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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 2

[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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endurance of the rape verdict. *See Wiggins, 539 U.S. at 534* (referencing the evaluation of penalty claims by considering trial and post-conviction evidence). Under this augmented evaluation, the rape conviction and finding of a completed rape readily withstand scrutiny. The presence of sperm cells inside Ms. Hildreth's vagina evidences penetration. For sperm cells to end up in Ms. Hildreth's vagina, there had to have been some penile vaginal contact, even if Berryman withdrew and volitionally ejaculated extra-vaginally. Regarding Dr. Comparini's [*350] opinion that the presence of sperm cells could have predated Ms. Hildreth's encounter with Berryman by up to five days, the Court rejects the suggestion Ms. Hildreth was sexually active with other partners. The suggestion amounts to pure speculation with no offered support. Next, the Court is unpersuaded by Dr. Comparini's conclusion that penetration must have been consensual by virtue of the absence of abrasion in the introitus. Consent also is not suggested by evidence that Ms. Hildreth previously had been in Berryman's truck or that they had been seen together at the Lake Woollomes recreation park. *See* discussion in Claims 15 and 16, Part XII.A.2., *supra*. Accordingly, failure of law enforcement or the prosecutor to have disclosed this information to trial counsel is not actionable under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, because it is not material to Berryman's innocence. Rather, clear evidence of a struggle between Ms. Hildreth and Berryman, including bruises on her body inflicted ante mortem and the appearance her clothing, supports both implicit findings that the sex was non-consensual and that she was alive at the time intercourse took place. [*351] Separately, the Court finds the discussion about the blood observed on the vaginal swab to be irrelevant to Ms. Hildreth's vitality at penetration. Although the trial judge mentioned this fact when denying Berryman's motion for acquittal under Penal Code § 1118.1, the theory was not presented to the jury, so there is, as the Warden argues, no reason to speculate that the jury followed similar reasoning. Dr. Comparini's explanation for how the blood most likely was introduced to Ms. Hildreth's vagina is equally irrelevant, as well as speculative. Dr. Comparini surmises that because the criminalist obtained the vaginal swab without a speculum, the process of introducing a swab into the vagina likely transferred blood present or oozing from the introitus. There is no evidence, however, as to whether the criminalist, Mr. Laskowski, did or did not use a speculum to obtain the swab sample, and there is no evidence that blood was present or oozing at the time of the autopsy. Contrary to Berryman's arguments, the evidence in the record, even coupled with the expert testimony offered in these federal proceedings, supports the jury finding that a completed rape was committed. The failure of [*352] defense counsel to retain an additional pathologist who could have testified as Dr. Comparini testified in her declaration would not have made a difference in the outcome.

In light of this determination, Berryman's strenuous and lengthy arguments that he did not receive adequate notice that the felony murder special circumstance was to be based on attempted rape as well as completed rape, has no merit. There is no *Sixth Amendment* violation when a defendant is not given notice that a conviction *might have been predicated* on an attempted crime in the alternative to a completed crime, when a completed crime was found by the jury and that finding is supported by the evidence. Berryman has offered no authority to the contrary. Berryman received notice of the predicate felony of which he was convicted, completed rape. Besides, Berryman did have notice of the attempted rape theory when the trial court read the pre-trial instructions to the jury. The Court further is persuaded by the Warden's argument that notice of attempted rape in the information was adequate on account of citation to § 190.2(a)(17), which clearly predicates the special circumstance on the commission or attempted commission [*353] of a target felony. *See People Cain, 10 Cal. 4th 1, 42, 40 Cal. Rptr. 2d 481, 892 P.2d 1224 (1995)*. This being a matter settled under California law, the Court is not at liberty to disturb it. *Estelle v. McGuire, 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*. The Court also specifically

rejects the notion that Berryman's defense team was surprised by the clarification that the special circumstance was to be predicated on completed or attempted rape. In the first place, as just recited, the theory of attempted rape was introduced in the pre-trial instructions. Second, even if defense counsel were not attending to the details of the instructions being read to the jurors, their § 1118.1 motion for acquittal was presented directly after the prosecution completed its case in chief, with the defense case still to be presented. Accordingly, there was ample opportunity to rebut the clarified allegations. No objection was interposed or request for continuance requested. Besides, even if counsel had proffered the evidence now before this Court on the issue of consent, the evidence would have been unavailing.

The same result must obtain respecting the trial court's refusal to read [*354] Berryman's live victim instruction. The actual rape instruction makes clear that the victim must have been alive when penetration occurred because a key element is that the violation occurs against the victim's will. Ms. Hildreth must have been alive for her will to have been overcome. Moreover, as the Warden argues, the plentiful signs of struggle refute the notion Ms. Hildreth was dead prior to intercourse, *see Doyle v. State*, 112 Nev. 879, 921 P. 2d 901, 915 (Nev. 1996), or that Berryman had in mind wanting to have sex with a corpse when he instigated his assault. *See People v. Kelly*, 1 Cal. 4th 495, 527, n. 8, 3 Cal. Rptr. 2d 677, 822 P.2d 385 (1992). The conclusion of the California Supreme Court on this subject is factually supported as well as a matter of state law. The denial of relief by the California Supreme Court must remain undisturbed under both 28 U.S.C. § 2254(d) and *McGuire*, 502 U.S. at 71-72.

The Court additionally agrees with the Warden's argument that Berryman's failure to disclose information to counsel about whether he was keeping company with Ms. Hildreth before her death must influence the assessment of whether trial counsel were ineffective. The "reasonableness [*355] of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691, quoted by *Langford v. Day*, 110 F.3d 1380, 1386-87 (9th Cir. 1997) (counsel is not ineffective for failing to discover facts known to the defendant which the defendant didn't tell him). Claims 12, 29, 35, 50, 71, and 71A are denied on the merits. Berryman's request for an evidentiary hearing as to Claims 12, 29, and 71A is denied.

XX. Miscellaneous Guilt Phase Challenge of Prosecutorial Misconduct (Claim 26).

Berryman alleges two instances of prosecutorial misconduct in Claim 26. First he complains that Mr. Moench improperly informed a panel of potential jurors during voir dire that he represented the State of California *and* the victim, Ms. Hildreth. Second, he improperly referred to the victim, Ms. Hildreth, by her nickname, "Mimi," throughout the proceedings. No evidentiary hearing is requested for this claim.

A. Statement of the Facts Relevant to Miscellaneous Prosecutorial Misconduct Challenges.

In addition to the summary of factual allegations stated above, the Warden points out that in the course of Mr. Moench's summation, he properly and correctly [*356] informed the jury that he represented the People of the State of California on at least three occasions. With respect to the manner in which he referred to the victim, the Warden notes that Mr. Moench did not use her first name exclusively. As often as not, when he referred to her, Mr. Moench used her nickname, Mimi, as her first name, coupled with Hildreth, her last name.

B. Berryman's Contentions.

Berryman contends Mr. Moench's conduct in referring to the victim by her nickname, Mimi, and introducing himself to a panel of potential jurors as representing the victim amounts to

prosecutorial vindictiveness, citing *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). He claims that to call the victim by her nickname implies a level of familiarity beyond the obligations of a public prosecutor. Similarly, to say that he represented the victim put him on a superior plain to defense counsel, implied he had information not shared with the jury, and was on a "crusade to vindicate the victim" rather than to determine the truth. Berryman equates such implications with discriminatory prosecution, citing *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

In [*357] his traverse he cites to a number of state court cases which stand for the proposition that prosecutors' arguments they represent crime victims are improper. He claims the prejudice arising from this misconduct his cumulative, going to Mr. Moench's superior knowledge as a basis for the death penalty.

C. Analysis.

As recited in connection with Claims 37 and 49, Part XVII.C., *supra*, the standard for evaluating prosecutorial misconduct during trial proceedings is whether Mr. Moench's statements and descriptions pertaining to Ms. Hildreth were so significant to have rendered the trial fundamentally unfair. *DeChristoforo*, 416 U.S. at 647-48. Examining the entire record, the Court confidently concludes they did not. *See id.* at 643, *quoted by Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991). The statement about representing Ms. Hildreth was made on one occasion to a group of potential jurors, only four of whom ultimately served on Berryman's jury. It was isolated, and as far as Berryman has argued and the Court can discern, stated only on that single occasion.

Use of the victim's nickname, "Mimi," also was not fundamentally unfair, or even unfair at all. "Mimi" was the name Ms. Hildreth was [*358] known has by her friends and family. This is the name to which she was referred by numerous witnesses. It would have been odd indeed if Mr. Moench had called her "Florence" or "Florence Hildreth" or "Ms. Hildreth" during trial proceedings when all the witnesses referred to her as "Mimi." Using Ms. Hildreth's nickname, alone, or in conjunction with her last name did not infect the trial process with unfairness as to make the resulting conviction a denial of due process. *See DeChristoforo*, 416 U.S. at 643; *Darden*, 477 U.S. at 181 (1986); *Thompson*, 74 F.3d at 1576. Claim 26 is denied on the merits.

XXI. Miscellaneous Guilt Phase Challenges of Ineffective Assistance of Trial Counsel (Claims 18, 19, and 52).

In Claims 18, 19, and 52, Berryman argues that his trial attorneys were variously disabled from adequately representing him: Mr. Soria for sleeping during substantial portions of the trial (Claim 18), Mr. Peterson for being deaf (Claim 19) and Mr. Peterson, again, for being distracted because of a serious automobile accident involving his wife (Claim 52). Because of these disabilities, Berryman argues, neither attorney, alone or as a team, was competent to represent him. He seeks an evidentiary [*359] hearing with respect to Claims 18 and 19.

A. Statement of the Facts Relevant to Berryman's Miscellaneous Claims of Ineffective Trial Counsel.

The primary evidence Berryman offers of Mr. Soria's somnolence comes from the declaration of Juror David Armendariz. Mr. Armendariz avers Mr. Soria "was asleep during portions of the trial" without specifying nature or duration of the proceedings during these periods of slumber. Mr. Armendariz continues that on "more than one occasion, Mr. Soria went to sleep with his head leaning on his arm" and was awakened when his head slipped off his arm. He further recounts that Mr. Soria's slumber was noticed by all the jurors.

With respect to Mr. Peterson's hearing impairment, Mr. Armendariz recounts simply that Messrs. Soria and Peterson "didn't appear to be in sync." Separately, Berryman refers to the incident just as Berryman's wife, Carol, commenced her penalty phase testimony. During a side bar conference Mr. Peterson informed the trial court that he could not hear well out of his left ear and also had a hard time hearing out of his right ear, and as a result could not understand many of the side bar whispers. RT-28: 3772. Then, during his examination [*360] of Carol Berryman, he reiterated, in front of the jury: "Mrs. Berryman, I have a problem. I don't hear out of the left ear and poorly out of the right so I'm going to ask you to speak up at least for me." *Id.*: 3774. A September 17, 2001 declaration of Mr. Soria confirms his awareness that Mr. Peterson was "somewhat hard of hearing in one ear," but that he "was not aware of any serious effect on the trial." Mr. Peterson's distraction due to his wife's automobile accident is evidenced by the omission of specific jury instructions, *CALJIC* 8.30 and 8.31, defining second degree murder through express and implied malice. Berryman also claims Mr. Peterson's distraction is evident by virtue his refusal of the lesser included offense instruction on involuntary manslaughter and failure to request an instruction on the defense of accident. With respect to all the lapses, *Strickland* expert Mr. Simrin opines that when a lawyer is "not there" due to being asleep or deaf, he cannot be giving competent representation. If neither lawyer was "there," the fact there were two of them would make no difference.

Berryman also complains there were numerous occasions where neither Mr. Peterson, nor Mr. Soria [*361] objected to improper evidence and prosecution argument. After a careful review of the record, the Court has logged a number of instances where objections were indeed made, but also where valid objections were completely omitted at guilt proceedings as well as penalty proceedings.

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125 Mr. Soria had primary responsibility for handling the guilt phase and Mr. Peterson for the penalty phase.

An early example of inattention to trial proceedings is described in the analysis of Claims 12, 29, 35, 50, 71, and 71A, *see* Part XIX., *supra*. Specifically, the record reflects that prior to the presentation of any argument or evidence at the guilt phase proceedings, pre-trial instructions explaining that the felony rape murder and the rape murder special circumstance could be predicated on a completed or an attempted rape. Mr. Soria claims in his declaration supporting this group of claims that he was surprised by the prosecutor's inclusion of attempted rape to support the felony murder and the rape murder special circumstance. *See* Part XIX.A.2.a., *supra*. Mr. Soria evidently was not attending when the trial court read the pre-trial instructions.

On the other hand, during the guilt phase, Mr. Soria [*362] closely followed the testimony of prosecution criminalist Greg Laskowski. When Mr. Laskowski began talking about the athletic shoes he received from the authorities for analysis, Mr. Soria objected because no foundation had been laid that the shoes belonged to Berryman. RT-19: 2619. Although Mr. Laskowski's testimony was quite technical, from tire track rolls, to hair comparisons, to shoe prints, to necklace chain link comparisons, Mr. Soria conducted a comprehensive cross examination, with no indication that he missed any of the testimony. RT-20: 2689- RT-21: 2866. His cross examination of all technical witnesses for the prosecution was equally comprehensive, including for pathologist John E. Holloway, M.D., technical investigator Jerry L. Roper, forensic serologist, Gary Clayton Harmor, and fingerprint technical Opal L. Chappell. His cross examination of the family members and friends also was detailed, focusing especially on timing issues (to advance Berryman's denial defense). During the motion for judgment of acquittal pursuant to Penal Code § 1118.1 and jury

instruction conference, Mr. Soria was animated and from the record, in full participation. Mr. Peterson also had a part [*363] to play during guilt proceedings as the attorney primarily responsible for requesting guilt phase instructions. Although Mr. Peterson's wife had been in an automobile accident, when the trial court reconvened after a reasonable period of time during which Mrs. Peterson was recuperating, he also was involved and participating in the jury instruction conference. As noted in discussion of Claims 39, 40, 41, 44, 45, 46, 47, 48, and 51, *see* Part XVII.A., *supra*, lesser included offense instructions were given on second degree murder and voluntary manslaughter, over Mr. Moench's objections.

Mr. Soria's guilt phase summation reflects his attention to the facts of the case and the defense strategy favored by his client (denial), as well as the need to interject some argument about Berryman's mental state and his degree of culpability. RT-25:3370- RT-26:3334. Mr. Soria carefully and accurately reviewed the testimony of the technical witnesses and lay witnesses to raise a reasonable doubt about Berryman's ability to have committed the crime. He argued that the state of Ms. Hildreth's injuries appeared to have followed from an unplanned altercation.

The performance of trial counsel during penalty [*364] phase proceedings also was a blend of appropriate participation and potential inattention.¹²⁶ With respect to the prosecution notice of aggravating evidence, both Mr. Soria and Mr. Peterson were active in objecting to evidence Mr. Moench proposed to introduce in aggravation of the sentence under Penal Code § 190.3. As a result, evidence of an attempted sexual assault and uncharged but non-violent acts were excluded. RT-27: 3500-3522.

126 The Court does not rule out that lack of active objection and interjection at every turn in the trial proceedings may just as well have been trial strategy to not call attention to evidence or arguments that were harmful to the defense case. Often trial attorneys will forego objections that can be made to avoid disrupting the proceedings and possibly incurring the annoyance of the jurors.

On the other hand, introduction of evidence about Berryman's prior felony conviction for three counts of transporting marijuana, is the subject of some of Berryman's current complaints. As noted in the statement of the facts of the penalty proceedings, *see* Part III.B., *infra*, his prior marijuana transportation conviction was made the subject of a stipulation so that, [*365] as Mr. Peterson put it, there wouldn't be a whole lot of detail about the circumstances of the crime. RT-27: 3497-98. In fact, during Mr. Moench's opening penalty phase argument, he introduced the fact that Berryman had been so convicted, *id.*: 3531. When this fact was re-emphasized during cross examination of several defense witnesses, however, Mr. Moench's questions overstepped the terms of the stipulation. First, during the cross examination of Berryman's younger brother, Bryan, Mr. Moench asked if Bryan had been involved in the marijuana transporting venture. *Id.*: 3621. During his cross examination of sister Ronnique Berryman, Mr. Moench suggested that Berryman had been arrested on *three separate occasions* for marijuana transportation. On this occasion, Mr. Peterson did object, clarifying there were not three separate cases, but a single transaction. *Id.*: 3658. The most damaging information came from Berryman's older brother, Ronald, Jr. Ronald Jr. described his past convictions, including the felony conviction for marijuana sales in which Berryman was involved. He testified the marijuana conviction involved a "sting" operation, in which Ronald, Jr. and Berryman thought they were [*366] selling marijuana to students attending the high school Berryman attended, but actually, they were selling to undercover narcotic agents. *Id.*: 3678. Mr. Moench also succeeded in getting Melinda Pena and Carol Berryman to discuss the marijuana-related conviction. RT-28: 3753, 3782.

With respect to Mr. Moench's treatment of mental health evidence, the inattentiveness of defense counsel appears ambiguous. One incident involves Mr. Peterson's interjection during the prosecution cross examination of Dr. Benson. After Mr. Moench asked for a copy of the notes Dr. Benson had been referring to during his testimony, and the trial judge stated there would be a break in the proceedings so appropriate copies could be made, Mr. Peterson spoke up, "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?" RT-28: 3900. Another incident involved the cross examination of Dr. Pierce, after Mr. Moench established that Berryman did not suffer from psychosis. RT-28: 3885-86. Mr. Moench then suggested that the next level of psychological dysfunction was neurosis, and that Berryman did not suffer [*367] from that either. Mr. Moench referred to an expert named Dr. Pollack at the Institute for Forensic Psychiatry and the University of Southern California as the individual who established levels of psychological problems. ¹²⁷ *Id.*: 3886. Despite an objection from Mr. Peterson and a statement by the court that ascending and descending levels of seriousness of psychological impairments would not be relevant, ¹²⁸ Mr. Moench persisted in referring to neurosis as the next level of descending seriousness of psychological problems. *Id.*: 3886. No further objection to this line of questioning is noted in the record. The next incident occurred during penalty summation, where Mr. Moench argued Dr. Pierce had testified Berryman had "an amoral personality." RT-29: 3981. This was a misstatement. Actually what Dr. Pierce said was that Berryman exhibited an "asocial" personality, referring specifically to Berryman's attack on motorist David Perez. RT-28: 3861. The incorrect reference drew no defense objection. Reviewing psychological test results obtained by Dr. Pierce, Mr. Moench further suggested that Berryman purposefully did not put the "blocks" together properly. There was no testimony about blocks. [*368] He argued that the experts stated if Berryman had a mental disorder, he wouldn't have been able to play basketball or baseball. RT-29: 3985. This was another misstatement which drew no objection. Finally, Mr. Moench misstated the testimony of Dr. Benson when he described the expert's testimony that Berryman could not rape and murder someone during a seizure. *Id.*: 3990. In fact, Dr. Benson's testimony was that Berryman could not commit rape, not that he could not commit murder, while he was having a seizure. ¹²⁹ (In other words, Dr. Benson said that Berryman *could* commit murder during a seizure.)

127 Mr. Moench also indicated to the jury that Dr. Pollack provided services in cases of Charles Manson and Sirhan Sirhan.

128 The objection did not mention the references to Manson or Sirhan.

129 On the other hand, Mr. Moench validly argued that Berryman's experts agreed he had a personality disorder, with Narcissistic features. The personality disorder was far from an extreme mental or emotional disturbance and the Narcissistic aspect merely demonstrated that Berryman was selfish.

Berryman also complains about Mr. Moench's characterization of Berryman as a "Casanova" during his summation and that [*369] his attorneys did nothing to ameliorate the impact of argument which he claims equated philandering with aggravating evidence. RT-29: 3995. This characterization actually followed the testimony of Ronald, Jr., where he stated during direct examination that Berryman had many girlfriends and was "like Casanova." RT-27: 3672. During Mr. Moench's cross examination of Karen Bonty, Berryman's maternal aunt, about Berryman's character, he pressed her as to whether she knew Berryman was married to one girl, living with another, and dating others. RT-27: 3563. The question drew no objection. Mr. Moench also confirmed with Berryman's younger brother, Bryan, that Berryman had many girlfriends. *Id.*: 3623.

Finally, he elicited testimony from Carol Berryman that she knew he was dating and having intercourse with several other women after they were separated in approximately June 1987. RT-28: 3801. Again, this testimony was given without objection.

With respect to the prosecution theory that Berryman stood on Ms. Hildreth's face for three to five minutes, while she bled to death, the defense response called Mr. Moench's characterization into question, but not by objection. As indicated in the recitation [*370] of facts in the guilt phase proceedings, *see* Part III.A., *supra*, Dr. Holloway testified that the bruise on Ms. Hildreth's face likely was caused by sustained pressure of Berryman's foot on her face as she lay dying and that her survival time from the stab wound was from three to five minutes. He did not testify that Berryman applied pressure from his shoe on her face for three to five minutes. On two occasions during his summation Mr. Moench reiterated his theory that Berryman stood on Ms. Hildreth's face for three to five minutes.¹³⁰ RT-29: 3980, 3982. Mr. Peterson's response was to sow doubt as to whether Berryman, in his inebriated condition, would have been able to stand on the victim's face for three minutes. *Id.*: 4018. During rebuttal argument, Mr. Moench stated that Dr. Holloway testified that the bruise on Ms. Hildreth's face actually was caused from someone standing on her face for from three to five minutes, again without objection from Mr. Peterson or Mr. Soria. *Id.*: 4027. On sur-rebuttal Mr. Peterson recounted the substance of Dr. Holloway's "testimony" exactly the opposite of what the pathologist actually stated on the stand. According to Mr. Peterson, Dr. Holloway said [*371] that the bruise on the victim's face could have been made by an impression of three to five minutes, but he did not testify that she would have died in this amount of time. Then in contradiction to that, he next said Dr. Holloway testified that a person who sustained a wound to the artery, as Ms. Hildreth sustained, could have lived a few minutes (which in fact is what Dr. Holloway did testify to, using the window of from three to five minutes). *Id.*: 4034.

130 On the first such occasion, Mr. Moench used his wrist watch to time for the jury a three minute interval.

Two miscellaneous prosecution theories also were advanced on cross examination: that Berryman struck motorist David Perez with a tire iron while others were holding Mr. Perez, and that Berryman attempted to force Ms. Hildreth to orally copulate him during the attack. Of 19 year old Tamara Pearson, Mr. Moench pressed if her favorable opinion of Berryman would change if she knew he hit a man with a tire iron while that man was being held by another or others.¹³¹ RT-28: 3669. Then he asked if her opinion would be altered if she,

knew that he took, enticed a 17 year old girl out into the country on some pretense . . . [a]nd she [*372] declined to have sex with him, and he struck her and stunned her and pulled her out of the car and threw her down on the ground and took her clothes off and stabbed her in the side of the neck and stood on her face for three to five minutes while she was bleeding to death.¹³²

Id.: 3770. The witness responded she did not think he would do that, but that it would not change her opinion; she would still see him as the person she knew in high school. *Id.* Of Yolande Rumford, Mr. Moench asked her if she knew people purchased drugs from him or that he was transporting drugs to the school he attended. *Id.*: 3813. Specifically with respect to her favorable view of his character, he asked if her opinion would be altered if she knew that he hit someone on the head with a tire iron while that person was being held.¹³³ She responded that she didn't think that one incident would have made her think he was a terrible person. *Id.*: 3816-17. Mr. Moench further

tested Ms. Rumford's opinion, asking her if it would have been affected by the fact that he tricked a 17 year old girl to go out into the countryside where no one could see him and stunned her because she refused to have sex with him and then [*373] forcibly dragged her out of his truck to have sex with her, after pulling off her clothes. Mr. Moench mentioned that Berryman also tried "to have her orally copulate him, give him a blow job." ¹³⁴ *Id.*: 3817. To this hypothetical, which was not based on evidence presented at the trial, Ms. Rumford responded, "Yes, but he wouldn't do anything like that." *Id.*: 3818. Defense counsel neither interposed an objection nor questioned the witness further.

131 There was no testimony that anyone was holding Mr. Perez when Berryman struck him.

132 The hypothetical question did not draw an objection.

133 See footnote 131, *supra*.

134 Other than a far-reaching inference that could be drawn from the fact that a pubic hair found on the victim's face was said by the prosecution criminalist, Mr. Laskowski, to have been consistent with another pubic hair taken from Berryman, there is no evidence of oral copulation completed or attempted, at all. Nor did Mr. Moench argue this point in either his guilt phase or penalty phase summation. Although, the Court notes that during the defense motion to dismiss during guilt phase proceedings, the trial judge suggested the fact that a pubic hair consistent with Berryman's [*374] was found on the victim's face indicated that Berryman could have penetrated the victim vaginally and then withdrawn prior to emission and engaged in "some movement" up her body towards her face.

There was one further misstatement by Mr. Moench the Court has noted. He argued that when Ms. Hildreth's body was found, Berryman tried to cause a diversion by getting a gun and going to Lorene Louis's house to shoot it up. RT-29: 3979. No testimony supports this argument and no objection was interposed.

In reviewing Mr. Peterson's penalty phase summation, his argument was cogent and geared toward the testimony. He emphasized Berryman's excessive drinking, noting that even though Berryman had developed a tolerance for alcohol (the hallmark of alcoholism), consuming excessive amounts of alcohol still impaired his judgment, removed inhibition and affected his coordination. RT-29: 4008. As foundation, Mr. Peterson reviewed with the jury the number of alcoholic beverages Berryman consumed throughout the day and evening of Ms. Hildreth's death. *Id.*: 4009. Similarly, Mr. Peterson's sur-rebuttal argument assiduously tracked Mr. Moench's rebuttal argument, point by point. By all indications, he heard [*375] the rebuttal argument. *Id.*: 4031-37.

B. Berryman's Contentions.

Berryman cites a number of cases in support of his request for an evidentiary hearing and his entitlement to relief. First, under *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984), he argues he is not required to demonstrate prejudice from Mr. Soria's somnolence where evidence supports the conclusion he was asleep during substantial portions of trial. Equating being asleep during substantial portions of the trial to a total deprivation of counsel, Berryman argues a structural defect occurred in his trial and no prejudice need be established, citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). In any event, he argues that there is little difference between saying prejudice is presumed and prejudice has been demonstrated in cases where an attorney's somnolence is pervasive and the attorney-client relationship during trial is "subject to repeated suspensions." *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996).

With respect to Mr. Peterson's alleged deafness, Berryman relies on *People v. Butterfield*, 37 Cal. App. 2d 140, 143, 99 P.2d 310 (1940) for the proposition that a lawyer [*376] who cannot

hear the murder proceedings he was supposed to be defending does not provide constitutionally adequate counsel. He analogizes an attorney's inattention due to deafness with an attorney's inattention due to being asleep. Mr. Peterson's alleged distraction over his wife's automobile accident is placed in the same category.

Berryman claims an evidentiary hearing is necessary to sort out the real issue, as to whether Mr. Soria was asleep during substantial portions of the trial, citing, *United States v. Petersen*, 777 F.2d 482, 484 (9th Cir. 1985). He claims entitlement to prove this contention because the Court denied investigation funding on September 9, 1999 which would have permitted further juror interviews. An evidentiary hearing as to Mr. Peterson's deafness is wholly predicated on the declarations of Messrs. Soria and Simrin.

C. Analysis.

Addressing the issue of Mr. Peterson's deafness and alleged distraction first, the Court find no evidence to support the claim he was essentially absent from the proceedings. While the record reflects Mr. Peterson's own admission that he was hard of hearing out of both ears, one more than the other, his participation in the trial proceedings [*377] does not support Berryman's claim that he was absent on account of deafness or distraction for a substantial portion of the trial. The case relied by Berryman for the proposition that a deaf attorney cannot provide constitutionally adequate counsel, *Butterfield*, 37 Cal. App. 2d 143, is inapposite. In *Butterfield*, the court's decision to vacate the petitioner's murder conviction was based on prosecutorial misconduct from the collusion among the sheriff, the prosecutor, and a jailhouse informant to induce the petitioner's confession. *Id.* at 144. A hearing disability which afflicted the petitioner's elderly attorney was only mentioned in passing, *see id.* at 143, and formed no basis for the conclusion. Putting aside the support or lack of support offered by *Butterfield*, the analogy to *Javor*, 724 F.2d 831, also fails. Unlike the situation in *Javor*, in the present case, there is every indication here that Mr. Peterson was "present and attentive in order to adequately test the credibility of witnesses on cross-examination." *See id.* at 834. Mr. Peterson also demonstrated familiarity with the testimony to formulate a closing argument consistent with the defense strategy. In light of this finding, [*378] the Warden's *Teague*-bar contention need not be addressed. Claim 19 is denied on the merits. The contention that Mr. Peterson was too distracted because of his wife's injury to give proper attention to appropriate guilt phase jury instructions also does not support the notion he was absent for a substantial portion of the trial. As discussed in connection with Berryman's lesser included offense instructional challenges, *see* Part XVIII.A., *supra*, Mr. Peterson was absent from trial proceedings from October 6, 1988 through October 17, 1988, apparently in connection with his wife's automobile accident, but no proceedings were conducted in his absence. After Mr. Soria informed the trial court of the circumstances of the accident, trial proceedings were suspended altogether until Mr. Peterson was able to return to his duties as Berryman's attorney. Accordingly, the issue of Mr. Peterson's distraction at most, was isolated, and thus "amenable to analysis under the *Strickland* prejudice test." *Tippins*, 77 F.3d at 686. With respect to each instance of attorney error attributable to Mr. Peterson, the *Strickland* analysis has been undertaken in the evaluation of Claims 40, 45, and 46. *See* Part XVIII., [*379] *supra*. Claim 52 is denied on the merits.

Mr. Soria's alleged somnolence poses more of an analytical problem. *Javor*, 724 F.2d 831, is controlling. "[W]hen an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.* at 833 (citing *Holloway v. Arkansas*, 435 U.S. 475, 489-91, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). The conclusion that prejudice is inherent follows from the court's conclusion that

"unconscious or sleeping counsel is equivalent to no counsel at all." *Id.* at 834. The harm to a defendant "lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." *Id.* (internal quotations and citations omitted).

Since the Ninth Circuit equates somnolence over a substantial portion of the trial with no counsel at all under *Holloway v. Arkansas*, 435 U.S. at 489, the Warden's *Teague*-bar argument must fail. The holding in *Holloway*, namely, "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical state in, at least, the prosecution [*380] of a capital offense, reversal is automatic," *id.*, was decided in 1978, long before Berryman's trial and finality of his conviction. Moreover, *Holloway* relies on *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). See also *Sullivan v. Louisiana*, 508 U.S. at 279. Berryman is not seeking the benefit of a new rule.

Based on the record and on Mr. Armendariz's declaration, this Court is called upon to determine whether Mr. Soria in fact slept during a substantial portion of the trial, and, if so, whether the presence of his co-counsel obviated the prejudicial impact. The Second Circuit opinion in *Tippins*, 77 F.3d 682, and the Fifth Circuit opinion in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), both adopting the presumed prejudice holding of *Javor*, 724 F.3d at 833, offer helpful analyses. *Tippins* involved a three defendant trial for illegal sale of narcotics. 77 F.3d at 683. After raising the issue of his attorney's competence in state court post-conviction proceedings, an evidentiary hearing was conducted at which testimony was given by the trial judge, the court reporter, the prosecutor, a juror, Tippins' co-defendants, his mother, and his girlfriend. [*381] *Id.* at 684. The trial judge testified that Tippins' attorney "slept every day of the trial." On one occasion, the trial judge halted the trial and spoke to all the attorneys outside the presence of the jury for the purpose of instructing the attorney for one of the co-defendants to wake Tippins' attorney up. The trial judge testified that this conference occurred during the testimony of one of the co-defendants. The court reporter testified that Tippins' attorney slept a "significant" portion during the testimony of five witnesses. *Id.* at 687. The court reporter also testified that the slumber was continuous and occurred "almost every day." The prosecutor recounted that the trial judge called all the attorneys outside the presence of the jury on at least two occasions during the trial to address the slumber of Tippins' attorney. The juror who testified stated that Tippins' attorney slept during the testimony of the confidential informant, and that he was asleep approximately 65% of the trial. One of the co-defendants also testified that Tippins' attorney was asleep during the testimony of a key prosecution witness, the supposed buyer of the narcotics. The other co-defendant testified [*382] that the attorney was always sleeping and was asleep practically the entire trial. Tippins' mother and girlfriend also recalled seeing the attorney sleep possibly three or four times during the testimony of a co-defendant. *Id.* at 688. In trying to sort out the facts, the Second Circuit focused on whether the portions of the trial through which Tippins' attorney slept were substantial enough to warrant a presumption of prejudice. Because the record evidence indisputably demonstrated that counsel was "unconscious for numerous extended periods of time during which the defendant's interests were at stake," there was an breakdown in the adversarial process and the fundamental fairness of the proceedings against Tippins was called into question. *Id.* at 685. The court further noted that when "counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable. The errors and lost opportunities may not be visible in the record, and the reviewing court applying the traditional *Strickland* analysis may be forced to engage in 'unguided speculation.'" *Id.* at 686 (quoting *Javor*, 724 F.2d at 834).

In *Burdine*, a single defendant capital case arising in Texas, the state habeas court [*383] conducted a hearing at which Burdine called eight witnesses, including three of his jurors and the

court clerk. These witnesses testified they had observed defense counsel sleeping during the prosecutor's examination of witnesses on numerous occasions and up to 10 minutes per incident. 262 F.3d at 339. The state court made factual findings that Burdine's attorney was repeatedly asleep "as witnesses adverse to Burdine were examined and other evidence against Burdine was introduced." *Id.* at 349. The federal courts accepted those state court findings as presumptively correct. This finding, in turn compelled the finding that Burdine's counsel could not function as constitutionally required because he was not able "to exercise judgment, calculation, and instinct." *Id.* (citing *Tippins*, 77 F.3d at 687).

On the present record in Berryman's case, the Court has the single declaration of David Armendariz recounting that Mr. Soria fell asleep on "more than one occasion" and that his slumber was noticed by all of the jurors. Also before the Court is Berryman's request for further evidentiary development from the other jurors and a prior denial issued by this Court in September 1999. However, as [*384] the Warden points out, Mr. Soria was not Berryman's only attorney, and it is true that under *Alford v. Rolfs*, 867 F.2d 1216, 1220 (9th Cir. 1989), a defendant cannot make out a claim for deprivation of counsel where two attorneys represented him, one of which is deemed to have been competent. Although Mr. Peterson admittedly was hard of hearing, the record refutes Berryman's contention that he was constructively absent from the trial. Nonetheless, the Court finds that reliance on *Alford*, does not obviate the need for further factual inquiry. In *Alford*, the two attorneys mentioned in the opinion represented Alford successively, not contemporaneously. Moreover, the second attorney was given an opportunity in state court to raise the exact argument Alford claimed was omitted by the first attorney which rendered his representation defective. *Id.* at 1220. No such analogy can be drawn in Berryman's case. In the absence of controlling authority on the issue, the Court is compelled to provide Berryman the opportunity to make a further offer of proof regarding Mr. Soria's conduct at trial.

Although the Court's review of the record appears to demonstrate that Mr. Soria did not sleep during "a [*385] substantial portion of the trial," the earlier denial of evidentiary development must be rectified before a final judgment is entered. Accordingly, Berryman will be permitted further evidentiary development of Claim 18, only, as specified in the Order, Part XXXVII., *infra*.

XXII. Berryman's Challenge to the Handling of the Berry man Family Member Outburst (Claims 73 and 74).

Berryman complains that a family member outburst following the verdicts at the guilt phase proceedings tainted the jury for further service during penalty proceedings because the jurors were not adequately examined to determine prejudice. In Claim 73, Berryman assails the trial court's failure to properly admonish the jurors, to properly examine the jurors, and to determine whether the family outburst prejudiced the jurors. In Claim 74, Berryman claims trial counsel were ineffective because they did not demand a proper examination and did not otherwise move for a mistrial. He does not request an evidentiary hearing regarding either of these claims.

A. Statement of the Facts Relevant to Family Outburst Claims.

Following the first day of penalty proceedings, members of Berryman's family directed loud remarks at jurors [*386] as the jurors were leaving the courtroom. Mr. Moench reported to the Court that one of the Berryman family members yelled to the jurors that they didn't know about "the girl's history." Mr. Moench also reported that he heard one family member complain while still in the courtroom that Berryman didn't receive a fair trial because that there weren't any blacks on the jury, and the jurors deliberated on the guilt issues less than an hour.¹³⁵ Mr. Peterson advised the

court that although he heard voices directed at the exiting jurors, he didn't recognize any voices. Then two jurors, Mary Donovan Radman and Billie Joe Honaker, returned to the courtroom to discuss what had been said or yelled to them. Ms. Radman informed the court that she was concerned because people (referring to Berryman's family members) were yelling at them (the jurors) as they left the courtroom. Without inquiring about what was said to the jurors, the trial judge told these two jurors that they should not give consideration to any comments made outside of the courtroom when deciding the case. He told them that any comments made by Berryman's family members should be ignored. Neither Ms. Radman, nor Mr. Honaker felt [*387] threatened by the comments made. The trial judge, however, assured the jurors that their entrance and exit from the courtroom on succeeding days would be without confrontation or incident. RT-27:3681-88. After the two jurors left the courtroom, the judge spoke to the members of Berryman's family who had been in the hallway and were summoned back into the courtroom, including Berryman's brothers, mother, sister, his cousin, his maternal aunt, and both grandmothers. The trial judge told the family members that the female juror felt "somewhat threatened," and that she and another juror "were concerned about it." *Id.*: 3689. He admonished the family that the jurors spent what he was sure was a very hard time deciding the guilt phase issues, in spite of the swiftness in returning their verdict and would not be appreciative of being told they didn't do their job or that they weren't fair. The judge advised the family members that the entire jury would be advised the next morning to ignore comments made outside of the courtroom, but that if any family member spoke or attempted to speak to any of the jurors, that person would be cited for contempt of court and punished accordingly. *Id.*: 3690-93. [*388]

135 Assuming the jurors took an hour for lunch beginning at 12:30 p.m., when the trial proceedings recessed, the jurors took approximately two and one-half hours until they reached a verdict on Count 1 at 3:50 p.m., and Count 2, at 4:12 p.m. *See* Part III.A., *supra*.

The next morning, the trial judge admonished all of the jurors that the issues before them must be determined solely from the evidence presented in court, and not from anything that might have occurred outside the courtroom. He instructed them that they had to disregard anything they may have heard in the corridor and not to attribute comments made by Berryman's family members to any participant in the case. When the trial judge asked if any of the jurors would have difficulty ignoring what comments and questions directed toward them the previously day, none of the jurors responded. RT-28: 3696-3700. Other than Ms. Radman and Mr. Honaker no member of the panel was asked if he or she felt threatened as a result of the family member outburst.

B. Berryman's Contentions.

Berryman maintains that when the trial judge informed family members that at a female juror felt somewhat threatened, the court made an implicit finding that she, [*389] in fact, felt threatened. This is notwithstanding the fact that the female juror in question, Ms. Radman, denied that she felt threatened when the trial judge questioned her. Berryman posits that the trial judge detected something in her demeanor that contradicted her words. Berryman also contends that other jurors may have felt threatened as well, but because the trial judge failed to conduct individual examination, or failed to ask that specific question, their sense of security was not elicited, and may not now be ruled out. He further argues individual examination should have been conducted to determine prejudice.

In his points and authorities, he argues that close examination of individual jurors is required when there has been a *prima facie* showing of intimidation. He refers to *Smith v. Phillips*, 455 U.S.

209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1981), as supporting the examination of jurors when misconduct is suggested by observable facts, and claims the holding in *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995), entitles him to habeas relief due to the trial court's failure to conduct such an examination. He challenges the representation of his trial counsel on the grounds that they [*390] did absolutely nothing to determine whether the jurors were prejudiced against him.

Referring to the Court's September 9, 1999 ruling denying investigation funding to interview jurors, Berryman asks for reconsideration, disagreeing with the Court's assessment that admonition given by the trial court was sufficient to dispel any presumption of prejudice.

C. Analysis.

There is no authority for the proposition that further examination of Berryman's jurors was constitutionally mandated on account of the family outburst. The fundamental and applicable principle here is that due process "means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Phillips*, 455 U.S. at 217. That principle was played out here.

When the problem of family members inappropriately speaking to exiting jurors arose, the trial judge immediately dealt with the issue informing counsel that he would admonish the jury the following morning that statements made by family members should be disregarded. The judge also gave the two jurors who remained behind an audience, [*391] to explore with them the full extent of their concerns. He then addressed offending family members, explaining to them the detriment their remarks potentially could cause.

Despite the fact the trial judge told the family members that a female juror felt "somewhat threatened" by their conduct, the Court does not agree with Berryman's assessment that the judge actually made a finding Ms. Radman felt threatened. Rather, in the context of the entire proceedings, it is clear that the trial judge accepted Ms. Radman's statement that she did not feel threatened, but gave family members a contrary account to impress upon them the detrimental potential they could have on jurors by inappropriate communication. It also is clear from the record that remarks directed toward the exiting jurors were not threatening. The comments recounted in the record pertain to the feelings family members had about the proceedings, not statements about what they intended to do to jurors. If there were any additional comments, that may have been actual threats, Berryman could have developed that evidence by interviewing the family members who made them or were present when they were made, including Berryman's mother, [*392] sister, younger brother, and cousin. There is no basis now, and there was no basis in September 1999, to grant investigative funds to interview jurors, when the information sought to be obtained would have been available from Berryman's family. Further, based on the character of the remarks family members made, as recounted in the record, the Court finds that the admonishment given by the trial judge to the jurors was entirely adequate to ensure juror impartiality. In any event, the relevant question is not whether the jurors felt threatened, but whether they could disregard the family outburst and render their decision impartially, solely on the evidence presented. *See Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Having made the determination that Berryman's jurors could continue to sit as an impartial body, the trial court's finding is entitled to deference that cannot be disturbed on federal habeas. 28 U.S.C. § 2254(d)(2). The trial court did not err in failing to conduct further examination and trial counsel were not ineffective for not asking that the trial court to do so.

Although the allegation of a *Teague*-bar is to be resolved before courts [*393] address the merits, *Bohlen*, 510 U.S. at 389, such a threshold inquiry here is pointless. See discussion of Claims 7, 8, 9, 10, and 23, Part VII.C., *supra*. Claims 73 and 74 are denied on the merits. Berryman's request for reconsideration of the funding request with respect to Claim 73 is denied.

XXIII. Berryman's Challenge to the Lack of Notice on Penalty Aggravating Evidence (Claims 13 and 14).

Claims 13 and 14 allege that evidence in aggravation of Berryman's sentence was introduced during penalty proceedings without notice as required by Penal Code § 190.3. He claims a straight due process violation for the lack of notice in Claim 13 and ineffective assistance of counsel from his trial attorneys' failure to object to introduction of unauthorized evidence in Claim 14. He seeks an evidentiary hearing with respect to both claims.

A. Statement of the Facts Relevant to the Lack of Notice on Penalty Aggravating Evidence.

During trial proceedings, Mr. Moench advised Berryman's trial counsel of evidence on which he intended to rely in aggravation of the sentence: circumstances of the crime (§ 190.3(a)), separate assaults on motorist David Perez and Berryman's father-in-law (§ 190.3(b)),¹³⁶ [*394] and two prior convictions, one for three counts of marijuana transportation and the other for grand theft (§ 190.3(c)). The parties agreed that evidence of the two prior convictions would be introduced by way of stipulation, whereby only the fact of the convictions would be before the jury and the circumstances of the underlying crimes would not be described. Berryman complains that the prosecution wrongfully introduced testimony of his brother, Ronald, Jr. that he (Berryman) sold narcotics to school children and testimony of various witnesses that he (Berryman) had numerous sexual liaisons outside of his marriage. Relevant to the commentary on the sale of drugs is the discussion between the trial judge and the parties about what aggravating evidence would be introduced. As for evidence of Berryman's extra-marital affairs, trial testimony of lay witnesses about his treatment of women and mental health experts about his need for nurturing is relevant. With respect to both categories, *Strickland* expert Mr. Simrin offers opinions about the manner in which trial counsel should have conducted themselves.¹³⁷

¹³⁶ As noted in the summary of the penalty phase proceedings, Part III.B, *supra*, [*395] Mr. Moench also advised the defense he intended to introduce evidence of Berryman's assault on a fellow inmate at the County Jail. This evidence was never introduced.

¹³⁷ A proffered declaration on the issue of the marijuana conviction from Mr. Soria is submitted, but not credited by the Court. The declaration text states that Mr. Soria objected to evidence elicited by Mr. Moench that Berryman sold narcotics to school children and that in retrospect, he (Mr. Soria) should have objected more. However, the declaration is not executed, but includes a handwritten sentence that states: "I don't remember any of this but if true I agree with the declaration." Moreover, the notion that Mr. Soria objected to any penalty phase evidence conflicts with the trial record.

1. Selling Narcotics to School Children.

The trial court entertained in limine motions prior to penalty proceedings. With respect to Berryman's prior felony conviction for the transportation of marijuana, the court accepted the parties' joint stipulation that there would be no "extensive recitation" of the acts that led to the conviction, unless, as Mr. Moench phrased it, the defense attempted to downplay the seriousness of the conviction. [*396] RT-27: 3497-3499. The trial judge agreed that delving into the

circumstances of the marijuana transportation conviction would only be appropriate under the circumstances outlined by Mr. Moench. *Id.*: 3500. During his opening statement, Mr. Moench in fact told the jurors that Berryman had suffered two convictions, one for three counts of marijuana transportation and one for a single count of grand theft. ¹³⁸ *Id.*: 3528. Mr. Peterson also mentioned the convictions in his opening statement, giving the jurors the actual code sections. *Id.*: 3531.

138 The introduction of the grand theft conviction has not generated a constitutional challenge to Berryman's conviction or sentence.

When Ronald, Jr. testified on direct examination, he admitted to Mr. Peterson that he had been convicted of prior felonies, including one pertaining to marijuana sales in which Berryman also was involved. *Id.*: 3674. On cross examination, Mr. Moench explored the prior felonies. Mr. Moench asked Ronald, Jr. about the felony in which Berryman was involved:

MR. MOENCH: And the one that your brother was involved in, what one was that?

