No. _____

IN THE

Supreme Court of the United States

MARTIN JAMES KIPP,

Petitioner,

v.

RON BROOMFIELD, ACTING WARDEN,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

MARTIN JAMES KIPP, Petitioner-Appellant, v. RONALD DAVIS, Warden, California State Prison at San Quentin, Respondent-Appellee.	No. 15-99020 D.C. No. 2:03-cv-08571-PSG Central District of California, Los Angeles ORDER

Before: PAEZ, MURGUIA, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition is DENIED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN JAMES KIPP, *Petitioner-Appellant*, v. RON DAVIS, Warden, California State Prison at San Quentin, *Respondent-Appellee*.	No. 15-99020 D.C. No. 2:03-cv-08571-PSG OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted March 28, 2019
San Francisco, California

Filed August 19, 2020

Before: Richard A. Paez, Mary H. Murguia, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Martin James Kipp's habeas corpus petition challenging his conviction and death sentence for first-degree murder, forcible rape, and robbery.

The district court granted a certificate of appealability for two of Kipp's claims: (1) that the admission of his references to Satan in two letters violated his First Amendment rights; and (2) that his counsel was ineffective for failing to adequately litigate the admissibility of those references. The panel expanded the COA as to two additional claims: (1) that the jury's use of the Bible during deliberations violated Kipp's right to a fair trial; and (2) that Kipp's counsel was ineffective by failing to adequately investigate and present mitigating evidence during the penalty phase.

Kipp contended that as in *Dawson v. Delaware*, 503 U.S 159 (1992), the evidence of his references to Satan was not connected in any way to his crime, and thus its sole relevance was to show that his beliefs were morally reprehensible, thereby violating his First Amendment rights. The panel affirmed the denial of relief on this claim because any constitutional error was harmless at both the guilt and penalty phases.

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

The panel reviewed Kipp's ineffective-assistance-of-counsel claims under AEDPA deference. The panel wrote that because the admission of the Satan references could not have had substantial and injurious effect or influence in determining the jury's verdict, Kipp cannot meet the higher *Strickland* standard of prejudice. The panel therefore affirmed the denial of habeas relief on Kipp's claim that counsel was ineffective by failing to competently litigate the admissibility of the references to Satan. As to Kipp's claim that his trial counsel was ineffective during the penalty phase by failing to adequately investigate and present mitigating evidence regarding his life, the panel held that the state court could have reasonably rejected the claim for failing to adequately establish deficient performance, and could reasonably have concluded that any deficiency in counsel's performance did not prejudice the result.

Applying AEDPA deference, the panel found it unnecessary to decide whether the use of Bible verses during jury deliberation constitutes misconduct because the state court could have reasonably concluded that any error did not prejudice the jury's verdict.

COUNSEL

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of the Attorney General, San Diego, California; Respondent-Appellee.

OPINION

NGUYEN, Circuit Judge:

Martin James Kipp was sentenced to death following his conviction for the first-degree murder, forcible rape, and robbery of 18-year-old Tiffany Frizzell in Long Beach, California, in September 1983.[1] Kipp appeals the district court's denial of his petition for writ of habeas corpus. We affirm.

I. BACKGROUND[2]

A. The Guilt Phase

Tiffany Frizzell was an 18-year-old who had recently left her home in Indianola, Washington to begin her college studies at Brooks College. Because her dormitory had not yet opened to students, she stayed nearby at a Ramada Inn along the Pacific Coast Highway in Long Beach, California.

Frizzell's body was discovered on the morning of Saturday, September 17, 1983, by the housekeeping staff at

[1] Kipp was also separately sentenced to death for the murder of Antaya Yvette Howard in Orange County in December 1983. Kipp's federal habeas petition for that conviction and sentence is addressed in a separate opinion (No. 16-99004).

[2] These facts are taken largely from the California Supreme Court's opinion in Kipp's direct appeal, *People v. Kipp*, 26 Cal. 4th 1100, 33 P.3d 450 (2001).

the Ramada. Her body was on the neatly made bed, on top of the sheets and blanket but under the bedspread. She was naked from the waist down, and a cloth belt had been pulled tight around her neck. She was also wearing a blouse but no bra, although a small hook (likely from her missing bra) was found embedded in the skin of her back. There were no signs of forced entry into the hotel room and no signs that a struggle had occurred, but one of her fingernails was broken. Frizzell's purse, driver's license, and around $130 in cash were found in a dresser in the room. Kipp's fingerprint was found on the telephone in the room.

A criminalist found semen and sperm in Frizzell's vagina and on her external genital area, but not in her mouth or rectal area. During her autopsy, the medical examiner removed the belt from her neck and revealed a deep ligature mark and scratches consistent with fingernails. There was also bruising on her abdomen, thigh, and shoulder, as well as a small abrasion on the back of her left hand, all of which appeared to have occurred in the 48 hours before her death. While there was no trauma to the external vaginal or anal areas, there were indications of sexual intercourse. The medical examiner found the cause of death to be asphyxiation due to ligature strangulation.

Two days after her body was found, a gardener in Long Beach found a bag in some bushes next to an alley, about a half-mile from the Ramada Inn. The bag contained Frizzell's personal items, including a torn bra with a missing fastener, and a book with Frizzell's name inside the cover. Frizzell's mother identified the items as Frizzell's, and both Frizzell's and Kipp's fingerprints were found on the book. About a month after her death, Kipp sold to a pawn shop in Westminster a stereo and cassette player that Frizzell's mother identified at trial as belonging to Frizzell.

In addition to the above evidence, the prosecution also introduced evidence to show consciousness of guilt. Specifically, the jury heard that, after his arrest, Kipp twice attempted to escape, once from an Orange County jail and then from a Los Angeles County jail. The first attempt was planned by Kipp's then-wife, Linda Anne Kipp, with an undercover investigator. Linda intended to have her son climb into the air conditioning ducts and guide Kipp out through a public restroom. Linda was arrested on April 18, 1987, after she paid $500 to the investigator to assist in the planned escape. During the second attempt, Kipp was found in the ceiling of his cell, where he had begun to escape through a hole. Guards had to pull Kipp out by his legs and subdue him.

The prosecution also introduced a handwritten letter postmarked on September 15, 1987 (the "September 15 letter") that Kipp wrote to his wife Linda, after she was arrested and jailed for attempting to help him escape. In the letter, Kipp mostly adulates Linda and their relationship, but he also referred to the crimes for which he was being tried: "I killed, raped, sodomized, beat, swore and laughed at those fucking no good bitches! Yeah! It felt great, because neither deserved to live anymore." Kipp also twice referred to Satan: "Well, 'Satan's' licking both those bitch's [sic] up now and laughing. Just like I laughed at my trial the whole time. . . . We are coming Home Satan!" During closing argument, the prosecution successfully admitted the letter into evidence and read aloud a portion of the letter.

The defense called no witnesses and presented no exhibits at the guilt phase.

The jury found Kipp guilty of robbery, rape, and first-degree murder. The jury also found true the special circumstance allegation that the murder occurred in the

course of a rape. The jury was unable to reach a verdict on a second special circumstance allegation that the murder occurred during a robbery.

B. The Penalty Phase

1. Prosecution's Case in Aggravation

The prosecution's aggravation case included evidence of Kipp's extensive history of violence against women, including the murder of another young woman, Antaya Yvette Howard.

The jury first learned that three years before Frizzell's murder, Kipp had choked and raped June Martinez, whom he had met at a bar in Long Beach. Kipp lured her to his truck, turned on the stereo, and had her shut the door. As she did so, Kipp drove off, hitting a car on his way out, and stopped in a residential area. Martinez asked to be taken back, but he refused, at which point she noticed that there was no inside door handle on the passenger side. Kipp pushed her into the back of the truck, which had been covered with a windowless shell, and started to remove her clothes. After she began to scream, he put his hand in her mouth. Kipp began to strangle her when she bit him. He finished removing her clothes and raped her. Her body had gone limp and she was unable to breathe. Kipp demanded that she orally copulate him, and she said she would if he gave her some fresh air. As soon as he opened the door, she ran out, flagged down a motorist, and reported the incident to the police. Martinez had severe bruises on her neck and wore a neck brace for two weeks after the attack. Kipp was convicted of felony rape.

In November 1983, shortly after Frizzell's murder, Kipp had violently assaulted and threatened to kill his then-

girlfriend Loveda Newman. During an argument one morning in the motel room where they had been staying, Newman had refused to have sex with Kipp; he responded by punching her in the head and choking her. She told him she needed to go to the bathroom because she was going to vomit. When she got to the bathroom, she locked the door and climbed through the window, although Kipp kicked down the door as she was escaping. Kipp was later arrested, but Newman did not press charges because Kipp threatened to kill her and her son if she did.

Finally, in December 1983, just three months after he raped and murdered Frizzell, Kipp sexually assaulted and murdered Antaya Yvette Howard. Howard, who was 19 years old, was seen drinking champagne with Kipp at a restaurant in Newport Beach, California. A few days later, a woman called the police because a foul odor was emitting from a car that had been parked in an alleyway for several days. The police arrived and found Howard's badly decomposed body covered by a blanket in the back of the car. Her blouse was open and missing two buttons, and her bra had been rolled up, exposing her breasts. Kipp's fingerprints were found on the window of the car's front doors, and on a beer can in the front passenger floorboard. Howard died of asphyxiation due to strangulation, with trauma to the head contributing to her death. Kipp denied having known Howard but could not explain the presence of his fingerprints.

In addition to evidence of Kipp's violence, the jury heard that he tried to escape through a hole in the ceiling of the Los Angeles County jail in January 1988. Upon being detained, he threatened to kill a sheriff's sergeant. An officer testified that Kipp "swore to me and his savior, Satan, [the sergeant] would be killed in a very big way and a very humiliating

way. Humiliating to him and his family." In the ceiling area, investigators found sharpened objects that could be used as tools or weapons.

The prosecution also presented expert testimony to explain the term "dim mak," which Kipp had used in the September 15th letter to explain how he killed Howard. The expert explained that the term "dim mak" literally means "death touch," referring to strikes at pressure points to cause unconsciousness or death.

2. Defense's Case in Mitigation

The defense presented a substantial mitigation case during the penalty phase, including dozens of witnesses to testify to Kipp's difficult upbringing and expert testimony regarding the history of the Blackfeet Tribe, of which Kipp is a member. The defense also called a psychologist to provide an expert opinion on how challenging aspects of his life impacted his development.

The jury heard evidence of the Blackfeet Tribe's bloody history in the U.S. In the late 1700's, the Tribe was a nomadic people who hunted buffalo and lived in teepees. After Americans began settling and taking over the fur trade, disease and alcohol spread across the Tribe. Although their territory was defined by treaty with the United States as of 1855, a gold rush in Montana resulted in invasions and encroachments on their land. In response to Blackfeet resistance, a group of soldiers massacred a peaceful encampment of Blackfeet. Joe Kipp, a part-Native American scout who assisted the soldiers during the attack, tried to stop the attack after realizing at the last minute that the group was peaceful. The tribe's chief was killed in the massacre, and Joe Kipp adopted one of the chief's sons, who

would become the grandfather to John Kipp, Martin Kipp's adoptive father.

After buffalo began to disappear from Blackfeet lands, the Tribe suffered starvation and at least 600 died during the winter of 1882–1883, leaving a small population of around 2,500. The Tribe's reservation in Montana was reduced in size, and the Bureau of Indian Affairs began to adopt harsh regulations aimed at assimilating Native Americans into White society. When the tribes were allowed to decide whether to allow the sale of alcohol on their lands, the Blackfeet opted to permit alcohol, exacerbating the alcoholism that had developed among their members returning from World War II. By the time of Kipp's trial in 1989, 6,000 Blackfeet lived on the Montana reservation, with an unemployment rate of 60 to 70 percent and an annual family income of $5,000 per year (less than a third of the statewide average of $18,000). Members who left the reservations often experienced low esteem and lost the support of their communities.

Kipp was born on the Blackfeet Reservation in 1958. His birth mother, Mary Still Smoking, was a "nervous" and "paranoid" alcoholic, who was "out drinking most of the time." Kipp first lived with his maternal grandmother, where 12 to 14 children all shared a filthy, two-room house. The children were neglected, and inebriation and fighting were common in the house. A psychologist testified that these conditions caused Kipp to view the world as an insecure and threatening place and to develop distrust, fear of people, and sensitivity to rejection or abandonment.

When Kipp was 23 months old, child welfare workers removed him from the house and placed him with John and Mildred (also known as Bobbie) Kipp, who were also members of the Blackfeet Tribe. They lived on a family

ranch within the reservation that was isolated from the rest of the community. John Kipp was a large and muscular man, and a decorated United States Marine Corps serviceman during World War II. John Kipp was a demanding perfectionist who always wanted things done his way. When Kipp arrived, he was small and malnourished, his head had been shaved off because he had lice, and he had a skin disease called impetigo. John Kipp at first was unwilling to accept Kipp into his family, but, after six months, he began to treat Kipp as his son. Kipp idolized his adoptive father and tried to live up to his expectations. The psychologist testified that Kipp was not given the freedom needed to develop internal controls on his behavior. As a result, Kipp had difficulty distinguishing his own wants and values from John's.

Still, up through his teenage years, Kipp was seen as "friendly and well mannered," and an honest, hard worker. He attended high school in Montana on the Blackfeet reservation, where he was viewed as gentle, shy with girls, and a "warm, loving, and respectful young man." He competed in cross-country, and his coach described him as being courteous, trustworthy, and an "all-around good kid to coach." John also trained Kipp in boxing.

In 1973, when Kipp was in a car with his uncle and 11-year-old cousin Billy, the car crashed and Billy was killed. John Kipp was fond of Billy and took the incident hard; he felt responsible because he had sent them to get seed grain when the accident occurred. John began to drink whiskey excessively and suffered a stroke. John's alcoholism also led his family relationships to deteriorate. John physically abused Bobbie and Kipp; he broke two of Bobbie's fingers when he slammed a door shut on her hand. He became aggressive and rough, spent his time in bars, and started an

affair. Bobbie eventually moved away and divorced John, who remarried.

The psychologist testified that Kipp's sense of identity was rooted in his relationship with John. John's deterioration was profoundly frightening to Kipp and resurfaced his fears and insecurities. Kipp was in a constant state of emotional turmoil and "lost heart," leading him to give up boxing. Kipp moved to his uncle's house in Spokane, Washington during his senior year of high school. When he was 19, he received news that John had died. Kipp left immediately and drove all night to the ranch. Following John's death, a dispute arose over the division of assets between John's family and John's widow. Kipp was caught in this conflict and unprepared to deal with it. Bobbie ended up with nothing, and Kipp received $13,000.

Kipp enlisted in the United States Marine Corps, where the discipline and high standards paralleled his relationship with John. Although Kipp was considered an outstanding recruit during boot camp, his performance plummeted when he was assigned a desk job in Okinawa. Kipp developed an attitude problem, stole some items, and spent time in the brig. He also began to abuse alcohol, cocaine, and methamphetamine. He was transferred to California, where he raped June Martinez in June 1981. In the following month, he left his military post without leave and returned to the Blackfeet reservation in Montana. He began to date a woman who testified that Kipp was a "gentleman" who was "really good to her."

Kipp was arrested for raping Martinez in August 1981. While in custody awaiting trial, he was sexually assaulted by other inmates. The experience was profoundly frightening to Kipp, and he coped by hiding his weakness and vulnerability. Still, Kipp adjusted well during his

incarceration, and Bobbie visited him during that time. But when he was released in 1983, Kipp continued to lack direction or identity, and he felt that he had no one with whom he could discuss his problems. He continued to abuse alcohol, cocaine, and methamphetamine. The defense presented an expert psychopharmacologist who testified that chronic use of these drugs can result in paranoia and is also associated with violence and suicide.

By the time of the penalty phase of the trial, the defense psychologist had interviewed Kipp five times between 1984 and 1989. Kipp had admitted to killing Frizzell and Howard, and he expressed shame, sorrow, and regret for his actions. Kipp explained to the psychologist that, when he wrote the September 15th letter to his wife denying that he had any remorse, he was upset and angry about what had happened during his trial for the murder of Howard.

The defense called a number of additional witnesses—Kipp's family and friends—who expressed their love for Kipp and urged the jury to spare his life. Another expert witness testified about the California prison system and described how individuals sentenced to life without parole are confined in small modules, where they are constantly surveilled and escape is virtually impossible. The expert also testified that individuals sentenced to life terms tend to be model prisoners, especially after the age of 40.

3. Prosecution's Rebuttal

The prosecution introduced a letter from Kipp to his wife from September 9, 1987 (the "September 9 letter")[3], in which he described his machinations for violence and rape against the female deputies and the district attorneys and their families. The letter had several references to Satan, including that Satan had helped rejuvenate his energy to carry out his intentions.

The jury deliberated for about three days and returned a death verdict. The trial court denied Kipp's motion for a new trial and imposed a death sentence.

C. Post-Trial Proceedings

On automatic direct appeal, the California Supreme Court affirmed Kipp's conviction and sentence in a reasoned opinion, issued on November 1, 2001. *People v. Kipp*, 26 Cal. 4th 1100, 33 P.3d 450 (2001). The U.S. Supreme Court denied certiorari. *Kipp v. California*, 537 U.S. 846 (2002).

Kipp filed his first state habeas petition on December 4, 2000, which the California Supreme Court summarily denied on November 12, 2003. He filed a second state habeas petition on November 5, 2004, and three days later filed a habeas petition in federal court, which the district court stayed pending the state court's disposition. On June 28, 2006, the California Supreme Court issued another summary denial. He filed an amended federal habeas petition and moved for an evidentiary hearing. The district

[3] Throughout the record, this letter is variously referred to as the September 7 or September 9 letter. We refer to the letter as the September 9 letter for consistency.

court denied the evidentiary hearing and denied Kipp's petition. The court granted a certificate of appealability ("COA") as to two of Kipp's claims. Kipp timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 2253, and we review de novo the district court's denial of habeas relief. *Godoy v. Spearman*, 861 F.3d 956, 961–62 (9th Cir. 2017) (en banc). Kipp's federal habeas petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because it was filed after April 24, 1996. *See White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018). Under AEDPA, we may not grant relief on any claim adjudicated by the state court on the merits unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). Where a state court summarily denies a claim without reasoning, we must "determine what arguments or theories supported or . . . could have supported[] the state court's decision[.]" *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Relief is warranted when the state's adjudication was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

The district court granted a COA for two of Kipp's claims: (1) that the admission of Kipp's references to Satan in two letters violated his First Amendment rights,[4] and

[4] The district court did not grant a COA for another reference to Satan during the penalty phase. A deputy testified that Kipp swore "to [the deputy] and his savior, Satan," that he would kill a sergeant "in a

(2) that his counsel was ineffective for failing to adequately litigate the admissibility of those references. We treat Kipp's opening brief, which addresses several uncertified issues, as an application to expand the COA, *see* Fed. R. App. P. 22(b)(2) and Ninth Cir. R. 22-1(e), and grant the application as to two additional claims: (1) that the jury's use of the Bible during deliberations violated his right to a fair trial and (2) that Kipp's counsel was ineffective by failing to adequately investigate and present mitigating evidence during the penalty phase. *See* 28 U.S.C. § 2253(c)(2). We decline to grant a COA as to the remaining claims.

III. Discussion

A. First Amendment Claim

Kipp argues that the state's admission of his references to "Satan" violated his First Amendment rights, as set forth by the Supreme Court in *Dawson v. Delaware*, 503 U.S. 159 (1992). Because we find that any constitutional error was harmless, we affirm the district court's denial of habeas relief on this claim.

1.

Kipp's First Amendment claim encompasses both the guilt and penalty phase. During the guilt phase closing argument, the prosecutor referred to the September 15 letter that Kipp wrote to his then-wife as a "significant piece of circumstantial evidence," and he read an excerpt to the jury:

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very big way." Because "the admissibility of this brief reference to Satan is not preserved for [state] appellate review[,]" *Kipp*, 26 Cal. 4th at 1135, he is procedurally barred from raising it here, and we decline to grant a COA.

> Page 7 reads in part: "I killed, raped, sodomized, beat, swore, and laughed at those fucking no-good bitches. Yeah, it felt great, because neither deserved to live anymore. . . . The other little tramp played it off as a college sweetheart. Hell, she was anything but that, and a loose fuck to boot. Well, Satan's licking both those bitches up now and laughing."

The prosecutor then argued:

> Ladies and gentlemen, that constitutes an admission, a rather chilling admission. Part of that statement that I just read to you alludes to an act that the defendant may or may not have committed elsewhere. . . . [Y]ou can accept that as an admission, a chilling admission of what occurred in Room 162, the Ramada Inn, on September 17, 1983.

The next day, after adjourning for the evening, the prosecutor resumed his argument by referencing the "rather indelible impression of the looks in [the jury's] eyes as [he] read that letter." He apologized for reading the "distressing" language from the letter but reminded the jury that it was Kipp's "unpleasant" language, not his own. A redacted copy of the letter was ultimately admitted into evidence, containing one additional reference: "In our next world we will celebrate and be on top, first in line to persecute and execute those would be heaven goers! (We are coming Home Satan!)"

During the penalty phase, the prosecutor again used the September 15 letter to cross-examine the defense expert.

The court also admitted the September 9 letter over the objection of Kipp's counsel, allowing certain portions to be redacted but leaving intact the Satan references. In his sentencing closing argument, the prosecutor said that he would not recite the September 15 letter again "because the language was rough, to say the least," but argued that it undermined Kipp's claims of remorse. He then read a portion of the September 9 letter to the jury:

> "I'd rape and sodomize every woman bitch deputy and gouge their eyes out. But I would let them live as invalids. Yeah, Satan will lick them all up in a tredge [sic] of horror. They better not ever give[] me the opportunity to escape, because I'll associate myself with a terrorist group and really go on a spree. I'd kill every DA and his family, deputies, men and women alike, and I'd gouge every one of their . . . fucking eyes out. After I got to 400 to 500 killings of this type, I'd also incorporate some ninja-type murders by poison. Yeah, I don't believe in God anymore, because their [sic] isn't one who has ever helped me. But Satan has helped me rejuvenate my energy in a working manner. Don't ever underestimate my intentions, babe, that's all I can say."

He argued:

> . . . When you consider these two letters with the language the defendant used in conjunction with that one 1988 escape attempt, you have a pretty consistent notion

> of what is going on in the defendant's mind with regard to remorse.

The prosecutor concluded, "This defendant, this real Martin Kipp, has murder in his heart, has Satan [in] his soul. And he had the life's blood of Tiffany Frizzell and Antaya Howard on his hands."

The defense attempted to contextualize the letters by urging that Kipp had lost all hope, explaining that when Kipp wrote, "Yeah, I don't believe in God anymore because there isn't one who has ever helped me," it exemplified how he was "a man who is down as low as you can go."

2.

The Supreme Court in *Dawson v. Delaware* held that the admission of a defendant's beliefs and associations at sentencing violates the First Amendment where it has "no relevance to the sentencing proceeding." 503 U.S. at 166. In *Dawson*, the prosecution introduced evidence at sentencing of the petitioner's affiliation with the Aryan Brotherhood, as well as evidence suggesting his belief in Satan. *Id.* at 162. To supplement the Aryan Brotherhood evidence, the parties agreed to a stipulation that read: "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.*

The Court held that the evidence was inadmissible because it "was not tied in any way to the murder," especially where "the prosecution did not prove that the Aryan Brotherhood had committed [or endorsed] any unlawful or violent acts" such that it would be relevant to

any aggravating circumstance. *Id.* at 166. In so holding, the Court rejected application of a "principle of broad rebuttal" in this case that would allow introduction of the evidence solely because Dawson put his character at issue in mitigation. *Id.* at 167–68. "[B]ecause the evidence proved nothing more than Dawson's abstract beliefs," and because it "was employed simply because the jury would find these beliefs morally reprehensible," its introduction violated Dawson's constitutional rights. *Id.* at 167.

Kipp contends that, as in *Dawson*, the evidence of his references to Satan was not connected in any way to his crime, and thus its sole relevance was to show that his beliefs were morally reprehensible. As such, he argues, the admission of the evidence violated his First Amendment rights and his conviction must be reversed.

As a preliminary matter, the parties disagree as to the standard of review that we must apply. Kipp contends that our review must be de novo because the state court either unreasonably applied *Dawson*, *see* 28 U.S.C. § 2254(d)(1), or unreasonably determined the facts by assuming that a belief in Satan represents an "abhorrent value system" that is unsupported by evidence in the record, *see id.* § 2254(d)(2). The state, on the other hand, argues that AEDPA deference applies. We need not resolve this issue because we find that, even on de novo review, Kipp's claim fails. We affirm the denial of habeas relief because, even assuming that the state's admission of Kipp's references to Satan violated his First Amendment rights, the error did not have a "substantial and injurious effect or influence in

determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).[5]

During the guilt phase, the Satan references were brief and minor. The prosecutor read aloud a brief portion of Kipp's September 15th letter that included "Well, Satan's licking both those bitches up now and laughing." The prosecutor later reminded the jury of "the rather indelible impression of the looks in your eyes as I read that letter." But there is no indication that the jury's reaction was to the brief mention of Satan rather than to the contents of the letter, which included Kipp's gruesome and deeply disturbing descriptions of violence. Moreover, while discussing how distressing the language was, the prosecutor focused on the crime rather than any religious implication of the Satan references: "[M]urder is an unpleasant thing by it's very nature. . . . There's nothing pretty about it." In the totality of the prosecutor's lengthy closing, the references to Satan comprised a relatively short section that went to Kipp's consciousness of guilt.

On the other hand, the evidence supporting Kipp's conviction was overwhelming. Kipp's fingerprints were found on a telephone in the room where Frizzell's body was discovered and on a book owned by her that was later discovered. *Kipp*, 26 Cal. 4th at 1110–11. Kipp also pawned

[5] We reject Kipp's contention that a *Dawson* violation is "structural" and thus not subject to harmless error review. Kipp cites no supporting authority, and we are unpersuaded that this type of constitutional violation satisfies the rationales for a structural error discussed by the Supreme Court in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)) (explaining that "the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself'").

a personal stereo and a cassette player that Frizzell's mother identified as her daughter's. *Id.* at 1111. Finally, the prosecutor had Kipp's own admissions in the September 15th letter that detailed how he "killed, raped, sodomized, beat, swore and laughed at" the victims. *Id.* The defense called no witnesses and offered no exhibits during the guilt-phase trial. *Kipp*, 26 Cal. 4th at 1112. Accordingly, the two references to Satan introduced during the guilt phase are wholly inadequate to show a "substantial and injurious effect" on the jury's guilty verdict.

The penalty phase likewise involved an insurmountable sum of aggravating evidence. Kipp argues that the centrality of the statements in the closing arguments both highlights their importance and exacerbated their impact. Certainly, the penalty phase presents a closer question than the guilt phase. The September 9th letter was introduced for the first time during closing argument and the prosecutor used the letters to argue that "this real Martin Kipp, has murder in his heart, [and] has Satan in his soul." The jury specifically requested to see the September 15th letter during the penalty phase deliberations. And the trial court did not take steps to ameliorate any impermissible inferences that the jurors might have drawn from the Satan references. *See, e.g.*, *United States v. Fell*, 531 F.3d 197, 230–31 (2d Cir. 2008) (finding no prejudice where the trial judge gave a jury instruction to ignore the defendant's religious beliefs and required each juror to certify on the special verdict form that they had followed that instruction).

Yet, on the other hand, the aggravating circumstances were overwhelming, and the prosecutor's methodical recounting of Kipp's continuous history of violence was particularly devastating. The prosecutor recalled the in-court testimony of Martinez, who had survived after Kipp

kidnapped, raped, and choked her in 1981. Martinez testified that Kipp had strangled her "to the point that her body began to go limp, her eyes started to roll back in her head, and she had one remaining thought which was 'Dear God, please don't let me die like this.'" The prosecution's narrative continued with Kipp's violent assault and attempted rape of Newman in 1983, whom Kipp had also choked, but who managed to escape through police intervention. The prosecutor reminded the jury that Newman was afraid to press charges because Kipp had threatened to kill her and her son. The prosecutor then described Kipp's brutal murder of Howard, merely three months after he killed Frizzell, and reminded the jury of a photograph showing her decomposing body in the car. He also described the violent way in which Kipp beat Howard before strangling her to death. Finally, the prosecutor described Kipp's attempted escapes from jail, and Kipp's assertion that they were lucky he was caught because he was out to kill. The letters themselves, separate and apart from the Satan references, paint a picture of a killer who not only showed no remorse, but who threatened to commit other depraved acts of violence and torture in the future. In short, the references to Satan are too minor in light of the other evidence to have "had substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 638. We thus affirm the district court's denial of habeas relief for this claim.

B. Ineffective Assistance of Counsel

Kipp argues that his Sixth Amendment right to counsel was violated because his counsel performed deficiently in a way that prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because the state court adjudicated his ineffective assistance of counsel ("IAC")

claim "on the merits for failure to state a prima facie case," we review under AEDPA deference. *See* 28 U.S.C. § 2254(d). Our examination of counsel's performance "must be highly deferential," *Strickland*, 466 U.S. at 689, and, when conducted through AEDPA's lens, our review is "doubly deferential," *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (per curiam)). Because the state issued summary denials as to Kipp's IAC claims, we must first "determine what arguments or theories supported or . . . could have supported[] the state court's decision," and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102.

1.

Kipp contends that his trial counsel "failed to competently litigate the admissibility of Kipp's oral and written references to Satan." Specifically, Kipp argues that counsel erred by objecting to the admission of the references to Satan on evidentiary rather than constitutional grounds. But because *Dawson* had not yet been decided, it is questionable whether any objection on constitutional grounds would have been successful. *See Strickland*, 466 U.S. at 688 (holding that deficient performance means that "counsel's representation fell below an objective standard of reasonableness" as measured by "prevailing professional norms"). Regardless, we need not decide whether counsel's performance was deficient because any error was clearly harmless. As we explained above, the admission of the Satan references could not have "had substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 638.

Accordingly, Kipp cannot meet the higher *Strickland* standard of prejudice, requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694; *see Kyles v. Whitley*, 514 U.S. 419, 435–36 (1995) (explaining that the *Strickland* test for prejudice imposes a "higher burden" on the defendant than the *Brecht* standard). We therefore affirm denial of habeas relief on this claim.

2.

Kipp also alleges that his trial counsel was ineffective during the penalty phase by failing to adequately investigate and present mitigating evidence regarding his life. He argues that a more thorough investigation would have uncovered "critical information about Kipp's history of prenatal exposure to alcohol, neglect as an infant, severe physical and emotional abuse and exposure to domestic violence . . . and escalating reliance on drugs and alcohol." We affirm the district court's denial of this claim because the California Supreme Court could have reasonably found that trial counsel's performance was neither deficient nor prejudicial to Kipp's case. *See Strickland*, 466 U.S. at 687.

As for deficiency, Kipp argues that trial counsel failed to timely conduct a mitigation investigation, which led to the defense missing important witnesses and to inadequate preparation of the witnesses that were put on the stand. Kipp's original counsel James Egar declared a conflict on January 15, 1986. Thereafter, when John Yzurdiaga and Jeffrey Brodey were appointed to take over, they inherited an incomplete investigation and considered Laurie Poore, the original mitigation investigation specialist, to be "in charge" of the mitigation investigation. However, they did not contact Poore until almost three years after Egar had been removed and after jury selection had already begun.

Poore stated in a declaration that she was "greatly disturbed" that counsel had waited so long to contact her, and that "it became apparent . . . that no one had done any work on the penalty phase investigation" since they were appointed as counsel. Similarly, the social historian, Craig Haney, who had interviewed potential witnesses in 1985 and 1986, did not resume work until after the attorneys contacted him in 1988. Thus, Kipp argues, counsel's "neglect of the mitigation investigation until Kipp's trial had begun" was deficient performance.

Kipp's framing of this delay, however, paints an incomplete picture of the totality of the mitigation investigation and evidence that was presented to the jury at the penalty phase. As an initial matter, Kipp had a hand in creating the "conflict" that arose with Egar by becoming romantically involved with Egar's paralegal and necessitating a transition midstream to Yzurdiaga and Brodey.[6] Thereafter, while the new attorneys waited a long time to begin the penalty phase, Poore acknowledged that a significant amount of work and investigation had already been conducted. Egar had previously "directed the penalty phase investigation and took an active role supervising" the investigators. The new attorneys had Egar's files and were in frequent contact with him during their preparation.

This case thus presents facts far different from the cases cited by Kipp. For example, in *Williams v. Taylor*, 529 U.S. 362, 395 (2000), the Court found that counsel's performance

[6] As Poore explains it, she began to catch on that a paralegal on the case "had become romantically involved" with Kipp, in part because the paralegal began to dress "like what she thought Native Americans looked like." Egar fired the paralegal over the improper relationship, and Kipp may have been persuaded by the paralegal to replace Egar.

was deficient where preparation for sentencing did not begin at all until a week beforehand. In *In re Lucas*, the California Supreme Court held that counsel was deficient because they entirely failed to follow-up with witnesses that had suggested alternative theories of mitigation. 33 Cal. 4th 682, 725 (2004). By contrast, here, the asserted "delay" did not impede counsel from presenting a substantial case in mitigation at the penalty phase. Poore was able to reestablish contact with her witnesses, to persuade twenty-one lay witnesses to travel to California and testify, and (despite some friction with the new attorneys) "conduct[] the [in-person] interviews with all of the remaining witnesses as [she] had planned."

Kipp cites *Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015), to argue that counsel may still be deficient even if a substantial case in mitigation was presented at trial. In *Bemore*, we held that counsel was deficient despite having presented over forty witnesses at trial. However, counsel had been aware of a potential mental impairment theory suggested by a forensic psychologist but had "truncated" the inquiry and "put his report in the back of a drawer." *Id.* at 1171–72. By contrast, and as discussed in more detail below, the allegedly overlooked evidence in this case was largely duplicative of theories of mitigation that were in fact presented at trial, detailing the drug and alcohol use, poverty, and abuse rampant in Kipp's childhood into his adulthood. Counsel here did not completely overlook a new, different theory of mitigation. Accordingly, the state court could have reasonably rejected Kipp's IAC claim for failing to adequately establish deficient performance.

Additionally, the California Supreme Court could have reasonably concluded that any deficiency in counsel's performance did not prejudice the result. To determine

whether the failure to investigate and present mitigating evidence prejudiced the defendant, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (internal citations omitted).

Here, the defense put forth a substantial case in mitigation that focused on the tragic circumstances of Kipp's personal history. Kipp's proffered "new" evidence is not meaningfully different in kind, but rather in detail, and we hold that any deficiency did not "undermine[] the reliability of the result." *See Strickland*, 466 U.S. at 693.

First, Kipp points to witnesses who could have more clearly demonstrated that his biological mother, Mary Still Smoking, drank alcohol while pregnant with him. This evidence is not meaningfully different from the extensive evidence of her drinking and alcoholism that was in fact presented.

Second, Kipp argues that the attorneys failed to accurately paint a picture of his childhood abuse. Contrary to the testimony presented at trial that John did not physically abuse Kipp as a child, Kipp notes that witnesses could have detailed specific instances of abuse during his childhood. However, Mildred, John's wife, denied that John hit Kipp, and her new declaration only acknowledges that he "switched from beating [her] to beating" Kipp before he started high school. At the very least, the additional evidence from extended family and friends would have contradicted the testimony of Mildred herself at trial. And, as the district court noted, the jury did in fact hear about

several incidents of disturbing and violent physical abuse by John, such as when he "choked [Petitioner] into unconsciousness for ten to twenty seconds," or when, two days later, he caused Kipp "occipital head trauma because John hit Petitioner's head against a nail on a wall."

Kipp also argues that the attorneys could have presented much more detailed evidence regarding his drug and alcohol abuse during his teenage years and escalating through his military service. This testimony would have merely duplicated the ample testimony that was already presented regarding Kipp's extensive drug and alcohol abuse. Moreover, as the state argues, not all juries would view this detailed evidence of drug and alcohol abuse to be mitigating.

In sum, the evidence that Kipp puts forth on habeas review largely duplicates the evidence that was in fact presented at trial, while any new information does too little to counteract the considerable case in aggravation. Because "fairminded jurists could disagree" whether the addition of this information would have a "reasonable probability" of changing the outcome, the district court properly denied this claim under AEDPA deference. *See Richter*, 562 U.S. at 102; *Strickland*, 466 U.S. at 695.

C. Juror Misconduct During the Penalty Phase

Kipp alleges that one of the jurors brought a Bible into the jury room and discussed various passages with the other jurors during the penalty phase deliberations. Kipp relies on

the declaration[7] of juror Algertha Rivers, who stated, in relevant part:

> I recall that during penalty phase deliberations a female juror with dark, shoulder-length hair brought in a Bible and read it to us. She talked about several verses in the Bible, which she told us would help us in making a decision. The jurors talked about standing in judgment of another human being. There was also discussion of the verses which state, 'an eye for an eye' and 'judge not lest ye be judged.' A little over half of the jurors had a religious background and strong religious beliefs.

Kipp argues that injecting Bible verses into the jury room constitutes juror misconduct because the jury improperly considered "extraneous evidence," and that the state failed to show the misconduct was harmless. Because the state court denied this claim "on the merits for failure to state a prima facie case for relief," AEDPA deference applies to our review of this issue.

The *Mattox-Remmer* framework set forth by the Supreme Court governs juror misconduct claims involving consideration of extraneous evidence during deliberations:

> At step one, the court asks whether the contact was "possibly prejudicial," meaning

[7] We agree with Kipp that the declaration is admissible under Rule 606(b) of the Federal Rules of Evidence, which permits juror testimony about the consideration of extraneous evidence during deliberations but not about the effect of such evidence on the verdict.

> it had a "tendency" to be "injurious to the defendant." If so, the contact is "deemed presumptively prejudicial" and the court proceeds to step two, where the "burden rests heavily upon the [state] to establish" the contact was, in fact, "harmless."

Godoy, 861 F.3d at 959 (quoting *Mattox v. United States*, 146 U.S. 140, 150 (1892); *Remmer v. United States*, 347 U.S. 227, 229 (1954)). This two-step analysis recognizes "the practical impossibility of shielding jurors from all contact with the outside world, and also that not all such contacts risk influencing the verdict." *Id.* at 967.

Kipp relies on cases that have applied the *Mattox* presumption of prejudice at the second step of the inquiry, but those cases involve extraneous influences that were wholly different in kind. For example, in *Godoy*, a juror had "'kept continuous communication' with the 'judge friend' 'about the case' and passed the judge's responses on to the rest of the jury." *Id.* at 958. The other cases he cites involve extraneous influences that are also easily distinguishable from the Bible verses here. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam) (bailiff's statement to jurors); *Turner v. Louisiana*, 379 U.S. 466, 468–70 (1965) (government witnesses interacting with jurors); *Remmer*, 347 U.S. at 228–30 (efforts to bribe juror); *Mattox*, 146 U.S. at 150–53 (exposure to newspaper article).

Whether the introduction of the Bible is an impermissible contact—the first step of the *Mattox-Remmer* framework—is still an open question, at least in our circuit. And circuits that have addressed this question are split. *Compare Oliver v. Quarterman*, 541 F.3d 329, 339–40 (5th Cir. 2008) (citing the Eleventh, First, and Sixth Circuits as

support that "[m]ost circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence") *with Robinson v. Polk*, 438 F.3d 350, 363–64 (4th Cir. 2006) (holding that the Bible is distinguishable from other types of external influences because "reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence"). Our circuit has previously opted to resolve juror misconduct claims involving use of the Bible on prejudice grounds. *See, e.g.*, *Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc); *Crittenden v. Ayers*, 624 F.3d 943, 973 (9th Cir. 2010). Here, we again find it unnecessary to decide the question of whether use of Bible verses during deliberation constitutes misconduct because the state court could have reasonably concluded that any error did not prejudice the jury's verdict.

To prevail on his claim in federal habeas review, Kipp acknowledges that any juror misconduct must have had a "substantial and injurious effect on the verdict." *See Fields*, 503 F.3d at 781; *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000). Applying this standard, we have previously found harmless error in other cases with even more troubling use of Bible passages. In *Crittenden*, the court rejected a misconduct claim based on a juror's introduction of the passage "[w]ho so sheddeth man's blood by man shall his blood be shed." 624 F.3d at 973. In *Fields*, the juror cited the same passage, as well as "He that smiteth a man, so that he dies, shall surely be put to death." 503 F.3d at 777, n.15. The *Fields* court found no prejudice, in part, because there were Biblical verses in support as well as against imposition of the death penalty. *Id.* at 781. Here, the same logic applies: the verses mentioned in Rivers's declaration included both "an eye for an eye" and "judge not lest ye be judged," verses

tending to support opposing views. And, in *Fields*, "[m]ore importantly, the jury was instructed to base its decision on the facts and the law as stated by the judge, regardless of whether a juror agreed with it. We presume that jurors follow the instructions." *Fields*, 503 F.3d at 781–82. The jury received similar instructions here.

Moreover, the jury's sentence of death was supported by overwhelming aggravation evidence. As discussed above, the evidence of the extent of Kipp's violence against women was devastating, including raping and choking Martinez, violently assaulting and threatening to kill Newman, and brutally raping and killing Frizzell and Howard. Kipp twice tried to escape from jail, showed an utter lack of remorse, and threatened to commit violent atrocities again in the future. Weighing the overwhelming weight of this aggravating evidence against the purported juror misconduct, we conclude that any misconduct was harmless.

AFFIRMED.

E-FILED 12/2/15
JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN JAMES KIPP,

Petitioner,

v.

RON DAVIS, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 03-8571 PSG

DEATH PENALTY CASE

JUDGMENT

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

The Clerk is ordered to enter this judgment.

Dated: December 2, 2015.

PHILIP S. GUTIERREZ
United States District Judge

E-FILED 12/2/15

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN JAMES KIPP, Petitioner, v. RON DAVIS, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 03-8571 PSG **DEATH PENALTY CASE** ORDER DENYING FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO AMEND

Petitioner Martin Kipp was convicted in December 1988 of the first degree murder, forcible rape, and robbery of Tiffany Frizzell in September 1983, with a special circumstance finding that the murder was committed in the course of the rape. At the penalty phase of trial, the prosecution introduced evidence that Petitioner sexually assaulted and murdered Antaya Howard in December 1983, assaulted and raped June Martinez in June 1981, assaulted and threatened to kill Loveda Newman in November 1983, and threatened to kill a sheriff's sergeant after an unsuccessful attempt to escape from the Los Angeles County jail in January 1988. The jury returned a penalty verdict of death. The California Supreme Court affirmed Petitioner's conviction and capital sentence. *People v. Kipp*, 26 Cal. 4th 1100 (2001).

Petitioner filed state petitions for writs of habeas corpus on December 4, 2000 and November 5, 2004, which the California Supreme Court summarily denied on November 12, 2003 and June 28, 2006, respectively. *In re Kipp*, Case Nos. S093369, S129115. He filed a federal petition for writ of habeas corpus in the instant proceedings on November 8, 2004. Petitioner filed the operative First Amended Petition for Writ of Habeas Corpus on July 5, 2006 ("Pet.").

Petitioner filed a Motion for Evidentiary Hearing on August 8, 2007. In its Order Denying Petitioner's Motion for Evidentiary Hearing and Order for Further Merits Briefing, the Court denied relief on Claims 1, 3, 14, 18-23, 26, 28(G), 34, and 36, the portion of Claim 15 regarding Forensic Science Services, and the portion of Claim 35 alleging a violation of international law. (Order Denying Petr.'s Mot. for Evid. Hr'g and Order for Merits Briefing, Apr. 30, 2014 ("Order on Mot. for Evid. Hr'g").) The Court dismissed without prejudice Claim 31 and the portion of Claim 35 alleging that California's lethal injection procedure violates the United States Constitution. (*Id.*)

The Court ordered the parties to proceed to brief the merits of Petitioner's remaining claims for relief under 28 U.S.C. § 2254(d). (*Id.*) The parties completed their briefing on October 19, 2015.

During the course of that briefing, a decision in *Jones v. Chappell*, CV 09-2158 CJC, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) held California's death penalty system to be unconstitutional. On September 19, 2014, Petitioner filed a Motion for Leave to Amend His Petition for Writ of Habeas Corpus, seeking to replace Claim 37 in the Amended Petition with an "updated" version alleging that California's death penalty system is unconstitutional and citing *Jones*. (Mot. at 1, 3-4.)

On November 12, 2015, the Court of Appeals reversed the District Court's decision in *Jones*. *Jones v. Davis*, No. 14-56373, ___ F.3d ___, 2015 WL 6994287 (9th Cir. 2015). In light of that decision, the Court denies Petitioner's Motion to

Amend and his currently pleaded Claim 37. In addition, for the reasons set forth below, the Court denies Petitioner's remaining claims for relief.

I. Claim 2: Profound Mental Illness and Cruel and Unusual Punishment

A. Allegations

In Claim 2, Petitioner alleges that the death penalty would be cruel and unusual punishment under the Eighth and Fourteenth Amendments in light of his "profound mental illness." (Pet. at 87-89.) Petitioner argues that:

> [t]he rationales that the Supreme Court relied upon to support its holding in *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] . . . apply equally well to cases in which the defendant suffers from profound mental illness. Such reduced mental capacity similarly undermines the social purposes of the death penalty and increases the likelihood that the defendants will be sentenced to death in spite of factors which may call for a less severe penalty.

(Petr.'s Opening Br. on the Merits of His Remaining Claims, Dec. 23, 2014 ("Opening Br."), at 10 (internal quotation omitted).) Petitioner points to the Supreme Court's determination that capital punishment is unconstitutional unless it measurably contributes to one or both of the goals of retribution and deterrence. (*See id.* at 9 (citing *Atkins*, 536 U.S. at 319).) He contends that "[t]he imposition of the death penalty in this case serves no more valid purpose than in the case of a mentally retarded individual." (*Id.* at 11.)

To establish the profound mental illness he alleges, Petitioner cites the expert declarations of Drs. Judith Becker, Pablo Stewart, and Hilary Weaver, although he discusses only the opinion of Dr. Stewart. (*See* Opening Br. at 10-11.) Petitioner relies upon Dr. Stewart's conclusions that:

> 'because of his prenatal exposure to neurotoxins, Martin began life cognitively impaired.' . . . The cognitive impairments that Kipp began life with were then 'exacerbated by various environmental factors he experienced throughout his life.' Dr. Stewart concluded that Kipp, including at the time for the crimes [sic] for which he received the

> death penalty in this case, suffered from 'profound cognitive deficits as a result of his in utero exposure to neurotoxins; attention deficit/hyperactivity disorder ["AD/HD"]; impulse control disorder; and complex post-traumatic stress disorder.'

(*Id.* at 11 (quoting Pet. Ex. 278 ¶¶ 4, 7, 8, 48).)

B. Analysis

Dr. Stewart provides little explanation regarding the nature or extent of the cognitive impairments Petitioner suffered as a result of his in utero neurotoxin exposure. He states merely that the exposure contributed to the formation of AD/HD and Impulse Control Disorder and that "[p]ersons exposed to neurotoxins prenatally often act impulsively and erratically, and their ability to understand or explain their actions can be quite limited." (Pet. Ex. 278 ¶¶ 7, 37.) Dr. Stewart ultimately concluded:

> Given Martin's genetic predisposition to substance abuse, his chronic psychiatric symptomatology and heavy drug abuse around the time of the crimes for which he is convicted, it is my professional opinion, which I hold to a reasonable degree of medical certainty, that there is a strong probability that Martin was incapable of acting with premeditation and deliberation on the dates of the charged offenses in September and December 1983. While it is impossible to state with absolute certainty what Mr. Kipp's exact mental state was on particular dates seventeen years ago, I can say that Martin's severely debilitating psychiatric symptoms are lifelong and had *some diminishing impact* upon his mental capacity in September and December 1983. This prevailing symptomatology amounts to important mitigating evidence that anyone attempting to assess Mr. Kipp's true culpability for the crimes would want to consider.

Id. ¶ 49 (emphasis added).

As to Dr. Weaver's opinion, the Court explained in its prior Order that Dr. Weaver "noted that Petitioner 'may' have inherited mental illness, was 'at risk' for impairment, 'probably' showed impairment in his self-descriptions, and may have

had some kind of mental disturbance prior to incarceration." (Order on Mot. for Evid. Hr'g at 47 (quoting Pet. Ex. 329 ¶¶ 24, 125, 137, 170).) The Court held that "the California Supreme Court may have reasonably disregarded [the opinions offered by Dr. Weaver] as speculative." (*Id.*)

Finally, Dr. Becker generally echoed the language Dr. Stewart used in his conclusion. (*See* Pet. Ex. 229 ¶ 54.) Instead of a "strong probability" that Petitioner was not capable of acting with premeditation and deliberation, as Dr. Stewart expressed, she found a "probability" that Petitioner was not capable. (*Id.*) In place of "severely debilitating psychiatric symptoms" that were "lifelong," Dr. Becker found "disorders" that "existed through his adulthood." (*Id.*) Most significantly, she concluded that Petitioner's disorders only "may" have had some diminishing impact on his mental capacity. (*Id.*) Dr. Becker diagnosed Petitioner as suffering from, as an adult, paraphilias ("classified by recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of one's self or one's partner or 3) children or other non-consenting persons that occur over a period of at least six months"), Polysubstance Dependence, and Dysthmic Disorder. (*Id.* ¶ 52.)

The California Supreme Court may have reasonably concluded that the expert opinions did not show Petitioner's limitations to be as significant as those of intellectual disability. In *Moormann v. Schriro*, 672 F.3d 644, 48-49 (9th Cir. 2012), for example, Petitioner presented an expert opinion that he was unable to know or appreciate the nature and consequences of his conduct, and suffered from possible organic delusional syndrome, pedophilia, schizoid personality disorder, and antisocial personality disorder. *See Moormann v. Schriro*, No. CV 91-1121 PHX, 2008 WL 2705146 (D. Ariz. July 8, 2008), at *6-7. Notwithstanding that evidence, the Ninth Circuit held that the state court's rejection of his *Atkins* claim was not contrary to, or an unreasonable application of, clearly established federal law. *See Moormann*, 672 F.3d at 649 (so holding on the basis that "[t]here is no

clearly established federal law that a person who was not mentally retarded at the time of the crime or the trial may nevertheless be exempted from the death penalty pursuant to *Atkins*, because of subsequent mental deterioration"). The California Supreme Court may have decided that Petitioner's cognitive impairments, AD/HD, impulse control disorder, complex PTSD, paraphilias, Polysubstance Dependence, and Dysthmic Disorder did not show him to be "categorically less culpable than the average criminal" in the way that intellectually disabled persons are. *Atkins*, 536 U.S. at 316; *cf. Franklin v. Johnson*, 290 F.3d 1223, 1234 (9th Cir. 2002) ("Jurors may well . . . look skeptically at a claim that someone who is psychologically prone to sexually abuse [others] should not be found guilty of a crime when he does commit such abuse."). The state court may have also reasonably held that Petitioner failed to show "the required objective indicia of consensus that evolving standards of decency now prohibit the execution" of persons with his degree of limitation. *Allen v. Ornoski*, 435 F.3d 946, 952 (9th Cir. 2006) (finding no such consensus as to the execution of elderly and infirm persons) (internal quotation marks omitted).

Similarly, Petitioner has not shown his claim to be supported by clearly established Supreme Court precedent, as required to merit federal habeas relief. He presents no authority to show that *Atkins*, or the principles applied in *Atkins*, should be extended to a person with his nature of impairment. To apply *Atkins* or its underlying precedent to Petitioner's circumstances would be to "announce[] a new rule . . . ." *Allen*, 435 F.3d at 955 (internal quotation omitted).

Claim 2 is, therefore, DENIED.

II. Claims 5 and 6: Rape Conviction and Special Circumstance Finding

In Claim 5, Petitioner alleges that the conviction and special circumstance finding of rape are not supported by sufficient evidence. (Pet. at 93-94.) In Claim 6, Petitioner claims actual innocence as to the rape conviction and special circumstance finding. (*Id.* at 94-96.)

A. Sufficiency of the Evidence

1. Application of § 2254(d)

Petitioner presented the sufficiency of the evidence claim to the California Supreme Court for the first time in his December 4, 2000 state habeas petition, as claim V. The California Supreme Court held, in relevant part:

> Each claim except claim XV is denied on the merits for failure to state a prima facie case for relief. . . .
>
> Except insofar as [it] allege[s] ineffective assistance of counsel, claim[] . . . V . . . [is] barred because, being based entirely on facts in the appellate record, [it] could have been, but w[as] not, raised on appeal. . . .
>
> Claim[] . . . V, alleging insufficiency of the evidence, [is] not cognizable on habeas corpus. *In re Lindley*, 29 Cal. 2d 709, 723 (1947).

In re Kipp, Case No. S093369 (Cal. Nov. 12, 2003) (internal citations omitted and edited). As Petitioner notes, the court used similar language when denying the claim a second time, after Petitioner raised it again in his November 5, 2004 state habeas petition. (*See* Opening Br. at 13 n.3; *In re Kipp*, Case No. S129115 (Cal. Jun. 28, 2006) (claim B).)

Petitioner acknowledges that "[i]t is not uncommon for the California Supreme Court to both impose a procedural bar and purport to reach a decision as to the merits of the barred claim." (Opening Br. at 14.) Petitioner argues that:

> [i]n this instance, however, the court did not merely find that the claim was barred; it found the claim was not *cognizable*. This is a term of art, and its meaning is incompatible with the court also having reached the merits of the claim. In relevant part, Black's Law Dictionary defines 'cognizable' as '1. Capable of being known or recognized . . . 3. Capable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction.' Thus, a claim that is not cognizable is a claim that the court cannot recognize, a claim that the court cannot judicially examine, a claim outside the court's jurisdiction. That such a claim should be adjudicated on the merits is

a legal impossibility.

(*Id.* (emphasis in original).)

Petitioner's argument is unavailing. A court's determination that a claim is not cognizable does not foreclose the possibility of an alternate decision on the merits of that claim. *See, e.g., United States v. Allen*, 157 F.3d 661, 667 (9th Cir. 1998) (denying claim on the merits even though "habeas claims that are not raised in the petition before the district court are not cognizable on appeal," based on "an exception to this rule . . . [where] the issue has been briefed fully on the merits so that the government will not be prejudiced if we consider it" (internal quotations and alterations omitted)); *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992) ("Because [petitioner] did not raise this claim in the district court, it is not cognizable on appeal. In any event, [the alleged violation] . . . does not give rise to an issue of constitutional proportions." (internal citation omitted)).

The California Supreme Court's decision expressly states that the claim was adjudicated on the merits in state court proceedings. *See* 28 U.S.C. § 2254(d). Review of the claim is governed by § 2254(d).

2. Merits Review

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

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

McDaniel v. Brown, 558 U.S. 120, 133 (2010). "Furthermore, after AEDPA, we apply the standards of *Jackson* with an additional layer of deference to state court findings." *Ngo*, 651 F.3d at 1115 (applying § 2254(d)) (internal quotation omitted).

The jury was instructed, pursuant to California law, that in order to find Petitioner guilty of rape, jt must find that: (1) two persons engaged in an act of sexual intercourse; (2) the two persons were not married to each other; (3) the act of intercourse was against the will of one of the persons; and (4) the act was accomplished by means of force or fear of immediate and unlawful bodily injury to such person. (RT 3828-29; *see also* CT 1340-41.) The jury was instructed that if those elements were established, any sexual penetration, however slight, was sufficient; that proof of emission was not necessary; and that if the victim was not alive at the time sexual intercourse took place, the jury must return a verdict of not guilty. (RT 3829; *see also* CT 1342-43.) The jury was further instructed, in relevant part, that to find the rape-murder special circumstance true, it must find that the murder was committed while the defendant was engaged in the commission of rape. (RT 3823.)

Petitioner identifies alleged "gaps" in the prosecution's presentation of evidence to support his argument that the rape conviction and special circumstance finding were not supported by sufficient evidence. (Opening Br. at 17.) He asserts that the prosecution did not introduce evidence linking the presence of semen in Frizzell's vaginal sample to Petitioner or establishing when the semen was deposited relative to her time of death. (*Id.* at 16.) Petitioner points to testimony that semen and/or sperm would remain detectable for an "extended length of time," a period of less than 72 hours, and argues that if it were deposited prior to Frizzell's death, she may have had consensual intercourse with her killer or with another person. (RT 3596; *see* Opening Br. at 16.) Petitioner further asserts that the semen may have been deposited after her death. (Opening Br. at 16 (citing an

expert declaration prepared after trial, Pet. Ex. 229, diagnosing Petitioner with necrophilia, among other paraphiliae).) He adds that although Frizzell was partially undressed when her body was found, "a homicide victim's unclothed or partially clothed status is insufficient to support a finding of either rape or attempted rape under California law." (*Id.* at 17 (citing *People v. Johnson*, 6 Cal. 4th 1, 39-42 (1993), *overruled on other grounds by People v. Rogers*, 39 Cal. 4th 826, 879 (2006)).) Petitioner emphasizes that there was no evidence of bruising or tearing of her vaginal or anal area. (*Id.*)

Finally, Petitioner attacks the factual reliability of a letter the prosecution introduced at trial. Petitioner wrote the letter to his then-wife on September 15, 1987, while they were both in the custody of the Orange County Jail. (Pet. at 76.) As the Court explained in its Order on Petitioner's Motion for Evidentiary Hearing:

> [t]he portion of the letter at issue read:
>
> > 'I killed, raped, sodomized, beat, swore, and laughed at those fucking no-good bitches. Yeah, it felt great, because neither deserved to live anymore. One was a black prostitute who liked to rob people and play games. . . . The other little tramp played it off as a college sweetheart. Hell, she was anything but that, and a loose fuck to boot. Well, Satan's licking both those bitches up now and laughing.'
>
> (RT 3853.) . . .
>
> The prosecution introduced evidence that Frizzell lived in Washington and had flown to Long Beach the day before her murder to attend Brooks College. (*Id.* at 3375-79.) She stayed in a hotel that night because the college dormitories were not open for registration until the next day. (*Id.* at 3378-79); *see also Kipp*, 26 Cal. 4th at 1110. She was found on the bed in her hotel room unclothed from the waist down, with a small hook embedded in her back that appeared to be from a missing bra, and semen and sperm were present in her vagina and on her external genital area. *Kipp*, 26 Cal. 4th at 1110.

> Petitioner's fingerprint was found on the telephone in the room. *Id.* It was a reasonable inference from that evidence that it was Frizzell Petitioner discussed as 'play[ing] it off as a college sweetheart.'
>
> The trial court observed [outside the presence of the jury] that the letter 'certainly seems to be an admission. A very substantial issue to what was heretofore a circumstan[t]ial case.' (*Id.* at 3714.) The jury could have drawn the same permissible inference from Petitioner's statements.

(Order on Mot. for Evid. Hr'g at 11-12 (internal quotations edited).) Petitioner argues instead that the letter was "so plainly inaccurate" that no rational juror would have relied on it without more corroborating evidence than was presented at trial, because its statements regarding sodomy and beating were "inconsistent with the physical evidence recovered from Frizzell." (Opening Br. at 17.)

The jury may have reasoned, as the California Supreme Court did, that the probative value of the admissions was not substantially weakened by this alleged inconsistency. *See Kipp*, 26 Cal. 4th at 1122. As the California Supreme Court noted, the evidence presented did not eliminate the possibility that Frizzell was sodomized and, "even if we assume the defendant did not sodomize [the] victim, defendant's false statements to the contrary could be attributed to exaggeration or embellishment without substantially detracting from defendant's admission that he, and not someone else, sexually assaulted and killed" the victim. *Id.* As this Court has held, the jury could reasonably infer from the evidence that Petitioner was referring to Frizzell.

In addition to evidence of the letter, the prosecution presented testimony at trial that Frizzell had bruising on her left thigh and her stomach, scratches and unusual bruising on her throat, and a wound on her left hand consistent with a defense wound. (RT 3430-31, 3607, 3615-17.) The injuries appeared to be antemortem. (*Id.* at 3618-21.) There was redness and erosion of the cervix, which was consistent with sexual intercourse. (*Id.* at 3623, 3631.) The state of undress of

her body, paired with physical evidence connecting Petitioner to the scene, supported a finding that the defendant partially unclothed the victim "for the purpose of sexual intercourse" under California law. *People v. Cain*, 10 Cal. 4th 1, 45-46 (1995).

The California Supreme Court reasonably determined that each element of the offense was supported by the evidence. Petitioner's statements and the physical evidence supported a finding that Petitioner engaged in sexual intercourse with Frizzell, that she did not consent, that Petitioner used force or fear, and that Frizzell was alive at the time. The jury's finding that Petitioner murdered Frizzell while engaged in the commission of rape was likewise supported by the evidence. Accordingly, Claim 5 is DENIED.

