confirming the prosecution results," and that he instead planned to argue that the State's "failure to do DNA testing should be held against" them. The court approved of this strategy, calling counsel's "tactics . . . very sound in this particular case."

C. Trial

Panah's trial began on December 5, 1994. With jury selection set to begin, Sheahen notified the court that Shafi-Nia was no longer able to serve as second counsel but did not request a continuance. Accordingly, Panah began jury selection with just one lawyer. Shortly after, the court appointed new second counsel to replace Shafi-Nia, but second counsel was required to familiarize himself with the case during trial.

i. Case-in-Chief

The State's theory was felony murder. It emphasized the abundance of circumstantial evidence against Panah and focused on "Parker's body bloody and battered," which was "tied up in a sheet inside a zipped suitcase" in Panah's closet. It also highlighted Panah's incriminating behavior soon after Parker went missing, including that Panah was "anxious" to encourage Parker's father to search outside the apartment complex; "had fled" work hours before his shift ended after receiving a call about Parker from his mother and police; and made numerous admissions about his involvement in Parker's murder. Panah's manager and Campbell testified about his statements on the day of and after Parker's disappearance.

The State also presented forensic evidence as part of its case-in-chief.

a. Pathology Evidence

The coroner, Dr. Heuser, testified that Parker's physical injuries occurred premortem. Describing the violent nature of the assault, she explained that Parker suffered "blunt force" injuries, including bruising on her forehead, eye,

neck, lip, arms, and buttocks; scratches on her inner thighs; and brain swelling. Dr. Heuser also testified to Parker's sexual assault injuries. Parker had bruising, as well as signs of bleeding and tears, in the vaginal and rectal areas. Her vaginal opening was "very widely" open – most likely consistent with digital penetration. Her anal opening was also "widely open and very lax looking," "consistent with the insertion of a penis into her rectum."

Dr. Heuser also testified that Parker's death was due to "traumatic injuries," either the result of "manual strangulation" or force to Parker's rectum.

b. Serology Evidence

Serologist William Moore testified about stains found on three items in Panah's bedroom: (1) the bedsheet Parker was wrapped in, (2) a robe found on Panah's bed,[1] and (3) a tissue from a wastebasket in Panah's bathroom. Preliminarily, Moore noted that Panah's blood type was B and Parker's was A. Because his testing discovered that stains on each item contained a mixture of A and B antigens, Moore posited that this was consistent with a mixture of Parker's and Panah's bodily fluids and thus sexual contact between them.

As to the bedsheet, Moore described the stains as "indicative of a mixture of physiological fluids" – blood, semen, and amylase (a constituent of saliva and other bodily fluids) – that included both A and B antigens. Because the bloodstain was "consistent" with Parker's type A blood, he surmised the other stains were consistent with semen from Panah and saliva from Parker. He also noted that the pattern

[1] The district court's opinion calls the robe a kimono.

of the stains "could . . . be consistent with the spewing of semen across the bed sheet."

Moore similarly testified that the tissue "bore semen stains, and high amylase activity," likely from a mix of Parker's and Panah's bodily fluids. Again, he remarked that this stain "could be consistent with the product of an oral copulation." Lastly, he testified that Panah's robe had a large stain with a mix of A and B antigens. Because the robe's bloodstain was consistent with Parker, he hypothesized that the B antigens came from Panah's saliva.

Moore also briefly testified about evidence collected from the sexual assault examination, although he did not conduct it. He acknowledged that the oral and anal swabs had not produced any signs of semen, nor was "the presence of semen conclusively" found anywhere on Parker's body.

On cross-examination, Moore admitted that he could not "establish any certainty" that either Parker or Panah was a contributor to the stains because of the relatively high statistical frequency of the A and B antigens matching other people. Moore further testified that his theory would not bear out if the A and B antigens on the three items came from one person with AB blood type.[2]

ii. Defense's Evidence

The defense consisted of testimony from Dr. John Palmer, the emergency room doctor who treated Panah the day after Parker went missing, and several character witnesses. Dr. Palmer reported that Panah was "acutely

[2] After the State presented its case, the court granted the defense's motion for acquittal on the substantive charges of kidnapping and the special circumstance allegation of kidnapping.

psychotic" and suicidal when brought into the emergency room that day.

iii. Closing Arguments

The State summarized its evidence: "We have blood typing that matches. We have the body in his suitcase in his closet, and we have statements he makes that show knowledge before the body was found. We have his involvement in the crime clearly established." The State focused on where Parker's body was found: "You have a body in his closet, in his suitcase. There isn't a whole lot more you need to do after that in terms of looking and investigating outside of the obvious, which is that Mr. Panah is the person involved." It also focused on Panah's statements after Parker went missing: "Those aren't crazed remarks. Those are the remarks of an individual who is telling exactly what happened." The State then reminded the jury of Moore's testimony, arguing it was "not a harebrained prosecution theory." It particularly used his testimony to prove the alleged oral copulation:

> We think the evidence that was presented to you is very consistent with the fact that he ejaculated in her mouth, that he allowed her to spit it out in a Kleenex, because we have the evidence of semen of his blood type, high amylase content, indicating a saliva which matches her blood type on the Kleenex, as well as having a spattering on the bed sheet of a mixture of semen and saliva – again the high amylase indicating saliva – of his type B and her type A.

It also said that "the one possible inference that can be drawn" from Moore's testimony about the robe is that the B

antigens came from "the saliva of the defendant" during the sodomy.

Acknowledging that none of this was "conclusive evidence," the State argued that, "when taken with everything else[, this] would indicate that there had been an act of oral copulation, that there was ejaculate in Nicole Parker's mouth." The State also responded to the defense's assertion that its case was weak because of the lack of DNA, claiming that DNA testing is "usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available."

In its closing, the defense questioned the reliability of the serology evidence, calling Moore's theory "hogwash," and insisted that the stains proved nothing. Rather, counsel highlighted the lack of DNA evidence, which "could tell us who's the source of this stuff . . . [and] whether it, in fact, could be traced to the deceased or whether it could be traced to any number of other people."

iv. Verdict

The jury convicted Panah of first-degree murder and the other felonies. The jury also found true the special circumstance allegations that the murder was committed while engaged in the crime of sodomy and lewd acts on a person under the age of fourteen. The jury did not find true the special circumstance allegation that the murder occurred in the commission of oral copulation. After the penalty phase, the jury returned a death sentence.

D. Post-Trial Proceedings

On March 14, 2005, the California Supreme Court affirmed Panah's conviction and sentence, *People v. Panah*,

107 P.3d 790 (Cal. 2005), and the United States Supreme Court subsequently denied certiorari, *Panah v. California*, 546 U.S. 1216 (2006). About a year later, the California Supreme Court summarily denied Panah's first habeas petition. After filing a protective habeas petition in the District Court for the Central District of California, Panah filed a second state habeas petition and a first amended petition in the district court. The district court stayed proceedings during the pendency of Panah's state habeas proceedings. On March 16, 2011, the California Supreme Court again summarily denied Panah's second state habeas petition, and the district court lifted the stay on Panah's federal habeas proceedings.

In his habeas petitions, Panah provided new evidence, including two reports detailing post-conviction DNA testing on the stains that Moore testified about at trial. The first report ("Calandro Report"), prepared in 2004, disagreed with much of Moore's testimony. But because the Calandro Report yielded several inconclusive results, additional testing was conducted two years later, leading to the second report ("Inman Report"). Both reports doubted the foundation of Moore's mixture theory. The Calandro Report called "Mr. Moore's approach . . . biased and indefensible," and the Inman Report wrote that "[n]o biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker was present on the tissue, bedsheet, or kimono."

More specifically, both reports "contradict[ed]" Moore's testimony about the tissue. While Moore testified that Panah and Parker were both possible contributors to the tissue stain, the reports eliminated any possibility that Parker was a source. On appeal to this court, the State concedes that Moore's tissue testimony was false.

However, the post-conviction testing produced inconclusive results regarding the bedsheet and robe stains. Neither report could definitively eliminate Parker as a contributor to several stains on the bedsheet. While they conclusively found that two stains were consistent only with Panah, they could not conclusively rule Parker out as a contributor to the three other bedsheet stains. Although this left open the possibility that Moore's mixture theory was correct, the reports opined that this at minimum refuted his assumption that "Ms. Parker 'spit out' ejaculate onto the bed sheet" because one would then expect to "detect Ms. Parker's DNA in significant quantities on the bed sheet." As for the robe, the reports agreed with Moore that the bloodstain was consistent with Parker's blood type. But, unlike Moore's serology testimony, they found no trace of Panah's DNA on the robe.

Panah's habeas petitions also included declarations from his three trial lawyers. Each declaration acknowledged there had been almost no pre-trial investigation and only a limited penalty-phase investigation, nor were any experts retained to independently analyze the State's serology and pathology evidence. Instead, "all of [defense counsel's] efforts had gone into the aborted settlement."

On November 14, 2013, the district court denied Panah's petition. As for Panah's *Napue v. Illinois*, 360 U.S. 264 (1959), claim, the district court held that, even if post-conviction DNA testing rendered a portion of Moore's testimony false, the California Supreme Court could have reasonably concluded that it did not render all of the testimony false and that his testimony was immaterial in light of the other evidence. In this discussion, the district court also rejected Panah's claim of ineffective assistance for failure to investigate the State's forensic evidence because

the California Supreme Court reasonably could have concluded that Panah was not prejudiced.

The district court granted a certificate of appealability ("COA") for Panah's *Napue* claim, discussed below in section III. On appeal, Panah has raised a number of uncertified issues in his opening brief, which we treat as a request to expand the COA. 9th Cir. R. 22-1(e). After asking the State to respond to several of the uncertified issues, we expand the COA to encompass Panah's guilt-phase ineffective assistance claim, addressed below in section IV, but deny Panah's request to expand the COA as to the other uncertified claims. We evaluate Panah's two certified claims in turn.

II. Standard of Review

We review the district court's denial of habeas relief de novo. *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004).

Because Panah filed his federal habeas petition after April 24, 1996, it is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). Under AEDPA, we may grant relief only if the adjudication "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," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

Although we typically "look through" a summary disposition to the last reasoned state court decision, *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), here there is no reasoned state court decision addressing either certified

claim. Therefore, we independently review the record to determine whether the California Supreme Court had any reasonable basis to deny Panah relief. *See Reis-Campos v. Biter*, 832 F.3d 968, 974 (9th Cir. 2016) (citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

III. *Napue* Claim

Relying on the two post-conviction DNA reports, Panah contends that he was prejudiced by the State's presentation of Moore's serology testimony, which he argues the State knew was false or misleading.

In *Napue*, the Supreme Court held "that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269. Nonetheless, a *Napue* claim succeeds only if three elements are satisfied. *See United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). First, the testimony or evidence in question must have been false or misleading. *See id.*; *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (considering whether "testimony, taken as a whole, gave the jury [a] false impression"). Second, the State must have known or should have known that it was false or misleading. *See Zuno-Arce*, 339 F.3d at 889; *see also Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010) ("[E]ven false evidence presented in good faith . . . hardly comports with fundamental fairness." (quoting *Killian v. Poole*, 282 F.3d 1204, 1209 (9th Cir. 2002))). And third, because "*Napue* does not create a 'per se rule of reversal,'" the testimony or evidence in question must be material. *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) (quoting *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008)); *see also Zuno-Arce*, 339 F.3d at 889.

Materiality under *Napue* requires a "lesser showing of harm . . . than under ordinary harmless error review." *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013). But, after weighing the effect of alleged *Napue* violations collectively, *see Phillips v. Ornoski*, 673 F.3d 1168, 1189 (9th Cir. 2012), there still needs to be a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005) (en banc) (quoting *Belmontes v. Woodford*, 350 F.3d 861, 881 (9th Cir. 2003)). Thus, a *Napue* claim fails if, absent the false testimony or evidence, the petitioner still "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Hayes*, 399 F.3d at 984 (quoting *Hall v. Dir. of Corr.*, 343 F.3d 976, 984 (9th Cir. 2003) (per curiam)).

Even if we assume there was no reasonable basis for the state court to deny Panah's claim as to the first two *Napue* requirements, we cannot say that it would be unreasonable to conclude that Moore's testimony was immaterial. *See Towery v. Schriro*, 641 F.3d 300, 308 (9th Cir. 2010) (not reviewing all three requirements because petitioner's "argument fails at the second *Napue* prong"). The State presented a powerful case of Panah's guilt, with substantial evidence linking him to Parker's murder and sexual assault. Moore's testimony was just one – and not a crucial – piece of that presentation. Because the "verdict" is still reasonably "worthy of confidence," *Phillips*, 673 F.3d at 1189 (quoting *Sivak*, 658 F.3d at 912), we hold that the California Supreme Court would not have erred in finding no "reasonable likelihood that [Moore's testimony] could have affected the judgment of the jury." *Hayes*, 399 F.3d at 985 (quoting *Belmontes*, 350 F.3d at 881); *see also Phillips*, 673 F.3d at 1190 ("[T]he prosecution's *Napue* violations, although 'pernicious' and 'reprehensible,' were not material to

[petitioner's] conviction of first-degree murder." (quoting *Hayes*, 399 F.3d at 981)).

Even setting aside Moore's testimony, the case against Panah was devastating. Parker's naked body was found in a suitcase in Panah's bedroom closet. Blood stains matching Parker's blood type – according to both Moore and the post-conviction reports – were found on Panah's robe. Moreover, Panah's behavior on the day of and after Parker went missing was highly suspicious. Hours after she disappeared, Panah tried to divert her father away from where her body was later found. Then, after the police called Panah at work to ask if he had seen Parker, he left without explanation, later telling his manager and Campbell that he was in serious trouble. The next morning, Panah even confided in Campbell that he was involved in Parker's death. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting))). And then, particularly incriminating in light of his statements, Panah attempted suicide the morning after Parker's disappearance.

The jury then heard Dr. Heuser's impactful testimony about the crime itself. She described Parker's extensive injuries from the sexual assault, including significant trauma to Parker's vaginal and rectal areas, indicative of digital and penile penetration. In addition, Dr. Heuser described the violent nature of the assault: Parker was hit with "blunt force," consistent with her "head striking . . . a wall or a floor" or being hit with a "fist." As a result, Parker's brain was swollen from this "significant impact," and she had bruises – some caused by "manual strangulation" – along her face, neck, arms, buttocks, and legs, and scratches on her

legs. Dr. Heuser cited strangulation and sodomy as "the most lethal injuries."

Although Dr. Heuser's testimony did not directly implicate Panah, it was nonetheless critical. It established that a crime – and a brutal one – took place. When added to the evidence the jury heard about where Parker's body was found and Panah's statements, it was more than sufficient for the jury to render a guilty verdict. And, while Panah contends that Moore's testimony was prejudicial because of its at-times graphic descriptions, particularly of oral copulation, Dr. Heuser's testimony offered an even more graphic and detailed description of the entire sexual assault and murder. As the State itself said, Dr. Heuser's testimony is "probably the most telling evidence of what happened."

The state court also reasonably could have found Moore's testimony to be an immaterial part of the State's case because it offered the jury, at most, hypotheticals and wavering findings. Unlike Dr. Heuser's straightforward testimony about Parker's injuries, Moore acknowledged that his findings rested on a number of assumptions, such as that the A and B antigens came from two people rather than one with AB blood type. And even if he was correct that the A and B antigens came from two people, Moore neither could definitively say they came from Parker and Panah, nor could he even narrow the pool of possible matches to less than hundreds of thousands of people. He said frankly on the stand: "I cannot establish any certainty based on conventional serology. I can only demonstrate consistency." For this reason, Moore's testimony was couched in inconclusive terms, such as "could have originated from" or were "consistent" with. The State even acknowledged this weakness in Moore's findings in closing argument:

> Now the question is, did a person with AB blood leave . . . body fluids such as blood, semen[,] and saliva, on the sheets, on the toilet paper, on the robe. That is one interpretation. The other interpretation, of course, is that you have two separate people, one of whom has type A, and one has type B.

Therefore, at best, Moore's testimony required the jury to draw its own inferences. This was not the case of impactful expert testimony telling the jury that there was a one-in-a-million chance the evidence matched anyone but Panah. Rather, any effect Moore's findings may have had on the jury – which was reasonably none – was fully dependent on the other weighty evidence presented by the State. For instance, without having found Parker's body in Panah's bedroom, no juror could have reasonably inferred that Parker was the A antigen contributor.

The jury's verdict removes any lingering doubt about the materiality of Moore's testimony. If the State needed Moore's testimony at all, it was to prove the special circumstance allegation and substantive charge of oral copulation. In its closing, for instance, the State referred to Moore's findings of mixed bodily fluids on the tissue and bedsheet to prove this sexual act. Yet, the jury did not find true the special circumstance allegation that Parker's murder was committed while in the commission of oral copulation. Although the jury did find Panah guilty of the felony of oral copulation, the verdict is still telling. A reasonable interpretation of the jury's rejection of this special circumstance is that the jury was not entirely persuaded by Moore's mixture theory. In contrast, this highlights the effectiveness of Dr. Heuser's testimony. The State relied on her findings to prove the special circumstance allegations

and substantive charges of sodomy and lewd acts, which the jury found to be true.

Still, Panah contends that Moore's testimony was material because it was the only evidence identifying him as the perpetrator. Although creative, this argument makes little headway. It ignores the substantial evidence tying Panah to Parker's murder and sexual assault. This was not a case where the police had no leads on a suspect. Nor was it a case where the prosecution needed Moore's serology evidence to place Panah at the crime scene. Rather, as the State emphasized in its closing: "You have a body in his closet, in his suitcase. There isn't a whole lot more you need to do after that in terms of looking and investigating outside of the obvious, which is that Mr. Panah is the person involved." And, as previously mentioned, Panah's own admissions linked him to the assault. Thus, even without Moore's testimony, the State had no difficulty proving identity.

For these reasons, Panah's reliance on *Miller v. Pate*, 386 U.S. 1 (1967), is unavailing. In *Miller*, the petitioner was also charged with the murder and sexual assault of a young girl without any eyewitnesses to the crime. *Id.* at 2–3. The State's only evidence linking petitioner to the victim was male underwear, which an expert said had blood stains on it matching the victim, found near the crime scene. *Id.* at 3–4. Post-conviction testing proved the underwear stains were paint, not blood, and that the State had known this at trial. *Id.* at 5–6. The Supreme Court reversed petitioner's conviction because, while the State successfully used the underwear as "an important link in the chain of circumstantial evidence against the petitioner," in reality it was "virtually valueless as evidence." *Id.* at 4, 6.

Miller is clearly distinguishable. First, although the parties agree that the tissue testimony was false, post-conviction testing did not render the majority of Moore's testimony false. Neither post-conviction report conclusively refuted his findings as to the bedsheet or robe stains. Therefore, unlike in *Miller*, the evidence in question here did not become "virtually valueless" to convict. *Id.* at 6. Second, Moore's testimony was not the "important link" in proving Panah's guilt. *Id.* at 4. The State did not even need Moore's testimony to convict Panah. This case differs significantly from *Miller* because here the state court could reasonably rely on an abundance of other evidence to still have confidence in the conviction.

Panah's reliance on *Alcorta*, 355 U.S. 28, also is misplaced. There, the Court overturned petitioner's conviction because the false "testimony was seriously prejudicial to petitioner" and "tended squarely to refute his claim." *Id.* at 31. Had the false testimony been corrected, petitioner's defense would have been corroborated. But, here, even if Moore's testimony had been corrected or entirely excluded, the jury would not have heard a significantly different presentation of evidence. At most, although we think unlikely, the State's case may have become marginally weaker.

Rather, this case is quite similar to *Sivak*, 658 F.3d 898, in which we rejected a guilt-phase *Napue* claim because the court had "full confidence that the jury would still have convicted." *Id.* at 913. There, we held: "[E]ven if the jury disbelieved [the false testimony] entirely . . . there still is no 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* at 914 (quoting *Jackson*, 513 F.3d at 1076). As in *Sivak*, we think the California Supreme Court reasonably still could have had

"full confidence" that the jury would have returned the same verdict even in absence of Moore's testimony. *Id.* at 913.

In sum, we do not think Moore's testimony was critical in convicting Panah. Excluding Moore's testimony, the State's case was still devastating and largely unchallenged. Moore's testimony was certainly not "the centerpiece of the prosecution's case." *Hayes*, 399 F.3d at 985. Rather, in light of the overwhelming evidence against Panah and the jury's rejection of the oral copulation special circumstance, it is reasonable to conclude that his testimony had essentially no effect on the jury's decision making. *Cf. Dow*, 729 F.3d at 1049–50 (concluding that false testimony was material because "[t]he evidence against [petitioner] was weak"); *Maxwell*, 628 F.3d at 508 (holding that false testimony was material because it came from a "'make-or-break' witness for the State" and there was a "paucity of other evidence"); *Hall*, 343 F.3d at 984 (reversing under *Napue* "[i]n light of the already scant evidence on which the conviction was based"). As such, we conclude that the California Supreme Court reasonably rejected Panah's *Napue* claim.

IV. Ineffective Assistance of Counsel Claim

We next turn to Panah's guilt-phase ineffective assistance claim. To prevail, Panah must show that his counsel's performance "fell below an objective standard of reasonableness" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "The likelihood of a different result," however, "must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. This already imposing standard becomes doubly difficult to satisfy once AEDPA deference is tacked on. *See Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) ("[T]he benchmark for judging any

claim of ineffectiveness [under *Strickland*] must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (quoting *Strickland*, 466 U.S. at 686)).

Panah argues that his trial counsel was ineffective for failing to conduct a reasonable investigation and therefore not rebutting the State's serology and pathology evidence. In support of his claim, Panah notes that his counsel never retained an expert to independently analyze the pathology and serology evidence or to testify at the guilt phase. Instead, defense counsel essentially seemed to accept the State's evidence as true. In post-conviction proceedings, counsel acknowledged that his inordinate focus on settlement resulted in too little, if even any, pre-trial investigation.

While we are instructed to "avoid the temptation to second-guess [counsel's] performance," *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc), we are concerned with defense counsel's lack of pre-trial investigation. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) ("[L]awyers [have] considerable discretion to make strategic decisions about what to investigate, but only *after* those lawyers '*have gathered sufficient evidence upon which to base their tactical choices*.'" (quoting *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002))). But we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. Here, even assuming counsel's performance was deficient, we cannot say – in light of the overwhelming evidence of Panah's guilt *and* the deference we owe the state court judgment – that the

California Supreme Court would have erred in finding no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

After weighing counsel's deficiencies cumulatively with "the strength of the government's case," *Rios v. Rocha*, 299 F.3d 796, 808–09 (9th Cir. 2002) (quoting *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986)), we believe the state court reasonably rejected Panah's assertion that the trial's outcome "would have been dramatically different" had counsel's performance not been deficient. Our reasoning on prejudice bears significant similarities to why we reject Panah's *Napue* claim. We do not wish to harp on what was detailed in the preceding section, but the State had a uniquely strong case against Panah. Parker's body was found in his bedroom; Panah's behavior the day of and after her disappearance was incriminating; Panah admitted his own involvement in her death; and Parker's serious physical injuries, including to her genitalia, were well-documented. Defense counsel even acknowledged that this evidence was the foundation of the State's case: "The critical pieces of evidence are obviously that the child's body is found in Mr. Panah's closet, her naked body with a considerable amount of blood. There is evidence . . . that the child was beaten."

It is, therefore, inconceivable, even had defense counsel independently investigated the serology and pathology evidence, that the jury would have reached a different verdict. *See Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018) ("We have long recognized . . . that 'prejudice resulting from ineffective assistance of counsel must be "considered collectively, not item by item."'" (quoting *Doe v. Ayers*, 782 F.3d 425, 460 n.62 (9th Cir. 2015))). Even if the weaknesses in Moore's and Dr. Heuser's findings that

came to light post-conviction were raised at trial, that would have done nothing to reasonably change the outcome. Not only was there no "strong, unequivocal, exculpatory evidence available," *Rios*, 299 F.3d at 813, but there was nothing to substantively challenge the serology or pathology evidence. It is true that counsel could have told the jury that Moore's findings as to the tissue were wrong. But counsel could not have refuted Moore's findings as to the bedsheet and robe stains, and even a different outcome on the felony of oral copulation would not affect Panah's guilty verdict and death sentence. Also, Panah's contention that he was prejudiced by counsel's failure to rebut Moore's mixture theory because it put him at the crime scene fails to acknowledge that finding Parker's body in his bedroom alone was sufficient to do that. Therefore, whatever rebuttal of the State's expert witnesses that Panah believes he was deprived of and thus prejudiced by would not have overcome the other significant evidence of guilt.

Moreover, for however deficient defense counsel's investigation was, the state court also could have reasonably found no prejudice because counsel adequately challenged the State's expert witnesses on the stand. *See Richter*, 562 U.S. at 111 ("In many instances cross-examination will be sufficient to expose defects in an expert's presentation."). During Moore's cross-examination, defense counsel attempted to cast doubt on his findings. His questions pushed Moore to acknowledge the high statistical probability of persons other than Panah and Parker contributing to the stains, and that Moore could not even "determine when th[e] stains were deposited." Counsel also remarked that Moore offered nothing more than "inconclusive blood typing," hypothesized that Moore simply "construct[ed] some sort of theory whereby you can link that blood to Mr. Panah or to the deceased," and

questioned why the jury was "not offered DNA evidence." Notably, even one of the post-conviction reports described the cross-examination of Moore as "reasonably successful."

Similarly, we do not think there was anything in the defense's questioning of Dr. Heuser that would have changed the outcome. There was nothing to rebut her detailed testimony about Parker's extensive injuries. Panah instead alleges that he was prejudiced by counsel's failure to rebut Dr. Heuser's assessment of the cause and time of death. But at trial, counsel did flag concerns with this part of her testimony. Thus, we agree with the district court's conclusion that, "in light of the 'setting of a sexual assault,'" further challenging Dr. Heuser's testimony on the cause of death "would have been no more palatable to the jury."

As a result, the state court would not have unreasonably determined that counsel's casting-doubt strategy was appropriate, even effective, and thus found a lack of prejudice. With little to do about the State's formidable evidence against Panah, counsel still sought to inform the jury of weaknesses in the experts' testimony. *See id.* ("When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict."). And here the strategy even seems to have been somewhat successful, as the jury rejected the special circumstance allegation of oral copulation. Like in the *Napue* analysis, this is probative evidence that the jury did not give persuasive weight to the serology testimony, presumably because of defense counsel's strategy and cross-examination.

Our analysis is further guided by *Richter*, in which the Supreme Court rejected a similar ineffective assistance claim based on counsel's failure to present an expert to rebut the State's forensic evidence. *Id.* at 111–13. The Court's

reasoning is almost entirely applicable here. Holding that the petitioner was not prejudiced, the Court concluded that there was little chance of a different outcome because the post-conviction evidence did not exonerate petitioner and because some of petitioner's post-conviction evidentiary concerns were already raised by counsel at trial before the jury. The Court went on to determine – as is also applicable here – that the petitioner also did not prove any likelihood of a different outcome because he had done nothing to rebut the other "sufficient conventional circumstantial evidence pointing to [his] guilt."[3] *Id.* at 113.

We do not hold that counsel should not have done more. But, based on the particular facts before us, we recognize there was "nothing more than a theoretical possibility" of a different verdict. *Id.* at 112. The evidence of Panah's guilt was so strong that there remained an "ample basis for the California Supreme Court to think any real possibility of [Panah's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id.* at 113. Therefore, we affirm the district court's denial of Panah's ineffective assistance claim.

AFFIRMED.

[3] Panah's attempt to analogize his case to several out-of-circuit cases falls short. For instance, in *Elmore v. Ozmint*, 661 F.3d 783, 871–72 (4th Cir. 2011), the Fourth Circuit held that the petitioner was prejudiced by counsel's failure to investigate any of the prosecution's forensic evidence. But, there, "[t]he case was a real 'who-done-it,'" and, with a proper "investigation, the jury undeniably would have seen a drastically different – and significantly weaker – prosecution case." *Id.* at 861, 870. None of that is true here.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner - Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent - Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The court is in receipt of appellant's pro se motion for reconsideration. Because appellant is represented by counsel, only counsel may submit filings, and this court therefore declines to entertain the submission.

On January 21, 2015, this court electronically served appellant's motion on appointed counsel of record Assistant Federal Public Defenders Mark Raymond Drozdowski, and Joseph Anthony Trigilio. Within 14 days after the date of this order, counsel shall file a response.

The previously established briefing schedule remains in effect.

The Clerk shall serve this order on appellant individually at Reg. No. J-55600, San Quentin State Prison, San Quentin, California 94974.

DV/AppComm Direct Criminal

FILED

APR 06 2015

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner - Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent - Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: Peter L. Shaw, Appellate Commissioner.

After reviewing counsel's February 23, 2015 response, the Petitioner's pro se filings, and the opening brief filed by Petitioner's counsel, the basis of the alleged irreconcilable breakdown between Petitioner and his appointed counsel remains unclear.

Petitioner's appointed counsel are highly trained, well-respected legal professionals who are vigorously advocating on Petitioner's behalf. The opening brief addressed many of the factual and legal issues about which the Petitioner has expressed concern. The decision as to which issues should be raised falls within the province of legal counsel. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983).

A review of record discloses that Petitioner obtained new counsel in the district court, replacing previous experienced legal counsel based upon an alleged breakdown in the attorney-client relationship.

In order to justify removing another set of experienced legal counsel, more must be shown than the client's apparent disagreement with which issues counsel has raised in the opening brief. Accordingly, counsel for Petitioner is directed as follows: (1) Counsel shall meet with Petitioner and explain that this Court is not inclined to grant the motion for substitution of counsel; and (2) by May 8, 2015, counsel shall file a supplemental response explaining with specificity the basis of the alleged irreconcilable difference between Petitioner and his counsel. Counsel may file the supplemental response under seal. Counsel shall serve a copy of all filings on the client.

FILED

MAY 13 2015

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner - Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent - Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The Court has reviewed the sealed supplemental response submitted by Petitioner's counsel on May 8, 2015 and served on the Petitioner. Petitioner's request for substitution of counsel is denied. The Federal Public Defender continues as counsel for Petitioner.

Petitioner's May 8, 2015 Motion To Appoint Firdaus Dordi As Co-Counsel With The Federal Public Defender is granted. The Clerk shall add Petitioner's co-counsel to the docket: Firdaus Dordi, Esquire, Dordi Williams Cohen LLP, 724 South Spring Street Suite 903, Los Angeles, CA 90014, 213-232-5160, fdordi@dordiwilliamscohen.com.

The briefing schedule set April 7, 2015 remains in effect.

The Clerk shall mail a copy of this order to Petitioner Hooman Panah, Reg. No. J-55600, San Quentin State Prison, San Quentin, California 94974.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner - Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent - Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: Peter L. Shaw, Appellate Commissioner.

On June 22, 2015, this Court received Petitioner's pro se letter brief in support of his May 28, 2015 pro se motion for reconsideration of the May 13, 2015 order denying substitution of counsel. Petitioner's pro se reconsideration motion has been referred to the merits panel for whatever consideration it deems appropriate.

The Clerk shall also refer the June 22, 2015 pro se letter brief to the merits panel for whatever consideration it deems appropriate.

The Clerk is directed to mail a copy of this order to the Petitioner at his prison address.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner - Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent - Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Petitioner's pro se motion, received by this Court on May 28, 2015, for reconsideration of the Appellate Commissioner's May 13, 2015 order is referred to the merits panel for whatever consideration it deems appropriate.

Respondent's unopposed motion to extend the time to August 11, 2015 to file the answering brief is granted. The reply brief is due within 30 days after service of the answering brief.

The Clerk shall mail a copy of this order to Petitioner at his prison address.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 21 2019

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

HOOMAN ASHKAN PANAH, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent-Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: WARDLAW, NGUYEN, and OWENS, Circuit Judges.

Appellant's pro se motions for reconsideration of the Appellate Commissioner's order denying his request for substitution of counsel, Dkt. Nos. 49, 79, are **DENIED**.

S155942

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HOOMAN ASHKAN PANAH on Habeas Corpus.

The petition for writ of habeas corpus, filed on August 30, 2007, is denied. All claims are denied on the merits, except Claim 53, which is denied as premature without prejudice to renewal after an execution date has been set. All claims are denied as untimely, except claims 50, 51, 52 and 53. (*In re Robbins* (1998) 18 Cal.4th 770, 780-781.)

Claims 2, 7, 8, 9, (except to the extent claims 7, 8 and 9 allege ineffective assistance of counsel), 12, 13, 17-21, 25-39, 43-45, 47, 48, 52 and 54 are also barred because they were raised and rejected on appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Claims 1, 2, 3 (except subpart 3C), 5, 6, 10, 11, 12 ,15, 16, 22-24, 40-42, 46, 49, and 51 are also barred because they were raised and rejected in petitioner's first petition for writ of habeas corpus (S123962). (*In re Miller* (1941) 17 Cal.2d 734, 735.)

Claims 3C, 9B2, and 14 are barred because they could have been, but were not, presented in petitioner's first petition for writ of habeas corpus (S123962). (*In re Clark* (1993) 5 Cal.4th 750, 767-769).

Claims 3, 5, 10, 42, 46, and 55 (except to the extent they allege ineffective assistance of counsel) are barred because they could have been, but were not, raised in the trial court. (In re Seaton (2004) 34 Cal.4th 193, 197-200.)

Claims 12, 13, and 14 are barred because they raise issues that are not cognizable in a petition for writ of habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Claim 14 is also barred because it raises an issue that could have been, but was not, raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.)

Justice Werdegar would not deny any claim based on petitioner's failure to have raised it in the trial court.

CANTIL-SAKAUYE

Chief Justice

JS - 6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOOMAN ASHKAN PANAH, Petitioner, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 05-7606 RGK **DEATH PENALTY CASE** JUDGMENT

Pursuant to the Order Denying Second Amended Petition for Writ of Habeas Corpus issued simultaneously with this Judgment, IT IS HEREBY ORDERED AND ADJUDGED that the Petition is denied with prejudice and judgment is entered in favor of Respondent and against Petitioner. The Order constitutes final disposition of the Petition by the Court.

The Clerk is ordered to enter this judgment.

Dated: November 14, 2013.

Gary Klausner

R. GARY KLAUSNER
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOOMAN ASHKAN PANAH,

Petitioner,

v.

KEVIN CHAPPELL, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 05-7606 RGK

DEATH PENALTY CASE

ORDER DENYING SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was convicted of sodomy by force, lewd acts upon a child under the age of fourteen, penetration of genital or anal openings by a foreign object with a person under fourteen years of age, oral copulation of a person under fourteen years of age, and the first degree murder of eight-year-old Nicole Parker. The trial court granted Petitioner's motion for acquittal on charges of kidnapping a person under fourteen years of age and kidnapping for child molestation and a special circumstance allegation of murder committed while engaged in kidnapping. The jury found not true the special circumstance allegation that the murder was committed while Petitioner was engaged in the crime of oral copulation. The jury found true found true special circumstance allegations that Petitioner committed the murder while engaged in the crimes of sodomy and lewd acts upon a child

under the age of fourteen. *See* Cal. Penal Code §§ 190.2(a)(17) (D), (E). The jury returned a sentence of death on the murder count.

Petitioner filed the operative Second Amended Petition for Writ of Habeas Corpus ("Pet.") on June 24, 2011. For the reasons set forth below, the Second Amended Petition is DENIED.

PROCEDURAL BACKGROUND

The California Supreme Court affirmed Petitioner's conviction and sentence on direct appeal on March 14, 2005. *People v. Panah*, 35 Cal. 4th 395 (2005). The United States Supreme Court denied Petitioner's petition for writ of certiorari on February 27, 2006. *Panah v. California*, 126 S. Ct. 1432 (2006).

Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court on April 9, 2004 (Case No. S123962), which was denied on August 30, 2006. Petitioner filed a Protective Petition for Writ of Habeas Corpus in this Court on February 26, 2007. He filed a second state habeas petition (Case No. S155942) and a First Amended Petition for Writ of Habeas Corpus in this Court on August 30, 2007. Upon stipulation of the parties, the Court stayed the federal proceedings during the pendency of Petitioner's state habeas proceedings. (Joint Stipulation and Order to Stay, filed January 9, 2008.) The California Supreme Court denied the petition on March 16, 2011, and the Court lifted the stay on the instant proceedings on April 11, 2011.

As stated above, Petitioner filed his Second Amended Petition for Writ of Habeas Corpus on June 24, 2011. Respondent filed an Answer on November 22, 2011, and Petitioner filed a Traverse on February 3, 2012. On February 7, 2012, the Court Ordered the parties to brief whether and how each claim satisfies 28 U.S.C. § 2254(d) on the basis of the record that was before the state court that adjudicated the claim on the merits. (Order Directing Merits Briefing under 28 U.S.C. § 2254(d), filed February 7, 2012, at 12.) The parties completed the merits briefing on August 16, 2013.

DISCUSSION

I. Standard for Relief under 28 U.S.C. § 2254(d)

Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides:

> 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). The Supreme Court held in *Cullen v. Pinholster* that when determining whether a petitioner has satisfied § 2254(d), a court may only consider evidence in the state court record. 131 S. Ct. 1388, 1398, 1400 n.7 (2011). The Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. Section 2254(d)(2) "includes the language 'in light of the evidence presented in the State court proceeding,' . . . [providing] additional clarity . . . on this point." *Id.* at 1400 n.7.

The Supreme Court explained that a state court decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases or if the state court confronts a set of facts that

are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from our precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotations omitted); *see also Crosby v. Schwartz*, 678 F.3d 784, 788 (9th Cir. 2012) (applying *Harrington v. Richter*, 131 S. Ct. 770 (2011)). "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (internal quotation omitted); *see also Crosby*, 678 F.3d at 788. "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (internal citation omitted); *see also Crosby*, 678 F.3d at 788.

"[A]s to the clause dealing with 'an unreasonable determination of the facts,'" section 2254(d)(2), "the statement of facts from the last reasoned state court decision is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence." *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) (internal quotation omitted). Under § 2254(d)(2):

> if a petitioner challenges the substance of the state court's findings, . . . [the court] must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. Similarly, when the challenge is to the state court's procedure, mere doubt as to the adequacy of the state court's findings of fact is insufficient; we must be satisfied that any appellate court to whom the defect [in the state court's fact-finding process] is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Hibbler v. Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012) (internal quotations omitted; alteration in original).

The United States Supreme Court made clear in *Richter* that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." 131 S. Ct. at 786 (internal quotation omitted). "Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision;" the court must not "overlook[] arguments that would otherwise justify the state court's result . . . ." *Id.* Section 2254(d) provides "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 131 S. Ct. at 1398 (internal quotations omitted).

II. Standard for Relief for Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Counsel's representation is deficient if, "considering all the circumstances," it "fell below an objective standard of reasonableness" and was unreasonable "under prevailing professional norms." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation omitted).

To establish that counsel's deficient performance prejudiced the defense, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

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reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

As the Supreme Court emphasized in *Richter*:

> [s]urmounting *Strickland*'s high bar is never an easy task. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 131 S. Ct. at 788 (internal quotations and citations omitted).

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III. Claims 1(2)(a),[1] 2, and 9(4): Serology Evidence

In Claims 1(2)(a), 2, and 9(4), Petitioner raises ineffective assistance of counsel and prosecutorial misconduct claims regarding serology evidence presented at trial.

In Claim 2, Petitioner alleges that a member of the prosecution team, Patrick Couwenberg,[2] presented "false and contrary serology evidence" that he knew or should have known to be false. (Pet. at 88, 93.) Petitioner maintains that through the prosecutor's questioning, he "repeatedly attempted to have [Serologist William] Moore establish that the three items of evidence – the bed sheet, the blue kimono, and the wad of tissue paper – contained a mixture of Nicole Parker's and Petitioner's bodily fluids," despite knowing that DNA testing conducted by the prosecution contradicted the serology evidence. (*Id.* at 95-97.)

Petitioner explains:

> The prosecution ordered DNA testing of the bed sheet evidence in July 1994, approximately four months before Petitioner's trial commenced. (RT 192.) The results of

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[1] Claim 1(1) pleads counsel's "global failure to investigate guilt defenses" but does not make any specific allegations of prejudice. (Pet. at 57 (capitalization removed); *see also id.* at 62 ("*[a]s shown further in the sections below*, because of insufficient investigation, readily available reasonable doubt evidence was not adequately developed and presented" (emphasis added)).) The Court does not, therefore, read Claim 1(1) to plead an independent claim of ineffective assistance of counsel. To the extent it does, Claim 1(1) is DENIED for failing to set forth specific allegations of prejudice. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief").

[2] Petitioner sets forth a body of allegations surrounding his statement that "Couwenberg, who later became a judicial officer, has since been found to have lied verbally, in writing, and under oath in order to further his self-interest. As a consequence of these findings, he has been disbarred and removed from the judicial bench." (Pet. at 88.) The Court has considered only the allegations of misconduct by Couwenberg involved in the case at hand. *See United States v. Zuno-Arce*, 339 F.3d 886, 890 (9th Cir. 2003) (holding that post-trial declaration that informant falsified his testimony at the instruction of prosecutors, even if true, "does not demonstrate anything about the truth or falsity" of other informants' testimony); *cf. Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 357 n.17 (1963) (observing that although "subsequent litigation has shown [the witness's] character not to be a savory one," it is the veracity "so far as this trial is concerned" that matters).

> the DNA tests were received in mid-October, around one month before trial. (*Id.* at 517-18.) The prosecution represented to the court that it expected to introduce DNA results at trial. (*Id.* at 518.) On November 14, 1994, for the first time, the prosecution represented that it had decided not to offer any DNA evidence in its case in chief, but reserved its right to argue DNA in rebuttal. (*Id.* at 715-17.) This disclosure was made approximately two weeks before Petitioner's trial commenced. The prosecution's decision not to present DNA evidence was apparently a strategic one, as the tests had been conducted and the results disclosed.

(Pet. at 97 (internal citations edited, footnote omitted).) Petitioner adds that the prosecution led the jury to believe that DNA testing had not been conducted by arguing, "'DNA testing can be ordered. It's ordered in some cases, but it's usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available. [¶] We have blood typing that matches.'" (*Id.* at 96-97 (quoting RT 2963).)

In Claim 9(4), Petitioner alleges that the prosecution withheld color copies of six pages of DNA Hybridization Records "demonstrating that there could have been no mixture of bodily fluids; thus [sic] providing no evidence of intimate contact." (Pet. at 163-64.)

In Claim 1(2)(a), Petitioner alleges that trial counsel was ineffective for failing to retain an independent serologist and DNA expert. (*Id.* at 62.) Petitioner contends that "the DNA evidence refuted the prosecution's theory of mixture of bodily fluids" on the bed sheet and the kimono, and demonstrates that Nicole Parker could not have been a contributor to the biological evidence contained on the tissue paper. (*Id.* at 66; *see id.* at 62-68.)

A. Legal Standard Regarding Prosecutorial Misconduct

To be entitled to relief based upon the prosecution's presentation of false evidence, it is Petitioner's burden to establish not only that the evidence is false,

but that it is material. *Zuno-Arce*, 339 F.3d at 889 ("To prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material" (citing *Napue v. Illinois*, 360 U.S. 264, 269-71 (1959))). To establish materiality, Petitioner must show "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (internal quotation omitted); *see also Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) (holding same).

Petitioner must also demonstrate the materiality of evidence withheld by the prosecution to be entitled to relief on that ground. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Materiality requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

B. Analysis

1. Bed Sheet

At trial, Moore testified that areas of stains on the bed sheet seized from Petitioner's bedroom were consistent with a mixture of bodily fluids from Petitioner and Nicole Parker. Moore testified that Nicole Parker had type A blood, and Petitioner has type B blood. (RT 2018-19.) He explained that the bed sheet held type A and B antigens that could have come from a person with type AB blood or could have come from a mixture of physiological fluids. (*Id.* at 2022.) Moore also testified that a certain collection of stains on the bed sheet "could be consistent with" the "spewing of semen across the bed sheet." (*Id.* at 2067-68.)

Moore opined that due to the degree of amylase in those stains, they could not have been the product of an ejaculatory process like masturbation. (*Id.* at 2073.) Moore testified that the type A antigenic activity demonstrated by the stain "relate[d]" the amylase to Nicole Parker. (*Id.*)

Citing an independent examination of the DNA testing results that were prepared by the Los Angeles Police Department, Petitioner alleges that "'[n]o DNA typing results consistent with that of Nicole Parker were obtained from any of the samples from the bed sheet.'" (Pet. at 98 (quoting Pet. Ex. 27 at 149).) Petitioner further alleges that "'[t]he DNA typing results do not support the hypothesis that the areas tested contain a mixture of semen and saliva stains from Mr. Panah and Nicole Parker, respectively.'" (*Id.* (quoting Pet. Ex. 27 at 149).)

The California Supreme Court may have reasonably determined that Petitioner's allegation that Nicole "was eliminated as a contributor to the stains on the bed sheet" is false. (Pet. at 98.) The report states that "[a] number of samples yielded 'inconclusive' results. The meaning of the 'inconclusive' finding cannot be determined without additional information such as photographic quality copies of the typing strips." (Pet. Ex. 27 at 149.) A supplemental report prepared by Petitioner's experts after they received color copies of "DNA Hybridization Records" states that "three samples gave weak 4 activity in both the non-sperm and sperm fractions. The weak activity was called inconclusive in the LAPD report . . . ." (Pet. Ex. 95 at 499.) The California Supreme Court may have reasonably determined that the weak 4 activity in the non-sperm fractions was consistent with, and did not eliminate, Nicole Parker as its source. (*See* Pet. Ex. 27 at 147 ("Ms. Parker is a type 2, 4").) The court may have reasonably held that although the inconclusive result did not constitute "evidence" of a mixture of biological material from Petitioner and Nicole Parker (Pet. Ex. 95 at 499), nor did it demonstrate the falsity of Moore's trial testimony about the bed sheet.

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The California Supreme Court may have likewise concluded, in light of the other physical evidence presented at trial, that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in failing to present DNA evidence that showed only inconclusive findings.

2. Kimono

Moore testified at trial that a stain found on Petitioner's kimono contained both type A antigens and type B antigens, which could have come from a person with type AB blood or could have come from a mixture of physiological fluids. (RT 2021-22.) Moore testified that the stain demonstrated a phosphoglucomutase ("PGM") subtype of 1+1-, which was consistent with Nicole Parker and not consistent with Petitioner. (*Id.* at 2062-63; *cf.* Pet. Ex. 27 at 150.) He added that he "determined that amylase, a constituent of saliva and other bodily fluids, was also present in the stain." (*Id.* at 2023.) Because there was evidence that Nicole Parker contributed to the stain, and Nicole had type A blood, Moore reasoned that there was "evidence[that] . . . the B antigen was the result of the saliva or the amylase . . . ." (*Id.*) Moore testified that the source of the saliva was consistent with Petitioner. (*Id.* at 2032-33, 2076, 2080.)

Petitioner alleges that the DNA testing, to the contrary, eliminated Petitioner as a contributor to the stain. (Pet. at 99 (citing Pet. Exs. 27, 95).) Petitioner's expert report states:

> DNA analysis was conducted on a stain from the kimono. . . . [P]resumably this stain is from the bloodstained area, however, the notes are not very clear with regard to this[]. . . . Hooman Panah was eliminated as a contributor to the DNA from this sample. . . .
>
> Reporting of typing results for an additional cloth sample . . . from the kimono yielded inconclusive results . . . . The meaning of the 'inconclusive' finding cannot be

> determined without additional information, such as photographic quality copies of the typing strips.

(Pet. Ex. 27 at 151.)

As for the bed sheet, the supplemental report prepared by Petitioner's experts after they received color copies of "DNA Hybridization Records" states that the inconclusive result from the kimono sample showed that "the non-sperm fraction gave weak 4 activity." (Pet. Ex. 95 at 499.) The California Supreme Court may have reasonably determined that this weak 4 activity was consistent with, and did not eliminate, Petitioner as its source. (*See* Pet. Ex. 27 at 147 ("Mr. Panah is a type 1.3, 4").) The California Supreme Court would not have been objectively unreasonable in determining that, although Petitioner had been eliminated as a source for the stain on the kimono about which Moore testified, Petitioner's potential consistency with a second stain on the kimono refuted his allegation that the prosecution knew or should have known that it presented false evidence.

The California Supreme Court may have also reasonably determined that even if the evidence the prosecution presented was false, it was not material. The court may have reasoned that the kimono's alleged mixture of Petitioner's saliva with Nicole Parker's blood did not have any reasonable likelihood of affecting the judgment of the jury on any charge. Petitioner does not dispute that Nicole Parker's DNA was consistent with that in the stain (*see* Pet. Ex. 27 at 151 ("DQ-alpha type 2, 4 was obtained from this sample, therefore, Nicole Parker could not be eliminated as a contributor to this sample")), and compelling evidence of a mixture of fluids consistent with oral copulation was presented through stains on the bed sheet. The court may have reasonably concluded, therefore, that any false evidence presented regarding the stain on the kimono did not have any reasonable likelihood of affecting the jury's guilt or penalty determinations.

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The California Supreme Court may have concluded that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in presenting DNA evidence about the kimono for the same reasons. The Court may have reasonably determined that undermining the kimono's alleged mixture of Petitioner's fluids with Nicole Parker's did not show a reasonable probability of a different outcome, since Petitioner did not challenge the presence of Nicole's biological material and compelling evidence of oral copulation was presented through the bed sheet.

3. Tissue Paper

Finally, Moore testified at trial that a stain on tissue paper found in the wastebasket of Petitioner's bathroom demonstrated both type A and type B antigenic activity. (RT 2027-28.) Moore testified that the tissue paper stain was positive for semen and was consistent with petitioner's PGM subtype and could have originated from him. (*Id.* at 2026, 2028, 2076-77, 2079, 2132.) Moore further testified that the tissue contained high amylase activity and that the type A antigenic activity found on the tissue could be consistent with Nicole Parker. (*Id.* at 2026, 2077, 2079, 2129, 2132.) Moore opined that the stain "certainly . . . could be consistent with the product of an oral copulation." (*Id.* at 2079.) He testified that he believed laboratory personnel knowledgeable in DNA techniques had determined the tissue stain to have inadequate DNA for a conclusion. (*Id.* at 2131.)

Petitioner alleges that independent analysis of the prosecution's DNA testing results "'eliminated [Nicole Parker] as a contributor to the tissue stain sample.'" (Pet. at 100 (quoting Pet. Ex. 27 at 147 (emphasis omitted)).) Petitioner alleges that "'[t]he DNA results contradict the State's assertion that the sample from the tissue contained a mixture of body fluids from Hooman Panah and Nicole Parker.'" (*Id.* (quoting Pet. Ex. 27 at 147 (emphasis omitted)).)

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The California Supreme Court may have reasonably determined that any false evidence about the tissue stain, like that about the kimono stain, was not material. The court may have reasoned that the tissue's alleged mixture of Petitioner's semen with Nicole Parker's saliva did not have any reasonable likelihood of affecting the judgment of the jury on any charge, because compelling evidence of the same mixture of fluids, consistent with oral copulation, was presented through the stains on the bed sheet. The court may have reasonably held that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in presenting DNA evidence about the tissue paper on the same basis.

The California Supreme Court may have concluded, therefore, that even if the prosecutor misled the jury by suggesting that DNA testing had not been conducted, Petitioner has shown no reasonable likelihood of any impact on the jury's decisions. As discussed above, the court may have reasonably held that any assertions called into question by the DNA testing had no reasonable likelihood of impacting Petitioner's outcomes at trial.

4. Color Copies of DNA Hybridization Records

Finally, in Claim 9(4), Petitioner faults the prosecution for withholding the color copies of the DNA Hybridization Records. The California Supreme Court may have reasonably determined that because those records evidenced only inconclusive results that were not inconsistent with testimony presented at trial and were not exculpatory or impeaching, Petitioner failed to establish a *Brady* violation.

Accordingly, Claims 1(2)(a), 2, and 9(4) are DENIED.

IV. Claims 1(3)(a) and 3: Evidence of Third Party Culpability and Inadequate Police Investigation

A. Allegations and Decision on Direct Appeal

In Claim 3, Petitioner alleges that the trial court violated his right to present a defense by excluding evidence of third party culpability and inadequate police

investigation. (Pet. at 105-19.) Petitioner faults the trial court for:

> preclud[ing] evidence and examination concerning: (1) Ahmad Seihoon and three unidentified males who were seen on the premises of the apartment complex during the time Nicole Parker disappeared; (2) the fingerprinting of the suitcase in which Nicole Parker was found; and (3) a tape-recorded telephone conversation between Mr. Panah and an individual named Sean who threatened that he would 'make life miserable for [Petitioner]' because Mr. Panah had allegedly slept with his girlfriend.

(*Id.* at 106 (internal citations omitted).) Petitioner also contends that the trial court violated his right to present a defense by denying his motion for mistrial based upon the court's restrictions on cross-examination of Detective Price regarding the failure to fingerprint the suitcase. (*Id.* at 111-13.)

On direct appeal, the California Supreme Court held:

> The third party culpability evidence defendant contends was erroneously excluded involved testimony defendant attempted to elicit from a police witness about three men in a moving van observed at the apartment complex the morning of Nicole's disappearance, evidence about Ahmad Seihoon and his two sons, one 12, the other 17, who defendant seems to imply were those three men, and a threatening telephone call made to defendant by a man named Sean.
>
> Preliminarily, defendant did not offer the evidence of the three men in a van to show third party culpability but to show the inadequacy of the police investigation. Defense counsel acknowledged he was not attempting to elicit the evidence for the truth of the matter, i.e., that there were three men in a van, but to demonstrate the police failed to follow up on obvious leads. Since defendant did not seek admission of the testimony as third party culpability evidence, he forfeited any claim that it was improperly excluded for that purpose. Besides, the mere presence of

three men in the parking lot of defendant's apartment complex at the time Nicole disappeared, absent any evidence, direct or circumstantial, linking them to the crime, does not qualify as admissible third party culpability evidence.

Defendant's somewhat confusing argument as to Ahmad Seihoon seems to suggest he and his two sons may have been the three men in the van, or perhaps that this was what defendant hoped to establish by questioning the officer about the three men. Again, defendant did not argue this point below, thus forfeiting it, and, in any event, the mere fact that Seihoon was observed talking to Nicole shortly before her disappearance was insufficient to render admissible as third party culpability evidence any evidence about Seihoon and his sons. Even less persuasive is defendant's claim regarding the threatening phone call by 'Sean.' Defendant argued the phone call demonstrated someone was 'out to get' him and could therefore have been involved in Nicole's disappearance and death. The trial court properly excluded this evidence as irrelevant and inadmissible under Evidence Code section 352.

Defendant's reply brief refers to another 'suspicious incidence' (*sic*) allegedly contained in a report by Mr. Parker to police about a man sitting in a van who approached him and questioned him about Nicole's disappearance. There is no citation to the record regarding this report, no indication defendant ever brought it to the court's attention or sought its admission under any theory. We disregard the reference. . . .

As there was no error in the trial court's rulings, the court properly denied defendant's mistrial motion. [¶] For the first time on appeal, defendant asserts that the trial court's evidentiary rulings respecting third party culpability evidence . . . violated his federal constitutional rights . . . . Assuming, without deciding, that defendant's offers of proof preserved these claims,

because we conclude the trial court's rulings were correct, the constitutional claims fail. . . .

Next, defendant . . . claim[s] that the trial court erred in limiting his cross-examination of Detective Price regarding the three men in the van. Since, as we have concluded, there was insufficient evidence to connect these unknown men to the crime for third party culpability purposes, whether or not Detective Price ascertained their identities was irrelevant and the trial court properly sustained the prosecution's objection on both relevance and Evidence Code section 352 grounds.

For the same reason, we reject defendant's claim that the trial court improperly limited his cross-examination of Detective Price regarding two potential witnesses, Heather Williams and Harold Dachs, Jr. In his offer of proof, defense counsel claimed Williams and Dachs told police they had observed 'individuals outside the [defendant's] apartment' who fit 'some of the statements that Mr. Panah has said to have made about other individuals being involved in this. . . .' In response to the trial court's inquiry about whether they were going to appear as witnesses, defense counsel asserted that the police had failed to keep track of them, rendering them unavailable. The trial court sustained the prosecution's relevance objection. We perceive no error. As with the men in the van, the offer of proof as to Williams and Dachs was grossly inadequate to support the admission of the evidence as third party culpability evidence and was therefore properly excluded as irrelevant.

Finally, defendant claims the trial court improperly restricted his cross-examination of Detective Price regarding whether Price had examined for fingerprints the suitcase in which Nicole's body was found. Defense counsel first asked Price if he had had the suitcase fingerprinted, to which Price answered in the negative. He then asked whether he 'cause[d] any part of it to be fingerprinted?' Again, Detective Price answered no.

> Defense counsel then asked, '[t]he outside?' At that point the prosecutor objected on the grounds the question had been asked and answered. The court sustained the objection. The trial court's ruling was proper; the question was clearly repetitive.
>
> Because we reject defendant's claim that the trial court's restrictions on the cross-examination of these witnesses deprived him of the opportunity to present a defense by attacking the police investigation, we also conclude that the trial court did not abuse its discretion when it denied his motion for mistrial on this ground.
>
> For the first time on appeal, defendant asserts the trial court's exclusion of evidence regarding the police investigation violated various federal constitutional rights. Again, assuming, without deciding, that his offers of proof preserved these claims, because we conclude the trial court's rulings were correct, the constitutional claims fail.

Panah, 35 Cal. 4th at 481-84 (internal citations omitted; footnotes included as text).

Relatedly, in Claim 1(3)(a), Petitioner faults trial counsel for failing to investigate and present evidence about information from Williams, Dachs, and Edward Parker about one or three white males near a van in the apartment complex; information from a witness that he overheard two unidentified men at a Best Western Motel say they saw Nicole there on the day of Petitioner's arrest; a report from Shawn Hosseini that Petitioner said he had been set up; and searches conducted by police dogs that did not detect a body in or near Petitioner's apartment. (Pet. at 79-81.)

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B. Analysis

1. Trial Court Rulings

Considering a defendant's right to a meaningful opportunity to present a complete defense, the United States Supreme Court observed in *Holmes v. South Carolina*, 547 U.S. 319, 324, 327 (2006):

> '[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged . . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial' (footnotes omitted). Such rules are widely accepted . . . .

Holmes, 547 U.S. at 327 (quoting 40A Am. Jur. 2d *Homicide* § 286 (1999); alterations in original). The Ninth Circuit found California's evidentiary rule requiring "direct or circumstantial evidence linking the third person to the actual perpetration of the crime" to have caused no due process violation in *Spivey v. Rocha*, 194 F.3d 971, 978 (9th Cir. 1999) (finding petitioner's asserted third party evidence that victim was in a gang and may have been killed by a rival gang to be "purely speculative") (internal quotation omitted). A court may exclude alleged third party evidence "'if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense.'" *Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993) (quoting *People v. Green*, 27 Cal. 3d 1, 22 (1980); emphasis omitted).

The California Supreme Court was not objectively unreasonable in concluding that Petitioner's proffered evidence concerning man in a moving van at the apartment complex, Seihoon's presence (along with that of his two sons), and a threatening phone call from "Sean," was insufficiently linked to the actual perpetration of the crimes to be admissible. Petitioner's trial was not

fundamentally unfair as a result of the exclusion. Regarding the trial court's limitation of Petitioner's cross-examination of Detective Price on fingerprinting, Petitioner was permitted to present Price's testimony that he did not have the suitcase or any part of it fingerprinted. (*See* RT 2279.) The trial court's prohibition of repetitive questioning on the matter did not render Petitioner's trial fundamentally unfair. *See Holmes*, 547 U.S. at 326 ("[T]he Constitution permits judges to exclude evidence that is repetitive" without violating a defendant's right to present a defense (internal quotation omitted)).

Claim 3 is, therefore, DENIED.

2. Ineffective Assistance of Counsel

The California Supreme Court may have reasonably determined that Petitioner failed to demonstrate deficient performance by counsel regarding Williams and Dachs. The record shows that trial counsel was aware of Williams' and Dachs' alleged statements and had tried to locate them. (*See* RT 2288-90, 2608.) Counsel endeavored to present the evidence through cross-examination of Detective Price. (*See id.* at 2282-90.) The California Supreme Court may have reasonably concluded that counsel's efforts regarding Williams and Dachs were adequate. *See Richter*, 131 S. Ct. at 789 ("An attorney can avoid activities that appear distractive from more important duties, . . . [and] need not pursue an investigation that would be fruitless" (internal quotation omitted)). In addition, the court may have reasonably concluded that Petitioner showed no reasonable probability of a different outcome at trial had counsel presented evidence from Williams, Dachs, or Edward Parker about the presence of a van at the apartment complex, since no other evidence presented at trial connected the van to the commission of the crimes.

The court may have reasonably concluded that counsel was not deficient for failing to pursue a report that two unidentified men were overheard saying that they saw Nicole at a Best Western Motel on the day of Petitioner's arrest. (*See* Pet.

Ex. 85.) Because no other information tied the Best Western or the unidentified men to the commission of the offenses, counsel may have reasonably decided not to pursue the investigation. *See Richter*, 131 S. Ct. at 789. In addition, the California Supreme Court could have reasonably held that Petitioner did not show a reasonable probability of a different outcome at trial based on an alleged sighting that did not fit with any other evidence presented at trial.

Regarding the report from Hosseini, the California Supreme Court may have reasonably concluded that Petitioner failed to show prejudice from any deficient performance by counsel. Bruce Cousins, Petitioner's manager at work, testified at the guilt phase that Petitioner told him "he couldn't come back because some people that he knew was trying to get him in trouble . . . ." (RT 1820.) The California Supreme Court may have reasoned that Petitioner did not show a reasonable probability of a different outcome at trial from the presentation of evidence to the same effect from Petitioner's friend. (*See* Pet. at 80.)

Finally, by Petitioner's own allegations, the canine searches of the apartment complex were withheld from trial counsel. (*Id.* at 162.) Petitioner does not explain how counsel could have been deficient in failing to learn of the searches. Moreover, as the Court holds below, Petitioner failed to show that any information from the searches was exculpatory. (*See infra* pp. 70-71.) The California Supreme Court may have therefore found no reasonable probability of a different outcome at trial had the evidence been presented.

Claim 1(3)(a) is DENIED.

V. Claims 1(4) and 16(B): Admission of Ring into Evidence

A. Allegations

In Claim 16(B), Petitioner alleges that the admission of a ring as evidence against him without proper foundation violated his rights under the Confrontation Clause and the Due Process Clause. (Pet. at 247-52; Petr.'s Br. at 217-18.) Petitioner argues that "[t]he prosecutor failed to establish the chain of custody to

relate the ring to Petitioner, and thus, did not properly lay the foundation for it being received into evidence." (Pet. at 250.)

The California Supreme Court aptly summarized on direct appeal the trial proceedings at issue:

> The ring, which was apparently skull shaped, was relevant to Dr. Heuser's testimony about scratches on the inside of Nicole's thigh. Dr. Heuser testified the scratches were consistent with having been inflicted by the ring. Prior to her testimony, criminalist Robert Monson testified that the ring, along with a necklace and a pendant, was given to him by Detective Peloquin at the emergency room of West Valley Hospital. When asked whether Detective Peloquin indicated if he took these items from defendant, Monson answered, 'Yes.' There were no objections to his testimony on either hearsay or foundational grounds. Detective Peloquin did not testify at trial.
>
> At the close of the prosecution's case, the prosecution moved for admission of the ring into evidence. The defense objected on grounds of lack of foundation and hearsay. Outside the presence of the jury, the trial court read into the record the prosecutor's examination of Monson regarding how he obtained the ring. The trial court noted this testimony came in without objection and concluded, 'that's the foundation.'

Panah, 35 Cal. 4th at 475-76. The court denied Petitioner's claim on the grounds that (1) Petitioner's failure to lodge a timely hearsay objection forfeited the objection, and (2) Monson's testimony sufficiently connected Petitioner to the ring and, in the alternative, the overwhelming evidence of guilt rendered any error harmless. *Id.* at 476.

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As Petitioner recounts, Detective Monson testified:

> Q. You have identified these two items, People's 21. [¶] Briefly for the benefit of the jury explain where you found those items?
>
> A. These items were given to me by Detective Peloquin at the emergency room when I responded there to the call.
>
> Q. Did he indicate to you whether he took them from the defendant?
>
> A. Yes, he did.

(RT 2300; *see* Pet. at 247.)

Petitioner contends that counsel was ineffective for failing to object to the hearsay testimony by Detective Monson in Claim 1(4). (Pet. at 83-85.)

B. Legal Standard and Analysis

"[F]ederal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (internal quotation omitted). Thus, to be entitled to relief, Petitioner must establish a violation of his federal constitutional rights.

1. Confrontation Clause

The United States Supreme Court considered the application of the Confrontation Clause and made clear in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009):

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person as part of the prosecution's case. While . . . [i]t is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. [G]aps in the chain normally go to the weight of the evidence rather than its admissibility. It is

> up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 557 U.S. at 311 n.1 (internal quotations and citations omitted).

Detective Monson's testimony evidencing the chain of custody was presented live and was open to cross-examination. Any weakness in the prosecution's evidence regarding the chain of custody was a matter for the jury's consideration and did not violate Petitioner's federal constitutional rights.

2. Due Process Clause

To establish a violation of the Due Process Clause through the admission of evidence, Petitioner must show that the admitted evidence "was so inflammatory as to prevent a fair trial," not that "its prejudicial effect outweighed its probative value." *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *see also McGuire*, 502 U.S. at 68 (holding petitioner's due process rights were not violated by admission of evidence of prior injuries to child victim, because prosecution was required to prove that killing was intentional and evidence need not be linked directly to defendant). "To show a violation of due process, [the petitioner] must demonstrate that the erroneous admission of the [evidence] rendered his trial fundamentally unfair." *Villafuerte v. Stewart*, 111 F.3d 616, 622, 627 (9th Cir. 1997) (holding that photographs of fatal wrapping of asphyxiated murder victim's head, bindings on her body, and blood were relevant to prove defendant knowingly restrained her with the required intent, and did not violate petitioner's due process rights).

Here, as the California Supreme Court held, the ring was relevant to the coroner's testimony that scratches on the inside of Nicole Parker's thigh were consistent with infliction by the ring. *Panah*, 35 Cal. 4th at 475. The ring was not

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so inflammatory as to prevent a fair trial and did not render Petitioner's trial

fundamentally unfair. Claim 16(B) is, therefore, DENIED.

3. Ineffective Assistance of Counsel

Finally, to be entitled to relief, Petitioner must establish prejudice from any deficient performance by counsel in failing to object to the hearsay testimony. "[T]he 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (internal citations omitted). Because Petitioner has failed to show that the admission of the ring rendered his trial unfair or violated his constitutional rights, the California Supreme Court may have reasonably concluded that Petitioner is not entitled to relief based upon counsel's failure to object. Accordingly, Claim 1(4) is DENIED.

VI. Claims 4 and 15: Sufficiency of the Evidence of Sodomy and Oral Copulation

A. Allegations and Decision on Direct Appeal

In Claim 4, Petitioner alleges that there was insufficient evidence to establish the crime of sodomy or the sodomy special circumstance allegation. (Pet. at 119-20.) Petitioner raised this claim in state habeas proceedings but not on direct appeal. In the context of Petitioner's challenge to jury instructions on direct appeal, the California Supreme Court found that the coroner:

> testified the anal opening was very relaxed and the circumference of the anus had a bruised appearance, and that there was tearing of the anus toward the vagina and there was bleeding. She testified these injuries were consistent with the insertion of a male penis, or a similar object, into the victim's anus. She also testified the bruising around the anus occurred before death and that sodomy was a possible cause of death. [Criminalist]

> Moore testified that the anal swab produced a positive acid phosphatase result indicative of the presence of semen, [though] inconclusive . . . .

Panah, 35 Cal. 4th at 486 n.36; *see also id.* at 488 (finding that "the evidence firmly established that her rectum had been penetrated").

In Claim 15, Petitioner alleges that there was insufficient evidence to establish the crime of oral copulation. (Pet. at 229.) Petitioner raised, and the state court denied, Claim 15 on direct appeal. The court held:

> [Panah] asserts that the insufficiency of the evidence is demonstrated by the jury's failure to find true the oral copulation special circumstance. Defendant was charged with violation of section 288, subdivision (c), oral copulation of a person under 14 and more than 10 years younger than the perpetrator. Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. Any contact, however slight, between the mouth of one person and the sexual organ or anus of another person constitutes oral copulation. Penetration of the mouth, sexual organ or anus is not required. Proof of ejaculation is not required. In order to prove this crime, each of the following elements must be proved: 1. A person engaged in an act of oral copulation with an alleged victim; and 2. The alleged victim was under the age of 14 and more than 10 years younger than the other participant.
>
> Defendant does not dispute that the age differential element was proved but claims the evidence was insufficient to prove an act of oral copulation occurred.
>
> Serologist Moore's analysis of a tissue paper found in the wastebasket of defendant's bathroom revealed semen stains consistent with defendant and high amylase activity indicative of saliva consistent with Nicole. Moore testified that the stains were consistent with the product of oral copulation. Semen and saliva stains

> found on defendant's bed sheet, which Moore testified could also have originated from defendant and Nicole, in a pattern that indicated spewing, also supported Moore's conclusion. [¶] This evidence was sufficient to support defendant's conviction. His citation of conflicting evidence is of no avail.
>
> Regarding defendant's claim of inconsistent verdicts, first, as the trial court noted, the verdicts are not necessarily inconsistent. The jury could have found that, while an act of oral copulation occurred, the murder was not committed during the commission of that act, and could have convicted him of the substantive oral copulation count while finding the oral copulation special circumstances not to be true.

Panah, 35 Cal. 4th at 489-90 (internal quotation and citations omitted).

B. Analysis

"In reviewing the sufficiency of evidence, [a court] may grant habeas relief only if 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Ngo v. Giurbino*, 651 F.3d 1112, 1115 (9th Cir. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). "Insufficient evidence claims are reviewed by looking at the elements of the offense under state law." *Emery v. Clark*, 643 F.3d 1210, 1214 (9th Cir. 2011) (citing *Jackson*, 443 U.S. at 324 n.16). A reviewing court must:

> review the evidence in the light most favorable to the prosecution. Expressed more fully, this means a reviewing court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

McDaniel v. Brown, 558 U.S. 120, 133 (2010). "Furthermore, after AEDPA, we

apply the standards of *Jackson* with an additional layer of deference to state court findings." *Ngo*, 651 F.3d at 1115 (internal quotation omitted).

At the time of Petitioner's crimes and trial, as at present, California Penal Code section 286 provided: "Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." Cal. Penal Code § 286(a). California Penal Code section 190.2 established a special circumstance for murder committed while the defendant was engaged in the commission of sodomy in violation of section 286. The record supports the factual findings of the California Supreme Court set forth above regarding the evidence of sodomy and murder committed while Petitioner was engaged in the commission of sodomy. (*See, e.g.*, RT 2387-93 and 2448-49 (coroner's testimony that the victim's anal opening was very relaxed, bruised, and torn toward the vagina, consistent with the insertion of a male penis or similar object), 2400-01 (bruising occurred before death and sodomy was a possible cause of death), 2029 and 2140 (criminalist's testimony that anal swab produced positive acid phosphatase result indicative of the presence of semen though inconclusive).) In light of that evidence, the California Supreme Court may have reasonably concluded that a rational trier of fact could have found proof of guilt of sodomy and the sodomy special circumstance allegation beyond a reasonable doubt.

The record also supports the factual finding of the California Supreme Court that semen and saliva stains found on Petitioner's bed sheet could have originated from Petitioner and from Nicole Parker, and appeared in a pattern that was consistent with spewing. (*See, e.g.*, RT 2020, 2024-25.) In light of those facts, Petitioner has not demonstrated that the California Supreme Court was objectively unreasonable in concluding that a rational trier of fact could have found proof of guilt of oral copulation beyond a reasonable doubt.

Accordingly, Claims 4 and 15 are DENIED.

VII. Claim 5: Failure to Give Requested Jury Instructions

A. Allegations and Decision on Direct Appeal

In Claim 5, Petitioner contends that the trial court violated his constitutional rights by refusing to instruct the jury on "the effects of mental disease or defect on the ability of Mr. Panah to form the requisite mental state for the underlying offense" (California jury instruction ("CALJIC") 3.32), and on voluntary and involuntary manslaughter. (Pet. at 126-27.)

The California Supreme Court held on direct appeal:

> 1. CALJIC No. 3.32
>
> Defendant contends the trial court erred when it denied his request to instruct the jury with CALJIC No. 3.32. We disagree.
>
> A trial court is required to give a requested instruction on a defense only if substantial evidence supports the defense. The sole evidence in support of defendant's request was the testimony of Dr. Palmer, the emergency physician who treated him the day after Nicole's disappearance. Palmer testified that defendant was psychotic, agitated, and delusional when he examined him and that a toxicological screen revealed the presence of tetrahydrocannabinol, the active ingredient of marijuana, and benzodiazepine, which belongs to a class of drugs used as a mild tranquilizer. (Defendant draws no distinction between Palmer's testimony regarding defendant's mental state and defendant's voluntary ingestion of drugs, but the latter would not have supported an instruction based on CALJIC No. 3.22 and defendant did not request a voluntary intoxication instruction.) He testified further that defendant was having visual and auditory hallucinations, acting inappropriately, and had self-inflicted slashes on his wrists. But these observations were made more than 24 hours after Nicole's disappearance. In the interim, defendant had spoken to Nicole's father and offered to

help him look for Nicole and had gone to work where he had interacted with two supervisors, Adele Bowen and Bruce Cousins, both of whom testified that defendant did not appear to be under the influence of any substance.

At best, Palmer's equivocal testimony established that defendant may have suffered from long-standing latent psychosis and, at some point, his condition deteriorated. This does not constitute evidence of defendant's mental state at the time of the commission of the crime. We conclude that this evidence was not sufficient to require the instruction.

2. Manslaughter Instructions

Defendant contends the trial court erred by rejecting his request to instruct the jury regarding voluntary and involuntary manslaughter as lesser-included offenses of murder. Defendant also based this request on Dr. Palmer's testimony, arguing . . . that Palmer's testimony constituted evidence of voluntary intoxication and mental illness so as to negate specific intent. The trial court rejected the request, observing, '[t]here is no evidence whatever in this case of any form of intoxication at the time of the murder, and there is no evidence whatever of any form of mental illness or disease at the time of the murder.'

Based on our analysis of Dr. Palmer's testimony in the preceding part, we agree with the trial court that there was no substantial evidence of mental disease or voluntary intoxication at the time of the commission of the offenses, and, therefore, conclude it properly rejected the request for an involuntary manslaughter instruction. (In his reply brief, defendant argues that if the evidence of intoxication was insufficient to support an involuntary manslaughter instruction, this was because the trial court prevented him from questioning Rauni Campbell about whether she and defendant had used marijuana. We have already concluded that the trial court's ruling was correct

> [because "defense counsel's question was phrased in the past tense and referred to some unspecified time"].) As for the instruction on voluntary manslaughter, defendant points to no evidence that would have supported such instruction based either on a theory of heat of passion or imperfect self-defense.

Panah, 35 Cal. 4th at 478, 484-85 (footnotes included parenthetically, footnote omitted, and internal citations omitted).

Petitioner argues that the "substantial evidence" standard that the California Supreme Court applied for determining when a trial court must give a requested instruction is contrary to federal law. (Pet. at 129.) He further argues that the California Supreme Court unreasonably determined the facts in finding that the instructions were not warranted. (*Id.*) Finally, relying upon *Beck v. Alabama*, 447 U.S. 625 (1980), Petitioner argues that "in a capital case, a trial court must instruct the jury on an uncharged offense that is lesser than, and included in, the greater offense if there is any evidence to support the instruction." (*Id.* at 130.)

B. Analysis

First, the California Supreme Court's "substantial evidence" standard is not contrary to federal law. In *Hopper v. Evans*, 465 U.S. 605, 611-12 (1982), the United States Supreme Court considered the constitutionality of a state standard for determining when a jury instruction must be given that was not identical to the federal standard. The Court held:

> [D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. . . . Under Alabama law, the rule in noncapital cases is that a lesser included offense instruction should be given if there is any reasonable theory from the evidence which would support the position. The federal rule is that a lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater. The Alabama rule

> clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.

Evans, 456 U.S. at 611-12 (internal quotations omitted, emphasis and alteration in original). Relying upon *Evans*, the Ninth Circuit held in *Darden v. Mitchell*, 219 F. App'x 707, 709 (9th Cir. 2007):

> [D]ue process is implicated only when a defendant fails to receive an instruction to which she is entitled. Because *substantial evidence* of a fear of imminent danger to life or great bodily [injury] did not exist, [petitioner] was not entitled to any self-defense instructions under California law. The state court did not unreasonably apply clearly established federal law by denying [petitioner's] habeas petition based on the trial court's refusal to give self-defense instructions.

Darden, 219 F. App'x at 709 (internal quotation and citation omitted, emphasis added).[3]

Second, the record supports the California Supreme Court's finding that Dr. Palmer's testimony did not provide evidence of Petitioner's mental state at the time of the crimes. Although Dr. Palmer testified that Petitioner may have suffered from long-standing latent psychosis, his examination of Petitioner came more than twenty-four hours after Nicole's disappearance. (*See* RT 1629-30, 2735-37, 3219.) He testified that Petitioner would not have been able to go to work the day before in the type of psychotic episode he observed. (*See id.* at 3223.) As the court found, Edward Parker, Bowen, and Cousins, each of whom spoke to Petitioner between Nicole's disappearance and Dr. Palmer's examination, observed no signs that Petitioner was under the influence of any substance, and none found Petitioner to appear delusional or psychotic. (*See id.* at 1633, 1637-38 (testimony of Edward

[3] *Cf.* 9th Cir. R. 36-3 (permitting citation of unpublished decisions issued on or after January 1, 2007, though unpublished orders are not generally precedential).

Parker that Petitioner did not appear unusual in any way when he spoke to Petitioner immediately following Nicole's disappearance), 1737-39 (testimony of Bowen that Petitioner did not appear to be under the influence of anything when she spoke with him when he arrived at work the afternoon of Nicole's disappearance), 1815-18 (testimony of Cousins that although Petitioner's "demeanor and the way he was acting was a little different from his normal behavior . . . [not] as up and cheery," he did not appear to be under the influence of alcohol or anything else when he arrived at work the afternoon of Nicole's disappearance).) The court also appropriately determined that the testimony Petitioner alleges Campbell would have given, that she and Petitioner had smoked marijuana together, would not have provided support for the requested instructions, as counsel's question was not specific as to the day or time of the drug use. (*See infra* pp. 102-05.)

Third, Petitioner's reliance upon *Beck* is misplaced. Petitioner's jury was charged with deciding his guilt or innocence of sodomy by use of force; kidnapping for child molesting; and kidnapping, lewd acts upon, penetration of genital or anal openings by a foreign object, and oral copulation of a person under fourteen years of age, apart from the murder charge. *See Panah*, 35 Cal. 4th at 409. His jury was not faced with a single option of reaching a first degree murder conviction to avoid acquitting him altogether. As the United States Supreme Court explained in *Spaziano v. Florida*:

> The Court in *Beck* recognized that the jury's role in the criminal process is . . . not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

468 U.S. 447, 455 (1984); *see also Evans*, 456 U.S. at 609-10 ("Our opinion in *Beck* stressed that the jury . . . could not take a third option of finding that . . . the defendant had committed a grave crime, . . . not so grave as to warrant capital punishment. . . . In such a situation, we concluded, the jury might convict the defendant of a capital offense because it found that the defendant was guilty of a serious crime"). Petitioner's jury had the option of convicting him of the serious crimes listed above as alternatives to "setting [him] free." *Spaziano*, 468 U.S. at 455. The California Supreme Court reasonably determined that Petitioner failed to show a violation of his federal constitutional rights under *Beck*. *See LaGrand v. Stewart*, 133 F.3d 1253, 1262-63 (9th Cir. 1998) ("[T]he instructions in the instant case do not implicate the concerns of the *Beck* doctrine because the jury was given the choice of convict[ions of] . . . aggravated assault, armed robbery, robbery and kidnapping . . . [i]n the event the jury had found itself unable to agree on a conviction of first-degree murder").

Accordingly, Claim 5 is DENIED.

VIII. Claims 1(2)(b), 1(3)(b), and 6: Presentation of False Testimony Regarding Cause of Death and Ineffective Assistance Regarding Cause and Time of Death

In Claim 6, Petitioner alleges that the prosecutor "presented false and unreliable forensic evidence that the victim died as a result of sodomy." (Pet. at 134.) Petitioner states that Dr. Eva Heuser testified at trial that either a sexual assault or brain injuries, or both, could have resulted in the victim's death. (*Id.* at 135.) Petitioner cites Dr. Heuser's testimony that persons have "died during the commission of sodomy without any other injuries and without any other cause for death and the basis is thought to be [a] reflexive slowing of the heart," and her explanation that:

> [p]roctologists, people, the doctors who operate in that area, in the lower intestinal tract, have noted that you can,

> if you manipulate the area, you can have what is called bradycardia, namely, swelling of the heart. [¶] Because again that area has a lot of parasympathetic innervation, which is what is stimulated and that reflexively can cause slowing of the heart. [¶] There is also in the forensic literature the opinion that – well, actually people have actually seen victims who died during the commission of . . . [s]odomy.

(RT 2400; *see* Pet. at 135.) Petitioner also appears to challenge the veracity of the autopsy report conclusion that "the cause of death was '[t]raumatic injuries,' which consisted of '[c]raniocerebral trauma, neck compression and sexual assault within a lacerations.'" (Pet. at 135 (quoting Pet. Ex. 29 at 155); *see also* Pet. Ex. 91.)

To demonstrate the falsity of Dr. Heuser's testimony, Petitioner cites the opinion of forensic pathologist Dr. Michael Baden that the victim's:

> neuropathology examination demonstrated that there was no injury to the brain – no trauma to the brain – and that Nicole's brain was entirely normal. Further, the full autopsy and the examination of the microscopic slides showed that the sexual assault did not produce injuries sufficient to cause death. [¶] It is my opinion, to a reasonable degree of medical certainty, that neither craniocerebral injuries nor a sexual assault caused Nicole's death . . . .

(*Id.* at 136 (quoting Pet. Ex. 29 at 155).)

Petitioner further relies upon the opinions of Dr. Gregory Reiber that:

> [t]he head and brain examination reveal no injuries of a severity to account for the child's death or to a result in a significant contribution to her death. . . . Dr. Heuser's trial testimony attributing death to reflex slowing of the heart due to anal penetration is a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion . . . [and] [t]here is limited and equivocal evidence of neck compression, and manual strangulation is very

> unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the eyes.

(Pet. Ex. 112 ¶¶ 8, 10, 15; *see* Pet. at 136.)

In Claim 1(2)(b), Petitioner alleges that counsel provided ineffective assistance by failing to retain an independent forensic pathologist to refute the prosecution's evidence regarding the cause of death, as discussed above, as well as the date and time of death. (Pet. at 72-77.) Regarding the date and time of death, Petitioner contends that an independent forensic pathologist could have testified that the victim died on Sunday, after Petitioner last left his apartment, rather than on Saturday as presented at trial. (*Id.* at 75-77.)

Finally, in Claim 1(3)(b), Petitioner adds that counsel was ineffective at the penalty phase of trial for failing to present evidence that there was an attempt to resuscitate the victim and thus that her death was accidental. (*Id.* at 82-83.)

A. Cause of Death

1. Legal Standard Regarding Presentation of False Evidence

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269 (citing, *inter alia*, *Mooney v. Holohan*, 294 U.S. 103 (1935)). As noted above, "[t]o prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) [] the false testimony was material." *Zuno-Arce*, 339 F.3d at 889. The burden of demonstrating falsity rests on petitioner. *See id.* (denying relief where petitioner's evidence of falsity was "unreliable").

//

The submission of contrary expert testimony does not demonstrate the falsity of the testimony it opposes. *See Harris v. Vasquez*, 949 F.2d 1497, 1524 (9th Cir. 1991) ("To support his assertion that [the prosecution expert] testified

falsely, [petitioner] submits opinions from other psychiatrists that differ, in some respects, from [the prosecution expert's] opinion. . . . [T]hese conflicting psychiatric opinions do not show that [the expert's] testimony was false; psychiatrists disagree widely and frequently" (internal quotation omitted)); *see also Sistrunk v. Armenakis*, 292 F.3d 669, 675, 675 n.7 (9th Cir. 2002) (en banc) (holding, as to alleged falsity of prosecution expert witness's testimony, that although the "testimony was clearly inaccurate, it is certainly not clear that it constituted a 'lie[.]' . . . The three-judge panel majority characterized [the expert] as having testified 'falsely[;]' . . . While we agree that [the expert] overstated the results of the study on which she relied, . . . we do not reach a similar conclusion"); *United States v. Workinger*, 90 F.3d 1409, 1416 (9th Cir. 1996) (citing with approval *Campbell v. Gregory*, 867 F.2d 1146, 1148 (8th Cir. 1989), for the proposition that "testimony of [an] expert is not perjury merely because it differed from opinions of other experts").

2. Analysis

First, regarding the injuries to the victim's brain, Dr. Baden offers no opinion on the testimony of Dr. Heuser regarding subarachnoid bleeding and swelling throughout the brain. (RT 2335.) Dr. Reiber, by contrast, opines that:

> [t]he degree of craniocerebral trauma, or head injury, described in the report is limited to bleeding in the deep layers of the scalp and Dr. Heuser's recollection of a degree of subarachnoid hemorrhage in her trial testimony, a finding not borne out by the neuropathology examation of the brain. The head and brain examinations revealed no injuries of a severity to account for the child's death or to result in a significant contribution to her death.

(Pet. Ex. 112 ¶ 8.) Dr. Heuser acknowledged at trial that:

> [b]ecause of the small amount of subarachnoid hemorrhage and because of the fact that the bruising is

> present on the bone surface, and because of the size which is almost an inch and a half, I believe that there was some degree of concussion, not fatal.
>
> I don't believe that this is a fatal impact, but it was a significant impact . . . .

(RT 2335-36.) Dr. Heuser went on to testify:

> Q. Do you have an opinion, doctor, as to the cause of death in this case?
> A. Yes.
> Q. What is that opinion?
> A. Traumatic injuries.
> Q. And when you use the term traumatic injuries, do you have a specific injury in mind?
> A. No. [¶] What I conceptualize, it is the incident that resulted in the traumatic injuries, so even though the little bruises are not in and of themselves significant, they are part of a set of circumstances that led to her death. [¶] So all her injuries caused her death in that sense, and –
> Q. I am sorry. [¶] Go ahead.
> A. I am sorry. No.
> Q. Are you then referring to the injuries to her neck, the compression injuries that you have described as being part of the cause of death?
> A. Yes. [¶] Well, in this case obviously the pressure on her rib cage was not in and of itself fatal. [¶] If that is all she had, she would not have died. [¶] Although these injuries connected in this indirect way that I conceptualize of it. [¶] The most lethal injuries she had are the neck and the genital trauma as we have been discussing.

(*Id.* at 2404-05.)

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That Dr. Reiber saw the evidence of neck compression as "limited and equivocal" does not show to be false Dr. Heuser's testimony that those injuries

connected to others caused her death. Similarly, Dr. Reiber's opinion that it was a "novel theory" to state that death could result from a slowing of the heart from anal penetration does not demonstrate the falsity of Dr. Heuser's conclusions. *Cf. Sistrunk*, 292 F.3d at 675, 675 n.7; *Workinger*, 90 F.3d at 1416; *Harris*, 949 F.2d at 1524. Although Dr. Heuser testified that sodomy was a possible cause of death, that possibility is not incompatible with (or a critical feature of) her testimony that the most lethal injuries were neck and genital trauma.

The California Supreme Court may have reasonably concluded that Petitioner had not met his burden of demonstrating the falsity of Dr. Heuser's testimony. Claim 6 is, therefore, DENIED.

The court may have also reasonably determined that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in presenting evidence regarding the cause of death. Dr. Baden offers no opinion in his declaration on what did cause Nicole Parker's death. (*See* Pet. Ex. 29.) Dr. Reiber opines:

> Given the totality of the scene and autopsy findings in the case of Nicole Parker, it is my opinion to a reasonable certainty that the manner of death was homicide. The specific cause of death is less clear, but in the setting of a sexual assault, some type of asphyxial death is likely. There is limited and equivocal evidence of neck compression, and manual strangulation is very unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the eyes. Other forms of asphyxial death, such as suffocation and/or "Burking" – pressure of a large person's body on a smaller person's chest causing restriction of breathing – remain possible, and the facial bruising and areas of contusion on the torso support either or both in combination. Such a situation could result unintentionally in an asphyxial death, or alternatively may have been a result of attempted resuscitation. This second possibility is given weight by the presence of soft tissue bruising in the chest wall as

> found at autopsy.

(Pet. Ex. 112 ¶ 15 (capitalization in original).) He opines that "[t]he findings of sexual assault are supported from autopsy findings of perianal laceration with external bleeding and microscopic hemorrhages in the underlying soft tissues." (*Id.* ¶ 10.)

The California Supreme Court may have reasonably concluded that in light of the "setting of a sexual assault," evidence of an asphyxial death, as from the pressure of Petitioner's larger body on Nicole Parker's chest or from her aspiration of her gastric contents, would have been no more palatable to the jury. As Petitioner acknowledges, the prosecution did not rely upon a theory of intentional killing, but only upon felony murder. (*See* Pet. at 150-51.) The California Supreme Court may have reasonably determined that Petitioner's evidence shows no reasonable probability of a different result at trial, and thus no prejudice resulting from any deficient performance by counsel. In addition, the court may have reasonably determined that counsel may have effectively strategized at the penalty phase of trial that calling the jurors' attention to the cause of the victim's death, to argue that it was accidental, would have done more harm than good. Accordingly, Claim 1(3)(b) is DENIED.

B. Date and Time of Death

1. Allegations

In support of his ineffective assistance of counsel claim, Petitioner next alleges that "[t]he State's evidence reveals that there was a serious question as to the date and time of death." (Pet. at 75.) Petitioner relies upon "[a] prosecution forensic report reflect[ing] that the death occurred on the day after Petitioner left his home, Sunday, [November 21, 1993]," (*id.* (citing Pet. Ex. 93)), along with a declaration from Dr. Reiber that:

> If the child had died around noon, or in the very early

> afternoon of 11-20-93, rigor should have been significantly decreased from a maximal or "fully fixed" condition by the late evening of 11-21-93, approximately 36 hours since death; if the observation of rigor was made in the early morning of 11-22-93 prior to the 0415 hours transport time, an observed decreased in rigor would have been even more likely. Furthermore, this child was found in a suitcase, wrapped in a sheet, under a pile of other objects in a closet; such a situation would provide insulation causing retention of body heat and promoting more rapid disappearance of rigor. The use of stomach contents as a basis for time of death estimation is unreliable; stomach emptying can be delayed by severe stress, and if the child were abducted before a breakfast meal had emptied from the stomach, the stress of the ensuing captivity could significantly delay emptying of the stomach and cause the estimated time of death to be much earlier than actually occurred. The lack of any additional analysis to confirm the identity and condition of the material in the stomach renders this basis for time of time of death even more unreliable. Other means to help determine time of death, such as core temperature or vitreous potassium level, were not performed in this case. It is unfortunate that the standard method of the LA County Coroner-Medical Examiner, that of obtaining a liver temperature, was not done at the scene in this case. Relying on typical patterns of rigor mortis, the expected interval between time of death and discovery should have been significantly shorter than the interval between the child's disappearance and her discovery. This suggests that the time of death was a significant number of hours later that [sic] Dr. Heuser testified to, based on her use of the time of the child's disappearance and the gastric contents.

(Pet. Ex. 122 ¶ 13; *see* Pet. at 75-77.)

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2. Testimony at Trial

Regarding the victim's stomach contents, Dr. Heuser testified at trial:

Q. If Nicole – if you learned that Nicole Parker had eaten eggs for breakfast sometime between 8:15 and 8:30 in the morning, would you have an opinion as to the approximate time of death based upon the contents of the stomach?

A. Well, it could be, the fact that I – the fact that I could recognize eggs, the food is not digested in the stomach but the stomach does secrete acid, so if food sits in the stomach[] for a long time, it gets kind of grayish and you can't tell what it is.

And after it has been there for – let's say you are stressed out and your food is in there for eight hours or so, you might not be able to tell, if it is well chewed, as this was, exactly what it was.

So I would say probably within that four hour limit, somewhere around there. [¶] It could be longer. [¶] I don't recall the circumstances. I don't recall the exact intervals of time.

But you have to – you have quite a range, and I think the range is broad enough that it can fit a number of circumstances.

Q. Would it fit a circumstance of say death occurring sometime in the early afternoon?

A. From 8:30 –

Q. If eggs had been eaten between 8:00 and 8:30?

A. Well, it could.

Q. You have indicated in the normal person you would expect the contents of the stomach to be gone within approximately four hours; is that correct?

A. Yes.

Q. But in some situations where there is stress or some other factor it can remain longer?

A. Yes.

(RT 2408-09.) Regarding the presence of rigor mortis, Dr. Heuser testified:

> Q. Now, assume for a moment that Nicole Parker disappeared on Saturday morning at about 11:00 in the morning, and the body was found Sunday evening at approximately 11:00. [¶] So we would be talking about 36 hours later. [¶] Would it be possible for the body to be set in full rigor 36 hours, approximately 36 hours after death?
>
> A. Well, yes, it would be possible.
>
> I am a little surprised that it is fully set, but yes, it can, because under relatively cool conditions, and I don't have any temperatures, I don't have an air temperature. [¶] Often the investigator will provide an air temperature. [¶] I don't have one in this case.
>
> But if the temperature were not in the '80's and the '90's, if it were maybe at the highest in the '70's and then perhaps lower, during that interval the onset of rigor would be delayed, cooling delays onset of rigor.
>
> [Objection by defense counsel]
>
> And also then the dissipation is also delayed. [¶] So 48 hours is certainly within the parameters given in the textbooks.

(*Id.* at 2409-10.)

3. Analysis

The California Supreme Court may have reasonably determined that the additional evidence Petitioner presented on habeas review did not establish a reasonable probability of a different outcome at trial. Dr. Heuser acknowledged that the appearance of fully set rigor mortis was "a little surpris[ing]," and that the investigator did not provide an air temperature as investigators "often" do. (*Id.* at 2410.) Moreover, while Dr. Reiber discusses the insulation of the body that would

have speeded the disappearance of rigor, he does not contest Dr. Heuser's testimony that an air temperature in the 70s or lower would delay the onset of rigor or that full rigor after 48 hours was "certainly within the parameters given in the textbooks." (*Id.*) Similarly, Dr. Heuser acknowledged at trial that stress delays the emptying of the stomach and that the food was well chewed and difficult to identify, yielding a broad range for a possible time of death. (*See id.* at 2408.) The California Supreme Court thus may have reasonably held that Petitioner failed to show a reasonable probability of a different result at trial had counsel presented additional evidence regarding the date and time of Nicole Parker's death.

Claim 1(2)(b) is, therefore, DENIED.

IX. Claims 7, 16(G), and 16(H): Prosecutorial Misconduct and Trial Court Error Regarding Victoria Eckstone

A. Prosecutorial Intimidation

1. Allegations

In Claim 7, Petitioner alleges that the prosecutor committed misconduct by intimidating defense witness Victoria Eckstone. (Pet. at 138-43.) Petitioner contends that the prosecutor's conduct interfered with his right to present witnesses in his defense. (*Id.* at 141.) He alleges that "[a]lthough she was courageous enough to testify at trial, this prosecutorial intimidation unnerved [Eckstone] and affected her demeanor on the stand. She was so unnerved on the witness stand that the prosecution had her detained and drug tested after she testified on behalf of Petitioner." (*Id.* at 142.)

Eckstone testified, in part, that the prosecution called her several times and when she eventually returned their call, she asked what would happen if she did not want to "come in." (RT 2663.) She testified that the prosecution told her, "'We'll send someone out to arrest you. So that way you would come in and speak with us.'" (*Id.*) Eckstone testified that she was afraid "somebody was going to come around and take my daughter away and take me to jail" and that she met with

the prosecution and "told them pretty much anything they wanted to hear as long as [she] wasn't going to get arrested." (*Id.* at 2663-64.)

After Eckstone testified, a bailiff informed the court that a sheriff present in the courtroom suspected Eckstone of being under the influence of a controlled substance, and the prosecutor requested that she be examined. (*See id.* at 2678-80.) The trial court authorized the examination. (*See id.* at 2679-81.) The trial court later reported to counsel that "[t]here was some indication of some substance useage [sic], but not enough where they were confident to make an arrest. So, apparently she also was taking some codeine and something else by prescription." (*Id.* at 2716.) The court stated that no urine screen was performed. (*Id.*) Counsel argued that Eckstone "was detained in another room for at least an hour. It may look to her like she was arrested . . . ." (*Id.* at 2717.)

In Claim 16(H), Petitioner alleges the trial court violated his constitutional rights by denying his request to present evidence that police detained Eckstone after her testimony. (Pet. at 271-75.) Petitioner argues that he should have been permitted to present evidence of Eckstone's detainment as part of his defense to support her credibility and her claims of police intimidation, to question the credibility of prosecution witnesses, and to show "a possibility that other prospective defense witnesses were too intimidated to testify on Petitioner's behalf." (*Id.* at 274.) Petitioner argues that Eckstone's detainment "manifested an apparent bias on the part of the police in their investigation . . . [and] their unwarranted determination to investigate and convict Petitioner, and only him." (*Id.*) Finally, Petitioner alleges that any jurors who were aware that law enforcement removed Eckstone from the courtroom were never informed that she was ultimately released and not charged. (*Id.*)

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2. Decision on Direct Appeal

On direct appeal, the California Supreme Court noted that "[o]n further

recross-examination, [Eckstone] acknowledged that what she was actually told by someone in the prosecutor's office was, 'I guess we're going to have to come out and get you,' which she considered 'a threat for an arrest.' She testified further that she had not intentionally lied to the prosecutor." *Panah*, 35 Cal. 4th at 461 (quoting RT 2667 and discussing RT 2670). The court also observed, regarding Eckstone's examination for drug use, that the trial court "agreed 'her demeanor and behavior was highly unusual, to say the least.'" *Id.* (quoting RT 2678).

The California Supreme Court held:

> We find no supportable claim of prosecutorial intimidation. The record makes clear that the alleged threat of arrest was simply a matter of interpretation on Eckstone's part. Moreover, even if the prosecutor had overreached during the investigatory part of this case, he did not interfere with defendant's Sixth Amendment compulsory process rights because Eckstone appeared and testified on defendant's behalf, not only in the guilt phase, but in the penalty phase. Thus, this case is easily distinguishable from the cases defendant relies upon in support of his argument, in which prosecutorial threats . . . deprived the defendant of the testimony of that witness. Defendant suggests that the threat of arrest may have subtly influenced Eckstone's demeanor. This is mere speculation.
>
> We also reject his claim that prosecutorial misconduct was involved in Eckstone's detention for possible drug use. The request came not from the prosecutor or the court, but from police present in the courtroom. The extent of the prosecutor's participation was his legitimate observation that whether a witness is testifying under the influence of drugs is relevant to credibility. Additionally, the detention did not prevent Eckstone from returning to testify for defendant at the penalty phase. There was no misconduct and no constitutional violation. . . .
>
> [Regarding the] exclusion of evidence of Eckstone's

> detention[, n]otwithstanding defendant's insinuation that Eckstone's detention was engineered by the prosecution in retaliation for her testimony, the record is clear that neither the prosecutor nor the court had anything to do with it. Thus, the evidence was irrelevant to any issue in the case.

Panah, 35 Cal. 4th at 461-62, 479 (internal citations omitted and capitalization edited).

3. Analysis

The California Supreme Court reasonably concluded that Eckstone's appearance at the guilt and penalty phases of Petitioner's trial undermines his claim of a Sixth Amendment violation. The Ninth Circuit has observed that "no court applying *Webb*," the "seminal case" on government interference with defense witnesses, "has ever extended it to situations, like this one, where the allegedly threatened witness continued to testify after the alleged threat." *United States v. Juan*, 704 F.3d 1137, 1141 (9th Cir. 2013) (discussing *Webb v. Texas*, 409 U.S. 95 (1972) (internal quotation omitted)). Even assuming, *arguendo*, that the Circuit's extension of *Webb* to govern such a situation could demonstrate clearly established federal law to that effect, *Juan*'s condition that the witness must "materially change" her testimony to show a constitutional violation is not met. *Juan*, 704 F.3d at 1142. By Petitioner's own allegations, Eckstone testified favorably to the defense. (*See* Pet. at 273-74.)

The California Supreme Court also reasonably rejected Petitioner's claim that the prosecution committed misconduct in requesting to have Eckstone examined for drug use. The observations of the trial judge and the evidence that Eckstone was indeed taking prescription codeine and another prescription drug show the prosecution's request to be well-founded. *See Williams v. Woodford*, 384 F.3d 567, 602 (9th Cir. 2002) ("The record does not support a conclusion that the prosecution brought baseless perjury charges against [the witness] to harass him

and discourage him from testifying at the hearing. To the contrary, the record suggests that the charges were well-founded given [the witness's] admissions to the authorities that he had provided perjured testimony on a number of occasions"). Finally, the California Supreme Court reasonably found Petitioner's claim that prosecutorial intimidation affected Eckstone's demeanor while testifying to be speculative, particularly in light of evidence in the record that Eckstone had been taking prescription codeine and another prescription drug at the time of her testimony. (RT 2716.)

Claims 7 and 16(H) are, therefore, DENIED.

B. Cross-Examination

1. Allegations

In Claim 16(G), Petitioner alleges that the trial court violated his constitutional rights by permitting the prosecution to cross-examine Eckstone regarding a prior arrest. (Pet. at 268-71.) Petitioner explains that the prosecutor questioned Eckstone about her contact with Detective Price, the lead detective in Petitioner's case, when she was in jail on the unrelated arrest. (*Id.* at 268-69.) Petitioner challenges the following line of questioning:

> Q. Do you recall telephoning Investigator Price at sometime [sic] when you were in custody?
>
> A. Yeah, I did call him. I was supposed to meet him that afternoon, but I was in jail.
>
> Q. Do you recall telephoning him because you wanted some kind of a break on your case?
>
> A. I didn't need a break. I had a thousand dollars in cash and that's all my bail was.
>
> Q. Do you recall calling him and telling him that you were afraid that because of your arrest your child might be taken away from you, and you wanted his assistance?
>
> A. Not with this case I didn't.

Q. Was there another case that you had where you made a telephone call to him?

A. It had nothing to do with this case at all. [¶] I was supposed to meet him that afternoon.

Q. When you say it had nothing to do with this case, are you referring to Mr. Panah's case?

A. Isn't that what you're referring to?

Q. I'm referring to your arrest.

A. I was arrested for something that had nothing to do with this case.

Q. And as a result of that arrest, you called Detective Price, and you requested Detective Price to help you out because you were afraid that based upon that arrest you would lose your child; is that correct?

A. I think I asked him what should I do. And I had the money to bail out, so I don't understand the question.

Q. The question is: Did you call Detective Price in order to get some kind of benefit or break on the case you had because you were worried about losing your child?

A. I did not have to have a break. I knew what I was being charged with. [¶] I had bail money. I don't understand.

Q. You knew you were a potential witness in this case; is that correct?

A. Yes. And they put me in my own private little cell because of it.

Q. Because you were a potential witness in this case, when you got in trouble you called Detective Price to see if you could get out of being in trouble on that new arrest; is that correct?

> A. No. I did not ask him to get me out of trouble. I knew I had to be bailed out. I hired my own attorney.

(RT 2673-75.) Eckstone went on to testify that the charges were dropped. (*Id.* at 2676-77.)

2. Decision on Direct Appeal

The California Supreme Court held on direct appeal:

> Evidence that Ms. Eckstone asked Detective Price for help and did not get it was clearly relevant to her credibility because it could have provided a reason for her hostility to the prosecution. Moreover, evidence that she sought Price's assistance also tended to undercut her direct testimony that he threatened to arrest her to induce her cooperation in the investigation of the case against defendant. Nor was the brief reference to her having been arrested so prejudicial that the trial court abused its discretion by not excluding it pursuant to Evidence Code section 352.

Panah, 35 Cal. 4th at 479 (internal citations omitted).

3. Analysis

The California Supreme Court's conclusion that the prosecutor's questions were permissible to show Eckstone's possible bias was not an unreasonable application of federal law. The United States Supreme Court explained in *Davis v. Alaska*, 415 U.S. 308, 316 (1974) that:

> [t]he introduction of evidence of a prior crime is . . . a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.

Davis, 415 U.S. at 316 (internal quotation omitted). The Court held in *Davis* that the defendant was constitutionally permitted to impeach a witness with evidence that he had a juvenile record and was on probation, evidence that was otherwise inadmissible on cross-examination under state law. *Id.* at 319. The Court held that the witness's "vulnerable status as a probationer" was appropriate evidence of possible bias for the jury to consider. *Id.* at 318. Circuit courts have interpreted *Davis* to support the ability of "the prosecution to impeach defense witnesses for bias by showing charges against them," to show their "antipathy toward law enforcement." *United States v. Spencer*, 25 F.3d 1105, 1109 (D.C. Cir. 1994); *see also Barber v. Chicago*, 725 F.3d 702, 711 (7th Cir. 2013) ("It is true that in some circumstances it may be proper to impeach a witness with evidence of a prior arrest, for instance, to establish the witness's bias").

The California Supreme Court's rejection of Claim 16(G) was not, therefore, objectively unreasonable. Claim 16(G) is DENIED.

X. Claim 8(A): Prosecutorial Misconduct Regarding Presumption of Innocence

A. Factual Background, Argument, and Decision on Direct Appeal

In Claim 8(A), Petitioner contends that the prosecutor improperly denigrated the presumption of innocence in his closing argument. (Pet. at 144-48.) After discussing the evidence at length, the prosecutor stated:

> Mr. Berman: For thirteen months, ladies and gentlemen, Mr. Panah has enjoyed the mantle of the presumption of innocence. He's been able to hide behind that as simply a person –
>
> Mr. Sheahen: Objection.
>
> The Court: Overruled.
>
> Mr. Berman: A person who was arrested for these crimes. The evidence we have presented to you has stripped away that presumption. It is no longer there.

> You are now in a position to brand him for what he is, and that is a person who murdered a helpless eight-year-old child, and in the course of murdering that child satisfied his own lust, treated her as though she wasn't human, gratified himself sexually with a victim, who was about four feet three inches tall and weighed about fifty-five pounds. No match for him, but a child who fought back as hard as she could during the course of that assault. [¶] It's time now for you to label Mr. Panah for what he is, and that is a person who is a murderer, a person who is guilty of special circumstances, and a person who is guilty of sodomy, lewd acts on a child, and oral copulation on a child.

(RT 2889-90.)

Following this conclusion of the prosecutor's argument, defense counsel immediately requested a bench conference. He again objected to the prosecutor's "reference to hiding in the presumption of innocence" as prosecutorial misconduct. (*Id.* at 2890.) The trial judge responded:

> I think you can't take the one comment out of context. [¶] I think in context everyone understood him to say that the defendant has been clothed for the last thirteen months in the presumption of innocence. [¶] Now is the time for the jury to assess the facts and see whether the presumption is going to hold or not. [¶] And I think that's the only reasonable and fair interpretation of the argument. [¶] He didn't denigrate the presumption. He didn't say the presumption didn't apply. He simply said the facts have now shown that the presumption is gone. He's been proven guilty. [¶] Your objection is noted, but respectfully overruled.

(*Id.* at 2890-91.)

The trial court did not issue a curative instruction. Following defense counsel's closing argument and the prosecution's rebuttal, the court informed the jury in its guilt phase instructions:

> A defendant in a criminal action is presumed to be innocent *until the contrary is proved*, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.
>
> This presumption places upon the people the burden of proof of proving him guilty beyond a reasonable doubt.

(*Id.* at 2991 (emphasis added).)

Petitioner argues that "'[b]oth the presumption [of innocence] and the burden [of proof beyond a reasonable doubt] remain throughout the trial and go with the jury when it deliberates.'" (Pet. at 146 (quoting *United States v. Cummings*, 468 F.2d 274, 280 (9th Cir. 1972)).) He contends that where "'the prosecutor describe[s] the presumption as a cloak that comes off at the end of the trial, he dilute[s] the petitioner's right to be presumed innocent until proven guilty beyond a reasonable doubt.'" (*Id.* at 147 (quoting *Pagano v. Allard*, 218 F. Supp. 2d 26, 35 (D. Mass. 2002) (granting habeas relief under AEDPA as a result)).)

On direct appeal, the California Supreme Court held:

> Defendant contends that the prosecutor improperly . . . denigrated the presumption of innocence, when he argued that the prosecution's evidence had 'stripped away' defendant's presumption of innocence. . . .
>
> We disagree. The prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Here, the prosecutor's references to the presumption of innocence were made in connection with his general point that, in his view, the evidence, to which he had just referred at length, proved defendant's guilt beyond a reasonable doubt, i.e., the evidence overcame the presumption.

Panah, 35 Cal. 4th at 463 (internal quotation and alteration omitted).

B. Analysis

1. Failure to Show Unreasonableness of State Court Decision

Even if "fairminded jurists could disagree on the correctness of the state court's decision," that disagreement does not render the decision objectively unreasonable. *Richter*, 131 S. Ct. at 786 (internal quotation omitted). Likewise, where "a petitioner challenges the substance of the state court's findings, . . . [the Court] must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Hibbler*, 693 F.3d at 1146-47 (internal quotation omitted).

The California Supreme Court's decision that the prosecutor's remarks stated his view that the evidence had overcome the presumption of innocence is supported by the record and is not objectively unreasonable. As the Supreme Court has cautioned, a court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). The Supreme Court in *Victor v. Nebraska* approved of a jury instruction identical to the one given here, that the defendant "is presumed to be innocent *until the contrary is proved* . . . ." 511 U.S. 1, 7 (1994) (rejecting due process challenge to instruction on reasonable doubt) (emphasis added); *see also id.* at 8 (quoting with approval jury instruction that "every person is presumed to be innocent *until he is proved guilty*" (internal quotation omitted, emphasis added)). The state court's interpretation of the prosecutor's remark to mean that because the contrary had been proved, Petitioner was no longer presumed to be innocent, is compatible with *Victor*.

The California Supreme Court's rejection of the claim on direct appeal was not, therefore, an unreasonable determination of the facts or contrary to, or an unreasonable application of, federal law under § 2254(d).

2. Failure to Show Entitlement to Relief under De Novo Review

In the alternative, even applying de novo review, the Court finds any error in the prosecutor's argument to be harmless. Because the claim "can be resolved by reference to the state court record," no evidentiary hearing or discovery is warranted. *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994); *see also Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir. 1984) (holding that no evidentiary hearing is required where a claim "must be determined from a review of the evidence in the record in the state proceedings" (emphasis omitted)).

a. Application of Harmless Error Review

In the case of a "structural error" a conviction is to "be set aside on collateral review without regard to whether the flaw . . . prejudiced the defendant." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008). The Supreme Court has emphasized that "while there are some errors to which [harmless error review] does not apply, they are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Structural errors, such as the introduction of a coerced confession, the complete denial of the right to counsel, and an adjudication by a biased judge, *see id.* at 577, strike at the "constitution of the trial mechanism" itself. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (internal quotation omitted). They are to be distinguished from mere errors "during the presentation of the case to the jury." *Id.* (internal quotation omitted). The Supreme Court held in *Sullivan* that a court's instructional error on the definition of reasonable doubt that "vitiates *all* the jury's findings" constitutes structural error. *Id.* (emphasis in original). By contrast, an instruction that erroneously informs the jury that it may presume an element of the offense is subject to harmless error review. *See Rose*, 478 U.S. at 579-80.

An error in the prosecutor's presentation of the case to the jury in closing argument does not rise to the level of structural error. *See Bartlett v. Battaglia*, 453 F.3d 796, 801 (7th Cir. 2006) (holding that prosecutor's misstatements about the burden of proof and presumption of innocence "simply could not have poisoned the jury's understanding in the same manner an erroneous jury instruction would have"); *Kellogg v. Skon*, 176 F.3d 447, 451 (8th Cir. 1999) (holding that prosecutor's argument that evidence had removed presumption of innocence was subject to harmless error review). The Supreme Court explained in *Boyde v. California*:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. . . . This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court.

494 U.S. 370, 384-85 (1990) (internal citations omitted). As the Seventh Circuit has observed, the Supreme Court has never extended the application of structural error in *Sullivan* to a prosecutor's misstatements, as opposed to a court's instructions. *Bartlett*, 453 F.3d at 801. The alleged prosecutorial error at issue here is, therefore, subject to harmless error review.

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b. Harmlessness of Error

On habeas review, constitutional error is harmless if it did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995) (quoting *Brecht v. Abrahamson*, 507

U.S. 619, 623 (1993)). Prosecutorial misstatements, like instructional errors, are harmless if they did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation omitted); *see also Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (holding that failure to instruct on presumption of innocence was subject to harmless error review).

The Seventh, Eighth, and Tenth Circuits, though ultimately finding the error to be harmless, have held that a prosecutor may not argue that the defendant's presumption of innocence has been removed by the evidence. *See United States v. Crumley*, 528 F.3d 1053, 1065 (8th Cir. 2008) ("It is improper to refer to the evidence as having removed the presumption"); *Bartlett*, 453 F.3d at 801-02, 804 ("strongly disapprov[ing]" of prosecutor's remarks that included a comment that defendant's "cloak" of innocence "through our evidence has been thrown in the garbage"); *Hamilton v. Mullin*, 436 F.3d 1181, 1188-89 (10th Cir. 2006). Each circuit court found the statements harmless in light of jury instructions on the prosecution's burden to prove its case beyond a reasonable doubt. *See Crumley*, 528 F.3d at 1066 (so holding where instruction was "enhanced" by defense counsel's argument); *Bartlett*, 453 F.3d at 804; *Hamilton*, 436 F.3d at 1189-90 (so holding where instruction was accompanied by prosecution's acknowledgment of its burden in closing argument and evidence against defendant was overwhelming); *compare Pagano*, 218 F. Supp. 2d at 35-36 (granting habeas relief based on such a statement).

The Ninth Circuit cases ordering reversal, upon which Petitioner relies, have considered significantly more egregious facts than those at hand. (*See* Pet. at 146 (citing *United States v. Perlaza*, 439 F.3d 1149, 1172 (9th Cir. 2006) and *Cummings*, 468 F.2d at 280).) In *Perlaza*, the Ninth Circuit found reversible error on direct appeal where the prosecutor stated not only that when the jurors started deliberating, the presumption would vanish, but that "that's when the presumption

of guilt is going to take over . . . ." 439 F.3d at 1169 (emphasis altered from original). When defense counsel objected to that remark, the trial court responded in front of the jury, "That's proper rebuttal. Go ahead. You are all right." *Id.* at 1170, 1171 n.25. In finding reversible error, the Circuit emphasized that the trial court had "ratified" the prosecutor's statement with its remarks. *Id.* at 1171-72. In *Cummings*, the Ninth Circuit found reversible error from a prosecutor's improper argument where the trial court's instruction suggested that "*any* evidence contrary to the presumption of innocence," as opposed to evidence convincing the jury beyond a reasonable doubt, "will overcome that presumption." 468 F.2d at 278, 280 (emphasis added).

"[T]he presumption of innocence is an inaccurate, shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion" beyond a reasonable doubt. *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978) (internal quotation omitted). An instruction on the presumption of innocence serves a "purging effect" that "protect[s] the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Id.* at 486. Here, although the trial court overruled defense counsel's objection to the prosecutor's arguably improper statement, it instructed the jury that it must follow the court's statements of the law over those of the attorneys (RT 2973), instructed on the prosecution's burden to prove its case beyond a reasonable doubt (*id.* at 2991-92, 2997-99, 3001-02), and instructed on Petitioner's presumption of innocence. (*Id.* at 2991.) In light of the relative strength of the trial court's instructions over the prosecutor's remarks, *see Boyde*, 494 U.S. at 384-85, and the considerable force of the evidence against Petitioner, the Court finds that the remarks did not so infect Petitioner's trial as to deprive him of due process. Accordingly, Claim 8(A) is DENIED.

XI. Claim 8(B): Prosecutorial Misconduct in Appeals to Sympathy and Passion

In Claim 8(B), Petitioner argues that the prosecutor improperly appealed to the jurors' sympathy and passion in his closing argument. (Pet. at 148-49.) Petitioner challenges the prosecutor's remarks that the victim was a small, "helpless eight-year-old child" who "fought back as hard as she could during the course of th[e] assault," and that Petitioner "satisfied his own lust" and "gratified himself sexually with the victim, who was about four feet three inches tall and weighed about fifty-five pounds." (RT 2889; *see* Pet. at 149.)

Regarding the references to the victim's age, weight, and height, the California Supreme Court held on direct appeal that "[t]hese were facts in evidence. The prosecutor cannot be faulted for misconduct because he referred to them, nor was he required to discuss his view of the case in clinical or detached detail." *Panah*, 35 Cal. 4th at 463. The state court's determination that the comments were fair remarks on the evidence is not objectively unreasonable. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) ("Prosecutors can argue reasonable inferences based on the record and have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence" (internal quotation and citation omitted)).

Even if the prosecutor's remarks about the victim in connection with the remarks about Petitioner's sexual gratification may have appealed to the passions of the jury, their impact was minimal, if at all. While comments "designed to appeal to the passions, fears, and vulnerabilities of the jury" are improper, they are only prejudicial in light of such factors as "the weakness of the prosecution's case, the prosecutor's disingenuity as to the whereabouts of [critical evidence], and the Government's resort to coercion to obtain evidence." *Comer v. Schriro*, 463 F.3d 934, 961 (9th Cir. 2006) (internal quotations omitted); *see also Allen v. Woodford*, 395 F.3d 979, 1016 (9th Cir. 2004) (holding that prosecutor's improper comment about witness retaliation, calculated to arouse passions or prejudices of the jury, was not unconstitutionally prejudicial given overwhelming evidence against

defendant and trial court's instruction that statements of counsel are not evidence). In addition, where "any emotional impact that the prosecutor's statement may have had on the jury likely only replicated the impact" of witness testimony, the defendant is less likely to have been prejudiced by the remark. *Comer*, 463 F.3d at 961.

Here, the prosecutor was not disingenuous or coercive in his treatment of the evidence, and the evidence against Petitioner was strong. The potential emotional impact of the connection between the victim's characteristics and those of the crime was inherent in the witness testimony and was only partially replicated by the prosecutor's statement. (*See, e.g.*, RT 2121-22, 2872 (defense counsel's remarks to trial court about groans from courtroom spectators and expressions by the victim's family of its "displeasure of [his] questioning"); 2872 (trial court's statement to defense counsel that the court was "sure some of the things you're going to say are not going to sit well with one segment of the population in the audience"); 2870-71 (defense counsel's report to trial court that the victim's mother had been "overly emotional . . . in the hallway in the presence of the jurors").) Finally, the jury was told that statements made by counsel in their arguments were not evidence. *See Allen*, 395 F.3d at 1016; (*see, e.g.*, RT 2834). The California Supreme Court's conclusion that the prosecutor's remarks were not so prejudicial as to render Petitioner's trial fundamentally unfair is not, therefore, objectively unreasonable. Claim 8(B) is DENIED.

XII. Claim 8(C): Prosecutorial Misconduct in Arguments on Reasonableness

A. Allegations

In Claim 8(C), Petitioner argues that "based on the prosecutor's repeated references to reasonableness, reasonable interpretations, and reasonable inferences, the jury was made to believe that the evidence only had to demonstrate a reasonable possibility that Petitioner was guilty." (Pet. at 152.) Petitioner cites three passages from the prosecutor's argument. In the first, the prosecutor argued:

> In this situation, you have a number of factors that are susceptible to two interpretations. [¶] Our position is *there's only one reasonable interpretation* when you take into consideration all of the facts of the case.
>
> As an example. The criminalist has testified that on the bed sheet there was body fluids and a mixture of blood and body fluids that came back with a typing of AB. [¶] Now the question is, did a person with AB blood leave – AB blood type leave body fluids such as blood, semen and saliva, on the sheets, on the toilet paper, on the robe. That is one interpretation.
>
> The other interpretation, of course, is that you have two separate people, one of whom has type A, and one has type B. [¶] That type B belongs to the male who leaves semen, and that was confirmed in this case to be type B. [¶] That saliva of type A, because of high amylase content, is also present. That blood that belongs to the victim in this case of type A is consistent with blood found on the sheets.
>
> Therefore, *you have a much more reasonable interpretation* that there are two people involved in this particular situation. One with type B blood, one with type A blood. [¶] So that would be the interpretation you would have to adopt as being the *more reasonable* given the totality of the facts.

(RT 2838-39 (emphasis added in Petition); *see* Pet. at 150.)

In the second, the prosecutor argued:

> It is *highly likely*, *it is a reasonable inference* based on what you know about Mr. Panah, his habits, his customs, and what he said to Rauni Campbell, that he videotaped what he did to Nicole Parker.
>
> It is also possible that he did not intend to kill her. That it started out as a seduction of some kind and that he was going to keep it as part of his collection.

(RT 2852 (emphasis added in Petition); *see* Pet. at 150-51.)

In the third, the prosecutor argued:

> The expert concluded that the semen on the toilet paper was consistent with type B blood, which you know is Mr. Panah's. [¶] The high amylase concentration would be indicative of the fluid being saliva that was mixed with it and that was consistent with type A, which is Nicole Parker's.
>
> Again in and of itself not conclusive evidence, but when taken with everything else would *indicate* that there had been an act of oral copulation, that there was ejaculate in Nicole Parker's mouth.

(RT 2876 (emphasis added in Petition); *see* Pet. at 151.)

Petitioner adds that CALJIC 2.01, which was given at his trial (*see* RT 2978):

> provides that if there is a reasonable and an unreasonable interpretation of certain evidence then the jurors must choose the reasonable interpretation. However, the prosecutor did not argue that the jurors should adopt the only reasonable interpretation of the facts. Rather, he repeatedly urged the jurors to adopt the 'more reasonable interpretation.' CALJIC No. 2.01 further states that if there are two reasonable interpretations of circumstantial evidence the jury 'must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.'

(Pet. at 153.)

B. Decision on Direct Appeal

The California Supreme Court held:

> [D]efendant cites three comments by the prosecution he claims improperly lowered the burden of proof: (1) that it was a 'reasonable interpretation' from certain body

> fluid evidence that defendant and the victim were on the bed in defendant's bedroom; (2) that it was a 'reasonable inference' from other evidence regarding defendant's habits, customs and statements to Rauni Campbell that he videotaped the crime; and, (3) the analysis of tissue paper found in the wastebasket in defendant's bathroom 'indicate[d]' that the victim had orally copulated defendant.
>
> . . . [T]hese isolated references did not constitute an argument that defendant could be convicted on a showing of less than guilt beyond a reasonable doubt but were reasonable inferences or deductions that the prosecutor could permissibly urge the jury to draw from the evidence.

Panah, 35 Cal. 4th at 463.

C. Analysis

At the outset, the Court again notes that it "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *DeChristoforo*, 416 U.S. at 647. A fairminded juror could conclude, as the California Supreme Court did, that the prosecutor's remarks did not inform the jury that Petitioner could be convicted based upon a lesser showing than proof beyond a reasonable doubt. *See Richter*, 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision" (internal quotation omitted)).

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"While the prosecutor's phrasing was inartful, his meaning is evident from context: to believe the defendant's account, the jury would have to believe implausible aspects of his [evidence]. This sort of argumentation is permissible." *United States v. Tucker*, 641 F.3d 1110, 1122 (9th Cir. 2011) (finding no violation

from prosecutor's arguments that the jury "must find" certain facts to find defendant not guilty, where the prosecutor reiterated that the government had the burden of proof and the court instructed the jury on proof beyond a reasonable doubt). The California Supreme Court may have reasoned that the context of the prosecutor's statements showed his argument to be that there was only one reasonable interpretation of the evidence. (*See, e.g.*, RT 2836-37 ("The instructions . . . say that guilt that is based upon circumstantial evidence can occur only when the proved circumstances . . . cannot be reconciled with any other rational conclusion. . . . When you have evidence which is susceptible to two reasonable interpretations, . . . you must adopt the one points towards innocence"), 2879 ("I don't think anybody in a reasonable interpretation of testimony would conclude that that blood stain was there at any other time prior to this assault on Nicole Parker").) The prosecutor acknowledged in his rebuttal argument that the state carried the burden of proof (*see id.* at 2962), and the court instructed the jury on the standard of proof beyond a reasonable doubt. (*Id.* at 2977-78.)

Regarding CALJIC 2.01, the Ninth Circuit has found no constitutional issue with the instruction's "reasonable interpretation" language. *See Gibson v. Ortiz*, 387 F.3d 812, 822-24 (9th Cir. 2004) (affirming a grant of habeas relief but observing that "[h]ad the instructions ended" on reasonable doubt after instruction 2.01 . . . [was] given, . . . "our inquiry would have ended with a denial of [the] petition. We would have assumed that the jury followed . . . the only standard regarding burden of proof they had received: reasonable doubt"), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009); *McMillan v. Gomez*, 19 F.3d 465, 479 (9th Cir. 1994) (holding that petitioner's "objection to the instruction [CALJIC 2.01] . . . is a quibble. The instruction given was ample and exact" and petitioner failed to raise a constitutional issue).

A fairminded jurist, therefore, could find no constitutional violation in the prosecutor's arguments regarding reasonableness. Claim 8(C) is DENIED.

XIII. Claim 8(D): Prosecutorial Misconduct Regarding Burden of Proof

A. Allegations and Decision on Direct Appeal

In Claim 8(D), Petitioner contends that the prosecutor's argument unconstitutionally shifted the burden to him to demonstrate his innocence. Petitioner challenges the following argument:

> It's true that the burden of proving a case is with the prosecution, and we are satisfied we have proved it with the evidence that you have been presented. [¶] But the mere fact that we have the burden of proof does not deprive the defense of the opportunity to investigate themselves. [¶] As you know there was an investigator seated at the table down there on the other side of Mr. Panah during this trial. *They have an investigator.*
>
> The suitcase was booked into evidence the night Nicole's body was taken out of it. It was booked into evidence immediately. [¶] Anybody can order up fingerprints of that suitcase. *The defense can order up fingerprints of the suitcase, if that's what they want to do.* It's put in evidence. It's carefully secured so that anybody can take a look at it.
>
> *You saw no evidence presented by the defense that there were any fingerprints from that suitcase that would indicate it was someone other than Mr. Panah.* They have the right to have it examined if they want to. [¶] *But the reality is that would be the kind of evidence that has a high probability of not showing what the defense wants.*
>
> *The same occurs with the DNA. DNA testing can be ordered.* It's ordered in some cases, but it's usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available.
>
> We have blood typing that matches. We have the body in the suitcase in his closet, and we have statements he

> makes that show knowledge before the body was found. We have his involvement in the crime clearly established.
>
> They are free to order up those kinds of tests as well, because the samples are there. They're the same samples that are worked on by the crime lab.

(Pet. at 154-55 (quoting RT 2962-64 (emphasis added in Petition)).)

On direct appeal, the California Supreme Court held:

> [D]efendant argues that the prosecutor committed misconduct when, in response to defense counsel's claim that the prosecutor had failed to produce either fingerprint or DNA evidence, he pointed out that the defense could also have conducted these experiments. Defendant contends that the prosecutor's argument shifted the burden of proof from the prosecution to the defense.
>
> . . . [T]he claim is without merit. Defense counsel argued that the prosecution had neglected to collect vital evidence, such as any fingerprints on the suitcase in which the victim's body was found or DNA evidence, and suggested the reason was because it did not want to risk linking someone else to the crime. The prosecutor's argument was a proper rebuttal to these claims.

Panah, 35 Cal. 4th at 464 (internal citations omitted).

B. Analysis

The California Supreme Court's determination that the prosecutor's argument responded to that of defense counsel is supported by the record. Defense counsel argued:

> If you're going to run scientific tests, you do the right ones. Do the DNA testing. You do fingerprints, and you come in with some positive results, and not this – excuse this expression – not some of this harebrained stuff that's been presented by Mr. Moore concerning the changing of

> blood types.

(RT 2951.)

The Ninth Circuit has held that:

> A prosecutor may properly reply to the arguments made by defense counsel, so long as the comment is not manifestly intended to call attention to the defendant's failure to testify, and is not of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify. A prosecutor may [also] comment upon a defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to defendant's own failure to testify.

United States v. Bagley, 772 F.2d 482, 494-95 (9th Cir. 1985) (holding that prosecutor's comments asking, "if any of those things [the defense argued as possibilities] had, in fact, happened, where would that evidence be, wouldn't it be presented to you" did not "amount[] to error at all") (internal quotation and citation omitted; alteration in original); *see also United States v. Mayans*, 17 F.3d 1174, 1185 (9th Cir. 1994) ("[P]rosecutors are entitled to call attention to the defendant's failure to present exculpatory evidence"); *United States v. Lopez*, 803 F.2d 969, 973 (9th Cir. 1986) (same).

The California Supreme Court's denial of the claim was not an unreasonable determination of the facts or an unreasonable application of federal law. Claim 8(D) is DENIED.

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XIV. Claim 9: *Brady* Violations

In Claim 9, Petitioner alleges five distinct violations of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (Pet. at 160-66.) Petitioner further alleges that the California Supreme Court unreasonably denied him discovery and an evidentiary hearing to develop his claims. (*Id.* at 166-67.)

As discussed above, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Materiality requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437; *see also Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) ("*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor" (internal quotation omitted)). The petitioner must show that the government failed to disclose or failed to discover the material, exculpatory evidence. *See Phillips v. Woodford*, 267 F.3d 966, 986-87 (9th Cir. 2001) ("As to [petitioner's] claim that the State suppressed a report by the California DOJ [in investigating the crimes at issue], the evidence that any report was in fact developed is tenuous, at best;" the claim was a "mere supposition[]" and thus "without merit").

A. Taped Interrogation

Relying upon a Los Angeles County Sheriff's Department memorandum dated June 4, 1996 (Pet. Ex. 40), Petitioner alleges that he was interrogated by Deputy Sheriff Jamila Bayati while he was hospitalized after his arrest. (Pet. at 160-61.) Petitioner alleges that he "was never supplied with the resulting tape of the interrogation while the fact that the interrogation took place was withheld from the defense until well after Mr. Panah's conviction and sentence of death." (*Id.* at 160.) Petitioner contends that the tape would have provided further evidence of alleged police misconduct in impermissible searches and interviews, served as impeachment evidence for officers "testif[ying] there were no taped interrogations

of Mr. Panah even though many officers were aware that the opposite was true," and evidenced Petitioner's incoherent state, mitigating the impact of his other potentially incriminating statements. (*Id.* at 161.) He argues that "because the tape apparently revealed no incriminating statements it was evidence to refute the supposed incriminating statements made by Mr. Panah." (*Id.*)

The memorandum Petitioner cites was generated in an investigation of alleged sexual harassment and gender bias by Deputy Bayati. (*See* Pet. Ex. 40.) The memorandum states:

> Deputy Gerlach described an incident where he and other deputies (NFD) observed Deputy Bayati walk from the LCMC ward/inmate housing area holding a microcassette recorder. Deputy Bayati sat near where Deputy Gerlach and the other deputies were and played the recorder. Deputy Gerlach described the recording as that of Deputy Bayati interviewing the murder suspect, Haroom [sic] Ashkan Panah, without the suspect's attorney present. According to Gerlach's interview, Bayati asked questions which included motive, time and whether or not the suspect sodomized the victim. The suspect, who was in four point restraints at the time, purportedly refused to answer Bayati's questions. It is not clear if there was a supervisor on duty at the time. Deputy Gerlach spoke to Bayati at that time, advising her that the use of the recorder and her talking to the suspect re: the case was in violation of policy and illegal.

(*Id.*)

The California Supreme Court may have reasonably determined that Petitioner's allegations of exculpatory evidence are speculative. *See Phillips*, 267 F.3d at 986-87. The memorandum does not identify which deputies heard the tape being played, providing no support for Petitioner's assertion that he could have impeached those particular officers testifying at his trial with knowledge of the recorded interview. Similarly, because the memorandum states that Petitioner did not answer the deputy's questions, Petitioner's assertion that the contents of the

tape could have demonstrated his mental condition is merely speculative. Finally, Petitioner's allegations of constitutional violations arising from the alleged searches and interrogations are addressed (and the claims rejected) below. (*See infra* pp. 106-21.) The California Supreme Court may have reasonably determined that adding evidence of the recorded interview would not have had a reasonable probability of changing the outcome.

B. Canine Search

Petitioner refers to two police reports indicating police dogs were present at or near the crime scene. (Pet. at 161-62 (citing Pet. Exs. 45, 89).) Petitioner alleges:

> First, a 'Watch Commander's Daily Report' dated November 21, 1993 indicated that Sheriff's Dogs were called 'on the scene' to search Mr. Panah's apartment. Further, the LAPD's crime scene log indicates K-9's were called to the 'footgate'[4] of Mr. Panah's apartment complex at 0750 hours and remained until 1650 hours. The log notes an 'area search' by K-9's again at 1435 hours.

(*Id.* at 161-62 (internal citations omitted).) Petitioner argues that the "fact that the dogs were called to the scene and did not detect Nicole Parker's body is strong evidence that the body was not continuously in Mr. Panah's apartment – meaning a third party must have been responsible for placing the body in the apartment at a later point in time." (*Id.* at 162.)

The California Supreme Court may have reasonably determined that these allegations of exculpatory information are also speculative. Petitioner presents no information to show the range of the dog(s)' detection abilities or that dog(s) "on the scene," without further specification of the location, would have been able to

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[4] The Court notes that the portion of the word(s) that Petitioner reads as "foot" appears to read otherwise, but because the remainder of the word is illegible and the word "gate" is clear, the Court assumes for purposes of the analysis that Petitioner's transcription is accurate. (*See* Ex. 45 at 211.)

detect the body in a suitcase in a closet.

C. Benefits Offered to Ronald Hicks

Petitioner alleges that "Ronald Hicks was a State agent and informant whose statements were the basis of the Los Angeles Superior Court ruling denying trial counsel an opportunity to interview a key prosecution witness, Rauni Campbell," and that the prosecutor in Petitioner's trial wrote a letter to the Pomona Superior Court on behalf of Hicks. (Pet. at 162-63.) Petitioner argues that had he been able to impeach Hicks's motives, he would have "undermined the Prosecution's argument for keeping Rauni Campbell's location a secret." (*Id.* at 163.) Petitioner maintains that "trial counsel's inability to speak with Ms. Campbell severely prejudiced Mr. Panah." (*Id.*)

On a related claim on direct appeal, the California Supreme Court found:

> At some point, apparently early in the case, there was an in camera proceeding at which the trial court granted the prosecution's request that Ms. Campbell's out-of-state address not be disclosed to defendant based on allegations that he had conspired with others to kill her and another witness. While defendant complained about his lack of access to Campbell in connection with his *Franks* motion, he made no attempt to compel disclosure of her address.
>
> On November 21, 1994, the prosecutor agreed to make Campbell available to the defense by phone. Two days later the prosecutor represented that Campbell had declined to speak to the defense. The defense made no
>
> response to the prosecutor's representation nor did it seek disclosure of her address or telephone number.
>
> On December 5, the prosecutor informed the trial court that Ms. Campbell would testify the next day. The prosecutor agreed to make her available to the defense. The following day, the prosecutor reported that he had

> introduced the defense investigator to Ms. Campbell and she had declined to speak to him. When defense counsel complained that he had been deprived of the ability to interview her, the trial court observed, '[j]ust to be clear, the prosecutor several times has indicated that Miss Campbell does not want to talk to the defense. And she apparently delivered that message herself to the defense investigator today.'

Panah, 35 Cal. 4th at 457-58.

The record supports the California Supreme Court's finding that "the prosecution provided defendant access to the witness but she refused to speak to the defense." *Id.* at 458; (*see* RT 1834-39). As the California Supreme Court observed, Campbell, an "adverse witness[,] . . . had a right not to be interviewed if she so chose." *Cacoperdo v. Demosthenes*, 37 F.3d 504, 509 (9th Cir. 1994). In light of Campbell's refusal to be interviewed by the defense, the California Supreme Court may have reasonably determined that Petitioner failed to show a reasonable probability that the result of the proceeding would have been different had the defense been permitted to access her from the time of the in camera hearing.

D. DNA Hybridization Records

The Court rejected Claim 9(4) above. (*See supra* pp. 7-14 ("The California Supreme Court may have reasonably determined that because those records evidenced only inconclusive results that were not inconsistent with testimony presented at trial and were not exculpatory or impeaching, Petitioner failed to establish a *Brady* violation").

E. Benefits Offered to Rauni Campbell

Petitioner next alleges a:

> continued failure to disclose evidence demonstrating that [the State] helped pay for [Campbell] to relocate and enter into the witness relocation program. Mr. Panah alleges that Ms. Campbell's relocation and travel

> expenses were paid by the Government. In a November 21, 1993 taped police interview of Rauni Campbell, the officers conclude the interview by telling Campbell that 'we're going to give you all kinds of stuff.'

(Pet. at 164 (citing Pet. Ex. 158A).) Petitioner contends that he could have impeached Campbell's credibility with these alleged relocation benefits from the prosecution. (*Id.* at 164-65.)

The California Supreme Court may have reasonably concluded that impeaching Campbell with evidence that the prosecution paid her relocation expenses to provide witness protection – thus suggesting that Petitioner or his supporters had threatened Campbell – would have been prejudicial, not beneficial, to his case. The Court may have held that Petitioner's allegations did not show a failure to disclose evidence that was favorable to the defense or that yielded a reasonable probability of a more favorable outcome.

F. Denial of Discovery

Finally, Petitioner contends that the California Supreme Court unreasonably denied his request for "subpoena power to obtain the missing items." (*Id.* at 167.) Petitioner argues that "[f]airminded jurists of reason could not deny this claim without first allowing discovery or an evidentiary hearing, and the denial violates 28 U.S.C. § 2254(d)(1) and (d)(2)." (*Id.* at 167 (internal citations omitted).)

The California Supreme Court's summary denial of a claim indicates that the petitioner failed to show a prima facie case for relief. *See Pinholster*, 131 S. Ct. at 1402 n.12. As the United States Supreme Court explained in *Pinholster*, when determining whether a petitioner has shown a prima facie case for relief:

> [i]t appears that the court [the California Supreme Court] generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, and will also review the record of the trial . . . to assess the merits of the petitioner's claims.

131 S. Ct. at 1402 n.12 (internal quotation and citations omitted). The court's determination here that Petitioner's allegations failed to show a prima facie case for relief is not unreasonable. As discussed above, the court may have reasonably concluded that Petitioner's allegations in sections A and B above were purely speculative. The court may have reasonably concluded that Petitioner's remaining allegations failed to show materiality (sections C and E) and exculpatory evidence (sections D and E) even if true. The court's denial of factual development of these claims thus did not constitute an unreasonable fact-finding process under § 2254(d)(2). Likewise, because the court was not objectively unreasonable in determining that Petitioner failed to state a constitutional violation, its denial of the claim did not violate § 2254(d)(1).

Claim 9 is, therefore, DENIED.

XV. Claim 10: Incompetence to Stand Trial

A. Allegations and Decision on Direct Appeal

In Claim 10, Petitioner alleges that he was incompetent to stand trial, that the trial judge had sufficient evidence before him to require a competency hearing, and that trial counsel was ineffective for failing to investigate and present evidence of incompetence and to request a competency hearing. (Pet. at 167-90.) In support of his claim, Petitioner relies upon evidence that he more than once tried to commit suicide; he was acutely psychotic, delusional, and hallucinating after his arrest and may have had a chronic psychosis; he was thought by psychiatrist William Vicary, J.D., M.D. to have suffered from a significant mental illness and a severe emotional and mental disturbance at the time of the offense; and he repeatedly informed the court of mistreatment and poor conditions of confinement and their impact on his mental functioning. (*Id.* at 171-81.) Petitioner notes that in ruling on the motion to exclude his statements, the trial court observed, "'I am clear that defendant was having some problems, and the nature of those problems varied from time to time.'" (*Id.* at 175 (quoting RT 819).) Petitioner particularly relies

upon the opinions of Michael Coburn, M.D. and those of trial counsel, expressed to the trial court on the record on November 28, 1994. (*See id.* at 175-80.) The California Supreme Court summarized those proceedings in its decision on Petitioner's claim on direct appeal:

> On November 28, 1994, just before trial began, the trial court learned that Dr. Coburn, defendant's court-appointed psychiatrist, had written defense counsel expressing his doubt that defendant was competent to stand trial. According to the trial court, the letter indicated that defendant was fully aware of the charges against him but 'he has little understanding of the nature of the plea change and has significant impairment in his ability to rationally cooperate with counsel. . . .' The court found that the letter was too vague to raise a doubt about defendant's competence. It asked Dr. Vicary, the defense psychiatric expert, and Dr. Coburn to interview defendant and assess his competence to stand trial. As part of their assessment, the court asked them to examine the November 21 *Marsden* proceeding transcript, calling it 'highly probative of whether or not the defendant understands the nature of the proceedings and can assist counsel.'
>
> Defense counsel Sheahen stated that, although working with defendant had been 'extremely difficult' and at times defendant 'lack[ed] [a] . . . grasp of what [was] going on,' he was 'surprised that Dr. Coburn felt there was a 1368 issue' and was uncertain whether defendant's behavior amounted to incompetence. The court also observed that defendant had 'repeatedly assisted counsel.' Shafi-Nia disagreed with Sheahen and the court, stating that he believed defendant was incompetent.
>
> After reviewing the transcript and interviewing defendant, both Coburn and Vicary opined that defendant was competent to stand trial. The trial court declined to conduct a competency hearing.

Panah, 35 Cal. 4th at 432-33.

Considering Petitioner's claim, the California Supreme Court held:

> When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. Evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial. Absent substantial evidence of defendant's incompetence, the decision to order such a hearing is left to the court's discretion. . . .
>
> Defendant contends that Dr. Coburn's somewhat equivocal statements about his competence and statements by defense counsel constituted substantial evidence of incompetence. They do not. While Coburn testified that defendant was 'fragile' and 'disturbed,' he also repeatedly acknowledged that defendant was not incompetent to stand trial. Moreover, defendant ignores the opinion of the other defense psychiatric expert, Dr. Vicary, who testified without reservation that defendant was competent.
>
> Nor did comments by defense counsel constitute substantial evidence of incompetence. First, defense counsel were not in agreement on the issue of defendant's competence. While Shafi-Nia claimed that defendant was incompetent, Sheahen, the more experienced criminal defense attorney, did not share this belief. Second, even if both counsel had agreed that defendant was incompetent, such opinion, standing alone, would not have been dispositive of the issue but only one factor for the trial court to consider in determining whether substantial evidence existed. Balanced against the conflicting statements of counsel were the opinions of the experts that defendant was competent and the trial court's own observation that defendant had repeatedly assisted in his defense, including bringing and arguing his first *Marsden* motion. We conclude therefore that the trial court did not abuse its discretion in declining to conduct a competency hearing.

> To support his claim that substantial evidence of incompetence existed, defendant also cites the preliminary hearing testimony of Dr. Palmer – the physician who treated him after his arrest – that, at that time, defendant appeared to be psychotic, and a letter written in February 1994 by defense counsel Sheahen to the presiding judge of the superior court, in which counsel alluded to defendant's history of mental instability and hospitalization. We do not review the propriety of the trial court's competency ruling based on evidence that was not presented to it at the time it made that ruling. In any event, evidence regarding past events that does no more than form the basis for speculation regarding possible current incompetence is not sufficient. Both Dr. Palmer's testimony and counsel's letter fall into this category.

Id. at 432-33 (internal quotations, alterations, and citations omitted; footnote included as text).

B. Discussion

1. Legal Standard

The Ninth Circuit recently considered a similar claim in *Deere v. Cullen*, 718 F.3d 1124 (9th Cir. 2013). There, a capital habeas petitioner argued that defense counsel was ineffective for failing to request a competency hearing and that the trial court erred by failing to hold a hearing *sua sponte*. Petitioner Deere pointed to "preliminary hearing testimony show[ing] that shortly before the murders Deere asked [his girlfriend's sister] to kill him, had exhibited suicidal tendencies and had cut himself with a razor blade in the past and was frequently intoxicated." *Deere*, 718 F.3d at 1135 (internal quotations omitted). He also presented an affidavit, prepared post-conviction, from the psychologist retained on his behalf at trial who examined him for mental state defenses at that time. *See id.* at 1130, 1139-40. In his affidavit, the psychologist testified, "Mr. Deere was competent in the limited sense of knowing what was going on around him, so that he understood the nature of the criminal proceedings; however, Mr. Deere's mental

disorders rendered him unable to assist counsel in the conduct of a defense in a rational manner." *Id.* at 1139 (internal quotation omitted). A second expert, a psychiatrist retained by habeas counsel, agreed that Deere could not rationally assist in his defense. *Id.* at 1140.

Deere sought to plead guilty to the capital murder charges. The prosecutor "suggested that before the Court entertain a change of plea, it should appoint a psychiatrist to examine Deere for competence just to make sure that the plea was proper and just." *Id.* at 1130 (internal quotation omitted). The prosecutor recommended a psychiatrist (whose credentials were later called into question) who had earlier examined Deere on behalf of police, and defense counsel agreed. *Id.* The trial court appointed him to examine Deere, and he returned opinions that Deere understood the proceedings and was able to assist his attorney adequately, and had no mental illness. *Id.* Trial counsel assured the court at length that Deere was competent. *Id.* at 1131-32. "The change of plea transcript establishe[d] that Deere was lucid, clearly understood the proceedings then consulted with counsel when he wanted to." *Id.* at 1131.

The Ninth Circuit explained that a defendant is competent to stand trial if he has "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.'" *Id.* at 1144 (quoting *Godinez v. Moran*, 509 U.S. 389, 396 (1993)). The court emphasized that state court findings that the petitioner was competent "are presumed to be correct if they are fairly supported by the record," and the petitioner "must come forward with clear and convincing evidence to rebut the presumption." *Id.* at 1145. The circuit court found the requisite support in the record, finding that the observations at the time of trial of the two mental health examiners and the judge and counsel consistently reported that petitioner was competent. *See id.* at 1145-46. Although the Ninth Circuit noted that Deere had never been found to be delusional or psychotic, *id.* at 1145, it also stressed that

"what matters is not whether [petitioner] had a mental illness that affected his decision, but whether he had a mental illness that affected his capacity to understand the situation and make rational choices." *Id.* at 1147 (discussing *Dennis v. Budge*, 378 F.3d 880 (9th Cir. 2004)). The Circuit held that the trial court was entitled to rely on the competency determination made by the court-appointed psychiatrist, and the record before the court "simply did not raise a bona fide doubt about Deere's competence to warrant a *sua sponte* hearing." *Id.* at 1147 n.13.

