

No. _____

IN THE
Supreme Court of the United States

DEAN PHILLIP CARTER,

Petitioner,

v.

RON BROOMFIELD,

Respondent.

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

**APPENDIX IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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FILED

UNITED STATES COURT OF APPEALS

JUN 10 2020

FOR THE NINTH CIRCUIT

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

DEAN PHILLIP CARTER,

Petitioner-Appellant,

v.

KEVIN CHAPPELL, Warden, San
Quentin State Prison,

Respondent-Appellee.

No. 13-99003

D.C. No. 2:06-cv-04532-RGK
Central District of California,
Los Angeles

ORDER

DEAN PHILLIP CARTER,

Petitioner-Appellant,

v.

KEVIN CHAPPELL, Warden, San
Quentin State Prison,

Respondent-Appellee.

No. 13-99007

D.C. No.
3:06-cv-01343-BEN-KSC
Southern District of California,
San Diego

Before: RAWLINSON, CLIFTON, and BYBEE, Circuit Judges.

The panel judges have voted to deny appellant's petition for rehearing.

Judge Rawlinson voted to deny the petition for rehearing en banc, and Judges

Clifton and Bybee recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no

judge has requested a vote on whether to rehear the matter en banc. Fed. R. App.

P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed March 23, 2020, is DENIED.

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DEAN PHILLIP CARTER,
Petitioner-Appellant,

v.

RON DAVIS, Warden, San
Quentin State Prison,
Respondent-Appellee.

No. 13-99003

D.C. No.
2:06-cv-04532-RGK

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

DEAN PHILLIP CARTER,
Petitioner-Appellant,

v.

RON DAVIS, Warden, San
Quentin State Prison,
Respondent-Appellee.

No. 13-99007

D.C. No.
3:06-cv-01343-BEN-
KSC

OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

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CARTER V. DAVIS

Argued and Submitted March 28, 2019
San Francisco, California

Filed December 26, 2019

Before: Johnnie B. Rawlinson, Richard R. Clifton,
and Jay S. Bybee, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus / Death Penalty

In appeals arising from Dean Phillip Carter's habeas corpus petitions challenging his convictions and death sentences in separate cases in Los Angeles and San Diego Counties, the panel (1) affirmed district court judgments in the Central and Southern Districts of California denying his petitions; (2) granted, as to one claim in the Central District, Carter's supplemental motion to expand the certificate of appealability; and (3) otherwise denied the supplemental motion to expand the certificate of appealability.

The Central District certified two claims for review: (1) that an irreconcilable conflict between Carter and trial counsel resulted in a denial of his Sixth Amendment rights, and (2) that trial counsel rendered ineffective assistance

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

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because they refused to allow Carter to testify in his own defense.

- The panel held that even if Carter were able to demonstrate a complete breakdown in communication or prove that an irreconcilable conflict with trial counsel existed under this circuit's precedent, his irreconcilable-conflict claim would fail because the U.S. Supreme Court has never held that an irreconcilable conflict with one's attorney constitutes a per se denial of the right to effective counsel. The panel explained that this proves fatal to Carter's claim because AEDPA conditions habeas relief on a determination that the state-court decision unreasonably applied "clearly established Federal law" as pronounced by the U.S. Supreme Court.
- The panel held that the California Supreme Court reasonably determined that counsel did not perform deficiently by refusing to let Carter testify, and that even if counsel performed deficiently by refusing to do so, the California Supreme Court's determination that Carter cannot show prejudice was not an unreasonable application of law.

The Southern District certified two claims for review: (1) that Carter's trial counsel rendered ineffective assistance at the penalty phase, and (2) that Carter was deprived of his right to the competent assistance of a psychiatric expert.

- The panel held that Carter failed to establish that the California Supreme Court was unreasonable in denying relief on his contentions that counsel performed deficiently (a) by focusing on the positive aspects of Carter's career and family life as a result, rather than

giving greater emphasis to his traumatic childhood; and (b) by failing to conduct an adequate investigation into Carter's mental health, including the possibility that he suffered from fetal alcohol syndrome.

- The panel held that Carter failed to establish that *Ake v. Oklahoma*, 470 U.S. 68 (1985), or any other U.S. Supreme Court decision would cause jurists of reason to disagree with the reasonable arguments in support of the California Supreme Court's denial of his claim that he was deprived of the right to competent assistance of a psychiatric expert at trial. The panel wrote that, as Carter conceded, the U.S. Supreme Court has never interpreted *Ake* to guarantee a due process right to effective expert assistance at trial.

The panel issued a certificate of appealability on one claim, not certified by the Central District, alleging ineffective assistance of counsel at the penalty phase. The panel affirmed the denial of relief on that claim because the California Supreme Court's determination that counsel satisfied the deferential standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is not contrary to or an unreasonable application of federal law. The panel wrote that the California Supreme Court may reasonably have concluded that the investigation supporting counsel's decision not to introduce more mitigating evidence was reasonable, and that even if Carter's defense team performed deficiently, the California Supreme Court could reasonably have concluded that Carter was not prejudiced by their performance.

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The panel denied a certificate of appealability as to the rest of the claims not certified by the Southern and Central District Courts.

COUNSEL

Michael D. Weinstein (argued) and Mark Yim, Deputy Federal Public Defenders; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Annie Featherman Fraser (argued), Deputy Attorney General; Holly D. Wilkens, Supervising Deputy Attorney General; Julie L. Garland, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

PER CURIAM:

In separate proceedings in Los Angeles and San Diego, Dean Phillip Carter (Carter) was convicted of murder, rape, robbery, and burglary and sentenced to death. Carter filed petitions for writs of habeas corpus in the United States District Courts for the Central District of California and for the Southern District of California. The district courts denied Carter's petitions.

In appeal No. 13-99003, we affirm the judgment of the Central District and deny Carter's motion to expand the certificate of appealability (COA) as to all claims except

claim 6, regarding ineffective assistance of counsel at the penalty phase.

In appeal No. 13-99007, we affirm the judgment of the Southern District and deny Carter's motion to expand the COA.

I. BACKGROUND

Carter stood trial in Los Angeles County and San Diego County for charges stemming from a crime spree throughout California in Spring 1984. In the Los Angeles proceedings, Carter was accused of the rape and murder of Bonnie Guthrie and the burglary of her residence; and of the murder of Susan Knoll, rape and murder of Jillette Mills, and the burglary of their shared residence. In San Diego County, Carter was accused of the murder and robbery of Janette Cullins and the burglary of her residence; and of the rape, forcible oral copulation, and robbery of B.S.¹ and the burglary of her residence. In both the Los Angeles and San Diego proceedings, prosecutors also introduced evidence of Carter's prior convictions for rape, robbery, and assault of J.S. in Ventura County, and of his connection to the murder of Tok Kim in Alameda County. The crimes occurred over four

¹ We identify living victims of sex crimes only by their initials in this opinion.

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California counties over a period of about three weeks. We describe them briefly and chronologically.²

A. The Crimes

On March 25, 1984, Carter broke into the San Diego home of B.S. wielding a knife and demanded money. After taking B.S.'s cash, he raped her, hog-tied her, and stole her car.

On March 27, Carter raped J.S. at knifepoint in her Ventura County apartment, cut her face, strangled her twice to the point at which she lost consciousness, and stole cash from her.³

On April 1, Carter met Tok Kim at a bar in Lafayette, California, and offered to help her with car trouble. Over the next two days, a service station manager named David Hogan observed Carter and Kim at his station together. Hogan observed that Carter was wearing sunglasses and a black "Members Only" style jacket. On the night of April 10, Kim's neighbor heard Kim arguing in her Oakland apartment with an unidentified man who was not her boyfriend. Kim's co-workers notified her apartment manager after Kim did not appear for work on two consecutive days. On April 13, the

² The facts set forth in this opinion are taken directly from the most recent reasoned state-court decisions issued in the challenged proceedings: *People v. Carter*, 117 P.3d 476 (Cal. 2005) (Los Angeles) and *People v. Carter*, 117 P.3d 544 (Cal. 2005) (San Diego).

³ A Ventura County jury convicted Carter of the rape, robbery, and assault of J.S. He does not seek relief from these convictions here. However, prosecutors introduced evidence of these convictions in both of Carter's death penalty trials.

apartment manager found Kim's body on her bedroom floor. The pathologist who performed the autopsy could not determine the cause of death because of the body's advanced stage of decomposition but testified that a curtain tie found beneath her neck could have been used to strangle her.⁴

On April 11, Culver City, California resident Susan Knoll went absent from her job at a bank. Knoll's co-worker took a call from an unidentified man who informed her that Knoll had been in a traffic accident and was being treated for minor injuries at a hospital. The same day, after Knoll's roommate Jillette Mills failed to respond to her brother's attempts to contact her, the brother and a friend searched for Mills at her apartment, place of employment, and college but were unable to find Mills or her car. The two men then climbed a fence to enter Mills's and Knoll's unlocked apartment and found the bodies of both women stacked in the closet.

Investigators discovered Kim's vehicle outside of Mills's and Knoll's apartment. Inside the vehicle was a pair of sunglasses, which Hogan identified as matching a pair he observed Carter wearing at his station while with Kim. Mills's white Datsun was missing. Inside the apartment, investigators retrieved a palm print matching Carter's from the bathroom sink. An autopsy determined that Knoll died of manual strangulation and Mills died of ligature strangulation. Both women also suffered injuries consistent with having struggled against an assailant and had seminal fluid on their genital areas. Mills additionally suffered injuries to her genital area consistent with traumatic sexual assault.

⁴ Carter has never faced charges relating to Kim's death. Prosecutors introduced evidence of the circumstances surrounding her death, however, in both of Carter's death penalty trials.

Also on April 11, the manager of Bonnie Guthrie's apartment building in Los Angeles entered Guthrie's apartment with a repairman. Guthrie was Knoll's best friend. The manager observed Guthrie lying on her bedroom floor and remarked to the repairman that she was sleeping. The next day, the manager noticed Guthrie's vehicle in the garage and wondered why she had not gone to work. He entered the apartment, observed Guthrie lying in the same position, and notified police. An autopsy determined that Guthrie died of ligature strangulation and that she had suffered injuries to her genital area consistent with traumatic sexual assault. Two days after the discovery of Guthrie's body, a witness found Guthrie's wallet in a San Diego shipyard, approximately fifty feet from a white Datsun matching the description of Mills's missing vehicle.

On April 12, Carter visited the San Diego apartment of Janette Cullins and her roommate Cheri Phinney. Carter and Cullins knew one another socially, and had met for drinks and dinner with other friends on two occasions in February and March 1984. On March 24, Carter had attempted to contact Cullins through her friend Cathleen Tiner. When Tiner told Cullins that Carter had called for her, Cullins became upset. Cullins had also told her former roommate, Nancy McEachern, that if Carter called for her she did not want to speak with him. When Carter visited Cullins on April 12, Cullins asked Phinney to come through the living room so that Carter would be aware that someone else was in the apartment. Carter left the apartment after an hour.

That evening, Cullins and Tiner attended the symphony together. Cullins informed Tiner that Carter was back in town. At 11:00 p.m., Cullins left Tiner's apartment and was never seen alive again. Between 11:15 and 11:30 p.m.,

Cullins's neighbor observed a white Datsun matching the description of Mills's missing vehicle outside of Cullins's apartment. The neighbor observed the vehicle drive away at 11:30, nearly hitting another vehicle while making a U-turn and running through a stop sign.

On April 13, Phinney and McEachern each attempted to contact Cullins without success. At midday, McEachern drove to Cullins's apartment and encountered Carter, who was driving a white Datsun. Carter asked McEachern if Cullins was home. That evening, Carter unexpectedly visited Tiner at her home and commented that Cullins had "stood [him] up" that day. Tiner then unsuccessfully attempted to contact Cullins.

The following day, Phinney and McEachern searched Cullins's apartment and found her partially clothed body in her bedroom closet. A police investigation found damage to the front door consistent with a forced entry. An autopsy determined that Cullins died of ligature strangulation and that she had sustained a wound consistent with the use of a sharp knife either while she was dying or after she had died.

On the same day Cullins's body was discovered, a pedestrian found a wallet containing Cullins's driver's license and credit cards in bushes next to a sidewalk on North Harbor Drive in San Diego. The pedestrian testified that he had seen a white Datsun matching the description of Mills's missing vehicle parked within one block of where he had found the wallet during the same week. Later that day, police recovered Guthrie's purse from the same area of North Harbor Drive.

On April 17, an Arizona Highway Patrol officer observed Mills's white Datsun driving erratically on Interstate 40 in

Yavapai County, Arizona. The officer initiated a traffic stop and discovered Carter alone in the vehicle with what appeared to be a burnt marijuana cigarette and placed Carter under arrest on suspicion of driving under the influence. While searching the vehicle for marijuana, the officer discovered Cullins's bank identification card between the driver's seat and center console.

A full search of the vehicle recovered the following items: a suitcase, Korean-made wood-handled knife, yellow rubber gloves, and a gold chain, all belonging to Kim; a supermarket card belonging to Knoll; towels, athletic wear, and photographic equipment, all belonging to Mills; three hand-woven sweaters belonging to Guthrie; a key ring belonging to Cullins; a piece of paper with Cullins's bank password written on it; and a black "Members Only" jacket matching the description of the jacket Hogan had seen Carter wearing while with Kim. The jacket contained a butcher knife, a knee-high nylon sock, and a business card from Hogan's service station.

Bank records revealed that all but \$4.06 of Cullins's bank account balance had been withdrawn from an ATM on April 13, the day after she was last seen alive. A video of the transaction showed a man wearing one of Guthrie's sweaters and a black jacket withdrawing the funds. A handwriting expert testified that there were "very strong indications" that Cullins had written the password on the slip of paper recovered from the Datsun but also could neither eliminate nor identify Carter as the writer.

B. Criminal Proceedings

1. Los Angeles County

The Los Angeles trial regarding the crimes against Knoll, Mills, and Guthrie was bifurcated into guilt and penalty proceedings. At the guilt phase, Carter's counsel rested without calling any witnesses or putting on a defense. Carter was convicted on all counts. At the penalty phase, Carter's counsel presented an extensive mitigation case detailed below. Carter was sentenced to death.

2. San Diego County

The San Diego trial, which followed his conviction in Los Angeles County, was also bifurcated into guilt and penalty proceedings regarding the murder of Cullins and the rape of B.S. Carter stipulated before trial that he had been convicted of the murders of Knoll, Mills, and Guthrie.

At the guilt phase, counsel put on a defense by calling several witnesses. But the jury found Carter guilty of the murder of Cullins, and found true the special circumstances that the murder was committed while lying in wait, during the commission of both a robbery and a burglary, and that Carter had previously been convicted of the murders of Knoll, Mills, and Guthrie. It further found Carter guilty of the robbery of Cullins and the burglary of her residence and found that he had inflicted great bodily injury during the course of these crimes. The jury also found Carter guilty of the forcible rape, forcible oral copulation, and robbery of B.S. and the burglary of her residence, and determined that Carter had used a deadly weapon (a knife) in the commission of each of his crimes against B.S.

At the penalty phase, counsel presented a mitigation case similar to that presented in the Los Angeles trial. The jury returned a recommendation of the death penalty. The court imposed a death sentence.

C. California Supreme Court Proceedings

Carter's convictions and sentences were appealed to the California Supreme Court. While those appeals were pending, Carter filed his first round of state habeas petitions in that court. In 2005, the California Supreme Court affirmed the convictions and death sentences in two separate, reasoned opinions. *People v. Carter*, 117 P.3d 476 (Cal. 2005) (Los Angeles); *People v. Carter*, 117 P.3d 544 (Cal. 2005) (San Diego). The court affirmed both judgments in their entirety with the exception of the San Diego court's finding of the special circumstance of lying in wait on the Cullins murder charge, which it set aside. Carter sought review of these decisions in the Supreme Court of the United States, which denied his petitions for writ of certiorari in 2006. *Carter v. California*, 547 U.S. 1099 (2006) (mem.) (Los Angeles); *Carter v. California*, 547 U.S. 1043 (2006) (mem.) (San Diego).

In 2006, the California Supreme Court summarily denied Carter's habeas petitions on the merits. Carter filed two subsequent rounds of state habeas petitions in 2007 and 2010. The California Supreme Court summarily denied each of those petitions on the merits in 2010.

D. Federal Habeas Proceedings

Carter initiated the instant proceedings in 2007. In a petition for writ of habeas corpus filed in the United States

District Court for the Southern District of California, he asserted seventeen claims for relief related to his San Diego County trial. Two days later, he filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, asserting seventeen additional claims for relief related to his Los Angeles County trial. Carter filed amended petitions in both federal district courts in 2010, reducing the number of claims in his Southern District petition to sixteen.

In 2013, the Central District of California published a 146-page order dismissing two of Carter's claims without prejudice and denying the rest of his claims on the merits. The district court granted a COA on two of Carter's claims: that an irreconcilable conflict between Carter and trial counsel resulted in a denial of his Sixth Amendment rights (Certified Claim 1, and Claim 1 of the First Amended Petition); and that trial counsel rendered ineffective assistance because they refused to allow Carter to testify in his own defense (Certified Claim 2, and Claim 5(D) of the First Amended Petition). It denied a COA on the remaining claims.

Later in 2013, the Southern District of California published a 318-page order denying all claims on the merits. The district court granted a COA on two claims: that trial counsel had rendered ineffective assistance during the penalty phase (Certified Claim 1, and Claim 3 of the Second Amended Petition); and that Carter was deprived of his right to the competent assistance of a psychiatric expert (Certified Claim 2, and Claim 4 of the Second Amended Petition). It denied a COA on the remaining claims. Carter filed a motion under Federal Rule of Civil Procedure 59(e) or 60(b) to vacate the order denying his petition and allow him to return

to state court to further develop the evidentiary record. The Southern District denied this motion in a reasoned decision.

Carter timely appealed both district court orders.

II. STANDARD OF REVIEW

“We review the district court[s’] denial of a habeas petition de novo.” *Jones v. Harrington*, 829 F.3d 1128, 1135 (9th Cir. 2016). Carter’s habeas petitions are subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which forecloses federal habeas relief for “any claim that was adjudicated on the merits in State court” unless the state court’s decision was (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”; or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

These standards are “intentionally ‘difficult to meet.’” *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). “[C]learly established Federal law” for purposes of § 2254(d)(1) includes only “the holdings” of Supreme Court decisions; it does not include Supreme Court dicta or circuit precedent. *Woodall*, 572 U.S. at 419–20 & n.2; see *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam). A state-court decision is “contrary to” clearly established Supreme Court precedent “if it ‘applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases’ or if it ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.’” *Price v. Vincent*, 538 U.S.

634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 06 (2000)). A state-court decision “involve[s] an unreasonable application” of clearly established Supreme Court precedent if “it correctly identifies the governing legal rule” but then applies that rule to the facts of a particular case in an “objectively unreasonable” way, such that the state court’s ruling rested on “an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Woodall*, 572 U.S. at 421, 426 27 (citations omitted). Finally, a state-court decision is “based on an unreasonable determination of the facts” if “we are convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.” *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (citation and internal alteration omitted).

These deferential standards apply to each claim adjudicated on the merits in state court, regardless of whether the state court disposed of the claim in a reasoned opinion or a summary ruling. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). We generally “look to the last reasoned state court decision to address the claim” on the merits. *White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018) (citing *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). If there is no reasoned state-court decision, we must “determine what arguments or theories . . . could have supported[] the state court’s decision.” *Richter*, 562 U.S. at 102.

Finally, even if a habeas petitioner satisfies one of the § 2254(d) prongs for relief, he must show that the claimed trial error “resulted in ‘actual prejudice.’” *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). “Under this test, relief is proper

only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 2197-98 (internal quotation marks omitted).

III. CERTIFIED CLAIMS

We begin with the claims certified by the district courts. For three of the four claims, the "clearly established Federal law," 28 U.S.C. § 2254(d)(1), is the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), which held that the Sixth Amendment guarantees a criminal defendant the "right to the effective assistance of counsel" at both the guilt and penalty phases of a capital trial. *Id.* at 685-87. Under *Strickland*, a defendant claiming denial of effective assistance of counsel "bears the burden to meet two standards." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017).

First, the defendant "must show deficient performance that the attorney's error was 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). Under *Strickland*, our inquiry is highly deferential, and we "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). "To overcome that presumption, a defendant must show that counsel failed to act 'reasonably considering all the circumstances.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (alteration omitted) (quoting *Strickland*, 466 U.S. at 688). The relevant inquiry is "whether an attorney's representation amounted to incompetence under 'prevailing

professional norms,’ not whether it deviated from best practices or most common custom.” *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690). And given the “temp[tation] for a defendant to second-guess counsel’s assistance after conviction or adverse sentence,” the Supreme Court has strongly cautioned us against drawing the conclusion “that a particular act or omission of counsel was unreasonable” just because it “proved unsuccessful.” *Strickland*, 466 U.S. at 689.

Second, the defendant must “demonstrate prejudice ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (quoting *Strickland*, 466 U.S. at 694). In the context of a death sentence, “[t]he question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Pinholster*, 563 U.S. at 198 (alteration omitted) (quoting *Strickland*, 466 U.S. at 695).

“Surmounting *Strickland*’s high bar is never an easy task,” and “[e]stablishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.” *Richter*, 562 U.S. at 105 (citations omitted). Our review under AEDPA is “doubly deferential,” as we must “afford ‘both the state court and the defense attorney the benefit of the doubt.’” *Donald*, 135 S. Ct. at 1376 (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

A. *Claims Certified by the Central District: Claims 1 and 5(D)(1), Carter's Conflict with Counsel*

The Central District issued a COA for two largely overlapping claims, which it addressed together. The certified claims effectively present two questions on appeal: whether the California Supreme Court's decisions that (1) Carter was not denied his Sixth Amendment right to counsel because of an "irreconcilable conflict" with his trial counsel and (2) counsel's performance in refusing to let Carter testify was not deficient, and even if it was, Carter was not prejudiced, were contrary to or an unreasonable application of clearly established federal law. For the reasons stated below, we hold that the California Supreme Court did not violate clearly established federal law in denying Carter relief.

1. Carter's Attorneys and the *Marsden* Hearings

Ezekiel Perlo was initially appointed lead counsel and represented Carter, along with Marcia Morrissey, for over two years during 1986–1988. About a year prior to trial, in March 1988, the court appointed Rowan Klein to assist Carter in his motion to substitute counsel, which under California law is referred to as a *Marsden* motion. *See People v. Marsden*, 465 P.2d 44 (Cal. 1970). The trial court held a *Marsden* hearing in which Klein notified the court that conflicts between Perlo and Carter had "led to a total breakdown of the attorney-client relationship" and that Carter wanted a new attorney to be appointed in place of Perlo. The trial court was troubled by this "easily made," "blanket statement" that would further delay a trial already "long overdue." It nevertheless agreed that the conflict between Perlo and Carter did not give it "much choice" but to grant the motion. The

court appointed Howard Gillingham lead counsel a week later, and he and Morrissey represented Carter throughout the duration of the trial.

a. July 5 (First *Marsden* Hearing)

On July 5, 1989, just after the prosecution rested during the guilt phase, Gillingham requested an *ex parte* hearing to apprise the trial court of a disagreement between him and Carter. Gillingham invoked *Marsden* in requesting the hearing but did not say anything that would suggest Carter had requested new counsel. Gillingham stated he wanted to “spread something on the record regarding the defense strategy and position.” He informed the court that it was his and Morrissey’s “firm belief that [they] should rest” and not put on a defense at the guilt stage. He noted that there were a number of potential witnesses he could call but that they made the “tactical decision not to call those witnesses.” He did not mention Carter as one of those witnesses. Gillingham acknowledged Carter emphatically disagreed with the decision not to call any witnesses and that Carter wanted the disagreement preserved in the record. Gillingham argued that this was a situation where the appointed lawyers “should call the shots.” The trial court agreed, noting “the record is clear” and that “in these matters the decisions should be with the counsel.” Carter did not speak during the hearing and Gillingham subsequently testified that, based on his belief that the “lawyer ought to do the talking,” he had instructed Carter not to speak unless the court directly addressed him.

b. July 10 (Second *Marsden* Hearing)

Carter later testified that after the first *Marsden* hearing, he complained to Gillingham for leaving out “a couple of

things,” including telling the court about his desire to testify, and for not “ma[king] it as clear as [Carter] would have liked.” Thus, on July 10, after both parties had rested but prior to closing arguments, Gillingham requested another hearing, which he noted “probably should be done in a sealed basis again under *People versus Marsden*.” The hearing was brief and Gillingham stated:

Your honor, one further thing, in all modesty, I think I neglected to do it the other day, and, that is, in addition, by not putting on the witnesses, it also precluded the potential of Mr. Carter testifying based on . . . what those witnesses would have testified to and the effect of their testimony.

The court responded: “You just wanted to add that?” Gillingham said he had nothing further and the court ordered the exchange sealed.

That same day, after closing arguments, the court held another *ex parte* hearing, which did not appear to invoke *Marsden*. It was also very brief and Gillingham added:

Your Honor, Mr. Carter asked me to spread upon the record that he does not agree with the closing argument that counsel made, that he had asked me what it was, and that he was not informed of the type of argument. And he certainly does not feel that it was adequate, and this just compounds the problem of the lack of defense by the argument that counsel made.

The court responded by noting the “record is clear” and again sealed the record. Carter did not speak during either of these exchanges.

c. July 17 (Third *Marsden* Hearing)

On July 17, while the jury was deliberating, Gillingham again requested a hearing “under the ambit of *Marsden*.” Gillingham informed the court:

Mr. Carter continues to express disappointment . . . [with] the manner in which to this point the case has been handled by counsel. He specifically would ask me to, as I understand it, ask you to appoint Mr. Rowen Klein . . . [to] prepare and file a new trial motion or some motion pre-penalty phase. This is part of the reason for the *Marsden*.

I will say that counsel opposes that motion. . . . We have discussed Mr. Carter’s now constitutional rights under the ultimately famous case of *Ferretta*. . . . He is not making that request today.

The court denied the request as untimely and noted that while Klein may ultimately be able to help Carter file a motion for new trial, it was not the appropriate time to consider such a motion.

d. September 5 (Fourth *Marsden* Hearing)

On September 5, after the jury returned a death verdict but prior to sentencing, Gillingham once again requested an *ex parte* hearing under *Marsden*. The following colloquy took place:

Gillingham: Your Honor, as you know, throughout the case there have been various instances where Mr. Carter's feelings, opinions, *et cetera*, as to how the case was being run surfaced. That has happened again, and my own personal opinion, for what it's worth, is, it's probably well taken. We asked to be here under *People versus Marsden*, and it's my impression and belief that Mr. Carter does not have confidence in the ability of Miss Morrissey to proceed with his defense. This is not a knee jerk reaction. We've discussed it.

Court: So without your opinion on the merits of his displeasure, you feel there are righteous differences of opinion here?

Gillingham: Yes, I do, your honor.

Court: And possibly is. You would be unable ethically or intellectually to pursue the types of claims that Mr. Carter would be making on a motion for new trial and other issues?

Gillingham: Absolutely, and I do feel strongly about it, that assuming new counsel

were available, the most expeditious judicial and most fair way to proceed, Miss Morrissey and I should be relieved. That is Mr. Carter's request, which I understand it is.

...

Court: And Mr. Carter, is that your desire to have Mr. Klein appointed to represent you in this proceedings from now on?

Carter: Yes, it is.

Court: And do you agree with Mr. Gillingham's statement that there is a difference

Carter: Definitely.

Court: I don't really see I have much choice in this matter. At this point I don't want to pry, and I certainly respect the tremendous amount, not only Mr. Gillingham and Miss Morrissey's legal abilities, but their ethical standards as well, a[nd] if they feel that this is the correct thing to do, I certainly would agree.

The trial court then appointed Klein to represent Carter on his motion for a new trial.

e. Hearing on Motion for a New Trial

Klein moved for a new trial based, in part, on the conflict between Gillingham and Carter. The court held a hearing on the motion and Gillingham was called to testify about his representation. Gillingham testified that he and Morrissey recognized it was a “potential death case” and that they had made the “tentative decision” to try it as a penalty case. He admitted that the cases pending in Oakland and San Diego “had to be some factor” in that decision. As an example of how this decision affected the trial strategy, Gillingham noted that “the voir dire of the jurors was almost entirely death focused.” Gillingham testified that Carter “wanted to put on at all times a full-blown defense” and “contest [] guilt” which included the “possibility” of Carter testifying. Gillingham observed that Carter’s comments were at times “framed in the negative,” such as: “Aren’t you going to do something?”; “Where are the witnesses?”; and “What are you going to do?” Gillingham further testified that in each of the hearings discussed above he had always intended to accurately convey Carter’s desires but that he likely did not do so very well.

Carter also testified during the hearing on the motion for new trial. Carter said he told his attorneys he “wanted to present a defense” and that he “was more concerned about the guilt phase and that [he] felt it was necessary for [him] to testify.” They did not settle on a defense strategy before trial because Gillingham told him they could not fully plan their strategy until they saw the prosecution’s case. He said the first serious discussion with his counsel about the defense case, including him testifying, was the day before the prosecution rested. At that time, Gillingham told him that he was not planning on putting on a defense, and if they were not going to put on a defense, Carter would not testify. Carter

was “upset,” and told Gillingham that he “wanted to call witnesses, put on a defense and testify.” Carter noted he had discussed trial strategy with Gillingham “around” ten times prior to trial.

One time after voicing his disagreement to Gillingham, Carter stated that Gillingham responded by telling him, “[a]s hard as it is sometimes a lawyer has to play god.” Carter testified he was particularly upset that he would not be able to testify as a result of Gillingham’s decision not to call witnesses and that he had requested the *Marsden* hearings to “indicate to the court that I was not happy with what [Gillingham] was doing and I wanted to make sure it was clear that it was over my objection that he was doing it.” On cross-examination, Carter conceded that he had not thought about how his decision to testify could affect the other pending cases. And when asked whether Gillingham stated Carter’s view “completely and accurately,” Carter responded, “As far as I recall.”

Klein argued that as soon as the court learned Carter wanted to testify, it was constitutionally obligated to seek a waiver of Carter’s right to testify. The court orally denied the motion for a new trial without expressing its reasoning.

f. California Supreme Court Proceedings

On direct appeal to the California Supreme Court, Carter argued the trial court erred by failing to adequately inquire into the conflict with his counsel and by failing to appoint new counsel once the conflict was disclosed. *Carter*, 117 P.3d at 530. The California Supreme Court denied this claim on its merits. *Id.* at 530–34. It rejected Carter’s claim

that his conflict with Gillingham denied Carter his right to conflict-free, effective representation and held:

Here, the record supports the People's position that defendant, a person with a sophisticated view of the criminal justice system from the inside, complained sufficiently during proceedings conducted in the trial court so as to create a colorable appellate issue, but not sufficiently to obligate the trial court to relieve his counsel.

Id. at 532–33 (internal quotation marks omitted). The court agreed with the prosecutor who argued the motion for a new trial that “Mr. Carter was a defendant who wanted things his way. . . . Mr. Gillingham did not do them his way for valid legally sufficient reasons, and Mr. Gillingham indicated this . . . displeasure of Mr. Carter, but in the end, Mr. Carter acceded to Mr. Gillingham’s trial strategy.” *Id.* at 533 n.40 (second alteration in original).

The court also denied Carter’s claim that the trial court failed to sufficiently inquire into the conflict, concluding:

[W]e are satisfied from the record before us that in the course of conducting three *Marsden* hearings, the trial court adequately inquired as to the issues raised by the defense, and that counsel fairly characterized the nature of the conflict for the trial court. . . .

[D]efendant fails to persuade us that his conflict with defense counsel over trial tactics and strategy (including the decision whether

defendant should testify), the trial court's inquiries into that conflict, or the court's refusal to appoint new counsel prior to the conclusion of the penalty phase, either singularly or in the aggregate, deprived defendant of his state or federal constitutional rights.

Id. at 534.

2. Irreconcilable Conflict

In his federal habeas petition, Carter argued he was denied his constitutional right to “conflict-free, effective counsel” because of “an irreconcilable conflict with his court-appointed attorneys” and that the California Supreme Court’s opinion to the contrary was an “unreasonable application” of clearly established federal law and “based on an unreasonable determination of the facts.”

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel at all critical stages of the proceeding. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). It ensures defendants “an effective advocate,” but does not guarantee the defendant “will inexorably be represented by the lawyer whom he prefers.” *Wheat v. United States*, 486 U.S. 153, 159 (1988).

We have stated that “to compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.” *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970); *see Stenson v. Lambert*,

504 F.3d 873, 886 (9th Cir. 2007). Concluding that such conflicts are tantamount to a denial of counsel altogether, we have held a defendant “need not show prejudice” as would ordinarily be required under a claim of ineffective assistance of counsel. *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998); *see also id.* (“[I]f the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [defendant’s] Sixth Amendment right to effective assistance of counsel.”). Carter argues that if he can establish an “irreconcilable conflict” existed between him and Gillingham under the three-step inquiry we set forth in *Moore*, he need not demonstrate the conflict prejudiced his defense. *See* 159 F.3d at 1158–59.⁵

Even under our circuit’s precedent, the conclusion that an irreconcilable conflict did not exist based on the disagreement between Carter and Gillingham was reasonable. *Carter*, 117 P.3d at 533. “[O]nly where there is a complete breakdown in communication,” have we recognized an irreconcilable conflict claim. *Stenson*, 504 F.3d at 886. At the hearing on the motion for a new trial, both Carter and Gillingham testified that they spoke many times before and throughout the trial about tactical decisions. The evidence simply does not demonstrate “a total lack of communication” between Carter and Gillingham. *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000). Moreover, “[d]isagreements over strategical or tactical decision do not rise to level [sic] of a

⁵ We fashioned a three-part test in *Moore* to determine whether a conflict rises to the level of “irreconcilable.” *See Moore*, 159 F.3d at 1158–59. Specifically, we consider “(1) the extent of the conflict; (2) the adequacy of the inquiry [by the trial court]; and (3) the timeliness of the motion [for substitution of counsel].” *Id.*

complete breakdown in communication.” *Stenson*, 504 F.3d at 886 (citing *Schell*, 218 F.3d at 1026).

Even if Carter were successfully able to demonstrate a complete breakdown in communication or prove that an irreconcilable conflict existed under the *Moore* factors, Carter’s irreconcilable-conflict claim would still fail. This is because the Supreme Court has never endorsed this line of precedent from our court. It has never held that an irreconcilable conflict with one’s attorney constitutes a per se denial of the right to effective counsel. This proves fatal to Carter’s claim because AEDPA conditions habeas relief on a determination that the state-court decision unreasonably applied “clearly established Federal law” as pronounced by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 365. Although we may look to our circuit’s precedent to see if we have already held a rule is clearly established, our decisions may not “be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam); *see Parker*, 567 U.S. at 49 (holding the Sixth Circuit erred in applying its circuit’s “multistep test” that bore scant resemblance to the general rules announced by the Supreme Court). Carter does not cite to any Supreme Court case holding that an irreconcilable conflict between a lawyer and his client constitutes a constructive denial of his right to counsel, with no showing of prejudice required. Nor has he pointed to Supreme Court precedent that resembles our test in *Moore*.

The Supreme Court cases Carter cites are inapposite, as they all deal with conflicts of interest between other clients the counsel represented. *See Wheat*, 486 U.S. at 163-64 (holding in multiple-representation cases, a district court must help protect criminal defendants against counsel's conflict of interest); *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981) (discussing potential conflicts arising from counsel hired by defendants' employer); *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) (holding joint representation of codefendants is not per se unconstitutional). The type of conflict Carter has alleged, however, is one over defense strategy. The term "conflict" can refer to different forms of conflict, and care must be taken not to mix them up. We have expressly declined to extend the conflict-of-interest analysis in *Wheat*, *Wood*, and *Holloway* to the type of conflict Carter alleges. We rejected arguments similar to Carter's in another capital habeas case:

[Petitioner's] disagreement with [his counsel] is better characterized as one over trial strategy We can find no clearly established Supreme Court precedent holding that this kind of disagreement amounts to an actual conflict of interest. The Washington Supreme Court correctly determined that no clearly established federal law supports [Petitioner's] construction of "conflict of interest" as describing a disagreement between attorney and client over trial strategy.

Stenson, 504 F.3d at 886.⁶ We are “not aware” of any Supreme Court case suggesting the Sixth Amendment is violated because the defendant “dislike[s] or distrust[s]” his counsel. *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008); *see also Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008).

Carter similarly fails to cite to any Supreme Court precedent establishing that a trial court’s failure to inquire into the nature of the attorney-client relationship is a per se violation of a defendant’s Sixth Amendment rights. Carter admits that the Supreme Court cases he relies on “do not explicitly hold that a trial court must ask the defense attorney and defendant about a conflict” but contends that the “requirement is implicit in the holdings.” AEDPA requires more than pointing to implicit holdings or dicta; it requires that the law be clearly established. *Williams*, 529 U.S. at 412.

In arguing the California Supreme Court’s opinion contains an unreasonable determination of the facts, Carter mischaracterizes the opinion as holding there was no conflict between Carter and Gillingham. The court, however, recognized the conflict and accurately described it as

⁶ Admittedly, we relied on our own precedent in *Stenson*, as Carter urges this panel to do, but that decision was rendered before the Supreme Court’s more recent admonitions against relying on circuit precedent. That opinion involved a habeas petition in a capital case where the court held that an “irreconcilable conflict” with counsel was a constructive denial of the Sixth Amendment right to effective counsel. Significantly, our opinion in that case did not hold that the right to “conflict-free” counsel, as Carter uses that term, was clearly established by any Supreme Court case law. Rather, it simply analyzed the claim under the *Moore* test without citing any similar Supreme Court case. *See Stenson*, 504 F.3d at 886–88.

“dissatisfaction with counsel’s trial strategy and tactics.”
Carter, 117 P.3d at 534.

In sum, Carter’s attempt to avoid the Supreme Court’s established framework for ineffective-assistance-of-counsel claims by looking to this circuit’s articulation of the right to effective counsel is unavailing and we review Carter’s claim under *Strickland*, which is the clearly established federal law for claims alleging ineffective assistance of counsel, as determined by the Supreme Court. *See Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016).

3. Ineffective Assistance of Counsel by Refusing to Let
Carter Testify

a. Prior Rulings

As described above, during the first *Marsden* hearing, Gillingham told the court he and Morrissey “firm[ly] belie[ved] that [they] should rest” and not put on a defense at the guilt stage. He explained they made the “tactical decision not to call [potential] witnesses,” despite Carter’s disagreement. The trial court agreed with Gillingham that “in these matters the decisions should be with the counsel.” During the second *Marsden* hearing, Gillingham clarified that “by not putting on the witnesses, it also precluded the potential of Mr. Carter testifying.”

The California Supreme Court determined that Carter “had ample opportunity during the course of [these] *Marsden* hearings to inform the court that he wished to testify, against the advice and over the objection of defense counsel, *even if defense counsel were permitted to decline to present any other defense witnesses who would support defendant’s own*

testimony,” but he did not. *Carter*, 117 P.3d at 533 (emphasis in original). The court reasoned that since Gillingham repeatedly informed the court of conflicts that arose with Carter, it could assume that if Carter “told his counsel that [he] insisted upon testifying despite the absence of any other defense witnesses, his counsel would have conveyed that demand to the trial court.” *Id.* Since there was no such evidence, the court concluded that “on this record we may not assume that defendant in fact had insisted upon testifying even where no other defense witnesses would be presented to support his testimony.” *Id.* at 533 34. “[I]n the end,” the court found, “Mr. Carter acceded to Mr. Gillingham’s trial strategy.” *Id.* at 533 n.40.

The district court agreed that Carter never insisted on testifying even if no other defense witnesses would be presented. It found that: the California Supreme Court’s determination that Carter “acceded through his conduct to Gillingham’s trial strategy, as a factual matter, was not unreasonable” in light of the facts that “[a] defendant is ‘presumed to assent to his attorney’s tactical decision not to have him testify,’” *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999) (quoting *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993)); Carter’s and Gillingham’s testimony that Carter wanted to put on a full-blown defense and testify after the presentation of defense witnesses was consistent; and Carter failed to move for new counsel when Gillingham intended to rest.

b. Performance

Carter argues that it was deficient performance not to allow him to testify because (1) doing so against Carter’s wishes conflicted with an objective standard of

reasonableness under prevailing professional norms, and (2) Gillingham did not have an informed basis for making the decision, as he did not go over “in detail” what Carter’s testimony might be. We conclude the California Supreme Court reasonably determined that counsel did not perform deficiently. *See Carter*, 117 P.3d at 526.

As to professional norms, Carter argues that at the time of trial, the Supreme Court had established that a criminal defendant has a fundamental constitutional right to testify in his own defense, citing *Rock v. Arkansas*, 483 U.S. 44, 49, 51, 53 (1987). But the California Supreme Court did not conclude that Carter lacked a right to testify in his own defense if he had asserted that right. Indeed, it expressly acknowledged that “[a]lthough tactical decisions at trial are generally counsel’s responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel.” *Carter*, 117 P.3d at 533. Rather, the court concluded that although Carter repeatedly told counsel that he preferred to call witnesses (including himself) and present a defense case, he never insisted that he wanted to testify even if counsel made the tactical choice not to call witnesses “in the end, Mr. Carter acceded to Mr. Gillingham’s trial strategy.” *Id.* at 533 & n.40. This was not an unreasonable determination of fact.

Carter argues that it was, in part, because he was unable to speak during the *Marsden* hearings because Gillingham told him not to. He also complains that the court did not ask him about whether he wanted his attorneys to present a defense or to testify. However, the transcripts reveal that Carter at least felt comfortable talking to Gillingham during these hearings to urge him to add things to his presentations at these hearings. When the court asked Gillingham at the

first *Marsden* hearing whether there was anything further, Gillingham initially replied there was not, but then said “[w]hoops, just a moment” while Carter told him about other possible witnesses, which Gillingham immediately relayed to the court.

Moreover, Carter’s own descriptions of what he told Gillingham included *both* his desire to present a defense by calling other witnesses and his desire to testify himself: he “wanted to call witnesses, put on a defense and testify,” he “wanted them to subpoena the witnesses [he] wanted to call, and . . . to put on a defense; and [he] wanted to testify,” he was “unhappy” because he “wanted to present a defense and [he] wanted to testify.” Similarly, Carter stated he was dissatisfied with Gillingham’s presentation to the court in the first *Marsden* hearing because he thought Gillingham “left out a couple of things” by not “mention[ing] all the witnesses that [Carter] wanted to call, and he also didn’t tell the court that [Carter] wanted to testify on [his] own behalf.” Additionally, Carter conceded that as far as he could recall, Gillingham accurately conveyed his objections. This lends further support to the California Supreme Court’s finding that “Mr. Carter acceded to Mr. Gillingham’s trial strategy.” *Id.* at 533 n.40. And Carter points to no Supreme Court case establishing that a client has a right to testify under these circumstances.

Carter’s argument that counsel did not have an informed basis for making the decision not to present a defense because he did not go over “in detail” what Carter’s testimony might be also fails. The California Supreme Court could reasonably have determined that counsel’s decision to focus on the penalty phase in the hope that the jury would spare Carter’s life was a reasonable tactical decision, made after discussions

with Carter about what he would say if he testified. Such a decision is not altogether uncommon in capital trials, especially where the attorney believes the defendant's guilt is clear, the evidence overwhelming, and the crime heinous. *Florida v. Nixon*, 543 U.S. 175, 190-91 (2004). Counsel explained to Carter that their decision not to present a defense, including to not have Carter testify, was this sort of "tactical decision."

c. Prejudice

Even if counsel performed deficiently by refusing to let Carter testify, the California Supreme Court's determination that Carter cannot show prejudice was not an unreasonable application of law. *See Carter*, 117 P.3d at 526. Carter argues that there is a reasonable probability the result would have been different if he had testified because (1) he would have explained the strongest evidence against him, and (2) he would have created a reasonable doubt that he had the required level of intent for first-degree murder. We disagree.

Carter never describes what explanation he would have given for driving a car belonging to one of the victims at the time he was arrested or for having the belongings of several of the victims in the car. Carter admits that his possession of those belongings was "[p]erhaps the strongest evidence against" him, without indicating how he might have explained that away. Nor does he explain how he would have undercut the physical evidence connecting Carter to the crime scenes—the palm print and semen. We cannot conceive of an explanation which would have created a reasonable probability that he would not have been found guilty. *Strickland*, 466 U.S. at 694.

Carter also contends he would have testified that he “effectively ‘blacked out’ during each of the crimes,” and thus “been able to successfully assert a ‘diminished actuality’ defense.” But such testimony would necessarily have admitted guilt and thus undercut any innocent explanation for having the victims’ belongings in his car.

Moreover, even if Carter testified, there is no reasonable probability one sufficient to undermine confidence in the outcome, *Strickland*, 466 U.S. at 694 that the jury would have found him not guilty. To begin, the jury heard this type of evidence and still convicted him. For example, the jury heard that Carter told a store employee while he was with Tok Kim, “I don’t even know what I’m doing here, I don’t even know her.” *Carter*, 117 P.3d at 486.

Similarly, there was so much evidence that Carter possessed sufficient mental capacity and intent to commit the crimes that it was highly unlikely that the jury would have been persuaded otherwise by his testimony. For example, Carter asked Cullins and Tiner if they lived alone or with a roommate. Carter told Tiner he instructed Cullins not to tell Tiner that he was in town. He arrived at Tiner’s house despite Tiner’s testimony that she had never given him her address. Carter withdrew \$60 from Cullins’ bank account, leaving a nearly \$0 balance. Carter’s numerous crimes were performed throughout northern, central, and southern California over twenty-three days, and he made it to Arizona before he was arrested. The California Supreme Court could reasonably have concluded that even if Carter had testified he blacked out during each crime, there is no reasonable probability the jury would have acquitted him.

Carter concedes “the prosecution’s case was strong” on this point. To show the result may have been different, he points to a juror declaration that the jury vote was mixed for guilty and not guilty when deliberations started. He also highlights how the jury took nearly five days to reach a guilty verdict.

Although the length of deliberation can be an objective sign that the jury struggled with the verdict, all of the cases Carter cites to this effect are distinguishable. They all involve cases where the length of deliberation was disproportionate to the length of the trial, or cases where there was only one charge for the jury to deliberate. *See Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012) (“The jury deliberated for almost five full days, even though it heard argument and evidence for only about six days.”); *Daniels v. Woodford*, 428 F.3d 1181, 1193 (9th Cir. 2005) (“After two days of deliberations, the jury returned a verdict imposing death [based on one murder].”); *Dyas v. Poole*, 317 F.3d 934, 936 (9th Cir. 2003) (per curiam) (“[T]he jury took 3-1/2 days to deliberate following Dyas’s 5-day trial [on only one murder and robbery].”). Here, on the other hand, the trial lasted multiple weeks but the jury deliberated only between 3 1/2 and 4 days, and had over a dozen issues to decide, including three murders, two rapes, two residential burglaries, and concurrent findings (including whether the murders were in the course of rape and burglary). The length of deliberation here is not so persuasive a sign that the jury struggled with the verdict, and the California Supreme Court could reasonably have concluded that it did not create a reasonable probability that the result would have been different had Carter testified.

B. Claims Certified by the Southern District

The Southern District issued a COA for two separate claims. We discuss each in turn and conclude that Carter was not deprived of constitutionally adequate representation.

1. Certified Claim 1 (Claim 3 of Second Amended Petition): Ineffective Assistance of Counsel at Penalty Phase

In the first claim certified for our review, Carter alleged that his trial counsel “failed to provide reasonably competent assistance at the penalty phase of his trial,” and if not for counsel’s “unprofessional actions and omissions,” the sentence imposed would have been different. Carter raised five specific arguments about his counsel’s performance: (1) they “failed to adequately investigate mitigating and aggravating evidence”; (2) they employed the same penalty phase strategy that had been used in the Los Angeles trial, a strategy that had resulted in a death verdict; (3) they were “ineffective in developing and presenting Carter’s background to the jury”; (4) they failed to develop evidence of Carter’s mental impairments; and (5) they were “deficient in penalty phase closing arguments.” The district court rejected each of these arguments.

On appeal, Carter asks us to find constitutional deficiency in the San Diego counsel’s strategy of focusing on the positive aspects of his career and family life as an adult, rather than giving greater emphasis to his traumatic childhood and mental illness. He attributes counsel’s decision to pursue this strategy despite having seen it fail during his Los Angeles trial to their failure to conduct a satisfactory investigation of his childhood in Nome. Had counsel’s

investigation been sufficient, he alleges, they would have instead called additional witnesses who knew of his childhood in Nome, and would have elicited more testimony from the twenty-one witnesses whom they did call about particular forms of abuse Carter had suffered, including that his parents chained him up at home and locked him in a makeshift jail cell. Additionally, Carter charges that counsel did not fully investigate the extent of his mother's alcohol consumption during his gestation and alleges that a sufficient investigation would have compelled counsel to present evidence that Carter suffered from fetal alcohol syndrome (FAS).

a. Prior Rulings

Carter did not allege ineffective assistance of counsel during the penalty phase of trial on direct appeal to the California Supreme Court. He raised this claim for the first time in his state habeas petitions, which the California Supreme Court summarily denied. The state does not argue that this claim was procedurally defaulted, and we treat the state court's decision as a denial of relief on the merits. *Richter*, 562 U.S. at 99. Because there was no reasoned explanation accompanying this decision, Carter must show there was "no reasonable basis for the state court to deny relief." *Id.* at 98. Our task is to determine what arguments or theories could have supported the California Supreme Court's decision, and whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with a prior holding of the U.S. Supreme Court. *Id.* at 102. We conclude that Carter has failed to demonstrate that the California Supreme Court lacked a reasonable basis for denying relief.

b. Performance in Investigating Carter's Background

Carter's first argument is that counsel performed deficiently in their investigation of his background in Nome. Under *Strickland*, "counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" during the penalty phase of a trial. *Strickland*, 466 U.S. at 691 (emphasis added); see *Wiggins v. Smith*, 539 U.S. 510, 526–28 (2003). "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 691.

Five years before trial, the state appointed Charles Ted Bumer to serve as Carter's lead trial counsel and Josephine Dedina to serve as co-counsel. Bumer and Dedina were assisted by paralegal Kathleen Gilberd and private investigators Marion Pasas and Chuck Hile. The trial team traveled to Alaska to gather evidence, and Pasas visited Carter's hometown of Nome to interview residents who had known the Carter family during his childhood.

Based on Pasas's investigation, during the penalty phase the defense team called six witnesses, out of a total of twenty-one, who knew Carter as a child in Nome. Each of the six witnesses testified about the relationship between Carter and his parents, and several also gave general testimony about the conditions Native Alaskans in Nome faced.

Carter's brother Jerry Carter (Jerry) testified that their mother Esther and stepfather Jim drank heavily, argued, and were often physically violent with one another. He also testified that Esther corporally punished the children with

branches, a belt, and a razor strap, and that Carter ran away, often for several days at a time. Jerry further testified to two instances of abuse from Carter's childhood: an incident where a five- or six-year-old Carter was dragged by the bumper of Esther's car while attempting to prevent her from going to a bar, and an incident where Jim and Esther chained Carter to his bed for a day or two to prevent him from running away. Jerry stated that sometime after these incidents, Jim and Esther sent Carter away to a home for unwanted children.

Carter's sister Polly Reaser (Polly) testified that Jim and Esther often drank in bars until 4:00 in the morning and were violent with one another, and that Carter would have witnessed these incidents of drunken violence.

Local elder Bertha Adsuna had lived in Nome for over fifty years at the time of trial. She testified that alcohol was a societal problem in the town, that Esther frequented the bars, that Carter spent much of his childhood alone, and that Esther dressed and treated Carter worse than she did Jerry. After Esther married Jim, Adsuna observed that the couple often went to bars together.

Harriet Brown served from 1947 to 1967 as a missionary pastor at a Nome church attended mostly by Alaska Natives and was Carter's childhood Sunday-school teacher for two to three years. She testified that the largest problem among the Native population was alcoholism. She also frequently saw child neglect in the community. Brown further testified that Jerry and Polly were always dressed well as children, but that Carter was not, and that Esther did not treat him nicely.

Beth Farley was a childhood classmate of Carter's. She testified that he was often alone, ignored by his family, and spent more time with the Farley family than his own. She also testified that she left Nome because of pervasive alcohol abuse, stating that even the children drank and many died of either exposure or suicide. Farley testified that her son was part Alaska Native and that she had witnessed and experienced prejudice against people of mixed race in Nome.

Ruth Butts was also a childhood classmate of Carter's. She testified that an incident had led many people to search for Carter as a child and that it was common knowledge that Jim was not the biological father of either of his stepsons, which led children to tease Carter and Jerry. She also testified to seeing Jim drunk in bars after church on Sundays.

Carter argues that this testimony was insufficiently compelling to the jury because his counsel had failed to further investigate his abusive childhood. A more complete investigation, he alleges, would have prompted counsel to call additional witnesses to the stand who could have testified to more specific instances of abuse.

Carter first points to counsel's failure to secure the testimony of his mother Esther. Pasas interviewed Esther in Nome, but Esther cut the interview short after Pasas asked a question about her alcohol consumption. After this aborted interview, Esther refused to provide any further assistance to her son's trial defense. However, in support of Carter's habeas petition, Esther submitted a sworn declaration stating that had she been "approached differently," she would have "talked to [counsel] and answered all of their questions" and "probably would have testified." Esther declared that her testimony would have included recollection of Jim using a

belt to discipline Carter, Jim chaining Carter to his bed, and she and Jim drinking heavily.

Carter also submitted several other declarations from Nome residents who were not called as defense witnesses during the penalty phase and who largely allege that they were not contacted or interviewed at the time of trial. As the district court noted, these declarations “largely outline, in greater detail than presented at trial, the mistreatment [Carter] suffered . . . at the hands of his mother and step-father and the alcoholism of his parents.”

Most notably, Carter submitted a declaration from Arthur (“Guy”) Martin, a colleague of Jim’s on the Nome police force. Martin declared that when responding to a call from one of the Carter family’s neighbors reporting child abuse, he had observed both Carter and Jerry chained to the floor of the family home. He suspected that Jim and Esther frequently chained the boys so that they could go out drinking. Martin declared that he had confronted Jim about the incident but that he had never reported it. Defense counsel had contacted and attempted to interview Martin prior to trial, but Martin had refused. Martin declared that he had declined to participate in the defense only because Esther had asked him not to speak to investigators or tell anyone about the abuse.

Additionally, Vaughn Johnson, a neighbor of the Carters, declared that he once saw Carter handcuffed and chained to the outside of his house, and that Carter had told Johnson that Jim had chained him. Cheryl Stavish, a childhood friend of Polly, declared that she recalled the same chaining incident, and had also observed a hidden room in the Carter home that resembled a jail cell, in which she “had a feeling” Carter was held.

Carter attributes Esther's refusal to testify to counsel's inadequate preparation of Pasas, and argues that a competent penalty defense would have featured his mother as the central witness. And had counsel not alienated Esther, Carter argues, Martin would have been willing to testify about the chaining incident he observed. He further argues that counsel was constitutionally deficient in failing to call both Johnson and Stavish, who would have corroborated each other's separate accounts of an incident of Carter being chained. Together, he argues, these witnesses could have established that Jim and Esther treated Carter more like a dog than a child.

The state argues that the testimony of Martin, Johnson, and Stavish would have been cumulative to that of Jerry, who testified that Carter had been chained to his bed for a day or two to prevent him from running away. We agree that much of their testimony would have been cumulative. But we disagree that their testimony would have been so entirely cumulative that it would certainly have been excluded as irrelevant. These three uncalled witnesses may reasonably have provided credible firsthand accounts of two additional instances in which Carter's parents chained him, supporting the inference that this was less an aberration than a routine practice. Had counsel's strategy been to present the young Carter as a metaphorical feral dog kenneled by his alcoholic parents, the eyewitness testimony of Martin, Johnson, and Stavish would have been relevant.

But that was never counsel's strategy. Rather than portray him as a feral child—a strategy which may have backfired by leading the jury to infer that the adult Carter was beyond rehabilitation—counsel's choice of witnesses during the penalty phase suggests that their intended narrative was one of Carter overcoming an abusive childhood home to find

personal and professional success before a divorce sent him spiraling into a life of violence. Indeed, the majority of witnesses counsel called gave testimony recounting how Carter had successfully rehabilitated himself as a young adult, allowing counsel to argue to the jury that Carter could again be capable of growth and redemption. The fifteen penalty-phase witnesses who came to know Carter after he left Nome included the house parent at the home for unwanted children Carter's parents sent him to, a youth counselor, a probation officer, a prison educator, and eleven professionals from the media industry who worked with Carter during his career as a television cameraman.

We cannot pass judgment on counsel's wisdom in choosing this narrative strategy over the one Carter argues they should have pursued. Rather, our duty is to determine what arguments or theories could have supported the state court's decision to deny Carter's claim that this strategic decision amounted to constitutionally deficient assistance, and whether fairminded jurists would disagree that those arguments or theories are inconsistent with a prior holding of the Supreme Court. *Richter*, 562 U.S. at 102.

The state court could have relied on *Strickland*'s "highly deferential" standard. *Id.* at 105. We "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" and presume that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Richter*, 562 U.S. at 110 (citation omitted). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than

‘sheer neglect.’” *Id.* at 109 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam)). Here, the state court may have reasonably determined that Carter’s trial counsel made a legitimate tactical decision to present Carter’s childhood trauma as they did rather than pursuing the child abuse angle more aggressively. It would have been able to support this determination with facts in the record: specifically, that counsel hired a professional investigator five years before trial began, that the investigator traveled to Carter’s hometown and interviewed many people who knew him and his parents, and that counsel procured the testimony of twenty-one witnesses whose testimony formed a cohesive narrative of abuse, perseverance, success, and unraveling.

Carter argues that this theory conflicts with the holdings of two Supreme Court decisions, *Williams* and *Wiggins*, in which the Court granted habeas relief upon finding that counsel had been constitutionally deficient in its investigation of the petitioner’s background. However, we are not persuaded that fairminded jurists would find that the holding of either case is in conflict with the *Strickland* analysis that could support the state court’s denial of habeas relief.

In *Williams*, the Court granted relief where counsel failed to conduct an investigation into the defendant’s “nightmarish childhood” because they incorrectly interpreted Virginia law to deny them access to records that were legally available to them. 529 U.S. at 395. Had Williams’s counsel accessed all available records,

the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly

beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. (footnote omitted). Carter argues that the facts of his childhood compare strongly to those of *Williams*.

We disagree. The holding of *Williams* is that counsel renders constitutionally ineffective assistance if it fails to investigate and pursue a reasonable defense because it incompetently interpreted the law. *Id.* Here, Carter makes no argument that his counsel misinterpreted Alaska law in a way that caused them to bypass an investigation of available records. More importantly, nothing in *Williams* tells us that counsel is incompetent unless it pursues a defense based entirely on the defendant's neglect as a child. After an extensive investigation of Carter's background, counsel implemented a sound defense strategy: to show that Carter had suffered under abusive, negligent parents but had risen above this poor upbringing. This contrasts with *Williams*, where the "weight of defense counsel's closing . . . was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life." *Id.* at 369. Thus, *Williams* does not provide any relevant point of "clearly established Federal law," 28 U.S.C. § 2254(d), on which a fairminded jurist could find disagreement with the theories supporting the California Supreme Court's decision. *Richter*, 562 U.S. at 102.

In *Wiggins*, trial counsel conducted no investigation into the defendant's background beyond reviewing a Presentence Investigation Report and social services records. 539 U.S. at 523. Counsel did not take advantage of public defense funds for commissioning a forensic social worker, which the record indicated was standard practice in the Maryland legal community at the time of the trial. *Id.* at 524. Further, counsel did not follow up on any of the red flags apparent in Wiggins's social services records, including his mother's history of alcoholism and child neglect. *Id.* at 525. Again, Carter analogizes his case to the underlying facts of *Wiggins*. However, the Sixth Amendment violations that the Court clearly identified in *Wiggins* were counsel's failure to take advantage of funds to commission a social worker and their failure to take any action upon discovering red flags indicating that Wiggins may have experienced child abuse. Carter does not plausibly allege that counsel failed to follow up on reports that Carter was abused as a child. In fact, counsel traveled to Alaska, hired a professional investigator to interview his relatives and neighbors, and put six of them on the witness stand to testify about his abusive childhood, his parents' alcoholism, and the conditions of discrimination he faced as an Alaska Native. Carter's counsel, unlike Wiggins's counsel, thus competently followed up on their investigation into Carter's social history. *Wiggins*, like *Williams*, provides no support for Carter's habeas claim.

Likewise, Carter cites no relevant support for his argument that counsel performed deficiently by failing to procure the testimony of Esther or Martin. We are aware of no Supreme Court case requiring counsel to secure the cooperation of reluctant witnesses. And for good reason. A witness asked to testify in support of a friend or family member convicted of capital murder faces an intensely

difficult, personal decision that belongs to the witness alone, and counsel's duty cannot reasonably be extended to compel a witness to participate in the defense. Carter's counsel had a duty to "make reasonable investigations," *Strickland*, 466 U.S. at 691, which the state court could have found that counsel satisfied by interviewing Esther and attempting to interview Martin.

Carter also argues that counsel's choice of strategy was constitutionally deficient because his Los Angeles County trial counsel had employed a similar narrative, without success, during the penalty phase of those proceedings. That begs the questions of whether there was another approach that was clearly more likely to have produced a better outcome. Counsel in this case was dealt a difficult hand. We have not been persuaded that there was an alternative argument so attractive that the failure of counsel to take that other path amounted to ineffective assistance.

Moreover, the state court's rejection of this argument could reasonably be supported by *Strickland*. There, the Court held that courts should not conclude that a "particular act or omission of counsel was unreasonable" merely because it "proved unsuccessful." *Id.* at 689. Rather, it must presume that counsel's decision fell "within the wide range of reasonable professional assistance." *Id.* In this light, because we presume both the Los Angeles and San Diego attorneys were professionally competent, the fact that both teams decided to pursue the same strategy after considering all the evidence they had available to them only supports the state court's position that neither defense team was unreasonable in its choice. Because Carter cites no Supreme Court holding that fairminded jurists could disagree was consistent with this plausible theory, this argument also fails.

c. Performance in Investigating Carter's Mental Health

Carter argues that counsel failed to conduct an adequate investigation into his mental health, including the possibility that he suffered from FAS. But as we have explained, “counsel’s decision not to pursue a mental health defense is a reasonable strategic decision under *Strickland* ” when “adopting a mental health defense would open the door to [unfavorable] rebuttal testimony.” *Atwood v. Ryan*, 870 F.3d 1033, 1063 (9th Cir. 2017).

Here, the record indicates that, at counsel’s request, a Dr. Lottenberg performed a PET scan of Carter’s brain approximately one week before the penalty phase of trial began. Counsel consulted with several experts, who recommended that the results be sent to Dr. Monte Buchsbaum for analysis. The court held an in-chambers teleconference with counsel and Dr. Buchsbaum, during which Dr. Buchsbaum identified an unusually high number of abnormalities in Carter’s brain. He then stated that he would need additional information to render a more detailed and substantive opinion about Carter. After this hearing, Carter’s counsel spoke to Dr. Buchsbaum alone and off the record. Counsel then informed the court that it had made a “tactical decision” not to introduce evidence of Carter’s mental health during the penalty phase. Judge Lasater noted on the record her agreement with counsel’s decision because Dr. Buchsbaum’s testimony would have opened the door to rebuttal evidence of Carter’s mental health from the state.

The trial record contains several mental health reports unfavorable to Carter that the state could have introduced during the penalty phase if the door had been opened. A

1973 psychological evaluation found Carter to be a “fairly classical sociopathic personality.” A probation report from the same year noted that Carter’s personality gave him “little chance at ever making acceptable social adjustment.” A 1975 psychiatrist’s evaluation found that, by Carter’s own admission, “his irritability and destructively aggressive conduct that emanates from it are willful, the result of personal choice, and represent matters over which he could exercise control if he chose to do so.” A 1977 psychological evaluation found that Carter “tended to see things in a concrete way with little insight.” A 1977 Alaska pre-sentence report described Carter’s behavior as “best explained [by] focusing on his immaturity and lack of consideration of consequences.” And a 1978 evaluation found that Carter had some indicia of psychiatric problems but did not need mental health assistance at the time, and described his behavior as “self-punitive in that he feels guilt for his misbehavior, but is not deterred by the guilt.”

We agree with both the trial judge’s observation and the district court’s conclusion that Carter’s counsel would have opened the door to introduction of this potentially damaging evidence by putting forth a mental health defense at trial. Notably, the district court was careful to emphasize that “this is not a case in which counsel failed to conduct *any* mental health investigation.” Carter’s counsel ordered a PET scan of Carter’s brain, conferred with an appropriate expert recommended by multiple other experts in the field, and made a tactical decision not to present mental health evidence at trial. *Strickland* directs us to presume that the challenged actions of counsel were “sound trial strategy,” 466 U.S. at 689, a presumption that is here supported by the aggravating mental health evidence that would have been made relevant for rebuttal purposes by Dr. Buchsbaum’s

testimony.⁷ Thus, we may conclude that the state court properly denied relief under *Strickland*'s deferential standard.

Carter also argues that counsel was deficient in failing to investigate and present evidence that he suffered from FAS, averring that competent attorneys would have pursued this avenue after learning that Esther consumed alcohol while pregnant. However, there is no evidence in the trial record that would have put Carter's counsel on notice that Esther drank while pregnant. Carter cites counsel's interviews with Jerry and Adsuna, but these interviews only reference Esther's drinking in her later years, after she gave birth to her children. Further, this argument fails for the tactical reasons described above, as any argument by counsel that Carter's actions could be attributable to FAS would have opened the door to the potentially damaging rebuttal evidence contained in the record.

In sum, Carter has succeeded only in establishing that counsel may have chosen to pursue other strategies during the penalty phase of his trial. He has failed to establish that counsel's investigation was deficient. Rather, our review of the state trial record shows that counsel acted with diligence beginning five years before trial to investigate events that took place thirty years prior in a remote town thousands of

⁷ Indeed, we granted habeas relief on an ineffective assistance claim—albeit in a pre-AEDPA case—where trial defense counsel presented an expert mental health witness whose testimony suggested that the defendant “may be a sociopath.” *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005). Here, even if Dr. Buchsbaum's testimony had been sympathetic to Carter, it may have directly led to the introduction of the 1973 psychological evaluation finding Carter to be a “fairly classic sociopathic personality.” We have no basis for second-guessing counsel's tactical decision not to pursue this line of defense.

miles away, and counsel succeeded in contacting a significant number of Carter's relatives, friends, neighbors, co-workers, and correctional counselors. Counsel elicited trial testimony from twenty-one of these individuals which tended to show that Carter had been severely abused as a child but had, as an adult, shown the capacity to be rehabilitated and function as a productive member of society. Counsel also conducted a PET scan of Carter's brain, but after conferring with a recognized expert, decided that the sum of the mental health evidence would be more aggravating than mitigating. On this record, Carter has failed to establish that the California Supreme Court was unreasonable in denying his ineffective assistance of counsel claim.

2. Certified Claim 2 (Claim 4 of Second Amended Petition): Denial of Psychiatric Expert Assistance at Trial

In the second claim certified by the Southern District for our review, Carter alleged that "he was deprived of the right to competent assistance of a psychiatric expert," that "counsel had an obligation to properly prepare the experts" who evaluated him, and that their failure to do so constituted ineffective assistance. Carter raised this claim in his first state habeas petition, which the California Supreme Court summarily denied. We treat that decision as a denial on the merits. *Richter*, 562 U.S. at 99. Because the decision was not accompanied by a reasoned explanation, Carter has the burden to show that "there was no reasonable basis for the state court to deny relief." *Id.* at 98. Again, our task is to determine what arguments or theories could have supported the California Supreme Court's decision, and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent" with a prior holding

of the U.S. Supreme Court. *Id.* at 102. We conclude that no such inconsistency exists here.

Carter bifurcated this claim into a charge that his attorneys failed to render effective assistance in preparing expert psychiatric witnesses, and a charge that his experts themselves rendered ineffective assistance. The district court construed the portion of the claim charging counsel as ineffective as a mere repetition of the prior certified claim regarding a FAS defense. We agree, and hold that Carter is not entitled to relief for the reasons stated immediately above.

Carter argues that the state court's denial of relief on his claim that his expert witnesses were ineffective is in tension with the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985). There, a state-supplied psychiatrist repeatedly evaluated a mentally ill murder defendant before trial, first deeming him not competent to stand trial but later deeming him competent. *Id.* at 70-72. During trial, defense counsel requested that the indigent defendant be provided with a psychiatrist to examine him "with respect to his mental condition at the time of the offense." *Id.* at 72. The state trial judge denied the request. *Id.* The Supreme Court granted certiorari on direct appeal and held that "the participation of a psychiatrist is important enough to preparation of a defense" that the Due Process Clause of the Fourteenth Amendment may require a state to provide an indigent defendant with psychiatric assistance under certain circumstances. *Id.* at 77.

At no point did the Court in *Ake* place any obligation on *defense counsel* to present psychiatric evidence at trial. Rather, that case's holding is limited to imposing an obligation on states to make a psychiatrist available to a

murder defendant upon the satisfaction of the balancing test. An *Ake* claim is *not* a Sixth Amendment ineffective assistance of counsel claim, but rather a Fourteenth Amendment due process claim against the state. *Id.* at 76 (“This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle [is] grounded in significant part on the Fourteenth Amendment’s due process guarantee of fundamental fairness”).

We conclude that Carter has failed to establish that *Ake* or any other Supreme Court decision would cause jurists of reason to disagree with the reasonable arguments in support of the state court’s decision. Carter conceded in his brief that the Supreme Court has never interpreted *Ake* to guarantee a due process right to effective expert assistance at trial. Rather, the Court has never extended the state’s obligation beyond providing a psychiatric expert to an indigent defendant, and Carter does not dispute that he had access to such an expert. Because we may rely only on the holdings of the Supreme Court in evaluating whether the state court’s decision was reasonable, *Williams*, 529 U.S. at 412, our analysis ends here. We do not address Carter’s arguments that rely on “circuit precedent,” which “cannot form the basis for habeas relief under AEDPA.” *Parker*, 567 U.S. at 48–49.

IV. UNCERTIFIED CLAIMS

Carter also raised several arguments relating to claims that the district courts did not certify in a COA. As a state prisoner seeking relief under § 2254, Carter has “no automatic right to appeal” the denial or dismissal of his

petition. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We lack jurisdiction to review a district court’s denial of a habeas claim “aris[ing] out of process issued by a State court” until and unless a federal court has issued a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 336. We accordingly construe Carter’s arguments on these uncertified claims as a motion to expand the COA. *See* 9th Cir. R. 22-1(e).

“A certificate of appealability may issue [in federal habeas review of state proceedings] only if the applicant has made a *substantial* showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (emphasis added); *see Wilson v. Belleque*, 554 F.3d 816, 825–26 (9th Cir. 2009). This statutory requirement “serves a gatekeeping function.” *Payton v. Davis*, 906 F.3d 812, 818 (9th Cir. 2018). In enacting § 2253, “Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not.” *Miller-El*, 537 U.S. at 337. “It follows that issuance of a COA must not be *pro forma* or a matter of course.” *Id.*

Nevertheless, the “standard for obtaining a COA is not a particularly exacting one.” *Wilson*, 554 F.3d at 826. “[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.” *Miller-El*, 537 U.S. at 337. Rather, “[a]t the COA stage, the only question is whether the applicant has shown that ‘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.’” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327). But when a district court “denies a habeas petition on procedural grounds without reaching the

prisoner's underlying constitutional claim," a COA can issue only if the prisoner shows that (1) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," and (2) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

We ordered supplemental briefing on several of the uncertified claims. Given the low bar for issuing a COA, *see Miller-El*, 537 U.S. at 338, for the reasons discussed below, we issue a COA on one claim not certified by the Central District that alleged ineffective assistance of counsel at the penalty phase. Although we issue a COA, we affirm the denial of habeas relief on this claim because the California Supreme Court's determination that counsel satisfied *Strickland*'s deferential standard is not contrary to or an unreasonable application of federal law. *Richter*, 562 U.S. at 105.

*A. Claim 6 of the Central District Habeas Petition:
Ineffective Assistance of Counsel at the Penalty Phase*

Similar to the claim certified by the Southern District that Carter's counsel was ineffective during the penalty phase, claim six in Carter's Central District habeas petition argued that if his attorneys had conducted more than an "initial attempt" at an investigation, they would have uncovered more evidence of child abuse and brain damage. Presentation of this additional evidence, he contends, would have changed the result at the penalty phase. We, however, can find no grounds for believing that the California Supreme Court unreasonably denied relief given the record of counsels' collective efforts.

1. Mitigation Evidence Presented at Penalty Phase

Counsel called twenty-one witnesses to present mitigating evidence. Carter's siblings, Jerry and Polly, testified that their parents were alcoholics who often came home late after drinking with "extreme arguing" that included hitting, throwing furniture, and throwing each other. Their mother also sometimes "g[ot] carried away" administering discipline with the children. Although Jerry denied that Carter was treated "that much worse" than Jerry, other Nome residents testified that Jerry was treated better than Carter. One neighbor even testified that Carter was "more like an orphan" when the boys were young.

Set against this background, the jury heard about dramatic instances of abuse and Carter's unusual family life. They heard about a time when Carter was seven or eight that their mother came home around 2:00 a.m. but started to leave again to pick up their father, and Carter tried to get her to stay home by "t[aking] off running after the car," "holler[ing] at [her] to stop," and "h[anging] on to the bumper and tried to stop the car for quite a ways," being dragged over a gravel road. They heard that Carter's father chained him to a bed at least once when he was only eight or nine years old.

The jury heard that in the midst of all this misery, Carter often ran away for several days at a time, including once to Anchorage by plane. Around age eight or nine, Carter's parents sent him to the Jessie Lee Home, far from Nome, which Carter's sister Polly described as "a jail or something for children." Even when the family traveled near the Home, they did not stop to visit him, which "shocked" Polly.

On appeal, post-conviction counsel submitted declarations tending to show that Carter being held in chains was not a one-time event. Childhood friends, classmates, and adults wrote in post-conviction declarations that they saw Carter handcuffed and chained to Carter's cabin, or held in a makeshift jail cell. One police officer who investigated allegations of abuse at the Carter house said he saw Carter, and possibly Jerry, chained to the floor with a bowl of water next to them. Counsel also asserted that Carter suffered from organic brain damage and Fetal Alcohol Syndrome at the time of the crimes, and that evidence to that effect should have been presented.

2. Ineffective Assistance of Counsel

Carter argues that trial counsel were ineffective because they failed to investigate and present more mitigating evidence regarding child abuse and possible brain damage. Since there is no state-court reasoned decision on this issue, Carter must show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. He cannot.

a. Performance

First, the California Supreme Court could reasonably have concluded that counsel did not perform deficiently because their presentation was based on strategic choices after a reasonable investigation. A defense attorney has a duty to make reasonable investigations that enable informed decisions about how best to represent the client. *Strickland*, 466 U.S. at 691; *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994). But "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at

689 “doubly so” when § 2254(d) is also involved, *Richter*, 562 U.S. at 105. Carter has the burden to “identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690.

Gillingham testified in a post-conviction declaration that his performance at sentencing could have been better in various ways:

- He was “unable to build rapport or develop [Carter’s] confidence,” which “contributed to [his] inability [to] present a compelling case in mitigation;”
- He was unable to secure Carter’s mother’s cooperation, as “she was not willing to discuss her life, petitioner’s birth father, circumstances surrounding his birth, his childhood, or any other subject related to her family;”
- He “failed and omitted to prepare a social historian or cultural anthropologist” or “a psychiatrist, psychologist or other mental health professional,” even though he believed Carter’s “childhood and adolescence were neglectful and alienating, and [was] aware of his long-term drug and alcohol abuse;”
- Although he “suspected the possibility of organic brain damage,” and a mental health professional he consulted suggested an MRI, he did not request an MRI or PET scan; and

- He generally “was unable to formulate any coherent strategy or plan to defend petitioner in guilt or penalty phases of trial.”

As the district court explained, however, Gillingham falling on his sword “in retrospect” is “not dispositive.” Rather, to fairly assess attorney performance, a court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. Viewed in that light, and especially given that “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” the California Supreme Court could reasonably have concluded that Gillingham’s team did not perform deficiently. *See id.*

Carter’s attorneys went to great lengths to investigate Carter’s troubled childhood. Both Gillingham and Morrissey traveled to Nome to interview family members and other residents, and their investigator Casey Cohen made four separate trips to Alaska and spoke with about forty different people. Cohen tried very hard to speak with Carter’s mother because he considered her “a very important” “primary witness to his early childhood.” Although he spoke to her “at least three times” in person, and “probably several times by phone,” Carter’s mother refused to cooperate, including by telling others not to communicate with Cohen.

While acknowledging the “resistance” his defense team faced from “unhelpful” Nome residents, Carter claims that if his counsel had done more than “an initial attempt” at an investigation, they would have gotten more people to testify and presented a fuller picture of the extent of the abuse Carter

suffered as a child. But the problem is not that Carter’s counsel made only an “initial attempt” at an investigation, but rather that they diligently followed leads and were met with dead ends. *Cf. Wiggins*, 539 U.S. at 523–25 (finding counsel unreasonably abandoned their investigation even though records in their possession put them on notice of possible child abuse). For example, although Cohen “pressed her hard to be honest with” investigators, Edna Buffas, whose father worked with Jim Carter and had “always” known the Carters, repeatedly called Dean “happy-go-lucky” and said “she couldn’t think of anything that might have improved the Carter family.”

Any “failure to investigate thoroughly” here resulted not “from inattention,” but from thwarted attempts. *See Wiggins*, 539 U.S. at 526. Attorneys are expected to formulate reasonable strategies that “balance limited resources in accord with effective trial tactics and strategies.” *Richter*, 562 U.S. at 107. Thus when they hit dead ends like this, they may abandon those inquiries, especially if they determine they are “distractive from more important duties.” *Id.* (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam)).

Moreover, Carter’s arguments downplay his own role in what he claims to be a stunted investigation. *See 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.”). Indeed, there was evidence that Carter himself told Polly and Jerry not to talk to defense investigators. As another example, Carter argued that “if Gillingham and Carter did not have a conflict, then Carter could have encouraged his mother and siblings to cooperate with trial counsel, which then would have led to a more fruitful mitigation investigation.” But if this alleged

conflict prevented his mother and siblings from cooperating in a way that Carter should benefit from, he has not explained how. Moreover, Carter himself could have given the defense team the details he claims people could have provided. *See id.* (“[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.”). The California Supreme Court could reasonably have determined that the investigation was not inadequate.

Carter also argues that it was “unreasonable” for trial counsel to decide “to focus their investigative efforts on developing evidence about Carter’s moderately successful life as an adult.” But Carter has not “overcome the presumption that, under the circumstances,” counsel’s investigation and presentation “might be considered sound trial strategy” developed after a thorough investigation. *Id.* at 689–91 (citation omitted). Indeed, there is evidence that this is so. In a memo written after interviewing Jerry Carter, Cohen wrote, “As the interview progressed we felt that there was no history of child abuse so significant that it would tie in with a general theory as to why Dean ends up murdering anyone.” He expanded,

[A] penalty phase defense would be focused as follows: To use Jerry only to tell the good about Dean and to plead with the jury to spare his life. To not try and construct a theory around any kind of child abuse. To lay out Dean’s life as it occurred. To recount how he perceived some problem deeply enough to try and run away from home from age 7 onward. To tell how he got into trouble, went to

institutions, and eventually grew up. Then, as an adult he rehabilitates himself, gets a good job, marries, and settles down. But problems in the marriage develop.

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 689.

Carter again relies heavily on *Wiggins*, 539 U.S. 510. But in *Wiggins*, defense counsel failed to present *any* evidence of the defendant’s life history, justifying this as “a tactical judgment not to present mitigating evidence at sentencing” and instead dispute *Wiggins*’ direct responsibility for the murder. 539 U.S. at 521. Here, the jury heard much about the abuse, including how Carter was treated worse than Jerry, chained at least once, and ran away multiple times because of the misery. As the district court reasoned, the California Supreme Court may reasonably have concluded that trial counsel decided not to present this evidence because (a) the jury would not have responded well to the insinuation that a child abused this badly would inevitably go on to rape, kill, and burglarize multiple women; (b) that the evidence of Fetal Alcohol Syndrome or brain damage would not have been well received because of the evidence that Carter acted so rationally over such a long period of time; and (c) that the evidence largely duplicated what they already presented.

For example, declarations from Vaughn Johnson, Chuck Reader, and Cheryl Stavish that Carter was chained which may or may not have been describing the same incident are

compelling, but the jury knew that Carter was chained as a child. Moreover, some of the evidence Carter faults his counsel for not presenting contradicted other evidence presented. For example, Jerry testified he himself was never chained, so the Officer's possible testimony saying that Jerry might have been chained would have been less helpful. Jerry also denied that Carter was treated "that much worse" than he was, so the value of additional evidence regarding the disparity between the two was minimal.

Additionally, as the government points out, many of the declarations Carter now submits rest on hearsay. For example, Cheryl Stavish testified that *Polly told her* that she used to hear Carter's father beating or whipping him; Officer Martin stated that *Sophie Swanson told him* the boys were chained every time the Carter parents went out to drink, which was frequently; and Chuck Reader declared that *Ivan Johnson told him* Carter was chained and locked up "almost all of the time." Moreover, some witnesses are less than confident in their claims. For example, Michael Ashmasuk testified that he and his friends "*assumed* Jim Carter had locked [Carter] in the closet," (emphasis added); Officer Martin stated that he "found Dean and Jerry Carter chained to the floor," but clarified that he "could see the chain on Dean, but [did not] remember seeing the chain on Jerry." The state court could reasonably have concluded that the investigation was sufficient.

The question here is not whether Carter's attorneys should have introduced more mitigating evidence, but rather whether the investigation supporting counsel's decision not to introduce more mitigating evidence was reasonable. *See id.* at 523. The California Supreme Court may reasonably have

concluded that the answer to that question was yes, that counsel's decision was reasonable.

b. Prejudice

Even if Carter's defense team performed deficiently, the California Supreme Court could reasonably have concluded that Carter was not prejudiced by their performance. To show prejudice, Carter must show that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. But here, there was no reasonable probability that the outcome would have been different if a jury had heard more evidence about the extent of the abuse Carter suffered, especially given the hearsay, contradictory, and weak nature of the additional evidence. *Id.* at 694.

A death verdict with overwhelming record support is less likely to have been affected by errors than one only weakly supported by the record. *Id.* at 696. As the California Supreme Court noted and Carter concedes, there was "strong evidence directly linking defendant to the charged murders." *Carter*, 117 P.3d at 527.

B. *Remaining Uncertified Claims*

We conclude that no jurist of reason would find it debatable that any of Carter's remaining uncertified claims states the denial of a constitutional right. *See Wilson*, 554 F.3d at 826. We therefore deny a COA as to the rest of the claims not certified by the Southern and Central District Courts.

CARTER V. DAVIS

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V. CONCLUSION

For the foregoing reasons, in Case No. 13-99003, the judgment of the United States District Court for the Central District of California is **AFFIRMED**.

For the foregoing reasons, in Case No. 13-99007, the judgment of the United States District Court for the Southern District of California is **AFFIRMED**.

Carter's supplemental motion to expand the certificate of appealability, filed October 6, 2015, is **GRANTED** as to Claim 6 in Case No. 13-99003, and otherwise **DENIED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

Case: 13-99003, 12/26/2019, ID: 11543863, DktEntry: 57-2, Page 3 of 4

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED (each column must be completed)			
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Excerpts of Record*			\$	\$
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Reply Brief / Cross-Appeal Reply Brief			\$	\$
Supplemental Brief(s)			\$	\$
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TOTAL:				\$

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

 DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEAN PHILLIP CARTER,

Petitioner,

vs.

KEVIN CHAPPELL, Acting Warden
of San Quentin State Prison,

Respondent.

CASE NO. 06cv1343 BEN (KSC)

DEATH PENALTY CASE

**ORDER DENYING MOTION TO
VACATE, ALTER, OR AMEND
FINAL ORDERS AND
JUDGMENT**

A Final Order Denying Habeas Relief was filed on March 18, 2013, and Judgment was entered in this case on March 19, 2013. (Doc. Nos. 171, 172.) On April 15, 2013, Petitioner filed a Motion requesting “an order altering, amending, or vacating [this Court’s] final orders and judgment dismissing his Second Amended Petition” under Federal Rule of Civil Procedure 59(e) or 60(b). (Doc. No. 174-1 [“Mot.”] at 7.)¹ Specifically, Petitioner moves the Court to vacate its orders and judgment, issue another stay,² and allow him to return to state court in order to present evidence that

¹ Page numbers for docketed materials cited in this Order refer to those imprinted by the Court’s electronic case filing system.

² This case was previously stayed for nearly three years to permit Petitioner to exhaust a number of claims and that filing, the second state habeas petition, contained the same claims Petitioner now seeks to present again to the state supreme court.

1 was precluded from this Court's consideration under Cullen v. Pinholster, 131 S.Ct.
2 1388 (2011). On May 20, 2013, Respondent filed an Opposition, and on May 28,
3 Petitioner filed a Reply. For the reasons set forth below, Petitioner's motion is
4 **DENIED.**

5 Petitioner asserts that "Federal Rule of Civil Procedure 59(e) allows judges to
6 amend or alter judgments to prevent 'manifest injustice,' and Rule 60(b) permits judges
7 to vacate judgments when doing so is 'appropriate to accomplish justice.'" (Mot. at 7.)
8 Under Rule 59(e), altering or amending a judgment is appropriate "if the district court
9 (1) is presented with newly discovered evidence, (2) committed clear error or the initial
10 decision was manifestly unjust, or (3) if there is an intervening change in the
11 controlling law." School Dist. No. 1J v. AC&S, Inc., 5 F.3d 1255, 1263 (9th Cir.
12 1993). Rule 60(b) of the Federal Rules of Civil Procedure provide for relief from
13 judgment where one or more of the following is shown: (1) mistake, inadvertence,
14 surprise or excusable neglect; (2) newly discovered evidence which by due diligence
15 could not have been discovered before the court's decision; (3) fraud by the adverse
16 party; (4) voiding of the judgment; (5) satisfaction of the judgment; or (6) any other
17 reason justifying relief. See Fed.R.Civ.P. 60(b).

18 Petitioner argues that "because of a novel, unforeseeable change in the law, there
19 is a very real danger that this case will result in manifest injustice." (Mot. at 7-8.)
20 Petitioner refers to the Supreme Court's April 4, 2011 decision in Pinholster, which
21 instructs that a federal habeas court's "review under § 2254(d)(1) is limited to the
22 record that was before the state court that adjudicated the claim on the merits." Id., 131
23 S.Ct. at 1398.

24 In the instant case, because the California Supreme Court rejected Petitioner's
25 claims on the merits, this Court indicated that:

26 [A]ny evidence that was not previously presented to the California
27 Supreme Court will not be considered by this Court in the evaluation of
28 each claim under [section] 2254(d). Based on the Court's review of the
record, this includes materials from trial counsel's files, currently under
seal, and the deposition of second chair trial counsel, submitted by

1 Respondent in connection with record expansion proceedings, labeled Ex.
2 1-14. (See Doc. Nos. 141-43, 148.) This also includes Petitioner's
3 exhibits filed in support of the Motion for Evidentiary Hearing, including
materials from trial counsel's files, witness interviews, memos, and expert
reports, labeled Ex. A through Ex. AA. (See Doc. No. 113.)

4 If Petitioner is able to satisfy § 2254(d) with respect to any of the
5 claims in the federal Petition, the Court will then consider this additional
6 evidence in determining whether relief is warranted on the claim or claims
at issue.

7 (Doc. No. 170 at 80-81.) Because Petitioner was unable to satisfy section 2254(d) with
8 respect to any of the claims, the Court did not consider materials not presented to the
9 state court.

10 Petitioner explains that "in light of the California Supreme Court's unwillingness
11 to allow petitioners to file privileged documents under seal (e.g. trial counsel files), the
12 prudent course of action was to wait for the California Supreme Court to issue an order
13 to show cause before they filed any privileged material," which would allow them to
14 seek a protective order. (Mot. at 13.) Petitioner explains that federal district courts in
15 the Ninth Circuit often issue protective orders in capital habeas cases. (Mot. at 14.)

16 However, the Supreme Court rendered Pinholster on April 4, 2011, nearly two
17 years before this Court's March 18, 2013 Order Denying Habeas Relief. Petitioner has
18 been well aware of Pinholster's import, given the Court's October 5, 2011 Order
19 Denying Petitioner's Motion for Reconsideration, the Court's earlier July 25, 2011
20 Order Denying Petitioner's Motion for Discovery, and the Court's August 12, 2011
21 Order Denying Petitioner's Motion for Evidentiary Hearing Without Prejudice, each
22 of which referenced or discussed the impact of Pinholster. (See Doc. No. 152 at 2-3;
23 Doc. No. 149 at 4; Doc. No. 150 at 3.) Given the Court's stated intention to apply
24 Pinholster in its adjudication of his federal claims under § 2254(d), Petitioner fails to
25 explain why he did not either: (1) request a stay after either the issuance of Pinholster
26 or after any of the Court's three separate 2011 orders referencing or discussing
27 Pinholster's application to his case, or (2) simply return to state court to present these
28 materials. In light of the Court's clear, long-standing, and explicitly-stated intention

1 to apply Pinholster, Petitioner's belated argument that its application may result in
2 "manifest injustice" is unpersuasive.

3 Petitioner's reliance on the Ninth Circuit's decision in Gonzalez v. Wong, 667
4 F.3d 965 (9th Cir. 2011), in advocating for a stay and abeyance of this case is also
5 misplaced. In Gonzalez, the petitioner presented a claim pursuant to Brady v.
6 Maryland, 373 U.S. 83 (1963), asserting that the prosecution failed to turn over
7 exculpatory information concerning a jailhouse informant who testified for the
8 prosecution at trial. Id. at 972. Several documents the state failed to disclose were
9 later obtained by the petitioner during federal habeas proceedings, and thus had not
10 been part of the state record at the time the California Supreme Court issued its
11 decision. Id. The Ninth Circuit reasoned as follows:

12 Under Pinholster, we may not consider those *later-discovered materials*
13 in reviewing [Petitioner's] federal habeas claim. Because it appears to us
14 that those materials strengthen [Petitioner's] Brady claim to the point that
15 his argument would be potentially meritorious- that is, that a reasonable
16 state court might be persuaded to grant relief on that claim- it is not
17 appropriate for us to ignore those materials. We remand that portion of
the case to district court to stay the proceeding in order to give [Petitioner]
an opportunity to return to state court and present his claim with the
benefit of *materials that were not available* and not part of the record at
the time of the California Supreme Court decision.

18 Id. (footnote omitted) (emphasis added).

19 Unlike in Gonzalez, the materials Petitioner seeks to present to the state supreme
20 court were, with the exception of the deposition of second-chair counsel, not
21 discovered after the conclusion of state habeas proceedings. Instead, as noted above,
22 Petitioner asserts that post-conviction counsel possessed the materials and made a
23 tactical decision not to submit the materials to the state court. Regardless of the post-
24 conviction counsel's reasoning, the fact remains that this situation is not akin to
25 Gonzalez, in which the Ninth Circuit clearly indicated that the late disclosure of the
26 newly-disclosed Brady materials was the state's responsibility, and "[f]or us simply to
27 ignore the materials that did not emerge until the federal habeas proceedings would be
28 to reward the prosecutor for withholding them." Id. at 980. Under California law, a

1 state habeas petitioner is required to not only plead his claim, but also should “include
2 copies of reasonably available documentary evidence supporting the claim, including
3 pertinent portions of trial transcripts and affidavits or declarations.” People v. Duvall,
4 9 Cal. 4th 464, 474 (1995). In this case, Petitioner, and not the State, bore the
5 responsibility of presenting the evidence to the state supreme court.

6 Petitioner contends that the additional evidence he seeks to present to the state
7 court bolsters the merits of federal Claims 2 and 3 to the extent that those claims are
8 “colorable and potentially meritorious,” warranting a return to state court. (Mot. at 17,
9 citing Gonzalez, 667 F.3d at 980.) Yet again, unlike in Gonzalez, both Claim 2 and
10 Claim 3 have been previously presented to the California Supreme Court on two prior
11 occasions, albeit prior to the date Pinholster was decided. Petitioner presented federal
12 Claims 2 and 3 as Claims II and III in the first state habeas petition (California
13 Supreme Court Case No. S096874) and as Claims Two and Three of the second state
14 habeas petition (California Supreme Court Case No. S153780). The California
15 Supreme Court adjudicated the claims on the merits in both petitions. Therefore,
16 Petitioner has not been deprived of an opportunity to raise his claims before the state
17 supreme court and has, in fact, twice presented these claims (and twice chosen not to
18 include materials from trial counsel files in his presentation to the state court).

19 The Court also acknowledges that deposition of second chair trial counsel
20 Dedina, was taken during federal proceedings after the state court’s decision and was
21 not “available” as evidence when Claims 2 and 3 were twice presented to the state
22 court. However, the Court’s Order granting the deposition clearly stated that Ms.
23 Dedina would be deposed in order to “preserve her testimony” in light of her declining
24 health due to cancer. (See Doc. No. 83 at 3-4.) The Court made no determination that
25 the Dedina deposition would, or would not, be considered in the adjudication of the
26 federal Petition, only that her testimony would be preserved. Moreover, in connection
27 with preparation for the Dedina deposition, Petitioner made portions of trial counsels’
28 files available to Respondent. Respondent, in turn, submitted a number of items from

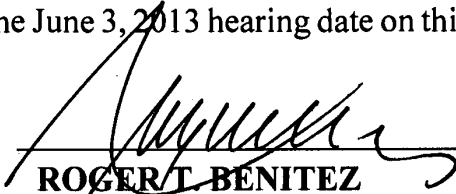
1 trial counsels' files to the Court during record-expansion proceedings to bolster their
2 assertion that trial counsels' performance in investigating, preparing and presenting
3 Petitioner's trial defense satisfied constitutional requirements. (See Doc. Nos. 141-
4 143, 148.) Pursuant to Pinholster, the Court did not consider those newly-submitted
5 materials in adjudicating the federal Petition. (See Doc. No. 170 at 80.) Thus, given
6 that both parties have submitted evidence during the federal proceedings that has not
7 been presented to the state court, Petitioner also fails to show that the net effect of this
8 evidence submitted in federal court has rendered his claims "colorable or potentially
9 meritorious."

10 In any event, the Ninth Circuit has instructed that a motion under Rule 59(e)
11 "should not be granted, absent highly unusual circumstances" such as those outlined
12 above. Herbst v. Cook, 260 F.3d 1039, 1044 (9th Cir. 2001), quoting McDowell v.
13 Calderon, 197 F3d 1253, 1255 (9th Cir. 1999) (en banc). Here, Petitioner fails to
14 establish that this Court's application of Pinholster constituted clear error, resulted in
15 "manifest injustice," or otherwise warrants relief under either Rule 59(e) or Rule 60(b).

16 Accordingly, as Petitioner fails to identify any factor under either FRCP 59(e)
17 or 60(b) that would justify the relief sought, Petitioner's Motion to Alter, Amend, or
18 Vacate the Court's Orders and Judgment is **DENIED**.

19 The Court also hereby **VACATES** the June 3, 2013 hearing date on this motion.
20 **IT IS SO ORDERED.**

21 Dated: 5/31/13

22 
23 **ROBERT T. BENITEZ**
24 United States District Judge
25
26
27
28



United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

DEAN PHILLIP CARTER,

Petitioner,

vs.

KEVIN CHAPPELL, Acting Warden
of San Quentin State Prison,

Respondent.

Civil Action No. 06cv1343-BEN-KSC

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

that the Petition for Writ of Habeas Corpus is denied as to all claims. The Court issues a Certificate of Appealability on Claims 3-4 and denies a Certificate of Appealability on Claims 1-2 and 5-16. Judgment is entered in favor of the Respondent. Case closed.

Date: 3/19/13

CLERK OF COURT
W. SAMUEL HAMRICK, JR.

By: s/ K. Betancourt

K. Betancourt, Deputy

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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 DEAN PHILLIP CARTER,
11
12 Petitioner,

13 vs.

14
15 KEVIN CHAPPELL, Acting Warden
16 of San Quentin State Prison,
17 Respondent.

CASE NO. 06cv1343 BEN (KSC)

DEATH PENALTY CASE

FINAL ORDER:

**(1) DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
AND**

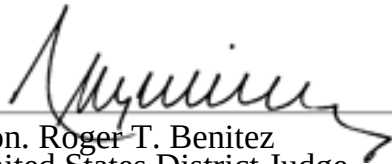
**(2) ISSUING CERTIFICATE OF
APPEALABILITY**

18 For the reasons discussed in the Court's March 18, 2013 Order (see Doc. No.
19 170), the Petition for Writ of Habeas Corpus is **DENIED** as to all claims. The Court
20 **ISSUES** a Certificate of Appealability ["COA"] on Claims 3-4 and **DENIES** a COA
21 on Claims 1-2 and 5-16. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473,
22 484 (2000); (see also Doc. No. 170 at 318.)

23 The Clerk is **ORDERED** to enter Judgment for Respondent and close Case No.
24 06-cv-1343.

25 **IT IS SO ORDERED.**

26 DATED: March 18, 2013

27
28 
Hon. Roger T. Benitez
United States District Judge

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEAN PHILLIP CARTER,

Petitioner,

v.

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

Respondent.

CASE NO. CV 06-4532 RGK

DEATH PENALTY CASE

JUDGMENT

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

The Clerk is ordered to enter this judgment.

Dated: March 1, 2013.



R. GARY KLAUSNER
United States District Judge

* Kevin Chappell is substituted for his predecessors as Warden of California State Prison at San Quentin pursuant to Federal Rule of Civil Procedure 25(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEAN PHILLIP CARTER,

Petitioner,

v.

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

Respondent.

CASE NO. CV 06-4532 RGK

DEATH PENALTY CASE

ORDER DENYING FIRST
AMENDED PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner was convicted of the forcible rape and first degree murder of Jillette Mills, the forcible rape and first degree murder of Bonnie Guthrie, the first degree murder of Susan Knoll, and two counts of residential burglary. The jury found true special circumstance allegations that the murder of Mills was committed in the course of a forcible rape and in the course of a burglary (Cal. Penal Code §§ 190.2(a)(17)(C), (G)); that the murder of Knoll was committed during the commission of a burglary (*id.* § 190.2(a)(17)(G)); that the murder of Guthrie was committed in the course of a forcible rape and in the course of a burglary (*id.* §§ 190.2(a)(17)(C), (G)); and that Petitioner was convicted in the proceeding of more

* Kevin Chappell is substituted for his predecessors as Warden of California State Prison at San Quentin pursuant to Federal Rule of Civil Procedure 25(d).

1 than one offense of murder. (*Id.* § 190.2(a)(3).) The jury returned a sentence of
2 death.

3 Petitioner filed the operative First Amended Petition for Writ of Habeas
4 Corpus (“Pet.”) on September 7, 2010. For the reasons set forth below, the First
5 Amended Petition is DENIED.

6 **PROCEDURAL BACKGROUND**

7 The California Supreme Court affirmed Petitioner’s conviction and sentence
8 on direct appeal on August 15, 2005. *People v. Carter*, 36 Cal. 4th 1114 (2005).
9 The United States Supreme Court denied Petitioner’s petition for writ of certiorari
10 on April 24, 2006. *Carter v. California*, 126 S. Ct. 1881 (2006).

11 Petitioner filed a Petition for Writ of Habeas Corpus in the California
12 Supreme Court on July 24, 2000 (Case No. S090230), which was denied on
13 September 13, 2006. Petitioner filed a Protective Petition for Writ of Habeas
14 Corpus in this Court on December 14, 2006. He filed a second state habeas
15 petition (Case No. S153790) and a Petition for Writ of Habeas Corpus in this Court
16 on June 22, 2007. Upon stipulation of the parties, the Court stayed the federal
17 proceedings during the pendency of Petitioner’s state habeas proceedings. (Order
18 Staying Federal Proceedings Pending Resolution of State Habeas Proceedings,
19 filed July 12, 2007.) The California Supreme Court denied the petition on June 17,
20 2010, and the Court lifted the stay on the instant proceedings on August 5, 2010.

21 As stated above, Petitioner filed the his First Amended Petition for Writ of
22 Habeas Corpus on September 7, 2010. Respondent filed an Answer on February 4,
23 2011. On February 14, 2011, the Court ordered the parties to file a joint discovery
24 stipulation and any requests for discovery within forty-five days of the filing of the
25 Traverse. On April 5, 2011, Petitioner filed a Traverse.

26 The preceding day, on April 4, 2011, the United States Supreme Court
27 decided *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). On April 11, 2011, the Court
28 vacated its February 14, 2011 Order, and instead Ordered Petitioner to file a status

1 report by May 16, 2011, indicating whether he intended to pursue a motion for
2 evidentiary hearing and, if so, addressing his entitlement to an evidentiary hearing
3 in view of *Pinholster*. (Case Management Order, filed April 11, 2011.) No
4 discovery requests or stipulations had been filed.

5 Petitioner filed a request to proceed with a motion for evidentiary hearing
6 and a joint stipulation for discovery. Respondent filed an opposition on June 6,
7 2011, and Petitioner filed a reply on June 16, 2011. On June 30, 2011, the Court
8 denied Petitioner's request without prejudice. The Court Ordered the parties to
9 brief whether and how each claim satisfies 28 U.S.C. § 2254(d) on the basis of the
10 record that was before the state court that adjudicated the claim on the merits.
11 (Order Denying without Prejudice Request to File Joint Discovery Stipulation and
12 Motion for Evidentiary Hearing, filed June 30, 2011, at 8.) The parties completed
13 the merits briefing on April 30, 2012.

14 **DISCUSSION**

15 **I. Standard for Relief under 28 U.S.C. § 2254(d)**

16 Section 2254(d), as amended by the Antiterrorism and Effective Death
17 Penalty Act of 1996 (AEDPA) provides:

18 An application for a writ of habeas corpus
19 on behalf of a person in custody pursuant to
20 the judgment of a State court shall not be
21 granted with respect to any claim that was
22 adjudicated on the merits in State court
23 proceedings unless the adjudication of the
24 claim –

25 (1) resulted in a decision that was
26 contrary to, or involved an unreasonable
27 application of, clearly established Federal
28 law, as determined by the Supreme Court of
the United States; or

(2) resulted in a decision that was
based on an unreasonable determination of

1 the facts in light of the evidence presented in
2 the State court proceeding.

3 28 U.S.C. § 2254(d). The Supreme Court held in *Pinholster* that when determining
4 whether a petitioner has satisfied § 2254(d), a court may only consider evidence in
5 the state court record. 131 S. Ct. at 1398, 1400 n.7 (2011). The Court held that
6 “review under § 2254(d)(1) is limited to the record that was before the state court
7 that adjudicated the claim on the merits.” *Id.* at 1398. Section § 2254(d)(2)
8 “includes the language ‘in light of the evidence presented in the State court
9 proceeding,’ . . . [providing] additional clarity . . . on this point.” *Id.* at 1400 n.7.

10 A state court decision is “contrary to our clearly established precedent if the
11 state court applies a rule that contradicts the governing law set forth in our cases or
12 if the state court confronts a set of facts that are materially indistinguishable from a
13 decision of this Court and nevertheless arrives at a result different from our
14 precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotations
15 omitted); *see also Crosby v. Schwartz*, 678 F.3d 784, 788 (9th Cir. 2012) (applying
16 *Harrington v. Richter*, 131 S. Ct. 770 (2011)); *Brown v. Horrell*, 644 F.3d 969, 978
17 (9th Cir. 2011) (same). “[U]nder the ‘unreasonable application’ clause, a federal
18 habeas court may grant the writ if the state court identifies the correct governing
19 legal principle from this Court’s decisions but unreasonably applies that principle
20 to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (internal quotation
21 omitted); *see also Crosby*, 678 F.3d at 788; *Brown*, 644 F.3d at 978. “The
22 ‘unreasonable application’ clause requires the state court decision to be more than
23 incorrect or erroneous. The state court’s application of clearly established law
24 must be objectively unreasonable.” *Lockyer*, 538 U.S. at 75

25 //

26 (internal citation omitted); *see also Crosby*, 678 F.3d at 788; *Brown*, 644 F.3d at
27 978.
28

1 “[A]s to the clause dealing with ‘an unreasonable determination of the
 2 facts,’” section 2254(d)(2), “the statement of facts from the last reasoned state
 3 court decision is afforded a presumption of correctness that may be rebutted only
 4 by clear and convincing evidence.” *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir.
 5 2012) (internal quotation omitted). Under § 2254(d)(2):

6 if a petitioner challenges the substance of the state court’s
 7 findings, . . . [the court] must be convinced that an
 8 appellate panel, applying the normal standards of
 9 appellate review, could not reasonably conclude that the
 10 finding is supported by the record. Similarly, when the
 11 challenge is to the state court’s procedure, mere doubt as
 12 to the adequacy of the state court’s findings of fact is
 13 insufficient; we must be satisfied that any appellate court
 14 to whom the defect [in the state court’s fact-finding
 15 process] is pointed out would be unreasonable in holding
 16 that the state court’s fact-finding process was adequate.

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

19 The United States Supreme Court made clear in *Richter* that “[a] state
 20 court’s determination that a claim lacks merit precludes federal habeas relief so
 21 long as fairminded jurists could disagree on the correctness of the state court’s
 22 decision.” 131 S. Ct. at 786 (internal quotation omitted). “Under § 2254(d), a
 23 habeas court must determine what arguments or theories supported or . . . could
 24 have supported, the state court’s decision;” the court must not “overlook[]
 25 arguments that would otherwise justify the state court’s result” *Id.* Section
 26 2254(d) provides “a difficult to meet and highly deferential standard for evaluating
 27 state-court rulings, which demands that state-court decisions be given the benefit of
 28 the doubt.” *Pinholster*, 131 S. Ct. at 1398 (internal quotations omitted).

II. Standard for Relief for Ineffective Assistance of Counsel

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

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

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

22 As the Supreme Court emphasized in *Richter*:

23 [s]urmounting *Strickland*'s high bar is never an easy task.
 24 . . . Even under de novo review, the standard for judging
 25 counsel's representation is a most deferential one.
 26 Unlike a later reviewing court, the attorney observed the
 27 relevant proceedings, knew of materials outside the
 28 record, and interacted with the client, with opposing
 counsel, and with the judge. It is all too tempting to
 second-guess counsel's assistance after conviction or

adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

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

III. Claims 1 and 5(D)(1): Presentation of Guilt Phase Defense and Petitioner's Right to Testify

A. Allegations

In Claim 1, Petitioner alleges that he "had an irreconcilable conflict with his court-appointed attorneys, and the trial court failed to provide Mr. Carter with conflict-free, effective counsel" (Pet. at 30.) Petitioner alleges that trial counsel "unreasonably decided not to defend Mr. Carter at his capital trial," and that "Mr. Carter was at all times adamantly opposed to [trial counsel's] decision to forgo a guilt-phase defense." (*Id.* at 31.) Petitioner "informed counsel . . . that 'I wanted them to subpoena the witnesses I wanted to call, and that I wanted to put on a defense, and I wanted to testify.'" (*Id.* at 32 (quoting 54 RT 6187).) Petitioner asserts that his "emphatic disagreement with trial counsel over his decision not to defend Mr. Carter at the guilt phase led to an complete [sic] breakdown in communication between the two," and that the "trial court failed to adequately

1 inquire into the nature and extent of the conflict.” (*Id.* at 35.) In Claim 5(D)(1),
2 Petitioner alleges that trial counsel failed to inform him adequately of his right to
3 testify, call witnesses on his behalf, and otherwise defend himself. (*Id.* at 62; see
4 also Petitioner Dean Phillip Carter’s 28 U.S.C. § 2254(d) Brief (“Petr.’s Br.”) at
5 21, 114-17.) Petitioner alleges that counsel interfered with his ability to address
6 the court about his grievances. (Pet. at 62.)

7 It is undisputed by the parties that the trial court held four hearings pursuant
8 to *California v. Marsden*, 2 Cal. 3d 118 (1970), to consider whether a substitution
9 of counsel was required as a result of ineffective representation. (See Petr.’s Br. at
10 51-52, 63 n.31; Response to Petitioner’s 28 U.S.C. Section 2254 Brief (“Respt.’s
11 Br.”) at 15.) The court also heard a motion for new trial based, in part, upon
12 Petitioner’s alleged inability to present a defense as a result of the conduct of his
13 trial counsel, Howard Gillingham. Petitioner was represented by separate counsel
14 at the hearing, and both Petitioner and Gillingham testified. (See 54 RT 6149,
15 6162-6203.)

16 Petitioner alleges that at the *Marsden* hearing held after the conclusion of the
17 prosecution’s case in chief, Petitioner did not speak because Gillingham “told him
18 that ‘he would present it to the court and for [Petitioner] to just sit there and let
19 him, you know, get it on the record.’” (Pet. at 33 (quoting 54 RT 6188).)
20 Petitioner contends that Gillingham improperly informed him that whether
21 Petitioner would testify was counsel’s decision, not Petitioner’s, and that Petitioner
22 would not be called as a witness despite his desire to testify. (*Id.* at 34, 36 n.12.)
23 Petitioner asserts that despite Gillingham’s statement to the trial court that his
24 decision not to present witnesses precluded Petitioner from testifying, the trial
25 court “did not inquire of Mr. Carter regarding his desire to testify, or whether he
26 wanted his attorneys to present a defense.” (*Id.* at 36.) According to Petitioner, the
27 trial court “erroneously decided that Mr. Carter did not have a superceding right to
28 present a defense to capital murder charges,” but that “it was a tactical decision

1 counsel could make unilaterally,” and “did not correct counsel’s misstatements of
 2 the law or directly inquire of Mr. Carter regarding the nature and extent of the
 3 conflict.” (*Id.* (citing 42 RT 5094-95; 45 RT 5394).)

4 **B. Decision on Direct Appeal**

5 On direct appeal, the California Supreme Court held:

6 Although a defendant in a capital trial [has] the right to
 7 have his only viable defense to the guilt or special
 8 circumstance charges presented at the initial stage of
 9 trial, and counsel lacks the authority to override the
 10 defendant’s decision to present such a defense at the guilt
 11 phase of the trial, in the present case the record does not
 12 establish that defendant had a viable defense. Here, the
 13 record supports the People’s position that defendant, a
 14 person with a sophisticated view of the criminal justice
 15 system from the inside, complained sufficiently during
 16 proceedings conducted in the trial court so as to create a
 17 colorable appellate issue, but not sufficiently to obligate
 18 the trial court to relieve his counsel.^[1]

19 ^[1] We believe that the prosecutor’s argument in
 20 summation at the hearing on defendant’s motion
 21 for new trial aptly summarizes the state of the
 22 record: ‘[L]ooking at the transcript, the court
 23 could . . . and should draw the conclusion that what
 24 happened was Mr. Carter was a defendant who
 25 wanted things his way. Mr. Gillingham did not do
 26 them his way for valid legally sufficient reasons,
 27 and Mr. Gillingham indicated this . . . displeasure
 28 of Mr. Carter, but in the end, Mr. Carter acceded to
 Mr. Gillingham’s trial strategy. He was present
 during all of these proceedings, and he is not a
 novice in this business. He is not a person who is
 not unfamiliar [sic] with the courts and the court
 system. He has not hesitated in the past to
 comment. I suggest this motion should be denied
 in its entirety. There is no error at all.’

Accordingly, defendant’s claim that he was denied the
 opportunity to present a defense, and to conflict-free,

1 effective representation, should be denied.

2 With respect to defendant's asserted desire to testify at
3 trial, we are guided by well-settled rules: 'Every criminal
4 defendant is privileged to testify in his own defense, or to
5 refuse to do so.' *Harris v. New York*, 401 U.S. 222, 225
6 (1971). . . . Although tactical decisions at trial are
7 generally counsel's responsibility, the decision whether
8 to testify, a question of fundamental importance, is made
9 by the defendant after consultation with counsel. [See]
10 *United States v. Martinez*, 883 F.2d 750, 755 (9th Cir.
11 1989), *vacated on other grounds at* 928 F.2d 1470 (9th
12 Cir. 1991).

13 Moreover, we previously have rejected the position that a
14 trial court must obtain an affirmative waiver on the
15 record whenever a defendant fails to testify at trial. . . .
16 [Cf.] *Florida v. Nixon*, 543 U.S. 175, [189] (2004)
17 (although defense counsel 'was obliged to, and in fact
18 several times did, explain his proposed trial strategy' to
19 the defendant, counsel 'was not additionally required to
20 gain express consent before conceding [the defendant's]
21 guilt')

22 Here, as noted above, defendant had ample opportunity
23 during the course of three *Marsden* hearings to inform
24 the court that he wished to testify, against the advice and
25 over the objection of defense counsel, *even if defense*
26 *counsel were permitted to decline to present any other*
27 *defense witnesses who would support defendant's own*
28 *testimony*. In view of defense counsel's repeated efforts
during the *Marsden* hearings to inform the trial court of
the conflicts that had arisen with his client, the trial court
reasonably could have determined that had defendant told
his counsel that defendant insisted upon testifying despite
the absence of any other defense witnesses, his counsel
would have conveyed that demand to the trial court. In
view of the circumstance that counsel never told the trial
court that defendant had made such a demand, on this
record we may not assume that defendant in fact had
insisted upon testifying even where no other defense

1 witnesses would be presented to support his testimony.

2 Similarly, defendant's further contention that the trial
3 court failed adequately to inquire into his conflict with
4 trial counsel similarly is belied by the record before us.
5 As noted above, the court conducted three *Marsden*
6 hearings during the course of the trial for the purpose of
7 permitting the airing of the conflict between defendant
8 and his attorneys. During these hearings, defense
9 counsel brought to the court's attention defendant's
10 dissatisfaction with counsel's trial strategy and tactics.
11 Although at the hearing on the motion for new trial,
12 defendant testified that counsel had not informed the
13 court at the July 5th and July 10th [1989] *Marsden*
14 hearings of all the witnesses whom defendant wanted to
15 call, we are satisfied from the record before us that in the
16 course of conducting three *Marsden* hearings, the trial
17 court adequately inquired as to the issues raised by the
18 defense, and that counsel fairly characterized the nature
19 of the conflict for the trial court.

20 *Carter*, 36 Cal. 4th at 1197-99 (internal quotations omitted, citations omitted and
21 edited, emphasis in original).

22 **C. Alleged Section 2254(d) Violations**

23 Petitioner argues that the state court's rejection of his claim was
24 unreasonable under § 2254(d) because "two premises of the state court's decision
25 are at odds with the evidence:" Petitioner did not accede to trial counsel's strategy,
26 and trial counsel did not have valid reasons for not putting on a defense as a result
27 of inadequate investigation. (Petr.'s Br. at 56-57, 117.) Petitioner asserts that
28 counsel did not go over his proffered testimony "in detail," and did not analyze
the forensic evidence in the case. (*Id.* at 55-56 (quoting 54 RT 6180).) Petitioner
also argues that the California Supreme Court's assumption that Petitioner had a
sophisticated view of the criminal justice system was unfounded, and that its
finding that the record did not establish that Petitioner had a viable defense was

1 objectively unreasonable. (*Id.* at 57-59.) Petitioner argues that the California
 2 Supreme Court made an unreasonable determination of the facts in light of the
 3 consistent testimony of Petitioner and Gillingham that an irreconcilable difference
 4 existed between them. (*Id.* at 16 (citing Pet. Ex. 64; 53 RT 6135-36; 54 RT 6186-
 5 87), 61.)

6 Petitioner contends that “[t]his case is on all fours with *Schell* . . .[, where,]
 7 in the context of a claim falling under *Gideon*, the Ninth Circuit found that the
 8 petitioner had sufficiently alleged that a ‘toxic conflict’ with his attorney violated
 9 his Sixth Amendment rights.” (*Id.* at 55 (quoting *Schell v. Witek*, 218 F.3d 1017,
 10 1026 (9th Cir. 2000) and citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).)

11 Finally, as to his claim that the trial court failed to inquire adequately into
 12 his conflict with counsel, Petitioner argues that the California Supreme Court’s
 13 rejection of the claim was unreasonable because “a cursory examination of the first
 14 three *Marsden* hearings reveals that the trial court made no meaningful inquiry . . .
 15 to determine the full extent of the conflict [It] appears that the California
 16 Supreme Court assumed that the trial court adequately inquired . . . , even though
 17 there was no evidence to support that assumption.” (*Id.* at 65.)

18 **D. Analysis**

19 **1. Counsel’s Strategy and Petitioner’s Position**

20 **a. Conflict and Constitutionally Effective Assistance**

21 The California Supreme Court relied in part upon *United States v. Martinez*,
 22 883 F.2d at 755. *See Carter*, 36 Cal. 4th at 1198. “Although *Martinez* is no longer
 23 binding precedent, its reasoning remains sound.” *United States v. Pino-Noriega*,
 24 189 F.3d 1089, 1096 (9th Cir. 1999) (citing *United States v. Joelson*, 7 F.3d 174,
 25 178 n.1 (9th Cir. 1993) (approving of *Martinez*’s reasoning)). In *Martinez*, at the
 26 close of the government’s case, according to defendant’s counsel, defendant:

27 ‘expressed to me the desire to testify; and I said no way,
 28 that I thought it was suicidal for him to testify and it

1 would be an error in judgment; and that was it. I just
2 made the decision he was not going to testify, I refused to
3 call him, and that was the way it went down.’ . . . ‘If we
4 keep it pure and simple . . . , the way it went down was
5 [defendant] says: “I want to testify”; I said “No, you’re
6 not going to testify”; period, end of conversation.’

7 883 F.2d at 752 (punctuation in original). After his conviction and sentence,
8 defendant obtained new counsel and moved for a new trial based upon a violation
9 of his right to testify at trial. On appeal from the denial of a new trial, the Ninth
10 Circuit rejected defendant’s argument that because he continued to ask to testify
11 even after counsel’s refusal, he had preserved his right to testify. *Id.* at 756.
12 Instead, the court held that defendant waived his right through his conduct by
13 continuing on in the proceedings under counsel’s representation without testifying:
14 “The defendant’s knowledge of his right [to testify] led him to insist [on
15 testifying]. Respect for his lawyer’s judgment eventually led him not to persist.”
16 *Id.* at 761.

17 Petitioner relies upon *Schell*, 218 F.3d at 1026, which considered a habeas
18 petitioner’s allegation that the trial court violated his right to counsel by failing to
19 rule upon a motion for substitute counsel. (See Petr.’s Br. at 55.) The public
20 defender representing Schell made the motion before Schell’s first trial judge, in
21 Schell’s absence. When the case was transferred to a second judge, the motion was
22 never addressed. On appeal from Schell’s conviction, the California Court of
23 Appeal held that Schell had waived or abandoned his motion for substitute counsel.
24 The California Supreme Court denied Schell’s petition for review and his habeas
25 petition, and “[n]o state tribunal held a hearing to explore Schell’s allegations
26 against his lawyer.” *Schell*, 218 F.3d at 1021. On habeas review, the Ninth Circuit
27 observed that “[t]he denial without a hearing of a motion to substitute appointed
28 counsel based on allegations of an ‘irreconcilable conflict’ implicates the
29 defendant’s Sixth Amendment right to counsel.” *Id.* at 1023. The court stated that:

1 the basic question is simply whether the conflict between
2 Schell and his attorney prevented effective assistance of
3 counsel. *See Morris [v. Slappy]*, 461 U.S. [1,] 13-14
4 [1983] (holding that the Sixth Amendment requires only
5 competent representation and does not guarantee a
6 meaningful relationship between a defendant and
7 counsel). It may be the case, for example, that because
8 the conflict was of Schell's own making, or arose over
9 decisions that are committed to the judgment of the
10 attorney and not the client, in fact he actually received
11 what the Sixth Amendment required in the case of an
12 indigent defendant, notwithstanding the State trial court's
13 failure to inquire.

14 *Schell*, 218 F.3d at 1026 (footnote omitted).

15 Here, after reviewing the multiple hearings conducted by the trial court, the
16 California Supreme Court held that Petitioner failed to demonstrate that the
17 conflict arose over a decision committed to the judgement of the client and not the
18 attorney. The California Supreme Court emphasized in its appellate decision that
19 Petitioner did not say that he wanted to testify "*even if defense counsel were*
20 *permitted to decline to present any other defense witnesses who would support*
21 *defendant's own testimony. . . .* [O]n this record we may not assume that defendant
22 had in fact insisted upon testifying even where no other defense witnesses would
23 be presented to support his testimony." *Carter*, 36 Cal. 4th at 1199 (emphasis in
24 original). The California Supreme Court's reasoning is critical. Petitioner
25 consistently testified that he wanted, as a whole, "to call witnesses, put on a
26 defense and testify." (54 RT 6187; *see also id.* at 6185, 6188.) Counsel's
27 testimony, too, was that "Mr. Carter wanted to put on at all times a full-blown
28 defense, and part of putting on a full-blown defense was the possibility potential
[sic] of testifying." (*Id.* at 6169; *see also* Pet. Ex. 64 ¶ 5 ("Petitioner . . . wanted
me to challenge the prosecution's case in guilt phase [sic], and . . . he then
anticipated he would testify in his own behalf *after the presentation of defense*

1 *evidence*” (emphasis added)).¹ The state court’s holding that it could not assume
 2 that Petitioner had insisted upon testifying even if no other defense witnesses
 3 would be presented is consistent with Gillingham’s testimony, and is not
 4 inconsistent with Petitioner’s. Gillingham testified:

5 Q. So, in other words, it was discussed several times
 6 prior to the *Marsden* hearing and in each of those
 7 occasions Mr. Carter indicated he wanted to put on
 8 a defense, and he wanted to testify?

9 A. Yes, and it might have been framed in the
 10 negative, you know, “Aren’t you going to do
 11 something, you know? Where are the witnesses?
 12 What are you going to do?” So it would have been
 13 like that, possibly, too. In fact, I think I recall that
 14 sort of thing.

15 (54 RT 6172.) Petitioner’s questions to Gillingham about what Gillingham was
 16 going to do and whether Gillingham was going to call witnesses support the
 17 California Supreme Court’s determination that Petitioner failed to demonstrate an
 18 insistence upon testifying even if no other defense witnesses would be called.

19 ¹ The Court notes that, contrary to Petitioner’s allegations, the trial court did not state that
 20 Petitioner lacked the right to present a defense. (See Petr.’s Br. at 36 (citing 42 RT 5094-95).) At
 21 the July 5, 1989 hearing at issue, the trial court stated that “the Court agrees that in these matters
 22 the decisions should be with the counsel.” (42 RT 5096.) At that hearing, only the “defense
 23 strategy . . . that we should rest at this time . . . [and the] potential witnesses that could have been
 24 called,” and not any desire by Petitioner to testify – dependent upon the presentation of witnesses
 25 or otherwise – was before the court. (*Id.* at 5092); *cf. Nixon*, 543 U.S. at 187 (“[C]ertain decisions
 26 regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made
 27 for the defendant by a surrogate. A defendant . . . has the ultimate authority to determine whether
 28 to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. Concerning those
 decisions, an attorney must both consult with the defendant and obtain consent to the
 recommended course of action” (internal quotation and citation omitted; citing with approval
Taylor v. Illinois, 484 U.S. 400, 417-18 (1988))); *Taylor*, 484 U.S. at 417-18 (“Although there are
 basic rights that the attorney cannot waive without the fully informed and publicly acknowledged
 consent of the client, the lawyer has – and must have – full authority to manage the conduct of the
 trial. . . . Putting to one side the exceptional cases in which counsel is ineffective, the client must
 accept the consequences of the lawyer’s decision . . . not to put certain witnesses on the stand”
 (footnote omitted)).

1 Finally, regarding Petitioner's acquaintance with the criminal justice system,
 2 Petitioner had, at a minimum, previously moved for the appointment of new
 3 counsel because of a conflict over the defense. (*See* RT 90A-90F.) Gillingham
 4 was appointed as a result of that successful motion. (*See id.*) Petitioner's motion
 5 was granted based upon a "total conflict of interest" over "how the case is
 6 defended[,] as to what the defense is going to be." (*Id.* at 90C.) Despite
 7 Petitioner's familiarity with that process, however, Petitioner did not request the
 8 appointment of new counsel when Gillingham stated his intention to rest without
 9 calling witnesses. Although Gillingham testified generally that Petitioner desired
 10 "the synthesis" of what was said on July 5, 10, and 17, 1989 to be presented on
 11 July 5, the day the defense rested (6 CT 1631; 54 RT 6182), he testified more
 12 specifically that he did not recall whether Petitioner wanted him to request new
 13 counsel on July 5. (54 RT 6176.) Gillingham testified that it "could be" that
 14 Petitioner wanted him to request new counsel on July 5, but he "just [doesn't]
 15 recall that part." (*Id.*) Counsel specifically recalled knowing that Petitioner
 16 "wanted to contest the guilt phase, *but he had some confidence in us, too . . .*" (*Id.*
 17 at 6171 (emphasis added).) Petitioner himself testified:

18 Q. During these discussions, did you make any
 19 request with respect to the *Marsden*-type of
 20 hearing?

21 A. Yeah, I did.

22 Q. What did you say?

23 A. Well, I asked him, you know, if he would indicate
 24 to the court that I was not happy with what he was
 25 doing, and I wanted to make sure it was clear that
 it was over my objection that he was doing it.

26 Q. By "unhappy," that you wanted to present a
 27 defense and you wanted to testify?

28 A. Right. . . .

1 Q. Now, after the first *Marsden* hearing [on July 5,
2 when counsel informed the court he was planning
3 to rest without calling witnesses,] was over, did
4 you say anything to Mr. Gillingham about
5 something that wasn't said in the first *Marsden*
6 hearing?

7 A. Yeah, I told him that I didn't think he really made
8 it as clear as I would have liked; that he had left
9 out a couple of things.

10 Q. What had he left out?

11 A. I don't think he mentioned all the witnesses that I
12 wanted to call, and he also didn't tell the court that
13 I wanted to testify on my own behalf.

14 (*Id.* at 6188.) Petitioner never testified that Gillingham failed to mention at the
15 July 5 hearing that he wanted new counsel.

16 "A defendant is 'presumed to assent to his attorney's tactical decision not to
17 have him testify.'" *Pino-Noriega*, 189 F.3d at 1094 (quoting *Joelson*, 7 F.3d at
18 177). The California Supreme Court's determination that Petitioner acceded
19 through his conduct to Gillingham's trial strategy, as a factual matter, was not
20 unreasonable in light of that presumption, the consistent statements by Petitioner
21 and Gillingham that Petitioner wished to put on a full-blown defense and testify
22 after the presentation of defense witnesses, and Petitioner's failure to move for new
23 counsel when Gillingham intended to rest. *See Hibbler*, 639 F.3d at 1146 (holding
24 that state court's factual findings are not unreasonable under 28 U.S.C.

25 § 2254(d)(2) unless they could not be reasonably concluded to be supported by the
26 record). Likewise, the possibility of disagreement among fairminded jurists over
27 the California Supreme Court's legal conclusion does not render that conclusion
28 objectively unreasonable. *See Richter*, 131 S. Ct. at 786 ("A state court's
determination that a claim lacks merit precludes federal habeas relief so long as
fairminded jurists could disagree on the correctness of the state court's decision")

(internal quotation omitted)).

b. Counsel's Investigation and Viability of a Defense

Petitioner also challenges the California Supreme Court's denial of the claim based upon its statement that Petitioner lacked "a viable defense." *Carter*, 36 Cal. 4th at 1197. As discussed in more detail in Claims 5(D)(2) and 5(D)(3), the California Supreme Court's conclusion was not objectively unreasonable. Petitioner's guilt phase allegations of "numerous forensic challenges [that] could have been raised at each crime scene" (Petr.'s Br. at 57) are discussed, and rejected, below (*see infra* pp. 40-45), as is his alleged evidence "to call into question whether Carter had the ability to form the requisite intent for the crimes and special circumstances with which he was charged." (Petr.'s Br. at 58; *see infra* pp. 34-39.) Likewise, the California Supreme Court's denial of Petitioner's claim that his penalty phase presentation was prejudiced by Gillingham's investigation (*see* Petr.'s Br. at 54) is not objectively unreasonable. (*See infra* pp. 59-63.)

2. Trial Court's Inquiry

The California Supreme Court's determination that the trial court adequately inquired into Petitioner's disagreement with Gillingham is also not objectively unreasonable. The trial court "permitt[ed] the airing of the conflict," *Carter*, 36 Cal. 4th at 1199, and inquiring further may have risked appearing to encourage Petitioner to testify. *See Joelson*, 7 F.3d at 178; *United States v. Edwards*, 897 F.2d 445, 447 n.[1] (9th Cir. 1990); *Martinez*, 883 F.2d at 756. In *Joelson*, for example, the defendant "made an on-the-record request to testify . . . [and], after Joelson's request, the district court encouraged Joelson to follow his attorney's advice," which (as Joelson had informed the court) was not to testify. 7 F.3d at 178. Defendant conferred with his attorney, and the attorney then stated that the defense would not be presenting any evidence. *Id.* Joelson did not object or ask to testify. *Id.* On appeal, the circuit court observed:

The court's extensive discussion with Joelson about

1 following his attorney's advice is troubling. As the
 2 *Martinez* court observed in holding that a court has no
 3 obligation to make an on-the-record determination as to
 4 whether a defendant wants to testify, judicial interference
 5 with this strategic decision poses a danger that 'the judge
 6 will appear to encourage the defendant to invoke or
 7 waive this right. . . . This danger is of great significance
 8 because the right not to testify counterpoises the right to
 9 testify, and the exercise of one is the waiver of the other.'
 10 883 F.2d at 756 (citations omitted); *see also Edwards*,
 897 F.2d at 447 n.[1] (discussing the concerns raised in
Martinez regarding excessive interference by the district
 court in the defendant's decision whether to testify).

11 *Joelson*, 7 F.3d at 178 (ellipsis in original).

12 Because the California Supreme Court's determination that the trial court
 13 adequately inquired into the disagreement with counsel is not objectively
 14 unreasonable, Petitioner is not entitled to relief on this basis. Claims 1 and 5(D)(1)
 15 are, therefore, DENIED.

16 **IV. Claim 3: Concealment of Information on Voir Dire**

17 **A. Allegations**

18 In Claim 3, Petitioner alleges that his federal constitutional rights were
 19 violated because "a juror who was seated on his jury concealed material
 20 information in voir dire." (Pet. at 41.) Petitioner alleges that juror Sharon K.
 21 "suffered a significant fear of violent crimes and burglary" that she could not set
 22 aside when sitting as a juror. (*Id.* at 44.) In his Petition, Carter alleges that Sharon
 23 K.'s communication of that fear to a second juror "create[d] an additional
 24 constitutional violation and a ground for an unrebutted presumption of prejudice,"
 25 (*Id.* at 44.) In his merits briefing, by contrast, Petitioner faults the California
 26 Supreme Court for applying a rebuttable presumption of prejudice, arguing instead
 27 that such a test is contrary to clearly established federal law. (Petr.'s Br. at 74
 28 (citing concurring opinions in *McDonough Power Equip., Inc. v. Greenwood*, 464

1 U.S. 548, 556-59 (1984)).) Petitioner adds in his merits brief that Sharon K.
2 “misrepresent[ed] her availability for trial.” (*Id.* at 77.)

3 **B. Analysis**

4 First, Petitioner mischaracterizes Sharon K.’s statements regarding her
5 availability for trial. (*See* Petr.’s Br. at 77-78.) Petitioner argues that Sharon K.
6 “provided inconsistent statements” when, on her juror questionnaire, she responded
7 “no” when asked, “Do you have any personal or other considerations that might
8 cause you to ‘hurry along’ the process of decision making in the jury room?”
9 (Petr.’s Br. at 77 (quoting Supp. CT II, Part II at 179).) Petitioner alleges that “[i]n
10 fact, however, . . . [a]s she explained during voir dire,” her work schedule required
11 ten to twelve hour days; she was short-staffed; and she would be consistently
12 worried about her business. (*Id.* at 77-78 (citing 13 RT 1601-02).) Petitioner
13 claims that “[n]o attempt was ever made by Juror Sharon K. to explain the
14 discrepancy between her juror questionnaire responses and her voir dire
15 responses,” and that “[d]iscrepancies such as these cast great doubt upon whether
16 Juror Sharon K. owned a gun because, as she claimed, she used it in her capacity as
17 a track official, or whether she owned a gun because she feared being the victim of
18 another crime.” (*Id.* at 78 (citing Supp. CT II, Part II at 174).)

19 The record shows no discrepancy between Sharon K.’s questionnaire and
20 voir dire responses. Sharon K. made clear upon voir dire that it was “[i]n the last
21 week and-a-half” that one of her staff had left the company and her job
22 responsibilities had become strained. (13 RT 1601.) “[T]his just happened,” she
23 said, “in between the first time we were here.” (*Id.*) Directly contrary to
24 Petitioner’s allegation that Sharon K. offered no explanation for the purported
25 discrepancy, she offered this update to the Court in response to its prompt to all
26 potential jurors that “[i]f there is an answer that you gave on the questionnaire that
27 you’ve thought about that you want to expand on or modify in some way, just tell
28 us. . . .” (*Id.* at 1599.) The discrepancy Petitioner conjures does nothing to support

1 his speculation that Sharon K. may have owned a gun for any reason besides her
2 stated explanation that she used it in her capacity as a track starter. (See Petr.'s Br.
3 at 78 (citing Supp CT II, Part II at 174); *see also* 13 RT 1622.)

4 Second, Petitioner fails to show that the California Supreme Court's
5 application of a rebuttable presumption of juror bias is contrary to clearly
6 established federal law. The California Supreme Court held, in relevant part, that:

7 juror misconduct involving the concealment of material
8 information on voir dire raises the presumption of
9 prejudice, and . . . [t]his presumption of prejudice may be
10 rebutted by an affirmative evidentiary showing that
11 prejudice does not exist or by a reviewing court's
12 examination of the entire record to determine whether
there is a reasonable probability of actual harm to the
complaining party [resulting from the misconduct].

13 Applying the foregoing standards, it is clear that Juror
14 K.'s failure to answer Question 61 more completely did
15 not constitute misconduct and, even if we were to assume
16 that misconduct did occur, the presumption of prejudice
17 was rebutted by the substance of her testimony at the
18 hearing on defendant's motion for new trial. Assuming,
19 for the sake of argument, that defendant is correct in
20 asserting that Juror K.'s answer to Question No. 61 was
21 inaccurate, her statement at the hearing that 'I hadn't and
haven't thought about that incident at all for the last 12
years' diminished if not dispelled its potential
significance.

22 Further, even if Juror K. in fact had concealed the
23 information, the circumstances that the incident was
24 'very brief' and occurred more than a decade earlier, and
25 that Juror K. realized because she had been burglarized
26 that 'everyone has feares' [sic], established that the
27 omitted information was immaterial to her overall
28 qualifications or suitability to serve as a juror. Those
qualifications clearly were established in the course of
counsel's voir dire.

Moreover, even if we were to assume Juror K.'s answer to Question No. 61 was inaccurate, evasive, and material, the circumstance that as a teenager living alone for the first time, Juror K. was 'paranoid for a short period of someone breaking in,' leading her to keep a kitchen knife in close proximity overnight, does not provide any basis for concluding that she harbored undisclosed juror bias. Accordingly, the presumption of prejudice was rebutted.

Carter, 36 Cal. 4th at 1208-09 (internal quotations, citations, and footnotes omitted; alterations in original).

"The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 556. The absence of bias, therefore, defeats a claim that a juror's failure to answer a material question honestly led to a constitutional violation. *See id.* The application of a presumption of bias that can be rebutted is not contrary to that principle. *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985) ("[T]he proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (internal quotation omitted)); *see also McDonough*, 464 U.S. at 556 ("[T]o obtain a new trial . . . , a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge or cause").

Here, the California Supreme Court found that Sharon K. had no reasons for concealing any information that affected her impartiality. The court held that "the substance of her testimony at the hearing on defendant's motion for new trial" disproved any potential bias. *Carter*, 36 Cal. 4th at 1208. Sharon K. testified:

I got an apartment for the first time when I was – I can't even remember – 18 or 19, and I lived by myself, and . . . I was paranoid for a short period of somebody breaking in, or whatever . . . [and] one night I woke up, could not

1 go to sleep, and I said, well, if anything does happen, I
2 am going to defend myself, so I went into my kitchen. I
3 got a knife, and I put it between my mattresses, and I then
4 – that didn’t help, so I spent the entire night up still, and I
5 don’t know exactly when, but I can tell you I probably
6 got up the next morning and thought how silly and put it
back. It was very brief and that was it.

7 (54 RT 6159.) When asked if she had ever been in a situation, at any time prior to
8 her juror questionnaire, in which she feared any kind of violence, she said, “no, no,
9 not really.” (*Id.* at 6160.) When next asked whether that night was not a situation
10 in which she feared violence, she responded that she “had trouble sleeping because
11 of noises going on, or whatever, and it was all in my imagination. Like I said, I
12 probably got up in the morning and thought how silly” (*Id.* at 6161.) Only
13 after being asked the same question again, and focusing on whether counsel was
14 asking about that night in particular, did Juror K. say that yes, on that night she
15 feared violence. (*Id.*) The California Supreme Court was not objectively
16 unreasonable in determining from Juror K’s testimony that she did not conceal
17 information for reasons affecting her impartiality.

18 Finally, Petitioner’s allegation that Sharon K. communicated her past fear to
19 another juror is supported in the record only by passing hearsay. Defense counsel
20 told the trial court that another juror “is a witness to [Sharon K.]’s making that
21 statement [that she slept with a knife under her bed out of fear], so I – I [would]
22 simply call her in case . . . [Sharon K.] denied making the statement. I may not
23 need her.” (54 RT 6153-54.) As the California Supreme Court noted:

24 With regard to defendant’s related claim of misconduct
25 arising from Juror K.’s reportedly having told Juror C-M.
26 of her concealed fears, we observe that the record on
27 appeal does not indicate what Juror K. said to the other
28 juror and when she said it. Defense counsel had the
opportunity to call Juror C-M. at the hearing on
defendant’s motion for new trial, but did not do so.

1 *Carter*, 36 Cal. 4th at 1209 n.49. Petitioner fails, therefore, to establish any
2 constitutional violation involving juror C-M.

3 Accordingly, Claim 3 is DENIED.

4 **V. Claim 4: Juror Notes**

5 In Claim 4, Petitioner alleges that the jurors in their deliberations improperly
6 relied upon the purportedly verbatim shorthand notes taken by one juror. (Pet. at
7 45-49; Petr.'s Br. at 81.) Petitioner offers as evidence two juror declarations that
8 the notes were very helpful and received much attention during deliberations. (See
9 Pet. at 47-48.) Petitioner argues that the jurors "were forbidden by law from
10 giving more weight to their own notes than to their own personal recollection of
11 the evidence presented in court [and] . . . were forbidden by law from disclosing
12 their own personal notes to the other jurors and from considering the personal
13 notes taken by other jurors." (*Id.* at 46.)

14 The California Supreme Court may have reasonably held that any
15 misconduct by the jury in considering the juror's notes was not prejudicial. "A
16 distinction may be drawn between extrinsic or extraneous influences and intrinsic
17 influences on the jury's deliberations. . . . Intrinsic influences include discussions
18 and even intimidation or harassment among jurors. Intrinsic influences on a jury's
19 verdict are not competent to impeach a verdict." *United States v. Bassler*, 651 F.2d
20 600, 602 (8th Cir. 1981). The Ninth Circuit, surveying cases in which alleged
21 juror misconduct was held to be nonprejudicial, cited *Bassler* with approval for the
22 proposition that a juror's notes taken into the jury room were "intrinsic to the
23 deliberations." *United States v. Bagnariol*, 665 F.2d 877, 886 (9th Cir. 1981); see
24 also *United States v. Bussell*, 414 F.3d 1048, 1055 (9th Cir. 2005) (relying upon
25 *Bagnariol* and *Bassler* in holding that jurors' speculation about disposition of
26 charges against co-defendant was not "extraneous prejudicial information" and
27 juror declarations were thus inadmissible under Federal Rule of Evidence 606(b)).
28 In *Bassler*, the Eighth Circuit concluded that although the juror's notes were made

known to the jury and referred to several times during deliberations, appellant could not show prejudice from the jurors' use of the notes. 651 F.2d at 602. Similarly, in *United States v. Connolly*, the First Circuit rejected a challenge to the jury's verdict based on the use of a juror's notes. 341 F.3d 16, 33-35 (1st Cir. 2003). There, a news article following appellant's trial reported that one juror said that notes taken by two jurors were "very helpful" during deliberations. *Id.* at 33. The circuit court held that any such notes "cannot be considered an 'extraneous' or 'extrinsic' influence," but were "*intrinsic*" and cannot demonstrate prejudice. *Id.* at 34-35 (emphasis in original).

Because any intrinsic influences on the jury's deliberations through use of the juror's notes are not competent to impeach the verdict, Claim 4 is DENIED.

VI. Claim 5: Ineffective Assistance at Guilt Phase of Trial

A. Overview

In Claim 5, Petitioner alleges ineffective assistance of counsel at various stages of his guilt phase of trial. Petitioner argues that but for counsel's unprofessional actions and omissions, the result of the proceeding would have been different. (Pet. at 49.)

B. Claim 5(B): Ineffectiveness at Preliminary Hearing

1. Allegations

In Claim 5(B), Petitioner asserts that Petitioner's counsel Ezekiel Perlo was ineffective for "assert[ing] Mr. Carter's 'vicinage' rights and unravel[ing] the consolidation" of the San Diego, Alameda, and Los Angeles charges. (*Id.* at 53.) Petitioner argues that he "gained nothing from having the charges separated into two separate trials." (*Id.*) Petitioner further alleges that:

during the preliminary hearing, Perlo had an opportunity to meaningfully question Ray Blevins Despite the fact that Blevins and Kim had a volatile and turbulent relationship, and that meaningful cross-examination could have been used to develop evidence implicating

1 Blevins in Kim's murder, counsel's cross-examination of
2 Blevins was perfunctory, lasting less than a couple of
3 minutes.

4 (Petr.'s Br. at 122; *see also* Pet. at 53.) Blevins's preliminary hearing testimony
5 was admitted at trial because Blevins was then deceased. (*See* 41 RT 5014-22.)

6 First, as to the separation of the San Diego, Alameda, and Los Angeles
7 charges, the California Supreme Court may have reasonably determined that
8 Petitioner failed to demonstrate prejudice from any deficient performance by
9 counsel. The court may have determined on habeas review, as it did on direct
10 appeal (in the context of a related claim), that Petitioner "presents no persuasive
11 basis for concluding that a jury that [convicted and] imposed the death sentence for
12 three murders would have imposed a lesser sentence if defendant had been charged
13 in this proceeding with additional crimes, including murder." *Carter*, 36 Cal. 4th
14 at 1160.

15 The California Supreme Court may have likewise found a lack of prejudice
16 regarding Perlo's cross-examination of Blevins. The court held on direct appeal:

17 Perlo's performance at the preliminary hearing was not
18 deficient. Defendant's assertions to the contrary ignore
19 Perlo's appropriate questioning of various witnesses and
20 instead merely speculate that more vigorous
21 cross-examination of certain witnesses, such as Ray
22 Blevins, Tok Kim's former boyfriend . . . , might have
23 led the trial court to preclude the prosecution from
24 introducing evidence relating to the death of Kim and the
25 murder of Janette Cullins. Defendant's assertions in this
26 regard do not establish that counsel performed
27 deficiently.

28 *Id.* at 1138. The court held that Petitioner had not identified any exculpatory
evidence overlooked at the preliminary hearing. *See id.* at 1139.

Blevins's preliminary hearing testimony established that his relationship
with Kim ended under tense circumstances. Blevins testified that he was in a year-

1 and-a-half relationship with Kim, during which he paid her full rent and lived most
 2 of the time in her apartment, when he discovered she had a relationship with
 3 someone else. (41 RT 5017-19.) He found out about the new relationship when he
 4 “saw Kim and this gentleman going down the stairway. She was coming out. . . .
 5 They both was coming out of the apartment. I was at the elevator.” (*Id.* at 5017-
 6 18.) Blevins saw the man, whom he identified as Petitioner, one later time at a
 7 market in the apartment building. (*Id.* at 5022.)

8 Because there was evidence in the record of the circumstances under which
 9 the Blevins-Kim relationship ended, and because Petitioner fails to present
 10 evidence of other testimony that could have been revealed with more vigorous
 11 cross-examination of Blevins, the California Supreme Court may have reasonably
 12 found a lack of prejudice from counsel’s performance.

13 Claim 5(B) is, therefore, DENIED.

14 **C. Claim 5(C): Ineffectiveness at Voir Dire and Jury Selection**

15 **1. Allegations**

16 In Claim 5(C), Petitioner alleges that trial counsel was ineffective for failing
 17 to conduct voir dire and jury selection effectively. Petitioner faults trial counsel
 18 for failing to “explore the prospective jurors’ attitudes and beliefs regarding Mr.
 19 Carter’s history of child abuse or history of cocaine or substance abuse as possible
 20 theories of mitigation.” (Pet. at 55.) Petitioner asserts that only two of the twelve
 21 seated jurors “were even asked whether they would be willing to consider Mr.
 22 Carter’s vaguely-defined ‘background’ as relevant to the penalty phase decision.”
 23 (*Id.*; *see also* Petr.’s Br. at 123 (citing Pet. Ex. 65 ¶ 9).) Petitioner also alleges that
 24 trial counsel “unreasonably exposed four of the twelve jurors to references of
 25 additional murders Carter allegedly committed. . . .” (Petr.’s Br. at 123 (citing Pet.
 26 Ex. 65 ¶ 12 (identifying Jurors Rachal, Rotolo, Larsen, and Dean)); *see also* Pet. at
 27 55.)
 28

1 Next, Petitioner alleges that trial counsel “frequently attempted to
2 ‘rehabilitate’ individuals who responded ‘yes’ to the fourth question – whether
3 they would in every case vote for death and in no case vote for LWOP – for no
4 benefit to the defense.” (Petr.’s Br. at 58.) Petitioner brings this allegation as to
5 Prospective Jurors Marguerite B., Harriet S., Karyn S., George L., and Forrest B.,
6 and to a lesser extent, Vera E. (*Id.* at 56-58, 58 n.14.) Petitioner similarly argues
7 that Prospective Jurors Charles C. and Jerome Paul N. “demonstrated bias against
8 Carter” on voir dire and trial counsel did not have a reasonable strategy in leaving
9 them on the panel. (Petr.’s Br. at 123, 123 n.84; Pet. at 58-60.)

10 Petitioner further alleges that trial counsel unreasonably agreed to have
11 Jurors Richard P., Margaret M., and Sharon K. remain on the jury panel without
12 inquiring “as to the strength of their need or desire to be excused so that they could
13 attend to their personal business.” (Pet. at 61.) Petitioner argues that each juror
14 indicated that he or she would have a scheduling conflict if the trial lasted past
15 August 1, 1989, as it did, and that it is “likely that these jurors rushed through
16 deliberations.” (Petr.’s Br. at 124.) Finally, Petitioner faults trial counsel for
17 stipulating to the removal of Prospective Juror Ellis C. by agreeing to an additional
18 peremptory challenge for the prosecution, when Ellis told the court he needed to go
19 out of town for business. (Pet. at 61.)

20 //

21 //

22 2. Analysis

23 First, the California Supreme Court may have reasonably determined that
24 counsel strategized against emphasizing Petitioner’s history of child abuse and
25 substance use as possible theories of mitigation or that Petitioner failed to
26 demonstrate prejudice on that basis. There is a “high level of deference given to
27 counsel’s decisions during jury selection,” and defense counsel here may, for
28 example, have reasonably “preferred to rely on ‘nonverbal communication’” to

1 judge the jurors' sentiments toward a history of child abuse and substance use.
2 *Carrera v. Ayers*, 670 F.3d 938, 948-49 (9th Cir. 2011) (quoting *Hovey v. Ayers*,
3 458 F.3d 892, 910 (9th Cir. 2006)). The state high court may have also determined
4 that Petitioner failed to make "the required showing of prejudice under *Strickland*,
5 because he has not shown that any juror who harbored an actual bias was seated on
6 the jury as a result of counsel's failure to voir dire" on the issue. *Ybarra v.*
7 *McDaniel*, 656 F.3d 984 (9th Cir. 2011) (so holding as to insanity defense).

8 Similarly, the court may have reasonably determined that Petitioner failed to
9 demonstrate prejudice from counsel's references to additional murders in voir dire.
10 Juror Rachal, told of charges that Petitioner killed three women "with possible
11 evidence of a couple more," confirmed that at a penalty phase he would be
12 interested in hearing about Petitioner's background and having as much
13 information as he could have to make the decision. (29 RT 3707-10.) Juror
14 Rotolo, told of the allegations that Petitioner killed three women "and there may be
15 evidence of two others . . . a total of five perhaps," was asked how he would feel
16 about mitigating evidence at a penalty phase. (7 RT 887-89.) He responded:

17 Well, it depends on his childhood and, I mean, some
18 things. I don't know. I would lean more so for the death
19 penalty but then again, there's a possibility that his
20 makeup, that whatever happened to him in his life would
make him lean this way. . . . [I]t's a real fine line there.

21 (*Id.* at 889.) Juror Larsen, told of "evidence of two other charges," stated that he
22 would still want to hear "the other circumstances about the individual" in reaching
23 a penalty decision. (19 RT 2348, 2355-58.) Juror Dean, told of "evidence of two
24 others," was asked whether life without parole could make sense as a punishment
25 for the kind of crimes counsel described to her. (*Id.* at 2374-75.) She responded
26 that she could not "imagine anything worse than spending the rest of your life
27 behind bars" and that life without parole would be a meaningful option as a
28 punishment. (*Id.* at 2375-76.) The state high court may have reasonably

1 determined that the jurors' responses fail to show that a juror who harbored an
2 actual bias toward Petitioner's alleged crimes was seated on his jury, to show
3 prejudice under *Strickland*. See *Ybarra*, 656 F.3d at 1001.

4 Second, as to Prospective Jurors Marguerite B., Harriet S., Karyn S., George
5 L., Forrest B., and Vera E., who did not serve on Petitioner's jury, the California
6 Supreme Court may have reasonably determined that Petitioner cannot demonstrate
7 prejudice. See *Skilling v. United States*, 130 S. Ct. 2896, 2920 n.24 (2010)
8 ("Statements [on voir dire] by nonjurors do not themselves call into question the
9 adequacy of the jury-selection process; elimination of these venire members is
10 indeed one indicator that the process fulfilled its function. Critically, . . . the seated
11 jurors showed little knowledge of or interest in" potentially prejudicial information
12 about the defendant); *Teague v. Scott*, 60 F.3d 1167, 1172-73 (5th Cir. 1995)
13 ("Demonstrating that some veniremen may have been biased, without establishing
14 that any of these biased veniremen actually served on the jury, is insufficient to
15 meet the requisite showing of prejudice under the *Strickland* test").

16 As to Jerome Paul N. and Charles C., counsel may have reasonably
17 strategized that each juror would be favorable to Petitioner at a penalty phase.
18 Juror Jerome Paul N. stated on voir dire, "[M]y personal feelings, I think life in
19 prison without parole is almost worse than death." (15 RT 1828-29.) He stated
20 that he would "certainly" be interested in hearing about Petitioner's childhood,
21 background, and psychiatric or psychological information, and that drug abuse
22 would also be important. (*Id.* at 1829-30, 1832-33.) He said that while he would
23 try to do a good job and do his duty as a juror, he was not comfortable "sitting in
24 judgment" of another person. (*Id.* at 1836.) Juror Charles C. stated on voir dire
25 that although in some cases the death penalty was "the most pragmatic thing to
26 do," "as a physician . . . [he] value[s] the inherency of life" and his penalty
27 decision would "depend upon the personality of the individual, his own values as
28 to survival, which he certainly will [have], as against freedom, which he will not

1 have.” (26 RT 3209, 3213.) Juror Charles C. said that it would make sense to hear
 2 testimony about Petitioner’s life history, background, childhood, teenage years,
 3 friends, relatives, employers, and employees. (*Id.* at 3220.) Most importantly,
 4 Juror Charles C. gave the following response to trial counsel:

5 Mr. Gillingham: We asked this question: ‘What in your
 6 opinion should or could be done about the crime
 7 problem?’ You said, ‘Education and training of young,
 8 provision of work opportunity for young criminals.’ . . .
 Could you tell me what you have in mind?

9 Prospective Juror Charles [C.]: Nothing very original
 10 about that. I’m sure that this is – attempts at
 11 rehabilitation are going on all the time.

12 While on the grand jury, I was impressed by the attempts
 13 of the camps and facilities of juveniles to give them
 14 actual education. And it was so obvious that – that the
 15 vast majority, almost unanimous – juveniles – criminals
 are illiterate, are terribly undereducated.

16 (*Id.* at 3221-22.) Based on the voir dire responses of Jerome Paul N. and Charles
 17 C., therefore, the California Supreme Court may have reasonably determined that
 18 counsel strategized that the prospective jurors would be helpful to Petitioner at a
 19 penalty phase of trial.

20 Third, the California Supreme Court may have reasonably reached the same
 21 conclusion as to Jurors Richard P., Margaret M., and Sharon K. Juror Richard P.
 22 stated on voir dire that the death penalty is “a real serious matter;” participating in
 23 a verdict of death is “a pretty heavy burden for somebody to be doing;” and he was
 24 only “reluctantly” prepared to accept that kind of responsibility. (29 RT 3717,
 25 3734-35.) He said that mercy should be considered in the penalty phase. (*Id.* at
 26 3732.) Significantly, Juror Richard P. stated about the criminal justice system:

27 I think the way that the jail system – we tend to penalize
 28 a lot of people by punishment, when in reality we should
 be trying to correct the – maybe the reason why they

1 were – got into the problem in the first place and we treat
2 the punishment instead of trying to address the reason
3 that it then occurred in the first place.

4 (*Id.* at 3731.) Juror Margaret M. stated on voir dire, “My feelings would be that
5 the death penalty would be for a very few cases, very rarely.” (23 RT 2850.) She
6 said that she would take the decision to impose the death penalty quite seriously
7 and that being a part of a jury with a verdict of life without parole or the death
8 penalty would be “something very difficult” though it could be done. (*Id.* at 2850,
9 2861; *see also id.* at 2864.) She stated that when one punishes another person,
10 sometimes mercy plays a part. (*Id.* at 2860.) Juror Sharon K. stated on voir dire
11 that life without parole seemed like a serious punishment even for a person who
12 may have killed other people and that she would “very much” be interested in
13 hearing testimony about a defendant’s background and about him personally at a
14 penalty phase. (13 RT 1614-15.) The state high court may have reasonably
15 determined that counsel strategized to keep Jurors Richard P., Margaret M., and
16 Sharon K. on the jury despite their personal schedules, in light of their expressed
17 feelings about a penalty phase of trial.

18 Finally, the California Supreme Court may have reasonably determined that
19 Petitioner failed to show prejudice from counsel’s agreement to an additional
20 peremptory challenge for the prosecution. As Respondent emphasizes, the record
21 reflects that the prosecution did not use the additional peremptory challenge and
22 did not exhaust its twenty statutorily provided challenges. (Respt.’s Br. at 59; 6
23 CT 1620); *see also* Cal. Civ. Proc. Code § 231 (“In criminal cases, if the offense
24 charged is punishable with death, . . . the people [are entitled] to 20 peremptory
25 challenges”); *Carter*, 36 Cal. 4th at 1174 (noting trial court’s provision of twenty
26 peremptory challenges under Cal. Civ. Proc. Code § 231). The prosecution used
27 fifteen peremptory challenges. (6 CT 1620.)

28 Claim 5(C) is, therefore, DENIED.

D. Claim 5(D): Failure to Investigate, Challenge the State’s Case, and Put forth a Reasonable Defense

1. Denial of Right to Testify

The Court addressed Claim 5(D)(1) above. (*See supra* pp. 7-19.)

2. Failure to Investigate and Present Mental Impairments

Petitioner alleges counsel failed to investigate evidence of his mental state at and before the time of the crimes. (Pet. at 62-63; Petr.’s Br. at 104.) Petitioner contends that counsel failed to retain competent and relevant expert assistance and failed to prepare adequately the experts with whom counsel consulted. (Pet. at 63.)

Petitioner was tried in 1989 for crimes committed in April 1984. In the years prior to Petitioner’s offenses, the defense of diminished capacity was abolished, expert witnesses were prohibited from testifying as to whether a defendant possessed a requisite mental state, and evidence of mental illness or intoxication could be introduced only to show whether the defendant “*actually formed* a required specific intent,” not whether he or she had “the *capacity* to form [that] mental state.” *Saille*, 54 Cal. 3d at 1111-12 (discussing the passage of Senate Bill No. 54, abolishing diminished capacity and limiting expert testimony, in 1981) (emphasis in original). Nevertheless, a defendant remained “free to show that because of his mental illness or voluntary intoxication, he did not *in fact* form the intent” required for the crime. *Id.* at 1116-17 (emphasis in original).

a. Allegations of Prejudice

Petitioner contends that, had counsel conducted an adequate investigation, counsel could have shown that it is probable that Petitioner had long-term neurological deficits and diffuse brain dysfunction and “‘suffers impaired functioning of anterior brain regions and experiences frontal lobe impairment,’” affecting the “‘area of the brain that allows individuals to think, reason, problem solve, control impulses, . . . and anticipate the consequences of their actions prior

1 to carrying out those actions.’” (Petr.’s Br. at 105, 105 n.74 (quoting Pet. Ex. 61
 2 ¶¶ 13, 15 and citing Pet. Ex. 59 ¶¶ 12, 15).) Petitioner asserts that counsel could
 3 have shown that, as a result of Fetal Alcohol Syndrome, Petitioner “‘lack[s] the
 4 ability to handle complex situations in ways that are appropriate.’” (*Id.* at 105
 5 (quoting Pet. Ex. 96 ¶ 74); *see also* Pet. at 64.) Carter’s Petition alleges that he:

6 relies upon the expert opinions of Dr. Adrian Raine (who
 7 describes the results of Mr. Carter’s abnormal PET scan
 8 (Pet. Ex. 59)); Dr. Myla Young (who opines about Mr.
 9 Carter’s neuropsychological impairments (Pet. Ex. 61));
 10 Dr. David Foster (who explains Mr. Carter’s neurological
 11 and psychiatric problems, at the time of the crimes, and
 12 what effect they had upon his actions, thinking, and
 13 behavior (Pet. Ex. 75)); Drs. Natalie Brown, Paul
 14 Connor, and Richard Adler (who all describe Mr.
 15 Carter’s Partial Fetal Alcohol Syndrome (“PFAS”) (Pet.
 16 Exs. 77, 95, 96); and Dr. Mindy Rosenberg (who
 17 discusses Mr. Carter’s social history and background
 18 (Pet. Ex. 78)).

19 (Pet. at 63-64 (footnote omitted; citations abbreviated).)

20 Dr. Raine explains that Petitioner’s PET scan depicts significant
 21 abnormalities; that Petitioner’s “ability to think, reason, problem solve, [and]
 22 control his emotions and impulses, would be significantly compromised by these
 23 brain dysfunctions;” and that certain specified risk factors “may particularly
 24 contribute to brain dysfunction and abnormalities consistent with those depicted in
 25 the petitioner’s PET scan.” (Pet. Ex. 59 ¶ 15.) Dr. Young reports that her “test
 26 results . . . raise concern that Dean experiences frontal lobe impairment.” (Pet. Ex.
 27 61 ¶ 13.) She concludes that it is “probable” that Petitioner has long-term
 28 neurological deficits and diffuse brain dysfunction, impaired functioning of
 anterior brain regions, and frontal lobe impairment. (*Id.* ¶ 15.) Dr. Foster opines
 that Petitioner’s traumatically based attachment disorder and mood disorder, severe
 drug dependence, and major affective disorder “were present before, during, and

1 after the crimes” (Pet. Ex. 75 ¶ 18.) Dr. Foster observes that Petitioner has
 2 been intermittently delusional and believes that he was being followed by the KGB
 3 in Anchorage and Seattle, and that such psychotic thinking would further
 4 compromise Petitioner’s decision making. (*Id.* ¶¶ 49, 51.) Dr. Foster opined that
 5 Petitioner:

6 has brain damage to those parts of his brain needed for
 7 the executive functions of insight, judgment, and impulse
 8 control in actual situations. Persons with such damage
 9 . . . cannot be relied upon to guide their own behavior in
 10 actual situations. . . . [E]specially when stressed or under
 11 the influence of alcohol or drugs[,] they are more like
 12 sleep walkers reacting to unconscious or emotionally
 13 triggered impulses and not guided by conscious and
 14 rational decision making processes. . . . It can be stated
 15 with medical certainty that Mr. Carter’s neurological and
 16 psychiatric problems . . . were present during the time
 17 frame of the crimes for which he is convicted and
 18 sentenced to death.

19 (*Id.* ¶ 51.)

20 Dr. Brown found that the data she reviewed “support a strong conclusion
 21 that Dean Phillip Carter meets criteria for FASD [Fetal Alcohol Spectrum
 22 Disorders].” (Pet. Ex. 77 at 1, 25.) Dr. Brown explained that individuals with
 23 FASD “often have problems understanding appropriate sexual expression and
 24 acting accordingly – a problem observed in nearly half of all individuals affected
 25 by FASD.” (*Id.* at 24.) She states that individuals with FASD “often overreact and
 26 behave impulsively because of executive function deficits. . . . [I]t is not
 27 uncommon for these individuals to . . . lash out in unfocused aggression when
 28 faced with stress” (*Id.* at 33.) Dr. Brown observes that executive function
 impairment may be noticeable when the individual is under the influence of a
 substance that further compromises executive functioning, such as drugs or
 alcohol, and that this “may be relevant with respect to Mr. Carter’s behavior in

1 March and April of 1984, which apparently occurred in the context of multiple
2 stressors (e.g., loss of his family, severe drug and alcohol abuse, escalating
3 paranoia, and homelessness).” (*Id.*) Dr. Brown opines that “one of the strongest
4 correlates of adverse outcomes in individuals with FASD is lack of an early
5 diagnosis [T]he research suggests that for Dean Phillip Carter’s brutal
6 aggression to have been prevented, he needed appropriate identification and
7 intervention in childhood.” (*Id.* at 35.) Dr. Brown noted that “[w]hile acute
8 intoxication may have been a factor in his functioning at the time of the rape and
9 murder, evidence is insufficient to establish substance-related impairment as the
10 sole explanation for his conduct either in the capital crimes at issue or across his
11 lifespan.” (*Id.* at 26 (emphasis in original).) Finally, Dr. Brown found that “[w]ith
12 respect to mental illness, while there is a record of ongoing anxiety and depression
13 in Mr. Carter’s history, acute mental illness is ruled out as an explanatory factor
14 because there is insufficient evidence of impairment severe enough to compromise
15 his capacity to know right from wrong.” (*Id.* at 26.)

16 Dr. Connor found that a diagnosis on the fetal alcohol spectrum was
17 warranted for Petitioner, and explained that Petitioner’s deficits show that he “does
18 not appear to be able to successfully apply his strong intellectual abilities to
19 appropriately solve problems, handle multiple tasks, or appropriately shift his
20 attention.” (Pet. Ex. 96 ¶¶ 64, 73, 74, 79.) Dr. Adler diagnosed Petitioner with
21 Partial Fetal Alcohol Syndrome and noted that the diagnosis of Partial Fetal
22 Alcohol Syndrome as opposed to Fetal Alcohol Syndrome “appears to be ‘a
23 distinction without a difference’” for “the level of functional impairment and life
24 outcomes In actuality, persons like Mr. Carter, who are prenatally-affected by
25 alcohol but who have higher IQs tend NOT to have their disability detected in a
26 timely fashion and thus suffer more serious life sequelae of this condition.” (Pet.
27 Ex. 95 at 17.) Dr. Rosenberg concludes that Petitioner’s prenatal exposure to
28 alcohol indicates a “high likelihood of diffuse brain damage and severe impairment

1 in cognitive and emotional functioning,” exacerbated by his parental caretaking
 2 environment. (Pet. Ex. 78 at 4.) Dr. Rosenberg opines that when a situation
 3 triggers Petitioner’s sensitivity to abandonment and rejection, Petitioner “could
 4 become flooded with overwhelming and intense emotions of terror and rage [and]
 5 . . . would be unlikely to be able to manage these emotions in an adaptive manner.”
 6 (*Id.*)

7 **b. Analysis**

8 A psychologist’s conclusion that a petitioner “*may* not have been able to
 9 form the required intent for the crime for which he was convicted” or that it was
 10 “quite unlikely that he formed the specific intent necessary for the crime . . . is
 11 speculative on its face.” *Griffin v. Johnson*, 350 F.3d 956, 965 (9th Cir. 2003)
 12 (holding petitioner had not demonstrated actual innocence and was not entitled to
 13 an evidentiary hearing) (internal quotation omitted, emphasis in original); *cf.*
 14 *Crittenden v. Ayers*, 624 F.3d 943, 961 (9th Cir. 2010) (finding no prejudice in
 15 light of overwhelming evidence of deliberation and premeditation, where experts
 16 opined that killings “most likely” or “might very well have” lacked specific intent).
 17 A petitioner likewise fails to establish prejudice from any deficient performance by
 18 counsel where the “post-conviction record contains no testimony whatsoever,
 19 expert or otherwise, concerning the impact of any mental disease or defect on [his]
 20 commission of the crime with which he was charged.” *Franklin v. Johnson*, 290
 21 F.3d 1223, 1234 (9th Cir. 2002) (holding counsel was objectively unreasonable for
 22 failing to investigate mental state defense while aware of substance abuse
 23 problems, pedophilia, and suicide attempts by defendant accused of sodomizing his
 24 stepson, but petitioner failed to demonstrate prejudice).

25 Here, the California Supreme Court may have reasonably determined that
 26 the evidence Petitioner presented failed to demonstrate prejudice. That Petitioner’s
 27 ability to think, reason, and control his emotions and impulses were “significantly
 28 compromised,” (Pet. Ex. 59 ¶ 15), does not mean that Petitioner did not form the

1 intent to rape and murder. (*See also* Pet. Ex. 75 ¶ 51 (observing that Petitioner’s
 2 decision making was “compromise[d]”); Pet. Ex. 96 ¶¶ 64, 73, 74, 79 (concluding
 3 that Petitioner “does not appear to be able” to appropriately solve problems or
 4 multitask).) Test results that “raise concern” and show “probable” deficits and
 5 dysfunction (Pet. Ex. 61 ¶¶ 13, 15) are speculative. (*See also* Pet. Ex. 78 at 4
 6 (opining that Petitioner would be “unlikely” to be able to manage his rage). In
 7 addition, the California Supreme Court may have fairmindedly reasoned that Dr.
 8 Foster’s opinion that persons with brain damage like Petitioner’s do not reliably
 9 guide their own behavior, and under certain circumstances in particular are “*more*
 10 *like sleepwalkers*” is too vague, in light of the evidence of rational decision making
 11 before the jury, to show a reasonable probability of a different result at trial. (Pet.
 12 Ex. 75 ¶ 51 (emphasis added)); *see Carter*, 36 Cal. 4th at 1184-85; (*cf. Respt.’s Br.*
 13 *at 43* (“The prosecution would have been able to confront any defense expert with
 14 Carter’s ability to . . . conceal the[] bodies so that they were not found for some
 15 time after the[] deaths, . . . leave without being caught[,] . . . stage crime scenes to
 16 move the victims’ vehicles to make it appear that they were not home, so as to
 17 guarantee himself more time before their bodies were found[, and attempt] . . . to
 18 escape, by fleeing in Mills’s stolen car to Arizona”)). Similarly, Dr. Brown’s
 19 discussion of problems that people with FASD face, not uncommonly lashing out
 20 in aggression and, in nearly half of all cases, struggling to understand and conduct
 21 appropriate sexual expression, does little to explain such uncommon behavior as
 22 murdering three women and raping two, as charged in the trial at issue.