B. Actual Innocence

Petitioner makes the same arguments discussed above in support of his actual innocence claim. He adds the allegations that none of the victim's jewelry was broken and that there were "no signs of . . . a struggle within her hotel." (Pet. at 95.)

The standard for assessing a claim of "actual innocence" brought after trial in a federal habeas corpus proceeding is "extraordinarily high," and Kipp must make a "truly persuasive" showing that he is innocent. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, "for the sake of argument . . . , that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim"). At a minimum, "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc). "[A] claim based on factual innocence . . . 'ha[s] to fail unless the federal habeas court is itself convinced that th[e] new facts unquestionably establish [petitioner's] innocence.'"

Morales v. Ornoski, 439 F.3d 529, 533 (9th Cir. 2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Petitioner does not go beyond attempting to demonstrate doubt about his guilt and does not affirmatively prove that he is probably innocent of rape or the rape-murder special circumstance. Claim 6 is DENIED.

III. Claims 7, 8, 9, 16, 17, and 25: Admission of Evidence

In Claims 7, 8, 9, 16, 17, and 25, Petitioner alleges that the admission of a number of items of evidence violated his due process rights. In its Order on Petitioner's Motion for Evidentiary Hearing, the Court addressed the constitutional admissibility of those same items of evidence, in deciding Petitioner's related ineffective assistance of counsel claims. (*See* Order on Mot. for Evid. Hr'g at 10-19.)[1] For the sake of brevity, the Court merely references, and does not repeat, that analysis here.

As set forth in the Order, a defendant suffers a constitutional violation from the admission of evidence only if it is "of such quality as necessarily prevents a fair trial" and "there are no permissible inferences the jury can draw from the evidence in question . . . ." *Hovey v. Ayers*, 458 F.3d 892, 923 (9th Cir. 2006) (internal quotation omitted); *see also Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) ("Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process" (emphasis in original)). As to each item of evidence, the Court held that because there were permissible inferences the jury could draw, Petitioner did not show prejudice from any ineffective assistance

[1] Claims 7 and 1(F) address Petitioner's September 15, 1987 letter to his then-wife. (*See* Order on Mot. for Evid. Hr'g at 11-13.) Claims 8 and 1(G) address the explanation for Frizzell's presence at a Long Beach hotel. (*See id.* at 13-14.) Claims 9 and 1(H) address Petitioner's escape attempts. (*See id.* at 14-15.) Claims 16 and 14(G) address Petitioner's September 9, 1987 letter to his then-wife. (*See id.* at 15-17.) Claims 17 and 14(H) address Petitioner's threat to a sheriff's sergeant. (*See id.* at 17-18.) Claims 25 and 14(J) address a postmortem photograph of Howard. (*See id.* at 19.)

of counsel in failing to object to its admission on constitutional grounds.

Petitioner emphasizes that the California Supreme Court did not reach the merits of certain constitutional claims on direct appeal, because it found that counsel's lack of objection on that basis failed to preserve the issues for appeal. (*See* Opening Br. at 21, 23; *cf. id.* at 24-26); *see generally Kipp*, 26 Cal. 4th at 1120-27, 1132-34, 1135-36. He argues that § 2254(d) does not apply to those claims as a result. Even reviewing the claims de novo, however, the same results obtain: because there were permissible inferences the jury could draw from each item of evidence, the admission of the evidence did not violate Petitioner's due process rights.

Claims 7, 8, 9, 16, 17, and 25 are, therefore, DENIED.

IV. Claims 4 and 10: Robbery Conviction and Felony Murder Verdict

In Claim 10, Petitioner alleges that there was "insufficient evidence upon which to convict Petitioner of the offenses of robbery and robbery felony-murder." (Pet. at 113.) Petitioner explains that he raised a "nearly identical claim as Claim 4" and that "[b]ecause Claim 4 is duplicative of Claim 10, Kipp hereby withdraws Claim 4." (Petr.'s Br. at 34 n.7.)

A. Robbery Felony Murder Theory of First Degree Murder

First, as to his first degree murder conviction, Petitioner asserts that the prosecution "rested the murder charge on alternate theories," including robbery felony murder, rape felony murder, and murder with premeditation and deliberation. (Pet. at 118.) Petitioner argues that "[b]ecause it is impossible to know whether the jury based its conviction on the invalid felony-murder theory, Kipp's first-degree murder conviction must be vacated." (Opening Br. at 39.)

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Where "alternative legal theor[ies] of liability" are presented to the jury, and the evidence is sufficient to support one but not another, the insufficiency as to one alternative "does not provide an independent basis for reversing an otherwise valid

conviction." *Griffin v. United States*, 502 U.S. 46, 60 (1991). Jurors are "well equipped to analyze the evidence" to decline "the option of relying upon a factually inadequate theory . . . ." *Id.* at 59. Petitioner does not challenge the sufficiency of the evidence of premeditated murder. In light of *Griffin*, Petitioner's challenge to his first degree murder conviction based on the alleged insufficiency of robbery felony murder fails. The state court's denial of the claim on direct appeal was not contrary to, or an unreasonable application of, federal law. *See Kipp*, 26 Cal. 4th at 1128-29.

B. Robbery Conviction

As to the charge of robbery, Petitioner's jury was instructed at trial, in relevant part:

> If you find that the defendant took the property of Tiffany Frizzell with the specific intent to permanently deprive her of that property, but you have a reasonable doubt whether the specific intent was formed before or after the homicide, then you must find the defendant not guilty of robbery and guilty of theft.

(RT 3831.) The California Supreme Court explained on direct appeal that Petitioner "argues that there was no substantial evidence that he formed the intent to steal before or during, rather than after, he applied force to the victim, Tiffany Frizzell." *Kipp*, 26 Cal. 4th at 1128.

As stated above, when evaluating a sufficiency of the evidence claim, the Court must consider the elements of the offense under state law. *Emery*, 643 F.3d at 1214. The California Supreme Court explained that under California law:

> when presented with evidence that the defendant killed another and took substantial property from the victim at the time of the killing, a jury ordinarily may reasonably infer that the defendant killed for the purpose of robbery. *People v. Turner*, 50 Cal. 4th 668, 688 (1990). We have recognized that a jury may reasonably draw this inference when the evidence shows that the defendant also raped or attempted to rape the victim at the time of the killing. *People v. Kelly*, 1 Cal. 4th 495, 529 (1992). In that situation, a jury may infer that the defendant

killed for purposes of both rape and robbery. *Id.*

Kipp, 26 Cal. 4th at 1128 (internal citations edited). Applying that law to the evidence presented at Petitioner's trial, the court held:

> Here, there was evidence that when defendant strangled Tiffany Frizzell, he took her personal stereo and her cassette player, both of which he later sold to a secondhand goods dealer for $70. From this evidence, the jury could reasonably infer that at least one reason defendant killed Frizzell was to accomplish the taking of these items.

Id.

"[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007) ("[S]tate courts are presumed to know and correctly apply state law."). Although Petitioner attempts to distinguish his case from that in *Turner* by arguing that Petitioner's jury, unlike Turner's, was convinced "that the purpose of the killing was the commission of a rape" (Opening Br. at 37), Petitioner fails to address the California Supreme Court's decision in *Kelly*, 1 Cal. 4th at 529. Petitioner has not rebutted the presumption that the California Supreme Court knew and correctly applied California law when evaluating his sufficiency of the evidence claim. The facts on which the state court relied are supported by the record. (*See* RT 3380-81, 3488-91.) The California Supreme Court's rejection of Petitioners' challenge to the robbery conviction was not objectively unreasonable.

Accordingly, Claims 4 and 10 are DENIED.

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V. Claims 11 and 15: Prosecutorial Misconduct

A. Guilt Phase Argument

1. Allegations and Decision on Direct Appeal

In Claim 11, Petitioner alleges the prosecutor improperly appealed to the jury's passion and sympathy in his guilt phase closing argument by stating:

> So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. *A living, breathing human being had all of that taken away.*

(RT 3877 (emphasis added); Pet. at 121.) Petitioner's trial counsel objected to the remark, and the prosecutor moved to another topic. (*See id.* at 3877-79.)

The California Supreme Court on direct appeal held that the remark was improper but did not infect the trial with such unfairness as to violate Petitioner's due process rights or render the verdict unreliable. *See Kipp*, 26 Cal. 4th at 1129-30. The state court observed that the remark was "brief, mild, and not repeated," and that the evidence that Petitioner raped and murdered Frizzell was "very strong and generally uncontradicted." *Id.* at 1130.

2. Legal Standard and Analysis

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985). "[I]t is not enough that the prosecutor['s] remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor['s] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotations omitted).

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The California Supreme Court's determination that the remarks did not deny Petitioner due process was reasonable. While comments "designed to appeal to the passions, fears, and vulnerabilities of the jury" are improper, they are only

prejudicial in light of such factors as "the weakness of the prosecution's case, the prosecutor's disingenuity as to the whereabouts of [critical evidence], and the Government's resort to coercion to obtain evidence." *Comer v. Schriro*, 463 F.3d 934, 961 (9th Cir. 2006) (internal quotations omitted); *see also Allen v. Woodford*, 395 F.3d 979, 1016 (9th Cir. 2004) (holding that prosecutor's improper comment about witness retaliation, calculated to arouse passions or prejudices of the jury, was not unconstitutionally prejudicial given overwhelming evidence against defendant and trial court's instruction that statements of counsel are not evidence). Here, the prosecution's case was strong, the government did not mishandle evidence, and the challenged remarks were, indeed, brief and mild. The California Supreme Court reasonably rejected Petitioner's claim.

B. Testimony of David Sugiyama

Petitioner sets forth several instances of alleged prosecutorial misconduct in Claim 15. First, Petitioner faults the prosecution's use of expert witness David Sugiyama. (Pet. at 182.) Petitioner alleges that the prosecution "knew or should have known [that Sugiyama] had worked on Petitioner's behalf in the very same case and had access to the files of a company retained by Petitioner (Forensic Science Services) to provide forensic analysis regarding the Frizzell and Howard crimes." (*Id.* (incorporating by reference Claim 23).)

Petitioner acknowledges that the Court has rejected Petitioner's underlying conflict of interest claim, Claim 23, and this portion of Claim 15 for lack of prejudice. (*See* Opening Br. at 40 n.8; Order on Mot. for Evid. Hr'g at 83-87.) Petitioner states that he "continues to rely on this aspect of Claim 15, however, to establish . . . the cumulative effect of the many instances of prosecutorial

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misconduct in this case . . . ." (*See* Opening Br. at 40 n.8.) The Court considers any impact of Sugiyama's testimony in that capacity, below. (*See infra* p. 24.)

C. Delivery of September 9, 1987[2] Letter to Defense

Next, Petitioner claims that the prosecution failed to provide defense counsel with the September 9, 1987 letter in a timely manner. Petitioner argues that "[a]lthough authorities intercepted the letter shortly after it was sent, . . . the prosecution did not provide counsel with a copy of the letter until approximately one year later, on or about September 28, 1988, the first day of jury selection." (Pet. at 182.) Petitioner maintains that the defense was prejudiced in its "counter or rebut[tal]" of the letter at trial. (*Id.*) Incorporating the allegations he made in Claim 14(G), Petitioner adds that defense counsel performed deficiently in countering or rebutting the letter. (*Id.* (referring to Claim 14(J) in apparent typographical error).)

Claim 14(G) alleged that counsel performed deficiently by failing to object to the admission of the letter on constitutional grounds. The Court denied the claim in its Order on Petitioner's Motion for Evidentiary Hearing. (*See* Order at 15-17.) Petitioner makes no specific, additional allegations in Claim 15 to explain what actions adequate counsel would have taken to counter or rebut the letter. Petitioner's ineffective assistance of counsel claim fails on that basis.

At the time of trial, defense counsel acknowledged that the prosecution disclosed the letter to the defense on December 7, 1988 (later than Petitioner now alleges). (*See* RT 4179, 4184, 4935, 4945.) The trial court ruled on January 20, 1989 that the letter would be admissible as rebuttal evidence, for which no advance notice to the defense was required. (*Id.* at 4945, 4950-52; *cf. id.* at 5003.) The California Supreme Court may have reasonably concluded that, in light of the trial court's ruling admitting the letter on rebuttal, Petitioner failed to show any

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[2] As the Court noted in its Order on Petitioner's Motion for Evidentiary Hearing, the parties inconsistently refer to this undated letter as the September 7, 1987 or September 9, 1987 letter. (Order at 15 n.3.) The Court uses the date of September 9, 1987 for the sake of consistency. (*Id.*)

prosecutorial misconduct in not disclosing the letter earlier.

D. Statement Regarding Attempted Rape Special Circumstance

Petitioner further alleges that the prosecutor committed misconduct in his guilt phase opening statement by telling the jury that Petitioner was charged with a special circumstance allegation that the victim's murder occurred during the attempted commission of rape. (Pet. at 183 (citing RT 3365).) Petitioner alleges that "no such charge had been made," and that the prosecutor's statement "prejudiced Petitioner by lowering the bar in the jury's mind on the rape charge, on which the jury ultimately ruled against Petitioner." (*Id.* (citing CT 992-95, 997).) Petitioner adds that counsel was ineffective for failing to object to or correct the misstatement. (*Id.*)

The prosecutor told the jury that Petitioner was charged with a special circumstance allegation of a murder occurring during the commission of rape or attempted rape. (RT 3365.) Petitioner was, indeed, charged with a special circumstance including alleged rape. (CT 997; *see also, e.g.*, RT 3822-23 (instructing jury that "[t] o find that the special circumstance referred to in these instructions as the commission of rape is true, it must be proven . . . that the murder was committed while the defendant was engaged in the commission or attempted commission of a rape," even though it must also find that the murder was committed in order to carry out, advance the commission of, or escape or avoid detection of "the crime of rape").) The jury was instructed that it could convict Petitioner of attempted rape as a lesser included offense of rape. (RT 3823-33; *see also id.* at 3783-84, 3943-44.)

In view of the explicit charge of a murder occurring during the commission of rape or attempted rape, the California Supreme Court may have reasonably

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concluded that there was no misconduct in the prosecutor's statement to the jury, and that counsel was not deficient for not objecting to it.

E. Penalty Phase Closing Argument

Finally, Petitioner alleges that the prosecutor committed misconduct in his penalty phase closing argument by: remarking that Petitioner "has murder in his heart, has Satan in his soul" (Pet. at 183 (citing RT 5196 ("has murder in his heart, has Satan *this his sole* [sic]" (emphasis added)))); comparing Petitioner to a predatory animal, a Bengal tiger (*id.* (citing RT 5193-94)); telling the jurors that by their verdict, they "will be sending a message back to the community of what you feel the appropriate verdict is in this case" (RT 5195; *see* Pet. at 183); and showing the jury a postmortem photograph of Howard, the victim in Petitioner's Orange County prosecution (Pet. at 183; *see* RT 5170-72). Petitioner alleges that each of these actions by the prosecutor constitutes an improper appeal to the passions of the jury. (Pet. at 183.)

The California Supreme Court may have reasonably found harmless any misconduct in the prosecutor's penalty phase argument. In so holding, the court may have reasoned that the prosecutor did not resort to coercion and was not disingenuous as to critical evidence, and that the penalty phase evidence against Petitioner was strong. *See Comer*, 463 F.3d at 961; *see also Allen*, 395 F.3d at 1016.

First, as to the prosecutor's remark that Petitioner had murder in his heart and Satan in his soul, the comment reflected Petitioner's statements, admitted into evidence, referring to his "savior Satan" and his intention to kill a prison guard. (*see* RT 4245-46, 5174, 5191; *see also* Order on Mot. for Evid. Hr'g at 57-68.) The California Supreme Court may have reasonably determined that the use of this language did not cause Petitioner's trial to be fundamentally unfair. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) ("Prosecutors can argue reasonable inferences based on the record and have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence" (internal quotation and citation omitted)); *United States v. Sullivan*, 522

F.3d 967, 982 (9th Cir. 2008) ("While the prosecutor's comments qualify as 'hard blows,' they were a fair inference from [the] facts"); *see also Comer*, 463 F.3d at 960 (prosecutor's remarks did not render trial fundamentally unfair where the prosecutor "once called [petitioner] a 'reincarnation of the devil'").

Second, as to the comparison of Petitioner to a Bengal tiger, the prosecutor's "parable" suggested that "the real Martin Kipp" was apparent only in the context of an attack. (RT 5194.) The prosecutor's story told of a man first viewing a listless Bengal tiger in a zoo, and then being taken to see a Bengal tiger in a jungle. (*Id.* at 5193-94.) The prosecutor portrayed the animal with bulging muscles, burning eyes, distended claws, and bared fangs in the jungle as the "real" Bengal tiger, just as "the real Martin Kipp [is] the Martin Kipp who rapes, who kills." (*Id.* at 5194.) The California Supreme Court may have reasonably determined that although the remarks were improper, they did not deprive Petitioner of a fair trial. *See Darden*, 477 U.S. at 180 (holding prosecutor's numerous improper remarks, including one "incorporat[ing] the defense's use of the word 'animal'" to refer to petitioner, did not render trial fundamentally unfair); *see also Comer*, 463 F.3d at 960 (so holding where the prosecutor "repeatedly referred to [petitioner] as a 'monster' [and] analogized his crimes to a horror movie").

Third, the California Supreme Court may have reasonably concluded that the prosecutor's statement that the jurors would be sending a message back to the community was cured by the trial court's admonishment. The court told the jurors:

> [T]here was an objection when [the prosecutor] talked about taking a message to the community. In that regard, even though you are representative members of the community, you are not representatives in that you're not to think, 'Well, what will the community expect me to do.' [¶] You will do this on your own. . . . You have to be guided by your own personal beliefs and what you heard in this courtroom. [¶] You all took an oath to do that and that is what is expected of you.

(RT 5245.) The California Supreme Court was not objectively unreasonable in

finding the remarks to have cured any impropriety. *See United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (holding that prejudice from prosecutor's request to the jury to "finish the job that the F.B.I. started" was adequately cured because the prosecutor made "only this single statement," and the court instructed that guilt or innocence must be determined from the evidence and statements and arguments of counsel are not evidence); *see also United States v. Nobari*, 574 F.3d 1065, 1077, 1082 (9th Cir. 2009) (concluding that prosecutorial misconduct in presenting testimony and argument employing ethnic generalizations, asking improper questions to co-defendant, and appealing to passions and fears of the jury by urging them to "not let [their] City [] down" was harmless in light of overwhelming evidence presented against defendants); *United States v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993) (holding that prosecutorial remarks attempting to capitalize on parochial inclinations did not affect jury's ability to judge the evidence fairly because remarks were isolated and jury was instructed not to consider statements and arguments of counsel as evidence).

Fourth, as to the postmortem photograph of Howard, the Court has held that the admission of the photograph did not violate Petitioner's constitutional rights. (Order on Mot. for Evid. Hr'g at 19.) Petitioner presents no authority to show that a prosecutor's presentation of properly admitted evidence during closing argument can constitute misconduct. The California Supreme Court may have reasonably rejected Petitioner's claim on that basis.

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F. Cumulative Prosecutorial Misconduct

Considering the cumulative effect of the prosecutorial misconduct Petitioner alleges, the Court "first analyze[s] the prosecutorial misconduct challenges [regarding arguments made to the jury] to assess whether they alone so infected the trial with unfairness as to make the resulting conviction a denial of due process. If

the prosecution's comments alone do not meet this standard, [the Court] analyze[s] them together" with any prosecutorial misconduct in failing to disclose evidence to the defense and in presenting false testimony, "to determine whether there is a reasonable probability that without those violations the result of the proceeding would have been different." *Hein v. Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010); *see also Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) ("[I]f the *Napue* errors are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether there is a reasonable probability that, but for [the] errors, the result of the proceeding *would* have been different" (internal quotation omitted, emphasis in original)).

The California Supreme Court may have reasonably determined that the prosecutorial misconduct alleged in Claims 11 and 15 in arguing to the jury, disclosing evidence, and presenting testimony, even when considered cumulatively, does not show a denial of due process or a reasonable probability of a different result absent the alleged misconduct. The court was not objectively unreasonable in concluding that the cumulative sum of all prosecutorial misconduct alleged in the Petition as a whole was harmless.

Claims 11 and 15 are DENIED.

VI. Claim 12: Instruction on Felony Murder

In Claim 12, Petitioner alleges that the trial court erred in instructing the jury on felony murder. (Pet. at 123-40.) Petitioner asserts that the codification of first degree murder in California separates "malice murder," under California Penal Code § 187, from felony murder, under California Penal Code § 189. (Opening Br. at 45-46.) Petitioner alleges that although he was charged only under § 187, the court nevertheless instructed the jury on felony murder. (*Id.* (citing CT 997-99, 1319-25).) He alleges that:

> instructing the jury on felony murder violated Kipp's constitutional rights because (1) the trial court lacked jurisdiction to try Kipp for an

> uncharged crime; [and] (2) the instructions on an uncharged crime violated Kipp's rights to notice of the charges against him, to have all elements of the charged crime proved beyond a reasonable doubt, and to a unanimous verdict.

(*Id.* at 46.)

Petitioner and Respondent agree that "this Court's ability to grant relief on this claim appears to be foreclosed by *Sullivan v. Borg*, 1 F.3d 926 (9th Cir. 1993)." (Opening Br. at 46; *see also* Respt.'s Opp. to Kipp's Opening Br. on the Merits of His Remaining Claims, June 22, 2015 ("Opp."), at 56 n.31.) The Ninth Circuit observed in *Sullivan* that "[w]hile Cal. Penal Code § 187 defines murder as 'the unlawful killing of a human being . . . with malice aforethought,' section 189 is almost identical to Arizona's statute [approved of in *Schad v. Arizona*, 501 U.S. 624 (1991)] in encompassing felony murder and premeditated murder as alternative grounds for establishing first-degree murder." *Sullivan*, 1 F.3d at 928 (ellipsis in original). The court determined that even though "California codifies premeditated and felony murder in separate statutes," applying *Schad*, "a general first-degree murder verdict under the circumstances is permissible." *Sullivan*, 1 F.3d at 928. "Thus California . . . characterize[s] first-degree murder as 'a single crime as to which a verdict need not be limited to any one statutory alternative.'" *Id.* at 929 (quoting *Schad*, 501 U.S. at 630-31). Petitioner "submits that *Sullivan* was wrongly decided and makes this argument to preserve this claim for appeal." (Opening Br. at 47.)

Based on the Ninth Circuit's holding in *Sullivan* that first degree murder under California Penal Code §§ 187 and 189 is "a single crime," there was no uncharged crime, as Petitioner alleges, on which he was tried or convicted. Accordingly, Claim 12 is DENIED.

VII. Claim 24: Change of Venue

In Claim 24, Petitioner alleges that he was unable to be tried fairly in the

venue of his trial as a result of the publicity surrounding his case. (Pet. at 218-21.) He asserts that trial counsel was ineffective for failing to move for a change of venue. (*Id.* at 218, 220.)

A. Legal Standard

To establish entitlement to a change of venue, Petitioner must show that "extraordinary local prejudice [would] prevent a fair trial – a basic requirement of due process." *Skilling v. United States*, 561 U.S. 358, 378 (2010) (internal quotation omitted). "When a trial court is unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere, due process requires that the trial court grant defendant's motion for a change of venue." *Hayes v. Ayers*, 632 F.3d 500, 507-08 (9th Cir. 2011) (internal quotation and alterations omitted). Counsel may show "two different types of prejudice in support of a motion to transfer venue: presumed or actual." *Id.* at 508 (internal quotation omitted).

"A presumption of prejudice," the United States Supreme Court has held, "attends only the extreme case." *Skilling*, 561 U.S. at 381. "Prejudice is presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Sheppard* were held[,] . . . entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975) (discussing *Rideau v. Louisiana*, 373 U.S. 723 (1963) (where "the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras"); *Estes v. Texas*, 381 U.S. 532 (1965) (where the trial was "conducted in a circus atmosphere . . . overrun . . . with television equipment"); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (where the "courthouse [was] given over to accommodate the public appetite for carnival")). The Court has explained that its decisions in *Rideau*, *Estes*, and *Sheppard* "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the

crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy*, 421 U.S. at 799; *see also Skilling*, 561 U.S. at 380, 380 n.12. "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling*, *id.* at 381 (emphasis in original).

In distinguishing those circumstances in which pretrial publicity warranted a presumption of prejudice, the Supreme Court in *Skilling* considered: (1) "the size and characteristics of the community in which the crime occurred;" (2) whether the media reports contained a "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight;" (3) the lapse of time between the crime and trial, and whether "the decibel level of media attention diminished" during that time; and (4) whether "the jury's verdict . . . undermine[s] in any way the supposition of juror bias," as through acquittals on certain counts, for example. *Id.* at 382-84.

Where juror prejudice is not presumed, the court must consider whether actual prejudice infected the jury. Jurors "need not enter the box with empty heads in order to determine the facts impartially. 'It is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.'" *Id.* at 398-99 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); internal alterations omitted). Thus, in addition to the adequacy of voir dire, the reviewing court should consider the trial court's instructions to the jury to decide the issues based solely on in-court evidence. *See Skilling*, 561 U.S. at 388 n.21, 399 n.34.

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The Court in *Skilling* found no actual prejudice where two jurors who attended to pretrial news coverage "indicated that nothing in the news influenced their opinions" about the defendant. *Id.* at 390-91. The trial court:

> did not simply take venire members who proclaimed their impartiality at their word. As noted, all of [defendant's] jurors had already affirmed on their questionnaires that they would have no trouble basing a verdict only on the evidence at trial. Nevertheless, the court followed up with each individually to uncover concealed bias. This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service.

Id. at 394-95 (footnote omitted).

B. Analysis

1. Presumption of Prejudice

Petitioner argues that the news articles at issue contained inflammatory language describing him as a "Parole Rapist" and "Ex-Con," and quoting his Orange County trial judge's statement, "I don't believe there is any place in civilized society, including any Indian society, for the likes of Mr. Kipp." (Opening Br. at 49 (internal quotations omitted).) Petitioner adds that the articles included "the most sensational and bizarre aspects of the case, including Kipp's alleged plans to escape from jail." (*Id.*) He contends that of the news articles on which he relies, "some . . . are dated from 1983 and 1984 . . . [and] some are dated from 1987, much closer in time to Kipp's trial." (Petr.'s Reply Br. on the Merits of His Remaining Claims, Oct. 19, 2015 ("Reply"), at 21.)

The California Supreme Court may have reasonably concluded that no prejudice should be presumed. The populous and diverse nature of the Los Angeles community in which the crime occurred stand contrary to a presumption of prejudice. The jury's verdicts also undermine the supposition of bias, as the jury was unable to reach a verdict on the robbery-murder special circumstance allegation. *See Skilling*, 561 U.S. at 383-34; *Kipp*, 26 Cal. 4th at 1112. The California Supreme Court would not have been unreasonable in determining that the decibel level of media attention had diminished toward the time of trial and that

the reports were not so blatantly prejudicial that jurors could not reasonably be expected to put them out of mind.

2. Actual Prejudice

Petitioner identifies only three panel members who were familiar with publicity of his case and who were seated on his jury: Jurors R.J., C.N., and A.R. (*See* Pet. at 219 (citing RT 1291 (voir dire of Juror R.J.), 2089 (voir dire of Juror C.N.)); Opening Br. at 49 (citing RT 1597-98 (voir dire of Juror A.R.)); CT 1261 (identifying seated jurors).) The trial court found no cause for concern in the jurors' exposure to information about Petitioner's pending cases and said that it was "impressed" with the jurors' statements on voir dire. (RT 2740 (denying defense motion to excuse for cause jurors with knowledge of details of Orange County case); *cf. id.* at 3221-24 (defense counsel's acceptance of the jury with peremptory challenges remaining).)

The California Supreme Court was not unreasonable in finding no actual prejudice resulting from jurors' exposure to media reports. The court may have reasonably determined that the voir dire of each juror sufficiently showed his or her ability to be impartial.

a. Juror R.J.

Juror R.J. disclosed on voir dire that he had recently read an article about Petitioner's case. (RT 1291.) When questioned by the trial judge, R.J. stated that he recalled "not much" about what he read, only Petitioner's and the victim's names and that the case was going to trial. (*Id.* at 1292.) When asked if it was "the article where they said there was another death penalty case going on in Long Beach at the same time," R.J. said that it was. (*Id.*) He was positive that he recalled "[n]othing at all" about Petitioner's background or any other offenses, and he had not gotten any other information from anyone else about Petitioner or the case. (*Id.*) When later asked by defense counsel whether he could be a fair and

impartial juror and whether he had any preconceived notions or opinions, he said that he could and he did not. (*Id.* at 2907-08.)

b. Juror C.N.

Juror C.N. stated that he believed he had read some newspaper articles about the incident, perhaps around the time it occurred. (*Id.* at 2089.) He said he might "remember something about the hotel, I think, Brooks College, I believe." (*Id.* at 2090.) He had not gotten any background information about Petitioner from anyone. (*Id.*) When asked later by defense counsel if there was any reason he could not be fair and impartial to both sides, he said there was not. (*Id.* at 2814.)

c. Juror A.R.

Juror A.R. was "not sure" if she had read about the case, but thought she had, around the time the crime took place. (*Id.* at 1598.) She asked if the victim was a college student. (*Id.*) When told by the trial judge that the victim was to start school at Brooks College, A.R. responded, "I thought it was Long Beach State. [¶] Maybe it's two different things. But I think it was – this girl I was thinking about was at Long Beach State, I think." (*Id.* at 1599.) She did not recall anything else about Petitioner or his background, and no one else had ever discussed anything with her. (*Id.*) When asked later by the trial judge and by defense counsel whether she thought she could be fair to both sides and be a fair and impartial juror, she said she could. (*Id.* at 3213, 3217.)

d. Conclusion

As discussed above, the California Supreme Court was not unreasonable in finding no actual prejudice resulting from the jurors' exposure to media reports. Each juror sufficiently showed his or her ability to be impartial on voir dire, notwithstanding the juror's encounter(s) with media coverage of the events. The trial court's instructions to the jury to decide the case based only on the evidence presented in the courtroom support the California Supreme Court's conclusion that

Petitioner's right to a fair trial was not violated. (*See, e.g.*, RT 3795, 5109-10, 5245); *see also Skilling*, 561 U.S. at 388 n.21, 399 n.34.

The California Supreme Court may have reasonably concluded that because Petitioner has not shown prejudice from the absence of a change of venue, he likewise has not shown prejudice from any ineffective assistance of counsel in failing to bring a motion to change venue.

Accordingly, Claim 24 is DENIED.

VIII. Claims 27, 28(F), and 33: Instructions on Penalty Phase Adjudication

A. Allegations

In Claims 27, 28(F), and 33, Petitioner alleges that deficiencies in the instructions given to the jury at the penalty phase of trial violated his constitutional rights. (Pet. at 241-49, 256-60, 274-85.)

In Claim 28(F), Petitioner challenges the absence of an instruction that the jury must return a life sentence if it finds that aggravating factors do not outweigh mitigating factors, and may return a life sentence even if it finds that they do so. (*Id.* at 256, 259.)

In Claims 27 and 33, Petitioner challenges the lack of instructions on the burdens and standards of proof in the jury's sentencing determination, the required unanimity in the jury's decision, and the "presumption of life." (Pet. at 241-49, 274-85.) Specifically, Petitioner claims that the jurors should have been instructed that they could return a sentence of death "only if they [were] persuaded beyond a reasonable doubt as to each and every aggravating factor, that the aggravating factors outweigh mitigating factors, and that death is the appropriate penalty." (*Id.* at 243.) He contends that the jury was required to reach a unanimous agreement on the supporting circumstances in aggravation. (*Id.* at 245-47.) He also contends that a "presumption of life" should apply in the penalty phase as a "corollary of the presumption of innocence" at the guilt phase, and that the jury should have been instructed accordingly. (*Id.* at 248.)

The California Supreme Court considered and rejected Claim 27 on direct appeal. *See Kipp*, 26 Cal. 4th at 1137. Petitioner explains that he presented the first issue raised in Claim 27, regarding the burdens and standards of proof, again on habeas review with citations to more recent Supreme Court cases, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). (Opening Br. at 52.) He pleads that updated claim in the instant proceedings as Claim 33. (*See id.*; *see also id.* at 74-77; Pet. at 274-85.)

B. Analysis

In *Apprendi*, the Supreme Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (discussing *Apprendi*). The Court applied *Apprendi* in *Ring* to hold that a state cannot "allow[] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19; internal citation omitted). The Court distinguished California's death penalty statute from Arizona's, observing that California commits sentencing decisions to juries, while Arizona was one of only four states to "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Id.* at 608 n.6.

California's "[s]pecial circumstances . . . make a criminal defendant eligible for the death penalty [and] operate as 'the functional equivalent of an element of a greater offense.'" *Webster v. Woodford*, 369 F.3d 1062, 1068 (2004) (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to be true, unanimously and beyond a reasonable doubt, death is an authorized punishment.

The jury need not make any additional findings of fact, beyond a reasonable doubt or under any other standard of proof or burden, to return a sentence of death.

The Ninth Circuit's decision in *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), denying a defendant's challenge to his death sentence under the Federal Death Penalty Act, is instructive. In *Mitchell*, defendant claimed that the jury was required to find "that aggravating factors sufficiently outweigh mitigating factors beyond a reasonable doubt." *Id.* at 993. The Circuit distinguished the finding of a death eligibility factor, made by the jury unanimously and beyond a reasonable doubt, from the weighing of aggravating and mitigating factors. The court explained that at the latter stage:

> the jury's task is no longer to find whether factors exist; rather, each juror is to consider the [eligibility] factors already found and to make an individualized judgment whether a death sentence is justified. Thus, the weighing step is an 'equation' that 'merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate.' *See Kansas v. Marsh*, 548 U.S. 163, 177 (2006). [Defendant] does not suggest how a beyond-reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process, or to make his death sentence reliable, or to comply with the Sixth Amendment.

Id. (internal quotation omitted; internal citation edited).

Petitioner presents no authority to show that a presumption in favor of a life sentence is constitutionally required. (*See* Pet. at 248 (arguing only that the California Supreme Court's decision to the contrary in *People v. Arias*, 13 Cal. 4th 92, 190 (1996), was in error).) The United States Supreme Court has not held that a sentencing jury's discretion must be channeled by a presumption in favor of a life sentence. *Cf. Delo v. Lashley*, 507 U.S. 272, 278 (1993) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."). Similarly, just as death is an authorized punishment once the jury

has found a special circumstance to be true, there is no constitutional requirement that the jury be instructed that it must return a life sentence if it finds that aggravating factors do not outweigh mitigating factors, or that it may return a life sentence in any event. *Cf. Williams v. Calderon*, 52 F.3d 1465, 1481-82 (9th Cir. 1995) (holding that instruction to the jury that it was "not required to weigh aggravating and mitigating factors, and was not under obligation to find for life or death based upon which factors predominated . . . violates no right" of the petitioner). Petitioner's jury was, nevertheless, instructed that it was "free to reject death as inappropriate under the circumstances, even if [it] believe[d] that the aggravating evidence predominate[d] over the mitigating." (RT 5133.)

The California Supreme Court was not objectively unreasonable in holding that Petitioner has shown no violation of his constitutional rights in the adequacy of the penalty phase instructions given to the jury. Claims 27, 28(F), and 33 are DENIED.

IX. Claims 28(B),[3] (C), (D), and (E): Errors in Sentencing Process

Within Claim 28, Petitioner challenges the constitutionality of:

(B) California Penal Code § 190.3 factor (a), "the circumstances of the crime . . . and the existence of any special circumstance;"

(C) California Penal Code § 190.3 factor (b), unadjudicated prior criminal activity;

(D) the inclusion of the term "extreme" and the phrase "at the time of the offense" in California Penal Code § 190.3 factors (d), (g),[4] and (h); and

(E) the inclusion of inapplicable sentencing factors in the jury instructions.

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[3] Section (A) of Claim 28 contains an introduction and does not plead an independent claim for relief. (Pet. at 249-50.)

[4] The parties disagree on whether Petitioner pleaded a challenge to factor (g) in these proceedings and exhausted such a claim in state court. (*See* Opening Br. at 55 n.11; Opp. at 67 n.35; Reply at 26.) Because the Court finds that the claim fails on the merits in any event, the Court does not reach these issues.

(*See* Pet. at 251-56.)

> Petitioner's jury was instructed:
>
> In determining which penalty is to be imposed on the defendant, you shall . . . consider, take into account and be guided by the following factors, if applicable:
>
> 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 other than the crime for which the defendant has been tried in the present proceeding which involved the use or attempted use of force or violence or the express or implied threat to use force or violence; . . .
>
> D. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; . . .
>
> 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 effects of intoxication; . . .
>
> 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 for which he is on trial.

(RT 5128-31; *see also* CT 1416-17.)

A. Claim 28(B): Factor (a)

In Claim 28(B), Petitioner alleges that as it was used in his case, factor (a) "licensed the indiscriminate imposition of the death penalty upon no other basis than the particular set of facts surrounding the murder." (Opening Br. at 58

(internal quotation omitted).) Petitioner maintains that factor (a) permitted the jury to "double count" the conduct that constituted the crime and special circumstances in this case in determining whether he should be sentenced to death. (*Id.*) He argues that the factor fails to provide sufficient limitation or guidance to the jury, and allows the jury to "weigh the presence of any special circumstance findings – a factor that necessarily is present in every case –" in favor of the death penalty. (*Id.* at 59.)

As the United States Supreme court held in *Tuilaepa v. California,* however:

> Petitioners' challenge to factor (a) is at some odds with settled principles, for our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

512 U.S. 967, 976 (1994) (internal citation omitted).

The Supreme Court has also held that the effect "that the jury would count the nature of the crime twice if it were instructed to consider both the facts of the crime and the eligibility [or special] circumstances . . . cannot fairly be regarded as a constitutional defect in the sentencing process." *Brown v. Sanders,* 546 U.S. 212, 222 n.8 (2006) (discussing *Zant v. Stephens,* 462 U.S. 862, 894 (1983)) (internal quotations omitted). The Supreme Court confirmed in *Sanders* that such an instruction under California Penal Code § 190.3(a) does not unconstitutionally lead the jury to give greater weight to the facts underlying the special circumstances. *Id.*

The California Supreme Court's rejection of Claim 28(B) was not, therefore, contrary to or an unreasonable application of clearly established federal law.

B. Claim 28(C): Factor (b)

Next, Petitioner argues that the use of unadjudicated criminal activities under factor (b) violated his constitutional rights, because "allegations of unadjudicated acts, by definition, have never been properly tested for reliability in a court of law." (Opening Br. at 60.)

The Ninth Circuit has held otherwise, and Petitioner presents no authority to the contrary. "[C]onsideration of unadjudicated criminal conduct for purposes of sentencing does not violate [a] defendant's constitutional due process rights" at the penalty phase of a capital trial. *Belmontes v. Ayers*, 529 F.3d 834, 876 (9th Cir. 2008), *rev'd on other grounds by Wong v. Belmontes*, 558 U.S. 15 (2009); *see also McDowell v. Calderon*, 107 F.3d 1351, 1366 (9th Cir. 1997) (holding that introduction at penalty phase of California trial of evidence of unadjudicated rape occurring in Florida was not unconstitutional), *opinion on reh'g*, 130 F.3d 833, 835 (9th Cir. 1997) ("leaving in tact those parts [of the court's prior decision] . . . deciding other issues" beyond supplemental jury instruction), *overruled on other grounds as stated in Morris v. Woodford*, 273 F.3d 826, 839 n.4 (9th Cir. 2001). The California Supreme Court's rejection of Petitioner's claim was not contrary to, or an unreasonable application of, clearly established federal law.

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C. Claim 28(D) : Factors (d), (g), and (h)

In Claim 28(D), Petitioner argues:

> By including [in factors (d) and (g)] the adjective 'extreme' to modify 'mental or emotional disturbance' and 'duress,' [the court] sent the message to the jury that it should *not*, for example, consider Kipp's mental and emotional disturbance *unless* it was 'extreme,' even if the

> disturbance he was experiencing was significant. . . . [T]here is also a strong likelihood that the jury understood from the instructions that the temporal language in factors (d) and (h) – *e.g.*, 'at the time of the offense' – to mean that evidence relating to such factors could not be considered mitigating unless related directly to the crime.

(Opening Br. at 61-62 (emphasis in original).) Petitioner maintains that factor (k), which instructed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," did "not cure the error[, because it] . . . would not appear to a reasonable juror to permit consideration of the kinds of mitigation that fall within the ambit of one of the specifically enumerated circumstances, but are excluded from consideration under them by their explicit limitations . . . ." (*Id.* at 62.)

The Supreme Court has rejected this argument as to factors (d) and (g). The Court held in *Blystone v. Pennsylvania* that an instruction allowing the jury to consider whether the defendant was affected by an "extreme" mental or emotional disturbance or duress does not "preclude[] the jury's consideration of lesser degrees of disturbance, impairment, or duress," where the jury is instructed that it is "entitled to consider 'any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.'" *Blystone*, 494 U.S. 299, 308 (1990); *see also Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (applying *Blystone* to California statute and holding same). Petitioner cites no authority to suggest that the use of the temporal words "at the time of the

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offense" and "while" in factors (d) and (h)[5] should receive a different analysis. Petitioner's jury was instructed that it could consider "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." (RT 5131-32.) The California Supreme Court's conclusion that the factor (d), (g), and (h) instructions were constitutionally adequate is not objectively unreasonable.

D. Claim 28(E): Inapplicable Sentencing Factors

In Claim 28(E), Petitioner asserts that "the trial court's failure to delete from the jury instructions those factors that were inapplicable to his case was a source of confusion, caprice, and unreliability in the jury's penalty determination." (Opening Br. at 63.)

The Ninth Circuit has found no constitutional error in instructing the jury on "the entire list of factors the state considered relevant to the sentencing decision, even when some did not apply." *Williams*, 52 F.3d at 1481 (noting that "the jury instructions expressly indicated that the jury was to consider each factor only 'if applicable,' and that "[t]he reading of the complete list gave the jury more guidance, not less"); *see also Bonin v. Calderon*, 59 F.3d 815, 848 (9th Cir. 1995) (rejecting petitioner's argument that the inclusion of inapplicable mitigating factors allowed the jury "to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances," where the jury was "warned . . . that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor"). Petitioner's jury was instructed that it should "consider, take into account and be guided by the following factors

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[5] "D. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; . . . 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 effects of intoxication . . . ." (RT 5129, 5131.)

[provided to the jury], *if applicable*." (RT 5128-29 (emphasis added).) The California Supreme Court may have reasonably found no constitutional violation in the trial court's instructions.

Claim 28 is, therefore, DENIED.

X. Claim 29: Capital Appellate Review Process

In Claim 29, Petitioner alleges that California's process of capital appellate review is unconstitutional (a) because it lacks proportionality review and (b) because Petitioner, like other capital defendants in California, was represented by the same counsel in his appellate and state habeas proceedings. (Pet. at 262-66; Opening Br. at 64-69.)

A. Proportionality Review

The California Supreme Court considered Petitioner's claim on direct appeal, stating that California's appellate review process "is not constitutionally defective in failing to provide for comparative or intercase proportionality review. Although a death sentence is subject to intracase proportionality review, defendant makes no claim that his sentence is grossly disproportionate to his moral culpability for the crimes he committed, and we conclude that it is not." *Kipp*, 26 Cal. 4th at 1139 (internal citations omitted).

Petitioner's claim to intercase proportionality review lacks support in clearly established federal law. The Ninth Circuit has found "no merit" in the claim, raised by a petitioner sentenced to death under the 1978 California death penalty statute (as Kipp was), that the lack of intercase proportionality review violates equal protection requirements. *See Allen*, 395 F.3d at 1018 ("[Petitioner's] due process argument is foreclosed by the Supreme Court's holding in *Pulley v. Harris*, 465 U.S. 37, 43-46 (1984), that neither the Eighth Amendment nor due process requires comparative proportionality review in imposing the death penalty" (internal citation edited)).

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A review of Petitioner's briefing on direct appeal confirms the California Supreme Court's determination that Petitioner made no claim there that his sentence was grossly disproportionate to his crimes, even under state law. (*See* Lodgment 4, Appellant's Opening Br., at 169-70; Pet. at 263; Opening Br. at 64 (stating that the claim was raised only on direct appeal as claim XV).) Whether Petitioner has exhausted such a claim under federal law is doubtful. Regardless, Petitioner has failed to show that his capital sentence is "greatly disproportionate to the offenses charged" or "grossly disproportionate and excessive punishment for the crime . . . ." *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (internal quotations omitted).

B. Representation in Appellate and Habeas Proceedings

Petitioner argues that his habeas counsel labored under a conflict of interest in raising claims of ineffective assistance of appellate counsel, because the same counsel represented Petitioner in appellate and habeas proceedings. (Pet. at 264-66; Opening Br. at 67-69.) The California Supreme Court rejected the claim on appeal. *See* Kipp, 26 Cal. 4th at 1139-40.

Even if Petitioner were constitutionally entitled to effective assistance of counsel in habeas proceedings, he makes no specific allegations of prejudice to show how the alleged conflict interfered with counsel's presentation of potentially meritorious claim(s). *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) ("[T]o demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.").

Accordingly, Claim 29 is DENIED.

XI. Claim 30: Political Considerations in Appellate Review

Petitioner alleges in Claim 30 that "political considerations dominate the process of the State of California's appellate review in capital cases." (Pet. at 266-67.) Petitioner refers to a 1986 retention election in which three justices of the California Supreme Court were purportedly removed from the bench "primarily

because of the Court's reversal rate in death penalty cases." (*Id.* at 268 (citing *People v. Cox*, 53 Cal. 3d 618, 696 (1991), *disapproved on other grounds by People v. Doolin*, 45 Cal. 4th 390 (2009)).) Petitioner alleges that between 1979 and 1986, the California Supreme Court reversed 95% of the capital cases it reviewed. (*Id.* at 269.) By contrast, he alleges, the court affirmed 84% of capital cases between July 1987 and December 1994, and 94% between the years 1990 and 1994 of that period. (*Id.*) Petitioner asserts that former Governor Peter Wilson and former Attorney General Dan Lungren added political pressures. (*Id.*) The California Supreme Court rejected Petitioner's claim in a reasoned decision on direct appeal. *Kipp*, 26 Cal. 4th at 1140-41.

There is a "general presumption that judges are unbiased and honest." *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Nothing in Petitioner's allegations about the process of the "internal decision-making of the California Supreme Court" suffices to overcome that general presumption. (Pet. at 245.) Petitioner fails to allege with specificity any support in the record of his own case to show judicial bias. He has not demonstrated that the justices who considered his case were in any manner influenced by a concern about a future retention election, a bias toward affirming capital convictions and sentences, or political pressure. Petitioner makes no specific allegation in Claim 30 of any observable impact on his own appellate or habeas proceedings. Because Petitioner has failed to demonstrate that the California Supreme Court's rejection of the claim was objectively unreasonable, he is not entitled to habeas relief on this basis. Claim 30 is DENIED.

XII. Claim 32: Discriminatory Application of Death Penalty Statute

In Claim 32, Petitioner alleges that California's death penalty statute "is applied in a manner that discriminates against poor, young male defendants." (Pet. at 273.) He alleges that "California's death row is overwhelmingly comprised of young indigent men. The application of the death penalty statute in California

results in the denial of equal protection to persons who are singled out for prosecution that is 'deliberately based upon an unjustifiable standard, such as race, religion or other arbitrary classification.'" (*Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).)

A petitioner alleging a violation of the Equal Protection Clause:

> has the burden of proving the existence of purposeful discrimination. A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination had a discriminatory effect on him. Thus, to prevail under the Equal Protection Clause, [the petitioner] must prove that the decisionmakers in his case acted with discriminatory purpose.

McCleskey v. Kemp, 481 U.S. 279, 292-93 (1987) (internal quotations and footnotes omitted); see also *id.* at 292 n.8 (quoting *Oyler*, 368 U.S. at 456). Petitioner McCleskey "offer[ed] no evidence specific to his own case that would support an inference that [discriminatory] considerations played a part in his sentence," but relied solely on statistical data. *Id.* at 292-93. The Supreme Court, noting that petitioner's "statistical proffer must be viewed in the context of his challenge," held that it would "demand exceptionally clear proof before [it] would infer" that any of the decisionmakers involved acted with a discriminatory purpose. *Id.* at 297. The Court held petitioner's proffered evidence to be "clearly insufficient." *Id.*; *see also Harris v. Pulley*, 885 F.2d 1354, 1372-75 (9th Cir. 1988) (applying *McCleskey* in rejecting petitioner's challenge to application of California death penalty based on statistical data that, *inter alia*, "a male between the ages of 25 to 34 stands a significantly greater chance than other defendants of receiving the sentence of death").

Here, Petitioner offers no statistical evidence and no evidence specific to his case that discriminatory considerations played a part in his sentence. Petitioner's allegations are conclusory. *See Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) ("[Petitioner's] conclusory suggestions . . . fall far short of stating a valid claim of

constitutional violation."); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). The California Supreme Court may have reasonably determined that Petitioner failed to meet his burden of proving the existence of purposeful discrimination. Claim 32 is DENIED.

XIII. Claim 37 and Motion to Amend

In Claim 37, Petitioner alleges that "the absence of legitimate justifications for the unnecessary taking of Petitioner's life and the haphazard and arbitrary methods that the State has employed to implement the death penalty upon Petitioner renders the imposition of the death penalty upon him cruel and unusual punishment." (Pet. at 308.) Petitioner explains in his Motion to Amend that the "updated version" of Claim 37 he seeks to file "does not introduce a new theory of relief" from the current Claim 37. (Mot. to Amend at 9 ("With this motion, Kipp is simply seeking to support his claim with facts and circumstances that developed since his 2006 petition was filed.").) Both versions, he explains, plead "the same claim that was recently raised in the *Jones* case." (*Id.*)

The Ninth Circuit held on November 12, 2015 that *Teague v. Lane*, 489 U.S. 288 (1989) bars relief on petitioner Jones's claim. *Jones*, 2015 WL 6994287, at *1, 7-12. It would, therefore, be futile for Petitioner to amend Claim 37 to reflect the facts and arguments presented in *Jones*. Petitioner's Motion to Amend is DENIED on that basis. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Relief on Petitioner's currently pleaded Claim 37 is likewise barred by *Teague*. *See Jones*, 2015 WL 6994287, at *7-12. Claim 37 is DENIED.

XIV. Claims 13, 38, and 39: Cumulative Error

In Claims 13, 38, and 39, Petitioner challenges the cumulative effects of the alleged errors at trial. In Claim 13, Petitioner challenges the cumulative guilt phase error; in Claim 39, the cumulative penalty phase error; and in Claim 38, the

cumulative guilt and penalty phase errors. (Pet. at 140-41, 312-22.)

"[P]rejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (finding that cumulative prejudice from counsel's performance that was "deficient in eleven ways, eight of them undisputed," "obviate[d] the need to analyze the individual prejudicial effect of each deficiency," but noting that "some of the deficiencies [may be] individually prejudicial" (internal citation and quotation omitted)). "[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal citation and quotation omitted); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983) (holding same). "[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based upon trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

The Court concluded above that the state court may have reasonably found the cumulative effect of any prosecutorial misconduct to be harmless. (*See supra* p. 24.) In addition, considering the entirety of Petitioner's allegations of ineffective assistance of counsel cumulatively under *Strickland*, the Court finds reasonable the California Supreme Court's determination that Petitioner was not prejudiced by any deficient performance. The California Supreme Court was not objectively unreasonable in concluding that any ineffective assistance in Petitioner's representation by the same counsel in appellate and habeas proceedings (*see supra* p. 41) and in counsel's failure, for example, to move for a change of venue (*see supra* p. 31), to object to the admission of evidence on constitutional grounds (*see* Order on Mot. for Evid. Hr'g at 13-19, 65, 68), to

investigate and present mitigating evidence and a mental state defense (*see id.* at 43, 48), to voir dire jurors on Petitioner's Native American heritage and belief in Satan (*see id.* at 73-74), and to discover and remedy any conflict of interest of David Sugiyama (*see id.* at 86-87), was harmless.

The California Supreme Court may have reasonably concluded that the effect of any guilt and penalty phase errors, considered cumulatively, was harmless. The court may have found harmless the combined effect of any prosecutorial misconduct and ineffective assistance of counsel, in addition to any errors, for example, in political considerations in the appellate review process (*see supra* p. 42), juror misconduct in the consideration of Bible passages (*see* Order on Mot. for Evid. Hr'g at 77), and the admission of evidence of Petitioner's references to Satan (*see id.* at 67-68). *Cf. Kipp*, 26 Cal. 4th at 1132, 1141 (finding no cumulative error on direct appeal, because "[a]part from a single instance of guilt phase prosecutorial misconduct, which we have found nonprejudicial, defendant has failed to demonstrate that error occurred at either the guilt or the penalty phase"). Claims 13, 38, and 39 are, therefore, DENIED.

XIV. Order

Claims 2, 4-13, 15-17, 24, 25, 27, 28(B)-(F), 29, 30, 32, 33, and 37-39 are DENIED. Petitioner's Motion for Leave to Amend His Petition for Writ of Habeas Corpus is DENIED.

The Court hereby denies the First Amended Petition for Writ of Habeas Corpus. Pursuant to 28 U.S.C. § 2253(c)(2), the Court issues a Certificate of Appealability on Claims 14(I) and 19, as to the September 9 and September 15, 1987 letters. (*See* Order on Mot. for Evid. Hr'g at 57-58.)

IT IS SO ORDERED.

Dated: December 2, 2015.

PHILIP S. GUTIERREZ
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN JAMES KIPP,

Petitioner,

v.

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

Respondent.

CASE NO. CV 03-8571 PSG

DEATH PENALTY CASE

ORDER DENYING PETITIONER'S MOTION FOR EVIDENTIARY HEARING AND ORDER FOR MERITS BRIEFING

Petitioner filed a Motion for Evidentiary Hearing on sixteen claims in his First Amended Petition for Writ of Habeas Corpus. (Petr.'s Mot. for Evid. Hr'g, Aug. 8, 2007, at 2.) Following the United States Supreme Court's decisions in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), *Walker v. Martin,* 131 S. Ct. 1120 (2011), and *Harrington v. Richter*, 131 S. Ct. 770 (2011), the Court Ordered the parties to file supplemental briefing on any procedural bars to Petitioner's evidentiary hearing claims and Petitioner's entitlement to a hearing to introduce evidence beyond the state court record. (Order re: Supplemental Briefing on Petr.'s Mot. for Evid. Hr'g, Apr. 29, 2011, at 2.)

The Court has reviewed the parties' supplemental briefs along with their prior briefs on Petitioner's Motion for Evidentiary Hearing. As set forth below,

the Court denies relief on Petitioner's evidentiary hearing claims. The parties shall proceed to brief the merits of Petitioner's remaining claims for relief.

I. Petitioner's Entitlement to an Evidentiary Hearing

In his briefing on the application of *Pinholster* to his motion for evidentiary hearing, Petitioner argues that he:

> is not seeking an evidentiary hearing for the purpose of developing evidence to show that, under § 2254(d)(1), the state court decision was unreasonable. Kipp can satisfy both § 2254(d)(1) and (d)(2) without the aid of an evidentiary hearing. Rather, he seeks an evidentiary hearing to enable him to further prove his entitlement to relief under § 2254(a), and for the purpose of resolving any factual issues that remain unresolved due to the California Supreme Court's failure to provide him with a full and fair hearing to develop the factual bases of his claims.

(Petr.'s Supplemental Br. in Supp. of Petr.'s Mot. for Evid. Hr'g, Sept. 23, 2011 ("Petr.'s Br."), at 16-17.) Petitioner further argues that "[i]n the present case, the lack of process Kipp received in the California Supreme Court must inform the § 2254(d)(1) and (d)(2) determinations." (*Id.* at 17.)

Section 2254(a) simply sets forth the authority of a federal court to grant a petition for writ of habeas corpus. Section 2254(a) states, "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see also Pinholster*, 131 S. Ct. at 1398 ("Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody 'in violation of the Constitution or laws or treaties of the United States'"). Section 2254(a) does not, by itself, establish a standard for relief for claims decided on the merits by the state court.

With two exceptions,[1] the state court denied Petitioner's claims on the merits. (*See* Lodg. 13 (Case No. S093369 (Cal. Nov. 12, 2003)), Lodg. 24 (Case No. S129115 (Cal. June 28, 2006))); *People v. Kipp*, 26 Cal. 4th 1100 (2001). The claims are thus subject to § 2254(d), which provides the standard for relief for "any claim that was adjudicated on the merits in State court proceedings . . . ." 28 U.S.C. § 2254(d).

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

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

28 U.S.C. § 2254(d). The Supreme Court held in *Pinholster* that when determining whether a petitioner has satisfied § 2254(d), a court may only consider evidence in the state court record. 131 S. Ct. at 1398, 1400 n.7. The Court held that "review under § 2254(d)(1) is limited to the record that was before

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[1] The first exception is Claim XV in Case No. S093369, alleging that Petitioner is incompetent to be executed in violation of the United States Constitution. The claim is pleaded as Claim 31 in the instant Petition. (*See* First Am. Pet. for Writ of Habeas Corpus, July 5, 2006 ("Pet.") at 9-10, 271.) The state court dismissed the claim as premature. For the reasons set forth below (*see infra* p. 90), this Court likewise dismisses without prejudice Claim 31 as premature.

The second exception is Claim G in Case No. S129115, "[i]nsofar as it asserts that petitioner is incompetent for execution" in violation of international law. The claim is pleaded within Claim 34 in the instant Petition. (*See* Pet. at 11, 286.) The state court also dismissed this claim as premature. For the reasons set forth below (*see infra* pp. 90-92), this Court denies Claim 34 on the basis that Petitioner fails to show that he is in custody in violation of the United States Constitution or laws or treaties of the United States.

the state court that adjudicated the claim on the merits." *Id.* at 1398. Section 2254(d)(2) "includes the language 'in light of the evidence presented in the State court proceeding,' . . . [providing] additional clarity . . . on this point." *Id.* at 1400 n.7.

As a result, a court may not consider evidence developed at a federal evidentiary hearing in its § 2254(d) analysis. "*Cullen v. Pinholster* now bars [an evidentiary] hearing unless [petitioner] can satisfy § 2254(d)." *Henry v. Ryan*, 720 F.3d 1073, 1093 n.15 (9th Cir. 2013). Where the petitioner "has not satisfied § 2254(d), the district court [does] not abuse its discretion by denying [petitioner's] request for an evidentiary hearing." *Id.*; *see also Gulbrandson v. Ryan*, 738 F.3d 976, 993-94 (9th Cir. 2013) (holding that the requirement that petitioners "rely only on the record before the state court in order to satisfy the requirements of § 2254(d) . . . effectively precludes federal evidentiary hearings for such claims because the evidence adduced during habeas proceedings in federal court could not be considered in evaluating whether the claim meets the requirements of § 2254(d)" (internal citation omitted)); *Pizzuto v. Blades*, 729 F.3d 1211, 1216 (9th Cir. 2013) ("If the state court's adjudication of a claim survives review under § 2254(d), that ends our analysis; the petitioner is not entitled to an evidentiary hearing on that same claim in federal court"). Petitioner cannot, therefore, receive "an evidentiary hearing to enable him to further prove his entitlement to relief under § 2254(a)" or, in turn, § 2254(d). (Petr.'s Br. at 17.)

Petitioner's argument that the state court "fail[ed] to provide him with a full and fair hearing" does no more to establish his entitlement to an evidentiary hearing. Petitioner Pinholster did not receive a hearing in state habeas proceedings, *see Pinholster*, 131 S. Ct. at 1396 n.1 ("Although the California Supreme Court initially issued an order asking the State to respond [to petitioner's allegations], it ultimately withdrew that order as 'improvidently issued'"), nor did the petitioners in *Gulbrandson* or *Pizzuto*, discussed above. *See Gulbrandson v.*

Schriro, No. CV 98-2024, 2007 WL 974104 (D. Ariz. Mar. 31, 2007) (noting that the state court denied relief on the petition for post-conviction relief "without holding an evidentiary hearing"); *Pizzuto*, 729 F.3d at 1218 ("[T]he state court did not hold an evidentiary hearing before denying [petitioner's] state petition for post-conviction review"). "A state court need not conduct an evidentiary hearing to resolve every disputed factual question." *Gulbrandson*, 738 F.3d at 987. "[S]uch a per se rule would be counter not only to the deference owed to state courts under AEDPA, but to Supreme Court precedent." *Pizzuto*, 729 F.3d at 1219 (internal quotation omitted).