RONALD, JR.: That was narcotic -- I think that might be when I was first arrested in the city [*397] of West Covina, when they had the biggest raid there, and we got caught up in a mix, Catch 22, and got busted.

MR. MOENCH: Sales of marijuana, from an investigation coming from --

RONALD, JR.: The West Covina High School.

MR. MOENCH: West Covina High School?

RONALD, JR.: Uh-huh, it was undercover in the West Covina High School.

MR. MOENCH: Yeah, they thought you were selling to kids; is that correct?

RONALD, JR.: Well, not I, myself, but my brother, my brother was in high school at the time, so he was able to do that, because he was a high school kid himself.

MR. MOENCH: You were supplying the stuff and he was actually doing the transaction, the transporting?

RONALD, JR.: Do I have to answer that? That's not -- I'm not in here for that.

THE COURT: Just answer the question.

RONALD, JR.: No.

Id.: 3678-79. Mr. Moench did not mention the marijuana conviction, or the circumstances underlying the conviction again during the proceeding. Mr. Simrin opines that even if objectionable material was volunteered, defense counsel should have moved to strike the offending testimony.

2. Extra-Marital Relations.

Quite a bit of evidence was introduced about Berryman's upbringing and his emotional needs which led [*398] Mr. Moench to emphasize Berryman's sexual infidelity. Friends and relatives of Berryman were asked about his character and the manner in which he treated women. The responses were unanimous and plentiful that Berryman was kind and attentive to women, and that he had many girlfriends. Berryman points to three of these witnesses, his aunt Karen Bonty, his

younger brother Bryan Berryman, and his wife, Carol, as instances where Mr. Moench's cross examination was prejudicially inappropriate.

Karen Bonty testified on cross examination that prior to the crime she did not know Berryman was married to one, living with another, and dating others. RT-27.: 3563. Younger brother Bryan Berryman testified about living arrangements of Berryman after he moved out of his mother's house at age 16. Bryan testified that during the ensuing few years, Berryman lived in various places, including with his grandmother, in Bryan's room, and with various girlfriends. He stated that Berryman had many girlfriends and that he (Bryan) was pretty sure he met them all. *Id.*: 3623. No quantity was assigned to the number of girlfriends. On cross examination, Carol Berryman testified she knew Berryman was living with another [*399] woman in Delano, and having intercourse with several other women. RT-28: 3801.

As set out in connection with Claims 18, 19, and 52, Part XXI.A., *supra*, Ronald, Jr., stated during direct examination that Berryman had many girlfriends and was "like Casanova." RT-27: 3672. Mr. Moench did not ask Ronald, Jr. any further questions about this characterization on cross examination. Mr. Simrin offers that Mr. Peterson should have moved to strike this answer.

The defense experts, Drs. Pierce and Benson, provided a psychological explanation for Berryman's attraction to women. First, Dr. Pierce testified that Berryman's lack of maternal nurturing from childhood through puberty left his dependency needs unfulfilled. Since his mother couldn't provide the nurturing he needed, he had a way of finding people who would take him in. RT-28: 3858. Berryman's attraction and intimate relationships with numerous females was driven by his "need for nurturance" he missed in his early childhood. It wasn't so much his attraction to sexuality that impelled him, as his need to be around someone who would treat him nicely. *Id.*: 3870. Part of his behavior was to try fill the gap in his interpersonal relationships, [*400] particularly with women, *Id.*: 3871. Similarly, Dr. Benson observed that Berryman's lifestyle was characterized by a kind of dependency, particularly on women, in wanting to be taken care of. He tended to get very close and obtain nurturing by being charming and somewhat immature. In Dr. Benson's opinion, Berryman seemed to need more than the average person would need. *Id.*: 3905-06.¹³⁹

139 The declarations of Berryman's mother, Lestine Bonty corroborated the expert testimony as she described the paucity of maternal nurturing she offered her children, particularly Berryman.

On penalty summation, Mr. Moench reviewed Berryman's attitude toward women and his multiple sexual liaisons. He reviewed that after the crime, Berryman returned to the Clark residence and awakened his girlfriend Crystal so he could get something to eat. Mr. Moench argued Berryman couldn't do it for himself, that's what he had women for, to take care of him and comply with his sexual needs. RT-29: 3979. Mr. Moench posited that Berryman became angry with Ms. Hildreth for refusing to give him the sexual affection he wanted. *Id.*: 3990-91. Finally, he referred to the testimony of Ronald, Jr.:

The defendant's brother is the [*401] one who calls him a Casanova. I assume he's not talking about Giacomina Casanova's ability to write music or anything like that, [b]ut his philandering, and his name has become synonymous with philandering. And I would suggest to you that this is [a] factor in aggravation and even more so than it would in mitigation.

Id.: 3995. Mr. Simrin opines this argument should have been tested by defense objection and that the failure to do so was constitutionally incompetent.

B. Berryman's Contentions.

Berryman claims he (his attorneys) were affirmatively misled by the lack of notice of aggravating factors. He characterizes the stipulation regarding the marijuana transportation conviction as an explicit ruling by the trial court that evidence of the circumstances of that conviction were "excluded." Finally, recognizing that the United States Supreme Court decision in *Gray v. Netherland*, 518 U.S. 152, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996), is adverse to his claim as to the existence of a due process violation, Berryman endeavors to distinguish the facts of *Gray* from the facts of his own case. Specifically, Berryman points out that the Virginia statute governing notice of aggravating factors in [*402] penalty proceedings at issue in *Gray* did not have a statutory notice requirement, whereas, the California statute, Penal Code § 190.3 does have a notice requirement.

C. Analysis.

The language of Penal Code § 190.3 provides in pertinent part: "[N]o evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time prior to trial, as determined by the court." Berryman's claim is that Mr. Moench's exuberant impeachment of Ronald, Jr. regarding the marijuana offense, his excessive testing of lay character witnesses about Berryman's infidelity, and his argument that Berryman's philandering was more aggravating than mitigating all required notice under § 190.3, and the fact that notice wasn't given constitutes a due process violation entitling him to habeas relief on his death sentence. There being no such rule, the Court declines to address the Warden's *Teague*-bar argument. See discussion of Claims 7, 8, 9, 10, and 23, Part VII.C, *supra*.

Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), recites the relevant due process concerns at penalty proceedings. First, sentencing, [*403] especially capital sentencing, is a critical stage of a criminal proceedings, at which a defendant is entitled to effective assistance of counsel. *Id.* at 358. Second, although a capital defendant may have no right to object to a particular result of the sentencing process, s/he does have "a legitimate interest in the character of the procedure which leads to the imposition of sentence." *Id.* Third, as part of a defendant's entitlement to effective assistance of counsel, full disclosure of information upon which a sentencing decision may be based is essential if counsel is going to have "an opportunity to comment on facts which may influence" that decision. *Id.* at 360. In conclusion, the Court held "the petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

In *Gray*, 518 U.S. 152, 116 S. Ct. 2074, 135 L. Ed. 2d 457, the Court did not find the due process violation present in *Gardner*. In that case, as here, the petitioner claimed his due process rights were violated because he was not given adequate notice of the evidence to be used against him during penalty [*404] proceedings. *Id.* at 155. At the beginning of Gray's trial, the prosecutor represented he intended to introduce statements made by Gray to his co-perpetrator and fellow inmates concerning his involvement in a separate but theretofore unsolved double homicide in a nearby community. *Id.* at 156-57. On the day before penalty proceedings commenced, however, the prosecutor stated he also intended to call police authorities who had investigated the other, double homicide to show similarities between that crime and the one for which Gray had just been

convicted. *Id. at 157*. Over Gray's objections, the evidence proffered by the prosecutor was introduced and the jury returned a death sentence verdict. *Id. at 157-58*. Even prior to the police officer's testimony, however, Gray knew the prosecutor intended to offer evidence concerning his involvement in the separate double homicide through the testimony of his co-perpetrator and fellow inmates. The sole basis for his contention that all evidence concerning the separate homicide should be excluded was that the prosecutor intended to call investigating police officers *in addition* to the previously identified co-perpetrator and fellow inmates. *Id.* [*405] This was not enough for a due process violation.

Similarly, here, there also is no due process violation. With respect to evidence elicited from Ronald, Jr. that Berryman had been involved in an operation selling marijuana to high school students, the prosecutor never argued this fact was an aggravating factor. Further, as the California Supreme Court found, it simply came out voluntarily during the cross examination of Ronald, Jr., *see 6 Cal. 4th at 1094*, and was not mentioned again in the proceedings. Thus this evidence cannot be characterized as evidence in aggravation within the meaning of Penal Code § 190.3. Berryman was given notice of the evidence in aggravation Mr. Moench intended to and did introduce, that is evidence regarding the circumstances of the crime under § 190.3(a), evidence of two prior violent acts which did not result in a conviction under § 190.3(b) (that is the altercation with his father-in-law and the confrontation with motorist David Perez), and his two prior convictions under § 190.3(c) (that is the three-count marijuana conviction and the grand theft conviction).

With respect to the marijuana conviction, any constitutional violation was harmless, as previously [*406] noted in connection with Claims 7, 8, 9, 10, and 23, Part VII.C, *supra*. *See Brecht, 507 U.S. at 637*. Claims 56, 62, 88, 89, and 90 also address evidence of the marijuana convictions. *See* Part XXX., *infra*. While selling marijuana may point to the fact that Berryman was opportunistic, the sale of marijuana is not a heinous crime causing the victims great pain. Any prejudice is ameliorated by the fact that the marijuana sales activities were not mentioned again in the proceedings, and further, as explained in Part XXX., *infra*, because the trial court instructed the jury to consider Berryman's prior convictions for grand theft and marijuana *transportation* (not sales). The Court reiterates it is convinced that Mr. Moench's elicitation of details regarding the marijuana offense had no impact on the jury's death verdict.

Assertive cross examination of lay witnesses about Berryman's good character and kindness toward women also does not constitute evidence subject to the § 190.3 notice requirement. As sanctioned by the Supreme Court in *Dawson v. Delaware, 503 U.S. 159, 167, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)*, Mr. Moench was simply rigorously testing the lay opinions of family and friends [*407] about Berryman's character. Similarly, Mr. Moench's summation in which he recounted the description of Berryman as a "Casanova" by his brother, Ronald, Jr. amounted to fair rebuttal to the character evidence of the lay witnesses and more substantially, to the expert testimony of Drs. Pierce and Benson about Berryman's need for female affection. The net result of this evidence and argument was to show two sides of Berryman -- one that he was emotionally needy, but still a nice guy, and two, that he was manipulative, selfish, and unwilling to put his own desires (or sexual urges) aside when he did not have a willing partner. This was appropriate material for the jurors to consider in deliberating Berryman's penalty. The Court agrees, however, that Mr. Moench resorted to improper argument when he stated Berryman's philandering should be viewed by the jurors as aggravating. Nonetheless, Berryman's sexual infidelity was no secret. It was presented by the defense through expert and lay testimony. The fact that Berryman attempted to maintain and participate in multiple sexual relations in a single evening before killing Ms. Hildreth is also a circumstance of the crime. He spent the day with [*408] Ms. Armendariz and went

apartment hunting with her for the purpose of cohabiting with her and her infant twins. Telling Ms. Armendariz he was going to visit his grandmother, he proceeded to ask Donna Faye Warner for a date. When she declined, he asked Melinda Pena for a date, and was successful. When his date with Ms. Pena ended, he picked up Ms. Hildreth, but the attempt to engage in another romantic, sexual union had tragic consequences. What was aggravating was that in the process of trying to fulfill his goal of multiple female relationships or philandering, he killed Ms. Hildreth. In light of the circumstances of the crime, including evidence of violence committed against Ms. Hildreth, the Court finds it implausible that the jury would have considered Berryman's philandering as a factor in aggravation of his sentence separate from the circumstances of the crime. The improper argument was harmless.

Claims 13 and 14 are denied. Further evidentiary development also is denied.

XXIV. Berryman's Challenge to Evidence and Argument that He Stood on the Victim's Face for Three to Five Minutes (Claims 29 and 75).

Claims 29 and 75 reiterate the challenge to the prosecution argument that Berryman [*409] stood on Ms. Hildreth's face for three to five minutes as she lay bleeding to death. In a previous section of this Memorandum Order, the Court addressed that portion of Claim 29 alleging that defense counsel should have retained a pathologist to testify at trial about the rape charges. *See* Part XIX., *supra*. This portion of Claim 29 alleges an independent pathologist should have been engaged to testify there was no evidence Berryman stood on Ms. Hildreth's face for three to five minutes and trial counsel were constitutionally incompetent for not retaining one. Claim 75, Berryman alleges prosecutorial misconduct for Mr. Moench's cross examination of defense witnesses and penalty summation about standing on the victim's face for three to five minutes.. An evidentiary hearing is requested to demonstrate that the evidence of Berryman standing on Ms. Hildreth's face was particularly compelling to the jury.

A. Statement of the Facts Relevant to Berryman's Challenge to Evidence and Argument He Stood on the Victim's Face for Three to Five Minutes.

The record evidence supporting these claims has been fully recounted in connection with related claims, notably those dealing with Mr. Moench's status [*410] as an elected judge, and the inattention of defense counsel to the proceedings. *See* discussion of facts relevant to Claims 7, 8, 9, 10, and 23, Part VIIA., *supra*, and to Claims 18, 19, and 52, Part XXI.A., *supra*. This includes Mr. Moench's cross examination of defense witnesses where he challenged them to still maintain their favorable opinion of Berryman even though he stood on the victim's face for three to five minutes. In addition, the actual guilt phase testimony of the trial pathologist, Dr. Holloway is reviewed in Part III.A., *supra*. The only additional evidence offered with respect to this portion of Claim 29 and Claim 75 is the declaration of David Armendariz. Specifically, Mr. Armendariz states:

To me, my feeling for the death sentence was affected most by the fact that Rodney stepped on the victim's face -- the severity and callousness of it. And they had the tennis shoe to prove it. I was particularly impressed when Deputy DA Moench placed a stopwatch down and described how the victim must have struggled on the ground as the seconds went by. Moench described how the victim would have had the foot on her face to stop her squirming. Her jugular was cut and blood was shooting [*411] out on to his [Berryman's] shoes. Then the alarm went off. I was impressed by how slowly the time passed and how long she must have suffered in suffocating.

B. Berryman's Contentions.

Berryman argues his attorneys should have hired their own pathology expert to controvert the notion suggested by Dr. Holloway that he (Berryman) stood on Ms. Hildreth's face for three to five minutes. He also argues Mr. Moench committed prosecutorial misconduct for misstating and misconstruing the evidence given by Dr. Holloway. Berryman vigorously complains that Mr. Moench's use of his watch to time three minutes during his summation was so prejudicial so as to warrant relief. *Darden*, 477 U.S. at 181.

C. Analysis.

The prejudicial impact of Mr. Moench's argument about standing on Ms. Hildreth's face is evaluated in connection with Berryman's complaint that Mr. Moench was an elected judge at the time he tried Berryman's case. *See* Part VII.C., *supra*. To reiterate, the erroneous argument about the length of time Berryman stood on the Ms. Hildreth's face constitutes one of the least prejudicial misdeeds Mr. Moench committed in the course of the trial. The evidence adduced at trial was that a patterned bruise [*412] on Ms. Hildreth's face bore similarities to the tread design on 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. He also testified that Ms. Hildreth's survival time from her neck wound was from three to five minutes. Thus, even if Berryman had not stood on Ms. Hildreth's face the entire three to five minutes Dr. Holloway stated was her maximum survival time, the fact remains that Berryman did apply sustained pressure of his foot for some significant amount of time in order to generate the patterned 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 insignificant. The error did not infect the trial process with unfairness as to make the resulting conviction a denial of due process. *See DeChristoforo*, 416 U.S. at 643; *Darden*, 477 U.S. at 181 (1986); *Thompson*, 74 F.3d at 1576.

Mr. Armendariz's declaration is not necessary to establish the prejudicial impact of the fact that Berryman stepped on [*413] Ms. Hildreth's face and in so doing, applied sustained pressure. Moreover, since Mr. Armendariz's declaration recounts how the trial evidence influenced his thoughts and emotions during deliberations, it is inadmissible under *Federal Rule of Evidence 606(b)*.

The remaining portion of Claim 29 as well as Claim 75 are denied on the merits. The request for an evidentiary hearing also is denied.

XXV. Berryman's Challenge to Constitutionally Inadequate Investigation Efforts and Resulting Failure to Develop Mitigating Evidence at Penalty Proceedings (Claims 6, 63, 64, 65, 69, and 70).

This group of claims challenges effective assistance of counsel due to the failure to retain a competent investigator and/ or to supervise the investigators that were retained, Bruce Binns and staff. Berryman requests an evidentiary hearing with respect to Claims 63, 65, and 69.

A. Statement of the Facts Relevant to Investigator Inadequacies.

The facts document lack of qualification of Mr. Binns and his staff and demonstrate what evidence counsel could have developed had they retained competent investigators (or properly supervised Mr. Binns and his staff). The sources for evidence relevant to these claims is varied,

[*414] including declarations appended to Berryman's First and Second State Habeas Petitions, as well as declarations offered with his motion for an evidentiary hearing.¹⁴⁰

140 As noted above, Berryman's first state habeas petition was filed September 3, 1993. His Second State Habeas Petition was filed on March 20, 1998. The declarations of friends and relatives appended to Berryman's motion for evidentiary hearing were executed between February and July 2001.

1. Qualifications of the Investigative Staff.

Anthony Gane, Berryman's investigator in these federal proceedings has been working with Berryman's federal counsel since late 1995. Mr. Gane looked into the trial defense investigation firm of Bruce Binns. This investigation reveals that Mr. Binns handled only certain aspects of Berryman's case and delegated other portions to unlicensed, untrained, unskilled, and unsupervised employees, Douglas Lemmons and Ed Beadle. The delegated tasks included arranging for laboratory tests of empirical evidence, gathering other documentary evidence, interviewing witnesses, and arranging Berryman's transportation for tests requested by the experts.

Mr. Gane interviewed people who were called as defense witnesses [*415] at Berryman's trial. He confirmed that defense counsel, Mr. Peterson, consistently made a point of not speaking to penalty phase defense witnesses before calling them, with the result that he (Mr. Peterson) didn't know whether testimony he elicited would be helpful, harmful, or he was overlooking helpful information. Similarly, Mr. Gane confirmed that the defense investigator Mr. Binns delegated to his unlicensed, untrained, unskilled, and unsupervised employees the task of identifying defense witnesses. None of the defense witnesses (largely family members) were meaningfully interviewed prior to their trial testimony.

Federal co-counsel Mr. Morris interviewed Mr. Lemmons. Mr. Morris learned that after working on Berryman's case, Lemmons, a Vietnam veteran, was admitted to the Menlo Park Veteran's Hospital for three months and then a mental hospital in Bakersfield. At some point in his life, he was granted a 100 percent mental disability rating for post-traumatic stress syndrome, but he was also said to have worked as a private security guard for ten years.

2. Efforts Undertaken to Have Berryman Tested for Neurological Problems.

Mr. Soria executed a declaration October 29, 1991 which [*416] Berryman's appellate counsel, Mr. Paul Posner, submitted with the first state habeas petition. In this declaration Mr. Soria discusses efforts undertaken to have Berryman undergo neurological tests requested by Drs. Pierce and Benson. The County Hospital advised the defense team that an alcohol induced EEG required special expertise which the County Hospital did not have. Mr. Soria explains that "for some reason the test could not be performed at the other hospital in Kern County," and that other than these two hospitals, no other hospitals could perform the tests. Although Dr. Benson informed Mr. Soria that the testing could be performed at a hospital in Oakland, Mr. Soria did not ask for funding to have Berryman transferred because he "believed at the time the [trial] court would not issue such an order." *Strickland* expert Mr. Simrin opines it was incompetent for trial counsel not to have requested to conduct the tests recommended by the experts. Mr. Soria notes that in a subsequent capital case he did request that testing be performed outside the county, and the request was granted by the same trial judge who presided over Berryman's case.¹⁴¹

141 That case was *People v. John Lee* [*417] *Holt*, Kern County Superior Court Case No. 39910, which also is pending before this Court on federal habeas corpus under the name *Holt v. Ayers*.

3. Mitigation Evidence Not Uncovered.

The record before the Court contains a wide variety of evidence that has been developed post-conviction, beginning with Berryman's first state habeas petition through declarations appended to his motion for evidentiary hearing. Except for a description of various of Berryman's school, juvenile, early criminal, and medical records, summarized immediately below, Part XXV.A.3.a., *infra*, all of the evidence consists of declarations from lay witnesses and various attorneys who have represented Berryman over the years.

a. Pertinent Records Not Uncovered.

Appended to the first state habeas petition are a number of documents from various sources. In the first category are several Los Angeles Superior Court Minute Orders regarding the two convictions Berryman suffered prior to the present offense (for transportation of marijuana and grand theft). The next category is comprised of two sets of school records, the first nearly illegible, but which show Berryman's progress in school from third grade through high school. [*418] At the high school level, Berryman was earning F's and D's with unsatisfactory effort. The second set of school records are also from the high school level, but the grades vary from B's and C's to D's and F's. Berryman attended at least three public junior high schools and seven public high schools, plus school at the Sacramento Boys Ranch. As his school attendance at the Sacramento Boys Ranch indicates, there are quite a large number of documents concerning Berryman's association with the juvenile system in Sacramento in the state record.

Berryman was first introduced into the juvenile system in August 1980, when he was 14 1/2 years old on an arson charge. At that time, he was living with his father in Sacramento. Thereafter, there were several additional charges, including Berryman being a runaway, escalating to shoplifting, burglary, a sexually charged assault on a teenage girl, possession of a machete, and fighting at school. Although Berryman's father participated in family reunification sessions, due to his work schedule he was not able (or willing) to devote sufficient time to Berryman's supervision. Berryman's mother, who lived in Los Angeles County, with a new family, told [*419] juvenile probation officers she could not handle Berryman either. Group home officials and probation officers during Berryman's adolescence described him as being aggressive, manipulative, and untrustworthy. He also reportedly was sexually active at the age of 15 and claimed when he was 17 that his girlfriend (unnamed) was pregnant.¹⁴² Berryman's last placement while under the jurisdiction of the Sacramento Juvenile Court was at the Sacramento Boys Ranch, where he was said to have made an "outstanding" adjustment to the requirements of the program. He was released from the wardship petition in June 1983, when he was 17 1/2. He was going to go to his paternal great grandmother's house in Delano, but ended up staying with his mother in Los Angeles County, where he attended West Covina High School until his arrest for the marijuana transportation charge in the spring of 1984, mentioned above.

142 Nothing further observed in the record confirms, refutes, or explains this statement.

The last category of documents pertains to injuries Berryman sustained beginning with he was 16. All of these records, except the Worker's Compensation Appeals Board and related documents regarding his work injury, [*420] are from Queen of the Valley Hospital in the Los Angeles

County community of West Covina. First, in August 1982, Berryman sustained a laceration to his scalp from being hit with a baseball. The x-ray taken was negative for a skull fracture. A few years later, when he was 18, in July 1984, he fell off a motorcycle and sustained a laceration to his chin as well as abrasions to his chest and hand. In December 1984, just before he turned 19, he fell from a forklift while working as an insulation cutter. The fall caused an injury to his low back, for which he ultimately received a worker's compensation settlement of \$ 3,200. Between the date of the injury and the settlement, Berryman spent some time in jail (presumably for the marijuana transportation and theft charges). In April 1985, when he was 19, and again in January 1986, just after his 20th birthday, he sustained lacerations from (unexplained) glass cuts. In November 1986, after Berryman was married and his son had been born, he went to the emergency room for a frontal headache.¹⁴³ There are no follow up records regarding headaches or seizures. Other than the disposition on the emergency department form for Tylenol, no other treatment [*421] is mentioned. Later that same year, in December 1986, just before Berryman's 21st birthday, he was seen in the emergency room for hemorrhoids. Finally in August 1987, after his separation from his wife, he was seen in the same West Covina Hospital for a penile discharge. Attending medical personnel noted a strong odor of alcohol from Berryman's breath at the time.

143 This emergency room visit coincides with the incident reported to the social historian by Berryman's mother that Carol Berryman hit him over the eyebrow with a metal flashlight. See Part XII.A.3.d., *supra*.

b. Declarations Of Berryman's Mother, Lestine Bonty.

The declarations of Berryman's mother, Ms. Bonty, provided with the first state habeas petition gives a detailed chronology establishing the transient nature of life for her children as youngsters. Because Ms. Bonty never spoke to Berryman's trial counsel prior to her testimony, she was not prepared to describe this life of transience when she was before the jury. She also describes that Mr. Peterson appeared equally unprepared, often surprised by her answers (as when she answered negatively to whether Berryman was affectionate with her). Although she states that she [*422] loves all other children, she seldom showed overt affection, particularly with respect to Berryman. In fact, Berryman was a lonely, unhappy child. By way of example, Berryman was a bed wetter until age 11 or 12, but Ms. Bonty's response was not nurturing. Another example was Ms. Bonty's response to Berryman's poor performance in elementary school and placement in special education; at the time Ms. Bonty responded that she thought he could do better.

Regarding the transient nature of the childhood, Ms. Bonty describes that Berryman was the second child born when she was just 17 years old and barely a year after the first son was born.¹⁴⁴ Berryman was premature and unloved by Ms. Bonty when he was a baby because she did not want to have another child at that time. After the father, Mr. Berryman (Ronald, Sr.), was discharged from the service, he and Ms. Bonty lived with her family in Delano, then moved to Los Angeles, then separated, and then reunited in San Jose when their third son was born.¹⁴⁵ The parents finally divorced in 1974 (having married on January 27, 1965, just about a month after their first son, Ronald, Jr. was born).

144 Berryman was born December 29, 1965. His older brother, [*423] Ronald, was born in December 1964.

145 Between Berryman's and the younger brother's birth, a sister was born.

Ms. Bonty reports that Mr. Berryman (Ronald, Sr.) drank, experimented with drugs, and gambled heavily. According to Ms. Bonty, he also "preferred to live on welfare." She did not share his values. She states he was not a good role model for Berryman because he also was "a woman chaser who thought he was the idol of women." He was tall and handsome, but could not keep a job and had dreams he could never accomplish. She recounts that Berryman was addicted to sex and women, and except that Berryman did not gamble, he was very much like his father. Berryman also was influenced by his older brother, who abused alcohol and drugs for pleasure. Both of her older sons developed the opinion that education wasn't worth the effort, seeing her work so hard, going to school and barely making ends meet.

There also was violence. During the last three and a half years of the marriage of Berryman's parents, there was a great deal of conflict. The parents would fight and Mr. Berryman (Ronald, Sr.) hit and beat Ms. Bonty. The last time he beat her, right before she filed for divorce, she ran from [*424] the house into the street to escape the abuse and was nearly struck by a car. Later, after the divorce, in the early 1980's, when Berryman received news of his father's death, Ms. Bonty observed that he was devastated, but she was not asked anything about this during Mr. Peterson's examination.

Before and after the divorce, when Ms. Bonty attended school and worked, she left the children with her parents and as many of their children who were at home (some younger than the Berryman children). Some time in 1987, prior to Berryman's arrest, Ms. Bonty learned that one other brother, Kanda Bonty, had molested her daughter, Ronnique. At the time of the molestation, Kanda Bonty was about 15; Ronnique was about five or six years old. When Ms. Bonty visited Berryman in the County Jail, after his arrest, he told her that two of his uncles (Ms. Bonty's brothers) had molested him as well, when he was eight years old. One of them was Kanda Bonty the same uncle who molested Ronnique. The other was Lester Bonty. At the time of Berryman said he molested, Kanda Bonty was age 15 while Lester Bonty was 18 or 19. Ms. Bonty never conveyed this information to Berryman's trial lawyers, "assuming" that Berryman [*425] would have told them or that they would have obtained the information from the taped telephone conversation during the jailhouse visit.

The declaration of Ms. Bonty attached to the second state habeas petition adopts a long portion of the second state petition and includes many conclusionary statements about Berryman's mental state, facts of the crime leading to Ms. Hildreth's death, the quality of trial counsel's representation, Berryman's interaction with other relatives, and Berryman's medical problems. The Court does not credit the allegations pertaining to matters clearly outside of Ms. Bonty's personal knowledge.

Ms. Bonty reports that Berryman was neglected as a child, both physically and emotionally. When his father died, Berryman became extremely depressed. But his problems really began at birth, which was premature by two months. Berryman weighed only 4 1/2 pounds. The pregnancy which produced him was unplanned and unwanted. The lives of his parents was somewhat transient. When Mr. Berryman (Ronald, Sr.) was discharged from the Air Force, the family moved from Delano to Los Angeles to San Jose so he could find work. But, he wasn't able to keep a job, and this led to escalating [*426] problems between his parents. In Delano, where the whole family lived for a time, and Berryman lived with his paternal grandmother, apart from his parents and siblings, there was pervasive racial tension and segregation.

After his parents separated and Berryman lived with Ms. Bonty. While she was working and attending school, Berryman and his siblings were babysat by her siblings and Berryman as well as

his sister Ronnique were molested. Berryman became withdrawn. He also resented Ms. Bonty's boyfriends and did not feel welcome. At the age of 12, he started running away from home. He seemed to enjoy the freedom of being on his own, except when it came to finding a place to sleep. Ms. Bonty reports that when Berryman was first married, he had a job, a family, and went door-to-door to proselytize, but that a work injury caused him pain and his working ability was interrupted by headaches.¹⁴⁶ When Berryman received his award for the injury, he purchased his pick up truck and returned to Delano to live with his grandmother. Berryman became paranoid after his arrest, believing people were spying on him and listening to his conversations. He believed his own attorneys were working with the [*427] prosecution. The submissiveness of his attorneys toward the attorneys contributed to Berryman's impression of a conspiracy.

146 According to the medical records, however, the work injury occurred in December 1984, long before Berryman was married (May 1986) or his son was born (August 1986), and involved an injury to his low back, not his head. Berryman's mother told the social historian that the headaches were caused by Carol Berryman hitting Berryman in the forehead with a metal flashlight. The discrepancy is not explained.

Ms. Bonty's third declaration, submitted with Berryman's evidentiary hearing motion, is substantially corrected in handwriting. She reiterates the difficulties she experienced during her first two pregnancies, with Berryman and his older brother, Ronald Jr., because of her youth, her unmarried status, and her family's unhappiness about her first pregnancy (when she was only 15 years old). Ms. Bonty suffered severe postpartum depression after the birth of Ronald Jr. This depression was amplified when she learned she was pregnant a second time (with Berryman) when Ronald Jr. was only around six months old. At 16 or 17, Ms. Bonty was not looking forward to caring for [*428] another infant, which she found overwhelmingly difficult. Once born (and prematurely), Ms. Bonty did not bond with Berryman as an infant for a number of reasons. Before he was born, she did not want another baby (not that she didn't want *him*), soon after he was born, she became pregnant again, and suffered a miscarriage, and shortly thereafter, she became pregnant again and gave birth to a premature daughter at five months. The child only lived a short time and Ms. Bonty spiraled into an even more severe depression. A fifth pregnancy produced Berryman's younger sister, Ronnique, born when Berryman was two and a half. During the last "several months" of that pregnancy, Ms. Bonty was bedridden and stayed with her husband's mother in Sacramento. During those months Ronald Jr. and Berryman stayed with other relatives. While Berryman was a baby, he was often ill and taken to relatives in California to be nursed back to health. During this time, Ms. Bonty was often angry because her husband was unfaithful to her. When she was about nine months pregnant with her last Berryman baby, Bryan, her husband was living with another woman.

During the four-year period after her husband left the service, [*429] the family moved around frequently in California. Sometimes it was because the couple was separated, and sometimes it was because they couldn't pay rent. She thinks her husband may have lost money gambling.

Once the couple was separated for good, Ms. Bonty focused on her own life, obtaining an education and a better job. This did not leave her much time for her children. Also, she became involved with a man (Jon January), married another, left him after six months, and returned to the first. She and Mr. January then began living together, while at least Berryman and his younger siblings were with her.¹⁴⁷ Ms. Bonty recites that she had surgery for a benign lung tumor, then an abortion, then she and Mr. January lost their house after he lost his job, and Ms. Bonty went to live with her parents. Berryman, who was then 12 1/2, went to live with his father. During the entire

period of time from his parent's final separation until Berryman went to live with his father, Ms. Bonty was unavailable for her children, a period she describes as "missing in action." She continued to be uninvolved in Berryman's life, having no contact with him until he came back to live with her when he was 17 years [*430] old.¹⁴⁸

147 Based on other accounts, Berryman's older brother, Ronald Jr. may or may not have already left to live with his father.

148 Other records indicate that she actively rebuffed Sacramento juvenile authorities assigned to Berryman's juvenile case.

When Mr. Berryman was killed in the airplane crash, the behavior of both Ronald Jr. and Berryman worsened. Ms. Bonty also went into a deep depression upon learning that her ex-husband had been killed. She was not able to offer Berryman or his brother any attention or consolation.

c. Declaration of Ronnique Berryman Appended to Berryman's First State Habeas Petition, executed August 26, 1993.

Ronnique reiterates her mother's declaration testimony regarding the fighting and physical violence between her parents, which Berryman witnessed, and including the occasion when Ms. Bonty ran into the street to escape the father's abuse and was nearly struck by a car. Ronnique also discusses the molestation that she and Berryman suffered at the hands of their maternal uncles, Kanda and Lester Bonty, when they were children. She recounts the unpleasant experience of having been repeatedly molested by Kanda Bonty when he was babysitting the Berryman [*431] children. These episodes began when Ronnique was 5 or 6 years old and included oral copulation as well as sexual intercourse. She first told her mother about having been molested by Kanda after Berryman's arrest for the present crime. She also told Berryman during one of their visits at the Kern County Jail about being molested by Kanda. In response, Berryman told Ronnique that he had been molested by Kanda as well, and also that he had been molested by Kanda's older brother, Lester. She relayed the fact of her own molestation to the defense investigator, but did not mention Berryman's molestation, and the investigator didn't ask. Before Ronnique testified at the penalty phase proceedings, Mr. Peterson asked her about her molestation, but he did not ask about whether Berryman had been molested. He did not ask her anything about her own molestation when she testified. She confirms her trial testimony that neither she nor Berryman were loved by their mother or other relatives. Berryman began running away to obtain love from other sources.

d. Other Family and Friend Declarations.

A total of twenty-four family and friend declarations are appended to Berryman's motion for an evidentiary hearing. [*432] The [*433] declarants and the dates their declarations were executed include: Johnetta Reed, April 24, 2001; Odessa Pearson, March 13, 2001; Kandy Rumford, March 15, 2001; Yolande Trinidad Rumford, May 10, 2001; Maxine Coleman, March 13, 2001; Carol Berryman (Fuller), March 15, 2001; Sonia Counts, March 13, 2001; Fred Sikes, March 21, 2001; Lester Bonty, March 14, 2001; Francis Bonty, April 21, 2001; Kanda Bonty, March 14, 2001; Linda Mitchell, March 14, 2001; Carolyn Bonty, May 10, 2001; Terrie Bonty, March 12, 2001; Karen Bonty, March 15, 2001; Sharon Bonty, March 14, 2001; Kenneth Bonty, 2001 (month and day not stated); Marcia Garcia, March 15, 2001; Ruben Hill, February 3, 2001; Ann Bonty, July 14, 2001; Helen Fuller, March 29, 1001; Emery Bonty, March 14, 2001; Donna McBride, March 13, 2001; Perry McBride, March 13, 2001. These declarations recount facts about Berryman's childhood, character, struggles with alcohol, brief marriage to Carol Berryman, injuries, and relationships. Rather than summarize each of the twenty-four declarations individually, the information contained

in the declarations is summarized by topic, with the source attributed to the witnesses who provided the information.

(1) [*434] Disbelief Regarding the Charges Against Berryman.

Odesser Pearson states she was very surprised to learn Berryman was convicted of the crimes at issue. Kandy Rumford cannot believe and Yolande Rumford states it is difficult for her to believe that Berryman committed the crimes for which he was convicted. Ms. Y. Rumford's difficulty in this regard follows from the fact that Berryman was a man who "has a great love for women," and therefore, he couldn't have killed a woman. Berryman's cousin Maxine Coleman, cannot believe the charges against Berryman. She knew him well all his life, and there "was no hint that he [wa]s capable of committing the crime he was convicted of." A maternal uncle, Kanda Bonty, describes his reaction to the charges against Berryman as being "shocked." He cannot see Berryman "throwing his life away like that." A maternal aunt, Linda Mitchell, also describes her reaction to the charges as being "shocked." Another maternal aunt, Carolyn Bonty, states that she doesn't believe Berryman is guilty. Berryman's maternal great aunt (in-law), Ann Bonty,¹⁴⁹ also states she is shocked by his conviction and "can't imagine him deliberately killing anyone." Ms. A. Bonty states [*435] it must have been "an accident, or, something he was caught up in" rather than a deliberate act. Maternal aunt Donna McBride also registers her reaction to the charges against Berryman as being "shocked." Like her Aunt Ann (Bonty), Ms. McBride believes the killing of Ms. Hildreth must have been an accident. Ms. McBride states that the young man she "watched grow up and become an adult and a father was incapable of committing such a crime." Ms. McBride's ex-husband, Perry McBride, states he was stunned when he heard of the verdict because he assumed Berryman could not be guilty of the crime; that there was a mistake.

149 Ms. Ann Bonty avers that she is the former wife of Berryman's maternal great-uncle Kenneth Bonty (the uncle of Berryman's mother, Lestine).

(2) Church Related Activities.

According to family friend Johnnetta Reed, Berryman and his (former) wife Carol were involved in church youth activities and the church choir at the Friendship Missionary Baptist Church, where Carol's father, Rev. Fuller, was the pastor. Margie Garcia, Rev. Fuller's daughter and Carol's sister also states she and her husband attended church activities with Berryman and Carol.

Fred Sikes, an elderly former [*436] minister to the New Allen Chapel in Delano, knew Berryman and his older brother Ronald Jr. when they came to church as children with their paternal great-grandparents, Thelma and Levi Mitchell. Mr. Sikes knew Berryman's maternal grandparents, Francis and Lester Bonty from church as well. Mr. Sikes reports that Berryman and his brother "were very good kids" when their great-grandparents brought them to church. Both boys were baptized "when they were twelve," participated in the church youth group, and sang in the choir. Berryman was well-disciplined in church.

(3) Lack of Gang Affiliation.

Yolande Rumford states she has no recollection of Berryman ever being involved in a gang.

(4) Childhood Neglect and Other Stressors.

Odesser Pearson was not aware of Berryman's feelings for his father, about his father's disappearance, or about his parents' divorce.

Berryman's cousin, Maxine Coleman, observed Berryman when he was child. The father, Ronald, Sr., was not around much and the mother, Ms. Coleman's cousin, Lestine, worked quite a bit, but Berryman "never complained of being neglected. He was a quiet boy and not the kind to complain when he was upset." Ms. Coleman avers that Berryman's mother, [*437] Lestine, was a battered woman (by Berryman's father). Berryman never talked to Ms. Coleman about how he felt concerning his parents' discordant marriage. As far as Ms. Coleman knows, Berryman and his siblings were not deprived; "Lestine was a good mother."

A younger sister of Lestine, Sonia Counts, avers that she was aware of the stormy relationship between her sister and Berryman's father, including the incident about Lestine almost getting hit by a car. Ms. Counts reports, however, that Lestine didn't talk about the incident. Ms. Counts describes Berryman's father as a person who was very controlling and manipulative. Unlike her cousin Maxine Coleman, Ms. Counts understands why Berryman and his siblings would have felt deprived of parental affection since their father was absent and their mother worked all the time.

Maternal uncle Lester Bonty (approximately 10 years older than Berryman) drew the conclusion that Berryman was neglected as a child based on what other family members told him about the absence of both parents. He describes Berryman's father as a person who was not all the concerned with his children and that had a reputation in the family for drinking. Mr. L. Bonty learned [*438] from a family member that Lestine's second husband (referring Jon January) did not want Berryman in the home. Mr. L. Bonty avers that he personally did not see the Berryman children often when they were young, and only became acquainted with Berryman when he was older.¹⁵⁰ Mr. L. Bonty does not know how Berryman took his father's death because he didn't observe Berryman's reaction. He did observe Ronald Jr., who did not take the news well.

150 Mr. L. Bonty does not say anything about having molested Berryman when he (Mr. L. Bonty) was in his late teens and Berryman was approximately 8 years old as reported by Berryman's mother, Lestine Bonty and his sister Ronnique Berryman.

Lester's younger brother, maternal uncle, Kanda Bonty (about six years older than Berryman), testified that he actually lived with the Berryman family from 1977 to 1978 after Lestine and Ronald, Sr. were divorced (or separated). Even though they were divorced (or separated), Ronald, Sr. still visited. Mr. K. Bonty baby sat for Berryman and his siblings.¹⁵¹ Mr. K. Bonty describes Berryman as a compliant, pleasant child. He doesn't have any kind words for Berryman's father. Mr. K. Bonty describes Berryman's father [*439] as a man who was aggressive, unhelpful around the house, and who eschewed work. He describes the incident where Ronald, Sr. pushed Lestine down the stairs causing her to fall into the street where she was almost hit by a car. Mr. K. Bonty was just coming home from school at this time. He states it was common knowledge in the family that Ronald, Sr. "slapped Lestine around." Mr. K. Bonty never saw Ronald, Sr. abuse the children. Like Maxine Coleman, Mr. K. Bonty describes his sister's mothering efforts in a favorable light, recognizing that she had to work many hours a day. He states: "She spent as much time with the kids as she could, but it's possible they felt the need for more attention than Lestine could give them." He states the children were not deprived when they lived with their mother. A maternal aunt, Linda Mitchell, states she never observed Ronald, Sr. acting inappropriately from too much alcohol consumption. Ms. Mitchell is not aware of any lack of attention or affection by Berryman's parents, but she concedes she "really wouldn't know about that." She is aware that during the marriage between Ronald, Sr. and Lestine, Ronald Sr. was "in and out of employment," but that [*440] "Lestine was always able to provide food and shelter for her children."

151 There is no indication that Mr. K. Bonty is aware of allegations from Ronnique Berryman and Lestine Bonty that he molested Ronnique and Berryman when they were youngsters during the time he stayed at the Berryman home.

Another maternal aunt, Carolyn Bonty, babysat for Berryman when he was a little baby and had contact with him until he was in his "early teens." She recalls that Ronald, Sr. "was mean and rough, and hard on the kids," but was not physically abusive. Ms. C. Bonty is aware that Ronald, Sr. beat Lestine. He was "hard on women." He also drank a lot. Ms. C. Bonty believes it was hard on Berryman to have been shuttled between relatives when he was growing up. She also recalls that Berryman had glasses, which he did not like. "He would break them or hide them and say that he lost them." Berryman held things in as a child. Berryman and Lestine's second husband (referring to Jon January), did not get along. She states Jon "wasn't good to the kids. And he was a womanizer. But so was Ronald, Sr." Ms. C. Bonty is not personally aware that Berryman suffered any sexual abuse at the hands of any of her brothers. [*441] She relates that Lestine told her about supposed sexual abuse approximately three years before she executed her declaration (which was in May 2001).

Maternal aunt Terrie Bonty began helping her sister Lestine with Berryman and his siblings when she (Ms. T. Bonty) was in the 10th grade in high school. At the time, the Berryman family was living in San Jose. Ms. T. Bonty also helped with child care when she was in the 11th and 12th grades in Los Angeles. Berryman was "a pretty good kid, well-behaved, well-mannered." Though Lestine and Ronald, Sr. were separated, he still came to visit the family and always provoked an argument. Ms. T. Bonty saw Ronald, Sr. strike Lestine on multiple occasions. Ms. T. Bonty was present in the house when the argument between Lestine and Ronald, Sr. resulted in Lestine falling or running down the stairs and falling in the street where she almost was run over by a car. The children also witnessed this incident. It was terrifying for Ms. T. Bonty, and she imagines for the children as well. Ms. T. Bonty can understand that Berryman would have felt neglected, since his father was always gone and his mother was always working. Ms. T. Bonty is aware that at times [*442] Lestine had problems providing for the children. There was at least a year when all Lestine could feed them was popcorn and oatmeal. Ms. T. Bonty does not know how Berryman took news of his father's death, because he did not show his feelings. His older brother, Ronald, Jr., however, "took it really hard."

Berryman's maternal twin aunts, Karen and Sharon Bonty, who are approximately a year older than Berryman, spent quite a bit of time with Berryman and his siblings when they all were children. Ms. K. Bonty reports that the Berryman children spent quite a bit of time in the Bonty household. She heard that Berryman's father had a drinking problem, but she states she has no personal knowledge of this. Berryman never spoke to Ms. K. Bonty about his father's death. Ms. K. Bonty describes her sister's second husband (referring to Jon January) as mean, evil, and rude.

Due to the closeness in their ages, her twin, Sharon Bonty, describes Berryman as a brother rather than as a nephew. She describes the times Berryman and his siblings came to the Bonty residence (while Berryman's mother worked) favorably. The children all played together in normal, active childhood pursuits (bicycling, skateboarding, [*443] skating). Ms. S. Bonty is not aware that Berryman's father had a drinking problem. She was too young to notice when he was around. Ms. S. Bonty does not know that Berryman went to live with his father after the divorce. Berryman never discussed with Ms. S. Bonty his feelings about the divorce, the reasons he went to live with his father, or his feelings about his father's death. Ms. S. Bonty recalls Berryman "as being clingy,

needing attention" when he was a youngster. She notes that Berryman very well may have wanted more attention because his mother worked a lot and his dad was gone. Ms. S. Bonty affirmatively states, however, that Lestine gave Berryman love and that her children were not deprived. Any emotional deprivation visited upon Berryman was inadvertent. Nor did Ms. S. Bonty ever observe that Berryman's parents favored Ronald, Jr. over Berryman. Unlike some of her other siblings, Ms. S. Bonty is not aware of any problems Berryman had with Lestine's second husband (referring to Jon January). And, she never heard anything from Berryman or anyone else in the family about physical abuse or molestation.

