NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

_____

RODNEY BERRYMAN – Petitioner

vs.

RON DAVIS – Respondent

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

VOLUME 1

[CAPITAL CASE]

SAOR E. STETLER*
Law Offices of Saor E. Stetler
P.O. Box 2189
Mill Valley, CA 94941
Telephone: (415) 388-8924
Email: saorstetler@me.com

Tim Brosnan, CA SBN 75938
Attorney at Law
P.O. Box 2294
Mill Valley, CA 94942
415-962-7967
timothy_brosnan@sonic.net

Attorneys for Petitioner
RODNEY BERRYMAN, Sr.
**Counsel of Record*

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Berryman v. Wong

United States Court of Appeals for the NinthCircuit

January 30, 2019, Argued and Submitted, University of San Diego, California; March 27, 2020, Filed

No. 10-99004

Reporter
954 F.3d 1222 *; 2020 U.S. App. LEXIS 9602 **

RODNEYBERRYMAN, ***SR***., Petitioner-Appellant, v. ROBERT K. WONG, Respondent-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, En banc, Rehearing denied by *Berryman v. Wong, 2020 U.S. App. LEXIS 26529 (9th Cir. Cal., Aug. 20, 2020)*

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of California. D.C. No. 1:95-cv-05309-AWI. Anthony W. Ishii, District Judge, Presiding.

Berryman v. Wong, 2010 U.S. Dist. LEXIS 9910 (E.D. Cal., Jan. 15, 2010)
Berryman v. Chappell, 2013 U.S. Dist. LEXIS 122246 (E.D. Cal., Aug. 27, 2013)

Disposition: AFFIRMED.

Core Terms

seizure, phase, brain, guilt, killed, ineffective, shoe, neurological, confirmed, disorder, sentence, alcohol, sex, jurists, violent, truck, rape, prejudiced, omission, trauma

Case Summary

Overview

HOLDINGS: [1]-Denial of petition for a writ of habeas corpus was affirmed because reasonable jurists could conclude that admission of evidence that petitioner was born prematurely, that he spent the first month of his life in an incubator, or that his father was a womanizer would not have led to a reasonable probability of a different sentence; [2]-Even if the neurological test results would have been admissible, petitioner could not establish a reasonable probability that they would have changed the outcome as petitioner's experts stated that the test results reinforced their penalty-phase testimony that petitioner had an organic brain disorder, but the state's experts strongly disagreed with their interpretation.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN1[] **Standards of Review, Contrary & Unreasonable Standard**

Under *28 U.S.C.S. § 2254(d)*, an appellate court must defer to a state court's decision unless it was contrary to, or involved an unreasonable application of, clearly established Federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *28 U.S.C.S. § 2254(d)*.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To succeed on a ineffective assistance of counsel claim, a petitioner must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

HN3[] **Effective Assistance of Counsel, Sentencing**

In the penalty-phase context, favorable results means test results that could help convince a juror to vote for life—that is, results whose absence could have affected the outcome within a reasonable probability.

Syllabus

SUMMARY[*]

Habeas Corpus

The panel affirmed the district court's denial of ***RodneyBerryman***, ***Sr***.'s federal habeas corpus petition challenging his California state murder conviction and death sentence.

In Claim 65, as to which the district court granted a certificate of appealability, ***Berryman*** alleged that he was denied his *Sixth Amendment* right to counsel at the penalty phase because his lawyers failed to present additional evidence of his family history and social background. The panel held that fairminded jurists could conclude that the California Supreme Court's conclusion that ***Berryman*** failed to show that he was prejudiced by any deficiency in his counsel's performance was correct.

The panel granted ***Berryman***'s motion to expand the COA as to four additional claims.

In Claims 15 and 16, ***Berryman*** alleged that his trial lawyers were ineffective in (a) failing to present expert psychological and psychiatric testimony at the guilt phase to support his argument that the killing was not premeditated or intentional and (b) failing to seek out and develop **[**2]** social history evidence and additional expert testimony to establish ***Berryman***'s brain disease and mental state for use at the guilty phase. The panel held that the California Supreme Court's determination that ***Berryman*** was not prejudiced by counsel's failure to seek out or present mens rea evidence at the guilty phase was reasonable.

In Claims 63 and 64, ***Berryman*** asserted that his lawyer was ineffective at the guilt and penalty phases for failing to obtain the trial court's transport order and funding authorization for neurological tests. The panel held that the California Supreme Court's conclusion that the tests lacked the capacity to produce results that might have moved a juror to vote to acquit or to vote for life in prison was reasonable, and that it was therefore reasonable for the California Supreme Court to conclude that ***Berryman*** suffered no prejudice from his defense counsel's failure to seek out these tests and press this argument.

Counsel: Saor E. Stetler (argued), Mill Valley, California; Tim Brosnan, Mill Valley, California; for Petitioner-Appellant.

Brian R. Means (argued), Deputy Attorney General; Kenneth N. Sokoler and Brian G. Smiley, Supervising Deputy Attorneys General; Michael **[**3]** P. Farrell, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

Judges: Before: M. Margaret McKeown, Morgan Christen, and Paul J. Watford, ***Circuit*** Judges.

Opinion

[*1223] PER CURIAM:

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

A California jury sentenced ***RodneyBerryman***, ***Sr***., to death for the 1987 murder of Florence Hildreth. The California Supreme Court affirmed his conviction and sentence on direct appeal, *see People v.* ***[*1224] Berryman****, 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40, 48 (Cal. 1993)*, and summarily denied his state habeas petition. This is the appeal from the district court's denial of ***Berryman***'s federal petition for a writ of habeas corpus. We affirm.

I. Background

A. Guilt Phase

Berryman was convicted of murder with special circumstances: felony-murder-rape with the use of a dangerous weapon. *Id. at 47*. The jury heard that Hildreth, the victim, was a 17-year-old high school student. *Id. at 48*. She and ***Berryman*** were acquaintances. *Id.* Around 10:45 p.m. on the night of her death, Hildreth left one aunt's house to walk to another's. *Id.* She never reached her destination, and her body was found the next morning sprawled on a nearby dirt road. *Id. at 48-49*. Her clothes had been pulled partly off, and forensic evidence suggested that she had been sexually assaulted. **[**4]** *Id. at 49*. Her death was caused by a shallow stab wound in her neck, which had nicked her carotid artery. *Id.* A mark on her right cheek had evidently been left by the sole of a shoe, pressing down on her head for several minutes as she died. *Id.*

Shoe prints in the dirt at the crime scene were similar to those of ***Berryman***'s shoes, and nearby tire tracks were similar to the tracks left by the tires of ***Berryman***'s truck. *Id.* A blood stain on his shoe was consistent with Hildreth's blood but not his own; it would have matched only 1 in 1,470 people who, like Hildreth, were African-American. *Id.* Small golden chain links found at the scene were consistent with a broken necklace found in ***Berryman***'s truck. *Id.*

Berryman told the police that Hildreth had never been in his truck, but her thumb print was found inside the passenger-door window. *Id.* He also said that he had not been on a nearby road the night of her death, but a witness saw his truck in that location. *Id. at 48-49*. ***Berryman*** appeared to know that Hildreth had been stabbed before that information was made public. *Id. at 49*.

Berryman's lawyer, Charles Soria, argued that the government's timeline did not add up and that ***Berryman*** could not possibly have been present **[**5]** to commit the crime. Although he argued at length that the prosecution had charged the wrong person, Soria briefly argued in the alternative that ***Berryman*** might have lost his temper after consensual sex and was guilty only of voluntary manslaughter.

B. Penalty Phase

After the jury's guilty verdict, the State offered additional aggravating evidence at the penalty phase. The jury heard that ***Berryman*** had previously been convicted of marijuana transportation and grand theft. *Id. at 50*. Two other witnesses testified to uncharged misconduct. One witness had been in a fight with ***Berryman*** in which he alleged that ***Berryman*** struck him with a tire iron. *Id.* The other witness, ***Berryman***'s father-in-law, recounted a scuffle during which ***Berryman*** hit him on the nose. *Id.*

Berryman's lawyers called twenty-one witnesses in mitigation. Many of the witnesses were friends and relatives, including ***Berryman***'s wife, siblings, and mother. Family and friends testified that ***Berryman*** was warm and loving and always peaceful with women. *Id. at 51*. The jury heard that ***Berryman***'s parents had a bad marriage **[*1225]** and that his father was violent with his mother. *Id. at 50*. The witnesses testified that ***Berryman*** was not given enough attention and affection **[**6]** as a child. *Id.* The family moved often, and ***Berryman*** struggled in school. *Id.* As a teenager, he began to abuse alcohol and, after a work-related injury to the head, he began experiencing disabling headaches. *Id.*

After ***Berryman*** got married in 1986, his life improved. He and his wife had a son, and ***Berryman*** was an active participant in his father-in-law's church. *Id.* But after he lost his job, he began drinking heavily again, leading to "a precipitous downward spiral." *Id.* He and his wife separated shortly before Hildreth's murder. *Id. at 50-51*.

Two expert witnesses testified about ***Berryman***'s mental health and development. Dr. William Pierce, a clinical psychologist, diagnosed ***Berryman*** with an "alcohol induced organic disorder." *Id. at 51*. On psychological tests, he saw "consistent signs of organicity"—a term then used to describe psychological disorders with apparent physical origins, such as brain damage. Based on his observations, Dr. Pierce opined that further neurological testing was required to "confirm or disconfirm the presence of an organic mental syndrome." But he explained that he had been unable to administer the necessary tests because the Kern County hospitals would not grant him permission.

[7]** Dr. Samuel Benson, a psychiatrist, agreed that ***Berryman*** exhibited signs of "organicity." *Id.* He opined that ***Berryman*** "does, in fact, suffer from an organic mental syndrome, that it's probably alcohol induced, but [that] other factors in addition to his consumption of alcohol" also contribute, among them "head trauma." *Id.* He testified that ***Berryman*** had sustained head trauma on other occasions, including a work-related fall from a crane or forklift, and once when he was hit with a pipe. Dr. Benson agreed with Dr. Pierce that additional testing was necessary—in particular, an electroencephalogram (EEG). This test would measure ***Berryman***'s brain activity to determine whether he was suffering from seizures. Drs. Benson and Pierce testified that these seizures could have caused ***Berryman*** to become violent and disoriented and experience blackouts. Dr. Benson would also have administered an alcohol-induced EEG, which looks for seizures specifically brought on by alcohol. He, too, testified that local hospitals refused to allow the tests.

On cross-examination, Dr. Benson agreed that he had no information that ***Berryman*** had ever experienced a blackout or a seizure or that ***Berryman*** had ever become lost or disoriented. He explained that because he was unable to perform the EEG tests, he did not know whether ***Berryman*** had a seizure disorder. He also conceded that, while an individual might be violent during a seizure episode, **[**8]** it would not be possible for him to commit rape.

During closing arguments, the prosecutor criticized the defense for failing to have the EEG tests performed. He offered one possible explanation for that failure: "Because as it stands, they have something to talk about. . . . They don't want that test to be performed because it will rule out [brain damage] and then they wouldn't have anything to talk about." The prosecutor argued that even if there had been tests showing brain damage, they would not have made a difference. The experts' hypothesis, he argued, did not fit the rape-murder facts of the case.

The jury returned a sentence of death. *Id. at 47*.

[*1226] C. Postconviction Proceedings

In state habeas proceedings, ***Berryman***'s new counsel presented additional mitigating evidence about ***Berryman***'s early life. This evidence included declarations from ***Berryman***'s mother and sister, who offered more details about ***Berryman***'s childhood and stated that they would have provided this information at the penalty phase if they had been asked or adequately prepared.

Berryman's lawyers also offered new evidence about trial counsel Soria's failure to obtain the scientific tests his experts had requested. Dr. Pierce stated **[**9]** in a declaration that he had told Soria that "further neurological testing was required to determine whether Mr. ***Berryman*** suffered from organic brain damage." Dr. Pierce suggested several tests, including an EEG and alcohol-induced EEG. He "told Mr. Soria that if further testing confirmed the existence of brain damage, this information should be used in the guilt part of the trial in addition to the penalty part of the trial."

Dr. Benson agreed that confirmation of his diagnosis required further testing—specifically, an EEG, an alcohol-induced EEG, and a Positron Emission Tomography (PET) scan. He explained that after learning the local hospitals would not perform the tests, he suggested to Soria that they have the tests performed in a different part of the State. Soria, however, told him that the court would not authorize such expensive tests to be performed outside of Kern County. Without the testing, Dr. Benson was unable to conclude with certainty that ***Berryman*** had brain damage. Like Dr. Pierce, Dr. Benson told Soria that his testimony, especially if confirmed by testing, could be used at the guilt phase to diminish ***Berryman***'s "culpability for the killing."

Soria explained in his **[**10]** own declaration that he never requested a transfer order to take ***Berryman*** out of Kern County for testing. This was because he "believed at the time the court would not issue such an order." In a case two years after ***Berryman***'s, however, Soria successfully obtained transfer orders from the same trial judge to get an out-of-county EEG and PET scan for another client. Soria conceded there was "no reason why a similar order would not have issued in [***Berryman***'s] case" had Soria sought one.

Berryman's postconviction counsel asserted ineffective assistance of counsel claims, both on direct appeal and in a state habeas petition. ***Berryman***'s conviction and sentence were affirmed on direct appeal in a reasoned opinion by the California Supreme Court. *See* ***Berryman**, 864 P.2d at 48*. The same day, the California Supreme Court summarily denied his habeas petition on the merits.

Berryman filed a federal petition for a writ of habeas corpus asserting numerous claims of error, all of which the district court denied. The district court granted a certificate of appealability (COA) as to Claim 65, ***Berryman***'s allegation of penalty-phase ineffective assistance of counsel for failure to present additional evidence of his family history **[**11]** and social background. On appeal, ***Berryman*** presses that issue and requests that we expand the COA to encompass fourteen other claims. We expand the COA to include four additional claims, discussed below, but otherwise deny ***Berryman***'s request. *See Hedlund v. Ryan, 854 F.3d 557, 565 (9th Cir. 2017)*.

II. Discussion

Because the California Supreme Court rejected each of the claims at issue here on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 applies. *See28 U.S.C. § 2254(d)*. The parties disagree whether the relevant decision is the California **[*1227]** Supreme Court's opinion on direct appeal, as ***Berryman*** asserts, or its summary denial of his state habeas petition, as the State contends. We need not resolve that dispute because, even accepting ***Berryman***'s argument, he still cannot prevail on any of his claims.

HN1[↑] Under *§ 2254(d)*, we must defer to a state court's decision unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)*. For ineffective assistance of counsel claims, the clearly established federal law is *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. ***HN2***[↑] To succeed, ***Berryman*** must show that his counsel's performance "fell below **[**12]** an objective standard of reasonableness," *id. at 688*, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id. at 694*.

We may grant ***Berryman*** habeas relief only if the California Supreme Court's application of *Strickland* was "objectively unreasonable." *Williams v. Filson, 908 F.3d 546, 563 (9th Cir. 2018)* (internal quotation marks omitted). That means we may issue the writ only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*.

A. Claim 65

Berryman alleges that he was denied his *Sixth Amendment* right to counsel at the penalty phase because his lawyers failed to present additional evidence of his family history and social background. The California Supreme

Court held that ***Berryman*** failed to show that he was prejudiced by any deficiency in his counsel's performance. The state court concluded that ***Berryman*** did not "establish ineffective assistance in defense counsel's asserted failure to further investigate his background and character . . . . He [did] not demonstrate that such further investigatory efforts would have yielded favorable results. Hence, he cannot demonstrate that their omission **[**13]** adversely affected the outcome within a reasonable probability." ***Berryman**, 864 P.2d at 78*.

Fair-minded jurists could conclude that the California Supreme Court's application of *Strickland* was correct. Nearly all of the "new" evidence that ***Berryman*** argues the jury should have heard was not new at all. The rest of the evidence, a fair-minded jurist could conclude, would not have been sufficient to make a different result reasonably probable.

We begin with a discussion of the "new" evidence that was cumulative of evidence the jury previously heard. First, ***Berryman*** argues that his lawyers should have presented evidence that ***Berryman***'s mother "showed him little love and affection during his early formative years." But during the penalty phase the jury heard evidence concerning the emotional deficits in ***Berryman***'s relationship with his mother. Witnesses testified that his mother was largely absent, that her children did not get "the attention that [they] should have," and that ***Berryman*** was left with "a hole in the bucket around mothering and nurturance" that continued to affect his relationship with women in adulthood.

Second, ***Berryman*** maintains that his lawyers should have presented evidence concerning his turbulent **[**14]** childhood. But the jury heard that ***Berryman***'s family moved often; that his father drank heavily; **[*1228]** that ***Berryman*** developed problems with alcohol; and that he was devastated by his father's death and, for some period of time, refused to accept that his father had died.

Third, ***Berryman*** faults his lawyers for not presenting evidence that his father beat his mother in front of him and his siblings, including an incident in which his mother escaped by running into the street and was nearly hit by a car. Although ***Berryman***'s mother did not provide the specifics of any particular incident, she did testify during the penalty phase that ***Berryman***'s father was violent toward her.

Finally, ***Berryman*** contends that his lawyers should have introduced evidence that he did poorly in school, was frequently placed in special education classes, and in the third grade had an IQ score of 75, which is in the borderline intellectually disabled range. But the jury heard repeatedly during trial that ***Berryman*** had a learning disability and intellectual deficiencies, and that he did poorly in school and was placed in specialized classes.

Berryman's habeas petition does offer some new evidence that was not presented at **[**15]** trial. The jury did not hear that he was born prematurely, that he spent the first month of his life in an incubator, or that his father was a womanizer.[1] This new evidence, we will assume, should have been discovered and presented to the jury. And we will assume that ***Berryman***'s lawyers should have presented some of the additional details not fully captured above, such as the details concerning his low IQ score and his father's abuse of his mother. Nonetheless, even if this evidence had been presented to the jury, it would not have significantly altered the character of the evidence supporting mitigation. Reasonable jurists could therefore conclude that admission of this evidence would not have led to a reasonable probability of a different sentence. *See Cullen v. Pinholster, 563 U.S. 170, 200-02, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (affirming a state court's finding of no prejudice notwithstanding new mitigation evidence of roughly the same strength as that presented here).

B. Claims 15 and 16

Berryman requests that we expand the COA to encompass Claims 15 and 16. Claim 15 alleges that ***Berryman***'s trial lawyers were ineffective in failing to present expert psychological and psychiatric testimony at the guilt phase to

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Berryman also presents affidavits from his mother and sister, both of whom state that he told them after his arrest that he was molested by two of his uncles when he was about eight years old. This evidence, however, is inadmissible hearsay. *See Fed. R. Evid. 801(c), 802-805*. The district court therefore did not consider it, and neither do we. *See* ***Fed. R. Evid. 1101(a)-(b)***.

support his argument that the killing was **[**16]** not premeditated or intentional. Claim 16 alleges that his trial lawyers were further ineffective in failing to seek out and develop social history evidence and additional expert testimony to establish ***Berryman***'s brain disease and mental state for use at the guilt phase. We conclude that "jurists of reason could disagree" with the district court's denial of these claims, and therefore expand the COA to cover them. *Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*; *see28 U.S.C. § 2253(c)(2)*. Ultimately, though, we agree with the district court that the claims must be denied.

In rejecting these closely related claims, the California Supreme Court concluded:

> Neither does defendant establish ineffective assistance in defense counsel's asserted failure to investigate his mental **[*1229]** state at the time of the crime or to introduce evidence thereon. Here as well, he does not demonstrate that the investigation would have yielded favorable results and hence cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

Berryman**, 864 P.2d at 61* (footnote omitted). In other words, the state court determined that ***Berryman was not prejudiced by counsel's failure to seek out or present mens rea evidence at the guilt phase. That decision was reasonable.

Berryman **[**17]** argues that his lawyers should have presented expert testimony supporting the theory that, although he killed Hildreth, he did so without premeditating or forming the specific intent to kill. In support, he points to Dr. Pierce's and Dr. Benson's testimony at the penalty phase, in which they offered their diagnosis of possible organic brain syndrome, as well as both doctors' affidavits on state habeas review, in which they stated that they told Soria their findings could be helpful at the guilt phase of trial.

Trial counsel's failure to present this evidence could have prejudiced ***Berryman*** only if the argument it supported had the potential to sway a jury. But presenting this evidence during the guilt phase would have required admitting to the jury that ***Berryman*** was present at the scene, had sex with Hildreth, and delivered the fatal cut to her neck. And because the expert testimony was that it would have been impossible for ***Berryman*** to have had sex during a seizure, his counsel would have been forced to argue that he and Hildreth engaged in consensual sex and that he had the seizure only afterward. It is reasonable to assume that this argument would likely have been greeted with extreme **[**18]** skepticism. The fact that Hildreth was found left on a dirt road with her clothes in disarray and a shoe imprint on her face would have made it seem frivolous to argue that her killing had occurred during a seizure, or was otherwise the product of unintentional conduct. The evidence was inconsistent with the shoeprint on her face being inflicted in a momentary outburst or by accident. ***Berryman**, 864 P.2d at 49* (estimating the mark took "more than one minute and perhaps as long as three to five" to make).[2]

The difficulty of persuading a jury of this theory would have been compounded by the lack of any case-specific evidence in support of it. Although his experts could have opined that it was possible for ***Berryman*** to have had a seizure and a fit of violence after consensual sex, ***Berryman*** does not suggest that he would have taken the stand to testify that that is what happened. Nor is there any physical evidence to back up the account. ***Berryman*** argues that "the absence of vaginal trauma and the victim's shoe being off established there was no rape, (i.e., the assault occurred after consensual intercourse, the disarranged clothing being equally consistent with hurried voluntary sexual interaction as with rape)." **[**19]** But the absence of vaginal trauma "establishes" nothing of the kind, especially considering that Hildreth had pelvic abrasions and a knife wound in her neck, suggesting that the knife may have been held to her throat. Whether or not the state of her shoes and clothing was "equally consistent" with rape and consensual sex, it did nothing to *support* the theory that ***Berryman*** killed her unintentionally or without premeditation.

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The fact that Soria briefly posited the possibility of an unintentional killing as an alternative argument did not mean that he should have pursued it more vigorously.

By adopting this far-fetched theory, ***Berryman***'s lawyers would have lost the **[*1230]** ability to argue the more straightforward theory that the police had arrested the wrong person. The circumstantial evidence tying ***Berryman*** to the scene was not insurmountable. The strongest piece of evidence was the drop of blood on ***Berryman***'s shoe, consistent with only 1 in 1,470 unrelated African-Americans. *Berryman, 864 P.2d at 49*. But ***Berryman*** had a ready reply: The blood could have come from any of Hildreth's relatives, with whom he frequently had contact. As for the fingerprint in his truck, his lawyers also had a response prepared: Even though Hildreth had never ridden in his truck, she still could have left a print by leaning against the car while talking. The straightforward innocence argument that ***Berryman***'s **[**20]** lawyers pursued was not a lost cause.

The California Supreme Court reasonably concluded that a mens rea defense theory would not have been reasonably probable to persuade the jury to acquit. *See28 U.S.C. § 2254(d)(1)*. Even if we assume that counsel rendered deficient performance in failing to conduct further investigation, it was eminently reasonable for the court to conclude that ***Berryman*** failed to show that the omission of this argument adversely affected the outcome, as counsel was more likely to succeed in arguing that ***Berryman*** had not killed Hildreth at all.

C. Claims 63 and 64

Berryman also requests that we expand the COA to encompass Claims 63 and 64, which together assert that his lawyer was ineffective at both the guilt and penalty phases for failing to obtain the trial court's transport order and funding authorization for the EEG tests and PET scan. ***Berryman*** argues the tests "were necessary to support the defense experts' conclusion" that he had brain damage, including a possible seizure disorder. We again conclude that "jurists of reason could disagree" with the district court's denial of these claims, and therefore expand the COA to encompass them. *Miller-El, 537 U.S. at 327*; *28 U.S.C. § 2253(c)(2)*.

In denying relief as to Claims 63 and 64, **[**21]** the California Supreme Court stated as follows:

> [D]efendant does not establish ineffective assistance in defense counsel's asserted failure to pursue neurological testing to determine whether and to what extent he suffered from an organic mental syndrome or disorder. He does not demonstrate that such testing would have yielded favorable results. Hence, he cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

Berryman, 864 P.2d at 78. As ***Berryman*** reads this decision, the California Supreme Court denied his claim because he could not show what the results of the various tests would have been. And because the state court had denied his requests for funding to have those tests performed, he argues that he was left in an "unreasonable catch-22," penalized for not knowing what the state court would not let him find out.

Although we agree with ***Berryman*** that a ruling on the circular ground he describes would have been unfair, the state court's use of the words "favorable results" is best understood more broadly. In the guilt-phase context, we read the California Supreme Court's reference to "favorable results" to mean test results that could help convince a juror to acquit. **[**22]** *HN3*[↑] And in the penalty-phase context, we read "favorable results" to mean test results that could help convince a juror to vote for life—that is, results whose absence could have "affected **[*1231]** the outcome within a reasonable probability." *Id.*

The California Supreme Court's conclusion that the tests lacked the capacity to produce results that might have moved a juror to vote to acquit (or to vote for life in prison) was reasonable. *See28 U.S.C. § 2254(d)(1)*. ***Berryman*** had been convicted of the rape and murder of a teenage girl. In the best-case scenario, the tests his experts wanted to conduct would have confirmed their diagnosis that he had brain damage. (The jury did hear ***Berryman***'s experts opine that he suffered from organic brain disease.) This argument hinges on ***Berryman***'s assumption that the tests could have confirmed that he had a seizure disorder, and that those seizures could have caused him to become violent. Even assuming the efficacy and admissibility of the testing, the tests were not capable of showing that ***Berryman*** had actually experienced seizures at any time in the past, much less that he was having a seizure when

he killed Florence Hildreth. *See Pizzuto v. Arave, 280 F.3d 949, 964 (9th Cir. 2002)*, *as amended*, *385 F.3d 1247 (9th Cir. 2004)*.

What's more, as Dr. Benson acknowledged, **[**23]** it would not have been possible for ***Berryman*** to commit rape if he were having a seizure. This theory therefore would have required a jury to believe that ***Berryman*** first engaged in sex with Hildreth and then had a seizure that caused him to lose control and kill her. The evidence showed, however, that she was killed by a relatively shallow cut, not by "thrashing out" or other especially violent activity that Dr. Benson described as possible in the course of a seizure. ***Berryman, 864 P.2d at 49***. As discussed above with respect to Claims 15 and 16, ***Berryman***'s lawyers would likely have had great difficulty persuading the jury to accept this version of events, no matter what the test results showed. It was reasonable for the California Supreme Court to conclude that ***Berryman*** suffered no prejudice from his defense counsel's failure to seek out these tests and press this argument, either at the guilt phase or during the penalty phase.

As for the argument that obtaining conclusive proof of ***Berryman***'s alleged brain injuries might have persuaded the jury to show ***Berryman*** more leniency in sentencing, ***Berryman***'s lawyers would have faced similar challenges. The fact remains that neither ***Berryman*** nor anyone else reported **[**24]** that he had ever suffered a seizure, a blackout, or disorientation. And while brain damage could have manifested itself in other ways, the jury was already well acquainted with ***Berryman***'s trouble in school, alcohol abuse, head trauma, and other difficulties. Jurors knew that he had areas of relative strength: He had married, held jobs, and had a year-long period of stability in which he functioned as a good father, good husband, and dedicated member of his church. The state court reasonably concluded that, even if testing could have made the expert diagnoses invulnerable to attack by the prosecution, the fact of brain damage without further evidence of actual manifestations or identifiable impact on ***Berryman***'s life was not reasonably likely to have made a difference in the jury's sentence.

Claims 63 and 64 are further undermined by the neurological testing that ***Berryman*** eventually obtained in 2001. In the course of his federal habeas proceeding, the district court granted permission for ***Berryman*** to receive the specialized neurological testing that Drs. Pierce and Benson requested. The 2001 test results confirm our conclusion that the California Supreme Court did not unreasonably determine **[**25]** that ***Berryman*** was not prejudiced by the omission of these tests at trial. **[*1232]** First, it is unclear whether the test results would have been admissible under the thenprevailing standard for scientific evidence. In its opposition to the request for this testing in the district court, the government strenuously argued that the tests were not generally accepted in the scientific community for the purposes that ***Berryman***'s experts advocated. The government argued the tests should not be performed for that reason. In its order denying ***Berryman***'s habeas petition, the district court acknowledged the controversy regarding the admissibility of the tests and did not decide whether the test results would have met the standard for admissibility.

Second, even if the neurological test results would have been admissible, ***Berryman*** cannot establish a reasonable probability that they would have changed the outcome. ***Berryman***'s experts stated that the test results reinforced their penalty-phase testimony that ***Berryman*** had an organic brain disorder, but the state's experts strongly disagreed with their interpretation. Dr. Waxman stated that the PET scan results did not indicate temporal lobe epilepsy and went **[**26]** on to suggest that ***Berryman***'s expert had presented an interpretation designed to "mislead the reader." Dr. Nuwer stated that the EEG tests indicated "normal EEG brainwaves as seen in someone who is intoxicated and drowsy." The disputed results from these neurological tests reinforce our conclusion that ***Berryman*** was not prejudiced by his counsel's failure to authorize these tests during the guilt or penalty phase.

* * *

We therefore affirm the district court's denial of ***Berryman***'s habeas petition as to each of his claims. ***Berryman***'s requests for judicial notice (Dkt. Nos. 190, 256) are GRANTED.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 20 2020

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

RODNEY BERRYMAN, Sr., Petitioner-Appellant, v. ROBERT K. WONG, Respondent-Appellee.	No. 10-99004 D.C. No. 1:95-cv-05309-AWI Eastern District of California, Fresno ORDER

Before: McKEOWN, CHRISTEN, and WATFORD, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed July 8, 2020, is DENIED.

RODNEY BERRYMAN, Sr., Petitioner, vs. Robert L. Ayers, Jr. as Warden of San Quentin State Prison, * Respondent.

* Robert L. Ayers, Jr. is substituted for his predecessor, Jill Brown, as Warden of San Quentin State Prison under Federal Rule of Civil Procedure 25(d).

Case No. 1:95-CV-05309-AWI

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 51738

July 10, 2007, Decided

PRIOR HISTORY: [*1]
People v. Superior Court (Berryman), 83 Cal. App. 4th 308, 99 Cal. Rptr. 2d 822, 2000 Cal. App. LEXIS 677 (Cal. App. 5th Dist., 2000)

COUNSEL: For Rodney Berryman, Petitioner: Charles M. Bonneau, Jr., LEAD ATTORNEY, Law Office of Charles M. Bonneau, Jr., Sacramento, CA.; Jessie Morris, LEAD ATTORNEY, Law Offices of Jessie Morris, Jr., Sacramento, CA.; Joseph Schlesinger, LEAD ATTORNEY, Federal Public Defender, Sacramento, CA.

For Jill L Brown, Warden of San Quentin State Prison, Respondent: Brian Roy Means, LEAD ATTORNEY, California Department of Justice, Office of the Atty. Gen., Sacramento, CA.; Ward Allen Campbell, California Department of Justice, Sacramento, CA.

For Eddie Ylst, Respondent: Brian Roy Means, LEAD ATTORNEY, California Department of Justice, Office of the Atty. Gen., Sacramento, CA.; Margaret Garnand Venturi, William George Prahl, LEAD ATTORNEYS, Attorney General's Office for the State of California, Sacramento, CA.

For Robert L. Ayers, Jr., Respondent: Brian Roy Means, LEAD ATTORNEY, California Department of Justice, Office of the Atty. Gen., Sacramento, CA.

JUDGES: Anthony W. Ishii, United States District Judge.

OPINION BY: Anthony W. Ishii

OPINION

DEATH PENALTY CASE

MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S [*2] REQUEST FOR EVIDENTIARY HEARING AND DENYING PETITION ON THE MERITS

Table of Contents

I. [*3] Introduction.

This matter is before the Court on the request of Petitioner Rodney Berryman, Sr. ("Berryman") for an evidentiary hearing as to Claims 2, 8, 12, 13,14, 15, 18, 19, 24, 29, 37, 40, 46, 54, 56, 59, 60, 61, 63, 65, 66, 68, 69, 71A, 72, 75, 79, and 91. Respondent Robert L. Ayers, Jr. as Warden of San Quentin State Prison (the "Warden") opposes the request. In addition to briefs submitted regarding the evidentiary hearing request, the Court has before it the previously submitted briefs in support of and opposition to each of Berryman's claims for relief. All claims and defenses are at issue and properly before the Court for merits resolution.

A. Overview of the Case.

Berryman's present theory of the case, as presented in the briefing filed on his behalf by his attorneys, is that the victim in this case, 17 year old Florence Hildreth, had voluntary intercourse with Berryman prior to her death. According to this version, the intercourse was followed by a verbal altercation which escalated into a violent confrontation and resulted in a shallow stab wound to Ms. Hildreth's neck. Berryman argues that if his trial counsel adequately had presented this theory, the jury would have acquitted [*4] him on the rape charge and returned a verdict of manslaughter on the homicide. In contrast, Berryman alleges that the strategy utilized at trial, total denial of responsibility, [1] was a sure loser, especially in light of forensic evidence connecting Berryman to the crime.

> 1 The defense contesting Berryman's identity as the perpetrator of the crime was advanced in the alternative. Trial counsel also attempted to raise a reasonable doubt due to inconsistencies in the evidence and that if Berryman was responsible for the Ms. Hildreth's death, he committed something less than first degree premeditated murder.

Berryman's alternative theory, the one that he advances in pro se documents transmitted to the California Supreme Court, is that he did not commit any offense respecting the victim and that he was, in fact, not present at the scene of her death, at all. Rather, he claims his conviction followed the admission of circumstantial and planted evidence by the prosecution and he complains that his trial attorneys (as well as his present habeas counsel) failed to subject this admitted evidence to

appropriate testing. The fact of Berryman's pro se profession of total innocence and perception [*5] that the various governmental agencies connected with his case (including government appointed defense counsel) have conspired to secure and uphold his death sentence is further evidence, according to his present counsel, of his mental illness. [2]

2 None of Berryman's retained mental health experts have addressed this point.

B. Overview of the Analysis.

Each of the claims in the Petition, both those for which an evidentiary hearing is requested and those Berryman concedes can be decided without an evidentiary hearing are addressed in conjunction with one another. The claims are presented by subject matter rather than as numbered in the Petition. With the exception of Claim 18, all requests for further evidentiary development are denied. [3] Further, again with the exception of Claim 18, all claims presented in the Petition are denied on the merits in this Memorandum Order.

3 With respect to Claim 18, the Court is directing Berryman to conduct further investigation and/ or discovery to make an offer of proof as to the somnolence of one of his attorneys. Final resolution of the claim will be reserved until Berryman presents his offer. *See* Part XXI., *supra.*

Because habeas relief is not being granted [*6] by this order, the Court completely eliminates any discussion about procedural default. The "independent and adequate state ground" or procedural default doctrine is not technically jurisdictional, but is "based on equitable considerations of federalism and comity." *Lambrix v. Singletary, 520 U.S. 518, 523, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)*. Since relief is not being granted, principles of federalism and comity are not offended by this Court's decision to reach the merits of the claims. Moreover, established precedent in this circuit dictates that a Court's decision with respect to evaluating procedural default is to be informed by furthering the interests of "judicial efficiency" in addition to the interests of federalism and comity. *Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998)*. Thus, if deciding the merits of a claim proves to be less complicated and less time consuming than adjudicating the issue of procedural default, a court may exercise discretion to follow this course of action in its management of the case. *Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982)*, *quoted by Boyd, 147 F.3d at 1127*. In light of the complex system for determining procedural default [*7] under present habeas jurisprudence, the Court opts for the more judicially efficient merits analysis. The Court specifically declines to engage in a protracted analysis of independent and adequate state grounds and the excuses of cause and prejudice or fundamental miscarriage of justice.

The ensuing analysis some times includes and some times omits a summary of the arguments and contentions advanced by the Warden. When the Warden's contentions are not included, this signals that the Court finds Berryman's contentions plainly unsupportable. A summary of the Warden's contentions are included when the Court finds the Warden's additional argument is helpful to merits resolution.

II. Procedural History.

Berryman's state trial for the September 6, 1987 murder and rape of Ms. Hildreth commenced on August 11, 1988. Born on December 29, 1965, Berryman was 21 years old at the time of the murder. Following jury selection, the prosecution and defense opening statements together with the

examination of witnesses commenced on September 26, 1988. The jury returned guilty verdicts as to both felony counts on October 18, 1988, and penalty proceedings thereafter began on October 24, 1988. Penalty deliberations [*8] commenced on October 27, 1988 and were completed on October 28, 1988 with a death verdict. Berryman's motions for a new trial and to strike the special circumstances were denied on November 28, 1988. The trial court sentenced him to death on December 5, 1988.

Direct appeal proceedings were completed on December 27, 1993 with the issuance by the California Supreme Court of an opinion affirming the conviction, special circumstance findings, and sentence. *People v. Berryman, 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40 (1993)*. On the same day, the state high court also summarily denied Berryman's state petition for habeas corpus, which he had filed September 3, 1993. [4]

4 The entire text of the state habeas denial is: "Petition for writ of habeas corpus DENIED on the merits."

This present federal action commenced on April 27, 1995 with a request for appointment of counsel and a request for a stay of execution. After counsel were appointed, a petition was filed on November 4, 1996. On July 30, 1997, the Court ordered Berryman to exhaust state remedies for certain claims presented in the original federal petition. Berryman complied with this order by filing an exhaustion petition with [*9] the California Supreme Court, his second state petition, on March 20, 1998. On April 29, 1998, the California Supreme Court denied Berryman's exhaustion petition. [5] Berryman filed his First Amended Petition in this Court on November 6, 1998 (the "Petition"). Accompanying the Petition were supporting points and authorities filed on the same day. The Warden filed his Answer on February 22, 1999. Thereafter, the parties conferred about the exhaustion status of the Petition and it was determined that portions of Claims 4 and 11 were unexhausted. Berryman filed a subsequent state habeas petition on April 2, 1999, which was his third state habeas petition, to exhaust these allegations. The California Supreme Court denied that petition on April 21, 1999. [6] The Warden then filed an Amended Answer on May 26, 1999 and points and authorities in opposition to the Petition on September 15, 1999. Berryman filed his traverse on June 15, 2000. After conducting investigation and further testing, Berryman filed his request for an evidentiary hearing on October 10, 2001. The Warden filed an opposition to the request for an evidentiary hearing on May 17, 2002, and Berryman filed his reply brief on July [*10] 29, 2002. The matter has stood submitted since that time.

5 The first sentence of the state court's April 29, 1998 order is: "The petition for writ of habeas corpus is denied on the substantive ground that it is without merit." Various specified claims additionally were dismissed on the procedural grounds that they were untimely, previously rejected on appeal, and successive.

6 The first sentence of the April 21, 1999 state court's order is: "The petition for writ of habeas corpus is denied on the merits." The claims in the petition also were denied on the procedural grounds that they were untimely, pretermitted, and successive.

During the briefing for the evidentiary hearing request, Berryman filed a fourth state habeas petition in pro per on October 25, 2001. By order filed May 1, 2002, the California Supreme Court denied this pro per petition in its entirety on the merits, and with respect to four of the five claims presented, on procedural grounds as well.

III. Summary of the State Trial Proceedings.

The evidence of the state trial proceedings consists of guilt phase proceedings; penalty proceedings; and post-verdict sentencing proceedings. [7]

7 Additional evidence relevant to Berryman's [*11] numerous claims are recounted in conjunction with the discussion of those claims.

A. Evidence Presented During Guilt Phase Proceedings and Jury Deliberations.

Kern County officials were notified on the morning of September 7, 1987, Labor Day, that the body of a young woman had been found on an agricultural access road by a farm employee. The only clue to the victim's identity was a mail box key found on a key ring (along with a house key) in one of her pockets. Officers eventually located a mail box which was opened by the key. Thereafter they contacted Ms. Hildreth's mother and confirmed the victim's identity as Florence Hildreth.

The cause of Ms. Hildreth's death was a shallow stab wound to the right side of her neck, from which she bled to death, mostly internally. The pathologist, John E. Holloway, M.D., testified that the knife wound was only 3/4 of an inch deep, but because Ms. Hildreth was so thin, the depth of the wound was fatal. Dr. Holloway also noted that Ms. Hildreth sustained a blow to the left side of the back of her head, abrasions on both sides of her neck, a mild blunt force injury to her chest cavity, and more abrasions over both of her hips and pelvis. All of these [*12] injuries were inflicted while Ms. Hildreth was still alive, but her blood pressure was dropping due to internal bleeding. Although there was no evidence of trauma to the vaginal area, a vaginal swab taken from the body during the autopsy revealed recent sexual activity. The vaginal swab specimen was comprised of a small amount of blood consistent with Ms. Hildreth's blood, and a small amount of semen, which was verifiable only by the presence of spermatozoa. Prosecution forensic testing revealed that the semen was of an insufficient quantity to determine the identity of the donor.

At the crime scene, investigators documented and photographed the condition of the body and surrounding area, noting distinctive tire tracks, shoe impressions, a gold colored chain link that appeared to have been broken from a gold chain link necklace, circular impressions in the dirt, drag marks in the dirt, impressions that appeared to have been made by the victim's buttocks and thighs, and a hand print. Off to the side, away from her body was a discarded wine cooler bottle. Ms. Hildreth was laying on her back with her lower garments pulled off her right leg completely but still around her left ankle and [*13] blood soaked upper garments pulled above her breasts, a stab wound in the right front neck region, abrasions on both sides of her neck, abrasions on her right pelvis, dried reddish or brownish fluid staining on her abdomen, a dried deposit of fluid on her left thigh, and a patterned abrasion on her face over her right cheek and jaw. [8] The deposit of fluid on her left thigh was contiguous to the external genitalia. Dr. Holloway opined that Ms. Hildreth's body, including her left thigh and abdomen were covered with dust from a struggle in the dirt and then the fluid was deposited. Although Dr. Holloway did not test the fluid, it was tested by a government laboratory, but the results were negative for blood or semen. Ms. Hildreth's legs were separated and her arms were extended out to the sides of her body with her elbows bent over her head suggesting she had been pinned down on the dirt. Dr. Holloway testified that due to her slender build, the stab wound, which was very shallow, cut across her jugular veins and nicked her carotid artery. Her survival time from this wound was only three to five minutes. Although Ms. Hildreth was bare-foot, no bare foot prints were observed at the scene. [*14] One thong sandal was found near the body, but there also were no tracks from that (nor from a matching sandal) at the scene.

8 Very little testimony described the appearance of the victim at the crime scene. Numerous photographic exhibits of her appearance at the crime scene and at the autopsy were introduced into evidence.

After authorities confirmed Ms. Hildreth's identity, they began questioning family members and friends to determine her last contacts. This investigation revealed that Ms. Hildreth was last seen about 10:45 p.m. on Sunday, September 6, 1987, visiting the home of one of her maternal aunts, Brenda Clark. Ms. Hildreth had come to Mrs. Clark's house in order to use the telephone, but when she arrived, she found the telephone was engaged by Mrs. Clark's daughter, Crystal Armendariz. Ms. Hildreth's presence at the Clark residence was noted by Crystal Armendariz (who heard her cousin's voice), by Nathaniel Jackson a maternal uncle, and by Andrew Bonner, another cousin (and the younger brother of Crystal Armendariz). Mr. Jackson testified that he stayed at the Clark residence until 12:35 a.m. the next morning, watching a movie that began at 11:00 p.m. Before he departed from [*15] the Clark residence, Mr. Jackson roused his nephew Andrew from the couch where he (Andrew) had been sleeping. He did not observe his niece, Crystal or Berryman at the time he departed. Nor did he observe Berryman's pick up truck parked outside when he departed.

At that time, and for the preceding three weeks, Berryman had been staying at the Clark residence as a guest and boyfriend of Ms. Armendariz. He shared sleeping quarters in a garage converted into an apartment occupied by Ms. Armendariz's brother Andrew Bonner and their step-brother Ricky Aubrey. Before residing at the Clark residence, Berryman had been living with his young wife and infant son in Los Angeles County until July of 1987, in an apartment they rented. Berryman's wife, Carol, and the couple's baby, Rodney, Jr. moved in with her parents the first few days of August 1987. By that time, Berryman already was staying with friends, including girlfriends, in Delano. [9] Although Berryman was recently separated from his wife and son, he evidently established an abiding relationship with Ms. Armendariz. On the afternoon Florence Hildreth was killed, Berryman and Ms. Armendariz had visited Bakersfield to look for an apartment [*16] they apparently intended to share, along with Ms. Armendariz's eight-month old twins. [10] While in Bakersfield Berryman was drinking malt liquor. After returning to the Clark home at 8:30 p.m., Ms. Armendariz testified that Berryman stayed for about an hour and then left the house. [11]

9 A hospital record appended to Berryman's first state habeas petition indicates that he visited an emergency room in West Covina just before midnight on August 10, 1987. The Court discerns from this that Berryman was traveling between eastern Los Angeles County and Delano, at least until August.

10 In an initial statement to police investigators, Ms. Armendariz told officers that she and Berryman left Delano to visit the apartment in Bakersfield between 5 and 5:30 p.m. and returned at 9:30 p.m.

11 Testimony of other witnesses indicate that Ms. Armendariz's estimate of when she and Berryman returned to the Clark residence and/or how long Berryman stayed at the Clark residence was inaccurate. He apparently departed the Clark residence at or just before 9 p.m.