The Court will, therefore, proceed to analyze Petitioner's claims under § 2554(d) on the basis of the state court record.

II. Legal Standard under § 2254(d)

To satisfy § 2254(d)(1), Petitioner must show that the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court explained in *Lockyer v. Andrade* that a state court decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from our precedent." 538 U.S. 63, 73 (2003) (internal quotations omitted); *see also Crosby v. Schwartz*, 678 F.3d 784, 788 (9th Cir. 2012) (applying *Richter*, 131 S. Ct. 770). "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (internal quotation omitted); *see also Crosby*, 678 F.3d at 788. "The 'unreasonable application' clause requires the state court

decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (internal citation omitted); *see also Crosby*, 678 F.3d at 788.

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

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

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

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

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state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 131 S. Ct. at 1398 (internal quotations omitted).

III. Legal Standard for Ineffective Assistance of Counsel

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

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

To establish that counsel's deficient performance prejudiced the defense, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

As the Supreme Court emphasized in *Richter*:

> [s]urmounting *Strickland*'s high bar is never an easy task. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney

> observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

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

IV. Claim 1(D): Failure to Make an Opening Statement

In Claim 1(D), Petitioner alleges that he "was deprived of his right to effective assistance of counsel at his capital trial because his counsel failed to present an opening statement to the jury." (Pet. at 71.) Petitioner concedes that the "failure to present an opening statement does not amount to per se ineffectiveness," but alleges that it is evidence of ineffectiveness when counsel's performance is considered as a whole. (Petr.'s Br. at 56.) He argues that in his case, counsel's "failure to make an opening statement was particularly prejudicial since the defense called no witnesses at the guilt phase. By the time the parties rested at the guilt phase, the jurors had heard no narrative other than that presented by the prosecution." (*Id.*; *see also* Pet. at 73.)

"The timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel." *United States v. Rodriguez-Ramirez,* 777 F.2d 454, 458 (9th Cir. 1985). The Ninth Circuit held in *United States v. Murray*, for example, that the "decision not to make an opening statement" was "a reasonable tactical decision" even though counsel, like Petitioner's counsel, did not "call any witnesses in defense." 751 F.2d 1528, 1535 (9th Cir. 1985). "When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict." *Richter*, 131 S. Ct. at 791. That assertion can be left strategically for counsel's closing argument.

"The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 788. In light of the strength of the evidence against Petitioner on first degree murder, defense counsel conceded that charge in his closing argument. (*See* RT 3895-96.) Defense counsel argued, however, that the prosecution had not presented sufficient evidence to establish the robbery-murder special circumstance, because the victim's property appeared to have been taken only as an afterthought. (*Id.* at 3897-98.) Counsel also argued that the prosecution had not presented sufficient evidence to establish the rape-murder special circumstance, because the evidence suggested only that intercourse occurred after the victim's death. (*Id.* at 3898-3900.) Counsel reminded the jurors of the concept of reasonable doubt and argued that they must "eliminate . . . every rational possibility pointing to innocence in this case." (*Id.*) He repeatedly asked for their "very thoughtful and very considerate" evaluation of the evidence. (*Id.* at 3893, 3899, 3900, 3901.)

In light of the guilt phase evidence against Petitioner, the California Supreme Court may have reasonably concluded that counsel's strategy in not making an opening argument was effective. Accordingly, Claim 1(D) is DENIED.

Petitioner's claim that counsel provided ineffective assistance when considered cumulatively will be evaluated once the merits of each of Petitioner's individual ineffective assistance claims have been briefed.

V. Claims 1(F), 1(G), 1(H), 14(G), 14(H), and 14(J): Admissibility of Evidence

In Claims 1(F), 1(G), 1(H), 14(G), 14(H), and 14(J), Petitioner faults trial counsel for objecting to several pieces of evidence at the guilt and penalty phases of trial "on state law grounds alone, rather than objecting to admission of the evidence on constitutional grounds." (Petr.'s Br. at 57.) Petitioner relies upon *Burns v. Gammon*, 260 F.3d 892, 897-98 (8th Cir. 2001) for the proposition that counsel's failure to object on constitutional grounds was prejudicial "in part because the petitioner had to overcome a 'much more onerous' standard of review" for plain error. (Petr.'s Br. at 59-60 (quoting *Burns*, 260 F.3d at 897-98).)

In *Burns*, the prosecutor asked the jury to consider the fact that by exercising his right to a jury trial and right to confront witnesses, the defendant had caused the victim to "relieve the attack." 260 F.3d at 896. The Eighth Circuit held that counsel's failure to object to that argument on constitutional grounds "worked to Burns' actual and substantial prejudice," because it allowed the jury to punish him for exercising his constitutional rights. *Id.* at 897. The court thus held that defendant suffered prejudice not only from the more demanding standard of review that applied because counsel failed to object adequately, but from the prosecutor's argument itself.

Here, where the admission of evidence is at issue, the defendant suffers a constitutional violation only if the evidence is "of such quality as necessarily prevents a fair trial" and "there are no permissible inferences the jury can draw from the evidence in question . . . ." *Hovey v. Ayers*, 458 F.3d 892, 923 (9th Cir. 2006) (internal quotation omitted); *see also Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) ("Only if there are *no* permissible inferences the jury may

draw from the evidence can its admission violate due process" (emphasis in original)).

A. September 15, 1987 Letter

Claim 1(F) addresses a letter Petitioner wrote to his then-wife on September 15, 1987, while he and his wife were in the custody of the Orange County Jail. (Pet. at 76-81.) The parties argued the admissibility of the letter, in whole or in part, in advance of its admission. (*See* RT 3709-30.) Defense counsel argued that the letter was more prejudicial than probative. (*Id.* at 3710-11.) The portion of the letter at issue read:

> 'I killed, raped, sodomized, beat, swore, and laughed at those fucking no-good bitches. Yeah, it felt great, because neither deserved to live anymore. One was a black prostitute who liked to rob people and play games. She goes, 'Okay, okay, Kipp,' while I crushed the hyoid bone in her throat with a dim-mak technique. The other little tramp played it off as a college sweetheart. Hell, she was anything but that, and a loose fuck to boot. Well, Satan's licking both those bitches up now and laughing.'

(*Id.* at 3853.)

The prosecutor offered to introduce into evidence an edited version of the letter that omitted any reference to the victim not at issue in the instant charges. (*Id.* at 3711-12.) Petitioner was charged in the instant trial in Los Angeles County with the rape, robbery, and murder of Tiffany Frizzell. *Kipp*, 26 Cal. 4th at 1109. He had been previously convicted of the attempted rape and murder of Antaya Howard in Orange County. *People v. Kipp*, 18 Cal. 4th 349, 358 (1998). The trial court ruled that at least the portion of the letter pertaining to the crimes against Frizzell would be admissible at the guilt phase. (RT 3712-14.)

Defense counsel then "advised the court that they wanted the entire letter to come in during [the] guilt phase so that the jury would not be shocked by its

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content when introduced by the prosecutor at [the] penalty phase." (Pet. at 78; *see also* RT 3718.) The court acceded to defense counsel's request. (RT 3722-28.)

Petitioner now contends that counsel was ineffective for failing to object to the admission of the statements regarding both Frizzell and Howard on constitutional grounds.

As to the portion of the letter regarding Frizzell, based on the evidence introduced at trial, it was a permissible inference that Petitioner raped and killed Frizzell. The prosecution introduced evidence that Frizzell lived in Washington and had flown to Long Beach the day before her murder to attend Brooks College. (RT 3375-79). She stayed in a hotel that night because the college dormitories were not open for registration until the next day. (*Id.* at 3378-79); *see also Kipp*, 26 Cal. 4th at 1110. She was found on the bed in her hotel room unclothed from the waist down, with a small hook embedded in her back that appeared to be from a missing bra, and semen and sperm were present in her vagina and on her external genital area. *Kipp*, 26 Cal. 4th at 1110. Petitioner's fingerprint was found on the telephone in the room. *Id.* It was a reasonable inference from that evidence that it was Frizzell Petitioner discussed as "play[ing] it off as a college sweetheart."

The trial court observed that the letter "certainly seems to be an admission. A very substantial issue to what was heretofore a circumstan[t]ial case." (*Id.* at 3714.) The jury could have drawn the same permissible inference from Petitioner's statements.

As to the remaining portion of the letter regarding Howard,[2] based on evidence introduced at the penalty phase of trial, it was a permissible inference that Petitioner raped and killed Howard. The prosecution presented evidence that Howard was black (*see* RT 4306, 5170-71 (admitting and discussing photograph of Howard); *cf.* Pet. Ex. 11 at 1206 (recording Howard's race as black)), that she

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[2] Petitioner's independent allegations regarding the letter's reference to Satan in connection with Frizzell and Howard are addressed below in Claims 14(I) and 19. (*See infra* pp. 57-68.)

was last seen with Petitioner, that she was found in her car with her breasts exposed and her pants and underwear at her ankles, that she died of asphyxiation from strangulation, and that Petitioner's fingerprints were found on and in her car. *See Kipp*, 26 Cal. 4th at 1114. Because the jury could permissibly infer that it was Howard Petitioner admitted strangling and raping (or attempting to rape), the admission of the letter for the penalty phase of trial did not violate his constitutional rights.

The California Supreme Court reasonably concluded that Petitioner failed to show prejudice from counsel's failure to object to the admission of the letter on constitutional grounds. *See Kipp*, 26 Cal. 4th at 1123. In addition, the state court could have reasonably held that counsel's strategy of presenting all admissible portions of the letter at the guilt phase of trial to diffuse their effect on the jury at the penalty phase was reasonable.

Claim 1(F) is DENIED.

B. Explanation for Tiffany Frizzell's Presence at a Long Beach Hotel

Claim 1(G) addresses testimony regarding the reason for Frizzell's presence at the Long Beach hotel where she was found. (Pet. at 81-83.) As mentioned above, Tiffany Frizzell's mother testified that she and Tiffany lived in Washington, and Tiffany flew to Long Beach to attend Brooks College. (RT 3375-76.) She had made arrangements for Tiffany to stay at the Ramada Inn in Long Beach because it was close to Brooks College and students could not check in to stay at the College itself until the next day. (*Id.* at 3378-79.) She testified that Tiffany traveled a day early "to lay in the sun and see the beach." (*Id.* at 3379.)

Ruling on its admissibility in advance of the testimony, the trial court observed that Frizzell's reason for being at a hotel was relevant to whether intercourse was consensual. (RT 3341-42.) The court remarked that the evidence would counter a potential inference that the victim may have been "a hooker [who]

worked in motels," which would make the intercourse suggested by the evidence more likely to be "consensual rather than rape." (*Id.* at 3341-42.) That the testimony in this way supported an inference that intercourse was not consensual is not objectively unreasonable.

Because there was a permissible inference from the testimony, the California Supreme Court reasonably concluded that "an objection on constitutional grounds would have lacked merit." *Kipp*, 26 Cal. 4th at 1125; *see Hovey*, 458 F.3d at 923; *Jammal*, 926 F.2d at 920. The California Supreme Court reasonably concluded that Petitioner was not prejudiced by counsel's failure to raise a constitutional objection. Claim 1(G) is DENIED.

C. Escape Attempts from Los Angeles County and Orange County Jails

Claim 1(H) addresses evidence regarding Petitioner's two escape attempts. (Pet. at 84-87.) In April 1987, Petitioner planned an escape from the Orange County Jail. *See Kipp*, 26 Cal. 4th at 1111-12. At that time, he faced murder charges in Los Angeles County as well as Orange County. Later, on January 1, 1988, Petitioner attempted to escape from the Los Angeles County Jail. *See id.*, 26 Cal. 4th at 1112. Petitioner's 1988 escape attempt came approximately four months after his Orange County death judgment was entered and less than twelve months before the beginning of his Los Angeles County trial.

"It is today universally conceded that the fact of an accused's . . . escape from custody, . . . and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *United States v. Greiser*, 502 F.2d 1295, 1299 (9th Cir. 1974) (internal quotation omitted); *see also South Dakota v. Neville*, 459 U.S. 553, 561 (1983) (listing categories of "circumstantial evidence of consciousness of guilt, such as escape from custody"); *cf. United States v. Silverman*, 861 F.2d 571, 581 (9th Cir. 1988) (holding that flight instruction is appropriate where there is evidence sufficient to support a chain of unbroken

inferences . . . '(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged'" (quoting and adopting test set forth in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977))). That the defendant attempted an escape in advance of his prosecution is evidence of guilt of the charged crimes. *See United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir. 1984) (holding *Myers* test was satisfied because "[t]he fact that the escape took place the day before defendants were to be arraigned on the charges involved in this case strongly suggests that the escape was motivated by considerations related to this case"); *see also Williams v. Woodford*, 384 F.3d 567, 580, 603 (9th Cir. 2002) (affirming denial of habeas relief where evidence of escape plans made one year and eight months before trial were admitted at guilt phase). It was, therefore, permissible for the jury to infer consciousness of guilt, and guilt, from Petitioner's attempts to escape from custody.

Because there was a permissible inference from the evidence of Petitioner's escape attempts, its admission did not violate Petitioner's constitutional rights. *See Hovey*, 458 F.3d at 923; *Jammal*, 926 F.2d at 920. The California Supreme Court may have reasonably concluded that Petitioner failed to show prejudice from counsel's failure to object to the evidence on constitutional grounds. *Cf. Kipp*, 26 Cal. 4th at 1125-27. Claim 1(H) is DENIED.

D. September 9, 1987 Letter

Claim 14(G) addresses a letter Petitioner wrote to his then-wife on September 9, 1987,[3] while he and his wife were in the custody of the Orange

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[3] The letter at issue was undated. (*See* RT 5006-07.) The parties at trial and since trial have referred to this letter inconsistently as the September 7, 1987 or the September 9, 1987 letter. This Court will use the September 9, 1987 date for the sake of consistency. *See Kipp*, at 26 Cal. 4th at 1120.

County Jail. (Pet. at 166-70.) The letter contained the following statements by Petitioner:

> Everyone hates a deputy on the street its [sic] why they are always getting killed! And your [sic] in their low-life setting so they like to rub it in all the time. It is how they get their satisfaction, besides turning key's [sic] all day long. (ha! ha! ha!) Satan will lick them all up when they die. Especially the bitch women deputies's [sic]. They walk around like their shit don't stink, but what they forget is their facts do. I'd rape and sodimize [sic] every woman bitch deputy and gouge their eye's [sic] out! But I would let them live as invalent's [sic]. Yeah! Satan will lick em all up in a tredge [sic] of horror. They better not ever given [sic] me the opportunity to escape, because I'll associate myself with a terrorist group and really go on a spree. I'd kill every D.A. and his family, deputies's [sic], men and women alike! And I'd gouge everyone [sic] of their fucking eye's [sic] out! After I got to 400-500 killing's [sic] of this type, I'd incorporate some ninja type murder's [sic] by poison! Yeah, I don't believe in God anymore, because their [sic] isn't one who has ever helped me. But Satan has help [sic] me rejuvanate [sic] my energie's [sic] in a working manner babe. Don't ever underestimate my 'intention's' [sic] that's all I can say!

(Pet. at 167-68; *see also* RT 5191.)

Concerning the admissibility of the letter, the trial court observed, in part, that Petitioner's expert, Dr. Craig Haney:

> related . . . a tremendous amount of hearsay statements on the stand . . . as to what Mr. Kipp told [him]. [¶] And here we have something that Mr. Kipp said, too, about escape attempts, about what he plans to do if he gets out that would show lack of remorse. [¶] [Dr. Haney] tells us the defendant's remorseful. Maybe he is at this time.

> Maybe he isn't. Maybe he's fooling the doctor. Who knows. [¶] I think the [jury] is entitled to weigh it.

(RT 4952.)

On direct appeal, the California Supreme Court:

> discern[ed] no abuse of discretion in the trial court's penalty phase ruling allowing in evidence the September 9 letter. The letter was relevant to rebut defense evidence that defendant committed the two capital murders during a relatively brief period of aberrant behavior, that he had since expressed regret and shame for the murders, and that he was unlikely to commit additional offenses if imprisoned for life.

Kipp, 26 Cal. 4th at 1132. The California Supreme Court was not objectively unreasonable in accepting the trial court's ruling that the jury could permissibly infer that Petitioner was not remorseful and was likely to commit additional offenses from the statements in his September 9, 1987 letter.

Because there were permissible inferences the jury could draw from the letter, its admission did not violate Petitioner's constitutional rights. *See Hovey*, 458 F.3d at 923; *Jammal*, 926 F.2d at 920. The California Supreme Court may have reasonably concluded that Petitioner failed to show prejudice from counsel's failure to object to admission of the letter on constitutional grounds. *Cf. Kipp*, 26 Cal. 4th at 1133. Claim 14(G) is DENIED.

E. Threat to Sheriff's Sergeant

Claim 14(H) addresses Petitioner's threat to a sheriff's sergeant in connection with his attempted escape from the Los Angeles County jail. (Pet. at 170-75.) A sheriff's sergeant present when Petitioner was removed from the ceiling above his cell testified that Petitioner stated:

> 'You will read about me again, Deputy Koeth, after I kill that sergeant.' [¶] I asked him, 'Which sergeant?' [¶] And he said, 'Sergeant Baeman.' He said he would kill him in a very big way. He swore to me and his savior,

> Satan, he would be killed in a very big way and a very humiliating way. Humiliating to him and his family. . . . I asked him why, and he said, 'Because he was, quote, "pissed because Sergeant Baeman choked him out."' [¶] But Mr. Kipp wasn't choked out. I told him he walked out of his cell, and he said, 'Whatever. I'm going to kill that sergeant. I have nothing to lose.' . . . He said I was lucky that we caught him that night, because he would have been gone in the morning. [¶] And he also said, about the sergeant, that time is on [Kipp's] side.

(RT 4245-46.) The California Supreme Court reasoned that the testimony was admissible because Petitioner's "threats against the sheriff's sergeant were relevant to an understanding of the violent potential of defendant's attempted escape." *Kipp*, 26 Cal. 4th at 1134.

That violent potential included a danger to Sergeant Baeman had Petitioner not been restrained at the time along with a danger of future harm to Sergeant Baeman. The jury could, therefore, permissibly infer from the sergeant's testimony that Petitioner posed a future danger while incarcerated. The Supreme Court "has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994); *see also Kelly v. South Carolina*, 534 U.S. 246, 248 (2002).

Because there was a permissible inference the jury could draw from the testimony, its admission did not violate Petitioner's constitutional rights. *See Hovey*, 458 F.3d at 923; *Jammal*, 926 F.2d at 920. The California Supreme Court may have reasonably concluded that Petitioner failed to show prejudice from counsel's failure to object to the testimony on constitutional grounds. *Cf. Kipp*, 26 Cal. 4th at 1134. Claim 14(H) is DENIED.

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F. Post-Mortem Photograph of Antaya Howard

Claim 14(J) addresses a post-mortem photograph of Antaya Howard. (Pet. at 178-81.) As the California Supreme Court held on direct appeal:

> by showing the position of the victim's clothing on her body, some of her injuries, and the position of her body as it was folded into the small hatchback area behind the rear seat of the car, the photograph was relevant to assist the jury in assessing the aggravating force of the murder and rape or attempted rape of this victim.

Kipp, 26 Cal. 4th at 1136; (*see also* RT 4302-06.)

The California Supreme Court was not objectively unreasonable in holding that the jury could permissibly infer that Howard's sexual activity was not consensual and could permissibly assess the nature of the murder from the photograph. *See Villafuerte v. Stewart*, 111 F.3d 616, 622, 627 (9th Cir. 1997) (holding that photographs depicting the fatal wrapping of an asphyxiated murder victim's head, bindings on her body, and blood at the crime scene did not deprive defendant of a fair trial because they were relevant to show defendant knowingly restrained the victim with the requisite intent); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1030, 1032 (9th Cir. 1997) (finding no due process violation from admission of "admittedly gruesome photos of the decedent," who had been run over with a car three times, struck in the head by the car, stabbed in the head, neck, and shoulders with a screwdriver at least thirty times, and dragged off a road into a field).

Because there were permissible inferences the jury could make from the photograph, its admission did not violate Petitioner's constitutional rights. *See Hovey*, 458 F.3d at 923; *Jammal*, 926 F.2d at 920. The California Supreme Court may have reasonably concluded that Petitioner failed to show prejudice from counsel's failure to object to the photograph on constitutional grounds. *Cf. Kipp*, 26 Cal. 4th at 1136. Claim 14(J) is DENIED.

VI. Claim 14(D): Presentation of Mitigating Evidence

In Claim 14(D), Petitioner alleges trial counsel was ineffective in his investigation and presentation of mitigating evidence. When a petitioner claims defense counsel failed to investigate or present certain evidence in mitigation, "in order to determine whether [counsel's actions] . . . might have affected the jury's decision, it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). "A state court's determination that [the] claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786 (internal quotation omitted).

A. Evidence Presented at Trial

1. Expert Testimony

a. Testimony from Dr. Craig Haney

Dr. Haney provided a social history for Petitioner. He testified that Petitioner grew up on the Blackfeet Reservation in Browning, Montana. (RT at 4876, 4893.) He testified that Petitioner "was, by all accounts, a neglected child[,] . . . in a home where there was a tremendous amount of instability on the part of both of his parents, . . . as a result of both the poverty and the alcoholism." (*Id.* at 4874-75.) Petitioner's mother was "very significantly alcoholic." (*Id.* at 4875.) Petitioner was taken from his biological home at approximately two years old by social workers. (*Id.* at 4876, 4879.) He and his siblings were in the home in the winter without heat, and Petitioner was wearing only a shirt. (*Id.*) Petitioner's biological mother had been jailed earlier in the day "for drinking." (*Id.* at 4877.) Medical records described her as "'quite ignorant'" or "'very ignorant.'" (*Id.* at 4878.)

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Dr. Haney testified that neglected children, coming out of the very early years of life:

> often come out of this period . . . with a basic distrust, a basic fear about people, and a basic sense that the world is not a particularly good place for them and that they cannot be secure in it. . . . This sense of insecurity and this sense of mistrust is a very difficult thing . . . to abandon once it's been created at that early an age.

(*Id.* at 4880.)

Dr. Haney testified that at the time Petitioner went to live with Mildred and John Kipp as foster parents, they were very stable parents. (*Id.* at 4883.) They legally adopted Petitioner when he was nine years old. (*Id.* at 4884.) John was "powerful" and that made Petitioner feel secure, although John was also a "very harsh taskmaster" and "expected everything to be done his way. . . . [H]e was such a dominant presence that he simply had – he could with words or with a look reprimand and punish, and Martin was his subject of that, as were all of the other people in John's environment." (*Id.* at 4884-86.) Dr. Haney testified that John did not physically abuse Petitioner or others. (*Id.* at 4885.) He explained that John came to serve too strong a purpose in Petitioner's life, because John became "the external control for many things in Martin's life that most children begin to develop internal controls for." (*Id.* at 4888.) Petitioner was mainly isolated on the Kipps' ranch. (*Id.* at 4888-89.) He was consistently described as a caring, polite, responsible child. (*Id.* at 4890.) He was shy and sensitive in his early years. (*Id.* at 4891-92.) He went to school in a community that was largely white and encountered racism there. (*Id.* at 4892-94.)

John later began drinking much more heavily, experienced marital problems with Mildred, and became romantically involved with someone else. (*Id.* at 4898.) John began to "physically mistreat" Mildred and Petitioner, and as John drank more, the physical mistreatment escalated. (*Id.* at 4899.) John and Mildred

separated and then were divorced. (*Id.* at 4898.) Petitioner was "squarely in the middle of the conflict" and also experienced significant humiliation and shame as result of John's deterioration. (*Id.*) Several people reported avoiding John eventually because of his aggressive and violent behavior. (*Id.* at 4894, 4899.) Petitioner went back and forth between his parents, needing John's approval when working on the ranch even though John was physically "beat[ing] [him] up." (*Id.* at 4900-01.) Petitioner experienced great confusion about "who he was, what his identity was, how he was going to live the rest of his life" because his plan to follow his father's model was failing. (*Id.* at 4900-01, 4904-05; *see also id.* at 4913.) Dr. Haney recounted an incident when John "choked [Petitioner] into unconsciousness" for ten to twenty seconds, and an incident about two days later when Petitioner suffered occipital head trauma because John hit Petitioner's head against a nail on a wall. (*Id.* at 4902-03.) He also recounted an incident when John "dragged" Petitioner out of a car by his feet and up a flight of stairs "with his head banging against the stairs." (*Id.* at 4903.) John became very upset when one of Petitioner's cousins was killed in an accident in which Petitioner was also injured, and Petitioner believed that John was upset with him as a result. (*Id.* at 4904.)

Dr. Haney testified that Petitioner encountered difficulties when he attempted to move off the Reservation. (*Id.* at 4908-10.) He stated that Petitioner followed a pattern of many young men who left the Reservation, of "feel[ing] the pull of the Reservation and go[ing] back," returning periodically or sometimes permanently. (*Id.* at 4910.) When John died, Petitioner returned to the Reservation and was drawn into a family conflict over John's funeral arrangements and the division of the ranch, and it was a very difficult time for him. (*Id.* at 4912-13.) John's death left Petitioner "without a reference point." (*Id.* at 4913.)

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According to Dr. Haney, Petitioner decided to join the Marines to escape the conflict and to gain some structure and direction. (*Id.* at 4914.) Petitioner was disappointed by the lack of physical challenge and mundane nature of his desk job and the lack of discipline of other Marines, and he stole a cassette player in Okinawa and "did some time in the Brig." (*Id.* at 4915, 4918-19.) He became "extremely disaffected" in Okinawa and developed a drug problem, using cocaine and methamphetamines along with alcohol. (*Id.* at 4916.) He was transferred back to El Toro and his drug and alcohol use intensified. (*Id.*)

Dr. Haney explained that Petitioner then committed and was incarcerated for the rape of June Martinez. (*Id.* at 4919-20.) While in jail, he was in a fight that significantly impacted him, and he "began to learn that you have to carry and conduct yourself in settings like that in a different way . . . ." (*Id.* at 4920.) He continued to deteriorate after being released from prison. (*Id.* at 4920-21.) In response to a question about whether any significant events led to the murders of Frizzell and Howard, Dr. Haney responded, "I think he was somebody who carried a fair amount of anger inside of himself as a result of experiences that he'd had . . . . These experiences were only compounded by the drug use and the alcohol use." (*Id.* at 4924-25.) When asked if he would characterize Petitioner as being "out of control" once he got out of prison, Dr. Haney responded, "I think in a basic way he was, in terms of not having a guidance or structure in his life. Absolutely." (*Id.* at 4925.) Dr. Haney testified that when he spoke to Petitioner about two weeks before testifying, Petitioner talked at length about feeling shame, humiliation, and regret, and "seeing very clearly and feeling very clearly what his actions had done to other people." (*Id.* at 4926.)

On cross-examination, Dr. Haney was asked about Petitioner's September 15, 1987 letter, which stated in part:

> 'Remember one thing about your husband, "He's a real man," not some weak deputy dressed in green, not some

> fat poor slob, not some weak natured rat, not some poor bastard lost in the system. I'm a warrior from the old school. Always remember that love. I'm tough as nails. . . . I'm one that takes no bullshit and demands respect at any cost.'

(*Id.* at 4971.) Dr. Haney testified that Petitioner's language was not "inconsistent with what I would have expected somebody in the debts [sic] of dispare [sic] as Martin was at that time to have written that." (*Id.*) Dr. Haney testified that Petitioner was angry at that time and for that period of time. (*Id.* at 4972.) Dr. Haney testified that he believed Petitioner's statements that Petitioner felt shame, sorrow, and regret, at the same time that he recalled Petitioner's written statements that:

> 'The way the newspaper made it look like I was remorseful and what not, babe, I was anything but that, you know. . . . Yeah, it felt great because neither deserved to live anymore[.] . . . Fuck the community. Their mothers I'd rape. Now, does it sound like that I'm in any way sorry?'

(*Id.* at 4980-81.)

b. Testimony from Other Experts

In addition to the testimony presented from Dr. Haney, Dr. Charles Heidenreich, a professor of Native American Studies and Anthropology, described the history of the Blackfeet Nation and the poverty and substance abuse problems found on the Blackfeet Reservation. (RT 4341-93.)

Dr. Thomas Holm, an Associate Professor in Political Science and American Indian Studies and also an American Indian and former Marine, testified about American Indians' history of military service. (*Id.* at 4754-68.) He attributed his ability to succeed coming out of the military to his strong family group and the ceremony of his community to "wash the blood from your hands" and "cleanse[] . . . [the] abnormal behavior that you acquired in warfare[,] [s]o that

you could lead a good, harmonious life within the group." (*Id.* at 4769-71.) He stated that in surveys of American Indian Vietnam veterans, those who had similar ceremonies were able to adjust better than those who had not. (*Id.* at 4771.)

Dr. Art Martinez, a clinical and counseling psychologist for Native Americans and a Native American Indian, discussed the deterioration of economic and community systems for the Blackfeet and other Native Americans and the "symptoms" of that deterioration including alcoholism, drug abuse, and child abuse. (*Id.* at 4834-45.) He described the challenges for Native Americans moving from rural reservation life to urban mainstream city life, including the difference in views of the world on "how to operate, . . . where our family and cultural lines exist, . . . how to get things done and . . . how to cooperate and benefit from one another." (*Id.* at 4834, 4846-47.) He testified that outside the Native American community, with a lack of support system, "a person is left to become continually more and more distraught, and to basically fall apart. [¶] More and more, as their life begins to fall apart, their esteem begins to chip away. We see that the . . . bonds and the binding that holds them together emotionally begins to fall." (*Id.* at 4849.)

Dr. Ronald Siegel, a psychopharmacologist, discussed the connections between alcohol and the commission of violent crime and between cocaine smoking and the commission of domestic violence. (*Id.* at 4739-40.) He discussed the progression of cocaine use and the aggressive or assaultive behavior that may ensue. (*Id.* at 4741-43.) He also described the sexual excitement associated with cocaine use and testified that the "almost automatic" sexual arousal appeared to result from areas of the brain that do not require any higher cortical functioning. (*Id.* at 4745-46.) It is higher cortical functioning that is responsible for reason, codes of conduct, and morality, he explained. (*Id.* at 4746.) He testified that a chronic cocaine user "can't stop" the sexual arousal

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experienced with cocaine use. (*Id.* at 4747.) He added that crystal meth, or methamphetamine, can produce the same psychopathology as cocaine. (*Id.*)

Dr. John Irwin, who specializes in sociology and the study of deviant behavior and criminology, discussed the security, daily routines, and living conditions in maximum security prison units. (*Id.* at 4780-94.) He testified about the effects of culture shock on persons being released from prison, as Petitioner had been. (*Id.* at 4794-97.) He also discussed the propensity of "lifers" to become "model prisoners" and to commit themselves to beneficial work. (*Id.* at 4800-07.)

2. Lay Witness Testimony

Marilyn St. Germaine, a neighbor of Petitioner's biological family, described his mother's alcoholism, the conditions of Petitioner's biological family and the community, the reputation of Petitioner's adoptive family, and the struggles of Native Americans both on a reservation and when transitioning to urban life. (*Id.* at 4311-39.)

Wesley Brown, who was Petitioner's boxing coach and lived on the Blackfeet Reservation, gave a similar account of Petitioner's biological mother's paranoia and alcoholism, the poverty of her family, and their severe lack of food. (*Id.* at 4438-46.)

Leslie Cobell, who lived on the Blackfeet Reservation, discussed the poverty of Petitioner's biological family and Petitioner's poor physical condition when placed in the custody of John and Mildred Kipp. (*Id.* at 4425-30.) He testified that Petitioner had impetigo and lice, was small, and had many scabs on his head and part of his body. (*Id.* at 4430.) He discussed Petitioner's shyness and unusually strong need to be near Mildred. (*Id.* at 4430-32.) He described John favorably as strong and nonviolent, and added that he ended his friendship with John after John began drinking far more heavily. (*Id.* at 4428, 4433-34.) He testified about the more recent detrimental effects of Petitioner's prosecution on

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Mildred and stated that if the jury returned a death sentence, "they are going to kill two. Not only Martin, but also his mother." (*Id.* at 4434-36.)

Murna Thomas, Petitioner's adoptive older sister, testified about his "pitiful" physical condition when he came to live with the Kipps. (*Id.* at 4513-14.) She testified that eventually she became aware of the problems between her mother, Mildred, and John and that it was a "tough, terrible time" when her mother "couldn't keep the problems under wraps any more and they just exploded." (*Id.* at 4663.) She stated that Petitioner suffered a lot during this time. (*Id.*) She described a time when John disabled her truck so that she couldn't leave, and then "came after" her and hit her and "knocked [her] across the side." (*Id.* at 4664-65.) She went to the hospital and required stitches in her hand. (*Id.* at 4665.) Murna also described her family's positive experience visiting Petitioner during his earlier prison sentence. (*Id.* at 4666-69.) She asked the jury, "I just beg you, spare my brother's life, please. There's good in him. The Lord is going to work with him, I know it. I know it. Just have mercy on him, please. [¶] Thank you so much." (*Id.* at 4670.)

Max Kipp, John's younger brother, discussed John favorably and testified that Petitioner was very small and extremely hungry when he first arrived in John's home. (*Id.* at 4395-4404.) Max discussed John's strength and John's boxing with Petitioner, and his subsequent alcoholism. (*Id.* at 4410-23.)

Marjorie Klein, Petitioner's adoptive older sister, identified photographs of their family and their town and newspaper articles about Petitioner's boxing. (*Id.* at 5063-75.) She asked the jury "if they would have mercy on him. I know it's hard on my mother, and I wanted to bring her down here to see Martin. We love him very much. . . . If you could just find it in your heart to have mercy on him." (*Id.* at 5076.)

Mildred Kipp described Petitioner's physical condition when he first lived with her. (*Id.* at 4448-49.) She discussed positive experiences she and John had

with Petitioner until John began drinking more heavily. (*Id.* at 4452-57.) She testified that John "started getting mean towards me . . . . I told him that I was going to leave him, that I wasn't going to take that. [¶] And then he started in on Martin. . . . It seemed like Martin couldn't do anything right. And he was doing everything he could." (*Id.* at 4457-58.) Although she denied John hitting Petitioner, she testified that he "hit [her] or chase[d her] around or beat [her] up." (*Id.* at 4458.) She described an incident when John took out his pistol and said, "'Might as well end this right now,' he said, 'both of us.'" (*Id.* at 4465.) She asked the jury "if they wouldn't spare Martin's life. He's my only son and I really love him. I don't want him . . . [trailing off] [.]" (*Id.* at 4469.) She told Petitioner, "I want you home, and I love you." (*Id.*)

Joseph Kipp, Petitioner's adoptive cousin, testified that John began drinking heavily after the death of Joseph's brother, Billy, and became aggressive. (*Id.* at 4471-79, 4488.) He described John as a "gentle giant" before then and testified that Petitioner idolized John but was never able to live up to his overly high expectations. (*Id.* at 4479, 4484-85.) Joseph testified that Petitioner was known for being a hard worker. (*Id.* at 4489-91.) He stated that he came to testify for Petitioner because "Martin is my cousin and I love him, and I love his mother, and I'm afraid of what's going to happen to her." (*Id.* at 4492.)

Fron Froman, who worked for John, testified that John became physically aggressive after he began drinking heavily. (*Id.* at 4514-17.) He stated that he did not "want to see Martin die" and "[a]bsolutely" felt that Petitioner was "worth saving." (*Id.* at 4518.) Fron's wife, Dorothy, testified that Petitioner would stay with them sometimes and that she loved Petitioner and believed that his soul could be saved. (*Id.* at 4521-23.) Fron and Dorothy's daughter, Gayle Tough, discussed her childhood friendship with Petitioner and recalled a time when Petitioner was brought to tears on the phone with John in her home. (*Id.* at 4592-96.) She told the jury, "I just pray that you would all find it in your hearts to have mercy upon

him, because I know that there are things that happen in our lives that caused us to be the people we are today. [¶] And I just hope that you do have some mercy." (*Id.* at 4600.)

Omar Michels, who worked on a farm near John's ranch, and his wife Ione testified that they had a son who was a good friend of Petitioner's and boxed with him. (*Id.* at 4525-28, 4531.) Petitioner spent time at the Michelses' home, and Omar stated that he was "just like another son to me. I dearly respected him. He was a hard worker, he was honest, and well mannered kid." (*Id.* at 4529.) He stated that he did not want to see Petitioner get the death penalty. (*Id.*) Ione added that when Petitioner spent time with them, she did not want her son to stay overnight at Petitioner's home because she feared what John could do because he was drinking. (*Id.* at 4534-35.) She also felt that Petitioner was "like another son" to her and Omar. (*Id.* at 4538.)

Judy Matt, who was raised by Petitioner's adoptive sister Murna, lived with Petitioner in Murna's home when she was fifteen and Petitioner was fourteen. (*Id.* at 4653-54.) She testified that Petitioner grew up in difficult circumstances with John and Mildred, and that John was particularly harsh to Petitioner at the boxing ring. (*Id.* at 4654-56.) She described John's heavy drinking. (*Id.* at 4656.) She told the jury that she "dearly love[d]" Petitioner and felt he "was a victim of a lot of people's mistakes," and asked the jury to "have mercy on him, because I know that Martin can do some good because he is a good person." (*Id.* at 4657.)

Harold St. Goddard, Petitioner's high school friend, reminisced about enjoyable experiences with Petitioner in high school, particularly involving cross-country events, and testified that he loved Petitioner and "[w]hen you have family, they're always family, no matter what they do. They're still your family." (*Id.* at 4542-58.) Harold's wife, Kristin, was also friends with Petitioner in high school. (*Id.* at 4561.) She described how upsetting the poverty on the Reservation is. (*Id.* at 4561-63.) She also reminisced about enjoyable experiences with Petitioner in

high school and while she was in college. (*Id.* at 4566-73.) She said he was a very gentle person. (*Id.* at 4572.) She said that she wanted Petitioner to be alive, that she wanted her kids to be able to meet him, and that he is still her friend and has had meaning in her life. (*Id.* at 4573.)

Linda Wetzel, who was a teacher at Petitioner's high school, testified that he was kind in high school and that after a cross-country meet, she "could just run up and give [Petitioner] a big hug and [she]'d get a hug in return." (*Id.* at 4576-78.) She testified that Petitioner was "such a warm, loving and respectful young man, and his family, his mother is such a gracious and loving person, and in our years of involvement, even though we have left the Reservation, the pain and the hurt does not stop just because we don't live there." (*Id.* at 4587.) She wished to testify in the hope that "there was any opportunity to spare Petitioner's life." (*Id.*)

Donald Wetzel discussed his experiences transitioning from the Blackfeet Reservation to the University of Montana, and his later struggles to keep his students from using alcohol as a high school basketball and cross-country coach in Browning. (*Id.* at 4702-17, 4720-24.) He coached Petitioner in cross-country and testified that Petitioner had a good work ethic and was trustworthy and courteous. (*Id.* at 4717-18.) He told the jury, regarding his position on the sentence Petitioner should receive:

> I've been on the other side of this. Two of my former students in that class in 1977, were picked up, a couple of hitchhikers, and booze and alcohol. Same thing. And they were – executed by these guys. And I was involved a little bit there and – I just don't think two wrongs make a right. [¶] I think this guy can help me in some ways [in trying to keep students away from alcohol abuse]. I can use guys like this, and I have – I've had students in Deerlodge Montana Prison. They've helped me. I've used them. [¶] But the drugs and the alcohol are killing

> my people, and I've lost too many and I can't – I don't want to lose any more.

(*Id.* at 4725-26.)

Coleen Cooper, Petitioner's ex-girlfriend, testified that he treated her well, was polite to her family, protected her, and was "really a gentleman." (*Id.* at 4687-89.) She said Petitioner was protective of her because she had been raped seven months before she began dating him. (*Id.* at 4688.)

Mary Lee Harwood, Petitioner's friend and ex-girlfriend, testified that he was very gentle and protective and never violent. (*Id.* at 4608.) She testified that after she became involved in a relationship with an abusive man, with whom she had a baby, Petitioner told her he was moving back to California and asked if she and her baby would move with him so that he could take care of them. (*Id.* at 4619-20.) She described the lack of opportunity for high school children and adults where she and Petitioner lived. (*Id.* at 4620-22.) She stated that she always thought she and Petitioner would get married and she still loved him. (*Id.* at 4624.) She said that she felt terrible about his penalty phase trial and "wished it was different. I wish we had had a chance. Both of our lives would've turned out differently." (*Id.*)

Leon Vielle, who knew Petitioner in high school and gave Petitioner a place to stay in Browning while Petitioner was enlisted in the Marines, described his own time in the Marines. (*Id.* at 4630-34.) He testified that being in the Marines changed his life dramatically, stating, "[W]hen I got out, I . . . had a killer instinct. . . . I wasn't afraid to hurt people or – I didn't feel the emotions or the – of a normal – normal human being, because that's what they teach you to be." (*Id.* at 4632.) He described his extensive use of drugs and alcohol in the Marines, including his time using opium in Okinawa, and stated that "probably 99.9 percent

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of everybody I knew in the Marine Corps was on alcohol or some kind of a mind-ltering substance." (*Id.* at 4634.) He stated that he and Petitioner used drugs and alcohol together when Petitioner stayed with him in Browning. (*Id.*)

Woodrow Kipp, John's adoptive brother, who served in the Marines as John did, testified that John believed that all the Marines did was "teach you to kill, become a professional killer." (*Id.* at 4494-97.) He testified that the Marines "encourage you to use alcohol. It's kind of the image of being a Marine, is to be able to fight and drink." (*Id.* at 4504.) He described John's physical strength and his demanding standards. (*Id.* at 4505-08.) He described Petitioner's relationship with John as very good, until a turning point when John started drinking heavily. (*Id.* at 4508.)

Kenton Wheeler, Petitioner's friend since childhood, testified that he and Petitioner "did a lot of serious partying," drinking alcohol and taking drugs, when they both had just completed boot camp in the Marines. (*Id.* at 5034-40.) They smoked marijuana together. (*Id.* at 5039.) Kenton lived with Petitioner when Petitioner returned from Japan, and Petitioner "was partying really hard . . . ." (*Id.* at 5040-43.) They used "a lot of cocaine, a lot of speed, crystal meth . . . ." (*Id.* at 5044.) Petitioner stayed with Kenton in the summer of 1983 after Petitioner had been incarcerated. (*Id.* at 5048-50.) Petitioner was "partying" rather heavily, drinking and using drugs, during that summer. (*Id.* at 5051.) Petitioner was "really confused" and did not seem to be in control of himself. (*Id.* at 5053.) Kenton expressed love for Petitioner and said that "I know that there's another guy there, . . . a good man in . . . Martin. [¶] And I just want him to – he knows what he's done, and he's aware of it. And I just want him to be able to think about what he's done and maybe someday somebody can learn from that. Can grow. And Martin can grow." (*Id.* at 5058.)

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B. Alleged Evidence Competent Counsel Should Have Presented

Petitioner alleges that competent counsel would have presented the following available evidence:

> Joseph Still Smoking, Martin's oldest brother . . . could have testified that he and Martin witnessed their father, Curly, beat their mother, Mary repeatedly (Pet. Ex. 281 ¶ 5); that he saw his mother drink alcohol when she was pregnant with Martin (*id.*, ¶ 6); that because of parental neglect, he took on responsibility for taking care of Martin (*id.*, ¶ 7); and that when Martin was just a baby, Martin drank alcohol left over from their parents' drinking binges (*id.*, ¶ 13). . . .
>
> One of Martin's cousins, William Michell, could have testified that he saw Mary drink alcohol while pregnant with Martin, and that Curly beat Mary in front of Martin, making Martin cry. (Pet. Ex. 268 (1/20/00 declaration), ¶¶ 4-6.) . . .
>
> Another cousin, Kenneth Wayne Still Smoking, could have testified to the same facts as Michell and also to the fact that Curly and Mary physically beat Martin and otherwise abused and neglected him. (Pet. Ex. 282, ¶¶ 5, 8, 9 ('I saw Curly knock down Martin many times. I even saw him hit Martin so hard that Martin just lay on the floor unconscious'), 10 (Curly locked Martin in a shed), 11, 12 (Martin drank from a slop bucket in the house that contained bowel movements and urine).) . . .
>
> Many people who knew John and Martin Kipp could have testified that John Kipp regularly and viciously beat Martin. . . . Darlene Bradshaw could have testified that John whipped Martin with a belt. (Pet. Ex. 231 ¶ 5.) [¶] Rosemary MacDonald Houston could have testified that John left huge welts on Martin's back after striking him with a horsewhip and that he once badly burned Martin's skin by placing a hot branding iron on him. (Pet. Ex. 249 ¶¶ 8, 11.) [¶] Wayne Juneau could have testified

> that John tied Martin's hands to a crossbeam in a barn, put a handgun to Martin's head and pulled the trigger. No bullet came out, and John continued the torture by beating Martin with a whip. (Pet. Ex. 252 ¶ 4.) [¶] Billie Jo Maddox could have testified to a brutal, bloody beating inflicted on Martin by John. (Pet. Ex. 262 ¶ 3.) . . .
>
> Many witnesses were available to inform the jury of John's vicious and frequent physical and emotional abuse of Martin. . . . Rose Mary MacDonald Houston and Dennis Juneau could have testified to John's abuse of Martin in the boxing ring. (Pet. Ex. 249 ¶ 11 ('I heard him telling Martin he had to learn boxing because, as John said, "Martin, you're not going to be a pussy. You have to learn to fight'"); Pet. Ex. 251 ¶ 5 (in boxing matches with Martin, John hit Martin as if he were an adult, sometimes with his bare hands rather than with boxing gloves).) . . .
>
> [Mildred] ["]Bobbie["] Kipp gave a more complete account [than that she presented at trial] of John's treatment of Martin and her in a post-conviction declaration. (Pet. Ex. 255.) . . . Had she been properly prepared to testify, Bobbie Kipp could have told the jury that John's drinking and abuse was so bad that when Martin was just around three years old (i.e., about one year after he was placed in the Kipps' house), she left Martin with a relative and fled to Chicago for several weeks to get away from John. (*Id.* ¶ 36.) Such testimony would have corrected a misperception Mr. Kipp's jury received, namely, that John Kipp's drinking and verbal abuse did not become acute until much later, when Martin was a teenager.
>
> When Bobbie left a second time, 'Martin was unable to care for himself, and [she] did not trust John with Martin on the ranch because of John's drinking.' (*Id.* ¶ 38.) She left Martin with his adoptive sister Murna for two

months while she went to Alaska. (*Id.* ¶¶ 38-39.) Bobbie moved out on John a third time after he slapped her. (*Id.* ¶ 40.) She told him if he hit her again, she'd divorce him. (*Id.*) According to Bobbie:

> Unfortunately, as a result of my threat, John switched from beating me to beating Martin. Martin was still quite young – he had not yet begun high school. When I was around, I did my best to protect Martin from John's blows. I shudder to think about the times I wasn't there to protect Martin when John flew off the handle and took out his drunken anger on Martin.

(*Id.*) . . .

As shown in the Petition, numerous witnesses were available to testify about Martin's escalating drug and alcohol use when he lived in Spokane as a teenager, including Joseph Kipp himself. In a post-conviction declaration, Joseph Kipp states that Martin smoked marijuana and drank beer when he stayed with him and Max Kipp, and that when Martin lived in Spokane the following year with Brian Tatsey, Max saw needle marks on Martin's arm and Martin asked him if he wanted some methamphetamine. (Pet. Ex. 253 ¶¶ 10, 13.) Joseph Kipp said that Martin's 'lifestyle really scared' him. (*Id.* ¶ 13.) . . .

Brian or Phyllis Tatsey . . . could have testified to Martin's increasing use of and reliance on dangerous narcotics, including PCP (he shot it intravenously), crosstops (a drug akin to methamphetamine), cocaine and acid. (Pet. Exs. 284, 285.) . . .

Murna Thomas, Martin's adoptive sister . . . provides much more detailed, and relevant, testimony in her post-conviction declaration [than the testimony she provided at trial]. (Pet. Ex. 287.) . . . She states in her declaration, and could have testified at trial, that John did beat

Martin, rarely showed affection or approval, and that 'Martin, in particular, would catch hell from John if he did not do something quick enough or well enough.' (*Id.* ¶¶ 20, 21, 28.) She could have confirmed, similar to Bobbie, that '[f]rom Martin's earliest days on the ranch, he saw John drink and get drunk, he saw John stash his liquor bottles around the ranch, he saw John abandon, cheat on, and strike [Bobbie], and he felt John's blows himself.' (*Id.* ¶ 28.) She also could have testified about the alcoholism rampant in Martin's natural family and about Bobbie's fleeing John and leaving Martin to be taken care of by others. (*Id.* ¶¶ 10, 11, 13-16.) . . .

Mr. Kipp has presented on habeas numerous lay and expert declarations describing in detail Mr. Kipp's substance abuse over his life and its affect on his behavior, as well as in utero exposure to neurotoxins and family history of substance abuse and addiction. (*See* Pet. at 13-48 and exhibits cited therein.) . . .

Mr. Kipp's jury need not have been left in the dark about his actual experience in the Marines, because witnesses were available to describe the escalation in his drug and alcohol abuse in the service. (*See* Pet. at 42 and exhibits cited therein.) For example, Carl Hyams served with Martin in the Marines and estimates that Martin used about one to one and a half grams of cocaine daily (often intravenously) when they were stationed in Okinawa in the late 1970s. (Pet. Ex. 250 ¶ 2.) Mr. Kipp also drank 'mojo,' a powerful alcoholic drink containing absinthe. (*Id.* ¶ 3.) . . .

Other witnesses could have provided additional, powerful testimony about Martin's use of drugs and alcohol while on leave from the Marines – including daily use of heroin and heavy use of acid – and about how he seemed like a different person compared to the Martin they knew before. (Pet. Ex. 246 ¶¶ 5-8; Pet. Ex.

> 286 ¶ 9; Pet. Ex. 230 ¶ 4; Pet. Ex. 239 ¶ 5; Pet. Ex. 254 ¶ 17.) . . .
>
> [N]umerous witnesses were available to discuss Mr. Kipp's difficult transition to urban and non-reservation life in Spokane, Oregon and Southern California . . . . (*See* Pet. at 41-44 and exhibits cited therein.) . . .
>
> [T]he jury did not hear, or at best heard only fleetingly and incompletely, of Mr. Kipp's . . . head injuries; and his witnessing of spousal abuse and rape at the hands of Curly Carpenter and John Kipp. (*See* Pet. at 23-39 and exhibits cited therein.)

(Mot. for Evid. Hr'g at 98-107 (footnotes omitted, citations edited).)

C. Comparative Analysis

Many portions of the evidence Petitioner faults trial counsel for not presenting were, in fact, covered at trial. *See Pinholster*, 131 S. Ct. at 1409-10 (holding it was not "necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a 'substantial' likelihood of a different sentence," where the additional evidence "largely duplicated" evidence presented at trial and "basically substantiate[d]" testimony given by petitioner's mother and brother); *Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (holding petitioner could not show prejudice from alleged ineffective assistance at penalty phase where "[s]ome of the evidence was merely cumulative of the humanizing evidence [counsel] actually presented; adding it to what was already there would have made little difference"). First, concerning Petitioner's evidence that his biological mother consumed alcohol during her pregnancy with him, Wesley Brown testified at trial that Petitioner's biological mother "drank all the time." (RT 4442.) Marilyn St. Germaine testified at trial that when there were small children in Petitioner's mother's home, "there was always a lot of drinking going on there. . . . [Petitioner's mother] was already pretty emersed [sic] in the alcohol problem."

(*Id.* at 4314-15.) Dr. Haney testified at trial that Petitioner's mother was "very significantly alcoholic." (*Id.* at 4875.)

Second, concerning his evidence that his brother took care of him when he was very young, Wesley Brown testified at trial that Petitioner's biological mother was too alcoholic to care for him. (*Id.* at 4444.) Marilyn St. Germaine testified at trial that in Petitioner's biological mother's home, there were "[k]ids running around not being taken care of. . . . Sometimes the kids that were there would not be feed [sic]. Sometime [sic] they wouldn't have diapers on. They would be out running around, and parents would be passed out, or whoever was there or just in and out of the house." (*Id.* at 4314.) Dr. Haney testified at trial that Petitioner was neglected by his parents, was not well taken care of, and was not adequately clothed or kept warm. (*Id.* at 4874-76.)

Third, regarding Petitioner's evidence about his adoptive father's treatment of him while boxing, Max Kipp discussed the boxing club to which John and Petitioner belonged and testified that John trained Petitioner, would spar with him in the ring, and wanted "to make Martin into a man." (*Id.* at 4410-11.) Regarding Petitioner's evidence of John's emotional abuse, Gayle Tough, for example, described at trial a moment when Petitioner was on the phone with John at her home, and she remembered thinking, "'What could he possibly be saying that would make him cry like that?' [¶] I know John was pretty strict, but it just kind of amazed me how you could make someone cry without raising your hand." (*Id.* at 4596.)

Fourth, related to Petitioner's evidence about John's long-standing alcohol abuse and Mildred's leaving the family home, Max Kipp and Leslie Cobell described at trial how John, who was "always a drinker," eventually developed a drinking problem that was no longer "under control" and testified that there was a "family breakdown" in John's marriage. (*Id.* at 4416-18, 4422; *see also id.* at 4428, 4434.) Mildred Kipp testified that John "drank all along," and that she

eventually told John she was going to leave and moved in with her daughter, Murna. (*Id.* at 4457, 4461, 4463.) She returned to the ranch once after that before leaving again. (*Id.* at 4465-66.) Murna Thomas testified that Petitioner "suffer[ed] a lot" during this time. (*Id.* at 4663.) Dr. Haney testified at trial that Mildred and John "had a long period of emotional conflict where she stayed in the home and they tried to work things out" before she ultimately left. (*Id.* at 4902.)

Fifth, concerning Petitioner's evidence about his drug use and experience in the Marines, Dr. Haney testified that Petitioner was disappointed by his experience and developed a drug problem in the Marines in Japan, using cocaine and methamphetamines along with alcohol, and that his drug and alcohol use intensified from that point. (*Id.* at 4916.) Leon Vielle testified at trial that he and Petitioner used drugs and alcohol together when Petitioner stayed with him in Browning while enlisted in the Marines. (*Id.* at 4634.) Kenton Wheeler testified about Petitioner's use of alcohol and drugs when Petitioner had completed boot camp in the Marines, after he returned from Japan, and after he had been incarcerated, including his use of cocaine, speed, crystal meth, and marijuana. (*Id.* at 5034-53.) Similarly, regarding the effect of Petitioner's drug use on his behavior, Dr. Haney discussed Petitioner's drug use as compounding Petitioner's experiences and leading to the murders. Dr. Siegel discussed the aggressive behavior and sexual excitement associated with cocaine use and testified that a chronic cocaine user "can't stop" the sexual arousal experienced with cocaine use. (*Id.* at 4739-47.) He also testified that methamphetamine can produce the same psychopathology as cocaine. (*Id.*)

Sixth, related to Petitioner's evidence about his struggle to transition to urban life in Oregon and Southern California, Marilyn St. Germaine testified at trial that many Native Americans "didn't even know how to survive in the cities. . . . It's a big transition moving from a little community of nine thousand to a big urban area. . . . [A]ny Indian coming from any reservation, it's a real

tramatic [sic] experience." (*Id.* at 4317, 4321, 4324.) Mary Lee Harwood testified at trial that "[i]t's pretty hard to go off the Reservation. Rent is so much higher and you don't have your family and your friends there for support. Run out of money. You starve." (*Id.* at 4623.) Donald Wetzel testified at trial that "when you come off that reservation and all of a sudden you're a minority, you're in a situation where hey, you know, it's a whole different ball game, and it's just tough. It's tough controlling that social life, and especially, you know, coming from the Blackfeet Reservation. [¶] It's hard to explain, but it's – it's a tough thing." (*Id.* at 4708.) Dr. Martinez provided fairly extensive expert testimony on the subject, as discussed above. (*See id.* at 4834, 4846-47, 4849-52.) Dr. Haney testified at trial that Petitioner, like many other young men, encountered difficulties when he attempted to move off the Reservation. (*Id.* at 4908-10; *see also id.* at 4917, 4922-24.)

Seventh, regarding Petitioner's evidence that he suffered head injuries, Dr. Haney testified at trial about three head injuries John inflicted, one causing unconsciousness for ten to twenty seconds, one causing occipital head trauma, and one involving Petitioner's head banging up a flight of stairs. (*Id.* at 4902-03.)

In support of his allegation that he witnessed John rape Mildred, Petitioner relies upon the declaration of Dr. Judith Becker. (*See* Pet. at 36 (citing Pet. Ex. 229 ¶ 21).) Dr. Becker declared that Petitioner "stated that he recalled being very young and out on the prairie when John Kipp raped Mildred in the back of a pickup truck. He recalls hearing her scream. He stated that there were many times when John Kipp forced sex on Mildred Kipp." (Pet. Ex. 229 ¶ 21.) The California Supreme Court may have reasonably given little weight to Petitioner's evidence, given that it merely repeats Petitioner's self-serving statements. The state court may have also reasoned that had counsel presented that evidence from Dr. Becker, she would have been subject to cross-examination regarding Petitioner's views on rape. *See Belmontes*, 558 U.S. at 24 (noting that penalty phase expert testimony

that petitioner would likely be nonviolent in prison would have been subject to cross-examination on whether evidence of a second murder by petitioner changed the expert's view); *Edwards v. Ayers*, 542 F.3d 759, 775 (9th Cir. 2008) (observing that penalty phase evidence that shootings of two twelve-year-old girls were impulsive and attributable to frontal lobe dysfunction would have opened the door to rebuttal evidence that petitioner was sexually confused and destructive and had long-standing rage toward women and a fetish for women's hair). Dr. Becker explained in her declaration:

> Mr. Kipp reported that he has always had a strong sex drive and has had urges to rape. . . . When questioned as to why he enjoyed engaging in sexual activity with a woman when she was unconscious, he responded, 'It was just you,' indicating that he did not necessarily need the interaction and feedback from a sexual partner. . . . When asked to estimate how many sexual partners he has had over the course of his life, he reports that he has had between 500 and 600. . . . He also reported that he engaged in sexual activity with prostitutes, approximately between 100 to 200 prostitutes. . . . He estimates that approximately one-third of the 500 to 600 sexual partners that he has had were not conscious at the time that he engaged in sexual activity with them. . . .
>
> Regarding . . . Ms. Howard, he stated that . . . she accompanied him in his car and that they engaged in consensual sex . . . . He stated that he had consumed a considerable amount of alcohol as well as cocaine. He stated that he engaged in consensual sex with her two or three times in the car as well as one time out of doors where there were some men watching. He reported that she wanted to go with one of the men who was observing them and that he got into an argument with her. He reported that he wanted to be sexual with her again and she pulled out a knife. He also reported that she pulled out a gun and that he grabbed her by the throat. He

> stated that initially he did not know that he had killed her. He had sex with her after he knew she was dead. . . .
>
> Regarding Ms. Frizzell, he reported that he had been depressed, having just broken up with a girlfriend. He stated that on that day he had consumed a fifth of Vodka. . . . He reported that he went with her to [her] hotel; she left him in the room; he started making out with her but then she pushed him away. He stated at that point he choked her, he strangled her and after she was deceased, he looked at her pubic[] hair which he found very arousing, and then penetrated her after she had died.

(*Id.* ¶¶ 26-42.) Based upon Dr. Becker's report, the California Supreme Court may have reasonably concluded that her testimony would have been more prejudicial than beneficial to Petitioner.

Moreover, although Petitioner presented more detailed evidence on habeas review regarding his exposure to alcohol, neurotoxins, and excrement after birth, his extremely poor conditions during his first two years of life were illustrated and undisputed at trial. Petitioner also presents evidence on habeas review that John abused him physically to a far greater extent than was portrayed at trial. Nevertheless, the California Supreme Court was not objectively unreasonable in concluding that Petitioner's evidence did not show a reasonable probability of a different outcome, in light of the jury's awareness of several incidents of significant physical abuse by John when it returned its verdict. Finally, although the accounts that Petitioner's biological parents assaulted each other and their children and that Mildred attempted to leave Petitioner's home early in his life are disconcerting new evidence, the California Supreme Court may have reasonably found that they did not show a reasonable probability of a different outcome in light of the extensive mitigating evidence already presented and the severity of the crimes at issue.

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In total, the California Supreme Court may have reasonably concluded that Petitioner's evidence failed to show prejudice from any deficient performance by counsel in investigating and presenting mitigating evidence. Claim 14(D) is, therefore, DENIED.

