No. _____

CAPITAL CASE

In the
Supreme Court of the United States

PAUL C. BOLIN,

Petitioner,

v.

RON BROOMFIELD,
Warden of San Quentin State Prison,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOLUME 2 OF 2

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DATED: May 4, 2022.

Respectfully submitted,

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Petitioner claims the trial court read CALJIC 17.40 as follows, leaving out the strikethrough word:

> The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberation to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocate in this matter. You are ~~impartial~~ judges of the facts.

(RT at 2217, emphasis added.)

Petitioner argues that this error deprived him of a fair trial and of due process and caused him prejudice under Brecht, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. See Irvin, 366 U.S. at 722 ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."); see also Skilling, 561 U.S. at 377-78.

Respondent concedes the error (ECF No. 194 at 289:16-19), but notes that the trial court did charge the jury to "keep in mind that you are not partisans and you are not advocates, you are judges." (RT at 2217.)

The California Supreme Court could reasonably have determined that the entire charge of the jury instructions adequately apprised the jurors of their duty to be impartial and unbiased in their deliberations. The jurors were instructed with CALJIC No. 1.00 which told them that they "must accept and follow the law . . . whether or not [they] agree with the law," and that in reaching their verdict they must not be influenced by pity, prejudice, sentiment, conjecture, sympathy, passion, public opinion or public feeling. (CT at 432; RT at 2182-83.)

Furthermore, the jury was instructed with CALJIC No. 2.22, which informed them that they "may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other." (ECF No. 194 at 289:23-26; see also CT at 447; RT at 2190-91.)

Respondent correctly notes that the jurors were repeatedly advised their determination was to be based upon reasonable interpretations of the evidence, only the evidence, and not on any sort of bias. (ECF No. 194 at 235:26-236:4, citing CT at 427 [CALJIC No. 2.02]; CT at 436 [CALJIC No. 1.03]; CT at 438-39 [CALJIC No. 2.01]; CT at 447 [CALJIC No. 2.22]; CT at 451 [CALJIC No.

2.60]; CT at 472 [CALJIC No. 2.02]; CT at 504 [CALJIC No. 17.30]; CT at 505 [CALJIC No. 17.31]; CT at 506 [CALJIC No. 17.40].)

Petitioner also claims this instruction was not provided to the jury in writing. (CT at 412-30.) But here again the record shows the jury was provided with a written copy of CALJIC No. 17.41 during its deliberations, which included the word "impartial" that was omitted by the trial court's reading of the instruction. (CT at 412, 507.)

For all the reasons stated, the California Supreme Court could have reasonably determined that it was clear from the entire charge to the jury that jurors understood they had a duty to be impartial. Cupp, 414 U.S. at 146-47.

The California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, United States Supreme Court law, or based upon an unreasonable determination of the facts.

Claim P9 is denied.

k. Review of Claim P10

In this final claim, Petitioner claims that cumulative instructional error arising from claims P1 through P9 *ante*, left the jury with insufficient guidance to render a fair and accurate guilt determination, (ECF No. 113 at 151-152) denying him a fair jury trial and due process under the Sixth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred because this claim could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected Petitioner's claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

Petitioner cites to claims P1-P9, alleging that "the jury was not properly instructed on the mental states for first degree murder or attempted murder, the concurrence of act and mental state or specific intent for murder, how to judge conflicting testimony, or even how to comport themselves as jurors." (ECF No. 113 at 151:17-20.) He claims the cumulative effect of this error was to deny him a

fair trial and due process, prejudice under Brecht.

"The Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citing Donnelly, 416 U.S. at 643).

Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993). However, the fact that errors have been committed during a trial does not mean that reversal is required. "[W]hile a defendant is entitled to a fair trial; [she] 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).

Here, for the reasons stated above, claims P1-P9 are insubstantial whether considered singly or cumulatively. See United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995) ("[b]ecause each error is, at best, marginal, we cannot conclude that their cumulative effect was 'so prejudicial' to [defendant] that reversal is warranted."); see also Rupe, 93 F.3d at 1445; Detrich v. Ryan, 740 F.3d 1237, 1273 (9th Cir. 2013). "Cumulative error analysis applies where there are two or more actual errors. It does not apply . . . to the cumulative effect of non-errors." Moore v. Gibson, 195 F.3d 1152, 1175 (10th Cir. 1999) (quoting Castro v. Ward, 138 F.3d 810, 832 (10th Cir. 1998)).

This Court does not find that the California Supreme Court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim P10 is denied.

9. Review of Claim Q

Petitioner, in his next claim, alleges that cumulative error during the guilt phase denied him due process, an impartial jury, effective assistance of counsel, and a reliable determination of guilt and sentence, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 152-53.)

Petitioner raised this same claim on direct appeal and in his petition for writ of habeas corpus in the California Supreme Court, which that court denied on the merits. Bolin, 18 Cal. 4th at 335; (CSC Order Den. Pet. Habeas Corpus).

Petitioner alleges that the cumulative effect of guilt phase errors denied him fundamental fairness at trial and prejudiced the jury's determination of their verdict under the Brecht standard. Lincoln v. Sunn, 807 F.2d 805, 814, n.6 (9th Cir. 1987); Odle v. Calderon, 65 F. Supp. 2d 1065, 1076-77 (1999).

As noted, "the Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle, 505 F.3d at 928 (citing Donnelly, 416 U.S. at 643). Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. Necoechea, 986 F.2d at 1282.

The California Supreme Court considered and rejected this claim on direct appeal, noting that:

> [D]efendant contends that even if harmless individually, the cumulative effect of the trial errors mandates reversal. Because we have rejected all of his claims, we perforce reject this contention as well.

Bolin, 18 Cal. 4th at 335

Likewise, for the reasons stated, *ante*, this Court has found no guilt phase constitutional errors. There is nothing to accumulate to a level of reversible error. Petitioner was "entitled to a fair trial but not a perfect one, for there are no perfect trials." McDonough Power Equipment v. Greenwood, 464 U.S. 548, 553 (1984) (quoting Brown v. United States, 411 U.S. 223, 231-232 (1973)).

Even if there were guilt phase error, Petitioner has failed to demonstrate prejudicial error, whether individually or in sum. The Court's analysis of guilt phase claims, *ante*, determines no reasonable likelihood of a more favorable result, for the reasons stated and given the noted substantial evidence against Petitioner. (See claim O, *ante*; claims R and S, *post*.)

Accordingly, the Court does not find that the state supreme court's rejection of the claim was

contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim Q is denied.

C. Claims Relating to Penalty Phase

1. Review of Claim R

In this next claim, Petitioner alleges that, over defense objection, the trial court allowed the prosecution to admit as Pen. Code § 190.3(b) aggravating evidence (i.e., evidence of uncharged "criminal activity which involved the express or implied threat to use force or violence"), Petitioner's June 25, 1990 letter in which he appears to threaten Jerry Halfacre. (See RT at 2442-54.) Petitioner claims this was error because the letter did not satisfy the elements of a "threat" under Penal Code § 422 and did not place Halfacre in fear of immediate harm.

The letter read as follows:

> Jerry 6/25/90
>
> Well I finally heard from Paula [defendant's daughter and mother of Halfacre's child] and what I heard from her I'm not to[o] pleased with. I heard her side of things w[h]ich are real different from what you had to say. I'm only going to say this one time so you better make sure you understand. If you ever[] touch my daughter again, I'll have you permanently removed from the face of this Earth. You better thank your lucky stars you['re] Ashley's father or you[']d already have your fucking legs broke.
>
> I found out what happen[e]d to most of the money from the van, and I also found out you got 1500 for the truck not 1300 like you said. I'm still going to find out how much you got for the Buick and if it's 1¢ over 1000 you can kiss your ass good by[e]. I also found out it was running like a top and the burnt valves was a bunch of bull shit, just like I thought in the first place. You sounded a little shak[]y over the phone and gave yourself away.
>
> I told you a long time ago don't play fucking games with me. You're playing with the wrong person asshole. I've made a couple of phone calls to San Pedro to some friends of mine and the[y're] not to[o] happy with your fucking game playing with other people's money and especially you hitting Paula.
>
> What I want done and it better be done. Everything that's mine or hers tools, clothes, books, gun, TV, VCR, I don't fucking care if it's a bobby pin, you better give it to Paula. I want all my shit given to her and I mean every fucking thing. You have a week to do it or I make another phone call. I hope you get the fucking message. Your game playing is eventually going to get you in more than a poo butt game player can handle.
> 1 week asshole. "And keep playing your game with [my granddaughter] and see what happens.

Petitioner concedes the jury was instructed (albeit deficiently, see claim R4) on the elements of California Penal Code § 422. (See ECF No. 113 at 213:7-8; CT 643.) Section 422 provides in pertinent part that:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(See ECF No. 113 at ¶ 586; see also Bolin, 18 Cal. 4th at 337.)

Petitioner alleges this error by the trial court denied him free speech, due process, and a fair sentence determination, violating his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments. (ECF No. 113 at 154-62.)

Petitioner raises multiple subclaims which are addressed separately below.

Petitioner raised certain of these allegations on direct appeal, and raised the claim in his state petition for writ of habeas corpus. On direct appeal, the California Supreme Court rejected the allegations, holding that a threat under Penal Code § 422 need not be unconditional, Bolin, 18 Cal. 4th at 336-41, and that Petitioner suffered no prejudice based on the introduction of the letter at the penalty phase. Id. at 340-41.

The California Supreme Court ruled that Petitioner's state habeas claim was procedurally barred because certain of the allegations could have been, but were not, raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected Petitioner's habeas claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

a. Clearly Established Law

A state law error that renders the trial fundamentally unfair violates the Due Process Clause. Chambers, 410 U.S. at 298, 302-03; Hicks, 447 U.S. at 346 (due process protects defendant from

arbitrary deprivation of expectations under state law).

Under California law, otherwise relevant evidence is precluded if "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evid. Code §§ 350, 352; Cardenas, 31 Cal. 3d at 903-04.

b. Factual Background

During the penalty phase, the prosecution introduced in aggravation Petitioner's June 25, 1990 letter to Jerry Halfacre, the common-law husband of Petitioner's daughter, Paula, and father of their child, Ashley. (RT at 1836, 1867, 2442-45.) Halfacre had given the letter to his former probation officer, Ms. Lancia O'Connor, on October 12, 1990. (RT at 2442-44, 2455); Bolin, 18 Cal. 4th at 336 n.11.

As noted, in the letter, Petitioner appears to threaten Halfacre never to touch his daughter again or Petitioner would have him "permanently removed from the face of this Earth." Petitioner also threatened to kill Halfacre if Petitioner found out that Halfacre had lied to Petitioner about a Buick that Halfacre had sold. Petitioner warned Halfacre that he had made phone calls to friends outside of prison about Halfacre's behavior, implying that these friends would carry out Petitioner's threats. Finally, Petitioner ordered Halfacre to deliver all of Petitioner's and Paula's belongings to Paula within one week or Halfacre would be killed. See Bolin, 18 Cal. 4th at 336 n.11.

Defense counsel objected to introduction of the letter on various grounds, all overruled by the trial court, (RT at 2390-93, 2453-54), which then instructed the jury on the elements of Penal Code § 422. (See CT at 643.)

c. Analysis of Claim R1

In this claim, Petitioner alleges that the Halfacre letter as introduced was more prejudicial than probative under California Evidence Code §§ 350, 352. He also claims the letter as introduced did not satisfy the elements of a "threat" under California Penal Code § 422. Petitioner's arguments are analyzed separately below.

1) Sustained Fear

Petitioner argues that Halfacre may not have actually received the letter, and that if he did it

did not place him in sustained fear. He points out that Halfacre waited four months before giving the letter to his probation officer. (RT at 2443-44; ECF No. 113 at 157); see Bolin, 18 Cal. 4th at 340. He points out that Halfacre did not testify, about his state of mind regarding the letter or otherwise.

However, the Court finds that the California Supreme Court could reasonably have drawn inference from the record that Halfacre received the letter and feared that Petitioner would follow through on the threats in it. The envelope which contained the letter was introduced into evidence and indicates that the letter was addressed to Halfacre and was postmarked. (People's Ex. 1; RT at 2443-54.)

The threats appear to be serious, angry, and immediate. The letter could be seen as threatening on its face. The prospect that Halfacre might be killed by Petitioner's friends on the outside was reasonably apparent. Bolin, 18 Cal. 4th at 336 n.11.

Petitioner has not demonstrated otherwise. Given Halfacre's relationship with Paula (RT at 2490-91), it was reasonable to conclude that Halfacre knew of the allegations that Petitioner had acted violently in the past and was wanted by the police for murder. (RT at 1867-68.)

2) Unconditional and Immediate

Petitioner argues that, at the time the letter was sent, he was incarcerated and unable to execute any immediate action on the alleged threats. (ECF No. 113 at 155:4-5); see People v. Stanfield, 32 Cal. App. 4th 1152, 1157 (1995). He also argues that his alleged threats were "conditional" and that his "goal was plainly to persuade Mr. Halfacre to behave himself, not to create a circumstance under which he could harm Mr. Halfacre." (ECF No. 178 at 217.)

However, the California Supreme Court considered and rejected these arguments on direct appeal, noting that:

> [T]he reference to an "unconditional" threat in section 422 is not absolute. As the court in People v. Stanfield noted, "By definition, extortion punishes conditional threats, specifically those in which the victim complies with the mandated condition. [Citations] Likewise, many threats involved in assault cases are conditional. A conditional threat can be punished as an assault, when the condition imposed must be performed immediately, the intent is to immediately enforce performance by violence and defendant places himself in a position to do so and proceeds as far as is then necessary. [Citation] It is clear, then, that the Kelner court's use of the word 'unconditional' was not meant to prohibit prosecution of all threats involving an 'if' clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying

> a gravity of purpose and imminent prospect of execution." As the court commented in U.S. v. Schneider (7th Cir. 1990) 910 F.2d 1569, 1570: "Most threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats."
>
> Moreover, imposing an "unconditional" requirement ignores the statutory qualification that the threat must be "*so* ... unconditional ... *as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution* . . . ." (§ 422, italics added.) "The use of the word 'so' indicates that unequivocally, unconditionally, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim." "If the fact that a threat is conditioned on something occurring renders it not a true threat, there would have been no need to include in the statement the word 'so.'" This provision "implies that there are different degrees of unconditionally. A threat which may appear conditional on its face can be unconditional under the circumstances. . . . [¶] Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. A seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution." Accordingly, we reject defendant's threshold contention that the letter was inadmissible because it contained only conditional threats.

Bolin, 18 Cal. 4th at 339-40; see also Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (finding that "any person could reasonably consider the statement 'If you don't give me this schedule change, I'm going to shoot you,' made by an angry teenager, to be . . . unequivocal and specific enough to convey a true threat of physical violence").

The California Supreme Court reasonably determined that these threats taken together were "unequivocal, unconditional, immediate, and specific." That court's analysis is not contrary to the holding of the Supreme Court in Watts v. United States, 394 U.S. 705, 708 (1969) (holding that statement "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." was hyperbolic speech, not a true threat), *post*.

The California Supreme Court reasonably could have found these threats to be non-illusory. The only unmet condition to the threatened conduct was Petitioner's awareness that certain events had occurred, i.e., whether Petitioner found out about Halfacre selling his Buick for more than $1,000 or touching his daughter, Paula. Bolin, 18 Cal. 4th at 336 n.11. Specifically, regarding the threat relating to the possibility that Halfacre sold Petitioner's Buick for more than the $1000 amount Halfacre said he got for it, that amount had already been determined and Halfacre was aware of it

since the sale had already taken place. Regarding the threat relating to the possibility Halfacre might touch Petitioner's daughter Paula and granddaughter Ashley, it is unreasonable to assume that Halfacre would never again have contact with his former girlfriend and their daughter. Halfacre would know whether the conditional events had occurred and he could reasonably anticipate that Petitioner would find out from Paula that they had occurred. If so, Petitioner stated that he would "make another phone call to his friends," apparently to make good on his threats. (Id.)

3) Exaggerated

Petitioner argues the alleged threat was exaggerated, (ECF No. 113 at 155:4-28), and did not convey a gravity of purpose and an immediate prospect of execution. Stanfield, 32 Cal. App. 4th at 1157; Watts, 394 U.S. at 705. He argues that the letter could not be a threat because "[t]he statements were plainly hyperbolic" (ECF No. 178 at 217:24) in that "touch my daughter" really meant "harm my daughter." (ECF No. 178 at 218:1-3.) He claims Petitioner was merely advising Halfacre not to commit criminal acts of domestic violence, child abuse, or theft. He argues that he was incarcerated and not in a position to make good on the alleged threats. However, the threatened actions and events triggering them were sufficiently clearly and angry. Petitioner states in the letter that Halfacre would already have had his "fucking legs broke" if he were not the father of Petitioner's granddaughter and that he "can kiss [his] ass goodby[e]" if he sold the Buick for any amount over $1,000. Bolin, 18 Cal. 4th at 336 n.11. Petitioner's reference to friends in San Pedro who could carry out his threats suggests they could be carried out. Id.; see also Allen v. Woodford, 395 F.3d 979, 987, 1009 (9th Cir. 2005) (incarceration is not a deterrent to directing crime outside the institution).

The California Supreme Court could reasonably have found the statements in the letter not simply rhetorical as petitioner contends.

4) No Foundation or Probative Value

Petitioner argues that Halfacre did not testify, and that the prosecution presented no evidence showing if, when and how Halfacre received the letter, or that the letter caused Halfacre to fear Petitioner. Because of this, Petitioner claims the letter was admitted without evidentiary foundation and lacked probative value. The Court is unpersuaded. Probation officer O'Connor testified that she received the letter from Halfacre on October 12, 1990, a few months after it was mailed to

Halfacre. (RT at 2442-46; see also RT at 2453:21 [the prosecutor argued at trial: "I think the evidence has shown that Jerry Halfacre gave the letter to his probation officer. If he didn't receive the letter, he couldn't have had it[.]"].) Moreover, Evidence Code § 641 provides: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." The envelope which contained the letter was introduced into evidence and indicates that the letter was addressed to Halfacre and was postmarked. (People's Ex. 1; RT at 2443-54.)

5) No True Threat or Prejudice

Petitioner argues that Penal Code § 422 is based on wording taken from United States v. Kelner, which "defined true threats as only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected [speech]." 534 F.2d 1020, 1026-27 (2d Cir. 1976); (see also ECF No. 113 at 154:25-28, citing Stanfield, 32 Cal. App. 4th at 1160). Applying these standards, Petitioner argues that the Halfacre letter contained only conditional language which did not satisfy the elements of a true threat under Penal Code § 422. (ECF No. 113 at 154-58.)

As discussed in claim R4, *post*, the California Supreme Court, in denying this claim on direct appeal, did not definitively rule whether the letter constituted a threat for purposes of § 422, due to instructional error. See Bolin, 18 Cal. 4th at 340 n.13. However, for the reasons stated and for purposes of this claim, that court could reasonably have found that introduction of the letter was not improper under § 422 as set out above and § 190.3(b).

Petitioner also argues introduction of the letter was inflammatory and prejudicial under Brecht, and denied him due process and a fair jury determination. Hicks, 447 U.S. at 346; Hamilton, 458 F. Supp.2d at 1090 (citing Brecht, 507 U.S. at 637). He argues the letter was significantly prejudicial because it suggested to the jury that Petitioner posed a risk of future dangerousness.

But even if the trial court erred in admitting the letter, the California Supreme Court reasonably determined in claim R4, *post*, that such error did not substantially impact the jury's verdict or deny him a fair sentencing determination. The aggravating evidence, including the circumstances of the charged crimes and prior violent activity, was substantial. (See claims O, *ante*; claim S, *post.)*

In this regard, the California Supreme Court concluded that:

> [T]he letter paled compared to other aggravating evidence, which the prosecutor focused on in closing argument. In particular, the guilt phase testimony revealed [Petitioner] as a calculating and callous individual, willing to kill defenseless victims, including his friend and partner Huffstuttler, in cold blood to protect his drug enterprise. In addition, the assault with great bodily injury against Matthew Spencer and attempted manslaughter against Kenneth Ross confirmed [Petitioner's] pattern of resorting to violence in dealing with problems. Given this history, it is unlikely the jury accorded the letter much, if any, weight in fixing the penalty at death.

Bolin, 18 Cal. 4th at 341. This Court agrees.

The letter also had some mitigating value. (Id.; see also claim R4.) To the extent the letter might have suggested future dangerousness, Halfacre's apparent lack of concerned for his safety, having waited four months before giving his probation officer the letter, appears to be mitigating. (Id.) Moreover, the letter demonstrated Petitioner's concern for his family, as noted by the defense. Bolin, 18 Cal. 4th at 340; (RT at 2492-93; 2578-91). The California Supreme Court could reasonably have discounted as conjecture, Petitioner's argument that the Halfacre letter, suggesting a propensity for violence, negatively impacted the jury's assessment of mitigating testimony by defense witnesses.

Additionally, to the extent this claim raises solely issues of state law, it is no basis for federal habeas relief. (See ECF No. 113 at 154-58 [arguing that the letter did not satisfy the elements of § 422]; ECF No. 113 at 157 [arguing that admission of letter violates Evid. Code §§ 350, 352].) As noted, "federal habeas corpus relief does not lie for errors of state law." Lewis, 497 U.S. at 780; see also Pulley, 465 U.S. at 41.

Accordingly, this Court does not find that the California Supreme Court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim R1 is denied.

d. Analysis of Claim R2

Petitioner's next claim alleges that applying the § 422 factors to show the letter was a criminal threat and aggravating at the penalty phase, improperly served to criminalize constitutionally protected speech, violating the First and Fourteenth Amendments. (ECF No. 113 at 158-60.)

Petitioner argues that only "true threats" may be punished without violating the First Amendment, Kelner, 534 F.2d at 1026, and that the Halfacre letter did not contain any true threat. This, he claims, was evident in Halfacre's delay in providing the letter to authorities, and the slim likelihood that the conditions of the threats would be satisfied, and even then that Petitioner would be able to make good on the threatened action.

The California Supreme Court considered this claim on habeas review and denied it as procedurally barred because the claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus, citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759.) The California Supreme Court also summarily denied the claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

"In general, threats are not protected by the First Amendment." Lovell, 90 F.3d at 371 (citing Watts, 394 U.S. at 705). Only "true threats" may be punished without offending the First Amendment. The California Supreme Court could reasonably have found that Petitioner's threats were not "constitutionally protected speech." See Watts, 394 U.S. at 707-08. "A 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the [F]irst [A]mendment." United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 (9th Cir. 1990), overruled in part on other grounds by United States v. Keyser, 704 F.3d 631 (9th Cir. 2012).

"Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." Id.; Lovell, 90 F.3d at 372; accord Kelner, 534 F.2d at 1027 ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied").

"[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself." United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970). "[A]s expansive as the [F]irst [A]mendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving of no [F]irst [A]mendment protection." Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991) (denying

habeas relief to inmate convicted under telephone harassment statute). "A threat to break a person's knees . . . is a statement of intention rather than an idea or opinion and is not part of the marketplace of ideas." United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985).

The California Supreme Court considered and rejected Petitioner's contention that the letter was inadmissible because it contained only conditional threats, Bolin, 18 Cal. 4th at 340, finding that "[a] seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution." Id. Petitioner contends the evidentiary record does not demonstrate the contingencies in the letter, which he characterizes as criminal acts by Halfacre, were "highly likely to occur."

It was not unreasonable for the state court to determine the contingencies in question were "highly likely to occur," because, as mentioned, the contingency regarding the Buick did in fact occur and it was reasonable to conclude Halfacre would have future contact with his child and the mother of his child. It is not dispositive for First Amendment purposes that Halfacre did not act immediately upon receiving the threat. See Lovell, 90 F.3d at 372 (fact that victim "chose not to seek help instantly is not dispositive"). For reasons discussed in claim R1, *ante*, the California Supreme Court could reasonably have determined that Petitioner's threats were not protected speech.

Accordingly, this Court does not find that the state supreme court's rejection of these allegations was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim R2 is denied.

e. Analysis of Claim R3

Petitioner next alleges that the California Supreme Court, on direct appeal, unforeseeably and for the first time interpreted § 422 as applying to "conditional" threats, and then retroactively applied this new interpretation to uphold Petitioner's sentence. He argues that this unforeseeable judicial enlargement of a criminal statute, applied retroactively, violated due process under the Fifth and Fourteenth Amendments to the U.S. Constitution. (ECF No. 113 at 160); cf. Bouie v. City of

Columbia, 378 U.S. 347, 354-55 (1964) (due process implicated when an unforeseeable state-court construction of a criminal statute is applied retroactively).

Petitioner raised this same claim in a petition for writ of habeas corpus to the California Supreme Court, which denied it as procedurally barred because it could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759].)

The California Supreme Court also summarily rejected the habeas claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

Petitioner argues that, under Bouie's fair warning rationale, the test is whether a petitioner could reasonably determine that his conduct violated the law:

> This circuit has in the past held that retroactive application of an interpretation of state law is not prohibited per se; however, "[s]uch a decision may violate due process if the court's interpretation of a criminal statute enlarges its scope to cover behavior not previously considered to be unlawful." Camitsch v. Risley, 705 F.2d 351, 355 (9th Cir. 1983); see also United States v. Walsh, 770 F.2d 1490, 1492 (9th Cir. 1985) ("radical and unforeseen departure from prior law").

McSherry v. Block, 880 F.2d 1049, 1053 n.4 (9th Cir. 1989). He argues that, in 1990, when he wrote the letter to Halfacre, prior judicial interpretation all precluded conviction for a conditional threat. (ECF No. 178 at 223:6-8.)

Respondent counters that the California Supreme Court's interpretation of § 422 had been uncertain on this issue and was still evolving in 1990 when Petitioner wrote the Halfacre letter. At that time, according to Respondent, the California Supreme Court had not interpreted the language in Penal Code § 422. Respondent points out that the authority on which Petitioner relies, People v. Brown, 20 Cal. App. 4th 1251 (1993), post-dates his letter, and that in any event it was not unforeseeable that a conditional threat might be found to violate Penal Code § 422. See United States v. Burnom, 27 F.3d 283, 284-85 (7th Cir. 1994) (holding Bouie does not apply "to the resolution of uncertainty that marks any evolving legal system"); cf., Moore v. Wyrick, 766 F.2d 1253, 1257 (8th Cir. 1985) (significant change in state law which, if applied retroactively, would materially expand defendant's criminal liability cannot be applied retroactively).

Petitioner concedes that "intermediate appellate courts of California had been divided on the

question." (ECF No. 178 at 216, n.142); see e.g., People v. Brooks, 26 Cal. App. 4th 142, 145 (1994) ("if you testify, I'll kill you" found sufficient to support conviction under Penal Code § 422); Brown, 20 Cal. App. 4th at 1251 ("if you call the police, I'll kill you" found insufficient to support conviction under § 422).

The California Supreme Court, in its review of this claim noted that the language of Penal Code § 422 was "adopt[ed] almost verbatim language from United States v. Kelner" which in turn relied upon Watts. That court stated:

> In Kelner, the defendant, a member of the Jewish Defense League, had been convicted under a federal statute for threatening to assassinate Palestinian leader Yasser Arafat, who was to be in New York for a meeting at the United Nations. Kelner argued that without proof he specifically intended to carry out the threat, his statement was political hyperbole protected by the First Amendment rather than a punishable true threat. [Citation]
>
> The reviewing court disagreed and concluded threats are punishable consonant with constitutional protections "when the following criteria are satisfied. So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied." [Citation] In formulating this rationale, the Kelner court drew on the analysis in Watts v. United States (1969) 394 U.S. 705 [ ], in which the United States Supreme Court reversed a conviction for threatening the President of the United States. Defendant Watts had stated, in a small discussion group during a political rally, "And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." [Citation] Both Watts and the crowd laughed after the statement was made. [Citation] The Supreme Court determined that taken in context, and considering the conditional nature of the threat and the reaction of the listeners, the only possible conclusion was that the statement was not a punishable true threat, but political hyperbole privileged under the First Amendment. [Citation]
>
> As the Kelner court understood this analysis, the Supreme Court was not adopting a bright line test based on the use of conditional language but simply illustrating the general principle that punishable true threats must express an intention of being carried out. [Citation] "In effect, the Court was stating that threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected [attacks on government and political officials]." [Citation] Accordingly, "[t]he purpose and effect of the Watts constitutionally-limited definition of the term 'threat' is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished – only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault. . . .'"

[Citation]

Bolin, 18 Cal. 4th at 338-39.

The California Supreme Court, consistent with its noted analysis, could reasonably have determined that "the reference to an 'unconditional' threat in section 422 is not absolute." Bolin, 18 Cal. 4th at 339. That court also could reasonably have found Petitioner's letter to be truly threatening notwithstanding any involved contingency. The conditions stated in Petitioner's letters reasonably could be seen as coated with threatening language. See Id. at 336, n.11. "Bouie applies only to unpredictable shifts in the law, not to the resolution of uncertainty that marks any evolving legal system." Burnom, 27 F.3d at 284-85. The California Supreme Court's analysis and conclusions relating to § 422 could reasonably fall within the latter. See e.g., United States v. Herrera, 584 F.2d 1137, 1149 (2d Cir. 1978) (due process requires only that "the law give sufficient warnings that men may conduct themselves so as to avoid that which is forbidden, and thus not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within its scope").

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim R3 is denied.

f. Analysis of Claim R4

Petitioner's final claim alleges that the trial court erred by failing to instruct the jury accurately and completely on the elements of a § 422 criminal threat regarding the Halfacre letter that was introduced as aggravating evidence at the penalty phase. Petitioner alleges this error denied him due process and a fair trial and sentence. (ECF No. 113 at ¶¶ 611-618.)

Petitioner raised this claim in a petition for writ of habeas corpus to the California Supreme Court, which denied it as procedurally barred because it could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected Petitioner's habeas claim

on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

The record reflects that at the penalty phase, the jury was instructed that evidence had been introduced to show Petitioner had committed various criminal acts, including writing a threatening letter to Halfacre. (RT at 2608; CT at 634, 643.) They were instructed that: "[b]efore a juror may consider any of such criminal acts as an aggravating circumstance in this case, the jury must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts." (CT at 634.) They were also instructed regarding the concurrence of act and specific intent for criminal threats. (RT at 2611-13; CT at 641.)

As to the § 422 criminal threat, the jury was instructed that:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person with the specific intent that the statement is to be taken as a threat, which causes that person reasonably to sustain fear for his own safety, is guilty of a violation of Penal Code Section 422.
>
> In order to prove such crime, each of the following elements must be proved:
>
> One, a person made a threat to commit a crime which, if carried out, would result in death or great bodily injury to another person.
>
> Two, such threat is made with the specific intent the statement was to be taken as a threat.
>
> Three, that such threat caused another person to fear for his own or his family's personal safety.
>
> It is not necessary that the defendant have the intent to carry out the threats.

(RT at 2613; CT at 643.)

Petitioner alleges that the trial court also should have instructed the jury that a § 422 "threat" must be "on its face and under the circumstances in which it is made, so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." See CALJIC 9.94.

The California Supreme Court agreed with Petitioner when it reviewed this allegation on direct appeal. See Bolin, 18 Cal.4th at 340 n.13. However, that court found such instructional error harmless, see Bolin, 18 Cal. 4th at 340 n.13, stating that:

> Alternatively, defendant argues that the letter still does not meet the statutory definition because the threat lacked immediacy and Halfacre did not testify he feared for his safety. We need not definitively resolve these contentions. Even if the trial court should have excluded the letter, we find no reasonable possibility the error affected the verdict. [Citation] Although some of the language in the letter is menacing, it also reflects defendant's concern for his daughter's and granddaughter's well-being, a point stressed by the defense in mitigation. Moreover, the nature and circumstances of the threats would not necessarily provoke serious concern, especially considering defendant was incarcerated and would at the least have to make outside arrangements to effect them. Halfacre waited four months before giving the letter to his probation officer, during which time apparently nothing had happened.

Bolin, 18 Cal. 4th at 340.

The California Supreme Court was not unreasonable in this regard. Though as noted, the jury may have been given incomplete instructions on the elements the aggravating criminal threat (id. at 340 n.13), the state supreme court was not unreasonable in finding the error harmless for reasons stated in the discussed of claim R1, *ante*, summarized as follows. The aggravating evidence, including the circumstances of the charged crimes and prior violent activity, was substantial. (See claims O, *ante*; claim S, *post*.) Halfacre's months long delay in taking any action on the letter could reasonably suggest Petitioner did not pose a future danger. The letter could be mitigating to the extent it suggested violence was not imminent and that Petitioner was motivated by his desire to protect his family. See e.g., Bolin, 18 Cal. 4th at 340; (RT at 2492-93; 2578-91). The state supreme court noted that:

> [T]he letter paled compared to other aggravating evidence, which the prosecutor focused on in closing argument. In particular, the guilt phase testimony revealed [Petitioner] as a calculating and callous individual, willing to kill defenseless victims, including his friend and partner Huffstuttler, in cold blood to protect his drug enterprise. In addition, the assault with great bodily injury against Matthew Spencer and attempted manslaughter against Kenneth Ross confirmed [Petitioner's] pattern of resorting to violence in dealing with problems. Given this history, it is unlikely the jury accorded the letter much, if any, weight in fixing the penalty at death.

Bolin, 18 Cal. 4th at 341.

Equally unavailing is Petitioner's re-argument (see claim R1, *ante*) that admission of the letter "altered the credibility analysis regarding [Petitioner's aggravating] assaults on Matthew Spencer and Kenny Ross" and that without the "prejudicial character evidence" of the letter "the jury would likely have given greater consideration to the defense's mitigating evidence regarding those [other

aggravating] incidents." (ECF No. 178 at 229: 7-14.) Such re-argument appears nothing more than speculation. The noted evidence in aggravation was substantial apart from the letter. Additionally, for the same reasons, neither Petitioner's trial counsel (for failing to object on this ground in the trial court) nor his appellate counsel (for failing to raise this ground on appeal) was ineffective. (ECF No. 113 at 161 n.45 [re claim W8, *post*]; Id. *at* 235-36 [re claim DD, *post*].)

It is not enough for habeas relief that "[an] instruction was allegedly incorrect under state law." Estelle, 502 U.S. at 71-72. "In the absence of a federal constitutional violation, no relief can be granted even if the instruction given might not have been correct as a matter of state law." Mitchell v. Goldsmith, 878 F.2d 319, 324 (9th Cir. 1989). For the reasons stated above and those discussed in claims R1-R3, Petitioner has not demonstrated the state instructional error as to § 422 denied him a fair sentence determination. See e.g., Hamilton, 458 F. Supp. 2d at 1090 ("The limited scope of federal habeas review does not warrant relief unless trial errors had a 'substantial and injurious effect or influence in determining the jury's verdict' and deprived [the petitioner] of a fair trial in violation of his right to due process.").

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim R4 is denied.

2. Review of Claim S

Petitioner, in his next claim, alleges that the jury erroneously was allowed to consider in aggravation evidence of prior unadjudicated criminal activity, denying him equal protection, due process, a fair jury trial, a reliable sentence, and freedom from cruel and unusual punishment, violating his rights under the Fifth, Eighth and Fourteenth Amendments. (ECF No. 113 at 162-164.) Petitioner made this same claim on direct appeal to the California Supreme Court, which was denied on the merits. Bolin, 18 Cal. 4th at 335-36.

a. Clearly Established Law

A state law error that renders the trial fundamentally unfair violates the Due Process Clause.

Chambers, 410 U.S. at 298, 302-03; Hicks, 447 U.S. at 346 (due process protects defendant from arbitrary deprivation of expectations under state law).

In a capital case, evidence of unadjudicated criminal conduct may constitute an aggravating circumstance and be admissible at sentencing. See Campbell v. Kincheloe, 829 F.2d 1453, 1461 (9th Cir. 1987) (holding unadjudicated criminal conduct may be introduced to support the aggravating factor of probable future violence).

b. Analysis of Claim S

Petitioner complains that the jury was allowed to consider, as aggravating, unconvicted criminal conduct in the form of his 1979 assault on Matthew Spencer (RT at 2371-2385, 2412-43; CT at 634) and his 1990 threatening letter to Halfacre (RT at 2442-54; CT 634). He argues he was never convicted, prosecuted, or charged with these events and that the jury's consideration of them fell below the heightened reliability requirement for capital sentencing. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); California v. Ramos, 463 U.S. 992, 998-99 (1983).

He also complains that the penalty jury, having just convicted him of capital murder, was biased against him; that the jury was not instructed that the presumption of innocence applied to unadjudicated criminal activity; that the jury was not instructed that they must unanimously find these allegations true beyond a reasonable doubt and make their findings in writing; and that the limitations period had run on the assault charge.

All of these alleged infirmities, he claims, had a substantial and injurious effect or influence on the jury's verdict under Brecht.

Preliminarily, the Court rejects Petitioner's allegations that the foregoing constitutional errors were not adjudicated by the state court. Rather, the California Supreme Court adjudicated these allegations by considered and rejected them on direct appeal, as follows:

> Defendant makes several claims regarding the jury's consideration of unadjudicated criminal activity as a circumstance in aggravation. (§ 190.3, factor (b).) He acknowledges this court has previously upheld the use of such evidence at the penalty phase. [Citation] He argues, however, that he was denied his constitutional right to an impartial fact finder and reliable penalty determination because the same jury that decided his guilt could not be expected to evaluate this evidence without bias or prejudice. We have considered and rejected this argument in People v. Balderas, [ ] , and find no reason to reconsider our conclusions. We have also previously determined that

> the use of factor (b) evidence does not run afoul of the statute of limitations. [Citation] Nor was the jury required unanimously to agree defendant committed the alleged crimes. [Citation]
>
> On this record, we find no error by virtue of the trial court's failure to repeat the "presumption of innocence" instruction given prior to guilt phase deliberations. At the beginning of the penalty phase, the court expressly alerted the jury that "[m]ost of the rules that I gave you before ... will apply to this case." Nothing in the court's subsequent penalty instructions suggested the jury should disregard the earlier admonition that a criminal defendant is presumed innocent; and a reasonable juror would assume it continued to apply. [Citation]

Bolin, 18 Cal. 4th at 335-36.

That court's determination in these regards was not unreasonable. Petitioner has not demonstrated clearly established authority from the United States Supreme Court holding that a jury may not consider prior unadjudicated criminal activity during the penalty phase of a capital case. See Sharp v. Texas, 488 U.S. 872 (1988) (Marshall J, dissenting) ("I would grant the petition to resolve the question whether the Eighth and Fourteenth Amendments preclude the introduction of evidence of unadjudicated criminal conduct at the sentencing phase of a capital case."); Miranda v. California, 486 U.S. 1038 (1988) (same); see Spencer v. Texas, 385 U.S. 554, 563-564 (1967) (approving limited use of other crimes evidence for purposes other than propensity). Given the Supreme Court has not decided the issue, the California Supreme Court's above decision could not be contrary to or an unreasonable application of United States Supreme Court precedent. Carey, 549 U.S. at 76.

Furthermore, the United States Supreme Court has upheld the constitutionality of California's death penalty law, including § 190.3(b), which permits evidence of prior criminal activity involving violence or threats of violence. California v. Brown, 479 U.S. 538, 543 (1987); see also Tuilaepa v. California, 512 U.S. 967, 975-80 (1994). California's death penalty statute expressly provides that a capital defendant's prior violent conduct is relevant to the penalty determination.

Petitioner's allegation that because he had been previously convicted of only one felony (the attempted voluntary manslaughter on Ross), the instruction on aggravating unadjudicated criminal activity unduly emphasized this evidence as an aggravating factor, was rejected by the state supreme court. That court reasonably was "unpersuaded the jury was likely to interpret the court's direction in this manner." Bolin, 18 Cal. 4th at 341. This Court agrees. The allegation appears no more than

speculation and was reasonably rejected.

California law also calls for a single jury to determine both guilt and penalty. People v. Balderas, 41 Cal. 3d 144, 205 (1985). Petitioner cites no United States Supreme Court authority for his contention that presenting evidence of his prior uncharged offenses to the same jury that found him guilty of first degree murder with special circumstances denies him an impartial fact finder. (ECF No. 113 at 163.)

Petitioner does not cite any authority for his claim that, in the penalty phase of a capital trial, the prosecution should be barred from presenting evidence of offenses that might be barred from actual prosecution by a statute of limitations. (Id. at 164.) The California Supreme Court could reasonably find that that penalty phase use of evidence of prior violent crime did not make the verdict unfair or unreliable. See Bolin, 18 Cal. 4th at 335 ("[T]he use of [§ 190.3] factor (b) evidence does not run afoul of the statute of limitations.").

Petitioner's argument, that his rights were violated by the absence of a requirement that the jurors unanimously agree in writing beyond a reasonable doubt that an allegation of criminal activity is true, (ECF No. 113 at 163), also is unavailing. The California Supreme Court reasonably rejected these allegations, stating "[w]e have long held the Constitution does not mandate such a finding." Bolin, 18 Cal. 4th at 341. Petitioner was not being tried for the aggravating conduct adduced at the penalty phase. The safeguards he seeks were unnecessary. See e.g., Williams v. Vasquez, 817 F. Supp. 1443, 1471 (E.D. Cal. 1993) (holding lack of jury instruction enumerating elements of offenses or standard of proof which must be met before jury can consider those offenses does not render unconstitutionally vague California's aggravating factor allowing jury to weigh unadjudicated criminal conduct).

For the reasons stated, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim S is denied.

3. Review of Claim T

In his next claim, Petitioner alleges the lack of a unanimous jury finding beyond a reasonable doubt that the prior criminal activity discussed in claim S, *ante*, was true, denied him equal protection, presumption of innocence, due process, a reliable and fair penalty determination, a unanimous jury, and subjected him to cruel and unusual punishment, violating his rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. (ECF No. 113 at 164-66.)

The California Supreme Court considered this same claim on direct appeal and rejected it on the merits. Bolin, 18 Cal. 4th at 335-36, 341.

a. Clearly Established Law

The applicable legal standards are set out in claim S, *ante*.

b. Analysis of Claim T

Petitioner argues that the absence of a unanimity requirement denied him a presumption of innocence, available in the non-capital context, resulting in an unfair trial and unreliable sentence determination. Hicks, 447 U.S. at 346.

Petitioner finds fault with the following instruction given the jury:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts, to wit: assault with a deadly weapon and writing a threatening letter which involved the express or implied use of force or violence or the threat of force or violence.
>
> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, the jury must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts.
>
> A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all the jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, then that juror must not consider that evidence for any purpose.

(RT at 2608; see also CT at 634.) Petitioner claims that, "in light of the importance of the [evidence of prior unadjudicated criminal activity] to the prosecution's case in aggravation," the errors alleged in this claim are prejudicial under Brecht.

Petitioner also alleges that the foregoing constitutional arguments were not adjudicated by the

state court. The Court disagrees, and finds the claim unpersuasive for the reasons stated in claim S, *ante*, and as follows.

Petitioner does not identify any clearly established authority from the United States Supreme Court holding that a jury must unanimously find Petitioner's prior unadjudicated criminal activity to be true in order to consider it as a factor in aggravation during the penalty phase of a capital case. See Cummings v. Polk, 475 F.3d 230, 238 (2007) (recognizing that the United States Supreme Court has not resolved this issue and thus, under AEDPA, claim must be denied). Additionally, an issue solely of state law is not a basis for habeas relief. Estelle, 502 U.S. at 67-68.

As noted, Petitioner was not being tried for the unadjudicated conduct offered at the penalty phase. Thus the unanimity safeguard was unnecessary. Aggravating circumstances are not separate penalties but are standards to guide the making of the choice between death and life imprisonment. People v. Raley, 2 Cal. 4th 870, 910 (1992). A factor set forth in Penal Code § 190.3 does not require a "yes" or "no" answer to a specific question, but points the sentencer to the subject matter which guides the choice between the two punishments. Tuilaepa, 512 U.S. at 975.

The United States Supreme Court has made clear that "the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise *unbridled discretion* in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.'" Ramos, 463 U.S. at 1008 n.22, (quoting Zant v. Stephens, 462 U.S. 862, 875 (1983)).

Petitioner's citation to Apprendi v. New Jersey, 530 U.S. 466 (2000), (see ECF No. 178 at 239:2-3) does not support this claim. Apprendi, which requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt, is not contravened by California's death penalty scheme. This is because once a California jury convicts of first degree murder with a special circumstance "the defendant stands convicted of an offense whose maximum penalty is death." People v. Ochoa, 26 Cal. 4th 398, 454 (2001),abrogated on other grounds as stated in People v. Prieto, 30 Cal. 4th 226, 263 n.14 (2003).

Petitioner's reliance upon cases involving the requirement of a unanimous verdict for a

criminal conviction (i.e., not for finding a factor in aggravation - see ECF No. 178 at 236-38) is misplaced, for the reasons stated.

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim T is denied.

4. Review of Claim U

Petitioner alleges, in seven subclaims, that the trial court committed multiple instructional errors at the penalty phase, "by refusing several entirely appropriate and necessary instructions offered by the defense, and by failing to inform the jury of the scope of their task and adequately guide their discretion, thereby failing to guarantee that the charge as a whole adequately guided the jury's discretion in determining whether [Petitioner] should live or die." (ECF No. 113 at 166:11-13.)

The clearly established law applicable to the subclaims is set out below. The subclaims are reviewed separately.

a. Clearly Established Law

A challenge to jury instructions does not generally state a federal constitutional claim. Rather, in order to warrant federal habeas relief, a challenged jury instruction "cannot be merely undesirable, erroneous, or even universally condemned, but must violate some due process right guaranteed by the [F]ourteenth amendment." Prantil v. California, 843 F.2d 314, 317 (1988) (quoting Cupp, 414 U.S. at 146). Petitioner must demonstrate the instructional error infected the entire trial as to render it unfair. Dunckhurst v. Deeds, 859 F.2d 110, 114 (1988); see also Estelle, 502 U.S. at 72 (quoting Cupp, 414 U.S. at 147). If an error is found, then the court must also determine that the error had "a substantial and injurious effect or influence in determining the jury's verdict before granting relief in habeas proceedings." Brecht, 507 U.S. at 637.

In evaluating a claim of instructional error, a single instruction is not viewed in isolation, but rather in the context of the overall charge. Spivey v. Rocha, 194 F.3d 971, 976 (9th Cir. 1999).

"[T]he proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Additionally, a reviewing court does not engage in a technical parsing of the instruction's language, but instead approaches the instructions in the same way that the jury would, with a "commonsense understanding of the instructions in the light of all that has taken place at the trial." Johnson, 509 U.S. at 368. Lastly, federal courts presume that juries follow instructions, including cautionary instructions. Weeks, 528 U.S. at 234; Olano, 507 U.S. at 740.

b. Analysis of Claim U1

Petitioner alleges that, beginning in voir dire and continuing through instructions at the penalty phase, the trial court erroneously told the jury that the penalty phase instructions, in their entirety, were simply "guidelines" (see RT at 242, 368, 395, 1009, 1091, 1114, 1117, 1354, 1399, 1419, 1906, 2394), and that the penalty decision would be entirely within the juror's discretion. (ECF No. 113 at 166-71.)

Petitioner complains that the trial judge characterized the determination of the death penalty as "just a balancing, not beyond a reasonable doubt" (see, e.g., RT at 1122:25-28), thereby failing to limit the jurors' discretion by objective standards, Gregg v. Georgia, 428 U.S. 153, 189 (1976), denying Petitioner due process, Estelle, 502 U.S. 62 (1991), and a fair and reliable sentence determination, Tuilaepa, 512 U.S at 973.

Specifically, Petitioner complains this violated his Fifth Amendment right not to testify and his Eighth and Fourteenth Amendment rights to have the jury consider all mitigating evidence, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978), and to have each element of aggravating prior criminal conduct established beyond a reasonable doubt.

The California Supreme Court considered this claim on petition for writ of habeas corpus and rejected it as procedurally barred because it could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) That court also summarily denied the habeas claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

This claim fails. The California Supreme Court could reasonably have determined that the

instructions given in this case, when considered as a whole, "adequately performed the constitutional function of guiding the jury's discretion in sentencing." Bolin, 18 Cal. 4th at 343. The jury was specifically instructed that it "shall" consider the mitigating factors it found applicable (RT at 2605-07), what the mitigating factors were (RT at 2615; CT 631-32), and how they should be weighed (RT at 2615). The jurors were specifically instructed that aggravating and mitigating factors were not simply to be counted. (RT at 2615; CT at 647.)

Petitioner argues the errors alleged above may have led the jury to consider less than all the mitigating evidence. But for the reasons stated below, the California Supreme Court could reasonably have found that the jury was fully instructed on the factors to consider when determining the appropriate penalty for Petitioner. (RT at 2605-07.)

The jury was instructed with CALJIC 2.60 relating to Petitioner's decision not to testify (CT at 646) and CALJIC 8.85 relating to the statutory factors they must consider at the penalty phase (CT at 631-32). The trial court directed the jurors that, "[y]ou must accept and follow the law as I give it to you, whether or not you agree with the law." (RT at 2604.) That court also instructed the jury that most of the guilt phase rules applied to the penalty phase, (RT at 2394), and that they should be guided by the applicable factors of aggravating and mitigating circumstances as instructed (CT at 647-48, CALJIC 8.88).

As noted, when evaluating the effect of an instruction on the jury, courts must follow "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Boyde, 494 U.S. at 378; Middleton v. McNeil, 541 U.S. 433, 435-36 (2004) (finding that an erroneous instruction was cured by the spillover effect of correct instruction on the law elsewhere).

The California Supreme Court generally reviewed instructional error claims on direct appeal and reasonably rejected any suggestion that a proper interpretation of California's death penalty law required the jury to be instructed in the manner requested by Petitioner. Bolin, 18 Cal. 4th at 341-345. It is unlikely that the jury would have interpreted the trial court's brief comments earlier in the trial as authorization to wholly ignore the guilt phase instructions when determining the appropriate penalty. (RT at 2603-16.) It follows that Petitioner has not demonstrated instructional errors that had

a substantial and injurious effect or influence in determining the jury's verdict under Brecht. See also claim D, *ante*.