Deere, unlike the instant case, was governed by pre-AEDPA law. Here, the state court's factual findings are still "afforded a presumption of correctness that may be rebutted only by clear and convincing evidence." *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) (internal quotation omitted). Application of AEDPA's amendment to 28 U.S.C. § 2254(d)(2) requires that "if a petitioner challenges the substance of the state court's findings, . . . [the court] must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Hibbler*, 693 F.3d at 1146 (internal quotation omitted).

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2. Analysis

A reviewing court could reasonably conclude that the trial court's finding of no substantial evidence of incompetence is supported by the record.

Dr. Coburn told the court repeatedly that "technically he's competent." (RT 1229; *see id.* at 1230 ("On a very technical bright line kind of way I have to say he's competent"), 1231 ("Technically, yes, he's competent in my opinion"), 1237 ("I have an opinion with reasonable certainty that he's competent").) The trial court questioned Dr. Coburn:

> The Court: It's a legal issue before the Court whether he understands the nature of the proceedings –
>
> Dr. Coburn: He does.
>
> The Court: It's clear to you he does?
>
> Dr. Coburn: Yes.
>
> The Court: It's clear he has the ability if he chooses to assist counsel?
>
> Dr. Coburn: Well, that's where the question comes. [¶] He has given conflicting stories, versions, information, *et cetera*, and made life almost impossible for people trying to manage his case. [¶] And when that happens, the question always is: is that a matter under his control or is it a function of a mental disorder. My letter reflects my ambivalence and the fact that I did have a doubt.
>
> But seeing him today, and – I cannot make a diagnosis that he is psychotic and as a result of delusions and hallucinations or memory impairment or something as severe of that sort he is unable to cooperate. . . .
>
> Technically, yes, he's competent in my opinion.

(*Id.* at 1230-31.) Dr. Coburn added, "I can't count just his fear, despite his past mental problems, which I believe he has, as being sufficient to render him incompetent." (*Id.* at 1233.)

During the same proceedings, Dr. Vicary first testified, "I don't have any data based upon my interview with [Petitioner] and my review of the records that were sent that would indicate that there's any doubt as to his competence to go forward with the legal proceedings." (*Id.* at 1217.) After reviewing a transcript of *Marsden* proceedings involving Petitioner and speaking to him again, Dr. Vicary gave his opinion that Petitioner was competent without "any reservation." (*Id.* at 1237-38.)

The trial judge observed:

> I've seen Mr. Panah, and I have never had any doubt in my mind that he was unable [sic] to understand the nature of the proceedings, and he was unable to communicate with counsel in a way that could assist counsel within the meaning of 1368.
>
> It may not have been the kind of communication that counsel wanted. It may have been inappropriate. And, again, I think that's a product of the defendant's lack of sophistication in matters like this.

(*Id.* at 1236.)

In view of the facts in the record, the California Supreme Court's conclusion that there was no substantial evidence of incompetence to require the trial court to hold a competency hearing is not an unreasonable application of federal law, nor is its denial of Petitioner's actual incompetence claim. *See Deere*, 718 F.3d at 1144-47, 1147 n.13; *Dennis*, 378 F.3d at 892 (noting that "evidence of suicidal ideation or attempts to commit suicide in the past is insufficient to demonstrate incompetency," citing *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990), and discussing *Massie v. Woodford*, 244 F.3d 1192, 1198 (9th Cir. 2001) (accepting state court finding of competency where [defendant] "had been a victim of abuse as a child; had serious mental problems from childhood; was diagnosed as schizoid, manic depressive, [and] schizophrenic; had contemplated suicide more than once and was considered a severe suicide risk")).

Finally, in light of the facts in the record, the California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability that Petitioner would have been found incompetent had counsel requested a hearing. The court may have reasonably determined that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in that regard. *See Deere*, 718 F.3d at 1144-47.

Accordingly, Claim 10 is DENIED.

XVI. Claim 11: Mental State Defense

In Claim 11, Petitioner alleges trial counsel was deficient for failing to investigate and present a mental state defense. (*See* Pet. at 190-95.) To show prejudice from counsel's performance, Petitioner presents a statement from Dr. Vicary that Petitioner "'suffered from an extreme mental impairment and disturbance at the time of the homicide'" (*id.* at 192 (quoting Pet. Ex. 7 ¶ 6)), and a statement from Dr. Rosenthal that Petitioner "was not able at the time of the homicide to form the requisite specific intent, premeditate, deliberate, or harbor malice . . . because of his mental disorders." (Pet. Ex. 12 ¶ 9; *see* Pet. at 193.)

In the years prior to Petitioner's offenses and trial, the defense of diminished capacity was abolished, expert witnesses were prohibited from testifying as to whether a defendant possessed a requisite mental state, and evidence of mental illness or intoxication could be introduced only to show whether the defendant "*actually formed* a required specific intent," not whether he or she had "the *capacity* to form [that] mental state." *People v. Saille*, 54 Cal. 3d 1103, 1111-12 (1991) (emphasis in original). Thus, a defendant remained solely "free to show that because of his mental illness or voluntary intoxication, he did not *in fact* form the intent" required for the crime. *Id.* at 1116-17 (emphasis in original).

A. Dr. Vicary

Dr. Vicary states in his declaration:

> I testified that the defendant suffered from an extreme mental impairment and disturbance at the time of the homicide. He has suffered from mental illness for a very long period of time. His mental condition was getting worse and decompensating, leading up to the time of the crime. He had a thought disorder and suffered from depression, a serious mental illness. Childhood experiences crippled the defendant psychologically. It is

> the type of illness which led to suicide attempts, hospitalizations, and treatment with antidepressant medication.

(Pet. Ex. 7 ¶ 6.)

As Dr. Vicary declares, he testified at the penalty phase that at the time of the offense, Petitioner was suffering from a serious emotional or mental disturbance. (*See, e.g.*, RT 3879.) On cross-examination, however, he went on to testify:

> Q. Explain to me then how his explosive emotional reaction enabled him to get an eight-year old girl out of a public area in front of his residence, inside and quietly inside, so he could perpetrate the crimes he did? [¶] Are you telling me it was an emotional outburst or it was premeditated?
>
> [Objection by defense counsel overruled.]
>
> A. This little girl is a neighbor. She is a friend, all right. [¶] So if she opens the door and she is there and they start a conversation and for some reason she is inside now, then something goes on in his head, all right.
>
> Q. Don't you think coming inside of an eight-year-old – coming inside his residence is some kind of a problem there, something is wrong with that?
>
> A. I would say that is questionable judgment, especially if you would close the door rather than leave the door open. [¶] We got problems right there in my mind.
>
> Q. Questionable judgment?
>
> A. Questionable judgment that in my view the crime is starting right then.
>
> Q. Could it be premeditation?
>
> A. In the sense there is some planning that he wants to see if he can do something sexual to this girl.

Q. So you think that Mr. Panah in the situation you are describing for us could have decided to do something sexual with that little girl and that's why he brought her inside; is that correct?

A. Yes.

Q. Does that make him mentally ill?

A. Yes, it does. [¶] Most people that want to have sex with an eight-year-old little girl, that is sick, baby.

Q. But you are saying that is sick because it is not something you ever felt like or encountered; is that correct?

A. No, that is sick because it is in this book. [¶] This is the Diagnostic and Statistical Manual. You can look in here. [¶] It is not something I cooked up. . . .

Q. . . . [Y]ou are telling us because it says in that book that that is a mental illness that that is gospel; is that correct?

A. I am saying that is politically correct. [¶] Anybody that says having sex with an eight-year-old girl is normal and natural and not a product of mental disorder is out of the mainstream in terms of psychiatry and psychology. . . .

Q. What if, doctor, hypothetically speaking, a sexual act was attempted against the child that injured the child, physically hurt her, and she started to scream. [¶] Would the reaction, as you know the facts of the case, be such that it might not be mental illness that results in her death, but rather a struggle where there is perhaps an accidental killing?

A. I don't think there's anything accidental about the killing at all.

Q. Do you know what the cause of death was, Doctor?

A. There was more than one cause of death here, but it was because of this violent struggle.

Q. What are the causes of death?

A. Partly the occlusion of the carotid artery by chocking. [sic]

Q. That couldn't have been accidental in the course of a struggle?

A. It might have been partly accidental.

Q. What else, Doctor –

A. When we're going to add these things together, partly was because she vomited and breathed in her own vomit, because the vomit couldn't get out of her mouth because of his hands over her mouth.

Q. Could that have occurred at the same time the artery was being pinched off?

A. Yes.

Q. Again it[']s something that could have been not intended by Mr. Panah; is that correct?

A. It's possible.

(RT 3894-86, 3905-06.)

The California Supreme Court may have reasoned that had Dr. Vicary presented testimony at the guilt phase of trial in support of a mental state defense, he would have been subject to similar cross-examination and would have most likely presented similar responses. The court may have reasonably concluded that those responses would have been highly damaging to a mental state defense. *Cf. Franklin v. Johnson*, 290 F.3d 1223, 1236 (9th Cir. 2002) ("Jurors may well, for example, look skeptically at a claim that someone who is psychologically prone to sexually abuse children should not be found guilty of a crime when he does commit such abuse"). The court may have reasonably determined that Petitioner

failed to demonstrate prejudice through Dr. Vicary's opinion from any deficient performance by counsel.

B. Dr. Rosenthal

The California Supreme Court may have reasonably concluded that Dr. Rosenthal's statement that Petitioner "was not able" to form the requisite mental state at the time of the crimes falls squarely within the scope of prohibited expert testimony on whether a defendant had "the *capacity* to form [that] mental state." *Saille*, 54 Cal. 3d at 1111-12 (emphasis in original). Dr. Rosenthal does not opine on whether Petitioner "*actually formed* a required specific intent." *Id*. at 1112 (emphasis in original). In addition, the court may have reasonably held that Petitioner failed to demonstrate prejudice with Dr. Rosenthal's opinion, because Dr. Rosenthal offers no explanation of how Petitioner's alleged mental health impairments impacted his commission of the crimes. *See Franklin*, 290 F.3d at 1234, 1237 (holding counsel was objectively unreasonable for failing to investigate mental state defense while aware of substance abuse problems, pedophilia, and suicide attempts by defendant accused of sodomizing his stepson, but prejudice had not been established because the "post-conviction record contains no testimony whatsoever, expert or otherwise, concerning the impact of any mental disease or defect on [his] commission of the crime").

Because the California Supreme Court may have reasonably concluded that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in investigating and presenting a mental state defense, Claim 11 is DENIED.

XVII. Claim 12: Withdrawal of Plea of Not Guilty by Reason of Insanity

In Claim 12, Petitioner alleges that his constitutional rights were violated in his withdrawal of the plea of not guilty by reason of insanity because the withdrawal was not voluntary, knowing, and intelligent, and because counsel failed to request a competency hearing at the time of the withdrawal.

A. Voluntary, Knowing, and Intelligent Plea Withdrawal

1. Decision on Direct Appeal

The California Supreme Court explained and rejected Petitioner's contention on direct appeal, holding:

> [After the jury's guilt phase verdicts and] [p]rior to the commencement of the sanity phase, defendant sought an advance ruling from the trial court to limit the scope of cross-examination if he testified. He wanted to testify only to matters regarding his childhood and his upbringing and to preclude the prosecution from cross-examining him about the murder. The trial court declined to issue an 'advisory opinion' regarding the scope of cross-examination in advance of hearing defendant's direct testimony.
>
> Defendant claimed the court left him 'no choice' but to withdraw his plea, but the court refused to accept the withdrawal. Defendant began to withdraw his plea a second time, but then again equivocated, and the trial court again declined to proceed unless defendant's withdrawal was unequivocal.
>
> The prosecutor, citing *People v. Bloom*, 48 Cal. 3d 1194 (1989), argued that defendant should be allowed to withdraw his NGI [not guilty by reason of insanity] plea if there was no doubt as to his sanity and the examining psychiatrists unanimously agreed he was sane. Without objection, the trial court unsealed the reports of Drs. Vicary and Sharma, and read portions of the reports into the record. The court noted that both Vicary and Sharma concluded that defendant was legally sane at the time of the commission of the offenses. Defendant was then allowed to withdraw his NGI plea. The court stated it was 'satisfied that defendant understood the nature of his plea and that he furthermore understood his right to a sanity phase trial, and that he has effectively and knowingly and intelligently given up that right and

> personally withdrawn his plea of not guilty by reason of insanity.'
>
> Defendant argues that the trial court's refusal to give him an advance ruling on the scope of cross-examination coerced him into withdrawing his NGI plea. He also suggests the withdrawal was involuntary because there were doubts as to his sanity. Neither claim has merit.
>
> Defendant's withdrawal of his plea was not coerced by the trial court's adverse ruling on his motion to limit the scope of cross-examination because there was no such ruling. Rather, the trial court properly declined to provide a ruling in advance of defendant's testimony. Defendant had no inherent right to a binding advance ruling which would spare him the necessity of raising specific objections before the jury[,] [and] . . . there was no conflict among the experts regarding defendant's sanity at the time of the offense. Accordingly, the withdrawal of his NGI plea was not involuntary.

Panah, 35 Cal. 4th at 436-37 (internal quotation omitted, internal citations omitted and edited).

2. Argument and Analysis

Petitioner argues that his plea withdrawal was not voluntary, knowing, and intelligent because:

> [t]he Court made no attempt to explain that if Petitioner chose not to testify out of fear of jeopardizing his right against compulsory self-incrimination, he could still present evidence in the sanity phase of the trial. . . . Petitioner abandoned his insanity defense, under the impression that his insanity defense could not be presented without his testimony. Nothing in the record indicates that he was advised otherwise.

(Pet. at 201.) Petitioner adds that the trial court "made no effort to meet the requirements of *Boykin*. The court did not advise him that the withdrawal would

terminate his right to a jury determination of the issue of his guilt and his right to cross-examine and confront the witnesses against him." (*Id.* at 201-02 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).)

The California Supreme Court's finding that Petitioner's withdrawal was not coerced by the trial court's reservation on the scope of cross-examination is supported by the record. The record reflects that Petitioner had several discussions with his attorneys during the proceedings on the withdrawal of his plea, and Petitioner asked counsel "to advise the Court that he is about to withdraw the plea because he does not want to risk self incrimination through his testimony and he feels that there is no way that he can *prevail* on these issues without personally testifying." (RT 3077 (emphasis added).) Counsel made clear on the record, in Petitioner's presence, that he was prepared with witnesses and reports to present at the sanity trial (*id.* at 3084), which were independent of Petitioner's testimony. The trial court told Petitioner that he had "the right to a trial on the issue of sanity," and Petitioner personally confirmed his desire to withdraw his plea. (*Id.* at 3078; *see id.* at 3079, 3084.) The court's denial of Petitioner's claim on that basis does not constitute an unreasonable application of federal law. *Cf. Morgan v. Bunnell*, 24 F.3d 49, 52 (9th Cir. 1994) (rejecting petitioner's "novel argument" that a waiver of the right to confrontation involved in a guilty plea under *Boykin* must be made in a change of plea from NGI to not guilty, and holding that the trial court "discharged [its] obligation by advising [petitioner] that he was giving up his right to a jury trial as to sanity").

B. Request for Competency Hearing

Petitioner next contends that counsel was ineffective for failing to request a competency hearing at the time he withdrew his plea. To show his alleged incompetence, Petitioner claims that his "sudden and mysterious desire to withdraw his not guilty by reason of insanity plea was unexpected even to his counsel," and that his feeling that he "had no choice but to testify on his behalf at

the sanity phase about his childhood and background or withdraw the plea . . . was irrational," because Petitioner's mother and Dr. Palmer were expected to present evidence to the jury. (Pet. at 203.) Petitioner relies upon no additional allegations beyond those presented (and rejected) in Claim 10 above.

The California Supreme Court was not objectively unreasonable in concluding that Petitioner's sudden decision to withdraw his plea did not show evidence of incompetence. The trial court itself noted that:

> certainly there is sound tactical reasons [sic] for the – pretty obvious to everybody – for [withdrawing the plea], particularly in light of . . . the unanimous opinion of the doctors who have looked at the defendant [who] believe that he was sane at the time, and the burden being on the defense at a sanity phase, I think it is a very prudent decision.

(RT 3085.) The trial court's observation refutes Petitioner's argument that his decision was "mysterious" and "irrational."

Because the California Supreme Court reasonably concluded that Petitioner's plea withdrawal was voluntary, knowing, and intelligent, and that Petitioner failed to establish ineffective assistance of counsel from the lack of request for a competency hearing, Claim 12 is DENIED.

XVIII. Claim 13: Informing Jury of Not Guilty by Reason of Insanity Plea

A. Allegations and Decision on Direct Appeal

Petitioner alleges in Claim 13 that his constitutional rights were violated because the trial court informed the jury prior to the guilt phase that Petitioner had entered a plea of not guilty by reason of insanity. (Pet. at 205-10.) The trial court told prospective jurors, "If the defendant is found guilty of any charge in this case, we will then proceed to a separate sanity phase trial. That will be held because the defendant has entered a plea of not guilty and not guilty by reason of insanity."

(RT 1069; *see also id.* at 1132 ("If the defendant is found guilty of any charge in this case, a separate sanity phase trial will be held because the defendant has also entered a plea of not guilty by reason of insanity").)

The California Supreme Court rejected Petitioner's claim on direct appeal, noting that in the "voir dire proceedings that followed, two prospective jurors were excused for cause, one because he told the court that, if the prosecution proved defendant guilty, he could not accept an insanity defense, and the other because she did not understand the burden of proof would shift during a sanity phase." *Panah*, 35 Cal. 4th at 434. The state high court found no constitutional violation, reasoning that jurors are presumed to follow instructions and thus to "hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination." *Id.* at 435 (internal quotation omitted). The court held that Petitioner's "claim that the jury was prejudiced by learning about his double plea at the outset of trial is wholly speculative." *Id.*

Petitioner argues that:

> [b]ased on this information [to the jury] alone, the jury was more prone to convict because the announcement and forewarning of the judge conveyed to the jury that Petitioner admitted through a plea that he had committed the homicide but was relying on insanity as a defense. *See In re Winship*, 397 U.S. 358, 364 (1970) (due process requires prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("[d]ue process require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense") . . . . In the minds of the jurors, Petitioner had conceded guilt.

(Pet. at 206 (internal citations edited).)

B. Analysis

A plea of not guilty by reason of insanity concurrent with a plea of not guilty does not concede guilt. *See Murtishaw v. Woodford*, 255 F.3d 926, 958 (9th Cir. 2001) ("In California, entering an NGI plea in combination with a not guilty plea does not admit the commission of the offenses"). Petitioner points to no authority holding that informing a jury of a not guilty by reason of insanity plea before guilt phase proceedings commence impinges upon the defendant's right to present a full defense or reduces the prosecution's burden of proving guilt beyond a reasonable doubt. Rather, in *Muench v. Israel*, the Seventh Circuit found no violation of the petitioner's right to present a defense (alleged on other grounds) where, pursuant to Wisconsin law, "[t]he jury [was] informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect." 715 F.2d 1124, 1133 (7th Cir. 1983) (internal quotation omitted). Likewise, in *People v. Troche*, the defendant:

> entered a plea of not guilty, and also a plea of not guilty by reason of insanity. When the cause came on for trial the court announced that it would submit the trial of both issues to the one jury then about to be selected, and explained to the prospective jurors the nature of the issues raised by the two pleas and the procedure to follow.

206 Cal. 35, 38 (1928), *overruled in part by People v. Wells*, 33 Cal. 2d 330 (1949). The defendant challenged on appeal "the constitutionality of the recently enacted law prescribing the procedure to be followed when a person accused of the commission of a penal offense interposes a plea of not guilty together with a plea of not guilty by reason of insanity." *Id.* at 39. The California Supreme Court found no constitutional violation and, as important here, the United States Supreme Court dismissed defendant's appeal "for the want of a substantial Federal question." *Troche v. California*, 280 U.S. 524 (1929).

Because Petitioner has failed to show that the California Supreme Court's decision constitutes an unreasonable application of clearly established federal law,

Claim 13 is DENIED.

XIX. Claim 14: Constructive Denial of Counsel

In Claim 14, Petitioner alleges that the trial court violated his constitutional rights by "(1) denying a continuance so that Petitioner's longtime attorney, Syamak Shafi-Nia, could recover from injuries sustained in an automobile accident; (2) removing Shafi-Nia over Petitioner's objections; (3) replacing Shafi-Nia with unqualified counsel, and (4) forcing Petitioner to trial without giving sufficient time for the replacement counsel to prepare . . . ." (Pet. at 210.) Petitioner makes no specific prejudice allegations, instead relying upon *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). (Pet. at 228.) Petitioner contends that he "was constructively denied the assistance of counsel when the trial court removed, over his objection, the only attorney with whom Panah was able to communicate." (*Id.* at 225.) The California Supreme Court denied the claim in a reasoned decision on direct appeal. *See Panah*, 35 Cal. 4th at 420-27.

A. Unreasonable Determination of Facts

First, Petitioner alleges that the California Supreme Court's denial of his claim was based upon an unreasonable determination of the facts because it "is premised on a factual finding that Shafi-Nia was not involved in trial preparation and that lead counsel did not require his assistance." (Pet. at 228); *see also Panah*, 35 Cal. 4th at 424 ("The trial had already commenced and the respective roles of defendant's two lawyers, Sheahen and Shafi-Nia, were clearly delineated. It was understood that Sheahen would be conducting the defense at trial because, by his own admission, Shafi-Nia was not qualified to try the case").

The California Supreme Court's factual finding is supported by the record. The record shows, as the California Supreme Court found, that Petitioner faulted Shafi-Nia for an "inadequate translation" of a magazine article from Farsi to English (*Panah*, 35 Cal. 4th at 421; (RT 1013)); the trial court understood Sheahen to be handling "all the jury selection" and Sheahen confirmed that he would be

"making the calls here" (35 Cal. 4th at 421; (RT 1285-86)); Sheahen stated that "97 percent of the decisions in this case have been made by me" and that Shafi-Nia's "learning curve" had been like a "fifty-pound weight that we are dragging around" (35 Cal. 4th at 421; (RT 1366-67, 1369)); the trial court believed the case did not require two defense lawyers and Shafi-Nia's absence had not "had any impact whatever on how the trial had progressed" (35 Cal. 4th at 422-23; (RT 1853)); Petitioner thanked the court when it removed Shafi-Nia and appointed William Chais in his place (35 Cal. 4th at 422; (RT 1840)); and Shafi-Nia admitted he was not qualified to try the case (35 Cal. 4th at 424; (Jan. 10, 1994 RT 8)). Finally, the record shows that Petitioner communicated with Chais throughout his trial. (*See* RT 2034-35 (statement by trial court that "since Mr. Chais has been with us, I have been able to observe the defendant communicating freely with Mr. Chais throughout the proceedings . . . and any suggestion that only Mr. Shafi-Nia could communicate with the defendant is obviously not accurate"), 3022-25.)

//

The California Supreme Court's finding that Shafi-Nia was not critical to Petitioner's representation it is not, therefore, an unreasonable determination of the facts.

B. Contrary to Federal Law

Second, Petitioner argues that the California Supreme Court's decision is "contrary to clearly established federal law holding that constructive deprivation of counsel claim are [sic] structural error." (Pet. at 228 (citing *Cronic*, 466 U.S. at 659 n.25).)

The Supreme Court held in *Cronic* that where a defendant is denied counsel at a critical stage of trial, he may establish a Sixth Amendment violation without a specific showing of prejudice. *Cronic*, 466 U.S. at 659. "Similarly," the Court held, "if counsel entirely fails to subject the prosecution's case to meaningful

adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." *Id.* The Supreme Court made clear in *Bell v. Cone*, 535 U.S. 685, 696-97 (2002):

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, 466 U.S. at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.

Cone, 535 U.S. at 696-97 (footnote omitted; internal citation edited). The Supreme Court's decision in *Cone* aligns with that in *Florida v. Nixon*, 543 U.S. 175, 187-92 (2004), where the Court held that defense counsel who conceded defendant's guilt at the guilt phase of trial to attempt to avoid a capital sentence during penalty proceedings did not fail to function as the prosecution's adversary under *Cronic*. The Court observed that despite counsel's concession, defendant "retained the rights accorded a defendant in a criminal trial. The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes . . . . Further, the defense reserved the right to cross-examine witnesses . . . and could endeavor, as [counsel] did, to exclude prejudicial evidence." *Id.* at 188 (internal citation omitted).

Here, defense counsel moved to disqualify all judges at the Van Nuys courthouse and to change venue or transfer district, *Panah*, 35 Cal. 4th at 444, 447; exercised peremptory challenges and raised four gender-based *Wheeler* motions and one race-based *Wheeler* motion, *id.* at 437-39; moved to suppress evidence and statements on Fourth and Fifth Amendment grounds, *id.* at 464-72; argued that the

prosecution failed to collect exculpatory evidence, *id.* at 464; objected to prosecution evidence and questioning, *id.* at 474, 476, 479, 491, 494 n.40; moved for acquittal on certain counts and a special circumstance allegation, *id.* at 409; called and cross-examined witnesses, *id.* at 416-19, 478; presented mitigation evidence, *id.* at 417-19; requested jury instructions, *id.* at 484-85; and moved for mistrial and for a new trial on multiple issues, *id.* at 443, 453, 489-91. The California Supreme Court's conclusion that counsel subjected the prosecution's case to meaningful adversarial testing on that basis was not unreasonable.

Because the California Supreme Court reasonably rejected Petitioner's claim that Shafi-Nia's removal and replacement constituted a constructive denial of counsel, Claim 14 is DENIED.

XX. Claim 16: Trial Court Rulings at Guilt Phase

A. Admission of Testimony Regarding Videotapes

In Claim 16(A), Petitioner challenges the trial court's admission of testimony from Detective Price that videotapes seized from Petitioner showed Petitioner engaged in sexual intercourse, and not oral copulation, with women appearing to be over the age of 18. (Pet. at 240-47 (citing RT 2261-62).) Petitioner contends that the testimony was improper habit and character evidence, was irrelevant, was unduly prejudicial, and was inadmissible under the best evidence rule. (*Id.* at 240-47.)

The California Supreme Court held on direct appeal:

> Rauni Campbell testified that defendant told her on the morning after the murder that what he had done was 'so big' and she would 'find out about it' because 'they have a tape of me.' Additionally, Detective Navarro testified that the search of defendant's apartment on Sunday morning was stopped when he saw a video camera facing the bed. [¶] Thus, the testimony was relevant to explain defendant's statement to Campbell; that is, whether any tapes, in fact, existed and if they depicted defendant and Nicole. They were also relevant to rebut the defense's

> claim that the body fluids found in defendant's bedroom and bathroom, which were consistent with oral copulation, could have come from other sexual partners of defendant, because the videotapes did not show acts of oral copulation. On this point, the evidence need not have been definitive as long as it had some tendency to establish the identity of the source of the fluids.
>
> We also find no abuse of the trial court's discretion conferred by Evidence Code section 352 [regarding prejudicial evidence]. As the trial court observed, there was already testimony from Ms. Campbell that she and defendant had engaged in sexual intercourse in his bedroom. Furthermore, the testimony about the tapes was neither graphic nor extensive. . . .
>
> In the instant case, defendant's best evidence objection was pro forma. Defendant neither challenged Detective Price's testimony regarding the contents of the videotapes nor requested that the tapes be played. Accordingly, even assuming defendant's perfunctory objection was sufficient to raise the issue, we conclude that any violation of the best evidence rule was harmless.

Panah, 35 Cal. 4th at 474-75 (internal citations omitted).

As noted above, federal habeas review is limited "to the question whether the admission of the evidence violated [the petitioner's] federal constitutional rights." *McGuire*, 502 U.S. at 68. Thus, the issue for this Court is whether the admitted evidence "was so inflammatory as to prevent a fair trial," not "whether its prejudicial effect outweighed its probative value." *Henry*, 513 U.S. at 366; *see also Villafuerte*, 111 F.3d at 622, 627 (holding that photographs of fatal wrapping of asphyxiated murder victim's head, bindings on her body, and blood were relevant to prove defendant knowingly restrained her with the required intent and did not violate petitioner's due process rights). "[F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting

habeas relief." *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

Here, as the California Supreme Court held, the content of the tapes was relevant to support the prosecution's contention that the combination of spermatozoa and saliva found on the bed sheet was connected to Nicole Parker and not to another of Petitioner's sexual partners. The testimony, which the California Supreme Court appropriately found was not graphic or extensive, did not violate Petitioner's due process rights or deprive him of a fair trial. *Cf. Watson v. Montgomery*, 431 F.2d 1083, 1085 (5th Cir. 1970) (rejecting petitioner's claim that admission of photocopy violated the best evidence rule because the state court's evidentiary ruling did "not rise to constitutional dimension"). Accordingly, Claim 16(A) is DENIED.

B. Admission of Ring

The Court rejected Claim 16(B) above. (*See supra* pp. 21-25.)

C. Admission of Photographs

Petitioner alleges in Claim 16(C) that the photographs of the victim admitted into evidence were highly prejudicial and violated his due process rights. (Pet. at 252-56.) Petitioner acknowledges that the California Supreme Court held on direct appeal that the photographs were relevant and although "'disturbing because they depict a dead child, her body is intact and neither her injuries nor any other aspect of the photographs can accurately be characterized as gruesome.'" (*Id.* at 253 (quoting *Panah*, 35 Cal. 4th at 477).) The court found the photographs relevant "for the reasons stated by the trial court," *Panah*, 35 Cal. 4th at 476-77 (noting that the photographs "depict the victim's unclad body and show injuries inflicted on her face, chest, arms, and rectum"), including relevance to illustrate how facial bruising may have occurred, the extent of the injuries and whether they occurred pre- or post-mortem, and whether and to what extent sexual assaults occurred. (*See* RT 1261, 1263.)

The California Supreme Court's decision was not objectively unreasonable.

Photographs of Nicole Parker's injuries, both sexual and non-sexual, were relevant to her cause of death and to the sodomy charge, and did not violate Petitioner's due process rights or render his trial fundamentally unfair. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1030, 1032 (9th Cir. 1997) (finding no due process violation from admission of "admittedly gruesome photos of the decedent," who had been run over with a car three times, dragged off a road, and stabbed in the head, neck, and shoulders with a screwdriver at least thirty times, and whose body was covered with bruises, abrasions, puncture wounds, fractures, and internal injuries); *Villafuerte*, 111 F.3d at 622, 627. Claim 16 (C) is DENIED.

D. Admission of Manager's Testimony

In Claim 16(D), Petitioner challenges the admission of testimony from his former manager, Adele Bowen. Petitioner alleges:

> The prosecution called as a witness Adele Bowen, manager of the Mervyn's store where Petitioner was an employee. While she was testifying, the prosecution began to question her concerning an alleged argument between Petitioner and her. The alleged argument occurred the day before the incident in question and concerned the fact that Petitioner had parked inappropriately. . . . Bowen was then permitted to testify that Petitioner was 'very argumentative,' 'very loud,' and 'was not listening' when she tried to tell him to move his car.

(Pet. at 256 (quoting RT 1736).) Petitioner contends that the trial court should have excluded the testimony as prejudicial, because "[t]he prosecution was merely using this evidence to lead the jury to believe that Petitioner had a bad temper and a 'propensity' to commit the crime in question." (*Id.* at 258.)

On direct appeal, the California Supreme Court held, "While evidence about defendant's state of mind in the hours *following* the disappearance of Nicole was relevant, we agree with defendant that evidence he argued with his supervisor the

night *before* was not relevant for this purpose. Nonetheless, Bowen's brief testimony, even if admitted in error, was harmless." *Panah*, 35 Cal. 4th at 477 (emphasis added).

The California Supreme Court's conclusion that admission of Bowen's testimony did not deprive Petitioner of a fundamentally fair trial is not unreasonable. Bowen's testimony that Petitioner was very loud and argumentative and was not listening, over a dispute about parking, was not prejudicial or inflammatory in the course of Petitioner's trial. Claim 16 (D) is DENIED.

E. Admission of Testimony from Serologist Moore

In Claim 16(E), Petitioner alleges a constitutional violation arising out of the following testimony from Serologist Moore:

> Q. Now, based upon the pattern that you observed, and I believe part of which is depicted in People's 15-B, could that be consistent with the spewing of semen across the bed sheet?
>
> [Defense counsel:] Objection.
>
> The Court: Do you have an opinion on that based on your expertise?
>
> [Serologist Moore:] Yes.
>
> The Court: The objection is overruled.
>
> [Serologist Moore:] Given my examination of these stains, yes. It could be consistent with such an activity.

(RT 2067-68; *see* Pet. at 259-62.) Petitioner argues that defense counsel proceeded to "place[] Moore's qualifications and the reliability of his testimony into question. The trial court, however, did not comport with the United States Supreme Court's directives in *Daubert* and *Kumho Tire Co.* or California's standard." (Pet. at 261 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)).) He adds that admission of the evidence constituted a denial of due process. (*See id.* at 262.)

In *Daubert*, the Supreme Court "held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" *Kumho Tire*, 526 U.S. at 147 (holding that Rule 702 extends to testimony based on technical and other specialized knowledge) (quoting *Daubert*, 509 U.S. at 589). However, "the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate . . . ." *United States v. Scheffer*, 523 U.S. 303, 318 (1998) (Kennedy, J., concurring in part and concurring in the judgment) (citing *Daubert*, 509 U.S. at 587). "Because *Daubert* does not set any specific constitutional floor on the admissibility of scientific evidence, the only relevant question [on habeas review] is whether the [evidence] rendered the trial fundamentally unfair." *Wilson v. Sirmons*, 536 F.3d 1064, 1101-02 (10th Cir. 2008); *see also Brown v. Watters*, 599 F.3d 602, 616 (7th Cir. 2010); *Keller v. Larkins*, 251 F.3d 408, 419 (3d Cir. 2001); *Norris v. Schotten*, 146 F.3d 314, 335 (6th Cir. 1998); *Spencer v. Murray*, 18 F.3d 237, 239-40 (4th Cir. 1994) (all holding same).

The admission of Moore's opinion did not violate Petitioner's due process rights or deprive him of a fair trial. Moore explained that the material on the bed sheet demonstrated the presence of spermatozoa as well as saliva. (RT 2067, 2072.) The jury could examine the photograph in evidence and evaluate Moore's opinion that the pattern in which the material was deposited on the sheet was consistent with spewing. Petitioner has failed to demonstrate that the admission of Moore's testimony violated his federal constitutional rights. Claim 16(E) is, therefore, DENIED.

F. Cross-Examination of Rauni Campbell

1. Allegations and Decision on Direct Appeal

Petitioner alleges in Claim 16(F) that the trial court violated his constitutional rights when it sustained the prosecutor's relevance objection to a question about whether Rauni Campbell and the Petitioner had smoked marijuana. (Pet. at 265 (citing RT 2182-83).) Defense counsel questioned Campbell:

> Q. Well, the question is is that what you told Hooman's mom at the time [when Campbell contacted Petitioner's mother at his request, following the victim's disappearance,] that you believed [certain plastic] baggies had contained marijuana?
>
> A. I don't – No, I definitely did not say that. [¶] She asked me what could or what was in them. I had no definite idea. [¶] I gave her my opinion of what might have been in them.
>
> Q. But you knew what marijuana was, right?
>
> A. Yes.
>
> Q. You and Hooman had smoked marijuana, right?
>
> [The prosecutor:] Objection. [¶] Relevancy.
>
> The Court: Sustained.
>
> [Defense counsel:] May we approach, Your Honor?
>
> The Court: Not on that.

(RT 2182-83.) Petitioner argues that "[c]learly, evidence of a witness's marijuana use is relevant to an evaluation of credibility to testify as a witness to events that had the capability of incriminating Petitioner." (Pet. at 265.) Petitioner further alleges that he "should have been able to provide evidence of his use of marijuana in order to establish a mental state defense." (*Id.* at 267.)

On direct appeal, the California Supreme Court held:

> Evidence of a witness's drug use is inadmissible unless the testimony tends to show that the witness was under the influence thereof either (1) while testifying, or (2) when the facts to which he testified occurred, or (3) that his mental faculties were impaired by the use of such narcotics. Here, defense counsel's question was phrased in the past tense and referred to some unspecified time. It was, therefore, properly excluded as irrelevant. Because the trial court's ruling was proper, there is thus no predicate error on which to base the constitutional claims.

Panah, 35 Cal. 4th at 478 (internal quotations omitted).

2. Analysis

"To state a violation of the Confrontation Clause, a defendant must show 'that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.'" *Sully v. Ayers*, 725 F.3d 1057, 1074 (9th Cir. 2013) (finding no violation where excluded lines of cross-examination "were peripheral and went only to [the witness's] general credibility, not her bias") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). "The defendant has met his burden when he has shown that '[a] reasonable jury might have received a significantly different impression of a [witness's] credibility had counsel been permitted to pursue his proposed line of cross-examination.'" *Id.* (quoting *Van Arsdall*, 472 U.S. at 680). "The defendant's right to attack the witness's general credibility enjoys less protection than his right to develop the witness's bias." *Id.* at 1075 (internal quotation omitted). The Ninth Circuit has "found in the past that a trial court's limitation of cross-examination on an unrelated prior incident, where its purpose is to attack the general credibility of the witness, does not rise to the level of a constitutional violation of the defendant's confrontation rights." *United States v. Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991); *see also Reiger v. Christensen*, 789 F.2d 1425, 1433 (9th Cir.

1986) (finding no Sixth Amendment violation from limitation on cross-examination because witness's "prior conviction for shoplifting does not suggest any bias against [defendant] and . . . was only marginally relevant to [the witness's] overall credibility").

The California Supreme Court reasonably determined that defense counsel's question was not directed to Campbell's use of marijuana at a specific, relevant time. Counsel's question thus went to Campbell's general credibility and was minimally probative even so. *See Reiger*, 789 F.2d at 1433; *see also United States v. Domina*, 784 F.2d 1361, 1365-67 (9th Cir. 1986) (finding no Confrontation Clause violation where district judge, considering that witness had not used drugs at the time of the events or of giving testimony, limited cross-examination on drug use and witness was subjected to considerable cross-examination on other topics). Petitioner has not demonstrated that the jury might have received a significantly different impression of Campbell's credibility had the court permitted cross-examination on her marijuana use. In addition, the California Supreme Court may have reasonably found speculative Petitioner's claim that Campbell's testimony about her drug use with Petitioner could have supported a mental state defense. Claim 16(F) is, therefore, DENIED.

XXI. Claim 17: Request for Appointment of Expert for Sanity Trial

In Claim 17, Petitioner alleges that trial counsel provided ineffective assistance "in failing to obtain and prepare a defense mental health expert to testify at a sanity trial." (Pet. at 276.) Petitioner alleges that trial counsel relied solely upon the court-appointed neutral experts appointed to evaluate his competence to stand trial. (*Id.* at 277.)

The California Supreme Court may have reasonably determined that the record belies Petitioner's allegations. On November 28, 1994, defense counsel informed the trial court "with respect to the sanity phase" that Dr. Coburn, who was present in court that day, was under appointment to the defendant to prepare a

confidential report. (RT 1239.) When the trial judge stated that Dr. Coburn was to prepare a report as soon as possible, the judge observed, "Dr. Coburn, you're shaking your head. You don't have enough data at this time to prepare a report?" (*Id.* at 1240.) Dr. Coburn said that was correct. (*Id.*) The court again asked that he prepare a report soon as reasonably possible. (*Id.* at 1241.) On December 12, 1994, defense counsel informed the court that although he had not yet received a written report from Dr. Coburn, Dr. Coburn "did visit with Mr. Panah and he conducted further analysis of Mr. Panah this past Friday in this building." (*Id.* at 2305.) As of that date, counsel intended to present testimony from Dr. Coburn at the sanity trial. (*See id.* at 2308.)

Counsel had received at least an informal report from Dr. Coburn on his sanity findings by December 22, 1994. (*See id.* at 3048; *see also id.* at 3271-73, 3277, 3776-77.) Counsel told the court that while calling Dr. Coburn was still a possibility, at that time, it was not his intention to do so. (*Id.* at 3048.) Counsel

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intended to rely upon testimony from Petitioner's mother, Dr. Palmer, and perhaps Petitioner himself. (*See id.*)

The California Supreme Court may have reasonably concluded that trial counsel diligently pursued and obtained a confidential opinion from a defense mental health expert on Petitioner's sanity and reasonably relied on that opinion. *See Richter*, 131 S. Ct. at 788 ("The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. . . . When § 2254(d) applies, the question is . . . whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" (internal quotations and citations omitted)); *cf. Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("In general, an attorney is entitled to rely on the opinions of mental health experts in . . . pursu[ing] an insanity . . . defense"). Because the California Supreme Court's rejection of Claim 17 does not constitute an

unreasonable determination of the facts or application of federal law, Claim 17 is DENIED.

XXII. Claim 18: Denial of Motion to Suppress Evidence

In Claim 18, Petitioner contends that his constitutional rights were violated by the trial court's denial of his motion to suppress "evidence based upon (1) the unjustified warrantless searches of his residence and vehicle[(s)]; (2) repeated interrogations by officers without *Miranda* warnings; and (3) the invalidity of the subsequently obtained warrant." (Pet. at 278 (footnote omitted).)

A. Evidence from Warrantless Searches and Validity of Warrant

First, Petitioner argues that the trial court erred by failing to suppress evidence seized during warrantless searches of his home and vehicle(s). (*See id.* at 279 n.50, 289-97.) Moreover, Petitioner asserts that the search warrant police ultimately obtained was invalid because it "was based upon an affidavit that contained deliberately false and misleading statements, multiple warrantless searches of Petitioner's home and car, involuntary statements by Petitioner obtained in violation of *Miranda*, and failed to include material information that would have rebutted a finding of probable cause." (*Id.* at 298.)

The United States Supreme Court held in *Stone v. Powell* that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494 (1976) (footnotes omitted). The Fourth Amendment "exclusionary rule is a judicially created remedy rather than a personal constitutional right." *Id.* at 495 n.37.

Petitioner argues that he was not given a full and fair opportunity to litigate his claims because the trial court (1) failed to hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978); (2) limited his questioning of witness Ahmad

Seihoon[5] at the suppression hearing; and (3) denied him an opportunity to question witness Rauni Campbell at the suppression hearing. (Pet. at 310-11.)

1. *Franks* Hearing Request

To be entitled to a *Franks* hearing to challenge the validity of a search warrant, the defendant must satisfy five requirements:

> (1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; [and] (5) the challenged statements must be necessary to find probable cause.

United States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (internal quotation omitted).

a. Decision on Direct Appeal

Petitioner's allegations were addressed by the California Supreme Court on direct appeal. The court held:

> Defendant contends the search warrant issued for his apartment should have been quashed because the affiant, Detective Price, omitted material information and included false information. The trial court found that the affiant had not included statements that were either false or made in reckless disregard of the truth and that none of the information defendant claimed had been omitted from the affidavit was material to probable cause. The information defendant claims was omitted included any mention of the prior entries into his apartment, that Officer Barnes had spoken to defendant and his mother, and that Mr. Seihoon was the last person seen talking to Nicole. Defendant contended further that the affiant

[5] The Court notes that the witness's surname is spelled inconsistently in the Report's Transcript as both "Seihoon" and "Seihwoon." The Court follows the spelling used by the parties and by the California Supreme Court on direct appeal.

> erroneously stated that Nicole lived in the same apartment complex as defendant, inaccurately reported certain statements made by defendant to police, and failed to report defendant's 'deplorable' condition at the hospital when the statements were made. We agree with the trial court that these omissions were immaterial to probable cause.
>
> Defendant also argues the search warrant should have been quashed because it was based, in part, on the prior illegal warrantless searches of defendant's residence and vehicle and on statements obtained in violation of *Miranda.* We have, however, rejected his challenges to the warrantless entries into his residence and vehicle and his *Miranda* claims. Our conclusions in this respect eliminate the predicate of his challenge to the search warrant on this ground. To the extent that defendant is advancing a *Franks* claim, he fails to make the required showings either that the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth or that, even had the allegedly false statements been excised, the remaining contents of the affidavit would have been insufficient to support a finding of probable cause. We conclude that the trial court properly denied his motion to quash the search warrant.

Panah, 35 Cal. 4th at 472-73 (internal citations omitted; footnote omitted (recounting contents of search warrant affidavit)).

b. Analysis

A review of the record demonstrates that Petitioner received a full and fair opportunity to litigate his *Franks* hearing request. When Petitioner requested a *Franks* hearing, the trial court heard counsel's arguments in support of the request, identified a collection of seven to eight officers from whom testimony was expected, and stated that it had three days available for the testimony at that time and would afford time to examine one officer in particular if he were not available

during that time. (RT 245-61.) The trial court heard testimony from the officers and other witnesses for three days, until the defense stated that it had no additional witnesses and rested on the motion to suppress. (*Id.* at 664.) The court then heard argument on the motion to suppress and on the validity of the search warrant, and on the *Franks* request in particular. (*See especially id.* at 697-713.) The trial court ruled:

> It appears to me that even had all of the [factual] deficiencies Mr. Sheahen feels exist in this case . . . [been] included in the warrant, the warrant would still contain ample probable cause, including the information about Mr. Seihwoon [sic] would not negate the probable cause to search the defendant's apartment. . . .
>
> Really all we are judging here is whether the affiant fairly presented to the magistrate the information known to him, and it's clear to me the affiant did just that. . . .
>
> Any of the matters that Mr. Sheahen has argued should have been included and were not, if added into the warrant and retested would not make me feel any differently about the adequacy of the warrant. . . .
>
> I'm satisfied given the totality of the evidence that I've heard in this case that there's been no deliberate or reckless misinformation or omissions by law enforcement in this case in connection with this warrant.

(*Id.* at 710-13.)

On appeal, as stated above, the California Supreme Court agreed with the trial court that the omissions were immaterial to probable cause. *Panah*, 35 Cal. 4th at 473. The court concluded that Petitioner failed to show that the affidavit contained statements that were deliberately false or in reckless disregard of the truth, or that the contents of the affidavit otherwise would have been insufficient to support a finding of probable cause. *Id.*

The record reflects that Petitioner received a full and fair opportunity to litigate his *Franks* hearing request.

2. Examination of Witnesses

Petitioner further alleges that he denied was a full and fair opportunity to litigate his Fourth Amendment claims because "the defense was precluded from determining what statements Seihoon actually made to the police," and "a *Franks* hearing could have demonstrated that the circumstances and statements attributed to Petitioner by Rauni Campbell were false and misleading as stated in Detective Price's affidavit." (Pet. at 304, 311.)

a. Ahmad Seihoon

The record belies Petitioner's contention that the trial court refused him a full and fair opportunity to litigate his Fourth Amendment claim by limiting his examination of Seihoon. Seihoon testified that he spoke with Nicole Parker at approximately 11:00 on the morning of her disappearance. (CT 528-29.) He explained that Mehri Monfared told him that the police were looking for "a guy supposed to talk to [her] the last time," and he told Ms. Monfared he had spoken to her, and went to talk to the police. (*Id.* at 529-33.) Defense counsel asked Seihoon what he told police when he arrived, and the prosecution objected as to relevancy. (*Id.* at 533.)

The trial court then heard thorough argument from both sides explicitly addressing the *Franks* issue. (*See id.* at 533-38.) Defense counsel argued that the police possessed information that Seihoon, and not Petitioner, was the last person to see Nicole Parker and omitted that information from the search warrant affidavit. (*Id.* at 536.) The court held:

> Suppose it was included. Does that factor into the probable cause equation in any way? I don't see that it does. . . . The search warrant which is before the Court does not indicate that Mr. Panah was the last person seen with the victim.

In fact, what you [defense counsel] just read to me [in support of the defense argument] was not based upon the interview with this witness. It was based upon information given to the police by Edward Parker, the father of Nicole Parker.

I think you might have a point if the affidavit had said that the defendant was the person last seen with Nicole Parker. But the affidavit says no such thing.

So there has not been a misstatement or an omission that was prejudicial to the defendant.

Furthermore, you can't divide the entire investigation up into little bits and pieces. [¶] At the time this affidavit was drawn, apparently this witness had been interviewed and given the police some information, but what had happened in addition is your client had attempted to commit suicide, had made statements to a girlfriend that he was involved in some way in the death or disappearance of the victim. [¶] He had fled the scene when the police arrived. He had given a statement in the field to Detective Burris indicating that he was involved in the disappearance.

I fail to see how any of the information you're trying to elicit from this witness is going to undermine any of the probable cause.

So I don't think you crossed the threshold for *Franks.* This is the first time the prosecution has made that objection in this hearing. [¶] They benevolently, in my opinion, let you go forward on this without making the initial *Franks* objection.

But at this time the objection has been made, and I'm going to sustain the objection.

(*Id.* at 537-38.) The trial court then permitted defense counsel to continue questioning Seihoon, and he did so. (*Id.* at 539*ff.*)

Petitioner has failed to demonstrate that he was denied a full and fair opportunity to litigate his Fourth Amendment claim based upon the trial court's limitation on his questioning of Seihoon.

b. Rauni Campbell

The record likewise belies Petitioner's contention that the trial court refused him a full and fair opportunity to litigate his Fourth Amendment claim by barring him from examining Rauni Campbell at a *Franks* hearing. When Petitioner sought to question Campbell during suppression proceedings, the trial court heard the following argument:

> The Court: This is a *Franks* type hearing, and I need some offer of proof or indication that there's going to be testimony that controverts what's in the affidavit.
>
> And do you have that offer of proof for me that there's material evidence that's controverted by what she would testify to? [¶] Because if not, there's no reason to bring her in. If there's reason to bring her in, we'll look into it.
>
> But, again, we're in a *Franks* type situation and there are certain requirements before we start bringing people in. . . .
>
> Mr. Sheahen: . . . The last paragraph on page one it says here: 'As Officer Kong was approaching the apartment, the suspect fled through the apartment courtyard.' [¶] Miss Campbell would testify that Mr. Panah did not flee through the apartment courtyard. That he just left the apartment in a normal fashion.
>
> 'It was at that time that Campbell told Officer Kong that the suspect had told her that he had done something very bad.'

This is relatively critical, Your Honor. We have reports. We have grand jury testimony. And there is a conflict as to what Campbell said in that respect.

At one point in time, one of the reports – there's a prior statement by Campbell to the effect that Mr. Panah had told her that they had done something very bad, not that he had done something very bad, but that they, meaning the two men or whatever. That reference has been made, that they had done something very bad, and that this is what Campbell told the police, but this has been twisted and tortured in the present form it's in the affidavit that he had done something very bad.

Obviously when making any sort of calculation of probable cause it makes an enormous difference between whether he has said he had done something very bad or whether he says they had done something very bad, and Campbell's presence would actually show that is they had done. [sic]

The Court: That's what she told the officers or what the defendant told her? What's important here is what she told the officer. [¶] Whether she inaccurately reported what the defendant told her doesn't give rise to any constitutional issue. [¶] The issue is what information the affiant was acting on.

Mr. Sheahen: . . . [I]f you want I can make an offer, Your Honor. The offer would be that Campbell – first of all, that Campbell would testify that what he said was that they had done something very bad, and further that that's what Campbell told Officer Kong, is that they had done something very bad. [¶] And that the way Kong got it down is that he had done something very bad.

The Court: All right. [¶] Mr. Berman, do you want to be heard on this?

Mr. Berman: Your Honor, counsel makes these

> pronouncements that this is the way the evidence is going to be shown.
>
> In the *Franks* case there are some very strict requirements, and we have been very generous in terms of not demanding that there be affidavits on file by counsel showing this.
>
> And I think we've cooperated fully. But I'm not quite sure what counsel is talking about as far as who's responsible for statements and being transposed and everything else.
>
> We have Officer Kong available, the officer who dealt with Miss Campbell and took the information. [¶] That officer would be relevant if it pertained to any showing that the statement that was made to the investigating officer who filled out the affidavit for the search warrant was incorrect. [¶] Miss Campbell's presence as a civilian is absolutely not necessary for that.
>
> Counsel has made no effort to bring in any of these witnesses. At the last minute he says suddenly he wants this witness. He comes with a supposed conflict of which there is no evidence presented before the court.
>
> The Court: I'm satisfied that the offer of proof is inadequate under *Franks* to justify bringing Miss Campbell in.
>
> If you want to call Officer Kong and you think there's something to be gained by that, that's another question.
>
> But there are strict requirements under *Franks*, and I don't think you've met the foundational requirement for bringing in the witness.

(RT 594-98.) The trial court continued to hear argument from defense counsel that all of the information attributed to Campbell should "be excluded from the search

warrant affidavit." (*Id.* at 599.) The court maintained its holding that defense counsel's offer of proof did not meet the "strict requirements set down by the United States Supreme Court [in *Franks*, and] adopted in California." (*Id.* at 600.) The California Supreme Court affirmed the trial court's denial of a *Franks* hearing as to Campbell on direct appeal. *See Panah*, 35 Cal. 4th at 456-57.

The Supreme Court provided in *Franks*:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. . . . Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, 438 U.S. at 171; *see also Perdomo*, 800 F.2d at 920 ("[A] detailed offer of proof, including affidavits, must accompany the allegations" to be entitled to a *Franks* hearing). The record regarding witness Campbell shows that the trial court applied the requirements of *Franks* and afforded Petitioner a full and fair opportunity to litigate his claim.

Petitioner has, therefore, failed to demonstrate that he was denied a full and fair opportunity to litigate his Fourth Amendment claims in state court. As a result, he may not be granted federal habeas relief on those claims. *See Powell*, 428 U.S. at 494.

B. *Miranda* Violation

1. Allegations and Decision on Direct Appeal

Petitioner alleges that the admission at trial of a statement attributed to him, given without *Miranda* warnings, violated his Fifth Amendment rights. The California Supreme Court held on direct appeal:

> [After his arrest,] [d]efendant was then taken to West Valley Hospital. At the hospital he was questioned by Officer Joe as to Nicole's whereabouts. Officer Joe did not advise defendant of his *Miranda* rights. Defendant listed various places she might be and said 'he'd like to be with the girl so much, that he would even carry her skeleton remains around.' . . .
>
> The trial court found that the questioning of defendant . . . at the hospital by Officer Joe, was permissible under the rescue exception to *Miranda*.
>
> Under some narrow circumstances, sometimes called the 'public safety' or 'rescue' exceptions, compliance with *Miranda* is excused where the purpose of police questioning is to protect life or avoid serious injury and the statement is otherwise voluntary. *New York v. Quarles*, 467 U.S. 649, 657 (1984).
>
> Defendant contends the trial court erred in applying this exception to the statements elicited from him at the scene of his arrest and by Officer Joe at the hospital because there was no exigency. He asserts the information available to the police by the time they questioned him indicated that Nicole was dead. We disagree. Some of the very evidence cited by defendant – Rauni Campbell's statement that defendant said he had done something bad, the discovery of the knives and bloodstains in defendant's car – could only have heightened the belief of the police that Nicole was injured but still alive, as her body had not yet been found when defendant was questioned. Furthermore, the officers' testimony establishes that the primary purpose of the questioning was rescue. Finally, notwithstanding defendant's perfunctory assertion that the statements were not a product of his free will, the record supports the conclusion the statements were voluntary. We conclude, therefore, that the trial court properly admitted these statements.

Panah, 35 Cal. 4th at 470-71 (internal citations omitted and edited).

Petitioner acknowledges that his statements to Officer Joe were the only statements admitted at trial. (Pet. at 287; Reply at 89.) Although Petitioner contends that other statements made without *Miranda* warnings were used to show probable cause for the issuance of a search warrant, that use poses no constitutional violation. *See Nguyen v. Garcia*, 477 F.3d 716, 725 n.10 (9th Cir. 2007) ("[S]tatements taken in violation of *Miranda* may be used in an affidavit to establish probable cause for a search warrant" (internal citation omitted)).

Petitioner argues that the admission of the statement was unconstitutional because no exigent circumstances justified the questioning and because he was

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"incoherent, acutely psychotic, and incapable of providing voluntary or reliable statements." (Pet. at 287.)

2. Analysis

a. Public Safety Exception

The parties agree that "the constitutional issue turns on whether or not the narrow public safety exception to *Miranda*, as carved out in *New York v. Quarles*, 467 U.S. 649 (1984), should have applied under the totality of the circumstances." (Reply at 90 (internal citation edited).) Petitioner argues that there was no imminent danger at the time he was questioned because "there was nothing to suggest the blood found in Panah's car was not his. Officers discovered him with sliced wrists at the time of the arrest and the knife used to slice them. There was no clothing or other evidence to suggest that the victim had ever been in the car." (*Id.* at 93.)

The California Supreme Court was not unreasonable in finding that the discovery of multiple knives and bloodstains in Petitioner's car added to the police's reasonable concern that Nicole Parker was injured and possibly still alive. (*Cf.* RT 1900-01 (testimony of officer observing the interior of Petitioner's car that

he directed the trunk to be forced open because he believed Nicole could be inside and sought "to preserve life if [he] could render any kind of medical assistance").) Moreover, Petitioner does not dispute that Officer Joe's questioning of him was limited to asking where Nicole Parker was. (*See* Pet. at 282; Petr.'s Br. at 303.) That Officer Joe's questioning was so restricted supports application of the public safety exception. *See Allen v. Roe*, 305 F.3d 1046, 1051 (9th Cir. 2002) ("[T]here was no indication that the officer's questioning was intended to elicit incriminating evidence. This further bolsters our conclusion that the officer's questioning was objectively reasonable in order to ensure the public's safety. The officer did not ask Allen why he shot his son, or any other questions regarding the crime. The questioning was limited to finding the gun and was not investigatory" (internal citations omitted)); *United States v. Reilly*, 224 F.3d 986, 993 (9th Cir. 2000) (applying public safety exception where the officer's "inquiry bears no indication of an attempt to elicit testimonial evidence"). Finally, Petitioner points to no authority to show that because police had sufficient information to support his arrest for murder, attempting to rescue Nicole Parker no longer outweighed his Fifth Amendment protections. (*See* Petr.'s Br. at 307.)

As the Supreme Court explained in *Quarles*:

> [W]e do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety . . . . In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles

> from responding to [the officer's] question . . . , the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. [The officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result . . . . We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.

Quarles, 467 U.S. at 656-57. The California Supreme Court's decision was not contrary to or an unreasonable application of *Quarles*.

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b. Voluntariness of Statements

Petitioner next alleges that his statements were inherently unreliable and were not "the product of free will," because his "mental condition at the time of the interrogations was not sound." (Pet. at 288.) Petitioner cites evidence that he was acutely psychotic, delusional, incoherent, and under the influence of a substance at the time of his statements. (*Id.* at 288-89.) He further alleges in his reply brief that when he made his statements, his wrists had been stitched and he was lying on his back on a hospital bed with needles and with a tube running along the back of his throat and his hands restrained to the bed. (*See* Reply at 96 (citing RT 754, 805 and discussing *Mincey v. Arizona*, 437 U.S. 385 (1978)).)

The California Supreme Court's decision that Petitioner failed to establish a Fifth Amendment violation on the basis that his statements were involuntary is not contrary to or an unreasonable application of federal law. *See Panah*, 35 Cal. 4th at 471 (rejecting Petitioner's contention that his statements "were not a product of his free will"). "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. . . . The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free

choice' in any broader sense of the word." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (holding petitioner's waiver of his Fifth Amendment privilege was not involuntary on the basis of his mental condition alone). The Court held in *Connelly* that a "perception of coercion flowing from the 'voice of God' . . . is a matter to which the United States Constitution does not speak." *Id.* at 170-71. The California Supreme Court's rejection of Petitioner's argument that his statements were unconstitutionally unreliable or involuntary on the basis of his mental state is consistent with *Connelly*.

Moreover, the California Supreme Court was not objectively unreasonable in determining that the record evidence upon which Petitioner relies to portray his physical condition in the hospital does not show his statements to be involuntary. Officer Joe testified that after doctors finished treating Petitioner, he asked a doctor if he could ask Petitioner some questions, and the doctor said yes. (RT 753.) He did not recall any other medical procedures beyond the stitching of Petitioner's wrists and believed there were "some tubes," but was not certain. (*Id.* at 754.) The statement Petitioner cites to support his allegation of a tube inserted down his throat was a statement in argument made by the prosecutor. (*Id.* at 805.) Marilyn Whitman, R.N., who attended to Petitioner when he entered the emergency room and who was present with detectives, testified that she inserted a tube through Petitioner's nose or mouth to administer charcoal to his stomach to absorb ingested substances, and then she removed the tube. (*Id.* at 434-37.) She testified that the tube was in place for thirty seconds or one minute. (*Id.* at 437.) The trial court, after hearing argument about Petitioner's physical condition in the hospital, found no coercion and held that Petitioner's statements were voluntary. (*Id.* at 819-20.) The California Supreme Court's denial of the claim does not constitute an unreasonable determination of the facts or an unreasonable application of federal law.

Claim 18 is, therefore, DENIED.

XXIII. Claim 19: Penalty Phase Presentation of Mitigating Evidence

In Claim 19, Petitioner alleges that counsel was constitutionally ineffective for failing to investigate and present available mitigating evidence at the penalty phase of trial. (Pet. at 312-35.)

To establish ineffective assistance of counsel, Petitioner must show deficient performance and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Pinholster*, 131 S. Ct. at 1403 (internal quotation omitted). The Supreme Court in *Pinholster*, for example, found that the additional available mitigating evidence petitioner presented was "not so significant that . . . it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a 'substantial' likelihood of a different sentence," where the additional evidence "largely duplicated" evidence presented at trial and "basically substantiate[d]" testimony given by petitioner's mother and brother. *Id.* at 1409-10; *see also Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (holding petitioner could not show prejudice from alleged ineffective assistance at penalty phase where "[s]ome of the evidence was merely cumulative of the humanizing evidence [counsel] actually presented; adding it to what was already there would have made little difference").

As set forth below, the California Supreme Court may have reasonably concluded that Petitioner failed to demonstrate prejudice from any deficient performance by counsel.

A. Dr. Coburn

First, Petitioner alleges that "the jury never heard Dr. Coburn's opinion[]" that Petitioner was "'severely disturbed.'" (Pet. at 323 (quoting Pet. Ex. 19 ¶ 5).)

The quoted portion of Dr. Coburn's opinion, stated in full, reads, "I talked with the defense attorney the following day, April 28, 1994, and advised that his client was severely disturbed. However, I explained that I could not make a diagnosis without much more information." (Pet. Ex. 19 ¶ 5; *see also id.* ¶ 13

(stating that he "would have been able to make an adequate diagnosis" only after a full psychiatric evaluation and supporting data).) Because Dr. Coburn was unable to make an adequate diagnosis, and other testimony was presented at trial that Petitioner was suffering from "an extreme mental or emotional disturbance" (RT 3745 (testimony of Dr. Vicary); *see also id.* at 3872, 3877, 3879), the California Supreme Court may have reasonably determined that Petitioner's allegations of prejudice from the absence of Dr. Coburn's opinion were speculative.

B. Mansour Rabei, Ph.D. and Fred Rosenthal, M.D., Ph.D.

Second, Petitioner alleges that "Dr. Rabei could have explained that Petitioner suffered from 'chronic psychosis and severe mental illness.' Dr. Rabei could have described Petitioner's impairments: 'he was delusional, schizophrenic, had judgment impairment, was mentally disoriented, depressed, had disorganized feelings, and [was] fearful.'" (Pet. at 328 (quoting Pet. Ex. 5 ¶¶ 7-8).)

Petitioner adds that "[l]ike Dr. Rabei, Dr. Rosenthal found Petitioner to be 'psychotic,' 'delusional [with] poor judgment,' and suffering from a 'loss of contact with reality.' Further, Dr. Rosenthal confirmed that Petitioner's mental condition is 'strongly indicative of a chronic disorder, Schizophrenic Paranoid Type.' [¶] Finally, Drs. Rabei and Rosenthal conclude that Petitioner suffered from 'posttraumatic stress disorder' stemming from his experiences in the Iran/Iraq war." (*Id.* at 329 (quoting Pet. Ex. 12 ¶¶ 6-7, Pet. Ex. 5 ¶ 7).)

At trial, John Palmer, M.D., testified that when he observed Petitioner, Petitioner was acutely psychotic, delusional, and hearing command hallucinations, or "voices . . . telling him to do something." (RT 3201, 3226.) He testified that it was possible that Petitioner's psychosis was long-standing and may have been "an underlying problem that has resurfaced as evidenced by his hospitalization four years ago." (*Id.* at 3203-04, 3212-13, 3227-28.)

Dr. Vicary testified that Petitioner suffered from "significant mental illness," i.e., "an extreme mental or emotional disturbance" at the time of the offense and

was "mentally disturbed." (*Id.* at 3745, 3872, 3877, 3879.) Regarding Petitioner's poor judgment, Dr. Vicary testified that Petitioner likely used as psychological defenses "a whole variety of strategies, none of which are very successful. Avoiding things, being dependent, doing things that are self-defeating." (*Id.* at 3796.)

Drs. Palmer and Vicary both testified to Petitioner's depression. Dr. Palmer testified that Petitioner was described in 1988 hospital records as suffering from major depression for which psychiatric hospitalization was recommended. (*Id.* at 3213-15.) Dr. Vicary testified that Petitioner suffered from clinical depression

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that was a component of an extreme mental or emotional disturbance. (*Id.* at 3744-45.)

Related to Petitioner's disorganized feelings, Dr. Vicary stated that Petitioner, as a passive person, would "tend to accumulate painful experiences[.] [F]rustration, resentments, anger tend to build up in these passive people until one day like a pressure cooker the top blows off." (*Id.* at 3699, 3724.) Related to Petitioner's fearfulness, Dr. Vicary testified that "underneath all of that normal appearing behavior, is a crippled person because of all of these abusive and traumatic things that happened to him during his life." (*Id.* at 3877-78.) Dr. Vicary added that Petitioner's psychological profile was "similar to that of a battered woman or battered child." (*Id.* at 3794 (internal quotation omitted).)

Related to Petitioner's alleged posttraumatic stress disorder symptoms stemming from his experiences in the Iran/Iraq war, Petitioner's mother testified that "[i]t was so dangerous to live in Iran, all bombing and fighting. Every night bombing. . . . Every time. Night. Daytime. Night. Most of it was nighttime." (*Id.* at 3397-98.) She feared Petitioner would lose his life in the war. (*Id.* at 3649.) When asked what she would do with Petitioner when bombs would fall, she replied that she "was so scared, Hooman – everybody is scared," and she and Petitioner

would stay at home and go to the basement, or stay in the same room. (*Id.* at 3397-98.) She stated that the bombing started two years before she and Petitioner left the country and continued after they left. (*Id.* at 3398.) She described, "[T]here is war over there, and also there's no electricity. There's no water. There's no nothing. [¶] And we have most the time no shower, no hot water, nothing." (*Id.* 3601.) Conditions were very bad and their family was very poor, she said. (*Id.*) She explained that the government:

> put [her] in the jail and Hooman was coming to the jail. He hurt a lot. He hurt a lot. He was crying during that I was in the jail.
>
> And the war came up. The war it was so hard for every – I mean, all my family, especially because my mom was sick and my father was old and also there is two kids at home, Hooman and my brother's daughter.
>
> And Hooman was scaring a lot at night. Every kid was scaring a lot at night, and he was when the bombing coming, he was wet. He – I mean, his pants would get wet because of scared and also he was shaking at night. He was screaming. He was walking at the night.

(*Id.* at 3635.)

While Petitioner contends that trial counsel should have presented evidence from a less self-interested witness than Petitioner's mother about the effects of "cultural issues" and the war (Pet. at 331), Dr. Vicary's testimony supported Ms. Monfared's credibility. Dr. Vicary testified that he thought Ms. Monfared was "more forthcoming when she was on the witness stand" and "the things she said were basically consistent with what she told [him]." (RT 3810; *see also id.* at 3878-79, 3889-90.) He testified that the history that Ms. Monfared and Petitioner provided was "highly consistent with the kind of sickness and traumatic experience that you find in perpetrators of a totally unprovoked, totally senseless homicide." (*Id.* at 3892.)

The California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability of a different outcome at trial had counsel presented, in conjunction with the other available mitigating evidence not before the jury, testimony from Drs. Rabei and Rosenthal that Petitioner, for example, was schizophrenic, was mentally disoriented, suffered from posttraumatic stress disorder, and had a loss of contact with reality. Compared to the aggravating circumstances of the crimes themselves and the victim impact testimony discussed below (*infra* pp. 137-41), it was not objectively unreasonable

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for the court to find no reasonable probability of a life sentence had the evidence been presented.

C. Jack Dye

Third, Petitioner contends that "[t]rial counsel failed to elicit from Mr. Dye that Petitioner would become 'very upset when talking' about his life before coming to the United States, and that Petitioner had told him 'that he had been sexually abused as a child by a male family member in Iran.'" (Pet. at 329-30 (quoting Pet. Ex. 23 ¶ 5).)

At trial, Petitioner's mother testified that when Petitioner was between nine and twelve years old, Petitioner told her that her father was having anal sex with him and with his cousin. On direct examination, Ms. Monfared testified:

> Q. Well, was your son having any particular problems in Teheran at that time?
>
> A. Yes. . . . [O]ne time especially he was telling me something about the problem about the – one of our family, I mean, who had molest one of my cousin, and he was Hooman age.
>
> I told him that 'I don't believe you.'
>
> And he was telling me, 'no, he tried – he touched me, too.'

I didn't believe him, and I slapped his face, and I fight with him. . . .

Q. When he told you there in Iran about a family member having molested himself and his cousin, you told him he was a liar?

A. Yes. Because I couldn't believe that old man do something like that to them.

Q. Something like what, Mrs. Monfared?

A. Molesting them.

Q. A ten-year-old boy and his cousin?

A. Yes. Yes. He had one year older – he is one year older than Hooman. . . .

Q. And you said the old man wouldn't do that?

A. Yes.

Q. Who was the old man, Mrs. Monfared?

A. Was my father.

Q. Did your son tell you that your father was having anal sex with him and his cousin?

A. Yes. . . .

(RT 3376-77, 3380.) On cross-examination, Ms. Monfared testified:

Q. Other than the one time that he told you his grandfather touched him, he never at any other time told you about any sexual activity between himself and his grandfather; is that correct?

A. I told you he was telling me when we were in Turkey.

Q. You told us that Hooman said his grandfather tried to chase him and tried to get him to do things. But you haven't told us what it is that Hooman said he was trying to do. [¶] Did Hooman tell you what he was trying to do?

A. I mean, I understand what he was talking about.

> Q. Mrs. Monfared, did Hooman ever say to you that he had sodomy with his grandfather?
>
> A. He said that he started doing, but I'm telling you I stopped him to talk about that.
>
> Q. Do you know what sodomy is?
>
> A. Yes.
>
> Q. That's where a male penis is put in a rectum?
>
> A. Yes.
>
> Q. All right. Did Hooman ever say to you that his grandfather had done that to him?
>
> A. Yes. He was telling me that and I stop him to continue that because I didn't want to hear about that.
>
> Q. So if Hooman told Dr. Vicary that he was never molested by his grandfather, that that never happened, are you telling us then that Hooman did tell you that?
>
> A. Yes, Hooman did tell me that.

(*Id.* at 3610-11; *see also id.* at 3604-05.)

In light of Ms. Monfared's testimony, the California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability of a different outcome at trial had he presented, in conjunction with the other available mitigating evidence not before the jury, the additional testimony from Jack Dye.

D. Mostafa Monfared, Homa Haeri, and Simin Dokht Takhfimi

Fourth, Petitioner alleges that counsel prejudicially failed to present testimony from Mostafa Monfared, Homa Haeri, and Simin Dokht Takhfimi. He alleges that Mr. Monfared, his maternal uncle, lived in Iran during the Iran-Iraq war and could have described the intense violence Mr. Monfared and Petitioner's family faced from the government. (Pet. at 330 (citing Pet. Ex. 21 ¶¶ 10-11).) Petitioner contends that Mr. Monfared could have testified that Petitioner visited him at ten years of age when he was imprisoned for political reasons and visited

his mother at eight years of age when she was imprisoned. (*Id.* (citing Pet. Ex. 21 ¶¶ 7, 9).) Mr. Monfared could have testified, Petitioner states, that there were frequent bombings, most often at night, that often killed Petitioner's friends and schoolmates, and that Petitioner was afraid of the dark, had awful headaches, and was a frightened and lonely child. (*Id.* (citing Pet. Ex. 21 ¶ 13).)

Petitioner further alleges that Homa Haeri, a close family friend, could have testified that Petitioner "became sad 'if someone killed a bug, like a mosquito or roach;'" was frightened and had headaches and nightmares "from the bombing and death surrounding him," which was "often live" on news footage; and

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"traumatically" visited his mother at age eight when she was imprisoned. (*Id.* at 330-31 (quoting Pet. Ex. 22 ¶¶ 7, 12, 14, 15).)

Finally, Petitioner alleges that his father's ex-wife, Simin Dokht Takhfimi, could have testified that Petitioner complained of his uncle and mother hitting him, had sudden mood swings as a child when he would be "engulfed by sadness," talked about killing himself, had terrible nightmares, saw "ghosts," as his father did, and had the nickname "Hooman Jenni" (Hooman the Possessed). (*Id.* at 331-32 (quoting Pet. Ex. 123 ¶¶ 6-8, 11).)

At trial, Petitioner's mother testified that he could not sleep well as a child and had nightmares. (RT 3580-82.) She testified about Petitioner's significant fear at night and his sadness during the time she was jailed and his visit to her, and about the violence from the Iran-Iraq war her family faced, as discussed above (*see supra* pp. 124-25). She also explained that Petitioner was very upset by her divorce from his father and wanted them to be together. (*Id.* at 3371-72.) She gave an account of Petitioner's fear and sadness in Cypress when a man broke into their room and assaulted Petitioner and his mother and attempted to rape her. (*Id.* at 3389.) She testified that Petitioner attempted suicide at four years of age and "said he doesn't want to live any more." (*Id.* at 3372-74.) She also described

Petitioner's suicide attempt upon coming to the United States at approximately eighteen years of age. (*Id.* at 3403-08.)

Petitioner's mother testified at trial that she and his uncles "beat him" in Iran. (*See, e.g.*, *id.* at 3410, 3647.) She testified that sometimes she beat him often, with her hands and with shoes; his uncles and aunt beat him with a belt; and his uncle slapped him. (*Id.* at 3377-78, 3410-11.) Dr. Sharma Kaushal testified that Petitioner told him during an interview that his mother had physically abused him and had been physically aggressive toward him many times, including slapping him and pushing him. (*Id.* at 4005.)

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Regarding Petitioner's allegation that witnesses could have testified to his gentle nature, Farrah Farzaneh, who had known Petitioner and his mother for approximately six to seven years, testified at trial that Petitioner was "a very sensitive and very caring young man" and was "warm and gentle." (*Id.* at 3660-61.) Petitioner's friend Kiyan Maqsudi testified that he had known Petitioner for three or four years and Petitioner was "very sweet [a]nd very emotional," a "very gentle man" who cried at movies. (*Id.* at 3304-05.)

The California Supreme Court may have reasoned that the additional evidence available from Mostafa Monfared, Homa Haeri, and Simin Dokht Takhfimi "largely duplicated" and "basically substantiate[d]" evidence that was presented at trial. *Pinholster*, 131 S. Ct. at 1409-10. In light of the evidence in mitigation that was presented, and also that in aggravation, the California Supreme Court may have reasonably concluded that Petitioner failed to demonstrate a reasonable probability of a different outcome at trial had the additional evidence from these witnesses been presented at trial along with other available mitigating evidence.

E. Delnaz Ashkan Panah

Fifth, Petitioner alleges that his paternal half-brother, Delnaz Ashkan Panah, "could have described Petitioner's sensitivity to violence: telling a story about how Petitioner would become bothered if small animals were harmed," and could have attested to their father's erratic and bizarre behavior and to Petitioner's paternal half-brother Kambiz's severe mental impairments. (Pet. at 331 (citing Pet. Ex. 122 ¶¶ 5, 12-13, 17-22).)

Delnaz Ashkan Panah states in his declaration:

> Once, I was playing with a couple of baby chicks and threw them out the window – I was too young to know what would happen to them. When Hooman found out what I'd done, he was beside himself. I still remember how much he chastised me, and how emotional he was. He told me that I had caused their deaths. He was so upset that he called his mother and had her pick him up.

(Pet. Ex. 122 ¶ 5.) The California Supreme Court may have reasoned that the jury would have responded poorly to evidence that Petitioner was sensitive to his half-brother's causing the death of the young birds, given the youth of Petitioner's own victim. *See Mayfield v. Calderon*, 229 F.3d 895, 903 (9th Cir. 2000) ("[T]estimony from [petitioner's] family and friends about his nonviolent nature and love for his family would likely ring hollow if presented to a jury which had already accepted the prosecution's version of the premeditated killings as evidenced by the guilty verdict"). The court may have reasonably found that the evidence would not have increased the likelihood of a life sentence at trial had it been presented.

Delnaz Ashkan Panah describes his father's behavior being excessively generous with other people, "show[ing]-off," and acting "impractical to the point of being disconnected to the very basic needs of his family." (Pet. Ex. 122 ¶ 12.) He says his father is "very optimistic and a dreamer. He has many dreams but he doesn't work to attain them; his way of pursuing them is by praying." (*Id.* ¶ 13.) His father is depressed, he reports, and "seeks people out and tells them about

Hooman, even when talking about it is inappropriate," because he has "very poor impulse control." (*Id.* ¶ 21.) The California Supreme Court may have reasoned that these observations Delnaz Ashkan Panah could have relayed about his father's behavior were attributable to his father's idiosyncratic traits or personal shortcomings, rather than any mental illness, and did not show a reasonable probably of a different outcome at trial alongside other available mitigating evidence.

Finally, Delnaz Ashkan Panah declares that Petitioner's paternal half-brother Kambiz "spiraled downward into psychosis" when he was about nine years old, has had several psychiatric hospitalizations, was eventually diagnosed as bipolar, has had acute obsessive behaviors, "disintegrates into screams and uncontrollable behaviors" when reminded of Petitioner, and has sworn to jump off a cliff if anything happens to Petitioner. (*Id.* ¶¶ 17-20.) Despite this potential mitigating testimony, however, the California Supreme Court may have reasonably concluded that, in light of the aggravating evidence at issue, Petitioner failed to show a reasonable probability of a different outcome at trial had he presented, in conjunction with the other available mitigating evidence not before the jury, evidence of his half-brother's mental impairments and difficulties.

F. Martina Intzen, Karin Röder, and Kay Gramberg

Sixth, Petitioner alleges that counsel prejudicially failed to present testimony from Martina Intzen, Karin Röder, and Kay Gramberg. Petitioner alleges that Martina Intzen, who "lived with Petitioner in a dormitory in Germany," could have testified that Petitioner was "'caring and supportive'" but "'emotionally unstable.'" (Pet. at 332 (quoting Pet. Ex. 31).) Further, Petitioner alleges that Karin Röder, his former teacher in Germany, could attest that he "ha[d] 'sadness'" and was very sensitive. (*Id.* (quoting Pet. Ex. 32).) He alleges that Kay Gramberg, a "caretaker who looked after Petitioner while his mother was in the United States," could have described his circumstances while living in a communal setting in a foreign

country away from his mother for more than a year and a half. (*Id.* (citing Pet. Exs. 73, 108).)

The California Supreme Court may have reasonably concluded that Petitioner's penalty phase presentation was more compelling without Ms. Intzen's testimony, which made her relationship with Petitioner sound much less serious than Ms. Monfared's portrayal of it at trial. (*See* RT 3399-3404 (testimony of Ms. Monfared that "they planned to get married to each other").) Ms. Intzen said of Petitioner that she had a "close friendship" with him, she did not remember the dates she knew him, and he was a "caring and supportive boy" who cooked and cleaned up for her, treated her kindly, and supported her financially and when he could. (Pet. Ex. 31.) Ms. Intzen declared that she "believed" Petitioner was not completely happy about moving to the United States and he "may" have preferred to stay in Germany. (*Id.*) Others at trial testified that Petitioner attempted suicide upon arriving in the United States over his despondency at leaving Ms. Intzen in Germany. (*See* RT 3403-05 (testimony of Ms. Monfared), 3858-59 (testimony of Dr. Vicary).)

The California Supreme Court may have likewise reasonably concluded that Petitioner's penalty phase presentation was more compelling without the declarations from his former teacher and youth home director in Germany. The court may have reasoned that Ms. Röder's potential testimony on cross-examination that Petitioner "wanted to see his mother and stay with her" when moving to the United States would have conflicted with more compelling evidence that Petitioner experienced a welcome respite from his mother's abuse while in Germany. (Pet. Ex. 32 (also recounting Petitioner "being happy to see his mother happy of having him back" in a letter written after his move); RT 3858 (testimony from Dr. Vicary that Petitioner while in Germany had "every expectation that he was going to lead an adult life and he wasn't going to have to be dominated and controlled by his mother anymore")); *see also Cunningham v. Wong*, 704 F.3d

1143, 1161 (9th Cir. 2013) (finding no prejudice from alleged penalty phase ineffective assistance where potential additional witnesses "would have been subject to thorough cross-examination" and may have provided more damaging testimony). Likewise, the court may have determined that Ms. Gramberg's potential testimony that Petitioner was able to "argue objectively" and "solve many conflicts" among his housemates would have detracted from the more significant evidence he presented from Dr. Vicary that he had a passive personality, always seemed to be very agreeable and docile, and had a profile similar to that of a battered woman or battered child. (Pet. Ex. 108 at 596; *see* RT 3698-99, 3794.) The California Supreme Court may have reasonably rejected Petitioner's allegations of prejudice from the absence of testimony from Ms. Intzen, Ms. Röder, and Ms. Gramberg on this basis.

G. Mehri Monfared

Seventh, Petitioner alleges that his mother could have testified about his "family history of mental issues. Petitioner's mother remembers that Panah's father was 'mentally unstable,' with irresponsible and erratic behavior. Demonstrating the hereditary nature of the mental impairments, Ms. Monfared could have also described Petitioner's paternal grandmother as being similarly 'impulsive' and acting like a teenager despite being an older woman." (Pet. at 332 (quoting Pet. Ex. 124[6] ¶¶ 3-7).) Petitioner alleges, without citation to supporting evidence, that "[a]n appropriate expert could have described how, in the Iranian culture, these descriptions were often symptoms of severe mental illness." (*Id.*) Petitioner further alleges that available medical records showed he suffered head injuries as a child and a high fever for which he was hospitalized, to which his mother could have also testified. (*Id.* (citing Pet. Exs. 20, 124).)

[6] Although Petitioner cites Exhibit 3 as the "M. Monfared Supp. Decl.," that declaration appears in Exhibit 124 and contains the quoted information.

Regarding his father's allegedly erratic and bizarre behavior, Petitioner's mother testified at trial that his father fought with her and pushed her, causing her to fall to the floor, more than once while she was pregnant. (RT 3350.) She stated that "when he got nervous, he got mad, he doesn't know what he's doing. At that time, he doesn't understand. [¶] He got mentally some – like mentally that he doesn't understand anything. [¶] He beat me up, and after he was telling me that 'I'm sorry. Accept my apologize.'" (*Id.* at 3351; *see also id.* at 3354, 3356.) She said that he wasn't able to take care of Petitioner or to be responsible for him. (*Id.* at 3356-57.) Once, she said, when Petitioner was about three months old, his father pushed her while she was holding Petitioner in a baby carrier, and the carrier fell to the ground and Petitioner fell from the carrier. (*Id.* at 3357-58.) She took Petitioner to the hospital following this incident. (*Id.* at 3357-58.) Although Petitioner did not present further evidence at trial of head injuries or a fever for which he was hospitalized, the California Supreme Court may have reasonably found that such evidence did not show a reasonable probability of a different sentence, had it been presented with other available mitigating evidence.

The California Supreme Court may have reasonably determined that Petitioner was not prejudiced by the lack of additional testimony from his mother on his father's and grandmother's alleged family history of "mental issues." (Pet. at 332.) The basis of Ms. Monfared's statement that Petitioner's father was "mentally unstable" was his extreme need to "stand out" and draw social attention, his habit of saying "crazy and inopportune things," his unpredictability, his financial irresponsibility, and his unreliability in childcare – behavior that, like the behavior described by Delnaz Ashkan Panah, could be attributed to idiosyncratic traits or personal shortcomings, rather than to hereditary mental illness. (Pet. Ex. 124 ¶¶ 3-6.) Likewise, Ms. Monfared points to Petitioner's grandmother's childlike impulsivity, showing off clothing and jewelry, offering inappropriate remarks and hugs and kisses, and being excessively talkative, along with one

incident of cooking Ms. Monfared's pet rooster, as the basis of her purported mental illness. (*Id.* ¶¶ 7-8.) The California Supreme Court may have reasonably found no prejudice from the absence of that testimony, on the basis that it would have shown the jury evidence of ordinary character flaws as opposed to apparent, hereditary mental illness. Finally, the California Supreme Court may have rejected as conclusory Petitioner's allegation, without supporting evidence, that an expert could have explained accounts of inappropriately juvenile behavior to be evidence of severe mental illness in Iranian culture.

H. Iisha Marie Scott

Next, Petitioner contends that "Iisha Marie Scott, who was Petitioner's girlfriend in Los Angeles, could have described the physical abuse Petitioner suffered from his mother, and the nightmares he endured as a result of his posttraumatic stress disorder." (Pet. at 332-33 (citing Pet. Ex. 114 ¶¶ 5, 14).)

The California Supreme Court may have reasonably determined that Petitioner was not prejudiced by the lack of testimony from Ms. Scott. Although, as Petitioner alleges, Ms. Scott could have testified that Petitioner told her his mother physically abused him and she saw his mother hit him more than once, and that Petitioner had nightmares (Pet. Ex. 114 ¶¶ 5, 14), other witnesses testified to the same facts, as discussed above. (*See supra* p. 129.) Moreover, Ms. Scott on cross-examination may have testified that Petitioner "was afraid for his mother" that someone would hurt her, and that "[w]hen he awoke from one of his dreams, he looked to see if his mom were home. He didn't like that she wouldn't tell him when she was going to be away. Being alone was difficult for him." (*Id.* ¶¶ 5-6.) The California Supreme Court may have reasonably determined that such testimony would have detracted from the more compelling testimony Dr. Vicary gave that Petitioner built up resentments as a battered woman would from being around his mother, suggesting that he would rather be free from her presence. (*See* RT 3698-3700, 3794; *see also id.* at 3858 (testimony from Dr.

Vicary that Petitioner wished not to be dominated and controlled by his mother any more).)

I. Eva Heuser

Finally, the California Supreme Court may have reasonably determined, contrary to Petitioner's allegation, that there was no "unequivocal evidence that the [victim's] death was accidental." (Pet. at 334.) Petitioner relies upon the autopsy notes from Dr. Heuser to assert that she "determined that there was an attempt '*to resuscitate*' the child and thus, an attempt to prevent her death." (*Id.* (quoting Pet. Ex. 25 at 128 (emphasis added in Petition).)

A review of the autopsy notes reveals that Dr. Heuser observed, "Lungs – lt color indicating poss exposure to wa [truncated in exhibit] or attempt to resuscitate." (Pet. Ex. 25 at 128.) Dr. Heuser observed a color of the lungs that may have shown a resuscitation attempt but may have stemmed from another cause; there is no "determin[ation]" of a resuscitation attempt. The California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability of a different outcome at his penalty phase trial had counsel presented the autopsy note from the coroner of a "poss[ible]" attempt to resuscitate the victim.

Accordingly, for the reasons set forth above, the California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability of a different penalty outcome, reweighing the aggravating evidence and the totality of the available mitigating evidence. *See Pinholster*, 131 S. Ct. at 1408. Claim 19 is, therefore, DENIED.

XXIV. Claim 20: Victim Impact Evidence

A. Allegations

In Claim 20, Petitioner alleges that the trial court "permitted the prosecution to introduce cumulative victim impact testimony that was so prejudicial that it rendered [his] penalty phase trial fundamentally unfair in violation of his

constitutional right to due process." (Pet. at 341.) Petitioner faults the trial judge for failing to adhere to his ruling that, although the victim impact evidence was admissible, each witness's testimony should be "limit[ed] to new matters that haven't been covered . . . ." (RT 3166; *see* Pet. at 338.) Petitioner asserts that the repetitive testimony was highly inflammatory and cannot be found to be harmless. (Pet. at 344.)

B. Legal Standard

In *Payne v. Tennessee*, 501 U.S. 808, 817, 829 (1991), the Supreme Court overruled its decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that the Eighth Amendment prohibited a //

capital sentencing jury from considering victim impact evidence. "In the majority of cases," the *Payne* Court held:

> victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief . . . .
>
> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'

Payne, 501 U.S. at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)). The Supreme Court reaffirmed in *Jones v. United States*, under the Federal Death

Penalty Act, that evidence of "victim impact in a particularly case is inherently individualized. And such evidence is surely relevant to the [penalty] phase decision. . . ." 527 U.S. 373, 401 (1999).

Circuit courts have rejected claims of undue prejudice based upon the cumulative nature of victim impact testimony. In *United States v. Mitchell*, 502 F.3d 931, 989-90 (9th Cir. 2007), for example, the Ninth Circuit found no unduly prejudicial victim impact testimony where one daughter of the victim testified that in their Navajo Tribe, the maternal side transmits the Tribe's values and culture to their children and grandchildren, and two other daughters testified, very similarly, that the victim was responsible for teaching her grandchildren about their Tribe's heritage and traditions. In *United States v. Nelson*, the Eight Circuit rejected a capital defendant's argument that the victim impact evidence presented at his trial was "highly emotional, cumulative, and unduly prejudicial." 347 F.3d 701, 713 (8th Cir. 2003). At his penalty phase trial, six witnesses testified that the ten-year-old rape and murder victim was loving, playful, and energetic, a good student, and ambitious with big dreams. *Id.* The court held that the highly emotional testimony, comprising approximately 100 pages of the 1100-page penalty phase transcript, was not significantly greater in quantity or quality than that in other, constitutionally permissible cases. *Id.* at 713-14. Likewise, in *United States v. Bolden*, the Eighth Circuit held that "[t]hough portions of th[e] testimony overlapped" where sixteen victim impact witnesses testified about the victim's relationship with his girlfriend, his career aspirations, and the effect of his death on his parents, the evidence was "not so cumulative as to confuse the issues or create unfair prejudice." 545 F.3d 609, 626 (8th Cir. 2008).

C. Analysis

The California Supreme Court was not objectively unreasonable in holding that the victim impact evidence was not unduly prejudicial. *See Panah*, 35 Cal. 4th at 494-96. The victim impact testimony constituted 34 pages of the approximately

1,031-page penalty phase transcript. (*See* RT 3155-88 (including bench conference at RT 3162-66); RT 3148-4178 (penalty phase of trial from prosecution opening argument to defense closing argument, including numerous proceedings out of the presence of the jury).) First, Edward Parker, Nicole Parker's father, testified about her background as a "PCP baby," her adoption, and her interests in cheerleading and softball. (*Id.* at 3155-58.) He testified about the effects of Nicole's death on Travis Parker's change in personality, change in college plans, and thoughts of suicide. (*Id.* at 3158-60.) He testified that Chad Parker "wants it [his sister's murder] to go away" and will not participate in counseling, is using drugs and alcohol, no longer playing sports, and earning C's and D's in school instead of a 4.0. (*Id.* at 3160-61.)

Travis Parker testified that his father took a leave of absence from work for three to four weeks after Nicole's death. (*Id.* at 3170.) He testified to the same effects on Chad as his father did. (*Id.*) He said "everything is a constant reminder for me and every day is a challenge to get through that day." (*Id.* at 3172.) He testified that he wanted to commit suicide for three days. (*Id.* at 3171.) He said he "was the one who played with Nicole" and "did everything with her," and he felt the greatest impact of the siblings other than Casey Parker. (*Id.*) He stated that Casey told him he wished he "could have done it over" and could have been outside with Nicole. (*Id.* at 3172.)

Chad Parker testified that the forty hours that Nicole was missing were the worst time he has experienced and changed his life dramatically. (*Id.* at 3175.) He described Nicole as different from any other eight-year-old he knew, because she was "the sweetest girl," who never had a bad time or a frown, but was always smiling and happy and made him happy to see her. (*Id.* at 3175-76.) He said Nicole had "the biggest imagination." (*Id.* at 3175.)

Casey Parker testified that he felt sad after Nicole died because he didn't have anyone to play with, and he had nightmares and trouble sleeping. (*Id.* at 3177-78.) He had been going to counseling, he said. (*Id.* at 3178.)

Lori Parker testified that the time Nicole was missing "lasted an eternity;" she couldn't sleep or eat, and "[t]he only thing [she] could think of she [Nicole] was alone and she was hurt somewhere by herself in the cold." (*Id.* at 3179.) She testified that Nicole was very pretty, witty, fun, friendly and happy, loving, physically affectionate, and trusting. (*Id.* at 3180.) She described her daily thoughts of Nicole and the future events she would miss with her only daughter, and her regret that her last images of Nicole were of the violence of her death. (*Id.* at 3181, 3187-88.) She said she thinks she is hardened to other people's problems now, and she has been in counseling. (*Id.* at 3181-82.) She described Travis's thoughts of suicide and his change in college plans. (*Id.* at 3182-83.) She discussed Chad's aversion to therapy and his desire to "wake up one morning and [find] everything is going to be fine," his decline in school performance, and his substance use since Nicole's death. (*Id.* at 3182-83.) She described Casey's fear at night that someone would kill him or harm her, and she said Casey acts out at school. (*Id.* at 3184.) Lori Parker testified that Nicole's death shook the confidence of her fiancé, a criminal defense attorney, "to be able to defend." (*Id.* at 3185.) She described impacts on Nicole's babysitter, cousin, and schoolmates. (*Id.* at 3185-87.) She said she had lost her faith in God. (*Id.* at 3187-88.)

With one minor exception, the family members did not comment on the Petitioner[7] or request any particular penalty outcome in their testimony. *Cf. Payne*,

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[7] Relaying a conversation she had with Casey Parker when he was afraid to sleep about three nights after Nicole was found, Lori Parker testified:

> Casey called me in his bedroom and I sat on his bed and he said mom, I am really afraid. [¶] I said what are you afraid of. He said I don't understand why this happened to Nicole. [¶] I said there are bad people in the world and that *a bad person did this to Nicole.* [¶]

(continued...)

501 U.S. at 830 n.2. The California Supreme Court was not objectively unreasonable in concluding that the repetitive references to Travis Parker's consideration of suicide, Chad Parker's possible use of drugs and alcohol and difficulty in school, and Casey Parker's nightmares were "brief" and were not "unduly repetitious or prejudicial." *Panah*, 35 Cal. 4th at 495. The California Supreme Court reasonably determined that the testimony portrayed the victim as a unique individual and described the specific harm caused by Petitioner, *see Payne*, 501 U.S. at 825, and was not unduly prejudicial. Accordingly, Claim 20 is DENIED.

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XXV. Claim 21: Penalty Phase Instructions

A. "If Proven" Instruction

First, Petitioner contends that the trial court's addition of the words "if proven" to his requested instruction on the consideration of mitigating evidence violates the Eight Amendment. (Pet. at 346-47.) The given instruction read, "[E]vidence which has been presented regarding the defendant's background, if proven, may be considered by you only as mitigating evidence." (RT 4192.)

1. Decision on Direct Appeal

The California Supreme Court denied Petitioner's claim on direct appeal, holding:

> The trial court justified the addition of the phrase '*if proven,*' because it made the instruction less argumentative. Defendant contends that the phrase erroneously implied the jury was required to find the

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[7] (...continued)

> And he thought about that for a minute and then he said, but, mommy, what if there is another bad person in the world that is going to come and get me and kill me. Then you would be all alone.

(RT 3184 (emphasis added).)

> mitigating circumstance had to be proven beyond a reasonable doubt. We disagree. Nothing in the phrase itself implies that the reasonable doubt standard, or any particular standard applies. Defendant's assertion that, because the reasonable doubt standard was used in the guilt phase, the jury likely applied it in the penalty phase is speculative. Furthermore, the jury was instructed, at defendant's request, that '[a] juror may find that a mitigating circumstance exists if there is *any* evidence to support it *no matter how weak the evidence may be*.' (Emphasis added.) We conclude, therefore, that the jury was not misled by the trial court's modification of defendant's instruction. . . .

Panah, 35 Cal. 4th at 497-98 (quoting RT 4191-92).

2. Analysis

Petitioner's argument lacks support in clearly established federal law. In *Kansas v. Marsh*, 548 U.S. 163 (2006), the United States Supreme Court approved

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of a Kansas death penalty scheme that provided:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [the death penalty statute] . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances *which are found to exist*, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law.

Marsh, 548 U.S. at 166 (internal quotation omitted; emphasis added; ellipsis in original). The Court held the case to be directly controlled by its decision in *Walton v. Arizona*, 497 U.S. 639, 650 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), that:

> '[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every

> element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.'

Marsh, 548 U.S. at 170-71 (quoting *Walton*, 497 U.S. at 650); *see also Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990) (approving of petitioner's capital sentence under Pennsylvania death penalty statute where "the jury was specifically instructed that it could consider any mitigating circumstances which petitioner had proved by a preponderance of the evidence").

The challenged instruction "may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole . . . ." *McGuire*, 502 U.S. at 72. Here, Petitioner's jury was instructed that it "must disregard any jury instruction given to [it] in the guilt or innocence phase of the trial which conflicts with th[e] principle" that it "shall consider, take into account and be guided by the [stated] factors, if applicable[.]" (RT 4189, 4191.) It was instructed immediately thereafter that "[a] juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence may be." (*Id.* at 4191-92.) Thus, to the extent Petitioner's jury understood there to be a burden of proof for finding any mitigating evidence to consider, that burden of proof was "any evidence to support it no matter how weak the evidence may be." (*Id.* at 4191-92.) In light of the Supreme Court's holdings that a defendant may be called upon to prove mitigating circumstances, *Marsh*, 548 U.S. at 170-73; *Walton*, 497 U.S. at 650, even by a preponderance of the evidence, *Blystone*, 494 U.S. at 306 n.4, Petitioner's claim that the given instruction violated his Eighth Amendment rights lacks support in clearly established federal law.

B. Instructions on Sentencing Determination

Second, Petitioner alleges that the trial court: (a) failed to instruct the jury that it could not return a death sentence unless the aggravating circumstances

outweighed the mitigating circumstances; (b) created ambiguity in the deliberative process by using the term "so substantial;" and (c) failed to instruct the jury that "it must find not just that death was 'warranted,' but rather that death was appropriate." (Pet. at 348 (quoting RT 4195).)

The jury was instructed in relevant part:

> A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them.
>
> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.

(RT 4194-95.)

The California Supreme Court's determination that the jury instructions provided adequate guidance in the jury's exercise of its discretion, and were not rendered unconstitutionally vague by the "so substantial" language, was not objectively unreasonable. *See Panah*, 35 Cal. 4th at 498. In California, "[s]pecial

circumstances . . . make a criminal defendant eligible for the death penalty [and] operate as 'the functional equivalent of an element of a greater offense.'" *Webster v. Woodford*, 369 F.3d 1062, 1068 (9th Cir. 2004) (quoting *Ring*, 536 U.S. 584, 609 (2002)). Thus, a special circumstance finding must be made by the jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602; *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2002). Once the jury has found a special circumstance to be true, unanimously and beyond a reasonable doubt, death is an authorized punishment. *See Belmontes v. Ayers*, 529 F.3d 834, 876 (9th Cir. 2008) ("[T]he maximum sentence authorized by the jury's guilt phase verdict was death"), *reversed on other grounds sub nom. Wong v. Belmontes*, 558 U.S. 15 (2009). "'A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision'" that follows. *Williams v. Calderon*, 52 F.3d 1465, 1482 (9th Cir. 1995) (quoting *Tuilaepa v. California*, 512 U.S. 967, 979 (1994)). An instruction to the jury, for example, that it is "not required to weigh aggravating and mitigating factors, and [is] not under obligation to find for life or death based upon which factors predominated . . . violates no right" of the petitioner. *Id.* Thus, the state court reasonably decided that the instruction to Petitioner's jury to assign whatever value it deemed appropriate to each factor and to determine whether the aggravating circumstances, compared to the mitigating circumstances, were sufficiently substantial to return a sentence of death did not violate his constitutional rights.

Moreover, Petitioner's contention that the jury was not instructed to determine that death was "appropriate," rather than simply "warranted," is not fairly supported by the record. Petitioner judges the instruction in artificial isolation to read that the jury must have been persuaded that the aggravating circumstances in comparison with the mitigating circumstances "warrant[ed]" death, to the exclusion of the instruction that "[i]n weighing the various circumstances [the jury] determine[s] . . . which penalty is justified and appropriate

. . . ." (RT 4195; *see also id.* at 4194 (instructing the jury on "determining the appropriateness of the death penalty").) The California Supreme Court's determination that the jury was adequately instructed is not objectively unreasonable. *Cf. Williams*, 52 F.3d at 1485 (holding that the "failure of the [California death penalty] statute to require a specific finding that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional").

C. Lack of Instruction on Burden of Proof

Finally, Petitioner contends that because the trial court "fail[ed] to instruct on any penalty phase burden of proof," the jury "was provided insufficient guidance on how to determine disputed factual issues raised by the penalty phase evidence." (Pet. at 350.)

In support of his argument, Petitioner cites only the proposition in *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) that "capital punishment must be 'imposed fairly, and with reasonable consistency, or not at all.'" (Pet. at 350; Petr.'s Br. at 253.) *Eddings* does not discuss the burden of proof at the penalty phase of trial, however; rather, *Eddings* specifies that the sentencer "may determine the weight to be given relevant mitigating evidence." 455 U.S. at 114-15. As discussed below (*see infra* pp. 210-12), the California Supreme Court's conclusion that Petitioner's constitutional rights were not violated by the lack of instruction on a penalty phase burden of proof is not objectively unreasonable. *See Panah*, 35 Cal. 4th at 498.

Accordingly, Claim 21 is DENIED.

XXVI. Claim 22: Absence During Jury Selection

A. Allegations

In Claim 22, Petitioner alleges that he was excluded from a portion of the jury selection proceedings. (Pet. at 350-58.) Petitioner alleges that "after conducting *voir dire* of the prospective jurors, the [t]rial [c]ourt conducted an in-chambers hearing, out of the presence of the prospective jurors and Petitioner,"

during which counsel were invited to exercise challenges for cause and peremptory challenges. (*Id.* at 351 (citing RT 1481-82).) Defense counsel asked:

> Mr. Sheahen: Should Mr. Panah be here?
>
> The Court: No.
>
> Mr. Sheahen: I don't know.
>
> The Court: He doesn't need to be here for this.

(RT 1482.) Petitioner states that "[a]t this time, both defense counsel and the prosecution exercised three of their peremptory challenges." (Pet. at 352 (citing RT 1482-84).)

Petitioner alleges that during the exercise of challenges that followed,[8] the court made "crucial rulings on biased jurors" L.W. and G.B. (*Id.* at 352-55.) Petitioner explains that the court denied his challenge for cause to remove prospective juror L.W., stating that she was a better candidate for a peremptory challenge. (*Id.* at 353.) Trial counsel then exercised his first peremptory challenge to remove L.W. (*Id.*) Petitioner states that the prosecution offered to stipulate to remove prospective juror G.B., and "defense counsel failed to stipulate and the court allowed G.B. to remain on the panel. Unfortunately, Petitioner was not present for this important proceeding and thus, had no opportunity to express his desire that G.B. be excused. Ultimately, the prosecution exercised a peremptory challenge of her." (*Id.* at 354-55 (internal citations omitted).) Petitioner contends that his absence was not harmless, because it "precluded him from giving input as to those potential jurors peremptorily excused" and he "could not review choices made by the prosecutor and acceded to by his attorneys." (*Id.* at 358.)

The California Supreme Court denied Petitioner's claim on direct appeal,

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[8] The excusal of prospective jurors L.W. and G.B. took place before the period of absence Petitioner claims. (*See* RT 1335, 1377.) Nevertheless, because Petitioner raises no other allegations of prejudice regarding any jurors to support his claim, the Court considers the circumstances of L.W. and G.B.'s excusals *arguendo*.

holding that Petitioner failed to show prejudice. *Panah*, 35 Cal. 4th at 443. As to Petitioner's claim that he could not review the prosecutor's choices, the California Supreme Court found the claim "unconvincing" because "[t]he only ground on which the defense could have objected to the prosecutor's exercise of peremptory challenges would have been for the discriminatory use of such challenges under *Wheeler/Batson* but defendant fails to show that any such issue arose during the in camera session." *Id.* Petitioner does not bring any allegations of the kind in support of this claim. Petitioner's independent *Batson* claim is discussed below. (*See infra* pp. 182-93.)

B. Analysis

The Supreme Court has "affirm[ed] *voir dire* as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be

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present . . . ." *Gomez v. United States*, 490 U.S. 858 (1989). However:

> the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror . . . . [A] defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. . . . [T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record.

United States v. Gagnon, 470 U.S. 522, 526-27 (1985) (holding that defendants' rights under the Fifth Amendment Due Process Clause were not violated by *in*

camera discussion with a juror) (internal quotations omitted). The "privilege of presence is not guaranteed when presence would be useless, or the benefit but a shadow . . . ." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (holding that exclusion from witness competency hearing, at which defense counsel was present, did not violate defendant's due process rights) (internal quotation omitted).

"The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error. To the contrary, in *Rushen v. Spain*, 464 U.S. 114, 117 (1983), the Court determined that the fact that the defendant was denied the right to be present during an *ex parte* communication between the judge and a juror was a trial error that was subject to harmless error analysis." *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005) (internal citation edited); *see also United States v. Fontenot*, 14 F.3d 1364, 1370 (9th Cir. 1994) (finding no prejudicial error where defendant had an opportunity to discuss with counsel his opinions about jurors before peremptory challenges were exercised in his absence); *Sanchez v. Duncan*, 282 F.3d 78, 82-83 (2d Cir. 2002) (holding that any error in habeas petitioner's absence from voir dire bench conferences was not structural error and was harmless).

"[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* . . . ." *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (internal citations omitted). "Under that standard, an error is harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 116 (quoting *Brecht*, 507 U.S. at 631).

Here, Petitioner acknowledges that the prospective jurors at issue during Petitioner's absence from portions of the jury selection proceedings did not serve on the jury. *See Sanchez*, 282 F.3d at 82 (emphasizing, in finding any error to be harmless, that "of the nine prospective jurors who attended bench conferences [in petitioner's absence], *none* actually served on the jury" (emphasis in original)).

Petitioner's counsel challenged juror L.W. for cause, and when that challenge was denied, he exercised a peremptory challenge. The prosecution offered to stipulate to the removal of Juror G.B., and when defense counsel declined to stipulate, it was the prosecution that used one of its peremptory challenges to remove G.B. Petitioner was not prejudiced by the prosecution's use of a peremptory challenge instead of his own; to the contrary, that outcome was, if anything, to Petitioner's benefit. The California Supreme Court's conclusion that Petitioner's absence from those portions of the jury selection proceedings was harmless is, therefore, reasonable. Claim 22 is DENIED.

XXVII. Claim 23: Juror Misconduct

In Claim 23, Petitioner alleges juror misconduct in (1) making racist remarks during deliberations; (2) consulting the Bible and non-jurors during deliberations; (3) receiving "spill[] over" public opinion about Petitioner through media coverage; and (4) being improperly influenced by the victim's mother. (Pet. at 358-69.)

A. Racist Remarks

1. Allegations

Petitioner presents two declarations, one from a juror and one from a defense investigator's interview with a juror, regarding discussions about Iranians. The juror declared that at one point in the deliberations:

> there was a brief discussion about how if Hooman had done this in Iran, it still would have been a crime, but he would have had his head chopped off. There would not have been all this fuss. Also, there was some discussion in deliberations about how women are less valued in Iran. [¶] These discussions were brief . . . .

(Pet. Ex. 37 at 1-2.) The defense investigator declared that she interviewed a juror who told her that she felt "'uneasy' about the presence of the Iranian spectators. She stated that all one hears about are 'the bombings.' She added that Iranians are

a very high strung and emotional people. However, she stated that she did not allow her 'uneasy' feeling to affect her ability to deliberate." (Pet. Ex. 36 ¶ 10.)

2. Analysis

Federal Rule of Evidence 606(b) provides:

> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> > (A) extraneous prejudicial information was improperly brought to the jury's attention;
> >
> > (B) an outside influence was improperly brought to bear on any juror; or
> >
> > (C) a mistake was made in entering the verdict on the verdict form.

(Fed. R. Evid. 606(b).) The Ninth Circuit has "not decided, as some courts have, whether Rule 606(b) prevents [a court] from considering evidence that a juror's racial bias was expressed during deliberations." *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013).

In *Hayat*, the Ninth Circuit considered a juror's statement during deliberations that "they all look alike when in a costume," referring to Pakistanis wearing clothing common among Pakistanis and Muslims. *Id.* at 886-87. Petitioner argued that the comment evidenced racial and religious bias, particularly in light of the juror's later remarks in a news interview about the government's use of so-called 'preventative criminal prosecutions' of potential terrorists:

> I don't want to see the government lose its case. . . . Can we, on the basis of what we know, put this kid on the

> street? On the basis of what we know of how people of his background have acted in the past? The answer is no. . . . Not this particular case, I'm saying, but future cases. . . . Too many lives are changed by terrorism . . . .

Id. at 887 (internal quotations omitted). The juror testified, after the interview was published, that he did not have those thoughts before jury deliberations began. *Id.* at 888. Upholding the district court's determination that the juror was not motivated by an impermissible racial, ethnic, or religious bias, the Ninth Circuit emphasized that "the issue was [the juror's] impartiality as a juror at the time of trial and not his post-trial attitudes" and the context of his statement during deliberations provided a non-biased explanation. *Id.* at 887, 889, 891. The court noted that while the statement "could be interpreted as reflecting a tendency to group people together on the basis of their shared cultural or physical characteristics," in context, the statement was an evaluation of the credibility of a witness's testimony identifying a particular person. *Id.* at 887.

Here, the jurors' brief discussions of the treatment of such a crime in Iran and the status of women in Iranian culture may have been legitimately related to their consideration of evidence presented at trial about the abuse Petitioner's mother faced from the Iranian government. (*See* RT 3375-76 ("[The Iranian] government . . . stop people going to the university, and they force everything. And I was fighting on behalf of women over there and they put me in the jail six years before I lived – I left my country. And they fire me from my job . . . and they don't let me to work any other place. And also I'm not allowed to leave the country"), 3635.) Similarly, the juror's statement made to the investigator, post-trial, that "all one hears about are the bombings" and that Iranians are very high strung and emotional may have been reflections upon the trial testimony regarding the bombings Petitioner's family witnessed and the tension, fear, and sadness they experienced from the war. (*See* RT 3397-98, 3580-82, 3601, 3635, 3649.) The

only statement the juror made about her feelings during deliberations, that she felt uneasy about the presence of the Iranian spectators, she confirmed to have not affected her deliberations.

The California Supreme Court's rejection of Petitioner's claim was not, therefore, an unreasonable application of federal law.

B. Consultation of the Bible and Non-Jurors

1. Allegations

Next, Petitioner alleges that during penalty phase deliberations, a juror consulted her husband, her minister, and the Bible. Petitioner presents evidence that the juror asked her husband, "What am I going to do?" to which he responded that she had to do what was right, should consult the Bible, and should ask herself what God would want. (Pet. at 363 (citing Pet. Ex. 36).) Petitioner presents further evidence that the juror told her minister she was serving as a juror on a murder case and needed biblical references or other spiritual writings on the legal system, which her minister gave her and she read. (*Id.*) Petitioner presents evidence that the juror reached her decision when she found a biblical passage that read, "He who sheds innocent blood, his blood too shall be shed." (*Id.* (internal quotation omitted).)

2. Analysis

The Ninth Circuit rejected a petitioner's claim based upon a juror's consultation of ostensibly the same biblical passage in *Crittenden v. Ayers*, 624 F.3d 943, 972-74 (9th Cir. 2010). There, over the course of a weekend during penalty phase deliberations, the juror studied the Bible and found the passage, "[w]ho so sheddeth man's blood by man shall his blood be shed." *Id.* at 973. A second juror testified that the juror mentioned something from the Bible during deliberations. *Id.* The Ninth Circuit held:

> We need not decide here whether clearly established Supreme Court law required the treatment of the Bible as

> extrinsic evidence, or whether reading and sharing biblical passages constitutes juror misconduct. Even if [the juror's] consulting of the Bible and sharing of the Genesis 9:6 passage with other jurors violated [petitioner's] Sixth Amendment right to a jury verdict based upon the evidence developed at the trial, he has not established prejudice. The alleged introduction of extrinsic evidence into deliberations did not have a substantial and injurious effect or influence in determining the jury's verdict of death.
>
> [The juror's] private study of the Bible was not prejudicial. Although we agree that [petitioner] was entitled to be tried by 12 . . . impartial and unprejudiced jurors, the bare showing that a juror read a religious text outside the jury room does not establish prejudice. Such a rule has no support in precedent and is, at the very least, in tension with the Supreme Court's teaching that a sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence.
>
> Our opinion in *Fields* [*v. Brown*, 503 F.3d 755 (9th Cir. 2007)], in which we also considered a claim of Bible-related juror misconduct, forecloses [petitioner's] claim that [the juror's] mention of Genesis 9:6 prejudiced him. In *Fields*, the jury's discussion of biblical passages was far more extensive, but we nonetheless concluded, reviewing the matter de novo, that there was no prejudice. The foreperson there checked the Bible and made notes 'for' and 'against' imposition of the death penalty which he brought to the deliberations the next day. *Fields*, 503 F.3d at 777. His notes were passed around and the religious material discussed by some jurors. *Id.* at 777-78. By contrast, nothing but the briefest mention of the Bible verse took place during penalty phase deliberations in Crittenden's trial. As the district court found after ordering an evidentiary hearing, the only juror who recalled any mention of the biblical passage recalled that there was no discussion of it except for a possible statement regarding the verse's irrelevance

> to the case. Moreover, the passage itself was innocuous compared to the contents of the foreperson's note in *Fields*, which quoted four passages besides Genesis 9:6, including the 'eye for eye' maxim and Romans 13:1-5, *Fields*, 503 F.3d at 777 n.15, which has been understood as cloaking the 'State with God's authority,' *id.* at 798-99 (Berzon, J., dissenting).

Crittenden, 624 F.3d at 973-74 (internal quotations, alterations, citations, and footnote omitted).

Here, too, Petitioner presents no evidence that notes from the Bible were brought into the jury room or that any extended discussion of the Bible took place. (*See* Pet. at 362 (citing juror declarations stating only that the juror "talked a lot about God and the Bible" and said she needed to "pray on this").) The iteration of the passage here was even more innocuous than that in *Crittenden*, for in *Crittenden*, the passage seems to call specifically for "man" to exact justice, while the passage here seems only to forecast that the outcome "shall" happen. The juror's consultation of her husband and minister, who did no more than direct her to reference her spirituality and the Bible, did not add appreciably to any extraneous influence. Following *Crittenden* and *Fields*, therefore, the Court finds no unreasonable application of federal law in the California Supreme Court's rejection of Petitioner's claim.

C. Media Coverage

Petitioner identifies two newspaper articles and a television interview with the victim's mother that were published and aired during his trial. He asserts that the interview "infected the overall public opinion of Petitioner that spilled over to the jurors . . . . [I]t would be wishful thinking to assume that all of the jurors heeded the judge's warning not to watch television during the trial." (Pet. at 364 (internal quotation omitted).) Petitioner makes no specific allegations that any juror saw the interview or read the newspaper articles.

The California Supreme Court may have reasonably concluded that Petitioner's allegations are purely speculative and rejected his claim on that basis. *See Phillips*, 267 F.3d at 986-87 (holding petitioner's *Brady* claims were "without merit" because they were "mere suppositions"); *see also West v. Ryan*, 608 F.3d 477, 490 n.12 (9th Cir. 2010) (holding that evidence that was "speculative in nature" did not entitle petitioner to an evidentiary hearing); *Gonzalez v. Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008) (holding that claims "grounded in speculation" did not merit an evidentiary hearing).

D. Influence by Victim's Mother

Finally, Petitioner alleges that "[t]he jurors also allowed themselves to be improperly influenced by the Parker family. Lori Parker was, on occasion,

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witnessed in the vicinity of the jurors." (Pet. at 366.) Petitioner asserts that this "close contact" with the victim's mother was an improper extrinsic influence. (*Id.*)

Petitioner again makes no specific allegations of improper interactions between the victim's mother and the jurors, and the California Supreme Court may have reasonably rejected his claim as speculative. *See Phillips*, 267 F.3d at 986-87; *see also West*, 608 F.3d at 490 n.12; *Gonzalez*, 515 F.3d at 1014. The mere proximity of the victim's mother to the jurors does not deprive Petitioner of a fair trial under clearly established federal law. *See Carey v. Musladin*, 549 U.S. 70, 72 (2006) (finding no violation of defendant's fair trial rights under clearly established federal law where several members of the victim's family's sat in the first row of the spectators' gallery and wore buttons with a photograph of the victim).

Claim 23 is, therefore, DENIED.

XXVIII. Claims 24 and 1(5): Bias of Juror W.D.

A. Allegations and Factual Background

In Claim 24, Petitioner alleges that the service of Juror W.D. denied him a

trial by an impartial jury and that defense counsel was ineffective for failing to remove W.D. (Pet. at 369-75.) Petitioner explains that:

> At voir dire, when asked about exposure to media reports of the case, W.D. stated: 'I live in the same area and the same parish where this young lady, the victim, was going to school.' (RT 1472-73.) He said he saw a 'newspaper at the time of the occurrence' but agreed that he could set that aside and decide the case based on what he heard in court. (*Id.* at 1473.) The court asked, 'Mr. [W.D.], is there anything else that we ought to know about you that touches upon your ability to give both sides a fair trial in this case?' (*Id.* at 1476.) He replied: 'I wrote something in the questionnaire that my children went to the same school where this young lady, the victim, attended." (*Id.*) He added: 'I heard some discussion [then] in the parish about it, because of that. And so I think there was some kind of a prayer meeting or something at the church.' (*Id.*) In his questionnaire, W.D. wrote that he 'was aware that her disappearance was the subject of much concern, prayer meetings, etc. in the parish . . . ." (Pet. Ex. 106 at 590.)
>
> W.D. told the court that despite all this knowledge, he [] didn't feel 'a little too close to this case.' (RT 1355 [quoting question from trial court to which W.D. responded].) He said it was a 'terrible crime' but that he thought he could look at the evidence and decide if there was sufficient proof. (*Id.* at 1476-77.) . . .
>
> In a post-conviction declaration, W.D. states: 'I belonged to Our Lady of Grace church where the victim attended school which I told the court when I was selected. I knew there had been a prayer service for her, but I did not attend the service.' (Pet. Ex. 30 at 169.)
>
> In another post-conviction declaration, a person who watched most of the trial states: 'At least two or three times during the trial while I was present in the courtroom, a young Catholic priest with full priesthood attire appeared in the audience and sat next to [Nicole

> Parker's] family members. Later on I discovered that he was the priest from the church of [Nicole Parker] and her family.' (Pet. Ex. 35 at 177.) According to this observer, '[i]t was obvious from the reaction of jurors, that the priest's appearance while wearing full priesthood attire had an adverse effect on the jurors.' (*Id*.) Petitioner's mother, Ms. Monfared, corroborates this report and explains that she 'saw the juror [who went to the same church as the victim], the priest and the Parker family make eye contact and nod to each other at different times in the courtroom.' (Pet. Ex. 3 at 2.) [¶] The same priest presided over Nicole's memorial service at their church. (Pet. Ex. 162 at 1-3.)

(Pet. at 370-72 (internal quotations edited to match originals; internal citations edited; footnote omitted).)

Petitioner adds that in the context of his motion to change venue or transfer the case, defense counsel stated that he did not:

> 'have the confidence that the Court does in the information that we are getting from the jurors. [¶] People seem to have an awful lot of information about the photographs, the headlines, and so on for people that didn't look at the article. . . . [W]ere we in another court we would have a greater chance of having jurors not so exposed and so presumptively tainted, and secondly, I would note that even with the jury that we have, we have people on the jury who are aware of the case, and needlessly so.
>
> Mr. [W.D.], for example, is a member – who is a member of our jury – is a member of the same church or whatever his answers are on the record, and this kind of thing could have been avoided had we been in another court. [¶] I chose not to exercise a peremptory on Mr. [W.D.] for other reasons. [¶] But we really don't need people as familiar with this case as these jurors are . . . .' (RT 1541-42.)

(Pet. at 371 (internal quotation edited to match original; internal citation edited).)

Petitioner asserts that:

> an average person in W.D.'s position – a member of the same church as the victim's family; who heard some discussion of the case or the victim at the parish; was aware of a church service held for the victim; had read media reports of the case; and whose children had attended the same school as the victim – would be biased against Petitioner.

(*Id.* at 373 (citing *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000)).) Petitioner argues that a juror may be disqualified for cause upon a showing of implied bias, for which prejudice is "presumed 'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.'" *Gonzalez*, 214 F.3d at 1112 (quoting *Tinsley v. Borg*, 895 F. 2d 520, 527 (9th Cir. 1990)); (*see* Pet. at 372-73). Petitioner does not allege that Juror W.D. held actual bias against Petitioner, was dishonest on voir dire, or knew Nicole Parker or her family personally. (*Cf.* Pet. Ex. 106 at 590 (declaration by W.D. that "I didn't have any personal involvement in these matters; and I don't know the families personally").)

Finally, Petitioner contends that counsel was ineffective for failing to move to strike Juror W.D. for cause and for failing to exercise a peremptory challenge against him, "despite having available peremptory challenges to do so." (Pet. at 374.) Petitioner also presents this allegation as Claim 1(5). (*Id.* at 85-86.)

B. Analysis

Under § 2254(d)(1), Petitioner is entitled to federal habeas relief only if the state court's denial of the claim was contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Ninth Circuit noted in *Fields* that "the

Supreme Court has not explicitly adopted (or rejected) the doctrine of implied bias . . . ." 503 F.3d at 768. The court observed that at most, the concurring opinions in *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556-58 (1984) "seem to embrace" the possibility of implying bias "when, for example, there is 'a revelation [that the juror is an actual employee of the prosecuting agency,] that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.'" *Fields*, 503 F.3d at 768, 768 n.6 (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)); *see also id.* at 775 n.14 (holding that no new rule of constitutional law is "implicated by the doctrine of implied bias *of the sort noted by Justice O'Connor's concurrence in Phillips*"(emphasis added)); *Sanders v. Norris*, 529 F.3d 787, 793-94 (8th Cir. 2008) (holding that even if the petitioner may establish implied bias under AEDPA, its scope is limited to "the examples that Justice O'Connor listed").

Assuming, *arguendo*, that Petitioner could be entitled to relief under AEDPA based upon a juror's implied bias, Petitioner has not demonstrated bias "of the sort noted by Justice O'Connor's concurrence in *Phillips*." *Fields*, 503 F.3d at 775 n.14. Juror W.D.'s connection to the victim through church and through the school attendance of children does not rise to the level of that of "a close relative" of one of the participants in the trial or the criminal transaction. *Phillips*, 455 U.S. at 222. As stated above, Petitioner does not contend that Juror W.D. even knew the victim or her family personally.

Moreover, because the California Supreme Court may have reasonably concluded that Juror W.D. was not biased against Petitioner, its conclusion that Petitioner failed to show prejudice from any deficient performance by counsel in failing to remove Juror W.D. is likewise reasonable. *See Fields*, 529 F.3d at 794 (rejecting petitioner's ineffective assistance of counsel claim on that basis).

Claims 24 and 1(5) are, therefore, DENIED.

XXIX. Claim 25: Denial of Motion for New Counsel

In Claim 25, Petitioner alleges that his constitutional rights were violated by the trial court's failure to grant his motion for new counsel based on a conflict of interest. (Pet. at 375-89.) He alleges that he complained of trial counsel's failure to investigate and develop available defenses on four separate occasions. (*Id.* at 376 (citing RT 998-1045 (Nov. 21, 1994), 1452-62 (Dec. 5, 1994), 1648-54 (Dec. 6, 1994), 2099-3109 (Jan. 3, 1995)).) Petitioner contends that he was "rebuffed" by the trial judge at a hearing held on each occasion. (*Id.*) He alleges, specifically, that as a result of counsel's failure to investigate, "[n]o investigator was ever secured until after the beginning of the guilt phase," and "forensic experts were not retained to analyze and advise the defense in various fields

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relating to DNA, serology, and pathology" to his prejudice at both phases of trial. (*Id.*)

A. Legal Standard

The Ninth Circuit considered a similar claim in *Stenson v. Lambert*, 504 F.3d 873, 885-88 (9th Cir. 2007). There, petitioner alleged that his counsel refused to pursue a defense that the victim's wife committed the murder for monetary gain. Petitioner argued that counsel's refusal "amounted to a conflict of interest, an irreconcilable conflict, and a constructive denial of counsel because [counsel] had a different trial objective than [defendant], that is, he did not want him to 'win' the trial; he merely wanted to avoid the death penalty." *Id.* at 885. The Ninth Circuit held that the "disagreement with [counsel] is better characterized as one over trial strategy, and . . . [w]e can find no clearly established Supreme Court precedent holding that this kind of disagreement amounts to an actual conflict of interest." *Id.* at 886; *see also Plumlee v. Masto*, 512 F.3d 1204, 1210-11 (9th Cir. 2008) (en banc) (holding that clearly established federal law on conflicts between counsel and defendants is limited to active representation of conflicting interests and failure

to 'function[] in the active role of an advocate,' and petitioner showed no such violation where relationship was dysfunctional due to petitioner's subjective distrust of the public defender's office (quoting *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967))); *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000) (holding that where the conflict between the defendant and counsel "arose over decisions that are committed to the judgment of the attorney and not the client," no Sixth Amendment violation is shown; "'a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval'" (quoting *Brookhart v. Janis*, 384 U.S. 1, 8 (1966))).

The court went on to hold in *Stenson* that the state court did not misapply federal law in finding no irreconcilable conflict. The court explained that an unconstitutional irreconcilable conflict occurs only where there is a "complete breakdown in communication . . . ." *Id.*; *see also Schell*, 218 F.3d at 1026 (providing that the court must consider whether the conflict was "so great that it resulted in a total lack of communication" or a comparably significant impediment). The court found none, emphasizing that "[d]isagreements over strategical or tactical decisions do not rise to [the] level of a complete breakdown in communication." *Stenson*, 504 F.3d at 886; *see also Plumlee*, 512 F.3d at 1210-11 ("[T]here is no Sixth Amendment right to 'a meaningful relationship between an accused and his counsel'" (quoting *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983))). The Ninth Circuit held that the state court properly considered the trial court's numerous ex parte hearings "vett[ing] [counsel's] reasons for adopting the trial strategy" and competence and examining the flow of communication between counsel and defendant. *Stenson*, 504 F.3d at 887.

B. Analysis

1. Reasonableness of State Court Decision under 28 U.S.C. § 2254(d)(1)

a. November 21, 1994 Hearing

At the November 21, 1994 hearing, Petitioner introduced a letter into the record, which he also read, listing fifteen complaints against counsel. (*See* CT 784-87, RT 1010-15.) Petitioner stated that his counsel "has neglected to pursue certain matters that I know are important in aiding my defense. [¶] This is nothing personal against my counsel, but, I am being forced into a trial that I am not adequately prepared for." (CT 784.) Petitioner listed:

> 1.) D.N.A. expert(s)
> 2.) Investigator
> 3.) Forensic criminalist(s)
> 4.) Writs on Judge's rulings 'writing writ(s)'
> 5.) A separate suppression motion specifically for any items or evidence(s) not listed in the affidavit search warrant.
> 6.) Interviewing certain witness(es)
> 7.) Mr. Panah's complaint of counsel Mr. Shafinia inexperience and not being a criminal attorney and defenately [sic] not qualifying for first degree death penalty cases. 'Note*,' I feel that I do need two criminal attorneys, one for guilt, and one for penalty if the need arises.
> 8.) There for [sic] my request for a second outstanding criminal attorney with appropriate experience and experti[se] in death penalty cases.
> 9.) My counsel, Mr. Shafina's inadequate translation. For example his incomplete translation of 'Ex[h]ibit C the Iranian magazine's article' relating to my case that important parts of it was [sic] missing, and misinterpreted by him on 11-17-94.
> 10.) Therefore my request for a Farsi translat[o]r to interp[r]et[], and articulate the law, and matters concerning to my case.
> 11.) The full access to all my paper work and whole case file.
> 12.) The request from prosecution and motion to return the original of every and any items seized from property car, or apartment that has not relate [sic] or value to this case and of those items that prosecution has no use for and has decided not to use against me, such as: pictures, audio tapes, videotapes, books, notebooks, posters, video camera, any clothing.
> 13.) My complaints about this harassment of a jailhouse informant have gone unnoticed, plus my complaints about this vicious criminal with a rap sheet as long as my sleeves, which I knew was an informant and he kept threatening me with my life constantly and tried to

> involve my mother with his lies and tricks, went unnoticed, as a matter of fact I was back and forth in contact with both my counsels Mr. Shafinia and Mr. Sheahan, [sic] and asking them to contact a judge or police or investigator to do something about this guy and his friends who were Mr. Peter Berman and detective Joel Price. I was denied of any assistance for both my counsel's [sic] to get an investigator for investigating my matter to the police, and judge.
> 14.) Request for a discovery hearing.
> 15.) Request for a specific hearing. '*Franks v. Delaware*' I'm respectfully bringing these issues to your attention, I feel strongly about these issues, and need the court to acknowledge this problem before proceeding any further. *P. v. Ebert* (1988) 199 Cal. App. 3d 40, 44' . . . Counsel whether advisory or otherwise is constitutionally required to act competently.

(CT 784-86 (ellipsis in original).)

After he read the letter, the court asked Petitioner if he "want[ed] the paperwork in the record, also," and Petitioner responded that he "would have to ask for advice from my counsel . . . . If my counsel says it's alright." (RT 1015-16.) Later in the hearing, Petitioner specified that he requested an attorney to be appointed to "help me defend my case, *and also be some kind of help to Mr. Sheahen.*" (RT 1030-31.) As he continued addressing the trial judge directly, Sheahen asked Petitioner to "[t]ell me what you want to tell him." (*Id.* at 1032.) Petitioner did so; "[c]ounsel and client confer[red]," and Petitioner did not proceed to address the judge directly. (*Id.*) Instead, counsel explained Petitioner's concerns on his behalf. (*Id.* at 1033-35.)

The court noted, in the context of Petitioner's competency to stand trial, that "[t]hroughout the proceedings I've been able to see the defendant assisting counsel, conversing with counsel." (*Id.* at 1039.) In addition, regarding trial counsel's advice to enter a plea of not guilty by reason of insanity, Petitioner told the court "it was a last minute advice I just got and I have to think about it. . . . I need time to go through it and to understand the whole thing truly with this plea hearing or whatever it is." (*Id.* at 1041.) The court permitted Petitioner more time to discuss

it with trial counsel. (*Id.*)

The record supports the California Supreme Court's findings that:

> In reply, Sheahen again said he had assessed the DNA question and determined that the downside of a defense examination was greater than the upside. (RT 1016.) He also stated that every important witness had been interviewed. (*Id.*) He said he was working on a petition for writ of mandate to review denial of a disqualification motion under Code of Civil Procedure section 170.1. (*Id.* at 1016-17.) He explained he had not moved to suppress certain items, including the victim's body, as defendant urged, because, as he had explained to defendant, there was no legitimate basis to suppress them. (*Id.* at 1017.) He pointed out that the defense had filed an exhaustive discovery motion and that [there] were no grounds for a hearing because the prosecution had complied with every request made by the defense. (*Id.* at 1018-19.) As to defendant's request for a *Franks* hearing (*Franks v. Delaware*, 438 U.S. 154 (1978) (evidence obtained pursuant to a search warrant based on an affidavit including false statements, or statements made in reckless disregard of the truth, must be suppressed)), Sheahen pointed out that such a hearing had been conducted a month earlier. (RT 1019.) Regarding the jailhouse informant to whom defendant referred, Sheahen said the district attorney had informed the defense that a cellmate of defendant's had been used to attempt to elicit incriminating statements from defendant about eliminating a witness. (*Id.* at 1019-20.) Their conversations had been taped and reviewed by Sheahen. (*Id.* at 1020.) He said nothing on them was admissible in the guilt phase and if the prosecution tried to use them at the penalty phase their probative value was minimal because defendant 'doesn't say much of anything on these tapes.' (*Id.* at 1012-22.)
>
> The trial court found that 'Mr. Sheahen has done a very, very thorough and comprehensive job in presenting the 1538.5 issues, the 402 issues, the change of venue

> motion, the challenge to the entire courthouse, including myself, as well as the renewed motion for change of venue or transfer of district.' (*Id.* at 1023.) It found Sheahen's decision not to call a DNA expert was a 'sound' tactical decision. (*Id.* at 1024.) When the trial court asked defendant if there were specific names of witnesses whom he believed counsel had not interviewed, defendant was unable to provide them. (*Id.* at 1025.) Sheahen stated if the case went to trial he would seek appointment of an investigator to interview any remaining witnesses. (*Id.*) Concluding there had been no irreconcilable breakdown of the attorney-client relationship, the trial court denied the motion. (*Id.* at 1032, 1036.)

Panah, 35 Cal. 4th at 429 (internal record citations added; internal case citations edited and omitted).

b. December 5, 1994-December 6, 1994 Hearing

On December 5, 1994, Petitioner requested a second hearing, at which he told the court that "[a]s Mr. Sheahen himself has stated many times, that only 6 to 10 percent of attorney and client communications done by him, and that the rest, 90 to 94 percent attorney and client communications done by Mr. Shafi-Nia." (RT 1453.) Petitioner alleged that Sheahen had stated many times on the record that without Shafi-Nia's presence in court, "it is hard for him to work on several things at the same time, such as presenting procedures, arguments, discussing and explaining matters, request for problems with his client . . . . Mr. Panah believes that all this load all of a sudden being dropped on Mr. Sheahen will have negative effects" on his defense. (*Id.* at 1453-54.) Petitioner faulted counsel's failure to investigate and present an "alibi defense," namely, "a professor of my college [who] knows about my suicide," and to interview prosecution witnesses Ronald Hicks, Victoria Eckstone, Adele Bowen, and Bruce Cousins, among others not named. (*Id.* at 1454-56.) Petitioner asserted that Sheahen told him "he has no

hope whatsoever for any kind of tactics or anything. [¶] That I would get found guilty regardless . . . . He has no tactics whatsoever. He has not talked to me himself. And many of these things, I don't have the chance to talk to him." (*Id.* at 1457-58.) The trial court interrupted and stated:

> Mr. Sheahen has visited you in the lockup here countless times.
>
> The Defendant: Right.
>
> The Court: I know he's arranged for meetings down at the county jail. [¶] You're not going to tell me or try and make the record reflect that Mr. Sheahen has not talked to you.
>
> The Defendant: Regarding me taking a deal. That's the only thing he's been talking, to take a deal. . . . I would like to talk to him regarding my defense, not taking a deal.

(RT 1458.)

The record supports the California Supreme Court's findings that:

> In response, Sheahen agreed with defendant that a substantial amount of communication with him had been done through Shafi-Nia, but said he also had met repeatedly with defendant. (RT 1459 ("I have been with him literally every weekday, over the Thanksgiving holiday, I was at the jail on Friday. I talked to him yesterday by phone. I saw him this morning").) As to defendant's complaint about suppression of evidence, Sheahen pointed out that 'we had a month long hearing where we moved to suppress.' (*Id.* at 1460.) With respect to defendant's claim about alibi witnesses, Sheahen said defendant 'doesn't have an alibi witness because he was there at the scene of the crime.' (*Id.*) As to the professor defendant mentioned, Sheahen stated there were other witnesses to defendant's mental state but he might use the professor. (*Id.*) Regarding defendant's claim about Sheahen's assessment of the case, Sheahen

> said, the record showed the evidence against defendant was substantial. (*Id.*) 'He wanted me to use a two bearded strangers defense. That is absolutely absurd and I will not use it.' (*Id.*) By 'two bearded strangers defense,' it seems Sheahen was referring to a defense that blamed others for the crime. (*See id.*) The trial court denied the motion. (*Id.* at 1460-61.) It pointed out that Sheahen 'cannot make up defenses where no defenses exist. [¶] His duty is to give the defendant solid advice and do the best he can under the circumstances. [¶] There is no doubt in my mind Mr. Sheahen has done exactly that. . . . [¶] I find there's no conflict. No irreparable breakdown in the attorney-client relationship.' (*Id.* at 1461.)

Panah, 35 Cal. 4th at 430 (internal citations added, footnote included as text).

The next day, on December 6, 1994, Petitioner brought to court two to three pages of handwritten notes that he stated were "from yesterday because the court cut me off, didn't let me make my record on *Marsden Bonin* hearing. I am going to bring that error to the air to make sure it is completed." (RT 1648.) The trial court declined to excuse the district attorney from the courtroom, explaining that Petitioner had a full *Marsden* hearing the day before and was not to repeat those arguments. (*Id.* at 1648-49.) He permitted Petitioner to summarize what the specific problem was, and Sheahen responded on his behalf. (*Id.* at 1649.) He explained that Petitioner's notes referenced counsel's failure to prepare for the penalty phase, along with a desire for "a provision to be made by the prosecution or by whomever to allow his father to enter the country as a witness for the penalty phase . . . ." (*Id.* at 1649-50.) As the California Supreme Court observed, Sheahen "told the court he had 'looked into' having defendant's father come but 'he is presently in an immigration status that precludes him from leaving Iran to come to this country.'" *Panah*, 35 Cal. 4th at 430; (*see also* RT 1650 (adding that "[w]e are aware of the issue. We are working on it")). The trial court "stated it was 'going

to stand by my rulings regarding the representation given the defendant in this case.'" *Panah*, 35 Cal. 4th at 430; (*see also* RT 1651). Sheahen continued to summarize Petitioner's additional issues, reiterated from previous complaints to the court, regarding the suppression of evidence, representation by a substitute public defender on a day when trial counsel was ill during voir dire, and continuation of the proceedings to await Shafi-Nia's availability. (RT 1651-52.)

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The trial court reaffirmed its findings and denied any request to continue. (*Id.* at 1653-54.)

c. January 3, 1995 Hearing

At the January 3, 1995 hearing, after the conclusion of the guilt phase but before the commencement of the penalty phase, Petitioner raised complains to the trial court about occurrences during the guilt phase. Because Petitioner would be discussing events already contained in the public record, the court held, there was no need to exclude the prosecution or spectators. (*Id.* at 3100, 3104-05.) Petitioner told the court his:

> request for my attorney to argue the false assumption of scratch marks to the victim being caused by a ring of mine and to show through forensic expert it was impossible for the scratches being caused by the ring, to show what else could have caused it, because of the pattern, superficiality of scratches, shape of them, and the single fact of no evidence being found on the ring such as skin samples or blood or any other evidence whatsoever, and the other fact that I had not been wearing . . . any ring on my hands or fingers or clothing for a long period of time.
>
> The other matter is, which I talked to my attorney, I know it may look bad for the jury, but I asked Mr. Sheahen to prove that Mrs. Lori Parker lied on the stand by saying her daughter had known my name.

(*Id.* at 3101.)

As the California Supreme Court discussed:

> The trial court stated that, with respect to the ring, counsel had objected to its admission and conducted cross-examination on whether it caused the scratches on the victim's body but that, in any event, it was an 'insignificant factor' on identity, the only possible issue to which it could have been relevant. (*Id.* at 3106.) With respect to attacking Mrs. Parker's credibility, the trial court stated this was a disagreement over tactics. (*Id.* at 3107 ("I think Mr. Sheahen's tactics were correct in that regard").) Regarding the cross-examination of Rauni Campbell, the trial court found defendant's complaints were conclusory and that, in any event, a tactical decision was involved. (*Id.* at 3108 ("It seems to me to be the only tactical decision to make there").) The trial court denied the motion. (*Id.* at 3109.)

Panah, 35 Cal. 4th at 431 (internal citations added).

d. Conclusion

The California Supreme Court was not objectively unreasonable under 28 U.S.C. § 2254(d)(1) in determining that Petitioner's complaints "amounted to nothing more than tactical disagreements between defendant and counsel," which did not constitute an actual conflict of interest or a complete breakdown in communication. *Panah*, 35 Cal. 4th at 431-32; *see Lambert*, 504 F.3d at 886; *Schell*, 218 F.3d at 1026. Likewise, the California Supreme Court's decision was not contrary to or an unreasonable application of federal law in holding that "[i]nquiring of counsel is necessary for the trial court to evaluate the defendant's request and for appellate review." *Panah*, 35 Cal. 4th at 432; *see Stenson*, 504 F.3d at 887 (holding that state court properly considered trial court's hearing vetting counsel's strategy and competence). The California Supreme Court's denial of the claim does not, therefore, constitute a violation of § 2254(d)(1).

2. Reasonableness of State Court Decision under 28 U.S.C. § 2254(d)(2)

Finally, Petitioner contends that the California Supreme Court's decision was an unreasonable determination of the facts because the court ignored critical evidence, failed to provide Petitioner with an opportunity for factual development, and failed to issue an order to show cause or hold an evidentiary hearing. (Petr.'s Br. at 282-87.)

The allegedly ignored evidence Petitioner points to consists of the trial record and declarations from Petitioner's trial team that because counsel was exclusively focused on securing a settlement, counsel did not conduct a pretrial investigation and present DNA, serology, and pathology evidence and evidence regarding Petitioner's mental impairments. (*Id.* at 282-84.) To the contrary, the California Supreme Court expressly reviewed evidence that defense counsel:

> tried to persuade defendant to move away from a claim of 'factual innocence' and either plead guilty to avoid the death penalty or enter a plea of not guilty by reason of insanity. . . . [H]e said he had assessed the DNA question and determined that the downside of a defense examination was greater than the upside. . . . [Petitioner] complained, moreover, that Sheahen had not investigated mental defenses . . . [because he] told him he would be 'found guilty regardless.' . . . Sheahen stated there were other witnesses to defendant's mental state but he might use [the witness Petitioner suggested he contact]. . . . Defendant complains that counsel had not argued his ring could not have made the scratches on Nicole's thigh and had not called a forensic expert to establish this point. . . . [W]ith respect to the ring, counsel had objected to its admission and conducted cross- examination on whether it caused the scratches on the victim's body but . . . it was an 'insignificant factor' on identity, the only possible issue to which it could have been relevant.

Panah, 35 Cal. 4th at 428-31. The California Supreme Court did not, therefore, ignore critical evidence causing its decision to be an unreasonable determination of the facts under § 2254(d)(2).

The state court's decision not to issue an order to show cause or hold an evidentiary hearing likewise does not render its factual determinations

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unreasonable under § 2254(d)(2). As the United States Supreme Court explained in *Pinholster*:

> Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that the claims made in the petition do not state a prima facie case entitling the petitioner to relief. It appears that the court generally assumes the allegations in the petition to be true, but . . . will also review the record of the trial . . . to assess the merits of the petitioner's claims.

131 S. Ct. at 1402 n.12 (internal quotations omitted). The Court expressed no concern that the process afforded to petitioner in his second state habeas proceeding, summarily denied without an order to show cause authorizing factual development and without an evidentiary hearing, failed to satisfy § 2254(d)(2). *See id.* at 1396 n.1, 1402 n.12. Here, the record refutes Petitioner's allegations that his counsel held a conflict of interest and that Petitioner suffered from an irreconcilable conflict with him. The California Supreme Court's reasoned opinion denying the claim without an order to show cause or evidentiary hearing did not, therefore, constitute an unreasonable determination of the facts.

Claim 25 is DENIED.

XXX. Claim 26: Denial of Motions for Change of Venue or District

In Claim 26, Petitioner contends that his constitutional rights were violated

by the trial court's failure to grant a change of venue or district. Petitioner argues that the California Supreme Court's decision denying the claim applied a standard that was contrary to federal law, and was based upon unreasonable factual determinations that the pre-trial publicity was not inflammatory or biased and was attenuated by the passage of time before trial. (Pet. at 391-99.)

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A. Decision on Direct Appeal

The California Supreme Court held on direct appeal:

> A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable. The de novo standard of review applies to our consideration of the five relevant factors: (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.
>
> Defendant brought three motions to change venue or transfer. Each was denied.
>
> We perceive no error. Only the first factor weighs in favor of granting the motion, but the nature and the gravity of the offense, standing alone, is not dispositive. Nor, contrary to defendant's claim, does the second factor weigh in favor of the motion because we conclude the publicity was neither extensive nor prejudicial.
>
> In his pretrial motion, defendant cited 18 newspaper articles about his case that had appeared between November 22, 1993 and June 9, 1994. (Defendant's renewed motions also referenced the pretrial publicity.)

Except for a letter to the editor, all the articles were news stories. Five reported the circumstances of defendant's arrest and the victim's death and two reported her funeral. The remaining articles reported developments in the case as it moved through the legal system. Defendant's trial did not commence until November 1994, more than a year after most of the articles had appeared, and about six months after publication of the last one. Any potential prejudice from the media coverage was attenuated by the passage of time. Moreover, 18 articles over a 12-month period can hardly be characterized as extensive, nor, contrary to defendant's claim, was the coverage biased or inflammatory simply because it recounted the inherently disturbing circumstances of this case and the victim's family's grief at her murder.

Moreover, the fact that prospective jurors may have been exposed to pretrial publicity about the case does not necessarily require a change of venue. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Here, all of the jurors and alternate jurors who had any knowledge of the case stated they could set aside this knowledge and decide the case on the law and evidence received at trial. In this connection, it should be observed that defendant failed to use all his peremptory challenges when he accepted the jury, thus indicating that the jurors were fair and that the defense itself so concluded.

Defendant also cites three newspaper[] articles that appeared during his trial that were the basis of renewed motions for change of venue on December 5 and December 7, 1993. His December 5 motion was based on a newspaper article that had appeared four days earlier, while jury selection was still in process, titled [']Child-Murder Case Inflames Emotions.['] The trial court included questions about this article and determined that the prospective jurors had not been exposed to it.