23 The California Supreme Court’s determination that Petitioner failed to
 24 demonstrate prejudice from any deficient performance by counsel in presenting
 25 guilt phase evidence of his mental state at and before the time of the crimes is not,
 26 therefore, objectively unreasonable.

27 3. Failure to Test Prosecution Evidence

28

1 Petitioner next alleges that trial counsel failed to challenge “the manner and
2 causes of death, the sequence of events, and evidence relating to the assailant’s
3 intent,” and to point out “the significant differences between the alleged crimes in
4 order to raise reasonable doubts as to the circumstances alleged.” (Pet. at 66; *see*
5 *also* Petr.’s Br. at 94-102 (citing Pet. Ex. 60).)

6 First, the state court may have determined that, during the guilt phase of
7 Petitioner’s trial, counsel may have strategized that attempting to highlight the
8 differences among the crimes would not be persuasive, in light of the evidence
9 linking Petitioner to each crime. *See Carter*, 36 Cal. 4th at 1148-49 (“The vehicle
10 owned by Tok Kim was missing at the time her body was found but later was
11 discovered near the residence of Knoll and Mills. Subsequently, a white Datsun
12 280 ZX matching the description of Mills’s vehicle, missing since the time Mills’s
13 body was found, was observed in the vicinity of Cullins’s apartment near the time
14 of Cullins’s murder. When arrested, defendant had on his person or in the Datsun
15 an eclectic array of objects identified as having belonged to (1) each of the three
16 victims in the murders charged in the present case, (2) Janette Cullins, and (3) Tok
17 Kim”).

18 //

19 //

20 Second, contrary to Petitioner’s allegations (*see* Pet. at 66-69):
21 • there was evidence, which reasonably could be considered more than “little”
22 evidence, of a violent struggle before Mills’ and Knoll’s homicides (*see* 40 RT
23 4871 (describing a blunt injury to the left side of Mills’ head, consistent with a
24 blow from a fist or a hand, occurring prior to death); *id.* at 4880-85 (describing
25 blunt injuries to Knoll’s forehead, upper and lower lips, and chest consistent with
26 blows from a fist, and injury to her left wrist consistent with grabbing and
27 squeezing, all consistent with a struggle);
28

1 • there was evidence, which reasonably could be considered more than “little”
 2 evidence, of a violent struggle before Guthrie’s homicide (*see id.* at 4894-96
 3 (describing blunt injuries to Guthrie’s nose and left thigh, consistent with blows
 4 from a fist));

5 • there was evidence that Knoll was sexually assaulted (*see id.* at 4825 (reporting
 6 seminal fluid from a vaginal sample), 4886 (describing an eight-centimeter blunt
 7 force injury just above the entrance to the vagina));

8 • the record shows no support for the statement of Dr. John Thornton that Guthrie’s
 9 boyfriend, Ronald Mancini, explicitly told police “that he had sexual intercourse
 10 with the victim within two days (April 9) of her death (April 11).” (Pet. Ex. 60 at
 11 8.) *Cf.* Fed. R. Evid. 702 (“A witness who is qualified as an expert . . . may testify
 12 in the form of an opinion or otherwise *if* . . . the testimony is based on sufficient
 13 facts or data” (emphasis added)); *Pinholster*, 131 S. Ct. at 1402 n.12 (“[T]he
 14 California Supreme Court’s [consideration] . . . of a habeas petition . . . will also
 15 review the record of the trial . . . to assess the merits of the petitioner’s claims”
 16 (internal quotation and citations omitted)). A police report reflecting Mancini’s
 17 statement to police shows that Mancini reported that he and Guthrie “were lovers .
 18 . . [and] [h]e had last seen [Guthrie] on 4-9-84.” (3 CT 776.) Mancini testified
 19 accordingly at trial, stating that he was involved with Guthrie in a romantic sense,
 20 and he saw her last on April 9, when she spent the night at his home (39 RT 4786);
 21 and

22 • the jury was not told that semen was found on women’s underwear located near
 23 Guthrie, and defense counsel Morrissey successfully blocked testimony from being
 24 presented to the jury regarding any semen on Guthrie’s pantyhose (42 RT 5036-
 25 39).

26 Further, counsel did present testimony on cross-examination that:

27 • the abrasion found on the labia majora of Guthrie was not necessarily recent or
 28 indicative of nonconsensual contact (40 RT 4896-98);

- 1 • the evidence of sexual assault as to Mills was not necessarily indicative of
2 nonconsensual intercourse. The supervisor for the pathologist who conducted
3 Mills' autopsy impliedly agreed that Mills suffered a "traumatic sexual assault,"
4 with trauma that usually is not evident in consensual intercourse (*id.* at 4845-46,
5 4897), and Gillingham emphasized on cross-examination that such trauma is
6 sometimes present from consensual intercourse (*id.* at 4898);
- 7 • one investigator saw a red nightgown on the bed (*id.* at 4832), while another
8 investigator testified that a white nightgown, which contained seminal fluid
9 consistent with Petitioner's ABO type O blood group and PGM 1+ enzyme, was on
10 the bed. (*Id.* at 4819-20, 4829.) The investigator who saw a red nightgown on the
11 bed testified that a second, white nightgown was on a chair in the living room (*id.*
12 at 4831);
- 13 • the latent print supervisor made unsuccessful attempts to identify other prints
14 found in the Mills/Knoll apartment besides Petitioner's. (38 RT 4724-25.)
15 Although the supervisor did not testify that there were precisely nineteen
16 unidentified prints, he did testify that he examined prints "on lift cards and on
17 paper items and on a rear-view mirror," indicating that there were several
18 unidentified prints (*id.* at 4721);
- 19 • there was no evidence that Cullins was sexually assaulted (42 RT 5080); and
- 20 • Kim's cause of death was undetermined because of decomposition of the body,
21 and there were no injuries to the nose, lips, facial bones, or arms (37 RT 4545-47;
22 *cf. id.* at 4542 (testimony on direct examination that there were no visible injuries
23 from a beating)), showing no evidence of a struggle.

24 Finally, the jury was aware that:

- 25 • there was "no forced entry in any of these cases," i.e., Guthrie, Mills, Knoll, and
26 Kim (44 RT 5232);
- 27 • it was unclear how long Knoll and Mills had been dead at the time they were
28

1 found, or which woman was killed first, beyond the fact that they had each been
2 dead at least fifteen hours or even much longer (40 RT 4889-91); and
3 • the supervisor for the pathologist who conducted Mills' and Knoll's autopsies
4 concluded that Mills was strangled manually while Knoll was strangled by a
5 ligature (*id.* at 4876, 4888-89).

6 As to Petitioner's remaining allegations, counsel may have reasonably:

7 • decided against testing any saliva from the wine glasses at the Mills/Knoll
8 apartment and the seminal material from Guthrie's vaginal area for ABO and/or
9 PGM type, because counsel "had reason to question" whether Petitioner was the
10 source of the fluids given his connection to the victims, the investigation could
11 have been "harmful to the defense," and "making a central issue out of [this
12 forensic evidence] would have increased the likelihood of the prosecution's
13 producing its own evidence on the [material's] origins" *Richter*, 131 S. Ct. at
14 789-90. In the alternative, the California Supreme Court could have reasonably
15 determined that Petitioner failed to demonstrate prejudice from any failure to
16 investigate, as he presents no evidence that the results of such testing would have
17 been favorable to his defense;
18 • strategized that jurors would not have been sympathetic to the suggestion that
19 Mills' consumption of alcohol could have made her more likely to have consented
20 to intercourse. Counsel may also have reasonably concluded that the very small
21 amount of alcohol found in Mills' blood, and the fact that she was discovered
22 strangled, would have made that suggestion unpersuasive and alienating to the
23 jurors;
24 • strategized that in order to preserve credibility at the penalty phase of trial, he
25 would not argue at the guilt phase any unlikelihood of the prosecution's theory that
26 Knoll may have been allowed to dress after forcible sexual intercourse and then
27 strangled. Counsel could have reasonably made that decision in light of the
28 testimony that Steward could provide at the penalty phase that Petitioner clamped

1 an arm around her neck, forced her to remove her top, forced her to orally copulate
2 him, strangled her until she lost consciousness, tied her hands when she awoke,
3 pulled her up off the floor, took an article of her clothing from a closet and put it
4 around her shoulders, forced her to orally copulate him again, and, after her ruse of
5 kissing him and telling him that she was his friend, allowed her to put on a sweater.
6 (48 RT 5594-5620.) Steward testified that shortly thereafter, Petitioner removed
7 her clothing again, raped her, accepted her reassurances, permitted her to dress, and
8 ultimately left (*id.* at 5633-41);

9 • decided against presenting evidence that Ronald Tulio was seen in Knoll's
10 driveway the evening before her and Mills' murders and that Tulio was first
11 arrested for the murders, based upon the lack of physical evidence connecting
12 Tulio to the murders and the evidence connecting Petitioner to the murders. (*Cf.*
13 42 RT 5093-94 (Gillingham's testimony that he made a strategic decision not to
14 call Tulio as a witness); 3 CT 793 (motion for production by Petitioner's former
15 defense counsel requesting evidence on Tulio).) None of the prints at the
16 Mills/Knoll apartment matched Tulio's (unlike Petitioner's) (38 RT 4723, 4725; 1
17 CT 225), and the only seminal fluid sufficient for typing was consistent with
18 Petitioner's O blood type and PGM 1+ enzyme (40 RT 4819-20, 4825, 4829);

19 • decided, based upon a review of the police report stating, "Blood spotting was
20 observed on sweat pants of victim [Guthrie] at the vaginal area. There was also
21 observed a small amount of blood on the outside of vaginal area," (3 CT 774), that
22 serological testing to identify the blood stain on Guthrie's sweat pants was
23 unnecessary, as there was no indication that the blood would have belonged to
24 anyone besides Guthrie;

25 • strategized that evidence that no tool for forcible entry to Cullins' home was
26 found in Petitioner's possession would not have influenced the jury, in light of the
27 other evidence in his possession linking him to Cullins' murder (*see Carter*, 36
28 Cal. 4th at 1133-35 (noting Petitioner's possession of Cullins' bank identification

1 card, bank account access code, and key ring));

2 • strategized against presenting any evidence that a blood stain on a sheet on
 3 Cullins' bed was similar to Petitioner's blood even though no significant wounds
 4 were found on Petitioner, to avoid further connecting Petitioner to the crime scene;
 5 • strategized against presenting evidence regarding the semen found in Kim's
 6 apartment, since Petitioner was not charged with sexual assault (or murder) of Kim
 7 in the proceeding; the jury was aware that Kim was involved in another
 8 relationship just prior to meeting Petitioner; and evidence regarding Kim was
 9 introduced only to connect Petitioner with the Los Angeles County crimes (*see*
 10 *Carter*, 36 Cal. 4th at 1147, 1161-62 (noting that Petitioner was not accused of
 11 sexually assaulting Kim, that Alameda County subsequently dismissed the charges
 12 against him, that the prosecution did not suggest at trial that Petitioner had sexually
 13 assaulted Kim, and that evidence involving Kim connected Petitioner to the Los
 14 Angeles County offenses); (41 RT 5016-19 (testimony of Blevins that he was
 15 involved in a relationship with Kim until discovering her relationship with
 16 Petitioner)); and
 17 • strategized against presenting evidence that prints taken from the Guthrie,
 18 Cullins, and Kim apartments did not match Petitioner's, on the basis that the
 19 evidence would not have been "important to the defense and . . . jurors might
 20 suspect [Petitioner] had destroyed evidence by wiping away [his] own prints."
 21 *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (approving of postconviction
 22 court's finding that counsel was not deficient for failing to present evidence that
 23 fingerprints found at the crime scene did not match petitioner's, notwithstanding
 24 petitioner's argument that the evidence "would have supported her theory that
 25 someone else was at the crime scene").

26 Because the California Supreme Court may have reasonably rejected
 27 Petitioner's claim on these grounds, Claim 5(D)(3) is DENIED.

28 **E. Claim 5(E): Failure to Provide Effective Assistance in Oral**

Argument and Cross-Examination

1. Allegations and Decision on Direct Appeal

In Claim 5(E), Petitioner argues that trial counsel provided ineffective assistance in opening and closing statements and on cross-examination. Petitioner alleges that counsel made no guilt phase opening argument and that the “penalty phase began with no transition between guilt and penalty.” (Pet. at 70.) Petitioner contends that counsel’s “guilt phase closing statement was so dramatically inadequate that it cannot be referred to as argument.” (*Id.*) Petitioner further alleges that a “reasonable opening statement in Mr. Carter’s case could and would have introduced themes of diminished actuality as a result of alcohol and drug use and mental impairments.” (*Id.* at 70-71.) Petitioner adds that “effective trial counsel would have explored these themes through effective cross-examination of prosecution witnesses,” (*id.* at 71), although he does not specify what evidence from which witnesses could have been presented.

On direct appeal, the California Supreme Court considered Petitioner’s arguments that counsel failed to “make an opening statement . . . [and to] make any substantive argument in his summation (which comprised four and one-half pages of the Reporter’s Transcript) as to whether the prosecution had sustained its burden of proof as to defendant’s guilt of the crimes charged or the truth of the special circumstances alleged.” *Carter*, 36 Cal. 4th at 1188. The court reasoned:

//

In view of the strong evidence directly linking defendant to the charged murders, as well as the looming prospect of other capital trials in Alameda and San Diego Counties arising out of the deaths of Tok Kim and Janette Cullins, reasonably competent counsel [considering whether to make an opening argument] could have determined to hear the prosecution’s case prior to deciding whether to present a defense, and further could have determined that counsel’s summation ought to be limited to inviting the jury to consider whether the prosecution actually had met

1 its burden of establishing guilt beyond a reasonable
2 doubt. Indeed, in his summation, counsel alluded to the
3 other criminal cases pending against defendant to suggest
4 a reason why defendant did not take the stand, and
5 emphasized the significance of the reasonable doubt
6 instruction. [¶] Defense counsel argued:

7 ‘While all the instructions that the judge will give
8 you are important, critical to deciding the guilt of
9 any person, is the instruction about reasonable
10 doubt. In short, you will hear words to this effect,
11 that you may not find Mr. Carter guilty unless you
12 believe beyond a reasonable doubt the truth of the
13 charge or charges to a moral certainty. [¶] I would
14 expect [the prosecutor], when he replies, as is his
15 right to reply to this argument since he has the
16 burden, to tell you that this does not mean beyond
17 all possible doubt. That’s true. But you will hear
18 the words “to a moral certainty.” [¶] . . . You’ve
19 heard reference to other pending cases in San
20 Diego and Oakland, and so there are some times
21 that defendants do not testify for many, many
22 reasons.’

23 Reasonably competent counsel could have determined
24 that an extended summation would present the danger of
25 focusing the jury’s attention upon the heinous details of
26 the crimes committed. Likewise, reasonably competent
27 counsel also could have determined that in view of the
28 strong evidence linking defendant to the murders, a guilty
verdict was virtually a foregone conclusion, and that
defendant’s prospects of avoiding the death penalty
would be improved if the defense refrained from placing
its ‘credibility’ at risk by suggesting an implausible
defense and instead focused upon challenging the
testimony of certain witnesses who testified for the
prosecution.

Id. at 1189, 1189 n.35 (internal citation omitted; quoting 44 RT 5234-35)).

2. Analysis

1 “The timing of an opening statement, and even the decision whether to make
2 one at all, is ordinarily a mere matter of trial tactics and in such cases will not
3 constitute the incompetence basis for a claim of ineffective assistance of counsel.”
4 *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *see also*
5 *Mayfield v. Calderon*, 229 F.3d 895, 898, 901 (9th Cir. 2000) (denying certificate
6 of appealability for petitioner’s claim of ineffective assistance of counsel at guilt
7 phase of trial, where defense counsel did not make an opening statement to the jury
8 and did not present any witnesses). Moreover, “[w]hen defense counsel does not
9 have a solid case, the best strategy can be to say that there is too much doubt about
10 the State’s theory for a jury to convict.” *Richter*, 131 S. Ct. at 791.

11 “The question is whether there is any reasonable argument that counsel
12 satisfied *Strickland*’s deferential standard.” *Id.* at 788. The state court’s arguments
13 that counsel satisfied *Strickland* at the opening and closing argument stages of
14 Petitioner’s guilt phase trial are reasonable.

15 Regarding counsel’s penalty phase opening argument, the California
16 Supreme Court may have reasonably determined that counsel did, contrary to
17 Petitioner’s allegation, effectively provide a “transition between guilt and penalty.”
18 (Pet. at 70.) Counsel told the jury, “Be sure of one thing. Your guilt verdict is not
19 the end, it’s the beginning of this phase.” (47 RT 5496.) Counsel explained that
20 the defense “do[es]n’t offer these things so you will feel sorry for him,” but so that
21 the jury would have “the full picture.” (*Id.*) Counsel challenged the prosecutor’s
22 opening argument that the jury would have to “do [its] duty” by stating, “It should
23 first not go unsaid, lest there be any confusion that you have any duty to return a
24 death verdict. You have no duty to return either. [¶] You have a duty to listen to
25 the evidence, give it full consideration.” (*Id.* at 5494-95.) Counsel concluded his
26 opening argument by telling the jury, “[Y]ou ought to know completely about this
27 man, and we intend to do that honestly, forthrightly, and I intend to ask you to
28 spare his life.” (*Id.* at 5498.) The California Supreme Court may have reasonably

1 concluded that counsel's remarks provided an effective opening to the penalty
2 phase of trial.

3 Finally, the California Supreme Court may have reasonably concluded that
4 Petitioner failed to demonstrate prejudice regarding counsel's failure to present
5 Petitioner's alleged alcohol and drug use and mental impairments, through cross-
6 examination or otherwise. (*See supra* pp. 37-39.) Petitioner's conclusory
7 allegations concerning counsel's performance on cross-examination do not entitle
8 him to relief. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.1994); *see also Greenway*
9 *v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011); *Jones v. Gomez*, 66 F.3d 199, 204-05
10 (9th Cir. 1995).

11 Claim 5(E) is DENIED.

12 **F. Claim 5(F): Comment on Failure to Testify**

13 In Claim 5(F), Petitioner alleges trial counsel unreasonably and prejudicially
14 commented on Petitioner's right to remain silent. (Pet. at 72.) Petitioner claims
15 that counsel told the jury in closing argument that Petitioner invoked his right to
16 remain silent because "'some people tell the truth in this kind of setting, some
17 people lie poorly.'" (*Id.* (quoting 44 RT 5236).)

18 //

19
20 The California Supreme Court considered this claim on direct appeal:

21 At issue is counsel's argument to the jury, in which he
22 hypothesized a number of reasons why a defendant might
23 elect not testify In his guilt phase summation,
24 defense counsel argued to the jury:

25 'In this decision your process is analytical; that is,
26 have the crimes been proven beyond a reasonable
27 doubt to a moral certainty, and has it been proven
28 beyond a reasonable doubt to a moral certainty that
[defendant] is the person who committed one or
more of the acts charged?

1 [Defendant] *did not testify*. The court will instruct
2 you that you may not consider this in any way,
3 shape, or form. *You may not hold it against him*.
4 However, experience tells us that people often
5 have trouble with that concept. “Well, if I were
6 the defendant, I would testify. I would be up there
7 screaming about it.”

8 Let me say a word about this: *There are many*
9 *reasons that a defendant may or might not testify*
10 *in a case*, speaking hypothetically. There is, for
11 example, the possibility that his lawyer might
12 instruct you not to testify, even though he wanted
13 to. There is on the contrary the possibility that his
14 lawyer wants him to and he does not want to for
15 various reasons.

16 He may be articulate, he may be too articulate. He
17 may be scared. I’ll tell you, it is not easy to be a
18 witness. If any of you have ever been a witness,
19 where from time to time one comes up in one’s
20 career at the bar, I’m always amazed that you were
21 just plain nervous up there even after all your
22 experience in law school [*sic*].

23 Some people tell the truth in this kind of setting,
24 some people lie poorly.

25 You’ve heard reference to other pending cases in
26 San Diego and Oakland, and so *there are some*
27 *times that defendants do not testify for many, many*
28 *reasons. There are many, many reasons why the*
defendant may not testify, and I give you
hypothetically various reasons that occur from
time to time so that you do not consider any of it
and hold it against him.”

Carter, 36 Cal. 4th at 1190-91 (emphasis in original). The court concluded that
“[v]iewing defense counsel’s remarks in their proper context, it is clear that
counsel was not suggesting that the jury draw any sort of adverse inference from
defendant’s silence. . . . Counsel’s references to defendant’s failure to testify were

1 made ‘so that you do not consider any of it and hold it against him,’ and manifestly
2 did not constitute” improper or ineffective remarks. *Id.* at 1192.

3 The California Supreme Court’s interpretation of counsel’s remarks is
4 reasonable. *See United States v. Stark*, 507 F.3d 512, 521-22 (7th Cir. 2007)
5 (having “no trouble finding” that trial counsel’s statements, which may have called
6 defendant’s choice not to testify to the jury’s mind, “were part of a responsible trial
7 strategy”); *Graham v. Dormire*, 212 F.3d 437, 440-41 (8th Cir. 2000) (holding that
8 defense counsel’s decision to address in closing argument defendant’s failure to
9 testify was not unreasonable). Because there is a “reasonable argument that counsel
10 satisfied *Strickland*’s deferential standard,” *Richter*, 131 S. Ct. at 788, Claim 5(F)
11 is DENIED.

12 **G. Claim 5(G): Failure to Investigate and Present Evidence of**
13 **Third-Party Culpability**

14 Petitioner asserts that “counsel knew or should have known that substantial
15 evidence pointed to Ray Blevins as the actual perpetrator of Kim’s murder,” and
16 that counsel “did not sufficiently investigate the possibility of Tulio’s involvement
17 in the capital crimes.” (Pet. at 73.) Finally, without further elaboration, Petitioner
18 alleges that defense counsel had information that two men, “known to Mr. Carter
19 as Mike and Kevin, were present in both Northern and Southern California at and
20 around the time of the crimes . . . [and] knew the various victims and had interacted
21 with them in the past.” (*Id.* at 75.)

22 First, Petitioner alleges that there was evidence that Blevins and Kim fought
23 shortly before her death, that Blevins was in a unique position to have access to
24 Kim and her apartment, and that Blevins refused to take a polygraph until after a
25 cause of death was determined. (*Id.* at 73 (citing 3 RT 296-303).) As noted above,
26 Petitioner was not charged in the instant trial (or in any other) with sexually
27 assaulting or murdering Kim. Evidence regarding Kim was introduced only to
28 connect Petitioner with the Los Angeles County crimes. The California Supreme

1 Court may have reasonably determined that Petitioner failed to demonstrate how
2 showing that Blevins murdered Kim would dissociate Petitioner from his
3 possession of Kim's belongings, along with Knoll's, Mills', Guthrie's, and
4 Cullins', in Mills' car at the time of his arrest, *see Carter*, 36 Cal. 4th at 1134-35,
5 and the presence of Kim's car at the Mills/Knoll apartment. *See id.* at 1131.

6 Second, Petitioner alleges that had defense counsel adequately investigated
7 Tulio's involvement, counsel would have uncovered evidence that: (1) Tulio lied
8 to police when he said he had never been to Knoll's apartment, according to John
9 Maloney, who said he and Tulio briefly stopped by Knoll's apartment some time
10 prior to her death (Pet. at 74 (citing Pet. Ex. 97)); (2) Tulio's alibi that he was
11 playing cards at Maloney's home at the time of the Knoll and Mills murders was
12 false, according to Maloney, who said he had never hosted a card game at his
13 house (*id.*); and (3) witness Craig Bloor, a Culver City Police Officer, identified
14 Tulio as the person he saw at the Mills/Knoll apartment building to Detective
15 Kevin White. (*Id.* at 74-75 (citing Pet. Ex. 99).)

16 The record reflects Gillingham's awareness that Bloor had information
17 concerning Tulio's presence at the building and could be called as a witness. (42
18 RT 5095.) The California Supreme Court may have reasonably determined that
19 Gillingham made a strategic decision not to investigate further Tulio's presence at
20 the building, based upon the lack of physical evidence tying Tulio to the crimes.
21 *See Pinholster*, 131 S. Ct. at 1407-08 ("There comes a point where a defense
22 attorney will reasonably decide that another strategy is in order, thus 'mak[ing]
23 particular investigations unnecessary.' Those decisions are due 'a heavy measure
24 of deference'" (quoting *Strickland*, 466 U.S. at 691; citations omitted)); *Richter*,
25 131 S. Ct. at 788 (finding no deficient performance by counsel on the basis that
26 "*Strickland* . . . permits counsel to make a reasonable decision that makes
27 particular investigations unnecessary" (internal quotation omitted)). The court may
28 have likewise reasonably determined that Petitioner had not demonstrated a

1 reasonable probability of a different outcome at trial, in light of the evidence
 2 connecting Petitioner to the crimes, had Gillingham presented evidence that Tulio
 3 was once briefly at the apartment, was not at Maloney's home as he said he was,
 4 and was seen at the Mills/Knoll apartment building that night instead.

5 Petitioner presents no evidence to establish prejudice from counsel's failure
 6 to investigate Mike and Kevin.

7 Claim 5(G) is DENIED.

8 **H. Claim 5(H): Other Ineffective Assistance of Counsel**

9 Petitioner raises five distinct allegations of ineffective assistance in Claim
 10 5(H):

11 (1) "To the extent" that the motion to consolidate charges "was not
 12 timely made," counsel's performance was deficient. (Pet. at 76.) As the
 13 Court held above (*see supra* p. 26), the California Supreme Court may have
 14 reasonably determined that Petitioner "presents no persuasive basis for
 15 concluding that a jury that [convicted and] imposed the death sentence for
 16 three murders would have imposed a lesser sentence if defendant had been
 17 charged in this proceeding with additional crimes, including murder."
 18 *Carter*, 36 Cal. 4th at 1160. Petitioner has therefore failed to demonstrate
 19 prejudice from any deficient performance.

20 (2) "To the extent" that the motion for mistrial based upon jurors'
 21 unsworn voir dire responses "was not timely made," counsel's performance
 22 was deficient. (Pet. at 76.) This subclaim is related to Claim 12(A) and will
 23 be addressed below. (*See infra* pp. 86-88.)

24 (3) "To the extent" that counsel failed to make proper objections to
 25 guilt phase instructions concerning CALJIC Nos. 2.01-2.02, 2.50, 2.50.1,
 26 2.50.2, and 8.83-8.83.1, counsel's performance was deficient. (Pet. at 76.)
 27 This subclaim is related to Claim 14(E) and will be addressed below. (*See*
 28 *infra* pp. 130-32.)

(4) “To the extent” that counsel failed to make proper objections to guilt phase instructions concerning CALJIC Nos. 2.09 and 2.51, counsel’s performance was deficient. (Pet. at 76.) This subclaim is related to Claim 12(E) and will be addressed below. (*See infra* pp. 97-98.)

(5) “To the extent” that counsel failed to make proper objections to misconduct in the prosecution’s guilt phase closing argument, counsel’s performance was deficient. (Pet. at 76.) This subclaim is related to Claim 10 and will be addressed below. (*See infra* pp. 73-79.)

VII. Claim 6: Ineffective Assistance at Penalty Phase of Trial

In Claim 6, Petitioner alleges that trial counsel’s penalty phase presentation was “disjointed, jumping from one area to another and consisted solely of lay witness testimony that was incongruous and sometimes conflicting.” (Pet. at 86-87.) He alleges that counsel “minimized [Petitioner’s] drug abuse with some witnesses, while emphasizing it with others,” for example, and presented evidence at some points that Petitioner loved his children while at other points emphasizing his shortcomings as a father. (*Id.* at 87-88.) Petitioner claims that counsel “overemphasi[z]ed . . . four years of Mr. Carter’s adult life prior to the homicides,” and “never even asked the jury to impose a sentence of life imprisonment.” (*Id.* at 87-88.) He alleges that counsel “conducted very little investigation and presented only a portion of the available mitigation evidence at the penalty phase” of his trial. (*Id.* at 79.)

A. Counsel’s Penalty Phase Presentation

1. Theme of Parental Neglect and Absence

Before he began his penalty phase presentation to the jury, counsel told the trial court that “[t]his penalty phase is going to be limited. It will be direct. One of the primary themes in this penalty [presentation] is going to be the absence of this man’s mother [S]he refused to talk about him I am going to ask the

1 brother and sister was there ever – did you ever talk about Dean in the house, and
2 they will say no. It is like a pariah. No significance.” (49 RT 5745.)

3 Indeed, counsel presented evidence from more than three witnesses that
4 Petitioner’s mother never wanted to talk about Petitioner. (*See id.* at 5742, 5745
5 (testimony of Bertha Adsuna), 5762 (testimony of Jerry Carter), 5768 (testimony
6 of Polly Reasner); 51 RT 5937-38 (testimony of Casey Cohen).) Petitioner’s
7 brother testified that counsel met with him in Anchorage. (*Id.* at 5753.) He
8 testified that Petitioner was not a topic of discussion at home at all. (*Id.* at 5762.)
9 He said that he talked to their mother about coming to Petitioner’s trial and she was
10 not coming. (*Id.* at 5762-63.) Petitioner’s sister, Polly, said that counsel spoke to
11 her a number of times before she testified. (*Id.* at 5767.) She explained that
12 Petitioner was gone when she was a child and her family “never talked about Dean
13 at all” at home. (*Id.* at 5768.) She told of going to Anchorage with her parents and
14 her younger sister and not learning that Petitioner was there until they returned to
15 Nome. (*Id.* at 5769.) Polly was “just shocked that we couldn’t even go and see
16 him. That they hadn’t even mentioned it to us, that we were so close to him but we
17 couldn’t go and see him.” (*Id.* at 5769.) She said she doubted that her parents
18 wanted to see him. (*Id.* at 5777.) She testified that she had asked her mother “to
19 please come” to testify for Petitioner and that his mother knew what was at stake.
20 (*Id.* at 5772.) Finally, Petitioner’s investigator, Casey Cohen, testified that he
21 traveled to Nome three times and attempted to speak to Petitioner’s mother about
22 Petitioner as a child and the circumstances of his childhood. (51 RT 5937, 5939.)
23 Cohen attempted to speak to her at least three times in person and several times by
24 telephone. (*Id.* at 5938.) Cohen testified that her reaction to his questions about
25 Petitioner’s childhood “ranged anywhere from just flat out refusing to talk about it
26 to sometimes just covering her ears and looking down at the table hysterically and
27 shouting, ‘Leave me alone. I don’t want to talk about that. I am not going to talk
28 about that – period.’” (*Id.* at 5937-38.) Cohen added that a former police officer in

1 Nome, Guy Martin, said that he was willing to discuss Petitioner if Petitioner's
2 mother would allow it. (*Id.* at 5940-41.) Cohen said that Martin was instructed by
3 Petitioner's mother not to discuss Petitioner, and he then did not do so. (*Id.* at
4 5941.)

5 Counsel's final question in the penalty phase presentation concerned the lack
6 of testimony from Petitioner's "unwilling mother[]." (*Id.* at 5942.) After the
7 prosecutor on cross-examination asked Cohen whether he was aware of a process
8 to subpoena witnesses from other states to testify, trial counsel asked, "In the
9 nature of our business do we normally subpoena unwilling mothers to come to
10 testify in court?" (*Id.* at 5942.) Cohen replied that he never had. (*Id.*)

11 Counsel presented evidence that Petitioner's mother is half Eskimo and
12 Petitioner was raised in Nome, Alaska. (49 RT 5739, 5747.) Counsel asked a
13 board member of a rape crisis counseling and educational outreach program in
14 Anchorage, who had worked in smaller towns in Alaska, about "any apparent
15 attitude that [she] came to observe or know about concerning the Eskimos in
16 disclosure of abuse in the home." (51 RT 5922-23, 5927-28.) She responded that
17 "it was very difficult for native communities for children and people who had
18 experienced sexual abuse or any kind of abuse to really talk about it or really get it
19 out." (*Id.* at 5927.) She testified that the native communities were "very private."
20 (*Id.*) Counsel presented further testimony from the Director of Education for a
21 social services organization for the Bering Strait region, including Nome, that there
22 was a need to "build[] up [the native population's] heritage, their feeling of worth."
23 (*Id.* at 5814-15.) A close friend and coworker of Petitioner, who worked in the
24 telecommunications department of the University of Alaska, also discussed the
25 "transition in native people, people as Western civilization. There is nowhere more
26 appropriate than in Alaska, and there's been a lot of turmoil within native people in
27 Alaska within the last twenty years, monumental changes" (50 RT 5867.)
28

1 Counsel presented evidence that Nome is a town just below the Arctic Circle
2 of about 4,000 people, and about 2,000 in the 1950s or 1960s, which can only be
3 reached by plane and where winter lasts nine months, daylight is as short as a few
4 hours a day, and days are typically gray. (49 RT 5722, 5740-41, 5780.) The
5 nearest village is about 90 miles away. (*Id.* at 5747.) Nome has a high suicide rate
6 and an “extreme amount” of alcohol abuse, including among the Eskimo,
7 according to the testimony. (*Id.* at 5753; *see also id.* at 5783; 50 RT 5832.)

8 Petitioner’s brother, Jerry, testified that their parents were alcoholics. (49
9 RT 5755.) They would come home late at night after drinking and there would be
10 “extreme arguing” and at times “hitting.” (*Id.* at 5756-57.) Their mother would
11 “get carried away” administering discipline. (*Id.* at 5755.) As a child, Petitioner
12 would run away for several days at a time, staying in a tool box and a wheel well
13 of a plane, and eating bread a friend would bring him. (*Id.* at 5754-55.) He once
14 ran away to Anchorage by plane. (*Id.* at 5755.) On one occasion, when Petitioner
15 was seven or eight, he was home alone with his brother, who was four years older,
16 and their mother came home around 2:00 a.m. (*Id.* at 5752, 5757.) She left again,
17 and when she did, Petitioner ran after her car and “hung on to the bumper and tried
18 to stop the car for quite a ways,” being dragged over a gravel road. (*Id.* at 5757-
19 59.) Petitioner’s father chained him by the ankle to a bed at least once, when he
20 was eight or nine years old. (*Id.* at 5759.)

21 Jerry testified that he “somewhat” grew up together with Petitioner, because,
22 as counsel phrased it, Petitioner “was gone a lot.” (*Id.* at 5752.) At age eight or
23 nine, Petitioner’s parents sent him to the Jessie Lee Home, which was far from
24 Nome. (*Id.* at 5764.) Although Jerry gave a more favorable description on cross-
25 examination, Polly described the Jessie Lee Home as “a jail or something for
26 children.” (*Id.* at 5777.) A classmate of Dean’s also remembered him running
27 away. (*Id.* at 5781.)
28

1 Polly said that there was “very much drinking” by their parents and that
2 when they came home after drinking, the children “wanted to get as far away from
3 them as you could,” and they would often throw furniture at each other and throw
4 each other. (*Id.* at 5769-71.)

5 Bertha Adsuna, a Nome resident who knew the Carters, testified that
6 Petitioner’s mother treated him quite differently from his brother, and he was
7 “more like an orphan . . . when they were small” based on the way Petitioner was
8 dressed. (49 RT 5746.) She testified that “it’s no good to grow up like that” and
9 that Petitioner’s mother did not ever want to talk about Petitioner. (*Id.* at 5745-46.)
10 Petitioner’s counsel spoke to her several times before her testimony. (*Id.* at 5745-
11 46.)

12 Counsel’s closing argument referenced Petitioner’s mother’s unwillingness
13 to discuss Petitioner. He argued:

14 Casey goes to Alaska three times and he comes up short.
15 We could have subpoena [sic] her under the Interstate
16 Compact Act. We could have even arrested her and have
17 her brought down and have her brought out from the
18 back, this reluctant mother who doesn’t want to talk to
19 us. [¶] How dare she. Talk about reality. Is that what
20 we do? Dean was never a topic we talked about. To this
21 day he is not talked about, according to Polly. [¶] Tell
22 me I could have subpoenaed her. . . .

23 So, what is the secret? What happened, if anything, in
24 Nome? I don’t know. Do you think I wouldn’t like to
25 know? Do you think I would not like to produce it? Guy
26 Martin said he’d be happy to talk to us. All Esther has to
27 do in Nome where they don’t talk about each other
28 because, of course, they need each other in that
environment. [¶] What kind of world would that be if
you were talking about your neighbor when you were
going to spend nine months in the ice or snow? Guy
Martin would talk to us if Esther would say it was okay.
And Casey saw her. Went to see if she would let him

1 talk, and the answer was no. . . . Even the lack of
2 information surely is something that causes you pause in
3 deciding what the punishment will be to this man.

4 (52 RT 6105-07.)

5 **2. Other Mitigating Evidence**

6 Counsel presented additional mitigating evidence regarding Petitioner's
7 substance abuse. Petitioner's friend testified that Petitioner was starting to use
8 drugs on a regular basis in Anchorage. (50 RT 5838, 5841.) Petitioner was using
9 marijuana, which was legal in Alaska, she stated, and cocaine. (*Id.* at 5841.) A
10 second friend in Anchorage testified that Petitioner's cocaine use appeared to have
11 taken a toll on him. (*Id.* at 5847-48.) A third, close friend and coworker testified
12 about his alcohol and drug use with Petitioner and explained that Petitioner "was
13 clearly out of control, and he was much further along in his progression into
14 cocaine addiction than I was at that point." (*Id.* at 5869.) An ex-girlfriend of
15 Petitioner's further testified about Petitioner's cocaine use. (*Id.* at 5859-63.)

16 A friend for whom Petitioner had acted as "best man" at his wedding
17 explained that Petitioner behaved unusually in August 1983. (*Id.* at 5898.)
18 Petitioner had unusual "flashes of anger, frustration" at him, and Petitioner was
19 arrested for drunk driving on his way to the wedding. (*Id.* at 5898-99.) Petitioner
20 stayed with him periodically in February and March 1984, and he had the "sense
21 that [Petitioner] was floating" (*Id.* at 5900-01.) When he learned that
22 Petitioner was accused of rape, he phoned Petitioner and Petitioner sounded "very
23 depressed . . . in extremely low level," and he tried to call a suicide prevention line
24 out of concern about Petitioner. (*Id.* at 5902-03.) Later that day, Petitioner called
25 his friend and said that he "wanted to go back up to Anchorage and . . . he could
26 perhaps go to the Alaska Psychiatric Institute." (*Id.* at 5903-04.)

27 Another close friend testified that in February and March of 1984, he
28 received phone calls from Petitioner in which Petitioner sounded "spacey" and was

1 “difficult to understand. He sounded very concerned or afraid or paranoid like
2 something was really troubling him. . . . There was a problem of some sort and . . .
3 from the sound of his voice . . . he was in quite a bit of fear. Very uncomfortable
4 but incoherent.” (*Id.* at 5873-74.)

5 Counsel also presented evidence that victim Steward reported that Petitioner
6 was periodically “crazy,” needed to be “br[ought] back to reality,” and had a
7 “glazed over . . . [and] mad look on his face.” (49 RT 5720-22.) Petitioner was
8 crying and “began apologizing to her and saying how terrible he felt and how sorry
9 he was for what had happened,” and Petitioner said that “he realized that he needed
10 psychiatric help and he knew of a place that he could go to in Anchorage.” (*Id.* at
11 5720-22.)

12 Finally, counsel presented testimony that Petitioner had no disciplinary
13 record in Los Angeles County jail. (50 RT 5844.)

14 **B. Analysis**

15 As noted above, when considering a claim of ineffective assistance of
16 counsel, the Court must “evaluate the conduct from counsel’s perspective at the
17 time” and must consider “whether there is any reasonable argument that counsel
18 satisfied *Strickland*’s deferential standard.” *Richter*, 131 S. Ct. at 788, 789
19 (internal quotation omitted). The Court “may not indulge *post hoc* rationalization
20 for counsel’s decisionmaking that contradicts the available evidence of counsel’s
21 actions.” *Id.* at 790 (internal quotation omitted).

22 The record reflects that trial counsel intended to focus on the absence of
23 Petitioner’s mother from the penalty phase proceedings. As set forth above,
24 counsel presented that evidence, along with other mitigating evidence of the
25 circumstances of the crimes. Counsel’s declaration made in retrospect that his
26 inability to “build rapport or develop the confidence of [Petitioner] . . . and other
27 failures and omissions on [his] part contributed to [his] inability [to] present a
28 compelling case in mitigation” is not dispositive. (Pet. Ex. 64 at 3; *see also* 51 RT

1 5940 (testimony of Petitioner’s mitigation investigator that he talked to
2 approximately forty people in his investigation)); *Richter*, 131 S. Ct. at 790 (“After
3 an adverse verdict at trial even the most experienced counsel may find it difficult to
4 resist asking whether a different strategy might have been better, and, in the course
5 of that reflection, to magnify their own responsibility for an unfavorable outcome.
6 *Strickland*, however, calls for an inquiry into the objective reasonableness of
7 counsel’s performance, not counsel’s subjective state of mind”). In addition, the
8 California Supreme Court may have reasonably concluded that expert testimony
9 was not necessary to understand the implications of the evidence counsel
10 presented. *See Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009) (holding that “the
11 body of mitigating evidence,” including a “difficult childhood” and alcoholism in
12 the family, “was neither complex nor technical. It required only that the jury make
13 logical connections of the kind a layperson is well equipped to make. The jury
14 simply did not need expert testimony to understand the ‘humanizing’ evidence; it
15 could use its common sense or own sense of mercy”).

16 Petitioner mischaracterizes counsel’s remarks at the time of trial regarding
17 his “utter and complete sense of failure,” when he alleges that counsel was at a loss
18 for how to “mitigate the crimes.” (Pet. at 86 (quoting 52 RT 6103).) Counsel’s
19 statement referred only to not comprehending Petitioner’s motivation for the
20 crimes, not to presenting evidence in mitigation. In context, counsel’s argument to
21 the jury stated:

22 The man was arrested in Arizona. ‘I think she’s got it
23 here,’ he says about the registration.

24 Desire to be caught? I don’t know. A desire to punish
25 others far away? I don’t know. I don’t know why, ladies
26 and gentlemen. I do not know why. And I have an utter
27 and complete sense of failure in that regard. Is there any
28 doubt, however, that this man leaves Alaska December
’83, a mere three months before the start of the two
weeks of horror, a different man when he leaves?

1 (52 RT 6103.) Similarly, Petitioner’s allegation that counsel “never even asked the
2 jury to impose a sentence of life imprisonment” is belied by the record. (Pet. at 87-
3 88.) Counsel told the jury, “Now here I stand before you and you know that I want
4 so badly for the judgment to life [sic] and not death, and you know it.” (52 RT
5 6094.)

6 Petitioner further alleges that “[t]rial counsel knew about Esther’s pervasive
7 alcoholism . . . [and] knew Dean suffered head injuries as a child and, from his
8 school records, could see on-going problems with learning and attention. Yet,
9 nothing in this regard was presented to the jury.” (Pet. at 95.) The California
10 Supreme Court may have reasonably found no deficient performance or prejudice
11 because the evidence would not have been well received in light of the facts
12 showing Petitioner’s rationality in carrying out and departing from the crimes. As
13 counsel recognized in his closing statement, “there were some things I suppose that
14 are rational, drive the car down, et cetera. I am not saying to you or trying to
15 suggest that the man was stoned out, that he was out of control every minute. I am
16 not suggesting that at all.” (52 RT 6103.)

17 //

18 Petitioner acknowledges that “[i]n general, juries tend to perceive mental
19 health evidence as a vehicle for defense counsel to ‘excuse’ the actions of the
20 defendant” (Pet. at 114), but argues that the jury would have been more
21 sympathetic to evidence of Fetal Alcohol Spectrum Disorder because it is seen as
22 “objective, something concrete, and something that is not the defendant’s fault.”
23 (*Id.* at 114-15.) Petitioner claims prejudice based upon counsel’s failure to show,
24 *inter alia*, that ““the research suggests that for Dean Phillip Carter’s brutal
25 aggression to have been prevented, he needed appropriate identification and
26 intervention in childhood.”” (*Id.* at 115 (quoting Pet. Ex. 77).) The California
27 Supreme Court may have reasonably concluded, however, that the jury would have
28 reacted unfavorably to the suggestion that once Petitioner had left childhood, his

1 brutal aggression was essentially inevitable. (*Cf. supra* pp. 37-39 (discussing the
2 limitations of Petitioner’s mental health expert opinions).)

3 Finally, the California Supreme Court may have fairmindedly concluded that
4 the additional evidence Petitioner faults counsel for failing to present, namely, his
5 physical abuse by his parents (Pet. at 88-89, 92-95); his disappearances as a child
6 and the knowledge among the community that his parents “locked up” their
7 children (*id.* at 89, 92-94, 96-97); the unsuccessful efforts to stop his abuse as a
8 result of James Carter’s power, the cultural norms against discussing or interfering
9 in private matters, and discrimination against Native Alaskans (*id.* at 96-98, 101-
10 02); his time spent in institutional settings (*id.* at 98-99); and the cultural
11 challenges in Nome and of Native Alaskans (*id.* at 99-100), “largely duplicated”
12 the evidence that was presented and does not “show a ‘substantial’ likelihood of a
13 different sentence.” *Pinholster*, 131 S. Ct. at 1409, 1410; *see also id.* at 1403 (“A
14 reasonable probability is a probability sufficient to undermine confidence in the
15 outcome. That requires a “substantial,” not just “conceivable,” likelihood of a
16 different result” (internal quotation omitted)); *Dyer v. Calderon*, 122 F.3d 720, 732
17 (9th Cir. 1997) (discussing “the wholly unremarkable fact that with the luxury of
18 time and the opportunity to focus resources on specific parts of a made record,
19 post-conviction counsel will inevitably identify shortcomings in the performance
20 of prior counsel” (quoting *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir.
21 1995))), *vacated on other grounds on reh’g en banc*, 151 F.3d 970 (9th Cir. 1998).

22 Claim 6 is, therefore, DENIED.

23 **VIII. Claim 7: Right to Competent Psychiatric Assistance**

24 In Claim 7, Petitioner alleges that he was “deprived of his right to the
25 competent assistance of a psychiatric expert,” citing *Ake v. Oklahoma*, 470 U.S. 68,
26 80 (1985). (Pet. at 121.) Petitioner contends that “[t]he court-appointed experts
27 retained before or during Mr. Carter’s trial provided incomplete evaluations of Mr.
28 Carter because they lacked the necessary foundation to reach reliable conclusions,”

1 namely, a complete psychosocial history, documents and directed family-member
2 interviews reflecting Carter's life history, and a thorough neuropsychological
3 evaluation with appropriate screening. (*Id.* at 123-24.) Petitioner asserts that
4 without that investigation and examination, "which provides the basis for
5 competent psychiatric and other mental health evaluations, Mr. Carter was
6 deprived of constitutionally sufficient mental health evaluations prior to and during
7 his trial." (*Id.* at 124.)

8 In *Ake*, the Supreme Court held that "when a defendant has made a
9 preliminary showing that his sanity at the time of the offense is likely to be a
10 significant factor at trial, the Constitution requires that a State provide access to a
11 psychiatrist's assistance on this issue if the defendant cannot otherwise afford
12 one." 470 U.S. at 74. The Court reached "a similar conclusion in the context of a
13 capital sentencing proceeding, when the State presents psychiatric evidence of the
14 defendant's future dangerousness." *Id.* at 83. "[T]he State must, at a minimum,
15 assure the defendant access to a competent psychiatrist who will conduct an
16 //
17 appropriate examination and assist in evaluation, preparation, and presentation of
18 the defense." *Id.*

19 To establish a constitutional violation, Petitioner must, therefore,
20 demonstrate that the state denied him access to a competent psychiatrist and
21 appropriate examination and assistance. *Harris v. Vasquez*, 949 F.2d 1497, 1516
22 (9th Cir. 1991). In *Harris*, the Ninth Circuit found no constitutional violation
23 "because the state did in fact provide Harris with psychiatric assistance. The state
24 provided Harris with access to any competent psychiatrist of his choice when it
25 gave Harris the funds to hire two psychiatrists from the general psychiatric
26 community. The state did not limit Harris's access to psychiatric assistance in any
27 way." *Id.* (emphasis in original).

1 Here, Petitioner acknowledges that the state provided him with court-
 2 appointed mental health professionals. (See Pet. at 123-25.) The California
 3 Supreme Court may have reasonably concluded, as the Ninth Circuit did in *Harris*,
 4 that Petitioner suffered no constitutional violation pursuant to *Ake* because the state
 5 provided Petitioner with access to competent psychiatric assistance. Accordingly,
 6 Claim 7 is DENIED.

7 **IX. Claim 8: Racially Discriminatory Jury Selection**

8 In Claim 8, Petitioner alleges that the prosecutor used peremptory challenges
 9 to remove “two African-American prospective jurors, the only Asian prospective
 10 juror, and a mixed-race juror . . . not guided by race-neutral criteria.” (Pet. at 128
 11 (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986); *Miller-El v. Dretke*, 545 U.S.
 12 231 (2005)).) He adds:

13 At the time of Mr. Carter’s trial, less than 50% of the
 14 residents of Los Angeles County were White. At the
 15 time of Mr. Carter’s trial, the jury venires from which
 16 petit juries were selected systematically over-represented
 17 White persons and under-represented persons of other
 18 races and ethnicities. Persons of White Anglo-Saxon
 19 ancestry were over-represented among the pool of
 20 prospective jurors in the jury venire called for Mr.
 21 Carter’s case; persons of other races and ethnicities,
 22 including but not limited to African-Americans and
 23 Latinos, were under-represented in the jury venire.

24 *Id.*

25 Petitioner acknowledges in a footnote that trial counsel failed to object to the
 26 prosecutor’s peremptory challenges at trial, but argues that the lack of objection “is
 27 not fatal to Carter’s *Batson* claim.” (Petr.’s Br. at 165 n.102.) Petitioner relies
 28 upon *United States v. Contreras-Contreras*, 83 F.3d 1103, 1105-06 (9th Cir. 1996),
 in which “the Ninth Circuit reviewed for plain error” the defendant’s *Batson* claim,
 and upon cases from other circuits also reviewing for plain error. (Petr.’s Br. at
 165 n.102.) The Ninth Circuit made clear in *Haney v. Adams*, however, that “a

1 petitioner may not raise a *Batson* claim in his habeas petition if the petitioner failed
2 to object to the prosecution's use of peremptory challenges at trial." 641 F.3d
3 1168, 1169 (9th Cir. 2011). Addressing its decision in *Contreras-Contreras*, the
4 court stated:

5 We have previously held that an objection 'must be made
6 as soon as possible, and preferably before the jury is
7 sworn' in federal criminal cases, but on direct appeal we
8 may review the claim for plain error. *Contreras-*
9 *Contreras*, 83 F.3d at 1104; *see also* Fed. R. Crim. P.
10 52(b). However, although Federal Rule of Criminal
11 Procedure 52(b) plain error review applies to federal
12 criminal cases, it does not apply to either the state
13 proceedings or habeas petitions. Accordingly, we have
14 implied that an objection must be made in order to
15 preserve a *Batson* claim in a habeas case. *See Boyd v.*
16 *Newland*, 467 F.3d 1139, 1142 n.2 (9th Cir. 2006).

17 *Haney*, 641 F.3d at 1171 n.5 (internal citations edited). The court explained that

18 [t]he Supreme Court has never allowed a *Batson*
19 challenge to be raised on appeal or on collateral attack, if
20 no objection was made during jury selection. Indeed, . . .
21 *Batson* itself presupposes a timely objection. *Ford v.*
22 *Georgia*, 498 U.S. 411, 423 (1991) held that states may
23 adopt rules for determining whether a *Batson* objection is
24 timely, but did not address whether failure to timely
25 object barred a habeas claim. Therefore, the state court's
26 habeas decision was not 'contrary to' clearly established
27 federal law. Furthermore, we join other circuits which
28 have considered this issue in holding that an objection at
trial is a prerequisite to a *Batson* challenge for purposes
of habeas review.

Haney, 641 F.3d at 1171 (collecting cases) (internal citation edited).

As to Petitioner's conclusory claim that whites were over-represented among
the pool of prospective jurors in his jury venire and that persons of other races and
ethnicities were under-represented, Petitioner raises no specific factual allegations

1 in support. (See Petr.'s Br. at 164 n.101.) "Conclusory allegations which are not
 2 supported by a statement of specific facts do not warrant habeas relief." *James*, 24
 3 F.3d at 26; *see also Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 204-05.

4 Claim 8 is, therefore, DENIED.

5 **X. Claim 9: Jury Questions**

6 **A. Allegations and Decision on Direct Appeal**

7 In Claim 9, Petitioner alleges that his constitutional rights were violated
 8 because "the record of a critical proceeding was not preserved, the trial court failed
 9 to adequately respond to questions from the jury, Mr. Carter was impermissibly
 10 absent from the proceedings, and the nature of the questions revealed that the jury
 11 was confused by the instructions and improperly applied the law." (Pet. at 130.)
 12 The California Supreme Court addressed this claim on direct appeal:

13 [D]efendant contends that on the second day of the jury's
 14 penalty deliberations, the trial court failed to respond
 15 adequately to two questions submitted by the jury that
 16 sought guidance as to the meaning of the terms
 17 'extenuating,' 'mitigating,' and 'aggravating'
 18 circumstances, and that the failure of the trial court to
 19 make an adequate record of its response deprived
 20 defendant of his right to due process of law by denying
 21 him meaningful appellate review of the proceedings. The
 22 jury's questions, submitted in a pair of notes signed by
 23 the jury foreman, inquired: [1] 'We would like the legal
 24 definition of: extenuating[,], mitigating[, and]
 25 aggravating [sic]. [2] If a member of the jury finds that
 26 the aggravating circumstances [are] greater than the
 27 mitigating circumstances, may the juror vote for life? If
 28 a member of the jury finds that the mitigating
 circumstances [are] greater than the aggravating
 circumstances, may the juror vote for death?'

With regard to the jury's request for definitions, the
 record is silent as to how, if at all, the trial court
 responded. [¶] The matter was discussed several years

1 later when the parties attempted to settle the record, prior
2 to filing their briefs in this court. Defense counsel
3 observed at the record settlement hearing that although
4 the Clerk's Transcript contains the questions submitted
5 by the jury, there is no corresponding Reporter's
6 Transcript indicating whether the trial court discussed the
7 questions with counsel. The Reporter's Transcript for the
8 date in question, August 2, 1989, indicates only that 'the
9 jury retired for further deliberations.' . . . Even if we
10 infer from the record that the trial court, either
11 intentionally or inadvertently, ignored the jury's request
12 for definitions of the terms 'extenuating,'
13 'mitigating,' and 'aggravating' circumstances, and did
14 not discuss the matter with counsel, any error was
15 harmless, because those terms did not require further
16 definition.

17 As to the second note from the jury, the trial court
18 answered 'yes' and 'no,' respectively. The jury
19 thereafter continued its deliberations and, without
20 submitting any further inquiries to the court, reached its
21 verdict five days later. Although the better practice
22 would have been for the court (or the parties) to ensure
23 that the proceedings responsive to the jury's questions
24 were reported, on the record before us we are unable to
25 discern any error in the trial court's handling of the jury's
26 inquiries. [¶] Defendant contends that the inadequate
27 record violates a panoply of defendant's rights under the
28 state and federal Constitutions. In the
absence of any showing by defendant that any matter not
reported was of consequence and prejudicial, defendant's
claim lacks merit.

Finally, defendant contends that because he was
personally absent from court when the jury submitted the
foregoing inquiries (although his counsel was present),
reversal of the death judgment is mandated. . . . [H]is
failure to demonstrate prejudice from his absence at this
stage of the proceedings forecloses his claim.

1 *Carter*, 36 Cal. 4th at 1202-03 (footnote and citations omitted).

2 **B. Analysis**

3 **1. Response to Jury Questions**

4 “[T]he factual findings arising out of the state courts’ post-trial hearings are
5 entitled to a presumption of correctness. The substance of the [judge’s]
6 communications [to the jury] and their effect on juror impartiality are questions of
7 historical fact entitled to this presumption.” *Rushen v. Spain*, 464 U.S. 114, 120
8 (1983); *see also Simmons v. Blodgett*, 110 F.3d 39, 41-42 (9th Cir. 1997) (“Finding
9 facts to determine if there is a constitutional error is a wholly different thing from
10 deciding whether or not an error, once found, affected the verdict. Well-settled
11 principles guide the fact-finding process, including the rule that when . . . the
12 relevant evidence leaves the trier of fact in equipoise, the party with the burden of
13 proof loses” (internal quotation omitted)). The California Supreme Court
14 ultimately concluded that on the record before it, it found no error in the trial
15 court’s handling of the jury’s questions. While Petitioner disagrees with the
16 conclusions reached after the record settlement hearing (*see Petr.’s Br.* at 181), he
17 fails to show that those proceedings were not full and fair, or that the court’s
18 findings are unreasonable. Additionally, the inadequacy of the contemporaneous
19 record does not, in itself, entitle Petitioner to habeas relief. *See United States v.*
20 *Gagnon*, 470 U.S. 522, 526 (1985) (“The defense has no constitutional right to be
21 present at every interaction between a judge and a juror, nor is there a
22 constitutional right to have a court reporter transcribe every such communication”);
23 *Spain*, 464 U.S. at 118-19 (“[T]he District Court held that automatic reversal was
24 necessary because the absence of a contemporaneous record made intelligent
25 application of the harmless error standard impossible. . . . [The] conclusion that an
26 unrecorded *ex parte* communication between trial judge and juror can never be
27 harmless error ignores the[] day-to-day realities of courtroom life and undermines
28 society’s interest in the administration of criminal justice”); *United States v.*

1 *Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (finding harmless error
 2 where “the court, for reasons not explained in the record, did not respond to the
 3 [juror] note . . . [and] [i]t is unclear at what point the parties learned of [it]”).

4 The California Supreme Court’s holding that any error the trial court
 5 committed was harmless, moreover, is not contrary to or an unreasonable
 6 application of federal law. *Cf. Beardslee v. Woodford*, 358 F.3d 560, 575 (9th Cir.
 7 2003) (holding that “in the usual case, harmless error analysis is appropriate in
 8 considering a claim that the trial court failed to clarify instructions,” and
 9 distinguishing cases where “the jury expressed actual confusion about the law”);
 10 *Barragan-Devis*, 133 F.3d at 1289 (holding, where defense counsel was not
 11 consulted and judge did not respond to jury’s question, that the error was harmless
 12 “beyond a reasonable doubt that the error did not contribute to the verdict
 13 obtained” (internal quotation omitted)). The California Supreme Court may have
 14 reasonably found no constitutional violation in the lack of further definition of
 15 “extenuating,” “mitigating,” and “aggravating.” In *Tuilaepa v. California*, for
 16 example, the United States Supreme Court rejected California habeas petitioners’
 17 arguments that:

18 the capital jury may not be instructed simply to consider
 19 an open-ended subject matter, such as ‘the circumstances
 20 of the crime’ or ‘the background of the defendant.’ Apart
 21 from the fact that petitioners’ argument ignores the
 22 obvious utility of these open-ended factors as part of a
 23 neutral sentencing process, it contravenes our precedents.
 24 . . . In *Zant*, we found no constitutional difficulty where
 25 the jury had been told to consider ‘all facts and
 26 circumstances presented in extenuation, mitigation, and
 27 aggravation of punishment as well as such arguments as
 28 have been presented for the State and for the Defense.’ . . .
 . And in *Gregg*, we rejected a vagueness challenge to
 that same Georgia sentencing scheme in a case in which
 the ‘judge . . . charged the jury that in determining what
 sentence was appropriate the jury was free to consider the

1 facts and circumstances, if any, presented by the parties
2 in mitigation or aggravation.'

3 *Tuilaepa*, 512 U.S. 967, 978 (1994) (considering 1978 California death penalty
4 statute) (internal quotations omitted). In *Ayers v. Belmontes*, the Supreme Court
5 observed that "California's overall balancing process" provided by the 1978 death
6 penalty statute "requires juries to consider and balance . . . factors . . . that are
7 labeled neither as mitigating nor as aggravating. . . . [T]he jury itself must
8 determine the side of the balance on which each listed factor falls." 549 U.S. 7, 23
9 (2006); *see also Harris v. Pulley*, 465 U.S. 37, 51, 52 n.14 (1984) ("Assuming that
10 there could be a capital sentencing system so lacking in other checks on
11 arbitrariness that it would not pass constitutional muster without comparative
12 proportionality review, the 1977 California statute is not of that sort,"
13 notwithstanding the fact that "[t]he statute does not separate aggravating and
14 mitigating circumstances"); *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir.
15 1995) (holding that the 1977 statute's "failure to label aggravating and mitigating
16 factors is constitutional"). Finally, in *Babbitt v. Calderon*, the Ninth Circuit
17 rejected a California habeas petitioner's argument that the trial court's instruction
18 of the jury on the current California death penalty statute "was erroneous because
19 the jury was not specifically told which factors it could consider as extenuating and
20 was not informed of the definition of the term 'extenuates.'" 151 F.3d 1170, 1178
21 (9th Cir. 1998).

22 The California Supreme Court's determination that no further definition of
23 "extenuating," "mitigating," and "aggravating" was constitutionally required is not,
24 therefore, contrary to or an unreasonable application of clearly established federal
25 law. Likewise, the California Supreme Court's conclusion that the jury's questions
26 did not reveal impermissible confusion over the relevant legal principles or
27 misapplication of the law is not objectively unreasonable. *See Tuilaepa*, 512 U.S.
28 at 977 (rejecting petitioner's challenge to the "equivocal" nature of the jury's

1 consideration of the defendant's age at the time of the crime and holding, "It is
 2 neither surprising nor remarkable that the relevance of the defendant's age can
 3 pose a dilemma for the sentencer. But difficulty in application is not equivalent to
 4 vagueness"); *Barragan-Devis*, 133 F.3d at 1290 (holding that juror's question
 5 during deliberation did not "reveal any legal disorientation[;] . . . it simply reveals
 6 some difficulty in assessing the probative value of the evidence. It is not the role
 7 of a judge to help a juror sort out her own deliberative thinking").

8 **2. Presence of Defense Counsel**

9 The California Supreme Court's factual finding that defense counsel was
 10 present when the trial court responded to the jury's second question is not
 11 objectively unreasonable. The record reflects the presence of defense counsel on
 12 August 3, 1989, when "in open court without the defendant being present, the
 13 judge answer[ed] the jury's question" (6 CT 1776.) As Petitioner concedes,
 14 "[t]he Court minutes from the August 3, 1989 proceeding contains [sic] the
 15 statement, 'Parties and counsel checked if present.' Next to Carter's counsel's
 16 names are two check marks, one for Howard Gillingham, the other for Marsha
 17 Morrissey." (Petr.'s Br. at 183 (quoting 6 CT 1776).) Petitioner's argument that
 18 "those marking[s] are neither determinative nor dispositive because it is unclear
 19 exactly when those marks were placed on the court minutes . . . [and] it is highly
 20 unlikely that Carter's counsel were present . . . when the jury resumed deliberating
 21 and when they took breaks" (*id.*) fails to show the California Supreme Court's
 22 factual determination to be objectively unreasonable. *Cf. Spain*, 464 U.S. at 456
 23 (holding that even "[t]he absence of a contemporaneous record will rarely deprive
 24 the [state court's] finding of . . . fair support in the record" (internal quotation and
 25 alterations omitted)). The contemporaneous record supports the state court's
 26 factual finding.

27 Finally, the California Supreme Court's conclusion that counsel's presence,
 28 and Petitioner's personal absence, was constitutionally adequate is not contrary to

1 or an unreasonable application of clearly established federal law as determined by
 2 the Supreme Court. A defendant:

3 has a due process right to be present in his own person
 4 whenever his presence has a relation, reasonably
 5 substantial, to the fulness of his opportunity to defend
 6 against the charge Thus, a defendant is guaranteed
 7 the right to be present at any stage of the criminal
 8 proceeding that is critical to its outcome if his presence
 9 would contribute to the fairness of the procedure.

10 *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (holding that exclusion from witness
 11 competency hearing, at which defense counsel was present, did not violate
 12 defendant's due process rights). The Supreme Court has not "previously stated
 13 whether the delivery of a supplemental jury instruction constitutes a critical stage
 14 [of trial] requiring the defendant's presence." *United States v. Rosales-Rodriguez*,
 15 289 F.3d 1106, 1110 (9th Cir. 2002). While the Ninth Circuit held in *Rosales-*
 16 *Rodriguez* that the delivery of a supplemental jury instruction was a critical stage
 17 of trial, it concluded that "the defendant's presence (*or that of his counsel*) is
 18 constitutionally required" *Id.* (emphasis added). Petitioner has not, therefore,
 19 shown the California Supreme Court's treatment of his claim to be contrary to or
 20 an unreasonable application of clearly established federal law.

21 Accordingly, Claim 9 is DENIED.

22 **XI. Claim 10: Prosecutorial Misconduct in Closing Argument**

23 **A. Decision on Direct Appeal**

24 In Claim 10, Petitioner challenges alleged prosecutorial misconduct in
 25 closing argument. (Pet. at 135-41.) The California Supreme Court considered this
 26 claim on direct appeal:

27 Defendant contends certain comments made by the
 28 prosecutor on eight distinct occasions during closing
 argument constituted prejudicial misconduct in violation
 of his [constitutional] rights. . . . With regard to seven of

1 the eight instances of alleged prosecutorial misconduct,
 2 defense counsel did not object when the comments were
 3 made. . . .

4 [In] [t]he instance in which an objection to the purported
 5 misconduct was interposed . . . the trial court sustained
 6 his objection Whatever potential for harm arose
 7 from the prosecutor's remark was assuaged by the court's
 8 ruling

9 In addition, the prosecutor's other comments – [to] which
 10 defendant . . . fail[ed] to object below – came within the
 11 bounds of fair comment or at most constituted trivial
 12 improprieties. Under these circumstances, and in view of
 13 the nature of defendant's crimes, we conclude that any
 14 possible error was harmless, because defendant has failed
 15 to establish a reasonable likelihood the jury understood
 16 or applied the complained-of statements in an improper
 17 or erroneous manner.

18 *Carter*, 36 Cal. 4th at 1203-05. The “eight distinct occasions” at issue occurred
 19 over the course of the prosecution's guilt phase and penalty phase closing
 20 arguments. *Id.* at 1203; (*see also* Pet. at 137-40.)²

21 **B. Analysis**

22 **1. First Degree Murder by Strangulation**

23 Petitioner challenges comments by the prosecutor that:

24 [y]ou will, after all, receive instructions on nothing but
 25 first degree murder, because that's what this case is, and
 26 there is nothing less for you to consider. . . . [B]y the
 27 very definition of the – of the term, every strangulation
 28 murder must be a first degree murder in the absence of
 some other evidence, and here there is none.

29 ² Petitioner includes in Claim 10 an allegation that “[t]he prosecutor improperly and prejudicially
 30 failed and refused to stipulate to matters beyond dispute for the improper purpose of inflaming the
 31 passions of the jury by exposing them to gruesome photographs and testimony.” (Pet. at 138.) As
 32 the Court holds below (*see infra* pp. 107-10), no evidence was admitted that was “so
 inflammatory as to prevent a fair trial.” *Duncan v. Henry*, 513 U.S. 364, 366 (1995).

1 (Pet. at 137-38, 138 n.22.) The California Supreme Court may have reasonably
2 determined that in context, the prosecutor's remarks argued that the facts of the
3 case demonstrated the required deliberation and premeditation for first degree
4 murder. The prosecutor argued:

5 [T]o put your hands around someone's throat, face-to-
6 face or behind him, and to squeeze and squeeze and
7 squeeze for a minimum of a minute . . . as long as
8 perhaps . . . four minutes [T]hink of . . . the force
9 required – the concentrated effort required to do that. . . .
Does that tell you something about this defendant? . . .

10 [Defendant] strangle[d] someone and then thr[e]w that a
11 person into a closet and thr[e]w the second one into a
12 closet, also dead, on top, and then put[] a picture in front
13 of it – in front of the closet door to delay any kind of
14 discovery What the pictures show you more clearly
15 than any words I say, . . . is the kind of attitude . . . it took
16 to do things like this. . . . [I]t describes as clearly as
anything can possibly describe the horror of this case and
why such crimes are clearly first degree murder.

17 You will, after all, receive instructions on nothing but
18 first degree murder, because that's what this case is, and
19 there is nothing less for you to consider.

20 We have asked and will continue to ask that you find the
21 defendant guilty of these crimes onto equal [sic] strong
22 theories. 'Theories' is a legal term. It just talks about the
path by which you reach a result.

23 I have talked to you for awhile now about willful and
24 deliberate premeditated murder, strangulation murders of
25 these women. And I've tried to indicate to you why it is
26 that, by the very definition of the – of the term, every
27 strangulation murder must be a first degree murder in the
28 absence of some other evidence, and here there is none.
[¶] There is no insanity issue or any other similar or
related issue.

1 (44 RT 5225-29.)

2 The California Supreme Court may have reasonably concluded that the
3 prosecutor's remarks came within the bounds of fair comment. *See United States*
4 *v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000) ("Prosecutors have considerable
5 leeway to strike 'hard blows' based on the evidence and all reasonable inferences
6 from the evidence"); *see also United States v. Tucker*, 641 F.3d 1110, 1120-22 (9th
7 Cir. 2011).

8 **2. Burden of Proof and Proof beyond a Reasonable Doubt**

9 Petitioner alleges that the prosecutor "improperly shifted the burden of proof
10 and encouraged the jury to return a verdict of guilt without finding proof beyond a
11 reasonable doubt on every element" in his guilt phase closing argument. (Pet. at
12 138 (citing 44 RT 5218).) Petitioner does not specify the precise remarks at issue.
13 To the extent Petitioner refers to the prosecutor's argument, "How do we know that
14 it was the defendant who did it? Circumstances clearly show it" (44 RT 5218), the
15 California Supreme Court may have reasonably concluded that the remark came
16 within the bounds of fair comment. To the extent Petitioner refers to the argument
17 that there was "[n]o evidence to the contrary" (*id.*), within context, the prosecutor
18 argued, "[A]s a photograph at . . . the bottom of this chart shows, there are the
19 sunglasses – rather distinctive. No evidence to the contrary – that the defendant
20 wore when he was at the gas station in Lafayette, identified by the gas station
21 attendant, Mr. Hogan, and they are in that car." (*Id.* at 5218-19.) The prosecutor
22 argued only that there was "no evidence to the contrary" that the sunglasses were
23 distinctive or that defendant was wearing them at the gas station. The California
24 Supreme Court may have reasonably concluded that the remark did not shift the
25 burden of proof or argue for a lower standard of proof, and came within the bounds
26 of fair comment.

27 **3. Identification**

28

1 Petitioner contends that in his guilt phase argument, “[t]he prosecutor
 2 misleadingly and wrongfully told the jurors they could consider only the question
 3 of identification after having introduced impermissibly suggestive identifications.”
 4 (Pet. at 138.) The prosecutor argued that the jury should consider evidence that
 5 Petitioner was identified by eyewitnesses in connection with the crimes. (44 RT
 6 5218-19 (“[H]e is seen and identified by a number of people, many of whom have
 7 a clear and ample opportunity to observe him and to remember him”); *id.* at 5229
 8 (“We are talking about a question of identity only”).)

9 As discussed below in Claim 12(G) (*see infra* pp. 101-07), the California
 10 Supreme Court reasonably determined that the identifications were not
 11 //
 12 impermissibly suggestive. The court may have reasonably concluded, therefore,
 13 that the prosecutor’s remarks were not improper.

14 **4. Kim Cause of Death**

15 Petitioner alleges that the prosecutor in his guilt phase argument “improperly
 16 asserted that he knew the manner in which Kim was killed even though the
 17 evidence at trial was inconclusive as to the cause of her death.” (Pet. at 138 (citing
 18 44 RT 5226).) In context, the prosecutor argued:

19 [T]hink of . . . the force required [to strangle a
 20 person]. . . . Does that tell you something about this
 21 defendant?

22 It is apparently a lot easier to do when one uses a cord of
 23 some kind because one does not do as much damage to
 24 the throat, but the end is certain.

25 One knows from the photographs of Miss Kim how she
 26 died. You can see the literature underneath her neck. It’s
 27 not – it’s a sad fact of body decay and composition that
 28 we cannot tell you exactly that by way of medical
 testimony. But do we really need medical testimony?

1 Is there anything that distinguishes these cases from one
 2 another? *Because of Ms. Kim's condition, the answer in*
 3 *her case is perhaps.* But when one looks at the
 4 remaining people, several things strike me at least. . . .
 5 [¶] [I]n each instance there are . . . items which tie them
 6 together, not the least of which is the manner of their
 7 disposition[, . . .] strang[ulation].

8 (44 RT 5225-28 (emphasis added).) The California Supreme Court may have
 9 reasonably concluded that the remark came within the bounds of fair comment.

10 **5. Kim Rape Allegation**

11 Petitioner alleges that the prosecutor in his guilt phase argument “improperly
 12 urged the jury to find that Kim had been raped after he assured the judge that there
 13 was no evidence that Kim had been raped.” (Pet. at 138.) Petitioner challenges the
 14 prosecutor’s remark, “When did he form the intent to steal or [to] rape? Was this
 15 in the case of [Miss] Kim . . . an afterthought? Certainly it’s possible.” (*Id.* (citing
 16 44 RT 5230).) In context, the prosecutor argued:

17 There is a second kind of felony-murder, not burglary
 18 murder, but rape murder. The rules are the same as to
 19 both in the sense that if you believe either occurred, this
 20 was – these were killings in the course of rape in the case
 21 of Miss Guthrie and in the case of Miss Mills, that is first
 22 degree murder. There is no alternative.

23 When did he form the intent to steal or to rape? Was this,
 24 in the case of Miss Kim, which is not before you as a
 25 finding that you have to make, an afterthought?
 26 Certainly it’s possible.

27 He could very well have murdered her and decided,
 28 ‘Well, I’ve done it. Let me grab things of value and
 leave.[’] That would not be a burglary, because the intent
 would have been formed inside.

(44 RT 5229-30.) The California Supreme Court may have reasonably concluded that the prosecutor intended, and the jury understood, his remarks to draw a distinction between the Kim crime and the Guthrie and Mills crimes, to emphasize the evidence of felony murder as to Guthrie and Mills. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (“[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations”). The state court may have reasonably determined that the remark came within the bounds of fair comment and that, if it did constitute misconduct, it was harmless. *See Darden v. Wainwright*, 477 U.S. 168, 179-82 (1986); *Comer v. Schriro*, 463 F.3d 934, 960-61 (9th Cir. 2006).

Related to his claims of prosecutorial misconduct in guilt phase closing argument, Petitioner alleges in Claim 5(H)(5) that “[t]o the extent that trial counsel failed to make proper objections” to that misconduct, trial counsel was ineffective. (Pet. at 76-77.) Because the remarks came within the bounds of fair comment or were harmless, Petitioner has failed to demonstrate that trial counsel was ineffective for failing to object, or that he was prejudiced by that failure. Claim 5(H)(5) is, therefore, DENIED.

6. Consideration of Kim and Cullins Evidence

Petitioner argues that in his penalty phase argument, “the prosecutor improperly urged the jury to disregard the limiting instruction applicable to evidence of the Kim and Cullins crimes and, instead, to consider this evidence not just to establish motive, intent, or identity, but as substantive evidence supporting statutory aggravating factors.” (Pet. at 139, 139 n.23 (citing 52 RT 6075, 6077, 6079).) Specifically, Petitioner challenges the following remarks:

Obviously, you have got to consider the circumstances of the crime or crimes, the trial, in other words, and everything that came out there because that gives you your basic framework, your idea of what this defendant

1 has done. . . . When you look at the photographs you will
2 have them again to consider. . . . Here is a man who has
3 wine with his victims, who wipes the glasses down, who
4 strangles them – pardon me – rapes them, strangles them,
5 throws them in a closet. . . . If you look at the bottom
6 picture – this is 34-1 [Cullins] – you see a hand and you
7 see it [is] bloody.

8 (52 RT 6077.)

9 The prosecutor’s references to wine referred only to the Culver City (Knoll
10 and Mills) and Ventura (Steward) crimes:

11 Thinking first about what happened in Culver City. . .
12 first of all, the wine glasses. Isn’t this partly the way
13 things occurred in Ventura? And the fact that the wine
14 glasses are wiped, . . . [i]t tells you how legitimate the
15 idea is that the defendant was not in control of himself,
16 that he didn’t know what he was doing, which is really
17 the essence of this defense, this penalty defense.

18 It tells you as clearly as anything could that here is an
19 efficient killing machine. Here is a man who has wine
20 with his victims, who wipes the glasses down, who
21 strangles them – pardon me – rapes them, strangles them,
22 throws them in a closet.

23 Hardly the conduct of someone who would not be in
24 control of himself

25 (*Id.* at 6077-78.) No evidence regarding Petitioner’s consumption of wine or
26 wiping of wine glasses was introduced regarding the Kim or Cullins deaths.

27 Evidence was introduced that Cullins’ body was found in a closet, and the
28 prosecutor explicitly referred to Cullins’ bloody hand. In that remark, the
prosecutor addressed Petitioner’s intent in committing the crimes and any theme of
the penalty phase defense that Petitioner “didn’t know what he was doing” or was
not “in control of himself.” (*Id.* at 6077-80.) The prosecutor argued:

1 [Y]ou see a hand and you see it [is] bloody. And you
 2 think back to the testimony about the damage to Ms.
 3 Cullins' face, and how do you think it was that the
 4 defendant got her, her car and was able to clean out her
 5 account? Is this not willful, deliberate, premeditated,
 controlled conduct?

6 (*Id.* at 6079-80.)

7 The California Supreme Court held on direct appeal that the evidence
 8 regarding the Kim and Cullins crimes was properly admitted at the guilt phase of
 9 trial to show Petitioner's intent in committing the charged offenses. *Carter*, 36
 10 Cal. 4th at 1149. Petitioner points to no clearly established federal law holding
 11 that other crimes evidence, properly admitted at the guilt phase of trial to show
 12 intent, may not be considered by a jury in the penalty phase as evidence of the
 13 circumstances of the crime. *Cf. Florida v. Burr*, 496 U.S. 914, 920-21 (1990)
 14 (Stevens, J., dissenting) (discussing whether post-trial acquittal of other crimes,
 15 admitted as evidence of identity at guilt phase, renders evidence of those crimes
 16 inadmissible at sentencing hearing in capital case). The California Supreme Court
 17 may have reasonably concluded that the prosecutor's remarks came within the
 18 bounds of fair comment on the evidence.

19 **7. Appeal to Vengeance and Conscience of the Community**

20 Petitioner argues that in his penalty phase closing argument, the prosecutor
 21 appealed to vengeance to incite the passions and prejudices of the jury and
 22 impermissibly appealed to them to be the conscience of the community. (Pet. at
 23 139.) Petitioner challenges the prosecutor's argument:

24 At some point we decide I think as a matter of self-
 25 protection that enough is enough as a society. You
 26 people, you 12, are in this sense the conscience of this
 27 society because it will be by your verdict that you give
 28 out a message of what is acceptable and what is not
 acceptable conduct because it seems to me that if the

1 death penalty in this case is to mean anything, this is such
2 a case in which it must be given.

3 (52 RT 6080.)

4 The California Supreme Court may have reasonably concluded that the
5 prosecutor's remarks were harmless. *See United States v. Nobari*, 574 F.3d 1065,
6 1077, 1082 (9th Cir. 2009) (concluding that prosecutorial misconduct in presenting
7 testimony and argument employing ethnic generalizations, asking improper
8 questions to codefendant, and appealing to the passions and fears of the jury by
9 urging them to "not let [their] City [] down" was harmless in light of
10 overwhelming evidence presented against defendants); *United States v. Williams*,
11 989 F.2d 1061, 1072 (9th Cir. 1993) (holding that prosecutorial remarks attempting
12 to capitalize on parochial inclinations did not affect the jury's ability to judge the
13 evidence fairly because the remarks were isolated and the jury was instructed not
14 to consider the statements and arguments of counsel as evidence); *United States v.*
15 *Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (holding that prejudice from
16 prosecutor's request to the jury to "finish the job that the F.B.I. started" was
17 adequately cured because the prosecutor made "only this single statement" and the
18 jury was instructed that they must determine guilt or innocence from the evidence
19 in the case and the statements and arguments of counsel are not evidence).

20 Petitioner's jury was instructed immediately before the prosecutor's argument that
21 "as we have told you a number of times, the statements of counsel are not
22 evidence." (52 RT 6072.) The court instructed the jury after closing arguments:

23 Your decision as to whether Mr. Carter should be
24 sentenced to life in prison without the possibility of
25 parole or death must depend on the facts and the law. . . .
26 [Y]ou must determine the facts from the evidence
27 received in the trial and not from any other source. . . . If
28 anything concerning the law said by the attorneys in their
arguments or at any other time during the trial conflicts
with my instruction on the law, you must follow my
instructions. . . . In deciding whether life imprisonment

1 without the possibility of parole or death is the
 2 appropriate sentence, you may not consider for any
 3 reason whatsoever whether or not there is a deterrent
 4 effect of the death penalty.

5 (52 RT 6111-13.) The California Supreme Court may have reasonably determined
 6 that the instruction cured any prejudice, that the prosecutor's statement was
 7 isolated and relatively brief, and that the evidence in aggravation was
 8 overwhelming.

9 **8. Defense Investigation and Presentation**

10 Finally, Petitioner challenges the prosecutor's penalty phase remarks:

11 [A]nd they [the defense] have not told you very much.
 12 They have had, as any criminal defendant facing the
 13 nature of these charges, a great deal of time to find
 14 people, to call them. Virtually unlimited money. . . . His
 15 mother chose not to come here. That's – that gives you a
 16 world of information because, if your mother won't stand
 17 up for you, who will? . . . It's interesting, first of all, that
 18 his mother wasn't forced to come down here by use of
 19 the Uniform Act that we talked about with Mr. Cohen.
 20 How effective, how touching would it have been to see
 21 her here and hear her talk about the defendant? How
 22 could this hurt him in anyone's sensible eyes if she is
 23 going to say anything good about him? Does this rather
 24 not give you a picture of a woman who has tried her
 whole life long to do something for a child and failed?
 . . . Well, he is [a] biological parent. There is no doubt
 about that, I suppose. But what has he ever done except
 express, except to say words? He ran away. He left. By
 the time those children were age one or two at best, he
 was gone. He abandoned them as he abandoned Alaska.

25 (52 RT 6083, 6085-86; *see* Pet. at 140 n.24.) Petitioner contends that the remarks
 26 improperly asserted that Petitioner's mitigating evidence was relevant to only one
 27 sentencing factor, shifted the burden of proof, and encouraged the jury to treat the
 28 mitigation presentation as non-statutory aggravation. (Pet. at 140.)

1 Defense counsel objected to the prosecutor's statement regarding the
2 defense's resources for investigation, and the court sustained the objection "as [to]
3 monetary" issues. (52 RT 6083.) The court instructed the jury, "Regarding the
4 factors you may consider in mitigation, if there is no evidence offered to support a
5 particular factor, you may not give such a factor any consideration at all. The
6 absence of any mitigating factor may not be considered as an aggravating factor."
7 (*Id.* at 6118.) The California Supreme Court may have reasonably determined that
8 the prosecutor's statements were within the bounds of fair comment on the
9 evidence Petitioner presented, and that any statements falling outside those bounds
10 were harmless in light of the sustained objection and the court's instruction to the
11 jurors.

12 Accordingly, Claim 10 is DENIED.

13 **XII. Claim 11: Failure to Disclose Evidence**

14 In Claim 11, Petitioner alleges that, in violation of *Brady v. Maryland*, 373
15 U.S. 83 (1963), the prosecution withheld material, exculpatory evidence that
16 Petitioner was not the donor of semen found on a bedspread in Kim's apartment.
17 (Pet. at 141-43.) Petitioner alleges that the laboratory report prepared by the
18 Oakland Police Department in 1986 was not disclosed to the defense until June 15,
19 1989, five days before the prosecution began its case-in-chief. (*Id.* at 143); *see*
20 *also Carter*, 36 Cal. 4th at 1160. Petitioner contends that if counsel had received
21 the report sooner, he could have obtained a blood sample from Blevins, who had
22 since died, to determine if Blevins was the donor of the semen. (Pet. at 144.)
23 Petitioner alleges that he has been denied "an opportunity to inspect and review the
24 Los Angeles District Attorney's files," which would have permitted him to
25 determine whether the District Attorney received the laboratory report. (*Id.*)
26 Petitioner adds that he has been prejudiced by any failure to preserve other,
27 unspecified evidence "that would have supported the claims asserted in his Petition
28 or led to the development of additional claims." (*Id.*)

1 On direct appeal, the California Supreme Court addressed Petitioner's claim
2 that the trial court erred in denying counsel's motion for mistrial, for exclusion of
3 the evidence regarding Kim's death, or for exclusion of Blevins's testimony, on the
4 basis of the nondisclosed report. *Carter*, 36 Cal. 4th at 1160-61. The court
5 rejected Petitioner's contention that the report was "highly material," explaining:

6 a proffer of rape never had been part of the proffer of the
7 other crimes evidence. Rather, the relevance of the
8 evidence pertaining to Kim's death was twofold: (1) to
9 demonstrate a similarity in the circumstances of her death
10 to the murders of Susan Knoll, Jillette Mills, and Bonnie
11 Guthrie . . . and (2) to establish a link between defendant
12 and the Los Angeles County murders of Susan Knoll,
13 Jillette Mills, and Bonnie Guthrie based upon the
14 circumstances that Kim's *vehicle* was parked outside the
15 apartment occupied by Knoll and Mills, and that Mills's
16 vehicle, containing possessions belonging to each of the
17 victims, was being driven by defendant at the time of his
18 arrest. The discovery of semen on Kim's *bedspread*, and
19 the report establishing that defendant had not been the
20 donor of that fluid, was, at best, of marginal significance
21 in the prosecution's case against defendant with regard to
22 the Los Angeles County murders. Therefore, defendant
23 was not prejudiced by the prosecution's belated
24 disclosure of the laboratory report prior to the
25 swearing-in of the jury and the introduction of evidence.

26 *Carter*, 36 Cal. 4th at 1161 (emphasis in original).

27 The California Supreme Court was not objectively unreasonable in rejecting
28 Petitioner's *Brady* claim on habeas review. "[T]he suppression by the prosecution
of evidence favorable to an accused upon request violates due process where the
evidence is material either to guilt or to punishment, irrespective of the good faith
or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Materiality requires "a
reasonable probability that, had the evidence been disclosed to the defense, the
result of the proceeding would have been different. A 'reasonable probability' is a

1 probability sufficient to undermine confidence in the outcome.” *United States v.*
2 *Bagley*, 473 U.S. 667, 682 (1985).

3 As the Court observed above, there was evidence presented at trial that
4 Blevins was in a year-and-one half relationship with Kim, during which he paid her
5 full rent and lived most of the time in her apartment, until the time of Kim’s
6 association with Petitioner. (*See supra* pp. 27, 44, 51.) Petitioner was not charged
7 with sexual offenses against Kim, and there was significant other evidence
8 connecting Petitioner to Kim. (*See supra* pp. 27, 51.) The California Supreme
9 Court’s conclusion that Petitioner failed to demonstrate a reasonable probability of
10 a different result at trial had the laboratory report been disclosed was not
11 objectively unreasonable.

12 Considering the cumulative effect of the prosecutorial misconduct Petitioner
13 alleges, the Court “first analyze[s] the prosecutorial misconduct challenges
14 [regarding arguments to the jury] to assess whether they alone so infected the trial
15 with unfairness as to make the resulting conviction a denial of due process. If the
16 prosecution’s comments alone do not meet this standard, [the Court] analyze[s]
17 them together” with any allegations of prosecutorial misconduct in failing to
18 disclose evidence to the defense, “to determine whether there is a reasonable
19 probability that without those violations the result of the proceeding would have
20 been different.” *Hein v. Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010). The
21 California Supreme Court may have reasonably determined that any prosecutorial
22 misconduct in arguments to the jury and in delayed disclosure of evidence, even
23 when considered cumulatively, does not show a denial of due process or a
24 reasonable probability of a different result absent the alleged misconduct.

25 Claim 11 is, therefore, DENIED.

26 **XIII. Claim 12: Trial Court Errors**

27 **A. Voir Dire under Oath**
28

1 In Claim 12(A), Petitioner alleges that the trial court failed to administer an
 2 oath to prospective jurors before commencing voir dire on the first day of jury
 3 selection, March 20, 1989. (Pet. at 146.)³ Petitioner asserts:

4 The trial court was statutorily required by state law to
 5 commence the voir dire of prospective jurors *after* those
 6 jurors were properly admonished. The requirement of
 7 sworn voir dire is a structural safeguard essential to
 8 impress upon jurors that false or misleading answers
 9 could subject them to penalties for perjury. The use of
 10 ‘unsworn testimony’ in court proceedings is ‘a practice
 which runs counter to the notions of fairness on which
 our legal system is founded.’

11 (*Id.* at 147 (quoting *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945))). Similarly, in
 12 Claim 5(H)(2), Petitioner notes that “trial counsel objected to the fact that a
 13 number of the jurors had not answered *voir dire* questions under oath. ([33] RT
 14

15 ³ Petitioner further observes that a second panel of prospective jurors, by contrast, was
 16 properly sworn for examination. (Pet. at 147 n.25.)

17 The California Supreme Court’s decision on direct appeal states, “On March 20-21, 1989,
 18 the trial court commenced jury selection by screening one panel of prospective jurors. On March
 27, 1989, the court screened a second panel. On May 1-2, 1989, the court screened a third panel.”
Carter, 36 Cal. 4th at 1174.

19 On March 20, 21, and 27, 1989, the trial court instructed prospective jurors that “we will
 20 count on you to give honest and candid answers to questions when your interview is conducted;”
 “[w]e will appreciate your honesty in all these matters;” “[w]e ask that each of you be as open and
 21 candid with us as possible;” and “during the questioning of you in court, honesty is the best
 policy.” (See 3 RT 433; 4 RT 470; 5 RT 622.) The court did not administer an oath to
 22 prospective jurors until May 1, 1989. (20 RT 2437, 2473-74.)

23 The California Supreme Court’s decision on direct appeal states, to the contrary, that
 “[w]ith regard to the latter two panels of prospective jurors,” i.e., the panels on March 27, 1989
 24 and May 1-2, 1989, “the trial court apparently failed to administer the oath to prospective jurors.”
Carter, 36 Cal. 4th at 1174.

25 Even if the California Supreme Court’s decision constitutes an unreasonable determination
 26 of the facts as a result of this discrepancy, Petitioner fails to establish a federal constitutional
 violation in the failure to swear the jurors applying *de novo* review. Likewise, Petitioner has not
 27 shown that counsel “failed to assert rights that may have altered the outcome” by not moving for a
 mistrial earlier, applying *de novo* review. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).
 28

1 4189.) Trial counsel requested a mistrial.” (Pet. at 76.) Petitioner alleges that
 2 “[t]o the extent” trial counsel’s request for mistrial was not timely, trial counsel
 3 was ineffective. (*Id.*)

4 Petitioner omits a critical portion of his quotation from *Bridges*, however: to
 5 “allow men to be convicted on unsworn testimony *of witnesses* [is] a legal practice
 6 which runs counter to the notions of fairness on which our legal system is
 7 founded.” *Bridges*, 326 U.S. at 153-54 (emphasis added). Petitioner points to no
 8 authority applying such a principle to the unsworn responses of jurors on voir dire,
 9 and the Court finds no support for Petitioner’s argument that a federal
 10 constitutional violation may be shown in a trial court’s failure to administer an oath
 11 of truthfulness to prospective jurors. *Cf. Morgan v. Illinois*, 504 U.S. 719, 729
 12 (1992) (“[t]he Constitution, after all, does not dictate a catechism for *voir dire* but
 13 only that the defendant be afforded an impartial jury”); *Theard v. Artus*, No. CV
 14 09-5702, 2012 WL 4756070, at *12 (E.D.N.Y. Aug. 27, 2012) (“[W]hether the
 15 trial court administered the jury truthfulness oath . . . is a state law issue for which
 16 habeas relief is unavailable”); *Robertson v. McKee*, No. CV 09-14675, 2012 WL
 17 263099, at *4 (E.D. Mich. Jan. 30, 2012) (“Petitioner has failed to show that the
 18 federal Constitution is violated where the trial court fails to swear a prospective
 19 jury pool prior to voir dire”). In addition, the California Supreme Court may have
 20 reasonably determined that Petitioner did not demonstrate that counsel “failed to
 21 assert rights that may have altered the outcome” by not moving for a mistrial
 22 earlier. *Lafler*, 132 S. Ct. at 1388.

23 Claims 12(A) and 5(H)(2) are, therefore, DENIED.

24 **B. Juror Challenges for Cause**

25 **1. Failure to Excuse Jurors for Cause**

26 First, Petitioner argues that his constitutional rights were violated by the trial
 27 court’s refusal to excuse prospective jurors for cause. (Pet. at 148-51.) Petitioner
 28 alleges that “[a]s a result of the trial court’s numerous errors, trial counsel were

1 compelled to exhaust their peremptory challenges in an effort to remove panelists
2 who were not qualified to serve on the jury in the first instance.” (*Id.* at 150.)

3 The California Supreme Court denied this claim on direct appeal, holding:

4 After exercising 18 out of the 20 peremptory challenges
5 available to it, the defense informed the court that the
6 jury as constituted was acceptable. [¶] Defendant
7 contends the trial court committed reversible error under
8 the federal and state Constitutions in denying challenges
9 to excuse the . . . prospective jurors As noted,
however, when the defense accepted the jury, it had not
exhausted all of its peremptory challenges.

10 *Carter*, 36 Cal. 4th at 1178-79. The court held that Petitioner could not
11 demonstrate that the trial court’s ruling had affected his right to a fair and impartial
12 jury. *Id.* at 1179.

13 The record is consistent with the California Supreme Court’s factual
14 determination that Petitioner did not exhaust his peremptory challenges. (*See* 6 CT
15 1620 (recording Petitioner’s exercise of eighteen peremptory challenges).) The
16 California Supreme Court reasonably concluded that Petitioner had not
17 demonstrated prejudice from any error by the trial court. “It [is] ‘immaterial’ that
18 petitioner had to use peremptory challenges to excuse jurors that the trial court
19 should have excused for cause [where] the petitioner did not exhaust all of his
20 peremptory challenges.” *Vansickel v. White*, 166 F.3d 953, 956 (9th Cir. 1999)
21 (quoting *Siripongs v. Calderon*, 35 F.3d 1308, 1322 (9th Cir. 1994) and discussing
22 *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993) (finding no due process
23 violation where defendant did not exhaust peremptory challenges), *overruled on*
24 *other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000)); *see also*
25 *Poland v. Stewart*, 169 F.3d 573, 583 (9th Cir. 1998) (finding no Sixth
26 Amendment violation where petitioner alleged that trial court should have excused
27 jurors for cause but did not allege that the use of peremptory challenges to excuse
28 the jurors forced him to accept a biased juror).

1 Claim 12(B)(1) is, therefore, DENIED.

2 **2. Excusal of Juror for Cause**

3 Second, Petitioner contends that his constitutional rights were violated by
4 the trial court's excusal of Juror Shaw for cause. (Pet. at 151.) Petitioner alleges
5 that while Juror Shaw "expressed reservation in potentially having to make the
6 ultimate decision of whether Mr. Carter should live or die," she "ultimately
7 expressed that she would be willing to follow the law." (*Id.* (citing 23 RT 2940,
8 2942).)

9 //

10
11 In *Uttecht v. Brown*, the United States Supreme Court considered the proper
12 application on habeas review of the standard for determining whether a juror's
13 views in opposition to the death penalty "would prevent or substantially impair
14 the performance of his duties as a juror in accordance with his instructions and his
15 oath.'" 551 U.S. 1, 7 (2007) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424
16 (1985)). The court placed heavy emphasis upon the deference reviewing courts are
17 to accord to the trial court. *Id.* The court observed:

18 The judgment as to whether a venireman is biased . . . is
19 based upon determinations of demeanor and credibility
20 that are peculiarly within the trial judge's province. Such
21 determinations [are] entitled to deference even on direct
22 review; the respect paid such findings in a habeas
23 proceeding certainly should be no less. And the finding
24 may be upheld even in the absence of clear statements
25 from the juror that he or she is impaired because many
26 veniremen simply cannot be asked enough questions to
27 reach the point where their bias has been made
28 unmistakably clear; these veniremen may not know how
they will react when faced with imposing the death
sentence, or may be unable to articulate, or may wish to
hide their true feelings. Thus when there is ambiguity in
the prospective juror's statements, the trial court, aided as
it undoubtedly [is] by its assessment of [the venireman's]

demeanor, [is] entitled to resolve it in favor of the State. . . . Even when ‘[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty,’ the need to defer to the trial court remains because so much may turn on a potential juror’s demeanor.

Brown, 551 U.S. at 7-8 (quoting *Darden*, 477 U.S. at 178, other internal quotations omitted, alterations in original). The Court held in *Brown* that:

where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion. The record does not show the trial court exceeded its discretion in excusing [the juror]; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment.

Id. at 20.

In its decision on direct appeal, the California Supreme Court did not discuss the excusal of Juror Shaw. “Regardless, there is no requirement . . . that a state appellate court make particular reference to the excusal of each juror. It is the trial court’s ruling that counts.” *Id.* at 17.

The California Supreme Court’s decision upholding the trial court’s finding regarding Juror Shaw was not objectively unreasonable. The California Supreme Court may have reasonably determined that the trial court appropriately found Juror Shaw’s responses and demeanor to show substantial impairment in the performance of her duties as a juror. Shaw stated, at points, that:

she did not know whether she could, as counsel phrased it, “look [Petitioner] in the eye, as it were, and say to him, ‘for what you’ve done, I vote that you should die’” (23 RT 2940); she “probably” could not do so (*id.* at 2951); she believed she could not do so (*id.* at 2944); and she did not think she would be able to do so, if that were her

1 state of mind, even if she believed that was the proper
2 outcome (*id.* at 2940-41);

3 she had “trouble answering” whether she could say that
4 death was the proper outcome for Petitioner through her
5 jury vote (*id.* at 2940-41);

6 she believed “[m]aybe [she’d] better say no,” that she did
7 not understand that she would have a duty to inform the
8 court if she could not participate in voting for the death
9 penalty during the penalty phase deliberations (*id.* at
2942-43); and

10 she felt that participating in that decision would cause her
11 such personal hardship that she “would rather not at all”
12 participate. (*Id.* at 2943.)

13 As Juror Shaw acknowledged, she did “keep vacillating” and had been “ambiguous
14 about all of this.” (*Id.* at 2952.) Both defense counsel and the prosecution noted
15 for the record Juror Shaw’s “long thoughtful pauses” and “thoughtful responses.”
16 (*Id.* at 2955.) The prosecutor interpreted Juror Shaw’s demeanor to reflect “at least
17 to [him] what appeared to be great difficulty in expressing her reluctance.” (*Id.*)

18 The trial court held:

19 I was watching her as well. ‘Apologize for vacillating.’
20 Shrugging of shoulders. She could, she could not return
21 a verdict. She said that quite clearly, then she said
22 maybe. She said[,] ‘I guess it’s my duty as a juror.’
23 Then she said she would probably be prevented from
imposing the death penalty. [¶] And the challenge is
granted on this lady.

24 (*Id.*)

25 The California Supreme Court may have reasonably found no error in the
26 trial court’s excusal of Juror Shaw for cause, based upon her voir dire responses
27 and her demeanor at trial. Accordingly, Claim 12(B)(2) is DENIED.

28 **C. Denial of Motion to Reconsolidate**

1 In Claim 12(C), Petitioner contends that the trial court's denial of his motion
2 to reconsolidate the San Diego and Los Angeles trials violated his constitutional
3 rights. Petitioner explains that the charges were initially filed together, and upon
4 the motion of defense counsel Perlo, the San Diego counts were dismissed from the
5 Los Angeles proceeding. (Pet. at 152); *see also Carter*, 36 Cal. 4th at 1158. When
6 Gillingham was later appointed as defense counsel, he moved to reconsolidate the
7 counts over Petitioner's objection. (Pet. at 152); *see also Carter*, 36 Cal. 4th at
8 1159. While the trial court opined that Petitioner's circumstances were likely more
9 favorable to him with the charges consolidated, the court denied the motion on the
10 basis that the decision was ultimately Petitioner's to make. (Pet. at 152-53); *see*
11 *also Carter*, 36 Cal. 4th at 1159. Petitioner asserts in Claim 12(C) that "vicinage is
12 a tactical matter within counsel's power to control" and that prejudice must be
13 presumed, but is nevertheless "manifest." (Pet. at 153.)

14 The California Supreme Court denied Petitioner's claim on direct appeal on
15 the ground that Petitioner had not shown prejudice from any error by the trial
16 court. The court held that Petitioner "presents no persuasive basis for concluding
17 that a jury that [convicted and] imposed the death sentence for three murders would
18 have imposed a lesser sentence if defendant had been charged in this proceeding
19 with additional crimes, including murder." *Carter*, 36 Cal. 4th at 1160. The
20 California Supreme Court noted that it was "questionable whether the trial court
21 was correct in determining that the defendant, rather than defense counsel,
22 possessed the paramount authority to decide" *Id.* at 1159 (internal quotation
23 omitted).

24 The vicinage clause of the Sixth Amendment guarantees the right to a "jury
25 of the . . . district wherein the crime shall have been committed.'" *Stevenson v.*
26 *Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) (quoting U.S. Const. amend. VI). It
27 does not guarantee a right to a jury from a district where the crime was *not*
28 committed, as Petitioner would have here for the San Diego charges, nor does it

1 guarantee a right to a jury from a locale of defendant's, or defense counsel's,
2 choosing. Petitioner asserts no venue issue in these proceedings.

3 Even assuming, *arguendo*, that Petitioner's claim could properly plead a
4 vicinage violation, such a claim cannot form the basis for federal habeas relief. As
5 the Ninth Circuit held in *Stevenson*, "[t]he United States Supreme Court has yet to
6 decide whether the vicinage clause applies to the states through the Fourteenth
7 Amendment." *Id.* at 1070. Because Petitioner cannot show that the California
8 Supreme Court's decision was contrary to or an unreasonable application of clearly
9 established federal law as determined by the Supreme Court, *see id.*, Claim 12(C)
10 is DENIED.

11 **D. Denial of Motion to Sever**

12 In Claim 12(D), Petitioner alleges that the trial court's denial of counsel's
13 motion to sever the Guthrie charges from the Mills and Knoll charges violated his
14 constitutional rights. (Pet. at 153-54.) Petitioner argues that the Guthrie and
15 Mills/Knoll homicides "were not inextricably connected in their commission and
16 the common markers between [them] were only minimally distinctive." (*Id.* at
17 155.) Petitioner contends that the failure to sever the charges had a substantial and
18 injurious effect or influence in determining the jury's verdict and that the
19 admission of Kim and Cullins "other crimes" evidence compounded the prejudice.
20 (*Id.* at 154-55.)

21 Considering a defendant's argument that the trial court's misjoinder of his
22 trial with a co-defendant violated Federal Rules of Criminal Procedure 8 and 52,
23 the United States Supreme Court observed in *United States v. Lane* that
24 "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder
25 would rise to the level of a constitutional violation only if it results in prejudice so
26 great as to deny defendant his Fifth Amendment right to a fair trial." 474 U.S. 438,
27 446 n.8 (1986). The Court held that harmless error review applied and that the
28 claimed error was harmless because the evidence of guilt was overwhelming, the

1 co-defendant evidence would likely have been admissible at a separate trial to
2 show intent, and the jury was instructed to give separate consideration to each
3 defendant and each count. *Id.* at 442, 450.

4 The Ninth Circuit has held since *Lane* that the Supreme Court's language
5 that misjoinder rises to the level of a constitutional violation if it results in the
6 denial of a fair trial under the Fifth Amendment "is dicta." *Collins v. Runnels*, 603
7 F.3d 1127, 1132 (9th Cir. 2010) (rejecting a state habeas petitioner's claim that
8 denial of motion to sever trial from codefendant violated right to a fair trial). The
9 Circuit explained:

10 The language upon which [petitioner] [relies] is dicta.
11 *Lane* dealt with the joinder of standards under Federal
12 Rules of Criminal Procedure 8 and 52; no constitutional
13 issue was before the Court. [T]he phrase 'clearly
14 established Federal law, as determined by the Supreme
15 Court of the United States' refers to the holdings, *as*
16 *opposed to the dicta*, of [the Supreme] Court's decisions
17 as of the time of the relevant state-court decision. . . .
18 The footnote upon which Collins relies did not set forth
19 the governing legal principle in *Lane*. It was merely a
20 comment.

21 *Id.* (internal quotation omitted; emphasis in original); *see also Runningeagle v.*
22 *Ryan*, 686 F.3d 758, 776-77 (9th Cir. 2012) (holding same).

23 Even if clearly established federal law could establish a basis for Petitioner's
24 claim, Petitioner has failed to show the California Supreme Court's decision to be
25 objectively unreasonable. *See Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000)
26 (holding, under pre-AEDPA law, that failure to sever two murder counts from two
27 other murder counts and one attempted murder count did not violate due process,
28 because evidence of severed murders would have been admissible at separate trial
and was not significantly weaker than evidence of included murders). The
California Supreme Court's determination that evidence of the Guthrie and
Mills/Knoll homicides was cross-admissible was reasonable. As the court held:

1 [t]he Susan Knoll/Jillette Mills and Bonnie Guthrie
2 offenses, having been committed approximately one day
3 apart, each involved the murder by strangulation of
4 young women whose belongings were found
5 approximately one week later in defendant's possession.
6 On this basis alone, the evidence connecting defendant to
7 the Knoll/Mills and Guthrie crimes would be cross-
8 admissible if the court had ordered separate trials,
9 thereby dispelling any inference of prejudice. Moreover,
10 because both crime scenes involved murder and sexual
11 assault, the evidence from each disclosed a commonality
12 with regard to intent and plan, while presenting little if
13 any possibility that one of the charges or set of charges
14 would have unduly inflamed the jury against defendant.
15 Although all three women were not strangled in an
16 identical manner – Mills and Guthrie were strangled by
17 ligature, whereas Knoll was strangled manually – both
18 crime scenes had in common a ligature strangulation, as
19 well as the traumatic sexual assault of Mills and Guthrie.
20 Nor did the prosecution join a 'weak case' with a 'strong'
21 one – the evidence linking defendant to each crime was
22 especially compelling. Further, Knoll and Guthrie were
23 best friends, a circumstance that suggested one person
24 committed the crimes against both victims in the two-day
25 period, and that therefore supported the
26 cross-admissibility of the evidence. The murders of each
27 of the three women presented one or more special
28 circumstances; because each one of the murders by itself
formed the basis for capital charges to be brought against
the perpetrator, joinder did not lead to one set of crimes
being 'elevated' to capital status.

23 *Carter*, 36 Cal. 4th at 1155 (internal citations omitted). The jury, in addition, was
24 instructed:

25 Each count charges a distinct crime. You must decide
26 each count separately. [¶] The defendant may be found
27 guilty or not guilty of any or all of the crimes charged.
28 Your finding as to each count must be stated in a separate
verdict. (44 RT 5275.)

1
2 You must decide separately each special circumstance
3 alleged in this case. (*Id.* at 5266-67.)

4 Finally, the California Supreme Court's decision that evidence of the Kim
5 and Cullins deaths was admissible to show identity and intent was not objectively
6 unreasonable. (*See supra* p. 39.)

7 Petitioner, therefore, is not entitled to relief on Claim 12(D). Claim 12(D) is
8 DENIED.

9 **E. Admission of Evidence of Kim and Cullins Homicides**

10 In Claim 12(E), Petitioner contends that his constitutional rights were
11 violated because the trial court allowed the presentation of "other crimes" evidence
12 regarding Kim and Cullins. (Pet. at 156.) The trial court denied counsel's motions
13 to exclude the evidence, and the California Supreme Court held that the evidence
14 was admissible to show Petitioner's identity and intent. *Carter*, 36 Cal. 4th at
15 1146-50. Petitioner asserts that "the trier of fact was improperly invited to use that
16 evidence to draw inferences of criminal propensity and disposition, contrary to law
17 . . . and to condemn Mr. Carter based on these uncharged acts regardless of
18 whether they believed there was sufficient proof of the actual charged offenses."
19 (Pet. at 159.) Petitioner argues that, "[m]ost importantly, the different episodes of
20 other crimes evidence did not bear any 'common markers.'" (*Id.*) Petitioner
21 maintains that the probative value of the evidence was outweighed by its
22 prejudicial impact and could not be ameliorated by the court's limiting instructions.
23 (*Id.* at 162; *see also* 44 RT 5246-47, 5251-53 (limiting instructions)); *see also*
24 *Carter*, 36 Cal. 4th at 1151 ("[T]he jury was instructed correctly pursuant to
25 CALJIC Nos. 2.09 and 2.50 as to the limited purposes for which it might consider
26 the evidence of the Kim and Cullins matters. The instructions conveyed that
27 evidence relating to those events could not be considered to prove defendant's bad
28 character or criminal disposition").

1 As the Ninth Circuit observed in *Alberni v. McDaniel*, “the Supreme Court
2 has never expressly held that it violates due process to admit other crimes evidence
3 for the purpose of showing conduct in conformity therewith.” 458 F.3d 860, 863
4 (9th Cir. 2006) (internal quotation omitted); *see also Mejia v. Garcia*, 534 F.3d
5 1036, 1046 (9th Cir. 2008) (holding same). The Ninth Circuit recognized that its
6 pre-AEDPA precedents held that the admission of propensity evidence could
7 violate due process, and that “every circuit, in cases decided prior to the enactment
8 of AEDPA, ha[d] acknowledged, at least implicitly, that the proper introduction of
9 evidence may violate due process if it renders the trial fundamentally unfair.”
10 *Alberni*, 458 F.3d at 864-65. The circuit court held, nevertheless, that because the
11 Supreme Court “expressly reserved consideration of the issue at hand in *Estelle*,”
12 the right petitioner asserted had not been clearly established by the Supreme Court
13 and could not be the basis for habeas relief under AEDPA. *Id.* at 866 (discussing
14 *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991)).

15 The Supreme Court has not revisited the issue of “other crimes” evidence
16 since *Estelle v. McGuire*. Because Petitioner’s claim lacks support in clearly
17 established federal law, he is not entitled to relief. Moreover, because the
18 California Supreme Court was not objectively unreasonable in holding that the
19 evidence was relevant show identity and intent (*see supra* p. 39), and because
20 limiting instructions were given, the California Supreme Court may have
21 reasonably concluded that the evidence did not render Petitioner’s trial
22 fundamentally unfair. *Cf. Walters v. Maass*, 45 F.3d 1355, 1357-58 (9th Cir. 1995)
23 (holding that admission of prior bad acts evidence did not render petitioner’s trial
24 fundamentally unfair where evidence was relevant to show intent and limiting
25 instruction was given).

26 The California Supreme Court may have likewise held that Petitioner failed
27 to show deficient performance or prejudice from counsel’s failure to object to jury
28 instructions that allegedly “allowed unlawful prosecutorial argument and jury

1 consideration of ‘other crimes’ (Kim and Cullins) evidence for unlimited
 2 purposes” (See Pet. at 76 (Claim 5(H)(4)).)

3 Accordingly, Claims 12(E) and 5(H)(4) are DENIED.

4 //

5 //

6 **F. Admission of Steward Facts**

7 **1. Allegations and Decision on Direct Appeal**

8 In Claim 14(F), Petitioner contends that his constitutional rights were
 9 violated by the trial court’s admission in the penalty phase of the alleged facts
 10 underlying his conviction for the Steward rape. Petitioner acknowledges that “the
 11 conviction was properly excluded,” but challenges the admission of the underlying
 12 facts on the ground that his conviction “was the direct result of prosecutorial
 13 misconduct (due to *Griffin* error) and Mr. Carter’s counsel’s ineffective
 14 representation (due to the failure to challenge the *Griffin* error). The alleged facts
 15 of the Steward case, therefore, should not have been admitted in a capital case.”
 16 (Pet. at 163 (footnote omitted).) California Penal Code section 190.3 provides that
 17 “in no event shall evidence of prior criminal activity be admitted for an offense for
 18 which the defendant was prosecuted and acquitted.” Cal. Penal Code § 190.3.

19 On direct appeal, the California Supreme Court held:

20 To begin with, in the prior proceeding both the trial court
 21 and the Court of Appeal explicitly rejected the claim that
 22 the prosecutor’s comments undermined the validity of the
 23 conviction. [¶] Defense counsel in the Ventura
 24 proceedings moved for a mistrial based on the
 25 prosecutor’s improper comments, but the trial court
 26 denied the motion. On appeal, the Court of Appeal, in an
 27 unpublished decision, affirmed defendant’s conviction,
 28 concluding ‘[t]his was not a close case,’ and that the
Griffin error ‘was harmless beyond a reasonable doubt.’
 [¶] Furthermore, even if defendant nonetheless properly
 could challenge the prior conviction on this ground at

1 this point (an issue we need not and do not decide), and
2 even if the error upon which defendant relies had been
3 prejudicial, the very most that defendant would have
4 been entitled to would have been an order striking the
5 prior conviction for purposes of this proceeding, not the
6 entry of an acquittal. Because, in any event, as already
7 noted, evidence of the conviction itself was not admitted
8 in the present case, defendant's challenge to the
9 prosecutor's conduct in the Ventura proceeding or to
10 defense counsel's allegedly ineffective assistance in that
11 proceeding has no bearing upon the validity of the trial
12 court's admission of evidence of the conduct underlying
13 the prior conviction.

14 With regard to that evidence, past cases make clear that
15 the introduction of evidence of the Ventura assault was
16 proper under section 190.3, subdivision (b), which
17 authorizes the trier of fact at the penalty phase to
18 consider '[t]he presence or absence of criminal activity
19 by the defendant which involved the use or attempted use
20 of force or violence or the express or implied threat to
21 use force or violence,' whether such violent criminal
22 conduct occurred prior to or after the charged capital
23 offense. No error appears.

24 *Carter*, 36 Cal. 4th at 1201-02, 1201 n.41 (internal citations omitted).

25 **2. Analysis**

26 The Ninth Circuit in *Gretzler v. Stewart* considered a habeas petitioner's
27 claim that the trial court erred in considering his nine prior murder convictions at
28 his penalty phase proceeding because the convictions were reached through guilty
pleas resulting from ineffective assistance of counsel. 112 F.3d 992, 1004-05 (9th
Cir. 1997). The reviewing court on direct appeal found no basis to disregard the
presiding judge's factual determination that the pleas were voluntarily made. *Id.* at
1005. The Ninth Circuit concluded, "[i]n light of [that holding . . .], that the trial

1 court did not commit error of constitutional magnitude by considering as
2 aggravating factors [petitioner's] nine California murder convictions." *Id.*

3 Here, the reviewing court on direct appeal observed that the presiding judge
4 over Petitioner's prior conviction denied his motion for mistrial, and the appellate
5 court found it was "not a close case" for finding error. *Carter*, 36 Cal. 4th at 1201,
6 1201 n.41. In addition, the California Supreme Court's determinations that
7 Petitioner would not have been entitled to a judgment of acquittal, and that the
8 evidence of Petitioner's conduct would have remained admissible, are not
9 objectively unreasonable. *Cf. McGuire*, 502 U.S. at 67-68 ("[I]t is not the province
10 of a federal habeas court to reexamine state-court determinations on state-law
11 questions. In conducting habeas review, a federal court is limited to deciding
12 whether a conviction violated the Constitution, laws, or treaties of the United
13 States"); *Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007) ("[S]tate courts are
14 presumed to know and correctly apply state law"). Finally, Petitioner does not
15 develop in these proceedings his conclusory allegations of prosecutorial
16 misconduct and ineffective assistance of counsel in the Steward rape trial. The
17 Court, therefore, finds no basis for determining that the California Supreme
18 Court's decision was objectively unreasonable.

19 Accordingly, Claim 12(F) is DENIED.

20 **G. Suggestive Eyewitness Identifications**

21 **1. Allegations and Decision on Direct Appeal**

22 In Claim 12(G), Petitioner contends that his constitutional rights were
23 violated by the trial court's admission of "unreliable, tainted and unduly suggestive
24 eyewitness identifications." (Pet. at 164.) Petitioner explains that potential
25 eyewitnesses were asked to identify the suspect using a "6-pack photo-spread
26 containing photographs of Mr. Carter and five police officers." (*Id.*) Petitioner
27 alleges that the photospread was unreasonably suggestive because: (1) Petitioner's
28 photograph was a booking photograph "in which he is visibly attired in an orange

1 jail jumpsuit;" (2) Petitioner's photograph was the only photograph that was not a
2 Polaroid photograph; and (3) the background of Petitioner's photograph, taken in
3 the booking room of the Culver City Police Department, was "entirely different"
4 from the background in the photographs of the officers, taken at the Oakland Police
5 Department. (*Id.*) Petitioner adds that "each witness's selection of Mr. Carter's
6 photograph was reinforced by observing the prior identifications by other
7 witnesses" shown by the witnesses' signatures on the back of the photograph they
8 selected. (*Id.* at 165.)

9 On direct appeal, the California Supreme Court held:

10 As part of the police investigation following the
11 discovery of Tok Kim's body on April 13, 1984, Oakland
12 Police Sergeant Raymond Conner prepared a
13 photographic lineup containing defendant's photograph
14 as well as the photographs of five other individuals
15 (members of the Oakland Police Department, shown
16 wearing street clothes, without indicia of their
17 occupation). The lineup was shown to nine witnesses,
18 eight of whom identified defendant as the man they saw
19 with Kim, and one of whom alternated between selecting
20 defendant's image and that of one other individual
21 depicted in the lineup. The order in which the
22 photographs were arranged was changed between
23 presentations to the witnesses, who were separately
24 shown the lineup. At a pretrial proceeding, defendant
25 moved to suppress the photographic identifications as
26 having been the product of an unduly suggestive lineup.
27 Following an evidentiary hearing, in which Sergeant
28 Conner testified, the court denied the motion, observing:
'[C]ertainly there are some differences, as there always
are in photographs, but I don't find that the photographic
lineup was unduly suggestive.' . . .

Our review of the photographs contained in the lineup
indicates that defendant overstates the significance of the
distinguishing characteristics seen in the photographs,
and overlooks their more compelling general similarities.

1 Each one of the six color photographs is approximately
2 the same size, and depicts a middle-aged or somewhat
3 younger adult male with a mustache and dark hair. Two
4 of the individuals are shown wearing white t-shirts, two
5 are seen wearing light-colored 'dress' or 'polo' shirts,
6 one wears a plaid shirt, and one individual – defendant –
7 is wearing an orange shirt. Nothing about defendant's
8 shirt identifies it as a 'jail jumpsuit' or any other type of
9 jail-issued clothing, and even if it had, a conclusion that
10 the lineup was unduly suggestive would not necessarily
11 follow. The expressions exhibited by the individuals are
12 roughly comparable: each has his eyes open and his
13 mouth closed, except for one individual whose mouth is
14 slightly parted. Such distinctions are immaterial.
15 Although the size of the white border around defendant's
16 photograph is slightly larger than the border seen on the
17 Polaroid images, and the Polaroid images are glossy
18 while the image of defendant is semigloss, such trivial
19 distinctions also are immaterial. The witnesses clearly
20 were instructed to consider the persons depicted, not
21 whether a particular image was potentially
22 distinguishable from the others based upon variations in
23 photographic composition or processing.

18 Nor do we attach significance to Sergeant Conner's
19 request that the witnesses write their names on the backs
20 of the particular photographs they identified. . . .
21 Because the witnesses' signatures were added only after
22 each witness had made his or her selection, we find no
23 basis for concluding that the witnesses were induced to
24 identify defendant's image. . . .

23 In sum, . . . we conclude that defendant has failed to meet
24 his burden of establishing that the photo identification
25 procedure used here was unduly suggestive. We
26 therefore need not reach the question whether the
27 identification was nevertheless reliable under the totality
28 of circumstances.

1 *Carter*, 36 Cal. 4th at 1162-64 (footnote, internal quotation, and internal citations
2 omitted).

3 2. **Analysis**

4 The Supreme Court considered the use of photographic arrays for
5 identification of suspects by eyewitnesses in *Simmons v. United States*, 390 U.S.
6 377 (1968). The court explained:

7 [I]mproper employment of photographs by police may
8 sometimes cause witnesses to err in identifying criminals.
9 . . . This danger will be increased if the police display to
10 the witness only the picture of a single individual who
11 generally resembles the person he saw, or if they show
12 him the pictures of several persons among which the
13 photograph of a single such individual recurs or is in
14 some way emphasized. . . . Regardless of how the initial
15 misidentification comes about, the witness thereafter is
16 apt to retain in his memory the image of the photograph
rather than of the person actually seen, reducing the
trustworthiness of subsequent . . . courtroom
identification.

17 Despite the hazards of initial identification by
18 photograph, this procedure has been used widely and
19 effectively in criminal law enforcement [E]ach case
20 must be considered on its own facts, and . . . convictions
21 based on eyewitness identification at trial following a
22 pretrial identification by photograph will be set aside on
23 that ground only if the photographic identification
24 procedure was so impermissibly suggestive as to give
rise to a very substantial likelihood of irreparable
misidentification.

25 *Simmons*, 390 U.S. at 383-84 (footnotes omitted). The Court held that “in the
26 factual surroundings” of defendant’s case, in which, *inter alia*, at least six
27 photographs were displayed to each witness, and a second suspect was “as
28

1 prominent in the photographs” as defendant, “the identification procedure used was
2 not such as to deny [defendant] due process of law.” *Id.* at 386.

3 The Court has since held that even a “single-photograph” display, though
4 “viewed in general with suspicion,” is not necessarily corrupting. *Manson v.*
5 *Brathwaite*, 432 U.S. 98, 116 (1977). The use of a “photographic array including
6 so far as practicable . . . a reasonable number of persons similar to any person then
7 suspected whose likeness is included in the array . . . avoid[s] the risk that the
8 evidence would be excluded as unreliable.” *Id.* at 117 (internal quotation omitted).

9 “If we find that a challenged procedure is not impermissibly suggestive, our
10 inquiry into the due process claim ends.” *United States v. Bagley*, 772 F.2d 482,
11 492 (9th Cir. 1985); *see also United States v. Love*, 746 F.2d 477, 478 (9th Cir.
12 1984) (observing, as to photographic identification procedure, that “[f]irst, it must
13 be determined whether the procedures used were impermissibly suggestive. *If so*,
14 it must then be determined whether the identification was nonetheless reliable”
15 (emphasis added)).

16 Although Petitioner makes the conclusory argument that the California
17 Supreme Court’s denial of his claim is based on an unreasonable determination of
18 the facts under 28 U.S.C. § 2254(d)(2) (Pet. at 164), Petitioner’s allegations are not
19 inconsistent with the court’s factual findings. Petitioner’s allegation that his
20 orange jail jumpsuit was visible is consistent with the California Supreme Court’s
21 determination that he was, indeed, wearing an orange shirt in the photograph, but
22 that “[n]othing about defendant’s shirt identifies it as a ‘jail jumpsuit’ or any other
23 type of jail-issued clothing.” *Carter*, 36 Cal. 4th at 1163. In addition, even if
24 fairminded jurists could disagree about whether a photograph depicting Petitioner
25 in an identifiable jail jumpsuit would be unduly suggestive (or about whether
26 Petitioner’s attire in the photograph at issue was, in fact, unduly suggestive), such
27 fairminded disagreement does not render the California Supreme Court’s decision
28 contrary to, or an unreasonable application of, federal law under § 2254(d)(1). *See*

1 *Richter*, 131 S. Ct. at 786; *Williams v. McDonald*, CV 10-9389, 2012 WL
2 3779068, at *6-7 (C.D. Cal. July 6, 2012) (holding petitioner failed to show
3 photographic array to be unduly suggestive where petitioner appeared in
4 photograph with the top portion of his orange jail clothes visible, but it was “not
5 apparent that he was wearing a jail jumpsuit,” one other person was wearing an
6 orange t-shirt, and witness did not notice petitioner’s clothing in choosing his
7 photograph), *adopted*, 2012 WL 3782532; *Zelaya v. Dexter*, No. CV 08-6160,
8 2010 WL 5775907, at *7 (C.D. Cal. Sept. 22, 2010) (holding that photographic
9 line-up was not impermissibly suggestive where array showed petitioner’s booking
10 photograph), *adopted*, 2011 WL 486549; *cf. Mitchell v. Goldsmith*, 878 F.2d 319,
11 323 (9th Cir. 1989) (holding that photographs showing the year of arrest of persons
12 in the array, where defendant’s arrest year was the most recent and the only one
13 matching the date of the crime, were not unduly suggestive).

14 Likewise, Petitioner’s allegation that his photograph was the only one that
15 was not a Polaroid photograph is consistent with the California Supreme Court’s
16 factual finding that “the size of the white border around defendant’s photograph is
17 slightly larger than the border seen on the Polaroid images, and the Polaroid
18 images are glossy while the image of defendant is semigloss” *Carter*, 36 Cal.
19 4th at 1163. The state court’s determination that those distinctions were not
20 unduly suggestive is not objectively unreasonable. *See United States v. Burdeau*,
21 168 F.3d 352, 357 (9th Cir. 1999) (holding that “dark hue” of photograph of
22 defendant did not create an impermissible suggestion); *United States v. Johnson*,
23 820 F.2d 1065, 1073 (9th Cir. 1987) (holding that photograph of defendant that
24 was hazier than others was not impermissibly suggestive); *Lopez v. Horel*, No. CV
25 06-2681, 2008 WL 4509366, at *14 (C.D. Cal. June 12, 2008) (“[E]ven if
26 petitioner’s photograph was darker than the other photographs and was the only
27 one with a glossy [Polaroid] coating, these insubstantial differences did not render
28

1 the photographic array unduly suggestive”), *adopted with modifications*, 2008 WL
2 4450321.

3 Petitioner’s allegation that the background of his photograph in the booking
4 room of the Culver City Police Department was “entirely different” from those of
5 the officers at the Oakland Police Department is also consistent with the California
6 Supreme Court’s factual finding that the Oakland Police Department photographs
7 did not indicate the occupation of those officers by way of their background or
8 otherwise. (Pet. at 164); *Carter*, 36 Cal. 4th at 1162. The California Supreme
9 Court found no other impermissibly suggestive characteristics of the photographs,
10 and its conclusion that the background differences were not unduly suggestive is
11 not objectively unreasonable. *See Mitchell*, 878 F.2d at 323 (holding that “various
12 background colors among the photographs” did not make the lineup unduly
13 suggestive); *United States v. Barron*, 575 F.2d 752, 754-55 (9th Cir. 1978)
14 (holding that photospread used to identify bank robber was not unduly suggestive
15 where only one photograph, of defendant, “displayed the victim bank in the
16 background”).

17 Finally, the California Supreme Court was not objectively unreasonable in
18 determining that because the witnesses only saw the selections made by others
19 after they made their own selection, there was no impermissibly suggestive risk of
20 an initial misidentification that would remain in the witness’s memory. *See*
21 *Simmons*, 390 U.S. at 383-84; *see also Barron*, 575 F.2d at 754-55 (finding no
22 substantial likelihood of misidentification where “one witness received non-verbal
23 approval after his [photospread] identification and another one was told that she
24 had made the correct selection”).

25 Claim 12(G) is, therefore, DENIED.

26 **H. Admission of Testimony from Victims’ Family Members and**
27 **Autopsy Photographs**

28 **1. Allegations**

1 In Claim 12(H), Petitioner alleges that his constitutional rights were violated
 2 by the admission of “highly inflammatory testimony of victims[’] relatives and
 3 evidence of autopsy photographs.” (Pet. at 165.) Petitioner explains that the
 4 testimony and photographs were proffered:

5 to establish identity and fatal wounds. . . . Admitted
 6 evidence included photographs of Mills, Knoll, and
 7 Guthrie as well as Cullins, with particular focus on the
 8 neck wounds to Mills and Cullins. Also admitted was the
 9 testimony of the victims’ relatives regarding the property
 10 found in Mr. Carter’s vehicle at the time of his arrest. . . .
 11 Pender’s [Knoll’s sister’s] testimony was offered to show
 12 Mills, Knoll and Guthrie knew one another
 13 Bollman [Mills’ sister] was offered to show she helped
 14 Mills moved into the . . . apartment and to identify items
 15 of property George Cullins’s [Cullins’ father’s]
 16 testimony . . . [discussed Cullins’s] bank records, and a
 17 videotape of the ATM machine [sic].

18 (Pet. at 166-67 (internal citations omitted); *see also* 41 RT 4964-65.) Petitioner
 19 asserts that “this was not a case in which the erroneously admitted testimony was
 20 harmless[, because] Bollman wept on the witness stand during her testimony, and
 21 each of the witnesses remained in the courtroom throughout trial.” (Pet. at 167-
 22 68.)

23 2. Analysis

24 Federal habeas review is limited “to the question whether the admission of
 25 the evidence violated [petitioner’s] federal constitutional rights.” *McGuire*, 502
 26 U.S. at 68 (holding petitioner’s due process rights were not violated by admission
 27 of evidence of prior injuries to victim, because prosecution was required to prove
 28 that killing was intentional and evidence need not be linked directly to defendant).
 Thus, the issue for this Court is whether the admitted evidence “was so
 inflammatory as to prevent a fair trial,” not “whether its prejudicial effect
 outweighed its probative value.” *Henry*, 513 U.S. at 366; *see also Hamilton v.*

1 *Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994) (“Claims of inadmissibility of
2 evidence are cognizable in habeas corpus proceedings only when admission of the
3 evidence violated the defendant’s due process rights by rendering the proceedings
4 fundamentally unfair”), *overruled on other grounds as recognized in Coleman v.*
5 *Calderon*, 210 F.3d 1047 (9th Cir. 2000).

6 In *Villafuerte v. Stewart*, for example, the Ninth Circuit held that
7 photographs depicting the fatal wrapping of an asphyxiated murder victim’s head,
8 bindings on her body, and blood at the crime scene did not deprive petitioner of a
9 fair trial. 111 F.3d 616, 622, 627 (9th Cir. 1997). The court held that the
10 photographs were relevant to prove that petitioner knowingly restrained the victim
11 with the required intent, and did not violate petitioner’s due process rights. *Id.* at
12 627. Similarly, in *Gerlaugh v. Stewart*, the trial court entered into evidence
13 “admittedly gruesome photos of the decedent,” who had been run over with a car
14 three times, struck in the head by the car, stabbed in the head, neck, and shoulders
15 with a screwdriver at least thirty times, and dragged off a road into a field. 129
16 F.3d 1027, 1030, 1032 (9th Cir. 1997). The victim’s entire body was covered with
17 bruises and abrasions, along with puncture wounds, fractures, and internal injuries
18 from his head to his midsection. *Id.* at 1030. The Ninth Circuit held that
19 petitioner’s habeas claim based on the admission of these photographs did not
20 “raise[] the spectre of fundamental unfairness such as to violate federal due process
21 of law” and was not cognizable. *Id.* at 1032. Finally, in *Plascencia v. Alameda*,
22 the Ninth Circuit found no due process violation in the admission of purported
23 victim impact testimony, where the father of the victim’s children and the victim’s
24 sisters testified to provide “background and foundation evidence explaining the
25 relationships of the witnesses and the circumstances leading up to [the victim’s]
26 murder.” 467 F.3d 1190, 1202-03 (9th Cir. 2006) (internal quotation omitted).

27 Here, as in *Villafuerte*, the photographs of the victims’ bodies were relevant
28 to demonstrate the extent of the victims’ injuries and the circumstances under

1 which they were inflicted. *See Carter*, 36 Cal. 4th at 1164-71. The admission of
 2 the photographs did not render Petitioner's trial fundamentally unfair so as to
 3 violate due process of law. *See Gerlaugh*, 129 F.3d at 1032; *Villafuerte*, 111 F.3d
 4 at 627; *Henry*, 513 U.S. at 366; *Hamilton*, 17 F.3d at 1159. Likewise, the family
 5 members' testimony established "the victims' ownership of various items of
 6 personal property discovered in Mills's Datsun 280 ZX" and were not "so
 7 inflammatory as to prevent a fair trial" in violation of Petitioner's due process
 8 rights. *Carter*, 36 Cal. 4th at 1164; *see also Henry*, 513 U.S. at 366; *Plascencia*,
 9 467 F.3d at 1202-03.

10 Claim 12(H) is, therefore, DENIED.

11 **I. Admission of Prior Convictions, Other Crimes Evidence, and**
 12 **Victim Impact Evidence**

13 In Claim 12(I), Petitioner alleges that his constitutional rights were violated
 14 at the penalty phase of trial by the admission of "constitutionally infirm" prior
 15 convictions from Alaska and Oregon and "other crimes" evidence concerning Kim
 16 and Cullins. (Pet. at 168-70.) Petitioner also challenges the trial court's
 17 consideration of the Kim and Cullins evidence when deciding his motion for
 18 modification of the death sentence, in Claim 12(J). (*Id.* at 171-72.) In addition, in
 19 Claim 12(J), Petitioner contests the trial court's alleged consideration of victim
 20 impact evidence before imposing the judgment of death. (*Id.*)

21 **1. Alaska and Oregon Prior Convictions**

22 Petitioner argues:

23 The Alaska conviction was infirm as it resulted from a
 24 plea that was neither knowing nor voluntary. The
 25 Oregon conviction was infirm because Mr. Carter was
 26 suffering from significant mental impairments at the time
 27 of the crime and of his trial. As discussed *ante*, Mr.
 28 Carter has substantial neurological and mental
 impairments, as well as other psychological incapacities.
 These mental impairments have existed since childhood.

1 As result, during both the commission of the crimes and
2 the court proceedings on the Alaska and Oregon charges,
3 Mr. Carter was not competent to stand trial or waive any
4 of his statutory or constitutional rights.

(*Id.* at 169 (internal citations omitted).)

5 During his capital trial, Petitioner challenged the constitutionality of his
6 Alaska and Oregon convictions. Petitioner acknowledged that:

7 [o]n December 12, 1984, the Ventura County Superior
8 Court sentenced Dean Carter to a term of imprisonment
9 which included a five-year enhancement . . . for his
10 Alaska conviction and an additional consecutive five-
11 year term under the same [enhancement] section for the
12 Oregon conviction. [¶] The proceedings in Ventura
13 County consisted of what was described as an admission
14 of the fact of the prior convictions by Mr. Carter,
15 followed by what appeared to be a trial, *at which the*
16 *sentencing judge determined those prior convictions to*
17 *be ‘constitutional.’*

18 (2 CT 547, Memorandum of Points and Authorities in Support of Motion to Strike
19 Prior Convictions (emphasis added); *see also* 47 RT 5440-41 (raising, during oral
20 argument on motion to strike the prior convictions, the constitutionality of the
21 Alaska and Oregon convictions).) Petitioner argued that the Ventura County
22 Superior Court’s findings should have “no effect on the present action” because
23 Ventura County counsel provided ineffective assistance and because that court’s
24 findings are not binding on the Los Angeles County “court of equal jurisdiction.”
25 (2 CT 547-48.) The trial court denied Petitioner’s motion to strike the convictions.
26 (47 RT 5442.)

27 On habeas review, the California Supreme Court may have reasonably
28 determined that the Ventura County court’s findings, maintained by the Los
29 Angeles County trial court, adequately and appropriately resolved the
30 constitutionality of the Alaska and Oregon convictions. In light of the deference
31 owed to the findings of the trial court and the state supreme court, this Court finds

1 no basis to hold the California Supreme Court's determination to be objectively
2 unreasonable. *See Gretzler*, 112 F.3d at 1004-05 (finding trial court did not
3 commit error of constitutional magnitude by considering prior convictions, in light
4 of state court's determination that the convictions were not unconstitutional); (*cf.*
5 *supra*. pp. 34-39 (discussing evidence presented in habeas proceedings regarding
6 Petitioner's alleged neurological and psychological impairments)).

7 2. **Kim and Cullins Evidence**

8 Petitioner argues that prejudicial evidence of the Kim and Cullins homicides
9 was admitted at the guilt phase of trial without instructions that the evidence could
10 only be considered at that phase, or at the penalty phase if the jury found beyond a
11 reasonable doubt that Petitioner committed the homicides. (Pet. at 169-70.)
12 Petitioner contends that to the extent counsel did not request such instructions,
13 counsel was ineffective. (*Id.* at 170.) Petitioner adds that the trial court erred by
14 considering the evidence in denying his motion for modification of the death
15 sentence. (*Id.* at 171-72.)

16 As discussed above (*supra* p. 80), the California Supreme Court held on
17 direct appeal that the evidence regarding the Kim and Cullins crimes was properly
18 admitted at the guilt phase to show Petitioner's intent in committing the charged
19 offenses. *Carter*, 36 Cal. 4th at 1149. Petitioner points to no clearly established
20 federal law holding that other crimes evidence, properly admitted at the guilt phase
21 to show intent, may not be considered in the penalty phase or on a motion for
22 modification of the sentence. *Cf. Burr*, 496 U.S. at 920-21 (Stevens, J., dissenting)
23 (discussing whether post-trial acquittal of other crimes, admitted as evidence of
24 identity at guilt phase, renders evidence of those crimes inadmissible at sentencing
25 hearing in capital case). As to Petitioner's allegations of ineffective assistance of
26 counsel, the California Supreme Court held on direct appeal as matter of state law
27 that the Kim and Cullins evidence could properly be considered in aggravation at
28 the penalty phase. *Carter*, 36 Cal. 4th at 1211. Petitioner has demonstrated no

entitlement to instructions restricting the penalty phase consideration of that evidence as he alleges. The California Supreme Court’s rejection of Petitioner’s ineffective assistance claim is, therefore, not objectively unreasonable. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (“[T]rial counsel cannot have been ineffective for failing to raise a meritless objection”); *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) (“To show prejudice under *Strickland* from failure to file a motion,” petitioner must show, in part, that “had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious”); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, “the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit”).

3. Victim Impact Evidence

Petitioner alleges that “prior to entry of the judgment of death, the court improperly and prejudicially received ‘victim impact’ evidence,” consisting of twelve letters from the victims’ family members and friends and three oral statements to the court from family members. (Pet. at 172.) Petitioner argues that *Booth v. Maryland*, 482 U.S. 496 (1987), “prohibited the admission and consideration of victim impact evidence at the time of Mr. Carter’s trial.” (Pet. at 172.)

The California Supreme Court rejected Petitioner’s argument on direct appeal, holding:

The [trial] court heard and denied defendant’s application for modification of the death sentence on January 11, 1990. No victim-impact statements were made in connection with that motion. Although the record contains 12 letters . . . written by family and friends of the victims . . . , the record does not indicate that the court considered any of these statements prior to denying the application for modification of defendant’s death

1 sentence. [¶] . . . [D]efendant does not challenge
 2 . . . January 30, 1990, as the date on which the court
 3 received the letters. [¶] On January 30, 1990,
 4 immediately prior to the court's imposition of a judgment
 5 of death, it heard . . . statements made by [three family
 6 members]. . . . [T]he three oral statements . . . were made
 7 approximately 3 weeks after the court denied the
 8 application, and nothing in the record indicates that the
 9 trial court considered the letters at any time.

10 *Carter*, 36 Cal. 4th at 1211-12.

11 The California Supreme Court's factual determinations are reasonable, and
 12 the record contains no indication that the trial court considered the oral statements
 13 or the letters in its process in imposing the judgment of death. The trial court
 14 stated:

15 Dean Phillip Carter, it is the judgment and sentence of
 16 this Court that for the offenses of murder as charged in
 17 the Information, of which you previously, to wit, on July
 18 17, 1989, were found guilty, the jury having found the
 19 offenses of murder to be first degree and the jury having
 20 returned a finding that the special circumstances alleged
 21 in the Information under California Penal Code section
 22 190.1, subdivision (a), were true; and the jury having
 23 previously, to wit, on August 7, 1989, found that the
 24 penalty shall be death; and this Court having on January
 25 11, 1990, denied your Motion for New Trial and
 26 Application for Modification of Verdict and Finding
 27 Imposing the Death Penalty; it is the Order of this Court
 28 that you shall suffer the death penalty

(54 RT 6277; *see also* 7 CT 1916-19 (reflecting same).)

29 In *Rhoades v. Henry (Baldwin)*, the Ninth Circuit considered a habeas
 30 petitioner's claim that the admission of victim impact statements in a pre-sentence
 31 report submitted to the sentencing judge violated *Booth*. 638 F.3d 1027, 1054-55
 32 (9th Cir. 2010). The Circuit found no violation, holding:

1 *Booth*'s concern that victim impact statements 'can serve
 2 no other purpose than to inflame the jury and divert it
 3 from deciding the case on the relevant evidence
 4 concerning the crime and the defendant,' is not the same
 5 when, as here, a judge does the sentencing. We assume
 6 that the trial judge applied the law – *Booth*, at the time –
 and considered only evidence that he knew was
 admissible.

7 *Id.* at 1055 (quoting *Booth*, 482 U.S. at 508; footnote omitted). The California
 8 Supreme Court's conclusion that the trial court considered only admissible
 9 evidence in imposing the death sentence is not unreasonable in light of the record
 10 of the trial court's proceedings, nor is its determination that the victim impact
 11 statements did not infringe upon Petitioner's constitutional rights.

12 Claims 12(I) and (J) are, therefore, DENIED.

13 **J. Admission of Blevins's Testimony**

14 In Claim 12(K), Petitioner contends that the admission of Ray Blevins's
 15 preliminary hearing testimony at trial "deprived Mr. Carter of his right to confront
 16 and cross-examine witnesses against him." (Pet. at 173.) Petitioner asserts that:

17 [b]ecause preliminary hearing counsel was litigating with
 18 the assumption that the Kim case would not necessarily
 19 be admitted, he did not have the same motive and interest
 20 that counsel would have had at trial. Moreover,
 21 Blevins's statements at the preliminary hearing were
 22 testimonial in nature and, due to the lack of meaningful
 23 cross-examination, were not reliable or accompanied by
 24 sufficient guarantees of trustworthiness. The admission
 25 was further in error because, although the state knew at
 the time of the preliminary hearing that the semen on
 Kim's bedspread did not match Mr. Carter, they had not
 disclosed this information to the defense.

26 (*Id.*)

27 The Sixth Amendment provides that "in all criminal prosecutions, the
 28 accused shall enjoy the right to be confronted with the witnesses against him. . . .

1 A witness's testimony against a defendant is thus inadmissible unless the witness
2 appears at trial or, if the witness is unavailable, the defendant had a prior
3 opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 557 U.S.
4 305, 309 (2009) (internal quotation and alterations omitted). Where defendant's
5 counsel "does not appear to have been significantly limited in any way in the scope
6 or nature of his cross-examination of the witness . . . at the preliminary hearing[,
7 and the witness] died or was otherwise unavailable, the Confrontation Clause
8 would not have been violated by admitting his testimony given at the preliminary
9 hearing" *California v. Green*, 399 U.S. 149, 166 (1970) (so holding despite
10 the recognition that "the preliminary hearing is ordinarily a less searching
11 exploration into the merits of a case than a trial"); see also *Pointer v. Texas*, 380
12 U.S. 400, 407 (1965) (observing that a defendant's rights may be protected where
13 the witness's statement was "taken at a full-fledged hearing at which [defendant]
14 had been represented by counsel who had been given a complete and adequate
15 opportunity to cross-examine").

16 Here, the California Supreme Court reasonably determined that Petitioner's
17 counsel's "performance at the preliminary hearing was not deficient. Defendant's
18 assertions to the contrary ignore [counsel's] appropriate questioning of various
19 witnesses and instead merely speculate that more rigorous cross-examination of
20 certain witnesses, such as Ray Blevins, . . . might have led the trial court to
21 preclude the prosecution from introducing evidence relating to the death of
22 Kim" *Carter*, 36 Cal. 4th at 1138. Petitioner has not demonstrated that
23 counsel was limited in his opportunity to cross-examine Blevins at the preliminary
24 hearing or that his cross-examination was not meaningful. (*See supra* pp. 26-27.)
25 Moreover, the California Supreme Court reasonably concluded that the
26 prosecution's delayed disclosure of the laboratory report regarding the semen
27 found on Kim's bedspread did not require exclusion of Blevins's testimony. See
28 *Carter*, 36 Cal. 4th at 1160-61; (*supra* pp. 84-85).

1 Accordingly, Claim 12(K) is DENIED.

2 //

3 //

4 **XIV. Claim 13: Insufficient Evidence**

5 **A. Allegations**

6 In Claim 13, Petitioner argues that his constitutional rights were violated
7 because there was (1) insufficient evidence to sustain the felony murder special
8 circumstance findings and (2) insufficient evidence to sustain the felony murder
9 convictions, from (a) insufficient evidence of felonious purpose in entering the
10 victims' apartments and (b) insufficient evidence of rape. (*See* Pet. at 174.)

11 As to the felony murder special circumstance findings, Petitioner asserts that
12 "there must be proof of the felonious purpose independent of the homicide. . . .
13 [A] special circumstance allegation of murder committed during a robbery has not
14 been established where the accused's primary criminal goal is not to steal but to
15 kill, and where robbery is merely incidental to the murder." (*Id.* at 177.) Petitioner
16 alleges that the evidence demonstrated that the assailant's "'primary purpose' was
17 to commit a killing, and not to obtain property or commit another felony upon
18 entry into a dwelling." (*Id.*; *see also id.* at 178 (adding that there was insufficient
19 evidence of felonious purpose in entering the apartments).)

20 As to the felony murder convictions, Petitioner argues that "it cannot be said
21 there was sufficient evidence to believe beyond a reasonable doubt that . . . entry to
22 either the Culver City or West Los Angeles apartments was for felonious purpose."
23 (*Id.* at 177.) Petitioner contends that there was no evidence of forced entry into the
24 apartment of Mills, Knoll, or Guthrie, and that the prosecution maintained that the
25 assailant's primary purpose in entering the apartment was to commit murder.
26 (*Id.* at 178 (citing 44 RT 5228-32).) Further, Petitioner argues that the evidence
27 was insufficient to support the rape charge as the victims were fully clothed and
28 there was limited testimony regarding injuries consistent with rape. (*Id.* (citing 44

1 RT 5227-28).)

2 //

3 //

4 **B. Analysis**

5 **1. Felony Murder Special Circumstance Findings**

6 Where one special circumstance finding is invalid and one or more other(s)
7 is valid, the error is harmless on federal habeas review if it did not have substantial
8 and injurious effect or influence on the jury's verdict. *See Beardslee v. Brown*, 393
9 F.3d 1032, 1041 (9th Cir. 2004); *Morales v. Woodford*, 388 F.3d 1159 (9th Cir.
10 2003); *cf. Williams*, 52 F.3d at 1476 (finding harmless error under 1977 death
11 penalty statute where instructional error meant that jury could have found felony
12 murder special circumstance true without finding an independent felonious
13 purpose, but several valid special circumstances remained). In *Beardslee*, the
14 Ninth Circuit found two invalid witness killing special circumstances harmless,
15 where a multiple murder special circumstance remained, and "very little would
16 have been altered" from the prosecution's penalty phase presentation absent the
17 invalid special circumstances. 393 F.3d at 1043. Similarly, in *Morales*, the Circuit
18 held that an invalid torture murder special circumstance "add[ed] only an improper
19 label" in the jury's consideration where the circumstances of the crime would still
20 have been presented and the lying in wait special circumstance remained valid.
21 380 F.3d at 1172 (quoting *Williams*, 52 F.3d at 1477).

22 Here, Petitioner has not shown the multiple murder special circumstance
23 finding to be invalid. (*See infra* pp. 126-30 (rejecting jury instruction challenge to
24 multiple murder special circumstance finding).) The circumstances of Petitioner's
25 crimes were properly before the jury in the penalty phase regardless of the felony
26 murder special circumstance findings. Evidence that Petitioner at the time of his
27 arrest possessed belongings from the apartments of Mills, Knoll, and Guthrie, and
28 evidence of sexual assault as to Mills and Guthrie, were only given labels as felony

1 murder special circumstances in the penalty phase. As in *Beardslee* and *Morales*,
 2 Petitioner here has failed to demonstrate that any improper felony murder
 3 //
 4 special circumstances had substantial and injurious effect or influence on the jury's
 5 verdict.

6 **2. Felony Murder Convictions**

7 "In reviewing the sufficiency of evidence, [a court] may grant habeas relief
 8 only if 'no rational trier of fact could have found proof of guilt beyond a
 9 reasonable doubt.'" *Ngo v. Giurbino*, 651 F.3d 1112, 1115 (9th Cir. 2011)
 10 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). A reviewing court must:

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

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

20 "Insufficient evidence claims are reviewed by looking at the elements of the
 21 offense under state law." *Emery v. Clark*, 643 F.3d 1210, 1214 (9th Cir. 2011)
 22 (citing *Jackson*, 443 U.S. at 324 n.16). "At the time the crimes were committed,
 23 first degree murder could be accomplished by a murder . . . committed in the
 24 perpetration of, or attempt to perpetrate, [*inter alia*,] . . . rape, [or] . . .
 25 burglary" *Carter*, 36 Cal. 4th at 1156-57 (internal quotation omitted).

26 **a. Burglary**

27 "At the time the crimes were committed, . . . [b]urglary was defined, in
 28 pertinent part, as an entry into any room, apartment . . . or other building . . . with

1 intent to commit grand or petit larceny or any felony.” *Carter*, 36 Cal. 4th at 1156-
 2 57 (internal quotation omitted). “With regard to the offense of burglary, evidence
 3 of a forced entry is not required to establish felonious intent; defendant’s
 4 intent instead may be inferred from all of the facts and circumstances disclosed by
 5 the evidence.” *Id.* at 1157. The California Supreme Court held that Petitioner’s:

6 commission of crimes in close temporal proximity,
 7 combined with a very similar *modus operandi* in each
 8 incident, strongly indicates that he entered the residences
 9 with the requisite felonious intent. [¶] Defendant was
 10 arrested driving Mills’s stolen Datsun 280 ZX,
 11 containing an Alpha Beta supermarket CASHEX card
 12 identified as having belonged to Knoll; towels, athletic
 13 wear, and photographic equipment identified as having
 belonged to Mills; and three hand-woven sweaters
 identified as having belonged to Bonnie Guthrie.

14 *Carter*, 36 Cal. 4th at 1157 (internal citation omitted); (*see also* 38 RT 4638-39
 15 (identifying camera and towel from Mills/Knoll apartment); 39 RT 4760
 16 (identifying sweaters from Guthrie apartment)).

17 The California Supreme Court’s determination that a rational trier of fact
 18 could have found proof of guilt beyond a reasonable doubt is not objectively
 19 unreasonable. The court reasonably determined that the evidence presented at trial,
 20 viewed in the light most favorable to the prosecution, could establish proof beyond
 21 a reasonable doubt that Petitioner entered the Mills/Knoll and Guthrie apartments
 22 with the required felonious intent.

23 **b. Rape**

24 “At the time the crimes were committed, . . . [r]ape was defined in pertinent
 25 part as an act of sexual intercourse accomplished with a person not the spouse of
 26 the perpetrator [that was] accomplished against a person’s will by means of force
 27 or fear of immediate and unlawful bodily injury on the person or another.” *Carter*,
 28 36 Cal. 4th at 1156-57 (internal quotation omitted). The California Supreme Court

1 held that “[t]he evidence was sufficient to establish rape; Mills’s and Guthrie’s
 2 bodies bore signs of having suffered traumatic sexual assault, and seminal fluid
 3 discovered on a white nightgown in the apartment was consistent with defendant’s
 4 PGM type and that of 15.8% of the population.” *Id.* at 1157; (*see also supra* p. 40
 5 (citing 40 RT 4845-46, 4871, 4894-98) (describing evidence consistent with a
 6 violent struggle before Mills’ and Guthrie’s homicides and with sexual assault of
 7 Mills and Guthrie)).

8 Here, too, the California Supreme Court’s determination that a rational trier
 9 of fact could have found proof of guilt beyond a reasonable doubt is not
 10 objectively unreasonable. The court reasonably determined that the evidence
 11 presented at trial, viewed in the light most favorable to the prosecution, could
 12 establish proof beyond a reasonable doubt that Petitioner accomplished an act of
 13 sexual intercourse with Mills and with Guthrie against the will of each by means of
 14 force or requisite fear.

15 Claim 13 is DENIED.

16 **XV. Claim 14: Jury Instructions**

17 **A. Overview**

18 To establish a jury instruction error meriting federal habeas relief, Petitioner
 19 must show that the given instruction violated Petitioner’s constitutional rights or
 20 “so infected the entire trial that the resulting conviction violates due process.”
 21 *McGuire*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).
 22 “[T]he instruction may not be judged in artificial isolation, but must be considered
 23 in the context of the instructions as a whole and the trial record.” *Id.* (internal
 24 quotation omitted).

25 “An appraisal of the significance of an error in the instructions to the jury
 26 requires a comparison of the instructions which were actually given with those that
 27 should have been given.” *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). “The
 28 fact that a jury instruction violates state law is not, by itself, a basis for federal

1 habeas corpus relief,” however. *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir.
 2 2006). “Federal habeas courts therefore do not grant relief, as might a state
 3 appellate court, simply because the instruction may have been deficient in
 4 comparison to the CALJIC model.” *Id.* (internal quotation omitted). “The
 5 question in a collateral proceeding is whether the ailing instruction by itself so
 6 infected the entire trial that the resulting conviction violates due process, not
 7 merely whether the instruction is undesirable, erroneous, or even universally
 8 condemned.” *Kibbe*, 431 U.S. at 154 (internal quotations omitted).

9 **B. Flight Instruction**

10 **1. Allegations and Decision on Direct Appeal**

11 In Claim 14(B), Petitioner alleges that the trial court erred by instructing the
 12 jury on flight pursuant to CALJIC 2.52. (Pet. at 179, 183.) Petitioner asserts that
 13 there was no evidence that, at the time of his arrest, he had been confronted with
 14 the charges against him and attempted to flee, that he immediately took flight after
 15 commission of a crime, or that he was conscious of guilt. (*Id.* at 183-84.) In
 16 merits briefing, Petitioner argues that the California Supreme Court’s decision was
 17 based on an unreasonable determination of the facts, and that a reasonable
 18 determination of the facts would not have supported giving the instruction under
 19 state law. (Petr.’s Br. at 226-29.)

20 On direct appeal, the California Supreme Court held:

21 Section 1127c requires a trial court in any criminal
 22 proceeding to instruct as to flight where evidence of
 23 flight is relied upon as tending to show guilt. CALJIC
 24 No. 2.52, which is derived from section 1127c, advises
 25 the jury ‘that evidence of flight alone is insufficient to
 26 establish guilt, but may be considered with other proven
 27 facts in deciding the question of guilt or innocence.’
 28 Contrary to defendant’s position, the instruction neither
 requires knowledge on a defendant’s part that criminal
 charges have been filed, nor a defined temporal period
 within which the flight must be commenced, nor

1 resistance upon arrest. In view of the evidence
2 introduced by the prosecution establishing that defendant
3 left California in the days immediately following the
4 charged offenses and was in possession of the vehicle
5 belonging to murder victim Jillette Mills when he was
6 arrested in Arizona, the flight instruction plainly was
7 warranted here. As noted, the instruction merely
8 permitted the jury to consider evidence of flight in
9 deciding defendant's guilt or innocence; it did not
10 suggest that the jury should consider such evidence as
11 dispositive.

12 Moreover, even if we were to conclude the instruction
13 should not have been given, any error would have been
14 harmless. The instruction did not assume that flight was
15 established, but instead permitted the jury to make that
16 factual determination and to decide what weight to
17 accord it.

18 *Carter*, 36 Cal. 4th at 1182-83 (footnote and internal citations omitted).

19 **2. Analysis**

20 The Ninth Circuit has held that a flight instruction is appropriate:

21 if there is evidence sufficient to support a chain of
22 unbroken inferences from the defendant's behavior to the
23 defendant's guilt of the crime charged. . . . [F]our
24 inferences must be justified: (1) from the defendant's
25 behavior to flight; (2) from flight to consciousness of
26 guilt; (3) from consciousness of guilt to consciousness of
27 guilt concerning the crime charged; and (4) from
28 consciousness of guilt concerning the crime charged to
actual guilt of the crime charged.

29 *United States v. Silverman*, 861 F.2d 571, 581 (9th Cir. 1988) (internal quotation
30 omitted). The court must "evaluate flight instructions by looking for facts that
31 support the inference[s] Evidence that a defendant fled immediately after a
32 crime was committed supports an inference that the flight was motivated by a

1 consciousness of guilt of *that* crime.” *Id.* at 581, 582 n.4 (emphasis in original);
2 *see also United States v. Dixon*, 201 F.3d 1223, 1232 (9th Cir. 2000) (applying
3 //
4 *Silverman* factors and finding no constitutional violation from flight instruction);
5 *United States v. Harrison*, 585 F.3d 1155, 1159-60 (9th Cir. 2009) (same).

6 When evaluating the appropriateness of the instruction, a reviewing court
7 may also consider whether the trial court “emphasized that the jury alone must
8 make the decision as to what inferences to draw from the defendant’s flight.”
9 *Dixon*, 201 F.3d at 1233.

10 Here, the jury was instructed that it “may” consider a fact of flight in
11 deciding Petitioner’s guilt or innocence, and that the weight to give any such
12 circumstance was a matter for the jury to determine. (6 CT 1676; *see also* 44 RT
13 5282-87 (regarding delivery of written flight instruction to jury).) Moreover, the
14 California Supreme Court’s factual and legal determinations that evidence
15 introduced at Petitioner’s trial supported an inference that Petitioner was in flight,
16 motivated by a consciousness of guilt of the Knoll, Mills, and Guthrie crimes, were
17 not unreasonable. The prosecution presented evidence that the Knoll and Mills
18 murders in Culver City were committed on approximately April 10, 1984 (38 RT
19 4628, 4636, 4657-61; 39 RT 4744), that the Guthrie murder in West Los Angeles
20 was committed on approximately April 11, 1984 (39 RT 4757, 4771-77), and that
21 the Cullins murder in San Diego was committed on approximately April 12, 1984
22 (40 RT 4903-10). The prosecution presented testimony that Petitioner was arrested
23 five days later, on April 17, 1984, driving Mills’ stolen vehicle on an interstate
24 highway eastbound, away from California, where the crimes were committed. (35
25 RT 4317-20; 38 RT 4630.) The California Supreme Court’s determination that
26 Petitioner fled immediately after the Knoll, Mills, and Guthrie crimes, supporting
27 an inference that his flight was motivated by a consciousness of guilt of those
28 crimes, was not objectively unreasonable. *See Silverman*, 861 F.2d at 581, 582 n.4.

1 //

2 //

3 The jury instruction regarding flight, therefore, did not “so infect[] the entire
4 trial that the resulting conviction violates due process.” *McGuire*, 502 U.S. at 72
5 (internal quotation omitted). Claim 14(B) is DENIED.

6 **C. Lesser Included Instructions**

7 In Claim 14(C), Petitioner argues:

8 In a case such as this one, where a second-degree murder
9 instruction was required by the evidence, and where
10 evidence to support felony murder was so weak . . . , it
11 was a violation of Mr. Carter’s state and federal
12 constitutional guarantees to not give the jury the ‘third
13 option’ of second-degree murder, and reversal is
14 required.

15 (Pet. at 189 (citing, *inter alia*, *Beck v. Alabama*, 447 U.S. 625, 635 (1980); *Hopper*
16 *v. Evans*, 456 U.S. 605 (1982)).) On direct appeal, the California Supreme Court
17 rejected the claim, finding “no error in the trial court’s refusal to give the
18 instructions requested by defendant. . . . [W]e agree with the trial court that there
19 was not substantial evidence to warrant the second degree murder instructions
20 requested by defendant.” *Carter*, 36 Cal. 4th at 1184-85.

21 The California Supreme Court’s assessment of the evidence is not
22 unreasonable. In addition, Petitioner’s jury was charged with deciding his guilt or
23 innocence of two counts of rape and two counts of residential burglary, apart from
24 the murder charges. Petitioner’s jury was not faced with a single option of a first
25 degree murder conviction to avoid acquitting Petitioner altogether. As the United
26 States Supreme Court explained in *Spaziano v. Florida*:

27 The Court in *Beck* recognized that the jury’s role in the
28 criminal process is . . . not always rational. The absence
of a lesser included offense instruction increases the risk
that the jury will convict, not because it is persuaded that

1 the defendant is guilty of capital murder, but simply to
2 avoid setting the defendant free. . . . The goal of the *Beck*
3 rule, in other words, is to eliminate the distortion of the
4 factfinding process that is created when the jury is forced
5 into an all-or-nothing choice between capital murder and
innocence.

6 468 U.S. 447, 455 (1984); *see also Hopper*, 456 U.S. at 609-10 (“Our opinion in
7 *Beck* stressed that the jury . . . could not take a third option of finding that . . . the
8 defendant had committed a grave crime, . . . not so grave as to warrant capital
9 punishment. . . . In such a situation, we concluded, the jury might convict the
10 defendant of a capital offense because it found that the defendant was guilty of a
11 serious crime”). Petitioner’s jury had the option of convicting him of the serious
12 crimes of up to two counts of rape and up to two counts of residential burglary as
13 alternatives to “setting [him] free.” *Spaziano*, 468 U.S. at 455. Petitioner has,
14 therefore, failed to show a violation of his federal constitutional rights under *Beck*.
15 *See LaGrand v. Stewart*, 133 F.3d 1253, 1262-63 (9th Cir. 1998) (“[T]he
16 instructions in the instant case do not implicate the concerns of the *Beck* doctrine
17 because the jury was given the choice of convict[ions of] . . . aggravated assault,
18 armed robbery, robbery and kidnapping . . . [i]n the event the jury had found itself
19 unable to agree on a conviction of first-degree murder”).

20 Claim 14(C) is, therefore, DENIED.

21 **D. Intent to Kill Instruction**

22 **1. Allegations and Decision on Direct Appeal**

23 In Claim 14(D), Petitioner asserts that the trial court unconstitutionally failed
24 to instruct the jury on the requisite intent to kill for the felony murder and multiple
25 murder special circumstance findings. (Pet. at 190-91.)

26 The California Supreme Court addressed the claim on direct appeal. The
27 court explained:
28

1 In 1983, this court held that intent to kill was an element
2 of felony-murder special circumstances whether or not
3 the defendant was the actual killer. *Carlos v. Superior*
4 *Court*, 35 Cal. 3d 131, 153-154 (1983). Although we
5 overruled *Carlos* in *People v. Anderson*, 43 Cal. 3d 1104,
6 1147 (1987), holding that the intent-to-kill requirement
7 applied only to an accomplice and not to the actual killer,
8 *Carlos* remained applicable to (and the trial court was
9 required to instruct the jury on) intent to kill in all cases
10 involving a defendant charged with a felony-murder
11 special circumstance if the offense was committed during
12 the ‘window’ period between our decisions in *Carlos* and
13 *Anderson*.

14 In the present case, the jury found a total of six special
15 circumstance allegations to be true – one allegation of
16 multiple murder, two allegations of rape murder (as to
17 Mills and Guthrie), and three allegations of burglary
18 murder (as to Mills, Knoll, and Guthrie). The murders
19 occurred in April 1984, during the *Carlos/Anderson*
20 ‘window’ period. Accordingly, the jury in this case
21 could find the special circumstance allegations to be true
22 only if it found that defendant acted with intent to kill.
23 Nonetheless, as defendant asserts and the People
24 concede, the trial court’s instruction on special
25 circumstances, CALJIC No. 8.80, in relevant part
26 informed the jury that defendant’s intent was
27 inconsequential: ‘If you find beyond a reasonable doubt
28 that the defendant was the actual killer, you need not find
that the defendant intended to kill a human being in order
to find the special circumstance to be true.’

We have consistently held that when a trial court fails to
instruct the jury on an element of a special circumstance
allegation, the prejudicial effect of the error must be
measured under the test set forth in *Chapman v.*
California, 386 U.S. 18, 24 (1967). Under that test, an
error is harmless only when, beyond a reasonable doubt,
it did not contribute to the verdict. We have held that
error in failing to instruct that a special circumstance

contains a requirement of the intent to kill is harmless beyond a reasonable doubt when the evidence of defendant's intent to kill . . . was overwhelming, and the jury could have had no reasonable doubt on that matter.

In the present case, the evidence was overwhelming that defendant possessed the intent to kill when he murdered Susan Knoll, Jillette Mills, and Bonnie Guthrie. As noted, within a very brief period all three victims were killed by strangulation – Knoll by manual strangulation, Mills and Guthrie by ligature strangulation. The latter two victims also suffered traumatic sexual assaults. That evidence, considered with the evidence that the bodies of Knoll and Mills were concealed within a closet, and that in each instance defendant departed from the crime scene with selected possessions of each victim, is consistent only with intentional killings. No evidence was presented that would have supported a finding of unintentional murder. Under these circumstances, we conclude that no reasonable jury, properly instructed, would have failed to find that defendant acted with the requisite intent to kill. We are satisfied that the trial court's instruction removing that issue from the jury's consideration was harmless beyond a reasonable doubt.

Carter, 36 Cal. 4th at 1185-87 (internal quotations and footnote omitted; citations omitted and edited).

2. Analysis

“[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious effect’ standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the ‘harmless beyond a reasonable doubt’ standard set forth in *Chapman*.” *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (internal citations omitted). “[T]he *Brecht* standard of actual prejudice” is “more forgiving” of error and “less onerous” on the state than is the *Chapman* standard. *Id.* at 116, 117, 120 (internal quotations omitted).

1 //

2 “An instruction that omits an element of the offense does not *necessarily*
3 render a criminal trial fundamentally unfair or an unreliable vehicle for
4 determining guilt or innocence,” but is instead subject to review for prejudice.
5 *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (emphasis in original). “[W]here a
6 defendant did not, and apparently could not, bring forth facts contesting the
7 omitted element, answering the question whether the jury verdict would have been
8 the same absent the error does not fundamentally undermine the purposes of the
9 jury trial guarantee.” *Id.* at 19; *see also United States v. Cherer*, 513 F.3d 1150,
10 1155 (9th Cir. 2008) (finding harmless error as to omitted jury instruction on
11 defendant’s requisite state of mind where defendant “scarcely” raised a state of
12 mind defense at trial).