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U1 is denied.

c. Analysis of Claim U2

Petitioner next alleges that the trial court erred by not reading CALJIC No. 8.84.1 ("Duty of Jury – Penalty Proceeding") regarding the penalty phase duty of the jury. Specifically he claims the jury was not instructed to "[d]isregard all other instructions given to you in other phases of this trial" and that it must "neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings [and that] you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a verdict." (ECF No. 113 at 171:19-28.)

This, he contends, may have left the jury confused as to whether it could consider sympathy, pity, compassion or mercy in the penalty phase. (RT at 2394); People v. Babbitt, 45 Cal. 3d 660, 718 n.26 (1988) (as modified on denial of reh'g (Aug. 25, 1988) (trial courts should expressly inform the jury at the penalty phase which instructions previously given continue to apply).

Petitioner also alleges that at the penalty phase, the jury did not consider the consequences their verdict and their individual sense of morality, because they were not instructed to disregard the guilt phase instruction requiring them to return a "just" verdict, "regardless of the consequences." (CT at 432-33; CALJIC 1.00.)

Petitioner raised the same claim in his petition for writ of habeas corpus in the California Supreme Court, (CSC Pet. Habeas Corpus at 246-50), which that court found to be procedurally barred because the claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759].)

The California Supreme Court also summarily rejected the claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

> CALJIC No. 8.84.1 ("Duty of Jury – Penalty Proceeding") (1989 New), provides in full:
>
> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(ECF No. 178 at 244:20-45-4.)

Respondent concedes that the trial court did not give CALJIC 8.84.1 (ECF No. 194 at 284:17-18), but argues that the California Supreme Court could reasonably have found that the jury was sufficiently instructed, through the other instructions given, with all the requirements contained in CALJIC 8.84.1. This Court agrees.

Petitioner cites to Babbitt and argues that CALJIC 8.84.1 was to be used at the penalty phase in lieu of CALJIC 1.00 due to the latter's lack of clarity as to applicability of guilt phase instructions at the penalty phase. 45 Cal. 3d 660, 717-18 & n.26. The Babbitt court stated that:

> [W]e upheld the 1978 death penalty statute against a challenge that it withdraws constitutionally compelled sentencing discretion from the jury. [Citation] To forestall any possible confusion we directed trial courts in the future to instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in Brown.

Babbitt, 45 Cal. 3d at 714.

Here, the state supreme court could reasonably have concluded that the jury was instructed as to their penalty phase responsibilities and the scope of their sentencing discretion. The jury was given the factors to consider in determining the penalty. (CT at 631-32; RT at 2605-07; CALJIC No. 8.85.) They were instructed not to consider "for any reason whatsoever the deterrent or non-deterrent effect on [*sic*] the death penalty or the monetary cost to the State of California of execution or maintaining a prisoner for life." (RT at 2614; CT at 644; see also Defendant's Proposed Instruction No. 15, CT at 644.) They were instructed they "must conscientiously consider and weigh the

evidence and apply the law" and must return a verdict that is "just and reasonable." (RT at 2604; CT at 628-29; Defendant's Proposed Jury Instruction No. 1.00.) They were instructed (at the guilt phase) not to be swayed by public opinion or prejudice. Id. They were instructed "to assume that if you sentence [Petitioner] to death, he will be executed in the gas chamber." (RT at 2614; CT at 645; Defendant's Proposed Instruction No. 4, CT at 645.) They were instructed to disregard conflicting guilt phase instructions. (RT at 2607; CT at 632; CALJIC No. 8.85.)

The state supreme court could reasonably have determined that the jury was bound to the principles embodied in CALJIC 8.84.1 and that "the jury could not have been misled about its sole responsibility to determine, based on its individualized weighing discretion, whether death was appropriate." Babbitt, 45 Cal. 3d at 718. Here again, jurors are presumed to follow the instructions as given and in their entirety and to use the appropriate factors when making their penalty determination. Middleton, 541 U.S. at 435-36 (not reasonably likely jury misunderstood requirements of charged offense when all the instructions are considered in their entity). Petitioner has not demonstrated that the court's failure to give CALJIC 8.84.1 was instructional error that made his trial unfair.

To the extent Petitioner argues ineffective assistance of trial and appellate counsel in connection with this alleged instructional error, as more specifically discussed in his claims W8 and DD, such allegations fail for the reasons stated above and in claims W8 and DD, *post*.

Petitioner's related argument that he was prejudiced by the alleged extensive misleading and negative pretrial publicity in this case, and by the prosecution's improper penalty phase closing argument that the jury should consider public sentiment in reaching their verdict, (see RT at 2574), fails for reasons discussed in claim V, *post*. Petitioner has not demonstrated federal constitutional error, Estelle, 502 U.S. at 67, and cannot show prejudice under Brecht.

Accordingly, this Court does not find that the California Supreme Court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U2 is denied.

d. Analysis of Claim U3

Petitioner next alleges the trial court erred by failing to distinguish between aggravating and mitigating circumstances in the penalty phase instructions, denying him due process and a reliable penalty determination, violating his rights under the Fifth, Eighth and Fourteenth Amendments. (ECF No. 113 at 174-75.)

Specifically, Petitioner alleges that the trial court's use of CALJIC 8.85 (CT at 631-32), which lists the Penal Code § 190.3 aggravating and mitigating factors without distinguishing which are aggravating and which are mitigating, allowed the jury to give mitigating factors aggravating weight, and to consider the absence of statutory mitigating factors as aggravating factors.

Petitioner also alleges that the state court did not adjudicate his constitutional arguments in this claim. The Court disagrees, and denies the claim for the following reasons.

The California Supreme Court reviewed these allegations on direct appeal and adjudicated them by denying the allegations on the merits, stating that:

> Defendant asserts the trial court violated various constitutional rights by failing to delineate which statutory factors were aggravating and which were mitigating. We have consistently rejected this argument. "[T]he aggravating or mitigating nature of [the section 190.3] factors should be self-evident to any reasonable person within the context of each particular case." [Citation] Here, the court explained that an aggravating factor was anything connected with the crime "which increases its guilt or enormity or adds to the injurious consequences ...." By contrast, a mitigating factor was any "extenuating circumstance" short of justification or excuse. Nothing in these commonly understood definitions supports defendant's assertions that the jury could have considered section 190.3, factor (d) (extreme mental or emotional disturbance), factor (g) (acting under the substantial domination of another), or factor (h) (impairment due to mental defect or intoxication) as aggravating, particularly since there was no evidence of such circumstances. Moreover, in closing argument both the prosecutor and defense counsel identified which factors could be considered aggravating and which mitigating.
>
> We are also unpersuaded that language instructing the jury to determine "whether or not" section 190.3, factors (d) through (h) and (j) existed caused any confusion in this regard. [Citation] This reference simply complemented the court's generic instruction that the jury's function was to "decide what the facts are from the evidence received in the trial ...." Furthermore, in the final analysis "the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute." [Citation]

Bolin, 18 Cal. 4th at 341-42.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. 586 at 604; Eddings, 455 U.S. at 113-114 (adopting rule in Lockett). "The standard against which we assess whether jury instructions satisfy the rule of Lockett and Eddings was set forth in Boyde, 494 U.S. 370 (1990)." Johnson v. Texas, 509 U.S. 350, 367-68 (1993). In Boyde, the Supreme Court held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 494 U.S. at 377 (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (1988)).

In evaluating the instructions, the "reviewing court must determine 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" Johnson, 509 U.S. at 367 (quoting Boyde, 494 U.S. at 380). "[W]e do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a commonsense understanding of the instructions in the light of all that has taken place at the trial." Id. at 368 (quoting Boyde, 494 U.S. at 381). Further, a single instruction "may not be judged in artificial isolation, but must be considered in light of the instructions as a whole and the entire trial record." Estelle, 502 U.S. at 72.

The failure to identify whether factors are aggravating or mitigating is not contrary to or an unreasonable application of Supreme Court authority. In Pulley, the Supreme Court reviewed California's sentencing system, including the manner in which the jury considered relevant factors in deciding the penalty. 465 U.S. at 51. The Supreme Court noted that the 1977 death penalty law (like the 1978 law applicable in this case) did not identify or separate the aggravating or mitigating factors. Id. at 53 n.14. The Court found California's death penalty law to be constitutional. Id. at 51 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977

California statute is not of that sort."). Pulley was clearly established authority at the time Petitioner's conviction became final on March 8, 1999.

In Tuilaepa, the Supreme Court revisited California's death penalty sentencing scheme. The Supreme Court rejected the argument that California's "single list of factors" was unconstitutional. The Court stated:

> This argument, too, is foreclosed by our cases. A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. In California v. Ramos, for example, we upheld an instruction informing the jury that the Governor had the power to commute life sentences and stated that "the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem." [Citation] Likewise, in Proffitt v. Florida, we upheld the Florida capital sentencing scheme even though "the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them." [Citation] In Gregg, moreover, we "approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." [Citation] We also rejected an objection "to the wide scope of evidence and argument" allowed at sentencing hearings. [Citation] In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process. [Citation] "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." [Citation] Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." [Citations] In contravention of those cases, petitioners' argument would force the States to adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors. The States are not required to conduct the capital sentencing process in that fashion. [Citation]

Tuilaepa, 512 U.S. at 979-80.

Here, at the penalty phase, the jury was instructed with CALJIC No. 8.85, which sets forth the factors the jury should consider in determining penalty:

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

(CT at 631; RT at 2605.) The court then read the several factors under headings A through J, (informing the jury of the statutory factors from Penal Code § 190.3(a) through (i) and (k)), but did not expressly inform them which factors were relevant solely as mitigating factors. (CT at 631-32;

RT at 2605-07.) However, the trial court did instruct the jury that it could consider any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial; and that it must disregard any instruction given in the guilt or innocence phase which conflicted with the foregoing instruction. (RT at 2607; CT at 632.)

There is no clearly established authority from the United States Supreme Court holding that a jury must be instructed in a particular manner. The Eighth Amendment does not require that a jury be instructed on particular statutory mitigating factors. Buchanan v. Angelone, 522 U.S. 269, 275-77 (1998). Accordingly, since the Supreme Court has not decided the issue, the state supreme court's decision could not be contrary to or an unreasonable application of United States Supreme Court precedent. Carey, 549 U.S. 76.

Petitioner has made no evidentiary showing that the instructions given in this case in any way foreclosed the jury from considering any relevant mitigating evidence. The Supreme Court has examined the language in California's jury instruction on mitigation multiple times, and upheld it against constitutional challenges every time. See Ayers v. Belmontes, 549 U.S. 7, 24 (2006); Brown v. Payton, 544 U.S. 133, 142 (2005); Boyde, 494 U.S. 370, 386.

Even if there were instructional error by failing to distinguish between aggravating and mitigating circumstances, the California Supreme Court could reasonably have found no "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638. The jury was instructed that:

> An aggravating factor is any fact, condition or event in the commission of a crime which increases its guilt or enormity or adds to the injurious consequences which is above and beyond the elements of the crime itself.
>
> The mitigating circumstance is any fact, condition or event which if such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

RT at 2615. The state supreme court reasonably found that these definitions used commonly understood terms. Bolin, 18 Cal. 4th at 341-42. Moreover, Petitioner has not demonstrated on the evidentiary record that the jury gave mitigating factors aggravating weight or considered the absence of

statutory mitigating factors to be aggravating. Bolin, 18 Cal. 4th at 341-42. Though Petitioner argues that "[i]t is reasonably likely that the jury applied CALJIC No. 8.85 in a manner inconsistent with the Constitution" (ECF No. 178 at 251:5-6), he fails to demonstrate on the evidentiary record that any juror was precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense to be mitigating.

In any event, it seems unlikely the jury would have held such an erroneous belief. The jury was instructed that it could consider any non-statutory extenuating, sympathetic, or other basis for a sentence less than death, whether or not related to the conviction, and that the jury must disregard any instruction given in the guilt or innocence phase which conflicted with the foregoing instruction. (RT at 2607; CT at 632.)

There also appear additional reasons that the state supreme court could have found no prejudicial error. Both sides, in their respective closing arguments, identified those factors which could be aggravating and those which could be considered mitigating. See RT at 2573-2601; see also Bolin, 18 Cal.4th at 341. The noted circumstances of the instant capital murders and evidence of adjudicated and unadjudicated past criminal acts also suggest substantial aggravating evidence. (See claims 0, R and S, *ante;* RT at 2605-14; CALJIC Nos. 8.85, 8.86, 8.87, CT at 631-33.)

For the reason stated by the California Supreme Court as well as those discussed above, the Court finds it unlikely that the jurors improperly and prejudicially applied CALJIC 8.85 as a result of the alleged failure to distinguish between aggravating and mitigating factors. Moreover, an error solely of state law is not a basis for federal habeas relief.

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U3 is denied.

e. Analysis of Claim U4

Petitioner next alleges that, at the penalty phase, the trial court failed to instruct on the definition of "reasonable doubt" applicable to aggravating criminal acts, denying him due process

under the Fifth and Fourteenth Amendments. (ECF No. 113 at 175-76.)

Petitioner made this same claim on direct appeal, which the California Supreme Court considered and rejected on the merits. Bolin, 18 Cal. 4th at 342. He alleges the state court did not fully adjudicate the claim.

However, the California Supreme Court considered and rejected the claim, stating that:

> During penalty phase instruction, the trial court did not repeat the definition of reasonable doubt given at the guilt phase. Defendant contends this omission violated various constitutional rights because the term is not commonly understood outside the law. We find no error. At the beginning of the penalty phase, the court expressly alerted the jury that "[m]ost of the rules that I gave you before ... will apply to this case." Nothing in the court's subsequent instructions suggested the jury should disregard the earlier definition; a reasonable juror would assume it continued to apply.

Bolin, 18 Cal. 4th at 342.

As noted, during the penalty phase, the prosecution presented aggravating evidence of Petitioner's prior felony conviction for attempted voluntary manslaughter and his two prior unadjudicated criminal acts of assault and writing a threatening letter. The jury was instructed at the penalty phase that it "must first be satisfied beyond a reasonable doubt" that Petitioner was convicted of or committed these criminal acts before they could be considered aggravating circumstances. (CT at 633-34; RT at 2607-08; CALJIC Nos. 8.86, 8.87.)

Petitioner concedes that the jury was instructed on the definition of "reasonable doubt" at the guilt phase, (CT at 457), but complains that jury was not re-instructed on this definition at the penalty phase. (RT at 2607; CT at 633.) He alleges that penalty phase instructions implied that the guilt definition did not apply at penalty phase. (RT at 2603-04; CT at 628.) He claims this error left the jury "unguided in their determination as to whether or not to accept the evidence presented by the prosecution in aggravation," (RT at 2603-08; CT at 628-34), which substantially and injuriously affected the jury's verdict under Brecht.

The Court is unpersuaded. The trial court's admonition at the beginning of the penalty phase instructions, that it would now "tell [the jury] about the law which applies to this phase of the trial", (see RT at 2603; CT at 628) was not followed by any penalty phase instruction that the jury disregard the definition of reasonable doubt (CALJIC No. 2.90) that had been given to them during the guilt

phase. (CT at 457; RT at 2195.) Instead, as noted by the state supreme court on direct appeal, the jury was instructed that "most of the rules that I gave you before . . . will apply to [the penalty phase]." RT at 2394; see also Bolin, 18 Cal. 4th at 342. The instructions are considered in their totality. Estelle, 502 U.S. at 72. The jurors were presumed to follow the instructions given by the trial court. Weeks, 528 U.S. at 234.

Petitioner has not demonstrated the jury was instructed to disregard the CALJIC No. 2.90 instruction. Nor has he demonstrated clearly established law required the trial court to re-read the reasonable doubt definition. See Sanders, 11 Cal. 4th at 561 (the court at the penalty phase is not required to re-read guilt phase instructions when the latter were not limited to use at the guilt phase and when no penalty phase instructions contradict the guilt phase instructions).

The Court finds that the California Supreme Court could reasonably determine it unlikely that a failure to re-instruct with CALJIC No. 2.90 at the penalty phase confused the jury such that they were left unguided in determining whether to accept aggravating evidence. The inference otherwise argued by Petitioner does not find sufficient support in the record.

Accordingly, this Court does not find that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U4 is denied.

f. Analysis of Claim U5

Petitioner next alleges that the then-effective California death penalty statute suffered from constitutional infirmities, which are reviewed separately below. (ECF No. 113 at 176-78.)

1) Failure to Minimize Risk of Arbitrary Penalty

Petitioner cites to Furman v. Georgia, 408 U.S. 238, 313 (1972), and complains that his death sentence was imposed arbitrarily and capriciously because jury instructions at the penalty phase did not provide "a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not," exposing Petitioner to cruel and unusual punishment and denying him due process in violation of the Fifth and Eighth Amendments. (ECF No. 113 at 176:20-

21.)

The California Supreme Court considered and rejected these allegations on direct appeal, stating that:

> In sum, our capital sentencing scheme does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function. [Citation] Nor does the felony-murder rule falter in this regard. [Citation] The statutory categories have not been construed in an unduly expansive manner. [Citation] The breadth of the prosecutor's discretion in choosing to seek the death penalty does not render it unconstitutional. [Citation] The jury need not make express findings with respect to circumstances in aggravation [Citation], or find beyond a reasonable doubt that death is the appropriate penalty [citation].

Bolin, 18 Cal. 4th at 345-46.

Supreme Court cases have established that a state capital sentencing system must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Kansas v. Marsh, 548 U.S. 163, 173-74 (2006). If the "state system satisfies these requirements," then the "state enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." Id. (citing Franklin, 487 U.S. at 179 and Zant, 462 U.S. at 87576, n.13.)

A state may narrow the class of murderers eligible for the death penalty by defining degrees of murder. Sawyer v. Whitley, 505 U.S. 333, 342 (1992). A state may further narrow the class of murderers by finding "beyond a reasonable doubt at least one of a list of statutory aggravating factors." Id.; see also Gregg, 428 U.S. at 196-97.

In California, a defendant may be sentenced to death for first degree murder if the trier of fact finds the defendant guilty and also finds true one or more of the special circumstances listed in Penal Code § 190.2. As relevant here, one of the circumstances is: "[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." Penal Code § 190.2(a)(3). There is no question that this sentencing scheme satisfies clearly established constitutional requirements. First, the subclass of defendants eligible for the death penalty is rationally narrowed to those who have committed multiple murders. Tuilaepa, 512 U.S. at 969-73. The multiple murder special circumstance sufficiently guides the sentencer and is not unconstitutionally vague. See Godfrey

v. Georgia, 446 U.S. 420, 428 (1980) (the sentencer's discretion must be guided by "clear and objective standards.").

In California v. Ramos, the United States Supreme Court stated that "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" the jury's consideration of a myriad of factors and exercise of "unbridled discretion" in determining whether death is the appropriate punishment is not arbitrary and capricious. 463 U.S. at 1008-09. At the selection stage, an individualized determination includes consideration of the character and record of the defendant, the circumstances of the crime, and an assessment of the defendant's culpability. Tuilaepa, 512 U.S. at 972-73. However, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." Id. at 979.

Here, the Court finds that the California Supreme Court could reasonably have determined that California's death penalty scheme then in effect did not fail to genuinely narrow the class of murderers eligible for the death penalty. California's scheme, which narrows the class of death-eligible offenders to less than the definition of first degree murder and permits consideration of all mitigating evidence, has been approved by the United States Supreme Court, Tuilaepa, 512 U.S. at 972-79; Harris, 465 U.S. at 38, and this Court, Ben-Sholom v. Woodford, E.D. Cal. Case No. CV-F-93-5531, ECF. No. 421 at 122, 124-25.

2) Vagueness Regarding Sentence Determination

Petitioner complains of vagueness in the trial court's instruction, CALJIC 8.88, that in order to "return a judgment of death, each of you must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (ECF No. 113 at 177:2-11; RT at 2616; CT at 648); see also Woodson, 428 U.S. at 305. He contends the trial court failed to inform the jury that it must find death to be the "appropriate" penalty and not just "warranted." (ECF No. 113 at 177:12-17.)

The California Supreme Court considered and rejected these allegations on the merits on direct appeal, stating that:

> In explaining the nature of the penalty phase deliberative process, the trial court instructed: "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." Defendant now argues the "so substantial" and "warrants" phrasing is impermissibly vague and does not adequately guide the decision to impose death. As in the past, we find no constitutional infirmity. [Citation] Prior to this instruction, the [trial] court explained, "In the weighing of aggravating and mitigating circumstances, it does not mean a mere mechanical counting of the factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Assessed in this context, the "so substantial" instruction "clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. [Citations]"

Bolin, 18 Cal. 4th at 342-43.

That court went on to find that, "considered as a whole," the instructions were "sufficient to guide the jury's deliberative process and inform the jurors they must find death is the 'appropriate' penalty if that [is] their verdict." Id. at 343.

Prior to the instant instruction, the trial court instructed the jury that "[i]n weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (RT at 2616; CT at 647-48.) That court also instructed the jury on the meaning of a mitigating circumstance, noting that such a circumstance may be used "in determining the appropriateness of the death penalty." (RT at 2615; CT at 647.) Defense counsel informed the jury that it would be deciding what is the "appropriate penalty." (RT at 2467, 2584, 2596.)

Upon consideration of the entire charge to the jury and related argument, it is unlikely the alleged vagueness prevented consideration of constitutionally relevant evidence in sentence determination. Boyde, 494 U.S. at 380. As noted, a reviewing court approaches the instructions in the same way that the jury would, with a "commonsense understanding of the instructions in the light of all that has taken place at the trial." Johnson, 509 U.S. at 368. It can be presumed that the jury followed the instructions, including the cautionary instructions. Weeks, 528 U.S. at 234.

Even if there was constitutional error, Petitioner has not demonstrated error under Brecht, i.e., that there is a reasonably likelihood the jury improperly applied the allegedly ambiguous terms in

determining their verdict, for the reasons stated and given the noted substantial evidence against Petitioner. (See claims O, R and S, *ante*; cf., Calderon v. Coleman, 525 U.S. 141, 145 (1998) (inaccurate sentence commutation instruction was Brecht error).

3) Aggravation, Sympathy and Mercy

Petitioner complains that the trial court, upon rejecting defendant's proffered Instruction No. 9, failed to instruct the jurors that they could return a life without parole sentence even where the aggravating circumstances substantially outweigh the mitigating circumstances (ECF No. 113 at 177) (citing Gregg, 428 U.S. at 199), and that they could consider other mitigating factors, such as sympathy and mercy.

The California Supreme Court considered and rejected these allegations on the merits on direct appeal, stating that:

> Defendant contends the trial court erroneously refused instructions informing the jurors in various terms that sympathy, pity, compassion, and mercy were factors in deciding the appropriate sentence. We find no error. "We have repeatedly held that a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise 'mercy.'" [Citations] Here, the trial court gave the standard instruction to take into account "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." The court also told the jury "to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." No additional instruction was required.

Bolin, 18 Cal. 4th at 343-44.

As noted, in reviewing penalty phase instructions, the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record. Estelle, 502 U.S. at 72.

Here, the state court could reasonably have found that the jury was not precluded from considering constitutionally relevant mitigating and sympathetic evidence during their sentence deliberations. The Supreme Court has never required a sentencing court to instruct a jury on how to

weigh and balance factors in aggravation and mitigation. In Tuilaepa, the Supreme Court stated, "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." 512 U.S. at 979. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." Id. (quoting Ramos, 463 U.S. at 1008.)

In Marsh, the Supreme Court stated:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. *"[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required*."

548 U.S. at 175 (quoting Franklin, 487 U.S. at 179). Here, in explaining the factors the jury was to consider in reaching its decision, the trial court specifically instructed the jury that it could consider:

> [A]ny 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 at 2607; CT at 632.) The trial court also told jurors that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (RT at 2615; CT at 647.) The prosecutor also noted that the jury could and should consider sympathy for the defendant in determining the appropriate penalty. (RT at 2396, 2579, 2581.)

There is no clearly established authority from the United States Supreme Court holding that a jury must be instructed in a particular manner. Accordingly, since the Supreme Court has not decided the issue, the state supreme court's decision could not be contrary to or an unreasonable application of United States Supreme Court precedent. Carey, 549 U.S. at 76.

To the extent Petitioner alleges the jury may have applied the instruction in a manner contrary to state law (see ECF No. 113 at 177: 23-24 ["state law provides that jurors may sentence a defendant to life without parole even where the aggravating circumstances substantially outweigh the mitigating

circumstances"]), this allegation is not alone a basis for federal habeas relief. Pulley, 465 U.S. at 41.

Accordingly, the state supreme court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U5 is denied.

g. Analysis of Claim U6

Petitioner next claims that the trial court erroneously refused certain of his proposed penalty phase instructions which were designed to guide jury discretion in sentence selection, denying him due process and a fair penalty phase determination. (ECF No. 113 at 178-86.)

The California Supreme Court considered and rejected the allegation relating to Petitioner's proposed Instruction No. 9 on direct appeal. He also raised all these same allegations in his petition for writ of habeas corpus in the California Supreme Court. That court found Petitioner's habeas claims were procedurally barred because these claims could have been, but were not, raised on direct appeal, or were repetitive of such claims. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also rejected the habeas claims on the merits. (CSC Order Den. Pet. Habeas Corpus); Bolin, 18 Cal. 4th at 343.

Petitioner alleges that the trial court erroneously determined that CALJIC 8.88 was "good enough," rejecting his proposed penalty phase instructions number 2, 9-14, and 19-21, all of which were allegedly designed to inform the jury that they should consider only instructions given at the penalty phase; that they could consider non-statutory mitigating factors; that "unlike in the guilt phase of the case, sympathy, mercy and compassion, or any other mitigating factors, are appropriate considerations for a penalty determination"; that they could return for life without parole even if aggravating circumstances outweigh mitigating circumstances; and that doubt is to be resolved in favor of life without parole. (ECF No. 113 at 178-81; RT at 2549-50; CT at 651, 652, 655, 656, 657, 658, 659, 660, 663, 665.) He also alleges that the trial court did not inform the jury that weighing of aggravating and mitigating factors was not to be done mechanically and that death was to be imposed only if it was the appropriate penalty.

However, the Court finds that the California Supreme Court could have reasonably rejected this claim for the reasons stated in claims U1-U5, *ante*. The trial court separately instructed the jury on the requirement that it follow the penalty instructions and stated rules of law, such that Petitioner's proposed Instruction No. 2 (CT at 663) could reasonably be seen as unnecessary. (RT at 2607; CT at 632; CALJIC No. 8.85.)

Petitioner acknowledges that the jury was instructed that it could consider "any sympathetic or other aspect of the defendant's character or record" to support a life sentence (CALJIC 8.85) and that it was free to assign whatever "moral or sympathetic value" was "appropriate" to the various factors it was "permitted to consider." (CALJIC 8.88; ECF No. 113 at 183:22-25.)

Petitioner's proposed instructions could have reasonably been seen as unnecessary given the overall charge to the jury regarding its exercise of sentencing discretion as discussed in claims U1-U5, *ante*. Spivey, 194 F.3d at 976. The trial court could properly reject a petitioner's proposed jury instruction if other instructions adequately cover the issues about which the defense is concerned. United States v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996); United States v. Tsinnijinnie, 601 F.2d 1035, 1040 (9th Cir. 1979) ("there is no right to have the instruction phrased in the precise terms requested by defendant").

Additionally, Petitioner's proposed instruction that jurors could not return a verdict of death unless they were persuaded beyond a reasonable doubt that it was the appropriate penalty, (ECF No. 113 at 184-85), was reasonably rejected. See, e.g., Williams v. Calderon, 52 F.3d 1465, 1485 (1995) (failure to require a specific finding that death is the appropriate penalty beyond a reasonable doubt does not render California's death penalty statute unconstitutional); accord People v. Webb, 6 Cal. 4th 494, 536 (1993).

Under California law "neither death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror." People v. Samayoa, 15 Cal. 4th 795, 853 (1997); see also Walton v. Arizona, 497 U.S. 639, 651 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584, 589 (2002) (a defendant may constitutionally be required to establish by a preponderance of the evidence the existence of mitigating circumstances, a conclusion manifestly inconsistent with

Petitioner's assertion that the Constitution requires the jury to determine beyond a reasonable doubt that death is the appropriate penalty). Petitioner's cited People v. Cancino is not authority otherwise because here, for the reasons stated, the jury was adequately instructed as to its sentencing discretion. 10 Cal. 2d 223, 230 (1937).

The California Supreme Court considered and rejected on direct appeal, alleged instructional error relating to Petitioner's proposed Instruction No. 9, noting that:

> [T]he instructions adequately performed the constitutional function of guiding the jury's discretion in sentencing. [Citation] In this case, the court gave similar instructions that told the jury "it could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict.
>
> Here, the trial court gave the standard instruction to take into account "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." The court also told the jury "to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." No additional instruction was required.

Bolin, 18 Cal. 4th at 343-44.

That court could reasonably have found that the standard penalty phase instructions given in this case, CALJIC Nos. 8.85, 8.86, 8.87, and 8.88, adequately guided the jury's sentencing discretion and determination. (RT at 2605-08, 2614-16; CT at 631-34, 647-48.) As the California Supreme Court stated on direct appeal:

> [I]n the final analysis "the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' [Citation]"

Bolin, 18 Cal. 4th at 342 (quoting Ramos, 463 U.S. at 1009 n.22).

"The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990); Boyde, 494 U.S. at 377. Here, the jury was specifically instructed to consider, in reaching their decision regarding the appropriate penalty, "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 at 2607.) The instructions given by the trial court could reasonably be seen as satisfying the Blystone and Boyde standards. A mere state law instructional error, if there were one, is not a basis for federal habeas relief. Dunckhurst, 859 F.2d at 114 ("a state trial court's refusal to give an instruction does not alone raise a ground cognizable in a federal habeas corpus proceeding.").

Additionally, the court's instruction to the jury about not "mechanical[ly] counting" the aggravating and mitigating factors (RT at 2615; CT at 647) adequately informed the jury that it could base a life sentence on the existence of only one factor in mitigation.

Accordingly, the state supreme court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U6 is denied.

h. Review of Claim U7

Petitioner claims cumulative penalty phase instructional error as alleged in claims U1-U6 rendered the court's charge to the jury insufficient as a whole to provide guidance necessary for a fair and reliable sentencing determination. (ECF No. 113 at 186-87.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which that court summarily rejected on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

Petitioner re-argues claims U1-U6 and claims cumulative effect of these errors caused substantial prejudice in the jury's determination of the verdict under Brecht.

"The Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle, 505 F.3d at 928 (citing Donnelly, 416 U.S. at 643). However, the fact that errors have been committed during a trial does not mean that reversal is required. "[W]hile a defendant is entitled to a fair trial, [he] is not entitled to a perfect

trial, for there are no perfect trials." Payne, 944 F.2d at 1477; U.S. v. De Cruz, 82 F.3d 856, 868 (9th Cir. 1996).

Here, for the reasons stated above in claims U1 through U6, the California Supreme Court could reasonably have found that there was no penalty phase instructional error, individually or cumulatively.

Accordingly, the California Supreme Court could reasonably have found that Petitioner failed to establish that rejection of claim U and all its subclaims was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim U7 is denied.

5. Review of Claim V

Petitioner next claims prosecutorial misconduct during penalty phase closing argument, denying him a fair trial, due process and fair and reliable penalty determination in violation of the Fifth, Sixth and Fourteenth Amendments. (ECF No. 113 at 187-90.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred because this claim could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3; In re Dixon, 41 Cal. 2d at 759].)

The California Supreme Court also summarily rejected Petitioner's habeas claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

a. Clearly Established Law

The standard of review for claims of prosecutorial misconduct is a "narrow one of due process"; the federal habeas court must determine whether the alleged instances of misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 643); see also Greer, 483 U.S. at 765; Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005).

To constitute a denial of due process, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. Greer, 483 U.S. at 765

(quoting Bagley, 473 U.S. at 676); see also United States v. Agurs, 427 U.S. 97, 98 (1976); Smith, 455 U.S. at 221 (ordinary trial errors by a prosecutor do not suffice; the misconduct must be egregious enough to deny the defendant a fair trial). The remarks complained of, in order to constitute a denial of due process, must be of such a quality that they prevent a fair sentencing hearing. Nichols v. Scott, 69 F.3d 1255, 1278 (5th Cir. 1997). A petitioner is entitled to relief in this context only where the constitutional violations exerted a "substantial and injurious" effect on the judgment. Brecht, 507 U.S. at 620; Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) (stating the Ninth Circuit applies Brecht if misconduct of constitutional dimension is established), amended 315 F.3d 1062 (9th Cir. 2002).

b. Analysis of Claim V

Petitioner alleges the penalty phase was unfair because the prosecutor's closing improperly argued matters outside the evidence, improperly stated her own personal opinion of the credibility of witnesses, misstated the law regarding the role of sympathy, and urged jurors to impose the moral judgments of the community rather than their individual moral judgments. The specific instances of alleged misconduct are discussed separately.

1) Public Sentiment

Petitioner alleges the prosecutor improperly encouraged the jury to consider public sentiment about petitioner and the death penalty during her closing argument, as follows:

> You must determine whether or not Paul Clarence Bolin, twice a killer, should be given the death penalty or should live out his natural life in prison. As jurors in this phase, you will be required to bring into play all of your individual and all of your collective consciousness, all of your sense of duty, all of your values, your morals, your ethics, your individual and your collective experiences in life, your personal values and also your value of what the community expects of you because you, as a member of this jury, are representatives of the community.

(RT at 2574; see also ECF No. 113 at 188:10-16.)

> Paul Bolin has crossed the line which society draws. He has to now accept the proper punishment for what he has done. When you came into this courtroom, you did not know that this is what your responsibility would be, it is a heavy responsibility. I am glad it is not mine, but I appreciate the fact that each of you has listened and each of you has paid attention, and I would like for you, as representatives of society, to draw the line that society draws and say to this man, "Paul Clarence Bolin, you have stepped over

> that line and now you must suffer the same fate as those people that you saw to cut their life off" and give this man the ultimate punishment, that punishment which I believe the evidence shows that he deserves, that is death.

(RT at 2582; see also ECF No. 113 at 188:10-16.)

However, these comments do not reasonably suggest the jury consider matters not in the record, or that they deviate from the instructions to be given by the trial court. The California Supreme Court could reasonably have determined the prosecutor's noted comments simply argued the crimes and aggravating factors already in the record and were not unfair. For example, the prosecutor specifically told the jury: "I would like you to consider your verdict rationally, with rational thoughts from all the evidence and not from emotion." (RT at 2582.) The prosecutor also asked the jurors to consider future dangerousness and the protection of society in general in determining whether Petitioner should spend his life in prison or be put to death for his crimes. (RT at 2577.) Significantly, these comments were consistent with the prosecution theme that Petitioner resolves conflict with violence. (RT at 2578-79); see Runnels, 413 F.3d at 1115 (the presence of a relevant theory in argument will place the argument outside those prohibited as based solely on appeals to passion and prejudice).

2) Matters Not In Evidence

Petitioner alleges that the prosecutor argued matters not in evidence when she asked jurors to consider Petitioner's character and influence upon others:

> Consider the fact that there are two people no longer alive because this man wanted to protect 300 lousy marijuana plants. And when you are thinking about his protection of his 300 marijuana plants, think about the people from Chicago and the help that this man, they thought, was giving to their youngsters, their teen-age children and *think about what happens to those marijuana plants of Mr. Bolin when they are grown and sold on the streets in Los Angeles; think about who they are sold to and think about what kind of role model this man would be making for those teen-agers in Chicago.*

(RT at 2581.) Petitioner claims there was no evidence of any intended or actual sale of marijuana. However, the state supreme court could reasonably have found that this argument was relevant to evidence presented regarding the marijuana farm - that at the time of the shootings the plants were not yet ready to harvest and sell (RT at 1879-80) - that Petitioner had not yet found a buyer (RT at 1669); and to rebut evidence presented by the defense relating to Petitioner helping his young relatives in

Chicago during his flight from authorities. Moreover, any such prejudice was likely ameliorated by the defense theory that the shootings were not motivated to save Petitioner's marijuana business. (RT at 2587); see Roberts v. Bowersox, 137 F.3d 1062, 1066 (8th Cir. 1998) (a defense attorney's argument may minimize any potential prejudice from inappropriate prosecution argument).

3) Personal Opinion

Petitioner alleges that the prosecutor, during closing argument, improperly expressed her opinion that Mary Bolin did not testify truthfully and credibly about her father's involvement in the aggravating Spencer assault event. As discussed in more detail in clam W6, *post*, Mary, testified that the event occurred when she was 12 years old. (See RT at 2469, 2483.) She testified that Spencer was partying at her house, smoking pot and sniffing paint, when he put his hands down her pants and tried to pull her top down. (See RT at 2470-71.) She testified that Petitioner, upset after Mary told him what had happened, arrived and ran towards Spencer and ordered Spencer to leave, and that Spencer then exited through the backyard where Petitioner's friend, Richard Balsamico, began beating him with a stick. (See RT at 2412-72.) Mary testified that she did not see Petitioner hit Spencer. (See RT at 2473.)

On cross-examination, Mary told the prosecutor she did not remember the police coming to her house or talking to the police. (See RT at 2480-81.) She was then impeached with Deputy Gutierrez's police report of the Spencer incident in which Mary failed to provide the information to which she testified, noted above. (See RT at 2479-83.)

During closing, the prosecutor argued as follows with regard to that testimony:

> Now, one of Paul Bolin's daughters took the witness stand and told you a story which did not go along with the police report and, of course, when she was questioned about it, she couldn't remember whether or not she told that to the police. When shown the police report, she couldn't remember anything, but I am sure that she loves her father, and I am sure that she thought she could help him by misrepresenting or perhaps just forgetting what actually happened.

(RT at 2578.)

> Again, a daughter came in and told a story which simply was not true but, then, again, this girl loves her father. A poor father is better than no father at all, so she would come in and tell a story that was entirely different than that which was told to the police or that [other witnesses] told, but just remember this man was convicted of this crime.
> . . .

(RT at 2579.)

However, as Respondent notes, the prosecutor was free to argue relative credibility and lack of truthfulness based upon reasonable inference raised by admitted evidence. See Duckett v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995); United States v. Sarno, 73 F.3d 1470, 1496-1497 (9th Cir. 1995). Here Petitioner acknowledges that Mary's testimony was contradicted by another witness. (ECF No. 113 at 189:13-16.) It was not unreasonable for the state court to find that the prosecutor's argument was properly related to Mary's credibility. The prosecutor also told jurors that they should be guided by their own feeling regarding the evidence, not counsel's argument. (RT at 2574-75.) The court's instructions emphasized this principle. (CT at 628-29; RT at 2604; Def.'s Proposed Instr. No. 1, CT at 628.)

At closing, a prosecutor is allowed wide latitude to argue reasonable inferences from the evidence, including casting a witness's testimony as lies or fabrication. See Turner v. Marshall, 63 F.3d 807, 818 (9th Cir. 1995), overruled on other grounds by Tolbert, 182 F.3d at 685. It follows that Petitioner's further citation to Turner v. Louisiana for the proposition that the prosecutor's conduct was unfair because it was not based on the admitted evidence, see 379 U.S. 466, 472-73 (1965), is unavailing. Ms. Ryals's comments could reasonably be seen as inference from noted evidence in the record.

Petitioner's allegation that federal law precludes the prosecutor's offering her personal opinion of issues of guilt and credibility, citing to United States v. Potter, 616 F.2d 384, 392 (9th Cir. 1979) and United States v. Davis, 564 F.2d 840, 866 (9th Cir. 1977), also is unavailing. The Potter court acknowledged the impropriety of the prosecutor interposing his own opinion and commentary on factual matters not in evidence, and found any prejudice neutralized by the court's instruction that argument is not evidence. Potter, 616 F.2d at 392. The Davis court likewise acknowledged the limits of personal opinion where not based on evidence in the record. Davis, 564 F.2d at 846. Here, the prosecutor's comments could be seen as proper given the conflicting testimony, and any error could be seen as harmless given the jury instruction the argument was not to be taken as evidence.

4) Ethical Norms

Similarly, Petitioner's allegation that the prosecutor's noted comments violated ethical norms

is unpersuasive. Even if the prosecutor's argument could be seen as unethical, Petitioner has not demonstrated it was contrary to clearly established Federal law.

5) Sympathy

Petitioner alleges that the prosecutor, in closing argument, improperly stated that sympathy should be limited to Petitioner's culpability for the crimes, and contradicted the language of California Penal Code § 190.3(j), by telling the jurors that:

> Mr. Cater and Mr. Bolin put on evidence of that factor which you can also consider called sympathy. That is anything which lessens the culpability of this man for these crimes. You can consider anything that makes this less serious, that mitigates his act and he put on the family and he put on friends, and he put on people who had known Mr. Bolin.

(ECF No. 113 at 189:23-26, citing RT at 2579:23-26.) The jury was instructed with CALJIC 190.3(j) which allows the jury to consider:

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

(CT at 632; RT at 2607.)

Petitioner contends the prosecutor's comment misled the jury as to what they could properly consider in determining their penalty verdict. However, the state supreme court could reasonably have found otherwise. The prosecutor neither argued against sympathy for Petitioner and his family, (RT at 2581), nor in favor of sympathy for the victims. (RT at 2575.) Instead the prosecutor urged the jury to consider the circumstances of crimes admitted into evidence. (RT at 2575.) Petitioner's reliance upon Penry v. Lynaugh is misplaced because in that case, unlike this case, the jury was not instructed that it could consider and give effect to mitigating evidence. 492 U.S. 302, 320 (1989) (abrograted by Atkins v. Virgina, 536 U.S. 304, 321 (2002)).

Nor do the other allegations in claim U demonstrate that the jury was improperly instructed regarding mitigating considerations of sympathy, for reasons stated in the discussion of that claim. Furthermore, the trial court instructed the jury that sympathy could be considered in determining the sentence. (RT at 2607, 2615; CALJIC Nos. 8.85, 8.88.)

6) Prejudice

Even if the prosecutor's comments were improper, there was no more than harmless error under Brecht. The prosecutor told the jurors that it was their feelings about the evidence and factors in aggravation that mattered, not her own. (RT at 2574-75.) The trial court properly instructed the jury on this point. (CT at 628-29; RT at 2604.) The prosecutor stated that the jury's deliberations should be based upon the evidence. (RT at 2574.) The trial court instructed the jury that the argument of counsel was not evidence. (RT at 2573.) The trial court also instructed the jury to follow its instructions if anything said by the lawyers contradicted the instructions. (RT at 2604.) Jurors are presumed to follow instructions. Boyde, 494 U.S. at 381-85. See Potter, 616 F.2d 384, 392 (9th Cir. 1979) (prosecutor's closing contained some improprieties albeit not purposeful or flagrant or requiring reversal); Furman v. Wood, 190 F.3d 1002, 1006-07 (9th Cir. 1999) (rejecting habeas claim where, although some of prosecutor's arguments were improper, jury was told comments were not evidence, and evidence against defendant was substantial).

For all the reasons stated, the state supreme court could reasonably have found this claim unavailing. A jury generally accords less weight to the arguments of counsel than to the instructions it is given. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996) (citing Boyde, 494 U.S. at 384) (jurors generally accord less weight to arguments of counsel than the court's instructions and such arguments must be viewed in the context of all argument and the instructions); see also Darden, 477 U.S. at 182 (claim of prosecutorial misconduct rejected where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent").

A fair-minded jurist could therefore reasonably conclude that Petitioner failed to establish rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim V is denied.

6. Review of Claim W

Petitioner next alleges multiple subclaims asserting ineffective assistance of counsel during

the penalty phase, resulting in a complete breakdown of the adversarial process, denying Petitioner due process, a fair trial, and a reliable verdict, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 190-219.) Petitioner also asserts ineffective assistance by state appellate counsel, Richard Gilman. These subclaims are reviewed separately.

a. Clearly Established Law

The applicable legal standard for ineffectiveness of counsel is set forth out in claim C2, *ante*. The basic requirements of Strickland apply with equal force in the penalty phase. Thus, Petitioner must show that counsel's actions fell below an objective standard of reasonableness, and that the alleged errors resulted in prejudice. Strickland, 466 U.S. at 687-98. In the context of the penalty phase, just as in the guilt phase, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688).

In the penalty phase, defense counsel has an "obligation to conduct a thorough investigation of the defendant's background," Williams, 529 U.S. at 396, and defense counsel has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings. Wiggins, 539 U.S. at 521-23. Counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances." Williams, 529 U.S. at 415.

Nonetheless, the Supreme Court has recognized that the duty to investigate does not require defense counsel "to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 382-83 (2005) (citing Wiggins, 539 U.S. at 525) (further investigation is excusable where counsel has evidence suggesting it would be fruitless); Strickland, 466 U.S. at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"). As the Strickland court stated:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

> unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91.

"In assessing counsel's investigation, the court must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms," Strickland, 466 U.S. at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." Id. at 689.

Further, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigative decisions are reasonable depends critically on such information. Strickland, 466 U.S. at 691.

In order to demonstrate prejudice, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-94. To assess that probability, the reviewing court must consider the totality of the available mitigation evidence and reweigh it against the evidence in aggravation. Porter v. McCollum, 558 U.S. 30, 41 (2009) (citing Williams, 529 U.S. at 397-398). The court must consider whether the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. Rompilla, 545 U.S. at 393 (quoting Strickland, 466 U.S. at 694).

b. Analysis of Claim W1

Petitioner claims generally that counsel Soria and his investigator Binns were lax and inefficient in their trial investigation and preparation and did not provide reports to, or communicate with co-counsel Cater following Cater's appointment as lead counsel. (ECF No. 113 at 193-94; RT at 2273-74.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which summarily rejected it on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

1) Withheld and Inaccurate Information

Petitioner alleges that investigator Binns did not conduct an effective investigation and provided misinformation regarding his investigation of Petitioner's relatives. (See SHCP Ex. 47.) Petitioner suggests that Binns did not share the small amount of information he gleaned during his investigation, placing Soria in breach of his ethical obligations as predecessor counsel. (See 1/7/91 RT at 2304-11.)

Petitioner alleges that Soria and Binns did not provide Cater with complete and accurate information, (id.; ECF No. 113 at 193), and that the "failure of Soria and Binns to turn over all information regarding the status and results of the penalty investigation forced Cater to start the investigation from scratch [and] to waste a significant portion of the short time that he had in reduplicating work already accomplished by Binns." (ECF No. 113 at 193:27-194:3.)

Petitioner also alleges that Soria failed to advise Cater of the evidence the prosecutor intended to use in aggravation, matters the prosecutor had spoken to Soria about "at great length." (RT at 2391.)

The California Supreme Court reviewed certain of these allegations in the context of denial of Cater's new trial motion, and determined that:

> With respect to Cater's concern about the adequacy of penalty phase investigation, the record contains no colorable claim that it was in fact deficient. At best, he offered only speculation based on hearsay reports, and defendant added nothing to substantiate the allegation.

Bolin, 18 Cal. 4th at 347.

This Court finds that, on the record before it, the California Supreme Court could reasonably have found Soria and Binns were not deficient in their investigation and did not withhold information from Cater. Binns did engage in penalty phase investigation, locating and interviewing witnesses including Petitioner's friends and family members in Covina and Chicago. (See SHCP Ex. 47, 1/7/91 Marsden RT at 2304-11.) Binns did turn over his written files to Cater (id.; see also SHCP at 91) and did respond to Cater's questions about the files (Id.). The California Supreme Court could reasonably have found no deficient investigation or inaccurate information was provided, even though Binns may have worked independently and largely provided oral reports of his investigative activities. (Id.)

Cater stated that his manner of investigating the penalty phase "differ[ed] greatly" from that used by Soria and Binns. (CT at 548.) However, this could reflect a matter of trial tactics. Nor was it unreasonable for the California Supreme Court to conclude that Cater's generalized complaint, that Binns's reports were incomplete and certain of the information provided by Soria and Binns was inaccurate, (see SHCP Ex. 47, 1/7/91 Marsden RT at 2304-11), was speculative. Similarly, Petitioner points to scant support in the record for Cater's allegation that Binns and Soria withheld information.

Petitioner himself stated in his petition for writ of habeas corpus filed in the California Supreme Court that:

> Trial counsel's files were not properly maintained, making it difficult to establish precisely what steps were taken, and when, by counsel. Nonetheless, Soria claims to have turned over all trial materials to Cater, when Cater took over the penalty phase. Soria's investigator, Bruce Binns claims to have turned over all records maintained by him to either Soria or Cater. Thus, the files obtained by appellate counsel from Cater appear to be the complete record of trial preparation in this case.

(SHCP at 91.)

2) Failure to Communicate

Petitioner also asserts that Soria and Cater failed to communicate effectively about the prosecution's intended case in aggravation. See e.g., Bean v. Calderon, 163 F.3d 1073, 1078 (9th Cir. 1998) (deficient development of mitigating evidence related to confusion between co-counsel as to respective duties constituted ineffective assistance). Petitioner points to a portion of the record in which the prosecutor suggested she had spoken with Soria about the prosecutor's intent to call Huffstuttler's girlfriend, Ms. Ward, as a witness during the penalty phase, and suggested Soria never passed this information along to Cater. (ECF No. 113 at 194; RT at 2363-64, 2391.)

However, it appears the prosecutor had also served Cater with notice regarding her intent to call Ward as a witness in support of an aggravating factor. (RT at 2363-64.) In fact, the prosecution provided adequate notice of that information, and Cater acknowledged that he had received discovery regarding it. (See claim K, *ante*.)

Petitioner also complains that Soria did not tell Cater of the prosecution's intent to introduce the letter to Halfacre, and that Cater was unaware of this fact until "three days before the penalty phase." (ECF No. 113 at 194.) But the record demonstrates that the prosecutor gave the required

notice of such to both Cater and Soria. (See RT at 2391.) The trial court overruled Cater's objection to admitting the letter on such notice grounds, finding "[the prosecutor] did give notice and did ask for an exemplar." (Id.) Additionally, the California Supreme Court reviewed the claim and determined that proper notice had been provided. Bolin, 18 Cal. 4th at 336-37.

Petitioner fails to show that any of the alleged errors gave rise to deficient performance resulting in prejudice under the Strickland standard. Cater apparently was able to talk to all of the necessary witnesses and contends that he was able to and did conduct a more thorough investigation than had Soria and Binns. (See SHCP Ex. 47 at 2305-10.) Petitioner fails to demonstrate that he was prejudiced by any alleged failure to communicate accurately, through role confusion, see Bean, 163 F.3d at 1078, or otherwise.