When Berryman departed from the Clark residence, he first went to the home of Donna Faye Warner, who lived nearby to the Clark residence. Ms. Warner testified [*17] that he arrived at her house about "ninish." He asked Ms. Warner if she wanted to go for a ride to a liquor store, but she declined. He then proceeded to the home of Melinda Pena, also nearby, where he arrived at approximately 9:20 p.m. After coming out of her house and getting into to his Mitsubishi pick up truck, Berryman and Ms. Pena stopped at two liquor/ convenience stores to purchase alcohol and

then rode out east of Delano to a nearby park where Lake Woollomes is located. They talked and had sexual intercourse over a period of approximately 40 minutes. They then returned to Ms. Pena's house, talked a bit more, and Berryman left.

While Berryman and Ms. Pena were at Lake Woollomes, Berryman's truck was observed by a witness racing with another vehicle at about 10 p.m. This witness, David Castillo, had been at the lake fishing with two brothers and a cousin. Mr. Castillo and his companions left the park (and lake) at approximately 10:30 p.m. Mr. Castillo first dropped his cousin home, since he lived nearest the lake on the east side of Delano. When he was on his way to take his brothers home, on the west side of Delano, he again observed Berryman's Mitsubishi pick up truck at convenience [*18] store on Cecil Avenue. Mr. Castillo's brother, Andrew Castillo, also testified. Although he testified first that he and his companions (brothers and cousin) were out at the lake for two hours beginning at 9:30 p.m., on cross examination by the prosecutor, Deputy District Attorney Romero J. Moench, he agreed with his brother, David, that he believed he saw Berryman's pick up truck at the convenience store on west Cecil Avenue at approximately 11 p.m. Lorene Louis also testified that she saw Berryman's truck parked along the shoulder of Cecil Avenue at about 11 p.m., [12] not far from the convenience store at which he was observed by David and Andrew Castillo. Ms. Louis recognized Berryman's truck because she had seen him racing his truck in the vicinity of her house with her daughter's boyfriend earlier in the evening. [13]

12 The dirt road where Ms. Hildreth's body was found was off Cecil Avenue. The location Ms. Louis observed Berryman's pick up truck was near the crime scene.

13 Although none of the testimony is clear regarding time and sequences, it appears the description of Berryman racing with the boyfriend of Ms. Louis's daughter referred to a time before Berryman and Ms. Armendariz [*19] went apartment hunting in Bakersfield.

About an hour and a half after being observed on Cecil Avenue, Berryman returned to the Clark home sometime around 12:30 a.m. early the next morning, but, apparently after Nathaniel Jackson left the Clark residence at 12:35 a.m. Berryman first awakened Ms. Armendariz, visited with her for a short time (in her bedroom), asked her to warm up some leftovers, and retired to the apartment (converted from the garage) in the rear of the house. [14] She could smell alcohol on his breath, but did not know if he was intoxicated. No one else was in the living room (particularly Nathaniel Jackson or Andrew Bonner) when Ms. Armendariz and Berryman came out of her room to heat up the leftovers. Berryman returned to the main house briefly to obtain a glass of water. Within another half hour, Ms. Armendariz received a collect call from Edward Armendariz, the father of her infant twins. [15] According to a telephone bill introduced into evidence, the time that telephone conversation commenced was 1:24 a.m., slightly less than an hour after Berryman had returned to the Clark home from his outing. Andrew Bonner testified that when Berryman returned to the garage apartment, [*20] he could smell the alcohol on Berryman's breath.

14 The time of Berryman's return to the Clark home is sketchy. Ms. Armendariz testified that after she and Berryman had been talking for a about a half hour, she went into the kitchen to heat up some leftovers and noticed that the time was 35 minutes after the hour of either 11 p.m. or 12 midnight. Based on her testimony about the span of time between Berryman's final departure for the garage apartment and her acceptance of a collect telephone call (see text), the Court discerns that, if the kitchen clock was accurate, the time was 12:35 a.m. This estimate conflicts with Nathaniel Jackson's testimony the least.

15 Ms. Armendariz testified at the preliminary examination hearing that Edward Armendariz was incarcerated at Folsom State Prison on this occasion.

The circular patterns in the dirt at the crime scene were said by prosecutor Mr. Moench, to have indicated a struggle whereby Ms. Hildreth was trying to avoid Berryman's advances. This evidence was emphasized in addition to the state of Ms. Hildreth's clothing (with the upper garments pulled up to her shoulders and the lower garments down around her left ankle). The broken chain link and [*21] the fact that three more broken chain links as well as a broken chain link necklace were found in Berryman's pick up truck also were said to have indicated a struggle. The final evidence of a struggle was the observation of a scratch below Berryman's right eye the day after Ms. Hildreth's murder. Berryman's contention was that the scratch was inflicted on him during a game of pick up basketball. He specifically asserted that one of Ms. Armendariz's young cousins, Brooks Riopelle, caused the scratch, a fact which Brooks denied on the witness stand. In support of this theory Berryman's lead counsel, Charles J. Soria, recalled Ms. Armendariz, Mr. Bonner, and Ms. Pena to testify. Ms. Armendariz testified that when Berryman returned to the Clark residence after being out from 9:00 (or 9:30) until sometime after midnight, he looked no different than he had when he left. Specifically, she observed no scratches or blood on his face. She also stated that he wasn't dirty. Mr. Bonner testified that the next day when he and Berryman along with other relatives and friends were playing basketball, he noticed a scratch under Berryman's eye, but he only noticed it after his cousin, Brooks, brought [*22] it to his attention. Ms. Pena testified that she was watching Berryman play basketball (with the cousins and friends of Ms. Hildreth and Ms. Armendariz). She first observed a scratch under Berryman's eye during a break in the game. At that time, the scratch was bleeding. On summation, in a final refutation of the notion that Ms. Hildreth inflicted the scratch under Berryman's eye the night before in a struggle, Mr. Soria argued that nothing in the autopsy records supported the prosecution contention. One of the procedures of the autopsy was that the clinicians examined Ms. Hildreth's fingernails to see if any skin had collected, indicating she scratched someone. None was found. Notwithstanding the conflicting evidence on this point, based on witness testimony of Brooks Riopelle that Berryman's scratch was observed prior to the basketball game, Mr. Moench argued that Berryman sustained the scratch during his struggle with Ms. Hildreth the previous night.

Besides the eye witness testimony regarding Berryman's pick up truck being observed near the crime scene approximately 15 minutes after Ms. Hildreth was last seen alive and the fact that she apparently had been engaged in a struggle [*23] before she died, forensic evidence connecting Berryman to Ms. Hildreth's death was introduced at trial. After identifying Berryman as a potential suspect, investigators conducted comparison tests between evidence observed (and documented) at the crime scene and Berryman's property.

There were positive tire track comparisons between impressions documented at the crime scene and the left front tire on Berryman's pick up truck, the right rear tire on Berryman's pick up truck, and a limited spare tire, which had been seen on Berryman's truck earlier, [16] but when seized was leaning up against the backyard fence of the Clark home. [17] Of significance to the defense case was that the limited spare tire found in the yard of the Clark property was not mounted on a wheel.

16 Ms. Armendariz's young step-brother. Ricky Aubrey, had observed the limited spare in the left rear position of Berryman's pick-up truck earlier in the week, whereas the sheriffs technician testified that at the crime scene the limited spare had been mounted in the right front position.

17 Mr. Clark testified that the limited spare tire was not a size that was suitable for any of his family member's vehicles. It was, however, a [*24] suitable size for Berryman's Mitsubishi pick up truck.

There also were positive comparisons between shoe impressions at the crime scene and the high top Brooks athletic shoes seized from Berryman at the time of his interview by investigators, including shoe tread marks of the soles and the side of at least one shoe, showing it to be a high top athletic shoe. Dr. Holloway and the criminalist, Gregory Laskowski, separately also made comparisons between the patterned bruise on Ms. Hildreth's right cheek and the sole pattern on Berryman's shoe, finding similarities. Dr. Holloway specifically testified that the bruise resulted more from sustained pressure rather than quick, sudden pressure. On summation, Mr. Moench combined Dr. Holloway's testimony about Ms. Hildreth's survival time from the wounds (three to five minutes) and the fact that the bruise on her face was caused by sustained pressure. He argued to the jury that Berryman pressed his shoe into Ms. Hildreth's face for three to five minutes as she lay bleeding to death. Mr. Moench then reiterated this theory of Berryman standing on Ms. Hildreth's face for from three to five minutes during penalty proceedings.

In addition there was [*25] a positive correlation between a gold-colored chain link found at the crime scene and three gold-colored chain links found on the floor board of the cab of Berryman's Mitsubishi pick up truck. Besides the chain links found on the floor of Berryman's pick up truck cab, there were two broken gold-colored chain link necklaces hanging over the rear view mirror of the truck, one of which contained chains found to have similarities to the links found on the cab floor and at the crime scene. In particular, similar tool marks were noted on the edges of each link.

A latent fingerprint lifted off the inside passenger window of Berryman's pick up truck matched the print of one of Ms. Hildreth's thumbs taken at the autopsy. One of two pubic hairs found on Ms. Hildreth's face was said to have borne substantial similarities to Berryman's pubic hair samples. [18] Finally, a forensic serologist testified that blood found on the canvas and on a shoe lace from Berryman's right shoe was consistent with Ms. Hildreth's blood type, but inconsistent with Berryman's blood type. Also, it should be noted that although independent testing could not be conducted separately by the defense litigation team (due to [*26] insufficient quantity of the sample), a defense serological expert was present and observing when the prosecution serologist conducted this testing.

18 The other pubic hair was said to have come from Ms. Hildreth herself.

Another factor that authorities used to connect Berryman to Ms. Hildreth's death was his knowledge about the fact of her death and how she was killed. The prosecution evidence brought out that Berryman seemed to know Ms. Hildreth had been killed before members of her immediately family had disclosed this information to the rest of the family and friends. Specifically, the prosecution called Berryman friend, Thellas Sanders, who had partied with Berryman on Labor Day, the day after Ms. Hildreth disappeared. Berryman asked Mr. Sanders for a gun because Ms. Hildreth had been stabbed. At that time, circumstances of Ms. Hildreth's death, particular the cause of death by a knife wound, were not known to her friends and family members.

After the prosecution put on its case in chief (and before the defense began its case), Berryman's attorneys moved for judgment of acquittal pursuant to Penal Code *§ 1118.1* on the grounds the prosecution had not established the intercourse, if [*27] there had been intercourse, occurred while

Ms. Hildreth was still alive. Defense counsel also argued the absence of trauma to the victim's vaginal vault signified the absence of non-consensual intercourse.

The trial judge denied the motion on the grounds that the presence of the victim's blood on the vaginal swab specimen indicated she was alive during intercourse. Next, the trial judge found sufficient evidence of penetration even though semen had been deposited on Ms. Hildreth's body, outside of her vagina. Finally, the trial judge found that the victim's body position and the state of her clothing was consistent with making her available for sexual intercourse.

Defense counsel Mr. Soria and Mr. George Peterson, called their own forensic expert, criminalist Stephan A. Schliebe, to cast doubt on the comparison evidence of shoe tracks, gold-colored chain links, pubic hairs, and tire tracks. [19] With respect to the shoe tracks, Mr. Schliebe concluded Berryman's Brooks athletic shoes could have been the source of the prints in the crime scene photographs, but that there were too many variables, including differences between the composition of the ground at the crime scene and the composition [*28] of the test mark, to be certain. He stated he could not be at all sure that the impression on the victim's cheek, as depicted in the autopsy photograph, was made by Berryman's shoe for the reason that a significant line on the shoe sole was not replicated on the check. Although the bruise on the victim's face could have been made by Berryman's shoe, the bruise mark was much longer than the shoe. With respect to the gold-colored chain links, Mr. Schliebe testified the photographs of the necklace chain links were of very little analytical value because they were out of focus and lacked detail. He offered that the positive comparison by the prosecution expert was a matter of subjective determination. [20] On cross examination, Mr. Schliebe further clarified that similarities found between disconnected chain links and/or links still intact on a necklace are not persuasive for establishing a positive comparison since metal composition of chains varies widely from link to link (since links are put together in random order). Mr. Schliebe also found the hair analysis to be sorely lacking. First an insufficient number of hair samples were gathered. Second, there was no indication of where in [*29] the pubic area the hair samples were taken. Third, any comparison made should have been made by comparing actual hairs, not photographs of hairs. Finally regarding the tire tracks, Mr. Schliebe testified there was a consistent pattern regarding left front tire and the crime scene impression. The spare tire test impressions showed some markings consistent with the crime scene impressions, but these consistencies appeared to be more a manufacturing similarity rather than a unique wear characteristic. The only way to check this would be to obtain several tires manufactured by the same company and then conduct a comparison. [21]

19 No evidence was introduced to contradict the serologic evidence presented by the prosecution.

20 The defense expert did not actually conduct his own tests on the chain links at issue, although the evidence was available for this purpose.

21 On cross examination, the defense expert conceded that he had not actually examined the tires (which were available to the defense).

On summation, Mr. Soria stressed that the position of the limited spare impression at the crime scene was said to have been in the right front position by the technical investigator, but the actual [*30] limited spare tire that was found was in the Clark yard, completely off Berryman's truck and not mounted on a wheel. Moreover, Ricky Aubrey, who earlier had observed a limited spare on Berryman's truck, said that it was in the left rear position. Mr. Soria argued that for Berryman to have removed the limited spare tire from the wheel rim after supposedly attacking Ms. Hildreth would have been a dirty and time-consuming job, yet he was not observed by Ms. Armendariz to be

dirty when he returned in the very early hours of the next morning and, overall, he was not gone long (after being observed by Ms. Louis and the Castillo brothers at 11 p.m. near the crime scene.) Ms. Armendariz's equivocation as to whether Berryman returned at 11:35 p.m. or 12:35 a.m. was also referenced by Mr. Soria to raise a reasonable doubt in Berryman's favor. On rebuttal, Mr. Moench argued the discrepancy between eye witness testimony that a limited spare was mounted on the left rear position on Berryman's pick up truck and the police investigators' conclusion that the limited spare had been mounted on the right front wheel when Berryman was at the crime scene, was explainable by the fact that Berryman had moved [*31] the tire to the front position in the interim.

Separate and apart from the defense forensic expert, defense counsel recalled Andrew Bonner to testify that Berryman was not wearing Brooks-brand athletic shoes on the day of Ms. Hildreth's death. Rather Mr. Bonner testified Berryman had been wearing Eagle-brand athletic shoes. Mr. Soria argued this inconsistency during his guilt phase summation along with his other arguments.

As presented at trial, the guilt phase defense theory was to raise a reasonable doubt about Berryman's guilt. This was accomplished in two ways. First, Mr. Soria suggested it would have been impossible for Berryman to have attacked and killed Ms. Hildreth and then remove the limited spare from a wheel on his truck within the brief window of time from Ms. Hildreth's last appearance and he returned to the Clark residence. Mr. Soria argued all the evidence of Berryman's guilt was circumstantial; there were no eye witnesses. Mr. Soria further argued that from the initial interviews given by members of Ms. Hildreth's family to the testimony given at trial, some of the time estimates had changed in order to incriminate Berryman, because they didn't like him and wanted to [*32] make him responsible for the crime. [22] This theory was consistent with Berryman's story when he was first interviewed by authorities the night after Ms. Hildreth's death. Specifically, he denied having been out on Cecil Avenue the night of Ms. Hildreth's murder and he denied that Ms. Hildreth had ever been in his car. [23] A tape of his statements to investigators was played for the jury, as more fully discussed in connection with Claims 27 and 28. *See* Part VI., *infra.* Mr. Soria also suggested that perhaps Ms. Hildreth had been killed by the person or persons she was trying to reach by telephone when she came over to the Clark residence.

22 Mr. Soria did not introduce any inconsistent statements from those reports at trial. The Court has not been provided copies of any investigative reports from Sheriffs deputies.

23 This latter denial has been retracted. During penalty proceedings, Mr. Peterson argued that Berryman and Ms. Hildreth had an on-going sexual relation and *she* wanted him to give up his relationship with Ms. Armendariz. Similarly, in Berryman's pro se habeas petition, he states that Ms. Hildreth had been inside his pick up truck on many occasions and accordingly, her finger prints [*33] should have been observed throughout the cab of his truck, and not merely on the inside of the passenger window (the print of which he also argued was a print of his thumb, not Ms. Hildreth's).

In the alternative, Mr. Soria argued that if Berryman had been with Ms. Hildreth on the night she died, the killing was either felony murder, [24] second degree murder, voluntary manslaughter, or an accident. Mr. Soria also tried to create a reasonable doubt about Berryman's responsibility for the shoe sole impression on Ms. Hildreth's cheek. He pointed out that the pattern on the face bruise did not match the shoe tread. He conceded, however, that the perpetrator of the crime had stepped on Ms. Hildreth's face for approximately three to four minutes. Next he argued that since the victim was bleeding profusely, and from an artery, there would have been more splatter on Berryman's

shoes if he had been standing near Ms. Hildreth, or stepping on her face, as she lay bleeding to death.

24 That Mr. Soria argued for felony murder, when that is a death eligible offense, is puzzling.

The instructions were read to the jurors in three phases. First, there were pre-trial instructions, which included a reading [*34] of the information as well as some general instructions about direct versus circumstantial evidence and witness credibility, as well as more specific instructions about malice, willfulness, felony murder, special circumstances, first and second degree murder, manslaughter, and reasonable doubt. A second set of instructions were given after both parties rested, but prior to summation of the prosecutor and defense counsel. These pre-summation instructions repeated the substantive instructions read in the pre-trial instructions, and in addition specifically delineated between first degree murder, second degree murder, and voluntary manslaughter. The concept that first degree felony murder and the felony murder special circumstance predicated on completed or attempted rape also were read. The third and final set of guilt phase instructions were given just before the jurors retired to deliberate. These post-summation instructions focused on explaining the various special verdict forms that needed to be completed for first degree murder, the lesser included offenses of first degree murder, and the death eligibility special circumstances. When the trial court completed jury instructions it [*35] was 12:30 p.m. At that time, the court took a lunch recess and the jurors were to commence deliberations directly after lunch, without the necessity of reconvening court. At 1:45 p.m., the jurors requested a tape player (to listen to the tape of Berryman's interview with authorities). At 3:50 p.m. a note from the foreperson informed the court that the jurors had reached a verdict on Count 1 (the murder charge). The bailiff advised the jury to continue to deliberate as to Count 2. At 4:12 p.m., the jury noted it had reached a verdict on Count 2. Court was reconvened and guilty verdicts were read on both counts at 4:50 p.m.

The verdict on Count 1 was guilty of first degree murder with the rape murder special circumstance. An additional special finding was made as to the murder charge -- that the killing of Ms. Hildreth was intentional. On Count 2, the jury found Berryman guilty of committing a completed rape.

B. Evidence Presented During Penalty Phase Proceedings and Jury Deliberations.

The prosecution case in support of the death penalty focused mainly on the circumstances of the crime under the sentencing factor codified at Penal Code *§ 190.3(a)*. This statutory provision specifies that [*36] the jury shall take into account the circumstances of the crime of which the defendant was convicted and any special circumstances found to be true. To a lesser extent, the prosecution case relied upon two prior violent acts not resulting in criminal convictions, under *§ 190.3(b)* (the presence or absence of criminal activity which involved the use or attempted use of force or violence or the express or implied threat of using force or violence), and evidence of two prior felony convictions, under *§ 190.3(c)* (the presence of absence of any prior felony conviction). Finally the prosecution made a considerable and forceful effort to undermine mitigation evidence presented by the defense.

The prosecution filed two notices regarding the evidence that it intended to present during penalty proceedings. The first notice was filed March 3, 1988 and included three categories of evidence. First was evidence under *§ 190.3(a)*, the circumstances of the present offense and all acts

committed by Berryman in furtherance of the crimes committed. Second was evidence under *§ 190.3(b)* regarding an assault on a fellow inmate housed at the County Jail. [25] Third was evidence under *§ 190.3(c)* regarding Berryman's [*37] prior felony convictions. On April 22,1988, the prosecution filed an amended notice setting forth five categories of evidence intended to be presented during penalty proceedings. The second notice reiterated the first three categories, and in addition added two more instances of prior violent acts which did not result in convictions under *§ 190.3(b)*: an altercation between Berryman and his father-in-law, Howard Fuller, in August 1987 and an attack on motorist David Perez with a wheel lock bar in July 1987. During pre-trial proceedings, Mr. Soria mentioned that he had received notice of the prosecution's intended aggravating evidence. He stated that he would object if the prosecution introduced any evidence in aggravation that wasn't listed in the notice.

25 This evidence was not introduced at trial.

The initial evidence presented in aggravation was a stipulation the prosecutor, Mr. Moench, secured from Berryman's trial counsel to the effect that Berryman suffered two felony convictions in Los Angeles County. The first conviction involved three counts of marijuana transportation in March 1984 and second involved one count of grand theft in August 1984. [26] The purpose of the stipulation [*38] regarding these convictions, as discussed in court, was to avoid having the details of the crimes presented to the jury. Mr. Moench agreed to a "sterile" presentation of the fact of the prior convictions so long as the defense team didn't attempt to downplay the significance of the marijuana transportation conviction. Although the defense did not offer evidence or argue in any way that the marijuana transportation conviction was insignificant, Mr. Moench breached the stipulation on many occasions in his cross examination of defense witnesses by repeatedly mentioning the fact that Berryman sold drugs to high school students (even though this wasn't the offense for which Berryman was convicted). Defense counsel objected only to Mr. Moench's characterization of the three count conviction as three separate arrests rather than a single transaction. The objection did not address the fact that Mr. Moench repeatedly informed the jury about Berryman's sales activities.

26 Berryman was 18 years old when both of these convictions were imposed.

Next, the prosecution presented evidence under *§ 190.3(b)*. The first witness was David Perez, a stranger Berryman encountered on the streets Los Angeles, [*39] and who Berryman attacked with an iron (wheel lock) bar after a dispute about blocking a public road. The facts leading up to the attack are that three vehicles on a city street were completely blocking the road, preventing Mr. Perez, who was driving behind the trio, from moving forward. Two of the vehicles were pick up trucks, one occupied by two males and the other occupied by Berryman, alone. The middle vehicle was a small car occupied by two females with whom the men in the pick up trucks were talking. When Mr. Perez sounded his horn for the pick up trucks to move, the passenger in the first pick up (not driven by Berryman) made a disrespectful hand gesture to Mr. Perez. A short time later, when the road block dissolved, Mr. Perez challenged the occupants of that pick up truck, whereupon the passenger exited the truck and began kicking Mr. Perez's pick up truck. Following this occurrence, Mr. Perez and that passenger became involved in mutual combat, to which the driver of the pick up and Mr. Perez's passenger also joined. Mr. Perez testified that when the driver of this first pick up entered the fight, he (the pick up driver) grabbed Mr. Perez from behind. Then, Berryman entered [*40] the fray by striking Mr. Perez on the back of the head with a tire iron. Mr. Perez was clear that he saw Berryman approaching, and he saw Berryman trying to strike him a second time, this

time on the face, although he didn't see Berryman deliver the blow to the back of his head. In light of Mr. Moench's later cross examination of defense witnesses, it must be emphasized that Mr. Perez *at no time* testified that Berryman struck him with the tire iron while the driver from the other pick up truck was holding him. [27] After Berryman's failed second attempt to strike Mr. Perez, Mr. Perez fled. He was pursued by Berryman as well as the driver and passenger of the first pick up while the pursuers (including Berryman) were yelling "L.A. Cryps."

> 27 Like Mr. Moench's argument, the Warden recites in his rendition of the facts that Berryman hit Mr. Perez on the back of the head with an iron bar while another of the combatants was holding him. The Court has re-read the trial transcript and finds that version not sustainable. The driver of the first truck grabbed Mr. Perez from behind as Mr. Perez was fighting with the passenger of that truck. Then, Mr. Perez's passenger got out of Mr. Perez's pick [*41] up truck and pulled the other pick up driver off of Mr. Perez. *See* RT-27: 3550. It was while all four of these individuals were fighting that Berryman came over and struck Mr. Perez on the head. As soon as Berryman struck Mr. Perez on the back of the head, Mr. Perez turned around and blocked the second blow. *Id.*: 3551. He did not testify he was being restrained at that time.

The other act of violence which did not result in a felony conviction under *§ 190.3(b)* involved an altercation between Berryman and his father-in-law, Reverend Howard Fuller. This evidence was presented on rebuttal. The facts leading to this altercation involve the separation of Berryman from his wife, Carol. Rev. Fuller, a pastor at the Friendship Missionary Baptist Church in Los Angeles County, testified that on August 4, 1987, Carol and her baby (Berryman's son) moved back home (having lost the apartment they had shared with Berryman). On the next day, Berryman came by to collect Carol and their infant son to move to Delano. According to Rev. Fuller, when Berryman arrived at the house, Carol had decided not to go with him to Delano. Rev. Fuller would not allow Berryman to come into the house, but Berryman did [*42] come to the door. When Rev. Fuller reiterated that Berryman could not come inside the house, he and Berryman began pushing each other and finally Berryman struck his father-in-law on the bridge of the nose. Rev. Fuller summoned the police. Both the jury instructions and Mr. Moench's summation clarified that the facts comprising these prior acts of violence had to be established beyond a reasonable doubt.

The defense case consisted of 16 friends and relatives, who testified about Berryman's favorable character, one former San Quentin inmate, who testified about death row, the criminalist, Mr. Laskowski, and one of the detectives who testified to having observed two bibles in Berryman's truck during the search, and two mental health experts. The 16 friends and relatives included Berryman's wife, his two brothers, his sister, his mother, two grandmothers, a cousin, a maternal aunt, and Melinda Pena, as well as other friends from the Los Angeles area. Mr. Peterson elicited from each of these witnesses that Berryman was not a violent person and he never demonstrated any aggressive behaviors towards girls and/or women. In addition to eliciting testimony that Berryman was a nice guy and a [*43] non-violent gentlemen toward women, Mr. Peterson succeeded in having each witness affirm that he or she had not spoken to any member of the defense team before testifying and that he or she would not lie for Berryman. Many witnesses attested to the fact that Berryman was very popular with girls and dated two or three at a time. His older brother, Ronald, Jr., described him as a "Casanova." To accentuate Berryman's non-violent conduct toward women, evidence was presented that on one occasion, Carol Berryman [28] struck Berryman, but Berryman did not respond physically. On the same or another occasion, Berryman reportedly yelled at his wife after she and Berryman's younger brother, Bryan Berryman, became

embroiled in a heated verbal argument. Relatives also testified that Berryman was affectionate and respectful to his older relatives and often attended family reunions with his wife and infant son accompanying him. His sister, Ronnique Berryman, testified that Berryman drank a lot of beer and she knew he had an alcohol problem, drinking morning, noon, and night. Nonetheless, he was not violent when he drank.

28 Carol Berryman filed to dissolve her marriage to Berryman sometime after his [*44] detention at San Quentin State Prison. Although she now uses her maiden name, Fuller, as her last name, she is referred to in this Memorandum Order as Carol Berryman.

Various friends of Berryman testified similarly, starting with Melinda Pena, his occasional paramour in Delano. Ms. Pena added that every time he visited her during his stay in Delano up until his arrest, he was drinking beer, about a quart at a time. On cross examination, Mr. Moench elicited that Berryman wasn't drunk as a result of his drinking, in that he could still operate his truck and perform sexually. Berryman's wife, Carol, also testified about Berryman's drinking, which she referred to as excessive and the basis for conflict in their marriage. His drinking also interfered with work, so much so that he just stopped going to work. She further testified that the more Berryman drank, the more he strayed from church. His response to his wife's nagging was to drink more (never to be physically abusive). Sometimes he drank so much, he staggered. During these times, when Berryman was drinking excessively, Carol Berryman testified that he complained of bad headaches and backaches. With respect to the backaches, she testified [*45] they followed from an accident whereby Berryman fell from a forklift. With respect to the headaches, she personally observed veins in his head pulsating. The onset of the headaches was sudden and lasted about five minutes. While the headache problem usually occurred while Berryman was drinking (a couple times a week), Carol recalled one occasion when a headache struck Berryman while he was sober. The headaches were so severe that Berryman said he couldn't drive when he was afflicted with one. On one occasion he went to the hospital. He was taken there by his friend Yolande Rumford. During Ms. Rumford's testimony, she confirmed that she took Berryman to a hospital emergency room because his head was hurting and he was dizzy. A cousin of Berryman's mother, Maxine Coleman, also testified about her knowledge of Berryman's drinking problem. She testified that Berryman came to her and talked about his problem. The last time she spoke to him, he told her his drinking was under control and he was trying to get straight because he had a son. The testimony about Berryman's drinking was foundational for the expert testimony which followed and is discussed in detail below.

The Court notes that [*46] Mr. Moench's cross examination was quite aggressive with respect to the friend witnesses. Two examples suffice. During his examination of 19 year old Tamara Pearson, he suggested that Berryman struck a man with a tire iron while he was being held by another and with respect to the present crime, stood on the victim's face for three to five minutes while she was bleeding to death. Mr. Moench similarly suggested during his cross examination of family friend Yolande Rumford that Berryman transported drugs to the high school he was attending, hit someone on the head with a tire iron while that person was being held, and with respect to this crime, tricked a 17 year-old girl to go out into the countryside, beat her, raped her and then tried to force her to orally copulate him.

Berryman's maternal grandmother testified that the Berryman children sometimes stayed with her while their mother worked and that Berryman's parents experienced a tumultuous marriage that finally ended in divorce. Berryman's mother, Lestine Bonty, additionally testified that after she and Berryman's father, Ronald Berryman, Sr. were divorced and her boys went to go live with their

father, she was estranged from the [*47] boys for approximately three years. Ms. Bonty testified that while the boys were living with their father, she chose not to communicate with them at all. Her conduct was laid out as foundation for the expert testimony about Berryman's emotional problems resulting from lack of maternal nurturing. Even Berryman's sister, who lived with the mother, testified she received inadequate maternal guidance and encouragement. When Berryman's father died and Berryman came back to live with his mother, the mother-son relationship did not improve.

Berryman's paternal grandmother described Berryman's and his brothers' lives with their father after the separation from their mother. The father, Ronald, Sr., apparently had numerous girlfriends himself and the boys were taken from girlfriend to girlfriend when they were young. They also stayed with their great grandmother. The paternal grandmother stated that the boys were bounced from house to house. The fact that the father and boys moved around a lot was echoed by the testimony of Berryman's older brother, Ronald, Jr..

Besides explaining further about the circumstances of Berryman's conviction for marijuana transportation, Ronald, Jr., a convicted felon, [*48] also testified about the trouble convicted rapists have in prison. Ronald, Jr. testified that convicted rapists tend to be raped or subjected to violence in prison by other inmates. In order keep safe, a convicted rapist must exhibit violent behavior to avoid being targeted for violence. A rebuttal witness called by the prosecution refuted this notion. That witness, another Kern County Deputy District Attorney, testified that during his tenure in the District Attorney's Office prosecuting crimes committed in the County's state prisons, he had not observed that any particular number of convicted rapists had been victims of criminal conduct in prison. [29]

29 Mr. Peterson's only impeachment tool for this testimony was that the witness was under the supervision of Mr. Moench at the time of his testimony.

The former San Quentin inmate called by the defense described the degrading prison conditions at San Quentin, as well as Folsom prison (where, among other correctional facilities he had at one time been incarcerated). He echoed the testimony of Berryman's older brother, Ronald, Jr., that child molesters and rapists are the most reviled inmates by other inmates and that they're often hurt. [*49] This witness had information about how the gas chamber operated, since he wrote for a prison newspaper and worked for a public relations group while at San Quentin. He described the process for executing a condemned inmate in the gas chamber, including the excruciating pain suffered and the lengthy duration of the agony. He also assured the jurors that if a defendant is sentenced to life without the possibility of parole, there would, in fact be no parole; the defendant would spend the rest of his life in prison. On cross examination, Mr. Moench asked a question suggesting that Berryman may be a gang member, and as a lifer (sentenced to life without possibility of parole), would be most likely to be assigned a "hit" behind prison walls for his gang. At the culmination of this testimony, one of the jurors, Ms. Mary Radman, informed the judge that this former inmate witness made an aside remark to the jury which she heard but did not understand.

The prosecution criminalist, Mr. Laskowski, who also was a technical investigator for Kern County testified that during the search of Berryman's truck (pursuant to a warrant), two bibles were found, but not seized. One of the sheriffs investigating [*50] officers, Detective Culley, who also was present during the execution of the search warrant of Berryman's truck also noted that one or two bibles were observed in the truck cab. Detective Culley did not know what had become of them. [30]

30 Apparently Detective Culley's partner in the Berryman case investigation, Detective Lage, seized the bibles. *See* summary of declarations of Jesse Morris, Jr. and Charles Bonneau, discussed in connection with Claim 72, Part XXXII., *infra.*

The last two defense witnesses were Dr. William Pierce, a clinical psychologist and founding member of the National Association of Black Psychologists, and Dr. Samuel G. Benson, a psychiatrist, who in addition to his medical degree, held doctorate degrees in psychology and pharmacology. A large part of Dr. Pierce's expertise was in the development of black identity among black adolescents. Dr. Benson's practice specialty was performing consultations for physicians in other disciplines to determine whether there was "a psychiatric overlay to a particular illness."

Dr. Pierce indicated he became involved with Berryman's case in March of 1988 (seven months before his October 1988 testimony) at the request of Mr. Soria. [*51] He interviewed and administered psychological tests to Berryman for approximately 12 to 13 hours. He additionally reviewed numerous documents and interviewed Berryman's mother, sister, wife, and mother's cousin, all of whom testified at the penalty phase. The battery of psychological tests he administered were to help him determine whether Berryman's behavior was influenced by central nervous system damage, brain damage, or other organic versus functional cause. For Berryman, Dr. Pierce's axis one diagnostic impression was "alcohol induced organic disorder, alcohol intoxication and rule out organic mental syndrome, not otherwise specified." [31] His axis two diagnostic impression of Berryman was personality disorder, not otherwise specified, with dependent narcissistic and depressive features. [32]

31 An axis one diagnosis refers to symptoms a person is experiencing at the time of the evaluation.

32 An axis two diagnosis would refer to long-standing personality characteristics that had been occurring over a longer period of time.

Dr. Peirce's conclusions were influenced by a number of factors, including Berryman's early history. As a child, Berryman and his siblings, particularly his brothers [*52] were subjected to a great deal of moving around, chaos in the marriage of his parents, and him living with different relatives. During the time Berryman lived with his father, there was quite a bit of moving. School records Dr. Pierce reviewed showed seven to eight different schools during that period. To compound the interruption of education experience, Berryman was identified as a slow learner in the third grade. His learning ability also suggested minimal brain syndrome. He had difficulty reading and writing. Dr. Pierce stated this history would not be atypical of people who developed personality disorders in reaction to their environments. Another fact was the lack of maternal nurturing Berryman experienced as a child through puberty. Berryman's mother told Dr. Pierce she was not close to Berryman when he was growing up. As a consequence, Berryman exhibited a great need to get his dependency needs fulfilled. In his youth, although Berryman's mother didn't provide the nurturing he needed, he had a way of finding people who would take him in, because they liked him. In the meantime, when Berryman was 15, his father was lost in an airplane accident and never found. [33] Berryman demonstrated [*53] to Dr. Pierce that he had a difficult time believing his father actually was dead. After his father was gone, Berryman was more difficult to control as a teenager. While still in his mid-teens, he started running away from home and began to show "asocial" behavior and alcohol abuse.

33 It is not clear how old Berryman was when his father disappeared and was presumed dead. Other evidence in the record relays that Berryman was 17 when his father died. *See* discussion of Claims 15 and 16, Part XH.AJ.d., *infra.*

Berryman's attempts at obtaining employment were largely frustrated by his lack of education because he could not keep up with the requirements of the jobs he obtained -- being unable to read or write well. In Berryman's marriage, there also were conflicts. He attempted to carry out the "male role" in having a job, attending church, and raising a family, but was not well-equipped to handle his role. When he lost his job, everything unraveled. His attempts to find other employment decreased as his drinking increased. Ultimately, his family was evicted from the apartment. Then there was his avoidance behavior and increase alcohol usage.

Dr. Pierce explained Berryman's apparently compulsive [*54] attraction and intimate relationships with numerous females. The attraction was driven by Berryman's "need for nurturance he missed in his early childhood. It wasn't so much [Berryman's] attraction to sexuality that impelled him, as his need to be around someone who would treat him nicely. . . . There was a hole in the bucket around mothering and nurturance, and . . . part of [Berryman's] behavior was to try to fill that hole in his interpersonal relationships, particularly with women."

Dr. Pierce reported that Berryman also had an old head injury from a 1983 fall from a crane while he was installing insulation. [34] He became unconscious and was taken to the hospital. Following this accident, he began to report recurrent intense headaches. The headaches had sudden onset, were intensely painful, lasted 15 to 20 minutes, [35] and then suddenly terminated. Dr. Pierce opined that these episodes were seizure equivalents. Corroborating this opinion, Dr. Pierce saw consistent signs of organicity, in the psychological test results. Specifically, Berryman had difficulty performing perceptual motor tasks, indicating a central nervous system problem. He also had difficulty in visual perceptual organization [*55] and in immediate recall. The signs of organicity included his history of learning disabilities, head trauma, intense headaches, increased alcohol intake, particularly between May and August 1987 (just prior to Berryman's move to Delano), and asocial, maladaptive behavior (referring to the attack on Mr. Perez). [36] Dr. Pierce specifically mentioned three to four arrests for driving under the influence in the few months prior to his move to Delano. [37] To confirm the existence of an organic problem affecting Berryman's brain and central nervous system, Dr. Pierce wanted to have additional tests performed. That is why he called upon Dr. Benson for assistance in obtaining the needed tests.

34 No other evidence about a fall from a crane while installing insulation was introduced at the trial. It cannot be discerned whether this crane fall is the same as the fall from the forklift accident described by Berryman's wife, Carol. The Court notes that in the testimony of Berryman's wife, she stated that the forklift fall accident resulted in backaches. She didn't attribute Berryman's headaches to any particular cause. Berryman's mother told the social historian hired by Berryman's federal habeas [*56] counsel that Carol was the cause of Berryman's headaches. During an argument, she hit him over the eyebrow with a metal flashlight and requiring him to go to the hospital. *See* Part XH.A.3.d., *infra.*

35 The testimony of Berryman's wife, Carol, was that the headaches lasted five minutes.

36 The attack on Mr. Perez was referred to by Dr. Pierce as asocial on direct examination and maladaptive on cross examination.

37 On rebuttal, this basis for Dr. Pierce's conclusions was vitiated. The prosecution evidence was that there were only two stops for driving under the influence, one in June 1986, and the other in the spring of 1987.

Dr. Pierce observed that Berryman's customary pattern of behavior when he became angry at his failures was to "leave the field." Accordingly, he felt that the crime involving Ms. Hildreth didn't "fit" Berryman's typical and historical response to frustration. Dr. Pierce referred to the crime as a "very bizarre act" on Berryman's part. This was another basis for Dr. Pierce's belief that Berryman suffered some sort of seizure or alcohol induced seizure on the night Ms. Hildreth was killed and the reason he wanted certain tests conducted. He called upon Dr. Benson to arrange [*57] the needed tests, for without empirical evidence in the form of test results, Dr. Pierce had only the symptomatology he obtained.

On cross examination, Mr. Moench minimized Dr. Pierce's reliance on the fact that Berryman suffered from intense headaches, because he himself had never observed Berryman having one. Dr. Pierce could not explain to Mr. Moench why the desired tests were not performed; that information needed to be obtained from Dr. Benson. Mr. Moench belittled Dr. Pierce's opinions because they were based on everything except the fact that Ms. Hildreth had been raped and murdered. Dr. Pierce denied this. Mr. Moench then asked Dr. Pierce what Berryman would have done if he came across a woman that didn't "buy into his needs, that absolutely reject[ed] him." Dr. Pierce explained that Berryman's pattern was to try to get his needs fulfilled, and if he couldn't, to "avoid the field or become frustrated." Dr. Pierce confirmed that Berryman had the capacity to become angry and demonstrate the entire range of human emotions. But, his typical pattern was not to leave someone as he left the victim in this case. Then Mr. Moench's questions became quite caustic. He asked Dr. Pierce to [*58] confirm that Berryman had the capacity for violence and frustration because he wasn't a successful father, worker, or husband, and that, having abandoned his wife and son in Los Angeles, he was living with one woman while dating two or three others and didn't want them to find out about one another. Dr. Pierce responded that he did not recall that Berryman didn't want the various girlfriends to find out about one another. On the contrary, the people in Berryman's life did know each other, though he did not disclose his relationships. Dr. Pierce did not recall, or didn't hear Berryman's taped statement where he mentioned to authorities he didn't want Ms. Armendariz to find out about his other girlfriends. [38] Dr. Pierce confirmed to Mr. Moench that Berryman did not suffer from severe psychological dysfunction, such as psychosis, schizophrenia, or Alzheimer's syndrome, but that he had long standing personality problems. He emphasized that the "rule out organic mental syndrome not otherwise specified" referred to his attempt to determine whether Berryman suffered from "some brain disease."

> 38 By the time of this interview by the investigators, Berryman had already telephoned Ms. Pena from [*59] the Clark residence to have her confirm to Ms. Armendariz that he had been with her at the time Ms. Hildreth went missing, and not, as a family friend Lorene Louis stated, parked on Cecil Avenue (near the crime scene).

Dr. Benson was next to testify. As indicated in Dr. Pierce's testimony, Dr. Benson was brought in because Dr. Pierce's findings indicated the possibility of an organic problem that may have accounted for the violent killing of Ms. Hildreth. Dr. Benson interviewed Berryman on three separate occasions. The soft signs of organicity confirmed by Dr. Benson included Berryman's memory loss, poor performance in school, perceptual visual motor coordination difficulties, visual organization difficulties, ringing in his ears, and stress related headaches. Dr. Benson opined that Berryman suffered from an organic mental syndrome, which he believed was largely alcohol induced, but with other contributors as well, including head trauma (referring to the 1983 fall from a crane). Dr. Benson also mentioned that Berryman had been hit over the head with a metal pipe at one point, but no date for this injury was mentioned. [39] The headaches were accompanied by facial

contortions, ringing [*60] in his ears, and the sensation he was smelling oil or gas just prior to the headaches. This olfactory sensation was referred to as an aura, commonly known to precede a seizure. Dr. Benson was not able to rule out epilepsy or other seizure disorder as the cause for Berryman's behavior the night of the crime. On cross examination, he explained that without sophisticated tests, he could not say that Berryman did not suffer from petit or gran mal seizures. He further explained on cross examination that people who suffered from temporal lobe seizures had been known "to do all kinds of things, and particularly violent sort of things," but, he conceded that committing rape was not among them. Dr. Benson concluded that Berryman was an alcoholic based on reports from investigators. [40] According to information conveyed to Dr. Benson, Berryman started drinking around age 14 and became a heavy drinker at age 16, continuing since that time. Further, in the late spring of 1987, Berryman's unemployment was accompanied by increased alcohol consumption and he received four driving under the influence in three or four months. [41] On cross examination, Dr. Benson stated that this information was derived [*61] from Dr. Pierce's notes. Mr. Moench then suggested that in fact Berryman only had two driving under the influence arrests, a year apart, and that witnesses who recounted a greater number of arrests either were mistaken or purposefully deceptive. Dr. Benson responded that exaggeration by Berryman of his drunk driving arrests would not alter his opinion because there were other sources for the fact that he drank excessively. That Berryman had a drinking problem was corroborated by many people, even though those reporting his drinking in August and September 1987 did not report that he was visibly intoxicated, had been picked up for drunk driving in Kern County, was falling down drunk, or vomited. Dr. Benson explained the concept of tolerance developed by alcoholics. He explained that for alcoholics to get the feeling they want, they drink more and more, and would not appear to be intoxicated, yet, would have alcohol blood levels much higher than individuals who were not tolerant. Being tolerant, however, would not mean that the alcoholic would know where he was or was coherent. Organic brain disease most commonly would develop in an individual who drank on a daily basis, like Berryman [*62] did.

39 There was no evidence presented regarding this injury. The Court has no way of discerning whether this injury was connected with the report of Berryman's social historian that Berryman's wife hit him in the forehead with a metal flashlight.

40 The content of those reports was not presented in evidence and is otherwise unknown.

41 The number of driving under the influence arrests during the months prior to the crime apparently was exaggerated, which Mr. Moench brought out on cross examination, rebuttal, and summation.

The clinical diagnosis for Berryman included learning disability and middle brain dysfunction. At this point in the proceedings, Mr. Moench interrupted Dr. Benson's testimony and requested a copy of the notes he was using in delivering his statements. Mr. Peterson then spoke up, as if he heard nothing of the proceedings: "I'm sorry, your Honor, I was engaged in some other activity here. You asked him about notes, you wanted to know if he can make copies of his notes, is that the question?" After that issue was resolved, the testimony continued. In reaching his clinical opinion, Dr. Benson considered Berryman's dependency, particularly on women, in wanting to be taken [*63] care of. He tended to get very close and obtain nurturing by being charming and somewhat immature. The clinical opinion also largely was based on Berryman's excessive and consistent drinking. Whereas in February of 1987, Berryman was doing well -- nice wife, new apartment, baby son, church activities and a job, when he lost his job, his alcohol consumption increased, he couldn't find another job, and he exhibited a real streak of aggression exemplified by his altercation of Mr. Perez, the confrontation with his father-in-law, and his anger at his mother because she would not

replace the tires on his pick up truck. [42] With all of this and the break up of his marriage, Berryman ran away to Delano rather than try to deal with his problems. His dependency needs, particularly with young women, increased in Delano, as did his alcohol consumption. In someone Berryman's age in September 1987 (21 years old), it was rare to see signs of chronic alcoholism which he displayed. Dr. Benson testified that one of the signs of chronic alcoholism Berryman displayed was the onset of blackouts with aggressive behavior during the blackouts, the nature of which behavior was reported to Berryman afterwards. [*64] [43] On cross examination, however, Dr. Benson conceded that no one Dr. Benson interviewed informed him that Berryman ever suffered a blackout, disorientation, or inability to identify people as a result of his drinking. Customarily, Berryman would start drinking first thing in the morning, usually malt liquor, and continue his drinking throughout the day. Berryman's father likely was an alcoholic, and alcoholism is subject to genetic predisposition.

