

## INDEX TO APPENDIX

	PAGE(S)
1. U.S. Court of Appeals for the Ninth Circuit Order Denying Panel Rehearing and Rehearing En Banc (March 9, 2020).....	20
2. U.S. Court of Appeals for the Ninth Circuit Memorandum Disposition (February 10, 2020).....	21
3. U.S. District Court for the Central District of California Amended Order Granting Certificate of Appealability (October 3, 2018) .....	32
4. U.S. District Court for the Central District of California Judgment (October 3, 2018) .....	34
5. U.S. District Court for the Central District of California Order Accepting Findings & Recommendation of Magistrate Judge (October 3, 2018) .....	35
6. U.S. District Court for the Central District of California Report and Recommendation of the U.S. Magistrate Judge (March 29, 2018).....	37
7. California Supreme Court Order Denying Petition for Writ of Habeas Corpus (October 12, 2016) .....	70
8. California Supreme Court Docket for Petition for Writ of Habeas Corpus.....	71
9. California Supreme Court Docket for Petition for Review.....	75
10. California Court of Appeals Opinion on direct appeal (May 10, 2011) .....	76

11.	Exhibits to Federal Second Amended Petition for Writ of Habeas Corpus (partial) (April 3, 2017).....	84
12.	Excerpts of Clerk's Transcript on Appeal (April 3, 2017).....	108
13.	Excerpts of Reporter's Transcript on Appeal (April 3, 2017).....	113

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MAR 9 2020

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

SHARRIEFF BROWN,

Petitioner-Appellant,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION,

Respondent-Appellee.

No. 18-56432

D.C. No.  
2:12-cv-09126-DMG-MRW  
Central District of California,  
Los Angeles

ORDER

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SILVER,\* District Judge.

The panel has unanimously voted to deny Petitioner-Appellant's petition for panel rehearing. The petition for panel rehearing (Docket Entry No. 43) is **DENIED**.

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\* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

**NOT FOR PUBLICATION****FILED****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT****FEB 10 2020**MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SHARRIEFF BROWN,

Petitioner-Appellant,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION,

Respondent-Appellee.

No. 18-56432

D.C. No.  
2:12-cv-09126-DMG-MRW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 8, 2019  
Pasadena, California

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SILVER, \*\* District Judge.

Petitioner-Appellant Sharrieff Brown appeals the district court's denial of his petition for habeas corpus relief from his California state conviction for second-

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

\*\* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

degree murder and assault on a child resulting in death. At Brown's trial, the State had called as a witness a medical examiner who testified that the victim child's injuries were not consistent with Brown's account that an accidental fall had caused the child's death. The district court denied Brown's petition for habeas relief as to his claim of ineffective assistance of counsel based on his trial counsel's failure to discover and utilize impeachment evidence showing that the medical examiner had a history of changing his testimony in outcome-determinative ways in homicide cases, as to a related claim that the State's failure to disclose impeachment material about the medical examiner amounted to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and as to a cumulative error claim. It then granted a certificate of appealability as to all such claims. We affirm.

We review the denial of a habeas petition de novo, and any findings of fact made by the district court for clear error.<sup>1</sup> *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005). We may affirm on any ground supported by the record. *Id.*

Because Brown failed to raise the operative ineffective assistance of counsel claim within one year of the date on which his state judgment became final by the

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<sup>1</sup> Brown argues that we should review some of his claims for clear error because they rest on underlying factual disputes. Because no factual disputes are relevant to our holding, however, we do not apply the clear error standard to any of the issues herein.

conclusion of direct review or expiration of the time for seeking such review, or within one year of any other tolling event, the claim was untimely. *See* 28 U.S.C. § 2244(d).

Brown argues that the claim was timely because his obligation to raise it was tolled, pursuant to 28 U.S.C. § 2244(d)(1)(D), to within one year of “the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence.” We disagree.

The factual predicate for a habeas petition based on ineffective assistance of counsel exists when the petitioner has discovered (or with the exercise of due diligence could discover) facts suggesting both deficient performance and prejudice. *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001). Brown argues that the factual predicate of his claim was his 2014 discovery that, at the time his trial counsel was litigating his case, the Los Angeles County Public Defender’s (“LACPD”) Office, where counsel worked, had boxes containing relevant impeachment material that counsel nevertheless did not discover or utilize. Brown contends that it was not until he learned that the impeachment materials were in the possession of his counsel’s own office that he could overcome the strong presumption that his counsel had furnished adequate performance. *See Cullen v. Pinholster*, 563 U.S. 170, 189 (2011); *Strickland v. Washington*, 466 U.S. 688, 689-90 (1984).

This argument fails because Brown clearly was aware of the basis for his ineffective assistance of counsel claim long before 2014. The factual predicate of Brown's ineffective assistance of counsel claim is the medical examiner's history of changing his medical testimony, which Brown knew about at least by November 2012, when his habeas counsel copied at the prosecutor's office boxes of impeachment material about the medical examiner.<sup>2</sup> Brown's counsel's failure to find or use widely available impeachment information and to do so after becoming aware of a California Supreme Court case identifying the existence of that information, *see People v. Salazar*, 112 P.3d 14 (Cal. 2005), likely was sufficient to support a claim that counsel's performance fell below prevailing professional standards, *see Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) (explaining that failure to investigate possible methods of impeachment may constitute ineffective assistance of counsel). And discovery that the LACPD in fact had boxes of impeachment material made no material difference as to whether Brown could establish prejudice. *See Hasan*, 254 F.3d at 1154-55 (concluding that, although petitioner had earlier knowledge of some facts suggesting that counsel had been deficient, the factual predicate of his claim arose after new

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<sup>2</sup> We need not resolve whether Brown knew of this factual predicate even earlier, such as at the time of trial. But, unlike our specially concurring colleague, we conclude that it was unreasonable for Brown's habeas counsel, after copying boxes of impeachment material, to continue to believe that Brown's trial counsel had conducted an adequate investigation.

information enabled a petitioner for the first time to make a prejudice argument in good faith).

To the extent Brown argues that his ineffective assistance of counsel claim is timely under a rationale that it relates back to either his first or his first amended habeas petition, we disagree. A claim may only relate back to an exhausted claim, *see King v. Ryan*, 564 F.3d 1133, 1142 (9th Cir. 2009), and none of the claims asserted in Brown's initial federal petitions were exhausted. Accordingly, because the factual predicate for Brown's claim arose no later than November 2012, no other tolling events occurred in the year following that date, and Brown's claim could not relate back to a claim in any prior petition, Brown's second amended petition was untimely and we affirm its denial.

Second, the district court did not err in denying Brown's *Brady* claim as unexhausted. To exhaust a habeas claim, a petitioner must clearly describe to the state court both the facts underlying the claim and the "specific federal constitutional guarantee" on which the claim is based. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Brown's petition to the California Supreme Court did not do this. To the contrary, it explicitly disavowed the *Brady* claim Brown had asserted in his first amended petition, gave no clear indication that Brown sought to raise a new *Brady* claim, and referenced the state's *Brady* obligations and failure to disclose information about the medical examiner to Brown's counsel only in the

course of explaining its claims for ineffective assistance of counsel and prosecutorial misconduct. It was therefore insufficient to present a *Brady* claim to the California Supreme Court. *See Gray*, 518 U.S. at 163; *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (explaining that the “citation of a relevant federal constitutional provision in relation to some other claim does not satisfy the exhaustion requirement”). Accordingly, we affirm the district court’s dismissal of Brown’s petition as to the *Brady* claim.

Finally, because “no error of constitutional magnitude occurred, no cumulative prejudice is possible,” *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011), and the district court therefore properly denied the writ as to Brown’s cumulative error claim.

**AFFIRMED.**

## FILED

*Brown v. CDCR*, No. 18-56432

FEB 10 2020

ROSLYN O. SILVER, District Judge, concurring.

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

I concur in the judgment affirming the District Court’s denial of Brown’s *Brady* and cumulative error claims, and in the judgment affirming the District Court’s denial of Brown’s ineffective assistance of counsel claim. However, I write separately because I view the ineffective assistance of counsel claim as timely such that resolving the claim on the merits is required. Pursuant to 28 U.S.C. § 2244(d), I find the relevant “factual predicate” for Brown’s ineffective assistance of counsel claim to be the discovery by Brown’s habeas counsel on January 29, 2014, that the Los Angeles County Public Defender’s (“LACPD”) Office had in its possession before Brown’s trial a copy of impeachment material (the “Ribe boxes”) demonstrating instances where medical examiner Dr. Ribe had changed his testimony. The one-year clock began running when Brown obtained sufficient knowledge that his trial counsel had failed to conduct an adequate pre-trial investigation: the necessary “facts suggesting both unreasonable performance *and* resulting prejudice.” *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).

The majority considers the factual predicate to be Dr. Ribe’s history of changing his medical testimony, and from this the majority concludes that the November 2012 discovery by habeas counsel of copies of the Ribe boxes in the Los Angeles District Attorney’s (“LADA”) Office was sufficient to start “[t]he ‘due

diligence’ clock . . . ticking.” *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). In my view, Brown did not know, nor through diligence could Brown have discovered, the “vital facts” at the time of his trial. And I disagree with the majority’s conclusions that Dr. Ribe’s history of inconsistent testimony was enough to start the clock. This decision is based on what occurred at a pretrial conference when Deputy Public Defender Joel Lofton (“Lofton”) was specifically told by the prosecution that the Ribe boxes did not exist.

On April 26, 2010, at the pretrial hearing, the trial judge *sua sponte* raised the question of “a host of [Fed. R. Evid.] 402 issues attendant with Dr. Ribe.” Brown’s trial counsel, Lofton, stated that he had not spoken with Deputy District Attorney Kelly Cromer (“Cromer”) “at all about Dr. Ribe” and that he didn’t “have any 402’s on Ribe.” Cromer then argued the Ribe boxes should be excluded from the cross-examination of Dr. Ribe. Lofton responded to Cromer by characterizing her statement as an assertion that “the People have a document of Dr. Ribe, they keep a file on Dr. Ribe,” and stating “in that case the defense is asking for it.” Cromer then responded unequivocally that LADA did not have any impeachment material that Lofton could request and receive, stating: “No, and counsel is mistaken; there are no files that the People keep on Dr. Ribe.”

The record of the pretrial hearing makes clear that Lofton had a right to rely on Cromer’s unambiguous representation that “there are no files that the People keep

on Dr. Ribe” and then conduct no further investigation. Given the strong presumption of adequate assistance, Brown would have had no reason to assume that Lofton’s reliance on Cromer’s representation constituted ineffective assistance of counsel. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011).

In November 2012, Brown’s habeas counsel discovered the Ribe boxes were in fact in the possession of LADA at the time of trial, contrary to Cromer’s representation. Cromer’s misrepresentation at the trial impacted Brown’s *Brady* and prosecutorial misconduct claims such that the magistrate judge granted a *Rhines* stay to permit exhaustion of those claims, but it did not impact Brown’s claim that his trial counsel was ineffective.

Because the claim is timely, I then reach the merits of the ineffective assistance of counsel claim, and it fails. To establish counsel’s assistance was constitutionally ineffective, a petitioner must prove counsel’s performance was deficient, such that the “representation fell below an objective standard of reasonableness,” and prove that the deficient performance prejudiced the defense such that “the decision reached would reasonably likely have been different absent the errors.” *Strickland v. Washington*, 466 U.S. 668, 687–88, 696 (1984). The *Strickland* standard for deficient performance is highly demanding, and requires the petitioner prove “gross incompetence.” *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). To meet the *Strickland* standard for prejudice, the petitioner must show “a

‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Cullen*, 563 U.S. at 189 (citing *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Furthermore, under the Antiterrorism and Effective Death Penalty Act, the relevant question when assessing an exhausted claim of ineffective assistance of counsel is not whether the two prongs of *Strickland* were met, but “whether the state court’s application of the *Strickland* standard was unreasonable.” *Atwood v. Ryan*, 870 F.3d 1033, 1056 (9th Cir. 2017) (quoting *Harrington*, 562 U.S. at 101). In other words, ““the question is not whether counsel’s actions were reasonable,’ but ‘whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”” *Martinez v. Ryan*, 926 F.3d 1215, 1226 (9th Cir. 2019) (quoting *Harrington*, 562 U.S. at 105).

I agree with the District Court that “[o]n habeas review, the state court would be hard pressed to say that the lawyer’s inaction met the standard of professionalism expected of a competent defender.” Lofton’s failure to search LACPD’s internal database of impeachment material, despite a protocol encouraging such searches and the obvious need to investigate the key prosecution witness, constituted deficient performance. Furthermore, Lofton’s failure to consult with his direct supervisor (who had personal knowledge of the Ribe boxes and in fact had previously used them to impeach Dr. Ribe’s credibility in a different case, and who regularly directed all LACPD attorneys working on cases involving Dr. Ribe to “make the appropriate

arrangements to view and review the materials maintained by the office”), during his very first murder trial, constituted gross incompetence.

But the state court’s finding that Brown was not prejudiced by Lofton’s failures was reasonable. The trial judge was familiar with the impeachment material and explicitly narrowed the scope of allowable cross-examination on Dr. Ribe’s changed opinions to avoid “open[ing] up th[e] can of worms” of Ribe’s previous testimony, basing his ruling “on [California Evidence Code §] 352 grounds.” Thus, even had Lofton searched the database or spoken to his supervisor and thus obtained the Ribe boxes, Lofton may not have been able to use them effectively at trial. Such trial-within-a-trial issues are the type of state law evidentiary issue which are generally exempt from federal constitutional review. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). Furthermore, even if Lofton had successfully impeached Dr. Ribe’s credibility, the jury could still have found Dr. Ribe more credible than defense expert Dr. Bonnell, who was impeached in a manner that cast a shadow on his competence and credibility. Brown has not shown a substantial likelihood of a different result. *Cullen*, 563 U.S. at 189.

Because Brown’s ineffective assistance of counsel claim fails on the merits, I concur in the judgment affirming the District Court’s dismissal of Brown’s habeas petition.

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

## SHARRIEFF BROWN,

Petitioner,

V.

CALIFORNIA DEP'T OF CORR. &  
REHAB.,

## Respondent.

Case No. CV 12-9126 DMG (MRW)

AMENDED ORDER GRANTING  
CERTIFICATE OF APPEALABILITY

Petitioner requested a clarification regarding the grant of the certificate of appealability in this action. [Doc. # 133.] The Court amends its earlier COA to make clear that Petitioner may seek appellate review on all of the claims raised in the Second Amended Petition:

- the ineffective assistance of counsel claim (Ground One);
- the unexhausted Brady claim (Ground Two);

1                   • the prosecutorial misconduct claim (Ground Three); and  
2                   • the cumulative error claim (Ground Four).

3  
4  
5                   DATED: October 10, 2018

6                     
7                   DOLLY M. GEE  
8                   UNITED STATES DISTRICT JUDGE

9                   Presented by:

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11                   HON. MICHAEL R. WILNER  
12                   UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

## SHARRIEFF BROWN.

Petitioner,

V.

CALIFORNIA DEP'T OF CORR. &  
REHAB.,

## Respondent.

Case No. CV 12-9126 DMG (MRW)

## JUDGMENT

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

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

DATED: October 3, 2018

Dolly M. Gee  
DOLLY M. GEE

JOEL P. GEE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

## SHARRIEFF BROWN,

Petitioner,

V.

CALIFORNIA DEP'T OF CORR. &  
REHAB.,

## Respondent.

Case No. CV 12-9126 DMG (MRW)

ORDER ACCEPTING FINDINGS  
AND RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE  
JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court engaged in a de novo review of those portions of the Report to which the parties objected.

The Court accepts the findings and recommendation of the Magistrate Judge. See, e.g., Sexton v. Beaudreauz, \_\_\_ U.S. \_\_\_, 2018 WL 3148261 at \* 4 (June 28, 2018) (*per curiam* remand to Ninth Circuit due to “fundamental error”

1 for failing to consider “the arguments or theories [that] could have supported the  
2 state court’s summary decision”).

3 Therefore, IT IS ORDERED that Judgment be entered denying the  
4 petition and dismissing this action with prejudice.

5 DATED: October 3, 2018

  
6 DOLLY M. GEE  
7 UNITED STATES DISTRICT JUDGE

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

SHARRIEFF BROWN,  
Petitioner,  
v.  
CALIFORNIA DEP'T OF CORR. &  
REHAB.,  
Respondent.

Case No. CV 12-9126 DMG (MRW)

**REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE  
JUDGE**

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

## SUMMARY OF RECOMMENDATION

*A reputation once broken may possibly be repaired, but the world will always keep their eyes on the spot where the crack was.”*

\* \* \*

1 Petitioner Sharrieff Brown was convicted of murder in the death of a  
2 toddler under his care. The medical evidence supporting the murder charge  
3 came from the testimony of the deputy coroner who examined the child's body.  
4 The believability of the pathologist was, therefore, central to the prosecutor's  
5 case.

6 It was also an issue of considerable familiarity for the county district  
7 attorney's office, the office of the public defender, and the state supreme court.  
8 For several years before and after Petitioner's trial, the district attorney's office  
9 voluntarily produced information regarding the testimony of Dr. Ribe in earlier  
10 cases to the public defender's office. The district attorney's office and several  
11 individual prosecutors believed that Dr. Ribe had a reputation for changing his  
12 medical opinions as homicide cases approached trial. The district attorney  
13 therefore viewed the pathologist's previous testimony to be potentially Brady-  
14 Giglio material that warranted regular disclosure to the defense.<sup>1</sup>

15 The prosecution did not make that disclosure in Petitioner's case, though.  
16 By the time of trial, a then-recent state supreme court opinion rejected the  
17 significance of the Ribe materials in another murder trial. Petitioner's appointed  
18 defense lawyer therefore did not obtain these items directly from the deputy  
19 district attorney involved in Petitioner's case. The defense lawyer also failed to  
20 obtain the material – which his office received and circulated over the years –  
21 from colleagues in the public defender's office. As a result, the attorney did not  
22 cross-examine the coroner with his testimony in those other actions.

23 In post-conviction proceedings, Petitioner raised a set of intertwining  
24 claims of ineffective assistance of counsel, prosecutorial misconduct, and Brady  
25

26 <sup>1</sup> Brady v. Maryland, 373 U.S. 83 (1963), requires a prosecutor to  
27 produce material, exculpatory evidence to the defense. Giglio v. United States,  
405 U.S. 150 (1972), extends the Brady disclosure obligation to information that  
28 could impeach the credibility of a prosecution witness.

1 violations. At their core, Petitioner's claims presuppose the significance of the  
2 "Ribe boxes" of putative impeachment material. The state supreme court denied  
3 habeas relief without substantive comment.

4 This Court reviews the state court's silent decision using a deferential  
5 standard under AEDPA. That standard asks whether, based on an independent  
6 review of the case record, there is any basis to conclude that the state court  
7 decision did not unreasonably apply clearly established federal law. The Court  
8 concludes that the state court's earlier published evaluation of the impeachment  
9 materials – and its not-unreasonable conclusion that the items were immaterial –  
10 did not fall short of this deferential standard. For this reason, the Court  
11 recommends that Petitioner's request for a writ of habeas corpus be denied.

12 **FACTS AND PROCEDURAL HISTORY**

13 **The Child's Death and the Investigation**

14 The victim was the 18-month-old daughter of Petitioner's girlfriend. The  
15 girlfriend left Petitioner alone with the girl and a younger infant. The girl died  
16 from a serious head wound when Petitioner was the only adult present in the  
17 home.

18 In his first statements to the police, Petitioner claimed that the girl fell off  
19 a kitchen counter when he momentarily left her unattended. Petitioner later  
20 admitted that he dropped the child. Other evidence of suspicious conduct was  
21 that:

22       • Petitioner called his mother (rather than 911) after the girl  
23            was injured – he claimed that the phone didn't work and that  
24            he didn't know his girlfriend's address;  
25       • a television was missing from the apartment, and a vacuum  
26            was found in an odd location (suggesting that Petitioner  
27            damaged the television during the incident); and

1           •     Petitioner admitted to smoking marijuana that night.

2           The autopsy result showed that the cause of death was a major skull  
3 fracture and cranial bleeding. The coroner's office concluded that the manner of  
4 death was homicide. The deputy coroner (Dr. Ribe) determined that the impact  
5 of the injuries to the child's brain and eyes was not consistent with a simple fall  
6 or drop from a counter height.

7           **Pre-Trial Discussions Regarding Dr. Ribe**

8           During pretrial proceedings, the lawyers and the trial judge discussed the  
9 anticipated testimony of Dr. Ribe at length. The defense attorney acknowledged  
10 that he interviewed the coroner approximately nine months before trial. (Docket  
11 # 90-4 at 41.) The lawyer stated that he intended "to cross-examine [Dr. Ribe]  
12 like any other witness." (*Id.* at 23.) To that end, the defense lawyer asked the  
13 prosecutor to obtain additional notes from the pathologist, and raised an issue  
14 regarding the coroner's failure to review hospital treatment records before the  
15 child's death. (*Id.* at 26-30, 41-43.)

16           There was also a truncated discussion about Dr. Ribe's prior testimony in  
17 other trials. The trial judge (who disclosed that he was a former prosecutor  
18 familiar with the coroner) initiated the discussion by noting that, "as I  
19 understand it, there are a host of 402 issues attendant with Dr. Ribe."<sup>2</sup> (*Id.*  
20 at 19.) The defense lawyer demurred, stating "I don't have any 402s on Ribe."  
21 (*Id.* at 20.)

22           The discussion soon widened. The prosecutor suggested that the defense  
23 "intends to try to impeach Dr. Ribe with the old Lance Helms [Wingfield  
24 (discussed below)] case materials?" (*Id.* at 21.) The prosecutor and the trial  
25 judge then explained several aspects of the Helms / Wingfield case for the

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27           <sup>2</sup> This was a reference to California Evidence Code section 402,  
28 which allows a court to evaluate the admissibility of evidence outside the  
presence of the jury.

1 defense lawyer. The lawyer said “I’m not exactly sure what the people are  
2 talking about with this Lance Helm[s.] I’m not sure about this case, but I’ll try  
3 to familiarize myself with what she’s [the prosecutor] talking about.” (Id. at 21,  
4 23.)