VII. Claim 1(E): Mental State Defense

A. Allegations

In Claim 1(E), Petitioner alleges that counsel was ineffective for failing to investigate and present evidence at the guilt phase of trial that he was unable to form the intent required for the charged crimes. (Pet. at 74-76; Petr.'s Br. at 48-53.)

In his Petition, Kipp relies upon the declarations of Dr. Pablo Stewart, Dr. Becker, and Dr. Hilary Weaver. (Pet. at 74.) He alleges that Drs. Becker and Stewart have diagnosed him as having Dysthymia Disorder by History (a chronically depressed mood), Attention Deficit/Hyperactivity Disorder (Not Otherwise Specified), possible Fetal Alcohol Effects, Polysubstance Dependence in a controlled environment, Complex Post-Traumatic Stress Disorder, necrophilia, and a variety of paraphilias.[4] (Pet. at 74-75.)

Although Petitioner makes only a brief reference to the opinion of Dr. Weaver in his Petition and does not discuss it in detail, she opined:

> Martin's biological father, Curly Carpenter, had a long history of violence, alcoholism, criminal behavior, and mental illness. . . . [His] later psychiatric evaluations clearly label his long-standing deficits. While it is impossible for me to document the biological legacy that Martin received from his father with complete certainty, it is clear that mental illness can be biologically based,

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[4] Dr. Becker explained that paraphilias "are classified by recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of one's self or one's partner or 3) children or other non-consenting persons that occur over a period of at least six months." (Pet. Ex. 229 ¶ 52.)

> and thus, may have profound implications for Martin's life. . . .
>
> [Petitioner's] exposure to alcohol in utero, as a nursing infant, and as a toddler who found and drank from bottles of alcohol clearly put him at risk for physical and mental damage. Likewise, the exposure to burning tires in the home of his birth family may have exposed him to toxic chemicals that could cause lasting impairment. It is not possible for me to determine conclusively that these early events led to impairments that hindered Martin's academic success and influenced his behaviors later in life, however, the exposure to known toxins was clearly there and put him at great risk. . . .
>
> During the interview, Martin's descriptions of himself in his 20s were less coherent than his earlier descriptions and they often led to tangents. This is probably a reflection of impairment as a result of his heavy drug use. The drug use made it difficult for him to have a full understanding of what he was doing at the time and has affected his ability to remember this time in his life. . . .
>
> Today, Martin presents as having more stability and control in his life but the scars of his upbringing are still apparent. . . .
>
> Throughout the interview, Martin twitched, sniffed, and looked around a lot. He seemed to be in a state of quiet agitation. . . . I interpreted his non-verbal behavior as indications of some mental disturbance. Based on my limited contact with him, it is not possible to elaborate on the nature of the disturbance or determine whether it existed prior to his incarceration.

(Pet. Ex. 329 ¶¶ 24, 125, 137, 139, 170.)

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In briefing, Petitioner relies upon the opinions of Dr. Stewart and Dr. Robin LaDue. (Petr.'s Br. at 49-51.) He discusses:

> Dr. Stewart's . . . opinion that at and around the time of the charged offense, Kipp suffered from profound cognitive deficits as a result of his in utero exposure to neurotoxins, Attention Deficit/Hyperactivity Disorder ("AD/HD"), Impulse Control Disorder, and Post-Traumatic Stress Disorder ("PTSD"). (Pet. Ex. 278 ¶ 48.) On the basis of these psychiatric disorders, combined with Kipp's heavy drug abuse around the time of the offense, Dr. Stewart concluded that there is a strong probability Kipp was incapable of acting with premeditation and deliberation when the offense occurred. (*Id.* ¶ 49.) Dr. Stewart also concluded that Kipp's 'severely debilitating psychiatric symptoms are lifelong' and would have impacted him during the relevant timeframe. (*Id.*)

(Petr.'s Br. at 49 (citations edited).)

Petitioner recounts Dr. LaDue's opinions that records "'strongly suggest'" that he was prenatally exposed to alcohol and "'suggest'" that he may be neurologically impaired as a result. (*Id.* at 50 (quoting Pet. Ex. 256 ¶ 11).) Petitioner relies upon Dr. LaDue's explanation that persons with Fetal Alcohol Effects "'typically have difficulty associating cause and effect, learning from experience, generalizing to new situations, controlling impulses, and internalizing principles of interpersonal behavior. Their behavior is often impulsive, inconsistent and erratic and their ability to understand, explain or justify their actions is quite limited.'" (*Id.* (quoting Pet. Ex. 256 ¶ 8).)

B. Analysis

As noted above, Kipp relies upon a brief portion of Dr. Becker's conclusions in his Petition but not in his briefing. Dr. Becker's full opinion, discussed above, notes that Petitioner "has had urges to rape," enjoyed engaging in sexual activity with unconscious women and had done so more than one

hundred times, admitted grabbing Howard by the throat after wanting to be sexual with her and claimed to have known she was dead before having sex with her, and choked Frizzell after she pushed him away from kissing her, strangled her, and penetrated her after she had died. (*See* Pet. Ex. 229 ¶¶ 26-42.) From these portions of Dr. Becker's report, the California Supreme Court may have reasoned that had counsel introduced a mental state defense, the prosecution would have been able to introduce powerful evidence to the contrary, that Petitioner intended the attacks and executed them with premeditation and deliberation. *Cf. Franklin v. Johnson*, 290 F.3d 1223, 1234 (9th Cir. 2002) (noting that "[j]urors may well . . . look skeptically at a claim that someone who is psychologically prone to sexual[] abuse . . . should not be found guilty of a crime when he does commit such abuse" and finding no prejudice from counsel's failure to investigate mental state defense based upon pedophilia for lack of expert testimony that mental disease or defect impacted his commission of the crime). Dr. Becker's opinion provides evidence that Petitioner was precisely capable of forming the intent to have sexual intercourse with non-consenting women and to have sexual intercourse with deceased women.

The state court may have also reasoned that the prosecution could have introduced evidence contrary to a mental state defense from Dr. Leisla Howell and Dr. Raymond Anderson.[5] Dr. Howell reported that Petitioner stated that he asked the prior rape victim (June Martinez) in his van if she would like to engage in sex, that she said no, and that he pushed her to the back of the van, pushed her down, and had intercourse with her. (Lodg. 11, Ex. 1, at 1-2; *see also id.*, Ex. 2, at 1.)

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[5] Dr. Haney was questioned on cross-examination at the penalty phase with the opinion of Dr. Howell that test results showed no signs of organic brain damage and the opinion of Dr. Anderson that Petitioner's early developmental history was unremarkable. (RT 4961-62; *see also id.* at 4973-75, 4992-94.) Dr. Haney was also questioned about his own interview note that Petitioner discussed his prior rape conviction, stating, "'He wanted to get laid no matter what.'" (*Id.* at 4977.) That evidence, too, may have been introduced to counter a mental state defense at the guilt phase of trial, to show that Petitioner had the capacity to form the intent to rape.

Drs. Howell and Anderson reported that the rape took place in the back of the van where there was no door handle to allow escape and while Petitioner was wearing a wig (suggesting an attempt to conceal his identity), evidencing Petitioner's capacity for premeditation concurrent with his sexual aggression and sexual deviation. (*See id.*, Ex. 1, at 2-3 ("Subject stated that he could not say why there was no door handle. This question was rephrased and repeated a number of times but Subject offered no information. He was informed that the absence of a door handle was strong indication that it was his intention that his passengers could not get out of the car until he was ready to let them out"); *id.*, Ex. 2, at 1-2 ("At the time he met the woman, he was wearing a wig – which the investigating probation officer believed was an attempt to conceal his true appearance and actions which suggested pre-meditation on his part").)

Considering the opinions offered by Dr. Weaver, the California Supreme Court may have reasonably disregarded them as speculative. *See Williams*, 384 F.3d at 610-11 (finding that expert report noting the possibility of diminished capacity but lacking "sufficient tangible evidence" did not substantiate a mental state defense, and the facts of the crimes reflected deliberate action (internal quotation omitted)); *Griffin v. Johnson*, 350 F.3d 956, 965 (9th Cir. 2003) (holding that psychologist's conclusion that petitioner "*may* not have been able to form the required intent for the crime for which he was convicted" and it was "quite unlikely" that he formed that intent was "speculative on its face" (emphasis in original)). Dr. Weaver noted that Petitioner "may" have inherited mental illness, was "at risk" for impairment, "probably" showed impairment in his self-descriptions, and may have had some kind of mental disturbance prior to incarceration. (Pet. Ex. 329 ¶¶ 24, 125, 137, 170.)

The state court may have also reasonably concluded that Petitioner showed insufficient evidence of intoxication on the night of the crimes to support a mental state defense on that basis. *See Williams*, 384 F.3d at 610-11; *Griffin*, 350 F.3d at

965 (finding speculative psychologist's conclusion that petitioner "*may* not have been able to form the required intent for the crime for which he was convicted" and it was "quite unlikely" that he did (emphasis in original)). Dr. Stewart declared that Petitioner's "heavy consumption of drugs and alcohol shows a pattern of use that results in a complete loss of control" and that in light of his "chronic psychiatric symptomatology and heavy drug abuse around the time of the crimes for which he is convicted," there is a "*strong possibility*" that Petitioner had diminished capacity. (Pet. Ex. 278 ¶¶ 46, 49 (emphasis added).) Dr. Stewart opined that Petitioner's psychiatric symptoms had "*some* diminishing impact" on his mental capacity. (*Id.* ¶ 49 (emphasis added).) Dr. Stewart does not discuss any evidence of Petitioner's alleged intoxication on the night of the crimes, however. While Dr. Becker reported Petitioner's statement that he consumed a fifth of vodka the night of Frizzell's murder (*see* Pet. Ex. 229 ¶ 41), Petitioner presents no evidence of his intoxication beyond his own statements.

Considering Petitioner's available evidence as a whole, the California Supreme Court may have reasonably found that the evidence of Petitioner's mental health issues and intoxication on the night of the crimes was insufficient to show a reasonable probability of a different outcome at trial had counsel presented a diminished capacity defense. Accordingly, Claim 1(E) is DENIED.

VIII. Claim 3: *Ake* Violation

In Claim 3, Petitioner alleges his constitutional rights were violated "because he was denied the assistance of mental health professionals and other experts necessary to adequately challenge the prosecution's case and to mount a constitutionally adequate defense," citing *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). (Pet. at 89.) Petitioner alleges that he "was denied his constitutional rights by counsel's failure to retain, consult with, adequately inform, and present the testimony of competent and appropriate experts" on a variety of mental health topics. (*Id.* at 90.)

In *Ake*, the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." 470 U.S. at 74. The Court reached "a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 83. "[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.*

To establish a constitutional violation, Petitioner must, therefore, demonstrate that the state denied him access to a competent psychiatrist and appropriate examination and assistance. *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1991). In *Harris*, the Ninth Circuit found no constitutional violation "because the state did in fact provide Harris with psychiatric assistance. The state provided Harris with *access* to any competent psychiatrist of his choice when it gave Harris the funds to hire two psychiatrists from the general psychiatric community. The state did not limit Harris's access to psychiatric assistance in any way." *Id.* (emphasis in original).

Here, nearly four years before Petitioner's jury selection began, the state authorized Petitioner's requested funding for a "psychiatric evaluation," an "EEG examination and analysis," and a "psycho-pharmacological evaluation" by experts of Petitioner's choice, without limitation to the guilt or penalty phase of trial. (CT 1521-23.) Approximately six months later, the state authorized Petitioner's requested funding for an "American Indian Psychologist," again without limitation to the guilt or penalty phase of trial. (*Id.* at 1524-26.) Approximately six months after that authorization, the state authorized Petitioner's requested funding "for the retention of experts to investiga[te]" the case, including investigation of

"psychological, psychiatric and factual aspects of the case pertaining to both the guilt and penalty phase . . . in order that defendant's lawyer may b[e] provided with information to advise the defendant of possible defenses and pleas." (*Id.* at 1535-37.) The state also provided funding for Dr. Haney, for example, who testified about Petitioner's mental health at the penalty phase of trial. (*See, e.g.*, CT 1688-97 (documenting state funding for Dr. Haney); *supra* pp. 20-24 (discussing testimony from Dr. Haney).) The California Supreme Court may have reasonably concluded, as the Ninth Circuit did in *Harris*, that Petitioner suffered no constitutional violation pursuant to *Ake* because the state provided Petitioner with access to competent psychiatric assistance.

In addition, to the extent Petitioner argues in his reply brief that the "core allegation" of Claim 3 was "of ineffective assistance of counsel," (Petr.'s Reply Br. in Supp. of Supplemental Mot. for Evid. Hr'g, Aug. 10, 2012, at 23), those allegations are addressed above in Claims 14(D) and 1(E). (*See supra* pp. 20-48.)

Claim 3 is, therefore, DENIED.

IX. Claims 14(E), 14(F), and 18: Jury's Awareness of Petitioner's Prior Death Sentence

A. Factual Background and Allegations

In Claim 18, Petitioner alleges that testimony informing the jury that Petitioner was under a sentence of death in Orange County "misled [the jury] in the role they played in the sentencing decision" and rendered his penalty decision unfair and unreliable. (Pet. at 197-200.)

The jury learned of Petitioner's Orange County death sentence through the testimony of Dr. Haney. The prosecutor cross-examined Dr. Haney about whether the statements Petitioner made in his September 15, 1987 letter were consistent with the opinion Dr. Haney gave regarding Petitioner's mental state. (RT 4970-72, 4980-81.) On redirect, defense counsel asked Dr. Haney about Petitioner's "attitude" about the letter when Dr. Haney discussed it with him. (*Id.* at 4998.)

Dr. Haney testified that Petitioner was angry, upset, confused, and "going through some very difficult[] emotional times." (*Id.*) Dr. Haney stated that he was aware that Petitioner was on "suicide watch" and his letter was consistent with the thoughts of a person considering suicide and experiencing "a tremendous amount of emotional distress." (*Id.* at 4998-99.) Dr. Haney explained that Petitioner's statement showed:

> shame[,] and in this instance inability to deal with it. [¶] This is a man who was in jail having just been sentence today death [sic]. He's at the very bottom of his life. He's trying to communicate to his wife and show her that he is not effected [sic] by this. And he's doing it in the accepted jail house manner of defiance. Of not showing vulnerability and not not [sic] being able to admit what's going on inside of him. . . .
>
> I think he's – he is very angry and upset about the way his trial was conducted, and what he felt was an inadequate defense in presentation of his life. And I think he felt angry that that had happened. And I think to a certain extents [sic] maybe blamed himself. But I also think feeling helpless in a system in which he feels now he has no control. And feeling as pessimistic about his future as he possibly could. [¶] So you deal with that not by showing vulnerability, not by being open to yourself or anybody. You deal with it by rejecting it. And that's the ultimate in a prison persona; a prison face taking any feeling and just reflecting it back and acting as though it doesn't matter and you don't care. And in part you're trying to convince other people, and in part you're trying to convince yourself as a survival strategy.

(*Id.* at 5000-02.)

Defense counsel then asked to approach the bench on a separate matter. At the bench, the trial court asked:

> Are you aware of what just happened? . . . He just told the jury that he's under sentence for death in Orange County.

> [Defense Counsel] Brody: I am aware. And I will tell you that as far as expressing an opinion, once the Court ruled that the letter was – the other letter was admissible in rebuttal, then it was going to come in any way [sic]. And he's going to have to talk about this letter and explain what this letter is about. [¶] I didn't want him to express the opinion, but I felt we had no choice. . . . And that's is [sic] my explanation of what we've done.

(*Id.* at 5002-03.) A short time later, at the conclusion of Dr. Haney's testimony, the trial court addressed the jury:

> Ladies and gentlemen, . . . I believe for the first time today you have heard what has happened to Mr. Kipp in Orange County. I hope this is the first time you've heard it. [¶] In any event, whether it is or not, I want to again admonish you that what that jury did is totally outside the relm [sic] of what you are to do or expected to do in this case. You are expected to treat this case as a[n] independent entity, and not be concerned about what that jury did. [¶] You are not to say, all right, that jury gave him death, so it's easy for us to go along and do the same thing. [¶] Or the reverse; since they gave him death it doesn't make any difference, we'll give him life without possibility of parole. [¶] That is not the way you are to operate. No one knows what's going to happen to that Orange County case, whether it's going to be sustained on appeal, be retried. No one knows. And it doesn't matter. You do what is right in this case, what you have heard at this trial.
>
> Anyone that can't go along with that admonition now that they've heard that? If so, please let us know.
>
> (No audible response from the jury panel.)
>
> Alright.

(*Id.* at 5011-12.)

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At the end of the trial court's penalty phase jury instructions, the trial court reiterated:

> You will do this on your own. As I mentioned before, the Orange County verdict has no bearing on this one way or the other, and neither does what your friends or family or the newspapers might think. [¶] You have to be guided by your own personal beliefs and what you heard in this courtroom. [¶] You all took an oath to do that and that is what is expected of you.

(*Id.* at 5245.)

Petitioner argues that counsel was ineffective for eliciting testimony about Petitioner's Orange County death sentence. (Pet. at 159-63 (Claim 14(E)).) He argues that knowledge of Petitioner's Orange County death sentence made it "far easier" for the jury to return a death sentence in this case. (*Id.* at 162.)[6]

Petitioner further alleges that trial counsel was ineffective for failing to ask jurors on voir dire about their ability to remain fair and impartial upon learning of Petitioner's Orange County death sentence. (*Id.* at 163-66 (Claim 14(F)).)[7] Petitioner argues that counsel "knew that there was little chance the letter would be suppressed . . . [and] that it was incumbent upon them to explain the content of

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[6] Petitioner cites to two juror declarations in an effort to show how the Orange County sentence impacted the jurors' deliberations. (*See* Pet. at 199; Petr.'s Br. at 25.) The declarations are inadmissible under Federal Rule of Evidence 606(b), which provides that the Court "may not receive a juror's affidavit" concerning "the effect of anything upon that juror's or another juror's vote; or any juror's mental processes concerning the verdict . . . ." Fed. R. Evid. 606(b)(1). In light of *Romano v. Oklahoma*, 512 U.S. 1 (1994), discussed below, the Orange County sentence does not constitute "extraneous prejudicial information . . . improperly brought to the jury's attention" or "an outside influence . . . improperly brought to bear" to make the declarations admissible. Fed. R. Evid. 606(b)(2)(A)-(B); *cf. United States v. Bussell*, 414 F.3d 1048, 1055 (9th Cir. 2005) (holding that jurors' speculation about disposition of charges against co-defendant was not "extraneous prejudicial information" and juror declarations were thus inadmissible under Federal Rule of Evidence 606(b)).

[7] Although Petitioner's Supplemental Brief identifies Claims 14(E), 14(*G*), and 18 as the subject of his motion for evidentiary hearing concerning his Orange County death sentence (Petr.'s Br. at 23), his Motion for Evidentiary Hearing correctly identifies Claims 14(E), 14(*F*), and 18. (Mot. for Evid. Hr'g at 41.)

the letter to the jury." (*Id.* at 164.) He argues that counsel should have "contemplated well before trial that it might be necessary to reveal the prior death sentence to the jury in order to explain" Petitioner's letter. (*Id.*)

B. Legal Standard

The United States Supreme Court held in *Romano v. Oklahoma* that the admission of evidence that petitioner received a death sentence in a separate trial for a separate murder "did not amount to constitutional error." 512 U.S. 1, 3 (1994). In *Romano*, the jury learned of the prior sentence and of petitioner's intention to appeal the sentence. *Id.* at 4. The Supreme Court rejected petitioner's contention that the evidence impermissibly reduced the jury's sense of responsibility for its decision, because the evidence was not false at the time it was admitted and did not pertain to the jury's role in the sentencing process. *Id.* at 6-9. The Court noted that the jury was correctly instructed that "it had the responsibility for determining whether the death penalty should be imposed." *Id.* at 9 (internal quotation omitted). The Court went on to hold that the evidence did not violate petitioner's due process rights because:

> even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the [prior] case rendered petitioner's sentencing proceeding for the [instant] murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment.

Id. at 13-14.

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The Tenth Circuit recently applied *Romano* in rejecting a petitioner's claim that counsel was ineffective for informing the jury about petitioner's prior death sentence. *Howell v. Trammell*, 728 F.3d 1202, 1223-24 (10th Cir. 2013). Counsel informed the jury of the sentence to rebut evidence in aggravation that petitioner posed a continuing threat, by showing that petitioner had been a model prisoner while on death row. *Id.* at 1223. The circuit court observed that there was no clearly established federal law to support petitioner's argument that telling a jury of a prior death sentence would predispose them to "follow the earlier jury's recommendation." *Id.* at 1224 (internal quotation omitted). The circuit court emphasized that "'evidence of the prior death sentence may not produce a unidirectional bias toward death,'" since the jurors may theorize that they are being asked to deliver a second sentence because the first sentence – a capital sentence – was "handed down in error" and was "wrong." *Id.* at 1224 (quoting *Romano*, 512 U.S. at 20 (Ginsburg, J., dissenting) (reasoning that "[s]ome jurors, otherwise inclined to believe the defendant deserved the death penalty for the crime in the case before them, might nonetheless be anxious to avoid any feeling of responsibility for the defendant's execution. Jurors so minded might vote for a life sentence, relying on the prior jury's determination to secure defendant's death")).

C. Analysis

1. Jury's Awareness of Orange County Death Sentence

Petitioner's argument that the jury's knowledge of his prior death sentence rendered the instant sentence constitutionally unfair and unreliable is foreclosed by *Romano*. As in *Romano*, the judge at Petitioner's trial informed the jury generally that each juror had the ultimate duty and responsibility, determined by his or her own values, to choose the proper penalty in this case (RT 5133), and

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that the People and the defendant were entitled to the individual opinion of each juror and each juror must decide the case for himself or herself. (*Id.* at 5239.) The judge also specifically instructed the jury, at the time the prior sentence was heard and at the conclusion of the penalty phase instructions, that the "Orange County verdict has no bearing in this one way or the other . . . ." (*Id.* at 5245; *see also id.* at 5012.) The California Supreme Court reasonably denied Petitioner's Eighth and Fourteenth Amendment claims in light of *Romano*. Claim 18 is DENIED.

2. Ineffective Assistance of Counsel

The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Strickland*, 466 U.S. at 689. "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 131 S. Ct. at 788 (cautioning that "[i]t is all too tempting to second-guess counsel's assistance after conviction or adverse sentence") (internal quotations and citations omitted). It was not objectively unreasonable for the California Supreme Court to determine that counsel's strategy to avoid informing jurors, on voir dire or otherwise, of the prior death sentence until the court ruled that the September 15 letter would be admissible was reasonable. (*See, e.g.*, RT 1316 (reflecting defense counsel's awareness during voir dire that a juror's knowledge of the prior sentence "might ease that burden for you and sort of cause you to know that if you vote for death in this case, he's already gotten death someplace else and the responsibility is lessened here").)

Counsel litigated against the admission of the letter not only on the basis that it was more prejudicial than probative (*id.* at 3709-14), but also on the grounds (1) that it was a privileged spousal communication and (2) that the Orange County Jail lieutenant had no authority to open the letter because

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Petitioner and his wife were both out of custody of the Jail at the time he did so. (*Id.* at 2440-52.) Although the trial court ultimately ruled the letter admissible, the California Supreme Court would not have been objectively unreasonable in holding that counsel's motions showed a sufficient chance of success to justify his strategy. The California Supreme Court may have reasonably concluded that trial counsel provided constitutionally adequate representation in attempting to exclude the letter and revealing Petitioner's prior sentence only after the trial court ruled the letter admissible.

In addition, in light of the highly damaging statements Petitioner made in his September 15 letter (*see supra* pp. 11-13), the California Supreme Court may have reasonably determined that it was strategic to present any and all explanations for the statements, including Petitioner's recent receipt of a death sentence. As discussed above, the jury's knowledge of a prior death sentence does not always weigh in favor of a second capital sentence. *See Howell*, 728 F.3d at 1224; *Romano*, 512 U.S. at 20 (Ginsburg, J., dissenting). Counsel's strategy may have been a reasonable one. Claims 14(E) and 14(F) are, therefore, DENIED.

X. Claims 14(I) and 19: Petitioner's References to Satan

A. Factual Background and Allegations

In Claim 19, Petitioner alleges that his constitutional rights were violated by the admission of evidence that he "worshipped Satan." (Pet. at 200-05.) Petitioner alleges that the jury learned that Petitioner was an "apparent worshiper of Satan" through three items of evidence: (1) his September 9, 1987 letter; (2) his September 15, 1987 letter; and (3) testimony regarding his January 1, 1980 threat to Sergeant Baeman. (*Id.* at 201.)

In Claim 14(I), Petitioner alleges that counsel failed to litigate competently the admissibility of the evidence. (*Id.* at 175-78.) Petitioner faults counsel for raising objections to the letters based only on the state evidentiary code, rather than the state and federal constitutions. (*Id.* at 175.) Petitioner further faults

counsel for failing to object to the reference to Satan in Petitioner's threat to Sergeant Baeman. (*Id.*)

1. September 9, 1987 Letter

As discussed above, in his September 9, 1987 letter, Petitioner stated:

> Everyone hates a deputy on the street its [sic] why they are always getting killed! And your [sic] in their low-life setting so they like to rub it in all the time. It is how they get their satisfaction, besides turning key's [sic] all day long. (ha! ha! ha!) *Satan will lick them all up when they die.* Especially the bitch women deputies's [sic]. . . . I'd rape and sodimize [sic] every woman bitch deputy and gouge their eye's [sic] out! But I would let them live as invalent's [sic]. Yeah! *Satan will lick em all up in a tredge [sic] of horror. . . . Yeah, I don't believe in God anymore, because their [sic] isn't one who has ever helped me. But Satan has help [sic] me rejuvanate [sic] my energie's [sic] in a working manner babe.* Don't ever underestimate my 'intention's' [sic] that's all I can say!

(Pet. at 167-68 (emphasis added); *see also* Pet. at 202; RT 5191.)

2. September 15, 1987 Letter

In his September 15, 1987 letter, Petitioner stated:

> 'I killed, raped, sodomized, beat, swore, and laughed at those fucking no-good bitches. . . . Yeah, it felt great, because neither deserved to live anymore. One was a black prostitute who liked to rob people and play games. . . . The other little tramp played it off as a college sweetheart. Hell, she was anything but that, and a loose fuck to boot. Well, *Satan's licking both those bitches up now and laughing.*' . . .

(*Id.* at 3853 (emphasis added).) On the next page of the letter, Petitioner stated, "We are coming home, Satan." (*Id.* at 3719-20.)

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3. January 1, 1980 Threat to Sergeant Baeman

A sheriff's sergeant testified that on January 1, 1980, following Petitioner's escape attempt, Petitioner stated:

> 'You will read about me again, Deputy Koeth, after I kill that sergeant.' [¶] I asked him, 'Which sergeant?' [¶] And he said, 'Sergeant Baeman.' He said he would kill him in a very big way. *He swore to me and his savior, Satan, he would be killed in a very big way and a very humiliating way.*

(*Id.* at 4245 (emphasis added).)

B. Legal Standard

Petitioner relies upon the United States Supreme Court's decision in *Dawson v. Delaware*, 503 U.S. 159 (1992). (*See* Pet. at 177; Petr.'s Br. at 22-23.) In *Dawson*, the jury heard evidence that defendant had the words "Aryan Brotherhood" tattooed on his hand and that the Aryan Brotherhood "refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.* at 161-62. The jury also heard evidence that defendant had the name "Abaddon" tattooed on his stomach, and had introduced himself at a bar as "Abaddon," saying that it meant "[o]ne of Satan's disciples." *Id.* at 161-62. Although the Supreme Court apparently held that the admission of both the Aryan Brotherhood and the Abaddon evidence was erroneous, *see id.* at 163, its analysis focused upon the Aryan Brotherhood evidence alone.

At the outset, the Court rejected as "too broad" the defendant's contention that the Constitution "forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment," holding that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because

those beliefs and associations are protected by the First Amendment." *Id.* at 164-65. In the facts of defendant's case, however, the prosecution "proved nothing more than Dawson's abstracts beliefs" and did not tie the Aryan Brotherhood evidence "in any way to the murder of Dawson's victim." *Id.* at 166-67. Dawson's victim was white, as was Dawson, showing no elements of racial hatred involved in the killing. *Id.* at 166. Moreover, the evidence was not relevant "to rebut any mitigating evidence offered by Dawson," because "the Aryan Brotherhood evidence presented in this case cannot be viewed as 'bad' character evidence in its own right." *Id.* at 167-68. "[O]n the present record," the Court explained, "one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible," which does not justify their admission. *Id.* at 167. The Supreme Court noted that it would be "a much different case" if the prosecution had presented evidence to connect the evidence to the crimes or to show that the Aryan Brotherhood is "associated with drugs and violent escape attempts at prisons, and . . . advocates the murder of fellow inmates," to show its relevance. *Id.* at 165-66.

The Ninth Circuit recently applied *Dawson* in denying habeas relief based upon the admission of testimony that petitioner belonged to the Aryan Brotherhood. *See Schneider v. McDaniel*, 674 F.3d 1144, 1149-50 (9th Cir. 2012). The Ninth Circuit explained that "*Dawson* held only that the First Amendment 'prevents [the state] from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.'" *Schneider*, 674 F.3d at 1149 (quoting *Dawson*, 503 U.S. at 168; alteration in original). The Circuit emphasized that "the Supreme Court expressly recognized that the case would be different if the evidence proved something more than Dawson's abstract beliefs." *Id.* at 1150. The Circuit held that in Schneider's case, evidence of his membership in the Aryan Brotherhood was relevant to his co-defendant's defense, that she was coerced into participating

in the crimes and could not escape because petitioner beat her and told her he was affiliated with the Aryan Brotherhood or Aryan Warriors, who "kill snitches." *Id.* at 1147-48. Because the evidence was relevant to the co-defendant's defense, the Ninth Circuit denied petitioner's claim.

Other circuits, too, have emphasized that *Dawson*'s prohibition is limited to abstract beliefs unrelated to the issues at trial. *See, e.g.*, *United States v. Kane*, 452 F.3d 140, 142-43 (2d Cir. 2006); *Kapadia v. Tally*, 229 F.3d 641, 647-48 (7th Cir. 2000); *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997) (holding that admission of evidence of Aryan Brotherhood membership did not violate petitioner's First Amendment rights because the prosecution introduced relevant evidence of future dangerousness, "distinguish[ing] . . . *Dawson* on exactly this point"); *United States v. Beasley*, 72 F.3d 1518, 1527-28 (11th Cir. 1996). As the Eleventh Circuit explained in *Beasley*, "[t]he First Amendment's protection of beliefs and associations does not preclude such evidence where relevant to a trial issue;" rather, "[a] person's beliefs, superstitions, or affiliation with a religious group is properly admissible where probative of an issue in a criminal prosecution." 72 F.3d at 1527-28 (discussing, *inter alia*, *Dawson*, 503 U.S. at 165); *cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

In *Kapadia v. Tally*, the Seventh Circuit rejected a habeas petitioner's argument that evidence of his anti-Semitic beliefs violated his First Amendment rights under *Dawson*. 229 F.3d at 647-48. The circuit court approved of the trial court's finding that petitioner was "more dangerous because he held anti-Semitic views and attacked a Jewish community center," which showed "a greater probability he would not be rehabilitated." *Id.* at 647. Because the petitioner made his anti-Semitic remarks after his conviction, the circuit court held that the trial court "was free to conclude that he lacked remorse" and, in sum, "presented a

threat of future dangerousness to the community, a proper consideration" at sentencing. *Id.* The Seventh Circuit concluded:

> Read in context, the court's remarks at sentencing weighed defendant's statements in the context of his attitude towards the victims, his lack of remorse, and lack of potential for rehabilitation. Nothing in the Constitution prevents the sentencing court from factoring a defendant's [otherwise protected] statements into sentencing when those statements are relevant to the crime or to legitimate sentencing considerations. . . . [T]he sentencing court was not punishing [petitioner] for his abstract beliefs but rather for his concrete application of those misguided beliefs in criminal activity . . . .

Id. at 648 (internal quotation omitted).

The Second Circuit has similarly identified a number of trial issues on which a defendant's otherwise protected beliefs or affiliations may be introduced. *Kane*, 452 F.3d at 142-43. The circuit court explained that:

> evidence regarding the defendant's beliefs or associational activity[,] . . . so long as it is relevant to the issues involved in the sentencing proceeding[,] . . . may be relevant to show motive, *see Barclay v. Florida*, 463 U.S. 939, 948-49 (1983) (plurality opinion), analyze a statutory aggravating factor, *see id.* at 949, 949 n.7, illustrate future dangerousness or potential recidivism, *see, e.g., United States v. Tampico*, 297 F.3d 396, 402-03 (5th Cir. 2002), or rebut mitigating evidence that the defendant proffers, *see generally Dawson*, 503 U.S. at 167.

Id. at 142-43 (internal quotation omitted; internal citations edited and omitted) (holding that "because much of [appellant's] writings concerned illegal real estate schemes, which related directly to his offense of conviction, the writings also may indicate the increased likelihood of recidivism or a lack of recognition of the gravity of the wrong" (internal quotation omitted)).

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In *United States v. Fell*, the Second Circuit reaffirmed that "evidence of the defendant's abstract moral beliefs may in some cases be constitutionally admissible to show motive," but held that "there must be stronger evidence of the connection than occurred here . . . ." 531 F.3d 197, 230 (2d Cir. 2008). The court found too attenuated a connection between evidence of appellant's satanic beliefs and tattoos and evidence of his motives in the crimes to permit its introduction. *Id.* The government argued that:

> a satanist believes he 'can murder[,] rape and rob at will without regard for the moral or legal consequences[,]' an inference buttressed by the fact that Fell committed the murders while wearing a 'Slayer' t-shirt. [¶] Slayer is a 'heavy metal' band whose albums and lyrics cover topics such as serial killers, satanism, religion and warfare. . . .

531 F.3d at 230, 230 n.24. The government "posit[ed] on appeal a relationship between the t-shirt Fell wore during the murders and Fell's satanic interests and his motive for killing" a victim he did not previously know. *Id.* at 230. Although the court ultimately found the evidence harmless, it was "not persuaded by the relevance of th[e] evidence" connecting appellant's Slayer t-shirt to Satanic motives in committing the crimes. *Id.*

C. California Supreme Court Decision on Direct Appeal

The California Supreme Court held on direct appeal:

> [Regarding] the September 15 letter, . . . [w]hen this issue was discussed in the trial court, the defense argued that the references to Satan were not relevant to any statutory aggravating factor. The prosecutor replied that the defense would place defendant's character in issue at the penalty phase, and that evidence about defendant's favorable regard for Satan would then be admissible in rebuttal. The court ruled it would allow the references to Satan 'at the penalty phase under factor k.'
>
> Defendant is correct that character evidence under section 190.3, factor (k), can only be mitigating, and

> therefore the prosecution may not introduce evidence of defendant's bad character as part of its case in aggravation at the penalty phase. Once the defendant puts his general character in issue at the penalty phase, however, the prosecutor may rebut with evidence or argument suggesting a more balanced picture of his personality. Here, it was understood that defendant intended to place his general character in issue at the penalty phase, and in this context the trial court's ruling properly permitted the prosecution to respond with rebuttal evidence about defendant's views on Satan. . . .
>
> [E]vidence about defendant's view of Satan during questioning about defendant's threats in January 1988 . . . was admissible as part of the circumstances of the escape attempt and threats. . . .
>
> Defendant wrote the September 9 and September 15 letters in 1987, four years after killing Tiffany Frizzell and around 15 months before trial began. Thus, the jury could properly consider these letters as bearing on defendant's claimed feelings of remorse at the time of trial. A favorable view of the biblical figure of Satan is generally understood as a symbolic rejection of the values of love and compassion, and as indicating acceptance of the contrary values of hatred and violence, with a consequent rejection of all moral restrictions on crimes such as murder and rape. *See McCorkle v. Johnson*, 881 F.2d 993, 995-96 (11th Cir. 1989). This abhorrent value system is inconsistent with defendant's claimed remorse and shame for the murders of his two victims, and thus the evidence was properly admitted in rebuttal. If defendant's conception of Satan encompassed qualities consistent with an attitude of remorse, he was free to articulate them.

Kipp, 26 Cal. 4th at 1134-35 (internal quotation omitted; internal citations edited and omitted).

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D. Analysis

1. Reasonableness of State Court Decision

The California Supreme Court's conclusion that the reference to Satan in the September 15 letter was permissible, rebuttal character evidence is not objectively unreasonable, in light of the statements in the letter connected to the reference. The "bitches" Petitioner said Satan was "licking . . . up now and laughing" were women he said he raped and killed. A fairminded jurist could conclude that the reference to Satan, in context, rose to the level of "'bad' character evidence in its own right." *Dawson*, 503 U.S. at 168.

As discussed above, the jury could permissibly infer from the evidence of Petitioner's threat to Sergeant Baeman that Petitioner posed a future danger while incarcerated. (*See supra* pp. 17-18.) The state court was not objectively unreasonable in concluding that Petitioner's reference to Satan in that threat was admissible as part of "the violent potential of defendant's attempted escape." *Kipp*, 26 Cal. 4th at 1134. The court may have reasoned that Petitioner's "swor[n]" promise to his "savior, Satan" to kill Sergeant Baeman lent additional weight to the threat. In addition, because the California Supreme Court reasonably held that there was no constitutional error in the admission of the threat and its reference to Satan, it may have reasonably determined that Petitioner showed no reasonable probability of success had counsel moved to exclude that evidence on constitutional grounds. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice under *Strickland* from failure to file a motion," petitioner must show, in part, that "had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious"); *see also United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, "the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit").

The reasonableness of the state court's remarks on the September 9 and 15 letters together poses a more difficult question. The California Supreme Court's statements that the September 9 and 15 letters evidence an "abhorrent value system" that "indicate[s] acceptance of the . . . values of hatred and violence, with a consequent rejection of all moral restrictions on crimes such as murder and rape," echo the abstract beliefs held to be inadmissible, without more, in *Dawson* and *Fell*. *See Dawson*, 503 U.S. at 167 (holding that fact that "the jury would find these beliefs morally reprehensible" did not justify their admission); *Fell*, 531 F.3d at 230 (rejecting the government's mere "inference" that "a satanist believes he can murder[,] rape and rob at will without regard for the moral or legal consequences" (internal quotation omitted)). Although the California Supreme Court stated that a favorable view of Satan is "generally understood" to have that meaning, critically, no such evidence was presented at trial.

2. Evaluation under De Novo Review

Assuming, *arguendo*, that the California Supreme Court's analysis of the September 9 and 15 letters constitutes an unreasonable application of *Dawson* in this respect, Petitioner would be entitled to de novo review of his claim. *See Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) (holding that when "the requirement set forth in § 2254(d)(1) is satisfied[, a] federal court must then resolve the claim without the deference AEDPA otherwise requires"); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (holding that where "there is [§ 2254(d)(1)] error, we must decide the habeas petition by considering de novo the constitutional issues raised"). No evidentiary hearing is required since the admissibility of the evidence can be decided on the basis of the state court record. *See Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994) (holding pre-AEDPA that a claim does not require a hearing if it "can be resolved by reference to the state court record").

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a. References to Satan in September 9 Letter

At the penalty phase of trial, Petitioner introduced evidence that "lifers" had a propensity to become "model prisoners" and to commit themselves to beneficial work. (RT 4800-07.) The prosecution was entitled to rebut that evidence with evidence that Petitioner posed a future danger if sentenced to life without parole, particularly in light of Petitioner's escape attempts. *See Simmons*, 512 U.S. at 162 (approving of "the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system"); *Dawson*, 503 U.S. at 165-66 (noting that otherwise protected beliefs could be admissible "to rebut any mitigating evidence offered" and to show an association with "violent escape attempts at prisons, and . . . the murder of fellow inmates"); *Kane*, 452 F.3d at 142-43 (holding defendant's beliefs admissible to show future dangerousness or to rebut mitigating evidence); *Fuller*, 114 F.3d at 498 (holding protected associations admissible to show future dangerousness). The references to Satan in the September 9 letter were relevant to show Petitioner's future dangerousness, because Petitioner felt Satan had rejuvenated his energy to carry out his intentions, which were to rape and sodomize female deputies. Because Petitioner's references to Satan were relevant to his future dangerousness, their admission did not violate Petitioner's First Amendment rights.

b. Reference to Satan in September 15 Letter

As the jury was instructed, the circumstances of the crimes were a relevant consideration at sentencing. (RT 5128-29.) The circumstances of the crimes are a permissible aggravating factor. *See Allen v. Woodford*, 395 F.3d 979, 1012 (9th Cir. 2004); *see also Tuilaepa v. California*, 512 U.S. 967, 976 (1994). Petitioner's statement that Satan was "licking both those bitches up now and laughing" was relevant to explain his possible motivations in the crimes, in light of his statements that the victims were a "prostitute" and a "loose fuck," who were "no-good" and

did not "deserve[] to live anymore [sic]." Petitioner's views on the character of the victims suggest that he may have been motivated to rape and kill them because Satan would then "lick[] [them] up" and "laugh[]."

These possible motivations and Petitioner's view that this was the outcome of his crimes constitute circumstances of the crimes that are constitutionally admissible. *See Dawson*, 503 U.S. at 165-67 (noting that Dawson's beliefs could have been admissible if tied "in any way to the murder of [his] victim"); *Kane*, 452 F.3d at 142-43 (holding beliefs admissible when "relevant to show motive, analyze a statutory aggravating factor, . . . or [demonstrate] a lack of recognition of the gravity of the wrong" (internal quotation and citation omitted)); *Kapadia*, 229 F.3d at 648 (holding beliefs admissible where "relevant to the crime" and given "concrete application . . . in criminal activity"); *Beasley*, 72 F.3d at 1527-28 (holding protected beliefs admissible "where probative of an issue in a criminal prosecution"); *cf. Mitchell*, 508 U.S. at 489 ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"). Moreover, as discussed above, the reference to Satan in its context constituted permissible, rebuttal character evidence. Petitioner's First Amendment rights were not, therefore, violated by the admission of his reference to Satan in the September 15 letter.

c. Ineffective Assistance of Counsel

Because there was no constitutional violation in the admission of the references to Satan in the September 9 and September 15 letters, Petitioner has failed to demonstrate a reasonable probability of success had counsel moved to exclude them on constitutional grounds. *See Wilson*, 185 F.3d at 990; *Molina*, 934 F.2d at 1447. Petitioner has, therefore, failed to establish prejudice from any ineffective assistance of counsel.

Accordingly, Claims 14(I) and 19 are DENIED.

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XI. Claims 1(B), 1(C), 14(B), and 14(C): Inadequate Voir Dire

In Claims 1(B) and 14(B),[8] Petitioner alleges that trial counsel was ineffective for failing to question the venire adequately regarding his Native American heritage. (Pet. at 63-67, 143-46.) In Claims 1(C) and 14(C), Petitioner makes the same allegation regarding his belief in Satan. (*Id.* at 68-71, 146-49.)

A. Legal Standard

There is a "high level of deference given to counsel's decisions during jury selection." *Carrera v. Ayers*, 670 F.3d 938, 948-49 (9th Cir. 2011) (collecting cases). "'The conduct of voir dire will in most instances involve the exercise of a judgment which should be left to competent defense counsel.'" *Hovey*, 458 F.3d at 909-10 (holding counsel's performance was not deficient in asking voir dire questions generally limited to whether the juror could "follow the law," "be fair to both sides," and "wait until all the evidence is in" to form an opinion) (quoting *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)).

A strategy "that in defending a capital case, the least voir dire is the best tactic, [and] . . . preferr[ing] to rely on nonverbal communication to make determinations about potential jurors because that avoids exposing potentially favorable jurors to prosecutorial challenges" is a reasonable strategy. *Hovey*, 458 F.3d at 910 (internal quotation omitted). Counsel is not ineffective for relying on jurors' statements that they would be fair and follow the law as instructed. *Wilson*, 185 F.3d at 991 ("Counsel's choice to rely on such a commitment, without emphasizing his client's criminal history, merits deference as a tactical decision").

As for prejudice, the state court may reasonably determine that a petitioner fails to make "the required showing of prejudice under *Strickland*" where he fails to "show[] that any juror who harbored an actual bias was seated on the jury as a result of counsel's failure to voir dire" on the issue. *Ybarra v. McDaniel*, 656 F.3d

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[8] The discussions in sections 1(A) and 14(A) of the Petition set forth factual background only and do not state individual claims for relief.

984, 1001 (9th Cir. 2011); *see also Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004) ("Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased").

B. Allegations and Analysis Regarding Native American Heritage

1. Right to Inquiry

Petitioner alleges that counsel asked only "a handful" of prospective jurors questions to uncover "any racist or biased feelings or views regarding Petitioner's Native American heritage." (Pet. at 63.) Petitioner argues that "[d]ue process requires that the court inquire into racial bias when there is a reasonable probability that racial or ethnic prejudice might influence the jury," citing, among others, *Turner v. Murray*, 476 U.S. 28, 36-37 (1986). (Pet. at 65-66.) Petitioner relies upon the Supreme Court's statement in *Turner* that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 476 U.S. at 36-37. The Court held that the trial court may not refuse such questioning. *See id.* at 30-31, 36.

The *Turner* Court specifically noted, however, that "should defendant's counsel decline to request *voir dire* on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*." *Id.* at 37 n.10. The Court observed that whether the questioning could "have the negative effect of suggesting to the jurors that race somehow is relevant to the case" was "a decision we leave up to a capital defendant's counsel." *Id.* *Turner*, therefore, does not govern Petitioner's claim of ineffective assistance.

As discussed above, Petitioner must establish prejudice from any deficient performance by showing that a seated juror harbored actual bias. See *Ybarra*, 656 F.3d at 1001. A petitioner could show, for example, that a juror made statements during voir dire that demonstrated bias. *See United States v. Quinto-Barraza*, 78

F.3d 1344, 1349-50 (9th Cir. 1995) (considering juror's apparently biased statements on voir dire but concluding that counsel's strategy was not objectively unreasonable). Here, instead, Petitioner presents two statements from juror declarations to attempt to show prejudice. (*See* Pet. at 66.) One juror stated, "'Like so many Indians on reservations, Kipp's family had spent almost all their time drinking alcohol.'" (*Id.* (quoting Pet. Ex. 303 ¶ 6).) The second stated, "He [Petitioner] reminded me of an Indian warrior. He was very macho and showed no remorse or fear." (*Id.* (quoting Pet. Ex. 312 ¶ 2).)

2. Admissibility of Juror Declarations

The Ninth Circuit has "not decided, as some courts have, whether Rule 606(b) prevents [a court] from considering evidence that a juror's racial bias was expressed during deliberations." *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013). In *Hayat*, the Ninth Circuit considered a juror's statement during deliberations that "they all look alike when in a costume," referring to Pakistanis wearing clothing common among Pakistanis and Muslims. *Id.* at 886-87. Petitioner argued that the comment evidenced racial and religious bias, particularly in light of the juror's later remarks in a news interview about the government's use of so-called 'preventative criminal prosecutions' of potential terrorists:

> I don't want to see the government lose its case. . . . Can we, on the basis of what we know, put this kid on the street? On the basis of what we know of how people of his background have acted in the past? The answer is no. . . . Not this particular case, I'm saying, but future cases. . . . Too many lives are changed by terrorism . . . .

Id. at 887 (internal quotations omitted). The juror testified, after the interview was published, that he did not have those thoughts before jury deliberations began. *Id.* at 888. Upholding the district court's determination that the juror was not motivated by an impermissible racial, ethnic, or religious bias, the Ninth Circuit

emphasized that "the issue was [the juror's] impartiality as a juror at the time of trial and not his post-trial attitudes" and the context of his statement during deliberations provided a non-biased explanation. *Id.* at 887, 889, 891. The court noted that while the statement "could be interpreted as reflecting a tendency to group people together on the basis of their shared cultural or physical characteristics," in context, the statement was an evaluation of the credibility of a witness's testimony identifying a particular person. *Id.* at 887.

3. Analysis

As in *Hayat*, the jurors' statements here may have been legitimately related to their consideration of evidence presented at trial. The jurors' statements were related to trial evidence introduced about the prevalence of alcoholism on Native American reservations, the warrior culture in the Blackfeet Nation, and Petitioner's own statements. In context, the first juror stated in her declaration, "The witnesses from Kipp's tribe testified about the defendant's background. Like so many Indians on reservations, Kipp's family had spent almost all their time drinking alcohol. However, I didn't see the defendant's background as a reason that he should be sentenced to life without the possibility of parole." (Pet. Ex. 303 ¶ 6.) Her statement reflects her consideration of evidence presented at trial that Petitioner's biological and adoptive families both suffered serious effects from alcoholism and that many Blackfeet and other Native Americans on reservations faced widespread alcoholism. (RT 4353-57, 4379-83, 4834-47, 4874-75, 4898-4905.)

The second juror's statement that Petitioner reminded him of "an Indian warrior" because he was "very macho and showed no remorse or fear" related to evidence presented at trial that Blackfeet men were "warriors," and that "Indians became warriors without weapons" who continued to learn "the ideals of the old warrior way," including "bravery." (*Id.* at 4386-91.) Petitioner, in fact, described himself as a "warrior from the old school" in his September 15 letter. (*Id.* at

4971.) In addition, defense counsel's penalty phase opening statement told the jurors that Petitioner's September 15 letter, written while he was in jail, "talks about a macho attitude." (*Id.* at 3995.) Similarly, Dr. Irwin testified that "[t]he macho phenom[enon] is very strong in prison." (*Id.* at 4821.) Finally, as held above, the jury could permissibly infer from the statements in Petitioner's September 9 letter that he was not remorseful. (*See supra* pp. 15-17.)

Thus, even considering the evidence Petitioner presents in juror declarations, the California Supreme Court may have reasonably concluded that Petitioner failed to demonstrate that a seated juror harbored an actual bias about Petitioner's Native American heritage. *See Hayat*, 710 F.3d at 886-87. The court may have reasonably held that Petitioner failed to show prejudice from counsel's voir dire questioning on the subject. *See Ybarra*, 656 F.3d at 1001. Claims 1(B) and 14(B) are, therefore, DENIED.

C. Allegations and Analysis Regarding Belief in Satan

To show prejudice from counsel's lack of questioning on voir dire regarding Petitioner's belief in Satan, Petitioner points to statements in juror declarations that "a little over half of the jurors had a religious background and strong religious views" (Pet. at 148 (quoting Pet. Ex. 310 ¶ 3)[9]), and that "[t]he satanic letters demonstrated Martin Kipp's anger towards society. Some of the jurors were aware of Satanism as a demonic force or a cult, and they were affected by that evidence." (Pet. at 70 (quoting Pet. Ex. 312 ¶ 7).)

The first juror statement about the religious background and beliefs of the jurors does not specify what types of religious beliefs the jurors held, nor does it state that the jurors considered or were biased against Petitioner's belief in Satan. The second statement that some jurors were "affected by the evidence" of Petitioner's letters is inadmissible under Federal Rule of Evidence 606(b)(1). *See*

[9] Although Petitioner cites Exhibit 309, the statement appears in Exhibit 310.

Fed. R. Evid. 606(b)(1) ("[A] juror may not testify about . . . the effect of anything on that juror's or another juror's vote"). Even considering the evidence, however, the statement shows only that the jurors took the letters to show Petitioner's "anger towards society," and not that they harbored bias against Petitioner because of his beliefs. (Pet. Ex. 312 ¶ 7.)

The California Supreme Court's determination that Petitioner failed to show that a seated juror harbored an actual bias about his belief in Satan is not objectively unreasonable. *See Ybarra*, 656 F.3d at 1001. The state court may have reasonably held that Petitioner failed to show prejudice from counsel's lack of voir dire questioning on his belief. *See id.* Claims 1(C) and 14(C) are DENIED.

XII. Claim 20: Jury Consideration of Bible Passages

A. Allegations

In Claim 20, Petitioner alleges that his constitutional rights were violated by the jury's consideration of "extraneous information" in the form of Bible verses. (Pet. at 206-09.) Petitioner relies upon a juror declaration stating that another juror:

> brought in a Bible and read it to us. She talked about several verses in the Bible, which she told us would help us in making a decision. The jurors talked about standing in judgment of another human being. There was also discussion of the verses which state, 'an eye for an eye' and 'judge not lest ye be judged.' A little over half of the jurors had a religious background and strong religious beliefs.

(Pet. Ex. 310 ¶ 3; *see also* Petr.'s Br. at 20.)

B. Legal Standard and Analysis

In *Crittenden v. Ayers*, the Ninth Circuit rejected a petitioner's claim based upon a juror's reading of a biblical passage during penalty phase deliberations. 624 F.3d 943, 972-74 (9th Cir. 2010). The juror studied the Bible at home and

found the passage, "[w]ho so sheddeth man's blood by man shall his blood be shed." *Id.* at 973. A second juror testified that the juror mentioned something from the Bible during deliberations. *Id.* The Ninth Circuit held:

> We need not decide here whether clearly established Supreme Court law required the treatment of the Bible as extrinsic evidence, or whether reading and sharing biblical passages constitutes juror misconduct. Even if [the juror's] consulting of the Bible and sharing of the Genesis 9:6 passage with other jurors violated [petitioner's] Sixth Amendment right to a jury verdict based upon the evidence developed at the trial, he has not established prejudice. The alleged introduction of extrinsic evidence into deliberations did not have a substantial and injurious effect or influence in determining the jury's verdict of death.
>
> [The juror's] private study of the Bible was not prejudicial. Although we agree that [petitioner] was entitled to be tried by 12 . . . impartial and unprejudiced jurors, the bare showing that a juror read a religious text outside the jury room does not establish prejudice. Such a rule has no support in precedent and is, at the very least, in tension with the Supreme Court's teaching that a sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence.
>
> Our opinion in *Fields* [*v. Brown*, 503 F.3d 755 (9th Cir. 2007)], in which we also considered a claim of Bible-related juror misconduct, forecloses [petitioner's] claim that [the juror's] mention of Genesis 9:6 prejudiced him. In *Fields*, the jury's discussion of biblical passages was far more extensive, but we nonetheless concluded, reviewing the matter de novo, that there was no prejudice. The foreperson there checked the Bible and made notes 'for' and 'against' imposition of the death penalty which he brought to the deliberations the next day. *Fields*, 503 F.3d at 777. His notes were passed around and the religious material

> discussed by some jurors. *Id.* at 777-78. . . . [T]he passage itself [read in *Crittenden*] was innocuous compared to the contents of the foreperson's note in *Fields*, which quoted four passages besides Genesis 9:6, including the 'eye for eye' maxim and Romans 13:1-5, *Fields*, 503 F.3d at 777 n.15, which has been understood as cloaking the 'State with God's authority,' *id.* at 798-99 (Berzon, J., dissenting).

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

The foreperson's passages in *Fields* were also more damaging than those at issue here. Along with the "eye for an eye" edict, the *Fields* foreperson shared passages stating, "Whoso sheddeth man's blood by man shall his blood be shed," and "He that smiteth a man, so that he dies, shall surely be put to death." *Fields*, 503 F.3d at 777 n.15 (internal quotations omitted). The Ninth Circuit found them not to have had substantial and injurious effect or influence partly because the foreperson's notes "had an 'against' [the death penalty] part as well." *Id.* at 781. Here, too, the biblical passages included the provision to "judge not lest ye be judged," weighing against the death penalty. (Pet. Ex. 310 ¶ 3 (internal quotation omitted).)

The circuit court in *Fields* held that even "[m]ore important[]" than the contents of the passages were the court's instructions to the jurors. The Circuit observed that "the jury was instructed to base its decision on the facts and the law as stated by the judge, regardless of whether a juror agreed with it. We presume that jurors follow the instructions." *Fields*, 503 F.3d at 782. Petitioner Kipp's jury received comparable instructions. (*See, e.g.*, RT 5109-10 ("You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. . . . You must not . . . consult reference works . . . for additional information"), 5238 ("The purpose of the Court's instructions is to provide you with the applicable law so you may arrive at a just and lawful

verdict"), 5244 ("[Y]ou determine under the relevant evidence which penalty is justified and appropriate . . . . To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole").)

Thus, assuming *arguendo* that the juror declaration is admissible evidence and that the Bible reading was misconduct, the California Supreme Court was not objectively unreasonable in holding that Petitioner failed to show a substantial and injurious effect or influence on the verdict. *See Crittenden*, 624 F.3d at 973-74; *Fields*, 503 F.3d at 781-83. As the California Supreme Court discussed, considerable aggravating evidence was presented at trial. *See Kipp*, 26 Cal. 4th at 1112-15, 1120. Claim 20 is, therefore, DENIED.

XIII. Claim 21: Juror Misunderstanding

A. Allegations and Factual Background

In Claim 21, Petitioner alleges that his constitutional rights were violated "as a result of [a] juror['s] . . . admitted misunderstanding of the court's instruction at [the] penalty phase . . . to mean that she could not consider sympathy for Petitioner as a factor on which she could rest a decision to spare his life." (Pet. at 210.) Petitioner relies upon the juror's declaration that:

> [a]s I recall, the judge's instructions to us stated that if there was no doubt that Mr. Kipp was guilty of murder, we had to bring back a verdict of death. As I understood the judge's instructions, the jury was not allowed to take sympathy for the defendant into consideration when deciding whether a sentence of death or life without parole was more appropriate.

(Pet. Ex. 310 ¶ 4; *see* Petr.'s Br. at 27-28.)

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The jury was instructed, to the contrary:

> In determining which penalty is to be imposed on the defendant, . . . [y]ou shall consider, take into account and be guided by . . . , if applicable[,] . . . 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 trial phase that we previously had [sic] which conflicts with this principle. . . .
>
> If any mitigating circumstance, whether it be an aspect of the background, character or your observation of the defendant, arouses mercy, sympathy or compassion, so as to persuade you that death is not the appropriate penalty, you may act in response thereto and decide for life without possibility of parole.

(RT 5128-29, 5131-33.)

B. Analysis

The juror's declaration is not admissible to show misunderstanding of the court's instruction. "After a verdict is returned a juror will not be heard to impeach the verdict when his testimony concerns his misunderstanding of the court's instructions. This rule does not violate a defendant's constitutional rights." *United States v. Stacey*, 475 F.2d 1119, 1121 (9th Cir. 1973) (internal citations omitted); *see also United States v. Span*, 75 F.3d 1383, 1390 n.8 (9th Cir. 1996) ("The [appellants] offer jurors' statements as evidence that the jurors misunderstood the applicable law and would have acquitted if they had been properly instructed. But Federal Rule of Evidence 606(b) bars the use of a juror's 'mental processes' to inquire into the validity of a verdict"); *United States v. Jackson*, 549 F.3d 963, 984 (5th Cir. 2008) ("[R]ule 606(b) has consistently been used to bar testimony [that] the jury misunderstood instructions" (internal quotation omitted)); *Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1373 (10th Cir. 1996)

("[P]laintiff claims the jury did not understand the meaning of 'unreasonably dangerous[.]' . . . [P]laintiff's attempt to impeach the jury's verdict based upon a juror's post-verdict statement is prohibited by Federal Rule of Evidence 606(b)"); *Karl v. Burlington N. R. Co.*, 880 F.2d 68, 75 (8th Cir. 1989) ("[E]vidence of the jury's misinterpretation of its instructions is deemed incompetent and inadmissible under Rule 606(b)"); *Warden, Ky. State Penitentiary v. Gall*, 865 F.2d 786, 789 n.2 (6th Cir. 1989) ("[J]uror testimony as to only external rather than internal influence is admissible, and . . . a misapprehension as to the instructions is internal in nature" (emphasis omitted)); *United States v. Neary*, 552 F.2d 1184, 1190 (7th Cir. 1977) ("[A] juror will not be heard to impeach the verdict by testimony concerning his misconception of the court's instructions"); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1247-48 (3d Cir. 1971) ("Long settled considerations of public policy dictate that . . . misapprehension of the law . . . cannot be shown by the evidence of the jurors themselves, as the ground of disturbing the verdict" (internal quotation omitted)).

Petitioner's jury was properly instructed that it could consider sympathy to return a sentence of life without parole. The California Supreme Court's conclusion that Petitioner could not show a constitutional violation through a juror's declaration that she misunderstood was not an unreasonable application of clearly established federal law. Claim 21 is, therefore, DENIED.