42 No evidence was offered about Berryman's anger at his mother because she would not replace his tires. Although presumably Berryman's mother still was available to testify, she was not recalled. During deliberations, the jurors asked for a read back of Dr. Benson's testimony about the dispute between Berryman and his mother over his truck tires.

43 Although Berryman apparently told Dr. Benson about blackouts, there was no corroborating evidence presented supporting the notion that he suffered from blackouts, other than the attack on Ms. Hildreth. The attacks on Mr. Perez and Berryman's father-in-law were not described in this manner.

Independent of Dr. Pierce, Dr. Benson determined that further testing was necessary. He wanted to compare the [*65] results of an EEG, with an alcohol induced EEG to measure changes in brain waves consistent with a seizure. When inquiries were made at the local hospital, the defense team was turned down by the hospital administrators.

The first question asked of Dr. Benson on cross examination was his billing rate and how much he expected to bill the County. Dr. Benson responded that his billing rate was $ 250 per hour and he anticipated billing for 32 hours ($ 8,000). This amount included one full day for an intended visit with Berryman in the jail, which could not be accomplished because Dr. Benson, and Dr. Pierce, who had accompanied him, were denied entry.

On rebuttal and closing, Mr. Moench belittled the foundation for the expert testimony. Rather than three to four driving under the influence arrests in the few months before his move to Delano, Berryman suffered only two driving under the influence citations, a year apart, one in June 1986 and one in the spring of 1987. An attempt by Mr. Peterson to undermine the testimony about official reports of drunk driving arrests only served to confirm that the prosecution view was fully supported by current Department of Motor Vehicles records. Mr. Moench [*66] also called on rebuttal an officer assigned to court services in the transportation section to testify that if defense counsel had obtained an order from the court, court services would have transported Berryman to any medical facility listed on the order. On summation Mr. Moench argued that the reason the tests were not performed was that the defense experts failed to pursue that course diligently. Alternatively, he suggested that the defense purposefully did not make arrangements to have the neurological tests discussed conducted in order give the experts "something to talk about" during their testimony.

Other issues discussed during closing arguments focused on the circumstances of the crime (under *§ 190.3(a)*). Significantly, Mr. Moench characterized Berryman as having no remorse for his

cold blooded killing of Ms. Hildreth. He emphasized that after the crime, Berryman came back to the Clark residence and woke up the victim's cousin so he could get something to eat. Mr. Moench stated sarcastically that Berryman couldn't heat up his own food, but needed a woman to do it for him. Women were "supposed to take care of him, . . . to come running out of the house and jump in his car and [*67] go have intercourse with him any time he want[ed]." But, Mr. Moench continued, Berryman had to keep his women separate. He stated that Berryman eliminated Ms. Hildreth so he wouldn't be inconvenienced if she told her cousin, Ms. Armendariz what had happened. Another factor Mr. Moench emphasized in his argument that the killing was cold-blooded was the fact that after authorities identified Ms. Hildreth as the victim, Berryman tried to cause a diversion by getting a gun with the intent of shooting up the home of Lorene Louis, one his detractors. [44] Emphasizing Berryman's callousness, Mr. Moench reminded the jurors his view that Berryman stood on Ms. Hildreth's face for three to five minutes as she lay bleeding to death.

> 44 The evidence adduced at trial was that Berryman attempted to obtain a gun from another family friend, because he said he knew who had killed Ms. Hildreth, that is, someone from Los Angeles. He wasn't able to obtain the gun and he never indicated that he was going to shoot up anyone's house.

There were further misstatements when Mr. Moench characterized the testimony of the experts. Without objection, he stated that Dr. Pierce testified Berryman had "an [*68] amoral personality," when in fact, Dr. Pierce testified that Berryman exhibited a asocial and maladaptive behavior. Mr. Moench's interpretation of the experts' testimony was that Berryman would do anything he thought he could get away with.

Moving to the sentencing factor under *§ 190.3(d)*, Mr. Moench argued that the defense evidence did not establish that the offense was committed while Berryman was under the influence of extreme mental or emotion disturbance. He was neither psychotic nor neurotic at the time of the commission of the crime. Rather, he had a personality disorder, which was no more serious than overeating or overusing caffeine. Emphasizing the expert diagnosis that Berryman's personality had dependent and narcissistic features, Mr. Moench argued that Berryman was a "spoiled brat" who was in love with himself and required everyone else to be too.

As relevant to Berryman's mental state, Mr. Moench minimized the significance of the moving around he experienced as a child. Mr. Moench also emphasized that even if the experts' opinions were accepted, Berryman still had the capacity for violence and he knew the difference between right and wrong. He further suggested that Berryman's [*69] extreme headaches were nothing more than hangovers (ignoring the testimony that Berryman was afflicted with headaches *while* he was intoxicated). He also argued that the psychological test results were invalid because Berryman purposefully performed poorly on them. He argued that the experts stated that Berryman's mental disorder would have impeded his ability to play basketball or baseball, and since Berryman played all the time, he couldn't have any organic brain disorder. [45] With respect to the "soft signs" of organic brain disorder, Mr. Moench argued they must be discounted because they were based on what Berryman told the experts. He criticized the experts' collective assessment that Berryman's crime was atypical for his behavior pattern on the grounds that it involved circular reasoning, that is, Mr. Moench characterized their testimony that Berryman didn't commit the crime because he's not the type of person who would commit the crime. [46] In addition to criticizing the experts for basing their opinion about Berryman's compromised mental state at the time of the crime on four drunk driving arrests, Mr. Moench further argued there was no indication Berryman was drunk or out of [*70] control the night of the murder. Rather, Mr. Moench asserted, Berryman acted

deliberately. In the same vein, Mr. Moench argued Dr. Benson's assessment that Berryman was an alcoholic lacked foundation. The basis of the assessment was that Berryman's father was an alcoholic, which was neither established by evidence nor necessarily relevant to Berryman's condition. In a personal attack on Dr. Benson, Mr. Moench argued to the jury that he muttered through is testimony as if they (the jurors) were idiots and treating him (Mr. Moench) as if he were asleep. [47]

45 Neither Dr. Pierce nor Dr. Benson stated that Berryman's mental disorder would interfere with his playing sports. No objection was interposed.
46 The argument did not well represent the experts' collective opinion, as neither said Berryman *didn't* commit the crime. The argument drew no objection.
47 Although the argument did not draw an objection, Mr. Peterson did comment on his own summation that Mr. Moench's personal attack on the experts was unprofessional and unwarranted.

Regarding the alcohol EEG discussed by the experts, Mr. Moench argued that even if it had been performed, the results wouldn't have altered the aggravating nature [*71] of Berryman's conduct. Mr. Moench then, incorrectly reviewed the experts' testimony that if Berryman were experiencing a seizure he could not commit rape *and murder.* [48] Under Mr. Moench's theory of the facts, Berryman became angry at Ms. Hildreth because she refused to have sexual intercourse with him and threatened to tell her cousin, Ms. Armendariz, about Berryman's advances. Even if this made Berryman angry, he killed Ms. Hildreth in cold blood, not in a rage. Moreover, there was no remorse. The next day, Berryman expressed no sorrow and carried on as usual.

48 In fact what Dr. Benson said was that during a seizure Berryman could not commit *rape.* Committing a homicide during a seizure would be possible, and in fact was offered by Berryman's trial attorneys as the defense.

Mr. Moench argued other statutory sentencing factors were not applicable to Berryman. Ms. Hildreth was not a participant in Berryman's homicidal act under *§ 190.3(e)* (whether the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act). To illustrate the point, he argued that Ms. Hildreth was not playing Russian roulette with Berryman; nor were they both involved in committing [*72] a robbery. Berryman did not have a reasonable belief that his crime was justified under *§ 190.3(f)* (whether the defendant reasonably believed the offense was committed under circumstances that were a moral justification or extenuation of his conduct). Mr. Moench added that although Berryman may have thought that the crime was acceptable, since Ms. Hildreth wasn't willing to play by his rules, his belief wasn't reasonable. Nor was Berryman acting under extreme duress or under the substantial domination of another pursuant to *§ 190.3(g)*. It was a single offender crime. Next, he argued, Berryman wasn't incapable of being able to appreciate the criminality of his conduct or conform his conduct to the requirements of the law due to mental impairment, disease, or defect, including intoxication under *§ 190.3(h)*. Mr. Moench emphasized there was no evidence of any sort of psychotic break. Similarly, Berryman's age at the time of the crime, that is, three months shy of his twenty-second birthday, was not mitigating under *§ 190.3(i)*. Berryman had long been out of school; he was a grown man, yet still continued his "hustle." The sentencing factor under *§ 190.3(j)* was irrelevant because Berryman [*73] was the principal of the crime, not an accomplice. Finally, *§ 190.3(k)*, the catchall factor, didn't apply. With respect to sympathetic evidence, Mr. Moench described the defense witnesses as susceptible to Berryman's "con" over the years. The testimony of the female witnesses, in

particular, was not reliable because they all said that Berryman couldn't have or wouldn't have committed the crime of which he already had been convicted. The testimony of Berryman's older brother that Berryman was a "Casanova" was emphasized as a factor in aggravation.

The defense summation was comprised of an amalgam of theories. Mr. Peterson began by complimenting the trial judge and jurors for their intellect, while criticizing Mr. Moench's personal attacks on the experts. Later in his summation, however, Mr. Peterson criticized the jurors as well for their guilt phase verdict, which they reached after really only 15 minutes of deliberation. [49]

> 49 Mr. Peterson recounted that after instructions and closing arguments in the guilt phase proceedings, the jurors were entrusted to the care of the bailiff at 12:35 p.m., whereupon they went to lunch. Upon completion of lunch until 1:45 p.m. they determined they [*74] needed a tape recorder and requested one. A tape player was provided at 2:15 p.m. and the jurors listened to the 45 minute tape until 3 p.m. and then at 3:15 p.m. notified the court they had a verdict. There is no indication in the record, however, as to how long the jurors were at lunch, nor that they abstained from deliberation from 1:45 p.m. to 2:15 p.m., nor that they listened to the entire 45 minute tape without deliberating. Moreover, according to the Clerk's Transcript, the jurors did not advise the court they had a verdict on Count 1 (the murder) until 3:50 p.m. (Rather than 3:15 p.m.) and on Count 2 (the rape) until 4:12 p.m. The verdict was read in court at 4:50 p.m.

Turning to the sentencing factors, Mr. Peterson argued that Berryman's lack of capacity to appreciate the criminality of his conduct under *§ 190.3(h)* due to intoxication, should not be discounted merely because he had developed a tolerance to alcohol and did not appear intoxicated. He reviewed the testimony that Berryman consumed alcohol for the better part of the day, beginning in the morning, then, when he went out with Melinda Pena and another when he was with Ms. Hildreth. The alcohol he consumed was from [*75] 40 ounce containers of ale. Mr. Peterson emphasized that despite Mr. Moench's belittling of the experts, no prosecution evidence was presented to contradict the conclusions of the defense experts.

Under the catchall factor, *§ 190.3(k)*, Mr. Peterson argued that Berryman didn't just "use" women, he also had time for "the old and disfigured." Separately, he argued that life was sacred. A death sentence would only be appropriate for someone who was a brutal and savage murder, not a human being. Even Mr. Moench didn't argue that. Mr. Peterson discussed two purposes of the death penalty, retribution and deterrence. Retributive punishment was the infliction of that amount of pain, suffering, and deprivation which was justified by the nature of the offense. A condemned inmate suffers more than merely death. He also suffers psychological torture. If the jurors were to sentence Berryman to death, Mr. Peterson invited them to come to the execution. Given the excruciating pain of death in the gas chamber, Mr. Peterson argued it wasn't certain that the death penalty was the necessary or appropriate punishment in Berryman's case. He stressed that a verdict for life in prison without the possibility [*76] of parole would condemn Berryman to die in prison and that life in prison was a harsh sentence appropriate for first degree murder. He would never again see the sun rise or set; it would be severe, and he would not receive parole under a life without parole sentence. The possibility of commutation of his sentence by the governor was extremely remote. He implored the jurors not to be too harsh on a man who had sinned, unless they could be certain they had not also sinned.

Under the circumstances of the crime factor, *§ 190.3(a)*, he argued that even if Berryman forcefully pulled Ms. Hildreth from his pick up truck, she entered it voluntarily. He also argued that

no evidence ever was introduced to tie the murder weapon to Berryman. He suggested that Ms. Hildreth herself brought the knife and perhaps threatened to use it on Berryman unless he discontinued his relationship with her cousin, Ms. Armendariz. Berryman's response could have been to go into a seizure.

Addressing the prior acts of violent conduct, under *§ 190.3(b)*, Mr. Peterson stressed that in the altercation between Berryman and Mr. Perez, Mr. Perez was an active participant in the injury he sustained.

On rebuttal, Mr. Moench recoiled [*77] in his argument about how reprehensible it was for Mr. Peterson to have criticized the jurors for deliberating for too brief a period on the guilt phase issues. He suggested that his own feeling of indignation would be shared by the jurors. He cautioned the jurors not to engage in mechanical counting of aggravating versus mitigating factors and told them they were free to assign whatever moral or sympathetic value they deemed appropriate to each of the various sentencing factors. The jurors also were at liberty to determine whether evidence presented constituted mitigating or aggravating circumstances. Mr. Moench launched into a criticism of the former inmate defense witness (who discussed execution procedures). He complained that this witness was brought in to improperly influence the jurors, because none of the evidence he presented fit into any of the sentencing categories. Mr. Moench conceded that the catchall factor (*§ 190.3(k)*) might apply but argued the evidence was wholly unrelated to the issue of extenuation. He insisted that the manner in which the execution is carried out should not be part of the jury's consideration.

On sur-rebuttal, Mr. Peterson resorted to calling Mr. [*78] Moench and his arguments insipid, repeatedly. He stood by his earlier criticism of the jurors for taking only 15 minutes (even though it actually was longer) to reach a verdict on the guilt phase issues. He stated it was his job to question the jury's verdict.

After reading the closing instructions, the jurors retired to deliberate at 3:47 p.m. At 4:48 p.m., the jurors requested a read back of Carol Berryman's testimony. After listening to her testimony on direct examination, the jurors went home for the evening. The jury resumed deliberations the following morning at 9:00 a.m. without the necessity of the court reconvening. At 12:05, the foreman requested a read back of portions Dr. Pierce's testimony, in particular, the paragraphs before and after the statement that the way the victim's body was left was not consistent with Berryman's behavior. The jury also wanted a read back of Dr. Benson's testimony about Berryman getting angry with his mother because she wouldn't buy him new tires for his truck and about Berryman's increasing aggressive acts. Mr. Peterson objected to the selective reading back of expert testimony, asking that if part of the testimony was read back, then all of [*79] it should be read back. The objection was overruled. At 1:56 p.m., portions of the defense expert testimony was read back to the jurors and deliberations recommenced on 2:08 p.m. The court received a note from the jury foreman showing the time to be 2:50 p.m. indicating that the jury had reached a verdict. The jury was called in and the verdict imposing the death penalty was read at 3:28 p.m.

C. Post-Verdict, Sentencing Proceedings.

During pre-trial and trial proceedings, Berryman insisted that he had nothing to do with Ms. Hildreth's death. He stated that he wasn't on Cecil Avenue the night of the crime, but rather was with Ms. Pena for the evening, remaining with her until he returned to the Clark home. He reiterated his denial to the probation officer who prepared the pre-sentence report (dated November 28, 1988), attributing the verdict against him to poor legal representation.

IV. Standards of Review.

This action is subject to the review provisions of the Anti-terrorism and Effective Death Penalty Act of April 24, 1996 ("AEDPA"), codified in amended *28 U.S.C. § 2254*. Berryman did not file his initial petition until November 4, 1996, over six months after the effective date of AEDPA. [*80] [50] Under controlling United States Supreme Court precedent, it is the filing of "an application for habeas relief seeking an adjudication on the merits of petitioner's claims" that triggers applicability of AEDPA. *Woodford v. Garceau, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)*. Cases with petitions on file prior to April 24, 1996 are not subject to AEDPA. Cases with petitions filed subsequent to that date are. Under AEDPA, three standards apply to the present proceedings. The first involves a determination of when habeas corpus relief may be granted in the face of a state court denial of those same claims on appeal and post-conviction proceedings. The second standard establishes when state court findings of fact are presumed correct. The third is the standard for granting an evidentiary hearing.

> 50 Berryman's operative pleading his is First Amended Petition, filed on November 6, 1998, as noted in the Procedural History, Part II., *supra.*

A. Applicable Standard for Reviewing State Court Denials Involving the Application of Federal Law.

Under AEDPA, a federal court is without authority to grant a writ of habeas corpus "with respect to any claim that was adjudicated on the [*81] merits in State court proceedings unless the adjudication of the claim [ ] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1)*. The United States Supreme Court has construed *subsection (d)(1) of § 2254* in *(Terry) Williams v. Taylor, 529 U.S. 362, 413-14, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

The Supreme Court has further explained that "A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the [*82] governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone, 530 U.S. 156, 165-66, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000)*. In sum, to grant a writ of habeas corpus under *§ 2254(d)(1)*, a federal court must find that the state court decision to the contrary was objectively unreasonable. *Bell v. Cone, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*. With specific reference to a state court's harmless error review, federal courts must practice deference unless the holding was in conflict with Supreme Court precedent, or the state court "applied harmless-error review in an objectively unreasonable manner."

Mitchell v. Esparza, 540 U.S. 12, 18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003). If a state court harmless-error holding is found to be contrary to Supreme Court precedent or objectively unreasonable, "then no deference is owed." *Inthavong v. LaMarque, 420 F.3d 1055,1059 (9th Cir. 2005)*. In that event, federal courts "revert to the independent harmless error analysis" they "would apply had there been no state court holding." *Id.* That harmless error analysis requires resort to the standard described in *Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*, [*83] namely that an error is not harmless if it has a "substantial an injurious effect or influence in determining the jury's verdict." *Id. at 637*. The federal habeas review process requires a two-step analysis:

> To grant relief where a state court has determined that a constitutional error was harmless, we must both determine (1) that the state court's decision was "contrary to" or an "unreasonable application" of Supreme Court harmless error precedent, and (2) that the petitioner suffered prejudice under *Brecht* from the constitutional error.

Inthavong, 420 F.3d at 1059.

Making the initial "contrary to" or "unreasonable application" determinations, however, are somewhat hampered where the state court merits decision is unaccompanied by any *ratio decidendi,* as is the case at bar. *See Greene v. Lambert, 288 F.3d 1081, 1088-89 (9th Cir. 2002)*; *Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000)*. "When a state court does not furnish a basis for its reasoning, [a reviewing court has] no basis other than the record for knowing whether the state court correctly identified the governing legal principle into a new context." *Delgado, 223 F. 3d at 981-82*. The solution devised by the Ninth Circuit for [*84] this dilemma is for federal reviewing courts to undertake "independent review" of the record. *Id.; accord Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001)*. The Ninth Circuit has cautioned, however, that federal habeas review in these circumstances is not de novo. *Delgado, 223 F.3d at 982*. Although a federal court is to undertake independent review of the record in the absence of a reasoned state court decision, the federal court must "still defer to the state court's ultimate decision." *Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2003)*. Since the state court decision cannot furnish any analytical foundation, the focus of this review is on Supreme Court cases for purposes of determining "whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *See Greene v. Lambert, 288 F.3d 1081, 1089 (2001)*. Federal district courts within the Ninth Circuit also look to Ninth Circuit law for persuasive authority in applying Supreme Court law and in determining whether a particular state court decision is an "unreasonable application" of Supreme Court precedent. *Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)*.

B. Standard [*85] **for Determining Presumption of Correctness of State Court Rulings on Factual Issues.**

A corollary to the standard for evaluating whether the state court application of federal law is unreasonable is the standard for determining the presumption of correctness of state court rulings. This standard addresses the finding of facts by state court tribunals. Under *subsection (d)(2) of § 2254*, an application for a writ of habeas corpus cannot be granted on factual grounds unless the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Subsection (e)(1) of § 2254* further clarifies that a state court determination of a factual issue is "presumed to be correct," with the applicant bearing "the burden of rebutting the presumption of correctness by clear and

convincing evidence." In a situation where the state court post-conviction denial does not supply a reasoned analysis for the decision, and no evidentiary development was permitted in advance of that denial, the Ninth Circuit indicates that the AEDPA standard of review is inapplicable. *See Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002)*.

> For [*86] claims for which no adjudication on the merits in state court was possible, however, AEDPA's standard of review does not apply. Hence AEDPA deference does not apply to Killian's perjury claim in this case because the state courts could not have made a *proper* determination on the merits. Evidence of the perjury, after all, was adduced only at the hearing before the [federal] magistrate judge. Having refused Killian an evidentiary hearing on that matter, the state cannot argue now that the normal AEDPA deference is owed the factual determination of the California courts. *See Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir. 1999)* (less deference accorded where the state court fails to make finding of fact); *cf Michael Williams v. Taylor, 529 U.S. 420, 444, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)* (state court denial of evidentiary hearing establishes cognizable cause for procedural default in not presenting claims to state court).

Id. at 1207-08 (emphasis added).

In light of this precedent, the Court will apply the presumption of correctness under *subsection (e)(1) of § 2254*, only as to state court factual decisions rendered after receiving and evaluating relevant evidence. Otherwise, the [*87] Court will, as instructed by the Ninth Circuit in *Delgado* and its progeny, undertake an independent review of the record to determine whether the state court conclusions that bear on factual issues were reasonable under *§ 2254(d)(2)*.

C. Applicable Standard for Granting an Evidentiary Hearing.

The standard for granting an evidentiary hearing requires Berryman to make a preliminary showing he is entitled to relief if the facts alleged can be proved.

> A habeas petitioner is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) the petitioner's allegations would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.

Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997) (citing *Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992))*; *see Rich v. Calderon, 187 F.3d 1064, 1067-68 (9th Cir. 1999)*; *Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999)*; *Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir. 1998)*. *See also Townsend v. Sain, 372 U.S. 293, 312, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)*, *overruled in part, Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)*. [*88] The first prong commonly is referred to as the requirement of asserting a "colorable claim." *Siripongs v. Calderon, 35 F.3d 1308, 1310 (9th Cir. 1994)*. The six factors identified in *Townsend v. Sain* inform the judicial evaluation of the second prong of this test. When any one or more of these factors is present, the state court trier of fact has not reliably found the relevant facts:

1. the merits of the factual dispute were not resolved in the state hearing;

2. the state factual determination is not fairly supported by the record as a whole;

3. the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;

4. there is a substantial allegation of newly discovered evidence;

5. the material facts were not adequately developed at the state court hearing; [51]

6. for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

372 U.S. at 313. In addition to being entitled to an evidentiary hearing as of right when the petitioner presents a cognizable claim and the state court has not reliably found the relevant facts, a federal court retains discretionary authority to conduct an evidentiary hearing. *Id. 318*; [*89] *Seidle v. Merkle, 146 F.3d 750, 753 (9th Cir. 1998)*.

51 In *Tamayo-Reyes,* the Court modified *Townsend* by adopting a stricter standard for granting an evidentiary hearing under the fifth enumerated factor. Before *Tamayo-Reyes,* so long as the petitioner did not deliberately bypass the opportunity to develop facts at the state level, an evidentiary hearing on federal habeas still was available. *See Fay v. Noia, 372 U.S. 391, 438, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963)*. Under the standard stated in *Tamayo-Reyes,* a habeas petitioner must demonstrate cause for failure to develop facts in the state court proceedings and actual prejudice resulting therefrom, consistent with the reasoning in procedural default cases. *504 U.S. at 8, 11*. In the absence of cause and prejudice, the habeas petitioner must demonstrate a fundamental miscarriage of justice, also consistent with the analysis of procedural default cases. *Id. at 12*. AEDPA further modified the fifth *Townsend* factor, as fully explained in the ensuing text, *infra.*

As relevant to the present proceedings, the impediment Berryman faces is meeting the "colorable claim" requirement. A "colorable claim," for purposes of determining entitlement to an [*90] evidentiary hearing, is a claim which would entitle the petitioner to relief if the facts alleged were proved. It is indistinguishable from a prima facie case under California law. [52] More than just the allegations in the petition, however, must be considered when determining the existence of a colorable or prima facie claim for federal habeas purposes. The Court will look to the entire record, including the evidence adduced at trial and the numerous offers of proof developed post-conviction, to assess whether any of Berryman's claims are "colorable." In the recent Ninth Circuit case, *Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005)*, the court refers to the "colorable claim" standard as having a "low bar." *Id. at 1170*. In the context of the opinion, however, this description refers not to persuasiveness of the evidence, but to the form of the evidence. Thus, the "low bar" language does not signify that the offers of proof need not be persuasive of a petitioner's entitlement to relief.

52 In California, where summary denials by the California Supreme Court are routine on habeas corpus cases, the state court action signals its finding that all of the claims in the petition failed to state [*91] a prima facie case. *See In re Robbins, 18 Cal. 4th 770, 814, n. 34, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998)*; *People v. Duvall, 9 Cal. 4th 464, 474-75, 37 Cal. Rptr. 2d 259, 886 P.2d 1252 (1995)*; *In re Clark, 5 Cal. 4th 750, 769, n. 9, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993)*.

In that case, the petitioner, Earp, presented significant declaration testimony in support of his claim that the trial prosecutor committed prejudicial misconduct. Specifically, Earp's trial defense team had located a witness who would have cast great doubt on the veracity of the chief prosecution witness, including pointing the finger at that prosecution witness as the perpetrator of the crime for which Earp was convicted (the rape and murder of a toddler). The proffered declaration testimony not only deflected blame from Earp, but also described how the witness was strong-armed by the prosecution and law enforcement to recant his own story to defense investigators. The Ninth Circuit found the evidence submitted was substantial enough to have warranted an evidentiary hearing in state court, and definitely should have resulted in an evidentiary hearing before the district court. *Id. at 1169*. The district court, [*92] however, denied Earp an evidentiary hearing on the grounds that statements of the defense witnesses were "inherently untrustworthy and not worthy of belief." *Id.* (internal quotes omitted). This was error. The appellate court held, in circumstances where declarations are submitted as offers of proof for an evidentiary hearing, the veracity of the declarants cannot be determined without conducting a hearing where witness credibility and demeanor can be assessed by the judge. *Id. at 1170*.

In specifically mentioned the colorable claim requirement, the court noted that Earp had only to raise allegations that would support his prosecutorial misconduct claim; he did not actually have to prove the prosecution committed misconduct. *Id.* (citing *Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001)*. Although the credibility and colorable claim issues are discussed separately, they are components of a single concept. Earp presented allegations, which if established, would warrant relief under the theory of prosecutorial misconduct. The allegations were comprised in part of the proffered declarations. The key to establishing entitlement to an evidentiary hearing is whether the allegations point [*93] to grounds for relief. The form of the allegations is less crucial than the substance, although, the form of the allegations isn't completely discounted. As noted above, the allegations and proffered evidence also must be evaluated against the evidence in the record and against counter evidence proffered by the Warden.

V. Berryman's Assertion He Was Denied Constitutionally Effective Counsel on Account of the State Courts' Treatment of his *Marsden* Motions (Claims 1, 2, and 3).

Three claims fall within Berryman's assertion he was deprived his constitutional rights on account of the state courts' treatment of his motions under *People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970)*. In Claim 1, Berryman challenges the trial court's denial of his motions, thus leaving him with counsel who did not adequately advocate and protect his interests. Claim 2 alleges a conflict of interest by counsel because Berryman was represented at the *Marsden* hearings by Mr. Soria, the very attorney he wanted replaced. Claim 3, which is closely related to Claim 2, alleges trial error for the trial court's failure to appoint independent counsel sua sponte at the *Marsden* hearings. Berryman requests [*94] an evidentiary hearing with respect to Claim 2.

A. Statement of the Facts Relevant to the *Marsden* Claims.

Berryman made his initial *Marsden* motion orally, on December 15, 1987, at the culmination of the hearing on a prosecution motion to obtain from him, blood, hair, and saliva samples. The judge presiding set a hearing on Berryman's *Marsden* motion for the following Thursday, December 17, 1987, before another judge, who it turns out was the eventual trial judge. At the hearing, Berryman complained that Mr. Soria failed to call a witness at the preliminary examination hearing he (Berryman) had requested, that Mr. Soria told other jail inmates he (Mr. Soria) believed Berryman was guilty, and that Mr. Soria was in complicity with the prosecutor, Lisa Green, [53] to obtain his

conviction. In response, Mr. Soria denied telling other inmate clients he thought Berryman was guilty, although he did inquire of them about how they perceived Berryman was adjusting to the jail. In addition, Mr. Soria reported that his relationship with Berryman had been poor all along because Berryman wanted a Los Angeles attorney to represent him, but the family could not afford one. The trial court denied the *Marsden* [*95] motion, finding no incompetence for counsel's failure to present defense witnesses at the preliminary examination hearing, that jailhouse gossip was rarely beneficial, and that the court was certain no conspiracy existed between Mr. Soria and Ms. Green. In fact, the judge explained in detail how Mr. Soria had presented a forceful discovery motion which at first was vigorously resisted, only to have the prosecutor ultimately accede. 1MRT: 2-10.

> 53 Ms. Green originally was assigned to prosecute Berryman's case in September 1987. Sometime after June 1988, Mr. Moench was assigned to take Ms. Green's place because she took maternity leave.

The second *Marsden* motion hearing was conducted over two days, May 5 and 9, 1988, before a different judge, and based on a memorandum of points and authorities dated May 3, 1988 filed by Mr. Soria and supported by a declaration over his signature. [54] In pertinent part, the motion recites: Berryman "does not feel that court appointed counsel can effectively represent him and that there is a conflict between him and this counsel that will not allow counsel to competently represent him effectively." Mr. Soria's supporting declaration relates that Berryman wished [*96] to address the court about the basis for his dissatisfaction with counsel. During the first day of the hearing, on Thursday, May 5, 1988, the major conflict aired at this proceeding had to do with trial strategy and forensic testing of body fluid specimens. Messrs. Soria and Peterson had apparently settled on trial strategy that although Berryman may have been responsible for the homicide of Ms. Hildreth, the charged sexual contact was consensual, and thus, there was no rape to make Berryman death eligible. Berryman, on the other hand, wanted to proceed with a total denial defense, that he had not even been present at the crime scene, even in the face of substantial circumstantial evidence developed by the prosecution to the contrary. [55] While Mr. Soria was explaining this position, Berryman interrupted the presentation and exclaimed, "Because I wasn't out there."

> 54 By This time, second counsel, George Peterson, had been appointed -- on April 6, 1988.
> 55 Specifically, Mr. Soria mentioned tire tracks, a portion of a gold chain necklace, and shoe prints connecting Berryman to the scene of the crime. Mr. Soria also informed the trial judge that a prosecution witness was prepared to testify [*97] she believed she saw Berryman's truck near the location where Ms. Hildreth was killed. All of this evidence, in fact, was presented at trial.

The confusing part of the hearing presentation came when Mr. Soria was describing problems the defense team had encountered with DNA testing of samples taken from the victim's vaginal swab specimen in comparison with blood and saliva specimens eventually obtained from Berryman. Mr. Soria started out by saying that specimens from the victim had been sent to a laboratory in New Jersey, but that the laboratory had misplaced the specimens. (In fact, as the record reveals, the laboratory was in Valhalla, New York, and went by the name of Life Codes.) Because of the reported loss of the specimens, Mr. Soria directed his investigator to fly out to New Jersey (New York) to retrieve the specimens. Unfortunately, Mr. Soria continued, the investigator missed his connection in Santa Barbara or Los Angeles, but in the meantime, the laboratory employee called

back to say that the specimens had been located. Following this discovery, Mr. Soria directed that the specimens be mailed to another laboratory in Southern California.

The veracity of this scenario was [*98] undermined when Berryman was allowed to speak and he produced a letter he received from an employee at Life Codes Laboratory saying that the laboratory never lost the specimens -- rather the specimens were sent without any written instructions as to what tests to perform. Mr. Soria than had to back pedal and point out that the letter Berryman received was explainable by the fact that all communications between counsel and the laboratory had been verbal. The defense team didn't want testing on the specimens to take place (again, these are body fluid specimens from Berryman and the vaginal swab specimen from the victim) until after the prosecution laboratory in Oakland, California completed its testing. Once that testing was done, then the defense team wanted to conduct its own testing. According to Mr. Soria, when he received notice that the prosecution laboratory completed its testing, and in fact could not identify Berryman as the source of the semen found on the victim's vaginal swab specimen, he then called the New Jersey (New York) laboratory and learned the specimens were missing (a fact Berryman vigorously disputed at the hearing).

A second specimen also was discussed at the hearing, [*99] separate and apart from the semen taken from the victim's vaginal swab specimen, and that was blood found on the shoe lace of one of Berryman's Brooks athletic shoes as well as blood on the canvas of one of his shoes (hereafter the "blood-stain evidence"). Mr. Soria described this as the most damaging evidence because the prosecution laboratory detected a genetic marker unique to the victim and that is what he understood the prosecution intended to rely upon to place Berryman at the scene of the crime. [56] He stated that no testing of the blood-stain evidence had yet been conducted by the defense. [57]

> 56 As the recitation of the facts discloses, there were numerous circumstantial indicators in evidence placing Berryman at the scene of the crime, which Mr. Soria mentioned when explaining the divergent strategies Berryman and his attorneys wanted to follow.
> 57 As set forth in the factual summary, the prosecution serologist who analyzed the blood-stain evidence testified at trial that there wasn't a sufficient quantity to turn over any blood-stain evidence to the defense after the prosecution tested it. However, Mr. Soria's statement that no defense testing had been conducted yet implies that [*100] the defense team planned to do so. If the serologist trial testimony was accurate, there was nothing for the defense to test, contrary to Mr. Soria's suggestion. This conflict is not explained or addressed by the parties.

The other matter that was particularly irksome to Berryman was Mr. Soria's failure to obtain Berryman's personal belongings from his Mitsubishi pick up truck before the truck was released to the finance company (on a writ of possession). Berryman reported that Mr. Soria told him he (Mr. Soria) didn't have to get his "junk." At the hearing Berryman also reiterated his suspicion that Mr. Soria and the prosecutor (Ms. Green) "got something going on and [he] would like both of them dismissed from [his] case."

The court was concerned that without laboratory test results on the specimens, it was really too early to determine a trial strategy. There was considerable discussion about testing the specimens mailed back from the New Jersey (New York) laboratory -- but from the context of the discussion, it also is clear that the court had in mind the blood-stain evidence with the clear genetic markers rather than the semen on the victim's vaginal swab specimen. Since Mr. Soria [*101] had represented the prosecution laboratory could not identify Berryman as the source of the seminal

fluid on the victim's vaginal swab, the trial court ascribed greater significance to the genetic marker said to have been detected by the prosecution in the blood-stain evidence. The court also subtly reprimanded Mr. Soria and his investigator for not recovering Berryman's personal belongings from the pick up truck. The trial court directed counsel to find out about the status of the testing and to retrieve Berryman's personal belongings prior to the continuation of the hearing on Monday, May 9, 1988. Supp.MRT:3-21.

At the reconvened hearing, much of the proceeding was taken up with discussing Berryman's back injury, his need for a wheelchair in order to be ambulatory, and the fact that Mr. Soria was unable to visit him in jail since the last hearing on account of his non-ambulatory status. With respect to Berryman's personal belongings left in his truck, Mr. Soria stated that his investigator attempted to contact both the prosecution criminalist, Mr. Laskowski, who would not turn anything over, and an employee of the finance company, with whom there was no meaningful discussion. The [*102] status of the laboratory testing was simply that the vaginal swab and Berryman's bodily fluid specimens originally in the possession of the New Jersey (New York) laboratory were transferred to a laboratory in Southern California, but due to a backlog there, in turn were transferred to another laboratory run by a criminalist who ultimately testified for the defense. At the time of this hearing, the defense criminalist had not yet performed any tests on the specimens. The criminalist recommended a DNA expert in northern California to conduct further more complicated DNA testing -- possibly to eliminate Berryman as the source of the semen found in the vaginal swab specimen. Mr. Soria posited that the same DNA testing might be performed on the blood-stain evidence, but that the specimen was still with the prosecution forensic people and a court order was needed to transfer it to the defense team. [58] The court, mainly focusing on the blood-stain evidence, indicated that until the test results were complete, trial strategy determinations were premature. In ruling on the *Marsden* motion, the court found that Mr. Soria was not a fault for the mix-up with Life Codes Laboratory. The court further [*103] found Mr. Soria and Mr. Peterson competent in their representation and that the major source of Berryman's dissatisfaction had to do with the failure of his attorneys to recover his personal belongings from the truck. Those items, however, were not considered to have any evidentiary value. [59] Since Mr. Soria represented that the defense team would be recovering those belongings, the motion to remove counsel was denied. 2MRT: 3-15.

> 58 In light of the testimony of the prosecution serologist mentioned in the preceding footnote, 57, *supra,* Mr. Soria's suggestion that further defense testing would be considered for the blood-stain evidence appears to based on misinformation or misrepresentation. Again, neither party addresses this discrepancy in Mr. Soria's representations.
> 59 As is set out below in the summary of Berryman's contentions, he argues two bibles found in the truck did have evidentiary value.

One of two declarations over the signature of investigator Bruce Binns which Mr. Soria submitted to the court on May 9, 1988 [60] specifically addresses efforts of the defense team to recover Berryman's personal belongings from his repossessed Mitsubishi pick up truck. Those efforts were undertaken [*104] by an employee, Doug Lemmons, of the defense investigator Bruce Binns. About a month after Berryman's truck was released to the finance company (following a hearing on a writ of possession conducted on March 3, 1988), Mr. Lemmons attempted to track down the now-repossessed pick up truck to ascertain the location of the personality. He received a run-around from the dealer in possession. Mr. Lemmons also attempted to find out if anyone from the state might have removed personalty from the truck before Mitsubishi took possession of it. The person

in charge was the prosecution criminalist Mr. Laskowski. Mr. Lemmons left a message for Mr. Laskowski on April 12, 1988 and followed up on May 5, 1988. Mr. Laskowski said he had no personalty from the truck. Also, on May 5, 1988, Mr. Lemmons followed up with the dealer, who said he would call back after checking. The dealer, however, did not return Mr. Lemmons' call. Earlier, on March 17, 1988, Mr. Lemmons had contacted Deputy District Attorney Lisa Green. At that time, Ms. Green, Mr. Laskowski, and District Attorney Investigator Mike Mara all reported that they had no authority to release personalty from the truck. On March 21, 1988, Mr. Lemmons [*105] reported his findings to Mr. Soria and Mr. Soria told Mr. Lemmons not to spend any more time on the matter. Finally, on May 6, 1988 Mr. Lemmons received a call from the dealer who gave him the telephone number of the actual recovery company. The recovery company insisted on having a notarized authorization signed by the Berryman or a court order before property would be released. [61] The recovery company, however, refused to provide an address, although there was an appointment for May 10, 1988 to return property. It is unknown whether the personalty in the pick up truck ever was recovered. Presumably it was not, in as much as other evidence in the record indicates that the personalty of greatest significance, two bibles, was noted by investigating detective Mike Lage, but never introduced into evidence. [62] DEC-B1.

60 Both of Mr. Binns' declarations were made part of the state record on a motion by the State of California before the California Supreme Court during record certification. They are lodged by the Warden in the state record as DEC-B1 and DEC-B2.

61 In fact, the judge had issued such an order on May 6, 1988.

62 Although Detective Lage was called on to testify in the guilt phase [*106] defense case, he was not asked about the bibles (or any other personalty found in the truck).

The other declaration, executed by Bruce Binns, provides an explanation about efforts Mr. Binns personally made to track the bodily fluid and hair specimens taken from Berryman and the vaginal swab specimen taken from the victim from Life Codes in New York. His account is consistent with both Mr. Soria's representations about Life Codes having misplaced the specimens and the letter Berryman presented to the effect that no written request for specific testing had been transmitted. Specifically, Mr. Binns states that he was in telephone contact with the manager of Life Codes and when the specimens were first transmitted, the manager was asked to store the specimens in the freezer. One week later, however, on March 7, 1988, Mr. Binns contacted the manager and "gave permission to run DNA prints" on the specimens. In April, Mr. Binns' assistant, Mr. Lemmons, was instructed to call Life Codes to ascertain the results of the testing, and it was at that time that Mr. Lemmons was told the specimens could not be located. When the director (as opposed to the manager) of Life Codes informed Mr. Lemmons [*107] there was no log of receipt of the specimens, Mr. Binns made plans to go to New York to straighten out the matter in person. The rest of his declaratory explanation is consistent with Mr. Soria's representations to the trial court. DEC-B2.

As relevant to forensic testing, a third in camera hearing, conducted during the actual trial proceedings, on October 4, 1988, revealed that Mr. Soria still intended to conduct further tests on the blood-stain evidence (from Berryman's shoe). In spite of the prosecution serologist testimony to the contrary, Mr. Soria told the trial court that the blood-stain evidence had been delivered to a DNA specialist to determine, conclusively, whether the blood-stain evidence could be connected to the victim. Mr. Soria continued that the testing was not, at that time, complete. He represented to the court that the defense would call the DNA specialist to testify if the test results showed that the blood was not the victim's, but would not if he confirmed it was hers or if the results were

inconclusive. In fact, the specialist was not called to testify, leading to the understanding that either the blood-stain evidence could not be ruled out as belonging to the [*108] victim, or more likely, no testing *could* be conducted because all of sample had been used up during testing by the prosecution serologist. [63]

63 No documentation for work conducted by this DNA specialist is referenced by either party, and the Court observed none in its review of the record.

In addition to the two actual *Marsden* hearings, Berryman has complained about the representation he received from his lawyers on three more occasions prior to his sentencing. First, members of his family, on his behalf, complained bitterly to the court that Berryman's lawyers were incompetent and inexperienced. These sentiments were expressed during a hearing following an outburst by family members directed at Berryman's jurors during penalty proceedings. The facts surrounding this incident are more fully discussed in connection with the analysis of Claims 73 and 74. *See* Part XXII, *infra.*

The second post-*Marsden* hearing occasion where Berryman expressed his dissatisfaction with appointed counsel was to the probation officer who prepared his pre-sentence report. [64] According to the probation officer, Berryman said that he did not commit the offenses for which he had been convicted and believed he was [*109] found guilty because his lawyers did not represent him very well. Berryman further relayed to the probation officer that he felt his attorneys "did not bring up some things about his case that would have helped him," although he declined to specify what those things were.

64 The probation officer's report is part of the state record lodged by the Warden.

Third, Berryman complained at his actual sentencing on November 28, 1988. He remarked:

> There's a lot of things that I feel that my lawyers could have done in this case, but, you know, I just feel that he didn't represent me properly, [P] I asked to get rid of him a couple of times, but you all wouldn't let me -- not you, but the other judges wouldn't relieve him, so I had to stick with him, and we had a conflict of interest between us since day one. [P] And just on that, I feel I had an unfair trial.

The final relevant fact to the *Marsden* motions is the legal opinion of *Strickland* expert Stanley Simrin [65] in a declaration executed June 4, 2001 and appended to Berryman's evidentiary hearing motion. Mr. Simrin opines that when Berryman presented his *Marsden* motions, the trial judges should have appointed independent counsel to question Mr. [*110] Soria. Mr. Simrin believes the appointment of independent counsel was compelled because Mr. Soria provided the only testimony credited by the presiding trial judges.

65 Although his declaration discloses he is a long time practitioner in Bakersfield, no recitation of qualifications or a curriculum vitae are provided for Mr. Simrin.

B. Berryman's Contentions.

Two of Berryman's arguments regarding the foregoing factual summary are directed at the state trial court, and one is directed at his appointed counsel. He maintains the trial court deprived him of

his constitutional rights by failing to grant his motion for replacement counsel (Claim 1) and not, sua sponte, appointing independent counsel to represent him at the *Marsden* hearings (Claim 3). He assails his appointed attorneys for continuing to represent him at these hearings even though they labored under a conflict of interest, also in violation of his constitutional rights. (Claim 2.) He requests an evidentiary hearing regarding the conflict of interest claim, and although he doesn't spell out precisely what evidence he wants to develop, the Court understands that he seeks to explore the nature and extent of the alleged conflict of [*111] interest suffered by counsel.

The primary justification Berryman advances for assigning error to the trial court's denial of his *Marsden* motions is the court's failure to adequately inquire into the extent of the breakdown in attorney-client relationship. He claims that what began in December 1987 as a serious breakdown in the attorney-client relationship evolved into an "irreconcilable conflict" by May 1988 as to appropriate defense strategy. Berryman maintains the trial court hearings did not permit full development of the existence of this conflict.

The problem is said to have been Mr. Soria's pretrial preparation and investigation. Since favorable laboratory results on the victim's vaginal swab would have advanced the total denial defense favored by Berryman, Mr. Soria's failure to request testing from the Life Codes Laboratory in New York promptly was particularly maddening to Berryman. Mr. Soria was unprepared for trial because of his failure to resolve the serology question, without which it was impossible to agree on an appropriate defense strategy. Mr. Soria's cover-up of his mishandling of the specimen issue and his mismanagement of the retrieval of Berryman's personal belongings [*112] from the truck were cause for engendering further distrust by Berryman. Berryman contends the procrastination of the defense team in having the blood-stain evidence tested was equally irresponsible and contributory to the continued breakdown in the attorney-client relationship. Ultimately, and certainly before the commencement of the actual trial proceedings, in August 1988, Berryman contends he was unable and unwilling to confide and communicate in his attorneys. The most promising defense, that Berryman was responsible for Ms. Hildreth's death, but did not commit rape or murder (as opposed to manslaughter), was sacrificed in order to mollify Berryman's complaints, with disastrous results. Berryman equates these facts to the situation in *Johnson v. Baldwin, 114 F.3d 835, 838-39 (9th Cir. 1997)*, where the court found ineffective assistance of counsel for counsel's failure to investigate his client's false and "incredibly lame" denial defense. Berryman claims the only reason trial counsel originally agreed to advance the lack of identity defense was that the serology results had not been obtained. By that time Berryman's trust and confidence were gone.