3) Appellate Counsel

Petitioner alleges that his appellate counsel was ineffective by failing to review a copy of the Reporter's Transcript from the January 7, 1991 Marsden hearing (see SHCP Ex. 47; ECF No. 113 at 191 n.52), and failed to include the transcript in the state certified record. But these claims are unsupported in the record. It appears that the transcript was before the state habeas court. (See SHCP Ex. 47.) Accordingly, no prejudice is apparent.

4) Conclusions

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome of this proceeding would have been different. Strickland, 466 U.S., at 687-98.

A fair-minded jurist could therefore reasonably conclude that Petitioner failed to establish rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W1 is denied.

c. Analysis of Claim W2

Petitioner alleges that Cater, upon his appointment as penalty phase counsel, was ineffective

by requesting only a two-week continuance to allow completion of the penalty phase investigation, when he knew or should have known that a life history investigation had not been done and that more time was required. (ECF No. 113 at 194-95.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which that court summarily rejected on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

Petitioner complains counsel Cater was ineffective by failing to investigate, prepare and present an adequate penalty phase defense. Cater had advised the trial court of his dissatisfaction with the previous investigation and opined that his investigator had obtained more satisfactory results. (See SHCP Ex. 47 at 2305-07). As noted, Cater indicated to the court that his investigation into the penalty phase "differ[ed]" from Soria's. (CT at 548.) Yet Cater requested only the additional two-week continuance to prepare for the penalty phase.

The record reflects that the trial court initially granted defense counsel three weeks to prepare for the penalty phase. (See RT at 2297-98.) At the Marsden hearing on January 7, 1991, Cater requested and was granted an additional two-week continuance. (See SHCP Ex. 47; RT at 2312-13.) During the Marsden hearing, Cater explained to the trial court what had been done and what remained to be done within the requested additional time. (See SHCP Ex. 47 at 2304-11). At that point, Cater stated to the court his belief that the requested further continuance would be sufficient "because we have got an excellent head start, Mr. Roger Ruby has practically closed down his office working full time for me right now to gather this together." (Id. at 2310.)

Petitioner concedes that Cater and his investigator, Roger Ruby, spent the five weeks following Cater's December 14, 1990 appointment, investigating and preparing the penalty phase defense. (See ECF No. 113 at 194-95.) Yet Petitioner argues that, because of the extent of the aggravating incidents, this was still not enough time to follow-up on mitigating life history facts including childhood abuse and neglect that caused Petitioner to live on the streets as a minor; work history including apparent occupational exposure to toxic solvents; prison records; and possible mental state defenses. (See RT 2504; SHCP Ex. 24; RT at 2307-08.) Petitioner contends that this failure to conduct additional investigation was unreasonable. He notes Cater presented a penalty

phase defense that lasted only a little over two hours, (see CT at 588-589), and presented no evidence regarding Petitioner's mental status, childhood abuse and trauma, exposure to neurotoxic chemicals, physical injuries, substance abuse, or military service.

However, it was not unreasonable for the California Supreme Court to determine that Cater's performance at the penalty phase was not deficient for reasons discussed in claims W1 *ante* and W3, through W10 *post.* Petitioner's reliance on Bean is unpersuasive because Bean appears factually distinguishable. 163 F.3d at 1078. Counsel in Bean, due to role confusion, did no penalty phase work until after the guilt phase was completed. Id. Here, defense counsel did conduct penalty phase investigation in the months before trial without any semblance of role confusion. (See claim C2, *ante*.) Cater's expressed dissatisfaction with the efforts of Soria and Binns did not appear to arise from role confusion or a failure by Soria and Binns to initiate the pretrial investigation.

As noted, Cater apparently was able to talk to all of the witnesses he felt necessary, and that he was able to do a more thorough investigation in his estimation than the investigation previously undertaken. (See SHCP Ex. 47 at 2305-10.) It does not appear that Cater requested or required any continuance beyond the five weeks previously granted.

Petitioner's cited Daniels v. Woodford in support of his argument that external constraints necessitated further continuance is unavailing because Petitioner has not demonstrated on the evidentiary record the existence of any external constraints. 428 F.3d at 1206 (counsel's deficient investigation resulted in part from court's refusal to grant a continuance and problems getting state funding). In fact, the record suggests the opposite. Cater requested, and trial court granted, additional funding to support further investigation during the two continuances to prepare for the penalty phase. (See SHCP Ex. 47.) Cater represented that he thought two weeks would be sufficient. (Id. at 2310.) Counsel's actions could be seen as strategic rather than the result of external constraints.

Petitioner also relies upon Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000), in support of his argument that Cater did not spend sufficient time preparing for the penalty phase. But Jackson too is distinguishable because there defense counsel, based on the belief trial would not reach the penalty phase, spent about 2 hours preparing for it by interviewing two witnesses and reviewing

defendant's juvenile and military records. Id. at 1162. Here, Cater acted as co-counsel during the guilt phase, and when the trial court appointed him to be lead counsel for the penalty phase, that court provided additional funding for another investigator and five weeks of additional time to further investigate and prepare. As discussed in claims W1 and W3-W10, counsel Cater and his investigator Ruby marshaled mitigating evidence including through interviews with numerous of petitioner's family and friends in California and Chicago, and otherwise by investigating family, social, military and medical and mental health background information and the aggravating evidence of the prosecution.

Based on the record, the state supreme court could reasonably have determined that Cater's decision to proceed to the penalty phase without requesting an additional continuance and funding was based on informed professional judgment following a reasonably adequate investigation.

A fair-minded jurist could have reasonably have determined that, based on the evidence, a longer continuance would not have resulted in a more favorable disposition for Petitioner, for the reasons stated and given the substantial evidence presented against Petitioner at the penalty phase. (See claims O, R and S, *ante*.)

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W2 is denied.

d. Analysis of Claim W3

Petitioner next alleges that defense counsel Cater did not adequately interview and prepare penalty phase witnesses Mary Bolin and Paula Bolin. (ECF No. 113 at 195-96.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California

Supreme Court, which the California Supreme Court summarily rejected on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

1) Pretrial Interview and Preparation

Mary Bolin was the sole defense witness regarding the Spencer and Ross incidents in aggravation. (See RT at 2468-2477.) Mary also testified that Petitioner had been a good father to her. (RT at 2477-80.)

Mary's sister, Paula, testified that Petitioner had suffered a personal tragedy (the death of a beloved girlfriend) shortly before the capital crimes, and that he had lived at the remote cabin, the site of the murders, for close to a year after his girlfriend's death. (See RT at 2494-95.)

Petitioner faults Cater for allowing his investigator, Ruby, to conduct the pre-testimony interviews and preparation with Mary and Paula for direct and cross-examination, rather than doing so personally. Petitioner contends this made their testimony less compelling than it could have been given the mitigating information referenced in their respective habeas declarations given ten years later. (See RT at 2477-2480, 2490-95; SHCP Ex.'s 5, 9.)

Petitioner also claims that the first time Mary ever spoke to Cater was on the witness stand. (See EH Ex. 5, p. 9.) Likewise, Paula did not discuss her testimony with defense counsel before she took the stand. (See EH Ex. 9, p. 15.) Petitioner claims this lack of preparation allowed these witnesses to be unnecessarily impeached (see RT at 2479-83), constituting ineffective assistance. See Douglas v. Woodford, 316 F.3d 1079, 1088 (9th Cir. 2003) (it is imperative in penalty phase that all relevant mitigation information be unearthed).

The California Supreme Court could reasonably have denied this claim. Neither Mary nor Paula recalled speaking directly to Cater before their testimony. (See SHCP Ex. 5 at 9; SHCP Ex. 9 at 15.) Nonetheless, Ruby interviewed these witnesses prior to trial, prepared a written report, and may have spoken with Cater about these interviews. Cater presumptively knew what mitigating information these witnesses had to offer. (See SHCP Ex.'s. 5, 9, 24.) Cater could reasonably have believed that other tasks were more important than interviewing these witnesses personally given information already learned from Mr. Ruby.

The record demonstrates that both Mary and Paula likely knew the general nature of their

expected testimony at Petitioner's trial given the facts covered in Ruby's interview with them. (See e.g., RT at 2478-79, 2495; SHCP Ex.'s 5 at 8, 9 at 14, 24 at 8-10.) Each knew their father was facing the death penalty and neither wanted him to be sentenced to death. (See RT at 2478-79, 2495.)

Petitioner's attempt to support his argument with citation to Douglas, Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997), and Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006), is unavailing because each case is distinguishable. (See ECF No. 178 at 277-78.) Douglas is a pre-AEDPA case, thus on review AEDPA deference was not given to the state court's finding of no error. 316 F.3d at 1085. Moreover, in Douglas, "Douglas's wife assert[ed] that she did not even know she would be testifying until the night before the penalty phase began." Id. at 1087. Here, Petitioner's daughters were interviewed multiple times and given information regarding the nature of their testimony in the weeks before trial.

The Bloom and Hovey courts considered the failure of counsel to prepare expert witnesses who were not given important documents and background materials regarding the defendants, seriously impairing the credibility and testimony of critical mitigation witnesses. See Bloom, 132 F.3d at 1277; Hovey, 458 F.3d at 930. Here, Petitioner's daughters had lived with him and were generally aware of his background. (See SHCP Ex's. 5 and 9.) Furthermore, both were presented as lay witnesses.

Petitioner also alleges that Cater failed to elicit from Mary and Paula certain details in mitigation relating to Petitioner's mental state, his family background, the effects of his experiences in Vietnam, his chronic physical pain, his many good deeds and the death of his girlfriend shortly before the capital crimes. (ECF No. 178 at 297-98.) However, it appears that neither Mary nor Paula could testify to Petitioner's mental state near the time of the shootings, not only because they were without sufficient knowledge or expertise, but because each stated that they had seen him only occasionally in the months leading up to the murders. (See SHCP Ex.'s 5 at 6, 9 at 14.)

Testimony regarding Petitioner's alleged good deeds was presented through other witnesses. (RT at 2508-09, 2515-19, 2523-24.) There was other testimony that Petitioner housed neighborhood teenagers and took in and provided for those in need of a home. (RT at 2402, 2469-70, 2473, 2486-89, 2567.)

It seems unlikely Mary and Paula could have provided any significant mitigating testimony relating to Petitioner's childhood and family life because Petitioner refused to discuss such matters with them. (See SHCP Ex. 9 at 8.) The record otherwise reflected Petitioner's troubled home and life as a youth, (see RT 2503-04); his enlistment in the Navy, (see RT at 2505); and his positive influence on his children and others. (See RT 2502-29.) As noted, Paula did testify about the death of Petitioner's girlfriend. (See RT at 2494-95.)

Petitioner claims that Cater's failure to prepare Mary to testify resulted in her impeachment regarding the Spencer assault. As discussed more fully in claim W6, *post*, Petitioner's unadjudicated 1979 assault upon Spencer, witnessed by Mary, was offered in aggravation at the penalty phase. (See ECF No. 113 at 200-03.) Mary testified that Spencer was partying at her house and put his hands down her pants and tried to pull her top down. (See Id. at 2470-71.) She testified that Petitioner, upset after Mary told him what had happened, arrived and ran towards Spencer and ordered him to leave and that Spencer exited through the backyard where Richard Balsamico began beating him with a stick. (See RT at 2412-72.) Mary testified that she did not see Petitioner hit Spencer. (See RT at 2473.) However on cross-examination, Mary told the prosecutor she did not remember the police coming to her house or talking to the police. (See RT at 2480-81.) She was then impeached with the police report of Deputy Gutierrez regarding the Spencer incident in which Mary failed to state the events to which she testified. (See RT at 2479-83.)

However, Cater was presumably aware of Mary's involvement in the Spencer assault from the police report and from her interview with investigator Ruby. (See SHCP Ex. 24 at 9.) Cater may have chosen, as a matter of trial tactics, not to have Mary re-read the police report from the Spencer assault prior to her testimony because: (1) she had told police at the time that she had not seen anything (see RT at 2480-83, 2578; SHCP Ex. 27 at 6-7) and (2) Cater could reasonably have believed that the jury would find her more credible if she simply indicated that she did not remember certain events rather than if she had prepared her testimony by reviewing the police report and the statements of others.

Along the same lines, Cater may have decided for tactical reasons to avoid in depth questioning of Paula and Mary at trial about the Ross and Spencer incidents. Mary, at the time of the

Spencer assault, apparently had declined to provide police with the information to which she testified. (RT at 2480-83, 2578.)

Nothing in the record suggests that Paula was present for the Ross shooting (Ross Police Reports), or that Paula had been untruthful to police (RT at 2496-97), or that Paula may have been using drugs at the time of trial. (SHCP Ex. 9 at 1).

Defense counsel reasonably could have concluded that further questioning Mary and Paula about these issues might have served only to emphasize the aggravating circumstances, rather than elicit information helpful to the defense.

The California Supreme Court could reasonably have concluded that Cater was not ineffective by failing to interview and prepare these witnesses personally.

2) Prejudice

Even if counsel was deficient as alleged, the state supreme court could reasonably have concluded there was no prejudice.

Petititioner makes no evidentiary showing that had counsel Cater personally interviewed Mary and Paula, he would have discovered more favorable evidence for use at the penalty phase trial. Mary and Paula were each interviewed by investigator Ruby. Yet neither apparently provided the information about the aggravating events that is contained in their respective habeas declarations of a decade later. (See SHCP Ex.'s. 5, 9, 24.) Moreover, as discussed in claim W7, *post*, defense counsel did present some of the information included in their declarations, and that which was not presented could reasonably be seen as essentially cumulative.

As to Mary's impeachment regarding the Spencer incident, i.e., that Mary, at the time of the Spencer assault, apparently had declined to provide police with the information to which she testified at trial (RT at 2480-83, 2578), mitigation is apparent in the record. Mary testified that she was only thirteen at the time of the incident. (RT at 2483.) She also may not have talked to police because she was scared (RT at 2482), given her youth and having just been the victim of an alleged sexual assault (RT at 2471).

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below

an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

For the reasons stated, it does not appear that the state supreme court's rejection of the claim claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W3 is denied.

e. Analysis of Claim W4

Petitioner next alleges ineffective assistance by defense counsel's failure to investigate and present evidence concerning the letter to Jerry Halfacre. (ECF No. 113 at 195-98.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court (see SHCP at 280-82), which that court summarily rejected on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus).

The prosecution introduced the letter written by Petitioner to Halfacre at the penalty phase trial. (See RT at 2443.) Though Halfacre did not testify at the penalty phase, his probation officer did, stating that Halfacre gave her the letter on October 12, 1990. (Id.) The letter and its contents are discussed in detail in claim R, *ante*.

Petitioner alleges that there were additional pages of that letter, subsequently obtained by Petitioner's daughter Paula as described in her unsworn statement, which allegedly implicate Halfacre in the capital murders and Petitioner's marijuana farm. (See ECF No. 113 at 197; SHCP Ex.'s 9, 16, 25.)

Petitioner also faults defense counsel for not interviewing Halfacre or his Probation Officer, Ms. O'Connor, regarding the surrounding circumstances including any inducement or benefit Halfacre might have received. (See ECF No. 113 at 196; see also claims R1-R4.) Petitioner alleges that in exchange for providing the letter to authorities, Halfacre was released from probation and allowed to leave the state.

Strategic decisions based upon investigation conducted by counsel are accorded deference:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. "The scope of a defense counsel's pretrial investigation necessarily follows from the decision as to what the theory of defense will be." Soffar v. Dretke, 368 F.3d 441, 473 (2004). In determining whether counsel made reasonable tactical decisions about certain evidence, a court focuses on whether the investigation supporting counsel's decision to introduce or omit certain evidence was itself reasonable. Wiggins, 539 U.S. at 523.

Here, for reasons discussed in claims I6 and K, *ante*, Petitioner has failed to demonstrate both that counsel failed to investigate these circumstances and, even if he did, that his failure to do so was prejudicial. Even assuming that the missing pages of the letter, allegedly obtained by Paula, could establish that Halfacre turned over the letter out of fear he would be arrested, nothing in the record suggests counsel, or Halfacre for that matter, were aware of the alleged missing pages.

Petitioner suggests that Cater obtained the missing pages of the letter sometime after the guilt phase, (see ECF No. 113 at 197), but has not offered Cater's declaration in this regard. If Petitioner is correct that Cater had the letter, he does not show that Cater failed to consider it. Significantly, nothing in the noted testimony about the shootings suggests that Halfacre was involved. A defense attorney is not obligated to track down each and every possible witness or to personally investigate every conceivable lead. An ineffective assistance of counsel claim cannot rest upon counsel's alleged failure to engage in a scavenger hunt for potentially exculpatory information with no detailed instruction on what this information may be or where it might be found. Farr, 297 F.3d at 658.

As more fully discussed in claim K, *ante*, Petitioner has not demonstrated that Halfacre provided the letter in exchange for his release from probation and travel restrictions. The state supreme court could reasonably have determined that Halfacre received no undisclosed benefits in exchange for his providing the letter to his probation officer.

Additionally, for reasons discussed in claims R and I6, *ante*, any alleged failure to investigate or present this evidence was not prejudicial. The state supreme court could reasonably have found that the missing page(s) of the letter could not have been used to "defeat[ ] any argument that [Halfacre] was in fear of [Petitioner's] threats" and thus prevent admission of the Halfacre letter under Penal Code § 422. (See ECF No. 113 at 197.)

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W4 is denied.

f. Analysis of Claim W5

Petitioner next claims that defense counsel did not adequately investigate and present evidence concerning Petitioner's prior serious felony conviction for attempted voluntary manslaughter of Kenneth Ross. (See ECF No. 113 at 198-200.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which the California Supreme Court summarily rejected on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.)

Petitioner, then the legal guardian of Nyla Olsen, alleges that the shooting of Ross, then Nyla's boyfriend, occurred following an argument between Ross and Olsen at Petitioner's residence. (See RT at 2400-10.) Ross eventually walked back to Petitioner's house to ask him what Olson had told him. (See RT at 2400, 2408.) Petitioner allegedly came out the front door and shot Ross once in the chest with an M-1 .30 caliber carbine rifle (see RT at 2400-02, 2563) and began to beat Ross all over his upper body with his rifle. (RT at 2401.) Ross was taken to the hospital by paramedics and

stayed there off-and-on for about a month while being treated for a torn liver, punctured diaphragm and lung, and broken rib. (RT at 2403.)

Mary, then 15 years old, was a witness to the shooting and testified that Ross was crazed, drunk, slapping Nyla around and that Ross appeared to have had something in his hand and gestured toward Petitioner prior to being shot. (See RT at 2473-76.) Olsen, who had married Ross by the time of trial, gave testimony that partially contradicted Mary's testimony. (See RT at 2555-72.)

Petitioner faults Cater for not cross-examining Olsen about contradictory testimony she gave at the preliminary hearing in the Ross matter (Testimony of Nyla Olsen, Preliminary Hearing Transcript, People v. Bolin, Los Angeles County Municipal Court No. A527608, SHCP Ex. 26), in order to show that Petitioner acted out of fear of Ross. This omission, Petitioner argues, allowed the prosecutor to use Olsen's testimony to support the prosecutor's statement to the jury that "[a]gain, a daughter [Mary] came in [and] told a story which simply was not true but, then, again, this girl loves her father." (See RT at 2579.)

Petitioner faults defense counsel for allowing Mary to testify regarding the Ross incident. He claims this created an inconsistent role for Mary, in that her testimony regarding the Ross incident undermined Petitioner's mitigation case because her credibility as a fact witness was compromised by her desire to assist her father, whom she loved. Petitioner claims further investigation would have turned up a witness to the event, Richard Brogden, who knew Ross and would have testified that, immediately before the shooting, he had told Petitioner that Ross carried a gun. (See ECF No. 113, at 199:21-200:8; SHCP Ex. 11.)

Petitioner faults defense counsel for not retaining a mental health expert to evaluate penalty phase issues and arrive at explanations for the shooting of Ross which might have become apparent to counter the prosecution's argument that Petitioner "is a violent man who uses violence to solve problems." (See RT at 2579.)

However, the California Supreme Court could reasonably have determined that defense counsel was not ineffective in any of these regards. Olsen testified at the preliminary hearing that she had been crying and screaming while she and Ross were outside arguing. (See SHCP Ex. 26 at 50-51.) At the penalty phase trial, she stated that she had argued with Ross outside, but she was never

asked if she was crying during that time. (See RT at 2563-73.) Also, at both the preliminary hearing and the penalty phase trial, Olsen confirmed Mary's testimony that Ross may have grabbed Mary and pushed her aside. (See SHCP Ex. 26 at 49-50; RT at 2572.) There was no apparent material inconsistency in these regards.

As to Olsen's testimony that there might have been a fight between Petitioner and Ross, Olsen never testified that the fight was anything more than verbal, or that Ross had a weapon. (See SHCP Ex. 26.) Instead, Olsen testified at the preliminary hearing that Ross had told Petitioner only "that he wanted to talk to him," not that he threatened him. (See SHCP Ex. 26 at 48.)

Defense counsel reasonably could have made a tactical decision not to focus on this testimony because it was minor and likely aggravating, and that attacking Olsen's credibility based on her marriage to Ross was a more promising strategy. As noted in claim I2, *ante*, impeachment tactics are a matter of trial strategy. Ferreira-Alameda, 815 F.2d at 1254; Jaiceris, 290 F. Supp. 2d at 1080-82. Similarly, the extent and nature of cross-examination is also a matter of trial tactics entrusted to the judgment of counsel. Dow, 211 F.3d at 487.

Petitioner's claim that allowing Mary to testify regarding the Ross incident created an inconsistent role for Mary is likewise not compelling. Mary was a witness to the Ross shooting and provided some mitigating evidence regarding the shooting. Even assuming that this allegation has been exhausted (Respondent argues otherwise, see ECF No. 194 at 334:21-24), any potentially "inconsistent role[]" created for Mary by allowing her to testify regarding both aspects of the case, likely was not prejudicial since Mary's testimony in both areas provided some mitigating evidence for Petitioner. Significantly, Petitioner does not explain how and why impeaching Mary's credibility regarding the Ross shooting necessarily resulted in "her ability to generate mercy [being] greatly reduced." (See ECF No. 178 at 283.)

Regarding defense counsel's failure to investigate potential witness Richard Brogden's information about the Ross shooting, counsel reasonably could have determined that Brogden's testimony would have been of questionable value. Brogden did not testify at the trial or the preliminary hearing in the Ross case. (See CSC Informal Response Ex. H.) Nor was he questioned by the police in that case. (See SHCP Ex. 11 at 6-7; see also SHCP Ex. 18b.)

Even had Brogden testified, it is not reasonably probable that the result of Petitioner's proceeding would have been more favorable. Brogden apparently did not see Petitioner shoot Ross or witness any altercation, other than verbal, between them. (See SHCP Ex. 11 at 6-7.) Though Brogden states in his declaration that he told Petitioner that Ross owned a gun, he also states that he had no idea whether Ross had it with him the day that Petitioner shot Ross. (See SHCP Ex. 11 at 6-7.)

Defense counsel also reasonably could have found that aspects of Brogden's testimony would have been unfavorable. Brogden states in his declaration that Petitioner "snaps" when he gets angry, that "once he snaps, all bets are off," and that he (Brogden) tells his friends to "get the hell out of Dodge . . . [w]hen [Petitioner] gets to the 'snapping' point." (See SHCP Ex. 11 at 1, 5-6.) Testimony along these lines would have supported the prosecution theme that Petitioner used violence to resolve problems.

Petitioner also faults defense counsel's failure to present mental health evidence to mitigate Petitioner's actions in the Ross shooting. Yet Petitioner apparently did not offer any mental health evidence or defense at his earlier trial in the Ross matter. Nor does it appear that Petitioner's own mental health experts opine that he was acting under a mental disorder at the time of the assault against Ross. (See SHCP Ex.'s 10, 22.)

For the reasons stated, the California Supreme Court could reasonably have found that Petitioner was not prejudiced by counsel's alleged failure to investigate or present evidence regarding the Ross shooting and that counsel rendered constitutionally effective assistance at trial in this regard.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability outcome of the proceeding would have been different. Strickland, 466 U.S., at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W5 is denied.

g. Analysis of Claim W6

Petitioner next alleges that defense counsel did not adequately investigate and present evidence concerning his unadjudicated 1979 assault upon Spencer offered in aggravation at the penalty phase. (See ECF No. 113 at 200-03.) Petitioner raised same allegations regarding the Spencer assault in his petition for writ of habeas corpus in the California Supreme Court (see SHCP at 287-90), which that court summarily rejected on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.)

The prosecutor presented the testimony of Spencer during the penalty phase. (See RT at 2411-29) Spencer testified that in 1979, he was Petitioner's 23-year-old neighbor. He had gone to Petitioner's house at the invitation of "Becky," who was renting a room there. Petitioner's daughters were present, as was an individual named Brian Martinez. (See RT at 2413-30.)

Spencer testified that the door flew open and Petitioner came in and swung a tree limb at him; Spencer ran out the back while "Rick" began beating him with a stick; Petitioner then hit Spencer in the head with a pipe. (See RT 2374-77.) Spencer was treated for abrasions and required eight stitches. (See RT at 2425-26.)

Mary, then about 12 years old (see RT at 2469, 2483), testified that Spencer and Brian Martinez were partying at her house, smoking pot and sniffing paint, when Spencer put his hands down her pants and tried to pull her top down. (See RT at 2470-71.) She testified that Petitioner, upset after Mary told him what had happened, arrived and ran towards Spencer and ordered Spencer and Martinez to leave, and that Spencer then exited through the backyard where Richard (Rick) Balsamico, who disliked Spencer, began beating him with a stick. (See RT at 2412-72.) Mary testified that she did not see Petitioner hit Spencer. (See RT at 2473.)

On cross-examination, Mary told the prosecutor she did not remember the police coming to her house or talking to the police. (See RT at 2480-81.) She was then impeached with the police report of Deputy Gutierrez regarding the Spencer incident in which Mary failed to provide the information to which she testified. (See RT at 2479-83.)

Petitioner faults counsel for not preparing Mary for the cross-examination (see SHCP Ex. 5)

and for not rehabilitating Mary thereafter. (See SHCP Ex. 27.) He complains defense counsel did not attempt to rebut the prosecutor's suggestion that Mary was lying to protect her father. (See RT at 2578.) He also complains that counsel did not present testimony from Balsamico, who would have stated that Spencer was drunk, armed with a knife and that it was Balsamico, not Petitioner, who beat Spencer. (See SHCP Ex. 12.)

The Court is not persuaded. The California Supreme Court could reasonably have found defense counsel's questioning of Mary about the Spencer assault was tactically motivated to avoid further harm to her testimony. Spencer testified that he had not been using drugs or alcohol that day and did not believe any of the teenagers at Petitioner's house were either. (See RT at 2417-25; see also SHCP Ex. 27.) He testified that he was not carrying any weapons, did not make any threats or moves toward Petitioner, and never spoke to Petitioner during the assault. (See RT at 2416, 2423, 2425.)

On cross-examination, Mary admitted that she did not tell the police any of this information to which she testified. (See RT at 2480.) She did not remember the police ever coming to talk to her or refusing to talk to them (see RT at 2480-81), or that the others were using drugs or alcohol that evening. (See RT at 2480-82.) However, she admitted that she may have told the police that she did not see anything because she was scared. (See RT at 2482.) She also admitted that she did not remember the incident very well. (See RT at 2480.) On redirect examination, counsel confirmed that Mary was only thirteen at the time of the incident. (See RT at 2483.)

Petitioner does not suggest how Mary's testimony could have been rehabilitated given the foregoing. It appears that, notwithstanding her denial, Mary gave statements to the police at the time of the incident. (See SHCP Ex.'s 5, 27.) The California Supreme Court could have found it reasonable for defense counsel not to pursue any significant rehabilitation attempt, but to move on to other defense matters.

As for Petitioner's assertion that his counsel failed to prepare Mary for her testimony resulting in her effective impeachment (see ECF No. 113 at 202; ECF No. 178 at 316), the state supreme court could reasonably have found the assertion refuted for reasons discussed in claim W3, *ante*. Similarly, Petitioner's complaint that Mary was placed in an inconsistent role by being asked to testify about the

Spencer and Ross incidents and to plead for mercy (ECF No. 178 at 316), fails for the same reasons discussed in claim W5, *ante*.

Petitioner also faults defense counsel for not presenting the testimony of his friend, Balsamico, (see ECF No. 113 at 202-03), who appears to claim responsibility for the assault on Spencer and who states that he would have testified on Petitioner's behalf had he been asked. (See SHCP Ex. 12 at 3, 5-6.) However, counsel could reasonably have found such testimony suspect. Balsamico's statement to the police at the time of the Spencer incident was that Petitioner was involved in a physical fight with Spencer, in which Balsamico joined in aid of Petitioner. (See SHCP Ex. 27 at 6.) Petitioner himself admitted that he was involved in the fight and struck either Spencer or Martinez. (See Id. at 5.)

Balsamico's habeas declaration, provided ten years after the shootings, also appears inconsistent with Mary's testimony and interview about the assault. (See RT at 2469-73; SHCP Ex. 12 at 3-4.) Counsel, for tactical reasons, may have chosen not to present such testimony that could have been readily impeached. See, e.g., Denham, 954 F.2d at 1505-06 (defense counsel not ineffective where decision not to call witness based on inconsistencies in witness's testimony).

Petitioner also complains that defense counsel should have presented the testimony of a mental health expert to attempt to explain Petitioner's behavior in the Spencer assault. This claim, which appears to be unexhausted, in any event lacks merit. Not even Petitioner's mental health experts opine the existence of a mental defense to his assault against Spencer. (See SHCP Ex.'s. 10, 22.) Moreover, counsel could have chosen not to present a mental defense, if one existed, because the Spencer assault was remote in time (ten years prior to the instant capital murders) and suggested some mitigating evidence (action by Petitioner protecting his daughter from a perceived sexual assault).

Additionally, Petitioner has not demonstrated prejudice. Mary was rehabilitated somewhat following her impeachment, by her testimony that she was only thirteen at the time of the Spencer incident, (see RT at 2483), and may not have talked to police because she was scared, (see RT at 2482), and having been the victim of an attempted sexual assault. (See RT at 2471). Thus tactical explanations may have existed for not pursuing Balsamico's testimony.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W6 is denied.

h. Analysis of Claim W7

Petitioner next presents multiple allegations that defense counsel was ineffective in the investigation, preparation, and presentation of the case in mitigation, denying the jury a fair and accurate profile of him, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (See ECF No. 113 at 203-18.)

Petitioner raised these allegations to the California Supreme Court on direct appeal, which that court rejected, noting that:

> Although several family members and friends presented mitigating testimony as to his background and character, defendant contends his counsel rendered ineffective assistance at the penalty phase in failing to submit additional evidence regarding his childhood, including alleged abuse, his mental health, his military service and injuries, and his employment history. We find none of this evidence of record. Accordingly, "without engaging in speculation, we cannot infer anything about its existence, availability, or probative force, or the probable consequences of its use at trial." Defendant has thus failed to establish either incompetence or prejudice.

Bolin, 18 Cal. 4th at 345.

Petitioner also raised these allegations in his petition for writ of habeas corpus in the California Supreme Court, which summarily rejected the claim on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus).

1) Petitioner's Background and Life History

Petitioner claims that counsel was ineffective for failing to adequately investigate his

background and family history, and by not conducting a social history or life history evaluation, as required by the *ABA Guidelines*. (See ECF No. 113 at 203-218; SHCP Ex. 47 1/7/91 Marsden Hearing RT at 2309); see also *ABA Guidelines*, §§ 11.4.1, 11.8.3.F(1).) Petitioner argues that further investigation would have revealed: a history of child abuse, head injuries, and neglect; a history of exposure to neurotoxins, back injury and substance abuse; his mental health issues related to his six months of service in the Vietnam War; his long history of polysubstance abuse; his alleged ingestion of multiple narcotics on the day of the shootings; and his character for hard work and generosity. (See ECF No. 113 at 203:13-18.)

The California Supreme Court was not unreasonable in rejecting these allegations. Mr. Cater's investigator, Mr. Ruby, discovered much information about Petitioner's background, despite the fact that Petitioner apparently was unwilling to discuss his childhood and was not particularly forthcoming with details about his background in general. (See SHCP Ex. 9 at 8 [Paula Bolin's declaration indicating that Petitioner refused to discuss his childhood, his family, or her mother]; SHCP Ex. 20 at 2 [interview with Dr. Markman during which Petitioner refused to discuss his family background]; see also February 25, 1991, Probation Officer's Report and Recommendation at 3, 16 [indicating that Petitioner refused to discuss his background or family history].)

Petitioner claims the "full story" of his abuse and neglect was never told. (See ECF No. 113 at 205:20-21.) However, the record reflects details of Petitioner's broken home and life on the street as a youth, (see RT at 2503-04); his enlistment in the Navy as a teen, (see RT at 2505); his positive influence on his kids and others (see RT 2502-29); and that he was a model inmate during his earlier incarceration relating to the Ross incident (see RT at 2498-2500; SHCP Ex. 24).

Capital defense counsel has "a duty to make reasonable investigations or to make reasonable decisions that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691; see also Babbitt v. Calderon, 151 F.3d 1170, 1173 (1998) (a lawyer may make a reasonable decision that a particular investigation is unnecessary). The relevant inquiry is not what counsel could have pursued but whether the choices counsel made were reasonable. Siripongs v. Calderon, 133 F.3d 732, 736 (9th

Cir. 1998).

Mr. Cater relied upon interviews with and statements from friends and family; materials related to Petitioner's prior convictions; materials related to the current offense; portions of Petitioner's trial testimony; and information related to his medical care, military service, employment, and education. (See, e.g., SHCP Ex 20, 24.) These are all sources similar to those relied upon ten years later by Petitioner's habeas expert, Dr. Matthews. (See SHCP Ex.'s. 22, 24, 29, 31, 32.)

Mr. Cater also spoke with Petitioner and questioned him about his background, including his employment history and military service, as well as his relationships with family and friends. (See SHCP Ex. 47, 1/7/91 Marsden RT at 2308-09.) Cater's investigator, Mr. Ruby, interviewed Petitioner's daughters Mary and Paula, his stepdaughter Pamela Castillo, Petitioner's sisters Francis and Rosemary, and other relatives, including Gary Monto, Marilyn Perez, Trina Perez, Florence Monto, Betty Monto, Jermiah Monto and Sylvester Monto. (See SHCP Ex. 24 at 1-5.) Ruby interviewed David Alexander, Petitioner's probation officer in Oklahoma (see SHCP Ex. 24 at 1), and a family friend named Mrs. Myrick, who agreed to testify on his behalf. (See Id. at 11-12.)

It appears that Ruby interviewed these witnesses prior to the penalty phase trial, prepared a written report and spoke with Cater about his interviews. (See SHCP Ex. 24.) It also appears that Cater spoke to Ruby about Paula and Mary Bolin and that Cater likely knew what mitigating information these witnesses had to offer. (See SHCP Ex.'s. 5, 9, 24.)

Based on this investigation, Cater could reasonably have determined which witnesses would provide the most effective presentation given the mitigation theory that Petitioner had positive attributes and could adjust well to prison. Even if defense counsel did not review and present evidence from Petitioner's prison file showing he would function well in a life without parole setting, (see ECF No. 113 at 212-13), such likely would have been cumulative of the above noted life history, and unlikely to affect the result of proceedings given the noted substantial aggravating evidence. (See claims O, R and S, *ante*.)

Significantly, Petitioner did not provide a declaration from either Ruby or Cater regarding the extent to which they discussed noted interviews and witnesses and trial tactics. Petitioner does not specifically identify any school, employment, medical or psychiatric records that Ruby or Cater could

have sought or introduced in 1990 that would have provided additional information in support of a mitigating factor.

Petitioner also argues that Soria and Cater did not communicate sufficiently with each other and relied on incomplete military, prison, and life history records. However, these allegations fail for reasons discussed in claim W1, *ante*.

The California Supreme Court could reasonably have found defense counsel's penalty phase investigation was not deficient in the above regards, for the reasons stated. See e.g., Hamilton, 458 F. Supp. 2d at 1134 (defense interviewed the available witnesses, and no better available witness about petitioner's background and social history other than his mother was uncovered).

2) Medical and Mental Health History

Petitioner claims counsel failed to investigate, develop and present mitigating medical and mental health evidence. (See ECF No. 113 at 203:4-8.) He faults counsel for failing to provide competency examiner, Dr. Markman, with sufficient information about Petitioner's family and life history; for failing to request that Dr. Markman evaluate potential issues in mitigation; and for failing to consult with other qualified experts regarding potential issues in mitigation. (See ECF No, 113 at 203-18.)

Petitioner claims that these shortcomings left his history of exposure to neurotoxins and organic brain damage undeveloped and unpresented. (See ECF No. 113 at 203:18-23; SHCP Ex.'s. 10, 20, 22.)

Petitioner claims counsel's deficiencies impaired his defense theory that the cumulative effect of medical and mental health factors, coupled with alcohol and cocaine ingestion prior to the crime, caused him to perceive a great threat from the actions of Huffstuttler and triggered a strong self-defense reaction at the time of the crimes. (See ECF No. 113 at 215:21-28; SHCP Ex. 22.)

The record reflects that Dr. Markman, during his trial competency (psychiatric) evaluation, asked Petitioner about his family history. Dr. Markman related his findings to counsel in a letter. (See SHCP Ex. 20 at 2.) Petitioner told Dr. Markman that his parents divorced when he was nine years old; that he was shuttled among different living situations; that he completed the tenth grade, performing poorly in school; and that he had been married and divorced three times. (Id.) Dr.

Markman noted that Petitioner refused to provide any further information regarding his family background. (Id.) Petitioner claimed polysubstance abuse "years ago" and an extended history of using alcohol daily. (Id.)

Petitioner told Dr. Markman that the shootings related to an exchange of marijuana for cocaine and that he had ingested a substantial amount of alcohol and smoked cocaine prior to the shootings. (Id.) However, Petitioner "repeatedly maintained that he knowingly acted in self-defense and that another individual, as yet unidentified, may have been responsible for some of the deaths." (Id.) Dr. Markman noted that Petitioner had a successful nine-year history of military service in the Navy and also that he had been discharged because of a back injury. (Id.)

Here, the state supreme court was not unreasonable in concluding counsel was not deficient regarding development and presentation of medical and mental health mitigating information. Dr. Markman's report, though generated with a view toward trial competency, did not reasonably suggest the need to investigate potentially mitigating medical and mental health defenses. Dr. Markman apparently did not identify matters warranting further investigation, concluding that Petitioner "demonstrates no current evidence of a major mental disorder." (SHCP Ex. 20 at 1-3.) Nor are the facts of this case suggestive of the need for such further investigation. Petitioner's noted seemingly purposeful and goal oriented statements and actions just prior to, during and after the capital murders do not suggest uninvestigated potentially mitigating medical or mental state defenses. Counsel is not put to further investigation where reasonable initial investigation suggests such would not bear fruit. See Hensley v. Crist, 67 F.3d 181, 186 (9th Cir. 1995).

Even though Petitioner may not have been forthcoming with useful information regarding his medical and mental health background, by speaking with friends and family Ruby and Cater discovered and presumably considered aspects of Petitioner's violent family background; that he had lived on the streets from a young age; that he served in the Navy for nine years; that he served in the Vietnam War in 1972; that he was discharged from the Navy a year later because of a back injury; that he had behaved well while on parole and while incarcerated in Chino; and that he claimed to have had a long history of substance abuse, including ingestion of alcohol and cocaine on the night of the shootings (although this latter claim appears rebutted by other facts in the record). (See SHCP

Ex.'s. 9, 20.)

Regarding alleged exposure to toxic substances, the California Supreme Court reasonably could have found that defense counsel might not have been on notice of such and that Petitioner's work as a machinist and a pipefitter in the Navy may have exposed him to toxic solvents.

Petitioner asserts that,

> [L]ay witnesses also had a wealth of information about Mr. Bolin's exposure to toxic chemicals, and their apparent effects. See, e.g., Exhibits 4 (Declaration of Mark Daser), 9 (Declaration of Paula Bolin), 11 (Declaration of Richard Brogden). Counsel made no efforts to locate such witnesses, nor to identify work and military records which would document the exposure.

(See ECF No. 178 at 293:12-18.) But Petitioner does not suggest that any of the noted witnesses saw in Petitioner signs of harmful toxics exposure, or were qualified to offer an opinion regarding toxic chemicals. Here again, the record seemingly contradicts any suggestion that Petitioner was impaired when he committed the capital crimes or while he was in custody. Ramirez described how Petitioner had wiped his prints off the gun, put the gun into Huffstuttler's hand, put marijuana near the body, staged the scene to look like a "drug deal gone bad," and pulled the wires from Wilson's car to prevent its use should Wilson return, thus ensuring that Wilson would bleed to death before getting help. (See SHCP Ex. 13 at 4-7, 15-17; RT 1738, 1863-64, 1928-29, 1957, 1959, 1961, 1975.)

Additionally, for the reasons noted above and in claim I10, *ante*, the California Supreme Court could have reasonably discounted evidence relating to exposure to toxins. As stated, after examining Petitioner and inquiring into his employment and service with the Navy, Dr. Markman concluded that Petitioner "demonstrates no current evidence of a major mental disorder." (See SHCP Ex. 20 at 1-3.) Petitioner's taking flight from the crime scene to the Los Angeles area and then Chicago, and his apparent self-serving statements to Dr. Markman, all suggested that he was mentally capable, as did his pursuit of heat of passion and imperfect self-defense theories. (See Id. at 1-2.)

In Hensley, the Ninth Circuit recognized that a petitioner must show that counsel was somehow put on notice to investigate a particular matter. 67 F.3d at 186; see also Langford v. Day, 110 F.3d 1380, 1387 (9th Cir. 1997) (citing Strickland, 466 U.S. at 691) (the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or

actions."); Dyer v. Calderon, 113 F.3d 927, 941 (9th Cir. 1997), vacated on other grounds, 151 F.3d 970 (9th Cir. 1998) (petitioner never told attorney that he smoked PCP, and doctors were also unaware, so no need to investigate despite current declarations). Here, it does not appear that either Petitioner or any other witness discussed prior exposure to toxic substances, or that Petitioner behaved as if he suffered from brain damage or had any noticeable cognitive deficits.

3) History of Substance Abuse

Petitioner claims that he was prejudiced by defense counsel's failure to investigate his long history of substance and alcohol abuse even though counsel was aware and could have introduced evidence through Dr. Markman and/or Petitioner. (ECF No. 178 at 294-95; SHCP Ex. 20 at 1-3.)

However, defense counsel could reasonably have decided to omit this evidence for fear it might not be viewed as mitigating by the jury. See Clisby v. Alabama, 26 F.3d 1054, 1056 (11th Cir. 1994) ("precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use"); see also White v. Singletary, 972 F.2d 1218, 1225-26 (11th Cir. 1992) ("counsel's strategy not to dwell on the intoxication issue" was tactical and reasonable).

Defense counsel may have felt that introducing a long history of substance abuse would have contradicted the other evidence presented in mitigation, namely that Petitioner was devoted to his family, had worked hard throughout his life to support his family, and that he had adjusted well to prison life. Furthermore, counsel also may have felt that evidence of substance abuse would have supported the defense theory that Petitioner shot the victims because his drug operation had been exposed. In such regards, the record could reasonably support a determination that defense counsel was aware of Petitioner's substance abuse and did not present this evidence for tactical reasons. If so, it appears unlikely that any further investigation would have changed counsel's decision not to present this type of evidence during the penalty phase.

Petitioner argues that the investigation in his case was similar to investigations which the Ninth Circuit had previously found to be deficient. He cites to the cases of Correll v. Ryan, 465 F.3d 1006 (9th Cir. 2006), amended by Correll v. Ryan, 539 F.3d 938, (9th Cir. 2008); Boyde, 404 F.3d 1159 amended by 421 F.3d 1154; Frierson v. Woodford, 463 F.3d 982 (9th Cir. 2006); and Karis v. Calderon, 283 F.3d 1117, 1133 (9th Cir. 2002). However, each of these cases is distinguishable.

In Correll, a pre-AEDPA case subject to de novo review, defense counsel met only briefly with defendant between the trial and penalty phase, almost completely failed to investigate available mitigation evidence, and put on no affirmative penalty defense. 539 F.3d at 943-44. In Boyde, defense counsel failed to investigate mitigating childhood abuse, and failed to introduce the evidence his limited investigated did uncover. 404 F.3d at 1176. In Frierson, defense counsel was on notice of, but failed to investigate and present mitigating evidence of extensive drug history, childhood abuse and head trauma, mental impairment and brain damage. 463 F.3d at 992-96. In Karis, defense counsel failed to investigate and present significant mitigation evidence; the defense mitigation presentation took only 48 minutes and omitted evidence of childhood poverty and abuse. 283 F.3d at 1133-41.

By contrast, in this case, investigator Ruby contacted numerous mitigation witnesses, including family and friends suggested by Petitioner, for additional information regarding his background, with noted positive results. (See SHCP Ex.'s. 5, 9, 24.) Moreover, the only evidence that Petitioner may have suffered drug and alcohol intoxication at the time of the capital murders was his possibly self-serving statement to Dr. Markman. (See SHCP Ex. 20 at 1-3.) Ramirez testified that he and Petitioner left the bar together and were at the cabin less than an hour before the victims arrived. (See RT at 1947.) In all the statements made to the police and during trial, Ramirez did not mention anything about Petitioner smoking cocaine prior to the shootings, or for that matter drinking alcohol at the cabin the day of the shootings. Additionally, Petitioner's noted conduct during and after the shootings reasonably suggests the absence of alcohol and drug intoxication.

4) Lay Witnesses

Petitioner complains defense counsel did not elicit from lay witnesses and present all possible information regarding circumstances in mitigation. (ECF No. 113 at 201-11.)

Petitioner argues that the mitigation defense was "meager" (see ECF No. 178 at 298:4); that defense counsel was ineffective by "fail[ing] to elicit testimony from the witnesses which would have provided the jury with insight into [Petitioner's] troubled childhood, his history of substance abuse, and his mental and emotional problems." (Id. at 298:9-12.) He claims this missed the opportunity to develop a "comprehensive mitigation picture." Ainsworth v. Woodford, 268 F.3d 868, 874 (9th Cir.

2001) (defense counsel ineffective for failing to adequately investigate, develop and present readily available substantial mitigating evidence).

However, the defense presented numerous mitigation witnesses during the penalty phase, including several family members, who testified that: (1) Petitioner supported and took custody of his two daughters who had been abandoned by his first wife; (2) Petitioner served in Vietnam in the Navy; (3) Petitioner financially supported and provided a home for his step-daughter after her biological mother (Petitioner's ex-wife) abandoned her; (4) Petitioner opened his home to other young people who needed his help and provided them with food and shelter; (5) Petitioner protected his daughters and other people who lived with him; (6) Petitioner was a "model inmate" when imprisoned in Chino for the attempted voluntary manslaughter of Ross; (7) Petitioner moved up to the secluded cabin after his fiancée Rhonda died in a car crash; (8) Petitioner had a difficult childhood and suffered the hatred of his biological father and his stepfather; (9) Petitioner was forced to live on the streets starting at about nine years of age for the greater part of his childhood; and (10) Petitioner fixed up the house where he was staying in Chicago, was generous and helpful, and established close ties with his family in Chicago after the capital murders. (See RT at 2402-2528.)

Petitioner also faults defense counsel for emphasizing his positive conduct with family members while he was a fugitive, rather than on developing mitigation from Petitioner's life history and experience. Petitioner claims this strategy was not based on any sufficient investigation. However, the California Supreme Court reasonably could have found defense tactics developed through the mitigation investigation influenced counsel's actions relative to lay witnesses. Counsel sought to portray the Petitioner as a person with positive qualities who had the potential to rehabilitate and to adjust to life in prison. Counsel here, unlike counsel in Ainsworth, did investigate and consider Petitioner's background and mental state, including witness interviews and examination of personal history records, and presented the noted evidence relating to his troubled childhood, substance abuse history, military and employment history, and prior incarceration. A more comprehensive background presentation reasonably might have opened the door to evidence of aggravating criminal activities, Petitioner's violent temper and use of violence, and his attempts to avoid responsibility for his violence.

To the extent Petitioner relies on pre-AEDPA cases noted *ante* (Summerlin, Bean, Jackson, Ainsworth, and Douglas), his reliance is misplaced. Bean and Jackson are unavailing for reasons discussed in claims W1 and W2, *ante.* Summerlin, Ainsworth and Douglas found counsel therein ineffective where there was no or only insubstantial investigation and presentation of available mitigation evidence, in contrast to the noted efforts of defense counsel in this case.

5) Mental State Defenses

Petitioner complains defense counsel did not consult or retain an expert to develop mental deficits and defenses. (ECF No. 113 at 203:11-12, 211-18.) He claims, and Respondent concedes (ECF No. 194 at 353:27), that the competency evaluation of Dr. Markman was not necessarily meant to evaluate mental illness for the purpose of presenting mitigation evidence. (ECF No. 178 at 300.)

Petitioner relies upon declarations of his habeas experts, Drs. Khazanov and Matthews, provided ten years after the capital crimes, suggesting the existence of brain impairment predating the crimes and that the crimes were triggered by a traumatic stress reaction and alcohol and cocaine ingestion. (See SHCP Ex.'s 10, 22.)

The Ninth Circuit has held that a defense attorney in the sentencing phase of a capital trial has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client facts that the experts do not request." Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999); see also Caro v. Woodford, 280 F.3d 1254, 1254 (9th Cir. 2002) (counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health). But defense counsel only has a duty to investigate a defendant's mental state "if there is evidence to suggest that the defendant is impaired," Douglas, 316 F.3d at 1085, and counsel has notice of the mental impairment. Caro, 280 F.3d at 1254. Petitioner was evaluated by a qualified forensic psychiatrist, Dr. Markman, prior to trial. Dr. Markman determined that Petitioner was competent to stand trial. Dr. Markman also determined that Petitioner did not suffer from mental disorders, (SHCP Ex. 20 at 1-3), based on an examination that:

> [R]evealed [Petitioner] to be fully oriented in all spheres, alert, cooperative, and above normal intelligence with an excellent fund of knowledge. Dr. Markman found that Petitioner's responses to be relevant and coherent and his memory and concentration were unimpaired and his affect was appropriate, though detached. There was no evidence of a major mental disorder, thought disorder or psychosis, judgment was not

> impaired and insight into his status was adequate. He was able to provide a coherent narration of his version of the events of September 2, 1990 and their sequeiae.