Berryman's maternal great-uncle, Kenneth Bonty, knew the Berryman family when [*444] they returned to California from Wyoming (after Berryman's father was discharged from the service) in 1970 or 1971. Mr. Kenneth Bonty states that the family stayed at his house at that time. He knew Ronald, Sr. well, as they often went out together. Mr. Kenneth Bonty reports that Ronald, Sr. drank more than he should have and was short tempered when he drank. He believes that Ronald, Sr. got into altercations when drinking, though he witnessed none of them. Mr. Kenneth Bonty also recalls seeing Berryman's mother, Lestine, with a swollen lip. His former wife, Ann Bonty, was familiar with Berryman's family. When Lestine gave birth to Berryman's older brother, Ronald, Jr. (before she and Ronald, Sr. were married), Lestine lived with him (Kenneth Bonty) and his wife (Ann Bonty).

Ms. A. Bonty (Kenneth Bonty's former wife) recalls that when Berryman was a baby, Lestine brought him to Delano because he was sick. Lestine and Berryman (as an infant) stayed with the grandparents of Ronald, Sr. (presumably the Mitchells) until he recovered. Berryman apparently was quite ill and suffered from fevers, but Ms. A. Bonty does not recall specific ailments he suffered. Ms. A. Bonty was around the Berryman [*445] children when they were small. She does not believe the parents' marital discord had a major impact on Berryman or that what was happening to Berryman's mother affected him. She did not observe problems with the child. Although she never observed it, she heard that Ronald, Sr. abused Lestine. One of the sources of this information was Lestine, herself. Ronald, Sr. wasn't a good husband and always tried to cover up. Ronald, Sr. did not work that much and wanted Lestine to take care of him. Ms. A. Bonty states that Ronald, Sr. took Lestine's money, possibly for drugs or gambling. She believes that when Berryman was very small "there were difficulties feeding and taking care of the kids." The rest of the family helped them out. When the Berrymans lived in Los Angeles, the children stayed with Francis Bonty (Lestine's mother) quite a bit of the time. Ms. A. Bonty does not believe that Lestine neglected the children; she loved them.

Maternal uncle Emery Bonty remembers Berryman as a "mostly happy" boy and young man. Mr. E. Bonty states that Berryman "partied all of the time as a young man," but was still quiet and gentle, more so than other young men his age. Berryman's father, Ronald, Sr. [*446] was a "playboy" and an alcoholic. Mr. E. Bonty discouraged his sister Lestine from getting involved with Ronald, Sr. because he was "spoiled and self-centered and, [Mr. E. Bonty] knew he wouldn't take care other." Mr. E. Bonty heard about Ronald, Sr. abusing Lestine from their siblings. When Mr. E. Bonty was discharged from the service, and the Berrymans lived in Los Angeles, he states he "must have moved Lestine ten or twelve times." According to Mr. E. Bonty, Lestine kept moving to "get away from Ronnie [Ronald, Sr.]." Mr. E. Bonty doesn't believe that Berryman ran away to live with his father, but that Ronald, Sr. took Berryman from Lestine. Mr. E. Bonty doesn't know the effect the death of Ronald, Sr. had on Berryman. Berryman kept his feelings inside. Mr. E. Bonty does know that Ronald, Jr. took the news very hard. Mr. E. Bonty doesn't believe that Berryman received

adequate attention from his parents due to Lestine's constant work and the fact that Ronald, Sr. was absent.

Maternal aunt Donna McBride lived with the Berryman family for two years starting when Berryman was five or six. Then she lived across the street from them.¹⁵² Berryman seemed very normal to Ms. McBride. There [*447] were no serious temper tantrums; he "was always real quiet, polite and easy to care for." There was, however, discord in the home between Ronald, Sr. and Lestine. Ms. McBride never saw Ronald, Sr. hit Lestine, but she did observe him push her around and curse her. He was a terrible father, very aggressive, tough, demanding, belittling, and controlling. As to Lestine, even when they were separated, he "wouldn't let her see other men." He also was a poor provider to the family because he "had a hard time holding on to a job" and "he didn't like to work." Berryman, as well as his siblings were afraid of Ronald, Sr. Because of the controlling character exhibited by Ronald, Sr., Ms. McBride doesn't believe Berryman ran away to be with his father (when he was 12); she believes that Ronald, Sr. took the boys to have control over them. Lestine raised the children alone, providing a decent home without "serious physical deprivation." Ms. McBride believes that his father's death was hard on Berryman despite the father's cruelty to the children. Ms. McBride recounts that Berryman came to live with his mother and her new husband (referring to Jon January) when he was a teenager. Ms. McBride recalls [*448] there were problems between Berryman and his stepfather. Berryman would not have received much attention from his mother at that time, since she had a new baby by her husband (January).

152 This description indicates that the Berryman family stayed in a single location for approximately three years, contradicting the other accounts that indicated frequent moves.

Perry McBride, Donna McBride's ex-husband, knew Berryman since he was an infant. When Mr. McBride and his former wife, Donna, were first married, they stayed with Lestine and her children. Berryman was just a little boy then. Lestine and Ronald, Sr. already were separated at that time, but he still came around the house. When he did, he and Lestine would argue. Mr. McBride did not see Ronald, Sr. strike Lestine, but he was aware of the incident where Lestine was running away from his assault, tripped, fell, and was almost struck by a car. Lestine worked a great deal and left the children alone. With Ronald, Sr. absent as well, the children likely didn't receive adequate attention. When Berryman was 17 or 18, he moved in with Mr. McBride for the better part of two years. Berryman did not use drugs and remained "a well-adjusted, [*449] bright-eyed, personable young man." Berryman was always sad when he spoke of his father (after the father's death). Mr. McBride believes Berryman took his father's death hard.

Carol Berryman relays how Berryman described his childhood. He told her that "he and his siblings frequently witnessed their father beating their mother," and in particular the incident where the mother fell down a flight of stairs to the street and was almost hit by a car. Berryman further said that when he was a child, his mother "had other things she wanted to do than care for her children," and thus, they stayed with various relatives. Berryman, in particular, was not allowed to stay with his mother by the time he was 12 or 13, so he stayed with "an older woman with whom he had a sexual relationship."¹⁵³ Ms. Berryman's sister, Margie Garcia, relates that Berryman told her he had a hard time growing up, living with grandparents part of the time. She retains the impression that "his childhood had been tough." Ms. Berryman's mother, Helen Fuller recalls Berryman talking about "how he was put out of his home at a very early age to fend for himself." She recalls that his childhood "was particularly rugged" because [*450] his mother put him out of the home when he was 12 or 13.

153 All other accounts of Berryman's pre-teen and early teen life place him with his father, first in Long Beach and then in Sacramento. Carol Berryman's account about an older woman in Berryman's early life is the first in the record, and totally uncorroborated.

Berryman was close with his father because the father included Berryman in activities. Berryman did not tell his wife how he felt when his father died. Berryman related that both his mother and father favored Ronald, Jr. over him. Ms. Berryman personally observed that Ronald, Jr. received favored treatment by Berryman's mother, grandmother, and great-grandmother.

Francis Bonty, Berryman's maternal grandmother, speaks ill of her late son-in-law, Ronald, Sr. She states he "was extremely jealous and domineering of Lestine." When the Berryman family lived in Los Angeles, they moved constantly because Ronald, Sr. gambled away the rent money and the family would be evicted. Mrs. Bonty also does not care for Lestine's second (ex-)husband, Jon January, because like Ronald, Sr., he was involved with other women the whole time he was married.

Family friend Ruben Hill was well-acquainted [*451] with Berryman's paternal great-grandfather, Levi Mitchell (who lived in Delano). Mr. Hill extolls Mr. Mitchell's virtues as a role model. He notes that when Berryman and his brother, Ronald, Jr. were living with their great-grandparents, Mr. Mitchell "was always bragging" on the boys. Thelma Mitchell (the great-grandmother) also was very proud of her great-grandsons. Berryman and his brother didn't live with the Mitchells for very long. They were in the 10 to 12 year old stage. They came and went often. Mr. Hill also knew Ronald, Sr. when he visited his grandparents (the Mitchells), but makes no comment about his character or parenting skills. He does not know the reason Berryman and Ronald, Jr. stayed with their great-grandparents. He believes that after they stayed in Delano, they went to live with their father when they were in their early teens. Mr. Hill is "unaware of any serious deprivations Rodney may have experienced as a young boy."

(5) Pre-Marital Living Arrangements.

According to Carol Berryman, when she and Berryman met in 1985, Berryman was living in Ms. Odesser Pearson's house. After they met, Berryman moved out of the Pearson home and stayed in various places, including [*452] with friends and in cars. After Ms. Berryman became pregnant, she and Berryman married in 1986 and then moved in with her parents in La Puente, California.

(6) Industrial Accident.

Odesser Pearson "heard about" Berryman industrial accident, but recalls no specifics. Kandy Rumford is not aware Berryman suffered an industrial accident. Yolande Rumford doesn't recall anything about Berryman's accident, except, once Berryman told her he was hit in the head. Carol Berryman states she met Berryman after his industrial accident, which she believes was caused by his falling from a forklift. Berryman's maternal aunt, Sonia Counts recalls the industrial accident Berryman suffered. Afterwards, he complained that his back hurt him. Berryman complained to his Aunt Sonia about back pain shortly before his arrest for the present conviction. Berryman's maternal uncle, Lester Bonty was neither familiar with Berryman's industrial accident nor any chronic pain he suffered as result. Neither was maternal aunt Carolyn Bonty familiar with Berryman's industrial accident, although she had "heard that he suffered a head injury." One of his maternal aunts, Karen Bonty states she recalls that Berryman was employed [*453] at a job where he sustained injuries and that he received a settlement from which he purchased (or put a down payment on) a truck (his Mitsubishi pick up truck). Karen Bonty's twin sister, Sharon Bonty, also was aware that Berryman suffered an industrial accident that caused him to suffer headaches. The

issue of Berryman's back injury also was brought to the fore during the May 1988 *Marsden* motion proceedings. During a weekend break in the course of these proceedings, Berryman claimed unable to walk and in need of a wheelchair. *See Part V.A., supra.*

(7) Severe Headaches.

Friend Johnnetta Reed reports that Berryman complained about severe headaches. Odesser Pearson, on the other hand, was not aware of headaches Berryman experienced.¹⁵⁴ Kandy Rumford was not aware that Berryman suffered from headaches. Berryman told Yolande Rumford that he had headaches. One occasion Yolande does remember was when Berryman came to her parents' home complaining of a severe headache. His nose was bleeding at the time. Yolande and her mother transported Berryman to the hospital. Without specifying a time-frame, Berryman's wife, Carol, avers that he "would experience a short, sharp headache," lasting five [*454] minutes about once or twice a month. During these headaches, Ms. Berryman observed a vein on his right temple throbbing. When the headaches passed, the vein ceased throbbing. When Berryman gave up alcohol, the headaches were more frequent.

154 This may be because when Berryman lived with Mrs. Pearson, he had not sustained the injury (being hit on the head with a flashlight by his wife) which caused the headaches. The evidence is that Berryman moved out of Mrs. Pearson's home when he started dating Carol.

Although maternal aunt Carolyn Bonty had heard that Berryman suffered a head injury, she did not know whether he suffered from headaches. Maternal aunt Terrie Bonty also does not "recall any complaints he might have had about headaches or back pain." Maternal aunt Karen Bonty also was not aware that Berryman complained of headaches. Her twin sister, Sharon Bonty, however states that Berryman did complain of headaches (which she associated with the industrial accident). He complained to Ms. S. Bonty about his headaches twice that she can recall, but he "didn't make a big deal out of it." Maternal great aunt (in-law) Ann Bonty is unfamiliar with any complaints about headaches Berryman [*455] suffered. Maternal aunt Donna McBride is not familiar with any details of Berryman's industrial accident.

(8) Academics.

Odesser Pearson did not know how well or poorly Berryman did in school. As a school teacher, herself, she always encouraged Berryman to study, even after he was in prison. His maternal aunts and uncles didn't know how well or poorly Berryman did in school. Maternal uncle Emery Bonty surmises that it must have been difficult for Berryman to succeed in school given the many times he moved around, changing school all the time.

(9) Employment.

Odesser Pearson didn't know what kind of work Berryman did when he was finished with high school. His maternal uncle (in-law). Perry McBride avers that when Berryman came to live in his (Mr. McBride's) apartment, he brought Berryman to a music studio to teach Berryman the technical end of the music industry business. Berryman did very well in these endeavors. When Johnnetta Reed knew Berryman (after his marriage to Carol), he worked detailing cars. Yolande Rumford was aware that Berryman worked in construction work and detailing cars. According to Berryman's wife, Carol, he worked "almost the entire time [they] were together. First [*456] he worked on a janitorial crew for Sears, then moved to detailing cars, for two different employers. He hoped he have a detailing shop of his own some day. Berryman's former sister-in-law (Carol's sister), Margie

Garcia reports that Berryman was employed cleaning and detailing cars with other members of the church.

(10) Relationship with Son.

Johnnetta Reed reports that Berryman adored his son. Yolande Rumford similarly states that Berryman was very proud and protective of his son. Carol Berryman avers that Berryman loved their son very much and that the reason he married Ms. Berryman was so his son would have a home. Her sister, Margie Garcia avers that Berryman loved his child and was always bragging about him. (The child was just barely a year old when Berryman was arrested.) Even long since the trial, Berryman's son, Rodney, Jr. visits his father at San Quentin whenever he can. Ms. Garcia describes an enduring close bond between Berryman and his son. Berryman's former mother-in-law, Helen Fuller, describes how Berryman interacted with his infant son before the arrest. Berryman showed great love and devotion to his child.

(11) Alcohol Consumption.

Declaration testimony of Berryman's [*457] excessive alcohol consumption is set out, in full, in connection with the discussion about a mental state defense. *See* discussion facts in support of Claims 15 and 16, Part XII.A.1., *supra*.

(12) Mild Manner and Good Character.

In Johnnetta Reed's opinion, Berryman was kind, helpful, and caring. His involvement in the church was deep and sincere. Odesser Pearson found Berryman to be courteous, polite, and respectful when he lived in her home, and afterwards, when he would come to visit, as well. Berryman was not violent and Mrs. Pearson saw no indication he had a temper. She allowed Berryman to live in her home while Berryman was still in high school (at West Covina High School). Kandy Rumford observed Berryman at the Friendship Baptist Church, where he attended with his wife and son. He "behaved with absolute respect" toward Ms. K. Rumford's family and friends. He did not display a bad temper. Yolande Rumford states she never observed Berryman irritable. She states that Berryman was always a "big flirt" who always joked and laughed with everyone, male and female. Maxine Coleman describes Berryman as "a fun person with a good personality, easy going, polite." He was "just a happy guy, [*458] laughing, a tall good looking, quiet young man."

According to wife Carol, Berryman was selfless. He sold his truck (before the Mitsubishi) so he and Ms. Berryman could put down a deposit for an apartment. Sometimes Berryman and Ms. Berryman would get into arguments, and Ms. Berryman reports sometimes he would grab her and shake her, but he never struck her with a closed fist and she does not recall that he ever slapped her. She describes herself as someone with "the ability to push people until they get very angry," and that she "pushed" Berryman in this manner many times. She also reports that she slapped or "smacked" Berryman when he grabbed her. When she did so, he usually would let her go or back off and leave. She was never afraid Berryman would hurt her. The extent of Berryman's abusiveness, if any, toward Ms. Berryman was verbal not physical. Berryman's former mother-in-law states that she is "not aware that he was ever violent toward [her] daughter [Carol]." With respect to Berryman's assault on Ms. Berryman's father (as Rev. Fuller testified at trial), Ms. Berryman contradicts her father's version of the events. First, Ms. Berryman recounts that her father, not Berryman, provoked [*459] the incident because he would not permit Berryman to come into the house to see his (Berryman's) infant son. Second, Rev. Fuller did not suffer a broken nose as he told others, but rather, simply a cut on the nose and "two small black eyes." ¹⁵⁵ Ms. Berryman's sister,

Margie Garcia, states that the understanding of family members about this altercation is that it was a pushing (rather than a striking) incident where no one was injured. Ms. Garcia states that she believed Berryman and her father always got along well. She did not see Berryman in the six to eight months prior to his arrest, but up until that time, his behavior had not changed. She states that the fact there was an altercation between Berryman and her father "does seem unusual and out of character" for Berryman.

155 Rev. Fuller told the jury that Berryman hit him on the bridge of his nose, following which Rev. Fuller summoned the police. He did not testify that Berryman broke his nose.

Ms. Berryman avers that she did not know about the incident where Berryman assaulted David Perez. She speculates that an assault may have occurred when Berryman chased a motorist who tried to run Ms. Berryman (in her car) off the road when [*460] she and Berryman were married.

Berryman's maternal grandmother, Francis Bonty states she remembers how nice Berryman was to his sister-in-law, when his brother, Ronald Jr. was abusive to her. Mrs. Bonty states that Berryman did not begin to drink until he married Carol Fuller and that she (Carol) "was very jealous, bossy and provocative" just like Berryman's father.

Maternal aunt Sonia Counts avers that she has never seen Berryman angry. He was quiet and well-mannered. During the four to six months prior to Berryman's arrest, Ms. S. Counts saw Berryman two times. On those occasions, she did not observe any changes in Berryman's behavior. Nor had she heard that he had changed from other family members. This, however, would not be unusual because Ms. Counts' family (Lestine Bonty's family) was very private. Another maternal aunt, Linda Mitchell, states that Berryman was quiet, well-behaved child. She did not observe a change in his behavior as he grew to a teenager. He was not a violent person. Maternal aunt Carolyn Bonty similarly described Berryman as a quiet, shy boy. Ms. C. Bonty states she did observe that Berryman changed as he got older, becoming "more aggressive like his daddy." [*461] He became less shy and more outspoken. Again, however, Ms. C. Bonty concedes she saw little of Berryman as he became a teenager. According to maternal aunt Terrie Bonty, Berryman "has always been very quiet and kept to himself." Ms. T. Bonty never observed him display a temper or irritability. He always seemed to get along with people. After Berryman was married and had his son, Ms. T. Bonty would see him at her mother's (Berryman's grandmother's) house. Ms. T. Bonty saw nothing that "he was having any problems either physically or with the law." Maternal aunt Karen Bonty describes Berryman as normal and active in his childhood and overall as "being playful, friendly, sweet tempered, a lot of fun to be with." Her twin sister, Sharon Bonty states she did not observe a change his Berryman's behavior. Except for the headaches he complained of, he "seemed like himself -- shy, quiet, friendly and good-natured."

Family friend Ruben Hill coached community football (in Delano) and both Berryman and his brother were on the team. Mr. Hill retains no "strong impression of either boy," but he remembers that Berryman was "always a pretty good boy, quiet, cordial and respectful." As Berryman grew [*462] up and Mr. Hill saw him in town, Berryman remained "pretty much the same, a respectful boy." He noticed no significant changes. Mr. Hill "did not notice him being prone to violent or hostile behavior."

Berryman's maternal great aunt (in-law), Ann Bonty, describes Berryman as a quiet, soft-spoken child, who would always give his aunt a hug. The last time Ms. A. Bonty saw Berryman was after he was grown, married, and had a baby. At that time, he was "still a quiet, polite young man." Ms.

A. Bonty never witnessed Berryman with "a bad temper, or any anger management problems." She "never saw him violent."

Maternal aunt Donna McBride always found Berryman "to be polite, kind and quiet[,] though outgoing." Ms. McBride doesn't recall that Berryman ever lost his temper. He was quiet. When he talked to Ms. McBride from jail (in Kern County) "he cried and cried." She states that knowing him, "under normal circumstances, he would not commit the crime he was charged with." In the year before Berryman left for Delano, Ms. McBride would see Berryman once or twice a week at her mother's (his grandmother's) house. She states she observed no changes in his behavior or personality during those visits.

Maternal [*463] uncle (in-law) Perry McBride states that from an early age, Berryman "was gentle, calm, and relaxed." He "never seemed angry or temperamental." Mr. McBride majored in psychology when he attended California State University at Bakersfield and even worked as a counselor to troubled juveniles for a year. Based on his background and the fact that Berryman lived in his apartment for approximately two years, Mr. McBride believes he "should have seen some evidence of pent-up hostility if it was there." Mr. McBride reports that Berryman's behavior around women was "always well-mannered and he treated women with respect." Mr. McBride observed "no evidence of hostility toward women."

e. Report From Counsel Regarding Great-Grandmother Thelma Mitchell.

In a declaration appended to Berryman's second state habeas petition, co-counsel, Jessie Morris, Jr. reports that Berryman's paternal grandmother, Thelma Mitchell, would have been a helpful mitigation witnesses, although convincing her testify and controlling her testimony would have been challenging. The challenge derives from the fact that she did not believe Berryman committed the rape or homicide. Nonetheless, Mr. Morris offers his opinion that [*464] experienced investigators could have drawn out her testimony.

In fact, the record in these federal proceedings reveal that Berryman's current litigation team noticed Ms. Mitchell's deposition for Monday, March 26, 2001. On the record, co-counsel Jessie Morris read a statement into the record:

Thelma Mitchell, the witness, is not going to be showing for this deposition. I had made contact with her late yesterday, and she said that she received a letter from Rodney Berryman. And, I'll quote part of that letter.

"I don't want you to help them, Mama. God has won this case for us, not us with the lawyers. So please, if my lawyers come again to talk to you, tell them I said I don't want them dragging you places. I want you to rest. An you're giving me the best help I can get, your prayers to God."

The witness, Thelma Mitchell, is 97 years old. She said that she is going to follow her great grandson's wishes and will not be answering questions or coming to this deposition.

Declaration of Non-Appearance of Thelma Mitchell, Dated March 26, 2001.

4. Appellate Counsel Mr. Posner's Opinion Regarding Investigation Efforts.

Mr. Posner recounted that after having been appointed to represented Berryman on [*465] direct appeal proceedings on December 27, 1990, he attempted to secure the trial records retained

by his trial attorneys, Mr. Soria and Mr. Peterson. When Mr. Posner finally connected with Mr. Soria in September 1991, the results were very disappointing; the documents Mr. Soria handed over to Mr. Posner did not even fill one expando file. Mr. Soria claimed that the remainder of the file was in possession of the defense investigator, Bruce Binns or co-counsel Mr. Peterson. When Mr. Posner finally was able meet with Mr. Binns, Mr. Binns informed him that he had divorced and lost his office. He did not maintain any files, but suggested that Mr. Posner contact Mr. Peterson, who handled the penalty trial. Mr. Posner's contact with Mr. Peterson similarly was unsuccessful, for he claimed he had no files. Mr. Posner found this state of affairs particularly irksome in as much as Mr. Peterson had informed the jurors that he ten brown expansion folders full of documents located in two banker's boxes full of documents. Mr. Posner found it incredulous that in presenting evidence in a death penalty case, counsel would not have maintained and preserved trial records for use on appeal. In his 38 years [*466] of practicing law, Mr. Posner found this appalling lack of record keeping to be unprofessional and incompetent.

B. Berryman's Contentions.

Underlying Berryman's challenges to the manner in which evidence was investigated (or not investigated) and presented (or not presented) is his complaint in Claim 6 that investigator Bruce Binns overbilled the county and provided unlicensed, unskilled, and untrained services. Berryman alleges that whereas Mr. Binns billed the county \$ 40 per hour, the actual investigative work was performed by amateur independent contractors Ed Beadle and Douglass Lemmons at the much lower rate of \$ 10 per hour. Mr. Binns reportedly provided no training or supervision of Messrs. Beadle and Lemmons. With respect to Mr. Lemmons, particularly, Berryman points out that he has been admitted to the Veteran's Administration Hospital in Menlo Park, California and a mental hospital in Bakersfield for the effects of post-traumatic stress syndrome as a result of his service during the Vietnam conflict. Recognizing that his attorneys bore the ultimate responsibility for ensuring competent investigative services, Berryman complains of poor investigative efforts and mitigation [*467] evidence development.

In Claims 63 and 64, Berryman complains that no neurological tests were conducted on Berryman to confirm diagnoses of Drs. Pierce and Benson, although both doctors recommended testing. Mr. Lemmons was the investigator in charge of finding a facility to perform the neurological tests. As a result, the experts' opinions were greatly undermined, more so because Mr. Moench argued the defense purposefully did not make arrangements to conduct the neurological tests discussed by the experts in order give the experts "something to talk about" during their testimony. *See* Part III.B., *supra*.

Claim 65 focuses on the failure of investigators to uncover relevant, personal and family history of Berryman's "extremely disruptive, abusive, and neglectful" background, particularly from his mother Lestine Bonty and his sister Ronnique, who among other statements have described that Berryman was the subject of sexual abuse as a child. The omitted evidence carried with it no risk of casting Berryman in a bad light. Citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) and *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992), Berryman claims the attorneys' [*468] failure to present mitigating evidence was extremely harmful to the defense. The facts of his upbringing Berryman emphasizes are supported by the post-conviction evidence obtained from his mother and sister, as well as from other sources. It reveals Berryman was born pre-mature and spent his first month in an incubator. His mother didn't want him when she was pregnant with him and never bonded with him. His father drank heavily, did not keep regular employment and abused his wife in front of the children (including Berryman). The parents

eventually divorced on 1974, after which his mother was compelled to neglect the children while she worked and attended school. The Berryman children were "cared" for by maternal relatives, during which care he claims he and his sister, Ronnique, were sexually molested, repeatedly. Berryman did not bond with his step-fathers. He went to live with his father in Long Beach and then Sacramento, but his father was a poor role model who drank, gambled, and had many girlfriends. In addition to being influenced by his father, Berryman was influenced by his older brother, Ronald, Jr., who used drugs and alcohol. Berryman claims to have suffered a severe psychological [*469] impact from the news of his father's disappearance and presumed death. His points and authorities recite, "to this day he believes his father is still alive and has abandoned him." Although Berryman appeared stable during his first year of marriage, when he lost his job, his drinking increased, he could not find work, and his drinking increased more and more. Because the foregoing evidence was not developed, the view the jurors had of Berryman "did not take into account the extent to which he was a victim of the circumstances of his upbringing." This is said to have been highly mitigating (although not an excuse or basis for acquittal). The prejudice occasioned by the alleged omissions is highlighted because he claims this "case was closely balanced in the penalty phase."

Claim 69 reviews a great deal of evidence from other lay witnesses and documents giving a picture of his life. The offered evidence of friends and family is set out above.¹⁵⁶ With respect to that evidence, Berryman reiterates the many positive characteristics. Fred Sikes, who baptized Berryman thinks well of him for his regular church attendance, membership in the church choir, and gentle nature. Delano Fire Chief [*470] Reuben Hill, who coached Berryman in basketball and football when Berryman was 12 observed Berryman to be a good athlete and a good sportsman with a good aptitude for mechanics. Mr. Hill also knew Berryman from church. Berryman's family members describe positive past associations, Berryman's reputation as a non-violent person, their own deep sense of loss if Berryman is executed, the tumult of his early upbringing, being passed from one care giver to another, Berryman's sorrowful reaction to his father's death as a teenager, the poor school services he received, and the racial discrimination he endured. His juvenile probation officers and juvenile attorneys also purportedly had positive impressions of Berryman as a youth. They also noted learning disabilities and family difficulties resulting in poor adjustment to adult life.

156 There are a number of witnesses and documents mentioned in Berryman's supporting points and authorities that were not presented in his offer of proof supporting the motion for evidentiary hearing. Included in this category is Rev. Howard Fuller, Berryman's former father-in-law and juvenile probation officers.

Claim 70 focuses on the failure of Berryman's trial [*471] attorneys to secure the cooperation of his great grandmother, Thelma Mitchell. In his points and authorities, he describes Ms. Mitchell as a pivotal figure in his early life. Because she believed Berryman was innocent of the rape and murder, however, Berryman recognizes it would have been difficult to convince her to testify. He also asserts that with experienced investigation personnel, she could have been convinced.

C. Analysis.

With the exception of the claim that Berryman was sexually molested by his maternal uncles (or by any one) as a child, let alone repeatedly molested, and the contention that the case was closely balanced in the penalty phase, the Court accepts the proffered evidence. The Court accepts that Berryman was born pre-maturely, the second child of two teenagers unprepared and somewhat unqualified for parenthood. The Court recognizes that the instability in the parental relationship, the

moving around, the joblessness of the father, the violence between the parents, and their ultimate separation would take a toll on the children. The Court further acknowledges that Berryman's father was less than a perfect parent, gone much of the time, and engaged in a life-style [*472] hardly conducive to strong family values. Berryman's poor academic achievements also must have had a role in his failures in the employment world as well as in his inter-personal relations. His injuries, including the industrial accident and the incident where his wife struck him with a metal flashlight also likely left him with residual headaches, perhaps coupled with his well-documented excessive drinking. Many of his friends point out that he was not a violent person by nature or reputation, leading to the supposition that his escalating violent outbursts was attributable to an external cause or causes. The Court's impression of Berryman is that he was a young man who had become trapped in a cycle of bad choices and escalating violent outbursts occasioned by those bad choices, including the assault on motorist David Perez, punching his father-in-law in the nose, continued drinking, not getting help for his drinking, not obtaining regular employment, trying to maintain multiple simultaneous intimate relationships, and, as Dr. Benson testified running away to Delano rather than trying to deal with his problems. *See* Part III.B., *supra*.

The Court specifically rejects the contention that [*473] Berryman, himself, was sexually abused. Neither his mother's nor his sister's declaration statements to that effect are based on first-hand, personal knowledge, and, accordingly are not credited. *See Fed. R. Evid. 702*. The statements also are hearsay and no hearsay exceptions or non-hearsay uses are applicable. *Fed. R. Evid. 802, 803, and 804*. No other credible, supported testimony made on personal knowledge is offered (including from the alleged molesters, Lester Bonty and Kanda Bonty, both of whom supplied declarations). The Court also rejects the notion that the penalty case was "close." According to the state record,¹⁵⁷ penalty deliberations commenced on Thursday October 27, 1988 at 3:47 p.m. CT-4: 855, RT-29: 4041. At 4:48 p.m., the jurors requested a read back of Carol Berryman's testimony. *Id.*: 4042, after which the jurors were allowed to adjourn for the day. They resumed deliberations the following morning at 9:00 a.m.. CT-4: 858. Portions of the expert witness testimony were read back. RT-29: 4046-51. After further deliberations and a lunch break, the jurors notified the trial court they had reached a verdict at 2:50 p.m. *Id.*: 4053. There is no evidence in the record that [*474] the vote for the death penalty and life without parole was evenly balanced at any point during the deliberations, even from Mr. Armendariz, the juror from whom Berryman has secured a declaration. Nor has Berryman pointed to any evidence, documentary or declaratory, that would support such a conclusion. Finally, as previously discussed in connection with Claims 15 and 16, Part XII.C.3., *supra*, even if the Court accepts the proposition that the neurological tests ultimately performed on Berryman demonstrate the existence of a seizure disorder, there is no evidence that Berryman was experiencing or did experience a seizure at the time he killed Ms. Hildreth.

157 *See also*, Part III.B., *supra*.

Without a medical cause for the attack, Berryman's conduct on the night of September 6, 1987 is reduced to a fatally bad choice, even though it may have been exacerbated by emotional turmoil, which in turn is attributable to his unhappy childhood. None of the proffered evidence persuasively demonstrates that Berryman's history, intellectual functioning, and compromised emotional stability in any way led him to commit the sexual assault and fatal stabbing attack on Ms. Hildreth. Rather, the proffered [*475] evidence suggests that the fatal assault was the culmination of frustration over the self-created life predicament in which he found himself. Berryman's insatiable need for female attention to make up for the lack of attention from his mother in his childhood does not amount to mitigation. His botched attempt to have a romantic interlude with Ms. Hildreth to have his

immediate needs met, was not compelled by uncontrollable mental infirmities, but was a result of a volitional act. This conclusion is informed by the trial testimony of both Dr. Pierce and Dr. Benson.

Dr. Pierce's trial opinion that Berryman's act in raping and stabbing Ms. Hildreth must have been the result of an alcohol induced seizure was based on Berryman's pattern of past behavior that when he couldn't get his needs met, he would leave or avoid the situation or just become frustrated. Dr. Pierce conceded, however, that Berryman had the capacity for violence. Dr. Benson similarly conceded that a sexual assault was inconsistent with a blackout. He also noted a streak of aggression in Berryman after he lost his job, his wife, and his apartment. Other than the disputed neurological test results that Berryman suffers from [*476] a seizure disorder, there is no corroboration in the record that Berryman actually suffered a blackout (as opposed to a headache) at any time before or since the attack on Ms. Hildreth. The additional proffered evidence is not sufficient to have made a difference in the outcome of the penalty proceedings under *Strickland* or *Brecht*. Claims 6, 63, 64, 65, 69, and 70 are denied on the merits. Berryman's request for an evidentiary hearing with respect to Claims 63, 65 and 69 is denied.

XXVI. Berryman's Assertion of Ineffective Assistance of Counsel for Failure to Obtain a Social History of Berryman (Claim 59).

In Claim 59 Berryman alleges ineffective assistance of trial counsel because his attorneys failed to obtain a social history of Berryman and argue mitigation based on that history. He requests an evidentiary hearing with respect to this claim.

A. Statement of the Facts Relevant to the Obtaining a Social History.

The facts pertinent to Claim 59 have already been set out in connection with the discussion of guilt phase mental defenses in Claims 15 and 16. *See* Part XII., *supra*. Specifically, Berryman offers the social history report of Dr. Gretchen White as an example of the type of material [*477] counsel could have presented had they commissioned a social historian. *See* Part XII.A.3.d., *supra*. In addition, Mr. Soria's statement in his September 17, 2001 declaration that at the time of Berryman's trial, he "had not been introduced to the practice of obtaining social histories in capital cases," is taken into account. *See* Part XII.A.5., *supra*.

B. Berryman's Contentions.

Berryman complains that instead of preparing a professional social history, the defense relied on random interviews by Douglas Lemmons, who Berryman describes as unlicensed, untrained, and medically disabled. The social history reveals the many deprivations Berryman endured as a child and teenager, including sorrow over the death of his father. Relying on *Castro v. State of Oklahoma*, 71 F.3d 1502 (10th Cir. 1995), Berryman claims the coherent expert testimony explaining mitigating evidence would have made a difference to his penalty proceedings.

C. Analysis.

The Court does not agree that Dr. White's social history presents such a persuasive picture of Berryman's life that the jury would have been persuaded to mitigate his sentence from death to life without the possibility of parole. Although he did endure a tumultuous [*478] and unstable childhood, he received care from his mother and her relatives. All lay witnesses indicate that although Ms. Bonty struggled to make ends meet for her four children she was a good mother who was diligent in making child care arrangements while she pursued an education and better employment. The fact that Berryman's father was largely absent and less than a stellar role model also does not engender compelling sympathy. Berryman's social history, as presented in Dr. White's

report and as described in the lay testimony of friends and family, shows a young man who consistently made poor choices. Although his intellectual capacity was not particularly high, it was within normal ranges. The Court's analysis regarding undeveloped and unrepresented mitigating evidence is set forth in the discussion of Claims 6, 63, 64, 65, 69, and 70. *See* Part XXV.C, *supra*. In particular, the Court rejects the assertion that any of Berryman's emotional problems are based upon him being a victim of childhood molestation.

The Court finds that the testimony of a social historian at Berryman's trial would not have made a difference in the outcome. Moreover, Berryman has yet to establish that retaining [*479] a social historian in 1987 and 1988 was the standard for competent counsel. Claim 59 is denied on the merits. Berryman's request for an evidentiary hearing with respect to Claim 59 is denied.

XXVII. Berryman's Challenges Arising from Miscellaneous Instances of Alleged Prosecutorial Misconduct During Summation (Claims 76, 79, and 80).

Claim 76 alleges Mr. Moench committed prosecutorial misconduct for arguing Berryman's expert stated he was "amoral," when in fact the expert testified he had an "asocial" personality. Claim 79 alleges ineffective assistance of counsel for three separately articulated failures by defense counsel, the first of which is the failure to object to Mr. Moench's "amoral" mischaracterization. The other instances involve the defense attorneys' failure to object for two additional prosecutorial misdeeds: one when Mr. Moench argued Berryman's "Casanova" life-style was a factor in aggravation and the other when he equated the statutory mitigating factor of impaired capacity with the "old insanity defense." As relevant to alleged prosecutorial misconduct, Berryman also asserts trial error in Claim 80 for the trial court's failure to cure these three improprieties.¹⁵⁸ [*480] Berryman requests an evidentiary hearing with respect to the portion of Claim 79 dealing with Mr. Moench's equating philandering with a factor in aggravation.

158 Claim 80 also alleges trial error for the trial court's failure to correct misstatements of Mr. Peterson during his penalty summation. This portion of Claim 80 is addressed in connection with Claim 91. *See* Part XXIX., *infra*.

A. Statement of the Facts Relevant to Miscellaneous Instances of Prosecutorial Misconduct.

Mr. Moench's arguments that Berryman was "amoral" rather than "asocial" and that his philandering amounted to a factor in aggravation have been laid out in connection with Claims 7, 8, 9, 10, and 23, *see* Part VII., *supra*, and Claims 18, 19, and 52, *see* Part XXI., *supra*. The argument about Berryman's philandering is additionally addressed in the discussion of Claims 13 and 14. *See* Part XXIII., *supra*. Mr. Moench's comment that the sentencing factor addressing Berryman's impaired mental state was "the old insanity defense," appears in the state trial record.

In accordance with Penal Code § 190.3(h), also referred to as the factor (h) instruction, the trial court directed the jury to, consider, take into account, and be [*481] guided by:

whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

In commenting on this particular factor, Mr. Moench reiterated the language of the instruction, and then stated:

That's the old insanity defense. Did he know what he was doing was criminal? Did he have the ability to [con]form it, his behavior? No indication from anyone he had any sort of psychotic break or anything even approaching it that he didn't know what he was doing was criminal. Not a factor in mitigation.

Id.: 3992.

B. Berryman's Contentions.

Berryman's arguments in Claims 76 and 79 regarding the "amoral" and philandering summation statements do not expand upon the arguments previously advanced in prior claims. *See* discussion of Claims 7, 8, 9, 10, and 23, Part VII., *supra*, Claims 18, 19, and 52, Part XXI., *supra*, and Claims 13 and 14, Part XXIII., *supra*.

In reference to Mr. Moench's "old insanity defense" statement, Berryman points out that an insane person is "incapable of knowing or understanding the [*482] nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime." Since the standard for the insanity defense is "considerably higher" than the standard for diminished or impaired capacity under the factor (h) instruction, introducing the issue of insanity eliminated consideration of a significant mitigating factor, namely inability to conform conduct to the requirements of the law due to mental impairments. Contrary to the legal definition of insanity, Berryman points out that the factor (h) instruction did not require him to show he did not know what he was doing was wrong or that he could not distinguish right from wrong, which is the standard for insanity. Relying on *Collier v. State*, 101 Nev. 473, 705 P.2d 1126, 1130-31 (Nev. 1985), he argues the trial court should have interrupted and corrected the prosecution misstatements under a higher duty of sua sponte intervention in death penalty proceedings.

C. Analysis.

The prosecutorial misconduct, attorney error, and trial error claims with respect to the "amoral" and philandering statements are resolved in the analyses of Claims 7, 8, 9, 10, and 23, *see* Part VII., *supra*, and [*483] Claims 13 and 14, *see* Part XXIII., *supra*. Those claims are denied. The prosecutorial misconduct, attorney error, and trial error claims with respect to "the old insanity defense" fare no better.

The issue was addressed by the California Supreme Court on direct appeal:

Defendant is right that the prosecutor misstated the law in remarking that the penalty factor on impairment of capacity was "the old insanity defense" [citation omitted] -- although his mistake is readily understandable¹⁵⁹ But misstatement is not enough. Defendant is wrong, however, in the rest of his complaints. Contrary to his assertion, the prosecutor did not lead "the jury away from considering [potentially] mitigating evidence. . . ."

6 Cal. 4th at 1094-95. The conclusion of the California court that the Mr. Moench's summation, even though it included a misstatement, did not eliminate from the jury's consideration valid mitigating evidence is entirely reasonable and dispositive to the analysis on federal habeas. 28 U.S.C. § 2254(d)(1). Besides the factors mentioned by

the California Supreme Court, the Court is struck by the improbability the jurors had any idea what the legal definition of insanity might have [*484] been or that insanity required a higher standard than impaired capacity under the factor (h) instruction. The real import of Mr. Moench's argument was that Berryman was not impaired at the time he killed Ms. Hildreth. That argument was appropriate. Further, had Mr. Peterson objected or the trial court interrupted with a curative instruction to the "old insanity defense" reference, there may have been an explanation as to the definition of the insanity -- thereby emphasizing a concept for the jury that, from the defense point of view, would be better left alone.

159 The remark that the prosecutor's mistake in equating the impairment of capacity factor with the insanity defense was "readily understandable" is explained by the Warden. Insanity requires that the defendant lacks "substantial capacity" to appreciate the criminality of his conduct. The factor (h) instruction requires that the defendant's capacity is impaired.

In light of this analysis, the trial court was under no sua sponte duty to correct alleged prosecutorial misstatements. Berryman's reliance on *Collier v. State* 705 P.2d at 1130-31, to the contrary is inapposite. In that case the Nevada Supreme Court had before it a case [*485] where the prosecutor injected statements about the effect of the victim's death on the family and the cost of life imprisonment if the death penalty were not carried out. The appellate court labeled both arguments as manifestly improper, so much so that they warranted the trial court's sua sponte intervention. Here, the complained of statements by Mr. Moench were minor, harmless, and/ or appropriate. There were no manifest improprieties and no basis for trial court intervention.

Claims 76, 79, and that portion of Claim 80 addressing alleged improper prosecution argument on penalty summation are denied on the merits. Berryman's request for an evidentiary hearing to develop Claim 79 is denied.

XXVIII. Berryman's Challenge to Improper Cross Examination Suggesting Berryman Subjected the Victim to Involuntary Oral Copulation (Claims 53 and 54).

In Claims 53 and 54, Berryman reiterates his complaint that Mr. Moench suggested during cross examination of Yolande Rumford that Ms. Hildreth had been subjected to forced oral copulation. Claim 53 is pleaded in terms of prosecutorial misconduct; Claim 54 is predicated on ineffective assistance of counsel. Berryman requests an evidentiary hearing with [*486] respect to Claim 54.

A. Statement of the Facts Relevant to the Involuntary Oral Copulation Suggestion.

During direct examination of Ms. Rumford by Mr. Peterson, she testified that Berryman was a nice person. Testing Ms. Rumford's favorable character opinion, Mr. Moench asked her if her opinion would change knowing that Berryman tricked a 17 year-old girl to go out to the countryside, beat her, raped her, and then tried to force her to orally copulate him, "give him a blow job." RT-28: 3817. See Parts III.B. (summary of penalty proceedings) and XXI.A. (facts relevant to Claims 18, 19, and 52), *supra*. Strickland expert Mr. Simrin opines that competent counsel would have objected immediately to Mr. Moench's baseless hypothetical.

B. Berryman's Contentions.

Berryman claims that a prosecution argument not based on evidence and that introduction of an aggravating factor without notice violate of his due process rights. He argues the oral copulation

question "was certainly meant to form part of the prosecution case, as an advance summary of the penalty phase argument." He characterizes the hypothetical as a serious allegation because it represented a detail of humiliation the victim endured before [*487] death, which, coming from the prosecutor carried with it a heavy presumption of truth.

C. Analysis.

As a preliminary matter, the Court agrees with Berryman's contentions that the oral copulation hypothetical constitutes misconduct on cross examination. The only support for the hypothetical was the presence of a pubic hair found on Ms. Hildreth's face that was said to have been consistent with a sample of Berryman's pubic hair. The presence of this hair, however, is far from sufficient to demonstrate or even suggest oral copulation. *See* discussion of Claims 7, 8, 9, 10, and 23, Part VII.C., *supra*. The conclusion on this preliminary matter requires analysis of the impact of the hypothetical.

To be entitled to relief, Berryman must demonstrate that the hypothetical so infected the trial process with unfairness as to make the resulting sentencing decision a denial of due process. *See DeChristoforo, 416 U.S. at 643; Darden, 477 U.S. at 181; Thompson, 74 F.3d at 1576*. While Mr. Moench's suggestion that Berryman forced Ms. Hildreth to orally copulate him is a serious allegation, by the time it was mentioned, the jury already had convicted Berryman of first degree murder, rape, and use of a knife [*488] to commit both offenses. The suggestion of forced oral copulation would be merely cumulative of Berryman's violent acts. The Court also notes that the misconduct was isolated. Contrary to Berryman's contentions, the oral copulation allegation was not advanced by Mr. Moench on summation. It was not mentioned again after examining Ms. Rumford. Under these circumstances, the Court declines to find a due process violation. *See Ortiz, 149 F.3d at 934* (no due process violation where improper prosecutorial remark is an isolated or one-time event).¹⁶⁰

160 The Warden argues that the California Supreme Court addressed the contentions in Claim 53 on direct appeal. The Court has searched the California opinion in vain for a decision on the oral copulation hypothetical.

Claims 53 and 54 are denied on the merits. Berryman's request for an evidentiary hearing with respect to Claim 54 is denied.

XXIX. Berryman's Challenges Arising from Defense Misstatement About the Burden of Proof (Claims 80 and 91).

Four instances of ineffective assistance of counsel with respect to Mr. Peterson are enumerated in Claim 91. First, according to Berryman's rendition of the facts, Mr. Peterson informed the jurors that [*489] Berryman bore the burden of proof on penalty issues. Second, he suggested to the jurors that Berryman might be a danger to the community in the future. Third, he informed the jurors that if Berryman received a life without parole sentence, the governor could unilaterally commute the sentence to life with parole. Finally, he insulted the jurors for neglecting their sworn duty to carefully deliberate on the evidence during guilt phase deliberations. Related Claim 80 asserts trial error because the trial court did not sua sponte admonish the jurors about Mr. Peterson's misstatements of law. Berryman requests an evidentiary hearing with respect to Claim 91.

A. Statement of the Facts Relevant to Defense Misstatements.

The misstatement concerning the burden of proof occurred during Mr. Peterson's opening penalty phase statement:

Mr. Moench will introduce items that the People are compelled to introduce by way of aggravation in order that you will at his request return a verdict of death. [P] *The defense has the burden of introducing to you evidence* which will assist you in making that decision, and that evidence, by way of notation, in order that you would return a verdict of life imprisonment, [*490] which is without the possibility of parole, that is, never to get out, and that is the law of this state and cannot be changed; *and the only way the person can be released is if the governor makes that decision*, and that will be Governor Deukmejian or his . . . successors, and the evidence that will be introduced for your consideration will be that with which you will ultimately make your decision.