He also notes that the personal [*113] belongings never retrieved from his truck, namely the two bibles previously mentioned, were important to his case. At penalty proceedings, these bibles could have been, but were not, offered to show that his Christian beliefs were honestly and genuinely held. He claims this information could have mitigated his sentence.

Berryman stresses that he repeatedly raised his argument that his attorneys were not effectively representing him. He not only advanced *Marsden* motions on two occasions before the trial, but his family complained of the incompetence of counsel after the guilt proceedings concluded and Berryman again raised the issue to the probation officer (who prepared the pre-sentence report) and to the judge at sentencing.

Berryman argues that under Ninth Circuit authority a defendant's motion to substitute counsel should be granted where the defendant makes a showing the attorney sought to be replaced was incompetent for failure to conduct timely investigation, citing, *Johnson v. Baldwin, 114 F.3d 835*. He claims the trial court (as well as the California Supreme Court) seriously erred for ignoring his

complaints and that his attorneys were seriously incompetent for not promptly having [*114] forensic materials tested. He further argues no presumption of correctness should attach because the state court findings are unsupported by the record.

Because of the failure to timely conduct testing of forensic evidence, an appropriate strategy could not be devised. The defense strategy ultimately followed, a combination of a total denial defense, the contention that the offense was not first degree murder, and the theory there was no rape, was improbable, unbelievable and "doomed to failure." Berryman argues that had Mr. Soria conducted a prompt investigation (ultimately producing negative results for the total denial defense), attorney-client communications would have improved and Berryman would have acceded to a reasonable defense of voluntary intercourse and an unintentional homicide following a "verbal altercation which escalated [in]to a violent confrontation."

Separate and apart from the failure of the trial court (involving two different judges) to grant his *Marsden* motions, Berryman argues that Mr. Soria's representation of his (Berryman's) interests at the hearing is grounds for finding a conflict of interest. In light of this, he claims the trial court judges should have, [*115] *sua sponte,* appointed independent counsel to represent Berryman at the *Marsden* hearings and that appointment of separate counsel is supported by *United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996)*. The procedure actually followed placed Mr. Soria in the untenable position of having to question "his own professional competence" when arguing for the substitution of counsel. Further, had the trial court appointed separate *Marsden* counsel, the mishandling of the laboratory testing would have been uncovered. The defense investigation problems were not brought to light by Messrs. Soria and Peterson "because they had a vested interest in not disclosing their own lack of preparation." Under *Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*, Berryman claims he is not required to show prejudice once he demonstrates a conflict of interest.

C. Analysis.

The California Supreme Court held in *People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970)* that an indigent criminal defendant may request the trial court to discharge appointed counsel and substitute new counsel if the defendant's right to counsel otherwise would be substantially impaired due [*116] to professional incompetence of the original attorney. *Id. at 123*. Because a *Marsden* motion implicates Berryman's *Sixth Amendment* right to counsel, the claim is cognizable on federal habeas corpus. *See Hudson v. Rushen, 686 F.2d 826, 829 (1982)*. To prevail in habeas corpus proceedings on his *Marsden* challenge, Berryman must demonstrate that the denial violated his constitutional rights because the conflict between him and his attorneys prevented effective assistance of counsel as required by the *Sixth Amendment*. *Schell v. Witek, 218 F. 3d 1017, 1026 (9th Cir. 2000)* (en banc). The first step in analyzing these claims is to review the adequacy of the state trial court hearings. *Id. at 1025*. Second is assessing whether the trial court's failure to appoint and trial counsel's failure to request independent counsel violated Berryman's constitutional rights. The third step entails an assessment of whether counsel's representation of Berryman at the *Marsden* hearings was marred by an actual conflict of interest, which Berryman contends would entitle him to habeas relief without showing prejudice. *See Cuyler v. Sullivan, 446 U.S. at 349*. In the absence of a conflict of interest, the final step [*117] is determining whether the alleged representational inadequacies resulted in prejudice. With respect to each of these steps, and the to extent the state courts have issued reasoned decisions, AEDPA requires deference to those state decisions under *28 U.S.C. § 2254(d)(1)* and *(2)*.

1. Adequacy of the State Trial Court Hearings.

"An accused's right to be represented by counsel is a fundamental component of our criminal justice system," *United States v. Cronic, 466 U.S. 648, 653, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. To give effect to this right, the accused must receive "a reasonably competent attorney, whose advice is within the range of competence demanded of attorneys in criminal cases." *Id. at 655* (quoting *McMann v. Richardson, 397 U.S. 759, 770, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970))* (internal quotations omitted). With respect to indigent defendants, the *Sixth Amendment* requires more than the mere appointment of counsel. "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler v. Sullivan, 446 U.S. at 344*. Accordingly, the adequacy of the state trial court hearing [*118] for substitution of counsel is measured by the extent to which the trial court explored the nature and extent of the conflict between defendant and appointed counsel. The ultimate issue is whether "the conflict deprived [the defendant] of the representation to which he was entitled by the *Sixth Amendment*." *Schell, 218 F.3d at 1027*. This is precisely the standard applied by California courts under *Marsden.* Under California law, in order to "thoughtfully exercise its discretion in this matter," the trial court must permit the defendant to specify the reasons "for requesting a change of attorneys." *2 Cal. 3d at 123*.

Determining the existence of a conflict, even an irreconcilable conflict, however, does not entitle an indigent defendant to substitute counsel in all situations, even where the motion is timely. This follows from the fact that indigent defendants, like Berryman, have no right to "a meaningful relationship" with appointed counsel; rather they are entitled to "competent representation." *Schell, 218 F.3d at 1026* (citing *Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983))*. Accordingly, a mere personality conflict, or even a strategy disagreement concerning [*119] a matter committed to the judgment of the attorney does not result in the abridgement of the right to effective counsel. *Id.* Sometimes, the inquiry by the trial court is whether the defendant himself has "sabotaged the [attorney-client] relationship or failed to make reasonable efforts on his end to develop the relationship." *Id. at 1027*.

The California Supreme Court analyzed the assignment of error to the trial court's failure to grant Berryman's *Marsden* motion on direct appeal. With respect to Berryman's initial motion in December 1987, the court found that Berryman and Mr. Soria were not "embroiled in such an irreconcilable conflict that ineffective assistance of counsel in violation of the *Sixth Amendment* was likely to result." *People v. Berryman, 6 Cal. 4th at 1070* (internal quotation marks and brackets omitted). The court specifically found that Berryman's lack of trust and inability to get along with Mr. Soria were insufficient to meet the constitutional standard. *Id.* The court then summarily dispatched Berryman's claim regarding the May 1988 motion, concluding, "[t]o the extent that he may be understood to assert that the [trial] court erred by denying a similar motion he made [*120] on May 5, 1988, he is not persuasive." *Id. at 1070-71* (footnote omitted). The corollary claims that the trial court erred for failure to sua sponte appoint independent counsel and appointed counsel were ineffective for failure to request appointment of independent counsel at the *Marsden* hearings were denied summarily on Berryman's initial state habeas petition.

In the present case, Berryman does not argue that the state courts invoked the wrong legal principles. *See 28 U.S.C. § 2254(d)(1)*. Rather, Berryman argues that the trial court (in the two hearings) failed to inquire adequately into the extent of the breakdown in the attorney-client relationship, which he characterizes as "serious" in December 1987 and an "irreconcilable conflict" by May 1988. This alleged failing implicates the reasonableness of the trial court's application of

clearly established Supreme Court precedent to the facts of Berryman's case under *§ 2254(d)(1)* and the reasonableness of the trial court's factual determination under *§ 2254(d)(2)*.

Neither trial court denial of Berryman's *Marsden* motions was an unreasonable application of law or an unreasonable factual determination. Berryman's primary complaint presented [*121] during the December 1987 hearing was the notion that Mr. Soria actively was working against him. Support for this contention was comprised of Berryman's complaint about the lack of defense witnesses called at the preliminary examination hearing, alleged comments Mr. Soria made to other County Jail inmates about Berryman's guilt, and a perceived conspiracy between Mr. Soria and the originally assigned prosecutor to obtain Berryman's conviction. After hearing Mr. Soria's explanation that he had merely asked other inmates how Berryman was adjusting, the trial court reasonably rejected Berryman's contention, noting that jailhouse gossip was rarely beneficial and that any cordiality observed between Mr. Soria and Ms. Green followed a vigorously contested defense discovery motion in which the prosecution ultimately conceded. [66] Since the trial court denial was reasonable, it follows that the California Supreme Court determination on the same issue also was reasonable.

66 Berryman does not contend in this proceeding that appointed counsel were in any way incompetent for failure to call certain witnesses at the preliminary examination hearing, as he did at the December 1987 *Marsden* hearing.

Addressing [*122] the May 1988 hearing is more complicated, largely because Berryman's and Mr. Soria's respective representations to the trial court were contradictory. Indeed, Berryman's chief complaint regarding the conflict between his attorneys and him was that Mr. Soria had not obtained the promised forensic testing, and then misrepresented efforts to do so to the trial court. Berryman's secondary complaint concerns personalty left in his truck (that by the time of the hearing had long been repossessed). In fact, as the record reveals, there is merit to Berryman's complaints. Mr. Soria's version of the facts regarding the testing of Ms. Hildreth's vaginal swab specimen against samples obtained from Berryman was not entirely accurate. Only the subsequently filed declaration of investigator Bruce Binns explained all of the details. There was a "mix-up" with the laboratory, but it cannot be said that the laboratory was completely at fault, because as the letter Berryman provided to the trial court established, Mr. Soria and his investigators in fact did not initially ask the laboratory to perform any tests. Although the trial court credited Mr. Soria's explanation about the forensic testing and referred [*123] to the entire set of circumstances as a mix-up that was not Mr. Soria's fault, the emphasis of that discussion was more focused on the fact that testing was going to be conducted in California, and that the results of that testing would determine a defense strategy on which both Berryman and his counsel could agree.

Based on the facts presented at the May 1988 *Marsden* motion hearing, this Court is compelled to find that even though Mr. Soria did misrepresent facts to the trial court, the trial court's denial of the motion was not unreasonable under *§ 2254(d)(1)* or *(2)*. The primary reason is that tests left unperformed by the New York laboratory were soon to be performed by a laboratory in California. The trial judge stressed this fact in rendering his decision. Further, a separate specimen, namely a blood-stained shoelace, was to be tested for genetic markers that the trial judge was told could rule out Ms. Hildreth as the source of that blood. With this as a back drop, Mr. Soria represented to the trial court that he and Berryman were conflicted as to what trial strategy to follow, with Berryman urging total denial of any complicity in Ms. Hildreth's death or sexual assault at all, [*124] and counsel favoring Berryman acceptance of responsibility for the homicide, but claiming the homicide was not murder (or at least not first degree murder) because the sex was consensual. Mr.

Soria clearly represented to the trial court that he was still willing to alter his preferred trial strategy if results favorable to Berryman's total denial defense were returned by either laboratory. Moreover, in conducting the May 1988 hearing, the presiding judge had the impression that Berryman's main bone of contention with Mr. Soria (and Mr. Peterson) was centered around the failure to recover his personal belongings from his truck. Since an order issued by the trial court resolved this matter, and counsel represented (through their investigator Mr. Binns) that they would retrieve Berryman's belongings, this issue was considered settled. Whether the belongings were or were or not retrieved, however, had no bearing on the presentation of evidence at trial (as far as the judge presiding knew). It is true that no one informed the trial judge of the potential importance the two bibles found in the truck would have as mitigation evidence during penalty proceedings. As more fully discussed below [*125] in connection with the analysis of Claim 72. *See* Part XXXII, *infra,* prejudice from failure to actually produce the bibles at the trial was significantly ameliorated because the fact that the bibles had been found in the truck was brought out at trial.

While it is regrettable that the California Supreme Court did not provide an analysis of its denial of relief respecting the May 1988 hearing, the omission is not an impediment. Based on the presentation of the matter to trial court, the trial judge was more than reasonable to conclude that the trial strategy conflict could be resolved once forensic testing was complete. The judge had no basis to doubt that favorable forensic test results might still be forthcoming and could resolve the dispute between Berryman and his counsel about the appropriate defense strategy. The state trial court decisions were entirely appropriate and reasonable. Under *Schell, 218 F.3d 1017*, the court clearly did not ignore the motion or fail adequately to inquire into the nature of the conflict between Berryman and counsel. *See id. at 1025*.

In reaching this conclusion, the Court does not overlook the fact that Mr. Soria's representations about being able to conduct [*126] further testing on the blood-stain evidence appear to be misrepresentations, whether innocent, negligent, or intentional. By May 1988, when the second *Marsden* motion hearings were being conducted, the blood-stain evidence was already used up during prosecution testing (and defense observation). The Court cannot reconcile the testimony of the prosecution serologist with Mr. Soria's statements to the *Marsden* hearing judge in May 1988 that the defense still wanted to conduct further tests of the blood-stain evidence to finally determine an appropriate defense strategy. Even more perplexing are Mr. Soria's representations to the trial judge in October 1988 that blood-stain evidence had been delivered to a DNA specialist for further testing and that the DNA specialist would be called to testify if the results could eliminate Ms. Hildreth's blood as the source of that blood-stain evidence. Neither the record nor the parties explain the discrepancy of representations, so the Court cannot make a definitive determination. It is clear, however, that the *Marsden* hearing judge at the May 1988 proceedings had no way of knowing that the blood-stain evidence was used up. Thus, the ruling denying [*127] the *Marsden* motion on the grounds that deciding on a defense strategy in advance of forensic testing was premature cannot be said to be unreasonable, or even erroneous. The discrepancy in representations about the further testing of the blood-stain evidence is addressed in the discussion of prejudice arising from presumed incompetent representation. *See* Part V.C.4, *infra.*

The Court further distinguishes the present ruling that Berryman suffered no constitutional violation on account of the *Marsden* motion denials from the recent Ninth Circuit decision in *Plumlee v. Del Papa, 465 F.3d 910 (9th Cir. 2006)*, which did find a such constitutional violation. First and foremost, *Plumlee* is referred to in the opinion as both an "unusual case" and a case presenting "extraordinary circumstances." *Id. at 913, 924*. Second, that holding follows from the finding that Plumlee "reasonably and in good faith believed that [his appointed attorneys from] the

[] Public Defender's Office were leaking information about his case to another suspect in the case and to the District Attorney." *Id. at 913*. Evidence adduced at a state court evidentiary hearing established that the chief deputy Public Defender was [*128] acquainted with Plumlee's former roommate, which roommate also was a suspected co-perpetrator in the crime, and Plumlee reasonably believed the chief deputy and the suspected co-perpetrator had discussed the case. *Id. at 913*. Separate and apart from that circumstance, the first deputy Public Defender appointed to represent Plumlee accepted a position with the District Attorney's Office during his representation of the defendant. Plumlee reasonably believed the attorney-client privilege had been compromised during that relationship because he told this deputy Public Defender about the potential evidentiary value of his car to the defense, and thereafter, the vehicle, which was in police custody, was destroyed. Plus, Plumlee claimed this deputy Public Defender lied about having accepted a job with the District Attorney's Office. *Id.* Finally, the second deputy Public Defender assigned to Plumlee's case denied the existence of a bail order in the case, although it turns out there was one, and when Plumlee insisted on this fact, the deputy Public Defender told him he (Plumlee) needed psychiatric treatment. *Id.* In finding a complete breakdown of the attorney client relationship, the Ninth [*129] Circuit was influenced by the trial judge's comments and findings that Plumlee's distrust of the Public Defender's Office was understandable and reasonable, even though the state trial judge also found no misconduct by members of that office. *Id. at 915, 916-17, 921-22*. Although there was no "actual conflict of interest" affecting the performance of the Public Defender deputies, the resulting distrust produced an irreconcilable conflict and a complete breakdown in communication between counsel and client" constructively resulting in the deprivation of counsel altogether. *Id. at 922*. The Ninth Circuit also was influenced in its holding that the breakdown was not caused by "the defendant's obstinance or delaying tactics," *id.,* distinguishing other cases where the conflict was of the defendant's own making. *Id. at 924* (citing *Schell, 218 F.3d at 1026*).

Berryman's case does not rise to this level of extraordinary circumstances. His claim at the *Marsden* hearings that Mr. Soria and the prosecutor were involved in a relationship and were colluding to obtain his conviction was unfounded and the first hearing judge told him so. His belief in the existence of a conspiracy was not reasonable. [*130] On habeas corpus, Berryman does not now advance this conspiracy theory as grounds for the claimed irreconcilable breakdown in the attorney client relationship. Rather he focuses on the attorneys' lack of prompt investigation of the case through forensic testing and adhering to a viable defense.

The Court also must acknowledge a very recent Ninth Circuit case, *Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005)*, which embraces a different analytical model in addressing the trial court's failure to grant a motion to substitute counsel. In *Daniels,* the court found an irreconcilable conflict between the defendant and his attorneys due to the defendant's lack of confidence in their ability to represent him, and in the case of lead counsel, ties to the District Attorney's Office. Indeed, the court found appointed counsel to be ineffective for overlooking a viable mental state defense and putting on a factually unsupportable denial defense. Utilizing the abuse of discretion review standard previously disapproved by *Schell, 218 F.3d 1017*, the court found that the defendant was entitled to habeas relief because the extent of the conflict was beyond repair (largely due the defendant's clinical [*131] paranoia), the trial court failed to question the appointed lawyers individually to really address the defendant's concerns, and the motions to substitute counsel were timely. Because *Daniels* is a pre-AEDPA case, however, the appellate court there reviewed the state court conclusions de novo. In the present case, this Court must give deference to the state court findings and conclusions under *28 U.S.C. § 2254(d)(1)* and *(2)*. Berryman is not entitled to de novo review. Moreover, even though the denial defense advanced at Berryman's trial

was unbelievable in light of substantial circumstantial evidence, that defense was urged by Berryman throughout the trial, direct appeal proceedings, and state habeas corpus proceedings. In contrast, the denial defense advanced in *Daniels* was developed and advanced by his appointed attorneys. Berryman cannot cast the total blame for his defense on counsel. They walked a fine line between trying maintain his trust and presenting a viable defense. Indeed much of cause for the alleged faulty trial strategy is attributable to Berryman's obstinance, insisting, as he did that he was neither responsible for Ms. Hildreth's death nor even present at the crime [*132] scene. There was no constitutional infirmity with the manner in which the trial court conducted the *Marsden* hearings. Claim 1 is denied.

2. Grounds for Appointing Independent Counsel.

The contention that independent counsel should have been appointed sua sponte under the authority of *United States v. Del Muro, 87 F.3d 1078*, must be analyzed from the perspective of what the two hearing judges had before them. During the first hearing, the judge determined there was no conflict on account of the conduct of the preliminary examination hearing, jailhouse gossip, and the alleged collusion between Mr. Soria and Ms. Green. During the second hearing, the judge understood that the conflict over defense strategy was capable of resolution after further forensic testing and that Berryman's unhappiness over personal property left in his pick up truck was not material to the defense. Given this perspective, the claim that the trial judge should have appointed independent counsel, sua sponte, is foreclosed by *LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998)*. In *LaGrand,* the petitioner advanced an identical claim of entitlement to independent counsel when making his motion for substitution counsel [*133] at trial. The Ninth Circuit rejected his contention, finding it a "novel extension of the right to counsel." *133 F.3d at 1277*. The court determined that the "defendant's self-interest and his lawyer's continuing professional obligation are sufficient to enable the trial court to make the necessary determination." *Id.* The Ninth Circuit's characterization of the petitioner's claim in *LaGrand* as "novel," implicates the *Teague* doctrine. *See 489 U.S. at 310*. Even without a *Teague*-bar, Berryman's reliance on *Del Muro* is unavailing.

Del Muro involved a motion for new trial from the defendant's conviction of immigration laws, where he claimed his appointed defense counsel "rendered ineffective assistance by failing to interview [and] subpoena witnesses suggested by Del Muro." *87 F.3d at 1080*. Specifically, Del Muro requested appointment of substitute counsel to present the new trial motion and elicit testimony to prove the ineffective assistance of counsel claim. The result of the trial court's denial of Del Muro's motion was that his trial attorney was required to elicit testimony from witnesses and argue that his (the attorney's) "own failure to investigate and call [these] witnesses prejudiced [*134] Del Muro's case." *Id.* The Ninth Circuit agreed that "the district court created an inherent conflict of interest by forcing trial counsel to prove his own ineffectiveness and thereby deprive Del Muro of his *Sixth Amendment* right to effective assistance of counsel." *Id.*

No analogous conflict infected Berryman's case, since neither Mr. Soria nor Mr. Peterson were asked to establish their own ineffectiveness at either *Marsden* hearing. The Court specifically does not view Mr. Soria's explanations about the delay in completing forensic testing and retrieving Berryman's personal belongings from his pick up truck as efforts to establish ineffective assistance of counsel. Rather, those explanations were presented to assist the trial courts ascertain the nature of the asserted conflict. Having reasonably determined the absence of a true conflict, the trial judges would have discerned no need for independent counsel. The trial court did not commit error in not appointing independent counsel to represent Berryman at the *Marsden* motions. There was no abuse of discretion, let alone a constitutional violation. Claim 3 is denied on the merits.

3. The Presence of an Actual Conflict of Interest.

When [*135] counsel labors under an actual conflict of interest affecting his/her performance the defendant has been deprived of his *Sixth Amendment* right to counsel because the attorney "fails to subject the prosecution's case to meaningful adversarial testing." *Cronic, 466 U.S. at 659* (citing *Cuyler v. Sullivan, 446 U.S. at 335*). Failure of this nature would include a conflicted defense attorney not cross examining or calling a particular witness, or not resisting the introduction of inadmissible evidence in order to assist a co-defendant. *Sullivan, 446 U.S. at 348-49* (quoting *Glasser v. United States, 315 U.S. 60, 72-75, 62 S. Ct. 457, 86 L. Ed. 680 (1942))*. However, the mere "possibility of a conflict is insufficient to impugn a criminal conviction." *Id. at 350*.

Berryman's alleged conflict in the present case falls far short of establishing an actual conflict under *Cronic* and *Sullivan.* His trial attorneys certainly did not make any strategic decisions to compromise his defense for the benefit of another suspect in Ms. Hildreth's murder, and Berryman does not contend they did. Rather, he complains that they (especially Mr. Soria) countered assertions of mishandling the forensic testing in order [*136] to save face before the trial judges, that is, for their own personal benefit. Recent Ninth Circuit authority, however, limits the circumstances under which an attorney conflict of interest claim maybe considered to cases of joint representation of multiple clients with conflicting interests. *Earp, 431 F.3d at 1184-85*. Thus, in *Earp,* the court rejected the petitioner's claim that his trial counsel labored under a conflict of interest warranting a presumption of prejudice on account of her romantic involvement with him during the trial. *Id. at 1185*. Relying on United States Supreme Court authority in *Mickens v. Taylor, 535 U.S. 162, 176, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)*, the Ninth Circuit noted that as of 2002, the issue of whether a *Sullivan* conflict of interest extended beyond joint representation remained "an open question." *Earp, 431 F.3d at 1184*; *see also Foote v. Del Papa, 492 F.3d 1026, 1030, 2007 U.S. App. LEXIS 15822, 2007 WL 1892862, *4 (9th Cir. 2007)*. Absent clear authority handed down by the Supreme Court, lower courts are not at liberty find state court rulings contrary or unreasonable applications of Supreme Court precedent under *28 U.S.C. § 2254(d)(1)*. *See Kane v. Garcia Espitia, 546 U.S. 9, 10, 126 S. Ct. 407, 408, 163 L. Ed. 2d 10 (2005)*. [*137] The contention that Berryman was deprived of *Sixth Amendment* representation under the presumed prejudice standard described in *Cronic* and *Sullivan* is without merit. Claim 2 is denied on the merits and Berryman's request for an evidentiary hearing as to Claim 2 also is denied.

4. Resulting Prejudice from the Alleged Inadequate Representation of Counsel.

Although Claims 1, 2, and 3 do not allege prejudice as an element of any of his claims, prejudice is argued in his points and authorities. For the sake of completeness, that prejudice must be addressed. The primary source of prejudice Berryman emphasizes is the unsuccessful and conflicting defense presented as a result of counsel's unpreparedness, which he equates with the "incredibly lame" denial defense trial counsel presented in *Johnson v. Baldwin, 114 F.3d 835*.

Under the familiar legal standard for evaluating prejudice pursuant to *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, Berryman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" with a "reasonable probability" being one sufficient to undermine [*138] confidence in the outcome" of the trial. *Id. at 694*. To conclude that his attorneys' alleged incompetent representation undermines confidence in the outcome of the trial, Berryman resorts to a layered process. He maintains that if his attorneys had timely conducted their investigation, he

(Berryman) would have learned early that forensic testing could not and did not exculpate him from the crime. Accordingly, the lack of identity defense would have been abandoned, attorney-client communications would have improved, and Berryman would have agreed to a reasonable defense of voluntary intercourse followed by an unintentional homicide, rather than the two-pronged inconsistent defense that was presented.

In the present case the Court proceeds on the assumption that Berryman's counsel were ineffective for their mishandling and unwarranted delay of forensic testing, followed by less than candid representations to the trial court. The Court further notes that Mr. Soria's repeated insistence that additional testing could resolve the defense strategy dispute is disturbing in that the samples were so small, only limited testing could be and already had been performed. While the record discloses [*139] the results of the prosecution serologic testing on the vaginal swab and blood-stain evidence, there is no indication of defense forensic testing results. No defense serologist testified at all, and the defense criminalist did not testify about the results of specimen comparison tests. The only testimony on this forensic testing came from the prosecution serology expert, and his testimony was not dispositive. The prosecution serologist noted that from the vaginal swab specimen, there was a small amount of blood and an even smaller quantity of semen (verifiable only by the presence of spermatozoa). He testified that the blood was consistent with Ms. Hildreth's blood, but the semen was of an insufficient quantity to determine anything about the donor. Hence Berryman could not be identified as the source of the semen from that specimen. [67] Testing of the blood-stain evidence also was somewhat inconclusive due to the small quantity of the specimen available. Comparing that specimen with only a few of 17 genetic markers present in Berryman's and the victim's blood, the prosecution serologist concluded the blood-stain was consistent with Ms. Hildreth's blood, but inconsistent with Berryman's [*140] blood. Because the testing procedure was observed by the defense serologist, there was no disagreement on this conclusion -- as far as it went. In light of these results, particularly the inconclusive nature of those results due to insufficient quantities, Mr. Soria's representations to the trial court during the *Marsden* hearings about needing to send the specimens off to a specialized DNA laboratory in another part of the state appears at best, disorganized, and at worst, disingenuous. Whether or not he truly didn't know about the insufficient specimen quantities, his representations served only to delay the inevitable conclusion that forensic testing would not support Berryman's lack of identity defense.

> 67 Indeed, given this inconclusive result and the small quantities the serologist had to work with, it's unclear why retesting the vaginal swab specimen was deemed so crucial. From the beginning it was doubtful a more favorable result could be obtained by defense retesting, and in the end, that was exactly the outcome.

Turning to the issue of prejudice, despite the delay in reaching this inevitable conclusion, nothing in the record or in the post-conviction evidence presented even vaguely [*141] indicates that Berryman would have acceded to the defense advocated by Berryman's appointed attorneys (and advanced on habeas corpus). Even after the serology issue finally was resolved, and presumably conveyed to Berryman, with neither the retesting of the vaginal swab nor the testing of the blood-stained shoe lace yielding results which favored Berryman, he still has persisted in claiming innocence. As noted, he told the probation officer preparing a pre-sentence report that he did not commit the offenses for which he had been convicted. [68] *See* Part III.C., *supra.* Next, in his pro se state habeas petition, filed in 2001, he argues that numerous evidentiary inconsistencies about tire track evidence connecting him with the crime scene create doubt that his pick up truck was even at the crime scene. Similarly, he argues that other tire track evidence was planted. He

makes the same argument about the presence of broken gold necklace chain links. Next, he calls into question the veracity of all evidence showing that the blood-stain evidence (from his shoes) belonged to the victim. He claims both inconsistencies in the evidence and intentional governmental manipulation resulted in a wrongful [*142] and unwarranted conviction.

68 Berryman quotes from portions of the probation officer's report to make the point that he continued to complain about the representation he received throughout the trial proceedings. The Court, therefore, views any hearsay objection to the statements of the probation officer or of Berryman as attributed by the probation officer to be waived.

Berryman's post-trial statements (including those to the pre-sentencing probation officer) show that even with the serology issue resolved as to both the vaginal swab specimen and the blood-stain evidence, he was not and may still not be amenable to accepting any responsibility for Ms. Hildreth's death, even with consensual sexual relations and an unintentional homicide. Rather, he has continued to focus on governmental malfeasance in obtaining his conviction by the alleged planting of inculpatory evidence and manipulating facts. The argument that trial counsel's prompt investigation and completion of forensic testing would have motivated Berryman to accept what is said to be the reasonable defense strategy embraced by trial counsel early on in the representation is mere speculation. His reliance on *Johnson, 114 F.3d 835* [*143] is misplaced.

In *Johnson,* the defendant was charged with three counts of forcible rape. A physical examination of the victim shortly after the incident, as well as her clothing and the bed on which the rape was said to have occurred, revealed no physical evidence that she had been subjected to sexual intercourse. The prosecution theory that Johnson committed rape was predicated solely on the victim's testimony. At trial, Johnson testified that he had not been at the residence where the rape occurred. After being convicted of three counts of rape, Johnson again testified at the sentencing, admitting that he had been at the residence at the time and place at issue, but denying that rape had occurred. Johnson also explained that "his attorney had told him to say he was not there." *114 F.3d at 836*. On state habeas corpus, Johnson alleged, among other things, that his trial attorney had not adequately investigated the case, had not adequately conferred with him, and had encouraged him to testify falsely. Following a state court evidentiary hearing, the state court found the trial attorney had met with Johnson on only two occasions and had conducted a cursory investigation, only briefly interviewing [*144] two witnesses. The state court also found that Johnson had not carried his burden of establishing that his attorney suborned perjury. *Id. at 837*. When the matter reached the Ninth Circuit, the alibi defense was referred to as "incredibly lame" because no details of where Johnson may have been at the time of the alleged crime were elicited on direct examination and no corroboration for the alibi was presented. *Id. at 839*. The attorney's failure to adequately investigate was held to be constitutionally incompetent and prejudicial. Had he investigated the proffered alibi defense, he would have discovered the implausibility of the story and encouraged Johnson to follow a reasonable trial strategy which didn't include lying to the jury and likely would have resulted in an acquittal. *Id. at 839-40*.

In the present case, even after Berryman was confronted with the fact that his lack of identity defense was not empirically supportable, he still clung to it throughout his trial and well into post-conviction proceedings. Berryman cannot establish prejudice for his attorneys' alleged incompetence for failing to promptly investigate the case. All residual allegations of Claims 1, 2, and 3 regarding [*145] errors and omissions in the trial court's and the defense attorneys' handling of his *Marsden* motions are denied. No further evidentiary development is warranted.

VI. Berryman's Assertion He Was Incompetent to Proceed to Trial and Incompetent to have Waived His Rights Under *Miranda v. Arizona* (Claims 4, 5, 27, and 28).

Claims 4 and 5 of the Petition allege that Berryman was incompetent to understand the trial proceedings against him or to assist his appointed attorneys in his own defense. In addition, in Claims 27 and 28, he claims that he was incompetent to waive his rights under *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, to consent to an interview by authorities on the night of his arrest, September 7, 1987. Berryman does not seek an evidentiary hearing with respect to any of these four claims.

A. Statement of the Facts Relevant to Berryman's Competence.

Berryman relies on the opinions of retained mental health experts to establish his alleged compromised mental state both at the time of his September 7, 1987 interview and at trial. In addition, as relevant to his statements made during the September 7, 1987 interview, he points to his chronic alcoholism [*146] and intoxication. The substance of the September 7, 1987 interview also must be considered, along with the defense and prosecution comments about the admissibility of his statement at trial.

1. Berryman's Mental Status.

The two mental health experts who testified at Berryman's trial also have provided post-conviction declarations expounding on their earlier assessments of Berryman's mental state. The trial opinions of these two experts, psychologist William Pierce, Ph.D. and psychiatrist Samuel Benson, M.D. are recounted above in the Summary of the State Trial Proceedings, Part III.B. Their post-conviction declarations in conjunction with Berryman's first state habeas petition (filed September 3, 1993) and the present federal habeas petition are more fully recounted in connection with the analysis of Claims 15 and 16. *See* Part XII.A.3., *infra.* Dr. Pierce opines that Berryman suffers from alcohol organic disorder and an organic mental syndrome or seizure disorder, now and at the time of the offense. Dr. Benson's assessment of Berryman is that he suffers from organic brain disease and possible alcohol seizure induced behavior.

2. Berryman's Excessive Alcohol Consumption.

Berryman recites [*147] in his moving papers that numerous friends and relatives could have testified, and have provided evidence, that he was a chronic and heavy drinker, including at the time of the crime and his September 7, 1987 interview with authorities. In fact, some did give trial testimony to this effect. The testimony of friends and relatives who did and could have testified to Berryman's excessive alcohol consumption is recounted in connection with Claims 15 and 16, below. *See* Part XII.A.1., *infra.* For purposes of analyzing these incompetence claims, evidence of Berryman's excessive alcohol consumption is accepted as true.

3. Evidence of and Relating to Berryman's September 7, 1987 Interview with Investigators.

The content of Berryman's statements to authorities were introduced into evidence during the guilt phase proceedings. Although initially, defense counsel moved to exclude the substance of the interview from the jury, and Mr. Moench indicated he would not introduce it except in rebuttal, an edited version of the statement was presented to the jury during the prosecution case in chief. [69] The edited version of the interview was read to the jury by Mr. Moench. In addition to this reading, an

[*148] edited transcript of the interview was admitted together with a tape recording of the interview.

69 The portions excised from the statement pertained to Berryman's prior arrest (for possession of marijuana) and the fact that he had a parole officer in Los Angeles County.

The transcript records that Berryman was told he had the right to remain silent, that anything he said could and would be used against him in a court of law, that he had the right to speak to a lawyer before proceeding with the questioning, and that if he couldn't afford an attorney, one would be appointed. After confirming his understanding of these rights and waiving them, Berryman denied having seen Ms. Hildreth or having being on Cecil Avenue the previous night. He told officers he had been with Melinda Pena, but he didn't want his girlfriend, Crystal, to know this, because he and Melinda engaged in sexual relations. After returning Melinda to her home, he stated he went to a convenience store to purchase a beer and telephone another girlfriend. [70] He then returned to the Clark residence, where he awakened Crystal and they talked a while. In the course of delivering this chronology, Berryman told detectives that he [*149] had consumed a couple of beers earlier in the day, but that he was not disabled in anyway from continuing with the interview and had no problem talking with the detectives.

70 The evidence at trial was that he telephoned the other girlfriend *before* going to Melinda's house.

Detective Lage, one of the questioners, observed that Berryman had a "busted wheel" on the right side of his truck. Berryman explained that earlier in the day (September 7, 1987) someone cut in front of him on the road, and when he chased that person, he ran his truck into a curb. He also denied having ever given Ms. Hildreth a ride in his truck. He claimed that the scratch on his face was the result of playing basketball (that day), and that Crystal's younger brother, Andrew Bonner, inflicted the scratch. When Detective Lage informed Berryman that his truck was seen on Cecil Avenue the previous night, Berryman concluded that the person who told authorities this information did so because she had a grudge against him. When Detective Lage told Berryman that tire tracks matching the treads of his tires were found at the crime scene, Berryman persisted in his denial of having been on Cecil Avenue or anywhere near the [*150] crime scene. Berryman gave officers permission to look at his clothes for "trace evidence."

On April 22, 1988, Berryman's defense counsel presented ten in limine motions, including one to exclude his September 7, 1987 statement on the grounds it was insufficiently reliable for a capital prosecution. In support of this motion, Mr. Soria wrote in a declaration: "The statement made by [Berryman] in no way admits responsibility for the alleged crimes. It is neither a confession nor an admission. [P] That for the reasons stated above, the 'Custodial Statement' taken from [Berryman] is not reliable and should be excluded as evidence." The prosecution filed a response to this particular motion which stated: "The People do not intend to introduce defendant's statement during its case in chief and the People are seeking an order prohibiting the defendant from questioning any officers about the contents of the defendant's statements on the grounds it is inadmissible hearsay."

At the August 15, 1988 in limine motion hearing, the trial court declined to rule on this particular motion because the prosecution only intended to use the statement for impeachment purposes, if at all. If the defense raised [*151] the statement, the trial court noted that the prosecutor would "ask for a hearing as to the propriety of going into his statement." Since it is clear that the September 7, 1987 interview statement (as edited) was introduced during the prosecution

case-in-chief, either the issue was raised as described in the trial court's ruling, or counsel had a change of strategy. [71]

71 The record before the Court sheds absolutely no light on this matter.

Mr. Moench brought up the substance of the interview during his rebuttal argument at guilt phase proceedings. Of significance to Berryman is the fact that Mr. Moench used the statement to show that Berryman was untruthful. Specifically, Mr. Moench pointed out that when Berryman perceived suspicion was focused on him, he developed an alibi, emphasizing his verifiable whereabouts at the time Ms. Hildreth was killed, even though authorities had not yet released information regarding the timing of her death to members of the family, and certainly not to Berryman.

B. Berryman's Contentions.

Berryman's claimed mental impairments and deficiencies are legion. He is said to suffer from permanent pre-existing mental disorders, severe mental and emotional impairments, [*152] the pervasive effects of organic brain disease with resulting limited intellectual and cognitive capacity, overwhelming developmental trauma including neglect, abandonment, physical abuse, emotional abuse, sexual abuse, plus, from the death of his father, post-traumatic stress disorder, depression, paranoia, and substance abuse, all which qualified (at the time of his interview by authorities and at trial) as a developmental disability. Because of these many impairments, Berryman claims he was incompetent to stand trial because he neither understood the proceedings against him nor was able to assist trial counsel. He advances a corresponding argument regarding his waiver of rights under *Miranda v. Arizona* relative to his September 7, 1987 interview.

The legal basis regarding Berryman's competence to be tried is comprised of three arguments. First, there is a straight due process substantive incompetency, as described in *Medina v. California, 505 U.S. 437, 453, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)*. Second there is trial error because the trial court did not sua sponte order a competency hearing when counsel requested authorization to have Berryman examined by mental experts to determine [*153] his mental condition at the time of the offense. For this proposition, Berryman relies on *Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997)*. In his traverse, Berryman emphasizes that the trial court was on notice from early on that he had difficulty grasping the meaning of the proceedings, especially distinguishing issues at his *Marsden* hearings and his fixation with what became of his personal belongings left in his repossessed pick up truck. Third, Berryman charges that his attorneys were constitutionally incompetent for not requesting a competency hearing. Berryman notes that his mental and emotional impairments were exacerbated between his arrest and trial due to conditions of confinement, [72] the lack of necessary communication with his lawyers, and fear he would not receive a fair trial. With respect to all three theories, Berryman maintains that if mental health experts had examined him regarding his competence to stand trial (in addition to his mental condition at the time of the offense), "they would have concluded that [Berryman] lacked the ability to assist counsel with a reasonable degree of understanding, and lacked a rational as well as factual understanding of the [*154] proceedings."

72 Except for the the presence of an intercom device in the attorney room at the County Jail, no description is offered of these conditions of confinement. The presence of the intercom device is discussed in Claim 17. *See* Part XI., *infra.*

Berryman relies on the same foundational underpinning of actual incompetence to support his claim that the content of his September 7, 1987 interview should have been excluded. His theory is that because of his many impairments resulting in limited mental ability, plus, the fact that he was intoxicated at the time of the interview and not otherwise sophisticated in matters of criminal justice process, he was not sufficiently mentally competent to understand and waive his right to remain silent. The corollary ineffective assistance of counsel claim is that his trial attorneys were constitutionally incompetent for failure to press for a ruling on the in limine motion to exclude the September 7, 1987 statement. As far as prejudice, he claims that but for the admission of the pretrial statement, he would not have been convicted.

C. Analysis.

The standard for competence to stand trial is whether the defendant has "sufficient present ability to [*155] consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)*(per curiam), *quoted by Godinez v. Moran, 509 U.S. 389, 398, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)*. Berryman bears the burden of establishing his incompetence by preponderance of the evidence. *Hayes v. Woodford, 301 F.3d 1054, 1078, n. 28 (9th Cir. 2002)* (citing *Simmons v. Blodgett, 110 F.3d 39, 41 (9th Cir. 1997))*.

Traditionally, conduct which supports a determination of incompetence to stand trial includes "either extremely erratic and irrational behavior during the course of the trial [citation], or lengthy histories of acute psychosis and psychiatric treatment [citation]." *Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985)*. In more recent opinions, the court has held that a defendant's calm demeanor at trial is not dispositive.

> Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his [*156] competence. *Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 43 L. Ed. 2d 103*, [ ] (1975). None of these factors is determinative. Any one of them may be sufficient to raise a reasonable doubt about competence. *Id.*

Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997). The recent Ninth Circuit opinion in *Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001)*, further holds that "[c]alm behavior in the courtroom is not necessarily inconsistent with mental incompetence. Some forms of incompetence manifest themselves through erratic behavior, others do not." *Id. at 1088*.

Berryman's evidence, taken separately or cumulatively does not establish his incompetence to stand trial. The Court has carefully reviewed the entire trial proceedings. In the first place, Berryman's conduct at trial was not unusual. It was certainly not erratic or disruptive. At most, he could be said to have been sullen because he did not agree with the defense strategy favored by his appointed attorneys. Even his insistence on a denial defense, though presumably unwise, does not establish mental incompetence or even confusion, and no expert has said so. Second, his history of mental impairments are not indicative of a pervasive [*157] mental disability. Further, none of his retained experts have offered an opinion that Berryman's alleged alcohol induced seizure disorder in any way compromised to his ability to assist counsel at trial and understand the trial proceedings

against him or rendered him incapable of knowingly and intelligently waiving his rights under *Miranda v. Arizona.* Moreover, the fact that Berryman did not assist counsel does not demonstrate he was incapable of doing so. Indeed, Berryman offers absolutely no additional evidence from his retained experts that he was incompetent at the time of trial. Although he states in his traverse (at least with respect to Claim 4) that his ability to communicate with and assist counsel must be resolved by an evidentiary hearing, he hasn't asked for one. The Court concludes that Berryman has failed to meet his burden of establishing mental incompetence through record evidence or an offer of proof. This finding forecloses relief on all four of his incompetence allegations in Claims 4, 5, 27, and 28.

An additional legal impediment precludes relief as to Claims 27 and 28. The standard for setting aside an waiver of *Fifth Amendment* rights under *Miranda v. Arizona* is [*158] slightly different from the standard for determining competence to be tried. *Miranda* itself holds that the defendant may waive the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." *384 U.S. at 445*, *quoted by Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)*. In *Moran v. Burdine,* the Court sets out the two parts to a valid *Miranda* waiver:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

475 U.S. at 421 (quoting *Fare v. Michael C, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979))*. Berryman focuses the second prong, that is, his awareness of the nature of the right and consequences for abandonment [*159] of that right.

It is well-settled, however, that even if the Court were to find Berryman suffered from a mental impairment, such a finding, alone, would not support vacating his conviction based on an invalid confession. This follows because the purpose the exclusionary rule under the *Fifth Amendment* is to deter police overreaching in obtaining confessions, *Colorado v. Connelly, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)*, and that purpose could not be effectuated by excluding the statement unless the Court also were to find that the detectives questioning Berryman on September 7, 1987 were aware of his mental infirmities and then exploited the circumstances to extract inculpatory statements. *See id. at 165*. In this case, Berryman cannot establish such official overreaching. In fact, the detectives were careful in their questioning to ensure that Berryman was not intoxicated or otherwise incapable of giving a statement. They specifically asked him if he had consumed any alcohol, and when he responded affirmatively, he assured them he was not disabled in any way from continuing with the interview and had no problem talking with them. Further, his responses to those inquiries [*160] betray no confusion or lack of comprehension.

Nor can Berryman establish the prejudice component to & *Miranda* waiver challenge. In order to vacate a state court conviction based on an erroneously admitted confession, it must be determined that the confession had a substantial and injurious effect on the verdict. *Taylor v. Maddox, 366 F.3d 992, 1016 (9th Cir. 2004)* (quoting *Brecht v. Abrahamson, 507 U.S. at 637-39*).

As argued by Mr. Soria in his in limine motion, Berryman's statement was largely exculpatory. Berryman told detectives he was elsewhere at the time Ms. Hildreth was killed. He now claims, however, that the prosecutor relied on the September 7, 1987 statements to demonstrate his untruthfulness. This prosecution argument, however, was merely a small part of the prosecution case. Even without the argument bearing on Berryman's untruthfulness or reference to the content of the statement, there was more than enough evidence to establish Berryman's guilt of Ms. Hildreth's rape and murder. The issue of Berryman's credibility at trial was minor. Claims 4, 5, 27, and 28 are denied on the merits.