(SHCP Ex. 22, at 58.)

Petitioner argues that his habeas expert, Dr. Matthews, determined that the shooting of Mr. Huffstuttler was likely the result of an exaggerated response to perceived dangers, that is:

> [T]o a reasonable degree of medical certainty that the shooting of Vance Huffstuttler was the result of trigger responses to perceived dangers to [Petitioner] himself. Petitioner's exaggerated perceptions and reactions were the result of [Petitioner's] many deficits, his organic brain damage, the stress he was under at the time of the crime and his ingestion of alcohol and cocaine.

(Id.) Even if this was the case, the California Supreme Court could reasonably have found that Petitioner's noted subsequent acts of walking down to the creek bed and shooting Mincy multiple times while the latter was curled on the ground begging for his life, wounding Wilson and searching for him following his escape, changing the scene of the murders to make it look like drug deal gone bad, disabling Wilson's truck and leaving him on the mountain to bleed to death, and then fleeing to the Los Angeles area and ultimately Chicago, all suggested mental state defenses were unavailable. As noted, the only evidence that Petitioner was under the influence of intoxicants was his statement to Dr. Markman. (See SHCP Ex. 20 at 1-3.) Ramirez did not mention it. Petitioner's close friend, Daser, stated that Petitioner drank only on the weekend and that Petitioner was not a binge drinker. (See SHCP Ex. 4 at 1, 4.) Petitioner's daughter, Mary, agreed with this assessment. (See SHCP Ex. 5 at 10.)

Nor does Dr. Matthews's mental evaluation, conducted over a decade after the capital murders, change the fact that shortly before trial, Dr. Markman, a qualified psychiatrist, evaluated Petitioner and concluded that he showed no signs of suffering from any "major mental disorder, thought disorder or psychosis" and furthermore that his judgment did not appear to be impaired. (SHCP Ex. 20.) Dr. Markman took into consideration Petitioner's claimed daily use of alcohol and claimed long history of substance abuse. (Id. at 2-3.) Dr. Markman diagnosed Petitioner with polysubstance abuse and a personality disorder with paranoid, explosive, and antisocial features. (Id. at 3.) The fact that Dr. Matthews, ten years hence, may have disagreed with Dr. Markman does alone

render Dr. Markman's opinions incorrect. See e.g., Boyde, 404 F.3d at 1168-69 (holding that if new mental health evidence, obtained after the trial, were sufficient to establish the petitioner's innocence, the petitioner could "always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion").

The California Supreme Court could reasonably have determined that Dr. Matthews's belief that Petitioner "may" have experienced neuropsychological damage in utero because his father may have beaten his mother, or because his mother may have worked at a metal plating shop (see SHCP Ex. 22 at 42-43), amounts to surmise and nothing more. The same can be said about the suggestion of Petitioner's expert, Dr. Khazanov, that Petitioner suffered post-partum closed head injuries. (See SHCP Ex. 10 at 11.) Dr. Khazanov apparently based this conclusion only upon her assumption that Petitioner suffered a closed head injury when his father threw him against a wall, (see SHCP Ex. 10 at ¶ 31-34), given head scars of undetermined origin. (Id.)

Dr. Khazanov's statement that Petitioner may have suffered organic brain deficits secondary to the effects of long-term military and workplace exposure to toxic substances (see SHCP Ex. 10 at ¶¶ 35-40) likewise could reasonably be seen as speculative, notwithstanding declarations from Petitioner's former coworkers purportedly vouching for their own exposure to toxic substances. (See SHCP Ex.'s 4, 11.) Petitioner was found to be healthy when he received a physical examination in 1981. (See SHCP Ex. 41.) Petitioner certified at that time that he did not suffer from eye trouble (pain, burning, itching, etc.), headaches or throbbing temples, depression, excess worry, or trouble sleeping, illness or injury from chemical exposure, or dizziness or fainting spells. (Id.) Again, the noted level of functioning suggested by the record, both in the military (see e.g., SHCP Ex. 33) and during and after the capital murders (see SHCP Ex. 13), belies a claim of brain damage.

Petitioner's claim that Dr. Markman failed to identify his "organic brain damage" and that counsel should have consulted and retained other experts in this regard (ECF No. 178 at 303) could reasonably be viewed as unsupported in the record that was before the state court. Defense counsel provided Dr. Markman with access to Petitioner to conduct an evaluation, along with Petitioner's prior police reports, the reports related to the capital crimes, and his prior probation reports (which presumably detailed much of his employment and life history). (See SHCP Ex. 20 at 1.) It is

reasonable to conclude that defense counsel could not have known that Dr. Markman would require any other information absent his request or further relevant information from Petitioner. Hendricks, 70 F.3d at 1038 (expert must provide guidance regarding information that may be helpful).

Nor does the record necessarily suggest that defense counsel was reasonably on notice of a toxic substances defense. Counsel has no duty to pursue neurological experts when a qualified forensic psychiatrist does not indicate that such testing is implicated, Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998), or when there is no indication of brain damage, Wright v. Angelone, 151 F.3d 151, 163 (4th Cir. 1998). Defense counsel is entitled to and can rely on the report of an expert who is consulted. Babbitt, 151 F.3d at 1174 (counsel has no duty to contact other experts when he reasonably thought those consulted were well-qualified and no duty to ensure the trustworthiness of an expert's conclusions).

For the reasons stated, the California Supreme Court could have found it unlikely that Petitioner was prejudiced by counsel's decision not to call Dr. Markman or another mental health expert as a witness. Doing so also might have opened the door to aggravating testimony relating to his violent outbursts, alleged substance abuse and his denials of responsibility for his actions including the self-inflicted wounds. (See e.g., SHCP Ex. 20 at 1-3); Harris, 949 F.2d at 1525 (counsel not ineffective by choosing not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion). Moreover, the noted evidence in aggravation at the penalty phase was substantial. (See claims O, R and S, *ante*.)

Accordingly, the California Supreme Court could reasonably have found that alleged mental state defenses would not have been sufficient to undermine confidence in the trial outcome. See U.S. v. Lewis, 786 F.2d 1278, 1283 (5th Cir. 1986).

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an

unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W7 is denied.

i. Analysis of Claim W8

Petitioner's next claim alleges defense counsel was ineffective by not objecting to the penalty phase instructional errors alleged in claims R4 and U1-U5, *ante*, denying him a fair trial and reliable sentence determination, violating the Sixth and Eighth Amendments. (ECF No. 113 at 218.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

The California Supreme Court also considered and denied certain of these allegations on the merits on direct appeal. See Bolin, 18 Cal. 4th at 341-45.

Petitioner argues that, had defense counsel objected to these instructional errors, they would have been corrected, (ECF No. 113 at 218:15), and that it is reasonably probable the result of his proceeding would have been more favorable. (Id. at 218:18-19.)

The Court disagrees. This claim fails for the reasons set forth in Claim R4 and Claims U1 through U5, *ante.* There is no cumulative error because there is no individual error. Parle, 505 F.3d at 928 (citing Donnelly, 416 U.S. at 643).

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W8 is denied.

j. Analysis of Claim W9

Petitioner's final claim alleges that counsel was ineffective by not objecting to the improper comments made by the prosecutor during her penalty phase closing argument, discussed in claim V, *ante* and summarized below, denying him a fair trial and reliable penalty determination, violating his rights under the Sixth and Fourteenth Amendments. (ECF No. 113 at 218-19.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which was summarily rejected on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.) Petitioner argues that defense counsel's failure to object to the prosecutor's improper closing comments that the jury should consider public sentiment; matters outside the record; sympathy only to the extent of Petitioner's culpability; and the prosecutor's personal opinion regarding the truthfulness and credibility of defense witness Mary Bolin - all misled the jury as to those factors they could properly consider at the penalty phase, impermissibly increasing the likelihood of a death sentence. (ECF No. 113 at 218:24-26.)

But this claim fails for the reasons stated in claim V, *ante*. Furthermore, "[b]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during opening statement and closing argument is within the 'wide range' of permissible professional legal conduct." Necoechea, 986 F.2d at 1281 (citing Strickland, 466 U.S. at 689) (finding no ineffectiveness for failure to object to the prosecutor's argument).

There is no cumulative error because there is no individual error. Parle, 505 F.3d at 928 (citing Donnelly, 416 U.S. at 643).

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an

unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim W9 is denied.

7. Review of Claims X and Y

In these next two claims, Petitioner alleges that following the penalty phase, the trial court erred in denying his request for appointment of separate counsel for the purpose of filing a new trial motion based on ineffective assistance of counsel. (ECF No. 113 at 219-26; SHCP Ex. 47.) He also alleges that Cater was ineffective for not filing a new trial motion and not renewing his request for separate counsel. (Id.) Petitioner claims these errors denied him the right to counsel, due process, and a reliable sentence determination, violating his rights under the Fifth, Sixth and Fourteenth Amendments. (Id.)

Petitioner raised these same claims on direct appeal, which the California Supreme Court denied on the merits. Bolin, 18 Cal. 4th at 346-47. Petitioner also raised these claims in his petition for writ of habeas corpus in the California Supreme Court. The California Supreme Court ruled that Petitioner's habeas claims were procedurally barred because they were repetitive of claims that had been raised and rejected on direct appeal. (See CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 824-29; In re Waltreus, 62 Cal. 2d at 225].) The California Supreme Court also summarily denied the habeas claims on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.)

a. Legal Standards

A state law error that renders the trial fundamentally unfair in violation of the federal Constitution violates due process. See Chambers, 410 U.S. at 298, 302-03 (due process protects defendant from arbitrary deprivation of expectations under state law).

The standard for ineffective assistance is set out in claim C2, *ante*.

b. Analysis of Claims X and Y

As grounds for new trial, Petitioner re-argues presumed prejudice arising from counsel Soria's alleged actual conflict of interest including the noted deficiencies relating to investigator Binns,

Soria's failure to ensure guilt phase witnesses were personally interviewed, and the complete breakdown of the relationship between Soria and Petitioner. (See claims A, J, *ante*.)

1) Independent Counsel

Petitioner claims that the trial court erred in denying his motion for appointment of separate counsel. (See ECF No. 113 at 219.)

However, the California Supreme Court could have found the trial court's denial of independent counsel to be reasonable in the absence of predicate ineffective assistance. Soria was not ineffective or conflicted for reasons discussed in claims A and J, *ante*. The trial court noted that it denied the request for independent counsel because it "did not see anything wrong with Mr. Soria's representation, and . . . [no] more favorable determination would have occurred." (2/25/91 RT at 16-17.) The trial court found no colorable claim for independent counsel, and suggested habeas corpus was appropriate to pursue ineffective assistance claims. (2/25/91 RT at 17.)

The California Supreme Court also considered and rejected these allegations, stating that:

> Following the penalty verdict, Defense Attorney William Cater requested the court appoint new counsel for the purpose of making a new trial motion that might involve issues of ineffective assistance at trial. In camera, Cater indicated he thought the investigation for both the guilt and penalty phases had been deficient due to inadequacies on the part of the investigative agency retained by prior trial counsel, Charles Soria. Because Cater had represented defendant at both the guilt and penalty phases, he felt it was inappropriate for him to argue ineffective assistance in the context of a new trial motion. Defendant did not express dissatisfaction with Cater during any of the proceedings. Relying on the standard set forth in *People v. Stewart* [Citation], the court denied the request because the defense did not present a "colorable claim" the assistance of another attorney was necessary for the new trial motion. [Citation] In the court's view, Soria's representation was adequate, "and I certainly don't think by any stretch of the imagination that any more favorable determination would have occurred."

Bolin, 18 Cal. 4th at 346.

This Court finds that the California Supreme Court also could reasonably have determined Cater was not prevented, by conflict of interest or otherwise from arguing Soria's ineffectiveness. Cater and Soria were each appointed independently. The record does not suggest any conflict of interest that might have prevented Cater from arguing ineffective assistance of counsel against Soria, at least to the extent based on matters unknown to Cater during the trial. See Strickland, 466 U.S. at 690 (counsel's performance is to be viewed as of the time of counsel's conduct). In fact, the record

reflects Cater's claimed ignorance of certain of the guilt phase issues allegedly mishandled by Soria. (See e.g., SHCP Ex. 47, 1/7/91 Marsden RT at 2304-11). Successive representation alone does not demonstrate a conflict of interest. See, e.g., Whiting v. Burt, 395 F.3d 602, 619 (6th Cir. 2005) ("the rather common occurrence of trial counsel [filing a direct appeal based on ineffective assistance of counsel] does not create any obvious prejudice.").

It seems that the trial court had sufficient opportunity to consider the reasons for a claim of ineffectiveness, having conducted two hearings on that issue. (See 12/13/90 Marsden hearing; 2/25/91 In Camera hearing.) The trial court found no basis for further evidentiary development of these issues. (See 12/13/90 Marsden Hearing RT at 2291-99; 2/25/91 RT at 7, 16-17.) The trial court found defense counsel's performance during the guilt and penalty phases not ineffective. (Id.)

In rejecting these allegations on direct appeal, the California Supreme Court stated:

> At the *Marsden* hearing, defendant had asserted that the shootings were the responsibility of several other individuals possibly in confederacy with Mincy and Wilson to steal his marijuana and that he himself had been wounded in the incident. Although he had given Soria names and addresses of some of the alleged assailants as well as names and addresses of persons to whom he had shown his wounds after he left Kern County, Soria failed to call any of them to testify at trial. Defendant also complained discussions he had with Soria had become known to the prosecutor possibly through some breach of confidentiality on the part of the defense investigator. Soria responded that he had investigated or attempted to investigate the witnesses provided by defendant, with inconclusive results. In particular, medical information indicated defendant's wounds were inconsistent with his description of the events. Soria also did not think the investigator had been the source of any leaks. He acknowledged, however, that he and defendant were in conflict. The court found no substance to defendant's complaints, but nevertheless determined a breakdown in the attorney-client relationship jeopardized defendant's right to a fair trial and therefore relieved Soria.
>
> On this record, we find no abuse of discretion in the trial court's refusal to appoint new counsel to prepare and present a new trial motion. The court originally concluded, and later reiterated, that Soria's representation was not inadequate. Because it was able to observe his trial performance, we defer to that assessment absent contrary evidence. With respect to Cater's concern about the adequacy of penalty phase investigation, the record contains no colorable claim that it was in fact deficient. At best, he offered only speculation based on hearsay reports, and [Petitioner] added nothing to substantiate the allegation. Accordingly, the trial court properly declined to replace Cater for a new trial motion. The court also properly refused to appoint additional counsel for that purpose. As we have noted before, no authority supports the appointment of "simultaneous and independent, but potentially rival, attorneys to represent defendant."

Bolin, 18 Cal. 4th at 347.

In light of this Court's denial of all the record claims, *ante*, the noted conclusions of the California Supreme Court regarding denial of independent counsel were not unreasonable. See also Jackson v. Ylst, 921 F.2d 882, 887-88 (9th Cir. 1990) (requiring a trial court to appoint substitute counsel whenever a defendant seeks a new trial on the basis of counsel's incompetence is unsupported by case law and would be a "new rule" under Teague).

The record does not demonstrate that the trial court's denial of independent counsel substantially and adversely affected his right to counsel, fair trial and a reliable sentence, or that had the trial court granted Petitioner a new trial, it is reasonable to believe that he would have obtained a more favorable outcome. The noted evidence supporting Petitioner's guilt and death sentence determination was substantial. (See e.g., claims O, R and S, *ante*.)

2) New Trial Motion

Petitioner faults Cater for not filing a motion for a new trial following the penalty phase and prior to imposition of sentence and claims his failure to do so was itself ineffective assistance. (ECF No. 113 at 224.) He speculates that Cater could have supported a motion for new trial by proffering then available facts, outside the trial record, included in the state habeas proffer. (See ECF No. 113 at 224-26.) These facts, according to Petitioner, would have shown the failure of Soria and Binns to investigate guilt and penalty phase issues; along with the evidence that appropriate investigation would have yielded including the missing pages of the Halfacre letter (see SHCP Ex.'s 9, 16, 25), statements from Balsamico that it was he, not Petitioner, who assaulted Spencer (see SHCP Ex.'s 12, 46), and statements from individuals including Sandra Hooten regarding the confrontation between Huffstuttler and Petitioner shortly before the murders. (See SHCP Ex. 28.)

However, the state supreme court could have concluded it was not reasonably probable that such extra-record facts, (see ECF No. 113 at 224-26), even if then available and admissible evidence, would have altered the outcome of Petitioner's trial. For the reasons stated in the record claims, *ante*, the California Supreme Court reasonably found lacking the claims relating to investigator Binns's incompetence; unspecified mitigating information from family members in Chicago; statements of Paula regarding the alleged missing pages from the Halfacre letter; statements of Balsamico regarding the Spencer assault; and unspecified mitigating information from Petitioner's friends in Los Angeles.

At bottom, Petitioner has not demonstrated a reasonable probability that an evidentiary proffer insufficient to warrant habeas relief would have resulted in granting a new trial. Even if a new trial motion had been granted, Petitioner has not demonstrated a likelihood of a more favorable result for the reasons stated in claims I1 through I17 and W1 through W9. Furthermore, the noted evidence against Petitioner was substantial. (See claims O, R and S, *ante*.)

3) Conclusions

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial; that defense counsel's performance fell below an objective standard of reasonableness; and that absent counsel's unprofessional errors there was a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of claim X and Y was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claims X and Y are denied.

8. Review of Claim Z

Petitioner next claims that the determination of his death sentence was unreliable due to the individual and cumulative ineffectiveness of counsel during the penalty phase as alleged in claims R, S, T, U, V, and W, *ante*, violating his rights under the Eighth Amendment to the U.S. constitution. (See ECF No. 113 at 226-27.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which that court summarily denied on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.)

Petitioner argues that the above noted penalty phase errors prevented the jury from considering exculpatory and mitigating evidence during their sentence selection deliberations, rendering their verdict unreliable. (ECF No. 113 at 226:17-227:11.) He claims this denied him the jury's reasoned moral response to all mitigating evidence relevant to his background, character and the circumstances of the crime. (Id.)

The Court finds that this claim fails for the reasons discussed in claims R, S, T, U, V and W, *ante*. As discussed in those claims, Petitioner has not demonstrated that the jury was precluded from considering mitigating evidence, so as to come within Eddings. 455 U.S. 104 (1982). Moreover, there is no cumulative error because there is no individual error. Parle, 505 F.3d at 928 (citing Donnelly, 416 U.S. at 643).

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim Z is denied.

9. Review of Claim AA

Petitioner next claims that the cumulative effect of the above noted guilt, special circumstance, and penalty phase errors denied him a fair trial and rendered his conviction and sentence unreliable, violating his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 227:14-27.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

The Court finds that this claim fails because all the foregoing record claims *ante*, fail for the reasons stated. There can be no cumulative error because there is no individual error. Parle, 505 F.3d at 928, citing Donnelly, 416 U.S. at 643. As noted, Petitioner was "entitled to a fair trial but not a perfect one, for there are no perfect trials." McDonough Power Equipment, 464 U.S. at 553 (quoting Brown, 411 U.S. at 231-32).

It does not appear that the state supreme court's rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim AA is denied.

10. Review of Claim BB

Petitioner next alleges multiple subclaims asserting that California's then-effective death penalty scheme was unconstitutional, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 228-30.) These subclaims are considered separately below.

a. Clearly Established Law

As noted, Supreme Court cases have established that a state capital sentencing system must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Marsh, 548 U.S. at 173-74. If the "state system satisfies these requirements," then the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." Id. (citing Franklin, 487 U.S. at 179, and Zant, 462 U.S. at 875–876 n.13).

A state may narrow the class of murderers eligible for the death penalty by defining degrees of murder. Sawyer, 505 U.S. at 342. A state may further narrow the class of murderers by finding "beyond a reasonable doubt at least one of a list of statutory aggravating factors." Id.; see also Gregg, 428 U.S. at 196-97.

b. Review of Claim BB1

Petitioner alleges that California's death penalty scheme "fails to account for differing degrees of culpability attendant to different types of murder, enhancing the possibility that a death sentence will be imposed arbitrarily, without regard for the blameworthiness of the particular defendant or the acts at issue." (ECF No. 113 at 228:5-8.)

Petitioner raised these same allegations in his petition for writ of habeas corpus in the

California Supreme Court, which that court summarily denied on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.) That court also generally denied these allegations on direct appeal. See Bolin, 18 Cal. 4th at 345-46.

Petitioner alleges that California's death penalty scheme then in effect was unconstitutional because it was unpredictable, failing to genuinely narrow the class of murders eligible for the death penalty. He cites to a separate California capital case, People v. Sanchez, No. S007780, in which "counsel analyzed published opinions in murder appeals over a period of five years, and demonstrated that 93% of defendants convicted of first degree murder in California committed their offenses under circumstances creating death-eligibility." (ECF No. 113 at 228:9-19.) This, he claims, demonstrates that "the California sentencing scheme does not provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." Id.; Furman, 408 U.S. 238. He argues that, to be constitutional, the death penalty "must be reserved for those killings which society views as the most grievous . . . affronts to humanity." Id.; Zant, 462 U.S. at 877 n.15.

Here, the California Supreme Court considered and denied Petitioner's claim regarding the narrowing effect of its death penalty statute. Bolin, 18 Cal. 4th at 345. That court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

The Court finds that this claim fails for the reasons stated in claim U5. California's death penalty scheme, which narrows the class of death eligible offenders to less than the definition of first degree murder and permits consideration of all mitigating evidence, has been approved by the United States Supreme Court, Tuilaepa, 512 U.S. at 972-79; Harris, 465 U.S. at 38, and this Court, see Ben-Sholom, E.D. Cal. Case No. CV-F-93-5531, ECF. No. 421 at 122, 124-25.

Claim BB1 is denied.

c. Review of Claim BB2

Petitioner next complains that under the California death penalty scheme then in effect "an

individual prosecutor had complete discretion to determine: 1) whether to charge a special circumstance; and 2) whether to seek the death penalty in a case in which one or more special circumstances are charged." (ECF No. 113 at 228-29.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which that court summarily denied on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.) These allegations relating to prosecutor's discretion to seek the death penalty were also denied on direct appeal. See Bolin, 18 Cal. 4th at 345.

Petitioner complains of "unbounded discretion" in the prosecution that creates a "substantial risk of arbitrariness" because offenders with similar characteristics may or may not be chosen as candidates for the death penalty depending on the individual prosecutor, or because the prosecutor may rely on impermissible characteristics such race and economic status. (ECF No. 113 at 229:3-9.) He claims this unconstitutionally expanded death penalty eligibility under Penal Code § 190.2. Petitioner relies in large part on Bush v. Gore, 531 U.S. 98 (2000), a voting rights case, to support his claim that California's death penalty law should be struck down because of a lack of statewide uniform standards as to when a prosecutor should seek the death penalty, analogizing the fundamental right to vote to the fundamental right to life. (See ECF No. 178 at 356.)

However, in McCleskey v. Kemp, the Supreme Court held that the mere existence of prosecutorial discretion over charging decisions does not render a capital punishment scheme unconstitutional. 481 U.S. 279 (1987). Prosecutorial discretion "is essential to the criminal justice process," and does not violate the federal Constitution. Id. at 297. Instead, the Constitution forbids only "purposeful discrimination" in the exercise of prosecutorial discretion, id. at 292-93, and in order to prevail in that regard, the Supreme Court emphasized that "we would demand exceptionally clear proof before we would infer that the discretion has been abused." Id. at 297. That California's statutory scheme gives the prosecutor discretion does not alone violate the Constitution. See Gregg, 428 U.S. at 225.

Petitioner has not demonstrated that Bush v. Gore is authority otherwise, and courts have held that it is not. See Coleman v. Quarterman, 456 F.3d 537, 542 (5th Cir. 2006) (finding Bush v. Gore inapplicable in context of criminal procedure); Black v. Bell, 181 F. Supp. 2d 832, 879 (M.D. Tenn.

2001) (Bush v. Gore is not authority that unbridled prosecutorial discretion is unconstitutional). The claim that California's death penalty scheme is unconstitutional by virtue of prosecutorial discretion is foreclosed by precedent. See United States v. Mitchell, 502 F.3d 931, 982, (9th Cir. 2007).

The California Supreme Court reviewed these allegations and arrived at the same conclusion, "[t]hat the breadth of the prosecutor's discretion in choosing to seek the death penalty does not render it unconstitutional." Bolin, 18 Cal. 4th at 345. That court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim BB2 is denied.

d. Review of Claim BB3

Petitioner next claims that the then effective California death penalty statute "fails to meet the minimum standards necessary to assure rational and consistent application of the death penalty", denying him due process, equal protection and a reliable and fair penalty determination, violating the Fifth, Eighth and Fourteenth Amendments. (ECF No. 113 at 229:20-25.)

Petitioner raised this same claim on direct appeal, which the California Supreme Court denied on the merits. Bolin, 18 Cal. 4th at 345-46.

Petitioner alleges that the death penalty statute is infirm because it does not require the jury to make written findings or require the jury's selection of a death sentence be based on the reasonable doubt standard. (ECF No. 113 at 229-30.) He points out that the Georgia death penalty scheme upheld in Gregg required written findings beyond a reasonable doubt of the aggravating circumstances. 428 U.S. at 165, 196-97.

This claim is unpersuasive. The Constitution does not require written findings by the jury regarding imposition of the death penalty. See Walton, 497 U.S. at 647-48; Williams, 52 F.3d at 1484-85.

Additionally, "[t]he United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." Harris, 692 F.2d at 1195. All that is constitutionally required is an "adequate basis for appellate review." Id.

The California death penalty scheme provides for the trial court's express reasons for its findings when ruling on the automatic motion for modification and this provides the "adequate basis" for appellate review. Id.; see People v. Diaz, 3 Cal. 4th 495, 571-573 (1992). Petitioner does not demonstrate that clearly established Supreme Court precedent requires more. See Williams, 52 F.3d at 1484 (California's statute "ensures meaningful appellate review") (citing Brown, 479 U.S. at 543).

Petitioner's citation to Ring, 536 U.S. 584, and Apprendi, 530 U.S. 466 (see ECF No. 178 at 359-60), does not suggest otherwise. Apprendi, which requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, id. at 490, is not implicated by California's death penalty scheme. As discussed previously, this is because once a California jury convicts of first degree murder with a special circumstance "the defendant stands convicted of an offense whose maximum penalty is death." Ochoa, 26 Cal. 4th at 454; see also Prieto, 30 Cal. 4th at 263 & n.14.

Ring is inapposite for the same reasons Apprendi is inapplicable. Ring invalidated Arizona's capital sentencing scheme because death could be imposed only after the judge, sitting as sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. 530 U.S. at 588-89. Because death was not the maximum penalty that could be imposed based solely on the jury's conviction of first degree murder, the aggravating factors in Arizona "operate as the 'functional equivalent of an element of a greater offense.'" Id. at 609.

Petitioner's citation to Cunningham v. California, 549 U.S. 270 (2007), for the proposition that the capital sentence determination must be by the jury and beyond a reasonable doubt, also fails to persuade the Court. (See ECF No. 178 at 361.) The Apprendi error in that case arose from trial court findings of fact in a determinate sentencing law case that served to increase the criminal penalty beyond the statutory maximum; such findings must be made by the jury beyond a reasonable doubt. Cunningham, 549 U.S. at 288-89. As discussed above, this is not the case here.

Petitioner also claims the constitutional arguments in this claim were not adjudicated by the state supreme court. (ECF No. 113 at 15-16.) However, the California Supreme Court adjudicated these allegations by rejecting them on direct appeal on the merits, stating that:

The jury need not make express findings with respect to circumstances in aggravation

> [Citation], or find beyond a reasonable doubt that death is the appropriate penalty [Citation].

Bolin, 18 Cal. 4th at 345-46.

For the reasons stated, that court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim BB3 is denied.

11. Review of Claim DD

Petitioner next claims ineffective assistance of appellate counsel by failing to raise, on direct appeal, all of the claims asserted in his federal proceeding, causing the California Supreme Court to reject claims B1, J, L1-L4, P1-P3, P5-P10, Q, R1-R4, U1, U2, U6, U7, V, X. Y, Z, AA, BB1-BB2 and FF as improperly presented on habeas corpus, violating his rights to due process and meaningful appellate review under the Fifth, Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 235-36; cf., ECF No. 178 at 365 [citing same claims plus claim A but minus claims L1 and L2].)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court), which the California Supreme Court summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

a. Clearly Established Law

The Strickland standard (see claim C2 *ante*) applies to appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2002). However, appellate counsel has no constitutional obligation to raise every non-frivolous issue, even if requested by the appellant. Jones v. Barnes, 463 U.S. 745, 751 (1983) (holding that an attorney need not advance every colorable argument on appeal).

The Supreme Court has recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52; cf. Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise a "dead-bang winner" - an issue obvious from the record which would have resulted in reversal - is ineffective).

The appropriate inquiry is not whether raising a particular issue on appeal would have been frivolous, but whether raising it would have led to a reasonable probability of reversal. Miller v. Keeney, 882 F.2d 1428, 1435 (9th Cir. 1989). Where a petitioner had only a remote chance of obtaining reversal based upon an issue, neither of the Strickland prongs is satisfied. Id.

b. Analysis of Claim DD

Petitioner alleges that his appointed appellate counsel, Mr. Gilman, was ineffective by failing to appropriately raise the noted claims on direct appeal, causing the California Supreme Court to deny the claims on habeas review pursuant to In re Dixon, 41 Cal. 2d 756 (1953). (ECF No. 113 at 235:21-236:11.) He claims prejudice to the extent this Court sustains Respondent's Dixon defense to these claims. (Id.)

Petitioner alleges the constitutional arguments in this claim were not adjudicated by the state court. (See ECF No. 113 at 236:6-7.) However, the state supreme court denied this habeas claim for ineffective assistance of appellate counsel claim on the merits. (CSC Order Den. Pet. Habeas Corpus.) This claim denial is sufficient as an adjudication of the claim. See Williams, 133 S. Ct. at 1094-96.

The record reflects that appellate counsel filed a 181-page opening brief raising 21 issues of law with numerous sub-issues. (See Appellant's Opening Brief lodged June 11, 1999.) Appellate counsel also filed a reply brief (see Appellant's Reply Brief lodged June 11, 1999) and a petition for rehearing (see Appellant's Petition for Rehearing lodged June 11, 1999). The appeal was disposed of by the noted lengthy merits opinion by the California Supreme Court. Bolin, 18 Cal. 4th 297.

Petitioner asserts for the first time in his brief in support of the amended petition that his appellate counsel failed to raise claim A (relating to whether the trial court improperly denied Soria's pretrial motion to withdraw) on direct appeal. (See ECF No. 178 at 365 n.249.) This allegation is not included in the amended petition and appears to be unexhausted. Even if this allegation were properly before this Court, it fails for the reasons discussed in claim A, *ante*.

Petitioner concedes that claims L1 and L2, not raised in the state opening brief on appeal, were raised in a supplemental appeal brief and that Petitioner was not prejudiced by this method of presentation. (See ECF No. 178 at 365 n.249.) Claim Q (cumulative error in the guilt phase), was raised by appellate counsel on appeal and no deficiency is apparent as to this claim. (See Appellant's

Opening Brief lodged June 11, 1999.)

Furthermore, the Court finds this claim fails because all the noted claims, having been adjudicated in state court, are denied on the merits under the § 2254(d) standard for reasons stated, *ante*. Even if appellate counsel was deficient as alleged, Petitioner has not demonstrated prejudice.

Petitioner also claims that appellate counsel "failed to prepare transcript notes, failed to perfect the record on appeal, failed to timely communicate with federal counsel, abandoned his client when the State threatened to set an execution date, and failed to fulfill his obligations as appointed counsel in a capital case." (ECF No. 113 at 235-36.) However, Petitioner has not made a showing on the evidentiary record that appellate counsel did not do so. Nor has Petitioner demonstrated prejudiced in these regards, for the reasons stated.

Accordingly, a fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent alleged that appellate counsel's performance fell below an objective standard of reasonableness and that but for counsel's unprofessional errors there is a reasonable probability the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-98.

It does not appear that the state supreme court's rejection of this claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim DD is denied.

12. Review of Claim EE

Petitioner' next alleges that to execute him following his lengthy confinement pursuant to his February 25, 1991 conviction and sentence of death, which became final on March 8, 1999, would be cruel and unusual punishment, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments and international law. (ECF No. 113 at 236-37.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which that court summarily denied on the merits without explanation. (See CSC Order Den. Pet. Habeas Corpus.)

Petitioner argues that to execute him after such a lengthy incarceration is cruel and unusual punishment and subjects him to double jeopardy of multiple ex post facto punishments not accurately described at the penalty determination. He cites to People v. Ochoa and argues that delay in determining whether a death sentence is valid may, if prolonged, have the effect of increasing the penalty imposed for the commission of capital crimes. 26 Cal. 4th at 463.

Petitioner claims that he has been confined in a "concentration camp" of the condemned (ECF No. 178 at 389:14) causing him psychological injuries and damages. He analogizes incarceration pending state review of the validity of his death sentence to "pretrial detention," apparently arguing for the more favorable conditions of confinement to which the latter are entitled. (ECF No. 178 at 416:21-22.)

However, Petitioner does not cite any clearly established authority from the United States Supreme Court addressing a prolonged detention claim. See Allen v. Ornoski, 435 F.3d 946, 958-59 (9th Cir. 2006) ("[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment. . . . Allen cannot credibly claim that there is any clearly established law, as determined by the Supreme Court, which would support this . . . claim"); accord Lackey v. Texas, 514 U.S. 1045 (1995); Knight v. Florida, 528 U.S. 990 (1999). In McKenzie v. Day, the Ninth Circuit rejected such a Lackey claim involving a twenty-year delay, stating that "[a] defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights." 57 F.3d 1461, 1466 (9th Cir. 1995).

The court in Ochoa concluded that "execution notwithstanding the delay associated with defendant's appeals was not unconstitutional and furthered both the deterrent and retributive functions; and that shielding defendant from execution solely on this basis would frustrate these two penological purposes." 26 Cal. 4th at 464.

For the reasons stated, the California Supreme Court's rejection of this claim was not contrary to or an unreasonable application of clearly established Supreme Court precedent. Since the U.S. Supreme Court has not decided the issue, the state supreme court's decision could not be contrary to or an unreasonable application of United States Supreme Court precedent. Carey, 549 U.S. 76; see also White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) ("White has benefitted from [the] careful and

meticulous [review] process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.").

It reasonably appears that the duration of Petitioner's appeal, as well as his collateral review proceedings, "is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life." Johns v. Bowersox, 203 F.3d 538, 547 (8th Cir. 2000) (quoting Chambers v. Bowersox, 157 F.3d at 570).

Petitioner's further allegation that execution after prolonged incarceration violates international human rights law and jus cogens theories (citing Pratt v. Attorney General for Jamaica, 4 All. E.R. 769 (Privy Council) 1993; Soering v. United Kingdom, 11 E.H.R.R. 439, ¶ 111 [Euro. Ct. of Human Rights]; International Covenant on Civil and Political Rights ("ICCPR"), article 7; Torture Convention, articles 1 and 16; and the American Convention on Human Rights, article 5), fails for the reasons discussed in claim FF, *post*.

Additionally, Petitioner concedes that the ICCPR and the Torture Convention are not self-executing, and that the ICCPR does not create a private cause of action, (*see* ECF No. 178 at 401-02 n.266), suggesting he may lack standing to raise claims thereunder.

Claim EE is denied.

13. Review of Claim FF

Petitioner's final claim is that the individual and cumulative errors alleged in all the above claims denied him a fair trial and reliable sentence under various international laws, covenants, and declarations. (ECF No. 113 at 237-38.) He cites to the Universal Declaration of Human Rights, the ICCPR article 6, the American Declaration of the Rights and Duties of Man (American Declaration) articles 1, 26, and customary international law. (ECF No. 178 at 429:25-431:15.)

Petitioner raised this same claim in his petition for writ of habeas corpus in the California Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

Petitioner's essential argument appears to be that imposition and execution of a death sentence for what he characterizes as "a single-victim felony murder, against a defendant who did not inflict the injuries resulting in death" violates customary international law and article 6, section 2, of the

ICCPR, which limits the death penalty to only "the most serious crimes." (ECF No. 113 at 238: 8-11.)

He argues that "the United States is bound by customary international law, as informed by such instruments as the ICCPR and the American Declaration," and that these international laws are instructive in Eighth Amendment cruel and unusual punishment analysis. (ECF No. 178 at 431:5-6) (citing Roper v. Simmons, 543 U.S. 551, 575 (2005)).

He points out that the Ninth Circuit has looked to the Universal Declaration as an exposition of customary international law, Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998), and that the American Declaration is comparable to the Universal Declaration. Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1252 n.11 (S.D. Fla. 1997).

The Court is unconvinced by this claim. On March 8, 1999, when Petitioner's conviction became final, no clearly established Supreme Court law held that capital punishment was illegal in the United States based on international law. It appears that challenges to imposition of the death penalty based on international law have regularly been rejected. See e.g., Buell v. Mitchell, 274 F.3d 337, 370-76 (6th Cir. 2001) (rejecting challenge to death sentence based international laws such as the American Declaration, the ICCPR, and customary international law norms); Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.")

This Court finds that the California Supreme Court could reasonably have determined that Petitioner may not rely on the Universal Declaration of Human Rights and the American Declaration as freestanding authority. Though 28 U.S.C. § 2254(a) limits the scope of these proceedings to alleged violations of the Constitution, laws, and treaties of the United States, the Universal Declaration of Human Rights is not a law or treaty within the meaning of 28 U.S.C. § 2254(a) - it "does not of its own force impose obligations as a matter of international law." Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004); see Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (international law rests on consent of states). Similarly, the American Declaration is not a treaty. See Jamison v. Collins, 100 F. Supp. 2d 647, 767 (S.D. Ohio 2000) (international law does

not preclude the state of Ohio from establishing and carrying out a capital punishment scheme). Petitioner concedes that the Universal Declaration and the American Declaration are not treaties. (See ECF No. 178 at 430:25-431:2.)

Furthermore, Petitioner has not demonstrated standing on this claim and thus cannot invoke the jurisdiction of international law in this proceeding. The principles of international law apply to disputes between sovereign governments and not between individuals. Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 545-47 (D.D.C. 1981). Petitioner suggests no basis for the Court to find that the international law he cites is self-executing and provides an individual right of action. See Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976) (disavowed in part by Filartiga v. Pena-Irala, 630 F.2d 876, 884) (2d Cir. 1980) (it is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights). The ICCPR is not self-executing. Sosa, 542 U.S. at 734-35; Jamison, 100 F. Supp. 2d at 766.

To the extent Petitioner argues that the noted international law is at least instructive as to interpretation of the Eighth Amendment, Roper, 543 U.S. at 575, nothing in his argument suggests an available basis for federal habeas relief for him, a convicted multiple first degree murderer. Even if Petitioner had standing to argue international law, the United States ratified the ICCPR subject to reservation of the right to impose capital punishment subject only constitutional constraints. See 138 Cong. Rec. S-4781-01, S4783 (1992).

Petitioner does not demonstrate that the other international law and custom to which he cites precludes capital punishment in his case. Accordingly, the California Supreme Court's rejection of this claim was not contrary to or an unreasonable application of Supreme Court precedent. Petitioner is not entitled to relief.

Claim FF is denied.

VIII. FURTHER EVIDENTIARY HEARING AND RECORD EXPANSION

The Court reserved ruling on Petitioner's December 22, 2008 motion for record expansion and evidentiary hearing relating to claims A, B2, D, F, G, I, J, K, W, Y, BB, DD, and EE of the amended petition. (ECF Nos. 214, 271.)

Petitioner, in post-hearing briefing, argues that "Mr. Soria's testimony on claim C2, insofar as it manifests the comprehensive and wide-ranging inadequacy of his representation of [Petitioner], bolsters [Petitioner's] argument that he is entitled to an evidentiary hearing on his other claims of ineffective assistance [i.e., claims B2, D, F, G2, I, W and Y] should relief not be granted on claim C2." (ECF No. 343 at 16 n.10.)

However, the Court shall deny further record expansion and evidentiary hearing. The record claims that were adjudicated in state court do not survive 28 U.S.C. § 2254(d) analysis for reasons discussed above. "[R]eview under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits." Pinholster, 563 U.S. at 181; accord Stokely v. Ryan, 659 F.3d 802, 809 (9th Cir. 2011). Any attempted "relitigation" is "bar[red]," Richter, 562 U.S. at 98, no matter what semantics Petitioner employs to avoid being "limited to the record that was before the state court that adjudicated the claim on the merits," Pinholster, 563 U.S. at 181. To this extent, new evidence in federal court simply cannot assist Petitioner. Id. at 185.

The record claims that were not adjudicated in state court, reviewed by the Court de novo, do not survive 28 U.S. C. § 2254(e)(2) analysis for the reasons discussed above. These claims are not entitled to record expansion and evidentiary hearing. 28 U.S.C. § 2254(e)(2)(A)(B).

Accordingly, Petitioner's December 22, 2008 request for further record expansion and evidentiary hearing as to claims A, B2, D, F, G, I, J, K, W, Y, BB, DD, and EE of the amended petition (ECF No. 214), shall be denied.

IX. CERTIFICATE OF APPEALABILITY

Because this is a final order adverse to the Petitioner, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a Certificate of Appealability ("COA"). Accordingly, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c).

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller–El, 537 U.S. at 335-36 (2003). The controlling statute in determining whether to issue a COA is 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Court may issue a COA only "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327; accord Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 537 U.S. at 338.

In the present case, the Court finds that, with respect to the following claims, reasonable jurists could disagree with the Court's resolution or conclude that the issues presented are adequate to deserve encouragement to proceed further:

1. Claim C2: whether trial counsel was ineffective for failing to renew the change of venue motion following voir dire of the jury.
2. Claim I13: whether trial counsel was ineffective because of irregularities and improprieties that occurred during the jury's view of the crime scene and related locations.

3. Claim L (L1-L4): whether the jury view of the crime scene violated Petitioner's state and federal rights.

4. Claim W2: whether trial counsel was ineffective by failing to move for a further continuance at the penalty phase.

Therefore, a certificate of appealability is granted as these claims.

As to the remaining claims and further requests for record expansion and evidentiary hearing, the Court concludes that reasonable jurists would not find the Court's determination that Petitioner is not entitled to relief debatable, wrong, or deserving of encouragement to proceed further. Petitioner has not made the required substantial showing of the denial of a constitutional right. Accordingly, the Court hereby declines to issue a COA as to the remaining claims and further requests for record expansion and evidentiary hearing.

X. ORDER

Accordingly, for the reasons stated, it is HEREBY ORDERED that:

1. The allegation of ineffective assistance of appellate counsel for failure to raise on appeal claim A is DISMISSED without prejudice as unexhausted,
2. Claim C2 is DENIED following limited evidentiary hearing,
3. Further record expansion and evidentiary hearing for claims A, B2, D, F, G, I, J, K, W, Y, BB, DD, and EE are DENIED,
4. Record based claims A, B, and D through FF, are DENIED,
5. The Amended Petition for Writ of Habeas Corpus (ECF No. 113) is DENIED,
6. A COA is ISSUED as to the Court's resolution of claims C2, I13, L (L1-L4), and W2, and DECLINED as to the remaining claims and further requests for record expansion and evidentiary hearing,
7. Any and all scheduled dates are VACATED, and

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8. The Clerk of the Court is directed to substitute RON DAVIS, Warden of San Quentin State Prison, as the Respondent warden in this action, and to enter judgment accordingly.

IT IS SO ORDERED.

Dated: **June 9, 2016**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

People v. Bolin

Supreme Court of California

June 18, 1998, Decided

No. S019786.

Reporter
18 Cal. 4th 297 *; 956 P.2d 374 **; 75 Cal. Rptr. 2d 412 ***; 1998 Cal. LEXIS 3645 ****; 98 Daily Journal DAR 6653; 98 Cal. Daily Op. Service 4680

THE PEOPLE, Plaintiff and Respondent, v. PAUL CLARENCE BOLIN, Defendant and Appellant.

Counsel: Richard C. Gilman, under appointment by the Supreme Court, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Ward A. Campbell, Shirley A. Nelson and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Brown, J., expressing the unanimous view of the court.

Opinion by: BROWN

Opinion

[*309] [383] [***421] BROWN, J.**

A jury convicted defendant Paul Clarence Bolin of two counts of first degree murder (*Pen. Code, § 187*; further unspecified statutory references are to the Penal Code), one count of attempted first degree murder (*§ 187*, *664*), and one count of cultivation of marijuana (*Health & Saf. Code, § 11358*). It found true allegations of personal firearm use (*§ 1203.06, subd. (a)(1)*, *12022.5*) and a prior serious felony conviction (*§ 667, subd. (a)*). The jury also returned a **[****2]** true finding on the special circumstance allegation of multiple murder (*§ 190.2, subd. (a)(3)*) and set the penalty at death. The trial court denied defendant's motion to modify the sentence (*§ 190.4, subd. (e)*). This appeal is automatic (§ 1239).

I. FACTS

A. *Guilt Phase*

The crimes occurred Labor Day weekend of 1989, when defendant was living in a small cabin located in a secluded mountainous area of Walker Basin in rural Kern County. Vance

Huffstuttler also lived on the property in a trailer. Together they cultivated marijuana defendant had planted nearby. Defendant had taken on Huffstuttler as an assistant in the marijuana venture and intended to give him a portion of the profits when they sold the crop.

On Friday, September 1, Steve Mincy and Jim Wilson drove from Garden Grove to a campsite owned by Mincy's father, Robert, near Twin Oaks, also in Kern County. Robert and several other family members and friends had already arrived and were planning to spend the weekend. The next day, Wilson went for a bicycle ride and then met Steve Mincy at a bar in Twin Oaks. Mincy was there drinking with several others, including Vance Huffstuttler; defendant was also among the group. **[****3]** Later, Wilson returned to the campsite, where he agreed to drive Huffstuttler back to his trailer; Mincy accompanied them.

[384] [***422]** According to Wilson's trial testimony, the trip to Walker Basin took about 45 minutes in his truck, including 30 minutes on rough dirt roads leading into defendant's property. Defendant had already returned to his cabin. Upon **[*310]** arriving, Mincy, Wilson, and Huffstuttler saw him there with Eloy Ramirez, a friend of defendant's who was blind in one eye. When they got out of the truck, Huffstuttler took Mincy and Wilson across a creek bed and showed them numerous marijuana plants under cultivation. Defendant followed shortly thereafter and confronted Huffstuttler about bringing strangers to the location. Wilson testified defendant became "pretty agitated" and began arguing with Huffstuttler. The two returned to the other side of the creek bed toward the cabin, out of Wilson's view, still arguing. Wilson then heard a gunshot from that direction. A moment later, he and Mincy saw defendant appear from behind a line of trees holding a revolver and saying he had "nothing against" them. As Wilson turned and ran, defendant fired a shot **[****4]** that hit him in the shoulder. He heard several more shots as Mincy begged for his life.

According to Ramirez's testimony, when defendant and Huffstuttler returned across the creek bed arguing, defendant went into the cabin and came out with a revolver. Huffstuttler asked, "What are you going to do, shoot me?" Defendant did not respond, but instead fired one shot at close range. Huffstuttler fell to the ground and did not move. Defendant then approached Mincy and Wilson and fired several more rounds. Back at the cabin, he took a rifle and shot at Huffstuttler's inert body. He also took other steps to make the scene appear like the result of a drug deal gone bad. Ramirez refused to assist him. When defendant finished, they both left for Southern California.

Meanwhile, after traveling all night over the mountainous terrain, Wilson found his way to a neighboring ranch, where the owner called the sheriff's office. When sheriff's deputies went to defendant's cabin, they found Huffstuttler's body lying near Wilson's truck; Mincy's body was in the creek bed in a fetal position. Both had several fatal gunshot wounds; Huffstuttler had been shot with both a revolver and a rifle. The area **[****5]** inside and outside the cabin was in disarray with broken bottles and marijuana paraphernalia as well as some loose marijuana scattered about. The revolver, wiped clean of fingerprints, was found near Huffstuttler. A knife was found nearby as well. Spent shell casings and bullets were retrieved from near each body. At trial, Criminalist Gregory Laskowski determined that grooves in the bullets were consistent with having been fired from the .45-caliber

weapon found at the scene. He also testified that blood spatters around Mincy's body indicated some gunshot wounds had been inflicted while he was running and at least one other while he was in a fetal position.

Despite an extensive search, law enforcement was unable to locate defendant for several months. Authorities eventually arrested him in Chicago, where he had been living with friends and family members. Sheriff's **[*311]** deputies also traced the whereabouts of Eloy Ramirez to the house of his girlfriend, Patricia Islas, in Covina, where he had gone after the killings. At trial, Ramirez corroborated the description of events recounted by Wilson.

The defense presented no evidence at the guilt phase.

B. *Penalty Phase*

[**6]** 1. *Prosecution Evidence*

At the penalty phase, the prosecution presented evidence of two instances of violent criminal conduct--an unadjudicated assault with great bodily injury of Matthew Spencer and the attempted manslaughter of Kenneth Ross, for which defendant was convicted and sentenced to prison. The prosecution also submitted a threatening letter defendant wrote to Jerry Halfacre while incarcerated awaiting trial. Halfacre had previously had a relationship with defendant's daughter, Paula, and was the father of her child. Among other things, the letter warned Halfacre not to see Paula again or defendant would have him "permanently removed from the face of this Earth." Halfacre had given the letter to his probation officer, who transferred **[**385]** **[***423]** it to a Kern County District Attorney investigator.

2. *Defense Evidence*

In addition to testimony that defendant had acted under provocation in the incidents involving Spencer and Ross, the defense presented evidence of his upbringing. Defendant's parents divorced when he was eight years old, and within a few years neither wanted to care for him. He lived on the street until he was 16 years old when he **[****7]** joined the Navy and went to Vietnam. Defendant's two daughters testified he had raised them from young ages when their mother abandoned them. Defendant also raised his stepdaughter, Pamela Castillo, after he and her mother were divorced. Other family members and friends recounted how defendant had helped them in various ways.