13 The California Supreme Court’s factual determination that “[n]o evidence
14 was presented that would have supported a finding of unintentional murder” is not
15 unreasonable. *Carter*, 36 Cal. 4th at 1187; (*cf. supra* pp. 34-39 (considering
16 evidence presented on habeas review regarding Petitioner’s mental state at and
17 before the time of the crimes); Pet. at 167 (“[T]he defense was not contending that
18 strangulation murder ‘would be anything other than premeditated’” (quoting 35 RT
19 4267))). The court’s further finding that the evidence of Petitioner’s intent was
20 overwhelming is similarly not unreasonable. As the court found, death by manual
21 or ligature strangulation evidences intentional killing, *see Schad v. Ryan*, 671 F.3d
22 708, 717-18 (9th Cir. 2009) (killing by ligature strangulation permitted inference of
23 intentional murder); *Davis v. Woodford*, 384 F.3d 628, 640 (9th Cir. 2003) (death
24 by strangulation requiring three to five minutes of continuous pressure permitted
25 inference of intentional murder); *United States v. Roston*, 986 F.2d 1287, 1290 (9th
26 Cir. 1993) (death by strangulation permitted inference of intentional murder), as
27 does evidence of a substantial struggle before death. *See id.*; (*see also supra* p. 40
28 (discussing evidence of violent struggles before Mills, Knoll, and Guthrie deaths)).

1 Petitioner has, therefore, failed to demonstrate that the California Supreme
2 Court's rejection of his claim was objectively unreasonable or that the instructional
3 error had a substantial and injurious effect on his trial. Claim 14(D) is DENIED.

4 **E. Guilt Phase Instructions**

5 In his Petition, Petitioner summarily alleges in Claim 12(E) that:

6 [s]everal pattern jury instructions read to the jury in this
7 case, including CALJIC Nos. 2.01, 2.02, 2.50, 2.50.1,
8 2.50.2, 8.83, and 8.83.1, impaired the presumption of
9 innocence, lightened the prosecution's burden of proof
10 beyond a reasonable doubt, and amounted to mandatory
11 conclusive presumptions of guilt, in violation of Mr.
12 Carter's rights to, inter alia, due process of law, a fair
13 trial, and reliable determinations of guilt and penalty.

14 (Pet. at 191 (citing 6 CT 1659-61, 1672-75, 1703-06).) Likewise, in Claim
15 5(H)(3), Petitioner alleges that "[t]o the extent" that trial counsel failed to object to
16 the instructions, trial counsel was ineffective. (*Id.* at 76.)

17 On direct appeal, the California Supreme Court held:

18 The trial court instructed the jury pursuant to several
19 pattern jury instructions at the conclusion of the guilt
20 phase, including CALJIC Nos. 2.01 (sufficiency of
21 circumstantial evidence – generally), 2.02 (sufficiency of
22 circumstantial evidence to prove specific intent), 2.50
23 (evidence of other crimes), 2.50.1 (evidence of other
24 crimes by the defendant proved by a preponderance of
25 the evidence), 2.50.2 (definition of preponderance of the
26 evidence), 8.83 (sufficiency of circumstantial evidence to
27 prove special circumstance), and 8.83.1 (sufficiency of
28 evidence to prove mental state). Defendant contends that
decisions rendered by this court rejecting constitutional
challenges to these instructions are 'inconsistent with
principles set forth by the United States Supreme Court'
and should be reconsidered.

1 Defendant has provided no basis for reconsidering our
2 prior decisions upholding the validity of these pattern
3 jury instructions. We therefore reject defendant's
4 challenge.

5 *Carter*, 36 Cal. 4th at 1188 (internal citations omitted).

6 In his opening merits brief, Petitioner elaborates upon his claim as to
7 CALJIC Nos. 2.50, 2.50.1, and 2.50.2. (Petr.'s Br. at 236-38.) Petitioner argues
8 that the instructions "were contrary to *In re Winship*'s maxim that a defendant may
9 not be convicted except 'upon proof beyond a reasonable doubt of every fact
10 necessary to constitute the crime with which he is charged.'" (*Id.* at 236 (citing
11 *Winship*, 397 U.S. 358, 364 (1970). Petitioner relies upon *Gibson v. Ortiz*, 387
12 F.3d 812, 821-22 (9th Cir. 2004), *overruled in part by Byrd v. Lewis*, 566 F.3d 855
13 (9th Cir. 2009), which considered CALJIC No. 2.50.01 – not an instruction given
14 or challenged here. CALJIC No. 2.50.01 provided that the jury may infer that the
15 defendant had a disposition to commit a similar type of sexual offense as a prior
16 crime. *Gibson* held that CALJIC No. 2.50.01, paired with an instruction that other
17 sexual offenses may be proved by a preponderance of the evidence, was infirm
18 under *Winship*. (See Petr.'s Br. at 237-38.)

19 The determining issue in *Gibson* was that "CALJIC No. 2.50.01 . . .
20 provided that the jury could infer that the defendant committed the charged crime
21 if it found 'that the defendant committed a prior sexual offense.'" 387 F.3d at 822.
22 Critically:

23 [t]he jury was never told how, or if, the two standards of
24 proof set forth in the instructions should be harmonized.
25 Rather, it received only a general instruction regarding
26 circumstantial evidence, which required proof beyond a
27 reasonable doubt, and the specific, independent
28 instruction relating to previous sexual abuse and

1 domestic violence, which required only proof by a
2 preponderance of the evidence.

3 *Id.*

4 Here, the jury was instructed that it may consider other crimes evidence
5 only in specified ways, and may not infer that Petitioner has a disposition to
6 commit crimes. (See 44 RT 5246-47, 5251-53.) The California Supreme Court
7 may have reasonably determined, particularly in light of those instructions, that
8 CALJIC instructions 2.50, 2.50.1, and 2.50.2, along with instructions 2.01-2.02
9 and 8.83-8.83.1, were constitutionally permissible. *Cf. Alberni*, 458 F.3d at 863,
10 866 (“[T]he Supreme Court has never expressly held that it violates due process to
11 admit other crimes evidence for the purpose of showing conduct in conformity
12 therewith”) (discussing *McGuire*, 502 U.S. at 75 n.5); *see also Mejia*, 534 F.3d at
13 1046 (holding same). Likewise, the state high court may have reasonably
14 determined that Petitioner suffered no prejudice from counsel’s failure to object to
15 the instructions.

16 Accordingly, Claims 14(E) and 5(H)(3) are DENIED.

17 **XVI. Claims 2, 12(L), and 15: Complete Breakdown in Adversarial Process**
18 **and Cumulative Error**

19 **A. Breakdown in Adversarial Process**

20 In Claim 2, Petitioner alleges “a complete breakdown in the adversarial
21 system of justice,” citing, *inter alia*, *United States v. Cronin*, 466 U.S. 648, 656-66
22 (1984) and *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991). (Pet. at
23 38.) Petitioner contends that counsel “virtually absented himself from the guilt-
24 phase proceedings. He offered no opening statement, did not call a single witness,
25 . . . only haphazardly cross-examined the state’s witnesses,” and made an
26 inadequate guilt phase closing argument. (*Id.* at 39; *see also* Petr.’s Br. at 65.)
27 Petitioner asserts that he was, therefore, “effectively abandoned by his counsel.”
28 (Pet. at 39.) Petitioner further argues that counsel’s actions in “affirmatively

1 aid[ing] the prosecutor” and in opposing Petitioner’s stated desire to testify
2 demonstrate a conflict of interest. (*Id.* at 37, 39.)

3 On direct appeal, the California Supreme Court held:

4 Defendant’s reliance upon *United States v. Swanson*, 943
5 F.2d 1070 (9th Cir.1991), . . . is misplaced. *Swanson*
6 held that defense counsel effectively abandoned and
7 betrayed his client and aided the prosecution by arguing
8 to the jury that there was no reasonable doubt his client
9 was the person who committed the bank robbery charged
10 in the indictment. By contrast, defense counsel’s
11 performance in the present case did not constitute
12 abandonment. In view of the strong prosecution
13 evidence linking defendant to the charged offenses, as
14 well as to the murder cases then pending against
15 defendant in Alameda and San Diego Counties, defense
16 counsel reasonably could believe that their client’s
17 interests would best be served by treating the case ‘as a
18 penalty case,’ rather than by presenting a defense or
19 relying upon defendant’s testimony.

20 *Carter*, 36 Cal. 4th at 1192-93 (citation edited).

21 So long as counsel does not “‘entirely fail[] to subject the prosecution’s case
22 to meaningful adversarial testing,’” counsel’s performance is subject to analysis
23 under the *Strickland* standard of error and prejudice. *Nixon*, 543 U.S. at 190
24 (quoting *Cronic*, 466 U.S. at 648). The United States Supreme Court concluded in
25 *Nixon* that defense counsel who conceded defendant’s guilt at the guilt phase of
26 trial to attempt to avoid a capital sentence during penalty proceedings did not fail
27 to function as the prosecution’s adversary under *Cronic*. 543 U.S. at 187-92. The
28 Court observed that despite counsel’s concession, defendant “retained the rights
accorded a defendant in a criminal trial. The State was obliged to present during
the guilt phase competent, admissible evidence establishing the essential elements
of the crimes Further, the defense reserved the right to cross-examine
witnesses . . . and could endeavor, as [counsel] did, to exclude prejudicial

1 evidence.” *Id.* at 188 (internal citation omitted); *see also Bell v. Cone*, 535 U.S.
2 685, 696-98 (2002) (noting that “[w]hen we spoke in *Cronic* of the possibility of
3 presuming prejudice based on an attorney’s failure to test the prosecutor’s case, we
4 indicated that the attorney’s failure must be complete,” and holding that counsel’s
5 alleged failure to present mitigating evidence and closing argument at capital
6 sentencing proceeding should be considered under *Strickland*, not *Cronic*).

7 The California Supreme Court’s determination that counsel subjected the
8 prosecution’s case to meaningful adversarial testing is not objectively
9 unreasonable. Counsel cross-examined witnesses (*see supra* pp. 41-42 (discussing
10 evidence counsel presented on cross-examination)); moved to exclude allegedly
11 prejudicial evidence (*see supra* pp. 84, 97, 102), *Carter*, 36 Cal. 4th at 1146-50,
12 1160-62; emphasized that Petitioner’s guilt must be proven beyond a reasonable
13 doubt (*see supra* p. 46), *Carter*, 36 Cal. 4th at 1189, 1189 n.35; presented
14 mitigating evidence (*see supra* pp. 54-59); and asked the jury “to spare
15 [Petitioner’s] life.” (*See supra* pp. 48 (quoting 47 RT 5498), 61 (quoting 52 RT
16 6094).)

17 In addition, considering the entirety of Petitioner’s allegations of ineffective
18 assistance of counsel cumulatively under *Strickland*, the Court finds that the
19 California Supreme Court’s determination that Petitioner was not prejudiced by
20 any deficient performance by counsel was not objectively unreasonable.

21 Claim 2 is DENIED.

22 **B. Cumulative Error**

23 In Claim 12(L), Petitioner contends that “relief is required when this claim
24 [Claim 12, alleging trial court error] is considered together with the additional
25 constitutional errors outlined in the remainder of this Petition.” (Pet. at 174.)

26 Further, in Claim 15, Petitioner asserts that he is entitled to relief based upon “the
27 cumulative and interrelated errors that occurred during both the guilt phase and the
28 penalty phase of his capital trial.” (*Id.* at 192.)

1 “[P]rejudice may result from the cumulative impact of multiple
2 deficiencies.” *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (finding
3 cumulative prejudice from counsel’s performance that was “deficient in eleven
4 ways, eight of them undisputed” which “obviates the need to analyze the individual
5 prejudicial effect of each deficiency,” but noting that “some of the deficiencies
6 [may be] individually prejudicial”) (internal quotation and citation omitted).
7 “[W]here the government’s case is weak, a defendant is more likely to be
8 prejudiced by the effect of cumulative errors. This is simply the logical corollary
9 of the harmless error doctrine which requires us to affirm a conviction if there is
10 overwhelming evidence of guilt.” *United States v. Frederick*, 78 F.3d 1370, 1381
11 (9th Cir. 1996) (internal citation and quotation omitted); *United States v. Nadler*,
12 698 F.2d 995, 1002 (9th Cir. 1983) (holding that when examining “the cumulative
13 effect of several errors[, . . .] [w]hether the alleged errors prejudiced the
14 [petitioner’s right] to a fair trial depends in turn upon the strength of the
15 Government’s [case] against [him]; the stronger the prosecution’s case, the less
16 likely that a [petitioner] would be prejudiced by the error or misconduct”).
17 “[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial,
18 ‘for there are no perfect trials.’” *United States v. Payne*, 944 F.2d 1458, 1477 (9th
19 Cir. 1991) (rejecting cumulative error claim based upon trial court errors) (quoting
20 *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

21 Here, the California Supreme Court’s determination that the evidence
22 against Petitioner was “overwhelming” is not objectively unreasonable. *Carter*, 36
23 Cal. 4th at 1138, 1187 (discussing guilt phase evidence); *see also id.* at 1146, 1182
24 (discussing penalty phase evidence). The court may have reasonably concluded
25 that any errors in Petitioner’s trial, considered cumulatively, were harmless in light
26 of that evidence. *Cf. id.* at 1212-13 (finding no cumulative error on direct appeal
27 because “defendant’s trial was nearly devoid of any error . . .

28 //

1 [and] to the extent any error was committed it was clearly harmless”). Claim 15 is,
2 therefore, DENIED.

3 **XVII. Claim 16: Requisite Specific Intent and Incompetence to Be Executed**

4 In Claim 16, Petitioner contends, first, that his mental condition renders him
5 incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The
6 California Supreme Court denied Claim 16 as “premature without prejudice to
7 renewal after an execution date is set.” *In re Carter*, Case No. S153790, June 17,
8 2010; (see also Petr.’s Br. at 245; Respt.’s Br. at 124.) Petitioner acknowledges
9 that this issue is “not currently ripe, because there is no established date for Mr.’s
10 Carter’s execution,” and he presents it to “preserve this claim for review when
11 ripe.” (Pet. at 199; see also Petr.’s Br. at 245; Respt.’s Br. at 124 (agreeing that the
12 issue is premature because “Carter’s execution is not imminent”).) This issue is
13 dismissed as premature and not ripe for review.

14 Second, Petitioner summarily contends that his “mental defects, disorders,
15 and illnesses from childhood and into adulthood . . . prevented him from
16 conforming his conduct to the requirements of the law and resulted in him not
17 forming the intent required for the crimes of which he was convicted.” (Pet. at
18 199.) As discussed above, the evidence Petitioner presents regarding his intent and
19 his ability to manage his conduct is speculative and vague and does not establish
20 Petitioner’s entitlement to relief. (*Cf. supra* pp. 37-39 (discussing the nature of
21 Petitioner’s expert evidence).) This portion of Claim 16 is denied.

22 Third, Petitioner argues that “the imposition of a sentence of death for
23 crimes committed by an individual who could not conform his conduct to the
24 requirements of law at the time of the crimes . . . constitutes cruel and unusual
25 punishment.” (Pet. at 199 (citing *Proffitt v. Florida*, 428 U.S. 242 (1976)).)
26 Petitioner has not established that he is entitled to federal habeas relief on this
27 basis. *Cf. Wilson v. Ozmint*, 352 F.3d 847, 870-72 (4th Cir. 2003) (rejecting
28 petitioner’s Eighth Amendment claim against execution of a person adjudicated to

1 have lacked sufficient capacity to conform his conduct to the requirements of the
 2 law, applying *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper v.*
 3 *Simmons*, 543 U.S. 551 (2005)); *see also Proffitt*, 428 U.S. at 246-47 (holding that
 4 death sentence was not cruel and unusual punishment where, *inter alia*, petitioner
 5 told a jail physician he previously “had an uncontrollable desire to kill that had
 6 already resulted in his killing one man . . . and that he wanted psychiatric help so
 7 he would not kill again,” and physician opined that petitioner was dangerous but
 8 his condition could be treated successfully). This portion of Claim 16 is also
 9 denied.

10 Claim 16 is, therefore, DISMISSED IN PART and DENIED IN PART.

11 **XVIII. Claim 17: Systemic Death Penalty Claims**

12 **A. Political Considerations in Death Penalty Review Process**

13 In Claim 17(A), Petitioner alleges that his federal constitutional rights were
 14 violated “because the California Supreme Court has labored since the year before
 15 Mr. Carter’s trial under political and economic pressures which do not permit it to
 16 decide death penalty cases in a fair and impartial manner, resulting in a capital
 17 sentencing scheme which is applied in an arbitrary and capricious manner.” (Pet.
 18 at 200.)

19 There is a “general presumption that judges are unbiased and honest.” *Ortiz*
 20 *v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) (citing *Withrow v. Larkin*, 421 U.S.
 21 35, 47 (1975)). Nothing in Petitioner’s argument regarding political pressure
 22 suffices to overcome that general presumption. Petitioner fails to specifically
 23 allege any support in the record of his own case to demonstrate judicial bias.
 24 Further, while Petitioner notes that three justices of the California Supreme Court
 25 were removed from the Supreme Court in a 1986 retention election in which those
 26 justices’ death penalty decisions were criticized (Pet. at 201), Petitioner has not
 27 demonstrated that the justices who considered his case were in any manner
 28 influenced by a fear of future challenge and removal from the bench.

1 Because Petitioner has failed to demonstrate that the California Supreme
 2 Court's rejection of his claim was objectively unreasonable, he is not entitled to
 3 habeas relief on this basis. Claim 17(A) is DENIED.

4 **B. Execution Following Lengthy Confinement and Violations of**
 5 **International Law**

6 In Claim 17(B), Petitioner contends that "the execution of Mr. Carter
 7 following his lengthy confinement under sentence of death (now more than twenty
 8 years since judgment) would constitute cruel and unusual punishment and violate
 9 international law, covenants, treaties and norms." (Pet. at 205.) Similarly, in
 10 Claim 17(G), Petitioner alleges that "the death penalty is unconstitutional and
 11 violates international law." (*Id.* at 223.) Petitioner argues:

12 First, the death penalty's use in California as a regular
 13 form of punishment violates the federal Constitution, and
 14 next, the impossibility of reconciling two equally
 15 important but opposing principles – the principle of
 16 individualized treatment and the principle of nonarbitrary
 and rational sentencing – means that the death penalty is
 no longer an acceptable form of punishment.

17 (*Id.*; see also *id.* at 224 (citing *Callins v. Collins*, 510 U.S. 1141, 1144 (1994)
 18 (Blackmun, J., dissenting)).) Petitioner alleges that "the law of nations now
 19 recognizes the impropriety of capital punishment as regular punishment" (*Id.*
 20 at 224.)

21 Petitioner's claim lacks support in clearly established federal law as
 22 determined by the Supreme Court. Clearly established federal law does not hold
 23 the death penalty to violate international law or the federal Constitution. *Cf.*
 24 *Nevius v. McDaniel*, 218 F.3d 940 (9th Cir. 2000) (denying certificate of
 25 appealability where state court did not contradict or unreasonably apply federal law
 26 in denying petitioner's claim that repeated scheduling of execution constituted
 27 cruel and unusual punishment in violation of "the Eighth Amendment and several
 28 instruments of international law, including the Universal Declaration of Human

1 Rights, and the Convention against Torture and Other Cruel, Inhumane, or
 2 Degrading Treatment or Punishment”). Likewise, “[t]he Supreme Court has never
 3 held that execution after a long tenure on death row is cruel and unusual
 4 punishment.” *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (quoting *Allen*
 5 *v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)).

6 Claims 17(B) and 17(G) are DENIED.

7 **C. Lethal Injection and Lethal Gas**

8 In Claim 17(C), Petitioner alleges that “the manner of execution, lethal
 9 injection, constitutes cruel and unusual punishment.” (Pet. at 211.) He adds that if
 10 lethal injection in California is held to be unconstitutional, the State “may attempt
 11 to execute Mr. Carter using lethal gas.” (*Id.* at 213.) Petitioner states that he raises
 12 these claims “to preserve his right to review if ever necessary.” (*Id.*) The
 13 California Supreme Court denied Claim 17(C) as “premature without prejudice to
 14 renewal after an execution date is set.” *In re Carter*, Case No. S153790, June 17,
 15 2010; (see also Petr.’s Br. at 245).

16 As a result of the district court’s ruling in *Morales v. Tilton*, 465 F. Supp. 2d
 17 972 (N.D. Cal. 2006), “there was a de facto moratorium on all executions in
 18 California.” *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010). California
 19 promulgated a revised lethal injection protocol effective August 29, 2010. Cal.
 20 Code Regs. tit. 15, §§ 3349-3349.4.6 (2010). The revised protocol provides, *inter*
 21 *alia*:

22 Inmates sentenced to death shall have the opportunity to
 23 choose to have the punishment imposed by lethal gas or
 24 lethal injection. . . . The inmate shall be notified of the
 25 opportunity for such choice and that, if the inmate does
 26 not choose either lethal gas or lethal injection within ten
 27 days after being served with the execution warrant, the
 28 penalty of death shall be imposed by lethal injection.

(*Id.*, § 3349(a)-(b).)

1 Following the effective date of the revised protocol, the State scheduled the
 2 execution of Albert Greenwood Brown. Brown moved to intervene in the *Morales*
 3 action. Holding that “Brown’s federal claims are virtually identical to those
 4 asserted” by Morales, the court granted the motion to intervene. *Morales v. Cate*,
 5 No. CV 06-219, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Considering
 6 Brown’s challenge to the revised protocol and his motion to stay his execution, the
 7 Northern District of California expressed that it “always has understood,
 8 apparently incorrectly, that executions could not resume until it had an opportunity
 9 to review the new lethal injection protocol in the context of the evidentiary record
 10 developed during the 2006 proceedings.” *Id.* The court conditionally denied a stay
 11 of execution on the basis that “there is no way that the Court can engage in a
 12 thorough analysis of the relevant factual and legal issues in the days remaining
 13 before [petitioner’s] execution date.” *Id.* at *5.

14 The Ninth Circuit remanded, directing the district court, “in light of . . . the
 15 court’s findings regarding the risk of unconstitutional pain inhering in the prior
 16 three-drug protocol, . . . to determine whether, under *Baze*, [petitioner] is entitled to
 17 a stay of his execution as it would be conducted under the three-drug protocol now
 18 in effect.” *Morales*, 623 F.3d at 831. Most recently, the district court explained:

19 California at this juncture lacks a lethal-injection protocol
 20 that is valid under state law. . . . [T]he Court has
 21 continued to defer to the parties’ repeated joint requests
 22 not to proceed with this litigation until an operative
 23 protocol is in place. When the Court resumes its review
 24 of the protocol, it intends to do so deliberately and
 25 expeditiously while complying with the instruction

26 of the Court of Appeals to ‘take the time necessary to do
 27 so.’

28 *Morales v. Cate*, No. CV 06-219, 2012 WL 5878383, at *3 (N.D. Cal. Nov. 21,

1 2012) (quoting *Morales*, 623 F.3d at 829; internal citation omitted).

2 In light of the ongoing *Morales* litigation and Petitioner's indication that he
3 raises the claims "to preserve his right to review" (Pet. at 213), Claim 17(C) is
4 DISMISSED WITHOUT PREJUDICE.

5 **D. Narrowing Process and Prosecutorial Discretion**

6 In Claim 17(D), Petitioner alleges that "the penalty of death and execution in
7 California is arbitrarily and capriciously imposed depending upon the county in
8 which the defendant is charged, and the relevant statutes fail to sufficiently narrow
9 the class of offenders who are eligible for the death penalty." (Pet. at 214.)

10 Similarly, in Claim 17(E), Petitioner contends that California's death penalty
11 statute "violates the Eighth Amendment because it does not distinguish death-
12 eligible and non-death-eligible first-degree murders in a meaningful and non-
13 arbitrary way." (*Id.* at 219.)

14 Petitioner's claims lack support in clearly established federal law. *Cf.*
15 *Bradway v. Cate*, 588 F.3d 990, 992 (9th Cir. 2009) (rejecting petitioner's due
16 process challenge to special circumstance and observing that "[Petitioner] has
17 offered, and we have found, no decision of the Supreme Court holding that a
18 distinction in intent (or, indeed, any other distinction) fails to adequately narrow
19 the class of first-degree murderers to those properly eligible for a sentence" of
20 death or life without parole under California Penal Code § 190.2). In addition, the
21 Supreme Court has rejected the argument that a capital punishment statute is
22 unconstitutional simply because it "vests unbridled discretion in the prosecutor to
23 decide when to seek the death penalty." *Campbell v. Kincheloe*, 829 F.2d 1453,
24 1465 (9th Cir. 1987) (citing *Gregg*, 428 U.S. at 199; *Proffitt v. Florida*, 428 U.S.
25 242, 254 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976)).

26 Claims 17(D) and (E) are, therefore, DENIED.

27 **E. Sentencing Factors**

28 In Claim 17(F), Petitioner contends that California's sentencing factors are

1 unconstitutional. First, Petitioner alleges that the sentencing factor provided in
2 California Penal Code § 190.3(a) “deprives the sentencer of the opportunity to give
3 full effect to the defendant’s mitigating evidence and make the appropriate
4 reasoned moral response.” (Pet. at 221 (internal quotation omitted).) As the
5 United States Supreme court held in *Tuilaepa*, however:

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

19 512 U.S. at 976 (internal citation omitted). Petitioner’s contention, therefore, lacks
20 support in clearly established federal law.

21 Second, Petitioner argues:

22 The word ‘extreme’ was not deleted from factor (d),
23 ‘extreme mental and emotional disturbance,’ in the
24 instructions. . . . Cases holding that the word ‘extreme’
25 need not be deleted from factor (d), *see, e.g., Blystone v.*
26 *Pennsylvania*, 494 U.S. [299,] 308 [1990]; *Hendricks v.*
27 *Vasquez*, 974 F.2d 1099, 1109 ([9]th Cir. 1992) . . . , are
28 based on the assumption that a jury will understand that
despite the reference to ‘extreme’ in factor (d), mental or
emotional disturbance of a lesser degree may be
considered under factor (k).

(Pet. at 221.) Petitioner further argues that “factor (k) may be given only
mitigating weight and may not be used in aggravation; however, by its terms factor

(k) is unlimited. An aggravating factor of such breadth [is] invalid” (*Id.* at 222.)

The instruction on the § 190.3(k) sentencing factor directed the jury to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime” (52 RT 6118.) The factor (k) instruction is not “by its terms . . . unlimited;” it is limited to “circumstances [that] *extenuate.*” (Pet. at 222; 52 RT 6118 (emphasis added).) The Supreme Court held in *Belmontes* that in a factor (k) instruction, “[t]he jury [is] directed to consider *any other circumstance* that might excuse a crime. . . . And . . . precrime background . . . may extenuat[e] the gravity of the crime” 549 U.S. at 15 (emphasis in original; internal quotation omitted). The Supreme Court has expressly rejected the argument that a jury instruction allowing the jury to consider whether defendant was affected by an “extreme” mental or emotional disturbance or duress “preclude[s] the jury’s consideration of lesser degrees of disturbance, impairment, or duress” under a broader mitigating evidence instruction. *Blystone*, 494 U.S. at 308; *see also Hendricks*, 974 F.2d at 1109.

Because Petitioner’s arguments lack support in clearly established federal law, Claim 17(F) is DENIED.

F. Inter-Case and Intra-Case Proportionality Review

In Claim 17(H), Petitioner alleges that the judgment in this case is constitutionally defective because “[n]o meaningful inter-case or intra-case proportionality review was conducted in this case at the time of trial, and none is required on appeal under the California death penalty statute.” (Pet. at 225.)

//

Petitioner argues:

First, because such review was afforded to non-capital inmates, the lack of it in this case violates Mr. Carter’s Fourteenth Amendment right to equal protection.
Second, the lack of proportionality review violates the

1 requirement that all potential mitigating factors be
2 considered by the sentencer, deprives the death-sentenced
3 defendant of meaningful appellate review, and results in
4 an unreliable, arbitrary, and capricious application of the
death penalty.

5 (*Id.* at 225-26 (internal citation omitted).)

6 Petitioner's claim lacks support in clearly established federal law. The Ninth
7 Circuit has found "no merit" in the claim, raised by a petitioner sentenced to death
8 under the 1978 California death penalty statute (as Carter was), that the lack of
9 inter-case proportionality review violates equal protection requirements. *See Allen*
10 *v. Woodford*, 395 F.3d 979, 1018 (9th Cir. 2005) ("[Petitioner's] due process
11 argument is foreclosed by the Supreme Court's holding in *Harris*, 465 U.S. at
12 43-46, that neither the Eighth Amendment nor due process requires comparative
13 proportionality review in imposing the death penalty" (internal citation edited)).
14 Petitioner points to no other defendants to whom he should be compared for intra-
15 case review, and no clearly established federal law supports a right to such review.
16 As to Petitioner's second argument, the United States Supreme Court in *Harris*
17 held that a capital sentencing system need not incorporate proportionality review to
18 consider mitigating circumstances, provide meaningful appellate review, and apply
19 the death penalty in a nonarbitrary manner. *See Harris*, 465 U.S. at 879-81.

20 Claim 17(H) is DENIED.

21 **G. Jury Determinations**

22 In Claims 17(I) and (J), Petitioner alleges constitutional violations: (1)
23 "because the jury was not asked to determine, unanimously and beyond a
24 reasonable doubt, the existence of at least one aggravating factor and whether the
25 aggravating factors outweighed the mitigating factors," relying on *Apprendi v.*
26 *New Jersey*, 530 U.S. 466, 490 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002)
27 (Pet. at 226, 229-30); and (2) "because his jury was not asked to determine,
28 unanimously and beyond a reasonable doubt, whether each of the unadjudicated

1 acts introduced in aggravation was proven,” with instructions on the elements of
2 the offenses, relying on *Ring*. (Pet. at 227.)

3 In *Apprendi*, the Supreme Court held that “[i]f a State makes an increase in a
4 defendant’s authorized punishment contingent on the finding of a fact, that fact –
5 no matter how the State labels it – must be found by a jury beyond a reasonable
6 doubt.” *Ring*, 536 U.S. at 602 (discussing *Apprendi*). The Court applied *Apprendi*
7 in *Ring* to hold that a state cannot “allow[] a sentencing judge, sitting without a
8 jury, to find an aggravating circumstance necessary for imposition of the death
9 penalty. Because Arizona’s enumerated aggravating factors operate as ‘the
10 functional equivalent of an element of a greater offense,’ the Sixth Amendment
11 requires that they be found by a jury.” *Ring*, 536 U.S. at 609 (quoting *Apprendi*,
12 530 U.S. at 494 n.19; internal citation omitted). The Court distinguished
13 California’s death penalty statute from Arizona’s, observing that California
14 commits sentencing decisions to juries, while Arizona was one of only four states
15 to “commit both capital sentencing factfinding and the ultimate sentencing decision
16 entirely to judges.” *Id.* at 608 n.6.

17 In California, it is “[s]pecial circumstances that make a criminal defendant
18 eligible for the death penalty [and] operate as ‘the functional equivalent of an
19 element of a greater offense.’” *Webster v. Woodford*, 369 F.3d 1062, 1068 (2004)
20 (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to
21 be true, unanimously and beyond a reasonable doubt, death is an authorized
22 punishment. The jury is authorized to consider at the penalty phase evidence
23 offered at the guilt phase in proof of the offense or special circumstances along

24 //

25 with the circumstances of the crime. See Cal. Penal Code § 190.3. The jury need
26 not make any additional findings of fact to return a sentence of death.

27 The California Supreme Court was not, therefore, objectively unreasonable
28 in holding that Petitioner has shown no violation of *Apprendi* or *Ring* in

1 California's capital sentencing structure. *Cf. United States v. Mitchell*, 502 F.3d
 2 931 (9th Cir. 2007) (finding no violation of *Apprendi* in Federal Death Penalty Act,
 3 which required a jury to find beyond a reasonable doubt a death-eligibility
 4 aggravating factor and then to weigh aggravating and mitigating factors to
 5 determine whether a sentence of death is justified). Claims 17(I) and (J) are
 6 DENIED.

7 **H. Guidance to Jury in Penalty Phase Instructions**

8 In Claim 17(K), Petitioner contends that:

9 [t]he court's instructions failed to apprise the jurors that
 10 factors (d), (e), (f), (g), (h), (i), (j), and (k) of the
 11 California Penal Code were mitigating only and could
 12 not be considered as aggravating factors. . . . [T]he
 13 instruction the court gave suggested that, if the jury
 14 found that a factor did not apply, this was relevant to the
 15 juror's penalty determination. . . . The court never
 instructed that the absence of mitigation was not
 aggravation.

16 (Pet. at 231-32.)

17 The record belies Petitioner's allegation. As noted above, the trial court
 18 instructed the jury, "Regarding the factors you may consider in mitigation, if there
 19 is no evidence offered to support a particular factor, you may not give such a factor
 20 any consideration at all. The absence of any mitigating factor may not be
 21 considered as an aggravating factor." (52 RT 6118.) Moreover, as the Court held
 22 above, the California Supreme Court's determination that no further definition of
 23 "mitigating" circumstances and "aggravating" circumstances was constitutionally
 24 //

25 required is not contrary to or an unreasonable application of clearly established
 26 federal law. (*See supra* pp. 69-71.)

27 Claim 17(K) is DENIED.

28 **I. California Penal Code § 190.2(a)(15)**

1 In Claim 17(L), Petitioner alleges that California Penal Code § 190.2(a)(15),
2 providing a special circumstance for lying in wait, is unconstitutionally broad and
3 fails to perform the required narrowing function. (Pet. at 234.)

4 No lying in wait special circumstance finding was made in Petitioner's case.
5 Moreover, the Ninth Circuit has held that "California's lying in wait special
6 circumstance instruction as interpreted by the California Supreme Court does
7 sufficiently narrow the class of first degree murders to satisfy the Eighth
8 Amendment." *Edwards v. Ayers*, 542 F.3d 759, 767 (9th Cir. 2008) (citing
9 *Morales*, 388 F.3d at 1173-78).

10 Claim 17(L) is, therefore, DENIED.

11 **ORDER**

12 For the reasons set forth above, Petitioner is not entitled to federal habeas
13 relief. The Court hereby denies the First Amended Petition for Writ of Habeas
14 Corpus with prejudice. Claim 16 as to Petitioner's competence to be executed and
15 Claim 17(C) are dismissed without prejudice.

16 **IT IS SO ORDERED.**

17 Dated: March 1, 2013.

18 
19 _____
20 R. GARY KLAUSNER
21 United States District Judge
22
23
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28



2 of 21 DOCUMENTS



Analysis
As of: Dec 02, 2011

DEAN PHILLIP CARTER ON H.C.

S153780

SUPREME COURT OF CALIFORNIA

2010 Cal. LEXIS 6153

June 17, 2010, Filed

PRIOR HISTORY: *Carter (Dean Phillip) on H.C.*, 2009 Cal. LEXIS 3108 (Cal., Feb. 23, 2009)

373, 855 P.2d 391]; *In re Waltreus* (1965) 62 Cal.2d 218, 225 [42 Cal. Rptr. 9, 397 P.2d 1001].)

OPINION

[*1]

Petition for writ of habeas corpus denied (AA).

The petition for a writ of habeas corpus, filed June 22, 2007, is denied as follows.

All claims, except claims 5 and 16 (subclaim C), are denied on the merits.

All claims are denied as untimely with the exception of claims 1 (subclaim D (with respect to Jurors Cigainero and Ridge)), 2 (subclaims C (with respect to the allegations concerning Fetal Alcohol Syndrome) and D (with respect to allegations concerning Tulio's alibi)), 3 (subclaims B, C, D, and E (insofar as they relate to allegations concerning child abuse and Fetal Alcohol Syndrome)), 5, 8 (insofar as it relates to allegations concerning Fetal Alcohol Syndrome), 13, 16, and 17. (*In re Robbins* (1998) 18 Cal.4th 770, 799, fn. 21 [77 Cal. Rptr. 2d 153, 959 P.2d 311]; *In re Clark* (1993) 5 Cal.4th 750, 782-787 [21 Cal. Rptr. 2d 509, 855 P.2d 729].)

Except insofar as they allege ineffective assistance of counsel, claims 1 (subclaims A and B), 6 (subclaims C.1-C.3, and D), 9, 10 (subclaims A-H), 11, 12 (subclaims B-C), 14, and 15 are denied on the ground that these claims were raised and rejected on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 829-841 [21 Cal. Rptr. 2d

Except insofar as they allege evidence of child abuse and Fetal Alcohol [*2] Syndrome, claims 2 (subclaims B, C, E, F, and G), 3 (subclaims B, C, D, E, and F), 4, 6 (subclaims B, C.1, C.2, C.3, and D), 7 (subclaims B and C), 8, 9, 10 (subclaim F), 14 (insofar as it alleges the trial court should have instructed the jury not to consider the other crimes against Kim, Knoll, Mills, Guthrie, and Jennifer S. as evidence during the penalty phase), and 15 (insofar as it alleges petitioner was denied a full hearing on his motion to suppress) are denied on the ground that these claims were raised and rejected in petitioner's prior petition for writ of habeas corpus (S096874). (*In re Clark, supra*, 5 Cal.4th at p. 767; *In re Miller* (1941) 17 Cal.2d 734, 735, 112 P.2d 10.)

Except insofar as they allege evidence of child abuse and Fetal Alcohol Syndrome or that prior postconviction counsel was ineffective for failing to raise them, claims 1 (subclaims A, B, C, and D (insofar as it alleges Juror McAlpine improperly met with the other jurors after his dismissal)), 2 (subclaim D (insofar as it relates to third party culpability concerning the murder of Tok Kim)), 10 (subclaims A, B, C, D, E, G, and H), 11, 12 (subclaims B and C), 14 (insofar as it alleges that several standard guilt phase [*3] instructions were erroneous), and 15 (insofar as it alleges that trial counsel provided ineffective assistance) are denied on the ground that they are successive, as they could have been raised in petitioner's prior petition for writ of habeas corpus (S096874) but were not.

(*In re Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547 [203 P.2d 513].)

Except insofar as they allege evidence of child abuse and Fetal Alcohol Syndrome or ineffective assistance of counsel, claims 1 (subclaim D (insofar as it alleges Juror McAlpine improperly met with the other jurors after his dismissal)), 6 (subclaim B), 7 (subclaim B), and 8 are denied on the ground that they could have been raised on appeal but were not. (*In re Harris*, *supra*, 5 Cal.4th at pp. 825 & fn. 3, 826-829; *In re Dixon* (1953) 41 Cal.2d 756, 759 [264 P.2d 513].)

Claims 5 and 16 (subclaim C) are denied as premature without prejudice to renewal after an execution date

is set. (*People v. Abilez* (2007) 41 Cal.4th 472, 536 [61 Cal. Rptr. 3d 526, 161 P.3d 58]; *People v. Lawley* (2002) 27 Cal.4th 102, 169, fn. 25 [115 Cal. Rptr. 2d 614, 38 P.3d 461].)

To the extent claim 12 (subclaims B and C) alleges insufficiency of the evidence, it is not cognizable on habeas [*4] corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723 [177 P.2d 918].)

To the extent claim 15 alleges a violation of the *Fourth Amendment*, it is not cognizable on habeas corpus. (*In re Sterling* (1965) 63 Cal.2d 486, 487 [47 Cal. Rptr. 205, 407 P.2d 5].)

SUPREME COURT
FILED

JUN 17 2010

Frederick K. Ohlrich Clerk

Deputy

S153790

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DEAN PHILLIP CARTER on Habeas Corpus.

The petition for a writ of habeas corpus, filed June 22, 2007, is denied as follows.
All claims, except claims 16 and 17 (subclaim C), are denied on the merits.

All claims are denied as untimely with the exception of claims 4, 5 (subclaims D.2 (with respect to the allegations concerning Fetal Alcohol Syndrome) and G (with respect to allegations concerning Tulio's alibi)), 6 (subclaims B, C, and D (as they relate to allegations concerning child abuse and Fetal Alcohol Syndrome)), 15, 16, and 17. (*In re Robbins* (1998) 18 Cal.4th 770, 799, fn. 21; *In re Clark* (1993) 5 Cal.4th 750, 782-787.)

Except insofar as they allege ineffective assistance of counsel, claims 3, 9 (subclaims A and B), 10 (subclaims B and C), 11 (subclaim B), 12 (subclaims A, C-K), 13, and 14 (subclaims A-D) are denied on the ground that these claims were raised and rejected on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 829-841; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Except insofar as they allege evidence of child abuse and Fetal Alcohol Syndrome, claims 1 (subclaims A and B), 2, 3, 5 (subclaims C, D.1-D.3, E, F, and H), 6 (subclaims B-E), 7, 11 (subclaims B and C), and 12 (subclaims E and I) are denied on the ground that these claims were raised and rejected in petitioner's prior petition for writ of habeas corpus (S090230). (*In re Clark, supra*, 5 Cal.4th at p. 767; *In re Miller* (1941) 17 Cal.2d 734, 735.)

Except insofar as they allege evidence of child abuse and Fetal Alcohol Syndrome or ineffective assistance of counsel, claims 5 (subclaims B and G (insofar as it relates to third party culpability concerning the murder of Tok Kim)), 8, 9 (subclaims A and B), 10 (subclaims B and C), 12 (subclaims B-D, F-H, J, and K), 13, and 14 (subclaims A-D)

are denied on the ground that they are successive, as they could have been raised in petitioner's prior petition for writ of habeas corpus (S090230) but were not. (*In re Robbins, supra*, 18 Cal.4th at p. 788, fn. 9; *In re Clark, supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547.)

Claim 8 is denied on the ground that it was forfeited by petitioner's failure to raise it in the trial court. (*In re Seaton* (2004) 34 Cal.4th 193, 197-201.)

Claim 12 (subclaim B) is further denied on the ground that it could have been raised on appeal but was not. (*In re Harris, supra*, 5 Cal.4th at pp. 825 & fn. 3, 826-829; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claims 16 and 17 (subclaim C) are denied as premature without prejudice to renewal after an execution date is set. (*People v. Abilez* (2007) 41 Cal.4th 472, 536; *People v. Lawley* (2002) 27 Cal.4th 102, 169, fn. 25.)

To the extent claim 13 alleges insufficiency of the evidence, it is not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Justice Werdegard would not apply the bar of *In re Seaton, supra*, 34 Cal.4th at pp. 197-200, to claim 8.

GEORGE

Chief Justice

CAPITAL CASE

Date Filed:	SAN DIEGO DISTRICT COURT
	JUN 30 2006
No.	SD00000X0005
	BY NOEMI ABUNDEZ

**SUPREME COURT
FILED**

JUN 28 2006

Frederick K. Ohlrich Clerk

DEPUTY

S090230

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DEAN PHILLIP CARTER on Habeas Corpus

The petition for a writ of habeas corpus, filed July 24, 2000, is denied as follows.
Claim I is denied on the merits.

Claim II is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225. To the extent the claim is based upon the record and was not raised on appeal, it could and should have been raised on appeal and hence is barred under *In re Dixon* (1953) 41 Cal.2d 756, 759.

Claims III and IV are denied on the merits.

Claims V and VI are denied on the merits. To the extent these claims reassert issues raised and rejected on appeal, they are procedurally barred under *In re Waltreus*, *supra*, 62 Cal.2d 218, 225. To the extent these claims are based upon the record and were not raised on appeal, they could and should have been raised on appeal and hence are barred under *In re Dixon*, *supra*, 41 Cal.2d 756, 759.

Claims VII, VIII, IX, X, XI, and XII are denied on the merits.

GEORGE

Chief Justice



8 of 21 DOCUMENTS



Analysis
As of: Dec 02, 2011

In re DEAN PHILLIP CARTER on Habeas Corpus

S096874

SUPREME COURT OF CALIFORNIA

2006 Cal. LEXIS 11312

September 13, 2006, Filed

SUBSEQUENT HISTORY: Habeas corpus proceeding at *Carter (Dean Phillip) on H.C.*, 2007 Cal. LEXIS 8706 (Cal., July 31, 2007)

PRIOR HISTORY: *Carter (Dean P.) on H.C.*, 2006 Cal. LEXIS 8130 (Cal., June 28, 2006)

OPINION

[*1] The order filed on June 28, 2006 is hereby amended to read in its entirety.

The petition for a writ of habeas corpus, filed April 16, 2001, is denied, as follows.

Claim I is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225 [42 Cal. Rptr. 9, 397 P.2d 1001]. To the extent the claim is based upon the record and was not raised on appeal, it could and should have been raised on appeal and hence is barred under *In re Dixon* (1953) 41 Cal.2d 756, 759 [264 P.2d 513].

Claims II and III are denied on the merits.

Claims IV is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus*, *supra*, 62 Cal.2d 218, 225.

Claim V is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus*, *supra*, 62

Cal.2d 218, 225. To the extent this claim is based upon the record and was not raised on appeal, it could and should have been raised on appeal and hence is barred under *In re Dixon*, *supra*, 41 Cal.2d 756, 759. [*2]

Claim VI is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus*, *supra*, 62 Cal.2d 218, 225. To the extent this claim is based upon the record and was not raised on appeal, it could and should have been raised on appeal and hence is barred under *In re Dixon*, *supra*, 41 Cal.2d 756, 759. To the extent this claim asserts a violation of petitioner's rights under the *Fourth Amendment*, it is not cognizable on habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 830 [21 Cal. Rptr. 2d 373, 855 P.2d 391]; see also *In re Clark* (1993) 5 Cal.4th 750, 767 [21 Cal. Rptr. 2d 509, 855 P.2d 729] (*Clark*); *In re Sterling* (1965) 63 Cal.2d 486, 487-488 [47 Cal. Rptr. 205, 407 P.2d 5]; *In re Lessard* (1965) 62 Cal.2d 497, 503 [42 Cal. Rptr. 583, 399 P.2d 39].)

Claim VII is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus*, *supra*, 62 Cal.2d 218, 225. To the extent this claim asserts a violation of petitioner's rights under the *Fourth Amendment*, it is not cognizable on habeas corpus. (*In re Harris*, *supra*, 5 Cal.4th at p. 830; see also [*3] *Clark*, *supra*, 5 Cal.4th at p. 767; *Sterling*, *supra*, 63 Cal.2d at pp. 487-488; *Lessard*, *supra*, 62 Cal.2d at p. 503.)

Claim VIII is denied on the merits. To the extent this claim reasserts issues raised and rejected on appeal, it is procedurally barred under *In re Waltreus, supra*, 62 Cal.2d 218, 225. To the extent this claim is based upon the record and was not raised on appeal, it could and

should have been raised on appeal and hence is barred under *In re Dixon, supra*, 41 Cal.2d 756, 759.

Claims IX, X, XI, XII, and XIII are denied on the merits.

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BY GLORIA BETTIS

SUPREME COURT
FILED

OCT 26 2005

Frederick K. Ohlrich Clerk

DEPUTY

S014021

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Respondent,

v.

DEAN PHILLIP CARTER, Appellant.

Petition for rehearing DENIED.

GEORGE

Chief Justice

No. S014021

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

TO THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES - Main (County Courthouse)

THE PEOPLE,

Superior Court No. A089330

Respondent,

v.

DEAN PHILLIP CARTER,

Appellant.

I, FREDERICK K. OHLRICH, Clerk of the Supreme Court of the State of California, do hereby certify that the attached is a true copy of an original judgment entered in the above-entitled cause on August 15, 2005.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, October 26, 2005

FREDERICK K. OHLRICH, Clerk



By MARSHA A. SMITH
DEPUTY



People v. Carter

Supreme Court of California

August 15, 2005, Filed

S023000

Reporter

36 Cal. 4th 1215; 117 P.3d 544; 32 Cal. Rptr. 3d 838; 2005 Cal. LEXIS 8910; 2005 Cal. Daily Op. Service 7222; 2005 Daily Journal DAR 9833

THE PEOPLE, Plaintiff and Respondent, v. DEAN PHILLIP CARTER, Defendant and Appellant.

Opinion by: George

Opinion

Subsequent History: Companion case at [People v. Carter](#), 36 Cal. 4th 1114, 32 Cal. Rptr. 3d 759, 117 P.3d 476, 2005 Cal. LEXIS 8908 (2005)

Modified by [People v. Carter](#), 2005 Cal. LEXIS 11890 (Cal., Oct. 26, 2005)

Modified and rehearing denied by [People v. Carter \(Dean Phillip\)](#), 2005 Cal. LEXIS 12016 (Cal., Oct. 26, 2005)

Later proceeding at [People v. Dean Phillip Carter](#), 2005 Cal. LEXIS 12564 (Cal., Nov. 3, 2005)

US Supreme Court certiorari denied by [Carter v. California](#), 547 U.S. 1043, 126 S. Ct. 1625, 164 L. Ed. 2d 340, 2006 U.S. LEXIS 2569 (2006)

Writ of habeas corpus denied [Carter \(Dean P.\) on H.C.](#), 2006 Cal. LEXIS 8130 (Cal., June 28, 2006)

Habeas corpus proceeding at [Carter v. Ayers](#), 2006 U.S. Dist. LEXIS 90861 (S.D. Cal., Dec. 13, 2006)

Application granted by [People v. Carter \(Dean Phillip\)](#), 2007 Cal. LEXIS 10734 (Cal., Sept. 25, 2007)

Writ of habeas corpus denied [Carter \(Dean Phillip\) on H.C.](#), 2010 Cal. LEXIS 6158 (Cal., June 17, 2010)

Motion granted by, Request denied by [People v. Carter \(Dean Phillip\)](#), 2010 Cal. LEXIS 6225 (Cal., June 17, 2010)

Prior History: Superior Court of San Diego County, No. 90280, Melinda J. Lasater, Judge.

Counsel: Phillip H. Cherney, under appointment by the Supreme Court, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Carl H. Horst and Jeffrey J. Koch, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: George, C. J., with Kennard, Baxter, Werdegarr, Chin, and Moreno, JJ, concurring. Concurring opinion by Kennard, J.

[**549] [***845] **GEORGE, C. J.**—Following the guilt phase of the trial, a San Diego County jury found defendant Dean Phillip Carter guilty of the murder of Janette Cullins. ([Pen. Code, § 187, subd. \(a\)](#).)¹ The jury also found defendant guilty of the burglary of Cullins's inhabited residence ([§§ 459, 460](#)) and the robbery of Cullins ([§§ 211, 213.5](#)), finding that during the course of the burglary and the robbery, defendant personally inflicted great bodily injury ([§ 12022.7](#)). The jury found true the [**550] special circumstances that the murder was committed while lying in wait, in the course of a robbery, and in the course of a burglary, and that defendant previously had been convicted of the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie. (§ 190.2, former subd. (a)(2), (15), (17)(i), (vii), as amended by Prop. 115, § 10, as approved by voters, Primary Elec. (June 5, 1990).)

[*1221] The jury further found defendant guilty of forcible rape ([§ 261](#)) and forcible oral copulation ([§ 288, subd. \(c\)](#)) arising out of his attack on Barbara S. on March 25, 1984 (approximately 18 days prior to the murder of Janette Cullins). The jury found defendant guilty of burglary of an inhabited residence ([§§ 459, 460](#)) and robbery ([§§ 211, 213.5](#)) in connection with the attack on Barbara S. As to each of the crimes committed against Barbara S., the jury found that defendant had used a deadly weapon, a knife. ([§§ 12022, subd. \(b\), 12022.3, subd. \(a\)](#).)

At the conclusion of the penalty phase, the jury returned a verdict of death. The court sentenced defendant to death for the murder of Janette Cullins, in addition to imposing a consecutive sentence of 21 years 8 months for the crimes

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

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committed against Barbara S. This appeal is automatic. (*Cal. Const., art. VI, § 11; § 1239, subd. (b).*)²

We set aside the special circumstance of lying in wait, but otherwise affirm the judgment in its entirety as to both guilt and penalty.

FACTS

I. GUILT PHASE EVIDENCE

A. The Prosecution's Case

1. Overview

The prosecution's theory of the case was that defendant, spurned by a number of women who had rejected his clumsy, unwanted advances, embarked upon a crime [***846] spree that spanned approximately three weeks in the early spring of 1984, and consisted of sexually assaulting, robbing, and fatally strangling various women whom he previously had befriended.

On March 24, 1984, defendant, who was then 28 years of age, telephoned an acquaintance of approximately one month, Cathleen Tiner, who declined his invitation to "run off to Mexico and get married." That evening, he telephoned another acquaintance, Polly Haisha, then 18 years of age, informing her that he would be arriving in San Diego the next day. Haisha, who had declined defendant's invitation to "quit school and come sail to France," and had cancelled several dates with defendant, asked him never to call her again. [*1222] Like Tiner and Haisha, Janette Cullins in the weeks leading up to her death also had spurned defendant's advances.

On March 25, 1984, Susan Loyland, with whom defendant had maintained a sexual relationship, traveled to Mexico without defendant, notwithstanding the circumstance that she previously had made plans to travel with him that day. In the evening, defendant broke into Loyland's San Diego residence, raped at knifepoint Barbara S., Loyland's housemate, and also stole money from Loyland's tip cache. Loyland never heard from defendant again.

On March 27, 1984, defendant, having befriended Jennifer S. in the preceding few days, raped her at knifepoint in her Ventura County apartment. He strangled her to the point at which she lost consciousness, and stole her tip money.

Defendant thereafter traveled north to the San Francisco Bay Area, and on April 1, 1984, encountered Tok Kim at a

bar located in Lafayette. They commenced a relationship over the next several days, during which period several witnesses observed them together. Kim's decomposed body was discovered on April 13, 1984. Although the cause of her death could not be determined, strangulation could not be excluded as the cause. Kim's vehicle and various personal items were missing.

[**551] Kim's vehicle was discovered several hundred miles away in Los Angeles County, parked in front of the Culver City apartment in which the bodies of Susan Knoll and Jillette Mills were found stacked in a closed bedroom closet on April 12, 1984. Mills had been sexually assaulted, and each victim had died from asphyxia caused by strangulation. Knoll's vehicle was discovered one block from the apartment. Mills's distinctive Datsun 280 ZX automobile, as well as personal items belonging to both victims, were missing.

On April 12, 1984, the body of Bonnie Guthrie was discovered on the bedroom floor of her Culver City apartment. She had been sexually assaulted and died from asphyxia caused by strangulation. Personal items were missing from her apartment. Later that same day, defendant made an unexpected visit to Cathleen Tiner at her residence in San Diego; Tiner and Janette Cullins had met defendant at a San Diego bar in February 1984. Tiner told defendant she was expecting her date for the evening momentarily and could not see him. Defendant departed.

On April 14, 1984, the body of Janette Cullins was found lying in the closed bedroom closet of her San Diego apartment. The cause of her death was asphyxia caused by strangulation. Near the front door, the presence of [*1223] wood chips on the floor indicated that someone had broken into her apartment. Cullins had died approximately one to two days earlier. A neighbor had observed that the preceding evening, Jillette Mills's vehicle had been parked in front of Cullins's residence and had departed suddenly and loudly. Cullins's vehicle subsequently was discovered several blocks away. A videocamera at a [***847] bank automated teller machine on April 13 recorded a man resembling defendant retrieving money from Cullins's bank account.

On April 17, 1984, an Arizona highway patrol officer observed Mills's vehicle traveling erratically near Ashfork, Arizona. The officer effected a traffic stop and arrested defendant. Inside the vehicle, investigators recovered numerous personal items linking defendant to each one of the deceased women.

² As explained more fully in *People v. Carter* (2005) 36 Cal.4th 1114, 1135 [32 Cal.Rptr.3d 759, 117 P.3d 476], footnote 5, the Ventura County Superior Court sentenced defendant to a sentence of 56 years for crimes he committed against Jennifer S.

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In order to explain certain factual differences in the crime scenes at the various residences where the deceased women were found, the prosecution theorized that the reason defendant did not conceal the bodies of Tok Kim or Bonnie Guthrie was that neither victim had a roommate who might discover the body. With respect to the killings of Susan Knoll and Jillette Mills, the prosecution theorized that defendant first murdered Knoll, placing her body in the closet, moved her vehicle to make it appear she was not at home, and then waited until Jillette Mills arrived and murdered her. The prosecution further theorized when defendant broke into Janette Cullins's apartment, murdered her, concealed her body in the closet, and then moved her vehicle, defendant similarly may have intended to kill two women. Cullins's new roommate, Cheri Phinney, whom defendant had met earlier that day, was not yet in possession of an apartment key, however, and did not return to the apartment that evening.

2. *The Rape of Barbara S.*

The prosecution presented the testimony of a number of witnesses to establish that on March 25, 1984, defendant raped Barbara S. at the residence she shared with Susan Loyland in the marina area of Bay Park, located in San Diego.³

[*1224] [**552] Barbara S. testified that on that date, she performed yard work at her residence for most of the day, ate dinner, then fell asleep while watching *60 Minutes* on television in her bedroom. She awakened to find a man grabbing her and dragging her from her bed. The man held at her throat a "sturdy knife" with a blade about six inches in length. The man repeatedly demanded money and held her while he rummaged through her purse. When he sought more money, Barbara S. directed him to the dresser, where she had \$ 200. That money was missing after the attack.

The man then pushed Barbara S. to her knees and repeatedly told her not to look at him. While he still held the knife, the man forced her to orally copulate him. Barbara S. complied

because she was frightened. She recalled that notwithstanding her compliance, the man's penis was "semi-flaccid" and "nothing to write home about."

[**848] Shortly thereafter, the man bent Barbara S. over the bed facedown and raped her; the man never attained a full erection, and the incident lasted "maybe a very short time."

The man then "hog-tied" Barbara S.'s hands and feet behind her with her pantyhose, and she heard her car keys being removed from her purse. The man departed, telling Barbara S. that "you shouldn't sleep with the TV on." Thereafter, she heard "[a] motor sound, and he screeched off." She partially freed herself by hobbling to the dishwasher, extracting a knife with her teeth, and using the knife to cut the ligature that bound her feet and hands.

Helen McGirr, a neighbor who was a retired registered nurse, testified that she heard Barbara S.'s cries for help and directed her husband to contact the police, who arrived at the scene approximately 10 minutes later. McGirr found Barbara S. "laying in kind of a curled-up position unclothed at the front door right in the doorway" and noticed that Barbara S.'s hands were "dark blue, almost black" from having been tied up. McGirr was certain Barbara S. was not under the influence of alcohol.

San Diego Police Department Detective Ken Creese testified that in his interview with Barbara S. shortly after the attack, the victim appeared "to be [*1225] upset, shaken, somewhat traumatized," and was unable to identify her assailant.

Susan Loyland testified that she rented a room in Barbara S.'s residence at the time of the attack, and had maintained a sexual relationship with defendant in the weeks immediately prior to the attack. Loyland had discussed traveling with defendant to Rosarito Beach, Mexico, on March 25, 1984, but left without him that morning when she was unable to locate him. Loyland suspected defendant

³ Prior to the preliminary hearing in this case, Barbara S. suffered severe strokes, and at the time of trial she was relegated to setting forth her answers to counsel's examination by typing them on a typewriter. The court appointed a court intern as a "neutral interpreter." As Barbara S. typed responses to the questions posed, the intern read them aloud to the jury. The court admonished the jury that Barbara S.'s "physical condition was unrelated to the events of March 25[, 1984]."

Outside the presence of the jury, through the proffered testimony of Barbara S.'s tenant and housemate, Susan Loyland, the defense sought to establish that Barbara S. had been a heavy drinker at the time of the attack. Barbara S. acknowledged having had "two drinks before and during supper, but was not impaired or drunk." The defense noted that in her testimony given at the preliminary hearing, Barbara S. recalled the number of drinks of "scotch and water" she had consumed prior to the attack as "about three," and that she had started drinking in the late afternoon. Barbara S. denied suffering from alcoholism in March 1984. The trial court disallowed the introduction of the proffered evidence relating to her drinking habits.

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might have been Barbara S.'s assailant, and so informed the police on the night of the attack.⁴

Based upon information supplied by Loyland, police investigators placed defendant's photograph in a photo lineup. Barbara S. was unable to identify the perpetrator from the lineup, but told one detective that the voice of her attacker sounded similar to that of defendant's. She testified that during the attack, she thought she recognized her assailant's voice but could not identify it, and after seeing news reports of defendant's arrest several weeks later, "it came together like a ton of bricks" that the man's voice was defendant's. At trial, Barbara S. identified defendant as the man who had attacked her.

Following the attack, Barbara S. noticed her kitchen and bedroom telephone lines had been cut, and that a window screen in Loyland's room was "bent out at a 45-degree angle." Loyland determined that some tip money was missing from a concealed location near the window. She testified: "nobody [*553] would look in the place that I had it ... you'd have to know that the coins were in there." Defendant occasionally had accompanied her home after work, and had seen her conceal her tip money, usually "between 10 and 20 bucks a night [***849] in coins." Loyland never saw or heard from defendant after March 25, 1984.

Barbara S.'s next-door neighbor, Janell Barksdale, testified that approximately 6:00 p.m. on March 25, she observed a man whom she did not recognize walk toward Barbara S.'s residence. The man had dark hair, a moustache, and an olive complexion, and "was attractive ... nice to look at." Upon learning of the attack upon Barbara S., Barksdale told investigators of [*1226] having seen a man in the area that evening. Three years later, upon seeing a photograph of defendant in the newspaper, Barksdale contacted investigators to inform them that she recognized the person in the newspaper photograph as the man she had observed. At trial, she identified defendant as the man she saw that night.

3. The Rape of Jennifer S.

Over defendant's objection, the prosecution commenced its case by presenting, under [Evidence Code section 1101](#),

[subdivision \(b\)](#), substantially the same evidence pertaining to the March 29, 1984 attack on Jennifer S. in Ventura, as is summarized in [People v. Carter, supra, 36 Cal.4th at page 1135](#).

4. The Death of Tok Kim

The prosecution introduced evidence pertaining to the Alameda County death of Tok Kim in early April 1984. With two exceptions, the evidence was substantially similar to that summarized in [People v. Carter, supra, 36 Cal.4th at pages 1128–1129](#).

The first exception involved the testimony of Eddis Jeffrey, who did not testify in defendant's Los Angeles County murder trial. Jeffrey, an apartment maintenance worker at the building in which Kim resided, testified that he saw defendant and Kim arrive at her apartment building on the afternoon of April 9 and leave shortly thereafter in the same vehicle. That was the last time Jeffrey saw Kim. Jeffrey acknowledged that prior to trial, he had identified in a police photo lineup prior to trial an individual other than defendant as the person he had seen with Kim.

The second exception involved the testimony of Dr. Byron Blackbourne, a forensic pathologist employed by the San Diego County Medical Examiner. Over defendant's objection, Dr. Blackbourne stated that after reviewing the Kim autopsy and crime scene photographs, he believed that her death possibly could have been caused by asphyxiation due to ligature strangulation.

5. The Fatal Strangulations of Susan Knoll and Jillette Mills

The prosecution introduced evidence pertaining to the fatal strangulations on or about April 10–11, 1984, of roommates Susan Knoll and Jillette Mills in Los Angeles County. The evidence was substantially similar to that summarized in [People v. Carter, supra, 36 Cal.4th at pages 1130–1131](#).

[*1227] 6. The Fatal Strangulation of Bonnie Guthrie

The prosecution introduced evidence pertaining to the fatal strangulation on or about April 11, 1984, of Bonnie Guthrie in Los Angeles County. The evidence was substantially similar to that summarized in [People v. Carter, supra, 36 Cal.4th at pages 1131–1132](#). [***850]

⁴ Loyland worked as a bartender at The Lost Knight Bar, which she described as "a cocktail lounge, kind of a dive," where she met defendant. She testified that she had been "pretty high [on alcohol, marijuana, and cocaine] most of the time" she spent with defendant, had brought him to her bedroom on several occasions in February and March 1984, and recalled that on at least one occasion, defendant had met the owner of the house, Barbara S. Barbara S. testified to having previously met defendant early one morning: "I saved him from getting the hell beat out of him by [Loyland's] regular boyfriend by waking him up."

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7. The Fatal Strangulation of Janette Cullins

The prosecution presented evidence, summarized below, establishing that defendant and Janette Cullins had been casually acquainted during the several weeks preceding Cullins's death on April 12 or 13, 1984, and that defendant fatally strangled her.

[**554] a. Cullins's acquaintance with defendant in early 1984

On Saturday evening, February 25, 1984, Janette Cullins and a friend, Cathleen Tiner, went to Jose Murphy's, a Pacific Beach nightclub that was featuring Cullins's and Tiner's favorite band. The band stopped playing at 1:30 a.m. (February 26), and the women walked across the street to the Old Pacific Beach Café. They were hungry and knew the café served breakfast until 3:00 a.m.

Cathleen Tiner testified: "When we got into the restaurant there was still a real good crowd, so we decided, let's have a drink, let's go over to the bar and see if we can get a drink before we go over to breakfast. ... [¶] [However, t]here was a very large crowd there. We were getting bumped around a lot. We could not get to the bar at all. We were far away from it. ... [¶] Mr. Carter came up to us and, at that time, we didn't know his name, and ... said my friend's at the bar, would you like me to order some drinks for you? [¶] We said yes, and he said what would you like? [¶] We said two Harvey Wallbangers. [¶] And so he yelled at this friend who was standing over to the bar, [']hey Antoine [whose last name was Masure], two Harvey Wallbangers.['] "

Tiner added: "Very shortly thereafter, [defendant's] friend came through the crowd with our drinks and with their drinks. I offered to pay for the drinks. I kept trying to pay for them. [¶] [Masure] kept saying no, no, no. [¶] ... I kept insisting on paying for the drinks. He wouldn't take the money. ... [¶] [Masure] just took our drinks and walked over to a table and sat them down on a table, and we ended up sitting down with them. ... [¶] We talked briefly. Dean asked Janette—I heard Dean ask Janette for her phone number." Tiner testified that Cullins eventually gave defendant her [*1228] telephone number, and that defendant asked the two women whether they had roommates or lived alone. Tiner gave Masure a card with her own telephone number on it.

Tiner further testified that defendant and Masure wanted the women to accompany them "someplace else," but the men did not provide a further description. The women declined: "Well, we said the right way for you to do it would be to call us and ask us out rather than try for us to go out with you now. [¶] Antoine said we'll go into the twin phone booths and you stand in the other and we'll call you. Then everything will be okay. [¶] We didn't agree with that idea, so Dean Carter said how about dinner. ... [¶] I said when. He said Antoine's a great cook, how about dinner. I said when, and they said we'll call you. ... [¶] We left shortly thereafter. I would say we were there less than an hour. ... [¶] Mr. Carter said we'll walk you to your car because we don't want anyone to get you, or attack you in the parking lot. So they walked us to my car and we drove off."

A few days later, defendant and Masure invited the women to have dinner with them on March 2, 1984, on their "yacht" named the Sea Quest, which was docked near Harbor Drive.⁵ The four had dinner [***851] on the vessel without incident, with the exception that Cullins's vehicle did not start immediately when the women departed that evening. Defendant and Masure, together with a third party who arrived with cables, assisted the women in "jump-starting" the vehicle. On the way home, Tiner and Cullins discussed the evening. Tiner related Masure's observation that he thought Cullins had not been ready to leave and wanted to stay with defendant. Cullins replied: "No way. I had no intentions of spending the night with him, and if he ever calls me again, I will tell him that."

Two days later, on March 4, defendant telephoned Tiner, informing her that he had spent the day sightseeing with Cullins, and wanted to know whether Tiner "wanted to go out and do something with him that night." Tiner declined.

Defendant telephoned Tiner again on March 24, 1984, indicating that he wanted to see Cullins "one time before he went back to Alaska." Tiner falsely informed defendant [**555] that she was unaware of Cullins's whereabouts. "He said to me, why don't I come down there and we can run off to Mexico and get married." Tiner declined that offer, as well as defendant's invitation to go out with him on the following evening.⁶

[*1229] Tiner then telephoned Cullins to inform her that defendant was looking for her. Cullins replied: "I thought

⁵ At a foundational hearing conducted outside the jury's presence, Tiner testified that the Sea Quest was neither a yacht, nor a sailboat, but actually a metal vessel that she characterized as rusty, greasy, and cluttered—a platform for large cranes, littered with junk all over the deck—not a pleasure boat that one would use for sailing on the bay.

⁶ March 25, 1984, was the date on which defendant attacked Barbara S. (See *ante*, at pp. 1223–1225.)

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I'd gotten rid of him. Now I won't be able to answer the phone." Tiner further testified: "[Cullins] was angry. She was upset about it that he was calling again." Nancy McEachern, Cullins's former roommate, testified that when she had shared an apartment with Cullins and the telephone rang, Cullins on multiple occasions had informed her: "If that's Dean, I don't want to talk to him."⁷

b. The events leading to the discovery of Janette Cullins's body

Janette Cullins resided in apartment B, located at 3972 Kendall Street in the Pacific Beach neighborhood of San Diego. In search of a new roommate, Cullins placed an advertisement in The Reader, a local free newspaper. Cheri Phinney responded to the ad and began moving into the apartment during the second week of April 1984.

On Thursday, April 12, 1984, Phinney and Cullins spent the day at the apartment. Phinney painted her new bedroom and bathroom, while Cullins kept her company, vacuumed the carpet, and performed other housekeeping chores. Approximately midafternoon, Cullins responded to a knock at her door. The visitor was defendant, and Cullins returned to Phinney, asking her "to come through the living room so that he [defendant] would be aware that there was someone else in the house." Defendant stayed for approximately one hour, asking questions such as how long she planned to continue painting. Shortly thereafter Cullins informed Phinney that defendant had departed.⁸

[***852] At approximately 6:30 p.m., Cullins left the apartment, informing Phinney that Cullins was planning to attend the symphony with her friend, Cathleen Tiner.⁹ Shortly thereafter, Phinney answered a telephone call and wrote down a message on a piece of paper. The paper was whole when Phinney wrote the [*1230] message, and she left blank the top portion of the paper. When Phinney left the apartment at approximately 7:15 p.m., the drapes and blinds were open. As she locked the door upon leaving, Phinney did not notice any damage to the front door frame.

Cathleen Tiner testified that after she and Cullins attended the symphony, the two women went to a restaurant and then returned to Tiner's apartment, where they watched television until 11:00 p.m. Cullins informed Tiner that defendant was back in town. After watching television with Tiner, Cullins left to return to her own apartment. Tiner never saw Cullins alive again.

Leanne Johnson, who resided across the street from Cullins's apartment, testified that at approximately 11:15 p.m. on April 12, she heard the engine of a vehicle running for about 10 minutes. Johnson peered through her drapes and observed a white vehicle that [**556] she identified as matching the white Datsun 280 ZX that defendant was driving when later arrested. Johnson testified: "It was probably 11:30 just before the news went off that I heard the car move out of the parking space and make a U-turn and it almost hit a pickup truck at the house next to mine. [¶] It just went up the street. It didn't stop at the stop sign ... [¶] ... I mean whoever was in the car sort of pulled out fast, and it was a big loud noise and I did look out and I did see him make a U-turn and almost hit the pickup truck."

Throughout the next day, Cheri Phinney attempted to contact Cullins without success. Nancy McEachern testified that on April 13, she was unsuccessful several times in attempting to contact Cullins by telephone. Cullins's telephone answering machine, which usually was switched on, was not activated. Concerned, McEachern drove to Cullins's apartment around midday. When she arrived, "another car pulled up on the opposite side of the street from me, and a man got out of the car and asked me if Jan was home. ... [¶] I said no, it doesn't look like she's home, her car is not here, I assume she's not. This person had identified himself as Dean. ... [¶] He was driving a white [Datsun] Z with a black bra on the front of the car." McEachern identified the individual who spoke with her as defendant.

McEachern had moved out of the apartment on April 6, but had retained a key in order to return on the morning of April

⁷ Nancy's McEachern's testimony on this point was illuminated by Tiner's testimony that one reason Jeanette Cullins was not interested in becoming involved with defendant was that "he was a drug user" and Cullins was "completely antidrug."

⁸ David Susi testified that at approximately 4:00 p.m., on April 12, 1984, defendant, driving a vehicle with the license plate "PHANTM Z," pulled up next to Susi's vehicle at an intersection in Pacific Beach and asked for directions to Mission Beach. Subsequently shown a police photo lineup, Susi selected defendant's photograph as depicting the man whom he saw driving the car, stating, "I think that's him, but I can't be sure." Susi acknowledged on cross-examination that during an interview with investigators conducted on June 1, 1984, Susi recalled that the date on which he saw the vehicle was either April 11 or 12, 1984.

⁹ There is a discrepancy in the testimony pertaining to the precise time that Cullins departed from the apartment. Phinney fixed the time of Cullins's departure at approximately 6:30 p.m. Tiner testified that Cullins arrived at Tiner's apartment, an approximate 20-minute drive from Cullins's residence, at 6:10 p.m. The discrepancy does not appear to have any significance.

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14 for the purpose of conducting a yard sale. McEachern entered the apartment (alone), stayed less than 15 minutes, left a message for Cullins, and departed. McEachern testified: “The apartment was closed up. Everything was pretty dark. The blinds were drawn, were closed very tightly, and all the windows, especially [*1231] the window in the kitchen, which is a place we never close them in [sic].” McEachern explained that the living room drapes also were drawn, an unusual circumstance, adding that when she and Cullins shared the apartment, they never adjusted the window coverings to their completely closed [***853] position. Although McEachern entered Cullins’s bedroom, the closet doors were shut, and she did not look inside the closet.

Shortly after 6:00 p.m. on the evening of April 13, as Cathleen Tiner was preparing to attend a San Diego Padres baseball game with a friend, defendant arrived unexpectedly at Tiner’s front door, “better groomed than I had ever seen him before.” He wore a beige sweater with a brown windowpane check.¹⁰ Tiner testified: “I was very surprised. ... [¶] I said Dean, I’m sorry I can’t invite you in. I have company coming over. You should have called. ... [¶] And he said [‘]Well, I was here in the neighborhood, I just thought I’d stop by.[’] [...] He said, [‘]Did Jan [Cullins] tell you I was in town?[/]’ [¶] And I said yes, she did. [¶] And he said, [‘]I told her not to tell you that.[’] [¶] I said, well, she did. I’m sorry I can’t invite you in. You have to leave. I have ... company coming over. I have to go. [¶] And then [defendant] put his chin up like this, and said, [‘]Do you know she stood me up today?[/]’ [¶] I said, no, I didn’t.” Tiner shut the door, unsuccessfully attempted to reach Cullins by telephone, and then attended the baseball game.

On the morning of April 14, Cheri Phinney again attempted to contact Cullins, and Nancy McEachern answered the telephone. McEachern informed Phinney that Cullins was not at home. Phinney drove to the apartment, arriving about 8:30 a.m. McEachern was there with her fiancé. The drapes and curtains were closed. Phinney noticed wood chips on the floor by the front door.¹¹

[**557] Because Phinney and McEachern had expected Cullins to be at the apartment, they began to search for a note from her, or a document with her license plate number in the event they needed that information to ascertain from

local authorities whether Cullins had been involved in a traffic accident. In the course of searching for this information, McEachern opened a bedroom closet door and discovered the partially clothed body of Janette Cullins, lying on some boxes. McEachern’s fiancé contacted the police.

[*1232] c. *The police investigation*

Richard Thwing, a San Diego police officer assigned to the police department’s homicide division, testified that the front door of Janette Cullins’s apartment displayed signs that a forced entry had been made. Cullins’s body was lying in the bedroom closet. Her neck bore what appeared to be a ligature mark.

Adolph Romero III testified that on the morning of April 14, 1984, as he was walking to work near the Point Loma piers by North Harbor Drive in San Diego, he retrieved a wallet he noticed in some bushes near the sidewalk. The wallet contained a driver’s license and other identification items and credit cards in the name of Janette Cullins. Cullins’s father later identified the wallet as having belonged to her. Because Romero had an important appointment that morning, he gave the wallet to a friend, Robert Pack, who gave the wallet to the police. During the same week that Romero found the wallet, he [***854] also had seen parked within one block of that location a white Datsun 280 ZX.

Dannis Nuckolls, who worked as a San Diego Police Department evidence technician in April 1984, testified that in conducting an inventory of the contents of Cullins’s wallet, he found a driver’s license and various identification cards, all in the name of Bonnie Guthrie. On April 14, 1984, San Diego police officers recovered Guthrie’s purse from the same North Harbor Drive area.

Hormez Guard, a forensic pathologist, performed an autopsy on Janette Cullins at 9:00 a.m. on April 15, 1984. Dr. Guard testified that the cause of Cullins’s death was asphyxia due to ligature strangulation, adding that he found evidence the victim had suffered “a sharply cutting incised wound” inflicted “after death, or ... when the person was dying,” consistent with the use of a sharp knife. There was no evidence of sexual assault. On cross-examination, Dr. Guard

¹⁰ The sweater had been knitted by murder victim Bonnie Guthrie, whom defendant had fatally strangled two days earlier.

¹¹ On cross-examination, the defense partially impeached Phinney insofar as having seen wood chips by the front door on the morning that Cullins’s body was discovered. Phinney acknowledged she had not recalled seeing the wood chips until police mentioned this detail during one of their interviews with her several months later. On redirect examination, Phinney testified that she told investigators on April 14 that when she departed from the apartment two days earlier, she had not noticed any damage to the doorjamb.

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stated that the time of Cullins's death was between 24 and 48 hours prior to the time that he performed the autopsy.

George Cullins, Janette's father, testified that he had purchased a Triumph TR 7 for Janette in 1980 or 1981. At the time of purchase, the vehicle bore a personalized license plate that read "SHYLAS," which she ultimately replaced.¹²

Susan Seminoff, a friend of Cullins's, testified that in December 1980 she and Janette went together to open checking accounts at San Diego Federal [*1233] Bank, which subsequently changed its name to Great American Bank (and later, after Cullins's murder, to Wells Fargo Bank). Seminoff recalled that in selecting an automatic teller machine (ATM) card password, Cullins picked the word from her license plate, "SHYLAS." The word "SHYLAS" was written on the back of a torn Alpha Beta Supermarket receipt recovered by investigators from the "Members Only" brand jacket found in the Datsun 280 ZX that defendant was driving when he was arrested.

Sandra Homewood, an examiner of questioned documents employed by the San Diego County District Attorney's Office, testified that in comparing exemplars of defendant's handwriting with entries found in his address book, Homewood discerned several "unique and conspicuous characteristics" and made a "positive identification" that defendant had written in his address book the names Susan Loyland (rape victim Barbara S.'s tenant, see, *ante*, at pp. 1223–1226), Janette Cullins, Cathleen Tiner, and Susan Knoll. With regard to the slip of paper that read "SHYLAS," Homewood was unable to eliminate defendant or identify him as the writer. In comparing the note to an exemplar of Janette Cullins's handwriting, [***558] Homewood indicated there existed "very strong indications" that Cullins had written it.

Great American Bank records revealed that on April 13, 1984, a withdrawal from Janette Cullins's account in the amount of \$ 60.00 (leaving an account balance of \$ 4.06) was made from an ATM located at the bank's Point Loma branch. A four-minute videotape of the transaction was introduced into evidence and shown to the jury. The tape depicted a man wearing a sweater (identified as having been knitted by Bonnie Guthrie) and a black jacket.

8. Defendant's Arrest

The prosecution introduced evidence pertaining to defendant's April 17, 1984 [***855] arrest in Arizona that

was substantially similar to that summarized in *People v. Carter, supra*, 36 Cal.4th at pages 1133–1134, with one noteworthy addition, as follows. In the trial conducted in the present case, the prosecution introduced the testimony of Jerald McKeand, a deputy sheriff employed by Yavapai County, Arizona, who recalled that at the time of defendant's arrest, defendant wore cutoff jeans, a gray sweatshirt, tennis shoes, and green socks. Defendant also wore a gold necklace that had belonged to Tok Kim and a workout shirt that had belonged to Jillette Mills.

9. The Contents of the Datsun 280 ZX

The prosecution introduced evidence pertaining to the contents of the Datsun 280 ZX that defendant was driving when he was stopped and arrested [*1234] in Arizona. The evidence was substantially similar to that summarized in *People v. Carter, supra*, 36 Cal.4th at pages 1134–1135.

B. The Defense Case

Outside the presence of the jury, the trial court informed defendant that he had the right either to testify or not to testify. Defendant replied that he was not going to testify.

Unlike defendant's trial in Los Angeles County, in which the defense did not present any evidence at the guilt phase (see *People v. Carter, supra*, 36 Cal.4th at p. 1135), the defense at this trial introduced the testimony of witnesses pertaining to the Los Angeles County murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, the San Diego County murder of Janette Cullins, and the San Diego rape of Barbara S.

1. The Los Angeles County Murders

The defense introduced the testimony of Ronald C. Tulio, an employee of the United States Postal Service, who had been Susan Knoll's boyfriend and also was acquainted with Knoll's roommate, Jillette Mills, and their friend, Bonnie Guthrie. Tulio testified that he and Knoll had lived together from July 1983 to February 1984, after which Knoll moved in with Mills. In the immediate aftermath of the Los Angeles County murders, members of the Culver City Police Department interviewed Tulio.

On cross-examination, Tulio acknowledged that his breakup with Knoll had been an emotional one, and that on the afternoon of April 12, 1984, Culver City Police Department officers investigating the Los Angeles County murders

¹² On April 14, 1984, Janette Cullins's father noticed her car parked about one and one-half blocks from her apartment. She usually parked her vehicle directly in front of her apartment.

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arrested him and detained him at the Culver City jail for four days. On the night of April 12, 1984, when Janette Cullins was murdered in San Diego County, Tulio was in police custody.

When asked on cross-examination what defense counsel had told Tulio he (Tulio) might testify about, Tulio recalled counsel stating: “He [defense counsel] said all he wanted to do was have me say that obviously the Culver City Police Department made a mistake in arresting me, saying that San Diego [Police Department] could make the same mistake arresting the wrong guy.”

Culver City Police Officer Craig Bloor testified that at the time of the Los Angeles County murders, he resided in an apartment [**559] building adjacent to the building in which the bodies of Susan Knoll and Jillette Mills were discovered. April 10, 1984, at approximately 8:30 p.m., Officer [***856] Bloor noticed [*1235] someone he did not recognize walking from the next-door apartments to the street. Upon learning several days later of the double homicide that had occurred in the adjacent building, Officer Bloor identified a photograph of Ronald Tulio as depicting the man he saw on April 10.

On cross-examination, however, Officer Bloor testified that when he observed Tulio at the police station, he recognized some similarities to the person he saw on April 10 but also noticed several differences, and concluded Tulio was not the man he had seen on that date. Instead, Officer Bloor identified defendant in court as the man he noticed on April 10, adding that the man was wearing a “ ‘Members Only’ style cut jacket that was popular then.”

On cross-examination, Officer Bloor acknowledged having spoken with defendant on April 10: “I asked him what he was doing in the area, and he said he was looking for a friend’s house [¶] ... [¶] Then he says[,] ‘[W]hy, do I look suspicious[?]’ [¶] I said yeah, you could. Then he said[,] ‘[I]t’s good that you check.[.]’ Then he left.” Defendant held “some kind of blue folder or something like that” that Officer Bloor recalled was “very similar” to a blue folder the prosecution previously had introduced into evidence. The folder, which contained a photograph of defendant, was among the items that investigators recovered from Jillette Mills’s Datsun 280 ZX.

2. The Murder of Janette Cullins

The defense presented the testimony of Michael T. Palermo, who in 1984 was employed as a San Diego Police Department latent print examiner. Palermo testified that as

part of the Cullins murder investigation, he examined latent fingerprint impressions recovered from Cullins’s apartment, but none matched defendant’s.

The defense also presented the testimony of William W. Loznycky, Jr., who in 1984 worked as a San Diego Police Department criminalist. Loznycky testified that neither fibers found on the hand of Janette Cullins, nor head or pubic hairs recovered from a blanket and sheets found in her residence, could be matched to defendant or his clothing. On cross-examination, Loznycky testified that he also examined an “O-type” bloodstain taken from the crime scene that did not match the victim’s blood, but could have been left by defendant, whom Loznycky characterized as having an “O” blood type.

Finally, the defense presented the testimony of Lauren Carville, who resided in the apartment one floor below the one occupied by Cullins. Carville testified that she and Cullins had sunbathed in their shared backyard during the afternoon of April 12, during which time an acquaintance of [*1236] Cullins visited with Cullins for about 15 minutes. Carville saw Cullins depart in her vehicle that evening at approximately 7:00 p.m., after which Carville went out. Returning at approximately midnight, Carville noticed that Cullins’s vehicle was not parked in front of their apartment building, where Cullins normally parked her car.

3. The Rape of Barbara S.

The defense presented the testimony of San Diego Police Department Officer Gene Loucks, who interviewed Barbara S. shortly after she was attacked. Officer Loucks testified that Barbara S. was unable to recall several physical attributes of her assailant.

II. PENALTY PHASE EVIDENCE

A. The Prosecution’s Case

The prosecution introduced into evidence the abstracts of judgment from defendant’s prior burglary convictions in Oregon [***857] and Alaska and, over defendant’s objection, his prior rape conviction in Ventura County. (See [*People v. Carter, supra*, 36 Cal.4th at pp. 1135–1136.](#))

The prosecution also introduced evidence that a deputy sheriff discovered in defendant’s San Diego County jail cell a homemade knife or “shank” wrapped in masking tape, as well as a 22-inch pipe. San Diego Police Department Sergeant Carlos Chacon [**560] testified over defendant’s objection that weapons such as those seized from defendant’s cell could have been smuggled into the jail in parts and

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assembled, and that the shank found in defendant's cell was designed as an offensive weapon to inflict serious bodily injury.

B. The Defense Case

The defense introduced extensive evidence pertaining to defendant's difficult childhood and upbringing in Alaska (defendant is part Eskimo), as well as evidence that he was an accomplished and cooperative television cameraman and a good father and friend. The evidence was substantially similar to that summarized in [People v. Carter, supra, 36 Cal.4th at pages 1136–1137](#).¹³

[*1237] DISCUSSION

I. PRETRIAL ISSUES

A. Double Jeopardy and Multiple Punishment

Several weeks prior to the commencement of jury selection, defendant filed motions to dismiss the proceedings against him on the grounds of double jeopardy, collateral estoppel, and the statutory prohibition against multiple punishments. In the alternative, defendant moved "to sever the trial of the issues raised by his pleas of once in jeopardy and former conviction ... from the trial of his guilt or innocence of the crimes charged in the information." Defendant asserted that he previously had been placed in jeopardy in the Los Angeles County proceedings, and that during those proceedings the jury heard and considered both evidence and argument suggesting defendant was responsible for the murder of Janette Cullins. Having been sentenced to death in those proceedings, defendant sought, on state and federal constitutional grounds, the dismissal of the San Diego County charge that he murdered Cullins.

The trial court denied defendant's motions, stating, among its reasons: "A legal analysis based on the statutes, case law and facts of this case as presented to the court for purposes of these motions shows there is no legal basis for a finding by the court of once in jeopardy. ... [¶] The double jeopardy

argument is meritless under the law and this fact situation, and therefore, the motion to dismiss would be denied. [¶] ... [¶] This motion is so meritless that in all honesty I don't see how anyone could call it incompetence of counsel not to enter the double jeopardy plea at the arraignment. [¶] ... [¶] ... I'm not going to allow the plea. I can't do that because in my discretion there's no legal basis for it."

(1) On appeal, defendant reiterates the contentions he made in the trial court. As we [***858] shall explain, defendant's position is procedurally barred by his own successful motion in the Los Angeles County proceedings to dismiss the Cullins murder charge. (See [People v. Carter, supra, 36 Cal.4th at pp. 1158–1159](#).) Even were we to ignore that procedural flaw, the trial court correctly determined that neither double jeopardy, nor collateral estoppel, nor [section 654](#) considerations barred the San Diego proceedings, and therefore properly rejected defendant's motions.¹⁴

[*1238]

[*561] 1. The Procedural Bar Based upon Defendant's Successful Motion in the Los Angeles Proceedings to Sever the San Diego Charges

As we have explained in the companion appeal, [People v. Carter, supra, 36 Cal.4th at page 1158](#), "the complaint against defendant charged all of the crimes allegedly committed in Alameda, Los Angeles, and San Diego Counties in a single pleading. Defendant subsequently moved to dismiss the charges arising from the Alameda and San Diego crimes committed against Tok Kim and Janette Cullins, respectively. The prosecution did not oppose the motion, instead informing defendant that if the motion were granted, the crimes committed in Alameda and San Diego Counties would form the basis for a refiling of the charges against defendant in those counties." The trial court in Los Angeles County thereafter granted defendant's motion to dismiss the charges involving the crimes committed in Alameda and San Diego Counties.

Because defendant previously sought and obtained in Los Angeles County the dismissal of the San Diego charges,

¹³ In their brief, the People observe that certain passages set forth in defendant's summary of the mitigation evidence contained in the appellant's opening brief were proffered but were not presented to the jury. The People contend the proffered testimony is irrelevant and should be stricken from the brief pursuant to [Code of Civil Procedure section 436](#). The point is a minor one, and in fact the brief observes, albeit indirectly, that the evidence was not presented to the jury. We therefore deny the People's request.

¹⁴ As we noted in another case: "With regard both to this claim and to every other claim raised in his brief, defendant asserts that each alleged error violates not only state law but multiple provisions of the federal and California Constitutions. In addressing each claim discussed in this opinion, we have considered defendant's contention that the alleged error violates the federal and California Constitutions, and our rejection of each claim of reversible error includes a determination that the alleged error does not warrant reversal under the state or federal Constitution." ([People v. Slaughter \(2002\) 27 Cal.4th 1187, 1199, fn. 2 \[120 Cal. Rptr. 2d 477, 47 P.3d 262\]](#).)

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knowing that the dismissal would compel the San Diego County prosecutor to file separate charges in that county for the crimes defendant was alleged to have committed in that jurisdiction, defendant's contention that proceeding with the San Diego County prosecution was fundamentally unfair or violative of his rights under the state and federal Constitutions is not well taken or worthy of extensive discussion. In view of the evidence linking defendant to the murder of Janette Cullins, San Diego County was entitled to prosecute defendant for that crime (as well as other crimes alleged to have been committed by defendant within that jurisdiction). (§§ 777, 790; ¹⁵ *People v. Carpenter, supra*, 21 Cal.4th at pp. 1038–1039; *People v. Bradford* (1976) 17 Cal.3d 8, 15 [130 Cal. Rptr. 129, 549 P.2d 1225].) Having moved in Los Angeles County for dismissal of the charges involving crimes committed in San Diego, notwithstanding the prosecutor's representation that the motion, if granted, would [***859] effect a *severance* of the charges against defendant and a refiling in the respective counties in which the crimes occurred, defendant cannot now complain that severance led to a second murder prosecution.

[*1239] 2. *Defendant's Jeopardy, Section 654, and Collateral Estoppel Claims*

Even if we were to assume that these claims are not barred, we would conclude that defendant's contentions based upon double jeopardy principles, *section 654*, and collateral estoppel, lack merit.

a. *Double jeopardy*

(2) The state and federal Constitutions declare that no person shall twice be placed in jeopardy for the same offense. (*U.S. Const., 5th Amend.*; *Cal. Const., art. I, § 15.*) In Los Angeles County, defendant was placed in jeopardy for the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie. In those proceedings, he was neither charged with, nor convicted of, any crimes pertaining to the murder of Janette Cullins or the rape of Barbara S. Accordingly, jeopardy never attached to defendant in the Los Angeles County proceedings for the crimes committed in San Diego County. (See *People v. Carpenter, supra*, 21 Cal.4th at p. 1039, fn. 4. [“ “[T]he murder of two persons, even by the same act, constitutes two offenses, for each of which a separate prosecution will lie, and ... a conviction or acquittal in one case does not bar a prosecution in the other.” ’ [Citations.]”]; *People v. Medina* (1995) 11 Cal.4th 694,

765 [47 Cal. Rptr. 2d 165, 906 P.2d 2] [rejecting the [**562] defendant's contention that double jeopardy principles should apply where the defendant already once had defended against the charges at the penalty phase of the earlier trial]; see also *United States v. Watts* (1997) 519 U.S. 148, 154–155 [136 L. Ed. 2d 554, 117 S. Ct. 633].) Accordingly, defendant's double jeopardy argument must fail.

b. *Section 654*

Defendant's assertion that *section 654* barred the San Diego County prosecutor from proceeding against him is deficient for reasons analogous to those noted immediately above. At the time of defendant's trial, *section 654* prescribed: “An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an *acquittal* or *conviction and sentence* under either one bars a prosecution for the same act or omission under any other.” (Stats. 1977, ch. 165, § 11, p. 644, italics added.)

Because defendant was neither acquitted nor convicted of the murder of Janette Cullins or the rape of Barbara S. in Los Angeles County, *section 654* did not bar the San Diego County proceedings instituted against him for those crimes. (*People v. Carpenter, supra*, 21 Cal.4th at pp. 1038–1039 [rejecting [*1240] the defendant's contention that *section 654* barred separate prosecutions in Marin County and Santa Cruz County for the crimes committed in each county]; see also *People v. Bradford, supra*, 17 Cal.3d at pp. 13–17 [where criminal behavior began in one county and, following a police chase, terminated in another, the crimes committed in each county properly were tried separately in the respective counties].)

c. *Collateral estoppel*

(3) Defendant contends the prosecutor was barred by collateral estoppel principles from trying defendant in San Diego County for the murder of Janette Cullins and the rape of Barbara S. We observe: [***860] “Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding ‘if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted

¹⁵ Several years after defendant's trials, *section 790* was amended to permit in certain circumstances the joint trial of murders committed in different counties. (See now § 790, subd. (b), as amended by Stats. 1998, ch. 549, § 1; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1039, fn. 4 [90 Cal. Rptr. 2d 607, 988 P.2d 531].) These statutory revisions are not material to our analysis.

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was a party or in privity with a party at the prior [proceeding].’ [¶] It is implicit in this three-prong test that only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. [Citation.] An issue is actually litigated ‘[w]hen [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is *determined*’ ” (*People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal. Rptr. 77, 651 P.2d 321], fn. omitted; see also *People v. Taylor* (1974) 12 Cal.3d 686, 695 [117 Cal. Rptr. 70, 527 P.2d 622] [the doctrine’s purposes are: “(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation.”].)

Here, the circumstance that the jury in the Los Angeles County proceedings never was asked to determine, and did not determine, defendant’s guilt or innocence of the murder of Janette Cullins and the rape of Barbara S. defeats defendant’s claim of collateral estoppel. Nor would any of the purposes of the doctrine noted above be served by its application here.

B. Motion to Disqualify the Trial Court Judge

On November 5, 1990, several months prior to the commencement of trial, defendant filed a motion pursuant to Code of Civil procedure [section 170.1, subdivision \(a\)\(6\)](#), to disqualify San Diego County Superior Court Judge Melinda J. Lasater from presiding at his trial. ¹⁶

[*1241] [**563] The basis for defendant’s motion was that Judge Lasater had maintained a “working relationship and a friendship with the prosecutor in this case [San Diego County Deputy District Attorney James Pippin] such that a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” ¹⁷

[***861] Judge Lasater thereafter conducted a hearing in which she reviewed her contacts with Mr. Pippin that spanned a period of approximately 16 years, noting the dates when they had worked together and general information pertaining to their social contacts. During the hearing, Judge Lasater recalled, among other things, that she and Mr. Pippin had worked together in the San Diego County District Attorney’s Office until she left that office in 1987, that her family and his had gone camping with other families, that her husband had purchased Mr. Pippin’s son’s dirt bike approximately 10 years prior to the hearing, that there had been sporadic social contacts at parties, that she had performed the wedding of Mr. Pippin’s daughter at his daughter’s request in August 1990, that his daughter gave her a necklace similar to necklaces given to the bridesmaids, and that Mr. Pippin’s daughter had “house sat” for her approximately one year earlier, for which his daughter had been paid a “minimal amount.” Judge Lasater attached a copy of the hearing transcript to her answer. ¹⁸

[*1242] On November 30, 1990, Judge Allen J. Preckle, selected by agreement of the parties, conducted a hearing on defendant’s motion. Relying on [United Farm Workers of](#)

¹⁶ [Code of Civil Procedure section 170.1, subdivision \(a\)](#) provides in pertinent part:

“(a) A judge shall be disqualified if any one or more of the following is true: [¶] ... [¶]

“(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.”

¹⁷ In defendant’s statement of disqualification, one of his attorneys, Josephine Dedina, declared: “I accompanied Deputy District Attorney James Pippin to his office to arrange a telephone call to Judge Lasater to set a schedule for hearings. Mr. Pippin stated that he had known Judge Lasater for a long time. He had been her supervisor when she worked as a Deputy District Attorney. Mr. Pippin informed me that Judge Lasater had participated in his daughter’s wedding in the summer of 1990. Mr. Pippin also stated that if the defense in this case filed the usual defense motions to declare the death penalty unconstitutional, he knew Judge Lasater would immediately deny them. [¶] This past working relationship, where the judge was the subordinate to the prosecutor, together with a relationship where Judge Lasater participated in the prosecutor’s daughter’s wedding several months ago, constitute facts that a person aware of those facts might reasonably entertain a doubt that the judge would be able to be impartial.”

¹⁸ Judge Lasater’s answer, in pertinent part, declared: “The defendant in this case has expressed concern over my ability to be impartial due to a perceived personal relationship with the prosecutor in this case, Mr. James Pippin. After reviewing the statement of disqualification, I conducted a hearing with all parties and their counsel present in which I detailed the contacts I could remember with Mr. Pippin over the last 17 years. ... [¶] Although I was with the district attorney’s office for almost 13 years, I have had relatively few contacts with Mr. Pippin. He was my supervisor for only four months in 1974, more than 15 years ago. During my last five years with the district attorney’s office, I was a division chief assigned to the Juvenile Division and Mr. Pippin was assigned as a division chief in the Superior Court division. We were essentially equals in this capacity and had very little contact. [¶] The social functions we both attended were incidental to our professional responsibilities with the district attorney’s office, rather

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America v. Superior Court (1985) 170 Cal. App. 3d 97, 104 [216 Cal. Rptr. 4], and *Leland Stanford Junior University v. Superior* [*564] *Court* (1985) 173 Cal. App. 3d 403, 408 [219 Cal. Rptr. 40], the court observed that “[t]he standard [for disqualification set forth in *Code of Civil Procedure, section 170.1, subdivision (a)(6)*] is fundamentally an objective one.” Reviewing the nature of the professional and social contacts between Judge Lasater and Mr. Pippin, the court viewed “as weightless, particularly given the substantial passage of time, the assertion that a reasonable person would doubt Judge Lasater’s impartiality because of her past association with Mr. Pippin [¶] ... [¶] This court is further satisfied that any, albeit unreasonable doubt, concerning Judge [***862] Lasater’s impartiality in this case would be erased by a reasonable person’s being apprised of Judge Lasater’s excellent reputation for integrity and fierce independence. [¶] This court, therefore, finds that a reasonable person, aware of all the facts, would not reasonably entertain a doubt that Judge Lasater will be able to be impartial in this case.” The court thereafter denied defendant’s motion.

Defendant did not seek review in the Court of Appeal by way of a petition for writ of mandate, the procedure required by *Code of Civil Procedure section 170.3, subdivision (d)*.¹⁹

In his appeal to this court, defendant contends that the superior court below erred in denying his motion to disqualify Judge Lasater. Acknowledging his failure to comply with the writ review requirement set forth in *Code of Civil* [*1243] *Procedure section 170.3, subdivision (d)*, defendant nevertheless asserts as a “structural defect” reviewable on appeal the “deni[al of] due process of law in violation of [the] state and federal Constitutions because the judge who presided over his case and who rendered the sentence of death was not impartial.”

We find no merit in defendant’s position. His failure to comply with the requirements of *Code of Civil Procedure,*

section 170.3, subdivision (d), precludes him from challenging the denial of his statutory disqualification motion on appeal from the judgment rendered in the trial court. (*People v. Brown* (1993) 6 Cal.4th 322, 333 [24 Cal. Rptr. 2d 710, 862 P.2d 710] (*Brown*).)

(4) Even if we were to overlook the procedural deficiency inherent in defendant’s challenge to the denial of his disqualification motion, we would find no merit in the assertion, implicit in defendant’s argument, that Judge Lasater had a responsibility to recuse herself in view of her prior professional and casual social relationship with Mr. Pippin. Defendant provides no statutory or case law authority in support of that position, and we are aware of none. Because virtually all judges are drawn from the ranks of the legal profession, such prior relationships are neither unusual nor dispositive. (See *United Farm Workers of America v. Superior Court, supra*, 170 Cal. App. 3d 97, 100 “[T]he proper performance of judicial duties does not require a judge to withdraw from society and live an ascetic, antiseptic and socially sterile life. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.”).)

In our view, Judge Preckle correctly determined that on the facts presented in the pleadings below, a reasonable person would not entertain a doubt as to Judge Lasater’s impartiality. (See *United Farm Workers of America v. Superior Court, supra*, 170 Cal. App. 3d at pp. 105–106; cf. *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230–231 [49 Cal. Rptr. 2d 615] [disqualification proper where, 13 years earlier, judge had been a prosecutor representing the People in other proceedings against the defendant].) Accordingly, disqualification was not mandated in the present case.

Defendant asserts a nonstatutory due process claim based upon evidence of bias adduced at trial. We need not decide

than a reflection of any close personal friendship. Our social interaction over the years has been no different than that of any other member of the legal community who occasionally engages in social activities with members of the profession. [¶] It is common practice for judges of this Court to perform wedding ceremonies for members of the legal community and their families. My agreement to perform the wedding ceremony for Mr. Pippin’s daughter was such an arrangement and was done at his daughter’s request, rather than Mr. Pippin’s. I was not paid to perform the ceremony and specifically indicated that no fee should be paid. [¶] Mr. Pippin’s alleged comments regarding my predilection in ruling on motions dealing with constitutional challenges to the death penalty, are also unfounded. As I stated at the time of the hearing referenced above, I have never seen such a motion and would consider it premature to assume such a posture until I had been presented with the issue and reviewed it. [¶] I am neither biased nor prejudiced for or against Mr. Pippin, the defendant or his counsel, and am satisfied that I can perform my duty to decide the issues presented fairly and impartially in this case.”

¹⁹ *Code of Civil Procedure, section 170.3, subdivision (d)*, provides: “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding.”

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whether defendant has forfeited this claim [***863] by failing to file a writ petition on this ground [***565] (see generally [Brown, supra, 6 Cal.4th at p. 336](#)), because his claim lacks merit. Specifically, defendant cites Judge Lasater's contempt order, issued on the eve of the penalty phase (June 3, 1991), against defense counsel *and* defendant for [*1244] failure to provide penalty phase discovery to the prosecution, as well as Judge Lasater's observation, made in considering defendant's application to modify the death sentence rendered by the jury, that defendant "frankly had no intention of testifying in Los Angeles." ²⁰

Neither of the actions cited by defendant, extracted from a trial court record in excess of 9,000 pages, remotely approaches the threshold required to establish the existence of judicial bias. (See [People v. Clark \(1992\) 3 Cal.4th 41, 143 \[10 Cal. Rptr. 2d 554, 833 P.2d 561\]](#) ["The question for us to decide is whether the judge 'officially and unnecessarily usurp[ed] the duties of the prosecutor ... and in so doing create[d] the impression that he [was] allying himself with the prosecution'"]). Moreover, our independent review of the entire record reveals a trial court judge who was scrupulously fair and courteous to each side, and whose rulings exhibited neither bias nor prejudice. We therefore reject defendant's claim.

C. Motion to Exclude Evidence of Wood Chips

At the preliminary hearing, Cheri Phinney testified that in April 1984, she decided to move into the apartment occupied by Janette Cullins. On April 12, Phinney was at the apartment, painting her new bedroom and bathroom. Phinney recalled that the carpet area in the living room near the front door had been vacuumed. At the time Phinney departed from the apartment, between 7:00 and 7:15 p.m., she did not notice any damage to the doorjamb surrounding the front door or any wood chips on the carpet beneath the door latch. When Phinney returned to the apartment on the morning of April 14, shortly before the discovery of Janette Cullins's body, she noticed wood chips on the floor, as depicted in a photograph introduced by the prosecution. On cross-examination, Phinney acknowledged that on April 14, she did not mention the wood chips to the investigating detective and she also failed to mention the wood chips

during her testimony at defendant's trial in Los Angeles County.

San Diego Police Department Homicide Detective James Shively testified that as part of his investigation of the crime scene on April 14, he directed that the wood chips be photographed. On cross-examination, Detective Shively acknowledged he did not mention the wood chips in the crime scene report that he prepared. He further acknowledged that under his direction, [*1245] evidence technician Dannis Nuckolls removed a portion of the doorjamb. Detective Shively did not recall whether he directed anyone to collect the wood chips. ²¹

San Diego Police Department Sergeant Douglas Naliboff testified that when he [***864] responded to the crime scene on the morning of April 14, the doorjamb "appeared that it had been pried open. There were wood chips separated from the doorjamb itself and laying on the floor." He identified the prosecution's photographs as depicting the doorjamb and wood chips that he observed.

Defendant moved to exclude all evidence related to the condition of the front door of Janette Cullins's apartment, including testimony regarding the doorjamb and the wood chips, and photographs of the wood chips. The basis for his motion was that the prosecution assertedly had "failed to preserve the wood debris, and carelessly removed the door and doorjamb removed and photographed [*sic*]." Defendant asserted that the [***566] prosecution's failure to preserve the "potentially exculpatory wood chips" violated defendant's constitutional rights to a fair trial and due process of law, and that pursuant to [Evidence Code section 352](#) the testimonial or photographic evidence was not admissible in the absence of the wood chips themselves.

The trial court denied defendant's motion, finding: "Defendant's ... motion to exclude ... the wood chips evidence and doorjam[b] is denied. There is an insufficient showing of bad faith by law enforcement as shown in [\[Arizona v.\] Youngblood \[\(1988\) 488 U.S. 51 \[102 L. Ed. 2d 281, 109 S. Ct. 333\]\]](#). In addition, the probative value of the evidence more than substantially outweighs any prejudice of the failure to preserve the wood chips. [¶] The record

²⁰ Far from exhibiting bias, Judge Lasater's comment in fact was made while *explaining the basis* for the court's denial of defendant's claim that he had been denied his right to testify in the Los Angeles proceedings. Her comment was based upon her review of the transcripts of both proceedings as well as her discussions with defendant under seal, and was made in the specific context of expressing the view that defendant "was using [the denial of the right to testify] issue as a tactical means for obtaining a reversal"

²¹ At trial, Nuckolls testified that he took photographs of the doorjamb and the wood chips and subsequently removed a portion of the doorjamb, but did not retain the wood chips and did not know what happened to them.

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should reflect that law enforcement took pictures of the evidence from several angles and preserved the door jam[b], itself. They apparently did not actually preserve the wood chips which are reflected in the pictures.”

On appeal, defendant contends the trial court erred in denying his motion to exclude this evidence. He argues that because the charge of burglary, as well as the burglary and lying-in-wait special circumstances, each depended upon the prosecution establishing that defendant unlawfully entered Cullins’s apartment, “the government[’s] fail[ure] to preserve evidence which was material and potential[ly] exculpatory” deprived him of a myriad of state and federal constitutional rights. Defendant further asserts that the photographs of the wood chips could have been taken *after* the doorjamb was removed, and thus the failure to preserve the wood chips deprived defendant of the [*1246] opportunity to demonstrate that the presence of the chips “may have been the result of Nuckolls’s post-crime removal of wood.” Defendant maintains that the trial court’s denial of his motion to exclude evidence was not harmless beyond a reasonable doubt and requires reversal, and further that the trial court’s ruling constituted an abuse of discretion under [Evidence Code section 352](#).

For the reasons that follow, defendant’s position lacks merit.

(5) “Law enforcement agencies have a duty, under the *due process clause of the Fourteenth Amendment*, to preserve evidence ‘that might be expected to play a significant role in the suspect’s defense.’ ([California v. Trombetta \(1984\) 467 U.S. 479, 488 \[81 L. Ed. 2d 413, 104 S. Ct. 2528, 2534\]](#); accord, [People v. Beeler \(1995\) 9 Cal.4th 953, 976 \[39 Cal. Rptr. 2d 607, 891 P.2d 153\]](#).) To fall within the scope of this duty, the evidence ‘must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.’ ([California v. Trombetta, supra](#), 467 U.S. at p. 489 [104 S. Ct. at p. 2534]; [People v. Beeler, supra](#), 9 Cal.4th at p. 976). The state’s responsibility is further limited when the [***865] defendant’s challenge is to ‘the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.’ ([Arizona v. Youngblood\[, supra,\] 488 U.S. 51, 57 \[102 L. Ed. 2d 281, 109 S. Ct. 333, 337\]](#).) In such case, ‘unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.’ (*Id.* at p. 58 [109 S. Ct. at p. 337]; accord, [People v. Beeler, supra](#), 9 Cal.4th at p. 976.)

“On review, we must determine whether, viewing the evidence in the light most favorable to the superior court’s finding, there was substantial evidence to support its ruling. ([People v. Griffin \(1988\) 46 Cal.3d 1011, 1022 \[251 Cal.Rptr. 643, 761 P.2d 103\]](#).)” ([People v. Roybal \(1998\) 19 Cal.4th 481, 509–510 \[79 Cal. Rptr. 2d 487, 966 P.2d 521\]](#); see also [People v. Cooper \(1991\) 53 Cal. 3d 771, 810 \[281 Cal. Rptr. 90, 809 P.2d 865\]](#).)

Under this standard, the court below did not err in concluding there was no showing of bad faith by law enforcement in failing to preserve the evidence; none of the testimony at the preliminary hearing (or trial) suggested otherwise. Similarly, nothing in the record suggests that the court below erred in [**567] determining that the wood chips did not have an exculpatory value that was apparent prior to their disappearance, or that the wood chip evidence was of such a nature that defendant was unable to obtain comparable evidence by other reasonably available means. (See [People v. Cooper, supra](#), 53 Cal.3d 771, 810.)

[*1247] Nor do we find any abuse of discretion in the court’s determination that the probative value of the evidence substantially outweighed any prejudice that could be attributed to the failure to preserve the wood chips that had been observed by Cheri Phinney and Sergeant Naliboff. Investigators photographed the wood chip evidence. The photographic evidence indicated that someone had forced an entry into Janette Cullins’s apartment, and therefore was probative as to the burglary charge and the burglary special circumstance. Defendant does not demonstrate how, in the absence of the wood chips themselves, the trial court abused its discretion in denying defendant’s motion to exclude the testimony and photographs of the wood chips. Defendant’s assertion that removal of a portion of the doorjamb during the investigation might have created the wood chips is speculative and has no bearing on whether the trial court abused its discretion in denying defendant’s motion to exclude the evidence.

II. JURY SELECTION ISSUES

Defendant contends the trial court erroneously prohibited sequestered voir dire examination of prospective jurors, unfairly restricted the examination of the prospective jurors by counsel, conducted voir dire in an oppressive atmosphere, improperly instructed prospective jurors, and applied an incorrect standard to exclude persons from the jury. In view of these asserted errors, defendant contends he was denied a myriad of rights guaranteed to him under the state and federal Constitutions and therefore his conviction and sentence must be reversed. As we shall explain, none of defendant’s contentions has merit.

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A. Defendant's Motion for Sequestered Voir Dire

At the commencement of jury selection, defendant moved for sequestered voir dire of prospective jurors pursuant to Hovey v. Superior Court (1980) 28 Cal.3d 1 [168 Cal. Rptr. 128, 616 P.2d 1301]. The prosecution joined in the request. The trial court [***866] denied the motion, stating that "Proposition 115 is the law and is applicable. ... [¶] And I intend to follow Proposition 115, and that includes, at this particular point in time, I'm not going to be using a sequestered inquiry of the jurors. [¶] In making that decision, I'm exercising my discretion as well as requested by the People." When defendant renewed his request, the trial court repeated its denial.

On appeal, defendant contends he was "denied meaningful voir dire by the court's improper procedures," including the trial court's denial of sequestered voir dire. He is mistaken. Proposition 115, which took effect on June 6, 1990 (approximately eight months prior to jury selection here), enacted Code of Civil Procedure section 223, which in relevant part provided (prior to its [*1248] amendment in 2000): "In a criminal case, the court shall conduct the examination of prospective jurors[, and such examination] ... shall, where practicable, occur in the presence of other jurors in all criminal cases, including death penalty cases." (Stats. 1990, p. A-245, italics omitted.)²²

[**568] Moreover, we repeatedly have rejected contentions similar to those advanced by defendant. (See, e.g. People v. San Nicolas (2004) 34 Cal.4th 614, 633-634 [21 Cal. Rptr. 3d 612, 101 P.3d 509]; People v. Ramos (2004) 34 Cal.4th 494, 513-515 [21 Cal. Rptr. 3d 575, 101 P.3d 478]; People

v. Slaughter (2002) 27 Cal.4th 1187, 1199 [120 Cal. Rptr. 2d 477, 47 P.3d 262]; People v. Box (2000) 23 Cal.4th 1153, 1180-1181 [99 Cal. Rptr. 2d 69, 5 P.3d 130]; see also People v. Waidla (2000) 22 Cal.4th 690, 713 [94 Cal. Rptr. 2d 396, 996 P.2d 46] [Proposition 115 "abrogates" the requirement found in Hovey v. Superior Court, supra, 28 Cal.3d at p. 80, of individual sequestered voir dire examination of prospective jurors during the death qualification portion of jury selection in a capital case]; Tapia v. Superior Court (1991) 53 Cal.3d 282, 288 [279 Cal. Rptr. 592, 807 P.2d 434] [applying Proposition 115 to crimes committed prior to enactment of the new statute, where (as here), the trial is conducted after its enactment].) Defendant has not provided us with any persuasive basis for revisiting the holdings in those decisions, and we decline to do so.

The trial court made clear that its ruling was guided by the provisions set forth in Code of Civil Procedure section 223. The court also explained at length the basis for its exercise of discretion in denying the requests for sequestered voir dire. No error or abuse of discretion appears.

*[*1249] B. The Trial Court's Imposition of Time Limits on Voir Dire*

The trial court permitted counsel for each party to have 60 minutes to conduct voir dire of the first 20 prospective jurors, and gave 30 minutes to each side for each additional group of nine jurors. The defense [***867] and prosecution each protested vociferously that the court's limits were unduly restrictive.²³ The parties repeatedly moved the court to reconsider its ruling, each side citing the difficulty of

²² At the time of defendant's trial, Code of Civil Procedure section 223 in full provided as follows (Prop. 115, § 7, as approved by voters, Primary Elec. (June 5, 1990)):

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

"Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

"The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." (Stats. 1990, p. A-245, italics omitted.)

²³ In seeking additional time in which to conduct the voir dire examination, defense counsel argued: "I would like more time than 60 minutes for the first 20 [jurors], and more time than 30 minutes with the fill-in jurors. [¶] Since it appears to me that the time being set is more or less arbitrary, in other words, Your Honor is just picking a figure sort of out of the air, 60 minutes, it could just as well be 90, 120, something like that. [¶] Sixty minutes is only an average of three minutes per juror, and that simply is not enough in a capital case."

Defense cocounsel added: "No disrespect to the court, the speed of this, I don't have time to reflect. ... I do not have time to consider[,] to reflect, to confer. One of the purposes to hav[ing] two attorney[s] is to be able to confer, and I don't have the time to

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ascertaining a prospective juror's views during group voir dire within the time allotted by the trial court. The court denied these requests, expressing confidence that the process would afford counsel an adequate amount of time in which to conduct the voir dire examination.²⁴

[*1250] [**569] [***868] (6) On appeal, defendant contends the trial court's restriction of the amount of time permitted each side in obtaining answers to questions was improper and resulted in a denial of meaningful voir dire. We have observed that the adequacy of voir dire is a matter

reflect and think this is the right decision. And I would appreciate the time to do that after the questions to be able to confer with [lead defense counsel] [¶] ... I don't want to be ... speeded along on this without making the right objections for the record. And I feel at some points that I'm not thinking swiftly enough because of the time constraints."

The prosecutor similarly argued: "To tell us that you only get an average of three minutes per juror to decide a case I think is unfair, and I don't think there is a legitimate reason for it."

²⁴ The trial court informed the parties in relevant part as follows:

"You'll be permitted to ask [prospective] jurors questions which are properly phrased and not repetitive of what is in the questionnaire directly yourselves. ... [¶] ... [¶]

"Now, let me give you a caveat on that: I don't want to be going back over what's in the questionnaires with them. [¶] ... [¶]

"[K]eep in mind if it's truly a follow-up question, something that's in the questionnaire, you should be giving it to me. [¶] ... [¶]

"You can go to L.A. where they don't allow any inquiry [by counsel on voir dire], in some instances, even on capital cases. [¶] ... [¶]

"But logic would dictate that if your main concern happens to be someone's reaction to sexual assault, or you have a particular [prospective] juror who you think you have got a problem with ... a particular issue, or if your main concern with a particular witness is their belief on the death penalty, then you're going to want to ask to spend more time on that particular [prospective] juror on those areas.

"What you're going to want to do is ask some of your general questions ... as a whole of the panel, and then to spot-check certain people who you're not really comfortable with.

"I mean there are different techniques of voir dire.

"If you decide that you want to go through each [prospective] juror one by one and ask the same set of questions, you're going to end up with three minutes per [prospective] juror.

"That's a decision that each side is going to have to make.

"But that is going to be the decision that you're going to make, because I believe that based upon my experience in using this technique and watching attorneys inquire, that you can cover more than adequately with 20 [prospective] jurors in 60 minutes what I have told you that you could cover. [¶] ... [¶]

"When I initially g[a]ve you the time periods, I believe I said ... : that you would have the opportunity to ... give me follow-up questions on the questionnaire.

"This is in addition to any questions I may decide to ask.

"Second of all, that if I didn't follow-up on an area in a questionnaire adequately and you want me to ask some more questions on a particular subject on a particular [prospective] juror, that I would be giving you that opportunity to ask me to do that.

"This is all prior to you asking questions.

"Finally, I said that each ... side would have one hour to inquire on those limited subjects without repeating questions in the questionnaire.

"I also said that if there was a response from a particular [prospective] juror that needed additional follow-up that seemed to be out of the ordinary, that I would be taking that into consideration in looking at the time period which you have.

"Now, if I feel, after I have done the inquiry of the [prospective] jurors, that there are some problem [prospective] jurors that you're going to need additional time with, I'm going to give you the time up front before you start your hour.

"If you hit upon something that hasn't surfaced, then what you need to do is prior to your hour[s] expiration say to me[,] ['J]udge, I need some additional time. I think, I'm concerned about this particular area.[']

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“ ‘not easily subject to appellate review. The trial judge’s function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and responses to questions.’ ” (*People v. Holt* (1997) 15 Cal.4th 619, 661 [63 Cal. Rptr. 2d 782, 937 P.2d 213], quoting *Mu’Min v. Virginia* (1991) 500 U.S. 415, 424 [114 L. Ed. 2d 493, 111 S. Ct. 1899]; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 247 [61 Cal. Rptr. 2d 583] [“ ‘The exercise of discretion by trial judges under the new system of court-conducted voir dire is accorded considerable deference by appellate courts.’ ”]; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313 [7 Cal. Rptr. 2d 676] [same].) The applicable standard is a demanding one: “Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. [Citation.] A fortiori, the same standard of reversible error applies when both the court and counsel participate in the voir dire.” (*People v. Holt, supra*, 15 [*1251] Cal.4th at p. 661; see also *People v. Bolden* (2002) 29 Cal.4th 515, 538 [127 Cal. Rptr. 2d 802, 58 P.3d 931] [same].)

(7) Our review of the record reveals the voir dire examination conducted here was more than adequate. The trial court informed the parties that if, in addition to the initial questions posed by the court and by each side, counsel desired that further inquiries be made of a prospective juror, counsel would be given the opportunity to request that the court ask followup questions directed to those particular jurors. “The right to voir dire, like the right to peremptorily

challenge [citation], is not a constitutional right but a means to achieve the end of an impartial [*570] jury. [Citation.] ... [I]t is the duty of the trial judge to restrict the examination of the prospective jurors within reasonable bounds so as to expedite the trial. [Citations.]” (*People v. Wright* (1990) 52 Cal.3d 367, 419 [276 Cal. Rptr. 731, 802 P.2d 221]; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086 [***869] [259 Cal. Rptr. 630, 774 P.2d 659].)

In view of the circumstance that the parties clearly were given the opportunity to elicit information on voir dire, we conclude, consistent with our foregoing pronouncements, that the time limits of which defendant complains did not prevent defense counsel from making reasonable inquiries into the fitness of prospective jurors to serve on the jury. No error or abuse of discretion appears. (See e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 353-354 [63 Cal. Rptr. 2d 1, 935 P.2d 708]; *People v. Lucas* (1995) 12 Cal.4th 415, 480 [48 Cal. Rptr. 2d 525, 907 P.2d 373].)²⁵

Moreover, even were we to assume that the trial court abused its discretion in restricting voir dire, defendant has failed to establish prejudice. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 354; see also *People v. Bittaker, supra*, 48 Cal.3d at p. 1082 [no abuse of discretion where the court formulated four specific questions to ask prospective jurors during the death-qualifying process, and refused to permit further questions from counsel].) The trial court’s rulings were minimally restrictive, and the circumstance that both parties passionately argued against them suggests that the [*1252] court’s restrictions did not disproportionately impact one side to the advantage of the

“I’ll let you know at that time, but for your planning purposes ... I’m not going to change the hour and [the] 30 minute [time periods], because I think you can ... more than adequately cover the subjects that you have if you are concentrating on those particular subjects.

“If it appears based upon the inquiry that it’s not working, I’m going to make a modification on the spot. [¶] ... [¶]

“But I am still comfortable in light of your positions, and I can understand your trepidation at trying to do the inquiry in one hour, but in the long run an hour efficiently used can be very effective, and more effective than if you were to spend two or three hours and felt as if you had all the additional time.

“But if we run into a problem, you know, I’m going to be watching for it, and I’m willing to listen to your positions on it.”

²⁵ We also observe that, pursuant to [Code of Civil Procedure section 205](#), the trial court permitted the use of written juror questionnaires, and that each of the questionnaires employed was comprised of 135 questions that spanned 30 pages. (See fn. 24, *ante*.)

Defendant contends the trial court improperly restricted the scope of the questions used in the questionnaire, and specifically notes the trial court’s refusal to permit questions “that might suggest ‘substantial impairment’ under [Wainwright v. Witt](#) (1985) 469 U.S. 412 [83 L. Ed. 2d 841, 105 S. Ct. 844], deciding instead that the questionnaire should only inquire whether a juror would ‘automatically’ refuse or vote for death or life imprisonment.” The trial court was not required to ensure that a particular question regarding a specific legal doctrine would be asked. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1224 [255 Cal.Rptr. 569, 767 P.2d 1047].) In any event, in passing, we observe that nine questions (including numerous subquestions) spanning five pages of the very thorough questionnaire were aimed directly at eliciting the views of prospective jurors regarding the death penalty.

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other. Jury selection required eight court days, a period of time hardly indicative of an unduly rapid proceeding.

C. *The Atmosphere in the Courtroom*

At certain points during the voir dire examination, defense counsel complained about the overcrowded conditions occasioned by the large number of prospective jurors who had been directed into the courtroom. At one point, counsel declared: “There is a carnival atmosphere in here not fitting for this kind of case. We’ve got a hundred and I don’t know how many people jammed into this one courtroom. Jurors are complaining. It is extremely uncomfortable, not only for the jurors, but for counsel. And the whole ... atmosphere militates against the calm deliberation which we ought to be applying to this case.” On another occasion, the court informed the jury venire: “I don’t want you to think that since all these chairs are so close up here that I’m just doing that to harass you, because given the way the last few days have gone for most of us, I wouldn’t be surprised if you thought that.” On yet another occasion, the court indicated that it had received a note from a prospective juror that read, “Can you lower the room temperature, it’s too stuffy, etc.,” to which the court responded, “We didn’t need to have him tell us.”

[***870] Defendant characterizes the atmosphere in the courtroom during the voir dire examination as having been “oppressive,” a circumstance that he contends—when viewed either singly or together with the trial court’s other asserted errors—warrants reversal. We disagree. The panel was comprised of 140 prospective jurors. Although the warm, crowded conditions in the courtroom [**571] undoubtedly were neither optimum nor particularly comfortable, they did not deprive defendant of any rights to which he was entitled. To the extent defendant’s claim is directed at the difficult “working conditions” under which the defense was forced to operate during voir dire, the prosecution was compelled to perform under the identical challenging conditions. To the extent defendant’s claim is directed at the potentially adverse impact the conditions may have had upon prospective jurors, we observe that defendant was entitled to an impartial jury, not a contented one. Although defendant’s representations as to the nature of the courtroom atmosphere portray a challenging environment for all concerned, we observe that the eight-day duration of these conditions was not inordinately lengthy.

Significantly, the defense had six peremptory challenges remaining when it accepted the jury—a circumstance

indicating that, notwithstanding defendant’s arguments regarding the “oppressive” nature of the courtroom atmosphere, the defense was not dissatisfied with the jury as sworn. Indeed, the [*1253] defense *requested* that the jury be sworn. “ ‘When the jury was finally selected, defendant did not claim that any juror was incompetent, or was not impartial. We therefore find no prejudicial error.’ ” (*People v. Carpenter, supra*, 15 Cal.4th at p. 354.)²⁶

D. *The Trial Court’s Voir Dire Examination of Prospective Jurors*

Defendant contends the trial court misled prospective jurors, some of whom eventually were sworn as jurors in the case, by conducting an “improper and misleading voir dire examination [that] left the defense guessing at bias or prejudice,” and by misstating the law related to the penalty phase of the proceedings. Defendant refers to assertedly imprecise questions posed by the trial court, and its repeated use during voir dire of inquiries such as, “would you *hesitate* to vote for the death penalty, and would you have a *tendency* to vote for the death penalty?” (Italics added.) Further, in response to questions posed by prospective jurors as to whether the “weighing process” described by the court would involve a “moral decision,” the trial court answered in the negative. Defendant contends that this response by the court conflicted with CALJIC No. 8.88 (1989 rev.), which specifically instructed jurors that “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.” (Italics added.) Defendant further asserts that “the record does not demonstrate adequate bases for trial court rulings on challenges for cause, in large part because it is not clear the views of prospective jurors would have prevented or substantially impaired performance of their duties as jurors.”

Our review of the trial court’s voir dire examination reveals that although defendant is correct that certain statements made by the court lacked precision, may have been overly simplistic, and contained technical misstatements of law, the court [***871] made clear that its comments were “not instructions on the law which I’m giving you at this time. You’ll receive, if you’re selected as a juror, the actual instructions on the law in their full detail later.” We believe the court’s admonition made clear that its comments were directed toward generally familiarizing the prospective jurors with the tasks ahead in order to elicit responses from them that would assist the parties in determining whether or

²⁶ The trial court denied the parties’ joint request to increase the number of their respective peremptory challenges from 20, the amount specified under [Code of Civil Procedure section 231, subdivision \(a\)](#), to 26.

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not to exercise their available challenges. Significantly, counsel were given the opportunity to ask followup questions of prospective jurors.

[*1254] E. *Trial Court's Rulings on Challenges for Cause*

(8) In considering defendant's contention that the trial court erred in ruling on challenges for cause, we are guided by well established principles. If, as occurred in the present case, a defendant has unused peremptory challenges available when the trial court impanels the jury, and the defendant [*572] does not express dissatisfaction with the jury ultimately selected, his or her claim is not preserved on appeal. (*People v. Ochoa (1998) 19 Cal.4th 353, 444 [79 Cal. Rptr. 2d 408, 966 P.2d 442]*.) Even were defendant's claim properly preserved, we would reject it on the merits because he has failed to identify any prospective juror who he contends was improperly retained on the jury despite a valid challenge for cause, or one who erroneously was removed for cause. In view of defendant's failure to establish specific reversible error, his contention must fail.

III. GUILT PHASE ISSUES

A. *Testimony of Polly Haisha*

Over defendant's objection on the ground of lack of relevancy, the prosecution introduced the testimony of Polly Haisha, an acquaintance of defendant's, who, as a senior in high school, met defendant at a party in February 1984. Haisha testified that she accepted defendant's invitation at the party to go sailing with him and gave him her telephone number, but subsequently cancelled the date because she "just felt really uncomfortable about the whole thing. I had a weird feeling about it. I ca[lled] him up and canceled. I made up an excuse why I couldn't go" Haisha and defendant spoke several times in the ensuing weeks; the two repeatedly rescheduled their date but, in Haisha's words, "I would always cancel out shortly before we were supposed to meet." Haisha identified defendant in court and in photographic exhibits. She also verified that an entry in defendant's address book was her telephone number at the time (observing, however, that her name had been misspelled).²⁷

Haisha further testified that upon informing defendant during one of their initial conversations of her plans to attend college, he responded: "You know, that's just a waste. He said why don't you quiet [sic] school and come sail to France with me. You'll get a better experience of life there

than you could in school. [¶] I said, well, you know, that might be so, but I plan on going to college. I barely know you. I'm not going to give up my life so I can sail to France with you."

[*1255] In response to the prosecutor's inquiry regarding defendant's demeanor on the telephone, Haisha testified: "Well, the very first time I talked to him the next day after I met him at the party, he was really nice and very open to what we could do, and anything that I wanted—to whenever we wanted to meet after that. [¶] It got— [***872] he got more and more aggressive. Like the time I said I wouldn't go to France with him, he acted like I was making fun of him; somehow that was a stupid idea or something. [¶] He would get kind of mean and when I would cancel on dates, he would get kind of irritated, like he had to change his whole schedule for me. Yet, again, he wasn't happy. [¶] It kind of scared me, but he would always tone it down towards the end so I wouldn't be afraid to talk with him the next time. [¶] ... [¶] Later on, towards the end of our phone conversations, he mentioned his ex-wife ... and at that time he was really bitter about it and, you know, would call her names and said he was happy that part of his life was over. He was happy to get away from her. [¶] He called her a bitch."

Haisha also testified that in the evening of March 24, 1984, defendant contacted her by telephone and informed her he would be in San Diego on the following day. In response, Haisha "asked him at the end of our phone call never to call me again, and that I didn't want to talk to him anymore. [¶] I certainly didn't want to see him, and he became very irritated and said why all of a sudden this change, we haven't even gone out yet. [¶] I said well, I don't feel comfortable about talking to you or seeing you. I would rather this ended right now, and would you please just never call this number again. ... [¶] He was very irritated and he started getting mad and almost hostile. That's when I knew for sure I made the right choice, because at previous times in phone conversations he had gotten that way." She added that she did not remember defendant ever contacting her again after that.

[**573] On cross-examination, Haisha testified that during the time period in which defendant was on trial (April 1991), she was a law student who, in the previous year, had worked as an intern in the San Diego County District Attorney's Office, and that she planned to return to that office again to work as an intern after taking the bar examination that upcoming summer.

²⁷ In addition to Polly Haisha's name, the address book contained the names of murder victims Susan Knoll and Janette Cullins.

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On appeal, defendant reiterates his contention at trial that Haisha's testimony was irrelevant and that it warranted exclusion for that reason, additionally asserting on appeal that the testimony was highly prejudicial, "designed to inflame the jury," and constituted improperly admitted character evidence ([Evid. Code, § 1101, subd. \(b\)](#)), and that the trial court erred in failing to exercise its discretion under [Evidence Code section 352](#) to exclude this evidence. Defendant adds that the trial court's admission of Haisha's testimony violated a panoply of defendant's state and federal constitutional rights.

[*1256] Preliminarily, we observe that defendant did not object at trial based upon [Evidence Code section 352](#) or [1101](#)—a point acknowledged by defendant but apparently overlooked by the People—and therefore has not preserved this claim for our review. (See, e.g., [People v. Boyette \(2002\) 29 Cal.4th 381, 424 \[127 Cal. Rptr. 2d 544, 58 P.3d 391\]](#).)

With regard to the substance of defendant's contentions, we conclude they are without merit for reasons similar to those set forth in response to defendant's challenge to the admission of other evidence introduced in the Los Angeles proceedings. (See [People v. Carter, supra, 36 Cal.4th at pp. 1165–1173](#).) In view of our more extensive summary of the applicable legal principles involving relevancy and prejudice in the companion appeal, the brief analysis that follows shall suffice.

The prosecution met its burden of establishing that the testimony of Polly Haisha was relevant under [Evidence Code section 210](#). Haisha's testimony corroborated the testimony of Susan Loyland that defendant [***873] intended to be in San Diego on March 25, 1984, the date on which Loyland's housemate, Barbara S., was raped in San Diego, and after which neither Haisha nor Loyland ever heard from defendant again. Haisha's testimony also bolstered the prosecution's theory of the case that defendant embarked upon his murderous crime spree in the immediate aftermath of being spurned by a number of women, including Haisha. (See *ante*, at pp. 1221–1223.) Implicit in the prosecution's theory is that these rejections comprised a "trigger" that, once pulled, propelled defendant to rape and murder women whom he recently had befriended. Accordingly, defendant's demeanor during his conversations

with Haisha—including his frustration and anger when Haisha cancelled their scheduled dates—in the weeks leading up to the murders and other crimes appears relevant.

The evidence was not unduly prejudicial. It merely described Haisha's initial encounter with defendant at a party and his subsequent fruitless efforts to meet her again, causing him to become irritated or angry. The testimony was not altogether uncomplimentary, as Haisha recalled that during their first telephone conversation, defendant "was really nice."

The trial court did not abuse its discretion in denying defendant's motion to exclude Haisha's testimony. Further, viewed in the context of defendant's trial, in which the prosecution's evidence overwhelmingly established that defendant committed multiple brutal murders and vicious rapes, the testimony of Polly Haisha—a woman whom defendant did not physically attack, and who had only minimal personal contact with him—was not even remotely prejudicial.

[*1257] Citing [Evidence Code section 1101, subdivision \(a\)](#), defendant also contends Haisha's testimony was "improperly admitted character evidence, and no doubt carried over to penalty phase as non-statutory aggravation evidence." ²⁸ Defendant's argument fails because, [***574] as noted, it was not presented at the trial court, nor did admission of the evidence violate [Evidence Code section 1101, subdivision \(a\)](#), because the prosecution did not offer Haisha's testimony to prove defendant's conduct on a specific occasion. Finally, it is not reasonably possible that the evidence "carried over" as an aggravating circumstance to the penalty phase, or that in the absence of the evidence defendant would have received a more favorable penalty verdict. As noted above, a massive amount of other, far more damaging evidence was introduced against defendant at the guilt and penalty phases of the trial.

Considered as guilt phase evidence, even if we were to determine under any theory that the trial court abused its discretion in admitting the testimony of Polly Haisha, such error would have been harmless under the applicable *Watson* standard, because it is not reasonably probable that the jury would have reached a different result in the absence

²⁸ Subject to certain exceptions not relevant to our discussion, [Evidence Code section 1101, subdivision \(a\)](#), provides: "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

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of Haisha's testimony. (*People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243]*.)²⁹

[***874] B. *Sufficiency of the Evidence*

(9) Defendant contends the evidence was insufficient to support his conviction of the crimes committed against Barbara S. and Janette Cullins, as well as the prior murder and lying-in-wait special-circumstance findings. "In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a [*1258] reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citation.]' (*People v. Hillhouse (2002) 27 Cal.4th 469, 496 [117 Cal.Rptr.2d 45, 40 P.3d 754]*.) The same standard of review applies to special circumstance allegations. (*People v. Maury (2003) 30 Cal.4th 342, 396 [133 Cal.Rptr.2d 561, 68 P.3d 11]*.) An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. (*People v. Rodriguez (1999) 20 Cal.4th 1, 11 [82 Cal.Rptr.2d 413, 971 P.2d 618]*.)" (*People v. Combs (2004) 34 Cal.4th 821, 849 [22 Cal. Rptr. 3d 61, 101 P.3d 1007]*.)

1. *The Crimes Committed Against Barbara S.*

Defendant contends his conviction of the crimes committed against Barbara S. is not supported by sufficient evidence. He is mistaken.

As we have noted (*ante*, at pp. 1221–1226), one day after having been rejected by Polly Haisha and Cathleen Tiner, defendant arrived in San Diego on March 25, 1984, having made plans to travel to Mexico that day with Susan

Loyland, who departed from San Diego without him. Janell Barksdale, the next-door neighbor of Barbara S. and Susan Loyland, observed defendant approaching the victims' residence on the evening of March 25. That evening, defendant broke into Loyland's residence, stole some of her tip money from a concealed location that previously had been revealed to him, and raped at knifepoint Barbara S., Loyland's housemate.

Barbara S. provided details of the rape, oral copulation, robbery, and burglary, including the circumstances that her assailant's voice sounded familiar to her and that weeks later she recognized the voice as defendant's. At trial, she identified defendant as the man who attacked her. Susan Loyland established that defendant had seen the location where she had concealed the money determined to have been taken from her bedroom, and explained why she suspected defendant might have been Barbara S.'s assailant.

Defendant glosses over the foregoing highly incriminating evidence, instead [*575] emphasizing Barbara S.'s general uncertainty and inability to identify her assailant in the immediate aftermath of the attack. Defendant also asserts the prosecution "clearly bootstrapped" its case in the Barbara S. sexual assault to the "other crimes" evidence implicating defendant in the murders of Susan Knoll, Jillette Mills, Bonnie Guthrie, and Janette Cullins, the death of Tok Kim, and the sexual assault of Jennifer S. He further asserts that the evidence supporting the convictions was undermined by the fact that the trial [*1259] court excluded evidence indicating that Barbara S. suffered from alcoholism in the spring of 1984.³⁰

[***875] None of defendant's points is persuasive. Barbara S.'s identification of defendant as the man who assaulted and robbed her at knifepoint in her residence was supported by her housemate's testimony that money was stolen from a

²⁹ In view of our conclusion that the trial court properly admitted the testimony of Polly Haisha, defendant's contention that his trial counsel's "failure to assert the proper objection [under *Evidence Code* sections 352 and 1101, subdivision (a)] constitutes ineffective assistance of counsel" necessarily fails. (See, e.g., *People v. Memro (1995) 11 Cal.4th 786, 834 [47 Cal. Rptr. 2d 219, 905 P.2d 1305]*; *People v. Frierson (1991) 53 Cal.3d 730, 747 [280 Cal. Rptr. 440, 808 P.2d 1197]*.)

³⁰ Defendant assigns error to the trial court's ruling, made pursuant to *Evidence Code* section 352, excluding the proffered testimony of Susan Loyland that Barbara S. suffered from alcoholism.

After conducting a foundational hearing at the People's request, outside the presence of the jury, in which Loyland described her own alcoholism and daily drug usage in the spring of 1984, the trial court explained at length its reasons for excluding Loyland's proffered testimony, stating that although the evidence "could be relevant," its admission "is going to take us in a circle of evidence that is ... going to be nonproductive and [cause] undue consumption of time." The court added: "I'm not precluding that subject of [Barbara S.] being an alcoholic being raised by other witnesses if the foundation can be laid."

The trial court's ruling conformed to the requirements of *Evidence Code* section 352. The proffered testimony regarding Barbara S.'s alleged alcoholism was marginally relevant and likely would have consumed an undue amount of court time. No abuse of discretion appears.

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concealed location known to defendant, and by a neighbor's testimony that defendant walked toward the residence on the night of the attack. Thus, the prosecution's evidence implicating defendant in the attack on Barbara S. more than adequately meets the substantial evidence standard summarized above. (*People v. Combs, supra*, 34 Cal.4th at p. 849.)³¹

2. The Crimes Committed Against Janette Cullins

Defendant contends the evidence is insufficient to sustain his conviction of murder, robbery, and burglary stemming from crimes committed at the residence of Janette Cullins on or about April 12, 1984. He challenges on similar grounds the jury's true findings as to the burglary, robbery, and lying-in-wait special circumstances. With the exception of the last special circumstance, we find unpersuasive each of these assertions.

The evidence adduced at trial established that defendant visited Janette Cullins's apartment on the afternoon of April 12, 1984, asking her new roommate, Cheri Phinney, how long Phinney planned to be there. That [*1260] evening, Cullins attended the symphony with her friend, Cathleen Tiner, who last saw Cullins at approximately 11:00 p.m., when Cullins departed to return to her apartment. A neighbor of Cullins observed the distinctive white Datsun 280 ZX in which defendant subsequently was arrested, parked with its engine running for several minutes late that evening. A number of Cullins's friends unsuccessfully attempted to contact Cullins on April 13.

A visitor to Cullins's apartment on April 14 noticed wood chips on the floor by the front door—evidence consistent with a forced entry. Cullins's body was found partially clothed in the bedroom closet, and her neck bore a ligature mark. The concealment of the body in a closet and the cause of Cullins's [*576] death—asphyxia due to strangulation—bore a strong resemblance to the circumstances of the Susan Knoll/Jillette Mills murders in Culver City three days earlier.

[***876] Cullins's wallet containing her various items of identification was recovered from a location near where the

distinctive Datsun 280 ZX was parked that same week. The wallet also contained Bonnie Guthrie's identification, strongly suggesting that one person had murdered and robbed both women.

On April 13, 1984, a man wearing a dark jacket made a withdrawal from Cullins's bank account. Four days later, in Arizona, a paper bearing the word "SHYLAS," a bank passcard bearing Cullins's name, and a black jacket were among the items found in defendant's possession at the time of his arrest.

The foregoing evidence amply supports the jury's conclusions that late in the evening of April 12, 1984, defendant, with the requisite felonious intent, forced his way into Cullins's apartment, encountered Cullins, compelled her to disclose her bank password, then fatally strangled her, concealed her body in her bedroom closet, took her wallet, and subsequently depleted her bank account. The evidence thus established the elements of the charged offenses—burglary, robbery, and murder—as well as the elements of the burglary and robbery special circumstances.

In reaching our conclusion, we reject defendant's contention that the prosecution failed to establish that defendant acted with felonious intent. Nor do we find persuasive his related contention that the robbery and burglary special-circumstance findings were improper because the crimes were merely incidental to the murder or intended to facilitate or conceal the murder. (See *People v. Zapien* (1993) 4 Cal.4th 929, 984–985 [17 Cal. Rptr. 2d 122, 846 P.2d 704].) The requisite intent for each crime, and supporting each of these special circumstances, readily may be inferred from the evidence. (See *People v. Matson* (1974) 13 Cal.3d 35, 41 [117 Cal. Rptr. 664, 528 P.2d 752] ["Although the People must show that a defendant charged with burglary [*1261] entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal."]; see also *People v. Ochoa, supra*, 19 Cal.4th at pp. 413–414 [In reviewing a

Moreover, even were we to conclude that the trial court ruled incorrectly, any such error plainly would have been harmless in view of the overwhelming evidence that defendant broke into the residence shared by Barbara S. and Susan Loyland, stole money belonging to each, and sexually assaulted Barbara S.

³¹ In view of our holding, above, we reject as without merit defendant's related claim that the "insufficiency of the evidence" supporting the sexual assault crimes perpetrated against Barbara S. led to error at the penalty phase when the trial court admitted this evidence in aggravation pursuant to [section 190.3, factor \(b\)](#) ("criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"). As noted, the evidence was sufficient; therefore defendant's argument fails.

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claim of insufficient evidence as to special circumstance findings, “ ‘ “we must determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt.’ ” ’ [Citation.]”.)

The requisite intent and all essential elements were present here. Cullins’s apartment showed signs of a forced entry consistent with an intent to commit a felony. The evidence that the doorjamb had been pried, producing a scattering of wood chips near the front door, supported the burglary charge and the burglary special circumstance.

The circumstance that defendant harbored an intent to rob Cullins—quite independent of his intent to murder her—may be inferred from the evidence that he obtained her bank account password prior to fatally strangling her. The circumstances of the break-in, murder, robbery, and theft, together with defendant’s hurried, loud, and dramatic departure in the stolen vehicle consistent with a perpetrator’s escape from a crime scene, amply support the inference of defendant’s intent to commit burglary. (*People v. Moody* (1976) 59 Cal. App. 3d 357, 363 [131 Cal. Rptr. 923].)

With regard to defendant’s contention that the lying-in-wait special circumstance was not supported by substantial evidence, the People contend the [***877] evidence adduced at trial suggested that defendant accomplished his entry prior to Cullins’s arrival home. The People urge that no other explanation for the forcible entry, indicated by the presence of the wood chips, was adduced at trial, and that it reasonably could be inferred that defendant was lying in wait for his victim from the forced entry, as well as from the presence of Jillette Mills’s stolen vehicle, with its engine running for several minutes, at the approximate time Cullins likely returned to her [***577] apartment. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 500–501; *People v. Michaels* (2002) 28 Cal.4th 486, 516–517.)

We reject the People’s position on this point. The evidence in support of the lying-in-wait special circumstance—essentially, the wood chips and the car with its engine running—appears unduly reliant upon the *inference* suggested by the prosecution that defendant arrived *prior to* Cullins’s return home in order to attack her by

surprise. The wood chip evidence tended to show forced entry, not that the entry occurred prior to Cullins’s arrival.

[*1262] Cullins may have arrived at her apartment before defendant did, and he may have forced his way in while she was undressing elsewhere in the apartment. Under the latter scenario, the lying-in-wait special circumstance would rely upon the neighbor who heard the car engine running, and the time of that event cannot be pinpointed. Moreover, the car idling, besides occurring at an uncertain time, does not strongly imply that defendant was waiting in the car to attack Cullins; if defendant had planned a home invasion when Cullins arrived home, he likely would have turned off the engine so as not to attract attention. We therefore set aside the special circumstance of lying in wait.

At the time of defendant’s arrest, he was fleeing California in a vehicle that had belonged to murder victim Jillette Mills, and was in possession of personal property that linked him to each one of the murdered women, including the murder victim in the present case. As noted, Janette Cullins’s body was concealed in a manner similar to that used to hide the bodies of Susan Knoll and Jillette Mills. Each of these women, and Bonnie Guthrie, had been fatally strangled. No reasonable explanation, other than defendant’s culpability for the charged offenses, presented itself at trial. Indeed, the evidence in support of the charged crimes and burglary and robbery special circumstances was overwhelming.³²

3. The Prior Murder Special Circumstance

Defendant contends the trial court committed prejudicial error when it denied his motion to strike the prior-murder special-circumstance allegations derived from the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, reflected in the Los Angeles County judgment rendered against defendant on January 30, 1990. Defendant challenged the prior convictions on the ground they were “constitutionally defective,” because defendant “was denied the right to effective assistance of counsel” and “denied his constitutional right to testify at the guilt phase of the Los Angeles trial; he was erroneously denied his constitutional [***878] right to present a defense at the guilt phase of that trial; and the Los Angeles trial court erroneously failed to afford him a hearing on conflict of interest allegations between him and his attorneys, in violation of his right to counsel.” Defendant further asserts that “failure to dismiss [the prior murder]

³² In view of our conclusion that substantial evidence supports defendant’s convictions and the burglary and robbery special-circumstance findings, we find no merit in defendant’s related contention that the trial court erred in denying his pretrial motion to dismiss the substantive charges and strike those special circumstance allegations. For the same reason, we reject defendant’s contention that the trial court erred in denying his motions for judgment of acquittal made during and at the conclusion of the prosecution’s case-in-chief.

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special circumstances ... would deny [him] a fair trial and due process of law ... and would deny him protection against cruel and unusual punishment” in violation of the applicable state and federal constitutional guarantees.

[*1263] In the companion case, *People v. Carter, supra*, 36 Cal.4th 1114, we have upheld the judgment of death against defendant for the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie. In so doing, we have rejected contentions that are substantially similar to those made in support of defendant’s motion at the trial of the present case to strike the prior murder special-circumstance allegations—contentions that, by his own acknowledgment, he has included “to a large extent” here. (*Id. at pp. 1156–1157.*) As we have [*578] explained in that decision, the Los Angeles County murder convictions were valid, and therefore the San Diego trial court properly denied the motion to strike. Insofar as defendant’s arguments regarding the validity of the prior murder convictions forming the basis for the prior murder special circumstance differ from the arguments made in his automatic appeal from the Los Angeles County judgment convicting him of those murders, we reject those arguments.

C. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct, requiring reversal of the judgment, based upon the following asserted transgressions: (1) “misstatements of fact and deceptive practices to gain favorable rulings,” (2) “comments disparaging of defense counsel,” and (3) “prosecutorial misconduct during opening and rebuttal arguments, including adverse comment upon defendant’s right against self-incrimination, improper shifting of the burden of proof, and misstatements of law.”

(10) “ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when

the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ (*People v. Samayoa (1997) 15 Cal.4th 795, 841 [64 Cal. Rptr. 2d 400, 938 P.2d 21.]*)” (*People v. Ochoa, supra*, 19 Cal.4th at p. 427; see also *People v. Box, supra*, 23 Cal.4th at pp. 1207–1208 [rejecting claim of prosecutorial misconduct where the defendant “failed to satisfy the general [*1264] rule requiring assignment of misconduct and request for admonition as to the prosecutor’s comment of which he now complains”].)

[***879] Here, defendant failed to request an assignment of misconduct or an admonition with regard to any of the conduct he now challenges as improper. Accordingly, he has not preserved his claims on appeal.

Even assuming defendant’s claims properly were before us, we would reject them on the merits, as follows.

1. Alleged Misstatements of Fact and Deceptive Practices

Defendant contends that prior to trial, the prosecution misled the trial court into believing that a key found in defendant’s possession was a key to Barbara S.’s business office. Defendant implies the prosecution acted in bad faith in light of its subsequent disclosure that the key could not be located. No misconduct appears.

Defendant faults the prosecution for declining to stipulate to certain facts supporting defendant’s motion to suppress evidence seized from the Datsun 280 ZX. Defendant contends the prosecution’s position was characterized by “obfuscation and gamesmanship.” The prosecution’s reluctance to accept a stipulation was not improper. (See *People v. Garceau (1993) 6 Cal.4th 140, 182 [24 Cal. Rptr. 2d 664, 862 P.2d 664].*)

Defendant contends the prosecution misrepresented the significance of the testimony of witness Polly Haisha. Defendant argues that the prosecution on the first day of trial deceptively suggested that Haisha was a potential witness who was unlikely to be called unless the defense denied ownership of the address book that included her name. Defendant also complains that Haisha, a law [*579] student, was permitted to remain in the courtroom during a portion of the opening statements, until the defense objected that her presence violated the court’s order excluding witnesses from observing the proceedings.

At trial, defendant objected to Haisha’s testimony on relevancy grounds, which the trial court properly overruled,

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as we previously have explained. (See, *ante*, at pp. 1254–1257.) Defendant did not object to Haisha’s testimony on the ground that the prosecution had violated discovery rules or had engaged in misconduct. Therefore, he has waived any such claim on appeal. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.) Even if we assume prosecutorial misconduct, it is not reasonably probable that a result more favorable to defendant would have occurred in the absence of Haisha’s testimony. (*People v. Haskett* (1982) 30 Cal.3d 841, 866 [180 Cal. Rptr. 640, 640 P.2d [*1265] 776].) As we previously have noted, Haisha was a minor witness whose testimony was peripheral to the central events underlying defendant’s crime spree. Neither her presence during a portion of the prosecutor’s opening statement, in violation of the court’s order excluding witnesses, nor her eventual testimony at trial, could have made any possible difference in the outcome of the trial, in view of the compelling evidence that linked defendant to the charged offenses.

2. The Prosecutor’s Comments Regarding Defense Counsel

Defendant contends the prosecution made disparaging comments regarding defense counsel. Again, defendant did not object to the comments of which he now complains, and thereby has waived his claim. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215 [40 Cal. Rptr. 2d 456, 892 P.2d 1199].)

Even if defendant’s contention properly were before us, we would reject it. With one exception, the comments were not made in the presence of the jury, and defendant fails to demonstrate how these comments outside the jury’s presence, [***880] which were of the sort one might expect to encounter during a vigorously contested capital trial, prejudiced the proceedings below. With regard to the one comment made before the jury—at the commencement of the prosecution’s guilt phase rebuttal argument—we note that it was fleeting, imprecisely attributed to a member of the United States Supreme Court, and not remotely similar in degree of impropriety to the comments we have held to constitute prejudicial misconduct. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800 [72 Cal. Rptr. 2d 656, 952 P.2d 673].)³³

[*1266]

3. Other Alleged Prosecutorial Misconduct

Immediately after making the comment noted in the margin (fn. 33, *ante*), the prosecutor commented upon the failure of the [**580] defense to present evidence as to “why defendant was in that car with all that property. They could do that if they wanted to.”³⁴ Defendant interposed an objection that the prosecutor improperly was “suggesting that the defendant should have testified, and [is] drawing attention to the fact that he did not.” (See *Griffin v.*

³³ The prosecutor argued on rebuttal as follows:

“Good morning. [Defense counsel] suggested that the prosecution, or law enforcement developed a theory about Dean Carter’s guilt and then suggested that perhaps the witnesses changed their testimony to fit that theory. Suggested perhaps that by the way we ask questions and the way we presented evidence, that we were somehow trying to manipulate the evidence to fit a theory about his guilt.

“I suggest to you that would be improper for the prosecution to do.

“[Defense counsel] likes to talk about age[-]old traditions in our system, he likes to talk about the Constitution, and he likes to talk about the rules, so I’m going to do that for a minute.

“I’m going to tell you what a United States Supreme Court [justice]—he likes to do that on occasion, to, quote the United States Supreme Court—said about the relative duties between prosecutors and defense attorneys.

“ ‘Law enforcement officers have an obligation to convict the guilty and to make sure they do not convict the innocent.’

“It would be improper for the prosecution to try to manipulate a case to convict somebody who wasn’t guilty. And if we tried to do that, he wouldn’t stand still for it, and the court wouldn’t stand still for it.

“That hasn’t happened.

“*That same United States Supreme Court Justice says, ‘Defense counsel have no comparable obligation to ascertain or present the truth.’*

“*They don’t have to tell you what’s true. We do.*” (Italics added.)

The prosecutor’s comments, of which defendant now complains, are derived from *United States v. Wade* (1967) 388 U.S. 218, 256–257 [18 L. Ed. 2d 1149, 87 S. Ct. 1926] (conc. & dis. opn. of White, J.).

³⁴ The prosecutor argued as follows:

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California (1965) 380 U.S. 609 [14 L. Ed. 2d 106, 85 S. Ct. 1229] (*Griffin*).) In view of the arguable ambiguity inherent in the prosecutor's comments, the trial court declined to rule as to their propriety, and instead acceded to defendant's request to reinstruct the jury at that time pursuant to CALJIC Nos. 2.60, and 2.61, which recognized defendant's constitutional right not [***881] to testify and his option to rely on the state of the evidence.

On appeal, defendant contends that the prosecutor's comments constituted *Griffin* error. (*People v. Sanders (1995) 11 Cal.4th 475, 527-529 [46 Cal. Rptr. 2d 751, 905 P.2d 420]*.)

(11) “ ‘Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf.’ (*People v. Hughes (2002) 27 Cal.4th 287, 371 [116 Cal.Rptr.2d 401, 39 P.3d 432]*.) We also have said ‘it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide.’ (*Id. at p. 372*, citing *People v. Murtishaw (1981) 29 Cal.3d 733, 757 & fn. 19 [175 Cal. Rptr. 738, 631 P.2d 446]*.) *Griffin*'s prohibition against “ ‘direct or indirect comment upon the failure of the defendant to take the witness stand,’ ” however, “ ‘does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.’ ” (*People v. Hovey [1267] (1988) 44 Cal.3d 543, 572 [244 Cal.Rptr. 121, 749 P.2d 776]*, quoting *People v. Jackson (1980) 28 Cal.3d 264, 304 [168 Cal.Rptr. 603, 618 P.2d 149]*.)” (*People v. Harrison (2005) 35 Cal.4th 208, 257 [25 Cal. Rptr. 3d 224, 106 P.3d 895]*; see also *People v. Stewart (2004) 33 Cal.4th 425, 505-506 [15 Cal. Rptr. 3d 656, 93 P.3d 271]*; *People v. Brown (2003) 31 Cal.4th 518, 554 [3 Cal. Rptr. 3d 145, 73 P.3d 1137]*; *People v. Bradford (1997) 15 Cal.4th 1229, 1339 [65 Cal. Rptr. 2d 145, 939 P.2d 259]*.)

In this case, we need not decide whether the prosecutor's comments constituted error under *Griffin*, because even if we assume (without deciding) that error occurred, in view of

the indirect nature of the prosecutor's comment, the court's timely reinstruction of the jury, and the strength of the evidence against defendant, it is “clear beyond a reasonable doubt that the jury would have returned a verdict of guilty” (*United States v. Hasting (1983) 461 U.S. 499, 511 [76 L. Ed. 2d 96, 103 S. Ct. 1974]*) even if the prosecutor had not made the comment at issue. Accordingly, no prejudicial error occurred.

Defendant also characterizes as improper argument certain additional remarks made by the prosecutor during summation: “There are people among us who murder other people because they like to murder other people. [¶] There are evil people among us. [¶] ... [¶] [Defense counsel] stresses that you are the conscience of the community, and you are. People in the community have emotions. It's ... improper for you to have your verdict influenced by emotion. But it is proper for you to express through a verdict how you feel about this case, to tell the defendant Dean Carter, what you did, you murdered Janette Cullins, was evil, [**581] was senseless, it was vicious, it was unforgivable, and it was first degree murder.” Elsewhere during his summation, the prosecutor argued similarly.

Defendant did not interpose an objection, and thus waived his claim. But even if the issue properly had been preserved, we would reject defendant's claim of error. The prosecutor's comments were not, as defendant asserts, references to “improper[] character propensity,” but instead came “within the range of permissible comment regarding egregious conduct on defendant's part. [Citation.]” (*People v. Thomas (1992) 2 Cal.4th 489, 537 [7 Cal. Rptr. 2d 199, 828 P.2d 101]* [rejecting a challenge to the prosecutor's characterization of the defendant as a “ ‘mass murderer, rapist,’ ” “ ‘a perverted murderous cancer,’ ” and a “ ‘walking depraved cancer’ ”]; see also *People v. Hawkins (1995) 10 Cal.4th 920, 961 [42 Cal. Rptr. 2d 636, 897 [***882] P.2d 574]* [upholding prosecutor's characterization of the defendant as “ ‘coiled like a snake’ ” and a “ ‘rabid dog’ ”].) Moreover, in view of the overwhelming evidence that connected defendant to the charged crimes, the prosecutor's remarks “could not have carried such an

“Defense counsel talked a lot about the presumption of innocence. He says you carry that with you into the jury room. I don't want to play a word game. The instruction says, ‘The defendant in a criminal action is presumed to be innocent until the contrary is proved.’

“That happened some time ago. The contrary was proved. His innocence was disproved a long time ago in this case. It doesn't exist anymore. The evidence took that away from him.

“The rules are that the defense doesn't have to present any evidence in a case. They can if they want to. No one prevents them from presenting any evidence to you. No one prevents them from telling you what happened. No one prevents them from bringing forth witnesses to explain why the defendant was in that car with all of that property. They could do that if they wanted to.”

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emotional impact as to make it likely the jury's [*1268] decision was rooted in passion rather than evidence." (*People v. Thomas, supra*, 2 Cal.4th at p. 537.)

D. Alleged Instructional Error

Prior to instructing the jury, the trial court reviewed with counsel the instructions to be given. Defendant objected to the trial court giving CALJIC No. 17.20, an instruction that directed the jury to determine whether, if the jury found defendant guilty of robbery and/or burglary, defendant in the commission of those crimes committed great bodily injury on Janette Cullins.³⁵

Defense counsel argued: "[T]here [are] all kinds of results that could follow from this. [¶] I don't know if it's a [section] 654 issue or not, but for the [great bodily injury allegation,] if the [great bodily injury] is the killing, and you could have some absurd results in this, one is that, for example, the defendant was found guilty of the robbery and the burglary, and not the murder and then the intentional [great bodily injury,] so I'm wondering if this instruction should be given at all."

The prosecutor responded: "I think [the instruction] should be given. I mean the issue in this case is who did the crime. The same person that robbed her killed her, and counsel expresses the possibility of bizarre results; that they could find him guilty of robbery with the intention of inflicting [great bodily injury], and not the murder. [¶] I can't imagine that happening. I imagine Mr. Carter would be happy as a clam if that happened, but that's not going to happen."

The trial court acknowledged the possibility of "an unexpected result under the facts as we know them," but concluded: "I don't see where it would be prejudicial or confusing to give the instruction." The trial court thereafter [*1269] instructed the jury pursuant to CALJIC No. 17.20.

Upon returning verdicts of guilty as to robbery and burglary, the jury found "true" the allegations that defendant personally inflicted great bodily injury on Cullins with regard to both of those offenses. The court imposed sentencing enhancements of three years' imprisonment for each of the [**582] special allegations, which the court stayed pursuant to [section 654](#).

On appeal, defendant contends the trial court erred in giving the instruction, citing [section 12022.7, subdivision \(g\)](#), which provides that a sentencing enhancement for inflicting great bodily injury [***883] "shall not apply to murder or manslaughter." Defendant further contends that reversal of the judgment is required "because as a matter of law criminal sanctions were imposed upon insufficient proof and double punishment is prohibited by law." He also challenges the sufficiency of the evidence in support of the great bodily injury findings.

We reject defendant's argument in all respects. The jury was properly instructed, because the allegations of great bodily injury clearly and specifically enhanced each of the robbery and burglary counts, not the murder count. The jury's verdicts specifically found defendant guilty of robbery and burglary, with a great bodily injury finding enhancing each of those two crimes. Nothing contained in the jury's verdicts or in the record as a whole indicates that the jury misunderstood its function in this regard or was confused by the challenged instruction. With regard to defendant's claim that the evidence was insufficient to sustain the findings as to the enhancements, the fatal strangulation of Janette Cullins provides the evidentiary support for the allegations that in committing the robbery and the burglary, defendant inflicted great bodily injury. The circumstance that the trial court stayed the three-year enhancements that were imposed based upon the jury's findings that defendant inflicted great

³⁵ Pursuant to CALJIC No. 17.20 (1991 rev.), the trial court instructed the jury as follows:

"It is alleged in Counts Two [robbery] and Three [burglary] that in the commission of the crimes therein described, the defendant, Dean Phillip Carter, with the specific intent to inflict injury, personally inflicted great bodily injury on Janette Ann Cullins.

"If you find the defendant guilty of robbery and or burglary, you must determine whether or not the defendant, with the specific intent to inflict such injury, did personally inflict great bodily injury on Janette Ann Cullins in the commission of robbery and/or burglary.

" 'Great bodily injury' as used in this instruction means a substantial physical injury. Minor or moderate injuries of a temporary nature do not constitute great bodily injury and are not sufficient.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

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bodily injury means that defendant was not subject to double punishment. No error appears.³⁶

E. Miscellaneous Contentions

Defendant raises a number of contentions that are either virtually identical or substantially similar to certain claims raised on appeal from the Los Angeles County death judgment rendered against him for the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie—contentions that we have rejected in the companion appeal in *People v. Carter*, *supra*, 36 Cal.4th 1114. These contentions are as follows: 1) defendant’s motion to suppress the [*1270] evidence seized from his person and from the stolen Datsun 280 ZX improperly was denied; 2) defendant’s motion to exclude other-crimes evidence involving the death of Tok Kim, the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, and the rape of Jennifer S., improperly was denied; 3) the photographic lineup procedures used by the Oakland Police Department in the investigation of Tok Kim’s death in Alameda County were impermissibly suggestive, and therefore the trial court erred in denying the motion to exclude the Alameda County witness identifications of defendant; 4) defendant’s motion to exclude the preliminary hearing testimony of Alameda County witness Ray Blevins (who had died prior to trial) improperly was denied; and 5) defendant’s motion to sever his trial for the murder of Janette Cullins from the charge of rape involving Barbara S. improperly was denied.³⁷

[**583] [***884] For the reasons we have set forth more extensively in the companion matter, *People v. Carter*, *supra*, 36 Cal.4th 1114, we reject defendant’s contentions. Insofar as defendant’s claims do not precisely mirror those set forth in the companion appeal, neither defendant’s

additional arguments nor the variants in their phrasing persuade us that the trial court committed an error or abuse of discretion prejudicial to defendant’s case. Indeed, these claims are not deserving of additional discussion. (*People v. Laursen* (1972) 8 Cal.3d 192, 205 [104 Cal. Rptr. 425, 501 P.2d 1145].)

IV. PENALTY PHASE

A. Evidence of Defendant’s Sexual Assault on Jennifer S.

At the conclusion of the People’s case in aggravation, the prosecutor, over defendant’s objection, offered abstracts of judgment as proof that defendant [*1271] had been convicted of: (1) sexual assault crimes committed against Jennifer S. in Ventura County in March 1984, (2) burglary in Alaska in 1978, and (3) burglary in Oregon in 1974. Defendant argued against the introduction of defendant’s Ventura County convictions on the basis that because the judgments were rendered in October 1984, they postdated the April 1984 murder of Janette Cullins and therefore were inadmissible as prior felony convictions under *section 190.3, factor (c)*. (See, e.g., *People v. Webster* (1991) 54 Cal.3d 411, 453 [285 Cal. Rptr. 31, 814 P.2d 1273]; *People v. Balderas* (1985) 41 Cal.3d 144, 201–202 [222 Cal. Rptr. 184, 711 P.2d 480].)

The trial court agreed with defendant’s interpretation of the temporal requirements of *section 190.3, factor (c)*, but pursuant to *section 190.3, factor (b)*, correctly recognized that “the evidence of crimes of violence can occur before or after the murder, and the [Jennifer S.] rape is a crime of violence.” (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 47 [252 Cal. Rptr. 525, 762 P.2d 1249].) The trial court thereafter admitted evidence of defendant’s sexual assault upon Jennifer S.

³⁶ The question whether *section 654* applies to enhancements is before us in *People v. Palacios* (review granted, May 11, 2005, S132144). Because, as noted in the text, the enhancements imposed here were stayed and defendant therefore was not subject to double punishment, we need not and do not address the *section 654* issue here.

³⁷ With regard to defendant’s contention that the trial court erroneously denied his motion to sever his trial for the murder of Janette Cullins from the charged rape of Barbara S., we rely upon the analysis of *section 954* and our decisions interpreting that statute as set forth in *People v. Carter*, *supra*, 36 Cal.4th at pages 1153–1154, and which need not be repeated here, except to observe that the distinctions between defendant’s motion to sever the Susan Knoll and Jillette Mills murder charges from the Bonnie Guthrie murder charge in the Los Angeles proceedings (see *id.* at pp. 1152–1156), and defendant’s motion to sever the Janette Cullins murder charge from the Barbara S. rape charge in the San Diego proceedings, do not persuade us that the trial court below abused its discretion. To the contrary, the court reviewed in exhaustive detail the basis for its conclusion that severance was improper, observing, among other things, that the rape and murder charges were of the same class under *section 954*, each crime involved a forced entry into a residence, each involved evidence that a knife had been used, each involved theft, and each victim previously had been acquainted with defendant. Strong evidence linked defendant independently to the death of Janette Cullins and to the rape of Barbara S. Accordingly, the likelihood that the jury might convict defendant of having committed one of the charged crimes based on the evidence that he committed the other was virtually nonexistent. No abuse of discretion in denying defendant’s motion to sever appears. Nor has defendant demonstrated that prejudice actually resulted from the joinder of the murder and rape charges at trial. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1318.)

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On appeal, defendant reiterates his contention that the trial court improperly admitted this evidence. For the reasons aptly noted by the trial court, no error appears.³⁸

Even if the trial court had failed to recognize the distinction between [section 190.3, factors \(b\)](#) and [\(c\)](#), and admitted evidence of defendant's crimes against Jennifer S. under [subdivision \(c\)](#), the error would have been harmless, "because the [***885] evidence was admissible as evidence of violent criminal activity under [\[section 190.3,\] factor \(b\).](#)" (*People v. Bradford*, *supra*, 15 Cal.4th at p.1374.)