VII. Berryman's Assertion He Was Denied a Fair Trial Due to the Prosecutor's Status as [*161] **an Elected Judge at the Time of Trial (Claims 7, 8, 9,10, and 23).**

Claims 7, 8, 9, 10, and 23 all revolve around the fact that the prosecutor, Mr. Moench, was a Municipal Court judge-elect at the time he tried Berryman's case. As a result, Berryman alleges Mr. Moench exercised judicial powers in violation of the *Separation of Powers Clause*. Further, Mr. Moench's participation in the proceedings is said to have violated Berryman's right to a fair trial and effective representation because the trial judge and defense counsel were aware of his judge-elect status and consequently, out of deference, did not challenge his many alleged prosecutorial misdeeds. Finally, Berryman alleges his jury was not impartial because an unknown number of the jurors also were aware that Mr. Moench had been elected to the Municipal Court and were influenced by his status as a judge-elect. Berryman requests an evidentiary hearing with regard to Claim 8, which alleges ineffective assistance of counsel for the failure of Messrs. Soria and Peterson to move to recuse Mr. Moench from prosecuting Berryman's case.

A. Statement of the Facts Relevant to Mr. Moench's Status as an Elected Judge.

The fact of Mr. Moench's [*162] election to the Municipal Court bench is undisputed. On June 7, 1988, he was elected to serve as a judge in the Taft-Maricopa District of the Kern County Municipal Court. On June 30, 1988, he signed a notarized oath of office [73] in which attested he would "support and defend the Constitution of the United States and the Constitution of the State of California," that he would bear "true faith and allegiance to the Constitution of the United States and the Constitution of the State of California," that he took "this obligation freely, without any mental reservation or purpose of evasion," and that he would "well and faithfully discharge the duties upon which [he was] about the enter." His term as a Municipal Court judge thereafter commenced on January 1, 1989. Mr. Moench's first appearance in Berryman's case was on August 1, 1988 (when the previously assigned prosecutor, Lisa Green, took a leave of absence). Mr. Moench continued as the prosecutor in the case until the trial court handed down Berryman's death sentence on November 28, 1988.

73 The Oath of Office is appended to Berryman's second state habeas petition.

Certain excerpts from the trial record are pertinent to this group of claims, [*163] particularly in support of Berryman's allegations of prosecutorial misdeeds. First, during the his guilt phase summation, Mr. Moench misspoke when explaining the order of deliberations on the various degrees of homicide. He stated, "Only if everyone of you, beyond a reasonable doubt believed that he [Berryman] did not commit a first degree murder, then and only then would you go down and consider murder second, or voluntary manslaughter." The misinformation in this statement is in the notion that before deliberating about a degree of homicide less than first degree murder, the jurors had to agree *beyond a reasonable doubt* (as well as unanimously) that Berryman was not guilty of

first degree murder. In fact, as the trial judge instructed, the only requirement for proceeding to deliberate about the next lesser offense was that the jury had to unanimously agree Berryman was not guilty of first degree murder. After Mr. Moench made the above quoted misstatement, the trial court called a side bar conference and pointed out the error. When argument resumed, Mr. Moench explained, correctly, that a first degree murder guilty verdict required a unanimous, beyond a reasonable doubt finding, but [*164] a first degree murder not guilty verdict simply had to be unanimous before the jury properly could consider second degree murder or manslaughter.

Next, during penalty proceedings, Mr. Moench elicited from motorist David Perez that as he (Mr. Perez) was fleeing from Berryman and the other combatants, his attackers (including Berryman) were yelling out "L.A. Cryps" while one of them continued to kick the quarter panel of Mr. Perez's truck. The specific question which produced this information was, "Did he [meaning Berryman] say anything to you while he was doing this [hitting Mr. Perez with a tire iron]?" In reference to another claim alleged in the petition, Berryman submits a declaration from *Strickland* expert Mr. Simrin, in which Mr. Simrin observes that the "L.A. Cryps" statement was included in police reports of David Perez which reports were made available to defense counsel prior to trial." [74]

> 74 Mr. Simrin's declaration to this effect is attached to Berryman's motion for evidentiary hearing in connection with Claim 61. No other evidence establishes that a police report containing this information was included with the discovery material turned over to defense counsel. For purposes [*165] of this Memorandum Order the Court will treat this notion as a fact. Mr. Moench also mentioned the name of this gang again during his cross examination of former inmate E.J. Corum. This reference is discussed in connection with Claim 61, *see* Part XXXII.A., *infra.*

During penalty proceedings, Mr. Moench elicited from Berryman's older brother, Ronald, Jr., details about the conviction he and Berryman suffered for selling marijuana to students at West Covina High School. As noted in the Summary of the Facts, Part III.B., *supra,* this conduct was contrary to the agreement the parties worked out before penalty proceedings commenced. When cross examining Yolande Rumford, Mr. Moench also managed to mention that Berryman had been involved in supplying drugs to high school students. No objections to Mr. Moench's questions were interposed. In the same manner, during cross examination of Ms. Yolande Rumford, Mr. Moench suggested proof existed that Berryman subjected Ms. Hildreth to forced oral copulation. *See* Part III.B., *supra.* As noted in this summary of the penalty phase evidence, the only fact that could conceivably lend support to the notion Berryman forced Ms. Hildreth to orally copulate him [*166] was the presence of a pubic hair found on her face and said by the prosecution criminalist to be consistent with a sample of Berryman's pubic hair. Mr. Moench also characterized Berryman's physical altercation with his father-in-law, Rev. Fuller, as an act of violence (whereas Berryman apparently views it as a "minor fist fight").

The list of prosecutorial misdeeds continues with Mr. Moench's penalty phase argument that Berryman stood on Ms. Hildreth's face for a full three to five minutes while she lay helplessly bleeding to death. To emphasize this "fact," Mr. Moench timed a three-minute interval for the jury. In contrast to Mr. Moench's argument, the testimony of Dr. Holloway was that Ms. Hildreth's survival time from her wounds was from three to five minutes and that the patterned bruise on her face was caused to sustained pressure of the perpetrator's shoe on her cheek. There was no testimony that the sustained pressure lasted three minutes, or any other duration. Next, is Mr. Moench's misstatement (whether deliberate or negligent) that Berryman's expert, Dr. Pierce, testified Berryman was "amoral" (when in fact the testimony was that Berryman had exhibited

asocial behavior). Mr. [*167] Moench also argued that Berryman was not mentally impaired and did have the capacity to harbor the requisite intent for the crimes charged because none of the experts, or anyone else, indicated that Berryman experienced any sort of psychotic break. The final argument relevant to the present group of claims concerns Mr. Moench's characterization of Berryman's philandering as a factor in aggravation of his sentence. As set out in Part III.B., *supra,* Mr. Moench brought out the fact that Berryman had multiple sexual relationships during cross examination of Berryman's older brother, Ronald, Jr., his aunt, Karen Bonty, his younger brother, Bryan Berryman, and his wife, Carol.

Post-conviction evidence relevant to this group of claims consists of the June 4, 2001 declaration testimony from *Strickland* expert Mr. Simrin, from trial counsel Mr. Soria, and from juror David Armendariz. Mr. Simrin opines that Berryman's trial counsel were incompetent for not having objected to the assignment of Mr. Moench as the prosecutor of this case in as much as his presence in the case was "bound to have an influence on the trial judge and the attorneys." Mr. Simrin believes a juror questionnaire should have [*168] been employed to ascertain if any of the jurors were aware of or would have been influenced by Mr. Moench's judge-elect status.

In his declaration, Mr. Soria confirms that he and Mr. Peterson were aware of Mr. Moench's judge-elect status and states his belief that the trial judge also was aware of the election results. [75] He did not know, however, whether any of the jurors were aware of Mr. Moench's judge-elect status. Mr. Soria explains that he did not challenge the assignment of Mr. Moench to the case because he did not recognize a constitutional or legal basis for doing so.

> 75 Mr. Soria prefaces all of his declarations with the disclaimer that his memory of representing Berryman in 1987 and 1988 "is not perfect."

The declaration testimony of Mr. Armendariz clears up some of the mystery about what the jurors knew concerning Mr. Moench's judge-elect status. Although Mr. Armendariz did not know at the time of the trial proceedings that Mr. Moench had been elected to the position of municipal court judge, he believes that the trial judge informed the jurors of Mr. Moench's election after the penalty phase of the trial. [76]

> 76 In reviewing the reporter's transcripts, the Court has observed [*169] no record of the trial judge saying anything about Mr. Moench's election to the bench. Further, Berryman has not directed the Court's attention to any specific record reference supporting juror knowledge of Mr. Moench's judge-elect status.

In response to Berryman's 1999 investigation funding request to interview jurors (to see if they were aware of Mr. Moench's judge-elect status at the time of the trial), the Court reviewed proffered articles from the *Bakersfield Californian.* Three articles published in advance of the election, the last of which was published over a month prior to the election, revealed the support, endorsement, and views of Mr. Moench. No publicity concerning Mr. Moench's status as a judge-elect during the trial was offered, and as far as the Court is aware, no such publicity exists (or existed). To determine whether any of the potential jurors lived in the Taft-Maricopa Judicial District, and may have voted in the election where Mr. Moench's name appeared on the ballot, the Court reviewed the jury questionnaires that are part of the record. [77] That review reveals that none of the prospective jurors were from the Taft-Maricopa area.

77 Juror questionnaires are part [*170] of the state record as Additional Clerk's Transcript, in five volumes, numbered page 1 through page 1295.

B. Berryman's Contentions.

Berryman maintains that as a judge-elect, Mr. Moench actually was exercising the powers of a judicial officer when he was prosecuting the case, in contravention to the Separation of Powers doctrine. Berryman relies on *Coolidge v. New Hampshire, 403 U.S. 443, 450, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)*, for the controlling principle that a prosecutor may not operate as a judicial officer in the same case. He also relies on *Mistretta v. United States, 488 U.S. 361, 404, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)*, for the proposition that judges must be sure not to impugn the integrity of the judiciary when performing non-judicial tasks. Aside from the identified problem of having the prosecutor exercising executive and judicial authority at the trial, Berryman points out that defense counsel were placed in an "impossible conflict" forcing them to sacrifice their client's interests to further their own future careers, appeasing Mr. Moench to ensure future favorable rulings on appointments and fee requests. He emphasizes instances where Mr. Peterson was actually [*171] "fawning" over Mr. Moench when working out differences concerning the admissibility of Berryman's prior marijuana transportation conviction. The fact that defense counsel failed to object to Mr. Moench's misstatements during his guilt and penalty closing arguments is said to support the conclusion that Berryman was prejudiced by Mr. Moench's status as a judge-elect. There also is the suggestion that the trial judge presiding at Berryman's trial failed to call Mr. Moench to task on his various misdeeds because it would be unseemly for a member of the bench to criticize a colleague. Berryman also challenges the constitutional effectiveness of his appellate counsel, Paul Posner, for failing to raise on direct appeal the challenge to Mr. Moench's assignment to the case. Finally, and consistent with the text of Mr. Simrin's supporting declaration, Berryman argues ineffective assistance of trial counsel because no effort was made, such as by use of questionnaires, to determine if members of the jury panel were aware of or influenced by Mr. Moench's judge-elect status. Berryman concludes the prejudice from jury awareness would be an unavoidable consequence.

C. Analysis.

Although the Warden [*172] has interposed a *Teague*-bar defense to each of the claims which comprise this group, a merits analysis nonetheless is appropriate. The *Teague* matrix simply does not fit these circumstances. There are two varieties of cases amenable to a *Teague*-bar defense. The first type involves a petitioner's reliance on a decision announced after his conviction became final. In the second, the petitioner relies on a decision announced before his conviction became final, but which is to be applied in a novel setting, thereby extending precedent in the present case. *See Stringer v. Black, 503 U.S. 222, 228, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992)*. Although in both instances, the *Teague* inquiry is to be resolved before courts address the merits, *Caspari v. Bohlen, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994)*, in the present case such a threshold inquiry is pointless, because there is no rule supporting Berryman's contentions. It's not a matter of whether a new rule was announced after Berryman's conviction became final, or alternatively whether an old rule is being applied in a new way. There is simply no rule, period. Based on the state record, the evidence offered, and Berryman's [*173] arguments, Claims 7, 8, 9, 10, and 23 cannot be sustained. In many cases, the facts simply do not support the allegations. In others, no controlling precedent supports Berryman's contentions.

The primary example of unsupported allegations is the total lack of evidence that Berryman's jurors were aware of Mr. Moench's judge-elect status. The Court already has expended considerable effort on this finding in the context of investigation authorization requests in 1999 and 2000. In the Court's prior orders it concluded Berryman had not made a colorable claim that further investigation would uncover possible juror knowledge of Mr. Moench's judge-elect status. First, Mr. Armendariz denied such knowledge, and second, the Court's own careful review of juror questionnaires failed to turn up any indication that any member of the venire resided in the judicial district where Mr. Moench's election took place. Berryman has not offered any evidence to suggest the contrary.

Another prime example of lack of factual support relates to Berryman's alleged Separation of Powers challenge. Contrary to the fundamental underpinning of his argument, there is absolutely no indication that Mr. Moench was exercising [*174] judicial or quasi-judicial powers at the time he was prosecuting Berryman's case. At all times during the trial, as apparent from the record, he was functioning as a prosecutor, notwithstanding his notarized signature on the oath of office he executed on June 30, 1988. Thus, even though Berryman's citation to *Coolidge v. New Hampshire* and *Mistretta v. United States,* are accurate, they are inapposite.

Similarly, there is no factual bases for Berryman's complaint that Mr. Moench committed misconduct for presenting Rev. Fuller's testimony about his altercation with Berryman in August 1987. Contrary to Berryman's complaint, evidence of the altercation was entirely relevant as a prior violent act under Penal Code *§ 190.3(b)*. Berryman struck his father-in-law on the bridge of his nose. It cannot be seriously disputed that striking someone in the face is an act of violence. The factual underpinning for this claim is revisited in the discussion of Claim 60 (together with Claims 56, 62, 88, 89, 90, and 93). *See* Part XXX., i*nfra.*

Berryman also misstates the record when he argues Mr. Moench's judge-elect status caused the trial judge to hold back from criticizing Mr. Moench out of professional [*175] courtesy. In fact, the trial judge did correct Mr. Moench, as noted, in connection with the misstatement of the law regarding the order of deliberations on degrees of homicide. There also is no direct evidence that Messrs. Soria and Peterson were seeking to curry favor with Mr. Moench for future appointments and fee requests. Mr. Soria's declaration is absolutely' silent on the matter.

On the other hand, there is indirect evidence suggesting the failure of defense counsel to object to misstatements made during Mr. Moench's summation was motivated by a desire not to alienate a future judge. Assuming this is true, even though Mr. Soria's declaration does not substantiate it, the prejudicial value of Mr. Moench's arguments must be evaluated. In each instance of misstatement and/or improper argument, the Court is persuaded that the jury's verdicts were not adversely affected. *See Brecht, 507 U.S. at 637.*

First, while it is true Mr. Moench argued Berryman's innocence had to be proved beyond a reasonable doubt before a lesser included offense could be considered, the erroneous statement did not go unconnected. The trial court called a side bar conference and informed Mr. Moench of the error. [*176] Mr. Moench then correctly stated the law in his argument and the trial court gave the correct instruction. Any prejudicial effect of the misstatement was cured. *See* discussion of Claims 37 and 49, Part XVII., *infra.*

Next is Berryman's complaint that Mr. Moench improperly argued the jury should not consider Berryman to have suffered from an impaired mental state because no one testified he sustained a psychotic break. Again, contrary to Berryman's characterization of this argument as improper, it was entirely proper for Mr. Moench to argue that Berryman was not mentally impaired and that he

did have the mental capacity to understand the unlawfulness of his conduct. That is the purpose of summation, as discussed in connection with Claims 76, 79, and 80, *see* Part XXVII.C., *infra,* and Claims 86 and 93, *see* Part XXXI.F., *infra.*

The third instance involves, Mr. Moench's alleged misconduct for eliciting a reference to "L.A. Cyrps" from David Perez. Because of the existence of a police report which apparently includes Mr. Perez's statement that his attackers yelled "L.A. Cryps," the Court rejects the Warden's contention that Mr. Moench could not have known the reference would be made when he [*177] was conducting his direct examination. On the other hand, since Mr. Moench did nothing in his follow up to emphasize the reference and it wasn't mentioned again during the examination of other witnesses or summation, the Court cannot agree that eliciting the comment was prejudicial. Rather, the Court finds the gang reference was merely tangential, and not significant enough, alone or in conjunction with other circumstances, to have swayed the jury to vote for death. *See* discussion of Claim 61, Part XXXII., *supra.*

The fourth alleged misconduct pertains to the agreement of the parties to limit admissibility of Berryman's prior marijuana transportation conviction by stipulation only. Contrary to this agreement, Mr. Moench actively elicited evidence that Berryman was selling marijuana to high school students. The Court is at a loss as to why Mr. Moench would go back on his agreement, why the trial court didn't put an end to Mr. Moench's misleading questions after at least the second time the proscribed evidence was elicited, and why defense counsel did not object. The impact of the marijuana sales, however, remains relatively insignificant. As the Court reads the record, the evidence was [*178] emphasized by Mr. Moench to establish Berryman's opportunistic character, namely, he would even sell drugs to high school students to advance his own personal objectives. But Berryman's selfishness was portrayed in many other ways as well. He was clearly a young man who constantly tried to get attention and consistently lied about his abilities and/or actions to avoid unpleasant consequences. Even Dr. Pierce referred to his personality has having Narcissistic elements. But selling marijuana is not, in an of itself, a heinous crime. It does not conjure up in the mind images of school children suffering the effects of a painful addiction. The Court is convinced that the fact of Mr. Moench's misconduct regarding revelation of the marijuana offense had no impact on the jury's death verdict. *See* discussion of Claims 56, 60, 62, 88, 89, 90, and 93, Part XXX., *infra.*

Fifth, Mr. Moench's false suggestion that Berryman forced Ms. Hildreth to orally copulate him, while much more serious than selling marijuana, also would not have tipped the scales in favor of death. By the time Mr. Moench suggested this theory of sexual abuse, the jury already had convicted Berryman of first degree murder, rape, [*179] and use of a knife to commit both offenses. While an objection from defense counsel and an admonition by the trial court would have been preferred, the absence of objection and admonition certainly were not dispositive. If anything the suggestion of forced oral copulation was merely cumulative, not prejudicial. *See* discussion of Claims 53 and 54, Part XXVIII., *infra.*

Sixth, the erroneous argument about the length of time Berryman stood on the victim's face as she lay dying actually constitutes one of the least prejudicial prosecutorial misdeeds. The evidence adduced at the trial was that a patterned bruise on Ms. Hildreth's face bore similarities to the tread design of the bottom of Berryman's Brooks athletic shoes. Dr. Holloway opined that the bruise was the result of sustained pressure of the perpetrator's foot on Ms. Hildreth's face. Thus, even if Berryman had not planted his foot on the victim's face for the entire three to five minutes Dr. Holloway stated was her maximum survival time from the nicked carotid artery, the fact remains

that he did apply sustained pressure of his foot for some significant amount of time (perhaps less than three minutes) in order to generate the patterned [*180] bruise. Had Mr. Moench advanced an argument more consistent with Dr. Holloway's testimony, the argument still would have been highly prejudicial. The incorrect information about the exact duration of the sustained pressure was not significant. *See* Claims 29 and 75, Part XXIV., *infra.*

Seventh, Mr. Moench's erroneous characterization of experts calling Berryman "amoral" (rather than "asocial") also is relatively minor in light of the entire argument. Mr. Moench forcefully urged the jury to impose the death penalty on Berryman because he had extinguished the life of a 17 year old high school senior, who was loved by many, many people. He belittled Berryman's background and sarcastically referred to Berryman as a man who wanted women to do his bidding for him. Mr. Moench actually described an amoral character. Though it was wrong to attribute this characterization to the experts, Berryman's conduct, as described by Mr. Moench, fit the amoral label. The misstatement was not prejudicial. *See* discussion of Claims 76, 79, and 80, Part XXVII., *infra.*

Eighth, the Court agrees that Mr. Moench crossed the line of proper argument when he argued that Berryman's philandering should be viewed by the [*181] jurors as a factor in aggravation of the sentence. However, this is not the only statement Mr. Moench made about Berryman's exploits with women. Running from one woman to the next, to the next, until finally Ms. Hildreth said "no" was a circumstance of the crime, a proper subject for argument. And the fact that in the course of a single evening, Berryman was in contact with four women, and spent time in the company of three, one of which he killed, properly is characterized as an aggravating factor. Berryman transported Ms. Hildreth to the secluded area off of Cecil Avenue to have sex with her and avoid the reality of his self-created mess of a life at the Clark residence. He was a philanderer and the jury surely was presented with evidence of this fact from both the prosecution and the defense. It was not improper to argue that Berryman's character, as exhibited during the commission of the crime, was aggravating. To be sure, it was prejudicial, but that is the goal of the prosecution, to present prejudicial evidence that is properly admitted. In this case that standard was met. *See* discussion of Claims 13 and 14, Part XXIII., *infra.*

Since the evidence and argument advanced did not [*182] violate Berryman's constitutional rights, his appellate counsel was not in any way ineffective for failing to challenge Mr. Moench's judge-elect status on direct appeal. Nor, was there any break down in defense counsel's professional competence for not bringing the fact of Mr. Moench's judge-elect status to the forefront of the potential jurors' outlook for the case. Just as Mr. Soria averred that he left Mr. Moench's assignment to the case unchallenged because he was aware of no legal or constitutional basis for objection, the Court also finds no legal or constitutional basis for a challenge. Had counsel asked any of the jurors if they knew Mr. Moench had been elected to the Municipal Court bench prior to trial, the potential for prosecutorial bias complained of in this group of claims certainly would have occurred. Claims 7, 8, 9, 10, and 23 are denied on the merits. Berryman's request for an evidentiary hearing as to Claim 8 is denied.

VIII. Berryman's Challenge to the Fair Cross Section of the Jury (Claims 20 and 21).

In Claims 20 and 21 Berryman challenges the composition of his jury because no African Americans were on the jury venire or jury panel from which his jury was drawn. [*183] Claim 20 is pleaded in terms of a straight constitutional violation for violation of the fair-cross section

requirement. Claim 21 alleges ineffective assistance of trial counsel for failure to object to the jury composition.

A. Berryman's Presentation of the Claims.

Berryman offers no factual support for his claim. The Court is not supplied with any information about the proportionate racial composition of Kern County or the proportion of African Americans (if any) who were on jury venires at the time of his trial. No evidentiary development for these claims is requested. The only law Berryman cites in his moving papers is *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*, for the proposition that racial discrimination in jury selection is unconstitutional. In his traverse, Berryman recognizes that Claims 20 and 21 are controlled by the Ninth Circuit case of *Thomas v. Borg, 159 F.3d 1147 (9th Cir. 1998)*, and that he cannot prevail unless the Ninth Circuit reexamines the issue, or *Thomas* is reversed by the United States Supreme Court.

B. Analysis.

The starting place for a fair-cross section challenge under the *Sixth Amendment* is *Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)*. [*184] [78] *Duren* holds:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation tot he number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

78 *Duren* is not cited by Berryman at all.

The first *Duren* prong is established, as African Americans are a distinctive group for purposes of *Sixth Amendment* analysis. Establishment of the second prong requires Berryman to show that representation of African Americans in Kern County venires from which juries were selected at the time of his trial was not fair and reasonable in relation to the number of African Americans in the community. *Thomas v. Borg, 159 F.3d at 1150*. This showing requires proof of an absolute disparity between the percentage of the distinct group represented in the total community population and the percentage of the distinct group represented on the master jury wheel. [*185] *Id.* (quoting *United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989))*. Typically proof of this disparity is presented in the form of statistical data. To establish that under representation of African Americans is due to systematic exclusion under the third *Duren* prong, Berryman must demonstrate that African Americans are actually subjected to a different treatment in the jury selection process from other prospective jurors.

Since Berryman has neither presented nor asked to develop evidence which would support an absolute disparity, the second prong of the *Duren* test cannot be established. Nor has Berryman offered any facts about the jury selection process in Kern County, much less information about the specific treatment of prospective African American jurors. Since no cognizable constitutional

violation is presented regarding the fair cross section requirement, it follows that Berryman's trial counsel cannot have been constitutionally ineffective for their failure to raise the issue. Claims 20 and 21 are denied on the merits.

IX. Berryman's Challenge to the Death Qualification of the Jury (Claim 22).

In Claim 22, Berryman asserts that his trial counsel were ineffective for [*186] failing to ascertain whether prospective jurors held the belief that capital punishment should be automatically imposed in every case in which it is authorized. He claims the subject was not adequately covered in the juror questionnaires or by the death qualification process conducted on voir dire. He does not request an evidentiary hearing.

A. Statement of the Facts Relevant to the Death Qualification Process.

Each of the twelve jurors who served on Berryman's jury were given questionnaires to complete and in addition were subject to individual death qualification voir dire.

1. Questionnaire Inquiries.

Question 25 of the questionnaire (which every prospective juror completed), asked: "Do you believe you should hear and review all the circumstances surrounding the killing before you decide whether the State should impose the death penalty?" A-CT-1:6. In the same vein, question 26 asks: "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the Court explains it to you?" *Id.* at 7. All of the jurors responded affirmatively.

2. Death Qualification Voir Dire.

During individual voir dire, the jurors generally were asked whether they would automatically [*187] vote against the death penalty, whether they would automatically vote for the death penalty, and whether they would carefully weigh evidence presented by both the prosecution and the defense. The Court has carefully reviewed the death qualification voir dire of the twelve jurors who served on Berryman's jury.

a. Juror Billy Joe Honaker.

The death qualification voir dire of Mr. Honaker, conducted by the trial judge, proceeded as follows:

> Q. [by the trial judge]... And if the People prove their case beyond a reasonable doubt that Mr. Berryman did, in fact murder this young lady in the course of raping her, then there would be a second phase of the trial in which that jury would be asked to make a recommendation as to whether or not the death penalty should be imposed or whether a penalty of life without the possibility of parole should be imposed. Those are the only two choices. [P] Do you have any feelings about the death penalty that would preclude you from making that choice[?] In other words, would you automatically refuse to apply the death penalty regardless of what the evidence was?
>
> A. No sir. I wouldn't.
>
> Q. On the other side of that coin, would you automatically apply the death penalty [*188] if Mr. Berryman was found to eligible for it?

A. No sir, not automatically.

Q. So, in other words, [you would] listen to all of the evidence that would be presented in that second phase of the trial?

A. Yes sir.

Q. And you would carefully weigh that evidence and deliberate that evidence with your fellow jurors to come to -- to attempt to come to a decision for yourself and then as a group of jurors on that issue?

A. Yes, sir.

RT-5: 404-05.

b. Juror LaVeta Morris.

The death qualification of Ms. Morris by the trial judge, Mr. Soria, and Mr. Moench proceeded as follows:

Q. [by the trial judge] Okay. Now Mrs. Morris, I mentioned on Friday, that due to the -- or on Monday, rather, of last week, that due to the nature of the charges, that if the People, the District Attorney's Office, representing the People, are able to prove their case to the jury, in the guilt phase of the trial, beyond a reasonable doubt, in other words, to establish in the first phase of the trial, that Mr. Berryman did rape and murder this young lady, that the jury then will have to go through a second phase of the trial, in which the jury will have to determine whether or not to impose the death penalty. First of all, do you [*189] have feelings about the death penalty that would make it impossible for you to vote for the death penalty, under any circumstances.

A. No.

Q. On the other side of that coin, do you have feelings about the death penalty, that in the event that your jury, in the first phase of the trial, found beyond a reasonable that Mr. Berryman did rape, and in the course of that rape, murder this young lady?

A. Uh-huh.

Q. That you would automatically impose the death penalty, without hearing any further evidence concerning the issue of penalty?

A. No.

Q. All right. You understand in the second phase of the trial, the so-called penalty phase, the jury would not only consider all of the evidence that they previously heard in the guilt phase, but also would be hearing evidence from the People, evidence in what we call aggravation, that would tend to support the death penalty, for example, and evidence from the defense, in mitigation, things that maybe Mr. Berryman had done during his life, exemplary things and so forth, that would tend to establish that life in prison without the possibility of parole would be the proper penalty?

A. Uh-huh.

Q. Do you think you could listen to that evidence fairly and weigh [*190] that evidence as you'd be instructed to do so by the Court?

A. Yeah, I think I could.

. . .

Q. [by Mr. Soria] And if that [reaching the penalty phase] were to happen, just saying if that were to happen, Rodney Berryman would stand before you guilty of the charges alleged, murder, and murder during the course of rape, [P] Could you still give Rodney Berryman a fair hearing regarding evidence we would present, regarding his life, or life in prison with the possibility of parole, as opposed to Mr. Moench, representing the People, that he thinks would warrant death. In other words, in the second phase, you weigh, you have an option of death, and an option of life in prison without the possibility of parole, [P] Do you think you could listen to the evidence fairly at that point?

A. Yes.

. . .

Q. [by Mr. Moench] Do you think that you would be able to go through and if the evidence warrants the death penalty, do you think you could vote for that, and then come into court and say so in open court? That's really the bottom line on this.

A. Yeah. If I felt that it was warranted, I could do it. I don't know if that -- if I'd be that happy about doing that.

RT-6: 506-07, 513-14, and 524-25.

c. Juror Mary [*191] **Donovan Radman.**

The death qualification voir dire of Ms. Radman was conducted by the trial judge:

Q. [by the trial judge] So I need to ask you some questions about your feelings on the death penalty.

A. Uh-huh, sure.

Q. Do you feel or are your feelings on the death penalty such that there is no situation, no case in which you could vote for the imposition of the death penalty?

A. Sir, you're saying that under no circumstances would I say, you know, I mean, I would refuse the death penalty, either -- regardless, right?

Q. Regardless, right.

A. No. Unh-unh.

Q. If your jury, for example, did convict Mr. Berryman in the guilt phase of the murder and rape, are you of a feeling in that situation, about the death penalty, that you would automatically impose the death penalty at that point?

A. No.

Q. Or would you listen -- would you be able to listen to all of the evidence on the penalty phase, both from the People and the defense, and carefully weigh that evidence?

A. Oh, yeah.

RT-6: 565-66.

d. Juror Helen Valdez.

Ms. Valdez's death qualification voir dire also was conducted by the trial judge, as follows:

Q. [by the trial judge] ... In the first phase, the jury doesn't involve itself with penalty, and would [*192] be expressly instructed not to concern itself with penalty, at all. [P] But in the second phase, the jury would hear additional evidence from both the People and the defense, about the proper penalty to apply, and would you be able to consider that evidence, along with all of the evidence they heard in the guilt phase. [P] The two penalty choices that they would have would be either death or life in prison without the possibility of parole.

A. Uh-huh.

Q. So, as you can see, the death penalty is a very serious consideration in this case.

A. Uh-huh.

Q. I need to ask you, do you have feelings about the death penalty that would make it impossible for you to vote for the death penalty under any circumstances?

A. I don't know. I don't know how I feel about it, I really don't know.

Q. All right. As you sit there right now, and having heard what I've told you thus far this afternoon, have you -- do you have any feelings about the death penalty at this point, one way or the other?

A. No, I don't.

Q. All right. Do you feel that if you were selected on this jury, and, you know, went through the first phase, and you and your fellow jurors determined that Mr. Berryman did, in fact, rape and murder this [*193] young girl, do you think that you could listen to the additional evidence that was presented and fairly consider whether or not to apply the death penalty or life in prison without the possibility of parole? Do you think you could do that?

A. I think I could.

RT-6: 635-36.

e. Juror Steven Ray Greenwood.

The death qualification voir dire of Mr. Greenwood was conducted by the trial judge, as follows:

Q. [by the trial judge] The questions I need to ask you are as follows, first question is this, are your feelings about the death penalty such that you could not vote for the death penalty under any circumstances?

A. Under any circumstances? No, sir.

Q. All right. Are your feelings about the death penalty such that if you reach that penalty phase.

A. Uh-huh.

Q. And Mr. Berryman was convicted by you and 11 other jurors of the rape and murder of this young girl, would you automatically apply the death penalty?

A. No, sir.

Q. All right. So I take it what you're telling us, you would consider all of the evidence in the penalty phase and the evidence that you previously heard, you would weigh that evidence, and make your decision on the basis of all the evidence?

A. Yes, sir. You know, it would have to be [*194] proven that was warranted, yes.

RT-7: 718.

f. Juror David Armendariz.

Death qualification voir dire of Mr. Armendariz was conducted by the trial judge and Mr. Moench:

Q. [by the trial judge] ... I have to ask you some questions on how you feel about the death penalty, [P] First question I want to ask you is this, are your feelings about the death penalty such that you would not be able to vote for the death penalty, under any circumstances?

A. No, I feel I could vote for that.

Q. All right.

A. I mean, depending on what my fellow jurors come up with, but as far as personally speaking, no, I wouldn't have any problem with it, once all the evidence has been weighed and everything.

Q. All right. On the other side of that coin, since in that second phase of the trial, Mr. Berryman would already have been convicted of the rape and murder of this girl, would you, based on the feelings that you have about the death penalty, automatically apply the death penalty, or would you consider all of the other evidence before making that decision?

A. I'd have to consider everything involved.

. . .

Q. [by Mr. Moench] ... But do you feel that this particular kind of murder, that is murder in the course of a rape, would [*195] be one that you feel is appropriate [for the death penalty]?

A. I can't judge it right now. I don't know the immediate, you know, facts in between. But it -- if the -- do you want me to speculate that if, indeed, the jury, you know, whatever special circumstances were involved.

Q. Uh-huh.

A. I knew the outcome was a rape, are you asking me if I could say yes, when the death penalty should be implemented?

Q. What I need to know is if this is the type of case where, if -- obviously it has to be proven, and once that's proven, do you think it's appropriate to seek the death penalty in those type of cases?

A. If it's proven, then yes.

RT-7: 735, 744-45.

g. Juror Kimberly Kay Arnold.

Ms. Arnold's death qualification voir dire was conducted by the trial judge and Mr. Soria, as follows:

Q. [by the trial judge] Okay. Do you understand, under California law, that the death penalty is not automatic?

A. (Affirmative nod.)

Q. In other words, the jury in that second phase of the trial, would be required to weigh all of the evidence again, under a different method, but weigh all of the evidence that it's already heard, it wouldn't be presented again, you'd already heard it.

A. Yeah.

Q. But you'd weigh that evidence, [*196] along with the additional evidence that I talked about a moment ago, and weigh it all together, and then decide fairly and impartially which of the 2 penalties would be the appropriate penalty. That's the job of the jury in that situation.

A. Uh-huh.

Q. I guess what you've indicated is that you could vote for the death penalty, if the evidence was appropriate.

A. Yeah.

Q. The other question, though, I need to ask you, is this. If Mr. Berryman stood before you already convicted of the rape and murder.

A. Uh-huh.

Q. Would you then automatically apply the death penalty, or would you listen to this additional evidence?

A. I'd listen to the additional evidence.

Q. And you would give it fair consideration?

A. Uh-huh.

. . .

Q. Now, the other one thing that we ask you, also, to do in completing the questionnaire, is to indicate to us any areas in the questionnaire that you would prefer to talk to us about privately, as opposed to out in open court, so some of these areas can be further inquired into [P] Two of the areas you did initial, one is the belief in the adage an eye for an eye. What did you want to tell us about that?

A. I just wanted to give an opinion myself on how I feel that if he's had a [*197] fair trial, and he's convicted, then I'm for eye for an eye, but, you know --

Q. Now, when you say a fair trial, are you talking about the first phase of the trial, in other words --

A. Well, both.

Q. All right. Because if you're talking just about the first phase, and we get back to that question about automatically applying the death penalty.

A. Yeah.

Q. Which you said you would not do, or consider all the evidence.

A. Uh-huh.

. . .

Q. [by Mr. Soria] [Regarding Ms. Arnold's concern that people are sentenced to death, but no one is executed,] I think you would agree that somebody would have the right to appeal their case.

A. Yeah.

Q. That's what that is. Your duty as a juror is not to consider what happens afterwards, if it were to reach the penalty phase and you'd have to make a determination.

A. That's true.

Q. You would be instructed by the Court that you're not to consider what happens after, you're just to consider what the evidence is the courtroom is, and make a decision on the evidence that's presented to you in the courtroom.

A. Uh-huh.

Q. And based on that, in the penalty phase, you have 2 choices, either life in prison without the possibility of parole or death, and that's what you concern [*198] yourself with.

A. Uh-huh.

Q. And that would be your duty as a juror. Do you think you could fulfill that duty?

A. Yes, I could.

Q. And you can put all the concerns mentioned here out of your mind?

A. Oh, yeah.

RT-7: 764-65, 766, 768-69.

h. Juror Jymme Lyn Ahl.

Ms. Ahl's death qualification voir dire was conducted by the trial judge and Mr. Soria, as follows:

Q. [by the trial judge] Now, if, in that [the guilt] phase of the trial, you and 11 other jurors determine that Mr. Berryman is guilty of the rape and murder of this young girl, then there would be a second phase of the trial, and in that phase of the trial, the jury would have to weigh all of the evidence, including the evidence in the first phase, plus any additional evidence that would be presented by either the People or the defense, on the question of penalty.

A. Uh-huh.

Q. And decide whether or not to impose the death penalty or impose life in prison without the possibility of parole.

A. (Affirmative nod.)

Q. So it's important that we know some of your inner feelings about the death penalty. The first question I want to ask you is this, under those circumstances, if you and your fellow jurors came to the point of considering penalty, [*199] are your feelings about the death penalty such that you could not vote for the death penalty under any circumstances?

A. No, they're not. I think -- are you asking that if it came down to it, and it looked like the death penalty was warranted, whether or not I personally could do it?

Q. Yes.

A. I could personally do it.

Q. All right. On the other side of that coin, if you and your fellow jurors had found Mr. Berryman guilty of the rape and murder, and had the choice between death or life in prison without the possibility of parole, would you automatically apply the death penalty, or would you consider --

A. No, sir.

Q. - all of the evidence?

A. No, sir.

Q. So I take it you would consider all of the evidence that would be presented, and make the weighing process that the law requires?

A. Yes, sir.

...

Q. [by Mr. Soria] But in the abstract, you do believe that the death penalty should exist?

A. I believe it's applicable in some situations.

Q. All right. But not in every situation.

A. No, sir.

Q. All right. And that's what we're concerned about, as the defense, if we reach the second stage, and we only reach that if Mr. Berryman, my client, is found guilty of the charges alleged by the prosecutor. Do [*200] you believe if that were to happen, you would still be listening to us with regards to considering whether he should live or die?

A. Yes, sir.

RT-9: 1032-34, 1037-38.

i. Juror Virginia Mae Douglas.

The trial judge conducted the death qualification voir dire of Ms. Douglas:

Q. [by the trial judge] The first question I need to ask you concerning your feelings about the death penalty is this, are your feelings about the death penalty such that you could not vote for the death penalty, as a trial juror in this case, under any circumstances?

A. I would have difficulty, but I would have to hear the evidence.

Q. Okay.

A. And all of the ramifications, as far as what reasons for it.

Q. All right. So I take it, if you -- you know, if the evidence was such that you felt the penalty was proper, you could, in that situation, vote for the death penalty?

A. Yes.

Q. Okay. On the other side of that proposition, if you got to the penalty phase of the trial, Mr. Berryman would have already been convicted of the charge of rape and murder, by you and 11 other jurors.

A. Uh-huh.

Q. And in that situation, could you consider both possible penalties, or would you automatically vote for the death penalty?

A. No, I would [*201] -- I would consider both of them.

Q. Okay. Do you feel you could consider and weigh all of the evidence that you would hear in that respect?

A. I would try to.

Q. Do you think you could do so fairly and impartially to both sides?

A. Hopefully.

RT-11: 1311-12.

j. Juror Gene Henry Bibb.

Mr. Bibb's death qualification voir dire was conducted by the trial judge and Mr. Soria:

Q. [by the trial judge] In that second phase of the trial, the jury would be instructed that they should weigh and consider all of the evidence that they heard in the first part of the trial, together with any additional evidence that would be presented on the issue of penalty. So it's important, as you can tell, we need to know something about your feelings about the death penalty.

A. Uh-huh.

Q. The specific questions I need to ask you are as follows, first one is this, are your feelings about the death penalty such that you could not, as a juror, vote for the death penalty, under any circumstances?

A. No, they're not.

Q. All right. Are your feelings such that if you were selected as a juror in this case, and Mr. Berryman was convicted by you and your fellow jurors of the rape a murder of this young girl, would you in the penalty [*202] phase of this trial, automatically impose the death penalty?

A. No, I don't believe it would be automatic.

Q. Then you I think are telling me, that you would weigh and consider all of the evidence that would be presented, and make an independent determination for yourself what the proper penalty would be?

A. Yes.

Q. Do you feel you can do that fairly and impartially to both sides?

A. Yes, I do.

...

Q. [by Mr. Soria] My concern is question 22 [of the questionnaire], about the enforcement of the penalty.

A. Uh-huh.

Q. You realize that cannot be a concern?

A. Yes, I understand.

Q. But what your belief is, whether that is enforced or not, you would have to put that aside?

A. Yes, I understand.

Q. And I believe the Court would instruct you that you're not to think about what is to happen after your decision, just apply what you hear in the courtroom, though the witness stand and properly admitted exhibits and the law the court gives you, could you do that?

A. Yes.

Q. Give both sides a fair shake?

A. Yes.

RT-12: 1405-06, 1408.

k. Juror Michael A. Carr.

The trial judge conducted the death qualification voir dire of Mr. Carr, as follows:

Q. [by the trial judge] So it's -- as you can understand, it's necessary that [*203] we know generally your feelings about the death penalty. [P] I want to ask you a couple of questions in that respect. First question is this, if you were selected as a juror in this case, are you feelings about the death penalty such that you could not vote for the death penalty under any circumstance?

A. No, I -- if all the evidence weighed out, I -- you know, I could vote that way, yes.

Q. All right. Let me ask you this, that if you were on this jury, and you and your fellow jurors had found Mr. Berryman guilty of the rape and the murder this young girl in the course that rape, in the penalty part of the trial, would you automatically vote for the death penalty?

A. I would want to hear everything that was presented.

Q. Okay. You would then follow the instructions and carefully weigh all of the evidence that was presented?

A. Yes.

Q. Do you think you could do that fairly and impartially to both sides?

A. Yeah.

RT-12: 1420-21.

l. Juror Margaret Anne Shea.

Ms. Shea's death qualification voir dire also was conducted by the trial judge, as follows:

Q. [by the trial judge] The first question I need to ask you is this, are your feelings regarding the death penalty such that if you were selected as [*204] a juror in this case, that you could not under any circumstance, vote for the death penalty?

A. No.

Q. Okay. Are you feelings about the death penalty such that if you and your fellow jurors had convicted Mr. Berryman of the rape and murder of this young girl, and thereby got to the penalty phase of the trial, would you in that penalty phase automatically vote for the death penalty?

A. No.

Q. Okay. So I gather what you would do is what I mentioned moments ago, that you would carefully consider all [ ] of the evidence and weigh that evidence and make a decision for yourself, based on all of the circumstances, what the proper penalty should be?

A. Yes, I would.

RT-13:1622.

B. Berrryman's Contentions.

Berryman recognizes that the controlling authority for Claim 22 is *Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)* and *Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*. He states *Witt* stands for the proposition that a prospective juror is unqualified to sit on a capital jury if the juror's views on capital punishment would prevent or substantially impair the performance of the his or her duties as a juror in accordance with the court's [*205] instructions. He further correctly asserts *Morgan* holds a court may not refuse defense counsel's question as to whether jurors would impose the death penalty automatically on a finding of guilt, regardless of facts presented in mitigation. He continues, that under *Morgan,* even if one juror is empaneled who would automatically vote for the death penalty where authorized, without consideration of mitigating and aggravating circumstances, the death verdict is void and must be set aside.

Although the Court already has reviewed the death qualification process conducted on voir dire, and determined Berryman's assertions to be unsubstantiated, [79] Berryman asks that the Court reconsider its position in light of the reasoning in an Oklahoma state court case, *Jones v. State, 1999 OK CR 8, 990 P.2d 247 (Okl. 1999)*, particularly with respect to jurors Michael A. Carr, Jymme Lyn Ahl, Helen Valdez, and LaVeta Morris.

79 This determination was made in connection with an order filed September 9, 1999 largely denying Berryman's request for investigative funding.

C. Analysis.

Morgan holds that a juror who will automatically vote for the death penalty in every case is one who "will fail in good faith to [*206] consider the evidence of aggravating and mitigating

circumstances as the instructions require," and may be challenged for cause. *504 U.S. at 729*. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* Berryman's reliance on the reasoning in *Jones* is misplaced. *Jones* adds nothing to the well-established rule in *Morgan.* As Berryman notes in his traverse, defense counsel in *Jones* was permitted to ask one juror: "Do you feel that because he [the defendant] admits to the crime . . . that he should be given the death penalty without further consideration?" *Jones, 990 P. 2d at 249*. The court characterizes this question as the only question, of many, asked of prospective jurors which explored "a juror's inclination to impose the death penalty automatically." *Id.* Had this question been asked of all the prospective jurors (or at least all the jurors who ultimately were selected for jury service), the Constitution would not have been violated. But, counsel was only able to ask a single juror this question. "The fact that counsel succeeded in asking this question of one juror, but was prevented from similarly questioning any [*207] other panel member, does not cure this error." *Id.*

Although the inclination of Berryman's jurors to automatically impose the death penalty was not explored in the juror questionnaires, during death qualification voir dire, each of the jurors, except for Helen Valdez, specifically was asked ifs/he would automatically impose the death penalty in the event s/he and his/her fellow jurors found Berryman guilty of murder and rape. Jurors Morris, Ahl, and Carr specifically were asked these questions. *See* Part IX.A.2.b., h., and k., *supra,* respectively. No further inquiry concerning their impartiality on the automatic imposition of the death penalty is warranted.