5 Of relevance to Petitioner’s current claim, the defense lawyer broadly  
6 stated “The People have a document of Dr. Ribe, they keep a file on Dr. Ribe,  
7 and in that case the defense is asking for it.” (Id. at 21.) In response, the  
8 prosecutor declared “No. And counsel is mistaken, there are no files that the  
9 People keep on Dr. Ribe.” (Id.) The prosecutor did not produce to the defense  
10 any material regarding any of the pathologist’s previous testimony in criminal  
11 cases.

12 Instead, the prosecutor affirmatively asked the trial judge to preclude the  
13 defense from using any of the Helms materials in questioning of Dr. Ribe.  
14 The prosecutor explained that there is “an appellate case [Salazar] which  
15 basically rules that that material is not relevant in any other proceedings[.]  
16 There’s nothing in that material that is relevant on the impeachment of  
17 Dr. Ribe.” (Id. at 21, 22.) The trial judge agreed that “there was some litigation  
18 over the extent and scope of impeachment of Dr. Ribe.” (Id. at 22.) However,  
19 the court offered no final ruling, and instructed the lawyers to raise issues  
20 regarding the cross-examination of Dr. Ribe in a later 402 hearing. (Id. at 23.)  
21 The trial judge later acknowledged reviewing the state supreme court’s decision  
22 in Salazar (discussed below). (Id. at 136.)

23 The issue came to a head when, during Dr. Ribe’s testimony, the defense  
24 lawyer indicated that he intended to ask the pathologist whether he had  
25 previously “made an opinion, he changed his opinion.” The defense lawyer  
26 stated that he was “not getting into specific cases” during his anticipated cross-  
27 examination of Dr. Ribe. (Id. at 187.)

28

1       The trial judge stated that the defense was “entitled to question [Dr. Ribe]  
2 on whether there have been times in the past when he has changed his opinions  
3 and what the reasons may have been” – that was “fair game.” However, that  
4 impeachment would have to be “without getting into case-specific issues” such  
5 as the Helms matter. The judge expressed concern that “we open a whole series  
6 of doors” and a “can of worms” by allowing specific questioning about the facts  
7 of other cases. The trial judge stated that “I don’t think that is relevant,” citing  
8 Salazar in his ruling. (Id.) The trial judge expressly cited California Evidence  
9 Code section 352 (analogous to Federal Rule of Evidence 403) which allows a  
10 court to exclude evidence if its probative value is “substantially outweighed by”  
11 the potential for undue prejudice, jury confusion, or undue consumption of trial  
12 time. (Id.)

13       **The Trial**

14       Petitioner went to trial on murder and child abuse charges in 2010. At  
15 trial, the prosecution called several law enforcement witnesses to establish the  
16 scene of the incident. Those witnesses also allowed the prosecution to present  
17 Petitioner’s inconsistent and inculpatory statements regarding the girl’s death.

18       The deputy coroner testified in the prosecution’s case-in-chief.

19       Dr. Ribe explained the cause and manner of death to the jury in considerable  
20 detail. Petitioner was represented at trial by a deputy county public defender  
21 handling his first murder trial. The defense cross-examination was fairly brief  
22 (covering approximately 15 pages in the trial transcript). The defense lawyer  
23 generically asked the coroner whether he had ever changed his medical opinion  
24 regarding a death after concluding an autopsy. The coroner agreed that it  
25 happened “all the time.” However, consistent with the trial judge’s pre-and  
26 mid-trial rulings and the defense’s stated intent, the Petitioner’s lawyer did not  
27 ask more detailed questions about other specific cases in the coroner’s career, his  
28

1 professional reputation, or otherwise impeach Dr. Ribe's credibility. (Docket  
2 # 90-5 at 192-207, 212)

3 The defense called its own forensic pathologist to offer a different opinion  
4 about the girl's death. The defense expert offered criticisms regarding how  
5 Dr. Ribe conducted the autopsy. Also, based on earlier testimony from the girl's  
6 mother that suggested that the girl had a preexisting head injury or brain  
7 disorder, the defense expert opined that the death could have been accidental.  
8 (Docket # 90-7 at 37-80.) The prosecutor cross-examined the defense expert at  
9 length. The questioning focused on scientific issues, the expert's reputation and  
10 qualifications, and an unsubstantiated claim of professional misconduct. (Id.  
11 at 80-118, 142-47.)

12 The jury convicted Petitioner of second-degree murder and assault. (It  
13 acquitted Petitioner of additional child abuse charges.) The trial court sentenced  
14 Petitioner to a prison term of 25 years to life.

15 **Appellate and Post-Conviction Proceedings**

16 The state appellate court affirmed the conviction on direct appeal. The  
17 appellate decision addressed legal arguments that are not the subject of the  
18 present federal habeas action. The state supreme court denied review.

19 This federal action followed. Petitioner filed two habeas petitions on a  
20 pro se basis in late 2012. Shortly after that, lawyers from a local law school  
21 clinic appeared in the action on Petitioner's behalf.<sup>3</sup> Petitioner then requested  
22 and obtained a stay of the federal action to pursue additional habeas relief in  
23 state court.

24 At the time that the Court entered its amended stay order, Petitioner's  
25 amended petition alleged that: (a) the prosecution withheld evidence regarding  
26 Dr. Ribe in violation of Brady (Claim 2 of the amended petition); and

27 <sup>3</sup> The Court also appointed the Office of the Federal Public Defender  
28 to represent Petitioner.

1 (b) misconduct by the prosecutor (Claim 3). The Court stayed those claims  
2 pending their presentation and exhaustion in the state courts, and dismissed the  
3 remainder of Petitioner's action.<sup>4</sup> (Docket # 37, 55.)

4 The gravamen of the amended petition, the stay request, and the initial  
5 state habeas proceedings that followed was that the prosecution allegedly  
6 concealed from the defense information regarding potentially inconsistent trial  
7 testimony of Dr. Ribe in other murder cases. However, Petitioner's clinic  
8 lawyers came to learn that the district attorney's office did regularly disclose this  
9 information – for a period of time (perhaps beginning in 2004 (Docket # 106  
10 at 23)) – to the county public defender's office in homicide cases. (The  
11 "Ribe boxes" are discussed in more detail below.) In addition, the public  
12 defender's office included information about Dr. Ribe in an internal computer  
13 database for attorneys to use in researching police and other law enforcement  
14 witnesses.

15 When Petitioner's lawyers learned that the district attorney did produce  
16 the Ribe boxes to the public defender's office several years before Petitioner's  
17 trial, the complexion of Petitioner's habeas claims changed somewhat.  
18 Petitioner's attorney candidly told a superior court judge that, instead of a Brady  
19 violation based on the prosecution withholding information from the defense,  
20 Petitioner's key claim was based on his trial lawyer's failure to obtain or use the  
21 previously-produced materials.<sup>5</sup>

22 This was due to the minimal amount of research that the defense lawyer  
23 conducted to investigate Dr. Ribe and his previous testimony. The defense  
24 lawyer acknowledged in a declaration that he conducted a rudimentary inquiry (a

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25 <sup>4</sup> Rhines v. Weber, 544 U.S. 269 (2005); Kelly v. Small, 315 F.3d  
26 1063 (9th Cir. 2003).

27 <sup>5</sup> The Court separately takes up Petitioner's claim that the  
28 prosecution violated Brady by failing to produce additional items to the defense  
beyond those contained in the Ribe boxes.

1 Google search of Ribe's name, and a review of the Salazar decision involving  
2 the coroner). He also reviewed transcripts directly related to the Salazar case.  
3 However, the lawyer failed to search the public defender's internal database or  
4 ask other lawyers about Dr. Ribe. (Docket # 91-22 at 14.) The bottom line – the  
5 public defender's office possessed ample information in the Ribe boxes  
6 (produced voluntarily by the D.A. in 2004) about the pathologist's previous  
7 testimony, but the deputy public defender assigned to Petitioner's case didn't  
8 personally know about it.<sup>6</sup>

9 So, as to the Ribe boxes produced years before Petitioner's trial, Petitioner  
10 pursued state habeas relief on a claim that his lawyer provided ineffective  
11 assistance. The state superior court denied relief. In the state supreme court,  
12 Petitioner's habeas petition consisted of three claims: ineffective assistance by  
13 trial counsel, prosecutorial misconduct regarding the existence of the Ribe  
14 boxes, and cumulative error. (Docket # 80-1 (discussed below).) The parties  
15 fully briefed the claims in the supreme court proceedings.

16 In 2016, the state supreme court ultimately denied relief by a short  
17 decision (quoted in its entirety):

18 The petition for writ of habeas corpus is denied.  
19 Petitioner's record-based claims of prosecutorial  
20 misconduct, except to the extent he alleges ineffective  
21 assistance of trial counsel, are procedurally barred under  
22 In re Dixon (1953) 41 Cal.2d 756, 759, in that they  
23 should have been raised on appeal. All remaining claims  
24 are denied on the merits. (See Harrington v. Richter  
25  
26

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27         <sup>6</sup> The defense lawyer claims that, after the prosecutor told him that  
28 the district attorney's office did not keep "a file" on Dr. Ribe, he "made no  
further investigation" into Dr. Ribe's background. (Docket # 91-22 at 14.)

1 (2011) 562 U.S. 86, 99-100, citing Ylst v. Nunnemaker  
2 (1991) 501 U.S. 797, 803.)

3 (Docket # 91-25.)

4 After the conclusion of state court proceedings, the Court lifted the stay in  
5 the federal action. Petitioner filed a second amended petition containing  
6 four claims: (1) ineffective assistance of counsel; (2) Brady error regarding  
7 non-Ribe-box materials; (3) prosecutorial misconduct; and (4) cumulative error.  
8 (Docket # 101.)

9 **The Ribe Boxes and the Salazar Decision**

10 For an extended period of time in the 1990s and early 2000s, there was an  
11 internal debate within the Los Angeles County District Attorney's Office  
12 regarding Dr. Ribe. Prosecutors generally considered him to be a skilled and  
13 knowledgeable pathologist. However, several attorneys became concerned  
14 when Dr. Ribe appeared to change his opinions during or approaching trial. In  
15 internal memos (later produced to the defense), those prosecutors noted  
16 occasions where they perceived Dr. Ribe to vacillate when questioned about the  
17 time or manner of death in homicide cases, or to backtrack from opinions  
18 regarding sexual molestation of victims. (Docket # 91-10 at 4, 8, 17.)

19 The district attorney's office ultimately decided to produce to the public  
20 defender's office a set of transcripts of Dr. Ribe's trial and preliminary hearing  
21 testimony and other case-related items from a half-dozen criminal cases. (It is  
22 not clear whether the D.A. produced the items one time or on multiple  
23 occasions.) The prosecution apparently concluded that Brady and its progeny  
24 required the production of these records; individual prosecutors continued to  
25 argue about the relevance and scope of use of the material at trial on a case-by-  
26 case basis. The production started as an assembly of relevant materials (1998)

1 and later involved the entry of Dr. Ribe's name into an internal Brady disclosure  
2 system (2003). (Docket # 54.)

3 The production of the Ribe materials (and the entry of his name in the  
4 district attorney's Brady-related disclosure system) ceased in mid-2005 after the  
5 Salazar decision. The Attorney General acknowledges that Dr. Ribe's name was  
6 re-entered in that system in mid-2011. (Docket # 106 at 90 n.32.)

7 \* \* \*

8 The parties each summarized the Ribe box materials in their submissions  
9 to this Court. (Docket # 101 at 38-41; # 106 at 40-78.) In addition to several  
10 candid memos from prosecutors, the specific case-related materials involved the  
11 following state criminal cases (identified by defendant):

- 12 • Cauchi – Dr. Ribe changes “tenor of my diagnosis” regarding  
13 whether child victim was sexually assaulted before death  
14 after reviewing a consultant’s opinion. (Docket # 106 at 45  
15 (quoting underlying record).)
- 16 • Wingfield – Change in opinion regarding timing of child’s  
17 death from injuries, which affected timeline for prosecution.  
18 (Docket # 101 at 40.)
- 19 • Tuccinardi – Testimony regarding number and nature of  
20 knife wounds on victim’s body. (Docket # 101 at 40; # 106  
21 at 52.)
- 22 • Hand – Victim fatally shot 12 times; Dr. Ribe “moved away”  
23 from whether one injury was entrance or exit wound.  
24 (Docket # 101 at 41; # 106 at 56.)

25  
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- Rathbun – Dr. Ribe gave inconsistent testimony regarding sexual assault on victim. (Docket # 101 at 41; # 106 at 60.)<sup>7</sup>

\* \* \*

The disclosure of these items ended (for a time) after the state supreme court's decision in People v. Salazar, 35 Cal. 4th 1031 (2005). Salazar involved a murder prosecution in which Dr. Ribe testified about the manner and timing of the violent death of a child. At Salazar's trial, the defense was not aware that the prosecution possessed impeachment material about Dr. Ribe, particularly his change of opinion regarding the timing of the victim's death in Wingfield.

A unanimous supreme court concluded that there was no Brady violation because the information was immaterial. The court determined that it was “unlikely” that the Wingfield information “would have even been viewed as significant impeachment evidence” regarding Dr. Ribe. Salazar, 35 Cal. 4th at 1051.

More broadly, the supreme court “reviewed the pleadings and the entire record below” – that is, the Ribe boxes consisting of other opinion testimony from the deputy coroner – and concluded that “none of the other cases, singly or in combination, present[s] an issue of materiality.” Id. at 1052 n.7. The court determined that “the evidence does not strongly support – if at all – petitioner’s claim that Dr. Ribe was a mere puppet of the prosecution and thus should have been disbelieved in this case.” And, given the minimal impeachment value of the Ribe materials and the other evidence in the case, the supreme court ruled that “it is not reasonably probable the result would have been different had the defense sought to use the Helms [that is, the Wingfield] murder investigation to

<sup>7</sup> The Attorney General also provided its summary of the Vildosola and Jacobo case. (Docket # 106 at 64.) However, beyond noting the existence of the Jacobo materials in the Ribe boxes, Petitioner makes no mention of the significance of these items. (Docket # 101 at 38.)

1 impeach Dr. Ribe's testimony." Id. at 1052. The court assigned no significance  
2 to the "lively debate" within the district attorney's office regarding disclosure of  
3 the Ribe information; a court "need not defer to a prosecutor's opinion that  
4 information already identified is or is not Brady material." Id. at 1052 n.8.

5 The Court takes judicial notice of the denial of Salazar's subsequent  
6 federal habeas petition (alleging Brady, ineffective assistance, and prosecutorial  
7 misconduct claims) in this district. Salazar v. Dawson, No. CV 07-6874 DOC  
8 (AJW) (C.D. Cal.). Salazar did not seek review of this Court's adverse decision  
9 in the Ninth Circuit.<sup>8</sup>

10 \* \* \*

11 During the pendency of this federal action, Petitioner's lawyers reviewed  
12 the substance of the Ribe boxes. Additionally, they requested additional  
13 discovery regarding Dr. Ribe during the state proceedings. The district  
14 attorney's office produced a spreadsheet in 2014. That spreadsheet listed what  
15 appear to be several additional criminal cases involving Dr. Ribe in the 1990s  
16 and 2000s. (Docket # 91-22 at 54-55.) Petitioner also became aware of news  
17 reports of a case [Gonzalez] in which prosecutors dismissed homicide charges  
18 regarding the death of a child with significant preexisting health issues. (Docket  
19 # 101 at 43.)

20 However, the D.A. ultimately declined to produce any materials  
21 (presumably transcripts and other items) from additional cases beyond the  
22 original Ribe boxes. The superior court did not order the prosecution to turn

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23 <sup>8</sup> Dr. Ribe featured in several other habeas cases in this district  
24 evaluating Brady/IAC issues. These include: Talley v. Diaz, No. CV 13-6572  
25 VAP (AN), 2014 WL 184135 (C.D. Cal.); Hand v. Hedgpeth, No. CV 10-3583  
26 DDP (JCG), 2011 WL 4386239 (C.D. Cal.); Helms v. Clark, No. CV 07-5263  
27 GHK (PLA), 2010 WL 935784 (C.D. Cal.); Vildosola v. Hornbeak, No. CV 08-  
6590 VAP (JEM), 2010 WL 1507100 (C.D. Cal.). None led to federal habeas  
corpus relief.

1 over these items. No materials from the additional cases recently identified on  
2 the 2014 spreadsheet were presented to the state supreme court on habeas  
3 review.<sup>9</sup>

4 **DISCUSSION**

5 **Standard of Review Under AEDPA**

6 Under AEDPA, federal courts may grant habeas relief to a state prisoner  
7 “with respect to any claim that was adjudicated on the merits in State court  
8 proceedings” only if that adjudication:

9 (1) resulted in a decision that was contrary to, or  
10 involved an unreasonable application of, clearly  
11 established Federal law, as determined by the Supreme  
12 Court of the United States; or (2) resulted in a decision  
13 that was based on an unreasonable determination of the  
14 facts in light of the evidence presented in the State court  
proceeding.

15 28 U.S.C. § 2254(d).

16 In a habeas action, this Court generally reviews the reasonableness of the  
17 state court’s last reasoned decision on a prisoner’s claims. Murray v. Schriro,  
18 746 F.3d 418, 441 (9th Cir. 2014); Harrington v. Richter, 562 U.S. 86, 99  
19 (2011). When the state court decision is “unaccompanied by an explanation” of  
20 the court’s reasoning, a federal court presumes that this decision reached and  
21 rejected the merits of Petitioner’s constitutional claim. Richter, 562 U.S. at 99;  
22 Johnson v. Williams, \_\_\_\_ U.S. \_\_\_, 133 S. Ct. 1088, 1092 (2013) (federal court  
23 ordinarily “must presume that [a prisoner’s] federal claim was adjudicated on the  
merits”).

24

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25 <sup>9</sup> The Attorney General surmises – without any support – that these  
26 items were added to the spreadsheet “after Petitioner’s trial” when the district  
27 attorney resumed making Ribe disclosures in 2011. (Docket # 106 at 90 n.32.)  
Conversely, Petitioner offers no insight into the substance of any of the cases or  
28 how Dr. Ribe could properly be impeached with this material.

In that circumstance, AEDPA requires the Court to perform an “independent review of the record” to determine “whether the state court’s decision was objectively unreasonable.” Richter, 562 U.S. at 98. When the state court does not explain the basis for its rejection of a prisoner’s claim, a federal habeas court “must determine what arguments or theories [ ] could have supported the state court’s decision” in evaluating its reasonableness. Id. at 102 (emphasis added); Espinoza v. Spearman, 661 F. App’x 910, 912 (9th Cir. 2016) (prisoner “still bears the burden of showing there was no reasonable basis for the state court to deny relief” on independent review) (quotation omitted). Independent review of the record “is not de novo review of the constitutional issue.” Rowland v. Chappell, 876 F.3d 1174, 1181 (9th Cir. 2017) (quotation omitted).

The Court acknowledges that it received and independently reviewed the state court record. *Nasby v. McDaniel*, 853 F.3d 1049, 1053 (9th Cir. 2017).

\* \* \*

Overall, AEDPA presents “a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” Burt v. Titlow, \_\_\_ U.S. \_\_\_, 134 S. Ct. 10, 16 (2013). On habeas review, AEDPA places on a prisoner the burden to show that the state court’s decision “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement” among “fairminded jurists.” Richter, 562 U.S. at 101, 103; White v. Wheeler, \_\_\_ U.S. \_\_\_, 136 S. Ct. 456, 461 (2015). Federal habeas corpus review therefore serves as “a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction” in the state court system. Richter, 562 U.S. at 102.

## **Petitioner Failed to Exhaust His *Brady* Claim**

A preliminary procedural issue for this Court to address is whether Petitioner properly exhausted his Brady claim as required under AEDPA. The Attorney General contends that the Brady claim contained in Claim Two of the Second Amended Petition in this federal action was not presented to the state supreme court and must be dismissed. (Docket # 106 at 81.)

## Petitioner's claims in federal and state habeas actions

The federal claim alleges that the prosecutor violated Brady by failing to disclose a variety of materials to the defense. Those items include the original Ribe boxes,<sup>10</sup> the items listed on the 2014 spreadsheet, “as-yet identified materials that may exist between 2005-2011,” and “any other Ribe materials in the possession” of the district attorney’s office. (Docket # 101 at 61.)

The federal petition clearly and directly referenced Brady, Giglio, and other well-established U.S. Supreme Court decisions (Agurs, Bagley, Kyles, etc.) as the basis for the claim of allegedly unconstitutional lack of disclosure. (Id.) The Second Amended Petition also laid out the elements of a Brady-Giglio claim for this Court’s analysis. (Id. at 61-62.)

Petitioner's petition in the state supreme court did not contain a similar ground of constitutional error. A plain reading of the substantive text of the petition and the table of contents reveals the following claims:

- misconduct regarding prosecutor's statements to the trial court and defense counsel regarding Dr. Ribe (Docket # 80-1 at 5-6, 69-94);

<sup>10</sup> The petition confusingly asserts that “it was later learned that the LADA had provided the Ribe boxes to the [county public defender] in 2004.” (*Id.* at 62.) The gist of the claim apparently is the prosecutor’s alleged failure to disclose potential impeachment material that should have been, but was not, included in the Ribe boxes turned over to the defense before 2004.

- 1                   • ineffective assistance by trial counsel for failing to properly  
2                   investigate Dr. Ribe's background and impeach his trial  
3                   testimony (Id. at 6, 94-112); and  
4                   • cumulative error "as a result of the prosecutor's misconduct  
5                   and trial counsel's deficient performance" (Id. at 6, 113-14).

6                   The legal arguments presented in the state petition cited federal cases and  
7                   state analogues that traditionally establish prosecutorial misconduct (Donnelly v.  
8                   De Christoforo, 416 U.S. 637 (1974); Berger v. United States, 295 U.S. 78  
9                   (1935)) or ineffective assistance (Strickland v. Washington, 466 U.S. 668  
10                  (1984)). (Docket # 80-1 at 70, 95.) Additionally, in a section of the petition  
11                  helpfully entitled "Summary of Mr. Brown's Legal Claims," Petitioner again  
12                  listed his three claims: (1) prosecutorial misconduct under Berger; (2) ineffective  
13                  assistance under Strickland; and (3) cumulative error (citing a state court  
14                  decision).