> Defendant's December 7 motion was brought after two newspaper articles implicated defendant in a plot to kill prosecution witnesses. The trial court questioned the jurors about the article and again determined that none of them had been exposed to it. Under these circumstances, the trial court properly denied defendant's renewed motions. (Defendant contends there were over 60 newspaper articles related to his case, but he includes numerous articles that appeared during his trial, some of them duplicates. These stories, obviously, were not before the court when it ruled on his motions to change venue or transfer and we do not consider them for purposes of our analysis.)
>
> None of the remaining relevant factors support a change of venue in this case. As to community size, the San Fernando Valley, from which the jury pool was drawn, contains over a million inhabitants and is far more populous than many counties. Therefore, the size of the community does not support a change in venue. Defendant asserts that the victim and her family occupied positions of prominence and popularity, but the victim became known only because she was a murder victim, not because of any preexisting status. Defendant also points out that the victim's mother was a legal secretary and her fiancé was a criminal defense lawyer who were known in the Van Nuys legal community, but nothing in the record suggests these factors had any effect on the jury pool. Finally, despite defendant's attempt to depict himself as an outsider because of his recent immigrant status, and the victim of ethnic bias because of his Iranian origin, there was no evidence of unusual local hostility to such persons, such that a change of venue would likely produce a less biased panel. Nor was the pretrial publicity calculated to excite local prejudices in this regard. . . .
>
> We therefore conclude that the trial court did not err in denying defendant's motions for change of venue or transfer.

Panah, 35 Cal. 4th at 715-18 (internal quotations and citations omitted; footnotes included in text parenthetically).

B. Legal Standard

To establish entitlement to a change of venue, Petitioner must show that "extraordinary local prejudice [would] prevent a fair trial – a basic requirement of due process." *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010) (internal quotation omitted). "When a trial court is unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere, due process requires that the trial court grant defendant's motion for a change of venue." *Hayes v. Ayers*, 632 F.3d 500, 507-08 (9th Cir. 2011) (internal quotation and alterations omitted). Counsel may show "two different types of prejudice in support of a motion to transfer venue: presumed or actual." *Id.* at 508 (internal quotation omitted).

"A presumption of prejudice," the United States Supreme Court has held, "attends only the extreme case." *Skilling*, 130 S. Ct. at 2915. "Prejudice is presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Sheppard* were held[,] . . . entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975) (discussing *Rideau v. Louisiana*, 373 U.S. 723 (1963) (where "the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras"); *Estes v. Texas*, 381 U.S. 532 (1965) (where the trial was "conducted in a circus atmosphere . . . overrun . . . with television equipment"); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (where the "courthouse [was] given over to accommodate the public appetite for carnival")). The Court has explained that its decisions in *Rideau*, *Estes*, and *Sheppard* "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime with which he is charged alone

presumptively deprives the defendant of due process." *Murphy*, 421 U.S. at 799; *see also Skilling*, 130 S. Ct. at 2914, 2914 n.12. "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling*, 130 S. Ct. at 2914-15 (emphasis in original).

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In distinguishing those circumstances in which pretrial publicity warranted a presumption of prejudice, the Supreme Court in *Skilling* considered: (1) "the size and characteristics of the community in which the crime occurred;" (2) whether the media reports contained a "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight;" (3) the lapse of time between the crime and trial, and whether "the decibel level of media attention diminished" during that time; and (4) whether "the jury's verdict . . . undermine[s] in any way the supposition of juror bias," as through acquittals on certain counts, for example. *Id.* at 2915-16.

Where juror prejudice is not presumed, the court must consider whether actual prejudice infects the jury. "This inquiry focuses on the nature and extent of the voir dire examination and prospective jurors' responses to it. Our task is to determine if the jurors demonstrated actual partiality or hostility toward the defendant that could not be laid aside." *Hayes*, 632 F.3d at 510-11 (internal quotation, alteration, and citation omitted). "Even where a prospective juror displays some prior knowledge of the facts and issues involved in a case, it is his ability to 'lay aside his impression or opinion and render a verdict based on the evidence presented in court' that is crucial." *Id.* at 511 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). Thus, in addition to the adequacy of voir dire, the court should consider the trial court's instructions to the jury to decide the issues based solely on in-court evidence. *See Skilling*, 130 S. Ct. at 2918 n.21. News reports that are "largely factual" are less prejudicial than those that are "invidious or inflammatory." *Murphy*, 421 U.S. at 800 n.4, 802; *see also Hayes*, 632 F.3d at

511.

C. Analysis

Petitioner asserts that "[t]he standard California adopts when reviewing the necessity of a change of venue is contrary to established Supreme Court precedent." (Pet. at 392.) He argues that "by applying five state-law factors, including the (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim," the state did not consider the potential for presumed prejudice and instead required a showing of actual prejudice. (Pet. at 391-93; Petr.'s Br. at 326-27.)

The United States Supreme Court held in *Early v. Packer*:

> A state court decision is contrary to our clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases or if it confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Avoiding these pitfalls does not require citation of our cases – indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.

Packer, 537 U.S. 3, 8 (2002) (internal quotation omitted). The Court explained that the decision need not include "a formulary statement" that the state court considered the claim in a particular way; "[i]t suffices that that was the fair import of the [state court's] opinion." *Id.* at 9.

The Ninth Circuit in *Crater v. Galaza*, 491 F.3d 1119, 1132 n.11 (9th Cir. 2007) applied *Packer* to the same five-factor California standard at issue here. Affirming the district court's denial of habeas relief under AEDPA, the Circuit held that the state court's application of the standard and its failure to cite any federal law did not entitle petitioner to relief. *Id.* The circuit court held that

"[w]hile the state court reached its determination without reference to federal law, we share its conclusion that the news reports did not create presumptive bias. . . . No evidence persuades us to doubt the state court's determination of impartiality in [the] jury . . . ." *Id.* at 1133-35. The court observed, *inter alia*, that the "state court aptly remarked that the coverage of [petitioner's] case 'was [no] more sensational than the very nature of the crime itself would require.'" *Id.* at 1134 (alteration in original).

Following *Crater*, the Court rejects Petitioner's assertion that the California Supreme Court's application of its five-factor standard renders its decision contrary to clearly established federal law. The Court also shares the conclusion of the California Supreme Court that Petitioner was not entitled to a change of venue or district.

First, as the trial court remarked, "[t]he Court draws from a huge community here. The San Fernando Valley is bigger than most cities in the world. There's well over a million people in the area served by this courthouse." (RT 980.) As the Supreme Court noted as one example in *Skilling*, there is a "reduced likelihood of prejudice where [the] venire was drawn from a pool of over 600,000 individuals." *Skilling*, 130 S. Ct. at 2915 (discussing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991)).

Second, the California Supreme Court reasonably determined that the extent of the pretrial publicity "was neither extensive nor prejudicial." *Panah*, 35 Cal. 4th at 448 (holding that "18 articles over a 12-month period can hardly be characterized as extensive" (internal quotation omitted)). The court found that "[e]xcept for a letter to the editor, all the articles were news stories. Five reported the circumstances of defendant's arrest and the victim's death and two reported her funeral. The remaining articles reported developments in the case as it moved through the legal system." *Id.* at 448. The court's decision on its face refutes Petitioner's contention that it "ignore[d] inflammatory articles such as [the]

editorial . . . ." (Reply at 87.) Although two other articles Petitioner cites report that Petitioner "told police he tried to kill himself because he was involved in Nicole's disappearance;" that Nicole's mother stated that Petitioner's life wasn't worth anything compared to her daughter's; that she would take Petitioner's life to feel better for five or ten minutes; and that Petitioner was "inhuman" and an "asshole" (*id.* (citing CT 1356-57, Pet. Ex. 137)), the California Supreme Court did not make an unreasonable determination of the facts in finding that the articles did not contain the extent of blatantly prejudicial information readers could not reasonably be expected to put out of mind. *See Skilling*, 130 S. Ct. at 2916. The trial court determined that the jurors had not been exposed to the third article upon which Petitioner now relies, discussed below. (*See* Reply at 87 (citing 16 RT 1390).)

Third, the California Supreme Court reasonably determined that the degree of publicity had abated by the time of trial. *See Skilling*, 130 S. Ct. at 2916; *see also Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998) ("To the extent any of the information printed was prejudicial (e.g., characterizing [the victim] as . . . sympathetic . . ., describing [the defendant's] criminal record, etc.), it was printed several months before trial. Such information is not presumptively prejudicial"); *Harris v. Pulley*, 885 F.2d 1354, 1362 (9th Cir. 1988) (relying upon the fact that "[t]he number of news reports regarding [petitioner's] case had dissipated considerably by the time of jury selection four months later" after the homicides in concluding there was no presumption of prejudice). The court found that by the time Petitioner's trial began, it was "more than a year after most of the articles had appeared, and about six months after the publication of the last one." *Panah*, 35 Cal. 4th at 448. Petitioner cites as evidence that the "publicity did not abate when trial started" one article on the front page of the *Los Angeles Times Valley Edition* titled "Child-Murder Case Inflames Emotions." (Reply at 87 (citing 16 RT 1390).) The California Supreme Court reasonably determined that "[t]he the trial court

included questions about this article and determined that the prospective jurors had not been exposed to it." *Panah*, 35 Cal. 4th at 448; (*see also* RT 1465-68, 1472-74, 1496-97, 1514-15, 1531-32, 1552-54, 1561-63, 1571).

Finally, the jury found not true the special circumstance allegation that the murder was committed while Petitioner was engaged in the commission of the crime of oral copulation of a person under fourteen years of age. (CT 860); *Panah*, 35 Cal. 4th at 409. That finding "undermine[s] . . . the supposition of juror bias." *Skilling*, 130 S. Ct. at 2916.

Claim 26 is, therefore, DENIED.

XXXI. Claim 27: Exercise of Peremptory Challenges against Women

Petitioner alleges in Claim 27 that the prosecutor exercised peremptory challenges against women based upon their gender. (Pet. at 401-16.) The prosecutor exercised eight peremptories against women and six peremptories against men in selecting the first twelve, seated jurors. (*See id.* at 1334-35, 1375, 1377, 1483, 1503-05, 1519, 1521, 1523.) He exercised two peremptories against women and one against a man in selecting the six alternates. (*See id.* at 1544, 1546, 1557.) Five women were seated in the first twelve jurors, and three of the six alternates were women. The California Supreme Court denied Petitioner's claim in a reasoned opinion on direct appeal. *See Panah*, 35 Cal. 4th at 438-42.

The United States Supreme Court held in *J.E.B. v. Alabama* that the Equal Protection Clause "forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race." 511 U.S. 127, 129 (1994) (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)). A challenge to a peremptory strike as discriminatorily motivated:

> requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race [or gender]. Second, if the showing is made, the burden shifts to the prosecutor to

> present a race- [or gender-]neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial [or gender-based] motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins (Steven), 546 U.S. 333, 338 (2006) (internal quotations and citations omitted).

At the first step of the inquiry, to establish a prima facie case of discrimination, the defendant must show that "(1) the prospective juror who was removed is a member of a cognizable group, (2) the prosecution exercised a peremptory challenge to remove the juror, and (3) 'the facts and any other relevant circumstances raise an inference' that the challenge was motivated by race or gender." *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001) (quoting *Batson*, 476 U.S. at 96); *see also United States v. Collins (Gwaine)*, 551 F.3d 914, 919 (9th Cir. 2009). The Ninth Circuit explained in *Collins (Gwaine)* that:

> [a] pattern of striking panel members from a cognizable . . . group is probative of discriminatory intent, but a prima facie case does not require a pattern because the Constitution forbids striking even a single prospective juror for a discriminatory purpose. . . . The burden for making a prima facie case is not an onerous one.

551 F.3d at 919-20 (internal quotations and citations omitted). A defendant can

"make out a prima facie case of discriminatory jury selection by 'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial." *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (quoting *Batson*, 476 U.S. at 94).

A. Standard Applied by the California Supreme Court

The California Supreme Court on direct appeal held that Petitioner failed to "raise a reasonable inference that the opposing party has challenged the jurors because of their . . . group association." *Panah*, 35 Cal. 4th at 442 (internal quotation omitted). To that extent, the court "recited the correct standard," as did the California Court of Appeal in *Johnson (Alonzo) v. Finn*, 665 F.3d 1063, 1068 (9th Cir. 2011). However, the California Supreme Court reached that conclusion because "the record suggests gender-neutral reasons for the use of peremptory challenges as to each juror excused and, therefore, . . . no prima facie case was established." *Panah*, 35 Cal. 4th at 442; *see also id.* at 439 ("If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm" (internal quotations omitted)). The Ninth Circuit held in *Johnson (Alonzo)* that this reasoning by the California court evidences an erroneous application of federal law:

> The version of the 'reasonable inference' standard that the Court of Appeal applied was the one rejected as unlawful in *Johnson (Jay)* [*v. California*, 545 U.S. 162 (2005)], not the one recognized by federal law. The strongest evidence of the court's error is its statement that '[w]hen a trial court denies a motion to contest the basis of a peremptory challenge because there is no prima facie showing,' the appellate court must affirm so long as 'there are grounds upon which a prosecutor could reasonably have premised a challenge.' As we explained in *Williams v. Runnels*, 432 F.3d 1102 (9th Cir. 2006), while 'other relevant circumstances' can 'rebut an inference of discriminatory purpose based on statistical disparity,' these '"other relevant circumstances" must do more than indicate that the record would support race-

> neutral reasons for the questioned challenges.' *Id.* at 1107-08. Contrary to the Court of Appeal's reasoning, the existence of 'grounds upon which a prosecutor could reasonably have premised a challenge,' does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework.

Johnson (Alonzo), 665 F.3d at 1068-69 (noting that the decision in *Johnson (Jay)*, that California's "strong likelihood" standard for a prima facie showing was incompatible with *Batson*, came after the state court decision at issue, as it did here).

The circuit court went on to hold that because "the federal law that the California [appellate court] applied unreasonably was *Batson* itself," the law was clearly established within the requirements of AEDPA. *Id.* at 1069. Petitioner is, therefore, entitled to de novo review of his claim.[9] *See id.* at 1070. As the Court finds for the reasons set forth below that Petitioner failed to demonstrate a prima facie case of gender discrimination, no evidentiary hearing is required to decide Petitioner's claim. *Cf. id.* at 1072 (holding that defendants "did make a prima facie showing of racial discrimination at the first step of the *Batson* framework [and] [i]t was *therefore* the duty of the [district court] magistrate judge to conduct an evidentiary hearing" (emphasis added)); *Cooperwood*, 245 F.3d at 1048 (holding on habeas review that "because there was no prima facie *Batson* violation, we need not reach the quality of the prosecution's response, as none was required").

B. Comparative Juror Analysis

In *Boyd v. Newland*, the Ninth Circuit held that "Supreme Court precedent requires a comparative juror analysis [on habeas review] even when the trial court has concluded that the defendant failed to make a prima facie case." 467 F.3d

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[9] Because the Court concludes that Petitioner has failed to demonstrate a prima facie case of gender discrimination applying de novo review, Petitioner would likewise have failed to make such a showing applying a more deferential standard of review to the state court's arrival at the same result.

1139, 1149 (9th Cir. 2004); *see also Crittenden*, 624 F.3d at 956 ("[C]omparative juror analysis may be employed at step one [of the *Batson* analysis] to determine whether the petitioner has established a prima facie case of discrimination," where the trial court found none). Comparative juror analysis includes comparison of the struck, class-member potential jurors with both accepted and struck non-class-member jurors. *See Jamerson v. Runnels*, 713 F.3d 1218, 1227-32 (9th Cir. 2013); *see also Collins (Gwaine)*, 551 F.3d at 922 ("Comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike"). "An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror." *Collins (Gwaine)*, 551 F.3d at 922 (finding an inference of discrimination where comparison "reveal[ed] little distinction that could account for the prosecutor's strike" and "none of [the struck juror's] answers to the court's questions suggested a reason for her removal").

Petitioner's trial counsel raised four gender-based *Batson* objections,[10] to the excusal of jurors A.R., B.B., B.D., and M.C. (RT 1519, 1521, 1544, 1557.)[11] Of the ten peremptory challenges the prosecution exercised against female jurors A.R., B.B., B.D., G.B., J.R., J.W., M.A., M.C., M.S., and R.M., Petitioner concedes that prospective jurors J.R. and M.C. showed justification for their excusal. (Pet. at 406.) At most, therefore, the prosecution's peremptory challenges against jurors A.R., B.B., B.D., G.B., J.W., M.A., M.S., and R.M. are at issue. *Cf. Haney v. Adams*, 641 F.3d 1168, 1169-71 (9th Cir. 2011) (holding that petitioner may not

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[10] The record reflects that Petitioner objected based upon *People v. Wheeler*, 22 Cal. 3d 258 (1978). "*Wheeler* is considered the California procedural equivalent of *Batson*," and a *Wheeler* motion "preserve[s] [the] federal constitutional claim because a *Wheeler* motion serves as an implicit *Batson* objection." *Crittenden*, 624 F.3d at 951 n.2.

[11] Counsel raised a fifth objection to the excusal of juror M.A., who was a woman, primarily on the basis of her African American race. (RT 1376.)

raise a *Batson* claim where he failed to object at trial).

1. Juror A.R.

Juror A.R. had a bachelor's degree in psychology and sociology. (CT Supp. 149, 150.) In response to the statement, "[r]egardless of the evidence, anyone who intentionally kills another person should *never* get the death penalty" (*id.* at 162 (emphasis in original)), she responded that she felt "that if the act of murder was committed for anything *other than* self-defense or *psychological reasons* or committed under duress – the the [sic] death penalty should apply where applicable." (*Id.* at 163, 167 (emphasis added).) She strongly agreed that it was important to know as much as possible about the defendant and his background before deciding between life without the possibility of parole and death, stating, "I want all the background information and fact [sic] about a human being before I can come to a conclusion, I am dealing with a human being's life – I want to be 'absolutely' sure of my decision and have all the information possible." (*Id.* at 164, 167.)

Compared to male jurors whom the prosecutor accepted, only Juror A.R. had a degree in psychology and sociology. Accepted Juror W.D., who had the most education in psychology and sociology of the accepted jurors, had education or training in "psychology & sociology as it relates to growth and development and educational issues," but had undergraduate and graduate degrees in education. (CT 2092-93.) More importantly, compared to male jurors whom the prosecution accepted, only Juror A.R. expressed that she would want to be "'absolutely'" sure of her decision before imposing a death sentence. Among the accepted male jurors, Juror W.D. again came the closest to Juror A.R.'s view. He stated that "[i]t is obviously an important decision and as much *relevant* information as available should be considered." (*Id.* at 2107 (emphasis in original).) Juror W.D.'s view that it is "obviously an important decision," however, stopped short of requiring "absolute" certainty – a significant difference in the apparent burden the jurors

would place on the prosecution. The burden Juror A.R. would have placed on the prosecution was more similar to that expressed by stricken male juror S.H., who stated that the most important consideration in sentencing an individual to life without the possibility of parole or death would be "if there is a *faint glimmer* that later technology would refute the guilt then the possibility of exoneration exists." (CT Supp. 1271 (emphasis added).)

2. Jurors B.B., G.B., and M.A.

Juror B.B. was the only juror reviewed at voir dire who responded "yes" on the juror questionnaire regarding whether she may wish to "hurry along" the process of decision-making in the jury room. (CT Supp. 643.) She explained that she was responsible for the operation of the Community Services Program at L.A. Valley College and it was "[v]ery hard to be away from [the] office very much." (*Id.*)

Juror G.B. stated on her questionnaire that if she had a choice she would rather not serve as a juror on the case, because "[t]wo months is a long time." (*Id.* at 452.) When asked in chambers about her questionnaire response that her contact with an individual who practices psychology or psychiatry was "confidential" (*id.* at 448), she explained:

> [T]he basic thing that's on my mind right now is the fact that my daughter had been raped by a psychiatrist, and her case is pending, and it's very heavy.
>
> The only thing is if it should come up and I should have to be with her and I'm on this case, I'm torn because I feel I should be there.

(RT 1329.)

Juror M.A. was the only juror reviewed on voir dire who responded "no" on the questionnaire regarding whether she was willing to stay as long as necessary to reach a verdict in a case that may last longer than estimated. (CT Supp. 400.) She stated that she was not willing because "to stay as long as necessary would ca[u]se

a hardship for me." (*Id.*)

Of the male jurors whom the prosecution accepted to serve, only Jurors W.D. and T.M. expressed any concern about the time commitment of the trial. Juror W.D. stated that he "would not like to sit on this case because of the time involved in this time of year, but I recognize the duties of citizenship." (CT 2098.) He confirmed that he did not have any pressing business or personal matters that might cause him to wish to "hurry along" the decision-making process and was willing to stay as long as necessary to reach a verdict. (*Id.* at 2100.) Similarly, Juror T.M. stated, "I would like to sit on it [the case] because it is my duty as a citizen. I would not like to sit on it because it may be long." (*Id.* at 1909.) He, too, confirmed that he did not have any pressing business or personal matters that might cause him to wish to "hurry along" the decision-making process and was willing to stay as long as necessary to reach a verdict. (*Id.* at 1911.) The statements of Jurors B.B., G.B., and M.A. that they may wish to hurry along decision-making, would rather not serve at the risk of feeling "torn," and were not willing to stay as long as necessary, respectively, were significantly more definitive than the drawbacks Jurors W.D. and T.M. noted. *See United States v. Stinson*, 647 F.3d 1196, 1207 (9th Cir. 2011) (affirming decision of district court that defendants did not make prima facie showing of gender discrimination where the challenged juror "had asked several times not to be selected because of a personal conflict [and] . . . the government had previously challenged four women [but] had also challenged two men[;] [c]onsidering the totality of the relevant facts, the record suggests that [the juror] was stricken because of her insistence that she did not want to serve, not because of her gender").

3. Jurors B.D., J.W., and M.A.

Juror B.D. agreed somewhat with the statement that regardless of the evidence, anyone who intentionally kills another person should never get the death penalty, because "[p]oor persons do not have means to explore every facet of the

case as opposed to a battery of high priced attorneys." (CT Supp. 486-87; *see also* RT 1545-46.)

Juror J.W. stated about her general feelings on the death penalty that "[o]nly God gives and takes away. But honestly, *if someone close to me was involved*, I dont [sic] know the dept [sic] of my compation [sic]." (CT Supp. 999 (emphasis added); *compare id.* at 1001 (listing as spiritual or religious beliefs that may pertain to the issue of the death penalty versus life in prison without possibility of parole, "Eye for an eye / Do not befriend a bad person").) When asked about her agreement with the statement that regardless of the evidence, anyone who intentionally kills another person should never get the death penalty, she replied, "Dont [sic] know / There is so much involved / I dont [sic] know what to answer." (*Id.* at 1000.) When asked about her general feelings regarding life in prison without the possibility of parole, she responded, "I agree with this decision." (*Id.*)

Juror M.A. (also discussed above) strongly agreed with the statement that regardless of the evidence, anyone who intentionally kills another person "should *never* get the death penalty." (*Id.* at 405 (emphasis in original).)

None of the male jurors whom the prosecution accepted to serve agreed even somewhat that regardless of the evidence, anyone who intentionally kills another person should never be sentenced to death. None expressed anything other than disagreement with the statement, and none stated that he "agreed" with a "decision" of life without the possibility of parole.

4. Jurors M.S. and R.M.

Juror M.S. stated that she had religious or moral beliefs or convictions that made it difficult or impossible for her to sit as a juror and pass judgment on another individual, citing "the Ten Commandments." (*Id.* at 1202; *see also id.* at 1217 (naming the "commandment's [sic] of God" as spiritual or religious beliefs that may pertain to the issue of the death penalty versus life in prison without the possibility of parole); *compare id.* at 1215 (stating that she was "for the death

penalty"), 1218 (stating that she strongly agreed that the cost of maintaining the defendant in prison for the rest of his life was a factor to consider in deciding whether to impose life without the possibility of parole or death).) She responded that she would not be able to view photographs of the deceased and/or the crime scene that may be unpleasant. (*Id.*) She stated that "due to my religious background and having children of my own and grandchildren I feel that it would be impossable [sic] for me" to sit on the case. (*Id.* at 1208.) She added that it would be difficult for her to sit through the trial and give it her full and complete attention because she was "under Dr.'s care for stress [sic]." (*Id.* at 1209.) She said that she would not test the credibility of a police officer in the same way she would any other witness, and she disagreed with the principle that the defendant has a constitutional right not to testify and his decision not to testify cannot be used against him. (*Id.* at 1209, 1212.) She responded that no matter what evidence was presented, she would always vote guilty as to murder and true as to the special circumstances in order to assure that the case proceeds to a penalty trial. (*Id.* at 1216.) She expressed that she would have difficulty following the instruction to keep an open mind until she had heard all the evidence, arguments, and jury instructions. (*Id.* at 1218.) She stated that she had "some" trouble being understood when speaking in English, despite having English as her first and only language. (*Id.* at 1209-10.) Describing what her comfort level would be when she must make herself understood to the other jurors during deliberations, she reported that she had "some problems pronouncing words." (*Id.* at 1210.)

Like Juror M.S., Juror R.M. responded that she had religious or moral beliefs or convictions that made it difficult or impossible for her to sit as a juror and pass judgment on another individual, citing "the Ten Commandments." (*Id.* at 905.) In response to a prompt for any spiritual and/or religious beliefs she held that may pertain to the penalty issue, she wrote, "Thou shalt not kill / The Ten Commandments." (*Id.* at 920; *compare id.* at 918 (stating that she voted for the

death penalty), 918-19 (stating that she strongly disagreed with the statement that regardless of the evidence, anyone who intentionally kills another person should never get the death penalty), 921 (stating that she strongly agreed that the cost of maintaining the defendant in prison for the rest of his life was a factor to consider in deciding whether to impose life without the possibility of parole or death).) She circled "yes," that she would be able to view photographs of the deceased and the crime scene which may be unpleasant, but added, "I think so." (*Id.* at 907.)

Although Jurors M.S. and R.M. each expressed internally conflicted views on the death penalty, they were nonetheless the only jurors reviewed on voir dire who responded affirmatively that they held religious or moral beliefs that made it difficult or impossible for them to sit as jurors. Jurors M.S. and R.M. were also the only potential jurors to express any hesitation about their ability to view unpleasant photographs in the case, and Juror M.S.'s reservations about testing the credibility of a police officer, accepting the defendant's constitutional right not to testify, not necessarily voting guilty and finding special circumstances to assure a penalty trial, keeping an open mind, and being able to be understood speaking in English to other jurors were also unique. Only accepted Juror J.L. shared her concern about a physical disability or other reason that might make it difficult to sit through the trial with full and complete attention. (CT 1856.) He explained that he may need to urinate approximately every one and a half hours due to an enlarged prostate. (*Id.*)

C. Conclusion

Petitioner has not shown that the totality of the circumstances and the relevant facts about the prosecutor's conduct raises an inference that his peremptory strikes against women were motivated by gender. *See Miller-El*, 545 U.S. at 239; *Collins (Gwaine)*, 551 F.3d at 919. The prosecutor exercised nearly half (seven of seventeen) of his peremptories against men in selecting the jury and alternates and nearly half (six of fourteen) against men in selecting the seated

jurors alone. Women comprised nearly half (eight of eighteen) of the jury members and alternates and nearly half (five of twelve) of the seated jurors. *See Cooperwood*, 245 F.3d at 1048 (holding petitioner failed to show a prima facie *Batson* violation where two white jurors were struck before the African American juror at issue, two African American jurors remained seated in the jury box when the challenged juror was struck, and the ultimate composition of the jury included those two African American jurors and four other jurors of color). In addition, a comparison of the women the prosecutor struck to the men he accepted reveals distinctions in their relevant attributes. *See Collins (Gwaine)*, 551 F.3d at 922. Accordingly, Petitioner has failed to show a prima facie case of discrimination on the basis of the potential jurors' gender. Claim 27 is, therefore, DENIED.

XXXII. Claim 28: Special Circumstance of Lewd Conduct upon a Child under the Age of Fourteen

In Claim 28, Petitioner contends that there was insufficient evidence to establish the special circumstance that the murder was committed while he was engaged in the commission of lewd conduct upon a child under the age of fourteen. (Pet. at 417.) Petitioner further contends that the definition of "lewd act" provided by the trial court was unconstitutionally vague. (*Id.*)

A. Decision on Direct Appeal

On direct appeal, the California Supreme Court held:

> [T]he record reveals that [Panah] sought dismissal of the special circumstance because it included conduct, like penetration with a foreign object, that, unlike rape or sodomy, the Legislature had determined was not sufficiently egregious to warrant a special circumstance unto itself. To the extent his attack on the sufficiency of the evidence here is a renewal of this argument, we reject it. Defendant's criticism of the lewd conduct special circumstance fails to take into account the well-established purpose of section 288, 'to provide children with "special protection" from sexual exploitation. The

> statute recognizes that children are "uniquely susceptible" to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned.' . . .
>
> Section 288 'is violated by "any touching" of an underage child committed with the intent to sexually arouse either the defendant or the child.' Defendant argues the evidence was insufficient (1) to establish that Nicole was alive during the commission of the lewd conduct and (2) to prove his intent.
>
> Dr. Heuser testified, in essence, that the bruising she observed on Nicole's body indicated her heart was still pumping blood when she sustained those injuries. Thus she concluded the bruises to Nicole's face, neck, arms, and legs occurred while Nicole was alive, as did the bruising she observed around Nicole's vaginal area and rectum. Indeed, she concluded the penetration of Nicole's rectum was a possible cause of death. Accordingly, substantial evidence established that Nicole was alive during the commission of the offense. Substantial evidence also establishes defendant's sexual intent, based on all the circumstances surrounding the commission of the offense. First, Nicole's body was found in the nude. Second, the evidence firmly established that her rectum had been penetrated. Third, her vaginal opening was 'very widely' open and bruised, which suggested stretching consisting with the penetration of the area with a finger. Fourth, there was body fluid evidence from which the jury could have inferred that defendant ejaculated in Nicole's presence. The conclusions to be drawn from this evidence, and the reasonable inferences therefrom, viewed in the light most favorable to the judgment are plain: defendant disrobed

> Nicole, or caused her to disrobe, penetrated her vaginally and anally, and ejaculated. This clearly established lewd conduct.

Panah, 35 Cal. 4th at 487 n.37, 488 (internal citations omitted).

B. Analysis

As discussed above, "[i]n reviewing the sufficiency of evidence, [a court] may grant habeas relief only if 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Ngo*, 651 F.3d at 1115 (quoting *Jackson*, 443 U.S. at 324). "Insufficient evidence claims are reviewed by looking at the elements of the offense under state law." *Emery*, 643 F.3d at 1214 (citing *Jackson*, 443 U.S. at 324 n.16). A reviewing court must:

> review the evidence in the light most favorable to the prosecution. Expressed more fully, this means a reviewing court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Brown, 558 U.S. at 133. "Furthermore, after AEDPA, we apply the standards of *Jackson* with an additional layer of deference to state court findings." *Ngo*, 651 F.3d at 1115 (internal quotation omitted).

At the time of Petitioner's crimes and trial, as at present, California law provided a special circumstance for murder committed while the defendant was engaged in "[t]he performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288." Cal. Penal Code § 190.2. As the California Supreme Court explained in its decision on direct appeal, section 288 is violated by "any touching" of an underage child committed with the intent to sexually arouse either the defendant or the child. *Panah*, 35 Cal. 4th at 488. The record supports the factual findings of the California Supreme

Court set forth above. (*See, e.g.*, RT 2352-55 (coroner's testimony that the victim's heart was still pumping blood when she sustained bruising), 2401 (bruises, including those to vaginal and rectal areas, were sustained while she was alive), 2387-93 and 2400-01 (victim's rectum had been penetrated and penetration was a possible cause of death), 2382-86 (victim's vaginal opening was widely open and suggested stretching consistent with penetration with a finger), 1997-98, 2020, and 2024-29 (criminalist's testimony regarding body fluid evidence from which the jury could have inferred that Petitioner ejaculated in the victim's presence), 2250-53 (detective's testimony that the victim's body was found without clothing).) In light of those findings, the California Supreme Court reasonably concluded that a rational trier of fact could have found proof of guilt of the lewd act special circumstance beyond a reasonable doubt.

Petitioner argues that "the 'lewd act' special circumstance is overbroad and vague in that it covers conduct specifically not included in Penal Code section 190.2 as a special circumstance," because "a death that occurred during the lewd touching through clothing of a child was sufficient for imposition of the death penalty, but a death that occurred during the penetration of the anus by a foreign object was not." (Pet. at 422 (discussing sodomy special circumstance, which does not extend to penetration by a foreign object).) Petitioner's argument is not well placed. As Respondent aptly emphasizes, the sodomy special circumstance applies to defendants who sodomize victims of any age. (Opp. at 144.) The broader scope of offenses governed by the lewd act special circumstance, by comparison, applies only to defendants who victimize children under the age of fourteen. The Ninth Circuit has acknowledged the broader scope of offenses governed by the lewd act special circumstance in rejecting a petitioner's due process challenge brought under that provision. *Cf. Hovey v. Ayers*, 458 F.3d 892, 922 (9th Cir. 2006) (holding that "the lack of physical evidence of molestation did not eliminate the possibility of securing a conviction" under section 288, because "lewd and

lascivious conduct does not require penetration, the molestation of any particular body part, or the touching of bare skin").

Accordingly, Claim 28 is DENIED.

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XXXIII. Claim 29: Incompetence to Assist Habeas Counsel

In Claim 29, Petitioner alleges that he "is incompetent to assist habeas counsel and therefore is entitled to a stay of the habeas action unless and until his competency is restored . . . ." (Pet. at 423-24.) He identifies two claims in the Petition that could potentially benefit from his assistance: (1) his incompetence to stand trial and counsel's ineffectiveness for failing to pursue a competency hearing, and (2) counsel's ineffectiveness in presenting mitigating evidence at the penalty phase of trial. (*Id.* at 427-28.) Petitioner relies upon *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 819 (9th Cir. 2003) in support of his claim. (Pet. at 424-25.)

The United States Supreme Court abrogated *Rohan* in *Ryan v. Gonzales*, 133 S. Ct. 696 (2013). The Court held that the Ninth Circuit "erred in holding that district courts must stay federal habeas proceedings when petitioners are adjudged incompetent." *Gonzales*, 133 S. Ct. at 700. The Court explained that:

> [g]iven the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. Indeed, where a claim is 'adjudicated on the merits in State court proceedings,' 28 U.S.C. § 2254(d) (2006 ed.), counsel should, in most circumstances, be able to identify whether the 'adjudication . . . 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," § 2254(d)(1), without any evidence outside the record. *See Pinholster*, 131 S. Ct. at 1398. Attorneys are quite capable of reviewing the state-court record, identifying legal errors,

> and marshaling relevant arguments, even without their clients' assistance.

Gonzales, 133 S. Ct. at 704-05 (internal citation edited). The Supreme Court provided that although the decision to grant a stay is generally left to the discretion of the district court, "a stay is not generally warranted when a petitioner raises only record-based claims subject to 28 U.S.C. § 2254(d)," because "any evidence that a petitioner might have would be inadmissible." *Id.* at 708.

This Court has determined that Petitioner's claims of incompetence to stand trial and ineffective assistance on competency and in the presentation of mitigating evidence, subject to § 2254(d), do not merit relief under that section. Accordingly, Petitioner's request for a stay of the proceedings in Claim 29 is DENIED.

XXXIV. Claim 30: Adequacy of Culpability for Execution

A. Allegations

In Claim 30, Petitioner argues that his execution would violate the Eighth Amendment as interpreted in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), because of his "severe brain damage, impairments, and limited function combined with his intoxication and youth at the time of the offense . . . ." (Pet. at 431.)

Petitioner acknowledges that he "has not presented an expert declaration attesting that Petitioner is mentally retarded . . . ." (*Id.*) Petitioner likewise was not a minor at the time of the offense; he was twenty-two years old. *Panah*, 35 Cal. 4th at 410. Petitioner contends, however, that "in this case the particular facts and circumstances show that his youth at the time of the crime combined with his mental impairments and defects diminish his ability to possess the minimum degree of culpability constitutionally required for death-eligibility." (Pet. at 430.) Relying upon the declaration of Fred Rosenthal, M.D., Ph.D., Petitioner alleges that he "is 'psychotic, paranoid, delusional, has poor judgment, disorganized feelings, and a loss of contact with reality.'" (*Id.* (quoting Pet. Ex. 12 ¶ 6).) Dr.

Rosenthal opined that Petitioner has "severe mental disabilities" and at the time of the crimes was not able "to form the requisite specific intent, premeditate, deliberate, or harbor malice," to "know[] or understand[] the nature and quality of his actions and [to] distinguish[] right from wrong," or "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law . . . as a result of mental disease or defect." (Pet. Ex. 12 ¶¶ 5, 9-11.) Petitioner also notes that "[e]ven the prosecutor essentially conceded that Petitioner was in a psychotic state when seen by a hospital doctor only hours after the alleged time of the crime." (Pet. at 430 (citing RT 2867-68).) Petitioner contends that as a result of his youth and mental impairments, he lacks the requisite culpability to be eligible for the death penalty under the Eighth Amendment. (*Id.*)

B. Legal Standard

"Construing and applying the Eighth Amendment in light of our evolving standards of decency," the United States Supreme Court in *Atkins* concluded that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321 (internal quotation omitted). The Court reasoned, in part, that "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. "To the extent there is serious disagreement about the execution of mentally retarded offenders," the Court explained, "it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317. In keeping with the Court's direction in *Atkins*, states have "adopt[ed] their own measures for adjudicating claims of mental retardation." *Schriro v. Smith*, 546 U.S. 6, 7 (2005). In California, to establish mental retardation within the scope of *Atkins*, a petitioner must prove by a preponderance of the evidence that he has "'the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of

18.'" *In re Hawthorne*, 35 Cal. 4th 40, 47, 50 (2005) (quoting Cal. Penal Code § 1376(a)).

In *Roper v. Simmons*, the United States Supreme Court echoed the concern of *Atkins* that "[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'" *Simmons*, 543 U.S. at 568. The Court noted that "[t]he death penalty may not be imposed on certain classes of offenders, such as . . . the insane, and the mentally retarded," and with *Simmons*, juveniles under eighteen, "no matter how heinous the crime." *Id.* The Court set forth "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. First, the Court observed that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569 (internal quotation omitted). Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, . . . [and] have less control, or less experience with control, over their own environment." *Id.* Third, the Court explained, "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570. Thus, "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* (internal quotation omitted).

Applying *Simmons*, the Ninth Circuit in *Mitchell* rejected a defendant's argument that his death sentence violated the Eighth Amendment "because of his age and maturity level." 502 F.3d at 981. The defendant, who was twenty years old at the time of the offenses, argued that he "suffers from the same infirmities as a juvenile." *Id.* at 982. The circuit court observed that:

> [o]f course, '[t]he qualities that distinguish juveniles

> from adults do not disappear when an individual turns 18,' so it may well be true that [defendant] is less mature than the average twenty year old. But whether true or not, and whether that mitigates against his crime, is a question the Constitution permits to be answered on a case-by-case basis.

Mitchell, 502 F.3d at 981 (quoting *Simmons*, 543 U.S. at 574). The court held that there was nothing to suggest that the jury was not permitted to consider defendant's lack of maturity, underdeveloped sense of responsibility, heightened vulnerability to negative influences or outside pressures, or transitory personality traits as mitigating, and defendant did not present evidence showing a manifestly underdeveloped level of maturity. *Id.* at 982.

C. Analysis

1. Penalty Phase Evidence Regarding Maturity and Mental Impairment

a. Maturity and Life Skills

At the penalty phase of trial, Petitioner presented evidence from Dr. Vicary that when Petitioner was seventeen, he lived in Germany and was "emancipated." (RT 3857.) He received a stipend from the government as a refugee, lived with his girlfriend in a group home, and was a student. (*Id.* at 3857-58.) He had "every expectation that he was going to lead an adult life and he wasn't going to have to be dominated and controlled by his mother anymore." (*Id.* at 3858.)

When Petitioner came to the United States and lived with his mother, he struggled in junior college because he did not speak English well, and he had difficulty with his job as a salesperson at Mervyn's department store because he could not arrange his work schedule to coordinate with his school schedule. (*Id.* at 3683, 3688, 3856, 3901.) When he was twenty-one, Petitioner dated a woman who was twenty-three, and they lived together at Petitioner's home with his mother for two months. (*Id.* at 3685, 3900.) Petitioner was "an adult," who "could leave if he

felt he could financially afford it and support [his] girl friend [sic]," even though it was questionable whether his mother would have allowed him to leave. (*Id.* at 3901.) Although Petitioner's history with his mother was "that he has been the pawn and she has been the queen[,]" by the time of trial, Petitioner was "much bigger . . . [and] definitely ha[d] the potential to at this point manipulate his mother and others." (*Id.* at 3811-12.)

Dr. Vicary testified that Petitioner:

> looks normal on the surface and for most of the time he can act in a fairly normal way and he can cope, you know. [¶] He can go to school. He can work. He can contract with other people. He can have girl friend [sic]. He can have sex alright. [¶] But underneath here, underneath all of that normal appearing behavior, is a crippled person because of all of these abusive and traumatic things that happened to him during his life.

(*Id.* at 3877-78.) Petitioner was gullible and docile and would be expected to have "some difficulty adopting behaviors expected of a male." (*Id.* at 3795.) Petitioner likely used as psychological defenses "a whole variety of strategies, none of which are very successful. Avoiding things, being dependent, doing things that are self-defeating." (*Id.* at 3796.)

b. Mental Impairments

Dr. Vicary testified that Petitioner had a "passive personality," a term used "in the diagnostic manual" (presumably the Diagnostic and Statistical Manual, which Dr. Vicary later referenced), and "always seem[ed] to be very agreeable and . . . docile . . . . But people that are excessively passive tend to accumulate painful experiences[.] [F]rustration, resentments, anger tend to build up in these passive people until one day like a pressure cooker the top blows off." (*Id.* at 3698-99, 3724, 3743, 3895.) Petitioner's profile was "similar to that of a battered woman or battered child." (*Id.* at 3794 (internal quotation omitted).)

According to Dr. Vicary, a confluence of four primary psychological factors – Petitioner's traumatic background, depression, substance abuse, and passivity – "caused th[e] offense" and "constitute at the time of the offense an extreme mental or emotional disturbance." (*Id.* at 3742-45.) Petitioner's mental condition was "decompensating," or "getting worse," prior to the crime. (*Id.* at 3696.) There was "no stop to the mental slide." (*Id.* at 3752.) Regarding Petitioner's ability to conform his conduct to the requirements of law the time of the offense, Dr. Vicary testified that "[W]hat happened at the time of the crime was an explosive emotional outburst. [¶] To that extent there was some degree of impairment." (*Id.* at 3880.) It was Dr. Vicary's opinion that Petitioner "suffered from significant mental illness at the time of the offense" and committed the murder "because of what has happened to him and the fact that he is mentally disturbed." (*Id.* at 3872, 3877, 3879.)

2. Reasonableness of State Court Decision

The California Supreme Court's denial of Petitioner's claim that he lacked sufficient culpability to be eligible for the death penalty was not an unreasonable application of *Atkins* or *Simmons*. As in *Mitchell*, Petitioner has not shown that the jury was not permitted to consider as mitigating circumstances his lack of maturity or his vulnerability to outside influences; to the contrary, Dr. Vicary's testimony highlighted Petitioner's impairments for the jury. The California Supreme Court may have reasonably concluded that neither Dr. Vicary's nor Dr. Rosenthal's opinion evidenced a manifestly underdeveloped level of maturity in Petitioner. Because the court may have reasonably concluded that Petitioner was not so limited in his culpability for the offenses that his capital sentence violates Eighth Amendment protections, Claim 30 is DENIED.

XXXV. Claim 31: Motion for Disqualification

In Claim 31, Petitioner alleges that his convictions and sentence of death were imposed in violation of his constitutional rights "because the trial judge ruled

upon his own disqualification motion and failed to refer the matter to another judge." (Pet. at 431.) He contends that because the judge had "'no power to act . . . after the filing of a statement of disqualification'" under California law, "all orders and acts in the case at hand including the trial, verdict, and death judgment, were void." (*Id.* at 433 (quoting Cal. Code of Civ. Pro. § 170.4(d)).)

Petitioner further alleges that the facts presented at trial through Petitioner's disqualification motion established a prima facie case for removal. (*Id.* at 439.) "These facts," he alleges, "included prejudicial comments by Judge Kriegler's bailiff, the close relationship of court officials to parties related to Nicole Parker, and the atmosphere of institutional bias evident from visible defacement of the courtroom." (*Id.* at 439-40.) Petitioner makes no allegation that Judge Kriegler was actually biased against him, but asserts that maintaining the appearance of justice sometimes requires disqualification of judges who have no actual bias. (*See* Petr.'s Br. at 296-97.)

A. Trial Court's Ruling on Disqualification Motion

The California Supreme Court explained on direct appeal:

> Upon receipt of the motion, Judge Kriegler filed a verified answer denying any bias or impartiality and stating that the motion was untimely. At the hearing on the motion, Judge Kriegler declined to refer the motion to another judge pursuant to Code of Civil Procedure section 170.3, subdivision (c)(5) but, instead, struck the motion on grounds it was untimely and without a legal basis. (Code Civ. Proc., § 170.4, subd. (b).) (Code of Civil Procedure section 170.3, subdivision (c)(5) states in pertinent part: 'No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In every such case, the question of disqualification shall be heard and determined by another judge . . . .' Code of Civil

> Procedure section 170.4, subdivision (b) states: 'Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.') Judge Kriegler's ruling was correct.

Panah, 35 Cal. 4th at 446 (footnote included parenthetically; citations as in original).

"[F]ederal habeas corpus relief does not lie for errors of state law. . . . [I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *McGuire*, 502 U.S. at 67-68 (internal quotation omitted); *see also Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007) ("[S]tate courts are presumed to know and correctly apply state law"). Because Petitioner's claim that the judge erred in ruling on his own disqualification motion is based in California law, it fails to establish Petitioner's entitlement to federal habeas relief.

B. Implied Bias

The Ninth Circuit explained in *Crater*:

> Supreme Court precedent reveals only three circumstances in which an appearance of bias – as opposed to evidence of actual bias – necessitates recusal. First, due process requires recusal of a judge who 'has a direct, personal, substantial pecuniary interest in reaching a conclusion against [one of the litigants].' *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (citing *Tumey*, 273 U.S. at 523); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986) (same). Second, due process requires recusal if a judge becomes 'embroiled in a running, bitter controversy' with one of the litigants. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). . . . Third, due

> process requires recusal if the judge acts as 'part of the accusatory process.' *In re Murchison*, 349 U.S. 133, 137 (1955).

Crater, 491 F.3d at 1131 (citations edited; alteration in original); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard"). There is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Crater*, 491 F.3d at 1132 (applying the presumption).

Here, Petitioner makes no allegations that Judge Kriegler had a direct, personal, substantial pecuniary interest in the outcome of the litigation; that he was embroiled in a running, bitter controversy with one of the litigants; or that he acted as part of the accusatory process. To the extent that Petitioner pleads a claim of unconstitutional appearance of bias, therefore, his claim lacks support in clearly established federal law.

Accordingly, Claim 31 is DENIED.

XXXVI. Claim 32: Violation of Vienna Convention

In Claim 32, Petitioner contends that his rights under the Vienna Convention were violated by his lack of consular access and failure to be informed that he could seek consular assistance from Iran, his country of citizenship. (Pet. at 446-59; Petr.'s Br. at 340-42.) Petitioner acknowledges that "the Supreme Court's decisions in *Garcia*, *Madellín I*, and *Madellín II* appear to suggest that Panah is not entitled to relief on this claim until Congress enacts legislation implementing the rights contained in the Vienna Convention." (Petr.'s Br. at 342 (discussing *Garcia v. Texas*, 131 S. Ct. 2866 (2011), *Madellín v. Texas*, 552 U.S. 491 (2008) ("*Madellín I*"); and *Madellín v. Texas*, 554 U.S. 759 (2008) ("*Madellín II*"), and citing *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007)).) Petitioner

explains that "[t]o the extent that is the case," he "preserves this claim for further review." *Id.*

In *Madellín I*, the Court "concluded that neither the President nor the International Court of Justice (ICJ) has the authority to require Texas to determine whether its violation of the Vienna Convention prejudiced petitioner." *Madellín II*, 554 U.S. at 761 (Stevens, J., dissenting) (discussing *Madellín I*). In *Madellín II*, the Court declined to issue petitioner a stay of execution on the "remote" possibility of congressional or state legislative action to create enforceable rights pursuant to the Vienna Convention. 554 U.S. at 759-60. The Court emphasized that "[i]t is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence . . . ." *Id.* at 760; *see also Cornejo*, 504 F.3d at 854-55 (holding that foreign nationals arrested and detained without being advised of their right to have a consular officer notified as required by the Vienna Convention lacked "judicially enforceable rights"). The Court reached the same decision in *Garcia*, observing that "[i]t has now been seven years since the ICJ ruling and three years since our decision in *Madellín I*, making a stay based on the bare introduction of the bill in a single house of Congress even less justified." 131 S. Ct. at 2868.

The California Supreme Court denied Petitioner's claim on the merits. *See Panah*, 35 Cal. 4th at 500-01; (*see also* Pet. at 446). Because Petitioner's claim lacks support in clearly established federal law, Claim 32 is DENIED.

XXXVII. Claim 33: Violations of International Law

In Claim 33, Petitioner alleges that his conviction and sentence of death are unconstitutional because errors in the proceedings deprived him of "the minimum guarantees for the defense under customary international law, the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights (ICCPR) . . . , and the American Declaration of the Rights and Duties of

Man . . . ." (Pet. at 460-61 (citing Articles 6 and 14 of the ICCPR and Articles 1 and 26 of the American Declaration).)

Petitioner's claim lacks support in clearly established federal law as determined by the Supreme Court. Clearly established federal law does not hold the death penalty to violate enforceable rights under international law. *See Sosa v. Alverez-Machain*, 542 U.S. 692, 734-35 (2004) ("[T]he [Universal] Declaration does not of its own force impose obligations as a matter of international law. . . . And, . . . the United States ratified the Covenant [the ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"); *Nevius v. McDaniel*, 218 F.3d 940 (9th Cir. 2000) (denying certificate of appealability where state court did not contradict or unreasonably apply federal law in denying petitioner's claim of a violation of "several instruments of international law, including the Universal Declaration of Human Rights"); *see also Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (rejecting as "wholly meritless" state habeas petitioner's contentions that capital punishment violates the American Declaration, the ICCPR, or customary international law); *Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001) (holding that execution under federal death sentence would not violate the American Declaration because it "is merely an aspirational document that, in itself, creates no directly enforceable rights").

Claim 33 is, therefore, DENIED.

XXXVIII. Claim 34: Method of Execution

In Claim 34, Petitioner alleges that California's method of execution by lethal injection violates the constitutional prohibition against cruel and unusual punishment. (Pet. at 461-65.) Petitioner states, however, that "[d]ue to the ongoing *Morales* litigation and the lack of a firmly established lethal injection protocol or a specified execution team, Petitioner's claim . . . is not yet ripe." (*Id.* at 465 (citing *Morales v. Cate*, No. CV 06-219 (N.D. Cal. Dec. 10, 2010)).)

Petitioner explains that he raises the claim to preserve his right to federal review. (*Id.*)

Since the district court's 2006 ruling in *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006) that California's implementation of lethal injection violated the Eighth Amendment, there has been "a de facto moratorium on all executions in California." *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010). California promulgated a revised lethal injection protocol effective August 29, 2010. Cal. Code Regs. tit. 15, §§ 3349-3349.4.6 (2010).

Following the effective date of the revised protocol, the State scheduled the execution of Albert Greenwood Brown. Brown moved to intervene in the *Morales* action. Holding that "Brown's federal claims are virtually identical to those asserted" by Morales, the court granted the motion to intervene. *Morales v. Cate*, No. CV 06-219, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Considering Brown's challenge to the revised protocol and his motion to stay his execution, the Northern District of California stated that it "always has understood, apparently incorrectly, that executions could not resume until it had an opportunity to review the new lethal injection protocol in the context of the evidentiary record developed during the 2006 proceedings." *Id.* The court conditionally denied a stay of execution on the basis that "there is no way that the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before [petitioner's] execution date." *Id.* at *5.

The Ninth Circuit remanded, directing the district court, "in light of . . . the court's findings regarding the risk of unconstitutional pain inhering in the prior three-drug protocol, . . . to determine whether, under *Baze*, [petitioner] is entitled to a stay of his execution as it would be conducted under the three-drug protocol now in effect." *Morales*, 623 F.3d at 831. The district court has since explained that:

> California at this juncture lacks a lethal-injection protocol that is valid under state law. . . . [T]he Court has

> continued to defer to the parties' repeated joint requests not to proceed with this litigation until an operative protocol is in place. When the Court resumes its review of the protocol, it intends to do so deliberately and expeditiously while complying with the instruction of the Court of Appeals to 'take the time necessary to do so.'

Morales v. Cate, No. CV 06-219, 2012 WL 5878383, at *3 (N.D. Cal. Nov. 21, 2012) (quoting *Morales*, 623 F.3d at 829; internal citation omitted).

In light of the ongoing litigation in *Morales* and Petitioner's acknowledgment that his claim is not yet ripe, the Court DISMISSES WITHOUT PREJUDICE Claim 34.

XXXIX. Claim 35: Constitutional Challenges to Death Penalty Statute

In Claim 35, Petitioner asserts a variety of constitutional challenges to California's death penalty statute. (Pet. at 465-85.) The California Supreme Court rejected Petitioner's arguments on direct appeal. *Panah*, 35 Cal. 4th at 499-500.

A. Failure to Narrow the Class

First, Petitioner contends that the statute does not adequately narrow the class of persons eligible for the death penalty. (Pet. at 466-67 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).) Petitioner's claim lacks support in clearly established federal law. In *Bradway v. Cate*, the Ninth Circuit rejected a petitioner's challenge to a special circumstance in the operative 1978 California death penalty statute and observed that the Supreme Court has not decided any "case that could reasonably support [petitioner's] due process claim of unconstitutional vagueness based on a failure to narrow the class . . . ." 588 F.3d 990, 992 (9th Cir. 2009).

B. Failure to Instruct on Burden of Proof

Second, Petitioner faults California's statutory scheme for failing to "require either that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable

doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty." (Pet. at 470.) Petitioner similarly faults the statute's failure to require that the jury "determine, unanimously and beyond a reasonable doubt, the existence of *at least one* aggravating factor, . . . whether the aggravating factors outweighed the mitigating factors[, and] . . . whether each of the unadjudicated acts introduced in aggravation was proven." (*Id.* at 466-67 (emphasis in original); *see also id.* at 478-79.)

The California Supreme Court reasonably rejected Petitioner's arguments. The court may have reasonably determined that Petitioner has no such constitutional right.

In *Apprendi*, 530 U.S. at 482-83, the Supreme Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (discussing *Apprendi*). The Court applied *Apprendi* in *Ring* to hold that a state cannot "allow[] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19; internal citation omitted). The Court distinguished California's death penalty statute from Arizona's, observing that California commits sentencing decisions to juries, while Arizona was one of only four states to "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Id.* at 608 n.6.

As discussed above, in California, "[s]pecial circumstances . . . make a criminal defendant eligible for the death penalty [and] operate as 'the functional equivalent of an element of a greater offense.'" *Webster*, 369 F.3d at 1068 (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to

be true, unanimously and beyond a reasonable doubt, death is an authorized punishment. *See Belmontes*, 529 F.3d at 876 ("[T]he maximum sentence

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authorized by the jury's guilt phase verdict was death"). The jury need not make any additional findings beyond a reasonable doubt.

The Ninth Circuit's decision in *Mitchell*, 502 F.3d at 993, denying a defendant's challenge to his death sentence under the Federal Death Penalty Act, is instructive. In *Mitchell*, defendant claimed that the jury was required to find "that aggravating factors sufficiently outweigh mitigating factors beyond a reasonable doubt." *Id.* at 993. The Circuit distinguished the finding of a death eligibility factor, made by the jury beyond a reasonable doubt, from the weighing of aggravating and mitigating factors. At the latter stage, the court explained:

> the jury's task is no longer to find whether factors exist; rather, each juror is to consider the [eligibility] factors already found and to make an individualized judgment whether a death sentence is justified. Thus, the weighing step is an 'equation' that 'merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate.' *See Marsh*, 548 U.S. at 177. [Defendant] does not suggest how a beyond- reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process, or to make his death sentence reliable, or to comply with the Sixth Amendment.

Id. (internal quotation omitted; internal citation edited).

The California Supreme Court's decision, that Petitioner's constitutional rights were not violated by the lack of requirements that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, that death be the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on a burden of proof at the penalty phase, is not objectively unreasonable.

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C. Failure to Require Written Findings and Agreement on Proven Aggravating Factors

Third, Petitioner faults California's death penalty statute for failing to require "jury agreement as to the existence of any [aggravating] factors, and written findings thereon," to allow constitutional review of the judgment. (Pet. at 471-72.) As held above, the jury need not make any additional findings at the penalty phase, unanimously or otherwise, as its special circumstance findings make death an authorized punishment. Further, the California Supreme Court may have reasonably concluded, as the Ninth Circuit did in reviewing the 1977 California death penalty statute, that its "statute ensures meaningful appellate review, and need not require written jury findings in order to be constitutional." *Williams*, 52 F.3d at 1484-85 (internal citation omitted).

D. Lack of Inter-Case Proportionality Review

Fourth, Petitioner alleges California's lack of "comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review," is unconstitutional. (Pet. at 472-73.) Petitioner alleges that the lack of inter-case proportionality review renders death sentences arbitrary in violation of the Eighth and Fourteenth Amendments, violates equal protection and due process "because such review was afforded to non-condemned inmates," and violates substantive due process because "significant benefits – here, life itself – [are] arbitrarily withheld." (*Id.* at 473-74.)

Petitioner's claims lack support in clearly established federal law. The Ninth Circuit has found "no merit" in the claim, raised by a petitioner sentenced to death under the 1978 California death penalty statute (as Panah was), that the lack of inter-case proportionality review violates equal protection requirements. *See Allen*, 395 F.3d at 1018. The court explained in *Allen*:

> [Petitioner's] claim is premised on California's requirement that the Board of Prison Terms review every sentence imposed under the Determinate Sentencing Law to ascertain its proportionality with other sentences, and the lack of a comparable requirement in the capital sentencing scheme. [Petitioner's] due process argument is foreclosed by the Supreme Court's holding in *Pulley v. Harris*, 465 U.S. 37, 43-46 (1984), that neither the Eighth Amendment nor due process requires comparative proportionality review in imposing the death penalty. . . . To the extent that Allen's equal protection claim survives th[at] holding[], . . . we [hold] that defendants sentenced under the Determinate Sentencing Law are not similarly situated to defendants sentenced in the capital system. We thus reject this claim as a basis for habeas relief.

Allen, 395 F.3d at 1018-19 (internal citations edited and omitted). The California Supreme Court's rejection of Petitioner's arguments was thus not contrary to or an unreasonable application of clearly established federal law.

E. Consideration of Unadjudicated Criminal Activity

Fifth, Petitioner challenges as unconstitutional the prosecutor's presentation of unadjudicated criminal activity at the penalty phase. (Pet. at 474.) As the Ninth Circuit has held, however, "consideration of unadjudicated criminal conduct for purposes of sentencing does not violate defendant's constitutional due process rights" at the penalty phase of a capital trial. *Belmontes*, 529 F.3d at 876; *see also McDowell v. Calderon*, 107 F.3d 1351, 1366 (9th Cir. 1997) (holding that introduction at penalty phase of California trial of evidence of unadjudicated rape occurring in Florida was not unconstitutional), *opinion on reh'g*, 130 F.3d 833, 835 (9th Cir. 1997) ("leaving in tact those parts [of the court's prior decision] . . . deciding other issues" beyond supplemental jury instruction), *overruled on other grounds as stated in Morris v. Woodford*, 273 F.3d 826, 839 n.4 (9th Cir. 2001).

Petitioner further contends that where unadjudicated crimes are introduced at

the penalty phase, the jury must be "instructed on the elements of the other alleged criminal offenses which were introduced in aggravation." (Pet. at 480.) Petitioner's argument lacks support in clearly established federal law and has been rejected by the Ninth Circuit. In *Williams v. Vasquez*, petitioner argued that California Penal Code § 190.3(b), which permits the jury to consider prior criminal activity, was unconstitutionally vague because it did not require a jury instruction setting forth the elements of the criminal offenses to be considered. 817 F. Supp. 1443, 1470-71 (E.D. Cal. 1993), *aff'd sub nom. Williams v. Calderon*, 52 F.3d at 1480-81. The district court rejected petitioner's arguments. The Ninth Circuit affirmed, holding that § 190.3(b) is not "void for vagueness, as [petitioner] contends," and also that any failure to instruct the jury that "it could consider any criminal activity only if proved beyond a reasonable doubt . . . is state law error, not cognizable on federal habeas." *Williams*, 52 F.3d at 1480-81. As the Court has noted, once a California jury has found a special circumstance beyond a reasonable doubt, it need not make any further findings to make death an authorized punishment. A lack of instruction on the elements that would be required to make a further finding is not, therefore, constitutionally deficient.

F. Use of "Extreme" and "Substantial" in List of Mitigating Factors

Sixth, Petitioner argues that "[t]he inclusion in the list of potential mitigating factors of such adjectives as 'extreme' (*see* factors (d) and (g)), and 'substantial' (*see* factor (g)), acted as barriers to the consideration of mitigation" evidence. (Pet. at 474.)

Factor (d) informed the jury that it "shall consider, take into account and be guided by . . . , if applicable . . . whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (RT 4189-90.) Factor (g) informed the jury that it should consider, if applicable, "whether or not the defendant acted under extreme duress or under the substantial domination of another person." (*Id.* at 4190.)

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The Supreme Court has expressly rejected the argument that a jury instruction allowing the jury to consider whether defendant was affected by an "extreme" mental or emotional disturbance or duress "preclude[s] the jury's consideration of lesser degrees of disturbance, impairment, or duress," where the jury is instructed that it is "entitled to consider 'any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.'" *Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990); *see also Hendricks*, 974 F.2d at 1109 (applying *Blystone* and holding same). Petitioner cites no authority to suggest that use of the terms "extreme" and "substantial" in the instruction on factor (g) should receive a different analysis. Petitioner's jury was instructed that it could consider "any . . . circumstance which extenuates the gravity of the crime . . . and any sympathetic or other aspect of the defendant's character or record that the defendant offers . . . as a basis for a sentence less than death." (RT 4191.) The California Supreme Court's conclusion that the factor (d) and factor (g) instructions were constitutionally adequate is not objectively unreasonable.

G. Failure to Instruct on Statutory Factors as Mitigating or Aggravating

Seventh, Petitioner faults the instructions for failing to inform the jury "which of the listed factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence." (Pet. at 474.) Petitioner argues that the absence of such instructions "invited [the jury] to aggravate the sentence upon the basis of the lack of mitigation . . . ." (*Id.* at 475.)

Petitioner's jury was instructed that factor (c), regarding his lack of prior felony conviction; factor (i), regarding his age at the time of the offense; and "evidence which has been presented regarding the defendant's background, if

proven," could only be considered as mitigating. (RT 4192.) The California Supreme Court reasonably found no constitutional violation in the failure to provide additional instruction on which statutory factors should be considered aggravating and which mitigating or how aggravating and mitigating factors should be weighed and evaluated.

In *Tuilaepa v. California*, the United States Supreme Court rejected California habeas petitioners' arguments that:

> the capital jury may not be instructed simply to consider an open-ended subject matter, such as 'the circumstances of the crime' or 'the background of the defendant.' Apart from the fact that petitioners' argument ignores the obvious utility of these open-ended factors as part of a neutral sentencing process, it contravenes our precedents. . . . In *Zant*, we found no constitutional difficulty where the jury had been told to consider 'all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense.' . . . And in *Gregg*, we rejected a vagueness challenge to that same Georgia sentencing scheme in a case in which the judge . . . charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Tuilaepa, 512 U.S. 967, 978 (1994) (considering 1978 California death penalty statute) (internal quotations omitted). In *Belmontes*, the Supreme Court observed that "California's overall balancing process" provided by the 1978 death penalty statute "requires juries to consider and balance . . . factors . . . that are labeled neither as mitigating nor as aggravating. . . . [T]he jury itself must determine the side of the balance on which each listed factor falls." 549 U.S. at 23; *see also Harris*, 465 U.S. at 51, 52 n.14 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977

California statute is not of that sort," notwithstanding the fact that "[t]he statute does not separate aggravating and mitigating circumstances"); *Williams*, 52 F.3d at 1484 (holding that the 1977 statute's "failure to label aggravating and mitigating factors is constitutional"). Finally, in *Babbitt v. Calderon*, the Ninth Circuit rejected a California habeas petitioner's argument that the trial court's instruction "was erroneous because the jury was not specifically told which factors it could consider as extenuating . . . ." 151 F.3d 1170, 1178 (9th Cir. 1998) (considering 1978 statute).

Further, in *Bonin v. Calderon*, the Ninth Circuit rejected a petitioner's argument that the inclusion of inapplicable mitigating factors in the trial court's instructions allowed the jury "to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances." 59 F.3d 815, 848 (9th Cir. 1995). The Circuit held that because the jury was instructed "to consider the listed factors only 'if applicable,'" the jury was "warned . . . that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." *Id.*; *see also Williams*, 52 F.3d at 1481 (finding no constitutional error in the trial court's instructions on "the entire list of factors the state considered relevant to the sentencing decision, even when some did not apply").

Petitioner's jury was likewise instructed that it should "consider, take into account and be guided by the following factors [provided to the jury], *if applicable*." (RT 4189 (emphasis added).) The jury was specifically instructed that "[t]he nonexistence of a factor in mitigation does not constitute a factor in aggravation." (*Id.* at 4192.) The California Supreme Court may have reasonably found no constitutional violation in the trial court's instructions.

H. Waiver of Jury Trial and Ineffective Assistance of Counsel

Finally, Petitioner argues that because the jury was not instructed on the elements of the unadjudicated crimes introduced in aggravation and was not

required to find the existence of aggravating factor(s) beyond a reasonable doubt, he was deprived of "his right to jury trial on these matters." (Pet. at 483.) He argues that the California Supreme Court and this Court may not posit that counsel had a strategic reason for not requesting such instructions because a waiver of Petitioner's jury trial would have required an express statement on the record. (*Id.* at 483-84.) Petitioner claims that counsel was ineffective for failing to request instructions on the elements of the unadjudicated offenses. (*Id.* at 484.)

Instruction on the elements of unadjudicated crimes in aggravation and findings of proof beyond a reasonable doubt are not constitutionally required. In addition, "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *United States v. Watts*, 519 U.S. 148, 156-57 (1997) (considering federal sentencing guidelines) (internal quotation omitted); *see also Kokoraleis v. Gilmore*, 131 F.3d 692, 695 (7th Cir. 1997) (holding, in habeas proceedings from state capital sentence, that consideration at penalty phase of other criminal acts "does not mean that the punishment in a given case is *for* these other crimes; it is for the crime of which the defendant now stands convicted" (emphasis in original)). The California Supreme Court may have reasonably concluded that a defendant does not, and cannot, waive any fair trial rights when evidence of unadjudicated crimes is introduced in aggravation. Moreover, because Petitioner did not suffer constitutional prejudice from the absence of the instructions, the California Supreme Court may have reasonably concluded that Petitioner suffered no prejudice from any deficient performance by counsel.

Claim 35 is, therefore, DENIED.

XL. Claim 36: Competency to Be Executed

In Claim 36, Petitioner asserts that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pet. at 485-86.) Petitioner states that

he "recognizes that the Court must further examine this issue after a date for execution has been set," but presents it to preserve it for later review. (*Id.* at 486.)

Because Petitioner's "execution [is] not imminent and therefore his competency to be executed [can]not be determined at th[is] time," *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998), Claim 36 is DISMISSED WITHOUT PREJUDICE.

XLI. Claim 37: Cumulative Error

In Claim 37, Petitioner asserts that he is entitled to relief based upon "the cumulative and inter-related errors that occurred during both the guilt phase and the penalty phase of his capital trial." (Pet. at 487.)

First, considering the cumulative effect of the prosecutorial misconduct Petitioner alleges, the Court "analyze[s] the prosecutorial misconduct challenges [regarding arguments to the jury] to assess whether they alone so infected the trial with unfairness as to make the resulting conviction a denial of due process. If the prosecution's comments alone do not meet this standard, [the Court] analyze[s] them together" with any prosecutorial misconduct in failing to disclose evidence to the defense and in presenting false testimony, "to determine whether there is a reasonable probability that without those violations the result of the proceeding would have been different." *Hein v. Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010); *see also Jackson*, 513 F.3d at 1076 ("[I]f the *Napue* errors are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether there is a reasonable probability that, but for [the] errors, the result of the proceeding *would* have been different" (internal quotation omitted, emphasis in original)).

The California Supreme Court may have reasonably determined that any prosecutorial misconduct in arguing to the jury, disclosing evidence, and presenting testimony, even when considered cumulatively, does not show a denial of due process or a reasonable probability of a different result absent the alleged

misconduct. The court was not objectively unreasonable in concluding that any prosecutorial misconduct in, for example, arguing to the jury about the presumption of innocence and appealing to jurors' sympathy and passion, failing to disclose any benefits offered to Hicks, and presenting false or misleading serology evidence was harmless.

Considering cumulative error more broadly, "prejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (finding that cumulative prejudice from counsel's performance that was "deficient in eleven ways, eight of them undisputed," "obviate[d] the need to analyze the individual prejudicial effect of each deficiency," but noting that "some of the deficiencies [may be] individually prejudicial" (internal citation and quotation omitted)). "[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal citation and quotation omitted); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983) (holding same). "[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based upon trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

Here, the California Supreme Court may have reasonably concluded that any prosecutorial misconduct; ineffective assistance, for example, in failing to remove a juror, to request a competency hearing, to request certain penalty phase instructions, and to investigate and present evidence on third party culpability, Petitioner's mental state, the cause and time of death, and mitigating circumstances; and trial court errors, for example, in admitting evidence, considered cumulatively, were harmless. *Cf. Panah*, 35 Cal. 4th at 501 (finding no

cumulative error based upon any errors found on direct appeal). Claim 37 is, therefore, DENIED.

ORDER

For the reasons set forth above, Petitioner is not entitled to federal habeas relief. The Court hereby denies the Second Amended Petition for Writ of Habeas Corpus with prejudice. Claims 34 and 36 are dismissed without prejudice. Pursuant to 28 U.S.C. § 2253(c)(2), the Court issues a Certificate of Appealability as to Claim 2.

IT IS SO ORDERED.

Dated: November 14, 2013.

R. GARY KLAUSNER
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 17 2019

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

HOOMAN ASHKAN PANAH, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent-Appellee.	No. 13-99010 D.C. No. 2:05-cv-07606-RGK Central District of California, Los Angeles ORDER

Before: WARDLAW, NGUYEN, and OWENS, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and petition for rehearing en banc are DENIED.

S123962

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HOOMAN ASHKAN PANAH on Habeas Corpus

The petition for writ of habeas corpus is DENIED.

All claims are denied on their merits.

In addition, claims 7 and 8 are also denied insofar as they were raised and rejected on appeal. (*In re Harris* (1995) 5 Cal.4th 813, 829-841; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Except to the extent they allege ineffective assistance of counsel claims 3, 4, 10, 11, and 14 are also denied insofar as they were raised and rejected on appeal. (*In re Harris, supra,* 5 Cal.4th at pp. 829-841; *In re Waltreus, supra,* 62 Cal.2dat p. 225.)

Moreover, claim 9 is also denied insofar as it could have been, but was not, raised in the trial court. (*In re Seaton* (2004) 34 Cal.4th 193, 197-200.)

Except to the extent they allege ineffective assistance of counsel, claims 3, 4, 7, 8 10, 12, and 15 are also denied insofar as they could have been, but were not, raised in the trial court. (*In re Seaton, supra,* 34 Cal.4th at pp. 197-200.)

Furthermore, insofar as claim 3 alleges insufficiency of the evidence, it is not cognizable on a petition for writ of habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Justice Werdegar would not deny any claim based on petitioner's failure to have raised it in the trial court.

GEORGE
Chief Justice

Filed 3/14/05

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S045504
v.	)	
	)	
HOOMAN ASHKAN PANAH,	)	
	)	Los Angeles County
Defendant and Appellant.	)	Super. Ct. No. BA090702
	)	

A jury convicted defendant Hooman Ashkan Panah of the first degree murder of eight-year-old Nicole Parker (Pen. Code, § 187), among other offenses, and found true the special circumstance allegations that the murder was committed while defendant was engaged in the commission of the crimes of sodomy and lewd acts upon a child under the age of 14 (Pen. Code, § 190.2, subd. (a)(17)(D), (E)). The same jury subsequently set the penalty at death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).) We affirm the judgment.

I. FACTS

A. Procedural History

Defendant was charged in a seven-count indictment with the murder of Nicole Parker (Pen. Code, § 187)[1] with the special circumstances that the murder

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

occurred while defendant was engaged in the commission of the crimes of kidnapping, sodomy, lewd acts upon a child under 14, and oral copulation of a person under the age of 14 and more than 10 years younger than defendant. (§ 190.2, subd. (a)(17)(B), (D), (E), and (F).) He was further charged with kidnapping for child molesting (§ 207, subd. (b)); kidnapping a person under 14 years of age (§§ 207, subd. (a), 208, subd. (b)); sodomy by use of force (§ 286, subd. (c)); lewd acts upon a child under the age of 14 (§ 288, subd. (a)); penetration of genital or anal openings by a foreign object with a person under the age of 14 and more than 10 years younger than defendant (§ 289, subd. (j)); and oral copulation of a person under 14 years of age and more than 10 years younger than defendant (§ 288a, subd. (c).)

Defendant pled not guilty and denied the special circumstance allegations. Prior to commencement of the guilt phase of his trial, he also entered a plea of not guilty by reason of insanity. (§ 1016, subd. (6).)

After presentation of the prosecution's case, defendant moved for acquittal (§ 1118.1); his motion was granted as to the special circumstance allegation of kidnapping and as to the substantive counts alleging kidnapping and kidnapping for child molestation, but was otherwise denied. The jury convicted defendant of first degree murder and found true the special circumstance allegations that he committed the murder while engaged in the commission of the crimes of sodomy and lewd acts upon a child under the age of 14. The jury found not true the special circumstance allegation that the murder was committed while defendant was engaged in the commission of the crime of oral copulation. Defendant was also convicted of sodomy by force, lewd acts upon a child under the age of 14, penetration of genital or anal openings by a foreign object with a person under 14 years of age and oral copulation of a person under 14 years of age.

Defendant withdrew his plea of not guilty by reason of insanity. Following the penalty phase, the jury returned a verdict of death. Defendant's motion for a new trial (§ 1181) was denied and the trial court declined to modify the verdict of death (§ 190.4, subd. (e)). Defendant was sentenced to death on the murder count. On the remaining four counts, he was sentenced to eight years on each count, to run consecutively. These terms were stayed pursuant to section 654.

B. Guilt Phase Evidence

1. Prosecution Evidence

On the morning of Saturday, November 20, 1993, Lori Parker drove her eight-year-old daughter, Nicole, and her son, Casey, to the apartment of their father, Edward Parker, in Woodland Hills. Mr. Parker lived with the Parkers' other two children, Chad and Travis. Defendant, then 22, and his mother, Mehri Monfared, lived in the apartment across the courtyard from Mr. Parker's apartment. Defendant's mother was having a business meeting that morning with Ahmad Seihoon. When Mr. Seihoon arrived about 9:00 a.m., defendant was asleep in his bedroom upstairs.

Ms. Monfared left the apartment sometime before 11:00 a.m., as did Mr. Seihoon, but Seihoon had to return to the apartment for his keys and wallet. As Mr. Seihoon was leaving, he saw Nicole. She asked him if he lived in the apartment and if he was the father of the "boy with the long hair." He told her he was a friend of the family. Nicole stared at him and then ran across the courtyard into her father's apartment. Mr. Seihoon went back into defendant's apartment and called out to him in Farsi to lock the door.

Sometime after 11:00 a.m., Nicole asked her father for a glove and softball. As Mr. Parker walked back and forth between his apartment and the laundry room,

he saw Nicole throwing the ball against the elevator. He told her to be inside the apartment by noon.

About 11:45 a.m., he came outside and called her. She did not respond, but he assumed she had heard him. Five minutes later, he went out again and called her. When she again failed to respond, he searched the apartment complex for her. About 12:30 p.m., he called Mrs. Parker and reported that Nicole was missing.

Afterwards, Mr. Parker began knocking on doors to see whether Nicole was playing inside a neighbor's apartment. He came to defendant's apartment. Defendant answered and stood in the doorway. Mr. Parker asked him whether he had seen Nicole and defendant answered "something like, oh, is she missing." Mr. Parker answered, "yeah. I can't find her," and went to the next door. Unable to locate her, he called the police.

While Mr. Parker waited for the police, defendant and other neighbors were standing around. They wanted to know if he had found Nicole. Defendant followed him down some stairs. He offered to drive down Ventura Boulevard with Mr. Parker looking for Nicole. Mr. Parker brushed him off, telling him the police were coming and would take care of it. Defendant was "very persistent," however, and kept "pushing," telling Mr. Parker, "let's go. Let's go." Mr. Parker told him, "no, no, no. Don't worry about it. Like just leave me alone." Eventually, he stopped paying attention to defendant, who left.

Los Angeles Police Department Officer Roger Mosset arrived about 1:15 p.m. He and Sergeant Melvin Patton set up a command post at the apartment complex. Officer Mosset obtained a description of Nicole from Mr. and Mrs. Parker and initiated a search of the apartment complex and the surrounding area. Officer Ruth Barnes and her partner, Officer Calderon, participated in a door-to-door search for Nicole. At defendant's apartment, Officer Barnes saw the television was on, but no one responded when she knocked, so she and Calderon

left. Sometime later, Officer Barnes returned to the apartment and observed the television was off. A neighbor told her a young man lived there with his mother.

Defendant reported to work at Mervyn's department store about 3:00 p.m. Adele Bowen was the store manager. The day before, she and defendant had argued about his parking in an unauthorized area. Defendant had become loud and argumentative and called Ms. Bowen a "dictator." When defendant arrived for work, Bowen sought him out to resolve the argument. His responses were normal and he did not appear to be under the influence of drugs or alcohol.

Defendant's direct manager, Bruce Cousins, saw him about 3:15 p.m. According to Cousins, defendant was not as "up and cheery" as usual, but he did not appear to Cousins to be under the influence of alcohol or drugs. About 5:00 p.m., Rauni Campbell, a fellow employee who had dated defendant, saw him in the store. Sometime between 5:15 and 5:30 p.m., Mr. Cousins noticed that defendant was gone. Cousins searched for him, but he could not be found.

At the apartment complex, Sergeant Patton received information that Nicole had been seen talking with a man outside of defendant's apartment. Officer Barnes also told him that the television in defendant's apartment had been on and then turned off. After obtaining a key from the apartment manager, Patton and several other officers, including Barnes and Calderon, entered defendant's apartment to search for Nicole. After about 15 minutes, when they did not find her, Patton ended the search.

When Ms. Monfared returned to the apartment complex, she was stopped by police who showed her a picture of Nicole and asked her whether she knew the child. Ms. Monfared said she did not. An officer told her that defendant had been seen talking with Nicole, and asked her where he was. She said he was at work.

Officers Calderon and Barnes went to defendant's apartment and spoke to Ms. Monfared about talking to defendant. Ms. Monfared called him and gave the

phone to Officer Barnes. Barnes asked defendant if he knew Nicole and he said, "vaguely," or "not really." Officer Barnes then asked him, "Do you know where she is?" Defendant answered, "No." Officer Barnes said, "Oh, because someone said that they had seen you with her earlier." Defendant replied, "No, I didn't see her."

Around 5:45 p.m., defendant called Bruce Cousins and told Cousins he was not in the store, would not be returning and loved everyone at Mervyn's. He said he could not come back "because some people that he knew [were] trying to get him in trouble and would I please inform his mother to get out of town." Cousins put him on hold to wait on customers. When he picked up the phone, defendant again asked Cousins to call his mother and "tell her that these people were after her and they were going to kill her, for her to get out of town." Cousins did not take defendant seriously.

Sometime after 5:00 p.m., defendant paged Rauni Campbell. He told her, "I need your help" and "I have done something very bad" and asked her to call his mother and his friends to tell them good-bye because he would not be seeing them again. When she asked him what he had done, he would tell her only that it was "so big" she would find out about it.

At 8:00 or 9:00 p.m., Mr. Seihoon called defendant's apartment and learned from Ms. Monfared that police were looking for a missing girl. He went to her apartment and told police about his earlier encounter with Nicole.

On Sunday, November 21, sometime around 9:00 a.m., Ms. Campbell was awakened by defendant knocking at her window. His wrists were slashed and there was dried blood on his sweater and wrists. She let him into her apartment and he told her he wanted her to buy sleeping pills for him. She did not ask him why he needed them. They drove to a store where defendant purchased the pills and then returned to her apartment.

After defendant took the pills, she asked him what he had done, and if it had anything to do with "the little girl that was missing from his apartment complex." He said, "Yes." When she asked him "if the little girl was still alive," defendant said, "No." She asked him, "do you know she is not alive or are you assuming that because of what you have done that is so bad she is not alive." Defendant answered, "she is not alive." He told her she would find out about it because "they have a tape of me." Defendant appeared to understand her questions and was responsive to them.

Ms. Campbell told him she needed to go downstairs to the manager's apartment and call in sick. Instead, she called 911 and told the operator that a friend was in her apartment trying to commit suicide. When Officer Kong arrived, she told him defendant was taking sleeping pills and had something to do with the missing girl.

When defendant saw Officer Kong, he ran. Officer Kong went in pursuit, but lost defendant. He broadcast a radio call describing defendant as the victim of a suicide attempt. When he learned from Ms. Campbell what defendant had told her about Nicole, he relayed this information to Sergeant Mascola.

Sergeant Mascola arrived at Ms. Campbell's apartment about 10:00 a.m. After talking to Officer Kong, he began a search. He came upon defendant's black BMW. Through the windows he saw a couple of bloodstained knives and bloodstains in the interior of the car. He also observed a cord sticking out from the trunk that he believed could have been a ligature. Mascola believed Nicole might be inside the trunk so he had his officers force it open. She was not there.

Detective David Navarro also went to Ms. Campbell's apartment that morning. From there, he went to defendant's apartment. Detective Navarro and other officers searched defendant's apartment for Nicole but did not find her. In defendant's bedroom, Detective Navarro observed a video camera set up with a

video machine. The video camera was pointing toward the bed. Detective Navarro ended the search and secured the location so he could obtain a search warrant.

Defendant was eventually detained by police at Ms. Campbell's apartment complex. His wrists were cut and he appeared to one of the officers, Officer Joe, to be under the influence of drugs or alcohol. Officer Joe asked defendant where the little girl was. Defendant replied she "could be at Topanga Canyon and Parenthia" at a motel. He also said she could be at the Fallbrook Mall or at a park located at Topanga Canyon and Roscoe Boulevard. He told the officer he "liked her very much, even carry her skeleton remains around." The statement did not make sense to Officer Joe. At times defendant spoke clearly, at other times he was incoherent as if he were falling asleep. He appeared to Joe to be under the influence of "something," and because of the cuts to his wrists, the paramedics were called. Defendant was transported to West Valley Hospital for medical treatment.

At 10:00 or 11:00 p.m., Detective Burris and other police officers arrived at defendant's apartment and conducted a search pursuant to a search warrant. In defendant's bedroom closet, Burris found three suitcases, one atop the other beneath a pile of clothes. Inside the third suitcase, Burris found Nicole's naked body wrapped in a bed sheet tied with a knot.

Various items were removed or collected from defendant's bedroom by police criminalist, Robert Monson, including the bedding, all the items on the bed, and defendant's blue robe. The sheet Nicole was wrapped in was preserved for later analysis. Monson also found and collected bloodstains from the bathroom and a tissue paper from the bathroom wastebasket that had a beige-colored stain on it. A preliminary acid phosphatase test of the stain indicated the possible presence of semen. Later, Monson went to West Valley Hospital where he

obtained a blood sample from defendant. A police detective also gave Monson a ring, a pendant, and a necklace belonging to defendant.

About midnight, a coroner's criminalist, Lloyd Mahany, arrived at the crime scene. He lifted Nicole's body out of the suitcase, placed it on the bed, and unwrapped it. Mahany examined the body and collected sexual assault evidence, including swabs of the mouth, vaginal and anal areas, and breasts.

The evidence collected by Monson and Mahany was analyzed by a third criminalist, William Moore, a forensic serologist. Preliminarily, Moore determined that defendant's blood type was ABO type B while Nicole's blood type was ABO type A. The sheet in which Nicole was wrapped was found to have bloodstains of ABO type AB, semen, and amylase, a constituent of saliva and other bodily fluids.

Moore testified the blood on the sheet could have come from a person who had type AB blood or could have been a mixture of A antigens and B antigens. The bloodstain on the sheet was "consistent" with Nicole. Additionally, there were a small number of stains on the sheet exhibiting positive acid phosphatase activity consistent with semen. Some of these stains revealed the presence of spermatozoa fragments, indicating "that a male had ejaculated and deposited semen directly on the sheet or it was deposited by some other means." Moore opined that the pattern of stains was consistent with the spewing of semen across the sheet and inconsistent with masturbation. The stains also showed amylase activity that was consistent with saliva. The saliva could have come from Nicole and the semen could have originated from defendant. Moore also analyzed the oral swab taken from Nicole as part of the sexual assault kit. The oral swab produced a positive acid phosphatase result indicative of the presence of semen, but was inconclusive.

Moore also analyzed defendant's blue robe. The robe, like the sheet, bore bloodstains of ABO type AB. These stains also contained high amylase activity, indicative of saliva. The bloodstain was consistent with Nicole. The saliva could have originated from defendant.

Moore's analysis of the tissue paper found in the wastebasket in defendant's bathroom revealed that the paper contained semen stains consistent with defendant and high amylase activity consistent with Nicole. The stains were consistent with the product of oral copulation.

Moore also examined the anal swab. The swab produced a positive acid phosphatase result indicative of the presence of semen, but was inconclusive.

The autopsy of Nicole's body was performed by Dr. Eva Heuser of the Los Angeles County Coroner's Office. Dr. Heuser testified that there were petechial hemorrhages around Nicole's eyes indicative of pressure to the neck. This was confirmed by evidence of neck injuries, including deep bruising to the tissue around the carotid artery and jugular vein. The bruising was consistent with application of pressure by a thumb. The injury to the carotid artery could have caused death. There was an injury to the larynx indicative of manual strangulation. The injuries to her neck were sufficient to cause death. An examination of her lungs indicated she had aspirated her own vomit.

Dr. Heuser also observed other bruises and abrasions to Nicole's face. A bruise on her forehead was consistent with impact with a wall or the floor or being struck with a fist. Other bruises were caused by finger pressure. Scratches on the inside of her thighs were consistent with having been made by defendant's ring.

The vaginal opening was "very widely" open and bruised, suggesting penetration with a finger or attempted penetration by a penis. The anal opening was very relaxed and the circumference of the anus had a bruised appearance; there was also tearing of the anus toward the vagina and indications of bleeding.

These injuries were consistent with the insertion of a male penis, or a similar object, into the rectum. All these injuries were premortem. Dr. Heuser opined that the injury to the rectum could have caused death.

Dr. Heuser concluded that the cause of Nicole's death could have been the injuries to her neck or the result of sodomy. She was unable to state a time of death but did opine that death would have taken at least a half-hour.

2. Defense Evidence

Defendant called Dr. John Palmer, who had treated him following his arrest. Dr. Palmer was not a psychiatrist but had treated many people with psychiatric problems in the emergency room. Dr. Palmer thought defendant was "psychotic," and described him as being "agitated" and "delusional." He was having auditory hallucinations, acting inappropriately, and had slashes on his wrists that appeared to have been self-inflicted. The cuts to his wrist were not life threatening. Defendant said that people in black hoods had told him to slash his wrists. A toxicological screen revealed the presence of tetrahydrocannabinol, the active ingredient in marijuana, and benzodiazepine, which belongs to a class of drugs used as a mild tranquilizer.

Dr. Palmer concluded that defendant was "acutely psychotic," suicidal and hearing "command hallucinations, meaning the black robed and hooded figures were telling him to kill himself." Defendant was also under the influence of drugs. Dr. Palmer could not tell whether his psychosis was brought on by the drugs, or was long-standing and relatively quiescent but had been exacerbated. He also acknowledged "environmental factors," like "acute stress" or "acute grief," can produce an acute psychotic break.

Defendant also presented character witnesses who testified to his peaceful disposition, sensitive nature and lack of any unnatural interest in children.

Two former girlfriends also testified that defendant was never violent during sex. One of them, Victoria Eckstone, whom defendant dated for six months to a year, also testified that she believed defendant was the father of her 19-month-old daughter. She testified that defendant loved the child.

Michael Mier, who lived about five miles from defendant, testified that on the evening of November 20, he heard a young girl and a man screaming for help in a creek next to his home. He called 911.

C. Penalty Phase Evidence

1. Prosecution Evidence

The prosecution presented victim impact evidence in the form of testimony from Mr. and Mrs. Parker and their sons, Travis, Chad and Casey. Each family member testified about Nicole's character and the effect that her death had had on that family member and other members of the family.[2]

2. Defense Evidence

Victoria Eckstone testified that she believed defendant was the father of her child, Amanda, and that defendant was good with the child. She acknowledged that she had never had Amanda's paternity medically determined but believed she bore an uncanny resemblance to defendant. She wanted defendant to continue to have a relationship with Amanda because even an imprisoned father was better than no father at all. If defendant were given the death penalty, Amanda would not have a father.

Five friends of defendant testified to his good character, describing him as "nice," "polite," "kind," "sensitive," "sweet," and "gentle," and described how

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[2] This evidence is discussed in greater detail in connection with defendant's argument that it was cumulative, unsubstantiated and prejudicial.

they would be affected should he receive the death penalty — "shocked," "devastat[ed]," "hurt," "very sorry," and "very upset." Daryoosh Adib, who befriended defendant after his arrest, believed defendant was a "very calm" person who could not have "bothered anyone." If defendant received the death penalty, he would feel as if he had lost a brother. William Glaser, defendant's history teacher, testified he had encouraged defendant to seek psychological counseling for stress after defendant expressed his pessimism about his future.

Farrah Farzaneh was a friend of defendant's mother, and had known defendant for approximately six years. Ms. Farzaneh believed that defendant's mother loved him very much but that her parenting methods had "failed miserably." She described defendant as a "sensitive" and "caring" young man who had had a very difficult life. She testified that it would be horrible for her if defendant received the death penalty.

Defendant's mother, Ms. Monfared, testified at length. She was born in Tehran in 1947 and married defendant's father when she was 21 and he was 25. She testified that she and defendant's father argued constantly and that he beat her. While she was pregnant with defendant, her husband physically abused her, more than once pushing her and causing her to fall to the floor. The abuse continued after defendant was born in 1971. When defendant was three months old, defendant's father pushed her and she dropped the baby carrier containing him. He required medical attention. When defendant was about three and a half years old, Ms. Monfared divorced her husband and was granted custody of defendant.

Defendant and his mother went to live with her family. Defendant was upset at his parents' separation. When he was four years old, he intentionally cut his finger severely enough to require stitches. When his mother asked him why, he said did not want to live anymore. Defendant did eventually reestablish a good relationship with his father.

When defendant was 10, he told his mother that his grandfather was sexually molesting him and an older cousin by having anal sex with them. Ms. Monfared did not believe defendant. She slapped him and called him a liar and a "kuni," a pejorative term in Farsi for a homosexual. A few months later, the principal at his school told her some students were saying defendant was "acting like a gay." Defendant denied it, but she did not believe him. She slapped him and punished him and frequently called him a "kuni."

In 1984, after the death of her parents, Ms. Monfared decided to leave Iran with defendant. She had been fired from her job because of her disagreement with the government over its treatment of women. At one point, Ms. Monfared was put in jail by the government. Also, while they were in Iran, the country was at war with Iraq. Defendant was so frightened by the bombing of Tehran that he wet himself at night. Ms. Monfared was afraid that defendant might be taken to war. She also wanted more opportunity for him. For all these reasons, she wanted to take him out of the country. Defendant, however, wanted to stay in Iran where he could have a relationship with his father.

They first went to Turkey where they lived for two years while Ms. Monfared attempted to gain entry into the United States. For the first two weeks they were in Turkey they had to share a bed; during this period, defendant, then 13, tried to "touch" his mother. At one point, during their sojourn in Turkey, they went to Cyprus where Ms. Monfared attempted unsuccessfully to obtain visas to the United States. While they were in Cyprus, a man tried to rape her in the hotel room she was sharing with defendant. Her yelling woke defendant, who was very frightened. The man struck them and left.

In 1986, Ms. Monfared obtained visas to Germany and to Mexico. Defendant did not require a visa to go to Germany, so they went there. Ms. Monfared remained in Germany for 10 days, then left for Mexico before her visa

expired. Defendant, then 15, stayed behind in Germany, which had granted him political asylum. He lived at a dormitory for teenagers from foreign countries or without parents. Eventually, Ms. Monfared obtained green cards for herself and defendant to allow them to travel to the United States. In 1988 she returned to Germany for defendant.

Defendant was happy in Germany where he had a girlfriend whom he wanted to marry. Ms. Monfared threatened to commit suicide unless he came with her to the United States. In September 1988, a month after they arrived, defendant took some pills in a suicide attempt. When Ms. Monfared asked him why he had attempted suicide, he told her it was because he had wanted to stay in Germany with his girlfriend.

In 1989, defendant began dating a girl named Laura. Laura lived with defendant and his mother briefly but Ms. Monfared asked Laura to leave because she suspected Laura was stealing from her. Defendant continued to see Laura. Ms. Monfared threatened to kill herself unless defendant stopped seeing Laura. They argued and she hit him and threw him out of the apartment. On one other occasion, Ms. Monfared threw a knife at defendant and threatened to kick him out of the house.

Ms. Monfared testified that she physically abused defendant when he was a child. She beat him with her hands and shoes, slapped him when he misbehaved and pulled his hair. She also put pens and pencils in the middle of his fingers and squeezed his hand to make him cry. Defendant's uncles and aunts also struck him when he misbehaved. She also testified that when defendant was eight or nine, she took more than 50 showers with him. She testified further that over the years, she would threaten to commit suicide to get defendant to do as she said. She threatened to commit suicide when defendant was offered a plea bargain in this case.

Dr. Palmer testified that it was "possible" the symptoms he observed defendant exhibit the night he treated him could have been the result of long-standing psychosis. He also examined the hospital records of defendant's 1988 suicide attempt. The records indicated defendant had taken a relatively small overdose of antihistamines, an over-the-counter medication. Dr. Palmer characterized the incident as a "suicide gesture, not a suicide attempt." The hospital records showed evidence of major depression, not psychosis. On cross-examination, Dr. Palmer stated it had "always been [his] opinion" that defendant's psychotic episode on the night of his arrest was more likely a stress-induced or drug-induced reaction, rather than a long-standing psychological problem.

Dr. William Vicary, defendant's court-appointed psychiatrist, testified that, prior to the crime, defendant's mental condition was "decompensating." He explained that, from childhood, defendant had been through "an ongoing series of traumatic experiences," and "was getting worse." He testified that "the best single diagnostic label" to apply to defendant would be "depression." He also described defendant as a passive personality, and explained that people who are excessively passive "tend to accumulate painful experiences, frustration, resentments [and] anger . . . until one day like a pressure cooker the top blows off." Nonetheless, Dr. Vicary concluded that defendant was sane at the time he committed the crimes.

3. Rebuttal Evidence

A police detective, Kevin Krafft, testified that Victoria Eckstone had told him William Boorstin, not defendant, was the father of her child. Eckstone described Boorstin as her "common law husband" of 10 years. Krafft obtained a certified birth certificate for Amanda that listed Boorstin as her father. Another police witness, Brent Rollins, testified that he had had a conversation with Eckstone just after she testified at defendant's trial. She told him that the child

would never see defendant. She also told him that the father's name was not on the birth certificate.

Dr. Kaushal Sharma, a forensic psychiatrist, testified that defendant was not suffering from a mental illness that would have caused him to be legally insane at the time of the crime. He agreed that defendant was passive in relation to his mother, but not in other relationships. He characterized defendant's 1988 suicide attempt as an impulsive act designed to gain attention and express his unhappiness. He agreed that defendant may have been suffering from depression. In his interview with defendant, defendant denied having been sexually molested by anyone. He also characterized defendant as manipulative during the interview. His conclusion that defendant was not suffering from a mental illness was not altered by the testimony presented regarding defendant's early life, his physical and sexual abuse, and the events that followed his departure with his mother from Iran.

II. DISCUSSION: GUILT PHASE ISSUES

A. Claims Relating to Removal and Replacement of Second Counsel

1. Background.

On December 14, 1993, attorney Syamak Shafi-Nia, who had been privately retained, appeared on defendant's behalf at his arraignment. Defendant was also represented at that point by Milton Kerlan. After Kerlan withdrew from the case, Robert Sheahen was substituted in to conduct the preliminary hearing. Shafi-Nia had limited experience in criminal law and described his role as being to

"help" defendant. Sheahen, by contrast, was a veteran criminal lawyer with death penalty experience.[3]

On February 25, 1994, Shafi-Nia and Sheahen were appointed by Judge Ito to represent defendant to settle the case. Shafi-Nia was appointed pursuant to *Harris v. Superior Court* (1977) 19 Cal.3d 786, notwithstanding his lack of criminal law experience, because of his personal relationship with defendant. Judge Ito made it clear that Shafi-Nia was being appointed "as second counsel" because of his "lesser qualifications" as a criminal lawyer.

On June 1, 1994, Judge Ito reappointed Shafi-Nia and Sheahen for all purposes. The case was transferred to Van Nuys where it was ultimately tried by Judge Kriegler.

On November 21, 1994, defendant made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) primarily directed at removing Shafi-Nia. He objected to Shafi-Nia's "inexperience in not being a criminal attorney and definitely not qualifying for first degree death penalty cases," and also faulted Shafi-Nia for his "inadequate translation" of a magazine article from Farsi to English. Defendant requested a "second outstanding criminal attorney with appropriate experience and expertise in death penalty cases." The trial court denied the motion, remarking, "I don't think there's any need for a second attorney in this case. I think it's nice that Mr. Shafi-Nia has been here to serve the function that he was appointed to serve, but it's more than the defendant necessarily would have received."

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[3] No preliminary examination was held because the prosecution elected to proceed by way of grand jury indictment.

On November 29, Sheahen informed the court that Shafi-Nia had been in a traffic accident the previous day for which he was being treated, but did not request a continuance.

The following day, jury selection began. Sheahen waived Shafi-Nia's presence. The court expressed its understanding that Sheahen would be handling "all the jury selection." Sheahen agreed that he would be "making the calls here." At the afternoon session, however, he said Shafi-Nia was his "communication link" to defendant and that it was "very important that he be here." He acknowledged he was not unable to proceed in Shafi-Nia's absence and asked that, if Shafi-Nia could not be present, another lawyer be appointed. He conceded he had not asked the case to be put over and was prepared to "go the distance" on jury selection. He also acknowledged that "97 percent of the decisions in this case have been made by me," and that Shafi-Nia's "learning curve" had been like a "fifty-pound weight that we are dragging around." Nonetheless, he said, Shafi-Nia had assisted him on the juror questionnaires. The prosecutor suggested a recess to allow Sheahen to read the questionnaires. Sheahen requested that the proceedings be "adjourn[ed]" until Shafi-Nia could return or, if the court declined to do so, he requested that the court "appoint a new and different second counsel for Mr. Panah." The court did not rule on the request, nor did Sheahen press for a ruling.

At some point, the court received a fax from Southern California Orthopedic and Medical Associates, dated November 29. It stated Shafi-Nia required bed rest for five days because of back pain due to the traffic accident.

On December 1, both Sheahen and Shafi-Nia appeared. Shafi-Nia wanted more time to discuss possible settlement and asked for a 10-day continuance or, alternatively, that another lawyer be appointed for defendant. The prosecutor said he would not object to the five-day continuance requested for Shafi-Nia to

recover, but would object if the continuance was sought to give the defense more time to talk defendant into taking a plea.

That afternoon, Shafi-Nia's representation of defendant was again discussed. The trial court had reviewed the transcript of Shafi-Nia's appointment and observed that he had been appointed to facilitate a settlement and because of his longstanding relationship with defendant. The court remarked that the latter ground "has nothing to do with this case. And I think in retrospect it has created nothing but problems for the court and the orderly processing of this case." The court also reiterated its belief that the case did not require two lawyers. It denied the request for a 10-day continuance, noting that it was giving Shafi-Nia until Monday, December 5 — the five days requested in the November 29 fax.

On December 5, the court received a fax from Dr. Solomon Hakimi saying Shafi-Nia continued to have severe lower back pain and required bed rest until December 10, at which point he would be evaluated again. The defense requested a continuance. It was denied.

The next day, defendant requested that the case be continued until Shafi-Nia could return or alternatively, for appointment of new counsel. Sheahen told the court he had spoken with a possible replacement, Marcia Morrissey. The court indicated it was willing to entertain this request but denied the continuance. Later that day, when the court was informed Ms. Morrissey was not available, the court said it would consider another attorney if Sheahen proposed one.

At the end of the court day, the trial court noted Shafi-Nia had not appeared. It terminated Shafi-Nia's appointment and appointed William Chais in his place as second chair. Defendant thanked the court, but Sheahen objected that replacing Shafi-Nia deprived defendant of Shafi-Nia's preparation and communication skills. He also complained that Shafi-Nia remained in possession of some files. The trial court responded that it would order him to return the files.

The following day, the court made the following statement to Mr. Sheahen to clarify the record: "You had, in fact, requested that a new second attorney be appointed and . . . your client last week had made that request. [¶] And I denied that request from [*sic*] the grounds Mr. Shafi-Nia was fulfilling the limited function he had been appointed to fulfill. [¶] You repeated your request for a new second lawyer yesterday, and I took action to ensure that an experienced criminal lawyer was brought in as second chair in an exercise of my discretion. [¶] That was not done because I felt that defendant was receiving inadequate representation or that the absence of Mr. Shafi-Nia had any impact whatever on how the trial had progressed to that point. [¶] It was done because the case started with two lawyers, and I thought really just to continue having two lawyers would be in the defendant's best interest." Sheahen responded that the defense would have preferred a continuance and complained again that Shafi-Nia was in possession of files in the case. At the end of the day, the defense investigator informed the court that he had spoken to Shafi-Nia and arranged for the missing files to be brought to court.

At the end of the guilt phase, the trial court observed that Chais had done an "outstanding job," and that what he "added to the trial in terms of good lawyering, coordination, and communication is far beyond what Mr. Shafi-Nia could have ever hoped to have added in this case because of his complete lack of criminal experience." Sheahen argued that Chais, who was 32 years old, lacked trial experience in murder cases and should have been given time to prepare. The court pointed out that the defense had not requested a continuance for that purpose nor had Chais ever indicated he was unprepared.

2. Analysis

Defendant contends the trial court erred by: (1) denying his request for a continuance to permit Shafi-Nia to recover from his back injury; (2) removing Shafi-Nia over his objection; (3) appointing Chais; and (4) failing to give Chais adequate time to prepare. He asserts the errors were of federal constitutional magnitude. As we explain, we reject his claims.

" ' "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." ' [Citation.] In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction. [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 972; § 1050, subd. (e).) Defendant bears the burden of establishing that denial of a continuance request was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

There was no such abuse of discretion here, but even if there was, defendant was not prejudiced. The trial had already commenced and the respective roles of defendant's two lawyers, Sheahen and Shafi-Nia, were clearly delineated. It was understood that Sheahen would be conducting the defense at trial because, by his own admission, Shafi-Nia was not qualified to try the case. Sheahen had, at least initially, waived Shafi-Nia's presence for purposes of jury selection and even after Sheahen argued that Shafi-Nia should be present, he acknowledged that he, not Shafi-Nia, was making "97 percent of the decisions in the case." Sheahen also conceded he was able to proceed in Shafi-Nia's absence.

Additionally, the continuance requests escalated from an initial request of five days, which, in effect, the court granted, to 10 days, and then, ultimately, to an open-ended request.[4] Furthermore, the trial court had reason to believe that the underlying reason for the request was not to allow Shafi-Nia to recover, but to obtain more time for defense counsel to persuade defendant to plead guilty after many months of fruitless plea negotiations.

Thus, the trial court was being asked to continue a trial that had already begun to some unknown point in the future to accommodate defendant's secondary lawyer whose role in the trial, it was understood by all participants, was to have been, at best, limited. Given these circumstances, the trial court did not abuse its discretion when it denied the request.

Defendant argues that Shafi-Nia's status as "*Harris* counsel," because of his "long-standing and unique relationship" with defendant, rendered his participation in the trial essential. We disagree. In *Harris*, while affirming the general principle that an indigent defendant's choice of counsel is not a dispositive factor in the appointment of counsel, we concluded that the trial court abused its discretion when it rejected defendants' request to appoint as counsel attorneys who had represented them in prior related criminal proceedings and with whom defendants had developed a relationship of trust and confidence over a substantial period of time. (*Harris v. Superior Court*, *supra*, 19 Cal.3d at p. 799.) We laid particular stress on the prior representation factor because it "served to provide those attorneys with an extensive background in various factual and legal matters which may well become relevant in the instant proceeding — a background which

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[4] In his reply brief, defendant suggests that even a 30-day continuance would not have been unreasonable but this number appears nowhere in the record, nor was a 30-day request made to the trial court.

any other attorney appointed to the case would necessarily be called upon to acquire." (*Id.* at p. 798.)

In this case, there was no prior history of representation like that present in *Harris* and, unlike the attorneys in *Harris,* Shafi-Nia was so wholly inexperienced in criminal matters that, even in appointing him, Judge Ito made it clear he was to function as "second counsel," behind Sheahen. The only basis supporting Shafi-Nia's appointment was his prior personal relationship with defendant. Fully aware of the circumstances of Shafi-Nia's appointment, the trial court concluded that he was not essential to the defense, but was, at most, a "special benefit bestowed" on defendant by Judge Ito.

The record bears this out. Just one week before trial began, defendant specifically sought to remove Shafi-Nia because of Shafi-Nia's lack of criminal law experience and his deficiencies as a translator.[5] Additionally, the various defense requests for a continuance also alternatively requested appointment of new counsel. Moreover, lead counsel Sheahen acknowledged that Shafi-Nia's lack of criminal experience was, in essence, a dead weight on the defense. Plainly, by the time this case reached the trial stage, any value Shafi-Nia may have had to the defense was exhausted.

Defendant also contends that the denial of his request for a continuance was detrimental because Shafi-Nia had been in contact with a number of potential witnesses in Iran and with defendant's German girlfriend, all of whom may have testified at the penalty phase but, ultimately, did not. This argument was not made to the trial judge at the time defendant requested the continuance and to the extent

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5 Defendant contends that he was not requesting that Shafi-Nia be relieved, but for a third lawyer to be appointed, one with criminal law experience. This is a misreading of the record; defendant was clearly requesting removal of Shafi-Nia.

he bases his claim of error on this point, his claim is forfeited. (Cf. *People v. Crovedi* (1966) 65 Cal.2d 199, 207 [whether denial of a continuance constitutes a due process violation " 'must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied' "].) In any event, defendant fails to establish either that the testimony of these witnesses — all of them unidentified except defendant's German girlfriend — would have been anything other than cumulative to his mother's penalty phase testimony.[6]

Accordingly, Shafi-Nia's asserted status as "*Harris* counsel" did not render the denial of defendant's request for a continuance an abuse of discretion. Since there was no abuse of discretion "there is thus no predicate error on which to base the [defendant's] constitutional claims." (*People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2.) Accordingly, we reject them as well.

Defendant next contends that the trial court abused its discretion and violated his constitutional rights when it removed Shafi-Nia from the case.

"On appeal, a trial court's removal of counsel for an indigent criminal defendant is reviewed for abuse of discretion." (*People v. Cole* (2004) 33 Cal.4th 1158, 1187; *People v. McKenzie* (1983) 34 Cal.3d 616, 629 [a trial court may remove defense counsel, even over a defendant's objections, "in order to eliminate potential conflicts, ensure adequate representations, or prevent substantial impairment of court proceedings . . ."].) Whether the trial court acted within its discretion in removing counsel to prevent "disruption of the orderly processes of

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6 Defendant does not explain why Shafi-Nia's removal prevented his German girlfriend from traveling to the United States to testify since she, presumably, would not have had the same fear of traveling to this country and participating in his trial that, he asserts, his potential Iranian witnesses experienced.

justice" is to be determined "under the circumstances of the particular case." (*People v. Crovedi, supra,* 65 Cal.2d at p. 208; *People v. Strozier* (1993) 20 Cal.App.4th 55, 62.) "A court abuses its discretion when it acts unreasonably under the circumstances of the particular case." (*People v. Cole, supra,* 33 Cal.4th at p. 1185.)

In this case, given Shafi-Nia's indeterminate unavailability coupled with defendant's insistence that he was entitled to two attorneys, the trial court acted within its discretion in relieving Shafi-Nia and replacing him.

Defendant advances the same arguments he raised in connection with his claim that the trial court abused its discretion in denying his request for a continuance. We find them no more persuasive in this context than in the continuance context and for the same reason we reject them. Further, the cases upon which he relies are inapposite because they involve the removal of lead counsel (e.g., *People v. Crovedi, supra,* 65 Cal.2d 199) or removal for reasons not present here (e.g., *Smith v. Superior Court* (1968) 68 Cal.2d 547 [trial court exceeded its authority by removing counsel for incompetence].)

Even if the trial court abused its discretion either by denying defendant's requests for a continuance or by removing Shafi-Nia, we would find any error harmless. Preliminarily, we reject defendant's assertion that the removal of Shafi-Nia, if error, is reversible per se. For this proposition, defendant relies on *People v. Crovedi, supra,* 65 Cal.2d 199.

In *Crovedi*, we found that the trial court denied defendant his federal and state constitutional right to counsel when it denied his request for a seven-week continuance of trial to permit his attorney to recover from a heart attack, removed counsel, and replaced him with the attorney's law partner over the latter's protest. (*People v. Crovedi*, *supra*, 65 Cal.2d at pp. 201-203, 208-209.) In this situation, we concluded the constitutional violation required reversal "*regardless* of whether

a fair trial resulted." (*Id.* at p. 205; accord, *People v. Gzikowski* (1982) 32 Cal.3d 580, 589 [denial of continuance to permit counsel to associate more experienced cocounsel, after withdrawal of original experienced cocounsel, reversible regardless of whether a fair trial resulted].) Here, Shafi-Nia was secondary counsel who had, from the beginning of his representation of defendant, disavowed any intention of trying the case, leaving that duty to Sheahen. Under these circumstances, a reversible per se standard is not required. (See *People v. Weaver* (2001) 26 Cal.4th 876, 952 [after one cocounsel withdrew, defendant agreed to proceed with remaining counsel and "nothing in the record suggests [remaining counsel] was an inexperienced attorney or was otherwise unable to assume lead counsel status"; distinguishing *Gzibowski*].)

Defendant was represented by two competent lawyers and nothing in the record shows he was prejudiced by Shafi-Nia's removal. Accordingly, any error, if there was error, was harmless under any standard of review.

Defendant makes two additional, related claims. He asserts that the trial court erred by appointing Chais because he was unqualified to try a death penalty case and that the court erred by failing to give Chais sufficient time to prepare. These claims are forfeited because defendant neither objected to the appointment of Chais on grounds he was unqualified nor did Chais request a continuance to prepare. In any event, defendant does not demonstrate Chais rendered ineffective assistance of counsel. Therefore, he fails to show any prejudice arising from his claims of error.

B. Denial of *Marsden* Motions

Defendant contends the trial court erred in denying his three motions for substitution of counsel. (*People v. Marsden*, *supra*, 2 Cal.3d 118 (*Marsden*).) He asserts that the trial court did not give him an adequate opportunity to explain his

dissatisfaction with counsel, as mandated by *Marsden*, and that, as a result, his right to effective assistance of counsel, and other constitutional rights were denied. We disagree.

1. The November 21, 1994 Hearing

On November 21, 1994, defendant filed a letter with the court in which he lodged 15 complaints against his lawyers.[7] Upon being informed by Shafi-Nia of

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[7] Those complaints included: "1.) D.N.A expert(s) [¶] 2.) Investigator [¶] 3.) Forensic criminalist(s) [¶] 4.) Writs on Judge's rulings 'writing writs' [*sic*]; 5.) A separate suppression motion specifically for any items or evidence(s) not listed in the affidavit search warrant. [¶] 6.) Interviewing certain witness(es) [¶] 7.) Mr. Panah's complaint of counsel Mr. Shafinia inexperience and not being a criminal attorney and definitely not qualifying for first degree death penalty cases. 'Note*,' I feel that I do need two criminal attorneys, one for guilt, and one for penalty if the need arises. 8.) There for [*sic*] my request for a second outstanding criminal attorney with appropriate experience and experti[se] in death penalty cases. [¶] My counsel, Mr. Shafina's inadequate translation. For example his incomplete translation of 'Exhibit C the Iranian magazine's article relating to my case that important parts of it were missing, and misinterpreted by him on 11-17-94. [¶] 10.) Therefore my request for a farsi translat[o]r to interp[r]et[ ], and articulate the law, and matters concerning to my case. [¶] 11.) The full access to all my paper work and whole case file. [¶] 12.) The request from prosecution and motion to return the original of every and any items seized from property case, or apartment that has not relate [*sic*] or value to this case and of those items that prosecution has no use for and has decided not to use against me, such as: pictures, audio tapes, videotapes, books, notebooks, posters, video camera, any clothing. [¶] 13.) My complaints about this harassment of a jailhouse informant have gone unnoticed, plus my complaints about this vicious criminal with a rap sheet as long as my sleeves, which I knew was an informant and he kept threatening me with my life constantly and tried to involve my mother with his lies and tricks, went unnoticed. As a matter of fact I was back and forth in contact with both my counsels Mr. Shafina and Mr. Sheahan [*sic*] and asking them to contact a judge or police or investigator about this guy and his friends were Mr. Peter Berman and detective Joel Price. I was denied of any assistance for both my counsel's [*sic*] to get an investigator for investigating my matter to the police, and the judge. [¶] 14.) Request for discovery hearing. [¶] 15.) Request for a specific hearing. '*Franks v. Delaware*' I'm respectfully bringing this to your attention, I feel

(Fn. cont. on next page)

the existence of the letter and some of its contents, the trial court excused the prosecutor and conducted a *Marsden* hearing. Responding to the letter, Sheahen told the court that, based on the evidence, and his discussions with other criminal defense lawyers who had tried death penalty cases, he had tried to persuade defendant to move away from a claim of "factual innocence" and either plead guilty to avoid the death penalty or enter a plea of not guilty by reason of insanity. With respect to defendant's desire for a DNA expert, Sheahen said he had explained to defendant that a DNA expert would only confirm the prosecution's serology results. He said he had told defendant the case was "moving toward the death penalty," and urged defendant to plead and avoid the death penalty. "And rather than do that, Mr. Panah has said, 'Well, let's get a new lawyer on the case. Let's do whatever.' [¶] And that's essentially where we are."

Defendant read a statement in which he claimed a conflict of interest with counsel existed because they had failed to pursue "certain matters" he asserted were important to his defense. He also read the complaints he had put in his letter.

In reply, Sheahen again said he had assessed the DNA question and determined that the downside of a defense examination was greater than the upside. He also stated that every important witness had been interviewed. He said he was working on a petition for writ of mandate to review denial of a disqualification motion under Code of Civil Procedure section 170.1. (See pp. 51-55, *post*.) He explained he had not moved to suppress certain items,

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(Fn. continued from previous page)

strongly about these issues, and need the court to acknowledge this problem before proceeding any further. *P. v. Ebert* (1988) 199 CalApp3d 40, 44 . . . Counsel whether advisory or otherwise is constitutionally required to act competently."

including the victim's body, as defendant urged, because, as he had explained to defendant, there was no legitimate basis to suppress them. He pointed out that the defense had filed an exhaustive discovery motion and that were no grounds for a hearing because the prosecution had complied with every request made by the defense. As to defendant's request for a *Franks* hearing (*Franks v. Delaware* (1978) 438 U.S. 154 [evidence obtained pursuant to a search warrant based on an affidavit including false statements, or statements made in reckless disregard of the truth, must be suppressed]), Sheahen pointed out that such a hearing had been conducted a month earlier. Regarding the jailhouse informant to whom defendant referred, Sheahen said the district attorney had informed the defense that a cellmate of defendant's had been used to attempt to elicit incriminating statements from defendant about eliminating a witness. (See pp. 65-67, *post*.) Their conversations had been taped and reviewed by Sheahen. He said nothing on them was admissible in the guilt phase and if the prosecution tried to use them at the penalty phase their probative value was minimal because defendant "doesn't say much of anything on these tapes."

The trial court found that "Mr. Sheahen has done a very, very thorough and comprehensive job in presenting the 1538.5 issues, the 402 issues, the change of venue motion, the challenge to the entire courthouse, including myself, as well as the renewed motion for change of venue or transfer of district." It found Sheahen's decision not to call a DNA expert was a "sound" tactical decision. When the trial court asked defendant if there were specific names of witnesses whom he believed counsel had not interviewed, defendant was unable to provide them. Sheahen stated if the case went to trial he would seek appointment of an investigator to interview any remaining witnesses. Concluding there had been no irreconcilable breakdown of the attorney-client relationship, the trial court denied the motion.

2. The December 5-6, 1994 Hearing

On December 5, defendant requested another *Marsden* hearing. The trial court excused the prosecutor. Pressed by the trial court to state his specific complaints against Mr. Sheahen, defendant complained that Sheahen had failed to adequately communicate with him, leaving most of the communication to Shafi-Nia and that Shafi-Nia's absence was having a "negative effect" on Sheahen's representation of him. He also complained Sheahen had failed to adequately investigate and prepare an "alibi defense." Specifically, he stated that Sheahen had not talked to a professor of his who knew he had been suicidal. He also said Sheahen had failed to interview other witnesses, including Ronald Hicks, Victoria Eckstone, Adele Bowen and Bruce Cousins. He complained, moreover, that Sheahen had not investigated mental defenses or sought to suppress evidence. Defendant said Sheahen had told him he would be "found guilty regardless . . . ."

The court interrupted and observed that Sheahen had visited defendant countless times in lockup and arranged meetings with defendant at county jail. Defendant complained, however, that Sheahen had only talked to him about "taking a deal."

In response, Sheahen agreed with defendant that a substantial amount of communication with him had been done through Shafi-Nia, but said he also had met repeatedly with defendant. As to defendant's complaint about suppression of evidence, Sheahen pointed out that "we had a month long hearing where we moved to suppress." With respect to defendant's claim about alibi witnesses, Sheahen said defendant "doesn't have an alibi witness because he was there at the scene of the crime." As to the professor defendant mentioned, Sheahen stated there were other witnesses to defendant's mental state but he might use the professor. Regarding defendant's claim about Sheahen's assessment of the case, Sheahen said, the record showed the evidence against defendant was substantial.

"He wanted me to use a two bearded strangers defense. That is absolutely absurd and I will not use it."[8] The trial court denied the motion. It pointed out that Sheahen "cannot make up defenses where no defenses exist. [¶] His duty is to give the defendant solid advice and do the best he can under the circumstances. [¶] There is no doubt in my mind Mr. Sheahen has done exactly that . . . . [¶] I find there's no conflict. No irreparable breakdown in the attorney-client relationship."

The following day, defendant appeared in court with a two- or three-page handwritten note and complained the trial court had cut him off before he could make his record on the "*Marsden Bonin* hearing." The court declined to excuse the prosecutors because it said it had heard all of defendant's claims. Nonetheless, with Sheahen's assistance, defendant was allowed to state his complaints. Defendant complained about Sheahen's failure to prepare for the penalty phase. He said he wanted his father to come from Iran for the penalty phase. Sheahen told the court he had "looked into" having defendant's father come but "he is presently in an immigration status that precludes him from leaving Iran to come to this country." The trial court stated it was "going to stand by my rulings regarding the representation given the defendant in this case."

3. The January 3, 1995 Hearing

On January 3, after the guilt phase but before the penalty phase, defendant made a third *Marsden* motion. The trial court declined to excuse the prosecutors

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8 By "two bearded strangers defense," it seems Sheahen was referring to a defense that blamed others for the crime.

because defendant's complaints related to tactical decisions made during the guilt phrase.[9]

Defendant complained that counsel had not argued his ring could not have made the scratches on Nicole's thigh and had not called a forensic expert to establish this point. He said counsel should have contended he had not worn the ring for a long time. Defendant also complained about counsel's failure to impeach the victim's mother and Rauni Campbell.

The trial court stated that, with respect to the ring, counsel had objected to its admission and conducted cross-examination on whether it caused the scratches on the victim's body but that, in any event, it was an "insignificant factor" on identity, the only possible issue to which it could have been relevant. With respect to attacking Mrs. Parker's credibility, the trial court stated this was a disagreement over tactics. Regarding the cross-examination of Rauni Campbell, the trial court found defendant's complaints were conclusory and that, in any event, a tactical decision was involved. The trial court denied the motion.

4. Analysis

"A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) When the defendant seeks to remove appointed counsel "the trial court must permit the defendant to explain the basis of his contention and to

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9 Defense counsel, Mr. Sheahen, objected to the trial court's failure to conduct this hearing in camera. The trial court overruled his objection. Defendant does not contest the propriety of this ruling.

relate specific instances of counsel's inadequacy." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1190.) The trial court's ruling is reviewed for abuse of discretion. (*Ibid*.)

Defendant asserts he was not given a sufficient opportunity to justify his request for new appointed counsel, that his attorney argued against him, and that the trial court improperly defended counsel. These claims are meritless. The record demonstrates that defendant was afforded the opportunity to explain the basis of his *Marsden* requests and to cite specific instances of counsel's inadequate performance. His complaints, however, amounted to nothing more than tactical disagreements between defendant and counsel. Given the overwhelming evidence of defendant's guilt, defense counsel was not obliged to pursue futile lines of defense simply because defendant demanded them, and his refusal to do so did not justify his removal as counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729 ["Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict' "].)

Furthermore, the trial court did not err in soliciting a response from defense counsel to defendant's complaints, nor was counsel "arguing" against him when he did so. Inquiring of counsel is necessary for the trial court to evaluate the defendant's request and for appellate review. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 205; *People v. Memro* (1995) 11 Cal.4th 786, 854-855.) Nor did the court improperly defend counsel against defendant's complaints when it disagreed with certain of defendant's assertions. The trial court is not required to sit mute while defendant advances patently erroneous grounds for substitution of counsel. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 95.) We conclude defendant failed to show the trial court abused its discretion in denying his *Marsden* motions and, of necessity, reject his claims of constitutional violation as well.

C. Mental State Issues

1. Failure to Order Competency Hearing

Defendant contends the trial court erred by declining to order a competency hearing pursuant to section 1368.

"When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] 'Evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial.' " (*People v. Lawley* (2002) 27 Cal.4th 102, 131, quoting *People v. Danielson* (1992) 3 Cal.4th 691, 726.) Absent substantial evidence of defendant's incompetence, "the decision to order such a hearing [is] left to the court's discretion." (*People v. Gallego* (1990) 52 Cal.3d 115, 163.)

On November 28, 1994, just before trial began, the trial court learned that Dr. Coburn, defendant's court-appointed psychiatrist, had written defense counsel expressing his doubt that defendant was competent to stand trial. According to the trial court, the letter indicated that defendant was fully aware of the charges against him but "he has little understanding of the nature of the plea change and has significant impairment in his ability to rationally cooperate with counsel . . . ." The court found that the letter was too vague to raise a doubt about defendant's competence. It asked Dr. Vicary, the defense psychiatric expert, and Dr. Coburn to interview defendant and assess his competence to stand trial. As part of their assessment, the court asked them to examine the November 21 *Marsden* proceeding transcript, calling it "highly probative of whether or not the defendant understands the nature of the proceedings and can assist counsel."

Defense counsel Sheahen stated that, although working with defendant had been "extremely difficult" and at times defendant "lack[ed] [a] . . . grasp of what [was] going on," he was "surprised that Dr. Coburn felt there was a 1368 issue" and was uncertain whether defendant's behavior amounted to incompetence. The

court also observed that defendant had "repeatedly assisted counsel." Shafi-Nia disagreed with Sheahen and the court, stating that he believed defendant was incompetent.

After reviewing the transcript, and interviewing defendant, both Coburn and Vicary opined that defendant was competent to stand trial. The trial court declined to conduct a competency hearing.

Defendant contends that Dr. Coburn's somewhat equivocal statements about his competence and statements by defense counsel constituted substantial evidence of incompetence. They do not. While Coburn testified that defendant was "fragile" and "disturbed," he also repeatedly acknowledged that defendant was not incompetent to stand trial. Moreover, defendant ignores the opinion of the other defense psychiatric expert, Dr. Vicary, who testified without reservation that defendant was competent.

Nor did comments by defense counsel constitute substantial evidence of incompetence. First, defense counsel were not in agreement on the issue of defendant's competence. While Shafi-Nia claimed that defendant was incompetent, Sheahen, the more experienced criminal defense attorney, did not share this belief. Second, even if both counsel had agreed that defendant was incompetent, such opinion, standing alone, would not have been dispositive of the issue but only one factor for the trial court to consider in determining whether substantial evidence existed. (*People v. Howard* (1992) 1 Cal.4th 1132, 1164.) Balanced against the conflicting statements of counsel were the opinions of the experts that defendant was competent and the trial court's own observation that defendant had repeatedly assisted in his defense, including bringing and arguing his first *Marsden* motion. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1282 [defendant's participation in his trial "demonstrate[s] beyond any doubt that he was fully aware of the nature of the proceedings and able to assist counsel"].) We

conclude therefore that the trial court did not abuse its discretion in declining to conduct a competency hearing.[10]

2. Informing Jury of NGI Plea

Defendant entered dual pleas of guilty and not guilty by reason of insanity (NGI). Where such dual pleas are entered, section 1026, subdivision (a) (section 1026) provides for a bifurcated trial.[11] The trial court told counsel it would inform prospective jurors that defendant had entered an NGI plea. Defense counsel objected that it would be prejudicial to do so. The trial court responded: "I think the jury needs to be advised of the plea and just what they're facing in this case." In the voir dire proceedings that followed, two prospective jurors were excused for

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10 To support his claim that substantial evidence of incompetence existed, defendant also cites the preliminary hearing testimony of Dr. Palmer — the physician who treated him after his arrest — that, at that time, defendant appeared to be psychotic, and a letter written in February 1994 by defense counsel Sheahen to the presiding judge of the superior court, in which counsel alluded to defendant's history of mental instability and hospitalization. We do not review the propriety of the trial court's competency ruling based on evidence that was not presented to it at the time it made that ruling. (Cf. *People v. Welch, supra,* 20 Cal.4th at p. 739 ["We review the correctness of the trial court's ruling at the time it was made, however, and not by reference to evidence produced at a later date"].) In any event, "[e]vidence regarding past events that does no more than form the basis for speculation regarding possible current incompetence is not sufficient." (*People v. Hayes, supra,* 21 Cal.4th at p. 1281.) Both Dr. Palmer's testimony and counsel's letter fall into this category.

11 "When a defendant pleads not guilty by reason by insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court." (§ 1026, subd. (a).)

cause, one because he told the court that, if the prosecution proved the defendant guilty, he could not accept an insanity defense, and the other because she did not understand the burden of proof would shift during a sanity phase.

Defendant contends that informing prospective jurors about his NGI plea violated the spirit of section 1026, and various constitutional protections including the privilege against self-incrimination and the presumption of innocence.

Nothing in the statute, either expressly or by implication, bars the trial court from informing prospective jurors about a defendant's NGI plea and defendant fails to articulate a basis for his claim of statutory violation. His constitutional claims are based on the premise that the jury would have been so prejudiced by having learned of his NGI plea it would have been unable to impartially determine his guilt. A similar claim was made and rejected in *People v. Guillebeau* (1980) 107 Cal.App.3d 531. There, the court remarked: "As to the contention that once the jury learns of the double plea it cannot approach the question of guilt in an impartial way, it is sufficient to cite the following passage from *People v. Leong Fook* [(1928)] 206 Cal. 64 at page 78: 'We must assume that a fair and impartial jury of intelligent men and women would obey . . . instructions and would therefore hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination. We are not to assume that such a jury will cease to be fair and impartial as the cause progresses upon its successive issues, but, on the contrary, we must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality under the changed procedure as before until the whole cause . . . has been determined.' " (*Id.* at p. 543.)

We agree with this analysis. Defendant's claim that the jury was prejudiced by learning about his double plea at the outset of trial is wholly speculative. There was no error and, necessarily, no constitutional violations.

3. Denial of Request to Appoint a Third Mental Health Expert

After defendant entered his NGI plea, the trial court, pursuant to section 1027, appointed two psychiatrists to examine him, Dr. Vicary for the defense and Dr. Sharma for the prosecution. At the conclusion of the guilt phase, defense counsel informed the court that defendant was requesting appointment of a psychologist to examine him for the sanity phase. Counsel told the court defendant had "declined to cooperate" with Vicary or Sharma. The trial court refused to appoint a psychologist but without prejudice to renewal of the request.[12] Defendant did not renew his request. Ultimately he withdrew his NGI plea.

Defendant contends the trial court's refusal to appoint a third mental health expert violated his federal and state constitutional rights, including the right to ancillary defense services as part of the right to effective assistance to counsel. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.) His claim is without merit.

As a procedural matter, defendant failed to argue in the trial court that the denial of a third mental health expert amounted to a violation of his federal constitutional rights. His constitutional claim is, therefore, forfeited. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.)

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12 When a defendant enters an NGI plea, section 1027 requires the trial court to appoint two psychiatrists or qualified psychologists to examine the defendant and vests the trial court with discretion to appoint a third.

His claim is also substantively without merit. Defendant contends that under California law, he has a federal constitutional right to effective assistance of a mental health expert. Not so. "Neither *Ake* [*v. Oklahoma* (1985) 470 U.S. 68] . . . nor the broader rule guaranteeing court-appointed experts necessary for the preparation of a defense [citation], gives rise to a federal constitutional right to the effective assistance of a mental health expert." (*People v. Samayoa* (1997) 15 Cal.4th 795, 838.) In any event, defendant received reasonable ancillary services and there was no showing that the appointed psychiatrists were unqualified or incapable of administering the psychologist tests defendant now argues were crucial to his defense. The issue, rather, is whether a defendant's unjustified refusal to cooperate with qualified, court-appointed mental health experts required the trial court to appoint another expert. We think not. (See, e.g., *People v. Messerly* (1941) 46 Cal.App.2d 718, 722 [trial court did not abuse its discretion in refusing to appoint a third mental health expert where two experts had been appointed pursuant to section 1027, had examined the defendant, were cross-examined and "(n)o objections were made at the trial as to their qualifications"].)

4. Withdrawal of NGI Plea

Prior to the commencement of the sanity phase, defendant sought an advance ruling from the trial court to limit the scope of cross-examination if he testified. He wanted to testify only to matters regarding his childhood and his upbringing and to preclude the prosecution from cross-examining him about the murder. The trial court declined to issue an "advisory opinion" regarding the scope of cross-examination in advance of hearing defendant's direct testimony.

Defendant claimed the court left him "no choice" but to withdraw his plea, but the court refused to accept the withdrawal. Defendant began to withdraw his

plea a second time, but then again equivocated and the trial court again declined to proceed unless defendant's withdrawal was unequivocal.

The prosecutor, citing *People v. Bloom* (1989) 48 Cal.3d 1194, argued that defendant should be allowed to withdraw his NGI plea if there was no doubt as to his sanity and the examining psychiatrists unanimously agreed he was sane. Without objection, the trial court unsealed the reports of Drs. Vicary and Sharma, and read portions of the reports into the record. The court noted that both Vicary and Sharma concluded that defendant was legally sane at the time of the commission of the offenses. Defendant was then allowed to withdraw his NGI plea. The court stated it was "satisfied that defendant understood the nature of his plea and that he furthermore understood his right to a sanity phase trial, and that he has effectively and knowingly and intelligently given up that right and personally withdrawn his plea of not guilty by reason of insanity."

Defendant argues that the trial court's refusal to give him an advance ruling on the scope of cross-examination coerced him into withdrawing his NGI plea. He also suggests the withdrawal was involuntary because there were doubts as to his sanity. Neither claim has merit.

Defendant's withdrawal of his plea was not coerced by the trial court's adverse ruling on his motion to limit the scope of cross-examination because there was no such ruling. Rather, the trial court properly declined to provide a ruling in advance of defendant's testimony. "Defendant had no inherent right to a binding advance ruling which would spare him the necessity of raising specific objections before the jury." (*People v. Keenan* (1988) 46 Cal.3d 478, 513; *People v. Sandoval* (1992) 4 Cal.4th 155, 178-179.)

Regarding his second claim, unlike *People v. Merkouris* (1956) 46 Cal.2d 540, 553, upon which defendant relies, there was no conflict among the experts regarding defendant's sanity at the time of the offense. (See *People v. Bloom,*

supra, 48 Cal.3d at p. 1214 [where there is no doubt in the trial court's mind of defendant's sanity, and the reports of the examining psychiatrists agree he was sane, defendant should be allowed to withdraw his NGI plea].) Accordingly, the withdrawal of his NGI plea was not involuntary.

D. Juror Issues

1. Failure to Remove Two Jurors for Cause

Defendant contends the trial court erred by failing to remove two prospective jurors for cause. Assuming, without deciding, there was error, defendant was not prejudiced in either case. One of the prospective jurors, G.B., did not sit on the jury because she was excused by the prosecution. (*People v. Boyette* (2002) 29 Cal.4th 381, 419). The other, L.W., was excused by the defense via a peremptory challenge, but because the defense did not exhaust its peremptory challenges, the claim of error is waived. (*People v. Seaton* (2001) 26 Cal.4th 598, 637.)

Defendant nonetheless argues he was prejudiced because the prospective jurors were not removed until toward the end of jury selection and were thus able to "intermingle and influence the objectivity of those potential jurors who ultimately become members of [defendant's] panel." This is sheer speculation.

2. Wheeler *Claim*

Defendant contends the trial court erred in denying his *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258) based on the prosecutor's use of peremptory challenges to remove women from the jury.[13]

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13 Defendant also asserts this claim under *Batson v. Kentucky* (1986) 476 U.S. 79, even though he apparently did not explicitly raise the federal claim below. Nonetheless, we may properly consider the *Batson* claim on its merits (see *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [a claim is not waived on appeal when

(Fn. cont. on next page)

" 'In [*Wheeler*] . . . we held that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. Subsequently, in *Batson* v. *Kentucky* (1986) 476 U.S. 79, 84-89 . . . the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. . . .' " (*People v. Catlin* (2001) 26 Cal.4th 81, 116.) Women constitute a cognizable group for purposes of *Wheeler.* (*People v. Crittenden* (1994) 9 Cal.4th 83, 115.) "The United States Supreme Court has given this explanation of the process required when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges: '[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial [or gender] discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral [or gender-neutral] explanation (step two). If a race-neutral [or gender-neutral] explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial [or gender] discrimination.' (*Burkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 1770-1771, 131 L.Ed.2d 834].)" (*People v. Silva* (2001) 25 Cal.4th 345, 384.)

(Fn. continued from previous page)

the state and federal standards and the factual inquiry are essentially the same].) Accordingly, defendant's *Batson* claim lacks merit for the same reason as his *Wheeler* claim.

Defendant brought four gender-based *Wheeler* motions. On each occasion, the trial court concluded that a prima facie case had not been made. Only once did the prosecutor offer a comment to justify his use of a peremptory challenge.[14] When, as here, "a trial court denied a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. [Citation.] 'If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.' " (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1155.)

Defendant concedes that the prosecution may have been justified in excusing two of the ten women on whom it used peremptory challenges, J.R. and M.C. We therefore consider only the remaining eight.

Prospective Juror M.A. Prospective Juror M.A. stated on her questionnaire that she strongly agreed with the statement that "[r]egardless of the evidence, anyone who intentionally kills another person should never get the death penalty." She also indicated her belief that life without possibility of parole might be worse for a defendant than death. Nonetheless, she stated she would be able to return a death sentence. She indicated further that she had had a negative experience with a police officer who gave her a "traffic ticket without cause," that she or someone close to her had been the victim of a robbery and her niece had been arrested or charged with a crime.

Prospective Juror G.B. Prospective Juror G.B. disclosed in camera that her daughter had been raped by a psychiatrist and the case was pending. When asked

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14 Defendant made a fifth race-based *Wheeler* motion, but he does not argue the trial court improperly denied it.

whether she could fairly listen to psychiatrists and not be upset about what had happened to her daughter, she replied, "I would have to check it in his record and the credibility and see if they had any previous problems or any incidents, but it's a very heavy situation." When asked if she would rather not sit on the case because of the NGI plea, she replied, "Probably so."[15]

Prospective Juror J.W. Prospective Juror J.W. responded to the question about her general feelings regarding the death penalty that "only God gives and takes away, but honestly, if someone close to me [was] involved, I don't know the [depth] of my [compassion.]" On the statement, "[r]egardless of the evidence, anyone who intentionally kills another person should never get the death penalty," she responded, "[t]here is so much involved I don't know what to answer." On the other hand, when asked about a spiritual or religious belief pertaining to the death penalty, she wrote, "Eye for an eye [¶] Do not befriend a bad person." However, she agreed that life without possibility of parole might be a worse punishment than death.

Prospective Juror R.M. Prospective Juror R.M. indicated it might be difficult for her to sit on the case because she had children of her own. She also responded, to a question regarding any religious or moral beliefs that would make it difficult for her to sit as a juror, with "the Ten Commandments." She again referred to the Ten Commandments and "Thou Shalt Not Kill," in response to the question whether she had any spiritual or religious beliefs that would have a bearing on the death penalty. Nonetheless, she also stated she had voted for the death penalty. In court, when asked to explain her reference to the Ten

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15 This is the same juror who defendant claimed should have been excused for cause because her daughter was raped by a psychiatrist.

Commandments, she replied, "One of the commandments obviously is thou shalt not kill. And there's a contradiction in my answer. I don't believe anybody should kill anyone. However, if someone is guilty of murder, it's my belief that they get what they deserve, be it life in prison or the death penalty, depending on how the jury decides to go."

Prospective Juror M.S. Prospective Juror M.S. also indicated on her questionnaire that she had religious scruples that might make it difficult to pass judgment on another, also citing the Ten Commandments. She agreed somewhat with the statement that "[r]egardless of the evidence, anyone who intentionally kills another person should never get the death penalty," explaining "selfdefence [*sic*]." Nonetheless, she also felt that life without possibility of parole was not a severe punishment. She responded to the question about why she might or might not want to sit on the case by writing, "[d]ue to my religious background and having children of my own and grandchildren I feel that it would be impossible." She also indicated she was under a doctor's care for stress. She indicated further that her ex-husband had been molested as a child, that she could not evaluate the credibility of police the same as other witnesses, believed that criminals were favored by the legal system, and would have a difficult time keeping an open mind. In court, she continued to express religious reservations about her ability to sit as a juror.

Prospective Juror B.B. Prospective Juror B.B. expressed skepticism regarding the validity of psychiatric opinions and, citing her job, answered yes to the question whether she had pressing business that might cause her to wish to "hurry along" the decisionmaking process. She expressed dislike of the death penalty although she also felt it was necessary to deter crime and recognized that one of the commandments was "[t]hou shalt not kill." She also stated she would "try hard to be an impartial juror, but a child is very precious."

Prospective Juror B.D. Prospective Alternate Juror B.D. indicated that she agreed somewhat with the statement that "[r]egardless of the evidence, anyone who intentionally kills another person should never get the death penalty" and expressed the view that life without possibility of parole would be a "living Hell." She had taken college-level courses in psychology and stated that "psychological tests should give insight" into the defendant in deciding upon a penalty.

Prospective Juror A.R. Prospective Alternate Juror A.R. had a bachelor of arts degree in psychology and sociology and was undergoing therapy for obsessive-compulsive disorder. She expressed the view that life without possibility of parole was "better than being put to death – at least they still have the gift of life," and that she would need to be "absolutely sure" before she could impose the death penalty. However, she also believed the death penalty should be enforced "more than it generally is" and that it is a "positive." She also stated that one brother had been murdered and another had been arrested or charged with drunk driving and theft.

Defendant focuses on the attitudes expressed by these jurors regarding the death penalty because this was a factor cited by the prosecutor when he explained why he excused prospective juror B.D. Defendant argues that while this may have been sufficient reason to excuse her, it did not provide support for the bulk of the prosecutor's peremptory challenges. We disagree. In the first place, each of these prospective jurors expressed some reservations or religious scruples about the death penalty and, while some of them nonetheless stated they could impose the death penalty, "neither the prosecutor nor the trial court was required to take the jurors' answers at face value." (*People v. Boyette, supra,* 29 Cal.4th at p. 422.)

Even if these reservations or scruples were insufficient to challenge a prospective juror for cause, such skepticism nonetheless constitutes a gender-neutral reason for a peremptory challenge. (*People v. Turner* (1994) 8 Cal.4th

137, 171; *People v. Ochoa* (2001) 26 Cal.4th 398, 432-433.) This provided a nondiscriminatory reason for the prosecutor to have excused J.W., M.A., R.M., M.S., and A.R.

Moreover, the prospective jurors' views on the death penalty were not the only nondiscriminatory basis for exclusion. Juror M.A., for example, also revealed a negative experience with a police officer and that a niece had been arrested or charged with a crime. Prospective Juror A.R. also had a relative who had been arrested or charged with a crime. A negative experience with police or the arrest of a prospective juror or a close relative is a gender-neutral reason for exclusion. (*People v. Wheeler, supra,* 22 Cal.3d at p. 277, fn. 18; *People v. Turner, supra,* 8 Cal.4th at p. 171.)

Four other prospective jurors, G.B., R.M., M.S., and B.B., expressed their reluctance to sit on the jury for various reasons: G.B., because the rape of her daughter by a psychiatrist might have made it difficult to evaluate testimony by psychiatrists; R.M., because she had children of her own; M.S. stated that because of her religious background and because she had children and grandchildren it would be "impossible" for her to sit on the jury; and B.B stated that concern about her job might cause her to wish to "hurry along" the decisionmaking process. M.S. was also under a doctor's care for stress. Because their reluctance to serve, and the reasons for it, might have impaired their impartiality or their ability to deliberate, these also constituted gender-neutral reasons for the exercise of a peremptory challenge.

We conclude, therefore, that the record suggests gender-neutral reasons for the use of peremptory challenges as to each juror excused and, therefore, affirm the trial court's ruling that no prima facie case was established. (*People v. Davenport, supra,* 11 Cal.4th at p. 1200.) We note, in this connection, that the *Wheeler* claim was particularly weak as it consisted of little more than an assertion

that a number of prospective jurors from a cognizable group had been excused. Such a bare claim falls far short of "rais[ing] a reasonable inference that the opposing party has challenged the jurors because of their race or other group association." (*People v. McDermott* (2002) 28 Cal.4th 946, 970.)

In this light, we consider defendant's further claim that the trial court's consideration of his motion was perfunctory because it only reviewed two of the 10 juror questionnaires when the motions were made. He also contends that the trial court acted as an advocate for the prosecutor. The record is clear that the trial court read the juror questionnaires in preparation for voir dire and asked pertinent follow-up questions of some of the jurors based on its evaluation of the questionnaires. Thus, the trial court was not unprepared to rule on defendant's motions. Second, given the weakness of defendant's prima facie showing, the trial court's response was appropriate. Finally, the trial court did not act as the prosecutor's advocate either because it found, based on defendant's bare-bones allegations, that a prima facie case was not made or because it did not further inquire of the prosecutor. Absent a prima facie showing, the prosecutor was not required to offer such explanation nor was the court required to ask it of him.

3. Defendant's Exclusion from Jury Selection Hearing

"A criminal defendant's federal constitutional right to be present at trial, largely rooted in the confrontation clause of the Sixth Amendment, also enjoys protection through the due process clause of the Fifth and Fourteenth Amendments [citation] ' "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defendant against the charge," ' but not ' "when presence would be useless, or the benefit but a shadow." ' (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S.Ct. 2658, 2667, 96 L.Ed.2d 631], quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107 [54 S.Ct. 330, 332-333, 78 L.Ed.

674, 90 A.L.R. 575].) Article I, section 15 of the California Constitution applies the same standard. [Citation]." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 433.)

Defendant contends these rights were violated by his exclusion from an in camera proceeding during voir dire at which the prosecutor and defense counsel passed for cause and each exercised three peremptory challenges. Even if his exclusion was error, he fails to show prejudice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357 ["Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial"].)

Defendant cites nothing in the record to support his generalized claim that, during this session, his attorney excused any juror whom defendant would have wanted to retain; thus his argument is speculative. Defendant's further claim that he was unable to review the prosecutor's choices is similarly unconvincing. The only ground on which the defense could have objected to the prosecutor's exercise of peremptory challenges would have been for the discriminatory use of such challenges under *Wheeler/Batson* but he fails to show that any such issue arose during the in camera session. His remaining claim, that defense counsel failed to excuse a juror who had connections to the victim and her family, also fails. The defense did not exhaust its peremptory challenges at the in camera session and could have excused the juror subsequently. That the juror was not excused cannot be attributed to defendant's absence from the in camera session.

4. Trial Court's Voir Dire Reference to "Murder"

During voir dire, in the course of questioning a prospective juror, the trial court said, "You know, to be quite blunt about it, there's one thing that's not in dispute in this case. That's that an eight-year-old girl was murdered." Defense counsel moved for a mistrial, arguing that the trial court had prejudged the evidence by referring to the killing as a murder. The trial court denied the motion,

observing, "I think the point you're making is a point that, when the case is finally submitted to the jury, no juror will even remember." Nonetheless, at the prosecutor's prompting, the trial court later repeatedly told prospective jurors that it had not intended to imply a murder had occurred, but that this was a determination for the jury.

Defendant contends the trial court erred when it denied his motion for a mistrial because its reference to murder lowered the prosecution's burden of proof. Not so. Denial of a motion for a mistrial is reviewed for abuse of discretion and should be granted " 'only when a party's chances of receiving a fair trial have been irreparably damaged.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282, quoting *People v. Welch* (1999) 20 Cal.4th 701, 749.) The motion should be granted only if the trial court is informed of the prejudice and it judges the prejudice to be insusceptible of being cured by admonition or instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.)