RT-27: 3529-30 (emphasis added by Berryman).

The testimony of former San Quentin State prisoner, E.J. Corum is relevant to the issue of Berryman's potential future dangerousness and the governor's power to commute a sentence. After describing the deplorable conditions in prison for inmates with life sentences, Mr. Corum declared to the jurors that if Berryman were given a life without parole sentence, he would serve life without parole. RT-28: 3708, 3722. He then explained the excruciatingly painful death a human being suffers in the gas chamber. *Id.*: 3727-29. Mr. Peterson's summation, also broached the subjects of Berryman's potential dangerousness and the governor's power to commute a sentence:

Life without possibility of parole means that he will spend the rest of his life in prison, in [*491] a cell. He will probably not see the sun set, he will not see the moon rise. He may never see the sun rise. Justice will be served by a sentence of life without possibility of parole.

That sentence is so severe that it denies the person so sentenced of ever hoping to get out. But it's the sentence that Rodney Berryman must serve if you decide that he shall serve life without parole.

Now I want to turn to your second concern, that our community will be protected by insuring that Rodney Berryman does not move within the community to commit another crime.

That's what life without possibility of parole means, that he poses absolutely no threat to you or to your family or to the family of the victim, or to your neighbors, or to anyone in the community.

Now, please don't confuse life without possibility of parole with the lesser sentence of life with the possibility of parole. And there is such a sentence. We citizens of this state reenacted the death penalty, and unless we, the citizens of this state, remove it, I have no reason to believe that that law will change.

Only the governor of the State of California has the authority to commute a sentence. Governor George Deukmejian is not going to [*492] do that, and I cannot conceive of any governor of this great state in the future doing so.

RT-29: 4011-12 (emphasis added by Berryman).

Further in his summation, Mr. Peterson explained how laborious, for the prosecution, the defense and the trial court, the presentation of the case had been. *Id.*: 4022-23. Yet, he continued, the guilt phase deliberations for murder were very brief. The jurors were put in the care of the bailiff on October 18, 1988 at 12:35 p.m., taken to lunch, returned to deliberate, and at 1:45 requested a tape player. A tape player was provided by 2:15 and the jurors listened to the 45 minute tape (until 3:00 p.m.). By 3:15, the jury had reached a verdict on Count I. *Id.* 4023-24. Mr. Peterson stated, "giving you the greatest latitude, it took you 15 minutes to reach a verdict." He said it "was an insult" to trial judge, the prosecutor, and the defense. He said the general rule of thumb was that deliberations should take one hour for each court day. *Id.*: 4024.

Mr. Moench's rebuttal seized on the jury criticism:

[N]ever in my wildest dreams, never in my experience, never in -- there's no way I could have foreseen that he [Mr. Peterson] would suggest that the time of your [*493] deliberation was an insult to me or this honorable court. ...

To suggest to you that there is a rule of thumb that you deliberate a certain amount of time when the evidence is clear to you and would be clear to anyone, that you somehow have to sit and ponder for a period of time when you are satisfied that the evidence has met the burden that you are required to find in this particular case, is reprehensible.

I feel insulted if I am lectured to in such a manner. And I can only assume that you felt as well [sic], and I apologize on behalf of the attorneys.

Id.: 4026-27.

On sur-rebuttal, Mr. Peterson again raised the issue of the abbreviated guilt phase deliberations. He stood by his earlier criticism of the jurors for taking only 15 minutes to deliberate and reach a verdict. He stated that his job was to question the jury's verdict. He argued that it was not possible for the jury to examine 114 exhibits, plus listen to a 45 minute tape, and re-examine the jury instructions in that length of time. *Id.* 4033-34.

Jury instructions read by the trial judge also bear on this set of claims. With respect to the burden of proof, the court stated: "To return a judgment of death, each of you must be persuaded [*494] that the aggravating evidence is so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole." *Id.*: 4038.

With respect to all of Mr. Peterson's misstatements and jury criticism, Mr. Simrin avers, "I would never have done any of the three things ¹⁶¹ complained of in Mr. Peterson's closing argument. ¹⁶² . . . I think all of those individually were harmful and should not have been made. The accumulated impact of all three of those improper statements do irreparable harm to the defendant's position with the jury." Mr. Simrin concludes that no matter what mitigation evidence was presented, it was undercut by Mr. Peterson's tactical mistakes.

161 The implication that the governor might commute a life without parole sentence and Berryman's future dangerous are not treated separately in Mr. Simrin's declaration.

162 The burden of proof misstatement was made by Mr. Peterson in his opening penalty phase statement.

B. Berryman's Contentions.

In addition to citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, Berryman claims Mr. Peterson's misstatements create an *Eighth Amendment* violation for misinforming the jury [*495] as to its role in the sentencing process under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). He points out that under California law, there actually is no burden of proof at penalty proceedings (except as to unadjudicated criminal activity). *People v. Davenport*, 11 Cal. 4th 1171, 1224, 47 Cal. Rptr. 2d 800, 906 P.2d 1068 (1995) (abrogated on other grounds, *People v. Griffin*, 33 Cal. 4th 536, 15 Cal. Rptr. 3d 743, 93 P.3d 344 (2004)). His challenge to comments about his dangerousness and the governor's power to commute his sentence emphasizes that Mr. Peterson was the only person to have raised those concepts. Mr. Moench did not mention either factor in his presentation of evidence or argument and the trial court did not instruct on either concept. Further, although a jury instruction on the governor's authority to commute a life without parole sentence to life with parole, the so called "Briggs Instruction," has passed constitutional muster, see *California v. Ramos*, 463 U.S. 992, 1013, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983), subsequent Ninth Circuit authority dictates that the instruction must accurately express the law to be upheld. Citing, *Hamilton v. Vasquez*, 17 F.3d 1149, 1162 (9th Cir. 1994), [*496] *Gallego v. McDaniel*, 124 F.3d 1065, 1076 (9th Cir. 1997), *McLain v. Calderon*, 134 F.3d 1383, 1385 (9th Cir. 1998), and *Coleman v. Calderon*, 150 F.3d 1105, 1119 (9th Cir. 1998), Berryman argues that when the Briggs Instruction misleads the jury because of inaccuracies conveyed in the commutation process, the death sentence has been set aside. In his case, as in the cases cited, Mr. Peterson's statement to the jury was that the governor could unilaterally commute Berryman's sentence (even though he didn't think it was likely). The true facts are, however, that the process of commuting Berryman's sentence from life without parole to life with parole would require participation of the Board of Prison Terms and the Supreme Court because of his prior felony convictions. Accordingly, to say the governor had unilateral authority to commute his sentence was misleading.

Berryman's argument concerning the criticism of the jury is based on analogy to cases where the defense attorney spoke of his own client in derogatory terms, see *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) and a prosecutor made derogatory comments about defense counsel, see *People v. Hill*, 17 Cal. 4th 800, 821, 72 Cal. Rptr. 2d 656, 952 P.2d 673 (1998). [*497] He argues the extension of these cases occurs when the defense attorney makes derogatory comments to the jurors. He also points out that the jury criticism was not isolated. Mr. Peterson first raised the matter in his summation. It was raised again by Mr. Moench in his rebuttal argument, and then one more time in Mr. Peterson's sur-rebuttal.

Finally, with respect to the trial error claim, Berryman argues that the gravity of the alleged misstatements, mandated sua sponte intervention by the trial court to neutralize the damage to the jurors. See *Collier v. State*, 705 P. 2d at 1130-31.

C. Analysis.

With respect to the burden of proof claim, Mr. Peterson's statement that the defense had the burden of introducing evidence was not an announcement that the defense bore the burden of proof, but merely an acknowledgment that the defense presented evidence to show a basis for mitigation. The record flatly does not support Berryman's contention that Mr. Peterson misstated the law. Mr. Peterson's statement that the defense had the burden of introducing evidence was part of his formalistic style of addressing the jury. No reasonable juror would have understood that he was

allocating the risk of non-persuasion [*498] to the defense. Further, as pointed out by the Warden, the trial court's instruction to the jury that a judgment of death required a finding that aggravating evidence was so substantial in comparison with the mitigating circumstances that death rather than life without parole was warranted, completely negates any ambiguity in Mr. Peterson's early comments. The jury was not misinformed of its sentencing responsibility under *Caldwell*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231.

Complaints about addressing Berryman's dangerousness to the community and the governor's commutation authority also must fall. Berryman correctly notes that the Supreme Court upheld the Briggs Instruction about executive clemency, which as drafted, read:

You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

California v. Ramos, 463 U.S. at 996-97. The high Court characterized this instruction as "merely an [*499] accurate statement of a potential sentencing alternative," since a life without parole sentence is amenable to commutation to life with parole. *Id.* at 1009.

The four Ninth Circuit cases relied on by Berryman which distinguish the facts in *Ramos*, and resulted in vacating the death sentences there at issue, are inapposite.¹⁶³ While it is true that they are based on instructions which conveyed inaccuracies to the respective juries about the scope of the governor's commutation authority, in each case the challenged instructions were requested by the respective prosecutors for purposes of convincing the juries to vote for the death penalty. In *Hamilton*, 17 F.3d 1149, the modified Briggs Instruction requested by the prosecutor actually informed the jurors that Hamilton would be eligible for parole in fewer than 17 years if a verdict of life without parole was returned. This was a plain misstatement. *Id.* at 1161. The modified instruction further failed to take into account that because Hamilton was a twice-convicted felon, under California law, both the Board of Prison Terms and the California Supreme Court had to be involved before the governor could commute his sentence. Thus, the governor [*500] could not act unilaterally. *Id.* at 1162. The jury was thus invited to speculate that the only way to avoid Hamilton's likely release was to return a death verdict. *Id.* In *Gallego*, 124 F.3d 1065, over defense objections, the trial court instructed that if the jury sentenced Gallego to life with parole (under Nevada law), he would be eligible for parole in ten years and, separately, that the governor had authority to commute a death or life without parole sentence. *Id.* at 1074. In fact, under Nevada law, if sentenced to life with parole, Gallego could not be paroled until serving at least 20 years. Further, he could not receive commutation for a death sentence or life without parole sentence because he was currently under a sentence of death for a murder committed in California. The instruction about executive clemency therefore was impermissibly misleading. *Id.* at 1076. The death sentence in *McLain*, 134 F.3d 1383, similarly was vacated because McLain's conviction history and the modified Briggs Instruction given were "materially indistinguishable" from the situation in *Hamilton*, 17 F.3d 1149. *See*, 134 F.3d at 1385. Accordingly, the instructions read to McLain's jury were impermissibly [*501] misleading because the jury would "have believed that the governor, acting alone could commute McLain's sentence." *Id.* at 1386. The same result obtained in *Coleman*, 150 F.3d 1105. Citing *McLain*, 134 F.3d 1383, and *Hamilton*, 17 F.3d 1149, the court in *Coleman* found that the instruction read to the jury failed to take into account Coleman's felony conviction

record and thus was inaccurate in informing the jurors that the governor had unilateral authority to commute a life without parole sentence to life with parole. *150 F.3d at 1118-19*.¹⁶⁴

163 Moreover, one of the four opinions, *Coleman*, *150 F.3d 1105*, was reversed by *Calderon v. Coleman*, *525 U.S. 141, 147, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998)*. The high Court directed the Ninth Circuit to undertake a harmless error analysis of the faulty instruction on remand. *Id. at 147*. Two of the four opinions, *Hamilton*, *17 F.3d 1149*, and *McLain*, *134 F.3d 1383*, were abrogated, to the extent they found entitlement to relief without undertaking an harmless error analysis under *Brecht* required under *Calderon v. Coleman*, *525 U.S. 141, 119 S. Ct. 500, 142 L. Ed. 2d 521*.

164 On remand from the Supreme Court reversal, *Coleman*, *525 U.S. 141, 119 S. Ct. 500, 142 L. Ed. 2d 521*, [*502] the Ninth Circuit reinstated its earlier grant of the writ of habeas corpus, having found a constitutional error and that the error was not harmless under *Brecht*. *Coleman v. Calderon*, *210 F.3d 1047, 1051 (9th Cir. 2000)*.

In stark contrast, the gravamen of Mr. Peterson's evidentiary presentation of E.J. Corum's testimony about the endurance of a life without parole sentence as well as his argument about Berryman's dangerousness and the governor's commutation authority was that a sentence of life without parole would permanently remove any threat Berryman could pose to the community and that the chances of commutation of that sentence were non-existent. The very purpose of the evidence and argument to this effect was to convince Berryman's jurors that life without possibility of parole was a harsh sentence and that commutation was extremely remote. This is entirely distinguishable from the situations in the cases cited by Berryman. Besides giving inaccurate descriptions of the governor's commutation authority, the primary concern addressed in those cases was that disclosure of the possibility of commutation could diminish the jurors' sense of individual responsibility in deciding the [*503] appropriate penalty proscribed under *Caldwell*, *472 U.S. at 328-29*. There is no such danger here. Even taking into account the fact that Mr. Peterson failed to discuss Berryman's felony history and the extra steps necessary for commutation of a life without parole sentence, no reasonable juror would have been induced to vote in favor of the death penalty out of concern Berryman might otherwise be released. Had Mr. Peterson not made the remarks, the outcome of the proceedings would have been no different. *See Coleman v. Calderon*, *210 F.3d 1047, 1051 (9th Cir. 2000)* (holding that once commutation instruction is found infirm, court must undertake a harmless error analysis under *Brecht*). Also of significance, the cases upon which Berryman relies involve actual jury instructions, which carry with them the authority of the trial court. Here the executive clemency issue was raised only by Mr. Peterson. Mr. Moench did not capitalize on the concept and the trial court did not reinforce it. Finally, as the California Supreme Court observed, "The remarks appear to be a reasonable attempt to anticipate and allay a possible concern on the part of the jurors." *6 Cal. 4th at 1109*. There is no reason [*504] to question the California Supreme Court's decision in this regard. *28 U.S.C. § 2254(d)(1)*.

As for Mr. Peterson's criticism of the jury for the brevity of guilt phase deliberations, the Court does not find incompetent representation. The Court agrees with the Warden's characterization of Mr. Peterson's decision to criticize the jury as a reasonable defense tactic. Mr. Peterson's argument emphasizing the breadth of evidence presented during guilt proceedings and the need for careful consideration was the equivalent of a plea to find lingering doubt upon reevaluation of the evidence in deliberating the penalty. The Court "will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, *18 F.3d 662, 673 (9th Cir. 1994)* (quoting *Strickland*, *466 U.S. at 689*.) Rather, in assessing trial counsel's performance, the Court

applies "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and hence that "scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

Finally, the trial court was under no sua sponte duty to correct the alleged misstatements and [*505] criticisms of Mr. Peterson. Berryman's reliance on *Collier v. State* 705 P.2d at 1130-31, to the contrary is misplaced. That case involved manifestly improper prosecution argument, so much so that sua sponte intervention by the trial court was warranted. In contrast, Mr. Peterson's closing argument was reasonably delivered and based on informed strategic concerns. There was no error.

Claims 91 and the balance of Claim 80 are denied on the merits. Berryman's request for an evidentiary hearing respecting Claim 91 is denied.

XXX. Berryman's Challenges Arising From Evidence and Instructions Concerning his Prior Convictions (Claims 56, 60, 62, 88, 89, 90 and 93).

This group of claims pertains to the introduction of evidence concerning Berryman's two prior convictions and evidence of prior violent acts which did not result in convictions. Claim 56 asserts that the evidence of the circumstances underlying Berryman's marijuana transportation conviction were actually ruled inadmissible by the trial judge and were inadmissible because transportation of marijuana is a non-violent criminal act. Claim 60 alleges ineffective assistance of counsel for the failure of trial counsel to object to the testimony [*506] of Rev. Howard Fuller on grounds that his testimony did not establish a violent act within the meaning of the statute. In Claim 62, Berryman alleges ineffective assistance of counsel for his trial attorneys' failure to challenge the validity of both prior convictions. Claims 88, 89, and 90 allege that pinpoint instructions of Berryman's prior convictions unduly emphasized those aggravating factors in violation of his constitutional rights, under the theories of trial error (for giving the instructions), ineffective assistance of trial counsel (for failing to object to the instructions), and ineffective assistance of appellate counsel (for failure to raise trial error for giving the instructions on direct appeal), respectively. Repeating the allegations of Claim 89, Claim 93, in part, asserts Mr. Peterson should have more effectively argued against the allegedly erroneous pinpoint instructions.¹⁶⁵ Berryman seeks an evidentiary hearing with respect to Claims 56 and 60.

165 The balance of Claim 93 pertains to other jury instructions and is discussed in connection with Claims 82, 83, 84, 85, 86, 87, and 92, Part XXXI, *infra*.

A. [*507] Statement of the Facts Relevant to Berryman's Prior Convictions.

The facts surrounding the introduction of a stipulation regarding Berryman's prior felony convictions are fully recounted in the summary of the penalty phase proceedings, *see* Part III.B., *supra*, and the discussion of his claims challenging the adequacy of penalty evidence notice in Claims 13 and 14, *see* Part XXII.A.1., *supra*. The facts regarding Mr. Moench's elicitation of testimony from friends and family members about Berryman's marijuana sales activities is recounted in the discussion of Claims 18, 19, and 52, *see* Part XXI.A., *supra*.¹⁶⁶ The full account of the discussion about the contingency under which the underlying circumstances of the marijuana transportation conviction would be introduced also is relevant.

MR. MOENCH: . . . And I'm pointing out that he suffered that conviction, and I would not say anything further about it, unless they [the defense] try and present him [Berryman] as, one, either trying to make a choir boy out of him, or, two, try to downplay it [the marijuana transportation conviction] in some form of testimony.

THE COURT: All right.

MR. PETERSON: Your Honor, I think it appropriate for the record [*508] to state we understand and we anticipated that Mr. Moench would make that statement on the record, and that has been his conduct throughout this trial. Mr. Moench is a gentleman, Mr. Moench is a true professional, he's going to play by the rules, and everything has been above board. We want the record to be crystal clear that we have discussed this.

THE COURT: All right.

MR. PETERSON: Now, with respect to this making the defendant look like a choir, boy, that may occur, but the fact that that -- that the defense succeeds in portraying the defendant as a choir boy does not then give the prosecution license, because it's done in some other fashion, to then bring in the undercover officer in the narcotics matter.

MR. MOENCH: No.

MR. PETERSON: And that should be crystal clear on the record.

THE COURT: I don't think there's any question about that, Mr. Peterson.

What I understand Mr. Moench to say basically is that I'm not going to say anything more about this incident unless the defenses attempts to say well, you know, transportation of marijuana, what could that be. That could be simply driving down the street in your car with one joint in your glove compartment, something like that.

If that [*509] happens, Mr. Moench obviously would have the right, in my view, to come forward and say that really wasn't what it was folks.

MR. PETERSON: Yes, we understand that --

MR. MOENCH: And I'd approach the bench before I --

THE COURT: Obviously.

RT-27: 3499-3500.

166 The witnesses questioned about Berryman's marijuana sales activities include his younger brother Bryan, his sister, Ronnique, occasional girlfriend Melinda Pena, wife Carol Berryman, and friend Yolande Rumford. In his points and authorities for this group of claims, Berryman emphasizes only the cross examination of Ronald, Jr. and Yolande Rumford.

The facts relevant to the altercation between Berryman and his father-in-law, Rev. Fuller are recounted in the summary of the penalty phase proceedings, *see* Part III.B., *supra*. For the viewpoint of Carol Berryman, confirming the notion that her father suffered no more than two small black eyes, the substance of her declaration is summarized in connection with Claims 6, 63, 64, 65, and 70, *see* Part XXV. A.3.d.(12), *supra*

Prior to deliberations, the Court read two instructions, reproduced below in pertinent part, which Berryman now challenges.

Now evidence has been introduced for the purpose [*510] of showing that the defendant Rodney Berryman has been convicted of the crimes of transportation of marijuana and grand theft prior to the offense of murder in the first degree for which he has been found guilty in this case.

Before you may consider any of such alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was, in fact, convicted of such prior crimes.

RT-29: 3971-72; CT-4: 879.

Now evidence has been introduced for the purpose of showing that the defendant Rodney Berryman has committed the following criminal acts which did not result in a conviction: That he assaulted his father-in-law, Reverend Fuller on or about August, 4, 1988, and that he assaulted David Perez with a tire iron on or about July 19th, 1988. These offenses involved the express or implied use of force of violence or the threat of force or violence.

Before you may consider any such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did, in fact commit such acts. You may not consider any evidence of any other criminal acts not resulting in conviction as an aggravating [*511] circumstance.

RT-29: 3972; CT-4: 880.

Mr. Simrin ventures his opinion that Berryman's trial counsel were ineffective for not objecting to testimony elicited on cross examination about the facts leading to Berryman's marijuana transportation conviction. He further opines that trial counsel should have registered an objection to evidence of the altercation between Berryman and his father-in-law on the grounds that the altercation did not actually qualify for a violent act under Penal Code § 190.3(b) and because eliciting evidence from an ordained minister was prejudicial. Finally, Mr. Simrin remarks that no tactical reason for permitting Mr. Moench to delve into these subjects is apparent.

B. Berryman's Contentions.

Berryman's two prior felony convictions which were the subject of the stipulation were for three counts of transporting marijuana and grand theft. The stipulation was entered under Penal Code § 190.3(c), which directed the jury to consider the "presence or absence of any prior felony conviction" in deliberating on an appropriate penalty. He complains vehemently that evidence of the circumstances underlying the marijuana transportation conviction were inadmissible under the stipulation [*512] approved by the trial court. Separately, he argues that because the felony marijuana transportation is not a crime involving violence, a recitation of the facts underlying the conviction was prohibited under § 190.3(b), which explicitly delimits evidence of prior criminal acts to violent conduct involving the use of force or threat of using force. Citing *People v. Kaurish*, 52 Cal. 3d 648, 702, 276 Cal. Rptr. 788, 802 P.2d 278 (1990), he argues that mere evidence of bad conduct does not fit any statutory category and therefore is inadmissible. He also relies on a decision rendered by a district court in Arkansas for the proposition that evidence of prior non-violent convictions is prejudicial when considered by the jury in assessing penalty. *See Ford v.*

Lockhart, 861 F.Supp. 1447, 1469-70 (E.D. Ark. 1994). With respect to the validity of both convictions, Berryman stresses that there was no "personal waiver" of the right to trial on the validity of the priors, citing *Curl v. Superior Court*, 51 Cal. 3d 1292, 276 Cal. Rptr. 49, 801 P.2d 292 (1990). He maintains that trial counsel could have mounted a constitutional challenge to the validity of the prior convictions, citing *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997).

Berryman's [*513] contention regarding evidence of the altercation between himself and his father-in-law Rev. Fuller has two components. First, he argues that because the argument involved "mutual combat" it did not qualify for a prior violent act under § 190.3(b). Second he claims the evidence was independently prejudicial under Evidence Code § 352 because of Rev. Fuller's status as a Baptist minister. Since the altercation involved nothing more than a family quarrel, the introduction of evidence elicited from an ordained minister was more prejudicial than probative.

With respect to the pinpoint instructions that identified the crimes for which Berryman suffered prior felony convictions as well as the violent criminal acts which did not result in convictions, he claims the were unfairly highlighted for the jury, and thus skewed the deliberations in favor of the death penalty. He alleges trial error for reading the challenged instructions, relying on *Arave v. Creech*, 507 U.S. 463, 470, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993), ineffective assistance of trial counsel for not objecting to the pinpoint instructions, relying on *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996), and ineffective assistance [*514] of appellate counsel for not challenging the pinpoint instructions on direct appeal, even in the absence of an objection by trial counsel, relying on *California Penal Code* § 1259.

C. Analysis.

Contrary to Berryman's argument, *Ford v. Lockhart*, 861 F.Supp. 1447 is inapposite. Although the case involved introduction by the prosecution of prior non-violent convictions and the district court was unable to conclude that the jury's consideration of those convictions was non-prejudicial, the statutory scheme governing imposition of the death penalty in Arkansas specifically proscribed the introduction of such evidence. In California, evidence of prior felonies, including non-violent felonies, is a statutory factor under § 190.3(c) to be considered by the jury in determining the appropriate penalty. Berryman's reliance on *People v. Kaurish*, 52 Cal. 3d at 702 is equally misplaced. In that case, the evidence of prior criminal activity introduced by the prosecutor was that the defendant violated the terms of probation on a prior conviction and thereafter re-committed to Florida state prison. The court determined this evidence was erroneously introduced because it did not fit the statutory definition [*515] of either § 190.3(b) or § 190.3(c). *Id.* In the present case, the evidence introduced was the background for Berryman's prior felony marijuana transportation conviction under § 190.3(c). Although it was introduced in contravention to the terms of the stipulation described in the factual summary, the introduction was harmless as discussed in the analysis of Claims 7, 8, 9, 10, and 23, see Part VII.C., *supra*, and Claims 13 and 14, see Part XXIII.C., *supra*. This finding tracks the holding of the California Supreme Court in *Kaurish*, 52 Cal. 3d at 703. Comparable to the past parole violation in *Kaurish*, the fact that Berryman was arrested when he attempted to sell marijuana to undercover agents posing as high school students "could hardly have figured significantly in [the jury's] decision, given the circumstances of the crime." *Id.* Moreover, when the trial court read the instructions, the jurors were told only the consider the fact of the prior, stipulated to convictions for marijuana *transportation* (not sales) and grand theft.

As to whether trial counsel should have subjected the validity of the prior convictions to collateral attack, Berryman's reliance on *Curl v. Superior Court*, 51 Cal. 3d 1292, 276 Cal. Rptr. 49, 801 P.2d 292 [*516] for the proposition that he did not enter a "personal waiver" of the right to trial on the validity of the priors, also is misplaced. *Curl*, stands for the proposition that a defendant may challenge the constitutional validity of a prior-murder special circumstance by means of an evidentiary hearing, but that the defendant bears the burden of proof. *Id.* at 1296. Since no evidence about the validity of either prior conviction have been presented in this proceeding, the Court cannot agree with Berryman's contention that such a challenge should have been advanced at trial. His corollary assertion that under *Gretzler*, 112 F.3d 992, trial counsel *could have* mounted a constitutional challenge to the validity of the prior convictions is irrelevant.

The Court also must reject Berryman's argument that evidence of the altercation between himself and Rev. Fuller was inadmissible on either of the theories advanced. As previously stated in discussion of Claims 7, 8, 9, 10, and 23, *see* Part VII.C., *supra*, evidence of the altercation was entirely relevant as a prior violent act under § 190.3(b). As a result of Berryman's frustrated attempts to gain entrance into the Fuller house to speak to his recently [*517] estranged wife, he and Rev. Fuller engaged in a shoving match which ended when Berryman punched Rev. Fuller in the nose. It cannot be seriously disputed that striking someone in the face is an act of violence, whether or not there was mutual shoving. Nor is the fact that his father-in-law happened to be an ordained minister mandate that evidence of the altercation should have been excluded. The evidence was clearly probative of the shoving and hitting incident. Prejudice occasioned by the fact of Rev. Fuller's station in life did not outweigh the fact of the altercation. Moreover, the Court cannot ignore the fact that Rev. Fuller's status as an ordained minister was used to Berryman's advantage when evidence about his church-going activities was introduced by friends and family members.

Finally, the Court finds that the complained of pinpoint instructions with respect to both the prior felony convictions and the prior violent conduct did not improperly divert the jurors' discretion in deliberating on the appropriate penalty under *Arave v. Creech*, 507 U.S. at 470. To the contrary the instructions informed the jurors they had to be convinced the *convictions* (not the facts underlying the [*518] convictions) were suffered and the violent conduct committed was beyond a reasonable doubt. Distilled to its essence, Berryman's argument is that the reiteration of the prior felonies and prior violent acts which had been presented during the penalty proceedings necessarily skewed the deliberations in favor of the death penalty. The argument is unsupported.

Claims 56, 60, 62, 88, 89, 90, and that part of Claim 93 predicated on Claim 89, are denied on the merits. Berryman's request for an evidentiary hearing as to Claims 56 and 60 is denied.

XXXI. Berryman's Challenges Arising from Miscellaneous Instructional Errors During Penalty Proceedings. (Claims 81, 82, 83, 84, 85, 86, 87, 92, 93, and 94).

This group of claims challenges nine miscellaneous instructions alleged to have been erroneously refused and erroneously read to Berryman's jury prior to penalty deliberations. Claim 93 relates to seven of these instructions challenged in Claims 82, 83, 84, 85, 86, 87, and 92, alleging Mr. Peterson should have argued in favor of the refused instructions and against the erroneous instructions. Berryman does not seek an evidentiary hearing for these claims. For clarity, the challenges are treated [*519] by topic.

A. Double Counting of the Rape Conviction (Claim 81).

During Mr. Moench's penalty summation, he argued the jurors should consider the circumstances of the crime in assessing the penalty. Characterizing Berryman's attitude toward the killing of Ms. Hildreth, he stated: "Never one statement, never one comment of sorrow or concern, and about as cold blooded as you can get, going back and waking up her cousin so she can come out and reheat the lasagna in the microwave." RT-29: 3978-79. Moving on to the other factors, but then regressing, Mr. Moench continued:

The next factor, and so I would suggest to you all those factors around the killing and the rape are strong, exceedingly strong factors in aggravation.

The presence or absence of criminal activity by the defendant, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. Already touched upon the rape and the murder and the way it was done. And it wasn't just a passing thing.

Id.: 3980.

After both sides concluded their respective summation arguments, the trial court instructed the jury:

[Y]ou shall consider, take into account, and be guided by the applicable factors [*520] of aggravation and mitigating circumstances upon which you have been instructed. The weighing of the aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side, of an imaginary scale, or the arbitrary assignment of weight to any of them.

You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

Id.: 4037-38

Berryman argues that based on Mr. Moench's summation, the rape conviction likely was counted twice as an aggravating factor, first under the circumstances of the crime factor (a) instruction, and second under the prior acts of violence which did not result in a felony conviction factor (b) instruction. He maintains that because the circumstances of the crime factor (a) is undefined and vague, the fact the jury determined Berryman raped Ms. Hildreth, means that it applied the violent criminal act factor (factor (b)) in addition to considering the rape as a circumstance of the crime

The Warden candidly concedes that Mr. Moench's argument was confusing in conflating the circumstances of the crime with acts of prior violence. The Court agrees that the [*521] prosecution summation was confusing, if not erroneous. The risk of double counting the rape conviction, however, was defused by the trial court's instruction directing the jurors not to mechanically count the factors in aggravation and mitigation. The instruction clearly was not erroneous; it was proper.

Moreover, in *Tuilaepa v. California*, 512 U.S. 967, 976, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), the United States Supreme Court specifically has rejected a vagueness challenge to the

circumstances of the crime factor (factor (a)) under the California death penalty statute. Berryman's current assertion that the phrase "circumstances of the crime" is undefined and unclear is without merit.

B. Failure to Adequately Instruct that Pity and Sympathy Could Be Considered (Claims 82 and 93).

Directly after both sides rested, but prior to summation, the trial court delivered the bulk of the penalty phase instructions. Most of these were written instructions to which the jurors had access during their deliberations. One instruction was stated which did not have an accompanying written counterpart:

The instructions that I previously gave you in the guilt-innocence phase of the trial will be applicable [*522] to the extent that they're relevant to the issues that you will be deciding in this phase of the trial and to the extent that they are not inconsistent with the instructions that I'm giving you now. *The instructions that I'm giving you now, if there are any inconsistencies, will prevail.*

For example, you were previously instructed not to consider penalty in the guilt of innocence phase of the trial, and of course, that is your consideration in this phase. That instruction would be totally inapplicable.

You will also be instructed at this time that you can consider sympathy for the defendant in deciding this continuing issue, and that was, of course, precluded from the guilt or innocence phase of the trial. Those are [a] couple of examples.

RT-29: 3966-67.

In reading the catchall factor (k) instruction under § 190.3(k), the trial court directed the jury to consider,

any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. And any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

Now [*523] you must disregard any jury instruction given to you in the guilt or innocence phase of the trial which conflicts with this principle.

Id.: 3971.

During the pre-summation instruction conference, the defense had proffered Special Instruction "16" which among other things would have provided: "In this part of the trial you may consider pity, sympathy, or mercy for the defendant in deciding on the appropriate penalty for him." CT-4: 902. This instruction was similar to the concluding instruction that was given, that is, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." *See*, CT-4: 884; RT-29: 4037-38 (recited above in Part

XXXI.A., *supra*). Accordingly, Mr. Peterson invited the trial court to refuse Special Instruction "16." *Id.*: 3944. The trial court did so.

Berryman maintains that the absence of a written instruction regarding the fact that the jury could consider pity and sympathy in rendering a penalty verdict actually removed the pity factor from the sentencing process. He does not acknowledge that the written forms of the factor (k) instruction or the concluding instruction was given [*524] to the jury before deliberations commenced.

The California Supreme Court rendered an extensive analysis pertaining to this challenge on direct appeal. The court first noted the jury was directed not to consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during guilt proceedings, and further that when considering which penalty instructions to give, the trial judge rejected the defense proffer of a specific instruction which affirmatively told the jurors they could consider "pity, sympathy or mercy" in rendering their penalty verdict. *6 Cal. 4th at 1097*. In light of the instructions the trial court did give, including the initial instruction about conflicts between guilt and penalty instructions as well as the factor (k) instruction, the California Supreme Court rejected "the claim out of hand." *Id. 1098*. It held:

[a] reasonable juror would have understood and employed the instructions in question to allow him [or her] to consider and give effect to pity, sympathy, and mercy to the extent he [or she] deemed appropriate in this case -- and indeed required him [or her] to do so. There is no reasonable likelihood that the jury misconstrued [*525] or misapplied the instructions in violation of the *Eighth* or *Fourteenth Amendment* or any other legal provision or principle.

Id. Though Berryman's challenge on federal habeas alleges a violation of the *Fifth* and *Sixth Amendments* in addition to the *Eighth* and *Fourteenth Amendments*, the California Supreme Court opinion is dispositive under *28 U.S.C. § 2254(d)(1)*. Moreover, as the Warden points out, under *California v. Brown, 479 U.S. 538, 543, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)*, even when a penalty jury is instructed *not* to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," so long as the jury is also not precluded from considering valid mitigating evidence there is no constitutional infirmity. *Id. at 542-43*.

Separately, Berryman argues Mr. Peterson was incompetent for his failure to forcefully argue for giving Special Instruction "16" on pity and sympathy as mitigating factors. There being no error in the failure to give the instruction, there can be no error for counsel's failure to argue for the instruction more forcefully. In any event, the Court notes that during his summation, Mr. Peterson did raise the issue by emphasizing [*526] that life is sacred, that life without parole is a severe punishment, and that death by execution in the gas chamber would result in an excruciatingly painful death. He further implored the jurors not to be too harsh on a man who had sinned, unless they could be certain they also had not sinned. Even in the absence of Special Instruction "16," the jurors had the concept of sympathy, pity, and mercy before them in the instructions read.

C. Instructions Implying A Single Mitigating Factor Could Not Outweigh All Aggravating Factors (Claims 83 and 93).

Just before sending the jury out for deliberations, the trial court instructed:

In weighing the various circumstances, you simply determine, under the relevant evidence, which penalty is justified and appropriate, by considering the totality of the aggravating circumstances, with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole.

Id.: 4038.

Berryman challenges that part of the instruction which directed the jurors to consider "the totality [*527] of the aggravating circumstances with the totality of the mitigating circumstances." He claims a reasonable juror would find it "almost impossible to conclude from this instruction that a single mitigating factor would be enough to outweigh multiple aggravating factors."

The California Supreme Court specifically held that a reasonable juror would have understood this language to mean exactly the opposite of Berryman's construction.

Certainly, such a juror would not have interpreted or used its language referring to the "totality" of the aggravating and mitigating circumstances in a "death oriented" fashion to "relate[]" solely to the "quantity . . . of the factors "and not to their "quality," or to entail "'a mere mechanical counting of factors on each side of the imaginary scale ..." [] There is no reasonable likelihood that the jury misconstrued or misapplied the challenged instruction in violation of the *Eighth* or *Fourteenth Amendment to the United States Constitution* or any other legal provision or principle.

6 Cal. 4th at 1099 (citing *People v. Grant*, 45 Cal. 3d 829, 857, n. 5, 248 Cal. Rptr. 444, 755 P.2d 894 (1988) (emphasis in original). Given the instructions as a whole, this [*528] state court conclusion is not unreasonable and therefore unassailable on federal habeas for the *Eighth* and *Fourteenth Amendments* as well as the *Fifth* and *Sixth Amendments*. 28 U.S.C. § 2254(d)(1).

Separately, the Court finds no merit to the contention that the failure of Mr. Peterson to have argued against the "totality of aggravating and mitigating factors" instruction constitutes ineffective assistance of counsel. First, the instruction was not erroneous. Second, the concept that a single mitigating factor could be enough to outweigh multiple aggravating factors, was before the jury on the instruction that weighing the aggravating and mitigating factors did not mean to mechanically count the factors. *See*, CT-4: 884; RT-29: 4037-38 (recited above in Part XXXI.A., *supra*).

D. Refusal of Instruction that Aggravating Evidence Was Limited to the Statutory Factors (Claims 84 and 93).

The defense offered Special Instruction "1" to limit the jurors' consideration of aggravating evidence to statutory factors previously enumerated. It provided: "The only aggravating factors which you may consider are those listed in *CALJIC 8.84.1*. [recitation of the statutory penalty factors (a) through (k)], the [*529] instruction I have just read to you. No other facts of circumstances may be considered in aggravation or as a reason to support a verdict of death." CT-4: 887.

The trial court refused proposed Special Instruction "1" because the instruction in the introductory paragraph to the sentencing factors adequately informed them of their sentencing responsibilities. RT-29: 3935 (recounting the jury instruction conference).

As read, the introductory paragraph to the sentencing factors advised:

Now, in determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial or this case, except as you may hereafter be instructed. You shall consider, take into account, and be guided by the following factors *if applicable*.

Id.: 3970; *see also* CT-4: 876 (emphasis added).

The trial judge further found Special Instruction "1" confusing, since factor (k), in particular is always mitigating, and other of the factors also could be considered mitigating.

Okay. One problem that you might have by giving this instruction is that the item K under 8.84.1 says any other circumstance, which extends -- sorry, extenuates the gravity and so forth. [*530] I would not want the jury to feel that the specific list of one or rather A through J is what we're talking about as opposed to K, which [is] kind of a catch all for the defense. So I think we're better off not giving instruction number one. So I will refuse that instruction.

Id.: 3935-36.

On summation, Mr. Peterson clarified that other than the circumstances of the crime, there were only four incidents which qualified as aggravating factors under the instructions. Two were prior convictions under factor (c), namely transporting marijuana and grand theft. Two were prior violent acts under factor (b), namely the assault on David Perez and the altercation with Rev. Fuller.

And that brazen individual [David Perez] comes into this court and says to you I was assaulted, and it's a factor which you can use to kill this man [Berryman]. We have another one. We have the father-in-law, who comes into this court to respond that [he] pushed Rodney Berryman, Rodney Berryman struck and left, ran away. You're asked to accept that as such conduct that it warrants your sentencing this man to death.

Those are the aggravating circumstances, together with some convictions for which he served some time in [*531] Los Angeles. *That's the extent of the aggravation that your asked to use as your justification for the death penalty.*

Id.: 4021 (emphasis added).

Berryman's primary concern in raising the challenge to omitted Special Instruction "1" revolves around the argument made by Mr. Moench that Berryman's philandering was a "factor in aggravation and even more so than it would be in mitigation."

The California Supreme Court held that since the introductory paragraph to the enumeration of the sentencing factors instructed the jurors to consider the factors "if applicable," there was "no reasonable likelihood that the jury would have construed or applied the standard instruction otherwise," including that the jurors would have considered outside or additional aggravating evidence. *6 Cal. 4th at 1100*. In so holding, the court also took into account the misstatements of Mr. Moench regarding Berryman's philandering.

Although the proffered instruction was admittedly not improper, a constitutional violation does not necessarily occur because a proper instruction has been omitted or refused. The Court concurs with the reasoning of the California Supreme Court that the jurors would not have considered aggravating [*532] factors in addition to the statutory factors enumerated in the instructions. With respect to the Mr. Moench's misstatement that Berryman's philandering was an aggravating factor, the Court has addressed the harmlessness of this comment in the analysis of Claims 7, 8, 9, 10, and 23, *see Part VII.C., supra*, and Claims 13 and 14, *see Part XXIII.C., supra*. In summary, given the considerable defense evidence that Berryman's tendency to maintain multiple sexual relations was impelled by his childhood lack of maternal nurturing, it is implausible that the jury would have considered his philandering, particularly on the night Ms. Hildreth was killed, apart from the circumstances of the crime, which was entirely proper. Finally, as the Warden argues, Mr. Peterson's summation clarified for the jury that the only evidence, other than the circumstances of the crime, which the jury could consider in aggravation of Berryman's sentence were the two prior convictions (transporting marijuana and grand theft), and the two prior acts of violence (assault on David Perez and altercation with Rev. Fuller). To the extent Mr. Moench's argument was confusing or misleading by suggesting additional aggravating [*533] factors, Mr. Peterson's argument clarified the matter. It is for this reason plus, the reading of the introductory paragraph to the sentencing factors instruction, the Court separately rejects Berryman's argument that Mr. Peterson provided constitutionally incompetent representation for not arguing more strenuously for Special Instruction "1." The jurors' attention to relevant aggravating factors was suitably circumscribed.

E. Double Counting of the Murder Conviction (Claims 85 and 93).

The factor (c) instruction concerning evidence of prior felony convictions, discussed in connection with Claims 88, 89, and 90, *see Part XXX., supra*, is relevant to the allegation of double counting of the murder conviction. The trial court instructed on factor (c) as follows:

Now evidence has been introduced for the purpose of showing that the defendant Rodney Berryman has been convicted of the crimes of transportation of marijuana and grand theft prior to the offense of murder in the first degree for which he has been found guilty in this case.

Before you may consider any of such alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the [*534] defendant was, in fact, convicted of such prior crimes.

You may not consider any evidence of any other criminal conviction other than the conviction in this case as an aggravating circumstance.

The trial court had earlier refused Special Instruction "4" that would have stated, "The fact that defendant Rodney Berryman has been found guilty of first degree murder is not itself an aggravating factor." CT-4: 890; RT-29: 3937. Mr. Moench objected to the proposed instruction because the circumstances of the crime factor (factor (a)) clearly permitted the jury to consider the facts surrounding Berryman's convictions of murder and rape and the proffered instruction conflicted with that concept. *Id.* The trial court stated, "you have to be careful in saying [the jurors] cannot consider any other criminal conviction. You have to be careful to point out they can consider the facts and circumstances of the conviction in this case." *Id.*

The double counting of the murder conviction contention under factors (a) and (c) stems from the combination of trial court's refusal to read the proffered Special Instruction "4" with the manner in which the factor (c) instruction [*535] was modified by the trial court. Berryman claims that without the instruction that the murder conviction was not an aggravating factor, the modified factor (c) instruction, as read (particularly the italicized portion), carried the implication that the conviction in the present case could be considered in aggravation under factor (c) in addition to a circumstance of the crime under factor (a).

There was no error in the trial court refusal of the instruction stating that the murder conviction was not to be considered an aggravating circumstance. This notion conflicted with the factor (a) instruction that the circumstances of the crime *were* to be considered. The California Supreme Court's holding on this issue, *6 Cal. 4th at 1102*, is unassailable. *28 U.S.C. § 2254(d)(1)*. The modification of the factor (c) instruction, however, is more troubling. The California Supreme Court refers to the modified language as "somewhat awkward phrasing" but holds that "a reasonable juror would probably have construed and applied [this language] so as not to bar consideration of the 'circumstances of the crime of which the defendant was convicted in the present proceedings. . .'" *6 Cal. 4th at 1102, n. 25*.

Based [*536] on the Court's review of the record, including the instructions and argument of counsel, the conjecture by the California Supreme Court about what a reasonable juror probably would have thought is too speculative to accord it deference under *§ 2254(d)*. To tell the jurors they are not to consider any other criminal conviction other than the conviction in the case seems to say they are not to consider the prior convictions for transporting marijuana or grand theft. But this construction is in direct conflict with the language of the instruction immediately preceding the challenged sentence. Frankly, the instruction is internally inconsistent and hopelessly confusing. The Court cannot tell what the trial court or the trial attorneys intended, and most certainly cannot guess how the jurors would have understood it.

Nonetheless, the confusing and internally inconsistent instruction did not have a impact on the jury's death verdict under *Brecht, 507 U.S. at 637*. In the first place, the Court cannot see how the defective instruction would or could have resulted in the double counting of the murder conviction. As phrased the instruction directs the jurors not to consider Berryman's prior convictions [*537] for transporting marijuana and grand theft, not that the murder conviction is a circumstance of the crime and a prior conviction to be double counted. Second, any risk was defused by the trial court's instruction directing the jurors not to mechanically count the factors in aggravation and mitigation. The jurors were directed to consider the evidence qualitatively, not quantitatively. The deliberative process was suitably channeled.

The Court similarly rejects the related ineffective assistance of counsel claim that Mr. Peterson failed to argue forcefully in favor of refused Special Instruction "4." As noted above (and held by

the California Supreme Court), Berryman's guilt of first degree murder in this case *was* an aggravating factor to be considered in conjunction with the circumstances of the crime. The proffered instruction was confusing and thus properly refused. Further entreaties by Mr. Peterson would and should have been unavailing.

F. Refusal of Instruction That Less Than Extreme Mental or Emotional Disturbance Was Mitigating (Claims 86 and 93).

The defense offered Special Instruction "7" on the subject of Berryman's mental state as a factor in mitigation: "You may consider any [*538] evidence tending to show that defendant Rodney Berryman was under the influence of a mental or emotional disturbance at the time of the offense, regardless of the degree of that disturbance." CT-4: 893. This instruction is similar, but not as exacting as the factor (d) and factor (h) instructions, which were read to the jury. Because of these similarities, Mr. Moench objected to Special Instruction "7" and the trial court agreed. Mr. Peterson did not protest. RT-29: 3938-39. The factor (d) and factor (h) instructions read to the jurors instructed them to consider:

whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance

. . . [and]

whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

Id.: 3970, 3971.