Defendant further contends the trial court improperly instructed the jury that it could double-count the crimes committed against Jennifer S. under [section 190.3, factors \(b\)](#) and [\(c\)](#). His citation to the record, however, is to an inapposite instruction (CALJIC No. 2.82—Concerning Hypothetical Questions), and our review of the other instructions given to the jury has not revealed any such "double-counting" instruction.

B. Exclusion of Proffered Evidence in Mitigation

The defense introduced evidence of defendant's troubled childhood while growing up in Alaska. Several witnesses testified that defendant spent considerable portions of his childhood and adolescence in orphanages, juvenile institutions, and foster homes, and was [***584] incarcerated in penal institutions during much of his early adulthood.

[*1272] Defendant sought to introduce additional evidence in mitigation, including testimony of defendant's older brother, Jerry Carter, regarding the particulars of defendant's upbringing and family life, the testimony of university professor Linda Ellana regarding cultural conditions experienced by the Native Alaskan population living in the Nome area, and the testimony of James Park, a California correctional officer and expert on prison operations and classifications. Defendant also moved for allocution. The trial court denied each of these requests.

On appeal, defendant contends the trial court committed prejudicial error in excluding the proffered evidence. As we shall explain, we disagree.

1. The Proffered Testimony of Jerry Carter

On direct examination, Jerry Carter testified regarding defendant's difficult childhood in a manner generally consistent with the testimony he gave at defendant's trial for

the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie. (See *People v. Carter*, *supra*, 36 Cal.4th at pp. 1136–1137.) In the course of presenting this testimony, however, defense counsel asked Jerry Carter several questions concerning subjects about which the witness lacked personal knowledge. These topics included where defendant would go as a child when he ran away; where defendant found food on those excursions; defendant's efforts as a child to stow away on airplanes; and information regarding where defendant went when he was sent away from Nome by his mother and his stepfather. The trial court sustained the prosecutor's objections to these lines of inquiry on foundational and hearsay grounds.

On appeal, defendant contends that the trial court's rulings improperly foreclosed the defense from presenting certain aspects of the case in mitigation. We are unpersuaded. In view of Jerry Carter's lack of personal knowledge as to certain aspects of his proposed testimony, the trial court ruled correctly. Similarly, insofar as the witness attempted to testify as to statements made to him that were offered for the truth of the matter asserted, the proffered testimony was hearsay that was not subject to any recognized exception, and properly was excluded by the trial court. (*Evid. Code*, § 1200, *subd. (a)*; *People v. Whitt* (1990) 51 Cal.3d 620, 642–643 [274 Cal. Rptr. 252, 798 P.2d 849].)

Moreover, even if we were to agree with defendant that the trial court ruled improperly, we observe that the defense succeeded [***886] in introducing the gist of the incidents through other testimony of Jerry Carter and of other witnesses. In the context of that testimony, much of which graphically described the abuse defendant suffered as a child, as well as defendant's institutionalization, the excluded testimony was of marginal significance. Thus, there is not a [*1273] reasonable possibility that the jury would have rendered a different verdict had the trial court not excluded the challenged testimony. (*People v. Brown* (1988) 46 Cal.3d 432, 447–448 [250 Cal. Rptr. 604, 758 P.2d 1135].)

2. The Proffered Testimony of Linda Ellana

Outside the presence of the jury, Dr. Linda Ellana, a professor of cultural anthropology at the University of Alaska, testified regarding cultural conditions experienced by the Native Alaskan population living in the Nome area.

A resident of Nome for 15 years, Dr. Ellana recalled the rampant alcoholism and depression suffered by the Native

³⁸ Insofar as defendant's argument can be read to incorporate his pretrial efforts to strike evidence of his sexual assault upon Jennifer S., his claim fails for the same reasons as those noted above.

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Alaskan population, as well as the racial and ethnic discrimination directed toward them by the Caucasian minority. She testified: “I would say that not only are natives discriminated against, but more importantly, people who are half-breeds, or quarter breeds, are neither accepted very well either by the ... native community in Nome. [¶] ... [¶] Alcohol abuse is extreme in Nome. It is not limited to the native community, though it is most noticeably focused on the native communities [Incidents that accompany the alcohol abuse in Nome include] many assaults. Assaults are the [most] common. [**585] Assaults, suicides, and homicides, assaults including, and not including rape.”

Dr. Ellana also testified to having been acquainted with James Carter, defendant’s stepfather, recalling that James Carter was negatively disposed toward the young Native Alaskans—colloquially known in the area as “bush students”—and that he called them “worthless, lazy, trouble causers.”

Dr. Ellana acknowledged, however, that she had no specific knowledge regarding defendant, his background, or the criminal charges filed against him. She never had met or spoken with defendant, although she recalled seeing him

“once or twice” when he was a child. She knew nothing of the problems that the Carter family experienced raising defendant. She never heard James Carter speak of defendant or of the other members of his family.

The prosecution argued against the introduction of the proffered testimony on the ground of relevancy. The defense countered that Dr. Ellana was experienced in the problems encountered by residents of the Nome area, including mixed-race individuals, had some knowledge of the disparaging attitude defendant’s stepfather portrayed toward Native and part-Native Alaskans, and that the significance of the testimony was “a question for the jury to decide.”

[*1274] The trial court rejected the proffered testimony on the ground of relevancy and under [Evidence Code section 352](#), explaining at some length the court’s reasoning.³⁹

[*1275] [**586] [***887] On appeal, defendant contends the trial court erred in excluding the testimony in question. Although certain aspects of Dr. Ellana’s testimony clearly fell outside the bounds of relevancy (for example, cultural attitudes and problems in Nome at the time of defendant’s 1991 trial, seven years after he was incarcerated in California), and other aspects were cumulative (for example,

³⁹ The trial court ruled as follows:

“... I was trying real[ly] hard with [Dr. Ellana] to figure out some way for her to be able to testify before the jury for a variety of reasons. But a number of things came up during the course of this discussion that cause me a great deal of concern in terms of relevance, as well as under [\[Evidence Code section\] 352](#), getting into her own biases that began to crop up at certain points.

“Now, the areas that I made note that the defense asked questions on had to do with prejudice by Jim Carter, the defendant’s father, prejudice in general, in the community of Nome, alcoholism in that area, [‘]bush kids[’] and that phrase, and the negative connotation that goes with it, and the despair. ...

“[Dr. Ellana] is a very qualified person for her particular occupation, but that doesn’t mean that she is automatically an expert who is ... appropriate for this particular case.

“First of all, foundationally, her testimony concerning Jim Carter relates to a time period when the defendant is probably about 12 years old, give or take a little, at that point. [¶] ... [¶]

“She has seen the defendant with his father two times, and obviously there was nothing inappropriate that was expressed or seen at that particular stage.

“Her foundation for her opinion about Jim Carter is based upon these staff meetings, is what she said. [¶] ... [¶]

“[T]here is no showing at this particular stage, that the defendant, himself, was experiencing prejudice on the part of his stepfather, and it is very speculative. I mean I’ve allowed a lot to come in on this issue of prejudice, and I think the jury is well aware that prejudice exists in Nome now, and it did then. And therefore, the defendant may have been subjected to, and probably was subjected to some of the prejudice. And that, you know, I think ought to be there, and is there, as well as the alcoholism.

“But to allow her to testify as to her opinion as to whether Mr. Carter is prejudice[d] when her own statements about a desire to have native people, you know, employed in the school, and she probably wouldn’t have hired him if she had known he was in law enforcement, does not sound to me like we are getting into an area where its truly an expert opinion being expressed. [¶] ... [¶]

“... The other comments lead me to believe under [\[Evidence Code section\] 352](#) we are going to get into a lot of things that are going to be very time-consuming, nonproductive in an area I’m determining at this stage, although relevant, is not compellingly relevant in light of the state that we know about any impact or prejudice on Dean Carter himself.

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the harsh living conditions experienced by residents of Nome), the question whether her testimony ought to have been excluded *in its entirety* is closer. Dr. Ellana did have firsthand knowledge of the rigid and prejudicial attitudes regarding “half-breeds” expressed by defendant’s stepfather; as noted earlier, defendant is part Eskimo. Consistent with the principles set forth in [Evidence Code sections 210](#) and [352](#), we believe that the trial court could have set certain limits as [***888] to the areas in which Dr. Ellana could testify.

We need not decide whether the trial court’s ruling to exclude Dr. Ellana’s testimony in its entirety was erroneous, however, because even if we assume that error occurred, defendant suffered no prejudice. The jury heard a considerable amount of other testimony regarding Nome’s harsh conditions and defendant’s troubled childhood. Viewed in the context of the comprehensive case in mitigation presented by the defense, Dr. Ellana’s testimony was of marginal significance and unlikely to have swayed the jury. Defendant fails to persuade us that it is reasonably possible a more favorable result would have been reached in the absence of the trial court’s ruling excluding this testimony. ([People v. Brown, supra](#), [46 Cal.3d 432, 447–448](#).)

3. *The Proffered Testimony of James W. L. Park*

Outside the presence of the jury, the defense offered the testimony of James W. L. Park, an expert in prison operations, prison construction, and prisoner classification who had lengthy experience working in the California Department of Corrections. Park testified that prisons use audiovisual equipment, and that a prisoner with experience in this field would be a benefit to the prison system. Based upon his review of defendant’s records of incarceration, Park stated that in his opinion defendant would make “an above[-]average adjustment” to living in a maximum security prison. Park further testified that defendant “would not be a danger to staff or to prisoners.”

The trial court ruled that Park could testify before the jury as to his opinion that defendant would adjust to life in prison, but also that if Park so testified, the prosecution would be permitted to cross-examine Park with regard to [*1276] defendant’s psychological testing results and history of violence and criminal behavior.⁴⁰

Defense counsel thereafter informed the court that the defense would not call Park as a witness.

[**587] On appeal, defendant contends “[t]he trial court’s improper ruling effectively precluded the expert’s testimony

“In other words, we don’t have any psychiatric testimony, and the defendant hasn’t testified, and I haven’t seen it come in any other way at this particular stage, except perhaps that his mother, not the father, didn’t bring him cookies when she brought cookies to the older boy.

“And I think it is necessary to lay the record on this, so I apologize for keeping you, because there is a real balancing that has to be done under [Evidence Code section 352](#). The probative value on these particular points, because a good portion of it is duplicative, as well, or cumulative—not just duplicative but cumulative—is also a part of what I’m weighing. [¶] ... [¶]

“[‘]Bush kids[’] is not relevant at this point. And as far as the despair is concerned, it is purely speculative based upon her particular knowledge of the area at that particular time. ... I did not get the feeling, based upon the qualifications, that this is where her expertise truly lies.

“So for those reasons, ... I just want to make it real clear, there is no evidence in terms of how Jim Carter treated Dean Carter directly as a result of any potential prejudice in that regard.

“And also the timing of it is a problem. I’m not going to allow it, is the bottom line. [¶] ... [¶]

“I think the probative value is minimal and the prejudicial effect in terms of getting into issues which are going to create a great deal of confusion in terms of timing and the cumulative effect of bringing her back is just—the probative value is minimal and the prejudicial effect is high, and I’m not going to allow it.”

⁴⁰ The trial court’s ruling included the following:

“[Defendant’s] status as a death row inmate will not come in.

“... [Park] may not testify to what it’s like to be ... a prisoner under a life without possibility of parole [LWOP] sentence in and of itself. ...

“He may testify that based upon his experience, that an LWOP prisoner could utilize a trade as a video operator.

“He will be allowed to testify as to his opinion that the defendant will make an adequate adjustment to state prison, but if that question is asked, the People may cross-examine him, including cross-examining him on his history of any violence or any criminal behavior. [¶] ... [¶]

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in violation of [defendant's] constitutional rights." We disagree. The proffered testimony sought to introduce into evidence certain experience and character traits of defendant that suggested he would adjust well to prison life and probably would not be dangerous to other inmates and staff. Had the defense introduced that evidence, the prosecution would have been entitled to cross-examine Park regarding defendant's psychological propensities and prior criminal record. (See People v. Daniels [***889] (1991) 52 Cal.3d 815, 882–883 [277 Cal. Rptr. 122, 802 P.2d 906].) The trial court did not preclude Park from testifying, nor unduly restrict the areas of inquiry pertaining to his proposed testimony, but instead simply made clear that if the defense offered evidence of defendant's character related to the likelihood of his adjustment to life in prison, the prosecution would be entitled to cross-examine the witness and seek to rebut his testimony. Under these circumstances, the defense for obvious tactical reasons declined to introduce Park's testimony. No error or abuse of discretion appears.

4. The Trial Court's Ruling Prohibiting Allocution

Although acknowledging that the right of allocution is not recognized in California, defendant nevertheless contends the trial court erred in refusing his request to plead for mercy without being subject to cross-examination. No error appears. (See, e.g., People v. Davenport (1995) 11 Cal.4th 1171, 1209 [47 Cal. Rptr. 2d 800, 906 P.2d 1068]; People v. Hunter (1989) 49 Cal.3d 957, 989 [264 Cal. Rptr. 367, 782 P.2d 608].)

[*1277] C. Alleged Prosecutorial Misconduct

Defendant contends the prosecution committed misconduct at the penalty phase by "propound[ing] questions to witnesses in bad faith," interposing objections on the ground of hearsay, propounding "arguments ... designed to improperly invoke non-statutory aggravation evidence in violation of [s]ection 190.3 and [defendant's] constitutional rights," and by improperly commenting upon defendant's failure to testify in violation of Griffin v. California, *supra*, 380 U.S. 609. Defendant further contends the prosecution improperly "used every means available to curtail testimony regarding [defendant's] childhood—or other—socio-medico information and history that were legitimately proffered for a sentence less than death."

(12) Our review of the record leads us to conclude that defendant greatly overstates his position. Although a prosecutor is not permitted to comment, "either directly or indirectly, on the defendant's failure to testify in his defense," the prosecutor may comment " 'on the state of the evidence, or on the failure of the defense to introduce material evidence or call logical witnesses.' " (People v. Turner (2004) 34 Cal.4th 406, 419 [20 Cal. Rptr. 3d 182, 99 P.3d 505], quoting People v. Medina, *supra*, 11 Cal.4th at p. 755 .) For the most part, the prosecution's handling of its penalty phase responsibilities fell within the range of appropriate behavior. The prosecution was vigorous in its cross-examination and summation, and in interposing objections (most of which clearly were well-founded). Even were we to assume that the isolated incidents of which defendant now complains constituted misconduct, they were trivial in the context of defendant's trial and did not resemble or even approach the sort of misconduct that we have held to be prejudicial. (See, e.g., People v. Hill, *supra*, 17 Cal.4th 800.) We therefore reject defendant's claim of prejudicial error.⁴¹

D. Miscellaneous Contentions

Defendant raises a number of contentions that are virtually identical or substantially similar to claims raised on appeal from the Los Angeles County death judgment rendered against him for the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, and which we have rejected in the companion case of People v. Carter, *supra*, 36 Cal.4th 1114. These contentions are as follows: [***890] 1) the trial court's pattern jury instructions to the jury were inappropriate; 2) the [**588] delay between the pronouncement of defendant's death sentence and his execution renders the entire process unconstitutional; and 3) the use of lethal gas as a method of execution is unconstitutional.

For the reasons we have set forth more extensively in the companion matter, People v. Carter, *supra*, 36 Cal.4th at pages 1201–1214, we reject [*1278] defendant's contentions. Insofar as defendant's claims do not precisely mirror those set forth in the companion appeal, neither defendant's additional arguments nor the variants in their

"And [defendant's] entire record, and any psychological testing results that the people have can be raised by way of cross-examination of this particular witness, because that's information that that witness should have in forming such an opinion.

"[The People] also [will] be allowed to cross-examine the witness and make it clear to the jury that this witness has not examined this defendant."

⁴¹ We also reject as meritless defendant's assertions of prosecutorial misconduct to the extent that they relate to alleged instances of misconduct during voir dire, which defendant addresses in connection with his penalty phase argument.

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phrasing persuade us that the trial court committed an error or abuse of discretion prejudicial to defendant's case. Indeed, these contentions are not deserving of additional discussion. (*People v. Laursen, supra*, 8 Cal.3d at p. 205.)

E. Challenges to the Death Penalty Law

Defendant contends that many features of California's capital sentencing scheme, singly and in combination, violate the federal Constitution. We previously have rejected similar challenges, and because defendant has not presented any persuasive reason for us to reconsider those rulings, we decline to do so.

(13) The 1978 death penalty law does not violate the *Eighth Amendment* by failing to distinguish between death-eligible and non-death-eligible murders in a meaningful and nonarbitrary way. (See, e.g., *People v. Combs, supra*, 34 Cal.4th 821, 868; *People v. Morrison* (2004) 34 Cal.4th 698, 729 [21 Cal. Rptr. 3d 682, 101 P.3d 568]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 676–677 [21 Cal. Rptr. 3d 612, 101 P.3d 509]; *People v. Burgener* (2003) 29 Cal.4th 833, 884 & fn. 7 [129 Cal. Rptr. 2d 747, 62 P.3d 1]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179 [74 Cal. Rptr. 2d 121, 954 P.2d 384]; *People v. Jones* (1997) 15 Cal.4th 119, 196 [61 Cal. Rptr. 2d 386, 931 P.2d 960]; *People v. Sanchez* (1995) 12 Cal.4th 1, 60–61 [47 Cal. Rptr. 2d 843, 906 P.2d 1129]; *People v. Stanley* (1995) 10 Cal.4th 764, 842–843 [42 Cal. Rptr. 2d 543, 897 P.2d 481].) The special circumstances set forth in the statute are not overinclusive by their number or by their terms, nor have these categories been construed in an overly inclusive manner. (*People v. Ray* (1996) 13 Cal.4th 313, 356 [52 Cal. Rptr. 2d 296, 914 P.2d 846].)

(14) *Section 190.3, factor (a)* does not bias the determination of penalty in favor of death, in violation of the *Eighth Amendment*, as defendant acknowledges.⁴² (See *People v. Duncan* (1991) 53 Cal.3d 955, 978–979 [281 Cal. Rptr.

273, 810 P.2d 131]; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1020 [258 Cal. Rptr. 821, 773 P.2d 172].)

(15) The use in *section 190.3, factor (d)* of the adjective “extreme” does not act as a barrier to the jury's proper consideration of defendant's evidence [*1279] in mitigation.⁴³ (See *People v. Morrison, supra*, 34 Cal.4th 698, 729.)

[***891] Nor was it reasonably probable that, because of factor (d), the jury failed properly to weigh defendant's evidence in mitigation. To the contrary, we observe that the trial court in the instant case instructed the jury pursuant to *section 190.3, factor (k)* (factor (k)) as reflected in CALJIC No. 8.85, which provided the jury wide latitude to consider any extenuating circumstance in determining penalty.⁴⁴ (See *People v. Holt, supra*, 15 [***589] Cal. 4th at p. 698 [upholding the validity of *factor (d)*, in view of *factor (k)*]; *People v. Benson* (1990) 52 Cal.3d 754, 804 [276 Cal. Rptr. 827, 802 P.2d 330] [“[T]here is no reasonable likelihood that the jury would have inferred from [CALJIC No. 8.85 (k)] that they could not consider mental or emotional disturbance of any degree whatever in mitigation of penalty”].)

Notwithstanding defendant's assertion that the *factor (k)* instruction is the least accurately understood of California's sentencing factors, contributing to “pronounced” “constitutional harm,” we repeatedly have rejected challenges to its validity. (See, e.g., *People v. San Nicolas, supra*, 34 Cal.4th at pp. 675–676; see also *Boyde v. California* (1990) 494 U.S. 370, 381 [108 L. Ed. 2d 316, 110 S. Ct. 1190] [upholding a predecessor version of *factor (k)*].) We do so again here. We also observe that defendant does not demonstrate that the jury misunderstood its function in the present case.

CALJIC No. 8.88 (1989 rev.) is not inconsistent with the requirement set forth in *section 190.3* that “If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances[,] the trier of fact shall impose a

⁴² *Section 190.3* provides in relevant part:

“In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to *Section 190.1*.”

⁴³ Under *factor (d)*, the trier of fact may, in determining the penalty to be imposed, take into account “[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.”

⁴⁴ Pursuant to CALJIC No. 8.85, the trial court instructed the jury: “In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable: [¶] ... [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character, background, social history 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. ...”

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sentence of confinement in state prison for a term of life without the possibility of parole.”⁴⁵ (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1194 [9 Cal. Rptr. 2d 834, 832 P.2d 146] [rejecting a similar contention].)

[*1280] The trial court did not err in failing to instruct the jury (or otherwise require) that the jury must agree unanimously as to aggravating circumstances, that all aggravating factors must be proved beyond a reasonable doubt, that aggravation must outweigh mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt. (*People v. Carpenter, supra*, 15 Cal.4th at p. 421; *People v. Berryman* (1993) 6 Cal.4th 1048, 1101–1102 [25 Cal. Rptr. 2d 867, 864 P.2d 40].)

The trial court’s failure to delete inapplicable factors from the instructions given to the jury did not violate defendant’s rights under the *Fifth*, *Sixth*, *Eighth*, or *Fourteenth Amendments*. (*People v. Carpenter, supra*, 15 Cal.4th at p. 421.) Moreover, as defendant acknowledges, the trial court instructed the jury pursuant to [***892] CALJIC No. 8.85 that “only those factors that are applicable on the evidence adduced at trial are to be taken into account in the penalty determination in the individual case.” We therefore reject defendant’s contention that he was deprived of his right to an individualized sentencing determination based upon permissible factors relating to him and the crimes he committed.

The circumstance that under California law an individual prosecutor has discretion whether to seek the death penalty in a particular case did not deny defendant his constitutional rights to equal protection of the laws or to due process of law. (*People v. Barnett, supra*, 17 Cal.4th 1044, 1179; *People v. Ray, supra*, 13 Cal.4th 313, 359; *People v. Crittenden* (1994) 9 Cal.4th 83, 152 [36 Cal. Rptr. 2d 474, 885 P.2d 887]; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 225 [49 L. Ed. 2d 859, 96 S. Ct. 2909] (conc. opn. of White, J.) [“Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.”].) Moreover, nothing in the present case even remotely suggests that defendant’s [***590] constitutional rights were denied by the decision of the San Diego County prosecutor to seek the death penalty. To the contrary, the evidence of defendant’s penchant for overpowering young

women and strangling them to death amply demonstrates that the prosecutor’s decision to seek the death penalty was neither arbitrary nor capricious, but rather an appropriate exercise of prosecutorial discretion in response to defendant’s criminal rampage across California. Defendant, an apparently unremorseful serial killer and rapist, is precisely the type of individual against whom virtually any California prosecutor would seek the death penalty. Defendant is totally unconvincing in suggesting otherwise.

[*1281] F. Cumulative Error

Defendant contends that the cumulative effect of the asserted errors committed at his trial led to a miscarriage of justice, requiring reversal of the guilt and penalty phase judgments. Having determined that defendant’s trial was nearly free of error, and that, to the extent error was committed, it clearly was harmless, we conclude that defendant’s claim of cumulative error lacks merit.

DISPOSITION

The special circumstance of lying in wait is set aside. In all other respects, we affirm the judgment as to both guilt and penalty.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

Concur by: KENNARD

Concur

KENNARD, J.—I concur in the majority opinion, which I have signed. I write separately to address the merits of defendant’s claim that the prosecutor improperly commented on defendant’s invocation of his right not to testify at trial.

Defendant was charged with the murder of Janette Cullins. In its case-in-chief, the prosecution presented evidence that defendant had also murdered four other women: Tok Kim, Susan Knoll, Jillette Mills, and Bonnie Guthrie. When defendant was arrested for the murders, he was driving a car belonging to murder victim Mills. In the car, the police found a key ring that belonged to victim Cullins; a kitchen knife, rubber gloves, and a gold chain, belonging to victim Kim; a supermarket CASHEX card that belonged to victim Knoll; towels, athletic wear, and photographic equipment

⁴⁵ Pursuant to CALJIC No. 8.80 (1989 rev.), the trial court instructed the jury: “To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.”

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that belonged to victim Mills; and three [***893] handwoven sweaters that belonged to victim Guthrie.

In his rebuttal argument to the jury, the prosecutor said: “No one prevents [the defense] from telling you what happened. No one prevents them from bringing forth witnesses to explain why the defendant was in the car with all that property. They could do that if they wanted to.” Defense counsel objected, asserting the prosecutor was in essence commenting on defendant’s invocation of the privilege against self-incrimination. Without ruling on the objection, the trial court instructed the jury that defendant had a constitutional right not to testify.

The majority does not decide whether the prosecutor’s comment was proper, concluding that any error was harmless. (Maj. opn., *ante*, at pp. 1266–1267.) In my view, the comment violated the rule established in *Griffin v. California* (1965) 380 U.S. 609 [14 L. Ed. 2d 106, 85 S. Ct. 1229]. [*1282] There, the United States Supreme Court held that a prosecutor who comments on a defendant’s failure to testify at trial violates the defendant’s privilege against self-incrimination, as protected by the *Fifth* and *Fourteenth Amendments to the federal Constitution*. The court explained that such a comment “solemnizes the silence of the accused into evidence against him,” and thus “cuts down on the privilege by making its assertion costly.” (*Id.* at p. 614; see also *Portuondo v. Agard* (2000) 529 U.S. 61, 65 [146 L. Ed. 2d 47, 120 S. Ct. 1119].)

This court has explained that, as a general rule, *Griffin v. California*, *supra*, 380 U.S. 609, does not prevent prosecutors from commenting on the failure of the defense to introduce relevant evidence or to call logical witnesses. (*People v. Hovey* (1988) 44 Cal.3d 543, 572 [244 Cal. Rptr. 121, 749 P.2d 776].) But *Griffin* does not allow a prosecutor to argue to the jury “that certain testimony or evidence is uncontradicted, [***591] if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 [65 Cal. Rptr. 2d 145, 939 P.2d 259]; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1229 [14 Cal. Rptr. 2d 702, 842 P.2d 1] [“a prosecutor errs by referring to evidence as ‘uncontradicted’ when the defendant, who elects not to testify, is the only

person who could have refuted it”]; *People v. Murtishaw* (1981) 29 Cal.3d 733, 757–758 [175 Cal. Rptr. 738, 631 P.2d 446].) Similarly, “a prosecutor may not comment on a defendant’s failure to present evidence to contradict the government’s case if ‘the defendant alone had the information to do so.’ ” (*U.S. v. Triplett* (8th Cir. 1999) 195 F.3d 990, 995.) To determine whether a prosecutor’s comment violated *Griffin*, a reviewing court must decide whether there is a “reasonable likelihood” that the jury construed the remark as a commentary on the defendant’s failure to testify. (*People v. Roybal* (1998) 19 Cal.4th 481, 514 [79 Cal. Rptr. 2d 487, 966 P.2d 521]; *People v. Clair* (1992) 2 Cal.4th 629, 663 [7 Cal. Rptr. 2d 564, 828 P.2d 705].)

Here, the evidence presented to the jury at trial did not disclose the existence of any living person other than defendant who could have testified as to how defendant had acquired a car that belonged to one of the murder victims and that contained property belonging to each of the other murder victims. Nor would there necessarily be such a person if defendant were innocent of the murders. Thus, there is a “reasonable likelihood” (*People v. Roybal*, *supra*, 19 Cal.4th at p. 514; *People v. Clair*, *supra*, 2 Cal.4th at p. 663) that the prosecutor’s assertion that nothing prevented [***894] the defense from “bringing forth witnesses to explain why the defendant was in the car with all that property” was construed by the jury as a commentary on defendant’s failure to testify in his own defense.

[*1283] The prosecutor’s improper comment does not, however, require reversal of the judgment. As the majority correctly explains, any error was harmless “in view of the indirect nature of the prosecutor’s comment, the court’s timely reinstruction of the jury, and the strength of the evidence against defendant.” (Maj. opn., *ante*, at p. 1267.) Thus, it is “clear beyond a reasonable doubt that the jury would have returned a verdict of guilty” (*United States v. Hasting* (1983) 461 U.S. 499, 511 [76 L. Ed. 2d 96, 103 S. Ct. 1974]) even if the prosecutor had not made the comment at issue.

Appellant’s petition for a rehearing was denied October 26, 2005, and the opinion was modified to read as printed above.

AUG 15 2005

C O P Y

Frederick K. Ohlrich Clerk

DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S014021
v.	)	
	)	
DEAN PHILLIP CARTER,	)	
	)	Los Angeles County
Defendant and Appellant.	)	Super. Ct. No. A-089330
	)	

Following the guilt phase of the trial, a Los Angeles County jury found defendant Dean Phillip Carter guilty of the forcible rape (Pen. Code, § 261)¹ and first degree murder of Jillette Mills (§§ 187, subd. (a), 189), and found true the special circumstances that the murder was committed in the course of a forcible rape and in the course of a first or second degree burglary (§ 460). (§ 190.2, subd. (a)(17), subparts (C), (G).)

The jury also found defendant guilty of the first degree murder of Susan Knoll (§§ 187, subd. (a), 189) and of residential burglary (§ 459), and found true the special circumstance that the murder was committed during the commission of a burglary. (§ 190.2, subd. (a)(17), subpart (G).)

The jury further found defendant guilty of the forcible rape (§ 261) and first degree murder of Bonnie Guthrie (§§ 187, subd. (a), 189) and of residential

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

burglary (§ 459), and found true the special circumstances that the murder was committed in the course of a forcible rape and in the course of a burglary. (§ 190.2, subd. (a)(17), subparts (C), (G).)

In addition, the jury found true the special circumstance that defendant was convicted in the present proceeding of more than one offense of murder. (§ 190.2, subd. (a)(3).)

At the conclusion of the penalty phase, the jury returned a verdict of death. This appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

We affirm the judgment in its entirety.

FACTS

I. Guilt Phase Evidence

A. The Prosecution's Case

1. The Death of Tok Kim

The prosecution commenced its case by introducing, over defendant's objection, evidence that pertained to the death of Tok Kim, who was 42 years of age, in Alameda County in early April 1984. The evidence, summarized below, was introduced under Evidence Code section 1101, subdivision (b), for the purpose of demonstrating defendant's identity and criminal intent in the charged offenses relating to the murders of Jillette Mills, Susan Knoll, and Bonnie Guthrie on April 10 and 11, 1984.

In the early evening of Sunday, April 1, 1984, defendant entered the Rocking Horse Bar and Grill, located in Lafayette, California. The bartender, Nicole Didion, testified that business was slow that evening when defendant sat down at the bar, ordered a drink, and introduced himself to her as "Phil." He wore casual pants, which she believed were jeans, and a sweatshirt inscribed with the words "Tenakee Tavern — Southeast Alaska's Classiest Joint." He told Didion

that he worked as a cameraman. Cocktail waitress Margo Fulton observed defendant sitting at the bar, and joined his conversation with Didion.

Approximately one-half hour later, Tok Kim entered the bar, sat down a few bar stools apart from defendant, and ordered a glass of white wine. She departed from the bar soon thereafter, only to return a few minutes later, declaring that she had been unable to start her Honda automobile. Defendant offered to assist her and left with her.

After a few minutes, defendant returned to the bar and asked whether anyone had "jumper cables." A restaurant employee obtained cables; the car thereafter was started, and defendant returned to the bar to gather his belongings. Defendant remarked to a cocktail waitress that he was getting a ride to the local BART station.

Approximately 9:00 p.m. the same evening, defendant and Kim walked into Jim Sutton's Lafayette Shell gasoline station and reported car trouble. David Hogan, an employee at the station, assisted the couple in bringing the disabled vehicle to the station. Because the alternator apparently was malfunctioning, the vehicle was left at the station overnight for repairs.

The next day, April 2, Kim and defendant returned to the Shell station. Hogan noticed that defendant wore a black "Members Only" jacket that "was in style back then," as well as mirrored sunglasses on top of his head. Hogan, observing that defendant's neck bore a "big — like a hickey on his neck," told defendant, "Well[, i]t looked like you had fun last night." Defendant replied: "I don't even know what I'm doing here, I don't even know her."

At approximately 11:00 p.m. on Tuesday, April 10 or Wednesday, April 11, Kim's neighbor, Connie Santos, heard Kim arguing with someone. Santos knew the voice of Kim's boyfriend, Ray Blevins, and testified that the person with whom Kim was arguing "was not [Blevins] definitely, but instead belonged to

someone “‘younger.’” Santos could not discern the precise words spoken, but recalled that the persons arguing sounded “really angry.” Santos thought that perhaps she should call the police, but instead she went to bed, pulling the bed covers over her head in an effort to block the noise.

On Thursday, April 12, Kim failed to arrive at her job at the Concord Macy’s department store. Her manager at Macy’s, Ingrid Maleska-King, telephoned Kim’s apartment manager, William Elson, to request that he ascertain whether she was at her apartment. Elson, who had observed defendant standing near Kim’s apartment mailbox earlier that same week, did not find Kim at her apartment. Elson also observed that Kim’s vehicle was not in its designated parking space or anywhere in the vicinity. When Kim did not appear for work on Friday, April 13, Maleska-King again contacted Elson and asked him to recheck whether Kim was at her apartment. As Elson approached the apartment on this second occasion, he “felt extintively [*sic*] that she was in there because of the odor that I smelled.” Elson found Kim’s lifeless body sprawled upon the floor of her bedroom.

Oakland Police Detective Raymond Conner investigated Kim’s death, arriving at her apartment on the morning of April 13. Beneath Kim’s neck, he discovered a curtain tie approximately 18 to 24 inches in length.

Kim’s body had decomposed to an extent that it precluded a determination of a cause of death. The pathologist who performed the autopsy, Thomas Rogers, testified over defendant’s objection that the tie found beneath Kim’s neck could have been used to fatally strangle her. On cross-examination, Rogers acknowledged that in view of the body’s advanced state of decomposition, he could not eliminate the possibility that Kim might have died from natural causes.

2. The Deaths of Susan Knoll and Jillette Mills

Susan Knoll and her sister, Sandra Pender, grew up in Wisconsin. Knoll's best friend was Bonnie Guthrie. In 1972, Pender relocated to San Diego, and in 1979 Knoll journeyed west to live with her. Guthrie also relocated to the Los Angeles area at some point and resumed her close friendship with Knoll. In March 1984, Knoll moved into a Culver City apartment with Jillette Mills. Knoll and Mills each were 25 years of age.

On April 10, 1984, Knoll appeared at work at Mitsubishi Bank, according to Annette Cheng, Knoll's colleague. On April 11, Knoll was absent from work, and Cheng received a telephone call from a male who declined to identify himself. The caller informed Cheng that Knoll was "just involved in a traffic accident and she have some minor injury [*sic*] and would like to go to hospital for the checkup, but she asked me to call the bank to let the bank know that she won't be in today." Cheng asked the caller if he was a friend of Knoll's, and the caller replied: "No, I just happened to be in the accident scene and she asked me to call for her." When Cheng asked for the caller's name, he hung up the telephone. Cheng never saw Knoll alive again. On cross-examination, Cheng acknowledged that when she spoke to the caller, she believed he was a Black man with a southern accent.

For a few days prior to April 10, 1984, Jillette Mills's brother, Jeff, tried without success to contact Jillette. On April 11, 1984, Jeff and his friend, Christopher Thurman, began searching for her. Jeff and Christopher traveled to Jillette's Culver City apartment, to her place of employment (Laird Studios), and to a local community college where she had attended classes, but were unable to locate Jillette or her automobile, a distinctive white Datsun 280 ZX that bore the

license plate "PHANTM Z."² Jeff and Christopher thereafter returned to the apartment building, scaled a security fence, and approached the apartment. Jillette's apartment door was unlocked.

Upon searching much of the apartment without success, Jeff and Christopher encountered a framed piece of artwork leaning against the doors of a bedroom closet. Opening the closet doors, Christopher noticed "feet on the floor" and advised Jeff that "we have a problem." The fully-clothed bodies of Susan and Jillette were lying on the floor of the closet, one stacked upon the other. Jeff called the police, and Christopher went outside to await their arrival.

While Christopher waited by the curb, he leaned on the left front fender of a blue Honda that investigators subsequently determined belonged to Tok Kim. Inside the vehicle, investigators recovered a pair of sunglasses identified at trial by David Hogan, the Lafayette gasoline station attendant, as matching the pair he observed resting atop defendant's head.

Police investigators examined Jillette's apartment for fingerprints and other physical evidence. Two wine glasses found in the kitchen appeared to have been wiped clean to eliminate any traces of fingerprints. A latent palm print was retrieved from the bathroom sink. Martin Collins, a latent print investigator employed by the California Department of Justice, testified that the latent print matched defendant's right palm print with "100 percent" certainty.

² In addition to its personalized license plate, Jillette Mills's white Datsun was easily identifiable by a black, front-fender car cover (or "bra") emblazoned with the vehicle model — "280 ZX," black engine cover vents, dual-colored pinstripes, a tinted-glass "T-top" roof, black "sports slats" that covered much of the rear window, a black rear stabilizer, and dual-colored wheel rims shod with Goodyear Eagle GT tires.

Dr. Lakshmanan Sathyavagiswaran, the Chief of Forensic Medicine at the Los Angeles County Medical Examiner's Office, testified that Jillette Mills died of asphyxia due to ligature strangulation. He added that "considerable force" had to have been "continuously applied" for approximately two minutes or more in order to cause death. Jillette also suffered "blunt force type trauma" to her head, and injury to her genital area consistent with "traumatic sexual assault" including "penile penetration . . . and ejaculation." Sam Le, a Los Angeles County criminalist, testified that a white nightgown found in the apartment contained seminal fluid consistent with defendant's PGM type and that of 15.8 percent of the population. Seminal fluid recovered from Mills's vaginal area "was [of an] insufficient quantity for typing."

Dr. Sathyavagiswaran further testified that Susan Knoll died of asphyxia due to manual strangulation, the result of "considerable compression force." Susan also suffered blunt force injuries and hemorrhages consistent with having struggled against her assailant. Dr. Sathyavagiswaran stated: "[W]hen Miss Knoll was strangled and was asphyxiated, this was probably a terminal event [—] that she vomited and aspirated. [¶] The very fact that the vomitus did not go to the distal parts of the lung, that is, [the] distal bronchi, she did not live very long after this vomitus — after this vomiting episode." Seminal fluid recovered from Knoll's vaginal area was of an insufficient quantity for typing.

Each victim had been dead for a minimum of 15 hours prior to the time the autopsies were performed upon their bodies.

3. The Death of Bonnie Guthrie

In the early afternoon of April 11, 1984, Bonnie Guthrie, then 34 years of age, and a friend, Geula Vehab, purchased fruit together in Santa Monica. The two parted company at approximately 1:20 p.m. Between 3:00 p.m. and

4:00 p.m., Matty Spiro, the manager of the apartment building in which Guthrie resided, entered her West Los Angeles apartment, accompanied by Manny Gleberman, to repair a leaky bathroom faucet. As Gleberman worked on the faucet, Spiro observed Guthrie lying on her stomach on the bedroom floor: "So I says to Manny, the plumber — I said, 'Look at that, Manny. She's sleeping on the floor.' I said, 'I better close the door and let her sleep.'"

The next morning, April 12, Spiro noticed that Guthrie's automobile was still in the garage. Wondering why Guthrie apparently had not gone to work, he returned to Guthrie's apartment and knocked on the door. Upon entering the apartment, Spiro noticed Guthrie lying in the same position as he previously had observed. He then notified the police.

Dr. Sathyavagiswaran testified that Guthrie died of ligature strangulation. He added that Guthrie's body bore the signs of having suffered blunt force injury as well as genital abrasions consistent with traumatic sexual assault. Vaginal area samples revealed the presence of spermatozoa.

Two days later, on April 14, Adolph Romero, a commercial fisherman, noticed a white Datsun 280 ZX parked in front of a San Diego shipyard. Approximately 50 feet from the vehicle, Romero retrieved Guthrie's wallet from beneath some bushes. When Guthrie could not be reached, the wallet ultimately was turned in to the local police.

4. The Death of Janette Cullins

The prosecution, pursuant to Evidence Code section 1101, subdivision (b), presented evidence over defendant's objection that on or about April 12, 1984, Janette Cullins, who was 24 years of age, died by strangulation. Janette originally had encountered defendant in a San Diego bar in February 1984, and saw him socially the following month. Lee Ann Johnson, who resided across the street

from Janette's apartment, reported that during April 1984 she observed a distinctive looking vehicle arrive and depart from the area on several occasions. At trial, Johnson testified that the vehicle, a white Datsun 280 ZX, resembled the one owned by Jillette Mills. One night that April, Johnson observed the vehicle parked across the street, its engine running for 10 or 15 minutes, "[a]nd then all of a sudden I heard the car start — take off, and it sort of screeched and made a u-turn and came up past my house to the corner and didn't stop for the stop sign and went through the stop sign." Johnson never saw the vehicle again.

Approximately midday on April 13, Cullins's previous roommate, Nancy McEachern, drove to Cullins's apartment because they had planned to conduct a yard sale on the following day, a Saturday, and McEachern wanted to drop off some items to sell. As she was parking her vehicle in front of the apartment, defendant drove up in a white Datsun 280 ZX. He asked McEachern whether Cullins was home. McEachern replied, "Her car is not here. She hasn't answered a phone call" placed by McEachern earlier that morning. Defendant left, and McEachern entered the apartment. Inside, the drapes were drawn and the Venetian blinds were closed, causing the apartment to appear dark, which McEachern testified was "unusual" for that time of day because "We had the habit of opening everything up and making it real bright first thing in the morning." McEachern left a note for Cullins on the dining table and departed from the apartment. McEachern returned the next day to discover Janette's body lying in the bedroom closet. The cause of her death was asphyxiation due to strangulation.

Records of Great American Bank revealed that on April 13, 1984, a withdrawal from Janette Cullins's account in the amount of \$60.00 (leaving an account balance of \$4.06) was made from an automatic teller machine located at the bank's Point Loma Branch. A four-minute videotape of the transaction,

introduced into evidence and shown to the jury, depicted a man wearing a black jacket.³

5. Defendant's Arrest

Approximately 10:50 p.m. on April 17, 1984, Arizona Highway Patrolman Robert Dapser was completing a traffic stop on Interstate 40 in northern Arizona, when he received a call from a truck driver on the citizen's band radio located in his patrol vehicle. The caller advised that "an erratic vehicle had been driving in his location, passed by him twice and nearly cut him off both times," and identified the California license plate on the car as "PHANTOM 2." The subject vehicle, a Datsun 280 ZX, drove by as Officer Dapser was receiving this information.

Officer Dapser pursued the vehicle, which he observed "swerving across the center line of the highway." He activated the emergency lights on his patrol vehicle and initiated a traffic stop. After illuminating the Datsun with a spotlight, Dapser approached the car and requested that the driver produce identification. Defendant, the lone occupant of the vehicle, produced an expired driver's license issued by the State of Alaska. Dapser asked for the vehicle registration documents. Defendant searched the center console and glove box and then stated, "I can't find it, she must not have it in here." Dapser thought he observed a burnt marijuana cigarette in the center console of the Datsun and, having witnessed the

³ In a separate proceeding conducted in San Diego County, defendant was charged with and found guilty of the first degree murder of Janette Cullins; the jury in that case also found true several special circumstances and returned a verdict imposing a sentence of death, and the San Diego court thereafter imposed a judgment of death. The facts of that case, and defendant's appeal from the judgment rendered in that case, form the basis of the companion case, *People v. Carter* (Aug. 15, 2005, S023000) ____ Cal.4th ____ decided simultaneously with this case.

vehicle's erratic movement, decided to take defendant into custody. He advised defendant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and placed him in the patrol vehicle.

Officer Dapser returned to the Datsun to search for the burnt marijuana cigarette. He noticed beer bottles, one of which was empty, located on the passenger side floorboard. While searching for the marijuana cigarette, Dapser observed a bank identification card located in the crevice between the driver's seat and the center console. The name on the card was that of Janette Cullins. Believing that the truck driver who originally noticed the Datsun had misidentified the license plate, Dapser transmitted a message over his police radio, advising that the license plate was not "PHANTOM 2," but "PHANTM Z." Within several minutes, a dispatcher instructed Dapser to detain the vehicle and all occupants at the request of California law enforcement officials. Dapser discontinued his search of the Datsun and arranged for it to be towed to a locked police storage area.⁴

Officer Dapser administered a Breathalyzer test to defendant, which revealed that his blood-alcohol content was .078 percent approximately 80 to 90 minutes after the traffic stop. Defendant was transported to the Yavapai County jail in Prescott, Arizona.

6. The Contents of the Datsun 280 ZX

On April 18, 1984, Officer Dapser released the contents of Jillette Mills's Datsun 280 ZX, as well as certain personal property confiscated from defendant's person, to West Los Angeles and Culver City police detectives. The detectives

⁴ Defendant asked Officer Dapser what he had been searching for, to which the officer replied, "I was looking for the marijuana roach that was on the console." In response, defendant said, "Don't waste your time looking for it."

inventoried the personal property and other objects recovered from the vehicle, which included the following items introduced into evidence at defendant's trial: an American Tourister suitcase containing a plastic jar filled with pennies and labeled "black bean soy sauce," a Korean-made, wood-handled kitchen knife, yellow rubber gloves, and a gold chain — all identified as having belonged to Kim; a sweatshirt depicting a location in Alaska; an Alpha Beta supermarket CASHEX card identified as having belonged to Susan Knoll; towels, athletic wear, and photographic equipment identified as having belonged to Jillette Mills; three hand-woven sweaters identified as having belonged to Bonnie Guthrie; a "Member's Only" jacket, which contained a butcher knife, a knee-high nylon sock, a business card from Jim's Lafayette Shell gasoline station; a key ring identified as having belonged to Janette Cullins; and a piece of paper with the words "SHY LAS" — the access code to Cullins's Great American Bank (originally San Diego Federal Savings and Loan) account; and a number of items emblazoned with the names of Las Vegas casinos. A pair of jeans recovered from the Datsun contained a yellow half sock and a blue bandana.

B. The Defense Case

The defense did not present any evidence.

II. Penalty Phase Evidence

A. The Prosecution's Case

The prosecution presented evidence in aggravation establishing that in the early morning hours of March 29, 1984, defendant, uninvited, entered the Ventura County residence of Jennifer S., 22 years of age, with whom he had been acquainted for approximately two weeks. During a period of four and one-half hours, defendant twice strangled Jennifer until she lost consciousness. After she regained consciousness, defendant tied her hands behind her back. Sometimes

wielding a bone-handled knife, defendant forced her to orally copulate him on multiple occasions. Unable to attain an erection, defendant complained that Jennifer “could do it better.” Shaking violently and uncontrollably, Jennifer asked for a drink of water. Instead, defendant located a bottle of wine and two wine glasses and “took the wine and . . . forced it against” her, causing it to spill onto Jennifer’s face. Thereafter, defendant demanded and obtained cash kept at the residence. Subsequently, he pulled off Jennifer’s clothes and raped her. At some point, defendant informed Jennifer he “liked cocaine,” and Jennifer told him he could find a small amount in a cupboard. Defendant retrieved the drug, which she assumed he snorted, and he subsequently “calmed down quite a lot.” Shortly after reassuring defendant that she wouldn’t call the police and feigning concern for defendant’s well-being, Jennifer “ran out the front door and ran as fast as [she] could” to a neighbor’s apartment, where she “pounded” and “kicked” the door. The neighbor answered and shortly thereafter notified the police.

The police took Jennifer to the Ventura County Medical Center, where she was treated for facial cuts, hip abrasions, and several broken fingernails, bits of which were recovered by police investigators from the floor of her residence. Jennifer testified that she was “fairly certain” that the facial cut she suffered was from the knife defendant had wielded.⁵

⁵ Based upon the offenses defendant committed against Jennifer S., Ventura County law enforcement officials filed a criminal complaint against defendant and caused an arrest warrant to issue. Prior to trial in the present case, a Ventura County jury convicted defendant of robbery, rape, four counts of oral copulation, and two counts of assault with a deadly weapon, and found that defendant personally used a knife in the commission of the offenses. Two prior serious felony convictions also were found to be true. Defendant was sentenced to serve a term of 56 years in prison. Only the facts underlying the offenses perpetrated against Jennifer S. were introduced at the penalty phase of the present

(footnote continued on next page)

The prosecution also introduced into evidence abstracts of judgments reflecting defendant's prior felony convictions, a 1974 burglary conviction in Oregon and a 1977 burglary conviction in Alaska.

B. The Defense Case

The defense evidence in mitigation was extensive, involving the testimony of 21 witnesses, as well as multi-faceted, presenting various aspects of defendant's background and character, as summarized below.

First, defendant's older brother, Jerry Lee Carter, and their younger sister, Polly Anne Reasner, testified regarding the difficulties of growing up as the children of an alcoholic mother and alcoholic stepfather in the small, remote Alaskan town of Nome. Esther Carter, defendant's mother, was half-Eskimo; Jim Carter, defendant's stepfather, served for several years as Nome's Chief of Police.⁶ Defendant's parents argued and fought frequently, hurling profanities as well as furniture at each other. As a result, the children "wanted to get as far away from them as you could." As a young child, defendant (who was born in 1955), repeatedly ran away from home for days at a time, once reaching Anchorage several hundred miles away, and another time hiding in the wheel well of an aircraft. When defendant was eight or nine years of age, defendant's stepfather affixed a chain to defendant's ankle, attaching the other end of the chain to a bed, to prevent further similar incidents. A family friend, Bertha Adsuna, recalled that

(footnote continued from previous page)

proceedings — the jury was not informed of defendant's arrest, conviction, or sentence for having committed those offenses.

⁶ The record is silent as to the identity or whereabouts of defendant's natural father. We refer to defendant's mother and stepfather as his parents. At the time of defendant's trial in 1989, defendant's stepfather was deceased, and his mother, who refused to discuss her son with a defense investigator, did not testify at trial.

defendant was treated differently from his older brother, and that defendant — unlike Jerry — was dressed by their mother “like an orphan.” When defendant was nine years of age, his parents sent him several hundred miles away to a boarding school for “problem children.”

Second, several witnesses testified that in the late 1970’s, defendant became an accomplished television cameraman, thereafter marrying and becoming the proud father of twin boys. He also engaged in activities not considered unusual for residents of Nome, such as climbing upon icebergs during the springtime ice break. In the early 1980’s, however, defendant’s enthusiasm for his career began to wane as marital problems and his addiction to cocaine increasingly dominated his life. By 1983, defendant and his wife were divorced, and defendant was not permitted to visit his children. According to his brother, defendant became “disgruntled,” “heartbroken,” and “angry.” Defendant missed his sons, and according to a former colleague, Mary Alexander, following defendant’s separation from his family “it was as if the light had gone out.” Defendant told Beth Farley, whose friendship with defendant dated to their childhood, that because he could not see his children, he planned to move away from Alaska and begin a new life.

Third, a number of defendant’s friends and former colleagues testified regarding defendant’s dependability and trustworthiness, but also to his accelerating addiction to cocaine, a substance that defendant termed “marching powder.” According to one witness, during several months prior to March 1984 defendant was using cocaine regularly, drinking heavily, and was “clearly out of control.”

Fourth, two witnesses employed by Ventura County provided further details regarding the rape of Jennifer S. Detective William Ragsdale recalled that Jennifer had remembered that defendant’s eyes were “glazed over” during the

incidents on the morning of March 29, and that, at various intervals, defendant acted remorsefully and acknowledged he "needed psychiatric help." Lynda Zych, a toxicologist, testified that Jennifer tested "positive for cocaine," but that a confirming test never was administered.

Finally, two witnesses testified regarding events following the attack upon Jennifer S. Andrew Holtz, a former colleague of defendant's, testified that on March 29, 1984, defendant telephoned him, sounding "very depressed," and expressed a desire to visit the Alaska Psychiatric Institute, located in Anchorage. Holtz encouraged defendant "to get in touch with the authorities in Ventura to straighten things out." Daniel Shields, an employee at the Los Angeles County jail, testified that during defendant's period of incarceration prior to trial, defendant had not presented any discipline problems.

DISCUSSION

I. PRETRIAL ISSUES

A. Ineffective Assistance of Counsel at the Preliminary Hearing

Defendant contends he was denied the effective assistance of counsel at his preliminary hearing because his attorney, Ezekiel Perlo, (1) performed only a perfunctory cross-examination of the prosecution's witnesses who testified pertaining to the death of Tok Kim and the murder of Jillette Mills, and (2) failed to cross-examine any of the prosecution's witnesses called to testify regarding the murders of Bonnie Guthrie and Janette Cullins. Defendant asserts: "The record demonstrates that defense counsel was not responsible for any meaningful challenge to evidence presented over a five-day preliminary hearing that produced thirty-seven witnesses and twenty-seven exhibits." As a result of these alleged deficiencies at the preliminary hearing, defendant alleges that he suffered prejudice at trial. The contention lacks merit.

“In general, irregularities in pretrial commitment proceedings require reversal on appeal only where the defendant shows he was ‘deprived of a fair trial or otherwise suffered prejudice as a result.’ (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [165 Cal.Rptr. 851, 612 P.2d 941].) Where the case involves an ineffective assistance claim of the sort at issue here [that is, the alleged failure to adequately cross-examine witnesses], no prejudice typically appears unless counsel’s pretrial performance resulted in the loss of material evidence and caused tangible harm to the defense at trial. (See *People v. Coleman* (1988) 46 Cal.3d 749, 771-773 [251 Cal.Rptr. 83, 759 P.2d 1260] [preliminary hearing counsel’s failure to contest prosecution’s scientific evidence and conduct independent forensic investigation did not impair defense of rape-murder charge at trial, including introduction of expert medical testimony]; *People v. Aston* (1985) 39 Cal.3d 481, 494-495 [216 Cal.Rptr. 771, 703 P.2d 111] [unavailability of witness at preliminary hearing was ‘cured’ when witness later testified for defendant at suppression hearing and was available at trial].)” (*People v. Millwee* (1998) 18 Cal.4th 96, 121-122.)

In the present case, defendant has failed to make the requisite showing. Perlo’s performance at the preliminary hearing was not deficient. Defendant’s assertions to the contrary ignore Perlo’s appropriate questioning of various witnesses and instead merely speculate that more vigorous cross-examination of certain witnesses, such as Ray Blevins, Tok Kim’s former boyfriend (who died prior to trial), might have led the trial court to preclude the prosecution from introducing evidence relating to the death of Kim and the murder of Janette Cullins. Defendant’s assertions in this regard do not establish that counsel performed deficiently.

Moreover, at trial the prosecution presented overwhelming evidence linking defendant to the charged offenses. Thus, even if we were to assume for the sake

of argument that the trial court erred in permitting the prosecution to introduce evidence pertaining to Kim and Cullins, defendant does not demonstrate that in the absence of such evidence, the result at trial would have been different. (See *People v. Coleman* (1988) 46 Cal.3d 749, 773 [in postconviction proceedings, the burden is on the defendant to establish prejudice as a result of counsel's pretrial performance].) Although at trial the defense presented no case-in-chief, defense counsel vigorously cross-examined numerous witnesses for the prosecution. We further observe that the prosecution's evidence at trial relating to Kim was inconclusive as to cause of death, and that although the Cullins evidence linked defendant to that homicide, defendant had not yet been tried or convicted in that case — circumstances that considerably lessened the impact of such evidence.

On this record, which is similar to that in *People v. Millwee*, *supra*, 18 Cal.4th 96, 122, “[d]efendant identifies no exculpatory or mitigating evidence overlooked at any phase of the proceedings, nor does he demonstrate that counsel’s performance at the preliminary hearing ‘affected the ability of trial counsel to advocate defendant’s case at trial.’ [Citation.]” We therefore reject defendant’s claim that counsel rendered ineffective assistance based upon counsel’s performance at the preliminary hearing.⁷

⁷ “With regard both to this claim and to every other claim raised in his brief, defendant asserts that each alleged error violates not only state law but multiple provisions of the federal and California Constitutions. In addressing each claim discussed in this opinion, we have considered defendant’s contention that the alleged error violates the federal and California Constitutions, and our rejection of each claim of reversible error includes a determination that the alleged error does not warrant reversal under the state or federal Constitution.” (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1199, fn. 2.)

B. Motion to Suppress Evidence

Defendant contends the trial court erred in denying his section 1538.5 motion to suppress evidence seized from his person and from Jillette Mills's vehicle following his arrest. Defendant asserts that his detention and arrest were unlawful because they were not supported by probable cause and that the search of his person and the vehicle violated state and federal constitutional guarantees against unreasonable search and seizure. We reject defendant's position as to each of these points.

At the pretrial hearing on defendant's motion, Robert Dapser, the Arizona law enforcement officer who stopped and detained defendant on April 17, 1984, testified that he initiated the traffic stop only after receiving a call that a "white Datsun 280 Z with California personalized [license] plates" had been seen driving in a dangerous manner and after the officer personally observed a vehicle that matched that description driving erratically. Upon directing the driver to pull over and stop, Officer Dapser approached the vehicle, observed beer bottles and a burnt portion of a marijuana cigarette inside, and detected the scent of alcohol as well as the faint smell of burnt marijuana. Defendant's eyes appeared to Dapser to have been "rather glossed over," indicating to Dapser that defendant "was under the influence of something." Dapser took defendant into custody for possession of the marijuana cigarette and advised him of his rights under *Miranda, supra*, 384 U.S. 436, "for driving under the influence of alcohol and/or drugs." Less than 10 minutes later, Dapser was notified to detain the vehicle and all occupants at the request of law enforcement officials located in Culver City, California.

At the conclusion of the hearing on defendant's motion to suppress, the trial court denied the motion, finding: "I think the officer did have sufficient cause to stop, detain, and then arrest Mr. Carter under the facts and observations."

On appeal, defendant's arguments are substantially similar to his assertions in the trial court. For the following reasons, we find them unpersuasive.

“ ‘An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] “The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.” [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.’ (*People v. Williams* (1988) 45 Cal.3d 1268, 1301 [248 Cal.Rptr. 834, 756 P.2d 221].)” (*People v. Alvarez* (1996) 14 Cal.4th 155, 182 (*Alvarez*); see also *People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410 [the trial court's findings must be upheld if supported by substantial evidence].)

“The Fourth Amendment, made applicable to the states through the Fourteenth Amendment's due process clause (*Mapp v. Ohio* (1961) 367 U.S. 643, 643-660 [6 L.Ed.2d 1081, 1081-1093, 81 S.Ct. 1684, 84 A.L.R.2d 933]; *Wolf v. Colorado* (1949) 338 U.S. 25, 27-28 [93 L.Ed. 1782, 1785-1786, 69 S.Ct. 1359], overruled on another point, *Mapp v. Ohio*, *supra*, 367 U.S. at pp. 654-655 [6 L.Ed.2d at pp. 1089-1090]), guarantees ‘the people’ ‘[t]he right . . . to be secure . . . against unreasonable searches and seizures’ ‘[A] Fourth Amendment “seizure” occurs when a vehicle is stopped at a checkpoint’ by a law enforcement officer. (*Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444, 450 [110

L.Ed.2d 412, 420, 110 S.Ct. 2481].) ‘The question thus becomes whether such [a] seizure [] [is] “reasonable” under the Fourth Amendment.’ (*Ibid.*)” (*Alvarez, supra*, 14 Cal.4th at pp. 182-183; see also *Terry v. Ohio* (1968) 392 U.S. 1, 19 [for any type of detention, the overall standard to which the government must adhere is that of reasonableness]; *People v. McGaughran* (1979) 25 Cal.3d 577, 584 [“the officer may temporarily detain the offender at the scene for the period of time necessary to discharge the duties that he incurs by virtue of the traffic stop”].)

Further, any challenge to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171; *In re Lance W.* (1985) 37 Cal.3d 873, 879; see also *California v. Greenwood* (1987) 486 U.S. 35, 38.) “ ‘An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded space or the seized thing. (*United States v. Salvucci* (1980) 448 U.S. 83, 91-92 [65 L.Ed.2d 619, 628, 100 S.Ct. 2547].) The legitimate expectation of privacy must exist in the *particular area searched or thing seized* in order to bring a Fourth Amendment challenge.’ (*People v. Hernandez* (1988) 199 Cal.App.3d 1182, 1189 [245 Cal.Rptr. 513], italics in original.)” (*People v. McPeters, supra*, 2 Cal.4th 1148, 1171.) The burden is on the defendant to establish that a legitimate expectation of privacy (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104) was violated by government conduct.

Our independent review has not disclosed any error in the superior court’s application of these principles. In the present case, defendant, as the driver of a stolen vehicle, lacked a legitimate expectation of privacy to contest the search of that vehicle. (See *Rakas v. Illinois* (1978) 439 U.S. 128, 141, fn. 9 [“ ‘No interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its

fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.’ ”]; accord *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533.) To accept defendant’s assertion that he had a legitimate expectation of privacy while driving a stolen vehicle would be to overlook the word “unreasonable” in the Fourth Amendment’s proscription against “unreasonable searches and seizures.”

As noted, Officer Dapser received information that a specific vehicle was being driven recklessly — information that soon was corroborated when he saw it drive by. Therefore, he had a reasonable basis to stop the vehicle and detain the driver. Upon encountering defendant, Dapser had further indicia of unlawful conduct: defendant’s eyes appeared glazed, the odor of alcohol and marijuana wafted from the car’s interior, the passenger-side floorboard was littered with beer bottles, and a burnt marijuana cigarette was visible. Because possession of marijuana was a felony in Arizona at that time, the officer’s observations provided him with a reasonable basis to arrest defendant and take him into custody.

Thus, even if we were to assume defendant’s expectation of privacy was reasonable, his challenge to the seizure of incriminating evidence fails because his detention and arrest were lawful, thereby eliminating any reasonable expectation of privacy that would have existed had the vehicle not been stolen. (*New York v. Belton* (1981) 453 U.S. 454.) Nor are we persuaded that the length of the detention prior to arrest — less than 10 minutes — was, as defendant asserts, “for an excessive time waiting for the dispatcher’s report,” or that Officer Dapser’s ultimately unsuccessful search for the marijuana cigarette during that period required “an inordinate amount of time.”

In sum, the trial court properly denied defendant’s motion to suppress the evidence recovered from Jillette Mills’s vehicle.

C. Motion to Strike Prior Burglary Convictions

Defendant contends the trial court erred in (1) refusing to strike his prior burglary convictions from Oregon and Alaska, alleged as prior serious felonies within the meaning of section 667, subdivision (a), and section 1192.7, subdivision (c)(18); (2) declining to dismiss these alleged prior convictions pursuant to section 1385; and (3) admitting evidence of the prior convictions at the penalty phase pursuant to section 190.3, subdivision (c). Defendant argues each of these alleged errors denied his constitutional rights to due process of law, a fair trial, and a reliable sentence. We are unpersuaded.

Prior to the commencement of trial, defendant moved to strike the prior conviction allegations on the grounds that the Oregon and Alaska priors did not constitute “serious felony convictions” within the meaning of section 667, subdivision (a).⁸ In defendant’s view, certain distinctions between the language of the Oregon and Alaska burglary statutes on the one hand, and the California statute on the other, precluded the introduction of the out-of-state priors.⁹

⁸ At the time defendant brought his motion to strike, section 667, subdivision (a) provided in pertinent part:

“Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately.”

⁹ The Oregon burglary statute in effect at the time of defendant’s December 1974 offense provided in relevant part:

“(1) A person commits the crime of burglary in the first degree if he violates ORS 164.215 and the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom he:

“(a) Is armed with a burglar’s tool as defined in ORS 164.235 or a deadly weapon, or;

“(b) Causes or attempts to cause physical injury to any person, or;

(footnote continued on next page)

Specifically, defendant alleged that neither the Oregon nor the Alaska burglary statute included all of the elements of the California crime of residential burglary.

At a pretrial hearing conducted on March 20, 1987, the superior court rejected defendant's motion to strike his prior burglary convictions. The court observed: "It seems like the purpose of this rule is to look to see if and to avoid the holding of an individual responsible for a serious felony prior for conduct that in this state would not substitute for a serious felony. And based on my review of the documents and the points and authorities in this case, that isn't what we're facing here. [¶] . . . [¶] What we have here is that it appears that what the defendant was charged with and convicted of is conduct, precisely that which is

(footnote continued from previous page)

"(c) Uses or threatens to use a dangerous weapon." (ORS 164.225.)

ORS 164.215, referred to in the foregoing statute, provided:

"A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein."

The Alaska burglary statute in effect at the time of defendant's December 1977 offense provided in relevant part:

"A person who breaks and enters a dwelling house with intent to commit a crime in it, or having entered with that intent, breaks a dwelling house or is armed with a dangerous weapon in it, or assaults a person lawfully in it is guilty of burglary, and upon conviction is punishable by imprisonment in the penitentiary for no less than one year nor more than 10 years. . . ." (Alaska Statute 11.20.080.)

Alaska Statute Section 11.20.090 defined breaking of a dwelling house as follows:

"An unlawful entry of a dwelling house with intent to commit a crime in it is a breaking and entering of the dwelling house for the purpose of section 80 of this chapter."

When defendant brought his motion to strike, section 459 provided in pertinent part:

"Every person who enters any house, room, apartment . . . with intent to commit grand or petit larceny *or any felony* is guilty of burglary." (Italics added.)

required to come within [section] 459 as a first degree burglary.” The court concluded, “The motion to strike is denied at this time.”

On appeal, defendant contends the trial court should have stricken the prior serious felony enhancements that were based on his residential burglary convictions in Oregon and Alaska, because the foreign convictions did not include all the elements of the “serious felony” of “residential burglary” (Pen. Code, §§ 667, subd. (a)(1), (4), 1192.7, subd. (c)(18)) as defined in California (*id.*, § 459). Defendant further urges that the court violated then-applicable law when it went behind the facial elements of the foreign convictions, and considered the entire records of the foreign convictions to determine whether the minimum elements of a California residential burglary were actually present.

As set forth in the margin (fn. 9, *ante*), the Oregon and Alaska statutes required only entry with intent to commit a “crime.” (ORS §§ 164.215, 164.225(1); Alaska Statutes 11.20.080, 11.20.090.) By contrast, Penal Code section 459, then and now, requires entry with intent to commit “*grand or petit larceny or any felony*.” (Italics added.) Thus, defendant’s Oregon and Alaska convictions conceivably could have been for conduct which, if committed in California, would not support a conviction under section 459.

As defendant observes, the law as it existed in 1984 allowed courts to look only at the face of a foreign conviction to determine whether its minimum elements established a “serious felony” under California law. (*People v. Crowson* (1983) 33 Cal.3d 623.) But, as defendant acknowledges, we overruled *Crowson* in *People v. Myers* (1993) 5 Cal.4th 1193. *Myers* held that, in determining whether a foreign conviction satisfies the minimum elements of a “serious felony” in California, the court may examine “the entire record of the prior conviction.” (*Id.*, at p. 1201; see also *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356 [in determining the truth of a prior-conviction allegation, the trier of fact may look to

the entire record of the conviction, overruling *People v. Alfaro* (1986) 42 Cal.3d 627].)

Defendant fails to explain his view that *Myers* is not fully retroactive, and no reason appears to depart from the general rule that judicial decisions, even those overruling prior authority, have full retroactive effect. (See, e.g., *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023; *Woosley v. State of California* (1992) 3 Cal.4th 758, 793-794.) Retroactive application is particularly appropriate here, because *Myers* would apply to the consideration of the prior conviction at any new trial.

Although defendant additionally questions the “competence” of the foreign records on which the trial court relied, he fails to persuade us that the records are invalid or otherwise deficient. Our own review of those records reveals that as to the Alaska conviction, defendant pleaded guilty to “unlawfully break[ing] and enter[ing] a . . . residence, . . . the breaking and entering being with the intent to commit the crime of larceny therein,” and that as to the Oregon conviction, defendant was found guilty of “knowingly and unlawfully enter[ing] a dwelling [a residence] . . . with the intent to commit the crime of theft therein.” (Cf. former § 459: “Every person who enters any house, . . . apartment, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary”; see also former § 460, subd. (1): “Every burglary of an inhabited dwelling house . . . is burglary of the first degree”; § 490a: “Whenever any law or statute of this state refers to or mentions larceny, . . . said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor”; § 1192.7, subd. (c)(18) [any burglary of the first degree is a “serious felony”].) Because each one of defendant’s prior

convictions thus would satisfy the necessary elements to convict defendant of first degree burglary in California, we reject defendant's challenge.¹⁰

After the jury reached its guilt phase verdicts, defendant outside the jury's presence renewed his request that evidence of his prior burglary convictions be excluded from the jury's consideration, this time requesting that the trial court exercise its discretion under section 1385 to strike the allegations. The trial court appears to have denied the request, although the reporter's transcript does not explicitly so indicate.¹¹

On appeal, defendant contends "it was in the interests of justice to dismiss the [prior conviction allegations] under section 1385, because the crimes charged were committed before the 1986 amendment to that section." We disagree. The circumstance that defendant's prior convictions were committed before the 1986 amendment that added subdivision (b) to section 1385 ("This section does not authorize a judge to strike any prior conviction of a serious felony . . .") did not preclude the trial court in 1989 from denying defendant's motion to strike the prior conviction allegations. No error or abuse of discretion appears.¹²

¹⁰ Even if we were to agree with defendant that the trial court should have struck defendant's prior convictions from Oregon and Alaska on the ground that they were not serious felonies, the prosecution still was entitled to introduce evidence of those convictions at the penalty phase under section 190.3, subdivision (c), which permits the prosecution to introduce evidence of "the presence . . . of any prior felony conviction" regardless of whether it is a "serious felony."

¹¹ The clerk's transcript, however, reads: "Motion to strike priors pursuant to [section] 1385 [of the] Penal Code in the interest of justice is denied."

¹² In rejecting defendant's claim that the trial court erred in failing to dismiss the prior conviction allegations pursuant to section 1385, we need not and do not address the broader question whether, in a case tried after the 1986 amendment to that statute but involving a prior conviction of a serious felony that was committed

(footnote continued on next page)

Defendant next contends the trial court erred in admitting the evidence of defendant's prior burglary convictions under section 190.3, subdivision (c) at the penalty phase. He is incorrect. (See *People v. Balderas* (1985) 41 Cal.3d 144, 201 ["The plain meaning of subdivisions (b) and (c) of section 190.3 is that the jury must consider any *violent* criminal activity by the defendant, whether or not it led to prosecution and conviction, and any 'prior *felony conviction*' (italics added), whether the underlying offense was violent or nonviolent."].) Defendant's prior burglary convictions in Oregon and Alaska clearly qualify as prior felony convictions. Defendant offers no persuasive argument to the contrary.

Finally, even if we were to assume for the sake of argument that defendant is correct in asserting that the trial court erred in admitting defendant's prior burglary convictions at the penalty phase, we perceive no prejudice. The jury did not learn of defendant's prior convictions until after it already had considered the evidence that defendant had committed the charged murders and had found him guilty of those crimes as well as other offenses. Under these circumstances, there existed no reasonable possibility of a different outcome at the penalty phase, had the prior burglary convictions not been admitted.

D. Denial of Pretrial Motion to Exclude Other-Crimes Evidence Pertaining to the Deaths of Tok Kim and Janette Cullins

Defendant contends the superior court abused its discretion in denying his motion to exclude evidence pertaining to the death of Tok Kim in Alameda County and the murder of Janette Cullins in San Diego County. He argues that the judgment must be reversed in its entirety due to the lower court's admission of this

(footnote continued from previous page)

before the enactment of that amendment, a trial court retained the authority to dismiss a prior conviction allegation under the statute.

“other-crimes evidence” in purported violation of defendant’s constitutional rights. We conclude defendant’s position is without merit.

In March 1987, approximately two years prior to the commencement of defendant’s trial, the prosecution informed the defense of its intention to introduce, at the guilt phase of defendant’s trial, evidence of the then-pending, unadjudicated crimes charged against defendant in Alameda and San Diego Counties. In July 1987, defendant responded to the prosecution’s notice by filing a “motion to exclude evidence of pending prosecutions in Alameda and San Diego Counties.” In July 1988, the superior court considered and summarily denied defendant’s motion. Approximately one year later (on the eve of trial), defendant renewed the motion to exclude this evidence, limiting the motion to the Kim matter only and asserting that the prosecution had failed to disclose laboratory and related police reports revealing that defendant had not been the donor of semen detected on a bedspread in Kim’s apartment. The court summarily denied this motion as well.¹³

As we have summarized in the foregoing statement of facts, at the guilt phase of trial the prosecution, over defense objection, introduced evidence pertaining to the death of Tok Kim and the murder of Janette Cullins. Defendant had yet to be tried in those cases and, in the wake of the death judgments rendered in the present case and in the subsequently tried case involving Janette Cullins, Alameda County dismissed the charges against him based on the death of Tok Kim. As noted, defendant contends the trial court below erred in permitting the prosecution to introduce evidence of these crimes.

¹³ The latter motion was captioned: “Motion for mistrial, or in the alternative renewed motion in limine re ‘Oakland’ evidence of other misconduct.”

Character evidence is not admissible to show conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) This type of evidence sometimes is referred to as evidence of criminal disposition or propensity. (E.g., *People v. Sam* (1969) 71 Cal.2d 194, 203 [77 Cal.Rptr. 804, 454 P.2d 700].) The rule excluding such evidence, however, is qualified by Evidence Code section 1101, subdivision (b), which provides: “Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . opportunity, intent, preparation, plan, knowledge, identity . . .) other than his or her disposition to commit such an act.”

“Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403.) On appeal, the trial court’s determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Scheid* (1997) 16 Cal.4th 1, 14; *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239; see also *People v. Hayes* (1990) 52 Cal.3d 577, 617; *U. S. v. Khan* (9th Cir. 1993) 993 F.2d 1368, 1376.)

“To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 403.) Evidence of an uncharged crime is relevant to prove identity only if the

charged and uncharged offenses display a ‘ “pattern and characteristics . . . so unusual and distinctive as to be like a signature.” ’ (*Ibid.*, quoting 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803.) ‘The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks.’ (*People v. Thornton* (1974) 11 Cal.3d 738, 756, italics in original, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)” (*People v. Kipp* (1998) 18 Cal.4th 349, 369-370.)

Viewing the evidence in the light most favorable to the trial court’s ruling, certain of the charged and uncharged offenses displayed common features that revealed a highly distinctive pattern. As noted in our summary of the evidence, Jillette Mills and Susan Knoll each was fatally strangled and their bodies found in a closed bedroom closet; in the uncharged offense involving Janette Cullins, the victim’s body also was found strangled in her closed bedroom closet. Although defendant notes certain differences in the circumstances surrounding the victims’ deaths, the combination of fatal strangulation and placement of a young woman’s body in a closed bedroom closet is both highly distinctive and suggestive that the same person perpetrated the crimes involving Knoll, Mills, and Cullins.

To be highly distinctive, the charged and uncharged crimes need not be mirror images of each other. Thus, although there were certain differences in the crimes committed against Knoll and Mills, and those against Cullins, such distinctions went to the weight of the evidence and did not preclude the prosecution from introducing the evidence regarding Cullins’s murder.

Although the evidence of Kim’s death did not share the distinctive features of the murders charged in the present case, it clearly was relevant on the issues of

intent and a common plan.¹⁴ The vehicle owned by Tok Kim was missing at the time her body was found but later was discovered near the residence of Knoll and Mills. Subsequently, a white Datsun 280 ZX matching the description of Mills's vehicle, missing since the time Mills's body was found, was observed in the vicinity of Cullins's apartment near the time of Cullins's murder. When arrested, defendant had on his person or in the Datsun an eclectic array of objects identified as having belonged to: (1) each of the three victims in the murders charged in the present case, (2) Janette Cullins, and (3) Tok Kim.

The shared characteristics of the killings, as well as the presence of evidence associated with a particular victim or victims at events related to the next murder, indicate that when defendant committed the crimes charged in the present case as well as the uncharged crimes, he acted pursuant to a common plan to kill and steal from his victims.

"A lesser degree of similarity is required to establish relevance on the issue of common design or plan. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 402.) For this purpose, 'the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.' (*Id.*, at p. 403.)

"The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 402.) For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" ' (*Ibid.*)" (*People v. Kipp, supra*, 18 Cal.4th 349,

¹⁴ Although no cause of death was established as to Kim, as noted a curtain tie was found beneath her neck. In his briefing, defendant characterizes Kim's death as an "uncharged homicide."

371.) Considering the shared characteristics noted above, we conclude that the trial court did not abuse its discretion in implicitly determining that the charged and uncharged offenses were sufficiently similar to support an inference that defendant harbored the same intent — to kill and to steal — in each instance. (See *People v. Kipp, supra*, 18 Cal.4th 349, 371.)

As we stated in *Kipp*, “There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 404–405.) On appeal, a trial court’s resolution of these issues is reviewed for abuse of discretion. (*Id.* at p. 405.) A court abuses its discretion when its ruling ‘falls outside the bounds of reason.’ (*People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)” (*People v. Kipp, supra*, 18 Cal.4th 349, 371.)

We find no abuse of discretion. Evidence of the circumstances surrounding the death of Tok Kim was highly probative, as it helped to establish a link between her recent acquaintance with defendant and her sudden death, and the murders of Susan Knoll, Jillette Mills, Bonnie Guthrie, and Janette Cullins that shortly followed. Because the five women each died within a period of approximately four days, the proximity of these incidents to each other “further enhanced” the probative value of the other crimes evidence. (See *People v. Kipp, supra*, 18 Cal.4th 349, 371.) Kim’s Honda was discovered shortly after her death, hundreds of miles from her residence, parked in front of the apartment in which the bodies of Knoll and Mills were discovered, and at approximately the same time that Mills’s car disappeared. Evidence of the circumstances of Cullins’s death was probative for the same reason. Mills’s missing white Datsun 280 ZX matched the

description of the vehicle that a neighbor observed rapidly driving away from the apartment building in which Cullins (who also had been acquainted with defendant) had resided. The cause of Cullins's death, and the location of her body in a bedroom closet, closely resembled both the manner of killing and the concealment utilized by the perpetrator at the Knoll/Mills crime scene. As noted, at the time of defendant's arrest items linking him to all five deceased women were discovered on his person or in Mills's vehicle.

These evidentiary links were highly probative as to the identity of the perpetrator of the crimes, as well that person's murderous and larcenous common plan and intent. The prosecution was required to prove in its case-in-chief that defendant intended to kill Knoll, Mills, and Guthrie, each of whom was fatally strangled. When the trial court ruled admissible the evidence in question, defendant had not conceded either the issues of identity or intent, nor did the prosecution possess other evidence proving these material disputed facts so conclusively that evidence of the Kim and Cullins deaths should have been excluded as merely cumulative. (See *People v. Kipp, supra*, 18 Cal.4th 349, 372.)

"Against this substantial probative value on material and contested issues, we must weigh the danger of undue prejudice to defendant, of confusing the issues, or of misleading the jury." (*People v. Kipp, supra*, 18 Cal.4th 349, 372.) Evidence of the Kim and Cullins crimes "posed a substantial danger of prejudice to defendant because a jury would be inclined to view [such] evidence . . . as evidence of his criminal propensities, and because a jury might well view defendant as deserving of punishment" for the Kim and Cullins crimes regardless of his guilt of the Knoll, Mills, and Guthrie murders. (*Ibid.*) "But prejudice of this sort is inherent whenever other crimes evidence is admitted (*People v. Ewoldt, supra*, 7 Cal.4th 380, 404), and the risk of such prejudice was not unusually grave here." (*People v. Kipp, supra*, 7 Cal.4th 349, 372.) The Kim death and the

Cullins murder were not significantly more inflammatory than the charged offenses; the prosecution was unable definitively to establish that Kim had died at the hands of another, and there was no evidence that Cullins suffered sexual assault as had Mills and Guthrie.

Moreover, the jury was instructed correctly pursuant to CALJIC Nos. 2.09 and 2.50 as to the limited purposes for which it might consider the evidence of the Kim and Cullins matters. The instructions conveyed that evidence relating to those events could not be considered to prove defendant's bad character or criminal disposition.¹⁵

¹⁵ The jury was instructed pursuant to CALJIC No. 2.09, as follows:
"Evidence concerning Tok Chum Kim in Oakland and Janette Cullins in San Diego was admitted for the limited purpose of determining if it shows the identity of the person who committed the crime of which the defendant is accused.

"Do not consider such evidence for any purpose except the limited purpose for which it was admitted."

The jury also was instructed pursuant to CALJIC No. 2.50, as follows:

"Evidence has been introduced for the purpose of showing that the defendant committed [crimes] other than that for which [he] is on trial.

"Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

"[The existence of the intent which is a necessary element of the crime charged;]

"The identity of the person who committed the crime, if any, of which the defendant is accused;]

"[A motive for the commission of the crime charged;]

"[The defendant had knowledge of the nature of things found in [his] possession;]

"[The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;]

"[The defendant did not reasonably and in good faith believe that the person with whom [he] engaged or attempted to engage in a sexual act consented to such conduct;]

(footnote continued on next page)

Defendant also contends that in view of the summary nature of the trial court's ruling denying defendant's motion, the court "failed to engage in the balancing process required under Evidence Code section[s] 352 or section 954," and on that basis reversal is required. We disagree. The parties agreed to present the issue to the court based on the strength of their written submissions (that is, without oral argument), prompting the court to observe that the parties' arguments "certainly were completely handled in the papers." Although "the better practice" would have been for the trial court, prior to issuing its ruling, to have set forth on the record its balancing of the probative value of the evidence against its prejudicial effect (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 793), its ruling did not have to be that explicit. (See *People v. Garceau* (1993) 6 Cal.4th 140, 177-179 [trial court's failure to state on the record that it had weighed prejudice against probative value held not erroneous when parties had argued at length as to the admissibility of certain testimony that allegedly was unduly prejudicial to the defendant]; *People v. Raley* (1992) 2 Cal.4th 870, 894-895 [trial court's explicit rejection of the Evidence Code section 352 claim deemed to be sufficient, the court "having heard lengthy argument"]; *People v. Mickey* (1991) 54 Cal.3d 612, 655-656 [in upholding admissibility of the defendant's letters that assertedly were privileged under Evidence Code section 980, observing that although the trial court could have been more explicit in explaining its reasoning, "we review the ruling, not the reasoning."]; see also *People v. Triplett* (1993) 16 Cal.App.4th 624,

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"[The crime charged is a part of a larger continuing plan, or scheme].

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."

626-629 [reviewing the evolution of the case law in this area].) In the present case, the parties submitted the issue to the court on the strength of their thoroughly prepared written arguments. In view of the court's indication it had reviewed such submissions, the weighing process contemplated by Evidence Code section 352 may be inferred.

In view of the foregoing, we conclude the trial court did not exceed the bounds of reason in determining that the probative value of the evidence of the Kim and Cullins matters "was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (See *People v. Kipp*, *supra*, 18 Cal.4th 349, 372.)

Finally, even if we were to assume that the trial court erred in denying defendant's motion to exclude the evidence relating to the deaths of Kim and Cullins, reversal would not be required unless it is reasonably probable the outcome would have been more favorable to defendant had such evidence been excluded. (*People v. Kipp*, *supra*, 18 Cal.4th 349, 374.) In view of the strong evidence implicating defendant in the charged murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, it is not reasonably probable that an outcome more favorable to defendant would have been reached in the absence of the evidence related to Kim and Cullins.

E. Denial of Motion for Severance of the Culver City Crimes (Knoll and Mills) from the West Los Angeles Crimes (Guthrie)

Defendant contends the trial court improperly denied his motion to sever defendant's trial on the "Culver City crimes" involving the murders of Susan Knoll and Jillette Mills, the rape of Mills, and the burglary of the apartment shared by Knoll and Mills (offenses that were alleged to have occurred on April 10, 1984)

from the “West Los Angeles crimes” involving the murder and rape of Bonnie Guthrie and the burglary committed at her apartment (offenses that were alleged to have occurred on April 11, 1984). Defendant argues that in denying the motion to sever and thereby compelling him to face “a joint trial of offenses arising from separate incidents on different dates,” the trial court denied defendant a panoply of state and federal constitutional rights, requiring reversal of the entire judgment. In particular, defendant maintains that “while the offenses are of the same class, the crimes were not inextricably connected in their commission, and the so-called common markers between the Mills/Knoll and Guthrie homicides can only be termed ‘minimally distinctive’ under close scrutiny.” Defendant further contends that the trial court erred in denying his motion to sever in the same summary fashion as the court had denied defendant’s motion to exclude the other crimes evidence, and in failing explicitly to weigh the relevant factors on the record and exercise its discretion. None of these claims has merit.

“Section 954 provides that ‘[a]n accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.’ Because both offenses involved murder and thus belonged to the same class of crimes, the statutory requirements for joinder were satisfied. Therefore, defendant can predicate error in denying the motion to sever only upon a clear showing of potential prejudice. (*People v. Osband* (1996) 13 Cal.4th 622, 666 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 [14

Cal.Rptr.2d 342, 841 P.2d 862], *affd. sub nom. Victor v. Nebraska* (1994) 511 U.S. 1 [114 S.Ct. 1239, 127 L.Ed.2d 583].¹⁶

“In reviewing this claim, we apply the familiar standard of review providing that the trial court’s ruling may be reversed only if the court has abused its discretion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 720 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Davis* (1995) 10 Cal.4th 463, 508 [41 Cal.Rptr.2d 826, 896 P.2d 119]; see *People v. Osband* [1996] 13 Cal.4th 622, 666; *People v. Cummings* (1993) 4 Cal.4th 1233, 1284 [18 Cal.Rptr.2d 796, 850 P.2d 1].) An abuse of discretion may be found when the trial court’s ruling ‘ “falls outside the bounds of reason.” ’ (*People v. Osband, supra*, 13 Cal.4th 622, 666.)

“ “The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” [Citation.] [¶] “The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.” [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a “weak” case has been joined with a “strong” case, or with another “weak” case, so that the “spillover” effect of aggregate evidence on several

¹⁶ “Proposition 115, adopted in June 1990, contained several new constitutional and statutory provisions on the subjects of joinder and severance. (See Cal. Const., art. I, § 30, subd. (a); § 954.1) Defendant was tried prior to the effective date of Proposition 115, and accordingly we apply the law predating Proposition 115 in our review of defendant’s claims regarding severance. (*People v. Arias* (1996) 13 Cal.4th 92, 126, fn. 7 [51 Cal.Rptr.2d 770, 913 P.2d 980].)” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1314.)

charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]’ (*People v. Sandoval*, *supra*, 4 Cal.4th 155, 172-173; *People v. Mayfield*, *supra*, 14 Cal.4th 668, 721; *People v. Memro* (1995) 11 Cal.4th 786, 849-850 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; *People v. Davis*, *supra*, 10 Cal.4th 463, 507-508; *People v. Mason* (1991) 52 Cal.3d 909, 933-934 [277 Cal.Rptr. 166, 802 P.2d 950]; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454 [204 Cal.Rptr. 700, 683 P.2d 699].)

“Furthermore, we have observed that the criteria enumerated in *Sandoval* are not equally significant. ‘[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled.’ (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172 [222 Cal.Rptr. 184, 711 P.2d 480]; see *People v. Mayfield*, *supra*, 14 Cal.4th 668, 721.) Cross-admissibility suffices to negate prejudice, but it is not essential for that purpose. Although ‘“we have held that cross- admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice.”’ (*People v. Sandoval*, *supra*, 4 Cal.4th 155, 173.)” (*People v. Bradford*, *supra*, 15 Cal.4th 1229, 1314-1316.)

In the present case, the trial court’s denial of defendant’s motion to sever clearly was based on certain obvious similarities among the crimes. “Pursuant to Evidence Code section 1101, subdivision (b), evidence that a defendant has committed an offense, although inadmissible to demonstrate a defendant’s *disposition* to commit crimes, may be received to establish, among other things, identity, intent, motive, or plan. To be admissible to demonstrate a distinctive *modus operandi*, the evidence must disclose common marks or identifiers, that,

considered singly or in combination, support a strong inference that the defendant committed both crimes. (*People v. Miller* (1990) 50 Cal.3d 954, 988-989 [269 Cal.Rptr. 492, 790 P.2d 1289]; *People v. Bean* (1988) 46 Cal.3d 919, 937 [251 Cal.Rptr. 467, 760 P.2d 996]; see *People v. Memro*, *supra*, 11 Cal.4th 786, 851; *People v. Ewoldt* (1994) 7 Cal.4th 380, 403 [27 Cal.Rptr.2d 646, 867 P.2d 757].)” (*People v. Bradford*, *supra*, 15 Cal.4th 1229, 1316.)

The Susan Knoll/Jillette Mills and Bonnie Guthrie offenses, having been committed approximately one day apart, each involved the murder by strangulation of young women whose belongings were found approximately one week later in defendant’s possession. On this basis alone, the evidence connecting defendant to the Knoll/Mills and Guthrie crimes would be cross-admissible if the court had ordered separate trials, thereby dispelling any inference of prejudice. (*People v. Bradford*, *supra*, 15 Cal.4th at 1315-1316.) Moreover, because both crime scenes involved murder and sexual assault, the evidence from each disclosed a commonality with regard to intent and plan (Evid. Code, § 1101, subd. (b)), while presenting little if any possibility that one of the charges or set of charges would have unduly inflamed the jury against defendant. Although all three women were not strangled in an identical manner — Mills and Guthrie were strangled by ligature, whereas Knoll was strangled manually — both crime scenes had in common a ligature strangulation, as well as the traumatic sexual assault of Mills and Guthrie. Nor did the prosecution join a “weak case” with a “strong” one — the evidence linking defendant to each crime was especially compelling. Further, Knoll and Guthrie were best friends, a circumstance that suggested one person committed the crimes against both victims in the two-day period, and that therefore supported the cross-admissibility of the evidence. The murders of each of the three women presented one or more special circumstances; because *each* one of the murders by itself formed the basis for capital charges to be brought

against the perpetrator, *joinder* did not lead to one set of crimes being “elevated” to capital status.

Although the better practice would have been for the trial court to make clear on the record the basis for its denial of defendant’s motion to sever, the court’s failure to articulate its reasoning does not invalidate its ruling or undermine the correctness of that denial.

Further, we observe that even had defendant demonstrated that the evidence would not have been cross-admissible, he has failed to establish prejudice. He has not demonstrated that one offense or set of offenses was “significantly more likely to inflame the jury against defendant, since the murders were similar in nature and equally gruesome. Defendant has not shown that evidence of guilt was significantly stronger in one case, creating the danger that that case would be used to bolster the weaker case, because the prosecutor’s evidence was nearly equal in strength” in establishing defendant’s involvement in the Knoll/Mills and Guthrie murders. (*People v. Bradford, supra*, 15 Cal.4th at 1317-1318.)

Under these circumstances, no abuse of discretion appears. We therefore reject defendant’s claims of error.

F. Pretrial and Midtrial Motions Contesting the Sufficiency of the Evidence of Felony Murder in the Deaths of Susan Knoll, Jillette Mills, and Bonnie Guthrie, and of the Special Circumstances of Burglary and Rape

Prior to trial, defendant moved pursuant to section 995 to strike and set aside the substantive charges and special circumstances pertaining to the murders and to other offenses involving victims Susan Knoll, Jillette Mills, and Bonnie Guthrie. The motion was denied. Defendant thereafter petitioned the Court of Appeal for writ relief, which also was denied. At the close of the prosecution’s case-in-chief, defendant filed a motion for judgment of acquittal, pursuant to section 1118.1. This motion, too, was denied.

Defendant generally contends there was insufficient evidence (1) to support his conviction, based on the theory of felony murder, for the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, and (2) to find true the special circumstance allegations of burglary and rape. Defendant specifically asserts the evidence was inadequate to establish that he harbored a felonious intent upon entering the victims' residences; he notes the premises bore no sign of forced entry. Defendant's position is without merit.

The law applicable to a claim of insufficiency of the evidence is well-settled: " 'In reviewing [a claim regarding] the sufficiency of the evidence, we must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " ' [Citation.] If we determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution [citation]." (*People v. Osband*, *supra*, 13 Cal.4th 622, 690; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 413-414; *People v. Morris* (1988) 46 Cal.3d 1, 19.)

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus with malice aforethought." At the time the crimes were committed, first degree murder could be accomplished by a "murder . . .

committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288” (Former § 189, added by Stats. 1982, ch. 950, § 1, p. 3440.) Rape was defined in pertinent part as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator [that was] accomplished against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.” (Former § 261, subd. (2) added by Stats. 1984, ch. 1635, § 79.5, p. 5865.) Burglary was defined, in pertinent part, as an entry into any “room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony” (Former § 459, added by Stats. 1984, ch. 854, § 2, p. 2896.)

With regard to the murder charges, we observe that Susan Knoll, Jillette Mills, and Bonnie Guthrie each was fatally strangled; Knoll manually, Mills and Guthrie by ligature. There is no question that each of these killings was unlawful and was committed with malice aforethought. Defendant’s palm print was discovered in the apartment shared by Susan Knoll and Jillette Mills where their bodies were found.

Similarly, the evidence was sufficient to establish rape; Mills’s and Guthrie’s bodies bore signs of having suffered traumatic sexual assault, and seminal fluid discovered on a white nightgown in the apartment was consistent with defendant’s PGM type and that of 15.8% of the population.

With regard to the offense of burglary, evidence of a forced entry is not required to establish felonious intent; defendant’s intent instead may be inferred from all of the facts and circumstances disclosed by the evidence. (*People v. Matson* (1974) 13 Cal.3d 35, 41.) Defendant’s commission of crimes in close, temporal proximity, combined with a very similar *modus operandi* in each incident, strongly indicates that he entered the residences with the requisite felonious intent. (*Ibid.*)

Defendant was arrested driving Mills's stolen Datsun 280 ZX, containing an Alpha Beta supermarket CASHEX card identified as having belonged to Knoll; towels, athletic wear, and photographic equipment identified as having belonged to Mills; and three hand-woven sweaters identified as having belonged to Bonnie Guthrie.

In view of the evidence summarized above, the jury reasonably could have inferred that the murders of Knoll, Mills, and Guthrie occurred in the course of defendant having committed the felonies of burglary and rape. The evidence adduced at trial clearly was sufficient, for purposes of the felony murder rule and the special circumstances alleged, to establish that defendant committed rape and burglary.

G. Motion to Reconsolidate the Los Angeles, Alameda, and San Diego County Cases

As originally filed, the complaint against defendant charged all of the crimes allegedly committed in Alameda, Los Angeles, and San Diego Counties in a single pleading. Defendant subsequently moved to dismiss the charges arising from the Alameda and San Diego crimes committed against Tok Kim and Janette Cullins, respectively. The prosecution did not oppose the motion, instead informing defendant that if the motion were granted, the crimes committed in Alameda and San Diego Counties would form the basis for a refiling of the charges against defendant in those counties.¹⁷

¹⁷ At the hearing on defendant's motion to sever, the prosecutor observed: "The law is very clear that venue objections must be made in a timely fashion or they are forever waived. This is the correct time for making such a motion, and I think there is no legally tenable ground the People would urge for the court to deny the motion. In other words, I think the motion is well-taken.

"I filed the case in its present form for two primary or three primary reasons. First, because it seemed to me quite clear that this is a series of crimes in

(footnote continued on next page)

On January 28, 1986, the court granted defendant's motion to dismiss the charges involving the crimes committed in Alameda and San Diego Counties. Defendant thereafter separately was charged in San Diego County for the murder of Janette Cullins, and was transferred to that county for arraignment, preliminary hearing, and other pretrial motions. Defendant also was charged in Alameda County with murder and related offenses involving Tok Kim.¹⁸

On August 8, 1988, more than two and one-half years after the court granted defendant's motion to dismiss the Alameda and San Diego County charges, defendant — now represented by new counsel — moved to reconsolidate the Alameda, Los Angeles, and San Diego cases. At the hearing conducted 10 days later, defense counsel informed the court that the motion was made over

(footnote continued from previous page)

the general sense connected in their commission. It made sense to me that there be one prosecution rather than three separate prosecutions, and in order to foreclose a later objection in Oakland and San Diego, it seemed to me important that the defense be given first an opportunity to have this case tried as one and secondly be put on notice that if only the Los Angeles crimes were charged here that it would be clear that both Oakland and San Diego were going to go forward with their cases as capital cases and that the defense would have to be prepared to defend the crimes committed in Oakland and in San Diego and could not then be heard in those two counties to urge that this should have been prosecuted all in Los Angeles County.

"[¶] . . . [¶]

"So, with that in mind, the defendant is put on notice now that there will be prosecutions in Oakland and San Diego.

"[¶] . . . [¶]

"Thus, what the defense has chosen to do is to accept the inevitability of three separate death penalty trials with the attendant risk of three death penalty verdicts by juries, three separate appeals, any [one] of which not being successful would result in the ultimate punishment."

¹⁸ As previously noted (*ante*, p. 29), the Alameda County prosecution ultimately was dismissed after the Los Angeles and San Diego County death judgments were rendered against defendant.

defendant's objection.¹⁹ After hearing the parties argue the issue and observing that the disagreement between defendant and his attorneys as to whether to seek reconsolidation "[d]oes raise an interesting issue," the court granted defense counsel's request for one additional day in which to review the matter with defendant. At the hearing the next day, defense counsel informed the court that notwithstanding counsel's efforts to persuade defendant to seek reconsolidation, defendant remained in "clear opposition" to the motion. The court determined that defendant's position on the issue was "paramount," and denied the motion to reconsolidate.²⁰

On appeal, defendant contends the trial court erred in denying his motion to reconsolidate the Alameda, Los Angeles, and San Diego cases. Specifically, defendant contends that his trial attorneys' decision to seek reconsolidation over defendant's objection fell within counsel's "tactical prerogative" to "waive"

¹⁹ At the hearing on the motion to reconsolidate, defense counsel represented to the court: "I . . . am prepared to indicate with the utmost clarity, that Mr. Carter opposes the motion to reconsolidate. [¶] . . . [¶] Mr. Carter's position on the motion to reconsolidate, his personal position is that he is opposed to the motion."

²⁰ The court found: "The bottom line is that Mr. Carter is facing three chances to get the death penalty as the cases stand now. If they were consolidated, there would be but one.

"And just from a logical standpoint it would seem like his odds are better with consolidation than the cases being tried in three separate jurisdictions as they're set up now.

"On the other hand, it's the court's view that this is a monumental issue and that it is one of fundamental importance and at this point in time I cannot see overriding Mr. Carter's desires in telling the District Attorney to set in motion procedures to bring all these cases together.

"[¶] . . . [¶]

" . . . I think this is the type of decision that Mr. Carter is entitled to make, and no matter what the court's personal view is to the benefit of his making that decision, I don't think it's the kind that can be overridden, I think Mr. Carter's decision will have to remain the paramount one in this issue and the motion to reconsolidate is denied."

defendant's right to a jury drawn from the vicinage where the crimes were committed, and that the trial court's denial of the motion violated defendant's rights to "due process of law, fair trial, burden of proof, effective assistance of counsel, death eligibility and reliable determinations of guilt and penalty."

Although it is questionable whether the trial court was correct in determining that defendant, rather than defense counsel, possessed the "paramount" authority to decide whether a motion to reconsolidate the charges should have been proffered (see, e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 935-939), even if the trial court erred in this determination we conclude that reversal of the judgment is not warranted because the error was not prejudicial. Had the trial court granted defense counsel's motion to reconsolidate the Alameda and San Diego charges with the Los Angeles charges, there is no reasonable probability (or, for that matter, possibility) that defendant would have fared better in a consolidated trial involving these additional charges than he did in a trial of the Los Angeles charges alone. Defendant presents no persuasive basis for concluding that a jury that imposed the death sentence for three murders would have imposed a lesser sentence if defendant had been charged in this proceeding with additional crimes, including murder.

Defendant contends that a trial court's error in failing to consolidate charges should be characterized as "structural error" that requires reversal without any showing of prejudice. (See, e.g., *People v. Cahill* (1993) 5 Cal.4th 478, 501-502.) Defendant presents no authority, however, to support the claim that a failure to consolidate charges arising from crimes committed in different counties constitutes structural error, and we conclude that the contention lacks merit. Although the severance of the Los Angeles charges from the San Diego and Alameda charges — on defendant's own motion — resulted in defendant having to face two separate capital trials, in the absence of any showing how defendant was prejudiced in either trial it is clear that the failure to consolidate the cases did

not undermine the basic fairness of either trial or warrant reversal of the judgment.²¹

H. Pretrial Ruling Denying Exclusion of the Evidence Related to Kim or of the Testimony of Ray Blevins, Based on the Prosecution's Failure to Timely Disclose Exculpatory Semen Evidence at the Kim Crime Scene

On June 15, 1989, five days before the prosecution commenced the presentation of its case-in-chief, defendant moved for a mistrial or, alternatively, for exclusion of the evidence pertaining to the death of Tok Kim or of the testimony of her former boyfriend Ray Blevins, on the ground the prosecution had failed to timely provide the defense with a 1986 laboratory report generated by the Oakland Police Department. The report indicated defendant was not the donor of semen found on a bedspread in Kim's apartment. Defendant argued that the prosecution's failure to respond in a timely fashion to a February 19, 1988 discovery order to produce any forensic evidence or related reports pertaining to the bedspread, coupled with Blevins's death in 1987, precluded the defense from ascertaining whether Blevins was the donor of the semen. In response, the prosecution argued that the report had not been timely disclosed because Oakland Police Department officials had failed to transfer it to the prosecutor and, in any event, the report was immaterial because the prosecution alleged that defendant had murdered Kim, not that he had raped her. The trial court denied defendant's motion in its entirety.

On appeal, defendant contends the trial court erred in denying his motion, asserting that the laboratory report was "highly material." We review the matter

²¹ In view of our determination that the trial court's denial of the motion to reconsolidate may not be set aside on appeal, we need not and do not address the broader question under what circumstances an intercounty reconsolidation order might be proper or improper.

for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 957.) No abuse of discretion appears. When the report was provided to the defense, the prosecution had yet to present its case-in-chief, and the defense still had time to formulate a response to the evidence. Moreover, as indicated above, a proffer of rape never had been part of the proffer of the other crimes evidence. Rather, the relevance of the evidence pertaining to Kim's death was twofold: (1) to demonstrate a similarity in the circumstances of her death to the murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie, pursuant to Evidence code section 1101, subdivision (b), and (2) to establish a link between defendant and the Los Angeles County murders of Susan Knoll, Jillette Mills, and Bonnie Guthrie based upon the circumstances that Kim's *vehicle* was parked outside the apartment occupied by Knoll and Mills, and that Mills's vehicle, containing possessions belonging to each of the victims, was being driven by defendant at the time of his arrest. The discovery of semen on Kim's *bedspread*, and the report establishing that defendant had not been the donor of that fluid, was, at best, of marginal significance in the prosecution's case against defendant with regard to the Los Angeles County murders. Therefore, defendant was not prejudiced by the prosecution's belated disclosure of the laboratory report prior to the swearing-in of the jury and the introduction of evidence.

Defendant makes the related assertion that the prosecutor misled the jury by arguing that the circumstances surrounding the deaths of each of the victims, including Tok Kim, had sexual assault as a common marker. The record belies this claim. In his closing summation to the jury, which was relatively brief in view of the number of crimes charged against defendant, the prosecutor did not assert that Kim had been raped or otherwise sexually assaulted, and instead made clear that only "two [victims] were raped" and that "[t]he evidence relating to Miss Kim [was] offered to you for your determination in how the defendant was

involved in this and, if he was, how he relates to all of this.” Later in his summation, the prosecutor asked, rhetorically if also ambiguously, “When did [defendant] form the intent to steal or to rape? Was this, in the case of Miss Kim, which is not before you as a finding that you have to make, an afterthought? Certainly it’s possible.” The fleeting reference to Kim in this context hardly suggested to the jury that defendant had sexually assaulted her; to the contrary, the prosecutor explicitly reminded the jury that it need not make any findings as to Kim. Again, no prejudice appears.

I. Pretrial Ruling Admitting the Alameda County Eyewitness Identifications

As part of the police investigation following the discovery of Tok Kim’s body on April 13, 1984, Oakland Police Sergeant Raymond Conner prepared a photographic lineup containing defendant’s photograph as well as the photographs of five other individuals (members of the Oakland Police Department, shown wearing street clothes, without indicia of their occupation). The lineup was shown to nine witnesses, eight of whom identified defendant as the man they saw with Kim, and one of whom alternated between selecting defendant’s image and that of one other individual depicted in the lineup. The order in which the photographs were arranged was changed between presentations to the witnesses, who were separately shown the lineup. At a pretrial proceeding, defendant moved to suppress the photographic identifications as having been the product of an unduly suggestive lineup. Following an evidentiary hearing, in which Sergeant Conner testified, the court denied the motion, observing: “[C]ertainly there are some differences, as there always are in photographs, but I don’t find that the photographic lineup was unduly suggestive.”

On appeal, defendant renews his contention that the lineup was impermissibly suggestive, “resulting in a tainted in-court identification critical to

the People's case." He asserts the testimony given by several of these witnesses at trial deprived him of his federal and state constitutional rights to due process of law, a fair trial, confrontation, an impartial jury, and reliable determinations of guilt, death eligibility, and penalty. Specifically, defendant contends: (1) he was the only person whose photograph depicted an individual wearing an orange shirt that resembled a "jail jumpsuit"; (2) the photograph of defendant was of "booking-photograph quality," as distinguished from the Polaroid photographs of the other individuals depicted in the lineup; (3) upon identifying defendant's photograph, the witnesses were asked to sign their names on the reverse side of the image, a technique that "subtl[y] . . . reinforce[d]" and tainted the witnesses' identification of defendant.

" 'In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) "whether the identification procedure was unduly suggestive and unnecessary," and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)' (*People v. Wash* [1993] 6 Cal.4th [215,] at p. 244.)" (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367.) Whether we review deferentially or independently the trial court's finding regarding suggestiveness (see *id.*, at p. 367; *People v. Johnson* (1992) 3 Cal.4th 1183, 1216-1217), defendant's position lacks merit.

Our review of the photographs contained in the lineup indicates that defendant overstates the significance of the distinguishing characteristics seen in the photographs, and overlooks their more compelling general similarities. Each one of the six color photographs is approximately the same size, and depicts a middle-aged or somewhat younger adult male with a mustache and dark hair. Two of the individuals are shown wearing white t-shirts, two are seen wearing light-colored "dress" or "polo" shirts, one wears a plaid shirt, and one individual —

defendant — is wearing an orange shirt. Nothing about defendant's shirt identifies it as a "jail jumpsuit" or any other type of jail-issued clothing, and even if it had, a conclusion that the lineup was unduly suggestive would not necessarily follow. (*People v. Johnson, supra*, 3 Cal.4th 1183, 1217 ["The fact that defendant was the only person depicted in jail clothing . . . was not unduly suggestive under the circumstances present here."].) The expressions exhibited by the individuals are roughly comparable: each has his eyes open and his mouth closed, except for one individual whose mouth is slightly parted. Such distinctions are immaterial. (*Id.*, at p. 1217 [minor differences in facial hair among the participants in a photo lineup held not to be suggestive].) Although the size of the white border around defendant's photograph is slightly larger than the border seen on the Polaroid images, and the Polaroid images are glossy while the image of defendant is semi-gloss, such trivial distinctions also are immaterial. (*Id.*, at p. 1217 [differences in background color and image size among the photographs held not to render the lineup impermissibly suggestive].) The witnesses clearly were instructed to consider the *persons* depicted, not whether a particular image was potentially distinguishable from the others based upon variations in photographic composition or processing.²²

Nor do we attach significance to Sergeant Conner's request that the witnesses write their names on the backs of the particular photographs they

²² Prior to viewing the photographs, the witnesses were admonished by Sergeant Conner: "You'll be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person that committed the crime. You're not obliged to identify anyone. [¶] It's just as important to free innocent persons from suspicion as to identify guilty parties. [¶] Please do not discuss the case with other witnesses or indicate in any way that you have or have not identified someone, other than to myself."

identified. Although it would have been preferable to employ a more neutral recordation procedure — for example, one in which a witness did not discover upon selecting an individual from the lineup that other witnesses previously had identified the same person — we disagree with defendant that the procedure utilized by Conner was unduly suggestive or represented a “subtle method of reinforcement.” Because the witnesses’ signatures were added only *after* each witness had made his or her selection, we find no basis for concluding that the witnesses were induced to identify defendant’s image. (Compare *People v. Ochoa*, *supra*, 19 Cal.4th 353, 411-413 [photographic identification of the defendant upheld notwithstanding the circumstance that his photograph was the only one taken in profile: “ ‘A procedure is unfair which suggests *in advance of identification* by the witness the identity of the person suspected by the police.’ ”] (Italics added.)

In sum, regardless of the applicable standard of review, we conclude that defendant has failed to meet his burden of establishing that the photo identification procedure used here was unduly suggestive. (See *People v. Carpenter*, *supra*, 15 Cal.4th 312, 367.) We therefore need not reach the question “whether the identification was nevertheless reliable under the totality of circumstances.” (*People v. Carpenter*, *supra*, 15 Cal.4th 312, 366-367; see also *People v. Ochoa*, *supra*, 19 Cal.4th 353, 413; *People v. Johnson*, *supra*, 3 Cal.4th 1183, 1218.)²³

²³ Assuming for the sake of argument that the witnesses’ in-court identifications of defendant as the man whom they saw in Alameda County with Tok Kim were tainted by unduly suggestive identification procedures at the pretrial stage, any error clearly was harmless in view of other evidence that directly linked defendant to Kim and to the murder victims in Los Angeles and San Diego Counties.

J. Pretrial Ruling Admitting Photographs and Testimony of Victims' Relatives Identifying Victims' Property

At a pretrial hearing, defense counsel made several motions in limine pertaining to evidence involving the three Los Angeles County murder victims, Jillette Mills, Susan Knoll, and Bonnie Guthrie, as well as the San Diego County murder victim, Janette Cullins, and the Alameda County deceased woman Tok Kim. Specifically, counsel offered a broad range of stipulations in an effort to prevent the prosecution from introducing exhibits depicting post-mortem photographs of the five individuals (including close-up images of various wounds) and testimony of family members as to the victims' ownership of various items of personal property discovered in Mills's Datsun 280 ZX.²⁴

Immediately prior to the parties' opening statements, outside the jury's presence, the defense renewed its offers to stipulate that on a certain date, Knoll and Mills died by strangulation. Counsel argued that the stipulation "must be accepted," emphasizing in particular the potentially prejudicial impact of one close-up photograph depicting a dark wound on the neck of Knoll's body, an image that counsel described as "terribly disturbing and in my opinion prejudicial." Counsel further offered stipulations as to the testimony to be given by family members. The prosecution rejected the proffered stipulations.

At trial, defense counsel renewed the offer to stipulate that Knoll and Mills "died of strangulation" and, in view of the prosecution's rejection of the proffered stipulations, counsel objected under Evidence Code section 352 to the introduction of two coroner's photographs, one depicting the wound to Knoll's neck, the other depicting bruises to Guthrie's vaginal area. The trial court overruled defendant's

²⁴ Defense counsel also requested, and the prosecutor agreed to, withdrawal of a photograph that depicted Kim when she was alive. The prosecutor also withdrew photographs depicting Guthrie and Cullins when they were alive.

objections to the introduction of the photographs, observing: "I don't feel that they're disturbing to the point of being excludable."²⁵

The trial court thereafter admitted the challenged photographic evidence and the testimony of various relatives identifying the items of personal property found in the Datsun 280 ZX.

On appeal, defendant renews his challenge to the above-described evidence. He contends that because, in view of "the lack of substantive defense presented at [the] guilt phase, trial counsel were willing to stipulate to many facts they considered not in dispute," including the strangulation of victims Knoll, Mills, and Guthrie and the victims' ownership of the items found in the Datsun 280 ZX, the prosecution was required to accept the stipulations offered by the defense. Defendant further contends that the photographic evidence was unduly gruesome as well as cumulative, and that evidence pertaining to the personal property found in the car — that is, the "highly emotional" testimony given by Sandra Pender

²⁵ The prosecution also introduced into evidence the following photographic evidence: (1) two photographs depicting Kim's clothed body lying face-down on the floor, each showing post-mortem discoloration on her arms; (2) three photographs showing the clothed bodies of Knoll and Mills stacked in their apartment bedroom closet; (3) two photographs showing Guthrie's clothed body lying face-down on the floor of her apartment and one photograph showing her clothed body after investigators placed her on her back, revealing discoloration to her arms and face and a stain on the midsection area of her pants; (4) two coroner's closeup photographs, each showing a portion of Guthrie's body — one showing her discolored facial and neck area and wounds to her nose and lower lip, and one showing her bruised neck; (5) three photographs depicting Cullins's partially clothed and discolored body lying in her apartment bedroom closet, one of which showed a closeup of her stained left hand; (6) two photographs, including one depicting Cullins's partially clothed and discolored body lying in the apartment bedroom closet, and one showing an apparent bloodstain on the bedding, and (7) one coroner's closeup photograph depicting Cullins's neck area, showing an abrasion, discoloration, and an apparent bloodstain on her jaw.

(Susan Knoll's sister), Jennifer Bollman (Jillette Mills's sister), and George Cullins (Janette Cullins's father) — “was clearly the subject of stipulation or other available procedures, such as identification by police personnel.” Defendant assigns further error to the trial court's failure to engage in a weighing process as to the admissibility of the photographs in response to defendant's objection on Evidence Code section 352 grounds. Finally, defendant asserts that he was denied various of his state and federal constitutional rights because of “the trial court's erroneous rulings admitting inflammatory and prejudicial autopsy and family evidence [regarding the items found in the car].”

As we shall explain, none of defendant's contentions have merit.

We recently set forth the applicable analysis in *People v. Heard* (2003) 31 Cal.4th 946: “In reviewing the ruling of the trial court, we reiterate the well-established principle that ‘the admissibility of this evidence has two components: (1) whether the challenged evidence satisfied the “relevancy” requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.’ (*People v. Scheid* (1997) 16 Cal.4th 1, 13.)” (*People v. Heard, supra*, 31 Cal.3d at p. 972.) We address these issues in turn.

1. Relevance of the Photographs and Testimony of Relatives

“ ‘The rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible (Evid. Code, § 350; *People v. Crittenden*[, *supra*,] 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681), and all relevant evidence is admissible unless excluded under the federal or California Constitution or by

statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).) Relevant evidence is defined in Evidence Code section 210 as evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” The test of relevance is whether the evidence tends “‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” (*People v. Garceau, supra*, 6 Cal.4th at p. 177.) The trial court has broad discretion in determining the relevance of evidence (*ibid.*; *People v. Crittenden, supra*, 9 Cal.4th at p. 132; *People v. Babbitt, supra*, 45 Cal.3d at p. 681) but lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 132; *People v. Burgener* (1986) 41 Cal.3d 505, 527.)’ (*People v. Scheid, supra*, 16 Cal.4th 1, 13-14.)” (*People v. Heard, supra*, 31 Cal.4th 946, 972-973.)

In his opening brief, defendant does not challenge the relevance of the photographs depicting the deceased women, although in his reply brief he adopts a more critical stance. Defendant’s ambivalent position is inconsequential. The images plainly were relevant to the proceedings at the guilt phase of trial (*People v. Heard, supra*, 31 Cal.4th 946, 973-975 [and cases cited therein]), as well as at the penalty phase, to demonstrate circumstances in aggravation. (*People v. Thompson* (1990) 50 Cal.3d 134, 182.) Nor does defendant clearly assert a relevancy challenge to the testimony regarding the property found within the Datsun 280 ZX, although his characterization of that testimony as being of “minimal probative value,” which in his reply brief is amplified to “irrelevant, cumulative, and prejudicial,” could be construed as a challenge to its relevancy. To the extent defendant’s characterization constitutes a relevance-based challenge, we reject it — the testimony linking the property to the women clearly fell within Evidence Code section 210’s definition, and was not cumulative. (See *People v. Heard, supra*, 31 Cal.4th 946, 973-975 [and cases cited therein].)

2. The Photographs and Testimony Were Not Unduly Prejudicial

Defendant contends the trial court erred in denying his motion to exclude this evidence pursuant to Evidence Code section 352. Defendant maintains the photographs were gruesome and cumulative. He further contends the testimony given by relatives of Knoll, Mills, and Cullins was “highly emotional [and] outweighed the minimal probative value of such testimony.” The People disagree with defendant’s characterizations and contend the trial court did not abuse its discretion in finding that the probative value of the photographs and the testimony outweighed any potential prejudice. As we shall explain, we find no abuse of discretion.

“The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court’s exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]” (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.)

The photographs at issue “served to illustrate and corroborate the testimony given by various prosecution witnesses regarding the circumstances of the crime[s].” (*People v. Heard, supra*, 31 Cal.4th 946, 976.) “ ‘[I]nsofar as defendant is contending that the trial court was required to exclude the photograph[s] under Evidence Code section 352 because th[e] physical evidence was cumulative of the testimonial evidence presented, the trial court correctly rejected defendant’s argument. (See *People v. Wilson* (1992) 3 Cal.4th 926, 938 [“ ‘[W]e have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony.’ ”]; accord, *People v. Kaurish* (1990)

52 Cal.3d 648, 684; *People v. Thompson* (1988) 45 Cal.3d 86, 115.)’ (*People v. Scheid, supra*, 16 Cal.4th 1, 19.)” (*People v. Heard, supra*, 31 Cal.4th at p. 976.)

As to whether the photographs or the testimony in question had an unduly prejudicial effect, we observe that “ ‘[w]e have described the “prejudice” referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. (*People v. Garceau, supra*, 6 Cal.4th 140, 178.) As we previously have observed, victim photographs and other graphic items of evidence in murder cases always are disturbing. (*People v. Hendricks* (1987) 43 Cal.3d 584, 594.)’ (*People v. Crittenden, supra*, 9 Cal.4th at p. 134; accord, *People v. Fierro* (1991) 1 Cal.4th 173, 223.)” (*People v. Heard, supra*, 31 Cal. 4th at p. 976.) Here, the challenged photographs depict the wounds suffered by Knoll and Guthrie; “that they are graphic and unpleasant to consider does not render the introduction of those images unduly prejudicial. (See *People v. Navarette* (2003) 30 Cal.4th 458, 496 [rejecting the defendant’s contention that the ‘sexually suggestive nature’ of photographs taken of the victim rendered them unduly prejudicial, and holding that ‘[w]hen the victim of a murder has been stabbed directly between the breasts and left with her pants and underwear around her ankles, the defendant cannot complain that the jury is exposed to images of her nudity.’]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1194 [‘The fact that the exhibits involved blood was due to the crime, not the court’s rulings.’].)” (*People v. Heard, supra*, 31 Cal.4th at p. 976.)

Our independent review of the photographs introduced at the trial convinces us that, although they are unpleasant, they are not unduly gory or inflammatory. (*People v. Heard, supra*, 31 Cal.4th at pp. 976-977; *People v. McDermott* (2002) 28 Cal.4th 946, 998; *People v. Michaels* (2002) 28 Cal.4th 486, 531-532; *People v. Anderson, supra*, 25 Cal.4th 543, 590-592; *People v. Pride*,

supra, 3 Cal.4th 195, 243, *People v. Fierro*, *supra*, 1 Cal.4th 173, 223; *People v. Kelly* (1990) 51 Cal.3d 931, 963; *People v. Turner* (1990) 50 Cal.3d 668, 707; *People v. Coleman* (1988) 46 Cal.3d 749, 776.) “The photographs . . . do not appear to be of the sort that might inflame a jury. (See, e.g., *People v. Turner* (1984) 37 Cal.3d 302, 320, 321, and fn. 9, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [upholding trial court’s finding that four crime scene photographs, which included a photograph of one victim’s head in a large pool of blood and of another victim lying face up with bleeding wounds, were ‘not gruesome’]; see also *People v. Allen*, *supra*, 42 Cal.3d 1222, 1258 [victims’ bodies were not depicted ‘in a badly decomposed condition . . . or after they had been grossly disfigured during autopsy’].)” (*People v. Heard*, *supra*, 31 Cal.4th at p. 977.)

Further, “as we observed in *People v. Scheid*, *supra*, 16 Cal.4th 1, 20, ‘the trial court clearly and properly could find that the photograph[s were] not so gruesome as to have impermissibly swayed the jury “in light of the testimony detailing each and every fact relating to the crime scene and victims.”’ Certain “witnesses for the prosecution testified in detail as to what they observed when they first encountered [the bodies]. (See *People v. Allen*, *supra*, 42 Cal.3d 1222, 1258 [observing that the inflammatory nature of nine photographs ‘was relatively slight in comparison with the heinous nature of the crime presented to the jury through the testimony of witnesses’].)” (*People v. Heard*, *supra*, 31 Cal.4th at p. 977.) The jurors having heard that testimony, the photographic images taken of the victims once their bodies had been taken to the coroner’s facility were unlikely to have elicited an improper response from the jurors.

Nor were the photographs unduly prejudicial on the ground they were cumulative by reason of their corroboration of facts independently established by testimony. (See, e.g., *People v. Heard*, *supra*, 31 Cal.4th at pp. 977-978, and

cases cited therein.) Similarly, although the testimony of the victims' friends and family members identifying objects found in the Datsun 280 ZX may have been punctuated with emotion that is not unexpected in a capital trial (for example, Mills's sister, Jennifer Bollman, cried during her testimony), such testimony was not unduly prejudicial in view of the expression of that emotion or because ownership of the identified items might have been established by stipulation or other means. The circumstance that the defense might have preferred that the prosecution establish a particular fact by stipulation, rather than by live testimony, does not alter the probative value of such testimony or render it unduly prejudicial. The prosecution was not required to accept such a stipulation or other "sanitized" method of presenting its case. (*People v. Garceau*, *supra*, 6 Cal.4th 140, 182; see also *People v. Box* (2000) 23 Cal.4th 1153, 1199; *People v. Crittenden* (1994) 9 Cal.4th 83, 133.)

Moreover, as was the situation in *People v. Heard*, *supra*, 31 Cal.4th at p. 978, "even if the photographs engendered a disturbing response among the jurors, we believe the risk defendant would be prejudiced by that response was minimal, because the jury knew defendant had committed the acts described by the witnesses who had appeared before them." We believe that risk, as well as the risk that jurors somehow might have been improperly moved by the testimony of friends and family members toward a guilty verdict, was further minimized here by the circumstance that the defense at the guilt phase rested without calling a single witness.

Accordingly, we conclude the trial court reasonably determined that the probative value of the photographic and testimonial evidence outweighed its potentially prejudicial effect. Although, in the interest of creating a clearer record, the court could have been more explicit in setting forth its reasoning in denying defendant's motions and overruling defense objections relating to the challenged

evidence (see *People v. Green* (1980) 27 Cal.3d 1, 25 [“the record must affirmatively show that the trial judge did affirmatively weigh prejudice against probative value”]), we are persuaded that the court engaged in a deliberative weighing process and acted within its discretion under Evidence Code section 352 in admitting the photographic and testimonial evidence. (*People v. Heard, supra*, 31 Cal.4th at p. 978; *People v. Crittenden, supra*, 9 Cal.4th at p. 134; *People v. Wilson* (1992) 3 Cal.4th 926, 938; *People v. Mickey* (1991) 54 Cal.3d 612, 656; *People v. Cox* (1991) 53 Cal.3d 618, 666; *People v. Benson* (1990) 52 Cal.3d 754, 786.)

3. Even if the Trial Court Had Erred, No Prejudice Would Have Occurred

“Even if we were to agree with defendant that the trial court erred in admitting the photographic [or testimonial] evidence in question, we nonetheless would conclude that any error in admitting such evidence was harmless under the *Watson* standard.” (*People v. Heard, supra*, 31 Cal.4th at p. 978; *People v. Allen, supra*, 42 Cal.3d 1222, 1258, applying the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.)

“Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)” (*People v. Scheid, supra*, 16 Cal.4th 1, 21.) The photographic evidence at issue did not disclose to the jury any information that was not presented through the testimony of witnesses; the testimonial evidence merely established that items of property found in the Datsun 280 ZX belonged to certain victims, thereby helping to establish a link between defendant and those victims. Although the photographic and testimonial evidence may have been unpleasant for the jury to

confront, it was not unusually disturbing or unduly gruesome, and was no more inflammatory than the testimony provided by other witnesses for the prosecution (such as the medical examiners, who offered their expert opinions as to the victims' suffering during the fatal strangulations). "Under these circumstances, we conclude it is not reasonably probable that the admission of the photograph[ic and testimonial evidence] affected the jury's verdict." (*People v. Heard, supra*, 31 Cal.4th at p. 978, citing *People v. Gurule* (2002) 28 Cal.4th 557, 625; *People v. Allen, supra*, 42 Cal.3d at p. 1258.)

**K. Pretrial Ruling Admitting Preliminary Hearing Testimony
Given by Witness Ray Blevins**

Tok Kim's former boyfriend, Ray Blevins, testified at defendant's preliminary hearing that he saw Kim and defendant together at midday on or "around" April 1, 1984. Blevins also identified certain objects as being similar to those he had seen in Kim's apartment. Some of these objects were seized in the search of the Datsun 280 ZX that defendant was driving at the time of his arrest. Defendant's attorney at the preliminary hearing briefly cross-examined Blevins. Several months later, but prior to the commencement of defendant's trial, Blevins died.

In pretrial proceedings, defendant moved to exclude from his trial the testimony given by Blevins at the preliminary hearing "on the ground that the lack of any meaningful cross-examination denied [defendant] his Sixth Amendment right of confrontation, and prevent[ed] him from presenting any effective defense to the events in Alameda County." The motion was denied. On the eve of trial, defendant renewed the motion to exclude this testimony, and that motion again was denied. At trial, the prosecution read into the record Blevins's testimony given at the preliminary hearing.

On appeal, defendant contends the admission of Blevins's testimony violated Evidence Code section 1291, as well as defendant's right of confrontation under the state and federal Constitutions. Specifically, defendant asserts the court should have excluded the testimony because at the preliminary hearing defense counsel made "no effort . . . to focus on Blevins as a third-party suspect in Kim's murder," despite counsel's knowledge that Blevins and Kim had argued bitterly just prior to her death. According to defendant, Blevins's prior testimony should have been found inadmissible pursuant to Evidence Code section 1291 "because there had been no meaningful cross-examination by [defense counsel] at [the] preliminary hearing, and therefore no adequate showing the preliminary hearing testimony was reliable." Defendant, however, misconstrues the applicable law.

A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. (U.S. Const., Amends VI, XIV; *Pointer v. Texas* (1965) 380 U.S. 400, 403-405.) The right of confrontation is not absolute, however, and may "in appropriate cases" bow to other legitimate interests in the criminal trial process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; accord *Barber v. Page* (1968) 390 U.S. 719, 722.) An exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. (*Crawford v. Washington* (2004) 541 U.S. 36, 59; *Barber v. Page*, *supra*, 390 U.S. at p. 722; accord *People v. Wilson* (2005) 36 Cal.4th 309, 339-348; *People v. Stritzinger* (1983) 34 Cal.3d 505, 515; see also *California v. Green* (1970) 399 U.S. 149, 167-168 [where a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement].) Further, the federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as

effective as a defendant might prefer. (*United States v. Owens* (1988) 484 U.S. 554, 559.)

California permits the use of the prior testimony of a witness against a criminal defendant only when the unavailability of the witness and the reliability of the testimony are established. (§ 686; Evid. Code, § 1291, subd. (a)(2).) A witness is deemed unavailable if he or she is deceased. (Evid. Code, § 240, subd. (a)(3).) The testimony is deemed reliable if “[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.” (Evid. Code, § 1291, subd. (a)(2).)

“In *People v. Zapien* [1993] 4 Cal.4th 929, 975, this court recognized that the ‘[a]dmission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions — not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant’s right to effective cross-examination against the public’s interest in effective prosecution.’ The court further determined that a defendant’s motive in cross-examining a witness at a preliminary hearing may differ somewhat from the motive at trial, but nevertheless the earlier testimony may be admissible at the trial under section 1291 because the ‘motives need not be identical, only “similar.”’ (*People v. Zapien, supra*, 4 Cal.4th at p. 975, citing *People v. Alcala* (1992) 4 Cal.4th 742, 784 [15 Cal.Rptr.2d 432, 842 P.2d 1192].) Following similar reasoning and principles, in *People v. Wharton* (1991) 53 Cal.3d 522 [280 Cal.Rptr. 631, 809 P.2d 290] the court held the defendant’s interest and motive in cross-examining the alleged rape

victim at the preliminary hearing in a prior unrelated criminal prosecution was sufficiently similar to the defendant's interest and motive at the penalty phase of a subsequent capital trial to warrant the admission of the preliminary hearing testimony under Evidence Code section 1291. (53 Cal.3d at p. 589.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 850.)

In the present case, defendant's motive and interest in cross-examining Blevins at the preliminary hearing were closely similar, if not identical to, defendant's objectives at the guilt phase of the trial — namely, to attempt to discredit the prosecution's theory as to the date on which defendant initially encountered Tok Kim (in turn, suggesting that someone other than defendant encountered Kim at the Lafayette bar on the evening of April 1, 1984). The record indicates that at the preliminary hearing, defense counsel sought to establish that Blevins saw defendant and Kim together around midday April 1, 1984, several hours prior to the time the prosecution's other witnesses placed the pair together initially.

In view of the foregoing, we conclude the trial court properly, if implicitly, concluded that defendant's "motive and interest" in cross-examining Blevins at the preliminary hearing and at the trial were sufficiently similar to satisfy the requirements of Evidence Code section 1291.

Defendant further contends the admission of Blevins's preliminary hearing testimony violated defendant's federal constitutional right of confrontation, because defense counsel's brief cross-examination constituted incompetent representation. We disagree. As we previously have explained: "as long as a defendant was provided the opportunity for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might

have been more effective.” (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 851; see also *People v. Zapien* (1993) 4 Cal.4th 929, 975; *People v. Alcala* (1992) 4 Cal.4th 742, 784 [the requirement that the party have a similar interest and motive is satisfied notwithstanding the decision of defense counsel to alter the nature or scope of cross-examination].)

It is undisputed that at the time of trial, Blevins was dead and thus unavailable as a witness. Blevins’s testimony at the preliminary hearing, where defendant had an interest and motive to cross-examine him similar to what defendant had at the trial, therefore was admissible. The trial court did not err in permitting the prosecution to introduce that testimony against defendant at trial.

II. JURY SELECTION ISSUES

A. Defendant’s Challenge to the Jury Selection Procedures

Defendant contends the jury selection procedures employed at his trial were improper, mandating a reversal of the judgment. Specifically, he contends: (1) the trial court failed to administer the oath of truthfulness on penalty of perjury to 28 prospective jurors, (2) the prosecutor engaged in misconduct by interposing improper objections to defense counsel’s voir dire examination, resulting in the improper restriction of voir dire, and (3) the trial court erred in denying a number of challenges for cause and also abused its discretion by denying defendant peremptory challenges in addition to the 20 specified in Code of Civil Procedure section 231, subdivision (a).

Although defendant’s initial contention is correct insofar as he asserts the trial court erred in failing to administer the oath to prospective jurors, for the reasons set forth below we conclude that defendant has failed to establish prejudice and that none of defendant’s other contentions has merit.

1. The Oath of Truthfulness on Penalty of Perjury Administered to Prospective Jurors

On March 20-21, 1989, the trial court commenced jury selection by screening one panel of prospective jurors. On March 27, 1989, the court screened a second panel. On May 1-2, 1989, the court screened a third panel. With regard to the latter two panels of prospective jurors, the trial court apparently failed to administer the oath to prospective jurors mandated by former Code of Civil Procedure section 232, subdivision (a).²⁶ Defendant moved for a mistrial or, alternatively, to excuse the 28 prospective jurors who had not been given the oath at the commencement of the voir dire examination. The court denied these motions.

After conducting further voir dire examination, the prosecution and the defense both informed the court that the jury as constituted was acceptable. At that point, the court administered the oath to jurors mandated by Code of Civil Procedure section 232, subdivision (b).²⁷ According to defendant, 14 of the

²⁶ Former Code of Civil Procedure section 232, subdivision (a) provided: "Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following acknowledgement shall be administered to the panel, which shall be acknowledged by the prospective jurors with the statement 'I do':

" 'You do, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution.' "

²⁷ Former Code of Civil Procedure section 232, subdivision (b) provided: "As soon as the selection of the trial jury is completed, the following acknowledgement and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement 'I do':

" 'You do, and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court.' "

(footnote continued on next page)

prospective jurors who were not administered the oath prescribed by Code of Civil Procedure section 232, subdivision (a) for prospective jurors at the outset of the voir dire examination became actual jurors or alternates.

Defendant contends the trial court's error at the commencement of the voir dire process in failing to administer the oath of truthfulness to the prospective jurors who comprised the second and third panels was a "structural defect" and therefore was reversible per se, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309, and *People v. Cahill* (1993) 5 Cal.4th 478, 502; see also *People v. Pelton* (1934) 116 Cal.App.Supp. 789, 791 [holding that a conviction by an unsworn jury renders the verdict "a nullity justifying a reversal"].)

We disagree with defendant's position. First, neither *Arizona v. Fulminante, supra*, 499 U.S. 279 (holding that the harmless-error rule applies to erroneously admitted coerced confessions), nor *People v. Cahill, supra*, 5 Cal.4th 478 (holding that the erroneous admission of a coerced confession does not require automatic reversal under California law), addressed the juror-oath question presented here and therefore are unhelpful to defendant's case. The fundamental or "structural" defects discussed in those decisions consisted of significant irregularities, unlike the present situation, where the trial court partially but not fully complied with the oath-giving provisions set forth in Code of Civil Procedure section 232. (See *Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310; *People v. Cahill, supra*, 4 Cal.4th 501-502.) Similarly, the decision in *People v. Pelton, supra*, 116 Cal.App.Supp. 789, unlike the present case, involved the trial court's

(footnote continued from previous page)

The Legislature slightly amended subsections (a), and (b) of the statute shortly after defendant's trial, but these modifications have no bearing upon the issues that confront us in the present case. (Amend. by Stats. 1989, c. 1416, § 10.)

failure to administer the oath to jurors mandated by Code of Civil Procedure section 232, subdivision (b). These decisions do not support defendant's assertion that the trial court's failure to administer the oath of truthfulness to prospective jurors, as provided in Code of Civil Procedure section 232, subdivision (a), constitutes a structural defect. Indeed, although empanelling one or more jurors who are actually biased against the defense would constitute structural error (*In re Carpenter* (1995) 9 Cal.4th 634, 654, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309), here the trial court's error in failing to swear some of the prospective jurors has not been shown to have resulted in the inclusion of any biased jurors on the panel, and defendant's claim of structural error fails for that reason.

Second, although there is a dearth of California case law examining the factual situation presented here, our decision in an analogous case, *People v. Lewis* (2001) 25 Cal.4th 610, 629-631, is instructive. In *Lewis*, we addressed the question whether the trial court erred in failing to administer the oath to prospective jurors prior to their answering written questionnaires regarding their views on the death penalty and other matters. (*Id.*, at p. 629.) Observing that the prospective jurors had signed their questionnaires under penalty of perjury and were sworn under Code of Civil Procedure section 232, subdivision (a), prior to being personally questioned in open court, we held that although the defendant was "correct that prospective jurors should have been sworn under Code of Civil Procedure section 232[, subdivision (a),] before filling out the questionnaires, he fails to establish that he was prejudiced by the trial court's failure to administer the oath at that juncture. [Citations.]" (*Id.*, at pp. 630-631; see also *People v. Cruz* (2001) 93 Cal.App.4th 69, 72-74 [no prejudicial error where the oath taken pursuant to Code of Civil Procedure section 232, subdivision (b), did not ask the jurors to agree to follow the instructions of the court].)

For similar reasons as those found in *Lewis*, we reject defendant's assertion of prejudicial error here. Although the trial court omitted giving the first oath, the jury ultimately was instructed as to its duty to follow the trial court's instructions and was presumed to have performed its official duty, and defendant has failed to establish that he was prejudiced by the trial court's failure to administer the required oath at the outset of questioning some of the prospective jurors. We further observe that, as in *People v. Lewis, supra*, 25 Cal.4th 610, 629-631, the prospective jurors each filled out a juror questionnaire that was signed under penalty of perjury, a circumstance that undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court's failure to timely administer the oath set forth in Code of Civil Procedure section 232, subdivision (a). In view of the virtual certainty that these prospective jurors understood that they were required to answer truthfully the questionnaires, we reasonably may infer that the same prospective jurors similarly understood that they were required to respond truthfully to the questions posed during the voir dire examination — much of which was essentially a follow-up to the prospective jurors' answers given in response to the questions set forth in the questionnaires.

Accordingly, on these facts we believe the jury understood that it was required to answer truthfully the questions posed during the voir dire examination. We therefore conclude the court's error in not administering the oath to some of the prospective jurors was not prejudicial to defendant.

2. Prosecutor's Objections to Defense Counsel's Questions During Voir Dire

In the course of defense counsel's examination of eight prospective jurors, the prosecutor interposed objections on the ground that counsel's questions asked the prospective jurors to "prejudge" the case. None of these eight individuals

became a member of defendant's jury (although one individual was selected as an alternate juror). Prior to the parties' presentation of their respective cases, defendant moved for a mistrial or, in the alternative, for excusal of the prospective jurors, asserting that the prosecutor's objections impeded and disrupted counsel's voir dire examination. The trial court denied the motion.

On appeal, defendant reiterates his contention that the prosecutor impermissibly interfered with defense counsel's voir dire examination of the prospective jurors and on that basis contends the trial court erred in denying his motion. He is mistaken; our review of the voir dire examination of the prospective jurors in question reveals that the prosecution's objections to defense counsel's questions were proper. The two passages of the hearing transcript cited by defendant as examples of the prosecutor's objections reveal no impropriety on the part of the prosecutor:

“[Defense counsel]: ‘Then, is it fair to say that if indeed the opposite were true, that is, it was not only not exemplary but there were other — there was evidence of other activity — criminal activity, that in that situation it would be difficult to see anything other than a death verdict?’

“[Prosecutor]: ‘Excuse me. I object. It asks the juror to prejudge the evidence.’

“The court: ‘Objection sustained.’

[¶] ... [¶]

“[Defense counsel]: ‘. . . . It would be some amount of extraordinary background evidence of an exemplary nature before you could even consider it?’

“[Prosecutor]: ‘Just a moment please. Now, I have an objection and it asks the juror to prejudge.’

“[Defense counsel]: ‘I would ask the [prospective] juror to go outside.’ ”

To the contrary, insofar as defense counsel's questions sought to ascertain the prospective jurors' views as to hypothetical cases not before the court, they were improper and the court acted within its discretion in prohibiting such questioning. (*People v. Noguera* (1992) 4 Cal.4th 599, 646.) Insofar as counsel's questions sought to commit a prospective juror to vote in a certain way given a particular set of facts, the questions similarly were improper. (See *People v. Williams* (1981) 29 Cal.3d 392, 408 ["We reaffirm that it is not 'a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.' "].)

Moreover, even were we to conclude that the prosecution's objections were improper, any error clearly would be harmless in view of the circumstance that none of the eight prospective jurors became a member of defendant's jury.

3. Peremptory Challenges

During jury selection, defendant challenged for cause prospective jurors Hickert, Kotz, Hughes, MacDonald, Craddock, Richards, Swope, and Humphrey. The trial court denied each of these challenges. Although prospective juror Craddock was selected as an alternate juror, none of these individuals was impaneled as a member of defendant's jury. After exercising 18 out of the 20 peremptory challenges available to it, the defense informed the court that the jury as constituted was acceptable. The prosecution similarly indicated its acceptance of the jury.

Defendant contends the trial court committed reversible error under the federal and state Constitutions in denying the challenges to excuse the above-named prospective jurors based upon their views regarding the death penalty.

(See *Wainwright v. Witt* (1985) 469 U.S. 412, 423-424; U.S. Const., 5th, 6th, 8th & 14th Amends., Cal. Const., art. I, §§ 1, 7, subd. (a) (15, 16). As noted, however, when the defense accepted the jury, it had not exhausted all of its peremptory challenges.

“In order successfully to claim error in the denial of a challenge for cause of a prospective juror, a defendant on appeal must demonstrate that the ruling affected his or her right to a fair and impartial jury.” (*People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Crittenden*, *supra*, 9 Cal.4th 83, 121; *People v. Garceau*, *supra*, 6 Cal.4th 140, 174.) Because defendant exercised peremptory challenges to remove the prospective jurors whom he unsuccessfully had challenged for cause, these individuals could not have compromised the impartiality of the jury. As a result, “under *Witt*, [defendant] cannot claim constitutional error based upon the trial court’s denial of those challenges for cause.” (*People v. Horton*, *supra*, 11 Cal 4th at p. 1093; see also *People v. Johnson*, *supra*, 3 Cal.4th 1183, 1211.) Indeed, “[i]t is well-settled that even if the trial court erred in denying a defendant’s motion to remove a juror for cause, that error will be considered harmless if ‘[n]one of the prospective jurors whom defendant found objectionable actually sat on his jury.’ ” (*People v. Hawkins* (1995) 10 Cal.4th 920, 939.) “Moreover, defendant did not communicate to the trial court any dissatisfaction with the jury selected.” (*Ibid.*)

In sum, defendant’s right to an impartial jury was not violated, and any error by the trial court in denying defendant’s motions to exclude the above-mentioned members of the jury venire for cause would not have been prejudicial.

(See *People v. Horton*, *supra*, 11 Cal.4th 1068, 1093; *People v. Hawkins*, *supra*, 10 Cal.4th 920, 939.)²⁸

III. JURY INSTRUCTION ISSUES

A. Instructions Regarding the Las Vegas Evidence and Evidence of "Flight"

At the outset of trial, and outside the jury's presence, the defense moved to exclude certain items that were recovered from the Datsun 280 ZX subsequent to defendant's arrest. These items included: a glass cup bearing the words "Silver City Casino, Las Vegas, Nevada," a booklet of casino coupons (characterized by the prosecutor as "drink tickets") with one ticket bearing the word "void" and "4/17/84" (the date of defendant's arrest), and a key with an attached green token identifying the Westward Ho Casino (hereinafter sometimes collectively referred to as "the Las Vegas evidence"). Defendant contended that the Las Vegas evidence was irrelevant and, even if relevant, unduly prejudicial as being improperly suggestive of a lack of remorse by defendant. In response, the prosecutor asserted that the listed items were relevant because they were recovered from the vehicle defendant was driving when arrested and established the route defendant had taken following his commission of the charged offenses. The defense offered to stipulate as to the route taken by defendant in the days leading up to his arrest in Arizona, but the prosecution declined to accept the stipulation. The trial court overruled defendant's objections to the introduction of the Las

²⁸ On June 19, 1989, the day set for trial to commence, the defense requested that the trial court grant three peremptory challenges in addition to the twenty prescribed by statute. (Cal. Code Civ. Proc., § 231, subd. (a).) As indicated above, however, defendant had not exhausted all 20 of the challenges available to him. The trial court denied the request. On appeal, defendant assigns error, but we previously have rejected virtually identical claims (see, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 230-231) and do so again here.

Vegas evidence, which briefly was identified at trial through the testimony of Sergeant Gary McEwen.

Immediately prior to the parties' closing arguments, defendant renewed his objection to the introduction of the Las Vegas evidence on the grounds of lack of relevancy and undue prejudice. (See Evid. Code, §§ 210, 352.) The trial court granted defendant's motion, finding that as to the Las Vegas evidence, "I didn't feel that they were probative of any disputed fact. [¶] The fact remains that the defendant was in Arizona heading eastbound and was not in California, and the fact that he may or may not have gone through Las Vegas I did not feel had any relevance and was not probative."²⁹

Defendant moved for a mistrial based upon the trial court's finding that the Las Vegas evidence erroneously had been introduced into evidence. Alternatively, the defense requested that the court admonish the jury with a curative instruction. The court denied the motion for a mistrial, but admonished the jury as follows:

"We've had a lot of exhibits marked. Not all of them were received [into evidence]. [¶] You're instructed to disregard exhibits 21 through 23 [the Las Vegas evidence]. It's a drinking glass, coupons, key chain and a key. Also Exhibit 4-E, which was a kitchen knife and the tape cassettes that were inside Exhibit 14, which was a gray Lancome Bag. [¶] You must also disregard any testimony about those things, and they should play no part in your thoughts or deliberations."

²⁹ The trial court also granted defendant's motion to exclude certain other items introduced into evidence, including a knife found inside the pocket of the black jacket retrieved from the Datsun 280 ZX, and a tote bag identified as having belonged to Janette Cullins, containing audio cassette tapes.

Although agreeing with defendant as to the asserted irrelevancy of the Las Vegas evidence, the trial court stopped short of prohibiting the prosecution from arguing to the jury that in its deliberations the jury could consider defendant's "flight" from California. Indeed, the trial court made clear that exclusion of the Las Vegas evidence "does not take away flight as an issue. . . ." Ultimately, the prosecutor did argue defendant's flight as demonstrating consciousness of guilt. When the trial court read its instructions to the jury, however, the court did not read CALJIC No. 2.52, the standard instruction pertaining to flight. Outside the presence of the jury, the prosecutor commented: "I noticed in your honor's reading of the instructions that there was no [CALJIC] No. 2.52 instruction which I had requested and which I thought I saw in the instructions when we went through them the other day." The prosecutor added that he was not asking that the jury be brought back to hear the court read CALJIC No. 2.52, but requested that the instruction be included with the written packet of instructions given to the jury. The defense objected to the giving of the instruction on the grounds that the defense did not contest the circumstance that defendant was arrested in Arizona, and that the omitted instruction focused the jury's attention on the Las Vegas evidence that the court ultimately had deemed irrelevant. The trial court overruled the objection, finding that the prosecution was "entitled to the instruction," which was inserted into the packet with the other instructions.

On appeal, defendant contends reversal is warranted on the grounds that introduction of the Las Vegas evidence was unduly prejudicial, the trial court's curative instruction was inadequate, and the court's instruction as to flight was violative of defendant's state and federal constitutional rights. For the reasons set forth below, we reject each of these contentions.

Defendant asserts that to the extent the irrelevant Las Vegas evidence was indicative of a lack of remorse on defendant's part, it was violative of his state and

federal constitutional rights to “due process of law, fair trial, burden of proof, death eligibility, and reliable guilt and penalty phase determinations,” and that the introduction of such evidence was prejudicial because “it create[d] the likelihood a non-statutory factor in aggravation will be considered by the jury in violation of the Eighth Amendment’s” proscription against vague and unreliable penalty determinations. We disagree. In view of the trivial nature of the Las Vegas evidence relative to the other evidence presented by the prosecution at the guilt and penalty phases, the trial court’s clear and comprehensive admonition to the jury to disregard that evidence, and the substantial evidence supporting the jury’s guilt and penalty phase determinations, we conclude that the trial court’s curative instruction was adequate and that any error in admitting the Las Vegas evidence could not have been unduly prejudicial.

Defendant further asserts “[t]here was no evidence of consciousness of guilt to warrant a flight instruction.” In support of this contention, defendant argues that there was no evidence he fled immediately after the commission of the charged offenses, that during his travels in the several days leading up to his arrest in Arizona he had not been confronted with (and therefore could not have fled from) the charges filed against him, and that at every point during his detention and arrest in Arizona he was cooperative. Defendant maintains that in view of these circumstances, the trial court erred in furnishing the jury with a written copy of CALJIC No. 2.52.

We reject defendant’s contention. Section 1127c requires a trial court in any criminal proceeding to instruct as to flight where evidence of flight is relied upon as tending to show guilt.³⁰ CALJIC No. 2.52, which is derived from section

³⁰ Section 1127c provides: “In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court

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1127c, advises the jury “that evidence of flight alone is insufficient to establish guilt, but may be considered with other proven facts in deciding the question of guilt or innocence.” (*People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Contrary to defendant’s position, the instruction neither requires knowledge on a defendant’s part that criminal charges have been filed, nor a defined temporal period within which the flight must be commenced, nor resistance upon arrest. (*Ibid.*) In view of the evidence introduced by the prosecution establishing that defendant left California in the days immediately following the charged offenses and was in possession of the vehicle belonging to murder victim Jillette Mills when he was arrested in Arizona, the flight instruction plainly was warranted here. (*Ibid.* [a jury could infer that the defendant’s flight reflected consciousness of guilt].) As noted, the instruction merely permitted the jury to consider evidence of flight in deciding defendant’s guilt or innocence; it did not suggest that the jury should consider such evidence as dispositive.

Moreover, even if we were to conclude the instruction should not have been given, any error would have been harmless. The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it. (*Id.*, 2 Cal.4th at p. 61.)³¹

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shall instruct the jury substantially as follows:

“The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.”

³¹ Having determined that the trial court’s curative instruction was adequate, and its instruction pursuant to CALJIC No. 2.52 was proper, we reject defendant’s contention that the erroneous admission of the Las Vegas evidence, in

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B. Instructions on Lesser Included Offenses

At the close of the guilt phase of defendant's trial, and outside the presence of the jury, defendant requested that the court instruct the jury on second degree murder and second degree felony murder.³² Defense counsel argued that the jury

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combination with the instruction on flight, violated defendant's state and federal constitutional rights.

³² Defendant requested that the trial court instruct the jury as follows:

"Murder of 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. (CALJIC No. 8.30.)

"Murder of the second degree is also the unlawful killing of a human being when:

- "1. The killing resulted from an intentional act,
- "2. The natural consequences of the act are dangerous to human life, and
- "3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

"When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being. (CALJIC No. 8.31.)

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during] [as the direct casual [*sic*] result of] the commission or attempted commission of the crime of [grand theft] is murder of the second degree when the perpetrator had the specific intent to commit such crime.

"The specific intent to commit [grand theft] and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. (CALJIC No. 8.32.)

"Murder is classified into two degrees, and if you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree. (CALJIC No. 8.70.)

"If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree. (CALJIC No. 8.71.)

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“really ought to have instructions on those . . . lesser included . . . areas that would be reasonably within their frame of a verdict” The prosecutor objected: “There is not one wit of evidence [*sic*], nor a scintilla either, for that matter, having to do with second degree murder or any other lesser crime, given the medical testimony and the unique facts of the case. [¶] I don’t think any theory [of admissibility] has been advanced until now, and either by cross-examination or any other — anywhere else in this case, and I don’t see it under the facts.” Acknowledging that “when you have crimes of degrees they have to be told about it, and sometimes it’s an issue,” the trial court rejected defendant’s request, finding: “Here it’s either first [degree murder] or nothing [i.e. acquittal] [¶] . . . [¶] The court’s . . . ruling is to reject the murder of the second degree instructions. I don’t see that as a theory in this case.”

On appeal, defendant contends the trial court deprived him of various constitutional rights and thus committed reversible error in declining to give the requested instructions pertaining to second degree murder and second degree felony murder, and further, that the court had a sua sponte duty to give such instructions even if defendant had not requested them. In support of this argument, defendant emphasizes that he “is entitled under [the] state and federal

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“Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree.” (CALJIC No. 8.74.)

Defendant additionally requested that the trial court instruct the jury regarding homicide generally, as follows:

“Homicide is the killing of one human being by another, either lawfully or unlawfully. Homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful.” (CALJIC No. 8.00.)

Constitutions to have the jury instructed on lesser-included offenses *arising from the evidence.*” (Italics added.) He contends that in addition to the possible verdicts of a first degree murder conviction and an acquittal, the jury ought to have been afforded the “third option” of convicting defendant of second degree murder. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637.)

We discern no error in the trial court’s refusal to give the instructions requested by defendant. “California decisions have held for decades that even absent a request, and even over the parties’ objections, the trial court must instruct on a lesser offense necessarily included in the charged offense *if there is substantial evidence the defendant is guilty only of the lesser.* [Citations.]” (*People v. Birks* (1998) 19 Cal.4th 108, 118, italics added.) In the present case, we agree with the trial court that there was not substantial evidence to warrant the second degree murder instructions requested by defendant.

As described above, the prosecution’s evidence demonstrated that Susan Knoll, Jillette Mills, and Bonnie Guthrie were murdered at their residences in similar fashion within days of each other. All three had been fatally strangled — Mills and Guthrie by ligature, and Knoll by what the medical examiner described as the use of “considerable compression force” (and had suffered blunt force injuries consistent with having struggled against her assailant). Not only does the manner in which each of these three killings was perpetrated strongly indicate in itself that each of the killings was willful, premeditated, and deliberate, but the entire course of conduct clearly revealed by the evidence, taken as a whole, is inconsistent with any suggestion that the killings were not willful, premeditated, and deliberate. Furthermore, the evidence additionally demonstrated that each of the murders occurred during the commission of either rape or burglary, a circumstance that in itself establishes the offenses as first degree murders under the felony-murder doctrine. (§ 189.) Defendant fails to point to any substantial evidence that would support a jury’s determination that the killing of any of the victims constituted second degree, rather than first degree, murder.

Defendant cites a number of decisions in support of his contrary contention, but these cases either have been overruled or involve inapposite factual situations. (See *People v. Geiger* (1984) 35 Cal.3d 510 [defendant has a right to instructions on lesser related offenses that merely bear some relationship to the charged offense, *overruled on that point* in *People v. Birks, supra*, 19 Cal.4th 1, 136], *People v. Dillon* (1983) 24 Cal.3d 441 [modifying the defendant's conviction of first degree felony murder to second degree murder where the defendant was an immature 17-year-old youth involved in a conspiracy with other youths to "rip-off" a marijuana farm and discharged his firearm when confronted by the victim, who displayed a shotgun]; *Vickers v. Rickettes* (9th Cir. 1986) 798 F.2d 369 [prisoner was stabbed and fatally strangled by his cellmate, who had a brain disorder related to an epileptic condition].)

The trial court therefore properly refused to instruct the jury regarding second degree murder and second degree felony murder. Because no evidence was presented indicating a basis for finding any of the killings to have been an excusable or justifiable homicide, the court also properly refused to give the homicide instruction. (CALJIC No. 8.00.)

C. Instructions Regarding Felony Murder and Special Circumstances

The trial court instructed the jury as to first degree felony murder and as to special circumstances. (CALJIC Nos. 8.21, and 8.80, respectively.)³³

³³ The trial court instructed the jury as follows:

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime of burglary or the commission of the crime of rape is murder of the first degree when the perpetrator had the specific intent to commit such crime.

"The specific intent to commit a burglary, the specific intent to commit a rape and the commission of such crime must be proved beyond a reasonable

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On appeal, defendant contends the trial court should have instructed the jury that it could not find the special circumstance allegations of burglary murder, rape murder, and multiple murder true unless it found that defendant possessed the intent to kill Susan Knoll, Jillette Mills, and Bonnie Guthrie. Defendant argues

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doubt.” (CALJIC No. 8.21.)

The court further instructed:

“If you find the defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true:

“(1) That the murder of Jillette Mills was committed by the defendant while he was engaged in the commission of the crime of rape;

“(2) That the murder of Jillette Mills was committed by the defendant while he was engaged in the commission of the crime of burglary;

“(3) That the murder of Susan Knoll was committed by the defendant while he was engaged in the commission of the crime of burglary;

“(4) That the murder of Bonnie Guthrie was committed by the defendant while he was engaged in the commission of the crime of rape;

“(5) That the murder of Bonnie Guthrie was committed by the defendant while he was engaged in the commission of the crime of burglary;

“(6) That the defendant has in this case been convicted of more than one offense of murder in the first degree.

“The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

“If you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.

“You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more, make your finding as to the one or more upon which you do agree.

“In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

“You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied.” (CALJIC No. 8.80, italics added.)

that the trial court's error in failing so to instruct constitutes a "structural defect" in the proceedings that is reversible per se (see *Arizona v. Fulminante*, *supra*, 499 U.S. 279, 307-309), or that alternatively constitutes an error that cannot be characterized as being harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18) and therefore requires setting aside the findings of special circumstances and reversing the judgment of death. (See *People v. Marshall*, *supra*, 15 Cal.4th 1, 41-44.) We reject defendant's position, for the reasons that follow.

"In 1983, this court held that intent to kill was an element of felony-murder special circumstances whether or not the defendant was the actual killer. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153-154 [197 Cal.Rptr. 79, 672 P.2d 862].) Although we overruled *Carlos* in *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], holding that the intent-to-kill requirement applied only to an accomplice and not to the actual killer, *Carlos* remained applicable to (and the trial court was required to instruct the jury on) intent to kill in all cases involving a defendant charged with a felony-murder special circumstance if the offense was committed during the 'window' period between our decisions in *Carlos* and *Anderson*. [Citations.]" (*People v. Marshall*, *supra*, 15 Cal.4th 1, 41-42.)

In the present case, the jury found a total of six special circumstance allegations to be true — one allegation of multiple murder, two allegations of rape murder (as to Mills and Guthrie), and three allegations of burglary murder (as to Mills, Knoll, and Guthrie). (§§ 190.2, subs. (a)(3), (a)(17), subparts (C), (G).) The murders occurred in April 1984, during the *Carlos/Anderson* "window" period. Accordingly, the jury in this case could find the special circumstance allegations to be true "only if it found that defendant acted with intent to kill." (*Id.*, at p. 42.) Nonetheless, as defendant asserts and the People concede, the trial

court's instruction on special circumstances, CALJIC No. 8.80, in relevant part informed the jury that defendant's intent was inconsequential: "If you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true." (See fn. 33, *ante*.)

"We have consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* [, *supra*,] 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705, 24 A.L.R.3d 1065]. [Citations.] Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman, supra*, at p. 24 [87 S.Ct. at p. 828].)" (*People v. Williams* (1997) 16 Cal.4th 635, 689.) We have held that "error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless [beyond a reasonable doubt] when "the evidence of defendant's intent to kill . . . was overwhelming, and the jury could have had no reasonable doubt on that matter." ' ' (*People v. Marshall, supra*, 15 Cal.4th 1, 42.)

In the present case, the evidence was overwhelming that defendant possessed the intent to kill when he murdered Susan Knoll, Jillette Mills, and Bonnie Guthrie. As noted, within a very brief period all three victims were killed by strangulation — Knoll by manual strangulation, Mills and Guthrie by ligature strangulation. The latter two victims also suffered traumatic sexual assaults. That evidence, considered with the evidence that the bodies of Knoll and Mills were concealed within a closet, and that in each instance defendant departed from the crime scene with selected possessions of each victim, is consistent only with intentional killings. No evidence was presented that would have supported a finding of unintentional murder. Under these circumstances, we conclude that no

reasonable jury, properly instructed, would have failed to find that defendant acted with the requisite intent to kill. We are satisfied that the trial court's instruction removing that issue from the jury's consideration was harmless beyond a reasonable doubt. (See *People v. Johnson, supra*, 6 Cal.4th at pp. 46-47 [intent to kill properly found where one victim was strangled and set on fire, and the other victim was beaten to death]; see also *People v. Osband, supra*, 13 Cal.4th 622, 683 [concealing of victim's body beneath dresser drawers "further supports the view that (defendant) intended to kill"].)

D. Guilt Phase Instructions in General

The trial court instructed the jury pursuant to several pattern jury instructions at the conclusion of the guilt phase, including CALJIC Nos. 2.01 (sufficiency of circumstantial evidence — generally), 2.02 sufficiency of circumstantial evidence to prove specific intent), 2.50 (evidence of other crimes), 2.50.1 (evidence of other crimes by the defendant proved by a preponderance of the evidence), 2.50.2 (definition of preponderance of the evidence), 8.83 (sufficiency of circumstantial evidence to prove special circumstance), and 8.83.1 (sufficiency of evidence to prove mental state). Defendant contends that decisions rendered by this court rejecting constitutional challenges to these instructions (see, e.g., *People v. Wilson, supra*, 3 Cal.4th 926, 942-943; *People v. Mickey, supra*, 54 Cal.3d 612, 669-671) are "inconsistent with principles set forth by the United States Supreme Court" and should be reconsidered:

Defendant has provided no basis for reconsidering our prior decisions upholding the validity of these pattern jury instructions. (See, e.g., *People v. Wilson, supra*, 3 Cal.4th 926, 942-943; *People v. Mickey, supra*, 54 Cal.3d 612, 669-671.) We therefore reject defendant's challenge.

IV. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel rendered ineffective assistance at the guilt phase by conceding defendant's guilt, as demonstrated by counsel's failure to (1) make an opening statement, (2) present any evidence on defendant's behalf, and (3) make any substantive argument in his summation (which comprised four and one-half pages of the Reporter's Transcript) as to whether the prosecution had sustained its burden of proof as to defendant's guilt of the crimes charged or the truth of the special circumstances alleged. Relying upon *Griffin v. California* (1965) 380 U.S. 609, defendant further contends that during the guilt phase summation, his counsel improperly drew adverse attention to defendant's assertion of the privilege against self-incrimination. Defendant also contends counsel inappropriately conceded guilt in his penalty phase summation.³⁴

As we explain, defendant fails to demonstrate that counsel rendered constitutionally deficient performance, or that such performance was prejudicial to the defense.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [233 Cal.Rptr. 404, 729 P.2d 839].) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of

³⁴ Defendant's argument encompasses issues relating to both the guilt and the penalty phases. In the interest of clarity and brevity, we address these issues together.

professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington*, *supra*, at p. 687 [104 S.Ct. at p. 2064]; *In re Andrews* (2002) 28 Cal.4th 1234, 1253 [124 Cal.Rptr.2d 473, 52 P.3d 656].) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [62 Cal.Rptr.2d 437, 933 P.2d 1134].) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [same]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["The decisions whether to waive opening statement and whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess."].)

Each one of counsel's decisions, to forego making an opening statement, present a defense, or offer more than a brief summation, was tactical. In view of the strong evidence directly linking defendant to the charged murders, as well as the looming prospect of other capital trials in Alameda and San Diego Counties arising out of the deaths of Tok Kim and Janette Cullins, reasonably competent counsel could have determined to hear the prosecution's case prior to deciding whether to present a defense, and further could have determined that counsel's summation ought to be limited to inviting the jury to consider whether the prosecution actually had met its burden of establishing guilt beyond a reasonable doubt. (See generally *People v. Mitcham*, *supra*, 1 Cal.4th 1027, 1059.) Indeed, in his summation, counsel alluded to the other criminal cases pending against

defendant to suggest a reason why defendant did not take the stand, and emphasized the significance of the reasonable doubt instruction.³⁵

Reasonably competent counsel could have determined that an extended summation would present the danger of focusing the jury's attention upon the heinous details of the crimes committed. Likewise, reasonably competent counsel also could have determined that in view of the strong evidence linking defendant to the murders, a guilty verdict was virtually a foregone conclusion, and that defendant's prospects of avoiding the death penalty would be improved if the defense refrained from placing its "credibility" at risk by suggesting an implausible defense and instead focused upon challenging the testimony of certain witnesses who testified for the prosecution.³⁶

Thus, reasonable defense counsel could have had a number of legitimate tactical reasons for refraining from making an opening statement, presenting witnesses in defense, or summarizing the case more extensively. The record before us does not fully reveal why counsel elected to proceed in the manner in which defendant now complains, and defendant's claim must fail for that reason. (*People v. Mitcham, supra*, 1 Cal.4th 1027, 1059.) To the extent the record on

³⁵ Defense counsel argued: "While all the instructions that the judge will give you are important, critical to deciding the guilt of any person, is the instruction about reasonable doubt. In short, you will hear words to this effect, that you may not find Mr. Carter guilty unless you believe beyond a reasonable doubt the truth of the charge or charges to a moral certainty. [¶] I would expect [the prosecutor], when he replies, as is his right to reply to this argument since he has the burden, to tell you that this does not mean beyond all possible doubt. That's true. But you will hear the words 'to a moral certainty.' [¶] . . . [¶] You've heard reference to other pending cases in San Diego and Oakland, and so there are some times that defendants do not testify for many, many reasons."

³⁶ Defendant acknowledges that "[o]f the more than 50 witnesses presented by the People, the defense cross-examined roughly half. . . ."

appeal does provide insight into the basis for counsel's decision not to present a defense at the guilt phase, counsel's strategy was a tactical one influenced by the relative strengths and weaknesses of a decision to present a defense, as well as by the pendency of the murder charges against defendant in other counties. (See *post*, at p. 95.)³⁷

As noted, defendant also complains that his counsel "drew adverse attention to [defendant's] assertion of the privilege against self-incrimination." At issue is counsel's argument to the jury, in which he hypothesized a number of reasons why a defendant might elect not testify, including the observation, "some people tell the truth in this kind of setting, some people lie poorly." Defendant asserts that counsel's remark was an improper comment upon defendant's invocation of his constitutional right not to testify, in contravention of *Griffin v. California, supra*, 380 U.S. 609. In response, the People respond that counsel's comment did not draw adverse attention to defendant's silence.

In his guilt phase summation, defense counsel argued to the jury:

"In this decision your process is analytical; that is, have the crimes been proven beyond a reasonable doubt to a moral certainty, and has it been proven beyond a reasonable doubt to a moral certainty that [defendant] is the person who committed one or more of the acts charged?

"[Defendant] *did not testify*. The court will instruct you that you may not consider this in any way, shape, or form. *You may not hold it against him*. However, experience tells us that people often have trouble with that concept.

³⁷ Defendant acknowledged at the hearing on his motion for new trial that he had understood the risks and perils of a defense strategy that involved his taking the witness stand. (See *post*, pp. 100-101.)

‘Well, if I were the defendant, I would testify. I would be up there screaming about it.’

“Let me say a word about this: *There are many reasons that a defendant may or might not testify in a case*, speaking hypothetically. There is, for example, the possibility that his lawyer might instruct you not to testify, even though he wanted to. There is on the contrary the possibility that his lawyer wants him to and he does not want to for various reasons.

“He may be articulate, he may be too articulate. He may be scared. I’ll tell you, it is not easy to be a witness. If any of you have ever been a witness, where from time to time one comes up in one’s career at the bar, I’m always amazed that you were just plain nervous up there even after all your experience in law school [*sic*].

“Some people tell the truth in this kind of setting, some people lie poorly.

“You’ve heard reference to other pending cases in San Diego and Oakland, and so *there are some times that defendants do not testify for many, many reasons. There are many, many reasons why the defendant may not testify, and I give you hypothetically various reasons that occur from time to time so that you do not consider any of it and hold it against him.*” (Italics added.)

As an initial matter, we observe that the decisions finding *Griffin* error have not extended to the situation of a defendant who asserts that *his or her own attorney* invited the jury to draw an adverse inference from the defendant’s failure to testify. (*Griffin v. California, supra*, 380 U.S. 609, 615 [“We . . . hold that the Fifth Amendment . . . forbids either comment *by the prosecution* on the accused’s silence or instructions *by the court* that such silence is evidence of guilt.”] (Italics added.)) Defendant does not cite any authority in support of the broad reading of *Griffin* that he advances here — to the contrary, the decisions upon which defendant relies are distinguishable, involving either a *prosecutor’s* comment upon

a defendant's silence (*People v. Morris* (1988) 46 Cal.3d 1, 35-36; *People v. Modesto* (1967) 66 Cal.2d 695, 711), or the trial of a case against multiple defendants in which the comment was made by counsel for a codefendant (*People v. Hardy* (1992) 2 Cal.4th 86, 157-161; *People v. Haldeen* (1968) 267 Cal.App.2d 478, 481) or a codefendant sought to make such a comment (*People v. Jones* (1970) 10 Cal.App.3d 237, 243-244). The absence of authority on the point is not surprising, because if — by merely reminding the jury at summation that the defendant did not testify — *defense counsel* thereby would inject *Griffin* error into the proceedings, counsel would be placed in the awkward and untenable position of deciding whether to infringe upon his or her client's constitutional privilege against self-incrimination in order to increase the likelihood that any conviction would be vulnerable to a grant of a new trial or reversal on appeal. *Griffin* does not stand for such a proposition.