15                  The state petition contained no citation to Brady, Giglio, or the other  
16                  disclosure-related Supreme Court precedent relied upon in the federal petition.  
17                  Instead, the state petition acknowledged (in explaining the delay in seeking  
18                  relief) that Petitioner "realized there was no viable Brady claim" in his case in  
19                  2014 when the lawyers learned that the public defender's office had the Ribe  
20                  boxes years earlier. (Id. at 56.) To be sure, there was ample reference to the  
21                  disclosed and allegedly undisclosed items by describing them adjectivally as  
22                  Brady or Giglio material. Nevertheless, Petitioner did not present a claim to the  
23                  state supreme court seeking relief based on the prosecutor's alleged failure to  
24                  comply with this line of constitutional decisions.<sup>11</sup>

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25                  11                  Petitioner's experienced attorneys were surely aware of the  
26                  requirement to present his claims to the state court before seeking federal relief.  
27                  They informed the state supreme court that "Petitioner files his habeas petition  
28                  with this [California Supreme] Court to exhaust his state court remedies before  
                        returning to federal court, where his case is pending." (Docket # 80-1 at 20.)

1                   Relevant federal law

2                   A state prisoner must exhaust state court remedies before a federal court  
3 may grant habeas corpus relief. 28 U.S.C. § 2254(b)(1)(A). To satisfy the  
4 exhaustion requirement under AEDPA, a habeas petitioner must fairly present  
5 the federal claims in the state courts. Duncan v. Henry, 513 U.S. 364, 365  
6 (1995) (per curiam); Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008).  
7 A habeas petitioner must give the state courts “one full opportunity” to decide a  
8 federal claim by carrying out “one complete round” of the state’s post-  
9 conviction review process in order to properly exhaust a claim. O’Sullivan v.  
10 Boerckel, 526 U.S. 838, 845 (1999). In California, the exhaustion prerequisite  
11 requires a prisoner to present a claim to the state supreme court. Peterson v.  
12 Lampert, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc).

13                   To effectively exhaust a claim, a petition must state “the factual and legal  
14 basis for the claim.” Scott v. Schriro, 567 F.3d 573, 582 (9th Cir. 2009)  
15 (quoting Castille v. Peoples, 489 U.S. 346, 351 (1989)); Johnson v. Neven, 599  
16 F. App’x 686 (9th Cir. 2015) (same). Minimal, driveby references to the federal  
17 constitution are insufficient to fairly present and exhaust the legal basis for a  
18 claim. Castillo v. McFadden, 399 F.3d 993, 999 (9th Cir. 2005). “Mere general  
19 appeals to broad constitutional principles,” such as due process or the right to a  
20 fair trial, “do not establish exhaustion.” Id.; Fields v. Waddington, 401 F.3d  
21 1018, 1021 (9th Cir. 2005) (claim is not exhausted by “a petitioner’s mention, in  
22 passing, of a broad constitutional concept, such as due process”).

23                   Analysis

24                   The current iteration of the federal habeas petition clearly and coherently  
25 alleges a Brady violation. But a plain reading of Petitioner’s state habeas  
26 petition does not reveal any similar claim. The Court cannot conclude that  
27 Petitioner fully or fairly gave the state supreme court the opportunity to evaluate  
28

1 his Brady arguments. Duncan, 513 U.S. at 365; Wooten, 540 F.3d at 1025. As a  
2 result, the claim must be dismissed as unexhausted.

3 The state petition undisputedly laid out the prosecutorial misconduct and  
4 ineffective assistance claims with ample clarity. Beyond the simple legal  
5 writing basics of point headings and capitalized summaries of the claims,  
6 Petitioner articulated those legal arguments in the state court with direct  
7 reference to the federal constitutional provisions and the clearly established  
8 Supreme Court decisions interpreting them.

9 But the state petition did not even remotely explain that Petitioner sought  
10 relief based on alleged violations of Brady, Giglio, or their progeny. To the  
11 contrary, Petitioner expressly informed the state court that he was abandoning  
12 his previously-asserted Brady claim regarding the existence of the Ribe boxes.  
13 If Petitioner intended to present and exhaust a claim about the prosecutor's  
14 failure to disclose impeachment material beyond the boxes' contents (and in a  
15 manner other than a prosecutorial misconduct claim), that doesn't come through  
16 at all from the petition. Scott, 567 F.3d at 582; Castillo, 399 F.3d at 999. And if  
17 the issue was not fairly presented to the state supreme court, its decision to deny  
18 habeas relief to Petitioner is unreviewable under AEDPA.

19 Petitioner's arguments in support of exhaustion are unconvincing.  
20 (Docket # 99 at 11-13 (discussing exhaustion at time of filing of amended  
21 petition); 116 at 24.) The single, bare citation to Brady in the petition (Docket  
22 # 80-1 at 63) was utterly tangential to his habeas claim; it occurred in a section  
23 of the petition addressing whether some of the material in the Ribe boxes were  
24 protected by the attorney work product doctrine. The supreme court could not  
25 have assumed that this discussion advanced a claim of constitutional error at  
26 trial. And the Court is unpersuaded that the Attorney General's overly-prudent  
27  
28

1 decision to presume that Petitioner raised a Brady claim (Docket # 107-2)  
2 functioned as a substitute for Petitioner's own lack of adequate pleading.

3 Petitioner clearly, directly, and intentionally raised three claims in his  
4 state supreme court petition. None was the recognizable Brady claim that he  
5 asserted in the pending federal matter. As such, the state supreme court did not  
6 rule on the merits of the constitutional argument. The unexhausted claim cannot  
7 be reviewed in this Court and must be dismissed.<sup>12</sup>

8 **Ineffective Assistance of Counsel**

9 Petitioner contends that his attorney provided ineffective assistance at  
10 trial. He argues that the lawyer's cursory investigation into Dr. Ribe's  
11 background and failure to take basic steps to obtain the disclosure already  
12 produced to the county public defender constituted deficient performance.  
13 Petitioner claims that he was prejudiced because his lawyer failed to adequately  
14 cross-examine the pathologist based on the information about his previous  
15 testimony in other cases.<sup>13</sup>

16 <sup>12</sup> In the alternative, even if Petitioner adequately presented and  
17 exhausted his post-Ribe box Brady claim in state court, the state supreme court's  
18 silent decision survives independent federal review. As set forth below, the state  
19 court could easily have concluded that Petitioner failed to demonstrate the  
20 materiality of the transcripts allegedly withheld from the defense (a necessary  
21 element of a Brady claim). Indeed, the state court had no factual basis to  
22 conclude that those items were more material than those analyzed in Salazar.

23 <sup>13</sup> The Attorney General previously opposed Petitioner's request to  
24 amend the petition to essentially substitute this ineffective assistance claim  
25 (regarding the lawyer's failure to find and use the Ribe boxes) for his  
26 previously-asserted Brady claim (failure of prosecution to disclose the boxes).  
27 (Docket # 94.)

28 Unlike the post-Ribe-box / Brady issue discussed above, Petitioner  
29 adequately preserved his right to plead and pursue this issue in federal and state  
30 court. The specific contours of the claim did not become clear until Petitioner's  
31 attorneys conducted additional work and were able to review the materials in the  
32 public defender's possession. That entitled Petitioner to a more favorable start  
33 date of his federal statute of limitations. Hasan v. Galaza, 254 F.3d 1150, 1154-  
34 55 (9th Cir. 2001). Alternatively, the Court easily concludes that the "time and

1                   **Facts and decision below**

2                   Dr. Ribe performed the autopsy on the victim in this case. He testified as  
3 to the manner and cause of death at trial. Dr. Ribe opined that the nature of the  
4 victim's injuries was so severe that they could not have been caused by an  
5 accidental fall (as Petitioner originally told the police).

6                   As noted above, Dr. Ribe's opinions in several other homicide cases were  
7 a topic of concern within the county prosecutor's office years earlier. According  
8 to memos from individual prosecutors, Dr. Ribe was believed to have modified  
9 his conclusions regarding the cause or timing of death or other injuries to the  
10 victim in several cases. These prosecutors complained that the pathologist's  
11 change in opinions – in the run-up to trial or while on the witness stand –  
12 undermined the prosecution of those cases.

13                  In response, the district attorney's office began to regularly produce  
14 Dr. Ribe's prior testimony (trial and preliminary hearing materials) from a series  
15 of criminal cases to the defense in more recent actions. That did not happen in  
16 the present case. Petitioner's trial occurred after the state supreme court's  
17 Salazar decision; the district attorney's office did not continue its production of  
18 the Ribe boxes in the wake of that decision.

19                  Petitioner presented a claim of ineffective assistance by his trial lawyer in  
20 the most recent state supreme court proceedings. The state court explicitly  
21 referenced the ineffective assistance claim, and denied it "on the merits" without  
22 any further explanation or reasoning for its decision. (Docket # 91-25.)

23  
24  
25  
26                  type" of facts asserted in the new IAC claim relate back to the Brady claim that  
27 Petitioner pled and was the subject of the Rhines stay in the action. Nguyen v.  
28 Curry, 736 F.3d 1287, 1297 (9th Cir. 2013). Bottom line – the change in how  
Petitioner pled this claim does not prevent federal consideration.

1                   Relevant federal law

2                   The Sixth Amendment of the Constitution guarantees a criminal defendant  
3 the right to effective assistance of a lawyer. Strickland, 466 U.S. at 688. To  
4 establish ineffective assistance under Strickland, “a defendant must show both  
5 deficient performance by counsel and prejudice.” Knowles v. Mirzayance, 556  
6 U.S. 111, 112 (2009). “Failure to satisfy either prong of the Strickland test  
7 obviates the need to consider the other.” Rios v. Rocha, 299 F.3d 796, 805 (9th  
8 Cir. 2002).

9                   \* \* \*

10                  Deficient performance is defined as representation that falls below an  
11 objective standard of reasonableness. Strickland, 466 U.S. at 688. A defense  
12 lawyer has a duty to conduct a reasonable investigation before trial. Atwood v.  
13 Ryan, 870 F.3d 1033, 1057 (9th Cir. 2017) (citing Strickland); Browning v.  
14 Baker, 875 F.3d 444, 471-72 (9th Cir. 2017). “A lawyer who fails adequately to  
15 investigate, and to introduce into evidence, [information] that demonstrates his  
16 client’s factual innocence, or that raises sufficient doubts as to that question to  
17 undermine confidence in the verdict, renders deficient performance.” Reynoso  
18 v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006) (citation omitted); Weeden v.  
19 Johnson, 854 F.3d 1063, 1070 (9th Cir. 2017) (“Under Strickland, counsel’s  
20 investigation must determine trial strategy, not the other way around.”).

21                  The failure to interview or elicit trial testimony from a key witness may  
22 lead to a finding of deficient performance. Howard v. Clark, 608 F.3d 563, 571  
23 (9th Cir. 2010). However, it must be apparent that the person involved was a  
24 “crucial witness” for the defense or “star witness for the prosecution” that a  
25 “reasonable attorney would [ ] have attempted to interview.” Id. at 570. The  
26 duty to investigate includes evaluating the impeachment of a key witness. If a  
27 lawyer’s “failure to investigate possible methods of impeachment is part of the  
28

1 explanation for counsel's impeachment strategy (or a lack thereof), the failure to  
2 investigate may in itself constitute" deficient performance. Reynoso, 462 F.3d  
3 at 1112.

4 \* \* \*

5 As to prejudice, a challenger must demonstrate that "there is a reasonable  
6 probability that, but for counsel's unprofessional errors, the result of the  
7 proceeding would have been different." Padilla v. Kentucky, 599 U.S. 356, 366  
8 (2010) (quotation omitted). Put another way, a litigant must show that there was  
9 a "substantial likelihood of a different result, as opposed to a mere conceivable  
10 possibility," based on the lawyer's performance that is "sufficient to undermine  
11 confidence in the outcome" of the trial. Boyer v. Chappell, 793 F.3d 1092, 1104  
12 (9th Cir. 2015) (quotation omitted). Speculation that a defendant might have  
13 suffered prejudice "is plainly insufficient to establish prejudice." Gonzalez v.  
14 Knowles, 515 F.3d 1006, 1016 (9th Cir. 2008).

15 The Strickland standard for prejudice imposes "virtually the same burden  
16 on the defense as the standard for materiality in Brady claims." United States v.  
17 Spawr Optical Research, Inc., 864 F.2d 1467, 1472 n.6 (9th Cir. 1988). As a  
18 result, "Brady materiality and Strickland prejudice are the same" on habeas  
19 review. Gentry v. Sinclair, 705 F.3d 884, 906 (9th Cir. 2013) (citing United  
20 States v. Bagley, 473 U.S. 667, 682 (1985)). If undisclosed impeachment  
21 evidence against a witness "does not constitute a Brady violation for lack of  
22 materiality, its absence likewise will not support an ineffective assistance of  
23 counsel claim" under Strickland. United States v. Olsen, 704 F.3d 1172, 1187  
24 (9th Cir. 2013) (§ 2255 claim). More directly, the conclusion "that none of the  
25 impeachment evidence" in a case is material is "dispositive of the prejudice  
26 prong of an ineffective assistance claim based on the same evidence." Gentry,

27

28

1 705 F.3d at 906 (emphasis added); Hall v. Beard, No. ED CV 14-2251 AG  
2 (RAO), 2017 WL 1234212 at \*19 (C.D. Cal.) (same).

3 \* \* \*

4 “Surmounting Strickland’s high bar is never an easy task.” Padilla,  
5 599 U.S. at 371. Establishing that a state court’s application of Strickland was  
6 unreasonable under AEDPA “is all the more difficult.” Richter, 562 U.S. at 105.  
7 The standards created by Strickland and Section 2254(d) are both “highly  
8 deferential”; when the two apply in tandem, “review is doubly so.” Id.  
9 (quotation omitted). Under AEDPA, “it is the habeas applicant’s burden to  
10 show that the state court applied Strickland to the facts of his case in an  
11 objectively unreasonable manner.” Woodford v. Visciotti, 537 U.S. 19, 25  
12 (2002).

13 **Analysis**

14 On deferential, independent review, the Court concludes that the state  
15 supreme court did not unreasonably apply Strickland in rejecting Petitioner’s  
16 ineffective assistance of counsel claims. Richter, 562 U.S. at 98.

17 At the start of its analysis, the Court declines to take up the deficient-  
18 performance prong of the ineffective assistance claim as presented in state court.  
19 Rios, 299 F.3d at 805. Petitioner persuasively establishes that his trial lawyer  
20 did not adequately prepare for the cross-examination of Dr. Ribe. In the years  
21 preceding Petitioner’s trial, issues regarding the appropriate disclosure of  
22 allegedly important Brady-Giglio-Bagley were widely known within the offices  
23 of the county district attorney and the public defender. The prosecution formally  
24 produced those items to the public defender. That office, in turn, made the  
25 coroner’s prior testimony available and accessible to any deputy who took the  
26 minimal step of inputting Dr. Ribe’s name into the agency’s database. The  
27 defense attorney admitted that he didn’t do so.

28

1        The Court recognizes that the defense lawyer took other steps to  
2 investigate the background of the key prosecution witness here. The lawyer  
3 interviewed Dr. Ribe regarding the autopsy well in advance of trial, conducted a  
4 basic Google search of his name, reviewed the coroner's testimony from one  
5 previous case, and consulted with his own expert to educate himself on the  
6 medical evidence. The defense lawyer took legitimate steps to prepare the case  
7 for trial.

8        But that's like listening to the piccolos when every horn in the orchestra is  
9        playing loudly. Reams of documentation regarding Dr. Ribe's prior work were  
10       almost literally in the defense lawyer's office,<sup>14</sup> yet he failed to obtain and  
11       review them. Indeed, both the trial judge and the prosecutor were more  
12       conversant with the previous disclosure of these items than Petitioner's lawyer.  
13       So too was the unanimous state supreme court, which stated that it reviewed the  
14       items in considerable detail in rendering its published decision only a few years  
15       before Petitioner's murder trial.

16 Only the line deputy defender handling his first murder case failed to  
17 review them. There could not have been any conceivable strategic decision for  
18 this oversight. On habeas review, the state court would be hard pressed to say  
19 that the lawyer's inaction met the standard of professionalism expected of a  
20 competent defender. Strickland, 466 U.S. at 688; Howard, 608 F.3d at 571;  
21 Reynoso, 462 F.3d at 1112.

23        But no matter. The Court concludes that the state court could reasonably  
24 have found no prejudice that resulted from the lawyer's failure to look for the

1 Ribe boxes. Six years before Petitioner's trial, the state supreme court  
2 considered a similar challenge regarding Dr. Ribe and his previous testimony in  
3 murder cases. In Salazar, the court expressly concluded that the Ribe transcripts  
4 did not constitute Brady evidence because they were not material to any cross-  
5 examination or impeachment of the pathologist.

6 The supreme court conducted a detailed analysis of the Ribe testimony  
7 under Brady and its progeny. The court concluded that two of the Brady factors  
8 ((a) evidence was favorable to defense and (b) suppression by state) weighed in  
9 favor of finding a constitutional violation. Salazar, 35 Cal. 4th at 1047-49.  
10 However, the "materiality" component under Brady was not met. As a result,  
11 the supreme court declared that the Ribe boxes – whether the Wingfield items on  
12 their own "or in combination" with the previous testimony from the other  
13 identified cases – were not likely to have been "significant impeachment  
14 evidence." Id. at 1051, 1052 n.2.

15 The supreme court also reasonably concluded that "the evidence does not  
16 strongly support" the contention that Dr. Ribe "should have been disbelieved"  
17 were he to have been cross-examined with his prior statements. Id. at 1052. The  
18 court also found no materiality because "Dr. Ribe's testimony was not the only  
19 evidence linking petitioner to the crime." Id. at 1050. The Salazar Court  
20 pointed to proof of the defendant's "inconsistent accounts of what happened  
21 during the period he was alone" with the victim and other circumstantial  
22 evidence of his guilt. Id.

23 The Court presumes that the Salazar decision was not unreasonable – this  
24 Court found no constitutional defect with it a decade ago. Salazar, No. CV 07-  
25 6874 DOC (AJW). Given that the state supreme court rejected a Brady  
26 challenge on materiality grounds in 2005 when it analyzed the Ribe boxes, that  
27 same analysis must survive constitutional scrutiny when the same court  
28

1 reviewed a parallel (Strickland) claim that relied on the same evidence. If the  
2 Ribe boxes were not material under Brady, the lawyer's failure to obtain or use  
3 them in Petitioner's case cannot have been prejudicial under Strickland. Gentry,  
4 705 F.3d at 906; Olsen, 704 F.3d at 1187; Spawr Optical Research, Inc., 864  
5 F.2d at 1472 n.6. And, as with the Salazar case, the supreme court could have  
6 concluded that there was additional evidence (Petitioner's inconsistent  
7 statements, his time alone with the victim, his call to his mother, the condition of  
8 the apartment, and his drug use) that pointed to his culpability, further  
9 diminishing the materiality of the impeachment items.

10 \* \* \*

11 The state supreme court could also plausibly have rejected Petitioner's  
12 claims of prejudice on another basis: the trial judge did not abuse his discretion  
13 under state evidentiary law in precluding the defense lawyer from using extrinsic  
14 proof (the Ribe items) to cross-examine the witness.

15 As evidenced by the transcripts of the pretrial and trial proceedings, the  
16 superior court judge was reasonably well informed about Dr. Ribe's  
17 impeachment issues. The trial judge was aware of the existence and disclosure  
18 of Ribe's previous testimony to the defense community. He also was familiar  
19 with the strongly-worded decision of the state supreme court finding these items  
20 to be immaterial in attacking the pathologist's credibility. Further, the judge  
21 knew that the only way for the defense to use anything from the Ribe boxes (the  
22 Helms file that the public defender possessed, or the additional items that he did  
23 not) was to delve into the scientific evidence of unrelated autopsies during trial.

24 The trial judge explained to the defense lawyer that the court would not  
25 allow that type of cross-examination. The court acknowledged that the defense  
26 lawyer could question the coroner about whether he changed his opinions  
27 regarding cause of death in the past. However, the judge cited Evidence Code  
28

1 section 352 as the basis for his discretionary conclusion that the defense was not  
2 entitled to “get[ ] into specific cases” – that is, to discuss the facts of other deaths  
3 and autopsies beyond that of the victim in the present action – during his  
4 anticipated cross-examination of Dr. Ribe. (Docket # 90-4 at 187.) The  
5 shorthand reference to section 352 suggests that the trial judge was concerned  
6 about juror confusion or trial-within-a-trial issues if the defense dove into the  
7 details of older criminal cases. That’s the type of state law evidentiary issue that  
8 is generally exempt from federal constitutional review. Estelle v. McGuire,  
9 502 U.S. 62, 67-68 (1991).

10 But more than that, the trial judge’s discretionary ruling limiting the use  
11 of the Ribe impeachment evidence essentially meant that, even if the defense  
12 lawyer had found the Ribe boxes before trial, they were not likely to see the light  
13 of day during the trial. Nor is there a convincing reason that they should have.  
14 Petitioner conclusorily assumes that Dr. Ribe’s reputational woes: (a) would  
15 have been established through impeachment such that (b) the jury likely would  
16 have doubted his opinion that the victim died as a result of homicide. Even if  
17 the pathologist waffled in his conclusions in certain other cases, there is no  
18 indication that this affected his opinion regarding this child’s death.<sup>15</sup> The other  
19 Ribe box cases involved unique facts and medical issues quite distinct from  
20 those in Petitioner’s trial. The trial judge could fairly have concluded that a  
21 generalized don’t-trust-the-coroner impeachment would have been time-  
22 consuming, distracting, and ultimately unfruitful.

23 As a result, the supreme court could have found a lack of prejudice on  
24 Petitioner’s Strickland claim based on the trial court’s evidentiary exclusion  
25

26 <sup>15</sup> The 2014 interview – and unsigned declaration – of Dr. Ribe as  
27 presented by habeas counsel hardly convince the Court that the coroner  
28 backtracked from his original opinion or that these statements could materially  
impact a jury. (Docket # 91-22 at 30-31.)

1 order. The state supreme court could have accepted the trial judge's decision to  
2 limit questioning on what the court found to be tangential issues. As above, that  
3 is not an unreasonable application of federal law (or, under McGuire, a  
4 permissibly reviewable application of state law).

5 \* \* \*

6 On deferential independent review, the Court cannot conclude that the  
7 state supreme court's decision – which the Court infers was based on the state  
8 court's near-identical decision a decade earlier – represents an "extreme  
9 malfunction" of the criminal justice system. Richter, 562 U.S. at 102.