On summation, Mr. Moench then argued no evidence supported the notion that Berryman suffered a psychotic break. *Id.*: 3992.

Berryman argues that because the prosecutor essentially argued that a mental or emotional disturbance [*539] less than extreme, that is, a psychotic break, was required to apply factors (d) and/or (h), he steered the jurors away from considering as mitigating the mental and emotional disturbances Berryman did suffer. In support of his argument, Berryman primarily relies on the California Supreme Court opinion in *People v. Wright*, 52 Cal. 3d 367, 276 Cal. Rptr. 731, 802 P.2d 221 (1990). That case found that similar prosecutorial argument "carried some potential for confusing the jury into believing that the defendant's evidence of emotional disturbance was not a 'legitimate' mitigating circumstance -- even under factor (k) -- unless it was extreme." *Id.* at 444. However, the court further noted that defense counsel's astute closing argument negated any possibility of prejudice." *Id.* In contrast, Berryman maintains that Mr. Peterson did nothing to negate the impact of Mr. Moench's closing argument in the present case.

Addressing this challenge, the California Supreme Court first found that the essence of Special Instruction "7" was covered by the factor (d), factor (h), and factor (k) instructions. 6 Cal. 4th at 1103. Separately, with respect to Mr. Moench's argument, the court found that it [*540] "simply [was] not the case" that the prosecution argument urged that "less than extreme 'mental or emotional disturbance' could not be considered as a circumstance in mitigation." *Id.* at 1103, n. 27. The Court finds this conclusion reasonable under § 2254(d)(1). As explained in the analysis of

Claims 76, 79, and 80, the essence of Mr. Moench's argument was that Berryman was not impaired at the time he killed Ms. Hildreth. *See* Part XXVII.C., *supra*. Berryman's reliance on *Wright*, accordingly, is overemphasized. This is not a case where mental or emotional impairments were dispositive. The evidence of such impairments at trial was not overwhelming, and, in any event unsubstantiated by empirical tests (which have since been conducted). Rather, this is a case where the defendant suffered from a personality disorder and exercised poor impulse control, his concluding, the Court is mindful of the conflicting evidence adduced in post-conviction proceedings about whether Berryman suffers from an alcohol induced seizure disorder. *See* discussion of Claims 15 and 16, Part XII.C.3., *supra*. Post-conviction evidence, however, is irrelevant to this claim, which challenges instructions given and arguments [*541] made based on evidence adduced during the trial.

Separately, the Court rejects Berryman's claim that Mr. Peterson was ineffective for not arguing in favor of the refused instruction. Contrary to Berryman's argument, Mr. Peterson did raise the issue on summation. As the summary of the penalty proceedings show, he argued Berryman's alcohol consumption and resulting intoxication should be considered by the jury in assessing penalty, in accordance with the factor (d) instruction. Under factor (h), he argued Berryman's lack of capacity to appreciate the criminality of his conduct should not be discounted merely because he had developed a tolerance to alcohol and did not appear intoxicated. He also highlighted the experts' conclusions by arguing that no contradictory evidence had been advanced by the prosecution. There was no prejudice for refusing Special Instruction "7" or for any perceived omission by Mr. Peterson.

G. Refusal of Instruction Permitting Jurors to Consider Lingering Doubt (Claims 87 and 93).

Special Instruction "11", offered by the defense would have informed the jury: "It is appropriate for you to consider in mitigation any 'lingering doubts' you may have concerning the defendant's [*542] guilt. Lingering or residual doubt is defined as that state of mind between 'beyond a reasonable doubt' and 'beyond all possible doubt.'" CT-4: 897. During the instruction conference, Mr. Moench urged refusal of Special Instruction "11" because the concept of lingering doubt would be covered by the circumstances of the crime factor (a). Mr. Moench also mentioned that the jurors would be told they could consider sympathy (presumably under factor (k)). RT-29: 3940-41. Mr. Peterson argued that without an instruction on lingering doubt any argument he would make on the subject would fall on deaf ears. He urged the trial court to read the instruction in order to give his proposed argument on the subject of credibility. *Id.*: 3941. The trial court took the matter under advisement to read a 1964 California Supreme Court case cited in support of Special Instruction "II," *People v. Terry*, 61 Cal. 2d 137, 37 Cal. Rptr. 605, 390 P.2d 381 (1964).¹⁶⁷ *Terry* involves a penalty phase retrial where the defendant attempted to introduce evidence of his innocence claiming he was not present at the scene of the robberies and murder of which he previously had been convicted. *Id.* at 140. Specifically, during [*543] voir dire examination, the trial court refused to permit the defendant to ask of prospective jurors about "possible reaction to his claim of innocence and misle[ading] the jury into believing that they could not take into consideration that claim." *Id.* at 147. The defendant was sentenced to death following his penalty retrial and on direct appeal the trial court was found to have committed error so the penalty again was reversed. *Id.* After reading this case, the trial judge in Berryman's case found it did not compel giving the lingering doubt instruction, and in any event was inapplicable because it involved voir dire examination. RT-29: 3964. The trial judge further agreed with Mr. Moench that the concept of lingering doubt could be considered in conjunction with the circumstances of the crime factor (a). *Id.* The California

Supreme Court agreed on direct appeal, holding that together the factor (a) and factor (k) instructions were broad enough to embrace lingering doubt. *6 Cal. 4th at 1104*.

167 *Terry* recently was overruled on other grounds, *People v. Laino*, 32 *Cal. 4th* 878, 893, 11 *Cal. Rptr. 3d* 723, 87 *P.3d* 27 (2004).

Berryman argues the California courts were both wrong because the [*544] concept of lingering doubt is not included in an examination of the circumstances of the crime. Nor is it embraced by the extenuating circumstances factor (k). He relies on the plurality and concurring opinions in *Franklin v. Lynaugh*, 487 *U.S.* 164, 108 *S. Ct.* 2320, 101 *L. Ed. 2d* 155 (1988). Neither opinion, however, offers support for his argument. The plurality opinion by Justice White states:

Our edict that, in a capital case, "the sentencer . . . [may] not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense," [citation to *Eddings v. Oklahoma*, 455 *U.S.* 104, 110, 102 *S. Ct.* 869, 71 *L. Ed. 2d* 1 (1982)], in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Id. at 174.

The concurring opinion written by Justice O'Connor states unequivocally, "the *Eighth Amendment* [*545] does not require" consideration of lingering doubt.. The entirety other statement¹⁶⁸ is:

Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is *not* a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. [Citations.] "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty."

Id. at 188 (emphasis added).

168 Berryman excerpted only a part of this quote and attributed a conclusion Justice O'Connor did not make.

Even in the face of authority that a lingering doubt instruction is not constitutionally mandated, Berryman argues that the differences between the Texas statute at issue in *Franklin* and the California statute mean that defense counsel in California were *precluded* from arguing the concept of lingering doubt in the absence of an instruction. This argument [*546] is unfounded and clearly contrary to the holding of the California Supreme Court in his case. In reviewing the trial court

refusal of Special Instruction "11," the court noted that the circumstances of the crime and extenuating circumstances under the factor (a) and factor (k) instructions would have permitted counsel's proposed argument on lingering doubt. *6 Cal. 4th at 1104*. Mr. Peterson was not precluded from arguing lingering doubt, and he did adequately present this subject. As set forth in the summary of the penalty phase proceedings. Part III.B., *supra*, Mr. Peterson spent a great deal of time addressing the concept of lingering doubt during his summation. He argued that Ms. Hildreth may have precipitated the assault by arguing with Berryman about whether she would or would not tell her cousin Crystal about their "relationship." Mr. Peterson also suggested that Ms. Hildreth may have been the one to have brought the murder weapon (knife) to the crime scene. Berryman's challenge is without merit. Accordingly, his separate argument that Mr. Peterson provided constitutionally incompetent representation for failing to argue for the lingering doubt instruction also fails.

H. Failure [*547] to Request Deletion of Inapplicable Sentencing Factors (Claims 92 and 93).

The sentencing factors described to Berryman's jury included all the factors enumerated in Penal Code § 190.3. They include:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct.
- (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant [*548] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as result of mental disease or defect or the affects of intoxication.
- (i) The age of the defendant at the time of the crime.
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as basis for a sentence less than death, whether or not related to the offense for which he is on trial.

CT-4: 876-77; RT-29: 3970-71.

Berryman points out that no defense objection to the reading of all the statutory factors was registered even though several of the factors had no bearing on the evidence before the jury. Those irrelevant factors include factor (e), the victim-participant factor, (f), the moral justification factor, (g), the extreme duress factor, and (j), the accomplice factor. He further notes that in the prosecution summation, Mr. Moench pointed out the inapplicability of factors [*549] (e), (f), (g) and (j). RT-29: 3990-93.

He argues that despite California Supreme Court precedent that it is not necessary to edit out inapplicable penalty factors from the instructions, citing *People v. Wright*, 52 Cal. 3d at 446 and *People v. Marshall*, 50 Cal. 3d 907, 931-33, 269 Cal. Rptr. 269, 790 P.2d 676 (1990), "freighting" the instructions "with useless baggage" has helped contribute to death verdicts and the practice *should* be unconstitutional. No other authority is cited.

These claims must fall based on lack of legal support, both for alleged trial error in giving the challenged instruction and ineffective assistance of counsel for Mr. Peterson's failure to object to reading all the statutory factors. In any event, the Court notes that the introductory paragraph read to the jurors before the actual sentencing factors specified they were only to take into account and be guided by the following factors, *if applicable*. See RT-29: 3970; *see also* CT-4: 876 (emphasis added). Part XXXI.D., *supra*.

I. Failure to Request an Instruction that Defendant's Failure to Testify Should Not Be Treated as an Aggravating Factor (Claim 94).

Berryman complains that his trial attorneys erred during penalty [*550] proceedings for not requesting the standard jury instruction that Berryman's failure to testify could not be considered against him in assessing the penalty. After the close of evidence during guilt proceedings, the trial court instructed: "Now, it is the constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." RT-25: 3300; CT-4: 768. In addition, as previously noted in Part XXXI.B., *supra*, the trial court instructed the jurors: "The instructions that I previously gave you in the guilt-innocence phase of the trial will be applicable to the extent that they're relevant to the issues that you will be deciding in this phase of the trial and to the extent that they are not inconsistent with the instructions that I'm giving you now." RT-29: 3966.

Berryman perceives a claim because the instruction about his decision not to testify was not repeated while other instructions given in the guilt phase were repeated in the penalty phase, including those about the credibility of witnesses [*551] and the evaluation of expert testimony. No authority is cited for the proposition that all relevant guilt phase instructions must be repeated in penalty phase proceedings. The claim is without merit. Moreover, as the Warden argues, Mr. Peterson may well have made a tactical decision not focus on the fact that Berryman did not attempt to explain his conduct.

Claims 81, 82, 83, 84, 85, 86, 87, 92, 94, and the remaining portion of Claim 93, predicated on Claims 82, 83, 84, 85, 86, 87, and 92, are denied on the merits.

XXXII. Berryman's Assertion of Ineffective Assistance of Counsel for Miscellaneous Shortcomings (Claims 58, 61, 66, 67, 68, and 72).

In these miscellaneous challenges to the performance of his trial attorneys, Berryman complains of their failure to object to Mr. Moench's references to Charles Manson and Sirhan Sirhan during cross examination of Dr. Pierce in Claim 58, their failure to object to mention of Los Angeles street gang the "Cryps" by David Perez during direct examination in Claim 61, their failure to prepare their witnesses for their testimony in Claims 66 and 68, the elicitation from Ronald, Jr. that Berryman would have to stab other inmates and staff if sentenced [*552] to prison in Claim 67, and their failure to interview and call Detective Mike Lage to the stand to discuss his observation of bibles in Berryman's pick up truck in Claim 72. He requests an evidentiary hearing with respect to Claims 61, 66, 68, and 72.

A. Statement of the Facts Relevant to Miscellaneous Attorney Short Comings.

As set forth in Part III.B., *supra*, during the cross examination of Dr. Pierce, Mr. Moench referred to a previously unidentified expert, Dr. Pollack who apparently discussed various types of mental conditions in ascending and descending levels of seriousness. RT-28:3886. To give further recognition to Dr. Pollack, Mr. Moench referred to him as the "head of the Institute for Forensic Psychiatry at the University of Southern California, the one who did the Manson cases and Sirhan Sirhan cases . . ." in his follow-up question to Dr. Pierce. *Id.* Mr. Peterson objected to some portion of this question, but the objection was not fully articulated. Rather, the trial judge interrupted and informed Mr. Moench the court was not interested in the order of ascension or descension of mental impairment seriousness, but whether Berryman suffered from neurosis. *Id.* There was no [*553] further reference to Charles Manson, Sirhan Sirhan, or Dr. Pollack.

The mention of "L.A. Cryps" by witness David Perez was related as part of a narrative response to Mr. Moench's general question as to whether Berryman said anything to Perez while striking him with the tire iron. RT-27: 3536. *See* previous rendition of this testimony. Part III.B., and in connection with Claims 7, 8, 9, 10, and 23, Part VII.A., *supra*. Relevant to this incident is the opinion of *Strickland* expert Mr. Simrin that since the "L.A. Cryps" statement was included in police reports of David Perez, and the police reports were made available to defense counsel prior to trial, they should have known Perez was prepared to give this testimony. Mr. Simrin believes defense counsel should have made a motion in limine to exclude the reference to a notorious street gang. If not a motion in limine, they should have interposed an objection when Mr. Moench asked if Berryman said anything to Perez during the attack. And if not an objection, then, at the least, they should have presented a motion to strike and request for an instruction for the jury to disregard the statement. Mr. Soria does not recall there being a reference [*554] to the "L.A. Cryps" during Mr. Perez's penalty phase testimony, and does not know why an objection would not have been interposed. He agrees, however, that a reference to gangs or Berryman's association with gangs should not have been allowed at the penalty phase proceedings.

A further mention of L.A. Cryps was made when Mr. Moench was cross examining former San Quentin inmate E. J. Corum. After explaining that status among prisoners is based on seniority, Mr. Moench asked, "If a hit is going to be made, Aryan Brotherhood, Blood, Cryp, BGF, Black Gorilla Family, any of the other groups, they usually pick a lifer to do the hit because there's nothing you can do to a lifer; right?" Mr. Corum disagreed with Mr. Moench's assessment, testifying that, rather than senior prisoners committing murders in prison, "[t]he game goes down on the youngsters that are very immature, lacking experience." *Id.*

Lack of witness preparation is presented in declarations of Mr. Soria together with witnesses Carol Berryman, Maxine Coleman, and Yolande Rumford. Regarding the presentation of mitigating evidence in general, Mr. Soria avers he does not recall the details of the testimony of the defense witnesses [*555] and that Mr. Peterson had the primary responsibility for penalty phase investigation and presentation of evidence. He opines that a complete investigation should be conducted and that an attorney should, if possible, interview witnesses in person.

Except for Berryman's wife, Carol, and one of his maternal cousins, Maxine Coleman, none of the twenty-four witnesses providing declarations, *see* Part XXV.A.3.d., *supra*, were contacted by any member of Berryman's state trial defense team in connection with developing mitigation facts. The record reflects that Mr. Peterson succeeded in having each testifying witness, except for Ms. Berryman and Ms. Coleman, affirm that he or she had not spoken to any member of the defense team before testifying. Those who testified aver that they were unprepared for their testimony and had no idea what questions would be asked of them. For instance, as a result of not being contacted about and prepared for her testimony, Yolande Rumford avers that she gave incorrect information about when she first met Berryman (testifying she met him in 1984 or 1985, rather than 1982 or 1983), because she didn't have an opportunity to consider the question before giving a response. [*556] Another example occurred when Mr. Peterson was examining Tamara Pearson, with whom Berryman lived after leaving his mother's house. Mr. Peterson learned, apparently for the first time, that Berryman's relationship with Ms. Pearson was sexual:

Q. [Mr. Peterson] Would you say that over the years that your relationship with him has been close?

A. [Tamara Pearson] Yeah, I think so.

Q. Intimate?

A. Intimate in are you saying physical sense? As well?

Q. If you wish.

A. Both ways.

RT-28:3767.

Statements made by Ronald, Jr. that prison inmates must and do use deadly force to protect themselves in prison is part of the record. Mr. Peterson instructed Ronald, Jr. to "[t]ell the Ladies and Gentlemen of the jury what the general prison population attitude is towards people who have been convicted of rape." RT-27: 3675. Ronald, Jr. responded:

It's dangerous, in other words, you to up there and the find out your case, which everybody knows what your case is, once you get there, what you've been convicted for.

And they go up there and they threaten you, they'll try and rape you, they're going to beat you up, not just by one and two, but maybe three, four, five and six people at a time.

And the guards, and the [*557] guards won't have nothing to say about it, they don't write nothing up in there, they don't write anything, and they will get you, *and if*

you don't cut a couple people up trying to save you 're a[--], then you won't make it, you won't make it, it's just that rough, it's that aggressive.

Id. (emphasis added).

Evidence regarding the two bibles observed in Berryman's pick up truck, but never recovered by the defense team is presented in the declarations of his present appointed counsel, Charles M. Bonneau and Jessie Morris, Jr. First, Mr. Morris, in his declaration appended to Berryman second state habeas petition, indicates that Detective Mike Lage actually seized two bibles from Berryman's truck. Mr. Morris opines that this information would have supported the notion that Berryman took his Christian affiliation seriously. Mr. Morris also recounts the substance of reports obtained by Berryman's current habeas investigator from his former father-in-law, Rev. Fuller, despite the altercation in which he and Berryman participated, Berryman was a good person. Similar accounts were obtained from a former coach, family members, and, from Berryman's juvenile court experience, a former attorney [*558] and his probation officer. Many of these interviews have been presented in declarations discussed in connection with Claims 6, 63, 64, 65, 69, and 70, *see* Part XXV.A.3.d.(2). With respect to church related activities, in particular, declarations of friend, Johnetta Reed, (former) wife Carol Berryman, (former) sister-in-law Margie Garcia, and childhood pastor Fred Sykes are presented. Berryman's mild manner and good character are similarly presented in Part XXV.A.3.d.(12) through the declaration testimony of Johnetta Reed, Carol Berryman, elderly friend, Odessa Pearson, (peer) friend Kandy Rumford, (peer) friend Yolande Rumford, grandmother Francis Bonty, aunt Sonia Counts, aunt Linda Mitchell, aunt Carolyn Bonty, aunt Terrie Bonty, aunt Karen Bonty, aunt Sharon Bonty, youth football coach Ruben Hill, great-aunt Ann Bonty, aunt Donna McBride and uncle Perry McBride.¹⁶⁹

¹⁶⁹ Absent from this list were an actual declarations from his former father-in-law, Rev. Fuller, and probation officer(s).

Next, in Mr. Bonneau's declaration appended to the evidentiary hearing motion, he describes an inventory of items observed, photographed, and/or seized from Berryman's pick up truck following his [*559] arrest. Among the items inventoried were two bibles, a New Testament in the driver's door pocket and a New Testament under the driver's seat. The inventory lists technical officer (Opal L.) Chappell and Detective (Mike) Lage as the authorities present during the inventory. Mr. Bonneau states his belief that the inventory he describes was among the discovery the prosecution turned over to Berryman's trial counsel. Either Ms. Chappell or Detective Lage would have been able to testify that two copies of the New Testament were found in Berryman's pick up truck after his arrest.

This evidence is significant because Mr. Peterson tried to elicit testimony about the existence of the bibles from Detective Lage's partner, Detective Culley. As noted in the summary of the penalty proceedings, Part III.B., *supra*, Detective Culley noted that one or two bibles were observed in the truck cab, but he did not know what had become of them. RT-28: 3829.

B. Berryman's Contentions.

Berryman suggests that Mr. Moench's mention of Charles Manson and Sirhan Sirhan during his cross examination of Dr. Pierce compared Berryman to historic villains, strongly discouraged in *People v. Bloom*, 48 Cal. 3d 1194, 1213, 259 Cal. Rptr. 669, 774 P.2d 698 (1989). [*560] He

argues Mr. Peterson should have objected to the question as argumentative. Regarding the allusions to his gang membership, Berryman contends that irrelevant evidence of gang membership is forbidden by United States Supreme Court precedent, citing *Dawson v. Delaware*, 503 U.S. 159, 160, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (holding that "the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of the Aryan Brotherhood, where the evidence ha[d] no relevance to the issues being decided in the proceeding").

Berryman's complaint about trial counsel's lack of witness preparation highlights two pitfalls. First, as a result, usable mitigating evidence was not developed. The declarations referred to in the discussion of Claims 6, 63, 64, 65, 69, and 70, *see* Part XXV., *supra*, are illustrative. Second, when Mr. Peterson posed questions to unprepared witnesses, he didn't know what the answers would be. For instance, he was unprepared for the responses of Ronald, Jr., notably about Berryman's marijuana sales activities, Ronald's expressed opinion Berryman was a "Casanova," and the notion that Berryman would [*561] have to "cut a couple people" if imprisoned for life, and that Berryman had a sexual relationship with yet another witness (Tamara Pearson). The defense strategy was to demonstrate that the witnesses were not coached. But, Berryman alleges, it was not a sound strategy because harmful testimony was unwittingly elicited and significant positive information was overlooked. Regarding overlooked positive information, Berryman highlights the fact that two bibles were actually seized from Berryman's pick up truck. Citing to *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995), Berryman argues that lack of witness preparation is a consideration in evaluating ineffective assistance of counsel claims.

C. Analysis.

None of Berryman's miscellaneous challenges to his attorneys' representation during penalty proceedings entitles him to relief. First, his suggestion about being compared to Charles Manson and/or Sirhan Sirhan is unfounded. Although he is correct about the law, that is, the California Supreme Court strongly discourages comparisons of defendants to historic villains, *see Bloom*, 48 Cal. 3d at 1213, no such comparison was made in his case. Rather, Mr. Moench was describing an expert [*562] to Dr. Pierce as the psychiatrist who worked on the Manson and Sirhan cases. From the context of the transcript, this reference was to give the expert (Dr. Pollack) credibility. The reference to Manson and Sirhan had nothing to do with Berryman. Besides, and also contrary to Berryman's argument, Mr. Peterson did object to the question, and there were no more references to these two notorious individuals. Next, the gang reference elicited by Mr. Moench, while inappropriate was not so significant to have had an impact on the jury's verdict.¹⁷⁰ For the very reason gang reference was inappropriate, that is, its irrelevance to the crime, the Court finds it was not prejudicial. Nor was gang reference mentioned during summation or otherwise emphasized. Unlike the situation in *Dawson*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309, on which Berryman relies, gang affiliation (even the suggestion of it) was not a significant prosecution anchor for arguing in favor of the death penalty.

170 The Court rejects the Warden's argument that Mr. Perez's reference to L.A. Cryps on Mr. Moench's direct examination was totally unanticipated in light of the police report reflecting the same information. [*563] The Court also rejects the Warden's contention that Mr. Moench's reference to various gangs, including the Cryps, during his cross examination of E.J. Corum was relevant or based on foundation or appropriate under any of the statutory

penalty factors. In fact, under prevailing authority cited by Berryman, it was clearly inappropriate because it had no relevance to Ms. Hildreth's killing. *Dawson*, 503 U.S. at 165.

With respect to the defense team failure to prepare witnesses for testimony, the Ninth Circuit recently has held that an "attorney's failure to prepare for and challenge the testimony of a critical witness may be so unreasonable as to violate both prongs of the *Strickland* test. *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002). There can be no question but that competent counsel would retain investigators to develop mitigating evidence from friends and family members and would personally interview at least the more important witnesses prior to their penalty phase testimony. The Court finds Berryman's defense attorneys did not measure up to this standard and proceeds on the assumption that their penalty phase representation in the particular was substandard. Accordingly, the [*564] resolution of these miscellaneous ineffective counsel claims turns on the prejudice of *Strickland*. Under that standard, Berryman must establish "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 confidence in the outcome" of the trial. 466 U.S. at 694. This he cannot do, singularly or cumulatively.

The Court already has assessed the impact of additional proffered mitigation evidence developed during post-conviction proceedings and concluded it would not have made a difference. See discussion of Claims 6, 63, 64, 65, 69, and 70, Part XXV.C, *supra*. The impact of the unexpected testimony also is too minimal to have altered the verdict. *Brecht*, 507 U.S. at 637. Evidence elicited from Ronald, Jr. about the marijuana sales activities and his "Casanova" life-style already have been reviewed. See discussion of Claims 7, 8, 9, 10, and 23 in Part VII.C, *supra*, Claims Band 14 in Part XXIII.C., *supra*, and Claims 56, 60, 62, 88, 89, and 90 in Part XXX.C, *supra*. The additional evidence elicited from Ronald, Jr., that is that Berryman would have [*565] to "cut a couple of people" if incarcerated under a life without parole term emphasized the punitive and dangerous conditions of prison. The purpose of testimony about the hardships inmates suffer in prison from both Ronald, Jr. and E.J. Corum was to impress upon the jurors the severity of a life without parole sentence, in case the jurors might have felt such a sentence would be too lenient. While it was imprudent to say that Berryman might have to resort to violence in self-defense, the comment did not portray Berryman as a predator who necessarily would commit violence in prison. It was not testimony about his future dangerousness. Nor was the revelation during examination of Tamara Pearson that she had been sexually involved with Berryman harmful. By the end of the case, the jury was informed that Berryman had a need for female attention to fulfill a longing for maternal nurturing. Evidence of the relationship with Ms. Pearson was merely cumulative of the descriptions of his many girlfriends by other witnesses.

Finally, the failure to interview and call Detective Lage to the witness stand about his seizure of the bibles from Berryman's pick up truck was harmless. Detective Culley [*566] actually did testify about the bibles, although he didn't actually seize them and didn't know what became of them. Thus, the fact that the bibles had been in Berryman's truck and that he may have resorted to biblical passages from time to time was before the jury. That fact complemented the testimony of family members and friends that Berryman's Christian faith was genuine.

Claims 58, 61, 66, 67, 68, 72 are denied on the merits. Berryman's request for an evidentiary hearing with respect to Claims 61, 66, 68, and 72 is denied.

XXXIII. Berryman's Challenges Arising from the Automatic Modification Hearing (Claims 95 and 96).

Berryman claims his attorneys were poor advocates to save his life at the sentence modification hearing and that the trial court committed two substantial errors. These claims are record-based and no further evidentiary development is requested.

A. Statement of the Facts Relevant to the Automatic Modification Hearing Challenges.

After the jury returned its verdict that Berryman should suffer the death penalty and was discharged, the trial judge set November 28, 1988 as the date for hearing on Berryman's motion for modification of sentence and sentencing. RT-29: 4059. His [*567] attorneys filed a motion pursuant to Penal Code § 190.4(e) for that purpose. CT-4: 918-27. No grounds specific to Berryman's case were stated in the motion. Rather counsel simply recited statutory authority for the motion and urged that the trial court exercise independent judgment as to whether the imposition of death was appropriate. The accompanying declaration of Mr. Soria stated: "Counsel for defendant will address the court during oral argument, and will be prepared to respond to the court's specific questions regarding the points and authorities filed herewith, and to the court's specific questions regarding the evidence." *Id.*: 927.

During oral argument, Mr. Peterson stressed that the case did not involve a dramatic brutal slaying,¹⁷¹ or multiple killings, or torture, or use of an explosive, and therefore the death penalty was not warranted. JdgmRT: 5-6. Mr. Moench responded that Berryman dragged 17-year old Florence Hildreth from his truck, so that she didn't even have a chance to put her feet down. He stabbed her with a knife, which broke in three pieces, stood on her face while she bled to death, cleaned himself up, changed a tire on his truck, and returned to the dark residence [*568] to ask his girlfriend, Ms. Hildreth's cousin, to prepare a snack for him. Mr. Moench argued the killing was cruel, callous, and heartless. *Id.*: 7-8. In discussing the trial judge's duties under § 190.4(e), Mr. Moench explained the judge is to determine "whether the jury's findings and verdicts of the aggravating circumstances outweigh[ing] the mitigating circumstances, are contrary to law, or the evidence presented." He characterized this process as there being "a presumption ... in favor of the jury's findings" which could be set aside only if those findings were found by the judge to be "contrary to law." *Id.*: 9. Mr. Moench then asked the trial court to consider the circumstances of the crime evidence, previously considered by the jury under § 190.3(a). *Id.*

171 He did note that the shoe tread impression on Ms. Hildreth's face and the duration of the pressure that caused that impression was argued by Mr. Moench to be brutal.

The trial court recited its duty of independent review under § 190.4(e):

[T]he court recognizes its duty in making a ruling on the motion to independently determine whether the jury's findings and verdicts on that issue, that is, that the aggravating circumstances, [*569] as specified in Penal Code *section 190.3* outweigh the mitigating circumstances, whether those findings are contrary to law or the evidence that was presented.

Id.: 11. Referring to the sentencing factors in § 190.3 (a) through (k), the court noted that factor (e) (providing that the victim was a participant in the homicidal conduct), factor (f) (providing that the defendant reasonably believed he had a moral justification for his conduct), factor (g) (providing

that the defendant was acting under duress), and factor (j) (providing that the defendant was an accomplice) were irrelevant, since no evidence was presented on these subjects. *Id.*: 11-12.

The trial court found factor (i), regarding Berryman's age, was neutral. Although Berryman was young, 21 years old at the time of the crime, he was not that young. He had been out of school for several years, was married, and had a child. Under factor (c), the court considered the prior felonies of grand theft and transportation of marijuana, noting they were nonviolent, but still indicative of "disregard for being a law-abiding citizen." This was a moderate consideration. *Id.*: 12. Next, the court considered factor (d), whether Berryman was under [*570] the influence of extreme mental or emotional disturbance at the time of the crime. In this process, the court reviewed the testimony of Drs. Pierce and Benson about Berryman's "alcohol induced disorder" and the possible organic mental syndrome. The court recited Dr. Pierce's axis two diagnosis of a personality disorder with dependent narcissistic and depressive features. *See* Part III.B. The court concluded that the observed condition of Berryman's mental and emotional state did not meet the factor (d) criteria, but rather indicated Berryman was "a self-oriented young man, that needs the attention of young women, and he becomes depressed and possibly angry if he doesn't get his way in that respect." *Id.*: 13.

Moving to factor (h), whether Berryman was impaired in his capacity to appreciate the criminality of his action or conform his conduct to law because of mental disease, defect, or intoxication, the court again reviewed the evidence adduced during the proceedings. The court concluded there was no evidence of the level of intoxication amounting to an impairment of capacity to appreciate the criminality of his act or to reduce his ability to conform his conduct to the law. *Id.*: 14.

Regarding [*571] factor (b) (prior acts of violence which did not result in a conviction), the court considered both Berryman's assault on his father-in-law and on David Perez. With respect to the former, the court felt it was minor, a family matter, carried out without weapons, and provoked to some extent by the father-in-law interfering with Berryman's marriage. With respect to the latter, the court found that striking someone with a tire iron demonstrated a "total disregard ... of human life."¹⁷²

¹⁷² The trial court also noted, erroneously, but as argued by the prosecutor, that Mr. Perez was struck in the back of the head by Berryman while he (Mr. Perez) was being held by another of the attackers. *Id.* This Court has carefully re-read the transcript and finds that Mr. Perez did not testify he was being held while Berryman struck him. *See* Part III.B., *supra*, and note 27, *supra*.

Finally, the trial court reviewed factor (a), the circumstances of the crime. Finding this factor "an extremely substantial factor in aggravation," the court stated:

The court is satisfied, in reviewing that evidence, that this was a particularly vicious and brutal and senseless killing of a 17 year old girl, who apparently refused [*572] to give into the amorous advances of Mr. Berryman. He thereafter forced himself on her, and stabbed her in the neck, and apparently stood over her with his foot on her face until she bled to death.

Then not long after that, he return[ed] home for a little lasagne.

This is an extremely substantial factor in aggravation, and in the court's view, this factor in aggravation, in and of itself, would outweigh all of the mitigating circumstances that the court has referred to.

There were no other mitigating circumstances in the court's opinion under subsection [(k)] of 190.3.

Under those circumstances, the court having considered all of the factors under Penal Code *section 190.3*, and having independently determined that the circumstances in aggravation outweigh the circumstances in mitigation, and that the verdict of the jury recommending a sentence of death is in accordance with law and the evidence presented, the motion of the defendant under Penal Code *section 190.4, subsection (e)*... is denied.

Id.: 15-16.

After this determination, the making of a correction to the probation report,¹⁷³ and the denial of the defense motion for a new trial, Berryman addressed the court prior to sentencing. He [*573] stated that he had given himself to the Lord and asked the court for mercy. He stated he felt he could be of some help in the prison, helping other prison inmates turn their lives around, because of his religious beliefs. If he could not be with his family, he wanted, at least to be of some service. He implored the trial court to let the Lord decide when he should die. *Id.*: 17-22. As noted in the summary of post-verdict sentencing proceedings. Part III.C., *supra*, Berryman expressed sorrow for the victim and her family, but did not take responsibility for the crime. He also complained about his lawyers. *Id.*: 18-19. He emphasized that except for the assault on David Perez, he had no history of violence. *Id.*: 20. He appealed to the trial court's sympathy for his then two-year old son and the trauma he would suffer because his father had to be executed. *Id.*: 21. He also pleaded for the suffering of his other family members. *Id.*: 22.

173 The probation report indicated that Ms. Hildreth suffered multiple stab wounds to the neck. Mr. Moench clarified there was only a single stab wound, and the report was so corrected. JdgmtRT: 16.

The court then referred to the (corrected) probation report [*574] before rendering a sentence. The trial judge specifically mentioned the uniform determinate sentencing act, as set forth in the report, as well as to statutory mitigating circumstances under Penal Code §§ 1203.065 and 1203. *Id.*: 23.

B. Berryman's Contentions.

Berryman's complaint about his defense attorneys is that they made no more than a perfunctory argument at the sentence modification hearing. He refers to his own impassioned plea to the trial judge for mercy by way of comparison. He then recounts what arguments could have been raised, including residual doubt that the victim had been raped, the fact that one of the jurors (David Armendariz) was related to the victim's family, the overreaching misconduct of the prosecutor in suggesting Berryman subjected Ms. Hildreth to forced oral copulation, violating the terms of the stipulation about his prior marijuana transportation conviction, and erroneously reciting that Berryman's own expert had referred to him as "amoral."

Seizing on Mr. Moench's statement that there is a presumption in favor of the jury's findings, Berryman argues that the trial court adopted this formulation for review and did nothing more than determine whether the evidence [*575] supported the verdict. This was error, Berryman argues, because in fact the trial court was to have exercised independent judgment to assess the suitability of the death penalty. Second, Berryman argues the trial court erroneously relied on the probation report and specifically on two aggravating factors listed in that report that Berryman's prior convictions are numerous and that he was on probation when he committed the present offenses. He claims the fall out of asserted errors for this reliance is great: Berryman was not given notice of these factors; evidence of these factors was not introduced at trial; and under California law, presentence reports are not to be considered on a motion to modify the penalty under § 190.4(e), citing *People v. Kipp*, 18 Cal. 4th 349, 383, 75 Cal. Rptr. 2d 716, 956 P.2d 1169 (1998).

C. Analysis.

In spite of the perfunctory argument at the sentence modification hearing, Berryman has not described any argument trial counsel could have made that would have altered the result of the trial court's ruling. The rape conviction was fully substantiated.¹⁷⁴ The relationship between David Armendariz and Ms. Hildreth's family (specifically Crystal Armendariz) [*576] was appropriately addressed by the trial court. Mr. Armendariz was determined to be impartial, and properly so. Nor were any of the instances of alleged prosecutorial misconduct significant enough, singularly or cumulatively, to have impelled the trial judge to rule differently. As the record demonstrates, the most compelling evidence in the case to the trial judge was the circumstances of the crime factor. Any actual or perceived shortcomings of trial counsel would not have altered his ruling denying modification of the sentence.¹⁷⁵

174 Even with the additional evidence proffered in these post-conviction proceedings, it remains so.

175 The Court also has no doubt that if the trial judge had not perceived David Perez was being held at the time Berryman struck him with a tire iron, he (the trial judge) would have reached the same conclusion. The trial judge made very clear that the circumstances of the crime factor, standing alone was so substantial that it outweighed all mitigating evidence.

With respect to the trial error assertions, they are unsupported by the record. Contrary to Berryman's contentions, the trial court did not evaluate Berryman's sentence modification motion by entertaining [*577] a presumption that the jury's sentencing verdict was correct. The record clearly demonstrates that the trial judge examined each of the sentencing factors under § 190.3 and assessed each such factor in connection with the evidence adduced at trial. This is the correct procedure, as explained by the California Supreme Court:

In ruling on a verdict-modification application, the trial judge is required to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. And he must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves. [] The trial judge's function, it must be emphasized, is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine

whether, in the judge's independent judgment, *the weight of the evidence supports the jury verdict*. [] Further, in deciding the [*578] question, the trial judge must specify reasons sufficient to assure thoughtful and effective appellate review.

6 Cal. 4th at 1105-06 (citations, ellipses, and quotation marks omitted) (emphasis in original). Applying this procedure, the California Supreme found that the trial court correctly and appropriately executed its duty under the statute. *Id.* at 1106-07.

Also contrary to Berryman's contentions, the trial court's reference to the probation report did not inform the ruling on the sentence modification motion. As the record reflects, the trial court did not mention the probation report until after it had ruled on the sentence modification motion. It must be emphasized again that the trial court found the circumstances of the crime factor compelling and sufficient in and of itself justify the death penalty. The trial court also found there were no mitigating factors. Moreover, even if the trial court had considered the probation report before ruling on the sentence modification motion, vacating the sentence is not warranted. Under California law, in the event a trial court does read or consider a presentence probation report in advance of ruling on a sentence modification motion, [*579] the reviewing court is to "examine the record to determine whether the [trial] court may have been improperly influenced by material in the report. [] If the [trial] court does not mention any material in the report when giving its reasons for denying the modification motion, [] there was no improper influence." *Kipp*, 18 Cal. 4th at 383 (citations omitted). There was no mention of the probation report factors during the trial court's ruling on the sentence modification motion in Berryman's case. There was no error; no prejudice.

Claims 95 and 96 are denied on the merits.

XXXIV. Berryman's Assertion the Death Penalty Charged Against Him Was Racially Motivated (Claim 11).

In Claim 11 Berryman asserts that the death penalty is imposed disproportionately on African-American males in California and Kern County. He argues his race was the reason he was capitally charged in this case. No evidentiary hearing is requested.

A. Berryman's Presentation of the Claim.

Berryman claims his relatively minimal record of prior violence, the uncertainty of evidence of rape, and evidence suggesting lack of necessary mental states were all factors against capitally charging him, but that his race was the determining [*580] consideration. He offers no statistical support about how frequently African-American males in California and Kern County were capitally charged during the relevant time period and no evidence of discriminatory purpose or racial animus at the Kern County District Attorney's Office. The only law Berryman cites are general references to *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) and *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992), with no analysis or point pages.

B. Analysis.

In *McCleskey*, the defendant, Warren McClesky, challenged the Georgia death penalty statute on the grounds it violated the *Equal Protection Clause of the Fourteenth Amendment* because race "infected the administration" of the statute. 481 U.S. at 291. He challenged every actor in the Georgia capital sentencing process, "from the prosecutor who sought the death penalty and the jury

that imposed the sentence, to the State itself that enacted the capital punishment statute." *Id. at 292*. The high Court found McClesky could not prevail under the *Equal Protection Clause* due to a failure of proof. McClesky was required to "prove that the decisionmakers in *his* [*581] case acted with discriminatory purpose." *Id.* (emphasis in original). Yet, he offered no evidence "specific to his "own case" to "support an inference that racial considerations played a part in his sentence." *Id. at 292-93*. Instead, he relied solely on the Baldus study, a statistical comparison of 2,000 murder cases in Georgia filed in the 1970's. While the high Court has accepted statistical evidence as proof of discriminatory intent in venire-selection and Title VII contexts, statistics are not sufficient to establish the discretionary judgments necessary to impose the death penalty. *Id. at 293-97*. The Ninth Circuit decision in *Carriger*, 971 F.2d 329, reiterates the principle that to prove discrimination, the defendant must establish that the decisionmakers in *his* case acted with discriminatory purpose. *Id. at 334*.

Berryman has not attempted to satisfy these requirements. Nor does the record support the contentions. Claim 11 is denied on the merits.

XXXV. Berryman's Challenges to the California Death Penalty Statute (Claims 97, 98, and 100).

Berryman advances three primary challenges to the death penalty statute. In Claim 97, he maintains the statute unconstitutionally fails to require [*582] specific findings on the aggravating factors relied on by the jury at sentence selection and that the California death penalty statute is constitutionally infirm for its failure to include inter-case proportionality. In Claim 98 and 100, he charges the statute fails to narrow the set of first degree murderers who are death eligible both in terms of a straight constitutional challenge and ineffective assistance of trial counsel for failure to advance the constitutional challenge.

A. Berryman's Presentation of the Claims.

With respect to the lack of specific jury findings on aggravating factors and lack of inter-case proportionality review, Berryman points out mitigation theories that could have been presented during penalty proceedings. He notes he had an exaggerated need for affection due to his fractured family background and, as a consequence, *may have* had an exaggerated reaction to romantic rejection. He also reiterates that he suffered from an impaired mental capacity and resultant limited ability to deal with the threat posed to his living situation by disclosure of his multiple sexual liaisons. Finally, he points out that he had a genuine ability to express concern and affection [*583] in situations unrelated to sexual encounters.

His lack of sufficient narrowing claim is predicated on two foundations. First, specific to his own case, he argues that the statute fails to narrow the class of death eligible defendants by reason of the frequency of felony rape allegations and the relative likelihood that a killing may be associated with rape. In a general sense, he also argues that aside from the rape murder situation, virtually any murder could carry the lying in wait special circumstance. He relies on *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), and claims his trial attorneys should have raised the issue before the trial court.

B. Analysis.

In summary fashion, the California Supreme Court held that Berryman's facial challenge to the 1978 death penalty law had been previously rejected in other California Supreme Court decisions

and that the court declined to revisit prior holdings. *6 Cal. 4th at 1109*. In light of this lack of analysis, *see Delgado, 223 F. 3d at 981-82*, this Court is constrained to examine federal law construing the same issues of narrowing, written findings and inter-case proportionality.

United States Supreme Court jurisprudence [*584] requires that death penalty schemes distinguish between "the few cases in which it [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia, 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)* (White, J., concurring). This is accomplished by channeling the jury's discretion using objective standards capable of appellate review, *Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)*, by findings of specifically defined "aggravating circumstances." In California, the narrowing "aggravating circumstances" are referred to as "special circumstances." *See Penal Code § 190.2(a)*.

The narrowing function of a death penalty statute can be satisfied by one of two methods. The statute may narrow the definition of a capital offense so that death eligibility occurs at the guilt phase. *Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)* (discussing Louisiana and Texas death penalty statutes which operate in this manner). Like the Louisiana and Texas statutes at issue in *Lowenfield*, California law places the narrowing function in the guilt phase proceedings by the jurors' unanimous finding of at least one statutory [*585] special circumstance beyond a reasonable doubt. *People v. Bacigalupo, 6 Cal. 4th 457, 468, 24 Cal. Rptr. 2d 808, 862 P.2d 808 (1993)*. Other states define capital offenses more broadly and "provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield, 484 U.S. 246* (referring to the Georgia death penalty statute at issue in *Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235*), *see also Bacigalupo, 6 Cal. 4th at 468* (discussing the same statutory process in Arizona, Florida, and Georgia).

In *Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995)*, the court held that the 1977 California death penalty statute, which is the predecessor to the 1978 statute under which Berryman was convicted, offered "constitutionally-sufficient guidance to jurors to prevent arbitrary and capricious application of the death penalty." *52 F.3d at 1484* (citing *Pulley v. Harris, 465 U.S. 37, 51-54, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)*). As relevant to Berryman's claims, here, the court further held that the statute did not suffer from the failure to require written findings. *Id. at 1484-85*. Berryman fails to suggest any meaningful distinction between the 1977 [*586] statute referred to in the *Williams* and *Harris* cases and the 1978 statute under which he was sentenced.¹⁷⁶ Apart from these holdings, two recent Ninth Circuit cases separately have addressed the topic of narrowing of the 1978 statute. In *Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2002)*, the court denied a certificate of appealability as to whether the 1978 California death penalty law adequately narrows the class of persons eligible for the death penalty. The court held the 1978 statute does narrow the class of persons eligible for the death penalty at both the guilt and penalty phases. *Id. at 924*. The same year the Ninth Circuit again addressed this issue in *Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002)*, holding:

[W]e reject Karis' argument that the scheme does not adequately narrow the class of persons eligible for the death penalty. The [1978] California statute satisfies the narrowing requirement set forth in *Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235* [] (1983). The special circumstances in California apply to a subclass of defendants convicted of murder and are not unconstitutionally vague. *See id. at 927*. The selection requirement is also satisfied [*587] by an individualized determination on the basis of the character of the individual and the circumstances of the crime. *See*

id. California has identified a subclass of defendants deserving of death and by doing so, it has "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Arave v. Creech*, 507 U.S. 463, 476, 113 S. Ct. 1534, 123 L. Ed. 2d 188 [] (1993).

Id. at 1141, n. 11. There being no constitutional violation regarding the absence of written findings or the narrowing function of the 1978 California death penalty statute, trial counsel could not have been and were not ineffective for failure to advance the challenge.

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Under the 1977 statute, like the 1978 statute, a person convicted of first-degree murder [wa]s sentenced to life imprisonment unless one or more "special circumstances" [we]re found, in which case the punishment [wa]s either death or life imprisonment without parole. [Citation omitted.] Special circumstances [we]re alleged in the charging papers and tried with the issue of guilt at the initial phase of the trial. At the close of evidence, the jury decide[d] guilt or innocence and determine[d] whether the special circumstances [*588] alleged [we]re present. Each special circumstance [had to] be proved beyond a reasonable doubt. [Citation omitted.] If the jury f[ound] the defendant guilty of first-degree murder and f[ound] at least one special circumstance, the trial proceed[ed] to a second phase to determine the appropriate penalty.

Pulley v. Harris, 465 U.S. 37, 51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

Also with respect to the 1977 death penalty statute, the high Court specifically held in *Harris v. Pulley*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 that inter-case proportionality review is not required, even though other states had adopted this procedure. *Id.* at 44-45. This holding is reiterated in *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005) with respect to the 1978 death penalty statute,¹⁷⁷ where the court observed, "neither the *Eighth amendment* nor due process requires comparative proportionality review in imposing the death penalty." *Id.* at 1018.