XIV. Claims 22 and 28(G): Instruction on Life Imprisonment without Parole

A. Allegations and Factual Background

In Claims 22 and 28(G), Petitioner alleges that "contrary authority from the California Supreme Court notwithstanding (*see, e.g.*, *People v. Hawthorne,* 4 Cal. 4th 43, 75 (1992)), the trial court had a sua sponte duty to instruct on 'life without parole.'" (Pet. at 260 (internal citation edited); *see also id.* at 213-14.) Petitioner asserts that the trial court should have informed the jury that life without parole "actually means no possibility of parole." (Pet. at 261.) Petitioner relies upon

Simmons v. South Carolina, 512 U.S. 154, 168-69 (1994) for the proposition that where the State makes a showing of future dangerousness, due process requires that the jury be instructed that the alternative to a death sentence will leave the defendant ineligible for parole. (See Pet. at 260-61; Petr.'s Br. at 26-27.) Petitioner points to statements in juror declarations that the jurors voted for the death penalty to avoid future danger, believing that if Petitioner received a sentence of life without parole, he might be released in the future. (See Petr.'s Br. at 26-27.)[10]

The trial court twice instructed the jury that "[i]t is the law of this state that the penalty for a defendant found guilty of the murder of the first degree shall be death or confinement in the state prison for life *without possibility of parole*." (RT 5128, 5243 ("It is now your duty to determine which of the two penalties, death or confinement in the state prison for life *without possibility of parole*, shall be imposed") (emphasis added).) The prosecutor argued to the jury:

> [T]he defense is going to present this argument to you that life without possibility of parole is an extreme, severe penalty. *It means that the defendant will never get out of prison.* It means that the defendant will die in prison. He will die of natural causes or be executed in prison if you determine that the death penalty is appropriate.

(*Id.* at 5157 (emphasis added).) Defense counsel, in turn, repeated that the possible alternate sentence to death was "life in prison *without the possibility of parole*." (*Id.* at 5217, 5225 (emphasis added).)

B. Legal Standard and Analysis

The Supreme Court held in *Simmons* that "when a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to

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[10] Because the Court holds that the California Supreme Court did not unreasonably apply federal law in finding no further instructions needed, the Court need not reach the admissibility of the juror declarations under Federal Rule of Evidence 606(b). (*See supra* pp. 78-79 (collecting cases holding juror declarations inadmissible to show jurors' misunderstanding of instructions).)

the jury is life imprisonment without possibility of parole, due process entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel." *Kelly*, 534 U.S. at 248 (discussing *Simmons*; internal quotations and alteration omitted); *see also Shafer v. South Carolina*, 532 U.S. 36, 52-54 (2001) (same).

Although the Court went on to hold in *Shafer* and *Kelly* that defense counsel's statements to the jury in those cases failed to protect the defendants' due process rights, the California Supreme Court may have reasonably found the facts of *Shafer* and *Kelly* to be inapposite here. The trial court in *Shafer* told the jury that "life imprisonment means until the death of the defendant," *Shafer*, 532 U.S. at 52 (internal quotation omitted), but neither trial court specified that the alternative punishment was life imprisonment without the possibility of parole. In neither case did the prosecutor inform the jury that "life without possibility of parole . . . means that the defendant will never get out of prison" either, as the prosecutor did here.

Likewise, the Supreme Court emphasized in *Shafer* that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status." 532 U.S. at 48. The Supreme Court observed that "[a]t the time we decided *Simmons*, South Carolina was one of only three states – Pennsylvania and Virginia were the others – that had a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refused to inform sentencing juries of that fact." *Shafer*, 532 U.S. at 48 n.4 (internal quotation, citation, and alterations omitted). Thus, the California practice of "simply identify[ing] the jury's sentencing alternatives of death and life without parole," *Simmons*, 512 U.S. at 167 n.7 (citing Cal. Penal Code § 190.3), did not constitute a "refus[al] to inform" the jury of the impossibility of parole.

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The Court explained that:

> [d]isplacement of the longstanding practice of parole availability [in South Carolina] remains a relatively recent development, and common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole. . . . Until two years before Shafer's trial, . . . the State's law did not categorically preclude parole for capital defendants sentenced to life imprisonment.

Shafer, 532 U.S. at 52-53 (internal quotations omitted). The Court added that "[t]he jury's comprehension was hardly aided" by the trial court's response to its question about parole. *Id.* at 53. The jury asked if there was "any remote chance for someone convicted of murder to become eligible for parole." *Id.* (internal quotation and alteration omitted). The trial court responded that "'[p]arole eligibility or ineligibility is not for your consideration.' That instruction did nothing to ensure that the jury was not misled and may well have been taken to mean that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Id.* (internal citation omitted, emphasis in original). The Court stated in *Kelly*, one year later, that there was not "any reason to believe that Kelly's jury was better informed than Simmons's or Shafer's on the matter of parole eligibility." *Kelly*, 534 U.S. at 257.

At the time of Petitioner's trial, the unavailability of parole in a sentence for capital murder was much longer established in California than it had been in South Carolina. Jury selection in Petitioner's trial began on September 28, 1988 (RT 90), approximately eleven years since the California legislature established life without parole as the alternative penalty for death-eligible crimes. *See* Cal. Stats. 1977, c. 316, §§ 5 *et seq.*; *cf.* http://www.cdcr.ca.gov/capital_punishment/history_of_capital_punishment.html. Moreover, Petitioner's trial judge twice told the jury that the only available alternative to a death sentence was confinement in the state prison for "life without possibility of parole." Petitioner's trial judge did

not limit his instructions, as did the South Carolina courts, to a stated alternative of only "life imprisonment." As noted above, the prosecutor at Petitioner's trial himself told the jury that a sentence of "life without possibility of parole . . . means that the defendant will never get out of prison." Finally, unlike Shafer's jury, Petitioner's jury asked no question about whether Petitioner could be paroled and was never told that they should not consider Petitioner's "parole eligibility or ineligibility."

The California Supreme Court was not objectively unreasonable in concluding that, in light of the differences between Petitioner's trial and those of the South Carolina defendants, Petitioner suffered no due process violation from the lack of further instruction. *See Kipp*, 26 Cal. 4th at 1138. Even if "fairminded jurists could disagree" about whether the Supreme Court's decisions in *Simmons* and *Shafer* require more explicit jury instructions on a defendant's ineligibility for parole, that possibility for debate does not satisfy 28 U.S.C. § 2254(d). *Richter*, 131 S. Ct. at 786 (internal quotation omitted). Claims 22 and 28(G) are, therefore, DENIED.

XV. Claims 15 and 23: Forensic Science Services Conflict of Interest

A. Allegations and Factual Background

In Claim 23, Petitioner alleges a constitutional violation from a conflict of interest by a testifying expert witness for the prosecution, David Sugiyama. (Pet. at 215-18; Petr.'s Br. at 28-30.) In a portion of Claim 15, Petitioner alleges that the prosecution's presentation of that evidence constitutes prosecutorial misconduct. (Pet. at 181-84; Petr.'s Br. at 28-30.)

Petitioner alleges that Sugiyama was employed by the Los Angeles County Sheriff's Department at the time of the crimes at issue in 1983 and examined Frizzell's body for evidence of rape and other injuries. (Pet. at 215; *see also* CT 648-50.) In 1984, Petitioner alleges, his counsel hired Keith Inman, a criminalist with the private firm Forensic Science Services ("FSS"), to work on Petitioner's

case and to consider evidence of Frizzell's and Howard's injuries and sexual assaults. (*See* Pet. at 215-16 (alleging that Petitioner retained FSS in 1984, citing Pet. Ex. 307[11] ¶ 3); *but see* Pet. Ex. 307 ¶ 3 (stating that Petitioner retained FSS in 1985).) Petitioner alleges that in approximately 1985, FSS employed Sugiyama, and Sugiyama had access to an office at FSS, where Inman's confidential case materials were stored. (Pet. at 216.) Inman assigned Sugiyama "the task of performing the analytical work on the evidence." (Pet. Ex. 307 ¶ 4; *see also* Pet. at 216.) On June 27, 1985, the trial court approved Sugiyama's confidential consultation with the prosecution. (Pet. at 216 (citing CT 985, 1381-82).)

Petitioner argues:

> It is difficult to imagine how defense counsel could have properly cross-examined Sugiyama on his findings regarding sexual assault, given that doing so would have placed counsel in the untenable position of attacking the credibility of their own expert. Unsurprisingly, defense counsel's cross-examination of Sugiyama at Kipp's trial totaled a mere six pages. (RT 3593-99.) Although Sugiyama admitted in his preliminary hearing testimony that his examination of the Frizzell sexual assault kit was both 'cursory' and 'subjective' (CT 681), defense counsel did not in any way seek to undermine his conclusions on cross-examination before the jury. . . . Additionally, the prosecutor had a duty to not present testimony of a conflicted defense expert, or to alert defense counsel and the trial judge that he intended to present the testimony of a conflicted defense expert.

(Petr.'s Br. at 29-30 (citations added).) Petitioner also alleges that counsel's failure to discover and remedy the conflict of interest constitutes ineffective assistance. (Pet. at 216.)

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[11] Petitioner's citation to Exhibit 306 appears to be a typographical error. Exhibit 306 is the declaration of Mary Lee Harwood, Petitioner's ex-girlfriend. Exhibit 307 is the declaration of Keith Inman.

B. Legal Standard and Analysis

Petitioner's claim that FSS's conflict of interest violated his constitutional rights lacks support in clearly established federal law. The Supreme Court held in *Mickens v. Taylor* that although "circuit courts 'have applied *Sullivan* unblinkingly to all kinds of alleged attorney ethical conflicts,' invoking it in cases involving interests of former clients, interests implicating counsel's personal or financial interest, interests inherent in romantic relationships with opposing counsel, and interests implicated by counsel's future or present employment with opposing counsel," the Supreme Court's holding in *Sullivan* was limited to joint representation. *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) (quoting *Mickens*, 535 U.S. 162, 174 (2002) (internal quotation omitted)); *see Cuyler v. Sullivan*, 446 U.S. 335 (1980). Joint representation requires an attorney "representing two or more defendants who have been jointly charged or have been joined for trial." *Sullivan*, 446 U.S. at 351 (internal quotation and alterations omitted); *see also Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) ("[J]oint representation" occurs where "a single attorney . . . represent[s] codefendants").

"[A]ny extension . . . outside of the joint representation context remain[s], 'as far as the jurisprudence of the Supreme Court [is] concerned, an open question.'" *Earp*, 431 F.3d at 1184 (quoting *Mickens*, 535 U.S. at 176; internal alteration omitted); *see also Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013) (rejecting habeas petitioner's claim based on mitigation expert's conflict of interest, because "[t]he right to conflict-free representation stems from the Sixth Amendment's guarantee of effective assistance of counsel. Since there is no constitutional right to a mitigation specialist, much less an effective one, there is no constitutional right to a specialist free of conflicts" (internal citations omitted)); *cf. Henslee v. Stewart*, 172 Fed. Appx. 759 (9th Cir. 2006) (affirming denial of habeas relief because "(1) there is no clearly established Supreme Court law establishing a due process right to a medical expert free from conflicts of interest;

and (2) no prejudice from any alleged conflict of interest is shown") (unpublished).

Petitioner attempts to distinguish this authority in his Traverse as follows:

> Respondent argues that Kipp cannot show a violation of any controlling Supreme Court authority on his conflict claim. (Answer at 115.) However, courts recognize that imputed conflicts and conflicts involving experts can amount to an actual conflict under *Sullivan*, and that evidentiary hearings are appropriate on such claims. *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003); *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992).

(Petr.'s Traverse, Mar. 12, 2007, at 44 (internal citations edited).) Petitioner's citations to *Rodrigues* and *Hendricks* are unavailing. Neither case discusses a conflict involving an expert witness. *Rodrigues* affirmed the district court's dismissal of a habeas petition because petitioner failed to allege specific facts to entitle him to relief under *Sullivan*. 347 F.3d at 820. The circuit court held that petitioner's defense was not adversely affected by his former prosecutor's affiliation with defense counsel's firm, and that counsel did not forgo investigating or presenting defense evidence because of his relationship with other clients. *Id.* at 825-28. In *Hendricks*, the circuit court remanded for an evidentiary hearing on petitioner's claims that counsel failed to investigate his background to present mental impairment evidence at the guilt and penalty phases of trial. 974 F.2d at 1109-10. No conflict of interest on the part of defense counsel or an expert witness was at issue in the case. Petitioner fails to show clearly established federal law in support of his claim that a conflict of interest by Sugiyama violated his constitutional rights.

The California Supreme Court may have also reasonably denied Petitioner's claims, including those of ineffective assistance and prosecutorial misconduct, for lack of prejudice. *See Williams*, 384 F.3d at 584-85 ("When the government

deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant"); *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 71-73 (1st Cir. 2009) (rejecting habeas claim based upon trial counsel's concurrent representation of prosecution's medical examiner, because petitioner failed to show that the conflict "'actually affected the adequacy of his representation'" (quoting *Mickens*, 535 U.S. at 171)). The Ninth Circuit explained in *Williams* that "[s]ubstantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial." 384 F.3d at 585 (rejecting petitioner's claim because he "does not argue, and the record does not show, that the prosecution used any confidential information obtained from the monitoring or interception to achieve an unfair advantage at trial").

Here, Petitioner alleges only that defense counsel's cross-examination of Sugiyama was attenuated. He makes no specific allegations of prejudice to show what facts trial counsel could have presented on cross-examination had there been no alleged conflict, apart from Sugiyama's statements that his examination was cursory and subjective. Petitioner likewise does not specifically allege any confidential evidence the prosecution gained from Sugiyama. The California Supreme Court's rejection of Petitioner's claims for lack of prejudice is not an unreasonable application of any clearly established federal law. Accordingly, Claim 23 and the related portion of Claim 15 are DENIED.

XVI. Claim 26: Constitutionality of California's Death-Eligibility Process

In Claim 26, Petitioner alleges that "California's process to determine who is eligible for the death penalty violates the Constitution." (Pet. at 225.) Petitioner contends that the process is unconstitutional because it makes "virtually

every murder potentially first-degree murder, and every defendant found guilty of first-degree murder eligible for the death penalty." (*Id.* at 225-26.) Specifically, Petitioner alleges that (1) the definition of first degree murder is overbroad and overlaps substantially with the death-eligibility special circumstances (*id.* at 227-30); (2) the special circumstances are "vague and overbroad" and fail to narrow adequately the class of persons eligible for the death penalty (*id.* at 230-33); and (3) the narrowing process is left to unconstitutional prosecutorial discretion. (*Id.* at 233.)

First, Petitioner argues that "both the sweeping nature of [California Penal Code] § 189," defining first degree murder, "and the substantial overlap between the special circumstances listed in § 190.2 and the factors listed in § 189 make *most* murders first-degree murders and *most* murderers death eligible." (*Id.* at 227 (emphasis added).) The Ninth Circuit has rejected the argument that classifications are overbroad if they make "'nearly'" all or "'virtually'" all murders first degree murder and subject to a special circumstance, however. *Morales v. Woodford*, 388 F.3d 1159, 1175 (2003) (holding that California's "lying-in-wait circumstance is not overly broad such that it 'applies to every defendant convicted of a murder,' . . . [t]o render it inadequate under *Tuilaepa*" (quoting *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); internal alteration omitted)). In addition, the Supreme Court in *Tuilaepa* "rejected a broad challenge to the California scheme" as impermissibly vague, *Morales*, 388 F.3d at 1174, concluding that "none of the . . . factors [at issue] is defined in terms that violate the Constitution." *Tuilaepa*, 512 U.S. at 976. Petitioner here raises no vagueness challenge to any specific special circumstance. His general argument is foreclosed by *Morales* and *Tuilaepa*.

Second, Petitioner contends that California's special circumstances fail to narrow adequately the class of persons eligible for the death penalty. (Pet. at 230-33). In particular, Petitioner argues that the felony-murder special circumstance fails to narrow the group of first degree murders adequately, because "[a]s

construed by the California Supreme Court in *People v. Anderson*, 43 Cal. 3d 1104 [(1987)], the felony-murder special circumstance under which Petitioner was made eligible for death, like the felony-murder rule itself, does not contain an intent element for the actual killer." (Pet. at 231.) *Anderson* overruled the California Supreme Court's earlier interpretation of a state statute, in December 1983, to require such an intent. *See Carlos v. Superior Court*, 35 Cal. 3d 131 (1983). Petitioner committed the rape, robbery, and murder of Frizzell in September 1983. The Ninth Circuit has held that "retroactive application of *Anderson* does not offend federal rights where, as here, the conviction occurred before *Carlos* was decided." *Hamilton v. Vasquez*, 17 F.3d 1149, 1164 (9th Cir. 1994); *see also Hunt v. Vasquez*, 889 F.2d 878, 880 (9th Cir. 1990) (denying habeas relief where petitioner sought "retroactive application of a state decision [*Carlos*] that does not implicate his rights under federal law"). Thus, no intent element for the actual killer is constitutionally required to narrow the class adequately. Regarding Petitioner's more general claim that California's special circumstances fail to narrow adequately the class of persons eligible for the death penalty (Pet. at 230 (citing *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 199 (1976))), the claim lacks support in clearly established federal law. In *Bradway v. Cate*, the Ninth Circuit rejected a petitioner's challenge to a special circumstance in the operative 1978 California death penalty statute and observed that the Supreme Court has not decided any "case that could reasonably support [petitioner's] due process claim . . . based on a failure to narrow the class . . . ." 588 F.3d 990, 992 (9th Cir. 2009).

Third, Petitioner's contention that capital prosecution in California leaves too wide a range of prosecutorial discretion is contrary to federal law. The argument that a "capital punishment statute is unconstitutional because it vests unbridled discretion in the prosecutor to decide when to seek the death penalty . . . has been explicitly rejected by the Supreme Court." *Campbell v. Kincheloe*, 829

F.2d 1453, 1465 (9th Cir. 1987) (citing *Gregg*, 428 U.S. at 199; *Proffitt v. Florida*, 428 U.S. 242, 254 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976)).

Claim 26 is, therefore, DENIED.

XVII. Claim 31: Incompetence to Be Executed

In Claim 31, Petitioner alleges that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pet. at 271-72.) Petitioner acknowledges that this claim is "not currently ripe, because there is no established date for Petitioner's execution." (*Id.* at 272.) Petitioner explains that the "claim is presented in conformance with the dictates of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), in order to preserve this claim for review when ripe." (*Id.* (internal citation edited).) The Supreme Court held in *Martinez-Villareal* that where a petitioner's "*Ford* claim was dismissed as premature . . . because his execution was not imminent and therefore his competency to be executed could not be determined at that time," once execution is imminent, the claim "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." 523 U.S. at 644-45.

Because Petitioner's execution is not imminent at this time, Claim 31 is DISMISSED WITHOUT PREJUDICE.

XVIII. Claims 34, 35, and 36: International Law and Constitutionality of Lethal Injection and Execution Following Lengthy Confinement

A. Allegations

In Claim 34, Petitioner alleges that "international customary law and the obligations of the United States under that law" prohibit the imposition of the death penalty on "mentally disordered individuals." (Pet. at 285.) He alleges that he is mentally disordered and that his execution would violate the "accepted norm . . . [of] 111 nations;" the standards of the United Nations Economic and Social Council, endorsed by the United Nations General Assembly; the position of the United Nations Commission on Human Rights in the findings of the United

Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions; Protocol No. 6 and Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States. (*Id.* at 288-92.)

In Claim 35, Petitioner alleges that "the methods for execution in California – lethal gas and lethal injection – and the procedures used to administer lethal injection" violate the United States Constitution along with international law, including Article 7 of the International Covenant on Civil and Political Rights (ICCPR). (*Id.* at 293.) Petitioner acknowledges that "[l]ethal injection is now recognized as the only method of execution currently authorized in California." (*Id.* at 294.)

In Claim 36, Petitioner alleges that execution following a lengthy confinement under sentence of death violates the United States Constitution and international law. (*Id.* at 301-08.) Petitioner argues that "[t]he international community is increasingly recognizing that . . . prolonged confinement under [judgment of death] is cruel and degrading in violation of international human rights law," including the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. (*Id.* at 302-03.)

B. Legal Standards and Analysis

Petitioner's claims lack support in clearly established federal law as determined by the Supreme Court. Clearly established federal law does not hold the death penalty, imposed upon mentally disordered persons or otherwise, to violate enforceable rights under international law. *Cf. Sosa v. Alverez-Machain*, 542 U.S. 692, 734-35 (2004) ("[T]he [Universal] Declaration does not of its own force impose obligations as a matter of international law. . . . And, . . . the United States ratified the Covenant [the ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal

courts"); *Nevius v. McDaniel*, 218 F.3d 940 (9th Cir. 2000) (denying certificate of appealability because state court did not contradict or unreasonably apply federal law in denying petitioner's claim that repeated scheduling of execution constituted cruel and unusual punishment in violation of "the Eighth Amendment and several instruments of international law, including the Universal Declaration of Human Rights, and the Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment"); *see also Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (rejecting as "wholly meritless" state habeas petitioner's contentions that capital punishment violates the American Declaration, the ICCPR, or customary international law); *Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001) (holding that execution under federal death sentence would not violate the American Declaration because it "is merely an aspirational document that, in itself, creates no directly enforceable rights"). Likewise, "'[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment.'" *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (quoting *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)). Accordingly, Petitioner fails to show that he is in custody in violation of the United States Constitution or laws or treaties of the United States to be entitled to habeas relief. *See* 28 U.S.C. § 2254(a). Claim 34, Claim 36, and the portion of Claim 35 alleging a violation of international law are DENIED.

The portion of Claim 35 alleging that California's lethal injection procedure violates the United States Constitution is DISMISSED WITHOUT PREJUDICE. *See Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011) (holding that challenge to California's lethal injection protocol is "unripe" until a "new protocol [is] in place" and should be dismissed).

XIX. Order

For the reasons set forth above, Claims 1, 3, 14, 18, 19, 20, 21, 22, 23, 26, 28(G), 34, and 36, the portion of Claim 15 regarding Forensic Science Services,

and the portion of Claim 35 alleging a violation of international law are denied. Claim 31 and the portion of Claim 35 alleging that California's lethal injection procedure violates the United States Constitution are dismissed without prejudice. Petitioner's Motion for Evidentiary Hearing is denied.

The parties shall proceed to brief the merits of Petitioner's remaining claims for relief under 28 U.S.C. § 2254(d). Petitioner shall file his opening brief no later than sixty (60) days from the date of this Order. Respondent shall file his opposition brief no later than sixty (60) days from the filing of Petitioner's opening brief. Petitioner shall file any reply brief no later than thirty (30) days from the filing of Respondent's opposition brief.

IT IS SO ORDERED.

Dated: April 30, 2014.

PHILIP S. GUTIERREZ
United States District Judge

CV03-08571 JVS Lodg. No. 24

S129115

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MARTIN JAMES KIPP on Habeas Corpus

The petition for writ of habeas corpus filed on November 5, 2004, is denied.

Insofar as it asserts that petitioner is incompetent for execution, claim G is dismissed as premature. (See *People v. Lawley* (2002) 27 Cal.4th 102, 169, fn. 25; *People v. Kelly* (1992) 1 Cal.4th 495, 545, fn. 11.) With that one exception, each claim is denied on the merits for failure to state a prima facie case for relief.

Except insofar as they allege ineffective assistance of prior appellate or habeas corpus counsel, claims A through E and J are also denied as repetitive of claims made in a previous petition for writ of habeas corpus. (*In re Miller* (1941) 17 Cal.2d 734, 735.)

Except insofar as they allege ineffective assistance of trial or appellate counsel, claims A, B, C (except insofar as it alleges prosecutorial misconduct in presenting the testimony of David Sugiyama), D, and E are barred because, being based entirely on facts in the appellate record, they could have been, but were not, raised on appeal. (See *In re Harris, supra,* 5 Cal.4th at p. 825, fn. 3; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claim B, alleging insufficiency of the evidence, is not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Except insofar as they allege ineffective assistance of prior habeas corpus counsel, Claims A through E and J are denied as untimely. (*In re Robbins* (1998) 18 Cal.4th 770, 780-781; *In re Clark* (1993) 5 Cal.4th 750, 763-799.)

GEORGE

Chief Justice

KIPP v. WOODFORD
CV 03-08571-GLT
LODGMENT 13

S093369

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MARTIN JAMES KIPP on Habeas Corpus

The petition for writ of habeas corpus filed on December 4, 2000, is denied.

Each claim except claim XV is denied on the merits for failure to state a prima facie case for relief.

Claim XV is dismissed as premature. (See *People v. Kelly* (1992) 1 Cal.4th 495, 545, fn. 11.)

Except insofar as they allege ineffective assistance of counsel, claims IV and XII are barred because they were raised and rejected on appeal. (See *In re Harris* (1993) 5 Cal.4th 813, 825; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Except insofar as they allege ineffective assistance of counsel, claims III, V, VIII (except insofar as it alleges misconduct in presenting the testimony of David Sugiyama), IX, and XVI are barred because, being based entirely on facts in the appellate record, they could have been, but were not, raised on appeal. (See *In re Harris, supra,* 5 Cal.4th at p. 825, fn. 3; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claims IV and V, alleging insufficiency of the evidence, are not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Agreeing that claim XV should be dismissed as premature, Justice Brown would deny all of the other claims solely on the merits.

Chief Justice

[No. S009169. Nov. 1, 2001.]

THE PEOPLE, Plaintiff and Respondent, v. MARTIN JAMES KIPP, Defendant and Appellant.

SUMMARY

A jury convicted defendant of one count of murder in the first degree (Pen. Code, § 187), with the special circumstance of murder in the commission of rape (Pen. Code, § 190.2, subd. (a)(17)(C)), and one count each of forcible rape (Pen. Code, § 261, subd. (a)(2)) and robbery (Pen. Code, § 211). The jury also returned a penalty verdict of death for the first degree murder. (Superior Court of Los Angeles County, No. A028286, Michael G. Nott, Judge.)

The Supreme Court affirmed. The court held that the trial court did not abuse its discretion in admitting into evidence a letter defendant sent his wife from jail in which he admitted murdering and raping the victim, evidence that the victim was in the geographic location to attend college, and evidence of defendant's plan to escape from jail. The court also held that there was sufficient evidence to support the conviction for robbery. The court held that the prosecutor's closing argument appeal to sympathy toward the victim was improper, but did not require reversal of the judgment. The court further held that the trial court did not err in instructing the jury on felony murder, even though the indictment only charged murder with malice.

As to penalty phase issues, the court held that the trial court did not abuse its discretion in admitting into evidence two letters defendant sent his wife from jail—one threatening women deputies and district attorneys and the other admitting to murdering and raping the victim. It held that the trial court did not abuse its discretion in admitting evidence that defendant threatened to kill a sheriff's sergeant who assisted in subduing him after his attempted escape from the county jail. The court also held that defendant's references to Satan were admissible as rebuttal evidence. The court also held that the trial court did not abuse its discretion in admitting a photograph of the body of defendant's previous murder victim. The court held the appellate review process for this case was not improper. The court finally held that

political influences did not render the appellate review process unconstitutional. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, Brown, JJ., and Kremer, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1d) Homicide § 41—Evidence—Admissibility—Confessions and Admissions—Defendant's Letter to His Wife Admitting Murder and Rape.—In the guilt phase of a capital homicide prosecution, the trial court did not abuse its discretion in admitting into evidence a letter defendant sent his wife from jail in which he admitted murdering and raping the victim. Defendant's uncoerced admission had substantial probative value and was not unduly prejudicial. The probative value was not diminished by the timing of the admission, coming about three weeks after a jury had returned a penalty verdict of death against defendant for the murder of a different victim and three days before the sentencing hearing for that crime. Although defendant may have been angry at that time, this did not explain why this emotion would have caused him to falsely admit culpability for crimes he had not committed. Also, admissions in the letter that he had sodomized both victims, for which no evidence was presented, did not render the letter unduly prejudicial, since even if defendant did not sodomize either victim, his false statements to the contrary could have been exaggeration or embellishment without substantially detracting from defendant's admission that he, and not someone else, sexually assaulted and killed the two victims. Furthermore, the prosecution offered to redact racial epithets and references to Satan from the letter, but defense counsel insisted on admitting the entire letter with few deletions.

[See West Key Number System, Criminal Law ⚿ 530.]

(2) Criminal Law § 657—Appellate Review—Standard of Review—Trial Court's Ruling Under Evid. Code, § 352.—An appellate court applies the deferential abuse of discretion standard when reviewing a trial court's ruling under Evid. Code, § 352 (evidence may be excluded if prejudicial effect outweighs probative value).

(3) Criminal Law § 288—Evidence—Admissibility—Trial Court's Discretion.—Under Evid. Code, § 352, a trial court has discretion to

*Presiding Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

exclude evidence if the prejudicial effect outweighs the probative value. For this purpose, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that uniquely tends to evoke an emotional bias against a defendant without regard to its relevance on material issues.

(4) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof.**—To establish a violation of the constitutional right to effective assistance of counsel, a criminal defendant must show both that his or her counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. If a defendant fails to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient.

(5a-5d) **Rape § 7.2—Evidence—Admissibility—Reason Victim Was in Geographic Area.**—In a prosecution for capital murder and rape, the trial court did not abuse its discretion in admitting evidence that the victim was in the geographic location to attend college. In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible. In determining whether this victim had consented to intercourse with defendant, with whom she had no prior acquaintance, the jury might have been assisted by the information that she was not traveling on a holiday or vacation, but had arrived to begin her college education. This information also prevented any speculation by the jury that a young woman alone in a motel room might be a prostitute who consented to intercourse with defendant on a promise of compensation. Although the probative value of the evidence was not great, it did not lack any tendency in reason to prove that the victim did not consent to sexual intercourse with defendant. Nor did the prejudicial effect of the evidence unduly outweigh its probative value. The testimony about the victim's purpose in traveling to the area to attend college was brief and apparently without any display of emotion. The trial court could have reasonably concluded, in the exercise of its broad discretion, that this testimony would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt.

(6a, 6b) **Criminal Law § 657—Appellate Review—Standard of Review—Relevance.**—An appellate court applies the deferential abuse of

discretion standard when reviewing a trial court's ruling on a relevance objection. Evidence is relevant if it has any tendency in reason to prove or disprove a disputed fact at issue.

(7) **Criminal Law § 565—Appellate Review—Preserving Objections—Evidence—Prejudicial Matter.**—In a prosecution for capital homicide and rape, defendant waived any objection, on the basis of Evid. Code, § 352 (evidence may be excluded if prejudicial effect outweighs probative value), to the trial court's admission of evidence that the victim was in the geographic location to attend college. Although defense counsel made two isolated references to the evidence being "inflammatory," counsel neither mentioned § 352 nor argued that the probative value of the evidence was substantially outweighed by a risk of undue prejudice. Instead, counsel argued consistently and exclusively that the evidence was entirely irrelevant and immaterial. This was insufficient to preserve a claim of error under § 352.

(8) **Homicide § 43—Evidence—Admissibility—Conduct and Statements of Defendant—Plan to Escape from Jail.**—In the guilt phase of a capital prosecution, the trial court did not abuse its discretion in allowing evidence of defendant's plan to escape from county jail before trial, but excluding evidence of defendant's accompanying threats against jail personnel. Ordinarily, an attempt or plan to escape from jail pending trial is relevant to establish consciousness of guilt. Although defendant was under a death judgment in a separate capital prosecution when he attempted to escape, which diminished the probative value of the evidence of an escape as to this trial, the probative value was not so diminished as to lack any practical significance. Defendant was not facing imminent execution, given the lengthy review process for death judgments. In this situation, defendant's decision to attempt an escape might well have been significantly influenced by consciousness that he was guilty of this charged capital murder and would likely incur a second death judgment. Balanced against this probative value, the risk of undue prejudice was slight, as there was no overt violence in the escape attempt. Also, given the strong evidence of defendant's guilt, it was not reasonably possible that exclusion of the evidence of the escape would have yielded a different result. Further, evidence that the son of defendant's wife was to participate in the planned escape was not unduly prejudicial, since there was nothing to indicate that the son was not an adult.

(9a, 9b) **Robbery § 6—Evidence—Sufficiency—Robbery of Murder Victim: Homicide § 66—Evidence—Sufficiency.**—In a prosecution

for capital murder, rape, and robbery, there was sufficient evidence to support a conviction for robbery. To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. When presented with evidence that a defendant killed another and took substantial property from the victim at the time of the killing, a jury ordinarily may reasonably infer that the defendant killed for the purpose of robbery. Also, a jury may reasonably draw this inference when the evidence shows that the defendant also raped or attempted to rape the victim at the time of the killing; in that situation, a jury may infer that the defendant killed for purposes of both rape and robbery. In this case, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to steal from the victim when he strangled her to death. There was evidence that when defendant strangled the victim, he took her personal stereo and her cassette player. From this evidence, the jury could reasonably infer that at least one reason defendant killed the victim was to accomplish the taking of these items. The fact that some of the victim's cash and other property was found in her motel room did not negate the inference. The undisturbed condition of the room indicated that the victim was killed elsewhere, and defendant did not search the room after returning the body. Further, even if the evidence was insufficient to support a robbery conviction, the first degree murder conviction was valid under the felony-murder theory, since the jury found that the murder was committed during a rape.

(10) **Criminal Law § 621—Appellate Review—Sufficiency of Evidence.**—To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.

(11a, 11b) **Criminal Law § 451.2—Argument of Counsel—Closing Argument—Capital Case—Appeal to Sympathy.**—In the guilt phase of a capital homicide prosecution, the prosecutor committed misconduct in the closing argument when, in discussing the killing of a human being, the prosecutor stated, "If you would, think for a moment about what it means. A living, breathing human being had all of that taken away." An appeal for sympathy for the victim is out of place during an objective determination of guilt. However, the misconduct was not reversible. The prosecutor's comment was brief, mild, and not repeated. It did not add cumulative effect to other errors in a crucial area of the case. The evidence that defendant raped and killed the victim

was very strong and generally uncontradicted. It was not reasonably probable that the jury would have reached a result more favorable to defendant absent the prosecutor's misconduct. Furthermore, the prosecutor's comment did not infect the trial with such unfairness as to make defendant's conviction a denial of due process or to render the verdict unreliable.

(12) **Criminal Law § 559—Appellate Review—Preserving Objections —Prosecutorial Misconduct.**—To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition. Otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.

(13) **Homicide § 85—Trial—Instructions—Felony Murder—Where Indictment Charges Murder with Malice.**—In a capital prosecution for first degree murder, rape, and robbery, the trial court did not err in instructing the jury on felony murder, even though the indictment only charged murder with malice. A pleading charging murder in these terms adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory. The two forms of murder have different elements, but there is but a single statutory offense of murder. Felony murder and premeditated murder are not distinct crimes. Although an information charging murder without elaboration may not always provide notice sufficient to afford the due process of law guaranteed by U.S. Const., 14th Amend., in this case, defendant had adequate notice. The information charged defendant with rape and robbery, as well as murder, and it alleged the special circumstances of murder in the commission of rape and robbery. The prosecution introduced evidence supporting each crime charged and each special circumstance allegation. The defense made no request for a continuance on the basis of inadequate notice, nor did defendant explain how the defense was significantly affected by the addition of the felony-murder rape theory. In any event, defendant waived any claim of insufficient notice by not moving to reopen when he learned that the court would instruct the jury on felony murder.

(14) **Criminal Law § 531.4—Penalty Phase of Capital Prosecution—Evidence—Aggravating Evidence—Defendant's Letter to Spouse.** —In the penalty phase of a capital prosecution, the trial court did not abuse its discretion in admitting into evidence two letters defendant sent his wife from jail—one threatening women deputies and district attorneys and the other admitting to murdering and raping the victim.

The first letter was relevant to rebut defense evidence that defendant committed this capital murder and a previous murder during a relatively brief period of aberrant behavior, that he had since expressed regret and shame for the murders, and that he was unlikely to commit additional offenses if imprisoned for life. As with the second letter, defendant failed to show that this probative value was greatly diminished by the timing of the admission, coming a few weeks after a jury had returned a penalty verdict of death against defendant for the first murder. Although defendant may have been angry, frustrated, and discouraged at that time, defendant did not plausibly explain why the jury could not have properly considered these emotions in deciding the appropriate weight to give the evidence.

(15) **Criminal Law § 531.5—Penalty Phase of Capital Prosecution—Evidence—Aggravating Evidence—Violent Conduct—Threats to Officer.**—In the penalty phase of a capital prosecution, the trial court did not abuse its discretion in admitting evidence that defendant threatened to kill a sheriff's sergeant who assisted in subduing him after his attempted escape from the county jail. Under Pen. Code, § 190.3, factor (b), at the penalty phase, the jury is permitted to consider 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. As used in this factor, the term "criminal activity" includes only conduct that violates a penal statute. Even if defendant's threat to kill the sheriff's sergeant, by itself, did not violate a penal statute at that time, the threat was admissible as part of the attempted escape, which did violate a penal statute. Under § 190.3, factor (b), the prosecution may introduce evidence to show not only the conduct establishing the criminal violation, but also evidence of any relevant surrounding circumstances. In particular, threats made while in custody immediately after an otherwise admissible violent criminal incident are themselves admissible under § 190.3, factor (b). In this case, defendant's threats against the sheriff's sergeant were relevant to an understanding of the violent potential of defendant's attempted escape.

(16) **Criminal Law § 531.4—Penalty Phase of Capital Prosecution—Evidence—Aggravating Evidence—Defendant's References to Satan.**—In the penalty phase of a capital prosecution, the trial court did not err in denying defendant's motion to exclude evidence of defendant's references to Satan. The evidence was not admissible in aggravation under the catchall Pen. Code, § 190.3, factor (k), since evidence allowed under that factor can only be mitigating. However, once a defendant puts his or her general character in issue at the penalty phase,

the prosecutor may rebut with evidence or argument suggesting a more balanced picture of his or her personality. In this case, defendant intended to place his general character in issue, and in this context the trial court's ruling properly permitted the prosecution to respond with rebuttal evidence about defendant's views on Satan. A witness testified that defendant swore "to his savior, Satan," that he would kill a sheriff's sergeant who subdued him during an attempt to escape. This evidence was admissible as part of the circumstances of the escape attempt and threats. Also, in a letter to his wife, defendant included two references to Satan, including a statement that Satan had helped rejuvanate him. A favorable view of the biblical figure of Satan is generally understood as a symbolic rejection of the values of love and compassion, and as indicating acceptance of the contrary values of hatred and violence, with a consequent rejection of all moral restrictions on crimes such as murder and rape. This was inconsistent with defendant's claimed remorse and shame for the murders of his two victims, and thus the evidence was properly admitted in rebuttal.

(17) **Criminal Law § 521.5—Penalty Phase of Capital Prosecution—Evidence—Aggravating Evidence—Other Crimes—Photograph of Other Murder Victim.**—In the penalty phase of a capital prosecution, the trial court did not abuse its discretion in admitting a photograph of the body of defendant's previous murder victim as police officers found it in her car. The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. On appeal, the reviewing court applies the deferential abuse of discretion standard when reviewing the trial court's ruling. In this case, by showing the position of the victim's clothing on her body, some of her injuries, and the position of her body as it was folded into the small hatchback area behind the rear seat of the car, the photograph was relevant to assist the jury in assessing the aggravating force of the murder and rape or attempted rape of this victim. Although the photograph was somewhat gruesome, as murder victim photographs almost invariably are, it was not shocking or inflammatory. Also, the trial court carefully weighed the potential prejudice and excluded another photograph that was more gruesome in its depiction of the victim's face.

[See 2 Witkin, Cal. Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 10.]

(18) **Criminal Law § 523.2—Penalty Phase of Capital Prosecution—Instructions—Weighing Process.**—In the penalty phase of a capital

homicide prosecution, the trial court's jury instructions were not erroneous. The trial court instructed the jury, "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life without parole." When the jury is instructed in this way, the trial court need not also instruct the jury to return a verdict of life without parole if the aggravating circumstances do not outweigh the mitigating circumstances. Further, the jury instructions were not defective in failing to state that the jury could return a verdict of life without parole even if the circumstances in aggravation outweighed those in mitigation. Although such an instruction is not required, the trial court gave a special instruction stating, "Each juror is free to assign whatever moral or sympathetic value he or she deems appropriate to each and all the various factors before him. You are free to reject death as inappropriate under the circumstances, even if you believe that the aggravating evidence predominates over the mitigating."

(19) **Homicide § 101.2—Punishment—Death Penalty—Validity—Appellate Review Process.**—The appeal process of a capital defendant's death judgment was not constitutionally defective. The process is not constitutionally defective in failing to provide for comparative or intercase proportionality review, and although a death sentence is subject to intracase proportionality review, defendant made no claim that his sentence was grossly disproportionate to his moral culpability for the crimes he committed. Nor was defendant subject to an unconstitutional conflict of interest by the fact that the attorney appointed to represent him on appeal also was appointed to investigate potential habeas corpus claims. Although habeas corpus counsel might potentially be burdened by a conflict of interest if placed in the position of urging counsel's own incompetence as appellate counsel, defendant failed to show that this dual appointment could in any way interfere with counsel's effective representation on the appeal. Moreover, a defendant has no right under the federal Constitution to the effective assistance of counsel in a state habeas corpus proceeding, although the alleged deficiencies of habeas corpus counsel, whether the result of a conflict of interest or some other cause, may be considered when determining the applicability of procedural bars. Thus, the appointment of a single attorney to represent defendant on direct appeal and on any petition for writ of habeas corpus did not violate the state or federal Constitution.

(20) **Homicide § 101.2—Punishment—Death Penalty—Validity—Appellate Review Process—Political Influences on Justices.**—Political influences do not render the appellate review process of death penalty

judgments unconstitutional. Under the due process clause of the federal Constitution, a defendant is entitled to an impartial trial judge, and to have his or her automatic appeal decided by appellate justices who are impartial. A defendant is not, however, entitled to have the appeal decided by justices who have never formed or expressed opinions or thoughts on general topics such as the propriety of the death penalty. Bias in the sense of crystallized points of view about issues of law or policy is almost universally deemed no ground for disqualification. Further, even if there is some relationship between a justice's affirmance of death sentences and his or her retention in office, a defendant must demonstrate that a justice will affirm every death sentence or any particular death sentence, or at least the defendant's own sentence. Thus, members of the California Supreme Court do not have a disabling conflict of interest in determining this type of appeal. Even if such a conflict of interest existed, it would apply equally to all California judges and, under the common law rule of necessity, the justices of this court would not be disqualified.

COUNSEL

Ross Thomas and John Ward, under appointments by the Supreme Court, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood, Janelle M. Boustany and Robert B. Shaw, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KENNARD, J.—Defendant Martin James Kipp appeals from a judgment of death upon his conviction by jury verdict of one count of murder in the first degree (Pen. Code, § 187),[1] with the special circumstance of murder in the commission of rape (§ 190.2, subd. (a)(17)(C)), and one count each of forcible rape (§ 261, subd. (a)(2)) and robbery (§ 211). The jury that returned these verdicts as to guilt and special circumstance also returned a penalty verdict of death for the offense of first degree murder. The trial court denied the automatic motion to modify penalty (§ 190.4, subd. (e)) and sentenced defendant to death.

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

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).) We will affirm the judgment in its entirety.

FACTS AND PROCEEDINGS

This court has affirmed a judgment of death against defendant for the murder of Antaya Yvette Howard in Orange County in December 1983. (*People v. Kipp* (1998) 18 Cal.4th 349 [75 Cal.Rptr.2d 716, 956 P.2d 1169].) In the trial of that case, the prosecution introduced evidence that defendant had raped and murdered Tiffany Frizzell in Los Angeles County in September 1983. (*Id.* at pp. 360-361, 369-373.) In this case, we consider the separate and later death judgment against defendant for the Frizzell murder.

A. *Prosecution's Guilt Phase Case-in-Chief*

On Thursday, September 15, 1983, Tiffany Frizzell, age 18 years, left her home in Indianola, Washington, and traveled to Long Beach, California, to attend Brooks College. Because the dormitories at Brooks College did not open until Saturday, September 17, she took a room near the college at the Ramada Inn on Pacific Coast Highway in Long Beach.

On the morning of September 17, 1983, the housekeeping staff at the Ramada Inn discovered Tiffany Frizzell's lifeless body face up on the bed in her room. The bed was neatly made, and the body was on top of the sheets and blanket, but under the bedspread. An article of clothing described as a sunsuit or jumpsuit covered her face under the bedspread. She was wearing a blouse without a bra, and she was naked from the waist down. Around her neck was a cloth belt pulled very tight. There were no signs of forced entry into the room, and no indication that a struggle had taken place there. Frizzell's purse, driver's license, and some $130 in cash were found in a dresser in the room. A small hook, evidently from her missing bra, was found embedded in the skin of her back. The fingernail on the middle finger of her left hand was broken. A damp bathing suit was hanging in the bathroom. Defendant's fingerprint was found on the telephone in the room.

A criminalist employed by the Los Angles County Sheriff used a standard sexual assault kit to obtain evidence from Frizzell's body. Examination and analysis of the materials obtained in this way revealed the presence of semen and sperm in Frizzell's vagina and on her external genital area, but not in her mouth or rectal area.

A deputy medical examiner employed by the Los Angeles County Coroner performed an autopsy of Frizzell's body. When he removed the belt from

her neck, he found a deep ligature mark underneath. Scratches near this ligature mark were consistent with fingernails. Petechial hemorrhages in the eyes and scalp were consistent with strangulation. There was a bruise on the abdomen, four and one-half inches to the left of the navel, a bruise on the outside of the front of the left thigh, a bruise on the top of the left shoulder, and a small abrasion on the back of the left hand. These injuries all occurred before death, but the absence of healing indicated they were fresh, within 48 hours of death. There was no trauma to the external vaginal or anal areas, but there was redness and erosion of the cervix consistent with sexual intercourse. The cause of death was asphyxiation due to ligature strangulation.

On Monday, September 19, 1983, a gardener working at a residence in Long Beach found a canvas bag in some bushes next to an alley. He gave the bag to the woman who owned the residence, and she gave it to the police. The residence where the bag was found was a half-mile from the Ramada Inn where Frizzell's body was found. The bag contained a camera, a purse, cosmetics, a pair of shorts, a terry cloth robe, a washcloth, four socks, a bra that was torn and missing a fastener, a newspaper dated September 16, 1983, a magazine, a map of the City of Long Beach, about $10 in cash, an apparently used tampon, and a book with Tiffany Frizzell's name written inside the cover. At trial, Tiffany Frizzell's mother identified the handwriting and signature in the book as Tiffany's, and she identified the camera, the shorts, the bra, and the purse as items belonging to Tiffany. Tiffany's fingerprints were found on the book and the magazine. Defendant's fingerprints were found on the book.

On October 18, 1983, defendant sold a personal stereo and a cassette player to a secondhand goods dealer in Westminster for $70. At trial, Tiffany Frizzell's mother identified these two articles as property that had belonged to Tiffany.

The prosecution introduced in evidence a 16-page letter that defendant wrote and sent to his wife, Linda Anne Kipp, while both were in custody at the Orange County jail. The letter was found in an envelope postmarked September 15, 1987. In this letter (hereafter September 15 letter), defendant admitted he had "raped" and "killed" Tiffany Frizzell.

To further demonstrate consciousness of guilt, the prosecution introduced evidence that while he was in custody for the murder of Tiffany Frizzell, and before he was tried for that offense, defendant made two attempts to escape, first from the Orange County jail and then from the Los Angeles County jail. This evidence revealed the following facts.

On April 15, 1987, Tom Giffin, an investigator for the Orange County Sheriff, met Linda Anne Kipp, defendant's wife, at a restaurant. Giffin was

working undercover, posing as a narcotics dealer. During that meeting and other meetings and telephone conversations over the next two days, Linda Kipp asked Giffin to assist her in helping defendant escape from the Orange County jail. Giffin pretended to agree. On April 16, defendant discussed the escape plan with Giffin during a telephone conversation. Defendant agreed to pay Giffin $1,000 for his help, with $500 in advance and the rest after the escape. As defendant described it to Giffin, the plan called for Giffin to accompany Linda Kipp's son to the jail. From a public lobby, they would enter a public restroom. In the restroom, Giffin would remove the ceiling grate covering the air conditioning duct and assist Linda Kipp's son to climb into the duct. The son would then somehow make his way to defendant through the ducts and guide him back to the public restroom. Giffin would wait in the restroom until Linda Kipp's son returned with defendant. The three of them—defendant, Giffin, and Linda Kipp's son—would then leave the restroom and walk out of the jail. On April 17, Linda Kipp gave Giffin $500 in cash. The next day, Linda Kipp was arrested for her role in the planned escape.

On January 1, 1988, around 11:30 p.m., a guard at the Los Angeles County jail heard a loud noise from the vicinity of defendant's cell. Upon investigation, he found that defendant was not in the cell, and he saw a rope hanging from a hole in the ceiling of the cell. After summoning assistance, the guard called for defendant to come down. Eventually defendant lowered himself through the hole and was immediately grabbed by the legs. Defendant was combative but was quickly subdued. Defendant then told the guards it was lucky they had caught him because he would have been gone by morning.

B. *Defense Case at the Guilt Phase*

The defense called no witnesses and offered no exhibits at the guilt phase.

C. *Guilt Verdicts*

The jury returned verdicts finding defendant guilty of the charged offenses of robbery, rape, and murder. The jury found the murder to be of the first degree, and it found true the special circumstance allegation that the murder occurred during a rape. The jury was unable to reach a verdict on another special circumstance allegation, that the murder occurred during a robbery.

D. *Prosecution's Penalty Phase Case in Aggravation*

For its case in aggravation, the prosecution presented evidence that defendant assaulted and raped June M. in June 1981, that he was convicted of rape

in December 1981, that he assaulted and threatened to kill Loveda N. in November 1983, that he sexually assaulted and murdered Antaya Yvette Howard in December 1983, and that he threatened to kill a sheriff's sergeant after his unsuccessful attempt to escape from the Los Angeles County jail in January 1988. The following is a summary of this evidence.

Between 10:30 and 11:00 p.m. on June 13, 1981, June M. went to a bar on Pacific Coast Highway in Long Beach. There she met defendant, with whom she had no prior acquaintance, and they began talking about custom pickup trucks. Defendant invited her outside to inspect his truck, and she accepted. A windowless shell had been welded to the bed of defendant's truck, making it similar to a van. As they were sitting in the truck, with defendant in the driver's seat and June M. in the passenger seat, defendant turned on the stereo and told June M. to shut the door on her side so she could hear the music better. As soon as she shut her door, defendant drove off, hitting a car on his way out of the parking lot.

Defendant stopped the truck in a residential area. June M. asked to be taken back, but defendant said they were going to a party and told her to remove her shoes. She noticed there was no inside door handle on the passenger side. Vise grips appeared to function as a makeshift door handle, but they came off when she grasped them. Defendant pushed her into the back of the truck and started to remove her clothes. When she screamed, defendant put a hand in her mouth, and when she bit his hand he began to strangle her. Defendant finished removing her clothes and raped her. Eventually her body went limp. She was unable to breathe and believed she was dying. Defendant demanded she orally copulate him. She said she would if defendant gave her some fresh air. When defendant opened the door, she jumped out and ran away, eventually flagging down a motorist and reporting the incident to the police. June M. had severe bruises on her neck and wore a neck brace for two weeks after this incident.

The parties stipulated that for his conduct in this incident defendant was convicted of rape, a felony, on December 4, 1981.

On November 10, 1983, defendant and Loveda N. had an intimate relationship and were sharing a room at a motel in Coos Bay, Oregon. During the early morning hours, after they had been drinking together at a bar near the motel, they began to argue. When Loveda N. refused to have sex with defendant, he started hitting her in the head with his fists and choking her. Thinking she was about to lose consciousness, Loveda N. told defendant she needed to go to the bathroom because she was about to vomit. Once inside the bathroom, she locked the door and climbed through the window. As she

was leaving, she heard defendant kicking down the door. She ran to the manager's office, and the police came and took defendant into custody. Loveda N. did not press charges against defendant because he told her that if she did he would kill her and her son. After the assault, Loveda N. had bumps on her head in the temple area where defendant had hit her, her throat was bruised where defendant had choked her, and she had difficulty speaking for around two weeks.

On December 29, 1983, Antaya Yvette Howard, who was then 19 years old, left her home in Huntington Beach, California, after 10:00 p.m. She was driving her car, a small hatchback model. At 3:00 a.m. the next day, she was seen drinking champagne with defendant at a restaurant in Newport Beach. Four hours later, a woman noticed a car, later identified as Howard's, parked in an alley in Huntington Beach. The woman telephoned the police on January 4, 1984, because the car had not moved and was emitting a foul odor.

The police found Howard's badly decomposed body, covered by a blanket, in the hatchback area of the car. Her blouse was open and missing two buttons. Her bra had been rolled up exposing her breasts. Her jeans and underpants were around her ankles. The jeans were muddy, especially on the left side. Defendant's fingerprints were found on the exterior window glass of the car's two front doors and on a beer can found on the front passenger floorboard.

An autopsy of Howard's body indicated that the cause of her death was asphyxiation due to strangulation, with trauma to the head as a contributing cause. Abrasions were found on her left forehead, left eyebrow, left thigh, and lower back. Bruises were found on her left eyebrow, left cheek, the back left side of her head, her left shoulder blade, and left thigh. There was internal bleeding, called ecchymosis, in her eyes. Internal bleeding was also noted in her head and neck. The injuries were consistent with having been struck on the back of the head with a blunt object and with strangulation by pressure to the front of the neck.

Huntington Beach police officers interviewed defendant on January 10, 1984. Defendant denied knowing Antaya Howard and could not explain the presence of his fingerprints on her car.

In January 1988, when defendant was handcuffed immediately after his unsuccessful attempt to escape from the Los Angeles County jail, defendant said he would kill a sheriff's sergeant who had assisted in subduing him, and that he would do it in a "big way" and a "humiliating way" because he had

"nothing to lose." In the ceiling area above defendant's cell, investigators found objects that could be used as tools or weapons, including two dinner knives (one of which had been sharpened) and two sharpened pieces of sheet metal.

The prosecution also presented the expert testimony of a martial arts instructor on the meaning of the term "dim mak." In the September 15 letter that defendant had sent to his wife, and that jail authorities had intercepted, defendant had written that he had killed Antaya Howard with a "Dim-Mak technique." The witness testified that "dim mak" literally means "death touch" and that in martial arts it refers to striking blows to certain pressure points on the body, resulting in unconsciousness or death.

E. *Defense Penalty Phase Case in Mitigation*

For its case in mitigation, the defense presented expert testimony about the history of the Blackfeet Tribe, of which defendant is a member, and evidence concerning defendant's life history. Psychologist Craig William Haney provided expert opinions on how certain aspects of defendant's history had affected his development.

According to the testimony, the Blackfeet in the late 1700's were divided into three major subgroups: the Piegan or Southern Blackfeet, the Blood or Kiowa, and the Northern Blackfeet. At this time, the Blackfeet were a nomadic, buffalo-hunting, teepee-dwelling Plains tribe, with a warrior culture. Work was divided by sex, with certain tasks performed exclusively by men and others exclusively by women. Social conformity was achieved, and misbehavior curbed, by a process of public shaming. The Blackfeet had contacts with the Spanish in New Mexico, from whom they acquired horses, and with the British in Canada, with whom they traded furs. Their first contact with Americans occurred in 1805 or 1806, when they met members of the Lewis and Clark survey expedition. After this, the Americans tended to align with the Crow Tribe, enemies of the Blackfeet, while the Blackfeet were aligned with the British. Around 1832, however, the Americans took over the fur trade and the Blackfeet's contact with Canada dwindled. From this time, disease and alcohol began to plague the Blackfeet and reduced their population.

In 1855, the Blackfeet's territory was defined by treaty with the United States, but the discovery of gold in Montana in 1862 caused an increase in the non-Indian population, resulting in invasion of and encroachments on the Blackfeet's treaty lands. The Blackfeet resisted this encroachment, but their resistance largely ended in December 1869 when a group of soldiers attacked and massacred a peaceful encampment of Blackfeet under Chief

Heavy Runner, mistaking them for a different group, under Mountain Chief, that had engaged in armed resistance. Joe Kipp, whose mother was a Native American, was a scout who assisted the soldiers during this attack, which is known as the massacre on the Marias River. He attempted to stop the attack when he realized, at the last minute, that the group being attacked was peaceful rather than hostile. After the massacre, in which Chief Heavy Runner was killed, Joe Kipp adopted one of Heavy Runner's sons, who was known both as Night Gun and as Cut Bank John. This adopted son was the grandfather of John Kipp, defendant's father by adoption.

The buffalo had largely disappeared from Blackfeet territory by 1882, and at least 600 Blackfeet died of starvation during the winter of 1882-1883, reducing the tribe's population to around 2,500. Boundaries for the Blackfeet Reservation in Montana were drawn in 1888, but the reservation's size was later reduced. In 1884, the Bureau of Indian Affairs (BIA) adopted regulations to discourage or prohibit Indian customs, ceremonies, and languages, with the intent to thereby accelerate the Indians' assimilation into White society. Indian children were required to attend boarding schools where Indian languages could not be spoken. The BIA encouraged the Blackfeet to farm their land, but the land was generally unsuitable for farming. When agriculture failed, many Blackfeet families sold the land assigned to them to obtain money for subsistence, causing further diminution of tribal lands.

After World War II, the BIA allowed tribes to decide whether alcohol would be sold on their lands, and the Blackfeet decided to allow sales of alcohol on the Blackfeet Reservation. Many Blackfeet who returned to the reservation after the war had acquired drinking habits while serving in the military or working in war-related industries. From this time, alcoholism became an increasingly serious problem on the reservation. At the time of trial in 1989, 6,000 Blackfeet lived on the reservation in Montana, with an unemployment rate of 60 to 70 percent and annual family income of around $5,000 per year, compared to $18,000 per year for Montana generally.

According to defendant's witnesses, Blackfeet and other Native Americans who leave their reservations often experience low self-esteem and lose the support of their communities. They may lack internal controls on their behavior. For this reason, Indians who experience problems after leaving the reservation may quickly fall apart.

Defendant was born on the Blackfeet Reservation in 1958. His birth mother was Mary Still Smoking, also known as Baby Girl Sherman or Sister Girl, who was an alcoholic and also "nervous" and "paranoid." She was "out drinking most of the time." Defendant's birth father was Curly Carpenter. At

first, defendant lived in the home of his maternal grandmother, Mary Still Smoking, known as Old Mary. Around 12 to 14 children lived in a two-room house. Inebriation and fighting were common in the house, which was filthy, and the children living there were neglected. According to Haney, the psychologist who testified as a defense expert, this experience of neglect would tend to cause defendant to view the world as an insecure and threatening place, and it would cause him to develop a basic distrust and fear of people and a great sensitivity to rejection or abandonment.

Defendant was 23 months old in January 1960 when child welfare workers removed him from his grandmother's home and placed him with John and Mildred Kipp, who were also members of the Blackfeet Tribe. Mildred Kipp, also known as Bobbie, had two daughters, Murna and Margie, who were not John's children and who at this time were grown and living in Chicago.

John Kipp was very large (his height was estimated at three to six inches over six feet, and his weight at 240 to 290 pounds), handsome and muscular. John was the leader of his family and ran the family ranch on Cut Bank Creek within the reservation. Because they lived on the ranch, John and Bobbie were somewhat isolated from the rest of the Blackfeet community. During World War II, John had served in the United States Marine Corps and was decorated for saving a wounded Japanese soldier by carrying him to medical aid. He was an excellent hunter, fisher, and trapper. He was demanding, a perfectionist, always wanting things done his way.

When he was placed with the Kipps, defendant was small and appeared malnourished. His hair had been shaved off and he had impetigo (a skin disease) and lice. At first, John Kipp seemed unwilling to accept defendant into his family, referring to him as "Bobbie's foster kid," but after about six months his attitude changed and he began to treat defendant as his son.

As a young child, defendant followed Bobbie everywhere and cried if he was separated from her. Defendant attended primary school in Cut Bank, a town just outside the reservation boundary. If the weather was bad, or if John and Mildred were busy taking care of their crops, defendant would stay in Cut Bank with Fron and Dorothy Froman, who were friends of John and Mildred Kipp.

During his boyhood and teenage years, defendant was a good worker. He idolized John and tried to live up to John's expectations, although he was never able to do so because of John's perfectionism. Defendant and John went hunting and fishing together, and John taught defendant to operate all the farm tractors. According to defense expert Haney, John did not give

defendant the freedom needed for development of internal controls, and defendant had difficulty distinguishing his own wants and values from John's wants and values.

John organized or joined a boxing club and trained defendant in boxing. At this time, defendant was "friendly and well mannered," honest and a hard worker. Defendant went to high school in Browning, Montana, on the Blackfeet Reservation. In high school, he was a gentle person who was shy with girls. He was "a warm, loving, and respectful young man." Defendant competed in cross-country, and his coach described him as then being courteous, trustworthy, and "an all-around good kid to coach."