Moreover, even if we were to overlook the foregoing fundamental defect in defendant's position, no *Griffin* error appears. Viewing defense counsel's remarks in their proper context, it is clear that counsel was not suggesting that the jury draw any sort of adverse inference from defendant's silence. Nor did counsel's comments represent a "concession of [defendant's] guilt" as defendant asserts. "Rather, the passage quoted above reveals that counsel merely sought to explain to the jury that there are "many reasons" why a defendant may not testify, including the "*hypothetical*[]" possibility that "[s]ome people tell the truth in this kind of setting, some people lie poorly," and that the jury should not hold such silence against him. (*Italics added.*) Counsel's references to defendant's failure to testify were made "so that you do not consider any of it and hold it against him," and

manifestly did not constitute the type of comments that *Griffin* declared invalid. (See *Griffin v. California*, *supra*, 380 U.S. 609, 613-615.)³⁸

Defendant's reliance upon *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070 similarly is misplaced. *Swanson* held that defense counsel effectively abandoned and betrayed his client and aided the prosecution by arguing to the jury that there was no reasonable doubt his client was the person who committed the bank robbery charged in the indictment. By contrast, defense counsel's performance in the present case did not constitute abandonment. In view of the strong prosecution evidence linking defendant to the charged offenses, as well as to the murder cases then pending against defendant in Alameda and San Diego Counties, defense counsel reasonably could believe that their client's interests would best be served by treating the case "as a penalty case," rather than by presenting a defense or relying upon defendant's testimony. Consistently with that strategy, at the close of the guilt phase counsel argued to the jury that a defendant might choose not to testify for any one or more of several reasons. Defense counsel's argument clearly was proper.³⁹

³⁸ At defendant's request, the trial court instructed the jury pursuant to CALJIC Nos. 2.60 and 2.61, as follows:

"A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way. (CALJIC No. 2.60.)

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element." (CALJIC No. 2.61.)

³⁹ Defendant also cites, "by way of comparison," this court's decisions in *People v. Samayoa*, *supra*, 15 Cal.4th 795, *In re Avena* (1996) 12 Cal.4th 694, and

(footnote continued on next page)

Next, defendant offers myriad contentions — most briefly stated and quite conclusory in nature — in an effort to demonstrate he was deprived of the effective assistance of counsel. These contentions encompass a wide array of both general and specific claims, including defense counsel's failure to present a coherent defense and more vigorously challenge the following: the prosecution's witnesses by cross-examination, the identification evidence discovered during the Kim investigation, the evidence linking defendant to Mills's murder (by highlighting evidence that Mills habitually kept personal items in her vehicle), the special circumstances allegations, the purportedly confusing jury instructions submitted to the trial court by the prosecution, and the absence of pinpoint jury instructions. All of these contentions, however, amount to or relate to trial tactics and, as noted previously, must be rejected because the record before us does not reveal why defense counsel elected to proceed in the manner of which defendant now complains. (*People v. Mitcham*, *supra*, 1 Cal.4th 1027, 1059.)

For the same reasons, we reject defendant's similar attack on the manner in which counsel represented defendant at the penalty phase of the trial.

In sum, defendant fails to demonstrate on this record that defense counsel rendered ineffective assistance at trial. To the contrary, the record indicates that counsel was placed in the extremely challenging position of representing a defendant clearly linked to the deaths of five women, four of whom died by strangulation within days of each other, as well as to the near fatality by strangulation of a sixth woman. The record before us does not suggest that counsel's performance in defending against the charges in the manner summarized

(footnote continued from previous page)

People v. Cain (1995) 10 Cal.4th 1. None of these cases is helpful to defendant's argument.

above, in the face of the prosecution's strong case against their client, "fell below an objective standard of reasonableness under prevailing professional norms," nor that "defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

Defendant's related claims, that counsel committed *Griffin* error and inappropriately conceded defendant's guilt at the penalty phase, lack merit for the reasons previously discussed.

V. CONFLICT OF INTEREST ISSUES

A. The Conflict Between Defendant and his Trial Counsel, Defendant's Desire to Testify, and the Motion for New Trial

In a multi-pronged argument, defendant contends the trial court failed to inquire adequately into defendant's conflict with his attorneys regarding the presentation of a defense during the guilt phase of the proceedings (including defendant's desire to testify), failed to appoint new counsel once the conflict was disclosed, and improperly denied defendant's motion for a new trial. As we shall explain, none of defendant's contentions has merit. (See fn. 34, *ante*.)

1. Factual and Procedural Background

On July 5, 1989, at the conclusion of the People's case-in-chief at the guilt phase, defendant's trial counsel requested an in-camera hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 803. At the hearing, conducted outside the presence of the jury and the prosecution, defense counsel informed the court that notwithstanding the circumstance that several defense witnesses were available to be called, counsel was prepared as part of the defense strategy to rest without putting on a defense, and that defendant "emphatically disagrees with that

strategy.” The trial court agreed with defense counsel’s reasoning that “in these matters the decisions should be with the counsel.”

On July 10, 1989, prior to the presentation of the parties’ closing arguments, defense counsel requested a second in-camera hearing under the authority of *Marsden*. During a brief hearing, counsel informed the court that during the July 5 *Marsden* hearing, he had neglected to mention that “by not putting on the witnesses, it also precluded the potential of [defendant] testifying”

Later that same day, after the parties had argued their respective cases to the jury, defense counsel informed the court during an in-camera hearing that defendant “asked me to spread upon the record that he does not agree with the closing argument that counsel made, that he had asked me what it was, and that he was not informed of the type of argument. [¶] And he certainly does not feel that it was adequate, and this just compounds the problem of lack of defense by the argument that counsel made, and he asked me to spread that upon the record.”

On July 17, 1989, the jury returned its guilt phase verdict. Later that same day, defense counsel requested a third *Marsden* hearing, informing the court that “[defendant] continues to express disappointment [in] the manner in which to this point the case has been handled by counsel.” Defense counsel continued: “[Defendant requests the court] to appoint Mr. Rowan Klein . . . to . . . prepare and file a new trial motion or some motion pre-penalty phase. . . . [¶] I will say that counsel opposes that motion. We have opposed other things before, and we would oppose that.” The trial court denied defendant’s motion, stating: “[I]t is just not timely. The motion to appoint Mr. Klein, even the motion for new trial, isn’t — now is not the time to raise such a motion. Certainly, if at some time it looks like Mr. Klein’s expertise would be of some assistance, I’d entertain the motion; but now I don’t think is the appropriate time to even consider it. That request is denied”

On August 7, 1989, the jury returned its penalty phase verdict. Approximately four weeks later, on September 5, 1989, the court conducted a fourth *Marsden* hearing, wherein defense counsel informed the court of their client's request that they be relieved and replaced by attorney Rowan Klein. The court granted the request.

On January 9, 1990, defendant, assisted by his newly appointed attorney, filed a motion for new trial that asserted: (1) defendant erroneously was denied his constitutional rights to testify and to present a defense at the guilt phase of trial; (2) the trial court erroneously failed to afford defendant a hearing regarding his allegations that a conflict of interest existed between him and his attorneys; (3) defendant did not validly waive his constitutional right to testify; (4) the trial court erroneously admitted evidence of other alleged homicides, and (5) the trial court erroneously determined that defendant lacked standing to object to evidence that was seized from the vehicle in which he was arrested.

At the hearing on defendant's motion for new trial, one of defendant's trial counsel, Howard Gillingham, testified that defendant "wanted to put on at all times a full-blown defense [¶] There was no question that [defendant], from early on, wanted to . . . contest the guilt at the special circumstance level. No question about that." Gillingham added: "Near the end of the case-in-chief, . . . we definitely knew that [defendant] did not agree with our approach." Gillingham explained the term, "our approach" to mean: "Our approach was this case was a potential death case, and at some point I, along with [co-counsel] Miss Morrissey, made the decision that that's how it had to be litigated. . . . [¶] As an example, the review of the voir dire of the jurors was almost entirely death-focused, so right from the beginning . . . the tentative decision was it was going to be tried as a penalty case."

Gillingham affirmed that the position of both attorneys representing defendant was not to present a defense and that defendant would not testify at the guilt phase. When Gillingham conveyed this position to defendant near the

conclusion of the guilt phase of the trial, defendant's response, according to Gillingham, was "[a]gitated. Total disagreement, which I must say, has been vindicated. We sort of had that feeling. [¶] . . . [¶] [W]e knew that [defendant] wanted to contest the guilt phase. . . ." Gillingham stated that defendant wanted to put on a defense and wanted to testify. On cross-examination, Gillingham acknowledged that he and defendant's co-counsel considered the decision not to present a defense at the guilt phase to have been tactical in nature, and that factors influencing counsel's decision included the strength and weaknesses of presenting a defense as well as the pending murder cases against defendant in Alameda and San Diego Counties.

Defendant testified that shortly after Gillingham was appointed to represent him, "I told him that I wanted to present a defense and that during the guilt phase I was more concerned about the guilt phase and I felt it was necessary for me to testify. [¶] . . . [¶] I questioned the way he was conducting voir dire. I wasn't happy with what he was doing, with what he was focusing on. [¶] . . . [¶] He wasn't really paying any attention to the guilt aspect. He was more concerned with the penalty phase. That is what I felt, anyway." According to defendant, on "the day before the prosecution rested," Gillingham "told me that he didn't plan to call any witnesses and that he wasn't going to put on a defense. [¶] . . . [¶] He also stated, well, if he didn't put on a defense and I am going to testify, I asked him about that, and he said if we are not going to put on a defense I was not going to be testifying." Defendant's reaction to counsel's strategy was, "I was upset. I indicated pretty strongly that I wasn't happy with him. [¶] . . . [¶] I told him I wanted to call witnesses, put on a defense and testify."

On cross-examination, defendant acknowledged that his trial attorneys had opined it was in defendant's best interest that defendant not testify: "they said it was a tactical decision." Defendant also acknowledged understanding that if he had testified at trial, he would have been subject to cross-examination by the prosecutor, including questions regarding the items taken from Tok Kim and

Janette Cullins found in the car defendant was driving when apprehended, and that defendant would be asked to explain how those items came into his possession and that such answers “more than likely” would have been communicated to the prosecutor’s counterparts in Alameda and San Diego Counties and ultimately used against defendant in proceedings conducted in those counties.

Defendant further testified on cross-examination that during the *Marsden* hearings, defense counsel accurately summarized the disagreements that existed between defendant and counsel.

During an in-camera portion of the hearing, defendant’s new counsel recited the names of several persons whom he identified as having been potential defense witnesses but who were not called to testify at the guilt phase of the trial in light of prior trial counsel’s decision not to put on a case-in-chief. Counsel thereafter argued extensively in favor of the motion for new trial, which was denied.

2. The Issues

a. Defendant’s conflict with his attorneys at trial

Defendant contends that he was denied his constitutional right to present a defense, including his right to testify, and that the trial court failed adequately to inquire as to the nature of the conflict. As we shall explain, we reject these arguments.

Although “a defendant in a capital trial [has] the right to have his only viable defense to the guilt or special circumstance charges presented at the initial stage of trial” (*People v. Frierson* (1985) 39 Cal.3d 803, 815 [plurality opn.]), and counsel lacks the authority to override the defendant’s decision to present such a defense at the guilt phase of the trial (*People v. Burton* (1989) 48 Cal.3d 843, 856), in the present case the record does not establish that defendant had a viable defense. (See *id.*, at p. 857 [“[d]efendant’s reliance on *Frierson* . . . is misplaced, since the record does not show that any defense he wished to present had credible evidentiary support]; see also *People v. Cox* (1991) 53 Cal.3d 618, 671 [“When

the record reflects a tactical choice to curtail presentation of defense evidence or closing argument with the defendant's purported knowledge and acquiescence, it would amount to an untoward interference with the attorney-client relationship to suggest the trial court has an obligation to question the defendant as to his concurrence in counsel's strategy and to secure a waiver of any rights incidentally relinquished."].) Here, the record supports the People's position that defendant, "a person with a sophisticated view of the criminal justice system from the inside," complained sufficiently during proceedings conducted in the trial court so as to create a colorable appellate issue, but not sufficiently to obligate the trial court to relieve his counsel.⁴⁰

Accordingly, defendant's claim that he was denied the opportunity to present a defense, and to "conflict-free, effective representation," should be denied.

With respect to defendant's asserted desire to testify at trial, we are guided by well-settled rules: " 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.' (*Harris v. New York* (1971) 401 U.S. 222, 225 [91 S.Ct. 643, 645, 28 L.Ed.2d 1].) The defendant's 'absolute right not to be called as a witness and not to testify' arises from the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

⁴⁰ We believe that the prosecutor's argument in summation at the hearing on defendant's motion for new trial aptly summarizes the state of the record: "[L]ooking at the transcript, the court could . . . and should draw the conclusion that what happened was Mr. Carter was a defendant who wanted things his way. [Defense counsel] Mr. Gillingham did not do them his way for valid legally sufficient reasons, and Mr. Gillingham indicated this . . . displeasure of Mr. Carter, but in the end, Mr. Carter acceded to Mr. Gillingham's trial strategy. He was present during all of these proceedings, and he is not a novice in this business. He is not a person who is not unfamiliar [*sic*] with the courts and the court system. He has not hesitated in the past to comment. I suggest this motion should be denied in its entirety. There is no error at all."

(*Cramer v. Tyers* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793.]) Although tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel. (*People v. McKenzie* (1983) 34 Cal.3d 616, 631, fn. 9 [194 Cal.Rptr. 462, 668 P.2d 769]; *U.S. v. Martinez* (9th Cir. 1989) 883 F.2d 750, 755, vacated other grounds (1991) 928 F.2d 1470; see also *People v. Robles* (1970) 2 Cal.3d 205, 215 [85 Cal.Rptr. 166, 466 P.2d 710].)" (*People v. Hines* (1997) 15 Cal.4th 997, 1032.)

Moreover, we previously have rejected the position that a trial court must obtain an affirmative waiver on the record whenever a defendant fails to testify at trial. (*People v. Alcala, supra*, 4 Cal.4th 742, 806 ["When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' (Citations.).]"; see also *Florida v. Nixon* (2004) ___ U.S. ___ [125 S.Ct. 551, 561] [although defense counsel "was obliged to, and in fact several times did, explain his proposed trial strategy" to the defendant, counsel "was not additionally required to gain express consent before conceding the (defendant's guilt)"]; *People v. Cox, supra*, 53 Cal.3d 618, 671 [" '[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify[,], is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial.' [Citation.]"]].)

Here, as noted above, defendant had ample opportunity during the course of three *Marsden* hearings to inform the court that he wished to testify, against the advice and over the objection of defense counsel, *even if defense counsel were permitted to decline to present any other defense witnesses who would support defendant's own testimony*. In view of defense counsel's repeated efforts during the *Marsden* hearings to inform the trial court of the conflicts that had arisen with

his client, the trial court reasonably could have determined that had defendant told his counsel that defendant insisted upon testifying despite the absence of any other defense witnesses, his counsel would have conveyed that demand to the trial court. In view of the circumstance that counsel never told the trial court that defendant had made such a demand, on this record we may not assume that defendant in fact had insisted upon testifying even where no other defense witnesses would be presented to support his testimony. (Compare *People v. Robles*, *supra*; 2 Cal.3d 205, 214-215 [a defendant has the right to testify in his or her own defense, over counsel's objection, when the defendant insists upon being permitted to testify].)

Similarly, defendant's further contention that the trial court failed adequately to inquire into his conflict with trial counsel similarly is belied by the record before us. As noted above, the court conducted three *Marsden* hearings during the course of the trial for the purpose of permitting the airing of the conflict between defendant and his attorneys. During these hearings, defense counsel brought to the court's attention defendant's dissatisfaction with counsel's trial strategy and tactics. Although, at the hearing on the motion for new trial, defendant testified that counsel had not informed the court at the July 5th and July 10th *Marsden* hearings of all the witnesses whom defendant wanted to call, we are satisfied from the record before us that in the course of conducting three *Marsden* hearings, the trial court adequately inquired as to the issues raised by the defense, and that counsel fairly characterized the nature of the conflict for the trial court.

b. Failure to appoint new counsel

Defendant contends that in view of the conflict between him and his trial counsel, the trial court was obligated to appoint new counsel, and the court's failure to do so constitutes reversible error. As we have indicated in the immediately preceding section, however, the record does not indicate that any defense that defendant sought to present had "credible evidentiary support" (*People v. Burton*, *supra*, 48 Cal.3d 843, 857; *People v. Jones* (1991) 53 Cal.3d 1115, 1139; see also *People v. Frierson*, *supra*, 39 Cal.3d 803, 815 ["a defendant

in a capital trial . . . retain[s] the right to have his only *viable* defense to the guilt or special circumstance charges presented at the initial stage of the trial” (italics added)). In view of that circumstance, the trial court was under no obligation to interrupt the trial proceedings to order the appointment of new counsel. We therefore reject defendant’s contention that the trial court erred in not appointing new counsel upon learning of the conflict between defendant and his counsel regarding trial tactics and strategy.

c. Motion for new trial

In view of defendant’s foregoing contentions, but without additional argument beyond what he has cited in support thereof, defendant asserts the trial court committed reversible error in denying defendant’s motion for a new trial. As we previously have explained, however, defendant fails to persuade us that his conflict with defense counsel over trial tactics and strategy (including the decision whether defendant should testify), the trial court’s inquiries into that conflict, or the court’s refusal to appoint new counsel prior to the conclusion of the penalty phase, either singularly or in the aggregate, deprived defendant of his state or federal constitutional rights. Having discerned no error in this regard, we conclude the trial court properly denied defendant’s motion for a new trial.

VI. PENALTY PHASE ISSUES

A. The Admissibility of Evidence of Defendant’s Attack on Jennifer S.

Prior to the commencement of trial, defendant moved to exclude from the penalty phase the evidence of (1) defendant’s prior conviction for the Ventura County sexual assault committed upon Jennifer S., and (2) the facts underlying that conviction. Defendant asserted he was denied the effective assistance of counsel during the Ventura County proceedings, that but for counsel’s deficient performance he would have been acquitted in that case, and that therefore the

Ventura County conviction and the facts underlying that conviction should be excluded from the penalty phase.

At the hearing on defendant's motion, the prosecution conceded that because the conviction had not occurred before the charged murders, it was not a "prior" conviction within the meaning of section 190.3, subdivision (c), and thus evidence of the conviction itself was not admissible under that provision. (See *People v. Balderas* (1985) 41 Cal.3d 144, 203.) Accordingly, the court granted defendant's motion to exclude evidence of the conviction.

With regard to the direct evidence of defendant's attack upon Jennifer S. underlying the conviction, however, the trial court denied defendant's motion. Accordingly, as described earlier (*ante*, pp. 12-13), at the penalty phase the prosecution introduced the testimony of Jennifer S. and other evidence relating to defendant's brutal attack upon her.

On appeal, defendant renews his challenge to the trial court's ruling denying his motion to exclude the evidence underlying the Ventura County conviction. He argues that had he not been represented ineffectively in Ventura County, "he would have been acquitted of the charges there and the evidence would not have been admissible against him here," relying on the portion of section 190.3 providing that "in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted." (See *People v. Sheldon* (1989) 48 Cal.3d 935, 948-952.) Defendant points in particular to the Ventura County prosecutor's assertedly improper reference to defendant's failure to testify in that case (see *Griffin v. California, supra*, 380 U.S. 609), implicitly asserting that had defense counsel in those proceedings more vigorously and effectively challenged the prosecutor's comments, the conviction would not have been sustained.

We conclude that defendant's contention lacks merit. To begin with, in the prior proceeding both the trial court and the Court of Appeal explicitly rejected the claim that the prosecutor's comments undermined the validity of the conviction.⁴² Furthermore, even if defendant nonetheless properly could challenge the prior conviction on this ground at this point (an issue we need not and do not decide), and even if the error upon which defendant relies had been prejudicial, the very most that defendant would have been entitled to would have been an order striking the prior conviction for purposes of this proceeding, *not* the entry of an acquittal. (See *People v. Horton*, *supra*, 11 Cal.4th at pp. 1126-1141.) Because, in any event, as already noted, evidence of the conviction itself was not admitted in the present case, defendant's challenge to the prosecutor's conduct in the Ventura proceeding or to defense counsel's allegedly ineffective assistance in that proceeding has no bearing upon the validity of the trial court's admission of evidence of the conduct underlying the prior conviction.

With regard to that evidence, past cases make clear that the introduction of evidence of the Ventura assault was proper under section 190.3, subdivision (b), which authorizes the trier of fact at the penalty phase to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence," whether such violent criminal conduct occurred prior to or after the charged capital offense. (See, e.g., *People v. Avena*, *supra*, 13 Cal.4th 394, 426-428 [unlike prior felony convictions, evidence of violent conduct is admissible even if it occurred after the capital crime]; *People v. Clair* (1992) 2 Cal.4th 629, 676-677 [possession of knife during burglary is sufficient to establish implied

⁴² Defense counsel in the Ventura proceedings moved for a mistrial based on the prosecutor's improper comments, but the trial court denied the motion. On appeal, the Court of Appeal, in an unpublished decision, affirmed defendant's

(footnote continued on next page)

threat of force or violence]; *People v. Miranda* (1987) 44 Cal.3d 57, 97 [upholding constitutionality of section 190.3, subd. (b)]; *People v. Balderas*, *supra*, 41 Cal.3d 144, 204-205 [evidence of other criminality, if proved beyond a reasonable doubt, “is simply one factor the penalty phase jury is to consider in deciding the appropriate punishment for the capital offense”].) No error appears.

B. Adequacy of the Jury Instructions Given

Defendant raises a number of contentions related to the standard jury instructions given by the trial court. As we shall see, none of these contentions has merit.

First, defendant contends the standard California instructions “do not adequately channel sentencing discretion by clear and objective standards that provide specific and detailed guidance for the sentencing authority, resulting in arbitrary and capricious sentencing decisions in violation of the Eighth Amendment.” We repeatedly have rejected similar claims. (See, e.g., *People v. Williams*, *supra*, 16 Cal.4th 153, 267-268; *People v. Osband*, *supra*, 13 Cal.4th 622, 702-703; *People v. Sanders* (1995) 11 Cal.4th 475, 563-564.) We are not persuaded to reconsider those decisions.

Second, defendant contends that on the second day of the jury’s penalty deliberations, the trial court failed to respond adequately to two questions submitted by the jury that sought guidance as to the meaning of the terms, “extenuating,” “mitigating,” and “aggravating” circumstances, and that the failure of the trial court to make an adequate record of its response deprived defendant of his right to due process of law by denying him meaningful appellate review of the proceedings. The jury’s questions, submitted in a pair of notes signed by the jury

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conviction, concluding “[t]his was not a close case,” and that the *Griffin* error “was harmless beyond a reasonable doubt.”

foreman, inquired: [1] “We would like the legal definition of: extenuating[,]
mitigating[, and] aggravating [*sic*]. [2] If a member of the jury finds that the
aggravating circumstances [are] greater than the mitigating circumstances, may the
juror vote for life? If a member of the jury finds that the mitigating circumstances
[are] greater than the aggravating circumstances, may the juror vote for death?”

With regard to the jury’s request for definitions, the record is silent as to
how, if at all, the trial court responded.⁴¹ We find entirely speculative, however,
defendant’s assertion that the jury’s request that the trial court elaborate on certain
legal definitions “raises serious doubts about the reliability of the sentencing
process conducted here.” Even if we infer from the record that the trial court,
either intentionally or inadvertently, ignored the jury’s request for definitions of
the terms, “extenuating,” “mitigating,” and “aggravating” circumstances, and did
not discuss the matter with counsel, any error (see § 1138) was harmless, because
those terms did not require further definition.

As to the second note from the jury, the trial court answered “yes” and
“no,” respectively.⁴² The jury thereafter continued its deliberations and, without
submitting any further inquiries to the court, reached its verdict five days later.
Although the better practice would have been for the court (or the parties) to
ensure that the proceedings responsive to the jury’s questions were reported, on

⁴¹ The matter was discussed several years later when the parties attempted to
settle the record, prior to filing their briefs in this court. Defense counsel observed
at the record settlement hearing that although the Clerk’s Transcript contains the
questions submitted by the jury, there is no corresponding Reporter’s Transcript
indicating whether the trial court discussed the questions with counsel. The
Reporter’s Transcript for the date in question, August 2, 1989, indicates only that
“the jury retired for further deliberations.”

⁴² At the record settlement hearing, the trial court recalled: “I am confident
that the jury was never brought out, that — I have some vague recollection, but I
could be in error — that we had contact with either [defense counsel] and we all
agreed that those were the correct answers.”

the record before us we are unable to discern any error in the trial court's handling of the jury's inquiries.⁴³

Finally, defendant contends that because he was personally absent from court when the jury submitted the foregoing inquiries (although his counsel was present), reversal of the death judgment is mandated. Although defendant did not waive his presence at any stage of the trial, his failure to demonstrate prejudice from his absence at this stage of the proceedings forecloses his claim. (See *People v. Bradford, supra*, 15 Cal.4th 1229, 1358.)

C. Alleged Prosecutorial Misconduct

Defendant contends certain comments made by the prosecutor on eight distinct occasions during closing argument constituted prejudicial misconduct in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

"Improper remarks by a prosecutor can 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 2471, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431]; cf. *People v. Hill* (1998) 17 Cal.4th 800, 819 [72 Cal.Rptr.2d 656, 952 P.2d 673].) Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [25 Cal.

⁴³ Defendant contends that the inadequate record violates a panoply of defendant's rights under the state and federal Constitutions. In the absence of any showing by defendant that any matter not reported was of consequence and prejudicial, defendant's claim lacks merit. (See *People v. Alvarez, supra*, 14 Cal.4th 155, 196, fn. 8 ["The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort."].)

Rptr.2d 867, 864 P.2d 40] (*Berryman*); *People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610] (*Price*).)

“Nevertheless, as a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. The rule applies to capital cases. (*Berryman, supra*, 6 Cal.4th at p. 1072 [rejecting defendant’s claim of prosecutorial misconduct both for failure to object or request admonition at trial[,] and on the merits]; *Price, supra*, 1 Cal.4th at pp. 447, 460-462 [declining to address whether prosecutors committed misconduct[,] because defense did not object at trial]; *People v. Monteil* (1993) 5 Cal.4th 877, 914 [21 Cal.Rptr.2d 705, 855 P.2d 1277 (*Monteil*) [although trial counsel objected to prosecutor’s remarks at trial, the failure to request admonition failed to preserve claim of prosecutorial misconduct on appeal].)” (*People v. Frye* (1998) 18 Cal.4th 894, 969-970; see also *People v. Ochoa, supra*, 19 Cal.4th 353, 427.)

With regard to seven of the eight instances of alleged prosecutorial misconduct, defense counsel did not object when the comments were made. Further, the record before us fails to disclose a basis for applying any exception to the general rule requiring both an objection and a request for a curative instruction. (See *People v. Frye, supra*, 18 Cal.4th at p. 970.) Accordingly, insofar as defendant’s claim of prosecutorial misconduct relates to comments that were not objected to, the claim is barred. (*Ibid.*)

The instance in which an objection to the purported misconduct was interposed consisted of the prosecutor arguing to the jury: “What kind of a man does things like this? Well, the defense has tried to tell you what kind of a man, and they have not told you very much. They have had, as any criminal defendant facing the nature of these charges, a great deal of time to find people, to call them. Virtually unlimited money—” At that point, defense counsel objected. The trial court ruled: “The objection is sustained as [to] monetary [*sic*].”

On appeal, defendant contends that although the trial court sustained his objection, defendant did not seek an admonition because to do so “would have been futile and not cured the prejudice.” We disagree. Defendant’s objection having been sustained, defendant bore the burden of seeking a curative admonition from the court. He refrained from doing so. Although defendant asserts here that such corrective action would have been pointless, his argument is unpersuasive. The prosecutor’s reference to money was fragmentary and ambiguous. It appears likely that the reference had minimal potential effect upon the jurors. Whatever potential for harm arose from the prosecutor’s remark was assuaged by the court’s ruling and certainly was capable of elimination by means of an admonition, had one been requested.

Moreover, the prosecutor’s brief remark was fleeting and of inarginal significance. The trial court’s ruling alerted the jury to the inappropriate nature of the comment. In addition, the prosecutor’s other comments — about which defendant has waived his right to complain based upon his failure to object below — came within the bounds of fair comment or at most constituted trivial improprieties. Under these circumstances, and in view of the nature of defendant’s crimes, we conclude that any possible error was harmless, because defendant has failed to establish “a reasonable likelihood the jury understood or applied the complained-of statements in an improper or erroneous manner.”

(*People v. Frye, supra*, 18 Cal.4th 894, 970.)⁴⁴

⁴⁴ Defendant includes in his claim of prosecutorial misconduct at the penalty phase a similar claim of prosecutorial misconduct at the guilt phase. With respect to defendant’s asserted claims of error directed at the prosecution’s closing argument at the guilt phase, defendant did not interpose a single objection. As we have explained *ante*, because defendant failed to object the trial court did not act to cure any purported harm through admonition. Defendant’s failure to assert a timely objection and request such an admonition constitutes a failure to preserve the claim on appeal. (*People v. Ochoa, supra*, 19 Cal.4th 353, 427; *People v. Frye, supra*, 18 Cal. 4th 894, 969-970.)

D. Motion for New Trial Based on Alleged Juror Misconduct

Prior to sentencing, defendant moved for a new trial on various grounds that already have been discussed. (See *ante*, pp. 99-105.) At the hearing on the motion, defendant orally conveyed an additional ground upon which he urged the trial court to grant his motion, juror misconduct. Defense counsel contended: "The basis of the allegation is that there may have been perjury committed by [Juror K.] in the questionnaire she completed for the court and counsel. Specifically Question 61 which says: 'Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?' Answer was: 'No.' " The defense argued that Juror K., who was 31 years of age when she completed the juror questionnaire, feared being raped, slept with a knife under her bed, and therefore committed perjury when she responded in the negative to Question 61. The defense added that Juror K. communicated her concealed fear to Juror C-M.

The prosecutor argued that the issue raised by Question 61 "is directed toward a specific instance" and did not apply to the "general fear" on the part of Juror K. noted by defense counsel, adding that there was no evidence before the court of any misconduct. The trial court voiced some misgivings over the defense's claim, observing: "I think we all fear violence [—] [I]f we don't, then there is something wrong with us, I imagine," but permitted defense counsel to question Juror K., as set forth below.⁴⁵

-
- 45 "Counsel: Ma'am, you were a juror in this case?
 "Juror K.: Yes.
 "Counsel: On March 20th, 1989, do you remember filling out a
questionnaire, it is about 18 pages, signed under penalty of perjury?
 "Juror K.: Yes.
 "Counsel: Prior to that time, did you ever sleep with a knife under your
bed?
 "Juror K.: Prior to what time?
 "Counsel: Prior to March 20th, 1989, did you ever sleep with a knife

(footnote continued on next page)

(footnote continued from previous page)

under your bed?

"Juror K.: At one time.

"Counsel: Why did you do that?

Juror K.: I got an apartment for the first time when I was — I can't even remember — 18 or 19, and I lived by myself, and prior to that time, I had never been alone and, after I first moved in, every little creak in my house, and tree branch, or whatever, I was paranoid for a short period of somebody breaking in, or whatever, because there is no one else around as my parents, or roommates at school, or whatever, and I think the incident you are referring to, one night I woke up, could not go to sleep, and I said, well, if anything does happen, I am going to defend myself, so I went into my kitchen. I got a knife, and I put it between my mattresses, and I then — that didn't help, so I spent the entire night up still, and I don't know exactly when, but I can tell you I probably got up the next morning and thought how silly and put it back. It was very brief and that was it.

"Counsel: Did you fear any particular kind of crime being committed?

"Juror K.: Well, somebody breaking in and, you know, raping and murdering, you know 18 years old —

"Counsel: Had there been anything in the community that you had read about —

"Juror K.: No.

"Counsel: — that contributed to that fear?

"Juror K.: No.

Counsel: Was this when you were living in Pasadena?

Juror K.: Yes, that is where I had my first apartment.

"Counsel: And did you ever tell anybody that you feared the fact that there had been rapes in the Pasadena community?

Juror K.: No, I don't know that I was aware of a lot of that happening.

"Counsel: Had you ever been burglarized prior to that time?

Juror K.: No.

"Counsel: Did you fear any — well, have you ever been in a situation where you feared any kind of violence?

"Juror K.: Are you referring to that particular time or moment?

"Counsel: Any time. Any time prior to March 20th?

"Juror K.: No, no, not really.

"Counsel: So the time that you put the knife under your bed, you didn't fear any particular violence —

"[Objection sustained.]

(footnote continued on next page)

After hearing further argument from the parties, the trial court without comment denied the motion for new trial.

On appeal, defendant contends that Juror K. “intentionally concealed her direct experience in *voir dire* and her questionnaire responses,” in contravention of defendant’s rights under the United States and California Constitutions “to [an] impartial and unbiased jury, due process, fair trial, present a defense, determination based on material facts and evidence at trial, and to death eligibility and reliable determinations of guilt and penalty.” Defendant asserts that in view of the charges filed against defendant (including burglary, rape, and murder), Juror K.’s testimony — “revealing fears of being victim to the very crimes at issue in [defendant’s] case” — must be presumed to establish prejudicial concealment in the absence of affirmative and competent rebuttal, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 402, *People v. Pierce* (1979) 24 Cal.3d (1979) 199, 207, and *Dyer v. Calderon* (9th Cir. 1988) 151 F.3d 970, 973, fn. 2).

In response, the People contend that the court’s ruling “necessarily rested on implied findings that Juror K. did not conceal the information, and/or that it was not material, and/or that any concealment was not deliberate, and/or that

(footnote continued from previous page)

“Counsel: Did you consider the time that you put the knife under your bed as being a situation where you feared violence[?]”

“Juror K.: I had trouble sleeping because of noises going on, or whatever, and it was all in my imagination. Like I said, I probably got up in the morning and thought how silly and, quite frankly, I hadn’t and haven’t thought about that incident at all for the last 12 years.

“Counsel: In you[r] mind, isn’t that a situation where you feared violence against you —

“[Objection overruled.]”

“Juror K.: That night?”

“Counsel: Yes.

“Juror K.: Yes.

“Counsel: Thank you.”

Juror K. had no actual bias against appellant.” The People further contend that the present case is unlike those relied upon by defendant.

Both parties refer to other answers provided by Juror K. on the questionnaire: Question 57 asked, “Have you or anyone close to you been the victim of a crime, reported or unreported?” to which Juror K. answered affirmatively, indicating that she been the victim of burglaries in San Jose, Pasadena, and West Los Angeles. Question No. 71 asked, “Any other comments?” to which Juror K. responded, “[E]veryone has fears [sic] + you don’t know what will happen in the next minute.”

In previous decisions, we have reviewed at some length the principles that guide our examination of a claim of juror misconduct during voir dire. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634, 646-660; *In re Hitchings* (1993) 6 Cal.4th 97, 110-123.) We need not reiterate here those extensive discussions; suffice it to say for present purposes that “juror misconduct involving the concealment of material information on voir dire raises the presumption of prejudice,” and that “[t]his presumption of prejudice ‘ ‘may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . .’ ” Citations.]” (*In re Hitchings, supra*, at p. 119; see also *Dyer v. Calderon, supra*, 151 F.3d 970, 973, fn. 2 [“The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.”].)

Applying the foregoing standards, it is clear that Juror K.’s failure to answer Question 61 more completely did not constitute misconduct and, even if we were to assume that misconduct did occur, the presumption of prejudice was rebutted by the substance of her testimony at the hearing on defendant’s motion for new trial. Assuming, for the sake of argument, that defendant is correct in asserting that Juror K.’s answer to Question No. 61 was *inaccurate*, her statement

at the hearing that “I hadn’t and haven’t thought about that incident at all for the last 12 years” diminished if not dispelled its potential significance.⁴⁶

Further, even if Juror K. in fact had concealed the information, the circumstances that the incident was “very brief” and occurred more than a decade earlier, and that Juror K. realized because she had been burglarized that “everyone has feares” [*sic*], established that the omitted information was immaterial to her overall qualifications or suitability to serve as a juror. Those qualifications clearly were established in the course of counsel’s voir dire.⁴⁷

Moreover, even if we were to assume Juror K.’s answer to Question No. 61 was inaccurate, evasive, and material, the circumstance that as a teenager living alone for the first time, Juror K. was “paranoid for a short period of someone

⁴⁶ Because the issue is not germane to the resolution of the issues presented here, we need not and do not have occasion to address the question whether a juror’s concealment of information must be intentional. (See *In re Hitchings*, *supra*, 6 Cal.4th 97, 114-116 [declining to answer the question]; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110, fn. 5 [same]; compare *People v. Diaz* (1984) 152 Cal.App.3d 926, 932 [concealment need not be intentional], *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 [same] with *People v. Kelly* (1986) 185 Cal.App.3d 118-125-128 [disagreeing with *Diaz*], and *People v. Jackson* (1985) 168 Cal.App.3d 700, 704-706 [same]; see also *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 555-556 [an honest yet mistaken answer to a question on *voir dire* rarely amounts to a constitutional violation, and even an intentionally dishonest answer is not fatal provided that the falsehood does not reflect a lack of impartiality].)

⁴⁷ During voir dire examination, Juror K. also made a few passing references to convicted murderer Charles Manson, indicating that she believed he would have been an individual eligible to receive the death penalty. On appeal, defendant contends that Juror K.’s “voir dire answers take on even greater significance when read with her concealed fears” and with “[w]hatever else may be said about Juror [K.]’s fears of Charles Manson.” Our review of the record indicates there is no basis for concluding that Juror K.’s brief references to Manson are supportive of defendant’s position. Moreover, both the prosecutor and defense counsel took the opportunity to ask follow-up questions on *voir dire* regarding Juror K.’s knowledge of the Manson case.

breaking in,” leading her to keep a kitchen knife in close proximity overnight, does not provide any basis for concluding that she harbored undisclosed juror *bias*. Accordingly, the presumption of prejudice was rebutted.⁴⁸

We further note defendant’s misplaced reliance upon our decisions in *In re Stankewitz*, *supra*, 40 Cal.3d 391, and *People v. Pierce*, *supra*, 24 Cal.3d 199, and the United States Court of Appeals’ decision in *Dyer v. Calderon*, *supra*, 151 F.3d 970. In *Stankewitz*, the petitioner successfully sought a writ of habeas corpus following his conviction of first degree murder, alleging he was denied a fair trial because one of the jurors, a police officer, had violated the court’s instructions and “ ‘consulted’ his own outside experience as a police officer on a question of law” as to when a robbery takes place. (40 Cal.3d at p. 399.) We characterized the juror’s determination as being “totally wrong,” and concluded that because the juror “stated it again and again to his fellow jurors [he] thus committed overt misconduct.” (40 Cal.3d at pp. 399-400, fn. omitted.) In *Pierce*, the defendant obtained a reversal of his conviction for second degree murder upon the ground of juror misconduct, because one of the jurors had ignored the court’s repeated admonitions not to discuss the case with third persons by discussing the proceedings during the course of the trial with a police officer acquaintance who had testified as a prosecution witness in the case. (24 Cal.3d at p. 209.) In *Dyer*, in which the court reversed a first degree murder conviction, a juror answered “no” to questions asking whether a relative or close friend ever had been a victim of any type of crime or had been accused of any offense other than a traffic

⁴⁸ With regard to defendant’s related claim of misconduct arising from Juror K.’s reportedly having told Juror C-M. of her concealed fears, we observe that the record on appeal does not indicate what Juror K said to the other juror and when she said it. Defense counsel had the opportunity to call Juror C-M. at the hearing on defendant’s motion for new trial, but did not do so. The record before us thus provides no basis for concluding that prejudicial misconduct occurred, and the claim therefore fails.

offense, notwithstanding the circumstance that the juror's brother had been murdered and her estranged husband had been arrested for rape. None of these decisions, involving egregious transgressions in derogation of the jurors' oaths, is remotely apposite to the misconduct alleged to have occurred here.

“ ‘The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’ ” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318 [rejecting a claim of juror misconduct based upon allegations that during a capital trial a juror consumed tranquilizers and engaged in a discussion regarding “the religious aspects of the penalty phase”].) Our review of the relevant portions of the record described above leads us to conclude that the trial court properly denied defendant's motion for a new trial based upon alleged juror misconduct. We agree with that court's implied finding that Juror K.'s fear of an intruder more than a decade earlier was highly unlikely to have influenced her role as a juror. Defendant's assertions to the contrary lack support and thus are unpersuasive. No abuse of discretion by the trial court occurred.

E. Section 190.4, subd. (e) Motion

Approximately five months after the jury returned its penalty phase verdicts, the court considered defendant's automatic motion for modification of the death sentence. At a hearing, the court stated that it had reviewed the evidence introduced at trial, found the jury's verdicts as to guilt and its findings as to special circumstances to be supported by the weight of the evidence, considered the factors in aggravation and mitigation as set forth in section 190.3, and concluded that “the aggravating circumstances substantially outweigh[ed] the mitigating circumstances.” The court on that basis denied defendant's application for modification of the death sentence.

On appeal, defendant contends the trial court improperly denied the motion, because (1) prior to ruling on the motion, the court considered other-crimes

evidence introduced at the guilt phase of trial (notably the deaths of Tok Kim and Janette Cullins), and (2) following the hearing on the motion to modify but prior to imposing the death judgment, the court considered victim-impact statements. Defendant's position is without merit.

“ ‘In ruling on a verdict-modification application, the trial judge is required by section 190.4(e) to “make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law.” [Citations.] That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. [Citation.] And he must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves.’” (*People v. Marshall* [1990] 50 Cal.3d [907,] 942.)

“On appeal, we subject a ruling on such an application to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined de novo [Citation]. Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty.” (*People v. Mickey, supra*, 54 Cal.3d 612, 703-704; see also *People v. Jones* (1997) 15 Cal.4th 119, 191 [same].)

Defendant contends initially that the trial court improperly considered the “other-crimes” evidence involving the deaths of Tok Kim and Janette Cullins in a light different from that considered by the jury — that is, the jury may have considered the evidence in the context of establishing intent, identity, or common plan, whereas the trial court at the section 190.4, subdivision (e) hearing considered the Kim and Cullins evidence in aggravation. As the People point out, however, the trial court was entitled to consider the Kim and Cullins evidence as a factor in aggravation under the category of criminal activity involving the use of force or violence. (§ 190.3, subd. (b).) In any event, any error in this regard clearly would have been nonprejudicial, because the court's comments in

extensively reviewing the list of aggravating and mitigating evidence and finding that the circumstances in aggravation “substantially outweigh[ed]” the circumstances in mitigation make clear that there is no reasonable possibility that such an error would have affected the trial court’s denial of the application for modification of the death sentence.

With regard to defendant’s claim pertaining to improper reliance by the trial court upon victim-impact evidence, we perceive no error. The court heard and denied defendant’s application for modification of the death sentence on January 11, 1990. No victim-impact statements were made in connection with that motion. Although the record contains 12 letters (either undated or bearing 1989 dates) written by family and friends of the victims Knoll, Mills, and Guthrie generally expressing extreme anger, loss, and sadness, the record does not indicate that the court considered any of these statements prior to denying the application for modification of defendant’s death sentence.⁴⁹ On January 30, 1990, immediately prior to the court’s imposition of the judgment of death, it heard similar statements made by Jillette Mills’s mother, Sue Ann Mills, Bonnie Guthrie’s sister, Jennifer Bollman, and Susan Knoll’s sister, Sandra Pender.

Defendant assigns error to the court’s consideration of the statements submitted by the victims’ family members and friends. His contention fails for two reasons. First, he failed to object to the statements in question and therefore forfeited appellate review of this claim. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1183; *People v. Hill* (1992) 3 Cal.4th 959, 1013.)

⁴⁹ The People assert that the letters were received by the court on January 30, 1990, the date the court entered the judgment of death, but do not include a reference to the record, which does not indicate whether the letters in fact were received on that date. In his Reply Brief, however, defendant does not challenge the People’s reference to January 30, 1990, as the date on which the court received the letters.

Second, defendant's claim fails on the merits. We previously have rejected similar contentions that *Booth v. Maryland* (1987) 482 U.S. 496, prohibiting victim impact statements, extends to proceedings under section 190.4, subdivision (e). (*People v. Ramos, supra*, 15 Cal.4th at p. 1184; *People v. Benson, supra*, 52 Cal.3d 754, 812; cf. *Payne v. Tennessee* (1991) 501 U.S. 808, 830 and fn. 2, overruling *Booth v. Maryland, supra*, 482 U.S. 496.) Nevertheless, we also have observed that "the scope of a modification motion does not encompass statements of the victim's relatives or any other evidence not presented to the jury during the penalty phase trial. [Citations.]" (*People v. Ramos, supra*, 15 Cal.4th at p. 1184.) Here, however, the record is clear that in denying defendant's application to modify the death sentence, the trial court relied solely upon the evidence presented to the jury and was guided by the factors enumerated in section 190.3; as indicated above, the three oral statements now challenged by defendant were made approximately three weeks after the court denied the application, and nothing in the record indicates that the trial court considered the letters at any time. Thus, the record before us provides no basis for concluding that the trial court in ruling on the application improperly considered any matter that was not placed before the jury.⁵⁰

F. Cumulative Error

Defendant contends that the cumulative effect of the asserted errors committed at his trial led to a miscarriage of justice, requiring reversal of the guilt and penalty phase judgments. Having determined that defendant's trial was nearly devoid of any error, and that to the extent any error was committed it was clearly

⁵⁰ Nor do we find any merit in defendant's claim that the trial court improperly admitted "prejudicial victim-impact evidence" in the form of the victims' family members' identification of items of personal property recovered from the vehicle driven by defendant at the time of his arrest. This testimony properly was admitted. (See *ante*, pp. 55-64.)

harmless, we conclude that defendant's contention as to cumulative error lacks merit.

G. The Delay Between Imposition of Sentence and Execution

Defendant was sentenced to death on January 30, 1990, and counsel was appointed to pursue his automatic appeal more than four years later, on March 18, 1994. Defendant contends that the passage of this period of time, in addition to the approximately eleven years that have elapsed since then (during which time defendant has pursued his automatic appeal and claims on habeas corpus in state and federal court), are "largely the result of inadequate resources provided by the state to review death verdicts, and the complexity of review mandated by past abuses." Defendant contends that in view of these asserted circumstances, the judicial process compels him "to endure the uncertainty and ever-present tension on death row for such an extended period of time constitut[ing] cruel and unusual punishment in violation of the Eighth Amendment" (*Ibid.*) (See *Lackey v. Texas* 1995) 514 U.S. 1045 [memo. opn. on den. of cert. by Stevens, J., observing that neither retribution nor deterrence is served when prisoners serve 17 years under a sentence of death].)

Defendant's contention resembles a claim that we declined to address in *People v. Barnett* (1998) 17 Cal.4th 1044, 1182-1183. As we explained in *Barnett*, "[b]ecause defendant's claim is dependent upon evidence and matters not reflected in the record on appeal, we decline to consider it at this juncture." (*Id.*, at p. 1183.) For similar reasons, we decline to address defendant's claim.

H. Use of Lethal Injection

Defendant contends the use of lethal injection as a method of execution constitutes cruel and unusual punishment and on that basis is unconstitutional. We previously have rejected the identical claim (see, e.g., *People v. Samayoa*, *supra*,

15 Cal.4th 795, 864; *People v. Holt* (1997) 15 Cal.4th 619, 702), and defendant fails to present any reason for us to reconsider our prior decisions. We therefore reject defendant's contention.

DISPOSITION

The judgment is affirmed in its entirety.

GEORGE, C. J.

WE CONCUR:

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

MORENO, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Carter

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S014021
Date Filed: August 15, 2005

Court: Superior
County: Los Angeles
Judge: Robert W. Thomas

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT WEST "C" HON. ROBERT W. THOMAS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 PLAINTIFF,)
)
 VS.) NO. A 089330
)
 DEAN PHILLIP CARTER,) VOLUME 42
)
 DEFENDANT.)
-----)

REPORTER'S DAILY TRANSCRIPT

WEDNESDAY, JULY 5, 1989

PAGES 5033 TO 5113, INCL.

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JANET BILYEU, CSR #3223
OFFICIAL REPORTER

2

ER 474

5092

1 (THE COURTROOM WAS CLEARED. PRESENT
2 ARE THE COURT, COURT REPORTER, CLERK,
3 TWO BAILIFFS, MR. GILLINGHAM, MS. MORRISSEY,
4 THE DEFENDANT, AND LAW CLERK TO MR.
5 GILLINGHAM.)
6

7 THE COURT: THE RECORD SHOULD REFLECT THAT THERE
8 ARE NO REPRESENTATIVES OF THE PROSECUTION NOR ANY
9 SPECTATORS REMAINING IN THE COURTROOM.

10 MR. GILLINGHAM: YES, YOUR HONOR. THANK YOU.

11 YOUR HONOR, THE -- I JUST FEEL THAT WE SHOULD
12 SPREAD SOMETHING ON THE RECORD REGARDING THE DEFENSE
13 STRATEGY AND POSITION.

14 ONE, IT IS MISS MORRISSEY'S AND MYSELF -- OUR
15 FIRM BELIEF THAT WE SHOULD REST AT THIS TIME. WE INTEND
16 TO DO THAT.

17 MR. CARTER EMPHATICALLY DISAGREES WITH THAT
18 STRATEGY.

19 IF I MIGHT JUST BRIEFLY, THERE WERE POTENTIAL
20 WITNESSES THAT COULD HAVE BEEN CALLED. THERE IS A
21 GENTLEMAN REGARDING OAKLAND, MR. EDDIS JEFFRIES, WHO WOULD
22 HAVE TESTIFIED OR COULD TESTIFY AS WE UNDERSTAND IT THAT
23 MR. CARTER WAS SEEN LEAVING THE OAKLAND ADDRESS SEVERAL
24 HOURS BEFORE THE OAKLAND MURDER COULD HAVE HAPPENED.

25 THERE ARE WITNESSES THAT COULD HAVE BEEN
26 CALLED CONCERNING MR. BLEVINS AND PERHAPS, PUTTING IT IN A
27 MORE APPROPRIATE CONTEXT, THE EXTENT OF THE DISAGREEMENTS
28 THAT HE HAD WITH THE VICTIM KIM.

ER 485

5093

1 THERE IS A MR. WILLIAM SCHROLL -- I BELIEVE
2 IT'S S-C-H-R-O-L-L, AND I'VE FORGOTTEN WHAT MR. SCHROLL
3 WOULD --

4 (A DISCUSSION WAS HELD BETWEEN
5 DEFENSE COUNSEL, NOT REPORTED.)

6
7 MR. GILLINGHAM: I'M SORRY, YOUR HONOR. I COULDN'T
8 READ MY NOTES.

9 MR. SCHROLL WOULD CONCEIVABLY TESTIFY AS TO
10 THE RELATIONSHIP WITH BLEVINS -- MR. BLEVINS AND MS. KIM.

11 CONCERNING CULVER CITY, DEALING WITH THESE
12 GEOGRAPHICALLY -- THERE IS A POLICE OFFICER, MR. BLOOR --
13 I BELIEVE IT'S B-L-O-O-R -- WHO WOULD TESTIFY, WE BELIEVE,
14 BASED ON REPORTS -- AND, INCIDENTALLY, ALL OF THESE
15 STATEMENTS ARE BASED ON REPORTS THAT WE'VE RECEIVED DURING
16 DISCOVERY FROM THE PROSECUTION, WHO WOULD TESTIFY THAT MR.
17 RON TULIO WAS SEEN IN THE IMMEDIATE AREA DURING THE
18 IMMEDIATE TIME THAT THE MURDERS OCCURRED IN CULVER CITY.

19 THERE WOULD BE NEIGHBORS WHO COULD
20 CONCEIVABLY TESTIFY TO THE SEEING MR. TULIO.

21 THERE ARE WITNESSES IN THE SAN DIEGO AREA,
22 AMONG WHICH IS A MS. CARVILLE, C-A-R-V-I-L-L-E, WHO LIVED
23 BELOW -- WHO LIVED BELOW MISS CULLINS AND WOULD TESTIFY,
24 AS WE UNDERSTAND IT FROM REPORTS, THAT SHE NEVER HEARD
25 ANYTHING, NO OUTSTANDING NOISES, ET CETERA.

26 THERE WAS A MR. MOSES WHO WOULD TESTIFY THAT
27 HE SAW SOMEONE GO TO A CAR. AND MY UNDERSTANDING IS BASED
28 ON THAT LACK OF IDENTIFICATION; THAT IS, HE SAYS THAT IT

ER 486

5094

1 WAS NOT MR. CARTER. HE CONCEIVABLY COULD BE A WITNESS
2 PLACING SOME OTHER PERSON GOING TO THE CAR.

3 WE HAVE UTILIZED A PATHOLOGIST AND A
4 CRIMINALIST, AND THERE COULD BE TESTIMONY BY OUR
5 CRIMINALIST TO SAY THAT THERE WAS NO SEXUAL ASSAULT IN SAN
6 DIEGO. AND OUR PATHOLOGIST WOULD BE ABLE TO TESTIFY
7 REGARDING MISS GUTHRIE, THAT HER INJURIES, IF YOU WILL, AS
8 DESCRIBED BY THE WITNESS THAT TESTIFIED WERE AS CONSISTENT
9 WITH CONSENSUAL SEX AS NOT, AND SO THAT THAT WOULD PERHAPS
10 ATTACK SPECIAL CIRCUMSTANCES.

11 IT IS OUR TACTICAL DECISION NOT TO CALL THOSE
12 WITNESSES.

13 MR. CARTER EMPHATICALLY, AND I UNDERSTAND,
14 DISAGREES WITH THAT DECISION. AND HE WANTED US TO SPREAD
15 THAT ON THE RECORD, AND WE DO SO.

16 THE COURT: WASN'T THERE A SUPREME COURT CASE THAT
17 TOUCHED ON THIS ISSUE?

18 MR. GILLINGHAM: WELL, THERE ARE LOTS OF CASES
19 THAT --

20 THE COURT: WELL, THIS WAS -- I CAN'T REMEMBER
21 EXACTLY WHEN -- THE FORMER SUPREME COURT, TALKING ABOUT
22 WHEN DEFENDANTS INSISTED UPON A PARTICULAR DEFENSE --

23 MR. GILLINGHAM: WELL, I DON'T KNOW ABOUT THAT.
24 BUT MY VIEW CERTAINLY IS THAT IN A CAPITAL CASE THAT THE
25 LAWYER AND LAWYERS APPOINTED, ASSUMING SOME SEMBLANCE OF
26 COMPETANCE, CALL THE SHOTS AND SHOULD CALL THE SHOTS.

27 AND I THINK THERE IS A LINE OF CASES,
28 INCLUDING DEERE, D-E-E-R-E, WHICH INDICATES THAT COUNSEL

ER 487

5095

1 IS THE ONE THAT MAKES THE CRITICAL DECISIONS, FOR EXAMPLE,
2 AT PENALTY PHASE.

3 AND, IF THERE IS SUCH A CASE, I WOULD SUGGEST
4 THAT IT'S A CONFLICT IN THE LAW, IF YOU WILL. PERHAPS A
5 CONFLICT IN SUPREME COURTS EVEN, BUT --

6 THE COURT: I WOULD AGREE WITH YOU. AND IT JUST
7 CAME TO MIND -- IT HAPPENED DURING ANOTHER TRIAL WE
8 HANDLED. CREATED A REAL DILEMMA FOR DEFENSE COUNSEL.

9 OKAY.

10 ANYTHING FURTHER?

11 MR. GILLINGHAM: NOTHING FURTHER.

12 WHOOPS. JUST A MOMENT.

13 MR. CARTER JUST MENTIONED TO ME THE
14 POSSIBILITY OF OTHER WITNESSES.

15 I MEAN, THERE ARE IN THE REPORTS, AND I THINK
16 I COULD REPRESENT GENERALLY SPEAKING -- THERE ARE
17 WITNESSES HERE AND THERE WHO WOULD BRING SOME
18 CONTRADICTION OR CONTRASTING TESTIMONY. HE MENTIONS A MR.
19 PURDY, P-U-R-D-Y, WHO AT THIS VERY MOMENT, IT HAD NOT
20 OCCURRED TO ME WHICH WITNESS THAT WAS.

21 CULVER CITY, MISS MORRISSEY SAYS -- MAY I
22 HAVE JUST A MOMENT WITH MISS MORRISSEY?

23 THE COURT: YES.

24 MR. GILLINGHAM: I MEANT TO MENTION, AND MISS
25 MORRISSEY REMINDS ME THAT I DID NOT -- I MENTION MR.
26 BLOOR, A POLICE OFFICER WITH CULVER CITY CONCERNING A MR.
27 TULIO'S PRESENCE AT THE LOCATION, BUT I ALSO MENTION
28 CALLING MR. TULIO HIMSELF.

ER 488

5096

1 WITH THAT, NOTHING FURTHER. WE'D BE PREPARED
2 TO REST.

3 THE COURT: THE RECORD IS CLEAR AND THE COURT
4 AGREES THAT IN THESE MATTERS THE DECISIONS SHOULD BE WITH
5 THE COUNSEL.

6 ARE YOU PREPARED TO BRING THE FOLKS BACK IN
7 NOW?

8 MR. GILLINGHAM: YES, YOUR HONOR.

9 I GUESS WE SHOULD HAVE MR. GOLDSTEIN BEFORE I
10 GO INTO ANOTHER MATTER.

11 SHOULD I GO RETRIEVE HIM?

12 THE COURT: IF YOU WOULD, PLEASE.

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ER 489

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT WEST "C" HON. ROBERT W. THOMAS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
PLAINTIFF,)
VS.) NO. A 089330
DEAN PHILLIP CARTER,) VOLUME 44
DEFENDANT.)
-----)

REPORTER'S DAILY TRANSCRIPT
MONDAY, JULY 10, 1989
TUESDAY, JULY 11, 1989
PAGES 5182 TO 5294, INCL.

APPEARANCES:

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OFFICIAL REPORTER

LXVI

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ER 491

5209

1 THAT --

2 THE COURT: NOW IT'S DELETED FROM THE TRIAL.

3 MR. GOLDSTEIN: I WANTED TO GIVE THEM THE LAST
4 OPPORTUNITY.

5 THE COURT: I UNDERSTAND, BECAUSE THERE WAS OTHER
6 COMMENT THAT SEEMED TO OPEN THAT LITTLE DOOR.

7 MR. GOLDSTEIN: THE OTHER MATTERS, I HAVE SHOWN
8 COUNSEL A SET OF BLOWUPS OF PAGES FROM THE DEFENDANT'S
9 ADDRESS BOOK THAT I EXPECT TO USE IN ARGUMENT. THEY
10 WERE NOT MARKED AS AN EXHIBIT.

11 MR. GILLINGHAM: INDIVIDUALLY, YOU MEAN?

12 MR. GOLDSTEIN: AT ALL.

13 THE BOOK IS IN EVIDENCE, AND THESE ARE
14 MERELY THREE PAGES FROM THAT BOOK WHICH SHOW LARGER THE
15 WRITTEN-IN NAME OF SUSAN KNOLL AND JANETTE -- HERE IN
16 THE BOOK, "JANET CULLINS" AND CATHLEEN TINER, AND BOTH
17 SIDES OF THE BUSINESS CARD WHICH HAS PREVIOUSLY BEEN
18 MARKED.

19 I MAY WELL USE THESE DURING THE COURSE OF
20 ARGUMENT. I DID NOT WANT COUNSEL TO BE SURPRISED WHEN I
21 PULL SOMETHING UP FROM AN ANGLE THAT THEY HAD NOT SEEN
22 BEFORE.

23 THE COURT: OKAY.

24 WE'RE IN RECESS, I THINK.

25 MR. GILLINGHAM: WE HAVE ONE MATTER THAT PROBABLY
26 SHOULD BE DONE IN A SEALED BASIS AGAIN UNDER PEOPLE
27 VERSUS MARSDEN.

28 MR. GOLDSTEIN: BEFORE THAT'S DONE, MAY I ASK A

ASER 1337

5210

1 QUESTION?

2 THE COURT: SURE.

3 MR. GOLDSTEIN: ON THIS INSTRUCTION, THE LATEST
4 HANDWRITTEN THAT DEFENSE HAS OFFERED ABOUT THE
5 PARTICULAR EXHIBITS, WHEN DOES THE COURT INTEND TO DEAL
6 WITH THAT? DO YOU WISH TO MAKE IT PART OF THE REGULAR
7 INSTRUCTIONS?

8 MR. GILLINGHAM: MY REQUEST IS THAT -- I MEAN, AS
9 I INDICATED BEFORE, I CONSIDER THOSE THINGS SIGNIFICANT,
10 SO --

11 THE COURT: I WAS GOING TO DO IT BEFORE ARGUMENT,
12 IS MAKE A COMMENT.

13 MR. GILLINGHAM: THAT'S WHAT I WOULD REQUEST.

14 MS. MORRISSEY: YEAH.

15 MR. GILLINGHAM: IN OTHER WORDS, IT'S
16 BASICALLY -- THE THINKING IS IT SHOULD BE DONE AS EARLY
17 AS POSSIBLE. AT THIS POINT, THIS IS THE EARLIEST TIME,
18 SO --

19 THE COURT: BEFORE WE STARTED, I WILL -- THAT'S
20 UNDER THE HEADING OF A FINAL COMMENT. IT ISN'T REALLY
21 LABELED A JURY INSTRUCTION, BUT THAT'S WHAT IT IS.

22 AND I THINK I'LL INDICATE THAT THERE WERE A
23 LOT OF EXHIBITS MARKED. HOWEVER, "YOU ARE NOT TO
24 CONSIDER THE FOLLOWING, BECAUSE THEY WEREN'T RECEIVED,"
25 AND THEN READ THIS INSTRUCTION.

26 MR. GOLDSTEIN: YOU WILL ALSO, I TAKE IT, MAKE A
27 COMMENT THAT ARGUMENT IS NOT EVIDENCE, AS YOU DID
28 BEFORE?

ASER 1338

5211

1 THE COURT: YES.

2 MR. GOLDSTEIN: OKAY.

3 THE COURT: OKAY.

4 I GUESS WE'LL HAVE TO ASK EVERYONE TO LEAVE
5 WITHOUT --

6 MR. GILLINGHAM: IF I MIGHT BELABOR THE RECORD A
7 SECOND, PERHAPS WE COULD MEET AT 1:30 TO LOOK AT THE
8 CORONER REPORT.

9 MR. GOLDSTEIN: OH, SURE.

10 THE COURT: ALL RIGHT. OKAY.

11 MR. GILLINGHAM: IT WILL JUST TAKE A SECOND,
12 SO --

13 THE COURT: ALL RIGHT. WE'LL HAVE TO ASK
14 EVERYONE ELSE.

15 MR. GILLINGHAM: WE'RE IN RECESS ANYWAY AFTER
16 THAT.

17 THE COURT: AFTER THIS BRIEF MARSDEN SITUATION,
18 YES.

19

20

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ASER 1339

aff. guilt rest
but before verdict

(SEALED)

7/10/89

44/5212

(AT 11:50 A.M., PROCEEDINGS WERE
HELD IN CAMERA IN OPEN COURT. PRESENT
ARE THE DEFENDANT AND HIS COUNSEL,
THE COURT, AND COURT STAFF.)

THE COURT: IS THE COURTROOM CLEARED
SUFFICIENTLY?

MR. GILLINGHAM: YES. THE WOMAN TALKING TO
MARCIA IS FROM SAN DIEGO. I MEAN, FROM MR. BUMER'S
OFFICE.

THE COURT: ALL RIGHT.

MR. GILLINGHAM: YOUR HONOR, ONE FURTHER THING,
IN ALL MODESTY, I THINK I NEGLECTED TO DO IT THE OTHER
DAY, AND, THAT IS, IN ADDITION, BY NOT PUTTING ON THE
WITNESSES, IT ALSO PRECLUDED THE POTENTIAL OF MR. CARTER
TESTIFYING BASED ON, HOWEVER, WHAT THOSE WITNESSES WOULD
HAVE TESTIFIED TO AND THE EFFECT OF THEIR TESTIMONY.

THE COURT: YOU JUST WANTED TO ADD THAT?

MR. GILLINGHAM: I WANTED TO ADD THAT; AND AGAIN
REMIND EVERYONE, INCLUDING DEPUTY BAILIFF VELASQUEZ,
THAT THIS IS SEALED AND SO NO ONE IS EVER SUPPOSED TO
SAY ANYTHING ABOUT WHAT TAKES PLACE HERE UNLESS THE
COURT ORDERS IT UNSEALED.

OKAY?

THE COURT: SO ORDERED.

1 (THE FOLLOWING PROCEEDINGS HELD IN
2 CAMERA COMMENCED AT 3:32 P.M. WITH
3 THE FOLLOWING PERSONS PRESENT:
4 THE COURT, CLERK, BAILIFFS, COURT
5 REPORTER, COUNSEL FOR THE DEFENDANT,
6 AND THE DEFENDANT.)
7

8 THE COURT: I UNDERSTAND THAT THERE ARE COMPETING
9 INTERESTS AROUND.

10 MR. GILLINGHAM: AND THERE IS A TENDENCY OF
11 PEOPLE TO CONGRATULATE LAWYERS AFTER THEY MAKE CLOSING
12 ARGUMENTS.

13 THE COURT: OKAY.

14 MR. GILLINGHAM: YOUR HONOR, MR. CARTER ASKED ME
15 TO SPREAD UPON THE RECORD THAT HE DOES NOT AGREE WITH
16 THE CLOSING ARGUMENT THAT COUNSEL MADE, THAT HE HAD
17 ASKED ME WHAT IT WAS, AND THAT HE WAS NOT INFORMED OF
18 THE TYPE OF ARGUMENT.

19 AND HE CERTAINLY DOES NOT FEEL THAT IT WAS
20 ADEQUATE, AND THIS JUST COMPOUNDS THE PROBLEM OF THE
21 LACK OF DEFENSE BY THE ARGUMENT THAT COUNSEL MADE, AND
22 HE ASKED ME TO SPREAD THAT UPON THE RECORD.

23 THE COURT: THE RECORD IS CLEAR.

24 OKAY. WE'LL BE IN RECESS UNTIL TOMORROW.

25 MR. GILLINGHAM: WE'D LIKE THIS SEALED AND ALL
26 OTHER MARSDEN HEARINGS SEALED.

27 THE COURT: THANK YOU, THE COURT WILL BE IN
28 RECESS UNTIL TOMORROW.

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT WEST C HON. ROBERT W. THOMAS, JUDGE
4
5 THE PEOPLE OF THE STATE OF CALIFORNIA,)
6)
7) PLAINTIFF,)
8)
9) VS.) NO. A-089330
10)
11) DEAN PHILLIP CARTER,)
12)
13) DEFENDANT.)
14)

15 REPORTER'S DAILY TRANSCRIPT

16 JULY 12, 13, 17, 1989

17 VOLUME 45

18 (PAGES 5295 TO 5395, INCLUSIVE)

19 APPEARANCES:

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1 AT THE JAIL, DEPENDING WHAT TIME THEY GET BACK.

2 THE COURT: OKAY.

3 MR. GILLINGHAM: THANK YOU.

4 LASTLY, YOUR HONOR -- MAY I HAVE JUST A MOMENT?

5

6 (DISCUSSION BETWEEN MR. GILLINGHAM

7 AND MS. MORRISSEY.)

8 MR. GILLINGHAM: YOUR HONOR, THIS HAS TO BE PROBABLY
9 DONE UNDER THE AMBIT OF MARSDEN. SHOULDN'T TAKE THAT LONG.

10 MR. GOLDSTEIN: IS THIS THE LAST THING ON THE CALENDAR?

11 MR. GILLINGHAM: YES.

12 MR. GOLDSTEIN: IN THAT CASE, I WILL SEE YOU --

13 THE COURT: SEE YOU MONDAY. I WILL, HOPEFULLY, HAVE
14 SOME INFORMATION. I WILL CALL THIS HOSPITAL ABOUT TRANSCRIPTS.
15 THE INFORMATION WILL BE AVAILABLE. IF I DON'T KNOW BEFORE
16 YOU GUYS LEAVE, I WILL WRITE IT DOWN HERE AND IT WILL BE
17 AVAILABLE TOMORROW MORNING, WHATEVER I FIND OUT.

18

19 (AT 4 P.M. MR. GOLDSTEIN AND SPECTATORS
20 LEFT THE COURTROOM AND THE FOLLOWING
21 PROCEEDINGS WERE HELD:)

22

23 MR. GILLINGHAM: YOUR HONOR, LET ME GO IN REVERSE ORDER
24 SOMETHING I DIDN'T MENTION, BUT I MENTIONED IT INFORMALLY
25 WITH THE BAILIFF AND I MENTIONED WITH THE SERGEANT IN CHARGE.
26 I SAID I NEED TO CONTACT YOU AND THAT IS -- I WOULD ASK TOTAL
27 CONFIDENTIALITY FROM EVERYBODY ABOUT THIS. THE VARIOUS
28 WITNESSES, SOME FAMILY MEMBERS OR WHATEVER COMING DOWN FOR

5392

1 THE TRIAL. THEY ARE FOR THE MOST PART COMING IN AND GOING
2 OUT ALMOST AS SOON AS THEY TESTIFY. FOR A COUPLE OF REASONS,
3 ONE STRATEGIC ONE, MORE MANDATORY I SUPPOSE -- I WOULD ASK
4 THAT THE COURT ORDER -- THAT IS A SOFT ORDER BECAUSE IT IS
5 NOT AS IF ANYONE'S BEEN TELLING ME TO STICK IT IN MY EAR --
6 THAT WOULD REQUIRE A COURT ORDER TO ALLOW MR. CARTER FOR THE
7 WITNESSES THAT I HAVE WHO ARE FAMILY MEMBERS AND SOME LONG-
8 TIME FRIENDS WHO GREW UP WITH HIM TO VISIT WITH HIM DOWN BELOW
9 IN THE SEPARATED GLASS-ENCLOSED ROOM.

10 I MENTIONED THAT FOR TWO THINGS. ONE IS BECAUSE
11 IT IS COMING DOWN AND GOING BACK. IN MY PRESENCE. I WOULD
12 BE THERE.

13 THERE IS AN ADDITIONAL SITUATION OF SOMETIMES
14 IT BECOMES IMPORTANT IN PENALTY PHASE. SO I WOULD ASK THAT.

15 AS I UNDERSTAND IT -- AND I DON'T WANT TO SPEAK
16 FOR THE SERGEANT BECAUSE WE DIDN'T TALK AT LENGTH. I DON'T
17 KNOW THAT THAT CAUSES ANY MAJOR HAVOC IF WE SCHEDULE IT AT
18 SOME CONVENIENT TIME.

19 ANYWAY -- AGAIN, I AM NOT TRYING TO SPEAK FOR
20 HIM. BUT I GUESS I SPOKE FOR YOU.

21 THE COURT: INFORMATION I HAVE IS THAT IT IS JUST NOT
22 FEASIBLE. I WISH I COULD. I JUST CANNOT GRANT THAT REQUEST.
23 IT'S COME UP BEFORE, AND THE SECURITY IN THIS BUILDING, AS
24 YOU KNOW, IS ALMOST NONEXISTENT.

25 I WILL TALK WITH THEM AND SEE IF SOMETHING CAN
26 BE WORKED OUT, BUT AT THIS POINT I JUST CAN'T GIVE YOU ANY
27 ASSURANCES THAT THAT INTERVIEW SITUATION CAN BE WORKED OUT.
28 JUST CAN'T DO IT.

5393

1 MR. GILLINGHAM: ALL RIGHT. INCIDENTALLY, I HAVE
2 MENTIONED -- I DON'T NEED TO MENTION IT TO YOU, I AM SURE,
3 BUT I MENTION IT TO YOU -- THIS IS NOT MR. CARTER'S IDEA,
4 BUT IT IS MY IDEA ACTUALLY.

5 THE COURT: I UNDERSTAND. I AM NOT DENYING MR. CARTER'S
6 REQUEST. I AM AT THIS POINT DENYING YOURS.

7 MR. GILLINGHAM: THEN MOVING ON TO THE OTHER UNDER
8 PEOPLE V. MARSDEN. MR. CARTER CONTINUES TO EXPRESS
9 DISAPPOINTMENT, BE FAIR TO SAY I THINK, THE MANNER IN WHICH
10 TO THIS POINT THE CASE HAS BEEN HANDLED BY COUNSEL.

11 HE SPECIFICALLY WOULD ASK ME TO, AS I UNDERSTAND
12 IT, ASK YOU TO APPOINT MR. ROWEN KLEIN, K-L-E-I-N, ROWEN,
13 R-O-W-A-N -- OR E-N -- TO, AS I UNDERSTAND IT, PREPARE AND
14 FILE A NEW TRIAL MOTION OR SOME MOTION PRE-PENALTY PHASE.
15 THIS IS PART OF THE REASON FOR THE MARSDEN.

16 I WILL SAY THAT COUNSEL OPPOSES THAT MOTION.
17 WE HAVE OPPOSED OTHER THINGS BEFORE, AND WE WOULD OPPOSE THAT.
18 SO THAT WOULD BE ONE REQUEST.

19 WE HAVE DISCUSSED MR. CARTER'S NOW CONSTITUTIONAL
20 RIGHTS UNDER THE ULTIMATELY FAMOUS CASE OF FERETTA. HE IS
21 GIVING THIS SOME THOUGHT. I AM NOT SURE WE ARE MAKING THAT
22 REQUEST TODAY.

23 ARE WE?

24 HE IS NOT MAKING THAT REQUEST TODAY.

25 THE COURT: ALL RIGHT, BUT IT IS SOMETHING THAT MAY
26 COME UP.

27 MR. GILLINGHAM: IT IS SOMETHING THAT MAY COME UP.
28 I THINK IN THAT REGARD -- AND I WILL REPRESENT THAT I WILL

5394

1 SERVE A COPY OR GIVE MR. GOLDSTEIN A COPY OF PEOPLE V. BLOOM.
2 JUNE 26, 1989 CALIFORNIA SUPREME COURT CASE. I WILL GIVE
3 MR. CARTER ONE.

4 IT ADDRESSES THE MOTION TO SUBSTITUTE COUNSEL
5 BETWEEN THE GUILT AND THE PENALTY PHASE. IN MY JUDGMENT IT
6 IS DISPOSITIVE. TALKS ABOUT SOME DISCRETION. ANYWAY, I HAVE --

7 THE COURT: THAT ISN'T THE CASE THAT JUDGE ALBRACHT
8 HAD, IS IT?

9 MR. GILLINGHAM: YES.

10 MS. MORRISSEY: YES.

11 THE COURT: IN THAT CASE THE DEFENDANT DID REPRESENT
12 HIMSELF.

13 MR. GILLINGHAM: HE DID REPRESENT HIMSELF, BUT IT WAS
14 A DISCRETIONARY CALL.

15 MS. MORRISSEY: IT IS NOT A WIDE CONSTITUTIONAL
16 DIMENSION.

17 THE COURT: IT CERTAINLY DIDN'T WORK IN THE DEFENDANT'S
18 BENEFIT IN THAT CASE EITHER, AS I RECALL.

19 MR. GILLINGHAM: IN ANY EVENT, I WILL GIVE MR. CARTER
20 A COPY AND GIVE THE COURT A COPY. I WILL GIVE MR. GOLDSTEIN
21 A COPY.

22 THE COURT: ALL RIGHT.

23 MR. GILLINGHAM: I THINK THAT IS --

24 THE COURT: AS TO THE FIRST REQUEST, IT IS JUST NOT
25 TIMELY. THE MOTION TO APPOINT MR. KLEIN, EVEN THE MOTION
26 FOR NEW TRIAL, ISN'T -- NOW IS NOT THE TIME TO RAISE SUCH
27 A MOTION. CERTAINLY, IF AT SOME POINT IN TIME IT LOOKS LIKE
28 MR. KLEIN'S EXPERTISE WOULD BE OF SOME ASSISTANCE, I'D

5395

1 ENTERTAIN THE MOTION; BUT NOW I DON'T THINK IS THE APPROPRIATE
2 TIME TO EVEN CONSIDER IT. THAT REQUEST IS DENIED, AND WE
3 WILL CERTAINLY DEAL WITH ANY OTHER REQUESTS ON THE NEXT DATE
4 WE SEE EACH OTHER.

5 MR. GILLINGHAM: OKAY.

6 THE COURT: ALL RIGHT. THANK YOU.

7

8 (AT 4:05 P.M. AN ADJOURNMENT WAS TAKEN
9 UNTIL MONDAY, JULY 24, 1989, AT 10 A.M.)

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ER 524

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT WEST C HON. ROBERT W. THOMAS, JUDGE
4
5 THE PEOPLE OF THE STATE OF CALIFORNIA,)
6 PLAINTIFF,)
7 VS.) NO. A-089330
8 DEAN PHILLIP CARTER,)
9 DEFENDANT.)
10

11 REPORTER'S DAILY TRANSCRIPT

12 WEDNESDAY, JULY 26, 1989

13 VOLUME 49

14 (PAGES 5707 TO 5826, INCLUSIVE)

15 APPEARANCES:

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1 WEDNESDAY, JULY 26, 1989 VOLUME 49 PAGES 5707 TO 5826

2 A.M. 5707
3 P.M. 5738

4 -----
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6
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5750

1 JERRY LEE CARTER,
2 CALLED AS A WITNESS BY THE DEFENDANT, WAS SWORN AND TESTIFIED
3 AS FOLLOWS:

4 THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY
5 YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL
6 BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO
7 HELP YOU GOD.

8 THE WITNESS: YES.

9 THE CLERK: BE SEATED.

10 WOULD YOU PLEASE STATE YOUR NAME AND SPELL YOUR
11 FIRST AND LAST FOR THE RECORD.

12 THE WITNESS: JERRY LEE CARTER. J-E-R-R-Y C-A-R-T-E-R.

13

14 DIRECT EXAMINATION

15 BY MR. GILLINGHAM:

16 Q JERRY, WHERE DO YOU LIVE?

17 A CRAIG, ALASKA.

18 Q AND THERE IS A MAP OVER THERE ON THE WALL, JERRY.
19 DID YOU ALSO USED TO LIVE IN NOME?

20 A YES.

21 Q WHY DON'T YOU TAKE THAT RED MARKER AND PUT A
22 CIRCLE AROUND WHERE YOU LIVE NOW IN CRAIG AND WHERE NOME IS.

23 ACTUALLY, THERE ARE TWO MAPS THERE. WHY DON'T
24 YOU DO IT ON THE BIG MAP FIRST.

25 A OKAY.

26 (WITNESS COMPLIES.)

27 Q WHAT ARE YOU CIRCLING NOW?

28 A THIS WOULD BE CRAIG.

ER 598

5751

1 Q THAT IS DOWN ON THE BOTTOM OF THAT EXHIBIT?

2 A RIGHT.

3 MR. GILLINGHAM: I WONDER IF THAT MIGHT BE MARKED
4 AS NEXT EXHIBIT IN ORDER J.

5 THE COURT: YES.

6 Q BY MR. GILLINGHAM: CIRCLE NOME.

7 A NOME IS HERE.

8 Q WHERE IS THE ARCTIC CIRCLE? WOULD YOU SORT OF
9 DRAW A LITTLE LINE.

10 A RIGHT ABOVE NOME.

11 Q HOLD ON. HOLD ON.

12 A (WITNESS COMPLIES.)

13 Q THANK YOU.

14 ON THE OTHER MAP --

15 MARK THAT NEXT IN ORDER.

16 WAS J --

17 MS. MORRISSEY: K.

18 Q BY MR. GILLINGHAM: COULD YOU MARK WHERE NOME
19 IS ON THAT. RATHER LARGE, APPEARS TO BE. IF I MIGHT -- AN
20 ALASKA AIRLINE MAP.

21 A NOME.

22 Q OKAY. THANK YOU.

23 A UH-HUH.

24 Q DEAN CARTER IS YOUR BROTHER?

25 A YES.

26 Q HOW LONG HAS IT BEEN SINCE YOU HAVE SEEN HIM?

27 A THIS IS THE FIRST TIME I HAVE SEEN HIM IN SIX --
28 AT LEAST SIX YEARS.

5752

1 Q DID YOU GROW UP TOGETHER?

2 A SOMEWHAT.

3 Q HE WAS GONE A LOT?

4 A YES.

5 Q ARE YOU OLDER THAN DEAN? IS HE OLDER THAN YOU?

6 A I AM FOUR YEARS OLDER THAN DEAN.

7 Q IN BRIEF, TELL US WHAT IN TERMS OF THE CONDITIONS

8 OF NOME, IF YOU WOULD, WAS IT LIKE TO GROW UP IN NOME?

9 TALK ABOUT THE WEATHER AND THAT SORT OF THING.

10 A OH, A LOT DIFFERENT. THERE IS NO REALLY
11 EXTRACURRICULAR ACTIVITIES TO BE HAD OR DONE. YOU ARE PRETTY
12 MUCH -- IT IS DARK ALL THROUGH THE WINTER AND DAYLIGHT THROUGH
13 THE SUMMER. SO YOUR OUTDOOR ACTIVITIES ARE PRETTY WELL
14 LIMITED.

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1 Q LET ME ASK YOU ABOUT SOCIAL ACTIVITIES. IS THERE
2 A LOT OF DRINKING IN NOME?

3 A EXTREME AMOUNT.

4 Q SUICIDES?

5 A YES, HIGH RATES.

6 Q I AM TALKING ABOUT NOW MAYBE NOW ALSO, BUT I AM
7 ASKING YOU IN PARTICULAR ABOUT WHEN YOU WERE GROWING UP.

8 A THERE ALWAYS HAS BEEN.

9 Q IN FACT, IS THAT A MAJOR PROBLEM IN ALASKA,
10 ALCOHOL AND SUICIDES, TO THIS DAY?

11 A ALCOHOL, YES.

12 Q AMONG THE ESKIMO?

13 A EXTREMELY.

14 Q SO YOU MOVED OUT OF NOME?

15 A YES.

16 Q WHEN DID YOU FIRST LEAVE NOME? DO YOU REMEMBER?

17 A '71.

18 Q WHEN YOU THINK BACK ABOUT AS A SMALL BOY WITH
19 YOUR BROTHER, DEAN -- WE HAVE TALKED BEFORE, HAVEN'T WE, ABOUT
20 THIS?

21 A YES.

22 Q MET YOU UP IN ANCHORAGE?

23 A YES.

24 Q TALKED IN THE HOTEL BEFORE TODAY?

25 A YES.

26 Q YOU TOLD ME ABOUT DEAN AS YOU KNEW HIM?

27 A YES.

28 Q WAS ONE OF THE STRONG RECOLLECTIONS YOU HAVE OF

5754

1 DEAN AS A SMALL BOY?

2 A INDEPENDENT, WANTING TO BE FREE AND NOT REALLY
3 WANTING DISCIPLINE.

4 Q DID HE RUN AWAY?

5 A YES.

6 Q DO YOU HAVE SOME INCIDENTS THAT YOU TOLD ME ABOUT
7 THAT YOU WOULD TELL ALL OF US ABOUT NOW.

8 A COMFORTABLY?

9 Q NO, I DIDN'T SAY COMFORTABLY.

10 A THERE WERE TIMES WHEN HE WOULD BE OUT PLAYING
11 AND STAYING LONGER, AND INSTEAD OF TAKING DISCIPLINE HE WOULD
12 PREFER TO RUN AWAY FOR SEVERAL DAYS AT A TIME.

13 Q DID HE OR DID YOU TELL ME ABOUT BOXES?

14 A YEAH. WELL, HE -- IN THE SUMMERTIME YOU HAVE
15 TO HAVE SOME PLACE TO STAY, AND ONE I REMEMBER RIGHT OFF THE
16 BAT WAS A TOOL BOX THAT HE HAD STAYED IN FOR A COUPLE OF DAYS;
17 AND WE HAD LOOKED ALL OVER TOWN FOR HIM AND WE WERE NOT ABLE
18 TO FIND HIM.

19 Q WHAT DID HE DO FOR FOOD, IF YOU KNOW?

20 A WELL, HE ALWAYS HAD A FRIEND THAT SEEMED TO BRING
21 HIM SOME FOOD. PILOT BREAD OR WHATEVER.

22 Q SO HE'D ACTUALLY STAY IN THE BOX A COUPLE OF DAYS
23 AT A TIME?

24 A I WOULD ASSUME YES 'CAUSE I WOULDN'T SEE HIM 'CAUSE
25 WE'D BE LOOKING FOR HIM.

26 Q I DIDN'T MEAN TO SUGGEST HE'D STAY IN THE BOX
27 AND WOULDN'T COME OUT.

28 WHAT ABOUT AIRPLANES? YOU TOLD ME ABOUT A COUPLE

ER 602

5755

1 A COUPLE OF INCIDENTS WITH AIRPLANES.

2 A YEAH. HE DID LEAVE NOME ON ONE OCCASION, AND
3 I REMEMBER FATHER HAVING TO GO DOWN AND BRING HIM BACK.

4 Q HOW OLD WAS HE ROUGHLY?

5 A OH, I WOULD SAY BETWEEN EIGHT AND TEN POSSIBLY.

6 Q AND WHAT DID HE DO?

7 A ONE TIME HE GOT ON A PLANE AND -- I DON'T KNOW
8 THE CIRCUMSTANCES BEHIND IT. I JUST KNOW THAT HE ENDED UP
9 IN ANCHORAGE AND THEY HAD GONE BACK TO BRING HIM BACK.

10 Q WAS THERE ANOTHER INCIDENT WITH A PLANE IN A
11 STOWING AWAY OR AN EFFORT?

12 A YEAH. I -- I DON'T KNOW IF THIS WOULD BE A FIRST
13 OR A SECOND TIME. I HAVE NO IDEA, BUT HE DID STOW AWAY ONCE
14 MORE, AND THE FLIGHT ENGINEER HAD COME ACROSS HIM IN HIS
15 PRE-FLIGHT.

16 Q WHAT KIND OF PLANE WAS THAT, IF YOU REMEMBER?
17 IF YOU REMEMBER.

18 A FLYING BOXCAR. I BELIEVE B-141.

19 Q WHERE WAS HE LOCATED?

20 A UP IN A WHEEL WELL.

21 Q AND THE PLANE DIDN'T TAKE OFF, OBVIOUSLY?

22 A NO.

23 Q THE MOM AND DAD, WHAT WAS THEIR PRACTICE AS FAR
24 AS ALCOHOL?

25 A I NEVER DID SEE THEM DRINK HARD STUFF, BUT THEY
26 SURE DRANK A LOT OF OLE. REAL OLE PEOPLE.

27 Q WOULD YOU SAY THEY WERE ALCOHOLICS?

28 A KNOWING WHAT I KNOW NOW, YES.

ER 603

5756

1 Q WAS THAT A DIFFICULT PERIOD FOR THE FAMILY?

2 A EXTREMELY.

3 Q THIS DISCIPLINE IN THE HOME, WOULD BOTH THE FATHER
4 AND THE MOTHER ADMINISTER DISCIPLINE FROM TIME TO TIME?

5 A YES.

6 Q WAS THERE ONE OR THE OTHER THAT WAS FROM YOUR
7 VIEW OR DEAN'S, WORSE THAN THE OTHER?

8 A YES.

9 Q WHO WAS THAT?

10 A THAT WOULD BE MY MOTHER.

11 Q AND TELL ME ABOUT THAT. I MEAN, WHAT WOULD HAPPEN?
12 WHY WAS THAT WORSE?

13 A OH, SHE WOULD GET CARRIED AWAY. I THINK SHAME
14 WOULD STEP IN AND SHE'D GET CARRIED AWAY.

15 Q WHAT WOULD STEP IN? I AM SORRY.

16 A SHAME.

17 Q WOULD THEY DRINK AT NIGHT?

18 A YES.

19 Q INCIDENTALLY, NOME HAS HOW MANY MAIN STREETS?

20 A THERE WAS REALLY ONE MAIN STREET.

21 Q THERE WERE LOT OF BARS?

22 A THIRTEEN BARS, THIRTEEN CHURCHES.

23 Q WOULD THEY COME HOME AT NIGHT AFTER HAVING BEEN
24 DRINKING?

25 A VERY LATE.

26 Q WHAT WAS THE RESPONSE OF THE CHILDREN WHEN THE
27 PARENTS WOULD BE COMING HOME? IF THAT IS A CLEAR QUESTION.

28 A JUST BE QUIET AND STAY OUT OF THE WAY.

ER 604

5757

1 Q WHAT WOULD HAPPEN WHEN THEY CAME HOME?

2 A OH, USUALLY EXTREME ARGUING.

3 Q WOULD THERE BE HITTING?

4 A AT TIMES.

5 Q DO YOU -- YOU TOLD ME ABOUT A PARTICULAR TIME
6 WHEN YOUR MOM CAME HOME. TELL ME ABOUT THAT AGAIN. I AM
7 SORRY. WHEN YOUR MOM CAME HOME ALONE AND THEN LEFT AND DEAN
8 WENT AFTER HER.

9 A OH, THAT WAS -- HE WAS REAL YOUNG.

10 Q ROUGHLY HOW YOUNG WAS HE?

11 A OH, GOSH, I WANT TO SAY SEVEN OR EIGHT. THEY
12 HAD BEEN OUT, AND BEING THE OLDEST I WOULD HAVE TO TAKE CARE
13 OF THEM SOMEWHAT, AND WE BOTH HAD THE SAME FEELING ABOUT THEIR
14 DRINKING, THAT THEY HAD NO CONTROL OVER AND --

15 Q WOULD YOU GO IN THE BEDROOM WHEN THEY CAME HOME?

16 A NO. SHE HAD COME HOME FOR SOMETHING AND WAS
17 LEAVING, AND WE KNEW SHE WAS BY HERSELF, AND DEAN HAD JUMPED
18 UP AND TRIED TO GET HER TO STAY HOME.

19 SHE LEFT. SHE WAS -- SHE WAS HEADING BACK DOWN
20 TO GET DAD, AND THIS MUST HAVE BEEN ABOUT AT LEAST 2:00 IN
21 THE MORNING.

22 Q WERE YOU GUYS IN BED AT THAT TIME?

23 A YES.

24 Q WHAT HAPPENED?

25 A OH, HE TOOK OFF RUNNING AFTER THE CAR AND --

26 Q WHAT DID HE DO?

27 A HUNG ON TO THE BUMPER AND TRIED TO STOP THE CAR
28 FOR QUITE A WHILE.

5758

1 Q I AM SORRY. GO AHEAD.

2 A SHE -- I THINK IT ALL HAPPENED SO QUICK, I DON'T
3 KNOW IF I HEARD ANYTHING. I JUST REMEMBER WHEN SHE BROUGHT
4 HIM BACK IN THE HOUSE.

5 Q WHAT WAS -- WERE YOU WATCHING HIM?

6 A OH, I SAW HIM WHEN HE LEFT. I SAW HIM WHEN HE
7 CAME BACK.

8 Q AND WHAT WAS HE DOING WHEN HE LEFT? DID YOU
9 ACTUALLY SEE HIM DOING SOMETHING?

10 A YEAH. HE WAS RUNNING AFTER THE CAR, AND HE WAS
11 TRYING TO HOLLER AT MOM TO STOP.

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5759

1 Q DID HE CATCH UP WITH THE CAR FROM WHAT YOU COULD
2 SEE?

3 A YEAH, BECAUSE HE GRABBED AHOLD OF THE BUMPER;
4 AND IT WAS GRAVEL ROADS, AND HE TRIED TO STOP THE CAR.

5 Q DID YOUR MOM AT SOME POINT STOP?

6 A AFTER AWAYS.

7 Q I MEAN, DO YOU THINK THAT SHE KNEW HE WAS BACK
8 THERE?

9 A NO.

10 Q AND SHE BROUGHT HIM BACK, AND WHEN SHE BROUGHT
11 HIM BACK WHAT DID HE LOOK LIKE?

12 A WELL, IT WAS A GRAVEL ROAD. HIS FEET WERE ALL
13 CUT UP AND HE'D BEEN DRAGGED TRYING TO STOP.

14 Q DID THE RUNNING AWAY BY DEAN SEEM TO CONCERN YOUR
15 PARENTS?

16 A YES.

17 Q WAS THERE AT LEAST ONE TIME WHEN YOUR DAD TOOK
18 SOME DRASTIC ACTION CONCERNING THAT?

19 A (AFFIRMATIVE RESPONSE.)

20 Q WHAT DID HE DO?

21 A HE ATTEMPTED TO KEEP HIM IN THE HOUSE.

22 Q AND HE WAS UNSUCCESSFUL?

23 A WELL, IN PAST EXPERIENCE HE HAD BEEN, BUT HE HAD
24 TO MAKE SURE HE STAYED IN THE HOUSE. SO HE JUST --

25 Q WHAT DID HE DO?

26 A PUT A CHAIN AROUND HIS ANKLE.

27 Q AND WHAT DID HE DO WITH THE CHAIN?

28 A ATTACHED IT TO THE BED.

ER 607

5760

1 Q DID HE EVER DO THAT TO YOU?

2 A NO.

3 Q NOW, YOU, AS I UNDERSTAND IT, YOUNG MAN LIKE IN
4 JUNIOR HIGH SCHOOL, DEAN IS GONE AWAY TO PLACES?

5 A YES.

6 Q DO YOU REMEMBER A THING CALLED THE JESSIE LEE
7 HOME?

8 A YES.

9 Q WAS HE SENT THERE?

10 A YES.

11 Q DO YOU KNOW ABOUT HOW OLD HE WAS?

12 A MY FOLKS WERE LOOKING FOR AN ALTERNATIVE, AND
13 I WANT TO SAY HE MUST HAVE BEEN, GOSH, AROUND EIGHT YEARS
14 OLD. POSSIBLY NINE.

15 Q AND FROM THEN ON A GOOD PART OF THE TIME WAS HE
16 GONE TO VARIOUS PLACES?

17 A (AFFIRMATIVE RESPONSE.)

18 Q SO IN TERMS OF SPENDING MUCH MORE TIME WITH HIM,
19 DO YOU?

20 A NO. DUE TO LOCATION AND AGE DIFFERENCE AND
21 DIFFERENT PERIODS IN OUR LIVES, NO.

22 Q YOU GOT MARRIED AND MOVED TO CRAIG AT SOME POINT?

23 A YES.

24 Q NOW, YOU REMEMBER WHEN HE LEFT ALASKA?

25 A YES.

26 Q APPROXIMATELY 1983?

27 A AROUND THAT PERIOD OF TIME.

28 Q AND DID HE COME BY YOUR PLACE?

ER 608

5761

1 A YEAH. HE DID A SURPRISE VISIT ON HIS WAY SOUTH.

2 Q AND DID YOU HAVE ANY NOTICE OF THAT?

3 A DID WE HAVE ANY NOTICE OF IT?

4 Q YEAH, THAT HE WAS COMING.

5 A OH, NO. IT WAS COMPLETE SURPRISE. WE WERE KIND
6 OF EXCITED ABOUT IT.

7 Q DID YOU KNOW HE HAD BEEN MARRIED?

8 A YES.

9 Q HAD YOU EVER SPENT MUCH TIME WITH -- HE MARRIED
10 A WOMAN NAMED KATHY?

11 A YES.

12 Q SHE HAD TWO OTHER KIDS, RIGHT?

13 A YES.

14 Q WHEN I SAY "TWO OTHER," TWO OTHER OTHER THAN THE
15 TWINS? SHE HAD TWO OF HER OWN?

16 A YES.

17 Q DID YOU SPEND ANY TIME WITH THEM TO SPEAK OF?

18 A VERY LITTLE. WE DIDN'T LIVE IN THE SAME TOWN
19 FOR VERY LONG.

20 Q SO YOU KNEW HE WAS MARRIED?

21 A OH, YES.

22 Q DID YOU KNOW WHEN THEY SEPARATED? I DON'T MEAN
23 THE DATE. I MEAN DID YOU KNOW THE EVENTS?

24 A NO, NOT UNTIL IT WAS DISCUSSED WHEN HE VISITED
25 US.

26 Q WHEN HE WAS LEAVING ALASKA?

27 A YES.

28 Q AND DID HE DISCUSS ANYTHING -- I MEAN, WHAT DID

ER 609

5762

1 HE SEEM LIKE WHEN HE CAME TO YOUR HOUSE IN '83?

2 A OH --

3 Q WHAT WAS HIS ATTITUDE?

4 A DISGRUNTLED. HEART BROKEN. ANGRY..

5 Q DID HE TALK ABOUT THE KIDS?

6 A OH, YES.

7 Q WHEN I SAY "KIDS," I GUESS I AM REFERRING TO THE
8 TWINS.

9 A HE TALKED ABOUT THEM, TOO.

10 Q AND HE SEEM TO MISS THEM?

11 A EVIDENTLY HE WASN'T ABLE TO SEE THEM, AND HE DID
12 MISS THEM.

13 Q THAT SEEM REAL TO YOU? DID IT SEEM REAL TO YOU
14 THAT HE MISSED THEM?

15 A THAT HE MISSED THE BOYS?

16 Q YEAH.

17 A THAT IS ALL HE USED TO TALK ABOUT, YOU KNOW. THEY
18 WERE HIS BOYS.

19 Q WAS DEAN A TOPIC OF DISCUSSION AT HOME AT ALL?

20 A NO.

21 Q HAVE YOU TALKED TO YOUR MOTHER ABOUT WHAT WE'RE
22 DOING HERE?

23 A EXTENSIVELY.

24 Q INCIDENTALLY, YOUR DAD HAS PASSED AWAY, HAS HE
25 NOT?

26 A YES.

27 Q HAVE YOU TALKED TO HER ABOUT COMING DOWN HERE?

28 A YES.

ER 610

5763

1 Q IS SHE COMING DOWN?

2 A NO.

3 MR. GILLINGHAM: I HAVE NOTHING FURTHER.

4 THE COURT: QUESTIONS?

5 MR. GOLDSTEIN: TWO COME TO MIND.

6

7 CROSS-EXAMINATION

8 BY MR. GOLDSTEIN:

9 Q HOW OLD WAS YOUR BROTHER WHEN HE RAN AWAY AND
10 THIS CHAIN INCIDENT YOU HAVE TALKED ABOUT TOOK PLACE?

11 A IT'S GOT TO BE WITHIN -- WITHIN THAT SAME TIME
12 FRAME. I WOULD SAY NINE, EIGHT OR NINE.

13 Q HAD YOU RUN AWAY?

14 A BEG YOUR PARDON?

15 Q HAD YOU RUN AWAY DURING ANY OF THAT TIME?

16 A HAD I? NOT KNOWINGLY, NO. I WOULD HAVE KNOWN
17 IF I RUN AWAY. I DON'T REMEMBER RUNNING AWAY AT ALL.

18 Q YOU HAD OTHER BROTHERS AND SISTERS AT ABOUT THAT
19 TIME OR WERE JUST THE TWO OF YOU?

20 A THERE WERE JUST THE TWO OF US FOR AWHILE, AND
21 THEN WE HAD OUR YOUNGER SISTER WHO WAS BORN, AND I WAS USUALLY
22 TAKING CARE OF HER. BABY-SITTING.

23 Q WHEN WAS THAT?

24 A SHE WAS BORN IN '62.

25 Q YOU SAID AT ONE TIME, AS I HEARD YOU, THAT YOUR
26 FOLKS WERE LOOKING FOR AN ALTERNATIVE WHEN YOU WERE TALKING
27 ABOUT SOMETHING CALLED THE JESSIE HOME?

28 A YES.

ER 611

5764

1 Q WHAT IS THAT?

2 A IT'S -- IT'S LIKE -- GOSH, IT WOULD BE SOMETHING
3 LIKE A CATHOLIC SCHOOL WOULD BE. IT IS A CHILDREN'S HOME.
4 A DISCIPLINE HOME.

5 Q WHERE IS IT LOCATED?

6 A AT THAT TIME IT WAS LOCATED IN VALDEZ.

7 Q WHERE IS THAT IN RELATION TO NOME?

8 A IT WOULD BE -- LET'S SEE. RIGHT DOWN THE HIGHWAY
9 FROM HERE. RIGHT WHERE THE -- QUITE AWAYS.

10 Q THIS IS THE VALDEZ WE HAVE HEARD ABOUT IN RECENT
11 MONTHS, THE OIL PORT?

12 A YES.

13 Q NOT VOLUNTARILY THE OIL PORT.

14 IS THAT WHERE MR. CARTER WAS EVENTUALLY SENT OR
15 WOUND UP?

16 MR. GILLINGHAM: OBJECTION. VAGUE.

17 MR. GOLDSTEIN: IF YOU DON'T UNDERSTAND, I WILL ASK
18 IT A DIFFERENT WAY.

19 Q WHEN YOU TALKED TO THE -- IS IT JESSIE LEE
20 SOMETHING HOME?

21 A JESSIE LEE CHILDREN'S HOME I THINK IT IS.

22 Q THIS IS A VOLUNTARY KIND OF THING WHERE PARENTS
23 WILL PUT PROBLEM CHILDREN SOMETIMES?

24 A YOU PAY ROOM AND BOARD FOR THEM.

25 Q WHAT WERE THE ALTERNATIVES YOU WERE TALKING ABOUT?

26 A WELL, THEY WERE TRYING TO SEE -- WHAT I PICKED
27 UP THEY WERE JUST TRYING TO FIND SOME WAY TO HELP THEM
28 BECAUSE HE WAS -- DISCIPLINE WAS A PROBLEM, AND THEY THOUGHT,

5765

1 WELL, MAYBE IF HE IS AWAY FROM HOME, THAT MAYBE HE'D APPRECIATE
2 IT MORE WHEN HE GOT BACK.

3 Q AND THIS WOULD HELP HIM?

4 A I ASSUME.

5 MR. GOLDSTEIN: I HAVE NOTHING FURTHER.

6 THE COURT: MR. GILLINGHAM.

7

8 REDIRECT EXAMINATION

9 BY MR. GILLINGHAM:

10 Q THE DISCIPLINE IN THE HOME, JERRY, WAS THERE ONE
11 OF THE FOUR CHILDREN WHO GOT IT THE WORST?

12 A I WANT TO SAY NO BECAUSE WHEN I SCREWED UP I GOT
13 IT, TOO.

14 Q YOU WANT TO SAY NO, BUT -- WHAT IS THE TRUTH?

15 A I FELT I HADN'T SCREWED UP AS MUCH. RUNNING AWAY
16 OR WHATEVER. IT SEEMED THAT RUNNING AWAY AND STUFF WAS A
17 STRONG DISCIPLINE PROBLEM THAT WE HAD TO DEAL WITH.

18 Q SO DID DEAN CATCH IT MORE EVEN THOUGH SOME MIGHT
19 SAY HE DESERVED IT?

20 A I WOULDN'T SAY HE CAUGHT IT THAT MUCH MORE.

21 Q BUT HE WAS THE ONLY ONE THAT WAS EVER CHAINED
22 TO THE BED?

23 A YES.

24 MR. GILLINGHAM: THANK YOU.

25 NOTHING FURTHER.

26 MR. GOLDSTEIN: NOTHING. THANK YOU.

27 THE COURT: THANK YOU VERY MUCH, SIR.

28 YOU MAY STEP DOWN.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WEST "C"

HON. ROBERT W. THOMAS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)

PLAINTIFF,)

VS.)

DEAN PHILLIP CARTER,)

DEFENDANT.)

NO. A 089330

VOLUME 54

REPORTERS' TRANSCRIPT ON APPEAL

THURSDAY, JANUARY 11, 1990

TUESDAY, JANUARY 30, 1990

PAGES 6148 TO 6295, INCL.

APPEARANCES:

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OFFICIAL REPORTER



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6168

1

1 MR. BUMER: MIGHT I JUST ADD WHAT I WANTED TO PROPOSE
2 TO DO WAS TO RAISE THE BASIC CONSTITUTIONAL ISSUES AND RIGHTS
3 OF THE DEFENDANT --

4 THE COURT: WELL, YOU CAN DISCUSS THAT WITH MR.
5 KLEIN. HE IS MR. CARTER'S LAWYER HERE.

6 MR. BUMER: THANK YOU, YOUR HONOR.

7 MR. KLEIN: IF I DIDN'T SAY IT, I MEAN WHAT MR.
8 BUMER WANTS TO HAVE IT MADE CLEAR THAT MR. CARTER DOES NOT
9 HAVE TO REVEAL ANYTHING WHAT HIS DEFENSE WOULD BE IN SAN
10 DIEGO, UNDER THE CONSTITUTION.

11 THE COURT: I AGREE.

12 YOU MAY PROCEED.

13 THE WITNESS: HOWARD W. GILLINGHAM, G-I-L-L-I-N-G-
14 H-A-M.

15
16 HOWARD W. GILLINGHAM,
17 CALLED AS A WITNESS BY THE DEFENDANT, HAVING BEEN FIRST DULY
18 SWORN, TESTIFIED AS FOLLOWS:

19
20 DIRECT EXAMINATION

21 BY MR. KLEIN:

22 Q MR. GILLINGHAM, YOU REPRESENTED MR. CARTER
23 STARTING WHEN IN CONNECTION WITH THIS CASE, APPROXIMATELY?

24 A I AM THINKING. APRIL 1988 I CAME INTO THE
25 CASE, AFTER IT HAD BEGUN, ALONG WITH MISS MARCIA MORRISSEY,
26 REPRESENTING MR. CARTER.

27 Q AFTER YOU CAME INTO THE CASE AND AFTER YOU
28 FAMILIARIZED YOURSELF WITH THE CASE, DID YOU HAVE DISCUSSIONS

6169

2

1 WITH MR. CARTER ABOUT WHETHER OR NOT HE WANTED TO PRESENT A
2 DEFENSE IN THIS CASE AND WHETHER OR NOT HE WANTED TO TESTIFY
3 IN THE GUILT PHASE OF THIS CASE?

4 A YES.

5 Q APPROXIMATELY HOW MANY DISCUSSIONS WOULD YOU
6 SAY YOU HAD WITH HIM BEFORE THE TRIAL STARTED?

7 A THAT WOULD BE HARD TO ESTIMATE, ACTUALLY.
8 LOTS.

9 Q ON ANY OF THESE OCCASIONS, DID MR. CARTER
10 INDICATE TO YOU WHAT HE WANTED TO DO WITH RESPECT TO TESTIFY-
11 ING IN THE CASE?

12 A WHAT HE WANTED TO DO? YOU HAVE TO CLARIFY
13 THAT.

14 Q WHAT WAS MR. CARTER'S DESIRE WITH RESPECT TO
15 WHETHER OR NOT HE WOULD TESTIFY IN THE GUILT PHASE?

16 A MY RECOLLECTION IS MR. CARTER WANTED TO PUT ON
17 AT ALL TIMES A FULL-BLOWN DEFENSE, AND PART OF PUTTING ON A
18 FULL-BLOWN DEFENSE WAS THE POSSIBILITY POTENTIAL OF TESTIFY-
19 ING.

20 Q WHEN IS IT THAT YOU WOULD SAY YOU HAD THE
21 FIRST SERIOUS DISCUSSION WITH MR. CARTER ABOUT THIS, WHEN IT
22 WAS ACTUALLY GOING TO HAPPEN?

23 A NOT TO BE -- I MEAN, THEY WERE ALL SERIOUS.
24 THERE WAS NO QUESTION THAT MR. CARTER, FROM EARLY ON, WANTED
25 TO CONDUCT-CONTEST THE GUILT AT THE SPECIAL CIRCUMSTANCE
26 LEVEL. NO QUESTION ABOUT THAT. THE FIRST SERIOUS -- TO USE
27 THE TERM "SERIOUS DISCUSSION" WOULD HAVE BEEN AS WE GOT
28 CLOSER WHERE IT WAS TIME TO MAKE SERIOUS DECISIONS AND --

PENGAD/WEST, FRESNO, CA 93725 - FORM CAL-18

ER 810

6170

1 Q WHEN WAS THAT?

2 A -- NEAR THE END OF THE CASE IN CHIEF WHERE
3 WE KNEW -- I MEAN WE DEFINITELY KNEW THAT MR. CARTER DID NOT
4 AGREE WITH OUR APPROACH, BECAME TIME TO DEAL WITH IT.

5 Q WHAT WAS YOUR APPROACH, "YOU" BEING YOU AND
6 MISS MORRISSEY?

7 A OUR APPROACH WAS THIS CASE WAS A POTENTIAL
8 DEATH CASE, AND AT SOME POINT I, ALONG WITH MISS MORRISSEY,
9 MADE THE DECISION THAT THAT'S HOW IT HAD TO BE LITIGATED.

10 Q WHAT DO YOU MEAN BY THAT?

11 A AS AN EXAMPLE, THE REVIEW OF THE VOIR DIRE
12 OF THE JURORS WAS ALMOST ENTIRELY DEATH FOCUSED, SO RIGHT
13 FROM THE BEGINNING --

14 Q YOUR POSITION, THEN, WAS THAT YOU WERE NOT
15 GOING TO PRESENT ANY DEFENSE OR MR. CARTER TESTIFY AT THE
16 GUILT PHASE?

17 A UNLESS SOMETHING DEVELOPED, THE TENTATIVE
18 DECISION, AS ANY OF US KNOW ON BOTH SIDES OF THE TABLE
19 YOU HAVE TOUGH DECISIONS TO MAKE, AND SOMETIMES YOU LIKE TO
20 AVOID THEM, BUT THE TENTATIVE DECISION WAS IT WAS GOING TO
21 BE TRIED AS A PENALTY CASE.

22 Q AGAIN, TO ANSWER MY QUESTION, IN OTHER WORDS,
23 THE POSITION OF THE ATTORNEYS WAS THAT YOU WERE NOT GOING TO
24 PRESENT A DEFENSE AND MR. CARTER WAS NOT GOING TO TESTIFY AT
25 THE GUILT PHASE?

26 A YES.

27 Q NOW, THERE WAS A MARSDEN HEARING ON JULY 5TH
28 OF THIS PAST YEAR. IN RELATIONSHIP TO THAT DATE, DID YOU AND

ER 811

6171

24

1 MISS MORRISSEY HAVE A CONVERSATION WITH MR. CARTER ABOUT
2 WHETHER OR NOT A DEFENSE WAS GOING TO BE PRESENTED AND WHETHER
3 OR NOT HE WOULD TESTIFY?

4 A YES.

5 Q AND WHEN WAS THAT CONVERSATION?

6 A I MEAN I DON'T RECALL EXACTLY WHEN -- I JUST
7 REMEMBER BEING IN THE LOCKUP, MAYBE DOWN BELOW IN THE HOLDING
8 TANK, AND CERTAINLY AT OR NEAR THE TIME OF THE MARSDEN HEARING,
9 SO AT THE END OF THE PROSECUTION'S CASE.

10 Q PROBABLY WITHIN A DAY OF JULY 5TH?

11 A OH, ABSOLUTELY.

12 Q YOU EXPRESSED WHAT TO MR. CARTER?

13 A WELL, IT BECAME TIME TO MOVE FROM THE TENTATIVE
14 TO THE DEFINITE, AND OUR ASSESSMENT AT THAT TIME WAS WE
15 SHOULD -- IT WAS IN MR. CARTER'S INTEREST TO NOT PUT ON ANY
16 DEFENSE AND TO NOT CALL HIM AS A WITNESS.

17 Q WHAT WAS MR. CARTER'S RESPONSE TO THAT?

18 A AGITATED. TOTAL DISAGREEMENT, WHICH I MUST
19 SAY, HAS BEEN VINDICATED. WE SORT OF HAD THAT FEELING.

20 Q WHO HAD THAT FEELING?

21 A IN OTHER WORDS, WE KNEW THAT DEAN CARTER WANTED
22 TO CONTEST THE GUILT PHASE, BUT HE HAD SOME CONFIDENCE IN US,
23 TOO, SO HE WAS JUST, YOU KNOW --

24 Q HIS POSITION WAS HE WANTED TO PUT ON A DEFENSE,
25 AND HE WANTED TO TESTIFY?

26 A THAT IS RIGHT.

27 Q WERE THERE OTHER DISCUSSIONS WITH MR. CARTER
28 ABOUT THE SUBJECT AFTER THIS MEETING AND PRIOR TO THE MARSDEN

PENGAD/WEST, FRESNO, CA 93725 - FORM CAL-28

ER 812

6172

1 HEARING?

2 DID YOU TALK TO HIM AGAIN?

3 A NUMBER ONE, I AM NOT PUTTING THIS IN THE
4 FRAMEWORK OF A PARTICULAR MEETING. I JUST REMEMBER TALKING
5 TO HIM DOWN BELOW, TALKING TO HIM UPSTAIRS, AND WHETHER IT
6 IS ONE OR TWO MEETINGS THAT THIS COMES OUT, I DON'T KNOW,
7 SO YOU HAVE TO HELP ME WITH THAT.

8 Q SO, IN OTHER WORDS, IT WAS DISCUSSED SEVERAL
9 TIMES PRIOR TO THE MARSDEN HEARING AND IN EACH OF THOSE
10 OCCASIONS MR. CARTER INDICATED HE WANTED TO PUT ON A DEFENSE,
11 AND HE WANTED TO TESTIFY?

12 A YES, AND IT MIGHT HAVE BEEN FRAMED IN THE
13 NEGATIVE, YOU KNOW, "AREN'T YOU GOING TO DO SOMETHING, YOU
14 KNOW? WHERE ARE THE WITNESSES? WHAT ARE YOU GOING TO DO?"
15 SO IT WOULD HAVE BEEN LIKE THAT, POSSIBLY, TOO. IN FACT, I
16 THINK I RECALL THAT SORT OF THING.

17 Q HOW WAS IT DECIDED THAT A MARSDEN HEARING WAS
18 GOING TO BE REQUESTED?

19 A WELL, I CERTAINLY KNOW WHEN THERE IS A
20 DISAGREEMENT BETWEEN COUNSEL AND THE DEFENDANT IF HE WANTS
21 TO HAVE THAT AIRED IT OUGHT TO BE AIRED, AND PROBABLY
22 INFORMED HIM -- I DON'T SPECIFICALLY RECALL THAT. IF I COULD
23 SPECULATE, I PROBABLY INFORMED HIM IF THIS IS THE VEHICLE,
24 THEN THIS IS WHAT WE SHOULD DO.

25 Q DID YOU HAVE A DISCUSSION ABOUT WHAT WOULD
26 TRANSPIRE, HOW THE MARSDEN HEARING WOULD BE HANDLED?

27 A I TOLD HIM, AS I TOLD HIM OR ANY OTHER CLIENT
28 ANY TIME ANY PLACE, THAT I WILL DO THE TALKING, AND I WILL

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26

1 REPRESENT TO THE JUDGE WHAT YOU REPRESENTED AND, QUITE FRANKLY,
2 I REMEMBER GAINING SOME CONFIDENCE THAT I WOULD DO THAT BY
3 REMINDING HIM THAT I HAD DONE THAT ON THE MOTION TO RECON-
4 SOLIDATE. THAT IS WHERE WE HAD A CONFLICT. I TOLD HIM I
5 WOULD PUT EVERYTHING ON THE RECORD, BUT WE DEFINITELY DIS-
6 AGREED WHETHER THERE OUGHT TO BE A MOTION TO RECONSOLIDATE.
7 HE WANTED IT ANOTHER WAY. I SPREAD IT ALL ON THE RECORD,
8 AND AS I RECALL, HE FOUND THERE WAS NO FURTHER STATEMENT.

9 Q DID YOU SAY WHETHER OR NOT -- DID YOU SAY
10 ANYTHING TO MR. CARTER ABOUT WHETHER HE SHOULD SPEAK DURING
11 THE MARSDEN HEARING?

12 A I SPECIFICALLY TOLD HIM HE SHOULD NOT SPEAK.

13 Q UNLESS WHAT TRANSPIRED?

14 A OH, UNLESS HE WAS ASKED A QUESTION BY THE
15 JUDGE, I MADE AN OBJECTION OR DIDN'T, OR MR. GOLDSTEIN AND
16 I, OR MISS MORRISSEY, GOT IN LITIGATION ABOUT IT, OTHERWISE
17 HE SHOULD NOT SAY ANYTHING BECAUSE I SHOULD MAKE THE
18 REPRESENTATION.

19 Q WHY IS THAT?

20 A JUST THE WAY I DO THINGS. I BELIEVE THE
21 LAWYER OUGHT TO DO THE TALKING, PROBABLY PRETTY CONSISTENT
22 WITH WHAT HAPPENS, BECAUSE USUALLY I HEAR JUDGES TELL
23 DEFENDANTS TO "KEEP QUIET. YOU HAVE GOT A LAWYER."

24 Q WAS IT AFTER THE FIRST MARSDEN HEARING DID
25 MR. CARTER SAY ANYTHING TO YOU ABOUT SOMETHING THAT WASN'T
26 SAID ON THE JULY 5TH MARSDEN HEARING THAT HE WANTED SAID TO
27 THE COURT?

28 A YES, THAT IS EVEN APPARENT AND, I AM, OF COURSE,

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3

1 CROSS-EXAMINATION

2 BY MR. GOLDSTEIN:

3 Q IN RECALLING THESE MARSDEN HEARINGS, I SUSPECT
4 THAT IN VERY FEW OF THEM WAS THERE A REQUEST MADE FOR YOU TO
5 LEAVE?

6 A YOU GOT ME.

7 Q WELL, I WILL CONTINUE TO CALL THEM "MARSDEN
8 HEARINGS," BUT I AM NOT SUGGESTING BY ANY MEANS THAT I AGREE
9 WITH THAT CHARACTERIZATION AS ACCURATE.

10 A BUT YOU ARE REFERRING TO THESE HEARINGS IN THE
11 TRANSCRIPT?

12 MR. KLEIN: EXCUSE ME. I DON'T MEAN TO INTERRUPT,
13 BUT MAYBE I SHOULD ASK ONE MORE QUESTION, IF I COULD DO THAT
14 JUST TO CLARIFY, BUT BEFORE HE MAKES HIS EXAMINATION --

15 THE COURT: VERY WELL.

16

17 DIRECT EXAMINATION (REOPENED)

18 BY MR. KLEIN:

19 Q THERE WAS A THIRD MARSDEN HEARING ON JULY 17TH,
20 MR. GILLINGHAM?

21 A YEAH -- OH, WAIT. YES, OKAY.

22 Q DURING THE COURSE OF THAT HEARING THERE WAS A
23 REQUEST THAT A NEW ATTORNEY BE APPOINTED?

24 A THAT IS AT THE JULY 17TH OR --

25 Q IT IS PAGE 5393 OF EXHIBIT 3 -- I MEAN EXHIBIT
26 "C" TO THE MOTION, PAGE 5393.

27 A CAN I READ THAT?

28 Q SURE. WHY DON'T YOU READ IT FIRST, AND THEN

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ER 816

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9

1 I WILL ASK THE QUESTION.

2 A OKAY. I GOT LOST WITH THE FAMILY VISITS.
3 I DIDN'T CONTINUE ON.

4 Q WAS THERE SOMETHING ELSE -- WAS THERE A
5 REQUEST TO APPOINT ANOTHER ATTORNEY THAT MR. CARTER WANTED
6 EXPRESSED IN CONNECTION WITH THE MARSDEN HEARING?

7 A YEAH. I RECALL IT NOW, READING THIS.

8 Q AND THIS IS SOMETHING ELSE HE WANTED YOU TO
9 SAY ON JULY 5TH?

10 A THAT COULD BE. I JUST DON'T RECALL THAT PART.
11 MR. KLEIN: I DON'T HAVE ANY OTHER QUESTIONS, THANK
12 YOU.

13

14 CROSS-EXAMINATION (CONTINUED)

15 BY MR.,GOLDSTEIN:

16 Q NOW, MR. GILLINGHAM, TO TALK FIRST ABOUT THE
17 DECISION WHETHER OR NOT TO CALL THESE WITNESSES THAT YOU
18 LISTED ON JULY 5TH. YOU HAVE THAT TRANSCRIPT BEFORE YOU, I
19 TAKE IT?

20 A I DO. IF YOU COULD HELP ME WITH THE PAGE.

21 Q 5092 IT BEGINS. YOU FELT, I TAKE IT, THAT AS
22 A TACTICAL MATTER IT WAS BEST TO FIGHT YOUR BATTLE AT THE
23 PENALTY PHASE RATHER THAN AT THE GUILT PHASE, IS THAT SO?

24 A YES.

25 Q DID YOU HAVE IN MIND IN MAKING THAT DECISION
26 THE PENDENCY OF THE OAKLAND AND SAN DIEGO CASES? WAS THAT
27 A FACTOR IN MAKING THAT DECISION?

28 A LET ME ANSWER IT THIS WAY. IT WAS VERY HARD TO

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30

1 SEPARATE, AS I SIT HERE NOW, IN TERMS OF HOW MUCH OF A FACTOR.
2 I SUPPOSE IT WOULD BE -- HAD TO BE SOME FACTOR, BUT I DO NOT
3 HAVE A VIVID RECOLLECTION, FOR EXAMPLE, OF CALLING MR. BUMER,
4 CALLING OAKLAND COUNSEL, A JOINT DECISION --

5 Q THESE ARE DECISIONS YOU AND YOUR CO-COUNSEL
6 MISS MORRISSEY, WOULD MAKE?

7 A YES.

8 Q TAKING INTO CONSIDERATION THE STRENGTHS AND
9 WEAKNESSES OF THE GUILT PHASE AND THE PENDENCY OF OTHER
10 PROBLEMS IN OTHER JURISDICTIONS, TRUE?

11 A TRYING TO --

12 MR. KLEIN: I OBJECT. IT IS AMBIGUOUS.

13 MR. GOLDSTEIN: HE SEEMS TO UNDERSTAND.

14 THE COURT: THE OBJECTION IS OVERRULED.

15 THE WITNESS: YEAH. IN TRYING TO KEEP A HANDLE ON A
16 LOT OF THINGS, A LOT OF BALLS IN THE AIR, IF YOU WILL.

17 Q BY MR. GOLDSTEIN: A LOT OF CONSEQUENCES, MANY
18 OF WHICH YOU FELT COULD BE BAD FOR THE DEFENDANT BY --
19 DEPENDING ON THE DECISIONS YOU MADE?

20 A YES, BUT THERE WAS NO QUESTION OUR PRIMARY
21 DECISION WAS THIS CASE, BECAUSE THIS IS WHERE I REPRESENTED
22 MR. CARTER.

23 Q IN CONSIDERING THESE VARIOUS WITNESSES WHOSE
24 NAMES YOU HAVE LISTED IN THE BEGINNING OF PAGE 5092, THESE ARE
25 WITNESSES -- COULD IT FAIRLY BE SAID WHO ARE NOT, IN A SENSE,
26 PRESENTING A SEPARATE DEFENSE LIKE DIMINISHED CAPACITY, OR
27 SOME DEFENSE LIKE THAT, BUT RATHER AN ATTEMPT TO WEAKEN THE
28 PROSECUTION'S SHOWING, IS THAT A FAIR SUMMARY OF THESE PEOPLE,

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31

1 OF THEIR TESTIMONY?

2 A I AM NOT SURE I WOULD DIFFERENTIATE WHEN YOU
3 SAY A SEPARATE DEFENSE. IF A DEFENSE PREVAILS, IT DOESN'T
4 MATTER WHAT YOU LABEL IT OR CALL IT. I AM NOT TRYING TO BE
5 CUTE ON THE STAND, BUT I AM JUST SAYING --

6 Q WE ARE NOT TALKING ABOUT A DEFENSE BASED UPON
7 A MENTAL ILLNESS OR ALCOHOL OR DRUGS TO BEGIN WITH. NONE
8 OF THESE WITNESSES HAD TO DO WITH THAT TYPE OF DEFENSE, TRUE?

9 A AGAIN, I AM JUST TRYING TO BE EXACT. I WOULD
10 HAVE TO REVIEW -- THAT DOESN'T POP INTO MY MIND, BUT I AM
11 NOT SURE THAT MY RECOLLECTION OF THOSE WITNESSES THERE WASN'T
12 SOMETHING THERE. I AM NOT TRYING TO SUGGEST THERE IS. I AM
13 JUST TRYING TO BE FAIR TO MY RECOLLECTION.

14 Q LOOKING AT THESE WITNESSES, EDDIS JEFFREY
15 AND CERTAIN WITNESSES WITH RESPECT TO RAY BLEVINS AND HIS
16 DISAGREEMENT WITH THE VICTIM FEMALES, AND A FELLOW BY THE
17 NAME OF WILLIAM SCHROLL, OR SCHROLL, S-C-H-R-O-L-L, ALL OF
18 THESE HAD TO DO WITH A GENERAL DEFENSE RATHER THAN A SPECIFIC
19 DEFENSE, THAT IS TO SAY, THAT IT WAS -- THAT THE PROSECUTION'S
20 EVIDENCE WAS NOT AS STRONG AS IT LOOKED, IN OTHER WORDS.

21 A WELL, LET ME ANSWER TWO WAYS. TO GO BACK TO
22 MY RECOLLECTION OF WHAT WITNESSES WOULD TESTIFY, IF I MIGHT
23 INVITE YOUR ATTENTION TO THE TOP OF 5093, YOU HAD RIGHT THERE
24 IN THE HEARING THAT I HAD FORGOTTEN RIGHT THERE WHAT MR.
25 SCHROLL WOULD TESTIFY TO, AND I HAD TO ASK MISS MORRISSEY.
26 I DON'T REMEMBER TODAY, SO FOR ME TO SAY NONE OF THESE
27 WITNESSES HAD A CERTAIN POTENTIAL IN THAT AREA, THAT WOULD
28 NOT BE FAIR TO SAY --

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ER 819

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52

1 Q IN ANY EVENT --

2 A GO AHEAD.

3 Q -- YOU HAD THESE WITNESSES' POSSIBLE TESTIMONY
4 IN MIND AND DECIDED NOT TO USE ANY OF THESE WITNESSES, IS THAT
5 SO?

6 A WHEN WE MADE THE DECISION, MARCIA AND I, NOT
7 TO PUT ON THE DEFENSE, THOSE WITNESSES DID NOT STAY IN MY
8 MIND MUCH AFTER THAT. IN OTHER WORDS, WHEN I DECIDED TO TRY
9 THIS AS A PENALTY CASE, THEY WERE NOT IN MY MIND.

10 Q BUT AT THE TIME YOU MADE THE DECISION NOT TO
11 PUT ON ANY DEFENSE AT ALL, YOU HAD AN IDEA WHAT DEFENSES WERE
12 AVAILABLE, DIDN'T YOU? YOU HAD INVESTIGATED A VARIETY OF
13 DEFENSES TO FIND OUT WHETHER THEY EXISTED AT ALL, YOU AND
14 YOUR PREDECESSOR, MR. PERLO?

15 MR. KLEIN: I OBJECT. IT IS COMPOUND, NOW.

16 THE COURT: WELL, I THINK WE ARE ENTERING IN AN AREA
17 THAT NEITHER PARTY WANTED TO GET INTO.

18 MR. GOLDSTEIN: I DIDN'T SAY I DIDN'T WANT TO GET
19 INTO IT AT ALL. I AM NOT ASKING FOR SPECIFIC DETAILS AT ALL.

20 THE COURT: I THINK WE ARE TALKING ABOUT A COMMUNICA-
21 TIONS THING. THE INFERENCES THAT MR. GILLINGHAM DIDN'T KNOW
22 WHO THEY WERE, WHAT THEY WERE GOING TO TESTIFY TO. YOU MADE
23 A CONSCIENTIOUS DECISION KNOWING WHAT THEIR TESTIMONY WAS
24 GOING TO BE TO NOT PUT THEM ON THE STAND AT THAT POINT,
25 NOT TO CALL THEM, RIGHT?

26 THE WITNESS: YES.

27 MR. GOLDSTEIN: THANK YOU.

28 Q BY MR. GOLDSTEIN: IN TERMS OF DEALING WITH THE

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3

1 DEFENDANT AND HIS POSSIBLE TESTIMONY OR POTENTIAL TESTIMONY,
2 AS I THINK YOU PUT IT, I TAKE IT YOU DISCUSSED THAT WITH HIM.
3 WITHOUT TELLING ME WHAT THE DETAILS WERE THAT YOU WENT OVER
4 IN DETAIL WITH HIM WHAT HIS POSSIBLE TESTIMONY WOULD BE,
5 DID YOU NOT?

6 A NO, I DIDN'T GO OVER IN DETAIL WITH HIM
7 WHAT HIS TESTIMONY WAS, BECAUSE MY APPROACH TO THE CASE WAS
8 I DID NOT WANT TO PUT DEAN CARTER ON THE STAND.

9 Q DIDN'T YOU FIND OUT OR TRY TO FIND OUT WHAT
10 IT IS HE COULD SAY OR WHAT HE INTENDED TO SAY?

11 A THERE CERTAINLY WERE DISCUSSIONS OVER A PERIOD
12 OF WHATEVER IT HAS BEEN THAT I HAVE BEEN IN THE CASE, YEAH.

13 Q EACH TIME YOU HAD A HEARING OR ASKED FOR A
14 HEARING AT WHICH THE DISTRICT ATTORNEY WAS EXCLUDED -- WE
15 HAVE BEEN CALLING THEM "MARSDEN HEARINGS" -- I DON'T KNOW
16 WHETHER THAT IS ACCURATE, I DON'T BELIEVE IT IS -- BUT EACH
17 TIME YOU WANTED TO SPREAD SOMETHING ON THE RECORD -- I THINK
18 THAT WAS YOUR PHRASE -- DID YOU NOT PUT ON THE RECORD AS
19 ACCURATELY AND COMPLETELY AS POSSIBLE AS YOU WERE ABLE TO
20 DO IT A SYNOPSIS OF THE DEFENDANT'S POSITION?

21 A IT WAS OBVIOUS I DIDN'T DO A VERY GOOD JOB OF
22 THAT.

23 Q I DIDN'T ASK YOU THAT, COUNSELOR. LISTEN
24 TO THE QUESTION:

25 IS IT POSSIBLE --

26 A DID I DO IT AS ACCURATE? NO --

27 Q DID YOU ATTEMPT IN EACH INSTANCE TO ACCURATELY
28 AND COMPLETELY SUMMARIZE THE DEFENDANT'S POSITION?

PENDING/RECEIVED: MARCH 11, 2014 11:11 AM

3

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34

1 A THAT WAS MY INTENT, YES.

2 Q IN TERMS OF THE MOTION TO RECONSOLIDATE, WHICH
3 YOU FAVORED AND HE DIDN'T --

4 A YOU ARE TALKING WAY BACK?

5 Q WAY BACK, YES. DID YOU NOT IN THAT HEARING
6 SET FORTH AT SOME LENGTH THE DEFENDANT'S DESIRE NOT TO HAVE
7 THESE MURDERS ALL TRIED IN ONE PROCEEDING?

8 A YES.

9 Q AND YOU DISAGREED WITH THAT, OF COURSE?

10 A YES, WITH HIS POSITION, YES.

11 Q IN TERMS OF THESE OTHER HEARINGS THAT WE HAD --
12 OR THAT YOU HAD, I SHOULD SAY, YOU MADE THE SAME EFFORTS TO
13 FULLY SET FORTH THE DEFENDANT'S POSITION?

14 MR. KLEIN: OBJECTION, AMBIGUOUS.

15 Q BY MR. GOLDSTEIN: IS THAT NOT SO?

16 THE COURT: OVERRULED.

17 MR. KLEIN: WHAT HEARINGS, YOUR HONOR?

18 MR. GOLDSTEIN: I AM ONLY TALKING ABOUT THE MARSDEN
19 HEARINGS.

20 THE COURT: THAT IS MY UNDERSTANDING.

21 IS THAT YOUR UNDERSTANDING, MR. GILLINGHAM?

22 THE WITNESS: YES. DID I -- WAS IT MY INTENT TO
23 SPREAD HIS FULL FEELING? YES.

24 Q BY MR. GOLDSTEIN: THAT WAS TRUE IN EACH
25 CASE, IN EACH INSTANCE WHERE THERE WAS SUCH A HEARING?

26 A YEAH, THAT WOULD BE MY INTENT.

27 MR. GOLDSTEIN: THANK YOU. I HAVE NOTHING FURTHER.

28 THE COURT: ANY REDIRECT?

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1 MR. KLEIN: YES.

2 THE COURT: GO AHEAD.

3

4 REDIRECT EXAMINATION

5 BY MR. KLEIN:

6 Q IT IS MR. CARTER'S DESIRE THAT THE SYNTHESIS
7 OF WHAT WAS SAID IN THE THREE HEARINGS -- ON JULY 5TH, JULY
8 10TH AND JULY 17TH -- BE EXPRESSED TO THE COURT ON JULY 5TH?

9 A YES.

10 Q IS THAT RIGHT?

11 A YES.

12 MR. KLEIN: NOTHING FURTHER.

13 THE COURT: ANYTHING FURTHER?

14 MR. GOLDSTRIN: NO.

15 THE COURT: THANK YOU, MR. GILLINGHAM.

16 JUST SO THE RECORD IS CLEAR, I HAD FORGOTTEN
17 THE DATES THE JURY BEGAN DELIBERATIONS ON THIS MATTER ON THE
18 10TH OF JULY, SO THE 17TH HEARING WAS A WEEK AFTER THAT?

19 MR. KLEIN: YES.

20 THE COURT: IT IS 12 O'CLOCK. DO WE NOT WANT TO
21 START ANOTHER WITNESS UNTIL AFTER LUNCH? IS MR. GILLINGHAM
22 SUPPOSED TO DO SOMETHING?

23 MR. GOLDSTEIN: WAIT OUTSIDE.

24 THE COURT: I AM NOT QUITE SURE WHAT THE QUESTION
25 WAS. I THINK WE WILL WAIT WITH THIS QUESTION UNTIL THIS
26 AFTERNOON.

27 MR. KLEIN: YES.

28 THE COURT: ONE-THIRTY. ARE YOU CALLING MISS MORRISSEY?

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ER 823

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36

1 MR. KLEIN: I AM GOING TO DECIDE THAT NOW, BUT I
2 THINK I AM GOING TO CALL MR. CARTER.

3 THE COURT: MR. KLEIN, DO I HAVE PERMISSION TO ASK
4 MR. GOLDSTEIN JUST A TECHNICAL QUESTION?

5 MR. KLEIN: OKAY.

6 (NOON RECESS TAKEN.)
7
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ER 824

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7

1 SANTA MONICA, CALIFORNIA; THURSDAY, JANUARY 11, 1990; 1:45 P.M.

2 DEPARTMENT "C" HON. ROBERT W. THOMAS, JUDGE

3 (APPEARANCES AS HERETOFORE NOTED.)

4
5 THE COURT: IN THE MATTER OF DEAN PHILLIP CARTER, THE
6 DEFENDANT AND COUNSEL ARE PRESENT, THE PEOPLE ARE REPRESENTED.
7 THE DEFENSE MAY PROCEED.

8 MR. KLEIN: CALL MR. CARTER.

9 THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

10 YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU
11 MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE
12 THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO
13 HELP YOU GOD?

14 THE WITNESS: YES.

15 THE CLERK: WOULD YOU TAKE THE WITNESS STAND AND
16 STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME,
17 PLEASE.

18 THE WITNESS: DEAN CARTER.

19
20 DEAN PHILIP CARTER,
21 THE DEFENDANT HEREIN, CALLED AS A WITNESS ON HIS OWN BEHALF,
22 HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

23
24 DIRECT EXAMINATION

25 BY MR. KLEIN:

26 Q MR. CARTER, AFTER MR. GILLINGHAM WAS APPOINTED
27 AND MISS MORRISSEY WERE YOUR ATTORNEYS ON THIS CASE, WHEN
28 WOULD THE FIRST TIME BE THAT YOU DISCUSSED WITH MR. GILLINGHAM

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ER 825

38

1 ABOUT STRATEGY CONCERNING A PRESENTATION OF DEFENSE AND YOUR
2 TESTIFYING?

3 A PROBABLY A FEW WEEKS AFTER HE WAS ON THE CASE
4 THE FIRST TIME.

5 Q NOW, FROM THAT TIME UNTIL THE TRIAL STARTED,
6 ABOUT HOW MANY TIMES DID YOU MEET WITH MR. GILLINGHAM AND
7 DISCUSS THESE TWO SUBJECTS?

8 A I AM REALLY NOT SURE HOW MANY TIMES THERE WERE.
9 THERE WERE A NUMBER OF TIME, MAYBE AROUND 10.

10 Q NOW, DURING THESE DISCUSSIONS DID YOU EXPRESS
11 TO HIM WHAT YOUR VIEW WAS AS TO WHETHER THERE SHOULD BE A
12 DEFENSE AND WHETHER YOU WOULD TESTIFY DURING THE GUILT PHASE
13 OF THE TRIAL?

14 A YES.

15 Q WHAT DID YOU SAY?

16 A WELL, I TOLD HIM THAT I WANTED TO PRESENT A
17 DEFENSE AND THAT DURING THE GUILT PHASE I WAS MORE CONCERNED
18 ABOUT THE GUILT PHASE AND THAT I FELT IT WAS NECESSARY FOR
19 ME TO TESTIFY.

20 Q NOW, DURING THESE DISCUSSIONS, WERE THERE
21 DISCUSSIONS OF -- LET ME MOVE ON.

22 DURING THESE DISCUSSIONS PRIOR TO THE TRIAL
23 WAS THERE ANY RESOLUTION OF WHAT THE STRATEGY WOULD BE?

24 A NO.

25 Q WHAT DID YOU THINK THE STRATEGY WOULD BE
26 IMMEDIATELY PRIOR TO THE TIME OF TRIAL?

27 A WELL, I HAD ASKED GILLINGHAM ABOUT THAT A
28 NUMBER OF TIMES AND HIS RESPONSE WAS ALWAYS, "WE CAN'T REALLY

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9

1 TELL UNTIL WE GET INTO TRIAL AND SEE WHAT HAPPENS."

2 Q NOW, WERE THERE ANY DISCUSSIONS DURING THE
3 COURSE OF THE VOIR DIRE ABOUT THIS SUBJECT?

4 A I'D ASKED HIM ABOUT IT A COUPLE OF TIMES, AND
5 HE REALLY DIDN'T HAVE A RESPONSE.

6 Q WAS THERE ANY DISCUSSION ABOUT THIS SUBJECT
7 IN THE CONTEXT OF HOW HE WAS CONDUCTING VOIR DIRE?

8 A YEAH. I QUESTIONED THE WAY HE WAS CONDUCTING
9 VOIR DIRE. I WASN'T HAPPY WITH WHAT HE WAS DOING, WITH WHAT
10 HE WAS FOCUSING ON.

11 Q WHAT WAS HE FOCUSING ON THAT YOU WERE UNHAPPY
12 ABOUT?

13 A HE WASN'T REALLY PAYING ANY ATTENTION TO THE
14 GUILT ASPECT. HE WAS MORE CONCERNED ABOUT THE PENALTY PHASE.
15 THAT IS WHAT I FELT, ANYWAY.

16 Q NOW, WHEN WAS THE FIRST TIME THAT YOU REALLY
17 HAD A SERIOUS DISCUSSION WITH MR. GILLINGHAM AND/OR MISS
18 MORRISSEY ABOUT THE PRESENTATION OF THE DEFENSE AND ABOUT YOUR
19 TESTIFYING AT THE GUILT PHASE AFTER THE TRIAL STARTED?

20 A IT WAS THE DAY BEFORE THE PROSECUTION RESTED.

21 Q WHAT DID MR. GILLINGHAM SAY TO YOU?

22 A HE TOLD ME THAT HE DIDN'T PLAN TO CALL ANY
23 WITNESSES AND THAT HE WASN'T GOING TO PUT ON A DEFENSE.
24 AS SOON AS THE --

25 Q AND WHAT ABOUT YOUR TESTIFYING?

26 A PARDON?

27 Q WHAT ABOUT YOUR TESTIFYING?

28 A HE ALSO STATED, WELL, IF HE DIDN'T PUT ON A

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1 DEFENSE AND I AM GOING TO TESTIFY, I ASKED HIM ABOUT THAT,
2 AND HE SAID IF WE ARE NOT GOING TO PUT ON A DEFENSE I WAS
3 NOT GOING TO BE TESTIFYING.

4 Q WHAT WAS YOUR RESPONSE TO THAT?

5 A I WAS UPSET. I INDICATED PRETTY STRONGLY THAT
6 I WASN'T HAPPY WITH HIM.

7 Q DID YOU TELL HIM WHAT YOU WANTED TO DO?

8 A I TOLD HIM I WANTED TO CALL WITNESSES, PUT ON
9 A DEFENSE AND TESTIFY.

10 Q AND WAS THERE SOME DISCUSSION ABOUT WHO WAS
11 GOING TO MAKE THAT DECISION?

12 A HE SAID IT WAS UP TO HIM? HE SAID THAT HE
13 KNOWS AS HARD AS IT IS SOMETIMES A LAWYER HAS TO PLAY GOD.

14 Q DID YOU SAY SOMETHING IN RESPONSE TO THAT?

15 A YEAH, WELL, I TOLD HIM THAT MIGHT BE FINE, BUT
16 I DIDN'T APPRECIATE HIM DOING THAT WITH MY LIFE.

17 Q AFTER THIS DISCUSSION, WERE THERE OTHER CONVER-
18 SATIONS WITH MR. GILLINGHAM AND/OR MISS MORRISSEY PRIOR TO
19 THE TIME OF THE FIRST MARSDEN HEARING ON JULY 5TH?

20 A WELL, EVERY OPPORTUNITY I HAD I WOULD MENTION
21 TO HIM THAT I WASN'T HAPPY.

22 Q DID YOU TELL HIM WHAT YOU WANTED TO BE DONE?

23 A YES, I DID.

24 Q WHAT DID YOU TELL HIM?

25 A WELL, I TOLD HIM I WANTED THEM TO SUBPOENA THE
26 WITNESSES I WANTED TO CALL, AND THAT I WANTED TO PUT ON A
27 DEFENSE, AND I WANTED TO TESTIFY.

28 Q DURING THESE DISCUSSIONS, DID YOU MAKE ANY

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1 REQUEST WITH RESPECT TO THE MARSDEN-TYPE OF HEARING?

2 A YEAH, I DID.

3 Q WHAT DID YOU SAY?

4 A WELL, I ASKED HIM, YOU KNOW, IF HE WOULD INDI-
5 CATE TO THE COURT THAT I WAS NOT HAPPY WITH WHAT HE WAS DOING,
6 AND I WANTED TO MAKE SURE IT WAS CLEAR THAT IT WAS OVER MY
7 OBJECTION THAT HE WAS DOING IT.

8 Q BY "UNHAPPY," THAT YOU WANTED TO PRESENT A
9 DEFENSE AND YOU WANTED TO TESTIFY?

10 A RIGHT.

11 Q WAS THERE A DISCUSSION ABOUT WHO SHOULD DO THE
12 TALKING DURING THE MARSDEN HEARING?

13 A YEAH, HE TOLD ME HE WOULD PRESENT IT TO THE
14 COURT AND FOR ME TO JUST SIT THERE AND LET HIM, YOU KNOW,
15 GET IT ON THE RECORD.

16 Q NOW, AFTER THE FIRST MARSDEN HEARING WAS OVER,
17 DID YOU SAY ANYTHING TO MR. GILLINGHAM ABOUT SOMETHING THAT
18 WASN'T SAID IN THE FIRST MARSDEN HEARING?

19 A YEAH, I TOLD HIM THAT I DIDN'T THINK HE REALLY
20 MADE IT AS CLEAR AS I WOULD HAVE LIKED; THAT HE HAD LEFT OUT
21 A COUPLE OF THINGS.

22 Q WHAT HAD HE LEFT OUT?

23 A I DON'T THINK HE MENTIONED ALL THE WITNESSES
24 THAT I WANTED TO CALL, AND HE ALSO DIDN'T TELL THE COURT THAT
25 I WANTED TO TESTIFY ON MY OWN BEHALF.

26 Q SO DID HE SAY WHAT HE WAS DOING IN RESPONSE TO
27 THAT?

28 A YEAH, HE SAID THAT HE WOULD ASK FOR ANOTHER

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2

1 MARDEN HEARING AND GET IT ON THE RECORD.

2 MR. KLEIN: I HAVE NO FURTHER QUESTIONS.

3 THE COURT: MR. GOLDSTEIN.

4

5 CROSS-EXAMINATION

6 BY MR. GOLDSTEIN:

7 Q WAS MISS MORRISSEY PRESENT DURING THESE CONVER-
8 SATIONS?

9 A DURING THE TRIAL, YOU MEAN?

10 Q NO, DURING ANY OF THE CONVERSATIONS THAT WERE
11 HAD OUTSIDE THE TRIAL WHEN YOU WERE IN CUSTODY IN THE BACK OR
12 AT THE JAIL?

13 A I DON'T REALLY REMEMBER. SHE HAS BEEN THERE
14 WHEN I HAVE TALKED TO HIM. I DON'T KNOW IF SHE WAS THERE WHEN
15 WE DISCUSSED THAT OR NOT.

16 Q WAS SHE PRESENT WHEN YOU INDICATED THAT YOU
17 WANTED TO TESTIFY?

18 A DOWNSTAIRS, YES.

19 Q WHEN WAS THAT IN RELATION TO THE HEARING OF
20 THE 10TH WHEN THIS SUBJECT FIRST CAME UP?

21 MR. KLEIN: WELL, I OBJECT TO THE QUESTION. IT MIS-
22 STATES THE EVIDENCE, WHEN THE SUBJECT FIRST CAME UP.

23 MR. GOLDSTEIN: I AM SORRY. LET ME ADD A PHRASE TO
24 IT.

25 WHEN THE SUBJECT FIRST CAME UP HERE IN COURT.

26 THE WITNESS: COULD YOU REPEAT THAT.

27 Q BY MR. GOLDSTEIN: IT APPEARS FROM THE TRAN-
28 SCRIPT THAT THE FIRST MENTION OF YOUR QUOTE HERE, "THE

PENGAD/WEST, FRESNO, CA 93725 - 108M CAL 18

ER 830

6190

13

1 POTENTIAL OF MR. CARTER TESTIFYING," THE FIRST TIME THIS EVER
2 IS RAISED HERE IN COURT IS ON THE 10TH, THIS IS -- I CALL IT
3 AN AFTERTHOUGHT, BUT TO ADD TO THE MATERIAL THAT HE, MR.
4 GILLINGHAM, TALKED ABOUT THE PREVIOUS TIME, I THINK, ON THE
5 5TH, THAT IS THE FIRST TIME YOU WOULD AGREE THAT THIS MATTER
6 WAS EVER DISCUSSED IN OPEN COURT IN THIS MARSDEN HEARING,
7 RIGHT?

8 A ON THE 10TH, RIGHT.

9 Q PRIOR TO THAT TIME YOU HAD, I TAKE IT, INDICATED TO MR. GILLINGHAM AND MISS MORRISSEY, BOTH, THAT YOU
10 WANTED TO TESTIFY?
11

12 A YES, I HAD.

13 Q AND YOU THOUGHT IT WAS IN YOUR BEST INTEREST
14 TO DO SO?

15 A ABSOLUTELY.

16 Q DID THEY ANSWER TO YOU, EITHER ONE OF THEM,
17 AT ANY TIME, THAT THEY THOUGHT IT WAS IN YOUR BEST INTEREST
18 NOT TO DO SO?

19 A YEAH, THEY DID. THEY SAID IT WAS A TACTICAL
20 DECISION.

21 Q DID THEY TALK ABOUT THE PENDENCY OF THE CASES
22 IN OTHER JURISDICTIONS?

23 A THEY DIDN'T TELL ME ABOUT ANY OTHER CASES.

24 Q WELL, YOU KNEW ABOUT THE OTHER TWO CASES, RIGHT?
25 I MEAN YOU ALREADY HAD YOUR PRELIMINARY HEARING DOWN IN
26 SAN DIEGO BY THIS TIME?

27 A YEAH.

28 Q DID YOU THINK THAT ANY TESTIMONY THAT YOU GAVE

PENDAD/WEST, FREEMING, JR.

6191

44

1 HERE IN LOS ANGELES MIGHT BE USED AGAINST YOU IN SAN DIEGO?

2 A I DON'T REALLY THINK THAT ENTERED -- I DON'T
3 FEEL -- DON'T REALLY THINK THAT IS A FACTOR INTO THE DECISION.

4 Q WITHOUT GOING INTO ANY OF THE SUBSTANCE OF
5 WHAT THAT TESTIMONY MIGHT BE, IF THAT WERE TO BE A DENIAL --
6 WHATEVER YOUR TESTIMONY WOULD BE ON DIRECT, YOU UNDERSTOOD
7 THAT YOU WERE GOING TO BE SUBJECT TO CROSS-EXAMINATION BY ME?

8 A YES.

9 Q AND THAT I WOULD BE ASKING YOU QUESTIONS ABOUT
10 YOUR TESTIMONY?

11 A RIGHT.

12 Q AND ABOUT THE ITEMS FOUND IN THE CAR THAT WE
13 ASSERT WERE IN YOUR POSSESSION?

14 A RIGHT.

15 Q AND SOME OF THOSE ITEMS INCLUDED THINGS TAKEN
16 BOTH FROM THE VICTIM IN SAN DIEGO AND IN OAKLAND, CORRECT?

17 A RIGHT.

18 Q DID YOU THINK YOU MIGHT BE ASKED QUESTIONS
19 ABOUT THOSE ITEMS?

20 A I HAD NO DOUBT ABOUT IT.

21 Q AND BE CALLED TO EXPLAIN HOW THEY CAME INTO
22 YOUR POSSESSION?

23 A YES.

24 Q DO YOU THINK THOSE ANSWERS WOULD HAVE BEEN
25 COMMUNICATED TO THE AUTHORITIES IN SAN DIEGO AND OAKLAND?

26 A MORE THAN LIKELY.

27 Q AND THAT THEY MIGHT BE USED AGAINST YOU IN
28 SOME FORM IN SAN DIEGO AND OAKLAND?

PENGAD/WLST, FRESNO, CA 93725 - IURM CA.28

ER 832

6192

+5

1 A I WOULD IMAGINE SO, YES.

2 Q DID YOU BELIEVE THAT YOU WERE GOING TO BE
3 TRIED IN SAN DIEGO AND OAKLAND?

4 A YES.

5 Q SO YOU KNEW THAT IN THE FUTURE THERE -- OR
6 BELIEVED IN THE FUTURE THERE WERE GOING TO BE THESE TWO
7 DEATH-PENALTY TRIALS?

8 A YES.

9 Q IN THE PAST WHEN THERE HAVE BEEN DISAGREEMENTS
10 BETWEEN YOU AND YOUR LAWYERS, THERE HAVE BEEN A NUMBER OF
11 HEARINGS IN WHICH THEY WERE EXPRESSED HERE IN COURT, CORRECT?

12 A YES.

13 Q YOUR LAWYERS WOULD STATE THE SUBSTANCE OF THE
14 DISAGREEMENT?

15 A YES, THEY WOULD.

16 Q YOU FOUND -- WITHDRAW THAT.

17 WERE YOU OF THE OPINION THAT THOSE SUMMARIES
18 WERE ACCURATE?

19 A PREVIOUS MARSDEN HEARINGS?

20 Q IN ANY OF THE PREVIOUS HEARINGS IN WHICH YOUR
21 LAWYERS AND YOU DISAGREED AND YOUR LAWYER STATED YOUR POSITION.

22 A YEAH, PRETTY MUCH.

23 Q TO GO BACK TO WHAT I BELIEVE IS THE FIRST
24 TIME AT THE PRELIMINARY HEARING WHEN THE MOTION WAS MADE TO
25 DISMISS THE OAKLAND AND SAN DIEGO CHARGES, THIS WAS DONE AT
26 YOUR REQUEST, WAS IT NOT?

27 A YES, IT WAS.

28 Q YOU COMMUNICATED THAT TO YOUR LAWYER, MR. PERLO?

ER 833

6193

16

1 A YES.

2 Q AND HE COMMUNICATED THAT BY MAKING THE OBJECTION
3 AT THE MUNICIPAL COURT PRELIMINARY HEARING, RIGHT?

4 A RIGHT.

5 Q HE DID WHAT YOU WANTED?

6 A YES, HE DID.

7 Q AND HE STATED YOUR VIEW COMPLETELY AND
8 ACCURATELY?

9 A AS FAR AS I RECALL.

10 Q YOU REMEMBER BEING ADVISED AT THAT TIME BY ME
11 OF THE CONSEQUENCES OF THAT?

12 A YES.

13 Q AND YOU UNDERSTOOD THAT?

14 A YES, I DID.

15 Q DID YOU HAVE THAT IN MIND WHEN THE TIME CAME
16 TO DECIDE WHETHER YOU WOULD TESTIFY HERE AT THE TRIAL?

17 A DID I HAVE IT IN MIND WHEN WHAT?

18 MR. KLEIN: OBJECTION, AMBIGUOUS WHETHER HE WOULD BE --
19 HAVE IT IN MIND.

20 THE COURT: OBJECTION SUSTAINED. YOU CAN CLARIFY IT.

21 MR. GOLDSTEIN: I WILL WITHDRAW IT AND GO ON TO
22 SOMETHING ELSE.

23 Q BY MR. GOLDSTEIN: YOUR FIRST DISAGREEMENT
24 WITH MR. GILLINGHAM, I BELIEVE, AT LEAST THAT WE KNOW ABOUT,
25 HAD TO DO WITH RECONSOLIDATING THESE CHARGES, A MOTION WAS
26 MADE BEFORE JUDGE THOMAS --

27 MR. KLEIN: OBJECTION. THAT MISSTATES THE EVIDENCE.

28 Q BY MR. GOLDSTEIN: IS THAT NOT SO?

PENGAD/WEST, FRESNO, CA 93725 - FORM CAL-28

ER 834

6194

47

1 A YES.

2 Q DURING THOSE PROCEEDINGS, MR. GILLINGHAM AGAIN
3 STATED YOUR POSITION AND STATED HIS OWN, AND THEY WERE
4 DIFFERENT, WEREN'T THEY?

5 A YES, THEY WERE.

6 Q HE WANTED THE ITEMS TO BE RECONSOLIDATED.
7 YOU WANTED SEPARATE TRIALS AND STILL DO, IS THAT TRUE?

8 A THAT IS RIGHT.

9 Q WHEN HE STATED THAT POSITION, DID HE STATE
10 YOUR POSITION ACCURATELY?

11 A AS FAR AS I CAN REMEMBER.

12 Q AND COMPLETELY TO YOUR SATISFACTION?

13 A WELL, THEY WEREN'T RECONSOLIDATED.

14 Q NO, NO, I AM NOT TALKING ABOUT THE RESULTS.

15 A I WAS SATISFIED WITH WHAT HE DID.

16 Q WERE YOU SATISFIED WITH THE CONTENT OF WHAT
17 HE SAID, THAT IT WAS ACCURATE?

18 A YES.

19 Q THAT IT COMPLETELY AND FAIRLY SUMMARIZED YOUR
20 POSITION IN THE MATTER?

21 A YES.

22 Q IF IT HADN'T, YOU WOULD HAVE SAID SOMETHING,
23 WOULDN'T YOU?

24 A I DON'T REALLY KNOW.

25 Q IN TERMS OF YOUR DISSATISFACTION WITH HIS
26 PUTTING ON A DEFENSE, NOT CALLED THESE WITNESSES AT THE FIRST
27 HEARING IN JULY HERE IN THIS COURTROOM, JULY 5TH, I BELIEVE
28 MR. GILLINGHAM STATED A NUMBER OF WITNESSES THAT YOU WISHED TO

PENGAD/WEST FRESNO, CA 93725 - JUDGE CAL-28

ER 835

6195

48

1 HAVE CALLED TO TESTIFY IN YOUR DEFENSE. DID HE STATE ALL
2 OF THE WITNESSES THAT YOU HAD IN MIND?

3 A AT THE INITIAL MARSDEN?

4 Q YES.

5 A NO, I DON'T BELIEVE HE DID.

6 Q WHO WAS NOT THERE? WHO WAS NOT LISTED?

7 MR. KLEIN: BEFORE WE GET INTO THAT, I ASK THE COURT-
8 ROOM BE CLEARED AND THE GAG ORDER THAT THE COURT MADE --
9 INDICATED IT WAS GOING TO MAKE AGAINST MR. GOLDSTEIN.

10 MR. GOLDSTEIN: RATHER THAN GET INTO THAT, THEN, LET
11 ME WITHDRAW THAT.

12 Q BY MR. GOLDSTEIN: WERE THERE WITNESSES THAT
13 MR. GILLINGHAM DID NOT MENTION WHOM YOU WISHED TO HAVE CALLED?

14 A WERE THERE WITNESSES THAT HE DID NOT MENTION?

15 Q YES.

16 A YES.

17 Q HE MENTIONED AT THIS FIRST HEARING A MAN NAMED
18 EDDIS JEFFREY, CERTAIN WITNESSES WHOM HE DID NOT NAME DEALING
19 WITH RAY BLEVINS AND HIS DISAGREEMENTS WITH MISS KIM, A
20 MR. SCHROLL, OFFICER BLOROR FROM CULVER CITY, A MISS CARVILLE
21 FROM SAN DIEGO, DANNY MOSES FROM CULVER CITY, CERTAIN
22 PATHOLOGISTS WHO WERE NOT NAMED, A MR. PURDY FROM CULVER CITY,
23 AND A MR. TULIO ALSO GENERALLY INVOLVED WITH THE CULVER CITY
24 CASE. WERE THERE OTHERS IN ADDITION TO THOSE PEOPLE WHOM YOU
25 WANTED TO TESTIFY IN YOUR DEFENSE?

26 A YES.

27 Q DID YOU TELL MR. GILLINGHAM WHO THEY WERE?

28 A I BELIEVE I DID.

PENGAD/WEST, FRESNO, CA 93725 - 10RM CAL:28

ER 836

6196

49

1 Q DID YOU AT ANY TIME INSIST THEIR NAMES BE
2 SPREAD ON THE RECORD?

3 A I BELIEVE I MENTIONED MORE THAN WHAT WAS PUT
4 ON THE RECORD, YES.

5 Q I CAN'T HEAR YOU.

6 A I SAID I BELIEVE I MENTIONED MORE THAN WHAT
7 WAS PUT ON THE RECORD.

8 Q DID YOU TELL HIM YOU WANTED THOSE NAMES
9 ALSO MENTIONED BY HIM IN OPEN COURT TO INDICATE THE EXTENT OF
10 YOUR DEFENSE?

11 A I BELIEVE SO, YES.

12 Q DID HE EVER DO THAT?

13 A NO.

14 Q BUT THE HEARING THAT FOLLOWED ON THE 10TH,
15 IT APPEARS THAT THE ONLY THING THERE WAS THAT WAS MENTIONED
16 WAS THE MATTER OF NOT PUTTING ON THE WITNESSES. IT ALSO
17 PRECLUDED THE POTENTIAL OF MR. CARTER TESTIFYING BASED ON,
18 HOWEVER, WHAT THOSE WITNESSES WOULD HAVE TESTIFIED TO AND
19 THE EFFECT OF THEIR TESTIMONY AT THIS HEARING. DID THIS
20 COMPLETELY AND FAIRLY EXPRESS YOUR POSITION AS FAR AS YOU
21 WERE CONCERNED?

22 A I WAS NOT SATISFIED WITH IT, NO.

23 Q YOU DIDN'T SAY ANYTHING, THOUGH, DID YOU?

24 A NO.

25 Q AND NO MENTION WAS MADE AT ALL OF ANY ADDITIONAL
26 WITNESSES TO THOSE LISTED BY MR. GILLINGHAM EARLIER?

27 A NO.

28 Q FIVE DAYS EARLIER?

PENGAD/WEST, FRESNO, CA 93720 - TURN CAL 78

ER 837

6197

50

1 A THERE WERE NO MENTION.
2 Q THAT IS TRUE, IS IT NOT?
3 A THAT IS TRUE.
4 Q AND YOU DIDN'T SAY ANYTHING TO MR. GILLINGHAM
5 ABOUT THOSE ADDITIONAL WITNESSES, DID YOU, AT THIS HEARING
6 ON THE 10TH?
7 A NOT DURING THE HEARING, NO.
8 Q DID YOU REMIND HIM BEFORE THE HEARING?
9 A I DON'T REMEMBER.
10 Q DID YOU REMIND HIM AFTER THE HEARING THAT HE
11 HADN'T MENTIONED THESE WITNESSES?
12 A I BELIEVE SO, YES.
13 Q PARDON ME?
14 A YEAH, I BELIEVE I DID.
15 Q WHERE WAS THIS DONE?
16 A I THINK IT WAS IN THE BACK. I THINK IT WAS IN
17 THE BACK.
18 Q THE BACK IN THE HOLDING TANK?
19 A RIGHT.
20 Q SO FAR AS YOU KNOW, THOSE ADDITIONAL WITNESSES
21 I HAVE JUST NOW MENTIONED HAVE NEVER BEEN MENTIONED ON THE
22 RECORD AT ANY TIME, IS THAT SO?
23 A I DON'T BELIEVE SO, NO.
24 MR. GOLDSTEIN: NOTHING FURTHER.
25 THE COURT: ANY REDIRECT?
26 MR. KLEIN: NO, YOUR HONOR.
27 THE COURT: YOU MAY RETURN TO YOUR SEAT, MR. CARTER.
28 MR. KLEIN: COULD I JUST HAVE ONE SECOND, YOUR HONOR.

PENGAD/WEST, FRESNO, CA 93725 - JUNE CAL-28

ER 838

6198

1 THE COURT: YES.

2 MR. KLEIN: MAY I JUST HAVE ONE SECOND OUTSIDE. I MAY
3 JUST WANT TO RECALL MR. GILLINGHAM VERY BRIEFLY.

4 THE COURT: YES.

5 ARE YOU RECALLING MR. GILLINGHAM?

6 MR. KLEIN: YES, IF THE COURT WOULD PERMIT, THANK YOU.

7 THE COURT: JUST TAKE THE STAND AGAIN, MR. GILLINGHAM,
8 AND STATE YOUR NAME FOR THE RECORD. REMEMBER YOU ARE STILL
9 UNDER OATH.

10 THE WITNESS: HOWARD W. GILLINGHAM.

11

12 HOWARD W. GILLINGHAM,
13 RECALLED AS A WITNESS ON BEHALF OF THE DEFENSE, HAVING BEEN
14 PREVIOUSLY DULY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER
15 AS FOLLOWS:

16

17 DIRECT EXAMINATION

18 BY MR. KLEIN:

19 Q AT THE CONCLUSION OF THE PROSECUTION'S CASE,
20 WHEN YOU HAD THIS ONGOING DISCUSSION WITH MR. CARTER ABOUT
21 HIS DESIRE TO PRESENT A DEFENSE AND TESTIFY, IT WAS THEN
22 DECIDED THAT YOU WERE GOING TO REQUEST A MARSDEN HEARING?

23 A YES.

24 Q NOW, PRIOR TO REQUESTING THE MARSDEN HEARING,
25 DID YOU PREPARE SOME LIST OF WHAT YOU BELIEVED THE DEFENSE
26 WAS GOING TO BE SO THAT YOU COULD PRESENT THAT TO THE COURT?

27 A YEAH, I DON'T REMEMBER -- I MUST HAVE WRITTEN
28 IT DOWN, BECAUSE I TEND TO TRY TO WRITE THINGS DOWN THAT I

PENGAD/WEST, PRESNO, CA 95725 - JUNE 1988

ER 839

6199

52

1 ORALLY NOTICE, BUT I DON'T PHYSICALLY REMEMBER MAKING THOSE,
2 BUT I MUST HAVE MADE SOME SORT OF A LIST -- IN FACT, I AM
3 LOOKING AT THE TRANSCRIPT, I HAPPENED TO KEEP REFERRING TO
4 MISS MORRISSEY, IT MAKES ME THINK IT MUST HAVE BEEN A PRETTY
5 ROUGH LIST.

6 Q WHEN DID YOU MAKE THE LIST?

7 A WELL, AS I SAID, I DON'T PHYSICALLY REMEMBER
8 MAKING THE LIST. I DON'T REMEMBER WHERE I MADE IT PHYSICALLY.

9 Q AND DID THAT -- WHAT WAS THE PURPOSE OF THAT
10 LIST?

11 A AID ME IN MAKING THE REPRESENTATION OF WHAT
12 I FELT NEEDED TO BE MADE IN THE MARSDEN HEARING.

13 Q DID YOU ATTEMPT TO LIST EVERY WITNESS THAT
14 COULD BE CALLED?

15 A NO, NO.

16 Q WHY NOT?

17 A WELL, PART OF IT PROBABLY WAS TIME AND JUST IT
18 DIDN'T SEEM NECESSARY TO ACTUALLY DO IT THOROUGHLY AS WE
19 HAD OUR DIALOGUE EARLIER HERE WHEN IT ENTAILED REVIEWING FILES,
20 ET CETERA, BUT THOSE ARE THINGS THAT CAME TO MIND.

21 THE COURT: EXCUSE ME. JUDGE ROTHMAN.

22 (BRIEF INTERRUPTION.)

23 Q BY MR. KLEIN: SO YOU DIDN'T MAKE UP THE LIST
24 BY REVIEWING ALL YOUR FILES AND RECORDS TO DETERMINE WHAT
25 THE DEFENSE COMPLETELY WOULD BE?

26 A NO.

27 Q AGAIN, I DON'T RECALL SPECIFICALLY WRITING A
28 LIST, BUT I AM SURE I MUST HAVE WRITTEN DOWN SOME ROUGH NOTES.

PENGAD/WEST, FRESNO, CA 93725 - FORM CAL-28

ER 840

6200

53

1 IT PROBABLY WAS BY VIRTUE OF MARCIA AND I TALKING, AND I
2 RECALL THAT.

3 Q NOW, THE LIST DID NOT INCLUDE ALL THE PEOPLE
4 THAT MR. CARTER WANTED TO BE CALLED?

5 A PROBABLY NOT, YEAH.

6 Q SOME TIME AFTER THAT MARSDEN HEARING, DID YOU
7 EVER THINK OF COMPLETING THAT LIST IN ANOTHER MARSDEN HEARING?

8 A NO, I THOUGHT I MADE A REPRESENTATIVE DISPLAY,
9 IF YOU WILL, TO THE RECORD OF WHAT NEEDED TO BE SPREAD ON
10 THE RECORD, AS I INDICATED.

11 Q SO THAT IS WHY YOU DIDN'T DO ANYTHING MORE ON
12 THAT SUBJECT AT A FUTURE TIME?

13 A NO, THERE WAS NO NEED TO EXHAUST AND SPREAD
14 ANY MORE ON THE RECORD, IN MY OPINION, ANYWAY.

15 MR. KLEIN: I HAVE NOTHING FURTHER.

16 THE COURT: ANY OTHER QUESTIONS?

17

18 CROSS-EXAMINATION

19 BY MR. GOLDSTEIN:

20 Q WHERE DID YOU GET THESE NAMES?

21 A I AM SORRY?

22 Q WHERE DID YOU GET THESE NAMES?

23 A THE NAMES? OH, WELL, I RECALL SOME OF THEM,
24 BLEVINS, B-L-E-V-I-N-S, FOR EXAMPLE. THAT WAS ONE NAME THAT
25 CAME RIGHT TO MIND. IN OTHER WORDS --

26 Q BLEVINS WAS DEAD AT THAT TIME.

27 A WELL, MAYBE I DIDN'T INDICATE BLEVINS ON THE
28 LIST.

PENGAD/WEST, FRESNO, CA 93725 - FORM CAL-28

ER 841

6201

1 Q YOU DID NOT?

2 A OKAY. WELL, THERE IS CERTAIN WITNESSES THAT
3 WERE -- THAT HAD BEEN ON OUR MIND, BECAUSE THEY WERE MORE
4 PROMINENT. I BELIEVE I AM REFERRING TO BLOROR, B-L-O-R-O-R.