177 The crimes at issue in *Allen* were committed in September of 1980, well after the 1978 statute became effective. *See Allen*, 395 F.3d at 988.

The 1978 California death penalty law has not infringed on Berryman's constitutional rights for its alleged failure [*589] to narrow the class of death eligible defendants, for not requiring written findings with respect to aggravating factors at sentencing, or for failure to require inter-case proportionality. Berryman's asserted exaggerated need for female affection, the possibility that he experienced an exaggerated reaction to Ms. Hildreth's rejection of his romantic advances, and his inferior cognitive abilities add nothing to his challenges. In the first place the statute under which he was convicted provided ample opportunity to develop evidence of these mental states. Second, and wholly dispositive, none of these mental states is particularly mitigating given the circumstances of the crime. Claims 97, 98, and 100 are denied on the merits.

XXXVI. Berryman's Assertion He Was Denied Meaningful Review on Direct Appeal and State Habeas (Claims 99 and 101).

Claim 99 alleges two separate constitutional violations, one for denial of meaningful appellate review and one for denial of meaningful post-conviction review. Claim 101 also alleges lack of meaningful state post-conviction review. No further evidentiary development is requested for these claims.

A. Berryman's Presentation of the Claims.

The asserted [*590] lack of meaningful appellate review stems from Berryman's contention that the California Supreme Court failed to address two claims briefed in his opening appellate brief. He points out that the challenges in these two claims replicate Claims 13 and 54, herein. Claim 13 alleges lack of adequate pre-trial notice of penalty aggravating evidence because of introduction of the circumstances underlying his marijuana transportation conviction and his numerous extra-marital affairs. Claim 54 asserts ineffective assistance of trial counsel for failure to object to the hypothetical question posed to Yolande Rumford suggesting Berryman had subjected Ms. Hildreth to forced oral copulation.

Berryman also claims that lack of investigative funding and denial of an evidentiary hearing on state habeas resulted in inadequate state post-conviction review. In particular, Berryman requested funding to obtain laboratory testing "which was omitted at the state trial court level." He contends this denial of evidentiary development significantly hampered his ability to present the issues raised in Claims 6, 7, 10, 18, 29, 65, and 69, herein. Claim 6 alleges ineffective assistance of counsel for failure to [*591] retain and supervise competent investigators. Claim 7 and 10 allege constitutional violations on account of Mr. Moench's prosecution of the case when he was an elected judge. Claim 18 alleges a denial of counsel on account of Mr. Soria's alleged somnolence during trial. Claim 29 alleges ineffective assistance of counsel for the failure Messrs. Soria and Peterson to retain a forensic pathologist on the credibility of the rape charge and the prosecution contention that Berryman stood on Ms. Hildreth's face for three to five minutes. Claim 65 alleges ineffective assistance of counsel for failure to develop mitigation evidence through the testimony of Berryman's mother and sister, particularly with respect to childhood turbulence and sexual molestation. Claim 69 alleges ineffective assistance of counsel for failure to develop mitigation evidence through the testimony of numerous other witnesses.

His final challenge to his state post-conviction is that the Kern County Superior Court dismissed his state habeas petition, when it was in the best position to have considered the petition on the merits, and therefore should have addressed the merits.

B. Analysis.

With respect to the alleged failure [*592] of adequate review on direct appeal, Berryman's assertion must fail for lack of prejudice. Even if there was an omission of the California court on direct review,¹⁷⁸ the issues raised in the omitted claims do not entitle Berryman to relief and do not warrant further evidentiary development. Claim 13, herein, is addressed in Part XXIII., *supra*. Claim 54, herein, is addressed in Part XXVIII., *supra*.

¹⁷⁸ The Court is by no means convinced that merely because a claim was not written about in the direct appeal opinion the California high court failed to consider it. The direct appeal opinion provides in a concluding footnote about cumulative error, *inter alia*: "Whether or not

expressly discussed, we have considered and rejected all of the assignments of error presented in all of defendant's briefs." *6 Cal. 4th 1110-11, n. 33* (quotation marks, citation, and internal ellipses omitted).

Berryman's complaints about the adequacy of state review on post-conviction proceedings both respect to the failure of the Superior Court to review his claims and the lack of funding and evidentiary development at the Supreme Court level are simply not cognizable because, in essence, he is complaining about [*593] the manner in which state law is applied. *See Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1993)*. Moreover an alleged error in state post-conviction proceedings does not amount to a challenge to a prisoner's conviction or sentence. *Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989)*. Further, with the exception of Claim 18, herein, this Court has determined that all of the claims specifically mentioned are without merit and require no further evidentiary development. *See Part VII (for Claims 7 and 10); Part XIX. (for Claim 29, part one); Part XXIII. (for Claim 13); Part XXIV. (for Claim 29, part two); Part XXV. (for Claims 6, 65, and 69); and Part XXVIII. (for Claim 54)*. In fact, with the exception of Claim 18, none of the claims in the petition have merit and none warrant further evidentiary development.¹⁷⁹ With respect to Claim 18, the Court is ordering further evidentiary development in these proceedings. *See discussion in Part XXI., supra*. Berryman is not entitled to relief respecting regarding state appellate or post-conviction proceedings. Claims 99 and 101 are denied on the merits.

179 The Court does not imply by this statement any finding regarding the merits of Claim [*594] 18. Since further evidentiary development is warranted, the Court's ruling on the merits of Claim 18 is reserved.

XXXVII. Order.

With the exception of Claim 18, all claims and arguments presented in the Petition are denied and all requests for further evidentiary development are denied. With respect to Claim 18, Berryman will have 45 days from the filing of this Memorandum Order to move for appropriate funding for an investigator and/or discovery. The funding request shall be filed under seal. The inquiry shall be strictly limited to observations of Mr. Soria's trial conduct, demeanor, and attentiveness. Berryman may address inquiries to actual jurors, the trial judge, the trial prosecutor, any reliable spectators, and any other trial participants. All investigation and/or discovery shall be completed within 60 days from the issuance of the funding order. Any evidence to be offered, in the form of declarations and/ or deposition transcripts must be lodged with the Court no later than 90 days following the issuance of the funding order. The parties are advised that the Court finds good cause for conducting discovery pursuant to *Rule 6 of the Rules Governing § 2254 cases*. In the 45 days [*595] between the filing of this Memorandum Order and the due date for Berryman's funding request, the parties shall meet and confer for purposes of agreeing on discovery authorized by this order. The results of conferences between the parties shall be referenced in a status report to be filed by counsel for the Warden within 40 days from the filing of the Memorandum Order. Upon receipt of Berryman's renewed offer of proof for Claim 18, the Court will issue a ruling. Until then, the decision is reserved.

IT IS SO ORDERED.

Dated: July 10, 2007

/s/ Anthony W. Ishii

United States District Judge

**THE PEOPLE, Plaintiff and Respondent, v. RODNEY
BERRYMAN, Defendant and Appellant.**

No. S008182.

SUPREME COURT OF CALIFORNIA

**6 Cal. 4th 1048; 864 P.2d 40; 25 Cal. Rptr. 2d 867; 1993 Cal. LEXIS
6377; 93 Cal. Daily Op. Service 9681; 93 Daily Journal DAR 16543**

December 27, 1993, Decided

SUBSEQUENT HISTORY: As Modified March 16, 1994. Rehearing Denied March 16, 1994, Reported at: 1994 Cal. LEXIS 1221.

PRIOR HISTORY: Superior Court of Kern County, No. 34841, Arthur E. Wallace, Judge. *People v. Berryman*, 1993 Cal. LEXIS 6657 (Cal., Dec. 27, 1993)

DISPOSITION: Having found no reversible error or other defect, we conclude that the judgment must be affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury convicted defendant of first degree murder (*Pen. Code, § 187*), found true the special circumstance allegation of felony murder in the course of a rape (*Pen. Code, §§ 261, 190.2, subd. (a)(17)(iii)*), and found true a sentence enhancement allegation that he personally used a deadly or dangerous weapon (*Pen. Code, § 12022, subd. (b)*). The jury also convicted defendant of rape (*Pen. Code, § 261, former subd. (2); now Pen. Code, § 261, subd. (a)(2)*) and found true the sentence enhancement allegation that he personally used a deadly or dangerous weapon (*Pen. Code, § 12022, subd. (b)*). The jury set the penalty at death. After denying defendant's automatic motion to modify the death verdict (*Pen. Code, § 190.4, subd. (e)*), the court imposed a sentence of death with a one-year enhancement for the murder, imposed the upper term of eight years plus a one-year enhancement for the rape, stayed the sentence of imprisonment temporarily pending execution of the death sentence and permanently thereafter (*Pen. Code, § 654*), and ordered payment of a restitution fine of \$ 100 (*Gov. Code, § 13967*). (Superior Court of Kern County, No. 34841, Arthur E. Wallace, Judge.)

The Supreme Court affirmed. It held that the trial court did not abuse its discretion in denying defendant's motion to substitute appointed counsel. The court held that the trial court properly admitted evidence of compensation paid to a defense expert. The court also held that the prosecutor committed no misconduct in his closing argument in the guilt phase. The court further held that the trial court committed no error in its instructions on jury deliberations concerning lesser offenses or on the definition of "implied malice," and the trial court did not err in not giving sua sponte an instruction on involuntary manslaughter as a lesser included offense

of murder. The court also held that defendant was not rendered ineffective assistance of counsel at the guilt trial. The court held that the evidence was sufficient to support convictions for first degree murder and rape and to support the felony-murder special-circumstance finding.

As to penalty phase issues, the court held that the prosecutor did not commit misconduct in his cross-examination of a defense witness or in closing argument. It held that the trial court made no error in its instructions to the jury or in its refusal to give defendant's requested special instructions. The court also held that the trial court properly denied defendant's motion to modify the death verdict. The court further held that defendant was not rendered ineffective assistance of counsel at the penalty phase. Finally, the court held that defendant's challenge to the use of gas as an execution method was not a ground for reversing the death penalty judgment. (Opinion by Mosk, J., expressing the unanimous view of the court. Separate concurring opinion by Mosk, J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 83--Rights of Accused--Aid of Counsel--Substitution--Denial of Capital Defendant's Motion. --In a capital homicide prosecution, the trial court did not abuse its discretion in denying defendant's motion to substitute appointed counsel. A defendant may be entitled to an order substituting appointed counsel if he or she shows that, in its absence, the constitutional right to the assistance of counsel would be denied or substantially impaired. Defendant did not make the requisite showing in his motion. Although defendant claimed a "lack of trust in, or inability to get along with" counsel, that was not enough. If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys. Moreover, defendant's asserted "irreconcilable conflict" was refuted by counsel's statement that there was probably no basis to grant defendant's motion.

[See 5 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 2746.]

(2) Criminal Law § 577--Appellate Review--Record--Matters Subsequent to Challenged Ruling. --In challenging the trial court's denial of his or her motion to substitute appointed counsel, a capital defendant may not rely on matters occurring after the denial of the motion. A reviewing court focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters.

(3) Criminal Law § 407--Evidence--Admissibility--Expert Witnesses--Evidence of Compensation Paid Defense Expert. --In a capital homicide prosecution, the trial court did not err in overruling defendant's objection to the admission, during cross-examination of a defense expert witness, of evidence of compensation paid to the expert. *Pen. Code*, § 987.9, provides that an indigent capital defendant may apply to the court for funds to pay investigators and experts and that "the fact that an application has been made shall be confidential and the contents of the application shall be confidential." However, *Evid. Code*, § 722, *subd. (b)*, provides that the compensation paid an expert witness is a proper subject of inquiry by an adverse party. *Pen. Code*, § 987.9, does not create an exception when the expert witness happens to be paid under its

provisions. The confidentiality requirement is intended to prevent the prosecution from learning of the application for funds and thereby improperly anticipating the accused's defense.

(4) Criminal Law § 444--Argument and Conduct of Counsel--Prosecutor. --In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. The prosecutor's good faith vel non is not crucial, because the standard in accordance with which the prosecutor's conduct is evaluated is objective.

(5) Criminal Law § 559--Appellate Review--Presenting and Preserving Objections--Argument and Conduct of Prosecutor. --A criminal defendant cannot complain on appeal of misconduct by a prosecutor at trial, unless in a timely fashion, and on the same ground, the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.

(6) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor--Closing Argument. --In assessing a criminal defendant's claim that remarks in the prosecutor's closing argument constituted misconduct, the question is whether there is a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion.

(7) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor--Closing Argument--Guilt Trial of Capital Prosecution--Deliberations on Lesser Offenses. --In the guilt trial of a capital homicide prosecution, the prosecutor did not commit misconduct in his closing argument by his remarks concerning the jury's deliberation on lesser offenses. The court had instructed the jury that it could find defendant not guilty of murder but guilty of the lesser included offense of voluntary manslaughter, but had not yet explained the jury's procedure in returning partial verdicts and related findings as to homicide, including first degree murder, second degree murder, and voluntary manslaughter. In commenting on this matter, the prosecutor told the jury that it "would work down this ladder of lesser included offenses." Although this could be construed to be contrary to the rule that a jury need not acquit on a higher offense before considering a lesser offense, at most, the prosecutor's remarks amounted to a misstatement of the law. Even if erroneous, they could not be characterized as misconduct. A prosecutor is not guilty of misconduct merely because in his or her argument of the law to the jury, he or she is wrong as to the law.

(8) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor--Closing Argument--Guilt Trial of Capital Prosecution--Explanation of Burden of Proof. --In the guilt trial of a prosecution for capital homicide and rape, the prosecutor did not commit misconduct in his closing argument explanation of the People's burden of proving defendant's guilt beyond a reasonable doubt. The prosecutor asked the jury to decide "do you feel that he murdered and raped [the victim]. Will that feeling stay with you? And is that feeling based upon moral evidence produced in this courtroom?" By the use of the words "feel" and "feeling," the prosecutor did not lessen the burden of proof or appeal to the passions of the jurors. There was no reasonable likelihood that the jurors construed or applied any of these remarks in an objectionable fashion.

(9) Criminal Law § 452--Argument and Conduct of Counsel--Prosecutor--Closing

Argument--Guilt Trial of Capital Prosecution--Inferences and Deductions--Reference to Victim. --In the guilt trial of a capital homicide prosecution, the prosecutor did not commit misconduct in his closing argument, by remarks concerning the humanity of the victim. The prosecutor stated that one element of murder is the killing of a human being. He continued to argue that victims are portrayed as being less than human, i.e., a bad person deserving of death. He then said that no one could say anything bad about this victim and referred to her as "just an absolute gem." This was not a statement that was unsupported by the record. The words constituted a reasonable inference from, and fair comment on, the evidence adduced at trial. Also, the prosecutor's remarks could not be construed to falsely attribute to the defense a claim that the victim deserved to die because she was not a human being. There was no reasonable likelihood that the jury so construed or applied the remarks. A reasonable juror would have understood and employed the language for what it was, i.e., a reasonable inference from, and fair comment on, the evidence.

(10) Criminal Law § 250--Trial--Instructions--Lesser Included Offenses--Procedure During Deliberations: Homicide § 82--Instructions--Included Offenses. --In its instructions in a capital homicide prosecution, the trial court did not improperly require the jury to acquit on a higher charge before considering a lesser included offense. Although a court may restrict a jury from returning a verdict on a lesser included offense before acquitting on a greater offense, the court may not preclude the jury from considering lesser offenses during its deliberations. The court instructed the jury that it could find defendant not guilty of murder but guilty of the lesser included offense of voluntary manslaughter; the court declared that the jury could return partial verdicts, and related findings, as to homicide, including first degree murder, second degree murder, and voluntary manslaughter; and the court explained how the jury was to complete the forms for the possible verdicts and findings. Although these instructions could have suggested that the jury was to deliberate in a certain order, there was no reasonable likelihood that the jury applied these instructions in this manner. A reasonable juror would have understood 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.

(11) Homicide § 79--Instructions--Malice--Implied Malice Aforethought. --In a capital homicide prosecution, the trial court's instructions on implied malice aforethought were not erroneous. 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 who acts with conscious disregard for life." This instruction did not establish a mandatory presumption of implied malice that relieved the People of their burden of proof beyond a reasonable doubt on that element, since there was no reasonable likelihood that the jury misconstrued or misapplied the challenged instruction as a "mandatory presumption" of implied malice or 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: a definition of implied malice.

(12a) (12b) Homicide § 77--Trial--Instructions--Mental State of Defendant--Requested

Special Instructions: Rape § 15--Trial--Instructions. --In a prosecution for capital homicide and rape, the trial court did not err in refusing defendant's three requested special jury instructions that would have declared that first degree felony-murder-rape requires the perpetrator to form a specific intent to rape either prior to or during the commission of the fatal act, that rape must involve a live victim and not a dead body, and that before the jury could find that the killing was deliberate and premeditated, it must find evidence of planning activity, motive to kill, and a calculated killing, or certain combinations of these factors. Although each of the requested instructions was legally correct at least in part, each point was adequately covered by one or more of the standard instructions actually given. It was not erroneous for the trial court to refuse duplicative instructions.

(13) Criminal Law § 248--Trial--Instructions--Covered by Other Instructions. --It is not erroneous to refuse a party's requested instruction that is not legally correct; indeed, it would be improper not to. Further, it is not erroneous to refuse even a legally correct instruction if it is duplicative.

(14) Homicide § 17--Manslaughter--Relationship to Murder. --Manslaughter is deemed to be related to murder as a lesser included offense of murder.

(15) Homicide § 86--Trial--Instructions--Manslaughter--Involuntary Manslaughter as Lesser Included Offense of Murder--Trial Court's Sua Sponte Duty. --In a capital homicide prosecution, the trial court did not err in failing to give sua sponte an instruction on involuntary manslaughter as a lesser included offense of murder. A court is not obligated to instruct sua sponte on involuntary manslaughter as a lesser included offense unless there is substantial evidence that the defendant killed the 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. This evidence was lacking in defendant's case. Although one could speculate that defendant killed the victim as he perpetrated some unspecified misdemeanor or performed some unspecified act with criminal negligence, speculation is not evidence, less still substantial evidence. Moreover, any error would not have required reversal. Indeed, it would necessarily have been harmless in light of the jury's special circumstance finding that defendant killed the victim in the perpetration of rape. Under this finding, the killing was necessarily felony murder.

(16) Criminal Law § 104--Rights of Accused--Competence of Defense Counsel--Burden of Proof. --In a capital homicide prosecution, defendant was not rendered ineffective assistance of counsel at the guilt phase. To succeed on a claim of ineffective assistance of counsel, a criminal defendant must show (1) deficient performance under an objective standard of professional reasonableness, and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome. Although defendant claimed that counsel failed to fully prepare a criminalist for his testimony and that counsel failed to investigate defendant's mental state at the time of the crime or to introduce evidence thereon, defendant failed to demonstrate how these omissions adversely affected the outcome of the trial within a reasonable probability.

(17a) (17b) Homicide § 69--Evidence--Sufficiency--Participation in Crime--Identity of Perpetrator: Rape § 17--Review. --In a prosecution for capital homicide and rape, the

evidence was sufficient to identify defendant as the perpetrator beyond a reasonable doubt so as to support convictions for first degree murder and rape. The evidence showed that tire tracks matching the tires of defendant's truck and defendant's jewelry clasp were found at the crime scene, an abrasion on the victim's right cheek displayed a pattern similar to that of the sole of defendant's right shoe, a stain on the shoelace of defendant's right shoe apparently was produced by the victim's blood, defendant's and the victim's pubic hairs were found on the victim's body, the victim's right thumbprint was on the inside surface of the passenger-door window of defendant's pickup truck, and defendant made self-incriminating statements to friends and acquaintances and to investigating law enforcement officers. Although the inculpatory evidence was not without weaknesses in certain particulars, considered as a whole, it was altogether substantial. It was not enough that some rational trier of fact might perhaps have declined to identify defendant as the perpetrator.

(18) Criminal Law § 621--Appellate Review--Scope of Review--Sufficiency of Evidence. -- In reviewing the sufficiency of evidence to support a conviction under the due process clause of *U.S. Const. 14th Amend.*, or the due process clause of *Cal. Const., art. I, § 15*, the question the appellate court asks is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime, and the identity of the criminal, beyond a reasonable doubt.

(19) Rape § 17--Review--Sufficiency of Evidence. --There was sufficient evidence of penetration to support defendant's conviction of rape. For rape there must be an act of sexual intercourse with at least some penetration involving a live victim who does not effectively consent. In view of the evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant raped the victim. As to sexual intercourse with at least some penetration, the victim's vagina contained sperm cells. As to lack of consent, the victim's upper clothing had been pushed up above her chest toward her neck and the lower clothing had been pulled down around her left ankle, her right iliac or pelvic region had been abraded, and her vagina contained blood cells. As to vitality, all the injuries on the victim's body were ante mortem. The absence of genital trauma was not inconsistent with nonconsensual sexual intercourse. Also, a serologist's testimony that a vaginal swab revealed the presence of a very small amount of semen was without consequence, in light of the fact that defendant had apparently ejaculated not long before the rape when he engaged in sexual intercourse with another woman. Further, from the fact that the victim's legs were spread apart in death, a rational trier of fact could have rejected, beyond a reasonable doubt, defendant's suggestion that he engaged in consensual sexual intercourse and only thereafter turned to violence.

(20a) (20b) Homicide § 66--Evidence--Sufficiency--Felony Murder--Evidence of Intent to Commit Underlying Rape. --In a prosecution for capital homicide and rape, there was sufficient evidence to support a conviction of first degree murder. The People prosecuted the case on two theories of first degree murder. The primary theory was felony-murder-rape. The secondary theory was willful, deliberate, and premeditated murder, but in his summation, the prosecutor all but expressly withdrew this theory. There was adequate evidence of rape, including semen in the victim's body consistent with defendant's. Furthermore, a rational trier of fact could have found the requisite specific intent to commit the underlying felony of rape beyond a reasonable doubt. There were facts disclosing defendant's manifest desire to engage in

sexual intercourse with any woman whom he could "pick up." There were also evidence, including the appearance and condition of the victim's body, that demonstrated the victim's desire not to engage in sexual intercourse with defendant. Further, even if the evidence failed to establish defendant's intent to kill, that intent is not an element of felony murder.

(21) Homicide § 16--Murder--Felony Murder--Requirements. --The mental state required for felony murder is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. There is no requirement of a strict causal or temporal relationship between the felony and the murder. All that is demanded is that the two are parts of one continuous transaction. There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony.

[See 1 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1988) § 470.]

(22) Homicide § 101--Punishment--Death Penalty--Felony-murder Special Circumstance--Relationship to Felony Murder. --Pursuant to *Pen. Code*, § 190.2, *subd. (a)(17)*, the felony-murder special circumstance covers the situation in which a murder was committed while the defendant was engaged in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit certain enumerated felonies. The felony-murder special circumstance is generally similar to felony murder. However, there are two peculiarities of the special circumstance. The first relates to independent felonious purpose. The felony-murder special circumstance requires that the defendant commit the act resulting in death in order to advance an independent felonious purpose. The second relates to intent to kill. At one time, the California Supreme Court concluded that intent to kill was an element of the felony-murder special circumstance, but it later overruled this decision and held to the contrary. However, when the felony-murder special circumstance is alleged to have occurred after the first Supreme Court decision and before the second decision, the first decision governs.

(23) Homicide § 78--Trial--Instructions--Intent--Felony-murder Special Circumstance--Failure to Instruct on Intent to Kill. --In a capital homicide prosecution, in which the prosecutor alleged a felony-murder special circumstance that occurred after the California Supreme Court ruled that intent to kill was an element of the special circumstance but before the Supreme Court overruled that decision, no reversible error resulted from the trial court's failure to instruct on intent to kill. In an erroneous belief that the second Supreme Court ruling governed, the court refused to instruct on intent to kill, but in an attempt to avoid prejudice, the court instructed the jury, if it found that defendant had committed first degree murder, to determine whether defendant intended to kill the victim. Subsequently, the jury so found. The standard of review for a claim of instructional error of this kind is *de novo*: the question is one of law, involving as it does the determination of the applicable legal principles. Also, the erroneous omission of the element of intent to kill is not automatically reversible but rather is subject to harmless-error analysis under the reasonable doubt standard for federal constitutional error. The trial court's omission was harmless, since under proper instructions the jury necessarily and soundly made a finding adverse to defendant on the issue erroneously omitted from the instructions.

(24) Homicide § 105--Appeal--Sufficiency of Evidence--Special Circumstance. --In reviewing the sufficiency of evidence to support a special-circumstance finding, as for a

conviction, the question the court asks is whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.

(25) Homicide § 66--Evidence--Sufficiency--Felony-murder Special Circumstance. --In a capital homicide prosecution, there was sufficient evidence to support the jury's finding true a felony-murder special circumstance. There was sufficient evidence that defendant committed first degree murder during the course of a rape. Also, there was sufficient evidence of intent to kill. A rational trier of fact could have found beyond a reasonable doubt that he sought to eliminate the victim as a witness to his crimes, a witness who could have identified him positively. Such a trier of fact could have declined to accept as accidental the act of fatally stabbing the victim or the act of pressing down her cheek with the sole of a shoe as she lay dying. Also, the special circumstance was supported even if defendant formed an intent to kill after termination of any actual or attempted rape. The felony-murder special circumstance does not require a strict causal or temporal relationship between the felony and the murder. The relationship that a rational trier of fact could have discerned from the evidence was enough.

(26) Criminal Law § 521.6--Punishment--Penalty Trial of Capital Prosecution--Evidence--Aggravating Evidence--Prior Convictions--Evidence Volunteered by Defense Witness. --In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct in his cross-examination of a defense witness. On direct examination, the witness, defendant's brother, related potentially mitigating background evidence. The witness also admitted a felony conviction for a marijuana transaction that involved defendant. On cross-examination, the prosecutor inquired as to the felony conviction, and the witness stated that defendant was selling marijuana at a high school. The prosecutor was properly attempting to impeach the witness's credibility. Also, the prosecutor did not intentionally elicit inadmissible evidence, namely, that defendant had sold marijuana to "kids." Rather, the witness volunteered this information in an answer beyond the scope of the prosecutor's question. The prosecutor's query did not portray defendant as a corrupter of youth. Indeed, at the relevant time, defendant was a youth himself.

(27) Criminal Law § 522.3--Punishment--Penalty Trial of Capital Prosecution--Argument--Mitigating Evidence--Defendant's Mental State--Inapplicable Factors. --In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct in his closing argument concerning mitigating evidence. In regard to whether the offense was committed while defendant was under extreme mental or emotional disturbance, the prosecutor pointed out there was no such evidence and referred to this factor as "the old insanity defense." Although this last remark was a misstatement of the law, the mistake was understandable in view of unclear legal authority. Moreover, misstatement is not enough to constitute misconduct, and the prosecutor did not lead the jury away from considering potentially mitigating evidence. Regarding other statutory factors, the prosecutor pointed out some were not applicable to defendant. This was not misconduct, since there was no reasonable likelihood that the jury would construe the prosecutor's statement as a declaration that the absence of certain mitigating factors is itself aggravating.

(28) Criminal Law § 523.3--Punishment--Penalty Trial of Capital Prosecution--Instructions--Sympathy. --In the penalty phase of a capital homicide prosecution, the trial

court's jury instructions did not preclude the jury from considering pity, sympathy, or mercy. Although the court refused to give defendant's requested instruction on this topic, the court told the jurors that in determining penalty they were to consider several specified factors, if applicable, including any circumstance which extenuated the gravity of the crime even though it was not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offense for which he was on trial. The court also told the jurors that in determining penalty, it must consider the applicable factors of aggravating and mitigating circumstances, and the court described the weighing of aggravating and mitigating circumstances. It was not reasonably possible that the jury misconstrued these instructions to mean it could not consider or give effect to pity, sympathy, or mercy. Indeed, a reasonable juror would have understood the instructions in question to allow consideration of pity, sympathy, and mercy.

(29) Criminal Law § 523.1--Punishment--Penalty Trial of Capital Prosecution--Instructions--Jury's Weighing Process. --In the penalty phase of a capital homicide prosecution, the trial court's instruction on the jury's weighing process was not erroneous. The court stated, "In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The court's use of the term "totality" did not improperly imply that a single mitigating circumstance could not outweigh any and all aggravating circumstances and hence could not support a decision that death was not the appropriate punishment. Although such an implication would have been erroneous, a reasonable juror would not have understood and employed the court's words to embrace that implication.

(30a) (30b) Criminal Law § 523--Punishment--Penalty Trial of Capital Prosecution--Instructions--Refusal to Give Defendant's Requested Special Instructions. --In the penalty phase of a capital homicide prosecution, the trial court did not err in refusing to give defendant's requested special instructions. Most of defendant's points were adequately covered by other instructions actually given the jury. Also, some requested instructions were not legally correct. Contrary to defendant's requested instructions, aggravating factors, and the facts upon which they are based, need not be proved beyond a reasonable doubt; the jury need not reach a unanimous decision as to the existence of an aggravating factor before any juror may consider that factor; the jury's determination that the aggravating factors outweigh the mitigating factors need not be determined beyond a reasonable doubt; and the appropriateness of the penalty need not be determined beyond a reasonable doubt. Further, defendant requested an instruction that the fact that he was convicted of first degree murder was not an aggravating factor. A court may refuse an instruction that is confusing. This instruction might have interfered with the mandatory consideration of the circumstances of defendant's offense.

(31) Criminal Law § 520--Punishment--Penalty Trial of Capital Prosecution--People's Burden of Proof. --The beyond-a-reasonable-doubt standard does not apply to the process of penalty determination. In particular, the 1978 death penalty law does not require imposition on

the People of the burden of proof beyond a reasonable doubt as to (1) the consideration of a circumstance in aggravation, (2) the determination whether aggravating circumstances outweigh the mitigating circumstances, and (3) the determination as to the appropriate penalty. Further, neither the United States Constitution nor the California Constitution imposes this burden on the People.

(32a) (32b) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict--Denial of Motion. --The trial court did not err in denying defendant's automatic motion to modify the jury's death verdict. The court's statement of its reason for denying the motion demonstrated that it independently reweighed the evidence and considered the mitigating evidence, and the court did not find aggravating factors unsupported by the record or convert mitigating evidence into aggravating evidence. The court was not required to find that defendant's age (21 at the time of the offenses) was a mitigating factor. Also, even if the court read the probation report before making its ruling, absent evidence to the contrary, it must be assumed that the court was not improperly influenced by the report. Moreover, the court specifically stated that it reviewed the circumstances of the offenses, a brutal rape and murder of a 17-year-old girl, and concluded that this was a substantial factor in aggravation that in and of itself outweighed all the mitigating circumstances.

(33) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict. --In ruling on a motion to modify a death verdict, the trial judge is required to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. That is to say, the judge must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported, and the judge must make that determination independently, i.e., in accordance with the weight the judge believes the evidence deserves. The trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. Further, in deciding the question, the trial judge must specify reasons sufficient to assure thoughtful and effective appellate review. On appeal, the reviewing court subjects the ruling to independent review. When the reviewing court conducts its scrutiny, it simply reviews the trial court's determination after independently considering the record; it does not make a de novo determination of penalty.

(34) Criminal Law § 104--Rights of Accused--Competence of Defense Counsel--Burden of Proof--Competence at Penalty Phase of Capital Prosecution. --In a capital homicide prosecution, defendant was not rendered ineffective assistance of counsel at the penalty phase. The prosecutor called few witnesses in its case in aggravation, and defense counsel called more than a score in the case in mitigation, presenting evidence about defendant's background and character from family members and friends and also from a psychologist and a psychiatrist. After the penalty phase, counsel made several motions including a verdict-modification application. Further, defendant did not meet his burden of showing prejudice resulting from alleged deficiencies in counsel's failure to obtain neurological testing of defendant, to further investigate defendant's background, or to personally prepare defense witnesses for their testimony. As to counsel's opening statement and summation, counsel's statements concerning

the Governor's commutation powers and the two possible punishments were reasonable. Counsel's remark as to the short time the jury took in reaching the guilt verdict was intemperate, but brief.

(35) Homicide § 104--Appeal--Death Penalty--Challenge to Method of Execution. --On appeal of a death sentence, defendant's challenge to the use of gas as a method of execution (*Pen. Code, § 3604*) could not be a ground for reversal of the judgment of death. After entry of the judgment, § 3604 was amended to allow injection of lethal substances as a means of execution. Moreover, the issue bore solely on the legality of the execution of the sentence and not on the validity of the sentence itself.

COUNSEL: Paul M. Posner, under appointment by the Supreme Court, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, W. Scott Thorpe, Edmund D. McMurray and Margaret Garnard Venturi, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Mosk, J., expressing the unanimous view of the court. Separate concurring opinion by Mosk, J.

OPINION BY: MOSK, J.

OPINION

[*1061] [**47] [***874] This is an automatic appeal (*Pen. Code, § 1239, subd. (b)*) from a judgment of death under the 1978 death penalty law (*Id., § 190 et seq.*).

On November 2, 1987, the District Attorney of Kern County filed an information against defendant Rodney Berryman in the superior court of that county.

[*1062] Count I charged that on or about September 6, 1987, defendant murdered Florence Hildreth. (*Pen. Code, § 187.*) It was alleged for death eligibility that he did so under the special circumstance of felony murder in the course of rape (*id., § 261.*) (*Id., § 190.2, subd. (a)(17)(iii).*) It was alleged for enhancement of sentence that he personally used a deadly or dangerous weapon, viz., a knife. (*Id., § 12022, subd. (b).*)

Count II charged that on or about September 6, 1987, defendant raped Hildreth. (*Pen. Code, former § 261, subd. (2), as amended by Stats. 1985, ch. 283, § 1, pp. 1307-1308, Pen. Code, present § 261, subd. (a)(2).*) It was alleged for enhancement of sentence that he personally used a deadly or dangerous weapon, viz., a knife. (*Id., § 12022, subd. (b).*)

Defendant pleaded not guilty to the charges and denied the allegations.

Trial was by jury. The panel returned a verdict of guilty as to murder and fixed the degree at the first. It found true the accompanying allegations of the felony-murder-rape special circumstance and the personal use of a deadly or dangerous weapon. It specially found that defendant killed Hildreth intentionally. It also returned a verdict of guilty as to rape. It found true the accompanying allegation of the personal use of a deadly or dangerous weapon. It subsequently returned a verdict of death for the murder. The court denied, among other motions,

defendant's automatic application for modification of the verdict of death. (*Pen. Code, § 190.4, subd. (e).*) It proceeded to enter judgment as follows. [**48] For the murder, it [***875] imposed the sentence of death, with an additional and consecutive term of one year for personal use of a deadly or dangerous weapon. For the rape, it imposed a sentence of imprisonment comprising the upper term of eight years, with an additional and consecutive term of one year for personal use of a deadly or dangerous weapon. It stayed the sentence of imprisonment temporarily pending execution of the sentence of death and permanently thereafter. (*Id., § 654.*) It also ordered payment of a restitution fine in the amount of \$100. (*Gov. Code, § 13967.*)

Finding no reversible error or other defect, we conclude that the judgment must be affirmed.

I. FACTS

A. GUILT PHASE

The People introduced evidence to the following effect.

The time relevant is September 1987; the place is the small city of Delano in rural Kern County.

[*1063] Florence Hildreth resided in Delano with her mother. She was a senior at Delano High School; she was 17 years of age, 5 feet 7 inches tall, and 108 pounds in weight. She had never been married. Her nickname was "Mimi."

Defendant had recently arrived in Delano, where he had spent part of his youth, in a red, black, and gray Mitsubishi pickup truck, having come from Los Angeles County. He was apparently unemployed; he was 21 years of age, 6 feet 2 inches tall, and approximately 190 pounds in weight. He was married and had a young son; he was estranged from his wife, who remained in Los Angeles County with the child. He was a womanizer. He was staying in Delano with a "girlfriend," Crystal Armendariz, who lived at the home of her mother, Brenda Clark, and her stepfather, Martin Clark; Armendariz was Hildreth's cousin and the Clarks were her aunt and uncle. Defendant and Hildreth were acquaintances.

On September 6, 1987, defendant and Armendariz drove to Bakersfield in his pickup truck and returned to Delano sometime in the late afternoon or early evening. Apparently about 8:30 p.m., they arrived at the Clark home. They ate lasagne for dinner. Defendant then left alone. About 9 p.m., he drove a short distance to the residence of a woman named Donna Faye Warner; he attempted to "pick her up"; he was unsuccessful. About 9:20 p.m., he drove a short distance to the residence of a woman named Melinda Regina Pena; he attempted to "pick her up"; this time, he was successful. They drove to Lake Woollomes. There they stayed about 30 minutes, having sexual intercourse on the grass. On the trip back, he asked her to be his "girlfriend"; she refused, saying she already had a "boyfriend"; he became upset. Thereupon, he dropped her off outside her home.

About 10:30 p.m., Hildreth was at the house of Diane Pruitt, one of her aunts, with whose family she had planned to spend the night. At that time, she set out to walk to the Clark home to find out whether she had received a telephone call she had been expecting. She promised she would return straightway. The distance was approximately one block. About 10:34 p.m., she arrived at the Clark home. Armendariz was there. Defendant was not. Apparently, he was then about to return, or actually returning, from Pena's home, which was also located in Delano. Hildreth checked for telephone calls, and found none. About 10:45 p.m., she left to go back to

Pruitt's residence. One of her uncles offered to escort her, but she declined. She never arrived at her destination.

About 11 p.m., defendant's pickup truck was seen pulling out of a convenience store onto Cecil Avenue and proceeding in a westbound direction. Two persons were observed in the vehicle. Shortly thereafter, it appears, defendant's pickup truck was seen parked on the shoulder of Cecil Avenue in the westbound direction some few miles away.

[*1064] Later that night--the time is uncertain--defendant returned to the Clark home. [***876] Armendariz [**49] let him in. He was calm. He asked for something to eat. She warmed up a plate of leftover lasagne. He ate the food and eventually went to sleep. Apparently, he had drunk alcoholic beverages throughout the day but did not become intoxicated.

On the morning of September 7, 1987, Hildreth's body was found sprawled on an isolated dirt road extending south off Cecil Avenue at a right angle, about four-tenths of a mile from the location at which defendant's pickup truck had been seen parked the previous night. Before death, Hildreth had apparently been dragged to the spot and beaten about her head and body, including the right iliac or pelvic region. She was fatally stabbed in the front of her neck on the right side to a depth of about three quarters of an inch, with a nick to the carotid artery. It appears that a knife was used, and broken, in the attack. As she lay dying, her right cheek was evidently pressed down and abraded by the sole of a shoe for some appreciable period of time--apparently more than one minute and perhaps as long as three to five. When found, her body was practically nude, with the upper clothing pushed up above her chest toward her neck and the lower clothing pulled down around her left ankle; two pubic hairs rested on the left side of her head; her legs were spread apart; her right iliac or pelvic region showed abrasions; and her vagina contained blood and sperm cells--a serologist testified that a vaginal swab revealed the presence of a "very small amount of blood," the "presence of sperm cells, spermatozoa," and the presence of a "very, very small amount of semen." All the injuries were ante mortem.

At the scene of the crime were discovered distinctive shoe prints and tire tracks. The shoe prints were very similar to those of defendant's shoes. The tire tracks were very similar to those of his pickup truck. At least one of the tires in question was seen leaning, without a rim, against a fence at the Clark home about 8 a.m. on September 7; it had not been seen there on September 6. Also discovered at the crime scene was a small round yellow metal jewelry clasp that could have come from a chain that defendant owned and that was found in his pickup truck.

It was determined that the passenger-door window of defendant's pickup truck bore Hildreth's right thumbprint on its inside surface. It was also determined that the abrasion on Hildreth's right cheek displayed a pattern similar to that of the sole of defendant's right shoe. It was ascertained that the shoelace of defendant's right shoe was stained with blood that could have been deposited by only 0.068 percent of the Black population; he was not a possible donor, but Hildreth was. It was also ascertained that one of the two pubic hairs resting on the left side of Hildreth's head was consistent [*1065] with defendant's and inconsistent with hers, and that the other was consistent with hers and inconsistent with defendant's.

In statements made to friends and acquaintances on September 7, 1987, defendant revealed that Hildreth had been killed and, more specifically, that she had been killed by stabbing; he did so before that fact was generally known. He claimed that Hildreth had met her death at the hands of some unidentified persons from Los Angeles, and said that he wanted a gun to pay them back. He also claimed that a scratch that marked his face resulted from a game of basketball earlier in

the day. Overhearing a comment that his pickup truck had been seen on Cecil Avenue sometime the previous night, he immediately denied the fact, stating that "it wasn't his truck" and that "he was at a girl's house the whole time." He telephoned a "girl" he called "Connie" and "tr[ie]d" to make [her] say that he was there the whole time"--evidently without success.

In statements made to investigating law enforcement officers later on September 7, 1987, defendant denied that he or his pickup truck had been on Cecil Avenue at any time the night before. He also denied that Hildreth had ever been in his vehicle. He said that the scratch on his face resulted from a game of basketball earlier in the day.

[**50] [***877] For his part, defendant introduced evidence to undermine the probativeness of the People's evidence, in an effort to show that they had not carried their burden. He played on various uncertainties, including uncertainties related to time. He did not take the stand.

B. PENALTY PHASE

In aggravation, the People introduced evidence of other violent criminal activity in which defendant had engaged and prior felony convictions that he had suffered.

Specifically, there was a stipulation that defendant was convicted in the Superior Court of Los Angeles County of three counts of transportation of marijuana (*Health & Saf. Code, § 11360, subd. (a)*) in March 1984, and one count of grand theft (*Pen. Code, former § 487, subd. (1)*, as amended by Stats. 1982, ch. 375, § 1, p. 1693, *Pen. Code, present § 487, subd. (1)*) in August 1984.

There was also testimony that defendant had committed assault (*Pen. Code, § 240*) and/or assault with a deadly weapon (*Id., § 245*) in two separate incidents.

[*1066] David Edmund Perez testified that on July 19, 1987, he was involved in a traffic altercation in Los Angeles County with a number of other men, including defendant; in its course, defendant "came up from behind me with a tire iron and hit me in the back of the head," causing a wound that later required 10 stitches to close; "after he hit me and tried to hit me again and I blocked it, the second one, he started chasing me, and him and his buddy were yelling out L A Cr[i]ps"--an apparent reference to a notorious street gang. It appears that defendant was arrested and charged with respect to the attack on Perez, but subsequently fled.

Howard Dean Fuller, who was the father of defendant's wife, testified that in early August 1987 at his home in Los Angeles County, he and defendant engaged in a dispute about family matters: ". . . Rodney came to the door, came into the yard, and I had told him several times not to come to the house, period, and I told him that he couldn't come in"; "[h]e continued to come in, I told him no, and I stood in his way, and we began to push backwards and forth"; and "he hit me" on the "bridge of the nose."

In mitigation, defendant introduced evidence relating to his background and character.

Family members and friends testified to the following effect:

In 1965, defendant was born in Cheyenne, Wyoming; his father and mother had an older son and would have a younger daughter and son; at the time of defendant's birth, his father was serving in the Air Force. Defendant's childhood and adolescence were troubled. His parents' marriage was stormy, marked by physical violence by his father against his mother, and punctuated with a number of separations before an eventual divorce. He moved back and forth

among his father and mother and others in various locations, including Delano; he was not given adequate attention and affection; he did poorly in school.

During his teenage years, defendant became a "Casanova"; he began to abuse alcohol, run away, and get in trouble with the law; his father died; and he started to experience recurrent disabling headaches, which were apparently connected (at least in part) to a work-related injury to his head.

In May 1986, defendant married his wife, Carol Lynn Berryman, née Fuller. They set up house together in Los Angeles County, and participated in activities at Carol's father's church. In August 1986, Carol gave birth to a son, Rodney, Jr. Defendant attempted to discharge his responsibilities as husband and father, providing for his wife and son and showing them [*1067] affection. Before long, however, he began to falter. There were problems in his personal life, marriage, and employment, which exacerbated, and were exacerbated by, his abuse of alcohol. By June 1987, he began a precipitous downward spiral. He seems to have recognized his difficulties with alcohol, but could not, or simply did not, bring them under control. Soon, he and his wife separated. [**51] [***878] In August 1987, he went to Delano, in part at least to avoid the legal consequences of his attack on Perez. On or about September 6, 1987, Hildreth was raped and murdered.

In the opinion of family members and friends, defendant was "warm," "caring," and "nice"; he had been, and remained, close to those who loved him and whom he loved; he was not violent, either generally or specifically in his dealings with women. His wife continued to "love him very much."

William D. Pierce, Ph.D., a clinical psychologist, testified as an expert witness in relevant part as follows. His "axis one" diagnosis of defendant--which "refers to the type of symptomatology or problems that you feel the person is experiencing like right now, or that are most important"--was "alcohol induced organic disorder, alcohol intoxication and rule out organic mental syndrome, not otherwise specified." He had discovered certain "soft signs" of "organicity," but could not "confirm or disconfirm" its presence because he was unable to obtain specified neurological testing. His "axis two" diagnosis--which "refers to long-standing kind of personality traits or characteristics that have been occurring over a longer period of time"--was "personality disorder, not otherwise specified, with dependent narcissistic and depressive features." He opined, in substance, that the rape and murder of Hildreth was "uncharacteristic" of defendant, and his conduct in the incident was "bizarre" and "out of control." He admitted that there was "no serious psychological disorder"--neither "psychosis" nor "neurosis"--but simply "evidence of ongoing personality and interpersonal problems."

Samuel George Benson, Jr., M.D., a psychiatrist, gave testimony as an expert witness that generally followed that of Dr. Pierce. He "confirmed" the "soft signs of organicity" found by Dr. Pierce. He proceeded to opine that defendant "does, in fact, suffer from an organic mental syndrome, that it's probably alcohol induced, but there is [*sic*] some other factors in addition to his consumption of alcohol that's [led] to it," including "head trauma." He stated that his "diagnosis" included "middle brain dysfunction." He added: "Increasingly more important in trying to understand and care for people from a medical point of view, it is necessary to know about their lifestyle." "In evaluating Rodney, Mr. Berryman, what I really noted and I thought was very important about his lifestyle was a kind of constant seeking for--to be taken care of, a kind of dependency, particularly on women, and almost [*1068] exclusively on women, of

becoming very close, to get nurturing by being charming, kind, somewhat immature, but constantly needing numbers, more than the average, more than most people, of women, so that he feels as though he's loved, so he feels as though he can somehow be taken care of."