10 **Prosecutorial Misconduct**

11 Petitioner advances a parallel claim of prosecutorial misconduct. The gist  
12 of the claim is that the deputy district attorney's denial of the existence of the  
13 Ribe boxes during Petitioner's pretrial proceedings led to an unfair trial against  
14 him. (Docket # 101 at 70.)

15 As noted above, the prosecutor told the trial court and defense counsel  
16 that "there are no files that the People keep on Dr. Ribe." (Docket # 90-4 at 21.)  
17 The prosecutor made that statement in the context of the pretrial discussion of  
18 the Helms/Wingfield case and the supreme court's decision in Salazar – all of  
19 which involved the district attorney's office and its previous production of the  
20 Ribe boxes to the public defender.<sup>16</sup> The defense lawyer submitted a declaration  
21 in which he claimed that he stopped investigating Dr. Ribe's background in  
22 reliance on the prosecutor's assertion. (Docket # 91-22 at 14.)

23

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24 <sup>16</sup> The prosecutor's statement may have been literally true. She made  
25 the statement in April 2010 during pretrial proceedings. (Docket # 90-4 at 11,  
26 21.) The district attorney's office stopped producing the Ribe materials in 2005  
27 (after the Salazar decision) and did not resume production until June 2011, or  
28 well after Petitioner's trial conviction in 2010. (Docket # 54 at 3.) At the time  
of the contested statement, the district attorney may not have been actively  
maintaining a disclosure file on Dr. Ribe; it certainly was not turning these items  
over to defense lawyers.

1 \* \* \*

2 In evaluating a claim that a prosecutor engaged in misconduct, a court  
3 must determine whether the prosecutor's statements or actions "so infected the  
4 trial with unfairness as to make the resulting conviction a denial of due process."  
5 Darden v. Wainwright, 477 U.S. 168, 181 (1986). Considerations include  
6 whether the prosecutor's remarks or conduct were improper; if so, the court must  
7 then consider whether the remarks or acts affected the trial unfairly. Tak Sun  
8 Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005); Wood v. Ryan, 693 F.3d  
9 1104, 1113 (9th Cir. 2012); Sassounian v. Roe, 230 F.3d 1097, 1106 (9th Cir.  
10 2000). Such unfairness may occur when there is an "overwhelming probability"  
11 that the prosecutorial misconduct was "devastating to the defendant" at trial.  
12 Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004).

13 Prosecutorial misconduct claims are reviewed in light of the entire trial  
14 record. Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974); Johnson v.  
15 Sublett, 63 F.3d 926, 929 (9th Cir. 1995) (habeas claim evaluated by "examining  
16 the entire proceedings" of trial). In federal habeas proceedings, such claims are  
17 subject to harmless error analysis; they "warrant relief only if [the misconduct]  
18 had substantial and injurious effect or influence in determining the jury's  
19 verdict." Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting Brecht v.  
20 Abrahamson, 507 U.S. 619, 637-38 (1993)). The "stringent" Brecht test requires  
21 a showing of "actual prejudice" to the defendant resulting from the prosecutor's  
22 misconduct. Hall v. Haws, 861 F.3d 977, 991-92 (9th Cir. 2017).

23 \* \* \*

24 On independent review, the Court finds no basis to grant habeas relief on  
25 this claim. The state supreme court's silent denial of relief<sup>17</sup> does not represent  
26

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27 <sup>17</sup> The supreme court's order cryptically stated that Petitioner's  
"record-based" claims of prosecutorial misconduct were procedurally defaulted  
28

1 an unreasonable application of federal law. The state court could have  
2 concluded that the prosecutor's denial of the existence of a Ribe "file" was of no  
3 import in light of the extended discussion among the trial judge, the prosecutor,  
4 and the defense lawyer exploring the issue. Darden, 477 U.S. at 181; Donnelly,  
5 416 U.S. at 639. Indeed, the prosecutor volunteered a considerable amount of  
6 information regarding Dr. Ribe's background and litigation (even as, according  
7 to Petitioner, she allegedly withheld other information from the defense). The  
8 state court could also have concluded that any misstatement by the prosecutor  
9 was far outweighed by the defense lawyer's inaction in obtaining the Ribe  
10 transcripts from his own colleagues. Any cumulative misconduct would likely  
11 not have been "devastating" in that context. Davis, 384 F.3d at 644.

12 But even if the prosecutor misled the defense in an unconstitutional  
13 manner, Petitioner runs into the materiality / prejudice problem yet again. It  
14 hardly matters whether the defense's failure to obtain the Ribe impeachment  
15 items was a result of the defense lawyer's ineptitude (Strickland) or the alleged  
16 deception of the prosecutor (Darden). If the transcripts of Dr. Ribe's other cases  
17 were not material under Salazar or the subject of a legitimate preclusion ruling  
18 by the trial judge, Petitioner cannot establish actual prejudice. Brecht, 507 U.S.  
19 at 637-38; Hall, 861 F.3d at 991-92; Wood, 693 F.3d at 1113.

20 **Cumulative Error**

21 Petitioner also argues that the cumulative prejudice of the alleged errors  
22 violated the Constitution. The "combined effect" of multiple errors may give  
23 rise to a due process violation if the errors rendered a trial "fundamentally  
24 unfair" and "infected the trial with unfairness," even if each error considered

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25 due to his failure to raise them on direct appeal. (Docket # 91-25) However, the  
26 order stated that the court carved out Petitioner's claims that intersected with his  
27 ineffective assistance allegations. Petitioner soundly argues that the state court  
28 "denied this claim on the merits," thereby establishing that the claim is  
exhausted and subject to deferential AEDPA review. (Docket # 101 at 71.)

1 individually would not require reversal. Parle v. Runnels, 505 F.3d 922, 927  
2 (9th Cir. 2007). But, when there is no single constitutional error, there is  
3 “nothing to accumulate to a level of a constitutional violation.” Mancuso v.  
4 Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

5 Neither of Petitioner’s claims (ineffective assistance or prosecutorial  
6 misconduct) amounts to constitutional error. His cumulative error claim must  
7 also fail.

8 **CONCLUSION**

9 The Court recognizes the centrality of Dr. Ribe’s testimony at Petitioner’s  
10 trial. If, in his professional opinion, the medical evidence established that the  
11 child died from wounds that only a human could have caused, then the jury  
12 could properly have convicted Petitioner for murdering the girl. If the jury  
13 rejected that opinion, though, it would likely have determined that Petitioner did  
14 not commit a crime or, at worst, was culpable of a reduced offense.

15 But the state supreme court did not violate the Constitution by rejecting  
16 Petitioner’s claims on habeas review. Only a few years earlier, that court  
17 rejected a similar argument about the appropriate cross-examination of Dr. Ribe  
18 using his previous testimony in unrelated homicide trials. The Salazar decision  
19 was not an unreasonable application of federal law regarding the materiality of  
20 the same impeachment items as in this case. As a result, the state court’s ruling  
21 in Petitioner’s case must survive AEDPA review.

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1 IT IS THEREFORE RECOMMENDED that the District Judge issue an  
2 order: (1) accepting the findings and recommendations in this Report;  
3 (2) directing that judgment be entered denying the Petition; and (3) dismissing  
4 the action with prejudice.

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6 Dated: March 29, 2018  
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HON. MICHAEL R. WILNER  
UNITED STATES MAGISTRATE JUDGE

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**S229080**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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In re SHARRIEFF BROWN on Habeas Corpus.

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The petition for writ of habeas corpus is denied. Petitioner's record-based claims of prosecutorial misconduct, except to the extent he alleges ineffective assistance of trial counsel, are procedurally barred under *In re Dixon* (1953) 41 Cal.2d 756, 759, in that they should have been raised on appeal. All remaining claims are denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, 99-100, citing *Ylst v. Nunnemacher* (1991) 501 U.S. 797, 803.)

SUPREME COURT  
**FILED**

OCT 12 2016

Frank A. McGuire Clerk

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Deputy

CANTIL-SAKAUYE

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*Chief Justice*

**PET LODGMEN 5  
CV 12-9126-DMG-MRW**

Pet. App. 70

## Appellate Courts Case Information

CALIFORNIA COURTS  
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court ▾

Court data last updated: 01/22/2017 08:58 PM

## Docket (Register of Actions)

**BROWN (SHARRIEFF) ON H.C.**  
Case Number **S229080**

Date	Description	Notes
09/04/2015	Motion to file document under seal filed	Sharrieff Brown, Petitioner Lara Abigail Bazelon, Retained counsel
09/04/2015	Petition for writ of habeas corpus filed	Petitioner: Sharrieff Brown Attorney: Lara Abigail Bazelon conditionally under seal
09/04/2015	Exhibit(s) lodged	Seven volumes of Exhibits, conditionally under seal
09/04/2015	Exhibit(s) lodged	Disc of Exhibits I - VII conditionally filed under seal
09/04/2015	Received:	"Ex Parte Application to transfer the file in Superior Court case number MA043976 to the California Supreme Court" Sharrieff Brown, Petitioner Lara Abigail Bazelon, Retained counsel
12/17/2015	Record requested	B225175 - People v. Sharrieff Brown
12/18/2015	Informal response requested	Pursuant to rule 8.385(b) of the California Rules of Court, the court has directed that I request an informal response on the merits to the above referenced matter. The petition was served on your office by mail on September 4, 2015. The informal response is to be served upon petitioner and filed in this court on or before January 7, 2016. Petitioner will then have to and including ten (10) days, to serve and file a reply to the informal response. If service is by mail, the provisions of Code of Civil Procedure section 1013 are applicable.
12/24/2015	Received Court of	two doghouses B225175 - People v. Sharrieff Brown

Pet. App. 71

**PET LODGMENT 4**

	Appeal record	#9051
01/11/2016	Request for extension of time filed	Counsel for respondent requests 32-day extension of time to February 8, 2016, to file the informal response.
01/13/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the informal response is extended to and including February 8, 2016.
01/15/2016	Letter sent to:	Erin Heiner, Court Manager, Antelope Valley Courthouse of LASC, requesting record of habeas proceeding denied on July 16, 2015 after OSC.
02/04/2016	Request for extension of time filed	Counsel for respondent requests 30-day extension of time to March 9, 2016, to file the informal response.
02/10/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the informal response is extended to and including March 9, 2016.
02/16/2016	Received:	from Los Angeles County Supr. Court, record of Habeas Corpus proceedings: Order to file Traverse Under Seal, Petnr.'s Motion to File, Minute Order, Petn. for Writ of Habeas Corpus, Return to Habeas Petition, Traverse, People v. Gonzales In-Camera Hearing, (4 vols.), Copy of letter from Supreme Court requesting records.
03/03/2016	Request for extension of time filed	Counsel for respondent requests 35-day extension of time to April 13, 2016, to file the informal response.
03/09/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the informal response is extended to and including April 13, 2016. No further extensions of time are contemplated.
04/05/2016	Request for extension of time filed	Xiomara Costello, counsel for respondent, requests a 14-day extension to April 27, 2016, to file informal response.
04/12/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the informal response to the petition for writ of habeas corpus is extended to and including May 2, 2016. No further extension of time will be granted.

04/18/2016	Motion filed	#9052 by counsel, Motion to Unseal, Petitioner's Writ of Habeas Corpus.
04/29/2016	Request for extension of time filed	Counsel for respondent requests a 21-day extension of time to May 23, 2016 to file the opposition to petitioner's Motion to Unseal.
05/02/2016	Informal response filed	Non-Titled Respondent: Department of Corrections and Rehabilitation Attorney: Shira Beth Seigle Attorney: Xiomara Costello by counsel for respondent, Conditionally Under Seal, Original + 8 copies of the Informal Response, and Original + 8 copies of Exhibits.
05/03/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the opposition to Motion to Unseal is extended to and including May 23, 2016.
05/04/2016	Request for extension of time filed	Counsel for petitioner requests an extension of time to June 20, 2016 to file the reply to informal response.
05/10/2016	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file the reply to Informal Response is extended to and including June 20, 2016.
05/23/2016	Filed:	by counsel for respondent, Application to File Under Seal, Opposition to Petitioner's Motion to Unseal
05/25/2016	Filed:	by counsel for petitioner, Reply to Respondent's Opposition to Petitioner's Motion to Unseal Petitioner's Habeas Petition, Exhibit A, and Excerpts of Record vols. I-VII; Exhibits Declaration of Counsel.
06/16/2016	Filed:	Counsel for petitioner request extension of time to (7) days from the Court's pending order on Petitioner's Motion to Unseal, to file the informal reply.
06/20/2016	Reply to informal response filed	Petitioner: Sharrieff Brown Attorney: Lara Abigail Bazelon by counsel for petitioner, Informal Reply to Respondent's Informal Response to petitioner's Writ of Habeas Corpus filed Under Seal.
06/20/2016	Filed:	by counsel for petitioner, Application to file Informal Reply Under Seal.
08/10/2016	Order filed	Petitioner's "Motion to Unseal Petitioner's Writ of Habeas Corpus

		"Petition, Attached Exhibit A, and Excerpts of Record Volumes I-VII" is refiled as "Motion to Withdraw the Application to File State Habeas Petition Under Seal." As refiled, petitioner's "Motion to Withdraw" is granted. Respondent's "Opposition to Petitioner's Motion to Unseal As to Limited Information Subject to Federal Court Protective Order" is refiled as "Motion to Seal Paragraphs Five Through Nine in Exhibit 5 of Petitioner's Excerpts of Record Volume VII." As refiled, "Respondent's Motion to Seal" is denied.
10/12/2016	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. Petitioner's record-based claims of prosecutorial misconduct, except to the extent he alleges ineffective assistance of trial counsel, are procedurally barred under <i>In re Dixon</i> (1953) 41 Cal.2d 756, 759, in that they should have been raised on appeal. All remaining claims are denied on the merits. (See <i>Harrington v. Richter</i> (2011) 562 U.S. 86, 99-100, citing <i>Ylst v. Nunnemaker</i> (1991) 501 U.S. 797, 803.)
10/13/2016	Returned record	B225175 - 2 doghouses

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## Appellate Courts Case Information

CALIFORNIA COURTS  
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

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Court data last updated: 01/09/2013 02:05 PM

Lodged Document 5  
CV 12-9126-DMG (MRW)

Docket (Register of Actions)

PEOPLE v. BROWN  
Case Number S193922

Date	Description	Notes
06/13/2011	Petition for review filed	Defendant and Appellant: Brown, Sharrieff Attorney: Landra E. Rosenthal
06/13/2011	Record requested	
06/15/2011	Received Court of Appeal record	one doghouse, volume 1 of 2
08/10/2011	Petition for review denied	
08/18/2011	Returned record	1 doghouse

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Lodged Document 3  
CV 12-9126-DMG (MRW)

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHARRIEFF BROWN,

Defendant and Appellant.

B225175

(Los Angeles County  
Super. Ct. No. MA043976)

COURT OF APPEAL - SECOND DIS-

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MAY 10 2011

JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Jared D. Moses, Judge. Affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Shira B. Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, appellant Sharrieff Brown was convicted of second degree murder and assault resulting in the death of a child under eight. On appeal, he claims that his conviction for second degree murder must be reversed because the trial court did not instruct the jury on involuntary manslaughter. We conclude appellant fails to show any prejudicial error, and we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On November 3, 2008, Trecion Grace, an 18-month-old child, died of blunt force head trauma. The principal issue at trial was how she received the blunt force head trauma.

Appellant was the father of Trecion's half sister; he sometimes took care of Trecion; and there was evidence he lived with Trecion, her two siblings, and her mother Taija Grace. Trecion was in appellant's care at the time of her fatal injury. Appellant claimed the accidental injury occurred when Trecion fell from a three-foot-high kitchen counter.

#### ***1. Prosecution Evidence***

Taija Grace and her mother (Trecion's grandmother) testified that when she left Trecion with appellant on November 3, Trecion had no unusual marks or bruises.

Several hours later, at the time of her death, Trecion had numerous injuries. The coroner, Dr. James Ribe, who performed an autopsy on Trecion, testified that Trecion suffered the following injuries: complex depressed comminuted fracture of the calvaria (round part of the head), a fracture in the base of her skull, brain injury, bruises on her face, injury to her abdomen, a tear in her liver, multilayered retinal hemorrhages in both eyes, bleeding in the optic nerve sheath, a bruise on her forehead, a bruise on her jaw, and partially healed rib fractures. Dr. Ribe opined that the injuries were caused by child abuse. He concluded that Trecion was either slammed against a flat surface or thrown against a flat surface. According to him, the severe injuries – especially the brain injury, the retinal hemorrhages, and the nonlinear skull fractures – showed that the injuries could not have been caused by a fall from a three-foot counter. According to him, Trecion's "smashed skull," showed someone had applied a "tremendous amount of force" to her head. And Dr. Ribe concluded someone inflicted at least six blows to Trecion.

When interviewed, appellant told officers and detectives Trecion fell from a kitchen counter where he had placed her when he left the room to tend to her half sister. According to appellant, when he returned to the kitchen, Trecion was on the floor, nonresponsive. Appellant said he tried to give Trecion Cardiopulmonary Resuscitation (CPR), though he lacked knowledge of how to properly administer it. Appellant explained away the abrasions on Trecion's face, claiming they occurred when he wiped her face with a washcloth. When a detective told appellant that his story was inconsistent with the evidence, appellant responded by stating that he also dropped Trecion. Appellant clarified that he did not "slam" her, but only "dropped her," and stated that he did not want to hurt her when he dropped her.

The prosecution suggested that appellant and his mother engaged in a coverup. There was evidence that the television in the living room disappeared the night Trecion was injured. In addition, a steam cleaner that was generally in the garage was found in the living room. No one explained what happened to the television or why the steam cleaner was in the living room.

## *2. Appellant's Evidence*

On November 3, 2008, appellant called his mother, Eyvonne Galloway, informing her that Trecion fell off the kitchen counter. Galloway rushed to the residence. Once there, Galloway called 911, and the 911 operator instructed her to give CPR, which Galloway attempted. Galloway had seen Trecion injure her head more than a dozen times before when she hit it against her crib, a wall, and the floor. Galloway's friend Penny Knight also saw Trecion hit her head.

Dr. Harry Bonnell, a forensic pathologist opined that Trecion's liver injury was the result of CPR. He opined that Trecion's hitting her head was not sufficient to cause the skull fractures. According to him, Trecion's injuries were consistent with a fall from a three-foot counter if Trecion was standing on top of the counter and landed head first. However, he acknowledged her injuries also were consistent with her head being hit on a hard object such as a television or a piece of furniture. Dr. Bonnell concluded that Trecion suffered four impact injuries. Dr. Bonnell noted the absence of any injuries to Trecion's arms or legs, the second most common injury to a battered child. But he

acknowledged she suffered from a head injury, the most common injury suffered by a battered child.

### ***3. Argument***

The prosecutor argued that appellant smashed Trecion's head against something or smashed something against her head, possibly the television. She argued that the severity of the injuries indicated Trecion did not simply fall from a counter. She argued that Dr. Ribe's testimony was more credible than Dr. Bonnell's testimony and criticized Dr. Bonnell's sources.

Defense counsel argued that Trecion's death was the result of a tragic accident. Counsel argued appellant did not intentionally slam Trecion or hit her against anything. Defense counsel argued that "the people's case, stands on how much . . . you believe Dr. Ribe" because Dr. Ribe was the only witness to directly contradict appellant's statement that Trecion fell from a counter. According to defense counsel, the television story was made up because there was no evidence of the television.

### ***4. Instructions***

Without objection, defense counsel requested the court instruct the jury on accident, and the court gave an instruction that when a person commits an act by accident, without criminal intent or criminal negligence, he does not commit a crime.

Defense counsel did not request instructions on any lesser included offenses. The prosecutor mentioned the involuntary manslaughter instruction, and defense counsel requested the court refrain from giving that instruction. No instruction on involuntary manslaughter was given. The court instructed the jurors on second degree murder.

### ***5. Verdict and Sentencing***

The jury found appellant guilty of second degree murder (Pen. Code, § 187) and assault resulting in death of a child under eight (§ 273ab).<sup>1</sup> The court sentenced him to

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

Section 273ab provides in pertinent part: "(a) Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to

state prison for 25 years to life for the section 273ab violation. The court imposed and stayed a 15-year-to-life prison sentence for the second degree murder. This appeal followed.

## DISCUSSION

The trial court has an obligation to instruct on all lesser included offenses supported by evidence that the offense committed was less than that charged. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) Appellant's sole argument is that the court should have instructed the jury on involuntary manslaughter.<sup>2</sup> He appears to have two theories why the instruction should have been given: (1) the killing occurred during the commission of a noninherently dangerous felony when appellant left Trecion on the counter; and (2) the allegedly unintentional killing occurred during the commission of an assault. As we explain, we conclude no instruction was warranted based on the latter theory, and any error in failing to instruct based on the former theory was harmless under any standard.

Involuntary manslaughter is a lesser included offense of murder. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) "Both murder (based on implied malice) and involuntary manslaughter involve a disregard for life; however, for murder the disregard is judged by a subjective standard whereas for involuntary manslaughter the disregard is judged by an objective standard. [Citations.] Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively

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life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of Section 187 or Section 189."

Appellant was also charged with two counts of child abuse in violation of section 273a, subdivision (a) for conduct allegedly occurring prior to November 3, 2008. The jury acquitted him of these charges.

<sup>2</sup> Because defense counsel requested the court refrain from giving the instruction, the "doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*People v. Barton*, *supra*, 12 Cal.4th at p. 198.) Nevertheless, we have considered appellant's arguments on the merits to forestall a claim of ineffective assistance of trial counsel. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282.)

appreciated the risk involved. [Citation.] In contrast, involuntary manslaughter merely requires a showing that a reasonable person would have been aware of the risk.

[Citation.] Thus, even if the defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant's belief was objectively unreasonable." (*Id.* at pp. 1008-1009.) The necessary mens rea for involuntary manslaughter is criminal negligence. (*Id.* at p. 1008.)