II. DISCUSSION

A. *Pretrial Issues*

1. *Change of Venue Motion*

Prior to trial, defendant moved for a change of venue due to pretrial publicity about the case. Not only had the local television and print media **[*312]** given the killings substantial coverage, the program, *America's Most Wanted*, featured a television reenactment of the crimes during a segment aired just prior to defendant's arrest. The broadcast apparently led to his identification in Chicago as the alleged perpetrator, and a second airing shortly

thereafter described his apprehension. In support of the motion, defendant submitted videotaped copies of the television episodes as well as local news clippings reporting the crimes. CA(1)[] **(1)** At the hearing on the change of venue motion, defense counsel also referred to the results of a public opinion survey the defense had undertaken in Kern **[****8]** County. Based on the survey, counsel represented that 45 percent of the people responding indicated they had some knowledge of the case due to the media attention. Of this number, 20 percent had seen the *America's Most Wanted* reenactment.

Initially, we address defendant's claim counsel was ineffective for failing to make a sufficient record in support of the motion because he failed to have the public opinion survey entered into evidence. We find no deficiency. (See *post*, at p. 333.) The trial court had a copy of the survey for its consideration. Counsel orally represented the statistical information he deemed most vital to the motion. Since the prosecutor offered no contradiction, we have concluded those representations were accurate and accepted them as part of the record, but for the reasons discussed below find them irrelevant to our determination of this issue. Defendant fails to identify any other materials that would have bolstered his motion.

After considering the materials presented, the trial court found only the initial television episode a possible basis for granting a change of venue, expressing concern that psychologically those who had watched the reenactment **[****9]** would be unable to set aside its impact. Nevertheless, the court tentatively denied the motion and reserved final ruling to see the number of prospective jurors who had actually viewed it and their reactions. At the close of voir dire, defendant accepted the jury with 16 peremptory challenges remaining, notwithstanding the fact 3 jurors had seen the crime scene dramatization on *America's Most Wanted*. [1] Because he never raised the issue again or sought a definitive ruling, his claim on appeal is procedurally barred.

CA(2)[] **(2)** This court has long held "that HN1[] it is no error for the trial court to postpone the consideration of an application for a change of venue until an attempt is made to impanel the jury, where leave is granted to counsel to renew his application if the facts disclosed . . . warrant it, and . . . where counsel fails thereafter **[****10]** to renew his motion, he cannot claim . . . error was **[*313]** committed by the court in failing to order a change of venue. In those cases it was held . . . that the failure to renew his motion, where it was denied temporarily only, was an abandonment and waiver of the whole question, and fatal to any **[***424]** claim based **[**386]** upon the original application." (*People v. Staples (1906) 149 Cal. 405, 412 [86 P. 886]*, overruled on other grounds in *People v. Newland (1940) 15 Cal. 2d 678 [104 P.2d 778]*.) Here, denial of defendant's motion was expressly conditioned on the extent to which the television reenactment might have influenced the attitudes of prospective jurors. As the court explained, "This is tentative." "I want to see first of all how many perspective [*sic*] [jurors] we get who actually have seen this video . . . . [P] So your motion is reserved . . . ." As in *Staples*, "no ultimate disposition of the motion was made, and defendant was accorded the right to subsequently renew his motion. He did not do so, and he cannot, within the rule of [cases cited in *Staples*], now

[1] Defendant asserts Jurors Barnes, Hanson, Bowles, and Vaughn indicated they had viewed the reenactment. According to the record, however, Barnes denied having seen it.

insist that the court erred, when his right to move was only postponed, **[****11]** and he did not see fit to avail himself of his opportunity to subsequently renew the motion." (*149 Cal. at pp. 412-413*.)

In the alternative, defendant contends counsel rendered ineffective assistance for failing to press for a definitive ruling. As will appear, this is the first of many instances in which he attempts to transmute a failure to preserve an issue for appeal into a claim of attorney incompetence. We therefore note some preliminary considerations in this regard. Although the Constitution does not demand an error-free trial, this case came close to meeting that exacting standard, perhaps because there were so few opportunities for error. With two eyewitnesses to the killing, the defendant's state of mind and intent were the only issues open to question. The forensic evidence bearing on those elements was straightforward, to the point, and not susceptible to much controversy. The guilt phase was matter-of-fact in tenor, and the penalty phase was presented and argued without inflammatory rhetoric or vilification.

Under the circumstances, defense counsel had few viable options, but made reasonable efforts to negate first degree murder despite considerable factual impediments. **[****12]** With more evidentiary leeway at the penalty phase, counsel marshaled a respectable array of family and friends to attest to defendant's good qualities and plead for his life. They could not, however, change the fact that defendant had turned a deaf ear to similar pleas from Steve Mincy.

Notwithstanding these efforts, the jury found death the appropriate punishment for defendant's crimes. Our Constitution thus mandates an appeal, but the hurdles for appellate counsel were formidable on these facts. Understandably, one strategy in such circumstances is to identify, with the acuity **[*314]** of hindsight, every aspect trial counsel could arguably have handled differently. "[I]n a painstaking search of any record, a zealous appellate counsel can find areas in which he would quibble with trial counsel." (*In re Lower (1979) 100 Cal. App. 3d 144, 147 [161 Cal. Rptr. 24]*.) Recognizing the adverse impact on effective advocacy, the courts have long cautioned against such intrusive posttrial inquiry and second-guessing of trial counsel. (*Strickland v. Washington (1984) 466 U.S. 668, 690 [104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674]*; *People v. Brooks (1966) 64 Cal. 2d 130, 140 [****13] [48 Cal. Rptr. 879, 410 P.2d 383]*.) ***CA(3)***[⬆] **(3)** ***HN2***[⬆] Counsel's performance is "a question of judgment and degree that must be assessed in light of all the circumstances of the case and with a view to fundamental fairness." (*People v. Whittington (1977) 74 Cal. App. 3d 806, 820 [141 Cal. Rptr. 742]*.)

CA(4)[⬆] **(4)** Evaluating the record in light of these principles, we find no incompetence. Counsel's failure to renew the change of venue motion did not result from ignorance or inadvertence and reflected a reasonable trial strategy. (See *post*, at p. 333.) The impact of the pretrial publicity generally and the *America's Most Wanted* episodes in particular was a critical focus of the voir dire. Although many prospective jurors had been exposed to some pretrial publicity, including the segment reenacting the killings, for the most part few recalled the specifics or had formed a resolute impression of defendant's guilt. In particular, those who eventually sat on the jury all gave assurances they would decide the case based solely on the courtroom evidence. (See *post*, at p. 316.)

In light of these responses, counsel could well have recognized the effect of the publicity had not been as substantial **[****14]** as feared, **[**387]** **[***425]** especially after an 11-month interim. Thus, renewed effort to seek a change of venue would be futile since the trial court had conditioned any change in its tentative ruling on a determination the television coverage had impaired the ability to assemble an impartial jury. In addition, the reenactment was relevant only to the guilt phase portion of the trial. With guilt virtually a foregone conclusion, counsel's concern may at that point have turned to the penalty phase, which was substantially insulated from the effect of pretrial publicity. (Cf. *People v. Cox (1991) 53 Cal. 3d 618, 661-662 [280 Cal. Rptr. 692, 809 P.2d 351]*.) Given the possibility of a valid trial tactic, we reject this claim of ineffective assistance. (*People v. Mendoza Tello (1997) 15 Cal. 4th 264, 266-267 [62 Cal. Rptr. 2d 437, 933 P.2d 1134]*.)

2. *Refusal to Excuse Jurors for Cause*

The trial court granted only some of defendant's numerous challenges for cause. He now contends the court erroneously failed to excuse five prospective jurors who eventually heard the case. As noted, the defense had exercised only four of its twenty peremptory challenges when it **[****15]** indicated no **[*315]** further objection to the jury as constituted. ***CA(5)***[⬆] **(5)** " 'It has long been the rule in California that ***HN3***[⬆] exhaustion of peremptory challenges is a "condition precedent" to an appeal based on the composition of the jury. [Citation.]' " (*People v. Coleman (1988) 46 Cal. 3d 749, 770 [251 Cal. Rptr. 83, 759 P.2d 1260]*.) "Defendant's right to a fair and impartial jury is not compromised as long [as] he could have secured the juror's removal through the exercise of a peremptory challenge." (*People v. Lucas (1995) 12 Cal. 4th 415, 480 [48 Cal. Rptr. 2d 525, 907 P.2d 373]*; cf. *Ross v. Oklahoma (1988) 487 U.S. 81, 85-88 [108 S. Ct. 2273, 2276-2278, 101 L. Ed. 2d 80]*.) Accordingly, "California courts hold that the defendant must exercise his peremptory challenges to remove prospective jurors who should have been excluded for cause, and that to complain on appeal of the composition of the jury, the defendant must have exhausted those challenges. [Citation.]" (*People v. Coleman, supra, 46 Cal. 3d at p. 770*; *People v. Raley (1992) 2 Cal. 4th 870, 904-905 [8 Cal. Rptr. 2d 678, 830 P.2d 712]*.) Defendant did not do so; he may not now claim error.

[**16]** Acknowledging these principles, but citing dictum in *People v. Lucas, supra, 12 Cal. 4th at page 481, footnote 13*, defendant argues alternatively that the trial court had a sua sponte duty to excuse biased jurors when counsel failed to do so. Whatever the language in *Lucas* may imply, this court has never imposed on the trial court an independent, affirmative obligation to excuse a prospective juror notwithstanding counsel's failure to exercise a peremptory challenge for that purpose. The decisional and statutory authorities cited do not support that proposition. (See former *Code Civ. Proc., § 223*, enacted by Stats. 1988, ch. 1245, § 2, p. 4148 and repealed by initiative measure, Prop. 115, § 6, passed by voters at Primary Elec. (June 5, 1990); former *Pen. Code, § 1078*, enacted 1872 and repealed by Stats. 1988, ch. 1245, § 36, p. 4155; *People v. Mattson (1990) 50 Cal. 3d 826, 845 [268 Cal. Rptr. 802, 789 P.2d 983]*; *Morgan v. Illinois (1992) 504 U.S. 719, 729-730 [112 S. Ct. 2222, 2229-2230, 119 L. Ed. 2d 492]*.) [2] ***CA(6)***[⬆] **(6)**

[2] The apparent source of the misperception the trial court has a sua sponte obligation is the statement in *People v. Mattson, supra,*

While the authority to control voir dire includes the power to excuse prospective jurors **[*316]** for cause (see People v. Jimenez (1992) **[****17]** 11 Cal. App. 4th 1611, 1621 [15 **[**388]** **[***426]** Cal. Rptr. 2d 268], disapproved on other grounds in People v. Kobrin (1995) 11 Cal. 4th 416 [45 Cal. Rptr. 2d 895, 903 P.2d 1027]), it does not impose a sua sponte duty to do so. We thus decline to excuse defendant's failure to preserve this issue for review. (See People v. Avena (1996) 13 Cal. 4th 394, 413 [53 Cal. Rptr. 2d 301, 916 P.2d 1000].)

[**18]** We also reject defendant's passing suggestion that defense counsel rendered ineffective assistance in failing to utilize all available peremptory challenges. "[T]he decision whether to accept a jury as constituted is obviously tactical, and nothing on the appellate record demonstrates counsel's tactical choice here was either unreasonable or prejudicial." (People v. Lucas, supra, 12 Cal. 4th at p. 480.) We have reviewed the voir dire of the jurors in question. Whether or not they had been exposed to any pretrial publicity, including viewing *America's Most Wanted*, each gave credible assurances he or she would decide the case based only on what transpired in the courtroom.

3. *Exclusion of Hispanics From the Petit Jury*

Defendant contends the prosecutor improperly utilized three peremptory challenges to exclude prospective jurors with Hispanic surnames. [3] (See People v. Wheeler (1978) 22 Cal. 3d 258 [148 Cal. Rptr. 890, 583 P.2d 748]; Batson v. Kentucky (1986) 476 U.S. 79 [106 S. Ct. 1712, 90 L. Ed. 2d 69].) At trial, counsel failed to make a *Wheeler* motion. This omission waives the right to complain on appeal. (People v. Gallego (1990) 52 Cal. **[****19]** 3d 115, 166 [276 Cal. Rptr. 679, 802 P.2d 169].)

[**20]** Alternatively, defendant argues the trial court had a sua sponte duty to question the prosecutor's use of peremptory challenges based on the court's general obligation to ensure a fair jury. He cites no authority in support of this argument. (See *ante*, at pp. 314-316.) Moreover, it conflicts with the procedure set forth in *Wheeler* allocating to **HN5**[⬆] the aggrieved party the burden of raising the point in a timely fashion and making a prima facie case of **[*317]** impermissible discrimination. (*People v. Wheeler*, *supra*, 22 Cal. 3d

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50 Cal. 3d at page 845: "The duty to examine prospective jurors *and* to select a fair and impartial jury is a duty imposed on the court . . . . (Code Civ. Proc., [former] § 223, subd. (a); Pen. Code, former § 1078.)" (Italics added.) This statement is, in fact, a misreading of the statutes cited, which did not contain the italicized conjunctive. Instead, they provided, "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury." (Former Pen. Code, § 1078.) This language, as well as related statutory provisions, made clear the obligation at issue concerns the voir dire process, not the ultimate selection of the jury. Former Code of Civil Procedure section 223, subdivision (a), which replaced former Penal Code section 1078 (Stats. 1988, ch. 1245, § 36, p. 4155), has since been repealed by Proposition 115. The current statute contains no reference to the court's "duty" or selection of a fair and impartial jury and expressly addresses only the court's control of voir dire. (Code Civ. Proc., § 223.)

[3] In conjunction with this claim, defendant also argues other Hispanics were improperly excused because of financial hardship. Even if defendant had preserved this contention by an appropriate objection (see People v. Champion (1995) 9 Cal. 4th 879, 907 [39 Cal. Rptr. 2d 547, 891 P.2d 93]), this court has consistently held **HN4**[⬆] such excusals do not violate the Sixth Amendment right to a fair and impartial jury drawn from a representative cross-section of the community because "persons with low incomes do not constitute a cognizable class. [Citations.]" (People v. Johnson (1989) 47 Cal. 3d 1194, 1214 [255 Cal. Rptr. 569, 767 P.2d 1047].) Thus, counsel was not ineffective for failing to object to these excusals. (See *post*, at p. 333.) We also find no incompetence for not challenging "the jury selection system in Kern County, the method by which the jury pool was assembled, and the sources used for summoning jurors to court." Nothing in the record establishes such efforts would have been successful.

at p. 280.) CA(7)[↑] **(7)** Whatever the obligations of the trial court to control the jury selection process, the defendant must comply with procedural prerequisites to preserve any error for appeal. (*People v. Avena, supra, 13 Cal. 4th at p. 413*.) Absent an appropriate challenge to the prosecutor's exercise of peremptories, the issue is not preserved. (Cf. *People v. Ramos (1997) 15 Cal. 4th 1133, 1160 [64 Cal. Rptr. 2d 892, 938 P.2d 950]*.)

Defendant makes a related claim of ineffective assistance of counsel for failing to preserve the *Wheeler* issue. On this record, we are unable to determine the reason counsel did not make a timely challenge. **[****21]** He may have perceived the prosecutor could adequately rebut the charge, or he himself may have been dissatisfied with the individuals excused. Since the decision may well have been "an informed tactical choice within the range of reasonable competence, the conviction must be affirmed. [Citation.]" (*People v. Pope (1979) 23 Cal. 3d 412, 425 [152 Cal. Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1]*.)

4. *Prosecutor's Use of Peremptory Challenges to Excuse Jurors With Scruples About the Death Penalty*

Relying primarily on *Witherspoon v. Illinois (1968) 391 U.S. 510 [88 S. Ct. 1770, 20 L. Ed. 2d 776]* and *Wainwright v. Witt (1985) 469 U.S. 412 [105 S. Ct. 844, 83 L. Ed. 2d 841]*, defendant contends the prosecutor violated various constitutional rights by using peremptory challenges to excuse prospective jurors who expressed scruples about imposing the death penalty. *Witherspoon* and *Witt* set forth the standard for determining whether the trial court properly excused prospective jurors for cause based on their attitudes toward capital punishment. (See, e.g., *People v. Cox, supra, 53 Cal. 3d at pp. 645-648*.) HN6[↑] With respect to peremptory challenges, this court **[****22]** has consistently held such excusals do not implicate any constitutional guaranty. (See, e.g., *People v. Champion*, *supra*, 9 Cal. 4th at p. 907.) Defendant offers no persuasive reason to reexamine that determination. Consequently, counsel was not ineffective for failing to make an objection. (See *post*, at p. 333.)

B. *Guilt Phase Issues*

1. *Juror Observations of Defendant in Shackles*

CA(8)[↑] **(8)** Defendant contends he was denied his right to a fair trial because on two occasions certain jurors observed him manacled. The record discloses no error.

On the first occasion, one of the jurors arrived at the courtroom prior to the commencement of trial for that day. The bailiff directed him to the jury **[*318]** room pending the completion of other court business. Unbeknownst to the bailiff, defendant was in the jury room sitting in a chair handcuffed and shackled. The juror immediately came out and informed the court of defendant's presence. The court instructed the juror not to discuss the matter and to wait in the hall. After informing counsel of the incident, the court held a voir dire examination during which the juror indicated in response to questioning by the court and **[****23]** defense counsel that he was in the jury room about a minute and a half and did not observe whether defendant was restrained in any manner. The juror also affirmed the encounter had not affected his impartiality. Prior to the voir dire examination, defense counsel had already represented he did not think the incident warranted juror

disqualification. Thereafter, he did not suggest the examination had changed his mind. Nor does anything in the record support defendant's current claim.

The second incident occurred following the guilt phase. Counsel represented that defendant had been brought into court and was being unshackled when three jurors walked into the courtroom. The bailiff immediately turned them around and sent them out. According to counsel, "it happened so quickly" and he was "not going to raise that as an issue." The court conducted individual voir dire examinations of the three jurors. One juror said she saw "just people's heads" and "wasn't really looking." Another "didn't see anybody but backs of heads" and did not know who was in the courtroom. The third juror saw defendant standing with his back toward the doorway. He did not notice anything about his dress, his manner, **[****24]** or what he was doing.

Following the examination, counsel did not indicate he had changed his mind. (Cf. *People v. Tuilaepa (1992) 4 Cal. 4th 569, 583 [15 Cal. Rptr. 2d 382, 842 P.2d 1142]*.) Again, nothing in the record supports a contrary view. Neither incident could have affected defendant's right to a fair trial. (*People v. Cox, supra, 53 Cal. 3d at p. 652*.) Moreover, since no juror saw him in restraints, the court had no obligation to instruct on the point.

2. *Evidence Issues*

a) *Police and autopsy photographs*

CA(9)[⬆] **(9)** Over defense objection, the trial court admitted into evidence three photographs of Mincy's body, which Criminalist Gregory Laskowski utilized to illustrate his testimony about blood spatters and drips found at the **[*319]** crime scene. [4] Defendant renews **[***428]** his **[**390]** contention these photos were cumulative and more prejudicial than probative due to their "gruesome" nature. (*Evid. Code, § 352*.)

[**25]** ***HN7***[⬆]

The admission of photographs of a murder victim lies within the sound discretion of the trial court, exercise of which will not be disturbed on appeal absent a showing of abuse, i.e., that their probative value is clearly outweighed by their prejudicial effect. (*People v. Sanders (1990) 51 Cal. 3d 471, 514 [273 Cal. Rptr. 537, 797 P.2d 561]*.) In overruling the objection, the court here characterized the evidence as "highly relevant" because Laskowski used all three pictures to explain how he concluded from the blood spatters and drips that Mincy had been in motion when defendant fired some of the shots. In the court's view, "it certainly goes to the issue of intent and premeditation and planning . . . ." These conclusions reflect a proper exercise of the court's discretion. Since identity was not at issue, defendant's state of mind was critical to the charge of first degree murder (see

[4] Apparently on the strength of his pretrial motion, defendant challenges on appeal the admission of a total of 13 photographs. At defense counsel's request, the court deferred ruling on the motion until the photographs had been marked. When the exhibits were eventually offered into evidence, counsel only objected to four photos, one of which the court excluded. Accordingly, he may not now claim error in the admission of any other photos. (*Evid. Code, § 353, subd. (a)*; cf. *People v. Morris (1991) 53 Cal. 3d 152, 187-190 [279 Cal. Rptr. 720, 807 P.2d 949]*, disapproved on other grounds in *People v. Stansbury (1995) 9 Cal. 4th 824, 830, fn. 1 [38 Cal. Rptr. 2d 394, 889 P.2d 588]*.)

People v. Scheid (1997) 16 Cal. 4th 1, 18-19 [65 Cal. Rptr. 2d 348, 939 P.2d 748]), and firing at a fleeing victim reasonably reflects an intention to kill. (Cf. *People v. Ramos*, *supra*, 15 Cal. 4th at p. 1170.) Moreover, even though the pictures served to corroborate a testimonial **[****26]** witness, they were not cumulative since the photographic evidence could assist the jury in understanding and evaluating that testimony. (*People v. Price (1991) 1 Cal. 4th 324, 441 [3 Cal. Rptr. 2d 106, 821 P.2d 610]*; see also *People v. Crittenden (1994) 9 Cal. 4th 83, 133 [36 Cal. Rptr. 2d 474, 885 P.2d 887]*.) Indeed, Laskowski's testimony may have made little sense without appropriate illustration. We have examined the exhibits and also do not find them unduly gruesome.

For the first time on appeal, defendant contends the court's ruling violated his rights under the *Eighth* and *Fourteenth Amendments to the federal Constitution*. Because he failed to object on these grounds at trial, the claim is not preserved. (*People v. Ramos*, *supra*, 15 Cal. 4th at p. 1170.)

b) *Testimony by Jim Wilson*

CA(10)[↑] **(10)** Defendant objected to testimony by Wilson concerning his actions after fleeing the scene of the shootings, arguing it was irrelevant and more **[*320]** prejudicial than probative. (*Evid. Code, § 351*, *352*.) The prosecutor countered that the evidence of the all-night flight through the mountains was relevant to the charge of attempted murder and on the question of premeditation **[****27]** and deliberation because Wilson's actions reflected his perceptions of defendant's murderous intentions and state of mind. The trial court admitted the evidence on that basis.

We find no abuse of discretion in the ruling. Wilson's testimony was relevant primarily in that his description of events following his flight completed that portion of the overall narrative and explained when and how law enforcement initiated their investigation. A full rendition of the details also bolstered his credibility by demonstrating his ability to recollect accurately despite the trauma of the shooting. Nor was the testimony unduly prejudicial. Wilson's actions were a natural reaction to defendant's unprovoked assault. The testimony was short and relatively dispassionate, with no particular danger of evoking the jury's unwarranted sympathy. Moreover, since the jury eventually viewed the scene, they could reasonably have inferred the nature of Wilson's escape ordeal even if he had not testified.

CA(11)[↑] **(11)** Defendant also challenges as inadmissible hearsay Wilson's testimony regarding Mincy's pleas for his life. Because he failed to make an appropriate objection, the issue is waived. (*Evid. Code, § 353, subd. [****28]* *(a)*.) In any event, the evidence was not hearsay. Mincy's words were not offered to prove the truth of the statements but the fact of the statements. (*Evid. Code, § 1200*.) Nor were they unduly prejudicial. Because they **[**391]** **[***429]** reflected defendant's deliberate callousness, they were particularly relevant to his intent and the issue of premeditation. "***HN8***[↑] The 'prejudice' referred to in *Evidence Code section 352* applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying *section 352*, 'prejudicial' is not synonymous with 'damaging.' " (*People v. Yu (1983) 143 Cal. App. 3d 358, 377 [191 Cal. Rptr. 859]*.) Counsel thus was not incompetent for failing to object.

c) *Testimony of Patricia Islas*

CA(12)[↑] **(12)** After the killings, Ramirez went with defendant to the house of Patricia Islas, a friend who lived in Covina. Over a hearsay objection, Islas testified that when defendant left her house, Ramirez told her defendant had shot three men, including Huffstuttler, and described the shootings. The prosecutor argued Islas's testimony was a prior consistent statement necessary to rehabilitate **[****29]** Ramirez's testimony following cross-examination. The trial court overruled the objection on that basis.

HN9[↑] Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness's trial testimony and is offered in **[*321]** compliance with Evidence Code section 791. Evidence Code section 791 allows a prior consistent statement if offered after "[a]n express or implied charge has been made that [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (*Id*., subd. (b).) The trial court correctly ruled Islas's testimony came within this exception. On cross-examination of Ramirez, defense counsel elicited testimony he had given his account of events implicating defendant in the killings only after he himself had been charged with two counts of murder and after he had spoken with his attorney. He was then released from custody and the charges were dropped. Impliedly, the defense was attempting to undermine Ramirez's credibility by suggesting his attorney had encouraged **[****30]** him to fabricate the accusations against defendant. Since the statements to Islas were made before that motive arose, they were properly admitted under Evidence Code section 1236. (See also People v. Ainsworth (1988) 45 Cal. 3d 984, 1014 [248 Cal. Rptr. 568, 755 P.2d 1017].)

d) *Testimony of Criminalist Gregory Laskowski*

Utilizing photographs of the crime scene, Criminalist Laskowski testified regarding the various positions of Mincy's and Huffstuttler's bodies when they were shot. Based on blood spatters and drips depicted in the photos, he indicated one shot was to Mincy's body while in a "fetal-like" position on its left side; as to the others, his body was in a vertical position. Laskowski also concluded Mincy "was moving at a relatively rapid pace" after being initially wounded. With respect to Huffstuttler, he determined that for several shots the body was prone and not moving. Defendant now contends this evidence was inadmissible because the witness was not qualified to render an expert opinion (Evid. Code, § 720) and because he did not personally investigate the crime scene. He further asserts it should have been excluded pursuant to Evidence Code section 352. **[****31]** Since he failed to make these objections at trial, the issue is waived. (Evid. Code, § 353, subd. (a); see People v. Rodriquez (1969) 274 Cal. App. 2d 770, 776 [79 Cal. Rptr. 240].)

We also reject defendant's related claim counsel was incompetent for failing to challenge the evidence; any objection would have been properly overruled. HN10[↑] Evidence Code section 720 provides that a person may testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him," (*id*., subd. (a)) which "may be shown by any otherwise admissible evidence, including his own testimony." (*Id*., subd. (b).) CA(13)[↑] **(13)** The trial court's determination of whether a witness

qualifies **[*322]** as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. (*People v. Bloyd (1987) 43 Cal. 3d 333, 357 [233 Cal. Rptr. 368, 729 P.2d 802]*.) " 'Where a witness has disclosed sufficient knowledge of the subject to entitle his **[***430]** opinion **[**392]** to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility.' " (*Seneris v. Haas (1955) 45 Cal. 2d **[****32]** 811, 833 [291 P.2d 915, 53 A.L.R.2d 124]*.)

The record establishes Laskowski was fully qualified to testify based on his educational background in biochemistry and serology and his training as a criminalist for 13 years, including attending and giving seminars in blood-spatter analysis and crime scene investigation. He had also testified as an expert witness on numerous prior occasions. Given his expertise, Laskowski's testimony was not cumulative. Utilizing his knowledge of blood spatters and drips, he was better able to describe the particulars of what occurred during the shooting of Huffstuttler and Mincy than any photographic depiction of their bodies. For example, he concluded from the spatter evidence that Mincy was moving around after he was first shot and before he fell into a fetal position, where he was shot one more time. He also explained that the large pool of blood around Huffstuttler's body indicated he was prone and not moving when he received the final shots. As discussed in other contexts, this evidence was relevant to the issues of intent and premeditation and deliberation. The photographs Laskowski referred to adequately illustrated his testimony; therefore, **[****33]** the fact he did not personally examine the crime scene was a matter of evidentiary weight. Since his testimony was admissible on all grounds, counsel had no basis for objecting.

e) *Testimony by Mincy family members*

CA(14)[⬆] **(14)** Mincy's father, Robert, and cousin, Shelly Barber, presented evidence at the guilt phase. Defendant now claims their testimony was objectionable under *Evidence Code section 352*. Because he did not raise this challenge at trial, the issue is waived. We also reject the claim counsel was incompetent for failing to object. These two witnesses were at the Mincy family campsite for the Labor Day weekend and were present during various activities involving Mincy, Wilson, and Huffstuttler preceding their departure for defendant's cabin. Their testimony filled in the chronology of events from Friday evening through Saturday afternoon. It does not appear from the record that either witness was unduly emotional or likely to evoke an inappropriate response from the jury as to defendant's guilt, especially in a case in which identity was not at issue. Defendant complains of testimony that as he left with Wilson and Huffstuttler, Mincy told his daughter he would return shortly **[****34]** and take her to a dance that evening. This brief statement was insufficient to inflame the jury.

[*323] 3. *Jury View*

At the prosecutor's request and with the express agreement of the defense, the jury was taken to defendant's cabin to view the scene of the crimes accompanied by the court, counsel, a court stenographer, and Sheriff's Deputies Layman and Williamson, who acted as bailiffs. For the first time on appeal, defendant contends Layman and Williamson were impermissibly allowed "to provide testimony regarding the crime scene, which they had

investigated." CA(15a)[↑] **(15a)** He argues this "testimony" violated provisions of section 1119 requiring that the officer charged with conducting the jury to the place of the view "must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial . . . ." [5] We find no error.

[**35]** When the jury arrived at the scene, the court indicated "we are not going to take any testimony at this time." The jurors were then permitted to walk around the area, including where the marijuana plants had been **[**393]** **[***431]** growing, but were admonished not to discuss the case. After the jurors had looked around for an unspecified time, the court inquired, "Do any of you have any questions?" One juror asked for the location of the trailer where Huffstuttler had lived, which defense counsel indicated. Thereafter, on inquiry primarily from the court, Layman and Williamson, who had originally investigated the crime scene, pointed out the location of Wilson's truck, Huffstuttler's body, a woodpile, and the main road into the cabin area, all of which had been testified to in court. Williamson also described the foliage as taller at the time of the investigation, obscuring the view of the marijuana plants from the cabin.

CA(16)[↑] **(16)** Because defendant failed to object to any aspect of the jury view, he cannot raise further challenge on appeal. (People v. Pompa (1923) 192 Cal. 412, 422 [221 P. 198]; People v. Fitzgerald (1902) 137 Cal. 546, 550 [70 P. 554].) "[HN12[↑] W]here, as **[****36]** in the present instance, no objection is made to the appointment of the person showing parts of the premises, the defendant cannot later complain. In putting certain questions to the 'shower,' the trial judge intended to clarify and expedite the proceedings; as to any other alleged irregularity at the scene of the view . . ., there can be no contention **[*324]** on appeal that there was error, for the silence of the defendant's counsel in those circumstances constitutes a waiver. [Citations.]" (People v. Walther (1968) 263 Cal. App. 2d 310, 323 [69 Cal. Rptr. 434]; *People v. Pompa*, *supra*, 192 Cal. at p. 422.)

CA(15b)[↑] **(15b)** In any event, the trial court conducted the jury view in full conformance with the provisions of HN13[↑] section 1119, which expressly provides that when the court determines a jury view of the scene is proper, the place or property "must be shown to them by a person appointed by the court for that purpose . . . ." Originally, in People v. Green (1878) 53 Cal. 60, 61, this court construed the statute to preclude any person, even on direction of the trial court, from speaking to the jury on any subject connected with the trial. In People v. Bush (1887) 71 Cal. [****37] 602, 606 [12 P. 781], however, this rigid construction was rejected as illogical and inconsistent with the statutory language: "[W]e cannot conceive how [the shower] could have shown the jury the . . . places which they were sent to view in any other way [than pointing out and naming such places], under the statute." (See People v. Milner (1898) 122 Cal. 171, 185 [54 P. 833].) For more than a

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[5] HN11[↑] Section 1119 provides in relevant part: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal . . . to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial . . . ."

century, courts have consistently applied this interpretation, implicitly recognizing that the admonition that "no person . . . speak or communicate with the jury" (§ 1119) is plainly directed to insulating the jury from extraneous contact and potential tampering. (See, e.g., *People v. Tarm Poi (1890) 86 Cal. 225, 231 [24 P. 998]*; *People v. Bush (1886) 68 Cal. 623, 627-628*; *People v. Walther, supra, 263 Cal. App. 2d at pp. 322-323*; *People v. Cahill* (1909) 11 Cal. App.. 685, 689 [*106 P. 115]*.)

At the same time, the broad discretion conferred by the statute authorizes the trial court to conduct the view as appropriate to the circumstances. For example, in *People v. Pompa*, *supra*, 192 Cal. 412, we rejected the defendant's claim of error that the view **[****38]** was not, as originally directed by the court, strictly limited to an inspection of the premises. (*Id. at p. 421*.) Although considerable testimony was taken and evidence received by the jury, "the record expressly disclose[d] that during the entire proceedings . . . the court in its completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the jury, the defendant, and the respective counsel was at all times present, the only element absent being the walls and fittings of the courtroom wherein the court is usually convened." (*Id. at p. 422*.) Since "the forms of law governing the trial of causes" was otherwise observed, we declined to hold this "absence of formality" had compromised the proceedings. (*Ibid*.; see, e.g., *People v. Mayfield (1997) 14 Cal. 4th 668, 739 [60 Cal. Rptr. 2d 1, 928 P.2d 485]*.)

In this case, Layman and Williamson investigated the crime scene; the trial court therefore reasonably designated them as "showers" to explain how **[*325]** the actual physical conditions related to their trial testimony. The record establishes that their involvement was limited to that end, i.e., "showing" the jury what their words **[****39]** had described and the **[**394]** **[***432]** photographs had depicted. (See *People v. Milner, supra, 122 Cal. at pp. 182-185*; *People v. Walther, supra, 263 Cal. App. 2d at p. 323*.) Given the court's broad discretion in these matters, we find no abuse in having the deputies respond to specific questions rather than proceeding in some other manner. (*People v. Walther, supra, 263 Cal. App. 2d at pp. 323-324*.) Williamson's statement that the foliage differed in height from the time of the crime was also proper "to account for any change in [the] condition between [its] state as shown by the evidence and [its] appearance at the time the jury inspected [it]." (*People v. Cramley* (1913) 23 Cal. App.. 340, 349 [*138 P. 123]*.)

CA(17)[↑] **(17)** We also find no violation of defendant's constitutional rights by virtue of his absence during the view. Prior to the excursion, defendant expressly waived his presence and acknowledged he did so voluntarily. The record reflects that before making this decision he had discussed the matter with counsel. We have repeatedly rejected the argument that the *Sixth Amendment confrontation clause of the United States Constitution* or the **[****40]** due process clause of the *California Constitution (art. I, § 15*) prevents a criminal defendant from waiving the right of presence at a critical stage of a capital trial. (*People v. Mayfield, supra, 14 Cal. 4th at p. 738*, and cases cited therein.) We have no reason to reconsider that conclusion, particularly when no additional testimony was taken in conjunction with the view. (Cf. *ibid*.)

CA(18)[↑] **(18)** We also find no prejudicial error with respect to defendant's statutory rights. In *People v. Jackson (1996) 13 Cal. 4th 1164, 1211 [56 Cal. Rptr. 2d 49, 920 P.2d*

1254], this court held "that HN14[↑] a capital defendant may not voluntarily waive his right to be present during the proceedings listed in section 977, including those portions of the trial in which evidence is taken [before the trier of fact] . . . ." (See also § 1043.) Although a jury view is not among the designated proceedings in section 977, we have long held that "in so viewing the premises the jury was receiving evidence" even if nontestimonial. (People v. Milner, supra, 122 Cal. at p. 184.) Thus, it comes within the purview of section 977. Nevertheless, in this case it is not reasonably probable that a more **[****41]** favorable result would have been reached had defendant, in addition to his counsel, been present. (People v. Mayfield, supra, 14 Cal. 4th at pp. 738-739.) On this record, we find "no sound basis to question the contemporaneous judgment of defense counsel, with which defendant then agreed, that defendant's trial interests would be better served by *not* attending the jury view." (Id. at p. 739.)

With respect to this latter point, we reiterate the "note of caution" sounded in *People v. Mayfield*: "Had the trial court obeyed the letter of the statutory **[*326]** commands by refusing to accept defendant's waiver of presence, defendant might well have argued on appeal that requiring him to attend the jury view, thereby exposing the jurors to the strict security precautions that would be necessary in such a situation, had so prejudiced him before the jury as to deny him his constitutional rights to due process and a fair trial. We do not imply any view on the merits of such a contention, which is not now before us; we suggest only that trial courts should proceed with caution and that the Legislature may wish to reconsider the wisdom of statutory provisions that deprive **[****42]** capital defendants of the ability to waive their presence at trial proceedings outside the courtroom." (People v. Mayfield, supra, 14 Cal. 4th at p. 739.)

4. *Instructional Issues*

a) *Consciousness of guilt*

CA(19)[↑] **(19)** The trial court instructed the jury in accordance with CALJIC No. 2.06 regarding any attempt to suppress evidence as circumstantial evidence of consciousness of guilt. [6] **[****43]** Defendant contends the instruction **[**395]** **[***433]** was unsupported by the evidence and improperly equated the conduct described with an admission or confession, especially when considered in conjunction with CALJIC No. 2.52, the "flight" instruction. [7]

HN15[↑] At the time the court discussed jury instructions, defense counsel agreed the evidence supported CALJIC No. 2.06 and did not object to the court's proposed wording.

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[6] As read by the trial court, CALJIC No. 2.06 (5th ed. 1988) provides: "If you find that a defendant attempted to suppress evidence against himself in any manner such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and its significance, if any, are matters for your consideration."

[7] As read by the trial court, CALJIC No. 2.52 (5th ed. 1988) provides: "The flight of a person immediately after the commission of a crime or after being accused of a crime is not sufficient in itself to establish guilt, but it is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding the question of his guilt or his innocence. [P] The weight to be given such a circumstance is entirely up to the jury."

Any claim of error is therefore waived. (*People v. Jackson*, *supra*, 13 Cal. 4th at p. 1223.) Regardless, no error occurred. Sufficient evidence supported the instruction in light of Ramirez's testimony defendant attempted to make the murder scene "look like a bad dope deal" by breaking bottles, scattering loose marijuana, and shooting the body several more times with a rifle after the initial revolver shot. Defendant wiped his fingerprints off the handgun, put the weapon in **[****44]** Huffstuttler's hand, placed a knife near the body, and poured chili sauce around it. He then fled south before leaving the state for Chicago. Along the way he threw away some wires he had taken to disable Wilson's truck. **[*327]** HN16[↑]

CALJIC Nos. 2.06 and 2.52 do not impermissibly emphasize noncriminal activity as "consciousness of guilt." On the contrary, these instructions "made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*People v. Jackson*, *supra*, 13 Cal. 4th at p. 1224.) Moreover, section 1127c requires a flight instruction when the prosecution relies on such conduct as tending to show guilt.

CA(20)[↑] **(20)** As in past decisions, we find no merit in the contention the instructions improperly allow the jury to draw inferences **[****45]** about defendant's state of mind and equate evidence of suppression or concealment with a confession. "A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' HN17[↑] The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (People v. Crandell (1988) 46 Cal. 3d 833, 871 [251 Cal. Rptr. 227, 760 P.2d 423].) For cognate reasons they do not violate the proscription of Griffin v. California (1965) 380 U.S. 609, 615 [85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106] against referring to the defendant's exercise of his Fifth Amendment right not to testify as evidence of guilt. The instructions in no respect implicated defendant's **[****46]** failure to testify or directed the jury to draw negative inferences from it.

b) *Special circumstance*

CA(21)[↑] **(21)** With respect to the special circumstance allegation, the trial court instructed in accordance with CALJIC No. 8.80 (5th ed. 1988) in part as follows: "The People have the burden of proving the truth of that special circumstance. [P] If you have a reasonable doubt as to whether or not a special circumstance is true, then you must find it to be not true." Defendant contends the court erroneously failed to define "reasonable **[**396]** **[***434]** doubt" in this context or to direct the jury to find the special

circumstance "beyond a reasonable doubt."

[*328] ***HN18***[↑] The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal. (*People v. Arias (1996) 13 Cal. 4th 92, 171 [51 Cal. Rptr. 2d 770, 913 P.2d 980]*; see *People v. Byrnes (1866) 30 Cal. 206, 208* [general instruction sufficient "particularly . . . where the accused does not request that the charge may be made more specific or minute"].)

Moreover, the claim is meritless. Shortly before giving the special circumstance instruction, **[****47]** the court had already charged the jury that the defendant is presumed innocent and that the prosecution has the burden of proving guilt beyond a reasonable doubt. It then delineated the applicable standard: "REASONABLE DOUBT IS DEFINED AS FOLLOWS: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

"It is well established in California that ***HN19***[↑] the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] '[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.' [Citation.] 'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions **[****48]** as a whole.' [Citation.]" (*People v. Burgener (1986) 41 Cal. 3d 505, 538-539 [224 Cal. Rptr. 112, 714 P.2d 1251]*.) In *Burgener*, the court had not defined reasonable doubt in conjunction with the instruction on express malice but had given the definition elsewhere. (*Ibid*.) Hence, the instruction was not defective. "Given the entirety of the charge to the jury, it is clear that there is no reasonable possibility that the jury could have been misled as to the appropriate standard for their special finding on express malice. The instructions taken as a whole indicate that the prosecution's burden of proof throughout was proof beyond a reasonable doubt." (*Id. at p. 540*.) We reach a similar conclusion on this record.

c) *Mental state for lesser included offenses*

Without much elaboration, defendant contends the instructions on the mental states necessary to prove the lesser included offenses of second degree murder and voluntary manslaughter "were more likely to have **[*329]** confused the jury and caused the jury to assume that [defendant's] mental state was the crux" of these offenses. [8] Contrary

[8] Defendant cites the following instructions as allegedly confusing:

A modified version of *CALJIC No. 3.31.5* (5th ed. 1988): "In each of the crimes charged in Counts 1 and 2 and in the lesser and included crimes of second-degree murder and voluntary manslaughter as to Counts 1 and 2, there must exist a certain mental state in the mind of the perpetrator, and unless that mental state exists, the crime to which it relates is not committed. [P] The mental state required or the mental states required are included in the definition of the crimes charged, which I will read you later."

to **[**397]** **[***435]** defendant's premise, ***HN20***[⬆] the perpetrator's **[****49]** mental state is precisely the "crux" of the distinction between first and second degree murder and between murder and manslaughter. (See § 187, 188, 189, 192; see generally, 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 452-455, pp. 508-513; *id*., § 487-489, pp. 549-553; *id*., § 511-517, pp. 577-585.) The instructions correctly stated the law and were not likely to confuse the jury when considered in context and in relation to each other. (*People v. Burgener, supra, 41 Cal. 3d at pp. 538-540*.) Since defendant did not request clarification or amplification, further consideration on appeal has been waived. (*People v. Arias, supra, 13 Cal. 4th at p. 171*; *People v. Rodrigues (1994) 8 Cal. 4th 1060, 1192 [36 Cal. Rptr. 2d 235, 885 P.2d 1]*.)

[**50]** ***CA(22)***[⬆] **(22)** Moreover, any alleged ambiguity in the second degree murder and voluntary manslaughter instructions could not have prejudiced defendant when the jury found him guilty of first degree murder.

[*330] d) *Reasonable doubt*

As previously explained, the trial court instructed the jury in accordance with ***HN22***[⬆] *CALJIC No. 2.90*, defining reasonable doubt as the state of the evidence which "leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (See *ante*, at p. 328.) Defendant now contends this definition violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the federal Constitution because the reference to "moral certainty" allowed the jurors to determine guilt based on their own subjective evaluation of defendant's conduct. As with prior similar challenges, we find no fault with this instruction. "We have repeatedly upheld the efficacy of this instruction, and defendant cites no persuasive reason to revisit this conclusion." (*People v. Bradford (1997) 14 Cal. 4th 1005, 1054 [60 Cal. Rptr. 2d 225, 929 P.2d 544]*; see *Victor v. Nebraska (1994) 511 U.S. 1, 6 **[****51]** [114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583]*.)

5. *Verdict Form for Prior Felony Conviction Allegation*

CALJIC No. 8.30 (5th ed. 1988): "Murder in the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being, but the evidence is insufficient to establish deliberation and premeditation."

A modified version of *CALJIC No. 8.40* (1989 rev.): "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of *Section 192(a) of the Penal Code*. [P] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the honest but unreasonable belief in the necessity to defend one's self against imminent peril to life or great bodily injury. [P] In order to prove [such] crime, each of the following elements must be proved: One, that a human being was killed. Two, that the killing was unlawful, and, three, the killing was [done] with the intent to kill."

HN21[⬆] *CALJIC No. 8.43* (5th ed. 1988): "To reduce the killing upon sudden quarrel or heat of passion from murder to manslaughter, a killing must have occurred while the slayer was acting under the direct[] and immediate influence of that quarrel or heat of passion. [P] When the influence of sudden quarrel or heat of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for anger or passion to end and [for] reason to control his conduct, it will no longer reduce an intentional killing to manslaughter. [P] The question as to whether the cooling period has elapsed and reason has returned is not measured by the standard of the accused but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled such passion and for that person's reason to have returned."

The trial court bifurcated proceedings on the truth of the allegation that defendant had previously been convicted of attempted voluntary manslaughter and deferred consideration pending the jury's determination of guilt on the substantive charges. Following the submission of evidence on the prior allegation, the jury received a verdict form on which to record their finding, which read: "We, the Jury, empaneled to try the above-entitled cause, find it to be true that the defendant Paul Clarence Bolin previously has been convicted of a violation of 664/192.1 of the Penal Code, within the [meaning] of *Penal Code Section 667*." [9] **[****52]** The form also contained an alternate version for a "not true" finding. [10] Defendant now maintains the verdict was defective due to the "unintelligible" reference to section "192.1," which assertedly is not a valid statute. He further contends this defect rendered the subsequent penalty verdict unreliable.

HN24[↑] We find no objection of record to the form of the verdict either at the time the **[**398]** **[***436]** court proposed to submit it or when the jury returned its finding. The issue is therefore waived. (*People v. Webster (1991) 54 Cal. 3d 411, 446 [285 Cal. Rptr. 31, 814 P.2d 1273]*.) We also find no prejudicial defect. Defendant **[*331]** was convicted of attempted voluntary manslaughter in 1983. At that time, nonvehicular voluntary manslaughter was set forth in *section 192, subdivision 1*, also referred to as section "192.1," as in the abstract of judgment for defendant's prior conviction. (See Stats. 1945, ch. 1006, § 1, p. 1942; see also Stats. 1984, ch. 742, § 1, p. 2703 [amending *section 192* to designate former subdivision 1 as subdivision (a)].) Any variance in the wording was thus technical at worst. ***CA(23)***[↑] **(23)** "[***HN25***[↑] T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified **[****53]** offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]" (*People v. Webster, supra, 54 Cal. 3d at p. 447*, fn. omitted; see § 1258, 1404.) The jury returned a "true" finding based on the testimony and documentary evidence presented at the proceeding, all of which was predicated on the allegation defendant had been convicted under former *section 192, subdivision 1*. Accordingly, we discern no possibility of prejudice.

6. *Sufficiency of the Evidence of First Degree Murder*

CA(24a)[↑] **(24a)** Defendant contends the evidence of first degree murder was insufficient to establish a preconceived design or careful thought or reflection. (See, e.g., *People v. Anderson (1968) 70 Cal. 2d 15, 26-27 [73 Cal. Rptr. 550, 447 P.2d 942]*.) In particular, he argues that he could not have formed the requisite state of mind because the unexpected arrival of Mincy and Wilson immediately precipitated both the argument with Huffstuttler about the strangers' observations of the marijuana plants and the shootings.

CA(25)[↑] **(25)** ***HN26***[↑] In assessing the sufficiency of the evidence, we review the entire

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[9] Defendant mischaracterizes the form as a "special verdict." ***HN23***[↑] Special verdicts are utilized for the jury to make specific factual findings rather than return a general verdict of "guilty" or "not guilty." (See § 1150 et seq.) Although it subsumes factual matters, a finding on the truth of an enhancement allegation is an ultimate determination of the legal question presented, making it tantamount to a general verdict.

[10] Although the "true" version omitted the word "meaning," the "not true" version directly underneath contained it. The jury thus could not have been confused by the omission.

record in the light most favorable to the judgment to determine **[****54]** whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson (1980) 26 Cal. 3d 557, 578 [162 Cal. Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255]*; see also *Jackson v. Virginia (1979) 443 U.S. 307, 319-320 [99 S. Ct. 2781, 2789-2790, 61 L. Ed. 2d 560]*.) Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond (1969) 71 Cal. 2d 745, 755 [79 Cal. Rptr. 529, 457 P.2d 321]*.) ***CA(26)***[⬆] **(26)** In *People v. Anderson, supra, 70 Cal. 2d at pages 26-27*, we identified ***HN27***[⬆] three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People v. Pride (1992) 3 Cal. 4th 195, 247 [10 Cal. Rptr. 2d 636, 833 P.2d 643]*: "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended **[*332]** to **[****55]** guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" Thus, while premeditation and deliberation must result from " 'careful thought and weighing of considerations' " (70 Cal. 2d at p. 27), we continue to apply the principle that "[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Mayfield, supra, 14 Cal. 4th at p. 767*.)

CA(24b)[⬆] **(24b)** Defendant correctly notes the killings took place within a few minutes of the victims' arrival at his cabin. What occurred within those few minutes, however, is particularly telling with respect to his state of mind. According to both Wilson and Eloy Ramirez, defendant began arguing with Huffstuttler when Mincy and Wilson were shown the marijuana plants. Defendant continued berating Huffstuttler as the two walked back toward the cabin. **[****56]** Defendant went inside, retrieved a revolver, and shot Huffstuttler at **[**399]** **[***437]** close range. He proceeded back across the creek and confronted Wilson and Mincy. After apologizing that he had "nothing against" them, he opened fire. As a wounded Wilson fled the scene, he heard Mincy plead for his life. More shots were fired. Defendant returned to Huffstuttler and fired several rifle rounds into his motionless body. The autopsy report indicated at least three shots were inflicted before he died, although according to Ramirez he did not move after the first shot. After the shootings, defendant told Ramirez he was going to make the scene look like a bad dope deal had occurred and scattered marijuana, broke bottles, and poured chili sauce around Huffstuttler's body. None of the victims were armed; nor did they engage in any provocative conduct.