In 1973, Billy Kipp, son of Max Kipp, the younger brother of John Kipp, died in an automobile accident on the reservation. Defendant (who was then 15) and Billy (then 11) were passengers in a car driven by Jimmy Kipp, Billy's older brother, when the car went out of control, hit an embankment, and turned over. Billy was thrown from the car and died. Defendant was hospitalized for an injury to his leg. John had sent the boys to get some seed grain, and he felt somehow responsible. He begged his brother Max to sue him, but Max refused. Because of his large size and easy disposition, Billy had been a particular favorite of John's, and John had invited him to stay at the ranch. After the accident, John began to drink whiskey excessively and suffered a stroke.

When John lost control of his drinking, his relations with other members of his family suffered. He became estranged from his brother Max after Max confronted him about his abuse of alcohol. His marriage to Bobbie broke down. He physically abused both Bobbie and defendant. He broke two of Bobbie's fingers when he jerked a door shut on her hand. He spent more time away from the ranch, much of it in bars, and became involved with another woman. He became aggressive and rough, and even old friends avoided him. Eventually Bobbie moved away from the ranch and divorced John, who then remarried.

According to psychologist Haney, John had provided defendant with his sense of identity, and John's deterioration was profoundly frightening to defendant, who was in a constant state of emotional turmoil. The fears and insecurities from his first two years of life returned, and he began to doubt that John's way of living was the right way. Defendant became discouraged and "lost heart." He gave up boxing and lacked a sense of direction.

Defendant went to Spokane, Washington, to live with Max Kipp, John Kipp's brother, during the fall of defendant's senior year in high school. He

was there in 1977 when, at the age of 19, he received news that John had died. During the previous year, defendant had taken charge of operating the ranch, but he was working as a bricklayer in Spokane when he received the news of John's death. Defendant left immediately and drove all night to return to the ranch. After John's death, there was a dispute over ownership of the ranch between the Kipp family and John's widow. Defendant was in the middle of this conflict and unprepared to deal with it. In the end, Bobbie got nothing, while defendant received $13,000.

Defendant enlisted in the United States Marine Corps. Because of the discipline and the high standards and expectations, being in the Marines was similar to defendant's previous experience as John's son. A defense witness testified that the percentage of American Indians who have served in the military is about twice that for the population as a whole. Among the Plains tribes, with a warrior tradition, combat experience is highly valued and members of these tribes tend to join elite combat units like the Marines and the Rangers. Those who join the military but do not have combat experience tend to feel shame and dissatisfaction.

Defendant was considered an outstanding recruit during boot camp, but then he was assigned to a desk job in Okinawa. According to defense expert Haney, once the challenge was gone, defendant was disappointed and unprepared for office work on a military base in a foreign country. He developed an attitude problem, stole some items, spent time in the brig, and began to abuse alcohol, cocaine, and methamphetamine. Defendant was transferred to California, where he raped June M. in June 1981. After the rape, defendant left his military post without leave and went back to the Blackfeet Reservation in Montana. There, in July 1981, defendant dated Coleen Cooper, who described him as a "gentleman" who was "really good to her."

Defendant was arrested for the rape of June M. in August 1981. While in custody in the Los Angeles County jail awaiting trial, he was sexually assaulted by other inmates. According to defense expert Haney, the experience was profoundly frightening, and defendant learned not to show any weakness or vulnerability to other inmates. Bobbie visited defendant at the state prison in Susanville, where defendant adjusted well. After his release from prison in 1983, defendant continued to deteriorate because he had no sense of direction or identity, and no one with whom he felt able to discuss his feelings and problems. He was abusing alcohol, cocaine, and methamphetamine. A psychopharmacologist testified that chronic use of either cocaine or methamphetamine can result in paranoia and that this effect is associated with violence and suicide.

Psychologist Haney interviewed defendant five times between 1984 and 1989, when Haney testified. Defendant admitted killing Tiffany Frizzell and

Antaya Howard, and he expressed shame, sorrow, and regret for his actions. Defendant told Haney that when he wrote the September 15 letter to his wife that the prosecution introduced at the guilt phase, in which he denied any remorse for the murders, he was very upset and angry about what had occurred during the Orange County trial for the murder of Antaya Howard.

Many of the witnesses, defendant's friends and relatives, expressed their love for defendant and urged the jury to spare his life.

A professor of sociology testified about the California prison system. Persons sentenced to life imprisonment without possibility of parole are assigned to closed custody prisons, where prisoners spend the whole day confined in a small area known as a module. In these modules, no more than 20 or 30 prisoners are ever together. Surveillance is constant and escape virtually impossible. In segregated housing units, prisoners are allowed to leave their cells only three to four hours per week. Individuals sentenced to life terms tend to be model prisoners, particularly after the age of 40.

F. *Penalty Phase Rebuttal*

In rebuttal, the prosecution presented evidence that on September 9, 1987, a sheriff's deputy at the Orange County jail read and copied a letter that defendant had written to his wife, Linda Kipp, who was then also in custody. This occurred about one week before jail authorities intercepted the September 15 letter from defendant to his wife that the prosecution introduced at the guilt phase. In this earlier letter (hereafter September 9 letter), defendant expressed a desire to rape, sodomize, and gouge the eyes out of every woman deputy serving as a guard at the jail. He said that if he escaped he would associate with a terrorist group and "really go on a spree," and that he would kill every district attorney and their families. He also said that he no longer believed in God and that Satan had helped him rejuvenate his energies.

ISSUES RELATING TO GUILT

I.[2] *Admission of the September 15 Letter*

(1a) At the outset of the guilt phase of the trial, the defense objected to admission in evidence of any part of the September 15 letter defendant wrote and sent to his wife, Linda Kipp, containing defendant's admissions that he had "raped" and "killed" both Tiffany Frizzell and Antaya Howard. The defense argued that the September 15 letter was inadmissible under Evidence Code section 352 because its probative value was substantially outweighed by the probability that its admission would create a substantial

[2]For the parties' convenience, the issues are numbered as in the appellant's opening brief.

danger of undue prejudice. The trial court overruled the objection under Evidence Code section 352, stating that "the letter will be admitted in some form."

The prosecutor proposed to have a deputy sheriff testify that jail authorities in Orange County had intercepted the September 15 letter from defendant to his wife, and to have this deputy then read only an edited portion of one page, including the admission that defendant had raped and killed Frizzell, without giving the jury access to the actual letter. Defense counsel noted that the prosecutor had announced his intention to introduce the entire letter at the penalty phase, adding that for tactical reasons the defense preferred to introduce at the guilt phase every part of the September 15 letter that would eventually be admissible for guilt or penalty. Defense counsel explained that the additional parts of the letter were necessary at the guilt phase to explain the context in which defendant had made the statements and to reduce the letter's impact at the penalty phase. Defense counsel suggested deleting only certain racial epithets, references to "Satan," and derogatory references to female deputies working at the jail. The trial court agreed to delete the racial epithets and the derogatory references to female deputies, but the court ruled that the references to "Satan" would be admissible at the penalty phase and therefore would not be deleted if the defense insisted that every part of the letter admissible at the penalty phase be received in evidence at the guilt phase. As so redacted, the September 15 letter was received in evidence.

(2) We apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609 [25 Cal.Rptr.2d 390, 863 P.2d 635].) **(1b)** Defendant's admission in the letter that he had raped and killed Tiffany Frizzell had substantial probative value and was not unduly prejudicial within the meaning of Evidence Code section 352. **(3)** For this purpose, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that " 'uniquely tends to evoke an emotional bias against defendant' " without regard to its relevance on material issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320 [75 Cal.Rptr.2d 412, 956 P.2d 374]; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016 [254 Cal.Rptr. 586, 766 P.2d 1].)

(1c) Defendant's spontaneous, uncoerced admission to his wife that he had raped and killed Tiffany Frizzell was highly probative on the material disputed issue of his identity as the perpetrator of the charged offenses of rape and murder. Defendant fails to persuade us that this probative value was greatly diminished by the timing of the admission, coming around three weeks after a jury had returned a penalty verdict of death against defendant

for the murder of Antaya Howard, and three days before the sentencing hearing for that crime. Although defendant may well have been angry, frustrated, and discouraged at that time, defendant does not plausibly explain why any of these emotions would cause him to falsely admit culpability for crimes he had not committed. Nor do we agree that the probative value of the admissions was substantially weakened by defendant's statements in the same letter that he had sodomized both Frizzell and Howard. Although the prosecution's evidence did not establish that either victim had been sodomized, neither did the evidence eliminate that possibility. Moreover, even if we assume that defendant did not sodomize either victim, defendant's false statements to the contrary could be attributed to exaggeration or embellishment without substantially detracting from defendant's admission that he, and not someone else, sexually assaulted and killed the two victims.

The trial court could reasonably determine that the probative value of the admissions was not substantially outweighed by the danger of undue prejudice. Both the prosecutor and the trial court indicated a willingness to redact the letter to remove material that was irrelevant and prejudicial (in the sense of being likely to evoke an emotional bias against defendant unrelated to its relevance on material issues), but the defense insisted that the entire letter be admitted with only a few deletions. Although defendant now objects to a highly vulgar reference to the victim, at trial the defense never suggested deletion of this reference. The trial court agreed to each of the specific deletions the defense requested at the *guilt phase*, although it ruled that the letter's various references to Satan would be admissible at the *penalty phase*. We consider below, as a penalty phase issue, defendant's separate claim that the trial court erred in overruling the objections to the references to Satan for purposes of the penalty phase. We conclude that the trial court did not abuse its discretion under Evidence Code section 352 in denying the defense motion to exclude the September 15 letter in its entirety.

Although defendant contends that the ruling denied him various rights under the state and federal Constitutions, he did not object on these grounds in the trial court, and thus he has not preserved these constitutional claims for appellate review. (*People v. Earp* (1999) 20 Cal.4th 826, 878 [85 Cal.Rptr.2d 857, 978 P.2d 15].)

We reject also defendant's related contention that his trial counsel, by failing to base the objection on constitutional as well as statutory grounds, denied him his constitutional right to the effective assistance of counsel. **(4)** To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent

attorney and that this deficient performance caused prejudice in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 2064, 80 L.Ed.2d 674]; see also *People v. Wader* (1993) 5 Cal.4th 610, 636 [20 Cal.Rptr.2d 788, 854 P.2d 80].) If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland v. Washington, supra,* 466 U.S. at p. 697 [104 S.Ct. at p. 2064].)

(1d) Here, defendant fails to establish either deficient performance or prejudice from counsel's failure to cite constitutional grounds when objecting to the September 15 letter. Defendant does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code. Because, as we have concluded, the September 15 letter satisfied applicable statutory admission standards, adding constitutional grounds to the objection would not have altered the trial court's ruling or our conclusion on review that the ruling was correct. Accordingly, defendant was not denied his right to effective assistance of counsel by counsel's failure to cite constitutional grounds in making his objection.

II. *Evidence of Why Tiffany Frizzell Was in Long Beach*

(5a) The defense objected at the guilt phase of trial to evidence that Tiffany Frizzell was in Long Beach to attend Brooks College, arguing that the purpose of her presence in Long Beach was irrelevant to any material issue. The prosecution argued that the evidence was relevant on the rape charge to establish that Tiffany Frizzell did not consent to sexual intercourse with defendant. The trial court overruled the objection but cautioned the prosecutor not to "go into great detail on it." Joan Frizzell, Tiffany's mother, then testified that Tiffany's purpose in traveling to Long Beach was to attend college.

(6a) We apply the deferential abuse of discretion standard when reviewing a trial court's ruling on a relevance objection. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718 [94 Cal.Rptr.2d 396, 996 P.2d 46]; *People v. Sanders* (1995) 11 Cal.4th 475, 554-555 [46 Cal.Rptr.2d 751, 905 P.2d 420].) **(5b)** We discern no abuse of discretion here. **(6b)** "Evidence is relevant if it has *any* tendency in reason to prove or disprove a disputed fact at issue." (*People v. Mayfield* (1997) 14 Cal.4th 668, 749 [60 Cal.Rptr.2d 1, 928 P.2d 485]; see Evid. Code, § 210.) **(5c)** In a prosecution for forcible

rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible. (See, e.g., *People v. Rowland* (1992) 4 Cal.4th 238, 264 [14 Cal.Rptr.2d 377, 841 P.2d 897] [evidence that victim had a "terrible headache" and had to get to work early the next morning was "clearly probative of rape"].) In determining whether Tiffany Frizzell had consented to intercourse with defendant, with whom she had no prior acquaintance, the jury might be assisted by the information that she was not traveling on a holiday or vacation, but had arrived to begin her college education. This information also prevented any speculation by the jury that a young woman alone in a motel room might be a prostitute who consented to intercourse with defendant on a promise of compensation. Although the probative value of the evidence was not great, we cannot say that it lacked any tendency in reason to prove that Frizzell did not consent to sexual intercourse with defendant.

(7) Defendant also contends the trial court should have excluded the evidence of the reason for Tiffany Frizzell's presence in Long Beach under Evidence Code section 352 because the probative value of this evidence was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. Because the defense did not object on this ground at trial, the issue is not preserved for appellate review. (Evid. Code, § 353, subd. (a).) Although defense counsel made two isolated references to the evidence being "inflammatory," counsel neither mentioned Evidence Code section 352 nor argued that the probative value of the evidence was substantially outweighed by a risk of undue prejudice. Instead, counsel argued consistently and exclusively that the evidence was entirely irrelevant and immaterial. This was insufficient to preserve a claim of error under Evidence Code section 352. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1130 [74 Cal.Rptr.2d 121, 954 P.2d 384]; *People v. Champion* (1995) 9 Cal.4th 879, 913 [39 Cal.Rptr.2d 547, 891 P.2d 93]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015 [30 Cal.Rptr.2d 818, 874 P.2d 248].)

(5d) Were the claim preserved for our review, we would reject it on the merits. Although the probative value of the evidence was relatively slight, this probative value was not substantially outweighed by the risk of undue prejudice. The testimony about Tiffany Frizzell's purpose in traveling to Long Beach to attend college was brief and apparently without any display of emotion. The trial court could reasonably conclude, in the exercise of its broad discretion, that this testimony would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt.

Defendant argues that admission of the testimony that Tiffany Frizzell was in Long Beach to begin her college studies denied him various rights

under the state and federal Constitutions, but he did not object on these grounds in the trial court, and thus these constitutional issues are not preserved for appellate review. (*People v. Earp, supra,* 20 Cal.4th at p. 878.)

We reject also defendant's related contention that his trial counsel, by failing to base his objection on constitutional grounds, denied him his constitutional right to the effective assistance of counsel. Defendant does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code. Because the evidence satisfied applicable statutory admission standards, an objection on constitutional grounds would have lacked merit. Accordingly, defendant was not denied his right to effective assistance of counsel by counsel's failure to cite constitutional grounds in making his objection.

III. *Evidence and Instruction Concerning Escape Attempts*

At the guilt phase, the defense requested an offer of proof from the prosecution on evidence of defendant's attempted escape from the Los Angeles County jail. After the prosecutor described the testimony he proposed to introduce on this incident, the defense objected to the proposed evidence, citing Evidence Code section 352 and objecting with particular vehemence to evidence of any statements defendant had made. The trial court ruled that the prosecution could introduce defendant's statement that he would have been gone by morning if the deputies had not stopped him, but the trial court ruled inadmissible at the guilt phase any statements by defendant threatening harm to the deputies. Otherwise, the trial court overruled the defense objection to evidence of the attempted escape. The trial court instructed the jury that an attempted escape, although not sufficient to establish guilt, could be considered in deciding the question of guilt or innocence.

(8) Defendant contends that the trial court erred in admitting evidence of the attempted escape from the Los Angeles County jail, that the trial court should also have excluded evidence of defendant's planning for an escape from the Orange County jail, and that the trial court should not have instructed the jury it could consider escape attempts in deciding his guilt or innocence. Recognizing that the defense did not object at trial to evidence of the Orange County jail incident, defendant contends that his trial counsel rendered constitutionally ineffective assistance by failing to make this objection.

We apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352. (*People v. Cudjo,*

supra, 6 Cal.4th at p. 609.) Applying that standard, we discern no abuse of discretion in the trial court's guilt phase ruling allowing evidence of the Los Angeles County jail escape attempt but excluding evidence of defendant's accompanying threats against jail personnel.

Defendant concedes that ordinarily an attempt or plan to escape from jail pending trial is relevant to establish consciousness of guilt (*People v. Morris* (1991) 53 Cal.3d 152, 196 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [38 Cal.Rptr.2d 394, 889 P.2d 588]; *People v. Terry* (1970) 2 Cal.3d 362, 395 [85 Cal.Rptr. 409, 466 P.2d 961]), but he argues that any such relevance is diminished here to the point of insignificance because at the time of the attempted escape defendant was under a judgment of death for the Orange County murder of Antaya Howard, and so his desire to escape execution for that crime provided a complete and powerful motive for the escape attempt, quite apart from any consciousness of guilt on the capital charge for the murder of Tiffany Frizzell. We agree that the existing death judgment diminished the probative value of the attempted escape as evidence of consciousness of guilt on the charges at issue here, but we do not agree that the probative value was so diminished as to lack any practical significance. Defendant was not facing imminent execution. Rather, as defendant surely knew, his automatic appeal, petitions for habeas corpus in the state and federal courts, and application for executive clemency would prevent execution for a period of years and afforded defendant some reason to hope that the execution would never occur. In this situation, defendant's decision to attempt an escape might well have been significantly influenced by consciousness that he was guilty of the charged capital murder of Tiffany Frizzell and would likely incur a second death judgment.

Balanced against this probative value, the risk of undue prejudice was slight. Apart from a brief resistance when defendant reentered his cell, the escape attempt involved no overt violence. The trial court could reasonably conclude, in the exercise of its broad discretion, that this evidence would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt. The trial court did not abuse its discretion in admitting the evidence or in instructing the jury that it could consider this evidence as one factor in deciding defendant's guilt or innocence of the charged offenses.

Defense counsel's failure to object to evidence of defendant's earlier planning efforts for an escape from the Orange County jail does not establish ineffective assistance of counsel, because defendant fails to establish prejudice. Had counsel objected under Evidence Code section 352, the trial court

could have overruled the objection, reasonably concluding, in the exercise of its broad discretion, that this evidence, like the evidence of the attempted escape from the Los Angeles County jail, had significant probative value and would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt. This escape never got beyond the planning stage, and the plans did not include any acts of violence. Thus, this evidence had even less potential to inflame the jurors' emotions than the evidence of the attempted escape from the Los Angeles County jail.

Moreover, even if we assume the trial court would have exercised its discretion under Evidence Code section 352 to exclude evidence of the escape attempt at the guilt phase, it is not reasonably probable that the jury would have returned guilt verdicts more favorable to defendant. The evidence of defendant's guilt included his own admissions that he raped and killed Tiffany Frizzell, the presence of his fingerprint in her motel room and on her book inside the bag discarded in an alley, and his possession and sale of Frizzell's personal stereo and cassette player. Given the strength of the prosecution's case, and the absence of any affirmative defense evidence of innocence, the jury's knowledge of the escape would not have contributed in any significant way to the guilt verdicts.

Defendant argues that counsel should at least have moved to exclude references to the planned participation of Linda Kipp's son in the escape attempt because evidence that defendant intended to involve a child was particularly inflammatory. We do not agree that counsel's failure to so move establishes a violation of the constitutional right to the effective assistance of counsel. Having reviewed the trial evidence and the prosecutor's argument on this point, we find nothing to indicate to the jury that Linda Kipp's son was a minor rather than an adult. Because the jury was never told that Linda Kipp's son was not an adult, and because there was no evidence that he was even aware of the planned escape, much less participated in the planning, there was no sound basis for a motion to exclude reference to his planned participation in the escape attempt, and trial counsel's performance was not deficient by reason of their failure to make this groundless motion.

Defendant's claimed instructional error is contingent on his claim of error in admission of the evidence of the attempted escapes. In other words, he argues only that if the trial court had excluded the attempted escape evidence, the instruction concerning the jury's consideration of that evidence would not have been proper. Because we have found no error in the admission of the evidence, we reject the related claim of instruction error. The instruction correctly states the law. (See *People v. Carrera* (1989) 49

Cal.3d 291, 313-314 [261 Cal.Rptr. 348, 777 P.2d 121]; *People v. Williams* (1988) 44 Cal.3d 1127, 1144-1145 [245 Cal.Rptr. 635, 751 P.2d 901].)

IV. *Sufficiency of the Evidence of Robbery*

(9a) Defendant contends the evidence at trial was insufficient to support the verdict finding him guilty of robbery. In particular, he argues that there was no substantial evidence that he formed the intent to steal before or during, rather than after, he applied force to the victim, Tiffany Frizzell. He also argues that this deficiency requires reversal of his first degree murder conviction, because felony murder in the commission of a robbery was one of the theories under which the charge of murder was submitted to the jury.

(10) To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34 [61 Cal.Rptr.2d 84, 931 P.2d 262]; *People v. Wader, supra,* 5 Cal.4th at p. 640.)

(9b) "To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force." (*People v. Marshall, supra,* 15 Cal.4th at p. 34.) Here, we are satisfied that a rational trier of fact could have found beyond a reasonable doubt that defendant intended to steal from Tiffany Frizzell when he strangled her to death. We have explained that when presented with evidence that a defendant killed another and took substantial property from the victim at the time of the killing, a jury ordinarily may reasonably infer that the defendant killed for the purpose of robbery. (*People v. Turner* (1990) 50 Cal.3d 668, 688 [268 Cal.Rptr. 706, 789 P.2d 887].) We have recognized that a jury may reasonably draw this inference when the evidence shows that the defendant also raped or attempted to rape the victim at the time of the killing. (*People v. Kelly* (1992) 1 Cal.4th 495, 529 [3 Cal.Rptr.2d 677, 822 P.2d 385].) In that situation, a jury may infer that the defendant killed for purposes of both rape and robbery. (*Ibid.*)

Here, there was evidence that when defendant strangled Tiffany Frizzell, he took her personal stereo and her cassette player, both of which he later sold to a secondhand goods dealer for $70. From this evidence, the jury could reasonably infer that at least one reason defendant killed Frizzell was to accomplish the taking of these items.

We are unpersuaded by defendant's argument that this inference is unreasonable in light of defendant's failure to take other property of value from

the victim, including $130 in cash found in a dresser in her motel room. The relatively undisturbed condition of the bed on which the victim's body was found, and the absence of any indication of a struggle having taken place in the room suggests that defendant killed the victim elsewhere. (See *People v. Kipp, supra,* 18 Cal.4th at p. 370.) When defendant returned the victim's body to her motel room, he evidently did not search the room, perhaps because he feared detection and was in a hurry, or perhaps because he did not suspect that it contained anything of value. Defendant's failure to search the motel room for additional property to steal after he had killed Frizzell at another location does not establish that he lacked the intent to steal when he killed her.

We note in addition that even were we to conclude that the evidence is insufficient to support the robbery charge, this conclusion would not affect the validity of the first degree murder conviction. Because the jury found true the special circumstance allegation that defendant killed Frizzell during the commission of rape (while being unable to reach a verdict on the special circumstance allegation of murder during the commission of robbery), we may be confident that the jury rested its first degree murder verdict on the theory of felony murder in the commission of rape, and not on the theory of felony murder during the commission of robbery. (See *People v. Marshall, supra,* 15 Cal.4th at pp. 37-38; *People v. Kelly, supra,* 1 Cal.4th at p. 531.)

Defendant claims that his conviction of robbery on insufficient evidence violated his rights under the state and federal Constitutions to due process, to present a defense, and to a reliable verdict. Having concluded that the evidence of robbery is sufficient, we reject these derivative constitutional claims.

V. *Prosecutorial Misconduct in Argument*

(11a) During closing argument for the guilt phase, the prosecutor said: "So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. A living, breathing human being had all of that taken away."

Defense counsel promptly objected and, at the bench, stated that the argument was "an appeal to sympathy." The prosecutor replied that the jury should understand that murder is "a grim business" but also that he was "done with that part of [his] argument" and would move on to another point. The trial court said the prosecutor "would be well advised to do that," adding

that the court had been "a little concerned" about the direction of the prosecutor's argument and noting that the jury would be instructed not to be guided by passion or sympathy. The prosecutor then resumed the argument by addressing a different point.

"[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [17 Cal.Rptr.2d 174, 846 P.2d 756], revd. on other grounds *sub nom. Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293]; accord, *People v. Arias* (1996) 13 Cal.4th 92, 160 [51 Cal.Rptr.2d 770, 913 P.2d 980]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Fields* (1983) 35 Cal.3d 329, 362 [197 Cal.Rptr. 803, 673 P.2d 680].) The prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore it was improper at the guilt phase of this capital trial.

(12) "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610].) **(11b)** Here, the defense made a timely objection to the prosecutor's improper argument but did not request an admonition. Because the trial court indicated that the jury would be instructed "not to be guided by passion or sympathy," the defense may have concluded that the instruction would function as an admonition.

In any event, reversal is not required. The prosecutor's comment was brief, mild, and not repeated. It did not "add cumulative impact to other errors in a crucial area of the case." (*People v. Pensinger, supra,* 52 Cal.3d at p. 1250.) The evidence that defendant raped and killed Tiffany Frizzell was very strong and generally uncontradicted. It is not reasonably probable that the jury would have reached a result more favorable to defendant absent the prosecutor's misconduct. (See *People v. Fields, supra,* 35 Cal.3d at p. 363.)

Defendant claims that the prosecutor's misconduct deprived him of his rights under the federal and state Constitutions to due process, equal protection, an impartial jury, and reliable guilt and penalty verdicts. Because he did not object on these grounds in the trial court, the constitutional claims are not preserved for appellate review. (*People v. Earp, supra,* 20 Cal.4th at p. 878.) In any event, the prosecutor's comment did not infect the trial with such unfairness as to make defendant's conviction a denial of due process (see *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 2471-2472, 91 L.Ed.2d 144]) or to render the verdicts unreliable.

VI. *Felony-murder Instruction*

(13) Defendant contends that the trial court erred in instructing the jury on felony murder when the information charged only murder with malice. We disagree.

The information charged defendant with murder in these terms: "The said MARTIN JAMES KIPP is accused . . . of the crime of MURDER, in violation of Section 187, of the California Penal Code, a felony, committed as follows: That the said MARTIN JAMES KIPP . . . did willfully, unlawfully, and with malice aforethought murder Tiffany Frizzell, a human being."

A pleading charging murder in these terms adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory. (*People v. Gallego* (1990) 52 Cal.3d 115, 188 [276 Cal.Rptr. 679, 802 P.2d 169].) Defendant mistakenly relies on a statement in the plurality opinion in *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697] that the "two kinds of murder"—that is, felony murder and murder with express or implied malice—"are not the 'same' crimes." (*Id.* at p. 476, fn. 23 (plur. opn. of Mosk, J.).) As we have since explained, however, this means only that the two forms of murder have different elements even though there is but a single statutory offense of murder. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394-395 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Pride* (1992) 3 Cal.4th 195, 249 [10 Cal.Rptr.2d 636, 833 P.2d 643].) "Felony murder and premeditated murder are not distinct crimes . . . ." (*People v. Davis* (1995) 10 Cal.4th 463, 514 [41 Cal.Rptr.2d 826, 896 P.2d 119].)

Because of the different forms or varieties of murder, we have acknowledged that an information charging murder without elaboration may not always provide notice sufficient to afford the due process of law guaranteed by the Fourteenth Amendment to the federal Constitution. (*People v. Gallego, supra,* 52 Cal.3d at p. 189; *People v. Murtishaw* (1981) 29 Cal.3d 733, 751, fn. 11 [175 Cal.Rptr. 738, 631 P.2d 446].) Here, however, defendant may not complain of inadequate notice. The information charged defendant with rape and robbery, as well as murder, and it alleged the special circumstances of murder in the commission of rape and robbery. The prosecution introduced evidence supporting each crime charged and each special circumstance allegation. The defense made no request for a continuance on the basis of inadequate notice, "[n]or has defendant persuasively explained how the defense strategy was significantly affected by the addition of the felony-murder rape theory." (*People v. Davis, supra,* 10 Cal.4th at p. 513.) In any event, defendant waived any claim of insufficient notice by not moving to

reopen when he learned that the court would instruct the jury on felony murder. (*People v. Memro* (1995) 11 Cal.4th 786, 869 [47 Cal.Rptr.2d 219, 905 P.2d 1305].)

We have previously rejected defendant's contention that the jury must unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200 [96 Cal.Rptr.2d 1, 998 P.2d 969]; *People v. Millwee* (1998) 18 Cal.4th 96, 160-161 [74 Cal.Rptr.2d 418, 954 P.2d 990].)

VII. *Cumulative Effect of Asserted Guilt Phase Errors*

Defendant argues that even if no single error requires reversal of the jury verdicts and findings returned at the guilt phase, the cumulative effect of guilt phase errors must be deemed sufficiently prejudicial to warrant this remedy. Apart from a single instance of prosecutorial misconduct, which we have found nonprejudicial, defendant has failed to demonstrate that error occurred at the guilt phase. Accordingly, there could be no cumulative effect.

PENALTY PHASE ISSUES

VIII. *Defendant's September 9 Letter to His Wife*

(14) As part of its case in rebuttal at the penalty phase, and over defense objection, the prosecutor introduced a redacted copy of the September 9 letter that defendant wrote to his wife, Linda Kipp, and that was intercepted by jail personnel approximately one week before they intercepted the September 15 letter that the prosecutor introduced at the guilt phase. In the September 9 letter, defendant wrote of his desire to rape women deputies and to kill district attorneys and their families. Defendant contends the trial court erred in overruling the defense objection to this evidence, arguing that the probative value of the September 9 letter was overwhelmed by its prejudicial impact on the jury.

We apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352. (*People v. Cudjo, supra,* 6 Cal.4th at p. 609.) Applying that standard, we discern no abuse of discretion in the trial court's penalty phase ruling allowing in evidence the September 9 letter. The letter was relevant to rebut defense evidence that defendant committed the two capital murders during a relatively brief period of aberrant behavior, that he had since expressed regret and shame for the murders, and that he was unlikely to commit additional offenses if imprisoned for life. As with the September 15 letter, defendant fails to persuade us

that this probative value was greatly diminished by the timing of the admission, coming a few weeks after a jury had returned a penalty verdict of death against defendant for the murder of Antaya Howard. Although defendant may well have been angry, frustrated, and discouraged at that time, defendant does not plausibly explain why the jury could not properly consider these emotions in deciding the appropriate weight to give the evidence. The evidence was properly admitted in rebuttal. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1072-1073 [5 Cal.Rptr.2d 230, 824 P.2d 1277].)

Defendant contends that the trial court's ruling admitting the September 9 letter into evidence denied him various rights under the state and federal Constitutions, but he did not object on these grounds in the trial court, and he does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code. Having concluded that the evidence was properly admitted under Evidence Code section 352, we also reject these belated and derivative constitutional claims.

IX. *Evidence of Threat to Sheriff's Sergeant*

(15) During the penalty phase, the defense moved to exclude evidence that defendant threatened to kill a sheriff's sergeant who assisted in subduing him after his attempted escape from the Los Angeles County jail. The defense argued that the threat did not violate any law and thus was not "criminal activity" within the meaning of section 190.3, factor (b). The prosecution argued in reply that the threat was relevant as part of the escape attempt. The trial court denied the motion. Defendant contends the ruling was reversible error.

At the penalty phase, the jury is permitted to consider "[t]he 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." (§ 190.3, factor (b).) As used in this factor, the term "criminal activity" includes only conduct that violates a penal statute. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1169 [36 Cal.Rptr.2d 235, 885 P.2d 1]; *People v. Boyd* (1985) 38 Cal.3d 762, 772 [215 Cal.Rptr. 1, 700 P.2d 782].) Here, respondent does not argue that defendant's threat to kill the sheriff's sergeant, by itself, violated a penal statute,[3] but instead that the threat was admissible as part of the attempted escape, which did. We agree.

Under section 190.3, factor (b), the prosecution may introduce evidence to show not only the conduct establishing the criminal violation, but also

[3]Section 422, which defines the offense of making criminal threats, took effect on September 26, 1988, some nine months after defendant made the threats at issue here.

evidence of any relevant surrounding circumstances. (*People v. Kirkpatrick, supra,* 7 Cal.4th at pp. 1013-1014; *People v. Ashmus* (1991) 54 Cal.3d 932, 985 [2 Cal.Rptr.2d 112, 820 P.2d 214].) In particular, threats made while in custody immediately after an otherwise admissible violent criminal incident are themselves admissible under factor (b). (*People v. Welch* (1999) 20 Cal.4th 701, 759 [85 Cal.Rptr.2d 203, 976 P.2d 754]; *People v. Montiel* (1993) 5 Cal.4th 877, 916-917 [21 Cal.Rptr.2d 705, 855 P.2d 1277].) Here, defendant's threats against the sheriff's sergeant were relevant to an understanding of the violent potential of defendant's attempted escape.

Defendant contends that the trial court's ruling admitting evidence of these threats denied him various rights under the state and federal Constitutions, but he did not object on these grounds in the trial court, and he does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code. Having concluded that the evidence was properly admitted under statutory evidence standards, we also reject these belated and derivative constitutional claims.

X. *Evidence of Defendant's References to Satan*

(16) Defendant contends the trial court erred in admitting evidence that he regarded Satan as his savior. We disagree.

At the guilt phase, the trial court agreed to delete references to Satan in the September 15 letter, but the court also ruled that these references would be admissible at the penalty phase. (See *ante,* at pp. 1121, 1122.) Defendant contends that this ruling is erroneous because the references to Satan do not tend to establish any circumstance in aggravation. When this issue was discussed in the trial court, the defense argued that the references to Satan were not relevant to any statutory aggravating factor. The prosecutor replied that the defense would place defendant's character in issue at the penalty phase, and that evidence about defendant's favorable regard for Satan would then be admissible in rebuttal. The court ruled it would allow the references to Satan "at the penalty phase under factor k."

Defendant is correct that character evidence under section 190.3, factor (k), can only be mitigating, and therefore the prosecution may not introduce evidence of defendant's bad character as part of its case in aggravation at the penalty phase. (*People v. Boyd, supra,* 38 Cal.3d at pp. 774-775.) Once the defendant puts his general character in issue at the penalty phase, however, the prosecutor may rebut "with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791 [230 Cal.Rptr. 667, 726 P.2d 113].) Here, it was understood that

defendant intended to place his general character in issue at the penalty phase, and in this context the trial court's ruling properly permitted the prosecution to respond with rebuttal evidence about defendant's views on Satan.

The prosecution elicited additional evidence about defendant's view of Satan during questioning about defendant's threats in January 1988, immediately after his unsuccessful attempt to escape from the Los Angeles County jail, to kill a sheriff's sergeant who had assisted in subduing him. The witness testified, without defense objection, that defendant "swore . . . to his savior, Satan," that he would kill the sergeant "in a very big way." Absent an objection, the admissibility of this brief reference to Satan is not preserved for appellate review. (Evid. Code, § 353, subd. (a).) In any event, the evidence was admissible as part of the circumstances of the escape attempt and threats. (*People v. Kirkpatrick, supra,* 7 Cal.4th at pp. 1013-1014.)

Defendant's September 9 letter to his wife, admitted at the penalty phase, included two references to Satan, including a statement that "Satan has helped me rejuvanate my energie's in a working way." In objecting to the September 9 letter in its entirety, defense counsel argued that the prosecutor was "seeking to get in some enormous prejudicial evidence about Satan which is [*sic*: has] virtually no probative value."

Assuming that this remark is sufficient to preserve a specific objection under Evidence Code section 352 to the September 9 letter's references to Satan, we conclude that the trial court did not err in overruling the objection. Defendant wrote the September 9 and September 15 letters in 1987, four years after killing Tiffany Frizzell and around 15 months before trial began. Thus, the jury could properly consider these letters as bearing on defendant's claimed feelings of remorse at the time of trial. A favorable view of the biblical figure of Satan is generally understood as a symbolic rejection of the values of love and compassion, and as indicating acceptance of the contrary values of hatred and violence, with a consequent rejection of all moral restrictions on crimes such as murder and rape. (See *McCorkle v. Johnson* (11th Cir. 1989) 881 F.2d 993, 995-996.) This abhorrent value system is inconsistent with defendant's claimed remorse and shame for the murders of his two victims, and thus the evidence was properly admitted in rebuttal. (See *People v. Jones* (1998) 17 Cal.4th 279, 306-307 [70 Cal.Rptr.2d 793, 949 P.2d 890].) If defendant's conception of Satan encompassed qualities consistent with an attitude of remorse, he was free to articulate them.

XI. *Photograph of Antaya Howard's Body*

(17) At the penalty phase, the prosecution sought to introduce in evidence two photographs of Antaya Howard's body as police officers found it

in her car. The prosecutor explained that he was offering one photograph to show the blood on the forearm and the other to show both the position of the clothing on her body and the position of the body in the hatchback area of the car. The defense objected to both photographs under Evidence Code section 352, remarking that the defense was not disputing that defendant had killed Howard. The trial court sustained the objection to the first photograph because "it's pretty grotesque as far as the face" and "the neck is extremely black and bloated." But the court overruled the objection as to the second photograph, remarking that it was a "very close question."

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." (*People v. Crittenden* (1994) 9 Cal.4th 83, 133 [36 Cal.Rptr.2d 474, 885 P.2d 887].) On appeal, we apply the deferential abuse of discretion standard when reviewing the trial court's ruling. (*People v. Cudjo, supra,* 6 Cal.4th at p. 609.) Applying that standard here, we find no abuse of the trial court's discretion. By showing the position of the victim's clothing on her body, some of her injuries, and the position of her body as it was folded into the small hatchback area behind the rear seat of the car, the photograph was relevant to assist the jury in assessing the aggravating force of the murder and rape or attempted rape of Antaya Howard. (See *People v. Wader, supra,* 5 Cal.4th at p. 655.) Although the photograph, which we have reviewed, is somewhat gruesome, as murder victim photographs almost invariably are, it is not shocking or inflammatory. The trial court carefully weighed the potential prejudice and excluded another photograph that was more gruesome in its depiction of the victim's face.

Defendant contends that the trial court's ruling admitting the photographs denied him various rights under the state and federal Constitutions, but he did not object on these grounds in the trial court, and he does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code. Having concluded that the evidence was properly admitted under statutory evidence standards, we also reject these belated and derivative constitutional claims.

XII. *California Death Eligibility Law*

Defendant contends that California's death penalty law violates the state and federal Constitutions because it fails to adequately narrow the class of death-eligible defendants. We have repeatedly rejected this contention (e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 191-192 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Lucero* (2000) 23 Cal.4th 692, 740 [97 Cal.Rptr.2d 871, 3 P.3d 248], and cases cited) and defendant does not persuade us to reconsider our previous rulings on this issue.

Defendant argues in particular that California's death penalty law fails to appropriately narrow the death-eligible class because it gives prosecutors unreviewable discretion in charging special circumstances and electing to seek the death penalty. For reasons we have previously explained, we disagree. (*People v. Earp, supra,* 20 Cal.4th at p. 905; *People v. Carpenter, supra,* 15 Cal.4th at p. 421; *People v. Arias, supra,* 13 Cal.4th at pp. 189-190; *People v. Crittenden, supra,* 9 Cal.4th at p. 152; *People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1024.)

XIII. *Instructions on Penalty Determination*

Defendant contends that the standard penalty phase jury instructions given in this case did not provide the jury with an adequate framework for resolving the capital sentencing decision. We have rejected each of the arguments defendant makes in support of this contention. In particular, we have held that the trial court need not instruct the jury that there is a "presumption of life" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1064 [90 Cal.Rptr.2d 607, 988 P.2d 531]; *People v. Arias, supra,* 13 Cal.4th at p. 190); that the prosecution has the burden of persuasion on the issue of penalty (*People v. Kipp, supra,* 18 Cal.4th at p. 381); that the prosecution must prove the existence of particular aggravating circumstances beyond a reasonable doubt (*People v. Box* (2000) 23 Cal.4th 1153, 1216 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Lucero, supra,* 23 Cal.4th at p. 741); that the jury must be persuaded beyond a reasonable doubt that death is the appropriate penalty (*People v. Bemore* (2000) 22 Cal.4th 809, 859 [94 Cal.Rptr.2d 840, 996 P.2d 1152]; *People v. Kipp, supra,* at p. 381); or that the jurors must unanimously agree on the existence of particular aggravating circumstances (*People v. Kipp, supra,* at p. 381).

XIV. *Death Selection Process*

Defendant challenges California's sentencing process in capital cases, claiming it "suffers from a wide variety of statutory, procedural and substantive defects." We have previously rejected each of the arguments defendant raises in support of this contention.

The use of section 190.3, factor (a), which permits the jury to consider in aggravation "[t]he 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," is not unconstitutionally vague or imprecise, nor does it improperly weight the scales in favor of death. (*People v. Mendoza, supra,* 24 Cal.4th at p. 192; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; *People v. Hawkins* (1995)

10 Cal.4th 920, 964 [42 Cal.Rptr.2d 636, 897 P.2d 574].) Section 190.3, factor (b), which permits the jury to consider in aggravation "[t]he 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," does not violate state or federal constitutional requirements of due process, equal protection, or reliability in death sentencing (*People v. Anderson* (2001) 25 Cal.4th 543, 584 [106 Cal.Rptr.2d 575, 22 P.3d 347]; *People v. Jenkins, supra,* 22 Cal.4th at p. 1054; *People v. Barnett, supra,* 17 Cal.4th at p. 1178), and the standard jury instructions given here provided adequate guidance on the use of this factor (*People v. Seaton* (2001) 26 Cal.4th 598, 687 [110 Cal.Rptr.2d 441, 28 P.3d 175]). Section 190.3, factors (d) (mental or emotional disturbance) and (h) (mental disease or defect, or intoxication), in their use of the word "extreme" and in their limitation to the time of the offense, do not impermissibly restrict the jury's consideration of relevant mitigating circumstances or make the factors impermissibly vague. (*People v. Anderson, supra,* at p. 601; *People v. Riel, supra,* 22 Cal.4th at p. 1225; *People v. Jenkins, supra,* at pp. 1054-1055; *People v. Welch, supra,* 20 Cal.4th at pp. 768-769.)

The trial court is not required to omit inapplicable factors when instructing the jury. (*People v. Riel, supra,* 22 Cal.4th at p. 1225; *People v. Kipp, supra,* 18 Cal.4th at p. 381.) Nor is the court required to instruct on the meaning of a sentence of life imprisonment without possibility of parole. (*People v. Sakarias* (2000) 22 Cal.4th 596, 641 [94 Cal.Rptr.2d 17, 995 P.2d 152]; *People v. Holt* (1997) 15 Cal.4th 619, 688-689 [63 Cal.Rptr.2d 782, 937 P.2d 213].)

(18) The trial court instructed the jury in these terms: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life without parole." When the jury is instructed in this way, the trial court need not also instruct the jury to return a verdict of life without parole if the aggravating circumstances do not outweigh the mitigating circumstances. (*People v. Kipp, supra,* 18 Cal.4th at p. 381.)

Defendant contends the jury instructions were defective in failing to state that the jury could return a verdict of life without parole even if the circumstances in aggravation outweighed those in mitigation. Although such an instruction is not required (*People v. Kipp, supra,* 18 Cal.4th at p. 381), the trial court gave a special instruction so stating: "Each juror is free to assign whatever moral or sympathetic value he or she deems appropriate to each and all the various factors before him. You are free to reject death as inappropriate under the circumstances, even if you believe that the aggravating evidence predominates over the mitigating."

XV. *Appellate Review Process*

(19) Defendant raises various challenges to the process for appellate review of death judgments in this state. As we have previously explained, the process is not constitutionally defective in failing to provide for comparative or intercase proportionality review. (*People v. Lucero, supra,* 23 Cal.4th at p. 741.) Although a death sentence is subject to intracase proportionality review (*id.* at pp. 739-740), defendant makes no claim that his sentence is grossly disproportionate to his moral culpability for the crimes he committed, and we conclude that it is not.

Defendant contends that the attorney appointed to represent him on this appeal is "burdened by an unconstitutional conflict of interest" because the same attorney was also appointed to investigate potential claims to be raised in a petition for a writ of habeas corpus.[4] Defendant analogizes this dual representation on appeal and in a proceeding on a habeas corpus petition to representation by the same attorney at trial and on appeal, a situation in which courts have recognized "an inherent conflict" because counsel "is in the untenable position of urging his own incompetency." (*People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255 [12 Cal.Rptr.2d 339]; see also *Burns v. Gammon* (8th Cir. 1999) 173 F.3d 1089, 1092.)

Defendant's argument explains why habeas corpus counsel might potentially be burdened by a conflict of interest if placed in the position of urging counsel's own incompetence as appellate counsel,[5] but it does not explain how this dual appointment could in any way interfere with counsel's effective representation on the appeal. Thus, defendant has failed to demonstrate that appellate counsel is burdened by an actual or potential conflict of interest.

Defendant's claim that habeas corpus counsel is burdened by a conflict of interest is not cognizable here on direct appeal. Moreover, it lacks merit in any event as defendant has no right under the federal Constitution to the

[4]This court no longer routinely appoints the same attorney to represent a defendant under judgment of death on both the automatic appeal and on a petition for a writ of habeas corpus. (See Gov. Code, § 68663 ["No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests [*sic*] continued representation."]; Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, std. 2-1 ["This court's appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter."]; *In re Robbins* (1998) 18 Cal.4th 770, 792, fn. 13 [77 Cal.Rptr.2d 153, 959 P.2d 311].)

[5]We observe, however, that this court has received petitions for writ of habeas corpus in which counsel have asserted their own ineffectiveness on appeal.

effective assistance of counsel in a state habeas corpus proceeding (*Coleman v. Thompson* (1991) 501 U.S. 722, 756-757 [111 S.Ct. 2546, 2568-2569, 115 L.Ed.2d 640]; *Murray v. Giarratano* (1989) 492 U.S. 1, 10 [109 S.Ct. 2765, 2770-2771, 106 L.Ed.2d 1] (plur. opn. of Rehnquist, C. J.); *id.* at pp. 14-15 [109 S.Ct. at pp. 2772-2773] (conc. opn. of Kennedy, J.)), although the alleged deficiencies of habeas corpus counsel, whether the result of a conflict of interest or some other cause, may be considered when determining the applicability of procedural bars (*In re Sanders* (1999) 21 Cal.4th 697, 719 [87 Cal.Rptr.2d 899, 981 P.2d 1038]). Thus, the appointment of a single attorney to represent defendant on direct appeal and on any petition for writ of habeas corpus does not violate the state or federal Constitution.

XVI. *Political Influences on California Appellate Review Process*

(20) Defendant contends that the process for appellate review of death judgments in California is dominated by political considerations and for this reason violates the due process and equal protection guarantees of the state and federal Constitutions. He notes that between 1979 and 1986, this court reversed 95 percent of the death judgments it reviewed. In 1986, there was a "strenuous and well publicized campaign to unseat [three members of this court] at the impending retention election." (*People v. Cox* (1991) 53 Cal.3d 618, 696 [280 Cal.Rptr. 692, 809 P.2d 351].) This campaign "coalesced around the high percentage of death penalty reversals." (*Ibid.*) The campaign was successful, and the Chief Justice and two associate justices were removed from office and replaced by new appointees. Between July 1987 and December 1994, this court affirmed 84 percent of death penalty cases, and between 1990 and 1994 the affirmance rate was 94 percent.

Under the due process clause of the federal Constitution, defendant is entitled to an impartial trial judge (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 1264-1265, 113 L.Ed.2d 302]; *People v. Brown* (1993) 6 Cal.4th 322, 332 [24 Cal.Rptr.2d 710, 862 P.2d 710]), and we assume that defendant is also entitled to have his automatic appeal decided by appellate justices who are impartial. He is not, however, entitled to have his appeal decided by justices who have never formed or expressed opinions or thoughts on general topics such as the propriety of the death penalty. " 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' " (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790 [171 Cal.Rptr. 590, 623 P.2d 151], quoting 2 Davis, Administrative Law Treatise (1st ed. 1958) p. 131; see also *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 821 [106 S.Ct. 1580, 1585, 89 L.Ed.2d 823]; *U.S. v. Payne* (9th Cir. 1991) 944 F.2d 1458, 1476-1477.)

Defendant argues, however, that the members of this court each have an actual conflict of interest because, as defendant puts it, "for a justice of this Court to keep his or her job, death sentences must be affirmed." Even if we assume for argument's sake that there is some relationship between affirmance of death sentences and retention in office, defendant fails to demonstrate that a justice of this court must affirm every death sentence or any particular death sentence, much less defendant's own sentence. Thus, defendant does not persuade us that members of this court have a disabling conflict of interest in determining this appeal. Even if such a conflict of interest existed, moreover, it would apply equally to all California judges and, under the common law rule of necessity, the justices of this court would not be disqualified. (*Olson v. Cory* (1980) 27 Cal.3d 532, 537 [178 Cal.Rptr. 568, 636 P.2d 532].)

XVII. *Cumulative Effect of Asserted Penalty Phase Errors*

Defendant argues that even if no single error requires reversal of the penalty verdict of death, the cumulative effect of the errors at the guilt and penalty phases must be deemed sufficiently prejudicial to warrant this remedy. Apart from a single instance of guilt phase prosecutorial misconduct, which we have found nonprejudicial, defendant has failed to demonstrate that error occurred at either the guilt or the penalty phase. Accordingly, there could be no cumulative effect.

DISPOSITION

The judgment is affirmed.

George, C. J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Kremer, J.,* concurred.

Appellant's petition for a rehearing was denied January 29, 2002.

*Presiding Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

CLAYTON # 26

GENERAL VOIR DIRE

1. **Please state:**

   a. **Your full name** OTIS CARL CLAYTON JR

   b. **Your age** 37

   c. **Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other).** MARRIED

   d. **Have you been known by any other name?**

   Yes X **No** _____

   If so, what is the name or names? N/A

   e. **Do you have any children? If so, please state their names, ages, sex and employment, if known.**

   OTIS CARL CLAYTON [redacted] III

   AGE (3) – MALE

   f. **State the City, County and area of your residence and the nearest major cross-streets.**

   CARSON – LOS ANGELES – AVALON & VICTORIA

   g. **How long have you been a resident at that location?**

   3yrs 3mos

   h. **Where did you reside just prior to your present address?**

   3017 STOCKER PL LOS ANGELES, CA 90746

   i. **How long did you reside at your previous address?**

   10yrs

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

N/A

d. Are you registered to vote?

Yes X No _____

e. If "yes", did you vote in the last election?

Yes X No _____

32. Please state your religious affiliation, if any:

BAPTIST

a. If you are active in church/religious activities, please describe.

N/A

33. What sort of things do you enjoy doing in your spare time?

Getting Together with Friends playing cards or dominos

a. Do you have any special hobbies or interests?

Yes _____ No X

b. If "yes", what are they?

c. Do you enjoy reading?

Yes X No _____

d. If "yes", what kind of books do you like to read?

Mostly Newpapers

e. What are the titles of the last three books you have read?

N/A

LAMBORN #147

GENERAL VOIR DIRE

1. **Please state:**

   a. **Your full name** Jackie Lou Lamborn

   b. **Your age** 54

   c. **Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other).**
   Married

   d. **Have you been known by any other name?**
   Yes ___ No X
   If so, what is the name or names? ___

   e. **Do you have any children? If so, please state their names, ages, sex and employment, if known.**
   Brenda Lamborn Miller, 34, F. - Manages Apt.
   Pamela Lamborn Adams; 32 - F. - Homemaker
   Lisa Lamborn (Walker) 28 - F. - Homemaker
   Ken Lamborn; 27; M (Wholesale Parts (Nissan))

   f. **State the City, County and area of your residence and the nearest major cross-streets.**
   Lakewood, L.A. Co., Del Amo & Bloomfield

   g. **How long have you been a resident at that location?**
   28 years

   h. **Where did you reside just prior to your present address?**
   Bell, CA

   i. **How long did you reside at your previous address?**
   1 year

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

yes; California School Food Service
Queen Mary Chapter 23 - Secretary

d. Are you registered to vote?

Yes X No _____

e. If "yes", did you vote in the last election?

Yes X No _____

32. Please state your religious affiliation, if any:

Baptist

a. If you are active in church/religious activities, please describe.

Attend Church + Sunday School

33. What sort of things do you enjoy doing in your spare time?

Read; Crossword Puzzles; Shop

a. Do you have any special hobbies or interests?

Yes _____ No X

b. If "yes", what are they?

c. Do you enjoy reading?

Yes X No _____

d. If "yes", what kind of books do you like to read?

Mystery - Love Story

e. What are the titles of the last three books you have read?

"Jesus"

MORENO #57

GENERAL VOIR DIRE

1. Please state:

a. Your full name JIMMY CLARK MORENO

b. Your age 42

c. Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other). MARRIED

d. Have you been known by any other name?

Yes ___ No X

If so, what is the name or names? ___

e. Do you have any children? If so, please state their names, ages, sex and employment, if known.

SHILO KIMBERLY MORENO
14 YEARS OLD FEMALE STUDENT

f. State the City, County and area of your residence and the nearest major cross-streets.

BELLFLOWER, L.A. COUNTY ARTESIA BLVD + CLARK ST.

g. How long have you been a resident at that location?

20 YEARS

h. Where did you reside just prior to your present address?

LONG BEACH

i. How long did you reside at your previous address?

14 YEARS

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

2ND VICE PRESIDENT

d. Are you registered to vote?

Yes X No _____

e. If "yes", did you vote in the last election?

Yes _____ No X

32. Please state your religious affiliation, if any:

CATHOLIC

a. If you are active in church/religious activities, please describe.

No

33. What sort of things do you enjoy doing in your spare time?

FISHING AND SHOWING DOGS

a. Do you have any special hobbies or interests?

Yes X No _____

b. If "yes", what are they?

SAME AS ABOVE

c. Do you enjoy reading?

Yes _____ No X

d. If "yes", what kind of books do you like to read?

e. What are the titles of the last three books you have read?

NONE

NAKAMURA

~~E-15~~ 61

GENERAL VOIR DIRE

1. **Please state:**

   a. **Your full name** Rebecca Ejiri Nakamura

   b. **Your age** 46

   c. **Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other).** Married

   d. **Have you been known by any other name?**

      Yes ✓ **No** ~~✓~~

      If so, what is the name or names? My maiden name Becky Kaneshiro

   e. **Do you have any children? If so, please state their names, ages, sex and employment, if known.**

      Lee Ann - age 26 - female - registered nurse (Long Beach Memorial)
      Lloyd - age 24 - male - electrical engineer (Hughes Aircraft)
      Lanae - age 22 - female - student (Long Beach State)
      Lane - age 19 - male - student (U.C. L.A.)

   f. **State the city, County and area of your residence and the nearest major cross-streets.**

      Carson - LA County - Main Street + Victoria St.

   g. **How long have you been a resident at that location?**

      23 years

   h. **Where did you reside just prior to your present address?**

      Norwalk, Calif.

   i. **How long did you reside at your previous address?**

      1 year.

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

d. Are you registered to vote?

Yes ✓ No _____

e. If "yes", did you vote in the last election?

Yes ✓ No _____

32. Please state your religious affiliation, if any:

Christianity

a. If you are active in church/religious activities, please describe.

33. What sort of things do you enjoy doing in your spare time?

reading

a. Do you have any special hobbies or interests?

Yes ✓ No _____

b. If "yes", what are they?

Japanese Dancing

c. Do you enjoy reading?

Yes ✓ No _____

d. If "yes", what kind of books do you like to read?

Non-fiction - history - Autobiographies books

e. What are the titles of the last three books you have read?

How to choose a guru / Great Depression 1780

Out On a Limb

NAYLOR #63

GENERAL VOIR DIRE

1. **Please state:**

   a. **Your full name** Naylor, Michael William

   b. **Your age** 34

   c. **Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other).** Married

   d. **Have you been known by any other name?**

   Yes ___ **No** ✓

   If so, what is the name or names? N/A

   e. **Do you have any children? If so, please state their names, ages, sex and employment, if known.**

   Amber Nicole Naylor 8yrs Female
   Nikki Lee Naylor 7yrs Female
   Sunny Mai Naylor 3yrs Female

   f. **State the City, County and area of your residence and the nearest major cross-streets.**

   Wilmington, Los Angeles - P.C.H. & Avalon

   g. **How long have you been a resident at that location?**

   5mo.

   h. **Where did you reside just prior to your present address?**

   3660 S. Barrington Mar Vista, CA

   i. **How long did you reside at your previous address?**

   5yrs

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

N/A

d. Are you registered to vote?

Yes ✓ No _____

e. If "yes", did you vote in the last election?

Yes ✓ No _____

32. Please state your religious affiliation, if any:

Baptist

a. If you are active in church/religious activities, please describe.

N/A

33. What sort of things do you enjoy doing in your spare time?

Fishing;

a. Do you have any special hobbies or interests?

Yes ✓ No _____

b. If "yes", what are they?

Cars, Motorcycles

c. Do you enjoy reading?

Yes ✓ No _____

d. If "yes", what kind of books do you like to read?

Historical

e. What are the titles of the last three books you have read?

"Gettysburg The Confederate High Tide", "Dubblin",

RIVERS #76

GENERAL VOIR DIRE

1. Please state:

a. Your full name ALGERTHA RIVERS

b. Your age 43

c. Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other). Single

d. Have you been known by any other name?

Yes ____ No X

If so, what is the name or names? _____

e. Do you have any children? If so, please state their names, ages, sex and employment, if known.

NO

f. State the City, County and area of your residence and the nearest major cross-streets.

Compton, Los Angeles ALONDRA AND TAMARIND

g. How long have you been a resident at that location?

10 YEARS

h. Where did you reside just prior to your present address?

135TH ST AND STANFORD AVE Los Angeles County

i. How long did you reside at your previous address?

3 YEARS

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

d. Are you registered to vote?

Yes X No _____

e. If "yes", did you vote in the last election?

Yes X No _____

32. Please state your religious affiliation, if any:

Baptist

a. If you are active in church/religious activities, please describe.

Attend Church every week, Choir MEMBER

33. What sort of things do you enjoy doing in your spare time?

Watching T.V., going to movies, watching sports EVENTS

a. Do you have any special hobbies or interests?

Yes _____ No X

b. If "yes", what are they?

c. Do you enjoy reading?

Yes X No _____

d. If "yes", what kind of books do you like to read?

Autobiographies

e. What are the titles of the last three books you have read?

VASQUEZ # 110

GENERAL VOIR DIRE

1. Please state:

a. Your full name ARNEZ PERFECTO VASQUEZ

b. Your age 34

c. Present marital status (including, but not limited to being single, married, divorced, widowed or living with significant other). MARRIED

d. Have you been known by any other name?

Yes ___ No ✓

If so, what is the name or names? NONE

e. Do you have any children? If so, please state their names, ages, sex and employment, if known.

SONYA MARIE VASQUEZ, 9 YEARS old - GIRL

REBECCA LEE VASQUEZ, 6 YEARS old - GIRL

JUSTIN LEE VASQUEZ, 2 YEARS old - BOY

f. State the City, County and area of your residence and the nearest major cross-streets.

LONG BEACH, LOS ANGELES, NORTH LONG BEACH, ORANGE & MARKET ST.

g. How long have you been a resident at that location?

9 YEARS

h. Where did you reside just prior to your present address?

CARSON, CALIF.

i. How long did you reside at your previous address?

2 YEARS

c. Have you ever been an officer in any of these organizations? If so, please state in which organization(s) and your title(s).

NONE

d. Are you registered to vote?

Yes ✓ No _____

e. If "yes", did you vote in the last election?

Yes ✓ No _____

32. Please state your religious affiliation, if any:

CHRISTIAN

a. If you are active in church/religious activities, please describe.

ATTEND CHURCH SERVICES WEEKLY

33. What sort of things do you enjoy doing in your spare time?

WORKING ON MY HOUSE

a. Do you have any special hobbies or interests?

Yes ✓ No _____

b. If "yes", what are they?

SOFTBALL

c. Do you enjoy reading?

Yes _____ No ✓

d. If "yes", what kind of books do you like to read?

NONE

e. What are the titles of the last three books you have read?

NONE

DECLARATION OF ALAN DEAN CLOW

I, Alan Dean Clow, declare:

1. I am currently an investigator working in the Orange County Public Defender's Office. In 1984, I was a licensed private investigator. I was hired to work as an investigator on Martin Kipp's capital trial cases.

2. After Martin Kipp's trial in Los Angeles County, I contacted and interviewed ten of the jurors and alternates who served at that trial. Below are some of the details of those interviews.

3. On February 9, 1989, I spoke with Juror Otis Carl Clayton, Jr. Mr. Clayton told me that there were somewhere between five and ten votes during penalty phase deliberations. Initially, he voted as undecided.