Notwithstanding that Juror Valdez was not asked if she automatically would vote for the death penalty in the event the jury found Berryman guilty of murder and rape, her voir dire responses clearly indicate her impartiality on this issue. Ms. Valdez equivocated when the trial judge asked her if she would refuse to vote for that punishment under any circumstances. She responded, "I don't know. I don't know how I feel about it, I really don't." *See* Part IX.A.2.d., *supra.* Next, when asked whether she had "any feelings" about the death [*208] penalty, "one way or the other," she responded, "No, I don't." *See id.* Finally, when asked whether she could listen to additional evidence presented during penalty proceedings and "fairly consider whether or not to apply the death penalty or life in prison without the possibility of parole," she responded, "I think I could." *See id.*

Based on these responses, there can be no doubt but that Ms. Valdez was not predisposed, and did not believe she was predisposed, to vote automatically for the death penalty in the event Berryman became death eligible. She could not answer definitely when asked whether she would refuse to vote for the death penalty, she affirmed that she had no feelings one way or the other about the death penalty, and she affirmed that she would consider penalty phase evidence before deciding to vote for death or life in prison without parole. The fact that the trial judge did not use the precise phrase "would you automatically vote for the death penalty?" is not dispositive. The Constitution "does not dictate a catechism for voir dire, [ ] only that the defendant be afforded an impartial jury." *Morgan, 504 U.S. at 729*. What is required is that the voir dire is adequate [*209] to identify unqualified jurors. While the adequacy of voir dire is not easily reviewed, the key is that "certain inquiries must be made to effectuate constitutional protections." *Id. at 730*. Those inquiries were adequate in the case of Ms. Valdez. The Court finds that the voir dire inquiries established her impartiality.

Since Ms. Arnold also equivocated on her belief in the automatic imposition of the death penalty, in terms of the "an eye for an eye" concept, her voir dire responses also warrant further

evaluation. First, Ms. Arnold indicated by an affirmative nod that she understood the death penalty was not automatic, even in the event Berryman were convicted of murder and rape. *See* Part IX.A.2.g., *supra.* Second, she agreed to weigh all the evidence presented during penalty proceedings before deciding on the two available punishments. *See id.* Third, she specifically affirmed that she would listen to all the evidence before making her decision. *See id.* When asked about her views on "an eye for an eye," Ms. Arnold first responded that if Berryman had a fair trial at both the guilt phase and penalty phase, she would be for "an eye for an eye." When the trial judge reminded her this [*210] was the equivalent of believing in the automatic imposition of the death penalty, a decision she said she would not make, Ms Arnold agreed that she would not automatically impose the death penalty. *See id.* This questioning was then followed up by Mr. Soria who asked for further clarification about Ms. Arnold's concern about death penalty enforcement. She clarified during this exchange that she would follow the trial court's instructions and not consider enforcement matters, but would focus her consideration on the evidence presented during the trial. *Id.* The Court finds these inquiries sufficient to ascertain Ms. Arnold's impartiality about imposition of the death penalty under *Morgan, 504 U.S. at 729*.

Claim 22 is denied on the merits.

X. Berryman's Challenge to Juror David Armendariz (Claims 24 and 25).

In Claims 24 and 25, Berryman alleges his conviction, the special circumstance finding, and penalty were obtained in violation of his *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendment* rights because the trial court failed to excuse David Armendariz from the jury after it was revealed that he had what Berryman characterizes as "a close family relationship" to the victim's family. Claim 24 [*211] presents a straight juror bias, structural error challenge. Claim 25 is pleaded in terms of ineffective assistance of counsel for the trial attorneys' failure to challenge Juror Armendariz for cause. Berryman requests an evidentiary hearing with respect to Claim 24.

A. Statement of the Facts Relevant to Juror Armendariz's Jury Service.

The facts relevant to Juror Armendariz's jury service consist of a review of trial proceedings where he revealed his potential connection to Crystal Armendariz and a declaration he executed during the investigation of Berryman's federal claims.

1. Trial Proceedings of Juror Armendariz's Revelation.

After Crystal Armendariz completed her testimony during which she mentioned receiving a call from Edward Armendariz, the father of her infant twins, Juror Armendariz informed the trial court, privately, that he thought the Edward Armendariz referred to by Ms. Armendariz was a cousin of his. Upon being questioned by the trial judge, Mr. Armendariz stated that he was not close to his cousin and this fact would not affect his ability to deliberate or be impartial. The dialogue between Mr. Armendariz and the trial judge is as follows:

> THE COURT: Let the record reflect [*212] that all of our jurors are excused, with the exception of juror number 8, Mr. Armendariz. I've asked Mr. Armendariz to remain behind for just a couple of moments. He apparently expressed a bit of concern to our bailiff that possibly there may be some possible relationships between Crystal Armendariz, the witness that testified just prior to Mr. Jackson, and himself, and that it might bother him in his function as a juror. [P] Mr. Armendariz, do you have some concern about that at this point?
>
> THE JUROR: No, I don't think it would bother me as far as my abilities as a juror or anything.

THE COURT: All right.

THE JUROR: The thing that rang a bell, I've never seen the witness before in my life.

THE COURT: Okay.

THE JUROR: It's just that when she mentioned that the father of her twins was Edward, which I have a cousin named Ed, but I've never heard [of] him as Edward.

THE COURT: Having twins.

THE JUROR: That kind of rang a bell, because like I said, when I stated in the peremptory and everything else, that I know -- I'm not tight at all with my cousins, I'm just the type of person, I don't --

THE COURT: All right. We can simply leave the matter alone or we can certainly find out more about the [*213] witness or, you know, her husband or the father of the twins or whatever the case may be, if you would feel more comfortable if you knew.

THE JUROR: No, I feel fine now.

THE COURT: All right. Well, if you have any concern or any problem about it, again, as Bill [the bailiff] suggested to you, and very properly so, let him know or write a note.

THE JUROR: Yeah, I was in the process of leaving you something, and I only got as far as Judge Wallace, and then we came in.

THE COURT: All right. If it does become a problem, please bring to our attention, and we'll certainly be happy to get some additional information for you, if necessary, or whatever it may take to help you. You know, either determine that it would be a problem, or satisfy yourself that it won't be. [P] At this point, I assume it's not a problem, and I will assume that to be the case unless we hear from you to the contrary.

THE JUROR: Okay. I'm perfectly satisfied.

THE COURT: All right.

THE JUROR: Like I said, I don't have much contact with my cousins.

THE COURT: All right. If it becomes a problem, let us know.

THE JUROR: It's just a concern, because I know the magnitude of the case, and I just want to be honest.

RT-18: 2502-04.

2. [*214] **Declaration of David Armendariz, Executed February 4, 2001.**

In the declaration, Mr. Armendariz confirms what he thought might be true during the trial, that the Edward Armendariz referred to by Crystal Armendariz during her testimony, in fact is his first cousin. He explains that the father of Ms. Armendariz's twins was his cousin Eddie Armendariz, son of Mr. Armendariz's uncle Diego Armendariz. In the 15 years prior to 1996 (when Berryman's current investigator interviewed him), Mr. Armendariz had visited his uncle, Diego Armendariz on

two occasions. He was not close to his cousin, Eddie, but knew that "he is trouble." At the time of Berryman's trial, Eddie Armendariz was in prison. At the time Mr. Armendariz executed his declaration, Eddie Armendariz was in prison again.

B. Berryman's Contentions.

Berryman relies on the concurring opinion of Justice O'Connor in *Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*, in which she recognizes "extreme circumstances" in which a court would appropriately find "implied bias" of a juror or prospective juror. *Id. at 222*. As recited in the concurring opinion, those circumstances include: "a revelation that a juror is an actual [*215] employee of the prosecuting agency, that *the juror is a close relative of one of the participants in the trial* or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Id.* (emphasis added). He maintains that Mr. Armendariz's relationship to his cousin Edward, and through him to Crystal Armendariz was sufficiently close to have triggered an finding of implied bias. He argues that the death in the family of Crystal Armendariz "undoubtedly affected" Mr. Armendariz's jury service. Berryman further notes that the "case was closely balanced as to penalty" and thus the familial relationship between Mr. Armendariz and Ms. Hildreth's family likely was a factor in the ultimate unfavorable verdicts. In his traverse, Berryman acknowledges that Mr. Armendariz denies his relationship to the victim's family had any effect on his judgment, but that Mr. Armendariz's self-assessment should be viewed with suspicion. He claims the only way to resolve the dispute is for the Court to grant an evidentiary hearing.

C. Analysis.

As a preliminary matter, Claim 24 is not *Teague*-barred. In *Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998)* (en banc), the court rejected [*216] the notion that implied bias constitutes a "new rule" barred by *Teague v. Lane.* Rather, "[i]mplied bias may indeed be the single oldest rule in the history of judicial review." *Id. at 984-85*; *see also Fields v. Brown, 431 F.3d 1186, 1195 (9th Cir. 2005)*. In *Dyer,* the majority acknowledged the dissent's complaint that no Supreme Court case actually had announced implied bias as a rule of constitutional procedure. But, the majority responded, "a rule needs to be announced for purposes of *Teague* only if it's new. What we have here is the antithesis of *Teague* -- a rule so deeply embedded in the fabric of due process that every one takes it for granted." *151 F.3d at 984*.

Nonetheless, Berryman has not presented a colorable claim of implied bias sufficient to warrant an evidentiary hearing and has not shown entitlement to relief under *Strickland v. Washington.* Mr. Armendariz's representations to the trial judge after the testimony of Crystal Armendariz, as well as his declaration testimony belies the notion that he had a close relation with Crystal Armendariz, much less the victim, Ms. Hildreth. He stated he was not close with his cousin, Ed, rarely saw his uncle, and had never met Crystal [*217] Armendariz. The cases relied on by the Warden are instructive. In *Andrews v. Collins, 21 F.3d 612, 620 (5th Cir. 1994)*, the Fifth circuit upheld the district court's finding that there was no implied bias where a juror's daughter had been married to the victim's deceased grandson. In *Howard v. Davis, 815 F.2d 1429, 1431 (11th Cir. 1987)*, the Eleventh Circuit found that the trial court had not committed an abuse of discretion for not excusing a juror who actually was a close friend of the murder victim, where the juror assured the trial court he could be impartial. In *United States v. Freeman, 514 F.2d 171, 174 (8th Cir. 1975)*, the Eighth Circuit similarly found there was no abuse of discretion for the trial court failing to excuse a juror who had been acquainted with the victim's family through a mutual friend, a fact the juror disclosed to the trial court after she had been selected as a juror, but before evidence was presented.

Berryman's case presents even less justification for excusing Mr. Armendariz. First, despite the fact that his and Crystal's last names were the same, he did not at first appreciate the fact that Crystal could have been the woman who bore the twins of his [*218] (Mr. Armendariz's) incarcerated cousin Ed Armendariz. Second, even when he informed the trial court about his suspicion to the contrary, he was not certain of the connection (although his suspicion later was confirmed). Third, Mr. Armendariz was not close with his cousin and was only vaguely familiar with Ed Armendariz's life situation. Finally, Mr. Armendariz assured the trial judge he could be impartial; that the possibility he may have been connected with Crystal Armendariz through his aloof cousin would not affect his duties as a juror.

Berryman's contention that Mr. Armendariz's assurances of impartiality should not be credited, but should be further explored during an evidentiary hearing, is unpersuasive. There is nothing to indicate that Mr. Armendariz would change his testimony were he examined live, before the Court. No other information or offer of proof is suggested to cast doubt on the veracity of Mr. Armendariz's account of his relationship with Edward Armendariz or his confidence in his own impartiality. The Court finds that Berryman has failed make an offer of proof sufficient to warrant an evidentiary hearing on Claim 24. Further, in the absence of a showing that a cause [*219] challenge to Mr. Armendariz would have resulted in his discharge from jury service, the ineffective assistance of counsel claim also must fall. Claims 24 and 25 are denied on the merits.

XI. Berryman's Assertion the State Interfered with his Communications with his Attorneys (Claim 17).

In Claim 17, Berryman argues that his communications with his attorneys, and consequent trial preparation, were severely hindered because of an intercom device in the County Jail interview room. Although Berryman does not claim that the device actually was connected, he maintains it had the appearance of being connected, and thus gave him the impression that his conversations with counsel were being overheard. Berryman does not request an evidentiary hearing with respect to this claim.

A. Statement of Facts Relevant to the Interference with Communications Claim.

Berryman's current investigator inspected the attorney interview room at the Lerdo branch of the Kern County Jail. He observed an intercom connection in the attorney visiting room "which could be connected, and has the appearance of being connected, to custodial officers." No information is supplied as to whether at the time of Berryman's detention [*220] on the Lerdo facility the intercom devise actually was connected or his conversations with counsel were being recorded.

B. Berryman's Contentions.

In his traverse, Berryman clarifies the nature of Claim 17. He does not contend his conversations were monitored by authorities, but rather that the presence of the intercom device gave the appearance of being a monitoring device, and that this interfered with his ability to freely communicate with his attorneys. As a result, he felt constrained to communicate by writing notes to his attorneys, an ineffective means for someone with limited academic skills. Further, the inhibition caused by the presence of the intercom device contributed to the breakdown of attorney-client communications addressed in Claims 1, 2, and 3. *See* Part V., *supra.* As a consequence, Berryman alleges, important information for the defense was not relayed to counsel. Relying on *Lakin v. Stine, 44 F.Supp.2d 897 (E.D. Mich. 1999)*, he claims that he was essentially forced to relinquish his right

to counsel because the level of state interference made meaningful attorney-client communication impossible.

C. Analysis.

As the Warden points out in his opposition brief, a *Sixth Amendment* [*221] violation for intrusion into the attorney-client relationship requires actual and intentional governmental conduct. *See United States v. Roper, 874 F.2d 782, 790 (11th Cir. 1989)*. Further, the intrusion must have resulted in disclosure of information which inured to the benefit of the prosecution and to the detriment of the defendant. *United States v. Morrison, 449 U.S. 361, 365, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)*; *United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980)*; *United States v. Glover, 596 F.2d 857,863-64 (9th Cir. 1979)*; *Cinelli v. Revere, 820 F.2d 474, 478 (1st Cir. 1987)*.

The more recent decision by the Ninth Circuit in *Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004)*, clarifies the standard:

> When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the *Sixth Amendment* right to counsel if it substantially prejudices the criminal defendant. [Citations.] Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and [*222] strategy, and from other actions designed to give the prosecution an unfair advantage at trial. [Citation.]
>
> *Id. at 584-85.*

Berryman can satisfy neither the deliberate interference requirement, nor the substantial prejudice requirement. He has alleged only an unfounded fear that his conversations might have been monitored, not that they were, or that the prosecution benefitted from any information obtained as a result. The Court also notes that the Michigan District Court decision, *Lakin, 44 F.Supp. 2d 897*, relied on by Berryman was been reversed by the Sixth Circuit for the very reason that the lower court granted relief without a showing of prejudice. *Lakin v. Stine, 229 F.3d 1152 (6th Cir. 2000)*. [80] In the present case, Berryman suffered no actionable interference in his *Sixth Amendment* right to counsel. Claim 17 is denied on the merits.

> 80 Berryman's current litigation team reasonably did not know of the reversal of the *Lakin* case because the Sixth Circuit opinion was decided on July 13, 2000 and Berryman's traverse was filed a month earlier, on June 7, 2000.

XII. Berryman's Assertion that His Attorneys' Were Constitutionally Incompetent for Failure to Present a Mental Defense at Guilt [*223] **Phase Proceedings (Claims 15 and 16).**

In Claims 15 and 16, Berryman alleges his attorneys were ineffective for not investigating, developing, and presenting evidence to defeat the prosecution case of premeditation, deliberation, intentional killing, and rape or attempted rape. In Claim 15, he alleges that trial counsel should have presented at the guilt proceedings a minimum of the same evidence presented at the penalty phase to develop a mental state defense. This includes the trial testimony of Drs. Pierce and Benson, as well as lay testimony supporting the fact of his excessive alcohol consumption. In Claim 16, he contends counsel should have presented mental state evidence at the guilt phase above and beyond

what was presented at the penalty phase. Berryman requests an evidentiary hearing with respect to Claim 15.

A. Statement of the Facts Relevant to a Potential Mental State Defense.

The proffered evidence for Claims 15 and 16 focuses on evidence that could have been presented regarding the numerous causes for Berryman's alleged mental deficiencies, including excessive alcohol consumption, diminished intellectual functioning, and mental impairments stemming from his difficult upbringing. [*224] This section also includes a summary of the social history report of psychologist Gretchen White, Ph.D., opinion testimony of *Strickland* expert Mr. Simrin, and explanation of efforts to develop mental state evidence by Mr. Soria, and counter evidence presented by the Warden.

1. Evidence of Excessive Alcohol Consumption.

The evidence supporting Berryman's excessive alcohol consumption is largely provided by lay witnesses, some who testified at his trial. In each instance of a trial witness testifying about Berryman's alcohol consumption, the testimony was elicited by defense counsel. During guilt phase proceedings, *see* Part III.A., *supra,* witness Thellas Sanders testified that Berryman was drinking a 40 ounce bottle of malt liquor, which he shared with Mr. Sanders during their conversation about the death of Ms. Hildreth, the day after her death. Ms. Armendariz testified that Berryman was drinking malt liquor during their outing to Bakersfield (before Ms. Hildreth went missing) and that she could smell alcohol on his breath when he returned (after Ms. Hildreth was killed). Her younger brother, Andrew Bonner confirmed the smell of alcohol on Berryman's breath when he returned to their [*225] garage apartment late Sunday night/ early Monday morning (following Ms. Hildreth's death). Melinda Pena testified that when she was out with Berryman, the night of the killing, Berryman was drinking. Finally, Berryman points to the fact that a wine cooler bottle was found at the crime scene. [81] Berryman's statement to interrogating detectives also reveals that he had been drinking the day Ms. Hildreth was killed and on the evening of the interview. *See* Part VI.A.3., *supra.* Penalty phase evidence also confirms Berryman's alcohol indulgence, including from Melinda Pena, Berryman's sister, Ronnique Berryman, his mother, Lestine Bonty, his wife, Carol Berryman, and his cousin, Maxine Coleman. *See* Part III.B., *supra.*

81 No evidence actually connected this wine cooler bottle to Berryman, a point emphasized in the Warden's opposition papers.

In addition to evidence elicited from witnesses at trial (by the defense team) about Berryman's alcohol consumption, numerous post-conviction declarations developed on federal habeas corpus shed light on the extent of his drinking. [82] Family friend Johnnetta Reed was aware that Berryman drank prior to his arrest in Delano. Although she reports she didn't [*226] see him much in six to eight months prior to his arrest and cannot recall "a particular problem" arising because of Berryman's alcohol consumption, Ms. Reed was aware that Berryman stopped attending church, began using bad language, and hung out with "the fellows." Berryman's cousin, Maxine Coleman was interviewed by a "black doctor" or investigator prior to her trial testimony about Berryman's drinking. A few days before Berryman was arrested, he told Ms. Coleman he was "concerned he was drinking too much." Ms. Coleman never saw Berryman when he was drinking.

82 These declarations actually are offered in support of Berryman's request for an evidentiary hearing regarding Claims 68 and 69 regarding the failure of trial counsel to

adequately develop mitigation evidence at the penalty proceedings, *see* Part XXV., *infra,* but they are relevant here as well.

Berryman's former wife, Carol Berryman, [83] avers that he drank socially when she met him in 1985. He stopped drinking completely for six months when they were living together, and then resumed, drinking more and more. Ms. Berryman was concerned about Berryman driving after or while drinking, particularly after they argued. She avers that [*227] his "DUIs usually happened after one of these confrontations when he would leave [her] and go off driving." Berryman and his wife separated because of his excessive drinking and unfaithfulness. His drinking affected his ability to work as well as their marital relationship. Ms. Berryman hoped the separation would motivate Berryman to stop drinking and get his life together. When Berryman moved to Delano, he told Ms. Berryman "he had a warrant out on him" and wanted to spend time with his great-grandmother before turning himself in. Ms. Berryman's sister, Margie Garcia, avers that she did see Berryman drink socially, but doesn't "ever recall seeing him drunk or out of line from drinking too much."

83 The declaration actually was executed under the name Fuller, but for consistency the Court refers to Ms. Fuller as Carol Berryman or Ms. Berryman, as she is referenced in other parts of this Memorandum Order.

Berryman's maternal uncle, Lester Bonty avers that he is "somewhat aware that Rodney [Berryman] drank excessively." Mr. L. Bonty's awareness, however came from reports of Berryman's drunken behavior from other family members, not from his own observations. Besides this, Mr. L. Bonty [*228] heard that Berryman had a "run-in" with his step-father (Jon January). When Mr. L. Bonty saw Berryman at the home of his (Mr. L. Bonty's) mother (Berryman's grandmother), Berryman seemed fine.

In contrast to the foregoing witnesses, Odesser Pearson, the grandmother of two of Berryman's female high school friends, did not observe any changes in Berryman's behavior in the time she knew him. Nor did she observe him drinking alcohol. Similarly, long-time friend Kandy Rumford did not observe Berryman consume alcohol and was unaware Berryman had a drinking problem. A maternal aunt, Linda Mitchell, avers that she did not know Berryman was "a drinker." She states she never saw him drink. Maternal aunt, Carolyn Bonty, did see him drink occasionally, but was not aware "that he had a problem with it." She concedes, however, that she saw less of Berryman when he was a teenager because *she* was moving around so much. Similarly, maternal aunt Terrie Bonty knew Berryman occasionally drank, but not that he "was having a problem with alcohol." Like Ms. C. Bonty, Ms. T. Bonty was not around Berryman so much to have noticed. Maternal aunt Karen Bonty similarly cannot recall ever seeing Berryman with a [*229] drink. Her twin sister, Sharon Bonty also states she is not aware he had a problem. Maternal great aunt (in-law) Ann Bonty is unaware Berryman had any problems with alcohol consumption.

Maternal uncle Emery Bonty recalls a family reunion in Pasadena where Berryman was "stone drunk and behaving badly." Berryman was only 15 or 16 at the time. Mr. E. Bonty confronted Berryman about his behavior at this time. [84] Maternal uncle (in-law) Perry McBride states that while he didn't see Berryman drink, he learned that Berryman's father was "a drinker."

84 The chronology reported here is confusing, since other evidence indicates that Berryman was living with his father in Sacramento at the time he was 15 or 16, and often was under the jurisdiction of juvenile authorities. In addition, Berryman's mother, Lestine Bonty, reports

that she had no contact with Berryman from the time he moved out of her house at age 12, until he came back to live with her when he was 17. It may be that the incident described occurred after Berryman returned to live with his mother, when he was 17.

2. Evidence of Voluntary Intercourse.

In his moving papers, Berryman argues his trial counsel knew "there was evidence that [*230] the victim voluntarily went with her assailant to a secluded spot and that there was consensual intercourse." Although there is no such statement in any of Mr. Soria's offered declarations, one of Berryman's attorneys in this federal action, Jessie Morris, Jr. provides a declaration appended to the second state habeas petition that the proprietors of a refreshment stand at the Lake Woollomes recreational park remembered Berryman coming out to the lake with Ms. Hildreth a week or two before her death. According to Mr. Morris's 1998 declaration, the concessionaires gave a statement to this effect, although no statement is provided. Mr. Morris also reports interviewing Ms. Armendariz and her mother, Brenda Clark, in this same declaration. Had they been asked at trial, both would have testified that Ms. Hildreth had been in Berryman's pick up truck prior to the night of her death. This declaration was updated by Mr. Morris with the execution of a new declaration on October 2, 2001. In the updated declaration, he reiterates that he interviewed Crystal Armendariz and her mother, Brenda Clark in February 1996. As documented by his interview notes, Mrs. Clark could have testified that Berryman [*231] gave Ms. Armendariz and Ms. Hildreth a ride in his pick up truck and Ms. Armendariz could have testified that she drove Berryman's pick up truck on one occasion, with Ms. Hildreth as a passenger. Mrs. Clark also informed Mr. Morris that Ms. Hildreth did not care for Berryman and didn't know why her cousin (Crystal) would get involved with him. Mrs. Clark further reported that she felt Berryman "eyeballing" her. Mr. Morris was not able to obtain declarations from Mrs. Clark or Ms. Armendariz because they "are to some extent hostile." Mrs. Clark specifically told Mr. Morris not to return. The offered purpose of this testimony is to establish that Berryman and Ms. Hildreth were well enough acquainted for her to have been in his pick up truck prior to the night of her death, and that she may well have gone with Berryman voluntarily to the agricultural field to have sexual intercourse. [85]

85 The sufficiency of the evidence of rape and the rape murder special circumstances is separately addressed in Claims 12, 29, 35, 50, 71 and 71A. *See* Part XIX., *infra.*

3. Mental State Evidence Developed by Berryman.

The mental state evidence consists of trial and declaration testimony of Drs. Pierce and [*232] Benson, the test results of two neurological tests, an alcohol induced EEG and a Positron Emission Tomograph ("PET scan"), and the social history report of Dr. White. Drs. Pierce and Benson each have provided two declarations, one each attached to Berryman's first state habeas petition, and one each appended to his evidentiary hearing request in this federal action. In connection with the EEG and PET scan, the experts who performed those tests, neurologist Paul Guisado, M.D. and neurologist Joseph C. Wu, M.D., respectively also provide background declarations as to their qualifications.

a. Trial Testimony of Drs. Pierce and Benson.

The trial testimony of Drs. Pierce and Benson is recounted in the summary of the penalty phase proceedings. *See* Part III.B., *supra.* To summarize, the gravamen of Dr. Pierce's testimony is that Berryman suffered a personality disorder, largely due to his neglected and dysfunctional childhood.

Separately, Dr. Pierce opined that Berryman was afflicted with a seizure disorder triggered by alcohol consumption. Dr. Pierce believed the seizure disorder also was associated with a head injury Berryman sustained. [86] Dr. Pierce and Dr. Benson both wanted to have Berryman [*233] submit to an alcohol induced EEG to confirm the presence of the seizure disorder, as they believed Berryman's aberrant behavior in committing a violent act on Ms. Hildreth was caused by a seizure disorder that would be detectable by the alcohol induced EEG. Dr. Benson's diagnosis was that Berryman suffered from a learning disability as well as organic mental syndrome, manifested by seizures, largely alcohol induced. Berryman's past head injury [87] also was said by Dr. Benson to be a cause of his organic mental syndrome. The seizures were described by Berryman and his wife as being preceded by the smell of gasoline or oil and accompanied by facial contortions, severe headaches, ringing in the ears, blackouts, and aggressive behavior. Dr. Benson ascribed the cause of Berryman's attack on Mr. Perez, the altercation with his father-in-law, a heated argument with his mother (over replacing tires on his pick up truck), and the killing of Ms. Hildreth to aggressive behavior during seizures, explaining that people who suffer from temporal lobe seizures had been known "to do all kinds of things, and particularly violent sort of things." Nonetheless, he also conceded that committing rape was [*234] not among the violent acts that people experiencing a seizure would do.

86 The cause of the head injury could have been from Berryman falling down from a forklift or crane at a job-site, or from being struck on the head with a flashlight by his wife.

87 Dr. Benson referred to the cause of the head injury as being hit with a metal pipe.

b. Mental State Declarations Appended to the First State Habeas Petition.

Dr. Benson executed a declaration dated August 17, 1993 which largely reiterates his trial testimony, notably that after examination, he concluded Berryman suffered from organic mental syndrome, probably aggravated by excessive alcohol consumption and two head injuries (which in turn resulted in recurrent severe headaches). Because of Berryman's scholastic history of having been placed in special education classes and his head traumas, Dr. Benson arrived at a diagnosis of middle brain dysfunction. To confirm this diagnosis. Dr. Benson sought an alcohol induced EEG, compared to a regular EEG (for determination of impact of alcohol on brain function), and a PET scan. When Dr. Benson learned that the tests could not be conducted in Kern County, he suggested to Mr. Soria that the tests [*235] be conducted outside the county. Mr. Soria replied, however, that the trial court would not grant an order allowing such expensive tests to be performed, particularly outside of the county.

Dr. Benson believed Berryman's neurologic dysfunction was relevant to his guilt, in addition to sentencing. He was not, however, called to testify at guilt proceedings. Since his trial testimony, Dr. Benson learned that Berryman was the victim of sexual molestation by an uncle when he was seven or eight years old, consisting of anal intercourse and oral copulation. [88] Such molestation certainly would have contributed to Berryman's personality disorder, particularly as this involved his relationship with women and excessive alcoholism. Knowing this information would have supported his and Dr. Pierce's respective diagnoses. Although Dr. Benson's diagnosis could not be confirmed with an alcohol induced EEG or a PET scan at the time of trial, he adhered to his conclusion based on his own observations, even without empirical confirmation.

88 As will be discussed in connection with Berryman's penalty phase arguments, *see* Claims 6, 63, 64, 65, 69, and 70, the foundation for Berryman's sexual abuse as a child [*236] is not established by any reliable evidence or offers of proof. *See* Part XXV.C., *infra.*

Dr. Pierce's declaration executed on August 31, 1993, similarly reiterated the basis for his trial diagnostic impressions, including Berryman's chaotic, unstable childhood and family history, an early learning disorder, low self-esteem, excessive alcohol usage, head injury traumas, sudden onset and termination of severe headaches, a declining marital relationship, and failed parental role. Dr. Pierce's diagnosis was two pronged: alcohol induced organic disorder and personality disorder, not otherwise specified with dependent narcissistic and depressive features. Dr. Pierce related his findings to Mr. Soria and urged further neurologic testing to confirm brain damage. Any such brain damage, in turn, would have been relevant to a determination of Berryman's guilt. Like Dr. Benson, Dr. Pierce felt that the post-trial discovery of sexual molestation inflicted on Berryman would have been significant to his poor male image development and relationship with females. The molestation would have been very important in the support of Dr. Pierce's diagnosis.

In appellate counsel Paul Posner's meetings with Drs. [*237] Pierce and Benson, he learned that defense counsel never provided them with any foundational material regarding Berryman's scholastic, psychological, medical, or injury history. This omission was a basis for Mr. Posner's opinion that Berryman's trial counsel were constitutionally ineffective.

c. Mental State Declarations of Drs. Pierce, Benson, Guisado, and Wu Developed in Federal Proceedings.

Dr. Pierce's most recent declaration, executed October 4, 2001, incorporates a report he authored the same day the declaration was executed. In preparation for his report, he consulted with Dr. Benson, interviewed Berryman on three occasions (over and above prior interviews), reviewed prior records and his prior trial as well as declaration testimony, examined the EEG report of Dr. Guisado and examined the PET scan report of Dr. Wu. In his present report. Dr. Pierce reiterates that during the period of his pre-trial evaluation of Berryman, he urged Mr. Soria to subject Berryman to neurological testing to confirm the existence of brain damage and that if brain damage could be confirmed by empirical test results, that information should be presented during guilt phase proceedings. The tests Dr. Pierce [*238] requested were an EEG and an alcohol induced EEG.

Dr. Pierce states that the test results from Dr. Wu (PET scan) and Dr. Guisado (alcohol induced EEG) confirm his initial diagnoses given in 1988, i.e., that Berryman suffers and suffered from an alcohol organic disorder and an organic mental syndrome or seizure disorder. Dr. Wu opines that his preliminary impression of the PET scan was abnormal. Dr. Guisado reports abnormalities in the alcohol induced EEG based on "increased right temporal slowing and focal left temporal sharp wave activity . . . consistent with bilateral temporal lobe dysfunction and alcohol induced left temporal paroxysmal activity." Dr. Pierce concludes that Berryman's alcohol consumption prior to the killing of Ms. Hildreth "could have produced a seizure in Mr. Berryman, resulting in an altered state of consciousness . . . leaving him amnestic or having no memory of the acts with which he was charged."

Dr. Benson's most recent declaration incorporates his report which is dated October 2, 2001. He describes the EEGs (resting and then alcohol induced) and the PET scan performed by Drs. Guisado and Wu, respectively, as objective tests that measure activity and function [*239] of the brain. He opines that the positive results support of the "diagnoses of organic brain disease and possible alcohol seizure induced behavior."

Dr. Benson's assessment of Berryman additionally is based on his understanding of Berryman's childhood and adolescent history. He reports there had been discord between the parents before

their divorce when Berryman was nine or ten, that a learning disability had been recognized by the time Berryman was in the third grade, that Berryman became a chronic abuser of alcohol by the age of 14, that Berryman sustained two significant head injuries during his adolescence, both causing brief periods of unconsciousness, that by age 21, Berryman was a chronic alcoholic, and that a seizure disorder was indicated due to sudden disabling headaches, ringing in the ears and the phantom smell of oil or gasoline.

Dr. Benson reports that the results of the alcohol induced EEG show increased wave activity in the right temporal and focal left temporal areas of Berryman's brain. When Berryman's blood alcohol level exceeded 0.1 mg, he suffered "intermittent seizure-like electrical activity." This was consistent with Dr. Wu's impression based on the PET scan that [*240] Berryman suffers bilateral temporal lobe dysfunction and also with alcohol induced left temporal paroxysmal activity. [89] Dr. Benson concludes, "The importance of these findings is that while the brain is seizing, the subject is incapable of conscious choice in his thoughts or behavior."

89 Dr. Peter Vaulk, who oversaw the administration of Berryman's PET scan, read the study as normal.

To qualify Drs. Wu and Guisado as appropriate experts in their fields, some background information additionally is provided with Berryman's reply brief in support of his evidentiary hearing request. In a declaration executed July 18, 2002, Dr. Wu describes his qualifications as a medical doctor and the Clinical Director of the Brain Imaging Center at the University of California, Irvine. He states that the PET scan described in July 18, 2001 report was based on techniques available at the Irvine "facility and elsewhere in 1988." He stresses there was "an appropriate database" for the conclusion of an abnormal scan. Dr. Wu also refers to the Warden's opposition declaration of Dr. Alan Waxman dated May 14, 2002. Dr. Wu points out that although Dr. Waxman "purports to be[ ] opposed to the use of functional [*241] brain imaging for assessment of brain trauma, [Dr. Waxman] . . .himself has utilized functional brain imaging to study mild head trauma." Dr. Wu describes three cases where Dr. Waxman utilized brain imaging procedures to study the patients' respective brain function. Dr. Guisado states that he is a medical doctor licensed to practice medicine in California. Referring to his July 28, 2001 alcohol induced EEG examination report, he states that the techniques used in that examination "were readily available in many locations in 1988." He stresses that even after reviewing the report of the Warden's EEG expert, Marc Nuwer, M.D., Ph.D. dated May 10, 2002, he (Dr. Guisado) still adheres to the conclusions of his report. He also notes that the abnormality observed in Berryman's EEG tracing is evident visually and did not rely on the QEEG procedure. [90]

90 The Court does not observe a reference to a QEEG procedure in Dr. Guisado's July 28, 2001 report. QEEG is described in Dr. Nuwer's declaration, as summarized in Part XII.A.6.a., *infra.*

d. Social History Prepared by Gretchen White, Ph.D., dated September 17, 2001.

In Claim 16, Berryman asserts that a social history would have given an accurate [*242] picture of his difficult upbringing and development in support of a mental state defense. The actual social history which Berryman's present litigation team obtained, however, is offered is support of his evidentiary hearing request for Claim 59, discussed below. *See* Part XXVI., *infra.* Because it also serves as the basis for Berryman's ineffective assistance of counsel guilt phase claims. Dr. White's findings and conclusions are recited here.

To prepare this report, Dr. White reviewed declarations of family members and investigative reports of family members. She did not interview Berryman or his wife Carol Berryman. She could not interview either of Berryman's brothers, as the older brother, Ronald, Jr. was the victim of a homicide in 1992, and the younger brother, Bryan Berryman was out of the country at the time she was preparing her report. [91]

91 The foundational support for Dr. White's report is largely verifiable in other declarations and documents that are part of the record, particularly declarations of Berryman's mother, sister, and numerous school, juvenile, and medical records. The documentary evidence is appended to Berryman's first state habeas petition.

She describes Berryman [*243] as a person born from an unwanted pregnancy to a teenage mother and irresponsible father. Because of the constant turmoil in his childhood, he made no attachments to any adult in his life and was left to find his own way to adulthood. There is quite a bit of background about Berryman's parents -- that his mother became pregnant with her first child (Berryman's older brother, Ronald, Jr.) at age 15, to the shame of both families, that she was unprepared for and didn't enjoy motherhood, that she was uprooted from her family when Berryman's father joined the Air Force and they moved to Wyoming, that she was unhappy to leam other second pregnancy (with Berryman) when the first child was only four months old, and that Berryman's father began engaging in a long line of extra-marital affairs during this difficult time. Berryman was born two months premature and remained in the hospital for a month. At the time, his young mother was anxious to leave her unfaithful husband and return to her family as soon as possible.

Dr. White points out that premature infants are at considerable risk for cognitive impairments and brain damage. They are four times less likely to graduate from high school -- [*244] as was the case with Berryman. Berryman's impairments were compounded by the fact that his mother never bonded with or wanted him. Within the first 18 months of Berryman's life, his mother became pregnant on two more occasions, one ending in a miscarriage, and the other ending with the death of a premature sister. Within another year, Berryman had a little sister, Ronnique Berryman, a still depressed mother, and an philandering father. During this period, Berryman's father was physically abusive to his young wife, on one occasion choking her until she passed out.

Berryman's mother reported to Dr. White that Berryman was a sickly infant and on several occasions was taken out of the family home in Wyoming to be nursed back to health in Delano with relatives. With the birth of his sister, Berryman was shuttled to the homes of various relatives because his mother was unable (or unwilling) to care for him. Dr. White observes that nurturing was sorely lacking in Berryman's young life.

During Berryman's early childhood, the family left Wyoming, moved to Delano and then to Los Angeles. While in Los Angeles, there were numerous moves to various apartments. There also was the initial separation [*245] between Berryman's parents. The parents reconciled and resumed cohabitation in San Jose with the father's parents, but the problems were not dispelled. During a subsequent separation, the fourth Berryman child was born -- Bryan. The parents apparently reconciled again, but the father remained very demanding, abusive, and unreasonable. Dr. White learned from a friend of Berryman that Berryman had reported observing several occasions where his father physically and seriously abused his mother. Even after the parents separated, and the father went to live in Delano while the mother and four children continued to lived in San Jose, the father visited. During the last of those visits there was a violent exchange that resulted in the mother

running away from his assault, falling down a flight of stairs into the street, and almost being run over by a car. All of this was observed by Berryman and his siblings.

When the couple finally separated for the last time, Berryman's mother endeavored to complete her high school education, vocational school, and work to support her children. During her long absences from home, her four children were left with their maternal grandparents and their mother's [*246] many siblings (some of whom were younger than Berryman). Berryman's sister, Ronnique, reported to Dr. White that the Berryman children were unwanted, ridiculed, unsupervised, uncared for, and unfed. Ronnique told Dr. White that one their mother's younger brothers, Kanda Bonty, lived in the Berryman household for a year, and was charged with the task of babysitting the Berryman children. Ronnique claimed that Kanda molested Berryman and her. [92] Dr. White additionally was informed by Berryman's mother that another one of her brothers, Lester Bonty, molested Berryman. [93]

92 This report is consistent with Ronnique's August 26, 1993 declaration appended to Berryman's first state habeas petition. *See* Part XXV.A.3.c., *infra.*

93 This report is consistent with Lestine Bonty's August 28, 1993 declaration appended to Berryman's first state habeas petition. *See* Part XXV.A.3.b., *infra.*

There were a number of years when Berryman's mother was completely absorbed in her own pursuits, and what little attention she did bestow on her children was reserved for Berryman's older brother, Ronald, Jr. Ronald, Jr. went to live with his father when Berryman was ten years old. The next year, when Berryman was 11 [*247] and in the fifth grade, school records showed he had great scholastic difficulties, with an I.Q. of 75, reading at the first grade level, and being resistant to school. His mother did not follow through with programs to assist Berryman and informed school officials she had a hard time wanting Berryman. After a year of special education and assistance, Berryman's scholastic functioning improved to the point that he was re-introduced into regular classes, hi Dr. White's opinion, Berryman's positive response to structure in his life demonstrates that "he was not beyond reach" but that "schools and institutions can rarely make up for parents' failure to nurture their children."

Home life in his mother's home for Berryman at this time was tumultuous. His mother began living with an older man, Jon January, who was like Berryman's father in that he was a philanderer. They broke up and the mother married another man, but reported to Dr. White that she divorced him after six months and resumed her relationship with Jon January. Berryman and January did not get along and Berryman started to rebel. Then the family finances plummeted and the mother returned to her parents' house. Apparently Berryman [*248] did not join his mother, but instead went to live with his father in Long Beach. Dr. White received conflicting reports as to whether Berryman was "kicked out" of the house by his mother, or he ran away to his father's home. Berryman was 12 years old at the time.

Family stability was shaky with his father as well. Dr. White states that the father was working full time, living with one woman and seeing another when his sons (eventually the youngest, Bryan, joined them as well) came to live with him. Dr. White reports that Berryman first came to the attention of juvenile authorities in Long Beach when he was 14 and on the streets. [94] The family moved to Sacramento that same summer (1980). In the next two and one-half years Berryman moved five times during which he attended seven different schools. During this period, Berryman had four out-of-home placements, two at a local group home, one with his great-grandparents in Delano, and one at Sacramento Boys Ranch. The father was still gone long hours and expected

Berryman to babysit his younger brother, which Berryman resented. Juvenile records indicate that Berryman wished for his father to spend more time with him. The records also indicate [*249] that when a probation officer contacted Berryman's mother, she was uncooperative, refusing even to provide her current address. During this period Berryman was totally unsuccessful at school, with fighting, truancies, and poor grades the hallmarks of his existence. One probation officer observed that Berryman displayed symptoms of rejection and appeared to be acting out his rejection by physical means. Berryman's performance improved in the juvenile hall and group home settings. Berryman, however, committed a "sustained battery" against a female teenager while in the group home and was sent back to juvenile hall in August 1981. His father then requested to have Berryman back in the home and Berryman began making a positive adjustment. Due to a change in the father's employment, however, he chose to move Berryman to Delano to live with Berryman's great-grandparents. The great-grandparents returned Berryman to Sacramento by bus after he engaged in a fight at his new school. Berryman's father could not receive him, so Berryman returned to the group home, where he made solid progress.

94 Juvenile reports that are appended to Berryman's first state habeas petition indicate Berryman's first [*250] run in with authorities was in Sacramento, when he was 14 1/2 years old.

Berryman entered the Sacramento Boys Ranch in January 1983 (when he was 17). His adjustment to the Boys Ranch was the best it had been since he received special assistance in the fifth grade. His adjustment was described as "outstanding." Dr. White again notes that Berryman, even at the age of 17, was "responsive to intervention." When it was time for him to leave the Boys Ranch, it was unclear where Berryman would live. His father had decided to move to the Bahamas, and did not want to take Berryman with him. His mother told authorities she was experiencing marital and personal problems and didn't want Berryman to live with her either. Berryman's great-grandparents in Delano agreed to take him, and when Berryman learned he was wanted by someone, his attitude changed.

In the summer of 1983, Berryman and his older brother, however, ended up at their mother's house, shared with Jon January and a new toddler brother. [95] They were 17 and 18 years old, respectively. Then they received the news that their father was killed in a plane crash, his body never recovered. The father's death affected Berryman, his brother, Ronald, [*251] Jr. and his mother, who deeply mourned her former husband. For his part, Berryman refused to go to school after his father's death, [96] which led to more conflict between him and January. At that point his mother kicked him out of the house and did nothing to ascertain where he might have gone and did not keep in contact with him for the next three years. Berryman lived with the family of a girlfriend, Tamara Pearson, and the ex-husband. Perry McBride, of one of his mother's sisters (Donna McBride).

95 Younger sister Ronnique Berryman and younger brother Bryan Berryman presumably also were in the house.

96 Apparently he was still enrolled in high school, because during this school year, he was arrested for involvement with distributing marijuana. The conviction was for three counts of transporting marijuana.

Because of his innate charm and good looks, Berryman attracted a lot of female attention, which Dr. White reports "he seldom resisted." He followed his father's pattern of maintaining several

relationships simultaneously. With his father as a role model and his mother withholding affection, Berryman was "hungry for female approval and attention."

His employment endeavors were no more [*252] successful than his education pursuits. Dr. White reports that he began working at a series of labor jobs. In December 1984, shortly before his 19th birthday, Berryman fell from a forklift and either hit his chest or suffered a blow to his chest when a crate fell on him. When he was able to return to work, he was discharged. Dr. White then describes that he was convicted on three counts of transporting marijuana, [97] and five months later of grand theft. He spent eight months in the County Jail. Following this, Berryman met his wife, Carol, in 1985. After she became pregnant (with Berryman's baby), Berryman moved in with her and her family in February 1986. She and Berryman were married in May and their baby was born in August. Life seemed to be going well; Berryman "had all the accouterments of adulthood," but, Dr. White stresses, he was ill-equipped to succeed.

97 The actual incident of marijuana transportation occurred the preceding year, while Berryman was still enrolled at West Covina High School.

The chronology of Dr. White's history becomes a little confused at this point. She states that Berryman "received a drunk driving conviction in June," but doesn't say if that is in 1986 [*253] or 1987. [98] After the baby was born, Carol moved back in with her parents. [99] As reported by Berryman's mother, at Thanksgiving time, Carol and Berryman engaged in an argument and she hit him over the eyebrow with a metal flashlight, giving him two black-eyes and causing him a great deal of pain in the frontal area of his head and nasal area. [100]

98 Evidence presented at his trial by the prosecution indicates that he was stopped for driving under the influence in June 1986 and again in the spring of 1987. Neither party presents a clear picture of Berryman's drunk driving incidents to the Court.
99 It's not clear where Berryman went when the couple separated.
100 This incident is supported by emergency room records from November of 1986 during which Berryman complained of a frontal headache.