From this evidence, a reasonable trier of fact could infer defendant had a motive for the killings, both to punish Huffstuttler for revealing the marijuana operation to strangers and to protect his crop from theft or exposure to law enforcement. He also may have wanted to eliminate Mincy and Wilson as witnesses to the Huffstuttler **[****57]** shooting. In conjunction with these possible motives, the manner of killing supports a finding of

premeditation and deliberation. Both victims died of multiple gunshot wounds, several of which would have been fatal individually. While defendant fired some shots at Mincy as he was attempting to flee, at least one shot entered his body as he lay in a fetal position. This forensic evidence indicates defendant did not want merely to wound either victim; he wanted to make certain they died. The trial testimony also suggests rapid but purposeful planning activity once defendant realized the potential consequences of his partner's carelessness. **[*333]** While chastising Huffstuttler, he walked back to the cabin where he got a gun. Rather than seek a reconciliation, he shot Huffstuttler without warning. He then shot Mincy and Wilson and made good his escape after attempting to conceal his own involvement in the crimes. Viewing the record in its entirety, we find sufficient evidence to support the jury's finding of first degree murder. (See *People v. Anderson, supra, 70 Cal. 2d at p. 27*.) Defendant's argument simply asks this court to reweigh the facts.

7. *Ineffective Assistance* **[****58]** *of Counsel Claims*

CA(27)[↑] **(27)** Defendant alleges numerous instances of ineffective assistance of counsel. ***HN28***[↑] To prevail on such claims, he must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. (*People v. Ledesma (1987) 43 Cal. 3d 171, 216, 217 [233 Cal. Rptr. 404, 729 P.2d 839]*.) Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington, supra, 466 U.S. at p. 690 [104 S. Ct. at p. 2066*].) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Pope*, *supra*, 23 Cal. 3d at p. 426, fn. omitted.) Finally, prejudice must be affirmatively proved; the record must demonstrate "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 **[****59]** to undermine confidence in the outcome." (*Strickland v. Washington, supra, 466 U.S. at p. 694 [104 S. Ct. at p. 2068*]; *People v. Ledesma, supra, 43 Cal. 3d at pp. 217-218*.)

a) *Inadequate investigation and review of discovery*

Defendant contends counsel's investigation and review of discovery were inadequate because he failed to interview Patricia Islas or to anticipate her testimony about statements made by Ramirez. At trial, counsel made a hearsay objection to this testimony and also complained the statements had not been disclosed on discovery. In response, the prosecutor noted they were contained in a police report. On that basis, defendant asserts counsel's review and preparation must have been deficient. The record **[**400]** **[***438]** reflects, however, that the "discovery" objection was predicated on a lack of detail in the report regarding Ramirez's statements, implying counsel had in fact reviewed what was provided. The record also suggests a defense investigator contacted Islas prior to trial. More importantly, even if he did not, defendant fails to establish additional investigation would have produced exculpatory or impeachment evidence.

[*334] **[****60]** b) *Use of inadequate investigator*

Without elaboration, defendant asserts the investigator employed on his case must have been inadequate because counsel's performance was so deficient, also noting the investigator admitted stealing money from defendant. These assertions are entirely too vague and conclusory to demonstrate any lack of competence on the part of either. Absent such a demonstration, we will not speculate defendant received ineffective assistance.

c) *Failure to utilize expert witnesses*

Defendant faults counsel's lack of "attack" in cross-examining the prosecution's expert witnesses and the failure to call defense experts to counter the ballistics and blood-spatter evidence presented by the prosecution. ***CA(28)***[⬆] **(28)** "***HN29***[⬆] As to whether certain witnesses should have been more rigorously cross-examined, such matters are normally left to counsel's discretion and rarely implicate inadequacy of representation. [Citations.] Defendant identifies no exculpatory or impeachment evidence that counsel could have revealed by further questioning of prosecution witnesses [or examination of defense experts] and that would have produced a more favorable result at trial. [P] . . . Such **[****61]** claims must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. [Citations.] We cannot evaluate alleged deficiencies in counsel's representation solely on defendant's unsubstantiated speculation." (*People v. Cox*, *supra*, 53 Cal. 3d at p. 662, fn. omitted; *People v. Mitcham (1992) 1 Cal. 4th 1027, 1059 [5 Cal. Rptr. 2d 230, 824 P.2d 1277]*.) Whether to call certain witnesses is also a matter of trial tactics, unless the decision results from unreasonable failure to investigate. (*People v. Mitcham, supra, 1 Cal. 4th at p. 1059*.) The record does not establish defense experts would have provided exculpatory evidence if called, and we decline to speculate in that regard as well.

d) *Admission of defendant's guilt in closing argument*

CA(29)[⬆] **(29)** Defendant asserts defense counsel was ineffective for acknowledging some culpability on defendant's part in closing argument: "There is no doubt that the events that happened on Labor Day weekend with my client has some liability for [*sic*], some responsibility for. We are not going to say not guilty on all counts. **[****62]** That is just not what happened."

We find no incompetence in these remarks. Given the overwhelming evidence of defendant's guilt, including the testimony of two eyewitnesses, the concession appears to be a reasonable trial tactic by which counsel could **[*335]** urge the jury to return verdicts on the lesser included offenses of second degree murder or voluntary manslaughter. Since counsel could also reasonably anticipate having to conduct a penalty phase, it also allowed him to preserve his credibility in arguing mitigation. (See, e.g., *People v. Cox, supra, 53 Cal. 3d at p. 661*.) ***HN30***[⬆] In resolving these claims, "we must 'assess counsel's overall performance throughout the case' [citation], evaluating it 'from counsel's perspective at the time of the alleged error and in light of all the circumstances. [Citation.]' [Citation.]" (*Ibid*.) Moreover, when read in context, the argument in no respect reflects a breakdown of the adversarial process. (See, e.g., *In re Visciotti (1996) 14 Cal. 4th 325, 362-366 [58 Cal.*

Rptr. 2d 801, 926 P.2d 987] (dis. opn. of Brown, J.).) Counsel noted discrepancies between the testimony of Wilson and Ramirez, suggested the jury could **[****63]** infer Ramirez was more involved in the crimes than claimed, and pointed to other evidence defendant was guilty of less than first degree murder. ***HN31***[↑] The multiple-murder special circumstance would **[**401]** **[***439]** be triggered even if the jury found only one of the killings was first degree murder (§ 190.2, subd. (a)(3)); therefore, counsel reasonably focused his guilt phase argument on reducing that possibility. Conceding some measure of culpability was a valid tactical choice under these restrictive circumstances.

8. *Cumulative Effect of Error*

Finally, defendant contends that even if harmless individually, the cumulative effect of the trial errors mandates reversal. Because we have rejected all of his claims, we perforce reject this contention as well.

C. *Penalty Phase Issues*

1. *Consideration of Prior Unadjudicated Criminal Acts*

Defendant makes several claims regarding ***HN32***[↑] the jury's consideration of unadjudicated criminal activity as a circumstance in aggravation. (§ 190.3, factor (b).) He acknowledges this court has previously upheld the use of such evidence at the penalty phase. (*People v. Balderas (1985) 41 Cal. 3d 144, 204-205 [222 Cal. Rptr. 184, [****64] 711 P.2d 480]*.) He argues, however, that he was denied his constitutional right to an impartial fact finder and reliable penalty determination because the same jury that decided his guilt could not be expected to evaluate this evidence without bias or prejudice. We have considered and rejected this argument in *People v. Balderas, supra, 41 Cal. 3d at pages 204-205*, and find no reason to reconsider our conclusions. We have also previously determined that the use of factor (b) evidence does not run afoul of the statute of limitations. (*People v. Jennings (1988) 46 Cal. 3d 963, 981-982 [251 Cal. Rptr. 278, 760 P.2d 475]*.) Nor was the jury **[*336]** required unanimously to agree defendant committed the alleged crimes. (*People v. Miranda (1987) 44 Cal. 3d 57, 99 [241 Cal. Rptr. 594, 744 P.2d 1127]*.)

On this record, we find no error by virtue of the trial court's failure to repeat the "presumption of innocence" instruction given prior to guilt phase deliberations. At the beginning of the penalty phase, the court expressly alerted the jury that "[m]ost of the rules that I gave you before . . . will apply to this case." Nothing in the court's subsequent penalty instructions **[****65]** suggested the jury should disregard the earlier admonition that a criminal defendant is presumed innocent; and a reasonable juror would assume it continued to apply. (*People v. Sanders (1995) 11 Cal. 4th 475, 561 [46 Cal. Rptr. 2d 751, 905 P.2d 420]*.)

2. *Admission of Threatening Letter*

Over defense objection, the trial court admitted evidence of a threatening letter defendant

sent to Jerry Halfacre while in jail awaiting trial. [11] Defendant renews his **[**402]** **[***440]** claims that the prosecution failed to give proper notice under section 190.3 and that the evidence did not constitute criminal activity.

[**66]** With respect to notice, the record discloses that the trial began on December 3, 1990. On November 1, at the time of the change of venue motion, the **[*337]** court reviewed various other matters including the notice of circumstances in aggravation, one being the threatening letter, which the prosecution had received approximately two weeks earlier. A prior written motion, served October 22, requesting an order for a handwriting exemplar from defendant, indicated the letter was "an important part of the case." At the November 1 hearing, defense counsel acknowledged the prosecutor had informed him of her intention to use the letter in aggravation and expressly disavowed any objection as to form or timeliness of the notice. Nor did he request a continuance to prepare a response to the evidence. In light of these circumstances, any further challenge to the sufficiency of the notice or alleged prejudice is precluded. (*People v. Medina (1995) 11 Cal. 4th 694, 771 [47 Cal. Rptr. 2d 165, 906 P.2d 2]*.)

With respect to the substantive claim, ***HN33***[] section 422 makes it a crime to "willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, **[****67]** with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ." Relying on *People v. Brown (1993) 20 Cal. App. 4th 1251 [25 Cal. Rptr. 2d 76]*, defendant contends that because the letter did not contain an unconditional threat, it did not constitute a violation of section 422 as a matter

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[11] The letter read as follows:

"Jerry 6/25/90

"Well I finally heard from Paula [defendant's daughter and mother of Halfacre's child] and what I heard from her I'm not to[o] pleased with. I heard her side of things w[h]ich are real different from what you had to say. I'm only going to say this one time so you better make sure you understand. If you ever[] touch my daughter again, I'll have you permanently removed from the face of this Earth. You better thank your lucky stars you['re] Ashley's father or you[']d already have your fucking legs broke.

"I found out what happen[e]d to most of the money from the van, and I also found out you got 1500 for the truck not 1300 like you said. I'm still going to find out how much you got for the Buick and if it's 1 cents over 1000 you can kiss your ass good by[e]. I also found out it was running like a top and the burnt valves was a bunch of bull shit, just like I thought in the first place. You sounded a little shak[]y over the phone and gave yourself away.

"I told you a long time ago don't play fucking games with me. You're playing with the wrong person asshole. I've made a couple of phone calls to San Pedro to some friends of mine and the[y're] not to[o] happy with your fucking game playing with other people's money and especially you hitting Paula.

"What I want done and it better be done. Everything that's mine or hers tools, clothes, books, gun, TV, VCR, I don't fucking care if it's a bobby pin, you better give it to Paula. I want all my shit given to her and I mean every fucking thing. You have a week to do it or I make another phone call. I hope you get the fucking message. Your game playing is eventually going to get you in more than a poo butt game player can handle.

"1 week asshole.

"And keep playing your game with [my granddaughter] and see what happens."

of law and was therefore inadmissible as evidence of prior unadjudicated criminal activity. In his reply brief, he further argues that even if section 422 does not mandate an unconditional threat (see, e.g., *People v. Stanfield (1995) 32 Cal. App. 4th 1152 [38 Cal. Rptr. 2d 328]*), the letter was still insufficient on its face to come within the statutory proscription.

In *People v. Brown*, the defendant accosted two women approaching their apartment and made several menacing statements **[****68]** as he pointed a gun at the head of one of the women. (*20 Cal. App. 4th at p. 1253*.) When the other said they should call the police, the defendant said he would kill them if they did. (*Ibid*.) A jury found him guilty of violating section 422. The Court of Appeal reversed the judgment, construing the statute to preclude conviction when the threat is conditional in any respect. "The plain meaning of an 'unconditional' threat is that there be no conditions. '*If* you call the police . . .' *is* a condition. [P] To--by some linguistic legerdemain--construe 'unconditional threat' to include a 'conditional threat' would only create 'serious constitutional problems.' (*People v. Mirmirani . . . (1981) 30 Cal. 3d 375, 382* . . . .)" (*People v. Brown, supra, 20 Cal. App. 4th at p. 1256*.)

[*338] Since *Brown*, several Court of Appeal decisions have expressly disagreed with this strict interpretation of section 422. (*People v. Dias (1997) 52 Cal. App. 4th 46 [60 Cal. Rptr. 2d 443]*; *People v. Stanfield, supra, 32 Cal. App. 4th 1152*; *People v. Brooks (1994) 26 Cal. App. 4th 142 [31 Cal. Rptr. 2d 283]*; see also *People v. Gudger (1994) 29 Cal. App. [****69] 4th 310 [34 Cal. Rptr. 2d 510]* [construing section 76, prohibiting threats against a judge].) ***CA(30)***[↑] **(30)** We find the reasoning of these subsequent cases more persuasive and now hold that ***HN34***[↑] prosecution under section 422 does not require an unconditional threat of death or great bodily injury. [12]

In reaching this conclusion, we begin with the original source of the statutory language. In 1981, this court invalidated former section 422 as unconstitutionally vague. (*People v. Mirmirani (1981) 30 Cal. 3d 375, 388 [178 **[**403]** **[***441]** Cal. Rptr. 792, 636 P.2d 1130]*.) The Legislature subsequently repealed the statute and enacted a substantially revised version in 1988, adopting almost verbatim language from *United States v. Kelner (2d Cir. 1976) 534 F.2d 1020*. (See Stats. 1987, ch. 828, § 28, p. 2587; Stats. 1988, ch. 1256, § 4, pp. 4184-4185.) In *Kelner*, the defendant, a member of the Jewish Defense **[****70]** League, had been convicted under a federal statute for threatening to assassinate Palestinian leader Yasser Arafat, who was to be in New York for a meeting at the United Nations. Kelner argued that without proof he specifically intended to carry out the threat, his statement was political hyperbole protected by the First Amendment rather than a punishable true threat. (*United States v. Kelner, supra, 534 F.2d at p. 1025*.)

The reviewing court disagreed and concluded threats are punishable consonant with constitutional protections "when the following criteria are satisfied. So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and

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[12] Contrary language in *People v. Brown, supra, 20 Cal. App. 4th 1251*, is disapproved.

imminent prospect of execution, the statute may properly be applied." (*United States v. Kelner, supra, 534 F.2d at p. 1027*.) In formulating this rationale, the *Kelner* court drew on the analysis in *Watts v. United States (1969) 394 U.S. 705 [89 S. Ct. 1399, 22 L. Ed. 2d 664]*, in which the United States Supreme Court reversed a conviction for threatening the President of the United States. **[****71]** Defendant Watts had stated, in a small discussion group during a political rally, " 'And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' " (*Id. at p. 706 [89 S. Ct. at p. 1401]*.) Both Watts and the crowd laughed after the statement was made. (*Id. at p. 707 [89 S. Ct. at p. 1401]*.) The Supreme Court determined that taken in context, and considering the conditional nature of **[*339]** the threat and the reaction of the listeners, the only possible conclusion was that the statement was not a punishable true threat, but political hyperbole privileged under the First Amendment. (*Id. at pp. 707-708 [89 S. Ct. at pp. 1401-1402]*.)

As the *Kelner* court understood this analysis, the Supreme Court was not adopting a bright line test based on the use of conditional language but simply illustrating the general principle that punishable true threats must express an intention of being carried out. (See *United States v. Kelner, supra, 534 F.2d at p. 1026*.) "In effect, the Court was stating that **[****72]** threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected [attacks on government and political officials]." (*Ibid*.) Accordingly, "[t]he purpose and effect of the *Watts* constitutionally-limited definition of the term 'threat' is to insure that ***HN35***[↑] only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished--only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault . . . .' " (*Id. at p. 1027*.)

Given the rationale of *Kelner* and *Watts*, it becomes clear the reference to an "unconditional" threat in section 422 is not absolute. As the court in *People v. Stanfield* noted, "By definition, extortion punishes conditional threats, specifically those in which the victim complies with the mandated condition. [Citations.] Likewise, many threats involved in assault cases are conditional. A conditional threat can be punished as **[****73]** an assault, when the condition imposed must be performed immediately, the defendant has no right to impose the condition, the intent is to immediately enforce performance by violence and defendant places himself in a position to do so and proceeds as far as is then necessary. [Citation.] It is clear, then, that the *Kelner* court's use of the word 'unconditional' was not meant to prohibit prosecution of all threats involving an 'if' clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent prospect of execution." (*People v. Stanfield, supra, 32 Cal. App. 4th at p. 1161*; **[**404]** **[***442]** *People v. Brooks, supra, 26 Cal. App. 4th at pp. 145-146*; see also *In re M.S. (1995) 10 Cal. 4th 698, 714 [42 Cal. Rptr. 2d 355, 896 P.2d 1365]*.) As the court commented in *U.S. v. Schneider (7th Cir. 1990) 910 F.2d 1569, 1570*: "Most threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats."

Moreover, imposing an "unconditional" requirement ignores the statutory qualification **[****74]** that *HN36*[ ] the threat must be "*so . . . unconditional . . . as to convey* **[*340]** *to the person threatened, a gravity of purpose and an immediate prospect of execution . . . .*" (§ 422, italics added.) "The use of the word 'so' indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim." (*People v. Stanfield, supra, 32 Cal. App. 4th at p. 1157*.) "If the fact that a threat is conditioned on something occurring renders it not a true threat, there would have been no need to include in the statement the word 'so.' " (*People v. Brooks, supra, 26 Cal. App. 4th at p. 149*.) This provision "implies that there are different degrees of unconditionality. A threat which may appear conditional on its face can be unconditional under the circumstances. . . . [P] Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. A seemingly conditional threat contingent **[****75]** on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution." (*People v. Stanfield, supra, 32 Cal. App. 4th at p. 1158*.) Accordingly, we reject defendant's threshold contention that the letter was inadmissible because it contained only conditional threats.

CA(31)[ ] **(31)** Alternatively, defendant argues that the letter still does not meet the statutory definition because the threat lacked immediacy and Halfacre did not testify he feared for his safety. We need not definitively resolve these contentions. [13] Even if the trial court should have excluded the letter, we find no reasonable possibility the error affected the verdict. (*People v. Brown (1988) 46 Cal. 3d 432, 446-448 [250 Cal. Rptr. 604, 758 P.2d 1135]*.) Although some of the language in the letter is menacing, it also reflects defendant's concern for his daughter's and granddaughter's well-being, a point stressed by the defense in mitigation. Moreover, the nature and circumstances of the threats would not necessarily provoke serious concern, especially considering defendant was incarcerated and would at the least have to make outside arrangements to effect them. Halfacre **[****76]** waited four months before giving the letter to his probation officer, during which time apparently nothing had happened.

[*341] **[****77]** More importantly, the letter paled compared to other aggravating evidence, which the prosecutor focused on in closing argument. In particular, the guilt phase testimony revealed defendant as a calculating and callous individual, willing to kill defenseless victims, including his friend and partner Huffstuttler, in cold blood to protect his drug enterprise. In addition, the assault with great bodily injury against Matthew Spencer and attempted manslaughter against Kenneth Ross confirmed defendant's

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[13] Resolution of defendant's contentions on the merits is somewhat problematic because the court did not properly instruct that the threat must "on its face and under the circumstances in which it is made, [be] so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat . . . ." (See *CALJIC No. 9.94* (6th ed. 1996).) Thus, it is unclear from the record whether the jurors understood they must determine whether, evaluated in context, the threats conveyed sufficient immediacy as well as "gravity of purpose and likelihood of execution" (*United States v. Kelner, supra, 534 F.2d at p. 1026*) to be criminal, and hence a circumstance in aggravation. Nevertheless, any instructional error is immaterial given our finding that admission of the letter did not prejudice defendant.

pattern of resorting to violence in dealing with problems. Given this history, it is unlikely the jury accorded the letter much, if any, weight in fixing the penalty at death.

[405] [***443]** 3. *Instructional Claims*

a) *Lack of unanimous finding as to other criminal activity*

Defendant claims instructional error for failure to require that the jury render a unanimous finding as to prior criminal activity. We have long held the Constitution does not mandate such a finding (*People v. Rodriguez (1986) 42 Cal. 3d 730, 777-779 [230 Cal. Rptr. 667, 726 P.2d 113]*), and find no reason to reconsider this conclusion. Defendant further argues that because he had been previously **[****78]** convicted of only one felony, attempted voluntary manslaughter, the instruction on unadjudicated criminal activity unduly emphasized this evidence as an aggravating factor. We are unpersuaded the jury was likely to interpret the court's direction in this manner.

b) *Instructing on aggravating and mitigating factors as a "unitary" list*

Defendant asserts the trial court violated various constitutional rights by failing to delineate which statutory factors were aggravating and which were mitigating. We have consistently rejected this argument. "[***HN37***[⬆] T]he aggravating or mitigating nature of [the section 190.3] factors should be self-evident to any reasonable person within the context of each particular case." (*People v. Jackson (1980) 28 Cal. 3d 264, 316 [168 Cal. Rptr. 603, 618 P.2d 149]*.) Here, the court explained that an aggravating factor was anything connected with the crime "which increases its guilt or enormity or adds to the injurious consequences . . . ." By contrast, a mitigating factor was any "extenuating circumstance" short of justification or excuse. Nothing in these commonly understood definitions supports defendant's assertions that the jury could have considered **[****79]** section 190.3, factor (d) (extreme mental or emotional disturbance), factor (g) (acting under the substantial domination of another), or factor (h) (impairment due to mental defect or intoxication) as aggravating, particularly since there was no evidence of such circumstances. Moreover, in closing argument both the prosecutor and defense counsel identified which factors could be considered aggravating and which mitigating.

[*342] We are also unpersuaded that language instructing the jury to determine "whether or not" section 190.3, factors (d) through (h) and (j) existed caused any confusion in this regard. (*People v. Carpenter (1997) 15 Cal. 4th 312, 420 [63 Cal. Rptr. 2d 1, 935 P.2d 708]*.) This reference simply complemented the court's generic instruction that the jury's function was to "decide what the facts are from the evidence received in the trial . . . ." ***CA(32)***[⬆] **(32)** Furthermore, in the final analysis ***HN38***[⬆] "the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that **[****80]** the defendant is a member of the class made eligible for that penalty by statute.' [Citation.]" (*California v. Ramos (1983) 463 U.S. 992, 1009, fn. 22 [103 S. Ct. 3446, 3457, 77 L. Ed. 2d 1171]*.)

c) *Failure to reinstruct on reasonable doubt*

During penalty phase instruction, the trial court did not repeat the definition of reasonable doubt given at the guilt phase. Defendant contends this omission violated various constitutional rights because the term is not commonly understood outside the law. We find no error. At the beginning of the penalty phase, the court expressly alerted the jury that "[m]ost of the rules that I gave you before . . . will apply to this case." Nothing in the court's subsequent instructions suggested the jury should disregard the earlier definition; a reasonable juror would assume it continued to apply. (*People v. Sanders, supra, 11 Cal. 4th at p. 561*.)

d) *Vague and ambiguous standard for imposing death sentence*

In explaining the nature of the penalty phase deliberative process, the trial court instructed: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison **[****81]** with the mitigating factors, that **[**406]** **[***444]** it warrants death instead of life without parole." Defendant now argues the "so substantial" and "warrants" phrasing is impermissibly vague and does not adequately guide the decision to impose death. As in the past, we find no constitutional infirmity. (See, e.g., *People v. Breaux (1991) 1 Cal. 4th 281, 315-316 [3 Cal. Rptr. 2d 81, 821 P.2d 585]*.) Prior to this instruction, the court explained, "In the weighing of aggravating and mitigating circumstances, it does not mean a mere mechanical counting of the factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. [P] In weighing the various circumstances, you determine under the relevant evidence which penalty is justified **[*343]** and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Assessed in this context, the "so substantial" instruction "clearly admonishes the jury to determine whether the balance of **[****82]** aggravation and mitigation makes death the appropriate penalty. [Citations.]" (*People v. Arias, supra, 13 Cal. 4th at p. 171*.)

We also find the instructions considered as a whole sufficient to guide the jury's deliberative process and inform the jurors they must find death is the "appropriate" penalty if that is their verdict.

e) *Refusal of defendant's instruction No. 9*

Defendant contends the trial court erroneously refused to give the following instruction proffered by the defense: "Each mitigating factor is important because any single mitigating factor may, standing alone, support a decision that death is not the appropriate penalty." [14] In *People v. Breaux, supra, 1 Cal. 4th at pages 316-317*, we rejected essentially the same claim for two reasons. First, the court did not give the "unadorned" *Brown* instruction

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[14] The record does not confirm this wording. The proffered instruction actually read: "The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. [P] But you should not limit your consideration of mitigating circumstances to these specific factors. You also may consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [P] *Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case*." (Italics added.)

(*People v. Brown (1985) 40 Cal. 3d 512, 538-544 [220 Cal. Rptr. 637, 709 P.2d 440]*), which might mislead the jury as to the scope of its sentencing discretion and responsibility. (*People v. Breaux, supra, 1 Cal. 4th at p. 317*; see *People v. Brown, supra, 40 Cal. 3d at p. 544, fn. 17*.) Second, the instructions adequately **[****83]** performed the constitutional function of guiding the jury's discretion in sentencing. (*People v. Breaux, supra, 1 Cal. 4th at p. 317*.) In this case, the court gave similar instructions that told the jury "it could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict." (*Id. at p. 316*, fn. omitted; see *ante*, at p. 342.) Defendant submits no persuasive reason for reconsidering this rationale.

[**84]** f) *Refusal to instruct on sympathy*

Defendant contends the trial court erroneously refused instructions informing the jurors in various terms that sympathy, pity, compassion, and mercy were factors in deciding the appropriate sentence. We find no error. **[*344]** "We have repeatedly held that ***HN39***[⬆] a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise 'mercy.' [Citations.]" (*People v. Stanley (1995) 10 Cal. 4th 764, 840 [42 Cal. Rptr. 2d 543, 897 P.2d 481]*; see also *People v. Clark (1992) 3 Cal. 4th 41, 163-164 [10 Cal. Rptr. 2d 554, 833 P.2d 561]*.) Here, the trial court gave the standard instruction to take into account "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other **[**407]** **[***445]** aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." The court also told the jury "to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you **[****85]** are permitted to consider." No additional instruction was required. [15]

g) *Lack of instruction on relative weight of aggravation and mitigation*

Defendant faults the trial court for failing to instruct the jury that a life sentence was mandatory if they did not find the aggravating circumstances outweighed those in mitigation and that they could return a judgment of life in prison even if they found to the contrary. We have previously addressed and rejected both arguments in light of the standard instructional language. As explained in *People v. Duncan (1991) 53 Cal. 3d 955, 978 [281 Cal. Rptr. 273, 810 P.2d 131]*, with respect to the first point, "We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed **[****86]** those in aggravation, the 'so substantial in comparison with' language nevertheless might demand imposition of the higher punishment. [Citation.] The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse . . . ."

With respect to the second point, we noted that unlike other sentencing schemes creating a presumption in favor of death, "our statute and instruction give ***HN40***[⬆] the jury broad

[15] Since the trial court directed the jury to disregard any inapplicable guilt phase instructions, we find it unlikely the earlier admonishment not to consider sympathy or pity misled their deliberations.

discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan, supra, 53 Cal. 3d at p. 979*; cf. *Blystone v. Pennsylvania (1990) 494 U.S. 299 [110 S. Ct. 1078, **[*345]** 108 L. Ed. 2d 255]* [concluding the Pennsylvania death penalty statute satisfied the requirements of the Eighth Amendment even though it mandated a death sentence upon the jury's finding one aggravating circumstance and no mitigating circumstances].) We decline to reconsider **[****87]** this determination.

4. *Ineffective Assistance of Counsel*

Although several family members and friends presented mitigating testimony as to his background and character, defendant contends his counsel rendered ineffective assistance at the penalty phase in failing to submit additional evidence regarding his childhood, including alleged abuse, his mental health, his military service and injuries, and his employment history. We find none of this evidence of record. Accordingly, "without engaging in speculation, we cannot infer anything about its existence, availability, or probative force, or the probable consequences of its use at trial." (*People v. Wrest (1992) 3 Cal. 4th 1088, 1116 [13 Cal. Rptr. 2d 511, 839 P.2d 1020]*.) Defendant has thus failed to establish either incompetence or prejudice. (*People v. Pope*, *supra*, 23 Cal. 3d at p. 426, fn. 16.)

5. *Cumulative Error*

As in the guilt phase, we find virtually no merit to defendant's individual assignments of error. Accordingly, we reject his claim of cumulative prejudice as well.

6. *Constitutional Challenges to the Death Penalty*

Defendant raises several challenges to the constitutionality of California's **[****88]** death penalty statute. We have previously resolved these issues against defendant and decline to reconsider our analysis. In sum, ***HN41***[↑] our capital sentencing scheme does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function. (*People v. Ray (1996) 13 Cal. 4th 313, 356-357 [52 Cal. Rptr. 2d 296, **[**408]** **[***446]** 914 P.2d 846]*; see also *People v. Bacigalupo (1993) 6 Cal. 4th 457, 465-468 [24 Cal. Rptr. 2d 808, 862 P.2d 808]*.) Nor does the felony-murder rule falter in this regard. (*People v. Marshall (1990) 50 Cal. 3d 907, 946 [269 Cal. Rptr. 269, 790 P.2d 676]*.) The statutory categories have not been construed in an unduly expansive manner. (*People v. Crittenden, supra, 9 Cal. 4th at pp. 154-156*.) The breadth of the prosecutor's discretion in choosing to seek the death penalty does not render it unconstitutional. (*People v. Stanley, supra, 10 Cal. 4th at p. 843*.) The jury need not make express findings with respect to circumstances in aggravation (*People v. Jackson*, *supra*, 13 Cal. 4th at p. 1246), or find beyond **[*346]** a reasonable doubt that death is the appropriate penalty **[****89]** (*People v. Berryman (1993) 6 Cal. 4th 1048, 1101 [25 Cal. Rptr. 2d 867, 864 P.2d 40]*).

D. *New Trial Motion*

Following the penalty verdict, Defense Attorney William Cater requested the court appoint new counsel for the purpose of making a new trial motion that might involve issues of ineffective assistance at trial. In camera, Cater indicated he thought the investigation for both the guilt and penalty phases had been deficient due to inadequacies on the part of the investigative agency retained by prior trial counsel, Charles Soria. Because Cater had represented defendant at both the guilt and penalty phases, he felt it was inappropriate for him to argue ineffective assistance in the context of a new trial motion. Defendant did not express dissatisfaction with Cater during any of the proceedings. Relying on the standard set forth in *People v. Stewart (1985) 171 Cal. App. 3d 388 [217 Cal. Rptr. 306]*, [16] the court denied the request because the defense did not present a "colorable claim" the assistance of another attorney was necessary for the new trial motion. (See *171 Cal. App. 3d at pp. 396-397*.) In the court's view, Soria's representation was adequate, "and I certainly **[****90]** don't think by any stretch of the imagination that any more favorable determination would have occurred."

CA(33)[⬆] **(33)** "***HN42***[⬆] When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. **[****91]** [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a 'colorable claim' of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]" (*People v. Diaz (1992) 3 Cal. 4th 495, 573-574 [11 Cal. Rptr. 2d 353, 834 P.2d 1171]*.)

At the in camera portion of the proceedings, Cater cited only two reasons defendant's representation may have been incompetent: In Cater's view, the case was not properly investigated because the defense investigator had not **[*347]** adequately interviewed witnesses, had been intoxicated when he did so, and had not personally contacted other potential witnesses. Additionally, an investigator apparently had misappropriated funds belonging to defendant, which were subsequently returned to him after he complained. Cater also referenced defendant's complaints to the trial court at the end of the guilt phase, which prompted the court to grant a *Marsden* motion and relieve Soria. (*People v. Marsden, supra, 2 Cal. 3d at p. 123*.)

At the *Marsden* hearing, **[****92]** defendant had asserted that the shootings were the responsibility of several other individuals possibly in confederacy with Mincy and Wilson to steal **[**409]** **[***447]** his marijuana and that he himself had been wounded in the incident. Although he had given Soria names and addresses of some of the alleged assailants as well as names and addresses of persons to whom he had shown his wounds

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[16] In *People v. Smith (1993) 6 Cal. 4th 684, 696 [25 Cal. Rptr. 2d 122, 863 P.2d 192]*, this court disapproved *Stewart* to the extent it suggested a defendant has a greater right at the later stage of a trial to substitute counsel under *People v. Marsden (1970) 2 Cal. 3d 118 [84 Cal. Rptr. 156, 465 P.2d 44]*. The same standard applies equally preconviction and postconviction. (*People v. Smith, supra, 6 Cal. 4th at p. 694*.)

after he left Kern County, Soria failed to call any of them to testify at trial. Defendant also complained discussions he had with Soria had become known to the prosecutor possibly through some breach of confidentiality on the part of the defense investigator. Soria responded that he had investigated or attempted to investigate the witnesses provided by defendant, with inconclusive results. In particular, medical information indicated defendant's wounds were inconsistent with his description of the events. Soria also did not think the investigator had been the source of any leaks. He acknowledged, however, that he and defendant were in conflict. The court found no substance to defendant's complaints, but nevertheless determined a breakdown in the attorney-client relationship jeopardized defendant's **[****93]** right to a fair trial and therefore relieved Soria.

On this record, we find no abuse of discretion in the trial court's refusal to appoint new counsel to prepare and present a new trial motion. The court originally concluded, and later reiterated, that Soria's representation was not inadequate. Because it was able to observe his trial performance, we defer to that assessment absent contrary evidence. (*People v. Diaz, supra, 3 Cal. 4th at p. 574*.) With respect to Cater's concern about the adequacy of penalty phase investigation, the record contains no colorable claim that it was in fact deficient. At best, he offered only speculation based on hearsay reports, and defendant added nothing to substantiate the allegation. Accordingly, the trial court properly declined to replace Cater for a new trial motion. (*Ibid*.) The court also properly refused to appoint additional counsel for that purpose. As we have noted before, ***HN43***[⬆] no authority supports the appointment of "simultaneous and independent, but potentially rival, attorneys to represent defendant." (*People v. Smith, supra, 6 Cal. 4th at p. 695*.)

[*348] III. DISPOSITION

The judgment is affirmed in its entirety.

[**94]** George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Chin, J., concurred.

Appellant's petition for a rehearing was denied August 12, 1998, and the opinion was modified to read as printed above.

End of Document

S090684

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re PAUL CLARENCE BOLIN on Habeas Corpus

The petition for writ of habeas corpus is denied.

Each claim is denied on the merits.

The following claims are each procedurally barred, separately and independently, as repetitive of a claim raised and rejected on appeal (see *In re Harris* (1993) 5 Cal.4th 813, 824-829; *In re Waltreus* (1965) 62 Cal.2d 218, 225): Claims E.1, E.2, I.3 (with respect to defense requested penalty phase instruction No. 9), and L.

Except to the extent the petition claims ineffective assistance of appellate counsel, the following claims are each procedurally barred, separately and independently, because 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 A, B.1 (to the extent it alleges trial court error), C, E.3, E.4, F, H, I.1, I.2, I.3 (except as to defense requested penalty phase instruction No. 9), and J.

Brown, J., would deny solely on the merits.

GEORGE

Chief Justice

DECLARATION OF NATASHA KHAZANOV, Ph.D.

I, Natasha Khazanov, Ph.D., declare as follows:

1. I am a clinical psychologist licensed to practice in the state of California. I specialize in the practice of clinical neuropsychology and neuropsychological assessment. I received my B.A. degree in Psychology from Leningrad State University in 1975, my M.S. in Clinical Psychology from Leningrad State University in 1977, and my Ph.D. in Clinical Psychology from the Bekhterev Psychoneurological Institute in 1988.

2. From 1993 to the present, I have been employed in the Behavioral Medicine Unit, Division of General Internal Medicine, at the University of California at San Francisco. In that role, I conduct evaluations, provide short and long-term individual and couples therapy, and perform neuropsychological assessments of adults with a variety of disorders, including closed head injuries, Attention Deficit Hyperactivity Disorder, epilepsy, and various psychiatric conditions.

3. From 1993 to 1994, I worked as a Psychological Assistant in the private practices of Dr. Karen Froming, and Dr. Rosemarie Bowler, and I continued as a Psychological Assistant with Dr. Froming through 1995. In this capacity, I provided individual and couples therapy, and conducted neuropsychological assessment of patients with a history of neurotoxin exposure, and of patients with a range of neurological disorders.

4. In 1993, I completed a Postdoctoral Externship at California Pacific Medical Center, where I conducted inpatient psychological evaluations and counseling for patients with a wide range of neurological and somatic problems, as well as patients who suffered from AIDS.

5. From 1988 to 1991, I held the position of Assistant Clinical Director of Psychology at the Bekhterev Institute, where I taught neuropsychological assessment to postgraduate students. From 1989 to 1991, I held the position of Adjunct Professor of

Psychology at Leningrad State University, where I taught Introduction to Psychology and Psychological Assessment to Masters-level graduate students.

6. From 1980 to 1991, I provided services in the neuropsychiatric, geriatric and neurosurgical wards at the Bekhterev Psychoneurological Institute. As a staff psychologist, I conducted pre- and post-operative assessment and cognitive rehabilitation for patients with medically-resistant epilepsy, brain tumors, and cerebral palsy, participated in treatment planning, and performed psychological assessment, and individual, group and family counseling for patients with mood disorders.

7. From 1977 to 1980, I was employed as a staff psychologist at Psychiatric Hospital 6, St. Petersburg, Russia, where I provided intellectual, neuropsychological and personality assessments and therapy for patients with a broad range of disorders, including schizophrenia, Alzheimer's disease, alcoholism, and mood disorders.

8. I have conducted research in the areas of neuropsychiatric assessment and the study of brain pathology, and in the assessment and rehabilitation of patients with cerebral palsy and epilepsy. From 1988 to 1991, I was the principal investigator and research supervisor of a research program which examined cognitive changes in patients with chronic schizophrenia. From 1985 to 1988 I was the principal investigator in a project designed to explore neuropsychological correlates of favorable outcomes of brain surgery in patients with medical-resistant epilepsy. From 1984 to 1985, I was a co-investigator in a research project assessing the effects of hemispherectomy in patients with cerebral palsy and seizure disorders.

9. I have published articles in numerous journals, including Problems in Clinical Psychology, Neurology, Neurosurgery and Psychiatry, Rehabilitation of Epileptic Patients, and Psychological Assessment of Neuropsychiatric Disorders. I have presented the results of my research at national and international conferences.

10. At the request of counsel for Paul Clarence Bolin, I conducted a comprehensive neuropsychological evaluation of Mr. Bolin at San Quentin State Prison on June 27 and June 28, 2000. The purpose of this evaluation was to determine if neuropsychological dysfunction or

deficits were present, and, if so, to determine the degree, nature, and effect of any such impairment on Mr. Bolin's cognitive and behavioral functioning. My assessment included the expanded Halstead Reitan battery, and additional standard neuropsychological tests designed to test frontal, parietal, temporal and occipital lobe functions. Such a battery of tests assesses a broad array of the cognitive and sensory-motor abilities that are dependent upon the overall integrity of the brain. Extensive clinical and research literature supports the validity of these tests to reliably and validly identify brain damage.

11. The formal aspect of my assessment included the following specific tests: the Expanded Halstead Reitan Neuropsychological battery, the Wechsler Adult Intelligence Scale-III (WAIS - III), the Wide Range Achievement Test -3 (WRAT - 3), the Memory Assessment Scales (MAS), the Digit Vigilance Test, the Go - No - Go Tasks, the Rapid Alternating Movements Test, the Hand Position Sequences, the Ruff Figural Fluency Test, the Controlled Oral Word Association Test, and the Rey Complex Figures Test. These tests were administered over the course of approximately ten hours.

12. The assessment also included a clinical interview, and a review of source documents and other materials relevant to Mr. Bolin's medical and social history. These documents included Mr. Bolin's school, military and available medical records, and lay declarations prepared by Mr. Bolin's family and friends describing his behavior and social history. This is the type of data routinely used in conducting a thorough and accurate neuropsychological assessment.

13. Mr. Bolin expressed initial ambivalence to undergoing testing. However, throughout the administration of the test battery, Mr. Bolin put forth full effort and appeared motivated to do well. He was friendly, open, and cooperative. When he was aware that he was not doing well on tests, he became visibly anxious and upset. He repeatedly attributed his poor performance to medication he was taking. I thus saw no indications of any effort to malinger or intentionally perform poorly, and his test results confirmed this: Mr. Bolin did extremely well in

some areas, and very poorly in others.[1] The tests results provide a valid estimate of his neuropsychological functioning.

14. At the time of the testing, Mr. Bolin was receiving medical treatment for hepatitis-C, which involves injections of interferon alpha three times a week, plus oral ingestion of ribavirin. These medications can have some impact on neuropsychological functioning, such as causing or increasing depression, fatigue, irritability and lack of concentration, so I necessarily considered and accounted for the possible effects of these drugs on the conclusions contained herein. Interestingly, although Mr. Bolin repeatedly attributed his poor performance to the medications, the areas of his functioning that are in fact impaired are not those that are affected by interferon and/or ribavirin.[2]

15. The results of the neuropsychological tests clearly and consistently point to the presence of neuropsychological dysfunction (i.e. brain damage) localized to the frontal lobes, with greater damage to the left frontal lobes. Evidence of brain damage was confirmed in both qualitative and quantitative analyses, including Mr. Bolin's impaired performance on several measures particularly associated with frontal lobe functioning: for example, significant performance discrepancies between specific aspects of his verbal and visual memory; severe impairment on tests requiring problem solving and abstract reasoning skills, and on tests of brain and motor skill coordination. The tests results were disproportionately low, given Mr. Bolin's overall intellectual functioning, and are consistent with frontal lobe damage.

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[1] For example, on the Memory Assessment Scales, Mr. Bolin performed extremely well, in the 95th percentile, on tests for visual memory. His memory for prose however was severely impaired. Malingerers generally perform poorly on all tests.

[2] In the WAIS-III subtests, Mr. Bolin also performed within or above average on the Perceptual Organization Index; Verbal Comprehension Index; and Processing Speed Index. However, he did show lower scores on the Working Memory Index, a test that measures attention and concentration. On this subtest, Mr. Bolin scored 88, falling within the 21nd percentile, or low average range. The lower score in this area could be a result of his treatment with interferon, which is known to effect concentration. However, it also could be the result of frontal lobe damage, underlying depression and anxiety or a combination of all these factors.

16. To test Mr. Bolin's intelligence(aptitude) and academic achievement, I administered the WAIS-III and the WRAT- 3, which are standard IQ and achievement tests. These tests are considered to be highly reliable. On both tests, Mr. Bolin demonstrated average ability, i.e. his scores were consistent with most people of his age group and with his level of education on most of the subtests. In unimpaired individuals, scores on the WAIS-III and WRAT - 3 fall in the same range as scores on the other tests administered; in other words, someone who is of average intelligence is expected to receive average scores on tests of the other brain functions in the neuropsychological battery. A discrepancy between IQ and/achievement and other test performance is considered a sign of neuropsychological impairment.

17. Mr. Bolin's WAIS-III scores reflect that he has average intelligence in his Verbal IQ (99 or 47th percentile) and his Performance IQ (92 or 30th percentile), as well as his Full Scale IQ of 97, which places him in the 42nd percentile. His WRAT - 3 scores similarly fall into the average range.[3] If Mr. Bolin had no brain damage, I would expect average performance on the neuropsychological tests I also administered. However, there were significant discrepancies, that will be discussed in detail below, between his performance on certain tests and his overall IQ and aptitude. These discrepancies indicate that Mr. Bolin is significantly impaired in several areas of mental functioning, specifically those controlled by the frontal lobes.

18. The frontal lobes of the brain are primarily responsible for the initiation, organization, planning, execution, and regulation of complex motor movements and actions. It is often referred to as the "organ of civilization" because it enables the integration of the highest levels of human behavior, and damage to it can result in extreme derangement and disorganization. Individuals with frontal lobe damage, especially those of normal intelligence, usually appear to

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[3] Although within the normal range, Mr. Bolin's incorrect answers on the WRAT-III were on occasion caused by perseveration, or repetition. For example, during the spelling subtest, Mr. Bolin spelled the word "institute" as "instititute." This type of error indicates an inability to shift thinking, or a mental inflexibility, a deficit that was corroborated repeatedly by Mr. Bolin's performance on other tests.

the untrained observer to be mentally and cognitively intact. However, often they are unable to adequately or properly perform everyday functions, such as decision making or carrying out all but the simplest plans. Although they may speak coherently and logically, and thus appear normal, their impairments are reflected in their actions and behavior. Proper functioning of the frontal lobes are fundamental to meet the daily challenges of motivation, control and self-regulation.

19. The frontal lobes allow an individual to maintain and shift attention, exert organizational control over all aspects of expression, anticipate consequences, consider alternatives, plan and formulate goals, shape, direct, and modulate personality and emotional functioning, and act to integrate ideas, emotions, and perceptions. Frontal lobe disorders may have the most extreme and far-reaching implications for behavior and functioning, and along with the temporal lobes, the frontal lobes are at particular risk for damage during falls, following blunt head trauma and from neurotoxin exposure.

20. Symptoms of frontal lobe syndrome are many and varied, and include behavioral effects such as **problems of starting** (decreased initiative, productivity, spontaneity), **difficulties making mental or behavioral shifts** (impaired flexibility, disrupted attention, cognitive rigidity, perseveration, difficulty shifting attention from one activity to another), **problems of stopping** (difficulty modulating emotions and behavior, impulsivity, overreactivity, disinhibition, impulse control problems, poor emotional control, difficulty inhibiting inappropriate or unwanted responses, diminished frustration tolerance, disinhibition regarding aggression and/or sexual behavior, outbursts of anger over trivial stimuli), **deficient judgment and self-awareness** (misperception of social expectations, inability to perceive performance errors, inability to appreciate one's impact on others, inappropriate social comments, poor judgment, lack of insight, inability to adapt to new situations, irritable and labile mood, inability to understand consequences, inability to profit from experience), and **deficits in abstract thinking** (deficiencies in planning and goal-directed behavior, impaired ability to plan, organize,

initiate, regulate, or monitor behavior, difficulty considering alternative solutions, deficits in problem solving abilities).[4]

21. Mr. Bolin's specific deficits, as revealed by both the quantitative and qualitative results of the testing, fall into most of the areas identified above. He suffers the most profound impairments in flexibility, the ability to shift or adapt thinking or behavior to changed circumstances, and in the ability to inhibit unwanted responses. He also demonstrates a tendency to confabulate, and showed signs of perseveration in his responses. These impairments are suggestive of damage to the left frontal lobes in particular.

22. Damage to the left frontal lobe often results in the inability to process social or environmental cues, and thus individuals with left frontal lobe injuries often cannot respond appropriately to feedback and lack adequate reality testing skills. They demonstrate marked inflexibility in their behavior and an inability to profit from their mistakes. Those who suffer from left frontal lobe damage also may experience dissociative states. In addition, confabulation, the unintentional production of inappropriate and fabricated information usually in response to direct questioning, has been linked to frontal lobe damage of the left hemisphere. Associated with confabulation is the failure to inhibit incorrect responses, poor error awareness, poor self-correction abilities, impaired memory, poor motivation and denial of impairment.

23. Many of these deficits are apparent in Mr. Bolin's test results, the most important of which are discussed in some detail below. Most significantly, he performed poorly on the Category Test, a test included in the Halstead Reitan battery. This test is the single most

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[4] While I have attempted to set forth some of the general effects of frontal lobe damage, the symptoms listed above are by no means comprehensive. Many of the symptoms identified above can have profound effects on executive functions, judgment and abstract thinking. The degree of impairment, and the functional effects of neuropsychological deficits, reflect not only the specific neuropsychological damage (i.e. frontal lobe damage), but also the interplay between the organic brain damage and other factors affecting cognitive, emotional and behavioral functioning. In Mr. Bolin's case, these other factors include trauma-based symptoms (from both childhood physical and emotional abuse and war experiences), alcohol abuse, and neurotoxin exposure.

sensitive test of brain damage in the battery. It has been found to be 90 percent effective in discriminating brain-injured from normal individuals. The Category Test is a nonverbal test which measures a person's ability to formulate abstract principles based on feedback after each specific test item. Several different concepts must be identified, and each concept is then applied to new information. It tests new problem solving, judgment, abstract reasoning, concept formation, and mental flexibility. Deficits on this test may indicate lesions on the left frontal area, although it is sensitive to brain injury in general.

24. Mr. Bolin's performance on the Category Test was extremely poor. In fact, I have never tested an individual who scored as low as Mr. Bolin on this test. He gave 95 wrong answers, placing him in the severely impaired range and strongly indicating damage or atrophy of the left frontal lobe. Qualitative analysis[5] based on the patterns of Mr. Bolin's performance on this test revealed an extreme rigidity and inability to inhibit unwanted responses. He would often initially correctly identify a new pattern, demonstrating an ability to form concepts. However, rather than applying that same pattern to new data, he would invariably revert back to an older pattern previously identified, even after being told the answer was incorrect. Because of damage to the frontal lobe, the neuro-pathways of Mr. Bolin's brain short-circuit, causing him to repeat certain behaviors, even when he is told they are inappropriate.

25. This same type of deficit was revealed in the Ruff Figural Fluency Test. Mr. Bolin performed this test, that involves making a series of different patterns by connecting dots, extremely slowly. He drew only 8 or 9 new patterns, while unimpaired individuals generally draw between 15 and 20. His extreme rigidity, and inability to inhibit his behavior was demonstrated by his repeated failure to change his performance once I asked him to do so.