The trial court's brief reference to "murder" in the particular context in which it occurred was not prejudicial but, in any event, any prejudice was cured by the court's subsequent clarifications.

E. Disqualification Motion

Defendant contends that the trial court committed statutory and constitutional error when it struck his motion to disqualify the court and all judges at the Van Nuys courthouse. (Code Civ. Proc., § 170.1, subd. (a)(6)(C).) We find no error.

Preliminarily, his claim is not cognizable on appeal. As set forth in Code of Civil Procedure section 170.3, subdivision (d): "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10

days of notice to the parties of the decision and only by the parties to the proceeding." As we have repeatedly held, the statute means what it says: Code of Civil Procedure section 170.3, subdivision (d) provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory. (*People v. Hull* (1991) 1 Cal.4th 266, 271-276; *People v. Williams* (1997) 16 Cal.4th 635, 652 [where defendant failed to seek review via writ of mandate, his "statutory disqualification claim is not properly before us on this automatic appeal following a judgment of death"]; *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 802; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 50-51.)

Here, defendant filed a writ petition in the Court of Appeal seeking review of the denial of the disqualification motion, which the Court of Appeal summarily denied. Defendant thus received the appellate review of his statutory claim to which he was entitled. Defendant suggests that Code of Civil Procedure section 170, subdivision (d) does not provide his exclusive appellate remedy but is merely a procedural step that must be followed before he can raise the disqualification issue on appeal. Not surprisingly, he cites no authority for this construction of the statute and our cases are clearly to the contrary.[16]

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16 We have observed that, notwithstanding the exclusive-remedy provision of Code of Civil Procedure section 170.3, "a defendant may assert on appeal a claim of denial of the due process right to an impartial judge." (*People v. Mayfield* (1997) 14 Cal.4th 668, 811.) Although defendant alluded to the due process clause in his motion below and on appeal here, his argument here is focused on whether the trial court complied with the statute and he makes no separate due process argument. Even if we construed his argument to encompass a due process claim, however, we would reject it for the same reasons we find his argument substantively unavailing.

Defendant's claim is also substantively without merit. Defense counsel's declaration in support of the disqualification motion made it clear that he was not asserting that the trial court was personally biased against him but, rather, that an institutional bias against him pervaded the Van Nuys courthouse because of the "unusual relationship between the Van Nuys court system and the family of the deceased in this case." The basis of this allegation was that the victim's mother, Lori Parker, a paralegal or legal secretary, and her fiancé, Martin Gladstein, a criminal defense lawyer, were known to court personnel at the Van Nuys courthouse and had personal relationships with some of them, and that Gladstein had recently tried a case before Judge Kriegler, to whom defendant's case was assigned, and had access to areas of the courthouse restricted to the general public.

The declaration also referred to four specific incidents to support the claim of institutional bias: (1) defense counsel had personally observed Mrs. Parker and two of her friends hold a "private conference" with Judge Ronald S. Coen in his courtroom, which was adjacent to Judge Kriegler's courtroom; (2) a lawyer named Larry Baker, who was a friend of both Gladstein's and Parker's, approached defense counsel outside of Judge Kriegler's courtroom and said "words to the effect of 'No offense, Bob, but I hope your guy dies' "; (3) graffiti had been carved on a wood railing outside Judge Kriegler's courtroom that read "anal sex kid must die"; and (4) a bailiff involved in transporting prisoners to Judge Kriegler's courtroom had told defendant, "Why don't you just kill yourself and save everybody time and money." The declaration noted that when defense counsel brought this information to Judge Kriegler, the bailiff was relieved of any duties with respect to defendant.

The declaration concluded that the perception of institutional bias, "local publicity," the "unusual relationship to the court system of the family of the

deceased" and the "venom of court personnel and members of the legal community" created "an appearance of bias or prejudice."

As early as September 24, 1994, defense counsel informed Judge Kriegler that he was contemplating bringing the motion and Judge Kriegler urged him to file it. On October 14, defense counsel again stated he would be "filing a motion in the nature of a 170.1 challenging this entire building." On November 14, when the defense again raised the issue of filing the disqualification motion, the trial court pointed out that the statute required the motion be filed "at the earliest possible opportunity." The motion was not filed until November 16.

Upon receipt of the motion, Judge Kriegler filed a verified answer denying any bias or impartiality and stating that the motion was untimely. At the hearing of the motion, Judge Kriegler declined to refer the motion to another judge pursuant to Code of Civil Procedure section 170.3, subdivision (c)(5) but, instead, struck the motion on grounds it was untimely and without a legal basis. (Code Civ. Proc., § 170.4, subd. (b).)[17] Judge Kriegler's ruling was correct.

" 'The standard for disqualification provided for in subdivision (a)(6)(C) of section 170.1 is fundamentally an objective one.' If a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality, disqualification is mandated. The existence of actual bias is

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17 Code of Civil Procedure section 170.3, subdivision (c)(5) states in pertinent part: "No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In every such case, the question of disqualification shall be heard and determined by another judge . . . ." Code of Civil Procedure section 170.4, subdivision (b) states: "Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken."

not required." (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170, fn. omitted, quoting *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *People v. Brown* (1993) 6 Cal.4th 322, 336-337.) "The challenge must be to the effect that the judge would not be able to be impartial toward a particular party." (*Flier, supra,* at p. 171.)

Defendant asserts that an institutional bias on the part of other judges or courthouse personnel is sufficient to disqualify a judge as to whose impartiality no question exists. We are far from persuaded the allegations in defense counsel's declaration demonstrated a pervasive institutional bias against defendant but, in any event, nothing in the disqualification statute supports his argument. His motion really appears to have been simply an attempt to relitigate his unsuccessful motion for change of venue.

The motion was also untimely. While certain specific events may not have been known to defense counsel until shortly before he filed the motion in November, specific facts to support his underlying argument of institutional bias were known to him as early as September. Thus, his failure to file the motion until the very eve of trial rendered it untimely under the statute. (Code Civ. Proc., § 170.4, subd. (b); *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 424 ["The matter of disqualification should be raised when the facts constituting the grounds for disqualification are first discovered . . ."].)

F. Denial of Venue Motion

Defendant contends the trial court erred when it denied his motions to change venue or transfer his case to another judicial district within Los Angeles County due to prejudicial pretrial publicity and courthouse bias.[18] We disagree.

"A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. 'Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, "the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable." ' [Citation.] 'The de novo standard of review applies to our consideration of the five relevant factors: (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 744, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1236-1237.)

Defendant brought three motions to change venue or transfer. Each was denied.

We perceive no error. Only the first factor weighs in favor of granting the motion, but the nature and the gravity of the offense, standing alone, is not dispositive. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 905.) Nor, contrary to defendant's claim, does the second factor weigh in favor of the motion because we conclude the publicity was neither extensive nor prejudicial.

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18 The same standard and considerations for determining whether to grant a motion to change venue apply in ruling on a motion to transfer and, therefore, we do not analyze that motion separately. (*People v. Jenkins* (2000) 22 Cal.4th 900, 945; *People v. Cummings* (1993) 4 Cal.4th 1233, 1276, fn.17.)

In his pretrial motion, defendant cited 18 newspaper articles about his case that had appeared between November 22, 1993 and June 9, 1994.[19] Except for a letter to the editor, all the articles were news stories. Five reported the circumstances of defendant's arrest and the victim's death and two reported her funeral. The remaining articles reported developments in the case as it moved through the legal system. Defendant's trial did not commence until November 1994, more than a year after most of the articles had appeared, and about six months after publication of the last one. Any potential prejudice from the media coverage was attenuated by the passage of time. (*People v. Welch, supra,* 20 Cal.4th at p. 744.) Moreover, 18 articles over a 12-month period can hardly be characterized as "extensive" (cf. *People v. Cummings, supra,* 4 Cal.4th at p. 1275 [51 newspaper stories and 24 television stories in an 11-month period], nor, contrary to defendant's claim, was the coverage biased or inflammatory simply because it recounted the inherently disturbing circumstances of this case and the victim's family's grief at her murder.

Moreover, the fact that prospective jurors may have been exposed to pretrial publicity about the case does not necessarily require a change of venue. (*People v. Proctor* (1992) 4 Cal.4th 499, 527.) " 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " (*People v. Daniels* (1991) 52 Cal.3d 815, 853, quoting *People v. Chadd* (1981) 28 Cal.3d 739, 750.) Here, all of the jurors and alternate jurors who had any knowledge of the case stated they could set aside this knowledge and decide the case on the law and evidence received at trial. In this connection, it should be observed that defendant failed to use all his peremptory

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19 Defendant's renewed motions also referenced the pretrial publicity.

challenges when he accepted the jury, thus indicating that "the jurors were fair and that the defense itself so concluded." (*People v. Balderas* (1985) 41 Cal.3d 144, 180; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 46.)

Defendant also cites three newspapers articles that appeared during his trial that were the basis of renewed motions for change of venue on December 5 and December 7, 1993. His December 5 motion was based on a newspaper article that had appeared four days earlier, while jury selection was still in process, titled *Child-Murder Case Inflames Emotions*. The trial court included questions about this article and determined that the prospective jurors had not been exposed to it. Defendant's December 7 motion was brought after two newspaper articles implicated defendant in a plot to kill prosecution witnesses. The trial court questioned the jurors about the article and again determined that none of them had been exposed to it. Under these circumstances, the trial court properly denied defendant's renewed motions.[20]

None of the remaining relevant factors support a change of venue in this case. As to community size, the San Fernando Valley, from which the jury pool was drawn, contains over a million inhabitants and is far more populous than many counties. Therefore, the size of the community does not support a change in venue. (*People v. Staten* (2000) 24 Cal.4th 434, 449.) Defendant asserts that the victim and her family occupied positions of prominence and popularity, but the victim became known only because she was a murder victim, not because of any

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20 Defendant contends there were over 60 newspaper articles related to his case, but he includes numerous articles that appeared during his trial, some of them duplicates. These stories, obviously, were not before the court when it ruled on his motions to change venue or transfer and we do not consider them for purposes of our analysis.

preexisting status. (See *People v. Daniels, supra,* 52 Cal.3d at p. 852.) Defendant also points out that the victim's mother was a legal secretary and her fiancé was a criminal defense lawyer who were known in the Van Nuys legal community, but nothing in the record suggests these factors had any effect on the jury pool. (*People v. Weaver, supra,* 26 Cal.4th at p. 906.) Finally, despite defendant's attempt to depict himself as an outsider because of his recent immigrant status, and the victim of ethnic bias because of his Iranian origin, "there was no evidence of unusual local hostility to such persons, such that a change of venue would likely produce a less biased panel. Nor was the pretrial publicity calculated to excite local prejudices in this regard." (*People v. Balderas, supra,* 41 Cal.3d at p. 179; cf. *People v. Williams* (1989) 48 Cal.3d 1112, 1129 [pretrial publicity focused on defendant's race and his status as an outsider to the community in contrast to victim's ties to the community].)

To the extent, moreover, that defendant asserts some racial or ethnic animus was at work among the jurors, his claim is belied by his failure to have exercised all his peremptory challenges. "In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial." (*People v. Daniels, supra,* 52 Cal.3d at p. 854.)

We therefore conclude that the trial court did not err in denying defendant's motions for change of venue or transfer.

G. Claims of Judicial and Other Bias and Inflammatory Publicity

1. Bias Rendering the Proceedings Unfair

Defendant claims that bias pervaded the proceedings, rendering them unfair. He again cites the incidents that supported his venue and disqualification

motions. Not only have we already concluded that none of these incidents justified either disqualification of the trial court or a change of venue, but defendant also fails to show that any juror or prospective juror witnessed or was aware of any of these incidents. Therefore, we reject his assertion that these events had any impact on his trial.

Next, defendant asserts the trial court's response to his allegation of mistreatment by jail staff evinced bias against his religious beliefs. Defendant claimed that, during the trial, jail staff entered his cell without his consent and defaced his copy of the Koran and his trial notes. When defense counsel brought this allegation to the trial court's attention, the court agreed to have its bailiff investigate and urged defendant to file a formal complaint with the sheriff. The trial court noted, in passing, that it had had the bailiff look into previous complaints made by defendant and determined they were unfounded but, nonetheless would "have my deputy check into" defendant's fresh complaints

Defendant contends the trial court's response was inadequate or indicative of judicial bias against him, but the trial court's actions were reasonable and responsive to his request.

Defendant also asserts the trial court and prosecutor ridiculed his religion. This assertion is without merit. After the discussion of defendant's mistreatment in the jail, the prosecutor pointed out that, earlier in the trial, defense counsel expressed concern that jurors might be prejudiced against defendant because he is Muslim. He noted that the trial court had permitted defendant to bring a Koran into the court but in a place where the jurors could not see it. He observed, however, that "I think it's important to note for the record the Koran, when this case started, was about by three inches in size, and now he's bringing one the size of a telephone book each day when he comes into court. [¶] I think it is important for the issue of bias and prejudice, that counsel has brought up on this record over

and over, that this is a situation that is being created at this point by the defendant by bringing this book in." The court noted that defendant was also kissing the Koran while witnesses were testifying against him. "I told him I thought he should sit there and quietly [*sic*] not make any overt movements during the trial that might be interpreted one way or the other by the jury. [¶] The defendant instead is flaunting the Koran in front of the jury and has been seen by me to be kissing the Koran at various times during the trial. [¶] So that is of record. It doesn't require any further response. There's no issue to be litigated on this."

The jury was not present during this exchange and defendant made no objection to either the prosecutor's remarks or the court's response. He now argues that the trial court "stif[led] his use of a spiritual guide during the proceedings." The trial court, however, despite its concern that defendant's use of the Koran might be a distraction, apparently neither prevented him from continuing to bring the book into the courtroom nor otherwise interfered with his religious practice.

Defendant next complains about an incident in which the victim's mother kissed the trial judge's bailiff. The record shows that the bailiff was not a willing participant but attempted to move away from the victim's mother. It was also unclear whether any juror witnessed the incident.

Furthermore, the prosecutor admonished the victim's mother to have no further contact with anyone related to the case.

Defendant rejected the trial court's offer to replace the bailiff and moved for a mistrial. The trial court denied the motion but suggested polling the jurors to determine whether they saw the incident. Defense counsel responded by requesting that the penalty phase be moved to another courthouse. The trial court denied the request. Defense counsel then requested that the court instruct the jury that any interaction between the victim's mother and the bailiff was improper and

to disregard it. The trial court replied, "She's not on trial. I'm not going to do that. [¶] I would be happy to tell them if they saw any interaction, obviously that should play no role whatever in their determination of what happened in the case." Defense counsel rejected the trial court's proposal and declined to make any "further requests."

"Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict. [Citation.] A trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) The incident appears to have been brief and it was not clear that any juror even witnessed it. We conclude that the trial court did not abuse its discretion in denying defendant's mistrial motion. In the absence of any indication on the record that any juror actually observed the incident, we reject defendant's further claim that the trial court erred by failing to admonish the jury to disregard the incident.

Defendant next claims that the trial court was biased against his family and supporters as evidenced by three incidents involving his mother, and a fourth incident involving some of his supporters.

During the discussion of the kissing incident between the victim's mother and the bailiff, the trial court noted that the defendant's mother was sitting in the court "crying almost uncontrollably right now while my bailiff is trying to console her." As the hearing progressed, defendant's mother became more and more voluble until, according to the court, she was "out of control." It ordered her removed from the courtroom. No juror was present when this occurred.

Defendant argues the court's removal of his mother indicated its bias against her. We disagree. "Trial courts possess broad power to control their courtroom and maintain order and security." (*People v. Woodward* (1992) 4

Cal.4th 376, 385; Code Civ. Proc., § 128, subd. (a)(1)-(5).) The trial court's removal of defendant's mother was a reasonable exercise of this power.

The second incident involving defendant's mother occurred when the trial court was informed that she had been seen in the vicinity of the parking structure reserved for court employees. In a closed session, the trial court briefly asked her whether she had been parking there and was satisfied by her explanation that, because it was rainy and wet, she had been dropped off at the parking structure. Defendant asserts this was evidence the trial court was biased against his mother and his supporters. We disagree. The trial court's concern that a witness was parking in an area reserved for court employees was reasonable, its inquiry was brief, and it was satisfied with the explanation given.

Defendant also asserts that the trial court showed its bias against his mother because it refused to order television cameras to be turned off during her testimony as requested by defendant. However, at the in camera proceeding to which he directs us, defendant did not make this request. He asked for special transportation for himself to the court because he had been spat at and taunted by other prisoners on the bus ride from the jail to the court. In passing he mentioned that some of them had said they had seen his mother on television and "they're going to have somebody from their friends do something to her." At no point did he request the cameras be turned off during her testimony.

Lastly, defendant claims the trial court evinced bias against his supporters because it conducted a hearing during which the bailiff charged with guarding the jury during its deliberations informed the judge that three men, apparently supporters of defendant, appeared to have been following or "shadowing" the jury. Out of the presence of the jury, the bailiff told the court he asked the men for identification and ran a warrant check; one of the men had three outstanding warrants. The court held him until he could be taken into custody. The court

briefly addressed the other two men, and admonished them not to follow the jury. Defense counsel objected to "the disparate treatment of our witnesses" and said he had observed the victim's mother in the cafeteria while the jury was also there. The trial court replied, "The jury is deliberating, and I want to make sure the jury does its best to reach a verdict without the kind of outside influences you are concerned about." As to the presence of the victim's mother in the cafeteria, the court pointed out that there was no report that she had followed the jurors.

On this record, it is clear that the trial court's action, in response to the bailiff's allegation, was intended to prevent any impairment of or interference with the jury's deliberation. We therefore reject defendant's claim of judicial bias.

We further reject defendant's more global claim that not only judicial bias, but courthouse personnel bias and "community" bias so "created an emotional atmosphere" that the jury was unable to reach a fair verdict. Every incident cited by defendant either clearly or apparently occurred outside the presence of the jury and could have had no impact on its deliberations or its verdict.

2. Denials of Mistrial Motions for Inflammatory Publicity

Defendant contends the trial court abused its discretion and violated his constitutional rights when it denied mistrial motions based on claims of inflammatory publicity.

"As we have previously explained, a mistrial should be granted 'only when " 'a party's chances of receiving a fair trial have been irreparably damaged.' " ' [Citation.] We review the trial court's ruling for abuse of discretion and find no such abuse here." (*People v. Burgener* (2003) 29 Cal.4th 833, 873, quoting *People v. Ayala, supra,* 23 Cal.4th at p. 282.)

The first incident involved a newspaper article that alleged prosecutors had reported that defendant was involved in a plot to kill a prosecution witness, Rauni

Campbell. When the article was brought to the trial court's attention, the trial court inquired of the jurors whether they had had any exposure to articles or television reports about the case. None had. At the end of its inquiry, the court, which had previously ordered the jurors not to read newspapers, watch any television reports, or listen to any radio reports about the case, directed them not to read the newspaper at all, except for the sports and classified sections. Defendant engages in the unsupported assertion that the trial court's admonition was either inadequate or ineffective, but we presume the jury followed the court's instructions. (*People v. Harris* (1994) 9 Cal.4th 407, 426.)

Defendant's second mistrial motion was made on January 9, 1995, after defense counsel learned that the victim's mother had given a television interview in which, according to defense counsel, she demanded the death penalty for defendant. The trial court reminded counsel he had admonished the jury not to watch television reports of the case and offered to poll them. Sometime later in the proceedings, the trial court returned to the subject. The trial court said it would order the Parker family not to discuss the case with anyone, including the press, during the remainder of trial. Regarding the television report, the court stated it was hopeful that the jurors had been abiding by its admonition not to watch television. Defense counsel characterized this as "wishful thinking" and moved for a mistrial. The trial court admonished the victim's family but did not rule on the motion, nor did defendant press for a ruling.

Again, we presume that the jury followed the trial court's admonition to avoid any publicity about the case. Accordingly, even assuming defendant has not forfeited this claim by failing to press for a ruling, we would find no abuse of discretion in the denial of the motion.

H. Prosecutorial Misconduct Claims

1. Use of an Informant

Defendant complains that the prosecution interfered with his attorney-client relationship because it used a jailhouse informant to investigate allegations that he was conspiring to kill a prosecution witness. The claim is without merit.

During a pretrial conference, an issue arose regarding the prosecutor's attempts to subpoena videotapes from three Iranian television stations that had broadcast stories in which defendant made statements about the case in phone calls to his mother, which were then aired. One of the stations had failed to comply with the subpoena and there was some discussion about how to enforce it. Defense counsel interjected, accusing the prosecution of "overreaching, [and] overzealous enforcement." In the course of his remarks, he claimed that the prosecutor had ordered defendant "transferred to various cells in the county jail so he can gather evidence." He asked that the subpoenas to the television stations not be enforced.

The trial court rejected his request, pointing out that he had no standing regarding the subpoenas because they were directed at third parties. Defense counsel cited *Barber v. Municipal Court* (1979) 24 Cal.3d 742 for the proposition that when "the prosecution infiltrates the defense camp, the prosecution runs afoul of the Sixth Amendment, and Mr. Panah does have standing to complain about Sixth Amendment violations, and I would submit it."

The trial denied the motion to quash, observing there was not "even a hint that this has anything to do with the attorney-client relationship or privilege." Then, while recognizing "there's no motion before the court," it invited the prosecutor to respond to defense counsel's other allegations.

The prosecutor replied that his office had received information that defendant was involved in a conspiracy to murder two prosecution witnesses and

had conducted an investigation that involved obtaining court orders to tape conversations between defendant and an informant. He pointed out that the defense had been fully informed of the investigation, which had not resulted in a filing against defendant. He invited the defense to file whatever motions it deemed appropriate with respect to the investigation.

Defense counsel responded, "When the day is appropriate, we will notice any appropriate motion and we will litigate it with appropriate testimony, Your Honor." There was no further discussion of the point.

Thus, defendant never made a motion on Sixth Amendment grounds to suppress any evidence obtained by the prosecutor's use of an informant to investigate the alleged conspiracy to kill witnesses. Indeed, no charges were ever filed against defendant arising out of the investigation nor was any of the evidence gathered during the information used against him at trial. Moreover, defendant cites nothing in the record that controverts the prosecutor's statements either that the investigation was conducted lawfully or that all information regarding it was turned over to the defense. In fact, during the course of defendant's November 21 *Marsden* motion, defense counsel acknowledged having received and reviewed transcripts from the taped conversations between defendant and the informant. We therefore conclude that defendant forfeited any Sixth Amendment claim based on the prosecution's use of the informant and, in any event, has failed to show any violation of his Sixth Amendment right or that he suffered any conceivable prejudice. (See *United States v. Morrison* (1981) 449 U.S. 361, 365, 366; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1006-1008.)

Defendant contends that the prosecutor used conversations between him and the informant to prevent defendant from gaining access to Rauni Campbell, one of the alleged targets of the conspiracy to kill witnesses. As noted below, the prosecution made Campbell available to the defense, but she declined to be

interviewed by the defense. Defendant cites nothing in the record to support his claim that Campbell's unwillingess to speak to the defense investigator was related to defendant's conversations with the informant.

2. Denial of Access to Prosecution Witness

Defendant contends the prosecution violated his Sixth Amendment and other constitutional rights by denying him access to a prosecution witness, Rauni Campbell. Specifically, he argues that the trial court erred when it refused to order Campbell to be brought before the court for a *Franks* hearing (*Franks v. Delaware*, *supra*, 438 U.S. 154); that the prosecutor prevented him from interviewing the witness before she testified; and that the trial court abused its discretion by withholding her out-of-state address from the defense out of concern for her safety. (§ 1054.7.)

Under *Franks v. Delaware*, *supra*, 438 U.S. 154, a defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower court must conduct an evidentiary hearing *if* a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth; and, (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause. The defendant must establish the statements are false or reckless by a preponderance of the evidence. (*Id.* at pp. 155-156; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1297.) Innocent or negligent misrepresentations will not defeat a warrant. (*Franks, supra,* 438 U.S. at pp. 154-155.) Moreover, " 'there is a presumption of validity with respect to the affidavit. To merit an evidentiary hearing[,] the defendant['s] attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-

examine. . . . The motion for an evidentiary hearing must be "accompanied by an offer of proof . . . [and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished," or an explanation of their absence given.' " (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 272, quoting *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1316.) Finally, "[a] defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause." (*People v. Bradford, supra,* 15 Cal.4th at p. 1297.)

During the suppression hearing, defense counsel asked that Ms. Campbell be ordered to testify regarding two statements made by Officer Kong in the affidavit supporting the search warrant for defendant's residence. Kong stated that as he approached the courtyard in Campbell's apartment complex, defendant "fled through the courtyard apartment." Defense counsel maintained that Campbell would testify defendant did not "flee" but "left the apartment in the normal fashion." Kong was also quoted as saying Campbell told him defendant had told her "he had done something very bad." Defense counsel claimed that what Campbell actually told Kong was that defendant said "they had done something very bad." The trial court found that defendant failed to meet the foundational requirements set forth in *Franks* and denied the motion.

We review denial of a *Franks* hearing de novo. (*People v. Benjamin, supra,* 77 Cal.App.4th at p. 271.) We conclude the trial court acted properly. Defense counsel's motion was unaccompanied by any of the evidentiary material

required of the moving party.[21] At most, he provided no more than "conclusory contradictions" of the affiant's statements "insufficient for the 'substantial preliminary showing' " required by *Franks.* (*Benjamin*, *supra*, 77 Cal.App.4th at p. 272.*)* He also failed to demonstrate that, even if the statements were inaccurate, they were material to the determination of probable cause. (*People v. Bradford, supra,* 15 Cal.4th at p. 1297.)

Defendant claims that the prosecution also denied him access to Campbell prior to her trial testimony. In this connection, he challenges the trial court's order withholding her address from defendant because of concern that he had conspired to threaten her safety. His claims are without merit.

At some point, apparently early in the case, there was an in camera proceeding at which the trial court granted the prosecution's request that Ms. Campbell's out-of-state address not be disclosed to defendant based on allegations that he had conspired with others to kill her and another witness. While defendant complained about his lack of access to Campbell in connection with his *Franks* motion, he made no attempt to compel disclosure of her address.

On November 21, 1994, the prosecutor agreed to make Campbell available to the defense by phone. Two days later the prosecutor represented that Campbell had declined to speak to the defense. The defense made no response to the prosecutor's representation nor did it seek disclosure of her address or telephone number.

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21 Defendant argues that defense counsel's brief reference to Campbell's grand jury testimony supplies the required evidentiary showing; he is wrong. On the other hand, if Campbell's grand jury testimony contradicted statements made by Kong in the affidavit, and Kong was available for questioning, defendant fails to explain why he did not call Kong and impeach him with Campbell's grand jury testimony.

On December 5, the prosecutor informed the trial court that Ms. Campbell would testify the next day. The prosecutor agreed to make her available to the defense. The following day, the prosecutor reported that he had introduced the defense investigator to Ms. Campbell and she had declined to speak to him. When defense counsel complained that he had been deprived of the ability to interview her, the trial court observed, "[j]ust to be clear, the prosecutor several times has indicated that Miss Campbell does not want to talk to the defense. And she apparently delivered that message herself to the defense investigator today."

The defense then requested her current address in order to gather information about her reputation in her current community. The prosecutor reminded the court that Campbell had been relocated to protect her based on information that defendant had been involved in a plan to jeopardize her life. He also noted that he was unaware of any efforts by the defense to have investigated Campbell's reputation in the community at the time of the offense. The trial court observed that information about Campbell's reputation in her new community, in which she had lived for only a brief time, was of minimal relevance, if any. It also observed that because she had been defendant's girlfriend, the defense had at its disposal some knowledge about her with which to investigate her reputation. Finally, it cited concerns about her security and denied the request for further discovery of her address.

A defendant has a "right to the names and addresses of prosecution witnesses and a right to have an opportunity to interview those witness *if they are willing to be interviewed.*" (*Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1332, italics added.) A defendant does not have a fundamental due process right to pretrial interviews or depositions of prosecution witnesses. (*People v. Municipal Court* (*Runyan*) (1978) 20 Cal.3d 523, 530-531.) Discovery of a prosecution witness's address, moreover, may be limited out of concern for the

witness's safety. (§ 1054.7; *In re Littlefield* (1993) 5 Cal.4th 122, 136.) Orders under this section are subject to review for abuse of discretion. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135-1136.)

Here, the prosecution provided defendant access to the witness but she refused to speak to the defense. Her refusal does not constitute prosecutorial misconduct. Defendant also challenges the trial court's denial of his motion to disclose the witness's address. On the record before us, where there appears to have been a credible allegation of potential injury to the witness, we find no abuse of discretion. In any event, since he failed to make this request until the day before Campbell testified, we fail to see how he could have been prejudiced by the denial of his motion. Accordingly, we reject defendant's claim that his statutory discovery rights, his right to counsel, or any other constitutional right were violated.

3. Failure to Provide Coroner's Report

Defendant contends the prosecutor committed misconduct by withholding a vital coroner's report, thereby violating the discovery statute (§ 1054.1) and his constitutional rights. The record discloses, however, that the report was prepared during the trial and provided to defendant at the earliest possible opportunity.

On the morning of Monday, December 12, 1994, just prior to the testimony of medical examiner Eva Heuser, the prosecution provided the defense a report from Dr. Heuser, prepared on the preceding Friday, December 9, entitled "Microscopic Report." The report contained Dr. Heuser's analysis of slides of tissue taken from the victim's vaginal and anal walls as well as perineal tissue. The analysis showed evidence of trauma and supported Dr. Heuser's conclusion that the injuries occurred while the victim was still alive. The prosecutor explained that on the previous Friday, in preparation for Dr. Heuser's testimony,

he had her pull the slides and take a look at them in light of specific questions he had for her, and prepare a report. The prosecutor stated the report was "confirmatory of the testimony" Dr. Heuser had previously given, presumably before the grand jury. Dr. Heuser later testified she had intended to prepare such a report when she had first examined the slides but had forgotten to do so.

The defense requested a continuance of an unspecified amount of time. The trial court denied the request, noting the defense had had access to the original coroner's report, to Dr. Heuser's grand jury testimony, and "the defense could have simply have called Dr. Heuser with any questions." Later that day, in connection with a mistrial motion based on defense counsel's allegation his cross-examination had been unfairly limited, counsel returned to the report. He asserted that Dr. Heuser's conclusion that the injuries occurred premortem was new material and asked either that the defense be granted a continuance or that the report be excluded.

The trial court denied defendant's motions. It reiterated its finding that the prosecution had timely disclosed the report. It also observed that, despite the court's urgings, the defense had not yet called in its expert to examine the report.

Section 1054.1, subdivision (f) requires the prosecutor to disclose to the defense "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of . . . scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence." Such disclosure must be made at least 30 days before trial, but "[i]f the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately . . . ." (§ 1054.7.)

Here, the trial court found Dr. Heuser's report was a new report and that disclosure was timely under the statute. Although defendant concedes "it could be argued the report was turned over within a reasonable time after it was prepared," he asserts that the prosecutor intentionally delayed having Dr. Heuser prepare the report to avoid discovery. Nothing in the record supports this imputation of misconduct to the prosecution. It is settled, moreover, that the prosecution "has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*In re Littlefield*, *supra*, 5 Cal.4th at p. 135.) Therefore, the prosecution did not commit misconduct simply because it failed to ask Dr. Heuser to prepare the report sooner.

Moreover, there was apparently no information in the report to which defendant did not already have access. He argues that "*regardless* of the content of the report" he was prejudiced because the prosecutor's "unexpected presentation of it to the defense hampered his ability to adequately prepare for his examination of the coroner." But defendant's failure to adequately prepare for cross-examination cannot be attributed to the belated production of a report containing information already in his possession.

We conclude that disclosure of the report was timely. Necessarily, then, we reject the edifice of constitutional error that defendant constructs upon his claim of discovery violation.

Defendant alternatively contends the trial court abused its discretion by denying his request for a continuance of unspecified length. Under the circumstances, we find no abuse of the trial court's discretion in its denial of the continuance request and, in any event, no prejudice. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 840.)

4. Intimidation of a Defense Witness

Defendant contends the prosecutor committed misconduct by intimidating a defense witness, Victoria Eckstone. His argues this misconduct violated his Sixth Amendment right to compulsory process, among other constitutional rights.

" 'Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution. [Citations.] [¶] The forms that such prosecutorial misconduct may take are many and varied. They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.]' " (*People v. Hill* (1998) 17 Cal.4th 800, 835.)

Ms. Eckstone testified that she believed defendant was the father of her child, had spent time with the child, and loved her. On recross-examination, she was confronted by the prosecutor with her statement to a detective that she would not allow defendant near her child. Therefore, on redirect, she testified that, during the investigation of this case, the prosecutor called her several times and, when she finally returned his call, threatened to arrest her unless she spoke to him. She testified further, "I told them pretty much anything they wanted to hear as long as I wasn't going to get arrested."

On further recross-examination, she acknowledged that what she was actually told by someone in the prosecutor's office was, " 'I guess we're going to have to come out and get you,' " which she considered "a threat for an arrest." She testified further that she had not intentionally lied to the prosecutor.

In a bench conference after her testimony, the trial court disclosed it had received a note from the bailiff that said sheriff's deputies in the courtroom believed Eckstone might be under the influence of a controlled substance. The court said she could either be arrested or examined by a drug recognition expert or

simply kept on call. The prosecutor asked she be examined because "if she's under the influence of a substance, I think the jury needs to know that." The court agreed, "her demeanor and behavior was highly unusual, to say the least." Over defense counsel's objection, the trial court ordered the examination in another part of the courthouse and outside the presence of the jury. Subsequently, the trial court reported on the record that the examination had taken place, and there was "some indication of substance usage" but not enough to make an arrest.

We find no supportable claim of prosecutorial intimidation. The record makes clear that the alleged threat of arrest was simply a matter of interpretation on Eckstone's part. Moreover, even if the prosecutor had overreached during the investigatory part of this case, he did not interfere with defendant's Sixth Amendment compulsory process rights because Eckstone appeared and testified on defendant's behalf, not only in the guilt phase, but in the penalty phase. Thus, this case is easily distinguishable from the cases defendant relies upon in support of his argument, in which prosecutorial threats to charge a defense witness with perjury (*People v. Hill, supra,* 17 Cal.4th at p. 835; *People v. Bryant* (1984) 157 Cal.App.3d 582, 590), or apprising a defense witness of his privilege against self-incrimination in an intimidating fashion (*People v. Warren* (1984) 161 Cal.App.3d 961, 973-974), deprived the defendant of the testimony of that witness. Defendant suggests that the threat of arrest may have subtly influenced Eckstone's demeanor. This is mere speculation.

We also reject his claim that prosecutorial misconduct was involved in Eckstone's detention for possible drug use. The request came not from the prosecutor or the court, but from police present in the courtroom. The extent of the prosecutor's participation was his legitimate observation that whether a witness is testifying under the influence of drugs is relevant to credibility. (*People v. Viniegra* (1982) 130 Cal.App.3d 577, 581 ["It is well established that a witness

may be questioned as to whether he or she has recently used, or is under the influence of, drugs"].) Additionally, the detention did not prevent Eckstone from returning to testify for defendant at the penalty phase. There was no misconduct and no constitutional violation.

5. Misconduct During Closing Argument

Defendant contends the prosecutor committed misconduct during his closing and rebuttal arguments. Defendant objected to only one of the statements he argues was misconduct, thus forfeiting his claims as to the rest. (*People v. Brown* (2003) 31 Cal.4th 518, 533.) In any event, we find there was no misconduct but, even if there was, no prejudice.

When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. (*People v. Ayala*, *supra*, 23 Cal.4th at pp. 283-284.) "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown, supra,* 31 Cal.4th at p. 553.) There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. Forfeiture for failure to request an admonition will also not apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition. A defendant claiming that one of these exceptions applies must find

support for his or her claim in the record. (*People v. Boyette, supra,* 29 Cal.4th at p. 432.) The ritual incantation that an exception applies is not enough.

Defendant contends that the prosecutor improperly appealed to the prejudices and passions of the jury, and denigrated the presumption of innocence, when he argued that the prosecution's evidence had "stripped away" defendant's presumption of innocence. Additionally, he claims that the prosecutor's reference to the victim's age, height, and weight also constituted an appeal to the jury's prejudices and passions because it drew an implied contrast between her stature and defendant's.

We disagree. "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) Here, the prosecutor's references to the presumption of innocence were made in connection with his general point that, in his view, the evidence, to which he had just referred at length, proved defendant's guilt beyond a reasonable doubt, i.e., the evidence overcame the presumption.

Defendant's further claim that the prosecutor's reference to the victim's age, weight, and height were intended to appeal to the jury's sympathies is also without merit. These were facts in evidence. The prosecutor cannot be faulted for misconduct because he referred to them nor was he required to discuss his view of the case in clinical or detached detail. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819 [" 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " ' "], quoting *People v. Williams, supra,* 16 Cal.4th at p. 221.)

Next, defendant cites three comments by the prosecution he claims improperly lowered the burden of proof: (1) that it was a "reasonable interpretation" from certain body fluid evidence that defendant and the victim

were on the bed in defendant's bedroom; (2) that it was a "reasonable inference" from other evidence regarding defendant's habits, customs and statements to Rauni Campbell that he videotaped the crime; and, (3) the analysis of tissue paper found in the wastebasket in defendant's bathroom "indicate[d]" that the victim had orally copulated defendant.

Defendant failed to object to any of these comments, or to seek a curative admonition, thus the claim is forfeited. (*People v. Brown, supra,* 31 Cal.4th at p. 553.) He argues that his failure to object or seek an admonition should be excused under the futility exception, but cites nothing in the record to support its application. In any event, these isolated references did not constitute an argument that defendant could be convicted on a showing of less than guilt beyond a reasonable doubt but were reasonable inferences or deductions that the prosecutor could permissibly urge the jury to draw from the evidence. (*People v. Hill, supra,* 17 Cal.4th at p. 819.)

Finally, defendant argues that the prosecutor committed misconduct when, in response to defense counsel's claim that the prosecutor had failed to produce either fingerprint or DNA evidence, he pointed out that the defense could also have conducted these experiments. Defendant contends that the prosecutor's argument shifted the burden of proof from the prosecution to the defense.

Again, defendant's failure to object to this argument or seek a curative admonition forfeits the claim and he points to nothing on the record that would excuse forfeiture. In any event, the claim is without merit. Defense counsel argued that the prosecution had neglected to collect vital evidence, such as any fingerprints on the suitcase in which the victim's body was found or DNA evidence, and suggested the reason was because it did not want to risk linking someone else to the crime. The prosecutor's argument was a proper rebuttal to these claims. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177; see also *People v.*

Wash (1993) 6 Cal.4th 215, 263, quoting *People v. Szeto* (1981) 29 Cal.3d 20, 34 ["prosecutorial comment upon a defendant's failure to 'introduce material evidence or to call logical witnesses' is not improper"].)

Our rejection of defendant's specific claims of misconduct necessarily forecloses his additional claim of cumulative error and cumulative prejudice.

I. Denial of Suppression Motion

Defendant contends the trial court erroneously denied his motion to suppress evidence obtained in unjustified warrantless searches of his apartment and residence or pursuant to an invalid search warrant, or statements obtained in violation of *Miranda v. Arizona* (1964) 384 U.S. 436.[22]

1. Warrantless Searches of Defendant's Residence and Vehicle

Defendant contends the police engaged in four warrantless searches of his apartment between the late afternoon of Saturday, November 20, 1994 and Sunday, November 21.[23] He alleges further that, in this same time frame, the police engaged in two warrantless searches of his vehicle.

"When reviewing a ruling on an unsuccessful motion to exclude evidence, we defer to the trial court's factual findings, upholding them if they are supported

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[22] The challenge to the statements was brought under Evidence Code section 402, not Penal Code section 1538.5, but some of the evidence adduced for purposes of the admissibility issue was taken at the suppression hearing for the convenience of the witnesses.

[23] Defendant asserts that there was a fifth warrantless search of his residence on Sunday morning, but the Attorney General points out that this assertion is based on the mistaken testimony of a police detective who initially testified the Sunday morning search had occurred at 11:50 a.m., but then on cross-examination corrected himself and stated entry had occurred at 10:40 a.m. Thus, there was only one search on Sunday morning, not two, and, in his suppression motion, defendant did not argue otherwise.

by substantial evidence, but we then independently review the court's determination that the search did not violate the Fourth Amendment." (*People v. Memro, supra,* 11 Cal.4th at p. 846.)

The first entry into defendant's apartment, unit 122, occurred sometime after 5:30 p.m. on November 21. Around 4:30 or 5:00 p.m., as part of a door-to-door search of the apartment complex, Officer Ruth Barnes and her partner knocked at the door of defendant's apartment and received no response, but she observed the television was on. She went back a second time at roughly 5:30 p.m. and knocked again. There was no response but she observed the television set was now off. A neighbor told her that a woman and a young man in his 20's lived in the apartment. Barnes reported her information to Sergeant Patton. Patton had independently learned that Nicole had been observed speaking to a male occupant of unit 122. Based on this information, Patton obtained a key from the manager and he and Barnes and two other officers entered the apartment to look for Nicole. The search lasted between 5 and 15 minutes. The officers checked the rooms upstairs and downstairs. Officer Barnes testified she did not search closets or look under beds while Sergeant Patton testified he checked closets. When they did not find Nicole, they left and the manager of the complex locked the door.

The trial court concluded the search was justified by exigent circumstances. "A long-recognized exception to the warrant requirement exists when 'exigent circumstances' make necessary the conduct of a warrantless search. . . . ' "[E]xigent circumstances" means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.' " (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1017, quoting *People v.*

Ramey (1976) 16 Cal.3d 263, 276; *People v. Duncan* (1986) 42 Cal.3d 91, 97-98 [" 'As a general rule, the reasonableness of an officer's conduct is dependent upon the existence of facts available to him at the moment of the search or seizure which would warrant a man of reasonable caution in the belief that the action taken was appropriate' "], quoting *People v. Block* (1971) 6 Cal.3d 239, 244.)

Among the factors the trial court cited in applying the exigent circumstances exception was that Nicole had been missing for several hours, the only lead the police had was that she had been seen talking to a male occupant of defendant's apartment and a neighbor told Barnes a young male lived in defendant's apartment. The trial court also cited Officer Barnes's observations about the television having been on and off, which indicated someone may have been in the apartment, the fact that the person missing was a child, which heightened the exigency because, aside from being a victim of a crime, she might have been injured or unable to extricate herself, and the fact that the search consisted of a cursory search of obvious places where a child might be found.

We agree that the first entry into defendant's residence fell within the exception to the warrant requirement for exigent circumstances. Defendant does no more than assert the trial court's ruling was in error. His cursory argument is not persuasive — as even he seems to recognize — because, elsewhere in his brief, he acknowledges the initial search was arguably justified by the exception.

He contends, however, that in addition to exigent circumstances, the police were required to have had probable cause to believe Nicole was in the apartment. We conclude that the circumstances known to Sergeant Patton sufficiently

establish probable cause for the brief entry into defendant's apartment.[24] Moreover, as defendant concedes in his reply brief, no evidence was collected by police during their first entry into his apartment and, therefore, even if the entry was unjustified, there was nothing to suppress. (See *People v. Mattson* (1990) 50 Cal.3d 826, 850-851 [purpose of the suppression statute is to "exclude evidence obtained in violation of defendant's state and/or federal (Fourth Amendment) right to be free of unreasonable search and seizure"].)

The trial court concluded that the second and third entries by police into defendant's residence were with the consent of his mother, Mehri Monfared. It is settled that when voluntary consent to search has been given by the individual whose property is searched, the requirement of a search warrant is excused. (*People. Memro, supra,* 11 Cal.4th at pp. 846-847.) The evidence adduced at the suppression hearing supports application of this exception to the second and third entries.

When Ms. Monfared returned to the complex in the early evening of November 20, Officer Barnes approached her in the parking lot and asked her about defendant's whereabouts. She told Barnes defendant was at work. Barnes asked Ms. Monfared if she would phone him and allow Barnes to talk to him. Monfared agreed. She unlocked the door to her apartment and Barnes followed her in. Monfared called defendant, spoke to him, then gave the phone to Barnes, who also spoke to defendant. She then returned the phone to Monfared and left the apartment.

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[24] The Attorney General argues the first search was also justified by the community caretaker exception to the Fourth Amendment warrant requirement, (see *People v. Ray* (1999) 21 Cal.4th 464) but, as we conclude the exigent circumstances doctrine applies, we need not reach this issue.

Later that evening, Ms. Monfared spoke to Ahmad Seihoon. Monfared told him police were looking for the man who had spoken to Nicole. Seihoon returned to defendant's apartment. In response to a call from Monfared, three or four police entered her apartment to speak to Seihoon. He was briefly interviewed in the dining room about his conversation with Nicole.

Defendant contends there was neither express nor implied consent from Ms. Monfared for the police to enter the apartment. Not so. The entry by Officer Barnes to speak to defendant on the phone was plainly with the implied consent of Ms. Monfared. (*People v. Martino* (1985) 166 Cal.App.3d 777, 791 ["Consent to enter a residence may be given nonverbally"].) The second entry by police to interview Seihoon was at Monfared's express invitation. Defendant asserts Ms. Monfared's consent was the product of coercion but cites nothing in the record to support this assertion. He also claims that while one police officer interviewed Seihoon, other police officers searched defendant's room. Again, the record does not support this assertion. While Seihoon testified that other police were in the apartment while he was interviewed, there was no testimony that they searched defendant's room or any other part of the apartment.

The fourth search of defendant's residence took place on the morning of November 21, when a number of police officers, including Detectives Burris, Navarro and Peloquin, entered the apartment. Prior to the search, Burris and Navarro went to the police station where they learned that a police officer was at the apartment of defendant's former girlfriend, Rauni Campbell, that defendant had attempted to commit suicide but fled when police arrived, and that he was a resident of the apartment complex from which Nicole had disappeared. Burris learned that defendant might have been involved in Nicole's disappearance and obtained the unit number of defendant's apartment from Navarro. Burris led the search of defendant's apartment to find Nicole. He instructed the other officers

involved to look in places where she might be hidden or hiding. He did not instruct his fellow officers to gather evidence of any kind. Burris terminated the search after 10 to 15 minutes.

The trial court found that this entry was also justified by the exigent circumstances exception. The court concluded the exigency had not dissipated between the first entry and this one but became "heightened" because it was not until this point that police had their first concrete evidence that Nicole's disappearance involved a crime, rather than an accident, and that defendant was involved. We agree with the trial court's analysis. This search involved different officers than those who conducted the first search and it was based on different and even more detailed information clearly raising the possibility that Nicole may have been in the apartment.

Defendant argues the passage of time between the first entry and the fourth entry, the police presence at the apartment complex during that period, and indications that Nicole was dead terminated any exigency. Not so. Less than 24 hours had passed between the arrival of police at the apartment complex and the Sunday morning search. The police could still reasonably have believed Nicole was alive notwithstanding defendant's statement to Rauni Campbell that Nicole was not alive. Defendant did not tell Campbell why he believed Nicole was dead, nor provide any details of her death. Police, meanwhile, had found bloodstained knives and bloodstains in defendant's car. The police could reasonably have believed that defendant had stabbed Nicole or inflicted some other serious, but not yet fatal, injury despite his statement to Campbell. While they had no definitive evidence Nicole was dead, they did know, beyond doubt, that she was the victim of some kind of criminal activity. We therefore agree with the trial court that the information police received regarding defendant's possible involvement in

Nicole's disappearance heightened the exigent circumstances and that the fourth entry was justified on this ground.[25]

Defendant argues that Burris waited an hour and a half after learning of the information about defendant's possible participation in Nicole's disappearance before going to defendant's apartment, thus undermining the claim of exigency. The record reveals, however, that Burris testified he arrived at the police station at 10:15 a.m. and was at defendant's apartment by 10:40 a.m.

Defendant also challenges two searches of his vehicle. Detective Burris testified that, after he terminated the search of defendant's apartment, he went to Campbell's apartment complex. There he learned that Campbell had identified a black BMW as belonging to defendant, and that the car was registered to defendant's mother. He and Sergeant Mascola examined the car. The outside of the car was dirty and muddy. They both observed what appeared to be blood on the front seat. Mascola also saw two knives inside the car, one of which was bloodstained, and a "cord-type wire" protruding from the trunk. Based on these observations, Burris formed the belief that Nicole might be in the trunk and had it pried open. Nicole was not found. A bloodstained notebook was then removed from the front seat of the car and examined by Burris and Mascola, who thought there might be something in it pertaining to Nicole's whereabouts.

The vehicle was impounded and removed to a tow yard where it was examined by a criminalist, Robert Monson, accompanied by Detective Peloquin.

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25 Additionally, no evidence was collected during this search. Police did observe posters of scantily clad women on the walls of defendant's room and a video camera and these observations found their way into the affidavit for the search warrant. Even if we assume the search was unjustified and that these observations should have been suppressed, probable cause for the search warrant would still have existed. (See pp. 89-90, fn. 27, *post*.)

After a visual inspection of the exterior of the vehicle, Monson collected evidence from the interior including the bloodstained notebook, a bloodstained knife, and bloodstains from front and rear seats.

In rejecting defendant's challenge to the vehicle searches, the trial court concluded that the first search was justified by exigent circumstances and both searches were justified by probable cause. We agree. Based on the circumstances known to Detective Burris and Sergeant Mascola, and their observations of apparent bloodstains in the car, knives, and a cord protruding from the truck that could have been used for binding, their belief that Nicole might be found in the trunk justified their search of the trunk, and their belief that the notebook might contain information regarding her whereabouts justified their inspection of it.[26] Moreover, the automobile exception to the Fourth Amendment's warrant requirement also applies to the initial search. (*United States v. Ross* (1982) 456 U.S. 798; *People v. Chavers* (1983) 33 Cal.3d 462, 466 [under *Ross*, "police officers who lawfully stop a vehicle, having probable cause to believe that contraband is located or concealed . . . or somewhere therein, may conduct a warrantless search of the vehicle that is as thorough (as to location and type of container searched) as that which a magistrate could authorize by warrant"].) The probable cause to search had not dissipated even after the vehicle had been impounded. (*Florida v. Meyers* (1984) 466 U.S. 380, 382, quoting *Michigan v. Thomas* (1982) 458 U.S. 259, 261 [" 'the justification to conduct such a warrantless search does not vanish once the car has been immobilized' "].)

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26 The notebook contained equivocal but somewhat incriminating statements by defendant but, as he concedes, it was not introduced at trial.

Furthermore, as defendant concedes, the second search of his car did not uncover evidence that connected him to Nicole's murder.

2. Miranda *Issues*

Defendant also challenged statements taken and physical evidence obtained from him, on grounds that they were obtained in violation of his rights under *Miranda v. Arizona, supra,* 384 U.S. 436 (*Miranda*).

Defendant was arrested by Officer Gourman. Upon being arrested he said something about having driven around Mulholland where there was a waterfall with someone he worked with at Mervyn's. He declined to answer Officer Gourman's follow-up questions.

Detective Burris arrived at the scene of defendant's arrest around 11:50 a.m. Without advising him of his *Miranda* rights, Burris proceeded to question him about Nicole's whereabouts because he believed she might still be alive. He asked defendant, "Where's the little girl?" Defendant told Burris he and two others might have taken her and dumped her over the "side of a hillside where there's a waterfall." Defendant was also questioned at the scene by Officer Angelo, who asked him if the little girl was okay. Defendant responded that he did not know what Angelo was talking about. He said, "What little girl?"

Defendant was then taken to West Valley Hospital. At the hospital he was questioned by Officer Joe as to Nicole's whereabouts. Officer Joe did not advise defendant of his *Miranda* rights. Defendant listed various places she might be and said "he'd like to be with the girl so much, that he would even carry her skeleton remains around." He was later interviewed by Detective Peloquin after being advised of his *Miranda* rights and waiving them. Peloquin showed defendant a photograph of Nicole and asked him if he knew her because police were looking for her. Defendant said he had seen her the previous day at the apartment complex. When asked if he knew where she was, he said yes, and "something to

the nature of it was Mulholland near a waterfall." When asked if she was still alive, he said no.

In response to a question by a nurse treating him about whether he knew Nicole, defendant said "he may have seen her by a waterfall or the men in black hoods made him do it." She asked him if he had taken little girls before and he said, "yes, dozens of times."

Later that afternoon criminalist Monson arrived and obtained from defendant fingernail scrapings and clippings, a blood sample, blood from the cuticles and pubic hair samples. Defendant's pubic area was partially shaved. When Monson asked why, he said, "to look good for the girls on Friday night." He also collected defendant's clothing from Detective Peloquin and an elastic hair band.

The trial court found that the questioning of defendant at the scene of his arrest by Detective Burris and Officers Gourman and Angelo, and at the hospital by Officer Joe, was permissible under the rescue exception to *Miranda*, *supra*, 384 U.S. 436.

Under some narrow circumstances, sometimes called the "public safety" or "rescue" exceptions, compliance with *Miranda* is excused where the purpose of police questioning is to protect life or avoid serious injury and the statement is otherwise voluntary. (*New York v. Quarles* (1984) 467 U.S. 649, 657 ["We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"]; accord, *People v. Coffman and Marlow, supra,* 34 Cal.4th at pp. 56-57; see *People v. Riddle* (1978) 83 Cal.App.3d 563, 579 [compliance with *Miranda* excused where exigent circumstances exist "in that the need for action was urgent, the possibility of

saving human life was present, and the primary motive for police questioning was rescue"]; *People v. Stevenson* (1996) 51 Cal.App.4th 1234, 1238.)

Defendant contends the trial court erred in applying this exception to the statements elicited from him at the scene of his arrest and by Officer Joe at the hospital because there was no exigency. He asserts the information available to the police by the time they questioned him indicated that Nicole was dead. We disagree. Some of the very evidence cited by defendant — Rauni Campbell's statement that defendant said he had done something bad, the discovery of the knives and bloodstains in defendant's car — could only have heightened the belief of the police that Nicole was injured but still alive, as her body had not yet been found when defendant was questioned. Furthermore, the officers' testimony establishes that the primary purpose of the questioning was rescue. Finally, notwithstanding defendant's perfunctory assertion that the statements were not a product of his free will, the record supports the conclusion the statements were voluntary. We conclude, therefore, that the trial court properly admitted these statements.

With respect to Detective Peloquin's questioning of defendant at the hospital after defendant waived his rights, the trial court concluded that defendant's medical and psychological condition did not render his waiver involuntary. It rejected any suggestion that the waiver was obtained by coercion. The trial court also found admissible statements made by defendant to the treating physician and nurse at the hospital, concluding they were not acting as agents for the police.

Defendant renews his claim that his hospital waiver was involuntary because of his compromised physical and psychological condition. In reviewing this claim, "the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's

finding as to voluntariness of the confession is subject to independent review." (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

Defendant argues that when he was admitted to the hospital, he was suffering from acute psychosis, was under the influence of drugs, and suffering from the effects of his suicide attempt, thus precluding a voluntary waiver of his rights. He also claims he was heavily affected by intrusive medical procedures, including the use of a catheter to extract a urine sample, injection with a tranquilizer and the injection of charcoal into his system to absorb the sleeping pills. Defendant also points out that Peloquin testified that defendant was alternately rational and irrational.

The procedures to which defendant refers took place after Peloquin interrogated him and could have had no effect on the voluntariness of his waiver. While Peloquin acknowledged defendant was sometimes irrational during the interrogation, he also testified that defendant was responsive to his questioning, and his testimony was corroborated by the nurse who attended defendant. The court observed further that there was no question of police coercion in obtaining defendant's statement. (*People v. Williams, supra,* 16 Cal.4th at p. 659 ["A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity"].) We conclude, therefore, that defendant's statements to Detective Peloquin were not involuntary.

Finally, defendant argues that the physical evidence obtained from his person must be suppressed as the fruit of the poisonous tree, by which, presumably he means his various statements to police. As we have found these statements were not taken in violation of his *Miranda* rights, we necessarily reject this corollary argument.

3. Challenge to Search Warrant

Defendant contends the search warrant issued for his apartment should have been quashed because the affiant, Detective Price, omitted material information and included false information.[27] The trial court found that the affiant had not included statements that were either false or made in reckless disregard of the truth

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[27] Price's affidavit related the following information: That, at 1:05 p.m. on November 20, police were notified of Nicole's disappearance by her parents; that she had last been seen playing ball outside the Parkers' apartment; that a command post was established at the complex and an extensive search had failed to locate her; that on Sunday morning, Rauni Campbell called police to report defendant's suicide attempt; that, when Officer Kong responded to the call, defendant fled; that Campbell told Kong defendant had told her he had done something very bad and was involved in the disappearance of an eight-year-old girl; that defendant lived in the same apartment complex as the missing girl; that defendant said the police would find out about it because they would find the video and the photographs; that, shortly afterwards, Officer Gourman observed defendant running from Campbell's apartment complex and arrested him; that defendant had ingested a number of sleeping pills and was transported to West Valley Hospital; that Campbell was taken to the police station where she made further statements about her conversation with defendant, including that "[t]hey" were going to make it look like he did it and the police were going to find the video and photographs, and that the girl was dead; that defendant's car was located, the trunk was forced open in an effort to find Nicole, and then the vehicle was impounded; that a second car registered to defendant was found parked in the parking garage at his apartment complex; that Detectives Burris and Navarro entered defendant's apartment to look for the girl and observed a video camera and photographs of women in various states of dress; that the residence was secured pending a search warrant; that Burris spoke to defendant who said he had dumped the girl's body somewhere off Mulholland Drive near a waterfall; that during this interview defendant was alternately rational and irrational; that he then retracted his statement about dumping the body; that physical evidence had been obtained from defendant's person; that defendant told criminalist Monson he had shaved his pubic hair; and that Price believed defendant had kidnapped the victim, photographed and videotaped her and then murdered her; that evidence showing the commission of these offenses would be found at defendant's residence and the two vehicles referred to in the affidavit.

and that none of the information defendant claimed had been omitted from the affidavit was material to probable cause. The information defendant claims was omitted included any mention of the prior entries into his apartment; that Officer Barnes had spoken to defendant and his mother; and that Mr. Seihoon was the last person seen talking to Nicole. Defendant contended further that the affiant erroneously stated that Nicole lived in the same apartment complex as defendant, inaccurately reported certain statements made by defendant to police, and failed to report defendant's "deplorable" condition at the hospital when the statements were made. We agree with the trial court that these omissions were immaterial to probable cause.

Defendant also argues the search warrant should have been quashed because it was based, in part, on the prior illegal warrantless searches of defendant's residence and vehicle and on statements obtained in violation of *Miranda*. We have, however, rejected his challenges to the warrantless entries into his residence and vehicle and his *Miranda* claims. Our conclusions in this respect eliminate the predicate of his challenge to the search warrant on this ground. To the extent that defendant is advancing a *Franks* claim (*Franks v. Delaware, supra,* 438 U.S. 154), he fails to make the required showings either that the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth or that, even had the allegedly false statements been excised, the remaining contents of the affidavit would have been insufficient to support a finding of probable cause. (*Id.* at pp. 155-156.) We conclude that the trial court properly denied his motion to quash the search warrant.

J. Guilt Phase Evidentiary Rulings

1. Testimony Regarding Videotapes

Defendant contends the trial court erred when it allowed Detective Price to testify about videotapes taken from defendant's bedroom that depicted him having sexual intercourse with consenting adult women. The actual videotapes were not admitted. Defendant objected that the testimony was irrelevant and, even if relevant, was more prejudicial than probative under Evidence Code section 352. He additionally objected that the evidence violated the best evidence rule.[28]

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "We apply the deferential abuse of discretion standard when reviewing a trial court's ruling on a relevance objection. [Citations.] We discern no abuse of discretion here." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) Rauni Campbell testified that defendant told her on the morning after the murder that what he had done was "so big" and she would "find out about it" because "they have a tape of me." Additionally, Detective Navarro

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28 For the first time on appeal, defendant contends that admission of this testimony violated the due process clauses of the Fifth and Fourteenth Amendments and undermined the reliability required for a conviction under the Eighth and Fourteenth Amendments to the United States Constitution. Assuming without deciding that defendant's trial objections preserved these federal claims (see *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117, 133), the constitutional claims fail. We apply the same analysis to defendant's assertion of constitutional violations in connection with the allegedly erroneous admission into evidence of (1) his ring, (2) crime scene photographs, (3) state of mind testimony, (4) the prosecution's allegedly improper cross-examination of Victoria Eckstone, (5) the denial of defendant's request to recall Ms. Eckstone to testify to her detention for drug use after her testimony, and (6) his claim of cumulative prejudice. (See discussion, *post*.)

testified that the search of defendant's apartment on Sunday morning was stopped when he saw a video camera facing the bed.

Thus, the testimony was relevant to explain defendant's statement to Campbell; that is, whether any tapes, in fact, existed and if they depicted defendant and Nicole. They were also relevant to rebut the defense's claim that the body fluids found in defendant's bedroom and bathroom, which were consistent with oral copulation, could have come from other sexual partners of defendant, because the videotapes did not show acts of oral copulation. On this point, the evidence need not have been definitive as long as it had some tendency to establish the identity of the source of the fluids. (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

We also find no abuse of the trial court's discretion conferred by Evidence Code section 352. (*People v. Brown*, *supra*, 31 Cal.4th at p. 576.) As the trial court observed, there was already testimony from Ms. Campbell that she and defendant had engaged in sexual intercourse in his bedroom. Furthermore, the testimony about the tapes was neither graphic nor extensive.

Defendant also objected to the testimony under the best evidence rule. Former Evidence Code section 1500 provided: "Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing."[29] For purposes of this section, a videotape is a writing. (*People v. Morgan* (1974) 39 Cal.App.3d 398, 407-408.) The purpose of the best evidence rule is "to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." (Cal.

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29 In 1998, this section was replaced with the secondary evidence rule (Evid. Code, §§ 1520-1523), but because this proceeding occurred before January 1, 1999, the former rule applies. (Stats. 1998, ch. 100, § 9.)

Law Revision com. com., 29B, pt. 4, West's Ann. Evid. Code (1995 ed.) foll. § 1500, p. 488.) Therefore, "[t]he best evidence rule applies only when the contents of a writing are at issue." (*Hewitt v. Superior Court* (1970) 5 Cal.App.3d 923, 930.) Conversely, "[u]nless the content is in issue the best evidence rule does not come into play." (*People v. Marcus* (1973) 31 Cal.App.3d 367, 371.) Where no dispute exists regarding the accuracy of the evidence received in lieu of the original writing, any error in admitting such evidence is harmless. (*People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1697-1698.)

In the instant case, defendant's best evidence objection was pro forma. Defendant neither challenged Detective Price's testimony regarding the contents of the videotapes nor did he request that the tapes be played. Accordingly, even assuming defendant's perfunctory objection was sufficient to raise the issue, we conclude that any violation of the best evidence rule was harmless.

2. Admission of Defendant's Ring

Defendant contends that the trial court erroneously admitted into evidence his ring because there was insufficient foundation. The ring, which was apparently skull shaped, was relevant to Dr. Heuser's testimony about scratches on the inside of Nicole's thigh. Dr. Heuser testified the scratches were consistent with having been inflicted by the ring. Prior to her testimony, criminalist Robert Monson testified that the ring, along with a necklace and a pendant, was given to him by Detective Peloquin at the emergency room of West Valley Hospital. When asked whether Detective Peloquin indicated if he took these items from defendant, Monson answered, "Yes." There were no objections to his testimony on either hearsay or foundational grounds. Detective Peloquin did not testify at trial.

At the close of the prosecution's case, the prosecution moved the ring into evidence. The defense objected on grounds of lack of foundation and hearsay.

Outside the presence of the jury, the trial court read into the record the prosecutor's examination of Monson regarding how he obtained the ring. The trial court noted this testimony came in without objection and concluded, "that's the foundation."

Defendant renews his claims that there was insufficient foundation and that Monson's testimony was hearsay. With respect to the hearsay claim, " '[i]t is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding.' " (*People v. Bailey* (1991) 1 Cal.App.4th 459, 463, quoting *Berry v. Chrome Crankshaft Co.* (1958) 159 Cal.App.2d 549, 552; *Estate of Fraysher* (1956) 47 Cal.2d 131, 135 ["evidence which is admitted . . . without objection, although incompetent, should be considered in support of that court's action"]; *People v. Pierce* (1979) 24 Cal.3d 199, 206, fn. 3.) Here, applying these principles, the trial court reasonably concluded that defendant's failure to lodge a *timely* hearsay objection to Monson's testimony forfeited such objection.

By contrast, his foundational objection to the admission of the exhibit was timely. We conclude, however, that the trial court did not abuse its discretion in admitting the evidence because Monson's testimony sufficiently connected defendant to the ring. (*People v. Coddington* (2000) 23 Cal.4th 529, 587 ["A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse"].) In any event, even if the trial court erred in admitting the evidence, the overwhelming evidence of defendant's guilt renders any such error harmless. (*Id.* at p. 588.)

3. Crime Scene Photographs

Defendant contends that the trial court should have excluded crime scene photographs of the victim because they were gruesome, cumulative, and more prejudicial than probative. The eight photographs in question depict the victim's unclad body and show injuries inflicted on her face, chest, arms, and rectum. Over defendant's objections, the trial court admitted the photographs as relevant to the nature and extent of the victim's injuries, whether the injuries were premortem or postmortem, and to assist the coroner in her testimony.

We have viewed the photographs, agree they are relevant for the reasons stated by the trial court, and conclude the trial court did not abuse its considerable discretion under Evidence Code section 352 in admitting them. (*People v. Stewart* (2004) 33 Cal.4th 425, 480-481; *People v. Scheid* (1997) 16 Cal.4th 1, 18 [trial court's determination under section 352 will not be reversed "unless the probative value of the photographs clearly is outweighed by their prejudicial effect"].) Furthermore, while the photographs are disturbing because they depict a dead child, her body is intact and neither her injuries nor any other aspect of the photographs can accurately be characterized as gruesome.

4. State of Mind Evidence

Defendant contends that the trial court erroneously admitted testimony about an argument he had with Adele Bowen, his supervisor at Mervyn's, the day before the murder. The defense objected on grounds of "[r]elevance. 352." The trial court overruled the objection, concluding the testimony was relevant to defendant's state of mind.

While evidence about defendant's state of mind in the hours following the disappearance of Nicole was relevant, we agree with defendant that evidence he argued with his supervisor the night before was not relevant for this purpose.

Nonetheless, Bowen's brief testimony, even if admitted in error, was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

5. Qualifications of Prosecution Expert

Defendant contends the trial court erred by denying his request to conduct a hearing pursuant to Evidence Code section 402 on the qualifications of the prosecution's forensic serologist, William Moore. The record reveals, however, that defendant never made such a request. Rather, he objected to the prosecution's attempt to pose a hypothetical question to Moore to establish that the pattern of semen on defendant's bed sheet was consistent with semen having been expectorated by the victim. At the sidebar hearing on defendant's objection, defense counsel disparaged Moore's qualifications but the reason he sought a "402 hearing" was because he claimed the attempted hypothetical question amounted to a "new theory." The trial court denied the request. It remarked, "I'm satisfied he's an expert," and told defense counsel he was free to cross-examine Moore about any opinion that he had not previously included in his reports or prior testimony.

Defendant's failure to have challenged Moore's expert qualifications in the trial court forfeits his claim. (*People v. Farnam* (2002) 28 Cal.4th 107, 162 [defendant forfeited claim that expert was not qualified to testify to blood-splatter evidence and crime scene reconstruction where his objection was to expert's qualification to estimate the amount of time elapsing from the start to finish of the attack on the victim].) The claim is also without merit. The trial court specifically found that Moore was an expert. That determination is governed by the deferential abuse of discretion standard and "will not be disturbed absent a showing of manifest abuse." (*People v. Bolin* (1998) 18 Cal.4th 297, 322.) "Error regarding a witness's qualifications as an expert will be found only if the evidence

shows that the witness ' " 'clearly lacks qualification as an expert.' " ' " (*People v. Farnam, supra,* 28 Cal.4th at p. 162, quoting *People v. Chavez* (1985) 39 Cal.3d 823, 828.) Moore testified he had a bachelor's degree in biology and had worked in private industry as a chemist before joining the Los Angeles Police Department's Scientific Investigation Unit. He had spent seven years in the narcotics and alcohol analysis units before joining the serology unit in 1991. He had qualified as a serology expert on four previous occasions, but this was his first death penalty case. Defendant's complaints about those qualifications go to the weight of Moore's testimony, not its admissibility. (*Ibid.*)

6. Limitation of Cross-examination of Rauni Campbell

During his cross-examination of Rauni Campbell, defense counsel asked her whether she and defendant "had smoked marijuana." The prosecutor objected on relevance grounds and the objection was sustained.

Defendant argues the trial court's ruling improperly restricted cross-examination and violated his state and federal constitutional rights. Not so. Evidence of a witness's drug use is inadmissible unless the testimony "tends to show that the witness was under the influence thereof either (1) while testifying, or (2) when the facts to which he testified occurred, or (3) that his mental faculties were impaired by the use of such narcotics." (*People v. Hernandez* (1976) 63 Cal.App.3d 393, 405.) Here, defense counsel's question was phrased in the past tense and referred to some unspecified time. It was, therefore, properly excluded as irrelevant. Because the trial court's ruling was proper, "there is thus no predicate error on which to base the constitutional claims." (*People v. Roybal, supra,* 19 Cal.4th at p. 506, fn. 2.)

7. Improper Cross-examination of Victoria Eckstone

Defendant contends the trial court allowed improper impeachment of Victoria Eckstone about whether she called Detective Price from jail and asked for his help in obtaining her release, after she had testified on direct examination that she had felt coerced by Price and the prosecutor into agreeing to talk to them about defendant. Defendant argues that evidence of her arrest on an unrelated matter constituted inadmissible character evidence.

Evidence that Ms. Eckstone asked Detective Price for help and did not get it was clearly relevant to her credibility because it could have provided a reason for her hostility to the prosecution. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1054; Evid. Code, § 780, subd. (b).) Moreover, evidence that she sought Price's assistance also tended to undercut her direct testimony that he threatened to arrest her to induce her cooperation in the investigation of the case against defendant. Nor was the brief reference to her having been arrested so prejudicial that the trial court abused its discretion by not excluding it pursuant to Evidence Code section 352.

8. Exclusion of Evidence of Eckstone's Detention

Defendant contends the trial court violated his constitutional rights to a fair trial and to present a defense when, pursuant to Evidence Code section 352, it refused his request to recall Ms. Eckstone to testify to her detention for drug use after her initial testimony. (See pp. 74-76, *ante*.)

Notwithstanding defendant's insinuation that Eckstone's detention was engineered by the prosecution in retaliation for her testimony, the record is clear that neither the prosecutor nor the court had anything to do with it. Thus, the evidence was irrelevant to any issue in the case. Moreover, even if there was some tangential relevance to her testimony, its probative value would have been

vastly outweighed by the probability that it would either have required an undue consumption of time or may have confused the issues and misled the jury. (Evid. Code, § 352.) We find no abuse of discretion in the trial court's exclusion of the evidence.

9. Cumulative Error

Defendant contends that the cumulative effect of evidentiary error requires reversal. "Defendant has demonstrated few errors, and we have found each error or possible error to be harmless when considered separately. Considering them together, we likewise conclude that their cumulative effect does not warrant reversal of the judgment." (*People v. Bolden* (2002) 29 Cal.4th 515, 567-568.)

K. Juror Bias

Defendant contends the trial court erred by failing to grant a mistrial motion based on bias by the jurors against defendant's family. His argument is wholly without merit, not the least because he failed to make a mistrial motion on this ground.

It appears from the record that some supporters of defendant were following or "shadowing" the jurors during breaks in their deliberations, while others, including his mother, were clustering near the jury while it was assembling on breaks. Against this backdrop, the trial court reported a juror had told the bailiff she felt intimidated by the presence of defendant's supporters, particularly his mother. The bailiff noted that he had also overheard a male juror express relief that the jury no longer had to assemble "on the sixth floor," presumably to avoid contact with defendant's supporters.

During the ensuing discussion of this problem, defense counsel did not move for a mistrial based on juror bias. Indeed, when the trial court asked counsel if he wanted the court to question the juror who had complained about defendant's

mother to determine if she was being influenced by the presence of anyone in the hallway, he said, "No, Your Honor."

Thus, defendant's belated claim of juror bias is forfeited. It is also meritless. There is no evidence the jury was biased against defendant, his mother, or his supporters, much less that such bias infected its deliberations. What the record seems to indicate is spectator misconduct on the part of defendant's supporters who, intentionally or not, made themselves conspicuous to the jurors in a manner that some of the jurors interpreted as intimidating. The jurors' understandable concern does not amount to misconduct and there is nothing on the record to support defendant's claim that he was denied an impartial jury.

L. Third Party Culpability Evidence

1. Exclusion of Third Party Culpability Evidence

Defendant contends the trial court erred by excluding third party culpability evidence, as well as evidence of defendant's 1988 suicide attempt, and by denying his subsequent mistrial motion. These arguments are without merit.

"A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. The rule does 'not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citation.]" (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 176, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.)

The third party culpability evidence defendant contends was erroneously excluded involved testimony defendant attempted to elicit from a police witness about three men in a moving van observed at the apartment complex the morning

of Nicole's disappearance, evidence about Ahmad Seihoon and his two sons, one 12, the other 17, whom defendant seems to imply were those three men, and a threatening telephone call made to defendant by a man named Sean.

Preliminarily, defendant did not offer the evidence of the three men in a van to show third party culpability but to show the inadequacy of the police investigation. Defense counsel acknowledged he was not attempting to elicit the evidence for the truth of the matter, i.e., that there were three men in a van, but to demonstrate the police failed to follow up on obvious leads. Since defendant did not seek admission of the testimony as third party culpability evidence, he forfeited any claim that it was improperly excluded for that purpose. (Evid. Code, § 354, subd. (a).) Besides, the mere presence of three men in the parking lot of defendant's apartment complex at the time Nicole disappeared, absent any evidence, direct or circumstantial, linking them to the crime, does not qualify as admissible third party culpability evidence.

Defendant's somewhat confusing argument as to Ahmad Seihoon seems to suggest he and his two sons may have been the three men in the van, or perhaps that this was what defendant hoped to establish by questioning the officer about the three men. Again, defendant did not argue this point below, thus forfeiting it, and, in any event, the mere fact that Seihoon was observed talking to Nicole shortly before her disappearance was insufficient to render admissible as third party culpability evidence any evidence about Seihoon and his sons. Even less persuasive is defendant's claim regarding the threatening phone call by "Sean." Defendant argued the phone call demonstrated someone was "out to get" him and could therefore have been involved in Nicole's disappearance and death. The trial

court properly excluded this evidence as irrelevant and inadmissible under Evidence Code section 352.[30]

Under Evidence Code section 352 the trial court also excluded evidence of defendant's 1988 suicide attempt. The defense sought to offer evidence of that attempt to negate any inference of consciousness of guilt from his suicide attempt at Ms. Campbell's apartment the morning after the crime. As the trial court noted, defendant's 1988 attempt at suicide was not a reaction to any allegation he had been involved in a crime, therefore it was, at best, minimally relevant. The trial court found any such relevance was outweighed by the potential of the issue to confuse the jury or involve the undue consumption of time. (Evid. Code, § 352.) We agree. The exclusion of evidence of a four-year-old suicide attempt under circumstances that were not remotely similar to those under which he attempted suicide in this case was not an abuse of the trial court's discretion.

As there was no error in the trial court's rulings, the court properly denied defendant's mistrial motion.[31]

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[30] Defendant's reply brief refers to another "suspicious incidence" (*sic*) allegedly contained in a report by Mr. Parker to police about a man sitting in a van who approached him and questioned him about Nicole's disappearance. There is no citation to the record regarding this report, no indication defendant ever brought it to the court's attention or sought its admission under any theory. We disregard the reference.

[31] For the first time on appeal, defendant asserts that the trial court's evidentiary rulings respecting third party culpability evidence and evidence of his 1988 suicide attempt violated his federal constitutional rights to a fair trial, reasonable access to the courts, effective assistance of counsel, reliable guilt and penalty determinations, and due process and equal protection of the laws as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Assuming, without deciding, that defendant's offers of proof preserved these claims (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133),

(Fn. cont. on next page)

2. Limitations on Attack on Police Investigation

Defendant contends the trial court improperly limited his cross-examination of certain witnesses with which he hoped to show that the police had failed to consider other suspects. Defendant first complains that the trial court erroneously sustained the prosecution's objections to his attempts to question Ahmad Seihoon at the suppression motion about what Seihoon said to police when they interviewed him the day after Nicole's disappearance. Seihoon was questioned in connection with defendant's *Franks* challenge to the search warrant. (*Franks v. Delaware*, *supra*, 438 U.S. 154.) The trial court sustained the prosecution's objection that the content of Seihoon's interview with police was irrelevant for purposes of his *Franks* challenge and constituted an improper attempt at discovery.

The trial court's ruling was correct in the context of defendant's *Franks* motion. Other than speculating Seihoon may have said something to the police that they omitted from the affidavit, defendant failed to establish the relevance of the content of Seihoon's interview vis-à-vis his *Franks* claim. (*People v. Bradford, supra,* 15 Cal.4th at p. 1297 ["A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause"].) It was therefore properly excluded.

Next, defendant recycles his claim that the trial court erred in limiting his cross-examination of Detective Price regarding the three men in the van. Since, as

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(Fn. continued from previous page)

because we conclude the trial court's rulings were correct, the constitutional claims fail.

we have concluded, there was insufficient evidence to connect these unknown men to the crime for third party culpability purposes, whether or not Detective Price ascertained their identities was irrelevant and the trial court properly sustained the prosecution's objection on both relevance and Evidence Code section 352 grounds.

For the same reason, we reject defendant's claim that the trial court improperly limited his cross-examination of Detective Price regarding two potential witnesses, Heather Williams and Harold Dachs, Jr. In his offer of proof, defense counsel claimed Williams and Dachs told police they had observed "individuals outside the [defendant's] apartment" who fit "some of the statements that Mr. Panah has said to have made about other individuals being involved in this . . . ." In response to the trial court's inquiry about whether they were going to appear as witnesses, defense counsel asserted that the police had failed to keep track of them, rendering them unavailable. The trial court sustained the prosecution's relevance objection. We perceive no error. As with the men in the van, the offer of proof as to Williams and Dachs was grossly inadequate to support the admission of the evidence as third party culpability evidence and was therefore properly excluded as irrelevant.

Finally, defendant claims the trial court improperly restricted his cross-examination of Detective Price regarding whether Price had examined for fingerprints the suitcase in which Nicole's body was found. Defense counsel first asked Price if he had had the suitcase fingerprinted, to which Price answered in the negative. He then asked whether he "cause[d] any part of it to be fingerprinted?" Again, Detective Price answered no. Defense counsel then asked, "[t]he outside?" At that point the prosecutor objected on the grounds the question had been asked and answered. The court sustained the objection. The trial court's ruling was proper; the question was clearly repetitive. (*People v. Kronmeyer* (1987) 189

Cal.App.3d 314, 352 ["The control of cross-examination is within the discretion of the trial court, permitting it to curtail cross-examination relating to matters already covered or irrelevant"].)

Because we reject defendant's claim that the trial court's restrictions on the cross-examination of these witnesses deprived him of the opportunity to present a defense by attacking the police investigation, we also conclude that the trial court did not abuse its discretion when it denied his motion for mistrial on this ground.[32]

M. Instructional Error

1. CALJIC No. 3.32

Defendant contends the trial court erred when it denied his request to instruct the jury with CALJIC No. 3.32.[33] We disagree.

A trial court is required to give a requested instruction on a defense only if substantial evidence supports the defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The sole evidence in support of defendant's request was the testimony

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[32] For the first time on appeal, defendant asserts the trial court's exclusion of evidence regarding the police investigation violated various federal constitutional rights. Again, assuming, without deciding, that his offers of proof preserved these claims (*People v. Yeoman, supra*, 31 Cal.4th at pp. 117, 133), because we conclude the trial court's rulings were correct, the constitutional claims fail.

[33] The 1995 version of the instruction stated: "Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant [____(insert name of defendant if more than one)____] at the time of the commission of the crime charged [namely, _____] [in Count[s] _____][.] [or a lesser crime thereto, namely _____]. You may consider this evidence solely for the purpose of determining whether the defendant [____(insert name of defendant if more than one)____] actually formed [the required specific intent,] [premeditated, deliberated] [or] [harbored malice aforethought] which is an element of the crime charged [in Count[s] _____], to wit, _____[.] [or the lesser crime[s] of _____]."

of Dr. Palmer, the emergency physician who treated him the day after Nicole's disappearance. Palmer testified that defendant was psychotic, agitated, and delusional when he examined him and that a toxicological screen revealed the presence of tetrahydrocannabinol, the active ingredient of marijuana, and benzodiazepine, which belongs to a class of drugs used as a mild tranquilizer.[34] He testified further that defendant was having visual and auditory hallucinations, acting inappropriately, and had self-inflicted slashes on his wrists. But these observations were made more than 24 hours after Nicole's disappearance. In the interim, defendant had spoken to Nicole's father and offered to help him look for Nicole and had gone to work where he had interacted with two supervisors, Adele Bowen and Bruce Cousins, both of whom testified that defendant did not appear to be under the influence of any substance.

At best, Palmer's equivocal testimony established that defendant may have suffered from long-standing latent psychosis and, at some point, his condition deteriorated. This does not constitute evidence of defendant's mental state at the time of the commission of the crime. We conclude that this evidence was not sufficient to require the instruction.

2. Manslaughter Instructions

Defendant contends the trial court erred by rejecting his request to instruct the jury regarding voluntary and involuntary manslaughter as lesser-included offenses of murder. Defendant also based this request on Dr. Palmer's testimony,

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34 Defendant draws no distinction between Palmer's testimony regarding defendant's mental state and defendant's voluntary ingestion of drugs, but the latter would not have supported an instruction based on CALJIC No. 3.22 and defendant did not request a voluntary intoxication instruction. (See CALJIC No. 4.21.)

arguing, under *People v. Saille* (1991) 54 Cal.3d 1103, that Palmer's testimony constituted evidence of voluntary intoxication and mental illness so as to negate specific intent. The trial court rejected the request, observing, "[t]here is no evidence whatever in this case of any form of intoxication at the time of the murder, and there is no evidence whatever of any form of mental illness or disease at the time of the murder."

Based on our analysis of Dr. Palmer's testimony in the preceding part, we agree with the trial court that there was no substantial evidence of mental disease or voluntary intoxication at the time of the commission of the offenses, and, therefore, conclude it properly rejected the request for an involuntary manslaughter instruction. (See, e.g., *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 423-424.)[35] As for the instruction on voluntary manslaughter, defendant points to no evidence that would have supported such instruction based either on a theory of heat of passion or imperfect self-defense. (*People v. Barton* (1995) 12 Cal.4th 186, 199.)

3. Defense Pinpoint Instructions

Defendant contends the trial court erred when it rejected two defense pinpoint instructions, denominated Defense Special Instruction No. 3 (Instruction No. 3) and Defense Special Instruction No. 4 (Instruction No. 4.) Instruction No. 3 stated: "There is evidence from which you may infer that the decedent was not alive at the time of the sodomy. This evidence includes the testimony of Dr.

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[35] In his reply brief, defendant argues that if the evidence of intoxication was insufficient to support an involuntary manslaughter instruction, this was because the trial court prevented him from questioning Rauni Campbell about whether she and defendant had used marijuana. We have already concluded that the trial court's ruling was correct. (See pp. 99-100, *ante.*)

Heuser concerning the failure of the anal sphincter to constrict. [¶] If you find from the evidence that it was reasonably possible that decedent was dead at the time of the sodomy, you must find the special circumstance to be not true, even though there may be evidence that the deceased was alive. [¶] In order to find the special circumstance of sodomy to be true, you must find that the only reasonable interpretation of the evidence was that the deceased was alive, and this must be proved beyond a reasonable doubt."

The first paragraph of Instruction No. 4 stated: "In considering whether the prosecution has failed to meet its burden of proving sodomy beyond a reasonable doubt, you may consider the testimony of Mr. Moore that he could not conclude that any semen was present in the anal region." There was a second paragraph, not reproduced in the record but which the trial court described as being "about the testimony of Dr. Heuser, that the penetration could have been by another object."

"A trial court must instruct on the *law* applicable to the facts of the case. [Citation.] In addition, a defendant has a right to an instruction that pinpoints the *theory* of the defense. [Citation.] The court must, however, refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " (*People v. Mincey* (1992) 2 Cal.4th 408, 437.)

The first paragraph of Instruction No. 3 is no more than an assertion that the victim was dead at the time of the act of sodomy, supported by a fragment of the coroner's testimony. Similarly, the first paragraph of Instruction No. 4 argues, in essence, that because the serologist testified semen was absent from the victim's "anal region," the prosecution failed to prove its case beyond a reasonable doubt.

The trial court properly rejected these portions of the special instructions as argumentative.[36]

A trial court is not required to give pinpoint instructions that merely duplicate other instructions. (*People v. Bolden*, *supra*, 29 Cal.4th at p. 558.) The second paragraph of Instruction No. 3 directed the jury to find the sodomy special circumstance not true if it found it was "reasonably possible" the decedent was dead at the time the act of sodomy was committed, notwithstanding evidence she was alive. The third paragraph of Instruction No. 3, in essence, required the jury to find the victim was alive beyond a reasonable doubt before it found the sodomy special circumstance true. Both proposed instructions were duplicative of the other instructions given, including, among others, the reasonable doubt instruction (CALJIC No. 2.90) and defendant's Special Instruction No. 1 (Instruction No. 1). This instruction informed the jury that, to find the sodomy special circumstance true, it must find the victim was alive when sodomy was committed. Also apparently duplicative was the second paragraph of Instruction No. 4, the intention of which appears to have been to instruct the jury that penetration with a foreign object did not constitute sodomy, a subject already covered in defendant's Instruction No. 1, which stated, in part, "If you find that penetration of the anus in

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36 Furthermore, as the Attorney General points out, the instruction mischaracterized the testimony of both Dr. Heuser and serologist Moore. Dr. Heuser testified the anal opening was very relaxed, the circumference of the anus had a bruised appearance, and that there was tearing of the anus toward the vagina and there was bleeding. She testified these injuries were consistent with the insertion of a male penis, or a similar object, into the victim's anus. She also testified the bruising around the anus occurred before death and that sodomy was a possible cause of death. Moore testified that the anal swab produced a positive acid phosphatase result indicative of the presence of semen, but was inconclusive, not that there was no semen in the victim's anus.

this case was with a foreign object, you may not find the sodomy special circumstance to be true," and in the reasonable doubt instruction.

We find, therefore, that the trial court correctly rejected defendant's proposed instructions.

N. Sufficiency of Lewd Conduct Special Circumstance Evidence

Defendant contends there was insufficient evidence to support the lewd conduct special circumstance finding.[37] We disagree.

"In considering a claim of insufficiency of evidence, a reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, 'but our opinion that

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[37] Defendant asserts he sought dismissal of the lewd conduct special circumstance in the trial court on grounds of insufficient evidence, but the portion of the record to which he directs us does not support this claim. Rather, the record reveals that he sought dismissal of the special circumstance because it included conduct, like penetration with a foreign object, that, unlike rape or sodomy, the Legislature had determined was not sufficiently egregious to warrant a special circumstance unto itself. To the extent his attack on the sufficiency of the evidence here is a renewal of this argument, we reject it. Defendant's criticism of the lewd conduct special circumstance fails to take into account the well-established purpose of section 288, "to provide children with 'special protection' from sexual exploitation. [Citation.] The statute recognizes that children are 'uniquely susceptible' to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.] It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned." (*People v. Martinez* (1995) 11 Cal.4th 434, 443-444.)

the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (*People v. Earp* (1999) 20 Cal.4th 826, 887-888, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) Additionally, "[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Moreover, an appellate court "resolve[s] neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*Id.* at p. 403.)

Section 288 "is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*People v. Martinez, supra,* 11 Cal.4th at p. 442.) Defendant argues the evidence was insufficient (1) to establish that Nicole was alive during the commission of the lewd conduct and (2) to prove his intent.

Dr. Heuser testified, in essence, that the bruising she observed on Nicole's body indicated her heart was still pumping blood when she sustained those injuries. Thus she concluded the bruises to Nicole's face, neck, arms, and legs occurred while Nicole was alive, as did the bruising she observed around Nicole's vaginal area and rectum. Indeed, she concluded the penetration of Nicole's rectum was a possible cause of death. Accordingly, substantial evidence established that Nicole was alive during the commission of the offense.

Substantial evidence also establishes defendant's sexual intent, based on all the circumstances surrounding the commission of the offense. (*People v. Martinez, supra,* 11 Cal.4th at p. 445.) First, Nicole's body was found in the nude. Second, the evidence firmly established that her rectum had been penetrated. Third, her vaginal opening was very widely open and bruised, which suggested stretching consisting with the penetration of the area with a finger. Fourth, there was body fluid evidence from which the jury could have inferred that defendant ejaculated in Nicole's presence. The conclusions to be drawn from this evidence,

and the reasonable inferences therefrom, viewed in the light most favorable to the judgment are plain: defendant disrobed Nicole, or caused her to disrobe, penetrated her vaginally and anally, and ejaculated. This clearly established lewd conduct.

Defendant attempts to parse the evidence as narrowly as possible, resisting all reasonable inferences that could be drawn from the testimony of the coroner and the serologist, and citing such portions of their testimony that support his argument. In doing so, defendant simply ignores the substantial evidence rule. Properly applied to the evidence in this case, the evidence is more than sufficient to support the lewd conduct special circumstance.

O. Denial of New Trial Motion

1. Sufficiency of Evidence of Oral Copulation

Defendant argues that his conviction of oral copulation was not supported by substantial evidence and the trial court erred when it denied his new trial motion on this ground. He asserts that the insufficiency of the evidence is demonstrated by the jury's failure to find true the oral copulation special circumstance.

Defendant was charged with violation of section 288, subdivision (c), oral copulation of a person under 14 and more than 10 years younger than the perpetrator. " 'Oral copulation' is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] Any contact, however slight, between the mouth of one person and the sexual organ or anus of another person constitutes 'oral copulation.' Penetration of the mouth, sexual organ or anus is not required. Proof of ejaculation is not required. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person engaged in an act of oral copulation with an alleged victim; and [¶] 2. The alleged victim was under

the age of 14 and more than 10 years younger than the other participant." (CALJIC No. 10.46, brackets omitted.)

Defendant does not dispute that the age differential element was proved but claims the evidence was insufficient to prove an act of oral copulation occurred.

Serologist Moore's analysis of a tissue paper found in the wastebasket of defendant's bathroom revealed semen stains consistent with defendant and high amylase activity indicative of saliva consistent with Nicole. Moore testified that the stains were consistent with the product of oral copulation. Semen and saliva stains found on defendant's bed sheet, which Moore testified could also have originated from defendant and Nicole, in a pattern that indicated spewing, also supported Moore's conclusion. This evidence was sufficient to support defendant's conviction. (*People v. Scott* (1978) 21 Cal.3d 284, 296 ["The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable"].) His citation of conflicting evidence is of no avail. (*People v. Maury, supra,* 30 Cal.4th at p. 403 [on review of a sufficiency claim, the reviewing court "resolve[s] neither credibility issues nor evidentiary conflicts; we look for substantial evidence"].)

Regarding defendant's claim of inconsistent verdicts, first, as the trial court noted, the verdicts are not necessarily inconsistent. The jury could have found that, while an act of oral copulation occurred, the murder was not committed during the commission of that act (§ 190.2, subd. (a)(17)(F)), and could have convicted him of the substantive oral copulation count while finding the oral copulation special circumstances not to be true. In any event, any inconsistency in the verdicts does not require reversal of the oral copulation conviction. "It is . . . settled that an inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of a

substantive offense, effect is given to both." (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

2. Remaining Issues on Motion for New Trial

Defendant contends the trial court abused its discretion by denying his motion for a new trial. Defendant's motion advanced 12 claims.[38] Here, he confines his argument to four grounds: (1) the removal of Shafi-Nia and appointment of William Chais violated his right to effective assistance of counsel; (2) the trial court erroneously denied his venue motions; (3) the trial court erroneously declined to give certain defense penalty instructions regarding defendant's offenses as a factor in aggravation and on the burden of proof on the grounds that the instructions it gave were adequate; and (4) a new trial was justified by erroneous trial court rulings including (a) denial to the defense of access to Rauni Campbell, (b) the trial court's refusal to give an advance ruling on the scope of cross-examination of defendant at the sanity phase, (c) the exclusion of the "Sean" tape, and (d) the trial court's refusal to exclude the coroner's report as a sanction for the prosecution's alleged violation of discovery. Defendant has presented most of these claims on appeal, independent of his new trial claim, and we have found them to be without merit and rejected them. We also reject his claim that the trial court abused its discretion in denying his new trial motion on

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38 The complete grounds include (1) insufficiency of the evidence; (2) unlawful search and seizure; (3) improper removal of Shafi-Nia; (4) replacement of Shafi-Nia with unqualified counsel; (5) denial of motions for change of venue; (6) prejudicial trial atmosphere; (7) bias of the judge and bailiffs against defendant and his supporters; (8) confusing and erroneous instructions; (9) denial of access to Rauni Campbell; (10) coerced withdrawal of defendant's insanity plea; (11) exclusion of the "Sean" audiotape; and (12) discovery violation regarding Dr. Heuser's report.

these grounds. Defendant's remaining claims are merely enumerated without further argument or citation to authority and for this reason we reject them. (*People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15.)

III. DISCUSSION: PENALTY PHASE ISSUES

A. Evidentiary Claims

1. Reference to a Menendez Brother

Defendant contends that his right to counsel was violated because the defense expert, Dr. Vicary, revealed during recross-examination that defendant had spoken to one of the Menendez brothers, prior to taking several psychological tests that Vicary testified defendant had answered in such a manner as to create the impression he was mentally ill. Defendant objected when the prosecutor asked if one of the people defendant might have spoken to prior to taking the tests was one of the Menendez brothers. Outside the presence of the jury, defense counsel moved for a mistrial on the grounds it was "improper" for the prosecutor to suggest defendant was "receiving advice from one of the Menendez brothers." In the course of the discussion, the prosecutor said that Vicary had mentioned defendant had talked to the Menendez brother "off the cuff." The trial court found the question was fair and denied the mistrial but told the prosecutor "there's going to be no additional questioning on that." There was no further reference to the subject.

Defendant contends that Dr. Vicary violated his Sixth Amendment right to counsel by revealing to the prosecutor that defendant told Vicary he had talked to one of the Menendez brothers.

Defendant failed to object on this ground in the trial court, where he only objected to defendant being associated with one of the Menendez brothers. His

claim, therefore, is forfeited. (*People v. Williams, supra,* 16 Cal.4th at p. 250 [constitutional objection to admission of evidence forfeited if not raised below].)

In any event, admission of defendant's statement to Vicary was relevant to the latter's assessment of defendant's mental state, which defendant himself tendered as an issue at the penalty phase, and its admission did not violate either his Fifth or Sixth Amendment rights. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190.) The prosecutor had established from Dr. Vicary that defendant had answered questions on the psychological tests so as to suggest he was mentally ill; that he may have sought advice from other inmates on how to do so was clearly relevant to the assessment of his mental state, and any such information he provided to Vicary was not privileged.

Even if the prosecutor's bare reference to one of the Menendez brothers was improper, the trial court did not abuse its discretion in denying defendant's mistrial motion. (*People v. Burgener, supra,* 29 Cal.4th at p. 873 [mistrial should be granted only when a party's chances of receiving a fair trial have been irreparably damaged].) For the same reason, even assuming the reference was improper, there is no reasonable possibility the jury would have rendered a different verdict in the penalty phase absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

2. Admission of Evidence of Hit-and-run Conviction

On direct examination, Dr. Vicary testified that defendant had no prior criminal record as a juvenile or an adult. On cross-examination, he acknowledged that defendant's criminal history included a hit-and-run arrest. Subsequently, at defendant's request, the jury was instructed that defendant's conviction of misdemeanor hit and run was received in connection with Dr. Vicary's opinion of defendant's mental state and could be only be considered "in assessing what

weight you choose to give Dr. Vicary's opinion. [¶] This misdemeanor is not violent criminal activity which can constitute an aggravating factor."

Defendant contends that admission of this evidence amounted to improper impeachment. Alternatively, he contends the evidence should have been excluded pursuant to Evidence Code section 352. We do not agree.

The evidence was admitted to impeach Dr. Vicary's testimony that defendant had no juvenile or adult convictions, to the extent that this conclusion reflected upon Dr. Vicary's opinion of defendant's mental state. As such, it was properly admitted. (*People v. Hendricks* (1988) 44 Cal.3d 635, 642 ["Other crimes evidence may be used to impeach the testimony of an expert witness"].) Furthermore, any possibility the jury might have misunderstood the purpose of this evidence was obviated by the limiting instruction, which we presume the jury understood and followed. (*People v. Harris*, *supra*, 9 Cal.4th at p. 426.) Defendant's Evidence Code section 352 claim is forfeited by his failure to have made this objection but even if he had, we would find no abuse of the trial court's considerable discretion in admitting the evidence. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

3. Improper Impeachment of Victoria Eckstone

Defendant's witness Victoria Eckstone testified that she believed defendant was the father of her child and she wanted her child to continue to have a relationship with defendant even if he was incarcerated. In rebuttal, a Burbank police detective, Kevin Krafft, testified that Eckstone had told him the father of her child was William Boorstin, whom she described as her "common law husband" of 10 years. Detective Krafft also testified he had obtained a birth certificate for the child listing Boorstin as the father. Additionally, Deputy Sheriff Brent Rollins testified that Eckstone told him defendant was the father of her child

but that the name of the father's child was not on the birth certificate, and that the child would never see her father again.

Defendant argues the testimony of Detective Krafft and Deputy Sheriff Rollins should have been excluded under Evidence Code section 352 because it was more prejudicial than probative and could have confused the jury and resulted in an undue consumption of time. Defendant also argues that, even if Detective Krafft's testimony was proper impeachment because it was inconsistent with Eckstone's testimony, Deputy Sheriff Rollins's testimony was not. Finally, he argued that the trial court erred in denying his request to order a blood test to determine the child's paternity.

The underlying issue presented to the trial court was Eckstone's credibility, not the actual paternity of her child. Thus, the fact that she told Detective Krafft another man was the father of her child and put his name on the birth certificate was not only inconsistent with her testimony that she believed defendant was the child's father, but even more deeply inconsistent with her assertion that a parental bond existed between defendant and her child that she wished to maintain and perpetuate. Similarly, her statement to Deputy Sheriff Rollins that defendant would never see the child also undercut this testimony. Thus, their testimony was proper impeachment testimony. (*People v. Price* (1991) 1 Cal.4th 324, 474; Evid. Code, § 780, subds. (g), (h).)

Nor did the trial court abuse its discretion in concluding the evidence was more probative than prejudicial. In light of the relatively brief testimony of Detective Krafft and Deputy Sheriff Rollins, defendant's concern that the evidence would have led to a minitrial on the issue of Eckstone's credibility, causing an undue consumption of time or confusion of the issues, obviously did not materialize.

Finally, because the actual paternity of the child was not at issue, the trial court did not abuse its discretion in denying defendant's request for a paternity test.[39]

4. Victim Impact Testimony

Defendant contends the victim impact testimony by Nicole's parents and brothers was cumulative, unsubstantiated and prejudicial.[40] He asserts further that fleeting references by two of the witnesses to the victim's having been "abducted" and "kidnapped" were prejudicial because the trial court had previously dismissed kidnapping charges and kidnapping special circumstances for insufficient evidence. Finally, he contends that statements made by the victim's mother to the press urging that defendant be sentenced to death violated rules regulating victim impact evidence.

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39 Defendant asserts on appeal that the trial court's denial of his request for a paternity test violated his federal constitutional rights to due process, a fair trial, and a reliable penalty determination as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Assuming, without deciding, that defendant's offer of proof preserved these claims (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133), because we conclude the trial court's ruling was correct, the constitutional claims fail.

40 Defendant objected to the proposed testimony of the victim's father on Sixth and Fourteenth Amendment grounds. In response, the trial court ruled that the victim's family members could testify only to "new matters that haven't been covered as we get to other witnesses." Defendant asserts that the trial court failed to follow its own ruling, permitting cumulative testimony which, as a result, violated his federal constitutional rights to fair penalty trial, his confrontation rights, and rights to due process and equal protection as required by the Fifth, Sixth, Eighth and Fourteenth Amendments. Assuming, without deciding, that his initial objection below preserved these claims (*People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133), because we find no error in the admission of the victim impact evidence, defendant's constitutional claims fail.

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court overruled earlier cases finding a federal constitutional proscription against victim impact evidence and argument. The high court concluded: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) "Moreover, after *Payne* was decided, we concluded that the immediate injurious impact of a capital murder is a 'circumstance of the crime' (§ 190.3, factor (a)) which may be introduced and argued in aggravation under state law. [Citation.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 935; *People v. Edwards* (1991) 54 Cal.3d 787, 835 [factor (a) of section 190.3 "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"].)

In *Edwards*, we stated that our holding "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) We said the trial court should weigh the probative value of the victim impact evidence against the prejudicial effect. " 'On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invokes an irrational, purely subjective response should be curtailed.' " (*Id.* at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

Defendant contends that testimony the victim's 16-year-old brother, Chad, had faltered in school and began to use drugs following his sister's death was improper because there was no connection between her death and his drug use. He also complains that, because the family's members testified about the impact

of Nicole's death on one another, that the evidence was cumulative and prejudicial.

The victim's father testified that, prior to Nicole's death, Chad was the family athlete, and was a "4.0 student," but, following her death, his grades deteriorated, "he is drinking a lot and doing drugs," and would not talk about his sister but "kept it all inside himself," and refused to go to counseling. Chad's brother, 18-year-old Travis, also testified that Chad was doing worse in school, was not playing sports and stated his belief that Chad "is into drugs and alcohol because of it." We conclude that these brief references to Chad's use of drugs and alcohol were neither irrelevant nor prejudicial but, in context, depicted the "residual and lasting impact" he "continued to experience" as a result of Nicole's murder. (*People v. Brown, supra,* 33 Cal.4th at p. 398.) Furthermore, the jury was specifically instructed that in assessing victim impact evidence it could "consider only such harm as was directly caused by defendant's act." In these circumstances, we conclude there was no error in the admission of this evidence. Even if it was error, given the brevity of the testimony, we would find any such error harmless.

Defendant also contends the victim impact evidence was cumulative because "the jury heard three times that Travis Parker . . . considered suicide, twice that Chad Parker may have been involved in drugs and alcohol, three times that he was having trouble in school, and twice that Casey Parker, youngest brother of the deceased, was having nightmares." We disagree. There is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members. Moreover, in this case the references were brief. Accordingly, we reject defendant's claim that the testimony was unduly repetitious or prejudicial.

Defendant next contends that Mr. Parker's reference to Nicole as having been "abducted" and Chad Parker's use of the term "kidnapped" were improper because the trial court had dismissed kidnapping counts and kidnapping special circumstances for insufficiency of the evidence. Defendant failed to object to either reference, thus his claim is waived. (Evid. Code, § 353.) In any event his claim is without merit. The witnesses' use of these terms was clearly colloquial, not legal. Moreover, the references occurred only once. In light of these circumstances, we reject defendant's assertion that the terms could have had any prejudicial impact on the jury.

Finally, defendant contends that statements the victim's mother made in a television interview calling for defendant's death violated victim impact evidence rules. These statements were not part of her victim impact testimony nor, as we have previously observed, is there anything in the record to support defendant's allegations that any of the jurors were exposed to her remarks. Therefore, we reject the claim.

5. Cumulative Prejudice

Defendant contends the cumulative effect of the trial court's erroneous evidentiary rulings during the penalty phase require reversal. As we have rejected his claims of error, necessarily he suffered neither individual nor cumulative prejudice from them. (*People v. Bolden, supra,* 29 Cal.4th at pp. 567-568.)

B. *Davenport* Error

A prosecutor may not argue that lack of evidence of a mitigating factor may be considered by the jury as a factor in aggravation. (*People v. Davenport* (1985) 41 Cal.3d 247, 289-290.) While conceding "the prosecutor did not specifically state that a lack of mitigating circumstance was an aggravating factor," defendant

nonetheless claims the prosecutor implied as much. He contends the trial court abused its discretion when it denied his motion for mistrial on this ground.

In the brief passage of the prosecutor's closing argument that defendant cites, the prosecutor observed there was no evidence of consent by the victim (§ 190.3, factor (e)), nor that the offenses had been committed under circumstances defendant reasonably believed to be a moral justification or extenuation for his conduct (§ 190.3, factor (f)), nor that he acted under extreme duress or under the substantial domination of another person (§ 190.3, factor (g).) The prosecutor concluded: "No evidence of that. What you have is one person solely involved in the crime. And that's Mr. Panah." The prosecutor then reviewed in some detail the circumstances of the crime (§ 190.3, factor (a)), at the end of which he stated, "[t]hese are all factors in aggravation."

Defendant claims this last statement implied to the jurors that the absence of any evidence to support the factors in mitigation to which the prosecutor had earlier referred converted them into factors in aggravation. Our review of the prosecutor's argument belies this claim. In context, it is clear he was referring to evidence pertaining to section 190.3, factor (a) only, notwithstanding his reference to "factors." His discussion of the lack of evidentiary support for the factors in mitigation was entirely proper. (*People v. Dyer* (1988) 45 Cal.3d 26, 83.) The trial court properly denied defendant's mistrial motion. Necessarily, then, we also reject defendant's claim that the prosecutor's conduct and the trial court's denial of defendant's mistrial motion violated his federal constitutional rights to due process, equal protection, a fair trial and a reliable penalty determination.

C. Instructional Error

Defendant contends the trial court erred when it denied or modified his proposed instructions. We find no error.

Defendant contends the trial court erred when it declined to instruct the jury as follows: "A juror properly may reject death as a penalty solely to grant mercy to a defendant." Not so. (*People v. Lewis* (2001) 26 Cal.4th 334, 393 [defendant is not entitled to a pure "mercy" instruction]; *People v. Bolin*, *supra*, 18 Cal.4th at p. 344.) In *Bolin*, "the trial court gave the standard instruction to take into account 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.' The court also told the jury 'to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.' No additional instruction was required." (*Ibid*.) Substantially the same instructions were given here.

Next, defendant contends the trial court erred when it denied his request to instruct the jury it could reject the death penalty if it had a "lingering doubt" about his guilt, though the court allowed the defense to argue the point. We have previously rejected this argument on the grounds that such instruction is not necessary because there is no requirement for it under either state or federal law (*People v. Lawley* (2002) 27 Cal.4th 102, 166), and the lingering doubt concept is sufficiently encompassed in other instructions ordinarily given in capital cases. (*People v. Hines* (1997) 15 Cal.4th 997, 1068.) On the same grounds, we reject defendant's claim.

Defendant argues that the trial court improperly modified the following instruction with the addition of the italicized words: "The permissible aggravating factors are limited to those circumstances in aggravation upon which you have been specifically instructed. Therefore, evidence which has been presented regarding the defendant's background, *if proven*, may be considered by you only

as mitigating evidence." The trial court justified the addition of the phrase "*if proven*," because it made the instruction less argumentative. Defendant contends that the phrase erroneously implied the jury was required to find the mitigating circumstance had to be proven beyond a reasonable doubt. We disagree. Nothing in the phrase itself implies that the reasonable doubt standard, or any particular standard applies. Defendant's assertion that, because the reasonable doubt standard was used in the guilt phase, the jury likely applied it in the penalty phase is speculative. Furthermore, the jury was instructed, at defendant's request, that "[a] juror may find that a mitigating circumstance exists if there is *any* evidence to support it *no matter how weak the evidence may be*." (Emphasis added.) We conclude, therefore, that the jury was not misled by the trial court's modification of defendant's instruction.

Finally, defendant advances two arguments regarding the burden of proof. The trial court instructed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." In addition, the jury was instructed that the determination of the appropriate penalty was not a mechanical counting process, but required the evaluation of the moral weight of all the evidence, aggravating and mitigating; that, to impose the death penalty instead of life without possibility of parole, each juror must be personally persuaded that the balance of aggravation over mitigation justified the punishment; and that each "juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence may be." Defendant nonetheless argues that the trial court's failure to instruct the jury it could not return a judgment of death unless it found that the aggravating factors "outweighed" the factors in mitigation requires reversal. He makes the further global claim that the trial court's failure to provide

a burden of proof instruction failed to give the jury adequate guidance. We disagree. "[W]e have consistently held that instructions similar to those given in this case adequately explain the jury's sentencing responsibilities and are not impermissibly vague." (*People v. Anderson* (2001) 25 Cal.4th 543, 600.)

In light of our rejection of defendant's claims of instructional error, we necessarily reject his further assertion that the cumulative effect of instructional error violated his federal constitutional rights to due process, equal protection, a fair trial, and a reliable penalty determination.

D. Constitutional Challenges to the Death Penalty Statute

Defendant raises a number of challenges to the death penalty statute that we have considered and consistently rejected in previous decisions. He provides no persuasive reason for us to reexamine those conclusions. We again conclude therefore that: (1) the statute adequately narrows the class of death-eligible offenders (*People v. Griffin* (2004) 33 Cal.4th 536, 596; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1179); (2) section 190.3, factor (a) is not impermissibly overbroad facially or as applied (*People v. Brown* (2004) 33 Cal.4th 382, 401; see *Tuilapea v. California* (1994) 512 U.S. 967, 987-988); (3) the statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, and specifically that all aggravating factors must be proved beyond a reasonable doubt, or that such factors must outweigh factors in mitigation beyond a reasonable doubt, or that death must be found to be an appropriate penalty beyond a reasonable doubt (*People v. Welch, supra,* 20 Cal.4th at pp. 767-768); (4) neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors, nor have our

conclusions in this respect been altered by recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 452-454); (5) the jury need not make written findings disclosing the reasons for its penalty determination (*People v. Jenkins*, *supra*, 23 Cal.4th at p. 1053); (6) the jury may properly consider evidence of unadjudicated criminal activity involving violence or force under factor (b) of section 190.3 (*People v. Brown*, *supra*, 33 Cal.4th at p. 402), although, we note, in this case no such evidence was introduced; (7) because the statute does not allocate the burden of proof (*People v. Medina* (1995) 11 Cal.4th 694, 782) and a burden of proof instruction need not, and should not, be given (*People v. Welch, supra,* 20 Cal.4th at pp. 767-768), neither the failure of the trial court to instruct the jury that the reasonable doubt standard does not apply to mitigating factors, nor its failure to instruct the jury it need not unanimously agree on such factors, violated defendant's constitutional rights, nor was it likely the jury would have imported the reasonable doubt standard from the guilt phase into its penalty phase deliberations; (8) the trial court is not required to omit inapplicable sentencing factors when instructing the jury (*People v. Kipp, supra,* 26 Cal.4th at p. 1138); (9) nor is the trial court constitutionally required to instruct the jury that certain sentencing factors are relevant only to mitigation (*People v. Krafft* (2000) 23 Cal.4th 978, 1078-1079), although in this case the trial court did instruct the jury that defendant's age could only be considered for mitigation; (10) the use of certain adjectives in the list of mitigating factors, here, "substantial," "reasonably believed," and "moral," are not so vague as to erect a barrier to the jury's consideration of mitigating facts and render the statute unconstitutional (see *People v. Prieto, supra,* 30 Cal.4th at p. 276 ["extreme," "substantial"]); (11) CALJIC No. 8.88, with which the jury was instructed, adequately defines "mitigation" (*People v. Ochoa, supra,* 26 Cal.4th at p. 452) notwithstanding

defendant's resort to empirical evidence which was not part of the record below (*People v. Taylor* (2001) 26 Cal.4th 1155, 1180); (12) neither the federal nor state Constitution requires intercase proportionality review (*People v. Brown, supra,* 33 Cal.4th at p. 402); (13) the statute does not deny equal protection because the statutory scheme does not contain disparate sentence review (*People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288), nor does it deny equal protection on any other ground (*People v. Boyette, supra*, 29 Cal.4th at pp. 465-467); and (14) the statute is not constitutionally deficient because prosecutors retain discretion whether to seek the death penalty (*People v. Ochoa, supra,* 26 Cal.4th at p. 461).

E. Preexecution Delay

Defendant contends the delay in carrying out his execution is violative of his constitutional rights, including federal and state proscriptions against cruel and unusual punishment. We have previously considered and rejected this argument because, as we explained in *People v. Ochoa, supra,* 19 Cal.4th at pages 477-478, "[a]s long as it is reasonable, the time required for our statutorily mandated review is not a violation of a criminal defendant's constitutional rights; it is essential to ensuring that those rights are and have been respected. . . . [¶] As we stated in [*People v.*] *Hill* [(1992) 3 Cal.4th 959], defendant's claim is in reality a facial challenge to the 1978 death penalty law. We have repeatedly held that the 1978 death penalty law is facially constitutional as a general matter [citation], and we adhere to our holding in *Hill* with regard to defendant's claim."

F. International Norms

Defendant argues that California's use of the death penalty violates international norms of humanity and decency. We have, as he acknowledges, repeatedly rejected this claim. "International law does not prohibit a sentence of death rendered in accordance with state and federal and statutory requirements.

[Citations.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

G. Disproportionality of Sentence

Defendant contends his sentence is disproportionate to his culpability and violates the state's constitutional proscription against cruel or unusual punishment. Defendant cites his lack of a previous criminal history and asserts his " 'personal characteristics' and background were most impressive. [Citation.] His community activities were extremely impressive." Additionally, defendant argues he was "improperly convicted of the charged crimes."

"To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity' " ' (*People v. Cox, supra,* 53 Cal.3d at p. 690), the court must invalidate the sentence as unconstitutional." (*People v. Lucero, supra,* 23 Cal.4th at pp. 739-740.)

It is true that defendant was a youth who, before this crime, had no prior record of any serious offenses and it is also true that his journey from his native land to this country was an arduous and perhaps traumatic one. His personal characteristics, however, pale in comparison to the gravity and circumstances of his current offense. Defendant sexually assaulted and brutally murdered an eight-

year-old child. We are unable to conclude that the penalty imposed in this case is disproportionate to his culpability.

H. Cumulative Error

Defendant contends the cumulative effect of error during the proceedings in his case, from pretrial rulings through the penalty phase, requires reversal. We have either rejected his claims of error or found any errors to be individually harmless. We also conclude their cumulative effect does not require reversal of the judgment. (*People v. Bolden, supra,* 29 Cal.4th at pp. 567-568.)

IV. DISPOSITION

For the reasons stated, we affirm the judgment.

MORENO, J.

WE CONCUR: GEORGE, C. J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Panah

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

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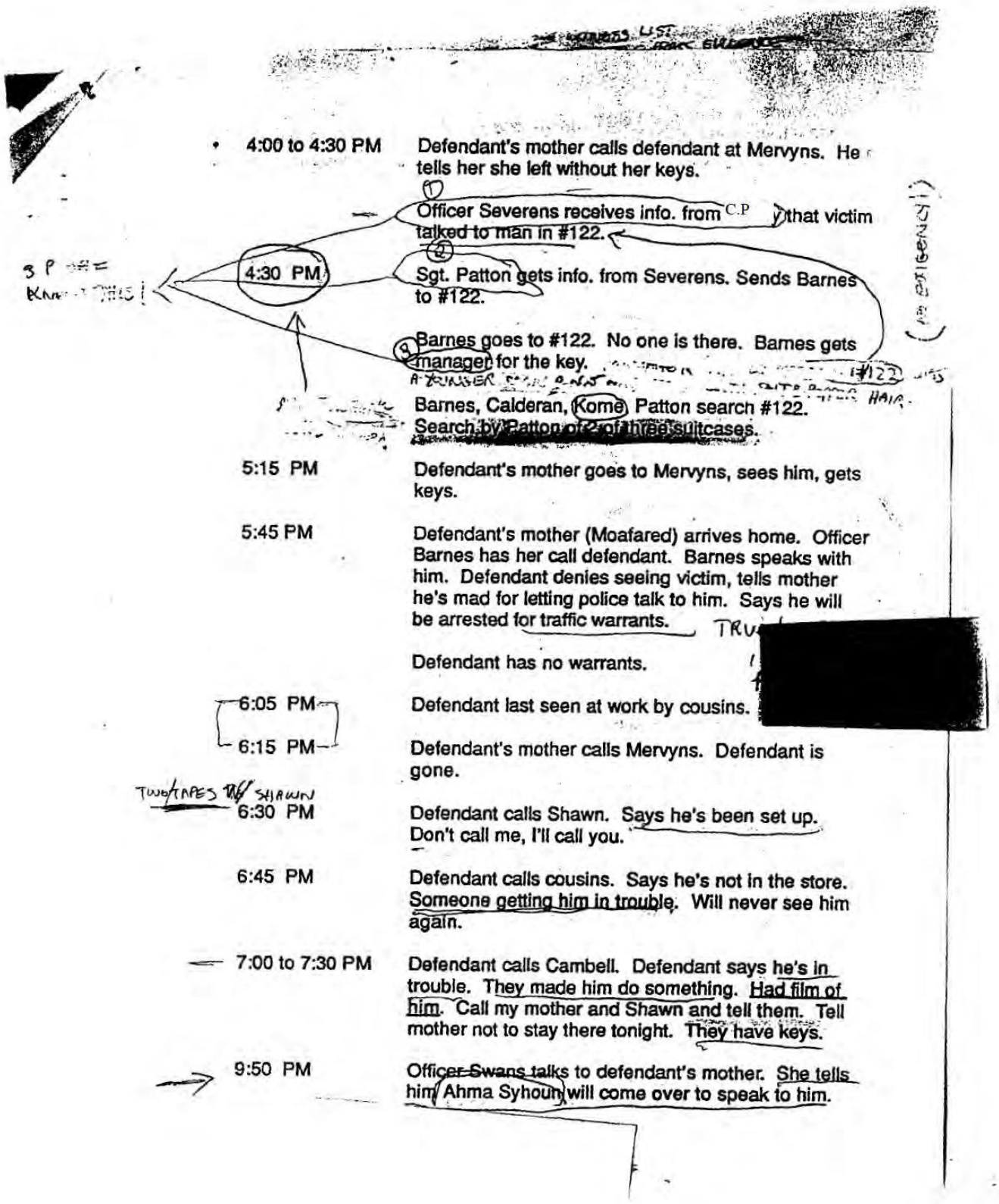
11-20-93 SATURDAY	8:00-8:15 AM	N. P. has breakfast, scrambled eggs (with Martin Goldstein) wearing white T-shirt with BUM lettering, blue jeans, and low black tennis shoes.
	8:30-8:40 AM	Lori [illegible]r drove N. P. and C. P., to Taryana Park for C. P.'s basketball game at 10 a.m.
approx.	8:30 AM	Lori drops N. P. and C. P. off at Ed Parker's apartment.
	9:45 AM	Drove with children to Taryana Park foe C. P.'s 10 AM game.
	10:45 AM	Game ends.
	11:00 AM	Ed Parker, N. P., and C. P. arrive back at Ed's apartment.
	11:00 AM	Ahmed Syhoun leaving with suitcase. See's victim and speaks to her. She asks if he is "Hooman's father (brother).
	11:30 AM	Per Ed, C. P. comes inside to watch TV.
	11:40 AM	Ed Parker sees victim playing ball outside.
	11:50 AM	Ed Parker checks on victim. She is missing.
	12:50 PM	Ed calls Lori. Ed begins knocking on doors.
	1:05 PM	Ed speaks with defendant senior seeing N. P. Ed calls LAPD and wife. Defendant tries to get Ed to leave in car. Ed tells him PD called. Defendant leaves.
	2:00 PM	Defendant's mother gets paged by defendant to call her home.
	2:00-3:00 PM	Defendant calls Victoria Eckstone- asks to come over.
	3:00 PM	Defendant starts work at Mervyns.



- 4:00 to 4:30 PM — Defendant's mother calls defendant at Mervyns. He tells her she left without her keys.

4:30 PM

Officer Severens receives info. from C.P that victim talked to man in #122.

Sgt. Patton gets info. from Severens. Sends Barnes to #122.

Barnes goes to #122. No one is there. Barnes gets manager for the key.

Barnes, Calderan, Korne, Patton search #122. Search by Patton of 2 of three suitcases.

5:15 PM — Defendant's mother goes to Mervyns, sees him, gets keys.

5:45 PM — Defendant's mother (Moafared) arrives home. Officer Barnes has her call defendant. Barnes speaks with him. Defendant denies seeing victim, tells mother he's mad for letting police talk to him. Says he will be arrested for traffic warrants.

Defendant has no warrants.

6:05 PM — Defendant last seen at work by cousins.

6:15 PM — Defendant's mother calls Mervyns. Defendant is gone.

6:30 PM — Defendant calls Shawn. Says he's been set up. Don't call me, I'll call you.

6:45 PM — Defendant calls cousins. Says he's not in the store. Someone getting him in trouble. Will never see him again.

7:00 to 7:30 PM — Defendant calls Cambell. Defendant says he's in trouble. They made him do something. Had film of him. Call my mother and Shawn and tell them. Tell mother not to stay there tonight. They have keys.

9:50 PM — Officer Swans talks to defendant's mother. She tells him Ahma Syhoun will come over to speak to him.

	See 11:00 A.M.	
	10:50 PM	Syhoun shows up. Tells Swans he left about 11:00 AM with a suitcase and a bag. She asked if he was "Hooman's" brother. Casey nearby with remote control car. ≠ FATHER
	11:00 PM	Defendant's mother calls Mervyns. Defendant has not returned.
	11:15 PM	Ms. Cambell reaches defendant's mother on phone. Tells her about defendant's 7:30 PM call. Campbell agrees to come over after work.
11-21-93 SUNDAY	12:15 AM	Campbell goes to defendant's house. See's mother and Syhoun to talk about defendant.
	1:00 AM	Cambell goes home.
		Syhoun leaven defendant's residence. NOPE!
		Defendant writes suicide note at Mullholland and Beverly Glen in his mother's BMW, cuts wrists and bleeds in car.
	9:00 AM	Defendant arrives at Campbells house. Says "did something bad and you will hear about it. Little girl is dead."
		Takes defendant to buy sleeping pills. Return to her apartment.
	9:36 AM	Operator 68394 at 911 gets call from Campbell about defendant's suicide attempt.
	1ST SEARCH	Officer Kong learns from Campbell what defendant said. Defendant arrested.
		Barris and Novarro go to #122 and force entry to conduct search. See video set up. Search for SW.
	11:00 AM	Barris interviews defendant. He claims he dumped victim's body off Mullholland near waterfall.
	INTERROGATED BY L.APS	
	9:30 PM	SW search of residence by Swanston, Peloqui, Power and Price. Locate victim's body.

STATEMENT FORM

Page 1 of

DR No.

Date/Time of Interview: 11-21-93, 1230

Location of Interview

Address: 10250 ETIWANDA AV DEV DIV

City

Zip Code

Phone: 989-8285

Desc.	Hair	Eyes	Hgt.	Wgt.	DOB	Age	Drivers Lic. No./Other ID	State
F W								

Interviewing Officer(s)

Serial No(s)

Division

Person(s) Present

Comments: Use first person. Include who, what, where, when, why and how.

ON 11-21-93 AT APPROX 1140 HRS WORKING UNIT 17X169 RESPONDED TO P/C, "PROWLER COMPLAINT 8435 NEVADA AV. SUSP DESCRIBED AS MALE BLK SHRT, BLK PANTS." PROWLER CALL POSS RELATED TO PREVIOUS TRANSMISSION OF SUICIDE VICT, MALE PSASIAN BLK CLOTHING 8371 NORTHGATE (POSS RELATED TO MP FR/WEST VALLEY).

UPON ARRIVAL I OBS'D ABV DESCRIBED SUSP LEANING AGAINST RT REAR FENDER OF TAN NISS LIC 2EXD463 FACING W/B.

[illegible] UNIT 17L55, ALSO RESPONDED TO P/C, AND SUSP WAS TAKEN INTO CUSTODY WITHOUT INC. I REQUESTED A SUPERVISOR AND AN RA. 17L20 AND RA 105 RESPONDED.

SUSP MADE SPONTANEOUS STATEMENT, "WE DROVE AROUND MULHOLLAND, DOWN WHERE THERE'S A WATERFALL."

I ASKED SUSP WHOM HE WAS WITH AND SUSP STATED A FRIEND WORKS WITH HIM AT MERVYNS. I ASKED SUSP WHAT IS HIS NAME AND SUSP STATED HE'D RATHER NOT SAY.

Staple Optional Photo Here

Additional space, use reverse

Defendant: Hooman Ashkan Panah **12-6-93**
Date of Crime:11-20-93 (Saturday)

Witness: Ofc. J. Barnes 27836

Evidence:

Testimony:

On 11-20-93, at CP. At 4:30 PM, sent by Sgt. Patton to check out info that victim was seen talking to one of the occupants of #122.

Barnes knocked but that there was no response. He contacted neighbor on left side and was able to see a TV on in the living room. Another neighbor reported that the son appeared to be weird.

Contacted the manager who appeared with a key for #122. TV now appeared to be off. No one responded to knock. Emergency entry.

Searched defendants room. Clothing piled three to three and a half feet high in the closet on both sides. Searched through clothing and discovered three suitcases on the bottom on the right side. Searched thru the clothes and two of the suitcases. Continued search of the rest of the apt. Nothing found.

Returned to Command Post and reported info to Sgt. Patton.

At 8:00 PM ??? (should be closer to 5:00 PM) learned from Sgt. Patton that a female who resides in #122 had arrived at front gate. Was sent to talk with her and her son.

He went to Apt. 122 with defendant's mother. She called the defendant at work and he talked with him.

When asked if he knew Nicole parker he replied "Vaguely, I'm not sure." When asked if he had seen her today because she was missing, he replied "No." Are you sure. Someone said they saw you with her earlier today? "I'm sure. I haven't seen her."

He told the witness where he was working, his name, and his DOB. He said he was working at Mervyns in the children's Department. Total conversation about one minute.

LOS ANGELES POLICE DEPARTMENT
FOLLOW-UP INVESTIGATION ☐ MULTIPLE

DATE THIS REPORT	DATE ORIGINAL RPT.	SPECIFIC TYPE ORIG. RPT. (ADW, TFV, EVID., ARREST/BURG., ETC.)	R. D.	PCD	DR
12-09-93	11-21-93	Murder/Rape/ Sodomy	1084		93-1041295

VICTIM/BOOKED TO/ARRESTEE (AS ON ORIGINAL REPORT): [redacted]erker, Nicole
IF RECLASSIFYING TO HOMICIDE — VICT'S: SEX | DESCENT | AGE
BKG. NO. (SUPPL. TO ARREST)
WORK FOLDER — PERIOD ORIG. RPT.: 11-H1 | INDEX NO.: 07

STATUS (1) CLEARED BY ARREST 2 CLEARED OTHER 3 REPORT UNFOUNDED 4 INVESTIGATION CONTINUED

Use this section only to add or correct info - do not repeat info from previous reports. Exception: Complete entire suspect info if making final disposition.

DATE OCCURRED	CHANGE TO-ON OR BTWN: MO	DAY	YEAR	TIME	& MO	DAY	YEAR	TIME	TYPE ORIG RPT - CHG. TO	RD-CHG. TO	DR CHANGE TO	INV. DIV. CHANGE TO

PROPERTY VALUE:	ADDITIONAL LOSS $	PARTIAL RECOVERY $	TOTAL RECOVERY $	DELETE FROM ORIG. RPT.	DESCRIPTION CHANGE ☐	ITEM NOS. RECOVERED/DELETED (ON MULT. RPTS. USE NARRATIVE)

	SEX	DESC	HAIR	EYES	HEIGHT	WEIGHT	DOB	AGE	NAME & ADDRESS (OR NAME & CHARGE, IF ARRESTED)	ACTION TAKEN	LA OR BKG. NO.
S-1	M	W	Blk	Bro	5-8	130	[redacted]-71	22	Panah, Hooman 187(A)PC	Filed (1)ct 187(A)PC	3766 199
2											
3											

NARRATIVE (USE BELOW COLUMNS FOR MULTIPLE REPORTS ONLY)

P/T/D	MULTIPLE RPT: PCD & DR NOS.	TYPE OF CRIME	RD	VICTIM'S NAME	DATE ORIG. RPT.	VALUE

See page 2 for narrative

[redacted] PROPERTY BOOKED IN CONJUNCTION WITH THIS REPORT OR INCIDENT? ☐ NO ☒ YES . . . . . IF YES, HAS I.O.S BEEN COMPLETED? ☒ NO ☐ YES

SUPERVISOR APPROVING — SERIAL NO. — REPORTING OFFICER(S) — SERIAL NO. — DIVISION

DATE & TIME REPRODUCED — DIVISION — CLERK

J. Price 22390 MVAL

B. Roberts 17324 MVAL

LAPD 03.14.0 (R. 3/85) FOLLOW-UP INVESTIGATION

30.

EX 82 457

On Saturday, November 20, 1993, at 1305 hours, Officers Toth #27905 and Mossett #25575 received a radio call of a missing juvenile at 20564 Ventura Blvd. Upon their arrival they were notified of the disappearance of 6 year old Nicole Parker. The report was made by the parents of the girl, Edward and Lori Parker. Edward Parker said that he last observed the victim 1140 hours at 20564 Ventura Blvd, as she was playing ball outside their apartment. The victim was last observed wearing blue jeans and a white T-Shirt and had in her possession a baseball glove and ball. Parker returned to check on her again approximately 10 minutes later and noticed that she was missing. A missing persons report was taken DR# 93-10 41295.

A command post was established and an extensive search was launched. The apartment complex consists of over 600 apartment units. The entire complex was canvassed and all of the victim's friends were contacted. The search failed to locate the victim or any evidence of her whereabouts. Posters were printed with the victim's picture and a description of missing girl was included.

Sgt Patton #22573 was assigned to the command post and received information from a unknown person (he cannot recall) that the missing child had been seen talking to a male resident of apartment #122. Unit 10X78, Officers Barnes #27836 and Calderon #27655 were went to apartment 122 and knocked on the door. When their was no response a the door Officer Barnes looked into the kitchen window and observed that the television was on in the living room. Because there was no response at the door despite the television being on, Sgt Patton contacted the building manager and obtained a key. Sgt Patton and Officers Barnes and Calderon entered the apartment and made a cursory search for either the missing child or anyone else inside. Nobody was located. This inspection of the apartment took place at approximately 1630 hours.

At approximately 2000 hours Sgt Patton received information that a female had entered unit #122. Barnes #27836 and Calderon #27655 were sent back to the apartment and spoke to Mehri Monfared (the suspect's mother). Monfared told the officers that her son, Hooman Panah, lived with her and that he was working. Monfared called her son at work and Officer Barnes spoke to him on the phone. Officer Barnes told Panah that he had reportedly been seen talking to the missing child earlier in the day which he denied. Office Barnes then asked him if he had seen the child and he stated that he hadn't. Panah indicated to the officer that he was at work at the Mervyn's in Fallbrook Mall. The conversation ended with Officer Barnes getting the name and date of birth of Hooman Panah.

Due to the fact that the entire valley was being besieged by a series of child molesting incidents, West Valley Detectives were called in to investigate the possibility of a connection between the series of reports and the missing girl disappearance.

Detective Severns #24350 had received information from the victim's brother, Casey Parker, that shortly before Nicole's disappearance he had seen Nicole talking to a man who had come out of apartment #122. Det. Severns knocked on the door of apartment #122 at approximately 2150 hours and was met by Mehri Monfared. She explained to Ms. Monfared that a man who had come out of her apartment had been seen talking to the missing girl and inquired as to his identity. Ms. Monfared was on the phone at the time and asked Det. Severns to wait a minute while she ended her phone conversation. Several minutes later Ms. Monfared returned to the front door and told Det. Severns that the man who had spoken to the child would be right over.

A approximately 2250 hours Det. Severns returned to the apartment (#122) and spoke to witness Ahmad Reza Seihoon. Seihoon stated that he had left Monfared's apartment at approximately 1100 hours that morning (Saturday, 11-20-93) carrying a suitcase and a bag. He said that he was in a bit of a hurry because there was a woman waiting for him in his car. Seihoon said that he inadvertently left his keys in the front door lock and went back to get them when he noticed the victim, Nicole Parker, standing near the front door to the apartment. Seihoon also recalled that there was a young male there playing with a remote control car. As he got the keys out of the door the victim asked him if he lived there (#122) and he told her that he did not. The girl then asked him if he was Hooman's father and he again said no. Seihoon then took his keys from the door and left.

On Sunday, November 21, 1993, at 0936 hours, Los Angeles Police Department Communications Division, Operator G8394, received a phone call from a female identifying herself as Rauni Campbell. Campbell stated that there was a male suspect attempting to commit suicide at [redacted] in apartment 12A. She identified the suspect as Hooman Ashkan Panah, Incident #1758.

Devonshire unit 17L55, Officer Kong #27512, responded to the call and was met by the P/R, Rauni Campbell. Campbell directed the officer to her apartment (#12A). As Officer Kong was approaching the apartment the suspect fled through the apartment courtyard. A description of the suspect was broadcast to other units in the area and Officer Kong continued to interview Campbell. It was at that time that Campbell told Officer Kong that the suspect had told her that he had done something very bad. During the ensuing conversation between Campbell and the suspect he indicated that he was involved in the disappearance of the 8 year old girl missing from Ventura Bl. Campbell also told Officer Kong that the suspect lived at the same apartment building as the missing girl. He (the suspect) indicated that they (the police) were going to find out about it because they would find the video and photographs. Officer Kong immediately notified West Valley Watch Commander of the incident.

Panah eluded police for approximately 90 minutes until he was located and arrested after a resident in the 8400 block of Nevada Ave. called the police and reported him as a prowler.

Officers Gorman #27300, Angelo #22399, and Joe #25098 observed the suspect sitting on the curb in front of [redacted]. and took him into custody without incident. The officer noted that the suspect had dried blood on his wrists at the time of his arrest. At the time of his arrest Panah made several statement to the officers regarding the missing victim.

Officer Joe #25098, still believing that the victim might be alive asked Panah questions in an effort to determine the whereabouts of the victim. Panah told the officer that he remembered being with the victim at a motel near Topanga Cyn. Blvd. and Parthenia St. Panah told the officer that the victim might be located either near Fallbrook Mall or Lanark Park. Panah then said that he would like to be with the girl even if he had to carry her skeleton around.

It was apparent from the interior of Campbell's apartment and his demeanor that Panah had ingested a number of sleeping pills. For that reason he was transported to West Valley Hospital for medical treatment. Panah was treated by Dr. John Palmer.

Upon being notified of Panah's arrest and the statements he had made, West Valley Watch Commander, Lt. Hulet #20012, accompanied by Sgt. Mastro #21672, and Officer Mossett #25575, responded to Panah's apartment. At that time the officers believed that the victim might possibly be alive and inside Panah's apartment. The officers were accompanied by West Valley Detectives Burris #16333 and Navarro #23155. When there was no response to the repeated knocks at the door entry was forced. The residence was checked for the victim and/or additional suspect's but none were found. During the brief time that the Detectives were inside the apartment they observed video recording equipment and numerous photographs of women in various stages of dress. At that point the residence was secured pending a search warrant.

A check of DMV indicated that the "suspect", Hooman Ashkan Panah, possessed a valid California driver's license which indicated a residence of [redacted]. Additionally the suspect had made a battery report on 01-27-93 indicating that same address. A check of DMV showed that the suspect has a 1986 Chevrolet Sprint 2 door, silver CA license# 1SEH115, registered to him. That vehicle was observed by Detective Navarro to be parked in space #35 in the common parking garage connected to the apartment building.

Witness Campbell was transported to West Valley Station and interviewed by Det. Navarro #23155. The interview was tape recorded on tape #147484. Campbell stated substantially the following:

"I work at Mervyn's in the Fallbrook Mall with Hooman. We are friends and have gone out a few times in the past. On Saturday night (11-20-93) at about 7:30 p.m. Hooman called me at work. He sounded like he was upset. He said that he was in trouble and that he had done something very bad. He later said that "they" had made him do something and that they had film of him and were trying to make it look like he had done something. I asked him some questions about what he had done and who "They" were but he didn't answer. Hooman asked me to call his mother and his friend Shawn and tell them what he had told me. He also said to tell his mother that "They" had the keys to his apartment and that she shouldn't stay there that night."

"At about 11:15 p.m. that same night I spoke to Hooman's mother on the phone. I told her what Hooman had told me to tell her and she asked me if I would come over to her house after I got off work. I went over there at 12:15 a.m. (11-21-91). Hooman's mother and a friend of hers were there. Hooman's mother showed me a couple of plastic baggies with some brown stuff in them and told me that she had found them in Hooman's room. I told her that I thought that they had contained marijuana. She told me that the police were all over the building looking for the little 8 year old girl. She told me that she thought Hooman might be involved and that she thinks he owes some "Bad Boys" some money. I went home shortly after that."

"At about 8:55 a.m. (11-21-93) I was asleep in my apartment when Hooman knocked on my door. I let him in and he showed me that he had cut his wrists. He said he couldn't take it anymore. He asked me to go with him to buy some sleeping pills. I went out to his car with him. It was his mother's black BWM and it was double parked in front of my building. We went over to Thrifty Drug Store and he bought a box of Thrifty brand sleeping pills. We went back to my apartment and I helped him open all the packages of pills. While I was opening the packages I asked Hooman if this had anything to do with the little girl that was missing. He said, "Yes". I asked him if she was alive and he said, "No". I then asked him if he knew that she wasn't alive or if he assumed that she wasn't and he said, "No, she is not alive". I gave him the pills and told him that I had to go make a phone call. My phone wasn't working so I went down to the manager's apartment and called the police. Before I went downstairs I saw him take 2-3 pills. I told the police operator that Hooman was in my apartment trying to commit suicide and that he may have had something to do with the missing girl. A few minutes later the police showed up

and took me to the police station."

A 1985 BMW 325E, CA Lic# 3BQL161 was located in front of the apartment complex. A check of DMV indicated that the vehicle belonged to the suspect's mother. Due to the exigent circumstances the trunk was forced open and checked for the missing victim. The vehicle was then impounded at Howard Sommers Tow.

A spiral notebook was located inside the vehicle and found to contain 13 pages of writings. In the writings the writer apologizes for his actions and indicates that the "kid" was dead. The latter pages of the writings had what appeared to be blood on them. Several knives believed to have been used by Panah to cut his wrists were also recovered from the vehicle interior. SID Criminalist R. Monson #G9286 examined the interior of the vehicle and discovered evidence of blood in various places. Samples were taken as evidence.

Detective Peloquin #21384 spoke to the suspect, Hooman Panah, in an effort to determine the whereabouts of the victim, Nicole Parker. Panah admitted that he knew the victim and had seen her yesterday at the complex. Panah seemed to be a bit incoherent and made some statements which didn't make sense. He spoke of two men in hoods and mentioned a waterfall near Mulholland that his friend Shawn knew about. When asked if the victim was alive he stated, "No". He was also asked if he had hurt the little girl and he stated that he had not but "they" had.

SID Criminalist, R. Monson examined the suspects body and recovered samples of blood and hair. During this examination Monson noted that the suspect appeared to have recently shaved his pubic hair. The suspect was asked about the shaved pubic region and he stated that he had shaved it recently because he was getting ready for Friday night.

Based on the statements made by Panah to various witnesses he was booked at L.A. County USC Medical Center, Jail Ward, for 187(A) P.C. Murder.

Panah's mother, Mehri Ahmad Monfared was located and interviewed at West Valley Station by Det. Navarro #23155. The interview was recorded on tape # 147484 & 147485. She stated substantially the following:

"I live with my son, Hooman Ashkan Panah at [redacted]. Hooman attempted suicide in 1988 by taking some pills. He had a hard time adjusting to his new life here in the United States and I threatened to sent him back to Iran. On Saturday (11-20-93) my friend Ahman Seihoon came over to my house to visit. He left at about 11:00 a.m. Hooman was asleep in his room and I went up there and asked him if he wanted to go to my flying

lesson with me. He said no. I left the house and went to my flying lesson. At about 2:00 p.m. Hooman paged me with the apartment number. I couldn't call him until 4-4:30 p.m. I called him at work (Mervyn's) and he told me that I had left my house keys at home."

"At about 5:15 p.m. I went to Mervyn's, talked to him for a few minutes and got my keys from him. Then I went home. I got home at about 5:35 p.m. and I was stopped by the police. The police told me about the missing little girl and asked me where Hooman was. They told me that the little girl's brother saw the victim talking to a man from my apartment. I told them that he was at work. The police told me that they had already looked inside my apartment. I went into my apartment and about 10 minutes later another officer came to my door. They asked me if I could call Hooman at work so that they could talk to him. I called him and one of the officers spoke to him on the phone. I heard her ask him some personal questions and some questions about the little girl. When the officer was done talking to him I took the phone and talked to him again. I asked him if he had seen the little girl and he told me that he hadn't. Hooman got mad at me for letting the police call him at work. He told me that he had a driving warrant and that they would arrest him."

"At about 6:15 p.m. I called Hooman back at work. His boss, Bruce, told me that Hooman had left work and that Hooman had told him that something had happened. Bruce also said that Hooman told him that he didn't do anything, that they were trying to involve him in a murder, and that he was not ever going to return to work".

"At about 10:30 p.m. I was talking to my friend Seihoon on the phone. He told me that he had talked to the little girl when he left my apartment. I called Mervyn's again at about 11:00 p.m. and Bruce told me that Hooman had not come back. He put Rauni Campbell on the phone and she told me that she had talked to Hooman at 7:00 p.m. Rauni is a friend of Hooman's and they have dated in the past. Rauni told me that Hooman told her to tell me that something had happened and that he was worried about me because they had my house keys. I asked Rauni if she would come to my apartment when she got off work so I could talk to her face to face."

"Rauni got there at about 12:15 a.m. (11-21-93). Mr. Seihoon came over to my house and he an I talked to Rauni. I had looked through Hooman's room and found some baggies with some brown stuff in them. I showed them to

Rauni and asked her if she knew what was in them. I was worried because I thought Hooman was hanging around with some bad boys and was being made to do something or not tell something that he had seen. Maybe they told him that they would hurt him or me. Rauni left at about 1:00 a.m. and Mr. Seihoon left shortly after."

"At 9:30 a.m. that same morning the police called me and told me that Hooman had been at Rauni Campbell's house and that he had tried to kill himself. They said he ran away from them. I called Mr. Seihoon and asked him to come pick me up and take me to Rauni's apartment."

Det. Burris identified and located Panah's friend Shawn Hosseini. Hosseini was interviewed and stated the following:

"I last spoke to Hooman on Friday at 6:00 p.m. He came to my house and said he wanted to talk to me. I had a friend there named Billy Jean. When he saw that I had a friend there he said that he would talk to me later. He stayed at my house about 30 minutes. I haven't seen him since. He called my house at about 6:30 p.m. on Saturday and left a message on my answering machine. He said he had been set up and not to call him at home or at work. His message said that he would call me. He repeated that he had been set up several times. He fantasizes and lives in a different world. He trips out a lot. He is very sexually active."

Hosseini then directed Det. Burris to several places that he knew of where he and Panah liked to hang out. He also led Det. Burris to the waterfall that he believed that Panah was speaking of. A search of the area was begun but was halted when it became dark. The search was to resume with LASO Search and Rescue personnel the following morning.

Based on all the information obtained to this point a search warrant was prepared for Panah's residence. The warrant was signed by Judge S. Mayerson and served at the location at 2130 hours on 11-21-93. Detectives believed that evidence would be located at the scene that would connect Panah to the disappearance of Nicole Parker.

SID Photographer A. Ferugia #B9568 photographed the apartment.

At 2230 hours Det. Burris located a suitcase inside Panah's bedroom closet. The closet was situated on the east wall of the room and the suitcase was discovered beneath a heaping pile of dirty clothing in the southern portion of the closet. Upon opening the suitcase Det. Burris discovered the body of Nicole Parker. Burris pronounced death at 2230 hours.

The L.A. County Coroner's office was notified and assigned Coroner's case # 93-10786. Coroner's Investigator Kellerman #233776 and Criminalist Mahanay #134851 responded to the scene. Mahanay conducted a sexual assault examination using kit # 1182. Investigator Kellerman examined the body and discovered bruising on the victim's chest, arms, right cheekbone, and forehead. There was also tearing of the skin between the anus and vagina. The victim was transported to the L.A. County Coroner's office.

An autopsy was performed by Dr. E. Heuser on 11-22-93 at 1100 hours. The autopsy was attended by Detectives Price #22390 and Roberts #17324. Dr. Heuser ascribed the cause of death as traumatic injuries.

Myself and Det. Roberts conducted a follow up to L.A. County USC Medical Center to interview Panah. Panah was strapped to a hospital bed but appeared to be coherent and alert. During the initial part of the interview Panah said that he had been set up by two men wearing hoods and that they had forced him to do it. He refused to say what it was they made him do. Panah then said that he wanted to talk to his mother and his attorney. I continued to ask him questions and at one point he admitted to having sex with the victim but stated that he had done nothing else. He said that he was being set up and that this was much bigger than what we knew about. I offered him the opportunity to provide us with additional INFORMATION which might be beneficial to him but he declined. He stated that he would talk to us and tell us the whole story after he talked to his mother and his attorney.

The victim's father, Edward Parker was re-interviewed telephonically on 11-23-93 at 1830 hours. At this time he stated the following:

> "About an hour after I realized that Nicole was missing I knocked on the door of apartment #122. The young guy answered the door and he stepped out into the courtyard. I asked him if he had seen my daughter and he said that he hadn't seen her. I walked away and headed down the stairs and this guy followed me. He kind of looked around like he was looking for her. He even offered to help me look for him. He said he would take me in his car and we could drive down Ventura Blvd and look for Nicole. This all occurred about 5 minutes before the first police officers arrived. I think the guy was still outside in the courtyard when the police got there. The guy was acting real strange."
>
> "Earlier before Nicole disappeared I noticed a guy hanging around in the complex. It struck me as odd then but when I saw this guy in a gold van after Nicole disappeared I thought maybe he had something to do with it. The van was still there when the police arrived and

one of the officers went up to the driver and showed him a picture of Nicole. The guy was a white male, mid 20's, possible goatee or beard, and a slender face. I think the first part of the license plate was 3C_____. The van must have come in through the front gate and I watched it leave through the front gate so it should be on the video tape. I think it was about 1:30 pm or so."