### ***1. Involuntary Manslaughter Based on Felony Child Abuse***

A noninherently dangerous felony may underlie the commission of an involuntary manslaughter. (*People v. Butler, supra*, 187 Cal.App.4th at pp. 1006-1007.) Based on this principle, appellant argues that the evidence he left Trecion unattended on a counter supported a finding of child endangerment, which he contends is a noninherently dangerous felony (based on authority discussing the felony murder rule).<sup>3</sup> As we explain, assuming the trial court should have instructed the jury on involuntary manslaughter based on the evidence appellant describes, appellant cannot demonstrate any harm resulted from the absence of the instruction. Because appellant cannot demonstrate prejudice under any standard, even assuming error, reversal is not warranted. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 138 [absent prejudice instructional error did not require reversal].)

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<sup>3</sup> Section 273a provides in pertinent part: "(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years. [¶] (b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

When it convicted him of assault resulting in death under section 273ab, the jury necessarily found that appellant assaulted Trecion and the assault resulted in her death.<sup>4</sup> Therefore, the jury necessarily rejected appellant's claim that he merely left Trecion on the countertop, the cornerstone of appellant's argument. According to the view of the evidence the jury indisputably accepted, it rejected appellant's theory (on appeal) that he was criminally negligent in leaving Trecion on the counter. Thus, assuming the court should have instructed the jury on involuntary manslaughter, appellant suffered no prejudice (under any standard) from the failure to so instruct.

This case is distinguishable from *People v. Albritton* (1998) 67 Cal.App.4th 647 (*Albritton*) in which the court found section 273ab and involuntary manslaughter were not inconsistent. In that case, the evidence showed that a child died of shaken baby syndrome and the defendant was responsible for shaking the child. (*Albritton*, at p. 656.) In *Albritton*, the jury could have found that appellant assaulted the child resulting in death and the assault resulted in involuntary manslaughter. In contrast here, appellant's theory that he left Trecion on the counter is inconsistent with the jury finding that he assaulted her. *Albritton*, thus, does not aid appellant.

## **2. *Involuntary Manslaughter Based on Assault***

Appellant states that the jury should have been instructed on involuntary manslaughter if the evidence would have supported the conclusion the homicide occurred during the commission of an assault. To analyze this contention, the key issue is whether there was evidence appellant acted without realizing the risk to Trecion because that

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<sup>4</sup> The court instructed the jurors on assault on a child under eight resulting in the child's death as follows: "Every person who, having the care or custody of the child under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting the child's death, is guilty of a violation of . . . section 273ab, a crime. . . . In order to prove this crime, each of the following elements must be proved: one, a person had the care or custody of a child under eight years of age; two, *that person committed an assault upon the child*; three, the assault was committed by means of force that to a reasonable person would be likely to produce great bodily injury; and four, the assault resulted in the death of the child." (Italics added.)

intent distinguishes murder and manslaughter. (*Albritton, supra*, 67 Cal.App.4th at p. 654.) Implied malice, necessary for a second degree murder conviction, is present “when an individual, with wanton disregard for human life, commits an act which involves a high degree of probability it will result in death.” (*Ibid.*) When a defendant realizes the risk involved and acts in disregard of the danger, the defendant is guilty of murder based on implied malice. (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.) In contrast, if the defendant does not realize the risk involved, his mens rea is criminal negligence and his crime is involuntary manslaughter. (*Ibid.*)

Here, there was no evidence appellant assaulted Trecion without realizing the risk to her. No evidence showed that he was unaware of the risk of slamming her head against a hard object. No evidence showed he had a subjective, good faith belief that his assault on Trecion posed no risk to her. Although Dr. Bonnell testified that Trecion’s injuries were consistent with a (head-first) fall from the counter, even that evidence does not support appellant’s new theory that he assaulted Trecion without comprehending the risk to her. The only evidence appellant cites to support his argument is his statement that when he dropped Trecion “he didn’t want to hurt her . . . .” But that evidence, even if credited, is not probative of his intent when he *assaulted* Trecion. Therefore, appellant has not shown the court was required to sua sponte instruct the jury on the lesser included offense of involuntary manslaughter. (*People v. Evers, supra*, 10 Cal.App.4th at p. 598.)<sup>5</sup>

#### DISPOSITION

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The judgment is affirmed.

FLIER, J.

11/11/11 ATTY FOR APPELLANT  
We concur  
BIGELOW, P. J.

GRIMES, J.

<sup>5</sup> To the extent appellant is arguing he lacked the ability to present a defense to the jury, his argument lacks merit. His defense was that Trecion suffered injuries when she fell from the counter. His counsel argued that the killing was accidental and asked the court to refrain from instructing on voluntary manslaughter. He was permitted to present a defense; the jury however rejected his defense.

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MEMORANDUM

John Lynch

TO: WILLIAM HODGMAN, Director  
Bureau of Special Operations

THROUGH: DONNA WILLS, Head Deputy  
Family Violence Division

FROM: DANIEL WRIGHT, Deputy District Attorney  
Family Violence Division

SUBJECT: DR. JAMES RIBE and PEOPLE v. ROBERTO CAUCHI  
CASE NO. BA111904

DATE: MARCH 24, 1997

Roberto Cauchi was charged with the special circumstances forcible child molestation and torture murder of his four-year-old stepdaughter Christina. On March 10, 1995, the defendant brought Christina to Clinica Familia where she was examined by Dr. Duncan. She was not breathing and Dr. Duncan directed the defendant to take Christina to Children's Hospital. It was at Children's Hospital that anal lacerations were noted by Dr. Ramos, Dr. Sanders and Dr. Galvis. Dr. Galvis photographed these anal lacerations. Christina was being kept alive by a respirator. Further tests indicated that she was brain dead and life support was removed.

Christina was transported to the coroners office. On March 12, 1995, Dr. Ribe performed an autopsy. He found that she had approximately seventy injuries and listed her cause of death as blunt force trauma. Dr. Ribe further concluded that the presence of two injuries indicated that the child had been forcibly penetrated by a foreign object. These were a retrorectal hemorrhage and ischial spine hemorrhages to the buttocks. He issued his findings in the official coroner's report.

On October 20, 1995, Dr. Ribe testified at the preliminary hearing. He testified that the only thing that could have caused the retrorectal hemorrhage was the insertion of a foreign object into Christina's rectum.

In preparation for trial, I met with Dr. Ribe in October, 1996, to discuss the evidence of anal penetration since the defense claimed this was the only issue of dispute. In fact, the defense attorney acknowledged the defendant's responsibility for Christina's death, but denied sexual assault. It was largely due to the evidence of sexual assault that the death penalty was initially sought.

At trial, on November 26, 1996, Dr. Ribe testified on direct examination that some object had been forced into Christina's rectum. More specifically, he noted that there were "large irregularities in the anal mucosa which he believed to be tears." (Tr. at 1438, l. 17-19). Additionally, he testified that the bruise on the back wall of the rectum indicated that part of the

ATTACHMENT #1

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rectum was crushed when some firm object impacted from inside. (Tr. at 1411). When asked to explain the cause of the ischial spine injuries he answered, "usually this injury is caused by the thumbs of the assailant who forcibly grasps the buttocks of a child and forces them apart... to insert something into the anus." (Tr. at 1439, l. 1-5). In summary, it was his expert opinion that Christine had been sexually assaulted.

Judge Rappe allowed defense attorney Vera Bradford to delay part of her cross-examination because Dr. Ribe testified to some new and unexpected findings. These were (1) the presence of a mark consistent with a ligature on the child's neck; and (2) that the victim died as a result of shaken baby syndrome.

Dr. Ribe returned to the witness stand on December 9, 1996. Before he took the stand, we had a chance to talk for approximately ten minutes. He did not disclose that he was about to contradict his previous testimony. He also failed to mention that he met with the defense attorney at his office, and that he recently found a forensic publication that he felt proved the victim in this case may not have been sexually abused. In fact our discussion consisted of ten minutes of pleasant small talk.

Resuming the stand for further cross, Dr. Ribe became a defense witness. He testified that the victim's rectal injuries were not necessarily a result of forcible anal penetration and could be as a result of the natural process of dying. (Tr. at 2321, l. 21-25). He testified that he has seen similar rectal injuries on adults and children that have not been anally penetrated. (Tr. at 2330 l. 1-7). Dr. Ribe continuously contradicted himself while testifying. For instance, Dr. Ribe stated that his conclusion upon completion of the autopsy was that the anus was normal. (Tr. at 2358, l. 25). Moments later, however, he noted that there were enough irregularities to cause him to take a sample and conduct further investigation. (Tr. at 2359, l. 3 - 7). Furthermore, after concluding that there were never tears to be diagnosed (Tr. at 2452, l. 10-11) he still maintains that the evidence strongly suggests something was shoved into the victim's anus. (Tr. at 2440, l. 2-5). In addition many of Christina's significant injuries were downplayed on cross-examination by Dr. Ribe as minor, faint, small or minimal hemorrhage.

At the last minute, I was able to convince former Deputy Coroner Dr. Eva Heuser to come out of retirement to repair the damage inflicted by Dr. Ribe's "flip flop". As part of the People's case in chief, I called Dr. Carol Berkowitz and Dr. Eva Heuser who are experts in child sexual abuse. Both of these preeminent specialists testified that this child was anally penetrated by a foreign object. I also consulted another renowned child sexual assault specialist. Dr. Astrid Heger agreed that Christina had been sexually abused, however she was unable to testify due to scheduling conflicts. After the trial, the jurors stated that Dr. Ribe's testimony led them to acquit on the sex counts and it played a significant part in their finding the defendant not guilty of first degree murder.

Dr. Ribe's "flip flop" had serious consequences to the revelation of the truth and had an adverse impact on the People's interests in this case. Had Dr. Ribe informed the prosecution before his further cross-examination that he intended to testify contrary to his official autopsy report, his testimony at the preliminary hearing, and his testimony on direct examination, the People might have negotiated a case settlement or at least avoided death qualifying a jury.

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I learned that this was not the first time Dr. Ribe has made serious errors. In the Charles Rathburn case, Dr. Ribe failed to note three abrasions on victim's clitoral hood. In the Piper Tech case, he testified in front of the jury that one victim was shot from the back when he was shot from the front. He also contradicted himself on the Lance Helms child murder case which is now being reanalyzed in the Family Violence Division.

I believe that Dr. Ribe's credibility has been destroyed. The defense has transcripts of his testimony which they may use to impeach him in the future. Unfortunately, Dr. Ribe has expressed an interest in conducting child autopsies. These cases can be extremely complex and difficult to prosecute. We do not need the additional handicap of Dr. Ribe's testimony.

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MEMORANDUM

To:

John Lynch  
Head Deputy

TO: WILLIAM HODGMAN, Director  
Bureau of Special Operations

FROM: *SK* STEVE KAY, Head Deputy  
Long Beach Branch Office

SUBJECT: DR. JAMES RIBE

DATE: JUNE 24, 1997

The Friday before he left, Scott Gordon asked me to send you a brief memo concerning my experience with Dr. James Ribe in the case of People v. Charles Rathbun. In the Rathbun case I had Dr. Ribe on direct examination for the best part of two days. I found him to be an outstanding witness on both direct and cross examination. Dr. Ribe is a brilliant pathologist who throughout the course of his testimony never had to refer to one note. In fact, in my opinion, Dr. Ribe was the best pathologist witness that I have ever seen.

The Rathbun case was an exceptionally difficult trial which relied on medical evidence. Dr. Ribe was unquestionably the star witness for the prosecution. In talking to the jurors after the trial, many of them felt that Dr. Ribe should be the Chief Medical Examiner/Coroner for the County of Los Angeles.

The mechanism of the cause of death of Linda Sobek was very difficult to determine. The actual cause of death was asphyxia due to neck and body compression. After extensive research and review of the case, Dr. Ribe concluded that the Defendant Charles Rathbun was probably lying on Linda Sobek's back when he reached around and manually strangled her with his right hand. Dr. Ribe was extremely helpful in the preparation of medical diagrams that I had produced by the Medi-Lex Corporation for trial. Dr. Ribe even drove out to Lakewood on several occasions on his own time to make sure that the charts were prepared accurately.

The one problem that Dr. Ribe has is that he is an absolutely brilliant man. He has a law degree from Columbia Law School where he was the Moot Court Champion. He was a practicing attorney in New Mexico when he decided that he really wanted to be a doctor. In order to get into med school he had to go to two more years of college taking pre-med courses (he had already graduated from Swarthmore College as a Economics Major) and then went on to the medical school at the University of New Mexico. Dr. Lucky has told me that he considers Dr. Ribe the most brilliant and knowledgeable pathologist on his staff. The problem is that every time Dr. Ribe looks at a case, he finds something new, which sometimes causes him to change his position on one or more aspects of a case. I literally had to spend countless hours meeting with Dr. Ribe in person, talking to him on the telephone at his office during the week and on

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the week ends and also talking to him at his home on his days off. I feel that it was only through thorough preparation and challenging his reasoning whenever he would come up with a new point that the final product was a very consistent outstanding presentation in court. You need to understand that Dr. Ribe does not change his opinion because he is making up things, he changes it because he is constantly investigating a case and looking at it from different angles and sometimes comes up with new conclusions that help him to better explain what happened in a case. Dr. Ribe continually studied the murder of Linda Sobek long after he had issued his Coroner's Report. Every time he would come up with something new, I would have him do a supplemental report so that it could be turned over to the defense. Fortunately, the jurors accepted Dr. Ribe's supplemental reports for what they were, reports of a brilliant pathologist continually examining and investigating a difficult cause of death.

In conclusion, I feel that without question Dr. Ribe is the most outstanding pathologist in Los Angeles County. If a prosecutor is willing to tirelessly work with him in the preparation of a case, he can be an absolutely outstanding witness. He is not, however, a witness to be called to the stand without thorough case preparation. Should you have any further questions, don't hesitate to contact me at (562) 491-6317.

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MEMORANDUM

TO: GIL GARCETTI  
District Attorney

THROUGH: ROBERT P. HEFLIN  
Chief Deputy District Attorney

RICHARD L. JENKINS  
Assistant District Attorney

GEORGE J. KNOKE, Director  
Bureau of Branch and Area Operations

FROM: JOHN F. LYNCH, Head Deputy  
Norwalk Branch Office

SUBJECT: BRADY OBLIGATIONS RELATING TO  
DR. JAMES RIBE OF THE CORONER'S OFFICE

DATE: APRIL 23, 1998

I. The Issue:

Dr. James Ribe is a senior medical examiner for the Los Angeles County Coroner's Office. He has testified in hundreds of criminal cases, many of them high profile. There are serious issues regarding whether our Office has fulfilled its obligation to disclose material relating to Dr. Ribe's performance to the defense bar and to our own deputies. In short, have we fulfilled our obligations under Brady v. Maryland, and its progeny? In my opinion, unquestionably we have not.

II. The Known History:

While the testimony of the medical examiner is often not critical in a homicide case, when it is, it can be the key evidence determining guilt or innocence, or whether a special circumstance is true or not. Dr. Ribe has been such a key witness in a number of cases in which his performance--whether characterized as change of opinion, mistake, clarification of testimony or any other term, is covered by Brady and must be disclosed to the defense.

Consider the following:

A. People v. Roberto Cauchi  
Case No. BA111904

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An alleged special circumstance murder of a four year old girl in which our Office sought the death penalty based upon medical evidence that the child's anus had been forcefully penetrated by a foreign object. Dr. Ribe so found in the autopsy report, his preliminary hearing testimony and his testimony on direct at trial. Without informing the trial deputy, Dr. Ribe on cross-examination completely reversed himself and testified that the anal injuries could be the result of natural processes. (See Attachment #1, memorandum from Dan Wright to William Hodgman dated March 24, 1997).

B. People v. Wingfield (Lance Helms' Case)  
Case No. LA020636

A homicide case involving the death of 2 1/2 year old Lance Helms as a result of blunt force trauma to the abdomen. The suspects were Eva Wingfield and David Helms, the victim's father. Dr. Ribe's testimony at the preliminary hearing relating to how rapidly the fatal blows incapacitated the child was the key evidence fixing Eva Wingfield as the child's sole caretaker when the blows were struck. Wingfield was charged with murder but pled to P.C. 273(a) and was sentenced to ten years in state prison. Nine months after the plea, L.A.P.D.'s Internal Affairs Division reopened the investigation. (Why? At the request of David Helms' mother?) When investigators met with Dr. Ribe to review his findings, Dr. Ribe admitted to them that his testimony at the preliminary hearing was wrong as it related to the victim's ability to remain conscious and alert after receiving the fatal blows.

Eva Wingfield filed a writ of Error Coram Nobis in June of 1997. The basis of the writ was that L.A.P.D.'s investigation had revealed additional evidence--Dr. Ribe's change of opinion--which cast significant doubt on whether she could have committed the crime. The writ was granted and Eva was released from prison. (See Attachment #2, L.A.P.D. follow-up investigation report of 31 pages).

C. People v. Tuccinardi  
Case No. YA029306

An intensely watched homicide case in Torrance in which the victim, Karen Tuccinardi, died as a result of either: her husband stabbing her in the neck, twice (according to Dr. Ribe), or, a sick, depressed woman falling on the knife killing herself (Leslie Abramson's theory).

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Dr. Ribe's autopsy report indicates two separate knife wounds and no definite guard mark on the neck (Attachment #3 excerpts of that report). DDA Ken Lamb, the trial deputy, told me that he reviewed the evidence and believed that it showed only one, through and through stab wound, with a mark on the victim's neck made by the blade guard. Lamb told me that Dr. Ribe would not budge from his original opinion and did not until he testified in front of the jury (Attachment #4 excerpt of Dr. Ribe's re-direct examination).

D. People v. Hand  
Case No. BA120989

A double homicide prosecuted by Hardcore in which Dr. Ribe supervised the autopsies, reviewed and approved the reports, and testified at the preliminary hearing (DDA Jennifer Lentz) and the trial (DDA Laura Laesecke). As to victim Kenyannie Chapell, the autopsy report and the preliminary hearing testimony indicate that gunshot wound no. 7 is an entry wound (Attachment #5). At trial, Dr. Ribe changed his opinion and testified that it was an exit wound (Attachment #6). It should also be noted that the autopsy report, reviewed and approved by Dr. Ribe, describes wound #1 as an entry wound with no exit. In fact, Dr. Ribe testified that the wound was a gaping wound to the left side of the head caused by a high velocity round which exited by blowing the back of the victim's head off.

E. People v. Charles Rathbun  
Case No. YA026602

The sensational homicide case involving the victim Linda Sobek. Dr. Ribe was an essential witness who, while highly praised by trial deputy Steve Kay, (see Attachment #7) did cause some difficulty when he was unable to identify evidence of sexual assault which was plainly visible to other experts (unrecorded conversation with Steve Kay).

Additionally, even Kay's laudatory memorandum points out that: "The problem is that every time Dr. Ribe looks at a case, he finds something new, which sometimes causes him to change his position on one or more aspects of a case. I literally had to spend countless hours meeting with Dr. Ribe in person, talking to him on the telephone at his office during the week and on weekends and also talking to him at his home on his days off." Is it reasonable to expect that extensive contact from a

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typical deputy? A Hard Core deputy filling in at the last moment?

F. Other Cases

In late October and November of 1997 when Mr. Dinko Bozanich and I first raised our concern that our Office may not be fulfilling its Brady obligations relating to Dr. Ribe, I was instructed to insure that compliance with the broad discovery order issued in the Norwalk case of Arce and Urbano (Attachment #8) was appropriately handled. A quick and incomplete survey revealed that Dr. Ribe appeared on the witness lists of hundreds of cases, including, Bryant, Piper Tech, Rathbun, etc.

It was obvious that we could not comprehensively identify and review every case involving Dr. Ribe and still respect the defendant's right to a speedy trial. Tactically, we convinced the court that the materials provided in five well-known cases -- Cauchi, Tuccinardi, Rathbun, Hand, and Wingfield, were sufficient to enable the defense to impeach Dr. Ribe, if they could get over the hurdle of admissibility. Dr. Ribe testified in the case, was ineffectively attacked, and both defendants were convicted of murder.

III. The Applicable Law

The law of discovery, including the most recent California Supreme Court case on the subject, clearly and definitively require that our Office disclose a great deal of material relating to Dr. Ribe's performance as an expert witness. To those who disagree, I recommend reviewing the following cases:

Brady v. Maryland (1963) 373 U.S. 83;

Kyles v. Whitley (1995) 514 U.S. 419;

Giglio v. United States (1972) 405 U.S. 150;

People v. Garcia (1993) 17 C.A. 4th 1169;

In Re Brown (1998) 98 DAR 3331 Cal. Supreme Court.

IV. Conclusion

There are several issues which require immediate attention. Specifically:

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A. Does our Office have Brady obligations relating to Dr. Ribe's performance?

I have maintained since November of 1997 that the answer is unequivocally yes. Note, however, the draft memorandum of then Special Assistant Jennifer Snyder in which she says that while the material is not strictly Brady discovery material, deputies should turn it over anyway. (Attachment #9, unpublished memorandum dated December 22, 1997)

If I am correct that the obligation exists, our Office has failed to fulfill it for well over a year--and continues to do so on every case involving Dr. Ribe.

B. What material exists in our Office which relates to Dr. Ribe's performance?

Trying to answer this question from the position of Branch Head Deputy is inefficient, ineffective and frustrating. What I have learned is that Dr. Ribe's performance, either in a specific case or overall, has been the subject of discussion with at least Bureau Directors Gunson, Hodgman, Mueller and Knoke; Head Deputy Donna Wills of the Family Violence Division; Brian Kelberg, the Office's Medico-Legal Specialist; Dr. Lahshmanan S., the Coroner; outside medical experts, and perhaps others.

Our Office needs to systematically identify what material exists which relates to Dr. Ribe's performance as an expert.

C. Does our Office have an obligation to inform its own deputies of issues relating to Dr. Ribe's performance as an expert?

Absolutely! And it's long past due. What possible explanation is there for not sharing this information with our lawyers? A trial deputy planning to prove that a dead child was sodomized prior to being killed, by using Dr. Ribe as the sexual abuse expert, will certainly want to know about the Cauchi case. Similarly, in homicide cases where the evidence relating to the time of death, victim incapacity, gunshot entrance/exit wounds, knife entrance/exit wounds, is critical, our trial deputy needs to be informed of potential attacks on Dr. Ribe's credibility in these areas.

D. Does our Brady obligation apply only to pending and future cases?

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No. It is absolutely clear that our obligations continue past conviction. This Office has addressed this issue many times. Material is discovered which should have been turned over to the defense. An effort is made to determine how many cases are affected. Letters are then sent to the defense attorneys in the affected cases, informing them of the materials' existence. We then wait to see if there are any motions filed by the defense attorneys claiming that the non-disclosure tainted the conviction. Generally, few such motions are filed. Such a procedure could be used in this situation.