Defendant also introduced evidence concerning incarceration in state prison and infliction of death by lethal gas.

Defendant did not take the stand.

II. GUILT ISSUES

Defendant raises a number of claims attacking the judgment as to guilt. As will appear, none is meritorious.

A. DENIAL OF MOTION TO SUBSTITUTE ATTORNEYS

On September 11, 1987, Charles J. Soria was appointed as counsel to defendant. On April 6, 1988, George W. Peterson was appointed cocounsel.

On December 15, 1987--after Soria's appointment but before Peterson's --defendant orally moved the court to relieve Soria and appoint new counsel in his place: "I would like another attorney appointed to me Because I don't feel comfortable with the attorney that I have." The court responded: "Well, you don't have a right to be comfortable with him, sir." Defendant: ". . . I feel I have a right to change lawyers if I want to. I don't feel comfortable with the man. ¶] And I'm looking at the death penalty and he's going to tell me that I don't have the right to change lawyers?" [**52] The court: [***879] "That's exactly what I'm telling you. If it's simply a matter of being comfortable with him." Defendant: "There is a reason why I don't feel comfortable with him." The court set a hearing for December 17 pursuant to *People v. Marsden (1970) 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44]*, in order to afford defendant an opportunity to state his reason.

On December 17, 1987, the court held a hearing in camera on defendant's motion, with only defendant, Soria, and court personnel present.

The court inquired as to the grounds of the motion. Defendant stated: "[D]uring our preliminary hearing I asked him to bring a witness in for me and he didn't. He failed to do that. He gave me some excuse I really can't remember." The court determined that this ground was insufficient: "[T]actically it is generally an accepted practice for the defense not to put on any evidence at the time of the preliminary hearing."

[*1069] The court continued its inquiry. Defendant stated: "He's talking about my case to other inmates in the jail. One inmate told me that he said he feels that I've done this crime and the reason why he's holding onto this case is because he has to. Like--you know, like he's not determined to win this case or fight it, just had to do it." Allowed to respond, Soria said that he had indeed asked "other inmates how Mr. Berryman was doing," but had "never said to any inmate that I believe that Mr. Berryman has done this." The court impliedly determined that this ground was unsupported.

The court went on with its inquiry. Defendant stated: "He's holding conversations with Lisa Green"--who was the deputy district attorney then assigned to the case. "And I think that these two have something going on together that's--instead of him defending me, trying to convict me with her."

Soria volunteered an explanation for the various acts and omissions of which defendant complained. He then commented: "He has not liked me from the start. Maybe it's because he's--even though he is born and raised in Delano, for some extent, the last few years of his life, he's been in Los Angeles. His people are in Los Angeles. They desperately wish to have a Los Angeles attorney or someone from down there. They don't have the money." "In this case I will [need his cooperation]. And if he's not going to place his confidence in me--the trial is set May 2nd. There's adequate enough time for new counsel. I don't know if Mr. Berryman will have the same disagreements with new counsel, but I don't believe our relationship is ever going to get any better. And I'll leave it up to the Court."

The court determined that this ground was unsupported as well: "We have appointed counsel to represent you, Mr. Berryman. . . . I have seen nothing that you've offered today that indicates that Mr. Soria is doing anything short of a journeyman job for you. [¶] I'm confident that your suspicions not only are not well founded based on what you've told me, but my experience with both Mrs. Green and Mr. Soria is there certainly is no underlying conspiracy between them that is working to your disadvantage and no underlying conspiracy between them in any way."

Thereupon, the court denied defendant's motion. "You've not shown grounds that would justify me granting that motion. [¶] I will urge you to cooperate with Mr. Soria in the preparation of your defense. Your failure to cooperate with him will only be to your undoing and not to Mr. Soria's. And if you do fail to cooperate with him that is an unfortunate situation that you may find yourself in later on. [¶] But it's not the doing of Mr. Soria and certainly not the doing of the Court. And it's inappropriate simply for [*1070] whatever reason to keep changing attorneys until you find one that you feel that you like. . . . Your motion will be denied."

(1) Defendant contends that the court erred by denying his motion to relieve Soria and appoint new counsel in his place. The applicable standard of review is abuse of discretion. (See, e.g., *People v. Marsden, supra*, 2 Cal.3d at p. 123.) [**53] [***880] No abuse appears. It was not at all unreasonable for the court to decline defendant's request for substitution: it determined--soundly, in our view--that each of the grounds on which he relied was either insufficient or unsupported. Certainly, it was not required to appoint an attorney whom defendant might like.

Defendant argues to the contrary. He fails to establish the merit of his position.

To be sure, a defendant may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired. (See, e.g., *People v. Marsden, supra*, 2 Cal.3d at p. 123.)

Defendant did not make the requisite showing in his motion. Notwithstanding his present assertion, he and Soria were *not* "embroiled in [such an] irreconcilable conflict" that ineffective assistance of counsel in violation of the Sixth Amendment was likely to result. True, defendant claimed a "lack of trust in, or inability to get along with," Soria. (*People v. Crandell* (1988) 46 Cal.3d 833, 860 [251 Cal.Rptr. 227, 760 P.2d 423] (lead opn. by Kaufman, J.)) That was not enough. "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." (*Ibid.*) Defendant maintains that Soria admitted an "irreconcilable conflict" of the kind that compels substitution. That is not the case. Indeed, Soria stated: "I agree with the Court there are probably no grounds

before it to rule" in defendant's favor.

(2) Defendant may not attempt to make up for what was lacking in his motion by relying on matters subsequent to its denial. A reviewing court "focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters . . ." (*People v. Douglas (1990) 50 Cal.3d 468, 542 [268 Cal.Rptr. 126, 788 P.2d 640]* (conc. opn. of Mosk, J.)) In any event, the matters on which defendant relies are without significance for present purposes. To the extent that he may be understood to assert that the [*1071] court erred by denying a similar motion he made on May 5, 1988, he is not persuasive. ¹

1 Defendant claims in substance that the asserted error in denying his motion amounts, at least in this case, to error violative of, inter alia, the *Sixth* and *Fourteenth Amendments to the United States Constitution*. There was no error.

B. EVIDENCE CONCERNING THE COMPENSATION OF A DEFENSE EXPERT

In his case-in-chief, defendant called as an expert witness Stephan A. Schliebe, a criminalist. On cross-examination, the prosecutor sought to inquire into his compensation--specifically, the amount. Defense counsel objected to the admissibility of such evidence on the basis of provisions including *Penal Code section 987.9* and its "confidentiality requirement." The court overruled the objection. On the prosecutor's inquiry, Schliebe testified in substance that his firm had already billed about \$2,500 for his services and would bill about \$1,300 in addition.

In relevant part, *Penal Code section 987.9* provides: "In the trial of a capital case," among others, "the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. . . . *The fact that an application has been made shall be confidential and the contents of the application shall be confidential.* Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing." (Italics added.)

[**54] [***881] (3) Defendant contends that the court erred by overruling his *Penal Code section 987.9* objection to the admissibility of evidence of Schliebe's compensation and subsequently allowing the testimony in question. We disagree. *Evidence Code section 722, subdivision (b)*, declares that the "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." We do not read *Penal Code section 987.9* to carve out an exception when the expert witness happens to be paid under its provisions. "The confidentiality requirement was evidently intended to prevent the prosecution from learning of the application for funds and thereby improperly anticipating the accused's defense." (*People v. Anderson (1987) 43 Cal.3d 1104, 1132 [240 Cal.Rptr. 585, 742 P.2d 1306]*.) Such a result was not threatened here.

[*1072] C. PROSECUTORIAL MISCONDUCT AS TO GUILT

Defendant contends that on numerous occasions before the jury the prosecutor engaged in misconduct as to guilt.

(4) "In general, a prosecutor commits misconduct by the use of deceptive or reprehensible

methods to persuade either the court or the jury." (*People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610].) His "good faith *vel non*" is not "crucial." (*People v. Benson* (1990) 52 Cal.3d 754, 793 [276 Cal.Rptr. 827, 802 P.2d 330].) That is because the standard in accordance with which his conduct is evaluated is objective.

(5) " 'It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion'--and on the same ground--'he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Ashmus* (1991) 54 Cal.3d 932, 976 [2 Cal.Rptr.2d 112, 820 P.2d 214], quoting *People v. Benson*, *supra*, 52 Cal.3d at p. 794.)

After review, we reject defendant's claim at the threshold. He failed to satisfy the general rule requiring assignment of misconduct and request for admonition as to any of the comments by the prosecutor of which he now complains. No exception is applicable.

(6) We also reject defendant's claim on the merits. When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Clair* (1992) 2 Cal.4th 629, 663 [7 Cal.Rptr.2d 564, 828 P.2d 705].) On this record, the answer is no. We do not overlook some apparent misstatements and other infelicities by the prosecutor. But when we consider each of the challenged comments in its context, we simply cannot conclude that the prosecutor used a method to persuade the jury that was "deceptive" or "reprehensible."

(7) Let us consider as representative examples the three complaints to which defendant devotes the greatest number of pages in his briefing.

In the course of his summation, the prosecutor sought to elucidate for the jury certain aspects of the court's charge. The court had already instructed the jury that it could find defendant not guilty of murder but guilty of the lesser included offense of voluntary manslaughter. The court would soon declare that the jury could return partial verdicts, and related findings, as to homicide, including first degree murder, second degree murder, and voluntary manslaughter. And the court would soon explain how the jury was to [*1073] complete the forms for the possible verdicts and findings. In commenting on the foregoing, the prosecutor evidently used a demonstrative aid in the form of a chart "to make sure that all of you understand . . . how you would work down this ladder of lesser included offenses."

Following our decision in *Stone v. Superior Court* (1982) 31 Cal.3d 503 [183 Cal.Rptr. 647, 646 P.2d 809] (hereafter sometimes [**55] *Stone*), [***882] we held in *People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325 [250 Cal.Rptr. 244, 758 P.2d 572] (hereafter sometimes *Kurtzman*), that a court may "restrict[] a jury from *returning a verdict* on a lesser included offense before acquitting on a greater offense" but may not "preclude [it] from *considering* lesser offenses during its deliberations." (Italics in original.) We thereby impliedly rejected a "strict acquittal-first rule under which the jury must acquit of the greater offense before even considering lesser included offenses." (*Id.* at p. 333.)

Defendant claims to discern misconduct in a number of comments by the prosecutor that arguably suggested, contrary to *Stone* and *Kurtzman*, that the jury was required to deliberate on the charges and allegations in a specified order. We do not. At most, the prosecutor's remarks may have amounted to a misstatement of the law. Even if "erroneous, however, they cannot be

characterized as misconduct. '[A] prosecutor is not guilty of misconduct because in his argument of the law to the jury, he is wrong as to the law. . . .' " (*People v. Bonin (1988) 46 Cal.3d 659, 702 [250 Cal.Rptr. 687, 758 P.2d 1217].*)²

2 In the course of these comments, the prosecutor misspoke himself by implying that acquittal depended on proof beyond a reasonable doubt of innocence. He effectively corrected himself after the court brought the matter to his attention.

(8) Next, in the course of his summation, the prosecutor set out to explicate for the jury the People's burden of proof beyond a reasonable doubt, on which the court had already given an instruction.³

3 In a supplemental brief filed practically on the eve of oral argument, defendant raised for the first time the contention that the court erred under the *Fifth, Sixth, and Fourteenth Amendments to the United States Constitution* by instructing the jury as it did on the People's burden of proof beyond a reasonable doubt, with specific regard to the definition of "reasonable doubt." He argues that the instruction "allow[ed] a finding of guilt based on a degree of proof below that required by the [Fourteenth Amendment's] Due Process Clause," i.e., proof beyond a reasonable doubt. (*Cage v. Louisiana (1990) 498 U.S. 39, 41 [112 L.Ed.2d 339, 342, 111 S.Ct. 328]* (*per curiam*).

When we consider a claim of this sort, the question we ask is whether there is a reasonable likelihood that the jury construed or applied the challenged instruction in an objectionable fashion. (*People v. Clair, supra, 2 Cal.4th at p. 663.*)

On this record--and notwithstanding any asserted infirmity in the underlying standard instruction itself (*CALJIC No. 2.90 (1979 rev.) (4th ed. 1979)*--the answer is negative. There is no reasonable likelihood that the jury misconstrued or misapplied the instruction in question as defendant argues.

[*1074] ". . . I'd like to discuss that a little more, what the burden of proof is, what it means, and how you're to go about proving--discharging that burden of proof.

". . . .

". . . [T]his particular burden is substantial. There is no doubt about that, because we all take the life and liberty of our fellow citizens, our fellow occupants of this country, whether or not they're citizens, very seriously.

"We want to make sure that before we deprive a person of their liberty, we have thoroughly examined those issues. And whether the evidence that has been presented persuades us that a law has been broken."⁴

4 Defendant claims that the sentence to which this footnote is appended amounts to misconduct in and of itself. It does not. There is simply no reasonable likelihood that the jury construed or applied the words in an objectionable fashion.

". . . .

"For that reason, I have the burden of proving beyond a reasonable doubt, and in the instruction it says not beyond a possible or imaginary doubt, because everything relating to human affairs is open to some possible or imaginary doubt.

"But it is that state of the case which after the comparison and consideration, comparison and consideration, of all the evidence, leaves the minds of the jurors that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

" [**56] [***883] It's not absolute knowledge. We're not going to--we haven't replayed any instant replays in this particular case.

"However, I would suggest to you that the photographs in this case are so graphic and so convincing, that they, themselves, are sufficient for you to return a verdict of guilty. ⁵ You can see for yourself what occurred there.

5 Defendant claims that the sentence to which this footnote is appended amounts to misconduct in and of itself. It does not. There is simply no reasonable likelihood that the jury construed or applied the words in an objectionable fashion.

"There's evidence on the ground and upon the person of Mimi Hildreth, as to what happened.

[*1075] "So the question that's been presented to you, and if you'll recall, one of the Judge's instructions to you . . . , what questions we have for the jurors to make the decision, do you feel that he raped and murdered Mimi.

"Will that feeling stay with you? And is that feeling based upon moral evidence produced in this courtroom?

". . . .

"Do you feel that he did it, and is your feeling based upon evidence that's produced here in court. Now, if your feeling would be based upon well, gee, he also reminds me of the little kid that used to throw my newspapers on to the roof and gave me a smart answer when I asked him to get it on the porch, or some other ridiculous thing like that.

"I don't suggest that any of you would have those feelings, but if you have a feeling that he didn't do it, what is that feeling based upon?

"Is that feeling also based upon evidence that's produced here in court?

"Unless it's a reasonable interpretation of evidence that's produced here in court, it's not proper for you to take into consideration at all.

"And even if it was, it would only have to do with an element of the offense, because all I have to prove in this case are the elements of the offense, plus the identity."

Defendant claims to discern misconduct in the comments by the prosecutor referring to "feel," "feeling," and "feelings." We do not. Defendant argues that, by using the words quoted above, "[t]he prosecutor lessened his burden of proof and appealed to the passions of the jurors . . ." There is simply no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(9) Last, in the course of his summation, the prosecutor stated that "[t]o return a verdict on the first degree intentional premeditated and deliberate killing, there would be [several] elements to be proved," one of which was that a "human being was killed. . . . Well, it seems like well, that obvious. But you do have in some cases, well, it wasn't really a human being that was killed. [¶] They try to place the victim outside of the pale of humanity, as it was, that person did

something wrong, it was a bad person, he or she deserved this. We didn't have that in this particular case. No one could say [*1076] a bad word against Mimi. If they could have, they would have been here on the stand. [¶] That is a 17 year old girl, looking forward to her senior year, and just an absolute gem, and no one can say she deserved to die."

Defendant claims to discern misconduct in the comments by the prosecutor quoted above. We do not. Defendant argues that the prosecutor's remarks to the effect that Hildreth was "just an absolute gem" were "unsupported by the record . . ." That is not the case. The words in question constitute a reasonable inference from, and fair comment on, the evidence adduced at trial. Defendant also argues that the prosecutor's remarks "falsely attribut[ed] to the defense a claim that [Hildreth] deserved to die because she was not a human being." (Underscoring omitted.) That is also not the case. There is no reasonable likelihood that the jury so construed or applied the words under review. A reasonable juror [**57] would have understood [***884] and employed the language for what it was, i.e., a reasonable inference from, and fair comment on, the evidence. ⁶

6 Defendant claims in substance that the asserted prosecutorial misconduct bearing on guilt requires reversal under, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17 of the California Constitution*. There was no misconduct. Certainly, the complained-of comments by the prosecutor did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 157, 106 S.Ct. 2464].)

D. INSTRUCTIONS ON LESSER INCLUDED OFFENSE AND PARTIAL VERDICTS AS TO HOMICIDE

As noted above (see pt. II.C., *ante*), the court instructed that the jury could find defendant not guilty of murder but guilty of the lesser included offense of voluntary manslaughter. It also declared that it could return partial verdicts, and related findings, as to homicide, including first degree murder, second degree murder, and voluntary manslaughter. Finally, it explained how it was to complete the forms for the possible verdicts and findings.

As also noted above (see pt. II.C., *ante*), we held in *People v. Kurtzman, supra*, 46 Cal.3d 322, after our decision in *Stone v. Superior Court, supra*, 31 Cal.3d 503, that a court may "restrict[] a jury from *returning a verdict* on a lesser included offense before acquitting on a greater offense" but may not "preclude [it] from *considering* lesser offenses during its deliberations." (*People v. Kurtzman, supra*, 46 Cal.3d at pp. 324-325, italics in original.) We thereby impliedly rejected a "strict acquittal-first rule under which the jury must acquit of the greater offense before even considering lesser included offenses." (*Id.* at p. 333.) [*1077]

(10) Defendant contends that by instructing the jury as it did, the court erred under *Stone* and *Kurtzman*: it effectively imposed, he asserts, an acquittal-first rule. We disagree.

On this record, there is no reasonable likelihood that the jury construed or applied the challenged instructions in a manner offensive to *Stone* and *Kurtzman*. We do not overlook certain language in the instructions themselves that arguably suggested that the jury was required to deliberate on the charges and allegations in a specified order. Neither do we overlook a number of comments in the prosecutor's summation, referred to above (see pt. II.C., *ante*), to similar effect. Nevertheless, we believe that a reasonable juror would have understood and

employed the instructions--which he or she was directed to consider as a whole and in context-- simply to govern how the jury was to return its verdicts and findings after it completed its deliberations on the charges and allegations. This is because, in accordance with their very terms, the instructions spoke much of returning verdicts and findings and little of deliberating on the charges and allegations. ⁷

⁷ Defendant claims in substance that the asserted instructional error under *Stone* and *Kurtzman* amounts, at least in this case, to error violative of, inter alia, the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17* of the California Constitution. There was no error, however, under *Stone* and *Kurtzman*.

We recognize that in *Kurtzman* we broadly stated that instructions like those under challenge here "may confuse jurors . . . as to how deliberations should proceed," "may create ambiguity as to just what is prohibited and what is required," and are "potentially misleading." (*People v. Kurtzman, supra*, 46 Cal.3d at p. 336.) "Whatever its validity in the abstract, that statement does not affect our view as to how a reasonable juror would have . . . understood [or employed] the instructions actually given in this case." (*People v. Mickey (1991)* 54 Cal.3d 612, 673, fn. 10 [286 Cal.Rptr. 801, 818 P.2d 84] [rejecting a claim of error against similar instructions on a similar record].)

Whether and when an erroneous instruction imposing an acquittal-first rule would be reversible is a difficult question.

Error of this sort appears to implicate California law only. "It is the general rule for error under state law that reversal requires prejudice and prejudice in turn requires a reasonable probability of an effect on the outcome." (*People v. Gordon (1990)* 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251].) That rule seems applicable here.

In the abstract, an acquittal-first instruction appears capable of *either* helping or harming *either* the People *or* the defendant.

Such an instruction "has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree. But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." (*United States v. Tsanas (2d Cir. 1978)* 572 F.2d 340, 346, fn. omitted (per Friendly, J.).)

As stated, in the abstract, an acquittal-first instruction appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and

what the effect was. Certainly, even if we could conclude that there is a reasonable likelihood that the jury in this case construed or applied the challenged instructions as imposing an acquittal-first rule, on this record we could not conclude that defendant suffered prejudice.

[*1078] [**58] [***885] E. *INSTRUCTION ON IMPLIED MALICE AFORETHOUGHT*

The court instructed the jury on the definition of murder, in relevant part, as follows: "The crime of murder is the unlawful killing of a human being with malice aforethought"

The court further instructed the jury on the definition of malice aforethought, including the following: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] 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 who acts with conscious disregard for life." (Brackets omitted.)

(11) Defendant contends that the court erred by instructing the jury as it did on implied malice. He argues that the instruction in question established a "mandatory presumption" of implied malice that relieved the People of their burden of proof beyond a reasonable doubt on that element and thereby violated the *due process clause of the Fourteenth Amendment to the United States Constitution*.

We reject the claim. There is no reasonable likelihood that the jury misconstrued or misapplied the challenged instruction as a "mandatory presumption" of implied malice, 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 (see *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221, fn. 1 [264 Cal.Rptr. 841, 783 P.2d 200] [finding "no error in the giving of" a substantially identical instruction]). [*1079]

F. *REFUSAL OF "SPECIAL" INSTRUCTIONS REQUESTED BY DEFENDANT*

Defendant requested the court to give the jury the following instructions, among others: (1) "Special Instruction No. 'A'," which declared to the effect that first degree felony-murder-rape requires the perpetrator to form a specific intent to rape either prior to or during the commission of the fatal act; (2) "Special Instruction No. 'B'," which stated in part that rape must involve a live victim and "not a dead body"; and (3) "Special Instruction No. 'E'," which [**59] [***886] would have told the jury, in language derived from *People v. Anderson* (1968) 70 Cal.2d 15, 27 [73 Cal.Rptr. 550, 447 P.2d 942], that "[b]efore you may find that the killing in this case was deliberate and premeditated, you must find evidence of planning activity, motive to kill, and a calculated killing; or extremely strong evidence of planning activity; or evidence of a motive to kill, in conjunction with either planning activity or a calculated killing," etc.

The court refused each of the three "special" instructions. In substance, its reasoning (at least in part) was this: to the extent that it was legally correct, each of the instructions was duplicative of one or more other instructions that it intended to give.

The court subsequently gave each of its intended standard instructions.

(12a) Defendant contends that the court erred by refusing each of the three "special" instructions.

(13) Of course, it is not erroneous to refuse an instruction that is not legally correct. (See *People v. Benson, supra*, 52 Cal.3d at p. 799.) Indeed, it would be improper not to. (See *ibid.*) Further, "[i]t is not erroneous to refuse" even a legally correct instruction if it is duplicative. (*Id.* at p. 805, fn. 12.)

(12b) There was no error in the court's refusal of any of the three "special" instructions. The question of the appropriate standard of review need not be addressed. Even if examined de novo, the court's determination is sound.

To be sure, it is clear that "Special Instruction No. 'A' " is legally correct at least in part. "[I]n order to establish a defendant's guilt of first degree murder on the theory that he committed the killing during the perpetration . . . of one of the enumerated felonies . . . , the prosecution must prove that he harbored the specific intent to commit one of such enumerated felonies.' [Citation.] Additionally, the evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of [*1080] the acts which resulted in the victim's death . . ." (*People v. Anderson, supra*, 70 Cal.2d at p. 34.)

Similarly, it is clear that "Special Instruction No. 'B' " is legally correct at least in part. Rape "must involve a live victim . . ." (*People v. Rowland (1992) 4 Cal.4th 238, 269 [14 Cal.Rptr.2d 377, 841 P.2d 897].*)

By contrast, it is doubtful whether "Special Instruction No. 'E' " is legally correct in any part. By its very terms, *People v. Anderson, supra*, 70 Cal.2d 15, guides appellate courts in conducting sufficiency-of-evidence review of findings by juries of premeditation and deliberation. (See *id.* at pp. 24-34.) It does not even purport to constrain juries in making such findings.

Nevertheless, to the extent that it was legally correct, each of the three "special" instructions was indeed duplicative. Each was adequately covered by one or more of the standard instructions actually given. There is no reasonable likelihood that the jury construed or applied the latter so as not to embrace the substance of the former. ⁸

⁸ Defendant claims in effect that the asserted instructional error amounts, at least in this case, to error violative of, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*. There was no error.

G. OMISSION OF AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER

(14) Manslaughter is deemed to be related to murder as a lesser included offense. (See, e.g., 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 327, p. 379; compare *Pen. Code, § 187, subd. (a)* [defining murder as the "unlawful killing of a human being . . . with malice aforethought"] with *id.*, § 192 [defining manslaughter as the "unlawful killing of a human being without malice"].) As relevant here, manslaughter is voluntary, i.e., "upon a sudden quarrel or heat of passion" (*id.*, § 192, subd. (a)), or involuntary, i.e., "in the commission of an unlawful act, not amounting to felony; or [**60] in [***887] the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (*id.*, § 192, subd. (b)).

The court instructed the jury on murder. It also instructed on voluntary manslaughter as a lesser included offense. Defendant had so requested. By contrast, it did not instruct on involuntary manslaughter as a lesser included offense. Defendant had not so requested. In discussing proposed instructions, defense counsel Soria had stated: "I don't think this is an involuntary [manslaughter] situation."

(15) Defendant contends that the court erred by failing to instruct the jury sua sponte on involuntary manslaughter as a lesser included offense.

[*1081] 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, i.e., evidence from which a rational trier of fact could find beyond a reasonable doubt (see *People v. Wickersham* (1982) 32 Cal.3d 307, 325 [185 Cal.Rptr. 436, 650 P.2d 311]) 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 negligence. But speculation is not evidence, less still substantial evidence. (See *People v. Pride* (1992) 3 Cal.4th 195, 250 [10 Cal.Rptr.2d 636, 833 P.2d 643].)

Any error, however, would not have required reversal. Indeed, it would "necessarily [have been] harmless in light of the jury's special circumstance finding that defendant killed [Hildreth] in the perpetration of [rape]. Under this finding, the [Hildreth] killing was necessarily felony murder." (*People v. Price*, supra, 1 Cal.4th at p. 464.)⁹

9 Defendant may be understood to claim that the asserted instructional error amounts, at least in this case, to error violative of, inter alia, the *Eighth* and *Fourteenth Amendments to the United States Constitution*. There was no error. And, if there were, it would not implicate the federal charter.

H. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO GUILT

(16) Defendant contends that defense counsel provided him with ineffective assistance as to guilt in violation of the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution*.

To succeed under the Sixth Amendment or article I, section 15, a defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218 [233 Cal.Rptr. 404, 729 P.2d 839] [discussing both the federal and state constitutional rights to the assistance of counsel].)¹⁰

10 To the extent that defendant argues that the showing required under the Sixth Amendment or article I, section 15 is different from that stated in the text, he is unpersuasive. He relies on language in various older decisions suggesting that prejudice may be shown under a test of reasonable *possibility*. (See, e.g., *People v. Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1] [discussing both the federal and state constitutional rights to the assistance of counsel].) Those words, however,

are no longer vital. (See, e.g., *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218 [same].)

The prosecutor called many witnesses and used many exhibits to prove defendant's guilt beyond a reasonable doubt. For their part, defense counsel [*1082] called several witnesses and used several exhibits to raise such a doubt, playing on various uncertainties in the prosecutor's evidence, including uncertainties related to time.

Defendant claims that defense counsel performed deficiently with regard to numerous cited acts and omissions and thereby [**61] subjected [***888] him to prejudice. In large part, he simply recasts arguments for reversal that we have expressly or impliedly disposed of in the course of the preceding analysis. He is indeed forceful in presenting his complaints. We have carefully considered each in its proper context. In few, if any, instances does he show professionally unreasonable conduct. In none does he show a reasonable probability of an adverse effect on the outcome.

For example, defendant 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.

Neither does defendant establish ineffective assistance in defense counsel's asserted failure to investigate his mental 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. ¹¹

11 Defendant appears to claim constructive denial of counsel bearing on guilt: defense counsel's assertedly deficient performance "resulted in a breakdown of the adversarial process at trial; that breakdown establishes a violation of defendant's federal and state constitutional right to the effective assistance of counsel; and that violation mandates reversal of the judgment even in the absence of a showing of specific prejudice." (*People v. Visciotti* (1992) 2 Cal.4th 1, 84 [5 Cal.Rptr.2d 495, 825 P.2d 388] (dis. opn. of Mosk, J.)) The point is without merit.

Defendant may be understood to claim that defense counsel's ineffective assistance under the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution* bearing on guilt entails the violation of other provisions of the federal and state charters, including the Sixth, Eighth, and Fourteenth Amendments and *article I, sections 7, 15, 16, and 17*. There was, however, no ineffective assistance.

I. SUFFICIENCY OF THE EVIDENCE FOR THE CONVICTIONS

(17a) Defendant contends in substance that the evidence is insufficient under the *due process clause of the Fourteenth Amendment to the United States Constitution* and/or the *due process clause of article I, section 15 of the California Constitution* to support his convictions for rape and first degree murder. [*1083] **(18)**

In reviewing the sufficiency of evidence under the *due process clause of the Fourteenth Amendment* and/or the *due process clause of article I, section 15*, the "question we ask is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime' "--and the identity of the

criminal--" 'beyond a reasonable doubt.' " (*People v. Rowland, supra, 4 Cal.4th at p. 269*, quoting *Jackson v. Virginia (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573, 99 S.Ct. 2781]*, italics in original.)

(17b) Defendant claims that the evidence is insufficient to support either his rape or first degree murder conviction on the ground that it is inadequate to identify him as the perpetrator.

In view of the evidence described above (see pt. I.A., *ante*), 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 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.

[**62] [***889] Defendant argues to the contrary. To be sure, the inculpatory evidence is not without weaknesses in certain particulars, including the matter of time. But considered as a whole, it is altogether substantial. Defendant establishes nothing more than that some rational trier of fact might perhaps have declined to identify him as the perpetrator. That is not enough.

(19) Defendant separately claims that the evidence is insufficient to support his rape conviction. In particular, he argues that evidence is lacking that he engaged in sexual intercourse with Hildreth, and specifically that he accomplished penetration; that he did so without her consent; and that he did so while she was alive.

As charged here, "[r]ape is an act of sexual intercourse . . . with a person not the spouse of the perpetrator" "accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another." (Pen. Code, former § 261, *subd. (2)*, as amended by Stats. 1985, ch. 283, § 1, pp. 1307-1308; accord, Pen. Code, present § 261, [*1084] *subd. (a)(2)*; cf. *id.*, § 262, *subd. (a)* [rape of spouse].) "Any sexual penetration, however slight, is sufficient to complete the crime." (*Id.*, § 263.)

Thus, for rape there must be, inter alia, an act of sexual intercourse with at least some penetration, "involv[ing] a live victim [citation] who does not effectively consent [citation]." (*People v. Rowland, supra, 4 Cal.4th at p. 269*.)

In view of the evidence described above, a rational trier of fact could certainly have found beyond a reasonable doubt that defendant raped Hildreth. As to sexual intercourse with at least some penetration: Hildreth's vagina contained sperm cells. As to lack of consent: Hildreth's upper clothing had been pushed up above her chest toward her neck and the lower clothing had been pulled down around her left ankle; her right iliac or pelvic region had been abraded; and her vagina contained blood cells. As to vitality: all the injuries on Hildreth's body were ante mortem.

Defendant's contrary argument again proves too little, establishing nothing more than that some rational trier of fact might perhaps have declined to find him guilty of rape. Notwithstanding his implication, the "absence of genital trauma is not inconsistent with nonconsensual sexual intercourse." (*People v. Rowland, supra, 4 Cal.4th at p. 265*.) And notwithstanding his assertion, in his summation the prosecutor did not concede lack of penetration. Defendant attempts to deny the existence of evidence that Hildreth's vagina

contained sperm cells. He cannot succeed. As noted, a serologist testified that a vaginal swab revealed the "presence of sperm cells, spermatozoa." That he also testified that the swab revealed the presence of only a "very, very small amount of semen" is without consequence here--especially in light of the fact that defendant had apparently ejaculated not long before the rape when he engaged in sexual intercourse with Pena. One point deserves special comment. Relying on the evidence referred to in the preceding paragraph and also on the fact that Hildreth's legs were spread apart in death, a rational trier of fact could have rejected, beyond a reasonable doubt, the following scenario that defendant suggests, to wit, that he engaged in consensual sexual intercourse *and only thereafter* turned to violence: such a trier could have concluded to the requisite degree of certainty that violence accompanied sex.

(20a) Finally, defendant claims that the evidence is insufficient to support his first degree murder conviction.

The People prosecuted the case on two theories of first degree murder. The primary was felony-murder-rape. The secondary was willful, deliberate, [*1085] and premeditated murder. In his summation, the prosecutor all but expressly withdrew the latter.

"Murder is the unlawful killing of a human being . . . with malice aforethought." (*Pen. Code, § 187, subd. (a).*)

As pertinent here, "[a]ll murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing . . . is [**63] [***890] murder of the first degree" (*Pen. Code, § 189.*) The mental state required is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See *id.*, §§ 187, *subd. (a), 189.*)

Similarly, "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate," certain enumerated felonies, including rape, "is murder of the first degree" (*Pen. Code, § 189.*) **(21)** The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. (See, e.g., *People v. Coefield (1951) 37 Cal.2d 865, 868-869 [236 P.2d 570]*; see, generally, 1 Witkin & Epstein, *Cal. Criminal Law, supra, Crimes Against the Person, § 470, p. 528*; see also *People v. Hernandez (1988) 47 Cal.3d 315, 346 [253 Cal.Rptr. 199, 763 P.2d 1289]* [stating that "[w]e have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape".]) There is no requirement of a strict "causal" (e.g., *People v. Ainsworth (1988) 45 Cal.3d 984, 1016 [248 Cal.Rptr. 568, 755 P.2d 1017]*) or "temporal" (e.g., *People v. Hernandez, supra, 47 Cal.3d at p. 348*) relationship between the "felony" and the "murder." All that is demanded is that the two "are parts of one continuous transaction." (E.g., *People v. Ainsworth, supra, 45 Cal.3d at p. 1016*; see, e.g., *People v. Hernandez, supra, 47 Cal.3d at p. 348.*) There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony. (See, e.g., *People v. Whitehorn (1963) 60 Cal.2d 256, 264 [32 Cal.Rptr. 199, 383 P.2d 783].*)

(20b) Defendant maintains that the evidence is insufficient as to the felony-murder-rape theory.

In part, defendant argues that evidence is lacking for rape. He is unpersuasive. The analysis above proves the point.

In other part, defendant argues that evidence is lacking for specific intent to commit the

underlying felony of rape. Again, he is unpersuasive. A rational trier of fact could surely have found the requisite intent beyond a [*1086] reasonable doubt. There are facts disclosing defendant's manifest desire to engage in sexual intercourse with any woman whom he could "pick up": remember Pena. There are also facts disclosing Hildreth's manifest desire not to engage in sexual intercourse with him: remember the appearance and condition of her body when it was found.

In still other part, defendant argues that the "evidence failed to establish either an intent to kill or, if such intent existed, that it arose prior to conclusion of the rape. An intent to kill formed after termination of any actual or attempted rape, and unrelated to those offenses, would not support a felony-murder conviction" Yet again, he is unpersuasive. Contrary to what appears to be his assumption, felony murder does not require intent to kill or a strict "causal" or "temporal" relationship between the "felony" and the "murder." In any event, the relationship that a rational trier of fact could have discerned from the evidence is enough. ¹²

12 Defendant may be understood to claim that the court erred by failing to instruct the jury on intent to kill as an "element" of first degree felony murder. But as explained in the text, intent to kill is not an element.

Defendant also maintains that the evidence is insufficient as to the willful, deliberate, and premeditated murder theory. This point need not be addressed. The conviction rests, at least, on the adequately supported felony-murder-rape theory. The fact is established by the jury's first degree murder and rape verdicts and its felony-murder-rape special-circumstance finding-- which, under the instructions actually given, necessarily entail a unanimous determination of felony-murder-rape beyond a reasonable doubt. (Compare *People v. Hernandez, supra*, 47 Cal.3d at p. 351 [arriving at a [**64] similar conclusion on a similar record]; [***891] *People v. Ainsworth, supra*, 45 Cal.3d at pp. 1015-1016 [same].) ¹³

13 Defendant claims that to the extent that the evidence is insufficient to support his convictions under the *due process clause of the Fourteenth Amendment to the United States Constitution* and/or the due process clause of *article I, section 15 of the California Constitution*, such convictions are invalid as well under, inter alia, the Fifth, Sixth, Eighth, and Fourteenth Amendments; *article I, sections 7, 15, 16, and 17 of the California Constitution*; and California statutory and decisional law. The evidence, however, is not insufficient.

J. REVERSIBILITY OF THE FIRST DEGREE MURDER CONVICTION UNDER THE GREEN RULE

In *People v. Green* (1980) 27 Cal.3d 1 [164 Cal.Rptr. 1, 609 P.2d 468] (hereafter *Green*), we stated the following rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt [*1087] rested, the conviction cannot stand." (*Id. at p. 69*, disapproved on another point, *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

In *People v. Guiton* (1993) 4 Cal.4th 1116 [17 Cal.Rptr.2d 365, 847 P.2d 45] (hereafter *Guiton*), we construed the rule of *Green* "as applying only to cases of *legal* insufficiency" and not to cases of *factual* insufficiency, i.e., those in which the evidence is insufficient. (*Id. at p.*

1128, italics in original.)

Defendant contends that, under the rule of *Green*, his conviction for first degree murder must be reversed. We disagree. The *Green* rule simply does not apply. We have already determined from the record that the first degree murder verdict rests, at least, on the theory of felony-murder-rape. (See pt. II.I., *ante*.) To our mind, that theory is legally sufficient. Defendant argues otherwise. He asserts that the theory is "tainted by reversible legal error . . ." He does not persuade: his points have previously been considered and rejected. He also argues that the theory is factually insufficient. As construed in *Guiton*, the *Green* rule does not cover such inadequacy. All the same, the evidence is indeed sufficient. (See pt. II.I., *ante*.)¹⁴

14 Defendant claims in substance that reversal under the rule of *Green*, at least in this case, entails reversal as well under, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17* of the California Constitution. The *Green* rule, however, does not apply. Defendant appears to argue that the rule should somehow be extended because this is a capital case. We do not agree.

Separately and independently, defendant claims that the "cumulative effect of errors" (capitalization omitted) bearing on guilt amounts to a violation of his rights under, inter alia, the *Fifth, Sixth, and Fourteenth Amendments* and *article I, sections 7, 15, and 16* and, as a consequence, requires reversal as to that issue. There were no such errors and no such effect.

III. DEATH-ELIGIBILITY ISSUES

Defendant challenges the determination that he was subject to the death penalty. As relevant here, death eligibility is established when the defendant is convicted of murder in the first degree under at least one special circumstance. (*Pen. Code, § 190.3*.) As shown above, defendant has not successfully attacked the jury's verdict of guilty as to murder in the first degree. As shown below, he does not successfully attack its felony-murder-rape special-circumstance finding. Hence, the challenge fails.

A. PROSECUTORIAL MISCONDUCT AS TO DEATH ELIGIBILITY

Defendant contends in substance that on numerous occasions before the jury the prosecutor engaged in misconduct as to death eligibility. This claim is dependent on the point charging the prosecutor with misconduct as to [*1088] guilt. The latter fails [**65] both at [***892] the threshold and on the merits. (See pt. II.C., *ante*.) So must the former.¹⁵

15 Defendant claims in substance that the asserted prosecutorial misconduct bearing on death eligibility requires reversal under, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17* of the California Constitution. There was no misconduct. Certainly, the complained-of comments by the prosecutor did not " 'so infect[] the trial with unfairness as to make the resulting [determination of death eligibility] a denial of due process.' " (*Darden v. Wainwright, supra, 477 U.S. at p. 181 [91 L.Ed.2d at p. 157]*.)

B. REFUSAL OF AN INSTRUCTION ON INTENT TO KILL AS AN ELEMENT OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE

(22) The felony-murder special circumstance covers the situation in which the "murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit" certain enumerated felonies, including rape. (*Pen. Code*, § 190.2, *subd. (a)(17)(iii)*.)

The felony-murder special circumstance is generally similar to felony murder. (3 Witkin & Epstein, *Cal. Criminal Law, supra*, Punishment for Crime, § 1582, pp. 1886-1887.) Two comments, however, should be made.

The first relates to independent felonious purpose. The felony-murder special circumstance requires that the "defendant [must] commit[] the act resulting in death in order to advance an independent felonious purpose." (*People v. Bonin (1989) 47 Cal.3d 808, 850 [254 Cal.Rptr. 298, 765 P.2d 460]*.)

The second--which is of direct concern here--relates to intent to kill. In *Carlos v. Superior Court (1983) 35 Cal.3d 131, 153-154 [197 Cal.Rptr. 79, 672 P.2d 862]* (hereafter *Carlos*), we concluded in substance that intent to kill is an element of the felony-murder special circumstance. In *People v. Anderson, supra*, 43 Cal.3d 1104, 1147 (hereafter *Anderson*), we overruled *Carlos* and held to the contrary. But when, as here, the "felony-murder special circumstance is alleged to have occurred after *Carlos* and before *Anderson*, the former governs." (*People v. Ashmus, supra*, 54 Cal.3d at p. 981.)

(23) The court generally instructed the jury on the felony-murder-rape special circumstance alleged in this case. In most respects, it did so properly. Under the erroneous belief that *Anderson* controlled and not *Carlos*, however, it refused to instruct on the element of intent to kill. But in an evident attempt to cure error or avoid prejudice in the event that its view proved to [*1089] be unsound, it effectively instructed the jury, if it found defendant guilty of the first degree murder of Hildreth, to determine whether he killed her intentionally. As noted, the jury subsequently so found.

Defendant contends that the court erred by refusing to instruct the jury on intent to kill as an element of the felony-murder-rape special circumstance alleged in this case.

The standard of review for a claim of instructional error of this kind is *de novo*: the question is one of law, involving as it does the determination of the applicable legal principles (see *People v. Louis (1986) 42 Cal.3d 969, 985 [232 Cal.Rptr. 110, 728 P.2d 180]*).

After independent scrutiny, we conclude that the court did indeed err. As stated, *Carlos* governs here. Under *Carlos*, intent to kill is an element of the felony-murder special circumstance. Pursuant to *Carlos*, the court should have so instructed. Its refusal to do so was error under the *due process clause of the Fourteenth Amendment to the United States Constitution*. (See *People v. Odle (1988) 45 Cal.3d 386, 412 [247 Cal.Rptr. 137, 754 P.2d 184]*; *People v. Garcia (1984) 36 Cal.3d 539, 552 [205 Cal.Rptr. 265, 684 P.2d 826]*.)

We further conclude, however, that the error does not require reversal. The erroneous omission of the element of intent to kill is not automatically reversible [**66] but [***893] rather is subject to harmless-error analysis under the "reasonable doubt" standard for federal constitutional error laid down in *Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824]*. (See generally, *People v. Odle, supra*, 45 Cal.3d at pp. 410-415.) In our view, it is not prejudicial on the facts of this case. "When, as here, under proper instructions the jury necessarily and soundly makes a finding adverse to the defendant on an issue erroneously

omitted from the instructions"--in this case, intent to kill--"there is no prejudice arising from the omission." (*People v. Williams (1992) 4 Cal.4th 354, 371-372 [14 Cal.Rptr.2d 441, 841 P.2d 961]* (conc. opn. of Mosk, J.).)

Defendant argues to the contrary, attacking both our analysis and our conclusion. He is unpersuasive. His assertion, among others, that the jury's intentional-killing finding is ineffective for present purposes because it was allegedly not made "in the context of felony-murder or the special circumstance," and did not specify that he had the "intent to kill concurrent with any sexual assault" or "sexual activity," is altogether lacking in merit. Neither "context" nor "concurrence" is of any consequence here. Notwithstanding what appears to be his assumption, the felony-murder special circumstance does not require a strict "causal" or "temporal" relationship [*1090] between the "felony" and the "murder." Indeed, as noted, it extends even to the situation in which the "murder was committed while the defendant was engaged in . . . the immediate flight *after* committing" the felony. (*Pen. Code, § 190.2, subd. (a)(17)(iii)*, italics added.) Plainly, it does not necessitate the "simultaneity" that defendant demands. ¹⁶

16 Defendant claims in substance that the court's refusal to instruct on intent to kill as an element of the felony-murder-rape special circumstance alleged in this case amounts to reversible error violative of, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17* of the California Constitution. Defendant's point essentially rehearses his unpersuasive argument that the error requires reversal. It falls of its own weight.

C. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO DEATH ELIGIBILITY

Defendant contends in substance that defense counsel provided him with ineffective assistance as to death eligibility in violation of the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution*. This claim is dependent on the point charging counsel with ineffective assistance as to guilt. The latter fails. (See pt. II.H., *ante*.) So must the former. ¹⁷

17 Defendant appears to claim constructive denial of counsel bearing on death eligibility. The point is without merit.

Defendant may be understood to claim that defense counsel's ineffective assistance under the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution* bearing on death eligibility entails the violation of other provisions of the federal and state charters, including the *Sixth, Eighth, and Fourteenth Amendments* and *article I, sections 7, 15, 16, and 17*. There was, however, no ineffective assistance.

D. SUFFICIENCY OF THE EVIDENCE FOR THE FELONY-MURDER-RAPE SPECIAL-CIRCUMSTANCE FINDING

Defendant contends that the evidence is insufficient to support the felony-murder-rape special-circumstance finding.

(24) " 'In reviewing the sufficiency of evidence for a special circumstance'--as for a conviction--'the question we ask is whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the

allegation beyond a reasonable doubt.' " (*People v. Rowland, supra, 4 Cal.4th at p. 271*, quoting *People v. Mickey, supra, 54 Cal.3d at p. 678*, italics in original.)¹⁸

18 In this case, "[w]e need not, and do not, reach the question whether the sufficiency-of-evidence review specified in the text is required under the *due process clause of the Fourteenth Amendment to the United States Constitution* and/or the due process clause of *article I, section 15 of the California Constitution.*" (*People v. Rowland, supra, 4 Cal.4th at p. 271, fn. 11.*)

[**67] [***894] Defendant's claim of insufficiency goes to the underlying felony of rape itself, independent felonious purpose, and intent to kill.