5 Q WELL, YOU APPARENTLY BETWEEN YOU AND MISS
6 MORRISSEY COMPILED A LIST OF SOME -- HOWEVER MANY NAMES THERE
7 ARE HERE -- SIX OR EIGHT, ANYWAY, FROM -- NINE NAMES AND
8 PERHAPS 10 INCLUDING MORE THAN ONE PATHOLOGIST, THIS WAS
9 APPARENTLY SOMETHING YOU HAD GIVEN SOME THOUGHT TO, WAS IT
10 NOT?

11 A NO, IT WAS NOT, BECAUSE THOSE PEOPLE WERE THE
12 ONES THAT I MEAN IN TERMS OF THE MARSDEN HEARING, THOSE ARE
13 THE ONES THAT OCCURRED TO US BECAUSE THOSE WOULD HAVE BEEN
14 THE MORE PROMINENT -- IF YOU WERE GOING TO CALL SO MANY
15 WITNESSES -- POTENTIAL WITNESSES. TULIO, FOR EXAMPLE, AS
16 MUCH AS WE DIDN'T PAY ATTENTION TO THE GUILT PHASE, TULIO,
17 T-U-L-I-O, WAS OBVIOUSLY A GENTLEMAN THAT THE NAME CAME UP.
18 I MEAN WE KNEW THAT.

19 Q AFTER THIS HEARING IN WHICH YOU REVEALED THESE
20 NAMES, MR. CARTER APPARENTLY REMINDED YOU THAT YOU HAD
21 FORGOTTEN SOMETHING HAVING TO DO WITH HIS OWN TESTIMONY?

22 A YEAH.

23 Q DID HE TALK TO YOU ALSO ABOUT OTHER WITNESSES
24 WHOSE NAMES -- WITHDRAW THAT -- OTHER WITNESSES THAT HE
25 WISHED -- WISHED YOU TO CALL, BUT YOU HAD NOT MENTIONED?

26 A I DON'T RECALL THAT. IN OTHER WORDS, WHAT
27 THAT MEANS, HE COULD HAVE OR HE COULD NOT. I SIMPLY DO NOT
28 RECALL OTHER WITNESSES.

PENGAD/WSJ: FRESNO, CA 9/3/20 - JURY CALL

6202

55

1 O HOW LONG HAVE YOU BEEN A LAWYER?

2 A HOW LONG? '73.

3 Q AND HOW LONG INVOLVED IN THE TRIAL, EITHER AS
4 A LEAD OR CO-COUNSEL OR SECOND SEAT IN CAPITAL CASES?

5 A MAYBE A YEAR.

6 Q THIS IS, IN ESSENCE, YOUR SPECIALTY TODAY,
7 IS IT NOT?

8 A I SUPPOSE.

9 Q AND IT IS ONE OF THE THINGS THAT YOU FOCUS ON
10 IS THE DEFENSE OF PERSONS CHARGED WITH CAPITAL CRIMES?

11 A YES, YES.

12 Q HOW MANY OF THESE WOULD YOU SAY YOU HAVE BEEN
13 INVOLVED IN?

14 A AT VARIOUS LEVELS AND ENDING AT VARIOUS TIMES
15 AND BEGINNING AT VARIOUS TIMES, PROBABLY 15 -- NOT 15 TRIALS.

16 Q FIFTEEN SEPARATE INDIVIDUALS?

17 A DIFFERENT CASES, RIGHT, APPEAL --

18 Q IS IT FAIR TO SAY YOU PRIDE YOURSELF ON KNOWING
19 THE LAW AND FOLLOWING THE LAW AS YOU UNDERSTAND IT?

20 A I PRIDE MYSELF ON TRYING TO KEEP UP WITH IT.
21 I DON'T CONSIDER MYSELF TO BE MIKE TIGRAR, T-I-G-R-A-R.

22 Q WHOEVER THAT IS --

23 A OFF THE CHARTS WITH BRILLIANCE. I DON'T
24 FASHION MYSELF -- I FEEL THAT I HAVE TO WORK AT KEEPING UP.

25 Q DO YOU MAKE NOTES OF THESE THINGS WE HAVE
26 BEEN TALKING ABOUT?

27 A MEANING THE --

28 Q THE CONVERSATIONS WITH YOUR CLIENT, SUMMARIES

PENNAUD/WESLEY, FREDNO, CA 95423

ER 843

6203

1 OF THE TOPICS DISCUSSED, SUMMARIES OF HIS VIEWS OF THINGS?

2 A COULD BE. I HAVE NOT REVIEWED ANY. COULD BE.
3 I MIGHT HAVE.

4 Q AND YOU HAVE KNOWN THAT YOU WERE TO BE A WITNESS
5 HERE FOR SOME TIME, HAVE YOU NOT?

6 A YEAH.

7 Q YOU DID NOT GO BACK AND REVIEW ANY OF THOSE?

8 A NO, TO BE HONEST WITH YOU.

9 Q I HOPE SO.

10 A WELL, TO BE HONEST WITH YOU, NO, NOT IN TERMS
11 OF NOTES OF CONVERSATIONS WITH MR. CARTER. PART OF THE REASON
12 IS -- WELL, ONE OF THE THINGS -- FIRST THINGS I DID WAS GET
13 EVERYTHING I NEEDED ROTEN (SIC) TO HIM. I DID NOT SPECIFICALLY
14 LOOK. I HAD A ROUGH RECOLLECTION OF WHAT TOOK PLACE.

15 MR. GOLDSTEIN: I HAVE NOTHING FURTHER, THANK YOU.

16 THE COURT: ANYTHING FURTHER?

17 MR. KLEIN: NOTHING FURTHER.

18 THE COURT: THANK YOU, MR. GILLINGHAM.

19 MR. KLEIN: I DON'T HAVE ANY OTHER EVIDENCE ON THIS
20 ISSUE.

21 THE COURT: ALL RIGHT.

22 MR. GOLDSTEIN: I HAVE NONE.

23 MR. KLEIN: WELL, I MEAN AS TO THE -- THE ONLY THING
24 LEFT THAT I HAVE IN THE WAY OF EVIDENCE THAT I WANTED TO
25 PRESENT IS A MORE COMPLETE RECORD CONCERNING WHAT THE DEFENSE
26 MIGHT HAVE BEEN. OTHER THAN THAT, I DO NOT HAVE ANY OTHER
27 EVIDENCE. IN OTHER WORDS, I AM NOT GOING TO CALL MISS
28 MORRISSEY.

6231

74

1 AS TO THE OTHER TWO ARGUMENTS, I THINK THEY
2 ARE IMPLICIT WITHIN ARGUMENT ONE AND TWO THAT THE COURT SHOULD
3 HAVE MADE INQUIRY IN THE MARSDEN HEARING OF MR. CARTER TO
4 RESOLVE BOTH OF THESE ISSUES. THE COURT DIDN'T. ONCE THE
5 COURT WAS AWARE THAT MR. CARTER WANTED TO PRESENT A DEFENSE
6 AND THAT MR. CARTER WANTED TO TESTIFY, THEN I THINK CONTRARY
7 TO WHAT MR. GOLDSTEIN SAYS, ONCE THE COURT IS AWARE OF THAT,
8 I THINK IT IS THE COURT'S OBLIGATION THEN TO TAKE A WAIVER
9 OF MR. CARTER'S CONSTITUTIONAL RIGHT TO TESTIFY, AND THAT IS
10 SET FORTH IN FOOTNOTE 8 IN FIERSON II, WHERE THE COURT SAYS:
11 "THUS NOTHING IN THIS OPINION IS INTENDED TO SUGGEST THAT
12 IN THE ABSENSE OF SUCH AN EXPRESS CONFLICT, THAT BEING THE
13 DISPUTE BETWEEN THE ATTORNEY AND THE CLIENT, THE COURT IS
14 REQUIRED TO OBTAIN, AND ON THE RECORD, PERSONAL WAIVER FROM
15 THE DEFENDANT WHENEVER DEFENSE COUNSEL CHOOSES TO REST WITHOUT
16 PUTTING ON A DEFENSE."

17 I THINK UNFORTUNATELY WHEN BOTH OF THESE
18 EVENTS OCCURRED ON JULY 5TH AND JULY 10TH, THE LAW DOES REQUIRE
19 SUCH A WAIVER. THE WAIVER DIDN'T OCCUR. FOR THE SAME REASONS
20 I THINK MR. CARTER IS ENTITLED TO THE NEW TRIAL. THANK YOU.

21 THE COURT: ANYTHING FURTHER ON THE MOTION?

22 THE MOTION FOR NEW TRIAL IS DENIED.

23 IT WOULD APPEAR THE NEXT ORDER OF BUSINESS
24 WOULD BE THE 190.4 PROCEEDINGS CONCERNING THE COURT'S REVIEW
25 OF THE JURY VERDICT.

26 CORRECT, MR. KLEIN?

27 MR. KLEIN: YES, YOUR HONOR.

28 THE COURT: AGAIN, THE RECORD SHOULD REFLECT THE

ER 845

DEFENDANT

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff
and Respondent/~~Appellant~~

VS

CARTER, DEAN PHILLIP Defendant
and Appellant/~~Respondent~~

No. ...A089330.....

"DEATH PENALTY"

CLERK'S TRANSCRIPT

Appearances:

VOLUME IV

Appeal from the Superior Court,
County of Los Angeles

Counsel for Plaintiff and Respondent:
THE ATTORNEY GENERAL

Honorable ROBERT THOMAS Judge

Counsel for Defendant and Appellant:

IN PROPRIA PERSONA

Date Mailed to:

Defendant (in pro per) _____

Defendant's Trial Attorney _____

Defendant's Appellate Attorney _____

District Attorney _____

Attorney General _____

HOWARD W. GILLINGHAM
LAWYER
4370 TUJUNGA AVENUE, SUITE 105
NORTH HOLLYWOOD, CALIFORNIA 91604
(818) 763-4775

891

August 2, 1988

Honorable Robert Thomas
Department West "K"
1725 Main Street
Santa Monica, CA 90401

ATTN: Michael White

Re: People v. Carter
Case No. A089330

Dear Judge Thomas:

As you know from our appearance on the 26th, there is lurking, a Motion to Reconsolidate all outstanding Capital Cases into the Los Angeles case. I indicated on the record that Mr. Carter had misgivings about such a Motion. It is indeed a serious one. Mr. Carter has mentioned that perhaps he ought to speak with some other counsel, since he and I disagree about this particular issue. This is not in the context of a possible Marsden inquiry. I think it is a good idea, if not technically required.

Therefore, my recommendation to the Court is to allow Attorney Rowan Klein to speak with Mr. Carter. Mr. Carter specifically mentioned Mr. Klein as a possibility. As you know, Mr. Klein was appointed by the Court to deal with a previous thorny issue of conflict with prior counsel. I have contacted Mr. Klein, and he has indicated his willingness with Court authorization to discuss the matter with Mr. Carter and give him any independent opinion.

My thought is that the Court might inform Mr. White of the Court's decision, and I will follow up with a telephone call on the 15th to Mr. White as to the authorization. If

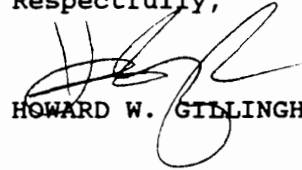
ER 912

Honorable Robert Thomas
August 3, 1988
Page Two

895

approved, it is my hope that Mr. Klein could see Mr. Carter before our appearance on the 18th and contact me with the results.

Respectfully,



HOWARD W. GILLINGHAM

HWG:tlb
cc: Marsh Goldstein

ER 913

9/23/88

1 HOWARD W. GILLINGHAM
2 Lawyer
3 4370 Tujunga Avenue
4 Suite 105
5 North Hollywood, CA 91604
6 (818) 763-4775

7 Attorney for Defendant

8
9 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10
11 COUNTY OF LOS ANGELES

12 THE PEOPLE OF THE STATE OF CALIFORNIA,) Case No. A089330
13)
14 Plaintiff,) SUPPLEMENTAL
15) DECLARATION IN
16 vs.) SUPPORT OF
17) REQUEST FOR FUNDS
18 DEAN PHILLIP CARTER) PURSUANT TO SECTION
19) 987.9 CALIFORNIA
20 Defendant.) PENAL CODE.
21)

22 CONFIDENTIAL

23 I, Howard W. Gillingham, declare:

24 1. On or about June 24, 1988, I applied to this
25 Honorable Court for my first disbursement of funds as counsel
26 for Dean Phillip Carter.

27 2. Those funds were received, and deposited into my
28 special trust account in this matter. With the exception of
the areas noted here, funds remain available for the various
services previously applied for.

Regarding the penalty phase, as I indicated to the
Court in my letter of July 27, 1988, it was necessary for the
penalty investigator and myself to travel to Alaska to locate,
interview, and evaluate witnesses for penalty phase. That has

ER 922

1 been accomplished. Of course full documentation of time spent,
2 as well as receipts is on file. It was anticipated that
3 further penalty funds would be needed, and indeed even beyond
4 this application. However, at this time, I have a billing from
5 Mr. Cohen for \$3,750.00 covering the period from August 1, 1988
6 through September 15, 1988. There is a balance of \$1,787.61 in
7 that portion of the trust account, leaving it approximately
8 \$1,900.00 short in paying off this present bill. Therefore, in
9 order to bring this billing up to date, I am requesting the
10 amount of \$7,500.00 to allow for future contingencies.

11 One future effort that is apparent, is the need to
12 interview a critical guilt and penalty witness, who has since
13 moved to Atlanta, Georgia. Since he is a news broadcaster, it
14 is possible he will be coming to Los Angeles, and in that
15 event, no trip would be necessary for Mr. Cohen or myself.
16 However, notwithstanding this indefinite situation, based on my
17 experience, there is a need to have funds on hand to move with
18 dispatch. For example, even after the many trips to Alaska, we
19 have still not been able to "crack" the situation of Mr.
20 Carter's childhood. Even during this last trip, his mother
21 absolutely refused to even speak with us. It could be that at
22 any moment's notice, there might be movement in that area, and
23 we would have to be prepared to respond with dispatch.

24 3. In addition, I am requesting \$750.00 to replace the
25 disbursement of \$750.00 to Rowan Klein. The Court previously
26 authorized, and there was disbursed, the sum of \$2,500.00 to

cover various miscellaneous legal functions, including action in the Ventura Court on a habeas corpus matter reflecting on penalty in this case.

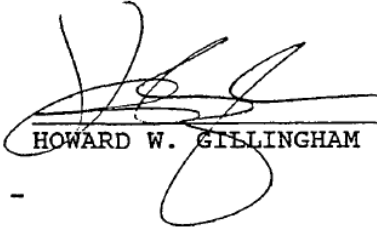
Unknown at the time of that authorization, was the future need, now accomplished, for Mr. Klein to interview Mr. Carter on three different occasions concerning the most critical legal motion to date, the move to reconsolidate all homicides into the Los Angeles case. Because of the conflict between Mr. Carter's trial counsel, and Mr. Carter, it was necessary that an independent view be given to Mr. Carter, and Mr. Klein accomplished that at no small inconvenience to himself.

On the last occasion, he had to drive straight from his trial in Santa Maria to the County Jail, where he and I met with Mr. Carter even after the closing of the attorney room. Therefore, I seek here only to reimburse the fund already anticipated with the sum just disbursed that was not anticipated.

Therefore, I seek an authorization at this time of \$2,250.00, to be placed in my trust account pursuant to the guidelines promulgated by the Court, and known by myself.

I declare under penalty of perjury that the foregoing is true and correct. Executed at North Hollywood, California.

Dated: September 23, 1988


HOWARD W. GILLINGHAM

- 3 -

ER 924

DEFENDANT

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff
and Respondent/~~APPELLANT~~

VS

CARTER, DEAN PHILLIP Defendant
and Appellant/~~RESPONDENT~~

No. A089330

"DEATH PENALTY"

CLERK'S TRANSCRIPT

Appearances:

Counsel for Plaintiff and Respondent:
THE ATTORNEY GENERAL

Counsel for Defendant and Appellant:
IN PROPRIA PERSONA

VOLUME VI

Appeal from the Superior Court,
County of Los Angeles

Honorable ROBERT THOMAS

Judge

Date Mailed to:

Defendant (in pro per) _____

Defendant's Trial Attorney _____

Defendant's Appellate Attorney _____

District Attorney _____

Attorney General _____

Date: 7-5-89		JUDGE		C. LEVENSON		Deputy Clk	
HONORABLE ROBERT THOMAS		Deputy Sheriff		J. BILEYU		Reporter	
C. BRAGG							
(Parties and counsel checked if present)							
A089330 PEOPLE OF THE STATE OF CALIFORNIA VS				Counsel for People:			
				DEPUTY DISTRICT ATTY: M. GOLDSTEIN ✓			
01 CARTER, DEAN ✓				Counsel for Defendant:			
187 03CTS 459 02CTS				H. GILLINKHAM ✓			
261.2 02CTS				M. MORRISSEY ✓			
NATURE OF PROCEEDINGS							
JURY TRIAL				REM		2-11-86	

Trial resumes from 6-29-89 with all counsel, the jury and the defendant present as heretofore.

OUT OF THE PRESENCE OF THE JURY:

Court's special exhibits 122-182 (each a xeroxed copy of newspaper article) are marked for identification only.

IN THE PRESENCE OF THE JURY:

Marcus Kellman, Leeann Johnson, Judith Adams, Rodney Beverly and Hornez Guard are sworn and testify for the People.

OUT OF THE PRESENCE OF THE JURY:

Court and counsel discuss admissibility of photographic evidence. People's motion to introduce photo of Cullins' neck is granted.

People's Exhibit 34-3 (photo of Cullin's neck) is marked for identification only.

IN THE PRESECE OF THE JURY:

Jury view videotape. People's Exhibit 40 (videotape) is marked for identification only.

People rest.

OUT OF THE PRESENCE OF THE JURY:

Marsden hearing is held. See notes of official Court Reporter.

IN THE PRESENCE OF THE JURY:

Defense rests.

The jury is admonished and the trial is continued to 7-10-89 at 10:30am in this department.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discuss exhibits. Counsel to convene on 7-6-89 at 10:30am in this department.

76M 413L C 120 186

to go over MINUTE ORDER jury instructions

REM

MINUTES ENTERED
7-5-89
COUNTY CLERK

ER 935

		1771	
		DEPT. WEC	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES			
Date: HONORABLE	8-1-89 ROBERT THOMAS C. BRAGG	JUDGE Deputy Sheriff	C. LEVENSON D. MRAZ
			Deputy Cler Reporter
(Parties and counsel checked if present)			
A089330 PEOPLE OF THE STATE OF CALIFORNIA VS		Counsel for People: DEPUTY DISTRICT ATTY: M. GOLDSTEIN ✓	
01	CARTER, DEAN PHILLIP 187 03CTS 459 02CTS 261.2 02CTS	Counsel for Defendant:	H. GILLINGHAM ✓ M. MORRISSEY ✓
NATURE OF PROCEEDINGS JURY TRIAL REM 2-11-86			

Penalty phase resumes from 7-31-89 with all counsel, the jury and the defendant present as heretofore.

OUT OF THE PRESENCE OF THE JURY:

Court and counsel discuss verdict forms.

It appearing to the court that through inadvertance and clerical ~~XXXXXX~~ error, the minute order dated 7-31-89 does not accurately reflect the Court's order; such minute order is corrected Nunc Pro Tunc to show Defense Exhibits C-Q, previously marked for identification only, are received into evidence.

IN THE PRESENCE OF THE JURY:

Counsel make closing statements.

The Court instructs the jury. Clerk swears bailiff to take charge of the jury and alternate jurors.

At 3:35pm, the jury retires to deliberate on the punishment.

At 3:52pm, the jury is admonished and the trial is continued to 10:00am in this department. The defendant is ordered to back.

REM

76M 413L C 120 1 dB

MINUTE ORDER

MINUTES ENTERED 8-1-89 COUNTY CLERK

ER 945

7 8-~~8~~-89 ROBERT THOMAS C. BRAGG		JUDGE Deputy Sheriff	C. LEVENSON L. ANASTASIOU	1774 DEPT. WEC Deputy Clerk Reporter						
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES										
(Parties and counsel checked if present)										
A089330 PEOPLE OF THE STATE OF CALIFORNIA VS 01 CARTER, DEAN PHILLIP 187 03CTS 459 02CTS 261.2 02CTS	In LOCK UP	Counsel for People: DEPUTY DISTRICT ATTY: M. GOLDSTEIN Counsel for Defendant: H. GILLINGHAM M. MORRISSEY - N/A	✓ ✓ N/A							
<table style="width: 100%; border: none;"> <tr> <td style="width: 33%; text-align: left;">NATURE OF PROCEEDINGS</td> <td style="width: 33%; text-align: center;">JURY TRIAL</td> <td style="width: 33%; text-align: center;">REM</td> </tr> <tr> <td></td> <td></td> <td style="text-align: right;">2-11-86</td> </tr> </table>					NATURE OF PROCEEDINGS	JURY TRIAL	REM			2-11-86
NATURE OF PROCEEDINGS	JURY TRIAL	REM								
		2-11-86								

Jury deliberation resumes at 10:20am with all jurors present as heretofore.

At 11:55am, the jury takes its noon break.

At 1:50pm, the jury resumes deliberating.

At 3:05pm, the jury takes a break.

At 3:13pm, the jury resumes deliberating.

At 4:00pm, the jury is admonished and the trial is continued to 8-4-89 at 10:00am in this departmnet. The defendant is ordered to return.

REM

MINUTE ORDER

MINUTES ENTERED 8-2-89 COUNTY CLERK

76M 413L C 120 1.88

ER 948

1776

DEPT. WEC

Date:	8-3-89	JUDGE	C. LEVENSON	Deputy Clerk
HONORABLE:	ROBERT THOMAS	Deputy Sheriff	L. ANASTASIOU	Reporter
	C. BRAGG			

A089330

(Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS

Counsel for People:

DEPUTY DISTRICT ATTY: M. GOLDSTEIN ✓

01 CARTER, DEAN PHILLIP *In Lock Up*
187 03CTS 459 02CTS
261.2 02CTS

Counsel for Defendant:

H. GILLINGHAM ✓

M. MORRISSEY ✓

NATURE OF PROCEEDINGS

JURY TRIAL

REM

2-11-86

Penalty phase resumes from 8-2-89 with all jurors present as heretofore. Deliberation resumes at 10:10am.

At 10:35am, the jury takes a break/

At 10:50am, jury deliberation resumes.

At 10:55am, in open court without the defendant being present, the judge answers the jury's question (see notes of the official Court Reporter).

At 10:59am, the jury retires to deliberate.

At 12:05pm, the jury takes its noon recess.

At 1:40pm, the jury resumes deliberating.

OUTSIDE THE PRESENCE OF THE JURY:

Court's Special Exhibits 242-244 (each a xeroxed copy of a newspaper article) are marked for identification only).

IN THE PRESENCE OF THE JURY:

The jury is admonished and the trial is continued to 8-7-89 at 10:00am in this department. The defendant is ordered to return.

78M 413L C 120 1-88

REM

MINUTE ORDER

MINUTES ENTERED 8-3-89 COUNTY CLERK

ER 949

1798

DEPT. WEC

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: 8-7-89
 HONORABLE: ROBERT THOMAS
 C. BRAGG

JUDGE
 Deputy Sheriff

C. LEVENSON
 L. ANASTASIOU

Deputy Cler
 Reporter

(Parties and counsel checked if present)

A089330

PEOPLE OF THE STATE OF CALIFORNIA

Counsel for People:

VS

DEPUTY DISTRICT ATTY: M. GOLDSTEIN ✓

01 CARTER, DEAN PHILLIP ✓

187 03CTS 459 02CTS

Counsel for Defendant: H. GILLINGHAM ✓

261.2 02CTS

M. MORRISSEY ✓

NATURE OF PROCEEDINGS

JURY TRIAL

REM

2-11-86

Jury deliberations resume from 8-3-89 with all jurors present as heretofore, at 10:00am.

At 10:30pm, the jury takes a morning break.

At 10:45am, jury deliberation resumes.

At 10:55am, the jury buzzes announcing it has reached a verdict.

At 11:30am, the jury enters the courtroom with the following verdict. Counsel and the defendant are present:

TITLE OF COURT AND CAUSE

"We, the Jury in the above-entitled action, fix the punishment at death.

This 7th day of August, 1989. Charles Larsen, Foreman.

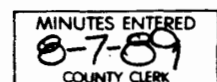
The verdict is read. The jury is polled. The verdict is recorded; re-reading is waived. Instructions given and refused and all verdict forms submitted to the jury are filed.

Probation and Sentencing is set for 9-15-89 at 9am in Department West C. The defendant is ordered to return.

Rem

75M 413L C 120 1-86

MINUTE ORDER



ER 950

Copy

1 SUPREME COURT - STATE OF CALIFORNIA
2
3)
4)
5)
6)
7)
8)
9)
10)
11)

THE PEOPLE OF THE STATE OF
CALIFORNIA,

PLAINTIFF-RESPONDENT,

VS

DEAN PHILLIP CARTER,

DEFENDANT.

SUPREME COURT NO. *SO23000*
FROM SAN DIEGO COUNTY
JUDGE MELINDA J.
LASATER

VOLUME LII

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SAN DIEGO
3 DEPARTMENT NO. 27 HON. MELINDA J. LASATER, JUDGE

4
5 _____)
6 THE PEOPLE OF THE STATE OF)
7 CALIFORNIA,)
8 PLAINTIFF,) NO. CR 90280
9))
10 VS)
11 DEAN PHILLIP CARTER,)
12 DEFENDANT.)
13 _____)

14 REPORTER'S TRANSCRIPT
15 JUNE 10, 1991
16 VOLUME LII
17 PAGES 7930-8133

18 APPEARANCES:

19 FOR THE PLAINTIFF: EDWIN L. MILLER, JR.,
20 DISTRICT ATTORNEY
21 BY: JAMES PIPPIN, AND
22 ROBERT EICHLER
23 DEPUTY DISTRICT ATTORNEY

24 FOR THE DEFENDANT: CHARLES BUMER, ESQ.
25 1168 UNION STREET, STE. 201
26 SAN DIEGO, CA 92101

27 JOSEPHINE DEDINA, ESQ.
28 934 23RD STREET
29 SAN DIEGO, CA 92102

30 JOHN R. AVERY, CSR #8605
31 DAVID DAILY, CSR #6885
32 OFFICIAL REPORTER
33 SAN DIEGO, CALIFORNIA 92101

		INDEX (CONTINUED.)			
	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
1	ROBERT J. JENKINS				
2					
3					
4	BY MR. BUMER	8050			
5	BY MR. PIPPIN:		8064		
6	BY MR. BUMER:			8075	
7	BY MR. PIPPIN:				8077
8	BY MR. BUMER:			8078	
9	ROBERT EDWARD STAPLETON, JR.				
10					
11	BY MR. BUMER:	8079			
12	BY MR. PIPPIN:		8094		
13	MELISA GLICK				
14					
15	BY MR. PIPPIN:	8104			
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19					
20					
21					
22					
23					
24					
25					
26					
27					
28					

8113

1 MR. PIPPIN: THANK YOU, MS. GLICK. I HAVE NO MORE
2 QUESTIONS.

3 THE COURT: CROSS-EXAMINATION.

4

5 CROSS-EXAMINATION

6 BY MR. PIPPIN:

7 Q. JUST A COUPLE OF QUESTIONS. DID YOU DATE
8 ANDREW HOLTZ?

9 A. NO, ANDREW -- ANDREW WAS VERY INTERESTED IN ME
10 THE VERY FIRST WEEK THAT I SHOWED UP, AND MADE IT CLEAR
11 TO ME THAT HE WOULD BE INTERESTED IN A ROMANTIC
12 RELATIONSHIP. HOWEVER, AT MY MOTHER'S URGING AND MY
13 OWN FEELINGS THAT MY FACE WOULD BETRAY ANY TROUBLE I
14 WAS HAVING ON THE AIR, I THOUGHT BETTER OF IT.

15 Q. YOUR ASSOCIATION WITH THE DEFENDANT WAS OVER A
16 SIX-MONTH PERIOD; IS THAT TRUE?

17 A. THAT WAS THE FIRST ASSOCIATION WITH HIM. HE
18 LATER CAME BACK TO THE STATION.

19 Q. DURING WHAT PERIOD OF TIME?

20 A. AGAIN, I'M NOT ABSOLUTELY CLEAR ABOUT THAT.
21 HE CAME BACK AFTER ANOTHER JOB AND WAS THERE UNTIL I
22 LEFT THE STATION.

23 Q. IN THE INTERIM, YOU'VE HAD SOME LETTERS FROM
24 HIM, AND THERE HAVE BEEN SOME PHONE CALLS?

25 A. NO, THAT IS SINCE I LEFT THE STATION.

26 Q. SINCE HE WAS ARRESTED, HAVE YOU HAD ANY
27 COMMUNICATION?

28 A. YES.

ER 1350

8118

1 THEY WILL ALL BE HERE ON WEDNESDAY.

2 OH, WAIT A MINUTE. WAIT A MINUTE. THERE IS A
3 PROBLEM. THERE IS A PROBLEM. I AM NOT SURE IT HAS TO
4 DO WITH LEAVING -- LETTING THEM GO RIGHT NOW.

5 THE WE HAD A NEUROLOGICAL STUDY DONE RECENTLY
6 UP AT IRVINE. THE ONLY PERSON WHO IS CAPABLE -- THE
7 RESULT OF THAT WAS AN ABNORMAL -- AND I'LL TURN IT OVER
8 TO THE PROSECUTOR, IT WAS A PAT SCAN. THE RESULT WAS
9 ABNORMAL PAT. I HAVE NO IDEA WHAT THE LANGUAGE BEYOND
10 THAT MEANS IN THE REPORT.

11 THE ONLY PERSON THAT WE CAN FIND -- AND WE'VE
12 BEEN TRYING, MS. GILBERT HAS BEEN TRYING FOR SEVERAL
13 DAYS NOW TO FIND SOMEBODY -- IS THE DIRECTOR OF THE
14 FACILITY AT IRVINE. HE IS ATTENDING A MEDICAL
15 CONFERENCE IN ITALY. WE HAVE CALLED LITERALLY ALL OVER
16 THE COUNTRY TRYING TO FIND SOMEBODY ELSE. THEY ARE ALL
17 AT THE CONFERENCE IN ITALY. IT IS A WORLDWIDE
18 CONFERENCE ON THE PAT SCAN IN THIS PARTICULAR AREA.

19 THE COURT: WHEN IS THE CONFERENCE OVER?

20 MR. BUMER: APPARENTLY THE CONFERENCE IS NOT OVER
21 UNTIL THE END OF THE MONTH.

22 THE COURT: DO YOU WANT -- LET'S DO THIS. BECAUSE
23 WE NEED TO TALK A LITTLE BIT ANYWAY, LET'S EXCUSE THE
24 JURY FOR TOMORROW. WE WILL WORK ON WHATEVER WE CAN
25 WORK ON TOMORROW MORNING, BECAUSE WHAT I WOULD LIKE TO
26 TRY TO DO IS AT LEAST -- WELL, ACTUALLY, LET'S JUST LET
27 THE JURY GO AND BRING THEM BACK WEDNESDAY.

28 YOU WILL HAVE AT LEAST FOUR WITNESSES ON

ER 1351

8119

1 WEDNESDAY, RIGHT?

2 MR. BUMER: YES.

3 THE COURT: OKAY. LET'S DO THAT, AND THEN WE CAN
4 TALK SOME MORE WITH CALENDARS IN HAND.

5 (END OF SIDE BAR.)

6 THE COURT: LADIES AND GENTLEMEN, I'M GOING TO GIVE
7 YOU THE EVENING RECESS AT THIS TIME. IT MAKES MORE
8 SENSE AT THIS STAGE FOR YOU NOT TO EVEN COME IN
9 TOMORROW. WE WERE ONLY GOING TO BE IN SESSION A HALF
10 DAY TOMORROW, BUT BECAUSE OF THE SCHEDULING, FRANKLY,
11 I'M JUST NOT GOING TO BRING YOU IN AT ALL TOMORROW.
12 BUT I WILL BRING YOU IN ON WEDNESDAY, AND I AM NOT
13 REALLY CLEAR ON A TIME LINE AFTER THAT.

14 SO IF YOU WILL KEEP SOME FLEXIBILITY IN YOUR
15 SCHEDULE, AS SOON AS I HAVE A BETTER FEEL FOR HOW WE
16 ARE GOING TO PROCEED, I WILL LET YOU KNOW.

17 ONCE AGAIN, I WANT TO REMIND YOU OF THE
18 ADMONITION. PLEASE DO NOT FORM ANY FURTHER OPINIONS,
19 DO NOT DISCUSS THE CASE AMONG YOURSELVES, OR WITH
20 ANYONE ELSE, OR ALLOW ANYONE TO DISCUSS THE CASE WITH
21 YOU OR AROUND YOU.

22 AND WHEN I SAY ANY FURTHER OPINIONS, I'M SURE
23 IT'S OBVIOUS, BUT JUST SO IT IS CLEAR FOR THE RECORD,
24 WHAT I'M REFERRING TO IS SINCE YOUR DELIBERATIONS
25 CONCLUDED, SINCE THAT TIME, I DON'T WANT YOU FORMING
26 ANYMORE OPINIONS.

27 I REALIZE AT THAT PARTICULAR STAGE YOU DID
28 FORM SOME OPINIONS, AND THAT'S THE REASON FOR THE

ER 1352

Copy

1 SUPREME COURT - STATE OF CALIFORNIA
2
3 _____)
4 THE PEOPLE OF THE STATE OF)
5 CALIFORNIA,)
6 PLAINTIFF-RESPONDENT,) SUPREME COURT NO 5023000
7) CR 90280
8 VS) FROM SAN DIEGO COUNTY
9 DEAN PHILLIP CARTER,) JUDGE MELINDA J.
10 DEFENDANT.) LASATER
11) VOLUME LIV

14

1 VOLUME LIV
2 JUNE 13, 1991
3

4 INDEX OF WITNESSES

5 WITNESSES: UNSWORN TESTIMONY .

6 DR. BUCHEBAUM

7 BY MR. BUMER 8314
8 BY MR. EICHLER 8317
9 BY MR. PIPPIN 8324

9 EXHIBITS RECEIVED IN EVIDENCE

10 NO. 149 ENVELOPE CONTAINING
11 149A, 149B, 149C
12 149A, 149B AND 149C
13 150 COLOR PHOTO
14 151 PHOTO
15 153A, 153B, 153C, 153D,
16 153E AND 153F PHOTOS, NOME, ALASKA
17 154A, 154B, 154C, 154D
18 154E PHOTOS FISHING CABIN, ALASKA
19 155 LAMINATED MAP ALASKA
20 156A, 156B PHOTOS JESSE LEE HOME
21 157 PHOTO JESSE LEE HOME
22 158 APPLICATION FOR ADMISSION TO JESSE LEE HOME
23 159A, 159B, 159C, 159D,
24 159E ABE NEWSLETTERS
25 160 MAGAZINE ARTICLE
26 161 XEROX OF WHALING PHOTO AND LETTER
27 162 UNIVERSITY OF ALASKA BOOKLET RE: SURVIVAL
28 163 VIDEO CASSETTE - RELEASED TO MR. BUMER
164 BETA CASSETTE - RELEASED TO MR. BUMER
165 VHS COPY OF 164 - RELEASED TO MR. BUMER

- - -

ER 1373

8313

1 LET'S TAKE A RECESS AND GET READY FOR TODAY.

2 (RECESS TAKEN.)

3 THE COURT: HI, DOCTOR, THIS IS JUDGE LASATER.

4 HOW ARE YOU DOING?

5 I'M TRYING TO GET THE SPEAKER PHONE TO WORK.

6 IT WORKED JUST A MINUTE AGO, BUT NOW IT'S NOT WORKING,

7 SO IT IS GOING TO TAKE A SECOND OR TWO IF YOU CAN BEAR

8 WITH US.

9 OKAY. DOCTOR, I THINK I HAVE YOU ON THE

10 SPEAKER PHONE NOW. WE ARE GOING TO TRY ONE MORE TIME.

11 OKAY? OKAY. HANG ON ONE SECOND. OKAY. JUST

12 ONE SECOND. THANK YOU.

13 OKAY. DOCTOR, WE ARE NOW ON THE SPEAKER

14 PHONE. IN CHAMBERS WITH ME IS MR. PIPPIN AND

15 MR. EICHLER FROM THE DISTRICT ATTORNEY'S OFFICE,

16 MS. DEDINA AND MR. BUMER FROM THE DEFENSE TEAM, AND THE

17 COURT REPORTER, WHO IS GOING TO TRY TO TAKE DOWN AT

18 LEAST THE PORTIONS OF IT WHERE I'M PRESENT.

19 HOW ARE YOU DOING?

20 WHAT DO YOU HAVE IN FRONT OF YOU BECAUSE WE

21 CAN'T HEAR YOU.

22 DR. BUCHSBAUM: ALL RIGHT. I HAVE IN FRONT OF ME

23 THE REPORT FROM MY LABORATORY ON DEAN CARTER, WHICH IS

24 THE TWO-PAGE NARRATIVE SUMMARY.

25 SECOND OF ALL, I HAVE THE LETTER FROM YOU,

26 ASKING FOR REVIEWING THE REPORT.

27 THIRDLY, I HAVE THE STATISTICAL PRINTOUT FROM

28 MY LABORATORY THAT SUMMARIZEZ THE CHANGES THAT WE

ER 1374

8314

1 OBSERVED IN MR. CARTER'S BRAIN IN THE CORTICAL SURFACE,
2 THE SECOND PAGE THE INNER PART OF THE TEMPORAL LOBE,
3 AND THEN TWO PAGES THAT DESCRIBE OTHER BRAIN REGIONS.

4 AND I HAVE A FAX ALSO OF A COPY OF
5 MR. CARTER'S PET SCAN, ALTHOUGH NOT IN COLOR.

6 THE COURT: WE COULDN'T FIGURE OUT HOW TO DO THAT
7 IN COLOR.

8 DR. BUCHSBAUM: NOT YET, BUT THAT WILL BE NEXT
9 YEAR.

10 THE COURT: OKAY. MR. BUMER, I'M GOING TO LET YOU
11 START WITH ANY QUESTIONS THAT YOU MAY HAVE AT THIS
12 STAGE THAT YOU WANT TO ASK WITH ALL OF US PRESENT. I
13 WILL GIVE YOU TIME SEPARATELY WITH THE DOCTOR.

14 BY MR. BUMER:

15 Q. DOCTOR --

16 A. MR. BUMER IS WITH THE DEFENSE?

17 Q. YES.

18 ALL RIGHT. DOCTOR, WHAT CAN YOU TELL US UP
19 FRONT ABOUT THE MATERIALS YOU HAVE ABOUT MR. CARTER?

20 A. ALL RIGHT. NOW, LET ME REMIND YOU THAT THIS
21 IS THE FIRST I'VE SEEN THIS REPORT, AND I DON'T HAVE
22 ANY CLINICAL INFORMATION ON MR. CARTER, SO THAT
23 NORMALLY A DIAGNOSTIC PROCEDURE LIKE THIS IS ADVISORY
24 TO THE PHYSICIAN WHO HAS EXAMINED MR. CARTER; THAT IS,
25 A NEUROLOGIST, THE NEUROSURGEON, OR PSYCHIATRIST, AND
26 THIS PERSON WOULD HAVE A CLINICAL HISTORY SO THEY WOULD
27 KNOW SOMETHING ABOUT -- I KNOW NOTHING ABOUT THE
28 DETAILS OF THE CRIME, THE MEDICAL HISTORY, OR ANYTHING

ER 1375

8315

1 ABOUT A NEUROLOGICAL OR PSYCHIATRIC EXAMINATION. SO
2 ALL I HAVE IN FRONT OF ME IS A STATISTICAL REVIEW OF
3 THE ABNORMALITIES OF THE BRAIN.

4 WHAT I CAN SAY ON THE BASIS, JUST OF LOOKING
5 AT THE REPORT, IS THAT THERE ARE LARGE NUMBERS OF
6 ABNORMAL BRAIN AREAS THAT SEEM SCATTERED THROUGH THE
7 REGIONS OF THE BRAIN. THIS IS SOMETIMES SEEN IN HEAD
8 INJURY, OR IN DEVELOPMENTAL ABNORMALITY. THE
9 ABNORMALITIES OF THE BRAIN ARE NOT CLUSTERED IN ANY ONE
10 SPECIFIC AREA OF THE BRAIN. THEY ARE SOMEWHAT
11 WIDESPREAD. SO I AGREE WITH DR. LOTTENBERG'S
12 CONCLUSION THAT THIS IS AN ABNORMAL PET SCAN, BUT I
13 CANNOT REALLY RELATE THIS TO ANY ASPECT OF THE MEDICAL
14 OR PSYCHIATRIC HISTORY WITHOUT MORE INFORMATION.

15 Q. CAN YOU TELL US WHAT PARTS OF THE BRAIN HAVE
16 BEEN AFFECTED IN RELATION TO THE FUNCTIONS OF THOSE
17 PARTS OF THE BRAIN?

18 A. WELL, I CAN COMMENT THAT THERE ARE A NUMBER OF
19 ASYMMETRIES IN THE BRAIN, AND THAT IN THE INNERPART OF
20 THE TEMPORAL LOBE AREAS OFTEN ASSOCIATED WITH MEMORY
21 THERE ARE WIDESPREAD DECREASES ON THE LEFT-HAND SIDE.
22 AND WITHOUT KNOWING ANYTHING ABOUT THE CLINICAL
23 HISTORY, I'M SOMEWHAT RELUCTANT TO COMMENT ON THAT,
24 EXCEPT TO SAY THAT IN GENERAL THOSE ARE AREAS
25 ASSOCIATED WITH MEMORY, AND ESPECIALLY WITH VERBAL
26 MEMORY.

27 ON THE SECOND PART OF THE REPORT, WHICH ON MY
28 FAX IS NUMBERED PAGES 4 AND 5, AND REPRESENT THE

ER 1376

8316

1 STATISTICAL AREAS THROUGHOUT THE BRAIN, WE ALSO SEE A
2 NUMBER OF AREAS OF THE BRAIN WHICH ARE DECREASED. SOME
3 OF THESE ARE IN THE FRONTAL LOBE. THERE ARE ALSO AREAS
4 IN THE THALAMUS, AND IN PARTS OF THE BRAIN'S VISUAL
5 SYSTEM, AND IN PARTS OF THE CINGULATE GYRUS, AN AREA OF
6 THE BRAIN INVOLVED IN THE REGULATION OF EMOTION. WE
7 ALSO SEE SOME ABNORMALITIES IN THE HIPPOCAMPUS AREA OF
8 THE BRAIN INVOLVED IN MEMORY, SO THAT THIS COULD BE AN
9 INDIVIDUAL WITH DEFICITS IN THOSE FUNCTIONS. BUT
10 WITHOUT MORE DETAIL ABOUT THE CLINICAL HISTORY, HISTORY
11 OF HEAD INJURY, HISTORY OF NEUROLOGICAL DISEASE, BRAIN
12 INFECTIONS, INJURY AT BIRTH, IT WOULD BE HARD TO GIVE A
13 MORE DETAILED STORY.

14 SO IN OTHER WORDS, I AM WHAT YOU WOULD SAY
15 COMPLETELY BLIND NOT HAVING MEDICAL HISTORY OR OTHER
16 INFORMATION ABOUT THE INDIVIDUAL.

17 Q. DOCTOR, ON THE REGULATION OF EMOTIONS, HOW
18 MARKED ARE THE ABNORMALITIES?

19 A. THIS IS SOMEWHAT HARD TO SAY WITHOUT
20 INVESTIGATING -- WITHOUT, FIRST OF ALL, SEEING THE
21 COLORED PICTURES TO FORM AN IMPRESSION, AND WITHOUT
22 KNOWING SOMETHING ABOUT CORROBORATING EVIDENCE, ABOUT
23 OTHER INFORMATION ABOUT THE PATIENT.

24 I WOULD SAY THIS; THAT WHILE WE ANALYZE A
25 LARGE NUMBER OF AREAS, I THINK THAT THERE ARE 17 OR 18
26 ABNORMAL AREAS IN THE PRINTOUT OF BRAIN AREAS, MY PAGES
27 4 AND 5. A NORMAL PERSON IN OUR SET OF NORMAL
28 CONTROLLED HAS ABOUT THREE AREAS THAT EXCEEDED THREE

ER 1377

8317

1 STANDARD DEVIATION LIMITS. SO ABOUT ONE PERSON IN 20,
2 OR ONE PERSON IN 40, WOULD HAVE AS MANY ABNORMAL AREAS
3 AS ARE SHOWN IN THE REPORT ON MR. CARTER. SO THIS
4 WOULD PUT IT ON A STATISTICAL BASIS IN THE AREA OF AN
5 ABNORMAL REPORT.

6 MR. BUMER: I HAVE NOTHING ELSE AT THE MOMENT, YOUR
7 HONOR.

8 THE COURT: OKAY. MR. PIPPIN, MR. EICHLER, DO YOU
9 HAVE ANY QUESTIONS OF THE DOCTOR AT THIS STAGE?

10 MR. EICHLER: YES.

11 BY MR. EICHLER:

12 Q. DR. BUCHSBAUM, THIS IS ROBERT EICHLER. LET ME
13 ASK YOU A COUPLE OF QUESTIONS HERE. WHEN YOU INDICATE
14 THAT ONE IN 40 PEOPLE MIGHT HAVE THE NUMBER OF
15 ABNORMALITIES THAT THE DEFENDANT HAS, OR MR. CARTER HAS
16 DEMONSTRATED, HOW MANY PEOPLE HAVE YOU ACTUALLY DONE
17 TESTS ON THIS TO DEVELOP THAT STATISTICAL INFORMATION?

18 A. YES, WE HAVE. I HAVE -- THIS IS SOMETHING
19 THAT I'VE LOOKED AT TO ANSWER THIS KIND OF QUESTION.
20 AND WE HAVE -- I WROTE A COMPUTER PROGRAM TO TABULATE
21 THE NUMBER OF ABNORMAL AREAS IN OUR ENTIRE GROUP OF
22 NORMAL CONTROLS. SO THAT IS WHY I KNOW WHY THIS NUMBER
23 OF ABNORMAL AREAS IS DEFINITELY ABNORMAL.

24 BY CHANCE ALONE OUT OF A LARGE NUMBER OF BRAIN
25 AREAS YOU MIGHT EXPECT SOME AREAS TO BE ABNORMAL. THIS
26 INDIVIDUAL HAS AN UNUSUAL NUMBER OF ABNORMAL AREAS, AND
27 THAT'S WHY I AGREE WITH THE GENERAL CONCLUSION THAT
28 THIS WAS AN ABNORMAL BRAIN SCAN.

ER 1378

8318

1 Q. HOW MANY PEOPLE ARE IN YOUR CONTROL GROUP FOR
2 YOUR NORMAL READINGS?

3 A. ON THE SAMPLE THAT I TABULATED THAT
4 INFORMATION, THERE ARE 24 PEOPLE, AND I THINK ONLY ONE
5 HAD THAT MANY DEVIATE AREAS, AND THAT IS WHY I KNOW IT
6 IS APPROXIMATELY UP AT THE FIVE PERCENT LEVEL, WHICH IS
7 THE TYPICAL LEVEL ACCEPTED BY MEDICAL LABORATORIES. IT
8 IS A LEVEL OF STATISTICAL SIGNIFICANCE.

9 NOW, THE ACTUAL REPORT THAT YOU HAVE IN FRONT
10 OF YOU, THE MEANS MAY BE BASED ON A SLIGHTLY LARGER
11 GROUP BECAUSE SINCE THAT TIME OVER THE LAST YEAR WE
12 HAVE COLLECTED ADDITIONAL NORMAL CONTROLS, AND SO I
13 THINK THERE ARE 30 INDIVIDUALS WHO ARE IN THE CURRENT
14 NORMAL CONTROL GROUP.

15 Q. NOW, THAT CONTROL GROUP ARE UC IRVINE
16 STUDENTS; IS THAT CORRECT?

17 A. WELL, THEY ARE PEOPLE FROM THE COMMUNITY.
18 THEY ARE A MUCH WIDER RANGE THAN STUDENTS BECAUSE WE
19 WERE ANXIOUS NOT JUST TO HAVE STUDENTS, SO THEY ARE A
20 SOMEWHAT WIDER RANGE INDIVIDUALS.

21 Q. HOW MANY OF THOSE PEOPLE ARE -- HAVE BEEN
22 INSTITUTIONALIZED IN EITHER A PRISON OR JAIL AT THE
23 TIME OF THE TEST?

24 A. NONE OF THEM.

25 Q. WHAT KIND OF NEUROLOGICAL OR PSYCHOLOGICAL
26 INFORMATION DO YOU HAVE ABOUT THOSE PEOPLE FROM YOUR
27 NORMAL STUDY GROUP IN ADDITION TO SIMPLY THE PET SCAN
28 INFORMATION?

ER 1379

8319

1 A. RIGHT, ALL OF THESE INDIVIDUALS WERE SCREENED.
2 WE COLLECTED MEDICAL INFORMATION, WE DID CHEMICAL
3 LABORATORY TESTS, THEY RECEIVED A BRIEF PSYCHIATRIC
4 EXAMINATION, AND A DETAILED MEDICAL HISTORY ABOUT BRAIN
5 DAMAGE, SO THAT THEY COULD SERVE AS VALUE NORMAL
6 CONTROLS.

7 Q. NOW, IN YOUR STUDIES, FOR EXAMPLE, IF SOMEONE
8 WERE INSTITUTIONALIZED IN A PRISON FOR THE LAST SEVEN
9 YEARS AND IF THAT WOULD HAVE SOME EFFECT ON THE WAY
10 THEY USE THEIR BRAIN, YOU HAVE NO WAY OF ACCOUNTING FOR
11 THAT; IS THAT CORRECT?

12 A. WE DON'T HAVE A SPECIFIC STUDY ON INDIVIDUALS
13 WHO HAVE BEEN -- WHO ARE OTHERWISE NORMAL BUT
14 INSTITUTIONALIZED.

15 NOW, WE HAVE DONE STUDIES OF PATIENTS WITH
16 SCHIZOPHRENIA, AND, OF COURSE, THEY ARE
17 INSTITUTIONALIZED.

18 WE HAVE SOME COMPARISONS IN THAT GROUP AMONG
19 PEOPLE WHO HAVE BEEN INSTITUTIONALIZED AND INDIVIDUALS
20 WHO HAVE NOT, BUT WE DO NOT SEE PATTERNS SIMILAR THAT
21 WOULD CREATE THESE ABNORMALITIES.

22 Q. NOW, CURRENTLY THE MOST PROMISING USE OF THE
23 PET SCAN IS IN DEVELOPING SOME TYPE OF MEANS OF
24 UNDERSTANDING SCHIZOPHRENIA AND THE BRAIN FUNCTIONS
25 THAT ARE AFFECTED THERE; IS THAT CORRECT?

26 A. THERE ARE A VARIETY OF CLINICAL APPLICATIONS
27 THAT INCLUDE EPILEPSY, IDENTIFYING EPILEPSY FOR SIGNS,
28 IDENTIFYING DIFFERENT KINDS OF DEMENTIA, THE DIAGNOSIS

ER 1380

8320

1 OF ALZHEIMER DISEASE, ASSESSING METABOLISM IN BRAIN
2 TUMORS, AND THEN BASIC RESEARCH IN PSYCHIATRIC ILLNESS,
3 SUCH AS SCHIZOPHRENIA AFFECT DISORDER. THAT'S WHAT
4 I'VE BEEN TALKING ABOUT HERE AT THE CONGRESS OF
5 NEUROBIOLOGICAL SCIENCE IN FLORENCE.

6 Q. IF YOU TAKE SOMEONE TO YOUR CLINIC, DO A PET
7 SCAN, AND YOU ARE PROVIDED WITH NO OTHER PSYCHOLOGICAL,
8 NEUROLOGICAL OR PSYCHONEUROLOGICAL STUDIES, AND YOU
9 FIND CERTAIN ABNORMALITIES SUCH AS YOU HAVE HERE, YOU
10 CANNOT SAY THAT, FOR EXAMPLE, AN ABNORMALITY IN A
11 PARTICULAR REGION OF THE BRAIN MEANS THAT THIS PERSON
12 HAS UNCONTROLLABLE RAGES AND WOULD LIKELY BE A SERIAL
13 KILLER? THERE IS NO WAY YOU CAN DO THAT, IS THERE?

14 A. NO, I DON'T THINK SO. AND I THINK THIS WOULD
15 BE TRUE OF ANY MEDICAL TEST OF ANY KIND. ONE WOULD NOT
16 CONSIDER A CHEST X-RAY OR AN ELECTROCARDIOGRAM
17 COMPLETELY IN THE ABSENCE OF ANY CLINICAL INFORMATION.
18 FOR INSTANCE, INCLUDING THE AGE OF THE PATIENT.

19 NOW, I'M ONLY INFERRING THIS IS A MALE BECAUSE
20 HIS NAME IS DEAN.

21 THE COURT: THAT'S A GOOD GUESS.

22 DR. BUCHSBAUM: SO I WOULD THINK WITHOUT ANY
23 CLINICAL INFORMATION WE WOULD BE SOMEWHAT LIMITED IN
24 INTERPRETING IT, BUT I DON'T THINK THAT NECESSARILY
25 MEANS THAT THE TEST IS INVALID.

26 THIS IS A COMMON PART OF MEDICAL PRACTICE,
27 THAT THE PATIENT'S PHYSICAL AND MEDICAL HISTORY IS
28 TAKEN INTO ACCOUNT IN THE INTERPRETATION.

ER 1381

8321

1 THE COURT: DOCTOR, BEFORE YOU WOULD BE ABLE TO
2 FORM ANY OPINIONS THAT YOU WOULD FEEL COMFORTABLE
3 TESTIFYING TO, WHAT TYPE OF INFORMATION WOULD YOU NEED?

4 DR. BUCHSBAUM: WELL, FIRST OF ALL I'D LIKE TO SEE
5 THE REPORTING TO A PHYSICIAN WHO'S ACTUALLY EXAMINED
6 MR. CARTER.

7 AND I DON'T KNOW ANYTHING ABOUT THIS CASE.
8 PRESUMABLY THERE ARE OTHER PHYSICIANS INVOLVED WHO
9 EXAMINED THE PATIENT, DONE NEUROLOGICAL AND PSYCHIATRIC
10 HISTORIES, THAT WOULD BE PART OF THIS REVIEW OF THE
11 STATUS OF THE BRAIN.

12 THE COURT: HOW DOES THAT WORK? DO YOU MEAN THAT
13 THEY JUST TAKE WHAT YOU'VE GOT AND THEY THEN UTILIZE
14 THE INFORMATION TO FORM OPINIONS, OR IS THAT --

15 DR. BUCHSBAUM: THAT WOULD BE PART OF THE NORMAL
16 PROCESS OF DIAGNOSIS. SO IN OTHER WORDS, IF YOU HAD
17 PNEUMONIA, YOU WOULDN'T GO TO A RADIOLOGIST FOR A CHEST
18 X-RAY, YOU WOULD GO TO AN INTERNIST OR A PULMONARY
19 SPECIALIST, HE WOULD SEND YOU TO THE RADIOLOGIST, THE
20 RADIOLOGIST WOULD EXAMINE THE CHEST X-RAY, AND THEN YOU
21 WOULD BE DIAGNOSED AS HAVING PNEUMONIA OR TUMOR OR
22 TUBERCULOSIS BY THE INTERNIST.

23 THE COURT: DOES THE --

24 DR. BUCHSBAUM: NO.

25 THE COURT: I'M SORRY. GO AHEAD.

26 DR. BUCHSBAUM: I CAN CONTRIBUTE TO THIS PROCESS IF
27 I KNEW SOMETHING ABOUT THE PATIENT. SO THAT I WOULD
28 ANTICIPATE THAT I WOULD WANT TO KNOW, AS PART OF

ER 1382

8322

1 REVIEWING THE SIGNIFICANCE OF THIS, SOMETHING ABOUT THE
2 PATIENT'S PSYCHIATRIC AND NEUROLOGICAL HISTORY AND
3 EXAM. BUT AS IT STANDS NOW, I HAVE JUST THE
4 COMPUTERIZED INFORMATION WHICH, ON EXAMINATION OF IT,
5 APPEARS TO SUGGEST ABNORMAL BRAIN FUNCTION.

6 THE COURT: BUT AT THIS POINT, YOU WOULD NOT BE
7 ABLE TO SAY WHAT IMPACT THAT WOULD ACTUALLY HAVE ON THE
8 PERSON'S BEHAVIOR.

9 THE WITNESS: I WOULD BE ABLE TO MAKE -- HAVE SOME
10 OPINION, BUT IT WOULD BE LIMITED BY THE ABSENCE OF ALL
11 OTHER INFORMATION. I WOULD HAVE A MUCH MORE DETAILED
12 AND SUBSTANTIVE OPINION IF I HAD ADDITIONAL INFORMATION
13 ABOUT THE PATIENT.

14 THE COURT: WHAT I'M TRYING TO FIGURE OUT IS HOW
15 MUCH FURTHER WE NEED TO EXPLORE THIS, SO IF YOU'LL BEAR
16 WITH ME. BASED UPON WHAT YOU HAVE IN FRONT OF YOU,
17 WHAT CAN YOU SAY?

18 DR. BUCHSBAUM: BASED ONLY ON THIS?

19 THE COURT: YES.

20 DR. BUCHSBAUM: BASED ONLY ON THIS, I WOULD SAY
21 THAT THIS BRAIN STUDY DOESN'T REPRESENT A BRAIN STUDY
22 OF A TYPICAL NORMAL INDIVIDUAL; THAT IT HAS A LARGE
23 NUMBER OF SCATTERED ABNORMAL AREAS WHICH INVOLVE AREAS
24 OF THE TEMPORAL LOBE, THE HIPPOCAMPUS, THE CINGULATE
25 GYRUS THE AREA OF EMOTION, AND THAT THIS PERSON COULD
26 HAVE ABNORMALITIES OF BEHAVIOR ASSOCIATED WITH MEMORY
27 AND THE REGULATION OF BEHAVIOR.

28 WE KNOW THAT IN A PRELIMINARY ANALYSIS OF

ER 1383

8323

1 OTHER VIOLENT OFFENDERS, THE CINGULATE GYRUS HAS BEEN
2 ONE OF THE AREAS WHICH HAS HAD ABNORMALITIES COMMON TO
3 THAT WHOLE GROUP OF INDIVIDUALS, AND SO THIS WOULD BE
4 ONE SUSPICION THAT I WOULD HAVE SEEING THAT SEVERAL
5 AREAS IN THE CINGULATE GYRUS WERE ABNORMAL.

6 THE COURT: OKAY. AND FOR YOU TO FORM A MORE
7 DEFINITIVE OPINION, YOU WOULD HAVE TO TALK TO SOMEBODY
8 ELSE WHO HAS ACTUALLY DONE OTHER TESTS OF A
9 PSYCHOLOGICAL, PSYCHIATRIC AND/OR NEUROLOGICAL NATURE
10 ON THE DEFENDANT; IS THAT CORRECT?

11 DR. BUCHSBAUM: I THINK THAT WOULD BE EXTREMELY
12 VALUABLE AS PART OF A GOOD MEDICAL WORK UP OF THIS
13 PARTICULAR PATIENT, REALLY PRESS IT BEYOND WHAT I HAVE
14 DISCUSSED UP TO NOW.

15 SO THE PET SCAN IS ONE STEP IN THIS
16 EVALUATION, AND I FEEL CONFIDENT LOOKING AT IT THAT
17 THIS IS AN ABNORMAL STUDY. TO GIVE A MORE DETAILED
18 STORY, I WOULD FEEL COMFORTABLE KNOWING MORE ABOUT THE
19 PATIENT.

20 THE COURT: OKAY. BUT AS FAR AS ANOTHER EXPERT
21 TESTIFYING, UTILIZING YOUR INFORMATION, IT SEEMS LIKE
22 THEY REALLY DON'T UNDERSTAND THESE RESULTS. IS YOUR
23 EXPERIENCE THEY HAVE TO TALK TO YOU TO BE ABLE TO FORM
24 OPINIONS BASED UPON THESE RESULTS?

25 DR. BUCHSBAUM: WELL, IT WOULD DEPEND ON WHO IT
26 WOULD BE. THE PERSON WHO WAS EXPERT IN BRAIN ANATOMY
27 AND NEUROLOGY MIGHT BE ABLE TO READ THE REPORT KNOWING
28 THE HISTORY OF THIS PATIENT AND HAVING SOME

ER 1384

8324

1 INTERPRETATION, BUT I DON'T KNOW WHO HAS BEEN ASKED
2 ABOUT THE INTERPRETATION OF THE REPORT.

3 THE COURT: OKAY. --

4 DR. BUCHSBAUM: WHAT KIND, IN FACT, MEDICAL
5 INFORMATION IS AVAILABLE ON THIS PERSON.

6 THE COURT: DOCTOR, BECAUSE OF THE ATTORNEY-CLIENT
7 WORK PRODUCT TYPE OF PRIVILEGE, I'M GOING TO GIVE THE
8 DEFENSE ATTORNEY AN OPPORTUNITY TO TALK TO YOU WITHOUT
9 THE REST OF US PRESENT TO PURSUE SOME OF THOSE
10 QUESTIONS. IF YOU COULD, JUST WAIT FOR ONE MOMENT IF
11 YOU WOULD.

12 MR. PIPPIN: MAY I ASK HIM A COUPLE OF QUESTIONS?

13 THE COURT: SURE.

14 BY MR. PIPPIN:

15 Q. DOCTOR, MY NAME IS JIM PIPPIN. I'M A DEPUTY
16 DISTRICT ATTORNEY, TOO. I HAVE A COUPLE QUESTIONS IF I
17 MIGHT.

18 A. SURELY.

19 Q. WHEN YOU DESCRIBE THE RESULTS OF THIS TEST AS
20 ABNORMAL, YOU'RE COMPARING THAT TO 20 PEOPLE OUT OF --

21 A. WELL, I THINK THERE ARE ACTUALLY 30 IN THE
22 SAMPLE AT THE CURRENT TIME THAT THIS STATISTIC IS BASED
23 ON.

24 Q. OKAY. AND THOSE 30 PEOPLE, HOW WERE THEY
25 SELECTED?

26 A. WELL, THEY WERE VOLUNTEERS FROM THE IRVINE
27 COMMUNITY.

28 Q. NOW, WITH RESPECT TO THAT, YOU STATED THAT OF

ER 1385

8325

1 THOSE PEOPLE THAT YOU USED IN THE TEST GROUP, THEY WERE
2 GIVEN A BATTERY OF TESTS IN ADDITION TO THE PET SCAN.

3 WERE SOME SOME OF THE PEOPLE EXCLUDED FROM THE
4 SAMPLES BECAUSE THEY WERE NOT NORMAL, OR DID EVERYONE
5 THAT WAS --

6 A. IN OTHER WORDS, SO THAT INDIVIDUALS WHO HAD A
7 FAMILY HISTORY OF PSYCHIATRIC ILLNESS, HAD NEUROLOGICAL
8 DISEASES, OR HAD A SEVERE INJURY SOMETIME IN THE PAST,
9 THOSE PATIENT WERE EXCLUDED FROM THE GROUP OF NORMAL
10 CONTROLS.

11 Q. SO YOU MADE A DECISION WHO WAS NORMAL, AND
12 THEN USED THAT AS THE NORMAL GROUP KIND OF; IS THAT
13 BASICALLY WHAT YOU DID?

14 A. THAT IS THE STANDARD PROCEDURE IN DEVELOPING A
15 NORMAL CONTROL GROUP. IN OTHER WORDS, YOU WOULDN'T
16 WANT TO INCLUDE A PERSON WITH A KNOWN HEAD INJURY AS
17 PART OF YOUR NORMAL GROUP.

18 Q. BUT WHAT IF THAT HEAD INJURY DIDN'T CAUSE ANY
19 BRAIN INJURY, HOW DO YOU KNOW IF THE HEAD JURY CAUSED A
20 BRAIN INJURY?

21 A. WE WOULD DEFINE THAT ABNORMALITY BASED ON A
22 GROUP OF PEOPLE WHO DIDN'T HAVE A HEAD INJURY.

23 THE COURT: DOCTOR, WHAT IF THIS PERSON DID -- WHAT
24 IF CARTER HAD A HEAD INJURY, WOULD THAT AFFECT YOUR
25 OPINION?

26 A. WELL, WHAT I WOULD SAY, LET'S ASSUME, AND THIS
27 IS -- I DON'T KNOW IF I SHOULD BE HYPOTHETICAL -- BUT
28 LET'S ASSUME THAT MR. CARTER DID HAVE A HEAD INJURY.

ER 1386

8326

1 LET'S ASSUME THAT FOUR YEARS AGO HE WAS IN AN
2 AUTOMOBILE ACCIDENT, HIS CAR ROLLED OVER, HE WAS
3 UNCONSCIOUS FOR 45 SECONDS, CONFUSED AFTERWARDS, SICK
4 FOR SEVERAL DAYS AND RECOVERED. AND THIS IS THE COMMON
5 DESCRIPTION OF PEOPLE WITH CLOSED HEAD INJURY.

6 IF WE HAD THIS KIND OF HISTORY, IF WE HAD AN
7 INJURY THAT HE WAS HIT ON ONE PARTICULAR SIDE OF THE
8 HEAD, THEN THE PET SCAN EVIDENCE WOULD BE STRONG
9 CORROBORATING EVIDENCE THAT INDEED THIS HEAD INJURY WAS
10 ASSOCIATED WITH LONG LASTING AND PERMANENT DAMAGE TO
11 THE BRAIN. SO THAT THE PHYSICIAN MAKING -- EVALUATING
12 THE PATIENT AND USING THE LABORATORY INFORMATION WOULD
13 THEN FIND THIS VALUABLE.

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ER 1387

8327

1 THE COURT: OKAY. I'LL GIVE YOU GUYS MORE TIME, I
2 PROMISE. I JUST WANT TO LET MR. BUMER AND MS. DEDINA
3 TALK TO HIM, THEN YOU CAN TALK TO HIM SOME MORE TOO.

4 MR. EICHLER: I HAVE SOMETHING I'D LIKE ON THE
5 RECORD. I DON'T KNOW THAT YOU'RE GOING TO BE --

6 THE COURT: I'M NOT GOING TO PUT THAT ON THE
7 RECORD.

8 MR. EICHLER: I'D LIKE A COUPLE OTHER THINGS ON
9 THE RECORD ON THIS.

10 THE COURT: I'LL LET YOU DO IT AGAIN.

11 MR. EICHLER: OKAY.

12 THE COURT: OKAY.

13 MR. PIPPIN: YOU WANT US OUT OF HERE RIGHT NOW?

14 THE COURT: YEAH. I'M LEAVING TOO.

15 ACTUALLY DO YOU WANT TO PICKUP A PHONE AND
16 AND TALK TO HIM ON THE PHONE INSTEAD? WOULD THAT BE
17 EASIER? YOU CAN DO IT IN HERE.

18 MR. BUMER: THAT MIGHT BE EASIER. I DON'T KNOW
19 HOW TO TURN THIS SPEAKER THING ON.

20 (RECESS TAKEN.)

21 THE COURT: WELL, DOCTOR, THIS IS JUDGE LASATER.
22 AGAIN, WE'RE BACK ON THE RECORD.

23 I REALLY WANT TO THANK YOU FOR YOUR TIME AND
24 EFFORT, ESPECIALLY AT WHAT IS NOW 7:30 YOUR TIME WHEN
25 I'M SURE YOU'D RATHER BE OUT IN FLORENCE DOING
26 SOMETHING A WHOLE LOT MORE FUN.

27 THE WITNESS: THAT'S QUITE ALL RIGHT. THIS IS
28 QUITE AN INTERESTING CASE. I WAS GLAD TO BE OF HELP.

ER 1388

8328

1 THE COURT: I SURE APPRECIATE IT. I'M GOING TO
2 ASK THE ATTORNEYS IF THERE IS ANYTHING THAT THEY WANT
3 TO ASK YOU FURTHER ON THE RECORD AT THIS POINT.

4 MR. BUMER?

5 MR. BUMER: NO.

6 THE COURT: MR. PIPPIN? I'M GOING TO ASK HIM IF
7 HE WOULD BE AVAILABLE TO US LATER ON IF WE NEED HIM,
8 KEEPING THAT IN MIND, I'M NOT TRYING TO PUSH, I JUST
9 WANT TO LET YOU KNOW I'M DOING THAT.

10 ANYTHING ELSE YOU WANT TO ASK HIM ON THE
11 RECORD?

12 Q. (BY MR. EICHLER) DR. BUCHSBAUM, I KNOW YOU
13 HAVE TESTIFIED IN A NUMBER OF CRIMINAL CASES.

14 ARE YOU AWARE OF ANY OTHER EXPERT IN THE
15 FIELD OF P.E.T. SCANS WHO HAS TESTIFIED IN CRIMINAL
16 CASES?

17 A. NO. UNFORTUNATELY, I'M NOT. I THINK WE'RE
18 THE ONLY ONES WHO HAVE COLLECTED THIS SERIES OF
19 PATIENTS.

20 Q. I'M NOT SURE I QUITE UNDERSTAND WHAT YOU'RE
21 SAYING.

22 A. I'M NOT ACTUALLY SURE OF THAT.

23 Q. WHEN YOU SAY THE SERIES OF PATIENTS, I'M NOT
24 SURE I UNDERSTAND WHAT YOU MEAN.

25 A. SERIES OF CRIMINAL CASES. I'M AFRAID I CALL
26 THEM PATIENTS.

27 Q. HOW MANY IN ALL HAVE BEEN PRESENTED TO YOUR
28 RESEARCH GROUP THERE AT U.C.I.?

ER 1389

8329

1 A. I THINK SOMEWHERE AROUND 18 OVER THE PAST
2 FIVE YEARS.

3 Q. (BY MR. PIPPIN) OF THOSE 18, WERE THOSE
4 PEOPLE CHARGED WITH MURDER, SPECIAL CIRCUMSTANCES
5 MURDERS?

6 A. IN SOME CASES, YES.

7 Q. HOW MANY WERE CHARGED WITH SPECIAL
8 CIRCUMSTANCE MURDER, DO YOU KNOW?

9 A. I DON'T HAVE THAT. I DON'T HAVE THAT
10 INFORMATION.

11 Q.. BUT THEY WERE ALL CHARGED WITH SOME KIND OF
12 A VIOLENT CRIME?

13 A. THAT'S CORRECT.

14 Q. IN THOSE 18, HOW MANY ABNORMAL P.E.T. SCANS
15 DID YOU FIND?

16 A. WELL, I DON'T HAVE THAT EXACT STATISTICS.
17 AS I SAID, WE'RE WORKING ON A STATISTICAL STUDY OF
18 THAT.

19 NOT ALL OF THEM WERE ABNORMAL. SOME THEM
20 WERE ABNORMAL. PERHAPS A MAJORITY.

21 BUT REMEMBER THAT WE DON'T SEE A RANDOM
22 EXAMPLE OF VIOLENT OFFENDERS.

23 MANY OF THE VIOLENT OFFENDERS WE HAVE SEEN
24 HAVE BEEN SENT TO US PARTLY BECAUSE THEY HAVE A
25 HISTORY OF A HEAD INJURY AND ARE, THEREFORE, MORE
26 LIKELY TO SHOW A P.E.T. SCAN ABNORMALITY.

27 Q.. (BY MR. EICHLER) AS I UNDERSTAND IT, WEREN'T
28 SOME OF THOSE INSTITUTED ON THE ISSUE OF COMPETENCY

ER 1390

8330

1 ALSO?

2 A. THAT WAS OUR VERY FIRST CASE. IT WAS SENT
3 TO US. IT WAS AN ISSUE OF PARANOID SCHIZOPHRENIA.

4 Q. SO, IN SOME OF THE CASES, SOME OF THE
5 CRIMINAL CASES YOU HAVE DEALT WITH, THE ISSUES WERE
6 SPECIFICALLY DEALING WITH WHETHER OR NOT THE PERSON
7 WAS CRIMINALLY SANE OR INSANE, OR SCHIZOPHRENIC OR
8 EXAMPLE; IS THAT CORRECT?

9 A. THAT'S CORRECT, BUT I WOULD SAY THE MAJORITY
10 HAVE REALLY INVOLVED BRAIN DAMAGE.

11 THE COURT: ANYTHING ELSE?

12 MR. EICHLER: NOTHING ELSE.

13 THE COURT: DOCTOR, I REALLY DON'T WANT TO OVER
14 IMPOSE UPON YOU, BUT I REALLY DON'T KNOW WHAT THE
15 DECISION IS GOING TO BE IN TERMS OF WHERE WE GO FROM
16 HERE.

17 I REALLY DON'T WANT TO DISTURB YOU AT 11 OR
18 12 O'CLOCK AT NIGHT AGAIN.

19 IS THERE A GOOD WAY THAT WE COULD REACH YOU,
20 IF YOU WOULD BE WILLING TO CONTINUE TO TALK TO US IF
21 WE NEED YOUR ASSISTANCE?

22 THE WITNESS: WELL, I'M SURE THAT WOULD BE ALL
23 RIGHT. I'M ABOUT TO GO OUT TO DINNER.

24 THE COURT: I DON'T THINK WE WOULD NEED TO
25 FOLLOW-UP WITH ANYTHING FURTHER TODAY ACTUALLY.

26 I THINK WE PROBABLY ASKED YOU WAY TOO MANY
27 QUESTIONS TODAY. I WAS THINKING MORE ABOUT IN THE
28 NEXT DAY OR SO.

ER 1391

8331

1 IF WE NEED TO GET BACK IN TOUCH WITH YOU,
2 HOW HARD WOULD IT BE, OR HOW MUCH OF AN INCONVENIENCE
3 IT WOULD BE, AND WHAT'S THE BEST WAY?

4 THE WITNESS: WELL, THE BEST WAY TO GET IN TOUCH
5 WITH ME PROBABLY WOULD BE TO SEND ME A FAX SAYING
6 YOU'D LIKE TO TALK TO ME ON THE PHONE, AND
7 APPROXIMATELY THIS TIME OF DAY.

8 THE COURT: IS THIS A GOOD TIME FOR YOU?

9 THE WITNESS: RIGHT.

10 THE COURT: THAT WOULD BE GREAT. I REALLY DO
11 APPRECIATE IT.

12 WOULD YOU DO ME A FAVOR AND SEND YOUR BILL
13 FOR YOUR TIME TODAY TO MR. BUMER, AND I WILL MAKE
14 SURE IT GETS PAID THROUGH OUR SOURCES, IF IT'S NOT
15 ALREADY AUTHORIZED THROUGH WHAT HE'S BEEN ALLOCATED.

16 THE WITNESS: ALL RIGHT. I WILL TAKE. IS IT ALL
17 RIGHT IF I TAKE CARE OF THAT WHEN I ARRIVE HOME?

18 THE COURT: ACTUALLY, WHENEVER YOU HAVE TIME IS
19 FINE WITH US. I JUST WANT TO MAKE SURE THAT IT GETS
20 DONE, BECAUSE I REALLY DO APPRECIATE YOUR ASSISTANCE.

21 THE WITNESS: CERTAINLY. I APPRECIATE THAT VERY
22 MUCH, AND IF YOU HAVE ANY OTHER INFORMATION THAT
23 YOU'D LIKE ME TO COMMENT ON, I WOULD BE GLAD TO DO
24 THAT IF YOU CAN REACH ME BY FAX HERE, AND I WILL BE
25 HERE THROUGH SATURDAY MORNING.

26 THE COURT: OKAY. AND THEN I TAKE IT YOU'RE GOING
27 SOMEPLACE ELSE?

28 THE WITNESS: THAT'S CORRECT. WELL, MY OFFICE

ER 1392

8332

1 HAS A LIST OF THE PLACES WHERE I'LL BE.

2 THE COURT: OKAY. DO YOU THINK THEY WILL CONTINUE
3 TO COOPERATE AND GIVE US YOUR NUMBER?

4 THE WITNESS: I'M SURE THAT THEY WILL.

5 THE COURT: OKAY. THANKS SO MUCH. I SURE
6 APPRECIATE YOUR HELP. HAVE A GOOD DINNER.

7 THE WITNESS: NICE TALKING WITH YOU TODAY.

8 THE COURT: BYE.

9 THE WITNESS: BYE.

10 THE COURT: SINCE WE HAVE THE COURT REPORTER
11 HERE, LET ME JUST DO A COUPLE THINGS. WOULD
12 EVERYBODY LIKE A COUPLE OF MINUTES TO SORT OF
13 REGROUP?

14 BASICALLY WHAT I NEED TO KNOW FROM THE
15 DEFENSE IS IF YOU'RE GOING TO BE PURSUING THIS OR
16 NOT.

17 I DON'T KNOW IF YOU NEED A LOT OF TIME TO
18 THINK ABOUT IT, OR IF IT'S SOMETHING THAT'S FAIRLY
19 EVIDENT TO YOU. DO YOU WANT TO TALK TO YOUR CLIENT?

20 MR. BUMER: YEAH. I'D ALSO LIKE TO BE -- I THINK
21 THE NEXT ORDER OF BUSINESS IS TO GO OVER THE
22 EXHIBITS.

23 THE COURT: EXHIBITS?

24 MR. BUMER: I THOUGHT WE WERE GOING OVER THE
25 PRIORS.

26 THE COURT: SAME THING. THAT'S AN EXHIBIT.

27 MR. BUMER: I'D LIKE TO BE EXCUSED FOR A FEW
28 MINUTES AND GO BACK TO MY OFFICE. I THINK MR. CARTER

ER 1393

14

8368

1 SAN DIEGO, CALIFORNIA, JUNE 13, 1991, 1:30 P.M.

2 PROCEEDINGS

3

4 THE COURT: OKAY. FOR THE RECORD, WE'VE GOT ALL
5 THE ATTORNEYS AND THE DEFENDANT.

6 MR. BUMER, HAVE YOU DECIDED IF YOU ARE GOING
7 TO BE PURSUING ANYTHING FURTHER IN TERMS OF THE PET
8 TEST?

9 MR. BUMER: YES, I HAVE, YOUR HONOR.

10 THE COURT: AND WHAT IS YOUR DETERMINATION?

11 MR. BUMER: MY DECISION IS, IT IS A TACTICAL
12 DECISION THAT WE ARE NOT.

13 THE COURT: OKAY. HAVE YOU HAD A CHANCE TO DISCUSS
14 THIS DECISION WITH YOUR CLIENT?

15 MR. BUMER: YES, I HAVE.

16 THE COURT: OKAY. COUNSEL, BECAUSE OF SOME OF THE
17 MATTERS OF WHICH I'M AWARE, WHAT I INTEND TO DO AT THIS
18 POINT IS ASK YOUR CLIENT IF HE'S IN AGREEMENT WITH THAT
19 DECISION. DO YOU OBJECT TO ME ASKING THAT QUESTION OF
20 YOUR CLIENT?

21 MR. BUMER: YES, I THINK SO, YOUR HONOR. I, FIRST
22 OF ALL, OBJECT TO ANY OUTSIDE THE STANDARD WAVERS, FOR
23 INSTANCE, IF HE SHOULD -- THAT YOU TAKE IN A GUILTY
24 PLEA AND THAT KIND OF STUFF, I OBJECT TO ANY COLLOQUY
25 WITH MR. CARTER IN THE PRESENCE OF THE PROSECUTION.

26 SECONDLY, I DON'T THINK IT IS NECESSARY. IT
27 IS PURELY A TACTICAL DECISION ON MY PART BASED ON A
28 CAREFUL CONSIDERATION OF A NUMBER OF THINGS, INCLUDING

ER 1394

8369

1 KELLY/FRYE, AND A NUMBER OF OTHERS.

2 THE COURT: ALLOW ME THE LUXURY OF BEING PRACTICAL
3 FOR JUST A MOMENT. BASED UPON THE DISCUSSION THAT WE
4 HAD WITH THE DOCTOR, IT IS APPARENT THAT IT WOULD MOST
5 LIKELY OPEN THE DOOR TO MORE THAN JUST THE TESTIMONY OF
6 THIS PARTICULAR DOCTOR AND OTHER ISSUES, SO I DON'T
7 DISAGREE WITH THE TACTICAL END OF IT.

8 MR. BUMER: THAT WAS ONE OF THE FACTORS, AMONG A
9 NUMBER OF OTHERS, THAT I HAD IN MIND.

10 THE COURT: GIVE ME JUST A MOMENT.

11 MR. BUMER, LET ME EXPLAIN TO YOU, PART OF WHAT
12 I'M CONCERNED ABOUT AT THIS PARTICULAR STAGE IS IF THAT
13 IS TRUE, THEN I'M GOING TO BE DOING CERTAIN THINGS
14 BASED UPON THAT REPRESENTATION, AND BASICALLY NOW IS
15 THE TIME TO KNOW WHICH DIRECTION -- AND WHAT I DON'T
16 WANT TO ENCOUNTER IS A MARSDEN HEARING THIS AFTERNOON
17 LATER, TOMORROW MORNING, MONDAY MORNING, WITH THIS
18 ISSUE COMING UP BECAUSE THIS IS THE TIME I REALLY NEED
19 TO DEAL WITH IT.

20 MR. BUMER: WELL --

21 THE COURT: LET ME TRY APPROACHING IT THIS WAY.
22 ARE YOU AWARE OF ANY DISAGREEMENT BY YOUR CLIENT WITH
23 THIS DECISION?

24 MR. BUMER: I AM NOT, YOUR HONOR.

25 THE COURT: OKAY. I'M SATISFIED AT THIS POINT.
26 YES.

27 MR. PIPPIN: MY ONLY CONCERN IN THIS REGARD IS HOW
28 WE DEFINE THE WORD "TACTICAL" AS MR. BUMER USES IT WHEN

ER 1395

Copy

1 SUPREME COURT - STATE OF CALIFORNIA
2
3
4 THE PEOPLE OF THE STATE OF)
5 CALIFORNIA,)
6 PLAINTIFF-RESPONDENT,) SUPREME COURT NO. *3023000*
7) *CR* FROM SAN DIEGO COUNTY
8 VS) JUDGE MELINDA J.
9 DEAN PHILLIP CARTER,) LASATER
10 DEFENDANT.) VOLUME LVI
11)

12

13

14 APPEARANCES:

15 FOR THE PLAINTIFF: EDWIN L. MILLER, JR.,
16 DISTRICT ATTORNEY
17 BY: JAMES PIPPIN, AND
18 ROBERT EICHLER AND
19 DEPUTY DISTRICT ATTORNEY

20 FOR THE DEFENDANT: CHARLES BUMER, ESQ.
21 1168 UNION STREET, STE. 201
22 SAN DIEGO, CA 92101

23 JOSEPHINE DEDINA, ESQ.
24 934 23RD STREET
25 SAN DIEGO, CA 92102

26 JOHN R. AVERY, CSR #8605
27 DAVID DAILY, CSR #6885
28 OFFICIAL REPORTER
SAN DIEGO, CALIFORNIA 92101

ER 1396

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SAN DIEGO
3 DEPARTMENT NO. 27 HON. MELINDA J. LASATER, JUDGE
4

5)
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28)

THE PEOPLE OF THE STATE OF
CALIFORNIA,

PLAINTIFF,

VS
DEAN PHILLIP CARTER,
DEFENDANT.

NO. CR 90280

REPORTER'S TRANSCRIPT
JUNE 14, 1991
VOLUME LV
PAGES 8448-8527

APPEARANCES:

FOR THE PLAINTIFF: EDWIN L. MILLER, JR.,
DISTRICT ATTORNEY
BY: JAMES PIPPIN, AND
ROBERT EICHLER
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: CHARLES BUMER, ESQ.
1168 UNION STREET, STE. 201
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JOHN R. AVERY, CSR #8605
DAVID DAILY, CSR #6885
OFFICIAL REPORTER
SAN DIEGO, CALIFORNIA 92101

ER 1397

14

1	VOLUME LVI				
2	JUNE 17, 1991				
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28					

8638

1 EVIDENCE FROM WITNESSES THAT WELL, THERE ARE A LOT OF
2 ALCOHOLICS IN NOME, AND THE SUICIDE RATE HIGH.

3 YEAH. I GUESS THAT STUFF IS TRUE, BUT
4 WHAT'S THAT GOT TO DO WITH MURDERS AND PUNISHMENT IN
5 SAN DIEGO?

6 HIS MOTHER, WE HEARD EVIDENCE, STILL
7 OWNS AN APARTMENT BUILDING IN NOME, ALASKA.

8 SHE CAN'T BE TOO IMPAIRED AS A RESULT OF
9 THE ABUSE OF ALCOHOL, OR SHE COULDN'T FUNCTION THAT
10 WELL.

11 SHE STILL VISITS THE DEFENDANT'S
12 BROTHER.

13 YOU DIDN'T HEAR THE KIND OF EVIDENCE
14 THAT AS A RESULT OF ALCOHOLIC PARENTS THAT YOU WOULD
15 EXPECT TO HEAR IF YOU WERE PROPERLY ASKED TO CONSIDER
16 THAT AS A MITIGATING FACTOR.

17 I SUPPOSE IF A PERSON GROWS UP IN A
18 FAMILY WHERE BOTH PARENTS ARE SERIOUS ALCOHOLICS, AND
19 THEY'RE MISTREATED, AND THEY'RE DENIED FOOD, THEY
20 DON'T HAVE A HOME TO LIVE IN, AND THEY'RE LEFT OUT IN
21 THE COLD AND THINGS LIKE THAT, THAT A JURY MIGHT WELL
22 CONSIDER THOSE IN DECIDING, AND WEIGH THAT AGAINST
23 THE AGGRAVATING FACTORS IN DECIDING WHAT THE
24 APPROPRIATE PUNISHMENT IS.

25 BUT YOU DIDN'T HEAR THAT KIND OF
26 EVIDENCE HERE.

27 THE ONLY THING YOU HEARD HERE WAS THEY
28 DRANK TOO MUCH BEER. YOU HEARD THAT THEY WORKED ALL

ER 1445

8639

1 THE TIME; THEY CARED ABOUT HIS PROBLEMS; THEY TRIED
2 TO GET HIM SOME HELP.

3 SO I SUGGEST TO YOU THAT THE EVIDENCE
4 THAT YOU HEARD ABOUT HIS PARENT'S DRINKING IS NOT
5 MITIGATING AT ALL.

6 I HAVE THE WORD "DISCIPLINE" WRITTEN UP
7 THERE. THERE IS NO EVIDENCE OF ANY CHILD ABUSE.

8 SO NO EVIDENCE THAT THE DEFENDANT WAS
9 ABUSED AS A CHILD.

10 I THINK THERE WERE SOME QUESTIONS IN
11 THAT REGARD ASKED OF YOU DURING JURY SELECTION, IF A
12 CHILD WAS MISTREATED BY HIS PARENTS WHEN HE WAS
13 YOUNG, PERHAPS THAT'S SOMETHING PROPERLY TO CONSIDER
14 IN MAKING THE DECISION YOU HAVE TO MAKE.

15 THERE IS ABSOLUTELY NO EVIDENCE OF THAT
16 IN THIS CASE. IT'S NOT A MITIGATING FACTOR.

17 HIS BROTHER SAID YEAH, THEY SPANKED US
18 WHEN WE WERE BAD, BOTH OF US.

19 HIS BROTHER'S AND HIS SISTERS ALL SEEMED
20 TO TURN OUT OKAY.

21 I THINK THE SISTER THAT TESTIFIED, I
22 THINK HER NAME WAS POLLY, I'M NOT CLEAR, AND I SHOULD
23 HAVE GONE BACK AND LOOKED, BUT IT WAS CLEAR SHE LOVES
24 HER BROTHER.

25 TO ME IT WAS CLEAR SHE LOVES DEAN
26 CARTER, HER OLDER BROTHER.

27 SHE SEEMED TO BE LIKE -- SHE SEEMED TO
28 BE A NICE YOUNG LADY.

ER 1446

8640

1 I SUPPOSE IN A DIFFERENT CASE A JURY
2 MIGHT BE ASKED TO CHOOSE LIFE IN PRISON INSTEAD OF
3 THE DEATH PENALTY SO THAT A PERSON'S FAMILY COULD
4 CONTINUE TO SEE THEM; COULD CONTINUE TO TALK TO THEM;
5 COULD CONTINUE TO VISIT THEM.

6 THAT'S SOMETHING THAT -- MAYBE IT'S
7 PROPERLY CONSIDERED BY A JURY IN DECIDING WHETHER TO
8 GIVE LIFE IN PRISON OR DEATH, BUT THE EVIDENCE HERE,
9 I SUGGEST, IS THAT THEY WANT LITTLE TO DO WITH DEAN
10 CARTER, SO IT'S NOT A MITIGATING FACTOR IN THIS CASE.

11 HIS CRIMES HAVE BROUGHT SHAME AND
12 EMBARRASSMENT TO HIS FAMILY.

13 THAT'S WHAT HIS BROTHER TESTIFIED TO.

14 THERE IS NOTHING MITIGATING ABOUT THIS
15 CASE, OR IN THIS CASE BECAUSE OF DEAN CARTER'S FAMILY
16 MEMBERS.

17 EMPLOYMENT, HIS MOM AND DAD, OR MOM AND
18 STEP DAD IT SEEMS WERE ALWAYS EMPLOYED. THERE IS NO
19 INDICATION THEY WEREN'T RESPONSIBLE, PRODUCTIVE
20 HARD-WORKING PEOPLE.

21 YET SOME EVIDENCE WAS BROUGHT OUT IN THE
22 DEFENSE THAT COULD LEAD YOU TO SPECULATE THAT MAYBE
23 THERE WAS SOMETHING WRONG WITH THEM; MAYBE IT'S THERE
24 FAULT WE'RE HERE; THEY DID SOMETHING WRONG IN RAISING
25 DEAN CARTER.

26 NOT THE CASE.

27 "SYMPATHY," I HAVE THAT WORD UP THERE,
28 AND THREE CATEGORIES UNDERNEATH IT. I SUPPOSE A

ER 1447

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,)
)
 on Habeas Corpus.) NO. _____
)
) (Superior Court for
) Los Angeles County
) No. A-089330;
) Related Appeal
) No. S014021.)
 _____)

DECLARATION OF HOWARD W. GILLINGHAM

I, HOWARD W. GILLINGHAM, DECLARE:

1. I am an attorney, licensed to practice law, admitted to practice in the State of California since 1973, and have been an inactive member of the Bar of the State of California since 1996.

2. On or about April 8, 1988, I accepted appointment to represent petitioner, Dean Phillip Carter, by the Superior Court for Los Angeles County, in place of Ezekiel Perlo; I was aware at the time of appointment that Marcia A. Morrissey had also been co-counsel for petitioner. I accepted appointment in above-referenced capitally charged murder case with the understanding of Ms. Morrissey and the Honorable Robert W. Thomas, judge assigned for all purposes, that I would be lead counsel. I acted in that capacity throughout my representation of petitioner from April 8, 1988 - September 9, 1990, when I was relieved.

3. In my capacity as lead counsel I was responsible for the investigation, retention of expert consultants, disbursement of related funds, and otherwise did control and direct the investigations and consultations related to both phases of trial. I was also in charge of the overall strategy, tactics, and decision-making with regard to the investigation, retention and consultation with experts, and other potential witnesses, and designed and conducted jury *voir dire* and selection.

4. At a hearing on petitioner's *Motion for New Trial*, held January 11, 1990, I testified under oath to, among other subjects, conversations that occurred with petitioner during pretrial and trial proceedings, especially about his dissatisfaction with decisions I had made to not challenge the prosecution's case in guilt phase. In addition to my testimony on January 11, 1989, I have been presented with one note from petitioner, which I am informed and believe was in my confidential file, turned over to appellate counsel for petitioner, and which expressed petitioner's frustration with my closing argument to the jury in guilt phase on July 10, 1989; I did not present the note to the trial court at the time it was presented to me, but I stated petitioner's dissatisfaction during an *in camera* hearing immediately thereafter. (See, *Appendix A [Copy of Note from Petitioner, 7/10/89]* and *Appendix B [RT 5292 7/10/89].*)

5. Petitioner had informed me on many occasions prior to trial that he wanted me to challenge the prosecution's case in guilt phase, and that he then anticipated he would testify in his own behalf after the presentation of defense evidence. There is no doubt in my mind that petitioner was very upset with me, and my decision not to challenge any of the prosecution's evidence was not made in consultation with him.

6. As a consequence of the animosity and frustration that had developed between us, I believe the attorney-client relationship suffered irreparably. I was not only unable to build rapport or develop the confidence of my client, but I believe these and other failures and omissions on my part contributed to my inability present a compelling case in mitigation of petitioner's punishment.

7. During the course of my representation of petitioner, I traveled to Alaska. I am informed and believe that prior to my trip to Nome, previous investigators and attorneys had traveled to Alaska, met with family members and local residents, and had obtained some documentary information regarding petitioner. Petitioner's mother refused to cooperate with me or my representatives in preparation of petitioner's case, and she was not willing to discuss her life, petitioner's birth father, circumstances surrounding his birth, his childhood, or any other subject related to her family. Petitioner's older brother, Jerry Carter, and his younger sister, Pollyanne Reasner, were

cooperative and testified at penalty phase, as did other persons from Alaska.

8. Although I knew at the time that expert witnesses could testify in penalty phase of a capital trial, I failed and omitted to prepare a social historian or cultural anthropologist to assist in presentation of petitioner's unique life history and experiences. Based on some reported childhood and adolescent incidences I was convinced in my mind that petitioner's childhood and adolescence were neglectful and alienating, and while aware of his long-term drug and alcohol abuse, as well as other documented mental health problems, I failed and omitted to properly prepare a mental health professional to assist in presentation of those mitigating themes to the jury.

9. With regard to other investigators and attorneys, I met with the San Diego defense team representing Dean. This included Charles Bumer and his staff associates, petitioner's attorney in the Superior Court for San Diego County No. 90280 (Supreme Court No. S023000), on several occasions, and regularly corresponded with him as well. There was some sharing of information between the two defense teams, but, overall, there were definite conflicts between us about who should travel to Alaska, the timing of travel, and what information would be shared. I believe that significant conflicts developed between the two defense teams regarding approaches to petitioner's defense, such that it was detrimental to the investigation and presentation of

petitioner's case.

10. However, after the collection and review of numerous life history documents obtained by attorneys and investigators, and my own familiarity with the charges against petitioner, I was unable to formulate any coherent strategy or plan to defend petitioner in guilt or penalty phases of trial. Although I had employed time-line charts and other recognized argumentative tools in other cases I had tried prior to this one, I did not provide the jury with any illustrative or persuasive guides in petitioner's behalf. I was at a loss both before and during trial as to how to present themes or theories in defense to the charges against petitioner or in mitigation of punishment.

11. During sequestered *voir dire* of prospective jurors from March 21, 1989 - June 15, 1989, I am informed and believe I conducted all questioning with the exception of three or four prospective jurors on one day (April 3, 1989). Ms. Morrissey questioned those jurors on April 3, 1989, and it was my decision that thereafter I would conduct all *voir dire*.

12. In this regard, I had consulted with mental health professionals, but I did not prepare or present a psychiatrist, psychologist or other mental health professional, to testify as an expert to any defense, and I had not provided sufficient information or prepared such a mental health professional to testify in guilt or penalty phase as to any of the following

areas: 1) mental state defenses to the offenses charged or aggravators alleged, 2) substance abuse, or 3) emotional or mental deficiencies or disturbances that might not amount to defenses to the offenses charged, but which could have been presented as mitigation evidence, or other evidence in mitigation, such as, 4) organic brain damage 5) the traumatic effects of early childhood abuse and neglect, 6) unique problems associated with the indigenous Native Alaskan culture and environment in Nome, Alaska, during the 1950's-1960's, 7) institutional life for unwanted children when petitioner was placed at the Jesse Lee Home in Seward, Alaska, in 1964, 8) conditions and effects upon petitioner of long-term detention in juvenile facilities around Anchorage, Alaska, during various periods of petitioner's life between 1968-1972, and 9) how petitioner's unique childhood and adolescent psychological development and adjustment difficulties might have affected his adult behavior, 10) or his potential for adjustment to prison.

13. Furthermore, although I suspected the possibility of organic brain damage, I have reviewed my own note that shows a magnetic resonance imaging (MRI) of petitioner's brain was suggested by a mental health professional I consulted. (See, Appendix C.) I did not request petitioner be examined for neurological damage by such an examination. I also did not request petitioner be examined by positron emission tomography

(PET) brain scan.

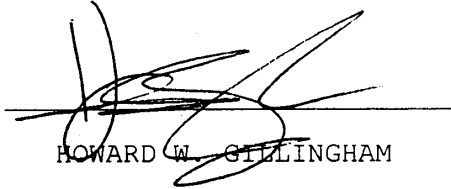
14. At the time I was appointed in this case, I also represented Robert Warren in an automatic appeal from death judgment in People v. Warren (1988) 45 Cal.3d 471, and upon reversal in May, 1988, I accepted appointment to represent Mr. Warren in the re-trial of his penalty phase in the Los Angeles County Superior Court for Torrance, California. During the pendency of petitioner's capital trial, I was assigned to prepare the Warren case, and was informed by the trial judge, the Honorable Madge Watai, that we would proceed to trial as soon as the Carter trial concluded. In August, 1989, the Warren case proceeded to trial. During the time I represented petitioner, I was experiencing great pressure, both from the court and self-imposed, to prepare for the Warren trial, and I believe this was another factor that caused me to be anxious and probably detracted from my responsibilities to petitioner.

15. I can now see that there existed at the time of petitioner's trial an irreconcilable conflict and breakdown in the attorney-client relationship in this case.

///

Case 2:06-cv-04532-RGK Document 47-4 Filed 09/07/10 Page 121 of 128 Page ID
#:1134

I declare under penalty of perjury the foregoing is true and
correct, except as to information and belief, which I am informed
and believe to be correct, to the best of my knowledge, this
15th day of July, 2000, at Berkeley,
California.


HOWARD W. GILLINGHAM

///

**INDEX TO APPENDICES
HOWARD W. GILLINGHAM, ESQ.**

Source materials referenced in the order they appear in the declaration:

Appendix A *7/10/89 Memo of Dean Phillip Carter*

Appendix B *Transcript of Marsden Hearing* [SDRT 5292]

Appendix C *6/29/89 Memo on Beam Study Results*

Appendix A

7/10/89 Memo of Dean Phillip Carter

Case 2:06-cv-04532-RGK Document 47-4 Filed 09/07/10 Page 124 of 128 Page ID
#:1137

MEMO

File _____

File Number _____

Date _____

☐ Office Conference

☐ Telephone Conversation With _____

1050 7/10/87 Fight after arrest. - subject of
I WANT TO REPORT ON THE RECORD THAT I DO NOT
AGREE WITH THE CHARGE AND THAT EVEN
THOUGH I HAD ASKED WHAT IT WOULD BE, I WAS NOT
INFORMED OF THE ALLEGEMENT AND DO NOT FEEL THAT IT
IS AN ADEQUATE IMPROVEMENT, AS THE DA SAID, IT WAS
NOT AN ARGUMENT AT ALL AND COMPOUNDED BY THE
FACT THAT NO DEFENSE WAS PRESENTED IS A DISERVICE
TO ME AND THE NEED OF YOUR RESPONSIBILITIES TO ME

FORM 172L

Appendix A

Appendix B

Transcript of Marsden Hearing [SDRT 5292]

APPENDIX B

LOWING PROCEEDINGS HELD IN
COMMENCED AT 3:32 P.M. WITH
JURING PERSONS PRESENT:
T, CLERK, BAILIFFS, COURT
COUNSEL FOR THE DEFENDANT,
DEFENDANT.)

8 THE COURT: I UNDERSTAND THAT THERE ARE COMPETING
9 INTERESTS AROUND.

10 MR. GILLINGHAM: AND THERE IS A TENDENCY OF
11 PEOPLE TO CONGRATULATE LAWYERS AFTER THEY MAKE CLOSING
12 ARGUMENTS.

13 THE COURT: OKAY.

14 MR. GILLINGHAM: YOUR HONOR, MR. CARTER ASKED ME
15 TO SPREAD UPON THE RECORD THAT HE DOES NOT AGREE WITH
16 THE CLOSING ARGUMENT THAT COUNSEL MADE, THAT HE HAD
17 ASKED ME WHAT IT WAS, AND THAT HE WAS NOT INFORMED OF
18 THE TYPE OF ARGUMENT.

19 AND HE CERTAINLY DOES NOT FEEL THAT IT WAS
20 ADEQUATE, AND THIS JUST COMPOUNDS THE PROBLEM OF THE
21 LACK OF DEFENSE BY THE ARGUMENT THAT COUNSEL MADE, AND
22 HE ASKED ME TO SPREAD THAT UPON THE RECORD.

23 THE COURT: THE RECORD IS CLEAR.

24 ALL, OKAY. WE'LL BE IN RECESS UNTIL TOMORROW.

25 MR. GILLINGHAM: WE'D LIKE THIS SEALED AND ALL
26 OTHER MARSDEN HEARINGS SEALED.

7 THE COURT: THANK YOU, THE COURT WILL BE IN
28 RECESS UNTIL TOMORROW.

Exhibit 64-794

Appendix C

6/29/89 Memo on Beam Study Results

Case 2:06-cv-04532-RGK Document 47-4 Filed 09/07/10 Page 128 of 128 Page ID
#:1141

MEMO

File

Carter Perry

File Number

Date

6/29/09

9:30 am

☐ Office Conference

☒ Telephone Conversation

With

Dr. Kanel

*nothing wrong that
beam picked up. Perhaps
MRI might find something*

FO 172L

Appendix C

EC

6

Exhibit 64-796

ER 969

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,)
)
 on Habeas Corpus.) NO. _____
)
) (Superior Court for
) Los Angeles County
) No. A-089330;
) Related Appeal
) No. S014021.)
)
 _____)

DECLARATION OF MARCIA A. MORRISSEY

I, MARCIA A. MORRISSEY, DECLARE:

1. I am an attorney, licensed to practice law, and admitted to practice in the State of California in 1975, and in good standing in all courts to which I have been admitted.

2. On or about June 3, 1986, I accepted appointment in the above-referenced case for all proceedings in the trial court, and initially associated at the request of Ezekiel Perlo, attorney for Mr. Carter at that time. On or about April 1, 1988, Mr. Perlo was substituted out of the case as a result of petitioner's request, upon judicial findings that a total breakdown in the attorney-client relationship had occurred.

3. On or about April 8, 1988, Howard Gillingham was substituted in as counsel of record. Mr. Gillingham was

substituted in as lead counsel for the defense. I had not yet tried a capital murder case and my role was to be as "second chair" in the case.

4. During the course of my representation of petitioner from June 1986 - September, 1989, petitioner consistently stated he wanted defense counsel to challenge the prosecution's case against him in guilt phase and in aggravation, and to present evidence in his behalf; he expressed an interest in testifying. Petitioner was certainly interested in his case and requested police and investigative reports, and often asked for progress reports on defense investigation.

5. I was of the opinion that there were viable defense theories to present to a jury in petitioner's behalf. I discussed some of those theories with petitioner, and on July 10, 1989, I presented arguments to the trial court on *Motion for Judgment of Acquittal* under Penal Code Section 1118.1, which represented many of my views as to weaknesses in the prosecution's case-in-chief.

6. Petitioner advised me of his dissatisfaction with lead counsel, Mr. Gillingham, on several occasions. I related petitioner's concerns to Mr. Gillingham but do not know whether he took any steps to address problems that had arisen with petitioner.

7. Prior to and during trial Mr. Gillingham and I did not engage in any detailed discussions about whether defenses would

be mounted against the prosecution's case, whether we would present defense evidence as petitioner wanted, or whether petitioner would testify. Mr. Gillingham did not consult me prior to or during trial about those decisions, and to the best of my knowledge he made the decisions on his own. There was one time during trial when he left the courthouse with defense investigator, Casey Cohen, and I was not included in whatever they did thereafter.

8. I was not consulted as to whether an opening statement would be given and I was not provided a preview of the nature of Mr. Gillingham's closing statement in guilt phase; I was not offered an opportunity to present argument to the jury in either phase, but was in fact advised by Mr. Gillingham that only he would present argument.

9. I specifically recall having a conversation with Mr. Gillingham during a break in my cross-examination of Jennifer Rose Steward, the key witness presented by the prosecution in aggravation at penalty phase, in which Mr. Gillingham informed me it was time to terminate my examination of Ms. Steward, because I was allegedly "alienating the jury...." I was also not informed by Mr. Gillingham that he intended to introduce Superior Court for Ventura County convictions from the *Steward* case, which he did after my cross-examination of Ms. Steward, and in spite of court rulings that we had obtained excluding those convictions.

10. For the most part, I acceded to Mr. Gillingham's trial tactics and strategies, against petitioner's stated desire for aggressive advocacy. I believed at that time that Mr. Gillingham had the requisite experience and skills to lead and control petitioner's defense, and because of my respect for his credentials and reputation, and my own lack of experience in capital litigation, I deferred to his judgment in every aspect of representation of petitioner.

11. Furthermore, I had traveled to Alaska and conducted interviews with persons familiar with petitioner's life history, and in preparation for penalty phase, met with numerous potential mitigation witnesses. I did meet with petitioner's mother in Nome, Alaska, but do not know the reasons for her refusal to cooperate with me or other representatives in preparation of petitioner's case; however, she was not willing to discuss her life, petitioner's birth father, circumstances surrounding his birth, his childhood, or any other subject related to her family.

12. Mr. Gillingham did not consult me as to which witnesses to call to testify in mitigation or how to present mitigation themes. After cross-examining Ms. Steward, I was not asked to question any mitigation witnesses or to present argument in petitioner's behalf at penalty phase.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this

12 day of July, 2000, at Santa Monica, California.

Marcia Morrissey

MARCIA A. MORRISSEY

///

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,
on Habeas Corpus.
NO. _____
(Superior Court for
Los Angeles County
No. A-089330;
Related Appeal
No. S014021.)

DECLARATION OF JOSEPHINE DEDINA

I, JOSEPHINE DEDINA, DECLARE:

1. I am an attorney licensed to practice law in the state of California (No. 81796), since 1978, and I am in good standing in all courts to which I am admitted to practice. On or about October 21, 1986, I was appointed, and associated with attorney Charles Ted Bumer, who is deceased, to assist as "second chair" in the representation of petitioner in a capital murder case filed in Superior Court for San Diego County No. 90280; I assisted Mr. Bumer in the pretrial investigation and preparation, and at both phases of trial. Mr. Bumer was also assisted by paralegal, Kathleen Gilberd, and Marion Pasas and Chuck Hile, investigators.

2. Over the period in which I was employed (1987-1991) on the San Diego case, I worked with Mr. Bumer, Ms. Pasas, Ms.

Gilberd, and petitioner, among others, in preparing the case for trial in San Diego, which was scheduled to follow petitioner's trial in Superior Court for Los Angeles County (Supreme Court No. 14021); I am informed and believe petitioner's penalty phase concluded on or about August 7, 1989, and his San Diego trial began with jury selection on or about March 1, 1991 and concluded in June, 1991. Petitioner's case was the first capital murder case in which I was associated as counsel of record.

2. As a part of my duties, I attended meetings with Mr. Bumer, Ms. Pasas, Ms. Gilberd, and others associated with the San Diego defense team. On numerous occasions from June 20, 1987 - August, 7, 1989, I also met and conversed with the Los Angeles' defense attorneys Marcia Morrissey and Howard Gillingham.

3. During the course of my association with Mr. Bumer on the San Diego defense team, I recall strained relations between the Los Angeles and San Diego defense attorneys, especially between Mr. Bumer and Mr. Gillingham. From my conversations with Mr. Bumer, as well my own observations and experiences, relations between the Los Angeles and San Diego attorneys and support staffs were competitive and suspicious, rather than trustworthy, and I believe those relations were not in petitioner's best interests.

4. From my conversations with Mr. Bumer, I am informed and believe that Ms. Morrissey expressed her frustrations about Mr. Gillingham's lack of leadership.

5. I was informed and believed prior to the Los Angeles trial that the Los Angeles defense team fully intended to challenge the prosecution's case-in-chief in guilt phase and aggravation evidence in penalty phase; it was my understanding that the Los Angeles team had focused its efforts on mounting defenses to guilt phase and aggravation evidence, while the San Diego defense team had primarily investigated and prepared for penalty phase.

6. As part of my duties I was assigned to attend and observe as much of the Los Angeles trial as possible, and I attended much of the five-week guilt and penalty phases from June 20-August 7, 1989. I also attended several of the sequestered *voir dire* sessions in which Mr. Gillingham examined prospective jurors during the months of March-May, 1989. I was concerned about the lack of any unifying mitigation themes, or the appearance of any defense strategies, during jury selection.

7. Prior to trial in Los Angeles I was informed and believed lead counsel, Mr. Gillingham, had a good reputation as an experienced capital defense attorney. As a consequence, I was extremely surprised by the lack of a vigorous challenge to the witnesses presented by the prosecution at the Los Angeles trial. On the opening day of trial, for example, Deputy District Attorney Marsh Goldstein described in detail what he expected the evidence would prove, and he did so in a clear, articulate manner. Mr. Gillingham, however, did not present an opening

statement then or at the end of the state's case-in-chief, and he appeared to be distracted and disinterested in court during the guilt phase of trial. Mr. Gillingham was clearly in charge of the defense decisions, and I know from conversations with Mr. Bumer, that Ms. Morrissey was disturbed by Mr. Gillingham's approach to the case. She did, however, remain passive during the course of the trial with one exception: During cross-examination of Ms. Steward, who was presented by the prosecution as an aggravation witness in penalty phase, Ms. Morrissey did vigorously examine the witness.

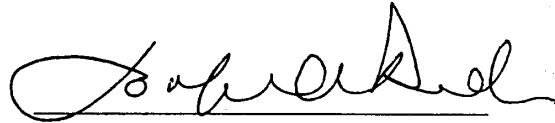
8. At petitioner's request, I met with him at various times over noon and other court recesses during the Los Angeles trial. During guilt phase of trial, Mr. Carter expressed his frustration with Mr. Gillingham. Towards the end of the guilt phase I recall meeting with petitioner several times and he was upset on each occasion; he told me, "Nobody's listening to me," and "Nobody's listening to what I want," or similar words.

9. I was shocked by Mr. Gillingham's superficial effort in petitioner's behalf during jury selection, and at the guilt phase of trial, and I recall discussing my concerns with San Diego defense team members at the time. He did not appear to talk to petitioner at counsel table and appeared to me to be out of touch with Mr. Carter. In penalty phase, although Mr. Gillingham appeared much more involved as he presented mitigation witnesses, the defense effort lacked cohesion and did not present mitigation

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themes. Mr. Gillingham's closing argument was rambling, he appeared confused, and he was clearly at a loss as to how to argue the case for a life sentence.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this
1 day of June, 2000, at San Diego,
California.



JOSEPHINE DEDINA

///

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,
on Habeas Corpus. NO. _____
(Superior Court for
Los Angeles County
No. A-089330;
Related Appeal
No. S014021.)

DECLARATION OF MARION L. PASAS

I, MARION L. PASAS, DECLARE:

1. I am an investigator licensed in the State of California (No. 8476), since 1982, and I have been continuously employed as a private investigator since that time. In June 1986, I was retained by attorney Charles Ted Bumer, who is deceased, to assist him in the representation of petitioner in a capital murder case filed in Superior Court for San Diego County No. 90280. I assisted Mr. Bumer in the pretrial investigation and preparation, and at both phases of trial. Mr. Bumer was also assisted by co-counsel, Josephine Dedina, his staff paralegal, Kathleen Gilberd, and private investigator, Chuck Hile.

2. Over the period in which I was employed (1986-1991) on the San Diego case, I worked with Mr. Bumer, Ms. Dedina, Ms. Gilberd, and petitioner, among others, in preparing the case for trial in San Diego, which was scheduled to follow petitioner's trial in Superior Court for Los Angeles County (Supreme Court No. 14021); I am informed and believe petitioner's penalty phase concluded on or about August 7, 1989, and his San Diego trial began with jury selection on or about March 1, 1991 and concluded in June, 1991.

3. As a part of my duties, I attended meetings with Mr. Bumer, Ms. Dedina, Ms. Gilberd, and others associated with the San Diego defense team. On several occasions from June 20, 1987 - August, 7, 1989, I also met and conversed with the Los Angeles' defense team investigator, Casey Cohen, and attorneys Marcia Morrissey and Howard Gillingham. On several occasions I participated in joint meetings with San Diego counsel and investigators for both teams.

4. Shortly after I was retained by Mr. Bumer, I was advised to make immediate travel arrangements for investigation into petitioner's family history and background in Alaska. I knew little about the case, Native Alaska culture, or petitioner's life history at that point in time. To the best of my recollection, on my first trip to Alaska in 1986, I was not provided any information as to the progress of the Los Angeles investigation, and to the best of my knowledge, I did not speak

with any member of the Los Angeles defense team prior to my initial trip.

5. During the course of my employment as a defense investigator for Mr. Bumer, I often observed tension and strain between the Los Angeles and San Diego defense attorneys. From my conversations with Mr. Bumer, as well my own observations and experiences, the Los Angeles attorneys and support staff created a competitive atmosphere, as opposed to a collaborative effort, and they were suspicious rather than trustworthy. I believe the poor relationship between the Los Angeles and San Diego attorneys and staffs subverted petitioner's interests.

6. As part of my duties I was assigned to attend and observe as much of the Los Angeles trial as possible, and I attended much of the five-week guilt and penalty phases from June 20-August 7, 1989. Prior to trial in Los Angeles I was informed and believed lead counsel, Mr. Gillingham, had a good reputation as an experienced capital defense attorney. I was not only surprised by the lack of any defense effort to challenge the witnesses presented by the prosecution at the Los Angeles trial, but lead counsel, Mr. Gillingham, acted ambivalent towards Mr. Carter. In fact, I was shocked by Mr. Gillingham's minimal effort in petitioner's behalf, and was so disturbed by it I recall discussing my concerns with San Diego defense team members at the time.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this 3rd day of June, 2000, at San Diego, Ca .
California.


MARION L. PASAS

///

Casey Cohen

Criminal
Justice
Consultant

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May 16, 1987

To: Zeke Perlo/Marcia Morrissey
From: Casey Cohen
Subject: Dean Carter

EDNA BUFFAS INTERVIEW

Monday, May 11, 1987

Originally scheduled to meet with this witness at her place of employment (The Nome Police Department-where she is a dispatcher) we were disappointed to find that she had left without waiting for us when she got off work at 5 p.m.

Later in the evening Zeke and I took a taxi out to her house, approximately 6 miles from Nome. To get there you just ask the driver to take you to Edna Buffas. Her husband is a fire captain on the Nome Fire Department.

Edna is a fairly tough appearing country woman. She has "always" known the Carters. Her father worked with Jim Carter. She says Jim was a "very nice man, very fair." Edna and her husband used to socialize with the Carters. Dean, she says, "was wild just like the rest of us..." She says Dean was spoiled. She says he got into trouble. But later in the interview it became clear that she used these terms and descriptions not in the negative sense, but with a kind of affection for Dean.

Edna goes back to before Esther and Jim married. There was Esther with her two sons. And Esther worked all the time. She had two sons and no husband and she had to work to take care of the boys. Later she married Jim and he adopted the boys. Until that time the boys were growing up with out a father and without supervision. Jerry was the more levelheaded of the two boys. Dean was spoiled before Jim came on the scene and "tried to tame him down."

Edna asks that we never let know Esther that she thinks Esther is "simple...She's very nice but simple." She is not smart but she is a lvoing person. She gets rattled real easy. She's hysterical.

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Edna Buffas Interview
5/11/87
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Edna confirms that the Esther we are seeing is the real person. Barely able to handle the slightest amount of stress. She falls apart. Edna said that if her son were in trouble she would be fighting tooth and nail to help him. Esther doesn't have that kind of toughness. She's just a nice, caring, simple minded woman who gets hysterical under pressure.

Edna says that Dean had a strict stepfather in Jim. He was a real good man, real nice... The Carters had a camp at Osborne. Edna was only there twice.

Edna says she couldn't think of anything that might have improved the Carter family. I pressed her hard to be honest with us. The only thing she could think of was that possibly the boys would have been better off if Jim had come into the family earlier so that Esther wouldn't have had to work so much.

Edna says there was a period of time in which she didn't see Dean for a very long time. Then he came back married. "I was impressed... Here was this tall, handsome kid, settled down..." Then Dean and his wife left and she never saw him again.

Edna said Dean was a happy-go-lucky kid. In fact she used that expression 3 or 4 times to describe him.

Edna says that one time she was driving a cab during some kind of celebration in town. All of a sudden Dean ran into the side of the cab and "knocked himself silly...and then went into convulsions." She's referring to the accident that Dean mentioned.

Edna was Guy Martin's ex-sister-in-law.

Reaction to Dean's arrest: "It couldn't be Dean. That just wasn't Dean. I've never known him to be violent like that. He was carefree, happy-go-lucky and I've never known him to be violent."

Edna says that Dean drank once in a while but that drugs were unheard of around Nome back when Dean was younger.

Edna says she's been in the Carter house. She and her husband lived right next door for a while. The house wasn't big. When she visited she always stayed in the front room or the kitchen. She never saw Dean's bedroom.

Edna does cite the fact that Dean got into a lot of trouble when he was young and this was embarrassing to Jim Carter. It was common knowledge. People in town talked about the "police chief whose son got into trouble. Dean was forever running away. He drove his mother nuts.

Edna Buffas Interview

5/11/87

Page 3.

Edna has heard Jim Carter griping and complaining about Dean. She says "Basically Dean was a nice kid. I liked him. I liked him a lot." She doesn't know what else she could tell us to help. She would be willing to come to Los Angeles and testify if required.

When she says Dean was "spoiled rotten," she is saying it with love in her heart as a grandmother would talk about a grandchild. Dean Reminded Edna of her husband. He liked to have fun and enjoy life. He was just a good kid out to enjoy life.

Edna had heard of Dean committing a burglary. She goes back to saying he would be better off if his mother had been stronger. Esther couldn't handle pressure then nor can she now.

Edna knows about McLaughlin. She doesn't think Dean should have been sent there nor to Jesse Lee. He should have stayed home. When asked about who was more assertive in the Jim-Esther marriage, Edna says, "Jim was pussy whipped."

Asked if Jim and Esther had fights, "Oh, shit ya!" And the fights were usually over Dean. Esther defended Dean and Jim yelled at her, always shouting, enver physical.

Edna has heard that Jim beat Dean when he screwed up or got caught and she wouldn't put it past Jim to lock Dean up.

Edna tried to approach Esther after Dean's arrest. Perhaps she wanted to talk about it or offer support. In any event Esther broke down and couldn't talk. "She just sits back and cries."

Edna knows that Dean liked children and played with kids and was good with them. Edna knew Esther when she (Edna) was just a kid. She just remembers Esther working.

Following the interview Edna drove us back into town. She drank from a can of beer while driving us. She said, "The cops could piss off if they didn't like it." Edna has been police dispatcher in Nome for 6 years.


Casey Cohen

Casey Cohen

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July 6, 1987

To: Zeke Perlo/Marcia Morrissey
From: Casey Cohen
Subject: Dean Carter

INTERVIEW WITH POLLYANNE JUNE REASNER

Sunday, June 14, 1987

Polly drove down to Anchorage to meet Marcia and I at the Sheraton Hotel. She is 25 years old. She has three daughters (5, 3, and 2 years old). She's a housewife with an 11th grade education. She married at age 18 to her husband, Robert, a plumber. Polly and her husband hold Christian Education Licenses in the Assembly of God Church. They are qualified to run a "Christian school." Polly says she and her sister attended Assembly of God church their entire life. Dean was 8 years old when Polly was born.

Polly says her mother was a great mother who worked the entire time the kids were growing up. She says her father was very respected. He died when she was 12. She thinks of him as a "great dad."

Polly lived in the corner house (the one we photographed) in Nome until she was around 8 years old. Her memories of Dean are very sketchy. Mainly she recalls a couple of times when he came home. She had heard her mother and father discuss Dean who she understood was in McLaughlin. She was upset once because she couldn't go see him.

Polly says that Dean telephoned once in a while but that no one in the family ever talked about him. When Polly was around 12 years old she got interested in her brother and wanted to know where he was. Her understanding of why he was gone was that he once broke into some place. To this date, however, she really doesn't know where Dean was during her childhood nor why he was gone. She says they never talked about problems at home or with Dean. She never recalls Dean being at the Campsite at Osborne.

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8/14/87 Polly Reasner Interview
Page 2

Polly's only knowledge of Dean's instant offense came from news broadcasts or what she read in the newspapers. She seems to have lacked curiosity to pursue the matter further. She says she loves her brother and wishes she had gotten to know him better.

The little Polly does know about Dean comes from when she was older and she got to know him in Anchorage. This is the only time they had any meaningful contact.

Polly seems to have had some difficulty in her early life but she didn't elaborate. She says she was born in 1963. In 1978, when she was 15 years old, she moved in with her future husband. Around the time when her father died she and her husband got very religious.

Polly says she and her mother had a good relationship until the father died. Then they moved to Anchorage. That's when mother-daughter problems began.

Polly tells of her father being police chief of Nome and how both her parents drank at the Bering Sea Saloon where they were friends of the owner. They drank "weekeneds, Friday nights, the middle of the week."

Polly took care of her younger sister when the parents were away drinking. She couldn't specify what time her parents usually got home when they were out drinking. She recalls once when they got home at 4 a.m. She "assumes" they got home earlier most of the time.

Polly said she never gave any thought to her brothers having different natural fathers. It appears that even during the instant interview she is under the impression that the boys had the same father and he was Jim Carter. She says the older brother has blue eyes and curly hair. Jim Carter had blue eyes.

Polly doesn't believe in the death penalty. She doesn't believe people should take another person's life.

Polly says that when Dean lived in Anchorage his wife "played a lot of games...tried to get Dean and mom to fight...She lied to Dean and mother..."

Polly says Dean was a very good father to the children.

Polly likes to do crafts as a hobby. Last spring she saw Dean's ex-wife at a fair and tried to talk to her. Kathy said to her, "I don't want anything to do with you and your murdering brother."

6/14/87 Polly Reasner Interview
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Polly can't recall the last time she saw Dean. She says he came out to visit her at home about 3 times. He came out on a motorcycle once just to go for a drive. "He drove up but he couldn't stay long."

Polly says it was a long time before she even knew he'd left Alaska.

The last time Polly and her older brother talked about Dean was when Marion Pasas came to Alaska. Dean had told Polly not to talk to Pasas. Polly and her older brother respected Dean's wishes. Polly says her husband did talk to Pasas for a long time. Polly says she felt Pasas had a hard time in Nome.

Polly says her father was a police chief but at some point became a state trooper. He gave driver's license tests. She doesn't know a lot about what he did. She says her father saw a lot of bad things (in life) and protected the kids. Polly is four years older than her sister.

Polly mentioned Beth Farley, a friend from their Nome school days. She recalled that Beth Farley used to date her brother, Jerry. She recalls a school teacher who lived in her mother's apartment who took acid with Dean. Polly said that BOB HAMILTON was Jerry's wife's brother.

Polly says she and Goldie are best friends. Jerry went to AMU in Anchorage. That's the Methodist University.

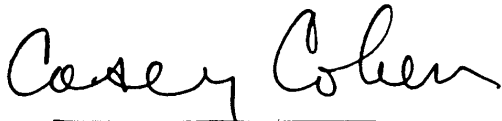
Polly said there were poor communications in the Carter family. They don't talk about things.

Esther worked at the jail under the post office. She was a matron. Polly can't understand why her mother is clamming up now and not helping more by giving us information.

Polly mentioned people Dean has telephoned. He telephoned a girl named JUDY DOUFTHIT, whose parents are William and Charlette Daufthit in Wasilla. Judy lives in Fairbanks.

Polly says that in their childhood Dean wasn't like part of the family. He was away and no one talked about him. She says that in the family their father made the decisions but the mother enforced them. They never questioned their father. They were taught that little girls should be seen and not heard.

Polly knows now that communications are very important to having a good healthy family. This is how she's raising her family. She says there wasn't "unity" in her home as a child because both parents worked. Polly wants to be able to talk to her daughter. She recognizes now she wasn't able to talk to her mother when she was young.



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Date: 10/17/87

To: Zeke Perlo/Marcia Morrissey

Subject: INTERVIEW WITH JERRY CARTER

This morning at 7:30 a.m. Zeke and I met with Jerry Carter for a five hour interview. The following is a summary of what took place.

Jerry Carter is Dean's older brother. Initially we had to spend some time gaining his confidence. He was very reluctant to talk to anyone about his brother. Furthermore, he had some questions he wanted answered because he believed that up till now his brother has not completely leveled with him about his predicament. In fact, he said, his brother has telephoned and told him that everything is looking okay etc. This, we know from other witnesses, Dean has done before.

First a description of Jerry.

Jerry is a solid individual both physically and, seemingly, emotionally. He appears to be a very honest individual who asks honesty from others. He is also a very mild mannered type guy who appears to be easy going but with strength in reserve. He seems to be family oriented. He has a good job that he likes maintaining equipment for the school district. He is mechanical. He has technical aptitudes. He is security oriented in that he wants to have a good stable job and be able to plan his future.

In this regard we encountered a problem he is having with Dean's situation. It appears that throughout his lifetime Jerry has been embarrassed by Dean. He seems to have suffered in childhood to the extent that his brother was an embarrassment. Then, he got

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Exhibit 72-840

ER 990

Jerry Carter
Page 2

older and established himself in a small, closeknit community. Then Dean gets into trouble in Southern California in a manner that's brought a lot of attention to his case in Alaska. There have been some pressures on Jerry as a result of this case, with at least one parent confronting him directly by telling him that he is being watched. That means that a parent was telling him that there was concern about Jerry being around the children when his brother is some kind of weirdo murderer. So, the point of this is that Jerry is still be afflicted with fall out from his brother's problems. In this case it is worse because there is some implied threat to his job. At one point Jerry was thinking about moving away as a result of this. Jerry admits that he is angry. But he is also ambivalent. He still cares about Dean. He is also concerned about their mother. He says his mother suffers terribly from Dean's predicament. She tries to put it out of her mind. She drinks. She uses other denial mechanisms. But Jerry is concerned that this won't last for ever and that one day she will have to confront the truth and, in his words, "I don't know what will happen." He mentions how someone should level with her.

We broached the subject of Dean's childhood with Jerry. At first he was just a bit suspicious that we might be trying to build up a case against their parents. We assured him we were not trying to malign anyone or make a case against anyone. Zeke and I both believe that Jerry was telling the truth when he described the childhood.

In essence there was no observable abuse beyond the "norm". In other words, as Jerry sees things, Dean had a lot of problems as a young kid. He was constantly getting into trouble and he was always trying to run away. The main problem was the running away. Dean was always taking off and sometimes he would live in a box for two or three days. He would steal food or other items. Then he would be returned home. Jerry recalls his parents taking Dean to a psychologist (or some other kind of professional) in Anchorage when he was young. He remembers how they put Dean in Jesse Lee Home to try and get control of him. He even remembers his dad putting a 50' leash of some kind on Dean so he couldn't get away. Eventually Dean got into trouble and state authorities got involved. Thereafter Jerry didn't see Dean that much.

Jerry talked about how both parents were working and he was left in charge of Dean and later the two girls. He recalls that Dean wouldn't behave or mind him. He recalls further embarrassment from Dean's problems. He recalls anger because Dean ran off and left him to do Dean's chores and take care of the girls. Jerry says that both he and Dean were spanked (sometimes with a branch that they had to go outside and select) but in each instance it

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Jerry Carter
Page 3

was for something they deserved. Jerry does not talk of any cruel or unusual punishment taking place.

A great deal of this interview actually consisted of conversation with Jerry. Our initial feeling was that if there was testimony about any cruelty in Dean's childhood that Jerry wouldn't make a good witness because he looks to normal and that would only raise a question in the juries mind as to how one brother could turn out so well in a bad family.

As the interview progressed we felt that there was no history of child abuse so significant that it would tie in with a general theory as to why Dean ends up murdering anyone. Instead we saw Jerry as a different kind of witness. We feel Jerry could be the family member to basically come to court to tell of some of the good things about Dean, and to say that he is loved by family members and to spare his life, etc. Jerry is ambivalent about getting involved but he said that if it had to be done he would rather be the family member to help rather than their mother. He also acknowledged that, hard as it might be, he might feel worse if Dean were executed and he hadn't done anything to help.

Jerry talked to us about the last time he saw Dean. He said that Dean came through for a few days and stayed at his (Jerry's) house. Dean showed up without advance notice. I asked Jerry if he saw anything different about Dean at this visit than he had seen during the previous time he'd seen Dean. He said, there was. He said that Dean was "hardcore" on the issue of his wife (Kathy). He said Dean was really angry at her for not allowing visits. He said Dean told him that he wasn't going to pay child support if he couldn't see his children. In effect, the impression I got from Jerry's remarks was that Dean didn't give a damn about anything anymore. He was sort of giving up on the straight life and taking off.

Jerry spoke about other aspects of Dean than negatives. He acknowledged that he was angry about a life time of embarrassment in the shadow of Dean's misbehavior. But, he said, Dean was not a violent person. He couldn't see Dean actually hurting anyone. He said Dean was gentle. He said that when Dean last visited him he would get down on the floor and play with his (Jerry's) two children.

One of the main emotional points in the interview was when Jerry talked about his frustration as a youth when he looked forward to playing on the same basketball team as Dean. There was a point in high school when Jerry and Dean were going to overlap one year. It was at that point that they might be on the same team. Jerry actually looked forward to that year. But when that year came

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Page 4

Dean was screwed up in some way and couldn't play. This was a big let down to Jerry.

Jerry says that his dad was the police chief during an era when there was a mayor system in Nome. Later they switched to a city manager system. The first city manager didn't get along with his dad and there was friction. It was obvious that his dad was going to soon be out of that job. It was also apparent from Jerry's remarks that Dean's getting into trouble added to the problem. People did whisper about Mr. Carter not being able to control his

own son. Mr. Carter also helped Dean out of his jams. This was a source of irritation to the city manager among other things. After Carter left the job of police chief he went into electronics work and he also transported prisoners. He was a bailiff. He also served subpoenas

A few years ago, in the spring of 1985, Jerry Carter was taking a computer course near San Jose. At that time he decided to visit Dean. He drove down to Los Angeles. But when he got to the jail he was unable to locate his brother. He says the sheriffs told him his brother wasn't there. He gave up. But he also says he was half-hearted about trying to see him. Even on the drive to Los Angeles he was half thinking about not wanting to see Dean. He says he was afraid he would break down if he saw his brother in the Los Angeles County Jail. He also says that his brother looked good the last time he saw him and he wanted to remember him that way.

Both Zeke and I felt Jerry was honestly wrestling with the issue of his brother's trial and possible penalty phase. We believe he was trying to help. He was trying to work through a lot of long standing, complex emotional issues. He was torn in several directions during the interview and when looking toward the future. He is angry about being stigmatized. He is protective of his mother.

Jerry also talked about Nome. He said one has to see Nome in the dead of winter to appreciate the depression people suffer who live there. Jerry doesn't have any desire to ever return to Nome. He talked about how it is only light for two or three hours a day and even that is only a deep overcast. You never see the sun. It is dark and cold the remainder of the time and people are clustered in small quarters with people who start to get on their nerves. There are a lot of suicides. There's a lot of depression. It's a small community. People either drink or look to the church for communal activity.

Jerry acknowledged that both his parents drank a lot. He talked

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Jerry Carter
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about how they would finish off a case of beer in one evening at their summer camp. Jerry reveals (but doesn't say so directly) some dissatisfaction with his mother's drinking. He says he can tell when she's drinking. She will telephone. He will say to her, "Mom, you've been drinking. Call me when you are sober." And he won't want to talk to her when she's drunk.

Jerry said that Nome has a certain amount of transient population and a certain amount of newcomers. But there is an old-time group that's been there for years. These people think of each other as a family. They are protective of each other. They gossip.

These oldtimers are protective of Mrs. Carter. They were well aware when we were in Nome asking questions about the Carter family. Jerry says there was a point when several of the old time men were going to ask Zeke and I to leave town and leave Mrs. Carter alone.

Jerry told of one time when Dean ran away that he went looking for him with a policeman named Guy Martin. They were driving along looking for Dean. Then they stopped. Martin asked a guy if he had seen Dean. The guy said he hadn't seen him. Then Martin said, "Well I've got my ace tracker here [pointing to Jerry]." Jerry got angry and said, "You talk to much," and got out of the car.

Comments:

In retrospect, after talking to Jerry, it appears that a penalty phase defense would be focused as follows: To use Jerry only to tell the good about Dean and to plead with the jury to spare his life. To not try and construct a theory around any kind of child abuse. To lay out Dean's life as it occurred. To recount how he perceived some problem deeply enough to try and run away from home from age 7 onward. To tell how he got into trouble, went to institutions, and eventually grew up. Then, as an adult he rehabilitates himself, gets a good job, marries, and settles down. But problems in the marriage develop.

Note: Jerry tells us that after Dean's marriage he got into a fight with a former boyfriend of his wife. As a result a gang was looking for Dean. Dean was scared. That's why he moved to Nome.

As marital problems developed Dean's scene falls apart. His one stab at the straight life didn't work out. He was angry, disillusioned, and disgusted. He was very angry at his wife. He falls completely apart and reverts to his former patterns. He

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Jerry Carter
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says, in effect, I tried to go straight and do right and all I did was get hurt. Now I'll go back to being the renegade outcast I always was. Only this time he has a real sensitivity to any further rejection by women. And the whole mood of his deterioration is exacerbated by the use of drugs.

The above will have to be elaborated on at another time.



Casey Cohen

PEOPLE VS. DEAN CARTER

INTERVIEW: BERTHA ADSUNA
Nome Alaska
(907) 443-2328

DATE, TIME
& LOCATION

OF INTERVIEW: Mrs. Adsuna was interviewed after she testified at the
L.A. penalty phase. This interview occurred in her
hotel room.

STATEMENT: Mrs. Adsuna explained that she came to Nome from an out-
lying village when she was in her twenties to live with
a family for whom she was going to work. She stated
at that time a relative of hers was working at the hospital
with Esther Carter and told her that she didn't like
Esther and therefore Bertha made no attempts to have anything
to do with Esther.

Berta also recalled an incident when one of her relatives
was invited to a friend's house for dinner with her children.
Esther Carter was also invited and brought her two sons,
Dean and Jerry. Bertha's relative recalled how Esther
allowed Jerry to eat at the table with her, but made
Dean eat on the floor. According to Bertha, this was
just uncalled for and they would have never done anything
like this in their family. Bertha saw this as a sign that
Esther treated Dean and Jerry differently and she never
cared about Dean.

Bertha stated that she did get to know Esther at a later
date when they both worked at the jail as matrons. Basically
the job was to cook for the inmates. She stated that
none of the inmates liked Esther because she didn't take
any care in fixing food for them. In contrast, Bertha
said she tried to make the food as good as she could for
the inmates and that they liked her for this. In addition,
Bertha stated that Esther seemed to be bossy and no well
liked. Bertha also stated that it was well known that Esther
was quite a drinker and although she herself did not drink,
Bertha stated that she was aware of Esther's drinking because
she was always late coming to work because of her hangover.

All in all, Bertha spoke quite disparagingly about Dean's
mother, Esther. It would appear from the way she discussed
her that Esther had a poor reputation in town. Essentially
she had a reputation of a woman who would go to the bars
and get drunk and was rather loose.

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LE VS. DEAN CARTER
INTERVIEW: BERTHA ADSUNA

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In addition, Bertha described Dean's brother Jerry as a boy who got away with a great many things because he was favored by his mother. Also, Jerry did not identify with Eskimos at all and appeared to think like his mother that "Eskimos were not good enough". Bertha explained that Esther seemed to repudiate her Eskimo heritage as did Jerry.

In contrast, Bertha described Dean as different. She stated that Dean was always friendly to everyone, even as a boy. She stated that Dean was willing to help anyone and seemed completely different. She described him as a person burning for love for everyone. Bertha recalled Dean when he worked with the elders at the elders conference. She stated that the elders loved him because he seemed to care and was willing to help them. Bertha described Dean's return to Nome as a successful video cameraman as being as though "he had gone through a storm and come through as a human being".

Bertha stated that she feels that Dean's mother never really cared for him; that she would never talk about Dean at all, even when asked. She stated that she talked about her grandchildren, but would never discuss Dean.

Bertha was asked if she knew anything about the abuse Dean may have suffered. She indicated she knew nothing about Dean being chained to a bed and was truly shocked to hear that he had been sent away by his parents to the Jesse Lee Home in Seward. She stated emphatically the Jesse Lee Home was an orphanage and she could not believe that Esther would have sent him away to that place. She stated if it had been Jerry, she would never have done that to him.

Bertha states that Grace Edmonds is now in the Pioneer Home in Anchorage. She stated that she knows Nurse Swanberg extremely well and that she still resides in Nome and that she would be happy to give us her phone number. She states if anybody knows anything about the abuse that Mrs. Swanberg would.

In addition to this information about Dean and his family directly, Mr. Adsuna is a wealth of information regarding Nome life as she has lived there since she was in her early twenties.

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DECLARATION OF MINDY S. ROSENBERG, Ph.D.

I, Mindy S. Rosenberg, declare:

PROFESSIONAL BACKGROUND

I am a licensed psychologist in the State of California. In 1984, I received my Ph.D. in clinical-community psychology from the University of Virginia in Charlottesville, Virginia and my M.A. from the same program in 1980. My doctoral dissertation was on the impact of spouse abuse on children's behavior, perceived competence and social problem solving abilities. My master's thesis was on the interpretations of children's behavior by abusive and non-abusive mothers in their perceptions of intent, children's disposition, maternal competence and stress. I completed my psychology internship in 1982-1983 with the Department of Psychology within the Psychiatry section of Yale University's School of Medicine in New Haven, Connecticut. In June 2003, I completed the Neuropsychology post-graduate certificate program through the Fielding Institute, Santa Barbara, California.

I am a Fellow of the American Psychological Association with specific membership in Division 12 (Clinical Psychology, Fellow status), Division 37 (Child, Youth and Family Services, Fellow status) and Division 40 (Neuropsychology). I am also a member of the National Academy of Neuropsychology and the Northern California Neuropsychology Forum.

From 1983 to 1985, I was on the faculty of the University of Denver's psychology department, and then became a psychology faculty member at Yale University in 1985-1989. I then set up a private practice in Sausalito, California and became an adjunct faculty member with the University of California, Berkeley's psychology department and the Wright Institute, a graduate psychology

program also in Berkeley. Through my private practice, I have provided psychotherapy to children, adolescents, and adults; conducted psychological evaluations; and provided testimony as an expert witness in juvenile and criminal cases, including capital cases.

I have published extensively in the area of domestic violence and child maltreatment and its impact on children's development. Included in my publications are three books and numerous peer-reviewed articles and book chapters on various aspects of child maltreatment and family trauma and its effects on child and adolescent psychological outcome. I have also been invited to speak at numerous conferences and workshops, both nationally and internationally, on similar topics. A copy of my curriculum vita is attached as Appendix A to this declaration.

REFERRAL QUESTIONS

In 1997, I was consulted by state appointed habeas corpus counsel, Phillip H. Cherney, for Petitioner, Dean Phillip Carter and prepared a declaration for submission in Mr. Carter's state habeas proceedings. In 2007, I was contacted by Mr. Carter's federal habeas counsel, the Federal Public Defender's Office, and asked to revise my declaration to incorporate the materials gathered by federal post-conviction counsel.

Both state and federal counsel asked me to evaluate Mr. Carter's social history and background in order to:

1. Identify the critical social, cultural, emotional, cognitive and behavioral factors contributing to Mr. Carter's development and functioning in childhood, adolescence and young adulthood;
2. Determine whether Mr. Carter experienced childhood trauma, including physical and psychological maltreatment;

3. Identify the effects of any such childhood trauma and maltreatment on Mr. Carter's subsequent psychological functioning and development; and
4. Render an opinion as to mitigation themes, if any, which could have been developed at the time of Mr. Carter's capital trials.

As a part of my consultation and review, I interviewed petitioner, Dean Carter, hereafter referred to as "Dean," at San Quentin prison, on June 25, 1997 (1 hr), September 24, 1997 (2.5 hrs.), November 19, 1997 (2 hrs), December 21, 1998 (4 hrs) and December 23, 1998 (4 hrs), a total of 13.5 hours. In addition, I reviewed an extensive package of documents provided to me, including transcripts of all penalty phase witnesses presented by defense counsel at both of Dean's capital trials (Los Angeles and San Diego).

I have considered the testimony, declarations, investigative reports as to Dean's childhood and adolescence, with persons having direct knowledge of Dean's background, and educational, juvenile and criminal records, including probation and mental health evaluations, as listed in the appendices hereto.

SUMMARY CONCLUSIONS

The documents I reviewed, along with my interviews with Dean, indicate that Dean's early childhood experiences led to the development of severe psychological and social problems in adulthood. An individual's psychological development is influenced by the interplay between biological and environmental factors. The biological factors that Dean experienced was his family's history of severe alcoholism and direct prenatal exposure to the toxic effects of alcohol. The environmental factors included extreme and chronic abuse and neglect, racial discrimination and multiple institutional placements, beginning at an early age. While his "family" includes his nuclear family ("the Carters"), Dean spent much of

his childhood, pre-adolescent and adolescent years in juvenile institutions and foster care. Although the institutionalizations removed Dean from his abusive home, they did little to remedy the deleterious effects of the chronic and severe trauma he experienced.

Based on review of case materials and expert declarations, Dean's prenatal exposure to alcohol indicates a high likelihood of diffuse brain damage and severe impairment in cognitive and emotional functioning. The effects of this brain damage were further exacerbated by the deleterious consequences of his chronic, malignant, parental caretaking environment.

Dean's experiences in his family led to the development of particularly severe deficits in a number of critical areas. As a result of his parents' violence and alcoholism, Dean developed problems with affect dysregulation as a child that persisted into adulthood. Having been raised by parents who vacillated between emotional neglect and domination and control, he was unable to develop a healthy internal self-structure. As a result, his life outside institutional placement was chaotic, and he has only been able to function adequately in an environment with sufficient external structure to give his life organization and direction.

Dean's childhood experiences led to the development of severe impairment in interpersonal relationships. As a result of early and extreme emotional rejection and isolation (e.g., being chained and left in the house alone while the parents were out drinking), he has developed an exquisite sensitivity to abandonment and rejection. When a situation triggers this core theme, he could become flooded with overwhelming and intense emotions of terror and rage. Due to his problems with affect regulation, he would be unlikely to be able to manage these emotions in an adaptive manner.

CULTURAL AND ENVIRONMENTAL SETTING

Dean was born on August 30, 1955, and raised primarily in Nome, Alaska, which is over 500 miles by land from Alaska's largest city, Anchorage. Nome, which appears to be derived from a Native Alaskan malapropism of the English word Name, is situated on the southwestern point of the Seward Peninsula facing the Bering Sea, less than two hundred miles from the Arctic Circle. It cannot be reached directly by automobile or train, and is ordinarily reached by ship, airplane or dog sled.

Northern Alaska's weather conditions present a formidable challenge to its population. In the winter months, Nome is often snowbound and sub-zero temperatures are the norm; daylight is restricted to a few hours. From June-August, darkness may be limited to a few hours. Weather cycles, particularly in winter, restrict outdoor activities, and alcoholism has long been a major problem for Native Alaskans, especially in Northern Alaska. (7, Psychiatric Problems and Cultural Transitions in Alaska, supra, 209; The Inupiat and Arctic Alaska, N. Chance (1990; Harcourt Brace),[excerpted chapters]; The Last Light Breaking, supra, p. 30; Testimony of Linda Ellana, Ph.D. [SDRT 7904) The high incidence of alcoholism among Native Alaskans has been linked also to depression, anxiety and other mental diseases and disorders. (The Arctic Hysterias of the North Alaskan Eskimos (1972) Anthropological Studies, E.F. Foulks; Testimony of Linda Ellama, Ph.D. (SDRT 7904; 7910.) This was certainly the case in Dean's family, where alcoholism and other mental health problems were evident.

Nome developed from a small Inupiat Eskimo village to a bustling town during the gold rush of 1898, infusing Native Alaskan culture with a flood of American, Russian and European ancestral migrants. (See John Murray, Alaska

(1999 Compass America Guide], pp. 45-50, 289, 297-300; M. Phillips and T. Inui, The Interaction of Mental Illness, Criminal Behavior and Culture: Native Alaskan Mentally Criminal Offenders, Culture, Medicine and Psychiatry (1986) 123-49.)

Unlike other Native American groups, Native Alaskans, of which Eskimos are the largest group, do not live on reservations, so the influx of non-Natives directly influenced the life-style of Native Alaskans. (*Id.*, at 125.) Acculturation, or the process of adaptation of non-Western ethnic groups to Western life-styles, has been a significant factor of influence for Native Alaskans, and the processes have been frequently associated with disintegration of traditional cultures and psychosocial dysfunction of the groups' members. (*Id.*) Inupiat Eskimos have maintained a subsistence-based culture of fishing, hunting, and gathering in an extremely harsh environment over two thousand years, and differences with Western culture continue to be significant sources of conflict. (*Id.*; Decl. of Fred Wemark; Inupiat Ithitqusiat, August 24, 1996, "The Arctic Venturer: Preserving the Inupiat Values" (Ballot, S.), p. 30, "Responsibility to Tribe: Education" (Wilson), p.31; "Spirituality" (Asik), pp. 35-36; "Two Worlds One Whale" (Lord), pp. 58-65, 87, 86 Sierra 4 (July/August 2000); Nick Jans, The Last Light-Breaking, Living Among Alaska's Inupiat Eskimos (1993, Alaska Northwest Books), pp. 30, 42.)

The attempted transition from the "bush" to urban centers, including to "big villages" like Nome, has led researchers to conclude that Eskimos suffer from denigration of native culture and personality, which in turn had resulted in extremely unhealthy social environments. (J.D. Bloom, M.D., Psychiatric Problems and Cultural Transitions in Alaska, Journal of the Arctic Institute of North America, (1972) Volume 25, Number 3, pp. 203-215.) Psychological and social problems, including increased alcoholism, substance abuse, and criminal

activity, are not unique to Native Alaskans from cross-cultural transition, but socio-cultural disintegration and resultant psychological and emotional illness as a result of cultural contact and change is a well documented part of Native Alaskan cultural history, and many of the studies of their unique culture-bound problems occurred during the 1950's-1970's. (*Id.* at 212; J.D. Bloom, Cross-Cultural Forensic Psychiatry in Alaska, Bulletin of the American Academy of Psychiatry and the Law (1975), Volume 111, Number 4.)

While inter-marriage between Caucasian and Native Alaskan adults was not uncommon, it was not until 1980 that 40% of Native children claimed one Caucasian parent. In the 1950-1960, when Dean was growing up in Nome, the population ranged between 2,000 and 3,000, and acceptance of children of mixed heritage was problematic. (*Id.*; LART 5740-41; Testimony of Linda Ellana, Ph.D. (SDRT 7436; 7901-03; 7907; *see also*, Decl. of Fred Wemark).)

Dean, a child of mixed ethnic heritage, experienced first-hand the internal confusion of wanting to align himself with one ethnicity over another, and feeling discriminated against by people in his environment.

FAMILY HISTORY

Maternal Background

Dean's mother, Esther Dorothy Stoney, was born [REDACTED] 1929 in Noorvik, Alaska. Noorvik was a village of roughly two hundred people. The villagers lived in log cabins with dirt floors. Esther was born in a tent. Her mother, Vera Starbuck, was Inupiat. At thirteen-years-old, Vera met Esther's father, George Lablin, a Caucasian. Esther was born when Vera was about fourteen years old. (Cohen Interview with Ida Everin, 7/6/87, 9/7/87; Decl. of Oman.)

Vera was an alcoholic who reportedly suffered from unspecified mental problems. She worked as a housekeeper for a family in Nome and was habitually borrowing “advances” on her paycheck to buy alcohol. (Decl. of Roscoe Wilke.) When Vera moved to Nome for the winters, Dean remembers taking cans of food to her house to ensure that she had something in the house to eat. She eventually died from cirrhosis of the liver, the result of years of alcohol abuse. (Cohen Interview with Ida Everin, 7/6/87, 9/7/87; Decl. of Oman.)

Esther Stoney was “adopted” in early childhood by an elderly Inupiat couple, Polly Kiana, and, her husband, Jim Stoney. Informal adoption into another family was not unusual for Inupiat children. (Decl. of Lela Oman; E. Adamson Hoebel, Law-Ways of the Primitive Eskimos, 31 Journal of Criminal Law & Criminology, pp. 663, 670-72 (1953).) Polly Kiana Stoney, Esther's adopted mother, had no legs. Esther assisted her with many chores, including fishing for food. Polly's husband, Jim, Esther's adopted father, died when Esther was very young. Polly and Esther, poor people who subsisted on welfare, never left Noorvik, except to go to traditional fish camps. (Cohen Int. with Ida Everin, 7/6/87, 9/7/87; Cohen Int. with Esther Carter, 6/16/87; Decl. of Lela Oman; see also, Decl. of Fred Wemark.)

Because Esther was not a full-blooded Eskimo, other children in the village routinely discriminated her against. This kind of discrimination against mixed race children was common, and Dean experienced it as well. (Cohen Int. with Ida Everin, 7/6/87, 9/7/87; Decl. of Lela Oman; *see also*, Decl. of Fred Wemark.)

In her early teens, Esther moved in with Polly Kiana's niece, Lela Oman, and her husband, Carl, who lived in Candle, Alaska. The family owned a bed and breakfast and had five children. Esther worked taking care of the children,

washing dishes, fixing the beds and, later, helping with the cooking. (Decl. of Lela Oman; Decl. of Esther Carter.)

When Esther was sixteen, the Oman family moved to Nome, Alaska and took Esther with them. Esther eventually moved into her own apartment. Jerry Carter, Esther's first child, was born on [REDACTED] 1951, when Esther was twenty-two years old. Dean was born four years later. The boys' fathers are unknown. Jerry's father is thought to be a man named Chuck Reader, but Mr. Reader denies knowledge of Jerry's biological father. Many Nome residents suspect that military men passing through town fathered Jerry and Dean. (Decl. of Chuck Reader; Decl. of Lilly Rose; Decl. of Catherine Dickson.)

Paternal Background

Virtually nothing is known about Dean's natural father. Efforts to uncover the truth about Dean's biological father have uncovered only rumor, suspicion, and poorly documented historical data. Perhaps for cultural or other reasons, including his mother's refusal to identify Dean's father, Dean's biological father remains a mystery. "Earl Ramey" has been rumored to be Dean's father, but parentage has never been verified and no one by that name has ever been identified as related to Dean. (LART 5937-38; Probation Report of Kenneth E. Brown, 1/25/71; Cohen Interview with Esther Carter, 6/16/87; Decl. of Lela Oman.)

It is likely, however, that Dean is part Caucasian, although that is based upon reasonable assumption and personal observation. Dean is at least one-quarter Inupiat. (Birth Cert.; Decl. of Lela Oman, Application to Jesse Lee Home, 9/10/64; Nome School Records; Seward School Records.)

Stepfather's History

In 1960, when Dean was five and Jerry was eight, Esther met and married James Carter. (Decl. of Esther Carter.) James Carter allegedly adopted Dean and

Jerry, but no legal records confirm the adoption. Both boys took the surname Carter. What father figure Dean had, was found in James Carter.

Esther and James Carter eventually had two children of their own, Pollyanne, born [REDACTED] 1963 and Goldie, born [REDACTED] 1967. One child apparently died in childbirth between Dean and Pollyanne. The girls knew Dean only slightly and intermittently, since shortly after Pollyanne's birth, he was only intermittently living in the Carter home. (SDRT 7531; 7546; 7547-7549; Cohen Int. with Pollyanne Reasner, 7/6/87; Case History Summary of S. R. Sobel, Counselor, 1/17/75.)

James Carter was born [REDACTED] 1919, in Pasco, Washington, and died in Seattle, Washington, [REDACTED] 1976. (Death Certificate; Cohen Int. with Esther Carter, 6/22/88.) James Carter was ten years older than Esther and had the appearance of an "old man." He was "a big, intimidating guy," who always seemed "grouchy and irritable." (Decl. of Beverly Gelzer.) "Jim was a big strong man standing well over six-feet tall Jim was stern and people didn't talk back to him." (Decl. of Cherryl Stavish.) People in Nome remember his generally unpleasant demeanor. "James was antisocial and he was not the type of person I would have befriended," states one contemporary. (Decl. of Catherine Dickson.) When James and Esther met, James Carter was an officer with the local police. From 1964 to 1971, he served as the chief-of-police and later became an Alaska State Trooper. (Jesse Lee Home Appl.; Pre-Sentence Report of Paul Tannenbaum, 10/27/77; Death Cert.) James's position in law enforcement gave him significant power and authority in the small community of Nome. "He was drunk on his authority as the Chief of Police in Nome." (Decl. of Catherine Dickson.)

James Carter was also known for his "tendency to be condescending towards natives." (Decl. of Catherine Dickson.) In 1971, when Dean was a teenager,

James Carter worked as a dormitory aid at William Beltz School, a high school in Nome, Alaska devoted to educating Native children from the Alaskan bush. James Carter was fired within a few months because he had characterized Native Alaskans in extremely derogatory terms, calling them “worthless, lazy, trouble causers.” (Testimony of Linda Ellana, Ph.D. [SDRT 7900] ; *See also* Prob. Rep. of Kenneth E. Brown, 1/25/71.)

The Carters’ Abusive Marriage

A controlling man, James Carter abused both his wife and his children. Esther remembers, “he made sure we followed all his rules at home, or else.” (Decl. of Esther Carter.) Following a pattern typical to abusers, James Carter was extremely “jealous” and would push Esther around. (*Id.*) A contemporary recalls seeing Esther with bruises, a black eye, and broken glasses. (Decl. of Cherryl Stavish.)

Like many abusers, James Carter displayed an unwillingness to confront anyone of equal strength. A fellow police officer recalls, “James Carter was not the type to confront someone his own size, and rarely made his own arrests. James usually called another officer for assistance if he needed to arrest someone.” (Decl. of Arthur “Guy” Martin.)

A close friend, Edna Buffas, describes Esther Carter as a “simple minded woman who gets hysterical under pressure.” (Cohen Int. with Edna Buffas, 5/16/87; LART 5740; Decl. of Lela Oman.) Esther acknowledged that she was incredibly naïve and followed James Carter's commands without question, claiming that James “wore the pants.” In other words, “whatever he says goes.” (Decl. of Esther Carter.)

Dean at first described his parents’ marriage as a close one, yet upon further questioning, a different picture emerged. Esther and James argued and the

arguments escalated into physical violence. Dean described his mother as “strong and quick,” “stubborn like a bulldog,” frequently “nagging and pushing, with a mean streak.” James contributed to the arguments by “egging her on, sometimes too far.” According to Dean, their arguments were primarily related to jealousy, with Esther often losing her temper and hitting her husband with an object, her fists or slapping him with her hands. He recalls times that he and Jerry broke up their fights; Dean siding with his mother and Jerry with James. Dean observed directly the arguments and violence, but he also heard them argue in the other room with furniture being thrown around. Dean does not recall his stepfather hitting his mother in front of him.

It is common for children from violent families not to have explicit memories of specific violent incidents. Children in these situations try to avoid their parents’ arguments and fights for several reasons. The fighting is emotionally traumatic to them and potentially dangerous physically, and children attempt to protect themselves from being unintended victims. One way in which children attempt to regulate the intense emotions associated with observing their parents’ violence is by trying not to think about the experiences, and, by not thinking about these experiences, they forget.

Parental Alcoholism

Nome was referred to as “sin city,” because of the residents’ heavy alcohol drinking. It seemed to Esther that people drank more in Nome than elsewhere in Alaska. (Decl. of Esther Carter.) Dean reported that the Nome bars opened at 6:00 a.m., stayed open all day and all night until 5:00 a.m., closed for one hour and then re-opened again. Nome was a small town and the majority of the socializing occurred in neighborhood bars. When his parents were not at their respective jobs, they drank.

Esther developed a significant alcohol problem in Nome, at times drinking throughout the day. (Decl. of Esther Carter.) Lily Rose remembers meeting Esther when she first moved to Nome. Lily was in her early twenties and Esther was a few years her junior. Esther and Lily became good friends and on the weekends, the two went out drinking together. (Decl. of Lilly Rose.) Esther also went out to bars during the week with other friends. (*Id.*)

After Esther became pregnant with Dean, she continued drinking regularly. Lilly Rose recalls,

I don't recall seeing Esther pregnant from Jerry, her first son, however I do know that Esther continued to drink throughout her pregnancy with Dean. When Esther was expecting Dean, I used to see her around town at bars drinking, especially during the weekend.

(Decl. of Lilly Rose.)

James Carter was also known to be a "heavy drinker." He "had all the characteristics of a heavy drinker. For example, his nose was red and swollen." (Decl. of Arthur "Guy" Martin.) Esther acknowledges that her and her husband's alcohol abuse caused conflict and physical confrontations. (Decl. of Esther Carter.) Her eldest son, Jerry, and her daughter, Pollyanne Reasner, joined others in describing their mother, as well as James Carter, as heavy drinkers, abusive to one another and their children. (LART 5755-56; 5769-70; SDRT 7437-39; 7444; 7549-50; 7583; 7589; Cohen Interview with Pollyanne Reasner, 6/14/87; Cohen Interview with Jerry Carter 10/17/87.)

Many Nome residents also described the Carters' alcohol abuse. Roscoe Wilke remembers, "[t]hey both drank a hell of a lot of alcohol." (Decl. of Roscoe Wilke, 4/4/07) Another contemporary recalls, "Esther and James Carter were heavy alcohol drinkers. I remember seeing them at bars drinking all the time."

(Decl. of Lilly Rose.) Chuck Reader “would regularly go out drinking with Jim Carter and Esther Carter. Esther could really drink.” (Decl. of Charles “Chuck” Reader.) Dean’s childhood friend often found Jim and Esther drinking when he visited the Carter family home. (Decl. of Vaughn Johnson.)

EARLY CHILD DEVELOPMENT

Dean was born at Nome’s Norton Sound Regional Hospital on or about [REDACTED] 1955. His birth certificate indicates “Dean Phillip Stoney” was born on [REDACTED], but the birth date of [REDACTED] 1955 has been used as custom.

His Inupiat name is “Mulluq” although his mother refused to teach him the Native language and he was forbidden to speak it. (Decl. of Fred Wemark.) No father is listed on the birth certificate and Dean has never met his biological father. Dean’s mother described him as a baby that did not cry much, but has offered little else about her infant son. (Cohen Int. with Esther Carter, 6/16/87.)

Lela Oman, a practical nurse and family friend, witnessed Dean’s birth. Dean’s head was larger than normal. Lela also noted other abnormalities of Dean’s skull, which alarmed her. There is no indication that Esther sought additional medical attention for her infant son. (Decl. of Lela Oman.)

Dean, his mother and brother, and later with James Carter, lived in a small house between the Snake River and Dry Creek, within two blocks of the vacant lot where the abandoned “old gold house” had been situated, and which in the 1970’s was converted into a park, known as the (contaminated) “Steadman Field.” (Decl. of Lela Oman; Weston Report.) Nome was a gold mining town and the old gold dredges became a place for Dean to play and to hide from his abusive home. (Decl. of Vaughn Johnson.)

Given Esther’s alcoholism and her pervasive neglect, it is extremely likely that Dean’s first five years were troubled. Dean’s difficulties, however, escalated

with the introduction of James Carter into the household. Esther remembers, “as soon as [her] husband Jim came into the picture, Dean began to act up and he ran away constantly.” (Decl. of Esther Carter.)

On or about April 15, 1962, when Dean was six-years-old, he was struck by a taxicab driven by Edna Buffas. The streets were crowded and Ms. Buffas did not see Dean as he entered the street. She does not recall whether Dean was rendered unconscious by the blow, but he did appear to be shaking and “in some sort of convulsions.” Hospital records note an accident did occur but injuries reported are minor. (Pasas Interview with Edna Buffas, 9/30/86; Norton Sound Hospital Record, 4/15/62.) Dean's recollection of the experience is of a “white light in a black tunnel,” and of regaining consciousness in his stepfather's automobile; he recalls James Carter was crying at the time. Dean remembers receiving an ice pack at the hospital for his head. When he returned home after the accident, he recalls that his mother was indifferent to him, but his stepfather showed some feeling.

Esther's actions at the time of the accident exemplify her failure to address even Dean's basic emotional needs, which was likely the case from the moment he was born. Although Dean recalls his stepfather responding to him at that moment in a humane way, the preponderance of data indicates that this was an aberration of the typical behavioral response by his stepfather.

As a child, Dean is remembered as “slow” and “not the sharpest kid around.” (Decl. of Lilly Rose, Decl. of Roscoe Wilke.) People had the impression that “something was off about [Dean]; Dean just seemed different.” (Decl. of Beverly Gelzer.) “I only saw Dean Carter a few times” a local police officer recalls, “but I always thought there was something wrong with the boy; he was different.” (Decl. of Cecil Johnson.) According to a childhood contemporary, Beverly Gelzer,

Dean had a hard time relating to the other kids. Sometimes when we were playing, the other kids would look at Dean and say what don't you understand?' There seemed to be a different process going on in his head. Dean would try to be funny, but his jokes weren't funny and sometimes they made no sense. He tried very hard to fit in.

(Decl. of Beverly Gelzer.) Even now, his childhood contemporaries comment of Dean's lack of attention span and difficulty remembering things. (*Id.*)

It was obvious to all that Jerry was the favored child. He was perceived of as "smart," and he excelled in school and sports. (Decl. of Lilly Rose.) "Jerry was sharper and more on the ball than Dean." (Decl. of Beverly Gelzer.) Jerry was pampered and petted by Esther, who reserved her affection entirely for him. (Decl. of Charles Reader.) "I never saw Esther be affectionate or speak kindly to Dean." (Decl. of Nancy Green.)

Dean became the scapegoat for the family. Dean was blamed for every "bad" act he committed with no insight into the family's contribution to his behavioral concerns. Dean was, and by his mother still is, perceived of as "acting up." (Decl. of Esther Carter.) Instead of acknowledging their role in Dean's "cry for help" behavior, the Carters' determined that he had been "born bad." When Dean would disappear for days at a time, the other Carter children would explain, "Dean was a bad boy." (Decl. of Cherryl Stavish.) Every possible wrongdoing was laid at Dean's door without question.

The rejection of Dean was exacerbated by the Carters' positive treatment of Jerry. "Jim Carter never had anything nice to say about Dean but put Jerry on a pedestal when comparing the two boys. He would constantly refer to Dean as "that bastard." (Decl. of Cherryl Stavish.) Adults in the community observed that Esther Carter "singled out" Dean in a "negative" way during these childhood years.

Harriet Brown, a missionary in Nome, picked up Dean and Jerry to take them to Sunday school for a brief time in 1961, and she observed the “very definite” (negative) way in which Dean's parents treated him as compared to Jerry. (SDRT 7616-24.) Bertha Adsuna, an Eskimo elder, had known Dean's mother since Esther had moved to Nome, and recalled Dean as “mostly alone” in the yard outside the Carter home; he was sadly “cast down” by his mother, while Jerry was “protected.” She observed Esther give Jerry cookies, while Dean was excluded; Jerry had new clothes, while Dean had hand-me-downs. (SDRT 7578-86.) She observed on one occasion that Esther required Dean to eat off the floor, while Jerry was allowed to eat at the table. (Pasas Interview with Bertha Adsuna, July 1989.) Beth Farley, Jerry's contemporary, also recalled Dean during these childhood years as always being alone at the Carter house, “like he didn’t belong” in the family. (SDRT 7642-66.) The family looked upon Dean as if he were “an orphan.” (LART 5746.) Ruth Butts, also Jerry's age, observed similar isolation, neglect and rejection. (SDRT 7681-96.)

There is also evidence that Jerry joined his parents in abusing Dean. A neighbor remembers that Esther and Jerry both picked on Dean and “when they weren’t picking on him or making fun of him, they were ignoring him.” (Decl. of Nancy Green.) Jerry seemed “to be in control of Dean.” (Decl. of Beverly Gelzer.) Despite his privileged role, Jerry showed signs of his exposure to the childhood trauma. A neighbor girl remembers Jerry “jumping” on her and trying to sexually assault her when playing a game of hide-and-seek. (*Id.*)

Although the reports of Dean’s abuse are far more extensive, at least in his early years, Jerry suffered abuse as well. (*See e.g.* Decl. of Arthur Martin, Decl. of Michael Ahmasuk.) It would not be unusual for someone in Jerry’s position, older, stronger, and smarter to try to deflect the abuse to someone younger and smaller.

In abusive families, survival is key, and children find different strategies to achieve that goal. If survival requires taking the side of the abusive parent against another victim, to protect themselves, some do so. As Jerry was able to succeed in sports and school, he may have been largely successful.

The Carters' pattern of scapegoating Dean and coddling Jerry continued as long as Dean was in the family home. On one occasion, a family friend believed that Jerry might have been involved in stealing his daughter's motorcycle. But the Carters "would not allow [him] to speak to Jerry. Jim and Esther refused to even consider that Jerry might have done something wrong. They just assumed if someone had taken something, it had to be Dean." (Decl. of Charles Reader.)

CHILDHOOD ABUSE

Dean was the victim of extreme, intense and unconscionable physical and emotional abuse that began in his early childhood. Whether the abuse began with James Carter's entrance into Dean's life or James Carter simply escalated the violence is unclear. It is certain, however, that James Carter regularly abused Dean.

Dean's parents chained him like an animal. Esther admitted that James chained Dean to his bed "many times." (Decl. of Esther Carter.) Looking back on this form of early childhood restraint, a juvenile court probation officer reported, "when Dean was very young . . . the Carters would leave him chained to a bed post so they could go out socializing." (Prob. Rep. of Kenneth Brown, 1/25/71.) Jerry Carter recalled that Dean was also chained up when his parents went to work. (SDRT 7451-52; 7469-71.) Dean may have been chained to his bed for periods as long as two weeks unchained only to use the bathroom. (S. R. Sobel, Oreg. Corrl. Records.)

In 1964, a Carter neighbor contacted Guy Martin, a police officer, to investigate possible abuse at the Carter home. He entered the home to find both Dean and Jerry chained to the floor. Next to the boys was a bowl of water. “I could see the boys had been crying.” (Decl. of Arthur “Guy” Martin.) According to the neighbor, “boys were chained every time James and Esther went out to drink, which was frequently because they were both heavy drinkers.” (*Id.*) Dean Carter was thought to be nine or ten years old at the time. A local water deliveryman also reported seeing Dean chained to the ground when he delivered water to the Carter family. (Decl. of Catherine Dickson.)