Witness Bruce Cousins was interviewed telephonically by Det. L'Heureux #20788 on 11-22-93 at 1910 hours. Cousins is the department manager over Panah at Mervyn's. Cousins stated substantially the following:

"Hooman arrived at work at 3:00 p.m. on Saturday (11-20-93) The last time I saw him was at about 5:50 p.m. I noticed that he was gone at about 6:05 p.m. At about 6:45 p.m. Hooman called me on the phone and told me that he wasn't in the store. He said somebody was trying to get him in trouble and that I nor anyone else at Mervyn's would never see him again. He said that the only thing he could do was kill himself."

On 11-23-93 Det. Roberts conducted a follow up to Mervyn's and conducted a search of Panah's locker. The locker was empty.

The case was submitted to the District Attorney's office on 11-23-93. Deputy District Attorney R. Cohen filed (1) count each of 187(A) PC Murder, 207 PC Kidnapping, 288 PC Child Molest, with special circumstances, case# LA015927.

On 12-07-93 Myself, Det. Roberts, and DDA Peter Berman conducted a follow up to Mervyn's (Panah's former place of employment) and spoke to the store manager, Adele Bowen. Ms. Bowen stated that she last spoke to Hooman on Saturday (11-20-93) at 3:00 p.m. when he arrived for work. The purpose for her conversation was to discuss a personnel issue which she later explained to us. Apparently the day before (Friday, 11-19-93), Hooman had parked his vehicle in a restricted area rather than the employee parking area. This had been brought to the attention of store management and Hooman was asked to move his car but refused. Ms. Bowen was counseling Hooman regarding his conduct. She indicated that Hooman had many disciplinary items in his personnel file which she would be glad to release upon presentation of a subpoena. Ms. Bowen further indicated that whenever Hooman was counseled he would always try to blame the behavior on someone else and would not take responsibility for himself.

CLEARED BY ARREST

Date June 14, 2001 Page No. 1 of 2

STATEMENT OF:

My name is Walter Nelson. I was a member of the jury on the Hoorman Farah case. I thought the jury took their responsibilities as jurors very seriously. As foreman of the jury, I made sure that all the jurors had a chance to speak. All the jurors participated in deliberations. During the penalty phase there were 2 of us who started out against death, Edna Collins and I. A third juror, I believe his name was Al Soltes, was willing to listen and could go either way. The rest of the jurors wanted death at the start of that phase of deliberations. Al was the first to state that he had decided for death. (As one of us made up our minds or changed our mind, we stated this aloud.) It took Edna about four days to decide. She was trying to find a path. She was looking at the decision from a very religious perspective. I don't recall the details, but the substance of Edna's concerns were religious. Throughout deliberations she talked about God and the Bible. At another point in deliberations, there was a brief discussion about how if Hoorman had done this in Iran, it still would have been a crime, but he would have had his head chopped off. There would not have been all this fuss. Also, there was some discussion in deliberations about how women are less valued in Iran

WTN

STATEMENT OF:

These discussions were brief and I made a deliberate conscious effort to not let cultural stereotypes enter into my decision making process. I believe most of the jurors felt this way, as well. I believe that any evidence that there was an attempted resuscitation should have been presented at trial. I have spoken here today to Angelica Garza who informed me that she was working on behalf of attorneys representing Hoffman Parish. She asked me questions about my jury experience. I understand that I am free to discuss the case with her or not discuss the case. I have received this statement and understand that I may have a copy of it should I wish one. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Santa Monica, Calif. on 6/14/01

DATE

by [signature]

SIGNATURE OF WALTER NELSON

Date 6/1/01 Page No. 1 of 2

STATEMENT OF: WD

My name is _____ I was a member of the jury on the Hoomen Perch case. I thought the jury was a very responsible group who did a good job sorting through the evidence. The evidence of guilt seemed conclusively not strong to me. There was no question in my mind about guilt. The defendant did not help himself after the guilt phase when he had some kind of outburst where he said something about how ~~he~~ ran another innocent man was going down. I don't recall the specifics of what he said but I sensed of heard that some of the jurors were offended by that comment. I was aware that there was TV ~~cable~~ WPT press coverage of the case but I did not see any of it during the trial. I belonged to Our Lady of Grace church where the victim attended school which I told the court when I was selected. I knew there had been a prayer service ~~for~~ NO for her, but I ~~pretty sure I didn't~~ don't think I did not attend the service. At one point during the ~~end~~ trial, we were told to assemble at a point on another floor or down the hall from the court. I believe that was to avoid the crowd which

X WD

Date 6/1/01 Page No. 2 of 2

STATEMENT OF:

was attending the trial. I have spoken here today with Keith Rahman who informed me that he was working on behalf of attorneys representing Mr. Lesch. He asked me questions about my jury experience. I understand that I am free to discuss or not discuss the case with him. I have reviewed this statement and understand I may have a copy of it. I declare under penalty of perjury of the laws of the State of California that the foregoing is true & correct. Executed at Torrance, CA on 6/1/2001

WD

by ___

February 27, 2004

Law Offices of Robert Bryan
Robert Bryan, Attorney at Law
1738 Union Street, 2nd Floor
San Francisco, CA 94123

Re: FSD Case #: 20000307
Peo. vs. Hooman Panah

Dear Mr. Bryan:

I have had the opportunity to review the reports issued by the Los Angeles Police Department Forensic Laboratory with regard to the above referenced case. I have also received an assortment of analytical notes pertaining to the serology and DNA analyses conducted. Refer to my letter dated November 3, 2000 for a list of discovery items received. The November 3, 2000 letter also documents a number of items related to the serolgy and DNA analyses which were **not** provided for review. It is my understanding that numerous requests have been made to LAPD for these items. In addition to the laboratory reports and notes I have also reviewed the following transcripts:

- Grand Jury transcript of LAPD Criminalist William Moore P233-250
- Trial transcript of LA County Coroner Criminalist Lloyd Mahanay P1964-1989
- Trial transcript of LAPD Criminalist Robert Monson P1989-2015
- Trial transcript of LAPD Criminalist William Moore P2015-2033 and P2054-2142

My impressions based on the information I have been provided with are as follows:

The reports dated March 4, 1994, January 5, 1994 and October 19, 1994 describe the serological analysis of evidence items related to the murder and alleged sexual assault of Nicole Parker. The reports dated May 24, 1994, October 6, 1994 and October 26, 1994 describe the DNA analyses conducted. I understand the circumstances of evidence collection to be as follows; Ms. Parker's body was found in a suitcase in the closet at 20564 Ventura Blvd., #122, Mr. Panah's residence. The body was wrapped in a sheet. Following discovery, the decedent was placed on a bed in the room and sexual assault evidence samples were collected (*Transcript of Lloyd Mahanay P1982 L1-11*).

It is not clear why the Coroner's office chose to process the body at the crime scene, risking transfer of biological materials to the sheet or body. It would not be unreasonable to expect that

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body fluids from Ms. Parker would be transferred to the sheet during the time she was wrapped in it or during the subsequent sexual assault examination which took place on top of the sheet. The sheet was later examined for evidence of body fluids from Ms. Parker and the history of the sheet must be considered in any interpretation of the examination conducted.

A blue bath robe, also described as a kimono, was recovered from the bed in the bedroom, where it was reportedly bundled with other items from the bed (*Transcript of Robert Monson, P1996 L9-13*). In order to prevent cross contamination, evidence items should have been collected and packaged separately. The robe was later examined for body fluids from Ms. Parker and Mr. Panah. It is not clear from the notes received whether there were body fluid stains on the other items contained within the bundle. There is no notation as to whether items contained within the bundle were dry upon collection and packaging. It is important to consider the possibility of cross-transfer among items in any interpretation of body fluids from the robe.

Bloodstains were collected from the bathroom and a tissue paper with a beige colored stain on it was recovered from the waste basket in the bathroom. A "field test" for semen (presumably a test for acid phosphatase, an enzyme found at high concentrations in semen and lower concentrations in other body fluids) was conducted on the stain with positive results (*Transcript of Robert Monson, P1997 L26 - P1998 L3*). The acid phosphatase test provides an indication that semen may be present. Further testing was conducted which established conclusively the presence of semen on the tissue.

The following items of evidence were examined by the LAPD laboratory as part of this inquiry.

Sexual Assault Evidence Kit of Nicole Parker (Item #67)

The sexual assault evidence collected from Ms. Parker included the following items:

- Item #67A Vaginal swabs (4)
- Item #67B Vaginal slides (2)
- Item #67C External genital swabs (2)
- Item #67D External genital slides (2)
- Item #67E Oral swabs (2)
- Item #67F Oral slides (2)
- Item #67G Anal swabs (2)
- Item #67H Anal slides (2)
- Item #67I Right nipple swab (1)
- Item #67J Left nipple swab (1)
- Item #67K Body surface control swab (1)

The objective of the analysis of the sexual assault kit was to determine whether there was evidence of intimate contact between the assailant and Ms. Parker. The analysis involved screening of items contained within the sexual assault kit for body fluids, such as semen or

saliva, from the assailant. It is, of course, possible for contact or penetration to have occurred without the presence of semen or saliva in scenarios involving use of a condom, no or very limited ejaculation, or penetration with a foreign object. The activity of the victim prior to death and the post-mortem interval (time between sexual contact and recovery of body fluids) are also important in establishing whether semen or saliva would persist in or on the body of the victim.

The vaginal slides, external genital slides, oral slides and anal slides were examined microscopically for the presence of spermatozoa. No spermatozoa were detected on any of these items.

Cellular material was extracted from the vaginal swabs, external genital swabs, oral swabs and anal swabs. Portions of each extract were examined microscopically for spermatozoa with negative results. Analysis of the vaginal and external genital swab extracts also yielded negative results for acid phosphatase.

The oral and anal swabs yielded positive results for the presence of acid phosphatase and were further tested for P30, a male specific protein. Detection of either P30 or spermatozoa is considered a positive indication of the presence of semen. P30 was not detected in the extract from the oral and anal swabs. It is possible that decomposition of the victim may have contributed to the positive acid phosphatase findings.

No semen was detected on items 67A through 67H. Although this is indicated in the analytical report dated March 4, 1994, the direct testimony of LAPD Criminalist William Moore implies that semen is indicated by the positive findings of acid phosphatase (*Transcript P2029 L24-28*). The cross examination of Mr. Moore by Mr. Sheahan is reasonably successful in clarifying these results as Mr. Moore acknowledges that "The presence of semen was not conclusively established on any of the items packaged in the coroner's sexual assault kit" (*P2099 L4-6*).

Extracts of the right nipple swab, left nipple swab and body surface control swab were analyzed for the presence of amylase. No significant quantity of amylase was detected. **No saliva was detected on items 67I through 67K.**

As there was no evidence of body fluids from Hooman Panah on items contained within the sexual assault kit of Nicole Parker, the biological evidence analysis does not corroborate a finding of sexual assault.

Tissue paper bearing stains (item #52)

As mentioned, the tissue paper was recovered from the waste basket in the bathroom at Mr. Panah's residence. The item is described in various locations as a piece of toilet tissue with a beige stain, yellow stains and a light pink stain. The light pink stain is not further characterized as to whether it is possibly blood or non-biological in origin. A sample was removed from the "central area" for analysis and cellular material was extracted from the sample. A portion of the

extract was examined for spermatozoa. A moderate number of spermatozoa were detected indicating the presence of semen on the tissue. The extract was also tested for amylase. The quantity of amylase detected was equivalent to approximately a 1:100 dilution of saliva based on comparison to a saliva standard of known dilution. The notes indicate that Mr. Moore used his own saliva as a standard. Given the variation of amylase present in other body fluids such as semen and urine, as well as in saliva from different sources, it is not possible to definitively ascertain the presence of saliva based on such a low quantity. Further characterization of the source of the amylase enzyme to determine whether it is of salivary or pancreatic origin may have resolved this issue.

Genetic marker typing conducted on the stain area from the tissue and on known reference samples from Hooman Panah and Nicole Parker produced the following results (*from Analyzed Evidence Report dated March 4, 1994*).

Item #	Description	ABO (H) Activity	PGM	PGM Sub	Pep-A
52	Tissue stain	ABH	Inc	2+1+	1
35	H. Panah reference	B	2-1	2+1+	Inc
68	N. Parker reference	A	1	1+1-	1

There is no evidence that would allow a determination of the number of contributors to this stain. Therefore, the following possible interpretations for the data above are as follows; assuming a single source, the results obtained for the tissue stain indicate a donor with ABO type AB, PGM subtype 2+1+ and Pep-A type 1. This interpretation would exclude both Hooman Panah and Nicole Parker. The typing results may also be the result of a mixture of more than one contributor. Under this scenario, Mr. Panah cannot be eliminated as a contributor as both his ABO type (B) and PGM subtype (2+1+) are detected in the stain. Assuming that Mr. Panah is a contributor, the ABO type A which is detected is foreign. Therefore any type A or type AB individual would be included as a contributor. Individuals who are type A or AB comprise approximately 39.8% of the Caucasian population and 46.6% of the Asian population (*Journal of Forensic Sciences 1978 23(3):582*). The ABO blood group refers to surface antigens detected on red blood cells. The majority of the population (approximately 70-80%) also secrete blood group substances into their body fluids, such as semen and saliva. Mr. Panah was determined to be a secretor by typing his saliva sample for ABO. Ms. Parker's secretor status is unknown. If Ms. Parker is a non-secretor she could not be the source of the type A detected in the tissue stain sample.

The Pep-A results are suspect. The results for Hooman Panah's reference sample (item #35) and for Ms. Parker's reference sample (item #68) produced identically recorded results. The "Electrophoresis Worksheet" dated December 27, 1993 indicates that, for both samples, the type 1 recorded by Criminalist Moore could not be verified by the second reader. The second reader (initials "LR") notes the Pep-A result as "INC 2-1" for both reference samples. There are no notes provided which indicate that repeat typing may have been done. Ms Parker's Pep-A type is reported as "INC" (inconclusive) in the January 5, 1994 report and as type 1 in the March 4, 1994

and July 12, 1994 reports. In the absence of repeat typing, Ms. Parker's Pep-A type should have been reported as inconclusive. Mr. Panah's Pep-A type is consistently reported as "INC" (inconclusive). If Hooman Panah is a type 2-1 at Pep-A he is eliminated as a contributor to the tissue semen sample.

No photographs of the PGM and Pep-A typing results were received for review. Confirmation of the reported types would require examination of photographic data.

DNA analysis was performed on the tissue stain using a differential extraction procedure. The differential extraction process physically separates the sperm cells (which have a much tougher cell wall) from the epithelial cells (such as those which line the vaginal canal, mouth or rectum), resulting in two separate DNA extracts. The DNA extracts were analyzed for a single genetic marker, DQ-alpha. The notes do not indicate whether epithelial cells were detected upon microscopic examination of a portion of the extract. One would expect that a mixture of semen and saliva would contain a detectable quantity of epithelial cells. DQ-alpha type 1.3, 4 was obtained for both the sperm and epithelial cell fractions. Mr. Panah is a type 1.3, 4, therefore, he cannot be eliminated as the source of the DNA from both fractions. Ms. Parker is a type 2, 4, therefore, **she is eliminated as a contributor to the tissue stain sample.**

The DNA typing results do not support the hypothesis that the tissue stain contains a mixture of body fluids from Nicole Parker and Hooman Panah. It is my understanding that the DNA results were not presented at Mr. Panah's trial. **The DNA results contradict the State's assertion that the sample from the tissue contained a mixture of body fluids from Hooman Panah and Nicole Parker.**

Stains from bed sheet, Item #55

This item consisted of the bed sheet which had been wrapped around the body of the decedent. The sheet was examined for the presence of body fluids. Human blood, semen and saliva were reportedly detected on the sheet. The notes indicate that multiple stains were excised from the bed sheet, however, the appearance and relative locations of the stains are not documented. The prosecution alleged in this case that the finding of stain areas containing mixtures of body fluids from Mr. Panah and Ms. Parker suggested sexual contact. Therefore, it is important to determine whether areas of blood, semen and saliva staining may have overlapped as well as to examine the distribution of these body fluids relative to one another. It is also important to consider whether Ms. Parker's body fluids transferred to the sheet as she was wrapped in it or during the sexual assault examination, which took place while she was lying on the sheet. The pattern of staining is not documented within the notes in the form of a sketch or diagram. Therefore, the relationship of the stains to one another cannot be ascertained without examining the sheet itself.

The pattern of biological material on the sheet is also important in order to determine the validity of testimony given by Mr. Moore at trial where he states that the pattern observed could be consistent with the "spewing of semen across the bed sheet" (*W. Moore trial transcript P2067 L*

27 to P2068 L 8). Prior to an objection by defense counsel, Mr. Moore is asked "Assuming, as a hypothetical, a situation where there was an act of oral copulation and ejaculation was inititated by the defendant, and the victim then spit out –". The objection precludes his assessment of this hypothetical, however, Mr. Moore further testifies that the stains could not "have come solely...from an ejaculatory process like masturbation". (*W. Moore trial transcript P2073 L19-23).*

It appears that the reports dated January 5, 1994 and March 4, 1994 document the analysis of two different stains from the sheet. The January 5, 1994 report documents the typing of a bloodstain (described in the analytical notes as stain "A") on the sheet. The following typing results were obtained from this stain:

Item #	Description	ABO	EsD	PGM	PGM Sub	EAP	ADA	AK	Pep-A
55	Stain from bed sheet	ind AB	1	1	1+1-	BA	INC	1	1
55 con	Control from bed sheet	ind B							
35	H. Panah reference	B	1	2-1	2+1+	BA	1	1	INC
68	N. Parker reference	A	1	1	1+1-	BA	1	1	INC

There is no evidence that would allow a determination of the number of contributors to this stain. Assuming a single contributor of ABO type AB, both Hooman Panah and Nicole Parker would be eliminated as contributors to this stain. Assuming a mixture is present, Nicole Parker cannot be eliminated as a contributor to this stain; however, she could not be the source of the ABO type B detected in the stain. It is not possible to determine how or when this bloodstain may have been deposited on the sheet. Type B was also detected in the background control sample for the sheet. This suggests that the type B in the stain could be due to a background source of biological material on the sheet. As this is likely a sheet from Mr. Panah's bed and he is a type B secretor, it would not be unreasonable to find type B on the bed sheet. **Therefore, this result does not provide strong evidence of a mixture of body fluids from Hooman Panah and Nicole Parker.**

The report dated March 4, 1994 indicates that both semen and saliva were detected in the extract of another stain from the sheet (described in the analytical notes as stain "3"). The amylase activity present in the stain was greater than that of the 1:100 saliva standard and less than that of the 1:10 saliva standard. The presence of amylase on a sheet would not be an unusual finding. The finding of amylase activity on the sheet does not allow a determination of whether any saliva was deposited at the same time as the semen in a particular area; nor does it allow a determination of the individual who deposited the saliva.

Typing results were obtained as follows:

Item #	Description	ABO (H) Activity	PGM	PGM Sub	Pep-A
55	Stain from bed sheet	ABH	N/A	N/A	N/A
55 con	Control from bed sheet	B			
35	H. Panah reference	B	2-1	2+1+	Inc
68	N. Parker reference	A	1	1+1-	1

N/A = No Activity

The serological analysis does not allow exclusion of **any** individual including Hooman Panah and Nicole Parker, as all possible ABO types would be included as contributors to a mixture. Mr. Panah could be the source of the type B detected in the control area from the bed sheet. The control area is likely an area outside the detected stain which is sampled to ascertain whether there is any "background" source of genetic material. Because no semen or saliva was detected in this sample, these results indicate that there is detectable type B blood group substance on the bed sheet from an unknown body fluid source (possibly perspiration).

DNA analysis conducted on at least five stain areas from the bed sheet which contained spermatozoa either yielded "inconclusive" results or DQA1 type 1.3, 4, which is consistent with Mr. Panah's type. **No DNA typing results consistent with that of Nicole Parker were obtained from any of the samples from the bed sheet.** Although some of the stain areas contained spermatozoa, the DNA analyst does not note the presence of significant quantities of epithelial cells. A number of samples yielded "inconclusive" results. The meaning of the "inconclusive" finding cannot be determined without additional information such as photographic quality copies of the typing strips. **The DNA typing results do not support the hypothesis that the areas tested contain a mixture of semen and saliva stains from Mr. Panah and Ms. Parker, respectively.** Had Ms. Parker "spit out" ejaculate onto the bed sheet, one would have expected a) to detect spermatozoa on the oral swab and b) to detect Ms. Parker's DNA in significant quantities on the bed sheet.

Photographic quality copies of the DQA1 typing strip photographs should be obtained for review.

Blue silk kimono, Item #60

The blue silk kimono was examined for the presence of semen with negative results. Human bloodstains were detected on the left chest area of the kimono. Typing results obtained from the bloodstain were as follows:

Item #	Description	ABO	EsD	PGM	PGM Sub	EAP	ADA	AK	Pep-A
60	Stain from kimono	ind AB	INC	1	1+1-	BA	1	1	1
60 con	Control from kimono	N/A							
35	H. Panah reference	B	1	2-1	2+1+	BA	1	1	INC
68	N. Parker reference	A	1	1	1+1-	BA	1	1	INC

The typing results do not allow for a determination of the number of contributors to the stain. Assuming a single contributor to the stain from the kimono, Nicole Parker and Hooman Panah are eliminated as contributors. Assuming that the stain is a mixture of body fluids from more than one source, Nicole Parker cannot be eliminated as a contributor to the bloodstain on the kimono. No typing results were obtained from the control area. It is of note that the control area was excised from the lower left side of the kimono, some distance away from the bloodstained area. It would be of greater interpretative value to analyze a substrate control area which is closer to the bloodstains, as this would provide a more accurate picture of any background material in that location.

Subsequent to the ABO analysis of the stain, and in an apparent effort to determine whether a mixture of body fluids existed, Mr. Moore analyzed a cutting removed from the edge of the bloodstained area for the presence of amylase. The quantity of amylase detected was less than the quantity detected for a 1:100 dilution of saliva. This quantity is not necessarily indicative of the presence of saliva and may be the result of perspiration. Epithelial cells, which typically line the body cavities such as the mouth, vagina and rectum, were detected in this cutting. Mr. Moore provides a suspect interpretation of the findings with regard to the amylase activity and serological analysis of this stain. The conclusions appear to presume the presence of both Hooman Panah as the source of the type B antigen and Nicole Parker as the source of the type A antigen when he indicates in the July 12, 1994 report:

> "Analysis for the presence of genetic markers provided conclusive results for ABO(H) antigenic activity. Given that Hooman Panah is known to be a secretor of type "B" and "H" ABO(H) antigens, the type "A" ABO(H) antigenic activity exhibited by this stain is foreign to him and could not have originated with him."

This interpetation clearly assumes Mr. Panah is the source of the B antigen detected in the stain and provides no alternate interpretation. Mr. Moore's approach is biased and indefensible. In fact, the source of the A and B antigens is unknown. The purpose of the analysis is to determine whether an individual can be eliminated as a contributor to a sample. The finding of ABH antigenic activity does not allow exclusion of **anybody**. Mr. Moore appears to have inferred that both blood and saliva are present and that each body fluid was contributed by a different individual. This inferrence is not supported by the evidence.

The conclusion continues:

> "Since Nicole Parker was known to possess type "A" blood, it is possible that she contributed the type "A" antigenic activity through her saliva or other bodily secretion. However, she cannot be a sole contributor of the antigenic activity detected in this stain."

The above interpretation makes the assumption that 1) the stain is a mixture of at least two individuals, 2) one of the contributors is a type "B" secretor and 3) Ms. Parker is a type "A" secretor and could be the source of the A antigen. The failure to clearly state these assumptions renders this interpretation incomplete and misleading.

DNA analysis was conducted on a stain from the kimono. No spermatozoa or epithelial cells were detected in the examination of the cell debris pellet from this sample (presumably this stain is from the bloodstained area, however, the notes are not very clear with regard to this). DQ-alpha type 2, 4 was obtained from this sample, therefore, Nicole Parker could not be eliminated as a contributor to this sample. Hooman Panah was eliminated as a contributor to the DNA from this sample. **The typing results obtained from this sample do not provide evidence of a mixture of body fluids from Nicole Parker and Hooman Panah.**

Reporting of typing results for an additional cloth sample and control area from the kimono yielded inconclusive results in the epithelial cell fraction and no results in the sperm fraction. The notes do not report the finding of spermatozoa in the cloth sample, so it is unclear why a differential extraction was performed. The meaning of the "inconclusive" finding cannot be determined without additional information, such as photographic quality copies of the typing strips.

Fingernail Samples of Hooman Panah, Items #28-34

DNA analyses performed on fingernail samples from Hooman Panah yielded Mr. Panah's own DNA type, 1.3, 4. **No types foreign to Mr. Panah's own types were detected.** The circumstances of collection of Hooman Panah's fingernails samples relative to the alleged contact is unknown to me. Assuming contact did occur, the ability to detect DNA from a source other than Hooman Panah would be affected by the time frame since the contact occurred and Mr. Panah's activity in the time following contact.

General Issues

No photographs of serological typing results were provided. The laboratory notes in general are incomplete and omit information which may be best obtained through an examination of the actual evidence items. The opinions provided are based only on information received to date.

Quantities of DNA recovered from evidence items was not determined. Quantitation results would have provided some means of assessing relative quantities of DNA in the various stain and control areas.

Photocopies of DQ-alpha typing results are incomplete and inadequate for independent review.

The bed sheet and kimono should be re-examined in order to document the appearance and relative locations of stains. Samples from the bed sheet, kimono and tissue should be analyzed using more sophisticated DNA typing methods which are now available to determine whether mixed stain areas are detectable. Control areas should be excised from areas in close proximity to the stain areas in order to adequately assess the presence of "background" DNA. These results should be analyzed in the context of the pattern of staining on the evidence items themselves, bearing in mind handling and storage conditions. Current DNA analysis methods also are capable of determining the gender of DNA sources. This may be helpful in assessing the existence of possible mixtures of body fluids from Nicole Parker, Hooman Panah or other sources. Adequate material remains from many of the stain areas for independent reanalysis; however, the effects of degradation of the DNA must be considered in light of the amount of time which has elapsed.

Regarding the reported DNA analyses: Hooman Panah's DQA1 type is 1.3, 4; Nicole Parker is a type 2, 4. Of the samples which yielded DNA typing results, none contained a mixture of DNA from Panah and Parker. Therefore, the DNA results may have been important to the triers of fact in evaluating the possibility of sexual contact between Hooman Panah and Nicole Parker.

In summary, assuming that the analytical data provided is the only information available, the biological evidence analyses reviewed herein do not support the hypothesis that intimate sexual contact occurred between Hooman Panah and Nicole Parker. Testimony regarding the DNA analyses would not have supported the conclusions that the stains tested were mixtures of body fluids. The opinions in this report are subject to amendment upon receipt of additional information.

Please feel free to call if you have any additional questions or requests.

I declare under penalty of perjury the foregoing to be true and correct.
Executed on this the 27th day of February, 2004, in Alameda County, California.

Lisa Calandro, MPH
DNA Laboratory Supervisor

DECLARATION OF ANGELICA GARZA

I, ANGELICA GARZA, declare under penalty of perjury as follows:

1. I was a private investigator employed with the firm Public Interest Investigations ("PII") in Los Angeles, California. PII was retained by counsel for Hooman Ashkan Panah, the Petitioner, on his capital appeal. I was assigned to work on the case.

2. On June 2, 2001, I visited the home of Edna Collins, one of the jurors in the case. Edna was not home, so I spoke with her husband Tom Collins. I informed Mr. Collins that I was a representative of the attorneys for Mr. Panah and that I was hoping to talk to Edna Collins about her jury experience. Mr. Collins remembered that during the trial, Mrs. Collins took about three to four days to decide how to vote during the penalty phase. He recalled that she came to him asking for advice and asked, "What am I going to do?" Mr. Collins told me that he told her that she had to do what was right and that she should consult the Bible to see what it has to say. He stated that he told her that she should ask herself, "What would God want?" Mr. Collins stated that he recalled Mrs. Collins coming to him and saying, "I've decided. It's murder and death by the gas chamber."

3. On June 6, 2001, I visited the home of Edna Collins again. I informed Mrs. Collins that I was a representative of the attorneys for Mr. Panah, and asked if she would be willing to discuss her jury experience. I advised Mrs. Collins that she had an absolute right to speak or not to speak with me. After engaging in some preliminary discussion with me, she began talking expansively about the case. As I began to take notes, I asked Mrs. Collins if this was okay. She responded that it was okay for me to take notes and very early into the interview actually restated a biblical quote ("He who sheds innocent blood, his blood too shall be shed.") so that I could write it down accurately. Mrs. Collins's husband, Tom, was inside their home during the interview.

4. Mrs. Collins began by telling me that when she and the rest of the potential jurors were assembled and told about the case, she said to herself, "This is heavy." However, she recalled wanting to serve as a juror because she felt that with God leading her, she could decide if the accused was innocent or guilty.

5. After finding guilt, Mrs. Collins related that she had a difficult time making a decision at the penalty phase. She stated, "When it finally came down to it, I had a hard time." She said it was very difficult for her to decide to have someone's life taken. She noted, "I'm the type of person that won't even step on a bug. I will scoop it up and take it outside."

6. Mrs. Collins stated that she went to a minister in her church, told him she was serving as a juror on a murder case, and that she needed biblical references or other spiritual writings regarding the legal system. She told her minister that she was having a hard time making a decision and wanted to consult any writings they had in the church bookstore that might help. Her minister gave her some selected materials, which she read.

7. Mrs. Collins said that she made up her mind when she found a biblical passage, which read: "He who sheds innocent blood, his blood too shall be shed." She said that this helped "get my peace with God" regarding her decision to vote for death.

8. During my interview with her, Mrs. Collins defended her decision to vote for death. She remarked that, according to the Bible, we must all abide by "the law of the land." She added that she would be ambivalent about serving on a capital jury again, but said that if asked to, she would. She maintained that, according to God, "we're supposed to have an authority" to decide legal issues.

9. Among other topics discussed during the lengthy interview, Mrs. Collins also commented on the courtroom security. She said that she was concerned that the court was worried enough to install a second metal detector. She observed that Mr. Panah's mother was being

so dramatic in the courtroom and maybe this had the court staff worried. Mrs. Collins said that at the time she wondered whether or not his supporters in the courtroom would take some kind of action.

10. Mrs. Collins admitted to feeling "uneasy" about the presence of the Iranian spectators. She stated that all one hears about are "the bombings." She added that Iranians are a very high strung and emotional people. However, she stated that she did not allow her "uneasy" feeling to affect her ability to deliberate. She commented that if she had been really affected, she would have advocated that Mr. Panah be "saved" in order to avoid raising the ire of the Iranian spectators.

11. Mrs. Collins however noted that her "thoughts about them [the Iranian spectators] were, I wondered if they would do anything and hoped they wouldn't." She added that the metal detector made her feel better, speaking in reference to the increased security in the courtroom. She recalled feeling more comfortable once the jury was being escorted by the bailiff. She remarked, however, that: "One thing I didn't understand. They walked us to our cars and once we were in our car, we were alone, sitting in the garage, waiting in line to exit the parking structure. Anything could have happened to us then."

12. At the conclusion of the interview, Mrs. Collins gave me her home phone number. We agreed to meet again, but did not set a specific date. I said I would contact her by phone to set an appointment with her.

13. Later, I briefed Mr. Panah's appellate counsel on what transpired in my meeting with Mrs. Collins. They directed me to return to Mrs. Collins' home to obtain a declaration from her.

14. I made an attempt to speak with Mrs. Collins again on June 18, 2001, but was advised by her husband Tom that she was not home, and to try again later. When I went by again

on June 19, 2001, I encountered Mrs. Collins and her husband outside of their house. I asked Mrs. Collins if we could talk more about the case, but she refused.

15. Mrs. Collins was upset and tried to make excuses for having talked to me on June 6, stating that she had been jet lagged and that I had taken advantage of her kindness. She seemed regretful for having spoken with me, but she did not deny any of the information she had originally revealed to me. Before leaving her home, I handed her a pre-prepared declaration, containing the information that she related to me during our June 6 interview. I asked her to review it for accuracy.

13. She took the declaration, scanned it, and threw it on the dashboard of her truck. She stated that she would not sign anything.

14. I apologized to Mrs. Collins for anything that might have upset her.

15. I declare under penalty of perjury the foregoing to be true and correct. Executed on this the 9th day of March, 2004, at Los Angeles County, California.

ANGELICA GARZA

DECLARATION OF WILLIAM F. CHAIS

I, William Chais, declare the following under penalty of perjury:

1. I am a member in good standing of the State of California, and a member in good standing of the State Bar, having been admitted to practice on December 11, 1989.

2. On December 6, 1994, I was appointed as associate counsel to represent Hooman A. Panah, an Iranian citizen, in the capital trial of *People v. Panah*, Los Angeles Case No. BA090702. (CT 604, 607; RT 1840.)

3. My appointment was following jury selection and after the trial had begun. Robert Sheahen, lead counsel, asked for a delay in the proceedings so that I could become familiar with the case. That would have included reading the voluminous pleadings, reading and outlining the transcripts of the extensive prior proceedings including the Grand Jury testimony, reviewing the large amount of discovery material including police reports, interviews, expert notes, reports and findings, meet enough with the new client in order to have an adequate understanding of him and develop a relationship of trust, etc. The continuance motion was denied. Judge Sandy Kriegler was insistent on rushing the case along. Consequently, I was reading this material as the trial progressed.

4. Mr. Sheahen also objected to my appointment because I lacked the minimum qualifications to be appointed to a case involving the death penalty. That too was denied.

5. I was appointed to replace Syamak Shafi-Nia, a native of Iran, whom I learned had been in an automobile accident and needed a few weeks delay to recover. I am not Iranian and had no experience with the Persian culture. Further, I do not speak the defendant's first language, Farsi. Mr. Shafi-Nia had brought an obvious cultural connection to the case that no longer existed after his removal.

6. Mr. Panah was severely prejudiced by the court not giving me time to prepare for trial. I was thrust into a situation in which it would be impossible for any attorney to become

sufficiently familiar with the case and client in order to make a meaningful contribution. I recall even reading case material in court as people were testifying, in order to understand and become familiar with the case. It was a terrible situation.

7. I discovered that Mr. Sheahen had expected the case to settle on a guilty plea and a sentence of life without the possibility of parole, but that had unexpectedly fallen through. I was told that the client has agreed to the settlement and was about to enter a plea, but his mother then objected. Thus, the case was not prepared for trial. The court would not give Mr. Sheahen additional time to prepare.

8. No defense investigator had been appointed until December 5, 1994, the day before my appointment and after the trial proceedings had started. (CT 600.) Since there had been no investigation in advance of trial, there was no planned defense. Had the court granted a reasonable continuance when I was brought into the case, I would have made every effort to see that the case was investigated for both the guilt and penalty phases. As it was, this did not occur. The trial judge was certainly aware that the defense was not prepared for trial, since he entered the order appointing the investigator.

9. Upon coming into the case, I was surprised to learn that no defenses had been prepared for the guilt or penalty phase. In the days and weeks following being appointed, I learned that there had been no investigation as to Mr. Panah's background in Iran, where he lived until leaving that country when he was approximately 15 years of age. There also had been no investigation of his life in Germany, where he lived for roughly two years before coming to the United States. Certainly extensive mitigating evidence for the penalty phase could have been secured. There were certainly many people in both Iran and Germany who could have come to testify as to Mr. Panah's background in mitigation, to humanize him. They could have described the

effect that experiencing the Iran-Iraq war would have had on the defendant as a child. Humanizing the client and bringing out details of his history, is the type of evidence that could have prevented a death verdict. Also, there likely was evidence bearing on his history of mental problems which would have been important not only at the penalty phase in mitigation, but also in developing mental defenses for the guilt phase.

10. It was clear to me from the outset that Mr. Panah had serious mental problems. These were important to understanding why this troubled young man was facing capital murder charges. I felt that had this aspect of Mr. Panah been adequately investigated, mental defenses could have been developed.

11. Mr. Panah's mental problems made it difficult for him to function and assist in his own defense. His thinking process was extremely disturbed. Even though intelligent, Mr. Panah was unable to see and understand things that were crucial to the defense. He was not a rational person. I felt that he was irrational, unable to cooperate in the preparation of a defense, and could not understand various things related to the case. I felt that he was incompetent to stand trial. That condition was aggravated and compounded by the poor jail conditions. Mr. Panah often complained about being mistreated in jail including being deprived of sleep, beaten by inmates, and the defacing of his Koran while it was left unattended in his cell. (RT 2048-2052.)

12. Serology and DNA were issues in the case. However, the defense did not have an expert to independently review and analyze the state's evidence and advise us in defending Mr. Panah. An expert could likely have given evidence to refute some of the state's evidence.

13. Another aspect of the case in content related to pathology. There were questions as to the time of death and whether some of the injuries on the deceased occurred after death. However, the defense did not have the services of a pathologist to independently review the forensic

evidence, analyze it, and advise us in defending Mr. Panah. Also, such an expert could likely have testified to refute some of the testimony of the state's expert.

14. Compounding the problems with the case not being adequately prepared was the prejudicial atmosphere surrounding the case. The prejudice was based on race due to the fact that Mr. Panah was Iranian. I observed that members or the Iranian community who attended the trial were treated unfairly by the courtroom bailiffs. For example, while everyone who entered the courtroom had to pass through metal detectors, those of Persian descent were additionally subjected to embarrassing and invasive body searches and pat-downs. This was be witnessed by the jurors. Such unjustified and improper conduct fostered a racial bias towards my client and his supporters. In fact, warrant checks were run on some of these individuals. (RT 4260.)

15. The prejudice against the defendant was clearly visible to the jury. There was even graffiti just outside the courtroom with the following words carved on a wooden railing in reference to my client: "Anal sex kid must die." (RT 831.)

16. In my opinion Mr. Panah did not receive a fair trial and the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendment. The resulting prejudice to him was substantial.

I declare under penalty of perjury that the foregoing to be true and correct.

Executed on this the 17th day of March, 2004, at Los Angeles County, California.

WILLIAM F. CHAIS

DECLARATION OF J. CHARLES EVANS

I, J. CHARLES EVANS, declare the following under penalty of perjury:

1. I was the defense investigator at trial in the matter of *People v. Panah*, Los Angeles Case No. BA090702.

2. I earned a BA degree from UCLA in Political Science. I graduated from the Los Angeles County Sheriffs Academy in October, 1971, and was employed as a patrol officer for the State of California. I later transferred to the Inglewood Police Department. As a police officer for the City of Inglewood, I was assigned to patrol. I initiated the investigations of two murders during that period of time. In 1977 I resigned from the Inglewood Police Department and took a job as a private investigator with Stein Investigation Agency. I remained with that firm for five years. In June 1982, I formed the Alexis Investigation Agency. As an investigator, I have handle in excess of five hundred murder investigations. Prior to taking the matter in question, I had handled 10 death penalty cases. I have qualified as an expert in drugs, gangs, and crime scene reconstruction. I am also the co-author, with John Waters, of *Bonded Thru Injustice* (1999).

3. On December 5, 1994, the day the prosecution made its opening statement and the first witnesses testified in the *Panah* trial, I was hired by lead defense counsel, Robert Sheahen, to begin work on the case. There was no prior investigator working on the case.

4. Mr. Sheahen had earlier informed me that it was possible there would be no need for an investigator because there was a plea agreement. When the settlement fell through, the judge forced the case to trial without giving him adequate time to prepare. It had also been believed that the judge would not rush the case to trial since Mr. Sheahen's co-counsel had been injured in a traffic accident. Instead, the attorney was dismissed and case went to trial.

Exhibit T

5. Hooman Ashkan Panah was a young man who suffered from severe mental illness. I had the opportunity to meet and talk with him numerous times while working on this case. His thought process was extremely impaired, and he was irrational, out of touch with reality, and delusional. He often talked about things that made no sense. Without question, Mr. Panah did not understand the nature and consequences of what was happening. In my opinion he was unable to rationally assist counsel in the preparation of a defense and was mentally incompetent. He did not appear to even be able to distinguish right from wrong. To put it bluntly, Mr. Panah was crazy.

6. An effective investigation in this case required a thorough investigation of Mr. Panah's family and childhood history. This would have necessitated trips to Iran where he was born and lived until in his teens, Turkey, and Germany where lived for a few years before coming to the United States. Unquestionably there were witnesses who could have come from those countries to testify as to Mr. Panah's mental problems and background. This was crucial to the development of a mental defense at the guilt phase, and presentation of mitigating evidence at the penalty phase. However, because the case was rushed to trial, this was not done.

I declare under penalty of perjury that the foregoing to be true and correct.

Executed on this the _____ day of March, 2004, at Los Angeles County, California.

J. CHARLES EVANS

3/26/2004

DECLARATION OF GRIFFITH D. THOMAS, M.D., J.D.

I, Griffith D. Thomas, M.D., J.D., declare the following under penalty of perjury.

1. I am a medical doctor and specialize in Pathology.

2. Regarding my background, I am Board Certified in Anatomic and Clinical Pathology, having received my medical degree in 1957 from the University of Southern California. My residencies in pathology were at Yale University (1958-1959), the Atomic Bomb Casualty Commission through affiliation with UCLA, Hiroshima and Nagasaki, Japan (1959-1961); and the Harvard University School of Medicine (1961-1963). I am licensed to practice medicine in California, and am an Emeritus Fellow, College of American Pathologists. Additionally, I am a member in good standing of the State Bar of California, having received a J.D. degree from the University of California at Los Angeles in 1972.

3. Robert Sheahen, the lead defense attorney in the death-penalty case of People v. Panah, Los Angeles Case No. BA090702, contacted me in 1994. He asked for my expert assistance as a pathologist. I recall sending him my Curriculum Vitae.

4. I was never retained or appointed to assist Mr. Sheahen. I have a vague recollection that he may have called when the trial was in progress. My policy is that I do not get involved in cases that are in trial. I never received any material for review from Mr. Sheahan to the best of my recollection.

I declare under penalty of perjury that the foregoing to be true and correct.

Executed on this thirtieth day of March, 2004, at Los Angeles County, California.

GRIFFITH D. THOMAS, M.D., J.D.

Michael M. Baden, M.D.
[redacted]
New York, New York 10019

Telephone (212) 397-2732 *Facsimile (212) 397-2754*

1 April 2004

Via Facsimile 415-292-4878

Robert R. Bryan, Esq.
[redacted]
San Francisco, California 94 23-4124

Re: People v. Hoonum Ashkan Panah
Nicole Parker, deceased

Dear Mr. Bryan:

I have reviewed the autopsy report, the neuropathology report, photographs, laboratory reports, the report of DNA expert Lisa Calandro, and the trial testimony of medical examiner Eva Heuser and criminalist Robert Monson that you sent to me relative to the death of Nicole Parker.

In this type of trial which requires proper evaluation of highly-specialized forensic and autopsy evidence, it is, in my opinion, essential that a forensic pathologist be consulted by trial counsel well in advance of the trial so that counsel can understand the strengths and weaknesses of the forensic and autopsy findings; so that time of death and nature of sexual injuries can be independently evaluated; so that counsel can be advised as to whether other testing or contacting other experts is warranted; so that counsel can more intelligently evaluate the appropriateness of a negotiated settlement;

so that counsel can properly cross-examine opposing experts; and so that counsel has available the expert to testify if appropriate.

In this matter, Nicole was 8 years old when her nude body was discovered wrapped in a white sheet in a suitcase in defendant's bedroom closet. The autopsy report concluded that the cause of death was "Traumatic injuries" which consisted of "Craniocerebral trauma, neck compression and sexual assault with anal lacerations." However, the neuropathology examination demonstrated that there was no injury to the brain - no trauma to the brain - and that Nicole's brain was entirely normal. Further, the full autopsy and the examination of the microscopic slides showed that the sexual assault did not produce injuries sufficient to cause death.

It is my opinion, to a reasonable degree of medical certainty, that neither craniocerebral injuries nor a sexual assault caused Nicole's death and a forensic pathologist expert would have been able to explain this to counsel and to the jury.

I declare under penalty of perjury that the foregoing is true.

Yours very truly,

Michael M. Baden, M.D.

MMB:ph

Michael M. Baden, M.D.
[redacted]
New York, New York 10019

Telephone (212) 397-2732 *Facsimile (212) 397-2754*

CURRICULUM VITAE

EDUCATION

- The City College of New York (1955) B.S. Degree
- New York University School of Medicine (1959) M.D. Degree

POST-GRADUATE TRAINING

1959-1960	Intern, First (Columbia) Medical Division, Bellevue Hospital
1960-1961	Resident, First (Columbia) Medical Division, Bellevue Hospital
1961-1963	Resident, Pathology, Bellevue Hospital
1963-1964	Chief Resident, Pathology, Bellevue Hospital

LICENSURE

- New York State Medical License (1960)
- Washington, D.C. License (1985)
- Diplomate, National Board of Medical Examiner's (1960)
- Diplomate, American Board of Pathology:
  - Anatomic Pathology (1965)
  - Clinical Pathology (1966)
  - Forensic Pathology (1966)

PROFESSIONAL POSITIONS

1986-Present	Director, Forensic Sciences Unit, New York State Police
1961-1986	Office of Chief Medical Examiner, New York City; Chief Medical Examiner (1978-1979)
1981-1983	Deputy Chief Medical Examiner, Suffolk County, New York; Director of Laboratories, Suffolk County, New York

TEACHING APPOINTMENTS

1961-1989	New York University School of Medicine, Associate Professor, Forensic Medicine
1975-6/2001	Visiting Professor of Pathology, Albert Einstein School of Medicine
1975-1988	Adjunct Professor of Law, New York Law School
1975-Present	Lecturer in Pathology, College of Physicians and Surgeons of Columbia University
1986, 1989	Visiting Professor, John Jay College of Criminal Justice
1965-Present	Assist Visiting Pathologist, Bellevue Hospital, New York
2002	Adjunct Lecturer, The Cyril H. Wecht Institute of Forensic Science and Law, Duquesne University School of Law
2002	Distinguished Professor/Adjunct Lecturer, Henry C. Lee Institute, University of New Haven (Connecticut)

GOVERNMENTAL APPOINTMENTS

1977-1979	Chairman, Forensic Pathology Panel, United States Congress, Select Committee on Assassinations, Investigations into the deaths of President John F. Kennedy and Dr. Martin Luther King
1973-Present	Member, New York State Correction Medical Review Board
1976-Present	Member, New York State Mental Hygiene Medical Review Board
1983-Present	Member, National Crime Information Center, Committee on Missing Children, United States Department of Justice

1971-1975	Special Forensic Pathology Consultant, New York State Organized Crime Task Force (investigation of deaths at Attica Prison)
1974-Present	Director and/or Moderator, Annual Northeastern Seminar in Forensic Medicine, Colby College, Maine
1973-1987	Lecturer, Drug Enforcement Administration, Drug Law Enforcement Training School, United States Department of Justice

PROFESSIONAL ORGANIZATIONS

1966-Present	American Academy of Forensic Sciences; Fellow Vice President and Program Chairman (1982-1983)
1965-Present	The Society of Medical Jurisprudence; Fellow President (1981-1985)
1966-Present	College of American Pathologist; Fellow Chairman, Toxicology Subcommittee (1972-1974)
1971-1975	College of American Pathologists Foundation; Forensic Pathology Seminar Faculty
1973-1976	American Board of Pathology; Forensic Pathology Board Test Committee (1973-1976)
1966-Present	American Society of Clinical Pathologist; Fellow Member, Drug Abuse Task Force (1973-1977)
1965-Present	New York State Medical Society; Chairman, Section of Medicolegal and Workers' Compensation Matters (1972)
1965-Present	Medical Society of the County of New York
1969-Present	National Association of Medical Examiner's
1965-Present	American Medical Association

HONORS

- Honor Legion, New York City Police Department, 1969
- College of American Pathologists, Certificate of Appreciation (Chairman, Toxicology Resource Committee, 1972-1975)
- American Academy of Forensic Sciences, Award of Merit, 1974 and 1983
- Drug Enforcement Administration, United States Department of Justice, Certificate of Appreciation, 1982
- New Jersey Narcotic Enforcement Officers Association, Certificate of Appreciation, 1977
- Fire Department of the City of New York, Certificate of Appreciation, 1978
- New York State Bar Association, Certificate of Appreciation, 1980
- New York City Health and Hospitals Corporation, Certificate of Appreciation for participation in development of emergency facilities for Emergency Medical Services for the City of New York, 1980
- New York University, Great Teacher, 1980
- First Fellow of the University of New Haven, Henry C. Lee Institute, University of New Haven (Connecticut), 2002

PROFESSIONAL PUBLICATIONS

1 M. Helpern and M. Baden; Editors: *Atlas of Legal Medicine* by Tomio Watanabe, Lippincott, 1968

2 D. Louria, M. Baden, et. al.: *The Dangerous Drug Problem.* New York Medicine, 22:3, May 1966

3. D. Gold, P. Henkind, W. Sturner and M. Baden: *Occulodermal Melanocytosis and Retinitis Pigmentosa.* Am. J. of Ophthalmology, 63:271, 1967

4. B. Van Duuren, L. Larseth, L. Orris, M. Baden and M. Kuschner: *Carcinogenicity of Expoxides Lactones and Peroxy Compounds v. Subcutaneous Injection of Rats.* J. Nat. Cancer Institute, 39:1213, 1967

5. M. Helpern and M. Baden: *Patterns of Suicides and Homicides in New York City,* Proceedings of the Seventh International Meeting of Legal Medicine (Budapest); October 1967

6 M. Baden: *Pathology of Narcotic Addiction*, Proceedings of the Sixth Latin American Congress of Pathology (San Juan, Puerto Rico); December 1967

7 M. Baden: *The Diagnosis of Narcotism at Autopsy*, Proceedings of the American Academy of Forensic Sciences (Chicago); February 1968

8 M. Baden: *Medical Aspects of Drug Abuse*, New York Medicine, 24:464, 1968

9 C. Cherubin, M. Baden, et al.: *Infective Endocarditis in Narcotic Addicts*. Ann. Int. Med., 69:1091, 1968.

10. M. Baden: *Pathologic Aspects of Drug Abuse*, Proceedings of the Committee on Problems of Drug Dependence, National Academy of Sciences, National Research Council, 1969.

11. W. Matusiak, L. Dal Cortivo and M. Baden: *Analytical Problems on a Narcotic Addiction Laboratory*, Proceedings of the American Academy of Forensic Sciences (Chicago), February 1969

12. M. Baden, P. Hushins and M. Helpern: *The Laboratory for Addictive Drugs of the Office of Chief Medical Examiner of New York City*, Proceedings of the International Conference on Poison Control (New York City), June 1969

13. M. Baden, S. Hofstatter and T. Smith: *Patterns of Suicide in New York City*, Proceedings of the Fifth International Meeting of Forensic Sciences (Toronto), June 1969

14. R.W. Richter and M. Baden: *Neurological Aspects of Heroin Addiction*, Proceedings of the Ninth International Congress of Neurology (New York City), September 1969

15. R.W. Richter and M. Baden: *Neurological Complications of Heroin Addiction*. Transactions of the American Neurological Association

16. M. Baden: *Of Drugs and Urine*, Editorial, Medical Tribune

17. M. Baden: *Methadone-Related Deaths in New York City*, Proceedings of the Second National Conference on Methadone Treatment (New York City), October 1969. Int. J. Addictions.

18. M. Baden: Chairman, *Workshop on Techniques for Detecting Drugs of Abuse*, Proceedings of the Statewide Conference on Prevention Aspects of Treatment and Research in Drug Abuse. New York City Narcotics Addiction Control Commission, 1969.

19. M. Baden: *Investigation of Deaths of Persons Using Methadone*, Proceedings of the Committee on Problems on Drug Dependence. National Academy of Sciences National Research Council, 1970.

20. M. Baden: *The Changing Role of the Medical Examiner*, Proceedings of the American Academy of Forensic Sciences (Chicago), February 1970, Med. Op. 7:64-68, 1971

21. N. Valanju, M. Baden, S.K. Verma and C.J. Umberger: *Analytical Toxicological Determination of Drugs in Biological Material*. I. Acidic Drugs. Acta Pharmaceutica Jugoslavica 20:11, 1970

22. M. Baden: *Deaths from Heroin Addiction Among Teenagers in New York City*, Proceedings of the Second World Meeting on Medical Law (Washington, D.C.), August 1970

23. M. Baden: *Bullous Skin Lesions in Barbiturate Overdosage and Carbon Monoxide Poisoning* (letter) JAMA 213:2271, 1970

24. M. Baden and J. Foley: *Heroin Deaths in New York City during the 1960's*. Int. M.J. of Legal Medicine, 5:1970

25. N. Valanju, M. Baden, S. Valanju and S. Verma: *Rapid Isolation and Detection of Free and Bound Morphine from Human Urine*. Int. M. J. of Legal Medicine, 5:1970

26. M. Baden: *Angitis in Drug Abusers* (letter), NEJM 264:11, 1971

27. M. Baden, et al.: *Methadone Maintenance – Pro and Con*. Contemporary Drug Problems, 1:17-152, 1971

28. M. Baden: *Changing Patterns of Drug Abuse*. Proc. Of Comm. On Problems of Drug Dependence. NAS-NRC, 1971

29. M. Baden: *Narcotic Abuse: A Medical Examiner's View*. In: Wacht, C., Editor, Legal Medicine Annual, 1971 (Appleton-Century-Crofts, New York State) Reprinted New York State J. Med. 72:834-40, 1972

30. Y. Challenor, R. Richter, B. Bruun, M. Baden and M. Pearson: *Neuromuscular Complications of Heroin Addiction*. Proc. Am. Coll. Phys., 1971

31. C. Cherubin, M. Baden, et al.: *Studies of Chronic Liver Disease in Narcotic Addicts*. Proc. Am. Coll. Phys., 1971

32. M. Baden: *Fatalities Due to Alcoholism*. In: Keup, W., edit., Drug Abuse – Current Concepts and Research. Charles C. Thomas, Springfield, Illinois, 1972

3). L. Roizin, M. Helpern, M. Baden, M. Kaufman and K. Skai: *Toxo-synpathys* (a multifactor pathogenic concept) In: Keup, W., edit.,: Drug Abuse – Current Concepts and Research. Charles C. Thomas, Springfield, Illinois, 1972

3). M. Baden, N. Valanju, S. Verma and S. Valanju: *Confirmed Identification Biotransformed Drugs of Abuse in Urine.* Am. J. Clin. Path. 57:43-51, 1972. Reprinted: Yearbook of Path. And Clin. Path., 1973, 357-361 (Yearbook Medical Publishers)

3). M. Baden: *Homicide, Suicide and Accidental Death Among Narcotic Addicts.* Human pathology 3:91-96, 1972

3). J. Pearson, R. Richter, M. Baden, Y. Challenor and B. Bruun: *Transverse Myelopathy as an Illustration of the Neurologic and Neuropathologic Features of Heroin Addiction.* Human Pathology, 3:107-112, 1972

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3). C. Cherubin, W. Rosenthal, R. Stenger, A. Prince, M. Baden, R. Strauss and T. McGinn: *Chronic Liver Disease in Asymptomatic Narcotic Addicts.* Ann. Int. Med., 76:391-395, 1972

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4). M. Baden and B. Lutz: *Preliminary Analysis of 128 Methadone-Related Deaths in New York City.* Proc. Com. Prob. Drug Depend., National Academy of Sciences – National Research Council, 1972

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46. L. Roizin, M. Helpern, M. Baden, et al.: *Methadone Fatalities in Heroin Addicts.* Psych. Quarterly, 46:393-410, 1972

47. M. Baden: *Suicide in Prison*, Proceedings of the American Academy of Forensic Sciences, March 1973

48. L. R. Reichman, C. S. Shim, M. Baden and R. Richter: *Development of Tolerance to Street Heroin in Addicted and Non-Addicted Primates.* Am. J. Public Health, 63:81-803, 1973

49. M. Baden and R. S. Turoff: *Deaths of Persons Using Methadone in New York City*, 1971, Proceedings of the Comm. On Problems of Drug Depend., Nat. Acad. Of Sci. Nat. Res. Council, 1973

50. J. C. Huang and M. Baden: *Rapid Methods of Screening Micro-Quantities of Abused Drugs from Urine Samples for Micro-Crystal Tests.* Clinical Toxicology, 6:325-350, 1973

51. P. Haberman and M. Baden: *Alcoholism and Violent Death.* Quarterly Journal of Studies on Alcohol, 35:221-231, 1974

52. P. Haberman and M. Baden: *Drinking, Drugs and Death.* International Journal of the Addictions, 9:761-773, 1974

53. D. C. Wise, M. Baden and L. Stein: *Postmortem Measurement of Enzymes in Human Brain: Evidence of a Central Noradrenergic Deficit in Schizophrenia* (submitted for publication)

54. R. Richter, J. Pearson, M. Baden, et al.: *Neurological Complications of Addiction to Heroin.* Bulletin of the New York Academy of Medicine, 49:3-21, 1973

55. M. Baden and D. Ottenberg: *Alcohol – The All-American Drug of Choice.* Contemporary Drug Problems, 3:101-126, 1974

56. M. Baden: *Pathology of the Addictive States.* Chapter in: Medical Aspects of Drug Abuse, Richter, R., edit. 1975 (Harper & Row)

57. M. Baden, N. Valanju, S. Verma and S. Valanju: *Detection of Drugs of Abuse in Urine.* Chapter in: Medical Aspects of Drug Abuse, Richter, R., edit., 1975 (Harper & Row)

58. D. Sohn and M. Baden: *The First Year of the College of American Pathologists Toxicology Survey Program*, Am. J. of Clin. Path.

59. M. Baden: *Narcotics and Drug Dependence* by J. B. Williams, Book Review, Journal of Forensic Sciences (in press)

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RECENT LECTURES AND CONFERENCES

- Annual SleuthFest Meeting, Exhumation Session, *"Famous Cases,"* March 20, 2004
- 44th Annual American College of Legal Medicine, *"The Role of the Forensic Pathologist in Medical Malpractice Cases."* Las Vegas, Nevada, March 5-7, 2004
- Stetson University College of Law, *"The Complete History of Murder and Science in One Hour."* Gulfport, Florida, January 29, 2004
- Quinnipiac Law School. Law and Forensic Science, January 24, 2004
- The City University of New York, Graduate School and University Center, *"Forensic Series,"* December 2, 2003
- Duquesne University, National Symposium on the 40th Anniversary of the JFK Assassination, *"Solving the Great American Murder Mystery,"* November 20-23, 2003

- Smithsonian Associates, Educational and Cultural Programs, *"Murder, Mystery and the New Forensics,"* November 1, 2003

- Association of Inspectors General, John Jay College of Criminal Justice, *"Non-Traditional OIG Investigations,"* October 17, 2003

- Colorado Association of Sex Crimes Investigator's Annual Conference, Snowmass, Colorado, August 20-22, 2003

- 31st Annual Florida Medical Examiner Educational Conference, F.A.M.E. 2003, *"The History of Forensic Science from Cain & Abel to O.J. Simpson,"* Ponte Vedra Beach, Florida, August 6-8, 2003

- Washington County Prosecutors Office, *"Dead Man Talking: Forensic Science and Homicide Investigation,"* May 5 and 6, 2003

- Medicolegal Investigation of Death, Wayne State University, *"Adult Sexual Assault & The Asphyxias"* and *"Child Sexual Assault/Abuse Myths* Dearborn, Michigan, April 2-4, 2003

- New York State Trial Lawyer's Association, Wrongful Death Seminar, *"Using Medical Science to Prove the Cause of Death and Conscious Pain and Suffering,"* March 25, 2003

- DNA Symposium, The State College of Pennsylvania, *"The Role of the Forensic Pathologist regarding DNA Evidence: From Autopsy to Courtroom,"* March 2003

- American Academy of Forensic Sciences, *"Overview of the Legal Issues Concerning the Discovery and Investigation and Prosecution of the Abuse of Elderly Patients in Healthcare Facilities and the Homicide of All Patients in Various Medical Treatment Facilities,"* Chicago, Illinois, February 17-22, 2003

- American Academy of Forensic Sciences, *"Presentation of Specific Cases through the Initial Contact by Prosecutors Concerning Suspected Criminal Deaths through the Exhumation and the Trial"* Chicago, Illinois, February 17-22, 2003

- 41st Eastern Analytical Symposium & Exposition, Somerset, New Jersey, November 18-21, 2002
- Utah County Police Officer's Workshop, November 2002
- 10th Annual Investigation for Identification Educational Conference, *"New Concepts in Forensic Pathology,"* Pensacola, Florida, September 20-21, 2002
- Singapore Government Ministry of Health Services Administration, Centre for Forensic Medicine, August 17-31, 2002
- State of New York, Office of the Attorney General, *Medicaid Fraud Control Unit, 2002 Training Conference*, June 10-13, 2002, Lake Placid, New York
- Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *International Postblast Investigation Class*, May 8, 2002, Brunswick, Georgia
- American Academy of Forensic Sciences, *Addressing Social and Legal Issues Associated with Police Involved Shooting Incidents Through Forensic Investigation & Shooting Scene Reconstruction*, February 11-15, 2002, Atlanta, Georgia
- American Academy of Forensic Sciences, *Bring Your Own Slides*, February 11-15, 2002, Atlanta, Georgia
- The UMKC School of Law, *The History of Murder Investigation and Forensic Science*, University of Missouri, Kansas City, January 24, 2002
- *DNA and the Law: Reining in the Revolution, "The Role of the Forensic Pathologist in DNA Use: From Autopsy to Courtroom,"* Duquesne University, November 30, 2001, Pittsburgh, Pennsylvania
- *New Technologies and the Proof of Guilt & Innocence*, Court TV, October 25, 2001
- *2001 Ohio Attorney General's Conference on Law Enforcement*, Plenary Speaker, October 11, 2001
- *The Second European-American Intensive Course in Clinical and Forensic Genetics*, September 3-14, 2001, Dubrovik, Croatia
- *Forensic Nursing Clinical Update*, "Death Investigation, Adverse Patient Events and Evidence Collection in the Hospital Setting," August 27 and 28, 2001, Phoenix, Arizona
- *Harvard Associates In Police Science*, Keynote Speaker, August 20-23, 2001, 52nd Annual Conference, Annapolis, Maryland

- *The Boston Strangler Case: A High Tech Hearing on the Murder of Mary Sullivan*, August 4, 2001, American Bar Association Annual Meeting, Chicago, Illinois
- *Emerging Technologies in Forensic Investigation*, June 1-3, 2001, Nova Southeastern University, Fort Lauderdale, Florida
- *The Forensic Investigation of Child Abuse and Neglect*, May 30, 2001, The Family Partnership Center
- *Making Communities Safer*, May 21-22, 2001, New York State Alliance of Sex Offender Service Providers, Sixth Annual Training Conference, Albany, New York
- *Practical Homicide and Medicolegal Death Investigation*, April 9-11, 2001, Beaumont, Texas
- *Police Liability in New York*, May 2, 2001, Albany, New York
- *Symposium on Forensic Medicine*, Kuwait Institute for Medical Specialization, January 27-29, 2001, Kuwait
- *Forensic Science and the Law*, October 27-28, 2000, Duquesne University, Pittsburgh, Pennsylvania
- *8th Annual Investigation for Identification Educational Conference*, Speaker, September 22-23, 2000, Pensacola Beach, Florida
- *Advanced Practical Homicide Investigation*, September 11-15,2000, Southern Law Enforcement Foundation, Irving, Texas
- *Vision 2000: Together We Can*, Funeral Service Conference of the Northwest, August 27-29, 2000, Coeur d'Alene Resort, Idaho
- *Mississippi Attorney General Prosecutor's Annual Training Conference*, April 26-28, 2000, Gulfport, Mississippi
- *Forensic Crime Scene Analysis Training*, April 28, 2000, Union County Police Chief's Association, Cranford, New Jersey
- *At the Heart of the Matter: The Medicolegal Aspects of Organ and Tissue Donation*, May 4, 2000, New York Organ Donor Network, Poughkeepsie, New York
- *NYSBA Criminal Justice Section Spring Meeting*, May 19-21, 2000, The Ethics of Scientific Evidence, Chautauqua, New York
- *2000 Dodge Seminar*, March 20-23, 2000, Clearwater Beach, Florida

DECLARATION OF ROBERT M. SHEAHEN

I, ROBERT SHEAHEN, declare the following under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of California, and a member in good standing of the State Bar of California. I specialize in criminal law.

2. I represented Hooman A. Panah, an Iranian citizen, as lead counsel in his 1994-1995 capital-murder trial in Van Nuys. (*People v. Panah*, Los Angeles Case No. BA090702.) On January 26, 1994, I first appeared on his behalf in the Los Angeles Municipal Court. (CT 78-88.) On February 25, 2004, I first appeared before the Honorable Lance Ito, Judge in the Los Angeles Superior Court, and was appointed. (CT 106) I was reappointed as lead counsel to represent Mr. Panah on June 1, 1994. (CT 562.)

Loss of second counsel

3. Second counsel was Syamak Shafi-Nia, a native of Iran whose first language was Farsi. He understood the defendant's culture. Although a civil attorney and not a criminal specialist, he was appointed under *Harris* due to his prior relationship with Mr. Panah. Mr. Shafi-Nia had represented the defendant and his mother, Mehri Monfared, for a number of years. He had assisted him in a variety of matters such as immigration, a civil case, problems with friends, automobiles, school, etc. (RT 16.) The defendant and Mr. Shafi-Nia had a close and trusting attorney-client relationship.

4. Due to a car accident that occurred a few days before trial, Mr. Shafi-Nia was temporarily unable to appear regularly in court. I moved to continue the trial a few weeks until his return. (RT 1285.) The request was denied by the Honorable Sandy Kriegler, the trial judge. (RT 1463, 1854.) The court stated that there would be no further delays with the case, even though the arrest of the defendant was just roughly a year earlier. I had never seen a case rushed to trial in this manner, especially one in which the death penalty was involved. There was no logical reason that the trial could not have been delayed until Mr. Shafi-Nia was well enough to resume his legal duties.

Exhibit R

5. As explained to the court, I depended upon Mr. Shafi-Nia to get a number of guilt and penalty phase witness from Iran to appear at the trial. With him gone from the case that could not and did not occur. The result was prejudicial to the defendant.

6. At the urging of Judge Kriegler, I proceeded with jury selection on November 30, 1994 without the essential assistance of co-counsel. (RT 1298.) I found it impossible to effectively undertake such an important task alone and had a difficult time keeping up with peremptory challenges. (RT 1338-1339.) My plan had been for Mr. Shafi-Nia to assist me since we had already split the job of reviewing the juror questionnaires. (RT 1370.)

7. Further, without co-counsel at my side, I also had to juggle with the daunting task of dealing with the client, who was a handful due to our cultural differences and his significant mental problems.

Mental incompetence of defendant

8. As I advised the court prior to trial, Mr. Panah was not mentally competent to assist in his own defense. He was unable to rationally understand the trial process. Further, Mr. Panah was not capable of rationally consulting with counsel and assisting in his own defense. I observed that his thought processes were both illogical and irrational. In fact, throughout the trial the defendant would write long, convoluted notes which made no sense. Comments he made to me in court throughout the trial were crazy. As I explained to the court: "When he keeps sending this plethora of notes to me, it's really distracting to me, and I consider it very detrimental to his case. That I have to deal with this. I've said – I've said to him repeatedly – I said, 'Don't talk to me.' When he keeps talking to me and asking me things, I can't function. That's why I asked him if he's got problems, to write to me. And that's why the court sees him feverishly writing, but most of the things that he writes don't add to his case at all." (RT 1234.) Mr. Panah's statements to me and writings were irrational and not grounded in reality. He was a mentally unstable young man whose realty was distorted and disturbed.

9. It was error for Judge Kriegler not to delay proceedings until the issue of the defendant's mental competence could be reasonably determined. Dr. Michael Coburn, a

forensic psychiatrist who had a limited time to meet with Mr. Panah in the court lockup, determined that he was not managed properly in the jail, was a very disturbed kid, had not received treatment for his mental problem, and was a very disturbed person.

10. The mental inability of Mr. Panah to function and assist in his own defense was aggravated and compounded by the poor jail conditions. I advised Judge Kriegler during trial that Mr. Panah had serious headaches, was experiencing a loss of sleep, constipation from being unable to use the facilities and general physical pain and vomiting in the lockup. (RT 1645.) Mr. Panah often complained to me about being mistreated in jail including being deprived of sleep, being beaten by inmates, defacing his notes for the trial, and the defacing of his Koran while it was left unattended in his cell. (RT 2048-2052.)

11. Due to factors weighing on Mr. Panah's mental and physical well-being, it was difficult to explain things to him in a way he could understand. He just did not comprehend things in a rational way. He operated mentally in a different reality from the rest of us. Also, he was unable to assist me in any rational or meaningful way in preparing and presenting a defense. In fact, the mental difficulties of Mr. Panah directly interfered with my ability to effectively represent him.

12. I could not function effectively under the Sixth Amendment in representing the defendant in this complex case without the help of second counsel who was familiar with the extensive facts, background of my client in Iran, Turkey, Germany and the United States. Otherwise, second counsel would be unprepared for trial. Also, my representation was compromised since I am not Iranian and had no expertise in the culture. Mr. Shafi-Nia was supposed to bring witnesses from Iran to testify on behalf of my client. Without him, the case was lost. Thus, I moved to continue the trial a brief and reasonable period until Mr. Shafi-Nia could return or other assistance could be provided. (RT 1362-1374.) My motion was denied. Judge Kriegler was adamant that there be no delay. (RT 1372.) It was like a train that would not stop.

13. All of a sudden Mr. Shafi-Nia, who was so crucial to the case, was gone and I was plunged into jury selection without the assistance of anyone.

Second counsel replacement after trial began

14. The 12-member jury and six alternates were selected on December 5, 1994. (RT 1538; 1573.) The day after we picked the jury, Judge Kriegler appointed William Chais as substitute counsel for Mr. Shafi-Nia. (RT 1840.) I objected to the replacement since Mr. Shafi-Nia had been working on the case for almost a year, had a rapport with our client, and was Iranian as was the defendant. Further, Mr. Chais was not Iranian and lacked the minimum qualifications to be appointed to a capital case. The objection was denied and Mr. Chais was appointed as co-counsel. The judge refused to give Mr. Chais any time to become familiar with the case.

15. There was a great imbalance to the representation. Not only was Mr. Chais inexperienced in general and not prepared in particular, the prosecution was represented by three top-of-the-line veteran prosecutors. All three prosecutors were fully versed in the case and all three appeared in court each day of the trial. Thus, the playing field was anything but even.

16. In order to permit Mr. Chais adequate time to get up to speed, I asked for even a brief continuance. (RT 4265.) That motion was denied. As it was, during the trial proceedings in court he was having to review the transcripts, pleadings and discovery material in an effort to become familiar with the case facts and issues. This was occurring even when people were testifying. It was a disaster that resulted in great prejudice to the client.

17. It was not just Mr. Chais who needed more time to prepare. We all needed more time. All of our efforts had gone into the aborted settlement and a full factual investigation had simply not been done. When the court appointed investigator J. Charles Evans to assist the defense on December 5, 1994, the trial had commenced. The court should have allowed both Mr. Chais and Mr. Evans a reasonable amount of time to prepare for trial and to assist in the defense. Mr. Shafi-Nia had worked on the case for months and all of his preparation was lost to the defense when the court removed him from the case.

Settlement

18. The prosecution offered to settle the case against Mr. Panah for life without parole in return for his entering a guilty plea. When that offer was made, I felt we had won because the case was so difficult. For example, the body was found in a suitcase in my client's bedroom closet.

19. Mr. Panah was agreeable to settling the case with a guilty plea. However, his mother was against a plea and obstructed attempts toward a settlement that would have saved his life. This included outbursts by her in open court and threats of suicide at the time my client was about to plead guilty. Up to then point Mr. Panah was willing to plead and avoid a death judgment. Because of the mother's interference with what was best for him, the settlement did not occur, we went to trial, he was found guilty, and sentenced to death.

20. On November 30, 1994, in an effort to settle the case, I even explained to the court that Mr. Panah has told me repeatedly he felt great remorse and was sorry for what happened to the little girl, and that he was willing to do anything to rectify the situation including entering a guilty plea to all charges. I remember the mother was shouting in court that she would kill herself if her son entered a plea. I had never had such difficulty in effecting a settlement of a case. (RT 1373.)

21. As I stated to the court, for a long time Mr. Panah had wanted to enter a guilty plea but his mother threatened to kill herself if he did, said she would never see him, would not send him any money in prison, and that she would cut him off from the family. (RT 1373-1374, 3646.) It was an unbelievable amount of pressure on a young person with serious mental problems who was trying to make amends for what had happened and avoid being executed.

22. We conducted a limited pretrial investigation due to my belief that the case would settle for a sentence of life without the possibility of parole. Virtually all of our pretrial efforts had been directed toward achieving the desired plea bargain. We asked numerous people to assist in obtaining this result. For example, we had two veteran Los Angeles criminal defense lawyers -- Marcia Morrissey and Edward Rucker -- meet with Mr.

Panah to help him understand that it was in his best interest to settle the case and thus avoid the death penalty. The only attorney involved in the case who was not helpful in this respect was Syamak Shafi-Nia.

23. In view of the complexity of the case, the court should have delayed the start of the trial for at least three months when the settlement broke down. This was completely unexpected. It was clear that, under the circumstances, the defense could not be adequately prepared for trial without the granting of a continuance..

Defense

24. The only defenses were mental, that Mr. Panah was insane and in a delusional mental state at the time of the homicide. He did not have the intent to kill or harm the girl. It was an accident.

25. On November 22, 1994, in addition to a not guilty plea, I entered a plea of not guilty by reason of insanity. (RT 1056.) Mr. Panah agreed to the insanity please when asked by the judge. (RT 1058.)

26. On January 3, 1995, Mr. Panah withdrew the insanity plea. (RT 3076.) He felt that he was forced to do this, since the court could not guarantee that he would protected in cross-examination if he decided to testify. (RT 3080.)

27. Without question, Mr. Panah suffered from a severe mental illness. In addition to being out of contact with reality, he was delusional.

Prejudicial atmosphere

28. For this case to have been tried in Van Nuys rather than downtown Los Angeles was a travesty, for there was so much prejudice against Mr. Panah.

29. There was a prejudicial atmosphere surrounding the case. The bias was due to the fact that my client was an Iranian citizen and Muslim. I observed that members or the Iranian community who attended the trial were treated unfairly by the courtroom bailiffs. The was no pretense of fairness by the bailiffs. For example, while everyone who entered the courtroom had to pass through metal detectors, those of Persian descent were additionally subjected to embarrassing and invasive body searches and pat-downs. This would be

witnessed by the jurors. They were exposed to the different treatment of people who were Iranian. In fact, warrant checks were even run on some of these individuals. This fostered a racial bias towards my client and his supporters. . (RT 4260.)

30. The prejudice against the defendant was clearly visible to the jury. There was even graffiti just outside the courtroom with the following words carved on a wooden railing in reference to my client: "Anal sex kid must die." This was plainly visible to all who passed by, including the case jurors whom I saw observing it. ." (RT 831.)

31. While Mr. Panah received adverse treatment in the courthouse, the family of the deceased were provided preferential treatment by court personnel. I observed that this was visible to the jurors. For example, the deceased's mother, Lori Parker, was familiar with the courthouse personnel since she worked there in the Van Nuys legal community as a legal secretary for approximately 15 years. Her fiancé, Martin Gladstein, was a criminal defense attorney who made appearances in the Van Nuys Superior Court, and even tried a successful case before Judge Kriegler. One day during an afternoon recess, I observed Mrs. Parker and two of her colleagues go into a courtroom adjacent to the one in which this case was being tried and engage in a conference with a judge in that department, Judge Coen. (RT 828.) I complained about this at the time to the court, to no avail. Such conduct gave the impression that she was part of the trial process. Given that Mrs. Parker also made public statements to the press that the death penalty should be imposed on my client, the jury certainly perceived the court as adopting such a view given her close connection with the courthouse and its personnel. Mrs. Parker was even observed publicly kissing a bailiff. While Judge Kriegler acknowledged this created a problem if jurors saw it, he offered to remedy the matter by simply replacing the bailiff. (RT 3131-3132.) However, the harm had been done.

32. The anti-defense bias in the courtroom is exemplified by the behavior of one of the bailiffs, who made the following remarks to the defendant: "Why don't you just kill yourself and save everybody time and money." This was brought to the attention of Judge Kriegler, who relieved the bailiff of his duties with respect to this case. (RT 240.)

33. In spite of the prejudicial trial atmosphere, pretrial publicity in the case and the bias expressed against my client by the courthouse personnel, Judge Kriegler denied my repeated motions for a change of venue or to transfer district. (CT 566,585; 592, 610.)

34. The mother of the deceased even went on television demanding the death penalty for Mr. Panah.

I declare under penalty of perjury that the foregoing to be true and correct.

Executed on this the 2d day of April, 2004, in Los Angeles County, California.

ROBERT M. SHEAHEN

DECLARATION OF SYAMAK SHAFI-NIA

I, SYAMAK SHAFI-NIA, declare the following under penalty of perjury:

1. I initially appeared on behalf of Hooman Ashkan Panah, an Iranian citizen, at his arraignment in the Los Angeles Municipal Court on December 14, 1993, and entered pleas of not guilty on his behalf. On February 25, 1994, the Honorable Lance Ito appointed me as second counsel to represent Mr. Panah in the capital trial of *People v. Panah*, Los Angeles Case No. BA090702. Judge Ito entered an order continuing my appointment on June 1, 1994. Robert Sheahen was appointed as lead counsel.

History and Cultural Relationship with Client

2. Even though not a criminal law specialist, I had a long history of representing and counseling Mr. Panah and his mother, Mehri Monfared. Also, the client and I were both Iranian and conversed in our first language, Farsi. I explained to Judge Ito during the hearing on February 25, 1994, that my relationship with Mr. Panah ran from being his attorney to functioning as his personal adviser and confidant. At that time I had represented Mr. Panah and his mother, Mehri Monfared, for approximately six years. I have counseled him on numerous occasions. He had come to me for a variety of reasons, from simple emotional matters to crises that he may have had as he was growing up. Mr. Panah came from Germany after leaving Iran with his mother. I represented his mother in gaining political asylum and citizenship in this country. Later I helped Mr. Panah regarding a variety of matters, e.g., his entry into the United States and becoming a lawful permanent resident, a civil case, problems with friends, automobiles, school, etc. We had a close and trusting attorney-client relationship.

3. I had fully explained to both the court and Mr. Sheahen that I was not a specialist in criminal law. Rather, what I brought to the defense was an understanding of the client both personally and culturally. I also knew many people both in the large Iranian community in Los Angeles, and, of course, in our native country of Iran. I had also actively represented Mr. Panah in the murder case, and had appeared on his behalf for nearly a year. (*E.g.*, CT 8-11 (Dec. 14, 1993), 13-18 (Jan. 3, 1994), 29-76 (Jan. 10, 1994), 78-89 (Jan. 26, 1994), 542 (Feb. 25, 1994), 561 (May 26, 1994), 563-564 (June 8, 1994), 561 (May 26, 1994), 562 (June 1, 1994), 563-563 (June 8, 1994), 644 (July 26, 1994), 681 (Sept. 26, 1994), 742 (Oct. 14,

1994), 744 (Oct. 17, 1994), 746 (Nov. 1, 1994), 747 (Nov. 14, 1994), 783 (Nov. 17, 1994), 783 (Nov. 22, 1994), 792 & 903 (Nov. 22, 1994), 793 ((Nov. 23, 1994), 589 (Nov. 28, 1994).) He also appeared in many pleadings. (See, *e.g.*, CT 209 [Order Allowing Defendant To Wear Street Clothing While Appearing In Court, July 26, 1994], 210 [Order Permitting Defendant's Attorneys To Visit Defendant In Visitation Booth, July 26, 1994], 566-587 [Motion To Change Venue, July 18, 1994], 682-702 [Motion To Suppress, Oct. 4, 1994], 712-732 Motion To Suppress, Oct. 5, 1994], 748-775 [Motion for Pre-Trial Discovery, Nov. 16, 1994].)

4. Due to a car accident which occurred a few days before trial, I was temporarily unable to actively represent Mr. Panah in court. Robert Sheahen consequently moved to continue the trial until I could proceed with the case. The request was denied by the Honorable Sandy Kriegler, the trial judge. There was no logical reason that the trial could not have been continued a few weeks until I fully recovered. Also, that would have given time to prepare a defense.

5. I was crucial to the defense of Mr. Panah in various areas. Since he and I were both of Iranian heritage and spoke the same first language, Farsi (Persian), he was able to communicate and relate with me far better than with anyone else in the legal process. Mr. Panah had problems understanding things in English, things that were happening in court and or in his meetings with other attorneys or experts. Sitting next to him, I was able to translate and help him understand. Similarly, Mr. Panah was misunderstood by the others involved in the case, as well, who did not speak Farsi. For example, many times when lead attorney or an expert had thought Mr. Panah would be agreeable to a settlement, I found out that in fact they has misunderstood him and visa versa.

6. Also, I was totally familiar with the case facts and issues. When I was removed and replaced by a non-Persian lawyer, that cultural link and level of understanding was lost. Further, the new lawyer's lack of familiarity with this complex case would have caused great harm to the defense. Finally, since the replacement lawyer did not speak Mr. Panah's first language, Farsi, he would have been totally lost in the trial proceedings.

7. It was indispensable for someone to participate in the trial with Mr. Panah who understood his culture, customs, and language. Because that did not occur, he was irreparably harmed and prejudiced.

8. Mr. Sheahen and I had agreed to work together in jury selection. For example, we split the job of reviewing the juror questionnaires. Also, I would deal with Mr. Panah to avoid him distracting Mr. Sheahen. I was to keep up with peremptory challenges.

Mental Problems of Client

9. It was apparent from my observations at the outset that Mr. Panah has serious emotional problems. We had many discussions about the case and his life and the two or more suicide attempts. He was bright, but not in contact with reality and emotionally confused. He simply was unable assist in his own defense. Mr. Panah's logic in crucial areas was based on delusions and thinking that was not rational.

10. I was also aware that the poor conditions in the Los Angeles County Jail and the serious mistreatments that he received had made Mr. Panah's mental condition worse and had further interfered with his ability to assist rationally in his own defense. I remember him having painful headaches, getting little sleep, and even being beaten by other prisoners. His mistreatment in the jail was a constant topic, because it interfered so much with Mr. Panah.

11. Mr. Panah had difficulty understanding things and in communicating, even with me, and certainly with other lawyers. He just was not rational.

12. Mr. Panah's mental problems were compounded by his difficulty in understanding things that were in English. It helped when I was present to translate and explain things to him.

13. In my opinion Mr. Panah was not mentally competent to proceed to trial.

Lack of Investigation and Defense Preparation

14. There was neither an investigation nor defense prepared prior to trial, either as to the guilt or penalty phase. The case was absolutely not prepared for trial.

15. I talked with Mr. Sheahen, lead counsel, on various occasions beginning with his entrance into the case, about prospective defenses and the need for various investigations

both for the guilt and penalty phases. I depended on his expertise and direction since he was in charge and control of the defense, and was suppose to be the expert on criminal law.

16. When the subject of an investigation and defenses arose, Mr. Sheahen would put off any meaningful discussion of the subject. He said there were limited funds for any investigation. He was zealously attempting to settle the case with a guilty plea, and he was of belief that no trial would be necessary. I was apprehensive about for a number of reasons. First, settlement with a guilty plea was not appropriate based upon the repeated assertions of innocence by my Panah to me. Secondly, on the weight of the evidence supported his innocence if the case were properly prepared for trial. Mr. Sheahen said there was no worry, because there would then be plenty of time to investigate if the settlement did not work out.

17. I asked Mr. Sheahen long before trial about obtaining funds under Penal Code section 987.9 so that we could retain the services of an investigator. He said that would not be necessary because the case would settle with a guilty plea. Also, he said there were not enough funds to retain the services of an investigator. I was totally against the settlement strategy.

18. Long before trial I mentioned that there needed to be a background investigation in Iran, since that is where Mr. Panah was born and raised. Clearly there were people who could come from there to testify in the penalty phase of the trial and at the guilt phase in support of mental defenses. People also needed to be interviewed in Turkey and Germany where Mr. Panah lived before coming to the United States. As it was, there were no interviews, and no one was even asked to come to testify in the trial.

19. The defense did not have the funds for an investigator or me to go to Iran, Turkey or Germany, unless Mr. Sheahen furnished them as part of his appointment as lead counsel. He always said wait, that the case would settle and that we would not need to go to trial. So there was no investigation in any foreign country.

20. No pretrial investigation was conducted in this case due to my reliance on the assurances of lead counsel, Mr. Sheahen. He advised me that the prosecution would agree to a sentence of life without the possibility parole upon the guilty plea of Mr. Panah. That was not consistent with Mr. Panah's assertions of innocence to me, and I supported his disagree-

ment with a settlement. Mr. Sheahen devoted a considerable effort to achieve that outcome including consulting with outside counsel and meeting with the prosecutor. He brought in other attorneys to consult with Mr. Panah. I recall Edward Rucker and Marcia Morrissey meeting with our client.

Forensic Experts

21. I also suggested to Mr. Sheahen, again and again, well before trial that he should consult and retain the services of both a pathologist and a serology/DNA expert. These areas were very much in contention in this case and in my opinion paramount to the preparation of a defense and to proving Mr. Panah's innocence. Mr. Sheahen said, as with the investigation, that the case would settle, therefore, such expenses were unnecessary. So, none were retained. He indicated that if the settlement did not work out, we would still have time before trial to hire the forensic experts. Mr. Sheahen seemed to believe that the only defense was a mental defense. I believed that we had a strong evidentiary defense, had it been properly prepared, not just a mental approach.

Settlement Failure

22. Mehri Monfared, Mr. Panah's mother, was against the guilt plea. This included her making statements and suicide threats in court at the time of the guilty plea was about to occur. So the settlement collapsed. I too was against a settlement. I do not recollect that Hooman agreed to a settlement in my presence; he told me he was innocent.

Prejudicial Atmosphere

23. There was a prejudicial atmosphere surrounding this case. It was obvious that the bias was based on the fact that Mr. Panah was Iranian. Even Judge Sandy Kriegler was affected. For example, he was set on rushing the case to trial at the expense of Mr. Panah's right to effective assistance of counsel, a fair trial, due process of law and equal protection of the law under the 5th, 6th and 14th Amendments. That he refused to even delay the case for a few weeks to that I could participate was shocking and inexcusable. Also, when the settlement fell through and it was clear that the defense was unprepared, there should have been a reasonable delay so that the case could be prepared for trial. Judge Kriegler used every opportunity to push and rush this case to trial. He opposed and denied every effort by the defense to

properly prepare for trial. This is a classic case a classic case of a defendant being railroaded to an unfair and prejudicial trial.

Ineffective Assistance of Counsel

24. In my opinion based upon what I knew at the time of trial, the failure by the defense to investigate Mr. Panah's background in Iran, Turkey and Germany, and attempt to secure the presence of material mitigation witnesses to testify at trial fell below a minimally competent standard of practice and constituted ineffective assistance of counsel.

25. In my opinion based upon what I knew at the time of trial, the failure by the defense to reasonably investigate the case including the failure to even hire an investigator until the beginning of the trial fell below a minimally competent standard of practice and constituted ineffective assistance of counsel.

26. In my opinion based upon what I knew at the time of trial, the failure by the defense to consult and retain the services of a pathologist fell below a minimally competent standard of practice and constituted ineffective assistance of counsel.

27. In my opinion based upon what I knew at the time of trial, the failure by the defense to retain the services of an expert in DNA and serology fell below a minimally competent standard of practice and constituted ineffective assistance of counsel.

I declare under penalty of perjury that the foregoing to be true and correct.

Executed on this the 5th day of April, 2004, in Los Angeles County, California.

SYAMAK SHAFI-NIA

SUPPLEMENTAL REPORT

Robert R. Bryan
Law Offices of Robert R. Bryan
2088 Union Street, Suite 4
San Francisco, California 94123-4117

May 25, 2006

RE: *People v. Hooman Ashkan Panah*
Calif. Supreme Court Nos. S123962, S045504
FSD Case 20000307

Dear Mr. Bryan,

This review supplements one written on February 27, 2004, by Lisa Calandro of our office. It is based upon new discovery material received on January 25, 2006 from the Los Angeles Police Department's Scientific Investigation Division.

In her February 2004 report, Ms. Calandro notes that inconclusive DNA results were obtained for two items of evidence, Item 55, a bedsheet, and Item 60, a kimono. She notes that

> *The meaning of the "inconclusive" finding cannot be determined without additional information such as photographic quality copies of the typing strips. (pages 7 and 9 of her report)*

This review was conducted to resolve the issue of "inconclusive findings" for the DNA results from these samples.

I received for review, from Larry Blanton of the Los Angeles Police Department's Scientific Investigation Division, color copies of 6 pages of "DNA Hybridization Records," including records 309, 310, 315, 316, 317, and 318. According to the notes that I have reviewed, all of the DNA typing of the samples of interest are contained in these records.

Each record consists of a table listing the samples typed, including information about the tube number, Item number, description (which typically contains the case number and sample analyzed), hybridization volume, and results. Also recorded are the lot numbers of reagents used, the date the samples were typed, and the initials of the primary and confirming analysts. Finally, a photograph of the typing strips is present on the record. For all but record 309, black and white photographs were taken. Record 309 contains a color photograph of the typing strips.

Item 52, Tissue

This typed unequivocally as a type 1.3,4 in both the non-sperm and sperm fractions. This is consistent with Mr. Panah's type, and different from Ms. Parker's type. This was reported correctly by LAPD, and Ms. Calandro does not equivocate in her opinion about the meaning of the result. My review of the hybridization record supports the findings and observations of Ms. Calandro, specifically that no evidence exists to support a claim of a mixture of semen and saliva from Mr. Panah and Ms. Parker.

3777 Depot Road, Suite 409, Hayward, California 94545-2761 · Telephone: 510/887-8828 800/827-FASL Fax: 510/887-4218

Item 55, Bedsheet

At least five stains from the bedsheet were tested for the DNA type of the semen donor. Two of these gave a type 1.3, 4 in the non-sperm and sperm fractions, consistent with the type of Mr. Panah. The other three samples gave weak 4 activity in both the non-sperm and sperm fractions. The weak activity was called inconclusive in the LAPD report, presumably because the control "C" dot was weak or absent. My review of the typing strips confirms all of the types indicated in the LAPD hybridization strips, and further supports the finding that no evidence exists of a mixture of biological material from Mr. Panah and Ms. Parker.

Item 60, blue silk kimono

Ms. Calandro comments on a bloodstain typed by DNA. Inasmuch as this portion of her report is unequivocal, I will not comment further.

She also noted that an unidentified area was examined for DNA using a differential extraction. She did not understand why this analysis was performed, inasmuch as semen was not detected on this item. Nonetheless, LAPD reported inconclusive results for the typing of this sample. My review of the typing strips reveals that the sperm fraction gave no results (consistent with finding no semen on the garment), and the non-sperm fraction gave weak 4 activity. The weak activity was called inconclusive in the LAPD report, presumably because the control "C" dot was weak or absent. No evidence exists in the DNA evidence of a mixture of biological material from Mr. Panah and Ms. Parker on this item.

Ms. Calandro summarized her review by indicating that no evidence existed of intimate contact between Mr. Panah and Ms. Parker, subject to further review of, at the least, the DNA typing strips. Assuming no other biological examinations were performed, my review of the DNA results confirms her opinions. No biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker was present on the tissue, bedsheet, or kimono. It is my opinion, based upon the foregoing, that there is no evidence to suggest intimate sexual contact between Mr. Panah and the victim.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 25 of May, 2006, at Hayward, California.

Keith E. Petersen Inman, MCrim
Senior Forensic Scientist

DECLARATION OF GREGORY REIBER, M.D.

I, GREGORY REIBER, declare:

1. I am not a party in this action and I do not know Petitioner, Ashkan Panah. I am a physician licensed in the State of California. I am Board Certified in Anatomic and Clinical Pathology and Forensic Pathology. I am competent to testify as an expert witness, as set forth herein.

2. I received my M.D. degree from Loma Linda University in 1981; residency in combined anatomic and clinical pathology, Loma Linda Univ. Medical Center, July 1981 through June 1985; fellowship in forensic pathology at Root Pathology Laboratory/San Bernardino County Coroner's Office, July 1985 through June 1986. Board certified in anatomic and clinical pathology, November 1985; board certified in forensic pathology, May 1987.

3. My academic appointments: Instructor, LLU School of Medicine (Pathology), 1982-1985; Assistant Clinical Professor of Pathology, LLU, 1987 - 1990; Assistant Clinical Professor of Pathology, UC Davis, 1991-2001; Associate Clinical Professor of Pathology, UC Davis, 2002 to present. Distinguished Special Lecturer, University of New Haven (California Campus), 1999 - 2001. Program Director, Forensic Pathology Fellowship (ABP accredited), UC Davis/NCFP, 1996 - 2001; Adjunct Associate Clinical Professor of Pathology, Touro University School of Osteopathic Medicine, 2006 to present.

4. My professional experience: Associate forensic pathologist with Root Pathology Laboratories, July 1986 - May

1990, primary duties at San Bernardino County Coroner's Office; Associate forensic pathologist with Northern California Forensic Pathology, June 1990 - December 2001, primary duties at Sacramento County Coroner's Office; Director of Autopsy Services, UC Davis Medical Center, Jan 2002 - Dec 2002; Associate forensic pathologist, Forensic Medical Group, Inc., Jan 2003 to present, primary duties with multiple Coroner's Offices in northern California including Sacramento, Solano, Yolo, Sutter, Colusa, Contra Costa, Marin, and Sonoma Counties.

5. I have conducted hundreds of autopsies for the purpose of determining cause and manner of death. From July 1, 1985 to the present, I have performed approximately 6,500 autopsies and have personally supervised approximately 600 autopsies. I have testified over 400 times in court cases.

6. In preparation of this declaration, I have reviewed the following materials: Los Angeles County Coroner-Medical Examiner autopsy report concerning the examination of Nicole Parker dated November 22, 1993 (28 pages including investigator's report and body diagrams); autopsy photographs (65); crime scene photographs (20); LAPD crime laboratory reports of analysis of evidence (serology and DNA); letters of Lisa Calandro to attorney R. Bryan, November 2002 and February 2004; report and opinion of Dr. Michael Baden, April 2004; letter of K. Inman to R. Bryan, May 2006; Grand Jury testimony of Dr. Eva Heuser, February 1994; Trial testimony of Dr. Heuser, December 1994; Trial testimony of Lloyd Mahanay, December 1994; Grand Jury testimony of Robert Monson, February 1994; Trial testimony of Robert Monson, October 1994 and December 1994;

Grand Jury testimony of William Moore, February 1994; Trial testimony of William Moore, December 1994.

7. The cause of death as listed in the autopsy report by Dr. Heuser is stated to be "traumatic injuries," further delineated as "craniocerebral trauma," "neck compression" and "sexual assault with anal lacerations." The specific injuries as described in the autopsy report and as illustrated in autopsy photographs and diagrams, however, do not support this conclusion.

8. The degree of craniocerebral trauma, or head injury, described in the report is limited to bleeding in the deep layers of the scalp and Dr. Heuser's recollection of a degree of subarachnoid hemorrhage in her trial testimony, a finding not borne out by the neuropathology examination of the brain. The head and brain examinations reveal no injuries of a severity to account for the child's death or to result in a significant contribution to her death.

9. The finding of neck compression rests on findings of rare, small hemorrhages in the right side of the neck, specifically in the adventitia of the thyrohyoid muscle and around the junction of the right hyoid bone and the upper thyroid horn, supported by (from Dr. Heuser's testimony) the presence of petechial hemorrhages in the skin around the eyes. No hemorrhages were seen in the left side of the neck, nor were there petechial hemorrhages in the conjunctival membranes of either eye. If manual strangulation were involved in the child's death, findings of hemorrhage in both sides of the neck and hemorrhages in the conjunctivae of the eyes would be

expected. Given the postmortem positioning of the child on the right side in a suitcase, as shown in the scene photographs, these scant hemorrhages in the neck and the petechiae in the facial skin may simply be representative of exaggerated hypostasis (lividity).

10. The findings of sexual assault are supported from autopsy findings of perianal laceration with external bleeding and microscopic hemorrhages in the underlying soft tissues; the extent of injury and resulting blood loss is not the degree of gravity to account for the child's death. The extent or depth of penetration, beyond the anal sphincter, cannot be determined from the autopsy as there are no further internal injuries. Dr. Heuser's trial testimony attributing death to reflex slowing of the heart due to anal penetration is a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion.

11. The anal laceration is consistent with some degree of penetration by an object. While such injuries may result from penile penetration, other elongated smooth cylindrical objects will yield the same results if used in the same fashion and with the same force; the precise nature of the object cannot be determined from the injury. It is also of note that no semen or foreign DNA was found in the swab samples from the child's body cavities, including the anal samples; this also disfavors the concept of penile penetration as the cause of the injury.

12. The location of the anal injury does not indicate whether the child was supine or prone during penetration.

13. Autopsy and scene observations relevant to estimating the time of death in this case center around the brief notation of rigor mortis as "fully set" in the Coroner Investigator's case report (form 1), and on the finding of what was assumed to be egg material in the stomach contents. The time of observation related to the notation of fully fixed rigor mortis is unclear; the time of discovery of the body is listed as 2230 hours, November 21, 1993 and the time of transport of the body from the scene is listed as 0415 hours on November 22, 1993. This leaves a time gap on nearly six hours during which the fully fixed nature of the child's rigor may have been observed. The child had been missing since about 1140 hours on November 20, 1993. Rigor mortis generally takes from 6 to 8 hours to fully develop, and after 24 hours from the time of death usually becomes observably decreased in intensity. If the child had died around noon, or in the very early afternoon of 11-20-93, rigor should have been significantly decreased from a maximal or "fully fixed" condition by the late evening of 11-21-93, approximately 36 hours since death; if the observation of rigor was made in the early morning hours of 11-22-93 prior to the 0415 hours transport time, an observed decrease in rigor would have been even more likely. Furthermore, this child was found in a suitcase, wrapped in a sheet, under a pile of other objects in a closet; such a situation would provide insulation causing retention of body heat and promoting more rapid disappearance of rigor. The use of stomach contents as a basis for time of death estimation is unreliable; stomach emptying can be delayed by severe stress, and if the child were abducted before a breakfast

meal had emptied from the stomach, the stress of the ensuing captivity could significantly delay emptying of the stomach and cause the estimated time of death to be much earlier than actually occurred. The lack of any additional analysis to confirm the identity and condition of the material in the stomach renders this basis for time of death even more unreliable. Other means to help determine time of death, such as core temperature or vitreous potassium level, were not performed in this case. It is unfortunate that the standard method of the LA County Coroner-Medical Examiner, that of obtaining a liver temperature, was not done at the scene in this case. Relying on typical patterns of rigor mortis, the expected interval between death and discovery should have been significantly shorter than the interval between the child's disappearance and her discovery. This suggests that the time of death was a significant number of hours later that Dr. Heuser testified to, based on her use of the time of the child's disappearance and the gastric contents.

14. It is also of note that the sexual assault examination of the child was performed at the scene of discovery, while the body was still positioned on the sheet in which she had been wrapped. This sheet was placed on a bed in the room where the child had been discovered. No plastic sheet or other barrier was used to prevent potential evidence transfer from the bed to the sheet, which was later taken into evidence, even though the bed itself had been previously "cleared" as stated in Mr. Mahanay's testimony.

15. Given the totality of the scene and autopsy findings in the case of Nicole Parker, it is my opinion to a reasonable certainty that the manner of death is homicide. The specific cause of death is less clear, but in the setting of a sexual assault, some type of asphyxial death is likely. There is limited and equivocal evidence of neck compression, and manual strangulation is very unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the eyes. Other forms of asphyxial death, such as suffocation and/or "Burking" - pressure of a large person's body on a smaller person's chest causing restriction of breathing - remain possible, and the facial bruising and areas of contusion on the torso support either or both in combination. Such a situation could result unintentionally in an asphyxial death during an assault on a child by an adult. Aspiration of gastric contents, resulting in air trapping and over-expansion of the lungs, was also noted in this case. This factor may have played an additional role in causing an asphyxial death, or alternately may have been a result of attempted resuscitation. This second possibility is given weight by the presence of soft tissue bruising in the chest wall as found at autopsy.

16. I concur with Dr. Michael Baden's opinion that this type of case is of a complexity that an adequate defense requires retention of forensic and pathology expertise well in advance of trial so that time of death, nature and causation of injuries and cause of death can be fully and independently evaluated without undue haste, so that additional forensic expertise can be retained if deemed necessary, so that proper

preparation of counsel for cross-examination of opposing experts may be accomplished, and so that counsel can evaluate the appropriateness of any negotiated settlement of the case that may be offered.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Roseville, California, August 27, 2007.

By: GREGORY REIBER, M.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW E HON. SANDY KRIEGLER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
PEOPLE,

VS. NO. BA090702

HOOMAN ASHKAN PANAH,
DEFENDANT.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 7, 1994

VOLUME 19

APPEARANCES:

FOR THE PEOPLE: GIL GARCETTI, DISTRICT ATTORNEY
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ALEXANDRIA FENNER, CSR NO. 4418,
JOAN KOTELES, CSR NO. 1911,
OFFICIAL REPORTERS

PAGES 1843 THROUGH 2036

THE CLERK: THANK YOU.

PLEASE BE SEATED.

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD, SPELLING YOUR FIRST AND LAST NAME.

THE WITNESS: WILLIAM MOORE. W-I-L-L-I-A-M. MOORE, M-O-O-R-E.

THE CLERK: THANK YOU.

MR. COUWENBERG: MAY I PROCEED, YOUR HONOR?

THE COURT: PLEASE.

MR. COUWENBERG: THANK YOU.

DIRECT EXAMINATION

BY MR. COUWENBERG:

Q. MR. MOORE, BY WHOM ARE YOU EMPLOYED?

A. I AM CURRENTLY EMPLOYED BY THE LOS ANGELES POLICE DEPARTMENT ASSIGNED TO THE SEROLOGY UNIT OF SCIENTIFIC INVESTIGATION DIVISION.

Q. DO YOU HAVE A SPECIFIC TITLE?

A. YES.

Q. WHAT WOULD THAT BE?

A. CRIMINALIST 3.

Q. AND WHAT DOES THAT MEAN?

A. THAT IS A LEAD PERSON DESIGNATION.

I AM SO DESIGNATED IN NARCOTICS, SEROLOGY AND ALCOHOL ANALYSIS.

Q. FOR THE BENEFIT OF THE JURY, MR. MOORE, COULD

YOU GIVE US A BRIEF BACKGROUND OF YOUR FORMAL EDUCATION, TRAINING, EXPERIENCE UP TO THIS POINT?

A. I POSSESS A BACHELOR OF ARTS DEGREE IN BIOLOGY, STUDYING A PREMEDICAL CURRICULUM.

I COMPLETED SUCH COURSES AS GENERAL CHEMISTRY, ORGANIC CHEMISTRY, INSTRUMENT ANALYSIS WHICH IS AN UPPER DIVISION COURSE DEVOTED TO THE DEVICES AVAILABLE TO THE CHEMIST.

FURTHER, I COMPLETED SUCH COURSES AS BIOCHEMISTRY, HUMAN PHYSIOLOGY, GENETICS AND ANATOMY.

AFTER FINISHING MY COLLEGE DEGREE, I BEGAN MY EMPLOYMENT IN A DUAL CAPACITY AS A QUALITY ASSURANCE CHEMIST AND AS AN ENVIRONMENTAL CHEMIST FOR A PLASTICS MANUFACTURING FIRM.

AFTER THAT STINT, WHICH LASTED APPROXIMATELY TWO YEARS, I JOINED THE LOS ANGELES POLICE DEPARTMENT SCIENTIFIC INVESTIGATION DIVISION WHERE I WAS INITIALLY ASSIGNED TO THE NARCOTICS ANALYSIS UNIT.

AFTER ANOTHER TWO YEARS I JOINED THE ALCOHOL ANALYSIS UNIT WHERE I RESIDED FOR APPROXIMATELY FIVE YEARS.

IN DECEMBER OF 1991, I JOINED THE SEROLOGY UNIT WHERE I SUBSEQUENTLY QUALIFIED AS A FORENSIC SEROLOGIST AND CONDUCTED MANY INVESTIGATIONS ON SEXUAL ASSAULTS AND BLOOD STAIN EVIDENCE.

Q. AND WHAT EXACTLY DOES A FORENSIC SEROLOGIST DO?

A. A FORENSIC SEROLOGIST RECEIVES EVIDENCE BELIEVED TO HAVE HUMAN BODY FLUIDS ON IT SUCH AS A SHIRT,

AND IT IS UP TO THE FORENSIC BIOLOGIST TO CHARACTERIZE THOSE STAINS AND PERHAPS DERIVE SOME INFORMATION ABOUT THAT STAIN THAT COULD LEAD TO THE IDENTITY OF A SUSPECT OR A VICTIM.

Q. HAVE YOU EVER QUALIFIED AND TESTIFIED IN EITHER SUPERIOR OR MUNICIPAL COURT IN LOS ANGELES COUNTY AS AN EXPERT SEROLOGIST?

A. YES.

Q. ABOUT HOW MANY TIMES?

A. ABOUT A HALF DOZEN TIMES.

Q. NOW, IN NOVEMBER OF 1993, WERE YOU WORKING IN SEROLOGY?

A. YES.

Q. AT THIS TIME DID YOU HAVE AN OPPORTUNITY TO EXAMINE A BLOOD SAMPLE THAT WAS NOTED TO BE A SAMPLE FROM A MR. HOOMAN PANAH?

A. EXCUSE ME A MOMENT.

I FIRST RECEIVED EVIDENCE ASSOCIATED WITH THIS CASE ON THE 13TH OF DECEMBER, 1993.

Q. AND AGAIN, SPECIFICALLY DID YOU HAVE AN OPPORTUNITY TO EXAMINE A BLOOD SAMPLE THAT WAS NOTED TO BE FROM A MR. HOOMAN PANAH?

A. YES, I DID.

Q. AND DID YOU ANALYZE THAT PARTICULAR SAMPLE FOR PURPOSES OF DETERMINING BLOOD TYPE?

A. YES.

Q. WERE YOU, IN FACT, ABLE TO DETERMINE THAT PARTICULAR BLOOD TYPE?

A. YES.

Q. AND WHAT WOULD THAT BLOOD TYPE BE?

A. ABO TYPE B.

Q. NOW, AT SOME OTHER TIME DID YOU HAVE AN OPPORTUNITY TO EXAMINE A BLOOD SAMPLE LABELED FROM A PERSON BY THE NAME OF NICOLE PARKER?

A. YES.

Q. AND LIKEWISE DID YOU CONDUCT AN EXAMINATION TO DETERMINE THAT PARTICULAR BLOOD TYPE?

A. YES.

Q. AND AGAIN WHAT WOULD THAT BLOOD TYPE BE?

A. THAT BLOOD SAMPLE POSSESSED AN ABO BLOOD TYPE A.

MR. COUWENBERG: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. BY MR. COUWENBERG: I AM GOING TO SHOW YOU NOW AN ITEM WHICH HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 10, WHICH IS A BED SHEET.

I AM GOING TO SHOW YOU THIS NOW AND ASK YOU IF YOU CAN IDENTIFY THIS PARTICULAR ITEM.

A. I RECOGNIZE THE PACKAGE BY MY YELLOW ANALYZED EVIDENCE SEAL WHICH I APPLIED ON THE 9TH OF FEBRUARY 1994.

FURTHER, BY OPENING THE PACKAGE I SEE WHAT RESEMBLES A BED SHEET, BEARING A NUMBER OF STAINS.

THE LAST TIME I SAW THIS WAS FRIDAY OF LAST WEEK.

Q. AT SOME TIME DID YOU CONDUCT AN EXAMINATION OF THIS PARTICULAR BED SHEET WHICH HAS BEEN MARKED AS PEOPLE'S 10?

A. YES.

Q. AND CAN YOU TELL US WHAT TYPE OF EVIDENCE YOU FOUND WHEN YOU EXAMINED THIS PARTICULAR ITEM?

A. THIS ITEM OF EVIDENCE WAS SHOWN TO BEAR HUMAN BLOOD OF ABO TYPE A AND SEMEN AS WELL AS AMYLASE, WHICH IS A CONSTITUENT OF SALIVA AND OTHER BODILY FLUIDS.

Q. NOW, WHAT, IF ANYTHING,, DID THAT TELL YOU IN TERMS OF YOUR KNOWLEDGE OF THE TWO BLOOD TYPES OF THE SAMPLES THAT YOU EXAMINED AND PREVIOUSLY REFERRED TO AS COMING FROM A NICOLE PARKER AND A HOOMAN PANAH?

A. THIS BED SHEET REVEALED TO ME WITH ADDITIONAL TYPING THAT THE BLOOD ON THIS SHEET COULD HAVE RESULTED FROM NICOLE PARKER.

THE SEMEN COULD HAVE ORIGINATED FROM HOOMAN PANAH AND THE SALIVA COULD HAVE ORIGINATED FROM NICOLE PARKER.

MR. COUWENBERG: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. BY MR. COUWENBERG: MR. MOORE, I AM GOING TO SHOW YOU NOW TWO WHAT APPEAR TO BE CHARTS.

MAY THESE BE MARKED AS PEOPLE'S 13 AND 14 RESPECTIVELY, YOUR HONOR?

THE COURT: SO MARKED.

Q. BY MR. COUWENBERG: PERHAPS YOU SHOULD STEP DOWN SO YOU COULD TAKE A LOOK AT IT.

I WOULD FIRST DIRECT YOUR ATTENTION TO PEOPLE'S 13, WHICH IS THE CHART CLOSEST TO YOU.

FOR THE BENEFIT OF THE JURY, WOULD YOU PLEASE

INDICATE WHAT THAT CHART DEPICTS.

A. THIS IS A REPRODUCTION OF THE EVIDENCE BY GRAPHICAL INFORMATION FROM ONE OF MY ANALYZED EVIDENCE REPORTS AND THE TABULATED DATA FROM THE SAME ANALYZED EVIDENCE REPORT FOR THE ITEMS SHOWN.

Q. I AM GOING TO SHOW YOU NOW AN ITEM WHICH HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 11, AND ON THIS CHART --

WELL, FIRST OF ALL, WHY DON'T YOU TAKE A LOOK AT THIS AND SEE IF YOU RECOGNIZE IT.

A. THIS PACKAGE CONTAINS A BLUE SILK KIMONO, THE LAST TIME OF WHICH I SAW IT WAS LAST FRIDAY.

Q. NOW, AT SOME POINT DID YOU CONDUCT AN EXAMINATION OF THIS ITEM THAT WE HAVE REFERRED TO AS PEOPLE'S 11?

A. YES.

IT IS DESCRIBED IN PEOPLE'S 13 AS ITEM NUMBER 60, ONE BLUE SILK KIMONO BEARING RED STAINS.

Q. AND WHAT WERE YOUR FINDINGS WITH RESPECT TO THAT PARTICULAR ITEM, THE BLUE SILK KIMONO?

A. THE ABO TYPE SHOWS THAT IT IS INDICATIVE OF TYPE AB BLOOD.

THAT IT POSSESSES TYPE ONE PLUS ONE MINUS PGM SUBTYPE ENZYMES AND A NUMBER OF OTHER ENZYMES WHICH ARE SHARED IN COMMON BY BOTH PARKER AND PANAH.

Q. NOW, IN LAYMEN'S TERMS, WHAT DOES THAT MEAN?

A. THAT MEANS BY WHAT WE HAVE SOLELY DESCRIBED IN PEOPLE'S 13 IS THAT WE HAVE BOTH A ANTIGENS AND B ANTIGENS PRESENT IN THE STAIN.

AND I MUST CORRECT MYSELF. I MISSPOKE. THE BED SHEET ALSO POSSESSED A AND B ANTIGENS.

THIS COULD BE INDICATIVE OF A PERSON WHO HAS TYPE AB BLOOD OR INDICATIVE OF A MIXTURE OF PHYSIOLOGICAL FLUIDS.

THE PGM COLUMN IS MERELY A LESS SPECIFIC WAY OF IDENTIFYING PGM SUBTYPE.

PGM IS SHORTHAND NOTATION FOR PHOSPHOGLUCOMUTASE, P-H-O-S-P-H-O-G-L-U-C-O-M-U-T-A-S-E.

PHOSPHOGLUCOMUTASE IS AN ENZYME ESSENTIAL FOR THE CONVERSION OF GLUCOSE WHICH IS A SIMPLE SUGAR TO ENERGY.

IT IS PRESENT IN MANY, IF NOT ALL, OF THE BODILY TISSUES AS IT PLAYS AN IMPORTANT FUNCTION OF CREATING ENERGY FROM SUGAR.

IN HUMAN POPULATIONS IT HAS BEEN SHOWN THAT THERE ARE TEN DIFFERENT VARITIES OF THIS PGM SUBTYPE ENZYME, ANYTHING FROM A SIMPLE ONE MINUS TO A COMBINATION OF TWO PLUS TWO MINUS.

YOU HAVE WHAT ARE KNOWN AS HOMOZYGOUS AND HETEROZYGOUS FORMS.

YOU CAN BE EXHIBITING ONLY ONE PLUS TYPE IN AN INDIVIDUAL AND A ONE PLUS ONE MINUS TYPE IN ANOTHER INDIVIDUAL, PERHAPS A SISTER OR BROTHER, WHICH CAN OCCUR IN FAMILIES.

Q. NOW, SPECIFICALLY WITH RESPECT TO THE BLUE SILK KIMONO, WHICH HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 11 AND ON PEOPLE'S 13, ITEM 60, ITEM 60 ON PEOPLE'S 13 INDICATES ONE BLUE SILK KIMONO BEARING RED STAINS.

WERE YOU ABLE TO TYPE THE PARTICULAR RED STAINS ON THE BLUE KIMONO TO, FOR EXAMPLE, THE BLOOD OF NICOLE PARKER?

A. THE STAIN AS IT TURNS OUT WAS MORE COMPLEX IN ITS COMPOSITION THAN IT FIRST APPEARED.

IT WAS LATER DETERMINED THAT AMYLASE, A CONSTITUENT OF SALIVA AND OTHER BODILY FLUIDS, WAS ALSO PRESENT IN THE STAIN.

IF AS IS EVIDENCED BY THE PGM SUBTYPE OF ONE PLUS ONE TYPE MINUS THE B ANTIGEN WAS THE RESULT OF THE SALIVA OR THE AMYLASE, IF YOU WILL, THIS BLOOD STAIN WAS CONSISTENT WITH NICOLE PARKER.

IF THE B ANTIGENIC ACTIVITY IN THE B PART OF THE BLOOD STAIN, AND WE CANNOT ASSIGN A SOURCE FOR ANY ANTIGENIC ACTIVITY TO THE AMYLASE, THEN THAT WOULD TEND TO EXCLUDE NICOLE PARKER.

Q. NOW, WITH RESPECT TO PEOPLE'S 14 FOR THE BENEFIT OF THE JURY AGAIN, WOULD YOU PLEASE EXPLAIN THE SIGNIFICANCE OF THAT PARTICULAR EXHIBIT?

A. THIS IS THE DESCRIPTIVE PORTION OF MY ANALYZED EVIDENCE REPORT FOR THE SEXUAL ASSAULT FOR SEMEN SPERM INVESTIGATIONS CONDUCTED IN PARALLEL WITH THE BLOOD INVESTIGATION, THE DESCRIPTION OF THE ITEMS EXAMINED, AND A DESCRIPTION OF THEIR RESULTS.

Q. NOW, GO AHEAD AND RESUME YOUR SEAT.

A. THANK YOU.

Q. WITH RESPECT TO THE BED SHEET THAT YOU HAVE INDICATED YOU EXAMINED EARLIER, WERE THERE SEVERAL STAINS ON

THE BED SHEET?

A. YES.

Q. AND WERE SOME OF THESE STAINS LARGER THAN OTHERS?

A. YES.

Q. NOW, WHEN YOU EXAMINED THE BLOOD STAINS ON THE BED SHEET, BEGINNING WITH THE FAIRLY LARGE BLOOD STAIN, WERE YOU ABLE TO DETERMINE AGAIN THE TYPE OF BLOOD THAT COULD HAVE CAUSED THAT STAIN?

A. YES, I DID.

Q. AND WHAT WAS THAT BLOOD TYPE?

A. THE STAIN EXHIBITED A AND B ANTIGENIC ACTIVITY AS DID A CONTROL SAMPLE FROM THAT BED SHEET.

IF THE B ANTIGENIC ACTIVITY IN THE BLOOD STAIN WAS A RESULT OF THE BACKGROUND OF THE CONTROL SAMPLE, IF YOU WILL, THEN THAT BLOOD STAIN WOULD BE CONSISTENT WITH NICOLE PARKER.

Q. NOW, DID YOU ALSO CONDUCT AN EXAMINATION AGAIN WITH RESPECT SPECIFICALLY TO THE BED SHEET WHETHER OR NOT THERE WAS ANY EVIDENCE OF ANY SPERMATOZOA ON THESE PARTICULAR STAINS?

A. YES.

Q. AND WHAT WERE YOUR FINDINGS IN THAT RESPECT?

A. THAT THERE WERE A NUMBER OF SMALL STAINS EXHIBITING POSITIVE ACID PHOSPHATASE ACTIVITY CONSISTENT WITH SEMEN.

A SELECTION OF A LIMITED NUMBER OF THESE STAINS REVEALED THE PRESENCE OF SPERMATOZOA FRAGMENTS.

Q. AGAIN, WHAT DOES THAT MEAN IN LAYMEN'S TERMS?

A. THAT MEANS THAT A MALE HAD EJACULATED AND DEPOSITED SEMEN DIRECTLY ON THE SHEET OR IT WAS DEPOSITED BY SOME OTHER MEANS.

MR. COUWENBERG: MAY I HAVE JUST A MOMENT, YOUR HONOR?

THE COURT: YES.

Q. BY MR. COUWENBERG: IF WE COULD GO BACK FOR A MOMENT TO THE BLUE SILK KIMONO, IF YOU REMEMBER WHERE WERE THE STAINS LOCATED ON THE KIMONO?

A. THE PRIMARY STAIN THAT WAS EXAMINED WAS APPROXIMATELY HERE TO MY LEFT SIDE APPROXIMATELY AT THE BASE OF MY RIB CAGE IF I WERE TO HAVE WORN THAT KIMONO AND IT WAS MY SIZE.

Q. JUST FOR THE RECORD, YOU ARE EXTENDING YOUR RIGHT HAND OVER WHAT APPEARS TO BE YOUR LEFT BREAST JACKET POCKET; IS THAT CORRECT?

A. YES.

Q. WOULD THERE ANY OTHER STAINS?

A. THERE WAS A STAIN DOWN NEAR THE LOWER HEM WHICH DISPLAYED SIMILAR CHARACTERISTICS TO THE STAIN, THE LARGER STAIN, UP NEAR THE LAPEL.

Q. ON WHAT SIDE OF THE GARMENT?

A. ON THE SAME SIDE, THE LEFT SIDE.

Q. NOW, IF I COULD DRAW YOUR ATTENTION TO WHAT HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 6 WHICH DEPICTS A SERIES OF PHOTOGRAPHS.

SPECIFICALLY IF I COULD HAVE YOU LOOK AT

PEOPLE'S 6A AND B, WHICH APPEARS TO DEPICT SOME TISSUE PAPER ON TOP OF A TOILET BASIN LID.

DO YOU SEE IT?

A. YES, I DO.

Q. WERE YOU ALSO ASKED TO CONDUCT AN EXAMINATION OF SOME TOILET TISSUE?

A. YES.

Q. AND DID YOU, IN FACT, DO THAT?

A. YES, I DID.

Q. WHAT WERE YOUR FINDINGS?

A. THE TISSUE PAPER BORE SEMEN STAINS, AND HIGH AMYLASE ACTIVITY.

MR. COUWENBERG: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. BY MR. COUWENBERG: I AM HOLDING IN MY HANDS NOW, MR. MOORE, WHAT APPEARS TO BE AN ANALYZED EVIDENCE ENVELOPE L.A.P.D.

WOULD YOU PLEASE TAKE A LOOK AT IT. IT IS STILL SEALED.

DO YOU RECOGNIZE THAT?

A. YES, I DO.

Q. AND HOW DO YOU RECOGNIZE THAT?

A. IT BEARS MY SIGNATURE, MY SERIAL NUMBER, AS WELL AS A YELLOW SEAL ATOP THE BACK FLAP AND ALONG THE LEFT RIGHT SIDE.

Q. WITHOUT OPENING IT, WHAT DO YOU EXPECT TO FIND INSIDE?

A. A PAPER BINDLE CONTAINING A WAD OF TISSUE

PAPER.

Q. AND WOULD THAT BE THE TISSUE PAPER YOU WERE ASKED TO EXAMINE?

A. YES.

Q. WITH RESPECT TO YOUR FINDINGS --

MAY THIS BE MARKED PEOPLE'S 8 I BELIEVE, YOUR HONOR?

THE COURT: BE SO MARKED.

MR. COUWENBERG: THANK YOU.

Q. BY MR. COUWENBERG: WITH RESPECT TO YOUR FINDINGS TO PEOPLE'S 8, WERE YOU ABLE TO RELATE THAT TO THE TWO BLOOD STAINS WHICH YOU HAD BEEN ASKED TO ANALYZE EARLIER AS BELONGING TO NICOLE PARKER AND MR. HOOMAN PANAH?

A. YES.

Q. WERE YOU ABLE TO MAKE ANY FINDINGS?

A. YES.

Q. WHAT WERE THOSE FINDINGS?

A. THE TISSUE PAPER BORE AB AND H ABO ANTIGENS, H BEING CONSISTENT WITH TYPE O OR CONSISTENT WITH ANY OF THE OTHER BLOOD TYPES, IN THAT THE TYPE H ANTIGEN IS GENERIC, AND WHEN A PERSON SUBSEQUENTLY DEVELOPS TYPE A OR TYPE B ANTIGENIC ACTIVITIES AS A RESULT OF THEIR GENETIC CODE, SOME SITES ON THE RED BLOOD CELL REMAIN TYPE H, AND THOSE ARE SHED IN FLUIDS SUCH AS SEMEN AND SALIVA.

FURTHER, THE STAIN ON THE TISSUE PROVIDED PGM SUBTYPE RESULTS OF TWO PLUS ONE PLUS.

STRIKE THAT. STRIKE THAT. TWO PLUS ONE PLUS. DID I SAY THAT?

Q. WHAT DOES THAT MEAN?

A. THAT MEANS THAT THE PGM SUBTYPE WAS CONSISTENT WITH HOOMAN PANAH, THAT THE B AND H ANTIGENIC ACTIVITY WAS ALSO CONSISTENT WITH HIM, AS HE HAS BEEN DETERMINED TO BE A SECRETER OF THOSE ANTIGENS.

THE A ANTIGENIC ACTIVITY WAS FOREIGN TO HIM AND COULD HAVE ORIGINATED IN THE SALIVA OR AMYLASE THAT WAS ALSO PRESENT IN THE TISSUE.

Q. NOW, DID YOU RECEIVE AT ANY TIME A CORONER'S KIT COMMONLY REFERRED TO AS A SEXUAL ASSAULT KIT FOR EXAMINATION?

A. YES.

Q. AND WERE YOU ABLE TO EXAMINE THE KIT?

A. YES, I DID.

Q. SPECIFICALLY TELL US WHAT DID YOU EXAMINE?

A. EXCUSE ME A MOMENT.

I EXAMINED WHAT WAS BOOKED INTO EVIDENCE AS ITEM 67.

I SUBSEQUENTLY DESCRIBED THEM ALPHABETICALLY A THROUGH K AS FOLLOWS:

VAGINAL SWABS, VAGINAL SLIDES, EXTERNAL GENITAL SWABS, EXTERNAL GENITAL SLIDES, ORAL SWABS, ORAL SLIDES, ANAL SWABS, ANAL SLIDES, RIGHT NIPPLE SWABS, LEFT NIPPLE SWABS AND BODY SURFACE CONTROL SWABS.

Q. OKAY.

IF WE CAN, LET'S START WITH ORAL SWABS AND ANAL SWABS.

DID YOU CONDUCT ANY KIND OF AN EXAMINATION WITH

RESPECT TO THOSE PARTICULAR SWABS?

A. YES.

Q. COULD YOU TELL US OF YOUR FINDINGS, PLEASE.

A. IT WAS DETERMINED THAT SEMEN WAS NOT DETECTED ON THOSE ITEMS.

Q. WHAT ABOUT THE REST OF THE ITEMS?

A. EACH OF THE ITEMS DESCRIBED IN THE SEXUAL ASSAULT KIT PROVIDED NO EVIDENCE OF THE PRESENCE OF SEMEN.

Q. DID YOU CONDUCT ANY OTHER TESTS WITH RESPECT TO THE ITEMS YOU HAVE MENTIONED?

A. YES.

I CONDUCTED AN EXAMINATION FOR THE PRESENCE OF SALIVA ON THE RIGHT AND LEFT NIPPLE SWABS.

Q. AND YOUR FINDINGS?

A. NONE WAS DETECTED.

MR. SHEAHEN: I AM SORRY, YOUR HONOR.

I MISSED WHAT THE WITNESS SAID NONE DETECTED ON WHAT SWABS.

THE COURT: RIGHT AND LEFT NIPPLE SWABS.

Q. BY MR. COUWENBERG: DID ANY OF YOUR TESTS YIELD POSITIVE FOR THE PRESENCE OF ACID PHOSPHATASE?

A. I WOULD HAVE TO REFER TO MY BENCH NOTES. JUST A MOMENT.

THE EXTRACT TAKEN FROM AN ANAL SWAB PRODUCED A POSITIVE ACID PHOSPHATASE RESULT.

Q. AND WHAT DOES THAT MEAN?

A. THAT IS A POSITIVE RESULT INDICATIVE OF THE PRESENCE OF SEMEN.

Q. NOW, DID YOU CONDUCT ANY FOLLOW-UP TESTS PRIOR TO THAT PARTICULAR EXAMINATION?

A. I AM SORRY. DID I DO ADDITIONAL TESTS ON THAT ITEM?

Q. YES.

A. I PERFORMED WHAT IS KNOWN AS A P30 TEST.

Q. PLEASE TELL US WHAT THAT IS.

A. THE P30 TEST IS AN EXAMINATION WHICH IS CONCLUSIVE FOR A SEMEN SPECIFIC PROTEIN DESCRIBED AS P30 BY ONE OF ITS DISCOVERERS, DR. SENSABAUM.

IT IS A PROTEIN THAT IS FOUND ONLY IN SEMEN AND IN NO OTHER BODILY FLUID, WHETHER IT BE FROM A MAN, A WOMAN OR A CHILD.

MR. COUWENBERG: MAY I HAVE JUST A MINUTE, YOUR HONOR.

Q. BY MR. COUWENBERG: IF WE COULD GO BACK TO THE ORAL SWAB.

YOU EXAMINED THE ORAL SWAB; IS THAT CORRECT?

A. YES.

Q. AND AGAIN WHAT WERE YOUR FINDINGS?

A. THAT NO SPERM WERE DETECTED IN A PREPARED SLIDE FROM A SWAB OR THE SLIDE PREPARED BY THE CORONER'S CRIMINALIST.

BUT IT DID YIELD A POSITIVE ACID PHOSPHATASE RESULT.

Q. WAS THERE ANY INDICATION OF AMYLASE IN THE ORAL SWABS?

A. THE TEST FOR AMYLASE DOES NOT ORDINARILY OCCUR

IN AN ORAL SWAB BECAUSE, OF COURSE, SALIVA IS GENERATED IN THE MOUTH AND AMYLASE WOULD BE DETECTED.

Q. NOW, JUST IF WE COULD RECAP, STARTING WITH THE BED SHEET AND THE BLUE KIMONO, THE TESTS THAT YOU PERFORMED ON BOTH ITEMS, HOW WOULD YOU RELATE THAT TO THE TWO BLOOD SAMPLES THAT WERE GIVEN TO YOU THAT CAME FROM THE VICTIM IN THIS CASE NICOLE PARKER AND THE DEFENDANT, MR. PANAH?

MR. SHEAHEN: OBJECTION.

ASKED AND ANSWERED.

THE COURT: OVERRULED.

YOU CAN ANSWER.

THE WITNESS: MAY I GO TO THE BOARD?

Q. BY MR. COUWENBERG: YES.

A. FIRST, REFERRING TO PEOPLE'S 13, THE DIAGRAM DESCRIBING THE BLOOD REPORT ON THE BED SHEET, WE HAVE DEMONSTRATED THE PRESENCE OF HUMAN BLOOD.

WE HAVE A AND B ANTIGENS, WHICH IN AND OF THEMSELVES EXCLUDE EACH OF THOSE TWO PEOPLE.

IF THIS WAS A MIXTURE OF ABO ANTIGEN TYPES AND WE CONSIDER THE PGM SUBTYPE AS UNIQUE, IT IS CONSISTENT WITH NICOLE PARKER WHICH IS DESCRIBED AS ITEM 68.

Q. IF I CAN JUST STOP YOU FOR A MINUTE.

SO THE BLOOD ON THE BED SHEET COULD HAVE COME FROM NICOLE PARKER; IS THAT CORRECT?

A. YES.

MR. SHEAHEN: OBJECTION.

ASKED AND ANSWERED.

THE COURT: OVERRULED.

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Q. BY MR. COUWENBERG: GO ON.

A. SIMILARLY, BASED UPON THE ABO ANTIGENIC ACTIVITY OF A AND B, IF THAT WERE FROM A SINGLE SOURCE, BOTH PANAH AND PARKER COULD BE EXCLUDED AS CONTRIBUTORS.

BUT IF THAT IS A MIXTURE OF BODILY FLUIDS, AND WE CONSIDER THE PGM SUBTYPE AS UNIQUE, AGAIN IT IS CONSISTENT WITH NICOLE PARKER.

MOVING TO PEOPLE'S 14, THE SEXUAL ASSAULT REPORT, FOR ITEM 55 --

MR. SHEAHEN: MAY I SEE WHAT THE WITNESS IS POINTING TO?

THE WITNESS: -- SEMEN WAS DETECTED, SALIVA WAS PRESENT.

WE HAVE AB AND H ANTIGENIC ACTIVITY, WHICH IN AND OF ITSELF IF IT WERE FROM A SINGLE SOURCE WOULD EXCLUDE BOTH PARKER AND PANAH.

IF WE CONSIDER IT AS A MIXTURE SUCH THAT SOME OF THE ANTIGENS WERE PROVIDING THE SEMEN BY MR. PANAH, THAT IS B AND H ANTIGENS AS DESCRIBED HERE IN ITEM 73, THE SALIVA SWAB FOR PANAH, THEN WE COULD ASSIGN PERHAPS THAT THE A ANTIGENIC ACTIVITY WAS CONTRIBUTED IN THE SALIVA, THAT ANTIGENIC ACTIVITY BEING CONSISTENT WITH NICOLE PARKER.

THAT IS THE SIMILAR SET OF RESULTS FOR ITEM 60, EXCEPT WE HAVE NO SEMEN PRESENT.

YET WE HAVE SALIVA PRESENT AND WE CONTINUE TO HAVE A MIXTURE OF AB AND H ANTIGENS.

SINCE THIS WAS ON THE EDGE OF A BLOOD STAIN DETERMINED TO HAVE ORIGINATED PERHAPS FROM NICOLE PARKER,

THE B ANTIGENIC ACTIVITY AT THE VERY LEAST WOULD BE FOREIGN AND PERHAPS COULD BE ASSIGNED TO THE SALIVA RESULT OF AMYLASE ACTIVITY DETECTED IN THAT STAIN.

THAT WOULD BE CONSISTENT WITH PANAH AND IT COULD HAVE ORIGINATED FROM HIM.

THE PGM SUBTYPE, AGAIN CONSIDERING THAT AS UNIQUE, FURTHER DEMONSTRATES IN PART THAT AT LEAST PART OF THAT STAIN ORIGINATED FROM NICOLE PARKER.

THANK YOU.

MR. COUWENBERG: YOUR HONOR, NOTING THE HOUR, PERHAPS THIS MIGHT BE A GOOD TIME TO BREAK.

THE COURT: I THINK SO.

ALL RIGHT. LADIES AND GENTLEMEN, WE WILL PICK IT UP AGAIN TOMORROW MORNING AT 10:00.

PLEASE REMEMBER THE ADMONITION NOT TO DISCUSS THIS CASE.

DO NOT FORM ANY OPINION ABOUT IT.

PLEASE ALSO DO NOT READ ANY NEWSPAPERS OTHER THAN AS I INDICATED EARLIER THIS MORNING.

HAVE A NICE EVENING.

MR. SHEAHEN: LOCAL NEWS ON TV.

THE COURT: AGAIN ANY OTHER NEWS, TV, RADIO, YOU SHOULD COMPLETELY DISREGARD.

DO NOT WATCH ANY STORIES OR LISTEN TO ANY STORIES PERTAINING TO THIS CASE.

HAVE A NICE EVENING.

WE WILL SEE YOU BACK HERE AT 10:00 IN THE MORNING.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW E HON. SANDY KRIEGLER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
PEOPLE,
VS. NO. BA090702
HOOMAN ASHKAN PANAH,
DEFENDANT.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FILED

DECEMBER 8, 1994

VOLUME 20

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PAGES 2037 THROUGH 2219

MR. COUWENBERG: THANK YOU, YOUR HONOR.

WILLIAM MOORE,

CALLED AS A WITNESS BY THE PEOPLE, HAVING PREVIOUSLY BEEN SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION (RESUMED)

BY MR. COUWENBERG:

Q MR. MOORE, YESTERDAY WE COVERED A LOT OF TECHNICAL GROUND.

IF I CAN JUST START ASKING YOU ABOUT ONE PARTICULAR AREA, SPECIFICALLY RELATED TO BLOOD TYPING.

WOULD YOU PLEASE, FOR THE BENEFIT OF THE JURY, EXPLAIN THE ABO BLOOD TYPING SYSTEM THAT WE HAVE?

A MAY I USE THE BOARD?

Q YES.

A THANK YOU.

MR. SHEAHEN: OBJECTION. ASKED AND ANSWERED, YOUR HONOR.

THE COURT: OVERRULED. IT'S NEVER BEEN EXPLAINED.

THE WITNESS: THE PRIMARY MEANS FOR IDENTIFYING AN INDIVIDUAL IN A FORENSIC LABORATORY IS BY THEIR ABO TYPE.

IN THE ABO SYSTEM, THERE ARE FOUR ABO TYPES POSSIBLE IN THIS SYSTEM.

AS YOU MAY KNOW THERE ARE TYPE A, TYPE B, TYPE AB, AND TYPE O.

AS IT SUBSTANTIALLY RELATES TO THE WORK THAT WE DO, THERE ARE SPECIFIC FUNCTIONAL GROUPS, IF YOU WILL, LITTLE FLAGS THAT STAND UP ON TOP OF THE SURFACE OF THE RED BLOOD CELL AS WELL AS OTHER TISSUES THAT IDENTIFY THE PARTICULAR ABO TYPE.

REPRESENTING OVER HERE, IN THE LEFT-HAND CORNER OF THE RED BLOOD CELL, ON EACH RED BLOOD CELL THERE ARE LITTLE PROTRUSIONS, AS I INDICATED. THESE PROTRUSIONS BEING THE MATERIALS WHICH CONSTITUTE THE PARTICULAR ABO TYPE.

FOR TYPE A INDIVIDUALS, ONE CAN EXPECT A LARGE NUMBER OF A-TYPE ANTIGENS, AND PERHAPS TO A LESSER DEGREE, SOME NUMBER OF H ANTIGENS.

THE REASON FOR THIS IS BECAUSE THE TYPE O BLOOD TYPE IS REALLY A GENERIC BLOOD TYPE. INDIVIDUALS WHO POSSESS TYPE O BLOOD HAVE EXCLUSIVELY TYPE H ANTIGENS ON THE SURFACE OF THE RED BLOOD CELLS.

THIS GENERIC BLOOD TYPE, AS RED BLOOD CELLS ARE FORMED IN THE HUMAN BODY, MAY GIVE RISE TO THE OTHER ANTIGEN TYPES. IN OTHER WORDS, AN ADDED ELEMENT IS ADDED TO THAT PROTRUSION.

AND I IMAGINE A CHILD'S TOY WHERE LITTLE STICKS ARE PUT TOGETHER ON LITTLE WHEELS. IT'S BEEN

SO LONG I FORGET.

BUT SUFFICE TO SAY THAT H WILL GIVE RISE TO A AND B, AND SIMILARLY IN AN AB INDIVIDUAL, AB ANTIGENS ON THE SURFACE OF THOSE CELLS, AND, AGAIN, TO A LESSER DEGREE, SOME H ANTIGENS MAY REMAIN ON THE SURFACE OF THOSE CELLS.

BEYOND WHAT APPEARS ON THE SURFACE OF RED BLOOD CELLS AND OTHER TISSUES, THERE'S THE APPEARANCE OF THESE ABO ANTIGENS AND OTHER BODILY FLUIDS SUCH AS SALIVA, SEMEN, VAGINAL FLUID AND EVEN SWEAT.

MR. CHAIS: OBJECTION NARRATIVE, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: IN THE FORENSIC LABORATORY WE CLASSIFY INDIVIDUALS AS SECRETORS OR NONSECRETORS.

IF THEY ARE SECRETORS, THESE ANTIGENS APPEAR IN THESE OTHER BODILY FLUIDS. IF THEY'RE NONSECRETORS, THEY DO NOT.

A INDIVIDUALS WILL PROVIDE TO THOSE OTHER SECRETIONS, A ANTIGENS AND H ANTIGENS, PERHAPS.

SIMILARLY B INDIVIDUALS WILL PROVIDE B AND H ANTIGENS TO THAT INDIVIDUAL'S SECRETIONS. AB WHOLE BLOOD TYPES WILL PROVIDE AB AND H ANTIGENS.

AND, OF COURSE, BECAUSE THE O INDIVIDUAL EXCLUSIVELY HAS H ANTIGENS PRESENT IN THEIR SYSTEM, H ANTIGENS WILL BE THE ONLY ANTIGEN TYPES PRESENT IN THOSE SECRETIONS.

IT'S IMPORTANT TO KEEP IN MIND THAT THE APPEARANCE OF H ANTIGENS IN INDIVIDUALS OTHER THAN THE TYPE O BLOODED INDIVIDUAL HAS A SPECIAL RELATIONSHIP AS WELL.

IN DECREASING QUANTITY, IF YOU WILL, THE MOST H ANTIGENS WILL APPEAR IN THE TYPE O INDIVIDUAL, LESS INTENSIVE IN THE TYPE B INDIVIDUALS. THE ARROW OPEN TO THE LEFT MEANING LESS THAN TO THE RIGHT. THE A INDIVIDUAL AND THEN FINALLY THE AB INDIVIDUAL.

THAT IS BECAUSE MOST OF THE SITES ON THE SURFACE OF THE CELL AND SUBSEQUENTLY WHAT APPEARS IN BODILY SECRETIONS ARE ACCOUNTED FOR BY THE A AND THE B MARKERS.

IN TERMS OF ANTIBODIES -- WHICH IS ANOTHER IMPORTANT CONSIDERATION IN THE FORENSIC LABORATORY, AND I WON'T DIAGRAM IT ANY FURTHER -- PERSONS WITH TYPE A WHOLE BLOOD WILL POSSESS TYPE B ANTIBODIES. TYPE B INDIVIDUAL WILL POSSESS TYPE A ANTIBODIES. MEANING THAT THERE WILL BE A REACTION BETWEEN THOSE INDIVIDUALS BY THE WAY YOU MIX THEM.

AND THE AB INDIVIDUAL, BECAUSE THAT INDIVIDUAL HAS BOTH A AND B ANTIGENS PRESENT IN THEIR BLOOD WOULD NOT HAVE THE COMPLIMENTARY ANTIBODIES, ELSE THEY WOULD REACT TO THEMSELVES AND THEIR BLOOD WOULD CLOT WITHIN THEIR BLOODSTREAM.

THE O INDIVIDUAL HAS ANTIBODIES TO BOTH A AND B ANTIGENS.

BY MR. COUWENBERG:

Q THANK YOU, MR. MOORE.

WITHIN THE SYSTEM, THE ABO SYSTEM, YOU'VE INDICATED THERE ARE SUBTYPES; IS THAT CORRECT?

A IN TERMS OF ENZYMES, PGM ENZYMES, YES.

Q FOR THE BENEFIT OF THE JURY, COULD YOU EXPLAIN THE PGM SUBTYPES?

A PGM, AS I MENTIONED YESTERDAY, IS SHORT FOR A MUCH LONGER TERM THAT THE COURT REPORTER DOESN'T NEED REPEATED.

THE PGM ENZYME ORIGINATES FROM CODED SEQUENCES ON CHROMOSOMES.

FOR A GIVEN INDIVIDUAL, THERE ARE TWO LOCATIONS ON A CHROMOSOME, COMPLIMENTARY CHROMOSOMES, IF YOU WILL, WHERE THIS CAN BE CODED FOR.

THE PGM ENZYME IS WHAT IS KNOWN AS A CO-DOMINANT GENE. MEANING THAT IF THE LOCATIONS ON EACH OF THOSE TWO CHROMOSOMES DEMONSTRATE DIFFERENT STRUCTURES, BOTH OF THOSE STRUCTURES WILL BE DEMONSTRATED IN A PERSON'S BODILY FLUIDS.

IMAGINE FOR A MOMENT YOU HAVE --

MR. SHEAHEN: OBJECTION. NONRESPONSIVE, YOUR HONOR.

THE COURT: OVERRULED.

GO AHEAD.

THE WITNESS: PERHAPS IT WOULD BE BETTER DESCRIBED IF I HAD A PHOTOGRAPH.

MR. COUWENBERG: YOUR HONOR, MAY THIS BE

MARKED PEOPLE'S 12, I BELIEVE, FOR IDENTIFICATION AT THIS TIME?

THE COURT: PEOPLE'S 12.

BY MR. COUWENBERG:

Q WOULD YOU PLEASE EXPLAIN WHAT THAT PICTURE DEPICTS, MR. MOORE.

A IN GENERIC TERMS, THIS IS WHAT'S KNOWN AS AN ELECTROPHEROGRAM, E-L-E-C-T-R-O-P-H-E-R-O-G-R-A-M.

THIS IS THE METHOD BY WHICH WE'RE ABLE TO IDENTIFY A PERSON'S PGM SUBTYPE

THIS ACTUALLY WAS GENERATED AS A RESULT OF AN INVESTIGATION OF THIS CASE.

AND I WANT YOU TO NOTE THAT THE D.R. NUMBER IS INCORRECT. THAT SHOULD BE "93" INSTEAD OF "94" AT THE TOP.

THIS IS A GEL DEPICTED IN THIS PHOTOGRAPH, AND WHAT HAPPENS AT THE OUTSET OF THE ANALYSIS, BODILY FLUIDS ARE ABSORBED UPON SMALL THREADS.

THE SMALL SECTIONS OF THREADS ARE PUT IN SMALL SLOTS IN THE GEL, AND THEN A CURRENT IS PASSED ACROSS THE GEL WHICH PUSHES THESE BANDS ACROSS THE SURFACE TOWARDS THE OTHER SIDE.

AFTER APPROXIMATELY FOUR HOURS HAVE PASSED, THE APPLICATION OF THIS CURRENT IS INTERRUPTED, AND SUBSEQUENTLY A REACTION MIXTURE IS LAID ACROSS THE TOP OF IT SO WE CAN SEE ACTUALLY WHAT HAS TRANSPIRED IN THOSE FOUR HOURS.

THIS SECOND LANE HERE IDENTIFIES THE FOUR-BAND STANDARD, SHOWS A BAND HERE, A BAND HERE, A BAND HERE, AND A BAND HERE.

THERE ARE OTHER BANDS ABOVE IT WHICH REFLECTS A DIFFERENT LOCATION ON ONE'S CHROMOSOME WHICH PERFORMS A SIMILAR ACTIVITY, BUT THE PGM ENZYME WHICH EXHIBITS THE MOST VARIATION IS WHAT'S SHOWN IN THOSE FIRST FOUR BANDS.

THIS FOUR-BAND STANDARD REPRESENTS A MIXTURE OF BLOOD SAMPLES THAT WE MIX ON THE MORNING OF ANALYSIS.

THIS PROVIDES US WITH A CLEAR OPPORTUNITY EVERY THIRD LANE TO EXAMINE SIDE BY SIDE A QUESTION STAIN WITH A KNOWN STAIN.

YOU WOULD NEVER SEE THIS FOUR-BANDING IN ONE GIVEN INDIVIDUAL. RATHER YOU WOULD SEE SOMETHING LIKE THIS BANDING PATTERN HERE.

AND EVEN THIS BANDING PATTERN IS CHARACTERIZED NUMERICALLY. THE ONE CLOSEST TO THE ORIGIN OR WHERE THE THREAD WAS PLACED IS KNOWN AS A ONE MINUS. AND AS WE MOVE AWAY FROM THE THREAD WE HAVE A ONE PLUS, A TWO MINUS, AND A TWO PLUS.

IN LANE NO. 1, WE HAVE A TWO PLUS AND A ONE PLUS SHOWN.

IN TERMS OF INHERITANCE, THE TWO PLUS COULD HAVE ORIGINATED FROM THE FATHER. THE ONE PLUS COULD HAVE BEEN INHERITED FROM THE MOTHER, OR ELSE EACH OF THOSE TWO WAS INHERITED FROM THE FATHER AND

THE MOTHER AND THEY WERE EXPRESSED ACCORDINGLY.

THIS IS AN EXPRESSION OF INHERITANCE. IT'S HIGHLY CHARACTERISTIC OF AN INDIVIDUAL.

AS YOU CAN SEE BY THIS ELECTROPHEROGRAM, WE CAN CLEARLY ELUCIDATE THE DISTRIBUTION.

THANK YOU.

Q BEFORE YOU RESUME YOUR SEAT, IF I COULD DIRECT YOUR ATTENTION NOW TO WHAT HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 13 AND 14 ON THE OTHER BOARD.

A YES.

Q LET'S START WITH PEOPLE'S 14.

ON THE TOP THERE ARE VARIOUS ITEMS REFLECTED. AND NEXT TO THEM EXPLANATIONS AS TO WHAT THEY ARE.

IF WE START, FOR EXAMPLE, WITH ITEM 35, WHICH IS PANAH WHOLE BLOOD SAMPLE, THAT WOULD BE THE DEFENDANT IN THIS MATTER. THEN WE GO DOWN TO ITEM 35, IT INDICATES UNDER ABO H, B.

DO YOU SEE THAT?

A YES.

Q UNDER PGM SUBTYPE, TWO PLUS ONE.

IS THAT CORRECT?