[*1091] In view of the evidence, which is described above (see pt. I.A., *ante*) and need not be rehearsed here, a rational trier of fact could certainly have found the felony-murder-rape special-circumstance allegation to be true beyond a reasonable doubt. That is to say, such a trier of fact could surely have determined to that degree of certainty that defendant murdered Hildreth while he was engaged in raping her or at least in fleeing the crime scene immediately thereafter.

Defendant's complaint about the asserted lack of evidence of the underlying felony of rape fails. Its substance has already been assessed and found wanting. (See pt. II.I., *ante*.)

Defendant's complaint about the asserted lack of evidence of independent felonious purpose also fails. A rational trier of fact could have found beyond a reasonable doubt that he committed the act resulting in death in order to commit rape.

(25) Finally, defendant's complaint about the asserted lack of evidence of intent to kill fails as well. A rational trier of fact could have found beyond a reasonable doubt that he sought to eliminate Hildreth as a witness to his crimes, a witness who could have identified him positively. Without question, such a trier of fact could have declined to accept as accidental the act of fatally stabbing Hildreth or the act of pressing down her cheek with the sole of a shoe as she lay dying. Defendant asserts that an "intent to kill formed after termination of any actual or attempted rape, and unrelated to those offenses, would not support a felony-murder . . . special circumstance." Contrary to what appears to be his assumption, the felony-murder special circumstance does not require a strict "causal" or "temporal" relationship between the "felony" and the "murder." In any event, the relationship that a rational trier of fact could have discerned from the evidence is enough.¹⁹

19 Defendant may be understood to claim that to the extent that the evidence is insufficient to support the felony-murder-rape special-circumstance finding, such a finding is invalid under, inter alia, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; *article I, sections 7, 15, 16, and 17* of the California Constitution; and California statutory and decisional law. The evidence, however, is not insufficient.

Separately and independently, defendant claims that the "cumulative effect of errors" (capitalization omitted) bearing on death eligibility amounts to a violation of his rights under, inter alia, the Fifth, Sixth, Eighth, and Fourteenth Amendments and *article I, sections 7, 15, 16, and 17* and, as a consequence, requires reversal as to that issue. There was only one such error and no such effect.

IV. PENALTY ISSUES

Defendant raises a number of claims attacking the judgment as to penalty. As will appear, none is meritorious.

[*1092] A. *EVIDENCE CONCERNING THE COMPENSATION OF A DEFENSE EXPERT*

As noted, in his case in mitigation defendant called as an expert witness Samuel George Benson, Jr., M.D., a psychiatrist. On cross-examination, the prosecutor sought to inquire into his compensation--specifically, the amount. Defense counsel objected to the admissibility of such evidence on the basis of *Penal Code section 987.9* and its "confidentiality requirement." The court overruled the objection. On the prosecutor's inquiry, Dr. Benson testified: "My fee is \$250 per hour. I believe I have spent about 32 hours on this case."

Defendant contends that the court erred by overruling his *Penal Code section 987.9* objection to the admissibility of evidence concerning Dr. Benson's compensation and subsequently allowing the testimony in question. We reject the claim for the reasons stated against a similar point arising from the guilt phase. (See pt. II.B., *ante*.)

B. *PROSECUTORIAL MISCONDUCT AS TO PENALTY*

Defendant contends that on numerous occasions before the jury the prosecutor engaged in misconduct as to penalty.

[**68] [***895] After review, we reject defendant's claim at the threshold. He failed to satisfy the general rule requiring assignment of misconduct and request for admonition as to any of the comments or questions by the prosecutor of which he now complains. No exception is applicable.

We also reject defendant's claim on the merits. There is no reasonable likelihood that the jury construed or applied any of the complained-of comments or questions in an objectionable fashion. We do not overlook some apparent misstatements and other infelicities by the prosecutor. But when we consider each of the challenged remarks and queries in its context, we simply cannot conclude that the prosecutor used a method to persuade the jury that was "deceptive" or "reprehensible."

(26) Let us consider as representative examples the three complaints to which defendant devotes the greatest number of pages in his briefing.

Defendant called his older brother Ronald Berryman as a witness in his case in mitigation.

On direct examination, defense counsel Peterson elicited potentially mitigating testimony from Ronald relating to defendant's background and character. In its course, Ronald compared defendant to "Casanova." Near its [*1093] conclusion, counsel asked, "Ronald, you've been convicted of a felony, haven't you?" Ronald answered, "Yes, I have." Counsel: "As I understand it, it has something to do with marijuana, and a transaction that Rodney was involved in, too; is that right?" Ronald: "Correct." Counsel: "And Rodney spent a little time in the county jail down in Los Angeles, right?" Ronald: "Yeah, but not that much." Counsel: "You went to state prison, didn't you?" Ronald: "Yes, I did."

On cross-examination, the prosecutor pursued the matter of Ronald's felony conviction. The following colloquy ensued.

"Q. And you were convicted of a felony. What felony specifically were you convicted of?"

"A. Robbery, possession of dangerous weapons, firearms, drugs.

"Q. You?

"A. Me.

"Q. Now, were all those incidents in which your brother was involved?

"A. No, sir.

"Q. And the one that your brother was involved in, what one was that?

"A. That was narcotic--I think that might be when I was first arrested in the city of West Covina, when they had the biggest raid there, and we got caught up in a mix, Catch 22, and got busted.

"Q. Sales of marijuana, from an investigation coming from--

"A. The West Covina High School.

"Q. West Covina High School?

"A. Uh-huh, it was undercover in the West Covina High School.

"Q. Yeah, they thought you were selling to kids; is that correct?

"A. Well, not I, myself, but my brother, my brother was in high school at the time, so he was able to do that, because he was a high school kid himself.

"Q. You were supplying the stuff and he was actually doing the transaction, the transporting?

[*1094] ". . . .

"A. No."

Defendant claims to discern misconduct in the questioning of Ronald by the prosecutor. We do not. The prosecutor sought to impeach Ronald's credibility. His effort in this regard was not improper. Defendant's argument to the contrary is unpersuasive. His assertion to the effect that the prosecutor "intentionally elicit[ed] inadmissible and prejudicial evidence," namely, evidence that he "sold marijuana to kids" (underscoring omitted), is without adequate support. Strictly speaking, the prosecutor did not elicit the evidence by his question. Rather, Ronald volunteered it in an answer beyond the question's scope. The prosecutor's query did not portray defendant--as he would have it--as [***896] a "corrupter of the [**69] youth." Indeed, at the relevant time, defendant was a youth himself.

(27) Next, in the course of his summation, the prosecutor referred to the penalty factor dealing with "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Any evidence of that? No, there was not. . . . No evidence that while this act was occurring that he was under any extreme mental or emotional disturbance." The prosecutor also referred to the penalty factor dealing with "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was impaired as a result of mental disease or defect or the effects of intoxication. That's the old insanity defense. Did he know what he was doing was criminal? Did he have the ability to perform it, his behavior? No indication from anyone he had any sort of psychotic break or anything even approaching it that he didn't know what he was doing was criminal. Not a factor in mitigation."

Defendant claims to discern misconduct in the comments by the prosecutor quoted above. We do not. Defendant is right that the prosecutor misstated the law in remarking that the penalty factor on impairment of capacity was "the old insanity defense" (see *People v. Babbitt* (1988) 45 Cal.3d 660, 720-721 [248 Cal.Rptr. 69, 755 P.2d 253])--although his mistake is readily understandable (cf. *People v. Drew* (1978) 22 Cal.3d 333, 336-337, 339-348 [149 Cal.Rptr. 275, 583 P.2d 1318] [adopting the standard proposed by the Am. Law Inst. in Model Pen. Code (Proposed Official Draft 1962) § 4.01, subd. (1): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."], superseded by *Pen. [*1095] Code, § 25, subd. (b).*) But as noted, misstatement is not enough. Defendant is wrong, however, in the rest of his complaints. Contrary to his assertion, the prosecutor did not lead "the jury away from considering [potentially] mitigating evidence" (Underscoring deleted.)

Last, in the course of his summation, the prosecutor argued that the following penalty factors "had not been factors in mitigation": "[W]hether or not the victim was [a] participant in the defendant's homicidal conduct or consented to the homicidal act"; "did the defendant have a reasonable belief to be a moral justification or extenuation of his conduct?"; and "whether or not the defendant acted under extreme duress or under substantial domination of another person."

Defendant claims to discern misconduct in the comments by the prosecutor quoted above. We do not. Defendant argues that the prosecutor's remarks implied that the absence of each of the cited circumstances in mitigation amounted to the presence of a corresponding circumstance in aggravation. There is no reasonable likelihood that the jury so construed or applied the words in question. A reasonable juror would have understood and employed the language to mean nothing more objectionable than the tautology that the absence of mitigation is the absence of mitigation.²⁰

20 Defendant claims in substance that the asserted prosecutorial misconduct bearing on penalty requires reversal under, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17* of the California Constitution. There was no misconduct. Certainly, the complained-of comments and questions by the prosecutor did not " 'so infect[] the trial with unfairness as to make the resulting [determination of penalty] a denial of due process.' " (*Darden v. Wainwright, supra, 477 U.S. at p. 181 [91 L.Ed.2d at p. 157].*)

Defendant also claims in substance that the asserted prosecutorial misconduct bearing on penalty gave rise to a duty on the part of the court to give certain "curative" instructions sua sponte, and that the court's failure to do so amounts to reversible error under, inter alia, the *Fifth, Sixth, Eighth, and Fourteenth Amendments* and *article I, sections 7, 15, 16, and 17*. To repeat: there was no misconduct.

C. INSTRUCTION ON THE "CIRCUMSTANCES OF THE CRIME"

In accordance with *Penal Code section 190.3*, as effectively construed in such [**70] [***897] decisions as *People v. Easley* (1983) 34 Cal.3d 858, 877-878 [196 Cal.Rptr. 309, 671 P.2d 813], the court instructed the jury as follows.

"In determining which penalty is to be imposed on . . . defendant, you shall consider all of

the evidence which has been received during any part of the trial of this case You shall consider, take into account and be guided by the following factors, if applicable:

[*1096] "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (Brackets omitted.)

Defendant contends that the penalty factor dealing with the "circumstances of the crime," as specified in *Penal Code section 190.3* and as set out in the instruction quoted above, is impermissibly vague under the *cruel and [*1097] unusual punishments clause of the Eighth Amendment to the United States Constitution* as construed in *Stringer v. Black* (1992) 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130], and required clarification by the court even, as here, in the absence of a request. We reject the claim under the holding of *People v. Bacigalupo*, ante, page 457, at pages 478-479 [24 Cal.Rptr.2d 808, 862 P.2d 808] (hereafter *Bacigalupo*). Defendant argues that the court's "error" was "compounded" by its refusal of two "special" instructions he requested, viz., "Special Instruction '4'" and "Special Instruction '10'." (See pt. IV.F., *post*.) There was no "error" to be "compounded."²¹

21 Defendant may be understood to claim that the penalty factor dealing with "age," as specified in *Penal Code section 190.3* and as set out in the instruction quoted in the text, is also impermissibly vague. We reject the point under the reasoning of *Bacigalupo*.

D. INSTRUCTION ON PITY, SYMPATHY, AND MERCY

At the guilt phase, the court had instructed the jury, in relevant part, as follows: "As jurors you must not be influenced by pity for a defendant or by prejudice against him. . . . [¶] You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and [**71] the defendant [***898] have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be."

At the penalty phase, defendant requested the court to give the jury, among others, "Special Instruction '16,' " which as pertinent here would have told the jurors that "[i]n this part of the trial you may consider pity, sympathy or mercy for the defendant in deciding on the appropriate penalty for him. If a mitigating circumstance or an aspect of the defendant's background or his character, called to you[r] attention by the evidence or your observation of the defendant . . . arouses sympathy or compas[s]ion such as to persuade you that death is not the appropriate penalty, you shall act in response thereto and impose a punishment of life without parole on that basis."

The court refused. It made plain its view that "Special Instruction '16' " was legally correct. It determined, however, that the "special" instruction was duplicative of certain other instructions that it intended to give. Defense counsel Peterson was in accord. "Defense would agree [W]e would invite the Court to refuse this instruction on the basis that the Court has already done substantially what is being proposed."

The court subsequently gave, among others, the following instruction, which it had itself drafted, in accordance with its expressed intent. "[Y]ou [*1098] were previously instructed not to consider penalty in the guilt or innocence phase of the trial, and of course, that is your consideration in this phase. That instruction would be totally inapplicable. [¶] You will also be instructed at this time that you can consider sympathy for the defendant in deciding this continuing issue, and that was, of course, precluded from the guilt or innocence phase of the trial."

As pertinent here and noted above (see pt. IV.C., *ante*), the court told the jurors that in determining penalty they were to consider several specified factors, if applicable, including "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (Brackets omitted.)

The court also told the jurors that in determining penalty, "you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without

parole."

(28) Defendant now contends that, by instructing the jury as it did, the court erred under the *Eighth* and *Fourteenth Amendments to the United States Constitution*. In support, he effectively asserts that the instructions quoted above told the jury that in determining penalty it could not consider or give effect to pity, sympathy, or mercy, or at least did not tell it that it could. We reject the claim out of hand. A reasonable juror would have understood and employed the instructions in question to allow him to consider and give effect to pity, sympathy, and mercy to the extent he deemed appropriate [**72] in this [***899] case--and indeed to require him to do so. There is no reasonable likelihood that the jury misconstrued or misapplied the instructions in violation of the *Eighth* or *Fourteenth Amendment* or any other legal provision or principle.

[*1099] E. INSTRUCTION TO WEIGH THE "TOTALITY" OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

As noted (see pt. IV.D., *ante*), the court instructed the jury that in determining penalty, "you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the *totality* of the aggravating circumstances with the *totality* of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (Italics added.) Defendant had requested an instruction to such effect.

(29) Defendant now contends that, by instructing the jury as it did, the court erred.

Defendant's argument appears to be this: with its language referring to the "totality" of the aggravating and mitigating circumstances, the instruction in question erroneously implied that a single mitigating circumstance could not outweigh any and all aggravating circumstances and hence could not support a decision that death was not the appropriate punishment.

An instruction containing an implication of this sort would indeed have been erroneous. In *People v. Grant* (1988) 45 Cal.3d 829, 857, footnote 5 [248 Cal.Rptr. 444, 755 P.2d 894], we characterized as "proper" an instruction that stated, inter alia, that "[o]ne mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case." An instruction to the contrary would obviously be improper.

The instruction here, however, was not such. In fact, a reasonable juror would have understood and employed its words to embrace the substance of what was found proper in *Grant*. Certainly, such a juror would not have interpreted or used its language referring to the "totality" of the aggravating and mitigating circumstances in a "death oriented" fashion to "relate[]" solely to the "quantity . . . of the factors" and not to their "quality," or to entail "a mere mechanical counting of factors on each side of the imaginary [*1100] scale" (Underscoring in original.) There is no reasonable likelihood that the jury misconstrued or misapplied the challenged instruction in violation of the *Eighth* or *Fourteenth Amendment to the United States Constitution* or any other legal provision or principle. True, an instruction like that in *Grant*

would have been proper. But it was simply not required.

F. REFUSAL OF "SPECIAL" INSTRUCTIONS REQUESTED BY DEFENDANT

(30a) Defendant contends that the court erred by refusing to give the jury certain "special" instructions he requested. We shall consider his claims seriatim.

Defendant requested "Special Instruction '1' ": "The only aggravating factors which you may consider are those listed in . . . the instruction I have just read to you. No other facts or circumstances may be considered in aggravation or as a reason to support a verdict of death."

The court refused, reasoning in part that this "special" instruction was duplicative of another instruction that it intended to, and did in fact, give, which specified the factors to be considered in determining penalty "if applicable."

[**73] [***900] **(31)** The refusal was not error. What was express in this "special" instruction was implicit in the instruction actually given. Reasonable jurors would have understood and employed the latter to "allow [them] to consider [for purposes of aggravation] the listed penalty factors, 'if applicable,' and to prohibit [them] from considering others." (*People v. Gordon, supra, 50 Cal.3d at p. 1275* [arriving at a similar conclusion as to a similar instruction on a similar record].) There is no reasonable likelihood that the jury would have construed or applied the standard instruction otherwise. In this regard, we do not overlook certain of the prosecutor's comments and questions to which defendant points. As a general matter at least, the prosecutor did not mislead. The one possible exception: In his summation, he characterized defendant as a "Casanova" or "philander[er]," and "suggest[ed] . . . that is [a] factor in aggravation and even more so than it would be in mitigation." The characterization was squarely based on the evidence. As noted, Ronald Berryman had compared defendant to "Casanova." The suggestion was brief and opaque. It must be deemed without effect. ²²

22 Defendant claims that the refusal of this "special" instruction was erroneous as violative of the *due process clause of the Fourteenth Amendment to the United States Constitution*. The point rests on the premise that the jury would have misconstrued or misapplied the instruction actually given as he asserts. As we concluded in the text, there is no reasonable likelihood that it would have done so.

(30b) Defendant requested "Special Instruction '2' ": "Aggravating factors, and the facts upon which they are based, must be proved beyond a reasonable [*1101] doubt. If any aggravating factor is not proved beyond a reasonable doubt, you must disregard it."

The court refused on the ground that this "special" instruction was not legally correct.

The refusal was not error. As a general matter, "[w]e have consistently rejected the contention that the beyond-a-reasonable-doubt standard applies to the process of penalty determination" (*People v. Hayes (1990) 52 Cal.3d 577, 643 [276 Cal.Rptr. 874, 802 P.2d 376]*.) In particular, the 1978 death penalty law does not require "imposition on the People of the burden of proof beyond a reasonable doubt as to [any] of the following issues . . . : (1) a circumstance in aggravation may be considered only if its existence is proved beyond a reasonable doubt; (2) the penalty may be fixed at death only if the aggravating circumstances are found to outweigh the mitigating beyond a reasonable doubt; and (3) the penalty may be fixed at death only if death is determined to be the appropriate punishment beyond a reasonable doubt." (*People v. Mickey, supra, 54 Cal.3d at p. 701.*) Neither do the United States and California

Constitutions impose any such burden--specifically, neither do (1) the cruel and unusual punishments clauses of the Eighth Amendment and *article I, section 17*; (2) the due process clauses of the Fourteenth Amendment and *article I, sections 7 and 15*; nor (3) the equal protection clauses of the Fourteenth Amendment and *article I, section 7*. (*54 Cal.3d at pp. 701-702.*)²³

23 Defendant claims that the refusal of this "special" instruction was erroneous as violative of (1) the *cruel and unusual punishments clauses of the Eighth Amendment to the United States Constitution* and *article I, section 17 of the California Constitution*; (2) the due process clauses of the Fourteenth Amendment and *article I, sections 7 and 15*; and (3) the equal protection clauses of the Fourteenth Amendment and *article I, section 7*. As noted in the text, we have held to the contrary. We shall not revisit the question.

Defendant requested "Special Instruction '3' ": "You must be unanimous as to the existence of any aggravating factor before it may be considered; if you do not unanimously agree that an aggravating factor exists, no juror may consider it in reaching his or her penalty verdict."

The court refused, reasoning that this "special" instruction was not legally correct.

[**74] [***901] The refusal was not error. It is *not* the law--contrary to the substance of this "special" instruction--that "jury unanimity on . . . aggravating factors" is required. (*People v. Sully (1991) 53 Cal.3d 1195, 1251-1252 [283 [*1102] Cal.Rptr. 144, 812 P.2d 163]*, citing cases [speaking expressly and specifically of the 1978 death penalty law, *Pen. Code, § 190 et seq.*, and impliedly and generally of U.S. Const. and Cal. Const.].)²⁴

24 Defendant claims that the refusal of this "special" instruction was erroneous as violative of the *Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*. "[J]ury unanimity on . . . aggravating factors" is not required under any of these federal constitutional provisions--or any others. (*People v. Sully, supra, 53 Cal.3d at pp. 1251-1252* [speaking impliedly and generally of, inter alia, the U.S. Const.].)

Defendant requested "Special Instruction '4' ": "The fact that defendant . . . has been found guilty of first degree murder is not itself an aggravating factor."

The court refused on what appears to be the ground that this "special" instruction was confusing: "You have to be careful to point out they can consider the facts and circumstances of the conviction in this case."

The refusal was not error. A court "may . . . refuse an instruction that is confusing." (*People v. Gordon, supra, 50 Cal.3d at p. 1275.*) The standard of review is abuse of discretion. (*Ibid.*) In our view, the court could reasonably have concluded that this "special" instruction was indeed confusing inasmuch as it might have interfered with the altogether permissible, and in fact mandatory, "consideration" of the "facts and circumstances of the conviction in this case." Defendant argues that the "prejudice" from this "error" was "exacerbated" or "compounded."²⁵ There was no error. Hence, there was no prejudice to be "exacerbated" or "compounded."²⁶

25 Defendant may be understood to claim, separately and independently, that the court erred by instructing the jury as follows. "Evidence has been introduced for the purpose of showing that the defendant . . . has been convicted of the crimes of Transportation of Marajauna [*sic*] and Grand Theft prior to the offense of murder in the first degree of which

he has been found guilty in this case. [¶] Before you may consider any of such alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crimes. You may not consider any evidence of any other criminal conviction *other than the conviction in this case* as an aggravating circumstance." (Italics added and brackets omitted.)

Defendant's point appears to be that the italicized language implied that the jury could consider his conviction for first degree murder as itself a circumstance in aggravation. There is no reasonable likelihood that the jury so understood or employed the language in question. To our mind, a reasonable juror would probably have construed and applied the somewhat awkward phrasing so as not to bar consideration of the "circumstances of the crime of which the defendant was convicted in the present proceeding"

26 Defendant claims that the refusal of this "special" instruction was erroneous as violative of the *Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*. Our determination that the court could reasonably have concluded that this instruction was confusing entails the rejection of this point. An instruction of this kind could not be required by the United States Constitution.

Defendant requested "Special Instruction '7' ": "You may consider any evidence tending to show that defendant . . . was under the influence of a [*1103] mental or emotional disturbance at the time of the offense, regardless of the degree of that disturbance."

The court refused, reasoning that this "special" instruction was duplicative of another instruction that it intended to, and did in fact, give.

The refusal was not error. This "special" instruction was in fact duplicative. It was more than adequately covered by the directive that the jury consider "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not [***902] related to the offense for which [**75] he is on trial." (Brackets omitted.)²⁷

27 Defendant claims that the refusal of this "special" instruction was erroneous as violative of (apparently) the *Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*. The point rests on the premise that the jury would have misconstrued or misapplied the instruction quoted in the text contrary to the clear meaning of its plain terms. There is no reasonable likelihood that it would have done so. We recognize that in conjunction with this point defendant asserts that the prosecutor committed misconduct by arguing in summation to the effect that less than extreme "mental or emotional disturbance" could not be considered as a circumstance in mitigation. That is simply not the case. There is no reasonable likelihood that the jury would have so understood or employed his words.

Defendant requested "Special Instruction '10' ": "You are free to consider any evidence offered by the defendant . . . in mitigation in determining whether death is the appropriate penalty for this defendant based upon his individual characteristics and notwithstanding the degree of his culpability for the offense."

The court refused on the ground that this "special" instruction was duplicative of another instruction that it intended to, and did in fact, give.

The refusal was not error. This "special" instruction was in fact duplicative. It was more than adequately covered by the directive, quoted above, that the jury consider "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (Brackets omitted.)²⁸

28 Defendant claims that the refusal of this "special" instruction was erroneous as violative of (apparently) the *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*. The point rests on the premise that the jury would have misconstrued or misapplied the instruction quoted in the text contrary to the clear meaning of its plain terms. There is no reasonable likelihood that it would have done so. We recognize that in conjunction with this point defendant asserts that the prosecutor committed misconduct by arguing in summation to the effect that the jury could or should decline to consider evidence defendant offered in mitigation. That is simply not the case. There is no reasonable likelihood that the jury would have so understood or employed his words.

Defendant requested "Special Instruction '11' ": "It is appropriate for you to consider in mitigation any 'lingering doubts' you may have concerning [*1104] the defendant's guilt. [¶] Lingering or residual doubt is defined as that state of mind between 'beyond a reasonable doubt' and 'beyond all possible doubt.' "

The court refused, reasoning that this "special" instruction was duplicative of another instruction that it intended to, and did in fact, give.

The refusal was not error. This "special" instruction was in fact duplicative. The court directed the jury to consider certain factors in determining penalty. One was the "circumstances of the crime of which the defendant was convicted in the present proceeding . . ." "This was broad enough to include 'lingering doubt.' " (*People v. Johnson (1992) 3 Cal.4th 1183, 1262 [14 Cal.Rptr.2d 702, 842 P.2d 1]* (conc. opn. of Mosk, J.) [reviewing the same instructional language].) Another factor was "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (Brackets omitted.) "This too was broad enough to include 'lingering doubt.' " (*Ibid.* (conc. opn. of Mosk, J.) [reviewing similar instructional language].) Of course, a "defendant has no federal or state constitutional right to" a "lingering doubt" instruction. (*Id. at p. 1252.*)²⁹

29 Defendant claims that the refusal of this "special" instruction was erroneous as violative of asserted rights under the *Eighth* and *Fourteenth Amendments to the United States Constitution* (including, specifically, the latter amendment's due process and equal protection clauses) and *article I, sections 7, 15, and 17* of the California Constitution. As stated in the text above, a "defendant has no [such] federal or state constitutional right . . ." (*People v. Johnson, supra, 3 Cal.4th at p. 1252.*)

[**76] [***903] Defendant requested "Special Instruction '12' ": "In order to impose the death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[es] the totality of the mitigating circumstances. If you are

not convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment without the possibility of parole."

The court refused on the ground that this "special" instruction was not legally correct.

The refusal was not error. As explained, it is *not* the law--contrary to the substance of this "special" instruction--that the "penalty may be fixed at [*1105] death only if the aggravating circumstances are found to outweigh the mitigating beyond a reasonable doubt" (*People v. Mickey, supra, 54 Cal.3d at p. 701.*)³⁰

30 Defendant claims that the refusal of this "special" instruction was erroneous as violative of (1) the *cruel and unusual punishments clauses of the Eighth Amendment to the United States Constitution* and *article I, section 17 of the California Constitution*; (2) the due process clauses of the Fourteenth Amendment and *article I, sections 7 and 15*; and (3) the equal protection clauses of the Fourteenth Amendment and *article I, section 7*. As noted in the text, we have held to the contrary. We shall not revisit the question.

Defendant requested "Special Instruction '13' ": "In order to impose a death sentence, you must be convinced beyond a reasonable doubt that death is the appropriate punishment for the defendant. If you are not convinced beyond a reasonable doubt that death is the appropriate punishment, you must return a verdict of life imprisonment without the possibility of parole."

The court refused on the ground that the instruction was not legally correct.

The refusal was not error. As explained, it is *not* the law--contrary to the substance of this "special" instruction--that the "penalty may be fixed at death only if death is determined to be the appropriate punishment beyond a reasonable doubt." (*People v. Mickey, supra, 54 Cal.3d at p. 701.*)³¹

31 Defendant claims that the refusal of this "special" instruction was erroneous as violative of (1) the *cruel and unusual punishments clauses of the Eighth Amendment to the United States Constitution* and *article I, section 17 of the California Constitution*; (2) the due process clauses of the Fourteenth Amendment and *article I, sections 7 and 15*; and (3) the equal protection clauses of the Fourteenth Amendment and *article I, section 7*. As noted in the text, we have held to the contrary. We shall not revisit the question.

G. DENIAL OF VERDICT-MODIFICATION APPLICATION

(32a) Defendant made an application for modification of the verdict of death under *Penal Code section 190.4, subdivision (e)*. The court denied the request. Erroneously, contends defendant.

(33) "In ruling on a verdict-modification application, the trial judge is required . . . to "make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law." That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. And he must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves.'" (*People v. Clair, supra, 2 Cal.4th at p. 689.*) The "trial judge's function," it must be emphasized, "is not to make an independent and de novo penalty determination, but rather to independently reweigh [*1106] the evidence of

aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury verdict.*" (*People v. Lang* (1989) 49 Cal.3d 991, 1045 [264 Cal.Rptr. 386, 782 P.2d 627], italics in original.) "Further, [**77] in deciding the question, the trial judge must [***904] 'specify reasons . . . sufficient "to assure thoughtful and effective appellate review." ' " (*People v. Clair, supra*, 2 Cal.4th at p. 689.)

"On appeal, we subject a ruling on a verdict-modification application to independent review." (*People v. Clair, supra*, 2 Cal.4th at p. 689.) "Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty." (*People v. Mickey, supra*, 54 Cal.3d at p. 704.)

(32b) After independent review, we find no error. The court gave a lengthy and detailed statement of reasons. In part, it declared: "[As] to factor A under [*Penal Code section*] 190.3, and that's the circumstances of the present offense. [¶] In that situation, the Court is aware of all of the circumstances and the evidence presented. The Court is satisfied, in reviewing that evidence, that this was a particularly vicious and brutal and senseless killing of a 17 year old girl, who apparently refused to give into the amorous advances of Mr. Berryman. He thereafter forced himself on her, and stabbed her in the neck, and apparently stood over her with his foot on her face until she bled to death. [¶] Then not long after that, he returns home for a little lasagne. [¶] This is an extremely substantial factor in aggravation, and in the Court's view, this factor in aggravation, in and of itself, would outweigh all of the mitigating circumstances . . ." In our view, the court satisfied the requirements of *Penal Code section 190.4, subdivision (e)*. Its denial of modification was sound.

Defendant argues to the contrary. Unpersuasively.

For example, defendant asserts that the court read the probation report before ruling on the verdict-modification application. Even if it did, "absent evidence in the record to the contrary, we must assume that the court was not improperly influenced" thereby. (*People v. Adcox* (1988) 47 Cal.3d 207, 274 [253 Cal.Rptr. 55, 763 P.2d 906].) No improper influence appears. Notwithstanding defendant's claim, reversal is not required by the *Fifth, Eighth, or Fourteenth Amendment to the United States Constitution* or by any other legal provision or principle.

Defendant asserts that the court did not independently reweigh the evidence. The record is otherwise. The court's statement of reasons reveals that it recognized, and actually discharged, its obligation in this regard.

[*1107] On a related point, defendant asserts that the court did not *properly* reweigh the evidence. His complaint is essentially a disagreement with the result. It is unfounded.

Defendant may be understood to assert that the court could not have independently and properly reweighed the evidence in the absence of "findings" by the jury on aggravating and mitigating circumstances. We disagree. Contrary to what appears to be his assumption, the court is required to review the verdict of death itself and not any underlying "findings."

Defendant also asserts that the court failed or refused to consider evidence he had offered in mitigation. Here too, the record is otherwise. The court's statement of reasons proves the point. Defendant maintains that the court "relied upon and was misled by" the probation report. We cannot so conclude.

Defendant cites the court's omission of reference to certain potentially mitigating background and character evidence. "Although the trial court did not expressly *mention* the [potentially] mitigating evidence referred to by defendant, there is no indication in the record that the court ignored or overlooked such evidence." (*People v. Ruiz (1988) 44 Cal.3d 589, 625 [244 Cal.Rptr. 200, 749 P.2d 854]*, italics in original.)

Defendant appears to assume that the court was required to conclude that the evidence he had offered in mitigation did in fact amount to a mitigating circumstance. [**78] [***905] The assumption is unsound. One matter deserves specific mention. The court stated: "Next factor I want to comment on is I, which is age of the defendant at the time of the incident, was 21 years of age." "Although the defendant was young at that particular point in time, he was not that young, and he had been out of school for several years, he was married, had a child. As far as this Court is concerned, that factor is a neutral factor in this particular case." Defendant argues that this penalty factor in *Penal Code section 190.3* is impermissibly vague under the *cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution*. We have held *contra*. (See fn. 21, *ante*.) Defendant then argues that the court was required by the *Fifth, Eighth, and Fourteenth Amendments to the United States Constitution* to find that his age was in fact a mitigating circumstance. It was not.

In addition, defendant asserts that the court found aggravating circumstances that were not specified in *Penal Code section 190.3* or, if specified, were not supported by the evidence. That is simply not the case.

Defendant also asserts that the court converted "mitigating evidence into aggravating evidence" and "mitigating circumstances into nonstatutory aggravating circumstances." That is also not the case.

[*1108] H. *INEFFECTIVE ASSISTANCE OF COUNSEL AS TO PENALTY*

(34) Defendant contends that defense counsel provided him with ineffective assistance as to penalty in violation of the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution*.

At the penalty phase, the prosecutor called only a few witnesses in the case in aggravation. For their part, defense counsel called more than a score in the case in mitigation, presenting, *inter alia*, evidence about defendant's background and character from the mouths of family members and friends and also from a psychologist and a psychiatrist. After the penalty phase, they made several motions, including the verdict-modification application.

Defendant claims that defense counsel performed deficiently with regard to numerous cited acts and omissions and thereby subjected him to prejudice. In large part, he simply recasts arguments for reversal that we have expressly or impliedly disposed of in the course of the preceding analysis. He is indeed forceful in presenting his complaints. We have carefully considered each in its proper context. In few if any instances does he show professionally unreasonable conduct. In none does he show a reasonable probability of an adverse effect on the outcome.

For example, defendant 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.

Neither does defendant establish ineffective assistance in defense counsel's asserted failure to further investigate his background and character and then to introduce additional evidence thereon. He does not demonstrate that such further investigatory efforts would have yielded favorable results. Hence, he cannot demonstrate that their omission adversely affected the outcome within a reasonable probability.

Further, defendant does not establish ineffective assistance in defense counsel Peterson's decision not to personally prepare witnesses for their testimony: "I . . . make it a practice to not talk directly with witnesses but have that done by investigation"--evidently to avoid suspicion of "coaching." He does not demonstrate that personal preparation would have yielded favorable results. Hence, he cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

[*1109] [**79] [***906] In addition, defendant does not establish ineffective assistance in defense counsel Peterson's opening statement or summation. We have reviewed, among all the others, Peterson's comments in his opening statement and summation to the effect that a governor could, but would not, commute any sentence of life imprisonment without possibility of parole imposed on defendant. The remarks appear to be a reasonable attempt to anticipate and allay a possible concern on the part of the jurors. We have also reviewed Peterson's argument for life in his summation, the gravamen of which was that a sentence of life imprisonment without possibility of parole was severe and sufficient punishment in this case. The plea, although not as positive as defendant now asserts it should have been, seems a reasonable effort in light of the evidence introduced as to the criminal and his crime. Finally, we have reviewed Peterson's comment in his summation that "giving you the greatest latitude, it took you 15 minutes to reach a verdict" at the guilt phase and "[t]hat was an insult to [the trial judge], to the prosecutor, and to the defense attorney, but it is your verdict." The remark was indeed intemperate. But it was also brief. It did not deny defendant effective assistance.³²

32 Defendant appears to claim constructive denial of counsel bearing on penalty. The point is without merit.

Defendant may be understood to claim that the asserted ineffective assistance by defense counsel under the *Sixth Amendment to the United States Constitution* and/or *article I, section 15 of the California Constitution* bearing on penalty entails the violation of other provisions of the federal and state charters, including the Sixth, Eighth, and Fourteenth Amendments and *article I, sections 7, 15, 16, and 17*. There was, however, no ineffective assistance.

Defendant also claims in substance that the asserted ineffective assistance by defense counsel under the Sixth Amendment and *article I, section 15* bearing on penalty gave rise to a duty on the part of the court to give certain "curative" instructions sua sponte, and that the court's failure to do so amounts to reversible error under, inter alia, the Fifth, Sixth, Eighth, and Fourteenth Amendments and *article I, sections 7, 15, 16, and 17*. To repeat: there was no ineffective assistance.

I. CONSTITUTIONALITY OF THE 1978 DEATH PENALTY LAW

Defendant contends that the 1978 death penalty law is facially invalid under the United

States and California Constitutions, and hence that the judgment of death entered pursuant thereto is unsupported as a matter of law. "[A]s a general matter at least, the 1978 death penalty law is facially valid under the federal and state charters. In his argument here, defendant raises certain specific constitutional challenges. But . . . in the . . . series of cases [beginning with *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 (230 Cal.Rptr. 667, 726 P.2d 113)], we have rejected each and every one. We see no need to rehearse or revisit our holdings or their underlying reasoning." (*People v. Ashmus*, supra, 54 Cal.3d at pp. 1009-1010; accord, *People v. Rowland*, supra, 4 Cal.4th at p. 283; *People v. Clair*, supra, 2 Cal.4th at p. 691.)

[*1110] J. *PROPORTIONALITY OF THE SENTENCE OF DEATH*

The cruel or unusual punishment clause of *article I, section 17 of the California Constitution* "prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and moral guilt." " (*People v. Marshall* (1990) 50 Cal.3d 907, 938 [269 Cal.Rptr. 269, 790 P.2d 676].) Defendant contends that the sentence of death imposed on him violates this prohibition. In view of the evidence adduced at trial, which is described above (see pt. I, ante) and need not be rehearsed here, we must reject the claim as lacking in merit.

K. *CONSTITUTIONALITY OF THE METHOD OF EXECUTION*

(35) As originally enacted, *Penal Code section 3604* provided that the "punishment of death shall be inflicted by the administration of a lethal gas." (Stats. 1941, ch. 106, § 15, p. 1117.)

In his opening brief, defendant raised the contention that this method of execution [**80] amounts to "cruel and unusual punishment[]" within the meaning of the *Eighth* [***907] *Amendment to the United States Constitution* and/or "[c]ruel or unusual punishment" within the meaning of *article I, section 17 of the California Constitution*.

Subsequent to the filing of defendant's opening brief, the Legislature amended *Penal Code section 3604* to provide that the "punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death" (*id.*, *subd. (a)*, italics added) at the election of the condemned prisoner (*id.*, *subd. (b)*). In his reply brief, defendant states his point is now "moot."

In any event, the claim must be rejected out of hand as a ground for reversal of the judgment of death. It bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself. ³³

33 Defendant claims that the "cumulative effect of errors" (capitalization omitted) bearing on penalty amounts to a violation of his rights under, inter alia, the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution* and *article I, sections 7, 15, 16, and 17 of the California Constitution* and, as a consequence, requires reversal as to that issue. There was no such error and no such effect.

We are of the opinion that, in view of the prosecutor's all but express withdrawal of the willful, deliberate, and premeditated murder theory during summation at the guilt phase, any assumed insufficiency of the evidence as to that theory would have been without prejudicial effect on the jury's verdict of death or the court's ensuing judgment.

Having reviewed the record in its entirety, we conclude that the jury found that defendant actually killed, and intended to kill, Florence Hildreth within the meaning of *Enmund v. Florida* (1982) 458 U.S. 782, 788-801 [73 L.Ed.2d 1140, 1145-1154, 102 S.Ct.

3368]. We also conclude that these findings are amply supported. Accordingly, we hold that imposition of the penalty of death on defendant does not violate the *Eighth Amendment to the United States Constitution*. (See *Cabana v. Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 106 S.Ct. 689].)

"Whether or not expressly discussed, we have considered and rejected . . . all of the assignments of error presented in all of defendant's briefs." (*People v. Sully, supra*, 53 Cal.3d at p. 1252.)

[*1111] V. DISPOSITION

Having found no reversible error or other defect, we conclude that the judgment must be affirmed.

It is so ordered.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

CONCUR BY: MOSK, J.

CONCUR

I concur, of course, in the opinion prepared for the court. I write separately merely to note that I have rejected defendant's claims based on *Stringer v. Black* (1992) 503 U.S. ____ [117 L.Ed.2d 367, 112 S.Ct. 1130], under compulsion of *People v. Bacigalupo, ante*, page 457 [24 Cal.Rptr.2d 808, 862 P.2d 808], a case I believe was erroneously decided (see *id. at pp. 484-493*) (conc. and dis. opn. of Mosk, J.).

Appellant's petition for a rehearing was denied March 16, 1994, and the opinion was modified to read as printed.

1993 Cal. LEXIS 6661, *

LEXSEE

In re Rodney Berryman on Habeas Corpus

S034862

SUPREME COURT OF CALIFORNIA

1993 Cal. LEXIS 6661

December 27, 1993, Decided

SUBSEQUENT HISTORY: Modified by *People v. Berryman*, 7 Cal. 4th 477C, 1994 Cal. LEXIS 1221, 94 Cal. Daily Op. Service 1923 (1994)

PRIOR HISTORY: *People v. Berryman*, 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40, 1993 Cal. LEXIS 6377 (1993)

OPINION

[*1] Petition for writ of habeas corpus DENIED on the merits.

1998 Cal. LEXIS 2633, *

In re Rodney Berryman on Habeas Corpus, The petition for writ of habeas corpus is denied on the substantive ground that it is without merit.

S068933

SUPREME COURT OF CALIFORNIA

*1998 Cal. LEXIS 2633***April 29, 1998, Decided**

PRIOR HISTORY: *People v. Berryman*, 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40, 1993 Cal. LEXIS 6377 (1993)

JUDGES: [*1] Mosk, J., and Brown, J., would deny the petition solely on the merits.

OPINION

The petition for writ of habeas corpus is denied on the substantive ground that it is without merit.

Separately and independently, all the claims, with the exception of Claim LVII, are each denied on the procedural ground (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10, 103 L. Ed. 2d 308, 109 S. Ct. 1038) that it is untimely (see *In re Clark* (1993) 5 Cal. 4th 750, 782, 855 P.2d 729): it is not alleged, with specificity, to have been presented within a reasonable time after its legal and factual bases were, or should have been, discovered (*id. at pp. 784-785*), and is raised herein without justification or excuse and outside any exception, including that for a fundamental miscarriage of justice (see generally *id. at pp. 763-798*).

Separately and independently, Claim XXXI (to the extent that it is based on the *due process clause of the Fourteenth Amendment to the United States Constitution*), Claim XL VII (to the extent that it is based on the *cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution*), Claim XL VIII (to the extent that it is based on the *Eighth and/or Fourteenth Amendments to the* [*2] *United States Constitution*), Claim XLIX (to the extent that it is based on the *Eighth and/or Fourteenth Amendments to the United States Constitution*), Claim L (to the extent that it is based on the *due process clause of the Fourteenth Amendment to the United States Constitution*), Claim LI (to the extent that it is based on the *Sixth, Eighth, and/or Fourteenth Amendments to the United States Constitution*), Claim LII (to the extent that it is based on the *Sixth, Eighth, and/or Fourteenth Amendments to the United States Constitution*), and Claim LIII (to the extent that it is based on the *Eighth and/or Fourteenth Amendments to the United States Constitution*), are each denied on the procedural ground (see *Harris v. Reed, supra*, 489 U.S. at p. 264, fn. 10) that it is repetitive (see *In re Waltreus* (1965) 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9, 397 P.2d 1001): it was raised, and rejected, on appeal, and is raised herein without justification or excuse and outside any exception (see generally *In re Harris* (1993) 5 Cal. 4th 813, 829-841, 855 P.2d 391).

In re Rodney Berryman v. Habeas Corpus

S077805

SUPREME COURT OF CALIFORNIA

1999 Cal. LEXIS 2420

April 21, 1999, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: *People v. Berryman*, 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40, 1993 Cal. LEXIS 6377 (1993)

JUDGES: Mosk, J., and Brown, J., would deny the petition solely on the merits.

OPINION

Petition for writ of habeas corpus is denied on the merits.

Separately and independently, each of the claims therein is denied as untimely under *In re Clark* (1993) 5 Cal. 4th 750, 855 P.2d 729, and *In re Robbins* (1998) 18 Cal. 4th 770, 959 P.2d 311; as pretermitted under *In re Dixon* (1953) 41 Cal. 2d 756, 264 P.2d 513; and as successive under *In re Clark, supra*, 5 Cal. 4th 750, and *In re Horowitz* (1949) 33 Cal. 2d 534, 203 P.2d 513.

Mosk, J., and Brown, J., would deny the petition solely on the merits.

Separately and independently, Claim I, Claim IV, Claim VIII, Claim IX, Claim XVIII, Claim XX, Claim XXI, Claim XXIV, Claim XXIX, Claim XXXI (to the extent that its basis is [*3] other than the *due process clause of the Fourteenth Amendment to the United States Constitution*), Claim XLIV, Claim XLV, Claim XLVI, Claim XLVII (to the extent that its basis is other than the *cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution*), Claim XLVIII (to the extent that its basis is other than the *Eighth and/or Fourteenth Amendments to the United States Constitution*), Claim XLIX (to the extent that its basis is other than the *Eighth and/or Fourteenth Amendments to the United States Constitution*), Claim L (to the extent that its basis is other than the *due process clause of the Fourteenth Amendment to the United States Constitution*), Claim LI (to the extent that its basis is other than the *Sixth, Eighth, and/or Fourteenth Amendments to the United States Constitution*), Claim LII (to the extent that its basis is other than the *Sixth, Eighth, and/or Fourteenth Amendments to the United States Constitution*), Claim LIII (to the extent that its basis is other than the *Eighth and/or Fourteenth Amendments to the United States Constitution*), and Claim LIV, are each denied on the procedural ground (see *Harris v. Reed, supra*, 489 U.S. [*4] at p. 264, fn. 10) that it is pretermitted (see *In re Dixon (1953) 41 Cal. 2d 756, 759, 264 P.2d 513*): it could have been, but was not, raised on appeal, and is raised herein without justification or excuse and outside any exception (see generally *In re Harris, supra*, 5 Cal. 4th at pp. 825, fn. 3, 829-841).

Separately and independently, all the claims, with the exception of Claim VII, Claim XXVI, Claim XXVII, Claim XXX, Claim LVI, Claim LVII, and Claim LVIII, are each denied on the procedural ground (see *Harris v. Reed, supra*, 489 U.S. at p. 264, fn. 10) that it is successive (see *In re Clark, supra*, 5 Cal. 4th at pp. 767-768): it could have been, but was not, raised on habeas corpus previously, and is raised herein without justification or excuse and outside any exception, including that for a fundamental miscarriage of justice (see generally *id. at pp. 763-798*).

Mosk, J., and Brown, J., would deny the petition solely on the merits.