4. On February 9, 1989, I spoke with Juror Algertha Rivers. Ms. Rivers told me that there were five or six votes during penalty phase deliberations. The very first vote the jurors took, before they began deliberating, indicated there were two jurors for death, two for life and eight who were undecided. On the final day, the jurors took three votes. The tally on the penultimate vote was eight for death, three for life and one undecided.

5. On February 14, 1989, I spoke with Juror Sharon Heffner. Ms. Heffner told me that she was a Christian and was one of the two jurors who were

A.D.C.

the last ones to change their votes from life to death. She remembered that the first vote during penalty phase deliberations was one person for death, one for life and ten undecided. The next day, there were five for death, four for life and three undecided. The last day there were eleven votes for death and one for life.

6. When asked why she voted for death, Ms. Heffner responded by telling me that she researched in the Bible for the types of crimes that the defendant committed, the Bible said individuals do not have the right to take a life, and according to the Bible the crimes of rape and murder deserve the death penalty.

7. Ms. Heffner felt the letters written by Mr. Kipp that were introduced during the trial hurt his case. She learned through his letters that he planned on killing 400 to 500 people when he got out, and she did not want to vote for life and then have any other murders he committed on her conscience. She felt his admitted Satanism also hurt his case. She was happy because a lot of his friends who were brought to the trial to testify had changed their ways and were now successful Christians.

8. Ms. Heffner also told me that after the trial she contacted someone in the prison ministry to see if they could visit Mr. Kipp. She felt he might be ready to ask for God's forgiveness. During the trial, she prayed for the defendant.

A.D.C.

9. On February 13, 1989, I spoke with Linda Mora, who was an alternate juror. Although she did not participate in deliberations, she stated that during the trial, there were times when she felt she would have voted for life and other times when she would have voted for death.

10. I met with an investigator from the Office of the Federal Public Defender, who currently represent Martin Kipp. I have read and reviewed this 3 page declaration.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct to the best of my recollection. Signed this 2 day of August, 2007 at SANTA ANA California.

Alan Dean Clow

DECLARATION OF ALGERTHA RIVERS

I, Algertha Rivers, declare:

1. I was a juror in Martin Kipp's murder trial in Los Angeles County between 1988 and 1989.

2. During the deliberation of the penalty phase of Mr. Kipp's trial, one of the jurors said that if we gave Mr. Kipp a sentence of life without parole, he might be released from prison one day. Several jurors agreed that since he had committed a murder in Orange County and one in Los Angeles County, he was capable of doing it again if he got a life without parole sentence and was released from prison.

3. I recall that during penalty phase deliberations a female juror with dark, shoulder-length hair brought in a Bible and read it to us. She talked about several verses in the Bible, which she told us would help us in making a decision. The jurors talked about standing in judgment of another human being. There was also discussion of the verses which state, 'an eye for an eye' and 'judge not lest ye be judged.' A little over half of the jurors had a religious background and strong religious beliefs.

4. As I recall, the judge's instructions to us stated that if there was no doubt that Mr. Kipp was guilty of murder, we had

to bring back a verdict of death. As I understood the judge's instructions, the jury was not allowed to take sympathy for the defendant into consideration when deciding whether a sentence of death or life without parole was more appropriate.

5. During the entire trial, I noticed that Mr. Kipp just sat there with an expression like his mind was somewhere else. One of the jurors commented during penalty phase deliberations that Mr. Kipp dropped his head and looked "teary" during the testimony of some of his family members.

6. I would have wanted to hear about the effects of Mr. Kipp's exposure to alcohol as a result of his birth mother's alcohol abuse while she was pregnant with him. If Mr. Kipp's attorneys presented evidence about Mr. Kipp's history of drug abuse throughout his life, it would have been important information for me to know, and it may have even made a difference in my decision during penalty phase deliberations.

7. On March 16, 2000, I spoke to staff members of the Office of the Federal Public Defender about my experience as a juror in the Kipp trial. They explained to me that they represented Mr. Kipp in federal court proceedings reviewing his conviction and death sentence. I have read and reviewed this

////

declaration.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

4-3-2008
DATE

Algertha Rivers
ALGERTHA RIVERS

KIPP V. WOODFORD
CV 03-08571-GLT
LODGMENT 2

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. MARTIN JAMES KIPP, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. A028286 APR 1 0 1990

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE MICHAEL G. NOTT, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: JOHN K. VAN DE KAMP
STATE ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

VOLUME 24 OF 24 VOLUMES

PAGES 5014 TO ~~5290~~ 5384, INCL.

PAMELA KIRKNER, CSR #2336
GLORIA ALDRIDGE, CSR #1178
FRANCES M. GERBER, CSR #2851
BARBARA CROOKER, CSR #1886
CAROL A. MC NEIL, CSR #4887
LAURIE TURK, CSR #4459
JOANNE LEONG, CSR #1819
GLENDA LEE ERLEY, CSR #2695
SUZANNE ECHANTE, CSR #2164
VICKI FRASER, CSR #6737
CHRISTINA ARCHAMBEAU, CSR #3416
OFFICIAL REPORTERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTH "L". HON. MICHAEL G. NOTT, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

MARTIN JAMES KIPP,

DEFENDANT.

NO. A 028286

FILED
JAN 23 1989
FRANK S. ZOLIN, COUNTY CLERK
BY DEPUTY

REPORTERS' DAILY TRANSCRIPT

TUESDAY, JANUARY 24, 1989

APPEARANCES:

FOR THE PEOPLE:

IRA REINER
DISTRICT ATTORNEY
BY: WILLIAM HODGMAN, DEPUTY
18-709 CRIMINAL COURTS BUILDING
210 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
(213) 974-3611

FOR THE DEFENDANT:

JOHN YZURDIAGA, ESQ.
970 WEST 190TH STREET
SUITE 605
LOS ANGELES, CALIFORNIA 90502
(213) 515-7633

-AND-

BRODEY & PRICE
BY: JEFFREY BRODEY, ESQ.
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(213) 277-8438

VOLUME 42

PAGE: 5149 - 5251

ORIGINAL

VICKI FRASER, CSR #6737
CHRISTINA ARCHAMBEAU, CSR #3416
OFFICIAL REPORTERS

ALTERNATE JUROR PLELL: NO, SIR.

THE COURT: THANK YOU.

MR. HODGMAN READY TO PROCEED.

MR. HODGMAN: I AM, YOUR HONOR. THANK YOU, VERY MUCH.

PEOPLE'S ARGUMENT

MR. HODGMAN: YOUR HONOR, FELLOW COUNSEL, GOOD MORNING LADIES AND GENTLEMEN OF THE JURY.

SATURDAY, SEPTEMBER 17TH, 1983, WAS A VERY HOT DAY. IT WAS A HOT DAY LIKE ONE OF THOSE DAYS THAT WE HAVE HERE IN SOUTHERN CALIFORNIA IN SEPTEMBER. IT WAS FIVE YEARS FOUR MONTHS AGO, APPROXIMATELY.

MORE THAN LIKELY YOU MIGHT BE ABLE TO RECALL WHERE YOU WERE AT THE TIME. MORE THAN LIKELY YOU WILL NOT BE ABLE TO RECALL PRECISELY WHAT YOU WERE DOING AT THE TIME. AND MOST CERTAINLY YOU DID NOT REALIZE THAT ON THAT DATE OF SEPTEMBER 17TH, 1983, THE EVENTS HAD BEEN SET IN MOTION THAT WERE TO BRING YOU, AND ME, THE DEFENDANT AND HIS ATTORNEYS HERE IN THIS COURTROOM TODAY, JANUARY 24TH, 1989.

FOR ON THAT DATE OF SEPTEMBER 17TH, 1983, IN ROOM 162 OF THE RAMADA INN ON PACIFIC COAST HIGHWAY IN LONG BEACH, LAY THE BODY OF A YOUNG WOMAN. IN THAT ROOM, AS YOU WELL KNOW, WAS THE DECEASED BODY OF 18 YEAR OLD TIFFANY FRIZZELL. SHE HAD BEEN DEAD FOR SOME TIME. THE LIFE HAD BEEN STRANGLED OUT OF HER. WOUND AROUND HER NECK WAS A SIMPLE WHITE CLOTH COTTON BELT. A BELT FROM ONE ~~HER~~ OF HER

VERY OWN OUTFITS. AND THAT BELT WAS WOUND TIGHTLY AS A LIGATURE AROUND HER NECK AND WAS EVIDENCE OF WHAT HAD HAPPENED TO HER.

SHE HAD BEEN RAPED. AND AS YOU RECALL HER BODY WAS FOUND PARTIALLY NUDE. AND AS IT APPROACHED NOON OF THAT DATE THE PROCESSES, THE PHYSIOLOGICAL PROCESSES OF DEATH WERE ALREADY BEGINNING TO TAKE PLACE. THE BLOOD WAS BEGINNING TO SETTLE IN HER BODY, HER BODY HAD BECOME STIFF OF RIGORMORTIS. THE DEFENDANT WAS ALREADY GONE. BUT HE HAD LEFT BEHIND NOT ONLY A PARTIAL FINGERPRINT, BUT HIS ~~INCRIMITER~~ imprimatur (UF) OF DEATH UPON TIFFANY FRIZZELL.

AND IT WAS THOSE EVENTS AND THE DISCOVERY OF TIFFANY FIRZZELL'S BODY WHICH SERVED AS A ~~CATALIST~~ Catalyst (UF) FOR, IN A SENSE, BRINGING US ALL TOGETHER IN THIS COURTROOM TODAY.

SINCE THE END OF NOVEMBER ALL OF US HAD BEEN ENGAGED IN A POSSESS. INITIALLY A FACTUAL PROCESS OF DETERMINING WHETHER OR NOT THE DEFENDANT WAS GUILTY OF THESE CHARGES. NOW YOU HAVE A MUCH MORE IMPORTANT DECISION BEFORE YOU, AND THAT DECISION IS TO DETERMINE WHAT IS TO BE THE JUST PUNISHMENT FOR THE DEFENDANT IN THIS CASE; LIFE WITHOUT POSSIBILITY OF PAROLE OR THE DEATH PENALTY.

AND BEFORE I BEGIN TO ADDRESS MYSELF TO THIS ISSUE IN THIS PHASE OF THE CASE, I WOULD LIKE TO SAY ONE THING PRELIMINARILY. I WOULD LIKE TO THANK YOU, AND I THINK I SPEAK ON BEHALF OF THE COURT AND ALL COUNSEL, FOR YOUR ~~CONSCIENCIOUS~~ conscientious (UF) ADHERENCE TO YOUR DUTY AS JURORS IN THIS CASE.

JURY SERVICE IS ONE OF THOSE OBLIGATIONS AND DUTIES OF CITIZENSHIP THAT SOMETIMES IS NOT ALWAYS WELCOME.

HOWEVER, IN THIS CASE BY THE VERY FACT THAT ALL OF YOU HAVE REMAINED HERE THROUGHOUT ALL OF THE PROCEEDINGS AND THAT YOU HAVE BEEN ATTENTIVE THROUGHOUT ~~SERVICE~~ serves OF, I THINK AS A VERY STRONG TESTIMONIAL TO YOUR ADHERENCE TO THAT DUTY. SO I HAVE TO SAY TO YOU, THANK YOU.

NOW, ON JANUARY 3RD OF THIS YEAR, 1989, I SPOKE TO YOU. AND I OUTLINED FOR YOU AT THAT TIME THE EVIDENCE THAT I WOULD BE PRESENTING IN THE PENALTY PHASE OF THIS CASE. AND AT THE CONCLUSION OF MY REMARKS, I INDICATED TO YOU THAT WHEN THIS PHASE OF THE CASE WAS OVER I WOULD BE URGING YOU TO FIND THAT THE APPROPRIATE PENALTY FOR THIS DEFENDANT IN THIS CASE WAS THE DEATH PENALTY.

AND IN LIGHT OF THE EVIDENCE THAT IS TRANSPIRED IN THESE INTERVENING THREE WEEKS, I THINK THAT IT STANDS NOW MORE CLEAR AND MORE COMPELLING THAN EVER THAT THERE IS INDEED ONLY ONE JUST PENALTY IF THIS CASE, AND THAT PENALTY IS INDEED THE DEATH PENALTY.

I WOULD LIKE TO SHARE WITH YOU SOME OBSERVATIONS THIS MORNING BEFORE I BEGIN TO REVIEW WITH YOU SOME OF THE EVIDENCE WHICH I SUBMIT TO YOU COMPELLINGLY SHOWS THAT THE DEATH PENALTY IS INDEED THE APPROPRIATE PENALTY IN THIS CASE.

AS JUDGE NOTT INDICATED, I WILL BE SPEAKING TO YOU ONE TIME, AND ONE TIME ALONE. I WILL NOT BE STANDING IN REBUTTAL TO ANYTHING THAT EITHER MR. BRODEY OR MR. YZURDIAGA SAY TO YOU THIS MORNING. AND IS THIS HAPPENS FOR A NUMBER OF REASONS. IT HAPPENS AS A MATTER OF PROCEEDING, AND IT HAPPENS BECAUSE I FEEL IN THIS TYPE OF CASE WHAT I HAVE TO SAY, BASICALLY, CAN BE SAID ONCE.

SO THIS MORNING I'M GOING TO HAVE MY SAY, I'M GOING TO IMPART TO YOU AS BEST AS I CAN THE POINTS THAT I THINK ARE IMPORTANT FOR YOU TO CONSIDER IN THIS PHASE OF THE CASE, AND THEN I WILL SIT DOWN.

SECONDLY, I THINK IT IS NECESSARY FOR ME TO SPEAK ONLY ONCE BECAUSE IN THIS PHASE OF THE CASE THE POWER OF WORDS I FEEL ONLY HAS SOME LIMITED APPLICATION.

NOW, IN THESE STAKES AND IN THESE TIMES WE ARE AWARE OF HOW THE POWER OF WORDS CAN MOVE PEOPLE. AND WE HAVE EVIDENCE OF CERTAIN ELOQUENT SPEAKERS IN OUR CONTEMPORARY LIVES THAT CAN MOVE PEOPLE BY THEIR VERY WORDS.

BUT IN A CASE LIKE THIS, AS POWERFUL AS WORDS CAN BE, I SUBMIT TO YOU THERE'S A FORCE THAT IS EVEN GREATER. AND THAT FORCE IS THE FORCE OF EVIDENCE. BECAUSE WHEN I HAVE DONE, OR WHEN I AM DONE SPEAKING AND WHEN THE DEFENSE ATTORNEYS ARE DONE SPEAKING AND YOU 12 JURORS RETIRE

TO THAT JURY DELIBERATION ROOM, OUR WORDS WILL NO LONGER BE WITH YOU. WE WILL NO LONGER BE SPEAKING. WHAT YOU WILL CARRY WITH YOU IS THE EVIDENCE. AND IT IS THE EVIDENCE IN THIS CASE WHICH SPEAKS MOST POWERFULLY, MOST COMPELLINGLY IN FAVOR OF THE DEATH PENALTY.

NOW, THERE ARE SOME ADDITIONAL OBSERVATIONS TO MAKE WITH REGARD TO THIS TYPE OF CASE. BECAUSE THIS IS A UNIQUE TYPE OF PROCEEDING. IT IS AN UNIQUE TYPE OF PROCEEDING IN LAW. VERY RARELY DO JURORS SUCH AS YOURSELVES GET TO MAKE THE DETERMINATION AS TO WHAT PENALTY IS APPROPRIATE. AND AS A RESULT OF THIS UNIQUE TYPE OF PROCEEDING, THERE ARE CERTAIN PHENOMENA WHICH OCCUR WHICH I THINK YOU SHOULD BE ALERT TO AS YOU BEGIN YOUR DELIBERATIONS.

~~PHENOMENA~~ Phenomenon (sp) NUMBER ONE THAT I WOULD LIKE YOU TO BE ALERT TO IS THE FOLLOWING: ~~AND~~ THIS IS THE PHENOMENA OF TIME PASSING. AND WHAT I ~~AM~~ mean (sp) BY THIS IS THAT IN THESE TYPES OF CASES THE PRESENTATION OF EVIDENCE TENDS TO BE QUITE PROTRACTED. AND I WOULD LIKE TO POINT OUT A COUPLE EXAMPLES FOR YOU AND HAVE YOU ~~PONDERED~~ ponder (sp) JUST FOR A MOMENT EXACTLY WHAT I MEAN.

FOR INSTANCE, IF YOU WILL THINK ABOUT IT, IT HAS BEEN 48 DAYS SINCE THE MOTHER OF TIFFANY FRIZZELL TESTIFIED IN THIS CASE. FOURTY-EIGHT DAYS SINCE JOAN FRIZZELL TESTIFIED. IT HAS BEEN 21 DAYS SINCE JUNE MARTINEZ TESTIFIED FOR YOU. IT HAS BEEN 20 DAYS SINCE MAXINE BRITTON TESTIFIED BEFORE YOU.

AND WHAT CAN HAPPEN IS THIS. WITH THE PASSAGE

OF TIME THE IMPACT OF THAT TESTIMONY CAN BE DIMINISHED SOMEWHAT.

AND WHAT I AM CAUTIONING YOU ABOUT IS THIS: IT IS IMPORTANT FOR THIS TESTIMONY AND THE TESTIMONY OF THESE WITNESSES, AND WITNESSES JUST LIKE THEM, TO BE AS MEANINGFUL FOR YOU IN THIS PHASE OF THE CASE AS IT WAS ON THE DAY YOU HEARD THAT TESTIMONY.

SO AS YOU REVIEW ALL OF THE EVIDENCE IN THIS CASE, PLEASE BE MINDFUL OF THE FACT THERE IS A CERTAIN NATURAL ~~PHENOMENA~~ phenomenon (OP) OCCURRING HERE. AND THAT PHENOMENA IS THE MERE PASSAGE OF TIME.

SECONDLY, A ~~PHENOMENA~~ phenomenon (OP) YOU SHOULD BE AWARE OF IS THE ~~PHENOMENA~~ phenomenon (VF) OF ~~A MOTION~~ Emotion (P). AND I CAN TELL YOU RIGHT NOW ON BEHALF OF MYSELF THAT I THINK I CAN SPEAK ON BEHALF OF THE DEFENSE ATTORNEYS, WITHIN US THIS MORNING AS WE ADDRESS YOU THERE IS A CERTAIN EMOTIONAL TENSION. AND HOPEFULLY THIS EMOTIONAL TENSION WILL NOT INTERFERE WITH OUR ABILITY TO IMPART WHAT WE WANT TO IMPRESS UPON YOU. BUT AT THE SAME TIME THIS IS AN EMOTIONALLY CHARGED PHASE OF THE CASE.

AND WHAT CAN OCCUR DURING THIS POINT IN TIME, AND QUITE OFTEN DOES, IS THAT THERE CAN BE, PARTICULARLY FROM THE DEFENSE, VERY STRONG ELOQUENT EMOTIONAL APPEALS TO YOU. APPEALS TO PERSUADE YOU THAT THE APPROPRIATE PUNISHMENT IS LIFE WITHOUT THE POSSIBILITY OF PAROLE.

AND IN THIS REGARD, QUITE OFTEN DEFENSE ATTORNEYS MAY QUOTE PASSAGES FROM THE BIBLE, THEY MAY QUOTE FROM LITERATURE, SOMETIMES THEY RECITE POETRY. AND, AGAIN, THERE'S AN EFFORT TO ACHIEVE THE CERTAIN HIGHER LEVEL,

ELOQUENCE.

AND, IN ADDITION, THERE IS ALSO AN EFFORT TO ACHIEVE A CERTAIN HIGHER EMOTIONAL LEVEL IN AN ATTEMPT TO MOVE YOU. AND QUITE OFTEN IN THIS REGARD ATTORNEYS THEMSELVES BECOME QUITE EMOTIONAL.

IT HAS BEEN KNOWN, IN FACT, WHERE MEMBERS OF THE DEFENDANT'S FAMILY AND FRIENDS ARE PRESENT FOR ATTORNEYS TO EVEN GO INTO THE AUDIENCE AND TO HUG THE DEFENDANT'S FAMILY AND FRIENDS AS PART OF THIS EMOTIONAL APPEAL TO YOU.

AND THIS IS NOT TO SAY THAT THIS IS WRONG. BUT IT IS SIMPLY TO PREPARE YOU THAT THESE SORT OF THINGS HAPPEN IN THIS EMOTIONALLY CHARGED PHASE OF THE CASE. AND THAT YOU MAY EXPECT IT. AND IF IT DOES OCCUR, YOU SHOULD BE PREPARED FOR IT.

NOW, THERE IS A THIRD ~~PHENOMENA~~ phenomenon (UF) WHICH OCCURS AS WELL. AND THIS IS THE ~~PHENOMENA~~ phenomenon (UF) OF PUNISHMENT. BECAUSE AS I STATED, THIS PHASE OF THE CASE IS UNIQUE IN JURIS PRUDENCE. IT IS UNIQUE BECAUSE YOU THE JURY WILL BE DECIDING WHAT IS THE APPROPRIATE PENALTY. AND YOU WILL BE CALLED UPON TO MAKE A DECISION BETWEEN LIFE WITHOUT THE PROBABILITY OF PAROLE ON THE ONE HAND AND DEATH. AND QUITE OFTEN THE DEFENSE IS GOING TO PRESENT THIS ARGUMENT TO YOU THAT LIFE WITHOUT POSSIBILITY OF PAROLE IS AN EXTREME, SEVERE PENALTY. IT MEANS THAT THE DEFENDANT WILL NEVER GET OUT OF PRISON. IT MEANS THAT THE DEFENDANT WILL DIE IN PRISON. HE WILL DIE OF NATURAL CAUSES OR BE EXECUTED IN PRISON IF YOU DETERMINE THAT THE DEATH PENALTY IS APPROPRIATE.

AND THEY WILL TALK ABOUT THE LIMITED LIVING SPACE THAT THE DEFENDANT HAS. THE FACT THERE MAY BE A STAINLESS ~~STEAL~~ steel (UF) TOILET IN THE MIDDLE OF THE ROOM. THE FACT OF THEIR PRIVACY IS EXTREMELY LIMITED.

AND THIS ~~PHENOMENA~~ phenomenon (UF) OF PUNISHMENT IS SOMETHING THAT IS ARGUED. TO TEMPER THIS I ASK YOU TO RECALL THE FOLLOWING, AND THESE ARE THINGS THAT WERE ELICITED THROUGH EVIDENCE IN THIS CASE.

PLEASE RECALL THAT AS THE DEFENDANT STATED TO MR. HANEY, "PRISON IS LIKE A CITY." IT IS A SOCIETY. ALBEIT, AN INCARCERATED ~~SOUTH.~~ society (UF) A SOCIETY BEHIND BARS. A SOCIETY BEHIND WALLS. BUT IT IS A SOCIETY, NONETHELESS.

AND THERE IS A TENDENCY, I THINK, FOR US TO CONSIDER THAT WHEN SOMEONE IS IN JAIL OR SOMEONE IS IN

PRISON THAT THEY ARE OUT OF SIGHT, OUT OF MIND. BUT ACTUALLY, THE PERSON IN QUESTION, PERHAPS THE DEFENDANT, IS SIMPLY IN A DIFFERENT TYPE OF SOCIETY. A SOCIETY WHERE THERE ARE MANY OF THE CONCERNS THAT PLAGUE SOCIETY OUTSIDE OF PRISON.

FOR INSTANCE, ALCOHOL, DRUGS, VIOLENCE, AND AS WE LEARNED IN THIS CASE TO THE EXTENT THE TELEVISION CAN BE CONSIDERED A CONCERN, TELEVISION EXISTS WITHIN THE WALLS OF PRISON.

INMATES WITHIN PRISON CAN COMMUNICATE WITH PEOPLE ON THE OUTSIDE, AND THEY HAVE A LIFE. A LIFE WITHOUT POSSIBILITY OF PAROLE MEANS THAT THERE IS LIFE. AND WHERE THERE IS LIFE, THERE IS HOPE.

AND I WOULD LIKE YOU TO CONSIDER THE PARTING WORDS OF DEPUTY MARTIN KOETH WHEN HE TESTIFIED WITH REGARD TO WHAT THIS MEANS, AND HE STATED IN CONNECTION WITH THIS DEFENDANT, AS WELL AS GENERALLY, THAT THESE INMATES LIVE WITH THE HOPE OF ESCAPE.

AND IN THIS PARTICULAR CASE THE ~~SPECTOR~~ Spectre (VP) OF ESCAPE IS CERTAINLY PREVALENT. SO AS YOU CONSIDER THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE AND DEATH, BE MINDFUL OF THE FACT THAT WHEN THE DEFENSE ATTORNEYS ARGUE HOW TERRIBLE LIFE WITHOUT POSSIBILITY OF PAROLE CAN BE, BE MINDFUL OF THE FACT THESE CONSIDERATIONS EXIST.

I DON'T MEAN TO DIMINISH THE SEVERITY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE, HOWEVER IN CERTAIN CASES LIFE WITHOUT POSSIBILITY OF PAROLE IS SIMPLY NOT ENOUGH. AND IN LIGHT OF THE AGGRAVATING EVIDENCE PREVENTED IN THIS

CASE, THIS IS ONE OF THOSE CASES.

THERE IS ONE ADDITIONAL ~~PHENOMENA~~ phenomenon (UP) TO BE DISCUSSED WITH YOU BEFORE I TURN TO THE EVIDENCE. AND THIS IS REALLY PART AND PARCEL OF THE ~~PHENOMENA~~ phenomenon (UP) OF EMOTION THAT OCCURS IN THIS PHASE OF THE CASE.

DURING THE JURY SELECTION PROCESS I ASKED SOME OF YOU IF YOU DETERMINED THAT THE DEATH PENALTY WAS THE APPROPRIATE PENALTY IN THIS CASE WOULD YOU BE ABLE TO COME HERE INTO OPEN COURT IN FRONT OF THE DEFENDANT'S FAMILY AND DEFENDANT'S FRIENDS AND INDICATE THAT, YES, INDEED THE DEATH PENALTY WAS YOUR VERDICT. AND MANY OF YOU HAD TO PONDER THAT FOR A MOMENT, BUT ULTIMATELY THE RESPONSE WAS, "YES, I COULD DO THAT."

NOW, THE THING THAT OCCURRED DURING THAT PHASE OF THE JURY SELECTION PROCESS IS THAT WE WERE DISCUSSING SOMETHING IN THE ABSTRACT. THIS WAS APPROXIMATELY TWO AND A HALF MONTHS AGO.

AND NOW WE ARE DOWN TO THE VERY REAL ASPECT OF PERHAPS YOU FACING THE DEFENDANT'S FAMILY AND FRIENDS AND INDICATING THAT THE DEATH PENALTY IS INDEED APPROPRIATE. AND IT IS A NATURAL THING, IF THAT IS INDEED YOUR VERDICT, FOR THE DEFENDANT'S FAMILY AND FRIENDS TO BE HURT AND SADDENED. AND I THINK YOU CAN EXPECT THAT. AGAIN, THIS TYPE OF EMOTION IS PART AND PARCEL OF THIS TYPE OF CASE.

BUT I WOULD LIKE YOU TO BEAR IN MIND ONE THING WITH REGARD TO THAT: YOU, THE MEMBERS OF THE JURY, ARE NOT RESPONSIBLE FOR THE DEFENDANT'S FAMILY AND FRIENDS FOR BEING HERE. THE PERSON WHO IS RESPONSIBLE FOR ALL OF US BEING

HERE IS SEATED RIGHT OVER THERE. IT'S THE DEFENDANT IN THIS CASE, MARTIN KIPP. HAD HE LIVED A LAW ABIDING, BLAMELESS LIFE YOU WOULD NOT BE HERE, NOR WOULD HIS FAMILY. HAD NOT THE DEFENDANT RAPED, AND RAPED AND KILLED, AND THEN KILLED AGAIN, YOU WOULD NOT BE PUT IN THE POSITION OF MAKING THAT JUDGMENT UPON HIM.

SO IT IS SOMETHING THAT CAN BE HURTFUL. IT IS SOMETHING THAT CAN BE HURTFUL TO THE DEFENDANT'S FAMILY. AND AS I WATCHED MRS. KIPP TESTIFY IN THIS CASE, THERE WAS A POIGNANT, TOUCHING MOMENT. AND I NOTICE THAT HAD -- SOME OF YOU WERE TOUCHED AND MOVED AS SHE SPOKE. AND THAT IS A NATURAL FEELING AND IT'S OKAY TO FEEL SYMPATHY FOR HER. BUT PLEASE DO NOT CONFUSE SYMPATHY FOR THE DEFENDANT'S FAMILY AND FRIENDS WITH SYMPATHY FOR THE DEFENDANT.

MR. BRODEY: I'M GOING TO OBJECT, YOUR HONOR. THAT'S IMPROPER.

THE COURT: WANT TO BE HEARD AT THE SIDE BENCH?

MR. BRODEY: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH.)

MR. BRODEY: MR. HODGMAN IS ARGUING THAT SYMPATHY FOR THE FAMILY AND FRIENDS DOESN'T COME WITHIN THE PREVIEW OF MITIGATING CIRCUMSTANCES, AND IT CERTAINLY DOES. THE INSTRUCTIONS REALLY PROVIDE THAT HIS BACKGROUND, HIS LIFE AND OBSERVATIONS ARE CONSIDERATIONS THAT YOU CAN TAKE INTO YOUR THOUGHT PROCESS.

THE COURT: HAVE YOU GOT A CASE CITATION THAT SYMPATHY FOR FRIENDS IS A FACTOR?

MR. BRODEY: NOT SYMPATHY FOR FRIENDS, BUT CERTAINLY SYMPATHY FOR FAMILY.

MR. YZURDIAGA: I THINK THE INSTRUCTIONS SAYS ANY FACTOR WHICH AROUSES SYMPATHY IN THE DEFENDANT'S BACKGROUND. AND THAT'S IN "K."

THE COURT: I THINK ALL HE ASKED WAS YOU JUST DON'T CONFUSE THE TWO.

IN OTHER WORDS, WHAT HE'S SAYING IS -- HE HASN'T SAID THAT IT'S NOT ALL RIGHT TO FEEL SYMPATHY. WHAT HE'S SAYING IS MAKE SURE YOU DON'T CONFUSE SYMPATHY WITH THE FAMILY FOR SYMPATHY FOR MARTIN KIPP. HE'S NOT SAYING -- I DON'T UNDERSTAND.

MR. BRODEY: I BELIEVE THAT THE JURY CAN CONSIDER SYMPATHY FOR THE FAMILY AND VOTE FOR LIFE OUT OF SYMPATHY FOR THE FAMILY. AND WHAT HE'S --

THE COURT: HE HASN'T SAID THAT THEY CAN'T.

MR. HODGMAN: AND I COULDN'T AGREE WITH YOU MORE. I

WAS TRYING TO MAKE A DISTINCTION THAT THERE IS A DISTINCTION BETWEEN SYMPATHY FOR THE DEFENDANT AND SYMPATHY FOR THE FAMILY, AND THEY SHOULD BE AWARE OF IT IN THIS OWN MIND WHEN THEY DELIBERATE AND NOT NECESSARILY ~~MELT~~ meld OR CONFUSE THE TWO TOGETHER.

MR. BRODEY: WELL, I THINK IT SHOULD BE MADE CLEAR THAT THEY CAN CONSIDER SYMPATHY FOR THE FAMILY IN REACHING THEIR VERDICT. IT WOULD BE PROPER TO GIVE --

THE COURT: IF YOU WANT SOMETHING AT THE END OF THE CASE ON THAT I'LL BE HAPPY TO GIVE IT WHEN EVERYONE IS FINISHED.

MR. HODGMAN: I'M SURE YOU WILL COVER THAT IN YOUR ARGUMENT, AS WELL.

MR. BRODEY: WELL, IT MAY BE --

THE COURT: BUT YOU NEED IT COMING FROM THE JUDGE.

MR. BRODEY: YES.

THE COURT: ALL RIGHT.

MR. BRODEY: THANK YOU.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE PRESENCE OF THE JURY.)

THE COURT: ALL RIGHT. MR. HODGMAN.

MR. HODGMAN: EXCUSE ME FOR THE INTERRUPTION.

THE POINT IS, LADIES AND GENTLEMEN, YOU ARE NOT ULTIMATELY RESPONSIBLE FOR ANY HURT CAUSED TO THE DEFENDANT'S FAMILY. THE PERSON RESPONSIBLE FOR THAT HURT IS THE DEFENDANT HIMSELF. THE DEFENDANT'S FAMILY, THE

DEFENDANT'S FRIENDS ARE IN A SENSE ACCIDENTAL VICTIMS OF WHAT THE DEFENDANT HAS DONE.

NOW, WITH THAT SAID, WITH THIS REALIZATION THAT THERE ARE CERTAIN LARGER PHENOMENA THAT ARE GOING TO OCCUR IN THIS CASE THAT YOU ARE GOING TO FEEL AS YOU DELIBERATE, WHAT I WOULD LIKE TO DO IS TURN TO A MORE LEGAL ANALYSIS OF THIS PHASE OF THE CASE.

AND IN THIS REGARD I PREPARED THIS CHART WHICH APPEARS TO THE RIGHT OF THE JURY BOX.

NOW, THESE ARE FACTORS WHICH WERE MENTIONED TO YOU BY JUDGE NOTT YESTERDAY IN HIS INSTRUCTIONS TO YOU. AND I WOULD LIKE TO TAKE A FEW MOMENTS THIS MORNING AND GO THROUGH THESE VARIOUS FACTORS, BECAUSE CERTAIN OF THESE FACTORS ARE GOING TO BE ~~SELF EVIDENCE~~ self-evident. HOWEVER, THERE ARE ~~SUBLTIES~~ subtleties INVOLVED WITH VARIOUS OF THESE FACTORS WHICH I THINK YOU SHOULD ABOUT AWARE OF AND PERHAPS YOU WILL FIND ULTIMATELY PERSUASIVE.

FACTOR NUMBER ONE AS MENTIONED IN THE INSTRUCTIONS GIVEN BY JUDGE NOTT STATES THAT IN DETERMINING THIS PHASE OF THE CASE YOU CAN TAKE INTO CONSIDERATION THE CIRCUMSTANCES OF THE CRIME OF WHICH THE DEFENDANT WAS CONVICTED, AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE.

WHAT THIS MEANS, QUITE SIMPLY, IS THIS: THAT THE RAPE, ROBBERY AND MURDER OF TIFFANY FRIZZELL IS NOT TO BE FORGOTTEN. IT IS SOMETHING THAT YOU CAN LEGITIMATELY CONSIDER IN EVALUATING WHAT PENALTY IS APPROPRIATE FOR THE DEFENDANT.

NOW, YOU HAVE DETERMINED THAT THE DEFENDANT IS GUILTY OF THE RAPE, ROBBERY AND MURDER OF TIFFANY FRIZZELL, AND YOU HAVE FOUND THAT THE SPECIAL CIRCUMSTANCE THAT TIFFANY FRIZZELL WAS MURDERED, IN THE COMMISSION OF A RAPE, TO BE TRUE.

WHAT I WOULD LIKE TO DO IN THIS PHASE OF THE CASE IS TO HIGHLIGHT A COUPLE POINTS THAT I MADE TO YOU INITIALLY DURING THE TRIAL PHASE OF THE CASE, AND THEN EXPAND UPON THEM JUST A LITTLE BIT.

FIRST OF ALL, TO CONSIDER JUST BRIEFLY THE NATURE OF THE VICTIM. TIFFANY FRIZZELL IS AN 18 YEAR OLD YOUNG WOMAN ON THE ~~THRUSHOLD~~ threshold (of) OF ADULTHOOD, WHO CAME TO SOUTHERN CALIFORNIA TO LONG BEACH TO ATTEND BROOKS COLLEGE AND IN A SENSE TO BEGIN REALIZING HER FUTURE AS A ADULT.

SHE WAS AN INNOCENT. AND AS AN (F) INNOCENT HER LIFE WAS BRUTALLY TAKEN.

MR. YZURDIAGA: I'M GOING TO OBJECT TO THIS, YOUR HONOR. MAY WE APPROACH THE BENCH?

MR. HODGMAN: YOUR HONOR --

THE COURT: YOU CAN LET ME KNOW THE OBJECTION AFTERWARDS.

GO AHEAD, MR. HODGMAN.

MR. HODGMAN: THANK YOU VERY MUCH, YOUR HONOR.

AS IMPORTANT AS IT IS TO REALIZE THE NATURE OF TIFFANY FRIZZELL AS A VICTIM, IT IS IMPORTANT TO REEMPHASIZE THE NATURE IN WHICH TIFFANY FRIZZELL'S LIFE WAS TAKEN. WE DISCUSSED IN THE TRIAL PHASE OF THIS CASE HOW THE MURDER OF TIFFANY FRIZZELL WAS A MURDER OF THE FIRST DEGREE.

IT WAS A MURDER OF THE FIRST DEGREE IN ONE SENSE BECAUSE THE DEFENDANT KILLED TIFFANY FRIZZELL DURING THE COMMISSION OF A FELONY INHERENTLY DANGEROUS TO HUMAN LIFE. THAT IS A RAPE. OTHERWISE KNOWN AS THE FELONY MURDER RULE.

THE SECOND AVENUE OF FIRST DEGREE MURDER I THINK BECOMES MORE IMPORTANT IN THIS PHASE OF THE CASE. AND THAT IS THAT THIS MURDER WAS A WILLFUL, DELIBERATE, PREMEDITATED MURDER.

AND I THINK THE POINT THAT BEARS EMPHASIS IS THIS: THIS WAS AN INTENTIONAL MURDER. THIS WAS A MURDER THAT WAS AS INTENTIONAL AS YOU CAN GET. IT WAS A MALICIOUS, COLD-BLOODED, CALCULATED MURDER.

AND WHEN YOU RECALL THE TESTIMONY OF DOCTOR GARBER AND DOCTOR FUKUMOTO AND REALIZE WHAT IS INVOLVED WITH A STRANGULATION MURDER, YOU CAN SEE QUITE READILY THAT THIS INTENTIONAL MURDER, THE INTENT TO KILL, IS SOMETHING THAT IS VERY STRONGLY EVIDENT WITH THE MURDER OF TIFFANY FRIZZELL.

RECALL DOCTOR GARBER AND DOCTOR FUKUMOTO TOLD

YOU THAT WITH THE STRANGULATION A PERSON CAN BE RENDERED UNCONSCIOUS IN AS FEW AS, PERHAPS, 15 SECONDS OR SO. BUT TO KILL, TO KILL BY MEANS OF STRANGULATION CAN TAKE ANYWHERE FROM A FIVE TO SEVEN MINUTES.

WHEN YOU'RE IN THAT JURY ROOM YOU MIGHT EVEN TAKE FIVE MINUTES OF SILENCE TO UNDERSTAND WHAT HAD TO HAVE BEEN GOING ON IN THE DEFENDANT'S MINDS (vf) AS HE COMPRESSED AND ~~TIGHTEND~~ tightened (vf) THAT LIGATURE AROUND TIFFANY FRIZZELL'S NECK.

LADIES AND GENTLEMEN, THAT WAS AN INTENTIONAL KILLING. AND AN INTENTIONAL KILLING IN ALL ~~CAPITALS.~~ capitals (vf) AND THAT TYPE OF KILLING IS VERY IMPORTANT FOR YOU TO CONSIDER AS YOU EVALUATE APPROPRIATE PENALTY IN THIS CASE. THIS WAS NOT A QUICK ONE BULLET TO THE HEAD, SOMETHING LIKE THAT, THIS TOOK TIME TO KILL TIFFANY. AND THAT TIME IS EVIDENCED IN THIS SORT OF INTENTIONAL KILLING THAT I WANT TO IMPRESS UPON YOU.

SO THE DEFENDANT HAD TO PONDER THE DECISION TO KILL. AND IN THOSE INTERVENING MINUTES HE COULD THINK, `DO I KILL, OR DO I LET HER GO,' MUCH AS HE DID WITH JUNE MARTINEZ. HE MADE THE DECISION TO KILL. TO CONTINUE TO COMPRESS, TO TIGHTEN THAT LIGATURE. TO KILL AND CHOKE THE LIFE OUT OF TIFFANY FRIZZELL.

SO AS YOU CONSIDER THAT PARTICULAR CIRCUMSTANCE, CIRCUMSTANCE "A" AND THE JURY INSTRUCTIONS GIVEN TO YOU BY JUDGE NOTT, THINK VERY CAREFULLY ABOUT HOW THAT MURDER WAS CONDUCTED. THE FACT THAT IT WAS A WILLFUL, DELIBERATE, PREMEDITATED MURDER. AND THAT IT IS EVIDENCE OF AN INTENTIONAL KILLING. NOT AN ACCIDENTAL, UNINTENTIONAL

KILLING, BUT AN INTENTIONAL KILLING.

WE MOVE ONTO CONSIDER FACTOR "B." FACTOR "B" STATES THAT YOU CAN CONSIDER OTHER 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.

AND THERE WERE A NUMBER OF PIECES OF EVIDENCE THAT WERE PRESENTED TO YOU IN CONNECTION WITH THIS FACTOR.

MOVING CHRONOLOGICALLY, WE HAVE THE MURDER OF JUNE SASSER AS SHE WAS KNOWN BACK IN 1981, NOW JUNE MARTINEZ.

AND AS YOU RECALL, THREE WEEKS AGO ON THIS DATE JUNE MARTINEZ TESTIFIED BEFORE YOU. SHE TESTIFIED HOW SHE WENT TO THE WAGON WHEEL RESTAURANT ON PACIFIC COAST HIGHWAY HERE THIS LONG BEACH, HOW SHE MET THE DEFENDANT, HOW SHE WENT OUT TO THE DEFENDANT'S VEHICLE IN THE PARKING LOT, HOW SHE GOT INSIDE THAT VEHICLE, AND UNDER THE PRETEXT OF HEARING A CAR STEREO SYSTEM THE DEFENDANT MANAGED TO CONVINCE JUNE TO SHUT THAT DOOR. AND THEN IMMEDIATELY THE DEFENDANT TOOK OFF IN THAT VEHICLE.

JUNE, IN THE COURSE OF THESE EVENTS, REALIZED A COUPLE THINGS. ONE, THERE WAS NO DOOR OR WINDOW HANDLE ON THE PASSENGER SIDE OF THAT DOOR. SECONDLY, AS SHE FOUGHT FOR HER LIFE LATER, SHE REALIZED THAT THE DEFENDANT WAS WEARING A LONG-HAIR WIG.

NOW, CONSIDER THOSE CIRCUMSTANCES IN CONNECTION WITH THIS PARTICULAR ACT OF VIOLENCE ON THE PART OF THE DEFENDANT. THIS PARTICULAR ACT OF VIOLENCE REPRESENTS TWO

THINGS. ONE, IT IS AN EXTREME ACT OF VIOLENCE BECAUSE, AS JUNE MARTINEZ TESTIFIED FOR YOU, THE DEFENDANT WAS CHOKING HER. SHE WAS TRYING TO BITE HIS HAND, HE CONTINUED TO CHOKE HER. HE CHOKED HER TO THE POINT THAT HER BODY BEGAN TO GO LIMP, HER EYES STARTED TO ROLL BACK IN HER HEAD, AND SHE HAD ONE REMAINING THOUGHT WHICH WAS "DEAR GOD, PLEASE DON'T LET ME DIE LIKE THIS."

SO THE EXTREME VIOLENCE OF THIS PARTICULAR INCIDENT IS IMPORTANT FOR YOU TO CONSIDER.

SECONDLY, IT IS IMPORTANT BECAUSE THIS INCIDENT IS A RATHER TERRIFYING ~~FORSHOT~~ portent ON THE GROUND OF THINGS THAT WERE TO OCCUR JUST OVER TWO YEARS LATER.

JUNE SASSER LIVED TO TELL YOU ABOUT WHAT HAPPENED TO HER. TIFFANY FRIZZELL AND ANTANYA HOWARD DID NOT.

HOWEVER, WE CAN INFER FROM WHAT HAPPENED TO JUNE MARTINEZ SOME OF THE TERROR THAT TIFFANY FRIZZELL AND ~~ANTANYA~~ Antaya (P) HOWARD WENT THROUGH WHEN THEY WERE CONFRONTED AND WERE AT THE HANDS OF THIS DEFENDANT.

AS WE THINK ABOUT JUNE MARTINEZ AS A VICTIM, RECALL THE PHYSICAL TRAUMA. AFTER THIS WAS OVER SHE COULDN'T SPEAK, SHE HAD TO WEAR A NECK BRACE, SHE HAD BURNS ON HER BACK AND SHOULDER AS A RESULT OF TRYING TO GET AWAY FROM THE DEFENDANT. AND, OBVIOUSLY, THERE WAS EMOTIONAL TRAUMA AS WELL.

AND I DON'T THINK ANYONE CAN FORGET THE RAW EMOTION, ALMOST STILLNESS CREATED BY THAT RAW EMOTION AS JUNE MARTINEZ TESTIFIED IN THIS CASE.

TIFFANY FRIZZELL AND ANTANYA HOWARD CAN NO LONGER SPEAK BECAUSE OF WHAT THE DEFENDANT DID TO THEM. BUT IN A SENSE, BY VIRTUE OF THIS VIOLENT ACT UPON JUNE MARTINEZ, JUNE MARTINEZ SPEAKS FOR THEM IN A WAY.

AS TO THE NEXT EVENT, CHRONOLOGICALLY WE HAVE THE ATTEMPTED RAPE OF LOVEDA NEWMAN. AND IF YOU RECALL IN NOVEMBER OF 1983 IN COOS BAY, OREGON, THE DEFENDANT AND LOVEDA NEWMAN WERE AT A HOTEL TOGETHER. THE DEFENDANT INDICATED IN A CERTAIN WAY THAT HE WANTED SEX. LOVEDA WAS SAYING, NO, AND THE DEFENDANT BEGAN TO CHOKE LOVEDA. HE TORE AT HER CLOTHES AND HE CHOKED HER TO THE POINT WHERE A FEW MINUTES LATER LOVEDA NEWMAN WAS PHYSICALLY SICK. SHE TRIED TO GET AWAY FROM THE DEFENDANT. AS YOU KNOW, THE DEFENDANT KICKED THE DOOR DOWN TO THAT BATHROOM OF THAT MOTEL ROOM, CHASED LOVEDA, DRAGGED HER BACK TO THE ROOM, SHE

TRIED TO GET AWAY AGAIN, AND ULTIMATELY THE POLICE INTERVENED.

NOW, IN THIS INCIDENT THERE WAS A CERTAIN UNFORTUNATE ASPECT. AND THAT ASPECT WERE THAT CHARGES WERE NOT PRESSED AGAINST THE DEFENDANT. AND LOVEDA NEWMAN TOLD YOU WHY. HAD CHARGES BEEN PRESSED, PERHAPS SUBSEQUENT EVENTS WOULD HAVE TURNED OUT DIFFERENT.

BUT IT IS IMPORTANT FOR YOU TO CONSIDER WHY LOVEDA NEWMAN DID NOT PRESS CHARGES. RECALL WHAT THE DEFENDANT SAID TO HER? HE SAID, "IF YOU PRESS CHARGES, I WILL KILL YOU AND YOUR SON."

NOW, ABSENT EVERYTHING ELSE YOU KNOW IN THIS CASE, SUCH A THREAT MIGHT SEEM LIKE AN IDLE THREAT. HOWEVER, IN CONJUNCTION WITH WHAT YOU HAVE RECEIVED AS EVIDENCE IN THIS CASE, THAT THREAT BECOMES EVEN MORE CHILLING. AND, AGAIN, AN AWFUL FORTENSE OF THINGS TO COME.

BECAUSE AS WE MOVE TO THE NEXT VIOLENT EVENT ON DECEMBER 29TH, 1983, MAXINE BRITTON SEES HER DAUGHTER ANTANYA YVETTE HOWARD FOR THE LAST TIME.

ON JANUARY 4TH, 1984, ANTANYA HOWARD'S BODY IS FOUND. NOW, THERE WAS A PICTURE THAT WAS INTRODUCED IN EVIDENCE WHICH DEPICTS HOW ANTANYA LOOKED WHEN SHE WAS FOUND. AND LADIES AND GENTLEMEN, IF THERE WAS EVER AN INSTANCE OF WHERE A PICTURE SPEAKS A THOUSAND WORDS, THIS IS THAT INCIDENT. THIS IS PEOPLE'S 54 NOW IN EVIDENCE. AND THIS IS HOW ANTANYA HOWARD WAS FOUND IN THE HATCH BACK OF HER CAR.

AS YOU CAN SEE, THERE IS CERTAIN OBVIOUS

CIRCUMSTANCIAL EVIDENCE OF ATTEMPTED RAPE. ANTANYA'S BRA IS PUSHED UP OVER HER BREAST, HER JEANS ARE DOWN AT ABOUT HER ANKLES. AND I SUSPECT BECAUSE OF THE WAY THE DEFENSE ELICITED EVIDENCE IN THIS CASE, THERE MAY BE SOME REFERENCE TO THE FACT THAT ANTANYA HAD A ROACH CLIP IN HER CAR, HAD SOME STICKERS HANGING FROM THE REAR VIEW MIRROR.

I SUBMIT TO YOU IN LIGHT OF THAT PHOTOGRAPH AND IN LIGHT OF WHAT HAPPENED TO HER, ANTANYA HOWARD IN NO WAY DESERVED WHAT THE DEFENDANT DID TO HER. IN NO WAY AT ALL. NO ONE, NO ONE, NO ONE DESERVED THAT.

WITH REGARD TO THE MURDER OF ANTANYA HOWARD, THERE IS SOME ANALYSIS FOR YOU TO DO WHICH IS VERY SIMILAR TO THE ANALYSIS YOU UNDERTOOK IN DETERMINING THE GUILT OF THE DEFENDANT AS TO THE MURDER OF TIFFANY FRIZZELL.

AGAIN, THERE IS EVIDENCE AS DEMONSTRATED BY THIS PICTURE AS WELL AS DEMONSTRATED BY THE TESTIMONY OF VARIOUS WITNESSES TO SUGGEST THAT ANTANYA HOWARD WAS KILLED BY THE DEFENDANT DURING THE -- OF AN ATTEMPTED RAPE. THEY'RE GO GIVING RISE TO THE FELONY MURDER RULE.

I THINK MORE IMPORTANTLY FOR YOU AT THIS PHASE OF THE CASE IS THE MANNER IN WHICH ANTANYA HOWARD WAS KILLED. BECAUSE JUST LIKE TIFFANY FRIZZELL, ANTANYA HOWARD WAS STRANGLED TO DEATH.

DISTINCT FROM WHAT HAPPENED TO TIFFANY FRIZZELL, ANTANYA HOWARD HAD SUFFERED A GREAT DEAL OF HEAD TRAUMA AT THE HANDS OF THE DEFENDANT. SHE WAS BEATEN QUITE A BIT ABOUT THE HEAD, AND I THINK YOU RECALL DOCTOR FUKUMOTO'S TESTIMONY TO THE FACT THERE WAS EVEN BLOOD IN

THAT FLUID WHICH ENVELOPES THE BRAIN INSIDE HER SKULL. SHE HAD BEEN BEATEN SEVERELY AND SHE HAD BEEN STRANGLED.

AND WHAT DOES THIS EVIDENCE TO YOU? IT EVIDENCES THAT NOT ONCE, BUT TWICE THE DEFENDANT FORMULATED AN INTENT TO KILL. HE MADE A COLD, CALCULATED, MALICIOUS DECISION TO TAKE ANOTHER HUMAN BEING'S LIFE. AND THE MANNER IN WHICH HE KILLED ANTANYA BY MEANS OF STRANGULATION, JUST AS WITH TIFFANY FRIZZELL, IS VERY STRONG DAMAGING EVIDENCE OF THAT TYPE OF INTENT.

THE POINT IS THE DEFENDANT ON TWO OCCASIONS WITHIN A PERIOD OF APPROXIMATELY FOUR MONTHS DETERMINED THAT HE WAS GOING TO TAKE ANOTHER LIFE. AND TWICE HE DID THAT.

THERE'S ONE ADDITIONAL ASPECT AS WE CONSIDER THE MURDER OF TIFFANY FRIZZELL AS WELL AS ANTANYA HOWARD THAT DISTINGUISHES IT FROM THE RAPE OF JUNE SASSER. AND THAT IS IT APPEARS THAT THE DEFENDANT LEARNED SOMETHING AFTER THE RAPE OF JUNE SASSER-MARTINEZ. AND IT APPEARS THAT THE LESSON THE DEFENDANT LEARNED WAS, DON'T LEAVE A LIVING VICTIM WHO CAN COME BACK TO POSSIBLY TESTIFY AGAINST YOU IN COURT.

FORTUNATELY FOR US, THE DEFENDANT LEFT FINGERPRINTS. UNFORTUNATELY FOR TIFFANY, UNFORTUNATELY FOR ANTANYA, HE DID NOT LEAVE HIS VICTIM'S ALIVE. A POINT TO DISTINGUISHED FROM WHAT HAPPENED TO JUNE MARTINEZ.

WE HAVE ONE LAST ACT, A CRIMINAL ACT WHICH INVOLVED THE THREAT OF VIOLENCE. AND THIS IS THE JANUARY 1ST, 1988, ATTEMPTED SCRAPE FROM THE LOS ANGELES COUNTY JAIL.

AND I THINK YOU WILL RECALL QUITE CLEARLY THE TESTIMONY OF MARTIN KOETH, AS WELL AS DEPUTY MARK STAMANT WITH REGARD TO THAT ESCAPE. I THINK THE TWO POINTS TO BE GLEENED FROM THAT PARTICULAR INCIDENT ARE AS FOLLOWS:

ONE IS THE EVIDENCE OF POTENTIAL WEAPONS. AND WHEN YOU GO BACK IN THIS JURY ROOM FOR THE FIRST TIME YOU WILL HAVE AN OPPORTUNITY TO EXAMINE THE PANOPLY, THE ARSENAL, IF YOU WILL, OF WEAPONS THAT THE DEFENDANT HAD IN HIS DISPOSAL INSIDE THE HIGH POWERED, SECURED AREA OF THE LOS ANGELES COUNTY JAIL.

IT DEMONSTRATES THAT EVEN WHILE IN CUSTODY THE DEFENDANT HAS A CERTAIN RESOURCEFULNESS AND INTEGRITY.

WE CAN ALL ASK OURSELVES HOW IS IT THAT THE DEFENDANT CAN OBTAIN A KNIFE FROM THE OFFICERS' MESS WITHIN THE COUNTY JAIL, WHEN ALL HE GETS TO EAT WITH IS A PLASTIC SPOON?

BUT THE FACT REMAINS, HOWEVER, HE GOT IT. HOWEVER HE OBTAINED THAT KNIFE AND OTHER KNIVES, HE GOT THEM WITHIN A CUSTODIAL SETTING.

SO WE HAVE CONTAINED WITHIN THAT INCIDENT AN

IMPLIED THREAT OF VIOLENCE.

IN ADDITION, WE HAVE A MORE EXPRESS THREAT OF VIOLENCE WHEN WE CONSIDER THE DEFENDANT'S WORDS UPON HIS CAPTURE WHEN HE WAS BROUGHT DOWN OUT OF THE CEILING.

IF YOU'LL RECALL WHAT HE TOLD TO DEPUTY MARTIN KOETH, AND IT WAS WORDS TO THE EFFECT OF, "YOU'RE LUCKY YOU CAUGHT ME. YOU'RE LUCKY YOU CAUGHT ME." AND HE GOES ON TO SAY, "I WAS GOING TO KILL," AND "I'M GOING TO KILL," A SERGEANT BAEMAN. AND HE TALKS ABOUT, "ON MY SAVIOR SATAN, I'M GOING TO KILL SERGEANT BAEMAN IN AWAY THAT WOULD BE MOST HUMILIATING TO HIM AND TO HIS FAMILY."

RECALL THE TESTIMONY OF DEPUTY MARTIN KOETH IN THAT REGARD. BECAUSE THIS INCIDENT IS NOT ONLY THE IMPLIED THREAT OF VIOLENCE, BUT AN EXPRESSED THREAT OF VIOLENCE AS WELL.

WE MOVE ON, LADIES AND GENTLEMEN, RATHER QUICKLY THROUGH SOME OF THE REMAINING FACTORS.

FACTOR "C," THE PRESENCE OR ABSENCE OF PRIOR FELONY CONVICTIONS. WE HAVE A STIPULATION TO THE DEFENDANT'S PRIOR RAPE CONVICTION. THIS INVOLVING THE RAPE OF JUNE MARTINEZ.

IT IS STIPULATED TO, IT IS A FACT WHICH YOU CAN CONSIDER. THERE IS NO DOUBT AS TO THE PROOF OF THAT CONVICTION.

THERE ARE OTHER THINGS FOR YOU TO CONSIDER. WE HAVE FACTOR "D." WHETHER OR NOT THE OFFENSE WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

NOW, I IMAGINE THAT THE DEFENSE IS GOING TO PRESENT SOME ARGUMENT TO YOU ALONG THIS LINE. THE QUESTION FOR YOU, THE JURY, IS WHAT WEIGHT, WHAT MORAL OR SYMPATHETIC VALUE, ARE YOU TO GIVE IT IN LIGHT OF ALL THE OTHER EVIDENCE IN THIS CASE?

AND, ALSO, I THINK IT IS WORTHY OF QUESTION WHETHER OR NOT ANYTHING GOING ON IN THE DEFENDANT'S MINDS COULD EVEN BE CONSTITUTED EXTREME AT THE TIME.

SUBFACTOR "E." WE HAVE THE FACTOR OF WHETHER OR NOT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S HOMICIDE, CONDUCT OR CONSENTED TO THE HOMICIDAL ACT.

IN THIS CASE, LADIES AND GENTLEMEN, THERE IS NO EVIDENCE. I SUBMIT TO YOU THAT THAT FACTOR DOES NOT APPLY.

FACTOR "F," WHETHER OR NOT THE OFFENSE WAS COMMITTED UNDER CIRCUMSTANCES WHICH THE DEFENDANT REASONABLY BELIEVED TO BE MORAL JUSTIFICATION OR EXTINUATING SITUATION FOR HIS CONDUCT.

IN THIS CASE THERE APPEARS TO BE NO EVIDENCE OF THAT FACTOR. AND I SUBMIT TO YOU IT DOES NOT APPLY.

FACTOR "G," WHETHER OR NOT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

THERE IS NO EVIDENCE OF THAT IN THIS CASE. ALL THE EVIDENCE SUGGESTS IS THAT THE DEFENDANT ACTED ALONE IN KILLING TIFFANY FRIZZELL.

SUBFACTOR "H," WHETHER OR NOT AT THE TIME OF THE OFFENSE, THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRLMINALITY OF HIS CONDUCT TO CONFORM HIS CONDUCT TO THE

REQUIREMENTS OF THE LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE OR DEFECT, OR THE EFFECT OF INTOXICATION.

WITH REGARD TO THIS, I SUBMIT TO YOU THAT THE DEFENSE WILL PROBABLY BE ARGUING CERTAIN FACTORS CONTAINED IN THIS FACTOR. SOMETHING TO THE EFFECT WHAT MORAL OR SYMPATHETIC VALUE YOU ARE TO ATTRIBUTE TO THE DEFENDANT'S APPARENTLY PREVASIVE PATTERN OF VOLUNTARY INTOXICATION BY MEANS OF ALCOHOL OR DRUGS.

AGAIN, BASED UPON THE TESTIMONY OF DOCTOR HANEY, WE KNOW THAT THE DEFENDANT WAS A RELATIVELY INTELLIGENT, ORIENTED YOUNG MAN. HE APPEARED TO BE FREE OF ANY SORT OF ORGANIC BRAIN DAMAGE AND AS FAR AS ANY MENTAL DISEASE OR DEFECT. EVIDENCE OF THAT WAS SLIGHT, IF ANY AT ALL.

THE THRUST OF THE DEFENSE ARGUMENT HERE WILL BE ALONG THE LINES OF VOLUNTARY INTOXICATION. AND I SUBMIT TO YOU, IT IS UP TO YOU TO DETERMINE WHAT MORAL OR SYMPATHETIC VALUE YOU ARE TO ATTRIBUTE TO THAT FACTOR IN LIGHT OF WHAT THE DEFENDANT HAS DONE.

SUBFACTOR "I, THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME. THIS MEANS AT THE TIME OF THE RAPE, ROBBERY AND MURDER OF TIFFANY FRIZZELL. HE WAS 25 YEARS OLD.

YOU CAN MAKE OF THAT WHAT YOU WILL.

SUBFACTOR "J," WHETHER OR NOT THE DEFENDANT WAS A ACCOMPLICE TO THE OFFENSE AND HIS PARTICIPATION IN THE COMMISSION OF THE OFFENSE IS RELATIVELY MINOR.