In February 1987, Berryman, Carol, and their baby moved into their own apartment. Berryman received a settlement from his industrial accident (from December 1984) and he bought (or put a down payment on) his Mitsubishi pick up truck. Dr. White reports that Berryman received another drunk driving violation that month. [101] As his drinking increased, he stopped going to work, and then he lost his job and [*254] stopped looking for work. Dr. White states that Berryman complained of frequent severe headaches since being hit with the flashlight (by his wife) a few months before. Dr. White observes that within a few months, his marriage was the mirror-image of his parents' marriage, except that he was not abusive to his wife. He was unemployed, drank excessively, and continued to see women outside of his marriage. He tried to get counseling from his mother and his mother's cousin, Maxine Coleman. By June 1987, he and Carol were "separated" though they still shared the same apartment. In July, Berryman assaulted David Perez with a tire iron (or iron wheel lock bar) and then left Los Angeles for Delano, where he moved in with another family and started up a relationship with another woman (Crystal Armendariz).

101 No evidence in the record supports the existence of this citation.

Dr. White received reports from both Berryman's grandmother (possibly his maternal grandmother) and his mother that his drinking had escalated following his marriage to Carol

Berryman. His mother reported that he seemed never to be without an open bottle (of liquor), even while driving. Notwithstanding Berryman's departure [*255] for Delano, he came back to his father-in-law's house to collect his wife and baby to move them to Delano in August of 1987. Dr. White reports he had been drinking and got into an altercation with this father-in-law during which Berryman ended up hitting his father-in-law in the nose. In Delano, life was not promising for Berryman the month before Ms. Hildreth's death. Berryman was not working or looking for a job. At the same time, he was drinking heavily and had liaisons with numerous young women.

Based on her professional training and research, Dr. White concludes that children, like Berryman who do not bond with their mothers, "are vulnerable, throughout their lives, to depression and to chronic difficulties in interpersonal relationships." Neither of Berryman's parents provided attention, affection, guidance, or supervision. As a result, Berryman grew up with a sense of insecurity regarding his self-worth. Dr. White further stresses that Berryman's sense of safety as a child was very compromised, based on the physical abuse he witnessed his father inflict on his mother as well as the sexual abuse to which he and his sister were subjected. Dr. White further opines that Berryman's [*256] premature birth, low I.Q., and poor school achievement suggest the possibility of compromised brain functioning. The numerous moves and family instability undermined his ability to form stable attachments that might have compensated for the indifference he felt from his parents. Dr. White concludes that Berryman's family history suggests a predisposition to substance abuse and depression. She states his mother was chronically depressed, his older brother was addicted to cocaine and attempted suicide, five relatives on his mother's side suffered from drug or alcohol abuse, [102] and his father also had a drug and/or alcohol abuse problem. In response to Berryman's woeful lack of personal resources to cope with adult life, he began drinking, which Dr. White describes as a temporary solution that only compounded his problems.

> 102 Nothing observed in the record corroborates that Berryman's brother attempted suicide or that maternal relatives suffered from alcohol or substance abuse.

With respect to Dr. Pierce's trial testimony, Dr. White points out that due to inadequacies in trial preparation, his diagnosis of possible organic brain damage was neither well-documented nor well-received by [*257] the jurors. Evidence which would have strengthened Dr. Pierce's clinical observations include the juvenile records from Berryman's residence with his father from age 12 to 17, particularly the lack of supervision by the father, the father's ambivalence in wanting to care for his son, and the outright rejection by his mother. The trial testimony of Berryman's mother and sister at trial did not capture the mother's total un-involvement with her children. The jurors were not informed that when Berryman lived with his mother after the parents' divorce, that she relied on her parents to care for the children. Nor were the jurors (or Dr. Pierce) aware that Berryman had been molested by two of their mother's brothers. The fact that Berryman sustained a frontal blow to his head (from his wife striking him with a flashlight) in 1986 also was not made known to Dr. Pierce for him to figure into his evaluation. It was this injury, and not the 1984 industrial accident which preceded Berryman's debilitating headaches and a change in his previously docile behavior to someone who was violent (as in the assault on Mr. Perez).

4. *Strickland* Expert Testimony.

In support of Claim 15, Berryman's retained [*258] *Strickland* expert, Stanley Simrin, has supplied a declaration in which he testifies about deficiencies at both the penalty and guilt phase proceedings. He opines that the testimony of Drs. Pierce and Benson presented during penalty proceedings would have been far more persuasive had Messrs. Soria and Peterson obtained the

empirical test results from the PET scan and alcohol induced EEG finally conducted in the year 2001. In Mr. Simrin's opinion, trial counsel were constitutionally incompetent for not exerting further effort to obtain these tests. He further opines that the testimony of these experts coupled with the testimony of the doctors who conducted the empirical tests would have made a significant difference to the guilt phase proceedings. The supported diagnoses of Drs. Pierce and Benson would have challenged the prosecution burden of establishing intent to kill, the intent to rape, premeditation, and deliberation.

5. Mr. Soria's Explanation for his Failure to Develop Mental State Evidence at Guilt Proceedings.

Two of Mr. Soria's declarations are relevant to the discussion of mental state evidence development. In a declaration dated August 20, 2001, he discusses his failure to [*259] obtain an alcohol induced EEG or a PET scan. He states he tried to obtain the appropriate neurological tests in Kern County, but that a PET scan wasn't available in Kern County, and efforts of defense investigator Doug Lemmons to obtain an alcohol induced EEG in Kern County were rebuffed. Mr. Soria did not attempt to obtain an order to have Berryman transported outside of the county to complete the tests because he "did not know if the [trial] court would approve the transportation order." Later, in 1990, he learned that such a transportation order was available, when he and Mr. Peterson represented subsequent capital defendant in Kern County, John Lee Holt. A transportation order for Mr. Holt to submit to a PET scan in Orange County (University of California at Irvine) was approved.

In a separate declaration, executed September 17, 2001, Mr. Soria explains his failure to commission a social history of Berryman's background was because he "had not been introduced to the practice of obtaining social histories in capital cases." Despite this omission, Mr. Soria did have one his investigators, Mr. Beadle, interview family members to get a general idea of Berryman's family history.

6. Counter-Evidence [*260] **Developed by the Warden.**

The Warden proffers one declaration and two reports with his opposition brief to Berryman's evidentiary hearing request. The declaration is subscribed by board certified neurologist and psychiatrist Marc R. Nuwer, a professor in the Department of Neurology at the U.C.L.A. School of Medicine. The reports are over the signature of board certified specialist in Nuclear Medicine, Alan Waxman, M.D., who, at the time of his declarations was director of the Nuclear Medicine Department at Cedars-Sinai Medical Center in Los Angeles. There are additionally eight exhibits attached to Dr. Waxman's reports.

a. Declaration of Marc R. Nuwer, Executed May 10, 2002.

Dr. Nuwer reviewed the EEG recordings obtained and reported on by Dr. Raul Guisado. The measurement of Berryman's brain activity was performed in three trials. The first trial was conducted without alcohol, the second was with six ounces of alcohol and the third was with an additional six (for a total of 12) ounces of alcohol. All three were undertaken while Berryman was awake (although he became drowsy during the third trial) and included respective three minute intervals during which Berryman hyperventilated.

Dr. [*261] Nuwer reports that the "changes in the three EEGs are consistent with Mr. Berryman having become severely intoxicated over the course of these tests.... [not showing] any other effects beyond drowsiness. In particular, there is no evidence of any epileptic activity or seizure-related activity or any other pathological abnormality in the recording." Dr. Nuwer disagrees with Dr.

Guisado's conclusion that the tracings shown on the third trial are consistent with anything pathological or seizure-related. Even if there had been any seizure-related epileptic spikes or sharp wave discharges in the third trial EEG (which Dr. Nuwer insists there were not), "that would not necessarily be a sign of a seizure disorder." Such spikes and wave discharges in fact are common in patients who experience no seizures. Further, EEGs, in general, are not diagnostic, but, rather, used to confirm a clinical suspicion. Actual seizures are identifiable by the patient's conduct, specifically, falling to the ground (convulsion) or succumbing to a blank stare (partial seizure), both followed by disorientation and sleepiness. After a seizure, a person may try to run away and may resist people who try to restrain them. [*262] Violent activity committed during this period would be simple and non-directed. Complex tasks, as in being able to "carry out a plan of action" are not performed by people in a convulsion, a partial seizure, or in the state of disorientation which follows. Dr. Nuwer further opines that people in these states generally do not commit violent acts. Under the facts in the case. Dr. Nuwer concludes that Berryman's conduct (disrobing the victim, stabbing her, and having sexual intercourse) were inconsistent with him having had a seizure.

Dr. Nuwer also comments on the Quantitative EEG (QEEG) test results (i.e., topographic maps showing bilateral temporal slowing of electrical waves) obtained by Dr. Guisado. First Dr. Nuwer opines that the results show normal EEG brain waves. Second, he states that the QEEG has a poor reputation for accuracy in the medical community and definitely was not accepted in 1988.

b. Reports of Alan Waxman, Dated May 14, 2002.

Dr. Waxman gives extensive information about his knowledge and qualifications to testify about brain imaging procedures, particularly PET scans. He begins his report by explaining his "understanding" of the current view that "PET scanning has [*263] not been generally accepted by the scientific community as a means of diagnosing traumatic brain injury, [e]specially in minor head trauma when the scans are performed at a time remote from the injury." Later in his report, he states, "It would be counter intuitive to assume that functional brain imaging would have been acceptable in 1988" for mild head trauma or alcoholism.

Dr. Waxman explains that in order to properly interpret PET scan results, there must be a control group of normal database subjects to which individuals with alcoholism and/or mild head trauma can be compared. Further, interpretation of results would have to be accomplished by readers who are "blind" to whether results being interpreted are from afflicted or normal subjects. Because of the paucity of information for evaluating mild head trauma patients, the Society of Nuclear Medicine as well as the American Academy of Neurology have suggested caution using PET brain studies. Dr. Waxman continues that "[s]ensitivity, specificity, accuracy, negative and positive predictive value must be determined to be acceptable before a test can be widely used. This has **not** been done for head trauma or toxic exposure (including [*264] alcohol)." (Double emphasis in original.) Rather accepted uses for functional brain imaging (PET scans) include evaluating stroke, dementia (especially Alzheimer's), and epilepsy. Poor study designs not using a double blinded technique contribute to inaccurate results. Interpretative errors are also a risk.

Dr. Waxman opines that Dr. Wu's report of Berryman PET scan demonstrates interpretative error. First Dr. Waxman points to Dr. Wu's conclusion that metabolic activity was lower in the right temporal pole than in the left. In Dr. Waxman's view, this difference is inconsequential because temporal asymmetry increases as a person ages. The difference in Berryman's temporal lobes is not significant for a man of 36 years old. [103] In any event, Dr. Waxman, himself, was unable to detect any significant temporal asymmetry. Dr. Waxman notes that the physician who initially read the PET scan at the Northern California PET Center, Dr. Peter Vaulk, also found the scan to be normal,

i.e., did not detect any significant abnormalities (including temporal asymmetry). In fact, the result of Berryman's study "is entirely within normal limits with no significant asymmetries identified."

103 Berryman actually [*265] was 35 when the scan was performed in July 2001.

Dr. Waxman further points out that the control database which Dr. Wu used to compare Berryman's scan results fails to show any real differences. In fact 15 of the 56 subjects in the database show temporal asymmetries equal to or greater than those shown on Berryman's scan. [104] Based on the fact "that there are no metabolic abnormalities demonstrated on the Berryman's scan, Dr. Waxman's opines that Dr. Wu "incorrectly analyzed the scan on Rodney Berryman." Dr. Waxman agrees "entirely" with the physician at the site where the PET scan was conducted, Dr. Vaulk, that Berryman's scan was within normal limits.

104 The exact language in the report is "at least 15 of the 56 normal subjects with temporal asymmetries present which are equal to greater than the PET brain scan on Rodney Berryman." The Court interprets the phrase, "equal to greater than" to mean, "equal to **or** greater than . . ." The Court views the omission of the word "or" to be a typographical omission.

In his second report, Dr. Waxman discusses a supplemental report which Dr. Wu prepared concerning Berryman's PET scan. Specifically, Dr. Wu provided a quantitative assessment showing [*266] the difference in temporal lobe function (between the right and the left) of 33.8%, whereas the mean temporal lobe difference in the normal database was 1%. Dr. Waxman explains that this is intended to imply that Berryman's temporal lobe differential is abnormal. In Dr. Waxman's opinion, these figures are not valid for demonstrating a disparity in the functioning of Berryman's right and left temporal lobes. This follows from the fact that the 1% mean temporal lobe difference Dr. Wu found in his normal database subjects was achieved by averaging the mean differences, which has the effect to minimizing normal asymmetries. Dr. Waxman indignantly states that Dr. Wu's method in this regard "is intended to mislead the reader by suggesting that normal individual subjects have no asymmetries of the temporal lobe." (Emphasis in original.) Dr. Waxman describes the whole quantitative comparison as inappropriate: "It is much worse than comparing apples to oranges, it is comparing apples to bricks."

Next, addressing scientific acceptability of PET scans, Dr. Waxman notes that only recently, and certainly not in 1988, have PET scans been approved for epilepsy reimbursement as a clinically accepted [*267] procedure. But the significant findings for finding epilepsy are mesial temporal lobe decreases. In Berryman's scan, there are no asymmetric regions in the mesial temporal regions to suggest temporal lobe epilepsy.

B. Berryman's Contentions.

As noted in the discussion of Claims 4, 5, 27, and 28, *see* Part VI., *supra,* Berryman's claimed mental impairments and deficiencies are numerous. He is said to suffer from permanent pre-existing mental disorders, severe mental and emotional impairments, the pervasive effects of organic brain disease with resulting limited intellectual and cognitive capacity, overwhelming developmental trauma including neglect, abandonment, physical abuse, emotional abuse, sexual abuse, plus, from the death of his father, post-traumatic stress disorder, depression, paranoia, and substance abuse.

Berryman argues that evidence adduced during guilt phase proceedings, coupled with what was presented at penalty proceedings, would have supported a mental state defense to defeat the

prosecution burden of establishing intentional killing, rape (or attempted rape), premeditation and deliberation. He claims he was too impaired to have known what he was doing when he stabbed Ms. [*268] Hildreth, maintaining either that he did not become impaired until after the two engaged in consensual intercourse or alternatively that the sexual attack possibly also was seizure related. Relying solely on the evidence developed for the penalty phase, as actually presented, to support a mental state defense, Berryman focuses on his excessive alcohol consumption. Although Penal Cole *§ 25(a)* prohibited evidence of diminished mental capacity at the time of his trial, voluntary intoxication or other mental conditions nonetheless could have been considered by the jury. In support of this argument, Berryman cites to *People v. Molina, 202 Cal. App. 3d 1168, 1173, 249 Cal. Rptr. 273 (1988)* (holding "an expert may testify regarding the defendant's mental condition so long as the expert gives no opinion on the ultimate question of whether or not the defendant actually had the requisite mental state"), *disapproved on other grounds, see People v. Saille, 54 Cal. 3d 1103, 1114, 1115-16, 2 Cal. Rptr. 2d 364, 820 P.2d 588 (1991)*, and *People v. Rangel, 11 Cal. App. 4th 291, 302, 14 Cal. Rptr. 2d 529 (1992)* (holding evidence of voluntary intoxication would be admissible on the issue of a defendant's [*269] capacity to harbor the requisite mental state).

The expert testimony of Dr. Benson, in particular, would have been key to establishing that the increase in Berryman's alcohol consumption caused seizures manifested by the escalation of angry and violent incidents (such as the altercation with motorist David Perez). A finding of such resultant seizure activity would have challenged the jury finding that Berryman intentionally killed Ms. Hildreth, a finding that was required under then existing California law. *See Carlos v. Superior Court, 35 Cal. 3d 131, 142, 197 Cal. Rptr. 79, 672 P.2d 862 (1983)*. Berryman argues that his trial attorneys failed to consult adequately with the retained experts in advance of the guilt phase, and thus the decision not to put on a mental state defense was uninformed.

Berryman further argues that the medical opinions of Drs. Pierce and Benson really only supplied a partial mental defense and that trial counsel should have done much more, including commissioning a social history, and obtaining neurological tests, notably an alcohol induced EEG and a PET scan.

C. Analysis.

The analysis of Claims 15 and 16 follows the standard in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. [*270] To obtain habeas relief, Berryman must establish both deficient performance and prejudice. With respect to deficient performance, he carries the burden of demonstrating that his attorneys' performance fell below an "objective standard of reasonableness." *Id. at 688*. This assessment, however, must be made "from counsel's perspective at the time," so as "to eliminate the distorting effects of hindsight." *Id. at 689*. In assessing trial counsel's performance, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* To establish prejudice, Berryman must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Where individual deficiencies are not by themselves sufficient to meet the *Strickland* prejudice standard, relief may be available when the deficiencies are considered cumulatively. *See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995)*. Before [*271] addressing the performance and prejudice prongs, the Court registers overall comments about both parties' arguments.

1. Overall Comments.

As a preliminary matter, the Court is puzzled by Berryman's proffer of evidence in support of an evidentiary hearing regarding Claim 15. Whereas Claim 15 alleges ineffective assistance of counsel for the failure to present at the guilt phase proceedings the evidence that actually was presented during penalty proceedings, the proffered evidence consists of new declarations of the trial experts based on neurological tests that were not performed during the state trial proceedings. Reliance on this additional evidence contradicts the gravamen of Claim 15, and conflates Claim 15 with Claim 16 (that additional evidence should have been presented). [105]

105 The primary reason Claims 15 and 16 are discussed together is that the Court views the evidence proffered with the evidentiary hearing request actually supports Claim 16 more than Claim 15.

On the Warden's side, the Court similarly is baffled by the repeated insistence that Drs. Pierce and Benson did not (at trial) request further expert assistance in diagnosing Berryman's organic brain dysfunction. To the [*272] contrary, both have provided declaration testimony, and even trial testimony, that they repeatedly urged trial counsel to obtain the neurologic tests to confirm their diagnostic impressions. Similarly, both doctors have provided post-conviction testimony that they believed their impressions of Berryman would have been helpful in formulating a mental state defense to the capital murder charge during guilt proceedings. Another wholly unsupported argument is that the experts testified Berryman did not suffer from any serious psychological disorder. This was the very argument Mr. Moench advanced both during cross examination of Dr. Pierce and on summation. During cross examination, his efforts to label degrees of psychological impairment, however, were curtailed by the trial judge. Whether psychosis is more serious than neurosis was determined by the trial judge to be irrelevant to Dr. Pierce's testimony. Both Dr. Pierce and Dr. Benson believed that Berryman's organic brain disorder was a serious psychological impairment. Putting these matters aside, Berryman's ineffective assistance of counsel claims are reviewed under *Strickland v. Washington.*

2. The Performance Prong.

With respect to [*273] the claim that a social historian should have been retained, no evidence is offered (notably from Berryman's *Strickland* expert, Mr. Simrin) to the effect that the standard capital defense practice in 1987 and 1988 dictated that Kern County counsel should to obtain a social history. Thus, Mr. Soria's declaration that he was unacquainted with the practice for commissioning social histories in 1987 and 1988 is accepted as reasonable attorney performance under *Strickland.*

The matter of whether counsel were constitutionally deficient for failure to press for neurological tests in or outside of Kern County is less clear cut on the present showing. Berryman's theory of attorney incompetence is the failure of Messrs. Soria and Peterson to provide Drs. Pierce and Benson with the means to confirm their diagnostic impressions that Berryman suffers from an alcohol induced seizure disorder. Indeed, the prosecutor, Mr. Moench, emphasized at trial there was no empirical support for this diagnosis. He even went so far as to suggest that the defense team purposefully failed to obtain the indicated neurological tests so the experts would have "something to talk about" during their testimony. From the [*274] defense stand point, what was lacking was empirical support for the notion that Berryman suffered from an alcohol induced seizure at the time of the crime.

In this case, alleged deficient performance necessarily overlaps with whether empirical test results would support the existence of a seizure disorder. Evidence establishing existence of a seizure disorder, in turn, is an element of the prejudice inquiry. If the empirical test results would have supported the experts' diagnostic impression of the existence of a seizure disorder, the Court could conclude counsel were constitutionally ineffective for failing to obtain those tests. [106] The parties' respective experts, however, do not agree on the import of the test results. Drs. Pierce, Benson, Wu, and Guisado claim the tests do support the existence of a seizure disorder. Drs. Nuwer, Vault, and Waxman conclude they do not. [107]

106 The other significant element of prejudice is whether the verification of a seizure disorder supports the contention that Berryman was mentally impaired on the night of the crime.

107 The Warden's argument extends even further -- to the contention that the test results themselves are not admissible because they [*275] are not and were not accepted in the scientific community, now or at the time of trial, citing *People v. Kelly, 17 Cal. 3d 24, 30, 130 Cal. Rptr. 144, 549 P.2d 1240(1976)*, and *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

The Court is not able to resolve the conflict without further examination, including cross examination, of the experts and the data relied on by the experts. The Court would need to assess witness demeanor and credibility. *See Earp v. Ornoski, 431 F.3d at 1170* (holding that where declarations are submitted as offers of proof for an evidentiary hearing, the veracity of the declarants cannot be determined without the court conducting a hearing where credibility and demeanor are assessed by the judge). For the sake of proceeding with the second element of prejudice, that is, whether the presence of a seizure disorder would have supported a viable mental state defense, the Court will assume *arguendo* that the test results do support the existence of a seizure disorder.

3. The Prejudice Prong.

What really is at issue here is the relative impact between what was presented during guilt proceedings, and what Berryman alleges could have [*276] been presented, both in terms of what was presented during penalty proceedings and the additional proffered evidence, plus the evidence submitted by the Warden. *See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (holding that in analogous examination of penalty phase claim, assessing prejudice requires re-evaluating the prosecution evidence against the totality of available defense evidence). Undertaking this task, the Court finds no reasonable probability that the outcome of the guilt phase proceedings would have been different if the penalty phase and/or additional evidence had been introduced (and admitted) at Berryman's guilt phase proceedings. *See Strickland, 466 U.S. at 694*.

Drs. Pierce, Benson, and White all have carefully documented Berryman's history, revealing a tumultuous childhood, with unhappy parents, turmoil, changing schools, and lack of supervision. These factors have led the experts to opine that Berryman suffers from a personality disorder. The doctors additionally document that Berryman, a charming and good-looking young man, experienced a great deal of difficulty in intellectual functioning, possibly due to his premature birth and [*277] poor post-natal care. Drs. Benson and Pierce further opine that Berryman suffers from an organic brain disorder which could have caused alcohol induced seizures and the type of aggressive behavior consistent with killing Ms. Hildreth in a rage. The three factors offered in support of this conclusion are (1) the EEG and PET scan results, (2) Berryman's excessive alcohol

consumption and/or alcoholism, and (3) two head injuries within the two years prior to Ms. Hildreth's death. [108]

108 For purposes of this analysis, the Court accepts the fact that Berryman sustained one or more head injuries with two years prior to Ms. Hildreth's death, and that these injuries were caused by a fall from construction equipment and being struck on the head by a metal flashlight.

With respect to the post-conviction "discovery" that Berryman was sexually molested as a child by two of his mother's brothers, the Court specifically rejects the notion that Berryman's mental or emotional problems are attributable to sexual abuse. The proffered evidence of Berryman's molestation, that is, declarations of Berryman's mother and sister about what Berryman told them when they visited him in the Kern County Jail for [*278] the present offense, even setting aside hearsay considerations, *see Federal Rules of Evidence, 802*, *803* and *804*, is not reliable. Neither Berryman's mother nor his sister are independently competent to testify about what happened to Berryman as a little boy, because they were not percipient witnesses and only learned about the alleged sexual abuse years later. Moreover, Berryman never told any of his examiners, the social historian, or even counsel about his sexual abuse. The Court concludes that Berryman's proffered expert opinion of mental impairment, to the extent it is said to be due to sexual molestation, is not "based on sufficient facts or data" required under *Federal Rule of Evidence 702*.

On the other hand, the Court accepts the fact that in the months following the head injury described in Dr. White's social history, Berryman's alcohol consumption increased and his response to conflict became increasingly violent. These violent episodes included Berryman's attack on Mr. Perez, an argument with his mother (over pick up truck tires), his altercation with his father-in-law, Rev. Fuller, and ultimately the sexual assault and stabbing death of Ms. Hildreth. Acceptance of the chronology [*279] of violent acts following head injuries, however, does not signal the Court's endorsement of the theory that alcohol induced seizures were causative of the violence. Even with the addition of the neurological test results, which are assumed for the sake of argument to support the presence of a seizure disorder, Berryman has come no closer than he did at trial to establishing he actually experienced a seizure when he attacked Ms. Hildreth.

First, there is no dispute about what a seizure means. When a person experiences a seizure or partial seizure, he loses consciousness or partial consciousness, perhaps succumbs to convulsions, loses track of what he is doing, becomes disoriented, and cannot remember what he did while experiencing the seizure. Although he may exhibit aggressive behavior, this behavior consists of non-directed violence, such as toward a person who might be trying to come to his aid. He would not be able to perform complex tasks such as carrying out a plan of action or engaging in forcible sexual intercourse. Even Dr. Benson conceded during his trial testimony (on cross examination) that if Berryman had experienced an alcohol induced seizure, he would not have been able [*280] to commit rape or attempted rape.

The evidence, however, clearly demonstrates that significant goal-directed violence and sexual assault was perpetrated against Ms. Hildreth at the location of her death. Contrary to Berryman's contention, the evidence does not support the notion that intercourse between Berryman and Ms. Hildreth was voluntary. Accepting the proffered evidence that Ms. Hildreth had been in Berryman's truck before the crime and that he and Ms. Hildreth were seen together by the concessionaires at Lake Woollomes within two weeks other death, the fact they may have been together is not sufficient to raise even an inference the sexual contact inflicted on Ms. Hildreth before her death

was consensual. In the first place, as reported in Mr. Morris's notes of his interview with Ms. Hildreth's aunt, Brenda Clark, she stated she didn't care for him. More significantly, the condition of Ms. Hildreth's body showed clear indications of a struggle. Her upper garments were pulled over her breasts. Her lower garments were pulled off her right leg completely but still around her left ankle. Her legs were separated and her arms were extended out to the sides of her body with her elbows [*281] bent over her head suggesting she had been pinned down on the dirt. There were circular impressions in the dirt that appeared to have been made by her buttocks and thighs. She had a stab wound in the right front neck region, abrasions on both sides of her neck, abrasions on her right pelvis, and a patterned abrasion on her face over her right cheek and jaw. Further, there were drag marks in the dirt and no foot or sandal prints associated with her feet. Moreover, with Dr. Holloway conducted the autopsy, he noted she had sustained a blow to the left side of the back of her head, which contributed to her death. Whether Berryman drank excessively or not, the condition of Ms. Hildreth's body and the crime scene amply indicate that she was subjected to goal directed violence. She was dragged or carried (not escorted) from Berryman's truck to a dirt clearing, had her clothes rearranged to give Berryman access to her breasts and genitalia, was struck or grabbed harshly, subjected to some sort of sexual intrusion, [109] sustained a stab wound to her neck which caused her to bleed to death, and finally suffered from having Berryman apply sustained pressure to her face with his shoe. Even if Berryman [*282] did not take Ms. Hildreth to that remote place originally with the intent to kill her, but rather intended to engage in consensual sexual intercourse, at some point, Ms. Hildreth's resistance became clear, and Berryman overcame that resistance with deadly force. His conduct, as evidenced by the scene of the crime, was not consistent with voluntary intercourse or a seizure. [110] The absence of evidence that Berryman's alcohol induced seizure disorder was a factor at the time of the crime forecloses his ineffective assistance of counsel claim challenging the failure of Messrs. Soria and Peterson to develop a mental state offense. *See Henley v. Crist, 67 F.3d 181, 186-87 (9th Cir. 1995)* (in federal habeas proceedings, no expert testified that the petitioner was mentally impaired *at the time* of the crime).

109 The sufficiency of the evidence to support rape as well as the constitutional adequacy of the rape instructions are discussed in connection with Claims 12, 29, 35, 50, 71, and 71 A. *See* Part XDC., *infra.*

110 In further support for this conclusion, the Warden points to the testimony of Crystal Armendariz, Andrew Bonner, and Melinda Pena that although Berryman had been drinking on the [*283] night of Ms. Hildreth's death, he did not appear intoxicated, was able to function normally, including having sexual intercourse with Ms. Pena, driving to various locations, and conversing with members of the Clark-Bonner-Armendariz household. The Court considers this evidence along with the concession of Dr. Benson that a person in the throes of a seizure would not be able to perform complex tasks, including rape.

Considering all the evidence, both offered in post-conviction proceedings and adduced at trial, the introduction of mental state evidence during guilt phase proceedings would not have altered the verdict of first degree murder or the finding as true the rape murder death eligibility special circumstance. Neither the neurological tests nor Dr. White's social history report connect Berryman's mental problems with his conduct on the night he killed Ms. Hildreth. The proffered evidence does not satisfy Berryman's burden of demonstrating a reasonable probability of a different outcome. The alleged inadequacies in mental defense development did not lead to Berryman's conviction. Rather, it was the fact that he took Ms. Hildreth out to a remote agricultural area, sexually assaulted [*284] her and then stabbed her, that led to his conviction. Claims 15 and 16 are denied. The request for an evidentiary hearing as to Claim 15 is denied.

XIII. Berryman's Assertion that His Attorneys' Were Constitutionally Incompetent for Failure to Adequately Review and Develop Forensic Tire Track Evidence (Claim 30).

In Claim 30, Berryman alleges ineffective assistance of his trial counsel for failure to adequately prepare the defense criminalist, Stephan A. Schliebe, to challenge the tire track evidence linking Berryman to the crime scene. He does not request an evidentiary hearing for this claim.

A. Statement of the Facts Relevant to the Defense Criminalist.

As noted in the summary of the guilt phase proceedings, Mr. Moench presented circumstantial evidence that Berryman's pick up truck had been at the scene of Ms. Hildreth's murder. The evidence supporting this contention was presented in the form of photographs of tire tracks observed by investigators at the crime scene when compared to "tire roll" tests of actual tires seized from Berryman's truck and the Clark residence. Defense expert, Mr. Schliebe, testified to cast doubt on this theory. Mr. Moench, however, brought out on cross examination [*285] that Mr. Schliebe did not examine the actual tires seized from Berryman's pick up truck, although they were made available to him. *See* Part III. A., *supra.* Rather, Mr. Schliebe's analysis was limited to examination of "tire rolls" prepared by prosecution criminalist, Mr. Laskowski, and comparison photographs of the crime scene. Nonetheless, Mr. Schliebe testified that one of the prosecution test impressions did show a consistent pattern with a photograph of a tire track at the crime scene, even though none of the comparison photographs showed an exact match. The tire roll with the consistent pattern to the crime scene was the limited spare.

B. Berryman's Contentions.

Berryman relies on *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, for his challenge to the constitutional adequacy of his trial counsel. In addition, he cites *Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)*, for the proposition that the Constitution grants criminal defendants the right to services ancillary to effective legal representation, including appointed experts. He claims that because Mr. Schliebe was not afforded an opportunity to review exhibits in a meaningful [*286] manner, the prosecution was able to capitalize on his lack of preparation during cross examination. Berryman clarifies in his traverse, that this cross examination adversely impacted Mr. Schliebe's credibility to the jury. He concedes that "Mr. Schliebe's opinion would not have been any different had he viewed the tires ... [b]ut his opinion would not have been so easily discounted by the prosecutor *and the jury* for lack of preparation." (Emphasis added.)

C. Analysis.

With respect to Mr. Schliebe's preparation, the California Supreme Court held:

> [D]efendant does not establish ineffective assistance in defense counsel's asserted failure to more fully prepare criminalist Schliebe for his testimony. He does not demonstrate that fuller preparation would have yielded favorable results. Hence, he cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

6 Cal. 4th at 1082.

As Claim 30 is clarified by Berryman's traverse, however, the Court understands that he is not claiming different or more favorable testimony would have resulted from better preparation, and

thus, the California Supreme Court decision is inapposite. Rather, he is claiming that Mr. Schliebe's [*287] credibility was damaged under Mr. Moench's cross examination. The claim is without merit.

As a preliminary matter, Berryman's reliance on *Ake, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53*, for the proposition that he has a constitutional right to the assistance of a forensic expert on his litigation team is unsupported. [111] *Ake* stands for the proposition that a criminal defendant who demonstrates his sanity at the time of the offense is likely to be a significant factor in determining guilt is constitutionally entitled to the assistance of a psychiatrist at state expense. *Id. at 83*. The obligation for expert assistance in *Ake* is limited to psychiatric experts and in no way extends to Mr. Schliebe.

111 The fact that Berryman does not provide a point-page reference to his *Ake* citation is not lost on the Court.

Second, addressing the issue of prejudice as originally framed, Berryman has not established any. Berryman hasn't alleged that Mr. Schliebe's credibility was determinative to the outcome of the guilt verdict. Besides, the idea that rigorous cross examination by Mr. Moench significantly diminished Mr. Schliebe's conclusions to the jury is speculative. Even if an offer or proof in [*288] this regard has been made, it would be rejected because juror impressions in the deliberative process would be strictly proscribed under *Federal Rule of Evidence 606(b)*.

Claim 30 is denied.

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Claim 30 is denied.

XIV. Berryman's Assertion of Trial Error for the Trial Court's Overruling Defense Objection to Questions Concerning Compensation Paid to Defense Forensic Expert (Claim 31).

In Claim 31, Berryman challenges the trial judge's failure to sustain a defense objection to the prosecution question about Mr. Schliebe's compensation. No evidentiary hearing is requested.

Second, addressing the issue of prejudice as originally framed, Berryman has not [*289] established any. Berryman hasn't alleged that Mr. Schliebe's credibility was determinative to the outcome of the guilt verdict. Besides, the idea that rigorous cross examination by Mr. Moench significantly diminished Mr. Schliebe's conclusions to the jury is speculative. Even if an offer or proof in this regard has been made, it would be rejected because juror impressions in the deliberative process would be strictly proscribed under *Federal Rule of Evidence 606(b)*.

Claim 30 is denied.

XIV. Berryman's Assertion of Trial Error for the Trial Court's Overruling Defense Objection to Questions Concerning Compensation Paid to Defense Forensic Expert (Claim 31).

In Claim 31, Berryman challenges the trial judge's failure to sustain a defense objection to the prosecution question about Mr. Schliebe's compensation. No evidentiary hearing is requested.

A. Statement of Facts Relevant to Evidence of Defense Expert Compensation.

During cross examination of Mr. Schliebe, Mr. Moench asked him what his fee was for the examination of the exhibits which were the subject of his testimony. Mr. Soria immediately objected and there ensued a lengthy side bar conference. RT-22: 3116-20. Following a review of authorities [*290] including Penal Code *§ 987.9* and Evidence Code *§ 352*, the trial court ultimately overruled the objection. When the question was reiterated, Mr. Schliebe responded, "Are you interested in knowing what Cal Lab charges for my time or my monthly salary?" Mr. Moench replied, "assume Cal Lab presented a bill to the defense on this particular thing, how much were you and/or your business compensated for this?" Mr. Schliebe then testified that his bill for reviewing evidence was $ 2,500 and $ 1,300 for giving his testimony. *Id.*: 3121.

B. Berryman's Contentions.

In his argument, Berryman acknowledges the California Supreme Court decision upholding the trial court ruling on the grounds that Evidence Code *§ 722(b)* permits evidence of compensation and expenses paid to expert witnesses and that Penal Code *§ 987.9* (providing a confidential procedure for indigent criminal defendants to obtain investigative and expert funding) provides no exception. *See 6 Cal. 4th at 1071*. He does not appear to dispute the applicability of Evidence Code *§ 722(b)* whether the expert is an independent contractor or is self-employed. He complains, however, that the California Supreme Court failed to take into account that [*291] Mr. Schliebe was employed by Cal Lab as a salaried employee and would receive the same salary whether he testified or not. He claims a salaried employee testifying for the defense is no more subject to impeachment than a salaried employee testifying for the prosecution, and since impeachment under *§ 722(b)* is not available for salaried prosecution witnesses, the statute discriminates. He provides no further information or argument.

C. Analysis.

The starting point for analyzing Claim 31 is *§ 722 of the California Evidence Code*. *Subsection (b)* provides that "compensation and expenses paid or to be paid to an expert witness *by the party calling him* is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." (Emphasis added.)

The Court understands Berryman's argument to be that expert witnesses who testified in the People's case were not subject to the impeachment provisions of Evidence Code *§ 722(b)*, and that this disparate treatment between prosecution and defense experts amounts to a constitutional violation. This would include criminalist Gregory Laskowski, pathologist, John E. Holloway, M.D., serologist Gary Clayton [*292] Harmor, and fingerprint technician Opal L. Chappell. However, all of these experts except serologist Gary Clayton Harmor were employed by the Kern County government. Dr. Holloway was employed by the Kern County Coroner's Office, RT-17: 2256, Ms. Chappell was employed by the Kern County Sheriff's Department, RT-18: 2413, and Mr. Laskowski was employed by the Kern County Regional Criminalistics Laboratory, RT-19: 2600. Accordingly, they would not have had their fees or expenses paid for by the party calling them, within the meaning of *§ 722(b)*. Only Mr. Harmor was employed by a private company, Serological Research Institute, RT-18: 2382. But Berryman never questioned Mr. Harmor about his compensation, although he could have done so under the statute. There is no support in the record

or the law for the discriminatory construction attributed to the California Evidence Code by Berryman.

Claim 31 is denied on the merits.

XV. Berryman's Challenges to Sufficiency of the Evidence of Criminal Liability for Murder (Claims 32 and 33).

In Claims 32 and 33 Berryman claims the trial evidence was insufficient to sustain his murder conviction. Claim 32 alleges there was insufficient evidence to identify [*293] Berryman as the perpetrator. Claim 33 alleges insufficient evidence to support first degree murder on alternate theories of premeditated or rape murder. Berryman does not request an evidentiary hearing for either of these claims.

A. Statement of Facts Relevant to Berryman's Criminal Liability for Murder.

As more fully set forth in the discussion of evidence presented during guilt phase proceedings, *see* Part III.A., *supra,* the combination of circumstantial evidence in six categories identified Berryman and his pick up truck as having been present at the crime scene where Ms. Hildreth was killed. First, there were positive tire track comparisons between impressions documented at the crime scene and two tires on Berryman's pick up truck, plus a limited spare tire which recently had been removed from his truck. Second, there were positive comparison's between shoe impressions at the crime scene, including on Ms. Hildreth's face, and the high top Brooks athletic shoes seized from Berryman at the time of his interview by investigators. Third there was a positive correlation between a gold-colored chain link found at the crime scene and three gold-colored chain links found on the floor board [*294] of the cab as well as broken gold colored chain link necklaces hanging over the rear view mirror of Berryman's pick up truck. Fourth, a latent finger print lifted off the inside passenger window of Berryman's pick up truck matched the print of one of Ms. Hildreth's thumbs taken at the autopsy. Fifth, one of two pubic hairs found on Ms. Hildreth's face was said to have borne substantial similarities to Berryman's pubic hair samples. Sixth, blood found on the canvas and on a shoe lace from Berryman's right (Brooks athletic) shoe was consistent with Ms. Hildreth's blood type. Additional circumstantial evidence supports the notion that Ms. Hildreth was raped, that is a vaginal swab revealed small amount of semen, verifiable by the presence of spermatozoa [112] and the appearance of her body, as encountered by investigating authorities when they arrived at the scene. Matters of timing from the testimony of Crystal Armendariz, David Castillo, and Lorene Louis also are fully recounted in the statement of facts from the guilt proceedings. *See* Part III.A., *supra.* In particular, both Mr. Castillo and Ms. Louis testified to have seen Berryman's pick up truck near the crime scene at a time that [*295] was after Berryman dropped Melinda Pena off at her house. RT-19: 2585-86 (Castillo); *id.:* 2593-94 (Louis) Next, as emphasized by the Warden, trial testimony of Thellas Sanders demonstrates Berryman's knowledge that Ms. Hildreth had been stabbed, before authorities had made this information public, and Berryman's attempt to construct an alibi for his whereabouts with Melinda Pena at the precise time Ms. Hildreth went missing and was killed demonstrates a consciousness of guilt. RT-17: 2319 (Sanders' testimony); RT-25: 3358, 3365.

112 Berryman's challenge to the rape conviction and rape murder special circumstance finding describe evidence of rape in more detail. *See* Part XIX., *infra.*

It bears stating here that Mr. Moench conceded in his guilt phase summation that the evidence supporting the People's case was largely circumstantial. RT-25: 3340. He emphasized, however,

that raping Ms. Hildreth was Berryman's goal and that the killing took place in the course of that act. He argued Berryman intended to kill her and also that he killed her because he didn't want her telling Crystal about the sex (rape). *Id.:* 3356.

B. Berryman's Contentions.

Based on the timing of Berryman's departure from [*296] the company of Melinda Pena and his return to the Clark residence, Berryman refers to the prosecution theory of his criminal responsibility for Ms. Hildreth's murder as a physical impossibility. Accordingly, he further argues that the jury's finding he was the perpetrator of Ms. Hildreth's death as an unreasonable determination of the facts. He stresses he could not have committed sexual assault and murder of Ms. Hildreth, and then changed his tires (specifically removing the limited spare, rim and all) from his pick up truck between the time he dropped Melinda Pena off at her house and the time he returned to the Clark residence.

With respect to the alternate theories of first degree murder (premeditated and rape felony murder), Berryman points out that the prosecution theory during summation was focused on rape felony murder. He then recites a portion of Mr. Moench's summation from *the penalty proceedings* in which he (Mr. Moench) described that Berryman killed Ms. Hildreth in a rage because he was upset she would tell her cousin, Crystal, about "what happened." Berryman implies the "what happened" refers to consensual sex, and since Mr. Moench endorsed a view that the sex was consensual, [*297] the rape felony murder theory is unsupported. He further points out there was no connection drawn between the small amount of blood detected in Ms. Hildreth's vagina (along with the presence of spermatozoa) and vaginal trauma. [113] Acknowledging that Ms. Hildreth's upper garment was pulled up over her breasts and her lower garment was pulled down around her ankles, Berryman suggests the "disarrangement" was occasioned by voluntary intercourse and that the injuries to her body were inflicted after this voluntary intercourse.

113 In fact, as pointed out by Berryman's retained pathologist, Dr. Camparini, the presence or absence of vaginal trauma has no bearing on whether sex was or was not consensual. *See* discussion of Claims 12, 29, 35, 50, 71, and 71 A, Part XIX.A.2.C, *infra.*

C. Analysis.

In addressing the sufficiency of the evidence supporting the notion that Berryman was the perpetrator of the crimes against Ms. Hildreth, the California Supreme Court held:

> [A] rational trier of fact could surely have found beyond a reasonable doubt that defendant was in fact the perpetrator. One need only recall the evidence relating to defendant's pickup truck, its tires, and the tire tracks; defendant's [*298] shoes and the shoe prints, defendant's jewelry clasp; the abrasion on Hildreth's right cheek displaying a pattern similar to that of the sole of defendant's right shoe; the stain on the shoelace of defendant's right shoe apparently produced by Hildreth's blood; defendant's and Hildreth's pubic hairs found on the latter's body; Hildreth's right thumbprint on the inside surface of the passenger-door window of defendant's pickup truck; and defendant's self-incriminating statements to friends and acquaintances and to investigating law enforcement officers.

6 Cal. 4th at 1083.

The California high court similarly found the evidence sufficient to establish commission of a rape to sustain the first degree murder conviction under the rape felony murder theory. *6 Cal. 4th 1084*. The findings made by the trial court in denying Berryman's motion for judgment of acquittal pursuant to Penal Code *§ 1118.1* also support the rape felony murder theory. Notwithstanding evidence creating doubt about the timing of Berryman's actions, these factual findings are fully sustainable by the record and cannot be upset on federal habeas. *28 U.S.C. § 2254(d)(2)*.

Moreover, even were the Court to evaluate the sufficiency [*299] of the evidence, the standard, as articulated by *Jackson v. Virginia. 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560(1979)*, is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Viewed in the light most favorable to the prosecution, as *Jackson* requires, *see id., at 326*, the evidence is sufficient to support both the finding of Berryman as the perpetrator and that first degree murder was, at a minimum, supported by the rape felony murder theory. Claim 32 and 33 are denied.

XVI. Berryman's Challenge to the Validity of the Special Circumstance Finding Due to Omission of the Intent to Kill Requirement (Claims 34, 42, and 43).

In Claims 34, 42, and 43, Berryman alleges the jury's death eligibility finding must be vacated because the intent to kill requirement for the felony murder special circumstance under *Carlos v. Superior Court, 35 Cal. 3d 131, 197 Cal. Rptr. 79, 672 P.2d 862*, was not satisfied. Claim 34 charges that to the extent he was convicted of first degree murder under the felony murder theory, the jurors were not instructed to find the killing was intentional. Claim 42 alleges trial error and Claim 43 alleges [*300] ineffective appellate counsel for failure to effectively raise the trial error on direct appeal. No evidentiary hearing is requested.

A. Statement of the Facts and State of the Law Relevant to the Intent to Kill Requirement.

These claims involve the application of changes in California law after the populace enacted the 1978 death penalty law by initiative. In *Carlos, 35 Cal. 3d at 153-54*, decided in 1983, the California high court held that intent to kill was a necessary element of the felony murder special circumstance. This holding was overruled just four years later in *People v. Anderson, 43 Cal. 3d 1104, 1147, 240 Cal. Rptr. 585, 742 P.2d 1306 (1987)*. Since Ms. Hildreth was killed after *Carlos* was decided, but before *Anderson* was decided, Berryman's case is said to have been in the *Carlos* window, wherein the former rule applies.