Dean’s childhood peer Vaughn Johnson recalls that Dean would disappear for “days at a time.” Vaughn “once asked Esther where Dean was, but she didn’t give [him] an answer.” (Decl. of Vaughn Johnson.) At school, Dean told his classmates that Jim Carter locked him in the closet. (Decl. of Michael Ahmasuk.) The Carters’ abuse of Dean was so prevalent that “whenever [his classmates] did not see Dean for a few hours, [they] assumed Jim Carter had locked him in a closet.” (Decl. of Michael Ahmasuk.)

The “closet” Dean was kept in may have been discovered by a friend of Dean’s younger sister who peeled back a piece of wood paneling in a bedroom in the Carter home to reveal a “room the size of a jail cell” that had in it “only an army-type bed. The only window in the room, which was small, had bars on it.” (Decl. of Cherryl Stavish.) A similar “jail” cell was found at the Carter summer camp. Cherryl Stavish “discovered a small shed about fifty feet from the Carter’s main cabin. When [she] looked inside the shed there were bars on the very small single pane window and nothing inside. To [her], it looked like a short ‘jail cell.’” (*Id.*)

When Dean was six years old, he started leaving home without warning or explanation; more than once he is reported to have stayed out over night. (LART 5780-81; Cohen Int. with Jerry Carter, 10/17/87.) Dean's recollections are of "wandering about town," but he has no memory or insight into other reasons for leaving home at such a young age. Mostly, Dean recalls being alone in the dark at night, and feeling fearful about returning home because of the physical beatings that awaited him.

Over the next three-four years, Dean would repeatedly "run away" from home. On one occasion he was located in a nearby tool shed two days after disappearing. Twice, Dean attempted to stow away on an airplane in order to leave his family. Once, he hid in the cargo bay while the plane flew to Anchorage, a five-hour, cold flight in the middle of winter. He was found when the plane landed and was sent back to Nome. (See, LART 5755; SDRT 7440-43.)

As Dean's attempts to escape his alcoholic, abusive home escalated, the Carters further justified their abuse and took little steps to hide it. Chuck Reader remembers visiting a friend at a summer camp across the way from the Carter family. "When I arrived, the Johnsons and the Carters were having a picnic. As the kids played around the camp ground, I noticed Dean hopping around the cabin while chained at both ankles." When confronted about his abusive treatment of Dean, Jim Carter responded only, "can't let him loose." Later, the neighbor would tell Chuck that the Carters kept Dean chained up, locked up and secluded most of the time. (Decl. of Charles "Chuck" Reader.) Even today, Esther Carter describes these humiliating, demeaning and physically abusive practices as "discipline." (*Id.*)

Esther Carter acknowledges that Jim Carter "used a belt" to discipline Dean. (Decl. of Esther Carter.) Dean remembers his stepfather using a barbershop strap

and leather belt to whip him on his legs and buttocks. A neighbor child heard Dean's cries from across the camp and was told later that Jim Carter beat Dean with a two-by-four. (Decl. of Beverly Gelzer.) Dean remembered feeling afraid of his parents and angry at their brutality. He recalled thinking even at a young age, that "this wasn't the way you treat your kids." As a result of his parents' physical abuse, Dean had bruises on his legs, back, butt, and welts on other parts of his body that hurt and made it painful to sit down. He recalled that the frequency of beatings could be unpredictable, sometimes occurring as much as two to three times per week, and other times every couple of weeks or longer. Sometimes his parents would be drinking when they beat Dean, sometimes they would sober. (*See also*, LART 5756; SDRT 7437-38; 7453.)

Esther Carter, although she now contends that she disagreed with Jim Carter's treatment of Dean, did nothing to stop it.

My husband Jim disciplined Dean in ways that I did not approve of but because he was bigger and taller than me, I was very afraid of him. There was really nothing I could say or do to stop the abuse. (Decl. of Esther Carter.)

Esther, in fact, claims not to know details of James's abusive treatment, "I don't know what happened between my son Dean and my husband Jim when I was away." (*Id.*)

It may well be that Esther's presence provided minimal protection or comfort to Dean. Attachment bonds are extremely strong. Children and adults will routinely turn toward an abusive attachment figure for comfort and protection. Jerry recalls one occasion when Esther came home late one night from drinking. Dean pleaded with her to stay home, but she rebuffed him. As she again left home, around 2:00 a.m., Dean grabbed onto the rear bumper of the automobile and he

was dragged as she pulled away. Esther returned to the house, carrying Dean, whose feet were bleeding and torn. But she did not stay, dumping Dean off and heading back to the bar. (SDRT 7450-51; LART 5756-59.)

Esther Carter was also an active participant in Dean's abuse. Dean recalls his mother using whatever was available, including her fists, a switch, extension or electrical cord, a boot or shoe, to beat him everywhere about his body, seeming to "not want to stop once she got started." She would work herself into a frenzy, screaming and cursing as she beat Dean "really hard," and the beatings would last "a really long time." She is also remembered as being generally "mean" to Dean, picking on him, teasing him and never showing him any affection. (Decl. of Nancy Green.)

Victims of marital violence find a variety of ways to physically and emotionally survive the abuse. Although Esther was a victim, she also knew how to protect herself by fighting back and at times, even precipitated arguments and physical violence. Not all battered women are helpless, defenseless victims. There is category of violent marriages where the abuse is mutual. Although Esther was physically aggressive to her husband, it does not take away the fact that she was also frightened of him and lived under his domination and control. Victims often build up tremendous rage that can be directed toward their spouse or their children. In the Carter family, both Esther and James turned their frustration and rage with one another against Dean.

As Dean grew older, his isolation increased. In typical abusive fashion, his parents' abuse oscillated. Friends of the Carters' younger children recall that there was rarely socializing at the Carter household and that the Carters' daughters were rarely allowed to have friends over. (Decl. of Cherryl Stavish.) Although they

frequently chained him up they also occasionally locked him out. A Nome townsman recalls:

Once, when Dean Carter was only twelve or thirteen years old, I came across him sitting alone on the school steps. He was crying. It was late, around 11:30 at night, and it worried me to see him out so late alone. I asked him why he was out and Dean told me that his father wouldn't let him in the house.

(Decl. of Roscoe Wilke.)

The Carters' abusive practices of "chaining" and beating Dean continued into his critical adolescent years. When Dean was fourteen or fifteen years old, Cherryl Stavish, a friend of his younger sister saw Dean chained in the rain to the Carter family's summer cabin.

It had been pouring rain for a few days. When we returned to the Johnson family cabin after a day in Nome, I saw Dean handcuffed and shackled by the ankles to the outside stilts of the Carter cabin. Dean was wet, cold, and hungry. From the look of him, Dean must have been chained to the cabin for hours and hours.

(Decl. of Cherryl Stavish.) Distraught by what she'd seen, Cherryl asked the father of the family she was staying with to intervene.

At first, Mr. Johnson told us to go into the cabin. Once we were all inside, Mr. Johnson decided he should go check on Dean and maybe cut him loose. Mr. Johnson's daughter, Wendy (my age) and I begged to go with him so we could bring Dean something to eat and a blanket. Mr. Johnson finally agreed, and all three of us walked over to the Carter cabin. After Mr. Johnson spoke to Dean, he worked to cut Dean loose. Dean told Mr. Johnson that Jim Carter

had chained Dean to the cabin. Dean would not say anything more about it.

(Decl. of Cherryl Stavish.)

A contemporary of Dean's recalls seeing Dean as a young teenager handcuffed and chained the back of the family's camp house. (Decl. of Vaughn Johnson, 3/3/07.) When asked, Dean said that James Carter had chained him there; the friend simply left. (*Id.*) Dean's sister Pollyanne, eight-years younger than Dean, listened to her father beat Dean through the thin walls separating their rooms. (Decl. of Cherryl Stavish.)

In Nome, it was common practice to chain sled dogs closely to their doghouses. The chain provided just enough length for the dog to get into the house, but not enough rope for the dog to stray more than a few feet from the chain's point of origin. (Decl. of Marion Pasas.) The descriptions of Dean chained to his home seem markedly similar to this customary treatment of dogs.

The extent and depth of the child abuse Dean suffered went well beyond the image of James Carter as a strict disciplinarian that was portrayed at trial. In fact, the trial testimony perpetuated the false notion of James Carter's abuse as "discipline."

It is highly likely that the abuse of Dean Carter was significantly worse than what was publicly known. Abusers tend to minimize and deny the extent and degree of their abuse to themselves and to others. James Carter was no different. Esther Carter contends that he was "private and secretive" about things. (Decl. of Esther Carter.) Shortly before he died, Jim Carter admitted to Esther that he had done terrible things to Dean and expressed regret. (*Id.*) Knowledge of the full extent of Jim Carter's maltreatment likely died with him.

Victims also frequently minimize their abuse because talking or even thinking about their experiences triggers intense emotional reactions. Because they were never taught adequate emotion regulation strategies, the flooding of traumatic emotional memory can overwhelm their ability to cope, and can often lead to depression, anxiety, and/or severe acting out. Therefore, not thinking about traumatic experiences early on cuts off emotional reactions, which are necessary to punctuate events so that we can remember them later. This becomes a problem when current situations evoke overwhelming emotional reactions that tax the individual's ability to regulate affect in an adaptive manner. Another reason why victims may not remember specific acts of violence is when there are so many acts that occur over a long period of time, victims may develop a generalized experience rather than recalling each specific individual act.

LACK OF SOCIETAL INTERVENTION OR PROTECTION

Although "the word in town" was that James Carter abused both Dean and Jerry nothing was done to prevent it. (Decl. of Catherine Dickson.) For example, one local man recalls that although he "did not really know the Carter family" it was "well known" that the Carters "locked up their kids." (Decl. of Robbie Fagerstrom.) Dean's childhood friend recalls, "nobody would say anything about Dean's disappearances." (Decl. of Vaughn Johnson.) Even Dean's desperate attempts to escape his home life, although considered "a very big deal" in Nome, were not sufficient to cause any intervention. (Decl. of Beverly Glazer.)

James Carter's position as chief-of-police made the notion of complaining to the police difficult. A townswoman related a conversation she had with Robert Sherman, a deliveryman who witnessed Dean chained inside the Carter home. "I remember Robert's facial expressions of disbelief as he took off his cap and rubbed his head when talking about Dean." Despite the two's disgust, they did nothing.

“I also remember that we discussed the fact that as the Chief of Police, how could anyone stand up against James Carter.” (Decl. of Catherine Dickson.)

One neighbor, Sophie Swanson, tried to reach out to the police. In typical small town fashion, Sophie Swanson contacted Guy Martin, a patrolman and a family friend. Although Guy Martin was off-duty, Sophie contacted him because she and Guy’s mother were close friends. Sophie told Guy that she thought the Carter boys were being abused and asked Guy Martin to check on them. Guy Martin found the Carter home empty except for Dean or Jerry, who were chained to the floor. (Decl. of Arthur “Guy” Martin.)

Although Guy Martin was “enraged,” he did no more than verbally confront Jim Carter who told him “to mind [his] own business or else.” (Decl. of Arthur “Guy” Martin.) Sometime later, before he left the police department, Guy Martin told James Carter “he’d better take care of it or [Martin] would.” (*Id.*) Again, James Carter’s position interceded to prevent any action from being taken and Guy took no further action. “I regret not reporting [the abuse] to the district attorney but at the time I was young and this would have meant turning over my superior, the man I reported to.” (*Id.*)

Small town culture also factored into the townspeople’s reluctance to intercede. In 1964, for example, there were four officers on the Nome police force, Robert Oliver, James Carter, Larry Minnix and Guy Martin. (Decl. of Arthur Martin.) Both James Carter and Larry Minnix would serve as chief-of-police. (Decl. of Lilly Rose.) Minnix’s wife, Lillian Minnix, was a good friend and drinking partner of Esther Carter. (*Id.*) After he became police chief, Chief Minnix told a junior officer Cecil Johnson “Esther and James Carter chained the boys (Jerry and Dean) to the bed when they went out drinking and when they went to work.” (Decl. of Cecil Johnson.) Although Cecil Johnson recalls Chief Minnix

as a “righteous man” he acknowledges that Minnix never took any action on the abuse, because “people mind their business in Nome.” (Decl. of Cecil Johnson.) Beverly Gelzer, whose family had a fish camp near the Carters knew of the abuse and was not surprised that nothing was done to protect Dean. “It is part of the small town way not to talk about personal things.” (Decl. of Beverly Gelzer.)

Racism against Native Alaskan’s also played a part in the societal failure to intervene to protect Dean. Esther and Dean were part Native and Alaskan “racism and discrimination were prevalent in Nome back then In those days, even if people knew that certain things were going on like child abuse, it was quickly dismissed especially if it involved Natives.” (Decl. of Catherine Dickson.)

EDUCATION

Dean’s education was sporadic and irregular, occurring in Nome and in various institutions. Throughout his educational career, he consistently reported serious problems with attention and concentration that went untreated. Despite high average intelligence (Psychological Evaluation by Marianne Hagen, Ph .D., 6/1/77; Decl. of Myla Young, Ph.D.), Dean performed poorly in school and was unable to apply his cognitive strengths to academic benefit. Problems with attention and concentration are hallmark indicators of potential brain damage, and should have been evaluated in greater detail.

According to Dean, the Nome elementary, junior high and high schools were all located in one building. There were approximately twenty students per class and two classes per grade (“A” and “B” sections). The “A” section was composed primarily of Caucasian children, while the “B” section included “native” children. The children in the “B” section were considered the less intelligent of the two groups. In what would have been Dean's senior year, the high school was moved to a separate building about 4 miles out of town.

Dean entered the first grade at Nome Elementary School in September 1961, at age 6, but was absent a total of fifteen days and was noted as tardy six times. (Nome School Records.) Dean recalled that as young as six years old, he felt “apart” and “different” from other children, and uncomfortable in the presence of Caucasian children. Based on his report, Dean was first placed in the “A” section but then moved to the “B” section with “native” children, with whom he felt more comfortable. Dean noted that he found it difficult to concentrate on schoolwork and “day dreamed” most of the time. At the time, the reasons for Dean's difficulties with attention and concentration were not clear-whether they were organically based, whether he was preoccupied with problems at home, a combination of the two, or indicative of some other problem. However, the school did not evaluate him further.

Dean first experienced name-calling at public school in first grade, and recalls being labeled a “half breed” by other children and parents. (SDRT 7665-66.) The use of terms, such as, “Salmon Cruncher” and “Fish Head Soup,” were common epithets used against children of mixed heritage in Alaska, who were neither accepted by whites nor Native Alaskans. (SDRT 7751.) Dean recalls that he identified more with Eskimo traditions and peers, unlike his siblings. His mother, however, refused to allow him to learn Inupiaq, the native Eskimo tongue; Esther told her son that she had been beaten physically by the missionaries when she had spoken her native language as a child.

Dean appears to have been qualified to matriculate to second grade with a “C” average from first grade, but there are no grades or attendance records for Dean in second grade. (*See*, Nome School Records.) Dean recalled that he began to skip school when he was in the second grade. His mother was in bed after working the late shift or graveyard shift by the time he went to school, and his

stepfather was beginning his shift at the police station. Therefore, there was no one to send Dean off to school and make sure he went to class, he felt a lack of caring and interest from his parents, and knew that if he showed up at school late, he would get into “trouble” i.e., be beaten with his stepfather's barber strap.

Dean apparently attended third grade at Nome Elementary School, at least for one semester. Again, his “C” grades were noted. But records do not indicate why Dean attended school only in the fall semester in 1963, or why there was no attendance records for Dean during his second-grade years. (Nome School Records.)

After Dean was sent to the Jesse Lee Home, he attended the local public school, Bayview Elementary, where he barely completed the first semester of the fourth grade. (Appl. for Admission; Seward School Records.) Dean recalls being prescribed his first set of lenses to correct blurred vision, and he believes his scholastic performance improved for a time, but his grades were all “D,” except for a “C” in reading and an “F” in arithmetic. (Seward School Records.) Dean's feelings of “isolation” did not go unnoticed by at least one of his schoolmates at Bayview Elementary, Joyce Wemark Birdinground. (Decl. of Joyce Wemark-Birdinground.) She recalls Dean as being very lonely, emotionally withdrawn, and extremely quiet and detached from his surroundings.

Dean returned to the Carter home in Nome in spring, 1965. Psychological problems and conflicts with his parents and his community had not been resolved. Dean completed the fourth grade at Nome Elementary School as a nine year old, but he continued to run away from home. Although Dean's attendance was sporadic over the next two years, he completed the sixth grade at Nome Elementary in 1967.

Dean recalled liking his fifth and sixth grade teacher (Mr. Mann), and for the first time, began to enjoy school and felt that “learning could be fun.” This was the first time Dean had a male teacher, and the first time that he felt someone took an interest in him, encouraging and supporting his schoolwork. By Dean's report, he stayed out of trouble most of those two years. He also reported helping out an older, blind woman by “being her eyes.”

When Dean was at Alcantra youth facility in February 1969, he was able to continue with school. His seventh grade teacher initially considered him immature for his age, easily distracted, and in need of direction and reassurance. (Wasecha Report, 3 /11/69.) But in March 1969, the same teacher observed that Dean was unable to work on assignments because he was restless and unable to concentrate. (*Ibid.*)

When Dean was released from a youth facility to his parents in fall, 1969, he entered the second semester of ninth grade as a fourteen year old at Nome Public School. His academic performance was barely passing, and his attendance sporadic. (Prob. Rep. of Kenneth E. Brown, 1/25/71; Nome School Records.) His relationships at home did not improve, but drug use escalated, as is discussed in more detail hereafter.

The following year (1970), when Dean was fifteen, he entered the tenth grade, which was the last grade of formal education he would complete. His first semester attendance was again poor and his grades were failing in each of four classes. His school attendance and performance for eleventh grade are marked as incomplete. (Nome School Records.)

As Dean came into adolescence, the dynamics in his family continued unabated, and he was increasingly rejected and isolated from them and from other sources of potential support in the community. Although he had above-average

intelligence (Psychological Evaluation by Marianne Hagen, Ph.D., 6/1/77; Decl. of Myla Young, Ph.D.), he consistently had trouble with schoolwork and did not make significant connections with any teachers who might have helped him out, other than a relatively short-lived connection with his elementary school teacher Mr. Mann. School records do not disclose that Dean ever received any intervention. As neuropsychological and intelligence tests disclose, Dean has probably compensated for many psychological deficits with above-average intelligence. (Decl. of Myla Young, Ph.D.)

Alaska juvenile court and institutional records are consistent with Dean's recollection of his childhood experience at school. He is observed by one of his 8th grade teachers at Alcantra Youth Camp as an "independent" student but "restless in class and cannot work at length on assignments . . .," and two years later as an "intelligent but disoriented youth." (Wasecha Report, 3/11/69; Prob. Rep. of Kenneth E. Brown, 1/25/71.)

INSTITUTIONALIZATION

When Dean was nine-years old the Carters took the incredible step of sending him to an orphanage. Over the next seventeen years, from age nine (1964) to age twenty-six (1981), Dean spent over three-quarters of his life institutionalized, and, as discussed hereafter, all evidence confirms that in the institutions where Dean was housed did not provide any therapeutic intervention.

At nine, Dean was sent to a Methodist home for unwanted Native Alaskan children, Jesse Lee Home, in Seward, Alaska. Parents of the children "either couldn't or wouldn't raise them, or they were sick." (SDRT 7717; Decl. of Fred Wemark, Decl. of Florita Richardson, and Decl. of Monty Richardson.) Dean was rejected by his parents, uprooted from Nome, and sent 1,200 miles away to a strange place, where he received no therapeutic intervention or special education.

Many of the children at the home were there because they were orphaned or their parents suffered from tuberculosis, which was epidemic in Alaska in the 1940-1950's. (*Id.*) Clearly, there were children who were long-term residents of the home, and whose parents did love them, but who were unable to care for them because of illness. (*Id.*) Dean, on the other hand, entered Jesse Lee Home in Seward, Alaska, as "unwanted."

Dean describes his experience at the home as that of an "outsider," someone who again felt rejected and socially ostracized. As those familiar with life at the home point out, it was not uncommon for the children at Jesse Lee Home to exclude children such as Dean, because he was identified as someone who would probably not live with them for long; as a survival mechanism, the long-term residents rejected the short-term children, such as Dean. (Decl. of Fred Wemark.)

By all accounts, the children who resided at the Jesse Lee Home were psychologically problematic, yet there were no mental health professionals at the home, and staff were not specially trained or educated. (*Id.*; SDRT 7748; Decl. of Florita Richardson, and Decl. Monty Richardson.) Instead, this was a traditional dependency home, where Dean was warehoused for lack of a better alternative. (Decl. of Fred Wemark, Decl. of Florita Richardson, and Decl. of Monty Richardson.) Thus, Dean's initial experience with institutional life, which is a long one, began without meaningful mental health intervention.

Esther Carter now contends that Jim Carter made all of the arrangements to send Dean to the Jesse Lee Home. Although she may not have agreed, Esther did nothing to stop it. "I did not stand up for my son or for my own self." (Decl. of Esther Carter.) During the months that Dean was at the Jesse Lee Home, the Carters did not visit him once. (*Id.*) He received no letters, no Christmas present and no indication that he was thought about during the time he was away. He felt

his family “didn't care about me, so why should I feel close to them?” This was a recurrent theme that began early in Dean's life, and replayed itself throughout his childhood and adolescence.

The experience of being sent so far away from his family without any contact at such a young age, where the importance of maintaining connection is crucial to one's psychological development, only heightened and intensified the lack of a caring connection between Dean and his family. (Natl. Register, Jesse Lee Home.) Dean's feelings of isolation and detachment had deep roots by age nine, and his experience was reinforced in Seward.

In August 1968, shortly before Dean's thirteenth birthday, he was arrested for burglary of a home in Nome, and found to be in possession of a handgun. Dean was made a ward of the juvenile court, and, after an undocumented evaluation, was placed at Alcantra Youth Camp outside Anchorage. (Prob. Rep. of Kenneth E. Brown, 9/10/70; SDRT 7772.)

Although he would spend the next fifteen months at the unsecured youth facility, he ran away (three times), and, was taken to a more secure facility in the City of Anchorage, McLaughlin Youth Center. (*Id.*) Dean was one of the youngest residents at the McLaughlin facility. He was observed by one counselor, Bertram Matsumoto, as an extremely introverted, shy, immature youth, and was described by another counselor, Thomas Finegan, as looking like “somebody rebounding from a flashbulb going off in their face . . . , very withdrawn.” (SDRT 7760; 772-82) Under close supervision at McLaughlin, Dean appeared to accept responsibility for job assignments. (Prob. Rep. of Barton Penny, 4/30/73.) Although much needed psychological services were not provided, Dean was becoming a well-adjusted “institutionalized” person.

On Christmas Eve 1970, at age fifteen, Dean was caught inside a stranger's home, eating their food. (Finding of Fact, 1/20/71; Prob. Rep. Of Kenneth Brown, 9/10/1970.) He was placed in a foster home in Anchorage after the latter incident. In the Probation Report of Kenneth Brown prepared for the Alaska Juvenile Court, January 25, 1971, the officer wrote, "there is some evidence that indicates that he wanted to be caught in order to escape his home situation and to get out of Nome." (*Id.*)

Officer Brown noted that "inter-family relationships" in the Carter home were "very poor." (*Id.*) He confirmed that James Carter "resents Dean . . .," and Esther Carter informed him that "she prefers to give her attention to Jerry." (*Id.*) Upon interviewing Esther and James Carter, Officer Brown observed that Dean's parents "just cannot understand what is wrong with their son [and] Mrs. Carter told me on many occasions that she has just given up on Dean . . ., [because] in their view he seems to have been "born a bad egg." (*Id.*) In his words, Dean evidently did not receive the attention and guidance that he wanted and needed at home. (*Id.*) He aptly suggested to the juvenile court that Dean's "developmental problems began very early in life due to a rather neurotic family arrangement." (*Id.*) Officer Brown recommended a foster home placement in lieu of juvenile detention facility because "what he has never had and what he desperately needs is a stable and loving home." (*Id.*)

Dean was sent to Anchorage in February 1971, and spent eight months in the foster care of Dale and Patricia Rymer at Fort Richardson in Anchorage, Alaska. (Prob. Rep. of Barton Penny, 4/30/73.) Virtually nothing is known of the Rymers, but Dean did attend A.J. Dimond School in Anchorage, a high school that was part of the Alaska juvenile correctional system. (Psych. Eval. by Marianne Hagen, Ph.D., 6/1/71.)

On July 11, 1971, Dean was arrested for joyriding, breaking and entering, and assault, accompanied by his foster “brother,” Bill Crismore. Dean was again adjudicated ward of the Juvenile Court and placed in custody at the secured juvenile facility at McLaughlin in Anchorage. (Prob. Rep. of Barton Penny, 4/30/73.) From July 1971-July 1972, Dean was housed at McLaughlin Youth Center. (*Id.*) During the year that he was at McLaughlin, Dean reports working at a cafeteria at Alaska Methodist University, and taking up boxing through Golden Gloves.

Dean, as always, was not a disciplinary problem at McLaughlin, according to youth counselors Finegan and Matsumoto, who once again supervised him. (SDRT 7762; 7768; 7778; 7782.) Dean described McLaughlin Youth Center as a “warehouse for kids,” a place “where he learned about life” and “a way out of Nome.” He acknowledges that he learned about cooking there, and was able to obtain a job using those skills at the Alaskan Methodist University’s snack bar in Anchorage.

Dean was released into his parents custody in Nome in July 1972, and at seventeen years-three months, he enlisted in the United States Army, November 1, 1972. Within the month he was reported Absent Without Leave from the U.S. Army post at Fort Ord, Monterey, California, where he was in basic training; he was disciplined, but reinstated. (Prob. Rep. of Barton Penny, 4/30/73; Memo to Barton Penny, 4/5/73; Enlistment Contract and Article 15 Records, 11/1/72, 11/18/72.) In February 1973, Dean was arrested in Salinas on suspicion of burglary and joyriding, but charges were dropped; he was “AWOL” again in early March 1973. After this incident, Dean was discharged from the Army. (*Id.*)

With “no sense of direction in his life,” Dean at seventeen years eight months, returned to Alaska. (Prob. Rep. of Barton Penny, 4/30/73.) In Ketchikan, Alaska, which is at the southern tip of Alaska, Dean and other juveniles, broke into several local businesses in Ketchikan, and Dean was arrested and charged with burglary. (*Id.*) Dean claimed he was trying to obtain money to make the return trip to Nome; he admitted the allegations in the charging petition. (*Id.*) Dean's parents refused to participate in juvenile court proceedings, and the Probation Officer assigned Dean's case, Barton Penny, referred to earlier records in his assessment of Dean's family situation. (*Id.*) Although Dean again made light of his parents' rejection, he expressed a desire to return to Nome. Dean candidly admitted though that he was “unable to cope with the way he [James Carter] teases him and shows favoritism to the other children.” (*Id.* at 4.) Mr. Penny referred Dean for mental health evaluation and recommendation as to whether Dean should be treated as a juvenile or adult. (*Id.*)

On April 13, 1973, Donald B. Kennoyer, a Clinical Psychologist at Gateway Community Mental Health Center, recommended that Dean be treated as a juvenile. (Kennoyer Report, 4/13/72.) Dr. Kennoyer found Dean “quite likeable,” and made a “strong recommendation that the boy be handled as a juvenile in court . . .” (*Id.*) Dr. Kennoyer concluded, “I do not feel that the prognosis for the boy is exceptionally good, but any method of treatment to be effective, must involve some personality reintegration along the lines of developing both emotional and social maturity and personal responsibility . . ., with well defined routines including personal counseling where the intent of the treatment is to help develop personality responsibility.” (*Id.*) Dean, unable to comprehend his motives, describes his reason for committing burglaries in terms, such as, “it seemed like a good thing to do” and “it was a dumb thing to do . . .” (Prob. Rep. of Barton

Penny.) The Probation Officer, Barton Penny, recommends Dean be treated as a juvenile because, among other things, he is “impulsive . . . remains immature . . . , [and] has no sense of direction in his life” (*Id.*) As others had learned, Mr. Penny also found he was “unable to communicate with Mr. and Mrs. Carter, [and] the record has been very revealing as far a determining their attitude and concern for Dean's present circumstances . . . , [that is] they have resigned themselves to the [alleged] fact that “Dean must have been born bad.” (*Id.*)

The juvenile court in Juneau, Alaska, committed Dean to a further term of detention, and upon interstate acceptance, he was transferred to California Youth Authority in Stockton, California in May 1973. (Memo of Classification Committee, 5/8/73.) By his eighteenth birthday (██████████ 1973), Dean had spent three months at the California Youth Authority in Stockton, and he remained in CYA custody for next six months before being released on parole in Northern California. (Dept. of Youth Authority, 5/15/72; Prob. Rep. of Barton Penny, 4/30/73.) Although some records were retained in the Alaska Department of Corrections' file, no records have been located at CYA itself. What is known, however, is that Dean was committed to the California Youth Authority in May 1973, and released roughly six months later; his time was divided between the DeWitt Nelson Vocational Center in Stockton and at the Ben Lomond Camp in Ben Lomond, California.

As was the case with McLaughlin Youth Center in Anchorage, DeWitt Nelson and Ben Lomond facilities provided another form of regimentation and structure for Dean, but he received no therapeutic intervention there, or anywhere else in the juvenile justice system. Dean was never reported to be violent or out of control in an institutional setting, but, in fact, from his childhood experience in Jesse Lee Home through his last term in a juvenile facility he appears to have

become the kind of “institutionalized” individual who performed well in a structured setting. (See, Testimony of J. W. L. Park [SDRT 8183-8201].)

As demonstrated by mental health evaluations conducted in 1974, the anxious, depressed young man, who was described by McLaughlin Youth Center counselor Thomas Finegan in 1969, as looking like “somebody rebounding from a flashbulb going off in their face . . . , [and] very withdrawn” (SDRT 7760-61; 7772-7821), has not been positively influenced by his experiences in the juvenile institutions to which he was committed.

By Dean's nineteenth birthday ([REDACTED] 1974) he had traveled back to Alaska, met up with a foster brother (Bill Crismore) from Anchorage, and drove with him to California. Dean was arrested in Corvallis, Oregon, in August 1974 for possession of hashish oil; he served 60 days in a county jail in Oregon. (S.R. Sobel Case History Report, 1/17/95.)

Shortly after his release, Dean was arrested for burglaries committed on or about November 19, 1974, convicted, and sentenced on or about December 20, 1974, to Oregon Department of Corrections to serve three years in prison. (*Id.*) Upon entry into the Oregon penal system, Dean was evaluated by a counselor who observed him to exhibit “anxieties, nervousness, fears, tension and depressed mood . . . ,” and he further described Dean as “immature, undirected young man of average intelligence.” (S.R. Sobel Report, 1/17/75.) Sobel noted Dean “likes to think of himself as ‘footloose and fancy free.’” (*Id.*) And also he observed that Dean “[a]ppears to have a rather inadequate self-concept, [and] claims his major strengths are ‘being able to hide his feelings.’” [Sic]. (*Id.*)

Dean remained in prison through the next two years (19-21) and was released from prison in March 1977. (Oregon Correctional Entry/Discharge Form, 3/3/77.) In May 1977, at age twenty-one, Dean, was arrested for burglary again.

YOUNG-ADULT PSYCHOLOGICAL EVALUATIONS

While in Anchorage, in June 1971, at age fifteen, Dean was evaluated by a mental health professional, apparently for the first time. At Dean's request, his youth counselor, Mr. Bader, referred him to counseling so that he could qualify for a work program. (*Id.*) Marianne Hagen, Ph.D., evaluated Dean for promotion into a program at A.J. Dimond School, an alternative high school in Anchorage, where Dean was attending the tenth grade. (Psych. Eval. by Marianne Hagen, Ph.D., 6/1/71.)

Dr. Hagen determined that Dean functioned with “the basic ability and academic skills necessary to function in high school . . .,” but she found that his “primary difficulties center around his difficulties with relationships, a tendency to over-react, and a high anxiety level.” (*Id.*) She referred to “Dean's perceptual skills [as] generally good but again in this area there is distress which is apparently caused by his high anxiety level and other emotional adjustment difficulties.” (*Id.*) She viewed test data as supportive of general level of intellectual functioning within the “high average range except in areas that are sensitive to an emotional tension of anxiety.” (*Id.*) He was observed to mask his anxieties with an evasive, breezy, hands off approach, but because of “high anxiety and other emotional adjustment difficulties . . . , Dean tends to build up to a point of over-reaction . . . , and perhaps some breaks in judgment.” (*Id.*) She foresaw a “pattern of emotional response [that] will continue to create problems for him.” (*Id.*) Once again, there was no indication of therapeutic intervention, and Dean was left to cope with his feelings of anxiety and isolation alone.

After his 1974 arrest and conviction, a psychiatrist, J. Rennebohm, M.D., saw Dean four times within four months (January-May, 1975). (Rennebohm Reports, 1/17/75; 4/3/75; 5/1/75; 5/29/75.) Dr. Rennebohm described nineteen-

year-old Dean as of above average intelligence, but “[d]ynamically, it would appear that he has operated much of his life with goals that are rather vague, an uncertain sense of self, and, somehow, an especially active conscience . . . [and] it is, therefore, that much of his thinking revolves around self-reproach.” (*Id.*) In this initial report,

Dr. Rennebohm notes Dean's “problems are essentially those of chronic anxiety tension recently aggravated by a depression condition.” (*Id.*) Dr. Rennebohm prescribes Sinequan for symptoms of depression and insomnia. (*Id.*) Dr. Rennebohm interviewed Dean again on April 3, 1975, and he described him as engaged in “a substantial measure of conscience activity . . . and committed to doing right and staying out of trouble . . . [but] he does not have a clear-cut sense of personal identity . . . and that which is present includes a strong inclination toward self-disdain.” (Rennebohm Report, 4/3/75.) Dr. Rennebohm alters his prescription, and orders Prolixin and Librium to alleviate problem[s] of anxiety and depression, which has been manifested mainly in insomnia and irritability. It (*Id.*)

Dr. Rennebohm next saw Dean on May 1, 1975, prescribed Benadryl and continued Librium, but noted “the prospects for definitive and constructive action on his part in this regard [rehabilitation] does not appear strong” (Rennebohm Report, 5/1/75.)

Dr. Rennebohm last saw Dean on May 29, 1975, and again ordered continuation of Benadryl and Librium, but wrote, Dean “is, however, still markedly anxious, which is an indication that his conflicts are not yet fully resolved.” (*Id.*)

After his May 1977 arrest, a court-appointed psychiatrist, Robert McManmon, M.D., described “repeated non-violent offenses and no history of

alcohol abuse [with a] history of depressive symptoms . . . [who] tend[s] to see things in a rather concrete way with little insight . . .” (McManmon Report, 11/18/77.)

Two years later (age 23), while at Eagle River Correctional Facility in the Alaska State Department of Corrections, Dean was examined by prison psychologist, Kathi Smith, Ph.D. (Report of Kathi Smith, 3/22/78.) While raw data is not supplied, Dr. Smith reports that after administering the Minnesota Multiphasic Personality Inventory (MMPI), results are indicative of a young man who is “somewhat depressed, restless, and having difficulty controlling impulse.” (*Id.*) She suggests data “raises the question of [unspecified] psychiatric problem.” (*Id.*)

USE OF ILLICIT DRUGS

Dean recalled that he began using drugs during the time he was committed to McLaughlin. He described trading cigarettes for psilocybin from an older boy at the Youth Center, and said it made him “laugh and have waves of good feeling,” which was different from his usual emotional experience. After he began working at the university's snack bar, he met students there who sold him LSD, and others offered him opium-cured marijuana in their dorm rooms. He reported that although McLaughlin was intended to be a structured, strict environment, it was easy for the youths to engage in drinking and substance use without the counselors’ knowledge or guidance.

Dean used LSD and other psychoactive drugs frequently throughout his youth and into adult life. He describes use of psychoactive substances and methamphetamine. In a September 7, 1972 medical examination for military service he described use of LSD fifteen times, amphetamines three times, and marijuana occasionally. (Military Exam Records, 9/7/72.) Dean described his

early use of psychedelic drugs as causing “bad trips.” Dean was reportedly also using “speed” when he was arrested in Oregon in 1974, and at the time of his evaluation (January 1975), complained of “frequent dizziness.” (S. R. Sobel Rep., 1/17/75, p. 3.) As pointed out, Dean's use of alcohol as a juvenile is minimal; use increases only after he is paroled in 1979 from Alaska Department of Corrections. (LART 5898; 5873.) He attributes his abstention from alcohol prior to that time as a reaction to the affects of alcoholism in his own family and community, where alcoholism is rampant. In addition, at age 10, he seems particularly effected by learning that a neighbor had frozen to death while drunk.

At the time of the capital crimes, Dean was using cocaine heavily and had developed a serious cocaine dependency. By 1981, Dean was considered a “regular” drug user by his friends. (LART 5854.) In 1983, Dean was referring to cocaine as “marching powder.” (LART 5847.) In December of 1983, a friend saw Dean in the airport and “he didn’t look like he used to. He was kind of slouchy and kind of dirty. His hair wasn't combed back. His eyes were red and he was shaky . . . he just looked horrible.” (LART 5848.) In late 1983, early 1984, Dean’s drinking and cocaine use had escalated to the point it appeared “out-of-control.” (LART 5869.) And friends noted he was withdrawn and depressed. (SDRT 8011-12.) In March of 1984, a female friend described Dean as high most of the time. (SDRT 3820-3909.)

OPINIONS AND CONCLUSIONS

Dean’s maternal and paternal family history is marked by significant pathology in the form of fetal exposure to alcohol; marital violence; rampant parental alcoholism; ethnic discrimination; severe and malignant emotional neglect, physical abuse, and psychological maltreatment. This was the context into which Dean was conceived and subsequently entered life. These events led to

Dean's development of cognitive impairment, extreme deficits in affect and behavior regulation, maladaptive and rigid problem solving, and a range of psychiatric disorders.

Dean's early institutionalization and recurring out-of-home placements, while accomplishing the goal of separating him from a rejecting and abusive family, did not provide the necessary psychological treatment that he desperately needed. In addition, because his parents never came to visit him, it only reinforced his belief that he was unlovable and alone in the world. After each placement, Dean was returned to his family, with the only change being his parents' heightened conviction of their son's inherent "defectiveness," with no insight that they were the cause of his physical and mental condition.

Research on children's reactions to traumatic and stressful life events indicates that single, acute stressors are not necessarily associated with significantly increased risk of psychological disorder in adolescence or young adulthood. However, multiple stressors and traumas, especially of a chronic nature, places children at far greater risk for psychopathology in later life. Multiple stressors and traumas do not have an additive effect, but tend to combine exponentially. For all types of childhood trauma, dimensions of severity and chronicity have been associated with the most deleterious psychological outcomes. The specific childhood traumas in Dean's life will first be described with relevant examples provided, followed by the long-term psychological effects.

Neglect

Neglect is the failure to provide basic necessities that endangers the child's well being. Neglect can result in damage to the child's physical, emotional, social or intellectual development. Neglect includes, but is not limited to, such categories as: (a) inadequate supervision: the child is left alone for inappropriate periods of

time given the child's age; the parent or care giver is drunk or under the influence of drugs while the child is in their care; the parent or caregiver pays no attention to the child's schooling needs; (b) inattention to physical needs: no awareness of the child's need for nutritious food, adequate clothing, and/or personal hygiene; (c) abandonment: the child is deserted without making prior arrangements for reasonable care and supervision; (d) emotional neglect: the child lacks positive emotional support or stimulation from the parent or caregiver; (e) medical and educational neglect: failure to provide adequate and necessary medical and mental health care, and appropriate educational services.

Dean was exposed to at least three forms of neglect that have been corroborated during his childhood and adolescence: inadequate supervision by his parents; emotional neglect; and medical and educational neglect. However, it is the chronic emotional neglect and rejection that is the underpinning of all forms of abuse and contributes to the most devastating outcomes for the child. Chronic emotional neglect leads to a deep sense of defectiveness, believing one is unloved and unlovable, and feeling alone in the world. Infants and children learn to cope with these extreme situations by deactivating or suppressing their emotional need for connection and/or defensively acting as if they do not need love and attention. If their attachment figure is not there to soothe them in times of distress, they have no other option but to shut down emotionally. When the parent returns, they may seek soothing or attention, even if the parent is not likely to respond. For example, even after years of abuse and neglect, Dean still did not want his mother to leave to go drinking, and jeopardized his own life to stop his mother from leaving him, as described by his brother Jerry. Dean came to understand that alcohol and its pursuit were unquestionably a higher priority to his parents than his own emotional and physical welfare.

When Dean's parents were not under the influence of alcohol, they continued to neglect his emotional needs and pay whatever attention they were capable of to Jerry, Dean's older half-brother, and later on, to Dean's two younger half-sisters, Pollyanne and Goldie. Dean recalled that his parents did not talk with him, did not try to understand him, and he felt like an outsider in his own family. When he was sent to the Jesse Lee Home, he was in effect, emotionally abandoned, since there was no contact with his parents or brother during the time he lived at the Home. Even though the Carter family might not have had the financial resources to visit or telephone their son, there was nothing preventing them from sending a letter-even once-to reassure Dean of their concern and care. From Dean's perspective, the lack of contact when he was so far away further validated his core belief that his mother and stepfather fundamentally did not love him or care about what happened to him. For a young boy (nine years old), a six-month separation from one's family is experienced as a much longer time, since young children perceive time differently than do adults.

Neglectful parents tend to ignore or fail to see their children's physical or emotional needs. Chronic neglect often results in too little cognitive and social stimulation, a lack of necessary routines, and can result in children experiencing danger due to lack of supervision.

Dean's parents failed to obtain appropriate medical, mental health and educational services for him. Early intervention is key to mitigating the effects of early neglect and abuse on children, and this opportunity was lost, not only by the Carter's family but by deficiencies in Nome's educational system and the juvenile justice system.

Dean did not receive corrective lenses, for example, until he was nine years old and at the Jesse Lee Home, even though his eyesight had been poor prior to

that time. In addition, although Dean evidenced problems in attention and concentration and had difficulty arriving at school on time or at all, no one made the decision to have his educational skills formally addressed, or for him to have a psychological evaluation, or to have the family involved in school meetings with teachers to identify obstacles that were hindering Dean's potential for success.

The reasons for Dean's educational and mental health neglect may be complicated by several other factors, including: a) his stepfather's status as Chief of Police for the City of Nome and reputation as a strict disciplinarian, i.e., teachers may have been intimidated by James Carter; b) Dean's mixed ethnicity or "half-breed" status, denoting second-class treatment; and/or c) limited awareness that children's acting out behavior may be a "cry for help" that is emanating from depression, anger, isolation, emotional rejection, physical abuse, or other complicated feelings and situations. Regardless, Dean did not receive a psychological evaluation until he was fifteen years old. Although Dr. Hagen identified several areas of concern, Dean did not receive counseling or therapy for the problems indicated, e.g., low scholastic achievement given his above-average intelligence level, high anxiety, tending to over-react emotionally and have lapses in judgment in the face of anxiety.

Physical Abuse

Physical abuse is defined as the non-accidental infliction of physical force by parents or caregivers against a child that results in injury. These acts are judged by a combination of community and medical standards to be outside the realm of healthy childrearing. The abusive behavior that was perpetrated against Dean by his mother and stepfather would have qualified as physical abuse by child protective service workers. Dean's parents used objects to inflict their discipline, including a barber shop strap, leather belt, switch, extension or electrical cord, a

boot, and a shoe, and their fists; all of which left painful bruises and welts that discolored Dean's skin and made it difficult for him to sit or lay down. James chained Dean to the bedpost, outside, and other places with his wife's support, sometimes up to two weeks at a time with only bathroom breaks allowed.

Unlike the insidious and slowly evolving effects that chronic neglect can have, physical abuse is experienced as an overwhelming assault on the child's physical and psychological being. Children are ill equipped to process these traumatic events and the subsequent terror they evoke, and have little choice but to "cope" the best ways they can. These coping strategies may include withdrawal, avoidance, fantasy, and in the most severe cases, dissociation. If the victim does not have access to good intervention to help process these traumatic events, then the associated terror and rage originally experienced with the trauma can be reactivated (e.g., feeling criticized or rejected can trigger intense and overwhelming emotional reactions).

Harsh, punitive, and abusive behavior can often have opposite effect of what was intended. The more that James and Esther were physically brutal to Dean, the more he wanted to stay away from home to avoid their mistreatment, and the more their behavior validated his core belief that he was unwanted by them. The situation ultimately escalated to his first institutional placement at the Jesse Lee Home, where he followed the program's structure and found respite from the abuse. No one in the schools or community attempted to investigate why Dean insisted on staying away from home so frequently.

Psychological Maltreatment

Experts believe that psychological maltreatment almost always accompanies other forms of abuse and neglect, and that it is often more destructive in its impact. Psychological maltreatment is defined as a pattern of behaviors and/or

verbalizations that jeopardize the child's psychological development, including self-esteem, social competence, and the capacity for intimacy and for healthy and positive interpersonal relationships. It includes acts of terrorizing, spurning, isolation and corruption.

Terrorizing involves situations that stimulate intense fear and dread, and create an atmosphere of unpredictable threat of brutal punishment. Situations in which loved ones threatened with, or sustain injury, are also considered terrorizing for children. In Dean's family, observing his mother's physical violence against his father was an example of terrorizing behavior. There were times that Dean and his brother, Jerry, intervened to stop the escalating violence, with Dean attempting to subdue his mother, who was the more violent and unpredictable of the two parents. Other examples of terrorizing situations were when Dean was the object of his mother's anger, and he experienced brutal beatings from her and from his stepfather. Jerry was also physically beaten, although much less frequently than Dean, but observing his brother's beatings was yet another category of terrorizing behavior.

Children's frequent experiences of terrorizing situations can produce emotional flooding of fear and dread that can overwhelm a child's ability to modulate his emotions, especially painful ones. When children have difficulty with emotion regulation, they tend to over-or under-react to emotional situations, sometimes alternating widely between the two, and they may also feel excessive anxiety and have little to no ability to calm themselves down when they do feel anxious or fearful.

Spurning includes acts of hostile degradation and rejection. Degradation refers to behaviors or verbalizations that shame or humiliates a child, whereas rejection is defined as behaviors or verbalizations that communicate to the child

that they are neither valued nor loved. Scapegoating also can be included under the category of spurning, which is when one child is identified and blamed for causing all the problems of the family. In Dean's situation, he was clearly identified as the "problem child" of the Carter family, and treated dramatically different than his brother, Jerry, as described above in paragraph 34 by neighbors and other adults in the community.

Dean was rejected by his mother and stepfather, and treated as though he were an "outsider" rather than a family member. Consistent rejection and scapegoating, coupled with abusive and neglectful caretaking, communicated to Dean that he was unworthy, unwanted, and "bad." He lacked parental guidance to help him pursue a direction, which was highly unfortunate, since his above-average intelligence could have been channeled into several directions, but it went unnoticed and unappreciated.

Isolation refers to separating the child from others, such as not allowing them to leave the house or locking them in a closet or room so that they cannot pursue developmentally relevant activities with their peers. Dean experienced this category of psychological maltreatment when he was chained to the bedpost for days at a time, up to two weeks, only being allowed bathroom breaks. He was not allowed to have friends over to his house, nor participate in activities that would have been appropriate for his age group (seven to eight years old). Dean perceived his parents' actions as treating him like an animal, and not caring about the impact of their behavior on him.

Corrupting refers to parents and caregivers modeling pathological behavior that encourages or reinforces antisocial, deviant, or destructive conduct. This type of behavior can negatively distort a child's perspective of others and what he can expect from being in relationship to another. In Dean's case, his parents engaged

in patterns of explosive, violent behavior and alcoholism, without recognizing or caring about the psychological effects of these behaviors on Dean or the other children.

The Effects of Child Maltreatment

In summary, Dean experienced multiple traumatic events, including pervasive neglect, physical abuse, and psychological maltreatment in forms of repeated terrorizing, spurning, isolating, and corrupting behaviors. The physical abuse that Dean experienced existed against a daily backdrop of parental emotional neglect, empathic failure, limited understanding of children's developmental needs beyond providing the physical basics of shelter, food and clothing, and psychological cruelty. Any one of these parenting practices has been associated with poor mental health outcomes for children. The combination of child abuse and emotional neglect occurring during critical developmental stages of Dean's life (e.g., beginning in early childhood and continuing through adolescence), witnessing domestic violence and discord, impaired general parenting, exacerbated by parental alcoholism, and multiple out-of-home placements, put Dean at significant risk of impaired psychological development and social functioning.

Moreover, it should be noted that the main perpetrators of abuse were Dean's parents: the effects of maltreatment on children are especially pronounced when the abuser is someone whom the child would normally seek for caretaking and protection. This situation places the child in the untenable position of experiencing fear without solution: the very person whom they seek for protection is also the source of their fear. Abuse interferes with the child's ability to trust, feel secure and safe in their relationships, and perceive the world as a positive, or at least a relatively benign place to live.

Parenting styles and children's self-regulation. Research and clinical literature on parent-child relationships has long documented the association between child and adolescent psychopathology and parenting or family dysfunction. Child maltreatment is an extreme example of disturbance involving the parent-child relationship and places children at even greater risk of psychiatric and psychological difficulties. Traumas such as neglect, physical abuse, and psychological maltreatment has been shown to interfere with healthy development of behavioral self-control; emotional understanding, tolerance and expression; social judgment and interpersonal relationships; and perceptions of the self and others.

Dean was exposed to extremes in parenting behavior from neglect with little or no adult guidance, to unpredictable violent outbursts of anger, authoritarian caregiving, with the emphasis on severe restriction and domination through fear. Each one of these parenting styles has been associated with behavioral and interpersonal difficulties, and the alternating combination is particularly detrimental to the development of healthy behavior regulation. Under favorable conditions, parents help children to develop their own self-regulatory mechanisms (i.e., the ability to stop disruptive behavior and engage in socially acceptable behavior) by providing structure, consistency, and appropriate consequences for specified actions. Children and parents shape each other in this process, as parents gradually change their expectations over time to match the increasing cognitive and emotional maturity of their children. The majority of evidence indicates that reliance on authoritarian, power-assertive and excessively physical means of punishment is associated with elevated rates of aggression, impaired self-control, and poor social competence in peer relationships. Rather than developing internal

mechanisms to regulate one's behavior, an abused child such as Dean learns to focus outward on surviving others' disregulated assaults.

Reliance on external versus internal structure. According to probation reports, Dean tended to do well in juvenile facilities and responded to a clear external structure. Unfortunately, but not unexpectedly, he was unable to maintain that structure in his life when he returned to Nome and to his family and home. One of the problems with programs for juvenile offenders, and it certainly is the case here, is the lack of family involvement and follow-up services, so that the youth goes back to the same environment that contributed to the problematic behavior without an effective plan to continue what change might have been made. Abusive, authoritarian, and unpredictable child rearing practices like those of Esther and James' actually encouraged Dean to rely on external structure rather than develop his own internalized behavior guidelines. He was a lost soul, trying to avoid the place that clearly gave him the most physical and emotional pain, but without a clear idea of what he was heading towards.

Emotion regulation. Healthy emotional functioning involves the ability to identify and experience a range of positive and negative emotional states, to regulate one's expression of emotion, as well as to empathize with another's emotional experience. Seriously disturbed parent-child relationships and children's experience of trauma at the hands of parents or caregivers often interferes with healthy emotional development, such that children and adolescents may have a limited and shallow range of affect, difficulties with emotion regulation, problems tolerating painful emotional states, evidence a mood disorder, feel cut off and emotionally isolated from others or lack empathy for others' situations.

For Dean, the emotional isolation, anxiety, sadness, and other painful affects associated with the traumas he experienced was too overwhelming to be processed

fully. Because he suffered emotional deprivation and neglect from very early childhood, he had little to no exposure of being soothed and having a caring person help him gradually increase his tolerance for different negative affective states. Consequently, his ability to soothe himself was extremely limited and he resorted to running away, withdrawing, and spacing out, as ways to escape painful affect. Over time, he added substance use as another way to cope with dysphoria and stress. All of these strategies had a short-term gain of relieving the immediate stress and discomfort, but the long-term trade-off was that Dean developed extremely limited psychological responses to cope with negative affective states. Moreover, Dean essentially lacked an emotionally constructive support system that could help him with these tasks. Caregivers were either medicating their own emotional pain by abusing substances or were unmodulated in their emotional reactions towards Dean.

Interpersonal relationships. Children and adolescents who have suffered extensive neglect and abuse almost invariably have difficulties with interpersonal relationships. Because the neglectful and abusive treatment occurred in the context of an interpersonal relationship, destructive patterns of relating have been experienced as the normal way of being with others, and setup specific expectations for future relationships. Adults maltreated as children such as Dean often describe difficulties being able to trust others; expect rejection and abandonment; dread being made vulnerable, humiliated, powerless or betrayed; crave closeness but fear intimacy; can be overly dependent in relating to others once they have found someone with whom they can be intimate, and may not see the other person's strengths and limitations realistically, but through the filter of their own needs and past experiences.

Dean's experience of extreme rejection by his mother was likely to cause him to become exquisitely sensitive to rejection by others, particularly women. Extreme parental rejection causes a child to both believe that he is unlovable and unlikely to receive love from others. When these dynamics, and the resultant internal models of self and others, are combined with severe unresolved trauma, an incident of interpersonal rejection could potentially cause an individual to become flooded with powerful and overwhelming emotions of fear and anger. If that individual has not learned how to regulate strong affect, it could lead to devastating consequences.

The toll of physical abuse, domestic discord and violence on children's emotional development and problem solving abilities can be extensive. Dean observed adult emotional behavior that was repeatedly explosive, labile, and unpredictable. His parents did not comfort him after he witnessed their brutal attacks on one another or on himself, nor did they engage in other parenting behaviors that could facilitate Dean's ability to soothe himself when faced with stress. Dean's parents did not resonate with their son's emotional life and were not emotionally available to respond to him empathically.

Parents and caregivers who are emotionally responsive and attuned to their children, who provide a balance between soothing and stimulating activities, play a critical role in helping their children modulate their own physiological arousal. Clearly, this was not the case for Dean. In addition, caregivers who continually "solve" interpersonal conflict through dominance, threat or violence fail to model constructive ways to resolve differences of opinion or strong emotions. Children who observe this destructive interactional style tend to have a limited repertoire of problem solving strategies themselves, especially when they are in the midst of stressful and emotional situations.

Based on psychological reports and others' perceptions, Dean was withdrawn, anxious, and had difficulty modulating his behavior and emotions in the face of stress, was described as "over-reactive," rather than someone who could make clear, assertive, mature and flexible responses to problems encountered. He was also at risk for using substances to block uncomfortable feelings rather than being able to tolerate them on his own or with the help of others.

The developing self. Research and clinical findings indicate that some of the most devastating effects of childhood maltreatment are on the individual's lowered sense of self-worth, self-understanding and self-efficacy. When parents and caretakers' neglect, assault, reject and degrade their children, they communicate a lack of basic respect. Without formal (e.g., therapy) or informal (e.g., a supportive relationship with an adult) intervention to counter the effects of such treatment, these children are at risk for internalizing the deleterious messages about themselves, and may develop a working internal model of the self that is unworthy, ineffective, incompetent, and unable to be self-reliant.

Abusive parenting practices not only contribute to low self-esteem but a sense of inner, core badness. Dean's parents believed that Dean was "born bad," and took no responsibility for their own contribution to the problems with which their son struggled. Dean had difficulties recognizing and sustaining the positive attributes and talents that he had, particularly during stressful times.

MITIGATION EVIDENCE AVAILABLE AND ACCESSIBILITY TO RESEARCH DATA.

The mitigation evidence presented in the penalty phase of Dean Carter's trial did not adequately reflect the type of information that could have been presented to the jury. A psychologist presented with the material provided to me could and would have been in a position to identify child abuse, neglect, psychological

maltreatment, domestic violence and its effects, as well as cultural and other useful information about Dean's unique life history. A qualified expert could and would have concentrated on the effects of these experiences, and in combination with other factors, such as, the unique cultural and biosocial background in Nome, Alaska, experts' findings.

Research and clinical information about the types of traumas to which Dean was exposed was plentiful by the time this trial commenced in 1989. For example, concepts of mental cruelty, emotional neglect, authoritarian child rearing, and other forms of harmful parenting practices have been in the mental health and developmental literature for some time and were certainly accessible by the early 1980's. By the time of trial, clinical and research information upon these topics had expanded enormously. Discussion and research on the concept of psychological maltreatment as it was addressed in this declaration was available in two major textbooks published in 1986 (Garbarino, J.; Guttman, E., & Seeley, J.W. *The Psychologically-Battered Child* (San Francisco, Jessey-Bass) and 1987 (Brassard, M.R.; Germain, R. & Hart, S.N., *Psychological Maltreatment of Children and Youth* (New York, Pergamon Press), with continuing published research on the topic by Stuart Hart and Marla Brassard.)

In addition, there was considerable literature on physical maltreatment and its psychological effects from various theoretical perspectives, including psychological, psychiatric, and social work backgrounds. All fifty states were required to report child maltreatment by the mid-1970s, and the mental health professions had a solid research base of information about identification, etiology, sequelae, and the treatment of child abuse by the time that Dean's case went to trial. For example, in 1975, R.D. Parke and W.C. Collmer published on the first comprehensive research reviews on child abuse entitled, "Child Abuse: An

Interdisciplinary Analysis,” in (E.M. Hetherlington Ed.), Child Development Research, Volume 5 (Chicago, University of Chicago Press). Five years later in 1980, Jay Belsky, a research psychologist, wrote and updated review article for the 35 American Psychologist, pp. 321-335, entitled, “Child Maltreatment: An Ecological Integration,” in which he integrates a wealth of research data on child abuse from various theoretical perspectives, including psychological, psychiatric, and sociological. In 1987, David Wolfe wrote a book entitled, Child Abuse: Implications-for Child Development and Psychopathology, (Newbury Park, Sage Press), which provides a comprehensive overview of child abuse, severe parent-child conflict and abuse, and a developmental perspective of abused children. These are only a few of the multitude of articles, book chapters, and books available at the time of trial that could have informed thinking about petitioner's case.

Research and conceptualization on the effects of witnessing domestic violence on children was also accessible by the early 1980's (Jaffe, P., Wolfe, D.A., Wilson, S.K., Zak, L. “Violence and Child Adjustment: A Comparative Analysis of Girls and Boys Behavioral Symptoms,” (1986) American Journal of Psychiatry, pp. 143-177).

Further, research and inter-disciplinary studies regarding the unique cultural, social and psychological factors presented Native Alaskans, and particularly Inupiat Eskimos, was accessible, as documented and incorporated here.

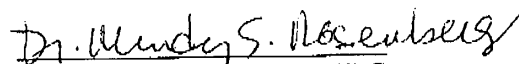
CONCLUSION

Dean Carter suffered pervasive child maltreatment beginning in early childhood and continuing through adolescence. This maltreatment included neglect, physical abuse, and psychological maltreatment in the forms of terrorizing, spurning, isolating, and corrupting. Exposure to these sustained and repetitive

traumas in combination with other risk factors, such as prenatal alcohol exposure, a unique cultural and environmental background, ethnic discrimination and rejection, community and institutional failures, including multiple out-of-home placements without treatment, and substance abuse, contributed to serious impairments in psychological functioning, including problems with behavior and emotional regulation, interpersonal relationships, problem solving, and issues of self worth. These factors formed the psychological context from which to view Dean's adult functioning and behavior.

Inclusion of the mitigation themes described above, and all the information that was gathered from Dean's family and background, would have presented a complete and integrated picture of his life to the jury. The jury would have then been able to understand what occurred to Dean throughout his early and later childhood and adolescence, and how he was shaped by a multitude of factors.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this 14th day of June, 2007, at Seaside California.


DR. MINDY S. ROSENBERG

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Pupil's Name		Last		First		Middle		Name		Location		Nationality of Pupil		Parent or Guardian		Date of Birth		Month		Day		Year		Entered From		Date		Withdrawn		Date		Reinstated		Date		High School Entered		Date			
Pupil's Name		Carler		Jean				Name				American		Tim - Ester		1955								Elementary School Permanent Rec		RD 9		(Not To Be Removed from School)		Date		Date		Date		Date		Date			
School		Nemo Public						Name																																	
Grade		1966-67		1965-66		1964-65		1963-64		1961-62																															
Semester		1		2		1		2		1		2		1		2		1		2		1		2		1		2		1		2		1		2					
Days Present		70		76		74		74		74		74		74		74		74		74		74		74		74		74		74		74		74		74					
Days Absent		4		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3					
Times Tardy		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3		3					
Reading		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Spelling		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Writing		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Grammar Language		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Arithmetic		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Geography		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
History		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Social Studies or Civics		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Science		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Health, Safety & Phys. Educ.		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Art		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Music		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
General Average		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Promoted to		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Held In		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
Condition In		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C		C					
TEACHER (Name)		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors		C. Coors					
(REMARKS)																																									

Exhibit 3-008

ER 1056

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Child's Name		Date	Age	Score	Standard Score	Important:
SRA PMA 5-7		12/3/12	6-5	14/101	19	1. Every child who enters the school must have a permanent record. 2. All grades must be entered for each semester. 3. Teacher must sign her name for each semester of grades recorded. 4. 1 = first semester; 2 = second semester; F = Final Grade.
Ottis P.M.A. Alpha		1/1/13				
SRA PMA		4/1/13				
SRA PMA		4/1/13				

Grade	School Year	Semester	Days Present	Days Absent	Times Tardy	Reading	Spelling	Writing	Grammar Language	Arithmetic	Geography	History	Social Studies or Civics	Science	Health, Safety & Phys. Educ.	Art	Music	General Average	Promoted to	Held In	Condition In	TEACHER (Name) (REMARKS)
7B	1967-68	1	8 1/2	9 1/2	3	B	C	C	C	C			D	D	C	C	C	C	D			ciabik
		2	7 1/2	14 1/2	10	B	F		D	D			D	D	C		C	D				Walek
		F	15 1/2	24	13	B	D		D	D			D	D	C		B	D	88			Whale
		1																				
		2																				
		F																				
		1																				
		2																				
		F																				
		1																				
		2																				
		F																				
		1																				
		2																				
		F																				

Exhibit 3-009

HIGH SCHOOL PE NENT RECORD

62

NAME OF SCHOOL: Nome-Beltz Regional H.S. LOCATION: Nome, Alaska 99762 ADDRESS: Box 1168
 STUDENT'S NAME: Carter Dean (M) F TEL: 2548 ADDRESS: Box 773
 AGE AT ENTRANCE: LAST DATE OF BIRTH: 55 PLACE OF BIRTH: Nome, Alaska
 DATE ENTERED: 9-11-72 FROM WHAT SCHOOL: Nome High School ADDRESS: Box 131 Nome, Ak. DATES: WITHDRAWN 11-72

GRADUATED: *Number of weeks. *Periods per week. *Minutes per class period. Grading System: A=Excellent, B=Good, C=Fair, D=Minimum passing grade, F=Failure
 REINSTATED: *Number in class.

1969-1970	Grade 9	•	••	•••	SEM, 1	2	FINAL	UNIT	1970-1971	Grade 10	•	••	•••	SEM, 1	2	FINAL	UNIT	1971-1972	Grade 11	•	••	•••	SEM, 1	2	FINAL	UNIT
Physical Education					C	C		1	Vocational Carp.		37	5	165	F			0	(At Wasilla Boy's								Insti
Math I					C	B		1	Driver Education		18	5	55	F			0	Correctional								Insti
World History					-	D		1/2	Typing I		37	5	55	F			0									
English I					-	D		1/2	Earth Science		37	5	55	F			0									
Earth Science					F	F		0																		

NAME SCHOOL		Nome Public		LOCATION		Nome, Alaska		ADDRESS		Box 131	
STUDENT'S NAME		Garter		MIDDLE NAME		None		ADDRESS		Box 773	
AGE AT ENTRANCE		14		DATE OF BIRTH		11-10-69		PLACE OF BIRTH		Nome, Alaska	
DATE ENTERED		11-10-69		FROM WHAT SCHOOL		Massilla, Alaska		ADDRESS		Box 188	
GRADUATED		11-10-69		FROM WHAT SCHOOL		Massilla, Alaska		ADDRESS		Box 188	
GRADUATION UNIT EARNED		166 1/4		DAYS PRESENT		88		DAYS ABSENT		50 1/2	
P.E.		37 5 55		SEM 1		FINAL UNIT		19		GRADE	
Math I		37 5 55		SEM 2		FINAL UNIT		19		GRADE	
World History		37 5 55		SEM 3		FINAL UNIT		19		GRADE	
English 1		37 5 55		SEM 4		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 5		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 6		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 7		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 8		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 9		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 10		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 11		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 12		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 13		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 14		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 15		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 16		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 17		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 18		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 19		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 20		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 21		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 22		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 23		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 24		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 25		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 26		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 27		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 28		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 29		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 30		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 31		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 32		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 33		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 34		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 35		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 36		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 37		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 38		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 39		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 40		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 41		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 42		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 43		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 44		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 45		FINAL UNIT		19		GRADE	
Earth Science		37 5 55		SEM 46							

Seward Public Schools
ELEMENTARY SCHOOL PERMANENT RECORD 9

(Not To Be Removed from School)

Child's Name: Castle, Evan Phillip
 School: Augustine Seward Middle
 Date of Birth: 1994-6-5
 Entered From: Therese Alaska Date: 1/1/10
 Withdrawn: 1/1/10 Reinstated: 1/1/10
 Graduated: 1/1/10 High School Entered: 1/1/10

Grade	School Year	Semester	Date Present	Date Absent	Times Tard	Reading	Spelling	Writing	Grammar Language	Arithmetic	Geography	History	Social Studies or Civics	Science	Health, Safety & Phys. Educ.	Art	Music	Citizenship	General Average	Promoted to	Held in	Condition in	TEACHER (Name) (REMARKS)
4	1994-6-5																						
5	1995-6-5																						
6	1996-6-5																						
7	1997-6-5																						
8	1998-6-5																						
9	1999-6-5																						
10	2000-6-5																						
11	2001-6-5																						
12	2002-6-5																						
13	2003-6-5																						
14	2004-6-5																						
15	2005-6-5																						
16	2006-6-5																						
17	2007-6-5																						
18	2008-6-5																						
19	2009-6-5																						
20	2010-6-5																						

TEACHER (Name)
(REMARKS)

Exhibit 4-013

ER 1060

RAY TULJUM
Jr. Jr. High School Principal

CAROLINE COONS
Elementary Principal

NOME PUBLIC SCHOOLS

GLEN BAHM, SUPERINTENDENT
BOX 131, NOME, ALASKA

MEMBER OF NORTHWEST ASSOCIATION OF SECONDARY AND HIGHER SCHOOLS

School Board
Paul Mendicino, Pres.
Doris Galtner, Sec.
Doris Wilho, Treas.
Robert Smith
Anny Craft

February 22, 1965

Mr. Marion C. Wright, Jr.
Elementary Principal
Seward Elementary School
Box 482
Seward, Alaska

Dear Mr. Wright:

When I last saw you at length returned to our school system. A quick appraisal of his appearance and manner seems to indicate that his stay in Seward was beneficial. We shall appreciate your sending us a transcript of the work that he did while he was in the Seward school system. We are particularly interested in any behavior problems that he had while there.

Sincerely,

Caroline Coons

Caroline Coons
Elementary Principal

66

Mr. Roberts, Dean

Reporting period 1-13-62 to 3-13-62
Avg attendance 38

Mr. Roberts, Dean

Mr. Wesescha

Dean is very "independent." He works poorly with others; it appears that he doesn't want to; yet, he will stay on the periphery of class activities as long as he can do what he wants and not class activities.

His progress in class has shown sporadic improvement, especially since his return from Anchorage. Last few days he's been restless in class and cannot work at length on assignments.

Achievement: Language is best; math is better; science and social studies weakest.

Mr. Roberts Shop:

On average, Dean has lost interest and has not accomplished much since his return from M.Y.C. He would rather clean up shop than do a project and does this quite a lot. He is short on patience, however, he is pleasant to be around and does not cause any trouble. He has shown some unsportsmanship lately and is some stubbornness, but over comes this when counseled without malice.

Reading: Dean's achievement in reading is sparse.
What he has done is good (SDL Lab -- 75% average).

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Dean, Carter

DEC 20 1981

Swallowed too large piece of candy - Assembled and open down now

JAN 28 1982 T-98.4

URI. Beechler - also + fluid
let p.

APR 15 1982

Struck by car - Confusion and bruising over left
biceps only - X-ray neg.

MAY 20 1982

Perforating around rt foot.
cleaned.

T. Toxoid 0.5cc *PS*

JUL 26 1982

Mag bite @ forearm to superficial break in skin & mild
swelling & redness about area. Cleaned & powdered
Zephiran. Painted w/ neostigmate. To watch degree return
of any signs of infection.

MAR 20 1983

7 yr old James T-98.4 po Dr. Schadler / M. Brown

C.C. Had flu post 1-2 weeks - now seems
"kind of better"

PE - Chest clear. Ht. T + A.

? lab. Serum clotting mild

Heart - R.R. Slow, irregular rate - ? apr. apical
systolic *and*

Pi - Bunchy. Soft 3 + 10

6-30-83

Bite by dog on rt. hand *some time around*
Tetanus Toxoid 0.5cc. V and procedure for
antibody titer x 10 2000

Schadler

132

JUN 27 1970

Carter, Dean

Seen in ER cut inner aspect of R wrist &
butcher knife. Wound shallow full ROM
Wound cleaned, butterfly's applied.

1/2 cc TT given. RTC in 3 days /cc

JUN 30 1970

Wound is still going
Downy.

OCT 19 1970

2 chest pain @ @ side for about 2-3 wks
lasts 5 seconds -

P/E of chest, abd + CVS entirely normal
lung - ? chest - chondritis

D. A. Waidhehn

FIELD REPORT

TO: Superior Court
William H. Sanders
Nome, Alaska

DATE: January 25, 1971

REGIONAL OFFICE: Nome Sub-Regional

NAME: DEAN CARTER

NUMBER: 68-58 CP

OFFENSE: BURGLARY IN A DWELLING

COMMENT: SENTENCE

DATE:

SUPERVISION TYPE: JUVENILE PROBATION

SUBJECT OF REPORT: JUVENILE COURT REPORT

WHEREABOUTS OF MINOR:

The Minor, Dean Carter, presently is in custody of his parents, James and Esther Carter, Nome, Alaska.

REASON FOR HEARING:

On or about December 23rd or 24th, 1970, the above named Minor was arrested and charged with Burglary in a Dwelling.

On January 21, 1971, Dean Carter, Mr. and Mrs. James Carter, Public Defender Bryan Timbers, and Kenneth Brown, Probation Officer, appeared in the Superior Court, Second Judicial District, Judge William Sanders presiding. At that time, Dean Carter admitted the allegations in the petition presented by the Division of Corrections wherein the above named minor was alleged to be a delinquent in that he had committed the crime of Burglary in a Dwelling. The Minor was consequently adjudicated a delinquent and a dispositional hearing is scheduled for January 27, 1971 at 10:00 A.M.

MINOR'S STATEMENT:

The Minor readily admits burglarizing the home of Diana Jo Claydon on four (4) separate occasions. In addition to these burglaries, he admits breaking into the Nome High School and stealing certain items. The Minor claims that Mrs. Claydon is a phony and that he doesn't like her. This belief, in part, influenced him to break in her home.

Dean Carter also states that he needs money in order to pay for damages he did to his brother's car. The Minor exhibits no evidence of remorse in the matter. There is some evidence which indicates that he wanted to be caught in order to escape his home situation and to get out of Nome.

PARENT'S STATEMENT:

Mr. and Mrs. James Carter says that they just cannot understand what is wrong with their son. Mrs. Carter has told me on many occasions that she has just given up on Dean. In their view, he seems to have been born a bad egg. Both appear anxious to have him out of their home and in some setting where he will be forced to attend school.

Exhibit 6-018

ER 1072

JUVENILE COURT REPORT
RE: DEAN CARTER

PAGE 2

PARENT'S STATEMENT Continued:

The parents do exhibit concern over their son, but seem to feel they are helpless to be of any benefit to the boy at this time.

PRIOR RECORD:

On or about August 4, 1968, the above named Minor, was arrested on the charge of Breaking and Entering and Assault With a Deadly Weapon. Dean Carter admitted to breaking into the house of Axel Edmonds and when confronted by the owner, he picked up a pistol and held it, while coked, on Mr. Edmonds.

FAMILY HISTORY:

The Minor, Dean Carter, a 15 year old, Eskimo male, was born on 1955. His real father is Earl Ramey who no longer lives in Nome. The Minor's mother, Mrs. Esther Carter, has since remarried to Mr. Carter, the Minor's step-father. This is also the second marriage for Mr. Carter. The Minor has lived in Nome his entire life except for periods of institutionalization. The family unit is composed of the parents, two boys and two girls. It should be noted that Mr. Carter legally adopted the Minor, Dean Carter, is the second of four (4) children, two boys and two girls. Mrs. Esther Carter is employed at the Nome State Jail as a female Matron. Mr. James Carter is employed as a Dormitory Aid at the William Beltr High School, Nome, Alaska. Dean Carter never received the affection and attention that a young boy should. James Carter evidently resented the boy to some extent because Dean was illegitimate. When Dean was very young it is reported that the Carter's would leave him chained to a bed post so they could go out socializing. Dean is presently always the one chosen to do the baby sitting while his parents go out on the town. This happens frequently. The intra-family relationships in this home are very poor. The father resents Dean. Dean dislikes his brother, Jerry. The mother feels that Dean is a failure and prefers to give her attentions to Jerry. The home situation is obviously very poor and not the place for the rehabilitation of this minor.

EVALUATION AND PLAN:

Dean Carter is a very maladjusted young man. His developmental problems began very early in life due to a rather neurotic family arrangement. Dean Carter has served several lengthy periods of institutionalization but evidently without much success. It is felt that further incarceration would serve little purpose. It is also felt that the minor should be removed from the home and placed in a foster setting. Attempts are being made to arrange this in Anchorage. Dean is very amenable to this suggestion. What he has never had and what he desperately needs is a stable and loving home.

JUVENILE COURT REPORT
RE: DEAN CARTER

PAGE: 3

EVALUATION AND PLAN Continued:

Dean Carter is an intelligent but disoriented youth. He seeks adult attention and needs a father figure. He always spent more time in this writer's office than he had to, and in addition came to my home on many occasions. Dean evidently did not receive the attention and guidance which he wanted and needed at home. Hopefully, a substitute foster home can replace what has been missing. The Division of Corrections is making every effort to find a foster home.

RECOMMENDATION:

It is therefore respectfully recommended that:

1. Place the Minor, Dean Carter, in full custody of the Department of Health and Welfare, Division of Corrections for an indeterminate period of time not to exceed minor's 21st birthday.
2. that placement be ordered in a foster home, school or institution as designated by the Division of Corrections.
3. that the regular medical order be issued.
4. the parents, Mr. and Mrs. James Carter, be made financially responsible for the care and custody costs of placement according to their ability to pay.

Respectfully Submitted,

Kenneth E. Brown
Kenneth E. Brown
Probation Officer

Betty Kavalirlook
Probation Aid

Exhibit 6-020

JUDICIAL BRANCH COURT
DIVISION OF CORRECTIONS FOR SUPERIOR COURT
KETCHIKAN, ALASKA
COURT DATE: April 18, 1973
RE: CARTER, Dean P.
DOB: [REDACTED] 55
PETITION NUMBERS: 73-23 CP; 73-24 CP; 73-25 CP; 73-31 CP; 73-32 CP
SOURCE OF INFORMATION: Ketchikan City Police Department

WHEREABOUTS OF MINOR:

Dean P. Carter has been in custody since April 1, 1973 after being arrested by the Ketchikan City Police Department and charged with 15 counts of Burglary Not in a Dwelling; 14 counts of Breaking & Entering a Dwelling House and Carrying a Concealed Weapon. A petition hearing was held April 18, 1973, at which time Dean was adjudicated a delinquent child and committed to the care and custody of the Department of Health & Social Services, Division of Corrections until his 18th birthday for placement in a suitable correctional facility. At the time of this writing Dean is detained at the juvenile unit of the Juneau State Jail after being transferred April 28th, as it was felt the Ketchikan Detention facility could not meet his needs pending placement of a treatment program.

PERSONS PRESENT AT THE HEARING:

Client's attorney, Bill Council (Public Defender); Assistant District Attorney, Jeff Currell and Barton Penny, representative of the Division of Corrections. Presiding Judge for this hearing was Judge Thomas B. Stewart.

REASONS FOR HEARING:

According to Ketchikan City Police reports dated 04/01/73 numbers, 73030927; 73030782 and 282487, it is alleged that Dean P. Carter, along with four other juveniles, burglarized 15 downtown business buildings and 14 family homes. Subsequent charges were filed, Burglary Not in a Dwelling (14 counts) AS 11.20.100 and Burglary in a Dwelling (15 counts) AS 11.20.080. Dean was also charged with Carrying a Concealed Weapon, AS 11.55.010. When arrested he was carrying a .357 magnum revolver under his belt. Two other charges have been filed against Dean stemming from an escape attempt while being held at the Ketchikan Detention facility; Assault & Battery, AS 11.33.100 and Attempted Escape, AS 11.30.090. The summary of this incident as described by Mr. Mark Wise, detention supervisor on 04/03/73, is as follows:

Exhibit 9-032

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ER 1077

CHILDREN'S COURT REPORT
RE: CARTER, Dean P.
Page 2

REASONS FOR HEARING (cont.):

"At 2045 hours, Carter came out of the back door of the Detention Home and tried to pull the lock off the back gate. I was in the shop with my work crew from the State Jail. I heard the back door close and went out of the shop to see what the noise was. I told Carter to go back inside and he told me to open the gate. I then told him again to go back inside and started towards him. He again told me to open the gate and then tried to kick me in the groin. I turned sideways to him and received a kick in the right hip and lower abdomen. I shoved him up against the door and he grabbed a scrub brush lying near the door and raised it as though to hit me with it. I picked up a piece of pipe lying near the door and raised it to defend myself and at the same time I called and reached Henry McNeill and James Martinez, who were working in the shop, to come out. Carter saw the two inmates come out of the shop, he changed his mind about fighting anymore and laid the brush down and said he would go inside."

MINOR'S STATEMENT:

Dean readily admits his involvement in the matters thus far described explaining that as far as the burglaries are concerned, he was attempting to raise money so he could get to home on his way back from California. "It seemed like a good idea." Said he met some friends here in Ketchikan who also needed money and someone mentioned he had a screwdriver and knew how to break in doors without anyone knowing. As far as his escape attempt is concerned, Dean had little to offer. He is without explanations other than, "it was a dumb thing to do."

PARENT'S STATEMENT:

No statement has been attained from the youth's parents except for a short letter received April 10, 1973 explaining why they were unable to attend the petition hearing. This letter reads as follows:

"Due to my financial situation I find that my wife and myself will be unable to make the trip to Ketchikan. We are unable to locate a reliable person to stay with our two younger girls. We feel that Mr. Council, the Assistant Public Defender, is very capable of handling this case."

It is, however, the impression of this officer, after speaking with Dean; the counselor from McLaughlin Youth Center, Mr. Covington; and after evaluating his past record, his parents, for the most part have given up as far as feeling they might play a major role in helping Dean make a proper social adjustment.

CHILDREN'S COURT REPORT
 RE: CARTER, Dean P.
 Page 3

PRIOR RECORD:

08/05/68	Breaking & Entering Assault With a Dangerous Weapon	Nome, Alaska Nome, Alaska
12/23/70	Breaking & Entering	Nome, Alaska
07/11/71	Joyriding Breaking & Entering Assault With a Dangerous Weapon	Nome, Alaska

It should be also be noted that, at the time of this writing, Dean is AWOL from Fort Ord, California where he was attending basic training with the United States Army.

Dean was first declared a delinquent child at age 12, August 26, 1968, after admitting to a petition of Breaking & Entering and Assault With a Deadly Weapon. This incident occurred in Nome, Alaska, August 4, 1968, when he attempted to enter a house belonging to Mr. Alex Edmonds. When confronted by the owner, he picked up a pistol and held it, while cocked, on Mr. Edmonds. Because of this offense and because of his poor adjustment in the home of his parents, Dean was committed to the Alcantra Youth Camp (09/13/68). While there his behavior was described as passive aggressive, dependant, will need much attention. His adjustments were considered less than desirable and he ran from the camp three times. Eventually matters completely deteriorated and he was finally transferred to McLaughlin Youth Center and closed supervision. His behavior under close supervision improved quickly and significantly. At McLaughlin Youth Center he was described as able to take responsibility and accept job tasks. In March 1970, Dean was released from McLaughlin Youth Center to his parents in Nome where he remained until January 1971 when he again found himself in difficulty facing a charge of Burglary in a Dwelling. He was again adjudged delinquent, placed on probation and in foster care of Mr. and Mrs. Rymer of Anchorage, Alaska.

Dean's foster care remained somewhat stable until July 11, 1971 when arrested in Anchorage for Joyriding, Breaking & Entering and Assault & Battery. After again being adjudged a delinquent he was returned to McLaughlin Youth Center, August of 1971. He remained with the program until July 1972 when he was released to the custody of his parents in Nome. He remained in Nome until November 1972 at which time he entered the Army basic training at Fort Ord, California.

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Exhibit 9-034

ER 1079

MINOR'S COURT REPORT
RE: CARTER, Dean P.
Page 4

PERSONAL HISTORY:

Dean is a 16 year, 8 month old eskimo male. He was born [REDACTED], 1955 to the union of Earl and Esther Ramey. This marriage was of short duration and the whereabouts of Mr. Ramey is presently unknown. It is believed Dean has never seen his father. The minor's mother, Mrs. Esther Carter, has since remarried to James Carter who a few year back adopted Dean.

Minor has lived in Nome his entire life except for a period of institutionalization at McLaughlin and Alcantra Youth Camp plus foster care near Anchorage. The family is composed of parents, two boys and two girls. Dean is the 2nd of four children. Mr. Esther Carter is employed at the Nome State Jail as a female matron. Mr. James Carter is employed as a dormitory aide at the William Blitz High School, Nome, Alaska. During his formidable years, (12-16-1/2) and while not in an institution, Dean remained in the home of his parents or in the care of foster parents. Last foster care was Mr. and Mrs. Rymer of Anchorage, Alaska. He claims to have completed ten grades of formal education received in Nome and in the Anchorage area. His grades ranged from C's to F's. At the time of this writing he expresses no desire to further his education but does claim that he is interested in training to become a bush pilot. Other than that he expresses no future planning.

When questioned, Dean appears to relate well to his parents. The subject indicates he has much affection for his mother and claims he likes his step-father but is unable to cope with the way he teases him and shows favoritism to the other children. He claims that if he could, he would like to return to the home of his parents in Nome and seek out some employment so he could train as a bush pilot.

Though this officer has been unable to communicate with Mr. and Mrs. Carter, the record has been very revealing as far as determining their attitude and concern for Dean's present circumstances. It would appear that after experiencing years of frustration and much futile effort they have resigned themselves to the fact that "Dean must have been born bad." Their impressions as related to a Probation Officer in January of 1971 are as follows:

"Mr. and Mrs. James Carter say that they just cannot understand what is wrong with their son. Mrs. Carter has told me on many occasions that she has given up on Dean and in their view he seems to have been born a bad egg. Both appear anxious to have him out of their home and in some setting where he will be forced to attend school. The parents do exhibit concern over their son but seem to feel they are helpless to be of any benefit to the boy at this time."

Exhibit 9-035

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ER 1080

CHILDREN'S COURT REPORT
RE: CARTER, Dean P.
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PERSONAL HISTORY (cont.):

Dean, though relating well to this officer, has been unable to provide in-depth information with regard to his formidably years at home and particular his innermost feelings about his parents or his brothers and sisters. His response to questioning has been brief and without detail. His effect in this area at the time of this writing seems to be emotionless.

MILITARY HISTORY:

Dean joined the United States Army, November 1, 1972. His basic training was initiated at Fort Ord, California. His first difficulty while in the service occurred on November 18th, when he received an Article 15 for being AWOL. On February 16, 1973 he was placed in jail in Monterey County Jail, Salinas, California for suspicion of Burglary and Joyriding. Charges were dropped due to illegal search. On March 3rd Dean absented himself from his unit and at the time of this writing remains on AWOL status. A letter from Captain Allen G. Sheveland dated April 6, 1973 reads as follows:

"This unit plans to request a discharge for Carter under provisions of AR635-0206 or Chapter 13 AR600-200 for Frequent Discreditable Acts Against Either Military or Civilian Authorities."

Subsequent telephone conversation with Captain Sheveland indicated that under no circumstances will the Army take Dean back and that regardless of what disposition the civilian courts plan, he will be discharged.

EVALUATION:

After several years of exposure to what appears to be professional guidance and supervision, both in the community as well as at an institutional level, Dean would seem in character and behavior as well as attitude to have gained little in way of development of an acceptable life style. It is evident that after examining his record he remains immature, lacks a sense of responsibility, is impulsive, has poor judgment and displays a definite disregard for not only his welfare but the welfare of others around him. The only real difference in his behavior now opposed to when he first developed delinquent behavioral patterns, is that now they have become sophisticated and more serious. Along with this he has no sense of direction in his life or real motivation towards employment or formal education.

RE: CARTER, Dean P.
Page 6

EVALUATION (cont.):

It would appear at this time, Dean has little going for him outside an institutional setting. His parents feel they can no longer care for him, the military will not take him back into their regiment and it would seem he is unamenable to treatment at the community level from Probation Services. He has, in a sense, "burned out" his access to community resources. It is evident, at this time anyway, that he has no choice but to return to closed supervision.

Not much can be said that has not, by other persons directly related to this case, already been said. Dean continues to display a personality such that without further professional efforts at reintegration he will continue to engage in delinquent or criminal behavior and have little chance at ever making an acceptable social adjustment.

RECOMMENDATION:

Therefore it is the recommendation of this officer that Dean P. Carter be committed to the care and custody of the Commissioner of the Department of Health & Social Services, Division of Corrections until his 19th birthday and further that he be placed in a suitable treatment facility such as the California Youth Authority. In way of specific treatment for this youth, I would agree with comments by Dr. Donald D. Kenoyer of the Gateway Community Mental Health Center when he said:

"I do not feel that the prognosis for the boy is exceptionally good but any method of treatment to be effective must involve some personality reintegration along the lines of developing both emotional and social maturity and personal responsibility. I feel such treatment is most likely initiated in controlled conditions with well defined routines including personal-counseling where the intent of the treatment system is to help develop personality responsibility."

Respectfully submitted,


Barton Penny
Probation-Parole Supervisor

EP:ap
Date of Dictation: April 30, 1973

CASE HISTORY SUMMARY

CARTER, Dean Phillip
3628-C
January 17, 1975

Prior Criminal Involvement: Juvenile offenses dating back to 2/73; property offenses predominate.

Present Offense: Approximately 11/19/74 through 11/20/74, with a two days from being released from Benton County Jail, where he was serving a 60 day term for Criminal Drug Promotion, resident became a suspect in approximately 15 burglaries or attempted burglaries. Subsequently convicted of two burglaries, those that occurred 11/19/74 through 11/20/74. Resident burglarized an apartment complex of rings, watches and other small items.

Codefendants: Marcus W. Doddson, 18, plead guilty to a misdemeanor, Second Degree Theft, currently serving a probationary sentence.

George Cirac, presently awaiting sentencing in Benton County. (R-S, OSCI)

Family:

Father: No official information obtainable, resident claims name and relevant social data of father unknown to him.

Mother: No official verification available, resident claims mother's name is Esther D. Carther, 35, residing at [REDACTED] Nome, Alaska, employed as a matron at a jail. (R-S)

Siblings: Jerry L. Carter, 23, residing in Anchorage, Alaska.

Resident, 19.

Paula A. Carter, 11, residing with mother.

Coldie M. Carter, 7, residing with mother.

Resident claims that none of the above siblings have any criminal records. (R-S)

Developmental History: Resident born in Nome, Alaska, [REDACTED]/55. Never knew natural father. Claims his mother married step-father James Carter, 52, poor health, formerly chief of police, Nome, Alaska, presently state trooper, resident age 4. Verbalizes a distant, "fair" relationship. Resided with parents, age 8, sentenced to a children's home for numerous runaways. Returned to parental home after 6 months. Conflicts over parental authority continued, also continued to runaway. Claims step-father kept him chained to a bed for two weeks to prevent runaways. Age 12, 1968, court committed to Alcantra Youth and Conservation Camp as a result of burglary. Stayed with the Alcantra Youth Center for approximately 9 months, runaway numerous times. Subsequently court committed to McLaughlin Youth Center, where he stayed six months and was released to parental home. Returned to Alcantra Youth Center 12 months later for Auto Theft. Stayed in Alcantra 14 months, runaway once. Release to parental home age 16. Altercations with law continued, age 17, experienced new arrest, property offense. Probation officer suggested that he join the Army. He did so. Approximately 3 or 4 months later convicted of Burglary, discharged from Army. Returned to McLaughlin Youth Center on a contract basis with California, he was then sent to California Youth Authority; DeWitt Nelson and Ben Lonood Youth Camp, released 15 months later, age 18. Claims he was released on "probation" to Alaska, where he returned and stayed approximately 7 1/2 weeks. Subsequently

PSYCHOLOGICAL EVALUATION

NAME: CARTER, Dean

BY: Kathi Smith, Psychological Counselor II

DATE: March 22, 1978

Dean Carter is 22 years old, single, and presently serving 3 years for B.I.A.D.. This is his second felony incarceration; he reports that he has spent 7 years in correctional settings, most of that time as a juvenile.

The Taylor-Johnson Temperament Analysis indicates a mildly anxious person who prefers to be alone or with one other person and feels uncomfortable in groups. He is emotionally detached and finds it hard to put feelings into words. He is a logical thinker, tolerant of others and appropriately assertive. He presents as overly self-controlled. The attitude scale reflects that he is presenting a true picture of himself. Dean agrees with the TJTA picture with the exception that he sees himself as more emotional.

The MMPI results appear to be valid. Dean is described as somewhat depressed, restless, and having difficulty controlling impulses. His behavior is self-punitive in that he feels guilt over misbehavior, but is not deterred by the guilt. He has conflicts centering around dependency needs. Repression and denial of problem areas are likely; he may develop anxiety attacks, he may respond to reassurance, but he is likely to resist a psychological interpretation of his problems. He is somewhat suspicious of others. The MMPI raises the question of psychiatric problems, but discussion with Mr. Carter does not indicate, to me, a need for psychiatric intervention at this time. The MMPI shows a low likelihood of habitual criminalism, parole violation or prison homosexuality. The prediction regarding habitual criminalism should be appraised with caution in view of Mr. Carter's 7 years of prior incarceration. This means merely that Mr. Carter's life style may be more resistant to change than the MMPI indicates, and not necessarily that he is a "hardened criminal".

In an initial interview, Mr. Carter strikes me as a pleasant, assertive young man, not as inhibited as the TJTA suggests. He appears bright and he seems confident. He explains that he is anxious and tense - staying up late, having trouble getting to sleep, and probably worrying about his problems. He has some insight into the reasons for his situation, but he would need to develop more insight and/or be in a state of psychological pain before he would see a reason for psychotherapy. Vocational training and moral support would probably do him more good at this time. Mr. Carter is already trained as a painter, and in metal and wood repair. He wants now to go into jet mechanics at Anchorage Community College on a school furlough of some sort. While at E.R.C.C., he would like to take college courses and work as a painter or in maintenance. He states that he drinks socially only and does not have a drug problem.

I recommend: school/vocational involvement as most appropriate for Mr. Carter while at E.R.C.C..

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,)
)
 on Habeas Corpus.) NO. _____
)
) (Superior Court for
) San Diego County
) No. 90280
) Related Appeal
) No. S023000.)
 _____)

DECLARATION OF MYLA H. YOUNG, Ph.D.

I, MYLA H. YOUNG, DECLARE:

PROFESSIONAL BACKGROUND AND REFERRAL QUESTIONS

1. I am a clinical psychologist, licensed in the State of California (PSY 11916) since 1990, and a certified Diplomate of the American Board of Professional Neuropsychology. I have been employed at the California Medical Facility at Vacaville the past ten years, and I maintain a private practice in Daly City, California, which includes consultations and forensic evaluations. My particular area of expertise is in intellectual, neuropsychological and personality assessment.

2. I received a Bachelor of Arts degree *magna cum laude* from the University of Guam (1975) in psychology, a Master's of Arts Degree *magna cum laude* in experimental psychology from Towson State University (1977) in Baltimore, Maryland, and my Doctorate in clinical psychology from the California School of Professional Psychology (1988) in Berkeley, California.

3. Since 1989, I have worked for the California Department of Mental Health at the Correctional Medical Facility at Vacaville. My responsibilities include the psychological evaluation of inmates within the California Department of Corrections, supervision and training of psychology interns, and research evaluating psychiatrically hospitalized inmates within the correctional facility. For the first two and one-half years of my employment, I served as a psychology representative to an interdisciplinary treatment team providing evaluation, stabilization, and treatment to men who, while incarcerated, required acute and/or subacute psychiatric treatment. For the past eight years I have been the program consultant for psychological services provided to inmates in an interdisciplinary treatment program. In this role I have, among other duties, conducted several research studies to evaluate the functioning of inmates in psychiatric treatment programs, and for the past six years I have been engaged in a research study describing intellectual, neuropsychological, and personality

functioning of psychiatrically hospitalized inmates. In 1993 I was awarded the *Superior Accomplishment Award*, and in 1999 the *Outstanding Accomplishment Award*, by the State of California for work-related performance at the Correctional Medical Facility. In addition, my private practice focuses on neuropsychological and personality assessment for forensic purposes, and I am a neuropsychiatric consultant for *Psychiatric Associates San Francisco Spine Care Medical Group*.

4. As a pre-doctoral candidate, I was an intern at McAuley Neuropsychiatric Institute of St. Mary's Hospital in San Francisco, California from July 1985 - July, 1987, and from January, 1988 - June, 1989, I was granted a post-doctoral fellowship in neuropsychology at University of California at San Francisco, San Francisco General Hospital. Since April, 1996, I have been a member of the Adjunct Faculty at the California School of Professional Psychology as an instructor of Neuropsychological Assessment, Cognitive Bases of Behavior, and other related subjects. I have provided technical presentation at mental health conferences on forensic and neuropsychological issues at Asilomar Conference Center in Monterey, Patton State Hospital, the Department of Corrections at Pelican Bay and Folsom, and the Correctional Medical Facility at Vacaville, and have authored several scholarly articles on violence in the community, violence in prison, self-harm in prison, and the

assessment of Psychopathy. In addition to being a Diplomate of the *American Board of Professional Neuropsychology*, I am a member of the *International Neuropsychological Society*, *National Academy of Neuropsychology*, *Society for Personality Assessment*, *American Psychological Association* and the *California Psychological Association*.

5. As both a private forensic consultant, and with the California Department of Mental Health, and since 1996, I have conducted several hundred neuropsychological and personality assessments of children, adolescents and adults. I have qualified as an expert witness in the courts of California and Nevada, and United States District Court for Northern California.

6. I was consulted by the attorney of record in these proceedings, Phillip H. Cherney, for Petitioner, Dean Phillip Carter, a forty-four-year-old Native Alaskan male, who is currently on death row at San Quentin Prison. I was asked to examine petitioner, hereafter referred to as "Dean," and to conduct a neuropsychological assessment in order to:

- a. Evaluate Dean's intellectual and neuropsychological functioning levels; and,
- b. Determine if there are any impairments in neuropsychological functioning, what areas he might be impaired in, and to report findings and opinions.

NEUROPSYCHOLOGICAL ASSESSMENT PROCEDURES AND TEST RESULTS

7. At the request of his attorney, I met on two separate occasions (December 16, 1998 and July 21, 1999) with Dean at San Quentin State Prison. Testing was completed in a private, quiet room, and was without interruption. The following tests were administered:

- Rey 15 Item Test
- Test of Malingering Memory (TOMM)
- Wechsler Intelligence Scale III (WAIS III)
- Peabody Individual Achievement Test (PIAT-R)
- Sensory Perceptual Examination
- Finger Tapping Test
- Grooved Peg Board
- Tactual Performance Test
- Seashore Rhythm Test
- Speech Sounds Perception Test
- Visual Search and Attention Test (VSAT)
- Stroop Color Word Test
- Paced Auditory Serial Attention Test (PASAT)
- California Verbal Learning Test (CVLT)
- Rey Complex Figure
- Aphasia Test
- Category Test
- Wisconsin Card Sorting Test

8. Dean's attitude towards testing was evaluated using two tests specifically developed to detect "malingering," by measuring his performance within and across tests, and by observing his behavior during testing. His performance on two tests (*Test of Malingering Memory* and *15 Item Test*), specifically developed to evaluate for "malingering," indicated that he was not attempting to fake his performance. The consistency and performance both within and across neuropsychological testing also indicates that he was not attempting to fake his performance. My observation of his effort put into testing further supports the conclusion that Dean was not attempting to fake his performance. This evaluation is a valid representative of Dean's intellectual and neuropsychological functioning.

9. Dean's intellectual functioning was evaluated using the *WAIS-III*. Dean completed 10 years of formal education. The level of his intellectual functioning was unanticipated. Dean's overall intellectual functioning is in the *High Average-Superior Range* (FIQ=116, 86%ile), with essentially equal abilities for verbal comprehension (VIQ=114, 82%ile) and for thinking in visual images (PIQ=116, 86%ile). This means that Dean has the biological capacity for intellectual accomplishment, and, despite his limited educational experience, he has learned from his environment.

10. As a general rule, neuropsychological performance is evaluated using normative standards which adjust for age and education. In this case, Dean's neuropsychological performance would be compared to that of other individuals who are 43 years old and have 10 years of formal education. Because of his high intellectual ability, Dean's performance was evaluated two ways: 1) in the typical way, comparing his performance to individuals with similar age and education, and 2) using his own level of intellectual functioning as a baseline and comparing his performance on each neuropsychological test with that marker.

11. Applying the typical statistical methods of evaluating Dean's neuropsychological performance, and comparing his test performance to that of other individuals who are 43 years old and have 10 years of education, Dean demonstrates impaired 1) attention, 2) verbal memory, 3) arithmetic, and 4) complex psychomotor functioning. His performance on three tests of attention (*Seashore Rhythm*, *Speech Sounds Perception Test*, and *Paced Auditory Serial Attention Test*) was mildly impaired. His performance on one test of memory and learning (*California Verbal Learning Test*) was mildly impaired. His arithmetic ability as tested (*PIAT-R Arithmetic Subscale*) was moderately impaired. His complex psychomotor functioning (*Rey Complex Figure Copy Trial*) was moderately-severely impaired. Using the least restrictive criteria, these results indicate that Dean experiences brain impairment.

12. A more accurate way of evaluating Dean's neuropsychological functioning, however, is to use his overall intellectual ability as the appropriate marker for his functioning. As stated in paragraph 9 above, Dean's overall intellectual ability is in the 86th %ile (T61). Using this criteria, Dean's test results demonstrate diffuse brain impairment. Of particular concern, his performance on tests which evaluate executive functioning (thinking, reasoning, problem solving, using alternative ways of solving problems, impulse control, etc.), was impaired. Also of concern, his performance across all tests of attention and concentration (*Seashore, Speech Sounds, VSAT, Stroop, PASAT*) was impaired. Impaired executive functioning and impaired attention indicate impaired frontal lobe/subcortical brain areas, as well as impaired transfer of information across brain hemispheres.

13. Frontal lobes of the brain are critical to human functioning. This is the area of the brain that allows individuals to think, reason, problem solve, control impulses, respond to information from the environment, change behaviors based on that feedback, and anticipate the consequences of their actions prior to carrying out those actions. Test results described in paragraph 11-12 imply impaired functioning of anterior brain regions and raise concern that Dean experiences frontal lobe impairment.

LIFE AND CASE HISTORY BACKGROUND REVIEWED

AFTER NEUROPSYCHOLOGICAL TESTS CONDUCTED

14. When I conducted intelligence and neuropsychological tests, I was not provided information about Dean's life history or the facts surrounding the cases at issue. After I completed my initial assessment of Dean from the tests I administered, I was provided copies of, and factual statements from *Appellant's Opening Brief* and *Respondent's Brief* filed in the above-referenced direct appeal, in order to familiarize myself with the evidence surrounding the guilt and penalty phases of trial. In addition, I was provided transcripts from the defense penalty phases of the Los Angeles and San Diego trials (California Supreme Court Case Numbers S014021 and S023000), and a series of life history documents to review, which included the following:

1. Declaration of Mindy S. Rosenberg, and appendices thereto, including probation reports, psychological evaluations, and prison records;
2. Medical history of head trauma and excerpts from the *U.S. Environmental Protection Agency* reports regarding neurotoxins located in Nome, Alaska in studies conducted in 1986-88;
3. *In camera* testimony of Monte S. Buchsbaum, M.D., from San Diego Superior Court No. 90280

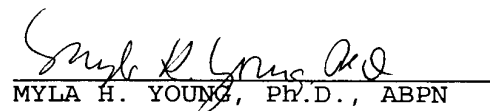
(Supreme Court No. S023000), June, 1991;

4. Declaration of Adrian Raine, D. Phil., as it relates to a *PET* scan conducted in June, 1991, and review of the *PET* scan.

FINDINGS AND OPINIONS

15. In summary, and based upon the foregoing, it is my opinion that it is probable Dean Carter has had long-term neurological deficits and diffuse brain dysfunction, and it is also probable that he suffers impaired functioning of anterior brain regions and experiences frontal lobe impairment. Precise etiology of this impairment, at this time, is not known. Information that I have gained from the previously described documents, however, suggests that some combination of prenatal exposure to neurotoxins, childhood/adolescent exposure to neurotoxins, drug abuse, multiple head traumas, and persistent childhood rejection and abuse combine to explain Dean's brain impairment.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this 19th day of March, 2001, at Daly City, California.


MYLA H. YOUNG, Ph.D., ABPN

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,)
)
 on Habeas Corpus.) NO. _____
)
) (Superior Court for
) Los Angeles County
) No. A-089330;
) Related Appeal
) No. S014021.)
 _____)

DECLARATION OF ADRIAN RAINE, D. PHIL.

I, ADRIAN RAINE, DECLARE:

1. I am a tenured Professor of Psychology in the Department of Psychology at University of Southern California, Research Associate at the Social Science Research Institute at the same university, Adjunct Associate Professor of Psychiatry at Western Psychiatric Institute and Clinic, University of Pittsburgh, Director of the Joint Child Health Project, Mauritius.

2. I am a British national living in the United States since 1987, and was educated at Oxford University, Jesus College,

where I received Bachelor (1977) and Master's (1982) degrees in Experimental Psychology; I received a Doctor of Philosophy (D.Phil) in Psychology from York University, England, in 1982, and taught in the Department of Psychiatry at the University of Nottingham, England. Since 1987, I have taught at the University of Southern California, and was Associate Chair of the Department of Psychology at University of Southern California between 1991-1993; I was also a consultant to the National Academy of Sciences' Panel on the Understanding and Control of Violence between 1990-1992. I was awarded the *Young Psychologist of the Year* by the British Psychological Association in 1980, an award for *Distinguished Research in Psychology* by the Department of Psychology at the University of Southern California in 1993, a *Research Scientist Development Award* in 1993 by the National Institute on Mental Health, an *Independent Scientist Award* from the National Institute of Mental Health in 1999, and the *Joseph Zubin Memorial Award* from the New York State Psychiatric Institute in 1998. I was given an endowed Chair, the *Robert G. Wright Professor of Psychology* from the University of Southern California in 1999. Among other professional memberships, I belong to the *American Psychological Association, American Psychological Society, American Society of Criminology, Society for Psychophysiological Research, and Society for Research in*

Psychopathology.

3. My particular academic and research interest, as it relates to this specific case, is in biological correlates of serious violence and the implications of such findings for psychological, social and legal purposes. My research has focused special attention on neurological studies and technologies that assist in measuring brain dysfunction and abnormalities. I have participated and/or directed in numerous experimental psychological studies related to the subjects addressed in this declaration, and have received numerous grants for research (over \$6.7 million). I have been invited and presented over one hundred papers to professional groups in experimental psychology in several countries, and am an ad hoc consultant to twenty scholarly journals, including *American Journal of Psychiatry*, *Journal of Psychiatry Research*, *Journal of Abnormal Psychiatry*, *Archives of General Psychiatry*, *Behavioral and Brain Sciences*, *Criminal Behavior and Mental Health*, and *Journal of Research in Crime and Delinquency*. I have authored or co-authored over one hundred articles that have appeared in professional publications and scientific journals, and three books, including the most recently published, Biosocial Bases of Violence (1997, Plenum Press).

4. I am the first author of *Selective Reductions in*

Prefrontal Glucose Metabolism in Murderers (Biological Psychiatry 1994), hereafter referred to as "Selective Reductions study," and the first author of *Brain abnormalities in murderers indicated by positron emission tomography* (Biological Psychiatry, 1997) which reported on an enlarged sample, both of which were the result of an experimental study conducted at the University of California at Irvine Imaging Center (UCI) in early 1990's. I have been associated with Monte S. Buchsbaum, M.D., one of the authors of the study, whose previous research in this area is referred to in the article, and whose testimony in petitioner's related case, is referred to as an exhibit. (See, Appendix 47, SDRT 8313-8328, 6/13/91, San Diego Superior Court No. 90280 [California Supreme Court No. S023000].) I am familiar with Dr. Buchsbaum's research and expertise, and have reviewed the described testimony from the San Diego proceedings.

5. An integral factor in conducting the *Selective Reductions* study was the advent of brain imaging in general over the preceding decade (1980's), and positron emission topography (PET) in particular, which allows for direct quantification of glucose metabolism in selected brain areas; earlier technologies, such as electroencephalographic (EEG) studies are more indirect and less powerful. The main aim of the study was to test the hypothesis that violent offenders are characterized by prefrontal lobe

dysfunction, as indicated by a selective reduction in glucose metabolism during performance of neurological tasks in the prefrontal cortex. Prior to the publication of the results of our study, the scientific community had recognized that a decisive link between prefrontal lobe dysfunction and violence, and in addition to the *Selective Reductions* study, current neuropsychological research provides strong evidence that such a correlation exists.

6. In the *Selective Reductions* study, the PET brain scans of twenty-two murderers and twenty-two controls subjects were examined. Twenty of the subjects were either charged with murder (three with attempted murder) or had been convicted; some were pending trial, others preparing for sentencing phases, or in post-conviction proceedings. While results of the study clearly demonstrate there are significant differences in brain structure and function of the forty-one violent offenders examined, from those subjects examined in the control group, the findings do not indicate that severe violence is a product of biological factors alone, nor that social processes are unimportant in explaining violence. Indeed, the study provides a basis upon which future brain-imaging studies may build in the contexts of law, psychiatry and society. There is every reason to believe that prenatal and birth complications, childhood abuse and neglect,

head trauma, drug abuse, and other factors, may contribute to brain dysfunction and violence. Some of these factors have been discussed in detail in scientific literature, including articles I have authored in Archives of General Psychiatry, December, 1994 (American Medical Assoc.), entitled, *Birth Complications Combined With Early Maternal Rejection at Age 1 Year Predispose to Violent Crime at Age 18 Years*, and Cerebrum (1999), *Murderous Minds: Can We See the Mark of Cain?*

7. Of the twenty-two subjects in the *Selective Reductions* study, the reasons for referral were diverse, including histories of schizophrenia, head injury or organic brain damage, psychoactive drug abuse, affective disorder, epilepsy, hyperactivity and learning disability, passive-aggressive or paranoid personality disorder, and all subjects were screened to assure that neither medication and drug use had occurred for two weeks prior to testing.

8. In 1997 we published an update of the above-referenced study in *Biological Psychiatry*, pp. 495-508, and increased the sample size from 22 to 41 convicted murderers, and from 22 to 41 control subjects. We again found poorer functioning of the prefrontal cortex compared to controls, but in addition they showed poorer functioning of the corpus callosum, abnormalities in the thalamus, hippocampus, and amygdala.

9. Petitioner, Dean Phillip Carter, was one of the subjects who underwent a PET scan at U.C. Irvine, on or about May 30, 1991, and his results were integrated into the study. I am in possession of petitioner's PET scan and raw data compiled from the scan since 1991, as they related to the *Selective Reductions* study. I have also been provided a transcript of the testimony of Monte S. Buchsbaum, M.D., elicited on June 13, 1991 in a separate murder trial, in which Dr. Buchsbaum rendered an opinion as to the "unusual abnormalities," depicted in petitioner's brain scan, as well as his reference to a lack of information about petitioner's medical background and life history. I am informed and believe the testimony of Dr. Buchsbaum occurred after the trial of the instant murder case, in which petitioner was convicted by a jury of murder in July, 1990. (See Appendix 47, see also, Exhibit 5, *Declaration of Kathleen Gilberd*.)

REFERENCE QUESTION

10. Petitioner's attorney, Phillip H. Cherney, requested that I review the above-referenced materials, and consult with him with respect to the following question:

Does the 1991 PET scan of Dean Phillip Carter depict any abnormalities of brain functioning, and, if so, how might abnormalities effect him?

11. Prior to answering the reference question, and in

preparation of this declaration, I reviewed the petitioner's *PET* scan, raw data test results, comparisons to other subjects within the *Selective Reductions* study, as well as Dr. Buchsbaum's testimony. In addition, I reviewed the neuropsychological test results conducted by Myla H. Young in 1999, her declaration, and a summary of life history documents provided to me by Mr. Cherney. (Exhibit 14, *Declaration of Myla H. Young, Ph.D.*)

12. Based upon the foregoing, it was, and continues to be, my opinion that petitioner's brain *PET* scan from May 30, 1991, depicts significantly abnormal brain functioning. The lateral and medial prefrontal cortex, corpus callosum, and occipital cortex all show evidence of reduced functioning. The hippocampus and thalamus also show evidence of abnormal asymmetries of function, while the midbrain is the one area that shows increased functioning.

13. The midbrain is thought to be the more "primitive" area of the brain and involved in part in the generation of impulsive aggressive feelings. The prefrontal cortex is an area involved in regulating and controlling impulsive behavior and feelings, and when functioning poorly the individual is less able to regulate and inhibit their behavior in a socially-appropriate manner. The corpus callosum allows the two cerebral hemispheres of the brain to communicate with each other; if this is functioning poorly, it

is possible that the more dominant, "logical" left hemisphere, may be less able to regulate and control the more nonverbal "emotional" right hemisphere. The functional significance of the hippocampus and thalamus is unclear at the present time. The occipital cortex is critical to processing visual stimuli.

14. Neuropsychological test data recently compiled by Dr. Young indicates abnormally poor performance in several areas of brain functioning, and Dr. Young's conclusion of diffuse brain impairment is consistent with, and corroborative of, findings in the 1991 *PET* scan.

15. Based upon the foregoing it was, and continues to be, my opinion that significant abnormalities are depicted in the petitioner's 1991 *PET* scan, and the petitioner's ability to think, reason, problem solve, control his emotions and impulses, would be significantly compromised by these brain dysfunctions. When risk factors, such as prenatal and birth complications, childhood abuse and neglect, head traumas, exposure to neurotoxins, such as mercury, are additionally present, these combined factors may particularly contribute to brain dysfunction and abnormalities consistent with those depicted in the petitioner's *PET* scan.

I declare under penalty of perjury the foregoing is true and correct, except as to information and belief, which I am informed and believe to be correct, to the best of my knowledge, this

12 day of July, 2000, at 6.02 p.m. L.A.,
California.

Adrian Raine

ADRIAN RAINE, D. PHIL.

**INDEX TO APPENDICES
ADRIAN RAINE, D. PHIL.**

Source materials referenced in the order they appear in the declaration:

Appendix 47 *Testimony of Monte S. Buchsbaum, M.D.* [SDRT 8313 - 8328]

Exhibit 59-745

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEAN PHILLIP CARTER,)
)
 on Habeas Corpus.) NO. _____
)
) (Superior Court for
) Los Angeles County
) No. A-089330;
) Related Appeal
) No. S014021.)
 _____)

DECLARATION OF DAVID VERNON FOSTER, M.D.

I, DAVID VERNON FOSTER, state:

1. I am a physician licensed to practice in the states of California. I received a B.A. degree in 1968 from Pacific Union College in Angwin, California. I studied under developmental psychologist Jean Piaget in Geneva, Switzerland, and in 1973 I received my M.D. degree from Loma Linda University in Loma Linda, California. I completed a medical internship at White Memorial Medical Center in Los Angeles (1973-1974) and a residency at the Los Angeles county/USC Medical Center (1974-1977). Subsequently, I completed a fellowship in child psychiatry at the UCLA Neuropsychiatric Institute (1977-1979). I am a Diplomate of the American Board

of Psychiatry and Neurology and am Board Certified in Child and Adolescent Psychiatry.

2. I currently maintain a private practice in Auburn, California, specializing in child, adolescent, and adult neuropsychiatry, and in the diagnosis and treatment of traumatic stress disorders. From 1995 to 1999 I served as Medical Director of Auburn Oaks Counseling Center, which provides partial hospitalization and intensive outpatient services as part of a larger integrated delivery system operated by Behavioral Health Corporation. I am a staff member at the BHC parent hospital Heritage Oaks Hospital in Sacramento, California. I am also consulting staff at Charter Hospital in Roseville where I serve as consultant to the Medical Director on program development for their adolescent program and clinical management of their adolescent patients. I also serve on the board of directors for the Placer County Children's Collaborative, an innovative effort to integrate the delivery of services to severely emotionally disturbed children and youth and their families, and those who are at high risk of emotional, educational, and behavioral problems. In addition I am Medical Consultant to the Director of the Placer County System of Care Project for Children and Youth at Risk, and Medical Director of Sierra Psychiatric Associates in

Auburn. I am also Consultant to the Director of The Center for the Study of Trauma and Violence and Social Change affiliated with the Drew University School of Medicine and the Los Angeles County Department of Probation.

3. From 1989 to 1993 I was Medical Director of Adolescent Services at Charter Hospital of Sacramento. From 1987 to 1989, I was Chief of Children's Mental Health for the Hawaii State Department of Health. During this time I also was an Attending Psychiatrist at Kahi Mohala Hospital in Ewa Beach, Hawaii. Prior to that, from 1979 to 1987, I held several positions at New England Memorial Hospital in Stoneham, Massachusetts, including Director of Adult and Adolescent Inpatient Services, Acting Director of the Department of Human Services (1985), Acting Chief of Psychiatry (1984-1985), Acting Director of the Child Inpatient Psychiatric Unit (1982-1984), Psychiatric Supervisor of Outpatient Services (1979-1983), and Senior Clinical Supervisor of Child Inpatient Services (1979-1983). I am founder and former Co-Director (1981-1984) of the Center for Family Treatment in Stoneham.

4. I was a Clinical Instructor in Psychiatry at Harvard Medical School from 1979 to 1987. During that period, I also supervised residents and fellows in psychiatry and child

psychiatry, and pre- and postdoctoral fellows in psychology at Cambridge Hospital's Department of Psychiatry. I was responsible, with other colleagues, for teaching courses in child psychopharmacology and psychopathology to fellows in child psychiatry. From 1980 to 1984, I was a lecturer in child psychiatry, family therapy and biopsychosocial medicine in the family practice residency program of Boston University's School of Medicine. I have served as a consultant to physicians, rehabilitation programs and health care providers, both public and private. I have lectured extensively on behavioral neurology and brain and behavior relationships. I also am author of papers and presentation on a variety of subjects, including adolescent development and the use of biopsychosocial data in the assessment and treatment of mental illness, and on the standards of practice in mental health evaluations in capital cases.

5. I have been involved in a range of criminal cases and have testified or submitted declarations in state and federal court for both the prosecution and the defense. I have conducted many psychiatric assessments of prisoners, including competency evaluations, in county and state prisons. On occasion, I have found that a prisoner was malingering or have found it necessary to advise counsel that my findings

would not support a claim of incompetency, insanity at the time of the alleged offense, or other mental health defense.

6. Organizations and societies to which I have belonged include the American Psychiatric Association, American Medical Association, California Medical Association, Hawaiian Psychiatric Association, and the Northern California Regional Organization of Child and Adolescent Psychiatry, the Massachusetts Psychiatric Society, Massachusetts Medical Society, and New England Council of Child Psychiatry.

7. At the request of counsel for Dean Carter, Phillip H. Cherney, I conducted a psychiatric examination of Mr. Carter at San Quentin State Prison on July 10, 2000. This included a mental status examination, neurological examination, a structured psychiatric diagnostic interview, a Luria-Nebraska screening test for possible neurological impairments, a Dissociative Experiences Scale, a House-Tree-Person Test, and an open-ended interview designed to elicit a medical and psychiatric history as well as any evidence of malingering. Total interview time was four and one half-hours.

8. The steps required in a competent mental health evaluation are outlined in Kaplan and Sadock's Comprehensive Textbook of Psychiatry (p 543, 4th ed. 1985). These are: 1) An accurate medical and social history. Every attempt must be

made to get historical data not only from the accused, but also from independent sources. 2) A thorough physical and neurological examination. 3) A complete psychiatric and mental status evaluation. 4) Since mental status examination cannot be relied upon alone to diagnose the presence or absence of organic impairments, mental retardation, and other disabilities, the use of specific specialists must be considered where appropriate. 5) Diagnostic studies such as neuropsychological testing and other appropriate tests must always be considered, and the failure to use them justified.

9. With the above data it is often possible for the trained neuropsychiatrist and neuropsychologist to determine the individual's brain-mind states in the present and, given adequate historical data, to deduce their state in defined past situations. In this declaration we strive to make it clear enough so that the average citizen can understand how our conclusions are logical and consistent with the evidence.

REFERENCE QUESTIONS AND MATERIALS REVIEWED

10. Current counsel for Dean Carter, Phillip H. Cherney, asked me to conduct a psychiatric examination and evaluation of Mr. Carter. The purpose of my examination was to determine Mr. Carter's mental status currently, when in custody, at the time of his trial, statements made at the time of his arrest,

at the time of the crimes for which he has been sentenced to death, and at the time of the allegedly aggravating acts. I was also asked to determine the factors that influenced his functioning and development, including genetic predispositions to mental illness, the effect of severe physical, and psychological abuse, and neglect, and his attempts to cope with substance use. As noted, the evaluation consisted of an interview with the client at San Quentin State Prison. I also reviewed extensive documentation of Mr. Carter 's family, social, medical and developmental history, including: educational records, medical records, declarations from witnesses familiar with Mr. Carter and his family, materials relating to Mr. Carter 's arrest for the acts for which he has been sentenced to death, materials relating to Mr. Carter 's prior convictions, and portions of the trial testimony in these cases. (See, Appendices 1, 9, 10, 13-20, 22-29, 31-48, and 52.)

11. Additionally, I read the declarations of friends and others who know Mr. Carter's family, and cultural history and have witnessed significant aspects of his social and psychological development. (See, Appendices 1-52.) I have also reviewed the statements and testimony of family members and other witnesses to Mr. Carter's childhood and adult

development. These materials provide external validation of Mr. Carter 's social history, detailed in the Declaration of Mindy Rosenberg, Ph.D., Ex. 8. The convergent data present in the consulted information offer a thorough and reliable accounting of Mr. Carter's life and are incorporated into this declaration.

12. These are the kinds of materials routinely relied upon by experts in the field of psychiatry to reach an expert medical opinion. As noted above, in performing a forensic psychiatric assessment such as that requested in this case, it is customary (indeed critical) that the psychiatrist review all available school, medical, law enforcement, incarceration, employment, psychiatric, psychological and social service records available as well as vital statistics pertaining to the client, key family members, and frequent care givers. It is also customary and proper to review sworn statements and testimony of individuals who can provide information regarding the behavior, characteristics and experiences of the client, his family members and the community in which he lived. This was also the customary standard at the time of Mr. Carter 's capital trial.

13. In performing a forensic psychiatric assessment, it is also customary for the evaluator to request that information provided by the client be corroborated by other sources of information (such as documents regarding the underlying facts or the sworn statements of witnesses familiar with the facts). Finally, it is customary for someone performing a forensic evaluation to have the client's counsel to provide him or her with additional information regarding the underlying facts, if in the course of the evaluation it appears that a particular set of facts played a role in the client's life. This was also customary at the time of Mr. Carter's capital trial.

SUMMARY OF FINDINGS

14. Based on my psychiatric examination of Mr. Carter, my review of the extensive historical material available to me, the *Declarations of Mindy S. Rosenberg, Ph.D., Ex. 8*, *Myla H. Young, Ph.D., Ex. 14*, and *Adrian Raine, D. Phil., Ex. 15*, I have formed professional opinions regarding Mr. Carter's psychiatric, neurological, developmental, and physical defects. I have also formed professional opinions regarding Mr. Carter's competency to stand trial, his adult behavior and functioning, his current mental status, his mental status at the time of the acts for which he was convicted, his

mental status at the time of his arrest, and his mental status at the time of the alleged aggravating acts. I hold my opinions to a reasonable degree of medical certainty. The facts upon which these opinions are based are outlined below. In summary, my findings are as follows:

15. Before Birth, Mr. Carter was genetically predisposed to a number of mental defects. Mr. Carter's family history is positive for addictive disease (alcoholism), depression and other severe mood disorders.

16. Childhood and Adolescent Abuse: Mr. Carter's childhood exposed him to a wide-variety of dangers. Among these dangers was physical and emotional abuse and neglect. Mr. Carter was raised in an abusive and neglectful family, where he alternately experienced physical violence and self-destroying humiliation, shame, and helplessness at the hands of both his mother and stepfather and numbing emotional neglect and abandonment at the hands of the very same people. This early experience of trauma put him in danger of a wide variety of psychological disorders. His early experience of violence and neglect did irreparable damage to the chemistry and physiology of his brain, and to his ability to develop an integrated and coherent awareness and sense of self over time.

17. Brain Damage: In addition he suffered physical traumas to his brain, including head trauma as a child and adolescent from beatings by family and peers, falls, and from motor vehicle accidents as six year old and as a young adult. (See Appendix 27, *Pasas Interview with Edna Buffas*, 9/30/86, Appendix 28, *Norton Sound Hospital Records*, 4/15/62, and Appendix 48, *Providence Hospital Records*, 5/24/77 - 5/26/77.) Mr. Carter was also exposed to significant neurotoxins as a child. The isolated village where he grew up was built on and around toxic pilings from gold mining days that were full of mercury and other known neurotoxins. Mr. Carter would run away from home and sleep in the dust of these tailings for days at a time or play for hours in the mine tailings. (Appendix 9, 1987 Technical Assistance Team "Weston Report" to the United States Environmental Protection Agency, Appendix 49, *Epler, High Levels of Mercury, Arsenic Discovered at Nome Playground* (Anchorage Daily News), Appendix 50, Compliance Order by Consent, Alaska Dept. of Environmental Conservation vs. Alaska Gold Company, and Appendix 51, Amendment to Compliance Order by Consent, Alaska Department of Environmental Conservation vs. Alaska Gold Company.) It

is also highly probable that Mr. Carter was exposed to significant amounts of alcohol in utero, which is a known neurotoxin to the fetus. Whatever the cause there is indisputable proof of Mr. Carter's brain damage available from a Positron Emission Tomography (PET) scan which shows damage to those areas of the brain required for judgment, insight, impulse control, and evaluation of reality and appropriate reality based responses. Mr. Carter's Neuropsychological testing also indicates damage to areas of the brain involved in evaluation, judgment and impulse control.

18. Psychiatric Disorders: Mr. Carter was abandoned and abused as a child and developed a traumatically based attachment disorder and mood disorder which increases ones vulnerability to stress and amplifies stress responses. He began treating his pain at an early age with drugs and therefore also suffered from severe drug dependence which further impaired his ability to accurately perceive and understand the world around him, his ability to respond adequately to complex situations, and his ability to function normally. There is credible evidence that Mr. Carter suffers from a major affective disorder and suffers severe mood swings. Affective disorders like bipolar

disorder and major depression are biological conditions with a genetic predisposition that is particularly likely to manifest as a result of severe stress or loss. All of these disorders are chronic long-standing conditions in Mr. Carter that were vulnerable to acute exacerbation (especially under duress). They were present before, during, and after the crimes for which Mr. Carter is convicted and sentenced to death. They are all disorders that were recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders available at the time of Mr. Carter's trial (DSM III) as well as the most recent edition (DSM IV).

19. Stressors Before the Crimes. It is amazing that Mr. Carter was able to function at all in any realm. Stunningly, in his adult life between the ages of 23-28 he was able to piece together a semblance of normality by becoming a television camera man and by marrying and fathering children. In spite of these improbable accomplishments, Mr. Carter decompensated under the weight of the cumulative stress of his life and under the duress of chronic drug and alcohol addiction.

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SOCIAL HISTORY OF DEAN CARTER AND HIS FAMILY

20. I have reviewed the *Declaration of Mindy S. Rosenberg, Ph.D., Ex.8*, along with related appendices, which provide the personal, historical basis for proper assessment. As more completely described by Dr. Rosenberg, whose declaration I have read, considered, and consulted in conjunction with my interview of Dean, the following summarizes his life history: Parental abuse, neglect, isolation, rejection and multiple out-of-home placements and institutionalization were prevalent. He was born into a unique cultural setting of mixed racial and ethnic heritage in Nome, Alaska, where discrimination and conflict with the dominant Western culture were major psychosocial factors. His mother, Esther Stoney, whose own mother was Eskimo, was unmarried at the time of Dean's birth (██████████ 1955), and had one child (Jerry) at the time, who is four years older than Dean. Dean's alleged biological father, Earl Ramey, never lived in Esther's home, and has not had any contact or involvement with Dean. Dean was born into a "family" and community where alcoholism was common. From his earliest days, Dean was physically abused, and emotionally shunned and rejected by his mother. His step-father, James Carter, who adopted Dean when he was approximately five years old, was known in the community as

intolerant and prejudiced towards Native Alaskans, which is well documented by the sworn testimony of Linda Ellana, Ph.D., a cultural anthropologist at the University of Alaska. (See, Appendix 10, *Testimony of Linda Ellana, Ph.D.* [SDRT 7890 - 7919]; see also, *Declaration of Mindy S. Rosenberg, Ph.D., Ex. 8.*) Both parents have been universally described as heavy drinkers, who frequently fought at home, becoming violent with one another and the children. (Appendix 22, *Cohen Interview with Pollyanne Reasner, 7/6/87*; Appendix 23, *Cohen Interview with Jerry Carter, 10/17/87*; LART 5755 - 5757 [Testimony of Jerry Carter]; *Declaration of Mindy S. Rosenberg, Ph.D., Ex. 8.*)

21. As a young child Dean was desperate for the attention and love of his mother. On one occasion, when he was six years old, in the middle of the night he latched onto the rear bumper of his mother's car as she attempted to drive away from home, after refusing Dean's pleas for her to stay. In this desperate gesture the soles of his feet were lacerated, and his mother had to return home. Dean was, however, "cast down" by his mother, and there is ample additional evidence that Dean's mother, as well as his step-father, viewed him as "born a bad egg," while his

older brother, Jerry, was praised and loved. (*Ibid.*; Appendix 13, Probation Report of Kenneth E. Brown, 1/25/71 and Appendix 29, Probation Report of Barton Penny, 4/30/73.)

22. Dean was so deeply affected by being shunned and rejected as a child that he began running away from home at the age of six. He describes wandering into the abandoned building known as the "old gold house, and of the many episodes described over the next three years, he would leave the shelter of "home" for the harsh Arctic environment surrounding Nome. He attempted to stow away on airplanes on two occasions, and was located in a shed near his home on another. (LART 5755, 5774; SDRT 7440-7443. As a final solution to Dean's "problem," as perceived by his parents, he was chained to his bed, and is reported to have been chained up for weeks at a time. (LART 5757-5759; SDRT 7451-7452; 7469-7471; Appendix 25, Case History Summary of S.R. Sobel, Counselor, 1/17/75.)

23. From his earliest childhood Dean experienced familial rejection and was targeted for abuse within the family. He also experienced racial denigration by peers and parents of both ethnic groups from which he was

descended. He would often wander the streets and a vacant lot a few blocks from his home. Dean was not recognized as a unique and valuable individual by any person or group with whom he had contact, and what minimal support he may have received, did not ameliorate the effects of his everyday experience of abuse and rejection. (SDRT 7665-66 [Farley]; 7616-24 [Brown]; 7578-86 [Adsuna]; Declaration of Fred Wemark, Exhibit 10; Appendix 26, Pasas Interview with Bertha Adsuna, July 1989.)

24. At the age of nine, his parents sent Dean to Seward, Alaska, to the *Jesse Lee Home*, an orphanage and home for "unwanted" Native Alaskan children. (Appendices 15, 30, see also, SDRT 7714 - 7756 [Sue Broughton].) Dean was uprooted from Nome and sent 1,200 miles away, and he was identified as an undesirable. For the next 9 months his description of life at *Jesse Lee Home* is one of being on "isolation." His recollections are vague, but he did not feel that he belonged or that he was engaged with anyone or any activity. He was fascinated with the buildings at the *Jesse Lee Home*, but again describes his experience as an "outsider," and someone who is once again socially ostracized. As the *Declarations of Fred Wemark*,

Ex. 10, Florita Richardson, Ex. 11, and Monty Richardson, Ex. 12, and Joyce Wemark-Birdinground, Ex. 13, document, Jesse Lee Home did not provide therapeutic intervention, and Dean was observed to be distant, distracted and lonely (*ibid.*). This was Dean's first experience with institutional life: For the next 15 years, from age nine (1964) to age twenty-three (1979), Dean spent nearly half of his life institutionalized.

25. Dean's childhood and teen years continued the patterns of rejection and isolation. He begins entering other people's homes to steal at a very early age, probably at age six. (Appendix 29, Barton Penny Report, 4/5/73.) On one occasion, Christmas Eve 1970, at age fifteen, he is caught inside another's home, eating their food. (Appendix 35, Finding of Fact, 1/20/71 and Appendix 36, Memo to Barton Penny, 4/5/73.) He is placed in a foster home in Anchorage after the latter incident. (*Ibid.*) He is described by youth counselors as a young teenager as appearing very immature for his age, and appearing as if a "flash bulb went off in his face." (*Id.*, SDRT 7760; 7772 - 7782 [Testimony of Matsumoto and Finegan].) He runs away three times from a juvenile detention facility outside the

Anchorage area, where he is detained, and again, each time he is placed far away from Nome. (*Id.*, Appendix 25, Case History Summary of S.R. Sobel, Counselor, 1/17/75, Appendix 29, Probation Report of Barton Penny, 4/30/73.)

26. Dean's childhood and youth can be summarized as one of grave uncertainty and insecurity in a harsh environment where he feels of isolated and rejected within his family and community, and he is anxious and often feels depressed, acting out of impulse rather than plan. He has difficulties with attention and concentration in school, and as described in greater detail hereafter, he struggles to understand his impulsiveness, and anxiety and depression are predominant symptoms observed by others. While he is accurately seen as relatively intelligent, he is also perceived by adults in the juvenile justice system as affecting a "breezy" exterior while trying to cope with a multitude of internal problems. (*Id.*, Appendix 29, Probation Report of Barton Penny, 4/30/73; Appendix 31, Psychiatric Evaluation by Marrienne Hagen, Ph.D., 6/1/71.) There is no therapeutic intervention and Dean's own ability to cope with his impulses, and the rejection of his family, is limited; he often feels anxious and depressed. (*Ibid.*)

27. Dean began using marijuana, LSD and other psychoactive drugs at age eleven or twelve, and he used them frequently throughout his youth and into adult life. He describes use of psychoactive substances use many times, and he began using methamphetamine in 1974, experiencing "frequent dizziness" as a side effect of the latter. (*Appendix 25, Case History Summary of S.R. Sobel, Counselor, 1/17/75.*) In a September 7, 1972 medical examination for military service he described use of LSD fifteen times, amphetamines three times, and marijuana occasionally. (*Appendix 46 , Military Exam Records, 9/7/72.*) In the past Dean described early use of psychedelic drugs as causing "bad trips," but, he is also experienced intense stimulation by the use of drugs. He does not, however, appear to have been an abuser of alcohol in his youth, in part because of his reaction to his parents' heavy abuse, and at age 10 he was impacted on learning that a neighbor had frozen to death while drunk. (*Appendix 44, Report of Robert McManmon, M.D., 11/18/77.*)

28. Dean's use of alcohol was minimal, until, he was paroled in 1979 from Alaska Department of Corrections. After 1981, the dissolution of his brief marriage, and

until his arrest on capital murder charges in April, 1984, Dean's use of alcohol escalated tremendously. As one person, Mary Alexander, described him, he "looked terrible" when she saw him in 1982 (RT 5821), and by early 1984, alcohol and cocaine abuse increased as Dean's life unraveled.

29. Dean's combined use of alcohol abuse and cocaine led others to become deeply concerned about him. As described by Robert Jenkins, by early 1984, Dean was drinking excessively and abusing cocaine to the point where he was "clearly out of control" (RT 5869), and in telephone conversations he sounded "paranoid" and often "incoherent." (RT 5874; see also, SDRT 8060; 8069.) Others who had known him over the few years since his release from *Eagle Mountain Correctional Facility* observed Dean to show "flashes of anger" (Andrew Holtz [RT 5898]), and according to another friend, Melinda Eggars, he was acting "spaced out, incoherent" and appeared "depressed, kind of out of it" (RT 5841-42) in early 1984, even "slouchy and kind of dirty" (RT 5448) as Paula Von Gemmingen related. Carol Bain described him as withdrawn and "depressed" when he visited her in Hawaii at the end of 1983. (SDRT 8011-12.) Susan Loyland, a bar waitress in San Diego, described her

relationship with Dean in March, 1984, as revolving around alcohol, drugs and sex, and they were "high most of the time." (SDRT 3909-3820.)

30. Rose Steward, the prosecution witness who testified in the penalty phase in aggravation in Los Angeles, and also in the San Diego case, observed Dean's use of alcohol, marijuana and cocaine during two weeks in March, 1984. (RT 5672; 5504; 5611-5615; SDRT 3462-63; 3512-13; 3577-78.) In addition to the physical assault to her, Ms. Steward described Dean as alternately angry and then "crying and hugging her" (RT 5721), and having a "glazed" look in his eyes (RT 5722). Ms. Steward described Dean as violent and in a "trance" during the altercation, then "he put his head in his hands" as if "he didn't know what had happened." (SDRT 3469-70.)

31. Dean also reportedly informed Ms. Steward at the end of the assault that took place on March 29, and Andrew Holtz shortly thereafter in a telephone conversation, in which sounded "very depressed," possibly suicidal, that he needed psychiatric help. (RT 5904-5905; 5722.)

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OTHER EVALUATIONS

32. *School Records.* School records indicate that Dean was an average to poor student in the Nome public elementary school system. Attendance is sporadic. He did not attend school in the second grade at all, but eventually he was allowed to move to third grade. This period (1961-62), when he was approximately six-seven years old, also coincides with a time when he was struck by a car and injured, several episodes in which he began to run away, culminating in being chained to the bed. As he spent the better part of the fourth grade at *Jesse Lee Home* in Seward, where he attended *Bayview Elementary*, and he returned to Nome to finish. (*Appendix 17, Seward Public School Records; Appendix 15, Application to Jesse Lee Home, 9/10/64.*) At *Jesse Lee Home*, Dean describes his inability to see clearly from the front row in class; he is prescribed lenses for the first time and his vision improves dramatically. (*Ibid.*; see also, *Declaration of Mindy S. Rosenberg, Ph.D., Ex. 8.*) As Alaska juvenile institutional records reveal, Dean is observed by one of his 8th grade teachers at Alcantra Youth Camp as an "independent" student, "restless in class and cannot work

at length on assignments . . . ,” and two years later as “an intelligent but disoriented youth.” (Appendix 32, *Wasecha Report*, 3/11/69; Appendix 13, *Probation Report of Kenneth E. Brown*, 1/25/71.) In 1975, at age 19, Dean is also described by a psychiatrist as having “above average intelligence.” (Appendix 33, *Report of J. Rennebohm, M.D.*, 1/17/75; see also, Appendix 31, *Psychiatric Evaluation by Marrianne Hagen, Ph.D.*, 6/1/71.) He completed the tenth grade. (Appendix 16, *Nome Public School Records*.)

33. *Juvenile and Young Adult Evaluations.* The theme of lack of special-education or therapeutic intervention continues throughout the reports generated during Dean’s institutional confinement, and is discussed in greater depth in the *Declaration of Mindy S. Rosenberg, Ph.D., Ex. 8*. The reports provide contemporaneous portraits of Dean, the Carter family dynamics, and a doubtful prognosis for Dean’s future. Of particular note, a probation report prepared for the Alaska Juvenile Court, January 25, 1971, when Dean is 15 years old, after the commission of a burglary in Nome on Christmas Eve, 1970, the officer points out that “there is some evidence that indicates that he wanted to be caught in order to escape his home situation

and to get out of Nome." (*Appendix 13, Probation Report of Kenneth E. Brown, 1/25/71.*) Upon interviewing Esther and Jim Carter, the Probation Officer Kenneth Brown notes Dean's parents "just cannot understand what is wrong with their son [and] Mrs. Carter told me on many occasions that she has just given up on Dean ..., [because] in their view he seems to have been born a bad egg." (*Ibid.*) In Officer Brown's words, "Dean evidently did not receive the attention and guidance which he wanted and needed at home." (*Ibid.*) He points out to the juvenile court that Dean's "developmental problems began very early in life due to a rather neurotic family arrangement." (*Ibid.*) In the final analysis the officer recommends a foster home placement in lieu of juvenile detention facility because "what he has never had and what he desperately needs is a stable and loving home." (*Ibid.*)

34. Sixth months later, June, 1971, Dean is evaluated for the first time by a psychologist, Marianne Hagan, Ph.D., as part of an evaluation for promotion into a program at A.J. Dimond School, an alternative high school in Anchorage, where Dean is attending the tenth grade. (*Appendix 31, Psychiatric Evaluation of Marianne Hagan,*

Ph.D., 6/1/71.) Dr. Hagen determines that Dean functions with "the basic ability and academic skills necessary to function in high school . . .," but she finds that his "primary difficulties center around his difficulties with relationships, a tendency to over-react, and a high anxiety level." (*Ibid.*) She refers to "Dean's perceptual skills [as] generally good but again in this area there is distress which is apparently caused by his high anxiety level and other emotional adjustment difficulties." (*Ibid.*) She views test data supports a "general level of intellectual functioning within the 'high average' range except in areas that are sensitive to an emotional tension of anxiety." (*Ibid.*) He is observed to mask anxieties with an "evasive, breezy, hands off approach," but because of "high anxiety and other emotional adjustment difficulties . . ., Dean tends to build up to a point of over-reaction . . ., and perhaps some breaks in judgment." (*Ibid.*) She foresees a "pattern of emotional response [that] will continue to create problems for him." (*Ibid.*)

35. At age 17, in April, 1973, Dean was arrested again for burglary, and he was seen by Donald D. Kennoyer at Gateway Community Mental Health Center in Ketchikan,

Alaska, regarding a recommendation as to whether Dean should be treated as an adult. Dr. Kenoyer recommended Dean be treated as a juvenile, finding him to be "quite likeable," but following with "the prognosis for the boy is [not] exceptionally good." (*Appendix 38, Report of Donald B. Kenoyer, Ph.D., 4/13/72; Appendix 36, Memo to Bart Penny, 4/5/73; Appendix 29, Probation Report of Barton Penny, 4/30/73.*) Dean's own reason for committing a series of burglaries was that "it seemed like a good thing to do" and "it was a dumb thing to do," while the Probation Officer, Barton Penny, recommended Dean be treated as a juvenile because, among other things, he was "impulsive ... remains immature..., [and] has no sense of direction in his life" (*Ibid.*) As others have learned, Mr. Penny also found he "has been unable to communicate with Mr. and Mrs. Carter, [and] the record has been very revealing as far as determining their attitude and concern for Dean's present circumstances ..., [that is] they have resigned themselves to the [alleged] fact that 'Dean must have been born bad.'" (*Ibid.*)

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36. On January 17, 1975, Dean, 19 years old, entered the Oregon Department of Corrections for adult burglary convictions. A counselor observed Dean appeared on intake as "an immature, undirected young man of average intelligence ..., who likes to think of himself as 'foot loose and fancy free.'" (*Appendix 25, Case History Summary of S.R. Sobel, Counselor, 1/17/75.*) Dean was also seen over the next four months by a psychiatrist, J. Rennebohm, M.D. (*Appendix 42, Reports of J. Rennebohm, 1/17/75, 4/3/75, 5/1/75, and 5/29/75.*)

37. Dr. Rennebohm described Dean as possessing above-average intelligence, but "[d]ynamically, it would appear that he has operated much of his life with goals that are rather vague, an uncertain sense of self, and, somehow, an especially active conscience ... [and] it is, therefore, that much of his thinking revolves around self-reproach." (*Appendices 33, Report of J. Rennebohm, 1/17/75, and 42, Reports of J. Rennebohm, 1/17/75, 4/3/75, 5/1/75, and 5/29/75.*) In this initial interview, Dr. Rennebohm noted Dean's "problems are essentially those of chronic anxiety tension recently aggravated by a depression condition."

(*Ibid.*) Dr. Rennebohm prescribed Sinequan for symptoms of depression and insomnia. (*Ibid.*)

38. Dr. Rennebohm interviewed Dean again on April 3, 1975, and he described him as engaged in "a substantial measure of conscience activity ... and committed to doing right and staying out of trouble ... [but] he does not have a clear-cut sense of personal identity ... and that which is present includes a strong inclination toward self-disdain." (*Appendix 42, Report of J. Rennebohm, 4/3/75.*) Dr. Rennebohm altered his prescription, ordering *Prolixin* and *Librium* to alleviate "problem[s] of anxiety and depression, which has been manifested mainly in insomnia and irritability." (*Ibid.*)

39. Dr. Rennebohm next saw Dean on May 1, 1975, prescribed Benadryl and continued Librium, but noted "the prospects for definitive and constructive action on his part in this regard [rehabilitation] does not appear strong...." (*Appendix 42, Report of J. Rennebohm, 5/1/75.*)

40. Dr. Rennebohm last saw Dean on May 29, 1975, and again ordered continuation of *Benadryl* and *Librium*, but wrote, Dean "is, however, still markedly anxious, which is

an indication that his conflicts are not yet fully resolved." (*Appendix 42, Report of J. Rennebohm, 5/29/78.* Dean remained in prison through the next two years and was released in March, 1977. (*Appendix 43, Oregon Correctional Entry Data/Discharge Form, 3/3/77.*)

41. In May, 1977, at age 21, Dean, employed to handle cargo by *Servair* at the airport in Anchorage, Alaska, was arrested for burglary again. As observed by a court-appointed psychiatrist, Robert McManmon, M.D., Dean has "repeated non-violent offenses and no history of alcohol abuse [with a] history of depressive symptoms..., [who] tend[s] to see things in a rather concrete way with little insight" (*Appendix 44, Report of Robert McManmon, M.D., 11/18/77.*)

42. While imprisoned (January, 1978-January, 1979), at *Eagle River Correctional Facility* in the Alaska State Department of Corrections, Dean, 23 years of age, was examined by prison psychologist, Kathi Smith, Ph.D. (*Appendix 45, Report of Kathi Smith, 3/22/78.*) She administered the *Minnesota Multiphasic Personality Inventory* (MMPI), concluding that test data disclosed a young man "somewhat depressed, restless, and having difficulty

controlling impulses." (*Ibid.*) She suggested testing data "raises the question of [unspecified] psychiatric problems." (*Ibid.*)

43. It is noteworthy that until his release from *Eagle River Correctional Facility* in 1979 at age 23, Dean spent the majority of his life in one institutional setting or another. In none of these settings (Jesse Lee Home, Alcantra, McLaughlin, DeWitt Nelson, Ben Lomond Youth Camp or Oregon State Correctional Center) was Dean ever perceived as a discipline problem, and shortly before his release from the *Honor Unit* at *Eagle River Correctional Center* he was seen as a "most positive influence on other inmates" (*Appendix 45, Report of Kathi Smith, 3/22/78; SDRT 7789-90.*) After early runaway episodes when he was a young teenager, Dean in fact adjusted well to the discipline and confinement of institutional life, and there are no significant incidences. (See also, *Appendix 41, Testimony of James W.L. Park [SDRT 8183-8202].*)

44. Until his arrest on murder and rape charges in April, 1984, at age 28, Dean spent a little over five years (March, 1979-April, 1984) of his life without arrest or conviction on criminal charges. As is well documented in

the testimony in both of Dean's trials, he learned photography and cinematography at *Eagle River Correctional Facility*, and, as is also fully documented, began his new career with the Department of Corrections and the State of Alaska. (See, LART 5785-5792; SDRT 7847-7866; 7947-7964.) After release from prison in spring 1979 Dean was gainfully employed as a camera man for *Channel 2* in Anchorage, then the University of Alaska, and he worked on and off as a photographer, including for the Native Alaskan *Kawerak, Inc.*, up to the breakup of his marriage to Kathleen Fuller. (LART 5893-96; 5881-5889; 5849-5854; 5801-5810; SDRT 7850-54; 7870-71; 7966-7974; 8025-8030; 8079-8085; 8104-8110; 7874-75. See also, *Appendix 52, Alaska Superior Court Records, Case No. 82-4012, 6/29/82 .*)

45. By all accounts his brief marriage (June, 1980 - June, 1982) reached a high point with the birth of twin sons (James and Jonathan) January 7, 1981, and its low point with their separation at the end of December, 1981. (LART 5820-23; SDRT 7870-71; 7997-8000; 8004; *Appendix 52, Alaska Superior Court Records, Case No. 82-4012, 6/29/82 .*

NEUROPSYCHIATRIC EVALUATION OF DEAN CARTER

46. On July 10, 2000 I conducted a neurological and psychiatric examination of Mr. Carter at San Quentin State Prison. The psychiatric evaluation included a mental status examination, a structured psychiatric diagnostic interview, a Luria-Nebraska screening test for possible neurological impairments, the Dissociative Experiences Scale (DES), a House-Tree-Person (HTP) test to evaluate visual motor integration, and psychological and emotional functioning, self concept, and self development. The interview also included an open-ended interview designed to elicit a medical and psychiatric history as well as any evidence of malingering. Total examination time was four and one half hours. Mr. Carter is a large man approximately six foot three inches tall and two hundred fifty pounds. He wore graying black hair combed back from his face, has brown eyes, covered by brown plastic rimmed glasses, an unclipped mustache and tufts of uneven beard hair on his roundish face. He was dressed in prison blue over long johns and wore his collar open at the top.

47. He was pleasant in demeanor and expression, and was initially fairly voluble. He frequently attempted to break the tension of the interview with efforts at humor and frequently displayed a wry smile that was at times incongruous with the serious content of his difficult childhood or the difficult circumstances of his imprisonment. His thought processes were generally logical, but frequently tangential (going off on a tangent and not returning to the original topic), and at times circumstantial (going off on tangents but returning to the original topic). (Tangentiality and circumstantiality are frequently found in brain damaged people.) He was alert, oriented to person, place, and time, and cooperative with all aspects of the evaluation. Immediate memory was intact with ability to repeat seven digits forward and five digits backwards. Recent memory was impaired with ability to recall only three of four items after ten minutes. His remote memory had gaps in his recall. His earliest memory was of Christmas of his third year, remembering being awakened by his brother who was shaking him and saying, "There's Santa Clause!" and seeing a "flash of red" as someone ran across the room. When he was informed at seven or eight by a peer that there was no Santa Clause he states

that this consolidated his belief that he could not trust grown ups. He remembers frequent beatings by his mother and step-father and runaways from the age of six or before, but tends to gloss over his painful memories with "good times" of "hunting, fishing, camping, playing basketball," which independent witnesses report he was frequently left out of by his step-father and brother. He is quick to excuse his parents for their beatings of him and sending him to out of home placement at an early age. "They did the best they could. What were they supposed to do with me?"

48. This minimizing and dismissive response was typical of all efforts to assess his mood and affective status. His history, choice of stimulant drug use, and previous psychological testing results indicate a history of depression and mood swings, but Mr. Carter minimizes mood symptoms. However, Mr. Carter does admit that he was severely stressed by the breakup of his marriage and that his stimulant drug abuse increased at that time.

49. It is after his divorce that his life seems to fall apart. He continues to believe that the KGB was

following him in Anchorage. Because of these perceptions and the accompanying fear that his life was in danger, he began to move around from friend to friend and finally became so concerned that he left suddenly in the middle of the night for Seattle where he had a friend. In Seattle he again became convinced that the KGB were following him so he again suddenly left his job at a news station and went to Hawaii. He finally ended up in San Diego. There his drinking and massive drug use continued -- as did his paranoia. He reports that drug use started at thirteen when he was locked up at McLaughlin Youth Center in Anchorage. By the time he was 18 his drug use had become severe. He used hallucinogens (primarily LSD), but became dependent on amphetamine or cocaine usage, which would go on runs of about six days "until I was psychotic and would crash." He made attempts to get away from drugs like coming to California at 19 "just to get away from Alaska and all the drugs." Instead he again ended up in trouble due to his impulsive behavior and poor judgement. On impulse he decided to go see a girl he knew in Oregon. There he was arrested for not having the headlight on of the stolen motorcycle he was riding. This pattern of self-defeating behavior was a pattern described throughout

his life: "I couldn't seem to think before I acted or to not do stupid things."

50. Neurological examination was significant for an upturned Babinski reflex on the left. This is consistent with cortical damage in the right hemisphere.

CONCLUSIONS

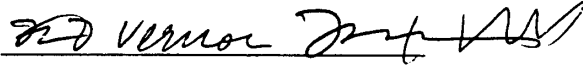
51. A review of Mr. Carter's developmental, medical, and social history, the neuropsychological testing, brain PET scan, and psychiatric and neurological evaluation results in an overwhelming convergence of data proving that Mr. Carter has brain damage to those parts of his brain needed for the executive functions of insight, judgment, and impulse control in actual situations. Persons with such damage can, in the abstract report appropriate responses to given situations, but cannot be relied upon to guide their own behavior in actual situations. In real life situations - most especially when stressed or under the influence of alcohol or drugs - they are more like sleep walkers reacting to unconscious or emotionally triggered impulses and not guided by conscious and

rational decision making processes. Mr. Carter also has been intermittently delusional and still believes that he was being followed by the KGB. This psychotic thinking would further compromise his decision making. It can be stated with medical certainty that Mr. Carter's neurological and psychiatric problems are long standing and were present during the time frame of the crimes for which he is convicted and sentenced to death.

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I declare under penalty of perjury under the laws of the United States and California that
the foregoing is true and correct to the best of my knowledge.

Executed this 18th, of July 2000.

A handwritten signature in black ink, appearing to read "David Vernon Foster", written over a horizontal line.

DAVID VERNON FOSTER, M.D.

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DAVID V. FOSTER, M.D.

Source materials referenced in the order they appear in the declaration:

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- Appendix 2 John Murray, Alaska (1999 *Compass America Guide*), pp. 45-50, 289, 297-300
- Appendix 3 M. Phillips and T. Inui, *The Interaction of Mental Illness, Criminal Behavior and Culture: Native Alaskan Mentally Ill Criminal Offenders*, Culture, Medicine and Psychiatry, 10 (1986) 123-149
- Appendix 4 *Inupiat Ithitqusiak*, August 24, 1996, "The Arctic Venturer: Preserving the Inupiaq Values" (Ballot, S.), P. 30, "Responsibility to Tribe: Education" (Wilson), p. 31; "Spirituality" (Asik), pp. 35-36
- Appendix 5 "Two Worlds One Whale" (Lord), pp. 58-65, 87, 86 *Sierra* 4 (July/August 2000)
- Appendix 6 Nick Jans, The Last Light Breaking, *Living Among Alaska's Inupiat Eskimos* (1993, Alaska Northwest Books), pp. 30, 42
- Appendix 7 J.D. Bloom, M.D., *Psychiatric Problems and Cultural Transitions in Alaska*, Journal of the Arctic Institute of North America, (1972) Volume 25, Number 3, pp. 205-215
- Appendix 8 J.D. Bloom, *Cross-Cultural Forensic Psychiatry in Alaska*, Bulletin of the American Academy of Psychiatry and the Law (1975), Volume III, Number 4
- Appendix 9 *1987 Technical Assistance Team "Weston Report" to the United States Environmental Protection Agency*
- Appendix 10 *Testimony of Linda Ellanna* [SDRT 7890 - 7919]
- Appendix 11 N. Chance, The Inupiat and Arctic Alaska (1990; Harcourt Brace)
- Appendix 12 E.F. Foulks, *The Arctic Hysterias of the North Alaskan Eskimos* (1972) Anthropological Studies
- Appendix 13 *Probation Report of Kenneth E. Brown*, 1/25/71
- Appendix 14 *Cohen Interview with Esther Carter*, 6/16/87
- Appendix 15 *Application to Jesse Lee Home*, 9/10/64
- Appendix 16 *Nome Public School Records*

- Appendix 17 *Seward Public School Records*
- Appendix 18 *Death Certificate of James Woodward Carter*
- Appendix 19 *Pre-Sentence Report of Paul Tannenbaum, 10/27/77*
- Appendix 20 *Cohen Interviews with Ida Everin, 7/6/87 and 9/7/87*
- Appendix 21 E. Adamson Hoebel, *Law-Ways of the Primitive Eskimos*, 31 Journal of Criminal Law & Criminology (1953) 663, 670-72
- Appendix 22 *Cohen Interview with Pollyanne Reasner, 7/6/87*
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- Appendix 29 *Probation Report of Barton Penny, 4/30/73*
- Appendix 30 *National Register of Historic Places, Jesse Lee Home for Children, United States Department of the Interior, National Park Service (8-86), pp. 1, 17*
- Appendix 31 *Psychiatric Evaluation by Marrienne Hagen, Ph.D., 6/1/71*
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- Appendix 39 *Memorandum of Classification Committee, 5/8/73*

- Appendix 40 *Department of Youth Authority Letter, 5/15/73*
- Appendix 41 *Testimony of James W.L. Park [SDRT 8183 - 8201]*
- Appendix 42 *Reports of J. Rennebohm, M.D., 1/17/75, 4/3/75, 5/1/75, and 5/29/75*
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- Appendix 50 *Compliance Order by Consent, Alaska Department of Environmental Conservation vs. Alaska Gold Company*
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DECLARATION OF NATALIE NOVICK BROWN, PH.D.

I, NATALIE NOVICK BROWN, DECLARE:

1. I am a psychologist licensed in the States of Washington (PY1965) and Florida (PY6219). I also am certified as an evaluator and treatment provider for the Division of Developmental Disabilities in the State of Washington. For the past 12 years, I have specialized in the evaluation and treatment of individuals with fetal alcohol impairment. My training in this field began in 1994 when I accepted a postdoctoral fellowship with Dr. Ann Streissguth at the University of Washington in Seattle. Dr. Streissguth is a pioneer researcher in Fetal Alcohol Syndrome (FAS), Fetal Alcohol Effects (FAE), and Alcohol Related Neurodevelopmental Disorder (ARND), which are now commonly referred to by the umbrella term "Fetal Alcohol Spectrum Disorders," or FASD. Up until her retirement last year, Dr. Streissguth was the director of the University's Fetal Alcohol and Drug Unit as well as a prolific research scientist and highly respected international expert in the FASD field. After completing a year of training and research with Dr. Streissguth in 1995, I began evaluating and treating youth and adults with FASD or suspected FASD. I estimate that since 1995, I have evaluated and treated more than 300 children and adults affected by prenatal alcohol exposure. In addition, I currently hold a faculty position at the University of Washington as a Clinical Assistant Professor in the Department of Psychiatry and Behavioral Sciences. In this position, I consult with staff at the Fetal Alcohol and Drug Unit and screen adults and juveniles for FASD referred by the local drug and mental health courts. I also

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evaluate and diagnose individuals referred by the Division of Developmental Disabilities who may have fetal alcohol impairment. I currently provide individual therapy to FASD youth in an effort to prevent adverse life outcomes (i.e., “secondary disabilities”) and to adults with FASD, many of whom are sex offenders in Washington State’s Community Protection Program. I have authored several scholarly articles and two book chapters on FASD and provided technical presentations on the behavioral and developmental effects of prenatal alcohol exposure at mental health and legal conferences. Most recently, I was invited to Harvard to present information about FASD to the American Bar Association’s national conference on children and the law. In the course of my work, I have conducted and/or reviewed hundreds of evaluations involving FASD diagnoses and am quite familiar with the diagnostic criteria and process of evaluation. I have qualified as an FASD expert witness in the courts of Washington, Florida, South Carolina, and New Jersey.

2. I have been retained by attorneys of record Brad D. Levenson and Amanda R. Touchton to conduct an assessment to determine if Dean Phillip Carter’s behavioral history and development are consistent with an FASD diagnosis and, if so, whether FASD would fully account for all of the data regarding Mr. Carter’s psychosocial functioning (i.e., his criminal and non-criminal behavioral history from childhood into adulthood). Dean Phillip Carter is a 51-year-old Native Alaskan male who is currently on death row at San Quentin State Prison as a result of capital murders committed in San Diego County and Los Angeles County in 1984.

3. Procedures in the current analysis involved a review of declarations from Drs. Myla H. Young, Adrian Raine, David V. Foster, and Mindy Rosenberg. I also reviewed declarations from Lilly Rose, Beverly Gelzer, Cecil Johnson, Catherine Dickson, and Lela Kiana Oman as

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well as the following primary source records: childhood photographs of Dean Phillip Carter, A.J. Diamond school records dated 1973, Alcantar Youth Center records dated 9/3/68 and 11/5/68, Mr. Carter's birth certificate, McLaughlin Youth Center educational records, Nome Elementary School records, Nome-Beltz Regional High School records, and Seward Elementary School records 1964-65.

4. Fetal Alcohol Syndrome, or FAS, is one of several conditions included under the umbrella term Fetal Alcohol Spectrum Disorders (FASD). Other FASD conditions include Alcohol Related Neurodevelopmental Disorder (ARND), Alcohol Related Birth Defects (ARBD), static encephalopathy/alcohol exposed, Possible or Partial Fetal Alcohol Syndrome (PFAS), and Fetal Alcohol Effects (FAE). Although the two latter terms have been superseded in diagnostic formulations developed by the Institute of Medicine (IOM 1996) and the Center for Disease Control and Prevention (CDC, 2004), they are still used by some diagnosticians.

5. Fetal Alcohol Syndrome was first recognized in the United States and discussed in a public paper by researchers at the University of Washington in 1973 (Jones & Smith, 1973). These researchers identified three diagnostic features associated with the syndrome: 1) pre- and/or postnatal growth deficiency, 2) a characteristic set of facial anomalies (referred to as "facial dysmorphology"), and 3) central nervous system (CNS) dysfunction. In the late 1970s, a study of alcohol related damage in the central nervous system suggested that *structural brain damage* might be the basis for many of the neurodevelopmental abnormalities and resulting behavior problems observed in FAS-affected individuals (Clarren & Smith, 1978). Since the 1970s, the three primary diagnostic criteria for FAS have not changed.

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6. FASD diagnoses involve permanent birth defects caused by maternal consumption of alcohol during any point in pregnancy. Alcohol is a teratogen that inhibits and disrupts fetal development by causing structural and functional damage to developing cells, organs, and systems, including the brain and central nervous system. Because alcohol causes damage throughout the developing fetus, physical anomalies and neurobehavioral defects can be widespread. Hence, the condition is referred to as a “syndrome.” The most serious and pervasive damage occurs in the central nervous system. In particular, brain imaging studies over the last decade have shown that prenatal alcohol exposure causes significant malformation in brain structures (e.g., corpus callosum, frontal lobes, basal ganglia, cerebellum, hippocampus) necessary for normal development and functioning (e.g., Bookstein et al., 2001, 2002a, 2002b). Notably, even individuals who do not display the characteristic facial features associated with FAS may have brain damage as severe as those who do (Mattson & Riley, 1994). In other words, brain damage with its associated CNS dysfunction typically accompanies *any* diagnosis under the FASD umbrella.

7. By 1978, after more than 250 published case reports, it was clear that FAS was only one of several identifiable disorders associated with maternal alcohol abuse. Hence, the term Fetal Alcohol Effects, or FAE, was developed to classify additional manifestations (Clarren & Smith, 1978). While individuals with FAE did not display the growth deficits or primary facial abnormalities associated with FAS (e.g., short palpebral fissures, flat philtrum, and thin upper lip), research consistently showed that compared to individuals diagnosed with FAS, those with FAE could suffer from as many or more of the functional deficits (Streissguth & O’Malley,

2000). Thus, even without facial stigmata, the cognitive-behavioral problems stemming from underlying brain damage could be as severe in individuals with FAE as those with FAS.

FASD Diagnostic Criteria

8. According to diagnostic standards in place since the 1970s, the following triad of criteria must be met for a diagnosis of FAS:

- **growth deficiency;**
- **facial dysmorphology;** and
- **CNS dysfunction** (structural, neurological, and/or functional abnormalities).

The fourth criterion, **prenatal alcohol exposure**, can be classified as confirmed, probable, or unknown. Confirmed or probable prenatal alcohol exposure is not necessary for a diagnosis of FAS if the three other criteria are met.

9. In addition to the primary diagnostic criteria noted above, individuals affected by prenatal alcohol exposure may also display numerous additional anomalies, including additional facial abnormalities (e.g., flat midface, short nose, micrognathia (undersized jaw), low nasal bridge, epicanthal folds, eye asymmetries, eyelid tiosis (drooping eyelids), microphthalmia (small eyes), cleft lip/palate), heart defects (ventricular septal defects are most commonly seen, followed by atrial septal defects), kidney problems (e.g., horseshoe, aplastic, dysplastic, or hypoplastic kidneys), skeletal anomalies (e.g., joint anomalies including abnormal position and function, altered palmar crease patterns, small distal phalanges, and small fifth fingernails), ocular problems (e.g., strabismus and optic nerve hypoplasia which may cause light sensitivity, decreased visual acuity, or involuntary eye movements), dental problems (e.g., narrow maxillary dental arches, high arched palate, misaligned/misshapen secondary teeth), and occasional

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abnormalities (e.g., webbed neck, short neck, Tetralogy of Fallot, coarctation of the aorta, Spina bifida, polythelia or supernumerary nipple, and hydrocephalus).

10. Currently, FAS is the only expression of prenatal alcohol exposure defined by the *International Statistical Classification of Diseases and Related Health Problems (ICD)* and assigned an *ICD-10* diagnosis. To make this diagnosis, a multidisciplinary evaluation is optimal to assess each of the four key features involved in FAS. The diagnostic team typically includes at least the following: medical doctor, psychologist, and social worker or substance abuse professional. Structural brain damage is typically determined through imaging techniques and assessed by specialists trained to measure subtle structural anomalies. Assessment of hard and/or soft signs of neurological damage is the responsibility of a neurologist and/or neuropsychologist. Functional assessment of behavioral and developmental abnormalities is typically the responsibility of a psychologist, aided by the assessments of social workers/historians and other specialists. Functional assessment involves an extensive record review and focuses on clinically significant impairments in three or more of ten brain domains: learning disabilities, academic achievement, impulse control, social perception, communication, abstraction, math skills, memory, attention, judgment. Finally, a physician assesses growth deficiency, FAS facial features, and other physical and/or structural anomalies. When evaluating an individual in the community, these professionals often work together as a team to develop an integrated, multidisciplinary diagnosis of an FASD condition.

11. In 1996, the Institute of Medicine (IOM) codified the diagnostic standards that had been in place for approximately two decades. This diagnostic formulation (see Appendix A) is used extensively in the United States and other countries to diagnose FASD conditions. In 2002,

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Congress authorized the Center for Disease Control (CDC) to make diagnostic criteria for FAS even more precise in terms of measurement. As a result, in 2004 the CDC produced *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis*, which established specific measurement criteria for the four elements of an FAS diagnosis (i.e., prenatal alcohol exposure, facial dysmorphology, growth deficits, and CNS abnormalities).

12. Notably, even with the increasing precision over time in terms of how to measure the abnormalities associated with FASD, the original diagnostic criteria established in 1973 have never changed. After its discovery in the United States in 1973, research on FASD proliferated. By 1981, the U.S. Surgeon General had declared FAS a national health problem, and by 1989, Congress had mandated labels on all alcoholic beverage containers warning pregnant women not to drink. By 1991, not only had the primary functional deficits associated with FASD been thoroughly described in the literature, researchers also were discovering the lifelong effects of FASD on CNS dysfunction (i.e., “secondary disabilities”). Thus, by the time of Dean Phillip Carter’s capital trials in Los Angeles (1989) and San Diego (1991), the condition was definitely not a new or novel concept in medicine or psychology.

Central Nervous System Damage

13. The mechanisms that underlie CNS damage begin at the molecular and cellular levels and are generally investigated in animal studies and in nerve cells grown in culture. Prenatal alcohol exposure is associated with increased susceptibility to cell damage caused by free radicals that kill brain cells, affecting the formation and migration of brain cells and altering the production or function of regulatory substances that help promote the orderly growth and differentiation of neurons (Michaelis & Michaelis, 1994). Neurons, or brain cells, are the building blocks of the

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brain. Within the fetus, embryonic cells destined to become brain neurons grow in number, move to their ultimate locations, and mature into a wide variety of functionally distinct neuronal cell types. Once in place, these neurons form connections with other brain cells in a predetermined pattern. Damage can occur at any point in this process.

14. The first FASD autopsy involved an infant diagnosed with FAS who died shortly after birth in 1973. Examination revealed extensive brain damage, including microcephaly (small head circumference), cell migration anomalies, callosal dysgenesis (malformation of the corpus callosum), and a massive neuroglial, leptomeningeal heterotopia (i.e., clumps of gray matter located in the wrong part of the brain) covering the left hemisphere (Mattson & Riley, 2002). Autopsies since that time have shown consistent structural abnormalities in the brains of FAS-affected infants. In fact, relatively recent advances in brain imaging research have revealed reduced overall brain size in some individuals living with FASD and disproportionate reductions in the size of specific brain structures (Roebuck, Mattson, & Riley, 1998). Notably, FASD is the only known factor reliably associated with alterations in the geometry of the corpus callosum (Riley, et al., 1995; Swayze, et al., 1997). The corpus callosum is the band of nerve fibers deep in the brain that functions as the communication link between the right and left lobes. Approximately 7 percent of children with FAS lack a corpus callosum altogether, an incidence rate 20 times higher than that in the general population (Riley, et al., 1995). Damage to the corpus callosum and adjacent prefrontal cortex has been associated with a relatively consistent pattern of executive function deficits in FASD-affected individuals (Bookstein et al., 2001). An FASD diagnosis is particularly significant in terms of mitigation because of these impairments in

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executive functioning, which profoundly impact the way an individual functions across his lifespan.

15. Studies also have shown that prenatal alcohol exposure damages the basal ganglia (another deep-brain structure), which impairs spatial memory and set shifting in animals (Mattson, et al., 1996; Mattson & Riley, 1999) and a variety of cognitive processes in humans (Bannister, 1992). Another frequent finding is reduced size of the cerebellum (Mattson, et al., 1994; Sowell, et al., 1996), a structure involved in balance, gait, coordination, and cognition (Riley, et al., 1995).