THERE IS NO EVIDENCE TO SUGGEST THAT IN THIS CASE. I SUBMIT TO YOU THAT THAT FACTOR DOES NOT APPLY.

THE LAST FACTOR READS AS FOLLOWS: "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.

AND IT SEEMS HERE, LADIES AND GENTLEMEN, THAT THE DEFENSE IS MAKING IT'S PRIMARY THRUST, BECAUSE THEY HAVE PRESENTED TO YOU 33 WITNESSES IN THE COURSE OF THEIR PRESENTATION OF THE PENALTY PHASE EVIDENCE, MOST OF WHICH APPEARED TO BE GEARED TOWARDS THIS FACTOR RIGHT HERE. AND IT IS TO THIS FACTOR THAT I WISH TO ADDRESS SOME OF MY REMAINING COMMENTS TO YOU THIS MORNING.

I AM NOT GOING TO GO OVER THE TESTIMONY OF EACH OF THOSE 33 DEFENSE WITNESSES ONE BY ONE. I THINK THAT WOULD SERVE NO USEFUL PURPOSE.

WHAT I WOULD LIKE TO DO IS SANITIZE CERTAIN OF THEIR TESTIMONY AND OFFER THEM TO YOU FOR YOUR CONSIDERATION AS YOU DELIBERATE.

FIRST OF ALL, WE HAVE TO CONSIDER THE FACT THERE WERE 33 WITNESSES CALLED BY THE DEFENSE. OUT OF THOSE WITNESSES THERE WERE APPROXIMATELY A HALF DOZEN THAT DID NOT EVEN KNOW THE DEFENDANT.

OUT OF THE REMAINDER OF THOSE WITNESSES, THERE WERE MANY OF THOSE WITNESSES WHO HAD NOT SEEN THE DEFENDANT FROM ANYWHERE FROM TEN TO 15 YEARS.

SO AS YOU CONSIDER THE IMPACT AND THE WEIGHT TO BE ATTRIBUTED TO SUCH TESTIMONY, PLEASE CONSIDER THAT FACT.

I SUBMIT TO YOU THAT AS THOSE WITNESSES CAME IN HERE TO OSTENSIBLY TALK TO YOU ABOUT THE REAL MARTIN KIPP, THAT IN THE FORM OF TIFFANY FRIZZELL, ANTANYA HOWARD, JUNE MARTINEZ AND LOVEDA NEWMAN, WE HAD MORE ACCURATE AND UP-TO-DATE WITNESSES AS TO WHO THE REAL MARTIN KIPP WAS.

SECONDLY, THERE IS A THEME EMBODIED IN THAT LAST FACTOR THAT SOMEHOW THIS WAS NOT THE DEFENDANT'S FAULT. THAT THE KILLING, THE RAPE THE ROBBERY AND MURDER OF TIFFANY FRIZZELL WAS NOT HIS FAULT, THAT IT WAS THE PRODUCT OF SOCIAL FORCES WHICH ACTED UPON HIM FROM THE AGE OF BIRTH RIGHT UP UNTIL THE TIME HE COMMITTED THE OFFENSE.

AND I WOULD LIKE TO OFFER YOU THIS ABOUT THAT SORT OF ARGUMENT. THE DEFENDANT IN A SENSE IS POSTING THE

THEORY TO YOU THAT HIS UPBRINGING IN MONTANA, THE ABUSE OF ALCOHOL AND DRUGS, HIS EXPERIENCES IN THE AMERICAN CORP, AS WELL AS HIS EXPERIENCE IN PRISON SOMEHOW ALL CONTRIBUTED TO HIM BECOMING WHAT HE WAS. TO HIM SITTING THERE IN THIS COURTROOM TODAY, THE DEFENSE HAS SUGGESTED THAT TO YOU SENSE THEIR OPENING STATEMENT IN THIS PARTICULAR PHASE OF THE CASE.

WELL, I WOULD LIKE TO HAVE YOU THINK ABOUT WHAT I CALL THE PHENOMENA OF PARALLEL LIVES. AND I WOULD LIKE YOU TO THINK ABOUT THIS AS YOU EVALUATE THE WEIGHT TO BE GIVEN TO THE TESTIMONY OF ALL THESE VARIOUS WITNESSES THAT TESTIFIED.

AND BY PARALLEL LIVES I MEAN THE FOLLOWING: LET'S CONSIDER THE FACT OF GROWING UP IN THE RIGORS OF ~~BROWING~~ Browning (VP) MONTANA. THE DEFENDANT WAS SUBJECT TO THAT. WAS THERE ANYONE ELSE WHO GROW UP UNDER THOSE SAME CIRCUMSTANCES, YET WHO DID NOT TURN OUT TO BE A RAPIST KILLER LIKE THE DEFENDANT?

THE DEFENSE PRESENTED A WITNESS FOR YOU. BY WAY OF EXAMPLE, MARILYN ST. GERMAINE WAS HER NAME. MARILYN ST. GERMAINE GREW UP UNDER CIRCUMSTANCES, AS SHE TESTIFIED, TO WHICH WERE EVEN MORE HARSH THAN THE ~~ONE'S~~ ones (VP) THAT THE DEFENDANT HAD TO ENDURE.

AND YET WHAT HAPPENED TO MARILYN ST. GERMAINE? SHE OVERCAME THOSE HARDSHIPS. SHE HAS BECOME A SOCIAL WORKER. SHE IS TRYING TO HELP HER PEOPLE. SHE HAS BECOME A POSITIVE FORCE IN SOCIETY. SHE HAS NOT BECOME A RAPIST KILLER LIKE THE DEFENDANT IN THIS CASE.

SO IS IT THE FACT THAT GROWING UP IN THAT PART OF MONTANA MAKES ONE A RAPIST KILLER? I THINK NOT. BECAUSE WE HAVE PARALLEL LIVES LIKE MARILYN ST. GERMAINE WHICH TELL YOU OTHERWISE.

WELL, IS IT ALCOHOL AND DRUG, THEN, THAT MAKE THE DIFFERENCE? IS IT ALCOHOL AND DRUGS THAT TURNS SOMEONE LIKE MARTIN KIPP INTO A RAPIST KILLER?

WELL, IS THERE A PARALLEL LIFE, A WITNESS WHO DEMONSTRATES FOR YOU OTHERWISE IN THIS CASE? AND THERE IS. AND IT WAS A WITNESS PRESENTED BY THE DEFENSE.

JUST TO CITE AN EXAMPLE, WE HAD HAROLD ST. GODDARD. AND MR. ST. GODDARD TESTIFIED TO HIS EXPERIENCES WITH ALCOHOL AND DRUGS. AND HE GREW UP IN THE SAME PART OF MONTANA.

BUT WHAT IS MR. ST. GODDARD TODAY? HE IS A PRODUCTIVE MEMBER OF SOCIETY IN MONTANA. HE IS WORKING IN A BUSINESS. HE IS MARRIED. HE HAS BECOME A POSITIVE LAW ABIDING FORCE IN THE COMMUNITY UP IN MONTANA. HE DID NOT BECOME A RAPIST KILLER.

WELL, IS IT THE MARINE CORPS THEN? ARE WE TO ATTRIBUTE THE DEFENDANT'S EVOLUTION INTO A RAPIST AND KILLER TO THE UNITED STATES MARINE ~~CORP~~ Corps?

WELL, I THINK BY WAY OF GENERALITY, ALL OF YOU CAN THINK OF COUNTLESS EXAMPLES OF MEN AND WOMEN WHO HAVE SERVED OUR COUNTRY IN THE UNITED STATES MARINE CORPS WHO DID NOT EVOLVE INTO RAPIST KILLERS.

IN THIS PARTICULAR CASE A WITNESS WHO TESTIFIED, MR. HOLM. MR. TOM HOLM, THE PROFESSOR FROM ARIZONA WAS ONE SUCH INDIVIDUAL. HE HAD SERVED IN THE MARINE CORPS. HAD ACTUALLY SEEN COMBAT. AND YET HE GOT AN EDUCATION AND BECAME AN EDUCATOR HIMSELF. HE BECAME A POSITIVE FORCE IN SOCIETY, NOT A NEGATIVE FORCE IN SOCIETY. NOT A RAPIST KILLER LIKE THE DEFENDANT MARTIN KIPP.

BUT WAS IT PRISON, THEN? THE DEFENSE IS GOING TO TALK TO YOU ABOUT PRISON. HOW THE DEFENDANT CAME OUT OF PRISON, AND HE WAS OUT OF CONTROL, HE HAD LOST FOCUS.

WELL, DOES PRISON AUTOMATICALLY DICTATE WHEN SOMEONE GETS OUT OF PRISON THEY ARE GOING TO BECOME THE TYPE OF RAPIST MURDERER THAT THE DEFENDANT IS?

LADIES AND GENTLEMEN, I SUBMIT TO YOU I THINK NOT. AND WE HAD A LIVING EXAMPLE A PARALLEL LIFE, IF YOU WILL, PRESENTED BY THE DEFENSE IN THIS CASE IN THE FORM OF

JOHN IRWIN.

NOW, THE DEFENDANT DID APPROXIMATELY 21 MONTHS AT SUSANVILLE. JOHN IRWIN DID FIVE YEARS AT A TOUGHER, MORE SEVERE PRISON HERE IN THE STATE OF CALIFORNIA.

NOW, WHAT DID JOHN IRWIN DO WHEN HE GOT OUT OF PRISON? HE WENT TO COLLEGE. HE GOT AN EDUCATION. HE, TOO, HAS BECOME AN EDUCATOR. HE, TOO, HAS BECOME SOMEONE WHO IS PUTTING SOMETHING BACK INTO SOCIETY INSTEAD OF TAKING AWAY FROM SOCIETY.

SO IS IT PRISON, THEN, THAT IS THE DETERMINANT THAT MAKES ONE A RAPIST KILLER LIKE THE DEFENDANT? I THINK NOT.

IS IT PERHAPS, THEN, A COMBINATION OF ALL OF THESE VARIOUS FACTORS?

WELL, I THINK WE CAN CITE TO YOU A WITNESS WHO WAS PRESENTED BY THE DEFENSE YESTERDAY AS A STRONG COUNTER POINT TO THAT SORT OF THEORY. AND THAT WAS MR. KEN WHEELER.

KEN WHEELER, A PARALLEL LIFE, I SUBMIT TO YOU, GREW UP IN THE SAME AREA AS THE DEFENDANT. HE WENT INTO THE MARINE CORPS, SAME AS THE DEFENDANT. BY HIS OWN ADMISSION HE ABUSED DRUGS AND ALCOHOL, SAME AS THE DEFENDANT.

AND WHAT IS KEN WHEELER TODAY? IS HE SITTING IN COURT AS A DEFENDANT ACCUSED OF AND CONVICTED OF RAPES AND MURDERS? YOU SAW HIM TESTIFY. A WELL DRESSED YOUNG MAN. AN ENGINEER AT A LOCAL AEROSPACE FIRM. DESPITE ALL OF THESE FORCES THAT ACTED UPON HIS LIFE, KEN WHEELER HAS BECOME A POSITIVE CONTRIBUTING MEMBER OF SOCIETY. HE DID NOT BECOME A RAPIST KILLER LIKE THE DEFENDANT.

THE DEFENDANT STOOD AT THE CROSS ROADS WHEN HE GOT OUT OF PRISON IN JULY OF 1983. AND THE DEFENDANT CHOSE THE PATH AFTER THAT. FORCES DID NOT DICTATE WHAT HE WAS TO DO. THE DEFENDANT CHOSE THE PATH AS HE STOOD AT THOSE CROSS ROADS.

WHEN THE DEFENDANT GOT OUT OF PRISON HE HAD MORE OPPORTUNITY THAN MOST INMATES WHO GET OUT OF PRISON. HE HAD, AS EVIDENCED BY THE DEFENSE CASE IN THIS PENALTY PHASE, HE HAD FAMILY AND FRIENDS WHO LOVED AND SUPPORTED HIM. HE HAD A READY-MADE FOUNDATION AND SUPPORT GROUP AWAITING HIM IN MONTANA. HE HAD MONEY, AS WAS BROUGHT OUT THROUGH ONE OF THE DEFENSE WITNESSES. HE HAD $13,000 AVAILABLE TO HIM. NOT ONLY THAT, HE HAD SOMETHING HE COULD DO. HE PUT IN TWO THOUSAND HOURS TO LEARN THE TRADE OF WELDING WHILE IN STATE PRISON.

AND THE DEFENDANT CAME OUT OF PRISON, STOOD AT THAT CROSS ROADS WITH THOSE SORTS OF RESOURCES AVAILABLE TO HIM, AND HE CHOSE THE PATH AFTER THAT. AND HIS PATH LED TOWARDS MURDER AND RAPE, AS YOU WELL KNOW NOW.

LADIES AND GENTLEMEN, AS YOU EVALUATE THESE VARIOUS FACTORS, YOU WILL BE CALLED UPON TO EMPLOY THE LAW. AND THE LAW WILL TELL YOU THAT THIS WEIGHING OF THE VARIOUS FACTORS IS NOT AN ARBITRARY SORT OF PROCEEDING. IN FACT, COULD TAKE -- FACTOR "K," YOU COULD TAKE SYMPATHY FOR THE DEFENDANT OR SYMPATHY FOR THE DEFENDANT'S FRIENDS AND FAMILY OR A COMBINATION THEREOF AND FIND THAT THAT SINGLE FACTOR OUTWEIGHS ALL OF THE EVIDENCE IN ~~AGGREVATION~~ aggravation THAT I PRESENTED TO YOU, AND YOU COULD FIND BY LAW THAT THE DEATH

PENALTY IS NOT AN APPROPRIATE VERDICT IN THIS CASE.

I SUBMIT TO YOU THAT THAT IS NOT A PROPER ANALYSIS. I SUBMIT TO YOU THAT THE AGGRAVATING EVIDENCE DOES SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE IN THIS CASE. AND IT DOES BECAUSE OF CERTAIN SUB-THEMES WHICH RUN THROUGH ALL OF THIS EVIDENCE PRESENTED AT PENALTY PHASE.

AND THESE SUB-THEMES CAN HAVE THREE HEADINGS. ONE IS CERTAINTY. ONE IS MORAL VALUE, IF YOU WILL. AND THE LAST IS CONSIDERATION OF REMORSE.

AND WITH REGARD TO CERTAINTY, UNLIKE SOME CASES WHEN WE ARRIVE AT THESE PHASES, THERE IS NO LINGERING DOUBT AS TO WHAT THE DEFENDANT DID. WE PRESENTED YOU A ~~CIRCUMSTANCIAL~~ Circumstantial (VP) EVIDENCE CASE, THE MURDER OF ~~ANTANYA~~ Antaya (VP) HOWARD WAS PROVED THROUGH ~~CIRCUMSTANCIAL~~ Circumstantial (VP) EVIDENCE. BUT WE NOW KNOW THROUGH EVIDENCE PRESENTED BY THE DEFENSE THERE IS ABSOLUTELY NO DOUBT THAT THIS DEFENDANT KILLED THOSE TWO YOUNG WOMEN. THAT HE MURDERED THOSE TWO YOUNG WOMEN. THE DEFENDANT ADMITTED IT TO HIS OWN PSYCHOLOGIST, MR. HANEY, IN THIS CASE.

SO AS TO THE MURDER OF TIFFANY FRIZZELL, AS TO THE MURDER OF ~~ANTANYA~~ Antaya (UF) HOWARD, THERE IS NO DOUBT. ABSOLUTELY NO DOUBT. IT IS ABSOLUTELY CERTAIN THAT HE DID THOSE THINGS.

WE KNOW THROUGH A SIMILAR ANALYSIS THAT THERE IS NO DOUBT THAT WE CAN BE ABSOLUTELY AS CERTAIN THAT THE DEFENDANT RAPED JUNE MARTINEZ. WE HAVE THE STIPULATION TO HIS CONVICTION, AND WE HAVE AN ADMISSION THROUGH MR. HANEY ONCE AGAIN.

NOW, THERE ARE TWO OTHER ACTS OF VIOLENCE WHICH INVOLVE THE ~~APPLIED~~ implied (UF) THREAT OF VIOLENCE WHICH WERE PRESENTED TO YOU. AND THIS CONCERNED THE EVENT INVOLVING LOVEDA NEWMAN AND THE EVENT INVOLVING THE JANUARY 1ST, 1988 ESCAPE ATTEMPT FROM THE LA COUNTY JAIL.

NOW, WITH REGARD TO THOSE TWO EVENTS, YOU HAVE TO DETERMINE DID THOSE THINGS OCCUR AND DID THE DEFENDANT COMMIT THOSE ACTS BY PROOF BEYOND A REASONABLE DOUBT?

WELL, THERE WAS NO EVIDENCE TO DISPUTE THAT THOSE TWO EVENTS OCCURRED. AND I SUBMIT TO YOU IN LIGHT OF THE UNCHALLENGED TESTIMONY THOSE TWO EVENTS BECOME CERTAIN AND SHOULD BECOME CERTAIN IN YOUR MINDS AS WELL.

ALL OF THESE EVENTS, STARTING FROM THE MURDER OF TIFFANY FRIZZELL THROUGH THIS EVIDENCE OF OTHER CRIMINAL ACT THAT I PRESENTED TO YOU IN THE PENALTY PHASE IS ~~CLOKED~~ cloaked (UF) WITH THE ~~ORA~~ aura (UF) OF CERTAINTY. THERE'S NO RESIDUAL DOUBT TO BE HAD ABOUT THAT.

AND YOU CAN TAKE THAT CERTAINTY AND PONDER THAT AS YOU EXAMINE ALL OF THESE FACTORS THAT WERE PRESENTED TO

YOU IN PENALTY PHASE.

IN ADDITION, WE HAVE THE ASPECT OF MORAL VALUE, IF YOU WILL.

WHEN WE BEGAN THIS PENALTY PHASE AND ABSENT THE PRESENTATION OF ANY OTHER EVIDENCE IN ~~AGGREVATION~~ aggravation (of), YOU HAD SUFFICIENT EVIDENCE TO DETERMINE THAT THE DEATH PENALTY WAS WARRANTED FOR MARTIN KIPP.

FORGET THE REST OF THE AGGRAVATING EVIDENCE JUST FOR A MOMENT. BY VIRTUE OF YOU FINDING THAT THE DEFENDANT HAD COMMITTED A FIRST-DEGREE MURDER AND BY FINDING THAT THE SPECIAL CIRCUMSTANCE WAS TRUE, THE DEFENDANT FOR THIS ACT ALONE WAS ELIGIBLE TO RECEIVE THE DEATH PENALTY.

SO FORGETTING ALL THE OTHER AGGRAVATING EVIDENCE JUST FOR A MOMENT, LET'S CONSIDER THE MORAL OR SYMPATHETIC VALUE OF EVERYTHING THAT THE DEFENSE PRESENTED IN COMPARISON WITH THIS ONE RAPE, ROBBERY, MURDER. BECAUSE AS CONTAINED IN THE JURY INSTRUCTIONS, THIS IS PART OF THE ANALYSIS THAT YOU REMEMBER TO EMPLOY.

DOES THE FACTS OF THE DEFENDANT'S BACKGROUND, THE FACTS THAT ANY SYMPATHY YOU MIGHT FEEL FOR THE DEFENDANT'S FAMILY OR FRIENDS, OUTWEIGH WHAT THE DEFENDANT DID? AND WHAT THE DEFENDANT DID IS SOMETHING WE ARE ABSOLUTELY CERTAIN OF. ABSOLUTELY CERTAIN.

DOES THE EVIDENCE THE DEFENSE PRESENTED OUTWEIGH THAT, OR DOES THIS ACT, THIS FURIOUS, INTENTIONAL, COLD BLOODED ACT ON THE PART OF THE DEFENDANT OUTWEIGH ALL OF THE MITIGATING EVIDENCE IN AND OF ITSELF?

I HAVE TO LEAVE THAT TO YOU TO DETERMINE

COLLECTIVELY.

BUT THE POINT IS, THE DEATH PENALTY COULD BE DEEMED APPROPRIATE FOR THAT ONE CRIMINAL MURDEROUS ACT ALONE. BUT YOU DON'T HAVE JUST THAT. YOU HAVE ADDITIONAL EVIDENCE IN ~~AGGREVATION.~~ aggravation (UP) WE HAVE THE BRUTAL RAPE OF JUNE MARTINEZ.

JUNE MARTINEZ BARELY ESCAPED DEATH ON JUNE 14TH, 1981. WE CONSIDER THIS ACT ALONG WITH THE RAPE, ROBBERY AND MURDER OF TIFFANY FRIZZELL, HOW DOES THE DEFENSE EVIDENCE COMPARE WITH THAT? DOES THE MORAL OR SYMPATHETIC VALUE OF WHAT THE DEFENSE PRESENTED OUTWEIGH THESE TWO ACTS, OR DO WE FIND THIS EVIDENCE IN AGGREVATION SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE?

AND WE CAN GO ON DOWN THE LINE ADDING IN THE FACTOR OF ATTEMPTED RAPE OF LOVEDA NEWMAN, THE ESCAPE FROM LA COUNTY JAIL, AND LASTLY AND MOST IMPORTANTLY THE TAKING OF ANOTHER LIFE, THE TAKING OF ~~ANTANIA~~ Antaya (UP) HOWARD'S LIFE. WHEN YOU TAKE ALL OF THIS EVIDENCE IN ~~AGGREVATION~~ aggravation (UP) AND COMPARE IT WITH THE EVIDENCE PRESENTED IN MITIGATION, YOU HAVE TO ASSIGN SOME MORAL VALUE SOME WEIGHT TO THE EVIDENCE IN MITIGATION.

AND I SUBMIT TO YOU, LADIES AND GENTLEMEN, THIS EVIDENCE IN ~~AGGREVATION~~ aggravation (UP) FAR OUTWEIGHS ANY EVIDENCE PRESENTED IN MITIGATION. THERE IS VALUE TO WHAT THE DEFENSE PRESENTED TO YOU, BUT THE VALUE IS NOT SERVED TO DIMINISH WHAT THE DEFENDANT DID. IT DOES NOT SERVE TO DIMINISH THAT IN ONE SENSE AT ALL. AND YOU ARE ENTIRELY JUSTIFIED IN EXAMINING THE JURY INSTRUCTION AND IN DETERMINING THAT THE AGGRAVATING

FACTORS SUBSTANTIALLY OUTWEIGH THE MITIGATING FACTORS IN THIS CASE TO THE POINT THAT THE DEATH PENALTY IS WARRANTED.

SO, WE HAVE THIS SUB-THEME OF CERTAINTY OF WHAT THE DEFENDANT DID. WE HAVE THE SUB-THEME OF WHAT MORAL VALUE ARE YOU TO ATTRIBUTE TO THE MITIGATING EVIDENCE PRESENTED BY THE DEFENSE, AND THEN LASTLY, THE NOTION OF REMORSE. OF THE DEFENDANT BEING REMORSEFUL FOR WHAT YOU KNOW HE DID. THINGS OF WHICH WE ARE CERTAIN.

LET'S MOVE CHRONOLOGICALLY BACK TO ABOUT JANUARY THE 6TH, 1984. WE KNOW BY WAY OF STIPULATION THAT ON THAT DATE THE DEFENDANT SURRENDERED HIMSELF TO LAGUNA BEACH POLICE DEPARTMENT AS A PAROLE VIOLATOR, AND HE WAS ULTIMATELY ARRESTED FOR SOME WARRANTS THAT HE HAD.

PERHAPS THE DEFENSE WILL ATTRIBUTE SOME SORT OF SENSE OF REMORSE TO BE INFERRED BY THE DEFENDANT TURNING HIMSELF IN. I SUBMIT TO YOU THAT WOULD NOT ABOUT A PROPOSITION, AND WOULD NOT BE A PROPOSITION BECAUSE OF THE SUBSEQUENT EVENTS.

TAKE JANUARY 10TH, 1984. DEFENDANT RICHARD HOOPER OF THE HUNTINGTON BEACH POLICE DEPARTMENT HOMICIDE DIVISION TESTIFIED FOR YOU THAT HE INTERVIEWED THE DEFENDANT. THE DEFENDANT WAIVED HIS MIRANDA RIGHTS, AND YOU HEARD THE TAPE. YOU HAVE THE TRANSCRIPT. YOU KNOW WHAT CONVERSATION TRANSPIRED.

DEFENDANT HOOPER GAVE THE DEFENDANT EVERY OPPORTUNITY TO TELL THE TRUTH. EVERY OPPORTUNITY TO TALK ABOUT WHAT HAD HAPPENED WITH ~~ANTANYA~~ Antaya (UP) HOWARD. AND WHAT DID THE DEFENDANT DO? DID HE COME FORWARD AND ADMIT WHAT HE DID? HE DID NOT. THE DEFENDANT LIED. HE SAID, "I'VE NEVER BEEN WITH THIS GIRL. I'VE NEVER BEEN IN CHARLIE'S CHILI. I'VE NEVER BEEN IN HER CAR." BUT OTHER WITNESSES AND FINGERPRINTS BELIED THE DEFENDANT'S STATEMENT ON THAT.

SO WITH THE DEFENDANT, WAS THE DEFENDANT COMING FORWARD OUT OF REMORSE WHEN HE SURRENDERED HIMSELF? CIRCUMSTANCES DICTATE, NO.

DID THE DEFENDANT COME FORWARD AFTER HE RAPED AND ROBBED AND MURDERED TIFFANY FRIZZELL? HE DID NOT. (UP)

I SUBMIT TO YOU THAT THE MOST ~~CREATIVE~~ Indicative (UP) EXPRESSION OF THE DEFENDANT'S SENSE OF REMORSE IS CONTAINED IN THE LETTER THAT YOU HAVE ALREADY RECEIVED IN EVIDENCE AT THE TRIAL PHASE OF THIS CASE, THE SEPTEMBER 15TH, 1987, LETTER. AND I DON'T NEED TO RECITE FOR YOU PRECISELY WHAT WAS STATED IN THAT LETTER, BECAUSE THE LANGUAGE WAS ROUGH, TO SAY THE LEAST.

BUT THE IMPACT AND THE ESSENCE OF THAT LETTER WAS, "WAS I SORRY? WAS I SORRY? NO. ABSOLUTELY NOT."

HE TALKS ABOUT, IN EFFECT, "THOSE GIRLS DESERVED TO DIE. AND IT FELT GREAT. YEAH, IT FELT GREAT BECAUSE THOSE GIRLS DESERVED TO DIE."

DOES THIS SOUND LIKE THE LANGUAGE OF REPENTENCE? DOES THIS SOUND LIKE THE LANGUAGE OF REMORSE?

WHEN YOU CONSIDER THE BOTTOM OF, I BELIEVE IT'S PAGE 6 OF THAT LETTER, THE DEFENDANT WRITES, "WAS I SORRY? NO."

YOU HAVE THAT LETTER AND THAT IS EXPRESS STATEMENTS BY THE DEFENDANT OF HIS OWN FEELINGS OF REMORSE.

NOW, THE DEFENSE HAS SOUGHT TO COUNTER THAT BY PRESENTING THE TESTIMONY OF MR. HANEY. AND IF YOU RECALL, A WEEK AGO MONDAY, ON JANUARY 16TH, 1989, MR. HANEY INTERVIEWS THE DEFENDANT. AND OSTENSIBLY THE DEFENDANT TELLS HIM, "I WAS ANGRY AND UPSET AT THE TIME I WROTE THAT LETTER." AND THIS IS HOW MR. HANEY INTERPRETS THE EVENTS SURROUNDING THAT PARTICULAR LETTER AS WELL. ~~AND~~ An (E) EFFORT TO MITIGATE, PERHAPS, THE IMPACT OF THE SEPTEMBER 15TH, LETTER.

WELL, LADIES AND GENTLEMEN, THROUGH DEVELOPMENTS YESTERDAY, AS WELL AS TO AN EXTENT LAST FRIDAY MORNING, WE HAVE BEFORE YOU A SECOND LETTER NOW. AND IN PERTINENT PART AT THIS TIME I'M GOING TO READ TO YOU SOME LANGUAGE FROM THIS SECOND LETTER THAT WAS INTERCEPTED ON SEPTEMBER 9TH, 1987, AT THE ORANGE COUNTY JAIL. AND I WILL ASK YOU, DOES THE LANGUAGE OF THE DEFENDANT SEEM CONSISTENT AT ALL WITH LANGUAGE YOU MIGHT EXPECT OF SOMEONE WHO WAS REMORSEFUL OR REPENTANT?

PARDON MY LANGUAGE, BUT IT READS ON PAGE 6.

"I'D RAPE AND SODOMIZE EVERY WOMAN BITCH DEPUTY AND GOUGE THEIR EYES OUT. BUT I WOULD LET THEM LIVE AS INVALIDS. YEAH, SATAN WILL LICK THEM ALL UP IN A TREDGE OF HORROR. THEY BETTER NOT EVER GIVEN ME THE OPPORTUNITY TO ESCAPE, BECAUSE I'LL ASSOCIATE MYSELF WITH A TERRORIST GROUP AND REALLY GO ON A SPREE. I'D KILL EVERY DA AND HIS FAMILY, DEPUTIES, MEN AND WOMEN ALIKE, AND I'D GOUGE EVERY ONE OF THEIR," EXCUSE ME, "FUCKING EYES OUT. AFTER I GOT TO 400 TO 500 KILLINGS OF THIS TYPE, I'D ALSO INCORPORATE SOME NINJA-TYPE MURDERS BY POISON. YEAH, I DON'T BELIEVE IN GOD ANYMORE, BECAUSE THERE ISN'T ONE WHO HAS EVER HELPED ME. BUT SATAN HAS HELPED ME REJUVENATE MY ENERGY IN A WORKING MANNER. DON'T EVER UNDERESTIMATE MY INTENTIONS, BABE, THAT'S ALL I CAN SAY."

THE LANGUAGE OF SOMEONE WHO'S REMORSEFUL. THE LANGUAGE OF SOMEONE WHO'S REPENTANT. WHEN YOU CONSIDER THESE TWO LETTERS WITH THE LANGUAGE THE DEFENDANT USED IN CONJUNCTION WITH THAT ONE 1988 ESCAPE ATTEMPT, YOU HAVE A PRETTY ~~CONSIST~~ consistent OF NOTION OF WHAT IS GOING ON IN THE DEFENDANT'S MIND WITH REGARD TO REMORSE.

LADIES AND GENTLEMEN, I HAVE JUST A FEW CONCLUDING REMARKS.

THUS FAR I HOPE MY REMARKS HAVE BEEN SOMEWHAT HELPFUL, AT LEAST IN OFFERING SOME IDEA OF HOW TO ANALYZE THE TYPE OF EVIDENCE YOU HAVE RECEIVED IN THIS PENALTY PHASE.

THIS ASPECT OF THE CASE IS ONE, LIKE I STATED EARLIER, THAT IS FROUGHT WITH EMOTION. PERHAPS FOR YOU, BUT

CERTAINLY FOR US AS TRIAL ATTORNEYS. AND I HAVE DONE MY BEST THIS MORNING TO WORK THROUGH THE LAW, TO WORK THROUGH CERTAIN LARGER CONSIDERATIONS THAT YOU WILL FACE AS JURORS IN MAKING THIS VERY IMPORTANT DECISION.

BUT, ULTIMATELY, WE COME DOWN TO THESE FEW ~~CONCLUDIGN~~ concluding up REMARKS. AND THIS IS WHAT I WOULD LIKE TO EXPRESS TO YOU:

IN THIS CASE, IN OPENINGS REMARKS BY MR. BRODEY AT THE PENALTY PHASE, MR. BRODEY REMARKS ABOUT THE TRAGIC JOURNEY OF THIS DEFENDANT MARTIN KIPP.

I SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT THE REAL TRAGEDY IN THIS CASE IS THAT PATH THAT MARTIN KIPP ~~SHOWS~~ chose up CROSSED THE LIVES OF JUNE MARTINEZ, TIFFANY FRIZZELL, LOVEDA NEWMAN AND ANTANYA HOWARD. THAT IS WHERE THE REAL TRAGEDY LIES IN THIS CASE.

THE DEFENDANT LEFT IN HIS PATH TWO DEAD VICTIMS AND TWO LIVING VICTIMS WHO WILL NEVER FORGET THE HORROR THAT THE DEFENDANT PUT THEM THROUGH.

THE DEFENDANT ~~CHOICE~~ Chose (LP) THIS PATH, LADIES AND GENTLEMEN. EVENTS DID NOT ~~CHOICE~~ Chose (LP) THIS PATH FOR HIM. THE TRAGEDY TO THE EXTENT THAT IT EXISTS IN THIS CASE BELONGS TO THE DEFENDANT'S VICTIMS, AND NOT TO THE DEFENDANT.

IN THIS PHASE OF THE CASE THE DEFENSE ATTORNEYS HAVE BROUGHT FORWARD MANY FRIENDS AND FAMILY MEMBERS OF THE DEFENDANT TO TESTIFY OF THE MARTIN KIPP THAT THEY KNEW TO APPEAL TO YOU OR YOUR SYMPATHY OR YOUR MERCY.

AND AS I LISTEN TO THESE WITNESSES TESTIFY, FIRST AT LENGTH ABOUT JOHN KIPP, AND THEN MORE SPECIFICALLY ABOUT THE DEFENDANT, AND AS I CONSIDERED THE FACT THAT FOR MANY OF THESE PEOPLE THEY HAD NOT SEEN THE REAL MARTIN KIPP FOR SOME YEARS, I THOUGHT OF THE FOLLOWING PARABLE. IT'S A STORY OUT OF TURN OF THE CENTURY ENGLAND. AND IT'S KNOW AS THE STORY OF THE BENGAL TIGER.

AND IN THE TURN OF THE CENTURY ENGLAND A JOURNALIST WAS VISITING A ZOO IN LONDON. AND HE WENT TO THE CAGE WHERE BORE A SIGN THAT SAID, "BENGAL TIGER." AND AS HE LOOKED IN THE CAGE HE SAW A TIGER RATHER SLEEPILY LOOKING BACK AT HIM. THE TIGER WAS CLEANING HIS OWN PAWS. THE TIGER APPEARED TO ALMOST BE ~~SUBAMBULENT~~ somnambulant (LP).

AND AS THE JOURNALIST LOOKED INTO THE CAGE AND LOOKED AT THIS TIGER A VOICE WAS HEARD BEHIND HIM SAYING, "SIR, THAT IS NOT A REAL ~~BANGEL~~ Bengal (LP) TIGER."

AND THE JOURNALIST TURNED AND THERE WAS ANOTHER

FELLOW WHO APPEARED TO BE DRESSED IN WHAT MIGHT BE DESCRIBED AS SAFARI-TYPE CLOTHING. AND HE SAID, "WHAT DO YOU MEAN, SIR? WHAT DO YOU MEAN THIS IS NOT A ~~BANGEL~~ Bengal (UP) TIGER? THAT'S WHAT THE SIGN SAYS."

AND THIS PERSON WHO IDENTIFIED HIMSELF AS A HUNTER SAID, "SIR, WHAT YOU ARE LOOKING AT IS NOT A REAL ~~BANGEL~~ Bengal (UP) TIGER."

AND THEY HAD A FRIENDLY WAGER, WHICH RESULTED IN THE JOURNALIST AND THE HUNTER GOING TO INDIA. THEY ARRIVED IN INDIA AND THEY LEFT THE CIVILIZED PORTIONS OF INDIA AND BEGAN TO GO INTO THE JUNGLE AREA.

AND AS THEY MOVED THIS ONE HOT AFTERNOON INTO THE JUNGLE, THE FOLIAGE WAS STEAMING, IT WAS HOT, THEY CAME UPON A CLEARING. THE JOURNALIST WAS LEADING THE WAY, AND AS HE STEPPED INTO THE CLEARING FROM THE OTHER SIDE OF THE CLEARING HE HEARD THE LOW GROWL OF A TIGER. AS HE LOOKED TO WHERE THE NOISE WAS COMING FROM, HE SAW A TIGER. THIS TIGER HAD ~~IT'S~~ its (US) MUSCLES BUNCHED AS IF TO LEAP. IT'S EYES WERE BURNING. ~~IT'S~~ Its (UP) CLAWS WERE DISTENDED. IT'S YELLOW TEETH AND FANGS WERE OUT. AND THE JOURNALIST RAN BACK TO THE COVER OF THE OTHER SIDE OF THE CLEARING TO WHERE THE HUNTER WAS. AND AS HE RATHER SHAKILY APPROACHED THE HUNTER, THE HUNTER SAID TO HIM, "SIR, NOW YOU HAVE SEEN A REAL ~~BANGEL~~ Bengal (UP) TIGER."

IN THIS PARTICULAR CASE THESE WITNESSES WHO HAVE BEEN PROFFERED BY THE DEFENSE SPOKE OF A MARTIN KIPP WHO WAS NO LONGER THE REAL MARTIN KIPP. YOU SIT IN JUDGMENT UPON THE REAL MARTIN KIPP. THE MARTIN KIPP WHO RAPES, WHO KILLS. THE MARTIN KIPP WHO ONE CAN ONLY INFER WAS THE REAL

MARTIN KIPP THAT TIFFANY FRIZZELL AND ~~ANTANYA~~ Antaya (UF) HOWARD SAW JUST BEFORE THEY WERE RENDERED UNCONSCIOUS DUE TO THE DEFENDANT'S STRANGLING THEM.

LADIES AND GENTLEMEN, THAT IS THE MARTIN KIPP IN WHICH YOU SIT IN JUDGMENT UPON. THAT IS THE REAL MARTIN KIPP.

WHEN THE DEFENSE ASKS YOU TO HAVE MERCY UPON MARTIN KIPP, THINK ABOUT THAT REAL MARTIN KIPP. THE REAL MARTIN KIPP WHO SHOWED NO MERCY TO HIS VICTIMS.

WHEN THE DEFENSE ASKS YOU TO HAVE SYMPATHY, ATTRIBUTE WHAT MORAL WEIGHT YOU FEEL IS APPROPRIATE.

BUT I SUBMIT TO YOU IN LIGHT OF THE AGGRAVATING EVIDENCE IN THIS CASE, IN LIGHT OF WHAT THE DEFENDANT HAS DONE, IN LIGHT OF WHAT THIS REAL MARTIN KIPP HAS DONE, THAT THE EVIDENCE IN ~~AGGREVATION~~ aggravation (UF) SO SUBSTANTIALLY OUTWEIGHS THIS EVIDENCE IN MITIGATION THAT THERE'S ONLY ONE PENALTY THAT IS PROPER UNDER THE LAW. AND THAT IS THE DEATH PENALTY.

I SUBMIT TO YOU VERY SHORTLY THE CASE. YOU, LADIES AND GENTLEMEN, YOU 12 JURORS, REPRESENT THE ~~CONSCIOUSNESS~~ Sensibilities (UF) OR THE ~~CONSCIOUS~~ conscience (UF) OF THE COMMUNITY. YOU BY YOUR VERDICT WILL BE SENDING A MESSAGE BACK TO THE COMMUNITY OF WHAT YOU FEEL THE APPROPRIATE VERDICT IS IN THIS CASE.

MR. BRODEY: I'M GOING TO OBJECT TO THAT.

THE COURT: JUST MAKE A NOTATION. I MADE A NOTE OF IT. THANK YOU.

GO AHEAD.

MR. HODGMAN: IN CLOSING, I URGE TO YOU ON BEHALF OF THE PEOPLE TO REMEMBER YOUR SOLEMN OATH AS JURORS. I URGE

UPON YOU TO WORK CAREFULLY AND ~~CONSCIOUSLY~~ Conscientiously (UF) TOGETHER AS YOU TRY TO RESOLVE THIS VERY IMPORTANT ISSUE. I URGE UPON YOU TO FOLLOW THE LAW AS YOU FEEL APPROPRIATE. AND I URGE UPON YOU THAT IN LIGHT OF THE EVIDENCE THAT HAS BEEN PRESENTED IN THE PENALTY PHASE OF THIS CASE, THAT THERE IS ONLY ONE PENALTY THAT IS WARRANTED. AND THAT IS BECAUSE THE AGGRAVATING EVIDENCE, AFTER ALL THE ANALYSIS IS DONE, SO SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE THAT INDEED ONLY THE DEATH PENALTY FOR THIS DEFENDANT IS APPROPRIATE.

THIS DEFENDANT, THIS REAL MARTIN KIPP, HAS MURDER IN HIS HEART, HAS SATAN THIS HIS ~~SOLE~~ soul (UF). AND HE HAS THE LIFE'S BLOOD OF TIFFANY FRIZZELL AND ~~ANTANYA~~ Antaya (UF) HOWARD ON HIS HANDS.

FOR WHAT HE HAS DONE, AS EVIDENCED BY THIS EVIDENCE IN ~~AGGREVATION~~ aggravation (UF), ANY VERDICT OTHER THAN THE DEATH PENALTY WOULD ABOUT AN ABSOLUTE INJUSTICE.

THANK YOU.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTH "L". HON. MICHAEL G. NOTT, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

MARTIN JAMES KIPP,

DEFENDANT.

NO. A 028286

FILED
JAN 23 1989
FRANK S. ZOLIN, COUNTY CLERK
BY DEPUTY

REPORTERS' DAILY TRANSCRIPT

MONDAY, JANUARY 23, 1989

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VOLUME 41

PAGE: 5014 - 5148

ORIGINAL

VICKI FRASER, CSR #6737
CHRISTINA ARCHAMBEAU, CSR #3416
OFFICIAL REPORTERS

JURY INSTRUCTIONS

THE COURT:

"LADIES AND GENTLEMEN: IT'S NOW MY DUTY TO INSTRUCT YOU ON THE LAW.

IF ANY RULE OR DIRECTION OR IDEA IS REPEATED OR STATED IN DIFFERENT WAYS IN THESE INSTRUCTIONS, NO EMPHASIS IS INTENDED AND YOU MUST NOT DRAW ANY INFERENCE BECAUSE OF ITS REPETITION.

DO NOT SINGLE OUT ANY PARTICULAR SENTENCE OR ANY INDIVIDUAL POINT OR INSTRUCTION AND IGNORE THE OTHERS. CONSIDER THE INSTRUCTIONS AS A WHOLE AND EACH IN LIGHT OF ALL THE OTHERS.

THE ORDER IN WHICH THE INSTRUCTIONS ARE GIVEN HAS NO SIGNIFICANCE AS TO THEIR IMPORTANCE.

STATEMENTS MADE BY THE ATTORNEYS DURING TRIAL ARE NOT EVIDENCE. HOWEVER, IF THE ATTORNEYS HAVE STIPULATED OR AGREED TO A FACT, YOU MUST REGARD THAT FACT AS CONCLUSIVELY BEING PROVED AS TO

THE PARTY OR PARTIES MAKING THAT STIPULATION.

IF AN OBJECTION WAS SUSTAINED TO A QUESTION, DO NOT GUESS WHAT THE ANSWER MIGHT HAVE BEEN. DO NOT SPECULATE AS TO THE REASON FOR THE OBJECTION.

DO NOT ASSUME TO BE TRUE ANY INSINUATION SUGGESTED BY A QUESTION THAT WAS ASKED OF A WITNESS. A QUESTION IS NOT EVIDENCE AND MAY BE CONSIDERED ONLY AS IT ENABLES YOU TO UNDERSTAND AN ANSWER.

DO NOT CONSIDER FOR ANY PURPOSE ANY OFFER OF EVIDENCE THAT WAS REJECTED OR ANY EVIDENCE THAT WAS STRICKEN BY THE COURT. TREAT IT AS THOUGH YOU NEVER HEARD OF IT.

YOU MUST DECIDE ALL QUESTIONS OF FACT IN THIS CASE FROM THE EVIDENCE RECEIVED IN THIS TRIAL AND NOT FROM ANY OTHER SOURCE. YOU MUST NOT MAKE ANY INDEPENDENT INVESTIGATION OF THE FACTS OR THE LAW, OR CONSIDER OR DISCUSS FACTS AS TO WHICH THERE IS NO EVIDENCE. THIS

MEANS, FOR EXAMPLE, YOU MUST NOT ON YOUR OWN VISIT THE SCENE, CONDUCT EXPERIMENTS OR CONSULT REFERENCE WORKS OR OTHER PERSONS FOR ADDITIONAL INFORMATION.

YOU MUST NOT DISCUSS THIS CASE WITH ANY OTHER PERSON, EXCEPT A FELLOW JUROR, AND YOU MUST NOT DISCUSS THE CASE WITH A FELLOW JUROR UNTIL THE CASE IS FINALLY SUBMITTED TO YOU FOR DECISION, AND THEN ONLY WHEN ALL JURORS ARE PRESENT IN THE JURY ROOM.

WJ #24

(1)

Linda,

Were's the great spirit lifting us up to where we belong. The tiger's are for our strength babe. Should be a great grizzly Bear But in this case it still signifys strength my love. Life will be great in that regrt believe me. Fuck those deputie's and all the Rat's and scandulous souls. For they are destined for hell little do they realize babe. We are in fact going to great them as they come on down! And administer to them what they always had coming due to their Karma.

It was exactly two years ago this month we were married and had the first sensational photo shoot of the Upp photographs. At the time, our low-key fame,

romance as it was, still bore the blush of its bloom. In little more than the span of four seasons, Linda had gone from being Linda Ann Louise Terenica Garaffa, formerly of New Haven, Connecticut — cute, unknown, scuffling — to being simply and spectacularly and sublimely Linda Ann Kapp, the sweetheart and sex goddess of the Western, and the eastern world.

It was her fate, her destiny, her luck, her fortune cookie from the Big Chinese Waiter whose name and the wind over Weehawken are one. The world was ready for it. More than that, the world was ravenous for it: the return of the Carmelite goddess, the renewed snap of the great magical garter more powerful than a thousand E.R.A.'s barreling headlong down the vast sexless watery slide of Judeo-Christianity. The world was ready for it, the appetite was there; and she was there, bless her, to give it what it wanted. But Linda proved herself to be much more than just a phosphorescent flash of platinum

JA 11-22-98

WJ #24

brunette body heat. Linda and the world — it was not merely a matter of a quick fuck between them. It was a fling through the move and a blown kiss, the beginnings of a liaison that has just gotten hotter and hotter with the passing of time.

"There are about a million opposites living inside of me," Linda once said. In the two years since Martin James Kipp shoved her as the world had never seen her, more than a few of those opposites have come to light. Diane Monroe reborn, peep-show floozy, suffering grisette in gingham, virgin and whore, little girl and bride, saint and man-eater, angel and sinner — Linda has swept through all these guises and more. At times, it has seemed that Linda is nothing more than a series of masks illuminated from behind; and it has been the mercurial mystery of that elusive radiance behind the masks that has captivated. Unknowable — if, indeed, there is anything to know — Linda enthralls,

in a way that flesh in the round never could. The true talents of Linda's heart, the true heart of her gift, may be just that: like illuminated manuscripts well. Linda gives good light. "Out in the cold by" [illegible] was first was dedicated to "my husband, the coolest guy in the universe."

That husband, of course, is Martin James Kipp, whom Linda had married on August 5, 1985, her 34th birthday. This petite and pugnacious warrior-like and reserved stealthy-like young method Martial Artist, [illegible] years her junior and a minor player in the bread winning scenario. Perhaps as disliked by the lowly public as Linda has been disliked, Linda's marriage to him tested that disliking! Marriage, it appears, tends to deflate the stock of a sex-symbol. It is an infidelity to the adorer — an adultery to the males, an abandonment to the females an irrevocable symbolic rending of a maidenhead and bond that lived in illusion

SP. 11-22-78

WJ #24

⑤

if not in fact. Of course, if are you must marry, it is better, imagewise, that it another icon. Linda's choice was thus not only baffling, it was dangerous. That she survived this test, stock unhurt and adoration unflagged, is a tribute to Linda's sovereignty. That she remained unscathed after calling Martin "the coolest guy in the universe" was more than a tribute; to the fact that, as far as sex symbols are concerned, a little stupidity worn on the sleeve can be just as attractive as a little beauty spot worn on the face?

I love you Linda and miss your face quite tremendously. You know I read your letter you wrote me babe, I only can say it was a beautifully written one. Yes, I understand the need for you to get released. I will do what I can to "expedite" the proceedings. Nikko is something else? He's a loser, so is Frank Miller, money the only important subject. I wonder what kind of digit's

were recorded into there bank accounts? Probably, enough to buy "St. Elsewhere" and "Falcon crest" with extra's! The type of presentation he put on was a complete fucking farce. If the county can pay people of Mike Heron's caliber to represent client's in the manner I've seen him operate. Well, they could hire me to do just as good as job. I told Mike "Oh what a great job" you did? But, rather in a sarcastic way you know. I mean it was such a joke I had to keep from laughing several times. Fuck, all they talked about was how nice a guy Mike Heron was! I told the D.A. Mel Jensen "You did a nice job" in a very sarcastic tone of voice and laughed hard. Mike tried to say it was meant in a sincere way? Quite the contrary as you would put it my dear. He only said that to make himself look good. (ha! ha!) The way the newspaper made it look like I was remorseful and what not babe. Fuck! I was anything but that you know.

WJ #24

(D)

I killed, raped, sodomized, beat, swore and laughed at those fucking no good bitches! Yeah! it felt great, because neither deserved to live anymore. One was a black prostitute who liked to rob people and play games. Well, she goes "okay okay Kipp" while I crushed her fucking throat with a Dim-Mak technique! The other little tramp played it off as a college sweetheart. Well she was anything but that and a loose fuck too boot! Well, "Satan's" licking both their bitch's up now and laughing. Just like I laughed at my trial the whole time. And they what me to be remorseful, crying and pay back their mother's. Fuck! the community, their mother's I'd rape, no does it at all sound like I'm in anyway, SORRY! FUCK NO!

The newspapers tried to make it appear as though I was, but further on they printed like it was. No one has any thing on us love always remember that Kay. The illusions they painted are illuminated to great hemisphere's of luxuries it appears? But do not be absorbed by these pictures of nothingness's. These are true facts not justifications by any means love. In our next world we will celebrate and be on top, first in line to persecute and execute those would be haven doers! (We are coming Home Satan!)

Linda could feel the hunger of Martin's mouth. Her eyes closed, and she began to hear thunder of a different sort.

Martin James liked to sneak up and surprise her, but Linda heard the Harley roaring like thunder from miles away. She loved it when Martin came to her hot from the road. The heat of the leather, the scent of night, did something to her. Martin knew exactly what she wanted.

JA 11-22-88

WJ #24

(9)

He wanted it, too. Linda, already naked, stripped the warm leather from Martin's body. Revealing flesh that was just as warm, she eased him downward. She could feel the hunger in his mouth. Her eyes closed, and she began to hear thunder from the unleashed east. This was the sweet sound of the storm they made together. Hours passed without them saying a word. Too soon, he would be gone again. There was no time for words ~~or~~

People don't ever want to remember the difficult times? Linda I remember way back when I was 4 year old. My father was sitting in his room with my mother. And he was crying, because the investor's had come to repossess all our farming equipment. Yes, there was a major crisis going on at the time! Failure and Doom guided the whole household it seemed. My mother put up 400 acres of land to keep the farming equipment and to save us from going bankrupt. I can't

tell you how or what would of became of our family at that time? It's times like those I look back on and say that hurt's deep to the bone babe. Because with the years to come. I was given the money from that crisis situation along with the many avenue's of opportunities it opened for me babe. You see, so what I'm going through now is nothing compared to those type of crisis's. But what certainly hurt's is the fact I can only write you these long letter's babe. Not seeing you is such a hard blow to me. At times if I could just see you. Could at least put together a better picture than this letter situation. What you tried to do for me will never be surpassed never! I did'nt tell Mike I never cared about your situation babe. You must understand something Mike will say anything to pacify a issue. As far as assisting you I'm doing my best babe. I have the scheduling of my final sentencing set for the 18th. I

WJ #24

(1)

wish to act my self rested and my mind, soul and spirit in condition. I won't take the case to trail, unless I am forced by the court's too. My thought's on some of the issue's were unclear, for I was really exhausted going to trial, and still working out each day babe? Now that I'm healthy and rested I'm concentrate so much easier okay. Look I told you to go P.C. over there Linda Ann! Your going to either get hurt or raped by some of those [redacted] over there. Don't you understand, talk to your attorney or a call to your way. A-Dorm right below you is P.C. what's wrong going down there. Those [redacted] Security can't refuse from protecting you. Especially if you are getting the threats and stupid remarks thrown at you babe. Use your head, realize the situation, take the aggressive action through your attorney. If those [redacted] Security's refuse to request. File a lawsuit on them and that will certainly turn some heads. Do you realize that would be a major lawsuit if you

(12)

were to be just over there! Handle that in a legal situation though your attorney and do it immediately babe. Don't play a hero for me too, you did enough for me okay. Don't you see that is always the way the cops will try to get back at us? You're a professional not a fighter babe. But I'd suggest if you must use a razor blade. All you do is melt a razor blade into the end of a toothbrush. Any time you draw blood [redacted] they run like hell! Believe me I've did it many times and it works like a charm? But be smart and so P.C. okay you don't need the extra time to do in prison use a fist with some of those [redacted] bitches babe. Tell I've told you the best I could on that issue Linda Ann.

Now getting to the Gilbert offer of wanting to help and let you stay a week. I think that's great and tell her I said thanks okay. And for your parents I'm so glad they decided to take Daisy Lu back in the fold once again. It'll help if I can get time

WJ #24

(13)

money from the tribe to help you out love. I already wrote a letter last week to Mel La Thom. Asking for a balance voucher so to know much is in my IIM account. I don't know maybe there's hardly enough to buy a pair of socks? Or possibly with a little luck $10,000.00 dollars huh? Whatever the case I will give it all to you Princess. I'm wanting to help you all I can even if it's just in a financial status. I've not forgot our agreement on some serious ultimate plans babe. I'm not refusing to to use my key to your freedom, so don't be baffled. You need not beg me for anything concerning your welfare love? You have a lot more coming than you think, so don't take anything for granted okay. Yes, you are my other half and you're not working alone on these important matters love. It's not my desire to keep you in that hell-hole of rat tail's babe. It cheers me up to know you all have some reprieve out there? You know I felt maybe you'd give up on me after all that has happened. So quite

naturally I fell into a old mood w/ woman as before. I must remember your my beautiful wife 2 years and my for many more years. You're right, for once it looks like we are getting some right-shed in our turnes of sadness? Well, as hard as it is I wish you'd try to understand me as a person. Not just for the fact I'm married to you love Sake. Your family is beautifully structured and I admire that Linda Ann. As far as those weak-natured people in Montana who are suppose to be family. Well, their definitely not of the warrior-type love. You can't call these Indians in no way of a fashion. Because they have no heart's, and if they do it's one of a coward! No! do not contact those people in any way Linda Ann okay. Why? so they can get some more money again, and on everything will be alright again. Fuck them fill in their ass, fucking son-of-a-Bitches anyhow! I'm glad all this info came to me today. For awhile I was wondering what was happening. I never received any mail

WS #24

(15)

for several days babe? Yes, its really a peace of mind for once things seem to be going our way Babe! ♥ Linda Ann, I will be working on every angle to get to L.A. county as soon as possible Love okay. Your love is safely in my heart forever Linda. And I do remember that you always Love me babe. Just to get you out of that hell-hole will be a victory for us huh! I want to get a lot of money from the tribe, so you can buy a new car. Or at least rent one to get around, instead of riding the bus's Babe. Lil baby still runs he's auntie Rita's boy? So you see how can you accuse Big Baby Martin James of not trying to assist you. Remember one thing about your husband "he's a real man". Not some weak deputy dressed in green, Not some fat poor slob, Not some weak-natured Pat, Not some poor bastard locked in the system. I'm a warrior from the old school always remember that love. I'm tough as nails and can breathe cold air in my lungs until they burn and ache love. I'm one

(16)

who takes no bullshit, and demands respect at any cost! Did Jacqueline get my birthday card I sent her. I sent the card to you so you could mail it to her babe. I still really miss Boo-Boo so very much. I believe she is doing just fine where she is. Except not getting to see us may hurt her a little bit huh?

Linda how do I express my love for you as a woman. And the thoughts of how I love you so beautifully. Your my wife whom I treasure so deeply with all my heart. Always remember that okay no matter what is going on babe. Alot of misinterpetations have come about due to the communication standard's we are bound by okay. So, let's have them pass, and not dwell upon them okay. I love your ass and miss your face write soon okay.

Love okay.

For always,

68

Lt. Lutin

FROM: INMATE MARTIN KIPP
TO: INMATE LINDA KIPP

①

Linda,

I'm sending this Birthday card for Boo-Boo to you. I have forgot the address where she lives now. Besides Denise would probably throw it away and not give it to Jacqueline? And I am sending you a card also. I went to L.B. August 31st a Monday. I went up and came right back? I get sentenced on Sept 15th about 3 weeks from now. I go back to L.B. on Nov 1st for good to clear that case up. After I'm sentenced on the 18th of Sept. My trial for the escape begins shortly thereafter down here. Laurie asked me to call her and I did. She said my beautiful wife was worried and really depressed! Linda I'm really trying to accomodate your every desire and wish. Especially your need to be with our daughter on her birthday. I basically told Laurie I needed time to recuperate from the long 8 weeks of

TYPE OF HEARING
CASE NO.
EXH. NO.
ADMITTED IN EVIDENCE
DATE
BY: DEPUTY

constant trial proceeding is. So the judge set sentencing for the mandatory time limit of 28 days. I would've pushed for a earlier sentencing date. But I thought since the court's are going to set a trial date on the escape charge's it made no sense to be dragged through more continous court proceeding's. I was totally exhausted after 8 weeks of trial proceeding's. I'm just now getting some energy back. I worked out in the morning's & evening's while going to court too. Which is the main factor I was so tired after all the court proceeding's. I just came away from a fever and tremendous cold which had me sick about one week after my trial. I think I got it from laying on the cold floor and bench's over there in central court. So I want you to understand where I'm coming from okay babe. I know when you get sentenced and your urgency to get out of that fuckin' Rat Hole. It

certainly hurts me to see you in the condition and atmosphere you live in. I at the time am just going through the motions and then letting it go! I must ready myself for what we have concurred upon already. Don't rush me babe, I am in a strong-minded sense. Don't doubt my intentions in the least my beautiful Wife. All things shall come to their proper designation, believe me! In fact, if you can read between the lines I had my chance Aug 31st. I shall get another opportunity I'm sure. I told you I wish to go out with a bang!

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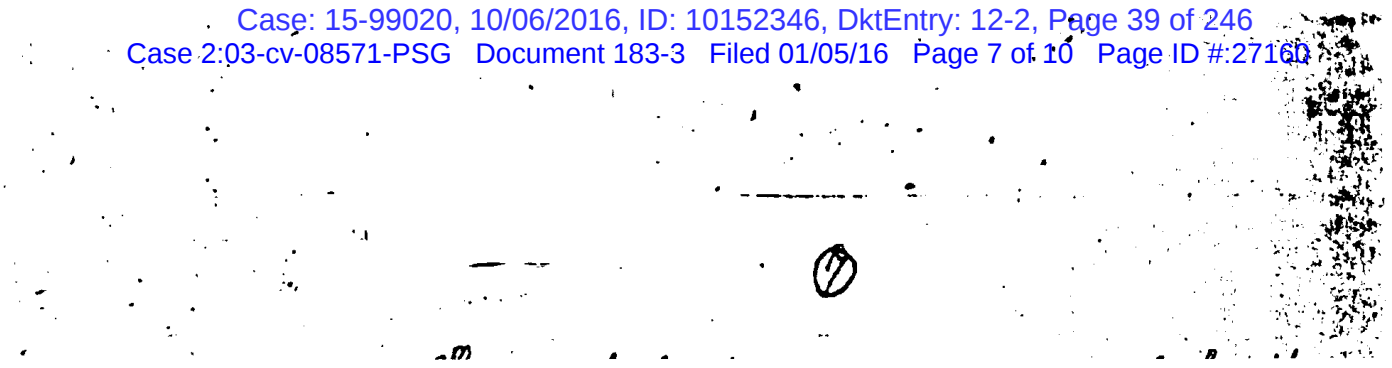
I'll rape and sodomize every women bitch deputy and gouge their (eyes) out! But I would let them live as invalants. Yeah! Satan will lick em all up in a wedge of horror. They better not ever given me the opportunity to escape, because I'll associate myself with a terrorist group. And really go on a spree. I'll kill every D.A. and his) family, deputies men women alike. And I'll gouge everyone of their fucking eyes out. After I got to 400-500 Killings of this type. I'll also incorporate some ninja type murders by poison. Yeah, I don't believe in God anymore, because there isn't one who has ever helped me. But Satan has helped me rejuvenate my energies in a disturbing manner to be. Don't ever underestimate my intentions that's all I can say!



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9

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Love always, Kyo-Ta-Gun