During jury selection, counsel and the trial court reviewed jury instructions to be read. Based upon a change in the law occasioned by *People v. Anderson,* the trial judge, at Mr. Moench's urging, eliminated the instruction that felony murder special circumstance required intent to kill. In fact neither the pre-trial instructions nor the pre-summation instructions, [*301] informed the jury of the intent to kill requirement. Prior to the pre-summation instructions, however, Mr. Moench experienced a change of heart about the reach of the new rule announced in *Anderson.* RT-25: 3281-82. He conceded that because the present offense occurred during the *Carlos* window, the intent to kill requirement for the felony murder special circumstance had to be met. To satisfy this requirement, a special verdict form was devised to confirm the jury's finding that Berryman intentionally killed Ms. Hildreth. *Id.* Anticipating the special verdict form, Mr. Moench in his guilt phase summation, mentioned the fact that the jurors would be asked whether Berryman intentionally killed Ms. Hildreth if they returned a verdict of first degree murder. RT-25: 3330. [114]

> 114 The Court has carefully read Mr. Moench's summation regarding the explanation of felony murder and the felony murder special circumstance. In his summation there is quite a bit of overlap between felony murder concepts and second degree murder under the theory of implied malice. He told the jury that felony murder permitted a first degree murder conviction even if the killing was unintentional, or accidental. Then, [*302] without clearly defining the special circumstance finding, he stated that the killing had to be intentional. Mr. Moench also was quite clear in his insistence that the killing was intentional.

It was not until the post-summation instructions, however, just before the jurors were sent out for deliberations, that the trial judge explained the verdict forms, including the intentional killing special verdict. Specifically, the trial judge instructed that if the jury unanimously and beyond a reasonable doubt found Berryman guilty of first degree murder, the next step was to proceed to the special verdict forms. The first special verdict form addressed whether the murder was committed in the course of rape. If so, then the jurors proceeded to the second form which required a finding on whether Berryman intentionally killed Ms. Hildreth. RT-26: 3467. In returning the verdict, the jury responded affirmatively to all three inquiries: yes to first degree murder; yes to the finding that the murder was committed in the course of the rape; and yes to the finding that the killing was intentional. As part of the general instructions the jurors were told that they must agree unanimously on whether [*303] Berryman was guilty of first degree murder "and any of the special findings" they were directed to make. The general instructions also informed them that the prosecutor's burden of proof was beyond a reasonable doubt.

B. Berryman's Contentions.

Despite the fact that the jurors were exposed to the intent to kill requirement prior to their deliberations, Berryman stresses that the intent element does not appear on the actual jury instructions and there is no indication that the intent to kill finding was made upon the proper beyond a reasonable doubt standard of proof. He argues prejudice resulted because his intent to kill was a close question on the facts of the case. He claims that although the issue was raised on direct appeal, appellate counsel rendered constitutionally ineffective representation because he failed to press the argument that the special finding of intentional killing did not satisfy standard of proof and unanimity requirements.

C. Analysis.

The California Supreme Court addressed the instructional omission of the intent to kill requirement on direct appeal, holding that the trial court "did indeed err" for its failure to instruct on intent to kill for the special circumstance [*304] finding. *Berryman, 6 Cal. 4th at 1089*. Upon conducting harmless error analysis, however, the court found the error to be harmless because of the special verdict that Berryman intentionally killed Ms. Hildreth. *Id.*

The state court decision on the issue is entirely reasonable and fully supported by the record. The jury was adequately instructed on the intent to kill requirement by inclusion of the special verdict form, the trial judge's instruction about the special verdict form, and the strenuous argument by Mr. Moench that Berryman actually intended to kill Ms. Hildreth. Further, the general instructions directed the jurors to decide special findings unanimously and beyond a reasonable doubt. The state court decision cannot be disturbed on federal habeas. *28 U.S.C. § 2254(d)(1)*. There is no basis to address the Warden's *Teague* bar argument. The Court also finds that Berryman's contention that the issue of his intent to kill was a close questions is without foundation. Claims 34, 42, and 43 are denied on the merits.

XVII. Berryman's Challenge to his First Degree Murder Conviction Due Errors Regarding the Order of Deliberations (Claims 37 and 49).

In Claim 37, Berryman contends counsel [*305] were constitutionally ineffective for not objecting to and securing a judicial clarification of the prosecutor's argument that the lesser included offenses to first degree murder could not be considered unless and until the jury agreed beyond a reasonable doubt that Berryman did not commit first degree murder. In Claim 49 he argues trial error because the trial judge failed to give adequate instructions on the order of deliberations concerning lesser included offenses to first degree murder. Berryman requests an evidentiary hearing with respect to Claim 37.

A. Statement of the Facts Relevant to Instructions on the Order of Deliberations.

Second degree murder and voluntary manslaughter, as lesser included offenses of first degree murder, were explained to jurors in pre-trial, pre-summation, and post-summation instructions. In addition, these lesser included offenses were addressed in Mr. Moench's summation. As far as the actual instructions, read to the jury both before and after the presentation of evidence, the trial judge instructed:

> Now, murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine and state in your [*306] verdict whether you find the murder to be in the first or second degree.
>
> If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but have a reasonable doubt as to whether such murder was of the first or the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the degree as second degree.
>
> Now, if the jury is not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, that being the offense of murder, and it unanimously so finds, it may convict him of any lesser offense, if the jury is convinced beyond a reasonable doubt that the defendant is guilty of such lesser offense.

RT-25:3310.

After these instructions were read, Mr. Moench delivered his summation, including a description the manner in which jurors were to consider the varying degrees of murder in completing the anticipated verdict forms. The issue of his summation on this subject has been addressed in the discussion of Mr. Moench's judge-elect status in Claims 7, 8, 9, 10, and 23, Part VII., *supra.* Specifically, Mr. Moench misspoke when explaining the order of deliberations on the various degrees of homicide. [*307] He stated:

> Only if, and you would have to find beyond a reasonable doubt, and unanimously, everyone on the jury would have to agree beyond a reasonable doubt that he did not commit a first degree murder.
>
> Only if everyone of you, beyond a reasonable doubt believed that he [Berryman] did not commit a first degree murder, then and only then would you go down and consider murder second, or voluntary manslaughter.
>
> ... And only if there is a unanimous not guilty verdict in this area, then you would go down to this, then you go down to murder second.

RT-25:3332.

At this point in Mr. Moench's summation, the trial judge interrupted and called for a side bar conference. During the side bar conference, the trial judge stated to counsel:

> Let the record reflect we're at side bar, out of the hearing of the jury, [P] There's a little concern, unless I misunderstood your argument, it sounded like you indicated to the jury that they had to find the defendant not guilty beyond a reasonable doubt, in other words, have to determine beyond a reasonable doubt that he was not guilty of first before they can go down to second. If -- I may have misunderstood your argument, but that's kind of the way it sounded to [*308] me.

Id.: 3333. In response, Mr. Moench said he would clarify the matter. Following the side bar conference, Mr. Moench clarified:

> If and only if you find unanimously the defendant is not guilty of Count 1, that is, this first degree murder, then you would move down to count two.
>
> If you find him guilty beyond a reasonable doubt of Count 1, you don't have to do anything -- let me try that again.
>
> If and only if you find him not guilty of the first degree murder in Count 1, and you have to make that finding unanimously, that after a unanimous finding, then you would sign the verdict that says we find the defendant to be not guilty of first degree murder.
>
> Now, that's unanimous decision on your part. Then you would go down and discuss and decide on whether or not he was guilty of the second degree murder, which is a lesser included offense of Count 1, and if you find him guilty beyond a reasonable doubt, that would have to be unanimous, then you would sign the verdict form.
>
> If you find him to be not guilty of the lesser included offense of murder second, and you would have to make that finding unanimously, then and only then you go down to the voluntary manslaughter consideration.

Id. 3334-35.

Prior [*309] to sending the jury out for deliberations, the trial judge explained the verdict forms:

> Now, the Court will provide you with the verdict forms as to each count charged and for the lesser offense to the Count 1.
>
> . . .
>
> Now, if you unanimously agree that the defendant is not guilty of murder in the first degree, you will have your foreman date and sign the not guilty verdict of the offense of murder in the first degree, and then you will go on to your determination of whether the defendant is guilty or not guilty of murder in the second degree.
>
> . . .

> Now, if you unanimously agree . . . that the defendant is not guilty of murder in the second degree, and then you will determine whether the defendant is guilty or not guilty of the lesser included offense of voluntary manslaughter.
>
> If you unanimously agree that the defendant is guilty or not guilty of the lesser and included offense of voluntary manslaughter, you will have your foreman date and sign such guilty or not guilty verdict.

RT-26: 3464-66.

Berryman's *Strickland* expert, Mr. Simrin has offered an opinion that Mr. Moench's argument was objectionable for suggesting that a defendant bore the burden of proof on determining innocence. He opines [*310] that Berryman's trial counsel were constitutionally ineffective for failing to object to and request a curative instruction regarding Mr. Moench's incorrect statement. He further concludes that the subsequent statement by Mr. Moench and the guilt phase instructions read by the trial judge were insufficient to overcome the suggestion to the jury that Berryman and not the prosecution bore the burden of proof.

Mr. Soria states in his declaration he did not know why an objection was not interposed to Mr. Moench's argument. He also states that the law on whether the jury was permitted to consider a lesser included offense before there was a verdict on the greater offense was unsettled at the time of Berryman's trial. The matter was not put to rest until the Supreme Court issued it's decision in *People v. Kurtzman, 46 Cal. 3d 322, 250 Cal. Rptr. 244, 758 P.2d 572 (1988)*, which was during Berryman's trial. [115] Mr. Soria states it is unlikely he kept abreast of new cases by reading advance sheets during the trial.

> 115 The *Kurtzman* case was decided August 18, 1988. The pre-summation instructions were read to the jury on October 17, 1988, the argument proceeded on October 17 and 18, 1988, and [*311] the concluding instructions were read on October 18, 1988.

B. Berryman's Contentions.

Berryman concedes that under *Stone v. Superior Court, 31 Cal. 3d 503, 519, 183 Cal. Rptr. 647, 646 P.2d 809 (1982)* and *Kurtzman, 46 Cal. 3d at 324-25*, a trial court may restrict jurors from returning a verdict on a lesser included offense before acquitting on a greater offense, but may not preclude the jury from considering lesser offenses during deliberations. This was the specific holding by the California Supreme Court reviewing his arguments on direct appeal. *See, 6 Cal. 4th at 1073*. He argues that this process is completely different, however, from requiring the jurors to find that Berryman was not guilty of first degree murder beyond a reasonable doubt before they could consider lesser included offenses. He contends that when Mr. Moench "clarified" the misstatement (after having been questioned at the side bar by the trial judge), the misstatement about the standard of proof remained uncorrected. He further claims Mr. Moench's summation essentially reversed the burden of proof and precluded the jurors from giving adequate consideration to the alternatives of second degree murder and voluntary [*312] manslaughter. Next, Berryman argues that the standard utilized by the California Supreme Court in denying relief on this claim, that is the requirement that the prosecutor committed bad faith for a finding of misconduct, *6 Cal. 4th at 1073*, has been overruled by *People v. Hill, 17 Cal. 4th 800, 823, n. 1, 72 Cal. Rptr. 2d 656, 952 P.2d 673 (1998)*.

In his traverse, Berryman additionally argues that changes made to the standard jury instructions after the *Kurtzman* decision reflect the erroneous nature of the instructions read at Berryman's trial. In the post-*Kurtzman* instructions on the order of deliberations, discretion has been conferred on the jurors "to choose the order in which [they] evaluate each crime and consider the evidence pertaining to it." This is in contrast to what Berryman refers to as the "acquittal first" instruction read to his jury.

He argues that the prejudice resulting from the misstatement of the order of deliberations was devastating to his proffered trial defense. Since Berryman's primary hope was to secure a conviction of voluntary manslaughter or second degree murder, the argument that the greater offense must be disproved beyond a reasonable doubt reinforced [*313] the argument that the offense committed was rape felony murder. Berrryman maintains that there is a reasonable probability that his jury would have found no rape, no premeditation, and no intent to kill, had it received proper instructions.

C. Analysis.

The California Supreme Court addressed the issue presented in Claim 37, under the theory of prosecutorial misconduct rather than ineffective assistance of counsel. The court first set out the rule from *Stone, 31 Cal. 3d at 519*, and *Kurtzman, 46 Cal. 3d at 324-25*, that a trial court may not preclude jurors from considering lesser offenses during deliberations, but may restrict them from returning a verdict on a lesser offense before acquitting on the greater offense. *6 Cal. 4th at 1073*. In the *Kurtzman* decision, the court "impliedly rejected a 'strict acquittal-first rule under which the jury must acquit of the greater offense before even considering lesser included offenses.'" *Id.* (quoting *Kurtzman, 46 Cal. 3d at 333*). Rather, California adheres to a "modified acquittal first rule." The state high court stated that even if Mr. Moench's remarks had amounted to a misstatement of the law, there was no reasonable likelihood the jury would [*314] have construed the complained of remarks to eliminate consideration of second degree murder or voluntary manslaughter during deliberations. The court also found Mr. Moench's misstatements were not intentional or made in bad faith, and therefore, independently not actionable. *Id.*

As relevant to the instructional error challenge in Claim 49, the California court rejected Berryman's contention that his jury was charged with the "strict acquittal-first rule" disapproved in *Kurtzman,* even taking into account that some of the language in the instructions suggested the jury was required to deliberate on the charges and allegations in a specified order. *Berryman, 6 Cal. 4th at 1076- 77*. The court further determined that a reasonable juror "would have understood the instructions and employed the instructions ... simply to govern how the jury was to return its verdicts and findings after it completed its deliberations on the charges and allegations." *Id.*

Berryman is correct that Mr. Moench's pre-side bar summation charged the jury to find beyond a reasonable doubt that Berryman "did not commit first degree murder" before deciding whether he was guilty of second degree murder. (Emphasis added.) He [*315] also told the jury that the lesser included offenses could not be *considered* until there was a unanimous decision acquitting Berryman of the greater offense. Both of these statements are misstatements of the law. The first is ambiguous as to whether Berryman, as opposed to the prosecution, must bear the risk of non-persuasion to prove the commission of first degree murder. The second constitutes a misstatement because under *Kurtzman,* and its progeny, jurors cannot be precluded from *considering* lesser included offenses before rendering a verdict on the greater offense, they can only be precluded from *deciding* on a verdict for a lesser offense before deciding on a verdict for a greater offense. Under

Hill, 17 Cal. 4th at 823, n. 1, Berryman is further correct that Mr. Moench's good or bad faith in misstating the law is now irrelevant under California law to establishing prosecutorial misconduct.

Berryman is not correct, however, when he states that the trial judge erroneously charged the jury on the order of deliberating on lesser included offenses. Consistent with California law, the jury was instructed under the modified acquittal-first rule. In fact, and as Berryman concedes, *Kurtzman* [*316] squarely holds that a trial court may require a jury to return a verdict on a greater offense before returning a verdict on a lesser offense, even though the instructions may not prohibit the jury from "considering or discussing" the lesser offenses before returning a verdict on the greater offenses. *46 Cal. 3d at 329*. Taking all the instructions together, even with the argument of Mr. Moench on summation, this is the charge the jury received.

Accordingly, Mr. Soria's failure to stay abreast on current California law, while neglectful of his responsibilities as a lawyer, was harmless. His concomitant failure to interpose an objection to Mr. Moench's misstatements of the law also was harmless. The trial court clearly rectified the error and correctly instructed the jury. The Court therefore finds unpersuasive Mr. Simrin's opinion that the post-side bar clarification summation given by Mr. Moench, after his error was pointed out to him, coupled with the trial court's instructions failed to correct the initial misstatements. Taken as a whole, the instructions in no way informed or even suggested to the jury that Berryman bore the risk of non-persuasion on his guilt or innocence. Under [*317] these circumstances, it is not necessary to address the Warden's *Teague*-bar contention that the unconstitutionality of a strict acquittal-first instruction is a new rule. This was not the charge.

Separately, Mr. Moench's misstatements were insignificant in light of the trial judge's side bar interruption, Mr. Moench's correction of his misstatements after the side bar, and correct post-summation instructions by the trial court. Accordingly the misstatements did not render the trial fundamentally unfair. *See Donnelly v. DeChristoforo, 416 U.S. 637, 647-48, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*. Nor can it be said they "so infected the trial process with unfairness as to make the resulting conviction a denial of due process." *See id. at 643*, *quoted by Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*; *Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996)*. *See also Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998)* (court consistently has refused to find a due process violation where improper prosecutorial remark is an isolated or one-time event). The trial judge's instructions were not erroneous, Mr. Moench's misstatements were overcome by the correct [*318] instructions, and trial counsel's failure to object to Mr. Moench's misstatement does not constitute ineffective counsel. Claims 37 and 49 are denied on the merits. The request for an evidentiary hearing as to Claim 37 is denied.

XVIII. Berryman's Challenges to Lesser Included Offense Jury Instructions (Claims 39, 40, 41, 44, 45, 46, 47, 48, and 51).

The remaining guilt phase instructional challenges relate to lesser included offenses. The first sub-category is comprised of Claims 39, 40, 41, and 51, which challenge the omission of proper implied malice instructions to support the lesser included offense of second degree murder. The second sub-category is presented in Claims 44 and 45 regarding the absence of instructions on the lesser included offense of involuntary manslaughter. The third sub-category, comprised of Claims 46, 47, and 48, involves the absence of instructions on the defense of accident. The gravamen of all these claims is the contention that Berryman's jury was faced with an all or nothing choice between capital murder and acquittal because the instructions on the lesser included offenses were incomplete, erroneous, inapplicable, or omitted. His overall challenge is [*319] based on *Beck v. Alabama, 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)*, which stands for the

proposition that "a death sentence may not be imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." Berryman contends the net result of the alleged defects is that the jury necessarily disregarded the inadequate and incomplete lesser included defenses on which they were instructed, and voted for capital murder. Berryman requests an evidentiary hearing with respect to Claims 40 and 46 in this group of claims.

A. Statement of the Facts Relevant to Lesser Included Offense Instructions.

Berryman's jurors were instructed on murder, its lesser included offenses, special circumstances, and rape both prior to the presentation of the prosecution and defense cases and prior to both parties' closing arguments. RT-17: 2216-27; RT-25: 3293-3317. In the first reading, the jury was told:

> In order to prove the commission of the crime of murder, each of the following elements must be proved, one, that a human being was killed; two, [*320] that the killing was unlawful; and three, that the killing was done with malice aforethought or occurred during the commission or attempt to commit a felony inherently dangerous to human life. Rape is a felony inherently dangerous to human life.

RT-16: 2216. The trial court then went on to define malice as either express or implied. Regarding implied malice, the court instructed:

> Malice is implied when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose, and with a wanton disregard for human life, or when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another, and whose acts -- and who acts with conscious disregard for life.

Id.: 2217. The court also explained that willful killing meant intentional killing. *Id.* Next, the court instructed about felony rape murder based on either a completed rape or attempted rape, and the rape murder special circumstances. *Id.:* 2219, 2220. After completing instructions of first degree murder and [*321] special circumstances, the court explained that second degree murder and voluntary manslaughter were lesser included offenses of first degree murder. *Id.:* 2223. The concept of express and implied malice for murder were not re-explained, but the jury was told that there is no malice element in voluntary manslaughter. *Id.*

Following the close of evidence, the prosecution and defense attorneys participated in a jury instruction conference. As Mr. Soria recites in his September 17, 2001 declaration in support of Claim 40, Mr. Peterson had the primary responsibility for drafting jury instructions in the guilt phase whereas Mr. Soria argued the guilt phase on summation. [116] Pursuant to that division of labor, Mr. Peterson advanced his list of requested instructions at the pre-summation conference. Just prior to the jury instruction conference, however, Mr. Peterson's wife was in a serious automobile accident with life-threatening injuries. Mr. Peterson did not appear in court from Thursday, October 6, 1988 until Monday October 17, 1988. When he did resume his participation, he requested instructions on second degree murder and voluntary manslaughter, but not involuntary manslaughter. RT-25: [*322] 3259-61. Over the objections of Mr. Moench, the trial court agreed to

give those lesser included offense instructions. *Id.* 3261-62. Mr. Peterson again confirmed during the jury instruction conference that an instruction on involuntary murder would not be requested. *Id.* at 3268. Nor was there a request to include instructions on the defense of accident.

> 116 Mr. Soria also delivered the opening statement and conducted the examination of witnesses during the guilt phase. Mr. Peterson was primarily responsible for argument and eliciting evidence during penalty proceedings.

As read, the pre-summation instructions mirrored the pre-trial instructions delivered earlier. Murder was defined as malice murder or felony murder. RT-25: 3303. Malice was then explained as express malice or implied malice, with both concepts defined. *Id.:* 3304. The definition of implied malice given before the presentation of evidence was repeated verbatim here. *Id.* First degree murder was then defined as premeditated malice murder or felony rape murder. *Id.:* 3305-06. This was followed by the rape murder special circumstance instruction. *Id.:* 3306-08. With respect to second degree murder, the court instructed that if [*323] the jury were to convict Berryman of murder, it was required to determine whether the murder was in the first or second degree. *Id.:* 3310. Also, if the jurors were convinced Berryman committed murder, but had a reasonable doubt whether the offense was in the first or second degree, they were to give Berryman the benefit of the doubt and return a verdict of second degree murder. *Id.* The trial court did not instruct on the theories of second degree murder other than just to inform the jurors that they had to choose between first and second degree. Nor were they instructed on involuntary manslaughter or the defense of accident.

With respect to the omission of instructions on accident and involuntary manslaughter, *Strickland* expert Mr. Simrin opines that trial counsel were ineffective for not requesting them because it is impossible to tell from the record whether the jury based its first degree murder verdict on premeditated murder or felony murder. Mr. Soria also avers in a supporting declaration puzzlement over the omission of involuntary manslaughter and accident instructions since he argued to the jury that Ms. Hildreth's death was accidental. [117] The accidental character of the death [*324] stems from the fact that the knife wound on Ms. Hildreth's neck was only 3/4 of an inch deep, was only fatal because she was so thin, and the fact that the knife was broken in three pieces. He argued that the breakage of the knife could not have occurred in the course of intentionally inflicting a 3/4 of an inch wound. It had to have been intentionally broken following "an explosion of emotions" after Ms. Hildreth had been accidentally stabbed.

> 117 In the course of this argument, Mr. Soria also conceded that if there had been a rape, the fact that the killing was accidental would make no difference.

B. Berryman's Contentions.

Three theories underlie the various claims of omission an error: (1) trial error, for the trial court's failure to read omitted instructions or correct erroneous instructions sua sponte; (2) ineffective assistance of trial counsel for failure to request them; and (3) ineffective assistance of appellate counsel for failure to raise the trial court's errors on appeal. Berryman claims the jury should have been instructed that second degree murder may be predicated on implied malice, where the killing resulted from an intentional act known to be dangerous and performed [*325] with knowledge of the danger in conscious disregard for human life. He maintains involuntary manslaughter should have been defined as the "commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and

circumspection." Finally, an instruction of the defense of accident should have informed the jurors that a person who commits an act through misfortune or accident, in the absence of evil design, intention, or culpable negligence, is not considered by the law to be capable of committing a crime.

Under Berryman's view of the facts in these habeas proceedings, Ms. Hildreth's death was "no more than a lover's tryst gone bad," citing to the fact that the murder weapon was a steak knife either Berryman or Ms. Hildreth could have brought to the crime scene, innocently. He points out that Ms. Hildreth went with him voluntarily to an isolated spot, generally viewed as a "lover's lane." After voluntary intercourse, he argues they became "engaged in a tussle, [118] ... that the knife was produced from some unknown location," and that Ms. Hildreth was stabbed as "an unintended part of the struggle." He re-emphasizes in his traverse [*326] that the trial court decided to give implied malice instructions because the jury could have found consensual sex, as argued by Berryman, and then that the killing occurred during an altercation. He also reiterates in his traverse that there was evidence the stabbing death of Ms. Hildreth was unintentional and accidental, and thus wholly consistent with the theory of implied malice second degree murder, involuntary manslaughter, and the defense of accident. He claims this case is controlled by *United States v. Lesina, 833 F.2d 156, 160 (9th Cir. 1987)* (reversing conviction of defendant who severely stabbed victim while both were drunk for trial court's failure to give an instruction on accidental death).

118 The altercation which supposedly followed the voluntary intercourse is said to have concerned whether Ms. Hildreth was going to tell Berryman's girlfriend and her cousin, Crystal Armendariz, about their encounter (or "relationship").

He argues that the trial court should have given all of these instructions sua sponte, since there was substantial evidence supporting them and they were not incompatible with the Berryman's presentation of the case. *See People v. Breverman, 19 Cal. 4th 142, 155-56, 77 Cal. Rptr. 2d 870, 960 P.2d 1094 (1998)*. [*327] As it was the partial instructions given on second degree murder served to eliminate a practical alternative to a first degree murder special circumstance murder verdict. Moreover, with respect to the implied malice instruction given, Berryman argues that no instruction connecting that concept to second degree murder was given to the jury, and that in any event, the instruction was defective because it created a mandatory presumption of malice if predicate facts were established. He claims this presumption placed the burden of disproving malice on him. In any event, he maintains, since the theory of premeditated murder was largely discounted during the trial proceedings in favor of felony rape murder, it was especially important to provide the jury with a meaningful choice of lesser included offenses.

With respect to his ineffective assistance of trial counsel claim, he alleges trial counsel's failure to request complete jury instructions was inexplicable and unreasonable. The prejudice claimed is that had the correct and complete instructions been given, Berryman would not have been convicted of capital murder. Foreshadowing Claim 52, [119] Berryman argues in his traverse that a plausible [*328] reason Mr. Peterson didn't request complete instructions is that he was preoccupied and distracted by the fact that his wife had been in a serious automobile collision.

119 The ensuing analysis here is dispositive as to Claim 52. *See* Part XXI. *infra.*

The assertion that appellate counsel was constitutionally ineffective stems from his failure to raise the trial error on direct appeal. He argues his case is analogous to the situation in *Turner v. Duncan, 158 F.3d 449, 459 (9th Cir. 1998)*, where the trial court omitted an entire page out of the CALJIC manual and appellate counsel failed to raise the omission on direct appeal.

C. Analysis.

The Warden raises a number of procedural defenses, including *Teague*-bar. Because all of the claims in this group are manifestly without merit, the Court does not address these procedural defenses. [120] In the first place, the concept of implied malice as the foundation for second degree murder was explained to the jury. As found by the California Supreme Court, the instruction given was perfectly acceptable:

> There is no reasonable likelihood that the jury misconstrued or misapplied the challenged instruction as a "mandatory presumption" of implied malice, [*329] less still as one that reduced the People's burden of persuasion in any way. Indeed, a reasonable juror would have understood and employed the instruction in accordance with what it purported to be, to wit, a *definition* of implied malice -- a definition, we may note that is adequate, [citations omitted.]

6 Cal. 4th at 1078. The finding that the implied malice instruction created no impermissible presumption of malice cannot be disturbed on federal habeas. *28 U.S.C. § 2254(d)(1)*. Notwithstanding the propriety of the implied malice instruction, the jury found Berryman guilty of a completed rape and returned a special verdict form finding that he intentionally killed Ms. Hildreth. This is tantamount to a finding of express malice. There can be no prejudice for failure to provide further or amplified instructions on implied malice when the jury determined the killing was intentional and malice was express. *See Brecht, 507 U.S. at 637*.

120 The Court notes that although the allegation of a league-bar is to be resolved before courts address the merits, *Bohlen, 510 U.S. at 389*, such a threshold inquiry here is pointless. As stated in connection with the analysis of Claims 1, 8, 9, 10, and 23, [*330] *see* Part VII.C., *supra,* it's not a matter of whether a new rule was announced after Berryman's conviction became final, or alternatively whether an old rule is being applied in a new way, there is simply no rule, period, because the allegations are totally unsupported by the record.

120

On the subject of involuntary manslaughter, the California Supreme Court held:

Defendant contends that the court erred by failing to instruct the jury sua sponte on involuntary manslaughter as a lesser included offense.

There was no error. A court is not obligated to instruct sua sponte on involuntary manslaughter as a lesser included offense unless there is substantial evidence from which a rational trier of fact could find beyond a reasonable doubt [citation] that the defendant killed his victim "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, *§ 192, subd. (b)*). Such evidence is lacking here. To be sure, one might speculate that defendant killed Hildreth as he perpetrated some unspecified misdemeanor or performed some unspecified act with criminal [*331] negligence. But speculation is not evidence, less still substantial evidence. [Citation.]

Id. at 1080-81. This finding is similarly resistant to collateral attack on federal habeas. *28 U.S.C. § 2254(d)(1)* and *(2)*.

The claim that lesser included offense omissions violated Berryman's due process rights under *Beck v. Alabama, 447 U.S. at 627* also is without merit because instructions on the lesser included offenses of second degree murder and voluntary manslaughter were given. In *Schad v. Arizona, 501 U.S. 624, 647, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)*, the high Court rejected the notion that a jury must be instructed on every lesser included offense and upheld a capital sentence in that case because the jury was not faced with the all-or-nothing choice between a capital murder conviction and acquittal. That principle applies here. In any event, there is no support for the notion that the jury chose rape felony murder because that was the only alternative to acquittal.

Finally, as the Warden argues, Berryman's assertion of the accident defense is meritless because applicable statute requires the absence of evil design, intention, or culpable negligence. In contrast, here, the record [*332] demonstrates that Berryman took Ms. Hildreth to a remote location where she was physically abused, sexually violated, and stabbed to death. There is no evidence suggesting the stabbing was accidental, [121] much less "substantial evidence." There is no evidence that Ms. Hildreth and Berryman fought over some threat on her part to expose their liaison to Berryman's girlfriend. Crystal Armendariz. The jury's rape finding defeats Berryman's theory in this regard. *Lesina, 833 F.2d 156* also is inapposite. In that case, the evidence was that the defendant grabbed a knife to remove it from the area where he and his girlfriend were fighting, and as he attempted to throw it back over his head, the victim, a mutual friend who had entered the fray to attempt to break up the fight, collided with the knife, sustaining a deep, penetrating wound. *Id. 157*. The defendant was convicted of second degree murder after the trial court refused an instruction of accident. *Id. at 160*. The Ninth Circuit reversed in light of the considerable evidence presented at trial that supported the accident theory. Here, in contrast, no evidence supports that Berryman accidently stabbed Ms. Hildreth during a fight over whether [*333] she would reveal her "relationship" with Berryman. Again, in his arguments, Berryman discounts the rape conviction and the more than sufficient evidence supporting that conviction.

121 It may be that Berryman did not intend for Ms. Hildreth to die, but there is nothing to suggest that he did not intend to press the knife blade to her neck.

Claims 39, 40, 41, 44, 45, 46, 47, 48, and 51 are denied on the merits. Berryman's request for an evidentiary hearing with respect to Claims 40 and 46 is denied.

XIX. Berryman's Challenges to the Rape Conviction and Rape Murder Special Circumstance Finding (Claims 12, 29, 35, 50, 71, and 71A).

In Claims 12, 29, 35, 50, 71, and 71A, Berryman advances a number of legal challenges to his rape conviction and the rape murder special circumstance finding. In Claim 12 he alleges he wasn't given adequate notice that the rape murder special circumstance could have been based on attempted rape in the alternative to actual, completed rape. In Claim 29 he alleges trial counsel were constitutionally ineffective for failure to retain an independent pathologist to testify about the lack of physical evidence of a completed rape. [122] In Claim 35 he alleges the evidence [*334] adduced at trial was legally insufficient to support the rape murder special circumstance. Claim 50 alleges that the trial court committed reversible error for not instructing the jury that intent to rape must precede the killing and that the victim must have been alive when the intercourse occurred. Claim 71 alleges that trial counsel were constitutionally ineffective for failure to develop and present evidence that Berryman and Ms. Hildreth had been alone together a few days before the homicide. Finally, in Claim 71 A he alleges prosecutorial misconduct for the suppression of witness statements that

placed the victim in Berryman's truck prior to the night she was killed. Berryman requests an evidentiary hearing with respect to Claims 12, 29, and 71A.

122 Claim 29 also addresses the issue of whether evidence supports the prosecution contention during penalty proceedings that Berryman stood on Ms. Hildreth's face for three to five minutes as she lay dying. *See* discussion of this portion of Claim 29 together with Claim 75 in Part XXIV., *infra.*

A. Statement of the Facts Relevant to the Rape Conviction and Rape Murder Special Circumstance Finding.

The relevant facts consist of a description [*335] of specified trial proceedings, trial testimony, and post-conviction declaration testimony.

1. Relevant Trial Proceedings and Testimony.

The information filed in the case alleged murder, the rape murder special circumstance, plus a weapon enhancement in the first count, and rape, plus a weapon enhancement in the second count. As relevant here, the rape murder special circumstance allegation in the information provides:

> [T]he murder of Florence Hildreth was committed by defendant RODNEY BERRYMAN while the defendant was engaged in the commission of the crime of rape or the immediate flight after committing the crime of rape, in violation of Penal Code Section 261(2), within the meaning of Penal Code *Section 190.2(a)(17)*.

RT-17: 2214-15.

The information was read to the jury in the course of pre-trial instructions prior to opening statements and the presentation of evidence. Among other things, the pre-trial instructions defined murder, its lesser included offenses, special circumstances, and rape. Notwithstanding the language of the information which covered only the actual commission of rape, the pre-trial instructions, read directly after the information, defined felony murder as the killing [*336] of a human being that "occurs as the result of the commission of *or the attempt to commit* the crime of rape" and the rape murder special circumstance as the commission of murder "while the defendant was engaged in the commission of *or attempted commission* of rape, or that the murder was committed during the immediate flight after the commission, *attempted commission,* of rape." *Id.:* at 2219, 2221. No comments or objections were interposed to these pre-trial instructions by defense counsel or the prosecutor.

Evidence at trial pertaining to sexual assault was presented by the testimony of pathologist Dr. Holloway and the results of laboratory tests. Dr. Holloway noted there was no evidence of trauma to Ms. Hildreth's vaginal vault. The criminalist, Gregory Laskowski, collected a vaginal swab from her body during the autopsy. Later forensic testing of the swab revealed a small amount of Ms. Hildreth's blood and a small amount of semen, verifiable by the presence of spermatozoa. As noted above, Berryman could not be identified as the person who deposited the semen.

Pre-summation instructions, read after the close of guilt phase evidence repeated the concept that first degree felony murder [*337] and the felony murder special circumstance were predicated on the alternative theories of completed or attempted rape. Discussion concerning attempted rape as the predicate for the rape murder special circumstance was generated by Berryman's motion for judgment of acquittal pursuant to Penal Code *§ 1118.1*. After the prosecution put on its case in chief

(and before the defense began its case), Mr. Peterson argued that both the rape murder special circumstance and the rape charge had to be resolved in Berryman's favor because rape cannot be committed against a victim who has expired. Alternatively, Mr. Peterson argued no rape occurred because there was no evidence of trauma to the victim's vaginal vault.

Finding that substantial evidence had been presented to support a jury finding of a completed rape, the trial judge first noted that the presence of the victim's blood on the vaginal swab specimen indicated she was alive during intercourse (although no expert testimony had been adduced to support this notion). Addressing the issue of penetration, the trial judge observed that despite the fact a pool of fluid believed to be semen had been deposited on Ms. Hildreth's abdomen and inner thighs, [*338] the occurrence of penetration was not precluded. The deposit could have meant no more than that Berryman withdrew from Ms. Hildreth's vagina before ejaculation. The judge then spoke to the matter of consent, noting that the victim's body position and the state of her clothing was "more consistent, and the jury could find, someone forcibly removing that clothing for the purpose of making her available for sexual intercourse." During the course of the argument on this motion, Mr. Moench conceded that the evidence he presented in the People's case in chief *might* be susceptible to an inference that the intercourse occurred after death, in which case the attempted rape theory should be used. Defense counsel did not object or ask for more time to prepare their defense case. Thus, when the jury was instructed on the guilt phase issues, the concept of attempted rape was presented both in the context of the felony rape murder definition and the rape murder special circumstance consistent with how it was presented before the parties put on their cases.

To punctuate the concept that rape requires a live victim, Berryman's trial counsel offered the following instruction:

> The prosecution must also [*339] prove beyond a reasonable doubt that an act of sexual intercourse was accomplished against the victim's will by means of force, violence, or fear of immediate and unlawful injury on the victim or another person, and that the rape was accomplished with a "person," not a dead body. Rape must be accomplished against a person's will. A dead body cannot consent to or protest a rape, nor can it be in fear of immediate and unlawful bodily injury. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. If you have a reasonable doubt that an act of sexual intercourse was accomplished against the victim's will as opposed to a dead body, you may not convict the defendant of first degree murder on the felony murder rule.

The trial court refused this and additional proffered instructions on the grounds that the other instructions adequately covered their content. The instruction read to Berryman's jury provides:

> In order to prove the commission of the crime of rape, each of the following elements must be proved, one, that two persons engaged in an act of sexual intercourse. Two, that the two persons were not married to each other. Three, that the [*340] act of intercourse was against the will of one of the persons. And four, that such act was accomplished by means of force, violence, or fear of immediate and unlawful bodily injury to such person.

After closing instructions were read, Mr. Soria continued to argue there was still a reasonable doubt about Berryman's identity as the perpetrator, and that because there was no injury to Ms. Hildreth's vagina vault, there was no rape. He refrained from arguing there was no rape because Ms. Hildreth's death preceded the penetration. [123]

123 As Berryman argues, this omission was logical since the jury was instructed that attempted rape could support the rape murder special circumstance.

2. Evidence Developed in Post-Conviction Proceedings.

The post-conviction evidence for these claims consists of five declarations. They are from trial counsel Mr. Soria, trial pathologist Dr. Holloway, retained expert pathologist Silvia O. Comparini, M.D., juror David Armendariz, and one of Berryman's federal habeas attorneys, Mr. Morris.

a. Declaration of Charles J. Soria, Executed August 20, 2001.

Mr. Soria reports that his defense strategy at the guilt phase proceedings was based on the belief that the prosecution [*341] intended to proceed on the theory of a completed rape to support the death eligibility rape murder special circumstance. He avers this belief was based conversations with the original prosecutor in the case, Lisa Green, who "indicated" the completed rape as opposed to attempted rape theory was the predicate for the rape murder special circumstance. Hence, the defense motion for judgment of acquittal was predicated on the theory that the prosecution could not prove the victim was alive during intercourse. Mr. Soria avers he was surprised when the prosecutor, Mr. Moench, changed the allegation to attempted rape after conclusion of the People's case. He states the defense was misled. Had attempted rape been alleged in the first instance, he insists, a different strategy would have been formulated. But, by the time the prosecutor changed theories, it was too late. Mr. Soria does not explain what different strategy he would have developed if attempted rape had been alleged in the information.

b. Declaration of John E. Holloway, M.D., Executed July 25, 2001.

Dr. Holloway states that at trial he was not asked about the significance of the trace of blood determined to be on the vaginal swab [*342] taken from Ms. Hildreth during the autopsy. Contrary to the statement of the trial judge, Dr. Holloway clarifies that the trace of blood does not establish Ms. Hildreth was alive at the time of intercourse: "In my opinion, the trace of blood in the vagina was not evidence that the victim was alive at the time of the intercourse. The trace of blood could have been present before the intercourse occurred." In other words, she could have been dead at the time of intercourse. He also states that the trace of blood should not be attributed to menstruation, but that many other causes, such as minor injuries, would account for the trace of blood. He repeats his trial testimony that the autopsy revealed no trauma to the vagina as the source of the blood. Finally, he states that the defense could have benefitted from the opinion of another pathologist at trial.

c. Declaration of Silvia O. Comparini, M.D., Executed October 10, 2001.

Dr. Comparini first observes that where a female does not give consent, an erect adult penis cannot enter through the narrow passage from the external genitalia to the vagina (introitus) without inflicting abrasions. From this, she concludes that Ms. Hildreth was not [*343] subjected to non-consensual intercourse because there was no trauma to the introitus or to the external genitalia. Dr. Comparini further notes that the fact there was no trauma to the vagina (or vaginal vault) is irrelevant, because vaginal tearing does not occur as the result of even forcible penetration by a

penis. With respect to blood observed on the vaginal swab, Dr. Comparini states that it is most likely the blood was deposited when the swab was introduced into the vagina without use of a speculum. The swab could have picked up blood present or oozing in the introitus. The presence of blood on the swab was "*not* evidence that Ms. Hildreth was alive at the time semen was deposited." (Emphasis in original.) The presence of sperm on the swab could have been residue from previous intercourse up to five days earlier. Finally, the "glossy material" or dried fluid deposited on Ms. Hildreth's left inner thigh was deposited above the dust on her body, and accordingly "had to [have] be[en] deposited by ejaculation outside of the genitalia." **d. Declaration of David Armendariz, Executed February 4, 2001.**

With respect to the rape challenges, Mr. Armendariz confirms that the combination of [*344] the rape with the weapon provided the special circumstances that justified the death penalty.

e. Declaration of Jesse Morris, Jr., Executed October 2, 2001.

As summarized in the discussion of Claims 15 and 16, Part XII.A.2., *supra,* Mr. Morris interviewed the proprietors of a refreshment stand at the Lake Woollomes recreational park, who remembered seeing Ms. Hildreth in Berryman's company at the park about a week or two before her death. Mr. Morris also interviewed Crystal Armendariz and her mother Brenda dark in February of 1996 and confirmed that both stated Ms. Hildreth had been in Berryman's pick up truck prior to the night of her death. Both witnesses also reported that they conveyed this information to a prosecution investigator. Mr. Morris states there was no mention of the fact that witnesses observed Ms. Hildreth in Berryman's truck prior to her death in any discovery materials handed over to Berryman's trial defense attorneys.

B. Berryman's Contentions.

Berryman's argument does not acknowledge that attempted rape instructions were read to the jurors at the beginning of the trial proceedings. [124] His argument assumes that the first time the attempted rape theory was raised was [*345] after all evidence was presented and that impetus for the introduction of this theory was the failed defense motion for acquittal pursuant to Penal Code *§ 1118.1*.

124 The Warden's argument also does not recite that the attempted rape theory was introduced at the beginning of the proceedings.

In his first challenge to the rape murder special circumstance, Berryman complains that he didn't have adequate notice required under the *Sixth Amendment* that his death eligibility could be predicated on attempted rape as opposed to an actual completed rape. He argues that because the trial court refused the defense instruction specifying that rape required a live victim, the issue of attempted rape nonetheless was presented to the jury. He argues he was prejudiced by the change in prosecution theory because defense counsel didn't have time to rebut a new and different allegation with evidence of consensual intercourse. The foundation for consensual intercourse now advanced is evidence that Ms. Hildreth had been seen in Berryman's truck and together with Berryman on previous occasions, and thus it would have been reasonable to surmise she went with him voluntarily on the night other death. These [*346] facts comprise both an ineffective assistance of counsel claim and a prosecutorial misconduct claim. Additional evidence relied upon to negate a completed rape consists of the post-conviction declarations of Dr. Holloway and Dr. Comparini to the effect that the trace of blood observed on the vaginal swabs taken during Ms. Hildreth's autopsy do not establish her vitality at the time of penetration. Berryman maintains that because the trial

judge interpreted the presence of a trace of blood as evidence of Ms. Hildreth's vitality at the time of penetration, it is reasonable the jury also improperly interpreted this evidence in the same manner.

Separately, he argues that because the trial court refused the proffered instruction that rape required a live victim, the jury could have convicted him of rape, even though Ms. Hildreth was already dead when Berryman conceived the notion of having sex with her body. He claims the trial court erred because the live victim principle was not covered by other instructions as the trial judge stated. On the same state of the evidence, he argues the evidence actually presented at trial was insufficient to support the rape murder special circumstance because [*347] Ms. Hildreth was dead at the time of intercourse.

C. Analysis.

In his first challenge to the rape murder special circumstance, Berryman complains that he didn't have adequate notice required under the *Sixth Amendment* that his death eligibility could be predicated on attempted rape as opposed to an actual completed rape. He argues that because the trial court refused the defense instruction specifying that rape required a live victim, the issue of attempted rape nonetheless was presented to the jury. He argues he was prejudiced by the change in prosecution theory because defense counsel didn't have time to rebut a new and different allegation with evidence of consensual intercourse. The foundation for consensual intercourse now advanced is evidence that Ms. Hildreth had been seen in Berryman's truck and together with Berryman on previous occasions, and thus it would have been reasonable to surmise she went with him voluntarily on the night other death. These facts comprise both an ineffective assistance of counsel claim and a prosecutorial misconduct claim. Additional evidence relied upon to negate a completed rape consists of the post-conviction declarations of Dr. Holloway and Dr. Comparini [*348] to the effect that the trace of blood observed on the vaginal swabs taken during Ms. Hildreth's autopsy do not establish her vitality at the time of penetration. Berryman maintains that because the trial judge interpreted the presence of a trace of blood as evidence of Ms. Hildreth's vitality at the time of penetration, it is reasonable the jury also improperly interpreted this evidence in the same manner.

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C. Analysis.

Acknowledging the importance of the rape conviction, as evidenced by Mr Armendariz's declaration, there is no merit to the contention that the completed rape finding was unsupported [*349] by the evidence because there was no penetration, or if there was penetration, the sexual intercourse was consensual or alternatively, occurred after Ms. Hildreth was dead. The California Supreme Court so held after reviewing the trial proceedings and making entirely reasonable findings. *6 Cal. 4th at 1084*. *See also Jackson, 443 U.S. at 319* (limiting review to whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Because these claims introduce additional evidence developed during post-conviction proceedings, however, the Court is compelled to factor in this evidence when evaluating the