A TWO PLUS, ONE PLUS.

Q TWO PLUS, ONE PLUS?

A YES.

Q CORRECT. NOW WHEN WE LOOK AGAIN AT ITEM 55, WHICH INDICATES A BED SHEET BEARING STAINS, WE NOTICE UNDER PGM SUBTYPE, NA. WHAT DOES THAT MEAN,

NOT APPLICABLE?

A NO ACTIVITY.

Q NO ACTIVITY. ALL RIGHT.

LET'S GO TO ITEM 52, TISSUE BEARING STAINS.

AGAIN UNDER PGM SUBTYPE THERE'S TWO PLUS, ONE PLUS.

WHAT DOES THAT MEAN?

A THAT MEANS THAT THE QUESTION STAIN FOUND UPON THE TISSUE WAS CONSISTENT WITH THE WHOLE BLOOD SAMPLE FOR PANAH.

Q LET ME JUST MARK WITH RESPECT TO ITEM 35 WHICH IS THE ONE WHOLE BLOOD SAMPLE PANAH, I AM MARKING NOW THE WORD "PANAH".

AND WITH RESPECT TO ITEM 52 AGAIN UNDER SUBTYPE TWO PLUS, ONE PLUS, THAT WOULD ALSO BE CONSISTENT WITH THE PGM SUBTYPE OF MR. PANAH; IS THAT CORRECT?

A YES. AND THAT'S GRAPHICALLY REPRESENTED IN THIS ELECTROPHEROGRAM.

Q NOW, WITH RESPECT TO AGAIN PEOPLE'S 14, ITEM 68, ONE WHOLE BLOOD SAMPLE PARKER.

UNDER PGM SUBTYPE WE HAVE ONE PLUS, ONE MINUS; IS THAT CORRECT?

A YES.

Q AND WITH RESPECT TO ITEM 60, WHICH APPEARS TO BE BLUE SILK KIMONO BEARING STAINS, UNDER PGM SUBTYPE ONE PLUS, ONE MINUS, WHAT DOES THAT

MEAN?

A THAT MEANS THAT THE QUESTION STAIN FOUND ON THE BLUE SILK KIMONO IS CONSISTENT WITH NICOLE PARKER.

Q THANK YOU.

IS THERE A SYSTEM WITHIN THE ABO BLOOD TYPING SYSTEM THAT HAS STATISTICAL PERCENTAGES AS IT RELATES TO A PARTICULAR BLOOD TYPE TO THE GENERAL POPULATION?

A YES.

Q NOW, SPECIFICALLY WITH RESPECT TO MR. PANAH'S BLOOD TYPE -- BY THE WAY WHAT IS HIS BLOOD TYPE?

A TYPE B.

Q WHAT WOULD BE, IF YOU KNOW, THE STATISTICAL PERCENTAGES OF THAT PARTICULAR BLOOD TYPE AS IT RELATES TO THE GENERAL POPULATION?

A APPROXIMATELY 16 IN A HUNDRED INDIVIDUALS IN THE GENERAL POPULATION POSSESS TYPE B WHOLE BLOOD.

Q NOW, WITH RESPECT TO NICOLE PARKER, WHAT WAS HER BLOOD TYPE?

A TYPE A.

Q AND AGAIN IN TERMS OF STATISTICAL PERCENTAGES, WHAT WOULD THE STATISTICAL PERCENTAGE BE AS IT IS RELATES TO NICOLE PARKER IN TERMS OF THE GENERAL POPULATION?

A APPROXIMATELY 33 IN ONE HUNDRED

INDIVIDUALS POSSESS TYPE A BLOOD.

Q I AM GOING TO SHOW YOU NOW A PHOTOGRAPH. MAY THIS BE MARKED, YOUR HONOR, AT THIS TIME AS PEOPLE'S 15-A?

THE COURT: YES.

BY MR. COUWENBERG:

Q WOULD YOU PLEASE, IF YOU CAN, IDENTIFY THIS PARTICULAR PHOTOGRAPH?

A THIS IS A PHOTOGRAPH OF WHAT I BELIEVE HAS BEEN PREVIOUSLY DESCRIBED AS PEOPLE'S 10, THE BED SHEET BOOKED AS ITEM NO. 55.

Q NOW, ON THAT PARTICULAR PHOTOGRAPH, I BELIEVE IT DEPICTS WHAT APPEARS TO BE BLOOD STAINS; IS THAT CORRECT?

A YES.

Q I AM GOING TO SHOW YOU NOW A PICTURE WHICH IS PART OF PEOPLE'S 2-A THROUGH J AND SPECIFICALLY I'D LIKE YOU TO LOOK AT PICTURE H?

A YES.

Q DOES THAT APPEAR TO BE -- WHEN I SAY "DOES THAT APPEAR TO BE," I'M REFERRING TO THE PICTURE ITSELF WHICH DEPICTS WHAT APPEARS TO BE A BLOOD STAIN.

DOES THAT APPEAR TO BE THE SAME BLOOD STAIN THAT YOU EXAMINED?

A YES.

Q AND THAT'S DEPICTED IN PEOPLE'S 15-A?

A YES.

Q NOW, DID YOU CONDUCT AN EXAMINATION WITH RESPECT TO THE STAIN AS DEPICTED IN PEOPLE'S 15-A?

A YES.

Q AND COULD YOU TELL US EXACTLY WHAT YOU DID WITH RESPECT TO YOUR EXAMINATION?

A I FIRST ESTABLISHED THAT THAT STAIN WAS A BLOOD STAIN OF HUMAN ORIGIN. I THEN ESTABLISHED THAT THAT STAIN POSSESSED TYPE A AND B ANTIGENIC ACTIVITY.

AND FURTHER, AS IS UNIQUE TO THIS INVESTIGATION, THAT THAT STAIN POSSESSES PGM SUBTYPE ONE PLUS, ONE MINUS.

Q THAT WOULD BE THE SAME PGM SUBTYPE THAT YOU FOUND IN NICOLE PARKER'S BLOOD; IS THAT CORRECT?

A YES.

Q NOW, YOU INDICATED THAT IT HAD AB MARKERS; IS THAT CORRECT?

A THAT WAS THE INDICATION OF THE TEST.

Q NOW, COULD YOU SAY THEN -- COULD YOU RENDER AN OPINION THAT THE TYPE A MARKER COULD HAVE COME FROM NICOLE PARKER?

A YES.

Q WHAT ABOUT THE TYPE B MARKER THAT YOU ALSO FOUND?

A THE TYPE B MARKER WAS ALSO PRESENT IN THE CONTROL SAMPLE TAKEN FROM A REMOTE PORTION OF THE BED SHEET, ONE THAT DID NOT BEAR ANY VISIBLE STAINS.

THE INDICATION IS THAT THE SHEET ITSELF

WAS CONTAMINATED AT THE LOCATION WHERE THIS BLOOD STAIN WAS DEPOSITED, AND THUS THAT WAS THE ORIGIN OF THE B ANTIGENIC ACTIVITY.

Q NOW, KNOWING MR. PANAH'S BLOOD TYPE, WOULD THAT BE CONSISTENT WITH HIS BLOOD TYPE?

A MOREOVER BECAUSE IT IS KNOWN THAT HE'S A SECRETOR OF B ANTIGENS, IT IS CONSISTENT WITH MR. PANAH.

Q I AM GOING TO SHOW YOU NOW A PICTURE.

MAY THIS BE MARKED YOUR HONOR AT THIS TIME PEOPLE'S 15-B?

THE COURT: THAT'S FINE.

BY MR. COUWENBERG:

Q COULD YOU PLEASE TAKE A LOOK AT THIS PICTURE, AND AGAIN FOR THE BENEFIT OF THE JURY EXPLAIN WHAT THAT PICTURE DEPICTS?

A THIS PHOTOGRAPH DEPICTS ANOTHER PORTION OF THE BED SHEET IDENTIFYING TWO STAINS THAT LATER SHOWED THE PRESENCE OF SPERMATOZOA.

THREE OF THE 14 STAINS THAT WERE SCATTERED OVER A WIDE AREA, ALL OF WHICH PROVIDED POSITIVE ACID PHOSPHATASE RESULTS.

Q WHAT DOES THAT MEAN WHEN YOU SAY PROVIDED POSITIVE -- WHATEVER THAT WORD WAS?

A THAT MEANS THAT THOSE STAINS DEMONSTRATED THAT SEMINAL FLUID MAY BE PRESENT IN THOSE STAINS.

Q NOW, WERE YOU ABLE TO TRACE, KNOWING

WHAT THE BLOOD TYPE OF THE VICTIM WAS AND THE BLOOD TYPE OF THE DEFENDANT IN THIS MATTER, WERE YOU ABLE TO TRACE IT BACK TO EITHER THE VICTIM OR THE DEFENDANT?

A SOMEWHAT.

Q AND HOW DID YOU DO THAT?

A THE STAINS SHOWED ON THIS PHOTOGRAPH, NOT ONLY DEMONSTRATED THE PRESENCE OF SPERMATOZOA, WHICH IS A CONSTITUENT OF SEMEN, IT ALSO DEMONSTRATED AMYLASE ACTIVITY.

EXCUSE ME A MOMENT.

(PAUSE IN THE PROCEEDINGS.)

A AMYLASE ACTIVITY THAT COULD NOT HAVE ORIGINATED FROM THE SEMEN ITSELF.

IN FACT, IT WAS CONSISTENT WITH NO OTHER BIOLOGICAL FLUID, ASIDE FROM SALIVA, THE INTENSITY OF THE AMYLASE WAS SO GREAT.

Q WOULD IT BE REASONABLE TO BELIEVE THEN THAT THE SEMEN COULD HAVE COME FROM A B SECRETOR?

A FURTHER EXAMINATION OF THE ITEM REVEALED THAT B ANTIGENS WERE PRESENT, YES.

Q AND WE KNOW THAT MR. PANAH IS A B SECRETOR; IS THAT CORRECT?

A YES.

Q NOW, BASED UPON THE PATTERN THAT YOU OBSERVED, AND I BELIEVE PART OF WHICH IS DEPICTED IN PEOPLE'S 15-B, COULD THAT BE CONSISTENT WITH THE SPEWING OF SEMEN ACROSS THE BED SHEET?

MR. SHEAHEN: OBJECTION.

THE COURT: DO YOU HAVE AN OPINION ON THAT BASED ON YOUR EXPERTISE?

THE WITNESS: YES.

THE COURT: THE OBJECTION IS OVERRULED.

THE WITNESS: GIVEN MY EXAMINATION OF THESE STAINS, YES. IT COULD BE CONSISTENT WITH SUCH AN ACTIVITY.

BY MR. COUWENBERG:

Q ASSUMING, AS A HYPOTHETICAL, A SITUATION WHERE THERE WAS AN ACT OF ORAL COPULATION AND EJACULATION WAS INITIATED BY THE DEFENDANT, AND THE VICTIM THEN SPIT OUT --

MR. SHEAHEN: YOUR HONOR, MAY WE OBJECT MID-QUESTION AND ASK TO APPROACH?

THE COURT: APPROACH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

THE COURT: WE'RE AT THE BENCH OUTSIDE IF PRESENCE OF THE JURY.

I THINK THE WAY YOU'RE PHASING THAT QUESTION IS OBJECTIONABLE.

I THINK YOU HAVE TO PHRASE THE QUESTION IN TERMS OF WHETHER SOMEBODY WITH ABO BLOOD TYPE AND PGM BLOOD TYPE CONSISTENT WITH THE DEFENDANT

EJACULATED, AND THEN GO ON FROM THERE.

BUT I DON'T THINK YOU CAN SAY THAT YOU CAN ASSUME IT WAS THE DEFENDANT WHO DID IT. THAT'S ASSUMING A FACT NOT IN EVIDENCE AT THIS POINT.

SO THE PHRASEOLOGY OF THE QUESTION I THINK IS IMPROPER.

MR. SHEAHEN: MOREOVER, YOUR HONOR, OUR OBJECTION IS THAT THIS WITNESS IS A BARELY QUALIFIED SEROLOGIST.

OUR INFORMATION IS THAT HE'S TESTIFIED A MERE FIVE TIMES AS AN EXPERT PREVIOUSLY TO THIS CASE, AND TO START ASKING HIM HYPOTHETICALS ON THE PROSECUTION'S THEORY OF THE CASE I THINK IS GROSSLY IMPROPER.

THE COURT: WHAT IS THE OBJECTION? YOU SAY HE'S NOT QUALIFIED?

MR. SHEAHEN: WHEN THEY START ASKING HYPOTHETICALS, "ASSUMING THE DEFENDANT AND THE VICTIM ENGAGED IN SUCH AND SUCH," I THINK THAT IS BEYOND THIS MAN'S EXPERTISE.

I THINK THIS MAN IS QUALIFIED TO SAY THAT HE EXAMINED CERTAIN SAMPLES, AND THAT THE SAMPLES WERE CONSISTENT WITH HAVING A CERTAIN SOURCE. THAT THAT SOURCE INCLUDED MR. PANAH, AMONG HOWEVER MANY, THAT IT INCLUDED MISS PARKER, AMONG HOWEVER MANY.

AND THAT THEY CAN'T GO ON TO HYPOTHETICALS ON THEIR THEORY OF THE CASE. THAT THE

DEFENDANT DID THIS OR MISS PARKER DID THIS.

MR. COUWENBERG: I THINK, FIRST OF ALL, HE'S QUALIFIED AS AN EXPERT.

SECOND OF ALL, BASED ON WHAT HE OBSERVED, THE PATTERN ON THE BED SHEET, HE'S RENDERED AN OPINION.

I THINK HE'S QUALIFIED TO GIVE AN OPINION AS TO HOW THAT PARTICULAR PATTERN OCCURRED.

THE COURT: YOU'VE ALREADY GOT THE OPINION IN THERE. IT IS SPECULATIVE, I THINK, FOR HIM TO TESTIFY AS TO HOW THE PATTERN OCCURRED. THAT'S REALLY FOR THE JURY TO DECIDE.

HE CAN TESTIFY AS TO THE CONTENTS OF WHAT HE DETERMINED, AND HE'S ALREADY GIVEN AN OPINION AS TO HOW IT MIGHT HAVE SPREAD ACROSS THERE.

BUT I THINK WHEN YOU START GOING BEYOND THAT, IT IS SOMEWHAT SPECULATIVE ON HIS PART.

MR. BERMAN: EVEN HIS OPINION THAT IT WAS CONSISTENT WITH SEMEN BEING SPEWED, BUT HE'S PREPARED TO GO FURTHER AND SAY IT'S NOT CONSISTENT WITH A NORMAL EJACULATION SUCH AS DURING MASTURBATION, BUT RATHER IT IS MORE CONSISTENT WITH THE SPITTING OF SEMEN, BECAUSE OF THE DILUTION INVOLVED AND THE INVOLVEMENT OF HIGH CONCENTRATE OF AMYLASE WHICH WOULD BE SALIVA.

I THINK WE HAVEN'T REACHED THE POINT WHERE HIS OPINION -- AS FAR AS HE'S PREPARED TO GO WITH HIS OPINION.

THE COURT: I THINK YOU'RE APPROACHING IT THEN A LITTLE BIT BACKWARDS.

WHY DON'T YOU FIRST APPROACH IT WITH WHETHER OR NOT HE HAS AN OPINION REGARDING WHETHER IT WAS CONSISTENT WITH MASTURBATION.

MR. SHEAHEN: YOUR HONOR?

THE COURT: YES.

MR. SHEAHEN: IF I MAY. THE STATEMENT ABOUT THE OPINION ABOUT SEMEN SPREADING WAS RECEIVED OVER OBJECTION.

I THINK ANY FURTHER OPINIONS, AS THE COURT SO APTLY NOTED, IS SPECULATION.

MR. BERMAN'S NEW THEORY COMES AS A COMPLETE SURPRISE TO ME, AND IF -- IT'S NOT IN ANY REPORT. IT'S NOT IN ANY TESTIMONY THAT I KNOW OF, AND I'VE READ IT ALL.

I WOULD ASK FOR A 402 HEARING BEFORE THIS WITNESS IS ALLOWED TO TESTIFY TO THAT OUTSIDE THE PRESENCE OF THE JURY.

THE COURT: THAT'S GOING TO BE DENIED.

THERE'S NO REASON FOR A 402 HEARING. I'M SATISFIED HE'S AN EXPERT.

IF HE HAS AN OPINION THAT DOESN'T AMOUNT TO SPECULATION, HE CAN RENDER THAT OPINION.

BUT I THINK YOU OUGHT TO APPROACH IT IN TERMS OF ESTABLISHING HIS OPINION BASED UPON THE PRESENCE OF THE AMYLASE AND APPROACH IT MORE DIRECTLY THAT WAY AS OPPOSED TO JUMPING TO THE ULTIMATE

CONCLUSION FIRST AND THEN COMING AT IT THROUGH THE BACK DOOR. I DON'T SEE ANY NEED FOR A 402 HEARING.

IF IT'S NOT IN THE REPORTS, YOU CAN CROSS-EXAMINATION ON ITS ABSENCE FROM THE REPORTS AND ABSENCE FROM ANY TESTIMONY HE'S PREVIOUSLY GIVEN.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE PRESENCE OF THE JURY:)

MR. COUWENBERG: MAY I PROCEED?

THE COURT: PLEASE.

BY MR. COUWENBERG:

Q MR. MOORE, AGAIN WITH RESPECT TO THE PATTERN AS OBSERVED IN PEOPLE'S 15-B, YOU INDICATE THERE WAS THE PRESENCE OF AMYLASE?

A YES.

Q WHICH WOULD INDICATE THE PRESENCE OF SALIVA; IS THAT CORRECT?

A YES.

Q SO THOSE SAMPLES WERE IN FACT DILUTED?

A YES.

Q YOU HAVE A PRESENCE OF SEMEN AND AMYLASE, WHICH WOULD INDICATE SALIVA; IS THAT CORRECT?

A YES.

MR. SHEAHEN: OBJECTION. MISSTATES THE EVIDENCE. MOTION TO STRIKE.

THE COURT: OVERRULED.

BY MR. COUWENBERG:

Q NOW, WERE YOU ABLE TO -- WITH RESPECT TO THE AMYLASE, WERE YOU ABLE TO RELATE THAT TO NICOLE PARKER?

A THROUGH THE A ANTIGENIC ACTIVITY DEMONSTRATED BY THE STAIN.

MR. COUWENBERG: IF I COULD HAVE JUST A MOMENT, YOUR HONOR.

(PAUSE IN THE PROCEEDINGS.)

BY MR. COUWENBERG:

Q WHEN WE TALKED ABOUT PERCENTAGES WITHIN THE POPULATION, DOES THE PGM SUBTYPING REDUCE THAT PERCENTAGE EVEN FURTHER SPECIFICALLY AS IT RELATES TO THE GENERAL POPULATION?

A YES.

Q NOW. ALSO WITH RESPECT TO THE PATTERN WHICH YOU OBSERVED IN 15-B, KNOWING THAT AMYLASE WAS PRESENT IN THOSE PARTICULAR STAINS, COULD YOU THEREFORE RENDER AN OPINION AS TO WHETHER OR NOT THOSE STAINS COULD HAVE COME SOLELY, FOR EXAMPLE, FROM AN EJACULATORY PROCESS LIKE MASTURBATION?

A THEY COULD NOT.

Q AND WHY WOULD THAT BE?

A THE AMYLASE ACTIVITY AT BEST HAS APPROXIMATELY ONE IN THREE HUNDRED THE ACTIVITY OF SALIVA. THESE STAINS WHICH I EXAMINED POSSESSED A FAR GREATER AMYLASE ACTIVITY.

THE ONLY BIOLOGICAL FLUID THAT COULD PRESENT SUCH GREAT AN ACTIVITY WOULD BE HUMAN SALIVA.

Q THANK YOU.

I'D LIKE TO DRAW YOUR ATTENTION NOW TO WHAT HAS BEEN PREVIOUSLY MARKED AS PEOPLE'S 11 FOR IDENTIFICATION.

I WANT TO TAKE IT OUT OF ITS WRAPPINGS AND HOLD IT UP FOR YOU.

IT APPEARS TO BE A BLUE COLORED GARMENT.

MR. CHAIS: YOUR HONOR, I WOULD LIKE THE RECORD TO REFLECT THAT COUNSEL IS WEARING SOME SORT OF PROTECTIVE GLOVES TODAY.

THAT THE ROBE WAS HANDLED BY MORE THAN ONE WITNESS YESTERDAY WHO DID NOT USE PROTECTIVE GLOVES.

THE COURT: THAT'S NOT CORRECT. THAT ROBE WAS HANDLED BY PEOPLE WEARING GLOVES.

GLOVES ARE REQUIRED IN THE COURTROOM WHEN ANY BODILY FLUIDS ARE IN COURT, AND THAT HAS BEEN THE RULE FOR QUITE A WHILE.

GO AHEAD.

MR. COUWENBERG: THANK YOU, YOUR HONOR.

Q DO YOU RECOGNIZE THIS GARMENT?

A YES, I DO.

Q DID YOU PERFORM ANY EXAMINATION ON THIS GARMENT?

A YES. AS EVIDENCED BY THE CUTTINGS, APPROXIMATELY HERE ON THE LEFT SIDE OF THE FRONT OF

THE GARMENT.

THE COURT: MR. COUWENBERG, WOULD YOU WALK IN FRONT OF THE JURY AND MAKE SURE THE JURY CAN SEE.

THE WITNESS: THE CUTTING NEAR THE BOTTOM HEM WAS FOR THE CONTROL SAMPLE DURING ABO TESTING.

THE COURT: MAKE SURE THE ALTERNATES SEE IT, TOO.

BY MR. COUWENBERG:

Q SPECIFICALLY WHAT DID YOU DO WITH THE CUTTINGS?

A THE CUTTINGS WERE EMPLOYED IN TESTS FOR THE PRESENCE OF SEMEN, SALIVA, AND HUMAN BLOOD.

Q AND WHAT DID YOU FIND?

A SEMEN WAS NOT DETECTED IN A PORTION OF THE STAIN SELECTED.

ABO ACTIVITY WAS DETECTED IN THIS ITEM. THE DEMONSTRATION OF A, B, AND H ANTIGENS.

FURTHER, AS UNIQUE TO THIS ITEM, PGM SUBTYPE ONE PLUS, ONE MINUS WAS EXHIBITED BY THE STAIN.

AS WELL AS --

Q GO AHEAD?

A AS WELL THE STAIN UPON LATER ANALYSIS DEMONSTRATED HIGH AMYLASE ACTIVITY.

Q AND WE KNOW THAT PGM SUBTYPE ONE PLUS, ONE MINUS IS CONSISTENT WITH THAT OF NICOLE PARKER; IS THAT CORRECT?

A YES.

Q NOW, WITH RESPECT -- DID YOU FIND ANY B AND H ANTIGENIC MATERIAL ON THIS PARTICULAR GARMENT?

A YES.

Q AND WHAT WE KNOW IS THAT THE B AND H ANTIGENIC MATERIAL CAN BE TRACED TO MR. PANAH; IS THAT CORRECT?

A YES.

Q I AM GOING TO SHOW YOU NOW A PICTURE.

MAY THIS BE MARKED PEOPLE'S 18 FOR IDENTIFICATION, YOUR HONOR, AT THIS TIME?

THE COURT: SO MARKED.

BY MR. COUWENBERG:

Q AGAIN FOR THE BENEFIT OF THE JURY, WOULD YOU PLEASE EXPLAIN WHAT THAT PICTURE DEPICTS?

A THIS IS A PHOTOGRAPH THAT I DIRECTED TO BE TAKEN LAST FRIDAY IN THE CRIMINALISTICS LABORATORY.

THIS PHOTOGRAPH DEPICTS WHAT WAS BOOKED AS PROPERTY ITEM NO. 52, A TISSUE BEARING STAINS.

Q DID YOU CONDUCT ANY EXAMINATION OF THIS PARTICULAR ITEM?

A YES, I DID.

Q AND TELL US WHAT YOU DID, PLEASE?

A I EXAMINED THIS ITEM FOR THE PRESENCE OF SEMEN, SPERMATOZOA WERE DETECTED.

SUBSEQUENT ABO TYPING REVEALED THE PRESENCE OF A, B, AND H ANTIGENS.

THIS STAIN OF HUMAN SEMEN ALSO

DEMONSTRATED A PGM SUBTYPE OF TWO PLUS, ONE PLUS.

Q AND WE KNOW THAT THAT PARTICULAR PGM SUBTYPE TWO PLUS, ONE PLUS IS CONSISTENT WITH THAT OF MR. PANAH; IS THAT CORRECT?

A YES. FURTHER TESTING ALSO REVEALED A HIGH LEVEL OF AMYLASE ACTIVITY.

Q NOW. WERE YOU ABLE TO TRACE THE AMYLASE BACK TO, FOR EXAMPLE, NICOLE PARKER?

A YES.

Q AND HOW DID YOU DO THAT?

A THE GENETIC MARKERS INDICATED THAT THIS SEMEN STAIN WAS CONSISTENT WITH MR. PANAH AND IT COULD HAVE ORIGINATED FROM HIM.

MR. PANAH DOES NOT POSSESS A ANTIGENIC ACTIVITY IN HIS BLOOD OR IN HIS SALIVA.

THAT MEANS THE A ANTIGENIC ACTIVITY WAS FOREIGN TO HIM, AND IN THIS CASE COULD BE A COMPANION TO THE AMYLASE ACTIVITY EXHIBITED BY THE TISSUE PAPER.

THIS A ANTIGENIC ACTIVITY, ON THE OTHER HAND, COULD BE CONSISTENT WITH NICOLE PARKER.

Q WOULD YOU BE ABLE TO TELL US THE PERCENTAGE OF THE POPULATION WITH, FOR EXAMPLE, PGM SUBTYPE OF TWO PLUS, ONE PLUS?

A THE MOST RECENT DATA ANALYSIS WHICH WAS COMPLETED UP THROUGH THE FIRST OF NOVEMBER OF THIS YEAR AND EXTENDS BACK TO JANUARY OF 1977 REFLECTS THAT THE OCCURRENCE OF PGM SUBTYPE TWO PLUS, ONE PLUS

IN THE GENERAL POPULATION IS JUST SHY OF 20 PERCENT.

Q AND WHAT ABOUT THE PGM SUBTYPE ONE PLUS, ONE MINUS?

A IT IS IN THE NEIGHBORHOOD OF 17 AND A HALF PERCENT.

Q NOW JUST FOR PURPOSES OF CLARIFICATION, WE'VE TALKED ABOUT THE PGM SUBTYPES. HOW DO THOSE PERCENTAGES RELATE TO, FOR EXAMPLE, TYPE B OR TYPE A BLOOD?

LET'S START WITH TYPE B BLOOD.

A IN A STATISTICAL ANALYSIS OF THESE FREQUENCIES, ONE CAN ASSUME THAT EACH OF THOSE GENETIC MARKERS IS INDEPENDENT OF ANOTHER, AND THUS THE POPULATION STUDIES AND THE FREQUENCIES THAT THEY PROVIDE ARE SIMPLY MULTIPLIED TOGETHER TO PROVIDE A COMBINED FREQUENCY.

SUCH, FOR EXAMPLE -- AND I'M USING A POCKET CALCULATOR -- THE OCCURRENCE OF TYPE A IN THE GENERAL POPULATION BEING APPROXIMATELY 33 PERCENT OR 33 IN ONE HUNDRED INDIVIDUALS, AND MULTIPLYING THAT BY 17.6 PERCENT, WHICH IS THE CURRENT VALUE FOR ONE PLUS, ONE MINUS, PROVIDES A COMBINED FREQUENCY OF THOSE TWO MARKERS OCCURRING IN THE GENERAL POPULATION TO ABOUT SIX IN ONE HUNDRED INDIVIDUALS.

Q NOW, YOU'VE TOLD US THAT THE STAIN WHICH YOU EXAMINED IN THE TISSUE PAPER DEMONSTRATED THE PRESENCE OF A, B, AND H ANTIGENS?

A YES.

Q PGM SUBTYPE CONSISTENT WITH THAT OF MR. PANAH; IS THAT CORRECT?

A YES.

Q AND THERE WAS AMYLASE ACTIVITY WHICH WOULD INDICATE THE PRESENCE OF SALIVA?

A YES.

Q AND BASED UPON YOUR EXAMINATION AND YOUR TESTS, YOU CONCLUDED THAT THAT COULD BE TRACED TO NICOLE PARKER; IS THAT CORRECT?

A YES.

Q BASED UPON THAT INFORMATION, COULD YOU RENDER AN OPINION AS TO WHETHER IT WOULD BE CONSISTENT OR INCONSISTENT WITH AN ACT OF ORAL COPULATION?

A IT CERTAINLY --

MR. SHEAHEN: OBJECTION. FOUNDATION.

THE COURT: OVERRULED.

THE WITNESS: IT COULD BE CONSISTENT WITH THE PRODUCT OF AN ORAL COPULATION.

(COUNSEL CONFERRING.)

BY MR. COUWENBERG:

Q WITH RESPECT TO THE -- I THINK YOU'VE TOLD US ABOUT THE PGM SUBTYPE AS IT RELATES TO TYPE A BLOOD TYPE IN TERMS OF PERCENTAGES?

A YES.

Q HOW DOES THAT RELATE TO THE TYPE B BLOOD TYPE WHEN WE TALK ABOUT PERCENTAGES?

A IN TERMS OF ONE PLUS, ONE MINUS OR TWO

PLUS --

Q TWO PLUS, ONE PLUS.

A THE COMBINED FREQUENCY OF THESE TWO GENETIC MARKERS CAN BE EXPECTED TO BE CARRIED BY APPROXIMATELY THREE IN ONE HUNDRED INDIVIDUALS.

Q THANK YOU.

JUST ONE LAST POINT OF CLARIFICATION. WHEN WE TALKED ABOUT THE ITEM, THE KIMONO WHICH I SHOWED YOU, DID YOU STATE THAT THE PGM SUBTYPE FOUND IN THE BLOOD ON THE KIMONO WAS CONSISTENT WITH THAT OF MR. PANAH; IS THAT CORRECT?

A NO. I BELIEVE I STATED THAT IT WAS CONSISTENT WITH NICOLE PARKER.

I MAY HAVE MISSPOKE.

Q AND THE SALIVA?

A COULD HAVE ORIGINATED FROM HOOMAN PANAH.

MR. COUWENBERG: THANK YOU.

NOTHING FURTHER.

THE COURT: CROSS-EXAMINATION?

MR. SHEAHEN: YES, YOUR HONOR.

CROSS EXAMINATION

BY MR. SHEAHEN:

Q IS IT DR. MOORE?

A NO, IT'S NOT.

Q OFFICER MOORE?

A NO. IT'S NOT THAT EITHER.

Q MR. MOORE?

A MR. MOORE IS FINE.
Q MR. MOORE, BY WHOM ARE YOU EMPLOYED?
A THE LOS ANGELES POLICE DEPARTMENT.
Q AND FOR HOW LONG HAVE YOU BEEN SO EMPLOYED?
A APPROXIMATELY 10 AND A HALF YEARS.
Q AND WHAT IS YOUR JOB AT THE LOS ANGELES POLICE DEPARTMENT?
A I'M EMPLOYED AS A CRIMINALIST. MY CURRENT ROUTINE ASSIGNMENT IS TO THE SEROLOGY UNIT WHERE I'M A BENCH ANALYST, AS WELL AS BEING THE ACTING SUPERVISOR.

ON AN OCCASIONAL BASIS I'M ALSO RESPONSIBLE FOR CONDUCTING FIELD INVESTIGATIONS, PARTICULARLY THOSE THAT PRECIPITATE THROUGH HOMICIDES AND RAPES.
Q YOU DON'T HAVE ANYTHING TO DO WITH NARCOTICS?
A NOT AT THIS PARTICULAR MOMENT. I STILL HAVE SUBPOENAS FOR NARCOTICS CASES AT MY HEELS, BUT NOT DIRECTLY AT THIS TIME.
Q WELL, IN THE RECENT PAST YOU'VE BEEN WORKING NARCOTICS, HAVE YOU?
A BETWEEN MID-JANUARY AND OCTOBER OF THIS YEAR, I WAS ASSIGNED AS THE LEAD ANALYST TO THE NARCOTICS UNIT.
Q SO YOU DON'T WORK EXCLUSIVELY HOMICIDE CASES?

A NO.

Q AND, IN FACT, FOR AT LEAST FOR THIS YEAR, MOST OF YOUR WORK HASN'T HAD ANYTHING TO DO WITH SEROLOGY OR HOMICIDES?

A THAT'S CORRECT.

Q YOU'VE BEEN WORKING NARCOTICS FOR MOST OF THIS YEAR?

A YES.

Q NOW, YOU'VE WORKED WITH BLOOD STAINS, HOWEVER, THE WHOLE 10 YEARS OR SO THAT YOU'VE BEEN WITH L.A.P.D.?

A TO SOME EXTENT THE ENTIRE 10 YEARS OF MY EMPLOYMENT I HAVE CONDUCTED THE PRESUMPTIVE TEST FOR BLOOD AT MOST, IF NOT ALL OF THE CRIME SCENES WHICH YIELDED BLOOD EVIDENCE.

SPECIFICALLY AS TO THE MORE SOPHISTICATED TESTS THAT FORENSIC SEROLOGISTS USE, I HAVE USED THEM ROUTINELY SINCE DECEMBER OF 1991.

Q IN MID-1993, DID YOU BEGIN WORKING WITH -- WORKING AS A SEROLOGIST IN THE STUDY OF BLOOD STAINS?

A I RECEIVED MY FIRST ASSIGNMENT TO THE SEROLOGY UNIT IN DECEMBER OF 1991.

Q DID ANYTHING OCCUR IN MID-1993?

A AS TO?

Q AS TO YOUR WORK IN BLOOD STAINS, THAT YOU BEGAN SOME NEW KIND OF WORK WITH REGARD TO BLOOD STAINS IN 1993?

A NOT MYSELF PERSONALLY, NO.

MR. SHEAHEN: MAY I HAVE ONE MOMENT.

(PAUSE IN THE PROCEEDINGS.)

BY MR. SHEAHEN:

Q WITH RESPECT TO SEXUAL ASSAULTS, IS THIS THE FIRST TIME YOU WORKED ON IT WITH RESPECT TO SEXUAL ASSAULTS AND BLOOD STAINS MID-1993?

A MY FIRST ASSIGNMENT WHEN I JOINED THE SEROLOGY UNIT WAS IN THE EXAMINATION OF SEXUAL ASSAULT EVIDENCE.

THROUGH THE BETTER PART OF -- STRIKE THAT.

ONCE I COMPLETED MY TRAINING, AND I WAS ROUTINELY DOING BENCH WORK IN THE EXAMINATION OF SEXUAL ASSAULT EVIDENCE, I THEN BEGAN TO INITIATE THE STUDY OF THE CHARACTERIZATION OF HUMAN BLOOD STAINS SUCH THAT CERTAINLY BY SEPTEMBER OF 1993 I WAS DEMONSTRATING SUFFICIENT PROFICIENCY IN THE EXAMINATION OF UNKNOWNS THAT I WAS PERMITTED TO ALSO CONDUCT BLOOD STAIN INVESTIGATIONS.

Q SO ALTHOUGH YOU'VE BEEN WITH L.A.P.D. THEN FOR 10 YEARS OR WHATEVER, WOULD IT BE CORRECT THIS PROFICIENCY YOU TALKED ABOUT IS A RELATIVELY NEW THING, THAT IS, SINCE SEPTEMBER 1993?

A I DON'T KNOW IF I CAN CHARACTERIZE IT AS A RELATIVELY NEW THING. BUT CERTAINLY WHEN I WAS GIVEN AUTHORITY TO DO BLOOD STAINS, MY SUPERVISOR WAS SATISFIED WITH MY PERFORMANCE AS WAS I.

Q AND THAT WAS AS OF SEPTEMBER 1993?
A APPROXIMATELY, YES.
Q NOW, YOU INDICATED THAT YOU HAVE TESTIFIED PREVIOUSLY AS AN EXPERT; IS THAT CORRECT?
A YES.
Q 10 TIMES? 20 TIMES? 30 TIMES?
A FOR ALL OF MY ASSIGNMENTS IN THE CRIMINALISTICS LABORATORY, I TESTIFIED WELL OVER FOURTEEN HUNDRED TIMES.
BUT AS IT RELATES SPECIFICALLY TO SEROLOGY, I'VE BEEN CALLED TO TESTIFY ONLY A HANDFUL OF TIMES.
Q YOU'VE BEEN CALLED TO TESTIFY AS A SEROLOGIST HOW MANY TIMES?
A APPROXIMATELY SIX TIMES.
Q AND, IN FACT, THAT SIX INCLUDES ONCE PREVIOUSLY ON THIS CASE, DOES IT NOT?
A YES, IT DOES.
Q SO EXCLUDING THIS CASE, HOW MANY TIMES HAVE YOU BEEN CALLED TO TESTIFY AS A SEROLOGIST?
A THAT LEAVES FOUR.
Q ANY DEATH PENALTY CASES?
A IN A PRELIMINARY HEARING ONLY.
Q SO THIS IS THE FIRST TIME YOU'VE EVER TESTIFIED IN A DEATH PENALTY CASE IN SUPERIOR COURT?
A THAT'S RIGHT.

Q SIR, YOU MENTIONED IN CROSS-EXAMINATION

THAT YOU HAD THE WRONG D.R. NUMBER ON SOMETHING.

WHAT WERE YOU TALKING ABOUT?

A THE ANNOTATED EXHIBIT THAT I PREPARED FOR COURT.

IN MY HASTE TO PREPARE TO GO AWAY FOR SCHOOL, WHERE I'M SUPPOSED TO BE TODAY AS A MATTER OF FACT, I ANNOTATED THE ELECTROPHEROGRAM, WHICH I PLACED ON THE BOARD, AND IT WASN'T UNTIL I ARRIVED TO COURT YESTERDAY THAT I REALIZED THIS WAS LAST YEAR'S INVESTIGATION RATHER THAN THIS YEAR'S.

AND THUS IT SHOULD SAY "93-1041295", INSTEAD OF "94-10" ET CETERA.

Q AND THAT WAS BECAUSE OF YOUR HASTE WITH RESPECT TO THE CASE?

A NOT MY HASTE WITH RESPECT TO THE ANALYSIS, NOT BY ANY MEANS.

MY HASTE IN PREPARING A COURTROOM EXHIBIT THAT WOULD BE OF SIGNIFICANCE.

Q SO YOU WOULD AGREE THAT HASTE IS INAPPROPRIATE FOR A DEATH PENALTY CASE?

A AS IT RELATES TO ANALYSIS, CERTAINLY.

Q BUT NOT AS IT RELATES TO EXHIBITS?

A AS TO THE EXHIBIT THAT YOU SEE THERE, SINCE I MADE THE TYPOGRAPHICAL ERROR KNOWN AT THE OUTSET, I THINK THAT IS ALL THAT'S REQUIRED TO BE NOTED.

Q ARE THESE -- ARE ERRORS LIKE THAT MADE BECAUSE OF BUDGET PROBLEMS AT ALL?

A ABSOLUTELY NOT.

Q MR. MOORE, YOU'VE BEEN ON THE WITNESS STAND NOW I THINK ON DIRECT EXAMINATION YOU TESTIFIED FOR A COUPLE OF HOURS, I'M NOT COUNTING THE MINUTES.

SO THAT WE UNDERSTAND YOUR TESTIMONY, IS IT YOUR TESTIMONY THAT THE SEMEN THAT YOU TALKED ABOUT OR THE POSSIBLE SEMEN THAT YOU TALKED ABOUT IN THIS CASE, IS IT YOUR TESTIMONY AS A MATTER OF SCIENTIFIC CERTAINTY, REASONABLE SCIENTIFIC CERTAINTY, THAT THAT ASSUMED SEMEN CAME FROM THIS MAN AND FROM NO OTHER PERSON?

A I CANNOT ESTABLISH ANY CERTAINTY BASED ON CONVENTIONAL SEROLOGY. I CAN ONLY DEMONSTRATE CONSISTENCY.

Q SO YOU CANNOT SAY WITH ANY CERTAINTY THAT WHAT YOU BELIEVE TO BE SEMEN CAME FROM MR. PANAH AND FROM NO OTHER PERSON; IS THAT CORRECT?

A I CAN MERELY STATE CONSISTENCY.

CERTAINTY IS BEYOND THE REALM OF CONVENTIONAL SEROLOGY.

Q AND ISN'T IT ALSO TRUE, SIR, THAT YOU CANNOT STATE WITH ANY REASONABLE SCIENTIFIC CERTAINTY THAT THE BLOOD AND THE OTHER THINGS THAT YOU'VE DESCRIBED CAME FROM MISS PARKER AND FROM NO OTHER INDIVIDUAL?

A WITHOUT CONSIDERING OTHER FACTS OUTSIDE OF WHAT ARE IMMEDIATELY KNOWN TO ME, THAT IS CORRECT.

Q SO AFTER YOU TESTIFIED FOR TWO HOURS, WE

DON'T KNOW WITH ANY CERTAINTY WHO'S BLOOD THIS WAS OR WHOSE SEMEN THIS WAS?

A I THINK THAT I'VE ESTABLISHED CONSISTENCY, AND THAT'S ALL THAT I CAN PROVIDE TO THE TRIER OF FACT, TWELVE PEOPLE SITTING IN THE JURY BOX.

Q WELL, LET'S TALK FOR A MINUTE, MR. MOORE, SO THAT MAYBE I CAN LEARN SOMETHING ABOUT BLOOD.

YOU MENTIONED A BLOOD TYPE DISTRIBUTION IN THE GENERAL POPULATION.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

BY MR. SHEAHEN:

Q NOW, MR. MOORE, YOU TALKED ABOUT TYPE A, TYPE B, TYPE AB, AND TYPE O BLOOD; IS THAT CORRECT?

A YES.

Q AND EACH PERSON, EACH HUMAN PERSON HAS ONE OF THOSE BLOOD TYPES; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND THE TYPE A BLOOD TYPE IS POSSESSED BY WHAT PERCENTAGE OF THE POPULATION?

A APPROXIMATELY 33 PERCENT OR 33 IN ONE HUNDRED INDIVIDUALS.

Q AND THE TYPE B BLOOD TYPE?

A APPROXIMATELY 16 IN ONE HUNDRED INDIVIDUALS.

Q AB?

A APPROXIMATELY FOUR IN ONE HUNDRED

INDIVIDUALS.

Q AND O?

A APPROXIMATELY 46 IN ONE HUNDRED INDIVIDUALS.

MR. SHEAHEN: MAY I HAVE ONE MOMENT, YOUR HONOR?

(PAUSE IN THE PROCEEDINGS.)

MR. COUWENBERG: IF I HAVEN'T DONE SO EARLIER, CAN WE HAVE THAT PARTICULAR DIAGRAM MARKED AS PEOPLE'S, I BELIEVE, 17?

THE COURT: PRINT IT OUT.

MR. COUWENBERG: IF THE RECORD COULD REFLECT I'M WRITING ON THE BACK OF THE PAPER 17.

17-B OR 17?

MR. BERMAN: IT'S JUST 17.

MR. COUWENBERG: 17. THANK YOU.

BY MR. SHEAHEN:

Q MR. MOORE, ASSUME FOR PURPOSES OF THE QUESTION THAT THERE IS A POPULATION BASE IN SOUTHERN CALIFORNIA OF TEN MILLION.

COULD YOU INDICATE -- COULD YOU START A CHART THERE AND INDICATE HOW MANY PEOPLE WOULD HAVE TYPE A BLOOD.

A THE RESULTING DISTRIBUTION OF TYPE A BLOOD WOULD BE APPROXIMATELY 3.3 MILLION PERSONS.

Q SO IN THE SOUTHERN CALIFORNIA AREA, A LITTLE OVER THREE MILLION PEOPLE WOULD HAVE THAT BLOOD TYPE?

A YES.

Q WITH RESPECT TO TYPE B, COULD YOU INDICATE, ASSUMING THE SAME POPULATION BASE, HOW MANY PEOPLE WOULD HAVE TYPE B BLOOD?

A APPROXIMATELY 1.6 MILLION INDIVIDUALS.

Q AND COULD YOU DO THE SAME WITH TYPE AB AND TYPE O?

A FOR TYPE AB, THERE WOULD BE APPROXIMATELY 410,000 INDIVIDUALS.

FOR TYPE O, APPROXIMATELY 4.6 MILLION PEOPLE.

Q SO YOU TESTIFIED EARLIER, SIR -- A LOT OF IT CONFUSED ME.

BUT I THINK YOU SAID THAT THERE WAS BLOOD ON A SHEET THAT YOU THOUGHT COULD HAVE COME FROM THE DECEDENT IN THIS CASE?

A YES.

Q COULD YOU WRITE ON THE BOARD, ASSUMING THAT POPULATION BASE, THE NUMBER OF OTHER PEOPLE IN SOUTHERN CALIFORNIA THAT COULD HAVE BEEN THE SOURCE OF THAT BLOOD?

A ASSUMING THAT THE B ANTIGENIC ACTIVITY WAS FOREIGN TO THE STAIN AND A CONSIDERATION OF ALL THE MARKERS THAT WERE ESTABLISHED FOR THAT STAIN?

Q LET'S JUST TAKE -- WHEN YOU TYPE THE BLOOD AS A, IS THERE ANY BLOOD YOU TYPED AS JUST A WITHOUT FURTHER DEFINING GENETIC MARKERS HERE?

A VERY OCCASIONALLY YES.

Q AND WHAT EVIDENCE WAS THAT WITH RESPECT TO?

A WELL, A REQUEST WAS RECEIVED RECENTLY, WHICH I ACTED UPON, WHERE HUMAN BLOOD STAINS LEFT AT A CRIME SCENE WERE OF TYPE A CHARACTERIZATION.

IF THE SUSPECT'S WHOLE BLOOD HAD BEEN ANYTHING OTHER THAN A, NO FURTHER TESTING WOULD HAVE OCCURRED.

BUT AS LUCK WOULD HAVE IT, HE ALSO POSSESSED TYPE A BLOOD. SO ADDITIONAL TESTING TOOK PLACE.

Q BUT THAT'S NOT IN THIS CASE?

A NOT IN THIS CASE, NO.

Q I'M SORRY. I WAS TALKING ABOUT THE SAMPLES IN THIS CASE.

WITH RESPECT TO -- WITH RESPECT TO THE BLOOD THAT YOU FOUND ON THE ROBE, AND JUST WITH RESPECT TO THE BLOOD THAT YOU FOUND ON THE ROBE, ASSUMING THE SAME POPULATION BASE, HOW MANY OTHER PERSONS COULD HAVE BEEN THE SOURCE OF THAT BLOOD?

MR. COUWENBERG: YOUR HONOR, I WOULD OBJECT TO THE FORM OF THE QUESTION BECAUSE THERE ARE OTHER GENETIC MARKERS THAT COME INTO PLAY.

MR. SHEAHEN: I THINK I CLEARED UP THE QUESTION.

I WASN'T LIMITING IT TO THE A GENETIC MARKER. I AM JUST ASKING WITH RESPECT TO THE GENETIC MARKERS FOUND ON THE BLOOD ON THE ROBE, HOW MANY

PEOPLE COULD BE THE SOURCE OF THAT BLOOD.

THE COURT: WHY DON'T YOU APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

THE COURT: WE'RE AT THE BENCH OUTSIDE THE PRESENCE OF THE JURY.

HE'S ALREADY TESTIFIED THAT THERE ARE WHATEVER THE NUMBER WAS, 1. -- 3.3 MILLION PEOPLE IN SOUTHERN CALIFORNIA OUT OF A POPULATION OF TEN MILLION WITH THE A BLOOD TYPE. NICOLE PARKER IS ONE OF THOSE.

I'M GOING TO SUSTAIN MY OWN OBJECTION UNDER 352. IT'S PATENTLY OBVIOUS IT'S ONE LESS THAN 3.3 MILLION.

WE'RE NOT GOING TO GO THROUGH EVERY ONE OF THESE MARKERS DEDUCTING ONE FROM THEM.

IT'S 352 IN ITS CLASSIC FORM. ITS A WASTE OF TIME. AND WE'RE NOT GOING TO INSULT THE JURY'S INTELLIGENCE BY SUBTRACTING ONE FROM ALL OF THESE NUMBERS, AND GO THROUGH THE DEFENDANT'S AND SUBTRACT ONE FROM ALL OF THEM.

IT'S GOING TO CONSUME AN UNDUE AMOUNT OF TIME FOR SOMETHING THAT'S POINTLESS. EVERYBODY KNOWS THAT THERE'S ONE DEFENDANT WITH A CERTAIN BLOOD TYPE

AND ONE VICTIM WERE A CERTAIN BLOOD TYPE HERE.

IF THAT IS WHAT YOU'RE INTENDING TO DO, I'M NOT GOING TO ALLOW IT.

BUT GO AHEAD. TELL ME WHAT YOU'RE DOING.

MR. SHEAHEN: THE PROSECUTION PUT ON A CASE WHICH LED THE JURY TO BELIEVE THAT THE BLOOD WAS NICOLE'S AND THAT THE SEMEN WAS PANAH'S.

WE ARE ENTITLED, FIRST -- SO FIRST OF ALL I WANT THE RECORD TO BE CLEAR THAT THIS WITNESS IS AN EXTREMELY ARTICULATE, ATTRACTIVE YOUNG WITNESS WHO MAKES A VERY FAVORABLE IMPRESSION ON THE JURY AND WHO SPENT TWO HOURS TALKING ABOUT THINGS THAT I DON'T THINK MOST OF THE JURORS HAD ANY IDEA WHAT HE WAS TALKING ABOUT.

THE COURT: GIVE ME YOUR LEGAL ARGUMENT ON THE POINT THAT WE'RE TALKING ABOUT.

MR. SHEAHEN: I THINK THE JURY IS ENTITLED TO A FULL EXPLANATION.

IF THEY KEPT HIM UP THERE FOR TWO HOURS, I'M NOT WASTING TIME TO ASK HIM FIVE MINUTES' WORTH OF QUESTIONS ABOUT THE DISTRIBUTION OF BLOOD TYPINGS IN THE GENERAL POPULATION.

I WANT TO MAKE IT PERFECTLY CLEAR TO THIS JURY THAT THIS BLOOD COULD HAVE COME FROM A NUMBER OF OTHER PEOPLE.

I ASKED INITIALLY HOW MANY PEOPLE HAD A BLOOD. HE SAID A LITTLE OVER THREE MILLION.

WHATEVER HIS NUMBER IS UP THERE.

I AM NOW ASKING WITH RESPECT TO THE BLOOD ON THE ROBE, HOW MANY PEOPLE COULD BE THE SOURCE OF THAT.

I ANTICIPATE THAT THE ANSWER IS GOING TO BE SOMETHING LIKE 600,000, WHICH IS A NEW AREA THAT WE HAVEN'T GONE INTO. THAT IS WHAT I'M GETTING TO, AND I'M ENTITLED TO SHOW THERE ARE 600,000 PEOPLE THAT COULD HAVE BEEN THE SOURCE OF THE BLOOD ON THE ROBE.

THE COURT: THAT WAS NOT YOUR LAST QUESTION.

YOUR LAST QUESTION WAS HOW MANY PEOPLE OTHER THAN NICOLE PARKER COULD HAVE BEEN THE SOURCE OF THAT A BLOOD. IT WAS ONE LESS THAN 3.3 MILLION.

IF YOU WANT TO ASK THE LAST QUESTION YOU JUST TOLD ME YOU WANT TO ASK, GO AHEAD AND ASK IT.

I DON'T WANT YOU TO ASK HIM TO SUBTRACT ONE FROM ALL OF THOSE NUMBERS, AND THAT IS WHAT YOUR LAST QUESTION WAS.

PROCEED WITH THE QUESTION YOU WANT TO ASK, YOU JUST TOLD ME.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE PRESENCE OF THE JURY:)

BY MR. SHEAHEN:

Q MR. MOORE, GETTING BACK TO THIS BLOOD ON THE ROBE.

YOU TESTIFIED EARLIER THAT THE BLOOD WAS TYPE A?

A GIVEN CERTAIN PRESUMPTIONS ABOUT COMMINGLING OF FLUIDS, YES.

Q IT'S NOT APPARENT THAT IT'S TYPE A. YOU HAVE TO --

A THE ABO TYPE INDICATED TYPE AB BLOOD. BUT GIVEN THAT WE ARE PRESENTED WITH A SUSPECT AND A VICTIM, AND THEIR BLOOD TYPES, IT'S INCUMBENT UPON THE FORENSIC SEROLOGIST TO MAKE OR PROVIDE OPINIONS AS TO THOSE TWO INDIVIDUALS.

AND THAT WAS THE FORM OF THE QUESTION AND THE FORM OF THE ANSWER IN EACH CASE.

Q SO I MUST HAVE BEEN MISTAKEN, MR. MOORE.

YOU DIDN'T FIND TYPE A BLOOD ON THIS ROBE. RATHER YOU FOUND TYPE AB BLOOD ON THE ROBE; IS THAT CORRECT?

A NO. I FOUND THAT IT WAS INDICATIVE OF TYPE AB BLOOD. THE TESTS ARE NOT CONCLUSIVE FOR AB BLOOD. SUCH THAT ONE TEST, BECAUSE AB INDIVIDUALS DO NOT POSSESS A OR B ANTIBODIES, THERE IS NO REACTION IN THAT PARTICULAR LABORATORY TEST.

AND THAT'S WHEN YOU HAVE NO REACTION, YOU CAN MAKE NO STATEMENT. AND THE BEST THAT YOU CAN SAY ABOUT THE COMPANION TEST, WHICH DEPENDS UPON THE

PRESENCE OF ANTIGENS, IS THAT IT IS INDICATIVE OF TYPE AB BLOOD.

MR. SHEAHEN: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

BY MR. SHEAHEN:

Q SO WHEN YOU INITIALLY LOOKED AT THE ROBE, IT APPEARS TO YOU TO HAVE -- THE FIRST INDICATION IS THAT IT IS TYPE AB BLOOD?

A YES.

Q AFTER YOU LOOK AT THE ROBE -- WHEN THE FIRST INDICATION IS THAT IT'S TYPE AB BLOOD, AND THERE ARE 410,000 PEOPLE AROUND THAT HAVE TYPE AB BLOOD, DO YOU TEST THAT AB OR THAT -- WHAT IS INDICATED AS AB BLOOD? DO YOU TEST THAT AGAINST THOSE 410,000 PEOPLE OR ANY OF THEM?

A NO. I ATTEMPT TO FURTHER CHARACTERIZE THE STAIN.

THE STAIN MAY PROVIDE MARKERS WHICH FURTHER ELIMINATE SUSPECT AND VICTIM OR FURTHER INCLUDE SUSPECT AND VICTIM, AND THUS ALLOWING FOR CONSIDERATION OF THE SOURCE OF THE FOREIGN ANTIGEN TYPES.

Q SO, MR. MOORE, WHAT WE'RE DOING HERE IS ALTHOUGH, AS I UNDERSTAND IT AND CORRECT ME IF I'M WRONG, PLEASE, THAT ALTHOUGH TO SOMEONE LIKE MYSELF I WOULD THINK AB BLOOD "LET'S GO LOOK FOR SOMEBODY IN THAT 410,000 GROUP," YOU HAVE BEEN ASKED TO TRY TO LINK THIS UP TO THE DECEDENT IN THIS CASE AND TO MR.

PANAH; IS THAT CORRECT?

A NOT DIRECTLY, NO. THE REQUEST IS TO CHARACTERIZE THE STAIN AND COMPARE WITH THE SUSPECT AND THE VICTIM, WHICH IS THE STANDARD OPERATING PROCEDURE FOR ANY FORENSIC ANALYSIS IN THE SEROLOGY UNIT.

Q BUT, MR. MOORE, WHAT I'M SAYING IS THAT RATHER THAN WHEN YOU LOOK AT THE ROBE, THE BLOOD STAIN ON THE ROBE, WHEREVER IT IS, RATHER THAN SAY, "WELL, IT APPEARS TO BE AB BLOOD. IT RELATES TO ONE OF THOSE 410,000 PEOPLE," RATHER THAN DOING THAT, YOU CONSTRUCT SOME SORT OF THEORY WHEREBY YOU CAN LINK THAT BLOOD TO MR. PANAH OR TO THE DECEASED?

A NO. NO THEORY IS DEVELOPED UNTIL ALL OF THE POTENTIAL MARKER TYPES HAVE BEEN ESTABLISHED.

Q IS THERE SOMEHOW -- MAYBE I JUST DON'T UNDERSTAND.

BUT DOES BLOOD THAT STARTS OFF AS AB -- WHICH IS A BLOOD TYPE; RIGHT?

A YES.

Q THAT CAN'T CHANGE INTO TYPE A, CAN IT?

A NO. BUT WHAT WE HAVE IS A QUESTION STAIN -- I EMPHASIZE QUESTION STAIN -- IN THAT WE DO NOT KNOW AT THE OUTSET, GIVEN ONLY ABO TYPING, WHAT IS THE FULL CONSTITUENCY OF THAT STAIN.

FOR EXAMPLE, IF I MAY DRAW YOUR ATTENTION TO THE TISSUE PAPER BEARING SEMEN.

IT WASN'T UNTIL I CONDUCTED AN

EXHAUSTIVE EXAMINATION OF ALL THE ITEMS OF EVIDENCE, AND THERE WAS THE POTENTIAL THAT TYPE A ANTIGENIC ACTIVITY WAS FOREIGN TO THAT STAIN AND COULD BE LINKED TO THE DECEDENT DID I REALIZE THAT AN AMYLASE TEST WAS INDICATED.

NO CONCLUSIONS WERE DRAWN UNTIL ALL OF THE EVIDENCE HAS BEEN DEVELOPED.

Q. MR. MOORE, WITH RESPECT TO SEMEN, FIRST OF ALL, YOUR TESTS POSITIVELY ESTABLISH THAT SOME SUBSTANCE IS OR IS NOT SEMEN?

A. YES.

Q. AND YOU DO THAT THROUGH SOMETHING CALLED AMYLASE?

A. NO. AMYLASE IS AN ENZYME FOUND IN ONE'S MOUTH IN RATHER LARGE QUANTITIES, AND IF YOU WERE TO SAY, FOR EXAMPLE, CHEW A SALTINE CRACKER FOR AN EXTENDED PERIOD OF TIME, THAT AMYLASE WILL ACT ON THOSE COMPLEX CARBOHYDRATES, REDUCE THEM TO SIMPLE SUGARS AND THE CRACKER WILL BEGIN TO TASTE SWEET.

IT IS THE PRESENCE OF ACID PHOSPHATASE AND THE PRESENCE OF P30, THE SEMEN SPECIFIC PROTEIN AS WELL AS THE PRESENCE OF SPERMATOZOA AS SEEN UNDER A MICROSCOPE THAT ESTABLISHED THE PRESENCE OF SEMEN.

Q. NOW, MR. MOORE, IN ANALYZING THE EVIDENCE IN THIS CASE, I MEAN AS YOU SAY, YOU HAVE BEEN ASKED TO TAKE THE EVIDENCE AND RELATE IT TO THE DECEASED AND TO THE SUSPECT IN THIS CASE, DID YOU EXAMINE THE BODY OF THE DECEASED FOR THE PRESENCE OF SEMEN?

A. NO, I DID NOT, NOT DIRECTLY BUT THROUGH THE CORONER'S SEXUAL ASSAULT KIT THAT WAS PRESENTED TO ME.

Q. YOU ANALYZED THAT SEXUAL ASSAULT KIT OR WHATEVER THE MATERIALS THEREIN?

A. THAT'S CORRECT.

Q. AND BASED ON THAT, WAS SEMEN FOUND IN THE BODY OF THE DECEASED?

A. NOT BY THE EVIDENCE THAT WAS PROVIDED TO ME WAS THE PRESENCE OF SEMEN CONCLUSIVELY ESTABLISHED.

Q. I AM SORRY. WHAT?

A. THE PRESENCE OF SEMEN WAS NOT CONCLUSIVELY ESTABLISHED ON ANY OF THE ITEMS PACKAGED IN THE CORONER'S SEXUAL ASSAULT KIT.

Q. SO DOES THAT MEAN THERE WAS SEMEN FOUND IN THE BODY OF THE DECEASED OR THERE WAS NOT?

A. THAT MEANS THAT I DID NOT DETECT SEMEN THROUGH THE COURSE OF MY ANALYSIS OF THAT SEXUAL ASSAULT KIT.

Q. SO THAT'S IN THE NATURE OF NO, YOU DID NOT FIND SEMEN IN YOUR ANALYSIS?

A. I DID NOT FIND SEMEN, THAT'S QUITE CORRECT.

Q. AND THAT'S IN THE BODY OF THE DECEASED?

A. AS IT WAS REPRESENTED BY THE CORONER'S SEXUAL ASSAULT KIT.

Q. NOW, YOU MENTION THAT YOU DID SOME VARIOUS -- YOU DID ANALYZE SOME VARIOUS SWABS OR SOMETHING; IS THAT RIGHT?

A. SWABS AND THEIR COMPANION MICROSCOPIC SLIDES.

Q. YOU DID A -- WHAT IS A SWAB?

A. AS IS PROVIDED IN THE CORONER'S SEXUAL ASSAULT KITS AND IN THE SEXUAL ASSAULT KITS GENERATED THROUGH THE EXAMINATION OF LIVING PERSONS, THERE ARE TWO COTTON TIPPED SWABS ON A WOODEN STICK INSIDE A PROTECTIVE TUBE.

THESE TWO STICKS ARE TO BE USED FOR A LOCALIZED AREA, AND THE CONTAINER WHICH PROTECTS THE SURFACE OF THE Q-TIP IS TYPICALLY LABELED THE LOCALIZED AREA WHICH WAS

SAMPLED FOR SEMEN.

Q. SO A SWAB IS LIKE A Q-TIP OR SOMETHING LIKE THAT WHERE YOU REACH IN AND YOU GET OUT SAMPLES OF MATERIAL FROM SOME SORT OF SAMPLE OF SUBSTANCE OR SOMETHING?

A. THE SWABBING OF A CAVITY SURFACE, BE IT FROM THE ORAL CAVITY, THE VAGINAL VAULT, WHAT HAVE YOU, THEY ARE SUBSTANTIALLY MORE LIKE WHAT YOU WOULD SEE IN YOUR DOCTOR'S OFFICE THAN WHAT YOU WOULD SEE IN THE GROCERY STORE SHELF, YES.

Q. AND IN ANY EVENT AS PART OF THE EVIDENCE IN THIS CASE, YOU WERE PRESENTED WITH A SWAB FROM THE VAGINAL AREA OF THE DECEASED?

A. LET ME REFER TO MY NOTES, PLEASE.

AS DESCRIBED IN MY BENCH NOTES WHAT HAS BEEN PREVIOUSLY DESCRIBED AS ITEM 67A WAS TWO SWUBES WHICH IS THE BRAND NAME APPLIED TO THE UNIT OF A PROTECTIVE TUBE AND THE SWABS.

Q. IT IS A SWUBE?

A. S-W-U-B-E.

Q. A SWUBE IS A FORM OF SWAB?

A. NO, IT IS THE ENTIRE UNIT OF SWAB AND PROTECTIVE TUBE.

Q. A TUBE AND A SWAB IS A SWUBE?

A. USUALLY IT IS TWO SWABS CONTAINED IN THE TUBE, BUT THIS IS THE TERM THAT HAS GROWN IN ACCEPTANCE AND I WOULD PREFER TO CONTINUE USING IT BECAUSE IT IS A UNIQUE DESCRIPTION OF THE ENTIRE UNIT.

Q. THE TUBE AND TWO SWABS?

A. YES.

FURTHER, THESE TWO SWUBES HELD FOUR SWABS LABELED ON EACH SWUBE, SWUBE WERE MARKED VAGINAL.

SO THERE WERE A TOTAL OF FOUR SWABS EMPLOYED TO COLLECT PHYSIOLOGICAL FLUIDS FROM THE VAGINAL CAVITY OF THE DECEDENT.

Q. AND ON THESE SWABS YOU FOUND SEMEN CONSISTENT WITH MR. PANAH'S; IS THAT RIGHT?

A. QUITE TO THE CONTRARY.

Q. I AM SORRY. WHAT?

A. I SAID QUITE TO THE CONTRARY.

SEMEN WAS NOT DETECTED ON THE VAGINAL SWABS NOR WERE THEY DETECTED ON THE VAGINAL SLIDES.

Q. SO THERE WAS NO SEMEN DETECTED IN THE VAGINAL AREA?

A. BASED UPON MY EXAMINATION OF THE SWABS, SEMEN WAS NOT DETECTED.

Q. AND WERE SIMILAR SWABS MADE WITH RESPECT TO THE ANAL AREA?

A. YES.

REFERRING AGAIN TO MY NOTES ITEM 67G WE HAVE ONE SWUBE HOLDING TWO SWABS LABELED ON THE SWUBE MARKED ANAL.

Q. AND SEMEN WAS DETECTED IN THAT AREA?

A. THE CONCLUSIVE DETERMINATION OF THE PRESENCE OF SEMEN WAS NOT ESTABLISHED.

AS IT WAS DISCUSSED ON DIRECT EXAMINATION, A POSITIVE ACID PHOSPHATASE RESULT WAS GENERATED BY AN EXTRACT

OF A PORTION OF ONE OF THOSE SWABS.

BUT LACKING A POSITIVE P30 RESULT, MY REPORT REFLECTS THAT SEMEN WAS NOT DETECTED.

Q. SO THAT'S IN THE ANAL AREA, THERE IS NO SEMEN?

A. SEMEN WAS NOT CONCLUSIVELY IDENTIFIED ON THE ANAL SWABS.

Q. NO SEMEN IN THE VAGINAL AREA. NO SEMEN IN THE ANAL AREA?

A. THAT'S CORRECT.

Q. HOW ABOUT THE CHEST AND NIPPLE AREA?

A. THE NIPPLE SWABS, DESCRIBED AS 67I AND 67J, WERE EXAMINED FOR THE PRESENCE OF AMYLASE A CONSTITUENT OF SALIVA.

OFTEN DURING THE COURSE OF AN EXAMINATION OF A CORONER SEXUAL ASSAULT KIT WE WILL BE NOTIFIED THAT THE DECEDENT WAS PARTIALLY DISROBED AND THE DETECTIVE TENDED TO BELIEVE THAT PRIOR TO DEATH A SUSPECT HAD APPLIED HIS MOUTH TO HER BREASTS.

AND THAT'S SUBSTANTIALLY THE REASON FOR THE COLLECTION OF THOSE SWABS, THE POTENTIAL THAT THE APPLICATION OF ONE'S MOUTH MAY HAVE OCCURRED.

Q. AND SO THE ANSWER TO THE QUESTION IS YOU FOUND NO SEMEN IN THAT AREA?

A. I DID NOT EXAMINE THESE SWABS FOR SEMEN.

I EXAMINED THEM FOR THE PRESENCE OF AMYLASE ONLY.

Q. AND WITH RESPECT TO THAT, THE FINDINGS WERE POSITIVE?

A. THEY WERE NEGATIVE.

AMYLASE WAS NOT DETECTED.

Q. SO -- MAY I, YOUR HONOR?

THE COURT: YOU MAY.

Q. BY MR. SHEAHEN: NOW, CAN WE SAY WITH RESPECT TO THE CHEST AREA THERE WAS NO SEMEN OR THERE WAS NO EXAMINATION?

A. ACCORDING TO MY NOTES THERE WAS NO SWAB TAKEN THAT MIGHT BE DESCRIBED AS A DRIED SECRETION SWAB.

A DRIED SECRETION SWAB TYPICALLY DESCRIBES A STAIN ON THE BODY OF A DECEDENT WHICH FLUORESCES UNDER U.V. LIGHT INDICATIVE OF SEMEN AND COLLECTED AS SUCH, A DRIED SECRETION.

Q. SO I HAVE WRITTEN ON THE CHART OVER THERE -- I JUST WANT YOU TO CHECK AND SEE IF THAT IS ACCURATE, WHAT I PUT DOWN THERE?

A. LET ME REPOSITION THIS BOARD.

I DON'T THINK THIS IS A PROPER CHARACTERIZATION BECAUSE NO CHEST SAMPLE WAS TAKEN, ONLY NIPPLE SWABS WERE TAKEN.

AND THE ONLY TEST THAT WAS CONDUCTED ON THE NIPPLE SWABS WAS FOR THE PRESENCE OF AMYLASE.

Q. SO THAT IF IT IS INCORRECT, MR. MOORE, CAN YOU CORRECT IT THEN AND TELL US WHAT IT SHOULD READ.

A. CERTAINLY.

Q. AND THANK YOU.

INDICATING YOU PUT LEFT/RIGHT NIPPLE SWABS, NO SALIVA, AND WOULD IT BE FURTHER CORRECT TO SAY THAT IT

WASN'T TESTED FOR SEMEN, NO INDICATION OF SEMEN?

A. IT WAS NOT INDICATED.

Q. SEMEN NOT INDICATED, WOULD THAT BE A PROPER WAY TO PHRASE IT?

A. THAT'S CORRECT.

Q. AND MAY I ADD THAT, PLEASE.

NOW, MR. MOORE, THE NEXT AREA WITH RESPECT I BELIEVE YOU TESTIFIED THAT THERE WAS AN ORAL SWAB OR SOMETHING THAT INDICATED THE PRESENCE OF SEMEN?

A. YES.

AN EXTRACT OF A PORTION OF AN ORAL SWAB YIELDED A POSITIVE ACID PHOSPHATASE RESULT.

BUT UPON FURTHER TESTING FOR THE PRESENCE OF THE P30 PROTEIN AND A NEGATIVE RESULT, THE PRESENCE OF SEMEN COULD NOT BE CONCLUSIVELY IDENTIFIED.

Q. NOW, SO THAT I UNDERSTAND THIS, WHEN YOU SAY ORAL SWAB, DOES THAT MEAN MOUTH?

A. YES.

Q. SO YOU TESTED THE MOUTH FOR THE PRESENCE OF SEMEN?

A. I TESTED THE SWAB THAT WAS USED TO COLLECT A SAMPLE FROM THE MOUTH OF THE DECEDENT.

Q. AND AT FIRST YOU THOUGHT THAT THERE MIGHT BE SEMEN IN THERE BECAUSE OF THE PRESENCE OF THIS AMALPHOSPHATASE OR WHATEVER IT IS?

A. ACID PHOSPHATASE.

Q. ACID PHOSPHATASE?

A. SHORTHAND NOTATION MIGHT BE USEFUL. AP IS

GOOD.

Q. AP.

A. AP.

Q. AND SO WHEN YOU SEE AP IN A SAMPLE, YOU SAY, AHA, THAT MIGHT BE SEMEN?

A. PARTICULARLY IF IT ORIGINATES FROM A LOCATION OTHER THAN THE VAGINAL AREA.

Q. BUT NOW WHEN YOU LOOK AT THAT AND BECAUSE YOU ARE -- I BELIEVE YOU ARE A SCIENTIST, YOU HAVE A DEGREE OR SOMETHING IN BIOLOGY?

A. YES.

Q. YOU CAN'T SAY FOR CERTAIN THAT THERE IS SEMEN IN THE MOUTH BASED ON THIS INITIAL AP TEST, RIGHT?

A. THAT'S QUITE RIGHT.

Q. AND SO WHEN YOU GET THIS INITIAL AP TEST, IT IS SORT OF LIKE IT SORT OF RAISES A RED FLAG, RIGHT, SAYING THERE MIGHT BE?

A. TO USE YOUR WORDS, YES, I SUPPOSE.

Q. AND SO WHAT YOU WANT TO DO BECAUSE YOU ARE A SCIENTIST YOU WANT TO DETERMINE WHETHER YOU CAN SAY WITH ANY CERTAINTY, THE KIND OF CERTAINTY THAT IS NEEDED IN COURT ON DEATH PENALTY CASES --

MR. BERMAN: YOUR HONOR, I AM GOING TO OBJECT.

THE COURT: SUSTAINED.

JUST ASK THE QUESTION WITHOUT THE EDITORIAL.

Q. BY MR. SHEAHEN: WHETHER YOU CAN SAY WITH ANY CERTAINTY THAT THE SWAB FROM THE MOUTH CONTAINED SEMEN?

A. THAT'S CORRECT.

Q. SO YOU CONDUCT A FURTHER TEST?

A. TWO ADDITIONAL TESTS.

Q. TWO ADDITIONAL TESTS?

A. YES.

Q. AND ONE OF THESE IS TO DETERMINE THE PRESENCE OF SOMETHING CALLED P30 OR SOMETHING?

A. YES.

Q. AND IS P30, WHATEVER IT IS, IS THAT SORT OF A NECESSARY INGREDIENT IN SEMEN?

A. IT IS A SEMEN SPECIFIC PROTEIN NOT FOUND IN ANY OTHER HUMAN PHYSIOLOGICAL FLUID.

Q. SO IF YOU HAVE SEMEN, YOU HAVE THIS P30?

A. YES.

Q. AND SO WHEN YOU TOOK THE ORAL SWAB, THAT IS, THE SWAB TAKEN FROM THE MOUTH OF THE DECEDENT HERE, AND YOU TESTED IT FOR P30, WHICH WOULD ESTABLISH THE PRESENCE OF SEMEN, YOU THEN CONCLUDED THAT SEMEN WAS PRESENT ON THE ORAL SWAB; IS THAT CORRECT?

MR. BERMAN: YOUR HONOR, OBJECTION.

HE KEEPS MISSTATING THE EVIDENCE INTENTIONALLY.

THE COURT: IT DOES MISSTATE THE EVIDENCE. THE OBJECTION IS SUSTAINED.

MR. SHEAHEN: IT IS CROSS-EXAMINATION WITH ALL RESPECT.

THE COURT: THAT'S FINE.

IT DOESN'T MEAN YOU CAN REPEATEDLY MISSTATE WHAT THE WITNESS HAS SAID.

ASK THE NEXT QUESTION.

Q. BY MR. SHEAHEN: WHEN YOU CHECKED FOR P30, THE NECESSARY INGREDIENT OF SEMEN, DID YOU DETERMINE THAT SEMEN WAS PRESENT?

A. NO, I DID NOT.

Q. AND COULD YOU INDICATE THAT ON THE CHART THAT WE ARE MAKING THERE WITH RESPECT TO MOUTH.

THANK YOU, MR. MOORE.

ARE WE GOING TO WORK RIGHT ON THROUGH OR TAKE A SHORT BREAK?

THE COURT: WE ARE GOING. 20 MORE MINUTES.

Q. BY MR. SHEAHEN: MR. MOORE, WITH RESPECT TO THE QUESTION OF SEMEN OR BLOOD ON A SHEET OR OTHER SUBSTANCE, DO YOU HAVE THE ABILITY TO DETERMINE WHEN THE STAINING OCCURRED?

A. NO, I CANNOT.

Q. COULD YOU EXPLAIN THAT, PLEASE?

A. THE APPEARANCE OF A PHYSIOLOGICAL FLUID ON A SURFACE SUCH AS A BED SHEET, WITHOUT PRIOR KNOWLEDGE AS TO THE CONDITION OF THAT BED SHEET, MEANS THAT IT COULD HAVE BEEN DEPOSITED ANY TIME THERE IN THE RECENT PAST AND NOT NECESSARILY DIRECTLY ASSOCIATED WITH A GIVEN ACT.

Q. DOES THAT MEAN THAT IF YOU FIND SEMEN AND BLOOD ON A BED SHEET THAT THEY WERE NOT NECESSARILY PUT THERE AT THE SAME TIME?

A. THERE ARE CONDITIONS OF APPEARANCE WHICH WOULD LEND CREDIBILITY TO ONE OPINION OVER ANOTHER, SUCH THAT ONE COULD SAY THAT THEY WERE COMINGLED OR THEY WERE DEPOSITED SEPARATE POINTS IN TIME.

Q. WITH RESPECT TO -- YOU TESTIFIED THAT THERE WAS SEMEN ON A BED SHEET IN THIS CASE; IS THAT CORRECT?

A. YES.

Q. AND WITH RESPECT TO THE SEMEN ON THE BED SHEET, COULD YOU TELL US WITH REASONABLE SCIENTIFIC CERTAINTY WHEN THAT SEMEN WAS PUT ON THAT BED SHEET?

A. NO, I CANNOT.

Q. CAN YOU TELL US WITHIN A TIME FRAME WHEN IT WAS PUT ON THE BED SHEET?

A. NO, I CANNOT.

Q. ARE YOU SAYING THAT THAT SEMEN COULD HAVE BEEN ON THAT BED SHEET FOR A DAY?

A. BASED UPON MY VERY LIMITED PERSPECTIVE ON THE FACTS OF THIS CASE --

Q. NO?

A. I CANNOT.

Q. ALL RIGHT.

A. I CANNOT DETERMINE WHEN THOSE STAINS WERE DEPOSITED THERE.

Q. SO IF YOU CANNOT DETERMINE WHEN THE STAINS WERE DEPOSITED THERE, IS IT CORRECT THEN THAT, MR. MOORE, THAT THEY COULD HAVE BEEN A DAY OLD, FIVE DAYS OLD, FIFTEEN DAYS OLD, THIRTY DAYS OLD?

A. I CANNOT EXCLUDE THAT FROM POSSIBILITY, BUT CERTAINLY IF THEY WERE MY SHEETS, I WOULDN'T BE SLEEPING IN THEM.

Q. THAT ISN'T SOMETHING THAT YOU WERE TAUGHT WHEN YOU GOT YOUR B.A. IN BIOLOGY AND THAT IS NOT PART OF YOUR

SEROLOGY WORK, IS IT?

MR. BERMAN: OBJECTION, YOUR HONOR.

THE WITNESS: I BEG YOUR PARDON?

THE COURT: OVERRULED.

Q. BY MR. SHEAHEN: WHAT I AM SAYING THAT IS NOT A SCIENTIFIC OPINION.

THAT IS JUST A PERSONAL OPINION; ISN'T THAT CORRECT?

A. THAT'S CORRECT.

Q. SO THE STAINS IN QUESTION WITH RESPECT TO THE SEMEN COULD HAVE BEEN PUT THERE BY WHAT YOU KNOW IN YOUR EXAMINATION AT ANY TIME IN THE PAST?

A. YES.

Q. DO YOU HAVE ANY IDEA -- IS THERE A TIME FRAME AT WHICH THE STAINS EVAPORATE? ARE THEY THERE FOR A YEAR OR WHATEVER?

A. WELL, IF THE STAIN IS UNDISTURBED, PARTICULARLY WHEN IT COMES TO SEMEN, IF THE STAIN IS UNDISTURBED, IT WILL STAY THERE FOR A LONG, LONG PERIOD OF TIME.

THE CLOSEST ANALOGY THAT I COULD COME TO THIS DISCUSSION IS IF SEMEN IS PRESENT IN THE VAGINAL AREA, ITS PRESENCE CAN BE DETECTED TYPICALLY WITHIN A 72 HOUR PERIOD OF TIME, BUT NO LATER BECAUSE OF THE MOVEMENT OF VAGINAL FLUID CLEANSING THE VAGINAL CAVITY.

THERE HAS TO BE SOME ACTIVITY GOING ON IN ORDER FOR THE STAIN TO DISAPPEAR FROM VIEW OR FROM DETECTION.

Q. SO THAT I AM NOT CONFUSED, YOU ARE NOT SAYING

THAT HERE WE FOUND ANY SEMEN IN VAGINAL FLUID?

A. NO.

I AM STATING IN RELATIONSHIP TO THE EXAMINATION OF A LIVING PERSON VERSUS THE DEPOSITION OF A STAIN ON A STATIC SURFACE SUCH AS A BED SHEET.

MR. SHEAHEN: THANK YOU.

YOUR HONOR, MAY I APPROACH AND I AM NOT -- WOULD HAVE TO ENLIST SOMEONE'S HELP.

I WANT TO MARK THAT, IF I COULD, AS A DEFENSE EXHIBIT AND CLEAR IT, BUT I DON'T KNOW THE EXACT PROCESS BY WHICH IT IS DONE.

THE COURT: JUST PUSH THE COPY BUTTON. IT WORKS AUTOMATICALLY.

PUSH IT ONCE.

MR. SHEAHEN: COULD I HAVE DEFENSE WHATEVER.

THE COURT: A.

MR. SHEAHEN: THANK YOU.

THE WITNESS: IT IS A REVOLVING DOOR.

MR. SHEAHEN: WE SEEM TO BE RETURNING TO ANOTHER --

THE COURT: OKAY.

THE WITNESS: THERE IS A TAB ON THE RIGHT THERE.

THE COURT: DEFENDANT'S A.

MR. SHEAHEN: ASK WE MAKE THIS PART OF THE RECORD.

I AM ALSO WONDERING HOW TO CLEAR THAT SO WE CAN START ON THE NEXT CHART.

THE COURT: JUST ERASE IT.

THERE IS AN ERASER THERE. YOU CAN JUST ERASE WHAT IS ON THE BOARD.

MR. SHEAHEN: THANK YOU.

Q. BY MR. SHEAHEN: MR. MOORE, I HAVE JUST WRITTEN ON THE QUESTION OF TIME, I HAVE WRITTEN THE QUESTION THAT WE HAVE DISCUSSED ON OUR CHART WHEN IS SEMEN PUT ON A SHEET OR SIMILAR SUBSTANCE, AND IS IT CORRECT THAT THE ANSWER IS A SIMPLE NO WAY TO TELL?

A. NOT FROM MY LIMITED VIEW ANYWAY.

IF I HAD A MORE COMPREHENSIVE VIEW OF THE INVESTIGATION, PERHAPS I COULD MAKE SOME DETERMINATIONS.

BUT MY ACTIVITY IS CONFINED TO THE EXAMINATION OF STAINS PRESENT ON THESE EXHIBITS.

Q. SO IF I PUT NO WAY FOR MR. MOORE TO TELL, THAT WOULD BE ACCURATE?

A. GIVEN THE QUALIFIER, CERTAINLY.

MR. COUWENBERG: YOUR HONOR, I AM GOING TO ASK AGAIN IT IS ONE MORE EXAMPLE -- AS MR. MOORE INDICATED THERE IS NO WAY FOR HIM TO TELL BASED UPON HIS LIMITED VIEW.

I WOULD HAVE NO OBJECTION IF THAT IS ADDED TO THE EXHIBIT.

THE COURT: OKAY. ADD IT. THAT'S WHAT HE SAID.

MR. SHEAHEN: CERTAINLY. NOW IT SAYS BASED ON HIS LIMITED VIEW.

Q. BY MR. SHEAHEN: SO, MR. MOORE, WE TALKED ABOUT THE SHEET WITH REFERENCE TO YOU BELIEVE THERE WAS A PRESENCE OF POSSIBLE SEMEN ON THE SHEET; IS THAT CORRECT?

A. THE PRESENCE OF SEMEN WAS DEMONSTRATED.

Q. BUT THERE IS NO WAY TO KNOW WHEN IT WAS PUT THERE BY -- UNDER YOUR LIMITED VIEW?

A. THAT'S CORRECT.

Q. NOW, YOU ALSO MENTIONED THAT YOU BELIEVE THAT THERE WAS SEMEN ON A WAD OF TOILET PAPER?

A. YES.

Q. WHEN WAS THAT SEMEN PUT THERE?

A. I DO NOT KNOW SPECIFICALLY.

Q. WELL, EVEN THOUGH YOU CAN'T TELL WHEN THE SEMEN ON THE SHEET WAS PUT THERE, CAN YOU TELL WHEN THE SEMEN ON THE TOILET PAPER WAS PUT THERE?

A. THERE IS NO DIFFERENCE IN MY PERSPECTIVE.

I ONLY KNOW THAT IT WAS PRESENTED TO ME AS AN EXHIBIT OF PHYSICAL EVIDENCE AND I SUBSEQUENTLY CONDUCTED TESTS ON IT.

ITS ACTUAL PLACE OF ORIGIN I DO NOT EVEN KNOW FOR SURE.

Q. SO YOU DON'T KNOW WHETHER THIS WAD OF TOILET PAPER CAME OUT OF A PARTICULAR BATHROOM OR NOT?

YOU JUST KNOW WHAT YOU HAVE BEEN ADVISED ALONG THE LINE?

A. I ONLY KNOW THAT THE PIECE OF TISSUE IN QUESTION IS ASSOCIATED WITH THIS INVESTIGATION.

Q. MR. MOORE, JUST TO CLEAR ONE THING UP, I HAVE USED THE PHRASE WAD OF TOILET PAPER BASED ON MY EXAMINATION OF THE CASE.

YOU USED THE WORD PIECE OF TISSUE. WHICH IS IT?

A. I BELIEVE YOUR CHARACTERIZATION IS MORE APPROPRIATE.

IT APPEARS AS IF SOMEONE TOOK A PORTION OF TOILET PAPER, WRAPPED IT SEVERAL TIMES AROUND ONE'S HAND. THAT IS THE APPEARANCE.

Q. BUT YOU CANNOT TELL US WITH ANY SCIENTIFIC CERTAINTY WHEN THAT SEMEN CAME TO BE ON THAT TOILET PAPER?

MR. BERMAN: YOUR HONOR, I AM GOING TO OBJECT.

THIS HAS BEEN ASKED AND ANSWERED NOW FOUR TIMES.

THE COURT: IT HAS.

SUSTAINED. ASK A DIFFERENT QUESTION.

Q. BY MR. SHEAHEN: MAY I JUST SO THAT WE CAN COMPLETE THIS, I HAVE INDICATED IN THE CHART, MR. MOORE, WITH RESPECT TO THE WAD OF TOILET PAPER, THERE IS NO WAY TO TELL BASED ON THE SAME LIMITED VIEW WHEN THE SEMEN WAS PUT THERE AND I ASSUME THAT IS NOT INCORRECT?

A. THAT IS A CORRECT ASSESSMENT.

Q. NOW, ON THE SAME POINT ABOUT TIME, DOES THE SAME -- WITH RESPECT TO THE QUESTION OF TIME THAT A SUBSTANCE OR THAT A SAMPLE OR WHATEVER IS LEFT ON A SUBSTANCE OR SURFACE, DOES IT ALSO APPLY TO BLOOD, WHAT WE HAVE BEEN TALKING ABOUT WITH RESPECT TO SEMEN?

A. COULD YOU CONSTRUCT A BETTER QUESTION, PLEASE.

Q. I WILL TRY.

A. THANK YOU.

Q. CAN YOU LOOK AT A BLOOD STAIN, SUCH AS THE BLOOD STAIN ON THE ROBE IN THIS CASE, AND THE ONE THAT YOU

INITIALLY THOUGHT WAS AB, AND CAN YOU TELL US FROM LOOKING AT THE BLOOD STAIN OR FROM YOUR ANALYSIS OF IT WHEN THE BLOOD STAIN WAS PUT THERE?

A. NO. THE SAME CONDITIONS APPLY.

I ONLY KNOW THAT I RECEIVED IT AS AN ITEM OF EVIDENCE IN THIS CASE.

IT WAS PRESENTED TO ME AS A DRIED STAIN AS WAS THE OTHER STAINS, AND I ACTED ACCORDINGLY.

Q. SO WHEN YOU GET IT YOU CAN'T TELL WHETHER THE BLOOD STAIN IS A WEEK OLD, A MONTH OLD OR A YEAR OLD?

A. THAT'S CORRECT.

Q. AND IS THAT TRUE WITH RESPECT TO THE BLOOD ON THE ROBE IN THIS CASE?

A. YES.

Q. YOU TESTIFIED I BELIEVE THAT THERE WAS WHAT YOU BELIEVED TO BE BLOOD ON A SHEET IN THIS CASE.

A. YES.

Q. IS THERE ANY WAY TO KNOW FROM THE EXAMS THAT YOU WERE ABLE TO CONDUCT WHEN THE BLOOD ON THE SHEET WAS PUT THERE?

A. NO, NOT WITH ANY CERTAINTY, NO.

Q. AND WITH RESPECT TO -- WITH RESPECT TO OTHER BLOOD SAMPLES IN THIS CASE, WOULD THE SAME BE TRUE?

A. YES.

THE COURT: MR. SHEAHEN, DO YOU WANT TO BREAK HERE?

MR. SHEAHEN: YES, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN, WE WILL PICK IT UP

AT 1:30.

COME BACK TO COURT AT THAT TIME.

REMEMBER THE ADMONITION NOT TO DISCUSS THE CASE AND NOT TO FORM ANY FINAL OPINION ABOUT IT.

SEE EVERYBODY BACK HERE AT 1:30.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: AND WE ARE OUTSIDE THE PRESENCE OF THE JURY.

MR. SHEAHEN, APPROXIMATELY HOW MUCH LONGER DO YOU --

(A JUROR ENTERED THE COURTROOM.)

THE COURT: HANG ON.

THERE IS A JUROR BACK.

(PAUSE IN THE PROCEEDINGS.)

(THE JUROR EXITED THE COURTROOM.)

THE COURT: GO AHEAD.

MR. SHEAHEN: WITH THE BENEFIT OF LUNCH, I SHOULD HAVE ANOTHER HALF HOUR, YOUR HONOR.

THE COURT: WHO IS GOING TO TESTIFY NEXT?

IS IT GOING TO BE THE CORONER OR THE CRIMINALIST?

MR. BERMAN: IT IS GOING TO BE MISS CAMPBELL.

THE COURT: OKAY. ALL RIGHT.

WE WILL SEE EVERYBODY BACK HERE AT 1:30 SHARP.

(AT 12:00 NOON A RECESS WAS TAKEN UNTIL 1:30 P.M. OF THE SAME DAY.)

VAN NUYS, CALIFORNIA; THURSDAY; DECEMBER 8, 1994

P.M. SESSION

DEPARTMENT NW E HON. SANDY KRIEGLER, JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL,
ROBERT SHEAHEN AND WILLIAM CHAIS,
ATTORNEYS AT LAW; PETER BERMAN,
PATRICK COUWENBERG, AND WILLIAM CRISCI,
DEPUTY DISTRICT ATTORNEYS OF
LOS ANGELES COUNTY, REPRESENTING
PEOPLE OF THE STATE OF CALIFORNIA.

(ALEXANDRIA FENNER, OFFICIAL REPORTER)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT, IN THE PRESENCE OF
THE JURY:)

THE COURT: BACK ON THE RECORD IN PEOPLE VERSUS PANAH.

THE DEFENDANT IS PRESENT WITH MR. SHEAHEN AND MR. CHAIS.

THE PEOPLE ARE REPRESENTED BY MR. BERMAN AND MR. COUWENBERG.

ALL TWELVE JURORS AND FIVE ALTERNATES ARE SEATED IN THE JURY BOX.

MR. MOORE IS ON THE WITNESS STAND. YOU REMAIN UNDER OATH.

MR. SHEAHEN, YOU MAY CONTINUE WITH YOUR CROSS-EXAMINATION.

MR. SHEAHEN: THANK YOU, YOUR HONOR.

WILLIAM MOORE,

CALLED AS A WITNESS BY THE PEOPLE, HAVING PREVIOUSLY BEEN SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

CROSS EXAMINATION (RESUMED)

BY MR. SHEAHEN:

Q MR. MOORE, I'D LIKE TO TALK -- TO GET TO THE WAD OF TOILET PAPER. BUT BEFORE DOING SO, I WOULD LIKE TO ASK ONE LINGERING QUESTION ABOUT THE ROBE.

BASED ON YOUR ANALYSIS, IS IT POSSIBLE THAT THE DECEDENT IN THIS CASE CAN BE EXCLUDED AS THE SOURCE OF THE BLOOD STAIN ON THE ROBE?

A NO, SHE CANNOT BE EXCLUDED AS A SOURCE OF THE BLOOD STAIN ON THE ROBE.

Q DID YOU WRITE IN YOUR REPORT:

"ALTERNATIVELY, IF THIS BLOOD STAIN ORIGINATED FROM SOMEONE WHO POSSESSES ABO TYPE AB BLOOD, NICOLE PARKER CAN BE EXCLUDED AS ITS SOURCE"?

A COULD YOU REFERENCE THE REPORT, PLEASE? THE DATE OF ANALYSIS BEING COMPLETED IN THE LOWER

LEFT-HAND CORNER.

WHAT IS THE DATE THAT YOU HAVE? WOULD THAT BE 5, JAN, '94?

Q I'M SORRY, MR. MOORE. I DON'T HAVE A DATE.

A LET ME LOOK AT THE REPORT I HAVE ENTITLED:

"EXAMINE RED STAINS FOR HUMAN BLOOD. TYPE AND COMPARE WITH VICTIM AND SUSPECT AS INDICATED."

IT'S A THREE-PAGE REPORT; IS THAT CORRECT?

Q THAT WOULD BE CORRECT.

A THERE ARE THREE ALTERNATIVES STATED IN THAT CONCLUSION SECTION OF THE REPORT.

Q MR. MOORE --

A THAT IS ONE OF THE CONCLUSIONS DRAWN.

Q ONE OF THE CONCLUSIONS THAT YOU DRAW --

A POSSIBLE CONCLUSIONS BASED UPON THE EXAMINATION OF THE EVIDENCE.

Q ONE OF THE POSSIBLE CONCLUSIONS, A REASONABLE CONCLUSION BASED UPON YOUR EXAMINATION OF THE EVIDENCE, IS THAT THE BLOOD STAIN ON THE ROBE COULD HAVE ORIGINATED FROM SOMEONE WITH AN AB TYPE BLOOD?

A THAT IS CORRECT.

Q AND THAT IF THAT IS THE CASE, THAT WOULD EXCLUDE THE DECEASED?

A ABSOLUTELY.

Q MR. MOORE, WITH RESPECT TO THE WAD OF TOILET PAPER, YOU DETECTED THE PRESENCE OF SOMETHING CALLED AMYLASE ON THE WAD OF TOILET PAPER?

A YES.

Q AND I KNOW YOU'VE DISCUSSED AMYLASE BEFORE, BUT COULD YOU TELL US AGAIN WHAT IS AMYLASE?

A AMYLASE IS AN ENZYME, AND IT IS A SIGNIFICANT PORTION OF ONE'S SALIVA.

IT HAS THE CAPACITY TO INITIATE THE DIGESTION PROCESS IN THE MOUTH BY ACTING UPON COMPLEX CARBOHYDRATES TO YIELD SIMPLE SUGARS.

Q AMYLASE IS AN ENZYME FOUND ONLY IN SALIVA?

A IT IS FOUND IN SUBSTANTIAL QUANTITIES IN SALIVA. IT IS FOUND IN SUBSTANTIALLY LESSER QUANTITIES IN OTHER BODILY FLUIDS.

Q IS IT FOUND IN URINE?

A I THINK MINUTE QUANTITIES HAVE BEEN DESCRIBED IN URINE.

I HAD A PAGE FROM THE SEROLOGY SOURCE BOOK PUBLISHED BY THE FBI, AND IN ALL OF MY TRAVELS, I SEEM TO HAVE MISPLACED IT THIS AFTERNOON.

BUT, YES, I BELIEVE IT HAS BEEN IDENTIFIED AS BEING PRESENT IN URINE IN SOME MINOR QUANTITIES.

Q YOUR MISPLACING THE PAGE, THAT IS BECAUSE YOU WERE ACTING IN HASTE?

A NO.

MR. SHEAHEN: YOUR HONOR, MAY WE APPROACH, IF IT PLEASE THE COURT?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

THE COURT: WE'RE AT THE BENCH, OUTSIDE THE PRESENCE OF THE JURY.

MR. SHEAHEN: TWICE TODAY, YOUR HONOR, THE VICTIM'S FAMILY HAS INDICATED ITS DISPLEASURE OF MY QUESTIONING.

WHEN I JUST ASKED THAT QUESTION ABOUT ACTING IN HASTE, I HEARD GROANS AND SNICKERS, AND GENERAL COMMUNICATION OF THEIR DISLIKE OF THE QUESTION.

AND THAT WAS THE SECOND TIME TODAY THAT IT'S HAPPENED, AND I THINK THESE PEOPLE HAVE BEEN ADMONISHED ABOUT THIS.

THE COURT: THEY HAVE BEEN. I DON'T THINK, THOUGH, THAT IT CAME FROM THE PEOPLE SITTING RIGHT BEHIND YOU.

IT APPEARED TO ME IT CAME FROM FARTHER BACK IN THE COURTROOM, WHICH IS NOT WHERE THE IMMEDIATE FAMILY IS SITTING.

I SUSPECT THAT THE LOOK I GAVE THEM WILL

PUT AN END TO THAT, SINCE I DID LOOK UP AT THE TIME.

WHEN WE TAKE THE NEXT BREAK, I'LL BE HAPPY TO ADMONISH THEM. IF I COULD TELL EXACTLY WHO THE SOURCE WAS, I'D THROW THEM OUT, BUT I'M NOT SURE.

SO THAT'S THE BEST I CAN DO AT THIS POINT.

MR. SHEAHEN: THANK YOU.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE PRESENCE OF THE JURY:)

BY MR. SHEAHEN:

Q MR. MOORE, THE PAGE THAT YOU MISPLACED FROM THE FBI BOOK, WHAT DID THAT RELATE TO?

A IT WAS A TABLE REFLECTING THE VARIOUS CONCENTRATIONS OF AMYLASE FOUND IN VARIOUS BODILY FLUIDS.

Q DID YOU HAVE A CHANCE TO READ IT OR AT LEAST TO PERUSE IT BEFORE IT WAS MISPLACED?

A YES.

Q AND DID IT REFLECT THAT AMYLASE IS FOUND AT LEAST TO SOME DEGREE IN URINE?

A THAT IS MY RECOLLECTION, YES.

Q DID IT FURTHER REFLECT THAT AMYLASE IS FOUND TO SOME DEGREE IN MUCUS?

A YES.

Q AND DID IT REFLECT THAT AMYLASE WOULD

ALSO BE FOUND IN VOMIT?

A IT WOULD SEEM TO FOLLOW THAT WHAT GOES DOWN TOWARDS THE STOMACH AND IT'S BROUGHT BACK UP, IT WILL BE PRESENT, YES.

Q AND THAT AMYLASE WOULD BE FOUND IN SALIVA?

A IN LARGE QUANTITIES, YES.

Q AND AMYLASE WHEN IT IS FOUND IN MUCUS, WOULD BE FOUND IN WHATEVER MANNER OF MUCUS SECRETION THERE MIGHT BE, WHETHER IT BE FROM THE EYE OR THE RECTUM OR WHEREVER; IS THAT CORRECT?

A I WOULD SUSPECT THAT THE PRESENCE OF AMYLASE IS NOT EXCLUSIVE TO ONE FORM OF MUCUS OVER ANOTHER, BUT CERTAINLY NOT NEARLY THE CONCENTRATION AS IS FOUND IN SALIVA.

Q IN ADDITION TO MUCUS, URINE, VOMIT, AND SALIVA, WOULD YOU ALSO FIND AMYLASE IN PERSPIRATION?

A POTENTIALLY, YES.

Q ARE THERE ANY OTHER BODILY FLUIDS THAT YOU WOULD ANTICIPATE FINDING AMYLASE IN?

A AMYLASE IS A MINOR CONSTITUENT OF SEMEN, AND I BELIEVE IT CAN EVEN BE FOUND IN THE FECES. BUT OTHER THAN THAT, I DON'T RECALL.

Q SO THE FACT THAT YOU FIND AMYLASE ON A WAD OF TOILET PAPER DOES NOT NECESSARILY MEAN THAT THAT IS SALIVA ON THAT WAD OF TOILET PAPER?

A THE AMOUNT -- THE SEMI-QUANTITATIVE ANALYSIS OF THE PRESENCE OF AMYLASE IS A SIGNIFICANT

MEASURE OF ITS POTENTIAL SOURCE.

GIVEN THAT THE CONCENTRATION OF THE AMYLASE ON THE WAD OF TOILET PAPER APPROACHED THAT OF MY STANDARD, AS I APPLIED IT FROM MY OWN MOUTH TO THE TEST SURFACE, WOULD CORROBORATE MY POSITION THAT THE AMYLASE PRESENT ON THAT WAD OF TISSUE WAS FROM SALIVA AND NO OTHER BODILY FLUID.

Q COULD YOU TELL ME WHERE IN YOUR LITERATURE IT'S INDICATED THAT THE ANALYST SHOULD REMOVE SALIVA FROM HIS OWN MOUTH?

A WELL, IN THE COURSE OF CONDUCTING TESTS FOR THE PRESENCE OF AMYLASE, ONE PRUDENTLY COMPARES THE QUESTIONED STAIN WITH A SOURCE OF AMYLASE THAT IS KNOWN TO THE ANALYST.

Q SO, YOU COMPARED IT WITH YOUR OWN SALIVA, AND YOU FOUND IT REASONABLY CONSISTENT WITH YOUR OWN SALIVA, AND YOU, THEREFORE, CONCLUDED THAT IT IS PROBABLY SALIVA?

A NO. IT WASN'T UNTIL I CONSULTED THE FBI SOURCE BOOK ON FORENSIC SEROLOGY THAT I DREW THAT CONCLUSION.

Q AND THAT'S THE BOOK OR THE PART OF THE BOOK THAT YOU DO NOT HAVE WITH YOU TODAY?

A THAT'S CORRECT.

Q BUT IN THIS ANALYSIS, DID YOU MAKE A DISTINCTION -- I MEAN, CAN YOU RULE OUT CATEGORICALLY THAT THIS WAS VOMIT, FOR EXAMPLE?

A NO, I CANNOT.

Q CAN YOU RULE OUT CATEGORICALLY THAT IT WAS MUCUS?

A NO, I CANNOT.

Q CAN YOU RULE OUT CATEGORICALLY THAT IT WAS URINE?

A YES.

Q CAN YOU RULE OUT CATEGORICALLY THAT IT WAS OTHER FLUIDS?

A YES.

Q SO IT COULD HAVE BEEN SALIVA, IT COULD HAVE BEEN VOMIT, AND IT COULD HAVE BEEN MUCUS, BASED ON YOUR ANALYSIS?

A IN DESCENDING ORDER OF LIKELIHOOD, YES.

Q I WANT TO MAKE ANOTHER CHART. BUT I JUST WANT TO GET BACK. I KNOW WE TALKED ABOUT IT, BUT THE BLOOD ON THE ROBE THAT COULD BE FROM AN AB PERSON; IS THAT RIGHT?

A IT CANNOT BE EXCLUDED FROM THE REALM OF POSSIBILITY.

MR. SHEAHEN: YOUR HONOR, I WOULD APPRECIATE IF WE COULD MARK THIS CHART NEXT IN ORDER.

MR. BERMAN: YOUR HONOR, I AM GOING TO OBJECT.

THE ENTRY COUNSEL JUST MADE DID NOT CONTAIN THE COMPLETE ANSWER OF THE WITNESS.

MR. SHEAHEN: MR. BERMAN IS QUITE RIGHT. I APOLOGIZE.

MR. BERMAN: I WOULD ASK THE COMPLETE

ANSWER BE WRITTEN ON THE CHART.

MR. SHEAHEN: I WILL ASK MR. MOORE TO ERASE MY ANSWER, OR MY SHORTHAND VERSION OF IT, AND PUT DOWN WHAT HE BELIEVES IS THE CORRECT STATEMENT.

THE COURT: FINE. STEP DOWN.

THE WITNESS: I DO NOT SEE ANY REFERENCE TO SALIVA OR AMYLASE.

BY MR. SHEAHEN:

Q BECAUSE WE'RE CHANGING THE CHART.

WE HAD GONE BACK TO THE QUESTION -- MR. MOORE, I'M SORRY.

THE BLOOD ON THE ROBE, THAT THE SOURCE OF THE BLOOD ON THE ROBE, THAT YOU COULD NOT RULE OUT AN AB PERSON AS A SOURCE OF THE BLOOD.

MR. BERMAN OBJECTED TO MY SHORTHAND VERSION OF IT, AND WE ASKED THAT YOU PUT DOWN AN ACCURATE VERSION AS TO WHAT IT SHOULD READ.

A REWRITTEN TO SHOW TYPE AB CANNOT BE EXCLUDED.

Q THANK YOU.

WITH THAT, YOUR HONOR, I WOULD ASK THAT WE MARK IT AND I BE ALLOWED TO PRINT IT?

THE COURT: THAT WILL BE DEFENSE B.

MR. SHEAHEN: THANK YOU.

IF I MAY APPROACH AGAIN AND ERASE WHAT WE HAVE THERE.

THE COURT: GO AHEAD.

MR. SHEAHEN: THANK YOU.

Q MR. MOORE, HOW DO YOU SPELL "AMYLASE" PLEASE?

A A-M-Y-L-A-S-E.

Q WOULD IT BE CORRECT TO SAY AMYLASE WAS DETECTED ON THE WAD OF TOILET PAPER?

A THAT WOULD BE CORRECT, YES.

Q AND THAT AS WE JUST TALKED ABOUT THAT, IT COULD BE SALIVA, VOMIT, OR MUCUS, AND I THINK YOU SAID THAT IN DESCENDING ORDER?

A YES.

Q BASED ON YOUR ANALYSIS OF THE WAD OF TOILET PAPER WITH RESPECT TO THIS AMYLASE DETECTION AND ASSUMING AGAIN A POPULATION BASE OF TEN MILLION, COULD YOU TELL US THE NUMBER OF PEOPLE WITHIN THAT POPULATION BASE THAT COULD REASONABLY BE THE SOURCE OF THAT?

A I WOULD HOPE THAT EVERYONE IN THIS COURTROOM AND BEYOND POSSESSES AMYLASE.

Q I'M SORRY.

WITH RESPECT TO THIS AMYLASE THAT YOU DETECTED, I THINK YOU SAID THAT YOU NARROWED IT DOWN TO SOME BLOOD TYPE OR SOMETHING.

A THE CONCLUSIONS DRAWN, AND I REFER TO MY -- I BELIEVE MY FINAL REPORT. THE AMYLASE ACTIVITY, WITHOUT CONSIDERING ANYTHING ELSE, COULD HAVE COME FROM ANYONE.

BUT GIVEN THAT WE HAVE A, B, AND H ANTIGENIC ACTIVITY EXHIBITED BY THIS MIXED STAIN, IT

WOULD SUGGEST AT THE VERY LEAST THAT IT WAS PROVIDED BY A SECRETOR OF AT LEAST ONE OF THOSE ANTIGENS.

THEREFORE, THE CONCLUSION WOULD BE LIMITED TO THE PERCENTAGE OF SECRETORS IN THE POPULATION, WHICH IS APPROXIMATELY 76 IN ONE HUNDRED PERSONS.

Q SO, AGAIN, MR. MOORE, I'M NOT TRYING TO CONFUSE YOU OR ANYTHING, COULD YOU INDICATE ON THE BOARD THE NUMBER -- ASSUMING THE TEN MILLION POPULATION BASE, THE NUMBER OF PEOPLE IN SOUTHERN CALIFORNIA THAT COULD HAVE PROVIDED THE SALIVA, VOMIT, OR MUCUS FOUND ON THE WAD OF TOILET PAPER?

A SURE.

THE STATEMENT READS AS FOLLOWS:

CONSIDERING ONLY THE AMYLASE PRESENT, AND ASSUMING THE CONTRIBUTION OF ANTIGENIC ACTIVITY, THE POSSIBILITY IS 7.6 MILLION IN A TEN MILLION POPULATION.

Q. SO WHAT YOU DETECTED THERE COULD COME FROM ANY THREE OUT OF FOUR PEOPLE BASICALLY?

A. BASED ON THE QUALIFICATION GIVEN, YES.

Q. DO YOU HAVE -- I THINK YOU TESTIFIED EARLIER THAT IT COULD HAVE COME FROM THE DECEDENT IN THIS CASE.

A. THAT'S CORRECT.

Q. THAT SHE IS ONE OF THE 7.6 MILLION?

A. YES.

Q. DO YOU HAVE ANY IDEA WHETHER MR. SEIHOON IS ONE OF THE 7.6 MILLION?

A. MR. SEIHOON?

Q. THE ANSWER IS NO, YOU DON'T, OR ANYBODY ELSE OR ANY L.A.P.D. OFFICER, ANYBODY ELSE WHO MIGHT HAVE BEEN IN THE BATHROOM WHERE THE TISSUE WAS FOUND.

MR. BERMAN: THERE IS GOING TO BE AN OBJECTION TO COUNSEL GIVING THE ANSWER TO A WITNESS.

THE COURT: JUST ASK THE QUESTION ONCE AND LET HIM ANSWER IT.

MR. SHEAHEN: THANK YOU.

Q. BY MR. SHEAHEN: DO YOU HAVE ANY IDEA BASED ON YOUR KNOWLEDGE OF THE CASE WHETHER THE SOURCE OF THAT COULD HAVE BEEN MR. SEIHOON?

A. INCONCLUSIVELY, NO.

Q. DO YOU HAVE ANY INDICATION BASED ON YOUR KNOWLEDGE OF THE CASE WHETHER THE SOURCE OF THAT COULD HAVE BEEN AN L.A.P.D. OFFICER?

A. NO.

Q. YOU MENTIONED, MR. MOORE, THAT THERE ARE, AND I

AM NOT SURE YOU SAID THIS, CORRECT ME IF I AM WRONG, THAT YOU CAN DO BETTER THAN THIS; IS THAT RIGHT?

THAT YOU CAN BE MORE SPECIFIC THAN THIS?

THERE ARE TECHNIQUES IN EXISTENCE THAT WOULD NARROW IT DOWN INSTEAD OF 7.6 MILLION THAT YOU COULD NARROW IT DOWN; IS THAT CORRECT?

A. POTENTIALLY, YES.

Q. WHAT WOULD THAT ENTAIL?

A. IT WOULD ENTAIL AN EXAMINATION FOR THE PRESENCE OF CELLULAR MATERIAL AS WOULD ACCOMPANY SALIVA UPON SPITTING OR OTHER LOSS OF SALIVA FROM THE MOUTH.

Q. FOR EXAMPLE, IF YOU,, IF YOU WANT TO ANALYZE -- IF YOU WANT TO TRY TO TELL THE HUMAN SOURCE OF THIS AMYLASE OR OF SEMEN, ARE THERE RECENT TECHNIQUES THAT ARE MORE REFINED THAN THIS TECHNIQUE YOU USED HERE?

A. YES.

Q. AND WHAT WOULD THOSE INCLUDE?

A. THE MOST EASILY ACCESSIBLE TECHNIQUE IS ONE KNOWN AS PCR, WHICH IS SHORT FOR POLYMERASE CHAIN REACTION, WHICH IS A DNA BASED TECHNIQUE WHICH HAS THE POWER OF AMPLIFYING THE DNA SO THAT IT CAN BE DETECTED MORE EASILY.

THE OTHER TECHNIQUE BUT FAR LESS APPLICABLE TO THIS TASK OF DETECTING CELLULAR TISSUE FROM A PERSON'S MOUTH BUT CERTAINLY APPLICABLE TO THE FURTHER CHARACTERIZATION OF A SEMEN STAIN SUCH AS WE HAVE ON THE WAD OF TISSUE PAPER IS KNOWN AN RFLP, WHICH IS RESTRICTION FRAGMENT LENGTH POLYMORPHISM DNA.

Q. AND WITH RESPECT TO THE ANALYSIS OF THIS WAD OF

TOILET PAPER, THESE METHODS WERE NOT WORKABLE?

A. THE CASE RECEIVED CONSIDERATION BY THE PEOPLE AT OUR LABORATORY WHO ARE KNOWLEDGEABLE IN THE PCR TECHNIQUE.

THE SPECIFIC RESULTS OF THAT I BELIEVE WERE THAT THERE WAS INADEQUATE DNA FOR A CONCLUSION.

Q. SO THEN THE CONCLUSION THAT WE CAN DRAW WITH RESPECT BASED ON YOUR EXAMINATION THAT THE WAD OF TOILET PAPER CONTAINS EITHER SALIVA, VOMIT OR MUCOUS, AND THAT IT COULD HAVE COME FROM ANYONE OF 7.6 MILLION PEOPLE IN SOUTHERN CALIFORNIA.

IS IT ALSO TRUE THAT IT COULD HAVE BEEN PUT THERE AT ANY TIME?

A. WELL, WE ARE NOW EXPANDING THE DISCUSSION.

Q. LET ME BREAK THE FIRST PART AND I AM SORRY TO MAKE THIS COMPOUND. I PROBABLY SHOULDN'T HAVE.

SO THAT WE ARE CLEAR ON THIS, BASED ON YOUR ANALYSIS AND WHAT YOU HAVE BEEN ABLE TO DO WITH RESPECT TO THIS CASE, YOU ARE ABLE TO CONCLUDE YOU BELIEVE THAT THE SUBSTANCE IN QUESTION ON THE WAD OF TOILET PAPER WAS EITHER SALIVA, VOMIT OR MUCOUS; IS THAT CORRECT?

A. MOST SPECIFICALLY THE LIKELIHOOD IS THAT IT WAS SALIVA AND IT CONTRIBUTED THE A ANTIGENIC ACTIVITY PRESENT ON THE TISSUE PAPER.

Q. AND YOU ARE ABLE TO DETERMINE BASED ON YOUR ANALYSIS OF THIS CASE THAT THE SALIVA, VOMIT OR MUCOUS COULD HAVE COME FROM ANY ONE OF 7.6 MILLION PEOPLE IN SOUTHERN CALIFORNIA?

A. THAT IS MY OPINION BASED UPON THE QUALIFICATIONS GIVEN AT THE OUTSET OF THIS PATH OF QUESTIONING.

MY OPINION AND I WANT TO EMPHASIZE IS THE SAME AS WHAT I PROVIDED ON DIRECT EXAMINATION AND THAT IS THE SEMINAL FLUID IN ALL LIKELIHOOD CAME FROM MR. PANAH AND THE --

Q. MR. MOORE --

MR. BERMAN: YOUR HONOR, I AM GOING TO OBJECT.

COUNSEL HAS INTERRUPTED HIS ANSWER.

MR. SHEAHEN: IT IS NONRESPONSIVE.

THE COURT: HE IS EXPLAINING HIS OPINION.

YOU ATTEMPTED TO STATE WHAT HIS OPINION IS AND HE IS DISAGREEING WITH YOUR STATEMENT OF HIS OPINION AND HE IS ENTITLED TO MAKE CLEAR FOR THE JURY WHAT HIS OPINION ACTUALLY IS.

THE OBJECTION IS SUSTAINED. PLEASE FINISH YOUR ANSWER.

THE WITNESS: AND THE AMYLASE ACTIVITY ORIGINATED FROM SALIVA FROM A PERSON POSSESSING A ANTIGENIC ACTIVITY SUCH AS MIGHT BE CONTRIBUTED BY NICOLE PARKER.

Q. BY MR. SHEAHEN: IT MIGHT BE CONTRIBUTED BY THE DECEDENT OR BY ANY NUMBER OF OTHER PEOPLE; IS THAT CORRECT?

A. I CAN CALCULATE THAT.

BASED UPON THE POPULATION OF TEN MILLION PEOPLE, APPROXIMATELY 2.5 MILLION PEOPLE ARE A SECRETORS AS IS INDICATED BY THIS EXHIBIT.

Q. THEN I HAVE BEEN WRONG, MR. MOORE.

IT IS NOT 7.6 MILLION. IT IS ONLY 2.5 MILLION THAT COULD HAVE BEEN THE SOURCE OF THIS.

MR. BERMAN: I AM GOING TO OBJECT.

COUNSEL HAS SWITCHED AGAIN IN TERMS OF HIS HYPOTHETICAL.

THE ANSWER GIVEN ABOUT 7.6 MILLION WAS BASED ON VERY SPECIFIC SET OF FACTS PROPOUNDED BY COUNSEL TO THE WITNESS.

THE WITNESS IS NOW ANSWERING A DIFFERENT LINE OF QUESTIONING WITH AN ANSWER THAT IS APPROPRIATE TO THE DIFFERENT LINE.

THE COURT: WELL, THE COURT IS GOING TO SUSTAIN ITS OWN OBJECTION.

THE LAST QUESTION IS IRRELEVANT.

WHETHER YOU ARE RIGHT OR WRONG ISN'T RELEVANT IN THIS CASE.

ASK A DIRECT QUESTION OF THE WITNESS.

Q. BY MR. SHEAHEN: WITH RESPECT -- IS IT CORRECT NOW WITH RESPECT TO THIS SPECIFIC SAMPLE ON THIS SPECIFIC TISSUE THERE ARE ONLY 2.5 MILLION PEOPLE THAT COULD HAVE BEEN THE SOURCE OF IT?

A. IN THE TEN MILLION POPULATION, YES.

Q. PERHAPS YOU WOULD INDICATE THAT ON THE CHART, PLEASE.

A. THE STATEMENT READS FULLY DESCRIBED APPROXIMATELY 2.5 MILLION PEOPLE COULD HAVE PROVIDED AMYLASE AND TYPE A ANTIGENIC ACTIVITY.

Q. AND THE LAST QUESTION IN THIS AREA, MR. MOORE,

IS THERE ANY WAY FOR YOU TO TELL OR IS THERE ANY METHOD THAT YOU HAVE USED THUS FAR THAT COULD TELL US WHEN THAT SALIVA, VOMIT OR MUCOUS WAS PLACED ON THAT WAD OF TOILET PAPER?

A. NO.

Q. AND IS THERE ANY METHOD IN EXISTENCE THAT COULD TELL US THAT?

A. I DON'T BELIEVE SO.

Q. COULD YOU INDICATE THAT ON THE BOARD, OR SINCE YOU HAVE BEEN UP THERE, I WILL JUST WRITE IT DOWN QUICKLY.

I HAVE WRITTEN ON THE BOARD NO WAY TO KNOW WHEN IT WAS PUT ON TISSUE.

IS THAT ACCURATE, MR. MOORE?

A. THAT'S ACCURATE.

MR. SHEAHEN: THANK YOU.

YOUR HONOR, I WOULD ASK THAT WE MARK THAT C.

THE COURT: DEFENDANT'S C.

MR. SHEAHEN: THANK YOU.

Q. BY MR. SHEAHEN: MR. MOORE, HOPEFULLY ONE LAST AREA.

YOU TESTED BLOOD WITH RESPECT TO --

I AM SORRY.

DID YOU TEST BLOOD THAT WAS ATTRIBUTED OR ASSOCIATED WITH MR. PANAH SPECIFICALLY. DID YOU TEST A SAMPLE OF HIS BLOOD?

A. YES.

Q. AND WAS THAT THE -- IS THAT WHEN YOU CAME BACK AND YOU TOLD US THAT IT WAS TYPE B?

A. YES.

Q. NOW, WITH RESPECT TO THE DECEDENT, DID YOU FIND ANY TYPE B BLOOD ON THE DECEDENT?

A. I AM SORRY. I DON'T QUITE UNDERSTAND THE QUESTION.

Q. OKAY.

YOU EXAMINED -- NO, I AM SORRY. YOU DIDN'T EXAMINE THE DECEDENT.

YOU EXAMINED THE KIT THAT WAS PROVIDED FROM THE FELLOW FROM THE CORONER'S OFFICE, RIGHT?

A. YES.

Q. AND FROM THAT KIT, WAS THERE ANY TYPE B BLOOD INVOLVED WITH THE BODY OF THE DECEDENT?

A. SEPARATELY PACKAGED THERE WAS A VIAL OF WHOLE BLOOD WITH THE ASSOCIATED INFORMATION FOR THIS CASE.

IT WAS REFRIGERATED WHOLE BLOOD THAT THAT WHOLE BLOOD PROVIDED ABO TYPE A.

Q. BUT YOU CHECKED THE VARIOUS SWABS WITH RESPECT TO THE DECEDENT; IS THAT CORRECT?

LET ME BE CLEAR.

YOU TESTIFIED EARLIER THAT THERE WAS NO SEMEN IN OR ON THE DECEDENT; IS THAT CORRECT?

A. TESTING WAS NOT CONCLUSIVE FOR THE PRESENCE OF SEMEN.

IN OTHER WORDS, SEMEN WAS NOT ESTABLISHED AS BEING PRESENT CONCLUSIVELY.

Q. MY QUESTION NOW GOES TO BLOOD.

IS THE SAME ANSWER TRUE FOR BLOOD THAT YOU COULD NOT ESTABLISH THE PRESENCE OF ANY B TYPE BLOOD?

A. I WAS NOT PRESENTED WITH ANY QUESTIONED STAINS REPRESENTED AS POTENTIALLY BEING HUMAN BLOOD.

Q. AND SO, THEREFORE, YOU DID NOT CONCLUDE THAT THERE WAS ANY B TYPE HUMAN BLOOD PRESENT ON THE SWABS PRESENTED TO YOU ASSOCIATED WITH THE DECEDENT?

A. THERE WAS NOTHING ABOUT THE CORONER'S SEX KIT THAT LEAD ME TO BELIEVE THAT BLOOD STAIN ANALYSIS WAS INDICATED OR REQUIRED.

Q. AND DOES THE SAME HOLD TRUE FOR SALIVA ANALYSIS FROM THE CORONER'S SEX KIT;

THAT THERE WAS NOTHING TO INDICATE THAT THERE WAS B TYPE SALIVA?

A. NO.

BECAUSE NIPPLE SWABS RETURNED A NEGATIVE RESULT FOR AMYLASE.

THEREFORE, NO ABO TYPING WAS INDICATED.

Q. SO, THEREFORE, THEREFORE, THERE IS NO B TYPE SALIVA ASSOCIATED WITH THE DECEDENT; IS THAT CORRECT?

A. INSOFAR AS THE CORONER'S SEX KIT IS CONCERNED.

Q. AND THE SAME HOLDS TRUE FOR URINE, OF COURSE, DOES IT NOT?

A. I AM SORRY.

Q. THE SAME WOULD HOLD TRUE FOR URINE, THAT THERE WAS NO SUGGESTION OF URINE ON ANY OF THE SWABS THAT WOULD COME BACK AS B TYPE?

A. THAT'S CORRECT.

Q. MR. MOORE, DO YOU HAVE -- AS A SEROLOGIST YOU WOULD HAVE NOTHING TO DO WITH FINGERPRINTING, WOULD

YOU?

A. THAT'S QUITE CORRECT.

Q. AND YOU MENTIONED DNA TESTING, YOU DON'T PERSONALLY DO ANY DNA TESTING, DO YOU?

A. NO, I DO NOT.

Q. AND HAVE YOU WORKED WITH DNA AT ALL?

A. ONLY IN THE CLASSROOM.

Q. NOT IN THE LABORATORY?

A. NOT IN THE LABORATORY.

Q. YOU HAVE NEVER TESTIFIED AS AN EXPERT ABOUT DNA?

A. THAT'S QUITE CORRECT.

MR. SHEAHEN: THANK YOU. NOTHING FURTHER, YOUR HONOR.

THE COURT: REDIRECT?

MR. COUWENBERG: YES. THANK YOU, YOUR HONOR.

IF I MAY HAVE JUST A MINUTE, YOUR HONOR. WHO HAS GOT THE DEFENSE A EXHIBIT.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

REDIRECT EXAMINATION

BY MR. COUWENBERG:

Q. MR. MOORE, WE DON'T HAVE THE DEFENSE A EXHIBIT ON THE BOARD ANYMORE, BUT THIS IS A PRINTOUT.

NOW, IF YOU REMEMBER, DEFENSE COUNSEL ASKED YOU

WITH RESPECT TO THE VARIOUS BLOOD TYPES THE PERCENTAGES OF THAT PARTICULAR BLOOD TYPE AS IT RELATES TO THE GENERAL POPULATION.

DO YOU REMEMBER THAT?

A. YES, I DO.

Q. NOW, KNOWING JUST THE BLOOD TYPE YOU HAVE GIVEN US CERTAIN NUMBERS; IS THAT CORRECT?

A. YES.

Q. FOR EXAMPLE, WITH RESPECT TO TYPE A, YOU HAVE GIVEN US 3.340000 IN A TEN MILLION NUMBER POPULATION; IS THAT CORRECT?

A. YES, THAT'S CORRECT.

Q. NOW, KNOWING THE PGM SUBTYPES, WOULD YOU BE ABLE TO GIVE US WITH A CERTAIN SPECIFICITY THE PERCENTAGE AS IT RELATES TO THE GENERAL POPULATION?

A. YES.

Q. AND WOULD THAT NUMBER BE DIFFERENT THAN THE NUMBER REFLECTED ON DEFENSE A?

A. YES.

Q. NOW, FOR EXAMPLE, WITH RESPECT TO TYPE A BLOOD KNOWING THE PGM SUBTYPES WHAT WOULD THAT NUMBER BE?

A. FOR TYPE A IN COMBINATION WITH PGM SUBTYPE ONE PLUS, ONE MINUS IN A POPULATION OF TEN MILLION, APPROXIMATELY 5.8 MILLION -- STRIKE THAT -- 587,000 INDIVIDUALS WOULD POSSESS THAT COMBINATION OF MARKERS.

Q. A NUMBER LESS THAN THE PREVIOUS 3,340,000?

A. YES.

Q. NOW, WITH RESPECT TO TYPE A BLOOD IF YOU KNOW

THE PGM SUBTYPE TO BE TWO PLUS, ONE PLUS, WHAT WOULD THAT NUMBER BE?

A. IN THE NEIGHBORHOOD OF 322,000.

Q. AGAIN A NUMBER THAT IS LESS --

A. YES.

Q. -- THAN THE NUMBER REFLECTED ON DEFENSE A; IS THAT CORRECT?

A. YES.

Q. NOW, YOU TESTIFIED THAT AMYLASE CAN BE FOUND IN OTHER BODILY FLUIDS OTHER THAN SALIVA; IS THAT CORRECT?

A. YES.

Q. NOW, YOU HAVE ALSO GIVEN US AN OPINION WITH RESPECT TO CERTAIN SAMPLES ALSO THAT IN YOUR OPINION THE PRESENCE OF AMYLASE INDICATED SALIVA; IS THAT CORRECT?

A. YES.

Q. AND IS THAT BASED UPON THE HIGH CONCENTRATION OF AMYLASE FOUND IN THOSE PARTICULAR SAMPLES?

A. YES, IT IS.

Q. NOW, ACID PHOSPHATASE IS FOUND IN SEMEN; IS THAT CORRECT?

A. YES, IT IS.

Q. YOU HAVE ALSO TESTIFIED I BELIEVE THAT YOU DETECTED ACID PHOSPHATASE ON ORAL AND ANAL SWABS PRESENTED TO YOU IN THE SEXUAL ASSAULT KIT TAKEN FROM THE VICTIM IN THIS CASE, NICOLE PARKER; IS THAT CORRECT?

A. YES.

Q. NOW, AGAIN WHEN DEFENSE COUNSEL PREPARED DEFENSE A --

CAN I ERASE THIS?

THE COURT: YES, IT HAS ALREADY BEEN MARKED.

Q. BY MR. COUWENBERG: -- HE HAD WRITTEN DOWN UNDER THE WORD DECEDENT VAGINA, NO SEMEN.

HAVING FOUND OR HAVING DETECTED ACID PHOSPHATASE IN THE ORAL AND ANAL SWABS, WOULD IT BE MORE CORRECT TO SAY INSTEAD OF NO SEMEN, INCONCLUSIVE OF SEMEN?

A. YES.

NOT FOR THE VAGINAL SWAB, BUT FOR THE ORAL AND ANAL SWABS.

Q. AND WITH RESPECT TO THE ANAL SWAB, WOULD THE MORE CORRECT WAY TO SAY BASED UPON YOUR DETECTION OF ACID PHOSPHATASE INCONCLUSIVE OF SEMEN?

A. THAT IS MOST CORRECT, YES.

Q. WITH RESPECT TO THE TISSUE PAPER, DID YOU DETECT THE PRESENCE OF BLOOD?

A. NO.

IT WAS NOT VISUALIZED. THEREFORE, ONE COULD NOT ANALYZE FOR BLOOD.

Q. DID YOU DETECT THE PRESENCE OF FECAL MATTER?

A. NO. NONE WAS VISUALIZED.

MR. COUWENBERG: THANK YOU.

I HAVE NOTHING FURTHER.

THE COURT: ANY RECROSS?

MR. SHEAHEN: JUST CLEAR SOMETHING UP.

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RECROSS EXAMINATION

BY MR. SHEAHEN:

Q. THE FACT THAT IT IS INCONCLUSIVE THEN THAT MEANS IT WAS THERE; IS THAT RIGHT?

A. NO.

Q. OH?

A. THE MOST CORRECT ANSWER IS THAT BECAUSE THERE WAS A POSITIVE ACID PHOSPHATASE RESULT BUT FOR THE LACK OF THE DETECTION OF SPERMATOZOA AND FOR THE LACK OF DETECTION OF P30, RESULTS ARE INCONCLUSIVE.

Q. MR. MOORE, NOT WANTING TO BEAT A DEAD HORSE, DIDN'T YOU TELL US IF YOU DON'T HAVE P30 YOU DON'T HAVE SEMEN?

A. THAT'S CORRECT.

BUT THE MOST CORRECT ASSESSMENT OF THESE SWABS, PARTICULARLY GIVEN THE SOURCE OF ORAL AND ANAL LOCATIONS, SOURCES WHERE ACID PHOSPHATASE ARE HIGHLY UNLIKELY TO BE FOUND, IT IS MOST CORRECT TO SAY INCONCLUSIVE.

Q. MEANING YOU DIDN'T FIND ANY SEMEN THERE THAT YOU CAN STATE WITH ANY CERTAINTY WAS THERE?

A. THAT'S CORRECT.

Q. AND THAT FOR OUR PURPOSES IT WASN'T THERE?

A. THAT'S THE POSITION THAT MOST WOULD TAKE, YES.

MR. SHEAHEN: THANK YOU.

MR. COUWENBERG: MAY I HAVE THAT PRINTED AND MARKED, YOUR HONOR, AS PEOPLE'S NEXT IN ORDER.

THE COURT: ALL RIGHT. I THINK WE ARE UP TO 19 FOR THE PEOPLE.

MR. COUWENBERG: PEOPLE'S 19.

THE COURT: I AM SORRY.

MR. COUWENBERG, DID YOU HAVE ANY ADDITIONAL QUESTIONS?

MR. COUWENBERG: NO, YOUR HONOR.

THE COURT: MAY THIS WITNESS BE EXCUSED?

MR. COUWENBERG: YES.

THE COURT: ANY OBJECTION, MR. SHEAHEN?

MR. SHEAHEN: NO OBJECTION, YOUR HONOR.

THE COURT: THANK YOU.

YOU ARE FREE TO LEAVE.

IS YOUR NEXT WITNESS READY TO START?

MR. SHEAHEN: YOUR HONOR, DID WE FINISH TESTIMONY FROM MR. MONSON?

MR. BERMAN: YOUR HONOR, WE HAVE KEPT THIS WITNESS --

RAUNI JEAN CAMPBELL,

CALLED AS A WITNESS ON BEHALF OF THE PEOPLE, TESTIFIED AS FOLLOWS:

THE CLERK: RAISE YOUR RIGHT HAND, PLEASE.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES. I DO.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW E HON. SANDY KRIEGLER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
PEOPLE,
VS.
HOOMAN ASHKAN PANAH,
DEFENDANT.

NO. BA090702

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 12, 1994

VOLUME 21

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OFFICIAL REPORTERS

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MR. SHEAHEN: THANK YOU.

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, IN
THE PRESENCE AND HEARING OF
THE JURY:)

THE COURT: LET THE RECORD REFLECT ALL TWELVE JURORS AND FIVE ALTERNATES ARE SEATED IN THE JURY BOX.

MR. BERMAN, YOUR NEXT WITNESS, PLEASE.

MR. BERMAN: PEOPLE CALL DR. EVA HEUSER.

EVA HEUSER,

CALLED AS A WITNESS ON BEHALF OF THE PEOPLE, TESTIFIED AS FOLLOWS:

THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE CLERK: THANK YOU.

PLEASE BE SEATED.

PLEASE STATE YOUR FALL NAME FOR THE RECORD SPELLING YOUR FIRST AND LAST NAME.

THE WITNESS: EVA, E-V-A. H-E-U-S-E-R.

THE COURT: PROCEED.

MR. BERMAN: THANK YOU.

DIRECT EXAMINATION

BY MR. BERMAN:

Q. DR. HEUSER, WHAT IS YOUR CURRENT OCCUPATION?

A. I AM A DEPUTY MEDICAL EXAMINER AT THE LOS ANGELES COUNTY CORONER'S OFFICE.

Q. AND FOR HOW LONG HAVE YOU BEEN SO EMPLOYED?

A. 15 YEARS. THIS IS THE FIFTEENTH YEAR.

Q. DID YOU CONDUCT AN AUTOPSY IN THIS CASE?

A. YES.

Q. WOULD YOU PLEASE DESCRIBE FOR THE JURY YOUR BACKGROUND, TRAINING AND EXPERIENCE WHICH LEAD YOU TO THE POSITION OF MEDICAL EXAMINER FOR THE CORONER'S OFFICE?

A. WELL, I AM A LICENSED PHYSICIAN. I AM LICENSED TO PRACTICE MEDICINE IN THE STATE OF CALIFORNIA.

I AM CERTIFIED BY THE AMERICAN BOARD OF PATHOLOGY IN ANATOMICAL PATHOLOGY AND IN FORENSIC PATHOLOGY.

I HAD ONE YEAR OF ROTATING INTERNSHIP AND THEREAFTER ALL MY TRAINING WAS IN PATHOLOGY, WHICH WAS FOUR YEARS.

AFTER THAT TIME I WORKED AS A PATHOLOGIST FOR NINETEEN YEARS AT CHILDREN'S HOSPITAL OF LOS ANGELES AND THEN CONSECUTIVELY, ACTUALLY WITH ONE YEAR OF SABBATICAL, WORKED AT THE CORONER'S OFFICE.

Q. WHERE DID YOU GO TO MEDICAL SCHOOL?

A. QUEEN'S UNIVERSITY IN CANDADA.

Q. WAS IT AFTER YOUR TIME IN MEDICAL SCHOOL THAT

YOU DID YOUR INTERNSHIP AND IS THAT THE FOUR YEARS OF ROTATION THAT YOU WERE TALKING ABOUT?

A. IT IS ONE YEAR --

YES. IT IS AFTER MEDICAL SCHOOL IT IS ONE YEAR OF ROTATING CLINICAL TYPE INTERNSHIP AND THEN FOUR YEARS OF PATHOLOGY INTERNSHIP OR RESIDENCY.

Q. AND WHERE DID YOU DO THAT FOUR YEARS OF PATHOLOGY TRAINING?

A. THE FIRST TWO YEARS WAS IN MONTREAL AT MC GILL, AND THE LAST TWO YEARS FIRST YEAR WAS AT CEDARS BEFORE IT BECAME CEDARS SINAI AND THE LAST YEAR WAS AT THE LONG BEACH V.A.

Q. AND WAS IT AFTER THAT THAT YOU WORKED FOR NINETEEN YEARS AS A PATHOLOGIST AT CHILDREN'S HOSPITAL?

A. YES.

Q. WERE MOST OF THE INDIVIDUALS THAT YOU CONDUCTED AUTOPSIES ON AT CHILDREN'S HOSPITAL IN FACT, CHILDREN?

A. THEY ALL WERE, YES.

Q. AND I BELIEVE YOU SAID THAT YOU HAD A YEAR'S SABBATICAL AFTER THAT?

A. WELL, IT REALLY WASN'T AFTER IT. IT WAS PART OF MY EMPLOYMENT.

BUT I WAS ON SABBATICAL DOING RESEARCH.

Q. AFTER THAT YOU BECAME EMPLOYED BY THE LOS ANGELES COUNTY CORONER'S OFFICE?

A. YES.

Q. AND YOU HAVE HAD NOW THIS IS YOUR FIFTEENTH YEAR IN THE L.A. COUNTY CORONER'S OFFICE?

A. WELL, I STARTED IN 1980. I BELIEVE THAT IS CORRECT.

I THINK IN AUGUST IT BECAME THE FIFTEENTH YEAR.

Q. DURING THAT TIME, DOCTOR, COULD YOU INDICATE FOR US APPROXIMATELY HOW MANY AUTOPSIES YOU HAVE CONDUCTED?

A. I DON'T KNOW THE EXACT NUMBER, BUT IT IS A FEW THOUSAND, SEVERAL THOUSAND.

Q. AND WHAT IS THE PURPOSE OF CONDUCTING AN AUTOPSY?

A. WELL, IN A HOSPITAL IT IS BASICALLY TO STUDY DISEASE.

BUT AT THE CORONER'S OFFICE IT IS TO USE THAT KNOWLEDGE TO ARRIVE AT A CAUSE AND MANNER OF DEATH.

Q. AND HAVE YOU PREVIOUSLY QUALIFIED AND TESTIFIED IN SUPERIOR, MUNICIPAL COURTS IN LOS ANGELES COUNTY AS AN EXPERT MEDICAL EXAMINER ON THE CAUSES OF DEATH?

A. YES.

Q. AND APPROXIMATELY HOW MANY TIMES HAVE YOU SO QUALIFIED AND TESTIFIED?

A. WELL, IT HAS GOT TO BE SEVERAL HUNDRED.

Q. YOU SAID YOU WERE CERTIED IN ANATOMICAL PATHOLOGY?

A. YES.

Q. WHAT DOES THAT MEAN EXACTLY?

A. WELL, IT IS THE SPECIALTY THROUGH WHICH ONE USES THE KNOWLEDGE OF BODY STRUCTURE AND THE DISEASE PROCESSES THAT AFFECT IT TO, WELL, IN MEDICINE TO STUDY DISEASE AND AGAIN IN MY PRESENT JOB TO ARRIVE AT THE CAUSES

AND MANNER OF DEATH.

Q. IN ORDER TO BE CERTIFIED IN THE SPECIALTY OF ANATOMICAL PATHOLOGY, DO YOU HAVE TO TAKE ANY KIND OF AN EXAMINATION?

A. YES.

Q. AND FORENSIC PATHOLOGY, CAN YOU TELL US WHAT THAT IS?

A. THE AMERICAN BOARD OF PATHOLOGY HAS SUBSPECIALITY EXAMS.

YOU HAVE TO BE QUALIFIED IN THE GENERAL, LIKE THE ANATOMIC PATHOLOGY PART, BEFORE YOU ARE ELIGIBLE TO BECOME SUBQUALIFIED IN A NUMBER OF AREAS, FORENSIC PATHOLOGY BEING ONE OF THEM.

ANOTHER ONE OF THEM BEING, FOR INSTANCE, NEUROPATHOLOGY, OR HEMOPATHOLOGY, DIFFERENT SUBSPECIALTIES.

Q. WHAT DOES FORENSIC PATHOLOGY MEAN?

A. WELL, FORENSIC, I NEVER REALLY, WELL, LEARNED OR READ UP ON THE MEANING OF FORENSIC AS APPLIED TO THE TYPE OF WORK I DO.

I BELIEVE IT HAS A COUPLE OF DIFFERENT TYPE OF MEANINGS.

BASICALLY THE MEDICAL EXAMINERS ARE THE ONES THAT DEAL WITH FORENSIC PATHOLOGY AND WE FUNCTION IN AN AREA WHICH IS DELINEATED BY LAW.

IN OTHER WORDS, WE ARE THE PHYSICIANS THAT DEAL WITH ALL DEATHS I BELIEVE IN PRETTY WELL ALL JURISDICTIONS IN THE COUNTRY WHERE THE DEATH IS OTHER THAN NATURAL OR WHERE THERE IS NO PHYSICIAN TO CERTIFY THE CAUSE AND MANNER

OF DEATH.

Q. AND DID YOU ALSO HAVE TO TAKE AN EXAMINATION TO QUALIFY TO BE CERTIFIED AS A FORENSIC PATHOLOGIST?

A. YES.

Q. AND HOW LONG HAVE YOU HELD THAT CERTIFICATION?

A. WELL, I OBTAINED IT IN 1984. SO THAT'S TEN YEARS.

Q. DOCTOR, YOU INDICATED THAT YOU CONDUCTED AN AUTOPSY ON THIS CASE; IS THAT CORRECT?

A. YES.

Q. AND DO YOU RECALL WHAT DATE YOU CONDUCTED THAT AUTOPSY?

A. WELL, I BELIEVE IT WAS NOVEMBER 22ND LAST YEAR.

Q. OF 1993?

A. YES.

Q. COULD YOU INDICATE FOR US JUST IN GENERAL TERMS HOW AN AUTOPSY IS CONDUCTED AND HOW REPORTS OF THAT AUTOPSY ARE PREPARED?

A. AN AUTOPSY IS BASICALLY ANALOGOUS TO A COMBINATION OF A PHYSICAL EXAMINATION AND A SURGICAL TYPE PROCEDURE CONDUCTED, BOTH CONDUCTED AFTER DEATH SO THAT WHAT WE DO IS WE EXAMINE THE EXTERNAL SURFACES OF THE BODY AND NOTE WHATEVER IT IS THAT WE FIND.

AND SUBSEQUENTLY WE EXAMINE ALL THE INTERNAL ORGANS.

AT THE LOS ANGELES COUNTY CORONER'S OFFICE, WE HAVE FORMS THAT ARE DIAGRAMATIC FORMS THAT WE USE, FOR INSTANCE, TO NOTATE THE HEIGHT OF THE BODY, THE WEIGHT OF

THE BODY, THE AGE OF THE DECEASED PERSON, WHETHER THEY ARE MALE, FEMALE.

IF WE FIND TRAUMA, FOR INSTANCE, WE DIAGRAM THE FINDINGS AND MAKE NOTATIONS ON THOSE TYPE FORMS.

THERE IS ALSO A FORM WHERE WE WILL NOTE THINGS LIKE THE WEIGHT OF THE HEART, THE WEIGHT OF THE BRAIN, ANY ANATOMICAL FINDINGS THAT HAVE TO DO WITH DISEASE OR TRAUMA IN THOSE ORGANS.

THEN THE SAME DAY AND GENERALLY IMMEDIATELY AFTER FINISHING THE AUTOPSY, WE DICTATE OUR FINDINGS.

ACTUALLY THERE ARE, SOME PEOPLE USE PROTOCOLS.

I DICTATE MY FINDINGS, USING THOSE DIAGRAMS.

Q. SO YOU MAKE -- IS IT FAIR TO SAY THEN YOU MAKE THE DIAGRAMS DURING THE COURSE OF CONDUCTING THE AUTOPSY?

A. YES, OR IN THE IMMEDIATE CONTEXT.

SOMETIMES I WILL ADD SOME THINGS RIGHT AS I FINISH, FOR INSTANCE, BEFORE LEAVING THE AREA.

Q. BUT AT LEAST SOME OF THE DIAGRAMS AND DRAWINGS ARE DONE DURING THE COURSE OF THE AUTOPSY ITSELF?

A. YES.

Q. AND THEN AFTERWARDS YOU DICTATE YOUR FINDINGS USING YOUR CHARTS TO GIVE A NARRATIVE OF WHAT YOU HAVE DISCOVERED DURING THE COURSE OF YOUR EXAMINATION?

A. YES.

Q. WAS SUCH A REPORT PREPARED IN THIS CASE?

A. YES.

Q. AND DID YOU BRING A COPY OF THAT REPORT WITH YOU?

A. YES.

MR. BERMAN: YOUR HONOR, I HAVE A CHART WHICH I WOULD LIKE TO HAVE MARKED PEOPLE'S 5 FOR IDENTIFICATION.

THE COURT: THAT'S A ONE PAGE, MULTIPAGE?

MR. BERMAN: WELL, IT IS A FIVE PAGE REPORT, AND IF WE CAN, I WILL JUST MARK ALPHABET LETTERS ON THE BOTTOM FOR THE INDIVIDUAL PAGES.

THE COURT: THAT'S FINE.

MR. BERMAN: A THROUGH F.

THE COURT: HOW MANY PAGES IS IT?

MR. BERMAN: A THROUGH F.

THE COURT: SIX PAGES THEN.

MR. BERMAN: SIX.

Q. BY MR. BERMAN: IF WE COULD, DOCTOR, COULD YOU TELL US WHAT NICOLE PARKER'S HEIGHT AND WEIGHT WERE AT THE TIME YOU CONDUCTED THE AUTOPSY?

A. SHE WAS 50 OR 51 INCHES TALL AND SHE WEIGHED 55 POUNDS.

YES. SHE WAS 51 INCHES TALL AND SHE WEIGHED 55 POUNDS.

Q. I WOULD LIKE TO APPROACH THIS IN A LOGICAL FASHION, SO CAN WE BEGIN BY DISCUSSING THE INJURIES THAT NICOLE RECEIVED TO HER HEAD DURING THE COURSE OF YOUR FINDINGS.

COULD YOU TELL US, PLEASE, WHAT YOU DISCOVERED UPON EXAMINING HER HEAD?

A. YES.

I SAW A BRUISE ON HER FOREHEAD. IT WAS MORE OR

LESS IN THE MIDLINE OF THE FOREHEAD.

IT WAS -- I HAVE TO REFER TO THE CHART FOR THE MEASUREMENTS -- IT WAS ABOUT ONE AND A HALF INCHES AS VIEWED ON THE SKIN SURFACE.

IT DIDN'T REALLY SHOW UP TOO WELL ON THE EXTERNAL ASPECT OF THE FACE.

WHEN EXAMINED ON ITS DEEP ASPECT AFTER THE SCALP WAS REFLECTED, THERE WAS MODERATE CONTUSION OR BRUISING WHICH BASICALLY THAT SHOWS IT IS BY HEMORRHAGE. WE CAN SEE THE HEMORRHAGE.

SO IT WAS A MODERATE VERY FRESH BRIGHT --

MR. SHEAHEN: EXCUSE ME.

THE WITNESS APPEARS TO BE READING FROM THE REPORT.

THE WITNESS: NO, I AM NOT, YOUR HONOR.

THE COURT: YOU ARE JUST REFERRING TO IT TO REFRESH YOUR RECOLLECTION?

THE WITNESS: I AM PARAPHRASING IT.

THE COURT: OKAY. GO AHEAD.

THE WITNESS: WHICH INVOLVED THE DEEP SURFACE OF THE SCALP AND ALSO WAS PRESENT ON THE SURFACE OF THE CORRESPONDING BONE.

BUT THERE WAS NO OTHER ADDITIONAL INJURY OF THE SKULL. THERE WAS NO SKULL FRACTURE.

THE BRAIN ITSELF WAS SWOLLEN AND SHOWED A SLIGHT AMOUNT OF HEMORRHAGE UNDER ITS SURFACE LINING WHICH IS CALLED THE ARACHNOID, RIGHT IN THE TIPS OF BOTH FRONTAL LOBES.

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THE OTHER THING THAT WAS VISIBLE ON HER HEAD --

Q. BY MR. BERMAN: IF WE COULD LET ME ASK YOU JUST A COUPLE OF QUESTIONS HERE.

THIS INJURY THAT YOU HAVE JUST DESCRIBED, WHERE ON THE FACE PRECISELY IS IT LOCATED?