Finally, I want to be unmistakably clear that I am not saying that Dr. Ribe is an incompetent witness who should not be called in our cases. In fact, I personally watched him testify in the Arce and Urbano case tried by Dinko Bozanich. He was an effective, credible witness. Even when the defense tried to impeach his credibility by referring to his change of opinion/mistakes in prior cases, he remained composed and handled the "attack" effortlessly.

I am saying that we have an obligation -- have had an obligation -- to disclose certain material involving Dr. Ribe's performance. We can deal as trial lawyers with the issues arising from such disclosure. We cannot deal as ethical prosecutors with continued failure to fulfill our Brady obligations.

gt

Attachments

000027

MEMORANDUM

To: MICHAEL E. TRANBARGER, Assistant District Attorney  
WILLIAM HODGMAN, Assistant District Attorney  
ALLEN D. FIELD, Director, Special Operations-II  
ROGER GUNSON, Director, Branch & Area Ops-II

From: GEORGE M. PALMER, Head Deputy, Appellate Division

Subj: In re JOSE A. SALAZAR on Habeas Corpus, LA025781

Date: August 17, 2000

This is to advise you that the Court of Appeal has ordered a reference hearing in this case, which involves Deputy County Coroner Dr. Ribe and the question whether the office properly discharged its duty under BRADY to provide the defense with materials concerning Dr. Ribe's testimony in other cases.

DDA Jennifer Turkat tried this case and obtained a verdict of guilty of second degree murder for the killing of one-year old Adriana Krygoski. Dr. Ribe testified as to the cause of death and the probable time of infliction of the injuries which caused death. Other medical experts also testified. Defendant filed a petition for writ of habeas corpus in the Court of Appeal in conjunction with his appeal. The court has ordered a reference hearing "to determine what evidence the defense has requested but was not turned over by the prosecution, whether any other relevant Brady evidence exists and should be disclosed even though not specifically requested by the defense, and for finding when the prosecution should have known that the information was material to petitioner's defense." (See p. 34 of enclosed opinion.) This means there must be an evidentiary hearing, held by the "trial court" (Judge Michael Harwin), at which various persons from our office will be required to testify. The opinion mentions the following persons (not in this order): Allan Yochelson, John Lynch, Roger Gunson, Jennifer Turkat, Bill Hodgman, and Dinko Bozanich. There may be other persons whose testimony will be needed.

No date has been set for a hearing. I would think that the earliest date would be approximately 30 days from now and that is very unlikely.

For reference hearings arising out of habeas proceedings such as this, it is customary that HABLIT handle the case. However, this is not an ordinary case. DDA Jennifer Turkat can not handle the case because she will be a witness. Assuming that HABLIT will handle the case, I have tentatively assigned DDA Lydia Bodin (her

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vacation until September 11 does present a problem but I have another deputy available). This case will obviously require considerable preparation so that the evidence can be presented properly and expeditiously. It should also be noted that the petitioner has the burden and should go first in the presentation of evidence. I would think that after everyone has read the court's opinion there should be a meeting to explore the evidence and plan its presentation.

Please advise me if HABLIT will have the responsibility of presenting the People's case.

cc: ROBERT P. HEFLIN  
GEORGE KNOKE  
BEVERLY CAMPBELL  
JOHN LYNCH  
ALLAN YOCHELSON  
JENNIFER TURKAT

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**DECLARATION OF LARA BAZELON**

I, Lara Bazelon, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am representing Sharrieff Brown in his state habeas case.
2. On or about May 10, 2010, Mr. Brown was convicted of second degree murder and child abuse resulting in the death of a child under the age of eight. His conviction was affirmed by the Court of Appeals in an unpublished decision on or about May 10, 2011. The California Supreme Court denied his petition for review on or about August 11, 2011.
3. Mr. Brown was represented at trial by Deputy Public Defender Joel Lofton.
4. Dr. Ribe was the sole medical expert who testified for the prosecution at Mr. Brown's trial. According to pretrial hearing transcript, DPD Lofton asked the prosecutor, Deputy District Attorney S. Kelly Cromer, for a copy any "file" of impeachment material kept by the People on Dr. Ribe. DDA Cromer told counsel and the Court, "there are no files that the People keep on Dr. Ribe."
5. In October of 2012, I met with Brentford Ferreira who was then the Deputy District Attorney in charge of the Habeas Corpus Litigation Team in the Los Angeles District Attorney's Office. Before that, from 1989-2003, Mr. Ferreira was a member of the Appellate Unit of the Los Angeles County District Attorney's Office.
6. Mr. Ferreira informed me that the Los Angeles County District Attorney's Office kept impeachment materials on Dr. Ribe consisting of 12 bankers boxes, which were gathered from various branch offices of the Los Angeles County District Attorney's Office and kept

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1 in the possession of the Habeas Corpus Litigation Team in downtown Los Angeles. Mr.  
2 Ferreira stated that he would make these boxes available to me for inspection and copying.  
3

4 7. On or about November 6, 2012, I went to Habeas Corpus Litigation Team office in  
5 downtown Los Angeles and inspected and photocopied the Ribe files.

6 8. Meanwhile, under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),  
7 Mr. Brown's *federal* habeas petition was due on or about November 10, 2012. Mr. Brown  
8 timely filed a pro se petition for a writ of habeas corpus in federal court on or about  
9 October 15, 2012. On November 7, 2012, he filed a first amended petition.

10 9. The federal litigation was procedurally complex and lengthy. Pro se, Mr. Brown sought a  
11 *Rhines* stay of the federal action so that he could first exhaust his unexhausted claims in  
12 state court, including a *Brady* claim and a prosecutorial misconduct claim concerning the  
13 Ribe Boxes. On or about August 8, 2013, Magistrate Judge Michael Wilner denied the  
14 request for a *Rhines* stay. Judge Wilner granted a *Kelly* stay and ordered Mr. Brown to file  
15 a state habeas petition on or before October 8, 2013, or the Court would lift the stay and  
16 dismiss the federal petition.  
17

18 10. After receiving a communication from Sheriff Brown about the Court's order, I filed a  
19 notice of appearance on behalf of Mr. Brown in federal court on or about September 4,  
20 2013, and requested an extension of time to file the state court habeas petition. Initially,  
21 the state court habeas petition deadline was extended until January 3, 2014.  
22

23 11. On or about October 23, 2013, I filed a request with the federal court to reconsider the  
24 denial of the *Rhines* stay. Respondent opposed that request on November 13, 2013. In  
25 support of its opposition, Respondent filed a redacted declaration by Deputy District  
26

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1 Attorney Imogene M.N. Katayama with a request that Judge Wilner seal paragraphs five  
2 through nine of that declaration and enter a protective order.

3  
4 12. On November 20, 2013, Judge Wilner granted the Respondent's request to seal paragraphs  
5 five through nine of the Katayama declaration and issued a protective order requiring that  
6 "any pleading or other papers served on opposing counsel or filed or lodged with the Court  
7 that contains or reveals the substantive content of paragraphs five through nine of this  
8 declaration shall be filed under seal."

9  
10 13. On November 21, 2013, Judge Wilner held a status conference. Judge Wilner granted in-  
11 part and denied in part Mr. Brown's request for a reconsideration of the previous denial of  
12 his request for a *Rhines* stay. Judge Wilner granted Mr. Brown's request for a *Rhines* stay  
13 with respect to his Brady claim and his prosecutorial misconduct claim. Judge Wilner  
14 continued the date of the filing of the state court habeas petition to February 3, 2014.

15  
16 14. On or about Tuesday, January 7, 2014, I spoke with Mr. Ferreira, who is now Special  
17 Counsel to the Loyola Law School Project for the Innocent and Adjunct Professor of Law  
18 at Loyola Law School. Also present was Andrea Blatchford, a Law Clerk with the Loyola  
19 Law School Project for the Innocent.

20  
21 15. Mr. Ferreira advised me that throughout his tenure as the deputy in charge of the Habeas  
22 Corpus Litigation Unit, he permitted defense counsel, upon request, to inspect and copy the  
23 contents of the Ribe boxes. More specifically, he permitted defense counsel, upon request,  
24 to inspect and copy the contents of the boxes during the period between 2005-2011.

25  
26 16. I asked Mr. Ferreira why he permitted defense counsel to inspect and copy the contents of  
27 the Ribe boxes upon request. He replied that he disclosed the contents of the Ribe boxes to

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1 defense counsel upon request because the determination had been made in 1998 that within  
2 the contents of the Ribe boxes was *Brady* material.  
3

4 17. On Wednesday, January 29, 2014, Mr. Ferreira informed me that he believed he may have  
5 provided copies of some or all of the Ribe Box materials to the Los Angeles County Public  
6 Defender's Office sometime in mid-2000s, years before Mr. Brown's trial took place. This  
7 disclosure came as a complete surprise to me.  
8

9 18. Upon learning this information, I followed up by contacting attorneys at the Los Angeles  
10 County Public Defender's Office (LACPD). On Thursday, January 30, Friday, January 31,  
11 and Monday, February 3, 2014, I spoke with three different attorneys at the Los Angeles  
12 County Public Defender's Office. On Monday, February 3, 2014, I spoke with Albert  
13 Menaster, who is the head of the Appellate Unit of the Office. DPD Menaster advised me  
14 to put my questions about the Los Angeles County Public Defender's Office's possession  
15 of the Ribe Boxes in writing. He further advised me that, given the sensitivity of the issues  
16 involved, my written questions would be reviewed by four different tiers of management  
17 within the Los Angeles County Public Defender's Office before I would receive written  
18 responses.  
19

20 21  
22 19. I asked DPD Menaster if, in his opinion, it would be possible to obtain the written  
23 responses and declarations in time to file Mr. Brown's state court petition on or before  
24 March 5, 2014. He advised me that, in his opinion, it would not be possible. He advised  
25 me to request an extension of several months for the filing of the state habeas petition.  
26  
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1 20. Based on DPD Menaster's statements, I sought a 60-day continuance from the federal  
2 court, until May 7, 2014, which was granted.  
3  
4 21. It took time to confirm that the LACPD had been in continuous possession of the Ribe  
5 Boxes since 2004. It took additional time to sort out which individuals at the LACPD had  
6 the information I needed to fully explore the ramifications of this information. I ultimately  
7 decided to seek declarations from trial counsel, trial counsel's supervisor, and the head of  
8 the Public Integrity Assurance Section (PIAS) at LACPD, which is the office within  
9 LACPD that possesses the Ribe Boxes.  
10  
11  
12 22. On March 5, 2014, I received draft declarations from trial counsel's supervisor and the  
13 head of the PIAS. Because the declarations raised additional questions, on March 11, 2014,  
14 I sent follow up questions to DPD Menaster and asked for clarifications. On March 13,  
15 2014, DPD Menaster wrote in an email that every time I asked for clarifications or asked  
16 additional questions, the extensive internal review process within the LACPD would have  
17 to begin again.  
18  
19  
20 23. On April 2, 2014, I followed up with DPD Menaster to get a sense of when to expect the  
21 final declarations and to advise him that I had an approaching filing deadline. On April 4,  
22 2014, I received one revised, unsigned declaration, and an email from DPD Menaster  
23 informing me that the other two declarations "might take two or three weeks, but that's just  
24 a blind guess."  
25  
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1 24. Based on that information, I sought an additional continuance from the federal court for the  
2 filing of the state habeas petition. On April 8, 2014, Judge Wilner granted my request in an  
3 order stating that the petition was due on June 11, 2014, or 21 days after receiving the  
4 signed declarations from the LACPD that I had been seeking.  
5  
6

7 25. On April 27, 2014, the final signed declarations of trial counsel and trial counsel's  
8 supervisor arrived in the mail. On May 8, 2014, I received a signed PDF version of the  
9 outstanding declaration from the head of the LACPD PIAS Unit, DPD Harvey Sherman.  
10 DPD Sherman's original, signed declaration arrived in the mail on May 16, 2014 (the letter  
11 was misaddressed).  
12  
13

14 26. On May 21, 2014, I visited the LACPD with a law clerk to examine the contents of the  
15 Ribe Boxes, which had been in the continuous possession of the LACPD since 2004. There  
16 were a total of 26 Ribe Boxes. Based on my inspection of the contents of the boxes, it is  
17 my belief that the Boxes contained the same material as the Boxes provided to me by  
18 former DDA Brent Ferreira, and contained additional materials as well, such as transcripts  
19 of the *Salazar* habeas corpus proceeding.  
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2 27. On or about January 23, 2014, I met with Dr. James Ribe to discuss this case, at which time  
3 he provided the information contained in paragraph 4 of his unsigned declaration.

4

5

6

7 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
8 knowledge.

9

10

11

12

January 28, 2014

DATE



LARA BAZELON

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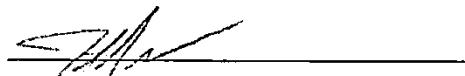
**DECLARATION OF JOEL LOFTON**

I, Joel Lofton, declare as follows:

1. I am an attorney licensed to practice law in the courts of the State of California, employed since July of 2005 as a Los Angeles County Deputy Public Defender. In that capacity, I was appointed to represent Sharrieff Brown in case number MA043976-01. It was the first murder case I took to jury trial.
2. During my employment as a Los Angeles County Deputy Public Defender I had access to an internal intranet computer system titled Public Integrity Assurance Section (PIAS). During my representation of Sharrieff Brown I did not conduct any searches of Dr. Ribe on this system.
3. I was aware of and did review one box of materials that our Lancaster branch office had in its possession concerning Dr. Ribe. Those materials contained preliminary hearing and trial transcripts of Dr. Ribe's testimony in the Salazar case. I was not aware of any additional materials or boxes concerning Dr. Ribe located in PIAS or anywhere else in the Public Defender's office.
4. When I became aware that Dr. Ribe would be testifying on behalf of the prosecution against Sharrieff Brown, I contacted the Coroner's office to set up an interview with him. I also Googled him. The Google search provided no information that I believed would be relevant or admissible at trial.
5. I do not recall reading *People v. Salazar* (2003) 110 Cal.App.4th 1616 during the time that I represented Sharrieff Brown. I did read the California Supreme Court's decision in *People v. Salazar* (2005) 35 Cal.4th 1031, and I reviewed transcripts of Dr. Ribe's testimony at the preliminary hearing and trial in the Salazar case.
6. It was the *Salazar* case which led me to believe that the prosecutor may have a file on Dr. Ribe which contained Brady material. I requested in open court that Deputy District Attorney Cromer turn over any files they kept on Dr. Ribe. When Deputy District Attorney Cromer denied in open court and on the record to the existence of such a file, I relied on that representation and made no further investigation.
7. I was aware that Deputy District Attorney Cromer had used Dr. Ribe in the past, however, I did not know how often she had used him or what the dates of those past cases might have been.

Under penalty of perjury I declare that the foregoing is true.

Signed this 10<sup>th</sup> day of April, 2014, at Los Angeles, California.



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FILED UNDER SEAL

DECLARATION OF IMOGENE M.N. KATAYAMA

I, Imogene M.N. Katayama, hereby declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in the State of California and am employed as a deputy district attorney ("DDA") for the Los Angeles County District Attorney's Office ("Office").
2. I have been assigned to the Brady Compliance Unit ("BCU"), which was originally established as the Brady Compliance Division ("BCD") on September 4, 2001, from April 1, 2004, to the present.
3. I am informed and believe and, upon such information and belief, aver that on or around May 28, 2002, the BCD began maintaining a "Brady Alert System" ("BAS"), a confidential and secure computerized database, which includes potentially exculpatory impeachment information known to the Office about peace officers and governmentally-employed expert witnesses. Every DDA is mandated by the District Attorney to access the BAS at least 30 days before trial to determine whether potentially exculpatory impeachment information on a peace officer or governmentally-employed expert witness exists therein. The system confirms whether information regarding the witness has been added to the BAS, and, if so, provide a brief summary of that information. When appropriate, the BAS will alert the DDA to contact the BCU for details.
4. I request that the information contained in Paragraphs 5 through 9 of this declaration be filed under seal for the following reason: The current Office protocol,

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which is respectful of a witness's privacy rights, dictates that the information regarding whether or not a witness has been added to the BAS is confidential and available only to Los Angeles County DDAs. Therefore, as a general rule, the information is not shared with any other person or entity, including other prosecutorial agencies. The information set forth in the following paragraphs of this declaration was shared with Deputy Attorney General Shira Seigle as an exception to the general rule in order to defend against an allegation of prosecutorial misconduct against a DDA, who may have been directly affected by information inextricably connected to the BAS.

\*\*\*\*\*BEGIN SEALED PARAGRAPHS\*\*\*\*\*

5. I am informed and believe and, upon such information and belief, aver that in or around 1998, the Office assembled a package and/or boxes of discovery materials relating to Los Angeles County Department of Coroner Senior Medical Examiner James Ribe, M.D. ("Ribe Boxes"), which was/were to be made available to defense counsel in cases involving Dr. Ribe.

6. I am informed and believe and, upon such information and belief, aver that on or around August 8, 2003, after the California Court of Appeal issued its decision in *In re Salazar* (2003) 110 Cal.App.4th 1616 (The District Attorney's failure to provide petitioner with potentially exculpatory evidence regarding Dr. Ribe constituted *Brady* error.), the BCD entered Dr. Ribe's name, along with information regarding the existence of the Ribe Boxes, into the BAS.

7. I am informed and believe and, upon such information and belief, aver that on or around June 6, 2005, after the California Supreme Court issued its decision in

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*People v. Salazar* (2005) 35 Cal.4th 1031 (Petitioner failed to establish true *Brady* error, because the evidence at issue was not material), reversing the judgment of the Court of Appeal in *In re Salazar, supra*, 110 Cal.App.4th 1616, Dr. Ribe's name, along with the information regarding the existence of the Ribe Boxes, was removed from the BAS.

8. On June 29, 2011, after careful reconsideration, the BCU determined that the nature and existence of the Ribe Boxes should be made known to DDAs litigating cases in which Dr. Ribe is a witness and it entered Dr. Ribe's name, along with the information regarding the existence of the material contained in the Ribe Boxes, into the BAS.

9. Therefore, if a DDA accessed the BAS between on or around June 6, 2005, and June 29, 2011, e.g., in 2010, and performed a search for Dr. Ribe's name, he or she would not have found it.

\*\*\*\*\*END SEALED PARAGRAPHS\*\*\*\*\*

Executed on November 18, 2013  
at Los Angeles, California

  
IMOGENE M.N. KATAYAMA

311

MINUTE ORDER  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 05/24/10

-----  
CASE NO. MA043976

THE PEOPLE OF THE STATE OF CALIFORNIA  
VS.  
DEFENDANT 01: SHARRIEFF BROWN

-----

INFORMATION FILED ON 03/16/09.

COUNT 01: 187(A) PC FEL  
COUNT 02: 273AB PC FEL  
COUNT 03: 273A(A) PC FEL  
COUNT 04: 273A(A) PC FEL

ON 05/10/10 AT 1100 AM IN NORTH DISTRICT DEPT A05

CASE CALLED FOR VERDICT

PARTIES: JARED D. MOSES (JUDGE) CHERIE WARREN (CLERK)  
ANN RUTAR (REP) S KELLY CROMER (DDA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY JOEL LAMONT LOFTON DEPUTY  
PUBLIC DEFENDER

COUNT (01) : DISPOSITION: FOUND GUILTY - CONVICTED BY JURY

THE JURY FINDS THE OFFENSE IN COUNT 01 TO BE IN THE SECOND DEGREE.

COUNT (02) : DISPOSITION: FOUND GUILTY - CONVICTED BY JURY  
COUNT (03) : DISPOSITION: ACQUITTED BY JURY  
COUNT (04) : DISPOSITION: ACQUITTED BY JURY

COURT ORDERS AND FINDINGS:

-THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

AT 11:40 A.M, THE JURORS RETURN INTO THE COURT, IN THE PRESENCE  
OF ALTERNATE JURORS, COUNSEL AND DEFENDANT WITH THE FOLLOWING  
VERDICTS:

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS  
ANGELES".

"DEPARTMENT A05".

"PEOPLE OF THE STATE OF CALIFORNIA VS. SHARRIEFF BROWN".

VERDICT  
PAGE NO. 1 HEARING DATE: 05/10/10

312

CASE NO. MA043976  
DEF NO. 01

DATE PRINTED 05/24/10

"CASE NUMBER MA043976".

"WE THE JURY IN THE ABOVE-ENTITLED ACTION, FIND THE DEFENDANT, SHARRIEFF BROWN, GUILTY OF THE CRIME OF MURDER IN THE SECOND DEGREE, ALLEGED VICTIM TRECION ADAMS-GRACE, IN VIOLATION OF PENAL CODE SECTION 187(A), A FELONY, AS CHARGED IN COUNT 1 OF THE INFORMATION".

"DATED THIS 10TH DAY OF MAY, 2010".

"SIGNED, JUROR NUMBER 6, FOREPERSON".

"IN THE SAME TITLE, COURT AND CAUSE".

"WE THE JURY IN THE ABOVE-ENTITLED ACTION, FIND THE DEFENDANT, SHARRIEFF BROWN, GUILTY OF THE CRIME OF ASSAULT ON A CHILD RESULTING IN DEATH, ALLEGED VICTIM TRECION ADAMS-GRACE, A CHILD UNDER THE AGE OF 8 YEARS, IN VIOLATION OF PENAL CODE SECTION 273AB, A FELONY, AS CHARGED IN COUNT 2 OF THE INFORMATION".

"DATED THIS 10TH DAY OF MAY, 2010".

"SIGNED, JUROR NUMBER 6, FOREPERSON".

"IN THE SAME TITLE, COURT AND CAUSE".

"WE THE JURY IN THE ABOVE-ENTITLED ACTION, FIND THE DEFENDANT, SHARRIEFF BROWN, NOT GUILTY OF THE CRIME OF CHILD ABUSE, ON OR BETWEEN JULY 1, 2008 AND OCTOBER 31, 2008, ALLEGED VICTIM TRECION ADAMS-GRACE, IN VIOLATION OF PENAL CODE SECTION 273A(A), A FELONY, AS CHARGED IN COUNT 3 OF THE INFORMATION".