26. Mr. Bolin suffers from a similar inability to inhibit responses in the area of motor functions. He exhibited serious difficulties in copying Hand Position Sequences. This

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[5] In addition to quantitative scores, neuropsychological testing requires qualitative evaluation to determine not only the number of mistakes made, but the specific nature of these mistakes.

test is considered to be particularly important in assessing frontal lobe damage. During the test, I showed Mr. Bolin a series of three simple hand movements (making a fist, making a flat palmed slapping movement, and making a slicing motion) and asked him to copy my movements. Mr. Bolin was able to copy the first sequence of movements perfectly, but when I changed the order of the three movements, and asked him to copy them, he continued to perform the movements in the order in which I had first performed them, and was unable to correctly shift the sequence of movements despite repeated demonstrations of the new sequence. Mr. Bolin's performance on this test was moderately to severely impaired, indicating a marked inability to inhibit unwanted or inappropriate motor responses, despite his cognitive ability to discern the incorrect behavior. Even when given verbal instructions or feedback, Mr. Bolin is unable to use the information to guide or correct his behavior.

27. Moreover, Mr. Bolin performance on the test was worse when he used his dominant, or right hand, than when he used his left hand. This discrepancy is very unusual, as generally people perform significantly better with their dominant hand. Higher performance with the non-dominant hand suggests lateralization of the damage, and where the right hand performs worse than the left, the brain injury may be localized in the left hemisphere. On another test of motor skills, Mr. Bolin demonstrated virtually equal grip strength with both hands, while greater grip strength is expected with the dominant hand. The lower performance with the right hand is further indication that the brain damage is on the left side. [6]

28. Mr. Bolin's overall memory was within normal range. However, there were signs of several significant impairments. Although Mr. Bolin had little difficulty in recalling numbers read to him, his ability to recall *and* change the order in which they were given (i.e., backwards), showed signs of mild impairment. This unusual discrepancy demonstrates a

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[6] During the clinical interview, Mr. Bolin expressed a belief that his left and non-dominant hand was much weaker than his dominant hand. The tests results showed the opposite. Mr. Bolin's incorrect description thus showed a great lack of self-awareness, which is also a hallmark of frontal lode deficiencies.

decreased ability in mental tracking, i.e. the ability to integrate memory with higher functions. Although Mr. Bolin's general verbal memory is normal, indicating few problems with attention or concentration, he is unable to perform more complex tasks utilizing his memory. This condition indicates frontal lobe deficits. In addition, because Mr. Bolin performed well on the tests of visual memory, the lower performance on the verbal memory subtests also indicates left hemisphere lateralization.

29. Mr. Bolin's performance on the Memory Assessment Scales shows that his memory for logically organized material is moderately to severely impaired. Once again, this suggests frontal lobe damage. While his immediate recall is moderately impaired, delayed recall is severely impaired, with test scores falling in the 1st percentile. Qualitative analysis of Mr. Bolin's performance on the delayed recall subtest reveals several distinct problems. Mr. Bolin was read a very short prose story, and then asked to repeat the story. He was then given several other tests, lasting about 20 minutes, and then asked to repeat the prose story again. After the other tests, Mr. Bolin was able only to repeat the basic gist of the story, with very few details. In response to specific questions about the details, Mr. Bolin provided incorrect answers, rather than ever saying he did not know or remember. In some instances, the incorrect answers included information borrowed from previous tests I had administered.

30. It was apparent that Mr. Bolin was confabulating, i.e, unintentionally making up information that he believed was true. Confabulation is often found in individuals with frontal lobe damage and may be a function of memory impairments. When the individual does not remember something, the brain fills in the gaps with misinformation. In this case, Mr. Bolin's memory was contaminated. His ability to realize that he did not remember was hampered by the intrusion of old information, information from previous tests. He lacked any awareness that either his answers were incorrect, or that he was unable to remember.

31. Mr. Bolin's history as indicated by the records and documents I reviewed, and my clinical interview with Mr. Bolin, fully supports my test results. There are three very strong indicators of possible brain damage in that history, including experiences that put him at a very

high risk for neurological injury. Most significant are 1) multiple head injuries, beginning in early childhood, at least one of which resulted in significant loss of consciousness; 2) long-term exposure to neurotoxins, including lead paint, solvents, and fuels; and 3) chronic alcohol abuse and dependence.

32. Brain damage is a cumulative process, where initial damage may greatly compound the effects of subsequent injuries. Thus, an individual who suffers from one injury may be able to compensate for any damage caused, whereas an individual who has repetitive injuries, even of a differing nature, will cease being able to make up for the deficits. Similarly, studies have shown that a mild or slight injury can cause severe impairment in an already damaged individual. Thus, Mr. Bolin's exposure to multiple risk factors rendered him far more vulnerable to organic damage.

33. During the clinical interview, Mr. Bolin showed me several significant scars on his head, most of which were on the right side. I felt a definite indentation at the site of one these scars, which was located at the border of the parietal and occipital regions on the right side of the skull. The specific etiology of these scars is not reflected in Mr. Bolin's records, although his military records do indicate the presence of two scars on the right frontal region of his head at the time of his initial enlistment, suggesting that they date back to his childhood or early teen years. Family members report an incident where Mr. Bolin was thrown against the wall by his father in early childhood and lost consciousness for a period of time.

34. Head trauma can result in physical injury to the frontal lobes. Whereas penetrating wounds will result in damage to the localized area of the brain where the injury occurred, closed head injuries often damage other areas, including the side opposite from where the injury occurred. It is most likely that Mr. Bolin suffered from a closed head injury when his father threw him against the wall. This is significant not only in the immediate injury to the brain, but also in increasing Mr. Bolin's vulnerability to subsequent brain damage from exposure to neurotoxins and subsequent head injury.

35. Mr. Bolin also discussed his extensive history of exposure to neurotoxins, beginning from the time he joined the Navy, at age 17, and continuing for many years after his discharge, when he worked as a pipefitter journeyman in naval shipyards and as welder-mechanic. Mr. Bolin suffered from acute effects of this exposure including headaches, dizziness, mental confusion and burning eyes. The history of exposure is corroborated by Mr. Bolin's medical and military records, and descriptions of working conditions in the shipyards provided by co-workers.

36. Mr. Bolin described himself as a daily drinker of whiskey prior to his incarceration. People close to him also described his drinking habits and suggested that he drank alcohol to self-medicate for physical pain due to a serious back injury he incurred while in the Navy.

37. It is well established, and has been for many years, that exposure to neurotoxins, including alcohol, may result in organic brain damage. The severity of mental dysfunction is correlative with amount and duration of the exposure. Of the categories of neurotoxins, solvents, including cleaning fluids, petroleum based fuels, and degreasers are considered to be the most damaging to the brain. Metals, such as lead, manganese, mercury and aluminum, are also extremely dangerous.

38. As an engineman in the Navy, a civilian pipefitter, and as a welder, for a period of approximately 15 years, Mr. Bolin was exposed to neurotoxins on a daily basis, including solvents, jet fuels and other petroleum products, and lead particles. In the late 1970's and throughout the 80's, a large body of research developed on the effects of solvents and fuels on the brain. This research demonstrates that solvent type neurotoxins lower the cerebral blood flow to the frontal and temporal lobes causing atrophy to large portions of the brain, and that exposure to these neurotoxins has been linked to dementia and Alzheimer's disease. Studies conducted also demonstrate reduced manual dexterity in individuals exposed to neurotoxins, and significant problems in functions linked to the frontal lobes, including deficits in reasoning,

problem solving, planning and impaired executive functioning. Emotional problems include depression.

39. Alcohol is also a known neurotoxin. Chronic alcohol abuse can cause significant cortical atrophy, resulting in impaired mental flexibility, memory loss and learning deficits and a tendency to perseverate.

40. Although no one specific cause for brain damage can be determined in Mr. Bolin's case, it is likely that all of the factors listed above contributed to his present organic impairments. Further, I have been informed that Mr. Bolin has symptoms consistent with post-traumatic stress disorder, obsessive-compulsive disorder and depression. Organic brain deficits, particularly of the frontal lobe, place a person at a significantly higher risk for these psychiatric disorders.

41. In conclusion, I have no doubt that Mr. Bolin suffers from significant impairment of his frontal lobes, with more impairment evident in the left frontal region. Because of this impairment, which well predates the time of the crime, he is prone to confabulate and fill in the large gaps in his memory with incorrect information. He is unable to adequately plan complex actions, learn from his mistakes, or to shift his thinking or behaviors in response to environmental or verbal cues. He is, moreover, largely unaware of these problems, and even when they are pointed out to him, he simply lacks the capacity to adapt to changed circumstances. Mr. Bolin's impairments are factors that greatly contributed to his behavior, functioning and personality throughout his life. Any evaluation of Mr. Bolin, whether psychological, social or psychiatric, that does not include consideration of these impairments would be wholly misleading, incomplete and inaccurate.

I declare under penalty of perjury that the foregoing is true and correct.

Signed and dated this 26th day of July, 2000 at San Francisco, California.

NATASHA KHAZANOV

DECLARATION OF ZAKEE MATTHEWS, M.D.

I, ZAKEE MATTHEWS, declare as follows:

1. I am a physician licensed to practice in the state of California, with specialization in the field of psychiatry and traumatic stress disorders. I have a private clinical practice, and I am currently on the volunteer clinical faculty at Stanford University School of Medicine in the Department of Psychiatry and Behavioral Sciences, Division of Child Psychiatry and Child Development.

2. From 1994 until 1998 I served as the Medical Director of the Adolescent Alcohol and Drug Treatment Center Program. I was a clinical instructor at Stanford University School of Medicine from 1994 to 1998. In addition, I consult on an ongoing basis the California Youth Authority (CYA) O.H. Close School in Stockton, California. In this capacity, I am responsible for the medication clinic which provides service to over 300 wards, as well as for diagnostic assessments for various social, emotional, and psychiatric problems.

3. From 1994 through 1996, I was the Medical Director of the Comprehensive Partial Hospitalization Program at Lucille Slater Packard Children' s Hospital at Stanford University. I have worked as the Director of Stanford's Child Psychiatry Fellows School Consultations to the Palo Alto School District. I have also served as a consulting psychiatrist to a number of organizations and institutions, including Community Companions in Santa Clara Mental Health in San Jose, California; Bay View Hunter's Point Community Mental Health in San Francisco, California; and Haight Ashbury Detox Clinic in East Oakland, California.

4. I received my M.D. degree from the University of Missouri School of Medicine in Columbia, Missouri, in 1988. I completed a rotating internship with the

California-Langley Porter Psychiatric Institute in San Francisco, California, from 1988 to 1989, and completed my residency in psychiatry at the University of California, San Francisco, from 1989to 1992. Thereafter, I was appointed in 1992-1994 as a Fellow in Child and Adolescent Psychiatry at the Department of Psychiatry and Behavioral Science, Division of Child Psychiatry, at Stanford University School of Medicine. At Stanford, I also served as Chief of the Trauma Clinic, a facility which is designed to provide comprehensive evaluation and treatment ofchildren and adolescent patients who have been exposed to various types of traumatic events

5. I am currently a member of the American Academy of Child and Adolescent Psychiatry. In 1993, I was the recipient of the American Academy of Child and Adolescent Psychiatry's Presidential Scholars Award, and I was awarded the California Wellness Foundation's Scholar Award.

6. I have qualified as a psychiatric expert in four death penalty trials in California and elsewhere.

7. I have been requested by counsel for Paul Bolin to evaluate his social history and background to determine what possible genetic, social and interpersonal factors affected his childhood development. I was also asked to address the psychiatric and psychological factors which influenced Paul's development and functioning as an adult, including the presence, severity, and effect of physical and psychological abuse and neglect he suffered as a child, his experiences in the military, and his extensive exposure to neurotoxins. I was asked to determine Paul's mental status at the time of the crime in Kern County.

8. I conducted four interviews with Paul on May 10, 1999, June 15, 1999, July14, 1999 and on June 19, 2000, all at San Quentin State Prison. I have spent a total of

approximately seventeen hours with Paul.

9. It is my professional opinion that to render a competent opinion on the questions posed to me, it is necessary to consider a thorough social history which documents the physical, mental, emotional and psychological traumas that Paul endured throughout his life. A social history assessment is an essential component and necessary first step of any adequate mental health evaluation. In reaching my conclusions, I thus reviewed Paul's educational, medical, military, incarceration, and employment records and written statements from witnesses familiar with Paul and his family, materials relating to the acts for which Mr. Bolin has been sentenced to die, materials relating to his prior convictions, and portions of the trial testimony in this case, to develop a reliable chronology of Paul's developmental years and adult life.

10. In order to complete an accurate evaluation of Paul's mental state, I requested that he receive a complete neuropsychological examination. Such an examination was conducted by Dr. Natasha Khazanov. Dr. Khazanov's findings, as set forth in her declaration, document that Paul suffers from numerous mental deficits. Without obtaining and reviewing the results of these medically indicated tests, it would not have been possible to complete a competent psychiatric evaluation of Paul. The materials I reviewed and the examination I conducted were of the type commonly relied upon by psychiatrists in rendering a full and accurate assessment and expert opinion of an individual's psychological, psychiatric and neurologic condition.

INTRODUCTION

11. Paul Bolin's childhood left him psychologically impaired and damaged in multiple spheres of functioning. His history includes exposure to neurotoxins during his early development and periods during his adulthood. A chronic history of physical abuse, including

life-threatening assaults by his father, led to an early and sustained pattern of withdrawal from the home and school, and later use of drugs and alcohol. In addition, Paul had a significant history of head trauma as reported by family members. Indications of organic impairment has been confirmed by subsequent testing.

12. This destructive combination of risk factors yielded both unique and interactive effects, which prevented Paul from developing the adaptive resources that would enable him to conduct a productive adult life.

13. Paul's period in the military served to help him establish a strong self image but this began to erode as his substance abuse increased during his involvement in the Vietnam War. Psychiatric evaluations during this period indicate he suffered from an anxiety disorder for which he required treatment.

14. The war, and Paul's experiences as an abused child, had a lasting and devastating toll on his psychological and social growth and development. Paul exhibits symptoms consistent with trauma-related stress disorder, which most likely resulted from the horrific, traumatizing events of his youth, together with his experiences in Vietnam.

15. Once he returned from the war, and suffered a debilitating back injury, Paul became increasingly paranoid, depressed, and began to use various drugs to self medicate. The combination of his early history of abuse, exposure to neurotoxins and traumatic events of the war, his organic impairments and his use of drugs significantly impaired his cognitive functioning. All of these things often interfered with his daily routine behaviors and impacted most major domains of his life

CHRONOLOGY

Childhood

16. Paul Phillip Bolin was born on April 28, 1947 at St. Elizabeth's Hospital in Chicago, Illinois, to William Martin Bolin (known as Marty) and Mary Monto Bolin. Paul was the second of three children. Paul's older sister Rose Mary, was born December 21, 1943 and his younger sister, Frances was born on November 11, 1951.

17. Both William and Mary Bolin worked for a metal plating company when Paul was born. Mary continued to work at the plating factory during her pregnancy with both Paul and his younger sister, Fran. Because both parents worked, the Bolin children were often left in the care of their maternal grandparents, Rose and Paul Monto. Although they occasionally lived near their paternal grandparents, they hardly ever saw them.

18. Paul's father suffered from intense and unpredictable mood swings and was an extremely violent man. As Paul's sister, Rose Mary states in her declaration,

> As far back as I can remember, my father had a vicious temper that was wholly unpredictable. We never knew what would set him off; he would become instantly enraged at something that never made him angry before. There was no way to tell when he would snap and start beating someone. One second, he could be sitting at the table talking and laughing, and the next minute he would be in a ferocious rage, screaming and hitting us. It was horrible suffering such vicious beatings, but almost worse than the pain, was not knowing what was going to make him angry or when he was going to beat one of us.

19. Paul's younger sister, Fran, describes their father in remarkably similar terms:

> My father was very mean-spirited and hot-tempered. He would fly into an absolute rage at the drop of a hat. We never knew when he was going to get angry until it was too late and he was in a rage. Anything could set him off and make him angry. When he got angry he would start screaming and knocking things off the table and throwing furniture around the room. His rages usually did not end until he had beaten someone, usually Paul or our mother, but he even beat me too.

20. Rose Mary thought her father was "evil and cruel," and even thought he rivaled Hannibal Lecter from *Silence of the Lambs* when he abused his children and wife without mercy:

> My father was not a true father to me or my siblings. He was merely my biological father. I say this because he was cruel and evil. He beat my mother. He beat me. He beat Frances. He beat Paul. He would beat us for anything, regardless of whether what we did was wrong or whether it was small and insignificant. When he beat us, it was clear from the look of pure violence on his face and the way he ranted, that he was completely out of control. His face would change and he would get a look in his eyes like he could kill you - he had "Silence of the Lamb" eyes. He would throw things around, knock things down, break whatever he could get his hands on and hit whomever was closest to him. He beat us until he was too tired to continue.

21. According to both of Paul's sisters, Paul was a favorite victim for William's violence. Rose Mary recalled that Paul was beaten as a toddler; sometimes Paul was even knocked unconscious by William:

> I remember my father beating Paul when Paul was just a toddler in diapers. Our father did not hit Paul with his belt; as he did with me, instead, he beat Paul with his fists. My father threw Paul into walls, down stairs, and punched him with his fists. Paul was knocked unconscious many times by our father. I remember a number of times after my father beat Paul, seeing Paul's still body lying on the floor and being terribly afraid that my father had finally beaten Paul to death.
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> * * * *
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> My father was a very strong man. So, when he hit Paul with his fist or threw him against a wall or down stairs, it was done with great force. I still have the image of my father violently throwing Paul's small body against a wall -- the way his body hit the wall and crumpled to the ground reminded me of a rag doll. I also remember once when my father was beating Paul, he knocked or pushed Paul down a wooden stair case. Paul blacked out from the fall. Even though I hated to see Paul being brutally attacked by our father, a part of me was relieved that I was not the one receiving the beating.

22. Paul, while being beaten, reminded Rose Mary of a "rag doll." William,

according to Rose Mary, sometimes beat the boy until William could no longer raise his arm. William beat Paul with whatever was handy, including a wooden board and a chair. One time William threw Paul up against the wall, and also threw him down the stairs. There was no medical attention for beatings Paul received.

23. Fran too remembered that Paul was beaten unconscious:

> Some of the beatings he gave Paul could have killed him. One time, when Paul was about eight years old, he knocked Paul down an entire flight of stairs. I can remember a relative went downstairs and found Paul unconscious with a bloody gash on the front of his head. She carried him back upstairs and called the police on my biological father.

24. William also beat his children with a leather strap. William beat Rose Mary with a belt on her legs starting when she was about six years old. She reported problems with the circulation in her legs because of the beatings. Rose Mary went to school with bruises, but no one at the school noticed because the bruises were on her legs. Fran only remembers being beaten one time. However, it was a very serious beating: "My father got angry with me for crying. He hit me so hard that I flew into a chair. The chair left a huge gouge above my left eye. I still have the scar from that incident."

25. On many occasions the police came by because William was beating Mary and the children. At least one time, the police took him away.

26. The Bolin children lived in constant fear of their father and waited in frightened anticipation for him to come home from work everyday. The only day they had a respite was on Friday evening, when he went to the movies. Of course, William never took the children with him, but at least they had a break from his violence.

27. For some unknown reason, William Bolin was especially abusive on the Fourth of July. Rose Mary always made it a point to be at a girl friend's house on the Fourth – a habit which she continues to this day.

28. Although Paul never received medical care for his injuries at his fathers hand, he has many scars on his head and upper body that predate his adulthood. His Navy records

indicate that when he enlisted at age 17 he had two significant scars on his forehead, a one inch scar on his right shoulder and a two inch scar on his right ankle. While the specific etiology of these scars is not reflected in Paul's records, it is not uncommon for children who were beaten like Paul was as a child to carry such scars into adulthood. The description of the head scar is also consistent with Fran's and Rose Mary's stories that Paul's head was injured when he was knocked down the stairs.

29. Paul was completely unable to protect himself from his father's rages, except by running away or hiding. However, he always was brought back to face his father's violent and terrifying rage.

> Paul tried to protect himself from my father's rages by trying to push him father away and run, if possible. After a beating, Paul would either run away or hide. When he ran away, he was often gone all day and my mother would go looking for him. Often Paul would not want to go back home to my father, but my mother would drag him back to the house. Paul would go and hide in the little space under the stairs where his red flyer wagon was stored. He would take his blanket and crawl into his wagon and try to sleep.

Even as older child, Paul would run away and sleep in abandoned cars, being gone from home for several days.

30. William was "calm," after he beat the children. As Rose Mary recalled:

> The only good thing about my father's rages is that after he would beat someone, he became very calm and sedate for a while. To see him after he beat us, you would not know he was the same man who had just knocked Paul unconscious or whipped my legs until they were completely bruised.

31. Not only did Paul have to endure his father's beatings, he was also forced to watch helplessly while his father beat his mother. Paul witnessed his mother being beaten innumerable times, for many different reasons. According to both his sisters, he also saw his father try to kill his mother. Fran recalled that one time William tried to kill Mary with a knife:

> Paul, Rosemary, and I were in the house when my father ran at my mother with a hunting knife. Fortunately, she saw him coming and had enough time to get out of the way, so that he ran into the wall with the knife. The knife left a gouge in

> the wall. We were all upset, but Paul tried to push our father away from our mother, yelling, "Daddy don't do that."

32. Rose Mary recalled a time that William attacked Mary with a corkscrew. Rose Mary was young and did not recall how badly Mary was hurt; however, she did remember that there was a lot of blood.

33. Paul, as he got a little older, tried to intervene to help his mother but, according to Fran, it was pointless for a little boy to try and stop a man with a temper like William's. In fact, Paul's attempts to stop the beatings only made Paul the target for William's violence – and subject Mary to an even more severe beating. Rose Mary remembered that if Paul tried to intervene William was even more vicious and banged heads together:

> Even though he was little, there were times when Paul tried to protect me or my mother from our father's beatings. Poor Paul could not do much, but the fact that he interfered really made my father angry. Paul would step in between my father and whoever my father was beating. My father would either start hitting Paul, and then push him away, or he would grab Paul and me or my mom, and bang our heads together. Despite the futility, Paul did try to protect us from our father.

34. William was extremely jealous of Mary, Paul's mother, and his jealousy was the occasion for many of the beatings in the household. William beat Mary beat up if she even so much as looked at another man. In fact, Mary was cheating on her husband. Fran recalled that William was so jealous that he would lift up his wife's skirt when she was leaving the house to make sure she had underpants on. Fran and Paul saw this happen hundreds of times. William also called Mary a "whore" in front of the children.

35. Mary's sister, Elizabeth, also described William's jealousy. Elizabeth refers to William as"Marty":

> Marty did not trust Paul's mother, because Mary was a very pretty woman. Marty

always checked up on her. I believe he knew she was seeing another man. Mary did cheat on Marty with her boss because her boss treated her like a queen. When Paul was around nine or ten years old, Marty had dropped Mary off at a friend's house. When Mary did not come home for several days Marty became suspicious that something else was going on, so he asked me to go with him to the friend's house to get her. When we got there, the people who were there said that Mary was not there. Marty hired an investigator to find Mary, and she was found on the other side of town with her boss from the plating factory - the same factory where Marty worked also. When Mary got home, Marty beat her. He was beating her on the back porch and he hit her so hard that she fell down a flight of stairs. The police came by, but I do not remember if Marty was arrested.

36. William Bolin also sexually abused the female members of his family. He tried to molest Rose Mary when she was thirteen or fourteen years old. William also fondled Rose Mary's oldest daughter, and may also have done the same with her younger daughter. Rose Mary did not speak to her father for many years because of the molestations.

37. Long after Paul was grown, Mary Bolin, Paul's daughter, stayed with her grandfather, William for a period of time. When she turned to give him a goodnight kiss, William grabbed her breast and tried to French kiss her, complaining that "Grandma wouldn't give him any."

38. Despite the horror that they faced daily, no one intervened to help the Bolin children. Although the family lived in an apartment adjoining Mary's parents' apartment, Mary's father and mother rarely attempted to stop William's beatings. Although he would occasionally call the police, Paul's grandfather was a physically small man and did not physically intervene between William and Mary.

39. For all the beatings he received, Paul never tried to hit William Bolin back. In fact, Paul was not a child who fought other children or his siblings. His sister thought that it took a lot to make Paul angry when he was a child. The one thing that did make Paul angry as a child

was when someone in the neighborhood would threaten someone in his family. Fran remembered that her big brother was very protective of her.

40. Mary and William finally separated in 1955, shortly after the incident where William pushed her down the stairs. William Bolin moved in with, and eventually married, a woman named Sophie Stranz with whom he had five more children. Sophie also had three children of her own from a previous relationship.

41. Mary Bolin remained in the apartment adjoining her parents', with Rose Mary. However, when her new husband, Joseph Biaggi, moved in with her, Paul and Fran spent most of their time in their grandparents' apartment. Joseph Biaggi was an alcoholic and the couple frequently fought about his drinking. He hated Paul and Fran, and was verbally abusive.

42. As Fran describes life with Joe:

> In fact, Joe was very mean to us. Although he did not beat anyone, like my biological father did, he was an alcoholic and he would yell and scream. I remember once, he got angry with me and packed up my clothes and put them outside. He would often yell at Paul and say nasty things to him. Neither my mother nor my grandparents did anything about it.

43. When life near Joseph Biaggi grew intolerable, Paul would to try to live with his father again. William continued to terrorize Paul. As Fran describes it, "[Paul] would literally leave one abusive home to go live in another."

44. When Paul was in William and Sophie's house, he was frequently savagely beaten by William for things that Sophie's children had done, while Sophie just watched. Paul also witnessed William beating Sophie, and the couple fought constantly.

45. William continued to beat his new family as well. Fran recalls Sophie's daughter, Donna, came to school full of bruises. The teachers asked Donna what happened, and

when she told them her father did it, they called the police on him.

46. William and Sophie moved around a lot. Fran remembers that they got evicted several times for not paying the rent or fighting with the landlord. She remembered one incident when William punched the landlord in the face.

47. Whenever Paul was living with his father, he would move with him. Every time William and Sophie moved, Paul had to go to a new school. He would change schools again when he returned to his grandparents' apartment.

48. Because Paul could not stand Joseph Biaggi's verbal abuse, or his father's physical abuse, he sometimes simply slept on the streets of Chicago. While on the streets, he lived where ever he could -- sometimes he slept in a car, sometimes he hid in the basement of his father's house. He did odd jobs for money and showered and ate at friend's houses.

49. Paul's school records show that he changed schools so often, that he barely remained a whole year in the same school. This began when he started school, and continued until he reached adolescence. Paul began school at the Von Humbolt School, but in September 1953, when he was six, Paul entered the Burr Elementary School. In November, 1953, less than a month later, Paul transferred to another elementary school in Gages Lake. Only two months after that, in January 1954, Paul transferred back to the Burr School.

50. In October 1955, after his parents separated, Paul enrolled in yet another school, St. Michael's. He stayed his whole second grade year at St. Michael's. At this time only his mother is listed as his caretaker. On the whole, Paul's second grade performance at St. Michael's was "below average."

51. Although he began the 3rd grade at St. Michael's, one month later he was

pulled out of the school and was put in Wood Lawn Elementary School. He spent the next four months at the Wood Lawn School and then transferred back to St. Michael's for the rest of third grade. He got mostly "good's" on his report cards.

52. The following September, 1957 Paul enrolled in the 4th grade at St. Michael's. He finished the school year with mostly "goods" on his report card. 1957 was the year his parents divorced. The school records list Paul as coming from a "broken home."

53. In September 1958, Paul transferred back to the Burr School again and then, almost immediately thereafter, to a fifth school, the Drummond School. At this time the school records list Paul as living with William and his new wife Sophie. Paul received "goods" on his fifth grade report card.

54. At the end of the year, in May, 1959, Paul transferred yet again from the Drummond School to yet another school, the Kosciuszko School. In September 1960 he transferred once again, this time to the Peabody School. In December of that year, he briefly transferred to the Burr School, having apparently attended the Koscuiszko School for some unknown period in between these two schools.

55. Paul's school records suggest that Paul's home life was extremely unstable, moving frequently and never having a chance to build friendships or develop relationships with peers or teachers. It is clear that no one from the school knew about the many problems Paul faced homes, or at least that no school official took action to get him away from the violence in his home.

56. Both of Paul's siblings remember that Paul was a very active child who had trouble sitting still. Paul was also easily frustrated. He used a lot of his energy building things

and showed mechanical ability at a young age. Fran remembers Paul taking the wheels off her roller skates and building "the first skateboard."

57. It is notable that throughout all these years of moving and moving again, and intense violence in the home, Paul was able to maintain good grades at his schools. Throughout the third, fourth, and fifth grades Paul's grade were mostly "goods,"a remarkable achievement in circumstances where even getting to school must have been a struggle.

Adolescence

58. When Paul was about fourteen years old his life changed dramatically. Joseph Biaggi had died of cancer, and his mother married James Amsbury. Amsbury told his new wife that he wanted to "put the family back together again." Rose Mary, who was eighteen, had already gotten married herself, but Amsbury was determined to make a new family and took both Fran and Paul in as though they were his own.

59. Amsbury took the family away from Chicago and out to the west. Paul's new family moved at least as much as his old one did. Paul went with James and Mary as they moved to California, Nevada, Utah, and finally to back to California.

60. Paul attended school in Fontana, California, but in September, 1962, the family moved to Nevada and Paul enrolled in Elko high school. Paul's grades at Elko were very poor, mostly "D's" and "F's." The family moved yet again and in November, 1963 Paul enrolled in Granite High School in Salt Lake City, Utah.

61. Paul apparently began working when he entered high school. He had reported earnings in both 1962 and 1963. At some point during his high school years, Paul worked as a mechanic.

62. James Amsbury did his best to be a father to Paul. According to Fran, Paul, having been essentially on his own for several years, was at first very suspicious of Amsbury, but eventually came to trust him.

63. In April of 1964, when he was seventeen, Paul left Granite High School and his family to join the United States Navy. Paul had been arrested and placed on probation for breaking into a garage with a group of boys, and Amsbury encouraged him to enlist because he thought it would keep Paul from getting into further trouble. Paul chose the Navy.

64. Paul's mother signed the form permitting him to join the Navy, in spite of the recruiting officer's advice that Paul stay in school and graduate before he joined. It is notable that by this time, Paul had cut himself off from all contact with his biological father. In the recruiting statement he signed, Paul listed his father's address as "unknown."

The Navy

65. At age seventeen, Paul entered the Navy in Salt Lake City, Utah. Very shortly thereafter, he transferred to Great Lakes, Ill. for a 12 week "service schools command." Shortly after he entered, Paul was recommended for a "mechanic/operation rating."

66. Paul was trained as an engineman by the Navy. An engineman is responsible for all repair and maintenance on board a ship.

67. Paul initially adjusted extremely well to the Navy. About six months after he entering, he was put on a ship. His first evaluation was excellent, with Paul receiving an average of 3.6 out of 4.0 in all areas. Paul's second evaluation a year later was almost as good. Several times during his first years in the Navy, Paul was recommended for advancement and, a year and a half after he entered, he received a letter of appreciation from Rear Admiral T.A. Long for "a

job 'well done.'"

68. In October, 1965, when he was eighteen years old, Paul married Mary Patricia Barnacky in Salt Lake City, Utah. Both of Paul's daughters were born while he was in the Navy. Mary Patricia Bolin was born on July 24, 1966 in the US Naval hospital in Portsmouth, Virginia. Paula Michele Bolin was born on November 7, 1967 in Orlando, Florida.

69. In 1966, Paul reported for his first duty at sea while he was in the Navy. He was assigned to the U.S.S. Orion, a submarine tender. Paul did repairs on ships and nuclear submarines including atmosphere controls, boilers and engines.

70. Initially, Paul's military performance was excellent, as it had been in the past. In 1966 and 1967, Paul's scores for "professional performance," "military behavior," "leadership and supervisory ability," "military appearance," and "adaptability" were all 3.0 or above.

71. In 1966, one commanding officer wrote glowing words about Paul's performance:

> Officer Bolin takes pride in his work and gets along well with his shipmates. He worksvery well on his own. He is well behaved and mannerly. He is clean-cut and wears his uniform with pride. He willingly follows orders and regulations. He obtains very good results from his men. His command of the English language is well above average both orally and in writing.

72. However, in 1967, when Paul was twenty years old, his performance in the military began to show signs of deterioration. In March 1967, Paul had an "unauthorized absence" from the Navy for about a day. Paul received three days of "restriction" for the offense. One of his Navy supervisors noted about this time that, while Paul was good when supervised, "he willingly permits laxity within himself."

73. More importantly, in July 1967, Paul was admitted to a military hospital

"with progressing symptoms of anxiety." The diagnosis was "anxiety reaction." Paul was hospitalized for five days and treated with Thorazine, a drug often used to treat symptoms of psychosis, such as hallucinations. While at the hospital, Paul stated that he had many "inter and intra personal problems." Later that month, Paul was discharged with "the recommendation that he be changed from his present division since this could have been a strong factor." Paul's military records do not indicate that he had any follow-up psychiatric care while in the military.

74. Paul's problems in the military continued and seemed to get worse. Early in 1968, there was a second incident where Paul received a commanding officer's "non-judicial punishment." Also, in early 1968, Paul was alleged to have been under the influence of "intoxicating chemicals while on duty." Paul was given 30 days restriction for this offense. In March of 1968, he was given a special court marshal for using a unissued identification card. At the end of 1968, had two further disciplinary charges related to the use of intoxicants. In June of that year, Paul was charged as "incapacitated for the proper performance of his duties as a result or previous indulgence of intoxicating chemicals." In December, he was put on restriction for disobeying an order and being drunk on duty. There is nothing indicating that Paul was offered or received drug or alcohol counseling while in the military.

75. Paul had a number of injuries and operations while he was in the Navy. In 1965, Paul was seen in the dispensary for contusions and a hematoma near his right eye. He had fallen from a ladder and struck his right zygomatic area (a small quadrangle bone on the side of the face below the eye). In 1966, he had to go to sick bay to have a piece of metal removed from the area around his eye. In 1967, he was hospitalized with gastroenteritis. In 1968, Paul was hospitalized when he was overcome with naphtha fumes. Also in 1968, after numerous bouts of

tonsilitis, Paul was hospitalized for a tonsillectomy. In 1969, Paul was exposed to "ionizing radiation."

76. Paul's problems spilled into his personal life. Late in 1967, the Virginia Electric and Power Company sent a letter to the Navy regarding Paul's indebtedness to them. In early 1968, Paul's wife, Mary, wrote a letter to the Navy complaining of the treatment Paul was getting. She wrote: "I want my husband out of the Navy because I can't live like this with people giving him so much pressure[.]"

77. In May, 1968, Paul was among the crew members who were stunned to learn that the U.S.S. Scorpion, a submarine that was on its way to back to Norfolk, had mysteriously sunk in the Atlantic. Family and friends of the Scorpion's crew were on the docks waiting for the ship to come in when they heard the news that all 90 of the crew members had drowned.

78. Paul's performance with the Navy improved for awhile in 1969 and 1970. His performance evaluations were very good. He was honorably discharged and then re-enlisted for six years. He also qualified for a re-enlistment bonus.

79. In late 1969 and early 1970, Paul was reassigned from the U.S.S. Orion to a barge commanded by Admiral Hildreth. His service for the admiral was excellent. As his commanding officer wrote:

> Bolin assumed duties on the Admiral's Barge during this period and achieved the task of replacing a complete engine. He works with great skill, knowledge, and patience. Bolin takes pride in his work and the appearance of his work. Bolin is helpful to subordinates and is a definite asset to the Navy.

80. Later, his supervisors wrote the following about his service for Admiral Hildreth:

> Petty Officer Bolin's work as an engineer on the Admiral's Barge has been consistently outstanding, and he has demonstrated exceptional ability in both leadership and technical phases of his rate. During the period of this report, he has been assigned an additional duty as an instructor in the COMCRUDESLANT REP NORVA CIAC School and has demonstrated an ability to adjust to his new responsibilities, and grasp instructor techniques rapidly. He is well versed in usage of the English language, both written and orally. Petty Officer Bolin has been recommended for EN1. The ratee's professional performance is outstanding. His leadership abilities are of such a nature that he has gained the respect and admiration of both his juniors and seniors. His adaptability is conducive to good morale among his associates.

Still later, in 1970, Paul's commanding officers wrote more favorable reports about Paul. The reports show the positive effects of the highly structured military environment on Paul's development.

> Paul is an exceptionally well qualified barge engineer and an outstanding petty officer. His professional attitude toward his work and the service makes him an invaluable asset to any assignment. Bolin's knowledge of the particular engines installed in this barge is unsurpassed. The material conditions of the boat is completely outstanding and this condition can be attributed to Bolin's hard work and effective supervision. Bolin takes an extreme personal interest in his work and although his services as the barge engineer are not utilized daily, he can be counted on to be ready to go no matter the hour. Bolin works whatever hours necessary to accomplish his task and will not deter from his goal until it is reached to his satisfaction. His ability in the use of the English language is excellent and he handles both written and oral forms with ease. Bolin's appearance in uniforms is always outstanding, and he serves as an excellent example to younger sailors. . . . Bolin is a definite asset to the staff and it has been through his hard work that Rear Admiral J.B. Hildreth has the finest barge in the area. He is strongly and sincerely recommended for promotion to First Class Petty Office at the earliest time.

81. In 1971, the praise was even more lavish:

> EN2 Bolin is an outstanding credit to the Naval Service. His professional knowledge and dedicated work have been paramount in keeping the barge assigned to Radm J.B. Hildreth in outstanding material condition. Bolin has spent numerous hours of his own time to ensure that all assigned tasks have been accomplished correctly and to his personal satisfaction. His work is filled with imagination and enthusiasm. In this independent type duty, Bolin has shown that

> he has the industry, drive, and self-discipline to handle all tasks assigned him and carry all to completion. Bolin's personal demeanor makes him ideally suited for this type duty which involves associations with senior officers other VIPs. His personality is extremely pleasant and contributes greatly to any situation. . . . Bolin takes extreme personal interest in the barge and takes pride in its appearance and material condition. He is a model sailor in appearance and courtesy and serves as a fine example to all navy men. His ability of expression in both written and verbal form is excellent. Bolin is certainly capable of responsibilities commensurate with the rate of first class petty officer and is sincerely recommended for promotion to that level. EN2 Bolin has served well on the staff of COMCRUDESFLOT FOUR and his presence will be sorely felt. EN2 Bolin is a completely outstanding sailor in all respects, and his performance in all areas is 4.0.

82. Although Paul's performance in the Navy was outstanding, Paul's personal problems, especially his problems with his wife got worse. Apparently, the couple separated for a time during the late 1960's. In 1969, Mary Bolin wrote the Navy requesting that the Navy advance. Paul's re-enlistment money. She wrote that she and Paul were on the brink of divorce although they were back together. They were deeply in debt and living with her mother. She wrote that they had sent the children to Arizona because they could not afford to keep them.

83. It is not clear from the records whether Paul was able to get the re-enlistment bonus in one lump sum, as his wife requested. However, his relationship with Mary continued to deteriorate. Paul wanted to bring his children back to Virginia.

84. However, at the same time Paul was getting positive reports from his commanding officers, he continued to have substance abuse problems as well as other psychological problems. In 1970, Paul went to see a Navy psychiatrist. The psychiatrist reported that Paul told him he was drinking heavily, and that he "wants to beat up someone." Paul expressed an "inability to express feeling toward other people, prefers to be alone and is hostile toward other people. In fact, he has demonstrated overt hostility more toward himself." The

psychiatrist prescribed Thorazine as well as requested a psychiatric consult for Mr. Bolin. There are no indications in Paul's military records that he got the help of a psychiatrist.

85. In October 1971, Paul was transferred to Mare Island, California for a 17 week course in Naval Logistics Advisory Training, which included instruction in pacification, operations, survival, evasion, resistance to interrogation and escape; a six week course in the Vietnamese language; human response training; first aid; radio-telephone procedures; communications security; weapons indoctrination; and, logistics and tactics. This was in preparation for his next assignment, which was to be in Vietnam.

86. Prior to shipping out, however, Paul took a leave to go to Florida to complete his divorce and obtain custody of his two daughters, Mary and Paula.

87. In March of 1972, Paul was shipped overseas to Vietnam. Paul served at Cam Ranh Bay and Saigon while he was in Vietnam.

88. The period Paul was in Vietnam, the middle months of 1972, was a time, relatively late in the war, during which the United States Navy was gradually disengaging from the war and handing over most of the military operations to the Navy of the Republic of Vietnam (the South Vietnamese), with the hopes, ultimately futile, that the Republican Navy would be fend off invasion by the communist north. At the same time, in what is called the Easter offensive, the North Vietnamese forces were attempting to forge south, both by land and by sea to strengthen their military positions for a time when the United States would ultimately leave.

89. By the time Paul was in Vietnam, it was clear to the ordinary soldier and sailor that the war was winding down and that the Americans were not going to win. This caused a great deal of demoralization amongst the troops. Enlisted men had doubts about the

competence of their commanding officers and were unwilling to put their lives at risk for a losing cause. A practice called "fragging," in which unpopular officers were attacked with fragmentation grenades by men under their command became common. In addition, many units were plagued by racial unrest, reflecting the civil disharmony back home. Many soldiers experimented with drugs, including marijuana and heroin.

90. At some point during his service in Vietnam, as part of the United States' efforts to turn the war over to the South Vietnamese, Paul became a Naval adviser to the Vietnamese Harbor Defense unit in Cam Ranh Bay, a major military base near Saigon. At that time, the Navy was protecting the Vietnamese coast from invasion, but was attempting to turn that responsibility over to the South Vietnamese. As a Naval advisor, Paul advised and assisted the Vietnamese on matters of small boat handling, patrol procedures, repair of engines, and procurement of necessary repair items. He also accompanied Vietnamese boat crews on daily patrols.

91. Paul's work as an adviser was excellent, as his performance evaluation showed:

> [As an adviser, Paul] constantly demonstrated his thorough knowledge and skill as an engineman. He is efficient, resourceful, and can always be depended upon to achieve excellent results with the sometimes limited resources at hand. These traits /and the fine rapport he has developed with his Vietnamese counterparts, has enabled him to become a very effective advisor. Petty officer Bolin has not hesitated to volunteer his own services, and has on numerous occasions given of his own time to complete necessary tasks. He has a friendly personality and is well liked by his associates. Petty officer Bolin adheres to proper military behavior, and his appearance is always well groomed and proper. He has an above average command of the English language, both oral and written. . . . Petty officer Bolin has proven that he can accept difficult assignments and accomplish excellent results. He has increased his professional knowledge by becoming highly proficient in the maintenance and repair of outboard engines. Upon his

> arrival, he was unfamiliar with outboards however in a limited time, and through his own efforts, he became a very capable repairman, and a valuable asset to the Harbor Defense Advisory Team.

92. Cam Ranh Bay during the period Paul was there was subjected to frequent attack by small groups of well-trained North Vietnamese guerillas, called "sappers," who attacked the base and the surrounding area at unpredictable times and in unpredictable ways. They often tried to plant "satchel charges," a kind of explosive, on the base itself. There were also individual sniper attacks on the base and on the Navy boats patrolling the area. As a sailor on the small boats, Paul was ". . . under constant threat of enemy mortar, rocket, and small arm attack."

93. On April 8 and 9, 1972, there was a substantial North Vietnamese sapper attack on Cam Ranh Bay, where Paul was located. Four men were killed and twenty wounded. A week or so later there was another documented attack where there were a number of North Vietnamese 122 mm rockets fired on Cam Ranh Bay. Ten of them hit the base.

94. Paul was given a number of medals for his service in Vietnam: National Defense Service Medal; Vietnam Service Metal; and Republic of Vietnam Campaign Medal. As a result of his service in Cam Ranh Bay, Paul also received the Small Craft insignia Award "in recognition of [his] service aboard the LCPL, forty-five foot Picket Boat, and Boston Whaler small craft of the Vietnamese Navy Harbor Defense Unit, Cam Ranh, Bay, RVN." Paul was entitled to wear the "Small Craft insignia" award, an award for service as a petty officer in charge of a Riverine or Coastal Craft under combat conditions.

Coming Home

95. In August, 1972, almost all the American troops had returned home, and Paul

too was transferred to San Diego. Shortly after his transfer to San Diego, Paul's service in the military abruptly ended. As Paul's daughter remembers, Paul often talked about how the military had taught him how to fight, but did not teach him how to survive once he returned to civilian life.

96. In September, Paul seriously injured his back after falling while working on a ship. The accident caused him severe pain. He had pain in his lower back radiating down his left leg and pain when he turned his leg outwards. The pain from Paul's back injury was intense, and he was later perscribed Valium. A few months after the injury, he was seen in an Emergency Room for Valium toxicity, a result of taking the medication for his back pain.

97. A month or so later, Paul had a hemilaminectomy and diskectomy (a procedure where part of the spinal cord is removed to ease the pressure on the nerves in the spine). He was put in the hospital for several days and then put on strict bed rest for a several months.

98. After months of hospitalization and leave from duty, the military doctors gave up on Paul: "It is the opinion of the medical board that Paul is not capable of performing his duties, and it is recommended that Paul be referred to the PEB [physical examination board] for disposition."

99. A few months later, in July 1973, Paul was not recommended for re-enlistment. He was honorably discharged from the Navy with a disability settlement payment. After serving his country for nine years, both at home and in Vietnam, Paul was suddenly on his own once more.

100. While Paul was in the hospital, he met Molly Cruz, a nurse. In late 1973, he

and Molly Cruz married in Arizona. They immediately went to Florida to get Paul's daughters, and then moved to San Diego, then to San Pedro and finally to Covina in Los Angeles County when they moved into a house on Traymore street.

101. Paul and Molly lived together with his daughters, Paula and Mary, and with Molly's three daughters, including Pamela Cruz Castillo, who became like a daughter to Paul.

102. In 1977, Paul and Molly separated. In 1978, they divorced. After the divorce, Pamela came to live with Paul and his daughters because her mother did not want her.

103. After he left the Navy, Paul sought out a familiar environment and continued to do the only work he knew, by working as a pipefitter in the naval shipyards. He worked in several different shipyards between 1973 and 1981. However he had trouble keeping a job because of his back problems.

104. In 1975, he went to the Long Beach VA hospital's emergency clinic due to back pain because he reinjured his back reaching for something. It was difficult for him to walk, and he had severe limited range of motion. The pain increased with coughing or straining. The doctor prescribed him Valium and bed rest. He returned several times in the next few months with low back pain radiating down his left leg, which was made worse by heavy labor. It was recommended that he take a break from heavy work, although it was apparent from the records the that he did not wish to because he had his children to support. He continued to work.

105. Paul was an excellent worker. However, he sometimes had difficulty doing the assigned work. According to his friend and supervisor, Mark Daser, Paul did not have difficulty understanding the basic tasks assigned him; rather, he was incapable of doing things in a different way than he was used to doing them. For example, one time Daser asked Paul to drill

holes in a particular part of the ship, so they could run pipes through it. Even though Daser had provided a blueprint, Paul drilled the hole in the wrong part of the ship. It was very difficult for Paul to understand that he had made a mistake, even though he had the blueprint right there in front of him.

106. Paul was also exposed to dangerous chemicals while working at the shipyards. In particular, Paul was exposed to JP-7 a jet and rocket fuel, whose main component is kerosene. The fumes from JP-7 cause a burning sensation in the lungs and eyes, as well as severe headaches. The workers were told to avoid coming into direct contact with JP-7, but that if they did they were to strip immediately and shower. However, in spite of the warnings, Paul was occasionally doused with the substance. Paul's friend and co- worker, Richard Brodgen, recalled at least five occasions that Paul was completely soaked with JP-7. The effect on Paul of being doused with jet fuel were dramatic. As Richard Brogden put it:

> Each time Paul and I were doused with JP-7, we would get nauseated, dizzy, the burned lung feeling and bad headaches. It would also cause us to vomit. The effects of this kind of exposure would last for a couple of days. The headaches lasted longer for Paul, though. For about a month after he was exposed to the JP-7, he would get excruciating headaches that were so painful tears would run down his face. At those times -- even though Paul tried his best to never show that he was in pain -- I believe that he was in so much pain that he didn't know he was crying.

107. Paul was also occasionally covered with "bilge fluid" (the ship's waste products) while working at the shipyard. Bilge fluid contained both human and mechanical wastes such as gasoline and oil. Richard Brogden recalled that after one of the incidents where Paul and another co-worker were covered with the fluid. The co-worker got violently ill and vomited until he was dry heaving traces of blood.

108. While at the shipyards Paul consistently inhaled smoke and particles in the air. As a pipefitter, Paul worked right next to welders, and, therefore, breathed a lot of "bad smelling black smoke." Paul also inhaled paint fumes which were thick in the air. He also worked next to sandblasters, who created a lot of dust and dirt. Paul also did work as a grinder. Some of the surfaces he ground were covered with asbestos tile and lead based paint.

109. Friends and family noted that during this time, Paul suffered from frequent and severe headaches. Paula remembered that her father got headaches almost everyday and that he would lay down on the coach when he got the headaches and that he told her that he felt like his eyes were going to pop out. The headaches sometimes lasted all day.

110. Paul tried to be stoic about his pain. Paul would not complain much and would rarely state that he was in pain. But people who knew him well could tell that he was suffering from the expression on his face and the way he carried himself. Paul's daughters both remembered the pained expression in his eyes everyday when he came home from work. Mary remembered that he was in so much pain he cried.

111. Paul drank whiskey and beer regularly. He appears to have used alcohol to help medicate his back injury and his headaches, as well as to dull his emotional pain.

112. In 1980, Paul went to see a doctor who evaluated him for exposure to asbestos. In a history taken for the medical exam, Paul noted that beginning about 1978, he noticed shortness of breath and chest pain described as "someone is sitting on my chest." With exertion, he felt his heart pounding and racing. He became dizzy when lifting heavy things. Paul also described a very sharp pain in the back of his head which lasted a few moments and then disappears. Paul attributed this pain to his back injury. A series of lung studies were done in

connection with Paul's symptoms. The tests showed a "a very significant defect in the patient's ventilation capacity and giving objective confirmation to his subjective complaints. . . " The doctor concluded that Paul was excluded from heavy work and precluded from exposure to respiratory irritants. He was diagnosed with "parenchymal asbestosis," which was expected to become progressively worse with time. Paul's exposure to asbestosis also put him at higher risk for cancer.