A. IN THE FOREHEAD.

THERE IS A -- THERE IS SOME DESCRIPTION GIVEN, AND THIS TIME I AM READING, THERE WAS A, ABOUT THE CENTER OR THE BEST VISIBLE PART OF THE BRUISE WAS ABOUT THREE QUARTERS -- AT A LEVEL ABOUT THREE QUARTER INCHES ABOVE THE EYEBROW BUT THE BRUISE WAS MOSTLY IN THE MIDLINE, SLIGHTLY MORE TO THE RIGHT THAN TO THE LEFT.

Q. DIRECTING YOUR ATTENTION TO PEOPLE'S 5D FOR IDENTIFICATION, I WOULD ASK YOU TO TAKE A LOOK AT THAT, PLEASE.

A. YES.

Q. IS THAT A DIAGRAM YOU MADE DURING THE COURSE OF YOUR EXAMINATION OF NICOLE PARKER?

A. YES.

Q. DOES THAT DIAGRAM, 5D FOR IDENTIFICATION, SHOW THE INJURY THAT YOU ARE DESCRIBING?

A. YES.

Q. COULD YOU INDICATE TO US BY GOING OVER TO THE BOARD AND POINTING TO WHERE THAT SPOT IS THAT YOU HAVE JUST DESCRIBED FOR US.

A. THIS AREA THAT IS CIRCLED REPRESENTS THE AREA OF TRAUMA.

THIS QUESTION MARK FAINT CONTUSION AND FAINT

CONTUSION REFERS TO THE APPEARANCE AS SEEN FROM THE SKIN SURFACE.

THE BRUISING WAS VERY DEFINITE LOOKING AT THE DEEP SURFACE OF THE SKIN.

Q. LET ME STOP YOU THERE.

SO IN LOOKING AT THE SKIN SURFACE, JUST LOOKING AT THE FACE BEFORE IT IS CUT OPEN, YOU ARE SAYING THERE WAS A VERY FAINT BRUISING APPEARANCE; IS THAT CORRECT?

A. YES.

Q. AND THEN YOU DISCOVERED BY OPENING IT UP THAT THERE WAS MUCH DEEPR BRUISING?

A. YES. I WAS ABLE TO DESCRIBE THE EXTENT OF THE BRUISING.

Q. CAN YOU TELL US WHAT THE EXTENT OF THAT BRUISING WAS AGAIN, PLEASE?

A. YES. THERE WAS ABOUT --

MR. SHEAHEN: MAY I, YOUR HONOR?

THE WITNESS: -- A ONE AND A QUARTER INCH BASICALLY ROUND AREA OF CONTUSION HEMORRHAGE ON THE DEEP SURFACE OF THE FRONTAL SCALP AND ON THE SURFACE OF THE CORRESPONDING BONE.

AND THE REASON THAT IS IMPORTANT IS BECAUSE YOU CAN HAVE BRUISING THAT IS ONLY IN THE SCALP AND NOT ON THE BONE.

VICE VERSA ALSO SOMETIMES, BUT MORE RARE.

Q. IN THIS CASE THERE WAS BRUISING THAT WAS INTO THE BONE AREA; IS THAT CORRECT?

A. BUT IT WAS ON THE SURFACE OF THE BONE, YES.

Q. NOW, YOU ALSO INDICATED THAT THERE WAS SOME SWELLING TO THE BRAIN; IS THAT CORRECT?

A. YES, THAT'S NOT DIAGRAMMED ON THIS PAGE.

Q. WHERE WAS THE AREA OF THE BRAIN IF YOU CAN SHOW US ON THAT PARTICULAR DIAGRAM WHERE YOU NOTICED THE SWELLING?

A. WELL, THE WHOLE BRAIN WAS SWOLLEN.

THE SWELLING WAS SYMMETRICAL AND THERE PROBABLY ARE NUMEROUS REASONS OR NUMEROUS WAYS OF EXPLAINING THE SWELLING.

THERE WAS SWELLING THROUGHOUT THE ENTIRE BRAIN.

Q. WAS THERE SOME BLEEDING IN THE AREA OF THE BRAIN?

A. WELL, THERE WAS A SMALL AMOUNT OF SUBARACHNOID BLEEDING, AND THAT MEANS BLEEDING UNDER THE SURFACE OF THE VERY THIN MEMBRANE CALLED THE ARACHNOID THAT COVERS THE BRAIN, AND THAT WAS PRESENT IN THE TIPS OF EACH FRONTAL LOBE WHICH WOULD BE BASICALLY IN THIS REGION ABOVE THE EYES.

Q. SO IT WOULD CORRESPOND TO THIS INJURY YOU HAVE DESCRIBED IN THE FOREHEAD; IS THAT CORRECT?

A. YES.

Q. NOW, WAS THE INJURY TO THE FOREHEAD THE TYPE OF INJURY THAT WOULD HAVE CAUSED A CONCUSSION OR YOU SAID THERE WAS NO FRACTURE BUT IS IT THE KIND THAT COULD HAVE CAUSED A CONCUSSION?

A. YES.

BECAUSE OF THE SMALL AMOUNT OF SUBARACHNOID HEMORRHAGE AND BECAUSE OF THE FACT THAT THE BRUISING IS

PRESENT ON THE BONE SURFACE, AND BECAUSE OF THE SIZE WHICH IS ALMOST AN INCH AND A HALF, I BELIEVE THAT THERE WAS SOME DEGREE OF CONCUSSION, NOT FATAL.

I DON'T BELIEVE THAT THIS IS A FATAL IMPACT, BUT IT WAS A SIGNIFICANT IMPACT AND YES, A SMALL AMOUNT OF CONCUSSION PROBABLY WAS PRESENT.

Q. WERE THERE ANY SCRATCHES TO THAT BRUISED AREA?

A. YES.

IN THE MIDDLE OF THE BRUISED AREA THE SKIN HAD TWO PARALLEL HORIZONTAL SCRATCHES.

THEY ARE CALLED ABRASIONS. ABRASION MEANS THAT THEY ARE JUST ON THE SURFACE OF WHATEVER IT IS THAT IS ABRADED, AND IN THIS CASE IT IS THE SKIN.

SO THEY WOULD JUST BE SCRAPING OFF OF THE SKIN SURFACE.

Q. DID THOSE TWO ABRASIONS APPEAR TO HAVE BEEN UNIFORMLY MADE?

A. YES. THEY APPEAR THE SAME.

Q. AND ABOUT HOW BIG WERE THOSE ABRASIONS?

A. WELL, THEY CAME OUT TO BE ABOUT ONE-EIGHTH OF AN INCH EACH. THEY WERE ONE QUARTER INCH APART, AND THE ONE CLOSER TO THE MIDLINE, WHICH THIS DOESN'T REALLY -- I DON'T KNOW WHETHER IT IS THIS ONE OR THIS ONE -- THIS DOESN'T REALLY DEMONSTRATE -- WAS THE THREE QUARTER INCHES ABOVE THE LEVEL OF THE EYEBROW.

MR. BERMAN: I HAVE A PHOTOGRAPHIC CHART WHICH I BELIEVE WE WISH TO MARK AS --

HAVE WE MARKED PEOPLE'S 1 FOR IDENTIFICATION

YET, YOUR HONOR?

THE COURT: WE HAVE NOT.

MR. BERMAN: THEN IT WOULD BE PEOPLE'S 1.

THE PHOTOGRAPHS ARE MARKED A THROUGH H.

Q. BY MR. BERMAN: DIRECTING YOUR ATTENTION, DOCTOR, TO THE PHOTOGRAPH MARKED PEOPLE'S 1A FOR IDENTIFICATION.

IS THAT PHOTOGRAPH OF NICOLE PARKER, THE PERSON YOU CONDUCTED THE AUTOPSY ON?

A. YES.

Q. AND DIRECTING YOUR ATTENTION TO THAT PHOTOGRAPH, DO YOU SEE THE INJURY THAT YOU HAVE DESCRIBED FOR US?

A. YES.

Q. AND WHERE WOULD THAT BE?

A. WELL, THE BRUISE IS IN THE MIDLINE, IN THE MIDDLE OF THE FOREHEAD, AND THE SCRATCHES ARE VISIBLE AS PURPLE AREAS WITH THE RIGHT SIDED ONE BEING CLOSER TO THE MIDLINE AND THEN THE OTHER ONE BEING FURTHER OVER TO THE RIGHT.

Q. YOU INDICATED THERE WERE OTHER INJURIES TO NICOLE PARKER'S FACE?

A. YES.

Q. COULD YOU DESCRIBE FOR US ANOTHER ONE OF THE INJURIES, PLEASE?

A. WELL, THERE WAS BRUISING AROUND THE RIGHT EYE WITH A DISTINCT KIND OF A LINEAR BRUISE ABOUT ONE-HALF INCH LONG AND A QUARTER INCH ACROSS ALMOST AT THE FOLD OF THE

EYELID.

Q. IS THAT INJURY DEPICTED IN THE PHOTOGRAPHS?

A. YES, I BELIEVE IT IS.

Q. AND WHICH PHOTOGRAPH WOULD THAT BE?

A. IT WOULD BE IN 1A ALSO ON THE RIGHT EYELID.

Q. DIRECTING YOUR ATTENTION TO 1D FOR IDENTIFICATION, PHOTOGRAPH D IS IT ALSO DEPICTED THERE?

A. IT IS ALSO DEPICTED ON 1D AS ARE THE SCRATCHES AND THE MIDLINE BRUISE OF THE FOREHEAD.

Q. NOW, THAT IS A BRUISE THAT YOU HAVE DESCRIBED ON THE EYE?

A. YES.

Q. ON THE EYELID I SHOULD SAY.

A. YES.

Q. GOING BACK FOR A MOMENT TO THE INJURY TO THE FOREHEAD, DO YOU HAVE AN OPINION AS TO WHAT CAUSED THAT TYPE OF INJURY?

A. WELL, IT IS BLUNT FORCE.

Q. BLUNT FORCE MEANS WHAT?

A. WELL, EITHER SOMETHING FLAT IMPACTED HER FOREHEAD OR HER FOREHEAD IMPACTED SOMETHING FLAT.

Q. FLAT AS OPPOSED TO ANY OTHER SHAPE?

A. AS OPPOSED TO A CORNER OR A SHARP EDGE OR EVEN LESS SHARP BUT DEFINITE EDGE WHICH WOULD RESULT IN A MORE ELONGATED PATTERN.

Q. WOULD IT BE CONSISTENT WITH A HEAD STRIKING SAY A WALL OR A FLOOR?

A. YES.

Q. HOW ABOUT A FIST?

WOULD THERE BE ANY WAY TO DETERMINE WHETHER OR NOT THE BLOW TO THE CENTER WAS CAUSED BY THE STRIKING OF A FIST?

A. YES. IT COULD BE A FIST.

IT WOULD NOT -- IT DOESN'T HAVE A KNUCKLE PATTERN SO IT WOULD HAVE TO BE A PORTION THAT IS FLATTER.

THERE IS NO APPEARANCE OF TWO POINTS THAT ARE RUNNING TOGETHER AS THERE IS WITH KNUCKLE PATTERNS.

Q. SO WHEN YOU SAY A FLATTER PART, YOU ARE REFERRING TO THE AREA OF THE FINGERS AS IT ATTACHES TO THE KNUCKLES?

A. YES.

THE COURT: ALL RIGHT. YOU WANTED TO APPROACH?

MR. SHEAHEN: YES, IF IT PLEASE THE COURT.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH:)

THE COURT: WE ARE AT THE BENCH OUTSIDE THE PRESENCE OF THE JURY.

MR. SHEAHEN: THANK YOU.

YOUR HONOR, I DON'T WISH TO BE INDELICATE UNDER THESE VERY DIFFICULT CIRCUMSTANCES, BUT THE COURT HAS PREVIOUSLY ASKED THAT PEOPLE WHO ARE NOT ABLE TO VIEW THESE PHOTOGRAPHS LEAVE THE COURTROOM.

I HAVE ALL THE SYMPATHY IN THE WORLD FOR MRS. PARKER, BUT SHE IS SITTING IN THE COURTROOM SHIELDING HER

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EYES, AVERTING HER EYES, AND IT IS GENERALLY DISTRACTING.

I FEEL THAT IT IS CAUSING TOO MUCH EMPHASIS.

IF MRS. PARKER IS NOT ABLE TO STAY HERE, LAST WEEK SHE WENT OUT WHEN THESE PHOTOGRAPHS WERE ANTICIPATED.

TODAY FOR SOME REASON SHE IS REMAINING AND LIKE I SAY, SHE IS COVERING HER FACE.

IT IS JUST VERY DIFFICULT.

THE COURT: WELL, SHE IS BASICALLY JUST SITTING THERE.

SHE IS AVERTING HERE EYES FROM THE EXHIBIT. SHE IS NOT DISRUPTING PROCEEDINGS. SHE IS NOT SAYING ANYTHING.

I HAVE BEEN WATCHING THE ENTIRE AUDIENCE AS WELL AS THE JURY FOR ANY UNUSUAL REACTIONS, AND SHE IS JUST SITTING THERE.

I THINK FRANKLY WE WOULD ALL FEEL A LOT MORE COMFORTABLE IF SHE HAD EXCUSED HERSELF FROM THIS, BUT I ASSUME SHE WAS FOREWARNED, MR. BERMAN.

MR. BERMAN: SHE WAS.

I STRONGLY RECOMMENDED SHE NOT BE PRESENT.

SHE SAID SHE FELT SHE COULD HANDLE IT AND THAT THERE WOULD BE NOTHING THAT SHE WASN'T NOW AWARE OF AND SHE FELT SHE COULD DO IT.

SHE SAID TO ME SHE WOULD STAY, AND IF AT ANY TIME SHE FELT IT WAS TOO UPSETTING, SHE WOULD GET UP AND LEAVE THE COURTROOM QUIETLY AND WITH DIGNITY SO THAT THERE WAS NO UNDUE ATTENTION.

THE COURT: WELL, LIKE I SAY, I WOULD HAVE PREFERRED

THAT SHE NOT BE HERE FOR THIS.

BUT BASICALLY ALL SHE IS DOING IS SITTING THERE WITH HER EYES CAST DOWNWARD, AND I CERTAINLY CAN'T ASK HER TO LEAVE FOR THAT.

SO I WILL PAY CLOSE ATTENTION.

IF I SEE ANY STRONGER REACTION AS WE MOVE INTO THE MORE GRUESOME PARTS OF THE EXAMINATION, I WILL CERTAINLY STOP PROCEEDINGS IMMEDIATELY.

BUT AT THIS POINT I JUST DON'T THINK THERE IS ANY LEGAL BASIS TO EXCLUDE A MEMBER OF THE PUBLIC.

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, IN
THE PRESENCE AND HEARING OF
THE JURY:)

THE COURT: PROCEED.

Q. BY MR. BERMAN: DOCTOR, SINCE YOU HAVE SAID IT IS HYPOTHETICALLY POSSIBLE THAT IT COULD HAVE BEEN THE FLAT AREA OF THE FIST IN SOME WAY, WERE YOU REFERRING TO THAT AREA WHERE THE FINGER CONNECTS TO THE KNUCKLES IF HELD IN A FIST LIKE SHAPE?

A. YES. I THINK IT IS MORE CHARACTERISTIC OF A FLAT SURFACE, HOWEVER.

Q. IF IT WAS A FIST, AND IF A PERSON HAD A RING ON AT THE TIME OF A STRIKING TO THE SKULL IN THAT FASHION, COULD THAT ACCOUNT FOR THE BRUISING AS WELL AS FOR THE SCRATCHES IN THE AREA THAT YOU HAVE DESCRIBED IN THE CENTER

OF THE BRUISING?

MR. SHEAHEN: OBJECTION, YOUR HONOR.

SPECULATION.

THE COURT: OVERRULED.

ASKING HER EXPERT OPINION.

THE WITNESS: WELL, I THINK THAT IT IS MORE LIKELY THAT IF THAT IS THE CASE, IF THERE WAS -- IF THIS WAS PRODUCED BY A FIST, OR IF THERE WAS A RING ON THE HAND THAT PRODUCED THE SCRATCHES --

LET'S PUT IT THIS WAY, I THINK IT IS MORE LIKELY THAT THE TWO ARE, THE SCRATCHES AND THE BRUISE, ARE SEPARATED IN TIME.

THEY ARE TWO SEPARATE EVENTS.

BECAUSE IF THE FOREHEAD HAD BEEN IMPACTED AS STRONGLY AS THIS ONE WAS, THOSE ARE VERY SUPERFICIAL SCRATCHES, AND THERE WOULD HAVE BEEN BRUISING MORE ASSOCIATED WITH THE AREAS OF SCRATCHING AND THERE ISN'T.

Q. BY MR. BERMAN: SO BECAUSE OF THE SUPERFICIALITY OF THE SCRATCHES THEMSELVES, IS IT FAIR TO SAY THEN IT IS YOUR OPINION THAT THOSE SCRATCHES WERE NOT RECEIVED AT THE SAME TIME AS THE BRUISING INJURY, THE CIRCULAR BRUISING INJURY TO THE FOREHEAD?

A. THAT WOULD BE MY OPINION, YES.

Q. WAS THERE ANY OTHER INJURY TO THE EXTERIOR OF THE EYE IN ADDITION TO THE BRUISE THAT YOU HAVE DESCRIBED?

A. WELL, THERE WERE WHAT WE CALL PETECHIAL HEMORRHAGES.

Q. BEFORE WE GET INTO THOSE, I AM TALKING ABOUT

THE EXTERIOR OF THE EYELID ITSELF.

A. WELL, THERE WAS THE BRUISE OF THE LID.

Q. BUT NOTHING OTHER THAN THAT AT THIS POINT? YOU NEED TO CHECK YOUR REPORT?

A. I NEED TO CHECK MY REPORT. I DON'T HAVE ANYTHING ELSE NOTED, NO.

THE BRUISE -- OFTEN THE EYE AREA TENDS TO SHOW A GENERALIZED BRUISING.

IN THIS CASE I DON'T MENTION THERE WAS A GENERALIZED BRUISE APPEARANCE TO THE EYE AREA, JUST THIS ONE PARTICULAR BRUISE.

Q. LET'S MOVE FARTHER DOWN THE FACE THEN.

I TAKE IT THERE WAS NO INJURY TO THE OTHER EYE, TO THE RIGHT EYE, ON THE EXTERIOR THAT YOU NOTICED?

A. THAT'S CORRECT.

BUT THERE IS A SCRATCH ON THE BRIDGE OF THE NOSE.

Q. CAN YOU DESCRIBE WHERE THAT IS AND HOW THAT APPEARED?

A. WELL, THAT WAS ANOTHER ONE-EIGHTH INCH SCRATCH ON THE LEFT SIDE OF THE BRIDGE OF THE NOSE.

Q. IS THAT DEPICTED IN YOUR DIAGRAM, FIRST OF ALL, IN 5D FOR IDENTIFICATION?

A. YES. THIS IS DEPICTED HERE.

Q. AND IS IT DEPICTED IN ANY OF THE PHOTOGRAPHS THAT ARE UP THERE, EITHER 1A OR 1D?

A. NO. D IS FROM THE RIGHT SO IT DOESN'T SHOW THE LEFT SIDE AND THE AREA INVOLVED IS IN SHADOW IN A.

Q. AND THAT WAS A ONE-EIGHTH INCH SCRATCH; IS THAT CORRECT?

A. YES.

Q. WAS IT VERY DEEP?

A. A SCRATCH BY DEFINITION IS ON THE SURFACE.

Q. SO IT JUST WAS A BREAKING OF THE SKIN?

A. RIGHT.

Q. HOW ABOUT THE CHEEKS, AREA OF NICOLE'S CHECKS?

A. WELL, HER RIGHT CHEEK AS YOU LOOKED AT IT EXTERNALLY THE WHOLE CHEEK APPEARED VERY DUSKY PURPLE AND SWOLLEN.

IT HAD SOME -- IT HAD AN APPEARANCE RESEMBLING LIVIDITY WHICH IS THE APPEARANCE THAT THE SKIN TAKES ON AFTER DEATH IN THE AREAS WHICH ARE DEPENDENT WHERE THE BLOOD SETTLES UNDER THE INFLUENCE OF GRAVITY, AND, IN FACT, THERE WERE -- I THINK THERE IS SOME AFFECT OF LIVIDITY THAT CAUSED THIS APPEARANCE.

BUT IT WAS JUST TOO SWOLLEN, SO I CONDUCTED AN EXAMINATION OF THE DEEP SURFACES OF THE CHEEK.

YOU CAN DO THAT AND OFTEN BRUISES WHEN THEY ARE VERY FRESH DON'T SHOW UP VERY DISTINCTLY ON THE SKIN SURFACE, BUT IF YOU LOOK AT THE TISSUE UNDER WHERE THE IMPACTS WERE, THEN YOU CAN SEE THE BRUISING IN THOSE TISSUES AND, IN FACT, THERE ARE BRUISES ON THE RIGHT SIDE OF HER FACE, AND THERE ARE AT LEAST TWO SEPARATE BRUISES IN THE FAT OF THE CHEEKS IN THE MIDDLE OF THE CHECK, AND THEN THERE ARE SOME BRUISES ON THE RIGHT, ALONG THE SURFACE OF THE RIGHT SIDE OF THE JAW.

Q. LET'S GO BACK FOR A MOMENT.

WHEN A PERSON DIES AND THE BODY IS LEFT IN A CERTAIN POSITION, YOU TALKED ABOUT LIVIDITY; IS THAT CORRECT?

A. YES.

Q. CAN YOU AGAIN TELL US WHAT HAPPENS IF, LET'S SAY, A PERSON WAS LAYING ON THEIR STOMACH AND THEY WERE DECEASED.

WHAT HAPPENS TO THE BLOOD WITHIN THE BODY AT THAT TIME?

A. WELL, WHEN YOU DIE, THE BLOOD PRESSURE GOES TO ATMOSPHERIC. I SAY ZERO.

BUT IT IS ATMOSPHERIC AND SO THE BLOOD WILL SETTLE DOWNWARD, STRAIGHT DOWNWARDS, SO THAT IF SOMEBODY DIES AND IS LYING ON THEIR STOMACHE, THEIR ENTIRE FRONT, EXCEPT FOR THE PRESSURE POINTS -- LET'S SAY THIS PART OF THEIR STOMACHE, WHICH OFTEN STICKS OUT MORE THAN OTHER PARTS, IS WHAT TAKES THE WEIGHT, AND THERE IS MORE OF A HOLLOW HERE IN THE SHOULDERS, WHICH IS NOT NECESSARILY AGAINST THE SURFACE, SO THE PORTIONS THAT ARE NOT COMPRESSED DUE TO THE POSITION OF THE BODY WILL TURN PURPLISH.

Q. IS LIVIDITY INDICATED IN SOME OF THESE PHOTOGRAPHS AS WELL? FOR EXAMPLE, 13 FOR IDENTIFICATION?

A. YES. THIS IS VERY DULL RED, VERY -- ACTUALLY VERY STRIKING UP HERE. VERY SHARP LINES OF DEMARCATION WHERE THERE WAS PRESSURE WHERE THE BLOOD COULD NOT SETTLE.

THESE ARE ACTUALLY LIVIDITY, AND 1F ALSO SHOWS

IT OVER THIS PORTION OF THE UPPER ARM.

Q. SO IN THESE PHOTOGRAPHS THE VERY RED AREAS IN D, E AND F TEND TO SHOW WHERE THE BLOOD SETTLED AFTER DEATH AS OPPOSED TO NECESSARILY ANY SPECIFIC INJURY; IS THAT A FAIR STATEMENT?

A. YES.

Q. NOW, IN THE CHEEK ITSELF YOU INDICATED THAT THE SWELLING CAUSED BY LIVIDITY THERE WAS INCREASED SWELLING BEYOND WHAT YOU WOULD HAVE BEEN EXPECTED; IS THAT CORRECT?

A. YES.

Q. AND SO YOU CONDUCTED A SURGICAL INCISION INTO THE AREA OF THE CHEEK TO SEE WHAT WAS BELOW THE SURFACE?

A. ACTUALLY I DISSECTED INTO THE AREA.

MY INCISION WAS ALONG THE SHOULDER AND THEN YOU CAN DISSECT THE SKIN UP, SO WE SAY REFLECT THE SKIN UP SO WE CAN SEE THE UNDERLYING TISSUES.

Q. BASICALLY YOU PEEL THE SKIN BACK FROM THE FACE?

A. YES.

WE DON'T CUT DIRECTLY ON THE FACE. WE DON'T LIKE TO DO THAT.

Q. AND UNDERNEATH THE CHEEK I TAKE IT THERE IS AN AREA OF FATTY TISSUE?

A. WELL, THE SOFT PART OF THE CHEEK HAS FAT AND MUSCLE TOO, OF COURSE, BUT ESPECIALLY IN CHILDREN THERE IS A PAD OF FAT IN THE SOFT PART OF THE CHEEK.

Q. AND THEN IS THERE MUSCLE AS WELL IN THERE?

A. THERE IS MUSCLE THERE TOO.

Q. AND YOU SAW BRUISING WITHIN THE FAT AREA AND

THE MUSCLE AREA; IS THAT CORRECT?

A. WELL, I DIDN'T DISSECT DOWN.

THE FAT IS DEEPER. IT IS CLOSER TO THE INSIDE OF THE MOUTH.

I JUST REFLECTED THE SKIN UP AND SAW THE SURFACE OF THE FAT AND COULD SEE I BELIEVE IT IS ONE-HALF TO THREE-QUARTERS -- EXCUSE ME -- ONE QUARTER TO ONE-HALF INCH, MOSTLY LIKELY TWO, CERTAINLY ONE --

FUNNY STATEMENT HERE. IT SAYS AT LEAST ONE OR TWO.

SO THAT I THINK THERE MAY HAVE BEEN MORE THAN ONE OR TWO BUT THEY KIND OF TENDED TO RUN TOGETHER AND BECAUSE THIS AREA WAS SO SUFFUSED WITH BLOOD BECAUSE OF THE LIVIDITY, THAT'S WHY THE STATEMENT IS NOT VERY PRECISE.

Q. DID YOU ON YOUR CHARTS DO A SEPARATE DIAGRAM THAT WOULD INDICATE MORE SPECIFICALLY THE SHAPE OF THE CONTUSIONS THAT YOU OBSERVED IN THE CHEEK AREA?

A. YES.

Q. PERHAPS WE CAN FLIP THE CHART FOR A MOMENT.

DIRECT YOUR ATTENTION TO 5A FOR IDENTIFICATION. DOES THAT DEPICT THE BRUISING AREAS THAT YOU REFERRED TO ON THE CHEEK?

A. YES.

Q. COULD YOU SHOW US THE TWO AREAS THAT YOU REFERRED TO ON THE CHEEK ITSELF SPECIFICALLY?

A. THESE TWO CIRCLES.

MR. BERMAN: FOR THE RECORD, YOUR HONOR, ON 5A -- EXCUSE ME -- IT WOULD BE THE TWO CIRCLES NEAREST THE TOP OF

THE DIAGRAM -- EXCUSE ME -- ON THE LEFT SIDE OF THE FACE AS YOU LOOK AT THE CHART.

THE COURT: ALL RIGHT.

Q. BY MR. BERMAN: DO YOU HAVE AN OPINION AS TO WHAT CAUSED THOSE TYPES OF BRUISES?

A. YES.

Q. AND WHAT IS YOUR OPINION?

A. MY OPINION IS THAT THESE ARE FINGER PRESSURE MARKS.

Q. NOW, ON YOUR CHART IT APPEARS AS THOUGH YOU HAVE ANOTHER FOUR, THREE OR FOUR MARKS; IS THAT CORRECT, CIRCLES THAT YOU HAVE DRAWN ON THE CHEEK AREA ABOVE THE JAW LINE?

A. YES. I BELIEVE THERE ARE FOUR CIRCLES.

Q. AND CAN YOU DESCRIBE FOR US WHAT YOU FOUND IN THAT AREA?

WHAT THOSE MARKS INDICATE ON THE DRAWINGS?

A. THOSE ARE ADDITIONAL SEPARATE POINTS OF BRUISING.

WELL, THE DESCRIPTION SAYS AT LEAST THREE AND POSSIBLY FOUR VERY SHARPLY DEFINED BRIGHT PURPLE BRUISES ABOUT ONE QUARTER TO ONE-HALF INCH IN DIAMETER.

AND THEY RUN ABOUT ONE-HALF TO THREE-QUARTER INCHES APART.

Q. NOW, DOCTOR, HOW DEEP INTO THE FACE WERE THOSE BRUISES THAT YOU OBSERVED?

A. WELL AGAIN, IN THIS CASE I DID NOT -- THESE ARE ON THE SURFACE OF THE JAW.

THERE IS A LITTLE LESS FAT BUT THERE IS SOME SOFT TISSUE AS WE CALL IT, CONNECTIVE TISSUE AND FAT, AND I SAW THE ASPECTS OF THEM THAT WAS UNDER THE SKIN.

I DID NOT ACTUALLY DISSECT THAT CONNECTIVE TISSUE AND FAT OFF THE EDGE OF THE JAW AND LOOK AT THE SURFACE OF THE BONE.

SO I CANNOT TELL YOU HOW DEEP THEY ARE. THEY ARE CERTAINLY AT LEAST SUBCUTANEOUS.

Q. SUBCUTANEOUS MEANING BELOW THE LEVEL OF THE SKIN?

A. YES, AT THE INTERFACE OF THE SKIN AND THE NEXT LAYER WHICH -- EXCUSE ME -- AT THE INTERFACE OF THE DERMUS AND THE NEXT LAYER WHICH IS THE SUBCUTANEOUS FAT.

Q. SO THERE IS BELOW THE SKIN A LEVEL OF DERMUS AND THEN THERE IS SUBCUTANEOUS FAT?

A. YES.

Q. AND IT IS BETWEEN THE DERMUS AND JUST AS IT REACHES THE SUBCUTANEOUS FAT LEVEL?

A. WELL, YES.

Q. AND YOU SAID THERE WERE THREE, POSSIBLY FOUR VERY SEPARATE AND DISTINCT BRUISES; IS THAT CORRECT?

A. YES.

Q. DO YOU HAVE AN OPINION AS TO WHAT CAUSED THOSE BRUISES?

A. I BELIEVE THEY ARE FINGER PRESSURE MARKS, BRUISES.

MR. SHEAHEN: OBJECTION.

LACK OF FOUNDATION, YOUR HONOR.

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THE COURT: OVERRULED.

Q. BY BERMAN: DOCTOR, SO THAT WE ARE CLEAR ABOUT THAT, THE LINE THAT YOU HAVE DRAWN BELOW THAT IS ON THE PREPRINTED CHART OF THE FACE, DOES THAT LINE DEFINE THE JAW LINE?

A. THIS IS THE PREPRINTED LINE AND IT DEFINES THE JAW LINE.

IT IS MEANT TO SHOW A HEAD WITH THE CHIN TILTED UPWARDS SO IT REALLY SHOWS THE UNDERSIDE OF THE CHIN.

THIS WOULD BE, THE LITTLE CURVED LINE HERE WOULD BE MORE OR LESS WHERE THE CREASE IS BETWEEN THE CHIN AND THE NECK.

Q. SO THE BRUISES YOU HAVE DESCRIBED SO FAR APPEAR ON THE FACE AS OPPOSED TO UNDER THE JAW LINE IN THE AREA OF THE NECK; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. NOW, GO BACK FOR A MOMENT TO THE FACE, WERE THERE ANY INJURIES THAT YOU NOTED TO NICOLE PARKER'S MOUTH?

A. YES.

Q. CAN YOU INDICATE FOR US WHAT YOU OBSERVED?

A. WELL, IN THE MIDLINE OF THE UPPER LIP JUST WITHIN THE LIP, NEAR ITS EDGE BUT WITHIN THE LIP, THAT WHOLE AREA LOOKED PURPLISH.

AND AGAIN IT HAD ENOUGH OF A PURPLE APPEARANCE THAT THERE I PUT IN AN INCISION, AND THERE WAS SOME SUPERFICIAL BRUISING RIGHT UNDER THE LINING OF THE LIP.

SO THAT ALTHOUGH THE WHOLE LIP WAS, LOOKED PURPLE, ONLY IN THE MIDLINE WAS THERE A BRUISE, AND THIS

DOESN'T GIVE YOU THE -- THE DESCRIPTION I DID NOT PUT DOWN A SIZE, BUT THE SIZE WOULD BE AGAIN AN EIGHTH TO A QUARTER INCH APPROXIMATELY.

Q. DO THE PHOTOGRAPHS OF PEOPLE'S 1 FOR IDENTIFICATION, PHOTOGRAPH 1A, DOES THAT DEPICT THE AREA WHERE THAT BRUISE WAS FOUND?

A. WELL, IT SHOWS THE LIPS BUT, NO, IT DOESN'T SHOW THE AREA BECAUSE HER MOUTH IS CLOSED IN THE PHOTOGRAPHS AND THIS WOULD BE JUST ON THE INSIDE OF THE LIP.

Q. IS THERE ANY WAY TO DETERMINE BASED UPON YOUR EXAMINATION WHAT CAUSED THAT PARTICULAR BRUISE?

A. SOME KIND OF PRESSURE.

Q. AS OPPOSED TO AN IMPACT?

A. IT COULD BE AN IMPACT, BUT I DON'T THINK I CAN TELL THE DIFFERENCE.

Q. YOU DON'T THINK YOU CAN TELL THE DIFFERENCE?

A. NO.

Q. OKAY.

IF WE CAN, I WOULD LIKE TO MOVE NOW TO THE AREA OF NICOLE PARKER'S NECK.

DID YOU CONDUCT AN EXAMINATION OF HER NECK?

A. YES.

Q. AND DID YOU FIND ANY INJURIES TO HER NECK?

A. YES.

Q. REFERRING YOU TO 5A FOR IDENTIFICATION, I WOULD ASK YOU TO TAKE A LOOK AT THAT DIAGRAM, PLEASE, AND TELL ME IF THE INJURY TO THE NECK IS DEPICTED AT ALL ON THAT DIAGRAM?

A. WELL, VERY DIAGRAMATICALLY, YES, IT IS.

Q. COULD YOU SHOW US WHAT YOU ARE REFERRING TO?

A. I AM REFERRING TO THIS HATCHED IN ROUND AREA UNDER THE RIGHT ANGLE OF THE JAW.

Q. AND COULD YOU SHOW US WHERE THAT SPOT, CORRESPONDING SPOT, WOULD BE ON YOUR OWN NECK AREA?

A. IT WOULD BE RIGHT UNDER THE ANGLE OF THE JAW WHERE YOU CAN FEEL YOUR GLANDS.

Q. ALL RIGHT.

CAN YOU DESCRIBE FOR US WHAT THE NATURE OF THAT INJURY WAS THAT YOU EXAMINED?

A. WELL, I WOULD LIKE TO GO BACK TO THE SKIN AROUND THE EYES.

Q. ALL RIGHT.

A. IT'S REALLY A PART OF THIS INJURY ALSO. IT IS AN INDIRECT MANIFESTATION OF IT.

THE SKIN AROUND THE RIGHT EYE, AND TO A MUCH LESSER EXTENT ON THE INNER CORNER, AROUND THE INNER CORNER OF THE LEFT EYE, HAD LITTLE TINY PUNCTATE HEMORRHAGES.

WE CALL THEM PETECHIAL HEMORRHAGES.

AND WHAT THEY ARE ARE HEMORRHAGES THAT OCCUR IN CAPILLARIES SO THEY ARE VERY SMALL, PEPPERING OF RED.

THEY ARE INDICATIVE OF -- WELL, I WILL SHORT CIRCUIT THE PHYSIOLOGY.

IN THE TYPE OF WORK THAT I DO THEY ARE 95 PERCENT OF THE TIME INDICATIVE OF PRESSURE TO THE NECK.

SO I WAS ALERTED THAT I NEEDED TO LOOK AT THE NECK CAREFULLY, AND THIS VERY ELABORATE DISSECTION

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AND REFLECTION OF THE SKIN WAS PARTLY DONE TO LAYOUT THE STRUCTURES OF THE NECK, AND THERE WAS BRUISING IN THE AREA THAT I INDICATED ON THE RIGHT BELOW THE ANGLE OF THE JAW WHICH WENT -- YOU COULD SEE IT IN ALL THE DIFFERENT LAYERS OF TISSUE.

THERE IS THE MUSCLE THAT RUNS FROM BEHIND THE EAR DOWN TO THE COLLAR BONE THAT TURNS YOUR HEAD. THAT WAS BRUISED.

THE TISSUES DEEP TO IT WERE BRUISED.

THE CAROTID ARTERY AND THE JUGULAR VEIN RUN DEEP TO THIS POINT. THE TISSUES AROUND THEM WERE BRUISED.

THE BRUISING EXTENDED EVEN FURTHER BACK THAN THAT ONTO THE SIDE EXPANSIONS OF THE VERTEBRAE, THE CERVICAL VERTEBRAE.

ALL THE VERTEBRAE HAVE WHAT WE CALL I THINK IT IS PEDICLES.

THERE IS A ROUND BODY AND IN THE BACK THERE IS AN ARCH AND THEN ON THE SIDES THERE IS LITTLE WINGS OF BONE WHICH IN THE NECK ARE JUST THERE, AND IN THE LUMBAR AREA THEY ARE JUST THERE.

BUT IN THE CHEST THAT'S WHERE THE RINGS ARE ATTACHED.

SO THE ONES IN THE FIRST TWO CERVICAL VERTEBRAE STICK OUT AND THIS BRUISING WENT ALL THE WAY BACK TO THAT.

AND, IN FACT, THERE WAS ALSO SOME BRUISING ON THE FRONT SURFACE OF THE MASTOID PROCESS, WHICH MAY HAVE BEEN PART OF THE SAME APPLICATION OF FORCE. IT IS IN THE

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SAME GENERAL AREA.

THIS BRUISING AT ALL THESE DIFFERENT LEVELS I THINK INDICATES PRESSURE, POINT PRESSURE IN THIS AREA WITH SOME MOVEMENT.

SO IT WASN'T STEADILY IN JUST ONE SPOT BUT PROBABLY MOVED SOMEWHAT.

ESPECIALLY I CAN'T SEE THAT THE SAME PRESSURE THAT CAUSED THE BRUISING AROUND THE CAROTID ARTERY WOULD ALSO DO IT TO THE MASTOID PROCESS.

I THINK, I BELIEVE IT WAS A THUMB HAD TO MOVE SOMEWHAT IN THIS GENERAL REGION, SO THIS BRUISING WAS EXTREMELY DEEP AND THERE WAS WAS BRUISING AROUND THE JUGULAR VEIN, SO THERE WAS COMPRESSION OF THE VEIN.

THE COMPRESSION OF THE VEIN WOULD BE WHAT WOULD ACCOUNT FOR THE PETECHIAL HEMORRHAGES BECAUSE IT RAISES THE VENUS PRESSURE IN THE VASCULAR BED OF THE HEAD BECAUSE THE ARTERY IS NOT NECESSARILY COMPRESSED BECAUSE THE PRESSURE IN IT IS MUCH HIGHER PLUS IT IS BESIDE THE VEIN SO IT IS POSSIBLE TO COMPRESS EACH ONE SEPARATELY.

SO THE ARTERY IS PUMPING BLOOD IN AND IT CAN'T EXIT THROUGH THE JUGULAR VEIN.

SO THE CAPILLARY BED GETS FILLED UP AND THE LITTLE CAPILLARIES BURST, AND THAT WAS INDICATED BY THIS LITTLE TINY PINPOINT HEMORRHAGES, MOSTLY AROUND THE RIGHT EYE.

IN ADDITION THERE WAS SOME SLIGHT TRAUMA WHICH I BELIEVE IS ALSO SIGNIFICANT, BUT SLIGHT IN ACTUAL EXTENT, TO THE JUNCTION OF THE HYOID BONE AND THE PROCESS -- THE

KIND OF PART OF THE THYROID CARTILAGE WHICH IS THE CARTILAGE OF YOUR LARYNX WHICH JOINS WITH THE HYOID BONE.

SO SHE HAD COMPRESSION OF THE NECK BASICALLY.

Q. NOW, BY COMPRESSION OF THE NECK YOU ARE REFERRING TO THE SQUEEZING, CUTTING OFF OF --

A. WELL, A COMPRESSION OF THE NECK IS JUST WHAT IT SAYS.

I THINK IN THIS CASE THERE MAY HAVE BEEN A CIRCULAR COMPRESSION AS EVIDENCED BY THE BRUISING AROUND THE HYOID BONE AND THE THYROID CARTILAGE, ALTHOUGH I CAN'T EXCLUDE JUST A NONCIRCULAR BUT JUST POINT PRESSURE CAUSING THAT AS WELL IN THE SAME GENERAL AREA OF THE RIGHT SIDE HIGH UP IN THE NECK.

Q. SO IF I UNDERSTAND CORRECTLY THEN, A PERSON JUST TAKING THEIR THUMB, JUST THEIR THUMB, AND PRESSING IT VERY HARD IN THIS AREA YOU HAVE DESCRIBED COULD ACCOUNT FOR THE INJURY THAT YOU SAW, AT LEAST IN PART TO THE DIFFERENT LAYERS OF MUSCLE ALL THE WAY DOWN TO ALMOST THE POINT WHERE IT IS AT THE BACK OF THE NECK AND THE STERNUM; IS THAT CORRECT?

MR. SHEAHEN: OBJECTION.

LEADING, YOUR HONOR.

THE COURT: IT IS LEADING.

SUSTAINED.

Q. BY MR. BERMAN: DOCTOR, YOUR OPINION THEN WOULD YOU TELL ME, PLEASE --

LET ME STRIKE THAT.

I THINK YOU VOICED AN OPINION CONCERNING A

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THUMB HAVING CAUSED AT LEAST SOME OF THESE INJURIES; IS THAT CORRECT?

A. YES.

Q. AND WOULD THAT BE CONSISTENT WITH A PERSON PRESSING THEIR THUMB AGAINST THAT PART OF THE NECK?

A. YES.

Q. YOU ALSO INDICATED I BELIEVE THAT, AND I CAN'T REMEMBER EXACTLY THE WORDS YOU USED, I THINK HEMISPHERIC, THAT IT COULD HAVE BEEN CAUSED BY THE THUMB OF THE HAND WHILE THE REST OF THE HAND WAS AROUND THE NECK?

A. I CAN'T EXCLUDE THAT, ALTHOUGH THERE IS REALLY NO EVIDENCE FOR IT.

BUT YOU CAN APPLY A LOT OF PRESSURE TO THE NECK WITHOUT CAUSING ANY TRAUMA TO ANY OF THE STRUCTURES OF THE NECK.

WHEN YOU SAW THESE BRUISES ON THE FACE AND THE NECK AS THE AUTOPSY WAS PROGRESSING, IT WAS -- YOU COULD JUST PUT YOUR FINGERS ON THEM, JUST LIKE THAT.

THAT'S WHY I AM SAYING IT IS FINGERS AND THUMB. THE FIT WAS JUST THERE.

Q. ALL RIGHT. YOU ARE TALKING ABOUT FINGERS AND THE THUMB.

SO YOU ARE REFERRING TO THE INJURIES THAT WERE ABOVE THE JAW LINE FOR FINGERS AND THE THUMB BELOW THE JAW LINE; IS THAT WHAT YOU ARE TELLING US?

A. YES.

I AM NOT SAYING THAT THEY WERE NECESSARILY SIMULTANEOUS.

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THEY COULD HAVE BEEN AT DIFFERENT TIMES, BUT THEY CERTAINLY FITTED A HAND, AND IN THIS CASE IT WOULD BE A LEFT HAND BECAUSE THE INJURIES ARE TO THE RIGHT.

OF COURSE, IF IT WAS FROM BEHIND, IT COULD BE THE RIGHT HAND SO I CANNOT SAY WHICH HAND, BUT IT CERTAINLY FITTED A HAND.

Q. THE INJURY TO THE VEIN YOU INDICATED WAS SEPARATE AND APART FROM THE INJURY TO THE MASTOID AREA; IS THAT CORRECT?

A. WELL, THE TWO OF THEM ARE SEPARATED BY I WOULD SAY, OH, A GOOD THREE QUARTERS, HALF AN INCH TO AN INCH. THEY ARE NOT NEXT TO EACH OTHER.

I THINK THE PRESSURE TO THE PROCESSES OF THE VERTEBRAE IS IN THE SAME PLANE AS YOU PUSH IN WITH THE ARTERY RUNNING OVER THAT PROCESS.

BUT THE MASTOID PROCESS IS IN A DIFFERENT PLANE.

IT IS A LITTLE FURTHER UP AND TO THE SIDE.

Q. DOES THAT MEAN THAT THE FORCE THAT WAS APPLIED WAS APPLIED ON TWO SEPARATE OCCASIONS OR THAT THE SAME AMOUNT OF FORCE WAS BEING USED, AND THE CHILD MAY HAVE MOVED CAUSING THE INJURY TO A SECOND AREA?

A. WELL, I DON'T KNOW WHETHER -- THERE WAS APPLICATION OF FORCE I BELIEVE IN AT LEAST TWO AREAS.

AND I DON'T KNOW WHETHER THE FORCE THAT WAS APPLIED MOVED OR WHETHER THE HEAD MOVED.

Q. BUT IN ANY EVENT, MOVEMENT COULD ACCOUNT FOR THE INJURIES IN TWO DIFFERENT AREAS?

A. YES.

Q. MOVEMENT OF THE HEAD OR MOVEMENT OF THE HAND ITSELF OR THE THUMB ITSELF?

A. YES.

Q. DOCTOR, WOULD THIS BE THE TYPE OF INJURY, THE ONE TO THE VEIN, THAT COULD CAUSE DEATH?

A. WELL, NOT SO MUCH TO THE VEIN BUT MORE TO THE ARTERY.

IF YOU EXERT PRESSURE IN THIS REGION, THERE IS A PLEXUS OF VAGUS NERVE IN THERE AROUND THE ARTERIES.

IT IS A VERY WELL KNOWN AREA, AND IF YOU PRESS ON THAT THAT CAUSES THE HEART TO SLOW DOWN.

SO PRESSURE IN THIS AREA IS DEFINITELY LIFE THREATENING AND THAT COULD BE A CAUSE OF DEATH, NOT THROUGH CUTTING OFF THE AIR SUPPLY BUT THROUGH CAUSING A DISCHARGE OF THE VAGUS NERVE SUCH THAT THE HEART RATE WOULD GO DOWN.

Q. THE SMALL AMOUNT OF HEMORRHAGING THAT YOU SAW OVER THE LARYNX WOULD THAT HEMORRHAGING BE CONSISTENT WITH STRANGULATION?

A. THE TRAUMA TO THE LARYNX IS VERY CHARACTERISTIC OF COMPRESSION OF THE NECK LIKE A REGULAR STRANGULATION, STRAIGHTFORWARD STRANGULATION, MANUAL STRANGULATION, AS OPPOSED TO A LIGATURE LIKE A SCARF.

Q. SO IT IS MORE CONSISTENT WITH MANUAL STRANGULATION MEANING A HAND AS OPPOSED TO AN OBJECT, A ROPE OR A SCARF, ANYTHING LIKE THAT?

A. YES.

Q. LET'S TALK FOR A MOMENT ABOUT NICOLE PARKER'S

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TRUNK, THE TRUNK OF HER BODY.

IS THAT ALSO DEPICTED IN ONE OF THE DIAGRAMS?

A. YES.

Q. WOULD THAT BE 5E FOR IDENTIFICATION?

A. YES.

Q. ALL RIGHT.

CAN YOU START WITH ANY ONE OF THE AREAS OF INJURY AND BEGIN DESCRIBING IT FOR US, DOCTOR.

A. WELL, ACTUALLY THERE WERE VERY FEW INJURIES THAT WERE VISIBLE ON THE SKIN SURFACE, ONE OF THEM BEING THIS BRUISE WHICH IS JUST ABOVE THE COLLAR BONE, JUST ABOVE THE MIDDLE OF THE COLLAR BONE IN THE SOFT TISSUES ABOVE THAT AND THAT WAS A QUARTER INCH -- ACTUALLY IT IS NOT A BRUISE. IT IS AN ABRASION.

AND LOOKING UNDER THE SKIN AT THAT SITE THERE WAS NO UNDERLYING BRUISE.

HOWEVER, IN THESE TYPE OF CASES I ALWAYS DO A LOT OF DISSECTING IN LAYERS SO THAT I WAS LOOKING CAREFULLY AT THE DIFFERENT LAWYERS BETWEEN THE SKIN AND THE SUBCUTANEOUS TISSUES, AND THEN THE SURFACE OF THE MUSCLES.

THERE WAS A BRUISE JUST BELOW THE INNER ASPECT OF THE RIGHT COLLAR BONE THAT YOU COULD NOT SEE EXTERNALLY ON THE SKIN SURFACE BUT IT WAS IN THE SOFT TISSUES.

IT IS DESCRIBED AS -- YEAH, IT IS UNDER THE SKIN.

Q. DO YOU HAVE ANY IDEA WHAT WOULD CAUSE THAT TYPE OF INJURY?

A. WELL, IT IS BLUNT FORCE AND THAT'S KIND OF A

GENERIC TERM.

I THINK IT COULD EITHER BE A BLOW WITH SOMETHING SMOOTH AND ROUND AND FAIRLY SMALL BECAUSE THE BLOW WOULD NOT BE VERY FORCEFUL OR IT COULD BE PRESSURE.

PRESSURE IS LIKE BLUNT FORCE WITH NO VELOCITY TO IT.

Q. PRESSURE AGAIN MEANING BY FINGER OR THUMB?

A. IT WOULD BE -- OR, WELL, CONCEIVABLY A SMOOTH OBJECT OF SOME KIND BUT CERTAINLY A FINGER COMES TO MIND.

Q. WHEN YOU HAVE BRUISING THAT OCCURS UNDERNEATH THE SKIN, WHAT CAUSES THE BRUISING ITSELF?

A. WELL, BRUISING IS ALWAYS, OF COURSE, UNDERNEATH THE SKIN.

BRUISING IS THE BODY'S RESPONSE TO TRAUMA, AND ALL THE BLOOD VESSELS ARE UNDER THE SKIN.

SO THE FORCE THAT CAUSES THE BRUISING HAS TO BE DELIVERED PAST THE SURFACE OF THE SKIN.

IF YOU JUST SLAP SOMEBODY ON A BROAD SURFACE, YOU DON'T CAUSE BRUISING, BECAUSE THE FORCE IS SORT OF DISTRIBUTED OVER A BIG AREA SO ANY ONE POINT OF IT DOESN'T GET ENOUGH TO CAUSE BRUISING.

BUT IF YOU HIT SOMEBODY WITH LET'S SAY A SMOOTH BAT OR WITH A FIST OR IF YOU HIT YOUR ARM AGAINST A WALL OR AN EDGE AS YOU GO ABOUT YOUR BUSINESS, YOU ARE TRANSMITTING FORCE TO YOUR TISSUES.

AND THE WAY IT WORKS IS THAT THE GREATER THE FORCE, THE LESS LIKELY YOU ARE TO GOING THE SEE THE BRUISING, BECAUSE THE FORCE WILL OVERCOME THE ELASTICITY OF

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THE TISSUES.

THAT IS THE ONLY EXPLANATION THERE IS.

SO IF YOU LOOK AT TRAFFIC VICTIMS, THEY WILL HAVE NOTHING FOR THREE INCHES AND THE FOURTH INCH IT WILL BE BRUISED LIKE YOU DON'T BELIEVE.

THE BEST WAY I CAN CONCEPTUALIZE IT IS THE TISSUES ARE LIKE A RUBBER BAND.

YOU CAN HOLD THE RUBBER BAND TO THE WALL AND PUNCH THE WALL.

YOU MIGHT MAKE A HOLE IN THE WALL AND MIGHT HURT YOUR HANDS AND NOTHING WILL HAPPEN TO THE RUBBER BAND.

SO THE MORE FORCE THAT IS EXERTED THE DEEPER THE BRUISE.

THAT'S WHY WE DO THIS THING IN LAYERS AND THAT'S WHY I WAS EMPHASIZING THE DEPTH OF THE BRUISES IN THE NECK REGION.

SO FINDING BRUISES THAT YOU CAN'T SEE ON THE SKIN SURFACE IS VERY COMMON IN OUR OFFICE, AND, OF COURSE, WITH TIME IF YOU HAVE, YOU KNOW, IF YOU ARE IN YOUR KITCHEN AND YOU HIT YOURSELF AND YOUR BLOOD PRESSURE IS OKAY AND YOU ARE HEALTHY, PRETTY SOON YOU WILL GET A VISIBLE BRUISE ON THE SKIN SURFACE.

LET'S SAY YOU FALL OFF YOUR BICYCLE AND GET A BRUISE ON YOUR THIGH.

IT MIGHT TAKE A COUPLE OF DAYS BEFORE THE BRUISE SHOWS UP.

EVENTUALLY THE TISSUE REACTION WILL MIGRATE TO

THE SKIN SURFACE.

BUT THERE ARE MANY BRUISES THAT YOU NEVER SEE ON THE SKIN SURFACE.

THAT'S WHY NONE OF THESE LITTLE BRUISES WHICH ARE ALL OF THEM PUNCTATE THAT ARE DIAGRAMED ON HER TRUNK WERE SEEN.

I BELIEVE THERE IS ONLY ONE BRUISE THAT WAS SEEN EXTERNALLY ON THE SKIN SURFACE AND THAT WAS ON HER ILIAC CREST WHICH IS THIS BONE RIGHT IN FRONT HERE OF YOUR PELVIS AND THAT ONE YOU COULD SEE.

Q. ALL RIGHT.

SO THAT I AM CLEAR BRUISING IS THAT CAUSED BY BLEEDING UNDER THE SKIN?

A. WELL, YES.

THE FORCE WE ARE TALKING ABOUT, THE TYPE OF FORCE THAT IS FORCE STRONG ENOUGH TO CAUSE ACTUAL INJURY OF TISSUE AT THE, MAYBE AT THE MICROSCOPIC LEVEL.

Q. IF THE HEART IS STOPPED SO THERE IS NO BLOOD BEING PUMPED THROUGH THE BODY, DOES BRUISING OCCUR?

A. NO. I ALWAYS HAVE TO EXPLAIN THIS.

BUT TO ME IT IS SO OBVIOUS.

IF I SAY BRUISE, THAT AUTOMATICALLY RIGHT AWAY IT MEANS THE PERSON IS ALIVE BECAUSE YES, FOR THE BLOOD TO SEEP OUT OF THOSE CAPILLARIES AND THOSE TORN LITTLE BLOOD VESSELS, YOU DO NEED BLOOD PRESSURE, AND WHEN YOU ARE DEAD, YOUR BLOOD PRESSURE IS DOWN AND YOU DON'T GET BRUISING.

Q. SO ALL OF THESE MARKS THAT YOU HAVE DESCRIBED

FOR US, ALL OF THESE BRUISES WOULD HAVE OCCURRED WHILE NICOLE WAS ALIVE; IS THAT CORRECT?

A. OH, YES.

Q. NOW, THE BRUISES THAT YOU POINTED TO IN THE REGION OF THE CHEST, I TAKE IT THAT WOULD BE THE RIGHT-HAND SIDE, THE ONES YOU REFERRED TO A FEW MINUTES AGO?

A. YES.

Q. ARE THOSE ALL BELOW THE SURFACE SO THAT THEY ARE NOT VISIBLE IN THE PHOTOGRAPHS THAT ARE ON THE BOARD HERE, D, E AND F, PEOPLE'S 1 FOR IDENTIFICATION?

A. YES.

Q. OR D AND E I SHOULD SAY.

A. YES.

Q. HOW ABOUT IN B FOR IDENTIFICATION?

A. THEY ARE NOT VISIBLE IN ANY OF THE PHOTOGRAPHS.

Q. AND APPROXIMATELY HOW MANY OF THESE BRUISES DID YOU FIND BELOW THE SURFACE ON THE CHEST?

A. THERE ARE THREE QUARTER INCH BRIGHT PURPLE BRUISES JUST UNDER THE SKIN ON THE SURFACE OF THE CHEST MUSCLES OVER THE FOURTH, APPROXIMATELY THE FOURTH, FIFTH AND SIXTH RIBS IN THE MIDDLE OF THE CHEST.

THAT WOULD BE KIND OF -- I MEAN IN THE MIDLINE OF THE CHEST AND TO THE FOURTH, FIFTH AND SIXTH RIBS IN FRONT WOULD BE SORT OF MORE OR LESS IN THE MIDDLE OF THE CHEST ALSO.

AND THEN THERE ARE TWO ADDITIONAL SLIGHTLY LARGER APPROXIMATELY HALF INCH BRUISES DEEPER IN ON THE OUTER SURFACES OF THE INTERCOSTAL MUSCLES ON THE EDGE OF

THE RIB CAGE AROUND THE, SORT OF TOWARDS THE MIDLINE, THE SIXTH AND SEVENTH, BETWEEN THE SIXTH AND SEVENTH RIBS.

Q. DO YOU HAVE AN OPINION, DOCTOR, AS TO WHAT CAUSED THOSE TYPES OF BRUISES?

A. WELL, THESE ARE ALL PUNCTATE.

THEY ARE ABOUT A QUARTER INCH. THEY ARE EITHER MULTIPLE BLOWS IN A LINE OR THEY ARE PRESSURE FROM OBJECTS SUCH AS FINGERS WHICH FIT RATHER WELL.

Q. SO FINGERS ALSO COULD HAVE CAUSED THE BRUISING THAT YOU OBSERVED ALONG THE CHEST AND MIDLINE AREA; IS THAT CORRECT?

A. YES.

MR. SHEAHEN: OBJECTION.

LEADING AND ASKED AND ANSWERED.

THE COURT: IT WAS LEADING.

OBJECTION SUSTAINED.

IS THIS A GOOD PLACE FOR A BREAK, MR. BERMAN?

MR. BERMAN: THAT'S FINE, YOUR HONOR.

THE COURT: LET'S TAKE FIFTEEN MINUTES, LADIES AND GENTLEMEN.

WE WILL RESUME AT FIVE AFTER 3:00.

PLEASE REMEMBER THE ADMONITION DURING THE BREAK NOT TO DISCUSS THE CASE AND NOT TO FORM ANY FINAL OPINION ABOUT IT.

(THE FOLLOWING PROCEEDINGS

WERE HAD IN OPEN COURT, OUT

OF THE PRESENCE AND HEARING
OF THE JURY:)

THE COURT: WE ARE OUTSIDE THE PRESENCE OF THE JURY.
WE WILL PICK IT UP AT FIVE AFTER 3:00.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, OUT OF THE PRESENCE OF THE JURY:)

THE COURT: BACK ON THE RECORD IN PEOPLE VERSUS PANAH.

WE'RE OUTSIDE THE PRESENCE OF THE JURY. THE DEFENDANT IS WITH HIS ATTORNEYS AND THE PEOPLE ARE PRESENT.

MR. BERMAN, ARE YOU GOING TO BE ON DIRECT FOR THE REST OF THE AFTERNOON, DO YOU THINK?

MR. BERMAN: WE'LL PROBABLY COME PRETTY CLOSE, YOUR HONOR. MAYBE BY QUARTER TO 4:00 WE WOULD FINISH.

THE COURT: OKAY. THEN WE'LL DO CROSS IN THE MORNING, MR. SHEAHEN. THAT GIVES YOU WHAT LITTLE ADDITIONAL TIME I CAN GIVE YOU AT THIS POINT.

THESE THINGS SEEM TO DRAG ON AND ON, AND YOU GET THE TIME THAT YOU REQUEST ONE WAY OR THE OTHER.

SO I SUGGEST PLEASE MAKE CONTACT, EVEN IF YOU HAVE TO SEND MR. CHAIS OUT NOW TO GET DR. THOMAS ALL LINED UP TO MEET WITH YOU GUYS THIS EVENING, BECAUSE YOU'VE NOW GOTTEN MORE TIME THAN I EVER WOULD HAVE EXPECTED YOU WOULD HAVE GOTTEN.

WE'LL DO THE CROSS-EXAMINATION TOMORROW

MORNING FIRST THING.

MR. SHEAHEN: IT'S THE LENGTH OF THE MISTRIAL MOTION, YOUR HONOR. WHEN YOU TACK THAT ON, IT SENDS US OVER TO THE NEXT DAY.

MR. BERMAN: YOUR HONOR, THERE'S GOING TO BE A REQUEST TO ADD ONE ADDITIONAL PHOTOGRAPH.

WE CAN DO THIS AT THE BENCH IF THE COURT WISHES.

THE COURT: HAS MR. SHEAHEN SEEN IT?

MR. BERMAN: I AM GOING TO SHOW IT NOW.

THE COURT: SHOW IT TO HIM AND SEE IF HE HAS AN OBJECTION.

MR. SHEAHEN: I'M SURE I DO.

(COUNSEL CONFERRING.)

THE COURT: APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: WE'RE AT THE BENCH.

MR. BERMAN: YOUR HONOR, I WENT THROUGH ALL OF THE PICTURES WE HAD. WE TRIED TO SHOW A PICTURE THAT DEPICTED THE MARKS CAUSED BY THE RING.

THIS WAS THE ONLY PHOTOGRAPH FROM THE CORONER'S OFFICE -- I MEAN OF ANYWHERE, THAT SHOWED THE MARKS ON THE LEG THAT WOULD BE CONSISTENT WITH THE KNOBS THAT ARE ON THE RING.

IT'S UNFORTUNATELY NOT DEPICTED ANYWHERE

ELSE.

I TRIED TO DO IT WITH THE PHOTOGRAPHS THAT WE HAD UP THERE, BUT THEY DON'T REFLECT IT.

SO WE'RE GOING TO ASK TO HAVE THIS PHOTOGRAPH MARKED AS THE NEXT PEOPLE'S EXHIBIT FOR THE PURPOSE OF ALLOWING THE DOCTOR TO TESTIFY TO HER OPINION AS TO THE CAUSE OF THESE INJURIES BEING CONSISTENT WITH THE RING.

THE COURT: ARE YOU TALKING ABOUT THESE MARKS HERE?

MR. BERMAN: YES.

THE COURT: CAN WE CROP THE PICTURE TO CUT OFF THE VAGINAL AREA?

MR. BERMAN: ABSOLUTELY.

THE COURT: WITH THAT CROPPING --

FOR THE RECORD RIGHT NOW THE PICTURE SHOWS, THAT'S THE VAGINAL AREA?

MR. BERMAN: I THINK IT IS, YES.

THE COURT: I THINK IT'S --

MR. BERMAN: I HAVE NO OBJECTION.

THE COURT: I THINK IT'S A LOT BETTER WITHOUT THE TOP PART OF THE PICTURE.

I THINK THE TESTIMONY YOU WANT TO GET IN COULD BE EXPLAINED WITHOUT THAT.

WITH THAT CROPPING, MR. SHEAHEN, DO YOU HAVE ANY OBJECTION?

MR. SHEAHEN: I OBJECT AND SUBMIT IT, YOUR HONOR.

I WOULD LIKE TO -- WHILE WE'RE HERE, MR. BERMAN HAS AN EXAMINATION TECHNIQUE IN WHICH HE ASKS PEOPLE, FOR EXAMPLE, WITH RESPECT TO THIS, HE WILL ASK "COULD THIS HAVE BEEN CAUSED BY A RING."

AND WHEN HER ANSWER IS "YES", MR. BERMAN DOESN'T INQUIRE AS TO THE 70 OR 80 OTHER THINGS THAT COULD HAVE CAUSED IT. RATHER HE INCORPORATES RING CAUSATION INTO HIS NEXT QUESTION AND PROCEEDS TO ASSUME THAT IT WAS CAUSED BY A RING.

I HAVE A GREAT DEAL OF DIFFICULTY WITH THAT AND I THINK THAT THAT METHOD OF QUESTIONING IS MISLEADING THE JURY.

I WOULD ASK IF HE BE ALLOWED TO QUESTION IN THIS AREA, THAT HE ESTABLISH THAT THERE ARE OTHER CAUSES THAN A RING, BECAUSE HE'S SIMPLY GOING TO ASSERT AND LEAD THIS WITNESS IN TO SAYING THAT THAT'S POSSIBLY CAUSED BY A RING.

THE COURT: WE'LL HAVE TO TAKE IT UP ON A QUESTION BY QUESTION BASIS.

I ASSUME AT THIS POINT HE'S INTERVIEWED THE DOCTOR AND EXPECTS HER TO TESTIFY THAT THOSE INJURIES ARE CONSISTENT WITH A RING OR SIMILAR TYPE OBJECT THAT WAS INTRODUCED INTO EVIDENCE EARLIER TODAY.

BUT I CAN ONLY RULE ON A QUESTION BY QUESTION BASIS.

LET'S PROCEED.

THAT WILL BE CROPPED, THOUGH.

MR. BERMAN: YES.

THE COURT: WITH THE CROPPING OF THE GENITAL AREA BEING REMOVED FROM THE PHOTOGRAPH, I AM GOING TO OVERRULE THE DEFENSE OBJECTION.

AS TIME HAS GONE ON AND THE DEFENSE POSITION HAS BECOME MORE CLEAR TO THE COURT INDICATING YOU ARE APPARENTLY CHALLENGING YOUR CLIENT'S PARTICIPATION IN THE OFFENSES AS OPPOSED TO JUST QUESTIONING MENTAL STATE OR THINGS OF THAT NATURE, IDENTITY IS CRUCIAL, AND I THINK THE PHOTOGRAPH GOES TO THE ISSUE OF IDENTITY.

SO THE OBJECTION WILL BE OVERRULED.

IT'S NOT UNDULY GRUESOME, PARTICULARLY AS CROPPED. IT'S NOT IN MY MIND GRUESOME AT ALL.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: BRING IN THE JURORS, PLEASE.

///

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE PRESENCE OF THE JURY:)

THE COURT: LET THE RECORD REFLECT ALL TWELVE JURORS AND FIVE ALTERNATES ARE SEATED IN THE JURY BOX.

DR. HEUSER IS ON THE WITNESS STAND. YOU REMAIN UNDER OATH.

MR. BERMAN, YOU MAY CONTINUE WITH YOUR DIRECT EXAMINATION.

MR. BERMAN: THANK YOU.

DIRECT EXAMINATION (RESUMED)

BY MR. BERMAN:

Q DOCTOR, WE WERE TALKING ABOUT BRUISES TO THE CHEST AREA.

I WANT TO GO BACK FOR A MOMENT, AND DIRECT YOUR ATTENTION TO 5-C ON YOUR CHART, TO A BRUISE IN THE AREA OF THE NECK.

DO YOU KNOW THE ONE I'M REFERRING TO?

A YES, I DO.

Q WHEREABOUTS ON THE BODY WOULD THAT BRUISE BE?

A THE -- IT'S ON THE LOWER PART OF THE MUSCLE THAT TURNS THE HEAD ON THE RIGHT-HAND SIDE. AND IT'S ON THE SURFACE OF THE MUSCLE.

IT'S IN THE CAPSULAR, THE CONNECTIVE

TISSUE THAT COVERS THAT MUSCLE, AND -- SO IT'S NEAR THE BASE OF THE NECK.

Q NEAR THE BASE OF THE NECK AND AT THE BOTTOM OF THE MUSCLE WHERE IT'S CONNECTED?

A NEAR WHERE IT INSERTS INTO THE BONE OF -- THE COLLAR BONE.

Q NOW, WHEN YOU EXAMINED THAT, DID YOU FIND A BRUISE IN THAT AREA?

A YES.

Q AND HOW SUBSTANTIAL WAS THAT BRUISE?

A WELL, IT'S THERE. IT'S A QUARTER --

Q IS THERE A SIZE GIVEN?

A YES, THERE IS A SIZE. IT'S -- NO. EXCUSE ME. IT DOES NOT GIVE A SIZE.

IT'S PROBABLY ABOUT A QUARTER INCH. AN EIGHTH OR A QUARTER INCH.

ABOUT THE SAME SIZE AS THE OTHER BRUISES. IT'S NOT VERY BIG.

I THINK THAT MAY SAY THREE QUARTER, BUT I DON'T THINK SO. NO. THE THREE QUARTER REFERS TO HOW FAR APART THEY ARE.

Q HOW FAR APART BETWEEN THE BRUISES; IS THAT CORRECT?

A YES, BETWEEN THE BRUISES.

Q NOW, DO YOU HAVE AN OPINION AS TO WHAT WOULD CAUSE THAT TYPE OF BRUISING, THE ONE WE'RE REFERRING TO AT THE BASE OF THE NECK AREA?

A EXCUSE ME. THE THREE QUARTER -- I THINK

IT'S TALKING ABOUT THESE BRUISES, NOT THIS DISTANCE.

THIS BRUISE COULD BE DUE TO A PRESSURE ALSO ON THAT PORTION OF THE NECK. IT ALSO COULD BE DUE TO STRETCHING OF THE TISSUE.

IF THE HEAD IS TURNED, IF THERE'S A TURNING FORCE APPLIED TO THE HEAD TOWARDS THE LEFT STRETCHING THIS MUSCLE.

Q SO IF NICOLE PARKER'S HEAD WAS TURNED TO THE LEFT --

A WITH THE TIP OF THE CHIN BEING UPWARDS, THAT PUTS A LOT OF PRESSURE HERE, AND IT'S A TYPICAL LOCATION IN CASES LIKE THIS.

Q IN CASES LIKE THIS.

SO, I GUESS MORE SPECIFICALLY MY QUESTION WOULD BE:

IF NICOLE PARKER HAD HER HEAD TURNED TO THE LEFT AND THE HEAD WAS PULLED BACK IN SOME FASHION, SUCH AS A HAND OVER THE MOUTH, PULLING BACK IN A DIRECTION TOWARD HER BACK --

MR. SHEAHEN: OBJECTION.

BY MR. BERMAN:

Q WOULD THAT CAUSE --

MR. SHEAHEN: OBJECTION. LEADING.

THE COURT: LET ME HEAR THE REST OF THE QUESTION.

BY MR. BERMAN:

Q WOULD THAT CAUSE THE TYPE OF INJURY THAT YOU'RE DESCRIBING FOR US?

THE COURT: THE OBJECTION IS OVERRULED.

THE WITNESS: YES. IT WOULD CAUSE THE STRETCHING NECESSARY TO PRODUCE AN INJURY SUCH AS THIS.

BY MR. BERMAN:

Q I'D LIKE TO GO BACK TO THE INJURIES OF -- THAT YOU'RE DESCRIBING FOR US ON THE TRUNK.

THE BRUISES YOU HAVE DESCRIBED FOR US SO FAR ARE ALL ON THE RIGHT-HAND SIDE OF HER BODY ON THE TRUNK ON THE FRONT; IS THAT CORRECT?

A YES.

Q DID YOU FIND ANY BRUISES ON THE LEFT-HAND SIDE OF THE BODY, THE UPPER TRUNK AREA AROUND THE RIBS?

A NO. NOT AS DIAGRAMED THERE.

I BELIEVE THE ONLY LEFT-SIDED BRUISES WERE ON THE ARMS AND ON THE LEFT BUTTOCK.

Q LET'S FORGET THE ARMS FOR A MOMENT, AND LET'S GO TO NICOLE PARKER'S BACK AND THE BUTTOCKS AREA AND THE LEGS.

WERE THERE ANY INJURIES THAT YOU OBSERVED IN THE UPPER REGION OF THE BACK DOWN TOWARDS THE WAIST?

A WELL, YES, THERE WAS A BRUISE. IT'S DESCRIBED AS BEING THE UPPER OUTER CORNER OF THE BUTTOCKS.

SO THIS IS -- THIS DIAGRAM COULD BE A LITTLE LOWER, BUT IT IS IN THE BUTTOCK REGION. IT'S

NOT REALLY IN THE WAIST REGION.

THERE IS THAT QUARTER-INCH BRUISE IN THE TISSUES UNDER THE SKIN, NOT VISIBLE EXTERNALLY.

Q IS THIS BRUISE SIMILAR IN TERMS OF ITS SIZE TO THE OTHER BRUISES THAT YOU HAVE DESCRIBED FOR US?

A YES.

Q AND DO YOU HAVE AN OPINION AS TO WHAT COULD HAVE CAUSED THAT PARTICULAR BRUISE?

A WELL, IT'S BLUNT FORCE. EITHER A BLOW OR PRESSURE.

Q DIRECTING YOUR ATTENTION TO THE PHOTOGRAPH MARKED 1-H FOR IDENTIFICATION.

DOES THE BRUISE APPEAR IN THAT PHOTOGRAPH?

MR. SHEAHEN: YOUR HONOR, I THINK THE QUESTION WAS WHETHER IT APPEARS IN THE PHOTOGRAPH, NOT IN HER REPORT.

THE WITNESS: WELL, I DON'T SEE IT IN THAT PHOTOGRAPH, AND I'M CHECKING TO SEE WHETHER IT WAS VISIBLE EXTERNALLY. I DON'T BELIEVE SO.

I THINK IT WAS FOUND AS A RESULT OF THE STANDARD INCISION THAT I MAKE IN CASES LIKE THIS. DOWN THE BACK AND DISSECT.

BY MR. BERMAN:

Q COULD YOU, USING THIS PEN, MAKE A CIRCLE IN THE AREA WHERE THAT BRUISE WOULD BE IN 1-H FOR IDENTIFICATION.

A (WITNESS COMPLIES.)

Q WERE THERE ANY OTHER INJURIES TO THE BUTTOCKS AREA OR THE LEGS?

A THERE WERE SOME SCRATCHES ON THE INSIDE TOWARDS THE BACK OF HER THIGHS.

IT WAS ON THE INSIDE OF THE CURVE OF THE LEG TOWARDS THE BACK, BUT IT COULD BE SEEN FROM THE FRONT, ALSO. SO IT'S REALLY ON THE SIDE.

AND I DIAGRAMED THAT ON THE BACK OF THIS FIGURE.

AND THERE IS A NUMBER OF SCRATCHES THERE.

Q YOU'RE REFERRING TO THE CHART 5-E FOR IDENTIFICATION, THE DIAGRAM OF THE BACK SIDE OF A PERSON, AND YOU'RE REFERRING TO THE AREA OF THE RIGHT LEG JUST BELOW THE BUTTOCKS?

A YES.

MR. BERMAN: YOUR HONOR, I HAVE A PHOTOGRAPH WHICH I WOULD LIKE TO HAVE MARKED AS 22 FOR IDENTIFICATION.

THE COURT: SO MARKED.

BY MR. BERMAN:

Q DOCTOR, SHOWING YOU THIS PHOTOGRAPH. I ASK YOU TO TAKE A LOOK AT THAT, PLEASE.

A YES.

Q DOES THAT PHOTOGRAPH DEPICT THE AREA YOU'RE REFERRING TO?

A YES.

Q AND YOU'VE INDICATED THESE ARE SCRATCHES THAT YOU SAW?

A YES.

Q HOW DEEP WERE THESE SCRATCHES?

A WELL, THEY'RE THROUGH PROBABLY AT LEAST HALF THE SKIN. NOT INTO THE SUBCUTANEOUS TISSUES. SO THEY'RE SCRATCHES.

A SCRATCH IS ALWAYS ON A SURFACE. IT'S HARD TO GAUGE DEPTH.

Q DO YOU HAVE ANY OPINION AS TO WHAT COULD HAVE CAUSED THE SCRATCHES?

A SCRATCHES WOULD BE WITH A SHARP OBJECT. IN THIS CASE A SMALL, SHARP OBJECT THAT IS CAPABLE OF CAUSING IRREGULAR SCRATCHES.

THESE ARE IRREGULAR SCRATCHES WITHOUT A RECOGNIZABLE PATTERN.

THERE IS A PATTERN, BUT...

Q I DIDN'T HEAR THE LAST PART.

A I SAID THERE IS A PATTERN, BUT IT'S NOT SOMETHING THAT JUMPS OUT AT YOU.

Q I WANT TO SHOW YOU A RING WHICH IS MARKED -- HAS BEEN MARKED AS PEOPLE'S 21 FOR IDENTIFICATION, AND I'LL ASK YOU TO TAKE A LOOK AT THAT, PLEASE.

A YES.

Q THAT IS APPARENTLY A RING SHOWING A SKULL WITH NUMEROUS HORN-LIKE, FOR LACK OF BETTER DESCRIPTION, PIECES OF METAL STICKING UP FROM THE

SKULL AREA.

WOULD THAT BE A FAIR CHARACTERIZATION OF WHAT THIS LOOKS LIKE?

A YES.

Q WOULD A RING SUCH AS THIS BE CAPABLE OF INFLICTING THE KIND OF SCRATCHES YOU DESCRIBED FOR US IN PEOPLE'S 22 FOR IDENTIFICATION?

A YES.

Q WERE THERE ANY OTHER INJURIES THAT YOU NOTED TO THE THIGH AREA ON THE BACK OF HER LEGS?

A NO.

Q ANY OTHER INJURIES FARTHER DOWN THAT YOU NOTED?

A WELL, THERE'S GENITAL INJURIES.

Q OTHER THAN THE GENITAL INJURIES?

A NO.

Q THEN LET'S GO TO THE ARMS, IF WE COULD.

DO YOU HAVE ANOTHER DIAGRAM THAT SHOWS MARKS TO THE ARMS OR IS THIS THE CORRECT PAGE?

A NO. I THINK THERE'S ANOTHER DIAGRAM.

Q REFERRING TO 5-F FOR IDENTIFICATION.

CAN YOU DESCRIBE FOR US THE KINDS OF MARKS THAT YOU SAW ON THE ARM OR ARMS?

A WELL, THERE WAS A RATHER PROMINENT BRUISE ON THE INSIDE OF THE RIGHT ELBOW. IT HAD THE APPEARANCE OF BEING TWO ROUND BRUISES THAT WERE RUNNING TOGETHER.

Q WHEREABOUTS ON THE ELBOW WAS THAT,

DOCTOR?

A IT WAS ON THE INNER ASPECT OF THE RIGHT ELBOW, WHERE THE BONY PROMINENCE IS.

Q AND IT WAS TWO SEPARATE BRUISES THAT YOU SAW?

A YES. IT WAS -- IT'S DESCRIBED AS AN AREA VERY INTENSE, PURPLE-RED CONTUSION -- WHICH CONSISTS OF TWO ROUNDED CONTUSIONS.

IF YOU COULD DISTINGUISH THEM, THEY WERE EACH ABOUT A HALF INCH IN SIZE, AND THEN AS THEY RAN TOGETHER, THAT OVERALL AREA WAS ABOUT ONE AND ONE QUARTER BY THREE QUARTER INCHES.

AND IT WAS HORIZONTAL AS OPPOSED TO VERTICAL.

Q DOCTOR, IF I WAS NICOLE PARKER, COULD YOU SHOW ME -- STRIKE THAT. LET'S BACK UP FOR A MINUTE.

DO YOU HAVE AN OPINION AS TO WHAT WOULD HAVE CAUSED THOSE PARTICULAR BRUISES?

A WELL, THEY'RE ON THE FRONT, SO THEY'RE NOT A GOOD PLACE FROM JUST KNOCKING AGAINST SOMETHING.

THEY, AGAIN, COULD BE FROM BEING GRABBED BY THE ELBOW.

Q SO ARE YOU TELLING US IT COULD HAVE BEEN PRESSURE THAT CAUSED THOSE TWO BRUISES?

A YES. AND AGAIN IT'S CONSISTENT -- IT'S VERY SUGGESTIVE OF THAT.

AND IF IT'S NOT THAT, THEN IT'S TWO BLOWS VERY CLOSE TOGETHER, WHICH IS MUCH LESS LIKELY.

Q WOULD IT THEN YOUR OPINION THAT IT'S MORE CONSISTENT WITH A GRAB TYPE OF MARK?

A YES.

Q ARE WE REFERRING TO THUMB OR FINGERS? ANYTHING SPECIFIC THAT YOU CAN TELL US?

A I THINK IT WOULD BE ONE OR THE OTHER. I CANNOT TELL YOU WHICH.

Q ANY OTHER INJURIES TO THE RIGHT ARM?

A THERE WERE SOME FAINT, TWO FAINT BRUISES. THEY WERE HALF AN INCH, AND LINE LIKE, LINEAR, NOT ROUNDED LIKE ALL THE OTHER BRUISES WE'VE BEEN TALKING ABOUT.

AND THEY WERE IN THE MIDDLE OF THE LEFT UPPER BICEPS.

AND, AGAIN, THEY WERE PARALLEL TO EACH OTHER, ONE AFTER ANOTHER IN A HORIZONTAL DIRECTION.

Q SO THERE WERE TWO PARALLEL BRUISES ON THE LEFT UPPER BICEPS?

A YES.

Q AND DO YOU HAVE ANY IDEA WHAT COULD HAVE CAUSED THAT TYPE OF BRUISING?

A IT'S AN UNUSUAL PATTERN. I DON'T KNOW IF IT WOULD BE TWO FINGER PRESSURE POINTS WHICH WERE -- THEY'RE HALF AN INCH LONG. THEY'RE NOT ROUNDED.

SO IT'S NOT CHARACTERISTIC -- IT DOES

NOT HAVE THE SAME CHARACTERISTIC OF THE OTHER BRUISES WE'VE BEEN TALKING ABOUT.

AND I'M NOT SURE I CAN TELL YOU SPECIFICALLY WHAT IT WAS THAT CAUSED THEM.

Q SO AS OPPOSED TO BRUISING CAUSED WHEN SOMEONE IS GRABBED AND THE FINGER TIPS IS WHERE THE PRESSURE IS APPLIED, YOU DON'T FEEL IT WAS THAT KIND OF A BRUISE; IS THAT CORRECT?

A THAT'S CORRECT.

Q WOULD IT BE CONSISTENT WITH A HAND THAT HAS GRABBED AROUND THAT ARM WHERE FINGERS ARE USED TO APPLY THE PRESSURE AS OPPOSED TO THE TIPS OF THE FINGERS?

A YES, IT COULD BE.

I THINK IT COULD BE LIKE PROBABLY A THUMB, BECAUSE IF YOU GRAB WITH ALL FINGERS YOU DON'T USUALLY EXERT WITH ONE FINGER MORE THAN THE OTHERS.

SO IF IT IS A DIGIT, IT'S MORE LIKELY A THUMB. AND, OF COURSE, I BELIEVE THERE'S BEEN MOVEMENT THERE, BECAUSE THERE ARE TWO IMPRESSIONS.

Q SO IT IS POSSIBLE THAT A THUMB CAUSED EACH OF THOSE IMPRESSIONS? IS THAT WHAT YOU'RE SAYING?

A YES.

Q BUT IT COULD BE OTHER THINGS AS WELL?

A YES. BUT IT'S AN UNUSUAL PATTERN.

Q ANY OTHER INJURIES TO THE ARM?

A THERE WERE SOME VERY -- IT'S DESCRIBED

AS FAINT AREA OF PATTERNED, VERY SUPERFICIAL BRUISES IN THE LEFT ELBOW AREA, OVER AN AREA OF ABOUT -- AT MOST A HALF AN INCH HORIZONTALLY AND THREE EIGHTS INCHES VERTICALLY.

AND IN THIS AREA THERE WAS A NUMBER OF FINE PARALLEL LINES ABOUT ONE THIRTY-SECOND OF AN INCH A PART.

SO THEY WERE VERY FINE, CLOSE TOGETHER.

Q DO YOU HAVE ANY IDEA WHAT CAUSED THOSE BRUISES?

A WELL, IT'S -- IT BRINGS TO MIND A RIBBED FABRIC THAT WAS PRESSED AGAINST THE SKIN RATHER FORCEFULLY AT THAT POINT, OR SOME OTHER OBJECT THAT HAD A LITTLE RIBBED PATTERN TO IT THAT MAYBE HIT THAT AREA.

Q ANY OTHER INJURIES THAT YOU NOTED BEFORE WE PROCEED TO THE GENITAL AREA?

A THE RIGHT UPPER ARM ON THE BACK JUST ABOVE THE RIGHT ELBOW HAD A ONE-EIGHTH INCH SCRATCH.

Q REFERRING TO THE CHART, PEOPLE'S 5-F FOR IDENTIFICATION, THE RIGHT ARM?

A YES.

Q AS YOU LOOK AT THE FIGURE FROM BEHIND?

A YES.

Q DID YOU CONDUCT AN EXAMINATION OF NICOLE PARKER'S VAGINAL AREA?

A YES.

Q CAN YOU DESCRIBE FOR US WHAT YOU NOTED?

A WELL, THE VAGINAL OPENING WAS VERY WIDELY PATENT. THAT MEANS OPEN.

AND IT WAS OUTLINED BY A BAND OF DARK PURPLE BRUISING. NOT VERY BIG. THIN LINEAR BAND OF DARK PURPLE BRUISING.

I DID NOT SEE ANY HYMEN TISSUE. I DID NOT SEE ANY LACERATIONS.

MR. SHEAHEN: I WOULD OBJECT TO THE WITNESS READING FROM HER REPORT.

THE COURT: ARE YOU USING THE REPORT NOW TO REFRESH YOUR RECOLLECTION?

THE WITNESS: YES.

THE COURT: OKAY. IF YOU NEED TO USE IT, JUST LET US KNOW.

LET'S HAVE THE NEXT QUESTION.

BY MR. BERMAN:

Q DID YOU SEE ANY LACERATIONS TO THE VAGINAL AREA?

A NO. THE SURFACE WAS NOT LACERATED.

Q DID YOU SEE ANY HYMENAL TISSUE IN THE VAGINAL AREA?

A NO.

Q DID YOU DIAGRAM YOUR FINDINGS CONCERNING THE BRUISING?

A YES.

Q I WANT TO REFER YOU TO 5-B FOR IDENTIFICATION.

IS THAT WHERE YOU CONDUCTED YOUR

DIAGRAMS?

A YES.

Q CAN YOU SHOW US ON THAT DIAGRAM WHERE THE BRUISING OCCURRED AROUND THE VAGINAL AREA?

A WELL, THIS IS A DIAGRAM OF AN ADULT. SO THAT THE OPENING HERE IS PROBABLY EXAGGERATED. PROBABLY HERS WAS NOT GRAPHICALLY AS LARGE AS THIS.

IT'S -- THE SIZE THING DOESN'T NECESSARILY APPLY TO THIS VICTIM.

BUT THE MARGINS OF THE VAGINAL OPENING WERE BRUISED. THEY HAD A PURPLE COLOR, WHICH IS CHARACTERISTIC OF BRUISING. THEY DON'T ORDINARILY HAVE THAT.

ALL THAT TISSUE HAS A UNIFORM PINKISH COLOR.

THE BRUISING -- EXCUSE ME -- THE PURPLE COLOR AS YOU LOOK INTO THE VAGINAL CANAL EXTENDED IN FOR JUST ONLY A LITTLE BIT.

AND WHAT I DO IN A CASE LIKE THIS IS I REMOVE THE PERINEAL SURFACE, WHICH WOULD BE THIS WHOLE AREA, INCLUDING THE GENITAL ORGANS, AND BACK TO BEHIND THE ANUS.

I REMOVE THE SKIN, ALL OF THOSE OPENINGS, AND THEN THE INTERNAL TISSUE IS MUCH THE WAY SURGEONS DO IT FOR VARIOUS OPERATIONS.

AND THEN OPEN UP THE VARIOUS CANALS, SUCH AS THE VAGINAL CANAL AND THE RECTUM.

IN THIS CASE, THE REST OF THE VAGINAL --

VAGINAL MUCOSA, VARIEGATED RED TO PURPLE COLOR. IN AND OF ITSELF I DON'T THINK YOU CAN SAY VERY MUCH ABOUT THAT APPEARANCE OF THE SURFACE.

THE MAIN THING IS THERE WERE NO OBVIOUS TEARS OR LACERATIONS.

Q WHEN YOU WERE REFERRING TO THE PURPLISH AREA AROUND THE VAGINAL OPENING, YOU WERE USING THE POINTER AND GOING COMPLETELY AROUND.

DID THE BRUISING APPEAR TO BE UNIFORMLY ALL ROUND THE VAGINAL OPENING?

A YES.

Q DOES THAT SUGGEST ANYTHING TO YOU?

A YES.

Q WHAT DOES THAT SUGGEST?

A STRETCHING OF THE OPENING.

Q AND WOULD THAT STRETCHING OF THE OPENING BE CONSISTENT WITH PENETRATION BY AN OBJECT SUCH AS A FINGER?

A YES.

MR. SHEAHEN: OBJECTION. LEADING, YOUR HONOR.

THE COURT: IT IS LEADING.

OBJECTION SUSTAINED.

BY MR. BERMAN:

Q DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THE OPENING OF THE VAGINA WAS STRETCHED AND THAT STRETCHING WOULD BE CONSISTENT WITH A FINGER?

MR. SHEAHEN: OBJECTION. COMPOUND.

THE COURT: OVERRULED.

YOU CAN ANSWER.

THE WITNESS: YES. MY ANSWER IS YES.

BY MR. BERMAN:

Q DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THE STRETCHING YOU'VE DESCRIBED WOULD BE CONSISTENT WITH PENETRATION BY A PENIS, MALE ADULT PENIS?

A WELL, I THINK IT MIGHT BE CONSISTENT WITH SOME ATTEMPT, BUT NOT WITH PENETRATION. ALTHOUGH I CAN'T EXCLUDE THAT.

Q OF THE TWO, MALE PENIS OR A FINGER, DO YOU HAVE AN OPINION AS TO WHICH ONE -- WHICH, IF EITHER OF THOSE TWO OBJECTS, YOUR FINDINGS WOULD BE MORE CONSISTENT WITH?

A THERE'S -- I BELIEVE IT WOULD BE MORE A FINGER. BECAUSE WHAT I WAS LOOKING FOR WAS THE ACTUAL MEASUREMENTS THAT I OBTAINED. AND THE DIAMETER OF THIS VAGINAL OPENING RANGED BETWEEN A QUARTER AND HALF AN INCH. SO THAT'S NOT VERY BIG.

AND IT'S A LITTLE SMALLER THAN A FINGER, LARGISH FINGER. MY FINGER IS PROBABLY AT THE UPPER LIMIT OF THOSE MEASUREMENTS.

AND AN ERECT PENIS IN A MALE INDIVIDUAL WOULD HAVE A BIGGER DIAMETER.

Q DID YOU NOTICE ANY OTHER INJURIES TO THE VAGINA ITSELF?

A NOT AT THIS POINT IN TIME, NO.

Q LET'S TALK FOR A MOMENT ABOUT THE RECTUM.

DID YOU CONDUCT AN EXAMINATION OF THE SPHINCTER MUSCLE AREA OF THE RECTUM?

A WELL, YES. I LOOKED AT THE ANAL OPENING.

Q CAN YOU DESCRIBE FOR US WHAT YOU OBSERVED?

A YES. I OBSERVED THAT THE ANAL OPENING WAS VERY RELAXED. THERE WAS NO MUSCLE TONE TO IT.

IT WAS -- THE TERMS WE USE ARE PATULOUS, ECTATIC, E-C-T-A-T-I-C, WHICH MEANS SORT OF OPEN.

ORDINARILY IT'S IN A CONSTRICTED CONDITION. SO THAT THERE'S KIND OF A DIMPLING OF THE SKIN AROUND IT.

IN THIS CASE IT WAS WIDELY OPEN AND VERY LAX LOOKING.

Q SO YOU WOULD NORMALLY EXPECT THE MUSCLE TO BE CLOSED, IS THAT CORRECT, WHEN YOU'RE CONDUCTING AN EXAMINATION?

A NOT NECESSARILY TOTALLY. BUT ORDINARILY THERE IS EVIDENCE OF A CONSTRICTION.

IT'S A VISUAL THING. IT'S VERY HARD TO DESCRIBE IN WORDS.

Q AND IN THIS CASE, THOUGH, YOU SAW SOMETHING THAT WAS DIFFERENT OR UNUSUAL IN TERMS OF THE OPENING ITSELF?

A YES. IT HAD TO ASPECTS OF A

CONSTRICTIVE ELEMENT.

Q SO WHEN YOU EXAMINED HER, YOU FOUND THE OPENING TO BE WIDE OPEN, FOR LACK OF A BETTER TERM?

A WELL, LIKE I SAID, I USED THE WORDS "LAX AND PATULOUS."

"PATULOUS" WOULD BE KIND OF OPEN.

Q WERE YOU ABLE TO CONDUCT A MEASUREMENT OF THE SIZE OF THE OPENING THAT YOU SAW?

A WELL, I GENERALLY GET THE MEASUREMENT, AND IN THIS CASE I DID. IT WAS ONE AND ONE EIGHTH INCH, JUST LOOKING AT IT, AND THE DIMENSION WOULD BE FROM FRONT TO BACK.

SO IT WASN'T VERY -- IT WAS NOT ALL UNIFORM ONE AND ONE EIGHTH INCH.

THE BIGGEST -- IT WAS OPEN IN AN OVOID WAY, AND THE BIGGEST DIAMETER WAS FRONT TO BACK OR BACK TO FRONT.

Q SO WE'RE CLEAR, THE DIAGRAM YOU HAVE THERE DOES NOT DEPICT THE OPENING AS BEING OPEN; IS THAT CORRECT?

A WELL, IT DEPICTS WHAT IS USUALLY SEEN.

I MEAN, THE SPHINCTER MUSCLE HAS WHAT WE CALL TONE. IT'S GENERALLY IN A STATE OF CONSTRICTION, NOT NECESSARILY TIGHT, TIGHT, BUT IT'S GENERALLY CONSTRICTED SO THAT THE ANAL OPENING IS CLOSED.

THIS IS WHAT THIS PICTURE OR THIS DIAGRAM IMPLIES.

Q THE DIAGRAM IMPLIES THE CLOSED STATE?

A YES.

Q AND IN NICOLE PARKER'S CASE WHEN YOU EXAMINED HER, THIS SPHINCTER WAS OPEN; IS THAT CORRECT?

A YES.

Q DID YOU NOTICE ANY TEARS IN THAT AREA?

A YES.

Q CAN YOU DESCRIBE FOR US WHAT YOU OBSERVED?

A THERE WERE TWO TEARS OF THE SKIN RUNNING FROM THE ANUS FRONTWARDS.

ONE OF THEM WAS IN THE MIDLINE RUNNING TO WITHIN THAT -- I BELIEVE A QUARTER INCH OF THE VAGINAL OPENING. SO IT WAS STRAIGHT IN THE MIDLINE.

THE OTHER ONE WAS TO THE RIGHT AND TO THE FRONT AND IT WAS SHORTER.

THE MIDLINE TEAR WAS ONE INCH LONG, AND IT WAS -- IT LOOKED -- JUST LOOKING AT IT, IT LOOKED WIDER.

I DON'T THINK IT WAS VERY WIDE. IT WAS PROBABLY AN EIGHTH OF AN INCH AT ITS WIDEST, BUT IT WAS WIDEST VISUALLY TOWARD ITS BACK; NAMELY, STARTING AT THE ANUS AND THEN BECAME THINNER TOWARDS THE FRONT. AND IT LOOKED AS THOUGH IT WAS A LITTLE DEEPER TOWARDS THE ANUS THAN TOWARDS THE VAGINAL AREA.

THE OTHER TEAR HAD THE SAME

CONFIGURATION. IT WAS SHARP, AWAY FROM THE ANUS, SHARP POINT.

SO IT WAS WIDEST TOWARD THE ANUS. AND IT WAS BETWEEN A QUARTER AND HALF AN INCH IN LENGTH.

Q WOULD THOSE TEARS BE PAINFUL?

A YES.

MR. SHEAHEN: OBJECTION.

THE COURT: WHAT IS THE OBJECTION?

MR. SHEAHEN: BEYOND HER EXPERTISE.

THE COURT: OVERRULED.

THE ANSWER IS WHAT?

THE WITNESS: YES.

BY MR. BERMAN:

Q DID YOU NOTICE ANY BRUISING AROUND THE ANAL AREA?

MR. SHEAHEN: OBJECTION. ALSO IRRELEVANT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: WELL, AGAIN, THE CIRCUMFERENCE OF THE ANUS HAD A BRUISED APPEARANCE, KIND OF PURPLISH, BRUISED APPEARANCE.

AND THE -- IMMEDIATELY AS YOU WENT IN -- THE ANUS IS ONLY, LET'S SAY, A HALF INCH LONG, KIND OF RING SHAPED.

IF YOU LOOK AT IT AS PART OF THE STRUCTURE OF THE ALIMENTARY TRACT, IT'S A VERY SHORT, MAYBE NO MORE THAN HALF AN INCH, QUARTER INCH LONG RING-SHAPED AREA, AND THE RECTUM IS ABOVE THAT.

THE RECTUM CLOSEST TO THE ANUS, RECTAL TISSUE ALSO HAD DUSKY, VERY BRUISED APPEARANCE.

AFTER THAT, IT JUST LOOKED IN ITS USUAL CONDITION. NORMAL, IN OTHER WORDS.

Q THE FACT THAT THE -- STRIKE THAT.

DID YOU LOOK AT THE TISSUES BETWEEN THE AREA OF THE RECTUM AND THE VAGINA?

A WELL, WHAT I DID IN THIS CASE, I OPENED UP THE RECTUM AND I OPENED UP THE VAGINAL CANAL.

BUT I DID NOT CUT INTO THE TISSUES INTERVENING BETWEEN THE RECTUM AND THE VAGINAL CANAL OR TO THE SIDE, AND I TOOK THE ENTIRE SPECIMEN AND PUT IT IN FORMALIN, AND THAT'S -- WE CALL THAT FIXING IT.

THE PROTEINS GET DENATURED AND THE TISSUE DOES NOT DETERIORATE AND IT BECOMES FIRM.

THEN WHAT HAPPENED WAS I HAD OTHER STUFF THAT I WAS BUSY WITH. SO THAT I DID NOT GET TO EXAMINE THAT SPECIMEN UNTIL AFTER THE GRAND JURY TESTIMONY, WHICH IS WHEN IT -- WHEN I REALIZED I HAD NOT YET LOOKED AT IT.

AND AT THAT POINT I DID EXAMINE IT AND I CUT INTO IT NUMEROUS TIMES AND TOOK MICROSCOPIC SECTIONS.

TO THE BEST OF MY RECOLLECTION, I INTENDED TO WRITE A DESCRIPTION OF IT BUT NEVER DID. SO THAT I DON'T HAVE A DESCRIPTION OF THE APPEARANCE OF THE TISSUES AS I CUT INTO THEM.

THE MICROSCOPIC SECTIONS, HOWEVER, SHOW THE TRAUMA. AND TO MY RECOLLECTION THERE WAS SUBSTANTIAL TRAUMA IN THE TISSUES PREDOMINANTLY BETWEEN THE VAGINAL CANAL AND THE RECTAL CANAL. AND THE TWO OF THEM INSIDE THE BODY ARE PARALLEL TO EACH OTHER.

AND FOR A DISTANCE OF APPROXIMATELY TWO INCHES OR THREE INCHES OR SO THEY RUN IN THE SAME COMPARTMENT OF CONNECTIVE TISSUE.

SO THE BRUISING THAT WAS PRESENT WAS ROUGHLY UNDERLYING DEEP IN THE TISSUES UNDER THE LACERATED AREA.

IT'S HARD TO IMAGINE IT FROM -- THREE DIMENSIONALLY FROM A FLAT DIAGRAM LIKE THIS, BUT THE SURFACES WERE NOT ABNORMAL. HOWEVER, THE LACERATION WENT IN UNDER THE SURFACE FURTHER SO THAT IT CAME TO THE -- JUST UNDER THE WALL OF THE VAGINA.

IT WAS MUCH CLOSER, THE LACERATION WAS MUCH CLOSER DEEPER IN THAN IT IS ON THE SKIN SURFACE.

Q DO YOU HAVE AN OPINION AS TO WHAT MAY HAVE CAUSED THE INJURY TO THE RECTUM OF NICOLE PARKER?

A WELL, AGAIN, THESE INJURIES ARE CHARACTERISTIC OF STRETCHING INJURIES, UNIFORMED STRETCHING IN A RADIAL MANNER; NAMELY, INSERTION OF A CIRCULAR OBJECT INTO THAT ORIFICE THAT IS POTENTIALLY CIRCULAR.

Q WOULD THE INJURIES THAT YOU OBSERVED TO

HER RECTUM BE CONSISTENT WITH THE INSERTION OF A PENIS INTO HER RECTUM?

MR. SHEAHEN: OBJECTION, YOUR HONOR. MAY WE APPROACH?

THE COURT: NO. DO YOU HAVE A LEGAL BASIS?

MR. SHEAHEN: LACK OF FOUNDATION.

THE COURT: OVERRULED.

THE WITNESS: YES.

MR. SHEAHEN: OBJECTION, AS WELL AS MOTION TO STRIKE. SPECULATION.

THE COURT: OVERRULED.

BY MR. BERMAN:

Q AND THE DAMAGE THAT YOU OBSERVED IN THE TISSUE AREA BETWEEN THE RECTUM AND THE VAGINA, DO YOU HAVE AN OPINION AS TO WHAT WOULD HAVE CAUSED THAT DAMAGE?

A THE SAME TYPE OF STRETCHING CONTINUED INWARDS.

Q WOULD THAT STRETCHING ALSO ACCOUNT FOR THE TEARING THAT YOU OBSERVED?

A YES. IT'S REALLY ONE INJURY.

Q DOCTOR, WOULD THE INJURY TO THE RECTUM THAT YOU DESCRIBED FOR US CAUSE DEATH?

A IT COULD.

Q CAN YOU EXPLAIN THAT, PLEASE?

A IT'S WELL KNOWN --

MR. SHEAHEN: YOUR HONOR, I WOULD OBJECT TO

THIS LINE AS SPECULATIVE.

THE COURT: APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

THE COURT: WE'RE AT THE BENCH OUTSIDE THE PRESENCE OF THE JURY.

MAYBE I'M MISSING SOMETHING HERE, BUT WE HAVE A QUALIFIED FORENSIC PATHOLOGIST.

SHE'S TESTIFIED TO THE THOUSANDS OF AUTOPSIES SHE'S CONDUCTED. SHE'S BEEN WITH THE L.A. COUNTY CORONER'S OFFICE FOR -- I THINK SHE SAID FOURTEEN OR FIFTEEN YEARS.

I'M AT SOMEWHAT OF A LOSS FOR WHY YOU'RE OBJECTING TO THESE QUESTIONS AS BEING SPECULATIVE OR OTHERWISE OBJECTIONABLE.

THESE ARE THE KINDS OF OPINIONS THAT FORENSIC PATHOLOGISTS ROUTINELY EXPRESS.

MR. SHEAHEN: YOUR HONOR, I APPRECIATE THE CONFIDENCE THE COURT HAS IMPOSED ON ME THAT EVEN THOUGH IT CONSIDERS THE OBJECTION FRIVOLOUS, THAT IT HAS ASKED US TO THE BENCH FOR AN EXPLANATION.

MY OBJECTION IS THAT MR. BERMAN ASKED "DO YOU HAVE AN OPINION AS TO THE SOURCE OF THE INJURY."

AND SHE SAYS "YES, IT IS FROM CIRCULAR

STRETCHING."

THAT IS ALL SHE'S QUALIFIED TO SAY.

IT IS MR. BERMAN'S THEORY THAT IT WAS A PENIS ENTRY THAT CAUSED THIS, BUT THIS WITNESS ISN'T QUALIFIED TO TESTIFY THAT IT WAS AN ENTRY OF A PENIS THAT CAUSED THIS.

SHE DOESN'T HAVE ANY IDEA. SHE DOESN'T KNOW WHETHER IT WAS A PENIS, A FINGER, A TUBE, A FLASHLIGHT OR ANY NUMBER OF TEN THOUSAND OTHER THINGS THAT COULD CAUSE CIRCULAR STRETCHING.

IT MISLEADS THE JURY, AND IT CONFUSES THE JURY TO HAVE THIS WITNESS STATE EX CATHEDRA IT WAS LIKELY A PENIS.

THE SECOND THING IS ON THE CAUSE OF DEATH, THIS -- THE QUESTION CALLED FOR SPECULATION. IT DIDN'T -- HE HAS YET TO ASK WHAT IS THE CAUSE OF THIS DECEDENT'S DEATH.

RATHER IS HE ASKING HER TO SPECULATE "WELL, COULD THIS CIRCULAR STRETCHING OF THE ANUS CAUSE DEATH."

AND RATHER THAN ASK WHAT IS THE CAUSE OF DEATH AND WHAT CAUSED THIS PERSON'S DEATH, HE'S STEERING AWAY FROM WHAT CAUSED HER DEATH BECAUSE HE DOESN'T KNOW WHAT CAUSED HER DEATH AND THIS DOCTOR IS UNABLE TO TELL WHAT CAUSED DEATH.

AND FOR HER TO SPECULATE NOW THAT THIS KIND OF INJURY COULD CAUSE DEATH IS SPECULATION.

THE QUESTION IS WHAT DID CAUSE DEATH.

THE COURT: DIDN'T SHE TESTIFY BEFORE THE GRAND JURY?

MR. BERMAN: YES.

THE COURT: AND DIDN'T SHE GIVE THE BASIS FOR HER OPINION BEFORE THE GRAND JURY AS TO WHY THIS PARTICULAR INJURY COULD HAVE CAUSED DEATH?

MR. BERMAN: YES, SHE DID.

THE COURT: YOU'RE AWARE OF THAT?

MR. SHEAHEN: MY VIEW OF HER GRAND JURY TESTIMONY IS THAT DR. HEUSER TESTIFIED THAT A PROBABLE CAUSE OF DEATH WAS STRANGULATION AND ASPHYXIATION.

IT WAS FURTHER ELICITED, AND I THINK THAT FURTHER -- I THINK THAT UNDER OUR THEORY OF THE CASE TO ELICIT A SPECULATIVE OPINION THAT ANAL STRETCHING COULD CAUSE DEATH IN A GIVEN CASE IS PREJUDICIAL BECAUSE ANAL -- ALTHOUGH ANAL STRETCHING COULD CAUSE DEATH IN A GIVEN CASE, IT DIDN'T CAUSE DEATH IN THIS CASE.

THE WEIGHT OF THE EVIDENCE IN THIS CASE IS THAT THE DEATH WAS BY STRANGULATION.

MR. BERMAN: WAIT A MINUTE. HE'S FLAT WRONG ON THAT. THAT IS NOT WHAT THE TESTIMONY IS FROM THE GRAND JURY.

SHE SAID IT IS A COMPILATION OF FACTORS. SHE CANNOT SAY WITH SPECIFICITY THAT ANY ONE OF THEM CAUSED DEATH, BUT IT WAS MORE LIKELY THE COMBINATION OF FACTORS, AND SHE COULD NOT RULE OUT THE FACT THAT

THE HEART COULD HAVE STOPPED SOLELY FROM THE PENETRATION OF THE RECTUM.

THE COURT: THE COURT UNDERSTANDS YOUR ARGUMENT, MR. SHEAHEN, BUT I DON'T SEE WHERE THAT PROVIDES A LEGAL BASIS FOR EXCLUDING THE EVIDENCE.

YOU CAN CROSS-EXAMINE ON IT, BUT IT'S HER EXPERT OPINION THAT THIS PART OF THE ATTACK COULD HAVE CAUSED DEATH.

SHE'S ALLOWED TO GIVE THAT OPINION. AND I STILL HAVEN'T HEARD A LEGAL REASON WHY SHE CAN'T GIVE THAT OPINION.

IT'S A POSSIBILITY, ALONG WITH THE STRANGULATION AND THE SUFFOCATION, AS I UNDERSTAND IT FROM A QUICK REVIEW OF THE GRAND JURY TESTIMONY.

SO GIVEN THAT, I DON'T SEE WHERE IT'S OBJECTIONABLE. IT DOESN'T CALL FOR SPECULATION. I THINK SHE'S SAYING THIS IS ONE POSSIBLE MEANS OF DEATH.

IT'S LIKE IF YOU HAVE A THROUGH-AND-THROUGH GUNSHOT WOUND WHERE YOU DON'T HAVE THE BULLET RECOVERED. THE CORONER CAN STILL SAY THIS WOUND IS CONSISTENT WITH A THROUGH-AND-THROUGH GUNSHOT WOUND WHICH COULD HAVE RESULTED IN THE VICTIM DYING FROM FRIGHT OR BLEEDING OR WHATEVER.

MR. SHEAHEN: WE FURTHER ASK THE COURT TO EXCLUDE IT ON 352 THAT IT IS PREJUDICIAL TO OUR THEORY OF DEFENSE THAT THE SODOMY WAS POSTMORTEM BECAUSE THERE IS NO EVIDENCE THAT THE SODOMY WAS

PREMORTEM, AND SHE IS BEING ASKED TO SPECULATE THAT IF IT WERE PREMORTEM, COULD THAT HAVE CONTRIBUTED TO THE DEATH.

AND BY BEING ALLOWED TO ANSWER YES, THAT PREJUDICES THE THEORY OF DEFENSE.

THE COURT: WELL, SHE HASN'T BEEN ASKED THAT QUESTION DIRECTLY.

FROM WHAT I CAN INFER FROM HER OTHER TESTIMONY, SHE'S OF THE OPINION THAT IF THERE IS BRUISING, IT IS NOT POSTMORTEM, AND SHE'S TESTIFIED IN DETAIL TO BRUISING OF THE ANUS AND THE BOTTOM OF THE RECTUM.

SO I DON'T THINK THAT'S A VALID OBJECTION EITHER UNDER 352.

IT'S HIGHLY PROBATIVE BECAUSE IT GOES TO THE HEART OF THE THEORY, ISSUE THAT'S CRUCIAL TO THIS CASE THAT YOU'RE TELLING ME. CERTAINLY ONE OF THE CRUCIAL ISSUES.

SO IT'S A CENTRAL ISSUE THE JURY IS GOING TO HAVE TO DECIDE, AND I DON'T THINK IT'S OVERLY PREJUDICIAL IN A 352 SENSE, AND IN BALANCING THE PROBATIVE VALUE AGAINST THE POTENTIAL FOR PREJUDICE, I FIND IT'S ADMISSIBLE.

MR. SHEAHEN: MY LAST OBJECTION IS THAT I ASK THE COURT TO EXCLUDE IT UNDER 352 AS IT IS CONFUSING UNDER THE CIRCUMSTANCES OF THIS CASE.

THE COURT: I DON'T SEE WHY IT'S CONFUSING EITHER.

MR. SHEAHEN: WE CAN STIPULATE, IF IT NEED BE, THAT IN A GIVEN CASE AN ANAL INJURY CAN CAUSE DEATH. THAT'S NOT THE QUESTION.

OUR POSITION IS SIMPLY THAT THESE INJURIES WERE POSTMORTEM. SHE CAN TESTIFY TO HER BELIEF THAT THEY'RE PREMORTEM BRUISING, OR IT MAY TURN OUT TO JUST BE LIVIDITY. SHE CAN TESTIFY TO A LOT OF THINGS.

BUT TO ALLOW HER TO GIVEN OPINIONS AND ASSUMPTIONS BASED ON HER GUESS THAT THIS IS PREMORTEM SIMPLY FORTIFIES WHAT SHE'S SAYING AND CONFUSES THE JURY ON THIS ISSUE.

THE COURT: I DON'T SEE WHERE THERE'S A POTENTIAL FOR CONFUSION, PARTICULARLY WHERE YOU'RE WILLING TO STIPULATE, APPARENTLY THAT THIS TYPE OF INJURY CAN IN SOME SITUATIONS CAUSE DEATH.

HAVING HEARD THAT, I'M MORE CONVINCED THAN EVER THAT MY RULING IS CORRECT, AND THIS SHOULD COME IN.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: PROCEED.

MR. BERMAN: THANK YOU, YOUR HONOR.

Q. BY MR. BERMAN: DOCTOR, COULD YOU EXPLAIN TO US HOW AN INJURY OF THIS TYPE COULD CAUSE DEATH?

A. YES.

PROCTOLOGISTS, PEOPLE, THE DOCTORS WHO OPERATE IN THAT AREA, IN THE LOWER INTESTINAL TRACT, HAVE NOTED THAT YOU CAN, IF YOU MANIPULATE THE AREA, YOU CAN HAVE WHAT IS CALLED BRADYCARDIA, NAMELY, SLOWING OF THE HEART.

BECAUSE AGAIN THAT AREA HAS A LOT OF PARASYMPATHETIC INNERVATION, WHICH IS WHAT IS STIMULATED AND THAT REFLEXIVELY CAN CAUSE SLOWING OF THE HEART.

THERE IS ALSO IN THE FORENSIC LITERATURE THE THE OPINION THAT -- WELL, ACTUALLY PEOPLE HAVE ACTUALLY SEEN VICTIMS WHO DIED DURING THE COMMISSION OF WHAT IS THE WORD -- I AM BLOCKING ON THE WORD.

INTRODUCTION OF AN OBJECT INTO THE ANUS. I DON'T KNOW WHY I AM BLOCKING ON THAT WORD.

SODOMY. THANK YOU. SODOMY.

THERE HAVE BEEN PEOPLE WHO HAVE ACTUALLY DIED DURING THE COMMISSION OF SODOMY WITHOUT ANY OTHER INJURIES AND WITHOUT ANY OTHER CAUSE FOR DEATH AND THE BASIS IS THOUGHT TO BE THIS REFLEXIVE SLOWING OF THE HEART.

SO THIS VICTIM HAS TWO POSSIBLE MECHANISMS FOR SLOWING, HAVING HER HEART SLOWED.

Q. ONE BEING THE INJURIES YOU DESCRIBED TO THE NECK?

A. YES.

Q. AND THE SECOND BEING THE PENETRATION OF THE ANUS?

A. YES.

Q. NOW, THE BRUISING THAT YOU HAVE DESCRIBED AROUND THE VAGINAL AREA, WOULD THAT BRUISING HAVE OCCURRED BEFORE DEATH?

A. YES.

Q. AND THE BRUISING YOU DESCRIBED AROUND THE RECTUM, WOULD THAT HAVE OCCURRED BEFORE DEATH?

A. YES.

Q. AND IS THERE ANY CHANCE THAT LIVIDITY COULD HAVE CONTRIBUTED TO SOME OF THE COLORATION THAT YOU OBSERVED IN THESE AREAS?

A. IT IS NOT SO MUCH LIVIDITY.

THAT AREA HAS A LOT OF VESSELS THERE, AND THERE IS AN AWFUL LOT OF WHAT WE CALL CONGESTION.

LOOKING AT THE MICROSCOPIC SECTIONS THERE IS A LOT OF CONGESTION, AND IN AND OF ITSELF, YOU CAN'T SAY IT MEANS MUCH.

I THINK IN THIS CASE IT IS PROBABLY RELATED TO THE TRAUMA.

BUT SO THE CONGESTION CONTRIBUTE[illegible]O THE APPEARANCE AND THE BRUISING, THE CIRCUMFER[illegible] AREA WHICH

I SAID LOOKED BRUISED WHICH IS A TRUE STATEMENT BECAUSE LOOKING AT IT IT LOOKED BRUISED.

BUT LOOKING AT THE MICROSCOPIC SECTIONS, I DON'T THINK THERE IS A CIRCUMFERENTIAL BRUISING.

I THINK IT IS MORE SPOTTY AND THE OVER ALL APPEARANCE IS DUE TO THE VERY MARKED CONGESTION.

Q. AND THAT CONGESTION WOULD HAVE OCCURRED BEFORE DEATH; IS THAT CORRECT?

A. THE CONGESTION -- I THINK IN THIS CASE.

BUT CONGESTION, IF THAT'S ALL WE HAD, I DON'T THINK I COULD MAKE HALF THE STATEMENTS I AM MAKING.

BUT WE ACTUALLY HAVE ACTUAL BRUISING. WE ACTUALLY HAVE RED CELLS AND MUSCLE FIBERS AND IN TISSUE PLANES AND SO ON.

Q. WAS THERE ALSO ANY INDICATION OF BLEEDING -- FROM THE CUTS THAT YOU OBSERVED TO THE AREA FROM BLEEDING FROM THE RECTUM TOWARDS THE VAGINA, THE TWO CUTS THAT YOU HAVE DESCRIBED FOR US OR TEARS?

A. YES.

IT IS NOT BLEEDING LIKE FROM A CUT ARTERY BUT A LACERATION LIKE THAT WOULD KIND OF SEEP BLOODY FLUID.

IT IS A MIXTURE OF BLOOD AND SERUM.

Q. DOCTOR, DID YOU CONDUCT AN EXAMINATION OF NICOLE PARKER'S LUNGS?

A. YES.

Q. AND CAN YOU DESCRIBE FOR US WHAT YOU OBSERVED IN THAT EXAMINATION?

A. WELL, HER LUNGS WERE UNUSUALLY OVEREXPA

AND THEY HAD UNUSUALLY LITTLE CONGESTION IN THEM.

USUALLY AS A PERSON DIES DURING THE NATURAL DEATH PROCESS, THE WAY THAT CIRCULATION WORKS, THE LUNGS GET FILLED WITH BLOOD WHICH THEN IS NOT PUMPED OUT ANY FURTHER.

BUT IN HER CASE THAT WASN'T SO AND THE REASON FOR THAT WAS BECAUSE HER BRONCHI AND HER TRACHEA WERE BLOCKED BY GASTRIC CONTENTS, SO THAT WHAT WAS HAPPENING WAS THERE WAS AIR GETTING INTO THE LUNGS BUT BECAUSE OF THE LARGE AMOUNT OF FOOD PARTICLES IN HER UPPER -- EXCUSE ME -- IN HER TRACHEA AND BRONCHI, THERE WAS AIR TRAPPING. THE AIR COULD NOT GET OUT.

AND THAT SITUATION WITH LACK OF VENTILATION, BASICALLY JUST AIR GETTING IN AND GETTING IN AND GETTING IN, THAT WILL CAUSE REFLEX VASOCONSTRICTION OR CONSTRICTION OF THE BLOOD VESSELS TO THE LUNGS.

SO THAT WAS WHAT THE SITUATION WITH THE LUNGS WAS.

Q. HOW WOULD THE MATERIALS THAT YOU HAVE DESCRIBED HAVE GOTTEN INTO THE BRONCHIAL AREA JUST OF HER LUNGS?

A. WELL, HER INJURIES WOULD MAKE HER -- HER INJURIES, YOU KNOW, THEY CAUSED THE BRADYCARDIA, AND THEN THE BRADYCARDIA CAUSES HYPOXIA.

WHETHER THE BRADYCARDIA PLUS THE PAIN OF ONE INJURY OR THE OTHER INJURY, BECAUSE IN MY OPINION BOTH WOULD HAVE BEEN VERY PAINFUL, EVERYTHING TOGETHER MADE HER THROW UP.

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Q. AND WAS IT AN ASPIRATION OF THAT VOMIT THAT YOU HAVE DESCRIBED FOR US IN THE BRONCHIAL AREA OF THE LUNGS?

A. YES.

Q. AND BY ASPIRATION, WHAT DO YOU MEAN?

A. WELL, ASPIRATION IS INHALATION OF SOMETHING OTHER THAN AIR INTO THE AIR PASSAGES.

Q. AND THAT ALLOWED HER TO TAKE AIR IN BUT NOT EXPEL IT; IS THAT CORRECT?

A. IN THIS CASE, YES.

Q. DOCTOR, COULD THAT CAUSE DEATH?

A. WELL, THAT WOULD BE PART OF THE MECHANISM OF DEATH IN THIS CASE, YES.

Q. DO YOU HAVE AN OPINION, DOCTOR, AS TO THE CAUSE OF DEATH IN THIS CASE?

A. YES.

Q. WHAT IS THAT OPINION?

A. TRAUMATIC INJURIES.

Q. AND WHEN YOU USE THE TERM TRAUMATIC INJURIES, DO YOU HAVE A SPECIFIC INJURY IN MIND?

A. NO.

WHAT I CONCEPTUALIZE, IT IS THE INCIDENT THAT RESULTED IN THE TRAUMATIC INJURIES, SO EVEN THOUGH THE LITTLE BRUISES ARE NOT IN AND OF THEMSELVES SIGNIFICANT, THEY ARE PART OF A SET OF CIRCUMSTANCES THAT LED TO HER DEATH.

SO ALL HER INJURIES CAUSED HER DEATH IN THAT SENSE, AND --

Q. I AM SORRY.

GO AHEAD.

A. I AM SORRY. NO.

Q. ARE YOU THEN REFERRING TO THE INJURIES TO HER NECK, THE COMPRESSION INJURIES THAT YOU HAVE DESCRIBED AS PART OF BEING THE CAUSE OF DEATH?

A. YES.

WELL, IN THIS CASE OBVIOUSLY THE PRESSURE ON HER RIB CAGE WAS NOT IN AND OF ITSELF FATAL.

IF THAT IS ALL SHE HAD, SHE WOULD NOT HAVE DIED.

ALTHOUGH THESE INJURIES CONNECTED IN THIS INDIRECT WAY THAT I CONCEPTUALIZE OF IT.

THE MOST LETHAL INJURIES SHE HAD ARE THE NECK AND THE GENITAL TRAUMA AS WE HAVE BEEN DISCUSSING.

Q. AND WOULD THE LUNGS BE ONE OF THE MORE LETHAL INJURIES AS WELL?

A. WELL, THE WAY I SEE THE LUNGS IS THEY ARE REALLY A CAUSE -- EXCUSE ME -- THEY ARE REALLY A CONSEQUENCE OF THESE OTHER INJURIES.

SO THEY ARE NOT A SEPARATE INJURY.

WHAT IS GOING ON WITH THE LUNGS RESULTS FROM THE TRAUMA TO THE NECK, THE GENITAL TRAUMA.

Q. BUT SHE WAS ALIVE WHEN SHE -- CORRECT ME IF I AM WRONG -- SHE WAS ALIVE WHEN SHE VOMITED AND THEN WAS UNABLE TO EXHALE AIR BUT KEPT TAKING IT IN?

A. OH, YES. DEFINITELY SHE WAS ALIVE.

Q. SO YOU ARE DESCRIBING REALLY A PROCESS AS

OPPOSED TO A SPECIFIC INJURY CAUSING INSTANTANEOUS DEATH?

A. YES.

Q. HOW LONG DOES DEATH USUALLY TAKE?

A. WELL, I DON'T THINK THE WORD USUALLY IS VALID, BECAUSE I THINK IT VARIES TREMENDOUSLY AND I THINK --

Q. LET ME REASK THE QUESTION THEN. IS DEATH INSTANTANEOUS?

A. AGAIN THE WAY I CONCEPTUALIZE IT, NO.

THERE ARE IRREVERSIBLE POINTS IN TIME PAST WHICH DEATH IS GOING TO OCCUR NO MATTER WHAT, AND THAT POINT, THE LENGTH OF THAT POINT, THE LENGTH OF THAT INTERVAL IS SOMEWHAT VARIABLE AND, OF COURSE, IT IS OBVIOUSLY MUCH LESS IF YOU SHOOT YOURSELF WITH A RIFLE IN YOUR HEAD AND YOUR WHOLE BRAIN GOES, I MEAN, YOUR WHOLE SYSTEM WILL CLOSE DOWN MUCH SOONER.

BUT IN CASES SUCH AS THIS, IT IS PROBABLY A REVERBERATING SYSTEM AND IT COULD GO ON FOR AS LONG AS HALF AN HOUR.

THE VICTIM WOULD BE UNCONSCIOUS BECAUSE THEY WOULD BE HYPOXIC QUITE EARLY ON BUT THE ACTUAL TIME TO DEATH COULD BE AN APPRECIABLE LENGTH OF TIME.

IN MY OPINION AS LONG AS HALF AN HOUR AT LEAST.

Q. WERE YOU ABLE TO MAKE A DETERMINATION OF THE APPROXIMATE TIME OF DEATH IN THIS CASE?

A. I THINK WE DISCUSSED IT. I DON'T USUALLY WRITE IT DOWN.

I LOOKED AT THE PARAMETERS THAT WE USE TO HAVE AN OPINION AS TO HOW LONG THE PERSON HAS BEEN DEAD AND THEN ASCERTAIN WHETHER THEY DO OR DO NOT FIT INTO THE CIRCUMSTANCES THAT ARE GIVEN.

AND IT IS NOT POSSIBLE TO GET AN EXACT TIME OF DEATH, OF COURSE.

Q. LET ME ASK YOU THIS QUESTION.

WHEN A PERSON EATS FOOD, APPROXIMATELY HOW LONG DOES IT TAKE FOR FOOD TO PASS THROUGH THE STOMACH AND OUT INTO THE OTHER PARTS OF THE SYSTEM?

A. WELL, IN A NORMAL HEALTHY PERSON GOING ABOUT THEIR BUSINESS WITHOUT ANY STRESS, WITHOUT ANYTHING UNUSUAL HAPPENING, A LARGE MEAL OR A LARGISH MEAL WILL USUALLY BE CLEARED IN ABOUT FOUR HOURS.

A SMALL MEAL, LIKE A SANDWICH, WILL USUALLY BE CLEARED IN ABOUT TWO HOURS.

BUT AGAIN IF YOU LOOK INTO IT, IF YOU LOOK INTO THE LITERATURE, IT BECOMES VERY COMPLICATED AND IF THE PERSON IS UNDER STRESS, THE STOMACH STOPS CONTRACTING AND THE CONTENTS CAN STAY IN THERE FOR HOURS AND HOURS.

SO THE LENGTH OF TIME IN A NORMAL PERSON IS AS I HAVE INDICATED.

Q. WOULD THE LENGTH --

A. ROUGHLY THERE SHOULD BE NO GASTRIC CONTENTS AFTER AN AVERAGE MEAL IN ABOUT THREE TO FOUR HOURS.

Q. DID YOU EXAMINE THE STOMACH CONTENTS OF NICOLE PARKER?

A. YES.

Q. AND DID YOU -- WERE YOU ABLE TO DETERMINE WHAT WAS CONTAINED THEREIN?

A. WELL, I THOUGHT THAT I RECOGNIZED EGG.

Q. ALL RIGHT.

IF NICOLE -- IF YOU LEARNED THAT NICOLE PARKER HAD EATEN EGGS FOR BREAKFAST SOMETIME BETWEEN 8:15 AND 8:30 IN THE MORNING, WOULD YOU HAVE AN OPINION AS TO THE APPROXIMATE TIME OF DEATH BASED UPON THE CONTENTS OF THE STOMACH?

A. WELL, IT COULD BE, THE FACT THAT I -- THE FACT THAT I COULD RECOGNIZE EGGS, THE FOOD IS NOT DIGESTED IN THE STOMACH BUT THE STOMACH DOES SECRETE ACID, SO IF FOOD SITS IN THE STOMACHE FOR A LONG TIME, IT GETS KIND OF GRAYISH AND YOU CAN'T TELL WHAT IT IS.

AND AFTER IT HAS BEEN THERE FOR -- LET'S SAY YOU ARE STRESSED OUT AND YOUR FOOD IS IN THERE FOR EIGHT HOURS OR SO, YOU MIGHT NOT BE ABLE TO TELL, IF IT IS WELL CHEWED, AS THIS WAS, EXACTLY WHAT IT WAS.

SO I WOULD SAY PROBABLY WITHIN THAT FOUR HOUR LIMIT, SOMEWHERE AROUND THERE.

IT COULD BE LONGER.

I DON'T RECALL THE CIRCUMSTANCES. I DON'T RECALL THE EXACT INTERVALS OF TIME.

BUT YOU HAVE TO -- YOU HAVE QUITE A RANGE, AND I THINK THE RANGE IS BROAD ENOUGH THAT IT CAN FIT A NUMBER OF CIRCUMSTANCES.

Q. WOULD IT FIT A CIRCUMSTANCE OF SAY DEATH OCCURRING SOMETIME IN THE EARLY AFTERNOON?

A. FROM 8:30 --

Q. IF EGGS HAD BEEN EATEN BETWEEN 8:00 AND 8:30?

A. WELL, IT COULD.

Q. YOU HAVE INDICATED IN THE NORMAL PERSON YOU WOULD EXPECT THE CONTENTS OF THE STOMACH TO BE GONE WITHIN APPROXIMATELY FOUR HOURS; IS THAT CORRECT?

A. YES.

Q. BUT IN SOME SITUATIONS WHERE THERE IS STRESS OR SOME OTHER FACTORS IT CAN REMAIN LONGER?

A. YES.

Q. DO YOU KNOW WHETHER OR NOT THE BODY HAD GONE INTO RIGOR MORTIS AT THE TIME IT WAS FOUND?

A. YES, I DO KNOW.

Q. AND WAS THE BODY IN RIGOR AT THE TIME IT WAS FOUND?

A. YES.

THE INVESTIGATOR WHO WAS CALLED TO THE SCENE STATES THAT THE RIGOR MORTIS WAS FULLY SET.

Q. NOW, ASSUME FOR A MOMENT THAT NICOLE PARKER DISAPPEARED ON SATURDAY MORNING AT ABOUT 11:00 IN THE MORNING, AND THE BODY WAS FOUND SUNDAY EVENING AT APPROXIMATELY 11:00.

SO WE WOULD BE TALKING ABOUT 36 HOURS LATER.

WOULD IT BE POSSIBLE FOR THE BODY TO BE SET IN FULL RIGOR 36 HOURS, APPROXIMATELY 36 HOURS AFTER DEATH?

A. WELL, YES, IT WOULD BE POSSIBLE.

I AM A LITTLE SURPRISED THAT IT IS FULLY SET, BUT YES, IT CAN, BECAUSE UNDER RELATIVELY COOL CONDITIONS, AND I DON'T HAVE ANY TEMPERATURES, I DON'T HAVE AN AIR TEMPERATURE.

OFTEN THE INVESTIGATOR WILL PROVIDE AN AIR TEMPERATURE.

I DON'T HAVE ONE IN THIS CASE.

BUT IF THE TEMPERATURE WERE NOT IN THE '80'S AND THE '90'S, IF IT WERE MAYBE AT THE HIGHEST IN THE '70'S AND THEN PERHAPS LOWER, DURING THAT INTERVAL THE ONSET OF RIGOR WOULD BE DELAYED, COOLING DELAYS ONSET OF RIGOR.

MR. SHEAHEN: YOUR HONOR --

THE WITNESS: AND ALSO THEN THE DISSIPATION IS ALSO DELAYED.

SO 48 HOURS IS CERTAINLY WITHIN THE PARAMETERS GIVEN IN THE TEXTBOOKS.

MR. SHEAHEN: OBJECTION.

AND MOTION TO STRIKE HER ANSWER CONCERNING HYPOTHETICALS ABOUT RIGOR MORTIS WHICH ARE NECESSARILY BASED ON HEARSAY.

THE COURT: OVERRULED.

MR. BERMAN: IS THAT OVERRULED, YOUR HONOR?

THE COURT: OVERRULED. YES.

MR. BERMAN: MAY I HAVE JUST ONE MOMENT, YOUR HONOR.

I HAVE NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT.

THEN WE WILL PICK IT UP TOMORROW MORNING AT 10:00 WITH CROSS-EXAMINATION OF THIS WITNESS.

LADIES AND GENTLEMEN, PLEASE RETURN AT THAT TIME.

OVER THE EVENING HOURS DO NOT DISCUSS THE CASE.

DO NOT FORM ANY FINAL OPINION ABOUT IT AND PLEASE RECALL THE OTHER ADMONITIONS I HAVE GIVEN YOU ABOUT DISREGARDING ANY PUBLICITY CONCERNING THIS CASE AND NOT READING CERTAIN SECTIONS OF THE NEWSPAPER.

HAVE A NICE EVENING AND WE WILL SEE YOU BACK HERE AT 10:00.

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, OUT
OF THE PRESENCE AND HEARING
OF THE JURY:)

MR. CHAIS: BEFORE THE WITNESS LEAVES, THERE IS SOMETHING I NEED TO TAKE UP WITH THE COURT.

THE COURT: WE ARE OUTSIDE THE PRESENCE OF THE JURY.

MR. CHAIS: YES, YOUR HONOR.

THERE IS AN ISSUE I WOULD LIKE TO RAISE WITH THE COURT.

I WAS WONDERING IF THE COURT MIGHT ASK THIS WITNESS TO WAIT OUT IN THE HALL FOR A MOMENT.

WE NEED HER BACK NOT AT THIS MOMENT, BUT I WOULD LIKE THIS TO BE CONDUCTED OUTSIDE HER PRESENCE.

THE COURT: I THOUGHT YOU ASKED ME TO DO IT WHILE SHE

IS HERE?

MR. CHAIS: I WANTED TO MAKE SURE SHE DOESN'T LEAVE FOR THE DAY.

THE COURT: DO YOU NEED TO MAKE A CALL RIGHT THIS MINUTE?

THE WITNESS: WELL, NOT RIGHT THIS MINUTE.

THE COURT: IF YOU WILL, JUST STEP OUT INTO THE HALL FOR A SECOND, PLEASE.

(WITNESS HEUSER EXITED THE COURTROOM.)

THE COURT: WE ARE OUTSIDE THE PRESENCE OF THE JURY AND THE WITNESS.

MR. CHAIS: THANK YOU.

I DON'T KNOW IF THE COURT NOTICED THERE WAS ONE POINT WHERE THE WITNESS WAS KIND OF STRUGGLING TO REMEMBER A WORD THAT WAS A RATHER SIGNIFICANT WORD.

IT TURNED OUT TO BE SODOMY BUT SHE WAS KIND OF STRUGGLING AND SAYING WHAT IS THE WORD AND WHAT IS THE WORD AND SHE SAID, OH THANK, AND SHE WAS LOOKING OVER TOWARDS THE JURY.

THANK YOU. SODOMY, AS THOUGH SOMEBODY HAD PROMPTED HER.

PERHAPS SHE THOUGHT OF IT HERSELF, BUT SHE DISTINCTLY WAS TRYING TO REMEMBER THE WORD AND IT EITHER CAME TO HER OR SOMEBODY TOLD HER AND SHE SAID, OH, THANK YOU.

THE COURT: I DIDN'T HEAR ANYTHING. I LOOKED AROUND AT THE TIME.

I HEARD HER GOING THROUGH THAT PROCESS, BUT I COULDN'T DETECT ANYBODY SAYING SOMETHING.

MAYBE SOMEBODY ELSE CAN HELP ME.

MR. CHAIS: DID YOU HEAR HER SAY THANK YOU?

THE COURT: YES.

MR. CHAIS: PERHAPS WE CAN ASK HER IF SHE WAS PROMPTED BY ANYBODY.

MR. BERMAN: I DON'T CARE.

I DIDN'T SAY IT.

MR. CHAIS: THE ONLY CONCERN I HAVE BECAUSE SHE WAS LOOKING IN THE DIRECTION OF THE JURY AND THAT WOULD BE A PROBLEM.

THE COURT: OKAY.

THE BAILIFF: SHALL I GET HER?

THE COURT: SURE.

(WITNESS HEUSER ENTERED THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD:)

MR. SHEAHEN: WHILE WE ARE WAITING, YOUR HONOR, WHEN YOU ARE TRYING TO ESTABLISH TIME OF DEATH THEY CAN'T ESTABLISH TIME OF DEATH BY LOOKING AT HEARSAY ASSERTION AT THE TIME OF ONSET OF RIGOR.

THEY HAVE TO HAVE THE GUY HIMSELF COME IN AND --

MR. BERMAN: IS THIS AN OBJECTION?

THE COURT: I HAVE ALREADY RULED ON THIS.

MR. BERMAN: IT IS ARGUMENT AT THIS POINT.

THE COURT: AN EXPERT CAN RELY ON HEARSAY. I HAVE ALREADY RULED ON IT.

DR. HEUSER, BEFORE YOU MAKE YOUR PHONE CALL, THERE WAS A POINT IN YOUR TESTIMONY WHERE YOU WERE STRUGGLING TO REMEMBER A WORD, AND YOU SAID THANK YOU WHEN YOU FINALLY GOT THE WORD.

DID SOMEBODY SAY THE WORD?

I DIDN'T HEAR IT.

THE WITNESS: THERE WERE PEOPLE THAT SAID IT IN THE THE FRONT AND TO THE SIDE OF ME, AND IT NUDGED MY MEMORY.

THE COURT: COULD YOU IDENTIFY ANYONE IN PARTICULAR WHO SAID IT?

THE WITNESS: NO.

THE COURT: YOU HEARD IT?

THE WITNESS: I WAS KIND OF GOING LIKE THIS. WHY AM I --

THE COURT: WE WERE ALL WONDERING THE SAME THING.

THE WITNESS: IT IS PSYCHOLOGICAL.

BUT ANYWAY THEN I HEARD "S" AND, OF COURSE, THE MINUTE I HEARD AN "S" SOUND, IT CAME BACK TO ME.

MR. CHAIS: I WANT TO KNOW WHICH SIDE OF HER SHE HEARD IT FROM.

SHE SAID IN FRONT AND TO THE SIDE.

THE COURT: CAN YOU PINPOINT IT ANY FURTHER?

THE WITNESS: NO.

THE COURT: YOU ARE JUST NOT SURE?

THE WITNESS: I CAN'T.

MR. CHAIS: THE COURT CERTAINLY DIDN'T SAY IT.

SO IT WOULD HAVE HAD TO HAVE BEEN TO THE RIGHT.

I THINK THIS REQUIRES SOME SORT OF AN INQUIRY OF THE MEMBERS OF THE JURY TO FIND OUT IF THEY ARE ASSISTING A PROSECUTION WITNESS IN THEIR TESTIMONY.

THE COURT: I HAVEN'T HEARD ANY INDICATION THAT A JUROR SAID ANYTHING AT THIS POINT.

CAN YOU SAY IT CAME FROM THE JURY?

THE WITNESS: I SAID I WAS SORT OF LOOKING OUT SAYING OH, MY GOD, HOW EMBARRASSING.

I CAN'T THINK OF THIS WORD AND THEN I HEARD "S", "S", I JUST HEARD "S" AND YOU HEAR "S", SO IT CAME BACK.

THE COURT: MR. SHEAHEN, DID YOU HEAR ANYTHING? I DIDN'T HEAR ANYTHING.

MR. SHEAHEN: I DIDN'T, YOUR HONOR.

MY ONLY VIEW OF IT IS THAT I DIDN'T SAY ANYTHING.

MR. CHASE DIDN'T SAY ANYTHING.

MR. PANAH DIDN'T SAY ANYTHING. YOU DIDN'T SAY ANYTHING.

I HAVEN'T HEARD ANYTHING FROM THE PROSECUTOR TABLE THAT THEY SAID ANYTHING.

AND I DOUBT THE COURT REPORTER SAID ANYTHING.

THAT NARROWS IT DOWN TO THE PEOPLE ON THE JURY.

THAT'S MY PROBLEM, YOUR HONOR.

THE COURT: OR PEOPLE IN THE AUDIENCE.

MR. CHAIS: SHE SAID THE SIDE.

MR. SHEAHEN: THE AUDIENCE IS A WAYS AWAY.

MR. BERMAN: SHE SAID TO THE FRONT AND TO THE SIDE.

THE FRONT COULD BE THE AUDIENCE.

MR. CHAIS: THE FRONT CAN BE THE AUDIENCE. THE SIDE CAN'T.

THE COURT: WHY DON'T YOU NOT ARGUE ABOUT IT, SINCE YOU DIDN'T HEAR IT AND YOU DIDN'T PINPOINT IT AND SHE HAS ALREADY SAID WHERE SHE HEARD IT FROM.

WAS IT COMING FROM IN FRONT OF YOU?

THE WITNESS: I CAN'T TELL YOU.

THE COURT: AND ALL YOU HEARD WAS AN "S" SOUND?

THE WITNESS: (THE WITNESS NODS HER HEAD UP AND DOWN.)

I DO CROSSWORD PUZZLES, YOUR HONOR, AND IF I HEAR THE FIRST LETTER, AND I WAS VERY EMBARRASSED FOR BLOCKING LIKE THAT ON THAT WORD.

MR. CHAIS: CAN I ASK ONE MORE QUESTION PLEASE, YOUR HONOR, JUST ONE MORE?

THE COURT: NO.

AS A MATTER OF FACT, NO. WE NEED SOME FINALITY TO ARGUMENT IN THIS CASE.

WHEN I RULE, THAT'S THE END OF IT.

MR. CHAIS: I WAS UNAWARE THE COURT HAD RULED.

I WANT TO KNOW IF THE "S" SOUND WAS FOLLOWED BY "ODOMY".

THE COURT: SHE JUST SAID THE "S" SOUND. LET'S NOT GET RIDICULOUS HERE.

AND THAT WAS IT.

WE REALLY NEED TO STOP BEATING ALL THESE THINGS TO DEATH.

IF YOU WANT ME TO ASK THE JURY TOMORROW AND PUT THEM ALL ON THE SPOT ABOUT WHETHER THEY SAID "S" OR SODOMY TO HELP HER OUT, I WILL BE GLAD TO DO THAT.

IS THAT YOUR REQUEST AT THIS TIME?

MR. CHAIS: NOT AT THIS TIME. PERHAPS WE CAN TAKE IT UP IN THE MORNING.

THE COURT: WE ARE GOING TO GET THIS TRIAL STARTED ONE DAY, JUST ONE DAY, ON TIME.

ANYTHING WE NEED TO RESOLVE, LET'S GET IT RESOLVED IF WE HAVE TO STAY HERE ALL NIGHT.

I CAN'T CONTINUE TO KEEP THE JURY WAITING OUTSIDE AN EXTRA HALF HOUR EVERY TIME WE TAKE A BREAK AND THAT HAS BEEN THE HISTORY OF THE CASE.

NO MATTER HOW EARLY I TELL PEOPLE TO GET HERE, THERE ARE ADDITIONAL ISSUES AND ADDITIONAL COMPLAINTS AND MATTERS OF THAT NATURE AND I WANT TO STOP THAT.

I WANT TO START THE TRIAL ON TIME. I DON'T WANT TO RENEW MATTERS.

I DON'T WANT TO RELITIGATE MATTERS.

I DON'T WANT TO HEAR ARGUMENTS ON THINGS I HAVE ALREADY RULED ON.

IF YOU WANT ME TO ASK THE JURY, I WILL BE HAPPY TO DO IT FIRST THING.

IF YOU DON'T WANT ME TO PURSUE IT, JUST TELL ME.

MR. CHAIS: I AM SORRY IF I DIDN'T HAVE THE SAME UNDERSTANDING AS YOU DID.

MAYBE I MISSED IT.

SHE SAID THE "S" WAS WHAT PROMPTED HER MEMORY, BUT I DON'T KNOW IF SHE HEARD ANYTHING BEYOND THAT.

THE COURT: I THOUGHT IT WAS PRETTY CLEAR. MAYBE I AM NOT HEARING WELL.

DID YOU HEAR ANYTHING BEYOND THE "S"?

THE WITNESS: YOUR HONOR, THE WORD WAS ON THE TIP OF MY TONGUE.

IT IS ONE OF THE SITUATIONS WHERE YOU KNOW A WORD PERFECTLY WELL, BUT YOU CAN'T THINK OF IT AND ALL I NEEDED WAS "S".

THE COURT: DID YOU HEAR ANYTHING BEYOND THAT?

THE WITNESS: I DON'T KNOW.

I CAN'T EVEN TELL YOU.

THE COURT: DO YOU WANT ME TO PURSUE THIS WITH THE JURY?

MR. CHAIS: NO. NOW I UNDERSTAND.

THE COURT: WHAT OTHER ISSUES DO WE HAVE FOR THE COURT TOMORROW?

MR. SHEAHEN: YOUR HONOR, MY VIEW OF THE PROMPTING BY THE JURY IS THAT I THINK IT IS AN INSOLUABLE PROBLEM.

CALLING IT TO ANYBODY'S ATTENTION IS JUST GOING

TO MAKE IT WORSE.

THE COURT: THERE IS NO EVIDENCE BEFORE THE COURT THAT THE JURY DID ANYTHING AT THIS POINT.

THAT'S WHY I KEEP SAYING IF YOU WANT ME TO ASK THEM, I WILL ASK THEM.

AT THIS POINT I CAN'T SAY IT CAME FROM THE JURY.

MR. CHAIS TELLS ME HE DOESN'T WANT ME TO ASK IT, AND I ASSUME THAT IS THE DEFENSE POSITION AT THIS POINT.

MR. SHEAHEN: YOUR HONOR, I DON'T WANT TO SOUND RIDICULOUS, BUT OUR POSITION IS WE ARE MAKING A MOTION FOR MISTRIAL BASED ON THAT.

AND SUBMIT IT AND THAT'S THE ONLY REMEDY WE SEEK.

THE COURT: ALL RIGHT.

WELL, ABSENT SOME INDICATION THAT THE JURY DID ANYTHING, I AM GOING TO DENY THE MISTRIAL.

ALSO, EVERYONE IN THE COURTROOM KNEW THIS WORD SHE WAS STRUGGLING FOR AND THIS IS REALLY A DIMINIS POINT AS FAR AS I AM CONCERNED.

ANYTHING ELSE THAT YOU ANTICIPATE FOR TOMORROW, MR. SHEAHEN?

MR. SHEAHEN: NO, YOUR HONOR.

THE COURT: MR. CHAIS, ANY OTHER ISSUES?

MR. CHAIS: NO, YOUR HONOR.

THE COURT: OKAY.

AT THIS TIME, MR. BERMAN, ARE THERE GOING TO BE

ANY OTHER WITNESSES AFTER DR. HEUSER?

MR. BERMAN: I DON'T ANTICIPATE ANY IN THE CASE IN CHIEF, YOUR HONOR.

THE COURT: OKAY.

MR. BERMAN: MIGHT I INQUIRE WHETHER OR NOT COUNSEL WAS ABLE TO OBTAIN THEIR SET OF PHOTOGRAPHS OR DID THEY WISH TO BORROW MINE FOR THIS EVENING?

MR. SHEAHEN: MR. EVANS WAS TO OBTAIN OURS AT 1:00. I HAVEN'T HEARD FROM MR. EVANS.

MR. BERMAN: WOULD YOU LIKE TO BORROW MINE THIS EVENING?

MR. SHEAHEN: YES, I WOULD LIKE TO BORROW MR. BERMAN'S TO BE SURE.

MR. BERMAN: IT IS MISSING FOR THE RECORD ONLY ONE PHOTOGRAPH WHICH WE CROPPED AND PUT INTO EVIDENCE.

BUT OTHER THAN THAT, THIS IS I BELIEVE A COMPLETE SET.

THE COURT: NOW, I WANT COUNSEL HERE IN PLACE READY TO GO AT A QUARTER TO 10:00 TOMORROW WITH A CONCISE LIST OF COMPLAINTS AND ISSUES FOR THE DAY, BECAUSE AT 10:00 WE ARE GOING TO CUT IT OFF AND THE JURY IS GOING TO WALK IN THE DOOR UNLESS THERE IS SOMETHING MOMENTUS THAT HAPPENS OVER THE EVENING HOURS.