"DATED THIS 10TH DAY OF MAY, 2010".

"SIGNED JUROR NUMBER 6, FOREPERSON".

"IN THE SAME TITLE, COURT AND CAUSE".

"WE, THE JURY IN THE ABOVE-ENTITLED ACTION, FIND THE DEFENDANT, SHARRIEFF BROWN, NOT GUILTY OF THE CRIME OF CHILD ABUSE, ON OR BETWEEN OCTOBER 1, 2008 AND NOVEMBER 2, 2008, ALLEGED VICTIM TRECION ADAMS-GRACE, IN VIOLATION OF PENAL CODE SECTION 273A(A), A FELONY, AS CHARGED IN COUNT 4 OF THE INFORMATION".

"DATED THIS 10TH DAY OF MAY, 2010".

"SIGNED, JUROR NUMBER 6, FOREPERSON".

PAGE NO. 2

VERDICT  
HEARING DATE: 05/10/10

313

CASE NO. MA043976  
DEF NO. 01

DATE PRINTED 05/24/10

THE JURY IS NOT POLLED.

THE JURORS ARE THANKED AND EXCUSED.

THE VERDICT IS FILED. ALL JURY INSTRUCTION GIVEN ARE FILED.

EXHIBIT RECEIPT NUMBERS 1760661, 1760662, 1760663 AND 1760664  
ARE WRITTEN.

MATTER IS CONTINUED TO MAY 27, 2010, AT 8:30 A.M. IN THIS  
DEPARTMENT FOR MOTIONS AND PROBATION AND SENTENCING HEARING.

BAIL SET AT NO BAIL.

**BAIL SET AT NO BAIL.**

**NEXT SCHEDULED EVENT**

**NEXT SCHEDULED EVENT**

NEXT SCHEDULED EVENT: 05/22/10 830 AM MOTION DIST. NORTH DISTRICT DEPT. A05

85, 27, 10 330 AM MOTION DISTRICT COURT AUG

NEXT SCHEDULED EVENT 2:  
PROBATION AND SENTENCE HEARING

CUSTODY STATUS: REMANDED TO CUSTODY

VERDICT  
HEARING DATE: 05/10/10

356

CR-292

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE  
[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, NORTH DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: SHARRIEFF BROWN		DOB: 08-27-85	MA043978-01	-A
AKA: SEE PROBATION REPORT				-B
CII NO: A25281842				-C
BOOKING NO: 1683902		<input type="checkbox"/> NOT PRESENT		-D
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT		<input type="checkbox"/> AMENDED ABSTRACT		
DATE OF HEARING 05-27-10	DEPT NO A05	JUDGE JARED D. MOSES		
CLERK CHERIE WARREN	REPORTER ANN RUTAR	PROBATION NO. OR PROBATION OFFICER X1875308		
COUNSEL FOR PEOPLE S KELLY CROMER		COUNSEL FOR DEFENDANT JOEL LAMONT LOFTON, PD		
		<input checked="" type="checkbox"/> APPTD		

1. Defendant was convicted of the commission of the following felonies:

Additional counts are listed on attachment  
(number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			CONCURRENT CONSECUTIVE	654 STAY
						JURY	COURT	REA		
01	PC	187(A)**	MURDER - 2 <sup>ND</sup> DEGREE	2008	05-10-10	X				X
02	PC	273AB	ASSAULT ON A CHILD RESULTING IN DEATH	2008	05-10-10	X				

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4.  LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts \_\_\_\_\_

5.  LIFE WITH THE POSSIBILITY OF PAROLE on counts \_\_\_\_\_

6. a.  15 years to Life on counts \_\_\_\_\_ c.  \_\_\_\_\_ years to Life on counts \_\_\_\_\_

b.  25 years to Life on counts 2 d.  \_\_\_\_\_ years to Life on counts \_\_\_\_\_

PLUS enhancement time shown above.

7.  Additional determinate term (see CR-290).

8. Defendant was sentenced pursuant to  PC 667(b)-(i) or PC 1170.12  PC 667.61  PC 667.7  other (specify): \_\_\_\_\_

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

Page 1 of 2

357

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: SHARRIEFF BROWN			
MA043976-01	-A	-B	-C
-D			

## 9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

## a. Restitution Fine(s):

Case A: \$5,000.00 per PC 1202.4(b) forthwith per PC 2085.5; \$5,000.00 per PC 1202.45 suspended unless parole is revoked.  
 \$\_\_\_\_\_ per PC 1202.44 is now due, probation having been revoked.

Case B: \$\_\_\_\_\_ per PC 1202.4(b) forthwith per PC 2085.5; \$\_\_\_\_\_ per PC 1202.45 suspended unless parole is revoked.  
 \$\_\_\_\_\_ per PC 1202.44 is now due, probation having been revoked.

Case C: \$\_\_\_\_\_ per PC 1202.4(b) forthwith per PC 2085.5; \$\_\_\_\_\_ per PC 1202.45 suspended unless parole is revoked.  
 \$\_\_\_\_\_ per PC 1202.44 is now due, probation having been revoked.

Case D: \$\_\_\_\_\_ per PC 1202.4(b) forthwith per PC 2085.5; \$\_\_\_\_\_ per PC 1202.45 suspended unless parole is revoked.  
 \$\_\_\_\_\_ per PC 1202.44 is now due, probation having been revoked.

## b. Restitution per PC 1202.4(f):

Case A: \$\_\_\_\_\_  Amount to be determined to  victim(s)\*  Restitution Fund  
 Case B: \$\_\_\_\_\_  Amount to be determined to  victim(s)\*  Restitution Fund  
 Case C: \$\_\_\_\_\_  Amount to be determined to  victim(s)\*  Restitution Fund  
 Case D: \$\_\_\_\_\_  Amount to be determined to  victim(s)\*  Restitution Fund

\* Victim name(s), if known, and amount breakdown in item 11, below.  \* Victim names(s) in probation officer's report.

## c. Fine(s):

Case A: \$\_\_\_\_\_ per PC 1202.5. \$\_\_\_\_\_ per VC 23550 or \_\_\_\_\_ days  county jail  prison in lieu of fine  concurrent  consecutive  
 includes:  \$50 Lab Fee per HS 11372.5(a)  \$\_\_\_\_\_ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: \$\_\_\_\_\_ per PC 1202.5. \$\_\_\_\_\_ per VC 23550 or \_\_\_\_\_ days  county jail  prison in lieu of fine  concurrent  consecutive  
 includes:  \$50 Lab Fee per HS 11372.5(a)  \$\_\_\_\_\_ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: \$\_\_\_\_\_ per PC 1202.5. \$\_\_\_\_\_ per VC 23550 or \_\_\_\_\_ days  county jail  prison in lieu of fine  concurrent  consecutive  
 includes:  \$50 Lab Fee per HS 11372.5(a)  \$\_\_\_\_\_ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: \$\_\_\_\_\_ per PC 1202.5. \$\_\_\_\_\_ per VC 23550 or \_\_\_\_\_ days  county jail  prison in lieu of fine  concurrent  consecutive  
 includes:  \$50 Lab Fee per HS 11372.5(a)  \$\_\_\_\_\_ Drug Program Fee per HS 11372.7(a) for each qualifying offense

## d. Court Security Fee: \$60.00 per PC 1465.8.

10. TESTING a.  Compliance with PC 296 verified b.  DNA per PC 296 c. AIDS per PC 1202.1 d.  other (specify):

## 11. Other orders (specify):

DEFENDANT TO PAY \$60.00 CRIMINAL CONVICTION ASSESSMENT PURSUANT TO 70373 G.C. NOT OWN, USE OR POSSESS ANY DANGEROUS OR DEADLY WEAPONS, INCLUDING ANY FIREARMS, KNIVES OR OTHER CONCEALABLE WEAPONS. DO NOT OWN, USE OR POSSESS ANY DANGEROUS OR DEADLY WEAPONS, INCLUDING ANY FIREARMS, KNIVES OR OTHER WEAPONS.

## 12. IMMEDIATE SENTENCE:

Probation to prepare and submit Post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin: BLA

## 13. EXECUTION OF SENTENCE IMPOSED:

- a.  at initial sentencing hearing.
- b.  at resentencing per decision on appeal.
- c.  after revocation of probation.
- d.  at resentencing per recall of commitment. (PC1170(d).)
- e.  other (specify):

15. The defendant is remanded to the custody of the sheriff  forthwith  after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to  the reception center designated by the director of the California Department of Corrections and Rehabilitation.  
 other (specify):

## 14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	655	570	<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
B			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
C			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
D			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
Date Sentence Pronounced:		Time Served in State Institution:	
05-27-10		DMH	CDCR
			CRC

## CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE TINA COATS <i>Tina J. Coats</i>	DATE 06-03-10
---	------------------

1       DELIBERATIONS, SOMEBODY ELSE MIGHT HAVE TO BABYSIT YOUR  
2       JURY FOR YOU. BUT I THINK WE'RE PUTTING THE CART BEFORE  
3       THE HORSE BECAUSE I THINK, LOOKING AT THE TIME FRAME,  
4       WE'RE STILL GOING TO GET TO IT.

5                   SO WHAT I'M GOING TO DO IS -- ALTHOUGH, I  
6       DON'T REALLY CARE WHEN WE START. IF YOU WANT TO START  
7       WEDNESDAY THAT'S FINE; IF YOU WANT TO START TUESDAY,  
8       THAT'S FINE. OBVIOUSLY, THE TWO OF YOU DON'T AGREE, SO WE  
9       CAN EITHER FLIP A COIN OR I CAN MAKE THE CALL.

10       MS. CROMER: I HAVE BEEN VERY CONSIDERATE OF YOUR  
11       TIME SCHEDULE, COUNSEL.

12       MR. LOFTON: TOMORROW IS FINE. I THINK WE JUST  
13       WANTED A JURY PANEL SO WE COULD START ON MONDAY.

14                   IS THAT RIGHT?

15       THE COURT: I AM PLEASED THE TWO OF YOU WERE ABLE TO  
16       AMICABLY WORK THIS OUT BETWEEN YOURSELVES.

17       MR. LOFTON: WELL, YOU DIDN'T SEE; SHE HAS A WEAPON,  
18       YOUR HONOR.

19       THE COURT: ALL RIGHT. THEN WHAT WE'RE GOING TO DO,  
20       LET'S ORDER A JURY PANEL FOR TOMORROW AFTERNOON AT 1:30.  
21       AND WE NEED TO ORDER A PANEL -- I'M GOING TO SAY 60  
22       JURORS, BECAUSE THIS IS A LIFE CASE.

23                   ALL RIGHT. SO WE WILL ORDER, THEN, 60 JURORS,  
24       IF THEY'LL GIVE US 60, FOR TOMORROW AFTERNOON.

25                   AND WE NEED TO TALK ABOUT 402 ISSUES. NOW, I  
26       HAVEN'T DONE MY RESEARCH ON THIS RECENTLY, BUT AS I  
27       UNDERSTAND IT, THERE ARE A HOST OF 402 ISSUES ATTENDANT  
28       WITH DR. RIBE?

1 MS. CROMER: NO.

2 THE COURT: NO?

3 MS. CROMER: NO, THERE ARE NOT.

4 IN FACT, I THINK WE ALREADY HAD A RULING ON  
5 THAT, DIDN'T WE, COUNSEL?

6 MR. LOFTON: NO.

7 MS. CROMER: OH. AM I GETTING THIS CONFUSED WITH  
8 THE OTHER CASE?

9 MR. LOFTON: WE HAVEN'T SPOKEN AT ALL ABOUT DR.  
10 RIBE.

11 MS. CROMER: OKAY. NO, THERE ARE NO ISSUES.

12 THE COURT: ALL RIGHT. OKAY. ARE THERE ANY 402  
13 ISSUES THAT WE NEED TO TALK ABOUT FROM THE DEFENSE  
14 PERSPECTIVE?

15 MR. LOFTON: AS FOR ONE OF THE TAPES I HAVEN'T  
16 FINISHED LISTENING TO, SO I'M NOT SURE WHETHER THERE'S  
17 GOING TO BE ANY MIRANDA ISSUES. THERE IS AN ISSUE WHERE  
18 MY CLIENT WAS ASKED WHETHER OR NOT HE WANTED TO TAKE A LIE  
19 DETECTOR TEST; HE DECLINED. I DON'T THINK THAT'S  
20 RELEVANT, SO I'D ASK THE COURT ADMONISH THE PEOPLE TO  
21 INSTRUCT THE INVESTIGATORS NOT TO MENTION ANY DISCUSSION  
22 WHETHER OR NOT THEY ASKED MY CLIENT WHETHER OR NOT HE  
23 WANTED TO TAKE A LIE DETECTOR TEST.

24 AND AS FOR, YOU KNOW, DR. RIBE, I GUESS THE  
25 PEOPLE AREN'T MAKING ANY MOTIONS, THEY DON'T HAVE ANY  
26 402'S, THEN I DON'T HAVE ANY 402'S ON RIBE.

27 THE COURT: ALL RIGHT.

28 MS. CROMER: WELL, YOUR HONOR, I GUESS THAT MEANS

1 THAT COUNSEL IS GOING TO INTEND -- INTENDS TO TRY AND  
2 IMPEACH DR. RIBE WITH THE OLD LANCE HELMS CASE MATERIALS?  
3 I BELIEVE -- I'M TRYING TO REMEMBER THE CASE. THERE IS A  
4 APPELLATE CASE, WHICH I WILL GET FOR THE COURT -- OR YOU  
5 CAN CALL JUDGE ZACKY, WHO'S FAMILIAR WITH THE CASE --  
6 WHICH BASICALLY RULES THAT THAT MATERIAL IS NOT RELEVANT  
7 IN ANY OTHER PROCEEDINGS. THE -- IF YOU READ THE CASE,  
8 YOU'LL UNDERSTAND THE RULING IN THE CASE.

9 MR. LOFTON: I THINK THAT CASE IS SAYING THAT --  
10 THE -- THE PEOPLE HAVE A DOCUMENT OF DR. RIBE, THEY KEEP A  
11 FILE ON DR. RIBE, AND IN THAT CASE THE DEFENSE IS ASKING  
12 FOR IT. I'M NOT ASKING FOR THE PEOPLE'S --

13 MS. CROMER: NO, AND COUNSEL IS MISTAKEN; THERE ARE  
14 NO FILES THAT THE PEOPLE KEEP ON DR. RIBE.

15 THE COURT: ALL RIGHT. ALL RIGHT. WELL, IF THERE  
16 ARE NO ISSUES REGARDING --

17 MS. CROMER: WELL, I'M ASKING THAT ALL THE LANCE  
18 HELMS MATERIAL BE EXCLUDED FROM EXAMINATION WITH DR. RIBE.

19 THE COURT: DO YOU INTEND TO GO INTO THAT --

20 MS. CROMER: I DO NOT.

21 MR. LOFTON: I'M NOT EXACTLY SURE WHAT THE PEOPLE  
22 ARE TALKING ABOUT WITH THIS LANCE HELM...

23 MS. CROMER: IT'S A CASE WHERE THE MOTHER LIED TO  
24 THE POLICE, AND BASED ON HER STATEMENT SHE WAS CONVICTED  
25 OF KILLING THE CHILD. LATER ON, SHE CHANGED HER STORY,  
26 AND IT BECAME APPARENT THEN THAT IT WAS HER BOYFRIEND THAT  
27 KILLED THE CHILD. SO SHE WAS CONVICTED, THEN -- SHE WAS  
28 ALLOWED TO WITHDRAW HER PLEA TO THE -- I DON'T REMEMBER IF

1 IT WAS A MANSLAUGHTER OR WHAT THE HOMICIDE PLEA WAS, AND  
2 PLEAD MERELY TO CHILD ABUSE WITH G.B.I. WHEREAS THE  
3 BOYFRIEND WAS THEN CONVICTED OF KILLING THE CHILD.

4 THE COURT: AND SHE TESTIFIED AGAINST HIM, AS I  
5 RECALL, IN THE TRIAL.

6 MS. CROMER: RIGHT.

7 THE COURT: AND --

8 MS. CROMER: AND THE WHOLE THING WAS THE TIME FRAME  
9 AND WHAT -- WHEN THE CHILD COULD DRINK WATER, AND BECAUSE  
10 OF THE WOMAN'S FALSE STATEMENTS AT FIRST TO THE POLICE  
11 WHERE SHE WAS TRYING TO COVER FOR THE BOYFRIEND, THEN  
12 THAT'S WHEN EVERYTHING CAME DOWN ON HER. BUT IF YOU READ  
13 THE CASE CAREFULLY, THERE'S NOTHING IN THAT MATERIAL THAT  
14 IS RELEVANT ON THE ISSUE OF IMPEACHMENT OF DR. RIBE.

15 THE COURT: ALL RIGHT. WELL, CERTAINLY, IF --  
16 HERE'S THE THING: IF EITHER SIDE INTENDS TO -- TO RAISE  
17 ANY ISSUES ON THIS MATTER, WE'LL HAVE, OBVIOUSLY, TO  
18 LITIGATE THIS BY WAY OF A 402 HEARING, AND BOTH SIDES ARE  
19 GOING TO HAVE AN OPPORTUNITY TO BE HEARD, AND I'M GOING TO  
20 NEED TO DO SOME RESEARCH ON THIS AND BE DIRECTED TO SOME  
21 CASES.

22 I'LL TAKE A LOOK AT THAT MATERIAL MYSELF JUST  
23 IN ADVANCE AND IN AN ABUNDANCE OF CAUTION BECAUSE I DO  
24 RECALL THAT THERE WERE SOME -- THERE WAS SOME LITIGATION  
25 OVER THE EXTENT AND SCOPE OF IMPEACHMENT OF DR. RIBE, AND  
26 I FRANKLY AM NOT FAMILIAR WITH THE CASES OFF THE TOP OF MY  
27 HEAD, SO I'M GOING TO DO A LITTLE RESEARCH ON THAT AND SEE  
28 IF THERE'S ANYTHING THAT WE NEED TO DISCUSS. SO -- BUT I

1       WOULD ASK THAT, BEFORE ANYBODY DOES ANYTHING IN TRIAL,  
2       LET'S DEAL WITH IT BY WAY OF A 402 FIRST SO THERE ARE NO  
3       SURPRISES.

4           MR. LOFTON:  OKAY.  BECAUSE I DO INTEND TO  
5       CROSS-EXAMINE HIM LIKE ANY OTHER WITNESS, SO I'LL -- I'M  
6       NOT SURE ABOUT THIS CASE, BUT I'LL TRY TO FAMILIARIZE  
7       MYSELF WITH WHAT SHE'S TALKING ABOUT.

8           THE COURT:  ALL RIGHT.

9           MS. CROMER:  AND THERE IS A 402 MOTION THE PEOPLE  
10      HAVE.

11          THE COURT:  AND WHICH IS?

12          MS. CROMER:  THAT IS TO EXCLUDE ANY QUESTIONING  
13      ABOUT THE INTUBATION OF THE VICTIM IN THIS CASE AT  
14      ANTELOPE VALLEY HOSPITAL WHERE THERE WERE PROBLEMS WITH  
15      GETTING THE INTUBATION AND GETTING THE TUBE IN THE CORRECT  
16      PLACE.  I'M BASING THAT ON THE LONG SERIES OF CASES IN  
17      CALIFORNIA LAW THAT HOLD THAT UNLESS THE MEDICAL -- THERE  
18      IS MEDICAL MALPRACTICE THAT AMOUNTS TO AN INDEPENDENT  
19      SUPERVENING CAUSE, THAT ANY ERRORS IN MEDICAL TREATMENT OR  
20      PROBLEMS IN MEDICAL TREATMENT DO NOT RELIEVE THE DEFENDANT  
21      OF RESPONSIBILITY FOR THE INJURIES WHICH HE INFILCTED ON  
22      THE VICTIM.

23           AND THAT WOULD START WITH THE 1947 CASE OF  
24      PEOPLE V. MC GEE, 31 CAL.2D 229.  THAT WAS THE ORIGINAL  
25      CASE.  NEWER CASES ARE PEOPLE V. STANLEY, 39 CAL.4TH 913.  
26      IT'S A 2006 CASE.  AND I WOULD ALSO CITE PEOPLE V.  
27      ROBERTS, 2 CAL.4TH 271, A 1992 CASE.

28           ALSO PEOPLE V. FUNES, F-U-N-E-S,

1        OCCURRED -- OR MULTIPLE SKULL FRACTURES COULD NOT HAVE  
2        OCCURRED FROM A SINGLE FALL. THE EVIDENCE WILL SHOW THE  
3        MISTAKE HE MADE WAS THAT SOME OF THOSE FRACTURES WERE  
4        PREEXISTING. WHEN YOU HEAR ALL OF THE EVIDENCE, NOT JUST  
5        THE PEOPLE'S CASE, LISTEN TO ALL THE EVIDENCE, LISTEN TO  
6        ALL OF THE WITNESSES, LISTEN TO THE DOCTORS CAREFULLY,  
7        THERE WILL BE NO DOUBT THAT WHAT SHARRIEFF TOLD THE  
8        INVESTIGATORS IS EXACTLY WHAT HAPPENED. I'M GOING TO ASK  
9        YOU TO COME BACK WITH VERDICTS OF NOT GUILTY. THANK YOU.

10            THE COURT: THANK YOU, MR. LOFTON.

11            AND MS. CROMER, THE PEOPLE MAY CALL THEIR  
12            FIRST WITNESS.

13            MS. CROMER: THANK YOU, YOUR HONOR. THE PEOPLE WILL  
14            CALL DR. JAMES RIBE.

15

16                    JAMES RIBE,  
17            CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND TESTIFIED  
18            AS FOLLOWS:

19            THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

20            DO YOU SOLEMNLY STATE UNDER PENALTY OF PERJURY  
21            THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CAUSE NOW  
22            PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE  
23            TRUTH, AND NOTHING BUT THE TRUTH?