113. Paul also had lingering effects from his time in the military. A number of his friends noted that he had been deeply effected by what he saw and heard in Vietnam. Mark Daser remembered that Paul was extremely troubled by the experience and that sometimes his actions were very strange. One time when Paul, Mark and a friend went to an Asian restaurant, Paul became very paranoid because he was certain that the waiters were Vietnamese. He was afraid that they were from North Vietnam and that they wanted to poison him. He got very agitated and refused to listen to Mark's explanation that there was no way that the waiters would have known that he had fought in Vietnam and the three friends finally had to leave.

114. Another friend described a different incident in 1982. He was with Paul in a restaurant and

> we were waiting to meet some of his old Navy buddies he had not seen in years. I was talking to Paul when I noticed a glassy, far-away look in his eyes. I looked toward the spot where he was looking and I saw his Navy buddies entering the restaurant, both dressed in a military uniform. There was a table of men sitting behind us talking loudly and being obnoxious, when Paul suddenly jumped up and jumped on one of them. Paul's friends and I rushed over and separated them. When Paul got a few steps away from the man at the other table, tears started rolling down his face. I took Paul home, and although we were supposed to meet up with his friends later, I talked Paul out of it due to his earlier behavior.

115. Paul talked a lot about Vietnam. When he talked about his time there, he

would get very serious, and tears rolled down his cheeks. Often, his face would go blank and his eyes looked like they were a million miles away, and he seemed unaware of who he was with. Mary thought that her father got a very strange and far away look in his eyes when he talked about Vietnam. She remembered that at ". . .these times his eyes looked weird, like he was not here with us, but somewhere far away." His body would start to twitch nervously. Other times when he talked about Vietnam, he would have a very pained and sad look in his eyes and voice. Paul acted like he was almost constantly haunted by memories of Vietnam.

116. Paul also told his daughter Paula about a Vietnamese girlfriend he had in Vietnam, whom he had a child with. Paul told her that his girlfriend and child were killed in an explosion. Paula remembered seeing letters from the girlfriend written shortly before she died.

117. Paula also remembered that sometimes her father would act very strange while they were living in Covina. Occasionally, he got agitated and nervous and told Paula and Mary that they had to get under their beds because someone was going to shoot up the house. While the girls were hiding under the bed, Paul put on his camouflage clothing and sat up all night waiting for an attack. This happened a number of times although the house was never shot up.

118. Sometimes while Paul was dressed up in his camouflage he walked around the house armed with a gun, as if protecting it from invaders. As he walked, he talked to himself in what Paula thought was Vietnamese. Paul's friend, Richard Brogden also remembers Paul wearing camouflage clothing.

119. Occasionally, Paul came home from work looking nervous and panicked. He rushed to the door, hustled his daughters into the car and then took off and drove around for

hours like someone was chasing him. Mary remembers that Paul swerved the car as if he were trying to throw someone off his tail although it never seemed that anyone was really chasing them.

120. Paul's family and friends also noted that he was very sensitive to loud noises and that when he heard a loud noise, his ears perked up and he jumped up to try and find out where the noise was coming from. He was so alert to strange sounds that he was often able to hear sirens long before anyone else noticed them. He reacted the same to the sound of helicopters, low flying airplanes and Fourth of July fireworks.

121.Paul's friend Richard Brogden remembered that " [o]nce when I was at Paul's house, he was sound asleep in his bedroom snoring. Someone merely shut an outside door, not loudly even, and Paul suddenly jumped straight out of bed and assumed a crouched stance, as if he were looking for something or someone."

122. He also had difficulty sleeping and suffered from bad dreams. As Mary Bolin noted: "For most of my life, I can remember that my dad used to wake up in the middle of the night because of bad dreams. He screamed and yelled in his sleep and woke up crying with sweat running down his body.

123. Despite the ill effects of his work environment and his strange behavior, Paul became well-known in his neighborhood for helping out the young people Thomas Dademasch, who was a teenager when Paul moved to Covina, described him as a generous man who would "give you the shirt off his back." He did his best to make people comfortable and happy. A number of teenagers stayed at Paul's house when they had no place to go. He made sure that there was food in the house for the kids and took care of the bills and the rent. He

bought birthday and Christmas gifts for all the kids in the house.

124. Paul took in another boy, Ricky Balsamico, when Ricky was thrown out of the house by his mother. Ricky recalled that Paul always had a place for him to sleep and food for him to eat. Ricky ended up staying with Paul for the next four years. He thought of Paul as the father he never had. Several of the neighborhood boys thought of Paul as a second father. Paul was also kind to Ricky's grandmother, Marie Gamble. He helped look after her and sat and talked with her for hours.

125. Paul tried to teach some of the kids, especially the boys, skills he thought they could use. He taught them how to fix cars, cook and take care of themselves. He also taught the boys how to become pipefitters. He brought scraps of materials home from his job and hold classes for the boys. One of the boys Paul trained, Richard Brogden, later became a co-worker of his.

126. Paul also became friendly with Eloy Ramirez in the middle 1970's. Eloy was a heavy drinker, a sort of town drunk who Paul took under his wing. When Eloy was too drunk to take care of himself, Paul did so. Mary Bolin noted that when Eloy was falling down drunk, her father would carry Eloy home, wash him because he often threw-up and defecated on himself, and put him to bed. He also saved Eloy from getting beaten many times. Eloy was a nasty drunk and he started fights that he couldn't finish, which Paul had to break up. One time Paul had to save Eloy from drowning.

127. Many people noted that Paul was easy-going and mellow, and that he was not an easy man to anger. He would get angry, however, if someone did not respect his property or family. Paul took enormous responsibility for his property and that of others. Paul would

also strongly react if someone refused to leave him alone. He would suddenly get very angry and then afterward act as if nothing had happened. He did not stay angry very long.

128. A friend described Paul as calm, but the he would suddenly "snap." He would get an eerie, vacant look in his eyes. After Paul would get angry, he did not appear to remember what happened. He did not remember the fight, although he may have remembered being angry. Afterwards Paul seemed to return to the place and time where his body is, he would act like nothing out of the ordinary happened. One time, after such an incident, his hands were badly bruised, so he knew something happened, but he did not remember what.

129. Paul had several encounters with law enforcement after he left the Navy, however, he was not convicted until 1983 when he was convicted of attempted involuntary manslaughter for the 1981 shooting of Kenneth Ross.

130. It is undisputed that Paul shot Ross because he believed that Ross had beaten Nyla Olsen, a young girl who Paul had taken into his home, with a baseball bat. Nyla, who was living with Ross at the time, arrived at Paul's house crying and bruised. She told Paul that Ross had hit her with a bat. A little while later, Ross arrived, and he and Nyla went outside to talk. Nyla and Ross were arguing outside when Paul's daughter Mary tried to intervene and Ross pushed her away. Ross was yelling loudly for Paul to come out of the house. Richard Brogden told Paul that Ross had a gun, so Paul got his own gun and exited the house. When Ross approached him, still yelling, Paul shot him.

131. After Paul was convicted, he was sent to the Chino Institute for Men. Paul did very well when in prison. He was discipline free while he was in Chino and his work record was excellent. Paul worked as a welder in one of the prison tractor barns and did outstanding

work. As one of his supervisors wrote:

> [Paul's] attitude and cooperation were outstanding and the quality of his work was first class. It was difficult to work around our busy schedule, inmate Bolin displayed patience and showed a definite interest in doing a job right the first time. I am very proud of his work.

132. Paul apparently got along very well with other prisoners at Chino. One of his close friends in prison was Robert Hartley, who remembered Paul as a generous and patient man. He was a congenial and easy-going cellmate who was patient both with the guards and with other inmates. Paul became good friends with Robert Hartley's parents and made them a number of presents in the prison wood shop.

133. While Paul was in prison, he went to chapel every night and also volunteered at the church. He frequently read the Bible and would quote scripture. Paul told Hartley that he read the Bible six times while in prison. He also got other inmates involved in the religious activities at the prison.

134. Hartley noted that one of the main topics of conversation between Paul and himself were Paul's daughters. He talked about them all the time, about how he missed them and how he was going to get back together with them when he got out of prison.

135. In May 1985, Paul was paroled from prison to Mr. Hartley's parents. Shortly thereafter, he received permission to have his parole transferred to Oklahoma where he went into business with a former inmate he knew, Jack Baxter. They went into business together. Mary Bolin and her husband John McDevitt came to Oklahoma to join him. The three of them lived in a small trailer with no heat, electricity or running water. There was not enough money to feed everybody, even though Paul was working. Paul and Baxter eventually had an

argument over money. Baxter got angry and attacked Paul with a board. Paul stabbed Baxter as he tried to defend himself from the attack. A jury acquitted Paul of all charges, finding that he acted in self-defense.

136. Despite his acquittal, and the recommendation of his parole officer, Paul's California parole was revoked and he was returned to prison following the incident with Baxter. He was finally released from prison in March 1987.

137. While Paul was in prison, his daughter Paula, had a baby girl, Ashley. Paula's boyfriend erry Halfacre was the father. Jerry was very abusive towards Paula while they were together. He hit, grabbed, and slapped Paula. Halfacre was an even worse father. He abused cocaine and methamphetamine. He did not have any money, he refused to get a real job, grew marijuana to sell, and he refused to support Paula and Ashley. Paul did not like Halfacre because he refused to take care of his family responsibilities. Although he did not like Jerry, Paula's father would not let his daughter, granddaughter, or even the father of his granddaughter go without food, shelter, and clothing. So, once he got out of prison, Paul supported the three of them. Paul helped Halfacre out because, as the father of Paul's granddaughter, Halfacre was family.

138. Because of his back injury and his status as a felon, Paul found it difficult to find work, although he occasionally worked as a welder for a wrecking company, or as a mechanic in a friend's auto repair shop. He also worked in a scrap yard.

139. His friend, Mark Dazer, tried to get him a job in the shipyard, but was unsuccessful. Paul's inability to find steady work was extremely discouraging to him. According to one friend, Mark Daser, Paul was very proud of his ability to work hard and earn money. He

had worked hard all of his life. He worked for Daser, who bought old houses and refurbished them. Mark thought that he could be trusted with any job. Daser also thought that Paul was good at dealing with other employees.

140. Friends also noticed that following his time in prison, Paul was a much more quiet and withdrawn person. He read the Bible a lot more and was much more devoted to religion. Paula, his daughter, noted that Paul went to church as much as possible and could quote scripture by heart. Mary Bolin remembered that Paul could read the Bible in Hebrew. In fact, she was embarrassed because he insisted on giving all of her girlfriends a copy of the Bible.

1987-1988

141. In 1987, Paul met and eventually became engaged to Rhonda DaCosta. Paul was introduced to Rhonda by his daughter Mary. According to his daughter Paula, Rhonda was the first woman Paul had been in love with for many years. Paul was deeply in love with her and he would do anything for her. He was constantly doing things for her to show her that he loved her and talked about her all the time. The two moved in together shortly after they began dating.

142. Unfortunately, after the two had been together for about a year, Rhonda died after an accident when her car was hit by a semi-truck. Paul visited Rhonda in the hospital, and may have been present when she died. Paul took Rhonda's death very hard, according to Mark Daser, Paul was as unhappy as Mark had ever seen him in all the years he knew him. Paul went on a three to four day drinking binge because he was so devastated by her death.

143. Paul was greatly changed by Rhonda's death. He became very withdrawn, silent and sad. He no longer wished to be with his family, when previously family had been very

important to him. Paul began spending time in a cabin in Thompson Canyon in remote rural Kern County. He stopped coming to family functions – like Thanksgiving and Christmas, instead choosing to be alone.

144. Paul spent a substantial amount of time by himself up in the cabin, although occasionally friends would come to visit. He originally went there to look for old gold mines. His friends would join him in exploring the hills and valleys surrounding the cabin. One of the friends who was frequently there was Eloy Ramirez.

145. Although he was spending most of his time at the cabin, Paul would return to Southern California periodically to try to make some money working for his friends. In April, 1989, Paul was severely burned while welding. He was treated at the hospital for second degree burns to his left chest, abdomen, and left under arm extending to his elbow. The wound was cleaned and he was prescribed Vicadin and Benedryl. However, he returned to the Emergency Room a few days later complaining of pains in his hand. There was a bright red line up his arm. Paul was diagnosed with acute cellulitis lymphangitis, a spreading bacterial infection of the skin, the tissue under the skin and the lymph nodes.

146. It was around this time that Jerry Halfacre gave Paul marijuana seeds to start a crop up at the cabin. Halfacre had experience with growing marijuana plants. It was Halfacre who helped Paul pick out where to plant the seeds. Halfacre was a frequent visitor to the cabin.

147. Around this time, Paul also met Vance Huffstuttler, at a Walker Basin bar. They become friendly and Paul invited Vance to live with him at the cabin and to become partners with him cultivating marijuana. Vance and his girlfriend, Becky Ward, moved into the cabin by mid-June, 1989.

148. In late July or early August, Paul's friends Sondra Hooten and Dennis Dademasch stayed for about a month at the cabin. A few days before Sondra and Dennis left, Paul and Vance got into a fight because Vance was beating on Becky and hitting Paul's van. Paul threatened Vance with a gun to get him to stop and Vance stopped, but he was very, very angry with Paul. Sondra noted that the situation between the two men was very tense and that Paul was frightened of Vance:

> After the fight, for the rest of the time my family was up there, Paul and Vance did not speak to each other and there was a lot of tension between them. I was concerned that Vance would try and start another fight with Paul.
>
> * * * *
>
> The day after the fight, Dennis and Vance went to a bar for a beer. Vance said that he was planning to "get" Paul. Dennis tried to talk him out of it, telling him that he had better leave Paul alone.
>
> * * * *
>
> After the incident with Vance and the gun, Paul seemed very concerned that something bad was going to happen. He knew that my family was going to leave in a few days, and he kept telling us that he really wanted to go with us, because he did not feel safe staying there with Vance after what had happened between them. Paul repeated this so many times, that I was really concerned for him, since I had never seen him act so nervous and frightened.

149. Approximately one week after the argument between Vance and Paul, on labor day weekend, the crimes for which Paul was sentenced to death occurred. Vance Huffstuttler and another man, Steve Mincy were shot to death near the cabin. A third man, Jim Wilson, was shot in the arm but fled into the hills and survived.

150. After the crimes occurred, Paul left California for Chicago and ended up with his family. When he arrived in Chicago, he said that he had gotten into some trouble and

wanted to be around his family. While in Chicago, Paul did all he could to help his family. For instance, he tried to get his sisters, especially Fran, to make amends with their father.

151. His aunt, Elizabeth Monto, became very ill, and Paul took her to the hospital. Paul stayed with her until she was feeling better, and then he made sure to visit her in the hospital at least once a day.

152. Paul remodeled his Uncle Sylvester's house; built a Christmas tree for his niece; and even though he had very little money, went to a second hand store and bought something for all the kids. Some of the items he had to repair, but everything was in good repair and no one was forgotten.

153. While in Chicago, Paul "became loved by all the kids. He would sit around and teach the kids Bible lessons and encourage them to do what was right." Paul became especially close to a cousin named Trina Perez, with whom he shared his continuing sadness about his time in Vietnam . He also tried to convince her to read the Bible and follow the scriptures.

154. A cousin who was only seven years old, Jeremiah Monto, came to love Paul so much that he requested that Paul be his godfather. After Paul was arrested and taken back to Bakersfield, he wrote to Jeremy and told him that he should get another godfather due to his situation; Jeremy persisted in wanting Paul, so they had a proxy stand in for him, and Paul was named as his godfather.

155. In January, 1990, the television program "America's Most Wanted," did a segment on Paul and the crimes in Thompson Canyon. Relatives in Chicago saw the program and notified the authorities as to Paul's whereabouts. He was actually visiting his father,

William, when he was arrested. He was brought back to California for trial.

MENTAL STATUS EXAMINATION

156. When I interviewed Paul at San Quentin, he appeared alert, fully orientated, and was cooperative. Paul is a white male who appears his stated age of 53. He was dressed in usual prison clothing light blue shirt and dark blue pants. Paul had several noticeable scars on his face and head.

157. During my initial interviews Paul was somewhat guarded and anxious, but later he was able to relax and became more engaging. His affect was full range and he spoke in a goal directed fashion.

158. Paul spoke about his early childhood and the difficulties he experienced. He spoke about growing up in Chicago and the abuse he suffered at the hands of his father. He described his father as a " drunkard" and his mother as "very quiet," someone who was unable to stand up to his father and protect him or his other siblings. He expressed feeling betrayed by his parents. His mother " she was nothing, not good or bad, she never said any thing to protect me". He recalls his mother saying she does not like kids and that she did not like her own kids.

159. He told me that his father "would out of nowhere for no reason suddenly go into a rage" and that Paul would often receive the brunt of his abuse. "We were beaten with closed fist, and belts." When describing his abuse he becomes tearful and angry, stating that "my parents did not care about me or the others." He stated that his mother " also got the worse of my father's abuse" and that "it was during these times that I would run away from home."

160. He ran away from home often because of the abuse and neglect he experienced. At the age of nine he recalls living on the streets for days at a time, in abandoned

cars, or where ever he could find shelter against the sometimes harsh winter and summer days, only to be found by a family member and returned to the same abusive environment. He reports between the ages of 9 and 15 that he was often times on his own. He commented that "I never had my own bed until the military."

161. He described symptoms of Dysthymic Disorder (a milder form of depression) which included problems with impulse control, feelings of helplessness and irritability, sleep disturbances and feeling over whelmed by the "craziness at home".

162. Paul told me about his time in the military and described this period as a time when he was able to develop his self esteem and began to feel good about himself, when people respected his work. However, later in his military career he began to experience problems in his marriage, his alcohol use increased, and while in Vietnam he was exposed to a severe amount of trauma which has had a devastating effect on him socially and psychologically. He spoke of this time as another very difficult period in his life which at times reminded him of earlier experiences during his childhood.

163. He reported having symptoms of Post Traumatic Stress Disorder including flashbacks , difficulty sleeping, nightmares, increased anxiety, symptoms of depression, paranoia and being hypervigilant during these periods. He stated that his sleep problem had become such a problem after the Navy that he would often sleep in a different bed and sometimes in a different room from his wife, because of his reactions to the many nightmares he would experience.

NEUROPSYCHOLOGICAL TESTING

164. After obtaining information from Paul about his head injuries, I recommended that he undergo neuropsychological testing. At the request of counsel, Dr.

Natasha Khazanov, Ph.D. conducted a comprehensive neuropsychological evaluation of Paul at San Quentin State Prison.

165. As part of her evaluation, Dr. Khazanov gave Paul the following tests: the Expanded Halstead Reitan Neuropsychological battery, the Wechsler Adult Intelligence Scale-III (WAIS - III), the Wide Range Achievement Test -III (WRAT - III), the Memory Assessment Scales (MAS), the Digit Vigilance Test, the Go - No - Go Tasks, the Rapid Alternating Movements Test, the Hand Position Sequences, the Seashore Tonal Memory Test, the Ruff Figural Fluency Test, the Controlled Oral Word Association Test, and the Rey Complex Figures Test.

166. Although Paul, as revealed by his WAIS-III, WRAT-III and achievement tests, demonstrated average ability, he is significantly impaired in several areas of mental functioning, specifically those controlled by the frontal lobes. The results of neuropsychological tests Dr. Khazanov administered clearly point to brain damage localized to the frontal lobes, with greater damage to the left frontal lobe.

OPINIONS

167. For the purposes of this psychiatric assessment, I have assumed that Paul was the perpetrator of the killings for which he was convicted and sentenced to death. It is my professional opinion, which I hold to a high degree of medical certainty, that Paul is psychiatrically and neuropsychologically impaired, and that his impairments have affected his functioning throughout his adult life. In addition, such deficits were causally related to his behavior at the time of the offenses for which he has been sentenced to death. It is likely that Paul's deficits affected and continue to affect his ability to meaningfully assist counsel in his

defense.

168. I hold each one of these opinions and conclusions to a reasonable degree of medical certainty. They are based on my training and experience as a psychiatrist, the neuropsychological testing done, the documents I reviewed, and my examination of Paul. Every conclusion and finding could have been made at the time of Paul's trial by competent mental health professionals provided with appropriate historical data about Paul and his family, results of comprehensive neuropsychological testing, and with a through psychiatric examination.

169. Based on my examination of Paul and my review of the available records and declarations, it is my professional opinion that he suffers from organic brain damage, particularly damage to the frontal lobes, substance abuse, and symptoms consistent with trauma-induced stress disorder and symptoms of a depressive disorder. It is my opinion that each of these impairments was present during 1989-1990, at the time of the crime for which Paul was sentenced to death and Paul's trial.

170. It is my opinion that Paul's multiple deficits may have their origin in childhood experiences and are beyond his control. His deficits were exacerbated by the stressors he was experiencing in the months and weeks before, September, 1989.

Organic Brain Damage

171. Throughout his life, Paul experienced numerous insults to his nervous system, insults which likely caused permanent neuropsychological damage. First, there is evidence that Paul's father frequently beat his mother. It is unlikely that William's beating of Mary stopped simply because she was pregnant. Hence, Paul may have experienced neuropsychological damage in utero before he was born.

172. In addition, Paul was exposed to neurotoxins before birth. Both Paul's parents worked as platers in a Chicago factory. It is clear that they were exposed to noxious fumes and vapors, since, as Paul's sister Fran recalled, both parents came home smelling of sulfuric acid. Rose Mary, Paul's older sister, remembered her mother working for the plating company while she was pregnant with Paul. As a plating worker, Mary Bolin was exposed to cyanide fumes and vapors containing lead, and possibly cadmium and hexavalent chromium particles.

173. Lead and cyanide are both known to be teratogens, that is, chemicals that cause malformation and damage to a growing fetus. There is some evidence that hexavalent chromium may cause damage to a growing fetus.

174. Paul was exposed to more lead, and hexavalent chromium, as well as manganese, nickel, and cadmium as an engineman, welder, pipefitter and shipyard worker. Exposure to lead causes permanent damage to the central nervous system. There are studies that show that manganese, nickel, hexavalent chromium and cadmium also cause nerve damage. In some reports, there is an increase in depressive disorders, aggressive behavior, and other maladaptive affective disorders in adult lead poisoned patients.

175. Paul was also exposed to solvents in his various employments. Paul inhaled solvents and absorbed them through the skin. Paul's exposure to solvents is another possible source of damage to his central nervous system, with effects in particular to his memory and mental abilities. Solvents such as those to which Paul was exposed cause the white matter of the brain to atrophy and degenerate. The neurological damage from such solvents is permanent. Studies have shown that solvents have direct toxic effects on the frontal lobes of the brain.

176. Paul also abused alcohol beginning when he joined the military. His alcohol abuse increased when he was discharged. Alcohol is a powerful neurotoxin and chronic alcohol abuse can cause significant cortical atrophy, resulting in impaired mental flexibility, memory loss, and learning deficits and a tendency to perseverate.

177. The abuse Paul experienced at the hand of his father was extreme to say the least. Given the severity of the beatings and the reports that Paul was knocked unconscious by his father's blows on more than one occasion, it is quite likely that Paul's brain was damaged by his injuries. Paul bears scars on his head consistent with such injuries.

178. Neuropsychological testing convincingly demonstrates that Paul has organic brain damage. More specifically, the testing shows that Paul has damage to the frontal lobes, with particular damage to the left frontal lobe.

179. Frontal lobe damage can cause extreme rigidity and an inability to stop unwanted responses, even when the individual has been told that such responses are incorrect. There are several examples of Paul's rigidity in his life history. For instance, Paul's friend noted that although Paul was capable of understanding the concepts involved in pipe fitting, he could not adapt to new circumstances and he would make repeated errors and was unable to understand the correct procedure even if it was pointed out to him a number of times.

180. Paul's inability to cope with life after the military was due in part to the damage to his frontal lobes. Individuals with frontal lobe syndrome find abstract thinking very difficult, lack the ability to organize behavior and consider different solutions. As difficult as the military might have been for Paul, it was a place where a great many of Paul's "life decisions" were made for him. Once Paul left the military and he was in an unstructured environment, he

had a great deal of difficulty. He tried what he knew from the military, that is mechanical and shipyard skills, and when that failed, due in part to his back injury, Paul began to flounder.

181. Individuals like Paul with frontal lobe damage also have great difficulty modulating emotions and behavior. They tend to overreact to stimuli, and have a poor ability to stop an unwanted behavior once it begins. There are numerous examples of Paul's overreaction to stimuli and difficulty modulating his behavior. The description of Paul's sudden anger once someone had "pushed" too far suggests difficulty in considering alternative actions. His overreaction to perceived danger is another example of an inability to stop inappropriate behavior once it starts.

182. As noted above the neuropsychological testing done on Paul showed significant damage to the left frontal lobe. Damage to the left frontal lobe often results in the inability to process or to accurately perceive social or environmental cues. Damage to Paul's left frontal lobe could therefore have contributed to Paul's tendency, described by family and friends, to interpret the possibly innocent behavior of others as dangerous to himself or loved ones.

183. It is clear from the neuropsychological testing done by Dr. Khazonov that Paul has a tendency to confabulate. Confabulation is the unintentional production of inappropriate and fabricated information usually in response to direct questioning, has been linked to frontal lobe damage of the left hemisphere. Because of such damage, when Paul does not know something, he unintentionally fills in the gaps with misinformation. Moreover, Paul's confabulated stories many sound plausible because his brain incorporates bits of information from his previous experience. This is something completely beyond his control. The stories will also sound convincing because Paul himself is convinced that they are true. Nevertheless, Paul

has a severely impaired ability to provide accurate information about himself and his past.

184. Those who suffer from left frontal lobe damage may experience dissociative states, that is, states in which behaviors, thoughts and feelings that ordinarily would be closely associated are split off from one another. It is clear that Paul was vulnerable to such states. The description by friends and family of Paul's glassy eyed stare when he talked about his experiences in Vietnam is completely consistent a dissociative state. Friends also describe a case where Paul had bruised hand from a fight and was unable to remember the fight. Most likely, Paul could not remember what he had done because he was in a dissociative state during the fight – consistent with damaged frontal lobes.

Implications of Childhood Abuse Physical Violence

185. As described in detail above, Paul's childhood was one of fear and pain, caused by his father's violence and rage. From a very early age, Paul's father hit and beat him, and threw him against the wall and down the stairs. Paul's father kept hitting him until his hand got tired.

186. Although experts cannot predict exactly what the results of physical violence towards a child will be, such violence almost always has enduring and devastating effects both on the child's development and on the adult survivor. However, there are a number of ways in which physical violence clearly impacted Paul's adult functioning.

Development of Psychological Symptoms

187. One effect of child abuse is to put the adult survivor of child abuse at risk for potential development of serious psychological symptoms. Children who have been traumatized in the first decade of life, such as Paul, are the most deeply affected. They

demonstrate a broad array of psychological symptoms. Their inability to regulate internal arousal manifests as hyperactivity and an exaggerated startle response. High levels of arousal along with intrusive thoughts cause adult survivors of child abuse to act impulsively in a mindless response as visceral memories of violence are mindlessly acted out.

188. There is ample evidence of psychiatric symptoms consistent with child abuse in Paul. For example, Paul has an exaggerated startle response. Loud noises and sudden motions are alarming to Paul. Additionally, Paul was described as a hyperactive child, a symptom consistent with child abuse.

189. One of the most common effects of childhood victimization is hypervigilance, which Paul has clearly developed as a coping strategy to psychologically protect himself against future violence. Hypervigilance refers to the heightened sensitivity and sustained attention to interpersonal cues that might help predict or protect against future physical injury or psychological harm such as betrayal, injustice, rejection or degradation. The expectation of such injury may lead to misperceptions and overreaction in the face of real or imagined threats. Hypervigilant people are always on guard, always prepared for flight or fight. Paul exhibits symptoms of hypervigilance. For instance, Paul was so sensitive to the possibility of danger that he could hear sirens long before anyone else was aware of them.

190. Adult survivors of child abuse are anxious, fearful, and often phobic. It is usual for them to develop suspiciousness, lack of trust and paranoia. In fact, psychiatrists have identified high levels of paranoid ideation in children who have been the victims of physical abuse. People who have paranoid ideation are more likely to think that other people are threatening and react in a hostile manner.

191. Paul has a tendency to paranoia. His children describe that would sometimes make them sleep under the beds, and at other times, drove them around erratically as though they were being followed -- when there was no evidence that they were. In another incident, Paul was paranoid about the Vietnamese waiters in a restaurant and thought they were going to poison him, something which surely was not true. Paul's paranoid thoughts may have rendered him unreasonably, but honestly, fearful of Vance Huffstuttler.

192. During my interviews with Paul, he exhibited many of the symptoms described above. It took multiple interviews to establish the rapport needed to overcome his guardedness about his past. When discussing his childhood, he became more anxious, tearful and, at times, angry. Paul described his own hypervigilant behavior as a child. Paul also shows a tendency towards paranoid thinking.

Impairments in Emotional Functioning

193. Another consequence of child abuse is impariment in emotional functioning. Healthy emotional functioning involves the ability to identify and experience a range of positive and painful emotions, to regulate one's expression of emotion, and to be able to share emotion with others or understand another's emotional state. Seriously disturbed parent-child relationships and a child's experience of parental-induced trauma interfere with healthy emotional development, such that a child or adolescent may have difficulties with emotion regulation, and show evidence of mood disorders such as depression and anxiety.

194. In Paul's family, his father clearly dominated and expressed only negative emotions with minimal regulation. Annoyance, resentment, anger and rage, interspersed with a lack of emotional connection or warmth pervaded the home atmosphere when Paul his father,

mother and step-parents. There were rare opportunities for emotional warmth in relationships with Paul's grandparents at Christmas time, but those were short-lived.

195. When I met with Paul and spoke with him about his childhood, his moods were labile. He shifted rapidly between anger, guilt, sadness and a sense of hopelessness. He expressed feeling helpless, which results in significantly lowered self-esteem.

Cognitive Distortions

196. In addition to being at risk for developing the above symptoms, another consequence of child abuse are deficits in the adult survivor's cognitive and practical abilities. Abused children have difficulty taking in new information and adjusting to new situations. They can be are proficient at concrete activities; however, they have very little knowledge of themselves and others, and have difficulties with abstractions. Their problem solving skills are impaired. They see problems, especially interpersonal problems, in black and white and respond in an "all or nothing" fashion. They react quickly to stimuli without devoting sufficient time to organizing their thoughts and identifying their options.

197. That Paul suffers from many of these problems is demonstrated by the results of the neuropsychological testing. He showed an inflexibility and inability to incorporate new information into already established patterns. His difficulties on the job with incorporating new instructions outside of the routine are also partly explained by Paul's history of abuse. That while in the military Paul expressed problems with interpersonal relationship is, therefore, not surprising.

198. Additionally, given Paul's history of child abuse, it is not surprising that when faced with an interpersonal problem, especially when he perceives there is danger to a

loved one, that he reacts in an "all or nothing" fashion.

Impairment in Social Relationships

199. Children and adolescents who have suffered extensive neglect and abuse almost invariably have difficulties with interpersonal relationships. Because the neglectful and abusive treatment occurs in the context of an interpersonal relationship, destructive patterns of relating are experienced as the normal and expected way of interacting with others, and also set up specific expectations for future relationships. Abused children may develop a strong sense of rejection, or not fitting in, which impedes self-esteem and the ability to form later relationships.

200. Adults maltreated as children often describe difficulties being able to trust others; expect rejection and abandonment; dread being made vulnerable, humiliated, or powerless; crave closeness but fear intimacy, experience feelings of guilt and shame, and other such conflicts. Becoming close with others can be a threatening process because of the expectation that closeness means the potential for physical and/or psychological harm. Paul clearly experienced difficulties in his interpersonal relationships, and that interfered with the development of close, meaningful contacts with others. Paul had several unsuccessful marriages.

201. Physical abuse may also be at the root of Paul's substance abuse problem. Paul first began to use alcohol or other intoxicants while in the military. His tendency to abuse substances was in part rooting into his desire to escape the emotional pain of his violent childhood.

Witnessing Violence

202. As is related above Paul, witnessed his father beat his mother, his step-mother and his sisters. He saw his father attack his mother with a knife at least once.

Witnessing this kind of abuse is as psychologically damaging as direct victimization. A child suffers empathetically from the blows a loved one inflicts on another.

203. The child witness to violence may experience extreme fear and helplessness. He fears that he will be the next beaten or that the beaten parent may die. He also experiences frustration that he cannot help his family member. This sets up a deep sense of powerlessness that can later lead the child to episodic efforts to gain power in inappropriate and dangerous ways, such as identifying with the aggressor. The constant threat of harm leaves the child in an enduring state of anxiety and battle readiness.

204. The psychological consequences of this for Paul were enormous, as he had to internalize his rage at this behavior and, because he could not protect his mother or sisters, he experienced feelings of guilt, shame and a sense of ineffectiveness.

205. In reaction to all the years that he was unable to protect his mother, his sisters, or himself, Paul developed a self-concept as protector of the defenseless. This is a frequently observed reaction among children who witness the repeated abuse of significant others under circumstances in which they are unable to intervene. The role of protector of others in need is a niche into which a victim of childhood psychological maltreatment like Paul fits easily, because the maltreatment so impaired his self-esteem that he considers himself unworthy of protection. He externalizes his protective impulses onto others perceived more worthy of protection than himself. Moreover, because of his distorted perception of reality, he is apparently unable to adequately distinguish truly threatening situations from delusions of danger and is therefore likely to be overprotective of other individuals. Paul's role as a neighborhood "second father," discussed above, is a concrete demonstration of Paul's identity as protector.

Implications of Childhood Psychological Abuse

206. In addition to physical abuse, Paul was the victim of psychological abuse and maltreatment. Paul was rejected, terrorized, scapegoated, and neglected. He was subjected to such chronic and extreme levels of psychological abuse under the coercive control of his caregivers that his parents essentially became sources of intense danger, fundamentally thwarting Paul possibility of normal psychological development. Paul's history is replete with extreme examples of virtually every category of maltreatment discussed in the literature.

207. One type of emotionally abusive behavior is known as spurning or rejection. This behavior includes belittling, denigrating, and other non-physical forms of overtly hostile or rejecting treatment, such as shaming a child for showing normal emotions, or singling out a child to criticize or punish. A spurning parent never recognizes a child as having any worth in the parent's life. There is no affection shown, and the child is often humiliated and degraded. A rejected and spurned child develops no sense of self worth, self esteem, or sense of his place in the world. He assumes that, because he is not worth anything to his parents, he has no worth to anyone. He thus anticipates rejection and responds accordingly.

208. Paul was spurned by his father, who showed him no affection and belittled and degraded him. His mother was distant and unavailable, and was too busy with boyfriends and her own life to pay much attention to her children. He was also verbally abused by his step-father, Joseph Biaggi, who acted like he hated children.

209. Another form of emotional abuse suffered by Paul is "terrorism." This does not refer to physical abuse, but to the failure of a parent to recognize that his or her threatening behavior is frightening and intimidating to the child. Terrorizing behavior frequently causes the

symptoms of children who are actually physically abused. The constant threat of harm is responsible for anxiety, depression, withdrawal and/or agitation and arousal.

210. Paul's father was subject to unpredictable explosions of rage. Paul and his sisters lived in constant fear of their father's anger. The trauma of being the target of his father's violence and abuse was intensified for Paul by the ongoing psychological terror of anticipating with certain knowledge what was going to happen when his father became enraged, but without the benefit of knowing when. This pattern of unpredictable terrorizing abuse made it impossible for Paul as the victim to anticipate when the violence might occur, thus preventing him from taking any action to avoid the abuse or protect himself.

211. Another dimension of the emotional abuse Paul suffered was caused by his father's disrespectful and inappropriate behavior. Paul's father fought and swore in his presence. His mother was having affairs during her marriage, and his father would pull up her skirt in front of the children to see if she was wearing underpants. Introducing a child to this type of behavior leaves the child with the opinion that if this is what his parents do, it must be acceptable.

212. Paul was subjected to abuse in the form of isolation. As a child, Paul changed schools so often he was essentially isolated from meaningful peer contact. Paul had difficulty sitting still in class and was therefore the object of many reprimands by his teachers. He had no real friends growing up. Because Paul had to little the opportunity to participate in school activities, he had little exposure to the types of nurturing, constructive social relationships that are possible in most healthy children's lives.

213. Paul's other impairments would have made it particularly difficult for him make the transitions necessary for adjustment to the frequent changes in his environment every

time he transferred to a new school. It is likely that these transfers were especially stressful on his development. Paul, as he grew up, frequently sought out structured and stable environments, such as the military, in order to cope with the chaos that he experienced as a child.

214. Because he was not given an appropriate opportunity to socialize with other children and adolescents who participated in age-appropriate activities, Paul was at great risk for getting into trouble with the "wrong crowd," especially as he became an adolescent; and, indeed, as a young teenager, he got into trouble and was put on probation for activities with other problems boys. Paul's step-father seemed to realize the risks Paul faced and recommended that he Paul join the Navy to avoid more serious trouble.

215. Paul's parents failed to provide him a safe and nurturing environment during his early childhood which was necessary to promote self-reliance and autonomy. The loss of a "safe base" was a profound trauma which compromised Paul's psychological development. Because his caregivers did not provide protection or nurturance, he had to find some sense of safety at any cost. The need for a caregiver is so strong that even when a child is being abused, as Paul was, he or she will attempt to remain emotionally connected to the abuser. In fact, abused children often are driven to become more dependant on their caregivers. For Paul, returning again and again to his father, despite the continual abuse William inflicted on him, is evidence that Paul remained attached to and dependent upon his father.

216. Paul was also the victim of scapegoating. He was frequently blamed and punished for the acts of his step-siblings. When a child is punished for things he did not do, he may develop the attitude his behavior simply does not matter. Because good behavior is punished instead of rewarded, the child may see no reason to conform his behavior to appropriate

conduct.

217. Paul was also neglected by his parents. They failed to provide medical or dental care to their children, even when they were injured. Neglected children may, of course, suffer from untreated injuries and illnesses. Neglect is also known to be a very important factor in predicting a child's future violent behavior (as important as physical abuse). When neglected, children are left to develop alone. They must respond to complex situations with no adult guidance. While their bodies grow and become adult, their emotions and behaviors remain immature and impulsive. They are easily frustrated and have difficulty dealing with such frustration. They also have less flexibility. Adults who were neglected as children cannot protect themselves appropriately. They have difficulties seeking emotional care from others, manage relationships or handle loss. They are at higher risk for depression and anxiety disorders. They frequently resort to the "wrong people" and to drugs and alcohol.

218. Some of the impairments Paul suffered while in the military are consistent with an adult survivor of child abuse. Paul was diagnosed with an anxiety disorder. An abused child is at increased risk for such disorders.

Summary

219. Paul Bolin grew up in a family system where he was at high risk for repeated abuse at a young age. The frequent involvement by the police in family resolving disputes, his parents' emotional impairment, alcohol use by his father, lack of social support, and the presence of domestic violence created a very dangerous and chaotic environment for him to grow. It is well-documented in the literature that a child growing up in such a toxic environment will experience problems with attachment (the bonding with the mother) effecting later

relationships in adulthood, resulting in problems with intimacy. Also evident in this group of maltreated children are interpersonal problems that relate to difficulty in understanding appropriate social responses to interpersonal situations and limited problem solving skills. The exposure to physical abuse places a child at greater risk for aggression by increasing the level of impulsivity and irritability, engendering hypervigilance and paranoia.

220. Research has identified the worst combinations of child abuse and neglect in terms of their impact on children and adolescents' perceptions and expectations of their present and future life. A combination of physical neglect, physical abuse and verbal abuse have the most negative effects; this was the same combination of maltreatment that Paul experienced as a child and adolescent.

221. The most important protective buffer against lasting harm to a child is a wise and caring adult, who can help the child interpret his experience. Other factors associated with healing from trauma include social support outside the family and an open, supportive educational climate. Structure, predictability, proper assessment and early intervention are also associated with protection from symptoms, as are intelligence, and a positive self-image. Paul had none of these things. No one intervened when he was abused. No adult, not even his grandparents, who were well aware of William's violence, effectively intervened. Paul had no structure in his home.

222. Some children are resilient to trauma. How well they cope with the psychological damage of trauma depends upon a number of factors such as the source, nature and duration of the trauma and neglect, the age of the child when trauma occurs; how much social support is available and how many other problems the child faces. Without protective buffers, the

effects on development can be catastrophic, especially when the trauma is of human design, and especially when it is the child's parent who causes it. Trauma that occurs at an early age makes the likelihood of developing traumatic stress reactions greater. Cumulative risk increases the chance of lasting damage to the child. Multiple risk factors cause an increase in the chance of permanent problems.

223. Dr. James Garbarino, a well-known researcher into child development and abuse, put it this way:

> Life is not fair. Some children are blessed with positive, well-functioning families and strong, healthy constitutions, and strong minds and supportive communities that provide financial, social, physical and spiritual resources. Other children contend with troubled families *and* hostile environments *and* weakened impaired minds *and* bodies.

224. Unfortunately, Paul Bolin falls into the latter category. He had many risk factors and few of the resources known to increase resilience to trauma and abuse. This left him extremely vulnerable to problems in later life.

MENTAL STATE AT THE TIME OF THE CRIME

225. I have reviewed the facts of the crimes for which Paul was sentenced to death. It is my opinion, which I hold to a high degree of medical certainty, that, at the time of the crime Paul became frightened and suddenly perceived great danger to himself in the actions of Vance Huffstuttler, which caused him to believe that he had to defend himself against that danger.

226. One of the symptoms of a trauma-based stress disorder is the tendency to dissociate. During a dissociative state, information enters the brain via the sensory organs, the eyes, ears and skin, but once a traumatic memory is invoked, very high levels of emotional

arousal prevent the accurate evaluation and categorization of experience. Before the information reaches the portions of the brain governing rational thought, the brain is flooded with fear and terror. The body is aroused, and fragments of a traumatic memory invade consciousness.

227. It appears that Paul, at the time of his encounter with Vance Huffstuttler, may have been experiencing stress-related traumatic recall consistent with a dissociative state. In such a dissociative state, Paul could not have formed a mental construct to make sense of what was happening to him. Instead he would have acted as if he were in great danger with a "fight or flight." response. Before his brain had a chance to explain the stimuli and select an appropriate response, Paul would have already acted with disastrous consequences.

228. It is my belief that the shooting of Vance Huffstuttler was not the result of careful thought and weighing of considerations for and against the proposed action, but were rather the result of trigger responses to perceived dangers to himself. Because of his mental condition at the time of the crime, Paul did not meaningfully reflect upon the gravity of his actions was severely diminished. He was not able to form an intent to kill. Additionally, given Paul's many deficits, his organic brain damage, the stress he was under at the time of the crime and his ingestion of alcohol and cocaine, it is likely that in shooting Vance Huffstuttler, Paul acted of out a perceived sense of extreme danger, without intent, prior reflection or the consideration of alternate actions.

REVIEW OF PRIOR EVALUATION

229. At counsel's request, I reviewed the psychiatric evaluation prepared by Dr. Ronald Markman before Paul's trial. Dr. Markman's evaluation was limited to assessing Paul's mental condition at the time of the evaluation, as well as his state of mind at the time of the

crimes.

230. The standards for an accurate, complete and reliable psychiatric opinion require a review of the individual's psychosocial history, including any biological, genetic, and environmental factors that influenced his development in infancy, childhood, adolescence and adulthood. This standard is widely recognized in the relevant scientific community.

231. At the time of Paul's trial, a reliable mental state evaluation required a) a complete social and medical history; b) a clinical examination; c) indicated psychological testing to assess intellectual functioning and detect indicators of neuropsychological defects; d) appropriate laboratory testing; and e) any necessary medical examination.

232. The historical review includes obtaining information from the person to be evaluated, as well as from relevant sources such as immediate and extended family members, acquaintances, institutional actors, and prior evaluators. It also includes documentation such as school records, social services contacts for the individual and his family, hospital and other medical records, military records, and the records from correctional institutions. This review is particularly necessary when determining whether to recommend neuropsychological and other medical and or psychiatric assessments.

233. It is extremely difficult to conduct an even minimally adequate evaluation based solely on information provided by the client. There are many different reasons for this. Individuals who suffered abusive and painful childhoods often have difficulty recalling details of traumatic events, may confuse or blur together separate incidents, and often minimize or distort events either consciously or unconsciously. Organic deficits, such as frontal lobe damage may result in memory or other problems that cause the individual to confabulate. For that reason, it is

necessary to obtain corroboration for information provided by the client from as many sources as possible.

234. In order to obtain accurate personal information from the client it is often necessary to conduct several personal interviews with him over a period of time. Without repeated contact, it is difficult to get the client to open up and to discuss troubling and/or sensitive events in his life. Clients are often guarded and reluctant to disclose the personal stories that have impacted them the most severely. They also often have no idea what types of information will be helpful to their cases. Individuals with a history of alcohol and/or substance abuse may have trouble remembering specific details. It is my experience that clients often require multiple contacts to establish a relationship that would allow exploration of very painful or trauma events.

CONCLUSION

235. All of the professional opinions and conclusions made in this declaration are based on information about Paul's history which could have been made available to a psychiatrist in 1990 and thereafter. These opinions and conclusions are consistent with the state of psychiatric knowledge and practice at that time. Paul's impairments are sufficiently extensive that they would have been discovered in the course of a competent psychiatric examination at that time.

I declare under penalty of perjury that the statements in this declaration are true and correct.

Signed and Dated this 6 day of August, 2000 at Hayward, California

M.D.
ZAKEE MATTHEWS, M.D.

Mincy was shot four times approximately in the position his body was found, but for at least one of the shots he must have been in a more erect posture. He was shot three times in the position in which his body was found, at least some of those shots being fired from a .45 caliber handgun.

MATERIAL REVIEWED

Evidence Lists

Kern County Sheriff's Office(KCSO) Evidence and Photographic Report - Dickerson - 89/09/03
KCSO Evidence and Photographic Report - Dickerson - 89/09/03
KCSO Evidence and Photographic Report - Dickerson - 89/09/03
KCSO Evidence and Photographic Report - Grove - 89/09/06
KCSO Evidence and Photographic Report - Rickels - 89/09/06
Handwritten report re Colt revolver
KCSO Property records - several pages

Technical Reports

KCSO Criminalistics Lab service request No. 1 - Mara - 90/02/26
KCSO Criminalistics Lab service request No. 2 - Mara - 90/05/17
KCSO criminalistics Laboratory Examination Report - Laskowski - 90/05/23
KCSO Criminalistics Laboratory Request for analysis - Ryals - 90/09/10
KCSO Criminalistics Laboratory Examination Report - Laskowski - 90/09/10
KCSO Criminalistics Laboratory Request for analysis - Mark - 90/10/04
KCSO Criminalistics Laboratory Examination Report - Laskowski - 90/10/10
KCSO Criminalistics Laboratory service request - Mara - 90/09/12
KCSO Criminalistics Laboratory examination report - Rickard - 90/10/09
Hospital records for Jim L Wilson Jr. - Kern Valley Hospital
Death certificate - Mincy - Jinadu - 89/09/08
KCSO Supplemental Report re Mincy - Lage - 89/09/12
KCSO Coroner's report re Mincy - Malouf - 89/09/26
Kern County Autopsy Protocol re Moncy - Holloway - 89/11/13
Kern County toxicology report re Mioncy - - 89/09/20
Death certificate for Huffstuttler - :
KCSO Supplemental Report re Huffstuttler - 89/09/12
KC Coroner's Office report re Huffstuttler - Malouf - 89/09/19
KC Coroner's Office autopsy protocol re Huffstuttler - Holloway - 89/09/11
KC Toxicology Report re Huffstuttler - -

Police Reports

KCSO Crime Report - Layman - 89/09/05
KCSO Crime Report - - 89/09/05
KCSO Crime Report - - 89/09/05
KCSO Supplemental Report - Nikkel - 89/09/11
KCSO Supplemental Report - Nikkel - 89/09/12
Crime scene diagrams - -

Transcripts

Trial transcript of KCSO Criminalist Greg Laskowski pp. 2040-2078

Photographs

KCSO Evidence and Photographic Report including 21 attached photocopies of photographs from crime scene - Dickerson :
KCSO Evidence and Photographic Report including 19 attached photocopies of photographs of Mincy autopsy - Grove :
KCSO Evidence and Photographic Report including 25 attached photocopies of photographs of crime scene and victim at scene and shoe tracks - Dickerson :
KCSO Evidence and Photographic Report including 29 attached photocopies of photographs of Huffstuttler autopsy - Rickels :
KCSO Evidence and Photographic Report including approximately 50 attached photocopies of photographs of crime scene and shoe tracks - Dickerson :
Photocopies of 5 photographs of rifle
Photocopies of 18 aerial photographs of crime scene
Photocopies of 12 photographs of crime scene and other areas
Photocopies of 4 photographs of two men
Photocopies of 5 photographs of Sand Canyon Store
Photocopies of 11 photographs of crime scene
Photocopies of 10 photographs of crime scene

REVIEW OF PHYSICAL EVIDENCE

Firearms Evidence

Three .30 caliber bullets were recovered from under Huffstuttler's body. He was shot four times, but the weapon causing the fourth wound is not known.

Six .45 caliber fired casings were recovered on the ground, apparently having been dropped there by a person who reloaded the Colt revolver. In addition, four fired rounds were present in the revolver when it was recovered. One fired .45 caliber bullet was recovered from under Mincy's body. It is not known which weapon caused Mincy's other wounds.

The photographs show in the Colt revolver in the dirt a few feet from the body of Huffstuttler. The weapon seems to be partially buried in the dirt, as if someone had stepped on the weapon or tried to push it into the dirt. Given where it was found, and the nature of the weapon, the fact that useable latent fingerprints were not recovered from the Colt revolver has little significance.

Shoe Impressions

Only one set of shoe prints was documented in the area around Mincy's body. A shoe impression similar to the impressions near Mincy's body was also present near the left front of the pick-up truck parked by the cabin. The sole pattern in the impression by the truck (identified as no. 21 in the crime scene diagrams) appears to show a sole with smooth parallel ribs, whereas the impressions near Mincy's body show a more irregular, parallel rib pattern. This difference may be due to differences in the surface where the impressions were found, or they may represent two different sole designs.

Two different shoe soles patterns were found in the impressions around Huffstuttler's body. Both of these designs are also found in front of the pick-up truck. These are different from the impressions around Mincy's body referred to above.