I DO WANT TO START ON TIME TOMORROW AND I DO WANT TO GET TO THE DEFENSE CASE TOMORROW.

MR. BERMAN, ANYTHING ELSE THIS MORNING?

MR. BERMAN: I HAVE NOTHING ELSE, YOUR HONOR.

THE COURT: EVERYBODY IS ORDERED TO RETURN.

PLEASE BE IN COURT READY TO START AT A QUARTER TO 10:00 TOMORROW.

MR. BERMAN: THANK YOU, YOUR HONOR.

(AT 4:20 P.M. THE MATTER WAS CONTINUED TO TUESDAY, DECEMBER 13, 1994, AT 9:45 A.M.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW E HON. SANDY KRIEGLER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
PEOPLE,

VS. NO. BA090702

HOOMAN ASHKAN PANAH,
DEFENDANT.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 13, 1994

VOLUME 22

APPEARANCES:

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FOR DEFENDANT: ROBERT SHEAHEN, ATTORNEY AT LAW
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-AND-
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ALEXANDRIA FENNER, CSR NO. 4418,
JOAN KOTELES, CSR NO. 1911,
OFFICIAL REPORTERS

PAGES 2422 THROUGH 2620

EVA HEUSER,

CALLED AS A WITNESS ON BEHALF OF THE PEOPLE, HAVING BEEN PREVIOUSLY DULY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

THE COURT: DOCTOR, YOU MAY JUST HAVE A SEAT. YOU ARE STILL UNDER OATH.

MR. SHEAHEN, CROSS-EXAMINE.

PROCEED.

MR. SHEAHEN: THANK YOU.

CROSS EXAMINATION

BY MR. SHEAHEN:

Q. GOOD MORNING, DOCTOR.

A. GOOD MORNING, MR. SHEAHEN.

Q. IS IT HEUSER OR HEUSER?

A. WELL, IT IS HEUSER BUT I PRONOUNCE IT HEUSER. I DO USE HEUSER.

Q. BUT IT IS --

A. BUT THE CORRECT TERM IS HEUSER, YES.

Q. BUT YOU USE HEUSER?

A. WELL, IT IS EASIER ON THE PHONE AND IT IS EASIER WHEN PEOPLE ASK ME HOW TO SPELL IT AND SO ON.

Q. NOW, DOCTOR, YOU SAID THAT YOU WENT TO MEDICAL SCHOOL AWHILE BACK, DID YOU?

A. QUITE AWHILE BACK, YES.

Q. AND WHAT DID THAT INVOLVE, THAT WAS IN CANADA SOMEPLACE?

A. YES, IT WAS.

Q. AND WHERE -- WHAT SCHOOL WAS THAT?

A. IT IS CALLED QUEEN'S UNIVERSITY AND IT IS IN KINGSTON, ONTARIO.

Q. AND WHEN ONE GOES TO MEDICAL SCHOOL, ONE STUDIES THE HEALING ARTS, DOESN'T ONE?

A. WELL, IF YOU MEAN BY THAT, MEDICINE IN GENERAL, YES.

Q. WELL, SPECIFICALLY MOST -- I USE THE TERM HEALING ARTS.

IS THERE ANYTHING ABOUT THE TERM HEALING ARTS THAT IS INACCURATE?

A. NOT AS FAR AS I CAN TELL.

Q. SO WHEN YOU GO TO MEDICAL SCHOOL, YOU STUDY THE HEALING ARTS?

A. YES.

Q. NOW, IN YOUR WORK RIGHT NOW, DOCTOR, YOU DON'T PRACTICE THE HEALING ARTS THOUGH, DO YOU?

A. WELL, DO YOU MEAN DO I PRESCRIBE MEDICATIONS, NO.

BUT DO I MAKE DIAGNOSIS, YES. SO I PRACTICE A PART OF THE HEALING ARTS.

Q. BUT MOST OF YOUR WORK DOESN'T INVOLVE HEALING PEOPLE, DOES IT?

A. NO.

NONE OF MY WORK INVOLVES HEALING PEOPLE

DIRECTLY.

Q. AND THAT'S BECAUSE MOST OF THE PEOPLE YOU WORK WITH ARE DEAD; ISN'T THAT CORRECT?

A. WELL, AS A PATHOLOGIST DOING AUTOPSY WORK, I OBVIOUSLY DEAL WITH DECEASED PERSONS.

Q. SO EVEN THOUGH YOU STUDIED THE HEALING ARTS YOU NOW WORK WITH THE DECEASED; IS THAT CORRECT?

A. WELL, YES, THAT'S CORRECT.

Q. AND, THEREFORE, YOU DON'T HEAL PEOPLE?

A. WELL, AS I INDICATED, I DON'T PRESCRIBE. I DON'T GIVE MEDICATIONS.

I DON'T PERFORM SURGERY UPON LIVING PEOPLE, NO.

Q. BUT YOUR PRIMARY FUNCTION IS TO PERFORM EXAMINATIONS ON DEAD BODIES; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. NOW, YOU HAVE TESTIFIED YOU SAID ANY NUMBER OF TIMES IN THE PAST, HAVE YOU NOT?

A. WELL, THAT'S MORE OR LESS HOW I WOULD CHARACTERIZE IT.

IT HAS BEEN A LARGE NUMBER OF TIMES, YES.

Q. NOW, AND YOU HAVE TESTIFIED IN HOMICIDE CASES?

A. YES.

Q. AND YOU HAVE TESTIFIED IN DEATH PENALTY CASES?

A. YES.

Q. NOW, UNDER OUR SYSTEM IN A CRIMINAL CASE, HOW MANY OR ARE THERE TWO SIDES IN A CRIMINAL CASE?

A. YES.

Q. ONE IS THE PROSECUTION SIDE, AND ONE IS THE

DEFENSE SIDE; IS THAT CORRECT?

A. YES.

Q. NOW, YOU HAVE TESTIFIED, AND CORRECT ME IF I AM WRONG, HAVE YOU TESTIFIED 1400 TIMES?

A. NO, I DON'T BELIEVE I HAVE USED THAT SPECIFIC A TERM.

I SAID SEVERAL HUNDRED TIMES.

Q. WOULD 500 BE?

A. BE CLOSER TO THAT, YES.

Q. YOU HAVE TESTIFIED 500 TIMES. SO WOULD IT BE CORRECT THAT YOU HAVE TESTIFIED SAY 250 TIMES ON BEHALF OF THE DEFENSE SIDE?

A. NO. I HAVE BEEN CALLED BY THE DEFENSE ONLY ONCE.

THE NATURE OF MY WORK IS SUCH THAT THE WAY OUR JUSTICE SYSTEMS WORK, I ALMOST INVARIABLY -- WELL, FOR PRACTICAL PURPOSES 500 MINUS ONE.

I DON'T KNOW WHAT PERCENTAGE THAT WOULD BE TIMES CALLED BY THE PROSECUTION.

Q. SO WOULD IT BE CORRECT THEN THAT 99.8 PERCENT OF THE TIME YOU TESTIFY FOR THE PROSECUTION?

A. I GET CALLED BY THE PROSECUTION, YES. WELL, YES. THAT I TESTIFY FOR THE PROSECUTION IF YOU WANT TO PHRASE IT THAT WAY.

Q. AND THAT'S 99.8 PERCENT, IF MY MATH IS CORRECT; IS THAT RIGHT?

A. IT IS PROBABLY MORE THAN THAT.

Q. CLOSER TO 99.9 PERCENT?

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A. WELL, I AM NOT A MATHEMATICIAN.

Q. BUT ASIDE FROM THAT ONE TIME, DID YOU ACTUALLY TESTIFY FOR THE DEFENSE IN THAT ONE CASE?

A. I WAS CALLED BY THE DEFENSE. I DON'T RECALL THE CASE.

Q. SO ASIDE FROM THAT ONE TIME, EVERY OTHER TIME YOU HAVE TESTIFIED YOU HAVE TESTIFIED ON BEHALF OF THE PROSECUTION?

A. THAT'S CORRECT.

Q. NOW, IN THIS CASE, DOCTOR, YOU TESTIFIED YESTERDAY FOR A COUPLE OF HOURS AND SO THAT I UNDERSTAND YOUR TESTIMONY, YOU TESTIFIED THAT YOU EXAMINED THE BODY OF THE DECEASED IN THIS CASE?

A. YES.

Q. AND YOU MADE VARIOUS FINDINGS WITH RESPECT TO THE BODY OF THAT DECEASED?

A. YES.

Q. AND YOU TESTIFIED IN COURT AS TO WHAT YOUR FINDINGS ARE; IS THAT CORRECT?

A. YES.

Q. NOW, BASED ON YOUR EXAMINATION AND FINDINGS -- THIS CALLS FOR A SIMPLE ANSWER, DOCTOR, NOT AN EXPLANATORY ONE -- YOU ARE NOT ABLE TO CONCLUDE, ARE YOU, THAT HOOMAN PANAH AND NO OTHER PERSON INFLICTED THE INJURIES THAT YOU DESCRIBED ON THE DECEDENT?

A. DO YOU MEAN --

Q. YOU ARE NOT ABLE TO CONCLUDE THAT, ARE YOU?

A. NO. I DON'T KNOW THAT IT IS A PARTICULAR

PERSON.

Q. IN FACT, YOUR EXAMINATION REVEALS LITTLE CLUE AS TO THE IDENTITY OF THE ASSAILANT; IS THAT CORRECT, DOCTOR?

A. THAT'S CORRECT.

Q. BECAUSE YOU ARE SIMPLY EXAMINING THE NATURE OF THE INJURIES TO DETERMINE AMONG OTHER THINGS THE CAUSE OF DEATH, THE TIME OF DEATH AND WHAT HAVE YOU; IS THAT CORRECT?

A. YES, THAT'S CORRECT.

Q. AND IT IS NOT PART OF YOUR FUNCTION TO ATTEMPT TO DETERMINE THE IDENTITY OF THE ASSAILANT OR ASSAILANTS; ISN'T THAT CORRECT, DOCTOR?

A. NOT, IT IS NOT MY DIRECT FUNCTION.

MY FINDINGS CONTRIBUTE TO THAT KIND OF DETERMINATION BUT I DON'T PERFORM THEM AND COME TO THE CONCLUSION MYSELF.

Q. YOUR FUNCTION IS TO EXAMINE THE BODY; ISN'T THAT CORRECT?

A. WELL, TO MAKE CERTAIN INTERPRETATIONS ALSO.

Q. WELL, LET'S TALK ABOUT SOME OF THESE INTERPRETATIONS, DOCTOR.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. BY MR. SHEAHEN: OKAY.

ON THE BOARD, DOCTOR, I HAVE WRITTEN THE WORDS TIME OF DEATH.

DO YOU REMEMBER TESTIFYING YESTERDAY ON DIRECT

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EXAMINATION AS TO THE TIME OF DEATH OF THE DECEDENT IN THIS CASE?

A. YES.

Q. DOCTOR, ARE YOU FAMILIAR WITH SPITZ AND FISHER'S BOOK ON MEDICOLEGAL INVESTIGATION OF DEATH?

A. YES.

Q. AND IS THIS A LEADING AUTHORITY IN YOUR FIELD?

A. YES.

Q. AND ARE YOU FAMILIAR WITH WHAT SPITZ AND FISHER HAVE TO SAY ABOUT HOW TIME OF DEATH IS DETERMINED IN A CASE SUCH AS THIS?

A. YES.

Q. AND CAN YOU TELL US WHAT ONE OF THE MOST RELIABLE INDICATORS OF TIME OF DEATH WOULD BE?

A. ONE OF THE MOST RELIABLE INDICATORS IS CORE BODY TEMPERATURE.

Q. I AM SORRY.

A. CORE BODY TEMPERATURE.

Q. IS THAT C-O-R-E?

A. YES.

Q. AND, DOCTOR, COULD YOU TELL US WHAT CORE BODY TEMPERATURE IS?

A. IT IS THE TEMPERATURE OF THE BODY INTERNALLY AS OPPOSED TO BODY HEAT ON THE SURFACE OR NEAR THE SURFACE, SUCH AS IN THE MOUTH.

SO THAT A RECTAL TEMPERATURE AND AN ORAL TEMPERATURE AND A TEMPERATURE TAKEN IN THE AXILLA WOULD BE A LITTLE BIT LESS THAN THE BODY TEMPERATURE AND THE BODY

TEMPERATURE COULD BE GOTTEN THROUGH A PROBE INSERTED INTO THE ORGANS.

Q. DOCTOR, ARE YOU SAYING THAT INSIDE THE BODY THERE ARE THINGS THAT YOU CAN MEASURE THE TEMPERATURE OF WHICH WILL ASSIST YOU IN DETERMINING THE TIME OF DEATH?

A. YES.

Q. IS ONE OF THESE THE LIVER?

A. THAT'S WHAT OUR OFFICE USES, YES.

Q. AND SO THAT WE ARE CLEAR ON IT, HOW DO YOU DO IT?

YOU PUT A THERMOMETER IN THE LIVER OF THE DECEASED?

A. THAT'S CORRECT.

Q. AND YOU MEASURE THE TEMPERATURE OF THE LIVER?

A. THAT'S CORRECT.

Q. AND AFTER YOU MEASURE THE TEMPERATURE OF THE LIVER, SAY THE LIVER TEMPERATURE IS 90 DEGREES WHEN YOU MEASURE IT, DO YOU THEN HAVE SOME SORT OF FORMULA TO SUBTRACT FROM 98.6?

A. WELL, IT IS ACTUALLY CLOSER TO A HUNDRED, BECAUSE THE CORE TEMPERATURE, NORMAL CORE TEMPERATURE IS -- I ALWAYS ROUND IT OFF TO A HUNDRED.

IT IS POINT SOMETHING UNDER A HUNDRED.

YES, THERE ARE TABLES GIVEN OF THE MOST COMMON OBSERVED RATES OF FALL OF CORE TEMPERATURE OR LIVER TEMPERATURE AFTER DEATH.

NOW, ANY ACTUAL TEMPERATURE THAT IS OBTAINED HAS TO BE INTERPRETED AND THE TABLE IS ONLY A GUIDELINE.

SO THAT WHAT ACTUALLY ONE GETS IS A RANGE OF TIMES AS DERIVED FROM THE BODY TEMPERATURE, BECAUSE ONE HAS TO MAKE CERTAIN ASSUMPTIONS AND ONE MAKES ASSUMPTIONS AT BOTH ENDS OF WHAT IS REASONABLE.

Q. IN SHORT, DOCTOR, YOUR OFFICE USES LIVER TEMPERATURE, YOU MEASURE THE TEMPERATURE OF THE LIVER IN A DECEASED TO HELP YOU DETERMINE THE CAUSE OF DEATH; IS THAT CORRECT?

A. WHENEVER POSSIBLE WE DO DO THAT, YES, OR WHENEVER INDICATED.

Q. NOW, IN THIS CASE, DOCTOR, WHAT WERE YOUR FINDINGS WITH RESPECT TO LIVER TEMPERATURE?

A. THE LIVER TEMPERATURE WAS NOT OBTAINED IN THIS CASE.

Q. LIVER TEMPERATURE WAS NOT OBTAINED?

A. THAT'S RIGHT.

Q. AND THE LIVER TEMPERATURE WAS NOT OBTAINED EVEN THOUGH IT IS A POLICY OF YOUR OFFICE TO OBTAIN THE LIVER TEMPERATURE; IS THAT CORRECT?

A. WELL, I DON'T KNOW WHY THE LIVER TEMPERATURE WAS NOT OBTAINED.

I WAS NOT THERE, AND I HAVE NOT DISCUSSED IT WITH THE INVESTIGATOR.

ONE OF THE COMMON REASONS WHY THE LIVER TEMPERATURE IS NOT OBTAINED IF THE BODY IS FOUND IN PUBLIC VIEW, IF THERE IS AN AUDIENCE, BECAUSE IT IS A VERY TRAUMATIC PROCEDURE TO WITNESS

Q. DOCTOR, THIS EXC TION DOESN'T APPLY TO AN

AUDIENCE FROM YOUR OFFICE AND A POLICE AGENCY, DOES IT?

A. I DON'T KNOW WHAT THE CIRCUMSTANCES OF THIS PARTICULAR SCENE WERE.

Q. BUT IN ANY EVENT, YOUR INFORMATION IS THAT THE LIVER TEMPERATURE WAS NOT OBTAINED IN THIS CASE?

A. THAT'S CORRECT, YES.

Q. AND, THEREFORE, ACCORDING TO THE LEADING WORK, THE MOST RELIABLE ESTIMATOR OF THE TIME OF DEATH IS NOT AVAILABLE TO US; IS THAT CORRECT?

A. YES.

Q. NOW, DOCTOR, YOU HAVE TALKED ABOUT WITH RESPECT TO TIME OF DEATH YOU HAVE GIVEN US A TIME OF DEATH BASED ON I BELIEVE YOU SAID THAT YOU THOUGHT WHEN YOU LOOKED AT THE GASTROINESTINAL CONTENTS THAT YOU COULD DETECT A SUGGESTION OF EGGS OR SOMETHING?

A. WELL, LOOKING AT THE STOMACH CONTENTS IS ANOTHER PARAMETER THAT WE USE TO APPROXIMATE OR TO ARRIVE AT A RANGE OF POSSIBLE TIME OR REASONABLE TIMES OF DEATH.

AND IN THIS CASE, YES, I WAS ABLE TO SEE WHAT I THOUGHT WERE EGGS, RECOGNIZE WHAT I THOUGHT WERE EGGS.

Q. WHAT SORT OF EXAM DID YOU PERFORM TO DETERMINE WHETHER IT WAS EGGS?

A. WELL, IN THIS PARTICULAR CASE I COULD TELL IT VISIBLY BY LOOKING AT THE STOMACHE CONTENTS.

Q. SO YOUR ANSWER IS YOU DID NOT PERFORM AN EXAM?

MR. BERMAN: OBJECTION. THAT IS NOT CORRECT.

IT MISSTATES THE ANSWER.

THE COURT: THAT IS CORRECT.

IT IS NOT HER ANSWER.

Q. BY MR. SHEAHEN: DOCTOR, ISN'T IT -- DON'T THE AUTHORITIES SAY THAT ESTIMATING GASTRO -- OR ESTIMATING TIME OF DEATH BY GASTROINTESTINAL CONTENTS IS ONE OF THE LEAST RELIABLE SOURCES OF THE TIME OF DEATH?

A. WELL, IF THEY DO, WHICH I AM NOT SURE THEY DO, I DISAGREE WITH THAT.

I DON'T THINK IT IS ANY MORE OR LESS RELIABLE THAN MOST OF THE OTHER METHODS.

ALL OF THE METHODS HAVE RANGES, HAVE, I GUESS WHAT IS -- THERE IS A STATISTICAL TERM FOR THAT.

THEY HAVE -- THEY ARE NOT PRECISE. YOU CAN NEVER GET A SINGLE POINT IN TIME FROM ANY OF THE PARAMETERS THAT ARE USED.

SO IN MY ANSWER WHEN I WAS ANSWERING THE QUESTIONS ABOUT THE STOMACH CONTENTS ON DIRECT EXAMINATION, I BELIEVE I EXPLAINED THE FACTORS THAT LEAD TO A CONCLUSION BASED ON EXAMINATION OF THE GASTRIC CONTENTS.

Q. BUT, DOCTOR, GASTROINESTINAL CONTENTS, THAT IS STOMACH CONTENTS, AS A MEANS OF DETERMINING TIME OF DEATH IS NOT CONSIDERED AS RELIABLE BY THE AUTHORITIES OR BY YOUR OFFICE AS LIVER TEMPERATURE, IS IT?

A. I DON'T THINK THAT IS TRUE AS FAR AS MY OFFICE GOES.

I DON'T THINK MY OFFICE HAS AN OFFICIAL POSITION ON IT BECAUSE IT VARIES FROM CASE TO CASE, AND I WOULD SAY WHERE, FOR INSTANCE, YOU HAVE NO STOMACH CONTENTS, THAT CERTAINLY TELLS YOU A VERY PRECISE FACT WHICH HAS A

RANGE OF INTERPRETATIONS.

IF YOU HAVE STOMACH CONTENTS AGAIN, IF THEY ARE RECOGNIZABLE, THAT CERTAINLY PUTS YOU IN A CERTAIN RANGE WHICH IS VERY DIFFERENT FROM THE OTHER END OF THE POSSIBILITY WHICH IS WHERE THE CONTENTS WOULD NOT BE RECOGNIZABLE. THEY WOULD BE GRAY, DISCOLORED BY THE ACID.

SO I CAN MAKE WITHIN THOSE LIMITS, WITH WHATEVER PRECISION THERE IS TO THOSE ANSWERS, I CAN CERTAINLY MAKE THEM AND I CAN VERY FIRMLY PUT MY OPINION AT ONE END VERSUS THE OTHER OF THE POSSIBLE RANGE.

AND THE RANGE AS I INDICATED CAN BE SEVERAL DAYS AND I DON'T BELIEVE THIS WAS THE CASE IN THIS CASE.

I BELIEVE THIS WAS TOWARDS THE TIME INTERVAL CLOSER TO AFTER THE VICTIM ATE WHATEVER SHE ATE INCLUDING THE EGGS.

Q. BUT DOCTOR, YOU SAID AMONG OTHER THINGS I BELIEVE -- CORRECT ME IF I AM WRONG -- THAT THIS GASTRIC CONTENTS EQUATION CAN BE AFFECTED BY ANY NUMBER OF FACTORS, DIDN'T YOU?

A. YES.

Q. IT CAN BE AFFECTED BY THE AGE OF THE DECEASED?

A. I DID NOT SAY THAT.

Q. WELL, CAN IT?

A. I DON'T BELIEVE SO.

IT MAY BE, BECAUSE OF THE -- THE TYPE OF DIET CHILDREN HAVE, THERE MAY BE SOME DIFFERENCE AND I THINK IN SMALL CHILDREN, LIKE TODDLERS, THE GASTRIC EMPTYING IS FASTER.

Q. IS IT INCORRECT THAT AGE AND BODY BUILD ALSO AFFECT THE RATES OF GASTRIC EMPTYING?

A. WELL, I JUST SAID THAT I THINK IN BABIES, BECAUSE THEY EAT MOSTLY SMOOTH, SOFT, SEMILIQUID FOOD, THEIR STOMACHES EMPTY FASTER.

OLDER PEOPLE OFTEN HAVE A GENERAL SLOWING OF ALL FUNCTIONS SO THAT IT IS POSSIBLE THAT IN OLDER INDIVIDUALS THAT GIVING ANYONE THE SAME FOOD, THE GASTRIC EMPTYING MIGHT BE A LITTLE LONGER.

THE NATURE OF THE FOOD ALSO, OF COURSE, INFLUENCES IT.

YES, THERE ARE A LOT OF FACTORS.

Q. SO AGE WOULD BE ONE OF THEM. ISN'T ANOTHER ONE STRESS?

A. YES.

Q. THAT IS, IF YOU OR I ARE IN A STRESSFUL SITUATION, GASTRIC EMPTYING MIGHT NOT OCCUR AT THE NORMAL RATE?

A. YES.

Q. AND IN SHORT THERE ARE A NUMBER OF VARIABLES?

A. YES.

Q. AND YOUR ESTIMATE IN THIS CASE IS BASED ON AN IDEALIZED SITUATION AND YOU REALLY DON'T HAVE ANY CONTROL OVER THE VARIABLES IN THIS CASE, DO YOU?

A. WELL, IT IS IN THE TEXTBOOKS ALSO. THE STATEMENTS IN THE TEXTBOOKS ARE EVEN MORE IDEALIZED THAN MY STATEMENTS.

THEY DON'T GO INTO ALL THESE PARAMETERS IN

GREAT DETAIL.

I HAVE READ OTHER TEXTBOOKS AND OTHER ARTICLES WHICH GOES INTO FAR MORE DETAIL THAN SPITZ AND FISHER DOES.

YES, IT IS IDEALIZED, BUT I DO HAVE A CERTAIN AMOUNT OF EXPERIENCE SO THAT I THINK SO AS LONG AS EVERYBODY REMEMBERS THAT I AM TALKING ABOUT A LIKELY RANGE AND ALSO I AM TALKING ABOUT A FIT WITH THE CIRCUMSTANCES, BECAUSE REALLY MY JOB IS NOT TO PROVIDE AN ABSOLUTE FIGURE BUT TO EVALUATE THE CIRCUMSTANCES BY MY FINDINGS, SO AS LONG AS EVERYBODY REMEMBERS THAT, THEN I THINK MY FINDINGS ARE PRETTY FIRM.

Q. BUT SO THAT WE ARE ALL CLEAR YOU ARE NOT REASONABLY CERTAIN AS TO THE TIME OF DEATH IN THIS CASE, ARE YOU?

YOU CAN'T BE BECAUSE OF THE VARIABLES OVER WHICH YOU HAVE NO CONTROL, CAN YOU?

A. I AM REASONABLY CERTAIN AS TO AN APPROXIMATE RANGE OF TIME WHICH IS SHORTLY WITHIN A FEW HOURS AFTER SHE ATE THE EGGS.

Q. BUT DIDN'T YOU JUST SAY THAT STRESS COULD EFFECT THAT?

THAT STRESS COULD KEEP THE EGG CONTENTS IN THERE FOR AS MUCH AS 24 HOURS?

A. WELL, BUT I ALSO SAID THAT IF THE FOOD SITS IN THE STOMACHE FOR 24 HOURS, IT CHANGES IN APPEARANCE.

IT DOES NOT -- NO LONGER LOOKS FRESH.

Q. BUT DIDN'T YOU ALSO SAY, DOCTOR, THAT YOU JUST

DID A VISUAL EXAM OF THE CONTENTS AND YOU DIDN'T DO ANY SORT OF SCIENTIFIC EXAM OF THE ALLEGED EGGS?

A. IN PRACTICAL TERMS SCIENCE IS OFTEN RATHER SIMPLE.

THAT DOESN'T MEAN THAT IT IS ANY LESS PRECISE.

AND IN LOOKING AT GASTRIC CONTENTS, THE APPEARANCE, THE VISUAL APPEARANCE, PRETTY WELL CORRELATES WITH THE FRESHNESS.

THERE REALLY IS NO TEST THAT IS DONE RELIABLY TO DETERMINE FRESHNESS.

IF YOU CAN LOOK AND YOU CAN RECOGNIZE A BEAN VERSUS YOU JUST SEE SOME MUSHY GREENISH GRAYISH STUFF, THAT'S THE TYPE OF THING I AM TALKING ABOUT.

Q. DOCTOR, YOU SAID I THINK A MOMENT AGO THAT YOU HAVE READ A NUMBER OF THE OTHER BOOKS IN THE AREA BESIDES SPITZ AND FISHER; IS THAT CORRECT?

A. WELL, I HAVE READ SOME EXCERPTS ON GASTRIC EMPTYING FROM OTHER TEXTBOOKS, YES.

Q. HAVE YOU READ SNYDER ON HOMICIDE INVESTIGATION?

A. I AM NOT SURE WHETHER SNYDER WAS ONE OF THEM.

WHAT THIS WAS WAS XEROXED EXCERPTS FROM THE CHAPTERS ON GASTRIC EMPTYING AND I DON'T HAVE A FIRM CORRELATION BETWEEN WHOSE TEXTBOOK WAS WHICH PARTICULAR PAGE.

Q. LET ME ASK YOU A QUESTION, DOCTOR.

HAVE YOU READ EVALUATION OF THE SEXUALLY ABUSED CHILD, A MEDICAL TEXTBOOK AND PHOTOGRAPH ATLAS BY ASTRID HEGER, M.D. AND S. JEAN EVANS, M.D.?

A. NO.

THOSE ARE -- THAT TEXTBOOK REFERS TO LIVE CHILDREN.

I HAVE GONE TO SEMINARS AT WHICH DR. HEGER HAS PARTICIPATED AND I HAVE HAD MANY DISCUSSIONS WITH HER AND THE FINDINGS IN THE TEXTBOOKS AND THE FINDINGS ON LIVE CHILDREN HAVE A LIMITED BEARING ON THE INTERPRETATION OF THE FINDINGS IN DEAD CHILDREN.

Q. WHEN YOU SAY A LIMITED BEARING, DOCTOR, DOES THAT MEAN NO BEARING?

A. THAT'S NOT WHAT I SAID. I SAID LIMITED.

Q. DOCTOR, YOU MENTIONED YESTERDAY I BELIEVE THAT YOU HAD FAILED TO DESCRIBE THE INJURIES TO THE DECEASED IN THIS CASE.

WERE THOSE YOUR WORDS?

A. I USED THOSE WORDS.

BUT IN A SPECIFIC CONTEXT WHICH YOU ARE NOT GIVING RIGHT AT THIS MOMENT.

Q. YOU CONDUCTED AN EXAMINATION OF THIS DECEDENT AND DID YOU SAY THAT YOU THEN GOT BUSY WITH OTHER THINGS AND DIDN'T DO SOMETHING IN THIS CASE?

A. AGAIN THERE IS A CONTEXT.

Q. YOU MENTIONED YESTERDAY, DOCTOR, YESTERDAY YOU MENTIONED THE QUESTION OF CAUSE OF DEATH.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. SHEAHEN: MAY I MARK THIS I THINK THIS WOULD BE C; IS THAT CORRECT?

THE COURT: NO. D.

MR. SHEAHEN: THANK YOU, D.

THANK YOU, YOUR HONOR. I WOULD LIKE TO MARK THIS D, PRINT IT.

Q. BY MR. SHEAHEN: DOCTOR, WITH RESPECT TO THE QUESTION OF CAUSE OF DEATH, IS IT YOUR TESTIMONY THAT YOU COULD NOT IN THIS CASE ISOLATE A CAUSE OF DEATH?

A. NO.

Q. WELL, DIDN'T YOU TELL US YESTERDAY, AND CORRECT ME IF I AM WRONG, THAT THE DECEASED IN THIS CASE RECEIVED INJURIES TO THE NECK AREA AND THAT THE DECEASED IN THIS CASE RECEIVED INJURIES TO THE GENITAL AREA?

A. YES.

Q. AND THAT YOU COULD NOT DETERMINE WHICH IF EITHER OF THOSE AREAS OF INJURY CAUSED THE DEATH OR BOTH?

A. NO. I DON'T BELIEVE THAT WAS MY STATEMENT OR THAT IS NOT WHAT I MEANT.

I DON'T BELIEVE I ACTUALLY SAID THAT.

Q. DOCTOR --

A. I SAID SOMETHING VERY SPECIFIC WHICH IS THAT I SAID TRAUMATIC INJURIES CAUSED HER DEATH.

Q. FINE, DOCTOR.

TRAUMATIC INJURIES. TRAUMATIC, TRAUMA MEANS INJURY, DOESN'T IT?

ISN'T THAT WHAT TRAUMA MEANS?

A. YES.

Q. SO WHEN YOU SAY TRAUMATIC INJURIES YOU ARE SAYING BASICALLY INJURY INJURIES, AREN'T YOU?

A. WELL, IN THIS CASE I DID INDICATE THAT I THOUGHT THAT, FOR INSTANCE, THE PRESSURE MARKS ON HER BODY WOULD IN AND OF THEMSELVES NOT CAUSED HER DEATH.

BUT THAT PRESSURE ON HER NECK AND THE GENITAL TRAUMA COULD CAUSE HER DEATH AND DID CAUSE HER DEATH.

Q. DOCTOR -- MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. SHEAHEN: THANK YOU.

Q. MR. SHEAHEN: DOCTOR, SHOWING YOU WHAT I AM MARKING E FOR IDENTIFICATION UNDER CAUSE OF DEATH, YOU TESTIFIED THAT THE CAUSE OF DEATH WAS TRAUMATIC INJURIES?

A. YES.

Q. AND IS IT FURTHER CORRECT THAT TRAUMA MEANS INJURY?

A. WELL, I THINK WHAT WE MEAN WHEN WE USE THAT TERM, AND WE USE THAT TERM COMMONLY, A LOT OF US USE THAT FOR INSTANCE IN TRAFFIC ACCIDENT DEATHS, IS THAT THE INJURIES TO THE BODY ARE CAUSED BY TRAUMA.

THERE ARE INJURIES THAT CAN BE CAUSED TO THE BODY BY LET'S SAY BACTERIA, BY AUTOIMMUNE PROCESSES, BY CANCER, BY SURGICAL INTERVENTION.

THOSE WOULD NOT BE CALLED TRAUMATIC AND THEY ARE NOT, THE TERM IS NOT REALLY USED TO REFER TO THOSE OTHER INJURIOUS PROCESSES.

THIS IS KIND OF A TRADITONAL TERM THAT WE USE.

SO WE DON'T JUST SAY THAT CAUSE OF DEATH IS INJURIES, BECAUSE THE HEALTH DEPARTMENT WOULD SAY WHAT KIND OF INJURIES.

AND WE DO SAY TRAUMATIC AND IN THIS CASE, YES, YOU ARE QUITE CORRECT, THE INJURIES ARE CAUSED BY A TRAUMA.

Q. DOCTOR, WHAT TROUBLES ME, AND AGAIN I AM NOT A DOCTOR, IT IS THE WORD TRAUMA.

THE WORD TRAUMA IN AND OF ITSELF MEANS INJURY, DOESN'T IT?

MR. BERMAN: YOUR HONOR, I AM GOING TO MAKE A 352 OBJECTION AT THIS POINT.

THE COURT: OVERRULED.

YOU CAN ANSWER.

THE WITNESS: WELL, FOR PRACTICAL PURPOSES WHEN I USE THE WORD, IT MEANS INJURY.

IT DOESN'T ALWAYS MEAN PHYSICAL INJURY.

THERE IS BAROMETRIC TRAUMA; THERE IS HEAT TRAUMA; THERE IS TRAUMA DUE TO EXPOSURE TO COLD.

TRAUMA I THINK HAS A BROADER MEANING. IT ISN'T ONLY FORCE.

IT IS ALSO OTHER PHYSICAL PARAMETERS LIKE I HAVE INDICATED, LIKE HEAT, YOU KNOW, IF YOU ARE DIVING, THE BAROMETRIC PRESSURE TYPE OF TRAUMA, THAT CAN CAUSE DEATH, VARIOUS OTHER ASPECTS OF PHYSICAL INJURY ALSO ARE, CAN OPERATE AND CAUSE TRAUMA, SO THAT -- OR CAUSE INJURY.

WHEN YOU DISSECT THE TERMS THE WAY YOU ARE DOING, OF COURSE, WE ARE ALL GOING TO GET VERY MIXED UP.

BUT IT IS REALLY VERY SIMPLE.

WHAT WE MEAN HERE THIS CHILD WAS INJURED BY MEANS OF PHYSICAL FORCE, NOT BY MEANS OF FIRE OR DROWNING

OR BEING PUT IN A DECOMPRESSION CHAMBER OR SOMETHING OF THAT SORT.

Q. I AM SORRY.

YOU SAID WHEN I -- IT IS THE DISSECTION OF THE TERMS THAT LEADS TO THE CONFUSION?

A. WELL, I AM NOT CONFUSED. I DON'T KNOW ABOUT ANYBODY ELSE.

BUT IF YOU START GOING AROUND IN CIRCLES, PRETTY SOON WE ARE GOING TO BE GOING AROUND IN CIRCLES.

AND YES, YOU CAN START GOING AROUND IN CIRCLES IF YOU SO WISH.

BUT THE COMMON INTENT AND MEANING OF IT IS VERY CLEAR.

Q. EVEN THOUGH THE DICTIONARY MAY SEEM TO BE REDUNDANT?

A. WE DON'T USE DICTIONARIES IN PRACTICAL TERMS.

I DON'T CONSULT A DICTIONARY EVERY TIME. THIS IS HOW WE SAY IT.

THIS IS WHAT WE MEAN.

Q. WELL, DOCTOR, IN THIS CASE YOU DESCRIBED AMONG OTHER THINGS A BRUISE ON A FOREHEAD; IS THAT CORRECT?

A. YES.

Q. NOW, THAT BRUISE ON THE FOREHEAD WOULD NOT BE SUFFICIENT TO CAUSE DEATH, WOULD IT, IN AND OF ITSELF?

A. THAT'S RIGHT.

Q. ALL RIGHT.

YOU DESCRIBED A SCRATCH ON A NOSE,

A. YES.

Q. AND THAT SCRATCH ON THE NOSE IN AND OF ITSELF WOULD NOT BE SUFFICIENT TO CAUSE DEATH, WOULD IT?

A. THAT'S CORRECT.

Q. AND YOU DESCRIBED A MARK OR SOMETHING ON A CHEEK.

AND THAT MARK IN AND OF ITSELF WOULD NOT HAVE BEEN SUFFICIENT TO CAUSE DEATH?

A. I HAVE DESCRIBED SEVERAL MARKS ON THE CHEEK IN THE CHEEK TISSUES AND NO, IF THERE HAD BEEN NOTHING ELSE INVOLVED, THE ANSWER IS NO.

Q. ALL RIGHT.

BUT LET US GET TO -- LET US MOVE TO THE AREA THAT WE CALL THE NECK.

YOU DESCRIBED VARIOUS INJURIES TO THE NECK; IS THAT CORRECT?

A. I DESCRIBED INJURIES TO THE NECK, YES.

Q. AND DID YOU DESCRIBE AN INJURY OR A TRAUMA TO THE LARYNX?

A. YES.

Q. ALL RIGHT. WHAT IS THE LARYNX?

A. IT IS THE ANATOMICAL STRUCTURE THAT INCLUDES THE VOCAL CORDS AND IT IS CALLED THE THYROID CARTILAGE.

ACTUALLY THERE IS ANOTHER, THE CRICOID CARTILAGE I BELIEVE IS -- WELL, NO.

THE CRICOID CARTILAGE IS PROBABLY NOT INCLUDED UNDER THE TERM LARYNX.

IT IS AN ANATOMIC AREA WHICH INCLUDES THE VOCAL CORDS AND THE MAIN COMPONENT IS THE THYROID CARTILAGE.

Q. IS THE TERM VOICE BOX USED FOR LARYNX, NOT YOU BY YOU?

A. I USE THE TERM SOMETIMES.

BASICALLY THE LARYNX IS THE VOICE BOX.

Q. AND THAT IS SOMEWHERE HERE IN THE NECK AREA?

A. YEAH, WELL, IT IS NOT SOMEWHERE. IT IS IN A SPECIFIC AREA OF THE NECK.

Q. WHERE IS IT, DOCTOR?

A. IF YOU PUT YOUR FINGER ON THE MIDDLE LINE OF YOUR NECK NEAR YOUR CHIN AND TALK, YOU CAN FEEL YOUR LARYNX MOVING.

Q. SO WHERE -- IN THIS AREA WHERE I AM POINTING?

A. YES. YES.

Q. YOU TESTIFIED I BELIEVE, DOCTOR, THAT IF THERE WAS A TRAUMA TO THIS AREA THAT COULD HAVE BEEN CAUSED BY SOME SORT OF STRANGULATION OR SOMETHING; IS THAT RIGHT?

A. WELL, WHAT I SAID WAS THAT THERE IS TRAUMA TO HER NECK.

SOME OF THE TRAUMA IN MY OPINION IS CAUSED BY JUST A SINGLE POINT OF PRESSURE WHICH WOULD NOT NECESSARILY HAVE TO INCLUDE A CIRCUMFERENTIAL GRABBING OF THE NECK.

HOWEVER, THERE IS ALSO TRAUMA TO THE LARYNX ON THE RIGHT SIDE WHICH USUALLY IS CAUSED BY A CIRCUMFERENCE OF THE NECK SUCH AS USED IN A STRANGULATION TYPE MANEUVER.

Q. WHAT OTHER SOURCES OF THAT INJURY ARE THERE?

A. NOT TOO MANY MORE.

THAT'S BASICALLY IN PRACTICE IN A CASE LIKE THIS, THAT'S ABOUT IT.

Q. WHAT OTHER SOURCES COULD THERE REASONABLY BE?
A. NONE.
Q. YOU SAID THAT LIGATURE YOU COULD RULE OUT?
A. WELL, IN MY OPINION TAKING THE CASE AS A WHOLE, THE INJURIES IN THIS AREA AS A WHOLE, I DON'T THINK A LIGATURE WAS USED.

A LIGATURE IS LESS LIKELY TO CAUSE TRAUMA WAY OUT TO THE SIDES OF THE LARYNX.

IT CAN, OF COURSE, BUT IN A CHILD ESPECIALLY THAT AREA IS VERY FLEXIBLE, AND IF A LIGATURE HAD BEEN USED, IT WOULD HAVE HAD TO HAVE BEEN USED FAIRLY TIGHTLY.

THERE ARE NO EXTERNAL LIGATURE MARKS.

THERE REALLY ISN'T ANYTHING IN THE MIDLINE, AND THERE AREN'T THAT MANY PETECHIAL HEMORRHAGES.

A POINT INJURY LIKE THAT TO THE SIDES OF THE LARYNX IS IN MY OPINION MORE LIKELY TO BE DUE TO A HAND.

Q. DOCTOR, MAYBE I AM GETTING CONFUSED, AND MAYBE I AM MISSTATING WHAT YOU SAID, BUT DIDN'T YOU SAY A MINUTE AGO THAT THERE WAS NO REASONABLE EXPLANATION OTHER THAN A HAND ON THE LARYNX AREA?
A. THAT'S CORRECT.
Q. AND NOW, DIDN'T YOU JUST NOW SAY THAT THE HAND IS MORE LIKELY THAN THE LIGATURE BUT YOU CAN'T RULE OUT LIGATURE?
A. NO, I DIDN'T SAY THAT.

I GAVE THE REASONS WHY I AM RULING OUT LIGATURE.

Q. NOW, BUT DIDN'T YOU SAY I DON'T THINK AND

DIDN'T YOU SAY THAT YOU ARE LEANING TOWARDS?

A. THAT'S THE WAY MY MIND WORKS.

MY CONCLUSION AFTER DELIBERATING WHICH WAS -- I WAS DELIBERATING IN MY ANSWER --

MY CONCLUSION IS THAT IN THIS PARTICULAR CASE IN MY OPINION IT WAS A HAND.

Q. BUT YOU ARE SAYING THAT YOU HAVE CONSIDERED THE --

AND SO THAT WE ARE CLEAR, WHAT IS A LIGATURE?

A. A LIGATURE IS ANYTHING THAT CAN ENCIRLCE THE NECK, SPECIFICALLY, SINCE WE ARE DIFFERENTIATING BETWEEN HAND AND NONHAND, OTHER THAN A HAND.

Q. SO ON THE INJURIES TO THE NECK YOU SAY NO TO LIGATURE BUT PROBABLY TO THE HAND; IS THAT CORRECT?

A. I DIDN'T SAY PROBABLY. I SAID A HAND IN MY OPINION.

Q. ALL RIGHT.

SO THAT WOULD BE HAND, YES.

AND NOW, THE INJURIES THAT YOU HAVE DESCRIBED TO THE DECEDENT'S NECK ARE THOSE INJURIES SUFFICIENT TO CAUSE, IN AND OF THEMSELVES, ARE THEY SUFFICIENT TO CAUSE DEATH?

A. YES.

Q. DOCTOR, I WONDER IF YOU COULD TAKE A LOOK AT THIS CHART WE HAVE MADE HERE LABELED E AND TELL ME IF THE CHART ACCURATELY REFLECTS YOUR TESTIMONY?

A. YES.

Q. THANK YOU.

AND, DOCTOR, THE INJURIES TO THE NECK IN AND OF THEMSELVES COULD BE SUFFICIENT TO CAUSE DEATH; IS THAT CORRECT?

A. YES.

Q. AND SO EVEN WITHOUT THE INJURY TO THE FOREHEAD, THESE COULD HAVE CAUSED DEATH?

A. YES.

Q. EVEN WITHOUT THE INJURY TO THE NOSE OR THE CHEEK, THESE COULD HAVE CAUSED DEATH?

A. YES.

Q. EVEN WITHOUT THE INJURIES TO THE GENITALS THESE COULD HAVE CAUSED DEATH?

A. YES.

MR. SHEAHEN: MAY I PRINT THIS, YOUR HONOR?

THE COURT: YOU MAY.

MR. SHEAHEN: THANK YOU.

Q. BY MR. SHEAHEN: DOCTOR, YOU MENTIONED YESTERDAY I BELIEVE YOU BROUGHT UP THE SUBJECT OF PROCTOLOGY; IS THAT CORRECT?

A. YES.

Q. AND COULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT PROCTOLOGY IS?

A. THERE ARE SURGEONS WHO SPECIALIZE IN THE LOWER GASTROINESTINAL TRACT AND THEY OFTEN ARE CALLED PROCTOLOGISTS.

Q. NOW, DOCTOR, YOU ARE NOT A PROCTOLOGIST, ARE YOU?

A. NO.

Q. BUT A PROCTOLOGIST, AMONG OTHER THINGS, DEALS WITH THE ANUS; IS THAT CORRECT?

A. YES.

Q. AND WITH THE ANAL SPHINCTER?

A. YES.

Q. THAT IS THE ANAL OPENING?

A. WELL, THE SPHINCTER IS THE MUSCLE AROUND THE ANAL OPENING.

Q. THE SPHINCTER IS THE SKIN RIGHT AROUND THE ANAL OPENING OR THE MUSCLE?

A. THE SPHINCTER IS THE MUSCLE AROUND THE ANAL OPENING.

Q. DOCTOR, MR. BERMAN ASKED YOU YESTERDAY AFTER YOUR EXAMINATION OF THE ANAL OPENING IN THIS CASE WHETHER THE INJURIES YOU OBSERVED THERE WERE CONSISTENT WITH THE INSERTION OF AN OBJECT SUCH AS A MALE PENIS.

DO YOU RECALL THAT QUESTION?

A. YES.

Q. AND YOUR ANSWER WAS THAT THERE WAS SUCH A CONSISTENCY; IS THAT CORRECT?

A. YES.

Q. ARE YOU ABLE TO CONCLUDE BASED YOUR EXAMINATION OF THESE INJURIES THAT THESE INJURIES WERE CAUSED BY THE MALE PENIS AND BY NO OTHER IMPLEMENT?

I THINK THAT CALLS FOR A YES OR NO, DOCTOR, WITH ALL RESPECT.

MR. BERMAN: WELL, I AM GOING TO OBJECT BECAUSE I THINK THE WITNESS IS ENTITLED TO ANSWER IT AS LY AND AS

COMPLETELY AS THE WITNESS FEELS IS NECESSARY.

THE COURT: SHE IS.

LET'S HEAR YOUR ANSWER.

THE WITNESS: WELL, MY ANSWER WOULD BE IT WOULD HAVE TO BE A PENIS OR AN OBJECT VERY MUCH LIKE A PENIS IN TERMS OF SIZE, CONSISTENCY, SMOOTHNESS. THOSE KINDS OF CHARACTERISTICS.

Q. BY MR. SHEAHEN: SO WOULD IT BE CORRECT, DOCTOR, THAT IF YOU ARE TALKING -- IS THE TERM CORRECT A CIRCULAR OBJECT WITH A ONE INCH CIRCUMFERENCE; IS THAT WHAT WE ARE TALKING ABOUT?

A. I DON'T KNOW WHAT WE ARE TALKING ABOUT RIGHT NOW.

Q. WHAT IS THE CIRCUMFERENCE WE ARE TALKING ABOUT HERE?

A. CIRCUMFERENCE OF WHAT?

Q. OF THE OBJECT THAT WE ARE TALKING ABOUT THAT CAUSED THE ANAL INJURY?

A. ABOUT THAT OF AN ERECT MALE PENIS.

Q. WHAT IS THE MEASUREMENT?

A. IT IS PROBABLY ABOUT AN INCH AND A HALF, TWO INCHES, MAKE IT AN INCH AND A HALF.

Q. DOCTOR, YOU EXAMINED THE DECEASED IN THIS CASE, DIDN'T YOU?

A. YES.

Q. AND YOU EXAMINED THE ANAL INJURIES IN THIS CASE?

A. YES.

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Q. AND YOU DID THAT IN YOUR CAPACITY AS THE OFFICIAL MEDICAL EXAMINER FOR THE CORONER'S OFFICE?

A. THAT'S CORRECT.

Q. WHAT IS THE EXACT DIAMETER OF THE INJURY TO THE ANUS?

A. THAT IS NOT SOMETHING THAT CAN BE DETERMINED.

IT IS A RELATIVE TYPE OF THING. THERE IS A CERTAIN SIZE TO THAT CHILD'S ANUS.

THERE IS A CERTAIN CAPACITY OF THAT SPHINCTER TO DILATE.

AND ALL WHAT I AM SAYING IS THAT THE EVIDENCE IS THAT THAT CAPACITY HAS BEEN EXCEEDED, AND IN MY OPINION AN OBJECT SUCH AS AN ERECT MALE PENIS COULD EXCEED THE CAPACITY OF THAT SPHINCTER AND THOSE TISSUES TO DILATE NORMALLY.

Q. DOCTOR --

A. BUT I DON'T KNOW TO WHAT EXTENT THAT WAS EXCEEDED.

ALL I CAN SAY, IN OTHER WORDS, IN TERMS OF NUMERICAL TERMS, I CAN TELL YOU IN TERMS OF THE TYPE OF INJURIES THAT HAVE BEEN SUSTAINED WHICH IS MORE OF A QUALITATIVE DESCRIPTION, BUT I CANNOT GIVE YOU A QUANTITATIVE ANSWER.

Q. NOW, DOCTOR, THE ANAL INJURY COULD HAVE BEEN CAUSED BY ANY NUMBER OF FOREIGN OBJECTS, COULDN'T IT?

A. IT COULD HAVE BEEN CAUSED BY SOME FOREIGN OBJECTS, YES.

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Q. IN ADDITION TO THE MALE PENIS, WHAT COULD HAVE CAUSED THE INJURIES, WHAT FOREIGN OBJECTS?

A. WELL, THERE ARE DILDOS THAT ARE BUILT LIKE A HUMAN PENIS AND SOME SUCH OBJECT COULD HAVE BEEN USED OR COULD HAVE CAUSED THE INJURIES.

Q. A DILDO?

A. YES.

Q. ANY NUMBER AND ANY VARIETY OF DILDOS COULD HAVE CAUSED THE INJURY?

A. WELL, NOT LIMITLESS.

SOME OF THEM ARE MUCH LARGER AND THEY COULD HAVE ACTUALLY CAUSED MORE INJURY.

I DON'T KNOW WHETHER SOME OF THEM ARE SMALLER ARE OR NOT.

I HAVE SEEN THE LARGER ONES.

SO THAT, YOU KNOW, IT IS NOT LIMITLESS, BUT I AM SURE THERE ARE VARIOUS SIZES THAT COULD HAVE CAUSED THE INJURIES.

Q. ANYTHING ELSE, DOCTOR?

A. WELL, I HAVE NOT GIVEN THAT MATTER SPECIFIC THOUGHT.

I WOULD LIKE FOR YOU TO GIVE ME HYPOTHETICALS.

Q. FLASHLIGHT?

A. NO.

Q. MICROPHONE?

A. NO.

Q. A VASE?

A. NO.

Q. SHAPED APPROPRIATELY.

THAT IS, THE KIND OF VASE THAT HOLDS A SINGLE ROSE?

A. NO. NONE OF THEM ARE CYLINDRICAL ENOUGH AND THE OTHER OBJECTS I THINK WOULD HAVE CAUSED MORE ABRASION.

THERE IS NO ABRASION IN THIS PARTICULAR CASE.

THE LINING OF THE ANAL CANAL, THE CANAL OF THE VAGINAL ORIFICE, THE LINING OF THE RECTUM EVERYTHING IS IN TACT.

SO THERE IS ABSOLUTELY NO ABRASION EVIDENCE. THERE IS JUST THE EVIDENCE OF THE RATHER MARKED STRETCHING WITH THE TEARING OF THE TISSUES.

Q. DOCTOR, SO IT COULD BE A PENIS, COULD BE A DILDO, BUT EVEN THOUGH THERE MAY BE OTHER OBJECTS OF THE SAME SHAPE, YOU DISCOUNT THOSE OBJECTS BECAUSE OF THE LACK OF ABRASION; IS THAT CORRECT?

A. WELL, NOT REALLY.

I DON'T DISCOUNT THEM, BUT THE OBJECTS YOU HAVE MENTIONED I DON'T THINK WOULD BE SUITABLE OBJECTS IN THIS PARTICULAR CASE.

Q. DOCTOR, HYPOTHETICALLY IF I TAKE THE MICROPHONE THAT IS IN FRONT OF YOU AND BREAK IT OFF AND LUBRICATE IT SUFFICIENTLY, COULD THAT BE USED TO CAUSE THESE INJURIES?

USING -- IF I BREAK IT OFF AND USE THE END, THE OTHER END THERE, NOT THE END RIGHT IN FRONT OF YOU, BUT THE SILVER PART OF IT.

MR. BERMAN: I AM GOING TO OBJECT TO THE QUESTION,

YOUR HONOR.

ASSUMES A FACT NOT IN EVIDENCE IN THIS CASE.

THE COURT: OVERRULED.

YOU CAN ANSWER.

THE WITNESS: WELL, YES. I GUESS IT COULD.

IF YOU LUBRICATED IT WELL ENOUGH AND INSERTED IT VERY CAREFULLY SO THAT IT NOT ABRADE OR LACERATE.

Q. BY MR. SHEAHEN: SO THERE ARE OBJECTS OTHER THAN PENIS AND DILDO THAT ARE CONSISTENT WITH THE INJURIES THAT THIS ANUS RECEIVED?

A. YES.

MR. BERMAN: I AM GOING TO OBJECT TO THE QUESTION, YOUR HONOR.

IT ASSUMES A FACT NOT IN EVIDENCE THAT THERE WAS A LUBRICANT USED.

I ASK THAT THE ANSWER BE STRICKEN AT THIS TIME AS WELL.

THE COURT: YOU CAN BRING THAT UP ON CROSS -- ON REDIRECT.

OBJECTION IS OVERRULED.

Q. BY MR. SHEAHEN: DOCTOR, QUESTION WITH RESPECT TO THE ANAL INJURIES.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. SHEAHEN: THANK YOU.

Q. BY MR. SHEAHEN: DOCTOR --

THE COURT: THERE WAS MORE TO NUMBER THREE.

CAREFULLY INSERTED SO AS NOT TO CAUSE

ABRASIONS.

Q. BY MR. SHEAHEN: IS THAT CORRECT, DOCTOR?

A. YES.

THE COURT: FOR THE RECORD I AM MAKING REFERENCE TO A CHART MR. SHEAHEN IS DRAWING ON A BOARD.

Q. BY MR. SHEAHEN: DOCTOR, ON THE QUESTION OF ANAL INJURIES, WHEN SOMETHING IS -- ALTHOUGH YOU ARE NOT A PROCTOLOGIST, YOU HAVE SOME FAMILIARITY WITH ANAL INJURIES; IS THAT CORRECT?

A. YES.

Q. AND WHEN SOMETHING IS INSERTED INTO AN ANUS, SOMETHING THAT IS LARGER THAN THE ANAL OPENING, WHAT IS THE RESPONSE OF THE SPHINCTER?

DOES IT EXPAND?

A. YES.

Q. COULD YOU DESCRIBE THAT PROCESS FOR US?

A. HOW? I MEAN FROM WHAT POINT OF VIEW?

Q. ASSUMING THAT A DILDO IS INSERTED INTO AN ANUS, DOES THE ANUS EXPAND AND HOW DOES THAT OCCUR OR WHAT IS THE PROCESS?

A. IF THE DILDO IS INSERTED FORCEFULLY ENOUGH, WE ARE TALKING ABOUT A DILDO THAT IS LARGER THAN THE NORMAL FUNCTIONAL CONDITION OF THE ANUS, THEN THE SPHINCTER MUSCLE WILL BE STRETCHED.

AND, OF COURSE, THE STRETCHING AND AGAIN I AM NOT A MATHEMATICIAN, BUT I BELIEVE THE STRETCHING IS PRETTY WELL RADIAL.

HOWEVER, THE TENSION IS ON THE PART OF THE

STRUCTURE WHICH HAS THE LEAST -- DISTENSION MAY NOT BE UNIFORM BECAUSE UNLESS THE DILDO IS INSERTED FULLY, IN SUCH A WAY THAT THE FORCES ARE UNIFORMLY DISTRIBUTED, IN OTHER WORDS, IF THERE IS AN ANGLE AT THE INSERTION, THERE MAY BE FORCES THAT ARE RADIAL BUT AS FAR AS -- FORCES ARE ALWAYS RADIAL -- BUT THEY MAY BE GREATER IN SOME AREAS THAN OTHERS, AND I BELIEVE THAT'S WHERE THE LACERATIONS COME IN.

Q. DOCTOR, WHEN YOU INSERT AN OBJECT SUCH AS A DILDO INTO AN ANUS, ISN'T IT CORRECT THAT THE ANAL OPENING EXPANDS?

A. DILATES WOULD BE THE WORD.

Q. HOW DO YOU SPELL THAT?

A. D-I-L-A-T-E-S.

Q. DILATES, AND MEANS IT GETS BIGGER; IS THAT CORRECT?

A. YES.

Q. WHAT HAPPENS WHEN YOU REMOVE THE OBJECT FROM THE ANAL AREA?

A. WE ARE STILL TALKING ABOUT AN OBJECT THAT IS CAUSING TRAUMA?

Q. SAME DILDO.

A. THE ANAL OPENING IS GOING TO STAY WIDER THAN IT WAS PRIOR TO THE INSERTION.

THE MUSCLE WILL HAVE LOST ITS TONE, T-O-N-E, AND IT WILL NOT CONSTRICT BACK AGAIN.

Q. ISN'T IT ORDINARY, DOCTOR, THAT WHEN A LARGE OBJECT PASSES THROUGH AN ANAL OPENING THAT THE ANUS EXPANDS BY THE PASSING THROUGH OF THE LARGE OBJECT AND THEN -- OR

DILATES TO USE YOUR WORDS -- AND THEN CONTRACTS, THAT IS, GETS SMALLER AGAIN?

A. ONE OF THE FINDINGS IN SEXUAL ABUSE OF CHILDREN, WHICH IS VERY WELL DESCRIBED IN DR. HEGER'S BOOK, THAT THAT DOES NOT HAPPEN.

IF WE ARE REFERRING ABOUT FECAL MATERIAL, WE ARE TALKING ABOUT FECAL MATERIAL FALLS INTO PHYSIOLOGIC LIMITS AND UNDER ORDINARY BODY PHYSIOLOGY CONDITIONS, WHAT YOU ARE SAYING IS TRUE.

WE ARE NOT TALKING ABOUT A PHYSIOLOGICAL CONDITION, AND WHAT YOU ARE SAYING IS NOT TRUE.

Q. DOCTOR, YOU HAVE AN ANAL OPENING, IS IT YOUR TESTIMONY THAT IN THE NORMAL COURSE OF THE HUMAN BODY SYSTEM IF THERE IS SOMETHING LARGER THAN THE ANAL OPENING WHICH GOES THROUGH THE ANAL OPENING, WHETHER IT BE FECAL MATERIAL OR WHATEVER, THAT THE ANUS WILL EXPAND FOR THAT MATERIAL TO BE INSERTED OR TO PASS THROUGH; IS THAT CORRECT?

A. WELL, IN NORMAL FUNCTIONING THERE IS NOTHING THAT GETS INSERTED.

THERE IS FECAL MATERIAL THAT GOES OUT.

AND THERE IS TO MY KNOWLEDGE NO CORRELATION BETWEEN CONSTIPATION AND DILATATION OF THE ANUS SUCH AS IS SEEN BETWEEN DILATATION OF THE ANUS AND SODOMY IN CHILDREN.

Q. DOCTOR, SO IT IS CORRECT THEN THAT IN THE NORMAL COURSE OF SOMETHING PASSING THROUGH THE ANUS, THE ANUS WILL EXPAND; IS THAT CORRECT NORMALLY?

A. YES, YES.

Q. IT IS ALSO CORRECT, DOCTOR, THAT IN THE NORMAL

COURSE OF THINGS PASSING THROUGH THE ANUS AFTER WHATEVER IT IS HAS PASSED THROUGH THE ANUS, THE ANUS WILL CONTRACT?

A. YES.

Q. AND IT IS ALSO TRUE I BELIEVE, DOCTOR, YOU TESTIFIED THAT YOU HADN'T READ DR. HEGER'S BOOK; ISN'T THAT CORRECT?

A. I HAVE TALKED TO DR. HEGER HERSELF.

Q. BUT YOU HAVEN'T READ HER BOOK, HAVE YOU?

A. NO.

Q. SO YOU DON'T KNOW WHAT IS IN DR. HEGER'S BOOK ON THIS ISSUE, DO YOU?

A. I HAVE NOT SPECIFICALLY READ IT. I HAVE SOME IDEA WHAT IS IN IT.

Q. BUT YOU HAVEN'T READ THE BOOK, HAVE YOU?

A. THAT'S CORRECT.

Q. AND BUT YOU -- ARE YOU SUGGESTING NOW -- CORRECT ME IF I AM WRONG -- THAT ALTHOUGH IN THE ORDINARY HUMAN BODY YOU HAVE ANAL DILATION OR EXPANSION FOLLOWED BY ANAL CONTRACTION, THAT THERE IS AN EXCEPTION TO THIS FOR CASES INVOLVING CHILDREN?

A. THAT'S NOT CORRECT. YOU ARE NOT QUOTING ME COMPLETELY.

Q. DOCTOR, NORMALLY, SO THAT WE ARE CLEAR ON THIS, NORMALLY THE ANUS WILL CONTRACT AFTER THE OBJECT OR WHATEVER HAS PASSED THROUGH OR IS REMOVED; IS THAT CORRECT?

A. YES.

Q. AND THAT'S WHAT HAPPENS, AND IN ORDER FOR THAT TO HAPPEN, FOR THE ANAL CONTRACTION TO OCCUR, THE BODY

SYSTEMS MUST BE FUNCTIONING; ISN'T THAT CORRECT?

A. WELL, THEY MUST BE FUNCTIONING WITHIN CERTAIN PARAMETERS, WHICH TO MAKE IT VERY BRIEF, I USE THE TERM WITHIN PHYSIOLOGIC PARAMETERS.

Q. THAT IS, IF A PERSON, FOR EXAMPLE, IS DEAD, THE BODY SYSTEMS AREN'T WORKING AND THE ANUS WILL NOT CONTRACT?

A. NO, THAT'S NOT CORRECT.

Q. DOES THE ANUS CONTRACT IN A DEAD PERSON?

A. ONCE A PERSON IS DEAD THERE IS NO FURTHER CONTRACTION, BUT A PERSON CAN DIE OR ACTUALLY A NORMAL PERSON DIES I WOULD SAY UNDER ALL CIRCUMSTANCES OR 99.999999 OF CIRCUMSTANCES WITH THE ANAL MUSCLE IN A STATE OF PARTIAL CONSTRICTION.

THAT IS THE STATUS OF THE ANAL SPHINCTER AT THE TIME OF DEATH, AND THE MUSCLE STAYS IN THAT CONDITION UNTIL THE BODY BEGINS DECOMPOSING AT WHICH POINT IT DOES LOSE ITS CONTRACTION AND DOES DILATE.

MR. SHEAHEN: YOUR HONOR --

THE COURT: YES.

MR. SHEAHEN: ARE WE GOING TO GOING TO BREAK AT ALL THIS MORNING?

THE COURT: I WASN'T PLANNING ON IT. DO YOU NEED ONE?

MR. SHEAHEN: PLEASE.

THE COURT: WE WILL TAKE TEN MINUTES.

LADIES AND GENTLEMEN, WE WILL PICK IT UP AT TWENTY MINUTES AFTER 11:00.

PLEASE RETURN TO COURT AT THAT TIME.
REMEMBER ALL THE USUAL ADMONITIONS.

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, OUT
OF THE PRESENCE AND HEARING
OF THE JURY:)

THE COURT: WE ARE OUTSIDE THE PRESENCE OF THE JURY.
EVERYONE IS ORDERED TO BE IN PLACE IN TEN MINUTES.
WE WILL PICK IT UP RIGHT ON TIME.

(RECESS.)

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, IN
THE PRESENCE AND HEARING OF
THE JURY:)

THE COURT: BACK ON THE RECORD IN PEOPLE VERSUS PANAH.
DEFENDANT IS PRESENT WITH MR. SHEAHEN AND MR. CHAIS.
PEOPLE ARE REPRESENTED BY MR. BERMAN AND MR. COUWENBERG.
ALL TWELVE JURORS AND [illegible] ALTERNATES ARE

SEATED IN THE JURY BOX.

DR. HEUSER IS ON THE WITNESS STAND.

SHE REMAINS UNDER OATH.

MR. SHEAHEN, YOU MAY CONTINUE WITH YOUR CROSS.

MR. SHEAHEN: THANK YOU.

Q. BY MR SHEAHEN: DR. HEUSER, IN THIS CASE WHEN YOU EXAMINED THE ANAL SPHINCTER OF THE DECEASED, DID YOU DETERMINE THAT THE SPHINCTER AREA DID NOT CONSTRICT AFTER THE OPENING?

A. WELL, I GUESS YES.

YOUR QUESTION IS A LITTLE UNUSUALLY PHRASED, BUT I GUESS I WOULD SAY YES.

Q. DOCTOR, YOU MENTIONED A VARIETY OF BRUISES AND WHAT HAVE YOU OTHER THAN THE NECK AND ANAL INJURIES.

FOR EXAMPLE, A BRUISE ON THE DECEDENT'S BACK. DO YOU REMEMBER TALKING ABOUT THAT?

A. WELL, I REMEMBER TALKING ABOUT A BRUISE ON THE BUTTOCK.

Q. YOU TALKED ABOUT ALSO A BRUISE ON THE SHOULDER; IS THAT CORRECT?

A. YOU MEAN ON THE CLAVICLE, THE COLLAR BONE; IS THAT WHAT YOU MEAN?

Q. MY NOTES SAY SHOULDER BRUISE. YOU CORRECT ME IF I AM WRONG, DOCTOR.

A. WELL, I RECALL TWO BRUISES AROUND THE RIGHT COLLAR BONE.

I BELIEVE IT IS THE RIGHT. I BE E IT IS THE

RIGHT. I MAY BE WRONG.

I WOULD HAVE TO REFER TO MY NOTES.

Q. DOCTOR, WHEN DID THE DECEASED RECEIVE THE BRUISES ON THE SHOULDER?

A. ALL THE BRUISES SHE HAS ARE CONTEMPORANEOUS.

THERE IS NO REASON TO THINK THAT OCCURRED DURING A SEPARATE INCIDENT.

Q. ALL THE BRUISES SHE HAS ARE CONTEMPORANEOUS?

A. THEY ALL FORM A PATTERN.

Q. CONTEMPORANEOUS MEANS THAT THEY HAPPENED AT THE SAME TIME?

A. THE WAY I USE THE TERM THEY HAPPENED DURING THE SAME INCIDENT.

Q. DOCTOR, WITH REFERENCE TO WHAT I CALL THE BACK BRUISE AND YOU HAVE SAID IT IS A BUTTOCK BRUISE; IS THAT CORRECT?

A. WOULD YOU LIKE ME TO REFER TO MY NOTES?

Q. CERTAINLY.

A. THE ONLY BRUISE THAT I FOUND ON HER BACK IS IN HER UPPER OUTER LEFT BUTTOCK.

Q. AND WHAT DID YOU ATTRIBUTE OR WHAT WAS THE SOURCE OF THAT BRUISE?

A. IT IS A BRUISE WHICH I DESCRIBED AS ONE QUARTER INCH AND UNDER THE SURFACE OF THE SKIN.

IT IS CONSISTENT WITH A PRESSURE BRUISE.

Q. DOCTOR, INDICATING THAT YOU USED YOUR HANDS; IS THAT YOUR TESTIMONY?

A. I MEANT TO INDICATE IT IS LIKE THE OTHER.

11

BRUISES THAT SHE HAS, PUNCTATE, IN OTHER WORDS, AND IT IS CONSISTENT WITH THE PRESSURE OF A DIGIT.

Q. THAT BRUISE -- WASN'T IT YOUR TESTIMONY YESTERDAY THAT THE BRUISE WAS CAUSED BY BLUNT FORCE?

A. YES.

PRESSURE IS A FORM OF BLUNT FORCE IN WHICH THE VELOCITY IS JUST ABOUT ZERO.

THAT'S I BELIEVE WHAT I INDICATED.

Q. SO THAT BRUISE IN QUESTION COULD HAVE BEEN CAUSED BY THE PRESSURE OF A HAND BUT NOT THE PRESSURE OF A FLYING BASEBALL?

A. DEFINITELY NOT A FLYING BASEBALL.

Q. AND IT COULD HAVE BEEN CAUSED BY THE PRESSURE OF A HAND?

A. FINGER I SAID.

Q. OH, PRESSURE OF A FINGER.

A. IT IS A QUARTER INCH.

Q. I AM SORRY. I AM SORRY, DOCTOR.

I THOUGHT I HAD SEEN YOU USE YOUR HANDS BEFORE FOR ILLUSTRATION PURPOSES.

BUT IT IS A FINGER THAT COULD DO IT?

A. I BELIEVE YOUR QUESTION RIGHT AFTER THAT WAS SUCH THAT I ELABORATED ON MY ANSWER AND SAID THAT YES, I MEANT THE DIGIT BECAUSE I DON'T KNOW IF IT WOULD BE SPECIFICALLY ANY ONE OF THE FIVE FINGERS.

Q. AND IS THERE ANYTHING ABOUT THAT BRUISE IN AND OF ITSELF THAT TELLS YOU THE SOURCE OF THE BRUISE?

A. NO.

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I BELIEVE I WENT OVER THAT IN MY DIRECT EXAMINATION THAT IN AND OF THEMSELVES THESE ARE -- ONE CAN'T SAY WHAT CAUSED THEM, OTHER THAN CERTAIN TYPES OF BLUNT FORCE.

HOWEVER, TAKING THEM ALL INTO ACCOUNT TOGETHER, THEY ARE ALL CONSISTENT WITH FINGER PRESSURE.

Q. ALL RIGHT.

DOCTOR, YOU MENTIONED NOW ALL OF THESE BRUISES ARE CONTEMPORANEOUS.

DID YOU SAY THERE WERE FAINT BRUISES ON ONE OF THE ARMS?

A. I DESCRIBED SOME OF THEM AS FAINT REFERRING TO HOW THEY LOOKED ON THE SKIN SURFACE.

Q. DOES FAINT SUGGEST A POSSIBILITY AT LEAST OF SOMETHING THAT WASN'T CONTEMPORANEOUS?

A. NO. IT DOESN'T HAVE THAT IMPLICATION.

Q. AND IF ANY OF THESE BRUISES WERE -- ANY OF THESE BRUISES, THE BACK, ARM, SHOULDER, ANYTHING, WERE CAUSED BY A BASEBALL OR BY A FALL OR ANY NUMBER OF A THOUSAND OTHER THINGS, WOULD YOUR EXAMINATION DISCLOSE THAT?

A. THEY ARE NOT CAUSED BY A BASEBALL BECAUSE OF THEIR SIZE.

THEY ARE NOT CAUSED BY A FALL BECAUSE OF THEIR LOCATION.

AND IF THEY WERE CAUSED BY BASEBALLS OR FALLS, THEY WOULD HAVE A DIFFERENT DISTRIBUTION AND A DIFFERENT SIZE, AND I WOULD THEN BRING THAT UP AS A POSSIBLE CAUSATION.

Q. DIDN'T YOU MENTION, DOCTOR, WITH RESPECT TO THE BRUISE ON THE FOREHEAD, THAT IT WAS CAUSED BY SOMETHING FLAT?

A. I SAID THAT IT WAS CAUSED BY, YES, CONTACT WITH A FLAT SURFACE.

Q. AND DIDN'T MR. BERMAN ASK YOU WHETHER IT COULD BE CAUSED BY A WALL?

A. YES.

Q. AND DIDN'T YOU TESTIFY YES, IT COULD BE CAUSED BY A WALL?

A. YES, I DID.

Q. AND DIDN'T YOU ALSO TESTIFY THAT THE BRUISE ON THE FOREHEAD COULD BE CAUSED BY A FLOOR?

A. YES.

Q. AND WHEN ASKED WHETHER IT COULD BE CAUSED BY A FIST, DIDN'T YOU ALSO SAY THAT THE BRUISE WAS MORE CHARACTERISTIC OF A FLAT SURFACE SUCH AS A WALL OR A FLOOR?

A. YES.

Q. DOCTOR, WITH RESPECT TO ANY VAGINAL INJURIES, IT IS CORRECT THAT YOU FOUND NO LACERATIONS IN THE VAGINAL AREA?

A. NOT IN THE SURFACE, NO.

I DID FIND LACERATIONS DEEPER IN THE VAGINAL TISSUES.

Q. AND NO OBVIOUS TEARS OF ANY KIND?

A. NOT FROM THE EXTERNAL SURFACE BUT DEEP IN THE TISSUES THERE WERE SOME TEARS, YES.

Q. AND YOU SAID THAT THERE WAS -- THAT THERE WAS

SOME AMOUNT OF BRUISING OR SOMETHING; IS THAT CORRECT?

A. YES.

Q. I THINK YOU SAID THAT IT, THAT THE BRUISING, WOULD BE INCONSISTENT WITH THE MALE PENIS HAVING CAUSED THE BRUISING?

A. YOU MEAN IN THE VAGINA?

Q. YES.

A. WELL, I BELIEVE I SAID THAT A MALE PENIS COULD HAVE CAUSED SOME OF THE BRUISING ON THE SURFACE DURING AN ATTEMPT BUT I DON'T BELIEVE THERE WAS A PENETRATION OF THE VAGINA BY A MALE PENIS.

Q. NOW, YOU ALSO SAID THAT I THINK IT WAS THAT THE, WHATEVER THE CONDITION OF THE VAGINA WAS, IT COULD HAVE BEEN CAUSED BY A FINGER?

A. YES.

Q. AND IS THAT LIMITED, FOR EXAMPLE, TO THE FINGER OF AN ASSAILANT OR ASSAILANT?

A. YES.

Q. OR COULD IT BE CAUSED BY ANY FINGER?

A. WELL, IT IS AN ASSAULT TYPE INJURY.

SO IN THAT SENSE IT IS THE FINGER OF AN ASSAILANT.

THAT'S WHAT I INTENDED TO CONVEY, YES.

Q. BUT YOU DON'T KNOW THAT IT WAS CAUSED BY ANY SORT OF ASSAILANT, DO YOU?

YOU CAN'T SAY THAT FROM THE INJURY?

A. WELL, THIS IS NOT THE ONLY INJURY WE HAVE.

Q. NO, FROM THIS -- WE ARE TALKING ABOUT THIS

INJURY, DOCTOR.

A. OH, WELL, OKAY.

Q. THE VAGINA INJURY ONLY AND TAKING ONLY THE VAGINA INJURY, I MEAN IF -- WITH RESPECT TO THAT INJURY, IS THAT INJURY, FOR EXAMPLE, CONSISTENT WITH SOME SORT OF GYNECOLOGICAL TREATMENT GONE ASTRAY?

A. NO.

Q. WHY IS THAT, DOCTOR?

A. GYNECOLOGICAL TREATMENTS DON'T GO ASTRAY TO CAUSE INJURY OF THIS KIND.

Q. WELL, DOCTOR, MY QUESTION ASSUMES THAT THE GYNECOLOGICAL TREATMENT WENT ASTRAY.

I AM SAYING IF YOU HAVE A DOCTOR CONDUCTING A GYNECOLOGICAL EXAM, COULD THAT DOCTOR LEAVE THE KIND OF MARK THAT IS CAUSED OR THAT IS SHOWN IN THIS VAGINA INJURY?

A. WELL, I THINK WE BETTER DEFINE WHAT WE ARE TALKING ABOUT MORE CLEARLY.

I CAN'T ANSWER YOUR QUESTION.

I DON'T KNOW EXACTLY WHAT YOU ARE REFERRING TO.

Q. DR. HEUSER, IF A DOCTOR CONDUCTING A VAGINA EXAM INSERTS A FINGER IN THE VAGINA AREA, IS THE PATTERN THAT YOU SAW ON THIS DECEDENT CONSISTENT WITH THAT?

A. IF A DOCTOR INSERTED A FINGER INTO THE VAGINA OF THIS CHILD, THAT WOULD BE AN ASSAULT.

A DOCTOR WOULD NOT DO THAT AND, THEREFORE, WE WOULD BE TALKING ABOUT THE SAME THING. WE WOULD BE TALKING ABOUT AN ASSAULT.

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Q. DOCTOR, WITH ALL RESPECT THAT IS NOT MY QUESTION.

MY QUESTION IS BECAUSE YOU ARE SIMPLY EXAMINING THE INJURY, IS THE INJURY CONSISTENT WITH A FINGER SUCH AS THAT TOUCHING THE VAGINA AREA?

A. NO, IT IS NOT.

Q. THE INJURY IS NOT CONSISTENT WITH A FINGER HAVING TOUCHED THE VAGINA AREA?

A. THAT'S CORRECT.

Q. DIDN'T YOU TESTIFY EARLIER THAT THE INJURY WAS CONSISTENT WITH A FINGER HAVING TOUCHED THE VAGINA AREA?

A. I TESTIFIED THAT THE FINGER WAS INSERTED INTO THE VAGINA AREA AND PART OF AN EXAMINATION OF AN VAGINA AREA OF A CHILD LIKE THAT DOES NOT INCLUDE THE INSERTION OF A FINGER.

Q. DOCTOR, THE QUESTION GOES NOT TO YOUR KNOWLEDGE OF HOW PEOPLE IN YOUR BUSINESS CONDUCT EXAMINATIONS.

THE QUESTION GOES TO WHAT HAPPENS IF THE EXAMINATION IS CONDUCTED IN A CERTAIN WAY.

IF A DOCTOR OR ANY OTHER PERSON INSERTS A FINGER IN THE VAGINA AREA OF THIS DECEASED, IS THE INJURY TO THIS VAGINA AREA CONSISTENT WITH THAT HAVING OCCURRED?

A. YES.

Q. IS THERE ANYTHING ABOUT THIS VAGINA INJURY THAT ENABLES YOU TO TELL WHETHER --

ASSUME FOR PURPOSES OF THIS QUESTION THAT IT IS A FINGER.

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IS THERE ANYTHING ABOUT THE NATURE OF THIS VAGINA INJURY THAT ENABLES YOU TO TELL WHETHER THE FINGER WAS THAT OF AN ADULT MALE OR ADULT FEMALE?

A. I CAN'T ANSWER THAT NOT KNOWING THE SPECIFIC SIZES.

THE LARGER FINGER WOULD, IN ANY CASE WOULD BE THE ONE THAT WOULD BE MOST LIKELY TO HAVE CAUSED THAT, THE APPEARANCE OF THE VAGINA OPENING.

I WANT TO BE SPECIFIC.

I AM UNDERSTANDING YOUR QUESTIONS TO REFER TO THE VAGINAL OPENING ONLY BECAUSE THERE ARE OTHER INJURIES TO THE VAGINA WALL THAT HAVE NOTHING TO DO WITH WHAT WE ARE TALKING ABOUT.

Q. THAT'S CORRECT, DOCTOR.

A. THANK YOU.

Q. SO MY QUESTION IS CAN YOU TELL ANYTHING FROM THE INJURY WHETHER --

LET ME ALSO ASK THIS.

IS IT CONSISTENT, THE INJURIES THAT WE ARE TALKING ABOUT TO THE VAGINA AREA, ARE THEY CONSISTENT OR INCONSISTENT WITH THE INSERTION OF PART OF MORE THAN ONE FINGER, SUCH AS TWO FINGERS, THREE FINGERS, OR A FIST?

A. THERE IS A SIZE LIMIT.

I BELIEVE I GAVE THE SIZE OF THE VAGINA OPENING, WHICH WAS -- I HAVE TO LOOK IT UP IN THE DIAGRAM.

THE DIAMETER OF THE VAGINA OPENING WAS LESS THAN A HA AN INCH.

IT WAS BETWEEN A QUARTER AND THREE EIGHTHS

INCHES.

THE VAGINA OPENING IS NOT AS DISTENDABLE AS THE ANAL OPENING.

THEREFORE, IN MY OPINION POSSIBLY TWO SMALL FINGERS OR PART OF TWO FINGERS WITH AN ATTEMPT BUT CERTAINLY NOT ANYMORE THAN THAT, GIVEN THE ABSENCE OF LACERATIONS ALTHOUGH THERE IS NO HYMENAL TISSUE VISIBLE SO THAT SAY MAYBE TWO FINGERS.

Q DOCTOR, I'M SORRY. DID YOU SAY TWO SMALL FINGERS?

A WELL, I DID SAY TWO SMALL FINGERS, YES.

Q THANK YOU.

THERE'S NOTHING ABOUT YOUR EXAM, DOCTOR, THAT WOULD ENABLE YOU TO RULE OUT THE POSSIBILITY THAT THOSE TWO SMALL FINGERS BELONGED TO THE DECEASED HERSELF, IS THERE?

A THESE INJURIES CAUSED ACTUAL BRUISING. THEY WOULD HAVE BEEN VERY PAINFUL.

I BELIEVE THAT SOME CHILDREN DO INFLICT SERIOUS PAIN ON THEMSELVES. I DON'T BELIEVE THAT'S VERY COMMON.

THIS INJURY IS CLEARLY A VERY FRESH INJURY THAT IS OF THE SAME AGE, BASICALLY, AS HER OTHER INJURIES.

SO WITHIN THOSE PARAMETERS, I -- WITHIN THE TOTAL PICTURE, I THINK IT'S UNREASONABLE TO SUPPOSE THAT THIS CHILD INSERTED TWO OF HER OWN FINGERS INTO HER VAGINA AND INJURED HERSELF.

BUT, OF COURSE, AS A TECHNICALITY I CANNOT EXCLUDE IT.

Q BASED ON YOUR TECHNICAL EXAMINATION OF THE VAGINAL WOUNDS YOU CANNOT EXCLUDE THAT POSSIBILITY; IS THAT CORRECT?

A THAT'S CORRECT.

Q DOCTOR, YOU TESTIFIED, I BELIEVE, THAT THE DECEASED VOMITED?

A YES.

Q WHEN DID THAT OCCUR?

A DURING THE COURSE OF THESE ATTACKS -- EXCUSE ME -- THIS ATTACK WHICH RESULTED IN THE OCCURRENCE OF THE INJURIES THAT SHE HAD.

Q AND IS THAT BASED ON THE PRESENCE OF FLUIDS IN HER LUNGS?

A NO. IT'S BASED ON THOSE FACTORS WHICH I DISCUSSED ON DIRECT EXAMINATION.

Q YOU HAVE CONCLUDED THAT THE DECEASED VOMITED; IS THAT CORRECT?

A WELL, I OBSERVED THAT SHE VOMITED. IT'S NOT A CONCLUSION. IT'S AN OBSERVATION.

IT DOESN'T HAVE TO BE INTERPRETED. THERE'S GASTRIC CONTENTS IN HER AIRWAY. THAT'S BY DEFINITION VOMITING AND ASPIRATION.

THE ONLY WAY IT CAN GET THERE IS IF SHE VOMITS.

Q DOCTOR, I -- WHAT IS YOUR, FOR WANT OF A BETTER WORD, IN THIS QUESTION OF WHETHER SHE VOMITED, WHAT'S YOUR LEVEL OF SCIENTIFIC CERTAINTY?

A 100 PERCENT.

Q I'M SORRY?

A 100 PERCENT.

Q AND I ASSUME YOUR EXAMINATION DOESN'T REVEAL ANYTHING ABOUT WHETHER THERE IS VOMIT PRESENT ON ANY TOILET PAPER IN THIS CASE, DOES IT?

A THAT'S NO CONCERN TO ME. I DON'T --

THERE MAY OR MAY NOT BE.

IT WOULD BE IRRELEVANT TO MY FINDINGS.

Q DOCTOR, DO YOU -- WHEN YOU'RE EXAMINING A BODY, YOU SAID THAT -- I THINK WHEN WE STARTED THIS CROSS-EXAMINATION, YOU SAID THAT YOU DO NOT GET INVOLVED IN DETERMINING THE IDENTITY OF ANY ASSAILANTS; IS THAT CORRECT?

A WELL, I DO INDIRECTLY, BUT NOT DIRECTLY, NO.

Q AND IN THIS CASE, THERE'S NOTHING ABOUT YOUR EXAMINATION THAT WOULD LEAD YOU TO CONCLUDE THAT MR. PANAH AND NO OTHER PERSON WAS INVOLVED, BECAUSE THAT'S NOT YOUR FUNCTION; RIGHT?

A WELL, THAT'S CORRECT.

Q NOW, IN SOME CASES WHEN YOU ARE EXAMINING BODIES, WHEN YOU'RE CONDUCTING AUTOPSIES, DO YOU CONDUCT AN EXAMINATION FOR THE PRESENCE OF FOREIGN MATERIALS ON THE DECEASED?

A WELL, YES AND NO. WE HAVE A VERY COMPLICATED SYSTEM. WE'RE NOT LIKE A SMALLER JURISDICTION WHERE FEWER PEOPLE DO MORE FUNCTIONS.

WE SEPARATE OUR FUNCTIONS, SO THAT IF YOU MEAN LOOKING FOR TRACE EVIDENCE, AND LOOKING FOR PRESENCE OF MATERIAL ON THE BODY BEFORE IT COMES TO THE AUTOPSY TABLE, THE ANSWER IS NO. I DO NOT GET INVOLVED IN THAT.

THERE ARE OTHER PERSONNEL IN THE INVESTIGATIVE PROCESS WHOSE DUTY IT IS TO DO THAT.

WHAT I DO IS I CONDUCT MY AUTOPSY, AND IF I DETECT ANYTHING, THEN, OF COURSE, I RECOVER IT. BUT, AGAIN, I DO NOT -- THIS DEPENDS ON VISUAL EXAMINATION.

Q SO THAT I HEAR YOU PROPERLY, DOCTOR, IS IT YOUR TESTIMONY THAT WHEN CONDUCTING THE AUTOPSY, IF YOU -- IF YOU FIND TRACE EVIDENCE, YOU RECOVER IT?

A WELL, I MAKE A NOTE OF IT, YES.

I HAD A CASE, FOR INSTANCE, THE OTHER DAY WHERE THE PERSON WAS STABBED WITH A PIECE OF PAINTED WOOD, AND SURE ENOUGH IN THE WOUND THERE WAS A LITTLE PAINT CHIP.

SO, THE POINT IS IF YOU DO A DISSECTION CAREFULLY, YOU DO FIND THINGS LIKE THAT. AND THEN, OF COURSE, YOU SUBMIT THEM INTO EVIDENCE.

IN A GUNSHOT WOUND CASE, IF THERE'S POWDER WITHIN THE WOUND, I MAKE A NOTE OF THAT AND IT'S MY JOB TO RECOGNIZE IT THERE. I DON'T KNOW IF THAT ANSWERS YOUR QUESTION OR NOT.

Q LET ME TRY IT A LITTLE BIT MORE, DOCTOR.

IN A GUNSHOT CASE, IF YOU'RE EXAMINING A BODY, AND YOU FIND A BULLET INSIDE, YOU WILL TAKE OUT THAT BULLET, WILL YOU NOT?

A WELL, ONE OF THE PURPOSES OF THE AUTOPSY IN GUNSHOT WOUND CASES IS TO RECOVER THE BULLET.

THAT'S REALLY THE AIM OF THE AUTOPSY, SO, YES, THAT'S NOT THE TYPE OF RECOVERY THAT I THOUGHT YOU MEANT.

Q WELL, AND WHEN YOU REMOVE A BULLET, YOU WILL KEEP THAT AS EVIDENCE SO THAT OTHER PEOPLE CAN TRACE IT DOWN TO WHATEVER GUN WAS THE SOURCE OF THE BULLET OR WHATEVER; IS THAT CORRECT?

A YES.

Q WHEN YOU ARE CONDUCTING YOUR EXAMINATION, IF YOU FIND ON A BODY FOREIGN HAIR, HAIR FOLLICLES, WILL YOU REMOVE THOSE FOR PRESERVATION AS EVIDENCE?

A IT WOULD DEPEND ON THE CASE. IT WOULD DEPEND ON THE CIRCUMSTANCES.

ACTUALLY VERY RARELY DOES THAT HAPPEN, BECAUSE BY THE TIME THE BODY GETS TO ME, THERE'S NO WAY TO TELL WHERE THE HAIR CAME FROM.

THAT KIND OF RECOVERY IS WHAT I INDICATED IS DONE BY PEOPLE PRIOR TO THE ACTUAL AUTOPSY.

Q BUT THERE MIGHT BE A GIVEN CASE IN WHICH THAT WOULD OCCUR?

A I MAY HAVE HAD ONE OR TWO CASES IN THE FIFTEEN YEARS THAT I HAVE BEEN IN THE CORONER'S OFFICE WHERE SUCH AN OBJECT WAS SEEN AND WAS ACTUALLY FELT TO BE POSSIBLY VALUABLE ENOUGH TO BE SAVED.

Q AND DOES THE SAME GO FOR SKIN, FOR FOREIGN SKIN?

A I DON'T UNDERSTAND.

Q THAT IS IF THERE'S THE PRESENCE OF SOMEONE ELSE'S SKIN ON THE BODY OF THE DECEASED THAT

COMES TO YOUR ATTENTION, YOU WOULD COLLECT THAT?

A I DON'T SEE HOW THAT WOULD HAPPEN.

Q HOW ABOUT FLUIDS, DO YOU HAVE ANYTHING TO DO WITH FLUIDS? SEMEN? SALIVA? PERSPIRATION?

A THAT KIND OF RECOVERY IS DONE BY OUR FORENSIC TECHNICIANS.

Q NOW, IN THIS CASE, DOCTOR, WITH RESPECT TO THE AREAS THAT WE'VE DISCUSSED, WHETHER IT BE HAIR OR SKIN OR SEMEN, SALIVA, PERSPIRATION, ANY OF THOSE THINGS -- AS PART OF YOUR EXAMINATION HERE, DID YOU FIND ANYTHING ON THE BODY OF THE DECEASED OF THIS NATURE THAT WOULD YIELD EVIDENCE?

A WELL, I'M NOT SURE HOW TO ANSWER THAT.

I BELIEVE A SEXUAL ASSAULT KIT WAS OBTAINED. WE HAVE A PROCEDURE WHICH WE CARRY OUT ON CASES OF THIS KIND.

AS I INDICATED, WE DON'T DO THAT PERSONALLY. ONE OF OUR CRIMINALISTS DOES THAT, AND I DON'T HAPPEN TO KNOW THE RESULTS. I HAVE NOT SEEN THAT REPORT.

Q SO, DOCTOR, WITH RESPECT TO YOUR WORK THEN, YOU DIDN'T DO ANYTHING WITH RESPECT TO PRESERVING SEXUAL ASSAULT EVIDENCE?

A I PERSONALLY DID NOT, NO.

Q AND THERE WAS NOTHING ABOUT THE BODY OF THE DECEASED IN THIS CASE WHICH YIELDED TO YOU AS PART OF YOUR EXAMINATION THAT KIND OF EVIDENCE THAT YOU WOULD WANT TO PRESERVE?

A I GUESS THE ANSWER IS THAT'S CORRECT.

MR. SHEAHEN: THANK YOU.

MAY I HAVE ONE MOMENT, YOUR HONOR?

THE COURT: YOU MAY.

(COUNSEL CONFERRING.)

MR. SHEAHEN: I'D LIKE TO PRINT THE CHART, YOUR HONOR, IF I MAY?

THE COURT: DEFENDANT'S F?

MR. SHEAHEN: YES.

THE COURT: OKAY.

NO ADDITIONAL QUESTIONS?

MR. SHEAHEN: NO, YOUR HONOR.

THE COURT: MR. BERMAN, DO YOU HAVE REDIRECT?

MR. BERMAN: I HAVE NO QUESTIONS, YOUR HONOR.

THE COURT: MAY DR. HEUSER BE EXCUSED?

MR. BERMAN: NO OBJECTION.

THE COURT: DR. HEUSER, THANK YOU VERY MUCH. YOU ARE FREE TO LEAVE.

LADIES AND GENTLEMEN, WE'RE GOING TO EXCUSE YOU UNTIL 1:45 THIS AFTERNOON. COME BACK TO COURT AT 1:45.

OVER THE NOON HOUR DO NOT DISCUSS THE CASE. DO NOT FORM ANY FINAL OPINION ABOUT IT.

HAVE A NICE LUNCH AND WE'LL SEE YOU BACK

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LOS ANGELES, CALIFORNIA 90067

(213) 553-1275

001106

February 24, 1994

Hon. Cecil J. Mills
Presiding Judge of the Superior Court
Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012

To be placed in confidential file

re: People v. Hooman Panah, LA 015927

Dear Judge Mills:

Pursuant to a grand jury indictment alleging a special circumstances homicide, the above defendant is scheduled for arraignment in Department 100 on Friday, February 25, 1994. Because the defendant has become indigent, the court will be asked to appoint counsel for him. This letter addresses the question of whether under Penal Code section 987.2, considering the unique circumstances of this case, it would be appropriate to appoint counsel other than the public defender.

I.

There can be no doubt that Department 100 must be accorded the widest latitude in its determination of issues relating to appointment of counsel. Alexander v. Superior Court, 93 Daily App. Rpt. 2077 (Feb. 17, 1994). Nevertheless, it still remains clear that there may be circumstances wherein the interests of justice would be served by the appointment of a particular attorney. Harris v. Superior Court, 19 Cal.3d 786.

II.

In this case, defendant Panah is a Persian-born, Farsi-speaking immigrant. Though he is accused of killing a young girl, Panah has a documented history of mental instability and hospitalization -- both in Iran and in the United States. He has no criminal history, and, at the time of the incident, was employed at Mervyn's department store.

Since the day he came to the United States more than six years ago, defendant Panah has maintained a close personal relationship with Syamak Shafania, a Farsi-speaking member of the Bar. Throughout the time defendant attended Taft high school and Pierce college, Mr. Shafania acted as defendant's tutor, mentor and advisor. For more than six years defendant has reposed enormous trust and confidence in Mr. Shafania.

At the time of his November 1993 arrest in this case, defendant immediately turned to Mr. Shafania, his friend and confidant. When the case was first filed in division

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119 in Van Nuys, it was Mr. Shafania who stood by defendant's side. Throughout numerous appearances in the municipal court, Mr. Shafania served as counsel of record for defendant.

At the same time, Mr. Shafania and the Panah family had begun a search for co-counsel -- someone experienced and skilled in special circumstances cases. Having consulted with any number of attorneys, the Panah family selected Robert Sheahen, a criminal lawyer of more than 20 years experience in homicide cases. (Mr. Sheahen is not a downtown panel attorney but has served with distinction by court appointment in death cases in Santa Monica and Van Nuys.)

Retained for purposes of the preliminary hearing only, Mr. Sheahen and Mr. Shafania thoroughly prepared the case. Together they worked with an investigator, interviewed witnesses and even caused two psychiatrists to be appointed to assess the boy's troubled background. They sought out his prior mental hospital records in this country and initiated contacts with Farsi-speaking witnesses in Tehran. They further spent countless hours interviewing the defendant in jail, working with the prosecutor and developing the ability to insure the trust and cooperation of the Panah family. (Though the case was exhaustively prepared, the preliminary hearing itself was not held due to the district attorney's resort to the superseding indictment.)

III.

Under these circumstances, it appears likely that the court system would be saved a great deal of time and the taxpayers would be saved a great deal of money if Mr. Sheahen and Mr. Shafania are appointed as counsel for defendant. They know the case and they know the defendant. Given the defendant's long-standing reliance on the counsel of Mr. Shafania and the defendant's complete faith in Mr. Sheahen, it is probable that he would follow their advice to enter a plea at an early stage of proceedings. On the other hand, were the public defender to be appointed, this sense of trust would not exist and the result might be an extremely costly trial.

It would thus appear that the Court has sufficient ground to find good cause for appointment of counsel other than the public defender.

Most sincerely,

Robert Sheahen

Rs/sjf

[http://cjp.ca.gov/CN%20Removals/CouwDecision_sign.doc]

2001 PUBLIC DISCIPLINE

Public Discipline

Following is a summary of public discipline imposed in 2001. The full text of these decisions is available from the Commission office.

Removal from office by the Commission

In 2001, the Commission issued one Order of Removal, in Inquiry Concerning Judge Patrick Couwenberg, No. 158. In November 2001, Judge Couwenberg filed a petition for review in the California Supreme Court. That petition was denied on January 16, 2002 and the matter has been included in the 2001 case disposition statistics.

Order of Removal of Judge Patrick Couwenberg,

August 15, 2001

Judge Patrick Couwenberg of the Los Angeles Superior Court was ordered removed from office by the Commission in August 2001, for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission's action concluded formal proceedings, during which there was a hearing before special masters and an appearance before the Commission.

The Commission determined that Judge Couwenberg provided false information on two Personal Data Questionnaires he submitted to the Governor when seeking appointment to judicial office. The judge made false representations about the colleges and law schools he attended, falsely stated that he had received a master's degree, and misstated the dates he had attended law school, thus hiding the fact that he had failed to pass the California bar examination on several attempts after completing law school. To further his efforts to obtain a judicial appointment, Judge Couwenberg misled two judges into believing that he had served in Vietnam, which they represented to others in connection with his application for appointment to the bench.

Upon being appointed, Judge Couwenberg made false statements about his education, military service, and past employment on a Judicial Data Questionnaire submitted to the presiding judge. Judge Couwenberg also misled the judge chosen to conduct his enrobing ceremony into stating that Judge Couwenberg had received a Purple Heart while serving in Vietnam. Judge Couwenberg never served in Vietnam.

In the courthouse, the judge made false statements to attorneys concerning his background and education. He also made false statements to a newspaper reporter about his military service.

The Commission further determined that during the Commission's investigation, the judge falsely testified under oath that he had participated in covert CIA operations in Southeast Asia and that he had a master's degree.

The Commission rejected Judge Couwenberg's claim of a mental condition that excused or mitigated his misconduct, and found that he engaged in willful misconduct when he made false statements on the Judicial Data Questionnaire, when he made false statements to the judge chosen to conduct his enrobing ceremony, and when he made false statements under oath during the Commission's investigation. The Commission also found that the judge engaged in prejudicial conduct when he made false statements on two Personal Data Questionnaires, when he misled two judges about his military background when seeking appointment, when he made false statements to attorneys in the courthouse, and when he made false statements to a newspaper reporter.

The Commission determined that removal from office was necessary for the protection of the public and the reputation of the judiciary. The Commission noted that the judge's lack of honesty was an ongoing problem, and that honesty was a minimum qualification expected of every judge. The Commission also pointed out that evidence of exemplary judicial performance would not excuse his misconduct.

Commission members Mr. Michael A. Kahn, Judge Rise Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mrs. Crystal Lui, Justice Vance W. Raye, and Ms. Ramona Ripston voted in favor of all the findings

and conclusions and the removal of Judge Couwenberg. Ms. Gayle Gutierrez did not participate in the proceeding. There were two public member vacancies at the time of the decision.

In November 2001, Judge Couwenberg filed a petition for review in the California Supreme Court. The petition purported not to challenge the judge's removal from the bench, but to seek the reinstatement of his license to practice law. (A judge removed by the Commission is suspended from practicing law pending further order of the Supreme Court.) On January 16, 2002, the Supreme Court denied Judge Couwenberg's petition without prejudice to the submission of an original motion for reinstatement before the State Bar.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Inquiry Concerning Judge Patrick Couwenberg, No. 158	DECISION AND ORDER REMOVING JUDGE COUWENBERG FROM OFFICE

This disciplinary matter concerns Judge Patrick Couwenberg, a judge of the Los Angeles County Superior Court. Judge Couwenberg was charged with: (1) misrepresenting his educational background on his Personal Data Questionnaires when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment in 1996, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 Judicial Data Questionnaire; (4) falsely representing to the judge who was to introduce him at the public enrobing ceremony that he was a Vietnam veteran who had received a Purple Heart; (5) falsely representing to attorneys that he went to Vietnam, had a master's degree in psychology and had shrapnel in his groin received in military combat; (6) falsely telling a newspaper reporter that he was in Vietnam in 1968 and 1969; and (7) making false statements about his education and military experience in letters and in testimony to the commission during its investigation of his conduct.

A panel of three judges, sitting as special masters, found that virtually all of the factual allegations were supported by clear and convincing evidence. For the reasons set forth in this decision, the commission adopts the masters' findings of fact. The commission finds that Judge Couwenberg made misrepresentations in order to become a judge, continued to make misrepresentations while a judge, and deliberately provided false information to the commission in the course of its investigation. For this misconduct, the commission hereby removes Judge Patrick Couwenberg from the bench.

PROCEDURAL HISTORY

Judge Couwenberg first sought a judicial appointment in 1993 in Los Angeles or Orange County and filled out a Personal Data Questionnaire (PDQ) dated October 18, 1993. He was not successful. He applied again in 1996, this time limiting his application to Los Angeles County. His second PDQ is dated July 10, 1996.

Governor Wilson appointed Judge Couwenberg to the Superior Court for Los Angeles County on April 24, 1997. On July 31, 1997, Judge Couwenberg signed a completed Judicial Data Questionnaire (JDQ) that was provided by, and returned to the presiding judge. A public enrobing ceremony was held on August 25, 1997, for Judge Couwenberg and eleven other new judges. Retired Judge Frisco introduced Judge Couwenberg and the other new judges. He based his introduction of Judge Couwenberg on Judge Couwenberg's JDQ and discussions with Judge Couwenberg.

On February 19, 1998, the *Los Angeles Daily Journal* published a profile of Judge Couwenberg noting his inconsistent statements about serving in Vietnam. This profile prompted the filing of a complaint with the commission (the complainant sent a copy to Judge Couwenberg) alleging that Judge Couwenberg had lied about having a degree from California Institute of Technology (Cal Tech), being a Vietnam veteran, and receiving a Purple Heart.

On March 13, 1998, the commission received an unsolicited letter from Judge Couwenberg in response to the complaint, which included the statement, "At no time did I lie to the Governor nor did I attempt to mislead anyone."

On August 25, 1998, the commission sent a preliminary investigation letter to Judge Couwenberg. The investigation continued over the next year with responses from the judge and a second letter from the commission. In December 1999, the

commission wrote Judge Couwenberg indicating that it was concerned that he had provided false and misleading information in response to the commission's inquiries concerning his military service and requested that he come to the commission's office for the taking of a statement. On January 21, 2000, Judge Couwenberg, accompanied by counsel, came to the commission's office and gave a statement under oath.

On June 30, 2000, the commission filed a six-count Notice of Formal Proceedings. Another investigation letter was sent to Judge Couwenberg on July 25, 2000, a response was received in September and on October 20, 2000, the commission filed a nine-count First Amended Notice of Formal Proceedings.

In the meantime, on August 17, 2000, the Supreme Court appointed three judges as special masters in this case. The evidentiary hearing before the masters[1] commenced on February 21, 2001, and concluded February 28, 2001. Mr. Jack Coyle and Mr. Sei Shimoguchi of the commission's Office of Trial Counsel presented the case in support of the charges. Judge Couwenberg was represented by Mr. Edward P. George, Jr., Mr. Thomas M. Goethals, and Mr. Timothy L. O'Reilly. The masters submitted their 47-page report to the commission on May 16, 2001.

Following receipt of objections and briefs from Judge Couwenberg and the Office of Trial Counsel, the matter was orally argued before the commission on July 19, 2001. Mr. Coyle presented argument on behalf of trial counsel and Mr. George and Mr. Goethals presented argument on behalf of Judge Couwenberg.

FINDINGS OF FACT

A. Counts One and Two – Misrepresentations on the Personal Data Questionnaires

An applicant for judicial appointment submits a completed PDQ to the Governor. In addition to being reviewed by the Governor, when Judge Couwenberg submitted his PDQs in 1993 and 1996, they were sent to the Commission on Judicial Nominees Evaluation and the Judicial Selection Advisory Board, to facilitate those entities' review of the applicant. Representatives for both entities testified that the entities generally assumed that the factual information on a PDQ was true and that discovery of an applicant's material misrepresentation on the PDQ would end the applicant's chance of a favorable report.

The masters found that on both of his PDQs, Judge Couwenberg provided the following false information: (1) he had attended California State Polytechnic University Pomona (Cal Poly Pomona) from 1964 to 1968 when he had actually attended from 1966 to 1968 only, and had attended Chaffey Junior College from 1963 to 1966, which information was omitted from the PDQs; (2) he went to California State University, Los Angeles (Cal State L.A.) from 1970 to 1972 and received a master's degree, when he was never enrolled there and did not have a master's degree from any school; (3) there was no mention that he attended Western State University College of Law from 1969 to 1970; (4) he attended Loyola Law School in 1972 and 1973, when he never went to Loyola; (5) he attended La Verne Law School from 1973 to 1976 when he actually attended La Verne from 1970 to 1973.

Judge Couwenberg admitted that the information was false, but denied that he provided "intentionally false" information. The masters rejected Judge Couwenberg's attempts to distance himself from the misrepresentations. They found that it "is simply not believable that the judge would be uncertain who filled out his judicial application," and that "even assuming that his wife did type the applications, it is not believable that she remembered the specifics of his educational background for 20 years." In response to Judge Couwenberg's claim that he did not review the educational information on the PDQs because he did not believe it was important, the masters stated that a "judicial candidate must assume that everything on the application form to the Governor is of some importance or it would not be on the form," and found that "Judge Couwenberg's professed view that education is essentially irrelevant to a judicial application is manufactured, in an effort to minimize his lies to the Governor." They further noted that even "according to the judge's version of the facts, he knowingly provided false information to the Governor – he assumed that his wife would provide the false information he had given her, but did nothing about it."

The masters had little trouble understanding why Judge Couwenberg lied. They noted:

> The reason for these lies is self-evident. Seeking appointment to the bench is a competitive situation. Judge Couwenberg would have been competing with 20 to 30 applicants. The school the judge lied about attending (Loyola) is more prestigious (as he acknowledged) than the ones he actually attended (La Verne and Western). It was also the only school of the three that was accredited. As he admitted, he told his wife he went to a large accredited law school "to make himself look better." His testimony that he didn't want to make a similar impression on the Governor because he'd already told his wife that is not credible.

[1] Judge Ina Levin Gyemant of the San Francisco County Superior Court was appointed as the presiding special master. Judge Thomas P. Hansen of the Santa Clara County Superior Court and Judge K. Peter Saiers of the San Joaquin County Superior Court were the associate masters.

They also noted:

> It is also more impressive to have passed the bar exam on the first try than after multiple attempts. Regardless of the Judge's attempt to portray failing the bar five times as something positive, this is the only logical reason for listing the date of graduation from La Verne as 1976, rather than the true date of 1973.

The masters concluded that Judge Couwenberg "knowingly and intentionally provided the Governor with false information material to his applications for judicial appointment," and noted that had the lies been discovered at the time, he would not have been appointed to the bench.

The masters' findings concerning the allegations in Counts One and Two of the First Amended Notice of Formal Proceedings are supported by clear and convincing evidence and the commission adopts the masters' findings.

B. Count Three – Statements to Judges about Serving in Vietnam

The masters found that in late 1995 or early 1996, Judge Cowell of the Los Angeles County Superior Court, in order to further Judge Couwenberg's efforts to obtain a judicial appointment, arranged a luncheon with Judge Couwenberg, Judge DiLoreto, and himself. Judge DiLoreto had been helpful to Judge Cowell in obtaining a judgeship, and Judge Couwenberg wanted to meet Judge DiLoreto.

At the lunch, Judge Cowell made a reference to Judge Couwenberg being a veteran. The masters explain:

> Judge DiLoreto then asked Judge Couwenberg, "you were in Vietnam and you were in combat?" As Judge DiLoreto recalls, the judge said "yes." Judge Cowell was not sure if Judge Couwenberg nodded or said yes, but testified that Judge Couwenberg affirmed Judge Cowell's statement that he was in Vietnam in some manner, and "certainly did not disabuse us [of] the idea that he was a veteran."

Judge DiLoreto told Judge Couwenberg that it was critical that Governor Wilson know this because both he and his judicial appointments secretary, Mr. John Davies, were ex-Marines. Judge Couwenberg indicated that he thought it was important too.

The masters noted that Mr. Davies testified that a war record was a plus with Governor Wilson and that he recalled his interview with Judge Couwenberg because of his "unusual war experiences." He did not recall the details, but remembered that it involved "undercover work" and that there was some "sort of heroism involved."

After the lunch meeting, Judge DiLoreto took several steps to help Judge Couwenberg. He called another judge to try and find out what had happened to Judge Couwenberg's 1993 application, he called Judge Couwenberg a couple of times, and he called Mr. Davies to check on the status of Judge Couwenberg's application.

The masters noted that Judge Couwenberg claimed that he didn't think that he discussed his military career when he met with Mr. Davies and that he remembers having lunch with Judge DiLoreto only (not with both Judges Cowell and DiLoreto), and denies any recollection of discussing Vietnam or his military career. The masters, however, credited the testimony of Mr. Davies as well as the testimony of Judges Cowell and DiLoreto that the luncheon conversation took place as alleged in Count Three.

The masters' findings, that Judge Couwenberg met with Judges Cowell and DiLoreto and in furtherance of his efforts to obtain a judicial appointment affirmed that he was a veteran of the Vietnam War, are supported by clear and convincing evidence and the commission adopts those findings as its own.

Count Three also alleged that Judge Cowell submitted a letter to Governor Wilson on Judge Couwenberg's behalf, which included the false statement that Judge Couwenberg was a veteran of the Vietnam War. The masters found that such a letter was written by Judge Cowell and given to Mrs. Couwenberg (Judge Cowell's court reporter) to prepare the envelope and mail. The Governor's office, however, could not locate the letter. The masters found that the evidence was insufficient to establish that the letter was in fact sent. The commission accepts the masters' findings concerning the letter and dismisses the allegations in Count Three concerning the letter.

C. Count Four – Misrepresentations on the Judicial Data Questionnaire

Judge Couwenberg received a Judicial Data Questionnaire (JDQ) from the presiding judge's office, filled it out, signed it on July 31, 1997, and returned it to the presiding judge. The presiding judge provided Judge Frisco with a copy of the

JDQ for the enrobing ceremony. The JDQ is used as a record of a judge's background information and for public announcements.

Judge Couwenberg's JDQ had the following misrepresentations: (1) his attendance at Chaffey Junior College and Western State Law School are omitted; (2) he falsely claims to have attended Loyola Law School (listed here as 9/73 through 9/74, as opposed to 9/72 through 6/73 on the PDQs); (3) the dates of attendance at La Verne Law School are 9/74 through 6/76, when his actual attendance dates were 1970 to 1973; (4) the attendance dates for Cal Poly Pomona are 9/64 through 6/66, when he actually attended that school from 1966 to 1968; (5) he attended "Cal Inst of Techn. Pasadena" [Cal Tech] from 9/66 to 6/68 and received a BS degree from that school, when he never attended Cal Tech; (7) the box next to "Veterans of Foreign Wars" was checked although Judge Couwenberg was never a member; (8) under "Armed Services Record," he entered "US Navy," instead of "US Navy Reserves"; and (9) under "Private Practice Experience," the application noted, "1976 Gibson, Dunn," although Judge Couwenberg never worked for the law firm of Gibson, Dunn & Crutcher.

There is no dispute as to the falsity of these statements. Judge Couwenberg attempted to sidestep responsibility by denying that he filled out the form himself. The masters found Judge Couwenberg's testimony "inconsistent and vague." They noted that Judge Couwenberg's claim that he did not review the JDQ before he signed it was inconsistent with his response letter to the commission, that he had no explanation for some of the false entries, and that his claim that the Cal Tech entry was a joke was contradicted by his statement under oath in January 2000 and by Judge Frisco. The masters concluded that Judge Couwenberg provided false information on the JDQ about his education, military service, and past employment. The masters' findings are supported by clear and convincing evidence and the commission adopts those findings as its own.

D. Count Five – Misrepresentations to Judge Frisco

The masters found that Judge Couwenberg gave or affirmed to Judge Frisco the following false information (as alleged in Count Five): (1) he was recruited from the Navy to the Army, when he was in the Navy Reserve and never in the Army; (2) he attained the rank of corporal in the Army; (3) he served in the Army for two years and was in Vietnam for 16 months, when he was never in the Army in Vietnam or elsewhere; and (4) he had received a Purple Heart, when he had never received or been eligible to receive a Purple Heart.

With the exception of the statement that he was recruited from the Navy to the Army, this false information was included in Judge Frisco's introductory remarks at the enrobing ceremony, along with false information that Judge Couwenberg attended Cal Tech for two years, earned a BS in physics from Cal Tech, and attended Loyola Law School for a year.

Judge Couwenberg admits that Judge Frisco's introductory remarks regarding his military service were false, but claims that he "does not recall" giving the alleged information or affirming it to be true. The masters rejected Judge Couwenberg's testimony noting that: (1) in his prehearing statement under oath, Judge Couwenberg admitted making certain misrepresentations to Judge Frisco; (2) Judge Frisco's handwritten notes of his conversations with Judge Couwenberg reflect that Judge Couwenberg was the source of the false information; (3) his claim that he discussed Cal Tech with Judge Frisco because Cal Tech was listed on the JDQ, is inconsistent with his testimony that he told his wife to list Cal Tech on the JDQ after he had joked with Judge Frisco about the difference between Cal Poly and Cal Tech; and (4) Judge Couwenberg's testimony that he thought the enrobing ceremony would be in the nature of a humorous roast is not believable as he admits that he had never been to an enrobing ceremony, which by its nature is a serious event, and he could not think of how receiving a Purple Heart could be mentioned as a joke. The masters also noted that Judge Couwenberg had the opportunity to correct Judge Frisco both before and after the enrobing ceremony, but did not do so.

The masters' findings that Judge Couwenberg gave or affirmed to Judge Frisco false information concerning his military service are supported by clear and convincing evidence and the commission adopts those findings.

E. Count Six – False Statements to Attorneys

An experienced attorney, who appeared frequently before Judge Couwenberg, testified that Judge Couwenberg told a group of attorneys in the courthouse that: (1) he moved to the United States when he was 18 and shortly after that served in the armed forces; (2) he went to college on the GI Bill; (3) he received his undergraduate degree in physics from Cal Tech; (4) he had a master's degree in psychology; and (5) he had a medical appointment for shrapnel in his groin.[2]

Judge Couwenberg in his Answer, denied making such statements but acknowledged that they would have been false if made. He claimed that he sometimes made statements about his background that were humorous or made in jest.

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[2] The masters noted that the attorney also testified that Judge Couwenberg stated that he worked for Gibson, Dunn & Crutcher, but that this false statement was not charged in Count Six.

The masters found that Judge Couwenberg made the statements recalled by the attorney and that the statements were false. They noted that there is no reason to doubt the attorney's testimony and that it is documented that Judge Couwenberg made the same or similar false statements elsewhere.

The masters' findings are supported by clear and convincing evidence and the commission adopts those findings.

F. Count Seven – The *Daily Journal* Profile

On February 19, 1998, the *Los Angeles Daily Journal* published a profile of Judge Couwenberg written by reporter Cheryl Romo, which was based on her two interviews with the judge. Ms. Romo had worked for the *Daily Journal* for over six years and testified that Judge Couwenberg made the statements to her that were quoted in the article. Specifically, he falsely stated in the initial interview that he was in Vietnam in 1968 and 1969 and saw combat. In the subsequent interview he told her that he was in the U.S. Naval Reserves from '65 to '69, that he was not in Vietnam and that she should "just leave that part out."

The masters stated that they "are convinced that Judge Couwenberg initially made the false statements about his military service," but "are likewise convinced that he effectively retracted these misrepresentations in his later conversations with Romo and his direction to 'leave that part out.'"

The masters' findings that Judge Couwenberg initially made false statements and subsequently sought to retract those misrepresentations are supported by clear and convincing evidence and are adopted by the commission.

G. Counts Eight and Nine – Misrepresentations During the Commission's Investigation Concerning Covert Operations and Educational Background

1. Misrepresentations about Covert Operations

The masters noted that Count Eight alleges that in January 2000, Judge Couwenberg under oath "testified falsely that he had been involved in covert Central Intelligence Agency (CIA) operations in Southeast Asia between June 1968 and December 1969, and had made a delivery of funds or documents to Africa for the CIA around 1984. Count Nine alleges that in three response letters to the commission (two before and one after his statement under oath), the judge both implied and stated the same false claim about participating in covert CIA operations in 1968-1969."

The masters found these allegations to be true. They found that Judge Couwenberg "was never affiliated with the CIA or any other agency involved in covert operations during the Vietnam War, and was not involved in any CIA covert operations at any time." The masters rejected Judge Couwenberg's testimony at the hearing where he maintained his story was true. They found that his testimony "was vague and unpersuasive in and of itself, is contradicted in part by circumstantial evidence, and was not corroborated. Most significantly, it was flatly refuted in its entirety by compelling testimony from a representative of the CIA."

The masters noted that in his January 2000 statement under oath Judge Couwenberg "testified at length that he had participated in a covert CIA operation in Southeast Asia ... where, among other adventures, he was wounded in a firefight resulting in his purported shrapnel wound." Also, in a subsequent letter to the commission, dated May 26, 2000, "the judge again stated that he participated in a classified, covert CIA operation in the Far East in 1968 and 1969 on two separate operations."

Military records establish that Judge Couwenberg received an honorable early discharge from the Navy Reserves in 1967 because of a liver problem. Judge Couwenberg testified that in 1966 he met a man named Jack Smith (or it could have been Jones), who told him that he could get a discharge without fulfilling his six year commitment with the Navy Reserves if he said there was something medically wrong with him. The masters noted that Judge Couwenberg "claims he told Smith he didn't want a medical discharge, and testified that he did not know until receiving discovery in this case that he had been discharged for these reasons. However, it is apparent that he knew of the medical discharge at the time. In a letter dated September 5, 1966, from the judge to his commander, the judge discusses his prospective medical discharge."

Judge Couwenberg testified that he went to Laos for a month in December 1968 and then went again for three or four weeks around June 1969. During this time he was working full time with the Los Angeles County Department of Social Services. Judge Couwenberg claimed he was able to be absent from work without a problem, despite the fact that he had started work there in June 1968. He could not recall whether he took vacation or leave without pay and he produced no employment records to verify that he was off work during these periods.

Mr. William McNair has been designated by the head of the CIA as the records validation officer. Although the CIA is not subject to a commission subpoena, the CIA voluntarily agreed to allow Mr. McNair to testify. Mr. McNair stated that the

CIA has records of everyone who has ever been engaged in a clandestine or covert relationship with the CIA in an operational capacity. These records have been maintained since the mid-forties and include anyone an operations officer has talked to and considered using. McNair testified that a thorough search was made of the CIA records to determine whether Judge Couwenberg, by any name, appears in the CIA records. He does not. Accordingly, he was never under consideration for, or employed by or utilized for clandestine operations by the CIA. Mr. McNair testified, "if someone were picked out, recruited in the U.S., and transported to Laos under our sponsorship, we would have a record of it."

Mr. McNair further testified that at the time in question there were no other United States agencies operating in Laos. The only speculative possibility would have been an agency operating illegally. Mr. McNair testified that he was well versed in what was going on in Laos at the time and would be "stunned" to find out any agency other than the CIA was conducting an operation in Laos, such as described by Judge Couwenberg.

Judge Couwenberg also testified that the same agency that sent him to Laos used him to make a delivery in Africa in the 1980s. Mr. McNair testified that if the CIA had so employed Judge Couwenberg, the CIA would have a record of the event and that the CIA does not have any record of the alleged event.

The masters noted that Judge Couwenberg now suggests that he never said he was with the CIA, but only guessed or assumed that the agency was the CIA. They find, however, that "the evidence is clear that Judge Couwenberg wanted the commission to believe that he was with the CIA, and ultimately flatly asserted as the truth that he was with the CIA." They noted his January 2000 testimony under oath and his letters to the commission, particularly Judge Couwenberg's May 26, 2000, response through counsel which states that the "August 3, 1999 letter correctly states that Judge Couwenberg participated in a classified, covert CIA operation in the Far East."[3]

The masters' findings that Judge Couwenberg testified falsely that he had been involved in covert CIA operations in Southeast Asia in December 1968 and June 1969 and had made a delivery of funds or documents to Africa for the CIA around 1984 are supported by clear and convincing evidence and the commission adopts those findings.

2. False Testimony Concerning a Master's Degree

Judge Couwenberg admits that he was never enrolled at Cal State L.A. and has no master's degree. Nonetheless, on January 21, 2000, Judge Couwenberg came to the commission and gave a statement under oath which included the following:

Q. And after Cal State Pomona your education after that?
A. After that I went part time to Cal State. Then went to law school, graduated from the University of La Verne.
Q. Okay. When you say you went to Cal State part-time, Cal State Pomona?
A. L.A.
Q. And did you get a degree from Cal State L.A.?
A. Yes.
Q. What was the degree in?
A. Psychology.
Q. Master's degree?
A. (Witness nods head).
MS. DOI: I am sorry, I don't think that was verbal.
THE WITNESS: Yes.
MR. COYLE: Q Do you know why it is that your master's degree from Cal State L.A. would not be on the Judge's Data Questionnaire?
A. I have no idea.

When this misrepresentation was first brought to Judge Couwenberg's attention, he suggested that he failed to focus on the question. At the hearing before the masters, Judge Couwenberg stated that he was focused on the question, that his response was not true, and that he volunteered the information. When asked why this was not perjury, he responded, "I suppose in the true sense it is. I just don't know why I did it."[4]

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[3] Commission Rule 106 reads, in relevant part: "The written communication of counsel shall be deemed to be the written communication of the judge. Counsel has the authority to bind the judge as to all matters except a stipulation as to discipline."

[4] The record suggests at least one possible explanation. Judge Couwenberg had indicated on his PDQs that he had a master's degree. In January 2000, Judge Couwenberg may not have known whether the commission was aware of this misrepresentation. He may have feared that if he failed to repeat this misrepresentation, the commission would investigate the inconsistency between his testimony and his PDQs.

The masters concluded that as a matter of fact and law that when Judge Couwenberg testified under oath on January 21, 2000, that he had a master's degree in psychology from Cal State L.A., he knowingly gave material false testimony under oath. The masters' findings are supported by clear and convincing evidence and the commission adopts those findings.

JUDGE COUWENBERG'S MENTAL DEFENSE

Judge Couwenberg offered as a psychological defense that he had a mental condition known as "pseudologia fantastica." This defense was presented by Judge Couwenberg's expert witness, psychiatrist Dr. Charles V. Ford. He described pseudologia fantastica as "story telling that often has sort of a matrix of fantasy interwoven with some facts."[5] Dr. Ford, as well as Judge Couwenberg's two other medical experts, however, agreed that the objective medical tests that were administered to Judge Couwenberg did not reveal any suggestion of cognitive or psychological disorder. Dr. Ford conceded that pseudologia fantastica is a description rather than a diagnosis.

The masters recognized that there was evidence that Judge Couwenberg was in a detention camp as a very young child in Indonesia and suffered racial discrimination in Holland in his youth. Judge Couwenberg's doctors said that these experiences caused him to have low self-esteem which, according to Dr. Ford, led to pseudologia fantastica. The masters found little evidence of this connection. They noted that none of the psychological tests revealed any evidence of a traumatic stress disorder, Judge Couwenberg had never been treated for any psychological disorder, and the subscales for post traumatic stress disorder in the Minnesota Multiphasic Personality Inventory test were all normal. They further noted that the many letters of recommendation on behalf of Judge Couwenberg suggest that he never exhibited any self-image problems either as an attorney or as a judge.

The masters properly questioned whether a judge may avail himself or herself of a psychological defense in a disciplinary hearing. They also noted that there was no evidence that Dr. Ford's contentions regarding pseudologia fantastica are accepted in the psychiatric community. They further opined that unless low self-esteem is a recognized mental disorder, it makes no difference whether or not the judge had the symptom of pseudologia fantastica, because a symptom without some mental disorder is of no legal consequence to the allegations of misconduct. The masters concluded as a matter of fact and law that Judge Couwenberg did not have any mental condition that excuses or mitigates his misconduct in this case.

The commission agrees that Judge Couwenberg does not have any mental condition that excuses or mitigates his misconduct. As noted by the masters, the possession of a "symptom" without any mental disorder is of little legal consequence. Also, it appears that pseudologia fantastica is an attempt to explain why a person lies in a way that does not directly promote his or her self-interests. The reasons for Judge Couwenberg's misrepresentations, however, are self-evident. He misrepresented his qualifications in order to become a judge, to maintain the false premise which appears to have been critical to his judicial appointment, and to frustrate the commission's investigation. As Judge Couwenberg's misrepresentations were clearly calculated to advance his self-interests, a theory aimed at explaining why a person lies in a way that does not obviously advance the person's self-interests has no application. Furthermore, as put forward by Dr. Ford, pseudologia fantastica attempts to explain why a person knowingly lies. Judge Couwenberg has not admitted to many of his lies, such as making misrepresentations to Judge Frisco and his alleged presence in Laos in 1968 and 1969. The application of Dr. Ford's contentions to these misrepresentations would suggest that Judge Couwenberg is continuing to knowingly lie to the commission.

CONCLUSIONS OF LAW

A. Counts One and Two (the Personal Data Questionnaires)

The masters noted that although the PDQs were submitted before Judge Couwenberg became a judge, a judge's prebench conduct is subject to general ethical standards.[6] The commission has jurisdiction to sanction a judge for conduct occurring within six years prior to the start of the judge's current term of office (article VI, section 18 subd. (d) of the California

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[5] Dr. Ford explained:

> When we use the word "lying," we generally mean that the person knows what he's saying is not true and is deliberately attempting to mislead another person. There's a two-part definition to lying. With the pseudologia [f]antastica it is really kind of an admixture of self-deception and trying to present oneself to other people in a certain way and not really related to a conscious intent to defraud or to lie, such as we might see in a person with antisocial personality.

[6] The fact that Judge Couwenberg was not yet a judge when he submitted his PDQs precluded the masters from reaching a conclusion of willful misconduct in office.

Constitution). The masters observed that judges have been disciplined for pre-bench conduct that was determined to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[7]

The masters concluded:

> Submitting false PDQs to the Governor constitutes an obvious violation of general ethical standards, and constitutes prejudicial misconduct. Honesty is a "minimum qualification" expected of every judge (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865) and presumably of every applicant for judicial position. Judge Couwenberg's falsehoods create the appearance that he obtained his judicial office by deceit. The 1996 PDQ also violates canon 5's specific prohibition against a knowing misrepresentation of qualifications. A judicial applicant who gets appointed after submitting falsified qualifications brings the judiciary into disrepute and damages public confidence in the integrity of the judiciary.[8]

For the reasons set forth by the masters, the commission concludes that Judge Couwenberg's submissions of PDQs to the Governor, which included misrepresentations as to his educational background, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

B. Count Three – Statements to Judges about Serving in Vietnam

The commission has found that in an effort to further the likelihood of a judicial appointment, Judge Couwenberg had lunch with Judges DiLoreto and Cowell and falsely affirmed to them that he was a veteran of the Vietnam War. Judge Couwenberg's conduct violated canon 5B and constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

C. Count Four – Misrepresentations on the Judges' Data Questionnaire

The commission agrees with the masters that Judge Couwenberg's false statements on the JDQ constitute willful misconduct in office. Judge Couwenberg was acting in his judicial capacity when he filled out the JDQ. He had already assumed judicial office. The form was used exclusively for judges in connection with public enrobing ceremonies and other administrative purposes concerning the judges. Judge Couwenberg received the JDQ from the presiding judge's office and returned it to that office. As noted by the masters, by definition, providing material false information about one's qualifications and experience is done in bad faith, i.e. for a purpose other than the faithful discharge of judicial duties. Also, providing such false information about one's experience and qualifications violates the basic precepts of canon 1 (judge shall uphold the integrity of the judiciary) and canon 2 (judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

D. Count Five – Giving False Information to Judge Frisco

The commission agrees with the masters that giving false biographical information to Judge Frisco for use in the public enrobing ceremony constitutes willful misconduct. The statements were made in Judge Couwenberg's judicial capacity, to another judge in connection with the public enrobing ceremony, and were not made for the faithful discharge of judicial duties, but to mislead Judge Frisco, other members of the legal community and the public.

E. Count Six – False Statements to Attorneys

The commission has found that Judge Couwenberg made false statements in the courthouse to attorneys regarding his background and education. This conduct violated canons 1 and 2A of the Code of Judicial Ethics and constitutes conduct prejudicial to the administration of justice that brings the judicial office into dispute.

F. Count Seven – Misrepresentations to the Newspaper Reporter

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[7] The masters cited *In re Stevens* (1981) 28 Cal.3d 873 [judge censured for discussing his sexual experiences and fantasies with a married couple employed by the Legislature; discussions began while judge was member of the Legislature and continued after he took the bench], *In re Blackwell*, Commission on Judicial Performance (1999) Public Admonishment 18 [judge's pre-bench conduct involved his failure to disclose acceptance of overpayment from his former employer, a bank, while seeking a general release of claims against him from the bank], and *In re Van Voorhis*, Commission on Judicial Performance (1992) Public Reproval No. 8 [public reproval for conduct that included one instance of pre-bench misconduct, misinforming the public of judge's marital status during his judicial campaign.]

[8] The masters noted that effective January 15, 1996, the California Supreme Court adopted a revised Code of Judicial Ethics that includes canon 5B, which provides that a "candidate for election or appointment to judicial office shall not ... (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate ...."

The commission has found that Judge Couwenberg falsely stated to the newspaper reporter that he saw combat in Vietnam and then in a subsequent conversation told her that he was not in Vietnam and that she should "just leave that part out." The newspaper article accurately recounted the false statement, the subsequent withdrawal and the direction to leave the information out. Judge Couwenberg knew or should have known that a misrepresentation of this caliber, when made to a newspaper reporter who was preparing an article on the judge, would become public. The commission concludes that Judge Couwenberg's misrepresentation violated canon 2A of the Code of Judicial Ethics and constitutes improper action.

G. Counts Eight and Nine – Misrepresentations During the Commission's Investigation Concerning Covert Operations and Educational Background

The commission agrees with the masters that Judge Couwenberg's conduct in providing false information to the commission, both in his written responses to commission investigation letters and in his testimony, constitutes willful misconduct. He was acting in his judicial capacity when he took these actions. (See *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 910 [judge acts in judicial capacity when responding to investigation letters from commission].) Judge Couwenberg's responses and testimony were given in bad faith. (See *Adams, supra,* 10 Cal.4th at pp. 910-911 [judge acts in bad faith by providing false and misleading information in response to investigation letter from commission], and *Fletcher* v. *Commission on Judicial Performance* (1998) 19 Cal.4th 865, 887-891 [judge committed willful misconduct in presenting commission with grossly incomplete and misleading responses and with continually shifting explanations].) Finally, as noted by the masters, providing false information to the commission, in writing and in sworn testimony, constitutes egregious violations of the fundamental precepts of canons 1 and 2. (See *Adams, supra,* 10 Cal. 4th at p. 914.)

DISCIPLINE

The commission is guided by the Supreme Court's reiteration that the purpose of a judicial disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." [9] The commission concludes that these purposes require the removal of Judge Couwenberg from the bench.

The facts establish that Judge Couwenberg's successful application for a judicial appointment was premised on material misrepresentations. First, through misrepresentations on his Personal Data Questionnaire he made it appear that he was in school from 1964 through 1976, except for two years between his undergraduate degree and starting on a master's degree. In fact, Judge Couwenberg never entered any master's program. His misrepresentations also masked, and thereby avoided any questions concerning, the three-year period of time between his graduation from law school and admission to the bar. Second, Judge Couwenberg encouraged Judges Cowell and DiLoreto, and the Governor's judicial appointments secretary (according to his testimony), in believing that Judge Couwenberg was a veteran of the Vietnam War. As noted by the masters, seeking appointment to the bench is a competitive situation. Although there is no evidence of the Governor's reasons for appointing Judge Couwenberg, it appears that Judge Couwenberg's misrepresentations were critical to his judicial appointment. Any discipline other than removal would leave the public paying Judge Couwenberg for a judgeship he apparently procured through misrepresentations.

Second, Judge Couwenberg lied in writing and in testimony under oath to the commission during the course of its investigation. The Supreme Court has noted that there "are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation." (*Adams, supra,* 10 Cal.4th at 914.) When his misrepresentation that he was in the Army in Vietnam was exposed, Judge Couwenberg told the commission – in testimony and in writing – that he had been employed by the CIA in Laos. When the CIA refuted this lie, Judge Couwenberg testified that he was in Laos working for some other agency – a representation that the masters found to be a lie. In addition, Judge Couwenberg volunteered in a statement under oath that he had a master's degree. At the hearing before the masters, he basically admitted that this was perjury. Any discipline other than removal for such blatant misrepresentations might well encourage others who are investigated by the commission to prevaricate and develop faulty memories.

Although some of the false information concerning Judge Couwenberg's education on his PDQs reflected misrepresentations that he first made years ago, his fanciful military career is of a more recent vintage. The record suggests that initially Judge Couwenberg simply failed to correct others when they misrepresented that he had been in the Vietnam War and that this developed into affirming the misrepresentation. By 1997 Judge Couwenberg was emboldened to tell Judge Frisco that he had received a Purple Heart as a result of being injured in Vietnam while in the Army. By 2000, however, Judge Couwenberg had admitted that these representations were lies, and was asserting that he had been employed by the CIA in Laos. At the

[9] *Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

hearing before the masters, Judge Couwenberg contended that he was not employed by the CIA, but by some other agency in Laos. The masters found clear and convincing evidence that this was not credible. Thus, the record shows that Judge Couwenberg's inability to testify forthrightly about himself is an ongoing, rather than past, problem.

Third, Judge Couwenberg's persistent misrepresentations might well require his removal from the bench, even if the misrepresentations had not been critical to his bid for a judicial appointment and had not been made to the commission in the course of its investigation. The Supreme Court has noted that honesty is a "minimum qualification" expected of every judge (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865). The commission has in a prior decision observed that the "public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own benefit."[10]

Judge Couwenberg complains that the masters failed to consider the numerous letters and witnesses testifying to his exemplary judicial performance and urges that on the basis of such "mitigating" evidence, the commission allow him to remain on the bench. Even assuming that his judicial performance was exemplary, it would not excuse his misconduct. In *Kloepfer, supra*, 49 Cal.3d at 865, the Supreme Court noted that "a good reputation for legal knowledge and administrative skills," although relevant to the degree of discipline, does not mitigate either willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Here, the record indicates that Judge Couwenberg committed four counts of willful misconduct and four counts of prejudicial conduct in what appears to be a deliberate course of misrepresentation. He lied to become a judge, elaborated on his misrepresentations for his enrobing ceremony, and subsequently lied to the commission in an apparent attempt to frustrate its investigation. A public censure would not adequately convey the commission's reproval of Judge Couwenberg's course of misconduct. (See *Spruance* v. *Commission on Judicial Performance* (1975) 13 Cal.3d 778, 802.) The commission is convinced that protection of the public and the judiciary's reputation requires Judge Couwenberg's removal from the bench. (See *Fletcher* v. *Commission on Judicial Performance* (1998) 19 Cal.4th 865, 921.)

CONCLUSION

The commission orders Judge Patrick Couwenberg of the Los Angeles Unified Superior Court removed from the bench for: (1) misrepresenting his educational background on his Personal Data Questionnaires when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment in 1996, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 Judicial Data Questionnaire; (4) falsely representing to the judge who was to introduce him at the public enrobing ceremony that he was a Vietnam veteran who had received a Purple Heart; (5) falsely representing to attorneys that he went to Vietnam, had a master's degree in psychology, and had shrapnel in his groin received in military combat; and (6) making false statements about his education and military experience in letters and in testimony to the commission during its investigation of his conduct. The commission concludes that its responsibility to protect the public, to enforce rigorous standards of judicial conduct, and to maintain public confidence in the integrity of the judiciary, require that Judge Couwenberg be removed from office.

This decision shall constitute the order of removal of Judge Patrick Couwenberg and pursuant to the provisions of Commission Rule 120(a) and article VI, section 18(b) of the California Constitution, Judge Patrick Couwenberg is hereby disqualified from acting as a judge.

Commission members Mr. Michael A. Kahn, Judge Rise Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mrs. Crystal Lui, Justice Vance W. Raye, and Ms. Ramona Ripston voted in favor of all the findings and conclusions expressed herein and in the removal of Judge Patrick Couwenberg from judicial office. Commission member Ms. Gayle Gutierrez did not participate in this proceeding. There are currently two public member vacancies.

[10] *In re Murphy*, Commission on Judicial Performance (2001).

DECLARATION OF ROSALVA ARREDONDO

I, RA declare as follows:

I was a juror on the *Hooman Ashkan Panah* case which was tried in the Van Nuys Superior Court. I recall that the jurors did their best to follow the judge's instructions. We reviewed the evidence extensively. We did not deliberate while any juror went to the bathroom or was out of the room. All the jurors participated in deliberations.

During the penalty phase, we deliberated for a long time. One juror, an older white woman, I believe her name was Edna Collins, had a difficult time deciding for death. From the very beginning of deliberations, she was against the death penalty. She wasn't at all sure she could vote for death and she kept putting off the vote saying that she wasn't ready. During deliberations, much of what she said had to do with religion. She talked about God and the Bible. She really struggled during this phase, but after we had a few days off, she was able to reach a verdict and voted for death. Also, during the trial a reporter from the Daily News was often present. As far as I know, no jurors talked to the reporter.

On June 18, 2001, and today, I spoke with Angelica Garza, who informed me that she was a representative of the attorneys for Hooman Panah. Ms. Garza asked me questions about my jury experience and told me that I was free to discuss or not discuss the case with her. I have reviewed this statement and understand that I may have a copy of it. I declare under penalty of perjury that the foregoing to be true and correct.

Signed this the 5th day of July, 2001, in Los Angeles County, California.

RA

RA

DECLARATION OF A.S.

I, A.S. , declare as follows:

I was a juror on the *Hooman Ashkan Panah* case which was tried in the Van Nuys Superior Court. I recall that during deliberations, all the jurors participated, although some more than others. During the trial, there was a journalist in court daily. That I can recall, none of the jurors talked to her until the trial was over.

There were many facts that led to my decision to find guilt, the testimony of Panah's girlfriend, the suitcase in the closet, etc. As for the penalty phase, some jurors were eager to vote for death at the onset deliberations even though we had not deliberated. I was initially open to hearing all sides and along with the jurors reviewed evidence. I initially abstained from voting, but eventually voted for death. I can recall that I was swayed by the innocence of the victim.

I recall that there was one juror who had a difficult time deciding whether or not to vote for death. She was an alternate and served on the jury during the penalty phase for a limited number of days. I believe her name was E.C. . I recall that she and her husband were bikers and were involved in good works, such as visiting prisoners and taking part in an anti-drinking and anti-drug organization. She was an extremely religious person and during deliberations, she talked a lot about God and the Bible. Her whole attitude had everything to do with religion. I distinctly recall that during the penalty phase she said, "I'm going to have to go home and pray on this." She asked the jury for time to go home and pray. I recall we then had three days off. When the jury reconvened, she had made up her mind. We the jurors created an atmosphere of neutrality for her, so she could vote her conscience.

On June 19, 2001, I spoke with Angelica Garza. She told me that she was a representative of attorneys working for Hooman Panah. She asked me questions about my experience as a juror and I understood that I was free discuss or not discuss the case with her. I have reviewed this statement and understand I may have a copy of it. I declare under penalty of perjury that the foregoing is true and correct to the best of my recollection. Signed this the 5th day of July, 2001, in Los Angeles County, California.

A.S.

A.S.

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DECLARATION OF DARYL D. ADIB

I, Daryl D. Adib declare as follows:

While the trial of People v. Hooman Panah was underway, I was in the courtroom during most of the trial.

At least two to three times during the trial while I was present in the courtroom, a young Catholic priest with full priesthood attire appeared in the audience and sat next to N. P. family members. Later on I discovered that he was the priest from the church of N. P. and her family.

It was obvious from the reaction of jurors, that the priest's appearance while wearing full priesthood attire had an adverse effect on the jurors. Had he come in without his priesthood uniform, the priest would have appeared as anyone else in the audience; but wearing his collar and his black uniform really made him remarkable.

The priest's appearance in that clothing was a wrong thing to do and it gave a sense of favoritism in Parker family and prosecution's trial. It had a strong emotional effect on the jurors.

I believe that besides the judge of the court wearing his/her black robe and the Sheriff's deputies wearing their uniforms in the courtroom while a trial is going on, no one should wear any clothing that in any form or shape could affect the jurors.

I declare under penalty of perjury under the laws of law of California that the forgoing is true and correct.

This declaration was written on September 16, 2002 at Los Angeles.

Daryl D. Adib

Daryl D. Adib

WATCH COMMANDER'S DAILY REPORT | DATE: 11-21-93 | DAY OF WEEK: SUN | WATCH: DAYS | WATCH COMMANDER'S NAME: SGT MASTRO

LAPD Temporary #126

DEPLOYMENT:	Early ACTUAL	Early PLAN.	Mid ACTUAL	Mid PLAN.	DEPLOYMENT:	Early ACTUAL	Early PLAN.	Mid ACTUAL	Mid PLAN.	DEPLOYMENT:	Early ACTUAL	Early PLAN.	Mid ACTUAL	Mid PLAN.
Field Sergeants	1	1			Z Units	—	—			C Units				
A Units	6	6			ZL Units	—	—			Special Units				
L Units	1	1			U Cars	—	—			FL	1	1		
X Units	1	1	2	2	Desk	4	4			FBL			1	1
XL Units	1	1			Jail	2	2							

BRIEFLY EXPLAIN ANY DEVIATION IN ACTUAL DEPLOYMENT FROM PLANNED DEPLOYMENT:

ASSIGNED A47, A67 & X5 TO MISSING JUVENILE C/D.

HW

ROLL CALL TRAINING

Early	Mid
Subject: MISSING PERSON INVESTIGATION	Subject: MISSING PERSON INVESTIGATION
Conducted By: W/C	Conducted By: W/C
Inspection By: W/C	Inspection By: W/C
VISUAL-OK.	VISUAL-OK.

STATION INSPECTIONS (Two per watch minimum)

TIME	INITIAL	
0855	DFM	INTERIOR & EXTERIOR.
0930	DFM	INTERIOR & EXTERIOR.

OPERATIONS BUREAU NOTIFICATIONS

TIME	INITIAL	List whom notified and log item number.

LOG OF SIGNIFICANT ACTIVITIES

Include all shootings, unusual arrests, demonstrations, officer-involved altercations, missing juveniles, special events, visits from outside agencies, visits from V.I.P.s (including Department V.I.P.s), items of unusual interest. Number each item and include time occurred. Attach all applicable reports to this chart.

No.	TIME	Activity: Include time occurred and person notified
	0750	CHANGE OR WATCH CALLS HOLDING 1 NOW CODED CLK.
	0800	HOLDING TANK CHECK
	0810	JAIL INSPECTION FEL 5 MISD 4
	0745	NARCO LOCKER 4 PACKAGES
	0750	PRIOR WATCH UNITS OT —

Continue on reverse side

CONTINUATION

DAY 11/21

No | Activity: Include time occurred and person notified.

(1) SENT OUT STATE WIDE TELETYPE ON MISSING JUVENILE.

(2) 0820 HOURS - SENT OUT TELETYPE AND COPY OF FLYER TO LOST HILLS SHERIFF'S STATION.

(3) CAPTAIN WARD CONTACTED FIELD DEPUTY ERIC ROSE REGARDING MISSING JUVENILE, 0820 HOURS.

(4) 0825 HOURS - ORDERED NAVARRO, BURNS, PELOQUIN TO MISSING PERSON COMMAND POST AS PER LT ROCK.

(5) 0900 HOURS - HOLLYWOOD VICE ADVISED WOULD BE SERVING A SEARCH WARRANT AT 0930 HOURS (24015 LAMAY).

(6) 0940 HOURS - CONTACTED DETECTIVE HEADQUARTERS AND REQUESTED PRESS RELATIONS OFFICER FOR MISSING JUVENILE COMMAND POST.

(7) 1020 HOURS - SURESE LITTLE LEAGUE CALLED AND ADVISED THAT THEY WOULD BE PASSING OUT MISSING PERSONS FLYERS OF NICOLE PARKER TODAY. MADE UP SEVERAL HUNDRED FLYERS FOR THE GROUPS.

WATCH COMMANDER'S SIGNATURE

CONTINUATION

No. Activity: Include time occurred and person notified.

(8) 1030 HRS — 17A81 REPORTED THAT THEY HAD A 51.50 CALL AT 8371 N. GATE WITH A SUSP WHO LIVED AT THE MISSING PERSONS APARTMENT COMPLEX. APPARENTLY SUSPECT ASHKAN WHO IMPLICATED HIMSELF AS THE ONE WHO KIDNAPED NICOLE PARKER. MADE A FOLLOW UP TO HIS RESIDENCE 20564 #122 VENTURA BL AND FORCED ENTRY WITH LT HULET AND OFFICER MOSSETT.

(9) 1200 HRS — CONTACTED METROPOLITAN DIVISION AND REQUESTED SEARCH DOG (RYAN).

(10) 1315 HRS — REQUESTED AIR SUPPORT AND A UNIT RESPOND TO MULLHULLAND AND TOPANGA, AS SUSPECT ASHKAN SAID THAT HE DROPPED NICOLE PARKER OFF IN THIS AREA LAST EVENING.

(11) 1315 HRS — LT HULET REQUESTED CERT TO RESPOND TO MULLHULLAND AREA TO ASSIST.

(12) 1340 HRS — LT ROCK GAVE UPDATE TO CHIEF POMEROY.

WATCH COMMANDER'S SIGNATURE

CONTINUATION

Activity (include time started and person notified.

(13) 1345 HOURS - DETECTIVE MEHRINGER ENROUTE TO WEST PARK HOSPITAL TO INTERVIEW SUSPECT ASIKAN.

(14) 1415 HOURS - REQUESTED PHOTOS AND CRIMINALIST RESPOND TO WEST PARK HOSPITAL (DHD CARRANZA).

(15) 1415 HOURS - DETECTIVE STEINBACHER ENROUTE TO TOPANGA AND MULHOLLAND.

(16) 1430 HOURS - C/P REPORTED SHERIFFS DOGS ON SCENE.

1515 HOURS - SERGEANT ANDERSON K-9 ADVISED THAT HIS UNIT IS AVAILABLE TO RESPOND 24 (818) 9611.

(18) 1600 HOURS - WENT OUT TO MALIBU PARK AND MET WITH RANGERS MACHADO / LIDDELL. GAVE THE RANGERS A COPY OF OUR FLYER ON OUR MISSING JUVENILE.

WATCH COMMANDER'S SIGNATURE