Dose, Exposure, and Timing

16. Alcohol exposure at any point in gestation damages the CNS since the brain develops throughout the entire pregnancy (Guerri, 2002). The minimum quantity of alcohol required to produce adverse fetal consequences is still unknown (Roebuck, Mattson, & Riley, 1999). Moderate alcohol consumption can be harmful, especially in the case of binge drinking (Barr, et al., 2006). For example, a recent study found that one episode of binge drinking (defined as seven drinks in one episode) was more harmful to the fetus than one drink per day for seven days (Mattson, Schoenfeld, & Riley, 2001). Another study found FASD in children whose mothers consumed just two drinks per day at certain stages of pregnancy (May, et al., 2006). Even very light drinking can cause abnormalities. For example, a large-scale prospective study involving 31,000 pregnancies found that consumption of just one drink per day was associated with increased risk of growth retardation, which is one of the four FASD criteria (Mills, et al., 1984). In another study, an average of one-quarter ounce of absolute alcohol daily had adverse effects on children's verbal language and comprehension skills (Gusella & Fried, 1984). Current

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recommendations on clinical thresholds of alcohol consumption during pregnancy do not support the concept of a “safe level” of alcohol consumption in terms of possible damage to the fetus.

Primary Disabilities

17. CNS damage may manifest in a number of cognitive and functional deficits, which are referred to in the FASD literature as “primary disabilities.” Often, primary disabilities are mistaken as behavior problems under the volitional control of the child (e.g., attention problems in school) when underlying brain damage is actually the source of the difficulty (Malbin, 1993). Recent studies have found that specific neurobehavioral functions are almost always impaired in individuals with FASD, including verbal memory (Mattson, et al., 1996a), visual-spatial learning (Uecker & Nadel, 1996), attention (Mattson & Riley, 1998), reaction time (Streissguth, et al., 1986), and executive functioning (Roebuck, Mattson, & Riley, 1999). These, plus a number of other primary disabilities have an additive effect on an individual’s ability to function appropriately and effectively.

18. Primary disabilities stemming from FASD are generally categorized into ten domains:
- a. achievement (e.g., learning disabilities, decreasing academic performance as schoolwork becomes more complex, poor academic achievement in relation to IQ);
 - b. adaptive behavior (e.g., poor daily living skills and developmental delays);
 - c. attention (e.g., attention deficits and hyperactivity);
 - d. cognition (e.g., mental retardation in a minority of cases, confusion under pressure, poor abstract skills, difficulty distinguishing between fantasy and reality, slower cognitive processing, poor abstracting abilities);

- e. executive functioning (e.g., deficient impulse control, poor social awareness including self- and other-awareness, poor emotion modulation, perseveration, poor judgment, faulty reasoning, deficient cause and effect reasoning, poor generalization skills and difficulty learning from experience);
- f. language (e.g., expressive and/or receptive language disorders, concrete perspective, difficulty understanding metaphor / idioms / sarcasm);
- g. memory (e.g., poor working and short-term memory, inconsistent memory and knowledge base);
- h. motor skills (e.g., poor handwriting and other fine motor skills; delayed gross motor skill development);
- i. sensory integration and soft neurological signs (e.g., sensory integration disorders, tactile defensiveness, under-/over-sensitivity to stimuli); and
- j. social communication (e.g., intrusiveness, inability to read nonverbal or social cues, “chatty” but without substance, poor boundary awareness).

19. In infancy, primary disabilities are often first noticed in infants who show early evidence of self-regulation problems, such as passivity, difficulties in self-soothing, over-sensitivity to environmental stimuli, or difficulty in reciprocal social interaction. An example of the latter is an infant who resists the nurturing touch of a caregiver. Examples of functional deficits in early childhood (i.e., toddlers) include delayed development in one or more functional capacities (e.g., motor skills, verbal skills, social skills, self-modulation of emotions, behavioral self-regulation). During elementary school years, functional deficits may manifest as communication disorders, attention deficits, learning disorders, poor impulse control, problems in social perception,

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interpersonal communication deficits, and problems in working memory. Elementary school children with FASD are unable to defer gratification or control urges and often take things that don't belong to them. Unable to understand their own cognitive limitations or explain their lack of control to others, they typically choose what they perceive as the path of least resistance and lie about their behavior in a transparent attempt to avoid discipline. Consequently, FASD-affected children often have recurrent problems with both stealing and lying. In later childhood, functional deficits are observed as abstraction difficulties (particularly in mathematics when coursework becomes complex and less dependent upon rote memorization), impulse control and judgment problems, and socialization deficits. It is often in the adolescent years that social skill deficits become obvious to professionals beyond the school environment. For example, youth who have not developed the ability to make and keep friends begin gravitating toward delinquent youth who accept them simply on the basis of their willingness to engage in similar antisocial conduct. This is typically the time when alcohol consumption and drug use begin, and rule-breaking behaviors escalate to law-breaking behaviors.

20. In addition, once FASD-impaired youth enter puberty, which may be somewhat delayed, functional deficits significantly impact how they handle their developing sexuality. Maintaining appropriate sexual boundaries is a complex behavior requiring multiple skills, including self- and other-awareness (e.g., boundaries), memory (e.g., retaining knowledge about appropriate social behavior), impulse control (e.g., restraining inappropriate sexual urges), and self-regulation (e.g., stopping inappropriate behavior in the face of negative environmental cues). Most unimpaired children are sexually socialized in a subtle and gradual manner as they assimilate information from parents, television, movies, social interaction with peers, and other environmental sources.

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However, if the ability to distinguish between appropriate and inappropriate environmental cues and integrate them into one's behavioral repertoire is compromised by multiple functional deficits, the process can go awry. Consequently, sexual boundary violations -- both minor and major -- are frequently seen in individuals with FASD.

21. Deficits in executive functioning have profound real-life implications for people with FASD. Executive functions control emotions, urges, and impulses and channel them into appropriate behaviors. Executive functioning is based on underlying cognitive skills such as social awareness, self-awareness, ability to organize thoughts and behavior, planning, time perception, internal ordering, working memory, inhibition skill, motor control, emotion regulation, motivation, decision making, and judgment. When executive functions are compromised by prenatal alcohol exposure, an individual may:

- be unable to figure out solutions spontaneously;
- lie and fabricate improbable stories to either avoid punishment or hold others' attention;
- have difficulty perceiving, prioritizing, processing, and retrieving information;
- act without thinking;
- lack personal boundaries and not recognize them in others;
- be unable to control sexual impulses or anger;
- have difficulty with abstract concepts or time and money;
- need frequent cues and reminders of appropriate behavior;
- be vulnerable to personal exploitation by others;
- show impairment in motor skills (particularly fine motor skills);

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- display exaggerated, roller-coaster emotions;
- lack empathy and/or remorse;
- need external motivators;
- be unable to generalize and apply consequences from past actions to future actions;
- be unable to weigh pros and cons when making decisions; and
- engage in a wide range of socially inappropriate or illegal behaviors, such as stealing items for personal use from friends, family, or neighbors; shoplifting, particularly items for immediate consumption (e.g., food or cigarettes); committing crimes at the behest of more sophisticated criminals; committing the same kind of crime over and over; engaging in panic behaviors such as running away or lashing out when cornered and overwhelmed by environmental stimuli; committing inexplicably foolish crimes involving obvious risk of apprehension; repeatedly engaging in relatively minor crimes without escalating to more serious offenses (e.g., repeated pattern of shoplifting or burglary); giving guileless confessions when apprehended by the authorities that most offenders would never make; and obtaining multiple technical violations while on probation or parole.

In other words, executive functions involve all of the skills that enable individuals to analyze what it is they want, determine how they might get it, decide whether their plan is appropriate (and legal), revise their plan if it seems inefficient or ineffective, and then carry out their intentions, sometimes changing their behavior midstream if they realize it is unproductive or yielding unwanted results. It is widely accepted that executive functions play a central role in complex social behaviors such as understanding how our actions impact others (e.g., empathy)

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and controlling anger and frustration. Socialization (Connor et al., 2000) and moral reasoning (Schonfeld, et al., 2005) depend on *intact* executive functioning (Connor et al., 2000). While individuals with intact executive functioning can make pro-social choices about their behavior and consider consequences before acting, those with deficient executive skills act before thinking and function only to the level of socialization that their brain impairments permit (Connor et al., 2000).

Prenatal Alcohol Exposure

22. The first criterion in an FASD diagnosis is prenatal alcohol exposure. The standard for meeting this criterion in the late 1980s and early 1990s was documentation of alcohol consumption by the birth mother at any point during the index pregnancy. It was known at the time of Dean Phillip Carter's trials that even light drinking (average of one-quarter ounce of absolute alcohol daily) could have adverse effects on a child's verbal language and comprehension skills (Gusella & Fried, 1984). Acceptable documentation of maternal drinking included clinical observation, self-report, report of heavy alcohol use during pregnancy by a reliable informant, medical records documenting positive blood alcohol levels or alcohol treatment, or other social, legal, or medical problems related to drinking during the index pregnancy. FAS also could be diagnosed in the case of unknown prenatal exposure to alcohol. The designation "unknown" prenatal alcohol exposure indicates there is neither confirmed presence nor confirmed absence of exposure (e.g., the individual was adopted and prenatal exposure is unknown or the birth mother was an alcoholic but confirmed evidence of exposure does not exist). In Dean Phillip Carter's case, direct observation of the birth mother drinking during her pregnancy confirms prenatal alcohol exposure. Lilly Rose (close friend of birth

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mother Esther Carter) reported that she observed Ms. Carter drinking alcohol during her pregnancy with Dean Phillip Carter:

...I do know that Esther continued to drink throughout her pregnancy with Dean. When Esther was expecting Dean, I used to see her around town at bars drinking, especially during the weekends.

Sworn testimony from a credible individual who directly observed the birth mother consuming alcohol during pregnancy was an accepted standard in FASD diagnosis for confirmed prenatal alcohol exposure at the time of Dean Phillip Carter's trials. Such testimony still meets this standard today.

Facial Dysmorphology

23. The classic facial dysmorphology associated with FAS is seen in a small minority of cases, typically in young children before they enter puberty. Malformation of the face reflects alcohol consumption during a small window of time (i.e., 6-8 weeks after conception) during the first trimester of pregnancy when facial features are forming in the fetus. When FASD-affected individuals go through puberty, the facial stigmata fade and often disappear entirely. In Dean Phillip Carter's case, childhood photos indicate the possibility of FAS facial abnormalities. In addition, Lela Oman, a practical nurse and family friend, recalled in her declaration that Mr. Carter had an enlarged head in infancy and other skull irregularities (Declaration, p. 3-4). Confirmation of facial dysmorphology is the domain of a medical doctor trained in this area.

Growth Deficit

24. Growth deficits, variably defined, have been documented consistently in individuals with FAS (CDC, 2004). These observations use a variety of parameters (e.g., height, weight, head

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circumference), severity levels (e.g., below the 25th percentile, below the 10th percentile, or below the 3rd or 2nd percentiles), and timing of growth problems (e.g., current, birth, or present at any point during life). As with facial dysmorphism, growth deficits also tend to disappear with puberty. According to current CDC guidelines, the relevant growth parameters are height or weight at or below the 10th percentile at any single point in time (adjusted for age, sex, gestational age, and race/ethnicity). At the time of Dean Phillip Carter's trials, disproportionate weight to height (or both) were the standard diagnostic criteria for growth deficit. In Dean Phillip Carter's case, none of the records I reviewed included his height or weight. Confirmation of growth deficiency falls within the diagnostic domain of a medical doctor if such records can be located.

CNS Abnormalities

25. The third FAS diagnostic criterion involves CNS abnormalities in the structural, neurological, and/or functional domains. CNS abnormalities are the key feature of any FASD diagnosis that relate to mitigation because they affect behavior. As noted previously, alcohol exposure at any point in pregnancy can cause significant brain damage. More than 2000 scientific papers regarding the teratogenic effects of alcohol exposure on CNS development have been published over the past 30 years, a large number of which focus on the behavioral manifestation of brain damage. CNS functional impairments stemming from structural brain damage are permanent and irreparable (Streissguth, et al., 1991). Damage to the central nervous system can vary from subtle impairments to catastrophic damage that disrupts virtually every domain of functioning (Stratton, et al., 1996). The extent of damage depends on the amount, timing, and frequency of alcohol exposure as well as the genetic predispositions of the fetus and

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mother (IOM, 1996; West, 1986). For example, longitudinal studies have found that many adults affected by FASD have complex mental health disorders and are unable to sustain independent living (Streissguth & O'Malley, 2000). Diagnostically, CNS abnormalities may be established in one or more of the following categories:

a) Structural Abnormalities:

- head circumference at or below the 10th percentile, adjusted for age and sex; *or*
- clinically significant brain abnormalities observable through imaging techniques (e.g., reduction in size, or change in shape, of the corpus callosum, cerebellum, or basal ganglia) as assessed by an appropriately trained professional.

Dean Phillip Carter underwent a positron emission topography (PET) scan in 1991 as one of the subjects in a prefrontal glucose metabolism study conducted by psychologist Adrian Raine. Dr. Raine opined in a declaration in 2000 that:

...petitioner's brain PET scan from May 30, 1991, depicts significantly abnormal brain functioning. The lateral and medial prefrontal cortex, corpus callosum, and occipital cortex all show evidence of reduced functioning. The hippocampus and thalamus also show evidence of abnormal asymmetries of function, while the midbrain is the one area that shows increased functioning.

b) Neurological Abnormalities:

- seizures not due to a postnatal insult or fever, or
- other soft neurological signs outside normal limits (e.g., coordination problems and difficulty with motor control, visual motor difficulties, nystagmus).

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In terms of differential diagnosis, along with structural damage, abnormal neurological findings can be most predictive of underlying CNS abnormality due to prenatal alcohol exposure rather than later environmental traumas. In the case of Dean Phillip Carter, neuropsychologist Myla Young opined in her declaration that testing and evaluation indicated “long-term neurological deficits” and “diffuse brain impairment.” She noted in particular that there was evidence of impaired executive functioning, suggesting damage to the frontal lobes and subcortical brain areas, and impaired transfer of information across brain hemispheres, suggesting damage to the corpus callosum. Testing revealed specific deficits in attention and concentration, verbal memory and learning, arithmetic, and complex psychomotor functioning. Testing by psychiatrist David Foster in 2000 found “cortical damage in the right hemisphere” based on Mr. Carter’s “upturned Babinski reflex” on his left side (David Foster Declaration, 7-18-00).

c) Functional Abnormalities:

According to the CDC, for functional deficits it is generally accepted that multiple locations in the brain (and corresponding functional capabilities) are affected by prenatal exposure to alcohol. To address this issue, functional deficits that fulfill the CNS abnormality criteria can be met in two ways:

- 1) a global cognitive deficit (e.g., cognitive or intellectual deficits representing multiple domains of performance below the 3rd percentile, or 2 standard deviations below the mean for standardized testing) or significant developmental delay in children too young for an IQ assessment; *or*
- 2) deficits in *three or more* specific functional domains:

cognitive deficits or significant developmental discrepancies (e.g., specific learning disabilities – especially math and/or visual-spatial deficits; uneven profile of cognitive skills; poor academic achievement (even in the presence of average or higher IQ); discrepancy between verbal and nonverbal skills; slowed movements or reactions to stimuli);

executive function deficits (e.g., poor organization, planning, or strategy use; concrete thinking; lack of inhibition; difficulty grasping cause and effect; inability to delay gratification; difficulty following multi-step directions; perseveration or difficulty changing strategies or thinking of things in a different way; poor judgment; inability to generalize or apply knowledge to new situations);

motor function delays or deficits (e.g., poor suck in infants; delayed motor milestones; difficulty with writing or drawing; clumsiness; balance problems; tremors; poor dexterity);

attention deficits or hyperactivity (e.g., described by adults as “busy”; inattentive; easily distracted; difficulty calming down; overly active; difficulty completing tasks; trouble with transitions);

social skill deficits (e.g., lack of stranger fear; often scapegoated; naiveté and gullibility; easily taken advantage of; inappropriate choice of friends; preference for younger friends; immaturity; superficial interactions; adaptive skills significantly below cognitive potential; inappropriate sexual behaviors; difficulty understanding the perspectives of others; poor social cognition; clinically significant inappropriate initiations or interactions); and

other deficits (e.g., tactile defensiveness and oral sensitivity; pragmatic language problems such as difficulty reading facial expression; memory deficits such as forgetting well-learned material or needing many trials to remember; difficulty responding appropriately to common parenting practices such as not understanding cause-and-effect discipline).

Functional abnormalities are documented in Dean Phillip Carter by the following:

Cognitive Deficits / Developmental Discrepancies

Records document learning disabilities, a specific math deficit, and developmental delays in Dean Phillip Carter.

- Learning disabilities are evident in Mr. Carter's school records. According to his high average IQ scores in testing by Dr. Myla Young in 2000, he should have been capable of attaining at least average grades. However, grade transcripts reveal below average grades from fourth grade on. By tenth grade, he was failing all four of his classes, including three non-academic classes (i.e., vocational carpentry, driver education, and typing).
- According to neuropsychologist Myla Young, testing revealed moderate impairments in Mr. Carter's arithmetic ability. Seward school records from fourth grade indicate Ds in all subjects except a C in reading and an F in arithmetic. A note from the Alcantar Youth Center in 1973 (8th grade) indicated Mr. Carter was "weak" in math. Elementary school transcripts indicated that as arithmetic classes become more complex in elementary school, Mr. Carter's academic performance in math deteriorated.
- Delays in social and emotional development are documented in a note from the Alcantar Youth center in 1973 (8th grade) that indicated Mr. Carter was "immature." He also was

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described by a prison counselor in 1975 as “immature” and “undirected” (David Foster Declaration, 7/18/00, p. 28).

Executive Function Deficits

Records in Dean Phillip Carter’s case confirm executive function deficits in multiple domains:

- According to neuropsychologist Myla Young, despite Mr. Carter’s high average IQ, testing revealed deficits in several areas of executive functioning, including verbal memory, thinking, reasoning, problems solving, using alternative ways of solving problems, and impulse control.
- According to psychiatrist Dr. David Foster, a psychologist who evaluated Mr. Carter in 1971 (i.e., Dr. Marianne Hagan) concluded that one of Mr. Carter’s primary problems was his ability to control his emotions. Dr. Hagan reportedly noted a high level of anxiety and tendency to overreact. She also reportedly noted possible “breaks in judgment,” another aspect of executive functioning (David Foster Declaration, 7/18/00, p. 26).
- Dr. David Foster also describes a comment from Mr. Carter’s probation officer Barton Penny, who reportedly described Mr. Carter as “impulsive” (Declaration, 7-18-00, p. 27).
- Dr. David Foster also notes that in 1977, Mr. Carter was described by a court-ordered psychiatrist as “rather concrete with little insight” who noted he had engaged in “repeated non-violent offenses” (David Foster Declaration, 7/18/00, p. 30).
- According to Dr. Foster (Declaration, 7/18/00), testing in 1978 by a psychologist at the Eagle River Correctional Facility in Alaska found that Mr. Carter self-reported “having difficulty controlling impulses” (David Foster Declaration, 7/18/00, p. 30-1).

- In his own testing, Dr. Foster found impairment in Mr. Carter's recent and remote memory (David Foster Declaration, 7/18/00, p. 34). He also noted a comment by Mr. Carter that indicated an impulse control deficit: "I couldn't seem to think before I acted or to not do stupid things" (p. 37).

Motor Skill Deficits

Motor skill deficits reflect damage to the cerebellum as well as the corpus callosum (Meyer, Kotch, & Riley, 1990). In Dean Phillip Carter's case, neuropsychologist Myla Young noted moderate to severe impairment in complex psychomotor functioning (Myla Young Declaration, 7/14/00, p. 7).

Attention Deficits / Hyperactivity

Attention deficit and hyperactivity disorders are highly correlated with FASD. The attention problems stem in part from difficulty in tuning out extraneous stimuli so as to focus on the target stimulus. Hyperactivity is associated with decreased size of the corpus callosum (Zimmerberg & Michus, 1990) and stems in part from deficient ability to self-soothe and moderate reactivity to external and internal stimuli. Records document both attention problems and hyperactivity in Dean Phillip Carter.

- According to neuropsychologist Myla Young, testing revealed an attention deficit in Mr. Carter (Myla Young Declaration, 7/14/00, p. 7-8).
- A note from the Alcantar Youth Center in 1973 (8th grade) indicates that Mr. Carter is "restless" in class, "cannot work at length on assignments," and is "short on patience."
- According to social historian Mindy Rosenberg, although Mr. Carter had above average intelligence, he reported it was difficult for him to concentrate on schoolwork and he

daydreamed most of the time he was in class (Mindy Rosenberg Declaration, 7/14/00, p., 19, 31).

Social Skill Deficits

Social skills enable an individual to interact appropriately with others. Social skills require intact executive functioning and depend on the ability to accurately perceive and understand subtle social cues, encode that information into memory, access the information quickly when new situations require interactions with others, simultaneously screen the information for appropriate versus inappropriate behavior, inhibit impulses that are inconsistent with the stored pro-social “model,” and engage in social behavior while monitoring the impact of that behavior on others and perhaps fine-tuning the behavior as one interacts. Simply put, appropriate social behavior is a highly complex skill built on interconnected, underlying executive skills. FASD-affected youth invariably have social skill deficits. Children with FASD have significant difficulty making friends. Their social perception deficits interfere with their ability to detect subtle social cues and interact easily with others. Social perception deficits also interfere with the development of empathy. Youth and adults with FASD often fabricate stories or exaggerate events in an effort to hold the interest of peers and fit in. Because they lack awareness of their effect on others (i.e., social boundaries), they sometimes stand too close to others or touch inappropriately. As a result of these skill deficits, the childhood histories of individuals with FASD typically reflect loneliness and isolation from peers. As they grow older, they often have problems understanding appropriate sexual expression and acting accordingly – a problem observed in nearly half of all individuals affected by FASD. Lack of sexual outlets can lead to unusual sexual interests and behaviors (e.g., sexual fetishes). Social skills deficits can affect self-concept development, which

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coupled with executive function deficits also can affect sexual expression. Records indicate that Dean Phillip Carter had problems in this area as well.

- A note from the Alcantar Youth Center in 1973 (8th grade) indicates that Mr. Carter “works poorly with others.”
- According to psychiatrist Dr. David Foster, a psychologist found in 1971 that one of Mr. Carter’s primary problems centered on his “difficulties with relationships” (David Foster Declaration, 7/18/00, p. 26).

Data Convergence

26. To a reasonable degree of psychological certainty, data support a strong conclusion that Dean Phillip Carter meets criteria for FASD. Confirmed prenatal alcohol exposure in combination with structural, neurological, and functional CNS deficits consistent with FASD would have qualified him for a specific diagnosis of Fetal Alcohol Effects (FAE) in 1989 and 1991. Recent evaluations in 2000 by specialists in three separate fields (i.e., Drs. Myla Young, David Foster, and Adrian Raine) are consistent with this conclusion. These evaluations converged on a single diagnostic finding Mr. Carter had diffuse brain damage that most likely affected his frontal lobes and prefrontal cortex, corpus callosum, occipital cortex, hippocampus, thalamus, and midbrain.

Differential Diagnosis

27. Brain injury can be caused and/or exacerbated by a number of things such as genetic factors, birth complications, childhood abuse and neglect, head trauma, mental illness, medical disorder, and/or exposure to neurotoxins (including sustained drug and/or alcohol abuse). Evidence of prenatal alcohol exposure in the current case establishes FASD as a primary

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explanation for *all* of his behavior from infancy through the capital crimes at issue. However, other factors may have had an additive effect as well. For example, Dr. Mindy Rosenberg made a cogent case for the possibility that pervasive child maltreatment may have exacerbated his functional problems. The ability of FASD-affected individuals to cope effectively with environment stressors and influences is severely limited due to executive function deficits. Often, these individuals turn to alcohol and/or drugs to escape environmental pressures, which is the route Mr. Carter followed. Alcohol and drugs would only serve to increase his underlying functional impairments, particularly impulse control and judgment. While acute intoxication may have been a factor in his functioning at the time of the rape and murder, evidence is insufficient to establish substance-related impairment as the *sole* explanation for his conduct either in the capital crimes at issue or across his lifespan. Although the record is silent with respect to the existence of any genetic factors or birth complications that might have compromised Mr. Carter's functioning, postnatal brain damage is a possibility as he suffered a head injury at age six. However, Dr. Mindy Rosenberg notes hospital reports that his injuries were minor (Mindy Rosenberg Declaration, p. 25). With respect to mental illness, while there is a record of ongoing anxiety and depression in Mr. Carter's history, acute mental illness is ruled out as an explanatory factor because there is insufficient evidence of impairment severe enough to compromise his capacity to know right from wrong.

28. Personality disorders often explain criminal conduct, particularly antisocial personality disorder. According to the *DSM-IV-TR*, antisocial personality disorder requires evidence of conduct disordered behavior prior to age 15 that involves a "repetitive and persistent pattern" of aggression, property destruction, deceitfulness or theft, and serious rule violations. In Mr.

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Carter's case, there is evidence of early behavior problems in two of these categories (i.e., deceitfulness or theft and rule violations). My understanding of his childhood history generally comes from Drs. David Foster (Declaration, 7/18/00) and Mindy Rosenberg (Declaration, 7/14/00), who reviewed multiple declarations and primary source documents regarding Mr. Carter's childhood.

29. According to both Drs. Foster and Rosenberg, Dean Phillip Carter suffered significant parental abuse, neglect, isolation, and rejection in his formative years. His mother was an alcoholic, and when he was five, she married a man who was reportedly alcoholic as well and prejudiced against Native Alaskans. This man eventually adopted Mr. Carter. Both his mother and adoptive father reportedly shunned him and favored his older brother. At the age of nine, he was sent to an orphanage, which began a 15-year period of institutionalization in multiple facilities (i.e., age 9 to 23). The first evidence of a functional problem occurred at age six when he began running away from home and entering other people's homes to steal things. Around the age of 12, he began using drugs and was arrested for burglary and placed in a youth camp. At age 15, he was caught inside the home of a family, eating their food. While some of these behaviors reveal a desire to escape from his surroundings both physically and psychologically, there is insufficient evidence of pervasive conduct-disordered behavior across many domains that might reveal developing hostility toward others.

30. Stealing in FASD-affected children is common. The behavior stems from multiple neurodevelopmental and executive functioning deficits, including lack of boundary awareness, deficient impulse control, inability to delay gratification, inability to consider consequences, inability to generalize, and poor judgment. Because FASD-affected individuals tend to lack the

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ability to link cause with effect and generalize from one instance to another, discipline regarding an inappropriate behavior in one context will not generalize to a new context. Thus, the individual will view each and every opportunity for stealing as completely unrelated to the previous episode. Those with FASD will typically begin stealing early in their lives and frequently, regardless of consequence. This appears to have been the case with Mr. Carter. His childhood pattern of taking things that did not belong to him eventually evolved into burglary in his teen and adult years despite multiple arrests. According to Dr. Foster's declaration (7/18/00), when arrested at age 17 following a string of burglaries, Mr. Carter's statement to his probation officer ("it seemed like a good thing to do") indicates that executive function deficits were more likely the catalyst for his stealing than antisocial dynamics as there was no goal-oriented motive to his behavior.

31. Given these data, antisocial personality disorder is ruled out as an explanatory factor in Mr. Carter's offense conduct for two reasons: the diagnosis addresses only an isolated segment of his behavior that was uncharacteristic of his functioning in his adult years, and it does not account for his lifelong functional deficits. According to the DSM-IV-TR, the characteristics of antisocial or any personality disorder must be pervasive across a broad range of personal and social situations and must not occur solely when the person has a substance-related disorder. According to Dr. Foster (Declaration, 7/18/00), there is considerable evidence to question both of these requirements in Mr. Carter's case:

It is noteworthy that until his release from Eagle River Correctional Facility in 1979 at age 23, Dean spent the majority of his life in one institutional setting or another. In none of these settings (Jesse Lee Home, Alcantra, McLaughlin, DeWitt Nelson, Ben Lomond Youth

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Camp or Oregon State Correctional Center) was Dean ever perceived as a discipline problem, and shortly before his release from the Honor Unit at Eagle River Correctional Center, he was seen as a "most positive influence on other inmates...." (quoted from Appendix 45, Report of Kathi Smith, 3-22-78; SDRT 7789-90).

The pattern of behavior depicted above is consistent with the consistent finding that FASD-affected individuals tend to do better in structured settings where there are guidelines and cues on how to behave and do much less well when left to their own devices, especially in times of stress.

32. Following his incarceration, the five years Mr. Carter spent in the community prior to his arrest on murder and rape charges in April 1984 were characterized by prosocial behavior inconsistent with a personality disorder. As noted by Dr. Foster, after learning photography and cinematography in prison, Mr. Carter was gainfully employed as a camera man for a television station in Anchorage and then for the University of Alaska, with occasional work as a photographer. He also married in 1980 and fathered twin sons. According to Dr. Foster, it was only after the breakup of his marriage in December 1981 that Mr. Carter began to disintegrate. He reported in his evaluation with Dr. Foster that he was quite stressed with losing his family and increased his drug use in an attempt to cope. He also reported other information indicating that his ability to cope was overtaxed: he became paranoid and perceived he was being followed by the KGB, he began moving around from friend to friend, he abruptly left his job at a news station in Seattle and went to Hawaii, and he began to use "massive" quantities of drugs as well as abuse alcohol. In short, this history indicates that Mr. Carter was able to cope during periods

in his life that were relatively stress-free and somewhat structured but lacked the cognitive capacity to cope when events became unstable and stressful.

33. In addition to the fact that antisocial personality disorder explains only an isolated portion of Dean Phillip Carter's history and doesn't account for his functional deficits, there is a third reason why the diagnosis should not be applied in his case. The diagnostic criteria for Personality Disorder in the *DSM-IV-TR* note that the enduring pattern of personality-disordered behavior must not be due to a general medical condition (p. 689). The DSM's appendix states that the ICD is the "official coding system" for general medical conditions, which includes "Toxic Effects of Alcohol" as one of the general medical conditions listed. Thus, if one follows diagnostic guidelines in the *DSM-IV-TR*, in the event that an underlying medical condition exists, other diagnoses (such as personality disorders) should be excluded *unless it can be shown that the symptoms manifested at times when the medical condition was not present*. As FASD is the lifelong result of the toxic effects of alcohol, it is the underlying medical condition. An FASD condition accounts for *all* of Mr. Carter's behavioral history: from infancy to the present, from innocuous but odd non-criminal behaviors to significant antisocial events, and whether he was intoxicated on substances or not.

34. There is a tendency among diagnosticians to view criminal conduct as evidence of antisocial personality disorder or other personality disorders involving Cluster B symptoms (i.e., histrionic and narcissistic traits). Because training in FASD is not a standard part of any medical school or graduate curriculum, the condition is often missed even by the most learned diagnosticians. Consequently, adolescents and adults with FASD who have not been diagnosed in early childhood typically present as individuals with "complex" psychopathology and a long

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list of diagnoses they've received over the years, each of which may explain a portion of their behavior but not all of their behavior. Records indicate that in Mr. Carter's case, it wasn't until he was almost 16 that he was seen by a psychologist as part of an evaluation for promotion into an alternative high school, and she focused on his mood symptoms and executive function deficits (i.e., anxiety, social deficits, and emotion control deficits) rather than an underlying problem (David Foster Declaration, 7/18/00, p. 25-6). He was seen again at age 17 by a mental health provider for determination as to whether he should be adjudicated as an adult, who focused on another executive function deficit (i.e., immaturity) rather than an underlying problem (David Foster Declaration, 7/18/00, p. 26-7). Subsequent mental health professionals who examined him also detected some of the executive function deficits but not the underlying issue. For example, in 1975 (age 19) a psychiatrist in the Department of Corrections noted mood problems and self-concept issues in Mr. Carter (David Foster Declaration, 7/18/00, p. 28), in 1977 (age 21) a court-appointed psychiatrist noticed abstraction deficits and limited insight (David Foster Declaration, 7/18/00, p. 30), and in 1978 (age 22) a prison psychologist noted impulse control problems (David Foster Declaration, 7/18/00, p. 30-1).

Secondary Disabilities

35. Overall, the functional deficits documented in Mr. Carter's file are consistent with the type of primary disabilities typically seen in individuals diagnosed with FASD, and his conduct from childhood into adulthood is consistent with the histories of FASD-affected individuals who experience pervasive adverse life outcomes or "secondary disabilities" because their primary disabilities are not diagnosed and treated during childhood. According to research that began to be published in the 1980s and culminated with a major publication in the mid-1990s, disabilities

stemming from FASD are categorized as either “primary” or “secondary” depending upon whether they are a direct manifestation of CNS abnormalities or whether they are mediated by environmental influences. “Primary disabilities” are defined as functional deficits that stem directly from structural brain damage and CNS dysfunction caused by prenatal ethanol exposure (e.g., Streissguth et al., 1996). Individuals with FASD are typically born with some or many of these primary disabilities, which include the ten broad deficits noted Section 18 above. “Secondary disabilities” reflect the adverse life outcomes that an individual experiences as he enters adolescence and adulthood that presumably could have been ameliorated if there had been early diagnosis and intervention. Environmental factors exert positive or negative influences on the expression of secondary disabilities but have nothing to do with primary disabilities, which are inherent in the individual’s brain damage. With effective treatment of primary disabilities, secondary disabilities can be prevented or at least reduced (Streissguth, 1997). However, without early diagnosis and treatment, secondary disabilities manifest in adolescence and adulthood as severe problems in psychosocial functioning. Secondary disabilities include mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behavior, alcohol and drug problems, dependent living, and problems with employment. A surprisingly large number of individuals with fetal alcohol impairment display numerous secondary disabilities (Streissguth et al., 1996; Streissguth & O’Malley, 2000). For example, 90% have mental health problems such as ADHD, depression, or other mental illness; 60% are arrested, charged, and/or convicted of a crime; 50% display inappropriate sexual behavior (e.g., sexual advances, sexual touching, or promiscuity); 50% are confined in institutional settings (i.e.,

psychiatric hospital, jail, prison, residential substance abuse treatment); and 35% have alcohol or drug abuse problems (Streissguth, et al., 1996).

36. In general, Dean Phillip Carter displayed almost every major primary disability typically seen in individuals with FASD. Beginning in adolescence, he also began displaying a number of secondary disabilities because his primary disabilities were not diagnosed and treated in childhood. In his declaration (7/18/00), Dr. Foster documented the following secondary disabilities in Mr. Carter's history: mental health problems, alcohol and drug problems, disrupted school experience, inappropriate sexual behavior, trouble with the law, and confinement.

37. When faced with events that trigger negative emotions, individuals with FASD often overreact and behave impulsively because of executive function deficits. For example, it is not uncommon for these individuals to run away, make dramatic suicidal gestures, or lash out in unfocused aggression when faced with stress as they lack the ability to handle frustration well or identify and communicate their distress appropriately. In some individuals with FASD, executive functions are so severely affected that there is chronic difficulty in functioning appropriately in virtually every context. In other affected individuals, executive function impairment is noticeable only at certain times, such as when the individual is severely stressed, encounters multiple unfamiliar stimuli, and/or is under the influence of a substance that further compromises executive functioning (e.g., alcohol and/or drugs). This latter example may be relevant with respect to Mr. Carter's behavior in March and April of 1984, which apparently occurred in the context of multiple stressors (e.g., loss of his family, severe drug and alcohol abuse, escalating paranoia, and homelessness).

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Exhibit 77-1003

Conclusion

38. By the time of Dean Phillip Carter's first trial in 1989, the U.S. surgeon general had issued a health advisory regarding the danger of drinking alcohol during pregnancy, warning labels had been placed on all alcoholic beverage containers, and FAS had been recognized for many years as a major known cause of neurodevelopmental disabilities. By the time of his second trial in 1991, the life-long implications of these disabilities (i.e., secondary disabilities) had been recognized for several years (Streissguth, 1990; Streissguth & Randels, 1988; Streissguth, et al., 1991) and follow-up studies had demonstrated the ongoing adverse effects of prenatal alcohol exposure into adolescence and adulthood (Streissguth, Aase et al., 1991; Streissguth, Clarren, & Jones, 1985). However, when Mr. Carter was a child and teenager in the 1950s and 1960s, no one knew about the functional deficits and long-term effects that prenatal alcohol exposure could cause. It wasn't until he was 18 that the term "Fetal Alcohol Syndrome" was identified publicly in the United States (Jones & Smith, 1973). However, by the time of his first trial in 1989, researchers had been publishing information for five years about Fetal Alcohol Effects (Abel, 1984). Moreover, by the late 1980s and early 1990s there were numerous publications regarding the impact of prenatal alcohol exposure on the developing brain (West, 1986), including information that this damage caused long-term behavioral and developmental disturbances (Spohr & Steinhausen, 1987; Streissguth & Randels, 1988; Streissguth, 1990). Thus, by 1989 and 1991 -- the years of Mr. Carter's trials -- any expert with knowledge about FASD could have testified about the primary disabilities and long-term social and behavioral ramifications of prenatal alcohol exposure in general, and any expert armed with the information

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Exhibit 77-1004

provided to me could have testified about the effects of FASD on Mr. Carter's lifelong functioning and offense conduct.

39. The awareness that FASD is a birth defect with pervasive and permanent neurodevelopmental effects has led to increasing awareness in the legal profession that a different level of attribution is warranted for individuals with this condition (Fast, Conry, & Loock, 1999; Baumbach, 2002). Rather than assuming individuals become unmotivated, manipulative, antisocial, and self-defeating solely because of poor parenting experiences and/or free will, research over the last 15 years has shown consistently that *untreated primary disabilities* are the basis for maladaptive behaviors. Notwithstanding the fact that environmental influences can play a significant role in the expression of secondary disabilities, it also has been established in the scientific research that individuals with FASD have structural brain damage that makes it highly unlikely they will be able to successfully withstand the negative influence of environmental risk factors without appropriate support and treatment that begins in childhood.

40. As Streissguth and colleagues noted recently (Streissguth et al., 2004), one of the strongest correlates of adverse outcomes in individuals with FASD is lack of an early diagnosis: "The longer the delay in receiving diagnostic information, the greater the odds of adverse outcomes." Thus, the research suggests that for Dean Phillip Carter's brutal aggression to have been prevented, he needed appropriate identification and intervention in childhood. While he might have been identified as a child at risk and referred for evaluation had he been born in the 1990s, unfortunately he was born too early to be detected in routine screening by medical or school personnel and referred for medical evaluation. Thus, it was the timing of his birth that prevented him from being diagnosed and treated as a child for FASD. Had he received

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appropriate treatment for his primary disabilities in childhood, it is highly likely that his secondary disabilities would have been more manageable and less extreme, if they had developed at all. This conclusion is based upon multiple studies of secondary disabilities in the 1980s and beyond (Abel, 1984; Aronson & Olegard, 1987; Spohr & Steinhausen, 1987; Streissguth et al., 1985, 1996; Streissguth et al., 1999; Yates et al., 1998), including research that I participated in during my postgraduate training.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington, on June 4, 2007.

A handwritten signature in black ink, appearing to read "Natalie Novick Brown", written over a horizontal line.

Dr. Natalie Novick Brown

Appendix A

Institute of Medicine FASD Criteria

In 1996, the Institute of Medicine (IOM) developed five diagnostic categories related to fetal alcohol exposure:

Category 1. Fetal Alcohol Syndrome (FAS) with Confirmed Maternal Alcohol Exposure

Requires:

- a. confirmed maternal alcohol exposure
- b. facial dysmorphism, including short palpebral fissures and abnormalities of the premaxillary zone (e.g., flat upper lip, flat philtrum, flat midface)
- c. growth retardation, such as low birth weight, lack of weight gain over time, disproportional low weight to height
- d. neurodevelopmental abnormalities of the Central Nervous System (CNS), such as small head size at birth and structural brain abnormalities with neurological hard or soft signs (e.g., impaired fine motor skills, neurosensory hearing loss, poor tandem gait, poor eye-hand coordination)

Category 2. FAS Without Confirmed Maternal Alcohol Exposure

Requires:

- b. through d. above

Category 3. Partial FAS With Confirmed Maternal Alcohol Exposure

Requires:

- a. confirmed maternal alcohol exposure
- b. some components of the FAS facial pattern
- c. growth retardation as in Category 1
- d. CNS neurodevelopmental abnormalities as in Category 1
- e. Complex pattern of behavioral or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions (e.g., learning difficulties, deficits in school performance, poor impulse control, problems in social perception, language deficits, poor capacity for abstraction, specific deficits in mathematical skills, and problems in memory, attention, or judgment)

Category 4. Alcohol-Related Birth Defects (ARBD)

Requires:

- a. confirmed maternal alcohol exposure
- b. one or more congenital defects including malformations and dysplasias of the heart, bone, kidney, vision, or hearing systems

Category 5. Alcohol-Related Neurodevelopmental Disorder (ARND)

Requires:

- a. confirmed maternal alcohol exposure
- b. CNS neurodevelopmental abnormalities as in Category 1 *and/or*
- c. complex pattern of behavioral or cognitive deficits as in Category 3

Appendix B

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DECLARATION OF PAUL D. CONNOR. Ph.D.

I, Paul D. Connor, declare:

I. Background and Qualifications

1. I am a former Assistant Professor and now a clinical faculty member in the Department of Psychiatry and Behavioral Sciences' Fetal Alcohol and Drug Unit (FADU) at the University of Washington. I received my Bachelor's degree in psychology from the University of Washington, and my Ph.D. in clinical psychology, with a specialization in neuropsychology, from Brigham Young University.

2. I served my internship at Henry Ford Hospital in Detroit, Michigan, specializing in neuropsychology, before I returned to the University of Washington for a post-doctoral fellowship in neuropsychology and fetal alcohol research. For the past thirteen years, I have been the neuropsychologist for the Fetal Alcohol and Drug Unit participating in the study of the damaging effects on the brain, cognition, and mental health functioning caused by prenatal alcohol exposure.

3. I served as the Project Director of the Seattle Longitudinal Prospective Study, a study that enrolled approximately 500 subjects prior to birth with known levels of prenatal alcohol exposure ranging from abstinence to relatively heavy exposure. I was a Co-Investigator for a study of structural MRI and neuropsychological functioning in patients diagnosed with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE).

4. I was also the Principal Investigator for a study of functional MRI that assesses brain activation in relation to several tests of cognitive function known to be impaired in patients with FAS and FAE. I have authored and co-authored several articles and book chapters on the neuropsychological, neuroimaging, and psychiatric implications of long term effects of prenatal alcohol exposure into

adolescence and adulthood, and I am a member of several professional societies.

5. I also have a private practice offering neuropsychological assessment services for adults with known or suspected prenatal alcohol damage in both clinical and forensic settings. I am the Neuropsychological Director of FASD Experts (www.FASDExperts.com). (*See attached resume.*)

II. Reference Question and Data Considered in Forming Opinion

6. I was retained by Mr. Carter's attorneys, Deputy Federal Public Defenders Brad Levenson and Alexandra Yates, to evaluate Mr. Carter for Fetal Alcohol Spectrum Disorders (FASD).

7. I performed a clinical and neuropsychological assessment in order to determine if Mr. Carter's pattern of cognitive functioning is consistent with a diagnosis on this spectrum.

8. I also reviewed the following relevant ancillary materials:

- a. Psychological Evaluation of Dean P. Carter by Marianne Hagen, School Psychologist, dated June 1, 1971;
- b. Evaluation Record of Dean Carter by Gateway Community Mental Health, dated May 1, 1973;
- c. Report of Psychiatric Evaluation of Dean Carter by Dr. Robert McManmon, dated November 18, 1977;
- d. MMPI Report of Dean P. Carter, dated March 6, 1978;
- e. Psychological Evaluation and Taylor-Johnson Temperament Analysis of Dean Carter by Kathi Smith, dated March 2, 1978;
- f. Psychological Evaluation of Dean Carter by Dr. Michael P. Maloney, dated September 12, 1987;
- g. Psychological Evaluation of Dean Carter by Dr. Paul S.D. Berg, dated June 5, 1989;

- h. Neurological Consultation, Evaluation & Assessment of Dean Carter by Dr. Arthur P. Kowell, dated January 10, 1989;
- i. Neuropsychiatric Committee Examination Summary of Dean Carter, State of California Department of Corrections, San Quentin State Prison, dated June 8, 1990;
- j. AFEES Report of Medical History of Dean Carter: Anchorage, Alaska, dated September 7, 1972;
- k. Providence Hospital Medical Records of Dean Carter: Anchorage, Alaska, dated May 24, 1977;
- l. Norton Sound Regional Medical Records of Dean Carter: Nome, Alaska from 1961 to 1980;
- m. Nome Public School Records of Dean Carter from 1961-1972;
- n. Anchorage School District Records of Dean Carter from 1969-1973;
- o. Testimony of Monte S. Buchsbaum, M.D., dated June 13, 1991;
- p. Declaration of Myla H. Young, Ph.D., dated March 19, 2001;
- q. Declaration of David V. Foster, M.D., dated March 30, 2001;
- r. Declaration of Mindy S. Rosenberg, Ph.D., dated June 14, 2007;
- s. Declaration of Natalie Novick Brown, dated June 4, 2007;
- t. Declaration of Adrain Raine, dated March 31, 2001; and
- u. Declaration of Richard Adler, M.D.

The materials I have reviewed are the kinds of materials routinely relied upon by experts in my field to reach a professional opinion both today and at the time of Mr. Carter's trials.

9. As will be discussed in more detail below, based on my clinical and neuropsychological examination of Mr. Carter and the review of the above-mentioned materials, and others to be discussed below, it is my opinion,

which I hold to a reasonable degree of medical certainty, that Mr. Carter evidences a complex pattern or behavior of cognitive abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment **alone**.

III. Diagnostic Features of FASD

10. FASD is an umbrella term used to denote the presence of significant damage caused by prenatal consumption of alcohol. It encompasses a number of specific diagnoses.

11. The first, and most recognized, is FAS. In 2004, the Centers for Disease Control and Prevention (CDC) developed a set of guidelines for the diagnosis of FAS that included three main diagnostic features:

Specific Pattern of Facial Features: the first diagnostic feature of FAS is a specific pattern of facial features including: (1) short palpebral fissures; (2) smooth or flat philtrum; and (3) thin upper lip. All three of these facial features must be present at some point in the person's life for a diagnosis of FAS. However, facial features often ameliorate as an individual passes through puberty, such that someone who may have had the full facial features as a child may not retain these facial features to the same degree in adulthood.

Growth Deficiency: The second symptom for a diagnosis of FAS is growth deficiency, defined as height and/or weight below the tenth percentile at some point in the person's life, especially as a child.

Evidence of Central Nervous System (CNS) Abnormalities: The third symptom group, and the one most germane to my area of practice, is evidence of CNS abnormalities. This can include such hard signs as abnormal neuroimaging, microcephaly, neurologic impairments (motor deficiency), seizures, soft neurological signs, and functional deficits as measured by neuropsychological

testing. Functional deficits are defined as intellectual functioning two standard deviations below average and/or deficits at least one standard deviation below average in at least three domains of cognitive functioning (e.g. motor functioning, executive functioning, memory, attention, social skills, and cognitive or developmental deficits or discrepancies).

In 1989 and 1991, the current diagnostic criteria described above had not yet been fully delineated. However, there were diagnostic criteria that had been generally accepted from the 1973 paper by Jones and Smith (Jones, K. L., & Smith, D. W. (1973) - Recognition of the fetal alcohol syndrome in early infancy - *Lancet*, 2(7836), 999-1001) and the 1978 paper by Clarren and Smith (Clarren, S. K., & Smith, D. W. (1978) - The fetal alcohol syndrome - *New England Journal of Medicine*, 35(10), 4-7). The physical features criteria used at that time are very similar to the criteria in use today. The CNS component of the diagnosis was much less well described, as a significant portion of the research on the effects on cognitive functioning in FAS was still underway and, at the time, was primarily being conducted with children. In addition, during these years, the diagnosis had primarily been made in children. However, it would have been possible, though more challenging, to make this diagnosis in an adult.

12. The second main diagnosis under the FASD umbrella is Alcohol Related Neurodevelopmental Disorder (ARND). In the 1970s this diagnosis was termed Fetal Alcohol Effects (FAE). The term FAE, however, was replaced by ARND in 1996 by the Institute of Medicine. In ARND, there often are no physical features (such as facial anomalies or growth deficiencies). However, the same set of CNS abnormalities seen in FAS, are present in ARND. Therefore, the same guidelines developed by the CDC for FAS can be applied for the diagnosis of ARND. There has been ample research in the United States that has demonstrated

no difference between FAS and ARND in the presentation of CNS abnormalities in neurological, neuroimaging, or neuropsychological signs.

13. Alcohol is a fairly nonspecific teratogen. When consumed during pregnancy, it can have a variety of impacts on the developing fetus depending on the timing and the amount of alcohol consumed. Therefore, the presentation of FASD can be quite varied. If alcohol is consumed very early in pregnancy (within the first six to eight weeks) the facial features of FAS will often result in addition to cognitive deficits. If alcohol is consumed after this relatively short window of time, the individual will likely not display facial features consistent with FAS. However, if alcohol is consumed later in pregnancy, the cognitive deficits can still result. Therefore, exposure to alcohol at anytime during pregnancy can lead to cognitive deficits. Alcohol can negatively impact the development of neurons at multiple stages of neuronal development. It can have an impact at the stages of cell generation, reproduction, migration, and cell interconnectivity.

14. Typically, a person with FASD does not have the global deficit of cognitive functioning. Instead, cognitive functioning is “patchy” -- some functions are intact while other functions are impaired.

15. In research on FASD, it is relatively rare to see individuals with intellectual functioning that is within the mentally retarded range. One study found that only approximately 20% of individuals with FASD had IQs below 70. Indeed, the IQ range of persons with FASD can extend from scores as low as the 40’s to as high as 140. Therefore, intellectual functioning, by itself, is not a good indication of the cognitive functioning in individuals with FASD.

16. When looking at individuals with FASD, it is quite common to see a variability of functioning on an IQ test. Often there is a “split” between functioning on language-based tasks versus non-language-based tasks. The most significant

deficits are in academic functioning (especially arithmetic), executive functions, and social or adaptive functioning.

17. These are the issues that I address when assessing a client for FASD. Other neurological insults, such as traumatic brain injury, stroke, hypoxia, and prolonged fever, among others, can have similar effects on cognitive functioning. Therefore, it is important to take all of these potential insults into consideration when determining if the client's functioning is consistent with FASD.

IV. Background Information and Clinical Examination

18. Mr. Carter is a 53-year-old man who is currently on death row at San Quentin State Prison, California, as a result of capital murder convictions suffered in San Diego County in 1989 and Los Angeles County in 1991.

19. I met with Mr. Carter on December 18, 2008. I interviewed Mr. Carter regarding his current functioning and background history.

20. Based on reports, Mr. Carter's mother was observed to have consumed alcohol while she was pregnant with him. Lily Rose, a friend of Mr. Carter's mother, observed Mrs. Carter in bars drinking throughout the course of her pregnancy with Mr. Carter, especially on weekends.

21. Alcoholism was prominent in Mr. Carter's family, including his grandmother, mother, and step-father. Based upon a lack of records, it is not clear if there were any complications with Mr. Carter's birth or any early developmental delays.

22. Over the years, Mr. Carter's health has been fairly good. It is reported that Mr. Carter was exposed to toxins as a child when he would play amongst the tailings from mining operations in Nome, Alaska.

23. When Mr. Carter was approximately five years old, he was run over by a car and knocked unconscious. He reports that he woke up in the police car on the

way to the hospital, possibly five to ten minutes after the accident. In Dr. Kowell's report, the length of unconsciousness following this accident was described as one to two hours. Mr. Carter did not know if there were any residual deficits following this accident.

24. When Mr. Carter was approximately twenty-one years old, he was involved in a motor vehicle accident, striking his head and breaking several teeth. He reports that he was rendered unconscious at the time of the accident, briefly returning to consciousness during the extraction process, but falling unconscious again until after he had been taken to the hospital. Medical records at the time of this accident indicate that Mr. Carter suffered a concussion, but that a skull X-ray taken indicated no skull abnormalities.

25. Mr. Carter indicates that he used to box for a couple of years, but never was knocked out, though he did suffer some rib injuries.

26. In 1989, Mr. Carter received an MRI and EEG. As reported by Dr. Kowell, the tests indicated no intracerebral abnormalities, although there were indications of considerable sinus troubles. However, it was unlikely that a neuroradiologist at that time would have looked for neuroimaging signs that are consistent with FASD. The research on neuroimaging findings began in the late 1980s and has continued to this day. In addition, the neuroimaging findings of structural abnormalities associated with FASD are often fairly subtle, requiring careful measurement of brain structures, in order to identify. It is quite likely that a clinically read image would not have picked up on the structural changes. Therefore, an image read as clinically normal does not, of itself, negate the possibility of brain damage secondary to prenatal alcohol exposure. Furthermore, based on current diagnostic guidelines, the presence of structural abnormalities is but one of the symptoms used to diagnose the condition, not the sole required

symptom.

27. Mr. Carter has also received a PET scan that was interpreted by both Dr. Monte Buchsbaum at trial and later, in a declaration by habeas expert Dr. Adrian Raine.

28. Dr. Raine indicated that “[t]he lateral and medial prefrontal cortex, corpus callosum, and occipital cortex all show evidence of reduced functioning. The hippocampus and thalamus also show evidence of abnormal asymmetries of function, while the midbrain is the one area that shows increased functioning.” Dr. Raine concluded that the PET scan “depicts significantly abnormal brain functioning.”

29. In his 1989 testimony, Dr. Buchsbaum opined that, although he had not seen any of the historical information on Mr. Carter, the PET scan showed considerable abnormalities that could be seen in individuals with head injuries or who had developmental abnormalities. Dr. Buchsbaum also commented that the abnormalities seen in the PET scan were not clustered in any specific region but were widespread.

30. When interpreting the PET scans, Dr. David Foster indicated the imaging “shows damage to those areas of the brain required for judgment, insight, impulse control, and evaluation of reality and appropriate reality based responses.” He further indicated that “neuropsychological testing [conducted by Dr. Myla Young] also indicates damage to areas of the brain involved in evaluation, judgment, and impulse control.”

31. Mr. Carter reports that he has difficulties with memory and that these difficulties have occurred throughout his life. According to Mr. Carter, he especially has troubles with people’s names. Mr. Carter states that when he sees a person’s face, he feels that he recognizes the person but is often not be able to put a

name to the face. He reports that if others remind him, he will be able to recall information.

32. When in school, Mr. Carter benefitted from repetition to assist him in remembering information. He would usually not pick up a concept on the first presentation, but would be able to improve his performance with repetition.

33. Mr. Carter indicates that over the last ten years, he has had increasing difficulties with attention problems. Mr. Carter also reports that even as a young child he had considerable difficulties with attention, distraction, and hyperactivity, especially in school. He notices that he will become easily sidetracked in conversations.

34. According to Mr. Carter, he has had difficulties with arithmetic skills throughout his life. Money management was also a considerable difficulty for him when he was not incarcerated. When he was married, he indicated that both he and his wife would handle the finances.

35. Records indicate that Mr. Carter began to display behavioral difficulties at a very early age. He began running away from home when he was approximately six years old. Various reports have described Mr. Carter as “immature,” “undirected,” and “impulsive” even at a very early age. Mr. Carter indicates that he always had behavioral difficulties and would do “stupid things” even before his two head injuries, described above. As a child, Mr. Carter was noted by others to be “slow,” and “not the sharpest kid around.” Dr. Mindy Rosenberg concluded that “Dean’s prenatal exposure to alcohol indicates high likelihood of diffuse brain damage and severe impairment in cognitive and emotional functioning. The effects of this brain damage were further exacerbated by the deleterious consequences of his chronic, malignant, parental caretaking environment.”

36. Mr. Carter indicated that he always felt a desire to have structure in his life, but had great difficulty following through on developing it. For a short time, he was in the military, but went AWOL a number of times, so was discharged. He reported that when he looks back on this, he felt he could have done well in the military because of the structure that it involves, but that he had a hard time getting used to the structure.

37. Mr. Carter was also noted to have difficulty with relationships, tending to avoid them.

38. Although he received his GED when he was seventeen years old while serving in the military, Mr. Carter did not attend school regularly since the seventh grade. Between the first and sixth grades, he averaged Cs in his classes. During the seventh grade, Mr. Carter received predominantly Cs and Ds. In high school, he typically received B, C, and F grades. Mr. Carter dropped out of school in the tenth grade. Prior to this, Mr. Carter had many absences. He never received special education, though he was enrolled in a number of reform and boarding schools for behavioral troubles.

39. A psychological evaluation conducted while Mr. Carter was in tenth grade indicated a Verbal IQ in the average range, Performance IQ in the high average range, and Full Scale IQ within the high average range, when tested with the Wechsler Intelligence Scale for Children (WISC). Academic testing indicated Mr. Carter's reading at the eighth grade level, passage comprehension at the seventh grade level, and arithmetic functioning at the sixth grade level. It was noted on this report that although his knowledge and basic arithmetic skills were relatively good, Mr. Carter tended to make errors through a failure to observe signs and through "careless" errors. It was also noted during this assessment that Mr. Carter demonstrated high levels of anxiety and that he "tends to build up to a point of

over-reaction and once there continues to be over-reactive.”

40. In a 1987 testing by Dr. Michael Maloney, Mr. Carter’s estimated IQ was between 115 and “120+” based on a screening test of word knowledge. In 1988, when tested by Dr. Paul Berg, the Raven Standard Progressive Matrices indicated Mr. Carter’s IQ as 131.

41. Mr. Carter reports he held many jobs during his life. He has worked in kitchens cooking and baking in institutional settings. He worked as a baggage handler for an airline, and did maintenance work on airplanes. His longest employment was as a television cameraman and still photographer, doing this work between 1979 and 1984.

42. Mr. Carter began using tobacco when he was nine or ten years old. He would smoke one to two packs of cigarettes per day until his mid forties. He began seriously drinking alcohol in his twenties. After his divorce, Mr. Carter began drinking more heavily and would often binge drink on the weekends. As reported by Mr. Carter, he began smoking marijuana when he was a pre-teen, and would use whenever he could get the drug. He used hallucinogens relatively frequently as a teenager, and began using cocaine when he was around eighteen or nineteen years old, initially using only occasionally. Between the ages of twenty-one and twenty-four, Mr. Carter would use cocaine on a daily basis. He cut back on his usage during his marriage but quickly returned to heavy use after his separation.

43. Regarding his mental health, Mr. Carter indicates that he tends to “live in the moment.” Several past psychological evaluations of Mr. Carter have documented some difficulties with depression, restlessness, and troubles with anxiety. These reports have also indicated that Mr. Carter has difficulty with controlling impulses.

44. In 1978, Kathy Smith (a psychological counselor) indicated that Mr.

Carter was mildly anxious. In his evaluation of Mr. Carter in 1987, Dr. Michael Maloney reported that MMPI and MCMI testing indicated a lack of psychological insight, denying of psychological difficulties, high levels of impulsivity with poor frustration tolerance, poor judgment, immaturity, and easy excitability and boredom.

45. Dr. Foster indicated that Mr. Carter presented with a major affective disorder with severe mood swings. In the past, Mr. Carter was prescribed Sinequan, Librium, and Benadryl for depression and insomnia while incarcerated. He currently is not prescribed any medications for mental health concerns.

46. It would appear that Mr. Carter experienced considerable chaos in his early childhood. There was indication of physical and emotional abuse. It was reported that his parents would chain him to the bed and would whip him with a barber shop strap. It was felt by Dr. Foster, in his declaration of 2001, that Mr. Carter began treating the pain of an abusive environment with substances at an early age which “further impaired his ability to accurately perceive and understand the world around him, his ability to respond adequately to complex situations, and his ability to function normally.” Dr. Rosenberg concluded that in addition to biological factors of family history of alcoholism and prenatal alcohol exposure, Mr. Carter’s early childhood experiences led to the development of severe psychological and social problems in adulthood.

V. Neuropsychological Testing Results

47. The purpose of the neuropsychological assessment in a forensic setting is to determine if an individual’s cognitive functioning is consistent with the cognitive deficits of FASD, taking into consideration other potential etiologies. Following this, it is usually a medical doctor, such as Dr. Richard Adler, who will take this assessment into consideration when making the final medical diagnosis of FASD.

A. Behavioral Observations

48. Mr. Carter was a well groomed tall and large man. He was not noted to display a tremor during the testing. He was quite friendly, on occasion joking with the examiner.

49. In general, Mr. Carter appeared to speak well for himself with a good font of knowledge. This may mislead people to believe that Mr. Carter is functioning at a high level. Mr. Carter would ask for a lot of feedback on his performance during tasks. At times he felt he was doing poorly on tasks and would say "I am a genius" quite sarcastically.

50. Mr. Carter asked for a lot of repetition of questions and instructions and at times appeared to be over-analyzing tasks. He took quite a bit of time to complete all tasks in order to make sure he was doing them correctly. Despite this, he worked very hard on all tasks that were presented to him. There was no indication of thought disorder or current suicidal or homicidal ideation. Mr. Carter's behavior while taking the tests indicates that they are an accurate representation of his current cognitive status.

B. Neuropsychological Measures

51. Due to time constraints while testing Mr. Carter at San Quentin, I was unable to complete a full neuropsychological assessment on the one day that I was able to meet with him.¹ However, in 1998 and 1999 he was evaluated by Myla Young, Ph.D. who was able to administer a full neuropsychological battery. There was considerable consistency between results of the tests that I administered during

¹ I administered the following testing: Wechsler Adult Intelligence Scale - Third Edition (WAIS-III); Woodcock Johnson Tests of Achievement - 3rd Edition (WJ-III); California Verbal Learning Test - 2nd Edition (CVLT-2); Wisconsin Card Sorting Test- 4th Edition (WCST); Ruff's Figural Fluency Test (RFF); Stroop Color and Word Test Trail Making Test (TMT); Consonant Trigrams Test (CTT); and Green's Word Memory Test (WMT) (partial administration).

my evaluation and similar tests administered by Dr. Young. Therefore, both the current testing and information from the assessment by Dr. Young will be combined below to describe Mr. Carter's pattern of neuropsychological functioning. In situations where developmental disabilities are concerned, it is not expected that there would be significant changes in a person's neuropsychological functioning over the years, as opposed to cases of degenerative disorders where functioning is expected to decline. Therefore, it is common practice that past testing is taken into account when conducting a neuropsychological evaluation.

Intelligence and Academic Achievement

52. Intellectual functioning, as measured by the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III), was within the high average range. Verbal IQ was measured at 113, performance IQ at 119, and full-scale IQ at 116. Mr. Carter's areas of greatest strength were on the following tasks: arranging images to create a sensible story (very superior range); definition of words (superior range); common sense problem solving (high average to superior range); and assembling blocks to match an exemplar (high average range). His area of greatest weakness was on a task of short term attention span (low average range). The balance of tasks were performed within the average range. Mr. Carter's performance on current intellectual testing was remarkably consistent with testing conducted by Dr. Young. On that testing, verbal IQ was measured at 114, performance IQ at 116, and full-scale IQ at 116. As Dr. Young indicated, Mr. Carter's level of intellectual functioning is surprising given his level of academic achievement (10th grade of formal education and subsequent GED).

53. Academic achievement, as measured by the Woodcock Johnson Tests of Achievement – Third Edition (WJ-III), indicated that Mr. Carter's performance was quite a bit lower than his measured intellectual functioning, but relatively

consistent with his level of formal education in the majority of areas. His areas of greatest strength were on tasks of passage comprehension, where he was functioning at a level beyond the eighteenth grade, and spelling, where he was functioning at a fourteenth grade level. Word pronunciation was performed at a tenth grade level, consistent with his formal education level.

54. Mr. Carter's area of greatest weakness was on a task of arithmetic functioning with graduated levels of difficulty. On this task, Mr. Carter was performing at a seventh grade level, three years below his level of education. Similarly, in the testing by Dr. Young, Mr. Carter's area of greatest weakness in academic testing was in the area of arithmetic. Mr. Carter's pattern of performance on academic testing indicates the presence of a learning disability (Mathematics Disorder) and is very consistent with past research on individuals with FASD. In these studies, academic functioning, and especially arithmetic functioning, has been found to be well below expectations based on intellectual functioning and levels of education.

Learning, Memory, and Attention

55. Mr. Carter's initial performance on a list learning task was within the low average range, recalling five of the sixteen items that were presented. He benefitted greatly from repetition, such that by the final trial, he was functioning within the high average range, recalling fourteen of the sixteen items. His overall performance on this task was within the high average to superior range (T-Score = 65). When Mr. Carter was asked to recall the items on the list after a short delay period, Mr. Carter was able to recall the majority of items initially encoded, functioning within the high average range. Following a long delay period, he again was functioning within the high average range. He tended to benefit from cuing of information, recalling more items than he did on free recall of information,

functioning within the high average to superior range following a short delay and within the high average range following a long delay.

56. On a recognition trial in which Mr. Carter was given a long list of items and asked to identify those that were presented on the learning trials, he correctly endorsed fourteen of the sixteen items (average range). His performance on current verbal memory testing is somewhat inconsistent with testing conducted by Dr. Young. In that assessment, he was noted to have verbal memory functioning within the mildly impaired range. Based on the length of time between the two assessments, it is unlikely that this difference in functioning could be due to learning effects.

57. Mr. Carter was administered two tasks designed to measure his effort. On the first, a forced choice component of the CVLT (described above), he correctly identified all sixteen of the items, indicating very good effort. Due to time constraints, Mr. Carter was unable to complete the full Green's Word Memory Test. On the one portion that he was able to complete before testing was terminated, he was able to identify 85% of the items on the immediate recognition trial. This is somewhat lower than might be expected but is still considered to be an indication of adequate effort. When combined with CVLT performance and observation of Mr. Carter's behavior while being assessed, it is my professional opinion that he put out very good effort on all tasks and thus the testing is an accurate assessment of his neuropsychological functioning. Indeed, Dr. Young concluded, based on her observations and two tests of effort, that, Mr. Carter was not attempting to fake his performance.

58. In her assessment of Mr. Carter, Dr. Young administered the Rey Complex Figure Test. Though she did not comment in her declaration on Mr. Carter's performance on the memory components of this test, she indicated that Mr. Carter displayed moderate to severe impairment on the copy trial of this test. This

indicates significant impairment in complex psychomotor functioning. Research has shown that individuals with FASD often have difficulties with complex psychomotor or visual spatial functioning. Dr. Young administered a series of attention tasks to Mr. Carter in her assessment. She indicated that Mr. Carter demonstrated mildly impaired functioning on the Seashore Rhythm Test, Speech Sounds Perception Test, and the Paced Auditory Attention Test. In addition, current testing indicated low average performance on a task of short-term attention from the WAIS-III. Taken together, there is indication that Mr. Carter displays deficits in attention functioning. Furthermore, when compared with his high intellectual functioning, his performance on attention tasks is significantly impaired. Mr. Carter's performance is consistent with past research on individuals with FASD, in which attention functioning is often impacted.

Executive Functioning

59. Executive functions are described as the ability to problem solve, learn from past mistakes, inhibit responses, multitask, shift attention, and generate information.

60. On a task of visual tracking, Mr. Carter performed within the average range. When test complexity was increased to include shifting attention during the visual tracking task, he again performed within the average range.

61. On a test requiring the generation of unique figural designs, Mr. Carter performed within the average range. There was no indication of a perseverative response style on this task. He demonstrated performance within the average range on a task of response inhibition.

62. On a working memory task in which Mr. Carter was required to remember a series of letters while performing a distraction task (counting backwards by "3s"), he performed within the mildly impaired range when the distraction task

was of relatively short duration (nine second delay). When the duration of the distraction task was increased (eighteen second delay), he performed within the moderately impaired range.

63. On a task of visual problem-solving, where he was asked to make judgments on matching stimuli in which multiple matching criteria could be applied, Mr. Carter performed, overall, within the average range. He was able to identify all six of the sorting strategies (average range) and identified the first sorting strategy relatively quickly (average range).

64. Taken as a whole, Mr. Carter demonstrated a significant deficit in his ability to multitask and appropriately maintain multiple pieces of information simultaneously. The balance of tasks were performed within the average range. However, when compared with his level of intellectual functioning, Mr. Carter demonstrates significant deficits on tasks of executive functioning. This is the same finding that Dr. Young observed during her assessment of Mr. Carter. This relative deficit indicates that Mr. Carter does not appear to be able to successfully apply his strong intellectual abilities to appropriately solve problems, handle multiple tasks, or appropriately shift his attention. Executive function deficits are frequently seen in research on individuals with FASD.

VI. Adaptive Functioning Assessment Results

65. The Vineland Scales of Adaptive Behavior-II (VABS-II) (a measure of personal and social skills from birth to adulthood), was administered to three individuals who have known Mr. Carter well. The respondents included Rob Stapleton, a long time friend, Mary Wondzell, a former employer, and Pat Rimmer, Mr. Carter's foster mother. The interviews were conducted by Joan Sienkiewicz, a nurse, who has extensive experience administering these interviews.

66. Mr. Carter earned an overall Adaptive Composite of 86 from Mr.

Stapleton (18th percentile, adequate range) and 78 from Ms. Rimmer (7th percentile, moderately low range). Ms. Wondzell was not able to provide sufficient information to determine a composite score. An average score on the VABS-II is 100 (standard deviation = 15) with the average range extending from 85 to 115. Based on Mr. Stapleton's report, Mr. Carter's scores were 0.9 standard deviations below average and 2 standard deviations below his level of intellectual functioning. Ms. Rimmer's report indicated his performance to be 1.5 standard deviations below average and 2.5 standard deviations below his level of intellectual functioning. Mr. Carter's adaptive functioning in relation to intellectual functioning indicates significant levels of deficit in his adaptive abilities. This is entirely consistent with past research on FASD that demonstrates significant deficits in adaptive functions, especially in relation to intellectual functioning.

67. The Vineland assesses three areas of adaptive functioning: Communication, Daily Living Skills, and Socialization.

68. Mr. Carter's functional Communication Skills, overall, fall within the adequate range and were considered by all informants to be his area of greatest strength. All three respondents agreed that Mr. Carter's area of particular weakness was in Expressive Skills where he was functioning at a twelve year, three month old level. Both Ms. Wondzell and Ms. Rimmer indicated that another area of weakness was in Written Skills where Mr. Carter was reported to function at a moderately low level (thirteen years, and fifteen years, three months, respectively).

69. Mr. Stapleton also indicated that Daily Living Skills were another area of relative strength for Mr. Carter with a relative weakness in Community Skills that were rated in the moderately low range. By contrast, Ms. Rimmer indicated that Mr. Carter had relative weaknesses in Personal and Domestic Skills and was functioning at an age equivalent of seventeen years (moderately low range).

70. Both Mr. Stapleton and Ms. Rimmer agreed that Mr. Carter's overall Socialization Skills were an area of considerable weakness for him (overall functioning within the moderately low range). They agreed that Mr. Carter's area of greatest weakness was in Coping Skills, with Mr. Stapleton reporting Carter's age level at eleven years, six months, and Ms. Rimmer indicating an age level of ten years, ten months in this domain.

71. Though there are some discrepancies in adaptive functioning reports by the respondents, there is also considerable overlap, which indicates that Mr. Carter demonstrates significant difficulties in his day-to-day adaptive abilities and that these difficulties are severe when considered against his quite high intellectual functioning.

VII. Summary of Findings

72. Mr. Carter's pattern of neuropsychological performance on this assessment and the one conducted by Dr. Young in 1998 and 1999, indicate several areas of relative cognitive strength in the presence of a number of areas of deficit. Figure 1 graphically represents Mr. Carter's pattern of performance on the current testing where all scores are converted to standard deviations from the mean (a score of 0). With the exception of intellectual functioning, standard deviations below "-1" represent areas of impaired functioning. As can be seen in Figure 1, Mr. Carter demonstrated deficits in the executive function of multitasking, and adaptive functions. Arithmetic functioning was significantly below expectations based on his level of education.

73. In addition to this, Dr. Young found Mr. Carter to have deficits in attention functioning and complex psychomotor functioning. If his neuropsychological functioning is considered relative to his intellectual functioning, Mr. Carter shows deficits in academic functioning, attention, psychomotor

functioning, executive functions, and adaptive functioning. Mr. Carter's performance is consistent with the diagnoses of Cognitive Disorder, NOS (DSM-IV code 294.9) and Mathematics Disorder (DSM-V code 315.1). It is likely that the neuropsychological deficits displayed by Mr. Carter could have a negative impact on his ability to develop appropriate problem solving strategies in complex situations and to respond appropriately if he is in situations that require considerable amounts of multitasking.

74. There is evidence that Mr. Carter's mother consumed alcohol during pregnancy, therefore consideration of a diagnosis on the fetal alcohol spectrum is appropriate here. The diagnostic guidelines developed by the CDC for diagnosing FASD require at least three domains of cognitive functioning that are at least one standard deviation below average. In Mr. Carter's case, he demonstrates four domains that achieve this level of deficit (executive functioning, attention, psychomotor functioning, and adaptive functions). In addition, a previous analysis of PET imaging has demonstrated abnormalities in neural functioning. Combined, these findings demonstrate ample evidence of CNS abnormalities as required by the CDC guidelines and are consistent with a diagnosis on the fetal alcohol spectrum. Mr. Carter's intellectual functioning is quite high. If only his intellectual functioning were addressed, it would be reasonable to assume that Mr. Carter would be able to handle real-life situations quite well. However, he demonstrates both relative and absolute deficits in several abilities including executive functioning and adaptive functioning. This strongly indicates that he is not able to appropriately apply his intellectual skills in the real world. Thus, his very high intellectual functioning serves to mask his lack of ability to handle complex situations in ways that are appropriate. This type of situation is entirely consistent with research on individuals with FASD. They very frequently will not be able to apply knowledge

or intelligence to handling complicated situations, and tend to evidence behaviors that appear to be more impaired than expected based on intelligence levels. It is often important to think of individuals with FASD as functioning at an adolescent or even preadolescent level, rather than at their chronological age, when trying to understand their inability to handle situations appropriately.

75. There are a number of insults and traumas in addition to prenatal alcohol exposure that can occur and may have similar impacts on cognitive functioning. Therefore, it is important to address these other potential etiologies. In Mr. Carter's case, he has experienced at least two head injuries that have caused a loss of consciousness. Indeed, the cognitive consequences of traumatic brain injury could be quite similar to that of prenatal alcohol exposure. However, there is indication that Mr. Carter was demonstrating some level of cognitive difficulty prior to receiving his first head injury at the age of five. It is possible that the subsequent head injuries could have had a synergistic effect on later cognitive development. There is also some concern that Mr. Carter may have been exposed to environmental toxins during his childhood while playing among the tailings of gold mines. Again, some of the toxins could have had a negative effect on later development. However, as in the case of the head injuries described above, Mr. Carter began showing evidence of disruptive behaviors and cognitive difficulties before the potential toxic exposure from the mining sites.

76. Mr. Carter appears to have experienced a fairly chaotic childhood with evidence of physical and emotional abuse. There has been growing research indicating that these traumatic experiences can have a negative impact on cognitive development. However, chaotic family environments are an all too common occurrence for individuals who were exposed to alcohol prenatally. In one study, 72% of individuals with FASD had experienced some form of physical abuse in

their lives. Therefore, the chaotic family environment could have had an additive effect on Mr. Carter's cognitive development.

77. The final potentially competing etiology that could describe the neuropsychological deficits displayed by Mr. Carter is his history of substance abuse. However, there is considerable research evidence in both animal and human studies that subjects exposed to alcohol prenatally have a much higher risk of alcohol and drug problems later in life. Furthermore, there is indication that Mr. Carter was demonstrating behavioral and cognitive difficulties prior to his onset of substance use.

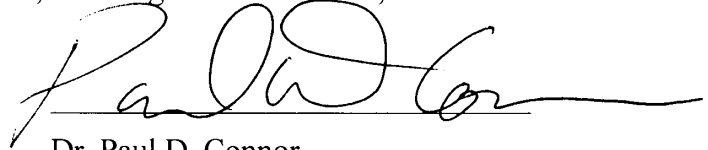
78. All of the above-mentioned possible etiologies could have had an additive impact on Mr. Carter's neuropsychological development. However, there is considerable indication that he was having difficulties with his functioning from the earliest stages of life.

79. During his examination of Mr. Carter, Dr. Richard Adler concluded that Mr. Carter displayed physical features that indicated a diagnosis of Partial Fetal Alcohol Syndrome. The current neuropsychological testing certainly supports this diagnosis, with Mr. Carter demonstrating deficits in neuropsychological functioning in several areas and considerably poorer neuropsychological and adaptive functioning than would be expected based on his level of intellectual functioning.

It is my opinion, which I hold to a reasonable degree of medical certainty, that a diagnosis on the fetal alcohol spectrum disorder is warranted in Mr. Carter's case. Were I asked in 1989/1991 about the consistency of the neuropsychological findings with a diagnosis of Partial Fetal Alcohol Syndrome, my conclusion would be the same as it is here. Based on Dr. Adler's examination, Mr. Carter demonstrates several features that are consistent with those of Fetal Alcohol Syndrome. However, as mentioned previously, research on the neuropsychological effects of

Fetal Alcohol Syndrome was still being undertaken in the late 1980s and 1990s and was focused primarily in children, so information would have needed to be extrapolated to adults at that time. Despite this, with information about prenatal alcohol exposure, demonstration of physical anomalies related to FAS, and neuropsychological deficits, this diagnosis could have been made during Mr. Carter's prior trials.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington on March 22, 2009.

A handwritten signature in black ink, appearing to read "Paul D. Connor", written over a horizontal line.

Dr. Paul D. Connor

CURRICULUM VITAE

Paul David Connor

EDUCATION

1988 B.S., University of Washington, Seattle, WA, Psychology
1995 Ph.D., Brigham Young University, Provo, UT, Clinical
Psychology/Neuropsychology

POSTGRADUATE TRAINING

1994-95 Internship, Henry Ford Health System, Detroit, MI, Neuropsychology
1995-1999 Senior Postdoctoral Fellow, University of Washington, Seattle, WA, Fetal
Alcohol Research and Neuropsychology

FACULTY POSITIONS

1999-2002 Acting Instructor, University of Washington, Psychiatry and Behavioral
Sciences, Fetal Alcohol and Drug Unit
2002-2005 Acting Assistant Professor, University of Washington, Psychiatry and
Behavioral Sciences, Fetal Alcohol and Drug Unit
2005-Present Assistant Professor, University of Washington, Psychiatry and Behavioral
Sciences, Fetal Alcohol and Drug Unit
2002-Present Research Affiliate of the Center on Human Development and Disability

LICENSURE TO PRACTICE

1997 Licensed Psychologist #PY00002050, Washington State

PROFESSIONAL ORGANIZATIONS

American Psychological Association
International Neuropsychological Society
National Academy of Neuropsychology, Program Committee 2007-2008
Pacific Northwest Neuropsychological Society, President 2004-2005
Research Society on Alcoholism

SPECIAL LOCAL and UNIVERSITY RESPONSIBILITIES

1998-Present UW Substance Abuse Theme Committee
2003-Present UW MSRTP Application Committee
2003-Present Board Member of Fetal Alcohol Syndrome Information Service
2004-Present UW FASD Training Alliance
2004-Present Dept of Psychiatry and Behavioral Sciences Addictions and Trauma Work
Group

SCIENTIFIC REVIEW COMMITTEES

June 2002 NIAAA Biomedical Research Review Committee ZAA1-DD-20
Feb 2004 NIAAA Neurotoxicology and Alcohol Study Section
Nov 2004 UW Research Royalty Fund
Jun 2007 ADAI Small Grant Review Committee
July 2007 NIAAA Review Committee ZAA1 CC 13

AD-HOC MANUSCRIPT REVIEWS FOR JOURNALS

Neuropsychology Review
Alcoholism: Clinical and Experimental Research
Child Neuropsychology
Alcohol Health and Research World
Developmental Neuropsychology
Brain Injury and Behavior

RESEARCH FUNDING

1995-1999 National Institute on Alcohol Abuse and Alcoholism, Grant No. R01 AA01455-20-23. "Alcohol Intake During Pregnancy: Offspring Development." Ann P. Streissguth, principal investigator. Total direct costs: \$1,363,749.
1999-2000 UW ADAI, Grant. "Regional Metabolic Changes in Brain Function Associated with Acute Alcohol Intoxication: A Functional Neuroimaging Study". Kenneth Maravilla, principal investigator.
1996-2002 National Institute on Alcohol Abuse and Alcoholism, Grant No. R01 AA10836-01-06. "Neuroanatomic-Psychologic Analyses of FAS/FAE Deficits." Ann P. Streissguth, principal investigator. Total direct costs: \$888,175.
1999-2004 National Institute on Alcohol Abuse and Alcoholism, Grant No. R37 AA01455-24-28. "Alcohol Intake During Pregnancy: Offspring Development." Ann P. Streissguth, principal investigator. Total direct costs: \$1,363,749.
2002-2005 National Institute on Alcohol Abuse and Alcoholism, Grant No. R01 A/HD12419-01A2. "Functional MRI of Cognitive Activation in FAS/FAE." Paul D. Connor, principal investigator. Total direct costs: \$600,000.
2003-2006 National Institute on Alcohol Abuse and Alcoholism, Grant No. R01 AA10836-07-10. "Neuroanatomic-Psychologic Analyses of FAS/FAE Deficits." Ann P. Streissguth, principal investigator. Total direct costs: \$750,000.
2004-2006 National Institute on Alcohol Abuse and Alcoholism, Grant No. U01. "Detecting FASD from Newborn Ultrasound and Infant Behavior" Ann P. Streissguth, principal investigator. Part of The Riley Consortium "Crosscultural Longitudinal Assessment of FASD".
2004-2009 National Institute on Alcohol Abuse and Alcoholism, Grant No. R37 AA01455-29-34. "Alcohol Intake During Pregnancy: Offspring Development." Ann P. Streissguth, principal investigator.

MANUSCRIPTS IN REFEREED JOURNALS

1. Connor, P.D. and Streissguth, A.P. (1996). Effects of prenatal exposure to alcohol across the life span. Alcohol Health and Research World. 20(3), 170-174.
2. Connor, P.D., Streissguth, A.P., Sampson, P.D., Bookstein, F.L., Barr, H.M. (1999). Individual differences in auditory and visual attention among fetal alcohol-affected adults. Alcoholism: Clinical and Experimental Research. 23(8), 1395-1402.
3. Connor, P.D., Sampson, P.D., Bookstein, F.L., Barr, H.M., Streissguth, A.P. (2000). Direct and indirect effects of prenatal alcohol damage on executive function. Developmental Neuropsychology. 18(3), 331-354.
4. Bookstein, F.L., Sampson, P.D., Streissguth, A.P., Connor, P.D. (2001). Geometric morphometrics of corpus callosum and subcortical structures in the fetal- alcohol-affected brain. Teratology. 64, 4-32.
5. Bookstein, F.L., Streissguth, A.P., Sampson, P.D., Connor, P.D., Barr, H.M. (2002). Corpus callosum shape and neuropsychological deficits in adult males with heavy fetal alcohol exposure. NeuroImage. 15, 233-251.
6. Bookstein, F.L., Sampson, P.D., Connor, P.D., Streissguth, A.P. (2002). The midline corpus callosum is a neuroanatomical focus of fetal alcohol damage. The New Anatomist. 269, 162-174.
7. Baer, J.S., Sampson, P.D., Barr, H.M., Connor, P.D., Streissguth, A.P. (2003). A 21-year longitudinal analysis of the effects of prenatal alcohol exposure on young adult drinking. Archives of General Psychiatry. 60, 377-385.
8. Grant, T., Huggins, J., Connor, P., Pedersen, J., Whitney, N., Streissguth, A. (2004). A pilot community intervention for young women with fetal alcohol spectrum disorders. Community Mental Health Journal. 40 (6), 499-511.
9. Grant, T., Huggins, J., Connor, P., Streissguth, A. (2005). Quality of life and psychosocial profile among young women with fetal alcohol spectrum disorders. Mental Health Aspects of Developmental Disabilities. 8(2), 33-39.
10. Bookstein, FL, Connor, PD, Covell, KD, Barr, HM, Gleason, CA, Sze, RW, McBroom, JA, Streissguth, AP (2005). Preliminary evidence that prenatal alcohol damage may be visible in averaged ultrasound images of the neonatal human corpus callosum. Alcohol: An International Biomedical Journal, 36(3), 151-160.
11. Connor, PD, Sampson, PD, Streissguth, AP, Bookstein, FL, Barr, HM (2006). Effects of prenatal alcohol exposure on fine motor coordination and balance: A study of two adult samples. Neuropsychologia. 44(5), 744-751.

12. Barr, HM, Bookstein, FL, O'Malley, KD, Connor, PD, Huggins, JE, Streissguth, AP (2006). Binge drinking during pregnancy as a predictor of psychiatric disorders on the structured clinical interview for DSM-IV in young adult offspring. The American Journal of Psychiatry, 163(6), 1061-1065.
13. Bookstein, FL, Streissguth, AP, Connor, PD, Sampson, PD. (2006). Damage to the human cerebellum from prenatal alcohol exposure: The anatomy of a simple biometrical explanation. The New Anatomist. 289B, 195-209.
14. Bookstein, FL, Connor, PD, Huggins, JE, Barr, HM, Pimentel, KD, Streissguth, AP. (2007). Many infants prenatally exposed to high levels of alcohol show one particular anomaly of the corpus callosum. Alcoholism: Clinical and Experimental Research, 31(5), 1-12.

BOOK CHAPTERS and OTHER PUBLICATIONS

1. Kopera-Frye, K., Connor, P.D., Streissguth, A.P. (2000). Recent advances in fetal alcohol syndrome: Implications for diagnosis, intervention, and prevention. In Seitz, H.K., Lieber, C.S., & Simanowski, U.A. (eds.), Handbuch Alkohol, Alkoholismus, Alkoholbedingte Organschäden (2nd Ed.). Heidelberg, Germany: Johann Ambrosius Barth Verlag.
2. Streissguth, A.P., Connor, P.D. (2001). Fetal alcohol syndrome and other effects of prenatal alcohol: Developmental cognitive neuroscience implications. In Nelson, C.A. & Luciana M. (Eds.) The Handbook of Developmental and Cognitive Neuroscience. Cambridge, MA: The MIT Press.
3. Connor, P.D., Huggins, J.E. (2006). Prenatal development: Fetal alcohol spectrum disorders. In Thies, K.M., Travers, J.F. (Eds.). The Handbook of Human Development for Health Professionals. Thorofare, NJ: SLACK, Inc.
4. Connor, P.D. (2001). Synthesizing animal and human studies of prenatal alcohol exposure. Journal of the International Neuropsychological Society. 7(5), 648-649.
5. Connor, P.D. (2004). Prison: A warehouse for individuals with FASD. Iceberg, 14 (2), http://www.fasiceberg.org/newsletters/Vol14Num2_Apr2004.htm#warehouse.

PUBLISHED ABSTRACTS

1. Norman, M.A., Lajiness-O'Neill, R.R., Nilsson, D.E., Walker, M.L., Boyer, R.S., Connor, P. D., and Bigler, E.D.(1994). Quantitative neuroimaging outcome in benign hydrocephalus. Archives of Clinical Neuropsychology. 9, 168-169.
2. Connor, P.D., Gale, S.D., Johnson, S.C., Anderson, C.V., Bigler, E.D., and Blatter, D.D. (1995). Cingulate degeneration following traumatic brain injury: Quantitative neuroimaging,

- memory and executive functions. Journal of the International Neuropsychological Society. 1(2), 174.
3. Connor, P.D. and Streissguth, A.P. (1997). Auditory and visual attention in adults with fetal alcohol syndrome. Journal of the International Neuropsychological Society. 3(1), 56.
 4. Connor, P.D. and Streissguth, A.P. (1997) Verbal fluency, word reading and color naming in adults with fetal alcohol syndrome and fetal alcohol effects. Alcoholism: Clinical and Experimental Research, 21(3 Suppl), 116A.
 5. Connor, P.D., Streissguth, A.P., Sampson, P.D., Bookstein, F.L., Barr, H., and Wegelin, J. (1998). Fluency and speed of information processing as related to quantitative neuroimaging in fetal alcohol syndrome and fetal alcohol effects: Preliminary findings. Journal of the International Neuropsychological Society, 4(1), 21.
 6. Connor, P.D., Streissguth, A.P., Barr, H.M., Sampson, P.D., and Bookstein, F.L. (1998). Psychiatric symptomatology and characteristic behaviors in adults with fetal alcohol syndrome and fetal alcohol effects. Alcoholism: Clinical and Experimental Research, 22(3 Suppl), 61A.
 7. Streissguth, A.P., Connor, P.D., Sampson, P.D., Barr, H.M., Bookstein, F.L., and Wegelin, J. (1998). Fetal alcohol syndrome: Relationships between CNS structure and function. Alcoholism: Clinical and Experimental Research, 22(3 Suppl), 58A.
 8. Connor, P.D., Streissguth, A.P., Sampson, P.D., Bookstein, F.L., Barr, H.M. (1999). Executive functioning deficits in adults prenatally exposed to alcohol. Alcoholism: Clinical and Experimental Research. 23(5), 31A.
 9. Bookstein, F.L., Streissguth, A.P., Sampson, P.D., Connor, P.D., Barr, H.M. (1999). Corpus callosum shape and neuropsychological deficits in adult males with heavy alcohol exposure. Alcoholism: Clinical and Experimental Research. 23(5), 28A.
 10. Streissguth, A.P., Barr, H.M., Sampson, P.D., Bookstein, F.L., Connor, P.D. (1999). Adult IQ as related to prenatal alcohol exposure, FAS, FAE, ARND, and child IQ in a large sample. Alcoholism: Clinical and Experimental Research. 23(5), 107A.
 11. Streissguth, A.P., Barr, H.M., Connor, P., Sampson, P.D., Bookstein, F.L. (1999). The fetal alcohol syndrome: Relationship between CNS structure and neuropsychological performance. In R.A. Saul & M.C. Phelan (Eds.), Proceedings of the Greenwood Genetics Center, (18:147-148). Greenville, S.C.: Keys Printing, Inc.
 12. Connor, P.D., Streissguth, A.P., Sampson, P.D., Bookstein, F.L., Barr, H.M., Toth, S.K. (2000). Motor coordination in adult males with fetal alcohol syndrome and fetal alcohol effects. Journal of the International Neuropsychological Society, 6(2), 237-238.

13. Connor, P., & Mahurin, R. (2001). A preliminary study of working memory in fetal alcohol damage using fMRI. International Neuropsychological Society, 7(2), 206.
14. Bookstein, F.L., Sampson, P.D., Connor, P.D., Streissguth, A.P. (2001). Excess variance of subcortical brain shape in fetal alcohol spectrum disorders: An analysis by landmark location data. Teratology, 63(6), 251.
15. Huggins, J.E., Connor, P.D., Barr, H.M., Streissguth, A.P. (2001). Quality of life in adults with fetal alcohol spectrum disorders (FASD). Alcoholism: Clinical and Experimental Research, 25(5), 125A.
16. Huggins, J.E., Connor, P.D., O'Malley, K., Barr, H.M., Streissguth, A.P. (2001). Suicide/parasuicide behavior in adults with fetal alcohol spectrum disorders (FASD). Alcoholism: Clinical and Experimental Research, 25(5), 123A.
17. Baer, J.S., Sampson, P.D., Barr, H.M., Connor, P.D., Streissguth, A.P. (2001). Prenatal alcohol exposure and young adult drinking: A 21-year longitudinal analysis. Alcoholism: Clinical and Experimental Research, 25(5), 123A.
18. Streissguth, AP, Barr, HM, Sampson, PD, Connor, PD, Bookstein, FL. (2001) Young adult outcomes of prenatal alcohol exposure from a large population-based study. Alcohol and Alcoholism, 36(5), 437.
19. Connor, PD, Bookstein, FL, Barr, HM, Sampson, PD, Streissguth, AP. (2002). Assessing prenatal alcohol damage: Test of Nonverbal Intelligence-2 (TONI-2) vs. WAIS-R. Alcoholism: Clinical and Experimental Research, 26(5), 175A.
20. Streissguth, AP, Sampson, PD, Bookstein, FL, Connor, PD, Barr, HM. (2002). 21-year dose-response effects of prenatal alcohol exposure on cognition. Alcoholism: Clinical and Experimental Research, 26(5), 93A.
21. Connor, PD, Barr, HM, Streissguth, AP. (2003). Two scoring methods of the Rey-Osterreith in adults with fetal alcohol damage. Journal of the International Neuropsychological Association, 9(2), 201.
22. Connor, P., Mahurin, RK, Dehaene, S. (2004). Subtraction ability in patients with fetal alcohol spectrum disorders: an fMRI study. Archives of Clinical Neuropsychology, 19, 917.
23. Connor, PD., Mahurin, R.K. (2005). Working memory in patients with fetal alcohol spectrum disorders: An fMRI study. Journal of the International Neuropsychological Society.
24. Connor, PD, Mahurin, RK (2005). Decreased cerebellar activation in patients with fetal alcohol spectrum disorders. Alcoholism: Clinical and Experimental Research, 29(5), 45A.

INVITED ADDRESSES

Sep 1996	Northwest Oregon FAS Conference, Forest Grove, OR. "Implications of secondary disabilities of fetal alcohol syndrome and fetal alcohol effects on intervention strategies."
Apr 1997	Juvenile Court Workers Conference, Lake Chelan, WA. "Fetal Alcohol Syndrome and Fetal Alcohol Effects: Brain Damage, Long-Term Consequences, and Treatment Concerns."
Jun 1998	FAS Study Group meetings, Hilton Head SC. "Perseverative styles of performance: Troubles learning from mistakes in patients with FAS and FAE."
Oct 1998	Seattle Mental Health, Seattle, WA. "Fetal Alcohol Syndrome and Fetal Alcohol Effects: Brain Damage, Long-Term Consequences, and Treatment Concerns."
Apr 1999	Association of the Advanced Practice of Psychiatric Nurses, Tacoma, WA. "Fetal Alcohol Syndrome and Fetal Alcohol Effects: Brain Damage, Long-Term Consequences, and Treatment Concerns."
Jun 1999	Department of Health and Welfare Idaho, Twin Falls, ID. "Fetal Alcohol Syndrome and Fetal Alcohol Effects: Diagnosis, Neuroanatomy, and Neuropsychology"
Nov 2001	Valley Family Care Residents Training for March of Dimes Grant (Preventing Double Jeopardy). "Developing Successful Interventions for Clients with FAS or ARND."
Dec 2001	Carolyn Downs Clinic, Obstetrics didactics training for March of Dimes Grant (Preventing Double Jeopardy). "Developing Successful Interventions for Clients with FAS or ARND."
Dec 2002	Monroe State Prison Special Offenders Unit "Fetal Alcohol Spectrum Disorders: Diagnosis, Prevalence, Neuropsychological and Mental Health Implications."
Oct 2003	11 th Annual MeritCare Pediatric Neuroscience Conference, Fargo, ND. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences." 6-hour CE course.
Dec 2003	Forensic Psychiatric Services Commission's Colloquium on Cognitive Impairment, Simon Fraser University, Vancouver, BC. "Efficacy of Neuroimaging and Neuropsychology for Patients with Fetal Alcohol Spectrum Disorders."
Feb 2004	Edmonds Community College, Human Sexuality. "Fetal Alcohol Spectrum Disorders."
Mar 2004	Western State Hospital, Grand Rounds. "Fetal Alcohol Spectrum Disorders: Diagnosis, Prevalence, Neuropsychological and Mental Health Implications."
Apr 2004	Joint Meeting of the Mental Health Advisory Board and the Chemical Dependency Administrative Board. "Developing Successful Interventions for Clients with FAS or ARND."

Aug 2004	Seattle Mental Health. "Fetal Alcohol Spectrum Disorders: An Interdisciplinary Perspective Identification, Treatment, and Community Involvement."
Oct 2004	School of Nursing , Graduate course 556. "Fetal Alcohol Spectrum Disorders."
Mar 2005	13 th Annual Children's Justice Conference, Seattle, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
June 2005	Center for Sexual Assault and Traumatic Stress, Seattle, WA. "Fetal Alcohol Spectrum Disorders: Brain Cognition, and Long-Term Consequences."
July 2005	fMRI/Brain Imaging Interest Group, Department of Radiology, University of Washington. "Neuroimaging Studies of FASD."
Oct 2005	Idaho Health Care Conference, Idaho State University. Plenary session "FASD Across the Lifespan" Psychosocial Workshop "Assessment and Treatment of FASD: A Neuropsychological Approach".
Nov 2005	Northwest Chapter of the American Association of Neuroscience Nurses, Swedish Hospital. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
Nov 2005	School of Nursing, Graduate course 556. "Fetal Alcohol Spectrum Disorders."
May 2006	DDD Region 1 Training, Lecture and Workshop Series. Two full day work shops in Wenatchee and Spokane, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
May 2006	Spruce Street Secure Crisis Residential Center didactics course, Seattle. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
Jun 2006	Mercy Medical Center 1 st Annual FASD Conference, Sioux City, IA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
Jun 2006	National Association of Drug Court Professionals, Seattle, WA. "Law and Disorder: Understanding Fetal Alcohol Spectrum Disorders within the Legal System."
Jun 2006	After an FASD Diagnosis: Then What? Strategies for effective interventions with youth with FASD and their families. Mount Vernon, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
Sep 2006	National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect. Atlanta, GA. "Neuroimaging Studies of Infants, Adolescents, and Adults with FASD: Perspectives from the Far Northwest."
Oct 2006	Washington WIC: Exceptional and Extraordinary, Bellevue, WA. "What Happens to a Fetus Exposed to Alcohol? Long-Term Effects of Prenatal Alcohol Exposure on the Brain and Behavior."
Nov 2006	School of Nursing, Graduate course 556. "Fetal Alcohol Spectrum Disorders."

- Mar 2007 Substance Use and Brain Development Conference, Eugene, OR. "The Impact of Prenatal Alcohol Exposure on Brain and Behavior Development."
- Apr 2007 Juvenile Justice at risk youth and truancy court, Seattle, WA. "Fetal Alcohol Spectrum Disorders and the Justice System."
- Apr 2007 Annual MRFASSTC Booster Session, St. Louis, MO. "The Brain and Behavior in Individuals with FASD."
- Apr 2007 Alaskan Dietetics Association Annual Meeting, Anchorage, AK. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- May 2007 SATUCI Impact of Fetal Alcohol Spectrum Disorders On Schools, Families, and Communities, Marshalltown, IA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- Aug 2007 Merrill Scott Symposium, Yakima, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- Sep 2007 Elements of Success: Helping Individuals with FASD and Co-occurring Disorders Conference, Federal Way, WA. "Adults with FASD: From Research to Clinical Practice."
- Sep 2007 Indian Health Services FASD Training, Seattle, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- Oct 2007 Spokane Child Abuse and Neglect Prevention Center Training, Spokane, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- Mar 2008 Nurses' Advisory Committee for Perinatal Education "Pot O' Gold Conference: Perinatal/Neonatal Challenges 2008", Spokane, WA. "Fetal Alcohol Spectrum Disorders: Brain, Cognition, and Long-Term Consequences."
- Apr 2008 NorCal SOT 2008 Spring Meeting, Menlo Park, CA. "As if Brain damage Wasn't Enough – The Lifelong Impact of FASD on Social Interaction."
- Apr 2008 The Forensic FASD Diagnostic Team: What? When? Who? How? Why? – a 3 day meeting with New Zealand practitioners. Seattle, WA. "The Role of Neuropsychological Testing in FASD."

DEPARTMENTAL TEACHING

- Feb 2000 Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Syndrome"
- Feb 2001 Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."
- Mar 2002 Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."

Sep 2002	Department of Psychiatry and Behavioral Sciences, University of Washington, R3 Medical School Didactics "Disorders of Brain Development: Fetal Alcohol Syndrome & Fetal Alcohol Effects."
Nov 2002	Children's Child Psychiatry Didactics for Psychiatry Residents and Developmental Pediatricians "Development of Executive Functions: Specific Examples in Fetal Alcohol Spectrum Disorders."
Mar 2003	Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."
Aug 2003	Department of Psychiatry and Behavioral Sciences, University of Washington, R3 Medical School Didactics "Disorders of Brain Development: Fetal Alcohol Syndrome & Fetal Alcohol Effects."
Feb 2004	Department of Psychiatry and Behavioral Sciences, University of Washington, Child Psychiatry Residents Didactics. "Brain Development: Executive Functions in Childhood and Adolescents."
Apr 2004	Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."
Feb 2005	Department of Psychiatry and Behavioral Sciences, University of Washington, Child Psychiatry Residents Didactics. "Brain Development: Executive Functions in Childhood and Adolescents."
Mar 2005	Department of Psychiatry and Behavioral Sciences, University of Washington, Neurosciences Seminar. "Neuroimaging Studies of FASD."
Mar 2005	Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."
Dec 2005	Department of Psychiatry and Behavioral Sciences, University of Washington, Child Psychiatry Residents Didactics. "Development of the Central Nervous System from the Prenatal Period On: The Special Example of Fetal Alcohol Spectrum Disorders."
Dec 2005	Department of Psychiatry and Behavioral Sciences, University of Washington, Friday Noon Conference. "Fetal Alcohol Spectrum Disorders."
Mar 2006	Department of Psychiatry and Behavioral Sciences, University of Washington, Psychology Residency didactics. "A Neuropsychological Perspective on Fetal Alcohol Effects."
Oct 2006	Department of Psychiatry and Behavioral Sciences, University of Washington, Child Psychiatry Residents Didactics. "Development of the Central Nervous System from the Prenatal Period On: The Special Example of Fetal Alcohol Spectrum Disorders."

PAPERS PRESENTED AT SCIENTIFIC MEETINGS

Feb 1995	International Neuropsychological Society, Seattle, WA. "Cingulate degeneration following traumatic brain injury: Quantitative neuroimaging, memory and executive functions."
Feb 1997	International Neuropsychological Society, Honolulu, HI. "Fluency and speed of information processing as related to quantitative neuroimaging in fetal alcohol syndrome and fetal alcohol effects: Preliminary findings."
Jul 1997	FAS Study Group, San Francisco, CA. "Brain study: Preliminary findings of a study of patients with FAS and FAE."
Jun 1999	FAS Study Group, Santa Barbara, CA. "Executive Function Deficits in Adults Prenatally Exposed to Alcohol."
Nov 2001	National Academy of Neuropsychology, San Francisco, CA. CE course entitled "Fetal Alcohol Syndrome: Brain and Cognition."
Jul 2007	Research Society on Alcoholism, Chicago, IL. "Screening for Fetal Alcohol Exposure in Human Neonates Using the Corpus Callosum."

MEDIA PRESENTATIONS

Nov 2000	Filmed Interview for Decouverte, a Science and Technology Canadian Broadcasting Company TV program from Montreal.
Feb 2004	Interview with Laurie McHale for CHDD Outlook article.
Mar 2004	Filmed interview with Michael Skinner for video "Recovering Hope Mothers Speak Out about Fetal Alcohol Spectrum Disorders" sponsored by SAMHSA's FASD Center for Excellence.
May 2007	Interviewed by Chicago Tribune for article on FASD and DDD in Illinois

DECLARATION OF RICHARD S. ADLER, M.D.

I, Richard S. Adler, M.D., hereby state and declare as follows:

1. I am a board-certified adult, child, and adolescent psychiatrist practicing in the State of Washington. Deputy Federal Public Defenders Brad Levenson and Alexandra Yates referred their client, Dean Phillip Carter, for an examination to determine whether a diagnosis of Fetal Alcohol Spectrum Disorder is appropriate in his case.
2. Attached is a true and correct copy of my forensic psychiatric evaluation, dated March 24, 2009. If called as a witness, I would testify to the opinions and observations contained therein.
3. As explained in detail in my report, it is my professional opinion that Mr. Carter suffers from Partial Fetal Alcohol Syndrome. If asked in 1989 to 1991 to conduct a similar evaluation, I would have made the equivalent diagnosis then that I am making now.

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED: 3/24/09


RICHARD S. ADLER, M.D.



RICHARD S. ADLER, M.D.

Forensic & Clinical Psychiatry

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FORENSIC PSYCHIATRIC EVALUATION

Evaluee: Dean Phillip Carter (DOB [REDACTED] 1955)
Cause: U.S. District Court No. CV-06-1343-BEN(CAB)
Report Date: March 24, 2009

Dean Carter is a 53 year old man referred by his lawyers, Mr. Brad Levenson and Ms. Alexandra Yates, Deputy Federal Public Defenders.

I was requested to conduct a face-to-face examination of Mr. Carter for the purpose of assessing whether he has the physical manifestations of Fetal Alcohol Spectrum Disorder (FASD), reviewing relevant materials, and if appropriate, making a specific diagnosis of FASD.

I am a Board-certified Adult, Child and Adolescent Psychiatrist. I graduated from the Forensic Psychiatry Training Program at the University Of Washington School of Medicine. I presently hold a faculty appointment at the University of Washington School of Medicine in the Department of Psychiatry and Behavioral Health Sciences. I am the Medical Director of FASD Experts (www.FASDExperts.com). FASD Experts has generated the first known Model Standard for the forensic evaluation of FASD.¹ I have experience in forensic civil and criminal (as well as clinical) matters concerning FASD. My resume is provided as an attachment.

Based on my examination of Mr. Carter and review of relevant ancillary materials, it is my opinion that Mr. Carter has Partial Fetal Alcohol Syndrome.

¹ Fetal Alcohol Spectrum Disorder in the Legal System: A Multidisciplinary Assessment Model for Adults and Adolescents. Presentation at the 3rd International Conference on Fetal Alcohol Spectrum Disorder, March 11, 2009, Victoria, British Columbia, Canada.

Forensic Psychiatric Evaluation
Mr. Dean Carter
March 24, 2009
Page 2 of 18

The following were relied upon in arriving at my opinion:

- 1) Examination of Mr. Carter, January 26, 2009, San Quentin State Prison, San Quentin, California:
 - a) A clinical interview was conducted in the presence of Defense Investigator, Ms. Rebecca Dobkin, 11:00 a.m. to 12:30 p.m.,
 - b) The physical examination was conducted from 3:45 p.m. to 4:15 p.m. This was conducted in the Infirmary, in the direct presence of two correctional officers.
- 2) Declaration of Natalie Novick-Brown, Ph.D., June 4, 2007, 43 pages,
- 3) Declaration of Paul Connor, Ph.D., neuropsychologist, March 2009, 24 pages,
- 4) Childhood pictures of Mr. Carter,
- 5) Personal Symptom Checklists (PSCs) completed by Ms. Pat Rimmer, Mr. Ed Cole, Rob Stapleton,
- 6) Declaration of Lilly Rose, March 3, 2007, 3 pages,
- 7) Declaration of Vaughn Johnson, March 3, 2007, 2 pages,
- 8) Declaration of Arthur "Guy" Martin, March 1, 2007, 5 pages,
- 9) Declaration of Lela Kiana Oman, July 13, 2000, 4 pages,
- 10) Declaration of Charles "Chuck" Reader, April 4, 2007, 3 pages,
- 11) Declaration of Roscoe Wilke, April 4, 2007, 2 pages,
- 12) Testimony of Bertha Adsuna, SD 50 RT 7578, 7583-90,
- 13) Testimony of Jerry Lee Carter, LA 49 RT 5750, 5754-57,
- 14) Testimony of Jerry Lee Carter, SD 49 RT 7435-40, 7444-46,
- 15) Testimony of Pollyanne Reasner, SD 50 RT 5766, 5768-71,
- 16) Testimony of Pollyanne Reasner, LA 49 RT 7547-51.

This is the kind of information routinely relied upon by psychiatrists in order to offer their expert opinions. Information relevant to establishing any diagnosis is addressed in this report. Other historical material that is well-documented elsewhere will not be reiterated.

NOTIFICATION OF RIGHTS AND LIMITS OF CONFIDENTIALITY:

Prior to the formal evaluation, Mr. Carter was informed of the purposes of the examination, the limits upon its confidentiality, and that a report would be generated from my examination. Mr. Carter was informed that the evaluation could result in recommendations for treatment. Mr. Carter demonstrated a factual and rational understanding of these notifications. After this, Mr. Carter was asked explicitly if he wished to proceed, and Mr. Carter indicated a willingness to do so.

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RELEVANT HISTORY:

Mr. Carter reported that he was born at the Maynard McDougal Memorial Hospital in Nome, Alaska, which is no longer open. He was told that he had “a big head” at birth.

His father was in the Air Force. He indicated that he never knew his father. He is his mother’s only child by this man. His mother married his step-father when Mr. Carter was 4 – 5 years old. His mother was a matron in a jail. She is a Native Alaskan (Nupiak). He described her as “pretty mean...not a people person.” His step-father was the chief of police.

Mr. Carter told me that as a child he “got in trouble a lot,” had a lot of “beatings...I was a difficult child...I stole, skipped school.”

Mr. Carter has no significant medical history, other than two episodes of head trauma. The first occurred at age five (5). He reports being “run over” by a car, but without sequelae. The second was at age 21 or 22, while he was driving. He reported possible alteration of consciousness and a several day admission to Providence Hospital in Anchorage. He also participated in boxing beginning at age 15 or 16, but could not provide details regarding significant head trauma.

Mr. Carter denied any history of seizures or tics. He takes a variety of vitamins and an aspirin daily. He denied any medication allergies.

Mr. Carter denied any physical symptoms presently on Review of Systems. He has had “bronchitis” on and off since age 12 or 13. Mr. Carter did not know of any genetically-inherited illnesses that afflicted his family, but did report that his mother and maternal grandmother were alcoholics.

Mr. Carter has not taken much in the way of psychiatric medications, other than medications “for sleep” while incarcerated in Oregon and Los Angeles County Jail (Sinequan, Benadryl in both settings).

PHYSICAL EXAMINATION:

Mr. Carter reported himself to be 6’2” – 6’3” tall. Mr. Carter was weighed in sneakers to be 291 pounds.

He appeared in no apparent distress. Although his temperature was not obtained, by touch he was grossly afebrile, and he was not sweating. No rashes or erythema were noted.

HEENT: Examination of his head revealed a grossly normocephalic (cranial) appearance.

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Mr. Carter's orbitofrontal (i.e. head) circumference was 62 centimeters. The ears (pinnae and external auditory meati) appeared grossly normal. Hearing was equal bilaterally by tuning fork of 128 Hz, and air conduction > bone conduction bilaterally. Examination of his eyes was grossly normal externally. Extraocular movements were grossly intact. Examination of the fundi revealed no marked pathology. No corneal or lens opacities were present. Examination of the oropharynx revealed no abnormalities.

FASD-Related Facial Features (see photograph below):

1. Palpebral fissures (using a see-through ruler):
 - a. Right: 30 mm in length,
 - b. Left: 30 mm in length.
2. Evaluation of the philtrum revealed "smoothness" consistent with a score of 4/5 maximum.
3. Evaluation of upper lip revealed "thinness" consistent with a score of 4/5 maximum.

Examination of the neck showed no adenopathy. There was no apparent thyromegaly.

Examination of the back did not reveal any abnormalities. There was no localized tenderness, nor clear scoliosis. Lungs were clear to auscultation and percussion bilaterally.

Examination of the anterior chest was within normal limits. There was some prominent adipose tissue of the upper chest. No axillary adenopathy was noted. There were no heaves or thrusts. Auscultation revealed normal heart sounds, without murmurs or rubs.

Abdominal examination featured normal bowel sounds and no tenderness on palpation. There was no hepatomegaly or splenomegaly appreciated.

Genitourinary and rectal examinations were deferred given the nature of the consultative question.

Extremities: grossly within normal limits although bilaterally. There was no edema at the lower extremities.

Neurological/Neuromuscular/Sensory examination: Mental Status Examination is provided in a separate section below. Cranial nerves II – XII were grossly within normal limits. Reflexes were difficult to elicit, and appeared generally decreased. There was downward flexion of toe (absent Babinski) bilaterally.

Muscle strength was 5/5 throughout, and equal bilaterally. Normal heel and toe walking. There were no abnormalities of gait, including heel-toe maneuver.

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Sensation normal to light touch and “brush.” There was a suggestion of deficient “letter recognition” when written on surfaces of hands and feet by the examiner.

MENTAL STATUS EXAMINATION:

Mr. Carter appeared his stated age. He was dressed in prison garb and appropriately groomed. He was cooperative and readily engageable. However, his overall manner was jocular and nonchalant. Eye contact was direct.

His motoric activity was within normal limits. There were no tics, twitches, stereotypies or abnormal involuntary movements noted.

His speech was normal in quantity, tone, volume and rate. His productions were spontaneous.

Mr. Carter rated himself as 10 – 20 /100 globally. He rated his mood as 5/10 on a scale of 1 (low) to 10 (maximum).

Mr. Carter’s affect appeared appropriate and the range of his affect was appropriate, but subtly constricted.

Mr. Carter’s thoughts appeared coherent and goal-directed. He neither exhibited nor endorsed any delusions of control, reference, thought broadcasting, thought insertion, somatic problems, erotomania, religion or grandiosity.

When asked whether he had present suicidal and homicidal ideations, he denied any. He denied auditory, visual, olfactory and somatic hallucinations

Mr. Carter reported the day and date correctly, as well as the season, the month and year.

He correctly identified the facility, floor, city, county and state. He could recall a list of three items immediately after presentation and two of the three items several minutes later.

He spelled “world” correctly, both forward and backwards. Mr. Carter was able to do “serial sevens” correctly from 100 to 44.

Mr. Carter was able to name two common items presented visually. He could repeat a short phrase correctly. He was able to carry out a simple three-step directive. He was able to read and carry out a simple one-step directive. When asked to write a sentence, he wrote in cursive: “Here I am.” He was able to copy a diagram consisting of two intersecting pentagons, although he copied these a bit smaller than the original and the

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form was not exact. He was able to correctly draw a "flower in a pot" and a clock reflecting the time at 6:15.

Mr. Carter identified the President as Obama. He reported that the California Governor is "Arnie." Mr. Carter was able to name five large cities in the state of California. He identified the last major holiday as "MLK Day." He reported that a recent significant current event as "the Inauguration," and knew about the upcoming Super Bowl.

When asked about the meaning of "Rome wasn't built in a day" he replied: "You can't expect everything right now." When asked about "A stitch in time saves nine," he responded "If you prepare, it save nine minutes later." As for "A rolling stone gathers no moss," he replied that it means "If you're on the move, nothing can stick to you... you don't have roots." When asked about the meaning of "The tongue is the enemy of the neck," he indicated that "If you run your mouth, you can get your neck chopped...maybe something from the French Revolution."

Mr. Carter reported intact sleep overall. He also reported an intact appetite and rated his energy as 5/10 1 (low) to 10 (maximum). Mr. Carter stated that he can concentrate on things "if interested." He reported his memory as variable.

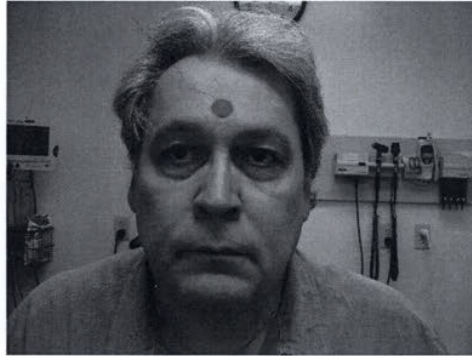
DIGITAL ANALYSIS OF FAS-RELATED FACIAL FEATURES PRESENTLY:

The method employed is detailed in Astley SJ, Clarren SK: "Measuring the Facial Phenotype of Individuals with Prenatal Alcohol Exposure Correlations with Brain Dysfunction," Alcohol & Alcoholism, Volume 36 (2), pp. 147 – 159, 2001. In addition to direct physical examination (including measurement) of Mr. Carter, digital photographs were obtained and analyzed using the Fetal Alcohol Syndrome Facial Photographic Analysis Software, Version 1.0.0, SJ Astley, Ph.D., FAS Diagnostic and Prevention Network, University of Washington, Seattle, WA, 2003.

Facial features are rated on a scale from 1 (not affected) to 5 (severely affected) and then translated to an "ABC Score" per the protocol. The program analyzes "Lip Circularity," which is a more accurate assessment for Upper Lip Smoothness.

The Palpebral Fissure – Philtrum – Lip Score Combination in Mr. Carter's case is "ACC." This Combination correlates to a 4-Digit Diagnostic Code Rank of 2 which is characterized as "FAS features mild." The full FAS Facial Photographic Analysis Report is provided as an attachment. Although a series of photographs was obtained, the frontal photograph (with a sticker on his forehead to provide a "standard" to measure facial features) follows:

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A brief summary of the data is also provided below:

	Right (mm)	Left (mm)	Rating 1 (none) to 5 (extreme)	ABC Score
Palpebral Fissure Length	33.0	35.6	N/A	A
Philtrum Smoothness	N/A	N/A	4	C
Upper Lip Smoothness (Circularity)	N/A	N/A	5	C

REVIEW OF CHILDHOOD PICTURES:

Examination of pictures provided by counsel (see next page), reflect both a smooth philtrum and smoothness of the upper lip. Since there is no standardized marker in the picture (akin to the adhesive paper "dot" used in my examination), digitalized evaluation of the palpebral fissure lengths cannot be performed. The ideal picture for examination features a "neutral," non-smiling face.

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FETAL ALCOHOL BEHAVIOR SCALE (FABS):

Exhibit 95-1167

ER 1246

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The FABS was developed at the University of Washington in research on individuals with fetal alcohol behavior disorders.² The behaviors assessed in this scale correspond to those most frequently observed in individuals with FASD conditions and fall in the following general categories: communication and speech, personal manner, emotions, motor skills and activities, academic/work performance, social skills/interactions, and bodily/physiologic functions.

The FABS consists of 36 items culled from the original 68 items on the Personal Behaviors Checklist (PBC).

The PBC was provided to: (1) Ms. Pat Rimmer, Mr. Carter's prior foster mother around age 14 and (2) Mr. Rob Stapleton, who described himself as "knew [Mr. Carter] in early 80's," and (3) Mr. Ed Cole, whose association/familiarity with Mr. Carter was not conveyed.

Ms. Rimmer endorsed a total of 35 items. Of the items she endorsed, 21 of them are items identified as making up the 36 FABS items. Thus, 21 of the 35 she endorsed are relevant (60%). The score of 21 is *four times* the mean for non-FASD persons, and the same as the score for the FASD cohort in the original study.

Mean: Normal Cohort	Mean: FASD Cohort	Median: FASD Cohort	Ms. Rimmer's Score	Total Possible Score
5.0	20.3	21.0	21.0	36

Mr. Stapleton endorsed only 5 items of the FABS items. Mr. Cole endorsed 2 of the FABS items. [Ms. Rimmer's FABS results are considered most probative because she was Mr. Carter's foster mother when he was in his youth].

NEUROPSYCHOLOGICAL TESTING:

Dr. Connor indicated in his declaration that due to time constraints he was unable to complete a full neuropsychological assessment on the one day that he was able to meet with Mr. Carter (at page 14). Tests results (as presented graphically below) were thus augmented by results of an evaluation by Myla Young, Ph.D. in 1998 and 1999. Dr. Connor noted that there was "considerable consistency between results of the tests I administered during my evaluation and similar tests administered by Dr. Young," supporting the decision to utilize the prior results.

² Streissguth AP, Bookstein FL, Barr HM et al. A Fetal Alcohol Behavior Scale. Alcohol Clin Exp Res 22(2) 326 – 333, 1998.

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Dr. Connor points out that one of the diagnostic systems used³ requires that there must be at least three (3) domains of cognitive functioning that are impaired and the impairment must be at least one standard deviation below average. These are more stringent diagnostic criteria than the one proposed by the Institute of Medicine,⁴ provided in detail later in my report.

In his review of Mr. Carter's neuropsychological test data, Dr. Connor identified four (4) domains of impairment:

1. Executive Functioning,
2. Attention,
3. Psychomotor Functioning (i.e. Visuospatial Performance),
4. Adaptive Functions.

[Mr. Carter's deficits are particularly notable in relation to his above average IQ of 116. This manner of analysis is not part of the official CDC guidelines. However, the IOM Guidelines, in my opinion, *do* permit a professional to take the discrepancy between the IQ and other CNS attributes into account.]

Dr. Connor also highlighted the prior CNS impairment demonstrated on PET Scan.

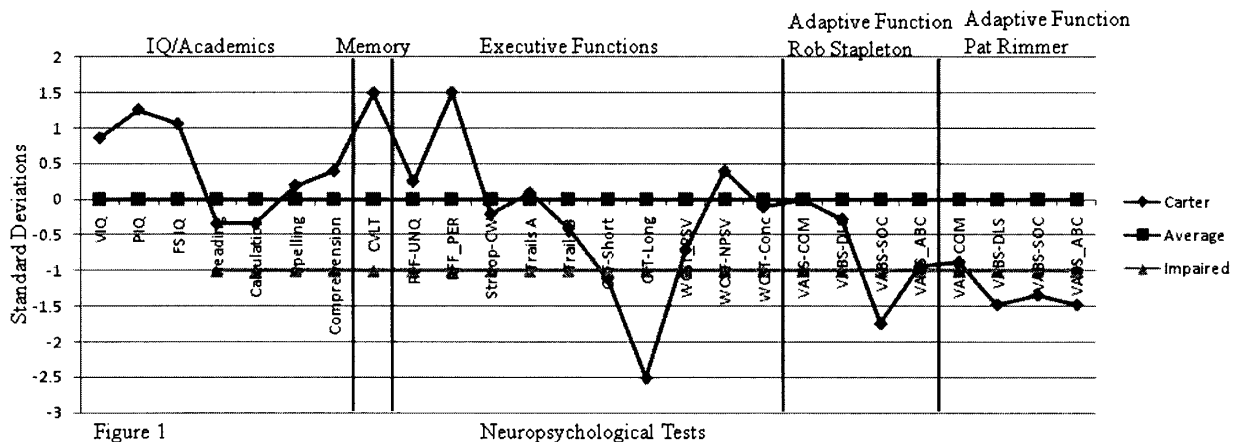
Dr. Connor addressed the issue of the "differential diagnosis," in this matter, particularly addressing the prior episodes of reported: (1) Traumatic Brain Injury (the first occurring at age 5), (2) exposure to the tailings of gold mining, (3) chaotic childhood including physical and emotional abuse and (4) substance abuse.

Dr. Connor concluded that in the face of reports of behavioral problems that preceded all of those elements, if anything, these influences would have likely had an additive but not causative role.

³ Betrand H, Floyd RL, Weber MK, et al. Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis. Atlanta, GA: US Department of Health and Human Services, Centers for Disease Control, 2004.
http://www.cdc.gov/ncbddd/fas/FAS_guidelines_accessible.pdf

⁴ Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). National Academy Press; Washington, D.C. 1996.

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Dr. Connor's examination of Mr. Carter included the following:

- Full Scale IQ of 116
 - Notably low score on Digit Span (7)
 - Notably low score on Digit Symbol – Coding (9)
- Woodcock Johnson Test of Achievement – 3rd Edition
 - Calculation at Grade Equivalent 7.5. Age Equivalent 12-11
- Consonant Trigrams Test
 - 18 Second Delay Trials – 1st percentile

Dr. Connor diagnosed Mr. Carter with Cognitive Disorder, NOS (DSM-IV Code 294.9), and Mathematics Disorder (DSM-IV Code 315.1).

At page 22 he concluded that: "Combined, these findings demonstrate ample evidence of CNS abnormalities...consistent with a diagnosis on the fetal alcohol spectrum."

DECLARATION, NATALIE NOVICK-BROWN, PH.D.:

At page 15, Dr. Brown stated: "In Dean Phillip Carter's case, direct observation of the birth mother drinking during her pregnancy confirms prenatal alcohol exposure. Lilly Rose (close friend of birth mother Esther Carter) reported...*'I do know that Esther continued to drink throughout her pregnancy with Dean. When Esther was expecting Dean, I used to see her around town at bars drinking, especially during the weekends.'*"

Dr. Brown referred to this information as "sworn testimony from a credible individual," meeting the accepted standard to establish a history of prenatal exposure.

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At page 17, Dr. Brown related that “none of the records I reviewed included his height or weight,” limiting her ability to assess whether Mr. Carter’s growth information would potentially satisfy one of the other diagnostic elements.

Noting that CDC diagnostic criteria include “clinically significant brain abnormalities observable through imaging techniques,” Dr. Brown summarized the findings of Dr. Adrian Raine⁵. According to Dr. Raine, a positron emission topography (PET) scan of Mr. Carter’s brain:

“...depicts significantly abnormal brain functioning. The lateral and medial prefrontal cortex, corpus callosum, and occipital cortex all show evidence of reduced functioning. The hippocampus and thalamus also show evidence of abnormal asymmetries of function...”

Dr. Brown’s review of records supported a finding of (1) learning disabilities, (2) a specific math deficit and (3) developmental delays.

In particular, Dr. Brown noted that despite high average IQ scores, “grade transcripts reveal below average grades from fourth grade on...Elementary school transcripts indicated that as arithmetic classes become more complex...Mr. Carter’s academic performance in math deteriorated.” Mr. Carter was noted in 8th grade to be “immature,” and two years later to be “immature” and “undirected.”

Dr. Brown, in an extensive review of Mr. Carter’s history, concluded: “An FASD condition accounts for all of Mr. Carter’s behavioral history: from infancy to the present, from innocuous but odd non-criminal behaviors to significant antisocial events, and whether he was intoxicated on substances or not.” (at page 30)

ADDITIONAL INFORMATION REGARDING MATERNAL ALCOHOL USE:

Mr. Charles Reader submitted a declaration. He indicated that he met Esther Carter in 1948 while he was bartending at the Nevada Saloon in Nome. He stated that “Esther could really drink” at page 1, item #3.

Ms. Lilly Rose also submitted a declaration. She indicated that she was born in 1930. She was friendly with Mr. Carter’s mother beginning when the two were in their 20’s.

⁵ From a declaration in 2000, referencing a May 30, 1991 brain positron emission topography study (i.e., PET scan).

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She indicated that “Esther went out more than me because she also went out drinking on weekdays [in addition to weekends]...on a regular basis... I would not be surprised if there is something wrong with Dean due to Esther’s drinking when she was pregnant.” (at pages 1 -2).

She also stated that “After she got married [to Mr. Carter]...Esther continued to drink for many years. Esther and James Carter were heavy alcohol drinkers. I remember seeing them at bars drinking all the time.”

Ms. Adsuna testified about Mr. Carter’s mother’s use of alcohol after his birth, but before the marriage to Mr. Carter’s stepfather. She stated that she had seen the mother go in and out of bars “staggering a little” from alcohol (at p. 7583, lines 19 – 26).

Younger half-sister, Ms. Pollyanne Reasner, testified that the parents “...got drunk all the time. It wasn’t just once a month” (at p. 7550, lines 3 – 4).

A peer, Mr. Vaughn Johnson, submitted a declaration. Item 7 at page 1 states; “I remember that Jim and Esther Carter were heavy drinkers. When I went to the Carter house, Jim and Esther were often drinking.”

Patrolman Arthur “Guy” Martin submitted a declaration. At page 3, item 17 he stated that the Carter parents “were both heavy drinkers.” Mr. Martin worked with Mr. Carter on the Nome, Alaska police force.

DIAGNOSIS:

Axis I:	Cognitive Disorder, NOS (DSM-IV Code 294.9) Mathematics Disorder (DSM-IV Code 315.1)
Axis II:	Deferred
Axis III:	Partial Fetal Alcohol Syndrome
Axis IV:	Stressors: Extreme: Incarceration on Death Row for years
Axis V:	Global Assessment of Functioning: 70/100 maximum currently, 70/100 prior year

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OPINION/DISCUSSION:

Diagnosis of Partial Fetal Alcohol Syndrome (PFAS):

The Diagnostic Criteria for PFAS are contained in: Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). National Academy Press; Washington, D.C. 1996. These are the Institute of Medicine (i.e., IOM) criteria. The Centers for Disease Control (CDC) report (2006), on the other hand, only provides diagnostic criteria for Fetal Alcohol Syndrome.

The criteria used here were established by the Institute of Medicine at the direction of the U.S. Congress pursuant to Section 705 in Public Law 102-321. At page 76, Table 4-1, the diagnostic criteria for PFAS are provided:

- A. Confirmed maternal alcohol exposure' which is a pattern of excessive intake characterized by substantial, regular intake or heavy episodic drinking. Evidence of this pattern may include frequent episodes of intoxication, development of tolerance or withdrawal, social problems related to drinking, legal problems related to drinking, engaging in physically hazardous behavior while drinking, or alcohol-related medical problems such as hepatic disease.

[AND]

- B. Evidence of some components of the pattern of characteristic facial anomalies

[AND Either C or D or E]:

- C. Evidence of growth retardation, as in at least one of the following:

- low birth weight for gestational age
- decelerating weight over time not due to nutrition
- disproportional low weight to height

- D. Evidence of CNS neurodevelopmental abnormalities, as in:

- decreased cranial size at birth
- structural brain abnormalities (e.g., microcephaly, partial or complete agenesis of the corpus callosum, cerebellar hypoplasia)
- neurological hard or soft signs (as age appropriate) such as impaired fine motor skills, neurosensory hearing loss, poor tandem gait, poor eye-hand coordination

- E. Evidence of a complex pattern of behavior or cognitive abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment alone, such as learning difficulties; deficits in school performance; poor impulse control; problems in social perception; deficits in

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higher level receptive and expressive language; poor capacity for abstraction or metacognition; specific deficits in mathematical skills; or problems in memory, attention, or judgment

The diagnostic criteria for Partial FAS are revisited in the table below along with the particular data upon which Mr. Carter meets these criteria.

Diagnostic Criteria for Partial Fetal Alcohol Syndrome (PFAS)			
		Dean Carter	
Area	Defined by	Data	Criterion Met?
(A) Confirmed Maternal Alcohol Exposure	IOM Criteria (1996)	Sworn testimony of Ms. Lilly Rose. (Additional support for the conclusion that Mr. Carter's mother drank heavily/was an alcoholic includes sworn testimony of: Mr. Arthur "Guy" Martin, Mr. Charles "Chuck" Reader, , Mr., Mr. Vaughn Johnson, Ms. Bertha Adsuna, and Ms. Polly Anne Reasner.)	YES
(B) Evidence of Some Components of the pattern of Characteristic Facial Abnormalities	IOM Criteria (1996)	Smooth philtrum, upper lip, etc.	YES
(E) Evidence of a complex pattern of behavior or	Learning difficulties, deficits in school	Learning difficulties, poor school	YES

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cognitive abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment alone.	performance, poor impulse control, problems in social perception, deficits in higher level receptive and expressive language, poor capacity for abstraction or metacognition, specific deficits in mathematics skills; or problems in memory, attention or judgment.	performance, specific deficits in mathematics, problems in memory, executive function, psychomotor functioning, social/adaptive functioning	

Regarding the issue of maternal alcohol exposure, the information summarized above documents *regular* intake resulting in *frequent episodes of intoxication*. The sworn testimony and/or declarations included above reflect alcohol abuse before, during and (long) after the mother's pregnancy with Mr. Carter. This information meets the "A" criteria.

The facial appearance of Mr. Carter has features typical of FAS, not only at present (confirmed by examination and computerized digital analysis), but also in numerous photographs from childhood, satisfying the "B" criteria.

Furthermore, Mr. Carter *abundantly* meets the "E" criteria from the IOM *and* he also meets the more stringent CDC criteria for CNS impairments.

FAS was first described by Jones and Smith in 1973.⁶ At that time the cardinal features of the syndrome were identified as: (1) prenatal alcohol exposure, (2) growth deficiency, (3) a constellation of facial features and (4) CNS dysfunction. Early on, an impressionistic or "gestalt" approach was used in evaluating the abnormal facial features (i.e. facial "dysmorphology").

⁶ Jones KL, Smith DW. Recognition of the fetal alcohol syndrome in early infancy. Lancet 836, 999, 1973.

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By 1978, alternate manifestations of prenatal alcohol exposure were appreciated that did not include growth deficits and were termed Fetal Alcohol Effects (akin to our present diagnostic label of Partial Fetal Alcohol Syndrome).⁷

In 1989 – 1991, provided a credible report regarding prenatal alcohol exposure, alongside the appearance of a flattened philtrum and thinned upper lip, and well-documented CNS dysfunction, it can be expected that a prudent evaluator could have made a diagnosis of a Fetal Alcohol Spectrum Disorder, particularly Fetal Alcohol Effect. In fact, as a Child Psychiatrist at that time, based on such information I would have made the (equivalent) diagnosis then, just as I am making it now.

On another note, PET scan findings are not explicitly referenced in either the IOM or CDC criteria. The CDC criteria appear to allude to “structural” (e.g. shape, size) abnormalities. PET scans reflect “functional” impairments. It is worthwhile to point out that Dr. Raine identified perfusion/blood flow deficiencies (reflecting decreased function) in the Corpus Callosum area of the brain in Mr. Carter. It is important to note that the Corpus Callosum is an area of the brain shown to be affected by prenatal alcohol by Diffusion Tensor Imaging, another functional radiological technique⁸.

Mr. Carter is diagnosed with Partial Fetal Alcohol Syndrome as opposed to Fetal Alcohol Syndrome. One of the central differentiating features here is that he has two, but not all three of the facial stigmata of FAS. The face changes over time, making the diagnosis of FAS in adults difficult, especially in the absence of analyzable pictures with a standardized marker permitting digital measurement.

For the sake of completeness, it should be emphasized that the diagnosis of FAS versus the diagnosis of Partial FAS appears to be ‘a distinction without a difference’ when it comes to the level of functional impairment and life outcomes for the affected individual⁹.

In actuality, persons like Mr. Carter, who are prenatally-affected by alcohol but who have higher IQs tend NOT to have their disability detected in a timely fashion and thus suffer more serious life sequelae of this condition.

⁷ Clarren SK and Smith DW. The fetal alcohol syndrome. New England Journal of Medicine, 298, 1063 – 1067, 1978.

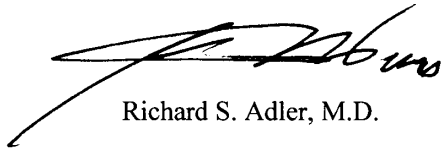
⁸ Ma X, Coles CD, Lynch ME, et al. Evaluation of Corpus Callosum Anisotropy in Young Adults with Fetal Alcohol Syndrome to Diffusion Tensor Imaging. Alcohol Clin Exp Res 29(7): 1214 – 1222, 2005.

⁹ Streissguth AP, Barr HM, Kogan J, et al: Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE): Final Report to the Centers for Disease Control on Grant No. RO4/CCR008515 (Tech. Report No. 96-16). Seattle: University of Washington, Fetal Alcohol and Drug Unit, 1996

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Thank you for permitting me to evaluate Mr. Carter. I hope I have answered the consultative questions in a complete and readily-understandable fashion. If you have questions or concerns, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Adler", with a long horizontal stroke extending to the left.

Richard S. Adler, M.D.



RICHARD S. ADLER, M.D.

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EDUCATION

1998 – 2000	Senior Fellow in Forensic Psychiatry University of Washington School of Medicine Seattle, WA
1986 - 1988	Fellow in Child Psychiatry Massachusetts General Hospital /Harvard Medical School Boston, MA 02114
1984 - 1986	Resident in Adult Psychiatry McLean Hospital/Harvard Medical School, Belmont, MA 02478 <i>Included rotations in Consult - liaison Adolescent and Family Treatment Unit at McLean Hospital</i>
1983 - 1984	Internship year in Adult Psychiatry McLean Hospital/Harvard Medical School <i>Six months medical internship at Mt. Auburn MGH, two months of Inpatient Geriatric Psychiatry, two months of Substance Abuse Psychiatry</i>
1978 - 1983	Albany Medical College of Union University (AMC) Albany, NY 12208 Doctor of Medicine <i>Alpha Omega Alpha Honor Society Shaeffer Prize in Pathology Honor Committee Member 1978 - 1980</i>

Exhibit 95-1178

ER 1257

1980 - 1981 **Research in Gastrointestinal Pathology**
Brigham and Women's Hospital
Department of Pathology, Ramzi Cotran, M.D., Chief
Boston, MA 02115
*American Gastroenterological Association Award for
Medical Student Research - Poster Presentation*

1976 - 1982 **Rensselaer Polytechnic Institute (RPI)**
Troy, NY 12180
Bachelor of Science in Biology
Summa cum laude, RPI - AMC 6-year Biomedical Program

POSITIONS

5/08 – present **Medical Director**
FASD Experts.com - Interdisciplinary collaborative forensic and
clinical evaluation of Fetal Alcohol Spectrum Disorders

2/97 - present **Private Practice**
Forensic and clinical psychiatric practice in child and adult
psychiatry

2007 – present **Clinical Instructor**
University of Washington School of Medicine
Seattle, WA

2007 – present **Clinical Instructor**
Antioch University Seattle
2326 6th Ave, Seattle, WA 98121

3/00 - present **Speakers Bureau and National Advisory Board**
McNeil Consumer Healthcare, makers of Concerta ®

- 2006 - 2008 **Psychiatric Consultant**
Renton Academy
Employed by the Renton School District to provide on-site psychiatric services for a new specialty school informed by the Re-Education Approach pioneered by Nicholas Hobbs, Ph.D.
- 2006 **National Advisory Panel**
Cephalon, Inc., makers of Sparlon ® (modafanil)
New Drug Application (FDA) pending
- 2/97 - 6/08 **Staff Psychiatrist**
Children's Hospital & Medical Center
Seattle, WA
Patient evaluation and psychopharmacologic management, team consultation two days a week
- 7/00 – 12/00 **Staff Psychiatrist**
Western State Hospital
Program for Forensic Evaluations in Corrections and the Community, Tacoma, WA 98498
Carl Redick, Psy.D, Director
- 7/98 – 6/00 **Acting Clinical Instructor (*)**
Children's Hospital & Medical Center, Lake City Way Satellite
(206) 368-4949
Individual and group supervision of Child Psychiatry Fellows, Adult Psychiatry Residents, Psychology Interns at a University of Washington Medical School teaching site.

() During the Senior Fellowship in Forensic Psychiatry (see Education), University of Washington regulations require that the instructorship be regarded as "acting".*
- 1/98 - 7/98 **Clinical Instructor**
Children's Hospital & Medical Center, Lake City Way Satellite
- 8/96 - 6/98 **Staff Psychiatrist**
Seattle Mental Health Institute, 1600 East Olive Street,
Seattle, WA 98122. (206) 324-2400
Provided staff consultation and treatment to adults, children and adolescents, including The Deaf Services unit, in a large CMHC with a wide continuum of care.

- 8/91 - 7/96 **Medical Director & Founding President**
Comprehensive Psychiatric Group, 120 East Main Street,
Salisbury, MD 21801.
*Region's largest multi-disciplinary mental health
practice with Addictions, Eating Disorders and
extensive Group Psychotherapy Programs.*
- 3/95 - 7/95 **Consultant - Behavioral Health Services**
Peninsula Regional Medical Center (PRMC)
100 East Carroll Street, Salisbury, MD 21801
*Retained to design integrated and managed care-
friendly inpatient, outpatient, consult-liaison and
emergency mental health services.*
- 1/94 -12/95 **Community Affiliate, Peninsula Regional Medical Center**
- 11/91-12/93 **Attending Psychiatrist, Peninsula Regional Medical Center**
Inpatient, emergency and consult - liaison services
- 7/88 - 6/92 **Medical Director, Mental Health Clinic**
Somerset County Health Department, Westover, MD 21871
*National Health Service Corps Scholarship Placement.
Included consultation to Colbourne Substance Abuse
Center, Crisfield, MD & Somerset County Sheriff's
Department, Public Schools, and Developmental Center.*
- 7/88 - 6/91 **Medical Director, Mental Health Clinics**
Worcester County Health Department, Snow Hill, MD
21863.
National Health Service Corps Scholarship Placement
- 7/86 - 6/88 **Part-time private practice**
Boston, MA
- 10/86 - 6/88 **Ciba-Geigy Clinical Trial of Clomipramine for Obsessive-
Compulsive Disorder in Children and
Adolescents.** Massachusetts General Hospital, Boston, MA
Co-investigator with Joseph Biederman, M.D.

1986 - 1990	Doctor-on-Call Pembroke Hospital, Pembroke, MA <i>150 bed Private Psychiatric Hospital</i>
1985 - 1990	Doctor-on-Call Norwood Hospital, Norwood, MA <i>21 bed locked psychiatric unit in a suburban community General hospital with Emergency Room and Consult- liaison consultation services.</i>
1985 - 1986	Psychopharmacology Consultant Cutler Counseling Center, Norwood, MA <i>Non-profit, community outpatient facility</i>

LICENSES

1996 -	Washington	33536	(3/12/96)
1988 - 1996	Maryland	D36903	(6/18/88)
1984 - 1991	Massachusetts	54358	(6/1/84)

CERTIFICATIONS

1992	Child and Adolescent Psychiatry American Board of Psychiatry and Neurology, #2903
1990	Adult Psychiatry American Board of Psychiatry and Neurology, #33030
1984	National Board of Medical Examiners, #262751

MAJOR COMMITTEE ASSIGNMENTS

2005 -	Chairman, Ethics Committee Washington State Psychiatric Association
1998	Managed Care Committee Division of Child & Adolescent Psychiatry, Children's Hospital and Regional Medical Center, Seattle, WA
1995	Representative of the Maryland Psychiatric Society to the Rural Psychiatry Task Force American Psychiatric Association Annual Meeting May, Miami Beach, FL
1992 - 1996	Board of Directors Life Crisis Center, 216 East Main Street, Salisbury, <i>Chairman, Executive Director Search Committee (1994)</i>
1993	Select Committee, Quality Council Peninsula Regional Medical Center Empowered to re-engineer Emergency Room Psychiatric Services. Developed satisfaction assessment tool
1992 - 1993	Utilization Review Committee Peninsula Regional Medical Center
1991 - 1993	Founding President Eastern Shore Psychiatrists' Group <i>Established to provide networking opportunities</i>
1991	Physicians' Steering Committee Atlantic General Hospital, Berlin, MD <i>Providing input on design of new community General hospital</i>
1988 - 1992	Utilization Review Committee Peyton Psychogeriatric Unit McCready Hospital, Crisfield, MD <i>Specialty in-patient locked unit for chronically mentally ill geriatric patients</i>

MEMBERSHIPS

1996 -	American Academy of Psychiatry and the Law
1984 -	American Psychiatric Association
1991 - 1996	Eastern Shore Psychiatrists' Group
1988 - 1996	Maryland Psychiatric Society
1986 - 1988	Massachusetts Psychiatric Society

PUBLICATIONS & PRESENTATIONS

2008	"Fetal Alcohol Spectrum Disorder in the Educational Context" Lake Washington School District, Redmond, WA 3-hour In-service
2008	"Collaboration Between Attorneys and Mental Health Experts: Beyond the Basics" - Continuing Legal Education TeamChild, Seattle, WA (www.TeamChild.org) (1) "Vetting the Expert" (2) "Bringing it all Home" – Program Discussant with Jeff Robinson
2007	"Parenting Evaluations – A Critical Review and Practice Skills" Washington State Bar Association – Continuing Legal Education Washington State Convention and Trade Center, Seattle, WA, August 8, 2007 Doubletree Inn, Suite B, Spokane, WA, August 21, 2007 www.wsbacl.org
2004 & 2006	"How to Help Your Client Survive a Parenting Evaluation in Washington" National Business Institute Seminar, Washington State Convention and Trade Center, Seattle, WA. November 5, 2004 & November 10, 2006. www.nbi-sems.com
2002	"Child Abuse and Neglect" Western State Hospital Forensic Seminar Series Greg Gagliardi, Ph.D., Seminar Director

- 2000 **“Pediatric Psychopharmacology: The Cutting Edge”**
Washington State and British Columbia Associations of School
Psychologists Fall Conference, Vancouver, B.C.
- 1999 **“Pediatric Psychopharmacology: The Cutting Edge”**
Child and Adolescent Neuropsychiatry Conference, Children’s
Hospital and Regional Medical Center, Seattle, WA
- 1998 **“The Broad Bandwidth of Autism Spectrum Disorders”**
Child and Adolescent Neuropsychiatry Conference, Children’s
Hospital and Regional Medical Center, Seattle, WA
- 1997 **“No Need to Panic: Anxiety Disorders Update for the
Clinician.”** Child and Adolescent Neuropsychiatry Conference,
Children’s Hospital and Regional Medical Center, Seattle, WA
- 1991 **“The Transition from Resident to Medical Director”**, American
Psychiatric Annual Meeting, Course: Administration in Austerity.
Paul Rodenhauer, M.D., Course Director.
- 1990 Adler RS, Jellinek MS. **Special Article: “After Teen Suicide:
Issues for Pediatricians Who Are Asked to Consult to Schools”**.
Pediatrics. 86:6, 982 - 7.
- 1990 Adler RS. **Out-of-Control Behavior**. The Massachusetts General
Hospital: Psychiatric Aspects of General Hospital Pediatrics.
Jellinek MS, Herzog DB, Eds. Chicago: Year Book Medical
Publishers, pp. 298-304.
- 1990 Adler RS, Jellinek M. **Suicide**. Ibid. pp. 324 - 30.
- 1985 Adler RS, Nafradi J, Szabo S. **“Cysteamine-induced Duodenal
Ulcer is not Site-specific: Effect of Local Modulating Factors”**.
J. Experimental Pathology 2:2, 111-22.
- 1983 Adler RS, Gallagher GT, Szabo S. **“Duodenal Ulcerogens
Cysteamine and Propionitrile Decrease Duodenal
Neutralization of Acid in the Rat”**. Digestive Diseases and
Sciences 28:8, 716-23.

FAS Facial Photographic Analysis Report

Case 2:06-cv-04332-ISK Document 43-4 Filed 09/07/10 Page 28 of 86 Page ID #:1541

IDENTIFICATION			
Name	Dean	Phillip	Carter
	First	Middle	Last
	Subject I.D. None		
	Source of Photo RSA SONY Netcam		
	Gender Male		
	Race Alaskan Native/Caucasian		
	Birth Date 8/30/1955		

PHOTO ASSESSMENT			
* Normal PFL Charts: <u>Hall</u>		Lip-Philtrum Guide: <u>Caucasian</u>	
	Frontal	¾ View	Lateral
File Name	DSC00038.JPG		
Date of Photo	1/26/2009		
Age (yrs) in photo	53.41		
Date of Photo Assessment	1/27/2009		
Photo Assessor	RSA		
Length of Real Internal Measure of Scale (sticker) placed on forehead (mm)			19.05
Length of Internal Measure of Scale in Frontal Photo (pixels)			117.0
Left Palpebral Fissure Length:	In photo (pixels) <u>199.0</u>	True Length (mm) <u>35.6</u>	* Z-score <u>3.91</u>
Right Palpebral Fissure Length:	In photo (pixels) <u>184.3</u>	True Length (mm) <u>33.0</u>	Z-score <u>1.82</u>
Mean Palpebral Fissure Length*:	In photo (pixels) <u>191.7</u>	True Length (mm) <u>34.3</u>	Z-score <u>2.87</u>
Inner Canthal Distance:	In photo (pixels) <u>217.1</u>	True Distance (mm) <u>35.3</u>	Z-score <u>1.64</u>
Flat Philtrum (5-point rank):		In Frontal Photo <u>4</u>	In ¾ Photo <u>4</u>
Thin Upper Lip:	Circularity (perimeter ² /area) <u>135.7</u>	5-Point rank (Circ)* <u>5</u>	5-Point rank (Scale) <u>4</u>
	clown eyebrows ☐	ptosis ☐	strabismus ☐
	flat midface ☐	protruding ears ☐	flat nasal bridge ☐
			epicanthal folds ☐
			hypertelorism ☐
Other anomalies present: <u>None reported</u>			
Comments:			
Other syndromes present: <u>None reported</u>			

PHOTO QUALITY			
	Frontal	¾ View	Lateral
Side showing			
Head rotation (5-point rank/degrees) to subject's Right (+) or Left (-)			
Head tilt (5-point rank) toward subject's Right (+) or Left (-) shoulder			
Head tip (degrees) Up (+) or Down (-) from Frankfurt Horizontal Plane			
Exposure (3-point rank)			
Focus (3-point rank)			
Facial Expression (3-point rank)			
Reliability of ABC-Score for palpebral fissure length (5-point rank)			
Reliability of ABC-Score for philtrum (5-point rank)			
Reliability of ABC-Score for upper lip (5-point rank)			

OUTCOME			
 No Picture Available No Picture Available DSC00038.JPG	ABC-Score	A	C
		PFL	Philtrum
	Data Used		
4-Digit Diagnostic Code for Face <u>2: FAS features mild</u>			

DECLARATION OF CHERRYL (BABE) STAVISH

I, Cherryl (Babe) Stavish, declare as follows:

1. I am the daughter of Charles and Marie Reader, and I grew up in Nome, Alaska.
2. My parents were friends with James and Esther Carter. The Carters did not socialize much, and I don't ever recall the Carters having social gatherings at their home.
3. I was born in 1963, and am roughly the same age as Dean Carter's younger sister, Pollyanne June Carter. Pollyanne and I were raised together and were great friends; we also went to school together.
4. Pollyanne was rarely allowed to have friends over to her house to socialize - she would always come to her friends home(s) or summer camp(s) to socialize. While all of us had birthday parties at our houses, Pollyanne never had birthday parties at her house.
5. Because this did not make sense to me, I once asked Esther Carter, Dean and Pollyanne's mother, why Pollyanne was not allowed to have birthday parties at her home. The upshot was that Esther allowed Pollyanne a small party for Pollyanne's sixth or seventh birthday. I can remember she was only allowed to have over a very few select friends (four or five perhaps, including myself).

Cherryl

6. The day of the party, Dean's step-father, Jim, was not at home. After the party, while Pollyanne was asking her mother whether she could spend the night at my house, I went snooping in Pollyanne and Goldie's bedroom. Their bedroom was wood paneled and by one wall I saw a piece of wood paneling that was sticking slightly out from the rest of the wall. When I "opened" the piece of paneling, I discovered a hidden room. The room was the size of a small jail cell and had in it only an army-type bed. The only window in the room, which was small, had bars on it. I had a feeling this is where Dean was kept.

7. When Pollyanne came back into the room, she told me "We are not supposed to look in there." Pollyanne then told me she was not allowed to sleep over at my house. When I asked Pollyanne whether I could spend the night at her house, she said, "No, I'm not allowed to have anyone sleep over."

8. In the summer, some families in Nome would spend their summers gathering subsistence foods and living at their cabins. Most cabins were wood dwellings in the nearby Alaskan countryside. The Carter family had a large cabin on stilts (roughly three feet above the tundra). The Johnson family had a cabin right across the street from the Carters summer cabin. This camp area is called Osborne, Alaska, and was about six miles from Nome.


CS

9. Either the summer after my discovery of the hidden room, or the following summer, I recall an incident that occurred when I was spending the summer with the Johnson family. It had been pouring rain for a few days. When we returned to the Johnson family cabin after a day in Nome, I saw Dean handcuffed and shackled by the ankles to the outside stilts of the Carter cabin. Dean was wet, cold, and hungry. From the look of him, Dean must have been chained to the cabin for hours and hours.

10. At first, Mr. Johnson told us to go into the cabin. Once we were all inside, Mr. Johnson decided he should go check on Dean and maybe cut him loose. Mr. Johnson's daughter, Wendy (my age) and I begged to go with him so we could bring Dean something to eat and a blanket. Mr. Johnson finally agreed, and all three of us walked over to the Carter cabin. After Mr. Johnson spoke to Dean, he worked to cut Dean loose. Dean told Mr. Johnson that Jim Carter had chained Dean to the cabin. Dean would not say anything more about it. I did not see Dean much after that, until I was in high school.

11. Later that same summer, Merwyn Johnson and I discovered a small shed about fifty feet from the Carter's main cabin. When we looked inside the shed there were bars on the very small single payne window and nothing inside.


CS

To me, it looked like a short "jail cell."

12. I recall that when I was at the Johnson summer camp in Osborne, three or four days would go by in which no one would see Dean although the other Carter children would be playing outside. When I asked the other Carter kids where Dean was I was told, "Dean was a bad boy."

13. My dad, and some of our family friends, would tell me "Dean was always running away." I suspected it was to get away from Jim Carter. Dean's running away was common knowledge in Nome.

14. Jim Carter was a big strong man, standing well over six feet tall. Jim was the police chief in Nome. Jim was stern and people did not talk back to him.

15. Esther Carter was quiet. And while she would scold her daughters, I never saw her being aggressive with them or spank them. As far as I knew, it was Jim Carter who was the disciplinarian in the family.

16. I believe, but have no proof, that Jim Carter used to "beat the ^{crap} ~~shit~~ out of Esther." I recall seeing Esther with bruises, ^a black eyes, and broken glasses.

17. Jim Carter never had anything nice to say about Dean but put Jerry on a pedestal when comparing the two boys. He would constantly refer to Dean as "that bastard."


CS

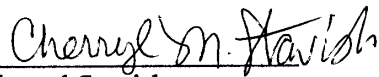
18. When I was a teenager, I asked Pollyanne about Jim's abuse of Dean. Pollyanne said that although she did not see anything, she used to hear Jim beating/whipping Dean through the thin walls separating their rooms. I remember seeing a leather strap hanging on the wall in their house.

19. I met with an investigator named Casey Cohen in May of 1987. I told him about the incident in which Dean was chained to the summer cabin, how Dean was kept in a room that looked like a jail cell, and that everyone in Nome knew about Dean's abuse at the hands of Jim Carter.

20. On February 6, 2007, I met with a lawyer and two investigators from the Office of the Federal Public Defender. The lawyer explained to me that their Office represents Dean in federal post-conviction proceedings. I have read and reviewed this five page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on March 7, 2007 in Hope, Alaska.


Cheryl Stavish

DECLARATION OF ARTHUR "GUY" MARTIN

I, Arthur "Guy" Martin, declare as follows:

1. I was born in Nome, Alaska on [REDACTED] 1942.
2. When I was a toddler, my brothers and I were sent to Holy Cross, an orphanage located in the southwestern part of Alaska. In the orphanage, I was mistreated. All of the children were beaten with straps and belts.
3. I returned to Nome when I was about ten years old. It was then that I first met Esther Carter. Esther was living with a man who cut hair.
4. In 1960, I joined the army. I was eventually stationed in Georgia, Washington, and Germany.
5. After about three years, I returned to Nome where I worked as a jailer.
6. When I turned twenty-one, I enrolled in the Alaska State Police Academy. I was sent to Anchorage, Alaska where I completed a 480 hour course that took approximately two months.
7. I returned to Nome in the Fall of 1964 to work as a police officer.
8. At that time, there were four officers on the Nome police force: Robert Oliver, Chief of Police; James Carter, Assistant Chief of Police; Larry Minnix, patrolman; and myself, also a patrolman.

9. James Carter was known to be a drinker and had all the characteristics of a heavy drinker. For example, his nose was red and swollen. James Carter was not the type to confront someone his own size, and rarely made his own arrests. James usually called another officer for assistance if he needed to arrest someone.

10. James Carter was married to Esther Carter. Esther's two boys from previous relationships, Jerry and Dean, were living with them.

11. Sometime around 1964, I received a telephone call from Sophie Swanson, a family friend. The Swansons lived next door to the Carter family. Sophie said that there was a lot of noise coming from next door and that she thought there was trouble. She told me that she thought the Carter boys, Dean and Jerry, were being abused and she asked me to check on them.

12. Sophie called me, even though I was off-duty, because she and my mother were close friends. Sophie was a very respectable person in the community. She was the kind of person that if she called there must really be a problem.

13. I went to the Carter home. It was daytime. I knocked, but no one answered. I pushed open the door and went in. Inside, I found Dean and Jerry Carter chained to the floor, like the Count of Monte Cristo. Next to the boys, I

found a bowl with water. I could see the chain on Dean, but I don't remember seeing the chain on Jerry.

14. Dean was younger, less than ten. Jerry was older, over ten. I could see the boys had been crying. Dean seemed more upset than Jerry, who was subdued. I know abuse when I see it and the Carter boys were definitely being abused.

15. I don't recall saying anything to the boys or them saying anything to me. Because of my prior experience of abuse, I became enraged at Jim Carter. I flew out of the house and to the police station. I recall only a couple of occasions during my lifetime that I had been that angry.

16. I went to the police department to confront James. When I found him, James told me to "mind my own business or else." I tried to provoke a physical confrontation with James, but it did not work.

17. I later talked to Sophie about what I had seen. Sophie told me that she knew that the boys were being chained and said that it had been going on for a long time. She thought that the boys were chained every time James and Esther went out to drink, which was frequently because they were both heavy drinkers.

18. Before leaving the police department, I told James Carter that he

better take care of it or I would.

19. I regret not reporting this incident to the district attorney but at the time I was young and it would have meant turning over my superior, the man I reported to. This was the only time James and I discussed this matter.

20. In the mid-1980's, two individuals who represented Dean Carter visited Nome. Esther Carter asked me not to say anything to them and specifically asked me not to tell them about the abuse. Nome is a small and private community. I respected Esther's wishes.

21. If I had been subpoenaed to testify at Dean's trial, I would have told them everything I have stated in this declaration.

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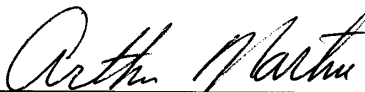
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22. On February 27 and 28, 2007, I met with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean in federal post-conviction proceedings. I have read and reviewed this five page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on March 7, 2007 in Nome, Alaska.


Arthur "Guy" Martin

DECLARATION OF VAUGHN JOHNSON

I, Vaughn Johnson, declare as follows:

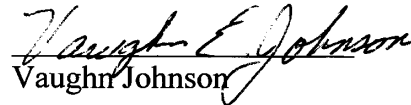
1. I was born in Nome, Alaska in 1954.
2. My family lived in the summer camp next door to the Carter's in Osborn, Alaska.
3. One day when I was a young teenager, I went to the Carters to see if anyone was home. I went around to the back of their camp house and saw Dean Carter handcuffed and chained to the house outside.
4. I asked Dean what had happened and he told me Jim Carter had chained him. I left and Dean's parents came back later that day and unchained him.
5. Dean and I and our friends used to go to the gold dredges near the FAA housing. We played there once a week or so for a couple of years.
6. Dean used to disappear for days at a time. I once asked Esther where Dean was, but she didn't give me an answer. Nobody would say anything about Dean's disappearances.
7. I remember that Jim and Esther Carter were heavy drinkers. When I went to the Carter house, Jim and Esther were often drinking.


V.J.

8. On March 1, 2007, I met with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean in federal post-conviction proceedings. I have read and reviewed this two page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on March 3, 2007 in Nome, Alaska.


Vaughn Johnson

DECLARATION OF CHARLES "CHUCK" READER

I, Charles Reader, declare as follows:

1. I was born in Berlin, North Dakota in 1927.
2. After leaving the military, I moved to Nome, Alaska where my sister and brothers had previously moved.
3. Around 1948, I met Esther Carter while I was bartending at the Nevada Saloon in Nome. I would regularly go out drinking with Esther and Jim Carter. Esther could really drink.
4. I recall that Esther dated a GI for about three years. I do not know who the biological father or fathers were of Dean and Jerry Carter.
5. Esther was a very stubborn person. She did not like to talk about her private life.
6. I only saw Dean a couple of times during Dean's younger years. However, I do have a vivid recollection of the day I saw Dean in Osborne.
7. I was spending the weekend in my cabin in Dexter, which was a few miles from Osborne. At some point I went to see my good friend, Ivan Johnson. Ivan's cabin was located in front of the Carter's cabin. When I arrived, the


CR

Johnsons and the Carters were having a picnic. As the kids played around the campgrounds, I noticed Dean hopping around the cabin while chained at both ankles.

8. At first I thought it was some kind of a joke or game the kids were playing. It was not until later that afternoon that I realized Dean had been chained intentionally by Jim Carter. When I asked Jim why on earth would he do something like that to his kid, Jim acted as if it was routine. Jim said, "Can't let him loose." Later, Ivan told me that Esther and Jim kept Dean chained up, locked, and secluded almost all the time.

9. I also noticed that Jerry was favored by Esther and Jim. Jerry was pampered and could do pretty much what he wanted. It was obvious to me that Jerry could do no wrong in Esther's eyes.

10. Once my daughter had her motorcycle stolen. I thought that Jerry Carter had taken it. When I went to talk to Jerry, Jim Carter became really angry and defensive. Jim and Esther would not allow me to speak to Jerry. Jim and Esther refused to even consider that Jerry might have done something wrong. They just assumed that if someone had taken something, it had to be Dean.


CR

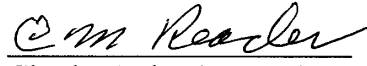
11. I saw Dean again when he returned to Nome with his wife and children. Dean and his family lived next door. Dean seemed happy and clearly loved his children.

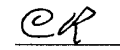
12. I have never been interviewed by anyone regarding Dean Carter in the past. Had I been interviewed or subpoenaed to testify at Dean's trial, I would have told them everything I have stated in this declaration.

13. On April 3, 2007, I spoke with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean Carter in federal post-conviction proceedings. I have read and reviewed this three page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on April 4, 2007 in Anchorage, Alaska.


Charles "Chuck" Reader


CR

DECLARATION OF CATHERINE "GIRLIE" DICKSON

I, Catherine "Girlie" Dickson, declare as follows:

1. I was born in 1937 in a mining village about 39 miles southwest of Nome, Alaska.
2. In 1943, my family moved to Nome and I have been living here ever since.
3. I first met Esther Carter around 1950.
4. I met Esther through my friend Minna Williams. Minna lived behind my parents' house in a small cabin by herself and her infant. Minna was very young and already a single mother when I met her. I used to babysit Minna's son when Minna went out. Minna, Esther, and another local girl named Lilly Tungwenuk, would go out to dance and party. The girls would go out to party and to meet G.I. men. I recall Esther at the time did not have any children.
5. I later heard that Esther was expecting a baby and that the father of her unborn child was Chuck Reader. Chuck Reader was considered a "lady's man," having lots of girlfriends including Esther. Esther was seen many times outside the Quyanna Club, a club located outside the city limits, waiting for Chuck Reader to pick her up.

6. Esther gave birth to her first son, Jerry, and then she had another son, Dean, some years later. Dean's biological father is believed to have been one of the military guys she went out with.

7. Esther married James Carter. James was antisocial and he was not the type of person that I would have befriended. He was different from the Nome residents and had the tendency to be condescending towards Natives. He was drunk on his authority as the Chief of Police in Nome.

8. After Esther and James got married, the word in town was that James was abusive towards Dean and Jerry.

9. Back then, life was very different in Nome than it is now. For example, we did not have running water in our homes so our water was provided by Moonlight Water. Two of the delivery guys who worked for Moonlight Water were family friends. Their names were Robert M. Sherman and Roscoe J. Wilke. Robert and Roscoe stopped by my house for snacks occasionally when delivering water in the neighborhood. I recall Robert telling me that he could not believe how James Carter was capable of mistreating the boys. Robert told me that he saw Dean chained up when he delivered water to the Carter family. I remember Robert's facial expressions of disbelief as he took off his cap and rubbed his head

when talking about Dean. I also remember that we discussed the fact that as the Chief of Police, how could anyone stand up against James Carter.

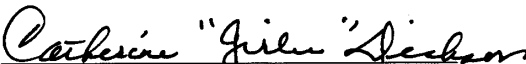
10. Racism and discrimination were prevalent in Nome back then, and it is still a factor today. In those days, even if people knew that certain things were going on, like child abuse, it was quickly dismissed especially if it involved Natives.

11. I have never been interviewed by anyone regarding Dean Carter in the past. Had I been interviewed or subpoenaed to testify at Dean's trial, I would have told them everything I have stated in this declaration.

12. On March 2, 2007, I met with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean in federal post-conviction proceedings. I have read and reviewed this three page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on March 3, 2007 in Nome, Alaska.


Catherine "Girle" Dickson

DECLARATION OF CECIL JOHNSON

I, Cecil Johnson, declare as follows:

1. I was born on [REDACTED] 1928.
2. I first came to Nome in 1964 from Anchorage where I had worked as a United States Marshal from 1954 through 1959. I then joined the Alaska State Troopers and was transferred to Nome.
3. When I arrived in Nome, Robert Oliver was the Chief of Police. James Carter and Larry Minnix were police officers. As a State Trooper, my jurisdiction was statewide, however, most of the issues I dealt with concerned matters in the surrounding villages. I hardly dealt with issues involving the city and in fact traveled to the villages most of the time. City matters were taken care of by the Nome police officers. Larry Minnix became the Chief of Police in Nome not long after my arrival.
4. I knew that James and Esther Carter were drinkers and although I did not socialize with them, I used to see them go in and out of bars all the time. In fact, Esther and Lillian Minnix, Chief Minnix's wife, were drinking buddies.
5. Chief Minnix told me many times that Esther and James Carter chained the boys (Jerry and Dean) to the bed when they went out drinking and

when they went to work. Chief Minnix was a righteous man and therefore I knew he was telling me the truth about the Carter boys. Chief Minnix never took any action on the abuse, because people mind their business in Nome

6. In my opinion, James Carter didn't give a damn about those boys because they were not his.

7. I would not be surprised if a lot of people in Nome knew what was going on at the Carter home. I used to worry at the thought of a fire. Jesus, if the house would have caught on fire, the kids would have been burned to death.

8. I believe James Carter used to be a wrestler because he had cauliflower ears.

9. I only saw Dean Carter a few times but I always thought that there was something wrong with the boy; he was different. I don't know why I felt this way but I recall having these thoughts about Dean.

10. I was never interviewed by anyone regarding Dean Carter in the past. Had I been interviewed or subpoenaed to testify at Dean's trial, I would have told them everything I have stated in this declaration.

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11. On March 2, 2007, I met with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean in federal post-conviction proceedings. I have read and reviewed this three page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my recollection.

Executed on March 3rd 2007 in Nome, Alaska.


CECIL JOHNSON

DECLARATION OF MICHAEL AHMASUK

I, Michael Ahmasuk, declare as follows:

1. I was born in Nome, Alaska in 1955.
2. While growing up, I used to live next door to the Carter family.
3. Dean and I were in the same school class off and on for about a ten year period.
4. Dean told his friends that Jim Carter used to lock him in a closet.
5. After school, all of us kids would go outside and play.
6. Whenever we did not see Dean for a few hours, we assumed Jim Carter had locked him in the closet.
7. The next day at school, Dean would not talk about it.
8. When we were all playing outside, Jim Carter would call Dean into the house but let Jerry stay outside.
9. I don't believe Jerry was locked up like Dean was.
10. If I had been subpoenaed to testify at Dean's trial, I would have told them everything I have stated in this declaration.

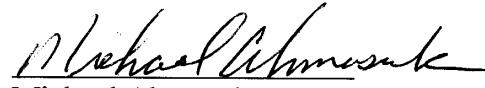
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11. On February 28, 2007, I met with an investigator from the Office of the Federal Public Defender. The investigator explained to me that their Office represents Dean Carter in federal post-conviction proceedings. I have read and reviewed this two page declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of Alaska that the foregoing is true and correct to the best of my recollection.

Executed on March 2, 2007 in Nome, Alaska.


Michael Ahmasuk