24            THE WITNESS: I DO.

25            THE CLERK: THANK YOU, YOU MAY BE SEATED.

26            PLEASE STATE AND SPELL YOU FIRST AND LAST NAME  
27            FOR THE RECORD.

28            THE WITNESS: FIRST NAME JAMES, J-A-M-E-S, LAST NAME

1 RIBE, R-I-B-E.

2 THE CLERK: THANK YOU.

3 THE COURT: YOU MAY INQUIRE.

4 MS. CROMER: THANK YOU.

5

6 DIRECT EXAMINATION

7 BY MS. CROMER:

8 Q DOCTOR, WHAT IS YOUR OCCUPATION?

9 A I'M A CORONER.

10 Q AND WHO DO YOU WORK FOR?

11 A LOS ANGELES COUNTY DEPARTMENT OF CORONER.

12 Q AND WHAT'S A FORENSIC PATHOLOGIST?

13 A A PATHOLOGIST IS A TYPE OF DOCTOR WHO  
14 DIAGNOSES ABNORMAL ORGANS AND TISSUES. A FORENSIC  
15 PATHOLOGIST IS THE TYPE OF PATHOLOGIST WHO DETERMINES THE  
16 CAUSE OF DEATH AND PRESENTS IT IN COURT.

17 Q OKAY. ARE YOU A FORENSIC PATHOLOGIST?

18 A YES.

19 Q OKAY. DOCTOR, HOW LONG HAVE YOU BEEN A  
20 MEDICAL DOCTOR?

21 A IT LOOKS LIKE 28 YEARS, IF I'M NOT WRONG.  
22 FROM 1982.

23 Q OKAY. AND WHAT IS YOUR EDUCATIONAL  
24 BACKGROUND?

25 A WELL, IN THE DISTANT PAST I WENT TO LAW SCHOOL  
26 AND PRACTICED LAW FOR A FEW YEARS IN NEW MEXICO, WHICH IS  
27 MY HOME STATE. THEN I WENT TO MEDICAL SCHOOL, AS I  
28 MENTIONED. IN 1982, I RECEIVED MY M.D. DEGREE FROM THE

1 UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE IN  
2 ALBUQUERQUE.

3 THEREAFTER, I PERFORMED A FOUR-YEAR RESIDENCY  
4 AND CHIEF RESIDENCY IN ANATOMIC PATHOLOGY AT THE MOUNT  
5 SINAI MEDICAL CENTER IN NEW YORK CITY. THEREAFTER, I  
6 PERFORMED AN ONE-YEAR INTERNSHIP IN FAMILY MEDICINE AT  
7 RIVERSIDE GENERAL HOSPITAL. THEREAFTER, I PERFORMED A  
8 ONE-YEAR RESIDENCY IN FORENSIC PATHOLOGY AT THE LOS  
9 ANGELES COUNTY DEPARTMENT OF CORONER. THEREAFTER, I  
10 PERFORMED A ONE-YEAR INTERNSHIP IN SURGERY AT THE BETH  
11 ISRAEL HOSPITAL IN NEW YORK CITY. THEREAFTER, I BECAME A  
12 DEPUTY MEDICAL EXAMINER WITH THE LOS ANGELES COUNTY  
13 DEPARTMENT OF CORONER. IN 1993, I WAS PROMOTED TO SENIOR  
14 DEPUTY MEDICAL EXAMINER WHICH I STILL AM.

15 I AM BOARD CERTIFIED IN ANATOMIC PATHOLOGY AND  
16 FORENSIC PATHOLOGY. I'M LICENSED TO PRACTICE MEDICINE IN  
17 THE STATE OF CALIFORNIA. AND IN THE COURSE OF MY WORK, I  
18 HAVE PERFORMED SEVERAL THOUSAND FORENSIC AUTOPSIES,  
19 INCLUDING SEVERAL HUNDRED ON CHILDREN. AND HAVE  
20 FREQUENTLY PRESENTED THE FINDINGS IN COURT.

21 Q OKAY. ARE YOU A MEMBER OF ANY MEDICAL  
22 ASSOCIATIONS OR GROUPS?

23 A YES.

24 Q AND...

25 A I'M A -- A MEMBER OF THE VOLUNTARY FACULTY AT  
26 THE UNIVERSITY OF SOUTHERN CALIFORNIA KECK SCHOOL OF  
27 MEDICINE IN THE DEPARTMENT OF PATHOLOGY. I AM A MEMBER OF  
28 THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, WHICH IS

1       OUR PROFESSIONAL ORGANIZATION, AND THE AMERICAN  
2       ASSOCIATION OF FORENSIC SCIENCES, WHICH IS ANOTHER  
3       PROFESSIONAL ORGANIZATION FOR FORENSIC SCIENTISTS.

4           Q       AND DOCTOR, HAVE YOU PUBLISHED ANY ARTICLES?

5           A       YES.

6           Q       WHAT HAVE YOU PUBLISHED?

7           A       WELL, BACK AT MOUNT SINAI, I PUBLISHED A CASE  
8       REPORT ON A VERY PROMINENT CASE OF A LIVER DISEASE IN A  
9       CHILD, AND THEREAFTER, I HAVE PUBLISHED ARTICLES ON CHILD  
10      DEATH, AND MOST RECENTLY A CASE REPORT ON A CHILD ABUSE  
11      CASE INVOLVING A BONE INFECTION THAT RESULTED FROM CHILD  
12      ABUSE.

13           Q       NOW, DOCTOR, DID YOU PERFORM AN AUTOPSY IN  
14      THIS CASE ON TRECION ADAMS.

15           A       YES.

16           Q       AND WAS THAT CORONER'S CASE NUMBER 2008-07710?

17           A       YES.

18           Q       THE CORONER'S CASE NUMBER, IS THAT USED AT ANY  
19      TIME DURING THE AUTOPSY PROCEDURE?

20           A       YES. IT'S USED A LOT, PARTICULARLY WHEN WE  
21      TAKE PHOTOGRAPHS AND X-RAYS AND TISSUE SAMPLES AND THINGS  
22      LIKE THAT, EVERY ONE OF THEM IS LABELED, EVERY PHOTOGRAPH,  
23      X-RAY, AND SAMPLE IS LABELED WITH THAT NUMBER.

24           Q       OH, AND I FORGOT. HOW LONG HAVE YOU BEEN WITH  
25      L.A. COUNTY MEDICAL EXAMINER'S OFFICE OR CORONER'S OFFICE?

26           A       I BELIEVE IT'S 22 YEARS.

27           Q       OKAY. NOW, AS A RESULT OF THAT, PERFORMING  
28      THAT AUTOPSY, DID YOU REACH AN OPINION AS TO THE CAUSE OF

1 TRECION'S DEATH.

2 A YES, I DID.

3 Q WHAT WAS THE CAUSE OF DEATH?

4 A BLUNT HEAD TRAUMA.

5 Q AND WHAT DOES "BLUNT HEAD TRAUMA" MEAN?

6 A IT MEANS A POWERFUL IMPACT OR IMPACTS TO THE  
7 HEAD OF THIS LITTLE GIRL WHICH LED TO HER DEATH.

8 Q NOW, YOU SAID, "IMPACT OR IMPACTS." IN THIS  
9 CASE, WAS IT JUST ONE IMPACT OR WAS IT MULTIPLE IMPACTS?

10 A IT WAS MULTIPLE IMPACTS.

11 Q DOCTOR, IF A CHILD WERE TO FALL OFF A COUNTER  
12 WHICH IS 36 INCHES HIGH AND -- WHETHER SHE'S SEATED OR  
13 WHETHER SHE'S STANDING, AND IF SHE'S A CHILD THE SIZE OF  
14 TRECION, IF SHE WERE TO FALL AND LAND BACKWARDS ON HER  
15 HEAD, WOULD SHE RECEIVE THE INJURIES THAT YOU SAW WHEN YOU  
16 PERFORMED THIS AUTOPSY?

17 A NO.

18 Q WHY NOT?

19 A NUMBER ONE, THE AMOUNT OF FORCE IS VERY  
20 DISPROPORTIONATE. WHAT TRECION HAD WAS EFFECTIVELY A  
21 SMASHED SKULL, INCLUDING A COMPLEX DEPRESSED COMMINUTED  
22 FRACTURE OF THE CALVARIA, WHICH IS THE ROUND PART OF THE  
23 HEAD, AND A BASAL SKULL FRACTURE, WHICH IS EXTENSION OF  
24 THE FRACTURE INTO THE BASE OF THE SKULL WHICH IS THE  
25 THICKEST AND STRONGEST PART OF THE HEAD. THAT'S  
26 NUMBER ONE. NUMBER TWO, ASSOCIATED WITH IT DEVASTATING  
27 AND IMMEDIATELY INCAPACITATING BRAIN INJURY FROM WHICH  
28 THERE WAS NO RECOVERY. THOSE TWO THINGS TAKEN TOGETHER

1       LOOKS KIND OF BLUISH WHITE, THAT'S THE NORMAL APPEARANCE  
2       OF THE DURA MATER. IT'S NORMALLY BLUISH WHITE. AND THEN  
3       YOU CAN SEE BLOOD STUCK TO IT; SOME ON THE RIGHT, SOME ON  
4       THE LEFT, AND SOME ON THE MEMBRANE IN BETWEEN. AND THAT'S  
5       CALLED INTER -- THAT PART IS CALLED INTERHEMISPERIC  
6       SUBDURAL HEMORRHAGE. AND THE OTHER PART THAT WE SAW IS  
7       CALLED AN EXITING SUBDURAL HEMORRHAGE. THESE ARE SUBDURAL  
8       HEMATOMAS WHICH ARE PART OF THE FATAL HEAD INJURY THAT SHE  
9       SUFFERED.

10       Q       OKAY. SO TRECION HAD DIFFERENT TYPES OF  
11       BLEEDING ON HER BRAIN.

12       A       YES.

13       Q       AND THE SUBDURAL IS UNDERNEATH THE DURA, WHICH  
14       IS THE COVERING OF THE BRAIN, CORRECT?

15       A       THE INSIDE -- YEAH, THE COVERING OF THE BRAIN  
16       OR THE INSIDE LINING OF THE SKULL THAT SITS ON TOP OF THE  
17       BRAIN.

18       Q       OKAY, AND THEN WHAT'S SUBARACHNOID?

19       A       SUBARACHNOID IS BLEEDING ON THE SURFACE  
20       MEMBRANES OF THE BRAIN ITSELF.

21       Q       OKAY. NOW, DOCTOR, YOU TALKED ABOUT A  
22       SURGICAL ARTIFACT OR SITE ON THE LEFT SIDE OF TRECION'S  
23       HEAD. WHAT KIND OF SURGERY WAS THAT?

24       A       IT'S CALLED A CRANIECTOMY. THAT MEANS CUTTING  
25       OUT A PIECE OF THE SKULL.

26       Q       AND WHY IS THAT DONE?

27       A       TO RELIEVE PRESSURE ON THE BRAIN.

28       Q       WHEN THAT PROCEDURE IS DONE, IF THERE IS AN

1 ACCUMULATION OF BLOOD AT THE SITE OF THE BONE THAT IS  
2 REMOVED, WHAT DO THE SURGEONS DO?

3 A THEY WILL CUT A LITTLE SLIT IN THE DURA MATER,  
4 WHICH WE'RE LOOKING AT HERE. THAT'S THE MEMBRANE OVER THE  
5 BRAIN. THE BLOOD IS UNDER THAT MEMBRANE. THEY CUT A  
6 LITTLE SLIT IN THAT MEMBRANE AND OUT COMES THE BLOOD. IN  
7 THIS CASE, IT CAME OUT UNDER PRESSURE. AND THAT --

8 Q AND WHAT DOES THAT MEAN?

9 A WELL, THAT MEANS THERE'S A LOT OF PRESSURE IN  
10 THERE. WHY? PARTLY THE BLOOD ITSELF HAS BLED INTO THERE  
11 UNDER BLOOD PRESSURE, AND PARTLY IT'S THE TREMENDOUS  
12 SWELLING OF THE BRAIN. THE BRAIN IS BADLY INJURED, IT  
13 SWELLS UP. JUST LIKE IF YOU SLAM YOUR ELBOW ON THE DOOR  
14 OR SOMETHING, IF YOU HIT IT HARD ENOUGH, IT'S GOING TO  
15 SWELL UP. A BEE STING SWELLS UP. THE BRAIN ALSO SWELLS  
16 UP IF YOU HIT IT HARD ENOUGH. AND THAT ACTUALLY CREATES A  
17 TREMENDOUS AMOUNT OF PRESSURE.

18 Q NOW, YOU -- HAVE YOU REVIEWED THE HOSPITAL  
19 RECORDS IN THIS CASE?

20 A YES.

21 Q AND IN FACT, DO YOU REMEMBER WHAT DATE IT WAS  
22 YOU RECEIVED THE HOSPITAL RECORDS?

23 A OH, BOY. I DON'T. IT WOULD BE SOMETIME IN  
24 THE MIDDLE OF NOVEMBER. I THINK A COUPLE WEEKS AFTER THE  
25 AUTOPSY.

26 Q WOULD IT REFRESH YOUR RECOLLECTION TO REFER TO  
27 THE CASE NOTES?

28 A YES.

1                   OKAY. I RECEIVED IT ON THE 6TH OF NOVEMBER,  
2 AND I BELIEVE THE AUTOPSY WAS ON THE 5TH, SO IT WAS THE  
3 DAY AFTER THE AUTOPSY.

4                   Q       AND WHAT DATE DID YOU SIGN OFF ON THE AUTOPSY  
5 REPORT?

6                   A       LET ME JUST CHECK THAT DATE FOR YOU.

7                   IT LOOKS LIKE NOVEMBER 18TH, IF I READ IT.  
8 18TH OR 19TH OF '08.

9                   Q       OKAY. SO YOU HAD REVIEWED THE HOSPITAL  
10 RECORDS BEFORE YOU SIGNED THE AUTOPSY REPORT.

11                  A       YES.

12                  Q       ALSO, BEFORE YOU PERFORMED THE AUTOPSY, DID  
13 YOU HAVE ACCESS TO NOTES THAT HAD BEEN MADE BY A CORONER  
14 INVESTIGATOR?

15                  A       YES.

16                  Q       AND WAS THAT DENISE BERTONE?

17                  A       YES.

18                  Q       SO YOU HAD THE INFORMATION THAT SHE FURNISHED  
19 REGARDING WHAT HAD HAPPENED AT ANTELOPE VALLEY HOSPITAL,  
20 CORRECT?

21                  A       YES.

22                  Q       OKAY. DOCTOR, SHOWING YOU PEOPLE'S 11.

23                  WHAT IS THIS A PICTURE OF?

24                  A       THIS IS A PICTURE OF THE BASE OF THE SKULL  
25 AFTER REMOVAL OF THE BRAIN. AND IF I MAY SUGGEST IT  
26 SHOULD BE TURNED OVER?

27                  Q       OKAY.

28                  A       180 DEGREES.

1 BREAK, MEMBERS OF THE JURY. LET'S TAKE A 20-MINUTE BREAK  
2 AT THIS POINT IN TIME. I'LL EXCUSE YOU -- PLEASE BE  
3 OUTSIDE THE DOORS IN 20 MINUTES AFTER 3:00. AND AGAIN,  
4 PLEASE DON'T DISCUSS THIS CASE WITH ANYONE; PLEASE DO NOT  
5 FORM OR EXPRESS ANY OPINIONS. WE'LL SEE YOU BACK IN 20  
6 MINUTES. THANK YOU VERY MUCH.

7 (THE JURY EXITED THE COURTROOM;  
8 THE FOLLOWING PROCEEDINGS WERE  
9 HELD:)

10  
11 THE COURT: ALL RIGHT. WE'LL BE IN RECESS UNTIL  
12 3:20, AND I'M GOING TO TRY TO HANDLE A COUPLE OF MR. DU'S  
13 MATTERS AT 3:15 IF WE CAN. ALL RIGHT. THANK YOU.

14 (RECESS.)

15 (THE FOLLOWING PROCEEDINGS WERE  
16 HELD IN OPEN COURT OUT OF THE  
17 PRESENCE OF THE JURY:)

18  
19 THE COURT: WE ARE BACK ON THE RECORD IN THE BROWN  
20 MATTER. MR. BROWN IS PRESENT WITH HIS ATTORNEY,  
21 MR. LOFTON; MS. CROMER FOR THE PEOPLE.

22 MR. LOFTON: THANK YOU, YOUR HONOR. I THINK THERE'S  
23 AN ISSUE, YOUR HONOR.

24 THE COURT: ALL RIGHT. DO YOU WANT --

25 MS. CROMER: COUNSEL HAS TOLD ME HE'S NOT GOING TO  
26 GET INTO ANY PAST HISTORY --

27 MR. LOFTON: ANY SPECIFIC PAST HISTORY.

28 MS. CROMER: WELL, THAT'S NOT --

1 MR. LOFTON: I MEAN, I --

2 THE COURT: YES. I MEAN, YOU'RE -- OBVIOUSLY, LOOK,  
3 YOU'RE ENTITLED TO CROSS-EXAMINE. IF THERE ARE ISSUES, I  
4 CAN ADDRESS THEM. I MEAN, I CAN'T PRERULE ON ALL OF THIS  
5 STUFF. I'M NOT -- HERE'S -- I MEAN, I'VE LOOKED AT THAT  
6 SALAZAR CASE. I THINK IF THERE ARE QUESTIONS ABOUT  
7 WHETHER OR NOT DR. RIBE HAS GIVEN OPINIONS IN THE PAST AND  
8 CHANGED HIS OPINIONS, THAT'S CERTAINLY FAIR GAME. I DON'T  
9 WANT TO START GETTING INTO SPECIFIC CASES. I MEAN, IF WE  
10 GET INTO LANCE HELM, WE OPEN A WHOLE SERIES OF DOORS ABOUT  
11 THE FEMALE WHO PLED ON THE ADVICE OF HER ATTORNEY AND TOOK  
12 TEN YEARS AND THEN WITHDRAW HER PLEA. WE'RE NOT GETTING  
13 INTO ANY OF THAT.

14 MR. LOFTON: YOUR HONOR, I'M NOT GETTING ANY FURTHER  
15 THAN WHAT YOU SAID ABOUT HE MADE AN OPINION, HE CHANGED  
16 HIS OPINION. I'M NOT GETTING INTO SPECIFIC CASES.

17 THE COURT: I THINK THE DEFENSE IS ENTITLED TO  
18 QUESTION HIM ON WHETHER THERE HAVE BEEN TIMES IN THE PAST  
19 WHEN HE HAS CHANGED HIS OPINIONS AND WHAT THE REASONS MAY  
20 HAVE BEEN WITHOUT GETTING INTO CASE-SPECIFIC ISSUES. I  
21 DON'T WANT TO GET INTO THE HELMS CASE AND OPEN UP THAT CAN  
22 OF WORMS BECAUSE I DON'T THINK THAT IS RELEVANT. I THINK  
23 IT'S RELEVANT THAT HE CHANGED HIS OPINION, AND MY RULING  
24 WOULD ESSENTIALLY BE ON 352 GROUNDS.

25 AND AGAIN, I'M NOT PRERULING ON THIS; THAT  
26 THERE ARE ISSUES THAT MAY COME UP AND THERE MAY BE  
27 OBJECTIONS, AND I CERTAINLY WILL ADDRESS THEM AS THEY COME  
28 UP. BUT TO THE EXTENT THAT WE'VE DISCUSSED THIS, BASED

1           A       SORRY, I DIDN'T HEAR THAT LAST -- OH, THAT'S  
2       RIGHT, THAT'S RIGHT.

3           Q       OKAY. I SEE YOU LOOKING DOWN AT SOMETHING?

4           A       I'M LOOKING AT MY REPORT.

5           Q       OKAY. JUST LET US KNOW IF YOU HAVE TO REFRESH  
6       YOUR MEMORY.

7           A       OKAY.

8           Q       YOU CONDUCTED THAT AUTOPSY ON NOVEMBER 5TH; IS  
9       THAT CORRECT?

10          A       YES.

11          Q       AT THE TIME YOU CONDUCTED THAT AUTOPSY, DID  
12       YOU HAVE ANY OTHER MEDICAL REPORTS -- DID YOU HAVE ANY  
13       MEDICAL REPORTS ABOUT TRECION?

14          A       YES. I DID HAVE SOME MEDICAL RECORDS,  
15       ALTHOUGH NOT THE COMPLETE ONES.

16          Q       OKAY. TELL THE MEMBERS OF THE JURY WHAT  
17       MEDICAL RECORDS DID YOU HAVE PRIOR TO PERFORMING THE  
18       AUTOPSY.

19          A       I'M NOT SURE WHICH ONES I HAD THEN. I BELIEVE  
20       I HAD THE -- AN OPERATIVE NOTE FROM THE SURGERY, AND I MAY  
21       HAVE HAD THE PARAMEDICS' RECORD OR A COPY OF IT.

22          Q       BUT YOU DID NOT HAVE THE FULL -- YOU DID NOT  
23       HAVE ANY PRIOR MEDICAL RECORDS OF TRECION; IS THAT  
24       CORRECT?

25          A       THAT'S CORRECT.

26          Q       YOU HAD SOME NOTES FROM THE SURGERY THAT  
27       HAPPENED TWO DAYS BEFORE?

28          A       RIGHT.

1 Q AND SOME NOTES FROM THE PARAMEDICS.  
2 A YES.  
3 Q OKAY. AND YOU WOULD AGREE THAT WHEN YOU'RE  
4 GIVING AN OPINION, IT'S YOUR BEST EDUCATED GUESS; IS THAT  
5 CORRECT?  
6 A NO.  
7 Q IT'S NOT YOUR BEST EDUCATED GUESS?  
8 A NO. I DON'T GUESS. I DIAGNOSE.  
9 Q OKAY. YOU GIVE A DIAGNOSIS.  
10 A CORRECT.  
11 Q YOU'VE TESTIFIED IN COURT A NUMBER OF TIMES.  
12 A YES.  
13 Q BOTH AT TRIALS AND PRELIMINARY HEARINGS.  
14 A CORRECT.  
15 Q ABOUT YOUR DIAGNOSIS.  
16 A RIGHT.  
17 Q AND YOU'VE HAD OCCASION TO CHANGE YOUR  
18 DIAGNOSIS; IS THAT -- THAT'S CORRECT?  
19 A YES.  
20 Q MULTIPLE TIMES.  
21 A YES.  
22 Q YOU GET NEW INFORMATION? YOU CHANGE YOUR  
23 DIAGNOSIS?  
24 A YES.  
25 Q IS THAT CORRECT?  
26 A RIGHT. HAPPENS ALL THE TIME.  
27 Q AND AGAIN, THE MORE INFORMATION YOU GET, THE  
28 MORE ACCURATE YOUR DIAGNOSIS.